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How National Self-Interest and Foreign Policy Continue To Influence the U.S. Refugee Admissions Program

Cover Page Footnote

J.D. Candidate, 2007, Fordham University School of Law. I would like to thank my family and friends for their tremendous support throughout the writing process, and Professor Jennifer Gordon for her invaluable guidance.

HOW NATIONAL SELF-INTEREST AND FOREIGN POLICY CONTINUE TO INFLUENCE THE U.S. REFUGEE ADMISSIONS PROGRAM

*Meital Waibsnaider**

INTRODUCTION

On September 11, 2001,¹ a group of forty-four Afghan refugees, made up of mostly widows and orphans, had their long-awaited flight to the United States cancelled.² Everyone in the group had passed the difficult process of interviews and medical screenings required to obtain refugee status,³ allowing them to enter and resettle⁴ in the United States, but they would never arrive. One American newspaper at the time called the refugees' dilemma "especially grim."⁵ For several months after September 11, the United States suspended refugee admissions.⁶

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1. On September 11, 2001, four American airplanes carrying passengers were hijacked. Two of the planes were flown into the World Trade Center towers in New York City, one was flown into the Pentagon in Washington, D.C., and the fourth crashed in a field in Pennsylvania. *See generally* Serge Schmemmann, *President Vows to Exact Punishment for "Evil,"* N.Y. Times, Sept. 12, 2001, at A1.

2. Editorial, *A Simple Twist of Fate*, St. Louis Post-Dispatch, Oct. 18, 2001, at B6.

3. Under the 1980 Refugee Act, a refugee is defined as a person with a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(42) (2000). *But see* David Rohde, *U.S. Urged to End Bias in Policy Toward Refugees*, Christian Sci. Monitor, Aug. 11, 1994, at 1 (stating that "critics call the U.S. definition [of refugee] . . . being persecuted in the right country, by the right government, at the right time").

4. When a refugee is resettled in the United States, he or she is entitled to receive access to

sufficient resources for employment training and placement in order to achieve economic self-sufficiency . . . as quickly as possible[,] . . . the opportunity to acquire sufficient English language training to . . . become effectively resettled as quickly as possible[,] . . . cash assistance . . . in such a manner as not to discourage . . . economic self-sufficiency[, and] . . . insur[ance] that women have the same opportunities as men to participate in training and instruction.

INA § 412(a)(1)(A), 8 U.S.C. § 1522(a)(1)(A). A refugee who has been resettled and physically present in the United States for at least one year is eligible to adjust his or her status to become a legal permanent resident. *Id.*

5. *A Simple Twist of Fate*, *supra* note 2, at B6.

6. U.S. Dep't of State et al., *Forward to Proposed Refugee Admissions for Fiscal Year 2003: Report to the Congress (2002)*, available at <http://www.state.gov/g/prm/refadm/rls/rpts/2002/13892.htm> [hereinafter State Dep't 2003

Admissions of overseas refugees to the United States have rebounded, but not nearly to their pre-September 11 levels.⁷ This Note examines policies towards overseas refugees rather than asylum-seekers. While under the definition in the 1980 Refugee Act every asylum-seeker is also a refugee, because asylum-seekers fear persecution in their home country,⁸ overseas refugees differ from asylum-seekers because they have not yet reached the United States, but can nevertheless qualify for refugee status.⁹ In contrast, asylum-seekers have already reached the United States. At present, five years after the terrorist attacks on September 11, overseas refugees from Afghanistan and Iraq have been almost shut out of the refugee program.¹⁰ America's "war on terror,"¹¹ and specifically the wars in Afghanistan and Iraq, appears to be the primary motivation for the changes in refugee admissions from Afghanistan and Iraq.¹² The downward shift in admissions from these countries¹³ is entirely consistent with the history of the program, which has been based on national self-interest and influenced by foreign policy practically since its inception.¹⁴ For refugees from Iraq and Afghanistan, where the U.S.-led military operations continue to foster conditions that create refugees,¹⁵ but where the United States has a strong incentive to claim that country conditions are

Report] (stating that "[c]oncerns regarding security for U.S. government personnel in the months following September 11 resulted in a several month hiatus in Immigration and Naturalization Service (INS) interviews worldwide and suspension of processing in some locations altogether").

7. See *infra* Part I.C.

8. See INA § 208(b)1, 8 U.S.C. § 1158 (stating that an asylum-seeker is eligible for asylum if the INS "determines that such alien is a refugee within the meaning of section 101(a)(42)(A)").

9. Compare INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (defining a refugee), with INA § 208(a)1, 8 U.S.C. § 1158 (authorizing "[a]ny alien who is physically present in the United States or who arrives in the United States" to apply for asylum).

10. See *infra* Part I.C.

11. The White House defines the "war on terror" as a war against "[t]he ideology known as Islamic radicalism, militant Jihadism, or Islamo-fascism—different from the religion of Islam—[which] exploits Islam to serve a violent political vision that calls for the murder of all those who do not share it." Press Release, White House, President Bush Remarks on the War on Terror (Oct. 6, 2005), available at <http://www.whitehouse.gov/news/releases/2005/10/20051006-2.html>.

12. See *infra* Parts I.C, III.

13. See *infra* Part I.C.

14. See *infra* Part I.A.

15. Theresa Sidebothom, *Immigration Policies and the War on Terrorism*, 32 Denv. J. Int'l L. & Pol'y 539, 577 (2004) (stating that "the campaign against terrorism has made the[] plight [of refugees fleeing fundamentalist Islam] worse, as the hostility of fundamentalist groups has been stirred up against them"); see also Peter Beaumont, *Abuse Worse than Under Saddam, Says Iraqi Leader*, The Observer (London), Nov. 27, 2005, at 1; Dexter Filkins, *Sunnis Accuse Iraqi Military of Executions*, N.Y. Times, Nov. 29, 2005, at A1; Carlotta Gall & Eric Schmitt, *Taliban Step Up Afghan Bombings and Suicide Attacks*, N.Y. Times, Oct. 21, 2005, at A3; David Rohde, *Afghan Symbol for Change Becomes a Symbol of Failure*, N.Y. Times, Sept. 5, 2006, at A1; David Rohde & Carlotta Gall, *Delays Hurting U.S. Rebuilding in Afghanistan*, N.Y. Times, Nov. 7, 2005, at A1; Sabrina Tavernise, *Sectarian Hatred Pulls Apart Iraq's Mixed Towns*, N.Y. Times, Nov. 20, 2005, at A1.

improving,¹⁶ the barring of admissions, like the cancelled flight of the forty-four Afghans on September 11, has become the status quo.¹⁷

The official refugee policy of the United States, as embodied by the 1980 Refugee Act (“the Act”), the 1951 United Nations Convention Relating to the Status of Refugees (“the Convention”),¹⁸ and the 1967 Protocol Relating to the Status of Refugees (“the Protocol”)¹⁹ requires that foreign policy play no role in refugee admissions. In fact, one of the primary goals of the Act was to eliminate foreign policy bias altogether in the admission of overseas refugees.²⁰ Since the terrorist attacks on September 11, however, the United States has admitted far fewer overseas refugees than have been admitted anytime since 1978.²¹ Additionally, the selection of countries from which those refugees have been admitted appears to be politically motivated.²² This Note examines the ways the American

16. See *infra* Parts I.B.1-2, III.

17. See *infra* Part I.C; see also Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 Colum. Hum. Rts. L. Rev. 323, 324 (2005) (stating that “[a]lmost three years [after September 11, the U.S. refugee resettlement program] is still running at only about two-thirds of its previous capacity; more than 100,000 refugees have lost opportunities to build new lives in the United States during this period”).

18. United Nations Convention Relating to the Status of Refugees art. 3, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter the Convention] (stating that “[c]ontracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion, or country of origin”).

19. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter the Protocol].

20. See *infra* Part I.A.4; see also Tahl Tyson, Comment, *The Refugee Act of 1980: Suggested Reforms in the Overseas Refugee Program to Safeguard Humanitarian Concerns from Competing Interests*, 65 Wash. L. Rev. 921, 924 (1990) (stating that the definition of “refugee” in the Act “on its face is ideologically and geographically neutral”).

21. Bureau of Population, Refugees, and Migration, U.S. Dep’t of State, Cumulative Summary of Refugee Admissions, 1975-2003, at 5 (2003), available at <http://www.state.gov/documents/organization/38023.pdf> [hereinafter State Dep’t 2003 Summary]; Bureau of Population, Refugees, and Migration, U.S. Dep’t of State, Summary of Refugee Admissions Fiscal Year 2004, at 3 (2004), available at <http://www.state.gov/documents/organization/37128.pdf> [hereinafter State Dep’t 2004 Summary].

22. See *infra* Parts I.B, III.

[Amnesty International] has documented a significant ‘backlash’ against refugees and asylum-seekers because of their national or ethnic origin or religious beliefs. [Amnesty International] has called on governments to live up to their human rights obligations by protecting those at risk, and has also joined the [United Nations High Commission of Refugees (UNHCR)] in warning that making unwarranted links between refugees and criminals or ‘terrorists’ may put already vulnerable individuals in danger.

Amnesty Int’l, *Refugee Protection Is Human Rights Protection: Amnesty International Statement to the Ministerial Meeting of States Parties to the 1951 Refugee Convention and/or Its 1967 Protocol*, <http://web.amnesty.org/library/print/ENGIOR510112001> (last visited Sept. 25, 2006). The UNHCR is the United Nations agency mandated to oversee refugee protection worldwide. The Statute of the Office of the UNHCR states that the UNHCR shall “provid[e] international protection” and “seek[] permanent solutions” to the problems of refugees, and that “the work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to

government's historical and current foreign policy bias and national self-interest approach to the admission of overseas refugees contradict the goals of the Act, the Convention, and the Protocol.²³ It argues that when the United States takes military action it claims is in the best interest of the citizens of the country in which it interferes,²⁴ it should not simultaneously close its borders to refugees that attain their status as a result of the military action.²⁵ Finally, this Note proposes that the United States has a moral obligation to implement a refugee admissions program that includes the refugees it created in Iraq and Afghanistan as a result of the post-September 11 U.S.-led wars in those countries.²⁶

Part I.A of this Note describes the development of the United States refugee admissions program, which has been influenced by national self-interest and foreign policy considerations since its inception. Part I.B examines the current refugee crises in Afghanistan and Iraq, and the near exclusion of refugees from these countries from the United States refugee admissions program. Part II of this Note explores the three major models that are typically cited as approaches to shaping a country's refugee admissions program: (1) the national self-interest approach, (2) the humanitarian approach, and (3) the human rights approach. Part III argues that the current refugee admissions from Afghanistan and Iraq are in keeping with the national self-interest approach and demonstrate the foreign policy bias of the United States refugee admissions program. Part III further argues that the United States has a moral obligation to accept refugees from Afghanistan and Iraq who have attained their status as a result of the war on terror, and proposes that the United States adopt a hybrid of the human rights and humanitarian models in a way that includes the admission of refugees the United States created as a result of military action in countries it claims to be helping.

I. AMERICA'S HISTORICAL AND CURRENT APPROACH TO REFUGEE ADMISSIONS

Part I of this Note details the development of the United States refugee admissions program, which has been largely based on national self-interest and influenced by foreign policy considerations. Part I also discusses the refugee situations in Afghanistan and Iraq as a result of the post-September 11 U.S.-led wars in these countries, and the composition of the United States' post-September 11 refugee admissions program.

groups and categories of refugees." G.A. Res. 428 (V), ch. 1 (1), (2), U.N. Doc. A/1775 (Dec. 14, 1950).

23. See *infra* Parts I.A.4-5, I.B, III.C.

24. See *infra* Parts I.B.1-2.

25. See *infra* Parts I.B, III.

26. See *infra* Part III.

A. *The Development of a Refugee Admissions Program in the United States that Is Primarily Based on National Self-Interest*

Part I.A of this Note examines the development of the United States refugee admissions program since World War II.

