The Leahy-Levin Refugee Protection Act of 2010
Sectional Analysis

March 2010 marks the thirtieth anniversary of the Refugee Act of 1980, a landmark piece of legislation that sought to fulfill the United States' obligations under the 1951 Refugee Convention. Unfortunately, current law falls short of those obligations. Senator Patrick Leahy, Chairman of the Committee on the Judiciary, introduced the Refugee Protection Act of 2010 with Senator Levin, Chairman of the Armed Services Committee, to ensure that refugees and asylum seekers with *bona fide* claims are protected by the United States. The Refugee Protection Act of 2010 will restore the United States as a beacon of hope for those who suffer from persecution.

Sec. 1. Short Title.
The short title is the Refugee Protection Act of 2010.

Sec. 2. Definitions.
This section defines the terms "asylum seeker" and "Secretary of Homeland Security."

Sec. 3. Elimination of Arbitrary Time Limits on Asylum Applications.
This section eliminates the one-year time limit for filing an asylum claim. The stated intent of Congress in enacting the one-year deadline was to prevent fraud, not to deprive *bona fide* applicants from securing protection under our laws. Yet, even in 1996, problems related to fraud had been resolved through administrative reform implemented by the INS, which opposed the implementation of an application deadline. Since the one-year deadline was enacted in 1996, and despite exceptions available in the law for extraordinary or changed circumstances that may prevent the timely filing of an application, many asylum seekers with genuine claims have been denied protection. The exceptions to the one-year deadline are not uniformly applied to applicants, leading to unfair treatment of those who have legitimate reasons for applying after the one-year deadline. Moreover, a significant number of applicants have subsequently met the higher standard for withholding of removal, demonstrating that their claims were valid.

Sec. 4. Protecting Victims of Terrorism from Being Defined as Terrorists.
This section would amend the law to ensure that asylum seekers and refugees are not barred from admission to the United States under an overly broad definition of "terrorist organization" in the Immigration and Nationality Act (INA). Since September 11, 2001, changes in the law have resulted in innocent activity, or coerced actions, being labeled as material support for terrorism, a determination that can render genuine refugees ineligible for protection in the United States. Specifically, this section would exclude coerced activity from the definition of "terrorist activity." It would also clarify the definition of "terrorist activity" such that the term does not include virtually all armed activity. Rather "terrorist activity" would encompass conduct intended to (a) intimidate or coerce a civilian population or (b) influence the policy of a government through intimidation or coercion. This section would also repeal an unduly harsh provision in current law that makes spouses and children inadmissible for the acts of a spouse or parent. All applicants for asylum or refugee status must meet all of the other traditional background

and security checks.

Finally, the provision would repeal the so-called Tier III terrorist group definition. That overbroad definition includes as a terrorist group any group that is comprised of two or more persons, whether organized or not, that engages in terrorist activity or activity that falls far short of terrorism, and does not include any exception for *de minimus* activity. In addition to sweeping in far too many innocent or inconsequential acts, Tier III is unnecessary because the actions it seeks to address are covered in other sections of the INA. Any asylum seeker or refugee who is individually culpable of engaging in terrorist conduct, or direct support for it, is already barred under current prohibitions to entry for a threat to national security, serious non-political crime, persecution of others, or engaging in terrorist activity.

Sec. 5. Protecting Certain Vulnerable Groups of Asylum Seekers.
To be eligible for asylum under the Refugee Convention and domestic law, an applicant must show that he or she has experienced persecution or have a well-founded fear of future persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. This section makes several modifications to current law to ensure that particularly vulnerable groups of asylum seekers have a full and fair opportunity to seek protection in the United States.

Subsection (a) codifies the holding of the landmark Board of Immigration Appeals (BIA) decision in *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985). That holding defined the basis of persecution based on membership in a "particular social group" as one comprised of individuals who share a common characteristic they either cannot change, or should not be required to change because the characteristic is fundamental to their identity or conscience. The *Acosta* precedent has been clouded in recent years by BIA opinions that require asylum applicants to prove additional factors, some of which are unnecessary or contrary to the spirit of domestic law and the Refugee Convention. Most damaging is a requirement that the social group in question be "socially visible," a factor that could endanger certain categories of refugees, such as victims of gender persecution or LGBT asylum seekers. These are groups that, as Judge Posner of the Seventh Circuit Court of Appeals described, are at great pains to remain socially invisible. This subsection codifies the definition of social group in *Matter of Acosta* such that inappropriate, additional factors such as social visibility cannot be required by the BIA.

