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THE EVOLVING UNITED STATES RESPONSE TO SOVIET JEWISH EMIGRATION

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Abstract

The wave of recent emigration from the Soviet Union found the U.S. unprepared, with policies and procedures more suited to the Cold War than to the age of *glasnost*. Competing foreign and domestic policy priorities, and Israel as a potential home for emigrating Soviet Jews, contributed to momentous changes in the U.S. response as it evolved. Long-standing immigration practices were questioned, changed administratively, and finally changed again by statute. Three distinct phases can be noted: the first from 1980 to August 1988, during which the U.S. government accepted as refugees all Soviets seeking

resettlement in the U.S., using what in practice was presumptive eligibility. In the second phase, from August 1988 through September 1989, most Soviet Jewish and Pentecostal applicants seeking resettlement continued to be processed in Rome, while in-country processing was established in Moscow for other applicants. Delays increased when the INS began adjudicating refugee status strictly according to the refugee definition in the Immigration and Nationality Act, which also resulted in some denials of refugee status. The last phase, beginning in October 1989, required Soviets seeking resettlement in the U.S. to register their interest with the Embassy in Moscow. While all Soviets are cur-

rently eligible to register for resettlement, interviewing priority was given to those with close relatives or other links. In November 1989 the 'Lautenberg Amendment' became law, requiring the establishment of several categories of Soviets who share common characteristics identifying them as targets of persecution. Unlike applicants under the worldwide adjudication standard, who must *establish* a 'well-founded fear of persecution', Soviet category applicants need do little but show bona fide category membership, and then *assert* a fear of persecution and a credible basis for that fear. Consequently, the acceptance rate for Soviet Jewish claimants in Moscow has risen to some 90%. U.S. refugee law has undergone a significant change: the burden of proof required to establish eligibility for refugee status and resettlement to the United States has been statutorily eased for certain designated categories. Future American policy may be confronted with significant pressure to rescue additional Jews from the Soviet Union as a result of intensified anti-semitism, or to divert prospective Soviet *émigrés* from Israeli destinations as a result of Israel's inability to absorb them. It is likely that the final phase of this policy evolution must eventually involve a return to the use of the worldwide standard for adjudicating all Soviet refugee applications.

1. Background

Perhaps no other U.S. refugee issue since the Vietnamese 'boat people' crisis of the early 1980s has evoked as much controversial debate over basic principles of refugee law as the evolving United States response to the continuing emigration of Soviet Jews. As Ted Koppel said when his show 'Nightline' discussed this response on 2 February 1989, 'For more than a generation, the United States has been urging the Kremlin to "let these people go," but now that the Soviet Union is letting Jews leave in record numbers, the U.S. won't let them all in . . . [Yet] very little about this story is quite as simple as it seems.'¹

Indeed, the issues involved are not simple: they include centuries of history and conflict in Russia and the Middle East; they resonate far beyond the borders of the Soviet Union, Israel, and the United States, and may eventually involve the community of nations. Changes in the U.S. response—within a span of only sixteen months (July 1988–November 1989)—were as rapid as they were fundamental. Longstanding immigration practices were questioned, then changed administratively, then changed again by statute. At the

end, what previously had been only the practice of the Immigration and Naturalization Service (INS), is now United States law.

Early INS memoranda conceptualizing U.S. policy options to increasing Soviet emigration focused initially only on that of Soviet Armenians,² for reasons of equity, and because of the increasingly unmanageable numbers of other Soviets opting for U.S. resettlement, these ideas were soon extended to the processing of all Soviet *émigrés*.³ This paper focuses almost exclusively on the evolving response to Soviet Jewish emigration. Relatively large numbers of other Soviets, particularly Armenians and evangelical Christians, are also interested in emigrating to the United States, but, while their emigration is similar in many respects to that of Soviet Jews, it presents differing perspectives on the policy issues involved.

2. Perspectives and Contexts

Many of us involved in formulating the response to Soviet Jewish emigration admit that the ramifications of U.S. policies on other perspectives were not always fully appreciated. Throughout this period of evolution, policy was made essentially for what primarily were 'perceived to be U.S. interests.'⁴ In fact, longer-term U.S. interests in other parts of the world might well have tempered some of the bases of that response; instead, short-term political domestic pressures and narrowly-focused foreign policy considerations dominated policy-making discussions.

3. United States Policies towards Soviet Emigration Before 1988

The U.S. response to Soviet emigration has evolved dramatically 'as Gorbachev's reforms have gathered momentum.'⁵ The annual trickle of some 1,000 Soviet Jews and Armenians permitted to emigrate during the mid-1980s,⁶ suddenly and unexpectedly rose in FY 1987⁷ to almost 11,500, swelled to over 30,000 in FY 1988, and became 'unmanageable'⁸ in FY 1989. Most accounts confirm that by mid-1989, previous systems of response were breaking down, and needed to be 'overhauled and redesigned.'⁹ The legal and policy components of that earlier system repay examination.

Before the passage of the Refugee Act of 1980,

departure from the Soviet Union, by whatever means and for whatever reasons, was sufficient for possible admission into the United States. No individual findings of persecution were required for such status . . . The passage of the

Refugee Act of 1980 changed the legal foundation of the U.S. refugee program . . . [P]rovenance from a communist or communist-dominated country [was] no longer sufficient ground for presumed refugee status nor for possible entry into the U.S. as a refugee. . . . [A]n individual, regardless of country of origin, must now demonstrate on a case-by-case basis a well-founded fear of persecution.¹⁰

After the passage of the Refugee Act of 1980, but prior to the changes initiated in August 1988, the refugee program for Soviet refugees involved four policies unique to U.S. processing, and applicable only to this group of applicants.¹¹ These included:

- The *Open Door* of virtually guaranteed admission to the U.S. for all Soviets, regardless of family ties or other qualifying links, seeking entry into the United States.
- *Freedom of Choice* of destination, despite having left the Soviet Union with an offer of firm resettlement in Israel.
- *Care-and-maintenance* funds for subsistence in Italy at U.S. government expense during refugee processing (see below, section 5.3 for a discussion of Soviet exit permission and U.S. refugee processing programmes).
- Virtual *presumptive* refugee status after rather perfunctory adjudications by the Immigration and Naturalization Service (INS) in Rome, Italy.¹²

4. The Evolution of United States Policy: Overview of Phases

The U.S. response to Soviet Jewish emigration has passed through three distinct phases. The first covers the period 1980 to August 1988, during which the government attempted to accept as refugees all Soviets seeking resettlement to the United States. Refugee status for Soviets was decided after an interview by the INS in Rome, using what effectively amounted in practice to presumptive eligibility. There were few denials of refugee status, and the U.S. generally was able to move those accepted to the U.S. soon after their interviews.

During the second phase, from August 1988 through September 1989, most Soviet Jewish and Pentecostal applicants seeking resettlement in the U.S. continued to pass through Rome. For others, mainly Armenians, in-country processing began in Moscow. A registry of applicants was established at the

Embassy in Moscow, and the U.S. government acknowledged that a backlog and processing delays were probable for some applicants. The INS then began adjudicating refugee status for all Soviet applicants strictly according to the refugee definition in the Immigration and Nationality Act (INA),¹³ with the result that some Soviet applicants were denied refugee status. All Soviets so denied, however, were offered parole in the U.S.¹⁴

The most recent phase began in October 1989. Since then, Soviets seeking resettlement in the U.S. are required to register their interest with the U.S. Embassy in Moscow. However, not all registrants are interviewed. While all Soviets are eligible to register for resettlement consideration under the U.S. refugee program,¹⁵ interviewing priority is given to those with close relatives in, or other links to, the U.S. Those without such links are implicitly encouraged to seek resettlement elsewhere, for example, in Israel. Those interviewed but found ineligible for refugee status are still offered parole into the United States. Eased refugee eligibility standards for Soviet Jews, evangelical Christians, and some Ukrainians were incorporated in legislation in November 1989.¹⁶

5. Phase One: to August 1988

5.1 Foundations of U.S. Policy and Response

For years, a fundamental tenet of U.S. foreign policy was nearly continuous pressure on the Soviet Union for greater respect for basic human rights, including that of freer emigration, especially for Soviet Jews. This doctrine was rooted both in U.S. humanitarian tradition and in post-World War II politics, and came later to be included in a modified form in the multilateral Helsinki Final Act of 1975, with implementation monitored by the standing Conference on Security and Cooperation in Europe (CSCE) process.¹⁷ At the 1988 CSCE follow-up meeting, the U.S. took a 'clear and strong stand [on the issue of free movement] in bilateral human rights discussions with the Soviets.'¹⁸ In doing this, the U.S. and the international community relied, either explicitly or implicitly, on Article 13(2) of the 1948 Universal Declaration of Human Rights,¹⁹ which states that, 'Everyone has the right to leave any country, including his own, and to return to his country.'