1. The Displaced Persons Act of 1948

The first piece of American legislation to resettle refugees was the Displaced Persons Act of 1948 (DPA).²⁷ The DPA was Congress's controversial response to the plight of millions of European refugees who had nowhere to turn after World War II.²⁸ The DPA, however, was not the open-door welcome that refugees might have expected after surviving the War. The DPA required that those who applied for visas show that they entered Allied zones in Germany, Austria, or Italy, on or before December 22, 1945,²⁹ thereby limiting the admission of Jewish refugees, most of whom fled to the Allied zones after this date.³⁰ The original cut-off dates by which refugees were required to enter Allied zones did not seem to promote any political objective, yet in its application, the cut-off dates hindered the vast majority of Jewish refugees from admittance to the United States.³¹ As a result, ninety percent of Jewish refugees were denied visas to the United States and were excluded from the relief provided by the DPA.³²

The DPA was signed during a restrictive period in American immigration history due to the fear of many Americans that refugees and other immigrants would compete with them for jobs.³³ Some members of Congress justified the restrictions based on the fear that a more "generous treatment" of Jewish refugees would negatively impact the American economy and social structure.³⁴ This restrictive period, however, also coincided with the realization by some politicians that the refugee program could be used as a political tool.³⁵ Such legislators began to look to refugee

27. Act of June 25, 1948 (Displaced Persons Act), ch. 647, 62 Stat. 1009 (1948), amended by Pub. L. No. 83-751, 68 Stat. 1044 (1950).

28. See Kathryn M. Bockley, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. Int'l L. & Com. Reg. 253, 261-64 (1995). "[B]ecause the Displaced Persons Act was fraught with restrictions designed to favor groups other than surviving Jews it produced a storm of public protest." *Id.* at 262 n.90.

29. Displaced Persons Act, ch. 647, 62 Stat. 1009.

30. Bockley, *supra* note 28, at 263.

31. *Id.*

32. *Id.*

33. Stephen H. Legomsky, *Immigration and Refugee Law and Policy* 921-22 (4th ed. 2005) (stating that "many [Americans] were unwilling to admit those with whom they would be competing for jobs. Other Americans feared that the refugee population contained subversive elements who would poison the United States with their radical views and their activities," and that, "Anti-semitism was clearly an additional factor, though historians differ as to its magnitude and its impact").

34. Bockley, *supra* note 28, at 261.

35. *Id.* at 261-62.

policy to discredit communist regimes.³⁶ Thus, “[i]nstead of enacting refugee legislation designed to provide protection for those most in need of it, immigration policy came to be used as a [foreign policy] tool,” whereby “those fleeing from communist or communist-dominated nations [were singled out] as the most deserving of refugee status.”³⁷ While he reluctantly acceded to public pressure and signed the DPA, President Harry S. Truman made an unusually critical statement at the time when he said, “[i]n its present form this bill is flagrantly discriminatory. It mocks the American tradition of fair play.”³⁸

Due to the public outcry that followed the discriminatory admissions that resulted from the DPA, the DPA was eventually amended in 1950³⁹ and again in 1951.⁴⁰ The first amendment extended protection to people fleeing the communist regime in China, and the second revised the cut-off date to allow people displaced after January 1, 1945 to be eligible for resettlement in the United States.⁴¹ The DPA reflects two important themes in American refugee policy: (1) the use of refugee admissions to promote a foreign policy and preserve some national self-interest goal despite legislation that is seemingly politically neutral,⁴² and (2) the powerful impact of public pressure to promote legislation favorable to refugees.⁴³

2. Refugee Admissions to the United States During the Cold War

The use of refugee admissions as a tool in the Cold War battle against communism, illustrated by the amendment of the DPA authorizing admission of Chinese refugees, became the dominant theme of U.S. refugee policy in the second half of the twentieth century.⁴⁴ Of the 1.5 million refugees admitted between the end of World War II and 1980, under two thousand were from noncommunist countries.⁴⁵ Throughout the Cold War, countries that admitted refugees often did so out of a desire to discredit those with an opposing ideology and in an attempt to bolster their own public image.⁴⁶ Refugee admissions were essentially used as a propaganda tool to “‘win the hearts and minds’ of the world’s peoples”⁴⁷ by showing

36. *Id.* at 262.

37. *Id.*

38. *Id.* at 263 (quoting Signing of the Displaced Persons Act of 1948, Statement by the President, July 4, 1948, Dep’t St. Bull., July 1948, at 21).

39. An Act to Amend the Displaced Persons Act of 1948, Pub. L. No. 81-555, 64 Stat. 219 (1950).

40. An Act to Clarify the Immigration Status of Certain Aliens, Pub. L. No. 82-14, 65 Stat. 28 (1951).

41. *Id.* at 222, 219; see also Bockley, *supra* note 28, at 264 n.107.

42. See Bockley, *supra* note 28, at 263.

43. See *infra* Parts I.A.5-6.

44. Bockley, *supra* note 28, at 271.

45. *Id.*

46. Julie Mertus, *The State and the Post-Cold War Refugee Regime: New Models, New Questions*, 20 Mich. J. Int’l L. 59, 65 (1998).

47. Daniel J. Steinbock, *The Qualities of Mercy: Maximizing the Impact of U.S. Refugee Resettlement*, 36 U. Mich. J. L. Reform 951, 981 (2003).

that the citizens of a disfavored regime were “voting with their feet by leaving.”⁴⁸

In this vein, throughout the 1950s, the United States accepted refugees fleeing communist regimes in Poland, Yugoslavia, and China via ad hoc legislative and administrative action taken by Congress.⁴⁹ In the early 1960s, the United States continued to embrace refugees “based largely on Cold War politics.”⁵⁰ The United States was most concerned about luring scientists and artists from the Soviet Union to flee the communist regime in an effort to one-up Soviet officials in the propaganda war.⁵¹ The United States was also so eager to accept refugees from President Fidel Castro’s communist Cuba that consular offices that processed Cuban visa applications often forewent routine criminal background checks.⁵² Meanwhile, refugees from countries whose governments the United States supported, such as Haiti, found little to no refuge in the United States.⁵³ The Cold War, and the refugee admissions it produced, are the clearest demonstration of foreign policy bias in the U.S. refugee admissions program.⁵⁴

3. The President’s Parole Power and the 1965 Conditional Entry Program

The President’s parole power, which allows him or her to admit individuals into the country at will but without granting the parolee any protection against future removal from the country, has been deployed in ways that illustrate foreign policy bias in the admission of refugees⁵⁵ and is an important stepping stone to understanding why Congress eventually passed the politically neutral Refugee Act of 1980.⁵⁶ The parole power was intended primarily as a temporary measure,⁵⁷ but by 1965, it became a numerically significant part of the country’s immigration system.⁵⁸

48. *Id.*

49. *Id.* at 956; *see also* Act of September 11, 1954, Pub. L. No. 85-316, 71 Stat. 639, 643 (1957) (amending the Refugee Relief Act by defining “refugee” as a person who has fled any “Communist, Communist-dominated, or Communist occupied area”); Act of Aug. 7, 1953, Pub. L. No. 203, 67 Stat. 400 (1953), *amended by* Pub. L. No. 83-751, 68 Stat. 1044 (1954); Bockley, *supra* note 28, at 265 (stating that the Refugee Relief Act was intended as a temporary measure, as opposed to a permanent refugee admissions program, to “address important American concerns about the prevention of the spread of communism”).

50. Bockley, *supra* note 28, at 269.

51. Mertus, *supra* note 46, at 65.

52. Bockley, *supra* note 28, at 269.

53. *Id.* at 272-76, 273 (explaining that “[d]espite evidence to the contrary, Haitian refugees . . . worked against a powerful presumption that they were not victims of persecution,” but rather were seeking refuge for economic reasons).

54. *Id.* (stating that “[t]he staggering difference in the numbers of Haitians and Cubans admitted before 1980 dramatically reveals the impact of foreign policy on immigration decisions”).

55. *Id.* at 268.

56. *Id.* at 281.

57. *Id.* at 267.

58. *Id.* at 269 (explaining that “[t]he Kennedy Administration used parole authority to admit hundreds of thousands of Cuban refugees”).

Frustrated by the lack of a unified refugee policy, the unreviewable executive discretion that the parole power provided, and the absence of meaningful opportunities for Congress to influence national policy regarding refugees,⁵⁹ Congress adopted a preference category for immigrant visas that essentially created a conditional refugee entry program in 1965.⁶⁰

The preference category, which imposed an annual ceiling of 17,400 admissions, expressly included a clear foreign policy bias: It offered refuge to those who feared persecution and were fleeing either a "Communist-dominated" country or a country "within the general area of the Middle East."⁶¹ Two problems with this program eventually emerged: The annual ceiling of 17,400 was drastically low considering the number of worldwide refugees, and presidents frequently bypassed the conditional entry program and continued to use their parole power to admit large numbers of refugees as they saw fit.⁶²

4. The Incorporation of the United Nations 1951 Convention on the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees into United States Refugee Policy via the 1980 Refugee Act

In 1980, Congress enacted the 1980 Refugee Act, the first comprehensive American refugee legislation.⁶³ One of the primary goals of the Act was to do away with the foreign policy bias that characterized refugee admissions in the United States in the preceding years.⁶⁴ The Act essentially replicates the United Nations 1951 Convention on the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees⁶⁵ and is the domestic statutory law governing overseas refugees in the United States.⁶⁶ The Convention, which established international standards for the treatment of refugees, was codified after World War II "[i]n a spirit of empathy and

59. *Id.* at 281.

60. The Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965), *repealed in part by* 8 U.S.C. §§ 1157-1159 (2000) (under the program, conditional entry meant that a person admitted through this preference category could apply for adjustment of status to permanent residence after two years).

61. The Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. at 913.

62. See Bockley, *supra* note 28, at 277 (stating that "[w]ith each successive group of refugees and subsequent exercise of parole power, Congress became more skeptical about the . . . ad hoc administration of refugee policy").

63. At the time, Senator Edward Kennedy stated that "[a] comprehensive asylum policy for refugees is long overdue." *Proposed Amendments to the Immigration and Nationality Act: Hearings on H.R. 9112, H.R. 15092 and H.R. 17370 Before Subcomm. No. 1 of the H. Comm. On the Judiciary, 91st Cong., 2d Sess.* 87 (1970).

64. See Tyson, *supra* note 20, at 924.

65. While the United States was not a signatory to the Convention, it indirectly became a party to it by acceding to the Protocol in 1968. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Nov. 1, 1968).

66. Legomsky, *supra* note 33, at 931.

humanitarianism, and with a hope that such widespread suffering might be averted in the future.”⁶⁷

Article 1 of the Convention defines “refugee” as a person who

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁶⁸

The fundamental premise of the Convention has proved to be enduring and was furthered by the Protocol.⁶⁹ The Protocol, however, expanded the Convention’s scope by removing the geographical limit in its definition of refugee to European refugees who had fled as a result of the events occurring in Europe before January 1, 1951.⁷⁰ The Protocol also requires signatory states to apply the provisions of the Convention “without discrimination as to race, religion or country of origin.”⁷¹ Additionally, the Convention and Protocol allow signatory parties to exclude certain people from protection, including those who have committed “a crime against peace, a war crime, or a crime against humanity,” “serious non-political crime[s],” and those “guilty of acts contrary to the purposes and principles of the United Nations.”⁷²

The Convention and the Protocol were replicated almost entirely in the Act, which provides the first United States statutory definition of the word “refugee.”⁷³ The definition in the Act is modeled exactly after that of the Convention, as amended by the Protocol, with the exception that it does not specifically require a refugee to be outside or inside his or her country of nationality or habitual residence.⁷⁴ The definition of “refugee” adopted by the Act specifically excludes any mention of ideological limitations.⁷⁵

The actual selection of refugees under the Act primarily involves the President, Congress, the State Department’s Bureau of Population, Refugees, and Migration (PRM), and the Department of Homeland Security (DHS), with the President exercising “[r]elatively unfettered choice . . .

67. Marilyn Achiron, *A ‘Timeless’ Treaty Under Attack*, *Refugees Magazine*, July 1, 2001, <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.htm?tbl=PUBL&page=home&id=3cdfd3e19>.

68. The Convention, *supra* note 18, art. 1(A)(2).

69. See James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 *Harv. Int’l L.J.* 129, 143 (1990).

70. The Protocol, *supra* note 19, art. 3.

71. The Convention, *supra* note 18, art. 3.

72. *Id.* art. 1(F)(a)-(c).

73. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2000).

