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Immigration scholars routinely overlook the 1968 U.S. Senate ratification of the United Nations Protocol Relating to the Status of Refugees, an international treaty defining a refugee in ideologically neutral terms. They dismiss this moment as symbolic because U.S. law continued to define a refugee as someone fleeing communism until the passage of the 1980 Refugee Act. We use archival documents, interview data, and court cases to argue that legal and bureaucratic mobilization by refugee advocates throughout the 1970s drew on the Protocol, achieving incremental policy change even before 1980, and ultimately shaped the provisions of the Refugee Act itself.

Testifying before the Senate in 1979 in favor of proposed legislation that would become the 1980 Refugee Act, Ambassador and Coordinator for Refugee Affairs Dick Clark argued that the bill:

acknowledges the size and diversity of current refugee populations by extending the definition of refugee beyond narrow geographic and ideological criteria. It essentially adopts the definition of the United Nations Protocol Relating to the Status of Refugees, to which we are a party.¹

The United States had acceded to the UN Protocol in 1968, and with it the UN’s non-ideological definition of a refugee. However, most policymakers viewed the 1968 accession as purely symbolic, with Johnson

Administration officials such as advisor Ernest Goldstein arguing at the time that it “does not really change domestic law, but it does accord refugees rights they already have.” For more than a decade after accession to the treaty, the UN definition stood in contrast to the ideological test in U.S. law that limited refugees to those fleeing communist or communist-dominated countries. Then, after 12 years of Congressional inaction, the 1980 Refugee Act removed the communist-centric restrictions on refugee status, and also created a dedicated asylum system so that refugees arriving directly in the United States could be processed and put on a path to permanent residency.

The passage of the 1980 Refugee Act provides a number of puzzles for scholars attempting to understand the development of refugee policy in the United States. On the empirical level, if policymakers in 1968 thought that ratification of the UN Protocol would not change U.S. refugee policy, how did the UN definition, as well as provisions setting out procedures for granting asylum (guaranteed by the UN Protocol) become incorporated into U.S. refugee law 12 years later? Put another way, if change was only symbolic in 1968, how did it become real and substantive over time? On a theoretical level, what can the development of refugee and asylum policy in the United States tell us more generally about how international human rights norms become incorporated into domestic policy?

In this article, we examine the course of refugee and asylum politics in the United States from the ratification of the UN Protocol in 1968 through the passage and early implementation of the Refugee Act in 1980. Rather than a decade of policy inaction, we argue that the late-1960s and 1970s were occupied with an iterative process of legal mobilization by advocates, which set the stage for entrepreneurial bureaucrats and legislators to write these protections into refugee law in 1980. Although most studies of domestic politics focus on the legislative and executive branches in setting policy, or the courts in shaping the aftermath of legislation, our study shows that the interaction between legal mobilization and administrative innovation was a critical precursor to legislative reform, and an essential catalyst of the incorporation of international law into domestic polity. Though these advocates, bureaucrats, and legislators were able to write more expansive refugee policies and a dedicated asylum provision into the Refugee Act of 1980, the
institutionalization of international refugee norms remained incomplete and continued to be contested in the decades after 1980. Still, we argue that the iterative process at work throughout the 1970s framed the debate in 1980 and beyond. This untold story is essential for understanding the shape of the current American asylum system.

**U.S. REFUGEE HISTORY AND THE DOMESTIC INSTITUTIONALIZATION OF INTERNATIONAL LAW**

The existing literature on the history of American refugee policy glosses over several important elements of the 1968 through 1980 period, and all but discounts the ways in which the 1967 United Nations Protocol Relating to the Status of Refugees became incorporated into U.S. law. The Senate ratified the treaty in 1968, despite an obvious tension between the Protocol’s definition of a refugee, which requires a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,”[^3] and the U.S.’s post-WWII policy of only accepting those refugees fleeing a communist or communist-dominated country, or the Middle East.[^4] However, many of the most important works of policy history make no mention of this ratification (see, e.g., Zucker and Zucker, 1987, 1992; Tichenor, 2002; Gibney, 2004; Haines, 2010).

Those scholars that do mention the ratification do so only casually, and often characterize it as inconsequential. Loescher and Scanlan (1986:83), for example, state: “exactly why the United States acceded to the Protocol is far from clear. The sparse legislative history suggests that it was primarily a symbolic gesture.” Similarly, Bon Tempo (2008:173) refers to the ratification as “an empty diplomatic and public relations gambit aimed at demonstrating interest in the UN’s International Year for Human Rights.” Both Loescher and Scanlan and Zolberg do acknowledge the theoretical importance of ratification since, to quote Zolberg, “it imposed on signatories the obligation” to admit people who fit the United Nations definition. And yet, both studies downplay the


significance of the Protocol, as subsequent presidential administrations failed to take these obligations seriously (1986; 2006:345). They do not examine how advocates or bureaucrats used the Protocol to argue for reform.

Besides the tendency of the literature to ignore or downplay ratification in 1968, refugee scholars also disregard the significance of the Protocol during discussions of refugee policy in the 1970s. In describing the factors that led to the passage of the landmark Refugee Act of 1980, most highlight a disconnect between expanding refugee crises around the world and the tools available to solve them, as well as the struggle between Congress and the Executive branch for control over setting admissions standards. By the late-1970s, the scope of refugee needs in Southeast Asia, combined with large-scale admissions of Cubans and Soviet Jews, led key members of Congress and the Carter administration to conclude that U.S. refugee law needed overhauling (Loescher and Scanlan, 1986; Zucker and Zucker, 1987; Tichenor, 2002; Gibney, 2004). Contemporary accounts of the legislative process stress that Congress was motivated by a desire to reclaim control over admissions levels from the executive branch (Anker and Posner, 1981; Kennedy, 1981).

Although the UN Protocol does not figure into these narratives of legislative reform, it is hard to deny its influence on many of the provisions of the 1980 Refugee Act. The Act adopted the language of the UN Protocol to define a refugee, replacing the previously communist-centric criteria. It also accepted UN Protocol mandates as the basis for a new asylum program, by which potential refugees could apply for refugee status upon reaching the United States. If we are to understand the passage of the 1980 Refugee Act as only deriving from inter-branch struggles and concerns about overseas refugee admissions, we are left with a stark and gaping hole. Why did the Act include a domestic asylum policy derived from the Protocol, and why did it extend refugee status to non-Communist groups? Certainly the Soviet Jews, Cubans, and Southeast Asians who comprised the most visible refugee groups of the 1970s fit into the existing Communist-centric definition of a refugee.

Tichenor (2002:247) describes the changed definition of a refugee as “a particularly significant provision” of the 1980 Act, without discussing how or why this choice was made. Gibney (2004:152) argues that legislators added these new provisions to “bring US responses to refugees into line with international law,” but cannot explain why this goal
became a priority in 1980, when it had not been so in 1968. Bon Tempo suggests that policy-makers were motivated by a growing culture of human rights when they pushed for “an important break with the past three decades of U.S. refugee policies and laws” (2008: 173). This explanation is most compatible with our own. Still, Bon Tempo’s narrative of human rights requires more elaboration as to the mechanisms behind the diffusion of the international refugee regime into U.S. policy, especially on the role of refugee lawyers and advocates in affecting change.

To inform our discussion of the development of the Refugee Act, we turn to the international relations (IR) scholarship on the domestic institutionalization of international law. This literature has typically not focused on migration policy,5 and instead tends to examine the impact of human rights norms on the practices of developing countries (see Keck and Sikkink, 1998; Risse, Ropp, and Sikkink, 1999), or international environmental regimes in developed countries (Schreurs and Economy, 1997; Young, 1997; Dai, 2005). Nevertheless, to the extent that this literature is concerned with building theories about how international human rights are incorporated into domestic policy, we argue that it should be applied to the comparable context of refugee policy.

In general, the IR literature argues that incorporation of international norms requires buy-in from domestic policy-makers, whereas civil society entrepreneurs also often help increase the salience and visibility of international norms in domestic policy debates (Cortell and Davis, 1996; Keck and Sikkink, 1998; Gurowitz, 1999; Risse, Ropp, and Sikkink, 1999). Cortell and Davis (2000:71) list a series of possible measures for delineating this salience, which they term “mechanisms devoted to [the] reproduction and reinforcement” of international norms in domestic polities. These include: reference to international norms in domestic policy discourse; the organization of domestic groups who press for policy that is consistent with international norms; the elimination of conflicting institutions; the creation of procedures for asserting violations of the norm; and the creation of state policies adopting the norm. The development of American refugee policy is compatible with Cortell and Davis’ concept of salience. As we illustrate below, all five mechanisms of reproduction and reinforcement are present in the story.