5.2 Qualifying for Refugee Status: Early to Mid-1980s

Even after the passage of the 1980 Refugee

Act, qualifying for refugee status was not difficult for Soviets; the process and effects of applying to leave were, in themselves, so egregious as to turn almost all Soviet applicants into genuine refugees. To obtain exit permission, a Soviet had to receive an invitation ('vzov') from first degree (that is, sibling or closer) relatives abroad, inviting him or her to live with them and pledging financial support.²⁰ To qualify for final Soviet approval and actually obtain an exit visa ('check-out'), the prospective emigrant had to

divest himself of his possessions, give up his apartment, and settle all financial accounts. He most likely would already have been fired from his job as soon as he applied to emigrate. Emigrants were branded as 'traitors' by the Soviet government. Only after all these steps had been completed would a Soviet citizen be allowed by the militia to apply for admission to the United States. By then, he would already have been disenfranchised by his own society.²¹

5.3 Avenues of Departure from the Soviet Union

5.3.1 'ATCP' from Moscow through Rome

Before July 1988, some prospective *émigrés*, mainly Armenians, obtained exit permission and final 'check-out' from the Soviet Union, showed up at the American Embassy in Moscow for the first time and registered their interest to emigrate; they were given an appointment for final processing. On the date of their appointments, they returned to the Embassy and were given transit visas to Rome under what was known as 'Accelerated Third Country Processing' (ATCP), a process founded on an understanding with the Italian government that no Soviet would be left 'stranded' in Italy.

5.3.2 The 'Vienna-Rome Pipeline'

A similar process, initiated by an invitation from a relative in Israel, was used by most Soviet Jews to obtain exit permission for emigration to Israel.²² Soviet Jews obtained their Israeli visas from the Dutch Embassy in Moscow acting on behalf of the Israeli government, and travelled by train to Vienna where they were met by a representative of the Jewish Agency for Israel. At this time, they were effectively allowed to choose their destination: immigration to Israel (in which case they continued on to Tel Aviv); application for refugee resettlement in the U.S. (in which case non-governmental organizations (NGOs) under contract with the U.S. Department of State helped them continue on to

Rome for INS refugee processing); or elsewhere.

Representatives of the U.S. government saw Soviet Jewish and Pentecostal *émigrés* exiting on Israeli 'vzovs' for the first time, only after their arrival in Rome to begin refugee processing to the United States. While NGOs had already seen them, no U.S. government official had, and there was thus no input into this flow, or any control over it; the *émigrés* arrived in Rome expecting admission to the U.S. as refugees, and for the most part, they got it.

5.4 Increasing Concern Over Eligibility

During the first half of 1988, many in the Congress and administration still believed that the existing special exemptions of the U.S. program for Soviet *émigrés* could be maintained. Others were not so sure, as concern began to be raised about the eligibility of Soviet Armenians for refugee status under the 1980 definition.²³

By July 1988, several observers had gone public. One wrote that, 'There is scant evidence that these Armenians, as a group or individually, are in a more beleaguered position than are other Soviet citizens. They are leaving in search of freedom and a better life. This is not the province of refugee policy.'²⁴ An editorial in *The New York Times* on 6 June 1988 asked, 'Which Armenians Are Refugees?', and cautioned that, 'U.S. immigration officials must guard against blurring the distinction [between political refugees and other *émigrés*], lest America's will to provide refuge be eroded.' An April 1988 INS memorandum had already pointed out that, 'One might be hard pressed to identify, even as a group, treatment of most Armenians (as a nationality within the Soviet Union) that is different to the point of persecution from the general situation of almost all other Soviet citizens.'²⁵

Important September 1988 Congressional testimony confirmed that, 'Until a few months ago, Soviet Armenians who received permission to depart the USSR were awarded refugee status simply on the basis of their nationality and ethnicity. They were not asked if they were persecuted.'²⁶

Before the U.S. government's July 1988 suspension and then complete shutdown of the ATCP, actions which triggered the August change to phase two, questions about the eligibility of some Soviet applicants for refugee status did generate ideas for change.²⁷ However, these concerns were generally subordinated to public demands for the admission of more Soviet Jews and evangelical

Christians. The executive director of the U.S. Committee for Refugees observed that, 'While humanitarian in rhetoric, the U.S. refugee program is also highly political . . . Foreign policy considerations have been the prime determinant of which refugees would be resettled in the United States . . . Determination of who and how many are to be resettled is a highly political process, understandably evoking strong ethnic passions and concerns.'²⁸

5.5 The U.S. Soviet Refugee Programme: Resettlement or 'Outposted' Asylum Processing?

According to international refugee practices supported by the international community as a whole in the name of the world's millions of refugees, third country resettlement is the last—and 'least desirable'—of the three main solutions to a refugee's plight. The first two, in order of preference, are voluntary repatriation, or local integration in neighboring countries of first asylum. If resettlement to third countries is necessary, a situation usually determined by the country of first asylum or temporary refuge and/or by the United Nations High Commissioner for Refugees (UNHCR), referral for resettlement is usually made to countries within the region; referral to countries outside the region, such as the United States, is a last resort.

In practice, under the evolving U.S. refugee program, prospective Soviet *émigrés* left the Soviet Union for resettlement in the United States, at first indirectly via Rome until August 1988, and more directly from Moscow after that date. In effect, U.S. refugee policy for Soviets created a process that was less a refugee resettlement program, than an 'outposted asylum' and immigration program. Only towards the end of the *ad hoc* U.S. response to increasing numbers of Soviet applicants, was the idea of 'internationalizing' the program considered. Internationally recognized solutions, including increased burden-sharing among other possible resettlement nations such as Australia, Canada and those of Western Europe, were finally considered and publicly discussed only on the occasion of the September 1989 announcement of changes to phase three.²⁹

5.6 The U.S. Programme and the 'Open Door' for Soviets

During this time, and despite later government statements to the contrary, existing U.S. policies and practices had linked the right of exit from the Soviet Union with a U.S. responsibility for their admission as refugees

(the so-called 'Open Door' policy for Soviet refugees).³⁰ The U.S. General Accounting Office (GAO) was quite clear on this: 'It has been long standing United States policy to accept all Soviets wishing to emigrate to the United States.'³¹ The U.S. Congress generally agreed: 'The U.S. has for many years championed the right of Jews to leave the Soviet Union, and now that large numbers are leaving for the first time in many years, we must respond generously.'³² But already in 1988, some administration officials were cautiously qualifying an unconditional 'Open Door.'

On 13 September 1988, U.S. Secretary of State George P. Shultz stated that: 'International human rights standards recognize the right to emigrate and to return to one's country, but not to immigrate into any country of one's choosing.'³³ Standards and limits to immigration are determined by national decision and legislation.³⁴ During testimony on FY 1989 refugee admissions ceilings,³⁵ the INS was clear 'that while the right to emigrate is a right guaranteed by the Universal Declaration of Human Rights, there is no corollary right of immigrant entry into, for instance, the United States. . . . [W]hile emigration is an internationally recognized right, immigration is a privilege granted by sovereign governments according to their own laws and procedures.'³⁶ The statement was reiterated a year later by Deputy Secretary of State Lawrence Eagleburger in his 15 September 1989 Senate testimony.³⁷

A problem thus existed: the United States was informally, if not formally, committed to an 'Open Door' for all Soviet *émigrés*, but avenues for such automatic entry were limited to immigrant or refugee processing. In order for the United States to respond to foreign policy objectives, yet keep refugee status reserved only for bona fide refugees, another status had to be created.

5.6.1 'Gaps' in the 'Open Door'

In June 1987, the so-called 'gap' in the range of avenues of admission possible under U.S. law was identified by Doris Meissner, a former Acting Commissioner of the INS, who recommended that a new legal status be created in order to 'uphold the integrity of the [1980 refugee] statute and at the same time be responsive to humanitarian and foreign policy needs.'³⁸ What was needed was a new formal category for the admission of persons for foreign policy reasons, who were neither immigrants nor refugees. By early 1988, this additional avenue was incorporated into INS

proposals for legal immigration reform. Experience during that year eventually led the entire administration to realize that 'there are occasions when our foreign policy goals . . . dictate a need for flexibility which is not currently available in immigration law to admit a group of people who do not immediately or neatly fit into current immigrant or refugee categories.'³⁹

5.6.2 'Special Interest Immigrant' Category

The related problems of statutory 'gaps' and the 'Open Door' for Soviet *émigrés* were discussed at the September 1988 Senate consultations on FY 1989 refugee admissions ceilings. While a new statutory avenue for the admission of 'Special Interest Immigrants' was eventually proposed to the Congress by the Bush Administration on 5 April 1989,⁴⁰ the need for this additional avenue of entry developed faster than the legislative process could respond. In August 1988, a directive from Attorney General Edwin Meese III,⁴¹ which heralded the beginning of phase two (see 6.1, below), would expand a previously limited and individualized use of 'public interest parole', so that Soviets denied refugee status could be permitted, as a group, to come to the United States, and the U.S. could thereby maintain the 'Open Door.'

5.7 'Freedom of Choice'

At the same time, the concept of 'freedom of choice' was debated at length, with some saying that Soviet Jews exiting the Soviet Union with valid Israeli immigrant visas should continue on to Israel and not America. Others, including Secretary of State Shultz, elevated 'freedom of choice' to the status of a fundamental international human right; 'We feel there is a fundamental principle involved in the human rights field, namely, the principle of "freedom of choice." Persons given permission to emigrate from the Soviet Union should have the freedom of choice as to where they want to go . . . If you are against "freedom of choice," you are inconsistent with the Universal Declaration of Human Rights.'⁴²

According to Mark Talisman of the Council of Jewish Federations, 'First of all, "freedom of choice" is the underpinning of movement, migration of any sort.'⁴³ Ben Zion Leuchter, President of the Hebrew Immigrant Aid Society (HIAS) went even further: 'I think human beings ought to have the right to live in the country of their choice, and I think we ought not be in a position of saying you have to live here or you have to live there.'⁴⁴

That this 'freedom' was not extended to any other group of refugee applicants seeking resettlement in the U.S. did not seem to bother its advocates.