74. *Id.*

75. See Bockley, *supra* note 28, at 280.

every step of the way.”⁷⁶ The Act authorizes the President to make the annual determination of how many refugees may be admitted in the upcoming fiscal year, with no upper or lower limits on the numbers, and it also includes a requirement that the President consult with Congress before making any numerical determinations.⁷⁷ The presidential determination applies to the regions from which refugees may be admitted. The PRM, which accepts and screens refugee applications, and the Refugee Corps of the DHS, which is comprised of officers from the U.S. Citizenship and Immigration Services and makes the individual determination of refugee status, then apply certain “processing priorities” to determine which refugees from each region will be admitted. The processing priorities are established yearly as part of the annual proposed refugee admissions⁷⁸ and are heavily influenced by the executive branch.⁷⁹

In the decade following the passing of the Act, refugee admissions did not reflect the Act’s politically neutral language.⁸⁰ Instead, the United States continued to admit mostly refugees from communist countries.⁸¹ Throughout the 1980s, the average approval rate for refugee status was twenty-five percent, while the percentage approval rate for refugees who

76. Steinbock, *supra* note 47, at 961. “The number of refugees accepted each year is set by a political process. This number bears very little relation to existing need.” *Id.* at 970.

77. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended at INA § 207(a), (d), (e), 8 U.S.C. § 1521 (2000)).

78. State Dep’t 2003 Report, *supra* note 6. The State Department’s proposed processing priorities for 2006 are as follows:

Priority 1: Individual Referrals

Priority 1 is reserved for individuals with compelling protection needs or those for whom no other durable solution exists who are identified and referred to the program by UNHCR, a U.S. Embassy, or a non-governmental organization (NGO). This processing priority is available to persons of any nationality.

Priority 2: Group Referrals

Priority 2 is used for groups of special humanitarian concern to the United States designated for resettlement processing. It includes specific groups (within certain nationalities, clans, or ethnic groups) identified by the Department of State in consultation with [U.S. Citizenship and Immigration Services (USCIS)], non-governmental organizations (NGOs), UNHCR, and other experts. Some Priority 2 groups are processed in their country of origin.

Priority 3: Family Reunification Cases

Priority 3 is extended to nationals of certain countries who are the spouses, unmarried children under 21, or parents of persons admitted to the United States as refugees or granted asylum, or persons who are lawful permanent residents or U.S. citizens and were initially admitted to the United States as refugees or granted asylum. Eligible nationalities are developed following review of UNHCR’s annual assessment of refugees in need of resettlement and ongoing repatriation programs and opportunities.

U.S. Dep’t of State et al., Proposed Refugee Admissions for Fiscal Year 2006: Report to the Congress 8-10 (2005), available at <http://www.state.gov/documents/organization/52475.pdf> [hereinafter State Dep’t 2006 Report]. Afghanistan and Iraq are eligible nationalities for Priority 3 in 2006. *Id.* at 10.

79. Steinbock, *supra* note 47, at 961.

80. See Bockley, *supra* note 28, at 282-83.

81. *Id.* at 283.

fled communist countries was between fifty and eighty percent.⁸² “The dramatic differences between the numbers of approved refugees departing from politically ‘unfriendly’ regimes and those originating from policy-neutral countries reveals the continuing influence of foreign policy on refugee policy decision-making” throughout the 1980s.⁸³

5. The Shift in Refugee Admissions After the Fall of the Berlin Wall

Since the fall of the Berlin Wall in 1989,⁸⁴ the refugee admissions program has shifted away from a concentrated focus on refugees from communist countries.⁸⁵ This shift, however, has not resulted in a rise in refugee admissions from noncommunist countries, but rather a decrease in overall refugee admissions.⁸⁶ Security concerns as well as concerns about preserving American culture have contributed to a refugee program and overall immigration program that tends towards a restrictive approach.⁸⁷ In this post-Cold War era, many

[w]ould-be receiving states and donors can no longer tell whom they are supposed to help based on clear-cut ideological grounds. . . . Receiving states talk less about the human rights of the uprooted and more about their own rights. For instance, they talk about their right to protect their own culture and standard of living from the foreign intruders and about the larger “security dimension.”⁸⁸

One area in which refugee admissions have increased since the fall of the Berlin Wall is for refugees who flee their home countries for religious reasons. In 1989, Congress passed the Lautenberg Amendment, which amended the Act to codify “cultural preferences.”⁸⁹ The specific cultural preferences cited create a presumption of refugee status for Soviet Jews and Pentecostals, active members of the Ukrainian Catholic and Ukrainian

82. *Id.*

83. *Id.*

84. Serge Schmemmann, *Wall Opened at Old Center of Berlin, and Mayors Meet; Communists Call Congress*, N.Y. Times, Nov. 13, 1989, at A1.

85. See Mertus, *supra* note 46, at 66.

86. Legomsky, *supra* note 33, at 933 (stating that “because United States refugee policy has been driven so strongly by Cold War politics, the net effect of the geopolitical changes was a decline in total United States refugee admissions, rather than a redistribution”).

87. See Arthur C. Helton & Dessie P. Zagorcheva, *Globalization, Terror, and the Movements of People*, 36 Int’l Law. 91, 92 (2002) (explaining that “the main challenge currently facing policy makers is to maintain the openness of society and . . . the openness of the United States to the world. The post-September 11th backlash against migrants, asylum seekers, and refugees threatens to undermine a clear comparative advantage”); see also Volker Türk, *Forced Migration and Security*, 15 Int’l J. Refugee L. 113, 114 (2003) (stating that “refugees . . . are increasingly perceived themselves as a threat. Discussion is often regrettably misinformed and sometimes suggests, for instance, that the international refugee instruments provide a safe haven to terrorists and extend immunity from criminal prosecution”).

88. Mertus, *supra* note 46, at 66.

89. Act of Nov. 21, 1989, Pub. L. No. 101-167, § 599D, 103 Stat. 1195, 1261-63 (1989) (current version at 8 U.S.C. § 1157 (2000)).

Orthodox Churches, and certain groups of Vietnamese.⁹⁰ The “presumption of persecution” for members of these religious and national groups means that a “[DHS] officer [is] to presume an individual [in these groups] to be a refugee unless there [is] persuasive contrary evidence.”⁹¹

The Lautenberg Amendment, which has been renewed on a yearly basis since its passage, sailed through Congress in much the same way as the Displaced Persons Act of 1948—on a wave of public pressure.⁹² Proponents touted the “alleged hypocrisy” of the United States, which had “press[ed] the Soviet Union to let Jews [and others] emigrate while [later] denying [them] admission to the United States on the grounds that they were not persecuted.”⁹³ Opposition to the Lautenberg Amendment centered around the perceived preferential treatment of a group of people who were seen as having summoned extraordinary political influence to get the Amendment passed.⁹⁴ Some critics also thought the Amendment contradicted the national-preference neutrality that the Act appears to require.⁹⁵

6. Incidents of Uncharacteristic Treatment of Refugees

In contrast to refugees the United States has admitted in order to embarrass political foes, there have also been instances when the United States has admitted refugees in response to a moral obligation, regardless of how it appeared politically. Refugees the United States created, as they are often referred to, were twice admitted after the failed involvement of the U.S. government in the affairs of foreign countries: first, with Hungarian refugees in 1956, and next with Vietnamese refugees upon the conclusion of the Vietnam War.

a. *Hungarian Refugees in 1956*

The admission of Hungarian refugees to the United States after the Hungarian revolution against the 1956 invasion by the communist Soviet Union was an instance in which the United States admitted refugees in

90. *Id.*

91. Victor Rosenberg, *Refugee Status for Soviet Jewish Immigrants to the United States*, 19 *Touro L. Rev.* 419, 433 (2003).

92. *Id.* at 434-35.

93. *Id.* at 435.

94. *Id.* at 434.

95. *Id.* (explaining that “Republican Representative Lamar Smith of Texas saw such preference to selected groups as a bad precedent and also as unfair: ‘We are saying basically that whoever gets in line and whoever finds a political champion or whoever has enough political influence, that they can perhaps get special attention, get special preference.’ Democratic Representative Romano Mazzoli of Kentucky saw it as ‘a step backward,’ counter to the Refugee Act of 1980, which eliminated national preferences in granting refugee status”).

response to a moral obligation rather than its national self-interest.⁹⁶ The Soviet army entered Hungary after a new, anticommunist government was installed as a result of a popular uprising.⁹⁷ Once the Soviet invasion gained strength, many Hungarians began to flee the country for nearby Austria and Yugoslavia.⁹⁸ The United States then sent large supplies of aid to advance the revolt against the Soviet army, and the CIA smuggled arms to Hungary's "freedom fighters."⁹⁹ At the height of the conflict, daily television coverage in America portrayed the Hungarian fighters as "heroes."¹⁰⁰ Once the Hungarian revolt was crushed, however, "the disparity between the rhetoric of liberation and America's passive response" was evident,¹⁰¹ and the United States eventually admitted nearly 40,000 Hungarian refugees, more than was admitted by any other country following the failed revolution.¹⁰² While the foreign policy bias in accepting the Hungarian refugees was clear in that the United States was admitting refugees fleeing the invasion of a communist regime, the Hungarian refugees were also accepted out of a sense of moral obligation that they had been "victims of false expectations about U.S. policy," and that "refugee relief [should be provided] in lieu of the military aid that had been withheld."¹⁰³

Similarly, after the United States left Vietnam in the wake of the Vietnam War, the United States admitted many of the refugees it had created through its military withdrawal. The incident is discussed below.

b. *Refugees After the Vietnam War*

Beginning in 1975, many Vietnamese, Laotian, and Cambodian refugees were similarly resettled in the United States after the United States ceased its military participation in the Vietnam War.¹⁰⁴ By 1975, the failure of America's military action to defeat communism in Southeast Asia, and Vietnam in particular, had become imminent, and many Americans wanted to "wipe[] the slate clean" with a complete disengagement from the region.¹⁰⁵ After nearly twenty years of political, economic, and eventually military involvement fighting communist regimes in the area, the United

96. Steinbock, *supra* note 47, at 978 (explaining that the revolt was partly instigated by CIA-trained agents).

97. Bockley, *supra* note 28, at 266.

98. Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* 52-53 (1986).

99. *Id.* at 53.

100. *Id.* at 52.

101. *Id.* at 52-53 (explaining that "even after it had become clear that the Soviet army was again in control, Radio Free Europe repeated the slogan 'America will not fail you . . . America will not fail you . . .' over and over again").

102. *Id.* at 52; *see also* Steinbock, *supra* note 47, at 978 n.118 (explaining that most of the Hungarians admitted had not even taken part in the revolt).

103. Loescher & Scanlan, *supra* note 98, at 54.

104. *See, e.g.,* Steinbock, *supra* note 47, at 978-80.

105. *See* Loescher & Scanlan, *supra* note 98, at 102, 120 (internal quotations omitted).

States was ready to withdraw but feared the reprisals facing those who had supported their efforts.¹⁰⁶

The admission of a “Vietnamese refugee population stemmed from political sympathy to the former Vietnamese allies who had fought with the United States. . . . Many Americans felt a sense of obligation to a people that the United States had supported and then abandoned.”¹⁰⁷ While the admission of Vietnamese refugees at this time also demonstrated a political bias in that the United States offered refuge to those fleeing a communist regime, this bias differed from the typical national self-interest approach in that it stemmed from the acknowledgment of a “moral responsibility” that arose from botched American actions.¹⁰⁸ “Regarding the crisis primarily in humanitarian and political terms rather than as an ideological opportunity . . . the White House, the military, and the State Department all committed themselves to a program of limited scope and duration dedicated to rescuing America’s Vietnamese allies.”¹⁰⁹

Part I.A of this Note explored the development of the U.S. refugee admissions program, which was largely based on national self-interest and influenced by foreign policy. This Note now turns to describing the current refugee crises in Afghanistan and Iraq, and the changes in the U.S. refugee admissions program since September 11, 2001.

B. The Impact of the U.S.-Led Wars in Afghanistan and Iraq on Refugees in the Region and the Influence of Foreign Policy and National Self-Interest on the United States Refugee Admissions Program Since September 11, 2001

Part I.B of this Note discusses the current refugee crises in Afghanistan and Iraq as a result of the U.S.-led wars there, and the changes in the U.S. refugee admissions program since September 11.