5Gurowitz’s (1999) study of Japanese immigration policy is a notable exception.
of the incorporation of the UN Protocol into US refugee policy. In particular, the asylum policy story reveals a key role for what Finnemore and Sikkink (1998:898) refer to as “norm entrepreneurs,” people motivated by “empathy, altruism, and ideational commitment.” These entrepreneurs sold the internationally accepted idea of a refugee, and the right to non-refoulement\(^6\) embedded in international law, helping them gain increasing salience in U.S. policy debates and institutions over the course of the 1968 to 1980 period.

Although the concepts of salience and norm entrepreneurs are extremely useful to this study, the existing IR literature does not suggest that the steps for institutionalization must occur in any particular order, whereas our case study demonstrates that the order of events in the salience-chain is crucial to their denouement. As such, we stress the importance of sequence and timing, which have been key elements in studies of American Political Development (see, e.g., Pierson, 2004). Ultimately, we argue that international norms become incorporated into domestic politics through an iterative process that begins in civil society, and works its way through the courts and the executive branch bureaucracies, and then legislative branch, in a policy feedback loop. Using the 1980 Refugee Act as a case study, we illustrate that a symbolic commitment to a universal refugee definition in 1968 laid the groundwork for lawyers and advocates to harness the more expansive UN definition of a refugee as the basis for admissions and asylum claims. Much in the way Borgwardt argues that the Atlantic Charter set the stage not simply for the creation of institutions like the IMF and World Bank, but also for a long term project of American multilateralism, we argue that refugee advocates harnessed the UN Protocol once it was ratified (Borgwardt, 2005). This symbolic moment paved the way for a process of legal and bureaucratic mobilization in the late-1960s and 1970s leading to refugee law reform in 1980, and laid the groundwork for an institutional legal advocacy and bureaucratic community to negotiate further refugee norms well beyond the 1980 Act. Thus, the 1980 Act constituted less of a break from earlier developments, and more of a step in a progression that began before, and continued after legislation codified international refugee norms into the U.S. context.

\(^6\)The idea of non-refoulement – that a refugee may not be returned to a place where he or she fears for his or her life – is written into Article 33 of the United Nations Convention on the Status of Refugees, 1951.
METHODOLOGY AND SOURCES

Our article takes an interdisciplinary, mixed-methods approach to uncover the policy feedback loop created by interaction between multiple players. We began with a foundation of archival materials drawn from the Lyndon Baines Johnson Library collections, and legislative materials at the National Archives surrounding ratification of the Protocol and passage of the 1980 Refugee Act. We also examined the full span of the Congressional Record and Congressional reports on refugee legislation for the 1968 to 1980 period. These sources give us access to the official narrative for ratification and passage, as well as the debates surrounding refugee policy within the Johnson Administration and key members of Congress, such as Senator Edward Kennedy and Congresswoman Elizabeth Holtzman. They also highlight how government officials in the period understood the goals, impetuses, and ramifications of legislative reform.

Archival records tell only one side of the story, and so to understand how different groups harnessed the mantle of universal refugee protections under the UN definition, as well as to understand the consequences of ratifying the UN Protocol and passing the Refugee Act, we conducted semi-structured interviews with key policymakers from the era. We spoke to three members of the Johnson and Carter Administrations; four members of the legal advocacy community directly involved in lobbying and drafting the legislation; four members of the INS, DOJ, and State Department most intimately connected with refugee legislation; and three people from the legislative branch involved in passing the Refugee Act. We used archival sources to develop our interview questions, and whenever possible we cross-checked the information from the interviews with other interviewees and with official written sources.7

Finally, to understand how legal advocates utilized the UN’s definition and asylum provisions in pushing for more expansive refugee legislation in the United States, we analyzed key court cases from the era.

7 See Appendix. We conducted 11 in-depth interviews and three additional brief telephone interviews/email exchanges. While we attempted to interview as many of the policymakers connected to refugee politics in the era as possible, at the time of writing, a number of important individuals (especially those from the Johnson Administration) had already passed away, most notably Senator Edward Kennedy, who died on August 25, 2009, just after we began the research for this project.
Fifteen federal cases between 1968 and 1980 raised arguments for relief based on the UN Protocol’s definition of a refugee. These cases help to clarify what protections asylum seekers had prior to 1980, in the absence of a fixed system for processing asylum claims. They also illustrate just how much the courts took the UN Protocol into account in their rulings, and how integrated the Protocol became in case law. Although the 15 petitioners in question all lost their claims to asylum, UN Protocol references in federal litigation only increased through the 1970s, and set the stage for advocates to make their case for more amplified refugee and asylee protections to entrepreneurial bureaucrats and lawmakers working on the legislation that became 1980 Refugee Act.

REFUGEE POLICY IN THE POST-WWII ERA

Although the United States had a long tradition of providing refuge to people fleeing persecution, the modern concept of a refugee, along with the passage of legislation to facilitate their entry, began with World War II. Provisions for the admission of refugees gained momentum throughout the post-war period, but much of the refugee legislation was confined to temporary admissions programs. Similarly, the post-war period began a focus among American policymakers on resettling primarily refugees from Communism (Bon Tempo, 2008; Wolgin, 2011).

In 1948, for example, legislators passed the Displaced Persons Act to resettle European war victims over the course of 4 years (Dinnerstein, 1982). Similarly, The Refugee Relief Act of 1953 allowed for 214,000 admissions over the course of 3 years (Bon Tempo, 2008:Chapter 2). The ad hoc nature of these bills reflected the generally restrictive mood of Congress, where conservative legislators like Senator Pat McCarran (D-NV) and Representative Francis Walter (D-PA), who controlled the Senate and House Judiciary Committees, respectively, worked to defend the national origins quota system, and keep out any large movements of people into the country throughout the post-war era (Reimers, 1992; Tichenor, 2002; Zolberg, 2006). Still, the 1953 Refugee Relief Act created the first permanent refugee bureaucracy within the State Department’s Security and Consular Affairs division (Hutchinson, 1981:528;

8We identified these cases using a Lexis Nexus search for cases with the terms “refugee” and “protocol” in the years between ratification of the UN Protocol in 1968 and passage of the 1980 Refugee Act.
Bon Tempo, 2008). Thus, even as legislation to admit refugees remained ad hoc throughout the post-war period, the refugee apparatus designed to encourage, fund, and resettle them grew. This growing institutionalization of refugee affairs reflected both the entrenchment of the Cold War fight against Communism, where the goal of encouraging defection from the Soviet Union and its allies underpinned much of the emphasis on refugee admissions, and an acknowledgment that refugee crises would not be contained to the aftermath of World War II (Wolgin, 2011).

Two significant refugee movements in the mid- to late-1950s helped to turn the tide toward more concern with refugee admissions. In 1956, in the wake of the failed Hungarian revolution, the U.S. faced its first emergency movement of refugees. To handle the approximately 38,000 Hungarians brought into the country by the U.S., President Eisenhower utilized a little-known provision of the 1952 Immigration Act, which granted the Attorney General the ability to temporarily “parole” people into the United States in times of need.9 Parole authority would later be used to admit large-scale movements of people, especially from South East Asia in the 1970s, and would become one of the major sources of political tension over admissions between the executive branch and Congress (Markowitz, 1973; Anker and Posner, 1981–1982:15; Bon Tempo, 2008: Chapter 3).

The second major movement began in January 1959, just after Fidel Castro took power in Cuba. Between 1959 and 1962, approximately 200,000 Cubans fled, marking the first time that asylum seekers came directly to the United States in large numbers. Beginning with Dwight Eisenhower, a succession of Presidents would go to great lengths to admit all Cubans seeking entry. Partially in response to the Cuban refugee crisis, in 1962 legislators passed the first permanent fiscal allotments for refugee resettlement, with the Migration and Refugee Assistance Act, and in 1965 created a permanent allotment for refugees – 6 percent of all legal permanent residence visas, or 10,200 visas per year (Anker and Posner, 1981–1982; Loeschner and Scanlan, 1986:61–67; Bon Tempo, 2008: Chapter 5).

On the international front, even though the United Nations had passed the Convention on the Status of Refugees in 1951, the U.S. never signed on to it. Instead, when congress laid out the framework for immigration policy in the McCarran-Walter Act of 1952 (Immigration and Nationality Act) they implemented section 243(h), giving the Attorney

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9Section 212(d)(5) of the Immigration and Nationality Act of 1952. 66 Stat. 163.
General the ability to withhold the deportation of anyone facing “physical persecution” in his or her home country. This provision was far narrower than the UN definition of a refugee outlined in the Convention a year earlier. Section 243(h) was also not equivalent to the granting of a refugee visa for two reasons. First, it was not tied to a permanent residency visa; it simply provided an indefinite relief from a deportation that threatened harm. Second, this relief was not available to people who were outside the United States, or even to those arriving at the border of the United States or at a port of entry. It could only be granted to people inside the country who were in the process of being deported. In other words, it was meant to be a lifesaving last resort.