Subsection (a) also responds to the Supreme Court's recent decision in *Negusie v. Holder*, 129 S. Ct. 1159 (2009), which held that the BIA erred in not considering whether the Refugee Act's bar to asylum for those who had participated in the persecution of others contained an exception for those who were coerced, under duress, into such participation. The coercion exception for the persecutor bar in subsection (a) is identical to the coercion exception for the material support bar above in section 102.

Subsection (b) makes additional changes to current law. Paragraph (1): United States law has long recognized that persecutors may have mixed motives for harming their victims. For example, a militia that operates outside government control may persecute a

particular race of persons because of xenophobia and also because it seeks to deprive the persecuted race of valuable land and property. The fact that the persecutor is motivated by two intertwined goals should not prevent the victims from obtaining protection. Nonetheless, the REAL ID Act of 2005 raised the burden of proof that asylum seekers must meet in order to show that they fear persecution on account of one of the five grounds enumerated in the Refugee Convention and in U.S. law. (The five grounds are race, religion, nationality, membership in a particular social group, or political opinion.) The REAL ID Act requires that the asylum seeker demonstrate that harm on account of a protected ground is "at least one central reason" for the feared persecution. *See* INA § 208(b)(1)(B)(i). The "one central reason" language is modified in this section, which does not fully repeal the notion of persecutor intent but applies it in a manner that is both realistic and fair. This paragraph strikes the language that requires the protected ground (e.g., race) to be one central reason for the persecution and requires instead that the protected ground "was or will be a factor in the applicant's persecution or fear of persecution."

Paragraph (2): The REAL ID Act of 2005 added requirements to the INA with regard to an asylum seeker's duty to provide corroborating evidence when it is requested by an immigration judge. The REAL ID Act stated that "such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." Corroborating evidence can be an important component of an asylum claim, but asylum seekers must have a fair opportunity to respond to requests for corroboration. In addition, as courts have noted, it is sometimes virtually impossible for asylum seekers to obtain certain types of corroborating evidence. Therefore, this paragraph requires that when the trier of fact seeks corroborating evidence, the trier of fact must provide notice and allow the asylum applicant a reasonable opportunity to file such evidence unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

Paragraph (3) renumbers text in the statute.

Paragraph (4): As noted above, an asylum seeker must show that his or her well-founded fear of persecution is *on account of* one of the five grounds of asylum. This link is often called the nexus requirement. Some genuine asylum seekers have been denied asylum because of a lack of clear guidance on how the nexus requirement may be established when the persecutor is a non-state actor. The Department of Justice issued draft regulations in 2000 that made clear that an asylum seeker can demonstrate nexus through either "direct or circumstantial" evidence. This draft regulation was consistent with the U.S. Supreme Court's decision in *INS v. Elias-Zacarias,* 502 U.S. 478, 483 (1992). This paragraph would codify the draft regulation by making clear that either direct or circumstantial evidence may establish that persecution is on account of one of the five grounds.

Paragraph (5): The REAL ID Act also modified the INA with regard to factors that an immigration judge may consider in determining the asylum seeker's credibility. In short, the REAL ID gave heightened importance to inconsistencies in an asylum seeker's claim, even if those inconsistencies were minor or immaterial to the heart of the claim. In

practice, an asylum seeker with limited English skills, with post-traumatic stress disorder, or with other conditions, may make simple, minor errors in the telling and retelling of their story. This paragraph modifies the INA to state that if the immigration judge determines that there are inconsistencies or omissions in the claim, the asylum seeker should be given an opportunity to explain and to provide support or evidence to clarify such inconsistencies or omissions. Subsection (c) makes identical corrections to the corroboration and credibility determinations for removal proceedings that are described in paragraphs (2) and (5) above.

Sec. 6. Effective Adjudication of Proceedings.
This section authorizes the Attorney General to appoint counsel to an alien in removal proceedings where fair resolution or effective adjudication of the case would be served by doing so. In certain cases, such as those involving highly complex asylum claims, unaccompanied minors, mentally impaired persons, or individuals who are incapable of *pro se* representation, delays in adjudication may result while an alien prepares a case or searches for *pro bono* representation. The immigration courts will operate more efficiently (with savings to taxpayers) if the Attorney General is provided explicit authority to exercise discretion to appoint counsel in certain instances, such as those described above.

Sec. 7. Scope and Standard for Review.
This section prevents the removal of an alien during the 30-day period an alien has to file a petition for review to a Federal Circuit Court of Appeals after the alien has been ordered removed. Staying the removal during this period will enable an applicant to carefully consider whether to file an appeal rather than rush to file in order to preserve his or her rights. In weak cases, the alien will likely decline to appeal, and deport voluntarily or via government removal. This section also restores judicial review to a fair and reasonable standard consistent with principles of administrative law. The standard in this section is that the Court of Appeals shall sustain a final decision ordering the removal of an alien unless that decision is contrary to law, an abuse of discretion, or not supported by substantial evidence. The decision must be based on the administrative record on which the order of removal is based.

