The Illegal Immigration Reform & Immigrant Responsibility Act's One-Year Filing Deadline on Applications for Asylum: The Narrow Interpretation and Application of Exceptions to the Filing Deadline

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THE ILLEGAL IMMIGRATION REFORM & IMMIGRANT RESPONSIBILITY ACT’S ONE-YEAR FILING DEADLINE ON APPLICATIONS FOR ASYLUM: THE NARROW INTERPRETATION AND APPLICATION OF EXCEPTIONS TO THE FILING DEADLINE

INTRODUCTION

After an intensive period of immigration to the United States and amid a brief period of anti-immigrant fervor among Americans, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996. Although members of Congress have generally lauded the IIRIRA as “landmark” legislation, many opponents of the IIRIRA describe the Act as “the harshest, most procrustean immigration control measure in [the twenty-first] century” because it oppresses a particularly vulnerable and well-deserving group of likely immigrants—refugees. Even refugees—those seeking a safe haven in the United States because of a reasonable fear of persecution or death in their home countries—must adhere to the IIRIRA’s strict one-year deadline for filing asylum applications.


2. Schuck & Williams, supra note 1, at 371. Opposition arose from the IIRIRA’s expansive retroactivity provisions, possible unconstitutional limitations to judicial review, exclusion of the Immigration and Naturalization Service (INS) discretion in extreme hardship cases, and expansion of the aggravated felony category. Id. at 371 n.16; see William Branigin, Congress Finishes Major Legislation; Immigration; Focus is Borders, Not Benefits, WASH. POST, Oct. 1, 1996, at A1; Pistone & Schrag, supra note 1, at 2.

Problems arise when a refugee, who would otherwise satisfy the statutory requirements and receive asylum, files an asylum application after the expiration of the one-year deadline.\textsuperscript{4} Without regard to the merits of the claim, the IIRIRA bars a refugee from gaining asylum protection if the refugee does not file within one year of entry into the United States, unless the refugee satisfies one of the two exceptions to the deadline.\textsuperscript{5} While the exception list is not exhaustive, the Board of Immigration Appeals (BIA) applies the exceptions very narrowly.\textsuperscript{6} Furthermore, an asylum-seeker must file an asylum application "within a reasonable period" of time after the occurrence of the exception to the one-year deadline.\textsuperscript{7}

This Note discusses the problems refugees face in adhering to the strict filing deadlines imposed by the IIRIRA to qualify for and receive asylum. Part I provides an overview of the protections granted to refugees through U.S. asylum law, focusing on the history of and recent developments in U.S. immigration and asylum law.\textsuperscript{8} Part II focuses on the one-year deadline for filing an application for asylum, highlighting the difficulties that ensue because of the immigration court’s narrow interpretation of the exceptions to the one-year deadline.\textsuperscript{9} Part III grapples with the outstanding questions that remain concerning what the Bureau of Citizenship and Immigration Services, Immigration Judges, and the BIA consider a "reasonable time" after the occurrence of an exception in filing within the one-year deadline.\textsuperscript{10} Finally, Part IV demonstrates the impact the one-year filing deadline has on both the refugee

\textsuperscript{4} See id.
\textsuperscript{6} See 8 C.F.R. § 208.4(a)(4)(i) (2004). The terms changed circumstances and extraordinary circumstances in the Act "may include, but are not limited to" the exceptions listed. Id. (emphasis added); see Immigration and Nationality Act § 208(a)(2), 8 U.S.C. § 1158(a)(2) (2004); AM. IMMIGRATION LAW FOUND., PRACTICE ADVISORY: OBTAINING FEDERAL COURT REVIEW NOTWITHSTANDING THE BAR IN ASYLUM ONE-YEAR DEADLINE CHALLENGES (Nov. 15, 2002, last updated Nov. 22, 2002)), http://www.ailf.org/lac/lac_pa_112002.asp [hereinafter AILF PRACTICE ADVISORY].
\textsuperscript{7} 8 C.F.R. § 208.4(a)(4)(ii) (2004); 8 C.F.R. § 208.4(a)(5)(v) (2004).
\textsuperscript{8} See discussion infra Part I.
\textsuperscript{9} See discussion infra Part II.
\textsuperscript{10} See discussion infra Part III.
community and the United States. The country's founders did not limit citizenship by birth or background, and the current President affirms this sentiment about immigration: "America [is] at its best . . . [when] [we] welcome not only immigrants themselves, but the many gifts they bring and the values they live by . . . mak[ing] our nation more, not less, American."12

I. PROTECTIONS GRANTED TO REFUGEES THROUGH UNITED STATES ASYLUM LAW

A. Sources of United States Immigration and Asylum Law

Current U.S. asylum law derives from two international treaties: the 1951 United Nations Convention Relating to the Status of Refugees (1951 Convention) and the 1967 United Nations Protocol Relating to the Status of Refugees (1967 Protocol).13 The humanitarian principles embodied in these international agreements create an obligation for the participating countries to protect individuals outside their home countries who have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership" in a particular social group, or political opinion.14

11. See discussion infra Part IV.
1. Definition of Refugee

The Immigration and Nationality Act (INA) defines a refugee as:

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

Not until Congress passed the Refugee Act of 1980 (Refugee Act), which comprised a nearly identical definition of “refugee” as the 1967 Protocol, did the United States execute the earlier international treaties’ obligations. Even with Congress’s astute attention to U.S. international treaty obligations in drafting the Refugee Act, the statutory definition of “refugee” generates controversy over the meaning of the term and the implementation of its statutory directive.

15. Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(42)(A) (2004); see discussion infra Part I.A.3; see also GERMAIN, supra note 13, at 3.
16. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C.); see S. Rep. No. 96-256, at 4 (1979), as reprinted in 1980 U.S.C.C.A.N. 141, 144 (highlighting that the Refugee Act would “bring the United States law into conformity with our international treaty obligations under the [1951 Convention and 1967 Protocol]”); GERMAIN, supra note 13, at 3; Bien, supra note 14, at 803 n.25; see also KAREN MUSALO, REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 64 (2d ed. 2001). While the United States began to address the problems of refugees during and immediately after World War II, the United States did not attempt to address refugees within the context of immigration until the Displaced Person Act of 1948. MUSALO, supra note 16, at 64. Under the Act, displaced persons included “those forced to depart from their place of habitual residence as a result of the actions of Nazi or Fascist regimes during World War II.” Id. However, the Act restricted eligibility of refugee status to those fleeing from the new Communist regime in Czechoslovakia, to Austrians and Germans, or to those involuntarily transported to Austria, Germany or Italy. Id.
2. The Nonrefoulement Principle

The fundamental requirement of the Refugee Convention and Protocol, nonrefoulement, protects refugees by prohibiting their return to countries where they would face persecution or a threat to their lives.\textsuperscript{18} The United States enacted the international nonrefoulement obligations into law through the Refugee Act.\textsuperscript{19} Accordingly, the Refugee Act authorizes the Attorney General to grant asylum to refugees present and seeking protection in the United States.\textsuperscript{20}

3. The Immigration and Nationality Act

The Immigration and Nationality Act (INA), the fundamental body of U.S. immigration law, contains the Refugee Act, which codifies and incorporates the Act’s definition of “refugee.”\textsuperscript{21}

B. Recent Developments in United States Immigration and Asylum Law

The immigration reforms of 1990 focused on the legal, as opposed to illegal, immigration system and culminated with the 2003 reorganization of immigration services as mandated by the Homeland Security Act.\textsuperscript{22} The initial overhaul in 1990 revised provisions for the exclusion and deportation of refugees, established new nonimmigrant

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\textsuperscript{18} 1951 Convention, supra note 13, art. 33, incorporated by reference in Art. I (1) of the 1967 Protocol ("No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."); see Germain, supra note 13, at 3; Pistone, supra note 5, at 816.

\textsuperscript{19} Pistone, supra note 5, at 816.

\textsuperscript{20} Id.


\textsuperscript{22} AleiniKoff et al., supra note 17, at 167, 238-39, 243-44.
visa categories, and expanded employment-based immigration. 23 Specifically, the Immigration and Naturalization Service (INS) incorporated a new cadre of asylum adjudicators specially trained to evaluate human rights situations in foreign countries and review applications of "affirmative" asylum applicants, those claimants who voluntarily present themselves to the INS. 24 In their administrative capacity, asylum officers have discretion either to grant an asylum-seeker's application for asylum or to refer the application to immigration court, formerly known as the Executive Office of Immigration Review (EOIR), for review by an immigration judge. 25

1. Illegal Immigration Reform and Immigrant Responsibility Act

The United States immigration priority returned to stemming the flow of illegal immigration after Congress passed the IIRIRA. 26 The IIRIRA provisions that focus on asylum drastically change U.S. asylum law by revising the definitions of refugee and nonrefoulement, imposing new limits on eligibility for asylum, and implementing an expedited removal process. 27 The new statutory bars to asylum preclude an individual from applying for asylum for several reasons: if the applicant does not file the asylum application within one year after arrival to the United States, if Immigration

24. 8 C.F.R. § 208.2(a) (2005); see Bien, supra note 14, at 806-08 & n.41.

[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Id. The amendments to the nonrefoulement section of IIRIRA preclude from protection anybody who has been convicted of an aggravated felony, which includes "a crime of violence... for which the term of imprisonment [sic] at least one year." Id. § 101(a)(43)(F); see GERMAIN, supra note 13, at 10-11; see generally INS Publishes Final Rule on Asylum Procedures, 77 INTERPRETER RELEASES 1695 (Dec. 11, 2000).
previously denied the applicant’s asylum application, or if the United States removed the applicant from the country. In addition, the IIRIRA limits the number that Immigration would grant asylum or admit to the United States as refugees to 1,000 individuals per year.

2. Reorganization of the Federal Agencies Under the Homeland Security Act

The federal approach to immigration experienced a major overhaul with the 2003 reorganization of immigration services under the Homeland Security Act. As a response to the terrorist acts of September 11, 2001, Congress voted to create the Department of Homeland Security (DHS) in November 2002, and the major restructuring of U.S. immigration services occurred in March 2003. The responsibilities of DHS are two-fold: government functions that focus on deterring and dealing with terrorism, such as the Coast Guard and Customs Service, and all of the restructured functions of the recently abolished INS.

What were formerly the immigration service and enforcement functions of the INS now comprise two distinct subunits of DHS. The Bureau of Citizenship and Immigration Services (BCIS) houses immigration services and oversees adjudications, benefits, approval or denial of applications filed by would-be immigrants or citizens, affirmative asylum claims, and refugee processing. The Under Secretary for Border and Transportation Security manages DHS enforcement responsibilities through the Bureau of Customs and Border Protection (BCBP) and U.S. Immigration and Customs Enforcement (ICE). The BCBP oversees border area enforcement,

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28. See Immigration and Nationality Act § 208(a) (2), 8 U.S.C. § 1158(a) (2) (2004); see also Germain, supra note 13, at 11.
30. See Aleinikoff et al., supra note 17, at 244; David A. Martin, Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements, 80 Interpreter Releases 601, 601 (Apr. 28, 2003).
31. See Aleinikoff et al., supra note 17, at 238-39.
32. Id. at 239.
33. Id.
34. Id. at 239, 244-45.
35. Id. at 244-45.
Border Patrol, and inspections.\textsuperscript{36} ICE directs interior enforcement, investigation of and arrest for violations, deportation, detention, removal, and employee sanctions.\textsuperscript{37}

Despite the overhaul and conglomeration of immigration services and enforcement under the DHS umbrella, many immigration functions remain outside of the DHS.\textsuperscript{38} The Department of Justice manages the immigration judges and the BIA.\textsuperscript{39} The State Department administers consular offices throughout the world and the Bureau of Population, Refugees, and Migration.\textsuperscript{40} Additionally, the Department of Health and Human Services Office of Refugee Resettlement supervises the care of unaccompanied minors.\textsuperscript{41}

