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Membership in a Particular Social Group: International Journalists and U.S. Asylum Law

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ARTICLE: "MEMBERSHIP IN A PARTICULAR SOCIAL GROUP": INTERNATIONAL JOURNALISTS AND U.S. ASYLUM LAW

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SUMMARY:

... At least thirty non-U.S. journalists in the last decade have argued in U.S. Courts of Appeal that U.S. immigration authorities erroneously denied their asylum applications based on persecution in their native countries. ... Still, journalists persecuted in their home countries for their journalism work might better fit the statutory qualifications for asylum --primarily persecution on account of race, religion, nationality, political opinion or membership in a "particular social group"--than the U.S. immigration system sometimes acknowledges. ... Finally, and most importantly, the asylum seeker bears the burden to establish that he or she is unable or unwilling to return to his or her home country because of past persecution or a well-founded fear of future persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." ... If the IJ does not grant the asylum application, the applicant may appeal to the Board of Immigration Appeals, another Justice Department entity. ... In a 2000 case, for example, one Ninth Circuit panel held that a Pakistani journalist who was beaten and threatened in his newspaper office by political partisans unhappy with his coverage had been persecuted because of his political opinion.

...

HIGHLIGHT:

At least thirty non-U.S. journalists in the last decade have argued in U.S. Courts of Appeal that U.S. immigration authorities erroneously denied their asylum applications based on persecution in their native countries. However, only about 20% of journalists were successful, mirroring the approximate national asylum success rate for all applicants. The U.S. Immigration and Nationality Act does not include journalism as a basis for asylum, but some circuit court judges have stated that reporting on systemic official corruption is inherently political and, as a result could be grounds for asylum for persecuted journalists. A 2007 opinion from the U.S. Board of Immigration Appeals defining "particular social group," a key requirement for asylum, is examined for its application to journalists.

TEXT:

[*279] The U.S. Board of Immigration Appeals (BIA) concluded in 2004 that Albanian newspaper and television journalist Zef Pergega did not merit asylum protection and must be deported to his native Albania, where government officials had mistreated and persecuted him and his family--with torture, repeated brutal beatings, sexual assault and extralegal kidnappings by police--since the advent of Communism more than fifty years earlier. ⁿ¹ The board, an eleven-member quasi-judicial body within the U.S. Department of Justice that adjudicates immigration matters under the direction of the Attorney General, based its denial largely on its agreement with a Justice Department administrative law judge (immigration judge or IJ) who earlier had deemed Pergega's story not credible.

[*280] Literally from birth, Pergega's life was made a living hell by Communist Party authorities in Albania. Because Pergega's father had attended a liberal arts school in Italy, his family was sent to a mining camp for "re-education," and Pergega himself lived there until graduating from high school in 1971. ⁿ² Eventually Pergega was sent to work as a mechanic, but he actually wanted to be a journalist, and he began writing for a local newspaper. During the course of eleven years, Pergega's criticisms of Albanian government policies in both newspaper stories and television reports caused him, his wife and children to be subjected to a series of government-sanctioned attacks. ⁿ³

The immigration judge who first denied Pergega's application for asylum determined that Pergega was not credible largely because he had stated that certain attacks were not reported to police, and yet Pergega produced police investigative reports of some of those incidents. ⁿ⁴ The immigration judge apparently failed to see the irony of a finding of incredibility in light of the fact that the police reports actually substantiated the attacks, but the United States Court of Appeals for the Sixth Circuit eventually agreed with Pergega that the IJ and BIA erred in finding him not credible. ⁿ⁵ The Sixth Circuit also concluded that discrepancies between Pergega's written affidavit and oral testimony were either inconsequential or were due to language translation problems. ⁿ⁶ The case was sent back to the BIA for reconsideration of Pergega's asylum application.

Pergega is just one of some two dozen foreign journalists in the last decade, and especially since the terrorist attacks of September 11, 2001, whose U.S. asylum applications have been met with skepticism by U.S. immigration authorities. In this regard, journalists may not be unique; U.S. immigration officials process more than 100,000 asylum applications annually, and only about 20% of asylum seekers are successful. ⁿ⁷ Still, journalists persecuted in their home countries for their journalism work might better fit the statutory qualifications for **[*281]** asylum ⁿ⁸ --primarily persecution on account of race, religion, nationality, political opinion or membership in a "particular social group"--than the U.S. immigration system sometimes acknowledges.

Against the backdrop of the contemporary public policy debate about immigration as well as ongoing problems in the U.S. government's interpretation and enforcement of immigration law, this study was designed to examine how the U.S. immigration system treats asylum claims by journalists who fled their homelands seeking refuge in the United States. The purpose of the study was two-fold: first, to discover whether generally recognized problems in the immigration adjudication process have affected U.S. asylum applications of international journalists; second, to determine whether U.S. immigration law views persecution for one's status and work as a journalist as a basis for granting asylum, and, if not, whether the Immigration and Nationality Act (INA) ⁿ⁹ should be amended to provide for asylum on those grounds.

The study is based on dispositions of journalists' asylum appeals in the U.S. Courts of Appeal during the last decade. ⁿ¹⁰ Although only a relatively small number of relevant cases--thirty--was located and analyzed, the results provide a basis on which to draw some conclusions about the treatment of international journalists under U.S. asylum law. This article first offers general background on U.S. immigration and a brief primer on the asylum application process. It then summarizes scholarly perspectives on what grounds qualify as a basis **[*282]** for asylum under the Immigration and Nationality Act. Following a discussion of whether U.S. judges view international journalists as members of a "particular social group" under the INA, the article concludes with observations about the likely direction of international journalists' U.S. asylum claims in light of a notable January 2007 opinion from the Board of Immigration Appeals.

HISTORIC AND CONTEMPORARY CLIMATE SURROUNDING IMMIGRATION

Immigration has been a topic of great public interest for virtually the entire history of the United States. In April 2006, during yet another uptick in public discussion, the *Atlantic Monthly* termed immigration "The Perpetual Controversy" and reprinted portions of articles on the topic dating to 1896.ⁿ¹¹ The content of the historical articles demonstrated that the issues surrounding immigration had changed little in more than 100 years. A June 1896 *Atlantic* article, for example, discussed how many individuals from outside the United States should be allowed to enter each year, how then-existing immigration laws should be enforced, whether Congress needed to make changes to immigration statutes and regulations, what the writer described as the threat posed by immigration to "the American rate of wages, the American standard of living, and the quality of American citizenship," and similar topics.ⁿ¹² *Atlantic* articles in subsequent years "defend[ed] newcomers against ... blatant discrimination"ⁿ¹³ and argued "that immigrants are probably more of a boon to this country than a burden."ⁿ¹⁴

In contemporary American society, even as Congress adopts costly measures that attempt to restrict the passage of undocumented immigrants through the U.S.-Mexican border,ⁿ¹⁵ immigrants may be [*283] more prevalent in more communities than at virtually any other time in recent history. For example, *The New York Times* reported in August 2006 that new data from the U.S. Census Bureau showed that "[t]he number of immigrants living in American households rose 16% over the last five years, fueled largely by recent arrivals from Mexico[.]"ⁿ¹⁶ The same Census Bureau data also demonstrated that immigrants continued to be found in large numbers in traditionally immigrant-rich states including New York, California, Texas, Florida, New Jersey and Illinois. Significantly, however, other states, including Indiana, South Dakota, Delaware, Missouri, Colorado and New Hampshire, saw their immigrant populations increase more than 25% in just five years.ⁿ¹⁷

Recently U.S. journalists have reported not only on the increasing presence of immigrants in the United States but also the increasing strains being placed on the U.S. government's administrative law system charged with interpreting and applying immigration laws. For example, *The New York Times* reported in August 2006 that the country's 200-plus immigration judges, who are not members of the federal judiciary but rather administrative law judges employed by the U.S. Justice Department, were warned by Attorney General Alberto Gonzales that they would face new performance reviews in the wake of allegations that some judges browbeat, bullied and otherwise mistreated immigrants and their lawyers.ⁿ¹⁸ In early 2006, Gonzales ordered a comprehensive review of the immigration court system after several Article III judges on the courts of appeal--charged by statute with hearing immigration appeals from the administrative law system--complained that some immigration judges were "biased and incoherent[.]" particularly with respect to decisions on applications for asylum.ⁿ¹⁹

The asylum issue, in particular, recently has attracted notable and widespread attention.ⁿ²⁰ *The New York Times*, once again, reported in [*284] mid-2006 that two recent studies had independently concluded that the system for processing asylum claims was, in essence, broken.ⁿ²¹ First, researchers from Syracuse University studied nearly 300,000 immigration cases from 1994 to 2005.ⁿ²² The Syracuse study demonstrated great disparities in treatment of asylum applications. One immigration judge in Miami, for example, denied nearly 97% of asylum applications in which the petitioner had a lawyer, but an immigration judge in New York granted asylum in approximately 90% of similar cases.ⁿ²³ Meanwhile, a second study, conducted by the congressionally mandated U.S. Commission on International Religious Freedom, confirmed disparities in treatment of asylum cases, concluding also that asylum seekers with lawyers were substantially more likely to be successful than those without lawyers.ⁿ²⁴

Such uneven treatment individual cases led one federal circuit judge, in particular, to severely criticize the administrative handling of asylum adjudications. In a published judicial opinion widely quoted by other judges and in subsequent news articles, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit wrote in November 2005 that "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."ⁿ²⁵ Judge Posner wrote that the Seventh Circuit had reversed administrative decisions in 40% of recent immigration appeals and had been obligated to engage in frequent and severe criticism of the immigration law courts for significant mistakes, unsupported or unexplained conclusions, disparaging remarks, personal bias, and a raft of other

problems. ⁿ²⁶

APPLYING FOR ASYLUM UNDER THE IMMIGRATION AND NATIONALITY ACT

Following the September 11, 2001, terrorist attacks in New York City and Washington, D.C., Congress undertook a major overhaul of [*285] the U.S. immigration system. Approximately one year later, November 25, 2002, President George W. Bush signed into law the Homeland Security Act, ⁿ²⁷ which abolished the former Immigration and Naturalization Service (INS) and distributed its functions into several bureaus within the new Department of Homeland Security. Thus, after March 1, 2003, many of the non-enforcement functions of the former INS, including the processing of asylum applications, became the prerogative of U.S. Citizenship and Immigration Services (USCIS or CIS). ⁿ²⁸ Meanwhile, immigration enforcement functions are now carried out by U.S. Customs and Border Protection, which includes the Border Patrol and U.S. Immigration and Customs Enforcement (ICE). ⁿ²⁹

Among other immigration-related efforts in the Bush Administration's response to the September 11, 2001, terrorist attacks, the federal government made obtaining asylum more difficult, especially for asylum seekers from certain countries thought to have ties to Al-Qaeda and other terrorist groups. As part of Operation Liberty Shield, announced March 18, 2003, the Department of Homeland Security began automatically detaining asylum seekers from certain nations while their applications were processed. ⁿ³⁰ By one government official's count, these changes resulted in a drop in the number of asylum applications approved from 44% in 2000 to 29% in 2003. ⁿ³¹ Subsequently, Congress further heightened requirements for asylum seekers in the Real ID Act of 2005. ⁿ³²

