Notes

Administrative Discretion Gone Awry: The Reintroduction of the Public Charge Exclusion for HIV-Positive Refugees and Asylees

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The ignorance, misinformation, and fear that accompanied public awareness of Acquired Immune Deficiency Syndrome (AIDS) in the mid-1980s has had lingering effects upon American immigration policy. The Secretary of Health and Human Services (HHS) first proposed adding AIDS to the list of "dangerous contagious diseases"¹ that are grounds for excluding an alien under the Immigration and Nationality Act (INA) in April 1986.² In 1987, Congress and the President prompted the Secretary to finalize regulations that would make Human Immunodeficiency Virus (HIV) infection a public health exclusion.³ Members of Congress were concerned that other countries would encourage and "support emigration of their [HIV] infected citizens" to the United States.⁴ The Secretary agreed that "[w]ith our current state of

1. The exclusion laws were amended in 1990 to change "dangerous contagious diseases" to "communicable disease[s] of public health significance." 8 U.S.C. § 1182(a)(1)(A)(i) (1994). A list of those diseases is provided at 42 C.F.R. § 34.2(b) (1987).

2. See Medical Examination of Aliens (AIDS), 51 Fed. Reg. 15,354 (1986) (to be codified at 42 C.F.R. § 34.2(b)(8)) (proposed Apr. 23, 1986).

3. See 133 CONG. REC. S7410 (daily ed. June 2, 1987); Medical Examination of Aliens, 52 Fed. Reg. 32,540 (1987) (to be codified at 42 C.F.R. § 34). Congress amended the Supplemental Appropriations Act by a vote of 96 to 0 to direct the Secretary of Health and Human Services to list HIV as an excludable disease. See 133 CONG. REC. S7415 (daily ed. June 2, 1987) (Rollcall Vote No. 142). These regulations were finalized in June 1987. See Medical Examination of Aliens (AIDS), 52 Fed. Reg. 21,532 (1987) (to be codified at 42 C.F.R. § 34).

4. Medical Examination of Aliens (AIDS), 52 Fed. Reg. at 32,543. Ignorance about the genesis and transmission of HIV led the Centers for Disease Control to list Haitians as a high risk group along with homosexuals, intravenous drug users, and hemophiliacs. See Elizabeth Mary McCormick, Note, *HIV-Infected Haitian Refugees: An Argument Against Exclusion*, 7 GEO. IMMIGR. L.J. 149, 153-54 (1993). Haitian national origin was removed as a risk factor in 1985, as knowledge increased about transmission of HIV. See *id.* at 156-57. There was uncertainty about the costs and health implications of HIV in 1987. One commentator has noted that,

knowledge about HIV infection, . . . the exclusion of applicants with HIV infection is justified.”⁵

In 1993, in the face of increasing knowledge about the transmission of HIV, President Bill Clinton announced his intention to order HHS to remove HIV infection from the list of excludable diseases.⁶ Congress responded by codifying the HIV exclusion to override the President’s decision.⁷ As a result, the exclusion of HIV-positive aliens applying for immigrant visas, refugee visas, and adjustment to permanent resident status is still in effect. The HIV exclusion, however, is not an absolute bar to admission for all aliens. Refugees may obtain waivers under the Refugee Act of 1980,⁸ which granted the Attorney General discretion to waive some exclusions, including the HIV exclusion, “for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.”⁹ Since 1988, the INS has refused to grant

[n]early all exclusions have been enacted at times of a high degree of nativism, racism, or anti-communism. Furthermore, the enactments often coincide with economic depressions and serve the domestic political needs of elected officials. The exclusions say more about the fears of the native-born than they do about the immigrant groups targeted.

Robert J. Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439, 445 (1994). Given that HIV was first associated with Haitian national origin in 1982, that there were fears about the U.S. economy in 1988, and that 1988 was an election year, it is not difficult to see why the general exclusion of HIV-positive immigrants was passed.

5. Medical Examination of Aliens (AIDS), 52 Fed. Reg. at 32, 543. The concern that other nations would export undesirable aliens to the United States was one of the primary reasons immigration exclusions were originally passed. See HOUSE COMM. ON THE JUDICIARY, GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT, H.R. DOC. NO. 89-263, at 6 (1988) [hereinafter EXCLUSION HISTORY].

6. See Philip J. Hiltz, *Clinton to Lift Ban on H.I.V.-Infected Visitors*, N.Y. TIMES, Feb. 9, 1993, at A17.

7. The exclusion was signed into law as part of the National Institute of Health Revitalization Act of 1993, Pub. L. No. 103-43, 107 Stat. 122, 210 (1993). From 1987 to the present, the Immigration and Naturalization Service (INS) has enforced the HIV exclusion primarily by requiring a serologic HIV test for aliens applying for immigrant visas, refugee visas, and adjustment to permanent resident status. See Medical Examination of Aliens (AIDS), 52 Fed. Reg. 21,607-08 (1987). Although the primary way the INS discovers that an alien is HIV-positive is through a required medical examination, it may exclude any alien whose HIV status becomes known to an immigration officer. See Memorandum from Office of the Commissioner, INS, to All Regional Commissioners, All District Directors, and All Officers in Charge (Sept. 18, 1990), reprinted in 67 Interpreter Releases 1089, 1100-01 (Fed. Publications) (1990); see also SANA LOUE, IMMIGRATION LAW & HEALTH: PATIENTS AND PROVIDERS 9-17 (1995).

8. Pub. L. No. 96-212, 94 Stat. 102, 104 (codified as amended in scattered sections of 8 U.S.C.). The Refugee Act explicitly covers refugees, who are, by definition, aliens applying for a refugee visa from abroad with a United States Consulate or regional director. See 8 C.F.R. § 207 (1995). The Refugee Act also grants the Attorney General discretion to admit asylees, who are aliens located in the United States when they apply for protection. See 8 U.S.C. § 1158 (1994); 8 C.F.R. § 208 (1995). Both refugees and asylees must meet the definition of a refugee. A refugee is a person who “is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42) (1994). The main difference between refugees and asylees is that refugees are overseas and asylees are in the United States when they apply for protection. In addition, the Refugee Act delegates authority over asylees to the Attorney General, so the standards governing admission of asylees, while parallel to the refugee provisions, are within the discretion of the Attorney General. Refugees and asylees who apply for adjustment to permanent resident status are also eligible for a waiver of the HIV exclusion. See *id.* § 1159(c). This Note only discusses the application of the INS HIV Rule to refugee applicants and applicants for permanent resident status. The term refugees encompasses both groups unless otherwise indicated.

9. 8 U.S.C. § 1157(c)(3) (1994).

HIV waivers to refugees unless they can prove that the federal government will not have to pay for their medical treatment. In 1988, Associate Commissioner James A. Puleo released a memorandum in which he set forth three criteria that limit the availability of HIV waivers.¹⁰ The third criterion of the memo requires immigration officers to evaluate whether the government will bear the medical costs of admitting a refugee, which this Note will refer to as the INS HIV Rule.

The INS initially applied the INS HIV Rule to illegal aliens applying for permanent resident status under the Immigration Reform and Control Act Amendment to the INA (IRCA)¹¹ in 1986 through a formal regulation.¹² This regulation only concerns aliens applying for permanent residence under the amnesty provisions of IRCA,¹³ but through the Puleo Memo the INS informally extended the HIV Rule to refugee applicants as well as refugees and asylees applying for permanent resident status.¹⁴ Puleo's successor, Alexander Aleinikoff, issued a memo reaffirming the Puleo Memo in 1995.¹⁵

The INS HIV Rule contradicts the Refugee Act waiver provision, which states that the Attorney General cannot apply public charge exclusions to refugees.¹⁶ While the Immigration and Nationality Act does not define the term "public charge," over one hundred years of case law and legislative history indicate that a public charge is a person who is likely to become dependent on government support for survival.¹⁷ In the 1995 Aleinikoff Memo, the INS recognized that refugees cannot be excluded as public charges

10. See Cable from James A. Puleo, INS Assistant Commissioner for Examinations, to INS Field Offices (Mar. 2, 1988), reprinted in 65 Interpreter Releases 239 (Fed. Publications) (1988) [hereinafter Puleo Memo].