During the early 1970s most Soviet Jews exiting through the Vienna-Rome pipeline opted to go on to Israel, rather than to the U.S. or elsewhere (96.4%, 97.5%, and 91.8% in 1971, 1972, and 1973, respectively); but, by 1980, only 32% opted for Israel, while by 1987 only 24% did so. With the increased Soviet emigration of 1988, and U.S. efforts to expand refugee ceilings to meet demand, only 6.5% went to Israel that year and in early 1989, only 2.2%.⁴⁵

5.8 Ideas for Change

The ideas considered by the U.S. for the better management of its Soviet resettlement program included recognition that some Soviet applicants did not meet the 1980 refugee definition; that the United States did not have an obligation to admit all Soviets wishing to resettle, especially those without relatives or other links to the United States; and that the U.S. policy against acceptance of those already possessing an 'offer of firm resettlement' elsewhere should be extended to the processing of all or some Soviet refugee applicants.

5.9 Change Becomes Inevitable

In April 1988, as Soviet emigration continued to increase, the Reagan administration proposed a revision to the refugee admissions ceilings established by the original Presidential Determination (88-1 of 5 October 1987) by invoking the emergency consultations procedures of the INA, for the first time since its enactment in 1980. The proposed revision doubled the Eastern European and Soviet refugee admissions ceiling from 15,000 to 30,000, raising the Soviet sub-ceiling from 8,500 to 22,500.⁴⁶ On 27 April 1988, the Senate Subcommittee on Immigration and Refugee Affairs concurred, 'on condition that the foreign policy, humanitarian and fiscal issues involved will be thoroughly reviewed at a hearing scheduled at a mutually convenient time with the Secretary of State.'⁴⁷ Following these Congressional consultations, the Presidential Determination was formally revised.⁴⁸

Before this review could be conducted, however, and in view of the very issues identified in the Senators' letter, the entire program was in disarray. The legal concerns already expressed in early 1988 alone proved ineffectual to bring about change. Instead, changes were eventually triggered by budget

problems, with the legal concerns expressed earlier as the justification.

5.10 The July Shutdown Leads to Changes in August 1988

On 4 July 1988, the Department of State, citing budgetary problems stemming from the decision a few months earlier to raise the Soviet refugee admissions ceiling without adding the resources needed to finance them, announced the suspension of the Soviet ATCP programme for Soviet Armenians, 'amid controversy over Washington's practice of granting them refugee status to speed their admission.'⁴⁹ The timing of this shutdown only added to the ensuing controversy. Hundreds and soon thousands of Armenians, who had already 'checked out' of the Soviet Union and were ready to travel to Rome for refugee processing, showed up for their appointments with the U.S. Embassy in Moscow, only to find themselves stranded.⁵⁰ With that suspension, forty years of U.S. policy were effectively over, though without any formal declaration to that effect.

6. Phase Two: August 1988 Through September 1989

6.1 The August 1988 Meese Directive

On 4 August 1988, then Attorney General Meese outlined his proposals for resolving the immediate crisis.⁵¹ Foremost among them was the directive to the INS to apply the refugee definition to all prospective refugee applicants, regardless of their country of origin: Soviet processing had to be brought 'into sync with INS procedures . . . Current practices in processing Soviet *émigrés* appear not to conform with the requirements established by the Immigration and Nationality Act [amendments] of 1980, as administered by the Department of Justice and the Immigration and Naturalization Service.'⁵² This directive became the foundation of policy extending the 'worldwide adjudication standard' to the adjudication of all Soviet refugee applicants, and later also to the Vietnamese Orderly Departure Programme (ODP).

In addition, the Attorney General decided to begin direct processing from Moscow.⁵³ The May revision of the Presidential Determination for FY 1988 had already authorized such processing under Section 101(a)(42)(B) of the INA. Because of the very general wording of this revision, ' . . . [a]ll 280 million residents of the Soviet Union are potentially eligible to apply for the U.S. refugee program.'⁵⁴

By mid-August 1988, the first of two refu-

gee officers arrived in Moscow to establish the INS presence, with the second following later that month. They began interviewing for refugee status the 'over 3,000' stranded prospective *émigrés*, mostly Armenians, using (temporarily, and for only this special and specified group which had been caught in the middle of changing policies and procedures), what the Attorney General had referred to as a 'most generous standard.'⁵⁵ Meanwhile, scheduling of further interviews, to be conducted using the worldwide adjudications standard, was suspended by Embassy Moscow for the rest of the fiscal year.

At the same time, the Vienna-Rome pipeline for Soviet Jews and evangelical Christians exiting with Israeli immigrant documents remained untouched by the changes in the ATCP programme from Moscow.⁵⁶ Even then, however, the problem of ever-increasing numbers was evident. Each month, more and more Soviets were given permission to exit via Vienna, and most made their way to the U.S. Embassy in Rome to apply for refugee resettlement in the U.S. By that time, the U.S. had committed itself to interviewing rapidly and then permitting all Soviets who applied to come either as refugees or parolees.

According to the August directive, transition to INS adjudication of refugee status according to the worldwide standard 'must be completed by 1 October 1988. After that date, INS officers have been instructed to uniformly apply the requirements of existing statutes regulating immigration processing.' In fact, use of this standard was extended to Soviet applicants in Rome processing in October 1988, to Soviet applicants in Moscow processing in January 1989, and to Vietnamese ODP processing in Ho Chi Minh City in February 1989.

From 1 October 1988, in a major change of procedure, the U.S. Embassy in Moscow began advising all prospective Soviet refugee applicants not to cut their ties within the Soviet Union, and thus to avoid putting themselves into serious legal and financial difficulties; they were further advised not even to apply for Soviet exit permission until they had determined their eligibility for emigration to the United States with U.S. Embassy personnel. The Embassy's announcement, published that day, stated that it could not 'tell you when you are going, or whether you are going at all.'⁵⁷

To maintain the U.S. 'Open Door' policy toward all Soviets seeking entry, the Attorney General's August directive also stated that, 'any [designated Soviet refugee applicant] not granted refugee status will be considered for

entry to the United States under my parole authority.' With the first Soviet denials of refugee status, 'public interest parole' was authorized by the INS Central Office.⁵⁸ The procedural changes initiated by departing Attorney General Meese in August 1988 were formally supported by the Department of State in a 17 November letter from Secretary Shultz to the new Attorney General, Dick Thornburgh. On 8 December 1988, the latter formally announced the parole option for Soviet applicants denied refugee status in Rome and Moscow, extending unlimited parole for those in the Vienna-Rome pipeline, and for 'up to 2,000 per month' out of Moscow.⁵⁹

Detailed legal guidance on the INS worldwide adjudications standard and related policies was cabled to the U.S. Embassy in Moscow on 16 December 1988, and remains the most definitive statement on the subject to date.⁶⁰ A version of this cable is now an integral part of INS training on the worldwide standard.⁶¹

6.2 Jewish Reaction to the New Policies

These new policies and procedures, and the resulting denial of refugee status to some Soviet applicants in Rome and Moscow, met with widespread public concern, from members of Congress and the American Jewish community in particular. The outcry was as immediate as it was strong.⁶² One critic charged that INS denial of refugee status to some Soviet applicants in Rome was 'wrong, illegal, extra-legal, [and] arbitrary.'⁶³ Another observed that it was 'sad, . . . ironic, . . . [and] shameful . . .', that the U.S. could push for increased Soviet Jewish emigration while denying refugee status to some of the *émigrés* permitted to leave.⁶⁴ One angry Congressman declared that the denial of refugee status to some Soviet Jews was due to 'the political deathbed edict from a departing attorney general, . . . which was not subject to public comment, and which has not been overturned.'⁶⁵

To most members of Congress and those American Jewish groups concerned with Soviet Jewry, the change in U.S. procedure, and the belated application of the 1980 refugee definition to this group, was incorrect, if not 'illegal.' They argued that it was time, in this period of 'thaw,' to take advantage of a 'window of opportunity' which might close on future Soviet emigration and trap prospective Soviet *émigrés* in a situation of renewed ethnic and anti-semitic violence and repression.⁶⁶ Notwithstanding the September 1988 consultation with the House Subcommittee on Immigration, Refugees, and International Law,

on the issues involving the U.S. response to continuing Soviet emigration, five Congressmen on the same House subcommittee wrote to Secretary Shultz on 9 December 1988, calling on the Administration,

to [administratively] reverse its [post-August] departure from longstanding policy of considering all Soviet Jews as refugees. This policy is founded on a long history of discrimination, antisemitism, and limited opportunities for Jews in the Soviet Union . . . Soviet Jews still face persecution in the practice of their religion. [Legal] modifications that affect such sensitive issues . . . should be brought to the immediate attention of Congress and not implemented through unilateral action.