Internal persecution and external conflict have created refugees from Afghanistan and Iraq for at least the last three decades.¹¹⁰ The post-September 11 U.S.-led wars in these countries, however, have fostered

106. *See id.* at 102-19. “Top secret telegrams were sent out to all embassies in the Southeast Asian nations inquiring whether their governments would be willing to receive Cambodians and Vietnamese in the event of Communist military victories.” *Id.* at 103.

107. Bockley, *supra* note 28, at 276.

108. Steinbock, *supra* note 47, at 978.

109. Loescher & Scanlan, *supra* note 98, at 102. Loescher and Scanlan explain that “[t]he backing of the Ford administration, the dominance of the Department of State in the decision-making structure, media support, and the lack of serious resistance among the public permitted the rescue policy to proceed with a minimum of political fallout.” *Id.* at 103.

110. *See* U.N. Dev. Programme, Afghanistan: National Human Development Report 117 (2004), available at <http://www.undp.org/dpa/nhdr/af-files/afnhdr2004-complete.pdf> [hereinafter Afghanistan: National Human Development]; Press Release, White House, Past Repression and Atrocities by Saddam Hussein’s Regime (Apr. 4, 2003), available at <http://www.whitehouse.gov/infocus/iraq/news/20030404-1.html> (explaining that for over twenty years Saddam Hussein was notorious for human rights abuses and attempts to quiet political dissent).

conditions in both places that have either created refugees out of people who were previously not endangered, or allowed conditions to fester, which continuously place people in danger of losing their lives.¹¹¹ Simultaneously, compared with its earlier rates of admission and the rates of admission from other countries, the United States has practically ceased offering Afghans and Iraqis refuge through its refugee admissions program.¹¹²

1. Afghanistan

Over the last three decades, ongoing conflict in Afghanistan has led to four distinct occurrences of population displacement.¹¹³ The last of these displacements was caused by the U.S. war, which began in October 2001 in retaliation for the terrorist attacks of September 11.¹¹⁴ For many years, Afghanistan has been the country from which the largest numbers of refugees originate worldwide, and in 2005,¹¹⁵ four years after the U.S. military activities in the country began, this trend continued.¹¹⁶ The global number of refugees reached 8.4 million in 2005; of those 8.4 million, approximately 1.9 million were Afghani.¹¹⁷

Indeed, the major refugee-producing events in Afghanistan's history have all been related to military conflict.¹¹⁸ The Soviet invasion in 1979, which by 1983, forced 3.9 million Afghans to flee, signaled the first wave of displacement in recent history.¹¹⁹ In the wake of the Soviet Union's withdrawal, warring between Mujahideen¹²⁰ factions seeking to gain

111. See Human Rights Watch, *A Face and a Name: Civilian Victims of Insurgent Groups in Iraq* (2005), available at <http://hrw.org/reports/2005/iraq1005/iraq1005.pdf> [hereinafter *A Face and a Name*]; Rohde & Gall, *supra* note 15, at A1.

112. State Dep't 2003 Report, *supra* note 6; U.S. Dep't of State et al., Proposed Refugee Admissions for Fiscal Year 2004: Report to the Congress 38 (2003), available at <http://www.state.gov/documents/organization/44529.pdf> [hereinafter State Dep't 2004 Report]; U.S. Dep't of State et al., Proposed Refugee Admissions for Fiscal Year 2005: Report to the Congress, 37, 38, 45-46 (2004), available at <http://www.state.gov/documents/organization/36228.pdf> [hereinafter State Dep't 2005 Report]; State Dep't 2006 Report, *supra* note 78, at 38-40, 51.

113. Under the definition of "refugee" in the Act, internally displaced people within their country of origin may still be considered refugees. See INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42) (2000).

114. See Editorial, *The Ground War Begins*, N.Y. Times, Oct. 20, 2001, at A22 ("The goals seem clear. The Pentagon is initially looking to destabilize and topple the Taliban leadership, first by bombing, now by pursuing individual leaders. The bigger target is Osama bin Laden and his followers").

115. The most recent year for which the UNHCR has published statistics regarding worldwide refugees is 2005. U.N. High Comm'r for Refugees, 2005 Global Refugee Trends (June 9, 2006), <http://www.unhcr.org/cgi-bin/texis/vtx/statistics/> (select 2005 Global Refugee Trends for the full report).

116. *Id.* at 3, 4.

117. *Id.*

118. See Afghanistan: National Human Development, *supra* note 110, at 117.

119. *Id.*

120. The Mujahideen were the western-backed Afghan guerrilla fighters in the war against the Soviet Union. *Id.* at 95.

control increased.¹²¹ The persecution practiced by the Taliban¹²² in the following years further led to the displacement of a terrorized population, and finally, the U.S.-led air strikes in October 2001, and the resulting instability due to the war, marked the fourth major refugee-producing event in recent Afghan history.¹²³ Soon after September 11, many Afghans anticipated the United States' military retaliation and attempted to flee the country through Iran and Pakistan.¹²⁴ Large numbers of the fleeing refugees, however, were stopped at closed borders, and "[w]ith neither the option of seeking security in neighboring countries nor in their homeland, many Afghans remained internally displaced, worsening the already precarious humanitarian situation."¹²⁵

Since major military operations were concluded in late 2001 and the Transitional Authority¹²⁶ gained control in 2002, many Afghans have returned to their homes,¹²⁷ but with mixed, and not always positive, results. In March 2004, Human Rights Watch reported that

the United States is maintaining a system of arrests and detention [in Afghanistan] as part of its ongoing military and intelligence operations that violates international human rights law and international humanitarian law (the laws of war). In doing so, the United States is endangering the lives of Afghan civilians, undermining efforts to restore the rule of law in Afghanistan, and calling into question its commitment to upholding basic rights.¹²⁸

Additionally, in many parts of Afghanistan, former warlords have continued to "wield considerable influence,"¹²⁹ and attacks by the Taliban are increasing,¹³⁰ due in part to the United States' lack of attention to the rebuilding of Afghanistan's infrastructure¹³¹ and the Afghani and U.S.

121. *Id.*

122. "The Taliban . . . rose out of the refugee camps in Pakistan, from where they brought the conservative values The Taliban . . . were [initially] . . . welcomed by the majority of the Afghan population, which was traumatized by the behaviour of local Mujahideen fighters." *Id.* But eventually, the Taliban enforced a very strict interpretation of Islam in which television, music, and photography were banned, and girls and women were forbidden from attending school or working without the accompaniment of a male relative. *Id.* at 96.

123. *Id.* at 117.

124. *Id.*

125. *Id.*

126. The Transitional Authority was the temporary governing body entrusted to oversee the transition of Afghanistan's government into a freely elected representative government. *Id.* at 124.

127. See U.N. High Comm'r for Refugees, Afghan Refugee Statistics (Feb. 2005), <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&id=421316072#search=%22unhcr%20afghan%20refugee%20statistics%20february%202005%22>.

128. Afghanistan: National Human Development, *supra* note 110, at 83.

129. Somini Sengupta, *Deadly Attacks Continue as Afghans Prepare to Vote*, N.Y. Times, Sept. 17, 2005, at A7.

130. Gall & Schmitt, *supra* note 15, at A3 (stating that "United Nations and Afghan officials have described the insurgency as taking a new, more brutal turn this year, with beheadings, throats cut and the assassination of religious and tribal elders and of doctors").

131. Rohde & Gall, *supra* note 15, at A1.

governments' inability to control neighboring Pakistan's tacit support of the Taliban.¹³² An ongoing drought in the country has also contributed to the refugee situation.¹³³

In the midst of the chaos in Afghanistan, some signs of progress have appeared.¹³⁴ These include two democratic national elections, an improved health care system, and a rise in the amount of children attending school.¹³⁵ Since the conclusion of major military operations in Afghanistan, however, the United States has had an interest in positively characterizing developments there.¹³⁶ This interest has stemmed from different purposes at different times.¹³⁷ In 2003, the United States had an interest in positively characterizing developments in Afghanistan because it aimed to entice other governments and nongovernmental organizations to contribute to the rebuilding efforts there.¹³⁸ In 2004, when military operations were underway in Iraq,¹³⁹ the interest stemmed from retaining the support of the American public as well as the international community.¹⁴⁰ And, by 2005, portraying events positively in Afghanistan became a propaganda tool against the insurgency in both Afghanistan and Iraq.¹⁴¹

Moved by the public messages and the positive developments, some countries have begun sending Afghan refugees back to their country out of a belief that they will be safe and a desire to stop providing refuge for

132. See Seth G. Jones, Op-Ed., *The Danger Next Door*, N.Y. Times, Sept. 23, 2005, at A19 (explaining that Pakistan's unwillingness to control Taliban training camps within its borders and the inability of the United States and Afghanistan to challenge that inaction are contributing factors to the increased Taliban attacks); Rohde, *supra* note 15, at A1 (stating that some southern towns in Afghanistan have become an "epicenter of . . . Taliban resurgence and an explosion in drug cultivation").

133. State Dep't 2005 Report, *supra* note 112, at 36.

134. Rohde & Gall, *supra* note 15, at A1.

135. *Id.* (stating that "five times as many children [are] in school").

136. See Jeff Gerth, *Military's Information War Is Vast and Often Secretive*, N.Y. Times, Dec. 11, 2005, at A1 ("After the Sept. 11 attacks forced many Americans to recognize the nation's precarious standing in the Arab world, the Bush administration decided to act to improve the country's image and promote its values. . . . What had begun as an ambitious effort to bolster America's image largely devolved into a secret propaganda war to counter the insurgencies in Iraq and Afghanistan."); Eric Schmitt, *U.S. Declares Major Combat in Afghanistan to Be Over*, N.Y. Times, May 2, 2003, at A21; see also Joel Brinkley & Ruhullah Khapalwak, *Rice, Visiting Violent Afghanistan, Still Finds Political Progress*, N.Y. Times, Oct. 13, 2005, at A5 ("Ms. Rice said nothing about the violence unless asked and remained focused on her message, as she usually does, unwilling to criticize the new state of Afghanistan, which is in large part an American creation."); Mark Danner, *Taking Stock of the Forever War*, N.Y. Times Mag., Sept. 11, 2005, at 45.

137. See Brinkley & Khapalwak, *supra* note 136, at A5; Danner, *supra* note 136, at 45; Gerth, *supra* note 136, at A1; Schmitt, *supra* note 136, at A21.

138. Schmitt, *supra* note 136, at A21 (stating that "[t]he United States declared today that major combat operations were over in Afghanistan, a step aimed largely at encouraging more nations to join the international reconstruction effort here").

139. David E. Sanger with John F. Burns, *Bush Orders Start of War on Iraq; Missiles Apparently Miss Hussein*, N.Y. Times, Mar. 20, 2003, at A1 (stating that the war in Iraq began on March 19, 2003).

140. Gerth, *supra* note 136, at A1.

141. *Id.*

them.¹⁴² Many Afghans have been deported unwillingly, however, and argue that it is too soon for them to return to their country.¹⁴³ Additionally, although the Afghan government and the United Nations High Commission of Refugees (UNHCR) have said they have experienced success in the repatriation of Afghan refugees,¹⁴⁴ “many returning refugees face further displacement and thus become new [internally displaced persons due to the unstable situation]: the cycle of human displacement has not yet been broken.”¹⁴⁵

While the United States has supported the emergence of a democratic government since its 2001 invasion of Afghanistan, the slow rate of rebuilding since military operations have ceased has created a dire situation for many refugees.¹⁴⁶ In late 2005, the *New York Times* reported that the United States planned to withdraw 4000 of its troops stationed in Afghanistan in the spring of 2006, and at the same time, foreign aid was expected to drop.¹⁴⁷ While American officials quintupled their financial assistance to Afghanistan in 2005 to \$4.8 billion, in 2006, that amount was reduced by thirty percent.¹⁴⁸ The slow rate of rebuilding in Afghanistan has become “emblematic of what [Afghans] see as a wasteful, slow-moving effort that benefits foreigners far more than themselves.”¹⁴⁹ “[B]oth Afghan officials and foreign diplomats are assessing what has been achieved during the past four years, and many are disturbed by what they see.”¹⁵⁰ While the United States has helped Afghanistan to progress since the fall of 2001, the plight of many Afghan refugees continues to remain “grim,”¹⁵¹ while the predominant portrayal by the United States and other countries of events there is positive.¹⁵²

2. Iraq

The instability in Iraq, if not the total number of refugees,¹⁵³ is worse than that in Afghanistan.¹⁵⁴ The toppling of Saddam Hussein and his government and the consequent vacuum of structure has uncovered a

142. See, e.g., Rachel Martin, *Deportations from Germany Rattle Afghans* (NPR Morning Edition radio broadcast Nov. 28, 2005).

