"CONDITIONAL ADMISSION" AND OTHER MYSTERIES: SETTING THE RECORD STRAIGHT ON THE "ADMISSION" STATUS OF REFUGEES AND ASYLEES

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Hundreds of thousands of U.S. residents live in the country lawfully and indefinitely but are not citizens. The rules governing the lives and freedom of these residents vary depending on their immigration status. This Article explores the boundaries of and rules attaching to two such important groups–resettled refugees and asylees–and explains why they must be deemed (unconditionally) admitted under the Immigration and Nationality Act. Whether a noncitizen is deemed "admitted" often determines whether he or she will be deported–banished–from the United States. It also may determine whether the noncitizen is subject to months or years of incarceration during resolution of her case, or while awaiting deportation. Perhaps because of these populations' relative indigence, which contributes to their inability to access counsel, the case law in both the administrative and federal courts is strikingly confused and often misleading. For example, the Board of Immigration Appeals has stated for decades that refugee admission is "conditional"–although that term appears nowhere in the relevant statutory provisions. I analyze the historical trajectory of the concept of admission as it relates to refugees and asylees to reach my conclusion that they are (unconditionally) "admitted." Today, as debates over immigration reform continue to rage, it is particularly important to understand the consequences of amendments relating to the grounds for detaining and deporting persons deemed not "admitted," and why refugees and asylees do not fall into this category.

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INTRODUCTION

Hundreds of thousands of displaced persons have settled in the United States since World War II. In general, the displaced have gained immigration status through one of three mechanisms: (1) resettlement as a refugee from overseas; (2) a grant of asylum in the United States due to fears of persecution in the country of origin; and (3) parole into the United States, whether for "humanitarian" reasons or in the "public interest."[1] All three types of status were created before an overhaul of immigration law in 1996[2] that rendered the question whether a noncitizen had been "admitted"[3] paramount to almost every analysis of his or her substantive and procedural rights. The members of Congress who drafted the foundational legislation establishing these statuses could not have foreseen this long-term evolution in the law, and the future consequences of precision (or a lack thereof) in indicating whether such statuses amounted to "admission."

The drafters of the 1996 statute—the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[4]—were not focused on the long-term displaced. Rather, Congress' goal in emphasizing "admission" was to level the playing field between persons who had slipped across the border without inspection and those who sought status through legal channels.[5] Previously, immigration law distin-

1. 8 U.S.C. § 1182(d)(5) (2012). The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, was the landmark legislation that created a lasting framework for the resettlement of refugees from overseas and the grant of asylum to refugees already in the United States. The statutory parole authority was created in the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188. The parole power is now codified at 8 U.S.C. § 1182(d)(5)(A) (2012). In this Article, I employ the term "displaced" to refer primarily to persons fleeing persecution in their countries of origin. Thus, I do not specifically address the beneficiaries of Temporary Protected Status (TPS), a status created by the Immigration Act of 1990 permitting persons already in the United States to remain if their homelands were stricken by natural disasters or armed conflict since their departure. *See* Pub. L. No. 101-649, § 302, 104 Stat. 4978, 5030–36 (codified at 8 U.S.C. § 1254a (2012)). Because persons from certain countries, such as El Salvador and Sudan, have benefited from TPS for many years, the term "temporary" is sometimes a misnomer. However, TPS has not generated the inconsistencies in statutory interpretation affecting resettled refugees and asylees. On the contrary, it is well settled that TPS does not amount to an admission. *See*, *e.g.*, Sosa Ventura, 25 I&N Dec. 391, 392 (BIA 2010).

2. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 [hereinafter IIRIRA].

3. The statute defines "admitted" and "admission" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A) (2012).

4. *See* IIRIRA, *supra* note 2.

5. *See* H.R. REP. NO. 104-469, pt. 1, at 225 (1996); Legal Memorandum from David Martin, Gen. Counsel, Immigration & Naturalization Serv., Request for Legal Opinion: The Impact of the 1996 Act on Section 245(i) of the Act, to Michael L.

guished between noncitizens who had "entered" the United States whether lawfully or otherwise, and those who had not yet crossed the border.[6] After 1996, mere entry into the United States was no longer the primary determinant of a noncitizen's substantive and procedural rights.

Following IIRIRA, the first question that any responsible immigration attorney must address is whether a noncitizen has been "admitted." This question controls such crucial issues as the burden of proof in removal proceedings, whether detention is statutorily mandated over the course of proceedings, and whether indefinite detention following a removal order is constitutionally permissible.[7] Otherwise stated, whether (and on what date) a noncitizen is deemed "admitted" often determines whether he or she will be deported—banished—from the United States. It also may determine whether the noncitizen is subject to months or years of incarceration during resolution of his or her case, or while awaiting deportation—or whether the noncitizen may be released on bond or under an order of supervision.[8] In short, noncitizens deemed not admitted are in an inferior legal position, vulnerable to deprivation of liberty and the reduction of procedural options through the administrative, judicial, or legislative processes.

The concept of "admission" was deeply embedded in immigration law long before achieving its paramount position in 1996. Oddly, however, congressional debates and conference reports on statutes relating to the long-term displaced reveal frequent conflation of the terms "parole," "admission," and "entry."[9] Because all three words

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Aytes, Assistant Comm'r, Office of Benefits (Feb. 19, 1997), *reprinted in* 74 INTERPRETER RELEASES 516, 520 (1997) [hereinafter Martin, Memorandum].

6. *See* Martin, Memorandum, *supra* note 5.

7. *See generally* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 64–126 (2001) [hereinafter Martin, *Constitutional Protections*] (discussing the relevance of "admission" to the constitutionality of indefinite detention, including the complex question whether IIRIRA affected the constitutional status of persons who entered without inspection); *cf.* Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J. C.R. & C.L. 165, 170–72 (2007) (arguing that IIRIRA stripped away important constitutional protections from noncitizens who entered without inspection); RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 28, 36–38 (2d ed. 2009) ("Persons seeking admission may not avail themselves of protections of the Constitution."). For a general examination of the applicability of constitutional protections to noncitizens, see David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367 (2003).

8. An order of supervision sets forth the conditions for release of a noncitizen whom the government does not succeed in deporting within ninety days following a removal order. *See* 8 U.S.C. § 1231(a)(3) (2012).

9. There are infinite examples of such errors. One notable instance is the titling of a congressional hearing "*Admission* of Refugees on *Parole*" (emphases added). *See*

were (and remain) distinct terms of art, they should not have been employed interchangeably. Notwithstanding the tenet of statutory construction that Congress "says in a statute what it means and means in a statute what it says,"[10] legislators' repeated misuse of the terms raises the specter of mistaken application in at least some provisions, and has eroded the terms' mutual exclusivity.[11]

This terminological problem was exacerbated by the 1996 statutory shift, because "Congress' substitution of the term 'admission,' as meaning a 'lawful entry,' for the previous definition of 'entry' as any unrestrained crossing of the United States border, was not carefully or thoughtfully accomplished."[12] The author of this comment, former Board of Immigration Appeals (Board) member Lory Rosenberg, thus criticized Congress' inconsistent usage of the term "admission" in the text of the Immigration and Nationality Act (INA) following the 1996 amendments.[13] Apparently the Department of Homeland Security (DHS) agrees with Ms. Rosenberg. In a 2011 Board case, for example, DHS went so far as to argue that "the admission concept has so many applications and is used in so many different ways throughout the Act that it would be futile for [the Board] to restrict its meaning by reference to [the statutory definition at 8 U.S.C. § 1101(a)(13)] or any other universal standard."[14] While the Board rejected DHS's argu-

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Admission of Refugees on Parole: Hearings on H.J. Res. 397 Before Subcomm. No. 1 of the H. Comm. on the Judiciary, 86th Cong. 1 (1960) [hereinafter *Admission of Refugees on Parole Hearing*]. In another example, a conference report relating to Section 586 of the Foreign Operations Appropriations Act, commonly known as the Indochinese Parolee Adjustment Act, which allows parolees from Vietnam, Cambodia, and Laos to adjust status to permanent residency, describes such persons as "lawfully admitted" to the United States. *See* H.R. REP. NO. 106-997, at 106 (2000).

10. Arciniaga v. Gen. Motors, 460 F.3d 231, 236 (2d Cir. 2006) (internal quotation marks and citations omitted).

11. Even the Supreme Court, in a foundational case on the constitutional rights of noncitizens, has referred to parolees as "admitted" to the United States. Mathews v. Diaz, 426 U.S. 67, 81 (1976) ("Cuban parolees are . . . aliens who have been admitted.").

12. Rosas, 22 I&N Dec. 616, 625 (BIA 1999) (Rosenberg, Board Member, concurring in part and dissenting in part).

13. This lack of clarity has often required inquiry into the structure and design of the statute as a whole or invocation of the "absurdity" doctrine to interpret certain provisions. *See, e.g.*, Alyazji, 25 I&N Dec. 397, 403–06 (BIA 2011); *Rosas*, 22 I&N Dec. at 618–23.

14. *Alyazji*, 25 I&N Dec. at 403 (internal quotation marks and citations omitted); *see also* Ilyce Shugall & Rebecca Desnoyers, *Case Note:* Orozco v. Mukasey*: When an Entry May Not Be an "Admission" and the Fundamental Problems with the Ninth Circuit's Analysis*, 35 WM. MITCHELL L. REV. 68 (2008) (highlighting the complexity of analyzing whether and when an "admission" has occurred).

ment, it did not quibble with DHS's underlying complaint about the law's lack of clarity.[15]

Congress' imprecise use of language when debating and crafting the statutes relating to the displaced, combined with immigration law's shift in emphasis towards "admission" after 1996, has resulted in strikingly confused case law and inconsistent DHS charging practices. In general, scholars, adjudicators and litigants have devoted inadequate attention to the concept of "admission" as it relates to the displaced. Perhaps because of the relative indigence of these populations, and their difficulty accessing competent counsel, the courts have not had the benefit of adequate, informed briefing fleshing out the issues.[16] They also have not compensated for the problem through their own research and analyses.[17] Rather, the courts often have compounded the confusion. The inadequacy of immigration law jurisprudence, if not the focus of this Article, is certainly a leitmotif.[18]

As one example, the Board has stated inaccurately for decades that refugees are only "conditionally" admitted—a concept that finds no support in the INA. In the 2012 opinion *Matter of D-K-*,[19] even as the Board finally found refugees "admitted" for charging purposes,[20] it adhered to the earlier characterization without explaining the implications for other aspects of immigration procedure. Moreover, although the law has migrated over time towards deeming "asylum" an admission, the Board in a 2013 case abruptly stated that it is not—ignoring binding regulations, the Board's own precedent, and agency guidance characterizing "asylum" as an admission.[21] The case law also has struggled with the question whether, if asylum is an admis-

15. *Alyazji*, 25 I&N Dec. at 404.

16. *See, e.g.*, Sesay v. Immigration & Naturalization Serv., 74 F. App'x 84, 88 n.6 (2d Cir. 2003) (explicitly leaving open the question whether a grant of asylum equates to an entry for a "fully briefed and properly argued" case); Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 8–9 (2008); Sam Dolnick, *Improving Immigrant Access to Lawyers*, N.Y. TIMES, May 4, 2011, at A24.

17. *See, e.g.*, cases cited *infra* Part III.B.3.

18. *See, e.g.*, Lynne Marek, *Posner Blasts Immigration Courts as "Inadequate" and Ill-Trained*, NAT'L L. J. (Apr. 22, 2008, 12:00 AM), http://www.nationallawjournal.com/id=900005509349 (detailing Circuit Judge Richard Posner's harsh criticism of Immigration Courts and the Board).

19. 25 I&N Dec. 761, 765–69 (BIA 2012).

20. In order to initiate removal proceedings, DHS charges noncitizens under the grounds of inadmissibility or deportability in a document called a Notice to Appear. *See* 8 U.S.C. § 1229(a)(1) (2012). Which grounds apply depend on whether the noncitizen has been "admitted." 8 U.S.C. § 1229a(a)(2) (2012).

21. *See* V-X-, 26 I&N Dec. 147, 150–52 (BIA 2013).

sion, an asylee who loses asylum status loses the "admission" that came with it.[22]

In this Article, therefore, I seek to clear away the decades of fog that obscure these issues and to explain why refugees and asylees[23] must be deemed (unconditionally) admitted. The literature has not yet examined these questions. Indeed, scholarly analysis of the concept of "admission" remains very limited, despite its overriding importance in immigration law and the many Board cases grappling with the term.[24] Now is a particularly important time to start reversing this trend. Congress continues to debate extensive reforms to immigration law, and the import of some provisions undoubtedly will depend on a noncitizen's "admission" status.[25] During the 2006 attempt to pass a bill overhauling immigration law, the version of the Act that passed the Senate included language easing the indefinite detention of certain

22. The Border Security, Economic Opportunity, and Immigration Modernization Act, which passed the Senate on June 27, 2013, would render this issue even more important if the bill became law, because it creates a presumption that asylum should be terminated if an asylee, even one who has obtained lawful permanent status, travels to her home country. *See* S. 744, 113th Cong. § 3411 (as passed by the Senate, June 27, 2013). This provision was prompted by the return to Russia of one of the Boston Marathon bombers, Tamerlan Tsarnaev, who already had adjusted to lawful permanent residency from asylum status. *See* S. REP. NO. 113-40, at 52–53 (2013).

23. By contrast, noncitizens granted withholding of removal under 8 U.S.C. § 1231(b)(3) are not deemed admitted. *Cf.* I-S- & C-S-, 24 I&N Dec. 432, 433–34 (BIA 2008) (observing that withholding of removal does not amount to a permanent right to remain in the United States, and that Immigration Judges may not grant withholding of removal without first entering a removal order). Withholding is a form of relief based on the same general criteria as asylum but with a higher burden of proof. *See* Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 423–24 (1987).

24. Some exceptions are Elwin Griffith, *The Meaning of Admission and the Effect of Waivers Under the Immigration and Nationality Act*, 55 HOW. L.J. 1 (2011) (exploring the relevance of "admission" to eligibility for waivers of removability, but not focusing on whether specific categories of noncitizens have been "admitted"); Shugall & Desnoyers, *supra* note 14 (discussing the distinction between "entry" and "admission" and its relevance to adjustment of status to lawful permanent residency); Elwin Griffith, *Admission and Cancellation of Removal Under the Immigration and Nationality Act*, 2005 MICH. ST. L. REV. 979 (2005) (discussing the concept of admission as it relates to cancellation of removal, a type of defense to deportation). Among the most important cases addressing "admission" are *Alyazji*, 25 I&N Dec. 397 (BIA 2011), which overruled, in part, *Shanu*, 23 I&N Dec. 754 (BIA 2005), and *Rosas*, 22 I&N Dec. 616 (BIA 1999). The federal courts of appeals also have grappled with the concept. *See, e.g.*, Abdelqadar v. Gonzales, 413 F.3d 668, 672–74 (7th Cir. 2005); Shivaraman v. Ashcroft, 360 F.3d 1142, 1146–49 (9th Cir. 2004).

25. For example, a provision in the "SAFE" Act, introduced in the House of Representatives on June 6, 2013, would tighten the imposition of mandatory detention during removal proceedings, which disproportionately affects inadmissible noncitizens. *See* Strengthen and Fortify Enforcement Act, H.R. 2278, 113th Cong. § 301(b)(2) (2013); *see also infra* Part II.B.2.

classes of noncitizens deemed not admitted.[26] Those proposals were not unique to the 2006 Act, and Senators Grassley and Inhofe have attempted to introduce such measures into current draft bills.[27] Similar immigration enforcement measures will continue to emerge as the counterpoint to attempts at liberalization. It is high time to set the record straight on the admission status of refugees and asylees—and for the literature in general to focus more carefully on the "admission" concept.

In Part I of this Article, I review the history of the statutes governing the long-term displaced, including the genesis of the 1952 provision codifying the parole authority, and the 1980 Refugee Act that still forms the backbone of the refugee resettlement and asylum regimes. In Part II, I examine the concept of "admission" and address its increased relevance following the 1996 overhaul of much of immigration law. In Part III, I build on these discussions to explain why refugees and asylees must be deemed (unconditionally) admitted.

I.
GENESIS OF THE FOUNDATIONAL REFUGEE STATUTES

Many authors have written expansive, informative histories of the foundational parole and refugee statutes.[28] The literature has focused for the most part on the politics of refugee resettlement, analyzing how the executive branch has decided *which* refugees to allow into the United States, and the extent to which decision-making has been driven by foreign policy as opposed to humanitarian concerns.[29] By

26. *See* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 206 (as passed by the Senate, May 25, 2006); *see also infra* Part II.C (discussing Supreme Court precedent on indefinite detention and proposed bills that would supersede the Court's decisions). Although the 2006 bill passed the Senate, it failed in the House of Representatives.

27. *See* discussion *infra* Part II.C.3.

28. *See, e.g.*, STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 874–88 (5th ed. 2009); Kathryn M. Bockley, Comment, *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 (1995); Ira J. Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 867–69 (1982); Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981); Marvin Samuel Gross, Comment, *Refugee-Parolee: The Dilemma of the Indochina Refugee*, 13 SAN DIEGO L. REV. 175, 177–82 (1975). For insider reflections on passage of the Refugee Act of 1980, see David A. Martin, *The Refugee Act of 1980: Its Past and Future*, *in* 3 MICHIGAN YEARBOOK OF INTERNATIONAL LEGAL STUDIES 91 (1982) [hereinafter Martin, *Refugee Act*] and Edward M. Kennedy, *The Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141 (1981).

29. *See, e.g.*, Anker & Posner, *supra* note 28, *passim*; Martin, *Refugee Act*, *supra* note 28, at 92–96, 104–09; *cf.* Daniel J. Steinbock, *The Qualities of Mercy: Maximiz-*

contrast, my goal is to examine the text and histories of the statutes to discern how the concept of "admission" interrelates with refugee and asylee status. Because a flurry of statutes was passed to address intermittent humanitarian crises leading up to enactment of the most crucial legislation—the Refugee Act of 1980—I also address several other laws.

As my discussion will make apparent, refugee status has bounced back and forth along a continuum between full-fledged admission as a lawful permanent resident and resettlement on nominally temporary parole. The statutes and practices immediately preceding passage of the Refugee Act of 1980, however, made refugee status inherently precarious. This appears to have engendered a legal mindset that read conditionality into refugee admission status that was not spelled out in the Act. I will discuss these interpretive irregularities in Part III, following my exposition of the history of the Act in this Part and the significance of "admission" to a noncitizen's substantive and procedural rights in Part II.

A. The Displaced Persons Act of 1948

The Displaced Persons Act[30] was the first major post-war legislation allowing for the systematic resettlement of refugees in the United States.[31] The statute assisted Europeans who had fled fascist or communist regimes during or at the close of World War II.[32] For this narrowly demarcated group of persons, the Act accorded a tremendous benefit upon resettlement—lawful permanent residency—and thus any refugee resettled under the Act was indisputably "admitted."[33] This beneficence would be repeated in subsequent, similarly selective laws during the 1950s, but would disappear permanently by 1960.[34]

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ing the Impact of U.S. Refugee Resettlement, 36 U. MICH. J.L. REFORM 951 *passim* (2003) (analyzing refugee selection grounds).