Yet, a few months later, after observing INS adjudication of Soviet refugee applicants in Rome, Italy, the U.S. Coordinator for Refugee Affairs concluded that, 'The [INS] officers who interviewed those particular [Soviet Jewish] applicants that day, in my opinion, had no choice but to rule the way they did, because the applicants did not in any way show that they deserved the status of a refugee.'⁶⁷

Apparent confusion within the administration over the changes contributed little clarity to the public debate. While Secretary Shultz had endorsed the changed policies and procedures in a September Congressional testimony, and again in his November 1988 letter to the Attorney General, some American Jewish leaders reported that he was seemingly unaware of the consequences of those changes on Soviet applicants. During a meeting on 6 December 1988, these representatives reported that Shultz had reaffirmed the 'Open Door' to all Soviet applicants and offered his opinion that 'all Soviet Jews should qualify [for admission to the United States] as refugees.'⁶⁸

6.3 Soviet Jewish *Émigrés* Also React

To make the point that all Soviet Jews were entitled to refugee status, most of the Soviet Jews denied in Rome refused to accept the U.S. offer of parole into the United States. In fact, the Hebrew Immigrant Aid Society (HIAS), the main non-governmental organization assisting, under contract with the Department of State/Bureau for Refugee Programs, in processing Soviet Jewish refugee applicants, 'urged . . . Jews in Rome not to heed the advice of U.S. officials to seek parole status, [while HIAS] is seeking reversal of the decision to deny them refugee status.'⁶⁹ Despite the presence of U.S. relatives as potential sponsors for over 50-60% of the prospective Jewish *émigrés*, they held out for

admission only as refugees. Refusing parole, they also refused to consider an onward journey to Israel where their original immigrant visas were still valid. At the same time, the Italian government became concerned about the presence of large groups of unhappy Soviets waiting in Rome for their status concerns to be resolved, before they were able to leave for the United States. The Italian government looked to the U.S. to deal with the situation, before it became a diplomatic problem.

6.4 Delays, Denials and Discord

As the number of Soviets denied refugee status in Rome grew, so did the pressure on the administration to do something. Several Congressional delegations went to Rome to review INS refugee processing; they were not impressed with what they saw. And what they saw, they officially repeated into the *Congressional Record*.⁷⁰ To cope with the growing applicant queues in Rome, INS had to detail adjudicators temporarily; not all were as thoroughly trained or as well briefed as they might have been.⁷¹ Administrative problems caused backlogs at all levels of the processing in Vienna and in Rome. Delays resulted in costs of hundreds of thousands, and then several millions, of dollars, both to the U.S. government and those non-governmental organizations in Rome continuing care-and-maintenance stipends to applicants once U.S. government funded reimbursement ceilings had been reached. Applicants were debriefed upon leaving their INS interviews and asked what questions had been asked, how long had the interviews been, who did the interviewing. These delegations and advocacy groups kept statistics on the approval and denial rates by individual INS officers, and officially reported them to their home offices, to the press and, occasionally, also into the *Congressional Record*.

As the controversy mounted, Ted Koppel of ABC News 'Nightline' devoted his entire broadcast on 2 February 1989 to the subject of Soviet Jewish emigration,⁷² bringing together publicly for the first time, representatives of the INS, the Jewish community, and the Government of Israel, to discuss the legal and political issues. In addition, legal briefs were written in support of a return to presumptive refugee status for Soviet Jews. A letter dated 9 February 1989, from the Hebrew Immigrant Aid Society (HIAS), transmitted to Attorney General Dick Thornburgh a fifty-two page legal memorandum, with an additional twenty-one exhibits supporting their contention 'that Soviet Jews, by virtue of their his-

tory and experience, have a well-founded fear of persecution. The memorandum further demonstrates that the INS is misapplying the appropriate standard in its determinations of the refugee status of Soviet Jews . . . These [INS] denials [of refugee status] are a wrongful application of U.S. law and are all the more tragic because of their far reaching effect on the lives of the affected families and the chilling message it sends to the families left behind in the Soviet Union.'

6.5 'Return to a Presumption'

In March 1989, concurrent resolutions were introduced into both houses of the U.S. Congress, 'Expressing the sense of the Congress . . . that the Department of Justice should reestablish [administratively] the presumption that Jews and members of other religious minorities emigrating from the Soviet Union qualify for refugee status for admission to the United States.'⁷³

A 29 March 1989 report to the House Subcommittee on Immigration, Refugees, and International Law by the Soviet Jewry Legal Advocacy Center of the Union of Councils for Soviet Jews, similarly remarked on the pre-August 1988 existence of a "presumption" that any Soviet Jew who was able to flee the Soviet Union necessarily and automatically qualified as a "refugee," or a person fleeing persecution under U.S. immigration laws. This presumption was never open to challenge. Nor could it be. The profoundly antisemitic nature of Soviet society was well-known and well-documented in the West.'

According to one Congressman, 'We [the United States] have spoken for many years, told the Soviet Union to let its people emigrate freely. We got up on our high horse, and now that they are letting [Soviet Jews] go, we are throwing roadblocks in their path, denying some Jewish applicants refugee status by these "hare-brained" policies. I think it is just absolutely disgraceful and immoral.'⁷⁴ Other advocates reacted similarly.⁷⁵

6.6 The End of Phase Two

Phase two was enormously controversial, with no one inside or outside the government very happy with the changes; as it turned out, almost all actions proposed in response to the ever increasing tide of Soviet *émigrés* were inadequate by the time of their implementation. The original FY 1989 Soviet refugee admissions sub-ceiling had been increased from 18,000⁷⁶ to 25,000 in December 1988, through a reallocation of numbers from other regions,⁷⁷ and eventually to 43,500 for the

year,⁷⁸ with a total of 39,171 Soviet refugees eventually admitted in FY 1989. But by the end of FY 1989, over 100,000 Soviets had applied under the U.S. refugee programme.⁷⁹

Still the numbers continued to increase. In August 1989 alone, over 10,000 Soviets applied under the U.S. refugee programme in Moscow;⁸⁰ by September-October, another 10,000 Soviet Jews and Pentecostals per month were arriving in Vienna,⁸¹ most of whom then travelled on to Rome for U.S. refugee processing. It is estimated that the combined exit rate for FY 1990 would have exceeded 240,000 if procedures had not changed in October 1989. As it turned out, even that number was a gross underestimate: over 800,000 additional Soviets are expected to have registered for U.S. emigration by September 1990.⁸²

Once again, legal questions and budgetary concerns combined to push yet another policy change. Another phase was formulated.

7. Phase Three: October 1989 to the Present

7.1 The September 14 Announcement

The Administration announced new policies and procedures at Congressional hearings held on 14 and 15 September 1989, effective from the beginning of FY 1990 (1 October 1989).⁸³

- 'Moscow-only' processing for all prospective Soviet refugee applicants after increasing INS interviewing capabilities at Embassy Moscow, and the establishment of the Washington Processing Center (WPC) to do 'off-shore' paperwork registrations and scheduling of interviews;
- a 1 October 'cut-off' for new entrants into the Vienna-Rome processing pipeline, enabling its eventual phase-out during FY 1990;
- 'clear-out' of those Soviet applicants 'stranded in Rome' following their denial of refugee status and their rejection of parole into the United States or onward movement to Israel; and,
- establishment of processing priorities among Soviet registrants.

According to the General Accounting Office, as reported in its 1990 review of Soviet refugee processing in Rome and Moscow mandated by the U.S. Congress, there were several reasons for the changes announced by the

Administration,

including (1) a recognition that the United States could not resettle all Soviets wishing to emigrate from the Soviet Union, (2) the need to better manage the program by being able to establish Soviet refugee admissions ceilings and give priority to Soviets with ties to the United States, (3) the high cost of the Rome processing, (4) concern about the hardship facing Soviets denied refugee status in Rome, and (5) fairness and consistency concerns resulting from two processing locations.⁸⁴

Central to these policies was the recognition that in order to manage the 'Moscow-only' programme, considerable staff would be needed. Because of existing reciprocal ceilings on staffing the U.S. and Soviet embassies in the other's capital, a central registry, the 'Washington Processing Center (WPC)' was therefore established, modelled on the Bangkok 'off-shore' processing facility for the Orderly Departure Programme from Vietnam.

7.2 Effects on the 'Open Door' and 'Freedom of Choice'

With the September policy changes, the U.S. 'Open Door' previously applicable to all Soviets with Soviet exit permission, is now unavailable to many prospective *émigrés*; and for some, 'freedom of choice' has been severely constrained. While current policy calls for all Soviets registered with the U.S. Embassy in Moscow before 1 October 1989 eventually to be scheduled for an interview, queues of 'post cut-off' Soviet applicants wishing to emigrate to the United States have been established,⁸⁵ with them, goes the implied assumption that not all who registered their interest will be interviewed, and an interview is required before an applicant can be offered either refugee admission or parole.⁸⁶ For many, especially those without close relatives in the United States, the September changes effectively limit the possibilities for entry to the United States. Tens of thousands of Soviet Jews with no close ties to the United States are now opting to emigrate to Israel. The U.S. Congress and Jewish advocacy groups initially greeted these developments with a mixture of hostility and regret.⁸⁷ However, the noticeable absence of criticism from the Jewish community since then seems to indicate at least acquiescence in, if not support for, the new policies.