[*286] These changes have added to the difficulty of asylum seekers, who already operated in an environment seemingly geared against them. First, asylum determinations involve some degree of discretion on the part of the designees of the Attorney General or Secretary of Homeland Security. ⁿ³³ Second, even a successful asylum applicant is not guaranteed permission to remain in the United States permanently, as Congress has authorized the Attorney General to revoke asylum status if the Attorney General determines that conditions have changed such that the refugee no longer meets the requirements. ⁿ³⁴ Third, multiple circumstances automatically disqualify one from gaining asylum. ⁿ³⁵ Finally, and most importantly, the asylum seeker bears the burden to establish that he or she is unable or unwilling to return to his or her home country because of past persecution or a well-founded fear of future persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." ⁿ³⁶

The determination of whether one has a well-founded fear of persecution involves both a subjective component and an objective component. ⁿ³⁷ In other words, the applicant must demonstrate not only that he or she has been persecuted or "actually fears persecution" but also that "a reasonable person in the applicant's position would ... fear persecution ... on account of one of the five grounds." ⁿ³⁸ The subjective determination hinges on whether the applicant's story is deemed credible and whether the applicant produces corroborating documents or testimony, while the objective component largely hinges on the content of the U.S. State Department's Country Report ⁿ³⁹ [*287] for the country in question. An applicant who demonstrates past persecution is entitled to a presumption of a well-founded fear of future persecution. ⁿ⁴⁰ A "well-founded fear" has been described as a "reasonable possibility" that is something less than a preponderance of the evidence. ⁿ⁴¹

An asylum application may arise affirmatively, ⁿ⁴² meaning a refugee from another country who is present in the United States files the application before he or she has come to the attention of U.S. immigration authorities, or the application may arise defensively, ⁿ⁴³ [*288] meaning the applicant already has been charged with removability (formerly called deportation) and raises asylum as a defense. ⁿ⁴⁴ In either case, the application is made on a form provided by CIS, and the central component of the application form is the applicant's own narrative declaration of the grounds for his or her asylum claim. ⁿ⁴⁵ Interestingly, Question 3A in Part B of the application form asks the asylum applicant whether he or she, or any family members, have ever "belonged to or been associated with ... the press or media[.]" ⁿ⁴⁶ In affirmative applications, the applicant will undergo an interview by an asylum officer. If the application is not approved at this administrative level, it will be referred to the Immigration Court. ⁿ⁴⁷

The Immigration Court and immigration judges are not part of the judiciary as established in Article III of the Constitution. Instead, the immigration judges are administrative law judges within the U.S. Department of Justice's Executive Office for Immigration Review (EOIR). Before the immigration judge, the applicant may be represented by legal counsel and may submit additional documentation, including photographs, affidavits from corroborating witnesses and expert statements, among others. Eventually, the applicant will appear for a hearing before the IJ, and the critical factor for the IJ will be whether the judge determines the applicant to be credible. ⁿ⁴⁸ If the [*289] IJ does not grant the asylum application, the applicant may appeal to the Board of Immigration Appeals, another Justice Department entity. Generally, counsel will prepare a brief to be filed before the BIA, which may affirm or reverse the decision of the IJ.

If the applicant does not prevail at the BIA, he or she may file an appeal in the U.S. Court of Appeals corresponding to the location in which the applicant lives. Given the discretionary nature of the administrative decision whether to grant asylum, Congress limited the ability of the Courts of Appeal to review asylum cases. In order to reverse a decision of the BIA, the Court of Appeals must find that the BIA abused its discretion--a high standard for the immigrant to meet. ⁿ⁴⁹

SCHOLARLY DISCUSSION OF "PARTICULAR SOCIAL GROUP"

Approximately 190 million people, or 3% of the world's population, were classified as migrants in 2005, according to the United Nations. ⁿ⁵⁰ Of those, approximately 8.4 million people were determined to be refugees ⁿ⁵¹ by the United Nations High Commissioner for Refugees. ⁿ⁵² The United States is the number one resettler of refugees in the world, having resettled more than 52,000 refugees in 2004, for example. ⁿ⁵³ However, only about one in five U.S. asylum applicants ⁿ⁵⁴ is successful in gaining asylum--about 25,000 to 30,000 successful asylum applicants per year. ⁿ⁵⁵ In cases decided by Immigration Judges, individuals from China made up the largest group (22%) of asylum seekers, while the second- and third-largest groups came from Haiti [*290] and Colombia, respectively (about 9% each). ⁿ⁵⁶ The next-largest groups of U.S. asylum seekers came from, in descending order, Albania, India, Guatemala, El Salvador, Russia, Mexico and Pakistan. ⁿ⁵⁷

Researchers have found that several factors impact an asylum seeker's likelihood of success. Applicants represented by lawyers, for example, achieve asylum about 36% of the time, while those without legal representation are successful only about 7% of the time. ⁿ⁵⁸ Likelihood of success also hinges on the country of nationality, with 80% of recent asylum seekers from El Salvador, Mexico and Haiti being denied while 70% of recent applicants from Burma and Afghanistan were approved. ⁿ⁵⁹ The chance of success also may depend greatly on the individual immigration judge to whom an applicant's case is assigned. ⁿ⁶⁰

Several scholars have recognized the importance of the definition of a "particular social group" but little or no research has focused on the term as applied to journalists. ⁿ⁶¹ The discussion and conclusions of scholars on whether certain other groups might fall within this definition will provide context for exploration of whether the term applies to journalists.

As an initial matter, academic writers have discussed who should be allowed to make the determination of what constitutes a "particular social group." While U.S. immigration officials and judges have tended to apply their own definition of the term, one writer argued that U.S. executive and judicial branch officers should defer to the subjective experiences and viewpoints of those applying for asylum. ⁿ⁶² This view would de-emphasize the perceptions of persecutors and even U.S. immigration authorities and jurists, whom the writer called "secondary oppressors," and restore the ability of individuals, at least in gender-based asylum claims, to define themselves. ⁿ⁶³

[*291] Several writers have documented cases in which IJs, the BIA and even the U.S. Courts of Appeal determined that certain individuals were entitled to asylum based on persecution for being members of the particular social group of gays and the transgendered. ⁿ⁶⁴ Two scholars argued that persons with physical disabilities constituted a particular social group for asylum purposes under the INA. ⁿ⁶⁵ Meanwhile, another commentator recommended

expanding the definition of who could qualify for asylum to include individuals caught up in generalized political violence even though they may not have personally advocated a particular political point of view within the larger conflict. ⁿ⁶⁶

Still another author contended that Bosnian women who were raped by Serbs in the former Yugoslavia in the 1990s constituted a particular social group. ⁿ⁶⁷ Similarly, commentators have debated whether asylum protection should be extended, under the "particular social group" language, to individuals subjected to involuntary medical intervention such as electroshock therapy for gays; ⁿ⁶⁸ to women subjected to forcible polygamy, female genital mutilation, abuse and other mistreatment because of their gender; ⁿ⁶⁹ to children exploited for prostitution and labor; ⁿ⁷⁰ to the mentally disabled; ⁿ⁷¹ to [*292] conscientious objectors; ⁿ⁷² and to victims of forced impregnation, abortion or sterilization. ⁿ⁷³

JUDICIAL DEFINITIONS OF "PARTICULAR SOCIAL GROUP"

Notwithstanding its importance, the term "particular social group" remains largely undefined. Congress has chosen not to define the term in the U.S. Code, and the executive branch immigration agencies likewise have not exercised their prerogative to define it in the Code of Federal Regulations. U.S. courts largely have struggled with the definition of the term, ⁿ⁷⁴ but some intrepid judges have attempted to outline its parameters. In the 1986 case *Sanchez-Trujillo v. INS*, ⁿ⁷⁵ the U.S. Court of Appeals for the Ninth Circuit examined relevant international materials ⁿ⁷⁶ on determining the status of refugees and reached the following definition:

[T]he phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group. ⁿ⁷⁷

The court went on to consider two hypothetical examples. An immediate family, in the court's view, might constitute a particular social group under the INA because the family is "a focus of fundamental [*293] affiliational concerns and common interests for most people" and is "a small, readily identifiable group." ⁿ⁷⁸ On the other hand, the court reasoned, a "statistical group" such as "males taller than six feet" would not likely constitute a particular social group as that term is defined in the INA, presumably because the group would be too large and the common characteristics of members of the group would not relate to the reason for persecution. ⁿ⁷⁹

Applying these principles to the facts at hand, the court concluded that a group of "young, working class, urban males of military age" did not constitute a particular social group for purposes of the INA because such a category was too sweeping in that members had "a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings." ⁿ⁸⁰ Thus, the court agreed with the IJ, who had reasoned "that to recognize any person who might conceivably establish that he was a member of this class is entitled to asylum or withholding of deportation would render the definition of 'refugee' meaningless." ⁿ⁸¹

Several other circuits have cited the Ninth's *Sanchez-Trujillo* case and added bits and pieces to the definition of "particular social group." For example, the U.S. Court of Appeals for the Second Circuit referred to the *Sanchez-Trujillo* definition and then elaborated that "[a] particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor--or in the eyes of the outside world in general." ⁿ⁸² The court further clarified that, like persecution on account of race, religion, nationality and political opinion, persecution on the basis of membership in a particular social group must relate to a group characteristic that is "recognizable and discrete." ⁿ⁸³

Meanwhile, four other circuits staked out a definition that focuses on "characteristics that are essentially beyond the [asylum seeker's] power to change." ⁿ⁸⁴ Under this definition, membership in a particular social group hinges on whether one shares common characteristics that are "beyond the power of an individual to change or [are] so

fundamental to individual identity or conscience that [they] ought [*294] not be required to be changed." ⁿ⁸⁵ For a time at least, the BIA appeared to endorse this definition, describing the key test in a 1985 case called *Matter of Acosta* as the sharing of a "common, immutable characteristic." ⁿ⁸⁶ As examples that would meet this definition, the BIA listed groups that share gender, race, kinship, land ownership and a history of serving in military leadership positions. ⁿ⁸⁷

Prior to *Matter of Acosta*, the BIA had been hesitant to endorse any detailed definition of the term "particular social group." ⁿ⁸⁸ For example, the BIA declined to pass judgment on whether members of the 1980 Mariel Freedom Flotilla that left Cuba and arrived at Key West, Florida, constituted a particular social group. ⁿ⁸⁹ The BIA avoided the issue by rejecting the Cubans' asylum applications on other grounds. ⁿ⁹⁰ In reviewing the BIA decision in that case, Attorney General William French Smith recognized that the board had not articulated a clear definition of particular social group but declined to do so himself. ⁿ⁹¹

Based on the BIA's subsequent determinations, it would seem that the First Circuit/BIA definition requiring an immutable characteristic is less inclusive than the Ninth Circuit definition. For example, the BIA held that Chinese couples who opposed China's "one child" policy and who faced forced sterilizations were not members of a particular social group. ⁿ⁹² Likewise, the BIA held that Guatemalan women who were victims of domestic violence by their husbands were not part of a cognizable social group. ⁿ⁹³ (This decision was later vacated by the Attorney General, who ordered the BIA to reconsider the case in light of a proposed regulation--never adopted in the Code of Federal Regulations--that would have codified in a single rule aspects [*295] of both the First Circuit/BIA definition and the Ninth Circuit definition of particular social group. ⁿ⁹⁴)

But the BIA has not rejected out of hand all claims about membership in a particular social group. Among individuals the BIA determined to be members of a particular social group were a Cuban homosexual; ⁿ⁹⁵ young women in a particular tribe in northern Togo who were subject to forced female genital mutilation; ⁿ⁹⁶ and members of a Somali clan with "linguistic commonalities." ⁿ⁹⁷ In a 2006 case, the BIA suggested strongly for the first time that, in addition to an immutable characteristic, the determination of one's particular social group status would depend on recognizability or social visibility. ⁿ⁹⁸ The BIA expounded on that requirement a few months later.