30. Pub. L. No. 80-774, 62 Stat. 1009 (1948).

31. *See* Anker & Posner, *supra* note 28, at 13. Note that limited executive and administrative measures provided for resettlement prior to and during the war, before the magnitude of the displaced population forced the United States to develop more expansive strategies. *See* LEGOMSKY & RODRIGUEZ, *supra* note 28, at 876–77 (citing and quoting ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY, 1924-1952, at 110–12 (1957)); *see also* Edwin B. Silverman, *Indochina Legacy: The Refugee Act of 1980*, 10 PUBLIUS 27, 28 (1980) (addressing the Truman Directive of Dec. 22, 1945).

32. *See* Displaced Persons Act of 1948, Pub. L. 80-774, §2(c), 62 Stat. 1009, 1009.

33. *See id.* §4(a). Note that lawful permanent residency is referred to colloquially as a "green card." *See, e.g.*, Laura Danielson & Stephen Yale-Loehr, *Introduction* to SAUNDRA AMRHEIN, GREEN CARD STORIES 9, 10 (2011).

34. *See* discussion *infra* Part I.D.

B. The Immigration and Nationality Act of 1952: Codification of the Parole Authority

The Immigration Act of 1952 introduced the first provision codifying the Attorney General's parole authority. However, Congress did not cut the concept of parole from whole cloth. Before the Act's passage, there existed a non-statutory administrative practice of "paroling" otherwise excludable noncitizens to avoid holding them in custody pending their deportation, or for specific purposes such as prosecution or testifying in criminal cases.[35] At bottom, "parole" equated to temporary release from immigration detention.[36] The text and history of the 1952 provision indicate that it was not intended as a large-scale mechanism for mass refugee resettlement. Because it subsequently was used that way, however, the inherently tenuous nature of parole engendered lasting confusion as to the nature of refugee "admission," confusion that has continued into the twenty-first century.

Under Congress' draft provision prior to comments from the Attorney General's office, the purpose of parole remained the temporary release into the United States of otherwise excludable noncitizens.[37] However, parole was available only to noncitizens requiring medical care. Following treatment, the parolee was to "be deported in the same manner as other aliens who are excluded from the United States."[38]

A congressional committee requested comments from the Attorney General.[39] In a written statement, Deputy Attorney General Peyton Ford suggested substituting the following language, explaining that the "modification[s] . . . would more likely be efficacious in the administration of the law":

> The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole have been served the

35. Gross, *supra* note 28, at 177. Professor David A. Martin and Senator Patrick Leahy both have advocated for admitting refugees as lawful permanent residents again. *See* DAVID A. MARTIN, THE UNITED STATES REFUGEE ADMISSIONS PROGRAM: REFORMS FOR A NEW ERA OF REFUGEE RESETTLEMENT 110–11(2005); Leahy-Levin Refugee Protection Act, S. 3113, 111th Cong. § 14 (2010).

36. *See* Ma v. Barber, 357 U.S. 185, 189–90 (1958).

37. *See* Anker & Posner, *supra* note 28, at 15.

38. S. 716, 82d Cong. § 212(d)(5) (1951). The House bill contained identical language. H.R. 2816, 82d Cong. § 212(d)(5) (1951).

39. *See Revision of Immigration, Naturalization, and Nationality Laws*: *Joint Hearings on S. 716, H.R. 2379 and H.R. 2816 Before the Subcomm. of the H. Comm. on the Judiciary*, 82d Cong. 711 (1951) (statement of Peyton Ford, Deputy Att'y Gen.).

> alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any applicant for admission to the United States.[40]

Congress adopted the suggested changes wholesale.[41] In accepting the proposed modifications, the Joint Committee observed:

> The provision in the instant bill represents an acceptance of the recommendation of the Attorney General with reference to this form of discretionary relief. The committee believes that the broader discretionary authority is necessary to permit the Attorney General to parole *inadmissible* aliens into the United States in emergency cases, such as the case of *an alien* who requires immediate *medical attention* before there has been an opportunity for an immigration officer to inspect him, and in cases where it is strictly in the public interest to have an inadmissible alien present in the United States, such as, for instance, a *witness* or for purposes of *prosecution*.[42]

In other words, Congress expected that the provision would apply to individual, inadmissible noncitizens whom immigration officers did not have the opportunity to inspect and who were either in the United States temporarily or for a specific purpose. The provision was not designed to effectuate the broad-scale, permanent resettlement of large groups of refugees.[43]

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40. *Id.* at 713. Today, 8 U.S.C. § 1182(d)(5)(A) reads as follows:

> The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

8 U.S.C. § 1182(d)(5)(A) (2012). For a discussion of the general uses of parole today, see David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167, 179–80 (2012), http://yalelawjournal.org/2012/12/20/martin.html.

41. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188.

42. H.R. REP. NO. 1365, at 1743 (1952) (emphases added); *see also* S. REP. NO. 1137, at 1116–17 (1952) (stating same).

43. In congressional hearings on the Fair Share Act of 1960, Congressman Feighan, one of the drafters of the parole provision, dispelled any doubts:

> I just want the record to show that I believe the parolee section of our permanent immigration law should not be used on a permanent basis. It was set up in the first instance strictly on the basis of a provision for an

Nonetheless, our Commanders in Chief subsequently employed the provision for just that purpose. Eisenhower was the first president to authorize the parole of a large group of refugees, resettling 15,000 Hungarians in 1956 in the wake of Hungary's failed revolution.[44] This set the precedent for the executive branch's parole of hundreds of thousands of Cuban refugees during the 1960s and 1970s.[45] President Kennedy in 1962 authorized the parole of a large group of ethnic Chinese who had been expelled from mainland China.[46] President Ford, after the fall of Saigon in April 1975, employed the parole provision to allow 130,000 refugees from Vietnam into the United States.[47] By 1979, more than 200,000 Indochinese had received parole.[48]

As Professor David A. Martin has insightfully observed, although the statute "speaks of parole as temporary permission to cross US borders . . . [the Indochinese refugees] were undeniably coming for a permanent stay."[49] In other words, there was no pretense that "parole" was being employed as prescribed by the statutory text. The executive's repeated invocation of the parole power generated tensions with some members of Congress, who later specifically sought to limit the use of parole in the Refugee Act of 1980.[50]

C. The Refugee Relief Act of 1953

The counterpoint to the executive's use of the parole power was Congress' passage of statutes that were too limited in scope and time frame to accommodate repeated humanitarian emergencies. Following the Displaced Persons Act, the next major legislation was the Refugee Relief Act of 1953.[51] The Act allowed 205,000 refugees to resettle in the United States, primarily persons from communist-dominated regions in Europe, but also from the Middle and Far East.[52] Like the 1948 Displaced Persons Act, the statute was a short-term exception to

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> emergency. At that time the idea of an emergency in the minds of the Joint Committee on Immigration . . . was no more than, as a maximum, 4,000 that probably would be the number on a ship in distress, such as the *Andrea Doria* which subsequently was sunk.

Admission of Refugees on Parole Hearing, *supra* note 9, at 45.

44. Kurzban, *supra* note 28, at 870–71.
45. Martin, *Refugee Act*, *supra* note 28, at 94; Gross, *supra* note 28, at 180.
46. Gross, *supra* note 28, at 180.
47. *Id.* at 182.
48. Kurzban, *supra* note 28, at 872.
49. Martin, *Refugee Act*, *supra* note 28, at 93.
50. *See* Pub. L. No. 96-212, § 203(f)(3), 94 Stat. 102, 108.
51. Pub. L. No. 83-203, 67 Stat. 400.
52. *Id.* §§ 3–4.

the United States' normal immigration policy, a temporary layering on of refugee admissions.[53]

Most importantly for our purposes, it was the last major piece of legislation to allow refugees to enter the United States on immigrant visas—i.e., as lawful permanent residents.

D. The Fair Share Act of 1960

The Fair Share Act[54] marked a turning point in the history of refugee resettlement: For the first time, Congress specifically legislated for resettlement via *parole*. In its preamble, the Act states:

> [Congress resolves that] under the terms of *section 212(d)(5)* of the Immigration and Nationality Act of [1952] the Attorney General *may parole* into the United States . . . an alien *refugee-escapee* . . . if such alien (1) applies for parole while physically present within the limits of any country which is not Communist, Communist-dominated, or Communist occupied, (2) is not a national of the area in which the application is made, and (3) is within the mandate of the United Nations High Commissioner for Refugees.[55]

The Act's purpose was to provide a mechanism for the United States to accommodate its "fair share" of the refugees displaced by World War II remaining in European refugee camps under the jurisdiction of the UN High Commissioner for Refugees.[56]

Perhaps because of this novel application of the parole power, the legislative history of the Act reveals striking imprecision in the use of crucial legal terms—the most glaring of which may be the titling of congressional hearings on the Act "*Admission* of Refugees on *Parole*." There are many additional examples of conflation of the terms "parole" and "admission" by members of Congress and prominent witnesses. For example, the commentary by the Department of State on the Act references the "*admission*" of refugees "under the terms of section 212(d)(5) . . . *and* under parole."[57] One of the bill's chief architects, Congressman Walter, presented an article by a "prominent expert," Albert E. Reitzel, formerly Assistant General Counsel to the Immigration and Nationality Service (INS).[58] In his article, Mr.

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53. Silverman, *supra* note 31, at 28.

54. Pub. L. No. 86-648, 74 Stat. 504 (1960).

55. *Id.* § 1 (emphases added).

56. S. REP. NO. 86-1651, at 5–7 (1960); 106 CONG. REC. 7259–60, 7265 (1960) (discussing the purposes of H.R.J. Res. 397 and announcing its passage).

57. S. REP. NO. 86-1651, at 19 (emphases added).

58. *Admission of Refugees on Parole Hearing*, *supra* note 9, at 47. Until 2003, the Immigration and Nationality Service (INS) was the principal agency charged with administering the immigration laws. In 2003, the INS was abolished and most of its

Reitzel referred interchangeably to refugees' being "admitted" and "paroled."[59] Apparently, explicit legislation for the parole of refugees was generating some cognitive dissonance.

The Act required paroled refugees to apply for adjustment of status after two years' presence in the United States.[60] The Senate Report accompanying the bill provides a glimpse into the rationale for scrapping the admission of refugees as lawful permanent residents. According to the report, the two-year period allowed for "additional scrutiny, screening, and investigation" prior to refugees' reaching the milestone of permanent residency, which would place them closer to the endgame of citizenship.[61] Congressman Walter, one of the chief architects of the bill, also made clear during congressional hearings that he did not trust the overseas screening process and wished investigation to continue even after refugees landed in the United States.[62]

Importantly, the Fair Share Act was the point in immigration law history where refugee resettlement was statutorily linked to a conditional status that easily could be terminated, and refugees correspondingly expelled. Notwithstanding subsequent amendments to the INA and a changed juridical landscape, the vestiges of these concepts still permeate adjudicators' decision-making, decades later.

E. The 1965 Amendments to the Immigration and Nationality Act: Creation of the "Seventh Preference" Category

The 1965 Amendments[63] were the first large-scale modification of the Immigration and Nationality Act of 1952.[64] The amendments revamped the way the United States ordered its choices in admitting noncitizens, moving from a national origin based quota system to a series of "preference categories."[65] The preference categories gave priority to family members of citizens and lawful permanent residents,

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responsibilities were transferred to the newly created Department of Homeland Security. *See* DAVID A. MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY 76 n.3 (2007).

59. *Admission of Refugees on Parole Hearing*, *supra* note 9, at 47–51.

60. §§ 3–4, 74 Stat. at 505.

61. S. REP. NO. 86-1651, at 26.

62. *Admission of Refugees on Parole Hearing*, *supra* note 9, at 56.

63. Pub. L. No. 89-236, 79 Stat. 911 (1965).

64. Gross, *supra* note 28, at 181.

65. According to Senator Kennedy, the changes were "based upon the fundamental belief that in our immigration policy we should put a high premium on keeping families together." 111 CONG. REC. 24,775 (1965).

and to persons with skills useful to the United States.[66] Refugees were set as the last preference category—the seventh preference.[67]

Unlike noncitizens in the other preference categories, refugees did not receive immigrant visas upon resettlement. Rather, they arrived in the United States as "conditional entrants."[68] Both the Senate and House Committees on the Judiciary, in their respective reports, explained why the label "parole" in the Fair Share Act was traded for "conditional entry" in the 1965 Amendments:

> The conditional entry of refugees as proposed in this bill is not unlike the parole procedure utilized during the existence of the so-called Fair Share Act (sec. 212(d)(5)) and it is intended that the procedure remain the same. Since the use of the term "parole" conveys a connotation unfavorable to the alien, the substitute term "conditional entry" has been used to avoid any such implication.[69]

Elsewhere, the report specifically focuses on how to label refugees' manner of "entry," but nonetheless incorrectly references "refugees already *admitted* to the United States under [the] provisions" of the Fair Share Act—which of course allowed for resettlement via *parole*.[70] Doubtless the drafters of the 1965 Amendments were well aware that refugees were not "admitted" for permanent residency via the seventh preference category, or under the Fair Share Act for that matter. Nonetheless, the misuse of terms of art that started with the passage of the Fair Share Act heralded the remarkable imprecision that later would permeate the drafting history of the Refugee Act of 1980—and ultimately find its way into the case law.

As in the Fair Share Act, the 1965 Amendments required refugees to apply for adjustment of status after two years' presence in the United States.[71] Lawful permanent residency was granted if a refugee was deemed "admissible as an immigrant at the time of inspection and examination" by an immigration officer.[72] By this point in history, the concept of refugee status as conditional, with a waiting period preceding adjustment of status to permanent residency, was deeply implanted in the legal framework surrounding refugee resettlement.

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66. 111 CONG. REC. 24,775 (statements of Sen. Kennedy and Sen. Holland).
67. Sec. 3, § 203(a), 79 Stat. at 912–13.
68. *Id*.
69. H.R. REP. NO. 89-745, at 15 (1965); S. REP. NO. 89-748, at 16–17 (1965).
70. H.R. REP. No. 89-745, at 15; S. REP. No. 89-748, at 17.
71. Sec 3, § 203(g), 79 Stat. at 914.
72. *Id.* sec. 3, § 203(h).

F. The Refugee Act of 1980

The Refugee Act of 1980 was a tremendous accomplishment, with a legislative history revealing untold hours of labor by members of Congress, executive branch officials, and witnesses from around the nation. Its immediate motivating factors included curbing the executive's unfettered use of the parole power[73] and creating a systematic resettlement process with sufficient allocations to replace the "patchwork of different programs that [had] evolved in response to specific crises."[74] The Act also introduced the first statutory provision for granting asylum to persons already in the United States who met the definition of "refugee."[75]

I will commence my discussion of the Refugee Act by tracing the concept of admission as it appeared in predecessor bills, and in the final enactment. Then, I will examine the discussions in each house of Congress in an effort to discern why the bill evolved as it did. Additionally, I will present commentary by members of Congress and key witnesses that illustrates a lack of clarity about key legal terms–which may help explain the lack of clarity in the final bill and subsequent case law.

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73. Kennedy, *supra* note 28, at 143–44, 146.

74. *The Refugee Act of 1979: Hearing on S. 643 Before the S. Comm. on the Judiciary*, 96th Cong. at 9 (1979) (statement of Dick Clark, U.S. Coordinator for Refugee Affairs).

75. S. REP. NO. 96-256, at 9 (1979). The INA of 1952 had provided for withholding of deportation only. *See* Arthur Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REFORM 243, 244–45 (1984). The standard for granting withholding—showing a clear probability of persecution—was very stringently applied. *See id.* Withholding was preserved as a defense to deportation in the Refugee Act of 1980, with modifications "to conform the language of that section to the Convention [on Refugees]." H.R. REP. NO. 96-608, at 18 (1979). There was no statutory provision for asylum applications, only a regulation at 8 C.F.R. § 108 issued pursuant to former INA § 103. *See id.* at 17. Since passage of the Refugee Act, asylee status has been available to persons physically present in the United States who meet the same definition of refugee applied to persons resettling from overseas. The Act defined "refugee" as

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

Refugee Act of 1980, Pub. L. No. 96-212, sec. 201, § 101(a)(42), 94 Stat. 102, 102 (1980).

1. Draft Bill Introduced to Congress by Senator Kennedy and Congressman Rodino

The draft bill[76] introduced in both houses of Congress in 1979 provided for the resettlement of two classes of refugees. "Normal flow" refugees were to be admitted to the United States as lawful permanent residents.[77] The bill placed a ceiling of 50,000 on such admissions.[78] Provision was also made for so-called "emergency situation" refugees who could be resettled above and beyond the 50,000 ceiling in the event of an "unforeseen emergency refugee situation."[79] This class of refugees was to be "conditionally admitted" rather than admitted to permanent residency, and was required to submit to inspection for adjustment of status after two years' presence in the United States.[80] The bill had no asylum provision.

After introduction in both houses of Congress, the bill traveled to their respective Committees on the Judiciary. By the time the bill was referred back to each chamber for a vote, significant differences had emerged.

2. Senate Version

The Senate version of the bill, passed on September 6, 1979,[81] provided that emergency situation refugees would arrive *either* as lawful permanent residents *or* as "conditional" admittees at the discretion of the Attorney General.[82] Conditionally admitted refugees were required to apply for adjustment of status after two years' presence.[83] Senator Kennedy indicated that any conditionally admitted refugee who was denied permanent residency would be subject to "exclusion proceedings," although the bill did not explicitly state this.[84] Kennedy's explanation seems to render "admission" a misnomer, because exclusion proceedings historically applied only to persons never admitted to the United States. On the other hand, it is unclear how meaningful Kennedy's use of the term "exclusion" was, given Congress' imprecision with immigration terms over the course of the drafting history.

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76. S. 643, 96th Cong. (as introduced by Sen. Kennedy, Mar. 13, 1979); H.R. 2816, 96th Cong. (as introduced by Rep. Rodino and Rep. Holtzman, Mar. 13, 1979).
77. S. 643 § 201(b); H.R. 2816 § 201(b).
78. S. 643 § 201(b); H.R. 2816 § 201(b).
79. S. 643 § 201(b); H.R. 2816 § 201(b).
80. S. 643 § 201(b); H.R. 2816 § 201(b).
81. 125 CONG. REC. 23,252 (1979).
82. S. REP. NO. 96-256, at 27 (1979).
83. *Id.* at 27–28.
84. S. REP. 96-256, at 16.

Another important change to the initial draft bill related to asylum. Under the Senate bill, those persons already in the United States who met the definition of "refugee" were eligible for asylum.[85] The Senate Committee on the Judiciary described asylum as a "conditional admission status"[86] and stated in its report that "The bill . . . makes clear that the Attorney General may terminate the conditional admission status [of an asylee] if conditions change in the individual's home country so that he would no longer be subject to persecution upon return."[87]

Thus, the term "conditional admission" under the Senate bill meant two different things, depending on whether it related to asylees or refugees. Emergency situation refugees who were "conditionally admitted" could be "excluded" if later denied adjustment of status, suggesting that "admission" was conditioned on a future ability to adjust. The "conditional admission" conferred by a grant of asylum, on the other hand, was terminable if conditions changed in the country of origin.