143. *Id.*

144. See U.N. High Comm’r for Refugees, *supra* note 127.

145. Afghanistan: National Human Development, *supra* note 110, at 117.

146. Rohde & Gall, *supra* note 15, at A1.

147. *Id.*

148. Rohde, *supra* note 15, at A1.

149. Rohde & Gall, *supra* note 15, at A1; see also Rohde, *supra* note 15, at A1 (stating that “over time, the lack of construction in rural provinces fueled Taliban propaganda claims that Americans were enriching themselves and bringing only corruption to Afghanistan”).

150. Rohde & Gall, *supra* note 15, at A1.

151. *A Simple Twist of Fate*, *supra* note 2.

152. Brinkley & Khapalwak, *supra* note 136, at A5; Danner, *supra* note 136, at 45; Gerth, *supra* note 136, at A1; Schmitt, *supra* note 136, at A21; Martin, *supra* note 142.

153. In 2005, 262,142 refugees originated from Iraq. U.N. High Comm’r for Refugees, *supra* note 115.

154. See Danner, *supra* note 136, at 45.

vicious clash between different religious groups, which some observers have predicted will spiral into civil war upon the military withdrawal of the United States, if not sooner.¹⁵⁵ The struggle for political control between the Shiite and Sunni Muslims is fueled by years of hatred between the groups. The current struggle has led to an environment in which those in the religious minority in their neighborhoods are fleeing their homes for towns in which their religion represents the majority,¹⁵⁶ and in which young men are kidnapped by men in police uniforms, tortured, and later found dead with handcuffs still attached.¹⁵⁷ In late 2005, Ayad Allawi, Iraq's first Prime Minister since the fall of Saddam Hussein's regime, said the current human rights abuses in Iraq are "as bad as they were . . . and are even in danger of eclipsing" those under Saddam Hussein.¹⁵⁸

In October of 2005, Human Rights Watch described the situation in Iraq as "extremely unstable."¹⁵⁹ Specifically, the group noted that "[i]n addition to a general absence of law and order in many parts of the country, insurgent attacks and indiscriminate bombings . . . pos[e] a grave risk to civilians. Individuals also risk kidnapping and assassination."¹⁶⁰ Human Rights Watch has placed a large part of the blame for the current situation in Iraq on the military activities conducted by the United States.¹⁶¹ In an October 2005 report, the group stated as follows:

[T]he United States had a legal obligation under international humanitarian law to take all measures in its power to restore and ensure, as far as possible, public order and safety [in Iraq]—an obligation the United States [has] failed to meet. U.S. and coalition forces largely stood by as individual Iraqis and organized groups looted government offices,

155. Seymour M. Hersh, *Up in the Air: Where Is the Iraq War Headed Next?*, *New Yorker*, Dec. 5, 2005, at 42, 54.

156. Tavernise, *supra* note 15, at A1 ("[T]he complex webs of tribal affiliations and social status that rule everyday life in Iraq do not always line up as simply as Shiite against Sunni. But increasingly, despite the urging of some Shiite religious leaders and Sunni politicians, the attacks have been. A mostly Sunni Arab fringe is carrying out vicious attacks against civilians, often Shiites, while Shiite death squads are openly stalking Sunnis for revenge, and the Shiite-dominated government makes regular arrests in Sunni Arab neighborhoods. . . . Some Iraqis, despite years of mass killings of Kurds and Shiites during Mr. Hussein's rule, still argue that sectarian divides did not exist in Iraq before the American invasion. But scratching just beneath the surface turns up hurt in most Shiite homes.").

157. Filkins, *supra* note 15, at A1 ("Hundreds of accounts of killings and abductions have emerged in recent weeks, most of them brought forward by Sunni civilians, who claim that their relatives have been taken away by Iraqi men in uniform without warrant or explanation. . . . The widespread conviction among Sunnis that the Shiite-led government is bent on waging a campaign of terror against them is sending waves of fear through the community.").

158. Beaumont, *supra* note 15 (reporting that Allawi claimed the Iraqi government, and particularly the Ministry of Interior, was condoning torture).

159. Human Rights Watch, U.K.: Forced Return of Asylum-Seekers to Iraq (Aug. 19, 2005), <http://hrw.org/english/docs/2005/08/19/iraq11642.htm> [hereinafter U.K.: Forced Return].

160. *Id.*

161. A Face and a Name, *supra* note 111, at 112.

hospitals, and, most dangerously for the country's security, abandoned police and army depots filled with arms and ammunition.¹⁶²

The United States has claimed several victories in Iraq since the 2003 invasion.¹⁶³ The ousting and subsequent capture of Saddam Hussein, the establishment of an interim government, and the democratic ratification of an interim constitution are all among the improvements cited by the United States.¹⁶⁴ As in Afghanistan, on the basis of these perceived victories, many countries have begun sending Iraqi refugees and asylum-seekers back to Iraq.¹⁶⁵

However, the UNHCR and many refugee organizations have strongly cautioned against such returns of Iraqi refugees.¹⁶⁶ In a September 2004 Return Advisory issued by the UNHCR that remains in effect, the UNHCR "strongly advise[d]" states to suspend any forced returns of Iraqi nationals 'until further notice' and urged states to 'postpone the introduction of measures which are intended to induce voluntary returns'" of both Iraqi refugees and asylum-seekers.¹⁶⁷ It stands to reason that, if the situation in Iraq is so precarious that refugees who have fled the country are urged not to return, people within the country certainly have reason to fear remaining there.¹⁶⁸

Part I.B of this Note discussed the status of refugees in Afghanistan and Iraq primarily as a result of the U.S.-led wars in those countries. This Note now turns to describe the impact of September 11 on the United States refugee admissions program.

C. *The Effect of September 11 on the U.S. Refugee Admissions Program*

Part I.C of this Note describes the changes in the United States refugee admissions program since September 11.

While the situations in Afghanistan and Iraq remain unstable for many as a result of the war on terror initiated after September 11, the United States has simultaneously reduced refugee admissions from these countries to the

162. *Id.*

163. See Elisabeth Bumiller, *Bush, Anticipating Violence and Low Sunni Turnout, Accentuates the Positive in Iraqi Voting*, N.Y. Times, Jan. 30, 2005, at A13.

164. See *id.*

165. See, e.g., U.K.: Forced Return, *supra* note 159.

166. *Id.*

167. *Id.* (quoting U.N. High Comm'r for Refugees, Return Advisory Regarding Iraqi Asylum Seekers and Refugees 4 (2004), available at http://www.unhcr.se/SE/Protect_refugees/pdf/Iraq_sept_2004.pdf).

168. See Sabrina Tavernise, *Iraq's Lethal Traffic: Warning! Anarchy Ahead*, N.Y. Times, Nov. 5, 2005, at A1 (stating that "in a city of daylight assassinations and regularly exploding cars, it is perhaps surprising that the most pervasive daily headache comes in the far more ordinary form of snarled lines of traffic. . . . With the virtual collapse of the state, rules have fallen away and [Baghdad] seems almost to have caved in on itself in an egocentric free-for-all. . . . And while in other capitals a traffic jam may cause you to miss a meeting, in Baghdad it may get you kidnapped or even killed").

point of near extinction.¹⁶⁹ While overall refugee admissions to the United States have diminished since September 11, admissions from other countries have not been nearly eliminated like those from Afghanistan and Iraq.¹⁷⁰ The detrimental effects of the war on terror have been twofold for Iraqi and Afghan refugees—the humanitarian situation has worsened for some,¹⁷¹ and very few may now seek refuge by resettling in the United States.¹⁷²

The downward shift in refugee admissions began immediately after September 11. On September 28, 2001, the State Department banned all refugees from entering the United States while security procedures were “reviewed.”¹⁷³ On November 21, 2001, President George W. Bush promised that the United States would accept 70,000 refugees in fiscal year 2002.¹⁷⁴ Yet, in 2002, the overall number of refugee admissions dropped dramatically to approximately 27,110.¹⁷⁵ In 2003, the overall admissions rose to approximately 28,400,¹⁷⁶ and then, in 2004 to approximately 52,800.¹⁷⁷ Refugee admissions for 2005 are expected to rise slightly¹⁷⁸ in comparison to 2004 admissions,¹⁷⁹ which will amount to refugee admissions that are far higher than those made in 2002 and 2003¹⁸⁰ but are still significantly lower than the pre-September 11 admission levels.¹⁸¹ To put the post-September 11 admission levels into context, it must be noted that throughout the 1990s the United States admitted anywhere from approximately 69,300 to 122,000 refugees per year, and that at its height in 1980, when the Presidential cap on the refugee admissions program was 231,700, the United States admitted 207,116 refugees.¹⁸²

169. State Dep’t 2003 Report, *supra* note 6; State Dep’t 2004 Report, *supra* note 112, at 38; State Dep’t 2005 Report, *supra* note 112, at 45; State Dep’t 2006 Report, *supra* note 78, at 51.

170. State Dep’t 2003 Summary, *supra* note 21, at 4; State Dep’t 2004 Summary, *supra* note 21, at 3; State Dep’t 2005 Report, *supra* note 112, at 45; State Dep’t 2006 Report, *supra* note 78, at 51.

171. *See* Parts I.B.1-2.

172. *See infra* note 194 and accompanying text.

173. State Dep’t 2003 Report, *supra* note 6.

174. Press Release, White House, Presidential Determination on Refugee Numbers (Nov. 21, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/print/20011121-5.html>.

175. State Dep’t 2003 Summary, *supra* note 21, at 5.

176. *Id.*

177. State Dep’t 2004 Summary, *supra* note 21, at 3.

178. State Dep’t 2006 Report, *supra* note 78, at 6. The final statistics from 2005 and 2006 have yet to be released.

179. State Dep’t 2004 Summary, *supra* note 21, at 3.

180. State Dep’t 2003 Summary, *supra* note 21, at 5.

181. *Id.*; *see also* David Martin, *The US Refugee Program in Transition*, Migration Information Source, May 1, 2005, <http://www.migrationinformation.org/Feature/display.cfm?ID=305> (stating that “[l]argely gone are the massive, steady, and more predictably manageable programs that had dominated U.S. admissions since the passage of the Refugee Act of 1980”).

182. State Dep’t 2003 Summary, *supra* note 21, at 5; *see also* Martin, *supra* note 181.

Afghanistan, Iran, and Iraq make up the bulk of admissions from the Near East and South Asia region, a region from which refugee admissions have followed a different pattern than that mentioned above over the last four years.¹⁸³ The numbers of admitted refugees from other regions have fluctuated more or less in accordance with the fluctuation of the overall changes in admissions since September 11.¹⁸⁴ In 2002 and 2003, when U.S. operations in Afghanistan and Iraq were close to concluding and just getting under way respectively, the rate of change in admissions from Afghanistan and Iraq also corresponded to the overall rate of change in refugee admissions.¹⁸⁵ By 2004, however, at which time the United States had a vested interest in positively portraying the conflicts in both countries¹⁸⁶ and therefore was not admitting refugees from them, the admissions almost ceased.¹⁸⁷ The extent to which admissions from the Near East and South Asia have failed to rebound in proportion to everywhere else is significant.¹⁸⁸

The per region numbers of refugee admissions since 2003 also demonstrate the dichotomy between the Near East and South Asia, and everywhere else.¹⁸⁹ Between 2003 and 2004, refugee admissions from Africa rose from 10,717 to 29,125, and Latin American admissions rose from 452 to 3556.¹⁹⁰ Admissions from the Near East and South Asia, however, decreased from 4260 to 2854.¹⁹¹ The projected admissions for this region in 2005, a year in which overall admissions are expected to rise slightly, continue the downward spiral to approximately 2000 admissions.¹⁹² Of those 2000, the government expects to admit 1700 refugees from Iran and several hundred from Pakistan “and elsewhere in the

183. State Dep't 2003 Report, *supra* note 6; State Dep't 2003 Summary, *supra* note 21, at 4, 5; State Dep't 2004 Report, *supra* note 112, at 38; State Dep't 2004 Summary, *supra* note 21, at 1-3.