Sec. 8. Efficient Asylum Determination Process for Arriving Aliens.
Under current law, an alien who requests asylum as they attempt to enter the United States (an "arriving alien") is subject to detention for part or all of the time that they await an asylum hearing. Such asylum seekers are provided an initial interview with an asylum officer to determine whether they have a credible fear of persecution, but then must pursue their asylum case in immigration court, rather than in a non-adversarial proceeding. Generally speaking, the adversarial immigration hearing is considerably lengthier and costlier than a non-adversarial asylum hearing. Under this provision, the DHS asylum office would be given jurisdiction over an asylum case after a positive credible fear determination. The alien would then undergo a non-adversarial asylum interview. If the asylum officer determines that he or she is unable to grant asylum, the case will be referred to an immigration judge and the asylum seeker placed in removal proceedings. This structure mirrors the current process for asylum seekers who apply for

asylum from within the United States.

The Secretary of Homeland Security currently has discretion to detain asylum seekers. This section maintains such discretion but clarifies that, consistent with a DHS policy announced in December 2009, it is the policy of the United States to release ("parole") asylum seekers who have established a credible fear of persecution. Under this section, asylum seekers who have established identity will be released within 7 days of a positive credible fear determination unless DHS can show that the asylum seeker poses a risk to public safety (which may include national security) or is a flight risk. If parole is denied, an immigration judge must review the decision within 7 days of the decision to deny release. This section also requires the Secretary and the Attorney General to promulgate regulations for parole.

Sec. 9. Secure Alternatives Program.
This section requires the Secretary of Homeland Security to establish a secure alternatives to detention program. The program will allow certain aliens in civil immigration custody to be released under enhanced supervision to prevent the alien from absconding and to ensure that the alien makes all required appearances associated with his or her immigration case. The program is to be designed as a continuum of alternatives based on the alien's need for supervision, which may include placement of the alien with an individual or organizational sponsor, or in a supervised group home. The program shall restrict the use of ankle monitoring devices to cases in which there is a demonstrated need for enhanced monitoring, and the use of ankle monitors shall be reviewed periodically. The program shall be designed to include individualized case management and referrals to community based organizations. In designing the program, the Secretary is instructed to consider prior successful programs, such the Vera Institute of Justice's Appearance Assistance Program.

Sec. 10. Conditions of Detention.
Regulations regarding conditions for detention shall be promulgated, and must address several issues including access to legal service providers, group legal orientation presentations, translation services, recreational programs and activities, access to law libraries, prompt case notification requirements, access to working telephones, access to religious services, notice of transfers, and access to facilities by nongovernmental organization. This section also limits the use of solitary confinement, shackling, and strip searches. It also defines the requirements for medical screening and treatment of detainees with medical needs, and creates an administrative appeal mechanism for detainees whose requested medical treatment is denied. Staff must be adequately trained and the facilities shall accommodate the needs of vulnerable populations, such asylum seekers. This section also requires that by January 1, 2014, facilities used by ICE to detain alien detainees be located within 50 miles of a community in which there is a demonstrated capacity to provide free or low-cost legal representation.

Sec. 11. Timely Notice of Immigration Charges.
This section requires the Department of Homeland Security to file a charging document with the immigration court closest to the location at which an alien was apprehended

within 48 hours of the alien being taken into custody by the Department. The Department is also required to serve a copy of the charging document on the alien within 48 hours of apprehension. This section will serve multiple purposes. It will prevent asylum seekers and other aliens from languishing in detention at taxpayer expense without being charged. It will encourage efficient handling of cases by both the Department of Homeland Security and the immigration courts, which are operated by the Department of Justice. Finally, it will ensure that if an asylum seeker or other alien is transferred from one detention facility to another, jurisdictional and due process protections will attach.

Sec. 12. Procedures for Ensuring Accuracy and Verifiability of Sworn Statements Taken Pursuant to Expedited Removal Authority.

This section modifies current policy to ensure that asylum seekers are not harmed by error in the production of sworn statements taken during the expedited removal process. It requires that the Secretary of Homeland Security establish a procedure whereby the interviews of asylum seekers are recorded. The recording may be a video, audio or other reliable form of recording. The recording must include a written statement, in its entirety, being read back to the alien in a language that the alien claims to understand, and the alien affirming the accuracy of the statement or making any corrections thereto. If an interpreter is necessary, such interpreter must be competent in the language of the asylum seeker. Once a record is produced and signed by the asylum seeker under these conditions, it may be considered part of the record. The Secretary may exempt facilities from the requirements of this section under certain circumstances.