To ease the plight of Soviet refugee applicants 'stranded' in Rome, and as part of the changes announced by the government on 14 September 1989, the Attorney General directed the INS to review the applications of

all Soviets in Rome denied refugee status, 'with due regard for the environment to which the person would be exposed in the Soviet Union [upon return].'⁸⁸ This directive also applied to all Soviets adjudicated in Rome during the phase-out of the Vienna-Rome processing pipeline. By the end of June 1990, the pipeline had been closed. Following the Attorney General's September 1989 directive, the approval rate for Soviet refugee applicants in Rome, including those previously denied by INS adjudicators, was 99.9%.⁸⁹

Early in October 1989, INS staffing in Moscow was increased from two to six adjudicating officers, and the U.S. Embassy there is currently being reconfigured to provide interviewing capacity for up to ten INS officers. The Soviet refugee admissions ceiling for FY 1990 is 50,000.⁹⁰

7.3 Eased Eligibility Standards Signed into Law

INS Deputy Commissioner Ricardo Inzunza recently observed that, 'despite the changes of the Refugee Act of 1980, government reaction to some humanitarian crises sometimes seems to reflect pre-1980 habits of dealing with refugees, and with it, a tendency to designate legislatively or by executive directive the groups and the numbers to be admitted as refugees.'⁹¹ In July 1989, Congress had 'succumbed to the temptation to respond in an *ad hoc* fashion when . . . [it] enacted temporary legislation⁹² to presume the eligibility of certain refugee claimants from the Soviet Union and Indochina.'⁹³ On 21 November 1989, well after the commencement of the phase three changes in Soviet refugee processing, a compromise version of this legislation, the 'Lautenberg Amendment', was signed into law by President Bush, establishing categories and easing refugee status eligibility for them.⁹⁴

Following the passage of the Lautenberg Amendment, INS issued final guidance, after some fits and starts, on the eased adjudication standard for category Soviet refugees. Section 599D(b) of the Lautenberg Amendment requires the establishment of several categories of Soviets 'who share common characteristics that identify them as targets of persecution'; these include Jews, evangelical Christians, and 'public, active and continuous' participants in the Ukrainian Catholic Church or the Ukrainian Autocephalous Orthodox Church.⁹⁵

Initial guidance issued on 8 January 1990 met swift condemnation from Jewish groups

and the Congressional sponsors of the amendment. They complained that while the guidance followed the letter of the law, it did not incorporate all the explanatory language accompanying the statute, language which defined the instances of treatment qualifying as bases for a credible concern about persecution. Representative Bruce Morrison, the sponsor of the legislation in the House of Representatives, charged, though with little foundation, 'that the administration has ignored the specific intent of Congress . . . The administration has resisted this legislation all along, and now they're (sic) trying to subvert it through bureaucratic manipulation.'⁹⁶ On 18 January 1990, however, INS revised the guidelines further specifying the standards to be used, and reissued them six days later.⁹⁷ At a press conference announcing the revised guidelines, INS Commissioner McNary 'indicated [that] virtually all Soviet Jews, evangelical Christians and other religious groups [in the Soviet Union] would be admitted as refugees.'⁹⁸

7.4 The 'Lautenberg' Standard

Unlike applicants under the worldwide adjudication standard who must establish a 'well-founded fear of persecution', Soviet category applicants need only establish their bona fide category membership,⁹⁹ then 'assert a well-founded fear of persecution', and 'assert a credible basis for concern about the possibility of such persecution.' Whereas the INS approval rate for Soviet Jewish applicants in Moscow was approximately 70% before the enactment of the 'Lautenberg Amendment,' it rose to some 90%¹⁰⁰ once the guidance had been received and INS Headquarters training had been given to INS officers in Rome and Moscow, by the Office of Refugees, Asylum and Parole.

As the General Accounting Office (GAO) observed, the passage of 'the Lautenberg Amendment, coupled with new adjudication guidance, effectively makes it easier for category members to qualify for refugee status, although it still does not provide presumptive refugee status.'¹⁰¹

Senator Lautenberg, in proposing a two year extension of the eased standards of his legislation in Senate Bill S. 2677, stated that, 'The . . . law is working as intended. It has replaced an arbitrary and slow process of refugee adjudication in the Soviet Union with a stable, consistent and fair process.'¹⁰² 'The 'Lautenberg Amendment' lowers the approval threshold for category members to make it easier for them to qualify as refu-

gees," said the GAO in its May 1990 report to Congress.¹⁰³ Also according to the GAO, 'At least initially, the flow [of Soviet refugees] has been better managed because Moscow processing enables U.S. officials to establish Soviet refugee admissions . . . based on U.S. foreign policy and budgetary considerations,¹⁰⁴ . . . and allows the U.S. government to give priority to adjudicating Soviet applicants with close family and other ties to the United States¹⁰⁵ instead of adjudicating according to the refugee application date.'¹⁰⁶

8. Conclusion

8.1 U.S. Response Was Controversial

Partly in response to decades-long pressure from the United States government and human rights advocates around the world in favour of freer emigration, the Gorbachev reforms led the Soviets in the late 1980s to 'let their people go' in increasingly large numbers. This new wave of emigration caught the U.S. by surprise, and with policies and procedures which were often more suitable to the conditions of the late Cold War than to those of *glasnost*. The U.S. response to the liberalized emigration of Soviet Jews since late 1987 has usually been inadequate, often erratic, and frequently controversial as forty years of policy assumptions and procedures, of necessity, evolved. But the United States has not failed to respond; indeed, it has responded on a scale unprecedented in the Western world. Ultimately, even this good will has had its limitations, as competing priorities and the existence of Israel as a home for emigrating Soviet Jews have led to the momentous changes in this response over the sixteen months from July 1988 to November 1989. United States policy and practice continue to be controversial, both domestically and internationally. Not all the factors involved in this response are yet known, particularly the 'unintended consequences' of Soviet Jewish emigration to Israel, and with it, real issues of war and peace in the Middle East; such possibilities existed even before the new challenge to peace in that area resulted from Iraq's invasion and annexation of Kuwait.¹⁰⁷

8.2 Significant Legal Revisions Were Made

In the course of this nation's response, U.S. refugee law has undergone a significant, albeit temporary, change: the burden and standard of proof required to establish eligibility for refugee status and resettlement to the United States have been statutorily eased

for certain designated categories of resettlement applicants from among the world's 14 million or so refugees. Before the Lautenberg Amendment passed, *The Washington Post* cautioned that, '... [T]he notion of setting a refugee entry standard of group cultural victimization . . . could give relief to Soviet Jews, but applied universally, it would also open the door to scores of aggrieved ethnic groups around the world. Applied particularly, it would revive a standard of ethnic favoritism that, in emigration matters, Americans banished years ago.'¹⁰⁸

In addition, according to the U.S. Committee for Refugees, this legislation has also 'had the perverse effect of closing off [the parole] option of escape.'¹⁰⁹ as almost all Soviet category members can now qualify for admission as refugees, there will be fewer offers of parole due to fewer denials. Instead of 'leveraging' the annual Soviet refugee admissions ceiling with an additional number of applicants interviewed and denied but offered parole, the number of category Soviets eligible for admission annually is once again effectively limited to the two usual avenues of immigration or refugee status. 'This means . . . that thousands¹¹⁰ of Soviet Jews and Pentecostals in Fiscal Year 1990 may be denied the option of leaving the USSR for the United States *because* of the narrowness of the Morrison-Lautenberg approach.'¹¹¹

8.3 Additional Phases Still Needed

The evolving U.S. response to Soviet emigration is not yet in its final stage. What that phase will be, and when we will get to it, are open to considerable conjecture. Until then, additional stages may be necessitated by events beyond either the influence or control of the United States.

One such phase might include U.S. participation in an international assistance programme for Soviet Jews displaced within the Soviet Union, or in a rescue of additional Jews from the Soviet Union as a result of anti-semitism. Another phase might involve the U.S. in a diversion of Soviet *émigrés* from Israeli destinations, for example, at the request of the Israeli government, triggered perhaps by violence against Soviet Jews after their arrival in Israel, or by problems of absorption or assimilation at current or increased rates.¹¹² A last phase, involving return to use of the worldwide standard for adjudicating all Soviet refugee applications, must be considered eventually.

If the past is indeed prologue to the future, the U.S. will be in the forefront of any re-

sponse to problems within the Soviet Union,¹¹³ Israel,¹¹⁴ or the Middle East, which is deemed by the international community to be necessary for the peace and dignity of those concerned.

ANNEX

United States Department of State
Outgoing Telegram

From: Secretary of State, Washington D.C.
To: American Embassy, Moscow
American Embassy, Rome
American Embassy, Vienna
American Consul, Frankfurt

Immediate

Unclassified State 405442

For Refugee Officers, Consular Officers and
INS

E.O. 12356: N/A

**Subject: Soviet Refugee Program—Legal
Issues**

1. *Summary:* All INS officers have received instructions, supported by the Department of State, to ensure that all refugee applicants—including those from the Soviet Union—are adjudicated under uniformly applied worldwide standards, as specified in Attorney General Meese's letter of August 4, 1988. With processing resuming in Moscow, the following instructions have been agreed to by Department and INS for use by Department and INS personnel as appropriate. The refugee definition and other requirements for refugee admission must be properly applied by INS to all applicants as determined after an individual interview. INS should seek guidance from Washington on factual matters and legal issues as needed. Embassy Moscow is requested to ensure that INS/CORAP and all INS posts handling Soviet caseloads (Rome, Vienna, Frankfurt) are addressees on all cables reporting on developments in the Soviet Union relevant to refugee adjudications. *End summary.*

2. It is very important that INS and State, including Embassy Moscow, work together to ensure that refugee adjudications are made on the basis of the most accurate relevant information available about conditions in the Soviet Union. Embassy Moscow will be able to talk directly with INS officers there on TDY (Temporary Duty—Ed.). Other posts should rely upon Dept.'s annual human rights reports, the World Refugee Report just submitted to Congress, Embassy Moscow reporting, and other available information on conditions in the Soviet Union and should request further factual information from Dept. as

needed.