In January 2007, at the urging of the U.S. Court of Appeals for the Second Circuit, the BIA made an effort to further refine its definition of "particular social group." ⁿ⁹⁹ Specifically, the BIA was charged with explaining its determination that "affluent Guatemalans" did not [*296] constitute a particular social group under the INA. The board reviewed its prior cases establishing the "common, immutable characteristic" definition but then stated that the determination of such a characteristic was not dispositive. ⁿ¹⁰⁰ The board further explained two factors alluded to but not emphasized in prior decisions: (1) social visibility and (2) particularity. ⁿ¹⁰¹ In doing so, the BIA essentially followed the Second Circuit's lead in its *Gomez* case. ⁿ¹⁰²

The BIA stated that a group's so-called "social visibility" must be measured against the backdrop of the particular country in question and the particular persecution feared. With respect to affluent Guatemalans fearing extortion or robbery, the board concluded that social visibility was not present because "violence and crime in Guatemala appear to be pervasive at all socio-economic levels." ⁿ¹⁰³ Still, the board noted, wealth could become a shared characteristic of a particular social group if there was evidence that a particular government imprisoned, mistreated or persecuted individuals with assets or income above a certain level. ⁿ¹⁰⁴ In short, the social visibility factor seems to measure whether society perceives a certain group of individuals to be more likely than others to suffer persecution as a result of their membership in that group. ⁿ¹⁰⁵

Meanwhile, the "particularity" requirement refers to whether a certain group of individuals is determinate or distinguishable. ⁿ¹⁰⁶ The group of wealthy Guatemalans was "simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group." ⁿ¹⁰⁷ This was so because there was no way of determining at what point to draw the line between wealth and non-wealth; the board noted that the group of wealthy Guatemalans might constitute as little as 1% or as much as 20% of the entire population. ⁿ¹⁰⁸ Although the "social visibility" and "particularity" requirements are relatively new and untested, and have not *yet* been applied either by the BIA or the

Courts of Appeals to claims of asylum by journalists, the two new factors may provide hope for international journalists seeking asylum.

[*297] JOURNALISTS' ASYLUM APPLICATIONS IN THE U.S. COURTS OF APPEAL

In approximately the last decade, the U.S. Courts of Appeal have considered at least thirty cases in which international journalists contended they were entitled to U.S. asylum. ⁿ¹⁰⁹ In twenty-four of the cases (80%) the intermediate federal appellate courts affirmed denials of asylum. ⁿ¹¹⁰ In six cases (20%) the courts reversed, in full or in part, denials **[*298]** of asylum. ⁿ¹¹¹ Twenty-three of the cases were decided after 2001, when immigration issues took center political stage after terrorist attacks in New York City and Washington, D.C. Although a more complete picture of journalist asylum claims could be provided through analysis of IJ and BIA opinions, the public availability of those decisions is extremely limited, making the courts of appeal opinions the best research option notwithstanding their own limitations. ⁿ¹¹²

In many of the cases studied, neither immigration officials nor appellate judges considered the merits of whether the journalists involved were indeed members of a particular social group. Instead, asylum applications were sometimes denied based on lack of proof of either subjective persecution or objectively reasonable fear of persecution. For example, a Nigerian radio journalist named Benjamin Agada was denied asylum in the United States despite documented evidence that journalists in Nigeria had been subjected to extra-judicial arrests, kidnappings and slayings during the regime of General Sani Abacha. ⁿ¹¹³ At a hearing before an immigration judge in 1999, Agada's story was determined to be credible (that is, the subjective element was established), but the IJ nevertheless denied his application for asylum because the judge concluded that conditions in Nigeria had changed sufficiently to allow journalists like Agada to return there without an objectively reasonable fear of persecution. ⁿ¹¹⁴

[*299] The *Agada* case demonstrates the tendency of IJs to discredit information submitted by asylum seekers that might contradict the State Department Country Reports. Agada submitted information gathered by the online Nigerian Media Monitor that suggested journalists were still being persecuted even after General Abacha's death in 1998. The IJ confessed to being unfamiliar with the Nigerian Media Monitor but nonetheless discredited its reports that journalists were still being harmed, in part because the administrative law judge concluded that "the journalists allegedly harmed were injured while attempting to report on dangerous but legitimate uses of police force." ⁿ¹¹⁵ Other cases reviewed also demonstrate the relative rarity of a credible subjective story of persecution coinciding with a Country Report documenting such incidents. ⁿ¹¹⁶

One of the primary pieces of subjective documentation required by immigration courts is evidence of a non-U.S. journalist's work. Although it seems likely journalists fleeing persecution in their native countries might not have access to their published or broadcast works, some Us place great importance on these pieces of documentary evidence and tend to discredit the stories of applicants who fail to produce them. For example, the Sixth Circuit in 2004 denied a petition for review filed by Guatemalan journalist Luis A. De Leon, largely because De Leon had failed to produce articles he wrote as a journalist. ⁿ¹¹⁷ Asylum decisions in other cases also have hinged on **[*300]** lack of production of published journalistic works. ⁿ¹¹⁸ Some applicants who failed to produce journalistic works have been denied asylum notwithstanding harrowing accounts of persecution. ⁿ¹¹⁹

The *Agada* case and others also demonstrate the difficulty under which asylum applicants operate with respect to their appeals in the federal circuit courts. For example, the Sixth Circuit explained that the abuse of discretion standard--generally called the "substantial evidence" standard in the immigration context--meant that the court would have to determine that no reasonable fact finder would have concluded as the IJ and BIA did. ⁿ¹²⁰ Notwithstanding the strong **[*301]** bias in favor of deferring to the decisions of IJs, particularly with respect to credibility determinations, some circuit courts have rejected the conclusions of Us that an asylum applicant was indeed credible. ⁿ¹²¹

For those non-U.S. journalists who overcome subjective and objective evidentiary requirements, credibility determinations in light of scarce evidence of journalistic product, and a limited standard of review on appeal, the

chances are better that a panel of circuit judges will find merit in an asylum application. Still, federal circuit judges universally do not view journalists as part of a particular social group in accordance with the statutory requirements for asylum. No case studied involved an explicit determination that journalists constituted a particular social group.ⁿ¹²² Even the six cases in which journalists successfully petitioned for judicial review of asylum denials did not hinge on particular social group inclusion; instead, those reversals were based on persecution on account of some other statutory ground, such as political opinion or ethnicity.

Journalists and the "Particular Social Group"

Clearly, under existing judicial tests, journalists do not constitute a particular social group for asylum purposes. Although few of the cases studied included explicit rejections of the social group argument (because most asylum applications were rejected on other grounds, such as lack of credibility), no cases explicitly held that journalists are part of a particular social group. Although some journalists may see their work as an important part of who they are, no circuit court even suggested that journalism might be an "immutable characteristic" that one could not change or something "so fundamental to individual identity or conscience that it ought not be required to be changed."ⁿ¹²³ Thus under the test applied by the BIA and [*302] several circuit courts, including the First Circuit, journalists do not fit the definition of a particular social group.

Under the Ninth Circuit definition in *Sanchez-Trujillo*, however, journalists might be a slightly better fit in the social group definition. That test focuses on "a voluntary associational relationship ... which imparts some common characteristic that is fundamental to their identity."ⁿ¹²⁴ Still, not even the Ninth Circuit has held that journalists meet the definition. For example, two members of a three-judge Ninth Circuit panel voted to deny an asylum appeal by a Russian Jewish journalist named Eugueni Bortnikov, who was beaten with a metal pipe because he would not give up a videotape depicting a coup attempt by an anti-Semitic political organization called Pamyat.ⁿ¹²⁵ The court concluded that he was beaten unconscious merely because he possessed the inculpatory videotape and not because he was a journalist; the two-judge majority also held that the group of Russian journalists was "too large and diverse a collection of individuals to qualify as a 'particular social group,'" within the meaning of the Immigration and Nationality Act.ⁿ¹²⁶

Even the dissenter in that case, Judge Richard Paez, did not argue Bortnikov was, as a journalist, a member of a particular social group. Instead, he noted that Bortnikov had voiced his political opposition to Pamyat before he was beaten and that Bortnikov and his family had been the target of religious hate speech; thus the dissent based its conclusion that Bortnikov merited asylum on religious and political persecution.ⁿ¹²⁷ Like Paez, those circuit judges who have looked favorably on journalists' asylum claims have done so not on the basis of journalism but rather political opinion, religion or another statutory ground. Some courts have suggested that journalism is inherently political, at least when it criticizes the performance of government.

Journalism and Political Opinion

It could be argued that persecuted journalists need not seek U.S. asylum protection based on the particular social group ground when they might more easily fit the asylum requirement for persecution [*303] based on political opinion. Although most U.S. journalists might deny their work is politically partisan,ⁿ¹²⁸ there is some evidence in the cases studied to conclude that persecuted international journalists do in fact fit within the realm of political persecution. In a 2000 case, for example, one Ninth Circuit panel held that a Pakistani journalist who was beaten and threatened in his newspaper office by political partisans unhappy with his coverage had been persecuted because of his political opinion.ⁿ¹²⁹ In that case, the panel concluded, Syed Zahid Hussain's twenty years as a newspaper editor at *Huriat* and later *Nawa Iwaqt*, both Urdu-language and politically independent newspapers, made clear that "[j]ournalism is work that overtly manifests a political opinion."ⁿ¹³⁰

In 1989, while Hussain worked at the *Huriat*, more than 100 members of the Mohajir Quami Movement (MQM) attacked the newspaper building, breaking windows with stones and shouting threats. Later that year members of MQM held the newspaper owner hostage and extracted a promise to publish pro-MQM news on the newspaper's front page.

Soon after, the newspaper stopped publishing. Thereafter, Hussain worked at *Nawa Iwaqt*. In 1991, members of the Punjabi Pakhpoon Intihad (PPI), a political group opposed to MQM, attacked Hussain in the newspaper office. He was detained until editors "ultimately agreed to publish PPI news on the back page of the newspaper." ⁿ¹³¹

The Ninth Circuit panel concluded that Hussain had been persecuted because PPI members thought he was a supporter of MQM and thus published pro-MQM news. The Ninth Circuit also made the important distinction that being persecuted for one's political opinion involves the persecutors' perceptions of one's political opinion, [*304] not whether the individual being persecuted actually holds the opinion:

[A]lthough Hussain believed that he was making politically-independent decisions when he decided what news to publish, the PPI believed that articles in the *Nawa Iwaqt* favored the MQM. Persecution because of an imputed political opinion, even if the petitioner does not actually hold that opinion, is a valid basis for asylum. ⁿ¹³²

This seems particularly pertinent to journalist asylum cases because even if journalists see themselves as objective and non-political, their persecutors might not. In a 2004 case, the Ninth Circuit drew the distinction that journalists' work to expose corruption was in fact a political statement, even though no particular political view might be espoused, as long as the journalists attempted to uncover systemic corruption as opposed to merely episodic corruption that might relate only to a single individual in political power. ⁿ¹³³ In that case, *Hasan v. Ashcroft*, the court granted a petition for review filed by a journalist from Bangladesh, primarily because the panel concluded that the IJ erred in concluding that the persecution of the journalist was not due to political opinion.