Perhaps in an effort to build consensus, the Senate tried to paint "conditional admission status" not as something new, but as a continuation of concepts already part of the then-existing statutory scheme. Thus, the committee report stated that "conditional admission status" would be "equivalent in most respects to that provided under current law to refugees *admitted* under present section 203(a)(7) or under this bill's proposed section 208 [addressing emergency situation refugees]."[88] This characterization, however, incorrectly termed conditional entry via the seventh preference category in § 203(a)(7) an *admission*, even though "conditional entry" was designed to be equivalent to the *parole* status accorded refugees in the Fair Share Act.[89] Thus, by the time this version of the bill appeared, the concepts of parole, entry, and admission were slipping towards convergence.

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85. *Id.*

86. *Id.* ("Paragraph (2) provides that persons granted asylum shall be placed into a conditional admission status . . . .").

87. *Id.* at 9. Asylees were permitted to apply for adjustment of status after two years' presence–but could not adjust "[i]f conditions ha[d] changed in the refugee's home country so that he would no longer be subject to persecution upon return." *Id.* The bill did not specify what would happen to asylees denied adjustment of status–whether they would be placed in proceedings, and if so, whether exclusion or deportation–and the report did not fill this textual gap.

88. *Id.* (emphasis added).

89. *See* discussion *supra* Part I.E.

3. House Version

The House version of the bill, passed on December 20, 1979,[90] also introduced some notable changes. Like the Senate, the House inserted a provision for granting asylum.[91] The House likewise provided that asylum could be terminated due to changed circumstances in the country of origin.[92] However, the House bill did not refer to asylum status as a "conditional admission" or any other type of "admission"—it cited only the "grant" of asylum.[93]

The more significant variation from the Senate version was the House's treatment of resettled refugees. Under the House's version, no refugee, whether normal flow or emergency situation, would be admitted as a lawful permanent resident.[94] The House further diverged from the Senate insofar as it *nowhere* employed the language "conditional admission." Rather, the House referred throughout the bill to refugee "admission."[95] Under the House version, all refugees were required to submit to examination for adjustment of status after two years' presence in the United States. The House crafted an entirely new provision stating that refugee status could be terminated upon a finding that the noncitizen was not a refugee at the time of admission.[96]

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90. *See* 125 CONG. REC. 37,242 (1979).

91. *See* H.R. REP. NO. 96-608, at 44 (1979).

92. *See id.*

93. H.R. REP. NO. 96-608, at 44 (setting forth § 208 of the proposed codification). Under § 208(a), "[t]he Attorney General shall establish a procedure for an alien physically present in the United States . . . to apply for asylum, and the alien may be granted asylum . . . if the Attorney General determines that such alien is a refugee." *Id.* Under § 208(b), "[a]sylum . . . may be terminated if the Attorney General . . . determines that the alien is no longer a refugee . . . owing to a change in circumstances in the alien's country of nationality or, in the case of an alien having no nationality, in the country in which the alien last habitually resided." *Id.*

94. *Id.* at 16. According to the House Committee on the Judiciary committee report, this decision was driven in substantial part by Attorney General Bell's unwillingness to represent that "someone is not slipping through [the overseas screening process] that should not." *Id.* at 17. Deputy Associate Attorney General Doris Meissner, on the other hand, opined that normal flow refugees should be allowed lawful permanent residency upon arrival, as "[w]e screen these people with the same procedures that we screen intending immigrants." *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Int'l Operations of the Comm. of Foreign Affairs*, 96th Cong. 75 (1979) (statement of Doris Meissner, Deputy Associate Att'y Gen.).

95. *See* 125 CONG. REC. 37,242–247 (1979).

96. H.R. REP. NO. 96-608, at 43. Section 207(c)(4) of the proposed codification provides: "The refugee status of any alien . . . may be terminated . . . if the Attorney General determines that the alien was not in fact a refugee . . . at the time of the alien's admission."

4. Final Version: The Refugee Act of 1980

After passage in the two houses of Congress, the bill proceeded to conference. Once it emerged, the bill contained the language (or lack thereof) relating to admission from the House's draft, and no refugee was to be resettled as a lawful permanent resident. In an apparent compromise, however, the waiting period to apply for adjustment of status was reduced across the board from two years to one. Thus, under the final version of the Refugee Act:

- Neither normal flow nor emergency situation refugees entered as lawful permanent residents;[97]
- Throughout the bill, the term "admission" was used to describe refugees' manner of resettling in the United States, and it was *nowhere* modified by the term "conditional";[98]
- Refugee status was terminable upon a finding that the noncitizen did not meet the definition of "refugee" at the time of "admission";[99]
- Refugees were required to submit to examination for permanent residency after one year's presence in the United States;[100]
- Asylum was referred to merely as a "grant," and neither an "admission" nor a "conditional admission";[101]
- Asylee status could be terminated if the noncitizen no longer met the definition of "refugee" due to changed circumstances in the country of origin;[102] and
- Asylees had the option of applying for adjustment of status after one year's presence in the United States, with no indication of the consequences of denial.[103]

Thus, the word "conditional" had been deleted entirely from the bill, appearing nowhere as a modifier for "admission." With respect to refugees, the text of the statute made their status "conditional" only insofar as it was revocable upon a finding that they were not refugees at the time of arrival.

The Joint Explanatory Statement of the Committee of Conference described the Senate/House compromise as follows:

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97. Refugee Act of 1980, Pub. L. No. 96-212, sec. 201(b), §§ 207–209, 94 Stat. 102, 103–06 (1980).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *See id.*

> Admission Status of Refugees
>
> The Senate Bill provided that refugees entering the United States under normal flow or additions to normal flow procedures would be admitted as lawful permanent residents. Those entering in emergency situations would be admitted conditionally or as lawful permanent residents in the discretion of the Attorney General.
>
> The House amendment provided that all refugees entering the United States be admitted conditionally as 'refugees' with retroactive adjustment of status to lawful permanent residents after two years.
>
> The Conference substitute adopts the House version with adjustment of status permitted after a period of one year. It is the intent of the Conferees, in creating this new "refugee" status, that such individuals not be subjected to employment discrimination[.][104]

I have been unable to find any indication in the written record why the term "conditional" disappeared from the final version of the statute, when the above explanation directly stated that refugee admission was conditional. Whatever the reason, the clear language of the text to the effect that all refugees are "admitted" trumps any discussion buried deep in the annals of legislative history.[105] Refugees could lose status if they were not in fact refugees at the time of resettlement. Asylees could lose status if there was no longer a risk of persecution in the country of origin. To the extent that conditionality was indicated in the Act's final version, it was in these two provisions only.

This type of conditionality for refugees would have been logical in light of Deputy Associate Attorney General Doris Meissner's explanation for the inclusion of a waiting period in prior statutes. As Meissner noted, the rationale behind giving refugees a second look before granting permanent residency was the concern that "refugees were coming largely from Communist countries, and there was a question of higher risk attached to those people."[106] In other words, there was a concern that Communist spies or plants might enter the United States under the guise of refugees. Such persons would not in fact be refu-

104. H.R. REP. NO. 96-781, at 21 (1980) (Conf. Rep.); S. REP. NO. 96-590, at 21 (1980) (Conf. Rep.).

105. The highly learned Professor David A. Martin, who was involved in some aspects of drafting the bill, has no specific recollection of why the term was omitted. One theory is that the term was deleted to gain consensus from Senate conferees on the one-year waiting period. *See* email from David A. Martin, Professor, Univ. of Va. Sch. of Law, to author (July 26, 2013) (on file with author).

106. *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Int'l Operations of the Comm. of Foreign Affairs*, 96th Cong. 75 (1979) (statement of Doris Meissner, Deputy Associate Att'y Gen.).

gees at the time of admission, and under the statute therefore could lose refugee status. This suggests that the conditionality of refugee admission was never intended to render refugee status tenuous and inherently impermanent. Rather, it was designed to address specific foreign policy and national security concerns.

5. Key Actors' Casual Use of Terms of Art

The examples of conflation of "admission," "entry," and "parole" over the course of the bill's drafting history are far too numerous to list. Conflation was more the rule than the exception. Members of Congress, representatives from the Attorney General's office, and other actors referred to refugee resettlement as "admission" regardless of whether it occurred via parole, conditional entry, or an immigrant visa (lawful permanent residency). The following examples illustrate the casual use of crucial terminology:

- Associate Attorney General Michael J. Egan in a prepared statement repeatedly referred to the "admission" of refugees through "conditional entry" or the "exercise of parole power."[107]
- Attorney General Griffin Bell in prepared testimony before the House Committee on the Judiciary observed: "Under the current law, the Attorney General has the sole authority . . . for the *admission* of refugees, either through the conditional entry provisions or the exercise of the parole power. The number of refugees *admitted* through use of the parole power ha[s] become far greater than was contemplated by Congress."[108]
- Doris Meissner, Deputy Associate Attorney General, referred to "conditional entrants" as "admit" or "admission" under the 1965 Amendments.[109]
- Congresswoman Elizabeth Holtzman, a co-sponsor of the Refugee Act, indicated that the House's final version of the bill provided "set procedures for [refugee] *admission*"—notwith-

107. *See The Refugee Act of 1979: Hearing on S. 643 Before the S. Comm. on the Judiciary*, 96th Cong. 18–19 (1979) (prepared statement of Michael J. Egan, Associate Att'y Gen.).

108. H.R. REP. NO. 96-608, at 11 (1979) (emphasis added). The Attorney General made identical statements in written testimony before the House of Representatives. *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 96th Cong. 20 (1979) (statement of Griffin B. Bell, Att'y Gen.).

109. *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Int'l Operations of the Comm. of Foreign Affairs*, 96th Cong. 66 (1979) (statement of Doris Meissner, Deputy Assoc. Att'y Gen.).

standing that she was a key proponent of retaining a form of "*conditional entry*" and discarding the possibility of admitting refugees as lawful permanent residents.[110] Throughout the December 13, 1979 final hearing on the House bill,[111] Congresswoman Holtzman consistently referred to the "admission" of normal flow and emergency situation refugees under the proposed law—never once appending the term "conditional."

- Congressman Rodino, a co-sponsor of the Refugee Act, referred to the "admission" of refugees under the 1965 Amendments and under the Attorney General's parole authority.[112]
- Similarly, Senator Kennedy, the bill's chief sponsor, in presenting the bill upon its emergence from the Committee on the Judiciary, referred to the "current [refugee] *admission* policies" under the 1965 Amendments, which of course allowed only for conditional entry.[113]
- The report from the House's Committee on the Judiciary indicated that adjustment of status was available for resettled refugees whose "entry" had not been terminated by the Attorney General—as opposed to their "admission" or "conditional admission."[114]
- That report repeatedly referenced the "admission" of refugees on parole in reciting the history of refugee resettlement after World War II.[115]

In sum, usage of the term "admission" was very casual over the course of the Refugee Act's drafting. Even those participants who should have been best informed—for example, witnesses from the Attorney General's office—employed crucial terms interchangeably, even in prepared statements.

This casual use of language made its way into an article published by Senator Kennedy not long after passage of the Act. In his

110. *See* 125 CONG. REC. 35,813–14 (1979); *see also* H.R. REP. NO. 96-608, at 16-17 (1979).

111. *Id.* at 35,813–15.

112. *Id.* at 35,816.

113. In Congressman Rodino's lengthy, apparently prepared, testimony on the U.S. postwar programs "providing for the *admission* of refugees," he applied the term "admission" to all refugees whether they were resettled via parole, conditional entry, or as lawful permanent residents. 125 CONG. REC. 35,816 (1979) (emphasis added).

114. H.R. REP. NO. 96-608, at 18 (1979).

115. "Since World War II, provision has been made for the *admission* of refugees into the United States under a series of ad hoc legislative and administrative authorizations. Even today, 14 years after the development of a permanent statutory provision for the *admission* of refugees, the majority of refugees continue to be *admitted* outside the regular procedure established by statute." *Id.* at 2 (emphases added).

article, Kennedy describes the main differences between the Senate and House versions of the bill—and thus the main areas for resolution by the Conference Committee:

> Admission Status of Refugees
>
> The Senate bill ended years of admitting refugees as "conditional entrants" or "parolees." Instead, it treated refugees like other immigrants, as permanent resident aliens. However, the conferees concluded that a one year "conditional entry" status as a "refugee" would be desirable until the new system and procedures under the Act were implemented. Therefore, the conferees established a *new admission status* for refugees, *different from* the previous "conditional entry" or "parolee" status. The new status would end after one year, after which the refugee could adjust to permanent resident status. The one year status would be counted in the five year period required for naturalization.[116]

In this excerpt, Kennedy says that "refugee admission" status is simultaneously the same as and different from "conditional entry." This could mean that refugee status is the same insofar as it is not admission as a lawful permanent resident, and that it is different insofar as it amounts to an "admission" rather than mere conditional entry. But Kennedy does not elucidate the point.[117] Nor does he explain the deletion of the modifier "conditional" from the Refugee Act of 1980, which contradicts his own commentary.

The confusion surrounding the admission statutes of resettled refuges has endured for decades. Adjudicators repeatedly missed the opportunity to reconsider and clarify the issue,[118] even after a statutory definition of "admission" was codified in IIRIRA. Who is to blame? Senator Kennedy, for his after-the-fact article discussing concepts no-

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116. Kennedy, *supra* note 28, at 150 (emphases added). Most of the language appears to have been drawn from a statement Kennedy made in Congress when presenting the conference report. *See* 126 CONG. REC. 3757 (1980).

117. I have not located any subsequent authority that clarifies Kennedy's commentary.

118. *See, e.g.*, Chan v. Kane, CIV No. 11-01166, 2011 WL 2200020, at *1 (D. Ariz. May 5, 2011) (incorrectly stating that a resettled refugee had been "paroled" into the United States); Thao Lee, A028 009 671, 2009 WL 2437133, at *1 (BIA July 28, 2009) (holding that a refugee was "paroled" into the United States as an "arriving alien" rather than "admitted"); Radenko Spiric, A079 848 824, 2007 WL 275768, at *2 (BIA Jan. 17, 2007) (holding that a refugee was an "arriving alien"); Martin Gama, A071 661 790, 2005 WL 3833029, at *1 (BIA Nov. 16, 2005) (holding that a refugee was "conditionally admitted" and thus subject to the grounds of deportability); *see also* Omanovic v. Crawford, No. CV 06-0208-PHX, 2006 WL 2256630, at *5 (D. Ariz. Aug. 7, 2006) (engaging in a bewildering analysis to find an alien's refugee status to be "conditional" but that the "conditional" nature of his admission was "severed" due to criminal convictions).

where extant in the bill? The Board of Immigration Appeals, for reading terms into the statute that simply were not there?[119] Or was the problem intellectual inertia—i.e., was it caused by old assumptions held by attorneys and adjudicators, in whose minds the conditional nature of refugee resettlement was deeply implanted?

As to the admission status of asylees, regulations, case law, and agency guidance seemed to move towards treating asylum as an admission until 2013, when the Board held in *Matter of V-X-* that a grant of asylum was not an admission.[120] I will explore these issues in more detail in Part III. Before turning to them, however, I shall address why it matters to each and every noncitizen whether her mode of arrival in this country is deemed an "admission."

II.
THE SIGNIFICANCE OF "ADMISSION"

A noncitizen's "admission" status is fundamental to his or her procedural options and constitutional standing. First, it determines whether the noncitizen is subject to the grounds of inadmissibility or deportability in removal proceedings. Generally speaking, the latter are far more favorable to noncitizens. A noncitizen's admission status also may control whether she is eligible for bond or subject to mandatory detention over the course of proceedings, including during any government appeal of a victory by the noncitizen at trial. Even more sobering, whether a noncitizen is deemed "admitted" may be decisive as to whether she possesses any constitutional right to be released from detention following a removal order—or may be incarcerated indefinitely. Finally, whether and when a noncitizen has been "admitted" can determine whether she is eligible for a defense to removal or is removable at all.[121] As we shall see, however, "admission" is not a unitary concept, and continues to be molded and shaped by the case law even following the codification of a definition in IIRIRA in 1996.

A. The Evolving Concept of "Admission"

Until IIRIRA's passage in 1996, "entry" carried the procedural significance held by "admission" today. Under former 8 U.S.C. § 1101(a)(13), "entry" meant "any coming of an alien into the United States, from a foreign port or place or from an outlying possession,

119. *See* discussion *infra* Part III.A.1.

120. 26 I&N Dec. 147, 147 (BIA 2013).

121. *See* discussion *infra* Part II.B.3.

whether voluntarily or otherwise."[122] In the 1973 case *Matter of Pierre*,[123] the Board interpreted "entry" as

> (1) a crossing into the territorial limits of the United States . . . plus (2) inspection and admission by an immigration officer . . . ; *or* (3) actual and intentional evasion of inspection at the nearest inspection point . . . ; *coupled with* (4) freedom from restraint[.][124]

A hard line was drawn between persons who had "entered" the United States and those who had not. Noncitizens who had not yet "entered" were subject to the grounds of excludability.[125] Noncitizens who had achieved entry were subject to the grounds of deportability.[126] Deportation proceedings carried greater procedural rights and substantive options than exclusion proceedings.[127]

IIRIRA replaced the statutory definition of "entry" with new language defining "admission."[128] The purpose of the shift in focus from entry to admission was to ensure that persons "who had entered without inspection [would not have] greater procedural and substantive rights . . . than those who had presented themselves for inspection at a port of entry and had been placed in exclusion proceedings."[129] In the years following the passage of IIRIRA, the significance of "admission" in the overall immigration scheme grew correspondingly. The grounds of inadmissibility were substituted for the grounds of excludability.[130] "Exclusion" and "deportation" proceedings were collapsed into "removal" proceedings, in which noncitizens could be charged under the grounds of inadmissibility or deportability.[131]

The Board grappled with the definition of "admission" long before it gained its paramount position in immigration law. In the landmark 1980 case *Matter of Areguillin*,[132] the Board was tasked with deciding whether a noncitizen had been "admitted" for purposes

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122. 8 U.S.C. § 1101(a)(13) (1958).

123. 14 I&N Dec. 467, 468 (BIA 1973) (emphasis in original).

124. *Id.* at 468 (internal quotation marks omitted) (emphases added).

125. *Id.*

126. *Id.*; Elwin Griffith, *Admission and Cancellation of Removal Under the Immigration and Nationality Act*, 2005 MICH. ST. L. REV. 979, 985 (2005).

127. *See* Mansoor v. Montgomery, 620 F. Supp. 708, 710–11 (E.D. Mich. 1985).

128. 8 U.S.C. § 1101(a)(13)(A) (2012) defines "admission" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."

129. Quilantan, 25 I&N Dec. 285, 291 (BIA 2010) (citations omitted).

130. *See* BOSWELL, *supra* note 7, at 26–28.