3. In adjudicating cases, no effort should be made to artificially lower approval rates in order to maximize use of parole, nor to keep approval rates high if high rates are not supported by the facts. While budgetary constraints have coincided with a need to change procedures for processing Soviet refugee applications, the legal and budgetary issues are distinct. Post should make very clear if the issue is raised that decisions to deny refugee status to Soviets are not being made for budgetary reasons.

4. Application of refugee definition: The statutory definition of refugee—i.e. section 101(A)(42) of the INA—should be applied to the adjudication of all applications to the U.S. refugee admission program. All Soviet applicants for refugee status must be interviewed individually by an INS officer to determine whether they meet the refugee definition and other requirements for refugee admission. General information about conditions in the Soviet Union, the treatment and recent history of any group to which the applicant belongs, and the applicant's individual circumstances and experiences should be assessed, along with the applicant's credibility.

5. In Moscow, allowances should be made as appropriate for expected unfamiliarity of many applicants with requirements for refugee status and the possibility that applicants will be reluctant to speak candidly about their experiences because they are being interviewed in the Soviet Union. If necessary, Embassy and INS officers on TDY should ensure as secure an environment for interviews as possible. In some cases, INS may wish to try covering sensitive questions and answers in writing. At all posts, INS should attempt to pursue all relevant lines of questioning so that applicants who may not fully understand requirements for demonstrating refugee status will have a full opportunity to make their cases.

6. In adjudicating cases involving discrimination, reference should be made to paragraphs 54 and 55 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979), which reads as follows:

Quote 54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of

discrimination lead to consequences of a substantially prejudicial nature of the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities.

55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination amount to persecution must be determined in the light of all the circumstances. A claim to fear persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved. *End Quote*

7. Cases that present evidence of persecution or a well-founded fear of persecution prior to the time the applicant sought exit permission will be the easiest to deal with. More difficult will be those cases in which the applicant's experiences prior to seeking exit permission were not such as to constitute persecution or to engender a well-founded fear thereof. Such applicants could qualify for refugee status only if the applicant were persecuted or could demonstrate a well-founded fear of persecution by virtue of having sought exit permission—a result Embassy Moscow has reported is becoming rare—or at some time thereafter. Difficulties encountered by such persons do not constitute persecution where they are inevitable consequences of cutting ties or are attributable merely to fac-

tors that exist for the population at large (e.g., housing and employment shortages).

8. To assist INS in determining whether a particular applicant granted exit permission is in a position where he or she has a well-founded fear of experiencing treatment that would constitute persecution on account of one of the five statutory factors, Embassy will need to monitor carefully treatment of all ethnic and religious groups applying for refugee status, treatment of persons seeking exit permission, and treatment of those who have returned to the Soviet Union after having lived abroad (or who have attempted to resume life in the Soviet Union after receiving exit permission). Embassy should share information with Washington and concerned INS processing posts on a timely basis.

9. Further guidance can be obtained from Washington as needed. Reference can also be made to the INS Worldwide Refugee Processing Guidelines (the 1983 version remains in effect until present revision is finalized), to the August 1981 opinion of Justice's Office of Legal Counsel, a copy of which was provided to Embassy Moscow in May, and to the U.S. Supreme Court's discussion in *Cardoza-Fonseca* (March 1987) of persecution and a well-founded fear of persecution. INS will ensure that all INS officers coming to Moscow have these materials available and are fully briefed on legal and program requirements. The UNHCR *Handbook on Criteria and Procedures for Determining Refugee Status* (Geneva, 1979) may also usefully be consulted as a general reference for INS adjudications. Shultz.

NOTES

1. Ted Koppel, 'Russian Emigres: Waiting for a Home,' *Nightline*, Transcript of ABC News Nightline Show #2009, 2 Feb. 1989, p. 1.

2. See *Report of the Hearing on Soviet Refugees* (hereinafter called *Soviet Hearing*), Subcommittee on Immigration, Refugees, and International Law (Committee on the Judiciary), U.S. House of Representatives, 6 Apr. 1989, Serial No. 12, U.S. Government Printing Office, 1989, which partially reprints [at pp. 362-367, p. 4 is missing] an April 1988 memorandum [hereinafter called 'INS April 1988 Memorandum'] concerning policy options for dealing with increased Soviet Armenian emigration; after a May 1988 meeting between the Departments of State and Justice, a June 1988 INS memorandum [reprinted at pp. 157-160 and 368-371] extended these policies to all Soviet processing.

3. General Accounting Office, 'Soviet Refugees: Processing and Admittance to the United States' [here-

inafter called the *GAO Report*], GAO/NSIAD-90-158, May 1990, at, p. 3: 'This change was necessary... to bring the Soviet refugee program into compliance with the Refugee Act of 1980, as well as to ensure that the limited refugee admissions available were used for bona fide refugees.'

4. Testimony of Priscilla Clapp (Deputy Assistant Secretary of State for Admissions, U.S. Department of State), *Report of the Joint Hearing on Processing of Soviet Refugees* (hereinafter called *Joint Hearing*), Subcommittee on Europe and the Middle East (Committee on Foreign Affairs) and the Subcommittee on Immigration, Refugees, and International Law (Committee on the Judiciary), U.S. House of Representatives, 14 Sept. 1989, Serial No. 54, U.S. Government Printing Office, Washington, D.C. 1990, at p. 62.

5. Prepared Statement of Ambassador Jewel S. Lafontant (U.S. Coordinator for Refugee Affairs), *Joint*

Hearing, above note 4, at p. 8.

6. See, 'Chart Depicting Emigration from the USSR' and 'Chart Depicting Soviet Emigration Through Vienna to Israel, the U.S. and Elsewhere,' reprinted in *Joint Hearing* (above note 4), at pp. 205 and 210 (Appendix 16 and Appendix 21, respectively).

7. The U.S. fiscal year (FY) runs from 1 October through 30 September.

8. Lafontant Testimony: 'The situation in Rome is inherently unmanageable, extremely costly, and ultimately inhumane under current conditions,' *Joint Hearing*, above note 4.

9. Lafontant Testimony, *ibid.*, above note 4, at pp. 4-5, 8-16.

10. Testimony of INS Commissioner Alan C. Nelson, *Report of the Consultation Hearing on Refugee Admissions for FY 1989* (hereinafter *FY 1989 Senate Consultation*), Committee on the Judiciary, U.S. Senate, September 13, 1988, Serial No. J-100-87, U.S. Government Printing Office, 1989, at pp. 79-80.

11. For a more detailed discussion of these four points, see INS Commissioner Nelson Testimony, *Soviet Hearing*, 'Current Policies Available to Soviets,' above note 2, at pp. 100-102.

12. *GAO Report*, see above note 3, at p. 3: 'Until [August 1988], the United States granted nearly automatic refugee status to almost all Soviet citizens wishing to emigrate.'

13. Immigration and Nationality Act (INA) of 27 June 1952 (as amended), 66 Stat 163, 8 USC 1101 et seq.

14. Section 212(d)(5)(a) of the INA authorizes the Attorney General to 'parole' into the United States, for reasons deemed to be in the public interest, persons who do not fall within any other categories of admissibility. 'Parole' does not constitute formal 'admission' or 'entry' into the U.S.

15. Presidential Determination 90-2, 9 October 1989, *Federal Register*, Vol. 54, No. 202, 20 October 1989, at p. 43036.

16. The 'Lautenberg Amendment,' Foreign Operations Appropriations Act for FY 1990, Pub. L. No. 101-167, 103 Stat 1195, 1261 (1989), Section 599D, refers.

17. Some aspects of emigration are referenced either directly or indirectly under 'Contacts Between People' in 'Basket 3' of the Helsinki Final Act: 'Cooperation in Humanitarian and Other Fields.'

18. Shultz Statement, *FY 1989 Senate Consultation*, see above note 10, at p. 61. 'Freedom to leave' [as opposed to the 'right to leave' mentioned in the 1948 Universal Declaration of Human Rights], is stated for the first time in the 1989 Vienna Document: 'Everyone is free to leave any country, including his own, and to return to his own country.'

19. Adopted and Proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

20. Soviet emigration procedures were detailed in the Statement of INS Commissioner Alan C. Nelson, *FY 1989 Senate Consultation*, see above note 10, at pp. 71-83.

21. Lafontant Testimony, *Joint Hearing*, see above note 4, at p. 13.

22. An identical process was used by Soviet Pentecostals under an arrangement whereby they received 'vyzovs' from 'relatives' in Israel. Soviet Jews and evangelical Christians exiting as intending immigrants to Israel were stripped of their Soviet citizenship upon departing from the Soviet Union.