When Congress passed its sweeping amendments to the INA in the Hart-Celler Act of 1965, they replaced the phrase “physical persecution” in Section 243(h) with “persecution on account of race, religion, or political opinion,” bringing it much more closely in line with the wording of Article 33 of the Convention. It also created a permanent refugee visa category, and committed the nation to admitting refugees as the seventh priority preference category. Although legislators insisted on maintaining a geopolitical focus to the definition of a refugee in U.S. law, the influence of the Convention is clear in the wording of the statute. The 1965 Act stated that a refugee should be defined as someone who “because of persecution or fear of persecution on account of race, religion, or political opinion [has] fled from any communist or communist dominated country or area, or from any country within the general area of the Middle East.” Thus, although the U.S. Senate did not ratify the Convention, its influence on American refugee law even in the 1950s and 1960s is clear.

Throughout the entire period, U.S. policymakers continued to view refugee admissions with a sense of what Gil Loescher and John Scanlan (1986) call “calculated kindness,” narrowly construing refugees as those fleeing Communism or turmoil in the Middle East, and excluding anyone not in the interest of U.S. foreign policy as a refugee. During the 1968, Senate debates over the ratification of the UN Protocol, the issue of why the United

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10As early as 1950, Congress passed legislation which gave the Attorney General discretionary power to withhold the deportation of any non-citizen that “would be subjected to physical persecution” if returned to his or her home country. When Congress passed the sweeping Immigration and Nationality Act of 1952, this provision was maintained, and became Section 243(h) of the new act.

11Section 203(a)(7) of the INA as revised by the 1965 Immigration Act.
States did not sign on to the 1951 treaty arose. Laurence Dawson of the State Department’s Office of Refugee and Migration Affairs argued that the United States in the early 1950s had already invested in solving the refugee situation in Europe, and did not feel the need to formally join the Convention. More importantly though, Dawson emphasized that under the pre-1965 refugee guidelines, the Attorney General only had the power to withhold deportation if a refugee would “suffer physical persecution” in the home country, in contrast to the UN’s more expansive definition, which prohibited refoulement of any refugee with only a well founded fear of persecution. “That physical persecution,” stated Dawson, “was a very limiting factor.” The original 1951 Convention, with its geographic temporal restrictions, looked increasingly antiquated as the number of refugee crises after World War II only grew in the next decades.

**RATIFICATION OF THE UN PROTOCOL**

In light of the continuing prevalence of refugee crises around the world, by the late-1950s and early-1960s, the UN recognized the need to update the 1951 Convention. As early as September of 1966, archival sources from the Johnson Administration indicate that Senator Edward Kennedy (D-MA) had met with the UN High Commissioner for Refugees, Prince Sadruddin Aga Kahn, to discuss world refugee issues and support UN refugee efforts. These efforts paralleled those in the United Nations – the UNHCR first drafted the Protocol in 1965, and submitted it to the UN in 1966. It passed in December of 1966, and came into force in November of 1967. Kennedy operated as a key “norm entrepreneur” in this stage of the process (Finnemore and Sikkink, 1998). As chairman of the Senate Judiciary Subcommittee on Refugees, he helped to push the Protocol through Congress (Zolberg, 2006:345). Congress then acted upon the Protocol quickly: On August

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12The Convention contained important geographic and temporal limitations which limited refugees to only those people that had become so prior to 1951. When refugee crises only continued in the 1950s and 1960s, the UN pushed for the Protocol, which removed these restrictions (see Wolgin, 2011:Chapter 5). Statement of Laurence A. Dawson, 90th Congress, 2nd Session, Executive Report No. 14, “Protocol Relating to Refugees,” September 30, 1968, Appendix, 8–9.

13Edward Kennedy to Bill D. Moyers, September 12, 1966, White House Central Files, ND 19-2, Box 418, Displaced Persons Refugees, LBJ Presidential Library.

14*Congressional Record*, 90th Congress, 2nd Session: 27758.
1, 1968, President Johnson sent the Protocol to the Senate, and on October 4, it passed unanimously. President Johnson signed the Protocol into law on October 15, 1968.\textsuperscript{15}

Why did the Johnson Administration accede to the Protocol, when previous administrations had declined to do so for the 1951 Convention? Two important factors emerge from the archival record to illuminate the decision-making process. The first is that 1968 was International Year for Human Rights, and the Johnson Administration sought a bill that would be able to easily pass the Senate to show their commitment to international human rights. Johnson advisor Ernest Goldstein stressed in a July memo to the President that there were six human rights conventions pending before Congress, ranging as far back as 1949, with the UN Convention on Genocide.\textsuperscript{16} “Because of the magic word ‘Refugees’,” Goldstein argued, the Protocol had “a better chance than its predecessors.”\textsuperscript{17} Furthermore, the State Department believed that there was strong domestic support for the Protocol, and, according to Department of State Executive Secretary Benjamin H. Reed, the Department “was not aware of any opposition to the Protocol in private domestic circles or in Congress.” On the contrary, Reed argued that State had received “numerous Congressional Communications expressing interest in the Protocol,” as well as supporting petitions from the umbrella groups the American Council of Voluntary Agencies and the American Immigration and Citizenship Conference.\textsuperscript{18} The transactional costs for the Johnson Administration

\textsuperscript{15} Constitutional authority gives the Senate alone the power to ratify international treaties. Generally the process begins with the President submitting the treaty to the Senate as a bill. It is then sent to Committee and, if and when it is reported out favorably, the Senate votes on it. It is sent back to the President for his signature. A two-thirds majority is necessary for ratification.

\textsuperscript{16} The UN Convention on the Prevention and Punishment of the Crime of Genocide, which passed in 1948, but was not ratified by the United States until 1988 (see Le Blanc, 1991). Sikkink (1993:150) states that Senator William Proxmire (D-WI) would express his frustration about the lack of movement on the Genocide Convention in 1967, but could not convince his colleagues to act.

\textsuperscript{17} Ernest Goldstein, “Memo for the President,” July 26, 1968 and Ernest Goldstein to Harry McPherson, July 26, 1968, White House Central Files, ND 19-2, Box 418, Displaced Persons Refugees, LBJ Presidential Library.

\textsuperscript{18} Benjamin H. Reed to Walt W. Rostow, July 25, 1968. A second memo from LBJ aid Harry McPherson to the President on October 10, 1968, stated that “there is great interest in this protocol among groups interested in refugees. These are mostly church and ethnic organizations.” Both documents in: White House Central Files, ND 19-2, Box 418, Displaced Persons Refugees, LBJ Presidential Library.
to pass the Protocol then appeared low, with strong domestic support and a need to pass some type of human rights legislation.

Even more than simply fulfilling international obligations, Johnson Administration officials stressed time and time again that ratifying the Protocol would not change U.S. refugee policy. Benjamin Reed, for example, argued in a memo to the White House that “The Federal Government will be able to carry out its obligations under the Protocol within the framework of existing legislation.” 19 And, even though the White House press release on the accession stated that “the Protocol constitutes a comprehensive Bill of Rights for refugees,” it argued that “most refugees in the United States already enjoy the protection and rights accorded by the Protocol.” 20 The release concluded that “our accession to the Protocol will, it is hoped, encourage like commitment by nations whose refugee protection and guarantees are presently less generous than our own.” The State Department argued that accession would strengthen American foreign policy, specifically in that it “extend[s] the image of the United States as a nation concerned with the persecuted.” 21 Similar to the Cold War civil rights story detailed by historian Dudziak (2000), the U.S. ratified a symbolic treaty to portray a better face to the outside world and, in this case, to prod other nations to develop robust refugee protections.

Clearly, the Administration did not feel that signing onto the Protocol would be revolutionary in any sense. In communications with Johnson Administration advisors (such as Harry McPherson, special counsel to the President, Bill Moyers, Press Secretary, and Joseph Califano, one of LBJ’s top assistants on legislative affairs) all have asserted they have no recollection that the ratification of the Protocol stood out within the normal course of business. Each of these three individuals’ names would frequently arise in discussions of immigration and refugee policy during the era, but as McPherson argues now, “I can fake knowing a lot of things, but I can’t fake this. I didn’t play any kind of role on that subject” (McPherson interview).

In fact, the only concerns the government had about the treaty were, according to a 1968 memo from Reed, “to avoid any conflict between the

19 Benjamin H. Reed to Walt W. Rostow, October 9, 1968. White House Central Files, Immigration-Naturalization, Box 1, EX IM 9/1/68, LBJ Presidential Library.
Protocol and our taxation and social security laws.” According to the Senate report on the Protocol, article 29(1) conflicted with federal taxation laws for nonresident aliens, whereas article 24 conflicted with federal regulations for social security. To alleviate these issues, the Senate voted two amendments: that for the purposes of taxation, only those refugees who become residents of the United States would be exempt from nonresident taxation laws, and that the U.S. would apply Social Security provisions such as old age and disability insurance to refugees only in the same ways that they did for other aliens. According to Senator William Proxmire (D-WI), in introducing the Protocol to the Senate, the reservations “remove even the slightest possible conflict between Federal and State provisions of the Convention and Protocol.”