11. See 8 U.S.C. § 1255a(d)(2) (1994).

12. 8 C.F.R. § 245a(3)(d)(4) (1995).

13. See *id.* See generally Bettina M. Fernandez, Comment, *HIV Exclusion of Immigrants Under the Immigration Reform and Control Act of 1986*, 5 LA RAZA L.J. 65 (1992) (arguing that HIV exclusion waiver criteria undermine purpose of IRCA amnesty legislation); Court E. Golumbic, Comment, *Closing the Open Door: The Impact of the Human Immunodeficiency Virus Exclusion on the Legalization Program of the Immigration Reform and Control Act of 1986*, 15 YALE J. INT'L L. 162, 177-79 (1990) (discussing application of HIV exclusion to IRCA amnesty applicants).

14. See Puleo Memo, *supra* note 10, at 239; UNITED NATIONS HIGH COMM'N ON REFUGEES, A GUIDE TO THE U.S. INS HIV WAIVER APPLICATION PROCESS FOR THE RESETTLEMENT OF REFUGEES I (1995) [hereinafter UNHCR Memo]. The INS has enforced the HIV Rule against refugees without the benefit of a formal regulation promulgated in accordance with the notice and comment requirements under the Administrative Procedure Act. See Angela M. Bean & Robert S. Hilliard, *Representing Clients with HIV*, in 2 AMERICAN IMMIGRATION LAW ASSOCIATION IMMIGRATION & NATIONALITY LAW HANDBOOK 492, 495 (4th ed. 1993).

15. See Memorandum from Alexander T. Aleinikoff, Executive Associate Commissioner of the INS, Regarding Immigrant Waivers For Aliens Found Excludable Under Section 212(a)(1)(A)(i) of the Immigration and Nationality Act Due to HIV Infection (Sept. 6, 1995), reprinted in 72 Interpreter Releases 1347 (Fed. Publications) (1995) [hereinafter Aleinikoff Memo].

16. See 8 U.S.C. § 1182(a)(4) (1994) (stating that "[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is excludable"). However, 8 U.S.C. § 1157(c)(3) (1994) specifically exempts refugees from this provision. See also *infra* note 20.

17. See *infra* Sections I.B-C.

even if they become dependent on the government for support.¹⁸ However, the Aleinikoff Memo also reiterates the INS HIV Rule, requiring an alien to show that "there will be no cost incurred by any level of government agency of the United States without the prior consent of that agency."¹⁹ While the INS claims that the HIV Rule is not the public charge exclusion listed under INA section 212(a)(4),²⁰ it is used to effect the same result. Under no other exclusion provision does the INS require a waiver applicant to prove that she will not become a public charge as a condition for waiver eligibility. In every other instance, the public charge exclusion is considered a separate ground for exclusion.

This Note argues that the INS HIV Rule violates the Refugee Act of 1980 and is therefore an illegitimate use of administrative discretion. Part I examines whether the INS HIV Rule is a public charge exclusion or a public health exclusion and concludes that it is a public charge exclusion.²¹ Part II argues that applying a public charge exclusion to refugees is contrary to the plain language and legislative history of the Refugee Act of 1980. It further demonstrates that the 1993 codification of the HIV exclusion did not grant the INS discretion to consider costs for HIV-positive refugees. Finally, Part III discusses the limited avenues of judicial review available to refugees and concludes with a discussion of policy reasons why the INS should abandon the HIV Rule.

I. PUBLIC CHARGE OR PUBLIC HEALTH?

The INS is clearly aware that the public charge exclusion does not apply to refugees. In a 1995 memorandum to all INS District Directors and Field Staff, Associate Commissioner Aleinikoff stated that "the public charge provisions do not apply to refugees," and that "[r]efugees and individuals granted asylum who are applying for adjustment of status under section 209 of the Act are not subject to the public charge ground of excludability."²² However, Aleinikoff also reaffirmed the INS HIV Rule, which requires refugees to prove they will not burden any government agency.²³ While

18. See Aleinikoff Memo, *supra* note 15, at 1353.

19. *Id.*

20. The refugee exclusion waiver provision states that "[t]he provisions of paragraphs (4), (5), and (7)(A) of section 1182(a) of this title shall not be applicable to any alien seeking admission to the United States under this subsection." 8 U.S.C. § 1157(c)(3). Section 1182(a)(4) provides for the exclusion of persons seeking admission to the United States on the ground that they are "likely at any time to become a public charge." *Id.* § 1182(a)(4). Section 1182(a)(5) is the labor certification requirement. See *id.* § 1182(a)(5). Section 1182(a)(7)(A) requires all immigrant applicants to provide documentation that will establish their identity, including a valid passport. See *id.* § 1182(a)(7)(A).

21. See Deborah J. Bartz, Comment, *The United States HIV Exclusion: Endangering Refugees' Human Rights*, 17 HAMLINE L. REV. 155, 174 (1993).

22. Aleinikoff Memo, *supra* note 15, at 1353.

23. See *id.* at 1351.

Congress initially conflated public health and public charge concerns in immigration exclusion law in the early 1900s, since 1952 Congress has treated medical costs as a public charge issue, not as a matter of public health. Judicial precedent confirms that ability to pay medical costs can only be understood as a public charge concern. The INS has not justified the apparent inconsistency between the mandatory waiver of the public charge exclusion under the Refugee Act and the HIV Rule.²⁴

A. *The INS HIV Rule: Requiring Evidence of Self-Sufficiency*

The INS has indicated in the Puleo and Aleinikoff memoranda that:

[T]he discretionary authority of the Attorney General will not be used unless the applicant can establish that (1) the danger to the public health of the United States created by the alien's admission to the U.S. is minimal, (2) the possibility of the spread of the infection created by the alien's admission to the U.S. is minimal, and (3) there will be no cost incurred by any level of government agency of the U.S. without prior consent of that agency.²⁵

According to the INS, the third criterion, the INS HIV Rule, can be met in at least four ways.²⁶ First, an applicant may provide evidence that she has private health care insurance that will cover her health care costs.²⁷ Second, an applicant may provide evidence of financial resources that would cover the medical costs of HIV treatment.²⁸ Third, an applicant may provide a statement of consent to treatment from government health care officials.²⁹ Last, an applicant may provide a statement from a specific private or government health care or research facility that will assume responsibility for treatment.³⁰ The INS has noted that "the average cost of medical treatment for an HIV-infected person . . . is approximately U.S. \$85,500."³¹ Given the conditions that create refugees,³² and the fact that the estimated lifetime cost to the government for treating HIV in the United States ranges from \$40,000

24. David Martin, General Counsel for the INS, could not explain the inconsistency in a brief interview, nor could Kelly Ryan, Associate General Counsel at the State Department. See Interview with David Martin, General Counsel, INS, in New Haven, Conn. (Apr. 18, 1996) (notes on file with the *Yale Law Journal*); Telephone Interview with Kelly Ryan, Associate General Counsel, Department of State (Apr. 26, 1995) (notes on file with the *Yale Law Journal*).