23. Robert Pear, 'Soviet Armenians Let in Improperly, U.S. Officials Say: Refugee Status at Issue: Immigration Service Said to Admit Thousands Without a Claim of Persecution,' *New York Times*, 29 May 1988, reporting on a 17 May 1988 meeting convened by the legal staff of the U.S. Department of State with its counterpart in the U.S. Department of Justice.

24. Doris M. Meissner, "'Refugee' is a Misnomer for Soviet Armenian Emigres," *Los Angeles Times*, Op-Ed Section, 8 Jun. 1988. (Ms. Meissner was INS Acting Commissioner from 1981-1982 and Executive Commissioner from 1982-1985.)

25. INS April 1988 Memorandum, p. 2: 'Soviet Armenians as Refugees,' in *Soviet Hearing*, above note 2, at p. 363.

26. Testimony of Ross Vartian, Executive Director, Armenian Assembly of America, *ibid.*, at p. 252.

27. See, for example, *Soviet Hearing*, INS memoranda of April and June 1988, above note 2.

28. Testimony of Roger Winter (Executive Director, U.S. Committee for Refugees), *Report of the Hearings on Refugee Admissions for FY 1990* (hereinafter *FY 1990 House Consultation*), Subcommittee on Immigration, Refugees, and International Law (Committee on the Judiciary), U.S. House of Representatives, 12-13 Sept. 1989, Serial No. 41, U.S. Government Printing Office, 1990, at pp. 104 and 106.

29. Adela Gooch, 'Eagleburger Defends Policy On Soviet Jews: Other Nations Urged to Accept Emigres,' *Washington Post*, 19 Sept. 1990, at p. A16.

30. John M. Goshko, "'U.S. Tells Jewish Groups 'Door Open' for Soviets: Shultz Acts After Unease Over Changes,'" *Washington Post*, 7 Dec. 1988, at p. A28.

31. Statement of Nancy P. Kingsbury (Director, Foreign Economic Assistance Issues, National Security and International Affairs Division, GAO), *Soviet Hearing*, above note 2, at p. 141.

32. Statement of Representative Hamilton Fish, Jr., *Joint Hearing*, above note 4, at p. 52.

33. Shultz Testimony, *FY 1989 Senate Consultation*, above note 10, at p. 9. Contrast this with his later statement on the 'fundamental principle' of 'freedom of choice,' below note 42.

34. Shultz Testimony, *FY 1989 Senate Consultation*, above note 10, at p. 9.

35. Held on 13 and 15 September 1988, respectively; for the former, see *FY 1989 Senate Consultation*, above note 10, at pp. 71-83.

36. Nelson Statement, *ibid.*, at pp. 80-81.

37. Eagleburger Testimony, *Report of the Consultation Hearing on Refugee Admissions for Fiscal Year 1990* (hereafter called the *FY 1990 Senate Consultation*), Committee on the Judiciary, United States Senate, 15 Sept. 1989, Serial No. J-101-43, U.S. Govt. Printing Office, Washington, D.C., 1990, at p. 47.

38. Statement of Doris M. Meissner, Senior Associate, Carnegie Endowment for International Peace, *Report of the Hearing on the Midyear Consultation on Refugee Programs*, Subcommittee on Immigration and Refugee Affairs (Committee on the Judiciary), U.S. Senate, 30 Jun. 1987, Serial No. J-100-29, U.S. Government Printing Office, Washington, D.C., 1987, at p. 40.

39. Shultz Statement, *FY 1989 Senate Consultation*, above note 10, at p. 64.

40. Department of Justice Press Release, 5 Apr. 1989, proposing the Special Immigrant Protection Act of 1989: 'This legislation, while intended to address per-

sons such as those Soviets being denied refugee status in Moscow and Rome, is non-nation specific in order to give the President the maximum flexibility to cover the immigration to the U.S. of any nationality of persons who could not meet the refugee definition, but who are of special foreign policy or other public interest to the United States.'

41. Letter of Attorney General Edwin Meese III (U.S. Department of Justice) to Lt. General Colin Powell, Assistant to the President for National Security Affairs (The White House, Washington, D.C.), 4 Aug. 1988, reprinted in *Soviet Hearing*, above note 2, at pp. 128-130.

42. Shultz Testimony, *FY 1989 Senate Consultation*, above note 10, at pp. 30-31.

43. Talisman Testimony, *Soviet Hearing*, above note 2, at p. 247.

44. Leuchter Testimony, *ibid.*

45. 'Chart Depicting Soviet Emigration Through Vienna to Israel, the U.S. and Elsewhere,' U.S. Department of State, *Joint Hearing*, Appendix 21, above note 4, at p. 210.

46. Presidential Determination 88-16, 20 May 1988; as no additional funding was requested at the time for these additional admissions, the stage was set (inadvertently) for the 4 July 1988 suspension of the Soviet Armenian ATCP, which in turn led to the development of the Attorney General's August 1988 directive, including changes resulting in INS processing in Moscow and use of a worldwide adjudication standard.

47. The complete exchange of letters, and Senate commentary, between the Administration and the Senate subcommittee, were reported in the *Congressional Record—Senate*, 28 Apr. 1988, at pp. S 5132-S 5133.

48. Presidential Determination 88-16, 20 May 1988.

49. Michael Parks, "U.S. Suspends Immigration of Soviet Armenians: Entry of 5,000 Blocked by a 'Financing Problem,' and Dispute Over Refugee Status," *Los Angeles Times*, 9 Jul. 1988, at p. A4.

50. *Ibid.*

51. *Soviet Hearing*, above note 2, at pp. 128-130.

52. *Ibid.*, at p. 128.

53. Shultz Statement, *FY 1989 Consultation*, above note 10, at p. 65.

54. Julia Vadala Taft, 'A Call to Action for Restructuring U.S. Refugee Policy,' *World Refugee Survey: 1989 in Review*, U.S. Committee for Refugees, Washington, D.C., 1990, at p. 10.

55. Shultz Statement, *FY 1989 Senate Consultation*, above note 10, at p. 65.

56. Philip Taubman, 'U.S. Embassy Holding Up Visas for Soviet Emigres,' *New York Times*, 8 Jul. 1988.

57. Reported in 'Refugee Backlog in the Soviet Union Nears 10,000,' *Refugee Reports*, U.S. Committee for Refugees, Washington, D.C., 11 Nov. 1988, at pp. 12-13.

58. INS policy cable, from the Office of Refugees, Asylum and Parole, 4 Oct. 1988 refers.

59. Michael R. Gordon, 'U.S. to Ease Backlog in Soviet Emigration, But Draws Criticism,' *New York Times*, 9 Dec. 1988; and Jennifer Parmelee, 'In Limbo in Italy: Soviet Jewish Emigres Claim Deception by Voice of America,' *Washington Post*, 9 Dec. 1988.

60. 'Soviet Refugee Program—Legal Issues,' State cable 405442 (unclassified), 16 Dec. 1988 refers; see below, Annex.

61. Guidance on this topic is included in all INS training programmes for refugee and asylum adjudicators.

62. John M. Goshko, 'Jewish Groups Criticize Change in Visa Policy: Soviet Emigres Denied U.S. Entry, They Say,' *Washington Post* 6 Dec. 1988, at p. A18.

63. Testimony of Karl D. Zukerman (Executive Vice President of HIAS), *FY 1990 House Consultation*, above note 28, at pp. 82 and 84.

64. Testimony of David A. Harris, *Soviet Hearing*, above note 2, at p. 193.

65. Representative Howard L. Berman, *Joint Hearing*, above note 4, at p. 90.

66. Robert Pear, 'U.S. Bars Some Soviet Jews and Armenians As Refugees,' *New York Times*, 12 Dec. 1988, quoting Philip Saperia, assistant executive vice president of HIAS: 'We don't know how long the Soviet Union will have a liberal emigration policy for Soviet Jews. It could change at any time. This is a window of opportunity. We have to get them out while we have the chance.'

67. Lafontant Testimony, *FY 1990 House Consultation*, above note 28, at p. 212.

68. Goshko, 7 Dec. 1988, above note 30.

69. Goshko, 6 Dec. 1988, above note 62, extensively detailed many of the problems with parole, including the inability of most parolees to adjust their status normally and eventually naturalize. Section 599E of the 'Lautenberg Amendment' provided for the adjustment of status for parolees; see also Adjustment of Status Under Public Law 101-167: *Federal Register*, Vol. 55, No. 118, 19 Jun. 1990, at pp. 24859-24860.

70. See, for example, July 1989 testimony in Congress summarizing INS problems in Rome: *Congressional Record—House*, Vol. 135, No. 93, 13 Jul. 1989, pp. H 3718-H 3738, and *Congressional Record—Senate*, 20 Jul. 1989, pp. S 8378-S 8393.

71. During the first 6 months of 1989, the INS made several improvements in its training of adjudicators and its administrative support to the programme in Rome. The GAO testimony on 6 Apr. 1989 detailed these problems: see *Soviet Hearing*, above note 2, at pp. 139-164; improvements were noted in September: see statement and testimony, *Joint Hearing*, above note 4, at pp. 106-108.

72. Ted Koppel, *Nightline* above note 1.

73. House Concurrent Resolution 73, submitted on 14 Mar. 1989, and Senate Concurrent Resolution 25, submitted 17 Mar. 1989; both were referred to their respective Committee on the Judiciary.