With accession to the Protocol, the U.S. had accepted the UN’s non-ideological definition for a refugee and adopted more expansive refugee protections. This was, theoretically, a major step in the institutionalization of an international norm into the domestic context. However, most officials inside the federal government believed, as Laurence Dawson stated during the 1968 hearings, that “there is nothing in this protocol which implies or puts any pressure on any contracting state to accept additional refugees as immigrants.” Questions about the sovereignty of U.S. decision-making over who qualified as a refugee, as well as any general notion of provisions relating to asylum, were not on the Congressional or bureaucratic radar at the time. As legal scholar Goodwin-Gill (1996:175–176) points out, the asylum provisions written into the Protocol only recommend that asylum be based upon the treaty definitions, and stressed the sovereignty of each individual nation in deciding who qualified as an asylee. The issue of controlling asylum would expand in the 1970s, as refugee crises grew, and as individual policy entrepreneurs began

22Reed to Rostow, October 9, 1968.
23Article 24, entitled “Labour Legislation and Social Security” states that “The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters…” Article 29(1), entitled “Fiscal Charges,” states that “The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations” (United Nations, 1951).
25Congressional Record, 90th Congress, 2nd Session: 27757.
26Executive Report No. 14, Appendix, 10.
to harness the non-ideological underpinnings of the UN Protocol in their legal and lobbying efforts. However, in 1968, accession was a purely symbolic event. Its impact would not be felt until the 1970s when legal and bureaucratic norm entrepreneurs began to highlight the tensions that it created.

THE 1970s AS PERIOD OF MOBILIZATION

The UN Protocol and the more general question of America’s obligations to asylum seekers under international law were not high-profile political issues during the 1970s. American adoption of the international refugee protection norm in 1968 did not automatically lead to the creation of procedures for asserting violations of the norm, a deeper level of institutionalization. The number of asylum seekers entering the country was negligible; about 2,000 asylum claims were processed each year.27 Despite ratification of the Protocol, asylum was not on the radar of most policymakers (Bon Tempo, 2008:178; see also Hearings on 1980 Act). Analysts at the time attributed a general “congressional apathy” towards asylum policy to the lack of a “significant public constituency” or an “entrenched influential ethnic community” advocating in its favor (Hanson, 1978:132). This lack of salience helps to explain why Congress did not immediately act to codify the asylum provisions of the UN Protocol into law. Instead, most Congressional discussions revolved around the issue of executive usage of parole admissions.

Legislative reform was also stalled throughout the 1970s for more basic institutional reasons. The Chairman of the Senate Judiciary Committee, Senator James Eastland (D-MS), was resistant to refugee issues, and every version of refugee legislation sent to his committee died there (Anker and Posner, 1981–1982). The judiciary committee held very few public hearings on immigration matters in the 10 years after passage of the Immigration Act of 1965. Congressman Peter Rodino (D-NY) was a sympathetic chairman of the House Judiciary Committee once he took the reigns in 1973, but the possibility of legislative action was essentially frozen until Senator Edward Kennedy took the chairmanship of the full

27Between 1973 and the end of 1979, the INS adjudicated 14,790 asylum cases and accepted 5,122, almost 35 percent of them. Source: INS Statistical Yearbook 1996. Table 27. Asylum Cases Filed with INS District Directors and Asylum Officers, Fiscal Years 1973–96.
Judiciary Committee in 1979 (Kennedy, 1981). Kennedy had been instrumental in securing passage of the 1965 Immigration Act, and saw refugee policy as the unfinished business of that previous reform effort.

This legislative inaction has lead refugee policy scholars to dismiss the 1970s as a lost decade, but even once the institutional channels for reform opened up in the Senate, congressional debate focused on the issue of admissions of refugees from overseas, an area where the boundaries of executive authority had become murky. President Johnson had bypassed Congress by continuing usage of the longstanding parole authority. The 1965 Hart-Cellar Act had an official cap of 10,200 refugee visas per year, and no explicit refugee provisions for any country in the Western Hemisphere, but Johnson declared that he would admit all Cubans seeking refuge (Loescher and Scanlan, 1986:74–78; Bon Tempo, 2008:127–132). Legally, presidential parole could only be used in exceptional circumstances, without advanced planning. Thus, a general pattern emerged in the years after the power was established in 1952: the administration would wait until problems in the sending countries built up to crisis levels before issuing an isolated parole, and then repeat the same process again shortly thereafter. The Attorney General did consult with Congress, via the ranking members of the house and senate judiciary committees, and during the 1970s, consultation became somewhat more institutionalized. Still, there were no formal guidelines for this dialogue (Anker and Posner, 1981–1982:19).

As the situation in the wake of the Vietnam War came to a head, the 10,200 visas set aside for permanent refugee resettlement proved too small to handle the scope of the world refugee crises. Many legislators viewed the resettlement of people from Vietnam, Cambodia, and Laos as part and parcel of the American postwar responsibilities. In 1975, legislators passed the Indochina Migration and Refugee Assistance Act, which authorized increased funding and admissions over 2 years, but by the end of the decade, President Carter was paroling in an ever-growing number of refugees per year.

According to Skip Endres, Deputy Staff Director for the House Immigration Subcommittee at the time, the process of consultation “had become very unwieldy” and often happened “in the middle of the night.” Especially after the fall of Saigon in 1975, Congressional parole consultations were occurring “on a daily basis…and it became clear after about four or five of these consultations that…it was kind of a ludicrous process that we all went thorough” (Endres interview). Frustration with these
consultations brought members of the committee to agree that a new process was necessary, and ultimately would provide the impetus for new refugee legislation. However, the pieces would not come together until 1979.

The UN Protocol and Asylum in the 1970s

In the absence of legislative guidance about the impact of the UN Protocol on U.S. law, courts and administrative agencies seemed initially reluctant to read ratification as a revolutionary change. In fact, an INS analyst at the time concluded that “the net effect of the Convention and Protocol upon current immigration law and its manner of dealing with claims for asylum appear to be very limited” (Frank, 1977:304). In the first major administrative case to consider the question of the Protocol’s impact on U.S. immigration law, the Board of Immigration Appeals (BIA) concluded that the Senate “did not contemplate that radical changes in existing immigration laws would be affected” by ratification of the Protocol (Matter of Dunar, 314). Instead, the BIA found that the existing provision for withholding of an immigrant’s removal is equivalent to the non-refoulement pledge embedded in the UN Convention: “In our estimation, there is no substantial difference in the coverage of Section 243(h) and Article 33” (Matter of Dunar, 320). The Dunar decision settled a good deal of uncertainty about the importance of the treaty: between 1968 and 1980 the Protocol was only raised in federal court in fifteen separate matters, and in none of the cases did the applicant win refugee status based on the Protocol.

Nevertheless, the UN Protocol did not lay dormant through the 1970s as the existing literature suggests. Despite a dearth of legal victories, the concept of asylum continued to develop, both administratively and judicially, as various policy entrepreneurs gradually drew attention to the need for a refugee policy that included asylum provisions as well as the more expansive UN definition. These entrepreneurs highlighted tensions between their on-the-ground experience with the realities of international migration, and existing policy frameworks, bureaucratic structures, and legal provisions. In the absence of legislative reform, they were able to secure policy responses within key agencies, develop a support structure for litigation and lobbying, and lay the groundwork for increasing openness to the concept of asylum within the Federal Courts. This story of mobilization, in contrast to the high profile struggle between Congress
and the Executive over admissions, generated little public controversy or debate at the time. Yet, it had deep and long-lasting ramifications for the institutionalization of international norms into U.S. refugee law.

As the 1970s began, the Department of State did not have an official policy position on the UN refugee definition, or on the proper procedures for handling asylum claims. When the issue came up in a congressional hearing in 1970, a team from the Department of State presented a mixed perspective on broadening the definition. Clement Sobotka, Deputy Director of the Office of Refugee and Migration Affairs, argued that:

> The determination that a country persecutes some of its inhabitants is a determination of considerable sensitivity. Therefore, the admission of persons to the United States as refugees without regard to the foreign policy factors could produce serious problems. Therefore, we do feel, as I mentioned before, that there ought to be, if you use a broader definition, some provision for restrictions by the President or the Secretary of State on the groups that could be admitted.²⁸

The State Department could not maintain its position of ambivalence for long. Events later that year forced several key federal agencies to put together more concrete policies on the subject of asylum. On November 23, 1970, a Lithuanian seaman named Simas Kudirka jumped from a Russian fishing vessel onto a Coast Guard cutter and asked for political asylum. Unsure of how to proceed, Coast Guard Officials consulted with the Navy, and concluded that, in the interests of maintaining relations with the Soviets, the sailor should be returned to his ship.²⁹ Public outcry about the Kudirka affair threw the absence of an asylum procedure into sharp political relief. For the first time, the issue of asylum had gained public salience through its link to the Cold War.³⁰

With the legislative agenda stalled, it fell to the relevant agencies to craft a policy response. According to a refugee advocate at the time, “Congress went nuts...And Congress said to the INS, you have to do something. You can't be sending these Soviet seamen back to Siberia. So, INS created a form” (Posner interview). This form, the I-589 Application

²⁸ Statements by Clement Sobotka, Deputy Director of the Office of Refugee and Migration Affairs, for H.R. 17370, 1970.
²⁹ For details on the Kudirka affair, see Hanson (1978).
³⁰ The episode resonated with the public so much that it was recounted in a 1978 made-for-TV movie starring Alan Arkin as Simas Kudirka. “The Defection of Simas Kudirka” (1978) won two Emmys and was nominated for a third. <http://www.imdb.com/title/tt0077418/>.
for Asylum, is the same basic form that is used to apply for asylum today. The form was the first step in the creation of procedures that institutionalized the international right to claim asylum.