131. *See id.*

132. *Areguillin*, 17 I&N Dec. 308 (BIA 1980).

of eligibility for adjustment of status.[133] The noncitizen Respondent had crossed the U.S.-Mexican border as a passenger, but an immigration officer questioned only the driver, who was a U.S. citizen, "then permitted the car and its occupants to proceed into the United States."[134] Although the Respondent was "inadmissible for lack of documentation" at the time of her entry, the Board nonetheless found that she had been "inspected and admitted" for purposes of adjustment eligibility.[135] Citing precedent dating back to 1941,[136] the Board observed that "an alien has not entered without inspection when he presented himself for inspection and made no knowing false claim to citizenship."[137] Although *Areguillin* was decided about a month after the passage of the Refugee Act of 1980, it affirmed and expounded longstanding principles.[138] The loose definition of admission in *Areguillin* was reaffirmed in the 2010 case *Matter of Quilantan*.[139] The two cases involved very similar facts, and *Quilantan*, like *Areguillin*, limited its holding to the meaning of "admission" for purposes of adjustment eligibility.[140]

By continuing to ascribe a meaning to "admission" specific to the adjustment of status context, the Board effectively indicated that "admission" has no single meaning under the INA. Although this flies in the face of the presumption of statutory consistency,[141] it is not the only instance where the Board has found it necessary to sidestep that canon when sketching the contours of "admission." While 8 U.S.C. § 1101(a)(13)(A) restricts the definition of "admission" to "the lawful entry of the alien into the United States after inspection and entry by an immigration officer," the Board has been forced to move outside that definition in order to avoid absurd outcomes.

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133. Then and now, adjustment of status generally requires that the noncitizen have been "inspected and admitted or paroled into the United States." 8 U.S.C. § 1255(a) (2012).

134. *Areguillin*, 17 I&N Dec. at 309.

135. *Id.* at 309–10.

136. *Id.* at 309.

137. *Id.* at 310 & n.4 ("'Admission' occurs when the inspecting officer communicates to the applicant that he has determined that the applicant is not inadmissible . . . . That communication has taken place when the inspector permits the applicant to pass through the port of entry.") (citations omitted).

138. *Id.* at 309 (collecting cases).

139. 25 I&N Dec. 285 (BIA 2010).

140. *Id.* at 285–86. As in *Areguillin*, the *Quilantan* Respondent crossed the border in a car driven by a U.S. citizen. The immigration inspector asked the driver if he was a citizen, then "waved the car through the port of entry" without addressing the Respondent. *Id.* at 286.

141. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 271–74 (2d ed. 2006).

One important example is the Board's holding in *Matter of Rosas* that a grant of adjustment of status amounts to an "admission."[142] In *Rosas*, a 1999 case, a lawful permanent resident argued that because she had entered the United States without inspection, she had never been "admitted" under 8 U.S.C. § 1101(a)(13).[143] Thus, the Respondent's argument went, because the grounds of deportability attach only following an "admission," her drug trafficking "aggravated felony" conviction could not form the basis for initiating removal proceedings.[144] The Board rejected her argument in significant part because it would produce procedural absurdities. As a lawful permanent resident, the Respondent was not subject to the grounds of inadmissibility,[145] but under her reasoning the grounds of deportability did not apply either. Ultimately, the Board concluded that the term "admission" is broader than the definitional language at 8 U.S.C. § 1101(a)(13), and includes adjustment of status to permanent residency.[146]

B. Procedural Options: Inadmissibility Versus Deportability

Persons seeking admission to the United States are subject to the grounds of inadmissibility at 8 U.S.C. § 1182.[147] In order to obtain a visa to enter the United States, or to adjust status once here, a noncitizen must either show that no inadmissibility ground applies, or seek a waiver of inadmissibility if available.[148] Any person in the United States who has not been admitted risks being charged as inadmissible by DHS and placed in removal proceedings.

For persons present in the United States following admission, however, the grounds of deportability at 8 U.S.C. § 1227 apply.[149] Even if the status in which a noncitizen was initially admitted has

142. Rosas, 22 I&N Dec. 616, 619 (BIA 1999). There are two ways of gaining admission as a lawful permanent resident: "(1) inspection and authorization at the border and (2) adjustment of status while in the United States." *Id.*

143. *Id.* at 623.

144. *See id.* at 616–17, 623. A conviction for an "aggravated felony" is a deportability ground, but is not among the grounds of inadmissibility. *Compare* 8 U.S.C. § 1227(a)(2)(A)(iii) (2012) (including aggravated felonies among the deportability grounds) *with* 8 U.S.C. § 1182(a) (2012) (setting forth the grounds of inadmissibility). For the definition of "aggravated felony," see 8 U.S.C. § 1101(a)(43) (2012).

145. Lawful permanent residents are subject to the grounds of inadmissibility only if they travel abroad and certain exceptions apply. *See* 8 U.S.C. § 1101(a)(13)(C) (2012).

146. *Rosas*, 22 I&N Dec. at 623.

147. *See* BOSWELL, *supra* note 7, at 26–30.

148. *See, e.g.*, 8 U.S.C. § 1182(h)–(i) (2012) (setting forth limited waivers of inadmissibility for criminal conduct or misrepresentations).

149. BOSWELL, *supra* note 7, at 26–30.

expired, she remains subject to the grounds of deportability.[150] Unless and until a person naturalizes, she potentially could lose her immigration status and be deported.[151]

The procedural inequalities between "deportable" and "inadmissible" noncitizens are manifold.

1. Burden of Proof and Evidentiary Thresholds

The burden of proof in removal proceedings depends on whether the noncitizen is subject to the grounds of inadmissibility or deportability. For both groups, the government has the initial burden to show "alienage"—i.e., that the respondent is not a U.S. citizen.[152] Alienage is rarely disputed, however, as noncitizens typically admit alienage when first encountering immigration authorities.[153]

Once alienage is established, the next issue is whether DHS has properly initiated proceedings—i.e., whether the noncitizen is removable as charged. If a person was previously admitted, the burden is on DHS to show "by clear and convincing evidence" that the person is "deportable."[154] If the noncitizen is deemed not admitted, however, all burdens of proof rest on her. She must show either "that [she] is clearly and beyond doubt entitled to be admitted," or that she is eligible for a waiver of inadmissibility or other defense to removal.[155]

Most grounds of deportability require DHS to meet a higher evidentiary threshold than the grounds of inadmissibility. For example, the majority of crime-related deportability grounds require a conviction.[156] The majority of crime-related inadmissibility grounds, on the other hand, may be triggered not only by a conviction, but also by a noncitizen's admission to committing an offense, or even just to com-

150. 8 U.S.C. § 1227(a)(1)(B)–(D) (2012). One example is conditional permanent resident status, whereby a noncitizen immigrates as a lawful permanent resident or adjusts status based on marriage to a U.S. citizen or a lawful permanent resident. If the "conditions" are not removed following a statutory two-year test period—because, for example, DHS believes the marriage was not bona fide—the noncitizen becomes deportable. *See* 8 U.S.C. §§ 1186a(b), 1227(a)(1)(D)(i) (2012); Stowers, 22 I&N Dec. 605, 605–06 (BIA 1999). Thus, although residency is lost, the admission remains.

151. *See* 8 U.S.C. § 1229a(e)(2)(B) (2012).

152. 8 C.F.R. § 1240.8(c) (2013) (requiring the government to establish alienage upon initiating removal proceedings); *see also* Guevara, 20 I&N Dec. 238, 242 (BIA 1991) (noting that it is the government's burden to prove alienage).

153. *See, e.g.*, Gomez-Gomez, 23 I&N Dec. 522, 523 (BIA 2002) (describing noncitizen's admission of alienage to border patrol officer); Ponce-Hernandez, 22 I&N Dec. 784, 784–85 (BIA 1999) (same); Barcenas, 19 I&N Dec. 609, 609–10 (BIA 1988) (same).

154. 8 U.S.C. § 1229a(c)(3)(A) (2012).

155. *See id.* § 1229a(c)(2)(A).

156. *See id.* § 1227(a)(2)(A)–(B)(i), (a)(2)(C)–(E)(i), (a)(3)(B).

mitting the "acts which constitute the essential elements" of a crime.[157] Moreover, some inadmissibility grounds are triggered by mere evidence of prohibited conduct. For example, engaging in prostitution is a bar to admission even without any showing that the conduct met the elements of a particular criminal statute.[158]

Perhaps the lowest threshold is the "reason to believe" standard. A noncitizen is inadmissible, for example, if an immigration officer has a mere "reason to believe" that she has engaged in controlled substance trafficking.[159] Courts have equated the "reason to believe" standard with "probable cause."[160] A police report, or an adjudication of juvenile delinquency which, by definition, is not a crime,[161] may be sufficient to meet the standard. Thus, any documents or testimony suggesting that a noncitizen has engaged in conduct relating to an inadmissibility ground may put her in the position of attempting to prove a negative.[162]

2. *Mandatory Detention During Removal Proceedings*

In 1996, Congress introduced mandatory detention for broad categories of noncitizens with even minor criminal offenses throughout removal proceedings.[163] One of the most serious consequences of the 1996 provisions is that mandatory detention attaches not only during proceedings in Immigration Court, but also while an appeal is pending

157. *Id.* § 1182(a)(2)(A)(i).

158. *See id.* § 1182(a)(2)(D).

159. *Id.* § 1182(a)(2)(C); *see also id.* § 1182(a)(2)(H)–(I) (inadmissibility for reason to believe that a noncitizen has been involved in human trafficking or money laundering).

160. *See* U-H-, 23 I&N Dec. 355, 356 (BIA 2002); *see also* Westover v. Reno, 202 F.3d 475, 480 n.6 (1st Cir. 2000) (suggesting that the "reason to believe" standard is akin to the "probable cause" standard).

161. *See* Devison, 22 I&N Dec. 1362, 1377 (BIA 2000); M-U-, 2 I&N Dec. 92, 93 (BIA 1944).

162. In general, it is far easier for the government to charge a person with inadmissibility than deportability, but there are exceptions. For example, a conviction for a crime involving moral turpitude ("CIMT") with a maximum possible sentence of one year, and for which the actual term of incarceration imposed was six months or less, is a "petty offense" that does not render a noncitizen inadmissible for a CIMT. *See* § 1182(a)(2)(A)(ii)(II). Such a conviction, however, could render an admitted noncitizen deportable if committed within five years after admission. *Id.* 8 U.S.C. § 1227(a)(2)(A)(i).

163. *See* Martin, *Constitutional Protections*, *supra* note 7, at 61–63 (discussing the passage and repeal of mandatory detention provisions prior to the 1996 enactment of IIRIRA and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214).

before the Board–even if the noncitizen won her case at trial.[164] Thus, mandatory detention threatens noncitizens with confinement for many months or years.[165]

If a noncitizen is subject to mandatory detention, the Immigration Judge ("IJ") has no jurisdiction to redetermine custody.[166] In other words, once DHS arrests and detains a noncitizen, she has no recourse to the immigration court.[167] In general, inadmissible noncitizens are more likely to be detained for very minor offenses than deportable noncitizens.[168] For example, a single offense for simple possession of marijuana automatically triggers mandatory detention for inadmissible noncitizens,[169] but not deportable ones.[170] A single, minor offense involving "moral turpitude," such as larceny, may also trigger mandatory confinement for inadmissible noncitizens.[171] Therefore, whether a noncitizen is subject to inadmissibility or deportability could determine whether he spends months or even years in immigration custody, or is able to return home to his family.

Additionally, DHS has the authority to hold "arriving aliens" in custody throughout removal proceedings, without any possibility of review by an IJ.[172] Many asylum-seekers come to the United States as

164. *See* 8 U.S.C. § 1226(c) (2012); *cf.* Galvez v. Lewis, 56 F. Supp. 2d 637, 647 (E.D. Va. 1999) ("Petitioner may be released simply by withdrawing his appeal of the deportation proceeding and returning voluntarily to his native land of El Salvador, thus ending his detention immediately.").

165. The numerous long-term detention cases litigated recently in the federal courts illustrate how lengthy the period of mandatory detention can be. *See, e.g.*, Diop v. ICE/Homeland Sec., 656 F.3d 221, 223 (3d Cir. 2011) (1,072 days of detention); Flores-Powell v. Chadbourne, 677 F. Supp. 2d 455, 462 (D. Mass. 2010) (22 months of detention); Sengkeo v. Horgan, 670 F. Supp. 2d 116, 118 (D. Mass. 2009) (almost 20 months of detention).

166. *See* 8 C.F.R. § 1003.19(h)(2)(i)(D) (2013).

167. The limited exception is that the IJ may hold a hearing to determine whether the noncitizen has been correctly labeled a "mandatory" detainee. *See* Joseph, 22 I&N Dec. 799, 800 (BIA 1999).

168. One notable exception is that a firearms offense is a ground of mandatory detention for deportable noncitizens but not inadmissible noncitizens. *Compare* 8 U.S.C. § 1226(c)(1)(A) (2012) *with* § 1226(c)(1)(B).

169. *See id.* §§ 1182(a)(2)(A)(i)(II), 1226(c)(1)(A).

170. A conviction for simple marijuana possession does not even render a noncitizen deportable, unless the amount was greater than thirty grams. *See id.* §§ 1226(c)(1)(B), 1227(a)(2)(B)(i).

171. *Compare* § 1226(c)(1)(A) (mandating detention for inadmissible persons with single CIMTs) *with* § 1226(c)(1)(C) (triggering mandatory detention for a single CIMT only if a one-year sentence was imposed).

172. *See* X-K-, 23 I&N Dec. 731, 732, 735 (BIA 2005); 8 C.F.R. § 1001.1(q) (2013) (defining "arriving alien" as "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United

arriving aliens, requesting protection from persecution at a port of entry. If asylum was granted but later terminated, the former asylee's entitlement to request bond from an IJ would hinge entirely on whether the asylum grant amounted to an admission, and whether the termination stripped away not only asylum status, but also any admission that came with it.[173] If the former asylee was deemed not admitted, she would revert to arriving alien status, with all the accompanying legal impediments.[174] This could occur even following an asylee's adjustment to permanent residency. Asylum (and permanent residency deriving from it) may be lost for a host of reasons, including changed circumstances in the country of origin, the asylee's obtaining a passport from her country of origin, her travelling back to the homeland for any reason, or the commission of certain crimes.[175]

3. Eligibility for Relief from Removal

A noncitizen's eligibility for a defense to removal may hinge on whether she was admitted, and if so, her date of admission. This issue commonly arises when a lawful permanent resident's eligibility for cancellation of removal is at stake. The statute requires an applicant to have accrued seven years of residence after being "admitted in any status" to qualify for cancellation of removal.[176] Thus, for example, a person paroled in 2003, and who adjusted status in 2007, would not be eligible for cancellation of removal if placed in proceedings in 2013. This is because only six years have passed since her admission as a lawful permanent resident and parole is not deemed an "admission."[177]

For refugees, this issue is of relatively little importance, because a refugee's adjustment of status is backdated to the date of resettle-

States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport").

173. *See* X-K-, 23 I&N Dec. at 732.

174. In extreme cases of very long custody, the federal courts have granted petitions for a writ of habeas corpus. *See, e.g.*, Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006).

175. *See* § 1158(c)(2); U.S. CITIZENSHIP & IMMIGRATION SERVS., FACT SHEET: TRAVELING OUTSIDE THE UNITED STATES AS AN ASYLUM APPLICANT, AN ASYLEE, OR A LAWFUL PERMANENT RESIDENT WHO OBTAINED SUCH STATUS BASED ON ASYLUM STATUS (2007) [hereinafter USCIS, TRAVEL FACT SHEET]. S. 744, 113th Cong. § 3411 (2013), part of an immigration reform bill passed by the Senate on June 27, 2013, establishes a presumption that asylum status should be terminated if an asylee travels back to her country of origin—even years after the grant, when return to the homeland no longer would suggest fraud in the application.

176. 8 U.S.C. § 1229b(a)(2) (2012).

177. *Id.* § 1101(a)(13)(B).

ment.[178] For asylees, on the other hand, it can be immensely important. Asylees' adjustment of status is backdated only one year, so whether the initial grant of asylum amounts to an admission can decide eligibility.[179]

Another obstacle to relief is that persons who entered without inspection are generally ineligible to adjust status.[180] Many asylum-seekers flee persecution and enter the United States without being inspected.[181] If such an asylee's status were terminated, she would be eligible to apply for lawful permanent residency only if the initial asylum grant amounted to an "admission" that survived termination.

C. Constitutional Rights and Indefinite Detention

The question whether a person has been admitted takes on significant constitutional dimensions in cases involving prolonged, sometimes indefinite, detention. Three Supreme Court cases have explored the constitutionality of indefinite detention most prominently: *Shaughnessy v. United States ex rel. Mezei*,[182] *Zadvydas v. Davis*,[183] and *Clark v. Martinez*.[184] *Mezei*, which held that indefinite detention was constitutional for noncitizens who never effected an "entry," was decided well before IIRIRA, while *Zadvydas* and *Martinez* came well after.

Curiously, the Supreme Court did not address in the latter two cases whether the post-IIRIRA shift in focus from "entry" to "admission" for purposes of immigration procedure moved the line in the sand for constitutional analyses. Perhaps the Court assumed it, or perhaps the Justices believed that the issue was not relevant to either matter.[185] In any event, the Court sidestepped a constitutional analysis by

178. *Id.* § 1159(a)(2).

179. *See id.* § 1159(b). For an in-depth discussion and analysis of the relevance of the date of admission to eligibility for relief from removal, see *Alyazji*, 25 I&N Dec. 397 (BIA 2011).

180. *See* 8 U.S.C. § 1255(a).

181. *See, e.g.*, R-A-, 22 I&N Dec. 906 (BIA 2001) (asylum seeker who entered without inspection); Villalta, 20 I&N Dec. 142 (BIA 1990) (same).

182. 345 U.S. 206 (1953).

183. 533 U.S. 678 (2001).

184. 543 U.S. 371 (2005).

185. In fact, the Supreme Court in *Zadvydas* incorrectly inserted the term "entry" rather than "admission" into a quotation from the post-1996 statute:

> An alien ordered removed [1] who is inadmissible . . . [2] [or] removable [as a result of violations of status requirements or *entry* conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained

interpreting a statute post-dating *Mezei* to prohibit the indefinite detention of noncitizens, whether admitted or not.

Numerous members of Congress have attempted to legislate both opinions away, including during the current round of debates over comprehensive immigration reform. Such amendments would force the Supreme Court to reexamine *Mezei*'s constitutional holding. The proposals illustrate the continued vulnerability of noncitizens who have not been admitted to the loss of constitutional protections.

1. Shaughnessy v. United States *ex rel.* Mezei

In *Mezei*, the Supreme Court drew a sharp constitutional line between persons who had "entered" the United States and those who had not. The respondent, Ignatz Mezei, lived in the United States as a lawful permanent resident from 1923 to 1948, traveled to Hungary for nineteen months, and then sought to re-enter the United States in 1950.[186] On Mezei's return, the Attorney General ordered him permanently excluded from the United States based on unspecified security risks.[187] However, neither Hungary nor any other country was willing to accept him for deportation.[188] After more than a year's confinement on Ellis Island, Mezei petitioned for a writ of habeas corpus.[189]

The Court rebuffed Mezei's bid for release, and in doing so articulated the inferior constitutional protections afforded noncitizens who have not yet "entered" the United States. As the Court famously wrote, "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."[190] However, "an alien on the threshold of initial entry stands on a different footing: Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[191] Although Mezei had been allowed to land on Ellis Island for inspection, legally he was

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> beyond the removal period and, if released, shall be subject to [certain] terms of supervision . . . .