74. Statement of Representative Eliot L. Engel, *Soviet Hearing*, above note 2, at p. 83.

75. See, for example, letter dated 5 Apr. 1989 from the Combined Jewish Philanthropies of Greater Boston to Senator Edward M. Kennedy, *Soviet Hearing*, above note 2, at p. 217.

76. Presidential Determination 89-2, 5 Oct. 1988.

77. Letter dated 13 Dec. 1988 from Ambassador Jonathan Moore, U.S. Coordinator for Refugees Affairs, The White House, to the Chairmen of the House and Senate Judiciary Committees; see also, Robert Pear, 'U.S. Raises Quota of Soviet Refugees By Cutting Asians,' *New York Times*, 12 Jan. 1989, at p. 1.

78. Presidential Determination 89-15, 19 Jun. 1989.

79. *GAO Report*, above note 3, at p. 3.

80. Lafontant Testimony, *Joint Hearing*, above note 4, at p. 15.

81. 'Entry of Soviets into Austria,' Chart D-251/D-272, U.S. Department of State/Bureau for Refugee Programs, 27 Apr. 1990: 5,039 in July 1989, 7,666 in August,

9,138 in September, 10,118 in October, and a high of 11,078 in November; after that, the number started falling as a result of the new U.S. Soviet admissions policy: 5,557 in December, 130 in January 1990, and 40 in February 1990.

82. *GAO Report*, above note 3, at p. 3.

83. The announcement was made to the House of Representatives on 14 Sept. 1989, *Joint Hearing*, above note 4; and to the Senate on 15 Sept. 1989, *FY 1990 Senate Consultation*, above note 37.

84. *GAO Report*, above note 3, at p. 4.

85. The GAO reported that 'As of mid-March 1990, preliminary questionnaires [registrations] representing 362,000 Soviets had been received': *ibid.*, at p. 15; and that 'State Department officials estimate preliminary questionnaires representing about 800,000 Soviets will be received during FY 1990': *ibid.*, at p. 3.

86. Referencing the statutory bar against parole for refugees (Section 212(d)(5)(B) of the INA), INS processing guidelines offer parole only to those Soviet applicants found ineligible for refugee status after an INS interview; parole is not offered without first having been interviewed.

87. See, for example, Robert Pear, 'Soviet Refugee Plan Faulted; Critics Say Flow will Dry Up,' *New York Times*, 15 Sept. 1989, at p. 1; Adela Gooch, 'Bush Plan for Soviet Jews Called Inadequate: Immigration Officials Cannot Handle Wave of Applications, Lawmakers Contend,' *Washington Post*, 15 Sept. 1989, at p. A27; Adela Gooch, 'Eagleburger Defends Policy on Soviet Jews,' *Washington Post*, 16 Sept. 1989, at p. A16; R.A. Zaldivar, "'U.S. Jews 'Uneasy' About New Policy on Soviet Refugees,'" *Miami Herald*, 17 Sept. 1989, at p. A18.

88. Melissa Healy, 'U.S. Will Review Status of 4,200 Soviet Jews: INS Ordered to Reopen Cases of Applicants Denied Admission as Refugees,' *Los Angeles Times*, 15 Sept. 1989, p. A5.

89. Soviet Processing Statistics for FY 1990, Cumulative (October 1989 through June 1990), Office of Refugees, Asylum and Parole, Immigration and Naturalization Service, Washington, D.C.

90. To maximize Soviet Jewish emigration within narrow budget constraints, American Jewish groups agreed to finance the admission of up to 8,000 Soviet Jews in FY 1990.

91. Ricardo Inzunza, 'The Refugee Act of 1980: Ten Years After—Still the Way to Go,' 2 *IJRL* 413, 417 (1990).

92. House bill HR 2022 (the Morrison Act) passed the House of Representatives by a vote of 357 to 44 on 13 July 1989, establishing categories of persons with a presumption of persecution and, therefore, virtually automatic refugee status; the Senate passed its version of this legislation, S 1160 (the Lautenberg Amendment), by a vote of 97 to 0 on 20 July 1989, establishing categories of persons eligible for eased, though not presumptive, access to refugee status, and attempting to shift the burden of proof to the government.

93. Arthur C. Helton, *The Implementation of the Refugee Act of 1980: A Decade of Experience*, Lawyers Committee for Human Rights (1990), at p. 3.

94. Foreign Operations Appropriations Act for FY 1990, above note 16.

95. Memorandum dated 24 Apr. 1990 from Attorney General Dick Thornburgh to INS Commissioner McNary on the Establishment of Categories of Soviet Refugee Applicants as Required by Recent Legislation (the

'Lautenberg Amendment').

96. John M. Goshko, 'INS Guidelines Thwart Law on Soviet Immigration, Critics Say,' *Washington Post*, 15 Jan. 1990.

97. Memorandum dated 24 Jan. 1990 to all INS Overseas Offices from INS Commissioner McNary, Adjudication of Refugee Claims of Category Applicants Under the 'Lautenberg Amendment' (P.L. 101-167, Section 599D).

98. Al Kamen, 'INS to Revise Proposed Rules on Soviet Immigration,' *Washington Post*, 19 Jan. 1990, at p. A3.

99. For guidance, see INS Memorandum dated 20 Mar. 1990 from Commissioner McNary to all INS overseas offices on 'Establishment of Category Membership.'

100. *GAO Report*, above note 3, at p. 13.

101. *Ibid.*, at pp. 12-13.

102. *Congressional Record-Senate*, Vol. 136, No. 67, 23 May 1990, pp. S 6840-S 6846, at p. S 6840.

103. *GAO Report*, above note 3, at p. 5.

104. This is, in the writer's view, instead of according to a 'well-founded fear of persecution' based on a country-neutral, group-neutral definition of refugee which is otherwise applied uniformly worldwide.

105. Again, in this writer's view, instead of giving priority according to their vulnerability if they were to remain where they are.

106. *GAO Report*, above note 3, at p. 2.

107. See, for example, 'Islamic Nations Demanding Halt to Soviet Jews' Exodus to Israel,' *Reuters News Service*, 9 Apr. 1990: 'Islamic states appealed urgently yesterday to the Soviet Union, the United States and the European Community for help in halting the Soviet Jewish exodus to Israel . . . The Jerusalem Committee of the Islamic Conference Organization (ICO) . . . said the migration would spark a "dramatic explosion and artificial growth of the population in a territory of limited size and resources . . . The ICO . . . is alarmed that Soviet Jews will settle in the [occupied territories], destroying Palestinian hopes of a homeland.'" Israel says it expects 750,000 Soviet Jews to arrive over the next five years following liberalized Soviet emigration restrictions.' See also Jackson Diehl, 'Influx of Soviet Jews Roils Mideast: Israelis Tracking Regional Instabilities Find Pattern Alarming,' *Washington Post*, 11 Jun. 1990, pp. A17, A20.

108. Editorial, 'Revisiting the Refugee Law,' *Washington Post*, 8 Sept. 1989, at p. A22.

109. Court Robinson and Bill Frelick, 'Lives in the Balance: The Political and Humanitarian Impulses in U.S. Refugee Policy,' 2 *IJRL*, *Special Issue*, September 1990, 293, 319; see also, Cohen, R., *Soviet Jewish Emigration to Israel*, Refugee Policy Group, (1990), p. 10: 'One of the consequences of the [Lautenberg] legislation was to close off parole for most Soviet Jews.'

110. For example, assuming that adjudication according to the worldwide standard produced a 40% denial rate for Soviet Jewish applicants, and that INS would continue interviewing Soviet applicants until all refugee admissions numbers (for example, 40,000 for FY 1991) available within the Soviet sub-ceiling were utilized, some 16,000 Jews would be denied refugee status but offered parole. As interviews are being scheduled mainly for ('petitionable') applicants with close relatives in the U.S., these U.S. relatives should be able to meet the support requirements of parole, which are identical to those required for immigrants. Such 'advanced immigration' would then have been offered to

16,000 Soviet Jews, *in addition* to the 40,000 admissions as refugees, for a total FY 1991 admission of 56,000 instead of only 40,000 if they all had received refugee status.

111. Robinson and Frelick, above note 109, at p. 319.

112. See R. Cohen, 'Israel's Problematic Absorption of Soviet Jews,' below, pp. 60-81; also, Jackson Diehl, 'Soviet Migration Severely Strains Israel's Budget,' *Washington Post*, 30 Jul. 1990, at p. A13: 'As protest encampments of the poor and homeless fester around the country and parliament debates steep price increases for basic goods [and \$250 million in budget cuts to finance housing and transportation for Soviet arrivals], Israel's euphoria over the arrival of thousands of Soviet

immigrants has acquired a tinge of anxiety . . . The government appears trapped between the growing pressure of the protests and its severe financial bind . . . [T]he dimensions of the country's potential upheavals are beginning to dawn on many Israelis . . . [P]roposals to curtail the number of Soviets eligible to immigrate under the country's Law of Return [have recently emerged].'

113. See, for example, Zvi Gitelman, *Antisemitism in the Age of Perestroika*, The Hebrew Immigrant Aid Society, New York, Apr. 1990, especially 'Hysteria or Persecution?' at pp. 33-37.

114. See, for example, Cohen, above notes 109, 112.