What came next was even more significant. The Department of State issued a Policy Statement in January 1972, entitled General Policy for Dealing with Requests for Asylum by Foreign Nationals. The document stated that:

President Nixon has re-emphasized the U.S. commitment to the provision of asylum for refugees, and directed appropriate departments and agencies of the U.S. Government, under the coordination of the Department of State, to take steps to bring every echelon of the U.S. Government which could possibly be involved with persons seeking asylum a sense of the depth and urgency of our commitment...Foreign nationals who request asylum of the U.S. Government owing to persecution or fear of persecution should be given full opportunity to have their requests considered on their merits...A primary consideration in U.S. asylum policy is the Protocol Relating to the Status of Refugees to which the United States is a party.31

Despite State Department assurances at the time of ratification that the Protocol would have no effect on American refugee policy, only 4 years later, the same agency insisted that asylum claims should be handled in consideration of that treaty. This reference to the Protocol in domestic policy discourse was another important step towards institutionalization, because it created procedural ripple effects. Still, this move created more questions than it answered, as advocates and the courts struggled to interpret the place of the UN document in asylum policy.

In keeping with the Department of State Policy Statement, the INS issued its own Operating Instructions laying out a procedure for handling asylum claims. These procedures included close consultation with the Department of State at multiple stages of the decision-making process.32 Although the Operating Instructions clarified a specific procedure, the creation of a new category of protection raised many more questions about standards for decision-making and the available avenues of appeal. As early cases wound their way through the administrative immigration court system and into the federal courts, three major areas of tension emerged: the relationship between the concept of asylum and the existing provisions in the law for withholding of deportation, the treatment of asylum seekers

from non-communist countries, and the distinction between asylum applications filed from within the United States and those filed at the border. These three strains on the system ultimately spurred advocates into action.

In the first place, immigration attorneys began to litigate over the appropriate standard of proof for determining whether the asylum seeker would be persecuted if returned to his or her home country. Immigration courts had interpreted the existing protections under sections 243(h) to require that the applicant show a “clear probability” of persecution, following that statute’s provision that deportation could be withheld in cases where the person “would be subjected to persecution.”33 Once asylum became a possible alternative route to protection, some immigration lawyers began to consult the UN Protocol for guidance on how to defend these cases. As the Protocol defined a refugee as someone with “a well-founded fear of persecution,” rather than a clear probability of persecution, advocates wondered if the standard of proof should be lower for asylum claims. According to the lawyer who first raised this argument before the BIA in 1973,

35 For more on the distinction between cause lawyers and case lawyers, see Sarat and Sheingold (2006).

It seemed to me that the Protocol changed the standard. I read about it and thought that this might be something that could have helped the client. Lawyers do what they have to do for a client... He could not prove he would be persecuted but was reasonably afraid of it. It was a totally different standard (Ungar interview).34

This argument was not ultimately successful. The BIA determined that the burden of proof for asylum seekers was identical to the standard for securing a withholding of removal under 243(h). However, this case only opened the floodgates for further legal edification as questions came before the courts and processes were clarified; ultimately the field of American asylum law was born. The lawyers who first brought these cases were not necessarily acting with the intention of advancing the cause of international human rights law, they were simply being strategic about possible new arguments that could assist their clients. Nevertheless, their actions would have great ramifications for the ultimate shape of asylum policy in the U.S.35
In 1974, the INS issued new regulations stating explicitly that the Attorney General gives administrative immigration judges (IJs) the authority “to consider claims for relief from deportation under Articles 32 and 33 of the Convention.”\(^\text{36}\) According to a report by the Department of State’s Office of the Legal Advisor, IJs “already possessed the right to dispose of contentions invoking Articles 32 and 33 of the Convention, but…In order to remove any doubt, and to end unnecessary litigation, the [new regulations were] adopted so that such authority would be expressly stated” (Rovine, 1974:724). During this time, immigration lawyers began to appeal negative administrative decisions more regularly, and so cases began to trickle up from the immigration court system into the federal courts.\(^\text{37}\) First, just the 2nd and 3rd Circuits (which deal with cases from New York, New Jersey, and Pennsylvania) received a sprinkling of cases dealing with people fleeing Communist China. These cases were generally unsuccessful because the applicants had complicating factors, such as having established residency in Hong Kong, which was thought to be an alternative safe haven to the United States.\(^\text{38}\) However, in their consideration of these cases, the federal courts took seriously the fact that the United States had acceded to the UN Protocol. Any treaty ratified by the Senate is within the purview of the judicial branch to interpret, and in many of the opinions, there is extensive discussion of the meaning of Article 32(1) of the UN Convention, which states that “contracting states shall not expel a refugee lawfully in their territory.” Here again, the unintended consequences from ratification exceeded the symbolic changes sought by the Johnson Administration in 1968.

\(^{36}\)INS regs May 9, 1974 – CFR 242.8(a) Regs went into effect on June 14, 1974.

\(^{37}\)Administrative immigration decisions occur within the Department of Justice, and are first heard by an Immigration Judge (IJ). These decisions can be appealed to the Board of Immigration Appeals (BIA) which is also within the Department of Justice. Beyond that point, cases can be appealed into the Federal Court system, in whichever regional Circuit the case originated.

As the decade continued, a second major tension in the system emerged. Although the early asylum seekers fit with definition of a refugee in U.S. law because they were fleeing from Communist countries in the Soviet Bloc or from China, more and more people began to file asylum claims from countries outside the definition. According to the INS Operating Instructions, for those granted asylum from Communist countries or the Middle East, transition to a regular immigrant visa was possible after a period of residence. For those granted asylum from other countries, their status was far more uncertain. Once their claims were approved, they would be placed in a category known as Extended Voluntary Departure (EVD), which meant that their “case shall be reviewed on an annual basis to determine if the facts surrounding the alien’s claim to political asylum continue to exist.”

It is not clear exactly how many people fell into the Extended Voluntary Departure category during the 1970s. However, according to David Martin who worked for the Assistant Secretary of State for Human Rights at the time, the “main decision-makers in the [State] Department under the Carter Administration were…growing noticeably more resistant by 1979 to adding new groups to the list,” because of the ad hoc nature of the process and the uncertain nature of the status granted. In addition to this Departmental resistance, refugee advocates had trouble explaining EVD status to their clients. According to one advocate who worked with Indians and Ugandans in Chicago:

Congress passed, ratified this treaty [the UN Protocol], which became the law of the land. And they established regulations for becoming a refugee but there was no real implementing law and so…Every year [my Ugandan clients] would have to come back and get an extension of their Voluntary Departure. It was just counterintuitive for them that they would be granted status here and it was called departure. But then I tried to figure out what the heck was going on with that (Posner interview).

39Current Laws; Title 8, Code of Federal Regulations 108.2 “Operations Instructions and Interpretations: Aliens within the United States.” Issued July 26, 1972. This category also included a growing number of national origin groups which had been granted blanket Extended Voluntary Departure by the State Department, including Ethiopians, Ugandans, Iranians and Nicaraguans. These groups were viewed by the State Department as being in need of protection despite their lack of fit with the official refugee definition. Proceedings of the Annual Meeting of the American Society of International Law, April 22–24, 1982. Testimony of David A. Martin. Vol. 76:18.

40See footnote 39.
As there was no possible path to permanent residency, these asylum seekers ended up in an indefinite state of limbo so long as the circumstances in their home countries remained dangerous.

The third major point of tension arising from the INS asylum regulations was the disparate procedural tracks for asylum claims made at a point of entry, rather than after arrival in the United States. For those people who applied for asylum as they sought entry to the United States (usually Haitians, another nation at odds with the Communist-centric refugee definition, arriving by sea), the 1972 Operating Instructions outlined the following process: applications went to the INS District Director, and the decision was made in consultation with the Department of State. If the request for asylum was denied, the applicant was sent to an IJ, who would process the removal of the asylum seeker from the country. However, during that final hearing, the IJ could not examine or review the substance of the asylum claim, because the procedures clearly delegated that discretionary power to the INS District Directors as agents of the Attorney General. Thus, they had no recourse to challenge their exclusion from the country.