25. Puleo Memo, *supra* note 10, at 239.

26. See Aleinikoff Memo, *supra* note 15, at 1351, 1353.

27. See *id.* at 1351; UNHCR Memo, *supra* note 14, at 2.

28. See Aleinikoff Memo, *supra* note 15, at 1351; UNHCR Memo, *supra* note 14, at 2.

29. See Aleinikoff Memo, *supra* note 15, at 1351; UNHCR Memo, *supra* note 14, at 2.

30. See Aleinikoff Memo, *supra* note 15, at 1351; UNHCR Memo, *supra* note 14, at 2.

31. Aleinikoff Memo, *supra* note 15, at 1349.

32. See generally U.S. COMM. FOR REFUGEES, WORLD REFUGEE SURVEY (1995) (documenting impoverished conditions under which most refugees survive after fleeing persecutors).

to \$75,000 per person,³³ the typical refugee would probably have difficulty qualifying for a waiver based on her personal resources. Unfortunately, the INS has not compiled a comprehensive list of its waiver decisions. In addition, a lack of explicit policies on what evidence is sufficient to prove that a refugee will not become a public burden exacerbates uncertainty in the waiver process and makes it difficult to evaluate how the HIV Rule is actually being applied to refugees.³⁴

B. *Lessons From the Past: The Separation of Public Charge and Public Health Concerns*

Congress and the INS excluded aliens as public charges and public health threats for over one hundred years. The historical development of exclusion policy by Congress and the INS, however, shows an increasingly clear distinction between health and public charge concerns. This distinction indicates that medical costs must be recognized as a public charge concern.

Congress enacted the first federal immigration exclusion on March 3, 1875.³⁵ The main purpose of the exclusion was to prevent the emigration of people likely to become dependent on the public coffers for support.³⁶ Congress passed the first formal public health exclusion in 1891, excluding "persons suffering from a loathsome or dangerous contagious disease."³⁷ The trend of excluding aliens for public charge and public health reasons continued throughout the early 1900s.³⁸ Congress enacted public health exclusions to protect the public health and the federal treasury; it was concerned about the financial burden posed by aliens' medical conditions.

33. See Jesse Green & Peter S. Arno, *The 'Medicaidization' of AIDS*, 264 JAMA 1261, 1261 (1990); discussion *infra* Subsection III.B.2.

34. Indeed, at least one East Coast district had no policy regarding evidence sufficient to meet the burden of proof other than health insurance. Given that the District Director had not adjudicated any applications for an HIV waiver to date, he indicated that he did not think the issue warranted attention until an application was actually under review. See John Weiss, Remarks at the Connecticut AILA Meeting (Nov. 30, 1995) (notes on file with the *Yale Law Journal*).

35. See EXCLUSION HISTORY, *supra* note 5, at 6 (discussing 18 Stat. 477 (1875)); see also Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475, 1480 (1995); James F. Smith, *A Nation That Welcomes Immigrants?: An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 229-30 (1995).

36. See EXCLUSION HISTORY, *supra* note 5, at 6.

37. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084; see also EXCLUSION HISTORY, *supra* note 5, at 10.

38. The Act of February 20, 1907, added the exclusion of persons with physical and mental defects. See Pub. L. No. 59-96, § 2, 34 Stat. 898, 898-99 (1907); see also EXCLUSION HISTORY, *supra* note 5, at 14. The Act of February 5, 1917, added the term "vagrants" to the public charge exclusions. See Pub. L. No. 64-301, § 3, 39 Stat. 874, 875; see also EXCLUSION HISTORY, *supra* note 5, at 21. Waivers were available, however, for some immediate relatives. The Act of March 3, 1903, provided a waiver for those persons suffering from "any contagious disorder" if they were immediate family members of immigrants who had applied for citizenship and could prove the "disorder was contracted on board the ship in which they came." Pub. L. No. 57-162, § 37, 32 Stat. 1213, 1221.

The Immigration and Nationality Act of 1952 refined the public health exclusions to separate the concern that a person with health problems would become a public charge from the concern that a person posed a health risk to the community.³⁹ The INA structurally separated these public health and public charge concerns by creating separately numbered exclusions in the legislation.⁴⁰ Under the 1952 regulations and under present regulations, there are two levels of health exclusion: those warranting the issuance of a Class A Medical Certificate and those warranting a Class B Medical Certificate.⁴¹

Doctors issue a Class A Medical Certificate out of a public health concern that an alien poses a threat to herself or the community. If an examining doctor issues a Class A Medical Certificate, the alien is presumptively excludable as a threat to public health and the immigration officer must exclude the alien unless a discretionary waiver is available.⁴² In contrast, the Class B Medical Certification is not concerned with public health, but rather, is used to exclude aliens on the basis that they might become public charges.⁴³ The Class B Medical Certificate is not a per se exclusion and is only used as evidence that the INS should exclude an alien as a public charge.⁴⁴ A physician issues a

39. See Immigration and Nationality Act, Pub. L. No. 82-414, § 212, 66 Stat. 163, 182 (1952). While the 1952 INA marks the first time public health and public charge concerns were clearly separated, in reality it was the culmination of a trend toward separation and refinement of immigration exclusion law. For instance, the Public Health Service kept active tuberculosis as a mandatory exclusion, but provided that tuberculosis which had been inactive for over one year was only a ground for exclusion if it affected an alien's ability to earn a living. See H.R. REP. NO. 82-1365, at 48 (1952), cited in EXCLUSION HISTORY, *supra* note 5, at 75. Similarly, the exclusion of people with disabilities that might affect their ability to support themselves became waivable if they could prove they would not have to earn a living. See S. REP. NO. 81-1515, at 345 (1950), cited in EXCLUSION HISTORY, *supra* note 5, at 75. In these two examples, Congress and the INS separated public health exclusions from the public charge rationale for exclusion. This refinement was codified in the 1952 INA which included a separate exclusion applicable to any alien certified by the examining surgeon as having a physical defect, disease, or disability, when determined by the consular or immigration officer to be of such a nature that it may affect the ability of the alien to earn a living, unless the alien affirmatively establishes that he will not have to earn a living.

Immigration and Nationality Act § 212(a), Pub. L. No. 82-414, 66 Stat. 163, 182 (1952). This increasing refinement in exclusion law can be attributed, in part, to the increasing bureaucratization of immigration law as the INS gained more control over the immigration process. See generally SELECT COMM'N ON IMMIGRATION AND REFUGEE POL'Y, 96TH CONG., HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE 61-66 (1980).

40. The public health exclusions were listed under INA §§ 212(a)(1)-(6), Pub. L. No. 82-414, 66 Stat. 163, 182 (1952). The public charge exclusions were listed as INA §§ 212(a)(7)-(8) & 212(a)(15), 66 Stat. 163. The public charge exclusions included exclusions for physical or mental disability that affected the ability to earn a living, exclusion of "paupers, professional beggars or vagrants," and exclusion of other persons likely to become a public charge. See *id.*

41. See 42 C.F.R. § 34.4 (1995).

42. See *id.* § 34.4(b).

43. See *id.* § 34.4(c).

44. The Immigration Act Amendments of 1990 reflected a growing belief that a physical or mental disability is not necessarily a threat to the community and does not necessarily make a person incapable of supporting herself. See Peter Margulies, *Asylum, Intersectionality, and AIDS: Women with HIV as a Persecuted Social Group*, 8 GEO. IMMIGR. L.J. 521, 539 (1994). Congress narrowed the mental and physical disability exclusions to apply only to those mental or physical afflictions that present a threat to the lives or property of others. See 8 U.S.C. § 1182(a)(1)(A)(ii)(I)-(II) (1994).