Zadvydas, 533 U.S. at 682 (alterations in original) (emphasis added) (quoting 8 U.S.C. § 1231(a)(6) (1994 ed., Supp. V)).

186. *See Mezei*, 345 U.S. at 208, 213.

187. *Id.* at 208.

188. *Id.* at 208–09.

189. *See id.* at 209.

190. *Id.* at 212.

191. *Id.* (citations omitted) (internal quotation marks omitted). For a critique of *Mezei* and its predecessor, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), see David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1982-1983).

"stopped at the border."[192] Accordingly, the Court found, his continued exclusion—and indefinite confinement—did not "deprive[ ] him of any . . . constitutional right."[193]

2. Zadvydas v. Davis *and* Clark v. Martinez

Zadvydas came before the Court almost fifty years after *Mezei*, by which time IIRIRA had shifted the focal point of immigration procedure from "entry" to "admission." It involved two lawful permanent residents, Kestutis Zadvydas and Kim Ho Ma, who were ordered removed for criminal convictions, but whom no country agreed to repatriate.[194] Their consolidated cases presented the question whether noncitizens who were "admitted" but subsequently ordered removed were in the same constitutional position as the *Mezei* detainee, and thus subject to indefinite detention. The Court skirted the issue, however, by invoking the canon of constitutional avoidance.[195]

Zadvydas involved the "post-removal statute," which undergirds the detention regime for persons with final administrative orders of removal.[196] Under the statute, DHS "may" continue to incarcerate noncitizens with final orders when deportation proves difficult.[197] The government contended that the post-removal statute authorizes indefinite detention for all noncitizens with final orders.[198] Indeed, because the statute identifies no terminating event, DHS detained numerous persons under this provision for years.[199]

The Court distinguished the two noncitizens' circumstances from Mezei's, observing that Mezei was arrested prior to "entering" the United States, whereas Zadvydas and Ma had both been "admitted" as lawful permanent residents.[200] According to the Court, "[a] statute permitting indefinite detention of [admitted noncitizens] would raise a

192. *Mezei*, 345 U.S. at 215.
193. *Id.*
194. *See* Zadvydas v. Davis, 533 U.S. 678, 684–86 (2001).
195. *Id.* at 689–90.
196. A final administrative order is an IJ order that was not appealed, or a Board order following an appeal. *See* 8 C.F.R. § 1241.1 (2013).
197. 8 U.S.C. § 1231(a)(6) (2012). There are myriad reasons why it is sometimes difficult for the government to effect removal. For example, the United States may have no repatriation treaty with the homeland; the country of origin might refuse to issue a travel document due to a noncitizen's health conditions; or the purported homeland may not recognize the person as its citizen. *See, e.g.*, *Zadvydas*, 533 U.S. at 684, 686 (indicating that neither Germany nor Lithuania agreed to issue travel documents to Zadvydas, and that the United States had no repatriation treaty with Cambodia).
198. *Zadvydas*, 533 U.S. at 689.
199. Zadvydas himself was detained from at least 1994 to 1997. *See id.* at 684–85.
200. *See Zadvydas*, 533 U.S. at 682, 693–94.

serious constitutional problem," implicating the liberty interest protected by the Fifth Amendment.[201] To avoid the constitutional question, the Court "read an implicit [time] limitation into the statute."[202] The Court held that noncitizens should be released after six months' confinement if "there is no significant likelihood of removal in the reasonably foreseeable future."[203]

Following the *Zadvydas* decision, previously admitted noncitizens were released from detention facilities across the country, but noncitizens deemed never admitted remained incarcerated.[204] At that time in immigration law history, whether a noncitizen was charged as inadmissible or deportable in removal proceedings was critical to her long-term custody status. That distinction was erased (but not irrevocably) when *Martinez* was decided in 2005.

Martinez involved two Cubans, Sergio Suarez Martinez and Daniel Benitez, who had been paroled into the United States during the 1980 Mariel boatlift.[205] It was undisputed that the two men had never been "admitted" to the United States.[206] Years later, both men applied for adjustment of status under the Cuban Adjustment Act, a statute that permitted paroled Cubans to obtain green cards after one year's physical presence in the United States.[207] Both men were inadmissible, however, because of criminal convictions occurring subsequent to their parole.[208] The former INS therefore revoked parole and denied adjustment of status.[209] The men were ordered removed and held in detention for years.[210] Removal was not possible because Cuba generally refuses to accept deportation from the United States.[211]

Justice Scalia authored the concise opinion. Because the post-removal statute applies equally to inadmissible and deportable noncitizens, and the *Zadvydas* court read a reasonableness limitation into the provision, the Court held that the limitation applied to all nonci-

201. *Id.* at 690.
202. *Id.* at 689.
203. *Id.* at 701.
204. The *Zadvydas* decision affected an estimated 3,000 immigration detainees. *See Supreme Court Finds Presumptive Six-Month Limit to Post-Removal-Period Detention*, 78 INTERPRETER RELEASES 1125, 1126 (2001).
205. Clark v. Martinez, 543 U.S. 371, 374 (2005).
206. *Martinez*, 543 U.S. at 374–75.
207. *Id.* at 374.
208. *Id.*
209. *Id.* at 374–75.
210. *Id.* at 375–76.
211. *See id.* at 386. This excepts the classified list of a limited number of Mariel Cubans whom Cuba accepts for deportation. *See* Alfonso Chardy, *Reagan-Era Accord Allows for Deportations of Some Mariel Refugees*, MIAMI HERALD, Apr. 26, 2010, at 1A.

tizens.[212] In other words, *Zadvydas* was a statutory decision, not a constitutional one, and a statute may be read only one way.[213] At the same time, Scalia noted, Congress retained the option of amending the statute to establish that noncitizens could be detained indefinitely.[214]

3. Continued Vulnerability

As the foregoing shows, noncitizens deemed not admitted are in an inferior legal position to those deemed admitted. They are at greater risk of the deprivation of liberty, and have lesser procedural and due process rights. The loss of liberty, and the reduction of procedural options, may occur not only through the administrative and judicial processes but also through the legislative process.

As Scalia observed in *Martinez*, members of Congress are able to amend the post-removal statute to authorize indefinite detention explicitly, because both *Zadvydas* and *Martinez* are statute-based decisions. Indeed, since *Martinez* legislation has repeatedly been proposed that would supersede *Martinez* and even *Zadvydas.* Such legislation could have consequences for both refugees and asylees, but the prospects for a successful constitutional challenge would be greater if both categories were deemed (unconditionally) admitted. Innumerable asylees initially come to the United States either without inspection or as arriving aliens. If such asylees were to lose status, and the termination of asylum status also terminated any admission that came with it, those noncitizens could be subject to indefinite detention under *Mezei*'s reasoning. Under the Board's reasoning in the 2012 case *Matter of D-K-*, refugees were expressly deemed "admitted" only for charging purposes.[215] Until the Board or a higher court recognizes that refugee admission carries the same rights as other noncitizen "admissions," one cannot predict how their admission status would be categorized for purposes of analyzing the constitutionality of indefinite detention. As surprising as it sounds, DHS for years alleged in removal proceedings that refugees were "arriving aliens" effectively

212. *See Martinez*, 543 U.S. at 377–78. As a result of the *Martinez* decision, several hundred Mariel Cubans were ordered released from immigration detention. *See* Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigration Servs., Implementation of *Clark v. Martinez*, 125 S. Ct. 716 (2005), at 1 (Mar. 7, 2005).

213. *See Martinez*, 543 U.S. at 378.

214. *See id.* at 386. Scalia even offered an example of congressional legislation superseding Supreme Court precedent. *See id.* at 386 n.8 (observing that a statute enacted after the Court's decision in *Zadvydas* expressly authorized continued detention of any alien for a period of six months beyond the removal period under certain circumstances).

215. 25 I&N Dec. 761 (BIA 2012).

"stopped at the border";[216] or that they were present in the United States without valid visas or travel documents; or even that they initially "entered without inspection."[217] It remains to be seen what position the government would take in any challenge to indefinite detention.

Several bills introduced after *Zadvydas* and *Martinez* illustrate the risk. For example, Texas Congressman Lamar Smith took up Scalia's suggestion from *Martinez* in his proposed Keep Our Communities Safe Act of 2011.[218] Smith's bill would have authorized the indefinite detention of all noncitizens for any of a laundry list of reasons, including the judicial grant of a stay of removal during a federal court appeal, failure to cooperate in the removal process, or a prior conviction for an "aggravated felony."[219] Smith's bill, if passed, would have forced the very issue the Supreme Court avoided in *Zadvydas*: whether a statute *explicitly authorizing* indefinite detention is constitutional as applied to previously admitted noncitizens.[220] Iowa's Senator Chuck Grassley proposed a similar measure in the Senate Judiciary Committee for inclusion in S. 744, the Senate bill that passed on June 27, 2013 as part of current efforts at comprehensive immigration reform.[221] Fortunately, Grassley's amendment was voted down, but it did have other supporters.

As I indicated in the Introduction, the Comprehensive Reform Act of 2006, which passed in the Senate but failed in the House, included provisions increasing the government's authority to hold noncitizens for indefinite periods, in particular noncitizens who never effected an "entry" (i.e., arriving aliens).[222] In other words, had the bill passed in the House, it would have superseded *Martinez*, commencing a new era of litigation over indefinite detention.

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216. *See supra* note 172 and accompanying text (defining "arriving alien").

217. *See infra* note 264 and accompanying text.

218. *See* H.R. 1932, 112th Cong. (2011).

219. *See id.* § 2(a). Of course "aggravated felonies" need be neither "aggravated" nor "felonies." *See* 8 U.S.C. § 1101(a)(43) (2012) (defining the term "aggravated felony"). The classic example of a minor crime that is classified as an aggravated felony is a shoplifting conviction carrying a sentence of one year or more, whether suspended or imposed. *See id.* § 1101(a)(43)(G), (48)(B).

220. The *Zadvydas* majority justified its invocation of the constitutional avoidance doctrine in part through its finding that no clear congressional statement authorized indefinite detention. *See* Zadvydas v. Davis, 533 U.S. 678, 697 (2001).

221. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (as passed by the Senate, June 27, 2013).

222. *See* Comprehensive Reform Act of 2006, S. 2611, 109th Cong. § 202 (as passed by the Senate, May 25, 2006).

Noncitizens are also vulnerable to legislation expanding detention during proceedings, prior to any entry of a removal order. Smith's proposed bill illustrates the general perception that persons deemed never admitted should receive less process. For example, Smith proposes stripping IJs of jurisdiction over bond determinations for *all* inadmissible noncitizens, regardless of their criminal history or personal situation.[223] Because of the lower constitutional standing of persons deemed not admitted, it is easier to defend such a bill against legal challenges.

In short, immigration procedure and constitutional doctrine generally afford inferior process to noncitizens deemed not "admitted."

III.
"ADMISSION" AND THE LONG-TERM DISPLACED

Having explored the genesis of the relevant statutes and the significance of "admission" in the immigration system, I now explain why refugees and asylees should be deemed unconditionally admitted upon obtaining those statuses. The Refugee Act always has referred throughout to refugees' "admission," without appending the term "conditional" as a modifier. The first implementing regulations, however, which were codified in 1981, subjected refugees denied adjustment of status to "exclusion proceedings."[224] Because only noncitizens who had not been admitted could be placed in exclusion proceedings, the regulations muddied the waters and lent support to the Board's earliest case law conclusions that refugee "admission" was somehow less than a true "admission." Those regulations have long been repealed, however, and the statute and regulations now point inexorably to the conclusion that refugee "admission" affords the same panoply of rights as the "admission" of other categories of noncitizens. As such, the Board's 2012 decision in *Matter of D-K-*, which held that refugees are "admitted" for charging purposes, but characterized refugee admission status as "conditional," "impermanent," and "subject to contingencies," got it only half right.[225]

The correct outcome for asylees is more challenging to discern. The statute is ambiguous, and the earliest regulations made clear that asylum was not an admission. Today's regulations, however, following subsequent codifications and recodifications, characterize asylum as an "admission." Not only are Immigration Judges and the Board

223. *See* H.R. 1932, § 2(b)(6).
224. 46 Fed. Reg. 45,116, 45,119 (Sept. 10, 1981) (codified at 8 C.F.R. § 209.1(a)(1) (1982)).
225. *See* discussion *infra* Part III.A.3.

bound by agency regulations, but agency guidance also treats asylum as an admission.[226] The only federal court that has directly confronted the question found that asylum was an "entry," and apparently squeezed a concession out of appellate counsel that asylum is also an "admission." Indeed, the Board of Immigration Appeals in several precedential decisions, including one of the best known immigration law cases, *Matter of Kasinga*, ordered noncitizens "admitted as . . . asylee[s]" in granting their claims. For this reason, the 2013 case *Matter of V-X-*, which found that asylum is not an admission, came as a large surprise to the immigration community—and its superficial reasoning is insufficient to overcome all the above-mentioned interpretive touchstones.

I also address the important corollary question whether the termination of asylum status strips away any admission that came with it. As detailed below, treating the admission as surviving termination is harmonious with the greater body of immigration law, as that is how other terminable statuses are dealt with under the INA.

Recall that in order to gain either refugee status under 8 U.S.C. § 1157 or asylee status under 8 U.S.C. § 1158, a noncitizen must show that she meets the definition of "refugee" at 8 U.S.C. § 1101(a)(42). Because of the overlapping terminology, I have referred to "resettled refugees" when addressing § 1157 refugees and to "asylees" when addressing § 1158 refugees. The primary distinction between the two groups is how they obtain status in the United States. Resettled refugees were interviewed abroad and, once found to qualify, were offered a resettlement slot by the United States.[227] Asylees applied for status when they were already here, either affirmatively to DHS, or, if in removal proceedings, defensively before an IJ.[228]

A. Resettled Refugees

In this section, I analyze the case law, statutory amendments, and regulatory developments relating to resettled refugees since passage of the Refugee Act in 1980. The authority points inexorably to the conclusion that refugees are "admitted," and that their admission is no more tenuous than other modes of "admission" that have not been the

226. Such nonlegislative rules do not carry the force of law. *See* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 357 n.4 (2012) (citations omitted). However, their language parallels the wording in regulations produced after notice and comment, and could be persuasive.

227. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 797–98 (7th ed. 2012).

228. *See id.* at 798, 815–16.

subject of such controversy. The Board case *Matter of D-K-*[229] took a big step in the right direction by finding that refugees are "admitted" for charging purposes—but stopped there. Whether, and to what extent, the ruling has exposed refugees to adverse legal outcomes will be revealed through future legislation, developments in detention policy, and litigation. Immigration scholars and litigators should deploy *Matter of D-K-* to move the law to where it should be—i.e., towards recognizing that the old cases characterizing refugee admission as "conditional" are no longer relevant.

1. The Root of the Problem? Matter of Garcia-Alzugaray *and Subsequent Precedent*

For decades, the character of refugees' "admission" status was controlled by the 1986 Board case *Matter of Garcia-Alzugaray*.[230] The *Garcia* Respondent was a Cuban refugee resettled in June 1980 under the newly minted Refugee Act.[231] Following a 1981 conviction for burglary of a vehicle, the former INS purported to revoke his parole and initiated exclusion proceedings.[232] The IJ terminated proceedings, finding that the Respondent had not been "paroled" under 8 U.S.C. § 1182(d)(5), but rather "admitted as a refugee under" the new Act.[233] Therefore, the IJ found, the Respondent was not an "applicant for admission," and could not be placed in exclusion proceedings.[234]

The Board agreed with the IJ that the Respondent had not been "paroled," but rejected the IJ's finding that he was not an "applicant for admission." Rather, the Board stated, the Refugee Act "provided for *conditional* admission of all refugees entering the United States."[235] The Board continued:

> We note that *in providing* that all refugees entering the United States be admitted *conditionally*, Congress specifically rejected the provisions in the Senate's version of the Refugee Act which would have admitted refugees entering the United States as lawful permanent residents.[236]

229. 25 I&N Dec. 761, 769 (BIA 2012).

230. 19 I&N Dec. 407 (BIA 1986).

231. *See id.* at 407.

232. *Id.* at 407–08.

233. *Id.* at 408.

234. *Id.*

235. *Id.* (emphasis added).

236. *Id.* (emphases added) (citing S. REP. NO. 256, at 4, 7–10 (1979), and H. R. REP. NO. 781, at 19, 21 (1979)).

In making this statement, the Board cited to the legislative history[237]—as it had to, because the Act did not "provide" that refugees would be admitted "conditionally." Moreover, there are infinite varieties of "admission" that do not amount to permanent residency, so Congress' rejection of the Senate version of the Act did not mean that "refugee status" was not an "admission."

The Board affirmed the IJ's termination of proceedings, but on different grounds.[238] According to the Board, refugees are entitled to an adjudication of their eligibility for permanent residency prior to any initiation of proceedings, and no such adjudication had occurred.[239] But here is the rub: the Act's implementing regulations stated that any refugee denied adjustment of status "may renew the request for admission . . . as an immigrant in *exclusion* proceedings."[240] The Board was (and still is) required to follow executive branch regulations.[241] Thus, the Board had to shoehorn its interpretation of refugee "admission" into the implementing regulations, and it did so by finding that the Refugee Act made admission "conditional."[242]

The next published Board case involving refugee admissions, *Matter of H-N-*,[243] was decided thirteen years later. In this 1999 case, the Board did not explore the subtleties of refugee "admission," as the Respondent evidently did not dispute the former INS' charge that she was "inadmissible" for a robbery conviction.[244] Rather, the issue before the Board was whether IJs have jurisdiction to adjudicate waiv-

237. *Id.*
238. *Id.*
239. *Id.* at 408–10.
240. *Id*. at 410 (emphasis added) (quoting 8 C.F.R. § 209.1(a)(1) (1986)).
241. *See* Ponce de Leon, 21 I&N Dec. 154, 158 (BIA 1996) ("The Board is bound to uphold agency regulations."); Board of Immigration Appeals, Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,884 (Aug. 26, 2002).
242. Curiously, the regulations in force at the time *Garcia* was decided referred throughout to refugee "admission" without appending the term "conditional." 46 Fed. Reg. 45,116 *passim* (Sept. 10, 1981). The only exception was at 8 C.F.R. § 207.4, which indicated that an approved application for refugee status "authorize[d] the district director of the port of entry in the United States to *admit* the applicant *conditionally* as a refugee upon arrival at the port." *Id.* at 45,119 (emphasis added). However, because the regulations also created procedures for terminating refugee status if the noncitizen did not meet the definition of refugee when admitted, the potentiality of termination could be interpreted as creating the conditionality to which § 207.4 referred. The regulations also indicated that resettled refugees have effected an "entry"—whereas under then-governing law noncitizens who had "entered" could not be placed in exclusion proceedings. *Id.* at 45,119 ("Every alien . . . paroled into the United States as a refugee . . . shall be considered as having entered the United States . . . ."). The regulations were thus internally inconsistent.
243. 22 I&N Dec. 1039 (BIA 1999).
244. *See id.* at 1039–40.

ers of inadmissibility in refugee adjustment cases.[245] Such waivers are available under 8 U.S.C. § 1159(c) to refugees and asylees only.