II. THE ONE-YEAR DEADLINE FOR FILING AN APPLICATION FOR ASYLUM

U.S. law regarding asylum protection significantly changed with the passage of the IIRIRA.\textsuperscript{42} In particular, the IIRIRA imposed a time limit for filing first-time applications.\textsuperscript{43}

Opponents argue that the one-year filing deadline for an asylum application threatens a particularly vulnerable and well-deserving group of likely immigrants—refugees seeking a safe haven in the United States because of a reasonable fear of persecution or death in their home countries.\textsuperscript{44} Should a refugee with a genuine fear of persecution fail to file an application within one year from arriving in the United States, the BCIS (formerly the INS) may deny asylum, even though the lengthy asylum application process inhibits timely filing.\textsuperscript{45}

\begin{flushleft}
\textsuperscript{36} Id. at 245. \\
\textsuperscript{37} ALEIKOFF ET AL., supra note 17, at 245. \\
\textsuperscript{38} Id. \\
\textsuperscript{39} Id. \\
\textsuperscript{40} Id. \\
\textsuperscript{41} Id. \\
\textsuperscript{42} See Pistone & Schrag, supra note 1, at 1-2. \\
\textsuperscript{44} Id. § 1158(a)(2)(B); see Pistone & Schrag, supra note 1, at 2. \\
\textsuperscript{45} See Pistone & Schrag, supra note 1, at 8-9. Many obstacles preclude many refugees from applying for asylum immediately after entering the United States. Id. at 8. Refugees, many of whom do
\end{flushleft}
Reviewing the environment under which Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 emphasizes the proponents' side, because Congress passed the IIRIRA amidst years of a systemic backlog of asylum cases. Most of the asylum applications creating the backlog involved asylum-seekers who had been in the United States for a long time; some were bona fide refugees, but others applied for asylum only to obtain a work permit. These abuses, in which those entering the United States under the guise of asylum would file a frivolous or false asylum application so they could remain in the country and obtain immediate authority to work while their case was pending, frustrated the immigration system and politicians by creating a backlog of asylum cases.

In addition, top INS officials publicized their views on the need to curb the tide of "spurious asylum claims" at ports of entry, especially airports, which allowed "for an almost foolproof formula to stay in the United States." The President responded to these fears by reversing the government's policy of granting work permits to asylum applicants, amending the regulations so an applicant had to wait 150 days while the application was pending and was ineligible to work during this time.

47. Id.
48. Id. at 47-48, 52-55.
49. Id. at 291 n.57 (citing an interview with William Slattery, the New York Immigration and Naturalization Service District Director, on a 60 Minutes Segment that reported on asylum and immigration fraud).
50. See Pistone & Schrag, supra note 1, at 10 n.52; Colin-Antonini Interview, supra note 45.
A. Exceptions to the One-Year Filing Deadline for Asylum

A refugee’s affirmative asylum claim becomes “defensive” when the asylum officer who hears the affirmative claim refers the refugee to removal proceedings before an immigration judge.\textsuperscript{51} Defensive claims under the exclusive jurisdiction of the Department of Justice’s Executive Office of Immigration Review (immigration court) result from, among other things, failure to meet the one-year deadline for filing an asylum application.\textsuperscript{52} In addition, federal courts have no appellate jurisdiction over claims rejected by the immigration court for failure to meet the one-year deadline.\textsuperscript{53}

The immigration court strictly enforces the one-year filing deadline, barring an individual from applying for asylum if the applicant fails to “demonstrate[] by clear and convincing evidence that the application has been filed within 1 year after the date of arrival in the United States.”\textsuperscript{54} But an asylum applicant may be exempt from the deadline if the applicant satisfies one of two exceptions by demonstrating either a changed circumstance or an extraordinary circumstance.\textsuperscript{55}

Once the asylum applicant demonstrates the existence of a changed or extraordinary circumstance, the applicant must file the application within a “reasonable period of time” given the circumstances.\textsuperscript{56} During this period, whether the applicant actually qualifies is irrelevant because asylum officers first must determine whether an exception to the one-year filing deadline applies before reaching the merits of the applicant’s asylum application.\textsuperscript{57} While the immigration

\begin{footnotesize}
\begin{enumerate}
\item[51.] 8 C.F.R. § 208.2(b) (2005); see Bien, supra note 14, at 807; see also supra Part I.B.
\item[52.] See 8 C.F.R. § 208.4 (2004); see also Bien, supra note 14, at 807.
\item[53.] See AILF PRACTICE ADVISORY, supra note 6. Section 208(a)(3) of the Immigration and Nationality Act precludes federal judicial review for the failure to file within the one-year deadline. \textit{Id.}
\item[54.] The Eighth, Ninth, and Eleventh Circuit Courts of Appeals have held that they lack judicial review of administrative asylum deadlines. \textit{Id.}
\item[56.] Immigration and Nationality Act § 208(a)(2)(D); Germain, supra note 13, at 83.
\end{enumerate}
\end{footnotesize}
statute and the Asylum Officer Basic Training Course manual both seem to support an applicant’s filing under an exception after the deadline, in reality the BIA applies the changed or extraordinary circumstances exceptions quite narrowly.  

1. Exception to One-Year Deadline: Changed Circumstances

First, an asylum applicant may qualify for an exemption from the one-year deadline for asylum if the applicant can demonstrate “the existence of changed circumstances which materially affect the applicant’s eligibility for asylum” that occurred on or after the statute’s effective date, April 1, 1997. As designated by the asylum regulations, changed circumstances may include, but are not limited to, “[c]hanges in conditions in the applicant’s country of nationality or, if the applicant is stateless, country of last habitual residence” or changes in objective circumstances relating to the applicant in the United States, including changes in applicable U.S. law, that create a reasonable possibility that the applicant may qualify for asylum. The exception due to changed circumstances must “materially affect” the applicant’s eligibility for asylum.