Class B Medical Certificate if she finds "other physical and mental abnormalities that bear on the likelihood of an alien becoming a public charge."⁴⁵

Under current regulations, medical doctors must make findings regarding the public charge provision separate from the public health exclusion decision. Federal regulations require doctors to consider:

the nature and extent of the abnormality, the degree to which the alien is incapable of normal physical activity, and the extent to which the condition is remediable. The medical examiner shall indicate the likelihood, that because of the condition, the applicant will require extensive medical care or institutionalization.⁴⁶

According to this description, medical costs are explicitly considered a public charge issue.

Given that medical costs are treated as a public charge issue in the Federal Regulations, it seems clear that the INS HIV Rule is a public charge exclusion for HIV-positive refugees. By injecting public charge issues back into public health exclusions, the INS has returned to the practice of the late 1800s and early 1900s, when public charge and public health concerns were not separated in exclusion decisions.⁴⁷

C. *Judicial Opinion: Ability to Pay Is Not a Health Concern, But a Public Charge Issue*

One argument for excluding aliens who cannot afford health care is that they pose a threat to public health if they are not treated. No court, however, has held that ability to pay for medical expenses is a public health concern. In fact, ability to pay has always been considered a public charge issue. Early cases held that hospitalization at public expense due to conditions arising before entry was a ground for exclusion as a public charge.⁴⁸ In *Ex parte Wong Nung v. Carr*,⁴⁹ an alien was excluded as a public charge because he

45. 42 C.F.R. § 34.4(c)(1) (1995).

46. *Id.* § 34.4(c)(2).

47. This conflation of public health and public charge concerns is premised on the notion that people with disabilities are incapable of supporting themselves. Under the logic of the INS HIV Rule, every alien with a medical disability would be presumptively excludable as a public charge. Such a view of disability would probably conflict with the Americans with Disabilities Act, 42 U.S.C. § 12101 (1994), but a full discussion of this issue is beyond the scope of this Note.

48. See, e.g., *Canciamilla v. Haff*, 64 F.2d 875 (9th Cir. 1933) (excluding alien as public charge after being committed to state hospital at public expense for epileptic condition); *Fernandez v. Nagle*, 58 F.2d 950, 950 (9th Cir. 1932) (excluding alien as public charge when committed to "Relief Home for the Aged and Infirm" because alien was "too weak and sick" to work).

49. 30 F.2d 766 (9th Cir. 1924).

was admitted to a public hospital for leprosy treatments.⁵⁰ Mental defects also have been grounds for exclusion as a public charge even without any proof of past institutionalization at public expense.⁵¹ One judge explained that "[a] person likely to become a public charge is one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty."⁵²

In *Matter of B*,⁵³ the Board of Immigration Appeals held that an alien admitted to an Illinois mental institution at public expense was not *deportable* as a public charge because the state provided free mental care to all state residents. The court considered hospitalization at public expense to be a public charge issue, and not a public health issue.⁵⁴ In *Matter of Harutunian*,⁵⁵ the Board used the same rationale when it modified the reasoning in *Matter of B* and held that an alien who received old age assistance from the state of California was *excludable* under the public charge provision.⁵⁶

This case law indicates that an alien's inability to pay medical costs is a public charge matter. Despite the fact that two cases involved leprosy and syphilis,⁵⁷ both contagious diseases listed as communicable diseases of public health significance in the Immigration and Nationality Act,⁵⁸ the courts have never excluded aliens unable to pay for their medical treatment as public health threats. The courts have not distinguished between dangerous and benign mental and physical conditions in reasoning that failure to pay medical expenses is solely a public charge issue.

50. See *id.* at 768-69.

51. See *United States ex rel. Minuto v. Reimer*, 83 F.2d 166, 168 (2d Cir. 1936) ("She was a woman seventy years old with an increasing chance of being dependent, disabled, and sick") (affirming exclusion order); *United States ex rel. Markin v. Curran*, 9 F.2d 900 (2d Cir. 1925) (excluding alien as likely to become public charge because she had syphilis and was blind in one eye); *United States ex rel. La Fata v. Williams*, 204 F. 848 (S.D.N.Y. 1913) (excluding alien as likely to become public charge due to valvular heart condition).

52. *Wallis v. United States ex rel. Mannara*, 273 F. 509, 511 (2d Cir. 1921) (excluding aliens as likely to become public charges due to cardiac problem and senility).

53. 3 I. & N. Dec. 323 (B.I.A. 1948).

54. See *id.* at 324. While asylees and refugees are presumably subject to the public charge ground for deportation, this decision significantly decreases the possibility that an asylee or refugee would be put in deportation proceedings on the basis of his or her medical costs. Refugees and asylees are eligible for many forms of public benefits granted to all residents. See Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1458-60 (1995). One other barrier to deportation proceedings is the lack of statutory authority under the Refugee Act to revoke asylum or refugee status on the basis of a refugee's excludability. See *infra* Section III.A.

55. 14 I. & N. Dec. 583 (B.I.A. 1974).

56. See *id.* at 590.

57. See *Ex parte Wong Nung v. Carr*, 30 F.2d 766 (9th Cir. 1929); *Markin v. Curran*, 9 F.2d 900 (2d Cir. 1925).

58. Any alien "who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for [AIDS]" is excludable. 8 U.S.C. § 1182(a)(1)(A)(i) (1995). The Secretary of Health and Human Services has listed chancroid, gonorrhea, granuloma inguinale, HIV, infectious leprosy, lymphogranuloma venereum, syphilis in the infectious stage, and active tuberculosis as diseases of public health significance. See 42 C.F.R. § 34.2(b) (1995).

D. *Public Health and Untreated Diseases: Why the HIV Exclusion Does Not Promote Public Health*

The exclusion of aliens because of their inability to pay for treatment of their medical problems has long been considered a public charge issue by the courts, Congress, and the INS. Deviating from the historical treatment of medical care costs by treating the INS HIV Rule as a public health exclusion admittedly could be justified by an unprecedented medical problem that presented an uncontrollable public health risk unless the disease was treated. When HIV was first discovered, scientists were unsure how it was transmitted and whether treatment for the medical condition would decrease the risk of transmission.⁵⁹ Under these conditions, barring the entry of aliens who were unable to guarantee they would be treated seems justifiable as a public health exclusion.⁶⁰ But under the current state of medical knowledge, the INS HIV Rule cannot be justified as a rule designed to protect the public health.

The only public health rationale that could be supported by the INS HIV Rule is that the mere existence of an untreated HIV-positive refugee in the community would pose a threat to the public health. This reasoning, however, has no basis in epidemiological knowledge. At the present time, there is no known cure for HIV, and there is no medical treatment that can decrease the probability of transmitting the virus. Unlike tuberculosis, treatment does not make HIV less contagious. HIV cannot be transmitted by casual contact; it can only be transmitted through specific behaviors.⁶¹ HIV, therefore, does not present the same public health risk that would be created by allowing people with contagious diseases spread by casual contact or airborne vectors to remain untreated.

II. ADMINISTRATIVE DISCRETION: LOOKING FOR JUSTIFICATION IN THE HISTORY OF THE REFUGEE ACT

While administrative agency interpretations of statutes are given great deference after *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁶² and *Citizens to Preserve Overton Park, Inc. v. Volpe*,⁶³ legislative regulations must be overruled when they are arbitrary, capricious, or manifestly

59. See *supra* note 4.

60. See generally McCormick, *supra* note 4, at 153–57 (discussing early medical knowledge of HIV).

61. See Christine N. Cimini, Note, *The United States Policy on HIV Infected Aliens: Is Exclusion an Effective Solution?*, 7 CONN. J. INT'L L. 367, 377–80 (1992) (discussing several studies of HIV transmission). The INS can exclude refugees who pose a threat because of their behavior without recourse to consideration of health care costs. See Aleinikoff Memo, *supra* note 15, at 1351. The first two prongs of the Aleinikoff Memo require refugees to prove that “(1) the danger to the public health of the United States created by [the alien’s] admission is minimal, [and] (2) the possibility of the spread of the infection created by [the alien’s] admission to the U.S. is minimal.” *Id.*

62. 467 U.S. 837 (1984).