The Board held en banc that IJs do have authority to adjudicate § 1159(c) waivers, and mentioned only in passing that the INS had charged the Respondent under the grounds of inadmissibility.[246] This is not terribly surprising, because the parties had not raised the issue of whether the Respondent had been admitted. On the other hand, the Board's discussion of the procedural history reveals a striking oversight. At the opening of its opinion, the Board observed that the Respondent had "arrived" in the United States as a "refugee," and that the INS later revoked her "parole."[247] These statements are incompatible, because refugees resettled under 8 U.S.C. § 1157—as the Board indicated that the Respondent was—are not "paroled" into the United States.[248] Moreover, had "parole" been the Respondent's manner of crossing the border, she could not have adjusted status under § 1159, or applied for a § 1159(c) waiver.[249]

If any procedural wrinkle existed that was capable of morphing the Respondent's "refugee" status into "parole," while keeping available a § 1159(c) waiver, the en banc Board should have explained it. If there was no such procedural wrinkle, the Board should have noted the INS' mistake. In other words, both the Board and the INS evinced insufficient understanding of the basics of refugee procedure. It appears that, as of 1999, both the Board and the INS remained intellectually tethered to the Fair Share Act of 1960—the last major piece of legislation providing for the "parole" of "refugees."[250] Either that, or the Board and the INS were conflating refugee resettlement under 8 U.S.C. § 1157 and the executive's frequent invocation of the parole power at 8 U.S.C. § 1182(d)(5) to resettle de facto refugees.[251] Certainly, the Board's decision reveals a lack of insight into the nuances of the Refugee Act of 1980.

The Attorney General's 2002 decision in *Matter of Jean*[252] also reveals procedural oversights. Unlike the Board, however, the Attor-

245. *Id.* at 1040.

246. *See id.* at 1044.

247. *Id.* at 1039–40.

248. There is a narrow exception for persons "paroled into the United States as a refugee after April 1, 1980 and before May 18, 1980." 8 C.F.R. § 209.1(a)(2) (2013).

249. *See* 8 U.S.C. § 1159 (2012) (controlling the adjustment of status of refugees and asylees only).

250. *See supra* Part I.D.

251. *See supra* Part I.B.

252. 23 I&N Dec. 373 (A.G. 2002). The Attorney General has the authority to review decisions of the Board pursuant to 8 C.F.R. § 3.1(h)(1)(i) (2013).

ney General deliberately highlighted others' errors. In a footnote, the Attorney General chastised the IJ and the Board for (in his view) incorrectly characterizing the arrival status of resettled refugees:

> The opinions of both the immigration judge and the BIA inaccurately characterize the nature of the respondent's entry into the United States. She was neither *paroled* nor *permanently admitted* into the country. Rather she was *conditionally admitted* as a refugee under [8 U.S.C. § 1157].[253]

Even so, the Attorney General himself danced around the issue of refugee "admission," twice referring to "[a]liens . . . who have been admitted (or conditionally admitted) as refugees."[254] In observing that a refugee denied adjustment of status is subject to removal proceedings, the Attorney General commented that the "INS is free to charge [the refugee] . . . with any applicable ground of inadmissibility *or* deportability."[255]

Notwithstanding these discussions of refugee "admission," the Respondent's admission status was not squarely before the Attorney General. As in *H-N-*, the *Jean* Respondent did not attempt to rebut the government's charge that she was inadmissible for a crime involving moral turpitude.[256] Thus, it appears that the Attorney General was attempting through dicta to rectify recurring legal errors relating to refugees—not to respond to issues raised in the case.[257]

Another critique by the Attorney General is tangential to the "admission" question, but nonetheless illuminating. In a footnote, the Attorney General made the following observation:

> Although the IJ's reasoning is not entirely clear from his brief oral decision, he appears to have improperly analyzed the respondent's adjustment of status application under . . . 8 U.S.C. § 1255 . . . which bars relief to aliens convicted of crimes involving moral turpitude . . . rather than [8 U.S.C. § 1159], *which contains no such express proscription*.[258]

Recall that the Respondent was in proceedings in the first place because she had been charged with inadmissibility for a crime involv-

253. *Id.* at 374 n.4 (emphases in original) (citing Garcia, 19 I&N Dec. 407, 408–10 (BIA 1986)). Ironically, the Attorney General chose to use the word "entry," another distinct term of art, in the above quote.
254. *Id.* at 376 n.7, 381.
255. *Id.* at 381 (emphasis added).
256. *Id.*
257. In another example, the Attorney General criticized the INS for failing to follow *Garcia*'s procedures, observing that "the INS had prematurely initiated removal proceedings against the respondent without affording her an opportunity to seek adjustment of status under [8 U.S.C. § 1159]." *Id.* at 375 n.6.
258. *Id.* at 376 n.7 (emphasis added).

ing moral turpitude. The bulk of the Attorney General's opinion was devoted to the question of whether she should be granted a § 1159(c) waiver, forgiving the crime and allowing her to adjust status. As the case makes abundantly clear, a crime involving moral turpitude is just as much a bar in the refugee adjustment context as it is in a typical family- or employment-based adjustment application.[259] Thus, despite bemoaning the errors of the INS, the Board, and the IJ, the Attorney General also misread the statute.

The collective missteps illuminated in these opinions can only be viewed as a disturbing indication that insufficient attention was devoted to understanding the legal framework governing resettled refugees, twenty-two years after passage of the Refugee Act.

2. The Turning Point That Did Not Turn: IIRIRA

Because the issue of refugee admission status was not squarely presented in *H-N-* or *Jean*, neither the Board nor the Attorney General was forced to confront a significant intervening event: the passage of IIRIRA. As discussed previously, IIRIRA introduced a statutory definition of "admission" in 1996: "The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[260] This language is in the opening, definitional section of the INA. It defines "admission" for the entire statute.

The codification of this language, plus the complete absence of the term "conditional" from the Refugee Act, should have immediately clarified refugees' admission status under the classic canons of statutory construction. 8 U.S.C. § 1157 employs the terms "admitted," "admission," or "admit(s)" at least thirty-six times. Similarly, the refugee adjustment of status provision at 8 U.S.C. § 1159 consistently refers to refugees' "admission." As the Supreme Court teaches, "[w]e should, of course, read the two sections [of a statute] as consistent rather than conflicting."[261] Moreover, "[w]here, as here, Congress de-

259. See 8 U.S.C. § 1159(c) (2012), which sets forth the grounds of inadmissibility that do or do not apply to refugees. The bar for crimes involving moral turpitude indisputably applies to refugees and asylees. The difference is the statutory authority for requesting a waiver: refugees and asylees request forgiveness under § 1159(c), while most other applicants seek waivers pursuant to § 1182(h). *Compare* § 1159(c) *with* § 1182(h).

260. 8 U.S.C. § 1101(a)(13)(A) (2012).

261. Helvering v. Credit Alliance Corp., 316 U.S. 107, 112 (1942). Of course, the presumption inherent in the consistent meaning doctrine may be rebutted where it undermines the overarching statutory framework. *See* Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198, 200–02, 206 (1949). After thoroughly researching the

fines what a particular term 'means,' that definition controls to the exclusion of any meaning that is not explicitly stated in the definition."[262] Finally, Congress is presumed to have been aware of the repeated employment of the term "admission" in §§ 1157 and 1159 when enacting IIRIRA.[263] Congress had the opportunity to distinguish refugee "admission" from the definition at 8 U.S.C. § 1101(a)(13) had it wished to. Thus, IIRIRA should have eliminated any doubt upon passage: Refugees are "admitted" when they pass through a port of entry upon resettlement in the United States.

The conflict between a plain reading of the statute and administrative precedent wrought havoc in the immigration courts, and led to wildly unpredictable DHS charging practices.[264] For a new generation of immigration attorneys, it quite logically appeared that there was a single definition of "admission," and that the definition applied to refugees. But immigration adjudicators and DHS did not always see it that way, as evidenced by the following language in a 2010 DHS memorandum:

> The [Detention and Removal] Field Office, in the exercise of discretion, may make a determination to issue [a Notice to Appear] to any unadjusted refugee for whom it believes there is prima facie evidence of inadmissibility under [8 U.S.C. § 1182(a)] or deportability under [8 U.S.C. § 1227(a)], regardless of whether the individual's refugee status has been terminated and even if USCIS has not yet considered the refugee's adjustment application. Although DHS is working to achieve clarity in the law, some immigration courts have taken varied positions on whether someone initially admitted as a refugee under [8 U.S.C. § 1157] is most ap-

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issue, however, I have not identified an argument by a scholar, a litigator or an adjudicator that reading the term "conditional" into the statute is more harmonious with the overarching framework than adhering to the definition of admission at 8 U.S.C. § 1101(a)(13)(A).

262. United States v. Roberson, 459 F.3d 39, 53 (1st Cir. 2006).

263. WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 227 (2007).

264. In the years leading up to the Chaparro memorandum, *infra* note 265, DHS charged resettled refugees inconsistently as, for example: (1) inadmissible for having entered without inspection; (2) inadmissible "arriving aliens"; (3) inadmissible for failure to possess a valid visa or other travel document; or even (4) inadmissible for criminal convictions following "admission" as a refugee. *See, e.g.*, Lee v. Kane, No. CV 09-1643-PHX-MHM, 2009 WL 3378502, at *1 (D. Ariz. Oct. 20, 2009) (indicating that an IJ sustained DHS' allegation that a refugee was an "arriving alien"); Dong v. Holder, No. CV-09-1594-PHX-JWS (LOA), 2011 WL 1119543, at *1 (D. Ariz. Feb. 7, 2011) (showing that DHS charged a refugee inadmissible for failure to possess a valid visa or other travel document). Notices to Appear issued by U.S. Immigration and Customs Enforcement (ICE) that illustrate these inconsistent charging practices are on file with the author.

> propriately charged under section [1182] or [1227]. It is critical, therefore, that DRO Field Offices work closely with ICE Offices of Chief Counsel (OCCs) to identify the most appropriate charge(s) and draft legally sufficient NTAs.[265]

Anecdotally, inconsistent decision making in the immigration courts caused DHS to request a published decision on whether refugees should be charged as inadmissible or deportable. In 2012, the Board apparently obliged by issuing the landmark opinion, *Matter of D-K-*.[266]

3. Matter of D-K-*: A Great Leap Forward, But Where Did We Land?*

Matter of D-K- stunned the immigration community, rejecting both of *Garcia*'s 1986 holdings. First, the Board overruled *Garcia*'s requirement that DHS adjudicate an adjustment application prior to initiating removal proceedings, finding that the requirement had been superseded by regulatory amendments.[267] Second, the Board held that, *for charging purposes*, refugees should be deemed "admitted."[268] Both of these holdings shook up longstanding practice. Yet the Board did not distance itself from the claim that refugee admission is "conditional," "impermanent and subject to contingencies."[269]

Reflective of the rampant confusion in immigration court, DHS initially had charged the Respondent with deportability under 8 U.S.C. § 1227 based on a drug trafficking conviction.[270] Subsequently, however, DHS withdrew and substituted the charge, alleging that the Respondent was inadmissible under 8 U.S.C. § 1182 for the same

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265. Memorandum from James Chaparro, Exec. Assoc. Dir., Office of Det. & Removal Operations, U.S. Immigration & Customs Enforcement, Detention of Refugees Admitted Under INA § 207 Who Have Failed to Adjust to Lawful Permanent Resident Status, to Field Office Directors, U.S. Immigration & Customs Enforcement 2 (May 10, 2010) [hereinafter Chaparro, Memorandum]. The primary purpose of the memorandum was to halt the ICE practice of detaining refugees for no other reason than failure to adjust after one year's presence in the United States. *See id.*; *see also* HUMAN RIGHTS WATCH, JAILING REFUGEES: ARBITRARY DETENTION OF REFUGEES IN THE US WHO FAIL TO ADJUST TO PERMANENT RESIDENT STATUS 13–22 (2009) (finding that DHS arbitrarily detained unadjusted refugees).

266. 25 I&N Dec. 761 (BIA 2012).

267. *Id.* at 761, 766. I disagree with the Board's analysis. *See* Laura Murray-Tjan, Matter of D-K-*: A Great Leap Forward in Refugee Jurisprudence?*, 89 INTERPRETER RELEASES 921 (2012); Laura Murray-Tjan, *Board of Immigration Appeals Disavows* Matter of Garcia-Alzugaray *in Unpublished Remand*, 88 INTERPRETER RELEASES 2870 (2011).

268. *D-K-*, 25 I&N Dec. at 761.

269. *Id.* at 767.

270. *See id.* at 762.

conviction.[271] The IJ sustained the inadmissibility charge and denied the Respondent's application for adjustment of status and a § 1159(c) waiver.[272] Because the Board found on appeal that the Respondent was "admitted" for charging purposes, the Board remanded his case for DHS to amend the charges "and for the [IJ] to further address the issue of the respondent's removability and his eligibility for relief."[273]

The Board's turnaround in *D-K-* was eased by post-IIRIRA amendments to the regulations. As explained above, when *Garcia* was decided, the regulations stated that refugees denied adjustment by the former INS could renew their request in "exclusion" proceedings.[274] In 1996, however, IIRIRA did away with "exclusion" and "deportation" proceedings—creating the single umbrella of "removal proceedings." The regulations were amended to match in 1998, stating that refugees could renew requests for adjustment "in removal proceedings."[275] Indeed, the Board noted in *D-K-* that the regulatory language no longer assumed that refugees would be placed in "exclusion" proceedings.[276]

In its analysis of just what refugee "admission" is, the Board started off with a discussion of *Matter of Jean*. The Board noted that the Attorney General in *Jean* had characterized refugee "admission" as a "conditional," rather than "permanent[ ]" admission.[277] The Board indicated its agreement with this characterization:

> We acknowledge the *conditional* nature of a refugee's status. However, the fact that a refugee admission is impermanent and subject to contingencies does not resolve the question whether it nevertheless qualifies as a *kind of "admission"* for purposes of the deportability grounds at [8 U.S.C. § 1227(a)].[278]

The Board acknowledged that its case law had never explained the "conditionality" of refugee admission, and tipped its hat to DHS' claim that refugee admission was not a "'true' admission."[279] Ultimately, however, the Board found that unresolvable procedural

271. *Id.* The respondent was also charged with inadmissibility for a crime involving moral turpitude and on the ground that "reason to believe" existed that he had engaged in controlled substance trafficking. *Id.*

272. *Id.* The IJ also denied the Respondent's applications for asylum, withholding of removal, and protection under the Convention Against Torture. *Id.*

273. *Id.* at 770.

274. *See supra* note 240 and accompanying text.

275. Adjustment of Refugees and Asylees: Processing Under Direct Mail Program, 63 Fed. Reg. 30,105, 30,109 (June 3, 1998) (amending 8 C.F.R. § 209.1).

276. *D-K-*, 25 I&N Dec. at 766.

277. *Id.* at 767.

278. *Id.* (first emphasis in original; second emphasis added).

279. *Id.*

problems created by charging refugees under § 1182 forced a determination that refugees are "admitted" for charging purposes:

> We . . . recognize that the concept of a 'conditional admission' is not without ambiguity. The proposition that such a status does not qualify as a "true" admission, which can require the bringing of charges on deportability rather than inadmissibility grounds, has some persuasive force. But if a refugee has not been "admitted," and also has not been paroled in view of the restrictive language at [8 U.S.C. § 1182(d)(5), generally prohibiting the parole of refugees], then the nature of his or her status becomes unclear. . . . To the extent that *the pertinent language is ambiguous*, we believe that a construction recognizing that a "conditional admission" is nevertheless a form of "admission" for purposes of [charging under the deportability grounds at 8 U.S.C. § 1227(a)] would best comport with the overall structure of the statute.[280]

What the Board never acknowledges is that this "ambiguous" language—"conditional admission"—*appears nowhere in the statute.* Litigation in the immigration courts effectively forced the Board to find that the grounds of deportability applied to refugees for charging purposes—but it preserved for other procedural and constitutional analyses the concept of "conditional admission." The Board did so even though the concept of "conditional admission" was rooted in its own case law, and notwithstanding the elimination of language from the regulations that supported (or led to) its holding in *Garcia*.

It is possible that the Board qualified its holding out of deference to the Attorney General's decision in *Matter of Jean*. On the other hand, the Attorney General's reference to the "conditional" nature of refugee admission was dictum, and he relied on the Board's own precedent in *Matter of Garcia*, which was grounded in a different regulatory scheme.[281] In other words, it is unclear why deference would have driven the Board to address "conditionality" at all. It remains to be seen whether the analytical smoke and mirrors were face-saving, deferential to the Attorney General in *Jean*, or had deeper procedural and constitutional purposes.

I disagree with the Board's continued adherence to the "conditional" label. The consistent meaning doctrine and a plain reading of the statute lead to the conclusion that refugees are *admitted*, and that their *admission* is no less a "true" admission than any other admission. Refugees are in the same legal position, with the same procedural and

280. *Id.* at 767–68 (emphasis added).

281. *Jean*, 23 I&N Dec. 373, 374 n.4 (citing *Garcia*, 19 I&N Dec. 407, 408–10 (BIA 1996)).

constitutional rights, as other "admitted" noncitizens. Refugee admission is a "kind of admission" only insofar as all "admissions" are a "kind of admission." Noncitizens are admitted in a range of different statuses, including lawful permanent residency and non-immigrant visas such as student, tourist, and employment visas.[282] All such persons are deemed "admitted," with the substantive and procedural privileges that come with "admission." All such persons may be deported, however, if they violate the conditions of their status.

Matter of D-K- was a welcome step in the right direction, but did not resolve the issue of refugee "admission" once and for all. Adjudicators, scholars, and litigators must bolster and build on its holding. Refugees' "admitted" status does not and cannot relate only to DHS charging decisions. Refugee status must be interpreted consistently across all areas of immigration law and constitutional jurisprudence.

B. Asylees

For refugees, the issue appears clear cut, notwithstanding the case law: Refugee status is an admission, with all the accompanying substantive and procedural rights. The analysis of whether asylum is an admission, on the other hand, and whether that admission "disappears" if asylum is terminated, requires more nuanced investigation and interpretation. Thus, I work my way through statutory, regulatory, and case law developments, as well as agency guidance. I conclude that a grant of asylum amounts to an "admission" to the United States, and that the admission survives any termination of asylum—just as loss of other types of status in immigration law does not "erase" any admission that accompanied them. The Board disagreed that asylum is an admission in a very recent precedent opinion, *Matter of V-X-*,[283] but the decision ignores the above-cited sources and the development of the Board's own case law, in addition to generating absurdities. The Board remanded the respondent's case in *Matter of V-X-*. In the event of an appeal, the Board should reconsider its holding. Failing that, higher courts should reverse.