Sec. 13. Study on the Effect of Expedited Removal Provisions, Practices, and Procedures on Asylum Claims.

A 2005 study by the United States Commission on International Religious Freedom (USCIRF) documented widespread problems in the implementation of expedited removal policy by U.S. Customs and Border Protection immigration officers at ports of entry. A few months prior to release of the Study, the Secretary of Homeland Security expanded Expedited Removal authority from immigration inspectors at Ports of Entry -- as applied to arriving aliens without proper documentation -- to Border Patrol agents who apprehend an alien within 100 miles of the border within 14 days after an entry without inspection. The 2005 USCIRF Study did not analyze the implementation of expedited removal by the Border Patrol, as USCIRF's data collection had been completed by that point in time. This section authorizes the Commission to conduct a new study to determine whether Border Patrol officers exercising expedited removal authority in the interior of the United States are improperly encouraging aliens to withdraw or retract claims for asylum. The Commission is also authorized to study whether immigration officers incorrectly fail to refer asylum seekers for credible fear interviews by asylum officers; incorrectly remove such aliens to a country where the alien may be persecuted; and/or detain such asylum seekers improperly or in inappropriate conditions.

Sec. 14. Lawful Permanent Resident Status of Refugees and Asylum Seekers Granted Asylum.

This section will enable refugees and asylees to become lawful permanent residents

(LPRs, or "green card" holders) when they receive the grant of refugee or asylee status. Current law requires both to wait for one year before adjusting to LPR status. This section allows refugees to be admitted as LPRs, and allows asylees to petition for adjustment of status at any time after they have been granted asylum. This modification to current law will save taxpayer dollars by eliminating the cost of processing refugee LPR applications and running security and background checks on persons who passed the same checks one year earlier. It will also enable refuges and asylees to assimilate into American communities more fully and efficiently than if they are forced to wait a full year before applying for a green card. This section retains waiver authorities that are available under current law to asylees and refugees who apply to adjust to LPR status, but maintains that all refugees and asylees must be admissible to the United States when they apply for LPR status. It also ensures that refugees and asylees who adjust to LPR status remain eligible for the benefits made available to refugees and asylees under current law.

Sec. 15. Protections for Minors Seeking Asylum.
The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) amended the immigration statute to exempt unaccompanied alien children from the safe third country and one-year filing deadline bars to asylum. This section will amend the statute to expand these TVPRA exemptions to all child applicants for asylum. This section also expands the exemption to the bar to asylum for applicants under 18 years of age who were previously denied asylum. The proposed language also clarifies that unaccompanied alien children who have previously been removed, or who departed voluntarily, should not have their removal orders reinstated, but should instead be placed in removal proceedings. Finally, this section states that all cases of children seeking asylum be adjudicated in the first instance by an asylum officer in a non-adversarial proceeding. These protections, which were provided to unaccompanied minors in the TVPRA, are expanded in the bill to all child asylum seekers.

Sec. 16. Multiple Forms of Relief.
This section simply allows individuals applying for refugee protection to simultaneously apply for other forms of admission to the United States, such as through a family-based petition. All applicants for admission must pass security and background checks. This modification to current law would not allow would-be refugees from gaming the system, but simply enable them to escape harm or persecution at the first opportunity a visa becomes available. This section also allows the very small number of asylum applicants who win the opportunity to apply for a green card through the diversity lottery the ability to apply for that diversity visa from within the United States. Typically, diversity visa applicants must apply from their home country, a requirement that would subject a genuine asylum seeker to risk of harm.

Sec. 17. Protection of Refugee Families.
This modification to current law would enable the spouse or child of a refugee (a "derivative") to bring their children to the United States when they accompany or follow to join the spouse or parent who was originally awarded refugee status (a "principal"). Current law does not allow a derivative's child to be admitted as a refugee, yet given the long waits and often unsafe conditions that many derivative applicants and their children

face in camps overseas, the United States should provide this group protection. This section also aids children who were orphaned or abandoned by their blood relatives and are living in the care of extended family, friends, or neighbors who are granted admission to the United States as refugees or asylees. Where it is in the best interest of such a child to join that refugee or asylee in the United States, this section creates a mechanism whereby they may be admitted. This section also repeals an unnecessary time limit in regulations on the filing of family petitions related to refugee and asylee family reunification. Finally, to facilitate the admission of eligible family members, this section requires that U.S. Citizenship and Immigration Services adjudicate family reunification petitions for those following to join refugees and asylees within 90 days of filing.