Afroza Hasan worked as a reporter for *Purnima*, a local newspaper in Bangladesh. She primarily wrote about women's issues and was active in Mohila Parishad, an organization that served women in crisis. She was also a member of the political party BNP, or Bangladesh Nationalist Party. ⁿ¹³⁴ In 1995, Hasan wrote an article critical of an associate of Abu Jaher, a local political and union leader. Jaher and his associate were members of the Awami League, a national political party in opposition to the BNP. Soon after publication of the article, Hasan was approached by the Jaher associate she wrote about and two other individuals, who threatened to "break my hand" and burn her with acid. ⁿ¹³⁵

[*305] Hasan was subsequently attacked numerous times, including more than once in a single night at her home. The attackers, who were identified as associates of Abu Jaher, or the "Chairman," ransacked Hasan's apartment and then broke into her parents' apartment, where they beat her father. Additionally, the attackers located Hasan's husband, who was hiding in a car, and beat him with sticks until he was unconscious. They eventually chased Hasan herself, causing her to fall and be injured, and they set fire to her bedroom. ⁿ¹³⁶ The next day *Purnima* published an account of these events, and the Chairman subsequently issued a wanted-style poster accusing Hasan of engaging in "anti-Islamic activities." ⁿ¹³⁷

Hasan and her husband entered the United States on six-month visas in 1999 and overstayed the visa period. The INS initiated removal proceedings; meanwhile, in Bangladesh, the Chairman's thugs had told Hasan's father that "[t]he day your daughter will land in ... Bangladesh that will be her last day." ⁿ¹³⁸ The Ninth Circuit eventually concluded that Hasan's work to expose corruption through the popular press was in fact a political statement. ⁿ¹³⁹ The court wrote:

The text of the article provided in the record reveals that, contrary to the IJ's characterization, Afroza did more than call the Chairman a "crook." She accused him of organizing a cadre of "terrorism, repression, and extortion," of "misappropriation of public money," of "collect[ing] tolls for his own while giving hookup connection[s] for water and gas lines," and of making his political office "an office of corruption." These are indisputably political issues. ⁿ¹⁴⁰

The panel concluded that Hasan's articles related not to a mere "personal vendetta" against the Chairman; instead, the panel suggested that a journalist who attempts to write about widespread corruption in government is engaging in an activity that is "by its very [*306] nature, political." ⁿ¹⁴¹ In all, five of the six journalists who succeeded on asylum

appeals in the cases studied did so because of persecution based on their political opinions; ⁿ¹⁴² the other case involved an Eritrean journalist who was fired from his Ethiopian government job and persecuted because of his ethnicity. ⁿ¹⁴³

While the Ninth Circuit has been outspoken in concluding that journalists' work is inherently political, at least two other circuits have denied petitions for review by journalists seeking asylum after exposing corruption. In 1999, the Sixth Circuit denied the asylum application of well-known Bulgarian journalist and author Jordan Gantchovski. ⁿ¹⁴⁴ The Court stated that even if Gantchovski was in danger of being harmed by those opposed to his investigatory work on the murder of anti-Communist author George Markov, he was not entitled to asylum because he was merely wrapped up in a nasty personal dispute rather than persecution based on politics or membership in a particular social group. ⁿ¹⁴⁵

[*307] Meanwhile, the Tenth Circuit in 1997 denied a petition for review filed by Oscar Garcia, a Guatemalan radio journalist who had spoken out against the illegal drug trade. ⁿ¹⁴⁶ As a result, he received threats and was subject to an assassination attempt by drug dealers. He was unconscious for several days after a drug dealer's car intentionally rammed him head-on. However, he was denied asylum by the IJ and BIA, who found his story not to be credible, and the Tenth Circuit stated that even if Garcia was the target of retaliation and violence by drug dealers, this persecution was not necessarily the result of his political opinion and thus asylum was not merited. ⁿ¹⁴⁷ However, journalists who do not qualify for asylum on the basis of persecution for political opinion might return to the social group membership argument in light of the BIA's new interpretation of the definition of that term.

Social Visibility and Particularity

In its January 2007 opinion in *In re A-M-E & J-G-U*, ⁿ¹⁴⁸ the BIA for the first time articulated the "social visibility" and "particularity" requirements within the definition of particular social group. Although future adjudications may refine these factors, social visibility seems to focus on whether members of a particular society perceive a certain social group as more likely targets of persecution than the general population. ⁿ¹⁴⁹ Meanwhile, particularity involves the distinctiveness of a particular group. ⁿ¹⁵⁰

Although somewhat speculative at this point, a conclusion seems reasonable that journalists might be able to make more headway with the new BIA factors than under the old BIA/First Circuit test for particular social group. Although it may not be possible to say conclusively whether state-sanctioned persecution of journalists has increased [*308] in recent years, recent conflicts in Iraq and other parts of the world have increased public awareness of the dangers of journalistic work. According to one press advocacy group, 93 journalists have been killed in Iraq since 2003. ⁿ¹⁵¹ The Committee to Protect Journalists' 2006 summary report "Attacks on the Press" documented several pieces of recent evidence indicating that persecution of journalists has entered the public consciousness: Venezuelan President Hugo Chavez threatened to pull broadcasters' licenses after accusing them of trying to divide the nation; Russian President Vladimir Putin signed a measure including slander of public officials within the definition of extremism or terrorism; and the Israeli government announced that journalists would be targeted if driving in southern Lebanon. ⁿ¹⁵²

In short, in many societies, the public is likely aware that journalists constitute a specific group of people that faces unique dangers and, possibly, persecutions. This might favor journalists arguing they are part of a socially visible group under the meaning of the BIA's 2007 *In re A-M-E & J-G-U* case. In the federal circuit asylum cases studied, even though the new BIA factors were not yet in place, there is some evidence that circuit judges considered journalists to be part of a socially visible group. For example, a Haitian broadcast journalist named Lamonste Jean Baptiste claimed he was attacked in December 1998 by members of Lavalas, the party of former President Jean-Bertrand Aristide, after reporting on an opposition press conference. ⁿ¹⁵³ In an attempt to discredit him, the U.S. Justice Department obtained a document from the Haitian Embassy claiming that Baptiste was "not well known" as a journalist in Haiti and he "did not have political problems" there. ⁿ¹⁵⁴

The U.S. Court of Appeals for the Second Circuit ultimately reversed a decision by the BIA that the document undermined Baptiste's credibility; the court reasoned that the Haitian Embassy document actually supported his claims because it showed that Baptiste did indeed work as a radio journalist in Haiti. The Second Circuit noted that "[t]he

Human Rights Watch report in the record confirmed that members of the press were frequently targeted in Haiti, and did not suggest that attacks were limited to the most [*309] prominent journalists." ⁿ¹⁵⁵ Thus, the court provided support for the proposition that journalists generally, even if not particularly famous as individuals, are part of a socially visible group that might become targets for government persecution. ⁿ¹⁵⁶

Still, the bigger hurdle might be BIA's new particularity requirement, given that distinguishing or defining journalists would not be an easy task. Although beyond the scope of this article, the question of who may be defined as a journalist has been much discussed in the last several years as part of the larger debate about whether journalists are entitled to a privilege not to disclose confidential sources in legal proceedings. ⁿ¹⁵⁷ Although the issue remains unresolved in the United States, at least, two things have become clear: first, defining journalists is very difficult; and, second, government efforts to define journalists raise constitutional free-expression concerns. ⁿ¹⁵⁸

At least in some countries, however, requirements for or regulations on journalists that would seem unconstitutional under the First Amendment might actually help define journalists for the purpose of the BIA's particularity requirement in the asylum context. For example, in more than a dozen Latin American countries, including [*310] Costa Rica and Venezuela, there has long been a legal requirement that journalists belong to a *colegio*, or professional association. ⁿ¹⁵⁹ Functionally, then, journalists in those countries are easy to distinguish by virtue of the simple check of whether they have met the requirements to become members of the *colegio*. Under one *colegio* system representative of others, all journalists had to join the association and abide by a certain code of ethics or they could be forbidden from the profession. ⁿ¹⁶⁰

In the cases studied, federal circuit judges seemed willing to allow journalist asylum seekers to define themselves, as long as there was some evidence in the form of stories published or broadcast segments produced. ⁿ¹⁶¹ This view is in line with that of commentators who have argued immigration authorities should defer to the self-definition of asylum seekers. ⁿ¹⁶² The most common sought-after verification by circuit judges were copies of journalistic work, ⁿ¹⁶³ but some judges suggested other items, such as newspaper employment records, might have been enough. ⁿ¹⁶⁴ One court, though, was not persuaded by a class ring showing that an asylum seeker was once a journalism major. ⁿ¹⁶⁵ Interestingly, some IJs seem to impose a higher-than-normal burden [*311] of articulation on journalists, who presumably have spent their professional lives telling stories and thus should be able to relate clearly their own persecution stories. ⁿ¹⁶⁶

Overall, there is no certainty yet that journalists seeking asylum will succeed in persuading IJs, the BIA and appellate judges that they are, in fact, members of particular social group because their profession has "social visibility" and "particularity." These factors have yet to be applied extensively by the BIA and the appellate courts, and, thus, it is not yet clear how expansive they will be in including potential social groups such as journalists. Still, based on a close reading and the little available evidence, it seems the new BIA factors will expand somewhat the definition of particular social group.

CONCLUSION

The thirty journalist asylum cases surveyed provide only a small picture of the realities of asylum, although they do represent the readily available federal circuit cases involving asylum claims by non-U.S. journalists. Future research could explore further the treatment of non-U.S. journalists in the U.S. asylum system and continue to analyze whether that treatment is appropriate. Still, it appears journalists are particularly vulnerable to persecution because the nature of their work is to investigate and write about issues that tend to make government officials unhappy, if not violent. Particularly when they cover official corruption, journalists place themselves at risk of persecution of a type that may not be accounted for in the U.S. Immigration and Nationality Act.

Of thirty relatively recent federal circuit cases involving asylum applications by non-U.S. journalists, denials of asylum were upheld in twenty-four cases and reversed in only six cases. It is unknown how many non-U.S. journalists during this time might have gained asylum approval through either an affirmative or defensive application. In case of a

grant of asylum, the applicant would have no reason to file a petition for review in the U.S. Court of Appeals, and thus no record of the case would appear in the federal circuit databases. To find grants of asylum to journalists, research would have to focus on [*312] decisions of Us and the BIA, most of which are not published in readily available databases. Even then, affirmative applications granted by an asylum officer would not be discovered.