1. The Statutory Language

As discussed above, the Refugee Act of 1980 was silent as to whether a grant of asylum amounted to an "admission" or "entry." Although the Act in its final form eliminated earlier language in the House bill that labeled asylum a "conditional admission," it attached

282. *See* BOSWELL, *supra* note 7, at 97–126.
283. 26 I&N Dec. 147 (BIA 2013).

conditionality to asylum status insofar as it provided that the status was terminable if an asylee no longer risked persecution.[284] That conditionality remains in the statute, with additional grounds for termination.[285]

Today, there is still no statutory language explicitly stating that an asylum grant is or is not an "admission." One intriguing provision, 8 U.S.C. § 1158(c)(3), which was added in 1996, begs the question without providing the answer: "An alien [whose asylum status has been terminated] is subject to any applicable grounds of inadmissibility or deportability under section [sic] 1182(a) and 1227(a)[.]"[286]

As discussed earlier, the grounds of inadmissibility apply only to those noncitizens who are applicants for admission, while the grounds of deportability apply only to persons who were previously admitted. How can it be that former asylees are potentially subject to both sets of grounds?

There are at least three ways to read the provision. First, asylum is not an admission, and former asylees are subject to the grounds of inadmissibility or deportability depending on whether they were admitted prior to the asylum grant—for example, on a tourist or business visa. Alternatively, asylum is an admission, but the admission "disappears" if the status is revoked, returning the noncitizen to the status she held before the asylum grant—which may or may not have amounted to an admission.[287] Third, asylum results in an admission, and that admission remains intact even if asylum status is lost.

Under the third understanding, termination of asylee status would usually lead to deportability. Asylees would be inadmissible only in instances where they departed the United States and sought to return, becoming applicants for admission. According to an INS General Counsel memorandum of 2001, for example, a returning asylee "must be examined as to his or her admissibility."[288] If a ground of inadmis-

284. Refugee Act of 1980, Pub. L. No. 96-212, sec. 201(b), § 208(b), 94 Stat. 102, 105.

285. *See* 8 U.S.C. § 1158(c)(2) (2012).

286. *Id.* § 1158(c)(3). This section was enacted by IIRIRA. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 604(a), 110 Stat. 3009-546, 3009-693.

287. This is the view that the government advocated in Second Circuit case *Sesay*, and that the Second Circuit accepted under *Chevron* deference principles, even as it left the issue open for a "properly briefed" case. Sesay v. Immigration & Naturalization Serv., 74 F. App'x 84, 88 & n.6 (2d Cir. 2003).

288. *See* Legal Memorandum from Bo Cooper, Gen. Counsel, Immigration & Naturalization Serv., Readmission of Refugees and Asylees without Travel Documents, to Michael Pearson, Exec. Assoc. Comm'r, Immigration & Naturalization Serv. 2 (Nov. 23, 1999) (citing 8 C.F.R. § 223.3(d)(2)(i)) [hereinafter Cooper, Memorandum].

sibility applies that is also a ground for terminating asylum, then the asylee would be charged with inadmissibility and placed in removal proceedings.[289] Because the memorandum repeatedly refers to asylees' "readmission," it assumes that initial asylum grants are "admissions."

The third reading seems the simplest and most logical way to understand section 1158(c)(3), and is harmonious with other areas of immigration law relating to loss of status that was obtained through an admission. For example, admission on a fiancé visa is contingent on marriage within ninety days of admission.[290] Loss of a fiancé visa does not result, however, in a "disappearance" of the admission. Rather, failure to marry is treated as a violation of the conditions of a non-immigrant visa, and the noncitizen becomes subject to the grounds of deportability, not inadmissibility.[291] Similarly, termination of conditional permanent residency—a status that most commonly arises when permanent residency is obtained through marriage—may occur due to a noncitizen's failure to apply timely for removal of the conditions.[292] However, this renders the conditional resident deportable, not inadmissible.[293] This holds true even if conditional residency is terminated because it was obtained through a fraudulent marriage.[294] Thus, termination of status generally results in deportability. It does not erase an earlier admission.[295]

Rescission of lawful permanent residency may be the exception that proves the rule. The Attorney General "shall rescind" adjustment of status if it "appear[s] . . . that the person was not in fact eligible for such adjustment of status, . . . and the person shall thereupon be subject to all provisions of [the INA] to the same extent as if the adjust-

289. *See id.*

290. *See* 8 U.S.C. § 1101(a)(15)(K) (2012).

291. *See id.* § 1227(a)(1)(C)(i).

292. For a careful analysis of the Immigration Marriage Fraud Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.), that created this type of conditional permanent residency, see Joe A. Tucker, *Assimilation to the United States: A Study of the Adjustment of Status and the Immigration Marriage Fraud Statutes*, 7 YALE L. & POL'Y REV. 20, 28–51 (1989).

293. *See* 8 U.S.C. § 1227(a)(1)(D).

294. *Id.* § 1227(a)(1)(G).

295. The same is true, for example, for loss of a student visa due to unauthorized work, or loss of any non-immigrant visa due to commission of certain crimes. *See* 8 U.S.C. § 1227(a)(1)(C) (making noncitizens deportable for status violations); 8 C.F.R. § 214.1(g) (2013) (setting forth criminal grounds specific to the revocation of non-immigrant visas); BOSWELL, *supra* note 7, at 108 (discussing student visas).

ment of status had not been made."[296] A crucial difference between rescission of adjustment of status and termination of asylum is that asylum can be terminated despite an initially valid grant. Rescission has a punitive cast, whereas changed circumstances in the country of origin, for example, or travel back to the country of origin years after receiving asylum,[297] should not invalidate an earlier asylum grant.

Finally, it must be noted that 8 U.S.C. § 1158(c)(3) was codified in the context of large-scale reform of the asylum system designed to prevent perceived abuses. It may well be that the provision was not intended to make any sort of statement as to whether asylum is an admission—but rather to cast the net as widely as possible to ensure that no undeserving former asylee escaped removal. By specifically providing for charging under the grounds of either inadmissibility or deportability, Congress avoided any scenario impeding deportation. In any event, I advocate the third interpretation discussed above because of its congruence with other areas of immigration law.

2. The Regulations and Agency Guidance

Because the statute and its legislative history do not provide a definite answer, I next examine the regulations. The regulations have evolved over time, from stating that asylum was not an "admission" in 1982, towards terming a grant of asylum an "admission" in today's iteration.

The first set of regulations—which were introduced on June 2, 1980 and remained in effect until 1990—provided that asylum status was valid for only one year.[298] Asylees were required to undergo interviews annually to extend their status.[299] The regulations indicated that termination of asylum would restore the status (or lack thereof) previously held by the asylee. Thus, a former asylee would be subject to exclusion proceedings if, at the time of the asylum grant, he or she was an applicant for admission.[300] If the asylee had "entered" prior to the asylum grant, however, he or she would be subject to deportation proceedings.[301] The inherently temporary nature of the status described in the regulations, coupled with the mandate to institute exclusion proceedings against former asylees who had not otherwise

296. 8 U.S.C. § 1256(a). For examples of rescission, see Adams v. Holder, 692 F.3d 91 (2d Cir. 2012); Estrada v. Holder, 604 F.3d 402 (7th Cir. 2010); and Ali v. Reno, 22 F.3d 442 (2d Cir. 1994).
297. *See* USCIS, TRAVEL FACT SHEET, *supra* note 175.
298. *See* 45 Fed. Reg. 37,392, 37,394 (June 2, 1980); 8 C.F.R. § 208.8(e) (1990).
299. 45 Fed. Reg. at 37,394; 8 C.F.R. § 208.8(e) (1990).
300. 45 Fed. Reg. at 37,795; 8 C.F.R. § 208.16(b) (1990).
301. 45 Fed. Reg. at 37,795; 8 C.F.R. § 208.16(a) (1990).

"entered" the United States, strongly suggests that asylum did not amount to "admission." Rather, the regulations created a system whereby an asylee's presence was merely tolerated until the risk of persecution abated.[302] In light of the Refugee Act's silence on the issue, the regulations were a perfectly fair implementation of the Act.

By 1990, the waters had muddied. On July 27 of that year, the INS promulgated a rule establishing new procedures relating to asylum. Although the regulations continued to provide for the initiation of exclusion or deportation proceedings against asylees whose status was revoked, the earlier language indicating which type of proceedings applied to whom had disappeared.[303] In fact, a 1988 proposed rule expressly provided that any asylee who lost asylum would be placed in *deportation* proceedings,[304] but that language was deleted from the final rule.[305]

After IIRIRA, a new interim rule was promulgated, doubtless in response to the collapse of exclusion and deportation proceedings into removal proceedings. Under the interim rule, which controlled until 2000, "[w]hen an alien's asylum status or withholding of removal or deportation is terminated . . ., the Service shall initiate removal proceedings . . . if the alien is not already in exclusion, deportation, or removal proceedings."[306] This language remained in the rule when it became final in 2000,[307] and is still there today.[308]

While these changes eliminated the regulations' earlier clarity, a separate provision in the 1990 rule contained the first indication that asylees are "admitted." The provision established procedures for according asylum status to an asylee's derivatives, and was entitled "*Admission* of asylee's spouse and childen."[309] That title was also

302. Asylees also could apply for adjustment of status, but the 10,000 adjustment cap in place until 2005 meant that asylees often had to wait many years before adjustment could occur. *See* REAL ID Act of 2005, Pub. L. 109-13, sec. 101(g), § 209, 119 Stat. 302, 305 (removing the cap).

303. *See* 55 Fed. Reg. 30,674, 30,685–86 (July 27, 1990) (codified at 8 C.F.R. § 208.24(e)).

304. 53 Fed. Reg. 11,300, 11,308 (proposed Apr. 6, 1988).

305. *See* 55 Fed. Reg. at 30,674–88.

306. 62 Fed. Reg. 10,312, 10,344 (Mar. 6, 1997) (codified at 8 C.F.R. § 208.20(b) (1998)).

307. *See* Asylum Procedures, 65 Fed. Reg. 76,121, 76,136 (Dec. 6, 2000) (codified at 8 C.F.R. § 208.21(e)).

308. 8 C.F.R. § 208.24(e) (2013). The parallel regulation at 8 C.F.R. § 1208.24 contains identical language. *See* 8 C.F.R. § 1208.24(e) (2013).

309. 55 Fed. Reg. at 30,685 (codified at 8 C.F.R. § 208.21 (1991)) (emphasis added). Although a title may not substitute for or supplant textual language, titles are useful interpretive aids when the text is ambiguous. *See* LINDA JELLUM, MASTERING STATUTORY INTERPRETATION 123 (2008) (collecting cases); *but cf. generally* Stack, *supra*

employed in the 1987 and 1988 proposed rules preceding issuance of the final rule in 1990.[310] When read in its entirety, the provision appears to equate asylum status with an admission:

> **Admission of asylee's spouse and children.**
> A spouse . . . or child . . . may also be granted asylum if accompanying or following to join the principal alien[.][311]

Derivatives "accompanying" the principal claimant are spouses and children present in the United States at the time of the asylum grant. Derivatives who are "following to join" are usually those spouses and children immigrating from abroad. The latter group is inspected at the border and makes a lawful entry that conforms to the definition of "admission" at 8 U.S.C. § 1101(a)(13) (i.e., a lawful entry following inspection and authorization by an immigration officer). This lends further support to the theory that asylum amounts to an admission. It would be absurd for derivatives to have a status superior to that of the principal. It also would be absurd for family members joining the asylee from abroad to be in a better legal position than those already in the United States.

Amendments to the regulations over the course of the 1990s and the early 2000s left this language intact.[312]

Also, the regulation at 8 C.F.R. § 209.2 governing asylees' adjustment of status terms a grant of asylum an "admission." The regulation reads in pertinent part: "The provisions of this section shall be the sole and exclusive procedure for adjustment of status by an asylee *admitted* under section 208 of the Act whose application is based on his or her asylee status."[313]

Because the pertinent language survived regulatory amendments post-dating IIRIRA, one may presume that the former INS and DHS understood the import of employing the term "admission" when describing derivative asylum grants and prescribing procedures for asylees' adjustment of status.

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note 226, at 357-60 (noting the absence of a consistent jurisprudential methodology for interpreting regulations).

310. 53 Fed. Reg. 11,300, 11,308 (proposed Apr. 6, 1988); 52 Fed. Reg. 32,552, 32,559 (proposed Aug. 28, 1987).

311. 55 Fed. Reg. at 30,685.

312. *See* 8 C.F.R. § 208.21(a) (2013); Asylum Procedures, 65 Fed. Reg. 76,121, 76,136 (Dec. 6, 2000) (codified at 8 C.F.R. § 208.21(a) (2001)); 62 Fed. Reg. 10,312, 10,344 (Mar. 6, 1997) (codified at 8 C.F.R. § 208.21(a) (1998)); 59 Fed. Reg. 62,284, 62,301 (Dec. 5, 1994) (codified at 8 C.F.R. § 208.21(a) (1995)).

313. 8 C.F.R. § 209.2 (2013) (emphasis added). The parallel regulation at 8 C.F.R. § 1209.2 contains identical language. *See* 8 C.F.R. § 1209.2 (2013).

Finally, as indicated previously, the agency that authors the regulations has characterized a grant of asylum as an admission. In his memorandum entitled "Readmission of Asylees and Refugees Without Travel Documents," former INS General Counsel Bo Cooper not only suggested in the title that asylum status is an admission, but in the body of the memorandum also repeatedly referenced asylees' "readmission" at the border and referred to asylees' ability to apply for admission anew when not in possession of a travel document.[314]

3. Pre-2013 Case Law

The slim body of case law in this area teaches us little beyond what we have learned from the statute, the regulations, and INS memoranda. Certainly, prior to *Matter of V-X-*, the case law appeared to be moving towards an assumption that asylum amounted to an admission, albeit crookedly. For example, a review of Board cases granting asylum prior to *Matter of V-X-* indicates a growing inclination towards ordering noncitizens "admitted as asylees."[315] This only makes sense, because the regulations characterize asylum as an admission, and the regulations are binding on Immigration Judges and the Board. In cases where asylum was not deemed an admission, it appears that adjudicators did not actually spot and analyze the issue.

a. Mansoor v. Montgomery

The 1985 case *Mansoor v. Montgomery*[316] relates the procedural obstacles encountered by an Iraqi who was granted asylum in 1980, but whose status was terminated in 1983 following the annual interview mandated by the regulations then in force.[317] Because Mansoor

314. *See* Cooper, Memorandum, *supra* note 288; *see also* U.S. CITIZENSHIP & IMMIGRATION SERV., AFFIRMATIVE ASYLUM PROCEDURES MANUAL 146 (2007) (describing an asylee who travels abroad and seeks to re-enter the United States at a port of entry as "seeking re-admission to the U.S."); U.S. CITIZENSHIP & IMMIGRATION SERV., AFFIRMATIVE ASYLUM PROCEDURES MANUAL 144 (2003) (same).

315. In the following cases, the Board entered an order granting asylum without terming the grant an "admission": *Y-T-L-*, 23 I&N Dec. 601 (BIA 2003); *X-P-T-*, 21 I&N Dec. 634 (BIA 1996); *D-V-*, 21 I&N Dec. 77 (BIA 1993); *Izatula*, 20 I&N Dec. 149 (BIA 1990); *Villalta*, 20 I&N Dec. 142 (BIA 1990); *Pula*, 19 I&N Dec. 467 (BIA 1987), *superseded on other grounds by regulation*, 45 Fed. Reg. 62,284, 62,301 (1994). However, several of the more recent cases order the claimant "admitted as an asylee." *See, e.g.*, *S-A-*, 22 I&N Dec. 1328, 1337 (BIA 2000); *S-P-*, 21 I&N Dec. 486, 497 (BIA 1996); *Kasinga*, 21 I&N Dec. 357, 357 (BIA 1996). The use of such language in *Matter of Kasinga* is particularly noteworthy, because it is one of the best-known cases in immigration law. Anecdotally, these cases led many thoughtful immigration scholars to view asylum as an admission.

316. 620 F. Supp. 708 (E.D. Mich. 1985).

317. *See id.* at 709.

initially had been paroled when he sought asylum at the border, he was once again deemed an applicant for admission and placed in exclusion proceedings.[318] Mansoor's applications for asylum and withholding were denied, and he was ordered excluded.[319] At this point in time, the regulations were clear, and did not contradict the statute. *Mansoor*—although heartbreaking—was rightly decided. Were Mansoor deemed admitted, he would have been eligible to apply for suspension of deportation, a discretionary waiver allowing persons to remain under sympathetic circumstances.[320] By the time he was ordered excluded, Mansoor had a five-year old son in the United States whose mother received public assistance, and who depended on Mansoor for financial and emotional support.[321] In other words, Mansoor had accumulated equities in the United States that might have allowed him to remain, had his asylum grant been deemed a lasting admission.

The regulations *Mansoor* applied are fortunately no longer extant. Subsequent case law suggested without firmly establishing that asylum is an admission. Below, I discuss some of the more notable cases.

b. Sesay v. Immigration & Naturalization Service

Possibly the only case that squarely confronted the issue prior to *Matter of V-X-* is the Second Circuit's lengthy, unpublished opinion *Sesay v. Immigration & Naturalization Service*.[322] In this 2003 case, the Second Circuit applied *Chevron* deference principles to uphold the Board's finding that a grant of asylum amounts to an "entry."[323] However, the court specifically indicated that it would reconsider the question whether asylees are "admitted" or necessarily have effected an "entry" if and when a "fully briefed and properly argued" case came

318. *Id.*

319. *Id.*

320. *See id.* at 710–11.

321. *Id.* at 709–10.

322. 74 F. App'x 84 (2d Cir. 2003). The petitioner in *Tanov v. Immigration & Naturalization Service* attempted to argue that an IJ's grant of asylum, coupled with the issuance of an I-94, amounted to an admission. *See* 443 F.3d 195, 200 (2d Cir. 2006). However, the Second Circuit deemed the argument waived, and additionally observed that because the Board reversed the IJ there was never a final agency order granting asylum in any event. *Id.* at 200–01. Thus, the Second Circuit in *Tanov* was not required to decide whether a grant of asylum amounted to an admission. A Magistrate Judge in the District of Arizona later misread *Tanov*, describing it as "at least one" instance in which a federal court found that an asylum grant plus an I-94 equals admission. Singh v. Vasquez, No. CIV 08-01901, 2009 WL 3219196, at *4 n.6 (D. Ariz. Feb. 5, 2009).

323. *Sesay*, 74 F. App'x at 88.

before it.[324] Ironically, at oral argument, Sesay's counsel "disclaimed" the contention that asylum is not "admission"—apparently in response to the panel's questioning.[325] One would assume that the government did not disagree.