63. 401 U.S. 402 (1970).

contrary to statute.⁶⁴ Under *Chevron*, courts review administrative agency actions in two steps. First, the courts determine whether an agency rule or regulation contradicts a congressional mandate as evidenced by express congressional intent.⁶⁵ The Supreme Court has held that the plain language of the statute is the first place to look for congressional intent.⁶⁶ If the wording of the legislation does not resolve the question, the courts proceed to examine the legislative history of the statute governing the administrative rule for evidence that the administrative rule is consistent with the intent and purpose of the statute.⁶⁷ If the legislative history does not address the issue, or the legislative history addresses the issue and clearly expresses an intention consistent with the administrative regulation, then the courts must defer to the administrative agency's interpretation of the statute and uphold the rule or regulation as a valid exercise of administrative authority.⁶⁸ Second, when an administrative agency rule is facially valid under the first step of the *Chevron* test, the court only determines whether the rule is being applied in an arbitrary or capricious manner.⁶⁹ Finally, if the court finds that the application of the regulation is "based on a permissible construction of the statute," the agency decision is not an abuse of discretion.⁷⁰

This Part applies the first step of the *Chevron* test to the INS HIV Rule and concludes that the INS HIV Rule violates the plain language, legislative intent, and general purpose of the 1980 Refugee Act and is therefore contrary to the statute.⁷¹ First, the INS HIV Rule ignores the unique language of the

64. See *Chevron*, 467 U.S. at 844; *Overton Park*, 401 U.S. at 416.

65. See *Chevron*, 467 U.S. at 842-43.

66. See *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993); see also *West Virginia Univ. Hosp. Inc. v. Casey*, 499 U.S. 83 (1991) (explaining that when statutory language is clear, courts should not look to statements from legislators or congressional committees); *Barr v. United States*, 324 U.S. 83, 90 (1945) ("If Congress has made a choice of language which fairly brings a situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators.")

67. See *Chevron*, 467 U.S. at 863.

68. See *id.* at 843, 866.

69. See *Overton Park*, 401 U.S. at 416; see also *Chevron*, 467 U.S. at 843.

70. See *Chevron*, 467 U.S. at 843.

71. This Note does not focus on whether the INS HIV Rule would also fail the second step of the *Chevron-Overton Park* test as an arbitrary or capricious use of administrative agency authority. In the second step of review, the courts determine whether the application of a regulation "was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416. Part III discusses the availability of judicial review and some policy reasons explaining why the application of the HIV Rule to refugees is contrary to humanitarian goals, but a more in-depth analysis of the second step of judicial review is beyond the scope of this Note. The INS HIV Rule may indeed be arbitrary if it is not applied to all refugee applicants equally or if it contradicts the general humanitarian purposes of the Refugee Act. While an exploration of this issue may be fruitful, it is difficult to evaluate the impact of the INS HIV Rule because the INS does not systematically compile statistics on waiver grants and denials for refugees. In fact, only three HIV waiver grants have been widely publicized. See Joseph Migliozi, Note, *The INA Asylum Application Procedure for Political Refugees With HIV*, 3 REGENT U. L. REV. 95, 117 (1993). Kelly Ryan, Associate General Counsel for the State Department, said that in her experiences at Guantanamo Bay, Cuba, HIV-positive waiver applicants were able to meet the burden of proof by showing that they had private health insurance. Telephone Interview with Kelly Ryan, Associate General Counsel, Department of State (Apr. 26, 1995) (notes on file with the *Yale Law Journal*).

Refugee Act by applying the INS HIV Rule to HIV-positive refugees. The INS HIV Rule also eviscerates two clearly stated purposes of the Refugee Act: (1) to distinguish refugees from immigrants; and (2) to apply the same criteria to all refugees in the admission process. Finally, the INS HIV Rule contradicts Congress's express intention not to exclude refugees who cannot pay for their medical care, but rather, to provide funding for their medical treatment.

A. The Language of the Refugee Act Exclusion Waiver Provision

The INS HIV Rule contradicts the plain language of the Refugee Act by deliberately applying the public charge exclusion to HIV-positive refugees. The Refugee Act, which was signed into law by President Carter on March 17, 1980,⁷² provided special guidance on the application of general immigration exclusions to refugees. That guidance was articulated in the refugee exclusion waiver, which indicates that the public charge exclusion, labor certification requirements, and immigrant documentation requirements "shall not be applicable to any alien seeking admission to the United States" under the Refugee Act.⁷³ The waiver also establishes that refugee applicants who are excludable under the public health exclusions, as well as many of the other immigration exclusions, may have those exclusions waived by the Attorney General "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."⁷⁴

The public charge exclusion must be waived for HIV-positive refugee applicants because they are a subset of the group of "any aliens seeking admission" under the Refugee Act. By its plain language, therefore, the Refugee Act bars consideration of government costs of admitting and supporting refugees, including the medical costs of refugees who are HIV-positive. The Aleinikoff Memo directly contradicts the plain language of the statute when it states that "the guidelines provided in this Memorandum are intended to ensure that all waiver applications involving HIV infection are adjudicated fairly and consistently, and that all aliens found excludable under section 212(a)(1)(A)(i) [the HIV exclusion] are treated equally."⁷⁵ This memorandum fails to recognize that refugees are distinct from other immigrants because they are aliens admitted under the Refugee Act.

72. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.); see also CONGRESSIONAL RESEARCH SERVICE, 96TH CONG., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 51 (1980) [hereinafter RESETTLEMENT REPORT].

73. 8 U.S.C. § 1157(c)(3) (1994); see also *supra* text accompanying note 20.

74. 8 U.S.C. § 1157(c)(3). Some exclusions are mandatory. Aliens who are ineligible to apply for refugee status due to a mandatory exclusion include: controlled substance traffickers; aliens who present a security concern; aliens who have engaged in terrorist activity; aliens whose admission affects foreign policy concerns; and aliens who participated in Nazi persecution or any form of genocide. *Id.* § 1157(c)(3) & § 1182(a)(2)(C), (a)(3)(A)-(C) & (E).

75. Aleinikoff Memo, *supra* note 15, at 1354.

Not all immigrants are eligible for a waiver of the HIV exclusion, and not all groups of immigrants are exempt from the public charge exclusion.⁷⁶ There are five separate waivers of the HIV exclusion available under the Immigration Act of 1990. These waivers cover different groups of immigrants and give the Attorney General different levels of discretion to waive immigration exclusions. Each waiver was passed with different considerations in mind. A comparison of the other four exclusion waiver provisions with the refugee waiver language clarifies how the INS HIV Rule, as a public charge exclusion, is contrary to the plain language of the Refugee Act.