Notwithstanding the relatively small number of cases covered and problems documenting the entire universe of journalist asylum claims, it is clear that the federal courts do not consider journalists members of a "particular social group" under the Immigration and Nationality Act. Still, some circuit court judges have concluded that journalists' work, particularly when it involved investigation of systemic government corruption, was inherently political and thus provided grounds for asylum under the INA. Congress, the Department of Homeland Security and the Department of Justice should be particularly sensitive to the merits of journalists' asylum claims. Whether described as persecution based on political opinion or social group membership, the targeting of journalists who work to uncover and publicize official corruption should be recognized as a basis on which asylum may be granted.

However, given the current U.S. climate regarding immigration, it seems unlikely that any political actors will be willing to take action that would be perceived to be "soft" on illegal immigrants. While perhaps somewhat understandable, the post-September 11 anti-immigrant sentiment has had real consequences for individuals and families. Particularly when it comes to U.S. attempts to promote democracy abroad, neither administration goals nor individual interests are served by removing from the United States non-U.S. journalists who already have experienced that their efforts to be catalysts for change in their countries will be met with strong opposition and, sometimes, government-sanctioned violence. In the end, the United States' failure to see the value of accommodating journalist asylum seekers will only have a negative effect on the U.S. interests of promoting democracy and protecting national security.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Immigration LawAsylum & Related ReliefAdministrative ProceedingsImmigration LawAsylum & Related ReliefEligibilityInternational LawSovereign States & IndividualsAsylum

FOOTNOTES:

n1 *Pergega v. Gonzales*, 417 F.3d 623 (6th Cir. 2005).

n2 *Id.* at 625.

n3 *Pergega* reported that he was detained by police and others more than a half-dozen times for interrogation, torture and beatings. He also recounted that his life was threatened numerous times, his wife was sexually assaulted, his office was blown up, and his son had gasoline thrown on him in an attempt to set him afire. Although some of these attacks were apparently carried out by adherents of a rival political party, *Pergega* testified that most of them were conducted by police or at the order of government officials. *Id.* at 625-27.

n4 *Id.* at 627-28.

n5 *Id.* at 629.

n6 *Id.*

n7 *See infra* notes 42-43.

n8 *See* 8 U.S.C. § 1101(a)(42)(A) (2006).

n9 8 U.S.C. § 1101 *et seq.* The Immigration and Nationality Act was adopted by Congress in 1952 to collect various provisions of immigration law. The act has subsequently been amended numerous times. It is part of the U.S. Code, but many immigration lawyers refer to and cite to the INA more frequently than the U.S. Code. Throughout this article, citations to the INA refer to the 2006 version, *available at* <http://www.uscis.gov/propub/ProPubVAP.jsp?dockey=baeb6daf5705c4f8629f8b6ea9f7c64d> (last visited Feb. 12, 2007). Much immigration law is administrative in nature and maybe found in the Code of Federal Regulations at 8 C.F.R. § 1.1 *et seq.*, *available at* <http://www.uscis.gov/propub/ProPubVAP.jsp?dockey=4a7b5efa3ac64c3b352bd97b8937ce80> (last visited Feb. 12, 2007).

n10 The decisions of immigration judges are not published consistently or, generally speaking, publicly available in any format. Some Board of Immigration Appeals decisions are published and are available in print and electronic formats, but coverage is spotty. Thus, it was determined that the Courts of Appeal opinions--even though many are technically designated as non-precedential--offered the best opportunity to explore the topic of whether journalists are members of a particular social group. This methodology is limited in that only a certain class of BIA opinions (namely, those in which the immigrant petitioners lost) is appealed to the Courts of Appeal. Still, even this limited view of the topic provides an opportunity to gain important insights and make conclusions about an increasingly visible and publicly debated topic.

n11 *Immigration: The Perpetual Controversy*, ATLANTIC ONLINE, Apr. 10, 2006, at <http://www.theatlantic.com/doc/200604u/immigration-flashback> (last visited Feb. 14, 2007).

n12 Francis A. Walker, *Restriction of Immigration*, ATLANTIC MONTHLY, June 1896, at 829.

n13 *Immigration*, *supra* note 11. *See also* John W. Foster, *The Chinese Boycott*, ATLANTIC MONTHLY, Jan. 1906, at 121-22 ("[T]he citizens or subjects of the foreign governments named are guaranteed the full and perfect protection of their persons and property in the same measure and under the same conditions as citizens of the United States.")

n14 *Immigration*, *supra* note 11. *See also* James Fallows, *Immigration: How It's Affecting Us*, ATLANTIC MONTHLY, Nov. 1983, at 45-68, 85-106.

n15 Associated Press, *U.S. Border Fence Plan Upsets Mexicans*, at <http://www.nytimes.com/aponline/world/AP-Mexico-Border-Fence.html> (Oct. 5, 2006) (reporting that, on Oct. 4, 2006, President George W. Bush signed into law a bill in which Congress allocated more than \$ 1 billion for border security measures, including a 700-mile wall).

n16 Rick Lyman, *New Data Shows Immigrants' Growth and Reach*, N.Y. TIMES, Aug. 15, 2006, at A1.

n17 *Id.*

n18 Nina Bernstein, *Immigration Judges Facing Yearly Performance Reviews*, N.Y. TIMES, Aug. 10, 2006, at A14.

n19 *Id.*

n20 See, e.g., Noreen S. Ahmed-Ulla & Jon Yates, *Judges Fumble Asylum Cases*, CHICAGO TRIB., Sept. 24, 2006, at A1 (documenting the deportation from the United States of a former Sudanese opposition leader who faced threats, attacks and potential death in his home country because of his political opinion).

n21 Rachel L. Swarns, *Study Finds Disparities in Judges' Asylum Rulings*, N.Y. TIMES, July 31, 2006, at A15.

n22 See Transactional Records Access Clearinghouse, *Immigration Judges*, at <http://trac.syr.edu/immigration/reports/160/>.

n23 Swarns, *supra* note 21, at A15.

n24 *Id.*

n25 *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

n26 *Id.* at 829. In the case before the Seventh Circuit, Judge Posner noted that immigration authorities had "ordered an alien who is married to a U.S. citizen removed (deported) because he failed to produce a document that was both peripheral to his claim to be allowed to remain in this country by virtue of his marriage and already in the possession of the immigration authorities." *Id.* at 830.

n27 Pub. L. No. 107-296, 116 Stat. 2135 (2002), codified as amended at 6 U.S.C. § 101 *et seq.*

n28 See, e.g., USCIS, About Us, at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2af29c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextchannel=2af29c7755cb9010VgnVCM10000045f3d6a1RCRD> (last visited Feb. 12, 2007).

n29 See, e.g., ICE, About Us, at <http://www.ice.gov/about/index.htm> (last visited Feb. 12, 2007).

n30 See Peter Schey, *U.S. Immigration Policies and the War on Terrorism*, 29-Sep. L.A. LAW. 12, 17 (2006).

n31 *Id.* (quoting Remarks of Arthur E. Dewey, Assistant Secretary for Population, Refugees and Migration, to the American Society for International Law, Apr. 3, 2003, available at <http://www.state.gov/g/prm/rls/2003/37906.htm>).

n32 The Real ID Act was adopted by Congress as an attachment to the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). One author described the asylum changes contained in the Real ID Act this way:

Congress further added to the difficulties faced by asylum seekers when it enacted the REAL ID Act in 2005. Among other things, the act increases the burden of proof for an applicant seeking asylum or objecting to removal by requiring the applicant to actively demonstrate that his or her membership in a protected class (based on race, religion, nationality, social group, or political opinion) was or will be a central reason for his or her persecution. The REAL ID Act also allows immigration judges who decide asylum claims to demand corroborating evidence even for otherwise credible testimony--evidence most asylum seekers have great difficulty obtaining. No court may reverse findings concerning availability of corroborative evidence, and no court may review any discretionary judgment, decision, or action made in removal proceedings.

Schey, *supra* note 30, at 17 (internal citations omitted).

n33 See INA § 208(b)(1) (2006) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures....") (emphasis added).

n34 INA § 208(c)(2) (2006).

n35 INA § 208(b)(2) (2006) (Among other reasons, one may be disqualified for having assisted in the persecution of others, for having been convicted of certain serious crimes, for having been involved in terrorist activity and for, in the eyes of the Attorney General, posing "a danger to the security of the United States.").

n36 INA § 101(a)(42)(A) (2006). *See also* INA § 208(b)(1)(B)(i) (2006). The statute specifically mentions forced sterilization or forced abortion as grounds for asylum because of persecution on account of political opinion.

n37 *See* Kirsten Schlenger, *The Nuts and Bolts of Representing an Asylum Applicant*, 1080 PLI/CORP. 209, 212 (1998).

n38 *Id.*

n39 The United States Country Reports on Human Rights Practices are released every February by the Department of State, in accordance with the requirements of the Foreign Assistance Act of 1961 as amended. The reports initially were required as a way to monitor the human rights practices in countries receiving U.S. aid. In addition to countries receiving aid, the law requires a report on any country that is a member of the United Nations. However, the State Department frequently includes reports on countries that do not fall into either of these categories. The reports are created at the embassy level. Each division within an embassy is asked to supply information regarding any human rights violations. The embassies use a variety of sources including, "government officials, jurists, armed forces sources, journalists, human rights monitors, academics, and labor activists." <http://www.state.gov/g/drl/rls/hrrpt/2005/61551.htm> (last visited Feb. 12, 2007). Once the embassies have completed their drafts, the reports are sent to the Bureau of Democracy, Human Rights and Labor. The drafts are then edited again at the bureau level, this time using information from "reports provided by U.S. and other human rights groups, foreign government officials, representatives from the United Nations and other international and regional organizations and institutions, experts from academia, and the media." *Id.* Today, the State Department lists the goals of the country reports as helping to shape foreign policy, allocate resources, and promote the observance of international human rights.

n40 *See* Schlenger, *supra* note 37, at 213.

n41 *Id.* at 213-14.

n42 In fiscal years 2000 to 2004, 251,000 affirmative asylum cases were filed with USCIS. During the same period, approximately 400,000 cases, some of which were part of a backlog prior to 2000, were resolved. Of the cases resolved from fiscal 2000 to 2004, 19% of the affirmative asylum applications were approved, 2% were denied (meaning the applicants, who were present legally in the United States, were not granted asylum but were allowed to remain in the country), and 31% were not granted asylum (meaning the applicants, who were not present legally in the United States, were ordered removed). The 31% of applicants who were ordered removed after having their applications not approved were sent to the Executive Office for Immigration Review, meaning they were given another opportunity to establish their eligibility for asylum before an immigration judge and the Board of Immigration Appeals. Meanwhile, 48% of affirmative asylum applications resolved from fiscal 2000 to 2004 were labeled "Otherwise Closed," meaning, among other things, applications were withdrawn, abandoned or determined to be improper for having been filed after the deadline of within one year of arrival in the United

States. *See* Transactional Records Access Clearinghouse, The Asylum Process, at <http://trac.syr.edu/immigration/reports/159/> (last visited Feb. 12, 2007).