The petitioner in *Sesay* was an official in a democratically elected Sierra Leonean government overthrown in a 1997 coup.[326] The new regime forced the petitioner to continue occupying a government post, but he fled the country as soon as he was able.[327] His asylum application was complicated, however, by President Clinton's 1998 proclamation suspending the "entry" into the United States of any member of the Sierra Leonean regime.[328] An IJ, and subsequently the Board, found the petitioner ineligible for asylum as a matter of law, because the proclamation barred his "entry" into the United States.[329]

Before the Second Circuit, the petitioner argued that he could have been granted asylum and then paroled into the United States, and that the Board was wrong in finding that asylum necessarily entailed an "entry."[330] The Second Circuit opined that his strongest support stemmed from the statutory provision that, upon termination of asylum, a former asylee becomes subject to any applicable ground of inadmissibility or deportability[331]—the provision discussed above at Part III.B.1. The court thus stated,

> Because inadmissibility by definition only applies to aliens who have not yet been admitted to the United States—that is, to aliens who have not legally "entered" the country—the fact that an alien becomes subject to inadmissibility upon termination of asylum status could indicate that asylees have never effected an entry into the United States as that term is used in the INA.[332]

The government countered, however, that the Board's interpretation could be reconciled with the statute on the reading that termination of asylum strips away the entry and the admission that came with it—returning the noncitizen to "'square one': seeking admission and

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324. *Id.* at 88 & n.6.

325. *Id.* at 87–88 ("In questioning Sesay's counsel about this point at oral argument, however, counsel expressly disclaimed this theory, stating: 'I don't deny that a person seeking asylum is seeking to be admitted because they will be admitted if they're granted asylum.'") (citations omitted).

326. *Id.* at 85.

327. *See id.*

328. *See id.* at 85–86.

329. *Id.* at 86.

330. *Id.* at 86–87.

331. *Id.* at 88.

332. *Id.*

admissibility."[333] In other words, the government advocated for the second of the three interpretations I outlined above at Part III.B.1. The Second Circuit, in according *Chevron* deference, found it "could not say with certainty that the BIA's interpretation is 'manifestly contrary to the statute.' "[334] However, the Second Circuit was obviously unsatisfied with its own conclusion, as it deliberately left the question open.[335]

c. Hernandez-Vasquez v. Holder

In the 2011 unpublished opinion *Hernandez-Vasquez v. Holder*, the Sixth Circuit upheld the removal order of a derivative asylee who had been charged with inadmissibility in removal proceedings.[336] The opinion does not directly address whether derivative asylum status is an admission. Rather, it illustrates the disturbing lack of careful analysis as to how asylees should be charged and dealt with in removal proceedings.

The petitioner first entered the United States without inspection but was granted asylum in 1989 as his mother's derivative.[337] In 2005, he was convicted of child endangerment.[338] DHS initiated removal proceedings in 2006.[339] Notwithstanding his asylee status, DHS charged the petitioner with inadmissibility for being present *without admission* or parole and for having a conviction for a crime involving moral turpitude.[340] The IJ terminated the petitioner's asylum status on the ground that his conviction was for a "particularly serious crime" and sustained the charges of inadmissibility.[341] Petitioner's applications for withholding of removal, protection under the Convention Against Torture, and a discretionary waiver of inadmissibility were denied by the IJ and subsequently the Board.[342] The sole issue on

333. *Id.*
334. *Id.* (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)). The District of Massachusetts in *Balasundaram v. Chadbourne* cited *Sesay* for the proposition that a grant of asylum is an admission. *See* 716 F. Supp. 2d 158, 160 (D. Mass. 2010). The court also stated in dictum (without analysis) that when a noncitizen's asylum status is revoked, so is his "admitted" status. *See id.* One of the implications of the holding is that the very learned District Judge Young located no stronger statement than the Second Circuit's lukewarm finding in *Sesay*. *See id.*
335. *Id.* at 88 n.6.
336. 430 F. App'x 448, 449–50, 453 (6th Cir. 2011).
337. *Id.* at 449.
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.* at 450.
342. *Id.*

appeal was whether the Board correctly found that the petitioner's conviction was a "particularly serious crime" warranting termination of asylum.[343] The Sixth Circuit found that it was.[344]

Hernandez-Vasquez is notable in that the petitioner was a derivative asylee; in that one of the glimmers of light as to the proper way to charge asylees is the DHS-issued regulation labeling derivative asylum an "admission"; and yet DHS charged him under the grounds of inadmissibility. Was the IJ cognizant of this regulation, but sustained the inadmissibility charges for the reason articulated by the government in *Sesay*—i.e., that asylees return to "square one" following termination of asylum? Or did the IJ sustain the charges merely because they went unchallenged, in other words, without even thinking about it? The Sixth Circuit opinion does not indicate that the IJ undertook any of these analytical steps—and does not reveal any objection to DHS' decision to charge the petitioner as present without admission or parole. In this situation, a petitioner who otherwise could defend against removal through an adjustment of status application would be barred, because entry without inspection is an unwaivable ground of inadmissibility.[345] Moreover, although the Sixth Circuit does not discuss the petitioner's detention status, it should be noted that his single crime involving moral turpitude would have been more likely to render him a mandatory detainee once he was categorized as "inadmissible" rather than "deportable."[346]

Notwithstanding the confusion illustrated by *Hernandez-Vasquez*, thoughtful immigration scholars, and apparently even Second Circuit judges, assumed that asylum amounted to an "admission." This is unsurprising in light of the Board's published precedent ordering noncitizens "admitted as asylees," the regulations terming asylum an "admission," and the characterization of asylum as an "admission" in

343. *Id.* at 451.

344. *See id.* at 451–53. What the opinion does not reveal is any application by the petitioner for adjustment of status with a refugee waiver, which was an option that was unquestionably procedurally available. *See* Matter of K-A-, 23 I&N Dec. 661 (BIA 2004). The Sixth Circuit's silence on the issue suggests that it never came up—which alone may have constituted grounds to grant the petition for review. *See* Mendoza-Lopez v. United States, 481 U.S. 828, 840 (1987) (removal order invalid where Immigration Judge did not explain to aliens that they were eligible for suspension of deportation); Copeland v. United States, 376 F.3d 61, 71, 73 (2d Cir. 2004) (stating that failure of an Immigration Judge to apprise alien of right to apply for 212(c) relief rendered proceedings fundamentally unfair, and removal order correspondingly invalid).

345. 8 U.S.C. § 1182(a)(6)(A)(i) (2013); ALEINIKOFF ET AL., *supra* note 227, at 659.

346. *See supra* Part II.B.2.

agency guidance. The surprise came in June 2013, when the Board published the disappointingly superficial decision, *Matter of V-X-*.

4. Matter of V-X-*: The 2013 Challenge*

Like *Matter of D-K-*, the 2012 decision announcing that resettled refugees should be deemed "admitted" for charging purposes, the 2013 case *Matter of V-X-* stunned the immigration community. In *Matter of V-X-*, however, the Respondent failed in his attempt to analogize his status to that of resettled refugees under *Matter of D-K-* and was deemed never admitted. The *V-X-* Respondent was initially paroled into the United States in 2003.[347] In 2004, he obtained "asylum as a derivative beneficiary of his father's asylum application."[348] During the next several years, he was charged criminally with offenses relating to distribution of marijuana and home invasion, which resulted in rehabilitative probation, and a conviction plus probationary incarceration, respectively.[349] DHS charged him as inadmissible for a crime involving moral turpitude and a controlled substance offense, and for "reason to believe" he had trafficked in controlled substances.[350] The IJ sustained the charges and ordered him removed.[351]

On appeal, the Respondent contended that DHS charged him improperly, arguing that he was not subject to the grounds of inadmissibility because he had been "admitted" as an asylee.[352] The Board disagreed, stating that [t]he respondent . . . identified nothing in the language of the Act to support his contention that Congress understood a grant of asylum to be a form of 'admission' into the United States."[353] Notwithstanding what the respondent did or did not identify, the Board failed to address 8 U.S.C. § 1158(c)(3), the statutory language analyzed by the Second Circuit in *Sesay*,[354] which provides that "An alien [whose asylum status has been terminated] is subject to

347. 26 I&N Dec. 147, 150 (BIA 2013). The Board erroneously refers to the Respondent's parole as an "entry" into the United States. *Id.* at 148.

348. *Id.* at 148.

349. *See id.*

350. *Id.* at 147.

351. *See id.* at 147–48.

352. *See id.* at 150. The Respondent also contended that his marijuana-related offenses were not "convictions," but rather mere juvenile delinquency adjudications, because he had been designated a "youthful trainee" under Michigan law. *Id.* at 152. For reasons beyond the scope of this Article, the Board found that the "youthful trainee" designation equated to a "conviction" for immigration law purposes. *Id.* at 152–53.

353. *Id.* at 151.

354. *See* Sesay v. Immigration & Naturalization Serv., 74 F. App'x 84, 88 (2d Cir. 2003).

any applicable grounds of inadmissibility or deportability under section [sic] 1182(a) and 1227(a)."[355]

In *Sesay*, the government argued that this very language meant that asylum was an "entry" that could be erased if asylum was terminated. A Second Circuit panel pressed the claimant's attorney into conceding that asylum was an "admission," and the government apparently did not counter.[356] Doubtless, the Board did or should have come across *Sesay* in researching its decision. Although this provision does not seal the deal by any means, it certainly required reflection and examination.

Next, the Board rejected the respondent's argument that the Board itself recognized that asylum is an admission when it ordered a respondent "admitted as an asylee" in the 2000 case *Matter of S-A-*.[357] The Board provided two justifications. First, it distinguished between the "concepts of 'admission to asylum *status*' and 'admission *into* the United States.'" In so doing, however, it coined a new phrase—"admission to asylum status"—even as it purported to refer to a known proposition.[358] Second, the Board indicated that, because the question whether asylum is an admission was not at issue in *Matter of S-A-*, its usage of the term "admitted" was "gratuitous."[359] Be that as it may, the language in a final order in any removal case is inherently important and substantial to all litigants and adjudicators. It is reasonable to read the opinion as treating asylum as an "admission." Moreover, it would have been more intellectually honest for the Board to acknowledge that *Matter of S-A-* was not the only instance where it ordered a claimant "admitted as an asylee," and that it did so in one of immigration law's best known cases, *Matter of Kasinga.*

Perhaps the Board's most spurious reasoning was contained in a footnote. In footnote 3, the Board acknowledged that the regulation governing asylee adjustment of status characterizes asylum as an "admission."[360] However, it ignored entirely other regulations that also refer to asylum as an admission, notably the regulations that govern the "[a]dmission of an asylee's spouse and children," even though the

355. 8 U.S.C. § 1158(c)(3) (2012).

356. *See supra* note 325.

357. *V-X-*, 26 I&N Dec. at 151.

358. *Id.* (emphasis in original).

359. *Id.*

360. *Id.* at 151 n.3 (citing 8 C.F.R. § 1209.2 (2013), which provides that "[t]he provisions of this section shall be the sole and exclusive procedure for adjustment of status by an asylee admitted under section 208 of the Act."). Note that this regulation was recodified as recently as November 2009. The parallel regulation at 8 C.F.R. § 209.2 contains the identical opening sentence.

V-X- Respondent was a derivative asylee.[361] The Board's basis for rebutting the regulatory language is interesting, but ultimately unsatisfying:

> That characterization [of asylum as an admission] is substantially contradicted, however, by 8 C.F.R. § 1208.14(c) (2013), which clarifies that a grant of asylum does not require a threshold inspection for admissibility, the sine qua non of an "admission," either at a port of entry or through adjustment of status.[362]

First, the regulation does not specifically state this—which explains why the Board does not refer to a particular subsection of the regulation or directly quote its language. Rather, the regulation indicates that an asylum officer who denies an asylum application shall refer any applicant who appears inadmissible or deportable to the immigration court for removal proceedings.[363] This regulation is unremarkable; it simply requires that failed asylum applicants without status, or who have violated the conditions of status, be placed in removal proceedings.

Second, the Board ignores that asylum is a defense to inadmissibility in removal proceedings, as are several other types of humanitarian relief. The INA makes many grounds of inadmissibility inapplicable to humanitarian petitions, including requests for U visas for crime victims, green cards for the battered spouses of U.S. citizens or lawful permanent residents, and Special Immigrant Juvenile status for neglected, abandoned, or abused youths.[364] Asylum is unusual in that most—but not all—grounds of inadmissibility do not apply.[365] This makes sense, because asylum protects against exceptional harm including persecution, torture, and death. An admission protecting against extreme consequences naturally is not subject to garden-variety inadmissibility grounds.

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361. 8 C.F.R. § 208.21 (2013). The identical language is in the parallel regulation at 8 C.F.R. § 1208.21 (2013).

362. *V-X-*, 26 I&N Dec. at 151 n.3.

363. 8 C.F.R. § 1208.14(c)(1) (2013).

364. *See* 8 U.S.C. § 1182(a)(4)(E) (2012) (stating exceptions for U visa applicants and self-petitioners under the Violence Against Women Act ("VAWA")); § 1182(a)(6)(A)(ii) (stating exceptions for VAWA self-petitioners); § 1255(h) (stating exceptions for Special Immigrant Juveniles); *see also, e.g.*, 8 C.F.R. § 245.15(e) (2013) (setting forth exceptions for applicants for adjustment under the Haitian Refugee Immigrant Fairness Act). See 8 U.S.C. § 1101(a)(27)(J) for the definition of a special immigrant juvenile, and 8 U.S.C. § 1255(h)(2)(A) for special immigrant juveniles' inadmissibility exemptions.

365. The grounds that do apply include the bar against persons who have provided material support to terrorist organizations, and the bar against persecutors of others. *See* 8 U.S.C. §§ 1158(b)(2)(A)(v), 1182(a)(3)(E) (2012).

Finally, the Board's assertion that no procedural absurdities are created is open to question. An asylee can petition for children and spouses to migrate to the United States as derivative asylees, or for those present in the United States to obtain derivative asylee status. If an asylum grant is not an admission, derivative asylees would be in a legal position superior to that of the principal. Derivative asylees should not be in a better position to protect against detention or removal than the principal who petitioned for them.

At bottom, the Board's decision in *Matter of V-X-* is untenable because it ignores binding regulatory language; the regulations do not contradict the statute; and following the regulations would avoid procedural absurdities. It is also disconcerting that the Board, in rendering a surprising new decision, failed to take into account the INS General Counsel memorandum of 2001 and other agency guidance.[366] Finally, the Board owed deeper consideration to its own several precedential opinions where it ordered respondents *admitted* as asylees, including *Matter of Kasinga*, one of the best-known opinions in immigration law.[367] Because *Matter of V-X-* is out of step with the broader body of immigration law, it should be challenged and overturned in the higher courts.

Considering the silence in the statute, the regulatory language characterizing asylum grants as "admissions," the importance of avoiding procedural absurdities; and the treatment of noncitizens holding other statuses that are later terminated, I conclude that asylum should be considered an "admission" that does not vaporize upon termination of the underlying status. This conclusion is most in harmony with the governing statutory and regulatory language and the rest of immigration jurisprudence.

CONCLUSION

Although the Refugee Act was passed decades ago in 1980, many of its finer points remain misunderstood and misapplied. Despite the great leap forward in *Matter of D-K-*, for example, the Board still read the nonexistent term "conditional" into the Act to modify refugee "admission." In *Matter of V-X-*, by contrast, the Board made a great leap backwards from regulatory and interpretive trends in a superficial decision finding that asylum is not an admission. The Board remanded

366. *See supra* note 314 and accompanying text.

367. *See supra* note 315. *Matter of Kasinga* is standard fare in immigration law textbooks. *See, e.g.*, ALEINIKOFF ET AL., *supra* note 227, at 860, 870, 880–82 (discussing and excerpting *Matter of Kasinga*); LEGOMSKY & RODRIGUEZ, *supra* note 28, at 905, 959 (same).

the case for new findings. In the event the respondent appeals the immigration court decision, the case should be reviewed en banc, or the federal courts should reverse it.

In general, the admission status of refugees and asylees has not been carefully explored or explained, and statutory construction of the relevant portions of the Refugee Act has been correspondingly lacking. The overarching goal of this Article was to rectify this omission. I have concluded, first, that refugee status is no more conditional than any other type of admission, and that refugees must be accorded the same panoply of rights as other admittees. This conclusion became inevitable following IIRIRA's introduction of a statutory definition of admission.

Second, an analysis of the statute and regulations over time leads to the conclusion that asylum status is also an "admission"—even if that was not so immediately following the Refugee Act's passage. Moreover, consideration of the broader body of immigration law, and the recognition that loss of status generally does not amount to a loss of any "admission" that came with it, indicates that even if asylum status is terminated, the accompanying admission is not. Asylum may be terminated for something as innocent as travel back to the country of origin for a family member's funeral, even years after the asylum grant, and even if the asylee has since become a lawful permanent resident.[368] Although asylum may also be terminated for crimes and other bad acts, termination is not necessarily indicative of any sort of fraud or bad faith on the asylee's part. It would be tragic if former asylees necessarily reverted to a status with lesser constitutional protections simply because they were no longer in danger in their homelands. Finally, as discussed in detail above, the Board's decision in *Matter of V-X-* is unsatisfying and the matter must be revisited by the Board or a higher court.

In addition to answering these questions, I also have sought to demonstrate why these issues have remained unresolved for so long. One reason is undoubtedly intellectual inertia: Litigators and adjudicators passively adhered to the concept of refugees as parolees or "conditional entrants" even though the Refugee Act superseded those modes of refugee resettlement. One of the greatest risks in immigration law is the tendency to fall back unthinkingly on old intellectual paradigms. Attorneys and judges are burdened by heavy caseloads. Noncitizens, especially immigration detainees, lack access to counsel.

368. This is because the noncitizen was eligible for lawful permanent residency on account of an asylum grant. *See* USCIS, TRAVEL FACT SHEET, *supra* note 175.

The quality of representation suffers, which in turn contributes to ill-informed decisionmaking.

My analyses of the case law are surely startling to many. Legal and procedural mistakes abound. Errors are committed by IJs, DHS, the Board, and the Attorney General—and even our venerable Article III courts. That immigration is a weak point of our legal system is no secret, but I have deliberately highlighted the magnitude of the problem.

I hasten to add that other areas of immigration law are better developed, and that certain aspects of the admission concept have been carefully analyzed by both administrative and Article III tribunals. For example, litigation and adjudication ultimately led to the Board's careful exposition in *Matter of Alyazji*[369] on how to ascertain the *date* of admission for purposes of assessing removability and eligibility for relief. I submit that one reason for the jurisprudential gap is that the population affected by the issue in *Alyazji*—typically lawful permanent residents with criminal convictions—have better access to resources than refugee and asylee populations. They may have lived in the United States longer; enjoyed superior educations; suffer less from post-traumatic stress disorder and other disabilities that interfere with asset accumulation; and have larger families in the United States to pool resources for representation. Refugee and asylee populations, particularly if detained, compete for free legal services and all too often go unrepresented.

Finally, in my discussion of the substantive, procedural, and constitutional import of whether a noncitizen has been admitted, I seek to convey why the literature should focus more attention on the admission concept. Given that *Zadvydas* and *Martinez* have been at issue during the debates around immigration reform, and will remain at risk unless and until the Supreme Court renders a constitutional rather than a statutory decision; and that the question of what categories of noncitizens should be subject to mandatory detention during removal proceedings frequently arises in congressional debates and bill proposals, the issue of admission status as it relates to long-term or indefinite detention will remain a subject of great importance. This Article contributes to an effort to dissect "admission" and the broad range of associated immigration issues, during the debates over immigration reform and beyond.

369. 25 I&N Dec. 397 (BIA 2011).