The fact that each waiver provision gives the Attorney General a different level of discretion indicates that Congress contemplated the precise language of the waiver provisions and intentionally waived the public charge exclusion for refugees. Under the first waiver provision, immediate relatives of U.S. citizens, permanent residents, and people with a valid U.S. immigrant visa may be granted an HIV waiver at the complete discretion of the Attorney General. A waiver of health exclusions is available under Section 212(g) of the INA.⁷⁷ Section 212(g) of the INA states that the Attorney General may grant a waiver "in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in his discretion after consultation with the Secretary of Health and Human Services, may by regulations prescribe."⁷⁸ Clearly, the Attorney General's discretion is unlimited under this provision.⁷⁹

The second example is the waiver provision in the Immigration Reform and Control Act of 1986 (IRCA),⁸⁰ a statute that granted illegal aliens who had been in the United States before January 1, 1982 the chance to apply for permanent resident status under a general amnesty if applications were filed between November 6, 1986 and November 6, 1987. The Attorney General has limited authority to waive the HIV exclusion for some IRCA applicants.⁸¹ The Attorney General cannot waive the public charge exclusion unless an applicant is "an alien who is or was an aged, blind, or disabled individual."⁸² The Attorney General may waive some immigration exclusions, including the HIV exclusion "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest,"⁸³ but the public charge exclusion cannot

76. The structure of the INA makes the public charge exclusion applicable to all immigrants unless a specific waiver of the exclusion is available. See 8 U.S.C. § 1182.

77. See *id.* § 1182(g). Under this provision, immediate relatives include minor unmarried children, spouses, and parents.

78. *Id.*

79. See Faith G. Pendleton, Note, *The United States Exclusion of HIV-Positive Aliens: Realities and Illusions*, 18 SUFFOLK TRANSNAT'L L. REV. 269, 277 (1995).

80. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201(a)(1)(A), 100 Stat. 3359, 3394.

81. See 8 U.S.C. § 1255a.

82. *Id.* § 1255a(d)(2)(B).

83. *Id.* § 1255a(d)(2)(B)(i). Application of the INS HIV Rule as a limitation on the use of Attorney

be waived unless someone is aged, blind, or disabled.

A waiver of some immigration exclusions was also available for Special Agricultural Workers until October 25, 1994 under the Special Agricultural Workers program (SAW).⁸⁴ Under this program, some migrant workers were eligible to become permanent residents if they were not excludable under the immigration exclusions. The statute gave the Attorney General the discretion to waive all exclusions "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."⁸⁵ The public charge exclusion was applied to Special Agricultural Workers, with a slight modification: "An alien is not ineligible for adjustment of status . . . if the alien demonstrates a history of employment in the United States evidencing self-support without reliance on public cash assistance."⁸⁶ As with the other waiver provisions, this waiver makes the decision to waive the public charge exclusion discretionary, and like the immediate relative waiver, the decision to waive the public charge exclusion is wholly within the discretion of the Attorney General.

Finally, under the Temporary Protected Status (TPS) provision,⁸⁷ the Attorney General has complete discretion to waive the public charge exclusion and many other immigration exclusions including the HIV exclusion. Applicants for TPS must prove that they are nationals of, or last resided in, a state designated by the Attorney General as eligible for Temporary Protected Status due to armed conflict, environmental disaster, or the inability of the state to handle the repatriation of nationals abroad or to assure the safe return of its nationals.⁸⁸ The TPS waiver reiterates the typical waiver language in providing that "the Attorney General may waive any other provision of section 1182(a) of this title in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."⁸⁹ Because the waiver of the public charge consideration is permissive and not mandatory, the INS HIV Rule would not violate the express language or structure of this statute either.

The language of the waiver in the Refugee Act differs from the language of the other four waiver provisions of the INA. It does not give the Attorney General the discretion to apply the public charge exclusion. The other four waiver provisions either give the Attorney General no discretion to waive the

General discretion to grant HIV waivers does not contradict the IRCA waiver provision because the statute already indicates that waiver applicants will have to prove that they will not become a public charge. In the limited case of aged, blind, or disabled applicants, the decision to waive the public charge exclusion is left to the discretion of the Attorney General, so if the Attorney General decides to limit her own discretion, it does not contradict any congressional mandates. *But cf.* Golumbic, *supra* note 13 (arguing that application of HIV waiver program under IRCA violates spirit and intent of legislation).

84. 8 U.S.C. § 1161 (1988) (repealed 1994).

85. *Id.* § 1161(e)(2)(A) (repealed 1994).

86. *Id.* § 1161(e)(2)(C) (repealed 1994).

87. 8 U.S.C. § 1254a(c)(2)(A)(ii) (1994).

88. *See id.* § 1254a(b).

89. *Id.* § 1254a(c)(2)(A)(ii).

public charge exclusion by making the public charge exclusion mandatory, or complete discretion to waive the public charge exclusion as she sees fit. In contrast, the Refugee Act gives the Attorney General no discretion to apply the public charge provision in any circumstance. When the INS considers a refugee's ability to pay for her medical expenses, it contravenes the plain language of the refugee waiver provision by applying a public charge concern.

The contrast with the language used for other groups of immigrants bolsters the conclusion that the language of the Refugee Act, which makes the public charge exclusion inapplicable to any and all refugee applicants, was intentional and clear. "Any alien[s] seeking admission" as refugees, whether they are HIV-positive, permanently disabled, or young and healthy, are exempt from the public charge exclusion.⁹⁰

B. *Refugees, Asylees, and Other Immigrants: Looking at Legislative Intent*

The legislative history of the Refugee Act further demonstrates that the INS HIV Rule is contrary to congressional intent. Whether the INS applies the public charge consideration indirectly during the exclusion waiver process or directly through the application of the official public charge exclusion, considering costs for individual refugees violates two purposes of the Refugee Act: ensuring that refugees are treated differently from other immigrant applicants; and removing ad hoc distinctions among refugees. The INS HIV Rule eviscerates both purposes by grouping excludable refugees with all other excludable immigrants.

1. *Refugees Are Not Immigrants*

While the legislative history of the Refugee Act does not specifically discuss the rationale for the waiver provision, the very creation of a new status not subject to the same requirements for admission as other immigrants clearly indicates that Congress intended to distinguish refugees from other immigrants. Moreover, in the legislative history of the Refugee Act, Congress indicated explicitly that refugees should be treated differently from immigrants. The legislative history expressly states that one objective of the Refugee Act is to "separate[] the admission of refugees from that of immigrants under the preference system."⁹¹ As one congressional report stated: "Refugees, as distinct from immigrants, are aliens who flee their country of nationality generally because of persecution or fear of persecution. Immigrants, in contrast, leave their country of nationality voluntarily to seek family reunification, economic, or other benefits through reestablishing permanent

90. *Id.* § 1157(c)(3).

91. H.R. REP. NO. 96-608, at 1 (1979).

residence in some other country of their choice.”⁹² Senator Edward Kennedy, a sponsor of the Refugee Act, echoed this recognition of the different policy reasons for admitting refugees than for admitting immigrants when he said, “It also will give statutory meaning to our national commitment to human rights and humanitarian concerns, which are not now reflected in our immigration laws.”⁹³ This statement, along with many others in the legislative history, shows that the standards for admission under the Refugee Act are separate from the applicable standards for admission of immigrants.⁹⁴

2. *Congress Intended to Create a Standardized Admission Process for All Refugees*

The legislative history also indicates that Congress intended to admit refugees on the basis of humanitarian concerns. To effectuate this goal, Congress created a standardized admission procedure for refugee applicants. The INS HIV Rule dismantles this standardization created by Congress because it applies an exclusion to one subgroup of refugees that is not applied to all refugees. The INS HIV Rule mandates proof that HIV-positive refugees will not become public charges by failing to pay for their medical treatment. This exclusion is not applied to refugees who are not HIV-positive.