The plight of Haitian asylum seekers attracted a different kind of immigration attorney. These norm entrepreneur lawyers actively used case law to highlight the hypocrisies they saw in U.S. asylum policy, and called for an institutionalization of international refugee law. In 1973, several lawyers organized a group of 147 Haitian nationals to form a class action suit asking for judicial review of the INS asylum procedure. They claimed that the UN Protocol “vests in all potential refugees a liberty right or expectation” under the due process clause that would require a more rigorous procedure. The case took several years to wind its way through the courts, but in 1977 the 5th Circuit rejected the argument that the UN Protocol granted asylum seekers rights under the constitution, and discounted that existing INS procedures were inadequate in light of the UN Protocol.41

Although the Pierre case was a major defeat for Haitian asylum seekers and refugee advocates, it did not settle the issue. Instead, the number of Haitian applicants continued to rise, and the networks of lawyers representing them in Florida grew rapidly. The National Council of Churches had taken on the Haitian refugees as a major cause and sponsored a host of litigation led by their general counsel Ira Gollobin, who had founded the National Lawyer’s Guild (Zucker, 1983:154).

Other lawyers who were deeply involved in Haitian litigation included Rick Swartz, with the Alien Rights Project of the Washington Lawyers Committee for Civil Rights Under Law, Peter Schey from the National Center for Immigrants’ Rights, and Ira Kurzban who worked with the Haitian Refugee Center and the National Emergency Civil Liberties Foundation.42

According to Rick Swartz, it was during this period that the treatment of Haitian asylum seekers captured the attention of the Congressional Black Caucus, and inspired its “first major foray into foreign affairs and migration policy.” This development led to a series of meetings between legal advocates and representatives such as Shirley Chisolm (D-NY) and Jesse Jackson (Swartz interview). Through these experiences, advocates like Swartz were “beginning to evolve personally from being really a lawyer’s lawyer, organizing litigation, organizing briefs, organizing pro bono assistance to getting more involved in the policy debates.” This evolution for Swartz and other norm entrepreneurs represented a key manner in which the policy feedback loop came full circle: advocates began to educate members of Congress about the practical legal ramifications of the decision to ratify the Protocol. Even with courts rejecting asylum claims based on the UN Protocol, this evolution allowed advocates to ultimately advance their claims in the legislative sphere.

The most immediate impact of the support structure for Haitian advocacy was improved documentation of both the conditions in Haiti and the discrepancies between the official INS procedure and the actual way asylum hearings were being conducted. As a result, the courts began to respond to these arguments, and became more aggressive in their review of asylum decisions. In the 1977 case *Coriolan v. INS*, the 5th Circuit remanded a negative decision to be re-heard in light of a new Amnesty International report about conditions in Haiti, and encouraged a broad reading of the refugee definition:

We cannot believe…that Congress would have refused sanctuary to people whose misfortune it was to be the victims of a government which did not require political activity or opinion to trigger its oppression.43

42Many of these lawyers went on to have long careers in immigration politics. Swartz, for example, went on to found the National Immigration Forum, Ira Kurzban later became President and General Counsel for the American Immigration Lawyers Association, and Peter Schey went on to lead the Center for Human Rights and Constitutional Law.
In the summer of 1978, the State Department proposed that the INS revise form I-589, the application for asylum, to include a notice to applicants that they had the right to ask to have their case reviewed by the UNHCR. According to a court opinion recounting the event, “such a procedure had been recommended by UNHCR and, in the judgment of the State Department, would accord with the spirit of the UN Protocol.” However, this suggestion of increased institutionalization pushed policymakers within the INS too far. The agency rejected the proposal, saying this change would lead to delays and would “subordinate” INS adjudicators. Instead, under increased caseload pressure, the INS procedures for handling Haitian claims become even more perfunctory. During 1978, the INS initiated a new expedited program for Haitian claims (known as the “Haitian Program”), whereby applicants were routinely denied any opportunity for external review. In fact, in 1978 through 1979, the INS processed thousands of Haitian cases through this program, and rejected every single application.

However although previous courts had been largely unsympathetic to the plight of Haitian refugees, by this point the federal courts, especially in Florida, had seen years of asylum cases, and some judges had internalized the arguments that the norm entrepreneurs had been making. All four of the entrepreneurial lawyers mentioned above argued the case of Haitian Refugee Center v. Civiletti before the Southern District Court of Florida, and ultimately won a watershed victory for a class of 5,000 Haitians. In his opinion reviewing the INS’s Haiti policies, Judge King discussed the disparity between acceptance rates for Haitian and Cuban asylum claims and, citing Article 3 of the UN Protocol, which requires that states apply its provisions “without discrimination as to race, religion, or country of origin,” called the INS numbers “an intentional, class-wide, summary denial” and “a pattern of discrimination.” King then went on to examine the Haitian Program and concluded that the “INS procedures were willfully and systematically violated.” The Court in Civiletti ordered the INS not to deport any more Haitians until it eliminated the Haitian Program, and established an “orderly, case-by-case, non-discriminatory, and procedurally fair reprocessing of the plaintiffs’ asylum applications” and suggested that “in formulating such a plan, the defendants shall

44Haitian Refugee Center v. Civiletti, SD Fla District Court 503 F. Supp 442 (1980).
46Haitian Refugee Center v. Civiletti, SD Fla District Court 503 F. Supp 442 (1980).
adhere to their own regulations and operating procedures." It is clear from this decision that the tides had turned, and the asylum protections of the UN Protocol had been incorporated into the U.S. legal system.

FROM COURTS TO CONGRESS: THE REFUGEE ACT OF 1980

By the time the institutional channels in Congress were opened in 1979 with Kennedy assuming chairmanship of the Judiciary Committee, the public salience of the UN refugee definition had increased dramatically. In fact, the legislative vacuum had made the need for a formal asylum procedure glaringly obvious to many key people within civil society, the bureaucracy, and Congress. The iterative relationships between Congress and the agencies on the one hand, and the agencies and legal advocates on the other, all came together to influence the shape of the 1980 Refugee Act. Ultimately, the team who drafted these provisions included representative from all these groups: lobbyists with experience litigating, and members of the State Department and Department of Justice with experience handling asylum claims.

The first change came within the Department of State. Attorney David Martin (currently with the Department of Homeland Security’s Office of Legal Counsel) had joined the State Department in October of 1978, and quickly realized that in addition to the issues with parole, the ideologically driven definition of a refugee was outdated. He also realized that a natural replacement was the UN’s non-ideological definition, as it had already been recognized with the accession to the Protocol a decade earlier (Martin interview). Martin had traveled to Haiti on a fact-finding mission with other State Department officials and Stephanie Grant of Amnesty International, and had gained an increasing awareness that the asylum provisions in the new act needed to be more flexible than existing law allowed. By 1977 and 1978, the State Department gave the UN definition its “unambiguous endorsement” (Anker and Posner, 1981–1982:33; see Hearings on Admission of Refugees into the U.S.).

Change also emerged from within the Department of Justice and INS. According to David Crosland, Acting Director of the INS from 1979 to 1981, the Department did not have a lot of expertise on how to handle asylum matters, and after “getting sued a lot” they ended up on a steep learning curve about the challenges of asylum law (Crosland interview). Doris Meissner, Deputy Director for Policy and Planning at the Department of Justice when the 1980 Refugee Act was drafted, was
involved in many of the conversations within DOJ about the shape of the Act. As she recalls:

We knew that the definition that was in the INA, in the immigration law, was an outdated definition that came out of a post-WWII era Cold War mindset. And we had already ratified the UN Convention...so the logical or responsible thing to do for the U.S. would be to then incorporate that into its domestic laws (Meissner interview).

Finally, lawyers who had cut their teeth on the early asylum cases of the 1970s were able to engage in extensive lobbying in Congress based on this experience with litigation. Michael Posner, for example, recalls:

When I came to the Lawyers Committee in 1978 I thought “you know, this is the perfect thing to be working on,” because congress was debating the Refugee Act... And I started asking. I went to Senator Kennedy’s office. Jerry Tinker was the guy there, Gelda Hahn, and to Liz Holtzman’s office and I said does this [bill] have anything to do with people seeking asylum in the United States and they said, what are you talking about? And I said well I had all these clients in Chicago, these Ugandans, and the system is made up. So...Jerry Tinker said to me, “why don’t you draft something?” (Posner interview).

The sections of the 1980 Refugee Act dealing with asylum provisions and the UN refugee definition were not driven by legislative politics. Because they flew beneath the radar, they were instead driven by the mobilization of lawyers and bureaucrats who were responding to developments on the ground. However, these developments had been shaped largely by the interplay between the Courts and entrepreneurial advocates. At the heart of this interplay was the UN Protocol, which had become far more institutionalized, in legal opinions and in bureaucratic procedures. The Refugee Act of 1980 represented the next logical step in the evolution and entrenchment of the Protocol’s protections.