Sec. 18. Reform of Refugee Consultation Process.
Each year, the executive branch is charged with consulting with Congress over the annual allocation of refugees to be admitted to the United States. Traditionally, however, little consultation has occurred between the two branches of government. This section requires meaningful consultation to take place between Cabinet-level officers and the committees of jurisdiction of the Congress by May 1 of each year.

Sec. 19. Admission of Refugees in the Absence of the Annual Presidential Determination.
This section states that for a fiscal year in which the executive branch does not determine the allocation of refugees for that year, the admission of refugees is not delayed. Rather, until a determination is announced for the new fiscal year, in each quarter of the new fiscal year, the number of refugees equal to one-quarter for the prior fiscal year's allocation may be admitted.

Sec. 20. Authority to Designate Certain Groups of Refugees for Consideration.
This section authorizes the Secretary of State to designate certain groups as eligible for expedited adjudication as refugees. The authority would address situations in which a group is targeted for persecution in their country of origin or country of first asylum and the Secretary wishes to expedite refugee processing for humanitarian reasons. The designation by the Secretary would be sufficient, if proved to the satisfaction of the Secretary of Homeland Security, to establish a well-founded fear of persecution for members of the designated group. However, each individual applicant would have to be admissible to the United States and pass security and background checks before being admitted. Refugees admitted under this authority would not be exempt from the annual limit on refugee admissions. This section simply enables the Secretary to call for expedited adjudication where necessary and appropriate.

Sec. 21. Update of Reception and Placement Grants.
When a refugee is resettled in the United States, the federal government assists him or her through Reception and Placement Grants to non-governmental organizations (NGOs) that help refugees find housing, place their children in school, enroll in ESL classes, and take other initial steps toward building a new life in the United States. Early in 2010, the administration increased the per capita grant level to $1800 per refugee, up to $1100 of which may be awarded directly to the refugee for immediate costs, and up to $700 of

which is used by the NGO to cover the cost of dedicated staff and expenses. Prior to 2010, the per capita level had not kept pace with inflation. For years it was set at a level so low that refugees were effectively consigned to poverty upon arrival in the United States, and NGOs were only able to offset the cost of basic support services to the refugees by raising additional funds. To ensure that the per capita amount does not fall behind the minimum level required for basic needs, this section requires the per capita amount to be adjusted on an annual basis for inflation and the cost of living. It also calls for better forecasting of financial needs with regard to the number of refugees expected to be resettled each year and allows for additional amounts to be paid out in the event that a higher than anticipated number of refugees is admitted in a fiscal year.

Sec. 22. Legal Assistance for Refugees and Asylees.
The Immigration and Nationality Act authorizes the Secretary of Health and Human Services to make grants to non-profit organizations to assist resettled refugees with mental health counseling, social services, education (including English as a Second language), and other assistance to help refugees assimilate into American communities. This section would authorize the Secretary to make similar grants to assist lawfully resettled refugees with legal advice on applications for immigration benefits to which they may be eligible after residing in the United States for certain periods of time, e.g., family reunification, adjustment of status, or naturalization.

Sec. 23. Protection for Aliens Interdicted at Sea.
The U.S. government should apply one standard, consistent with the Refugee Convention, to all asylum seekers interdicted at sea, regardless of their nationality. Yet a patchwork of policies has evolved over the past two decades often in response to mass migrations at sea. The result is disparate treatment of Cubans, Chinese and Haitians. This section will require the Secretary of Homeland Security to develop uniform policies to identify asylum seekers among those interdicted at sea and to treat those individuals fairly and in a non-discriminatory manner.

Sec. 24. Protection of Stateless Persons in the United States.
This section will enable individuals who are *de jure* stateless to obtain lawful status in the United States. *De jure* stateless persons are individuals who are not considered to be citizens under the laws of any country. Persons in such circumstances do not have a country and therefore cannot be returned anywhere. They are ineligible for lawfully recognized status in the United States based on the fact that they are stateless. This section would make such persons eligible to apply for conditional lawful status if they are not inadmissible under criminal or security grounds and if they pass all standard background checks. After one year in conditional status, *de jure* stateless persons would be eligible to apply for lawful permanent status. This period of time mirrors the traditional one year of residence required for other discretionary grants of asylum and refugee status, after which time asylees and refugees have become eligible to apply for lawful permanent status.

Sec. 25. Authorization of Appropriations.
This section authorizes such sums as are necessary to carry out the Act.

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