One purpose of the 1980 Refugee Act was to end ad hoc and arbitrary distinctions made between refugees for the purposes of admission. Before the passage of the 1980 Refugee Act, there were many different programs for the admission of refugees.⁹⁵ Some refugee groups were subject to the public charge exclusion while other groups of refugees were not. The admission criterion varied depending on the law under which the refugee was admitted.

92. RESETTLEMENT REPORT, *supra* note 72, at 21. As one Representative argued:

[T]here is a fundamental difference between being an immigrant and being a refugee. An immigrant is a person who would like to come to the United States in search of the American dream That is also true of the refugee, but a refugee comes not only in search of the American dream but to escape a desperate personal nightmare. That person is coming not only looking for personal opportunity but physical safety, refuge and sanctuary.

125 CONG. REC. 35,818 (1979) (statement of Rep. Mikulski).

93. 125 CONG. REC. 23,231–32 (1979).

94. See 126 CONG. REC. 4504 (1980) (statement of Rep. Sensenbrenner) (“[W]hen this bill was before the House of Representatives on December 20, I opposed this bill on the grounds that it separated out our policy on refugees from our policy on legal immigration The conference committee report does not solve the problem . . . and should be rejected for that reason.”); 125 CONG. REC. 35,815–16 (1979) (statement of Rep. Hamilton Fish) (“This bill represents a statement of a new U.S. policy toward refugees, principally a focus on the humanitarian plight of the refugee.”); see also *infra* Subsection II.B.2.

95. For a discussion of refugee law history, see generally GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA’S HALF-OPEN DOOR, 1945 TO THE PRESENT (1986) (detailing history of U.S. refugee policies); Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981) (analyzing U.S. legal responses to refugee and asylum policy after World War II, culminating in enactment of Refugee Act of 1980); Kathryn M. Bockley, Comment, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT’L L. & COM. REG. 253 (1995) (presenting historical analysis of political factors in refugee admission process).

The original Refugee Act bills, S. 643 and H.R. 2816, both included mandatory waivers of the public charge exclusion for all refugee applicants.⁹⁶ This waiver was modeled after the Indochinese Refugee Act of 1977,⁹⁷ in which the INS granted Indochinese refugees adjustment to permanent residence without regard to the public charge exclusion, the immigrant documentation requirements, or the literacy requirement.⁹⁸ Congress had passed several pieces of legislation benefitting refugees before the passage of the Indochinese Refugee Act.⁹⁹ Under every previous piece of legislation, with one exception, the public health and public charge exclusions had been mandatory.¹⁰⁰ The one exception, the parole provisions of the INA, gave the Attorney General complete discretion to parole aliens without regard to exclusions, "in his discretion[,] . . . temporarily [and] under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest."¹⁰¹ The parole provision gave the Attorney General the authority to license aliens to come into the country temporarily for emergency reasons. Parole is similar to probation in that the Attorney General can revoke parole at any time for any reason including no good reason at all. Under this provision, Hungarian, Soviet, Cuban, and Indochinese refugees were all paroled regardless of whether they were technically excludable due to disease or poverty.¹⁰²

Congress departed from the past practice of using different criteria to admit and adjust different groups of refugees when it enacted the Refugee Act. As initially drafted, the Senate version of the Refugee bill, S. 643, limited eligibility to refugees of "special concern" to the United States.¹⁰³ The Senate intended to allow flexibility for future policymakers when it adopted the "special concern" language. As the Judiciary Committee of the Senate stated:

96. See S. REP. NO. 96-256, at 15 (1979); H.R. REP. NO. 96-608, at 29 (1979).

97. Act of Oct. 28, 1977, Pub. L. No. 95-145, 91 Stat. 1223.

98. See RESETTLEMENT REPORT, *supra* note 72, at 17.

99. See generally Bockley, *supra* note 95 (detailing use of political criteria for admission of refugees under pre-1980 refugee programs).

100. Under the Displaced Persons Act of 1948, an applicant had to provide evidence that she would not displace an American worker and that she would not become a public charge. See Pub. L. No. 80-774, § 2(d), 62 Stat. 1009, 1010, *as amended by* Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219, *and* Act of June 28, 1951, Pub. L. No. 82-60, 65 Stat. 96. Similarly, under the Refugee Relief Act of 1953, aliens had to prove they had housing and would not become public charges. Again, they were inadmissible if they had contagious diseases. See Pub. L. No. 83-203, § (a)(14), 67 Stat. 400, 403, *as amended by* Act of Aug. 31, 1954, Pub. L. No. 83-751, 68 Stat. 1044. The Fair Share Refugee Act also mandated that a refugee-escapee prove she could, "with some assistance, become self supporting," and that she meet the public health exclusion. Act of July 14, 1960, Pub. L. No. 86-648, § (b), 74 Stat. 504, 504-05. Finally, under the INA seventh preference for refugees, an alien had to be admissible as an immigrant, except that the literacy requirements were not applicable. See Immigration and Nationality Act, Pub. L. No. 82-414, § 212(b), 66 Stat. 163, 187 (1952); see also RESETTLEMENT REPORT, *supra* note 72, at 5-6 (listing all refugee programs and admissions under those programs).

101. 8 U.S.C. § 1182(d)(5) (1994). It is clear, however, that Congress did not foresee the use of the parole provision to admit large groups of refugees. See Anker & Posner, *supra* note 95, at 15.

102. See Bockley, *supra* note 95, at 266-78.

103. S. REP. NO. 96-256, at 3 (1979).

The bill does not, and cannot, explicitly define what refugees are deemed to be "of special concern to the United States." . . . The bill, when enacted, is designed for the decades to come, and what refugees will be deemed of special concern to the American people will be a public policy issue that will be, as it is now, debated and reviewed continuously by Congress, the President, and the American people.¹⁰⁴

The House of Representatives preferred to use the term "special humanitarian concern" instead of the term "special concern."¹⁰⁵ The House made it clear that it wanted to eliminate political considerations from the admission criteria.¹⁰⁶ As Representative Hamilton Fish explained:

With respect to the allocation of numbers of refugees to be admitted among different groups of refugees, the term "special humanitarian concerns" defines those who will be admitted. . . . *[T]he word humanitarian was added to emphasize that the plight of the refugees themselves is paramount as opposed to national origins, political considerations or a possible contribution by the United States to the refugee condition. . . .*

The committee report sets forth some of the historical considerations that can provide guidance as to persons who are in fact of humanitarian concern to this country.¹⁰⁷

The House wording was eventually adopted so that all "refugees of special humanitarian concern" are eligible to apply under the Refugee Act.¹⁰⁸

104. *Id.* at 6.

105. *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Int'l Operations of the House Comm. on Foreign Affairs*, 96th Cong. 84 (1979) [hereinafter *House Hearings*] (statement of Dale F. Swartz, D.C. Lawyers Committee for Civil Rights Under the Law).

106. Dale F. Swartz of the D.C. Lawyers Committee for Civil Rights Under the Law explained: The House version, as I understand it, adopts the concept of special humanitarian concern, the purpose being to, in effect, eliminate from our determinations of what groups of refugees we will admit, purely political considerations; that it should be a humanitarian determination not, as it has been in the past by statute, a somewhat humanitarian, somewhat political determination.

Id.

107. 125 CONG. REC. 35,816 (1979) (statement of Rep. Fish) (emphasis added); *see also id.* at 23,237 (statement of Sen. Thurmond); *id.* at 23,246 (statement of Sen. Kennedy); *id.* at 35,813 (statement of Rep. Holtzman) ("The committee report states explicitly that the criterion for admitting refugees . . . will be 'special humanitarian concern.'"). The Senate explicitly rejected an amendment offered by Senator Huddleston that would have limited refugee admissions to those of "special responsibility to the United States." *Id.* at 23,246 (Amendment No. 529).