The changed circumstances exception to the one-year filing deadline recognizes refugees sur place—individuals whose refugee designation materializes after they have left their home countries, or even after living in another country for several years. To qualify as

58. See 8 C.F.R. § 208.4(a)(2) (2004); see also ASYLUM TRAINING COURSE, supra note 56 at 8; see generally Immigration and Nationality Act § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D).
60. 8 C.F.R. § 208.4(a)(4)(i)(A) (2004).
61. Immigration and Nationality Act § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2) (2004); ASYLUM TRAINING COURSE, supra note 56, at 9. The Asylum Officer Basic Training Course provides examples of what asylum officers should and should not consider to be a changed circumstance, for instance:
Applicant was forced by her government to undergo an abortion. She arrives in the U.S. in 1992. The 1996 change to the refugee definition related to harm pursuant to a coercive population control program materially affects her asylum eligibility. She files for asylum on April 18, 1998. This applicant is not entitled to the changed circumstance exception because the change did not occur on or after April 1, 1997 (the effective date of the statute). If no other exceptions apply, her application will be rejected.

ASYLUM TRAINING COURSE, supra note 56, at 9 (emphasis added).
a refugee *sur place*, the change can occur in an applicant’s country or place of last habitual residence or as a result of activities in which the applicant participated outside her home country. Examples of what asylum officers deem to be refugees *sur place* include, but are not limited to the following: an applicant who works in a profession toward which the foreign government is now hostile, such as journalism or political organization; an applicant who is involved in organizations critical of the applicant’s former country; an applicant converting to or abandoning a religion; an applicant associated with a nationality, race, or religion against which the foreign government has recently been hostile or aggressive; or an applicant who has a family member living abroad who is receiving threats.

The legislative history of changed circumstances reveals that Congress anticipated that the exception would apply more generously when it passed the IIRIRA. The changed circumstances exception should include a provision for an applicant who does not become aware of the U.S. asylum system until after the filing deadline.

2. *Exception to One-Year Deadline: Extraordinary Circumstances*

An asylum applicant may also be exempt from the one-year filing deadline if the applicant can show “the existence of . . . extraordinary circumstances relating to the delay in filing an application” and the applicant files for asylum “within a reasonable period given those circumstances.” The extraordinary circumstances exception includes, but is not limited to, the following:

and remained anonymous to the Khomeini regime until he had an altercation with a regime agent at the Algerian Embassy who threatened that "his kind had better keep their eyes and ears open because 'their day' would come soon").

64. ASYLUM TRAINING COURSE, supra note 56, at 11.
66. *Id.*
(i) Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;

(ii) Legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival;

(iii) Ineffective assistance of counsel . . . ;

(iv) The applicant maintained Temporary Protected Status . . . until a reasonable period before the filing of the asylum application;

(v) The applicant filed an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by the Service as not properly filed . . . ; and

(vi) The death or serious illness or incapacity of the applicant’s legal representative or a member of the applicant’s immediate family.68

Asylum officers will consider other circumstances not specifically mentioned in the regulations as extraordinary circumstances if the circumstance had a severe impact on the applicant’s ability to function and file a timely application.69 Other extraordinary circumstances include, but are not limited to, “severe family or spousal opposition, extreme isolation within a refugee community, profound language barriers, or profound difficulties in cultural acclimatization.”70 The extraordinary circumstances can occur before

68. 8 C.F.R. § 208.4(a)(5)(i)–(vi) (2004).
69. See ASYLUM TRAINING COURSE, supra note 56, at 15-16.
70. Id. at 16-17.
or after the applicant arrives in the United States. However, the circumstances must have a direct correlation to the applicant’s failure to file for asylum within one year of his or her arrival in the United States.

The legislative history of the changed circumstances exception reveals that Congress expected the BCIS, immigration judges, and the BIA to interpret this exception broadly. Congress believed that threats of retribution against family members living abroad, the delay of efforts to obtain asylum due to temporary unavailability of professional or legal assistance, the death or illness of the applicant’s legal counsel, or other broadly interpreted extenuating circumstances would be included in the changed circumstances exception. But the interpretation of the statutes by the BIA exposes the actual strict interpretation of this exception.

B. Narrow Interpretation by the BIA of the Exemptions to the One-Year Filing Deadline

An examination of cases where the asylum applicant sought asylum status by applying under the exception provisions of the IIRIRA reveals two distinct outcomes given the circumstances. In

71. Id. at 12. The extraordinary circumstance can also occur before or after the April 1, 1997 effective date of the IIRIRA. Id.
72. See id.
73. See 142 CONG. REC. S11491 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch). Sen. Orrin Hatch (R-Utah) explained to his Senate colleagues before the vote on the final bill that the changed circumstances provision will deal with situations like those in which an alien’s home government may have stepped up its persecution of people of the applicant’s religious faith or political beliefs, or where the applicant may have become aware through reports from home or the news media that it would be dangerous to return home.
74. Id.; see 142 CONG. REC. S11838, S11840 (daily ed. Sept. 30, 1996) (statement of Sen. Hatch). Sen. Hatch further explained his interpretation of the bill, saying: [t]he changed circumstances provision will deal with situations like those in which the situation in the alien’s home country may have changed, the applicant obtains more information about likely retribution he or she might face if the alien returned home, and other situations that we in Congress may not be able to anticipate at this time. 142 CONG. REC. S11838, S11840 (daily ed. Sept. 30, 1996) (emphasis added); see Pistone & Schrag, supra note 65, at 1568-69.
75. Pistone & Schrag, supra note 65, at 1569.
76. See id.; discussion infra Part II.B.
77. See discussion infra Part II.B.1-3.
In re Y-C-, an unaccompanied minor in the custody of the INS pending removal proceedings established extraordinary circumstances that exempted his failure to file an asylum application within one year of arriving in the United States, because the BIA found his status as an unaccompanied minor to be a legal disability under the regulation.\textsuperscript{77} Conversely, in In re Assaad, the BIA dismissed an asylum seeker’s appeal because he failed to demonstrate prejudice to him by his former counsel’s failure to file a timely application, which did not establish a sufficient extraordinary circumstance.\textsuperscript{78}