184. State Dep't 2003 Report, *supra* note 6; State Dep't 2003 Summary, *supra* note 21, at 4, 5; State Dep't 2004 Report, *supra* note 112, at 38; State Dep't 2004 Summary, *supra* note 21, at 1-3.

185. State Dep't 2003 Summary, *supra* note 21, at 4, 5.

186. Brinkley & Khapalwak, *supra* note 136; Danner, *supra* note 136; Gerth, *supra* note 136; Schmitt, *supra* note 136.

187. State Dep't 2005 Report, *supra* note 112, at 37, 38, 45; State Dep't 2006 Report, *supra* note 78, at 38-40, 51. In 2004, only sixty-five Iraqis and approximately 910 Afghans were admitted to the United States. State Dep't 2006 Report, *supra* note 78, at 51. In contrast, in 2001, prior to September 11, 2473 Iraqis and 2954 Afghans were admitted as refugees. State Dep't 2003 Report, *supra* note 6.

188. See State Dep't 2003 Report, *supra* note 6; State Dep't 2004 Report, *supra* note 112, at 38; State Dep't 2005 Report, *supra* note 112, at 45; State Dep't 2006 Report, *supra* note 78, at 51.

189. State Dep't 2005 Report, *supra* note 112, at 45; State Dep't 2006 Report, *supra* note 78, at 51; State Dep't 2003 Summary, *supra* note 21, at 5; State Dep't 2004 Summary, *supra* note 21, at 3.

190. State Dep't 2003 Summary, *supra* note 21, at 5; State Dep't 2004 Summary, *supra* note 21, at 1-2.

191. State Dep't 2003 Summary, *supra* note 21, at 5; State Dep't 2004 Summary, *supra* note 21, at 3.

192. State Dep't 2006 Report, *supra* note 78, at 42.

[Near East and South Asia] region.”¹⁹³ The government claimed that “[m]id-way through [fiscal year] 2005, the United States resumed active processing of Iraqi cases, which had been on hold since 9/11.”¹⁹⁴ Yet, the vague wording in the proposed plan for 2005 appears to allot almost no spaces for refugees from either Iraq or Afghanistan, despite the government’s claim that “the U.S. program is once again open to receiving new referrals of vulnerable Iraqi cases.”¹⁹⁵

In addition to the political role the United States has played in Iraq and Afghanistan since September 11, heightened security measures that reflect a growing fear of immigrants and refugees from the Muslim world have shaped the emerging refugee policy.¹⁹⁶ While a heightened attention to security measures is understandable in light of the terrorist attacks, it is indisputable that none of the hijackers on September 11 was a refugee or was seeking refugee status in the United States, and that to date, no known terrorist activity has resulted from refugee admissions.¹⁹⁷ The Convention and Protocol both include provisions for excluding applicants for refugee status who have committed serious crimes, including those who have committed “a crime against peace, a war crime, or a crime against humanity,” “serious non-political crime[s],” and those “guilty of acts contrary to the purposes and principles of the United Nations.”¹⁹⁸ These safeguards have been largely ignored as viable solutions to protecting national security.¹⁹⁹

Part I of this Note described the United States’ historical and current approach to refugee admissions. Part I detailed that, in the historical development of the refugee admissions program, refugee legislation was based almost entirely on national self-interest and exhibited a foreign policy

193. *Id.*

194. *Id.*

195. *Id.* The State Department’s proposed refugee admissions for 2006 from the Near East and South Asia region rose to a total of 5000 refugees, with 2000 being admitted from Iran, 1000 from Afghanistan, and 2000 from Iraq (the remaining 1000 slots were not accounted for). *Id.* at 42-43. Yet, in mid-2006, it appears that the United States fell short of these higher admissions and admitted only 2977 refugees from the region. Bureau of Population, Refugees, and Migration, Fact Sheet: Refugee Admission Program for Near East and South Asia (May 9, 2006), <http://www.state.gov/g/prm/rls/fs/2006/66018.htm>. Yet, because the final statistics from 2005 and the proposed admissions for 2007 have yet to be released, it is not yet possible to determine from which countries these refugees were resettled.

196. See State Dep’t 2006 Report, *supra* note 78, at 42; see also Geoff Gilbert, *Protection After September 11th*, 15 Int’l J. Refugee L. 1, 1 (2003) (explaining that “[p]ost-September 11th, the industrialized countries have imposed stricter controls on applicants in the name of security”).

197. Somini Sengupta, *Refugees at America’s Door Find It Closed After Attacks*, N.Y. Times, Oct. 29, 2001, at A1 (“[S]omeone who wanted to come into the United States to inflict harm would be unlikely to take the refugee route, which usually involves spending some time living in a refugee camp, [and, as explained by Lavinia Limon, a former State Department official in President Bill Clinton’s administration,] ‘often [being] on the margins of existence.’”).

198. The Convention, *supra* note 18, art. 1(F)(a)-(c); see *supra* Part I.A.4.

199. Gilbert, *supra* note 196, at 1.

bias. Part I also discussed the impact of the U.S.-led wars in Afghanistan and Iraq on refugees in the region, as well as the impact of September 11 on the refugee admissions program. Part II of this Note explores the predominant approaches to refugee admissions programs. These approaches include the national self-interest approach, the humanitarian approach, and the human rights approach.

II. MODELS FOR DETERMINING REFUGEE ADMISSIONS

Part II of this Note explores the three predominant approaches to shaping refugee admissions programs. While the United States has employed mostly the national self-interest approach, other alternatives are also discussed below.

Because the United States seems unlikely to admit more than approximately 70,000 refugees on a yearly basis in the foreseeable future,²⁰⁰ the challenge of choosing an approach by which to admit refugees is great.²⁰¹ Given the large numbers of refugees worldwide and the relatively low ceiling on the refugee admissions program in the United States, the process of determining which refugees to admit leaves a great deal of discretion to the President.²⁰² The three approaches to refugee selection typically cited are as follows: (1) the national self-interest approach, which includes consideration of foreign policy goals, as illustrated by the United States refugee admissions program and discussed above in Part I; (2) the humanitarian approach, which aims to relieve the suffering of large numbers of refugees confronted by disease, hunger, or armed conflict in their home country; and (3) the human rights model, which selects refugees individually based on human rights violations they have suffered, thereby aiming to deter the government that committed the violations. Part II of this Note explores these three approaches in turn.

A. Admissions Based on National Self-Interest

The national self-interest model is based on the theory that receiving countries should use their refugee admissions program in whatever way is most favorable to them.²⁰³ Thus, this model seeks to admit refugees who will most benefit the host country politically and economically on the domestic as well as the foreign front. This model is illustrated by the debate at the time the Convention was codified, when “most Western states

200. See State Dep’t 2005 Report, *supra* note 112, at vi; see also State Dep’t 2006 Report, *supra* note 78, at vi; Steinbock, *supra* note 47, at 972 (stating that “refugee admission numbers appear highly unlikely to increase drastically”).

201. See Rohde, *supra* note 3, at 1 (“The ideal would be . . . a perfect method for weighing . . . fear, threat to life, torture, and incarceration . . . But you’re never really going to have a perfect system.” (quoting Lawrence Fuchs, then-Vice Chairman of the U.S. Commission on Immigration Reform); Steinbock, *supra* note 47, at 955.

202. Steinbock, *supra* note 47, at 961. “American refugee selection is akin to being touched by an angel.” *Id.* at 953.

203. Hathaway, *supra* note 69, at 144.

[who were parties to its codification believed] that their limited resettlement capacity should be reserved for those whose flight was motivated by pro-Western political values,” such as a rejection of communism.²⁰⁴ The United States has adhered to this model by employing a foreign policy bias in its refugee selection.²⁰⁵ The United States has repeatedly admitted refugees from countries that it sought to embarrass politically, while at the same time barring the admission of refugees from politically friendly nations.²⁰⁶ “Historically, those who have fled countries friendly to the United States—El Salvador, Guatemala, Haiti, and others—have had strikingly little success” in gaining admission to the United States as refugees.²⁰⁷ Proponents of American refugee policy “argue that those from countries allied to the United States tend to be ‘economic migrants’ fleeing poverty, not true refugees fleeing persecution.”²⁰⁸

Opponents of this model argue that refugees should be selected based on their need for resettlement, whether due to their humanitarian situation or their human rights predicament, as opposed to whether their admission will benefit the host country politically, or in some other way.²⁰⁹ Critics also note that “[i]n a world where information is so much more readily available than during the Cold War, refugee acceptance seems an indirect and inefficient means of conveying negative images” about countries with opposing ideologies.²¹⁰ Additionally, “whatever publicity value might come from encouraging or highlighting emigration from a particular country seems a small payoff compared to other possible uses of refugee admissions.”²¹¹ The fact that at this time the U.S. refugee program admits so few people also bolsters the argument that playing with these numbers only to send a political message is likely a lost cause.²¹²

The national self-interest approach has been characterized as conducive to refugee resettlement when it comes to burden-sharing.²¹³ Burden-sharing is the term for when receiving countries attempt to distribute the burdens placed on host countries through financial support and through refugee admissions, often based on their foreign policy and national self-interest goals.²¹⁴ Professor Daniel J. Steinbock has explained that the main goal behind burden-sharing is to preserve the right of asylum and protect

204. *Id.* at 148. “[T]he current framework of refugee law, even if it were to be fully and universally implemented, is largely inconsistent with the attainment of either humanitarian or human rights ideals on a universal scale.” *Id.* at 144.

205. *See supra* Part I.

206. *See supra* Part I.A.

207. Legomsky, *supra* note 33, at 916.

208. *Id.*; *see also* Bockley, *supra* note 28, at 272-76.

209. Hathaway, *supra* note 69, at 132-33.

210. Steinbock, *supra* note 47, at 982; *see also* Arthur C. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* 10 (2002) (stating that “[t]he end of the cold war reduced the ideological value of refugees in the eyes of states”).

211. Steinbock, *supra* note 47, at 982.

212. *Id.*

213. *Id.* at 986.

214. *Id.*

against involuntary returns.²¹⁵ Steinbock has outlined three reasons for burden-sharing:

First, refugees do not move evenly around the globe, both because refugee-producing events are concentrated in particular countries or regions, and because most refugees cannot seek sanctuary far from their countries of origin. Second, despite the benefits individual refugees might ultimately bring, refugee-receiving countries regard refugees as an unwanted burden in just about every way imaginable. Third, countries vary widely in their abilities to cope with refugees in their territory.²¹⁶

He has explained that foreign policy and national self-interest purposes that drive receiving countries to share the burden of admitting refugees with less capable countries is a positive outcome of this approach to refugee admissions.²¹⁷

Another positive outcome to the national self-interest approach is the category of refugees the United States created. This category is typically recognized as a subset of the national self-interest approach because it involves foreign policy considerations,²¹⁸ yet it differs from the typical foreign policy considerations because it “[f]avor[s] people whose persecution or other danger the U.S. has helped to cause.”²¹⁹ The United States has tended to use this approach to select refugees in instances where it has urged an “uprising or other resistance in another country and then fail[ed] to follow through with military support,” such as in Hungary and Vietnam.²²⁰ The reasoning behind refugee admissions from a country in which the United States has interfered militarily is that “[h]aving come to help but having failed, the U.S., in effect, is often expected to be the guarantor of the people it sought to aid.”²²¹

Critics of this approach argue that the moral claim of would-be refugees varies with the particular circumstances of each case, and that “not every ‘ally’ necessarily becomes a refugee ‘America has created’ or whose ‘injury America has caused’ if that common effort does not succeed.”²²² Sometimes, “causal connections become muddled, and moral responsibility less clear,” particularly in instances where the threat America sought to curb was present regardless of its involvement in the region, or when those who allied themselves with the activities backed by the American military would have done so even without its participation.²²³ Critics also note the foreign policy bias in this subset of the national self-interest model in that the

215. *Id.*

216. *Id.* at 985.