n43 From fiscal year 2001 to 2005 defensive asylum applications were filed on behalf of approximately 311,000 individuals. During this same period, approximately 300,000 defensive asylum cases were resolved. Of these, 20% were granted asylum, 32% were not, and 48% were withdrawn, abandoned or reached an alternate resolution. *See id.*

n44 *See generally* Schlenger, *supra* note 37, at 237.

n45 The application, Form I-589 (Application for Asylum and Withholding of Removal), consists of 12 pages--there are another 11 pages of instructions--and must be filed either at the appropriate regional CIS Service Center (in affirmative applications) or in the Immigration Court (in defensive applications). No filing fee is required. USCIS, Application for Asylum and Withholding of Removal, at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=de9814836a14d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD> (last visited Feb. 12, 2007).

n46 USCIS, Form I-589, at <http://www.uscis.gov/files/form/I-589.pdf>, at *6 (last visited Feb. 12, 2007).

n47 Approximately 71% of the cases that enter the Department of Justice's Executive Office for Immigration Review, which consists of the EOIR and the BIA, come from referrals by Asylum Officers who did not approve affirmative asylum applications. Meanwhile, 29% of the cases in EOIR come from Department of Homeland Security arrests of illegal immigrants or the "expedited removal" process, in which a single DHS officer summarily orders an immigrant, who is often found in local county jails through arrest records, removed from the United States. When the DHS officer interviews an immigrant, the officer is required to determine whether the immigrant has a "credible fear" of persecution if removed from the United States, and, if so, the case automatically becomes a defensive asylum application. TRAC, The Asylum Process, *supra* note 42. For an analysis of how expedited removal and the one-year deadline for filing asylum applications have potentially deprived thousands of deserving asylum seekers of gaining asylum, *see generally* Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 GEO. IMMIGR. L.J. 1 (2001).

n48 *See generally* Schlenger, *supra* note 37.

n49 *See generally id.*

n50 See Transactional Records Access Clearinghouse, *Asylum Law, Asylum Seekers and Refugees: A Primer*, at <http://trac.syr.edu/immigration/reports/161/> (last visited Feb. 12, 2007).

n51 The definition of a refugee is essentially the same for United Nations purposes as the definition of a person entitled to asylum for the purposes of U.S. immigration law, with the obvious difference being that U.S. asylum recipients are required to be present in the United States at the time of application while refugees generally are not. In fact, the definition of an asylum recipient in U.S. immigration law was taken from the United Nations Convention Relating to the Status of Refugees. Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150; the United Nations Protocol Relating to the Status of Refugees; Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. See also T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 924 n.4-5 (1992).

n52 TRAC, "Asylum Law," *supra* note 50.

n53 *Id.*

n54 See *supra* notes 42-43 and accompanying text.

n55 TRAC, *Asylum Law*, *supra* note 50.

n56 Transactional Records Access Clearinghouse, *Immigration Judges*, at <http://trac.syr.edu/immigration/reports/160/> (last visited Feb. 12, 2007).

n57 *Id.*

n58 *Id.*

n59 *Id.*

n60 *Id.* See also *supra* note 23 and accompanying text.

n61 See, e.g., Michele R. Pistone, *Assessing the Proposed Refugee Protection Act: One Step in the Right Direction*, 14 GEO. IMMIGR. L.J. 815, 816 (2000) (noting that among the classes of individual seeking U.S. asylum were "journalists from countries such as Congo who escaped government-sanctioned persecution for criticizing their government's actions" but not engaging in analysis whether the term "particular social group" included journalists).

n62 See generally B. J. Chisholm, Comment, *Credible Definitions: A Critique of U.S. Asylum Law's Treatment of Gender-Related Claims*, 44 HOW. L. J. 427 (2001).

n63 *Id.* at 429.

n64 See Fatima Mohyuddin, *United States Asylum Law in the Context of Sexual Orientation and Gender Identity: Justice for the Transgendered?*, 12 HASTINGS WOMEN'S L.J. 387 (2001); Jin S. Park, *Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy*, 42 U.C.L.A. L. REV. 1115 (1995).

n65 Arlene Kanter & Kristin Dadey, *The Right to Asylum for People With Disabilities*, 73 TEMP. L. REV. 1117 (2000).

n66 See generally Laura Isabel Bauer, *They Beg For Our Protection and We Refuse: U.S. Asylum Law's Failure to Protect Many of Today's Refugees*, 79 NOTRE DAME L. REV. 1081 (2004).

n67 Krishna R. Patel, *Recognizing the Rape of Bosnian Women as Gender-Based Persecution*, 60 BROOKLYN L. REV. 929 (1994).

n68 Ryan Goodman, Note, *The Incorporation of International Human Rights Standards Into Sexual Orientation Asylum Claims: Cases of Involuntary "Medical" Interventions*, 105 YALE L.J. 255 (1995).

n69 Linda A. Malone, *Beyond Bosnia and In re Kasinga: A Feminist Perspective on Recent Developments in Protecting Women From Sexual Violence*, 14 B.U. INT'L L.J. 319 (1996); Karen Musalo, *Gender Jurisprudence in the United States: Developments in Asylum Laws Relating to the Protection of Women*, 27 SAN FRANCISCO ATT'Y 25 (2001).

n70 Jill C. Stroguludis, Note, *The Refugee Act of 1980: An Empty Promise to Exploited Children*, 29 J. MARSHALL L. REV. 995 (1996).

n71 Laura E. Hortas, Note, *Asylum Protection for the Mentally Disabled: How the Evolution of Rights for the Mentally Ill in the United States Created a "Social Group,"* 20 CONN. J. INT'L L. 155 (2004).

n72 Cecilia M. Bailliet, *Assessing Jus Ad Bellum And Jus In Bellum Within the Refugee Status Determination Process: Contemplations on Conscientious Objectors Seeking Asylum*, 20 GEO. IMMIGR. L.J. 337 (2006).

n73 Rebecca O. Bresnick, *Reproductive Ability As A Sixth Ground of Persecution Under the Domestic and International Definitions of Refugee*, 21 SYRACUSE J. OF INT'L L. & COM. 121 (1995).

n74 See, e.g., Parish, *supra* note 51, at 939 ("Article III courts have, for the most part, displayed a reluctance or inability to explain how they decide the legitimacy of a claimed social group.").

n75 801 F.2d 1571 (9th Cir. 1986).

n76 The United Nations High Commissioner for Refugees Handbook defines "particular social group" as "persons of similar background, habits or social status." See Kanter & Dadey, *supra* note 65, at 1141.

n77 801 F.2d at 1576. The Ninth Circuit approach has been described a four-part test: (1) Is the group cognizable? (2) Does the alien qualify as a member? (3) Has the group been targeted because of characteristics as a group? (4) Are "special circumstances" present which permit *per se* finding and which do not require findings of individual persecution of members of group? IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 306 (8th ed. 2002).

n78 801 F.2d at 1576.

n79 *Id.*

n80 *Id.* at 1577.

n81 *Id.*

n82 Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991).

n83 *Id.*

n84 *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985). *See also* *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003); *Lwin v. INS*, 144 F.3d 505 (7th Cir. 1998); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

n85 766 F.2d at 626.

n86 19 I&N Dec. 211, 233 (BIA 1985).

n87 *Id.*

n88 Even after *Matter of Acosta*, the board searched for ways to avoid focusing directly on whether certain claimants were members of a particular social group that merited asylum protection. For example, the BIA decided that an El Salvadoran police officer had not demonstrated eligibility for asylum, not because he was not a member of a particular social group but because he had not demonstrated that his fear of persecution was "on account of" an eligible statutory ground. *See Matter of Fuentes*, 19 I&N Dec. 658, 661 (BIA 1988).

n89 *Matter of Leon-Orosco and Rodriguez-Colas*, 19 I&N Dec. 136 (BIA 1983; Atty. Gen. 1984).

n90 *Id.* at 141.

n91 *Id.* at 152 ("I am reluctant to substitute my judgment for that of the Board to insist that the Board provide an exegesis on the phrase 'membership in a particular social group' when the Board did not feel that such was necessary.").

n92 *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989).

n93 *In re R-A-*, 22 I&N Dec. 906 (BIA 1999).

n94 *See* Chisholm, *supra* note 62, at 443 n.96. The regulation, as proposed, stated:

(1) A particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it. The group must exist independently of the fact of persecution. In determining whether an applicant cannot change, or should not be expected to change, the shared characteristic, all relevant evidence should be considered, including the applicant's individual circumstances and information country conditions information about the applicant's society.

(2) When past experience defines a particular social group, the past experience must be an experience that, at the time it occurred, the member either could not have changed or was so fundamental to his or her identity or conscience that he or she should not have been required to change it.

(3) Factors that may be considered in addition to the required factors set forth in paragraph (b)(2)(i) of this section, but are not necessarily determinative, in deciding whether a particular social group exists include whether:

(i) The members of the group are closely affiliated with each other;

(ii) The members are driven by a common motive or interest;

(iii) A voluntary associational relationship exists among the members;

(iv) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question; (v) Members view themselves as members of the group; and

(vi) The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.

Id. (quoting Asylum and Withholding Definitions, 65 Fed. Reg. 76,588-98 (2000) (to be codified at 8 C.F.R. § 208.15(c)) (proposed Dec. 7, 2000)).

n95 *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990).

n96 *In re Kasinga*, 21 I&N Dec. 357 (BIA 1996).

n97 *In re H-*, 21 I&N Dec. 337 (BIA 1996).

n98 In re C-A-, 23 I&N Dec. 951 (BIA 2006) (holding that a group of former Colombian informants about Cali drug cartel activities was not sufficiently recognizable in Colombian society to merit social group status).

n99 In re A-M-E & J-G-U, 24 I&N Dec. 69 (BIA 2007).

n100 *Id.* at 73.

n101 *Id.* at 74-76.

n102 *See supra* notes 82-83 and accompanying text.

n103 *Id.* at 75.

n104 *Id.* at 75 n.6.

n105 *See id.*

n106 *Id.* at 76.

n107 *Id.*

n108 *Id.*

n109 These cases were located using several search strings in both Westlaw and Lexis databases for federal court opinions. For example, the search terms "journalis! /p asylum" produced thirty-eight documents--twenty-one of which were ultimately deemed relevant--in the Westlaw database "im-cs." The search terms "particular social group" and "journalist" produced forty-five cases in the Lexis "cta" database, and approximately four of those were deemed relevant and non-repetitive. The remainder of the cases were found in the same database using the search terms "particular social group" and "reporter" or "particular social group" and "editor" or "particular social group" and "publisher." Although many of the cases were not formally published because circuit judges deemed them to lack some special precedential quality, the dispositions are nevertheless valuable in that they provide virtually the most prominent available grounds on which to base conclusions about the federal courts' treatment of asylum issues.