1. Valid Exception Based on Extraordinary Circumstance: In re Y-C-

In In re Y-C-, an unaccompanied minor, who was a native and citizen of China, entered the United States in 1998 without inspection.\textsuperscript{79} Upon his arrival, the INS took the minor into custody and served him with a notice to appear.\textsuperscript{80} Released to the custody of his uncle a year later, the minor attempted to file for asylum five months after his release, but the immigration judge rejected his application.\textsuperscript{81} When the minor finally reapplied for asylum in May 2000, the immigration judge again denied his application, because the minor failed to file within a year of his arrival to the United States and did not establish an extraordinary or changed circumstances exception to the expired one-year deadline.\textsuperscript{82}

The BIA established that it will use a case-by-case analysis to determine whether extraordinary circumstances delay the filing of an application for asylum, and the regulation defines extraordinary circumstances to include “factors directly related to the failure to

\textsuperscript{77} 23 I. & N. Dec. 286, 288 (BIA 2002).
\textsuperscript{78} 23 I. & N. 553, 562-63 (BIA 2003).
\textsuperscript{79} In re Y-C-, 23 I. & N. Dec. at 286.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 287.
meet the 1-year deadline." Thus, in *In re Y-C* the BIA sustained the minor’s appeal because his status as an unaccompanied minor was a legal disability under the regulation; the minor was in INS custody until just over a year after his arrival; and the immigration judge never set a deadline for receiving the asylum application, even though the INS placed the boy in removal proceedings immediately after he arrived in the United States.

2. *Valid Exception Based on Changed Circumstance: Fear of Honor Killing Case*

Likewise, the INS granted asylum under the changed circumstances exception to a man who feared death because of his intimate nonmarital relationship with a female in his home country, where the man failed to file a timely application because of his delay in discovering that the relationship made a return to his home country unsafe. The asylum applicant had Palestinian parents and obtained Jordanian citizenship after moving to Jordan to complete his education. The general Jordanian population, which was nonurban and tribe-affiliated, regarded the applicant an outsider. Thus, when the applicant became involved with a fellow Jordanian student, whose Bedouin family opposed the relationship, the couple hid their relationship.

The applicant came to the United States in 1998 with a nonimmigrant student visa. Soon after his arrival to the United States, he learned from a mutual friend that his girlfriend’s parents

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84. *In re Y-C*, 23 I & N. Dec. at 288 (citing 8 C.F.R. § 208.4(a)(5)(ii) for the proposition that legal disability includes “an unaccompanied minor” during the one-year period after arrival).


86. See Michael D. Gragert & Kathleen Harvey, *Asylum Granted in “Honor Killing” Case*, 7 BENDER’S IMMIGR. BULL. 513-515 (May 1, 2002).

87. Id.

88. Id.

89. Asylum on Fear of Honor Killing, supra note 85, at 594.
had discovered the relationship, which endangered her life.\textsuperscript{90} Furthermore, the girlfriend’s family was looking for the applicant, and individuals who threatened his life confronted his parents.\textsuperscript{91}

The applicant filed an affirmative application for asylum after the one-year deadline.\textsuperscript{92} He qualified for the exception, because as he explained on his application, he did not discover that his relationship with his girlfriend had become a problem until four months after arriving in the United States.\textsuperscript{93} When the threats against him intensified, he determined that he could not safely return to Jordan, but it took him three months to gather his documentation and translate it into English.\textsuperscript{94}

On his asylum application, the applicant stated that he belonged to the persecuted social group of “non-original Jordanian males involved in non-marital relationships with ‘original Jordanian females.’”\textsuperscript{95} He also submitted extensive evidence describing “honor killings” of Jordanian women from traditional tribal backgrounds whom the tribal authorities accused of premarital or extra-marital relations with “non-original” Jordanian men.\textsuperscript{96} The documentation also included history of the Jordanian government’s leniency when dealing with those who commit “honor killings” and the applicant’s inability to “buy protection for any dishonor caused by their relationship” as an “original Jordanian” man could do.\textsuperscript{97}

Despite his delay in filing the asylum application, the Chicago Asylum Office of the INS, in an unprecedented decision, granted the asylum request based on the changed circumstances exception, because the applicant feared death as a result of his intimate nonmarital relationship with a traditional Jordanian female.\textsuperscript{98}

\textsuperscript{90} Gragert & Harvey, supra note 86, at 513.
\textsuperscript{91} Id.
\textsuperscript{92} See Asylum on Fear of Honor Killing, supra note 85, at 594.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.; Gragert & Harvey, supra note 86, at 513.
\textsuperscript{96} Gragert & Harvey, supra note 86, at 513; see Asylum on Fear of Honor Killing, supra note 85, at 595.
\textsuperscript{97} Gragert & Harvey, supra note 86, at 513.
\textsuperscript{98} See Asylum on Fear of Honor Killing, supra note 85, at 594.
3. Invalid Exception Based on Extraordinary Circumstance: In re Assaad

In In re Assaad, the respondent, a native and citizen of Syria, entered the United States in 1993 as a nonimmigrant visitor, and based on his marriage to a U.S. citizen, he became a conditional permanent resident. After the respondent’s status terminated, the INS initiated removal proceedings against him. The respondent sought a waiver of the removal, but the immigration judge denied it. Exercising the respondent’s right to appeal, his counsel submitted the appeal a week late, and the BIA dismissed the appeal as untimely. Nearly three years after the denial of his waiver by the immigration judge, the respondent appealed his denial of relief, alleging ineffective assistance of prior counsel. The respondent submitted evidence in compliance with the procedural requirements of In re Lozada for filing a claim based on ineffective assistance of counsel. The Immigration Judge again decided against the respondent, from which he appealed.