217. *Id.* at 977 (stating that “[r]efugee resettlement can potentially serve a variety of foreign policy goals and complaints of a foreign policy bias in refugee admissions do not always acknowledge the differences”).

218. *Id.* at 977-80.

219. *Id.* at 977.

220. *Id.* at 978; *see supra* Part I.A.6.a-b.

221. *Id.* at 980; *see also* Loescher & Scanlan, *supra* note 98, at 52-53.

222. Steinbock, *supra* note 47, at 980.

223. *Id.* at 979-80.

government retains a great deal of discretion in determining whether it has created refugees at all.²²⁴

B. Admissions Based on Humanitarian Need

The humanitarian model of refugee selection typically focuses on relieving the suffering of people due to dangers such as hunger, disease, and armed conflict.²²⁵ The concept behind this approach is that human suffering should not be viewed through a political prism.²²⁶ This approach is premised on the concept that “state response[s] to refugees should be based on [the refugees’] predicament rather than on the basis of value-laden distinctions.”²²⁷ This model stems from the concept of charitable giving²²⁸ in that it simply aims to help other human beings in need and does not look to the ways in which the host country will benefit from the admitted refugees.²²⁹

Applying humanitarian principles, Professor Matthew J. Gibney has argued that receiving countries should assist those in need when the cost of helping is not great.²³⁰ He has argued that countries that refuse to raise the overall number of admitted refugees ought to at least revamp their immigration program so as to prioritize the admission of refugees over relatives who are not immediate family members of citizens and to prioritize refugee admissions over employment-based immigrants.²³¹ Other observers, however, have proposed a balancing of refugees’ interests against those of the receiving country’s citizens.²³² Under this model, “affluent nations should be taking far, far more refugees than they are taking today,” and “potential refugee settlement countries should, on the basis of the principle of equal consideration of interests, gradually increase their refugee intakes,” until the harm to the receiving country outweighs the interests of refugees.²³³

Because the admitted number of refugees to the United States does not appear to be on the verge of increasing,²³⁴ however, one of the difficulties

224. *Id.*

225. *See id.* at 964-69.

226. *See, e.g.,* Legomsky, *supra* note 33, at 916.

227. Hathaway, *supra* note 69, at 134.

228. Steinbock, *supra* note 47, at 963-64 (stating that “[a]t bottom, refugee resettlement is a question of the distribution of charity, a subject seldom touched upon in legal literature”).

229. Tyson, *supra* note 20, at 921 (describing the conflict between the national self-interest and humanitarian approaches through writer and Holocaust survivor Elie Wiesel’s words: “When human lives are endangered, when human dignity is in jeopardy, national borders and sensitivities become irrelevant” (quoting Elie Wiesel, Nobel Peace Prize Acceptance Speech at Oslo, Norway (Dec. 10, 1986))).

230. Matthew J. Gibney, *Liberal Democratic States and Responsibilities to Refugees*, 93 *Am. Pol. Sci. Rev.* 169 (1999).

231. *Id.*

232. Peter Singer & Renata Singer, *The Ethics of Refugee Policy, in Open Borders? Closed Societies?* 111, 128 (Mark Gibney ed., 1988).

233. *Id.* at 128.

234. *See* Steinbock, *supra* note 47, at 972.

to the humanitarian approach is identifying “the principles that should guide the distribution of lifesaving resources when the need is great, the resource is scarce, and no one has an *a priori* claim.”²³⁵ Typically known as the “floodgates” problem, countries simply fear that once they begin admitting refugees for humanitarian reasons, they will never see an end to the stream of refugees.²³⁶ One way to distinguish between refugees is the “degree and probability of harm” they are likely to encounter without resettlement.²³⁷ This calculation becomes difficult, however, when the “plight of persons facing some present danger or hardship [is] weighed against the claim of those who have suffered past persecution but are not currently at risk.”²³⁸ It also becomes challenging to weigh the need of those who encounter great danger in their current location when compared to “long-stayers,” refugees who have spent years in refugee camps without a chance to return to their home country or settle in the location of the camp.²³⁹

If the United States were somehow to prioritize the dangers confronting different refugee populations (i.e., prioritizing refugees from armed conflict above those who flee disease and hunger), the problem of the order in which to accommodate them (i.e., those fleeing armed conflict in Iraq over those fleeing armed conflict in the Sudan) would pose a new challenge.²⁴⁰ A “waiting list” approach, common to other immigration preferences, would result in a substantial waiting period for many refugees.²⁴¹ While the waiting period may be acceptable, although arduous, for an immigrant not facing imminent danger in her home country, a waiting list approach for many refugees would prove deadly.²⁴² Alternatively, selection could be based on the refugee’s connection to the United States via relatives, a lottery system, or by selecting “long-term refugee groups that are somewhat self-contained, so that an entire ethnic group or at least an entire camp population could be given a durable solution without leaving a few behind.”²⁴³ The floodgates fear is accompanied by the belief by some that there may exist solutions other than resettlement to curb the plight of humanitarian refugees in their home countries.²⁴⁴ Direct humanitarian aid and “political and diplomatic pressure on the offending or failing governments” are two alternatives.²⁴⁵

235. *Id.* at 963.

236. *See* Hathaway, *supra* note 69, at 153-54 (explaining that during the codification of the Convention, states “conten[ded] that it was simply not pragmatic to create a universal refugee protection system premised on humanitarianism. There was great fear that a general commitment to refugees would constitute a ‘blank check’ that would commit states in advance to respond to future, unforeseeable events”).

237. Steinbock, *supra* note 47, at 973.

238. *Id.* at 976.

239. *Id.* at 975.

240. *Id.*

241. *Id.* at 975-76.

242. *See id.*

243. *Id.* at 976.

244. *Id.* at 964.

245. *Id.*

C. Admissions Based on Human Rights Considerations

As explained above in Part II.B, the humanitarian approach to refugee admissions embraces a very large number of people, not all of whom can be accommodated by a refugee program with a ceiling of 70,000.²⁴⁶ The human rights model is meant to embrace refugees fleeing governments due to gross human rights violations, which some commentators have argued “make the most forceful claim for admission.”²⁴⁷ This approach “provides an enhanced ability to fine-tune the refugee determination process, thus offering the assurance that refugee recognition is fair within the context of an inability to meet the full range of human needs.”²⁴⁸ Like the humanitarian model, however, the problem of making individualized determinations of which refugees have suffered, or are in danger of suffering, the “worst” kinds of human rights violations is challenging and time-consuming.²⁴⁹ Additionally, the process of determining which human rights violations are the most horrific provides countries receiving refugees with a large range of political discretion.²⁵⁰ As a result, Amnesty International has said that “there remains *in practice* a fundamental [lack of commitment by] the international community to address refugee protection through a rights-based approach. . . . This fundamental failure stems largely from a lack of political will on the part of states.”²⁵¹

Some observers have noted that the human rights approach is rife with opportunities for governments to make political or national self-interest decisions under the guise of protecting human rights.²⁵² The asylum system

246. See *supra* Part II.B.

247. Mark Gibney, *United States Immigration Policy and the “Huddled Masses” Myth*, 3 *Geo. Immigr. L.J.* 361, 382 (1989) (quoting M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 49 (1983)); see also Helton, *supra* note 210, at 10 (stating that “[e]ven the most hardened foreign policy realists in the West accept as important national interests the promotion of democracy and human rights around the world”).

248. Hathaway, *supra* note 69, at 140.

249. Schoenholtz, *supra* note 17, at 336 (describing the process of political asylum interviews in the United States, where entry is based on the violation of an applicant’s human rights, and noting that “[t]he challenges to decision-makers are . . . considerable”).

250. See Rohde, *supra* note 3, at 1 (quoting an Ethiopian refugee who said that “[t]here are a lot of countries that abuse human rights, but if they’re not on the American government’s list, it’s not abuse”); see also Hathaway, *supra* note 69, at 142 (stating that “the linkage between refugee law and human rights [has always been] selective in a way that reinforced the economic and political hegemony of major Western states”). Hathaway argues that immediately following the atrocities committed by the German government during World War II “[i]t was contextually logical that refugee law should follow the more general pattern of achieving some measure of basic protection from abusive national authority through the adoption of a human rights strategy.” *Id.* at 140–41. During the codification of the Convention, however, “[t]here was . . . no commitment to grounding refugee law in the promotion of international human rights; French efforts to link refugee status to violations of fundamental human rights and to the general human right to seek asylum were summarily rejected as theoretical and too far removed from reality.” *Id.* at 148 (internal quotations omitted).

251. See Amnesty Int’l, *supra* note 22.

252. See Hathaway, *supra* note 69, at 132; Laura Isabel Bauer, Note, *They Beg for Our Protection and We Refuse: U.S. Asylum Law’s Failure to Protect Many of Today’s*

in the United States, which is essentially based on the human rights approach to overseas refugees discussed above, has been criticized for virtually the same reasons as the overseas refugee program: its national self-interest and foreign policy bias.²⁵³ Professor James C. Hathaway has argued that “[t]o codify a standard of conduct in international human rights law is to remove it from the realm of pure discretion, to constrain somewhat the scope for the exercise of power politics, and to provide a basis upon which states may be called upon to account for their behavior.”²⁵⁴ He goes on to say that

[w]hile law provides no guarantee of compliance in a world of sovereign nation states in which coercive authority is denied to the international community, it nonetheless creates a context in which respect for basic human rights can be addressed and at least occasionally promoted. . . . [R]egional and interest-driven protection [should be emphasized] because states have proved assiduously resistant to assuming obligations viewed as inconsistent with their own national interests.²⁵⁵

Under Hathaway’s model, states would be encouraged to embrace refugees whose human rights had been violated in a nearby country, or where the receiving states’ political interests were aligned with admitting the refugees.

Part II of this Note described the three predominant approaches to refugee admissions: the national self-interest approach, the humanitarian approach, and the human rights approach. This Note now turns to discussing a proposal for a U.S. refugee admissions program that includes refugees from Afghanistan and Iraq created as a result of the war on terror by encompassing both humanitarian and human rights considerations.

III. AN AMERICAN REFUGEE POLICY BASED ON HUMANITARIAN AND HUMAN RIGHTS CONSIDERATIONS THAT INCLUDES REFUGEES THE UNITED STATES CREATED IN AFGHANISTAN AND IRAQ AS A RESULT OF THE WAR ON TERROR

Part III of this Note proposes that the United States admit refugees it created in Afghanistan and Iraq by adopting a refugee policy that combines the humanitarian and human rights approaches.

Refugees, 79 Notre Dame L. Rev. 1081 (2004); Kathryn A. Dittrick Heebner, Comment, *Protecting the Truly Persecuted: Restructuring the Flawed Asylum System*, 39 U.S.F. L. Rev. 549 (2005).

253. Bauer, *supra* note 252, at 1087 (“Unfortunately, political motives persist in the administration of U.S. asylum and refugee law. Because even a nationality-neutral definition of ‘refugee’ requires a conclusion that another government has actively persecuted or failed to prevent persecution, an asylum grant involves criticism of a nation’s actions or inactions. Since 1980, the U.S. government has catered to the plea of the refugee who ‘advance[s] American political objectives.’” (quoting Bockley, *supra* note 28, at 256)); Heebner, *supra* note 252, at 551 (explaining that “judicial discretion [in granting or denying asylum status] has been employed in a haphazard manner and produces illogical results”).

254. Hathaway, *supra* note 69, at 132.

255. *Id.* at 132-34.

Similar to the U.S. approach to refugee admissions during the Cold War, the Bush Administration has curtailed admissions of refugees from countries from which it would be politically embarrassing to accept suffering people, namely Iraq and Afghanistan.²⁵⁶ This Note proposes that refugees the United States created should be admitted pursuant to the humanitarian approach and that the United States should adopt a hybrid of the human rights and humanitarian models to shape a refugee admissions program that accepts responsibility for refugees the United States created in Afghanistan and Iraq. When American military action results in the displacement of thousands of people who consequently fear for their lives, as they do in Afghanistan and Iraq, the United States owes those refugees who would benefit from resettlement that opportunity. This proposal is explored below.