**Legislating the Refugee Act**

Work on a comprehensive refugee bill began in 1978, spearheaded by staff from Senator Kennedy’s office, the House Immigration Subcommittee, and members of the State Department, INS, and Department of Justice. All of these actors collaborated with the Carter Administration’s newly enshrined Ambassador for refugee affairs, Dick Clark. Following the tenor of the Southeast Asian refugee crises, much of the debate in Congress focused on overseas admissions. And, in line with the struggle between branches of government over control of refugee policy, arguably the most contentious provision of the new law focused on establishing a
system of consultation between the President and Congress for emergency admissions. Groups advocating for reform, according to Bon Tempo (2008), framed the issue as one of human rights and international responsibilities, redirecting the debate away from a focus on total numbers admitted. On the opposite side of the coin, traditional restrictionist groups such as the Federation for American Immigration Reform (FAIR) put forth only weak opposition, and most parties agreed that the U.S. required *some* procedure for admitting refugees.

This consensus allowed the bill to pass unanimously in the Senate, and overwhelmingly in the House. Kennedy helped to steer the bill through the Senate, while Congresswoman Elizabeth Holtzman (D-NY), shepherded the bill through the House. Kennedy had a long history of support for refugees, helping to push through ratification of the Protocol in 1968. Holtzman had been active in the Civil Rights and Women’s Movements in the 1960s, and strongly supported a shift toward a more liberal, human rights based-foreign policy to counter the effects of the Vietnam War (Anker and Posner, 1981–1982:31–39; Bon Tempo 2008:160–161, 173–177). Thus, her support of refugee legislation is not surprising.

The Refugee Act made four primary changes to U.S. refugee policy. (1) It codified the UN definition of a refugee into domestic law, removing the earlier restrictions on refugees outside of Communism countries or the Middle East. (2) It removed refugee admissions from the immigration preference system, and set up two streams of refugee admissions: (i) each year the U.S. would admit no less than 50,000 normal flow refugees, but (ii) the President (in consultation with Congress) had the ability to adjust this admissions level after 3 years, and could admit extra refugees “justified by humanitarian concerns or…otherwise in the national interest.”47 (3) The Act set up the U.S. Coordinator for Refugee Affairs to guide U.S. policy on resettlement, and (4) it ordered the Attorney General to develop procedures for screening asylum claims, which would, for the first time, be linked to permanent residency visas instead of indefinite temporary status (Zucker and Zucker, 1987:Chapter 4; Bon Tempo, 2008:173–179).

As the iterative process of policy feedback had been building within the courts, advocacy community, and immigration bureaucracy for over a decade, by the time Congress passed the Refugee Act in 1980, the idea of

47 These admissions could only take place if the President certified the need for a specific number prior to the beginning of the fiscal year, and only with the consultation of Congress. Section 207(a)(1), P.L. 96-212, 92 Stat. 102.
codifying the UN definition had become remarkably non-controversial. Witnesses testifying before the House and Senate committees on the bill, including Norman Hill (Executive Director of the A. Philip Randolph Institute), the AFL-CIO, and Ambassador Clark all argued that the new definition of a refugee, (to quote Clark) “corresponds more closely to the situation that we now face.” Even though in 1968 legislators had argued that the Communist and Middle East-centric definition of a refugee fulfilled U.S. obligations under the UN Protocol, by 1980, the Protocol’s meaning had been thoroughly reinforced within domestic politics, so much so that policymakers viewed the adoption of the UN refugee definition as an essential step.

Some, like Rick Swartz of the Washington Lawyers’ Committee for Civil Rights, and Michael Posner believed that since accession to the Protocol already made the UN definition the law of the land, it made sense to incorporate it legislatively – as Posner put it, “we’ve already agreed to this, so let’s just codify it in a federal statute” (Posner interview). Others, like Doris Meissner of the Department of Justice testified during the 1979 hearings on the bill, that “refugees come from many other countries than had originally been written into the law,” and thus, according to Meissner, “we believe we ought to be trying to receive them.” As Anker and Posner (1981–1982:43) point out, the adoption of the UN definition of a refugee was the one facet of refugee policy that almost everyone agreed upon. That unity represented a significant step from 1968, and had much to do with the efforts of entrepreneurial advocates and bureaucrats. Without that groundwork, proposals to incorporate the UN Protocol into the Act would have seemed incongruous, and would likely have become controversial.

Asylum Policy and the 1980 Refugee Act

If the UN definition proved non-controversial during the legislative process, the incorporation of an asylum provision, (Section 208(a)), was not even on most legislators’ radars at the time. Most of the 1980 discussions, recalled Michael Posner, revolved around the issue of overseas admissions policy, and how to “go from using parole authority and all these ad hoc solutions to having a regular annual admission of refugees from overseas incorporated into

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48 See footnote 1.
49 United States House of Representatives, “Hearings before the Subcommittee on International Operations of the Committee on Foreign Affairs, Ninety-Sixth Congress, First Session, on H.R. 2816,” 71 and 79.
law” (Posner interview). Posner himself was a key norm entrepreneur, and a central figure in drafting the asylum provisions, along with members of Amnesty International, the State Department, and Senator Kennedy’s staff.

The one question that did arise during the discussions over asylum, according to Posner, was whether or not the change would have an effect on the number of people arriving. But with few people actually claiming asylum prior to 1980, bureaucrats like Posner did not believe that much would change (Posner interview). Likewise David Martin, then at the State Department, pointed to the non-controversial nature of these legislative changes, arguing that “it was hard for people to argue against” including an asylum provision, as like the adoption of the UN definition, including an asylum procedure also brought refugee in law with the provisions of the UN Protocol (Martin interview).50

For those few policy entrepreneurs that did focus on the asylum provisions, the debate revolved around creating a streamlined and universal procedure for adjudicating claims. As in the early 1970s, advocates like Rick Swartz, for example, drew on their own history of difficulties in getting Haitian refugee claims recognized, and were highly motivated to improve their treatment. Swartz recalls that:

I wanted to ensure rights of asylum seekers, what we were litigating…[the] right to counsel, [the] right to a fair hearing, [the] right to administrative and judicial review, no discrimination, due process and equal protection (Swartz interview).

For Martin, Meissner, and Posner, their main recollection of the definition and asylum provisions was the lack of debate or opposition.51

50 Martin also points out that the UNHCR had been pushing for the U.S. to align its asylum provisions with its obligations under the Protocol, and he remembers UNHCR officials sitting in on meetings with State Department and Justice officials, and with Congressional leaders.

51 The INS, as Anker and Posner (1981–1982:41) point out, did not at first believe that a formal asylum procedure was necessary, but members of the refugee subcommittee pressed for an asylum process that would be able to cover more than just those fleeing communism. Like the adoption of the UN definition, those pushing for an asylum procedure argued for common sense. International obligations, they believed, created the requirement for hearing claims of persecution, ergo the United States needed to have a process by which all claims could easily and equally be processed. Doris Meissner echoed this sentiment arguing that the team drafting the asylum provisions was truly trying to put in place a workable standard. With so few people actually claiming asylum prior to the 1980 Act, according to Meissner, it was “a conversation for which we just didn’t have precedence” (Meissner interview).
These changes, according to Posner, “made sense and nobody really said no.” Posner does point out that the more intricate details of the bill, like the asylum provisions, were intentionally kept quiet, so as to not detract from the larger goal of winning passage of a bill primarily designed to fix overseas admissions. But according to him “it was almost too abstract and seemingly inconsequential to rise to the level of substantive debate about the merits” of the asylum program. Thus, the inclusion of these provisions had less to do with attempts to sneak game-changing standards into refugee legislation, and more about the very basic and technical nature of the changes themselves (Posner interview). Overall, the focus was on the big questions of refugee admissions and resettlement. Only the advocates and bureaucrats with experience in questions of asylum were involved in detailing that part of the bill.

The story of the passage of the Refugee Act of 1980 is not simply that its genesis can be traced to inter-branch struggle of control of admissions, as scholars have so often argued. It also stems from an iterative policy feedback loop between lawyers and the courts, as well as bureaucrats and a select few legislators that occurred outside of the public sphere. Legislators passed two of the most enduring changes to refugee policy (the incorporation of the UN non-ideological definition of a refugee and the development of an asylum provision with a path to permanent residency) largely without opposition or public debate. Much of the groundwork for these two policies was laid by a decade of legal and bureaucratic mobilization, which reproduced and reinforced the international legal norms, until they became a part of domestic policy (see Cortell and Davis, 2000:71). Although in 1968, policymakers spoke of the Act as a symbolic change, through the process of mobilization, by 1980, the symbolic had become real.

**EPILOGUE: POST-PASSAGE IMPLEMENTATION**

The passage of the 1980 Refugee Act marked a significant step in the institutionalization of international norms in American refugee politics. Nevertheless, it also had a number of unintended consequences. On the one hand, large-scale movements such as the Mariel Boatlift showed the constraints that the new asylum policy put on U.S. foreign policy goals. On the other hand, the passage of the Act spurred the creation of an amplified legal advocacy community to bring the protections of the Act to new generations of refugees and asylees. The post-passage history of
refugee policy in the United States points to the incomplete process of institutionalization, whereby international norms continued to be reinterpreted in light of domestic and foreign relations contexts.