n110 *Hasani v. Gonzales*, No. 04-3561, 2006 U.S. App. LEXIS 25453 (2d Cir. Oct. 6, 2006) (unpublished opinion); *Ismail v. Bureau of Immigration and Customs Enforcement*, No. 05-9591, 2006 U.S. App. LEXIS 18408 (10th Cir. July 19, 2006) (unpublished opinion); *Pepic v. Gonzales*, No. 05-4268, 2006 U.S. App. LEXIS 11703 (6th Cir. May 8, 2006) (unpublished opinion); *Porras v. U.S. Att'y Gen.*, No. 06-13460, 2006 U.S. App. LEXIS 30759 (11th Cir. Dec. 13, 2006) (unpublished opinion); *Quintero v. Gonzales*, No. 03-74362, 2006 U.S. App. LEXIS 16880 (9th Cir. June 30, 2006) (unpublished opinion); *Jalloh v. Gonzales*, 423 F.3d 894 (8th Cir. 2005); *Pena v. U.S. Att'y Gen.*, No. 04-13414, 2005 U.S. App. LEXIS 10977 (11th Cir. June 10, 2005) (unpublished opinion); *Agada v. Ashcroft*, 368 F.3d 867 (8th Cir. 2004); *De Leon v. INS*, No. 02-4148, 2004 WL 1088243 (6th Cir. May 12, 2004) (unpublished decision); *Dushi v. Ashcroft*, No. 03-3374, 2004 WL 2030084 (7th Cir. Aug. 30, 2004) (unpublished order); *Faqee v. INS*, No. 02-4457, 2004 WL 1202955 (6th Cir. May 28, 2004) (unpublished order); *Stoev v. Ashcroft*, No. 02-4473, 2004 WL 232729 (6th Cir. Feb. 2, 2004) (unpublished disposition); *Tchokothe v. Ashcroft*, No. 03-3596, 2004 WL 2316615 (6th Cir. Sept. 23, 2004) (unpublished opinion); *Bortnikov v. INS*, No. 02-70279, 2003 WL 1793389 (9th Cir. Apr. 3, 2003) (unpublished decision); *Mekshi v. Ashcroft*, No. 02-3339, 2003 WL 1904547 (3d Cir. Apr. 21, 2003); *Alam v. INS*, No. 01-70820, 2002 WL 1272127 (9th Cir. June 7, 2002) (unpublished decision); *Roman-Fernandez v. INS*, No. 01-70477, 2002 WL 661725 (9th Cir. Apr. 22, 2002) (unpublished disposition); *Oudeh v. INS*, No. 00-70843, 2001 WL 1440836 (9th Cir. Nov. 14, 2001) (unpublished disposition); *Gantchovski v. INS*, No. 97-3916, 1999 WL 313749 (6th Cir. May 6, 1999) (unpublished disposition); *Lingad v. INS*, No. 9770370, 1999 WL 50903 (9th Cir. Jan. 21, 1999) (unpublished opinion); *Garcia v. INS*, No. 96-9523, 1997 WL 299338 (10th Cir. June 5, 1997) (unpublished disposition); *Santos v. INS*, Nos. 96-70065, 96-71122, 1997 WL 547987 (9th Cir. Aug. 28, 1997) (unpublished disposition); *Milosevic v. INS*, 18 F.3d 366 (7th Cir. 1994); *Momalife v. INS*, No. 92-2048, 1992 WL 389224 (7th Cir. Dec. 30, 1992) (unpublished disposition).

n111 *Baptiste v. U.S. Citizenship & Immigration Services*, No. 05-5954, 2006 WL 1668068 (2d Cir. June 13, 2006) (unpublished decision); *Woldemichael v. Gonzales*, No. 03-72610, No. 04-74022, 2006 U.S. App. LEXIS 21572 (9th Cir. Aug. 21, 2006) (unpublished opinion); *Pergega v. Gonzales*, 417 F.3d 623 (6th Cir. 2005); *Hasan v. Ashcroft*, 380 F.3d 1114 (9th Cir. 2004); *Samsonov v. Ashcroft*, No. 02-74315, 2004 WL 1238277 (9th Cir. June 3, 2004) (unpublished disposition); *Hussain v. INS*, No. 98-70454, 2000 WL 1523100 (9th Cir. Feb. 8, 2000) (unpublished disposition).

n112 Virtually by definition, the courts of appeal opinions come in cases in which the applicants' asylum claims were denied by immigration authorities. Claimants unsuccessful at the BIA level may file a petition for review in the court of appeals, and thus the cases studied may be inherently different than, for example, cases in which immigration officials determine in the first instance to grant asylum applications.

n113 *Agada v. Ashcroft*, 368 F.3d 867, 867-68 (8th Cir. 2004). While working as a senior producer for Radio Nigeria from 1978 to 1991, Agada joined the Nigerian Union of Journalists, which frequently voiced its opposition to the Nigerian government. In 1985, Agada reported that the government had secretly enrolled Nigeria in the Organization of Islamic States and thus would be required to declare Islam the country's official religion. As a result of his reporting work on this story, which was not challenged as inaccurate, Agada was demoted to a position in the library at Radio Nigeria. After his U.S. visitor's visa expired, Agada sought asylum but the then-named Immigration and Naturalization Service initiated removal proceedings against him in 1998. *Id.*

n114 *Id.* The IJ concluded that since General Abacha had died in mid-1998, the Nigerian government had ceased ignoring its constitutional guarantees of freedom of speech and press. Under the new president, General Abdulsalami Abubakar, conditions had apparently become more favorable to journalists.

n115 *Id.* at 870.

n116 *See, e.g., Faqee v. INS*, No. 02-4457, 2004 WL 1202955 (6th Cir. May 28, 2004) (unpublished order) (acknowledging that a Yemeni journalist had been arrested, interrogated and professionally punished for writing two articles critical of the Yemeni government but denying asylum because of a perceived lack of credibility and absence of evidence in the State Department Country Report that the government of Yemen was prone to target journalists); *Roman-Fernandez v. INS*, No. 01-70477, 2002 WL 661725 (9th Cir. Apr. 22, 2002) (unpublished disposition) (notwithstanding objective evidence of general political persecution in Colombia, denying a petition for review of a Colombian DJ and TV talk show host based on changed country conditions); *Santos v. INS*, Nos. 96-70065, 96-71122, 1997 WL 547987 (9th Cir. Aug. 28, 1997) (unpublished disposition) (notwithstanding a determination of credibility and thus subjective fear of persecution, denying a petition for review from a Filipino journalist who was attacked three times in 1991 for writing articles critical of the Aquino government and in favor of the Marcos Loyalist Party, and noting lack of evidence of persecution of journalists in Country Reports).

n117 *De Leon v. INS*, No. 02-4148, 2004 WL 1088243 (6th Cir. May 12, 2004) (unpublished decision). De Leon said he had been persecuted in Guatemala due to the political opinions he expressed while writing for an organization called The Institution for Transformation of Agrarian Reform. *Id.* at *1. This organization, an opponent of the Guatemalan government, advocated for peasants. In 1990, a guerilla leader demanded that De Leon publish a pro-guerilla bulletin but he refused. He was subsequently followed and threatened by guerilla leaders and also received visits from gun-wielding government intelligence officers. But a U.S. immigration judge did not believe De Leon's story to be credible, in part because De Leon could not produce articles he wrote as a journalist. *Id.* The Board of Immigration Appeals, in a one-line summary decision without any independent analysis, and the Sixth Circuit deferred to the IJ and affirmed the IJ's decision to deny De Leon's asylum application. *Id.*

n118 *See, e.g., Stoev v. Ashcroft*, No. 02-4473, 2004 WL 232729 (6th Cir. Feb. 2, 2004) (unpublished disposition) (denying a petition for review from a Bulgarian journalist who had endured threats after writing articles critical of corruption in the Bulgarian government, and

noting an adverse credibility determination in light of failure to produce copies of articles he had written); *Tchokothe v. Ashcroft*, No. 03-3596, 2004 WL 2316615 (6th Cir. Sept. 23, 2004) (unpublished opinion) (denying a petition for review submitted by journalist from Cameroon who had published articles and a music album critical of the government of Cameroon, and noting failure to corroborate story with copies of critical articles); *Lingad v. INS*, No. 9770370, 1999 WL 50903 (9th Cir. Jan. 21, 1999) (unpublished opinion) (denying a petition for review filed by a former journalist from the Philippines who said he was persecuted for writing articles critical of revolutionary groups there, and noting an adverse credibility determination in light of failure to corroborate his status as a journalist in the Philippines or submit copies of articles written there).

n119 For example, in 2005 the Eighth Circuit denied a petition for review filed by Sallieuh Jalloh, a native and citizen of Sierra Leone. *Jalloh v. Gonzales*, 423 F.3d 894 (8th Cir. 2005). Jalloh told a sickening story of abuse at the hands of military and government officials in Sierra Leone, but the IJ and BIA discredited his story over inconsistencies not directly related to his claims of persecution. Jalloh said he was a member of the Fula tribe, a minority group, and that his father was part of the ruling All People's Congress, which was overthrown in a coup in 1992. During the ensuing rule by Valentine Strasser, Jalloh's father was imprisoned and Jalloh moved to another part of the country, where he began to work as a journalist for a publication called *New Light Press* in 1994. After his first story was published, Jalloh was beaten on the head in the newspaper office by a military officer wielding the butt of a gun. The blow opened a cut that required four stitches. Jalloh then told a bone-chilling story involving additional brutal persecution. The IJ denied his application for asylum, finding him not to be credible. The IJ based this determination on, among other considerations, the fact that a forensic document analyst concluded the birth certificate submitted by Jalloh was not genuine. Also, the IJ noted a discrepancy in whether Jalloh was born in 1965 or 1971. The IJ also faulted Jalloh for failing to submit any medical records substantiating, for example, that he received four stitches after publication of his first article in *New Light Press*, although the IJ apparently did not say how Jalloh was supposed to have maintained such records through prison and a hasty escape to England and then the United States. The BIA and, eventually, the Eighth Circuit affirmed the IJ decision. *Id.* at 896-99.

n120 *Faqee v. INS*, No. 02-4457, 2004 WL 1202955, *1 (6th Cir. May 28, 2004) (unpublished order).

n121 For example, in 2003 the Third Circuit denied a petition for review filed by a former Albanian journalist who had actually been granted asylum by the IJ after telling of imprisonment, beatings and threats in Albania because of his published criticisms of, first, the Communist government there, and later, the successor government to the Communist regime. *Mekshi v. Ashcroft*, No. 02-3339, 2003 WL 1904547 (3d Cir. Apr. 21, 2003).

n122 In two cases, courts assumed, without actually deciding, that journalists might be a protected class under the asylum statute but then denied the asylum seekers' appeals anyway. *See Porras v. U.S. Att'y Gen.*, No. 06-13460, 2006 U.S. App. LEXIS 30759 (11th Cir. Dec. 13, 2006) (denial based on conclusion that alleged persecution amounted only to threats and not actual harm); *Quintero v. Gonzales*, No. 03-74362, 2006 U.S. App. LEXIS 16880 (9th Cir. June 30, 2006) (denial based on conclusion that Satanic cult targeted for persecution anyone, including but not limited to journalists, who shed light on their secret activities).

n123 *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985).

n124 Sanchez-Trujillo v. INS, 801 E2d 1571, 1576 (9th Cir. 1986).

n125 Bortnikov v. INS, No. 02-70279, 2003 WL 1793389 (9th Cir. April 3, 2003) (unpublished decision).

n126 *Id.* at *1.