A. *The Continuation of a Refugee Admissions Program Influenced by National Self-Interest and Foreign Policy*

The near absence of refugee admissions from Iraq and Afghanistan in current years²⁵⁷ is entirely in keeping with the history of the program, which has been influenced by foreign policy and national self-interest since World War II, when the United States enacted the Displaced Persons Act of 1948.²⁵⁸ The United States' pattern of favoring refugees from countries it wishes to embarrass or harm politically,²⁵⁹ while at the same time turning a blind eye to refugees from countries politically allied with the United States or from countries it wishes to portray positively, is well established.²⁶⁰ This Note proposes that the continuing influence of national self-interest and foreign policy are the primary reasons for the near exclusion of Afghan and Iraqi refugees from the refugee admissions program.

The State Department has employed three explanations to defend the dearth of refugee admissions from Afghanistan and Iraq.²⁶¹ The first is that until approximately four years after September 11, name-checking procedures for processing Iraqi refugees were being streamlined in the wake of the terrorist attacks.²⁶² In combination with this first argument, the State

256. See Steinbock, *supra* note 47, at 984-85 (writing at the onset of the war in Iraq that “[a]fter September 11, it may be said, the U.S. acquired a new ideology: anti-terrorism. . . . In a war that demands as much commitment in troops, casualties, foreign relations, and funding as this one already has (and will), it is unrealistic to think that refugee admissions will not also be used as a weapon. If refugee resettlement appears helpful in the war against terrorism it is sure to be called upon, even at the expense of other people in greater need”).

257. State Dep't 2003 Summary, *supra* note 21, at 19-20; State Dep't 2004 Summary, *supra* note 21, at 3; State Dep't 2005 Report, *supra* note 112, at 45; State Dep't 2006 Report, *supra* note 78, at 51.

258. See *supra* Part I.A.

259. See *id.*

260. See *id.*

261. State Dep't 2005 Report, *supra* note 112, at iv, 38; State Dep't 2006 Report, *supra* note 78, at 41.

262. State Dep't 2005 Report, *supra* note 112, at 38.

Department has also said that at times country conditions in Iraq are so unstable that government officials cannot enter certain parts of the country in order to process refugees.²⁶³ The third explanation is that, with respect to Afghanistan (and some parts of Iraq), country conditions have improved enough so that refugees can be returned to their home country and repatriated or can resettle in the countries where they are currently located (namely neighboring Pakistan) and therefore would not benefit from resettlement in the United States.²⁶⁴

Although the streamlining of security procedures in the wake of September 11 is a completely appropriate response to the attacks, it is important to note that none of the hijackers on September 11, or any known terrorist since, was a refugee, or entered the United States by way of the refugee admissions program.²⁶⁵ Additionally, given the immediate and pressing needs of refugees, five years and counting is quite a long time for security procedures to be streamlined. As discussed above, procedures for screening out criminals from the refugee program were already in place as per the Convention, and the extensive screening involved in the admission of overseas refugees has been quite efficient in weeding out would-be terrorists to date.²⁶⁶

The issue of country conditions in Iraq being so precarious that the United States cannot enter certain parts of the country in order to process refugees seems like a self-serving argument considering that the U.S. military is in control of the country and has created the conditions it now deems unstable.²⁶⁷ While the security conditions in some parts of the country are indeed unstable, it should be the singular responsibility of the United States to devise a plan that limits the danger to government workers so that persecuted Iraqis may be aided. The United States' explanation in this regard is akin to one setting her neighbor's house on fire and then declaring it too dangerous to attempt the neighbor's rescue; it is irresponsible and absent-minded.

While the UNHCR and other countries have supported the United States' assertions that conditions in Afghanistan are sufficiently stable to begin repatriating some Afghans,²⁶⁸ the conditions there are not necessarily so stable that Afghans should no longer be admitted as overseas refugees. Continuing attacks by the Taliban and other insurgents, as well as natural occurrences such as an ongoing drought in the region, continue to produce refugees.²⁶⁹ So long as the U.S. presence in Afghanistan continues under

263. *Id.* at iv.

264. State Dep't 2006 Report, *supra* note 78, at 41 (stating that "[w]ith repatriation now a reality for Afghans, and a real possibility for many Iraqis, we expect to process only those vulnerable refugees who cannot return to their homes from those countries").

265. *See* Sengupta, *supra* note 197, at B6.

266. *See supra* Part I.A.4.

267. *See supra* Part I.B.2.

268. *See supra* Part I.B.1.

269. *See supra* Part I.B.1.

the guise of rebuilding and improving conditions for Afghans, the United States should not also refuse to admit Afghan refugees for whom it would be dangerous to remain.

While the State Department's explanations for the low refugee admissions from Afghanistan and Iraq are plausible, the more likely explanation is that the United States has been guided by national self-interest and foreign policy objectives in admitting fewer and fewer refugees from these countries. The current trend in refugee admissions from these countries can be compared to admissions during the Cold War. As in the Cold War, the United States is currently engaged in an ideological battle in which it is attempting to "win the hearts and minds" of many people around the world in order to garner support for its military action in the "war on terror."²⁷⁰ Just as the United States was also interested in winning a worldwide propaganda war during the Cold War, public relations have played a dramatic role in the Bush administration's war on terror as the government has attempted to win support by swaying both the American electorate and potential allies abroad.²⁷¹ During the Cold War, the United States utilized refugee admissions to discredit governments with opposing ideologies by admitting their refugees.²⁷² Given the current U.S. involvement in Iraq and Afghanistan, however, it would be entirely unseemly to admit that the United States both created refugees there and now needs to resettle them in the United States. The diminished admissions of refugees from Afghanistan and Iraq correlate to the United States' interest in positively portraying the situations in those countries and is a manifestation of the national self-interest approach to refugee admissions.

B. *Adhering to the Spirit of the Act, Convention, and Protocol*

Part III.B of this Note proposes that the United States adhere to the spirit of the Act, Convention, and Protocol by adopting a refugee admissions program that does not politically discriminate against refugees according to their country of origin.

Apart from the tragic humanitarian implications of the exclusion of Afghan and Iraqi refugees from the current refugee admissions program,²⁷³ the disturbing trend since September 11 contradicts the politically neutral spirit and language of the Act, the Convention, and the Protocol.²⁷⁴ Even though the Convention allows states to make their own determinations of who deserves refugee protection, thereby "add[ing] significantly to the scope for ideologically influenced interpretations,"²⁷⁵ states are still

270. See *supra* Part I.A.1-3, B.1-2.

271. See *supra* Part I.B.1.

272. See *supra* Part I.A.1-3.

273. See *supra* Part I.B.1-2.

274. See *supra* notes 69-74 and accompanying text.

275. Hathaway, *supra* note 69, at 150.

supposed to adhere to the politically neutral language of the Convention. One observer has noted,

In practice, the lack of any meaningful international scrutiny of the procedural dimensions of refugee protection has allowed political and strategic interests to override humanitarian concerns in the determination of refugee status, has facilitated the interposition of domestic economic and social considerations in deciding which persons and groups are to be assisted, and has resulted in a variety of interpretations of the Convention, thereby undercutting the universality of the protection mandate.²⁷⁶

Yet, the United States ought to play a leadership role in this area by proving that refugee admissions can be based on humanitarian and human rights considerations, and not biased by foreign policy and national self-interest considerations that serve to exclude deserving refugees.

C. Classifying the Moral Obligation of the United States to Refugees the United States Created as Part of the Humanitarian Approach to Refugee Admissions

Part III.C of this Note argues that refugees the United States has created be admitted pursuant to the humanitarian approach to refugee admissions.

The model for admitting refugees the United States created is practically the antithesis of the national self-interest model, under which U.S. refugee policy is typically categorized because of its consideration of foreign policy-related events.²⁷⁷ It stems more from the charitable, moralistic instinct that drives the humanitarian model²⁷⁸ rather than from the self-focused model that uses foreign policy as its guide.²⁷⁹ The admission of refugees the United States created serves the role of an apology for botched military actions²⁸⁰ rather than the furtherance of political goals.

Although in past instances when refugees the United States created were admitted to the United States the military activities that involved the United States were largely over,²⁸¹ the fact that the military operations in Iraq and Afghanistan are ongoing should not impede the admission of refugees from these countries. There are thousands of civilians currently in danger of religious and political persecution, insurgent attacks, and armed conflict due to the actions of the U.S. government. Their exclusion from the refugee admissions program denies them one possible solution to their plight.²⁸²

276. *Id.* at 167-68.

277. *See supra* Part II.A.

278. *See supra* Part II.A-B.

279. *See supra* Part II.A.

280. *See supra* Part I.A.6.a-b.

281. *See supra* Part I.A.6.a-b.

282. Sengupta, *supra* note 197, at A1 (stating that “if the Sept. 11 hijackings exposed the alarmingly large gaps in the government’s ability to track who comes into the country, they also made indirect casualties out of otherwise deserving refugees”).

D. *Incorporating Human Rights and Humanitarian Considerations into the U.S. Refugee Admissions Program*

Part III.D of this Note proposes that the United States incorporate the humanitarian and human rights approaches to refugee admissions into its admissions program.

The United States could incorporate humanitarian and human rights considerations into its refugee admissions program, particularly when it comes to Afghan and Iraqi refugees, by applying aspects of Steinbock's and Hathaway's suggestions discussed above regarding burden-sharing and region-related considerations.²⁸³ The burden-sharing vehicle, in which an interested nation provides support or resettlement opportunities to refugees currently hosted by another nation,²⁸⁴ would allow the United States to admit both Afghan and Iraqi refugees who have fled their countries for either humanitarian or human rights-related reasons. Given the United States' interest in stabilizing conditions in these countries, it would seem that a region-related approach by which the United States could assist local, endangered refugees would greatly enhance its goal of maintaining order there. Additionally, providing humanitarian and human-rights based aid in the form of refugee resettlement could serve to enhance the United States' image in these countries, rather than cause political embarrassment.

CONCLUSION

Past instances of reform in the U.S. refugee admissions program have been spurred by public outcry and powerful lobbying groups.²⁸⁵ A public movement to urge the President to admit refugees from Afghanistan and Iraq does not seem entirely out of reach given the current unpopularity of the U.S. presence in Iraq.²⁸⁶ Some observers have noted that

[t]oday's Congress does not seem awash in humanitarian goodwill. It included provisions in the intelligence reform bill enacted in December 2004 that bespeak a mood of hostility and deep skepticism toward asylees, which could easily spill over onto those

283. See *supra* Part II.A, C.

284. See *supra* Part II.A.

285. See *supra* Part I.A.1, 5-6.

286. Danner, *supra* note 136, at 47 (stating that "[a]s the Iraq war grows increasingly unpopular in the United States—scarcely a third of Americans now approve of the president's handling of the war, and 4 in 10 think it was worth fighting—and as more and more American leaders demand that the administration 'start figuring out how we get out of there' (in the words of Senator Chuck Hagel, a Republican), Americans confront a stark choice: whether to go on indefinitely fighting a politically self-destructive counterinsurgency war that keeps the jihadists increasingly well supplied with volunteers or to withdraw from a post-Saddam Hussein Iraq that remains chaotic and unstable and beset with civil strife and thereby hand Al Qaeda and its allies a major victory in the war on terror's 'central front'").

admitted through the resettlement program, if amendments to that program are offered.²⁸⁷

Yet, Congress alone does not make the determination of which refugees are admitted.²⁸⁸ The President plays the most crucial role in determining whom to admit and could make the determination alone.²⁸⁹

As the events of September 11 demonstrate, it is undoubtedly in this country's best interest that desperate people abroad are not permitted to stew in conditions that could breed a destructive ideology.²⁹⁰ "[C]ompassion for refugees and concern for the national interest are not mutually exclusive. Rather, including humanitarian 'compassion' as a separate criterion on which to allocate refugee admissions serves the national interest because it helps preserve the United States' credibility in politically unstable, refugee producing regions."²⁹¹ Allotting the limited number of slots that the government holds for overseas refugees to victims of human rights abuses and to those who would be best served by a humanitarian response that includes resettlement in this country, particularly when the United States has taken part in creating their situation, would promote a broader and more enduring type of national self-interest than a policy that continues to politicize persecuted refugees.

287. Martin, *supra* note 181.

288. *See supra* Part I.A.4.

289. *See supra* Part I.A.4.

290. Tyson, *supra* note 20, at 931.

291. *Id.*