In the respondent’s final appeal, the BIA affirmed the holding in In re Lozada, that a respondent in immigration proceedings maintains the right to effective counsel as grounded in the Fifth Amendment guarantee of due process, and ineffective assistance of counsel is a denial of due process “only if the proceedings were so fundamentally

101. Id. at 555. The immigration judge found that respondent did not know much about his wife and did not provide sufficient evidence to qualify as a valid marriage. Id.
102. Id.; see BIA Reaffirms Lozada, supra note 99, at 240.
104. 19 I. & N. Dec. 637 (B.I.A. 1988), aff’d, 857 F.2d 10 (1st Cir. 1988). The BIA set forth procedural requirements for a claim of ineffective assistance of counsel, which were necessary to provide an evaluative basis for claims, to deter baseless allegations, and to notify counsel about the standards in immigration proceedings for representing aliens. Id. at 637. The BIA requires an alien to follow the following procedural requirements: (1) the alien must submit an affidavit detailing the agreement that he entered into with counsel, and the representations that counsel made to him; (2) the alien must inform counsel of the ineffective assistance allegations and give counsel the opportunity to respond; and (3) the alien must file a complaint with the appropriate disciplinary authorities. Id.; see In re Assaad, 23 I. & N. at 556.
unfair that the alien was prevented from reasonably presenting his or her case.”

Even though the BIA recognized that the regulations governing asylum claims specifically include ineffective assistance of counsel as an exception to the one-year deadline for filing for asylum, the regulations also mandate that an asylum applicant claiming the exception comply with the procedural requirements established in In re Lozada. Here, despite the respondent’s compliance with the three-step procedural requirements established in In re Lozada, the BIA ultimately denied the appeal because the respondent failed to adequately demonstrate that the requisite prejudice resulted from his prior counsel’s inaction.

After reviewing the record, the BIA concluded that the respondent’s prior counsel represented him sufficiently and that the respondent had a “fair and complete hearing before the Immigration Judge,” because he had representation throughout the entire hearing and had “every opportunity” to present his case. Thus, the BIA denied the respondent’s appeal for relief, because he did not sufficiently establish an exception based on ineffective counsel.

C. The Ninth Circuit Invades the BIA’s Province

In Lo v. Ashcroft, the husband and wife petitioners had two minor children born in the United States and they cared for the husband’s sick, elderly mother, who was a lawful permanent resident of the United States. In 1998, the INS notified the husband and wife that they were subject to removal, and they subsequently filed an application for cancellation of removal, contending that they were

106. Id. at 558.
107. Id. at 560 n.8.
108. Id. at 561.
109. Id. at 562; see BIA Reaffirms Lozada, supra note 99, at 242.
110. In re Assaad, 23 I. & N. Dec. at 562; Assaad v. Ashcroft, 378 F.3d 471, 476 (5th Cir. 2004); see BIA Reaffirms Lozada, supra note 99, at 242. In a subsequent appeal of the BIA decision to the Fifth Circuit Court of Appeals, the court held that it lacked jurisdiction to overturn the BIA’s decision in In re Assaad, because Mr. Assaad did not assert a substantial constitutional claim, and assuming that he had a Fifth Amendment right to effective assistance of counsel, his attorney’s failure to file a timely appeal did not violate that right. See Assaad, 378 F.3d at 476.
111. Lo v. Ashcroft, 341 F.3d 934, 935 (9th Cir. 2003).
“eligible for cancellation of removal because . . . removal would result in exceptional and extremely unusual hardship” to their minor children and the husband’s mother. The petitioners appeared at all the scheduled removal hearings, each of which was continued to a later date.

The petitioners called their attorney the day before they thought they were to appear at the next removal hearing because the wife was experiencing back trouble. The attorney was out of the office, and his secretary erroneously informed the couple that they “had nothing to worry” about, since the secretary believed the hearing was not scheduled for another four days. Relying on this advice, the petitioners failed to show up for their hearing the next day, and the immigration judge conducted the hearing in absentia and ordered the removal of both petitioners.

The petitioners next filed a timely motion to reopen the removal hearing. Supported by their own and their attorney’s affidavits, the petitioners asserted that the wife’s back pain was an “exceptional circumstance,” warranting an overturning of the removal order, and based on the erroneous advice from their attorney, the immigration judge should reopen the removal hearing due to ineffective assistance of counsel. When the immigration judge refused to reopen their removal proceedings based on either the exceptional circumstances exception or ineffective assistance of counsel, the petitioners

112. Id.
113. Id.
114. Id. at 935-36.
115. Id. at 936.
116. Id.
117. Lo, 341 F.3d at 936.
118. Id.
appealed, unsuccessfully, to the BIA.\footnote{Id. The immigration judge ruled that their appeal for ineffective counsel was not sufficient because the petitioners failed to file a complaint with the State Bar against their attorney or to explain why they did not file a complaint as established in \textit{In re Lozada}. \textit{Id}. In addition, the immigration judge held that the petitioners failed to show prejudice since they received notification of the correct hearing date. \textit{Id}. Finally, the immigration judge refused the petitioners’ alternative assertion that the wife’s back problem was an exceptional circumstance. \textit{Id}. The BIA agreed with the immigration judge’s analysis. \textit{Lo}, 341 F.3d at 936.} Finally, the petitioners appealed to the Ninth Circuit Court of Appeals.\footnote{\textit{Id}.}

Finding that the petitioners substantially complied with the requirements set forth in \textit{In re Lozada}, the Ninth Circuit reversed the BIA’s decision.\footnote{\textit{Id} at 938-39; see \textit{Federal Court Update: Summaries of Recent Immigration Decisions: Ineffective Assistance of Counsel}, 80 INTERPRETER RELEASES 1416 (Oct. 13, 2003) [hereinafter \textit{Ineffective Assistance of Counsel}].} The court held that the petitioners sufficiently established that they had received ineffective assistance of counsel and qualified for an exceptional circumstance due to the wife’s back problems, and thus the court granted them relief from the removal order.\footnote{\textit{Ineffective Assistance of Counsel}, supra note 121, at 1416-17.}