n127 *Id.* at *2-3 (Paez, J., dissenting). Judge Paez noted a "troubling lack of understanding of the history of Eastern European and Russian anti-Semitism" on the part of the INS, which had cast doubts on Bortnikov's Jewishness because he purportedly had not legally adopted his mother's Jewish nationality. *Id.* at *3 n.1.

n128 *See, e.g.*, THE MISSOURI GROUP, NEWS REPORTING AND WRITING 14 (2005) ("The rules that mainstream journalists follow in attempting to arrive at the best obtainable version of the truth are commonly summarized as objectivity. Objectivity has been and still is accepted as a working credo by most American journalists, students and teachers of journalism.").

n129 Hussain v. INS, No. 98-70454, 2000 WL 1523100 (9th Cir. Feb. 8, 2000) (unpublished disposition).

n130 *Id.* at *2. For this proposition the Ninth Circuit panel relied on two cases. In one case, the Third Circuit held in a denaturalization proceeding that publishing anti-Jewish propaganda in a private newspaper constituted, by definition, assistance in persecution of Hungarian Jews during World War II. *United States v. Koreh*, 51 F.3d 431, 439 (3d Cir. 1995). The Second Circuit reached a similar conclusion in a case involving a former German Army newspaper editor who published anti-Semitic propaganda in Russia during WWII. *United States v. Sokolov*, 814 F.2d 864 (2d Cir. 1987).

n131 *Hussain*, 2000 WL 1523100, at *1.

n132 *Id.* at *2. However, even this seemingly favorable Ninth Circuit panel was split. One dissenting circuit judge would have held that Hussain was not persecuted on the basis of his political opinion. In that judge's view, PPI did not persecute Hussain because he published news favorable to the MQM. Instead, the dissenting judge said, PPI merely threatened and attacked Hussain because it wanted its own news published, and that is not a statutory basis for which one can receive asylum. *Id.* *3-4 (Wardlaw, J., dissenting).

n133 Hasan v. Ashcroft, 380 F.3d 1114 (9th Cir. 2004).

n134 *Id.* at 1117.

n135 *Id.* The Ninth Court documented the following subsequent events:

In 1996, a woman reported to the Mohila Parishad that she had been raped by the Chairman. When she went to file a police report, the Chairman [Abu Jaher] identified her as a prostitute. The woman's husband divorced her and she committed suicide. Before killing herself, she told Afroza of two people who could serve as witnesses to the Chairman's crimes. Based on these and other sources, Afroza wrote a report that described the Chairman as a "godfather" in the region, with a gang of followers who carried out a wide range of criminal activities: drug deals, misappropriation of money and foodstuff, bribery, and terrorizing of the population. Afroza's editor promised not to put her name on the article, but when the article was published, on November 11, 1998, it had her name prominently displayed as the author.

Id.

n136 *Id.* at 1117-18.

n137 *Id.* at 1118.

n138 *Id.*

n139 *Id.* at 1120.

n140 *Id.*

n141 *Id.* at 1121.

n142 *Baptiste v. U.S. Citizenship & Immigration Services*, No. 05-5954, 2006 WL 1668068 (2d Cir. June 13, 2006) (unpublished decision); *Pergega v. Gonzales*, 417 F.3d 623 (6th Cir. 2005); *Hasan v. Ashcroft*, 380 F.3d 1114 (9th Cir. 2004); *Samsonov v. Ashcroft*, No. 02-74315, 2004 WL 1238277 (9th Cir. June 3, 2004) (unpublished disposition); *Hussain v. INS*, No. 98-70454, 2000 WL 1523100 (9th Cir. Feb. 8, 2000) (unpublished disposition).

n143 *Woldemichael v. Gonzales*, No. 03-72610, No. 04-74022, 2006 U.S. App. LEXIS 21572 (9th Cir. Aug. 21, 2006) (unpublished opinion).

n144 *Gantchovski v. INS*, No. 97-3916, 1999 WL 313749 (6th Cir. May 6, 1999) (unpublished disposition).

n145 *Id.* at *2. Gantchovski testified that he worked at a publishing firm controlled by the former Communist government of Bulgaria. He was fired from the job in 1991 for encouraging dissident writers. He then worked at an anti-Communist publication until leaving Bulgaria for the United States, and the publication subsequently was shut down. Before he left Bulgaria, however, Gantchovski helped organize a circle of writers whose purpose was to investigate the assassination of Markov. Gantchovski's investigation into this murder led him to interview Markov's brother in the United States and then participate in a Voice of America production, which was broadcast in Bulgaria, about the assassination. Just before he was to return to Bulgaria, Gantchovski was told by a friend living there that she had received a threatening telephone call warning Gantchovski that someone would be waiting for him when he returned to his native country. While still in Chicago, Gantchovski was robbed in the middle of the night by two assailants who took not only his money but also a screenplay he had written about the Markov assassination. Additionally, his car was bombed while parked outside his residence in Chicago. Finally, Gantchovski published a magazine article in 1995 with the results of his investigation into the Markov murder. But these were not all the factors that led Gantchovski to fear for his safety if he returned to Bulgaria. He also submitted evidence to the IJ that another anti-communist Bulgarian writer had been assassinated in New York. Also, he submitted affidavits from two individuals who were official U.S. observers of Bulgarian elections in the early 1990s, and they stated that Gantchovski would be in extreme danger in Bulgaria. A third affidavit from an auto mechanic stated that his car was deliberately set on fire rather than catching fire accidentally while parked outside his residence. Notwithstanding all this evidence, the IJ found that Gantchovski had not established a well-founded fear of persecution. The IJ conjectured that the robbery was just a random mugging; that the car started on fire accidentally; and that Gantchovski's firing did not rise to the level of persecution. The IJ also relied on the State Department Country Report, which said that conditions in Bulgaria had changed for the better such that dissidents did not face harm. The BIA affirmed on the same grounds, and the Sixth Circuit affirmed the BIA. *Id.* at *1-3.

n146 *Garcia v. INS*, No. 96-9523, 1997 WL 299338 (10th Cir. June 5, 1997) (unpublished disposition).

n147 *Id.* at *1.

n148 24 I&N Dec. 69 (BIA 2007).

n149 *Id.* at 75.

n150 *Id.* at 76.

n151 Committee to Protect Journalists, at <http://www.cpj.org/>.

n152 See Joel Simon, "Introduction," *Attacks on the Press in 2006*, available at <http://www.cpj.org/attacks06/pages06/intro06.html> (last visited Feb. 8, 2007).

n153 *Baptiste v. U.S. Citizenship & Immigration Services*, No. 05-5954, 2006 WL 1668068 (2d Cir. June 13, 2006) (unpublished decision).

n154 *Id.* at *1.

n155 *Id.*

n156 *Id.* at *1-2. *See also* Samsonov v. Ashcroft, No. 02-74315, 2004 WL 1238277, *3 (9th Cir. June 3, 2004) ("In addition, the 2000 Russian Country Report lists numerous accounts of the abuses faced by print, television, and radio journalists who publicly criticize the government."). In contrast, though, one court faulted an asylum seeker from the former Yugoslavia for failing to prove her own prominence as a journalist. *See* Pepic v. Gonzales, No. 05-4268, 2006 U.S. App. LEXIS 11703, *8-9 (6th Cir. May 8, 2006) ("She claimed to be a well-known journalist and published a newspaper. However, when she was questioned about evidence relating to her prominence and influence, Pepic was unable to produce evidence to support her claims.... Pepic had not presented any affidavits from fellow journalists establishing her alleged influence in politics.").

n157 *See, e.g.*, Clay Calvert, *And You Call Yourself a Journalist?: Wrestling With a Definition of "Journalist" In the Law*, 103 DICK. L. REV. 411, 411 (1999) ("Unlike law or medicine, no course of study, examination, or license is required to practice journalism in the United States. One need not major in journalism or even attend college. Defining who is a journalist--separating the posers from the professionals--thus is as difficult today as defining news.") (citations omitted); Nathan Fennessy, Comment, *Bringing Bloggers Into the Journalist Privilege Fold*, 55 CATH. U. L. REV. 1059, 1062 (2006) ("[I]f courts are unable to tackle the tough questions of differentiating between the New York Times reporter and the rumor-mongering blogger, courts are less likely to grant any protection to an individual claiming a privilege to protect confidential sources.").

n158 *See* Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists and the Uncertain Future of the Federal Journalist's Privilege*, 14 WM. & MARY BILL OF RIGHTS J. 1063, 1076 (2006) ("In *Branzburg*, Justice White's majority opinion stated that one reason the Court could not recognize a First Amendment press privilege was that such a privilege would inevitably engage courts in defining who is a journalist.").

n159 *See* Michael Perkins, *International Human Rights and the Collegiation of Journalists: The Case of Costa Rica*, 4 COMM. L. & POL'Y 59 (1999) (discussing whether such *colegios* are permissible under the American Convention on Human Rights in the wake of a Costa Rica Supreme Court decision that they were not).

n160 *Id.* at 65 (stating that, in Costa Rica, a journalist was defined as "one who has as his or her principal occupation, salaried or by wage, the practice of the profession in a daily or periodic publication, or in a news medium broadcast by radio or television, or in a news service, and gets from it the principal resources for his or her subsistence").

n161 *See, e.g.*, Tchokothé v. Ashcroft, No. 03-3596, 2004 WL 2316615, *1 (6th Cir. Sept. 23, 2004) ("He did not corroborate his work as a journalist as he said he would, by obtaining copies of articles or by obtaining statements from his employer.").

n162 *See supra* notes 62-63 and accompanying text.

n163 *See, e.g.*, *Ismail v. Bureau of Imm. and Customs Enforc.*, No. 05-9591, 2006 U.S. App. LEXIS 18408, *10 (10th Cir. July 19, 2006) ("Ismail provided no published copies of his magazine articles that he claimed made him a target of retribution."); *Stoev v. Ashcroft*, No. 02-4473, 2004 WL 232729, *2 (6th Cir. Feb. 2, 2004) ("In addition, Stoev did not provide any of his articles to confirm that he was in fact a journalist."); *Roman-Fernandez v. INS*, No. 01-70477, 2002 WL 661725, *2 (9th Cir. Apr. 22, 2002) ("However, aside from Roman-Fernandez's assertions, there is no proof in the record to show that he has ever made a single appearance on radio or TV or has ever criticized the Colombian government or the drug cartels, much less that he is a well-known political journalist. What evidence we have shows that Roman-Fernandez is a handyman.").

n164 *See Lingad v. INS*, No. 9770370, 1999 WL 50903, *1 (9th Cir. Jan. 21, 1999).

n165 *Id.* In another case, circuit judges concluded asylum was not merited where a man from the former Yugoslavia had written only seventeen pages of a book critical of his former government and where the book had yet to be accepted by a publisher. *Milosevic v. INS*, 18 F.3d 366, 369 (7th Cir. 1994).

n166 *Mekshi v. v. Ashcroft*, No. 02-3339, 2003 WL 1904547, *1 (3d Cir. Apr. 21, 2003) ("On the second day of testimony, the clearly exasperated IJ warned petitioner as follows: 'I mean, after all, sir, you tell us that you were a political writer and a propagandist. I haven't seen any evidence of it so far in this case. There is not one occasion yet when you have acted as I would expect a political propagandist [to act] and state clearly and in detail what the criticisms were that you made that got you in trouble.'").