Almost as soon as President Carter signed the Refugee Act into law, and lasting throughout the summer of 1980, boatloads of Cuban asylum seekers began to arrive on the shores of Florida. Fidel Castro encouraged anyone who wanted to leave to do so, and over that summer almost 130,000 fled in an exodus that became known as the Mariel Boatlift (Loescher and Scanlan, 1986:170; Bon Tempo, 2008:180). In the words of a prominent refugee advocate, “the act was tested through this ongoing first asylum phenomenon” (Swartz interview).

Under the new asylum procedure, each of the Cuban refugees would require individualized assessment for fit with the UN definition. However, there were immediate hurdles: first, the process could take months. Second, it was not clear that the Marielitos would pass this new test, as they did not appear to be dissidents with an individual history of state persecution. Initially, the plan was to intercept and return the envoys, but the Cuban American lobby pushed hard against this plan, and Cuban Americans from across the United States traveled to Florida to meet the boats. Senator Edward Kennedy insisted that the new Refugee Act could be used to admit the Marielitos, but in June, Carter decided instead to use parole power to admit them on a temporary basis, adding to the tradition of a president bypassing refugee law in exigent circumstances (Zucker and Zucker, 1987:64; Bon Tempo, 2008:183).

The asylum provisions in the Refugee Act had fallen by the wayside, much to the dismay of some State Department officials. According to Frank Loy, Director of the Department of State’s Bureau of Refugees from 1979 to 1981, “I was really unhappy with the way we handled Mariel...The criteria fell apart because of domestic politics, and it was quite dramatic” (Loy interview). Thus, the Mariel boatlift not only created frustration among the drafters of the Refugee Act, it also sparked public frustration with the new piece of legislation. According to David Martin, who worked very closely on the Act:

52The Refugee Act of 1980 also had a surprising and unintended impact on overseas resettlement, because the new streamlined processes for admissions were far more constraining than group-based parole authority, which did not turn on individualized assessments. Messiner interview.
We had about three weeks of celebration. We’ve done this wonderful thing. We’ve passed the Refugee Act, it’s cleared up everything, we have this wonderful new framework for dealing with refugee issues, and then boom…The Mariel Boatlift [happened] and the views on the Refugee Act soured pretty quickly. [The public asked] What? You didn’t foresee this? (Martin interview).

The Refugee Act also threw into even greater relief continued attempts to differentiate between Cubans and both Haitians and Central American refugees from right-wing regimes. The Carter administration had avoided using the individualized UN definition of a refugee to assess the Cubans, preferring instead a group-based parole. In the case of the Haitians, Guatemalans, and Salvadorans, the INS (especially under the new President Ronald Reagan) went through the process of individualized assessment of each claim, and the State Department recommended rejection in almost every case (Zucker and Zucker, 1992). The continued discrimination against non-communist Central American refugees illustrates the limits of institutionalization in triumphing over domestic politics and foreign policy priorities.

On the other side of the coin, in the wake of the Refugee Act, a new domestic infrastructure arose to implement the new asylum provisions and to challenge the double standard between treatment of Cubans and other asylum seekers. As the new Act left many unanswered questions about standards and procedures in asylum, the field of asylum law grew in leaps and bounds during the 1980s, building off of the foundations that were laid in the 1970s. Although the American Association of Immigration Lawyers had existed since the 1940s, between 1975 and 1985 its membership tripled, from 600 to 1,800 members (Serrill, Constable, and Woodbury, 1985). By 1980, the Lawyers Committee for Human Rights had established a Political Asylum Project run by Arthur Helton. This project focused on procedural fairness issues in asylum hearings, created training videos and manuals, and worked with over 1,500 volunteer attorneys around the country. By 1985, the Committee had a 10-person staff, and offices in New York and Washington, DC (Tolley, 1990:623).

Congress’s lack of attention to the asylum provisions as they were passing the Refugee Act of 1980 led to years of uncertainty about the statute. Because of the ideological commitments of the Reagan administration, advocates after 1980 found it challenging to secure asylum for their Haitian and Central American clients, and battles between courts and administrative agencies were the focus of the implementation period, just as they had been in the 1970s. Although the implementation of the 1980 Act was in many ways a slow and tortured process, the groundwork for
legal contestation, advocacy, and lobbying had been laid. These activities only gained momentum and legitimacy once the newly codified UN definition gave their legal advocacy more teeth.

CONCLUSIONS

The story of how international refugee law became incorporated into American refugee policy in the decades leading up to the 1980 Refugee Act has been overlooked and under-theorized. Dramatic tales of boat people, refugee camps, and resettlement during the 1960s and 1970s have overshadowed the understanding we put forth of a much more subtle shift, as the non-ideological United Nations definition of a refugee, and the asylum procedures outlined in international law gradually became reference points and advocacy tools for legal mobilization and bureaucratic innovation. These changes began well before they were officially codified into legislation, and have continued to evolve ever since, even though the 1980 Refugee Act remains the overarching statutory framework. Indeed, without understanding how the symbolic ratification of the UN Protocol in 1968 led to a period of legal mobilization in the 1970s, the dedicated asylum process and UN definition would seem to appear from nowhere in 1980. Rather, the legislative change was driven by a dedicated set of norm entrepreneurs who used the UN Protocol to push for greater rights for their clients and convinced key bureaucrats of the practical need for reform.

By focusing on the mechanisms by which international refugee law has been incorporated into domestic asylum policy, we have sought to fill several gaps in the existing literatures on American immigration policy history and the domestic incorporation of international norms. First, the ratification of the United Nations Protocol in 1968 was intended to be a symbolic moment, with politicians in the Senate and the Johnson administration believing that the treaty would not change anything. However, we have argued that symbolic politics are not in-and-of-themselves meaningless. In fact, as the American Political Development literature on policy feedback reminds us, early policies can be useful explanatory variables in understanding the shape and timing of future reforms (Pierson, 2004). We suggest that the Senate ratification of the 1968 Protocol operated in just this sort of policy feedback loop: once ratified, legal mobilizers and entrepreneurial policymakers took advantage of the new refugee protections and changing circumstances to slowly incorporate its provisions into
law. Much of this activity happened outside of, and prior to, the legislative activity of 1979 and 1980. This insight suggests that international norm incorporation can happen across multiple iterative cycles, and importantly, outside of the sphere of formal legislative policymaking.

Secondly, we argue that the 1970s do not comprise a gap period in American asylum policy-making, as many studies suggest. International norms about refugee policy gained public salience, and norm entrepreneurs were activated during this period, leading to new judicial interpretations and several policy changes coming out of the agencies. Though Congressional reform did not advance, people continued to arrive in the United States and claim asylum, and bureaucrats and advocates continued to grapple with refugee protections. Some of those people had fled Communist countries that fit with the statutory definition of a refugee, but some had not. Presidents Nixon and Carter spoke publicly about their commitment to asylum, and officials within the Departments of State and Justice responded. Key legislative entrepreneurs like Kennedy, Rodino, and Holtzman drew on international norms such as those of the UN, and an extensive infrastructure for legal mobilization developed in support of those norms.

In short, the adoption of international legal standards in the 1980 Refugee Act was not a total about-face from previous refugee policy. Instead, it was a watershed event in a long series of developments before and after that legislative moment. The moment was only possible because the international norms had been reproduced and reinforced via a policy feedback loop over time. That loop would continue operating in a similar way post-passage, because the form of earlier institutionalization laid the framework by which refugee rights would continue to be contested after 1980.

Thus, we suggest that to understand how international norms become institutionalized in fragmented political systems, it is crucial to examine events outside of the legislative sphere, and over the course of multiple decades. Both the migration policy literature and the IR literature on domestic incorporation of international norms have placed too much emphasis on key legislative moments, and paid too little attention to the ripple effects of seemingly symbolic actions. This article has argued instead that legal mobilizers can use symbolic politics to create bureaucratic buy-in, and that these are essential factors for understanding policy change that incorporates international norms. That these norms continue to be contested after the passage of legislation lends only more weight to the need to study institutionalization from multiple standpoints.
## APPENDIX: LIST OF INTERVIEWS

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<td>Director, Bureau of Refugee Programs, Department of State (1979–1981)</td>
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<td>Harry McPherson</td>
<td>Special Assistant/Counsel to President Johnson</td>
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<td>Doris Meissner</td>
<td>Deputy Associate Attorney General, Department of Justice (1973–1980)</td>
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<td>Bill Moyers</td>
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<td>Rob Stein</td>
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<td>Rick Swartz</td>
<td>Alien Rights Project of the Washington Lawyers Committee for Civil Rights Under the Law</td>
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