Departing from the strict reasoning offered by the BIA in \textit{In re Assaad}, the appellate court emphasized that “[f]lexibility in applying the \textit{Lozada} requirements comports with [its] policy goals” to assess the bona fide ineffective assistance of counsel claims, to discourage unwarranted allegations, and to hold attorneys to the proper standards of their profession.\footnote{\textit{Lo}, 341 F.3d at 937; see discussion supra note 104; \textit{Ineffective Assistance of Counsel}, supra note 121, at 1417; see also \textit{In re Assaad}, 23 I. & N. Dec. at 555.} The appellate court relied on affidavits submitted by both the petitioners and their attorney, in which the petitioners asserted that they had dutifully appeared at all other scheduled hearings, except the hearing where the secretary misinformed them, and the attorney admitted his responsibility for the error and took immediate steps to correct the situation.\footnote{\textit{Lo}, 341 F.3d at 938; see \textit{Ineffective Assistance of Counsel}, supra note 121, at 1417.} The court also accepted the petitioners’ explanation for not having filed a complaint against their attorney, as required by \textit{In re Lozada}, because they recognized that his mistake was inadvertent and wanted to give the attorney an opportunity to rectify the error.\footnote{\textit{Lo}, 341 F.3d at 938; see \textit{Ineffective Assistance of Counsel}, supra note 121, at 1417.} In addition, the
appellate court held that the "Attorney General may cancel removal of a deportable non-permanent resident alien" based on the petitioners' contentions that they had resided in the United States continuously for more than ten years; had maintained good moral character; had no criminal convictions; and their removal would cause hardship to their minor children, who would remain in the United States as citizens, and to the husband's mother, who would also remain in the United States as a lawful permanent resident.\footnote{8 U.S.C. § 1229 (b)(1) (2005).}

In concluding that the BIA abused its discretion in denying the petitioners' motion to reopen the in absentia removal hearing, the appellate court stressed that it had moved away from strict compliance with the \textit{In re Lozada} requirements.\footnote{\textit{Lo}, 341 F.3d at 937; \textit{see Ineffective Assistance of Counsel, supra note 121, at 1417.}} The appellate court took a more lenient approach than the BIA when reviewing the requirements to evaluate ineffective assistance of counsel, as set forth in \textit{In re Lozada}, and granted the petition for review, reversed the denial of the petitioners' motions to reopen, and remanded the matter to the BIA for further proceedings consistent with the court's opinion.\footnote{See \textit{Lo}, 341 F.3d at 937-39; discussion supra note 104.} Thus, the appellate court in \textit{Lo v. Ashcroft} reversed the BIA's longstanding strict compliance with \textit{In re Lozada}, in favor of a more lenient and flexible approach to ineffective assistance of counsel, applying it as an exception based on extraordinary circumstances for failure to file an asylum application within the one-year deadline.\footnote{See \textit{Lo}, 341 F.3d at 939.}

III. "\textit{REASONABLE PERIOD}" AND THE \textit{ONE-YEAR DEADLINE Exceptions}

A. \textit{The Confusion Surrounding "Reasonable Period" in the One-Year Deadline Exceptions}

Uncertainty surrounds what the BCIS, immigration judges, and the BIA consider a "reasonable period" for an asylum-seeker to file an
application under either a changed or an extraordinary circumstances exception to the one-year filing deadline.\textsuperscript{130} The regulations state that when there are changed or extraordinary circumstances that would exempt an applicant from the one-year filing rule, the applicant must file the application within a “reasonable period” given those circumstances.\textsuperscript{131} No definition of “reasonable” exists in the regulations, and determinations as to what constitutes a reasonable period remain with the immigration adjudicators.\textsuperscript{132} However, the Asylum Officer Basic Training Course manual seems to imply that the former INS would not strictly apply the filing deadline based on a reasonable period, especially with less-educated applicants.\textsuperscript{133}

B. Interpretation of “Reasonable Period” After the Occurrence of an Exception

The Asylum Officer Basic Training Course manual, which DHS updates annually, provides a greater understanding of how asylum officers should interpret a “reasonable period” in applying exceptions to the one-year deadline.\textsuperscript{134} If the asylum applicant can establish that she did not become aware of the changed circumstances until after they occurred, the asylum officer must consider “delayed awareness” when determining what is a reasonable amount of time to file an application.\textsuperscript{135} When determining whether the applicant filed within a reasonable period of time following changed or extraordinary circumstances, the manual directs asylum officers to review the facts of the case and use their discretion by “ask[ing] themselves if a reasonable person under the same or similar circumstances as the applicant would have filed sooner.”\textsuperscript{136} In addition, the directives encourage asylum officers “to give applicants the benefit of the doubt in evaluating what constitutes a reasonable period of time in which to

\textsuperscript{130} See Pistone & Schrag, \textit{supra} note 1, at 22.
\textsuperscript{131} 8 C.F.R. § 208.4(a)(4)(ii) to (5) (2004).
\textsuperscript{132} Peggy Gleason, \textit{The One-Year Filing Deadline for Asylum}, \textit{8 Bender’s Immigr. Bull.} 193, 193 (Feb. 1, 2003).
\textsuperscript{133} Pistone & Schrag, \textit{supra} note 1, at 22.
\textsuperscript{134} See Gleason, \textit{supra} note 132, at 194.
\textsuperscript{135} ASYLUM TRAINING COURSE, \textit{supra} note 56, at 18.
\textsuperscript{136} \textit{Id.} at 18-19.
file." Relevant factors that asylum officers should consider include the applicant’s “education and level of sophistication, the amount of time it takes to obtain legal assistance, any effects of persecution and/or illness, when the applicant became aware of the changed circumstance, and any other relevant factors.”

However, the INS commentary on the exceptions to the one-year filing deadline seems to be more restrictive than the rule or the training manual. The comments recognize that while there may be “some rare cases in which a delay of one year or more may be justified because of particular circumstances, in most cases such a delay would not be justified.”

Thus, the different interpretations of a “reasonable period” provided by the asylum officer training manual and the INS commentary underscore the confusion that results from the lack of an agreed-upon definition of a “reasonable period” within which an asylum applicant may file an application after the one-year deadline under the extraordinary or changed circumstances exception.

IV. EFFECTS OF THE STRICT INTERPRETATION OF THE ONE-YEAR FILING DEADLINE EXCEPTIONS

A. The Deadline’s Impact on the Refugee Community

Since enactment of the IIRIRA, BCIS, immigration judges, and the BIA have drastically reduced the number of asylum applications approved by applying the one-year deadline for filing. Before the IIRIRA’s passage, a refugee could apply for asylum at any time, which was a fair application of asylum law given the many

137. Id. at 19.
138. Id.
139. See Pistone & Schrag, supra note 1, at 23.
140. Id.
141. See id. at 22-23; see also Gleason, supra note 132, at 193-94.
challenges that impede refugees from immediately applying for asylum after entering the United States.\textsuperscript{143}

Refugees experience a profound negative consequence when they fail to demonstrate with "clear and convincing evidence" that they have filed an asylum application within one year of arriving in the United States.\textsuperscript{144} Regardless of the merits of their claims, the IIRIRA threatens refugees with return to a home country where soldiers harass them for involvement in an opposition political party; the government threatens them with a compulsory abortion because of strict family planning policies; or they face a well-founded fear of persecution.\textsuperscript{145}

The United States rejected the claims of 3,141 asylum-seekers in an eight-month period simply because the refugees missed the one-year deadline, never considering the merits of their claims.\textsuperscript{146} Relaxing the strict interpretation of the IIRIRA's one-year deadline filing exceptions would "restore fairness to our treatment of refugees who arrive at [the] shores [of the United States] seeking freedom from persecution and oppression."\textsuperscript{147}

B. The Deadline's Impact on the United States

The one-year deadline harms the United States reputation in the international community because other nations perceive the deadline as a failure to comply with the international obligations of nonrefoulement under the 1967 Refugee Protocol, the Refugee Act, and international law.\textsuperscript{148} Furthermore, the lack of federal appellate jurisdiction gives immigration adjudicators too much discretion, an opportunity to inconsistently apply the law, and insufficient guidance

\textsuperscript{143} See Pistone & Schrag, supra note 1, at 8; discussion supra note 45.
\textsuperscript{144} See Elizabeth Brundige, Too Late for Refuge: An International Law Analysis of IIRIRA's One-Year Filing Deadline for Asylum Applications, 7 BENDER'S IMMIGR. BULL. 778, 778-79 (July 1, 2002).
\textsuperscript{145} See id. at 778.
\textsuperscript{146} Id. The eight-month period extended from October 2000 to June 2001. Id. at 779.
\textsuperscript{148} See Brundige, supra note 144, at 779. The United Nations High Commissioner for Refugees has expressed serious concerns about IIRIRA's one-year filing deadline, because the Act does not include sufficient protections against refoulement. Id. at 788; see also discussion supra Parts I.A.1-2.
to decide what constitutes a valid exception for failing to apply for asylum within the one-year deadline.\textsuperscript{149}

While the United States has real concerns about fraud, the asylum backlog, and terrorism, it must not permit the abuses of a few to close the door on refugees who legitimately require U.S. protection.\textsuperscript{150} Furthermore, the United States can achieve national security without infringing on the civil liberties and basic rights of immigrants.\textsuperscript{151}

The United States must determine what is more important for the country’s stability and future: the continued restriction of the exceptions to the one-year deadline and limiting the number of refugees approved for asylum, or the flexible application of the exceptions and opening the country’s borders to those in need of protection from persecution.\textsuperscript{152}

\textbf{CONCLUSION}

The IIRIRA imposes the unreasonable and burdensome obligation on refugees to file applications for asylum within one year of arriving in the United States.\textsuperscript{153} Most refugees face enormous challenges when they first enter the United States: they are unable to speak English, they have little savings or property, they are in poor physical and mental health, and they harbor extreme suspicion and fear of government.\textsuperscript{154}

Problems arise when a refugee, who would otherwise satisfy the IIRIRA’s statutory requirements and receive asylum, files an asylum application after expiration of the one-year deadline.\textsuperscript{155} Without regard to the merits of the claim, an immigration adjudicator often bars a refugee who does not file within one year of entry from gaining asylum protection unless the applicant satisfies an exception

\textsuperscript{149} See AILF Practice Advisory, supra note 6; Colin-Antonini Interview, supra note 45; discussion supra note 104.

\textsuperscript{150} See Schrag, supra note 46, at 47, 55; discussion supra Part II.

\textsuperscript{151} See AM. BAR ASS’N, AMERICAN JUSTICE THROUGH IMMIGRANTS’ EYES 114 (2004).

\textsuperscript{152} See Colin-Antonini Interview, supra note 45.

\textsuperscript{153} See supra Parts I.B.1, II.

\textsuperscript{154} See supra text accompanying note 44.

\textsuperscript{155} See supra Parts I.B.1, II.
to the deadline by demonstrating either changed or extraordinary circumstances.\textsuperscript{156} Furthermore, once the asylum applicant demonstrates the existence of a changed or extraordinary circumstance, the applicant must also have filed the application within a "reasonable period" of time under the circumstances.\textsuperscript{157}

The refugee’s ability to show an exception to the one-year deadline does not necessarily signify that the immigration court will automatically grant asylum.\textsuperscript{158} The refugee first faces the challenge of immigration adjudicators narrowly applying the changed and extraordinary circumstance exceptions in actual cases.\textsuperscript{159} In addition, the refugee must confront the ambiguity and inconsistency that surrounds what the BCIS, immigration judges, and BIA consider a "reasonable period" of time for an asylum-seeker to file an application under one of the exceptions.\textsuperscript{160}

Since enactment of the one-year deadline for filing an asylum application, immigration adjudicators have drastically reduced the number of asylum applications approved.\textsuperscript{161} Additionally, the one-year deadline continues to endanger the United States reputation in the international community because many perceive it as a failure to comply with international obligations.\textsuperscript{162}

The United States now stands at a crossroads and must decide whether it will allow the harsh provisions of the IIRIRA to continue to play into the fears of those who want to restrict the entry of refugees seeking asylum or if it will return to its long history of opening the United States borders to those who legitimately require protection from a well-founded fear of persecution.\textsuperscript{163}

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\textsuperscript{156} See supra Part II.A.1–2.
\textsuperscript{157} See supra Part III.A.
\textsuperscript{158} See supra Parts II.B, III.B.
\textsuperscript{159} See supra Part II.B.
\textsuperscript{160} See supra Part III.B.
\textsuperscript{161} See supra Part IV.A.
\textsuperscript{162} See supra Part IV.B.
\textsuperscript{163} See id.