108. 8 U.S.C. § 1157 (1994). Congress requires the President to admit only refugees of "special humanitarian concern." Refugee Act § 101(b), Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended at 8 U.S.C. § 1157 (1994)). The President conducts annual refugee prioritization based on humanitarian factors in consultation with Congress. *See* 8 U.S.C. § 1157(a)(3). Under the consultation provision, President Clinton submitted a proposed revision to the worldwide refugee priority system in 1995. *See Report to the Congress on Proposed Refugee Admissions for Fiscal Year (FY) 1996*, Aug. 1, 1995, available in WESTLAW, U.S. Testimony Library, File No. 1995 WL 455226. If Congress or the President intended to exclude HIV-positive refugees who could not pay for their medical costs, these officials could have excluded HIV-positive refugees from the group of refugees of special humanitarian

Congress standardized the admission criteria for refugees to combat ideological and political restrictions and to create a procedure guided by planning rather than ad hoc decisionmaking. As Senator Rudy Boschwitz explained:

We need a permanent and systematic procedure for the admission of refugees so as to insure [sic] all refugees that they will be treated equally and fairly. . . . Our response to each crisis is subject to the mood of the times rather than being guided by a set procedure that must be applied to all the refugees seeking admission to the United States.¹⁰⁹

Echoing these comments, Representatives Shirley Chisholm, Peter Rodino, and Elizabeth Holtzman lauded the fact that the Refugee Act applied the same admission criteria for all refugees.¹¹⁰

Even though Congress was primarily concerned with political discrimination when it enacted the Refugee Act, Congress clearly did intend to apply the same admission criteria to all refugees as a mechanism for reducing both political and ideological discrimination. Exclusions are admission criteria because they determine eligibility for admission. The INS HIV Rule contradicts Congress's intent to eliminate the public charge exclusion from the refugee admission process and to apply the same criteria, including uniform exclusions, to all refugee applicants.

3. *Congress Decided to Fund Medical Treatment Instead of Excluding Refugees*

The legislative history of the Refugee Act also indicates that Congress intended to pay for refugee medical expenses, not to exclude refugees with

concern indicated in the priority list. Not only did the President and Congress decline to take this measure, but they also affirmatively indicated that refugees with severe medical problems warranted a high admission priority. Included among the group of refugees who receive first priority for admission are "UNHCR-referred or Embassy identified persons . . . including women-at-risk, victims of torture or violence, physically or mentally disabled persons in urgent need of medical treatment not available in the country of first asylum," and "UNHCR-referred or Embassy identified persons, for whom other durable solutions are not feasible and whose status in the place of asylum does not present a satisfactory long-term solution" *Id.*

109. 125 CONG. REC. 23,240 (1979); *see also* RESETTLEMENT REPORT, *supra* note 72, at 1 ("The major impetus for the legislation was the need to end an ad hoc approach that had characterized U S Refugee policy since World War II.").

110. *See* 126 CONG. REC. 4501 (1980) (statement of Rep. Rodino) ("I firmly believe that the product of our labors has enabled us to present to the House landmark legislation in an area which for years has been dealt with on an ad hoc, piecemeal basis, many times reacting to a situation when it was upon us"), 125 CONG. REC. 35,820 (1979) (statement of Rep. Chisholm) ("Refugees fleeing persecution regardless of the country they come from, on humanitarian considerations alone, should be equal in standing for entry into the United States."); *id.* at 35,813 (statement of Rep. Holtzman) ("[This bill] will mandate equity in our treatment of all refugees . . . it will provide set procedures for admission . . .")

medical problems. At least one commentator has argued that Congress never intended to allow refugees into the country who would be dependent on the state for medical treatment.¹¹¹ In reality, the legislative history of the Refugee Act documents congressional awareness of the price for refugee assistance quite vividly. In the face of significant evidence that the medical costs for treating refugees would be long term and significant, Congress chose a policy of assistance rather than exclusion.

When debating the Refugee Act, Congress was aware that many refugees had medical problems that required treatment. As Representative Vento said,

The squalid conditions of the camps have contributed to severe health problems among the refugees. In many cases their physical ailments are chronic conditions requiring long-term treatment or the result of tropical diseases, the diagnosis and treatment of which can be a major problem for a physician in a cold weather State.¹¹²

Not only was Congress aware that some refugees had long-term medical disabilities, but Congress also knew that some refugees would need state-supported medical care and benefits after admission.¹¹³ Instead of excluding aliens with medical problems because they could not support themselves, Congress responded to the potential burden on state governments by funding programs to address refugee needs. Representative Lungren stated in the floor debates that "[t]here is a Federal commitment, a correct Federal commitment, in my judgment, that we should accept these refugees. However, at the same time it ought to be a Federal commitment to take care of the refugees to the extent that Government programs are necessary."¹¹⁴ The cost of medical assistance was one of the most contentious issues in the floor debates. Congress made it abundantly clear that the response to costs of resettlement

111. See Jason Pardo, Comment, *Excluding Immigrants on the Basis of Health: The Haitian Centers Council Decision Criticized*, 11 J. CONTEMP. HEALTH L. & POL'Y 523, 538 (1995).

112. 125 CONG. REC. 37,230 (1979) (statement of Rep. Vento); see also *id.* at 37,234 (statement of Rep. Bruce Vento). Representative Holtzman added:

This bill sets up careful and explicit requirements regarding medical screening. There was a question on the floor about exotic and tropical diseases that refugees might have. We have no system now for following up with refugees who come here with medical problems. This bill will set up such a system.

Id. at 37,236.

113. See 126 CONG. REC. 4504 (1980) (statement of Rep. Danielson) ("Recent HEW figures . . . indicate that, nationwide, 37.02 percent of the refugees (more than 112,540) were receiving Medicaid [sic] . . ."); 125 CONG. REC. 23,251 (1979) (statement of Sen. Chiles) ("A disproportionate number of the refugees were elderly and disabled, who were pushed out of Cuba. . . . They need a tremendous amount of medical and social services, and that is what we have agreed to provide in the appropriations compromise . . ."); *id.* at 35,819 (statement of Rep. Lungren) ("[A] good portion of those refugees who have already been here for 4 years are still on some form of assistance—cash assistance or medical assistance of some sort."); *id.* at 23,248 (statement of Sen. Cranston) ("The California Department of Social Services does know that 43,000 Indochina refugees presently receive cash assistance. . . . This implies that the refugees are not becoming economical [sic] self-sufficient as originally expected.").

114. 125 CONG. REC. 35,819 (1979).

was not to exclude but to provide for a coordinated program that took into account the differing needs of individual refugees.¹¹⁵ Representative Boschwitz explained, "This legislation provides that organization and planning we so desperately need. It allows us to take into consideration the particular needs of the refugees as well as our own resources."¹¹⁶

While Congress made the public health exclusions applicable to refugees at the discretion of the Attorney General, Congress also made it abundantly clear that refugees would not be excluded because they could not pay for medical care. Congress understood that the new refugee admission policy would be expensive when it considered the 1980 Refugee Act. Instead of creating divisions between refugees based on their ability to support themselves, Congress limited the overall number of refugee admissions¹¹⁷ and funded medical assistance programs.¹¹⁸ Absent any indication by Congress that it intends to change its approach to refugee medical costs, the INS HIV Rule contradicts congressional intent.

C. *The Attorney General's Discretion to Grant Waivers of Excludability to Refugees and Asylees*

In response to the analysis of the legislative history and plain language of the Refugee Act, the INS could argue that the waiver decision is distinct from the admission decision and that the waiver authority of the Attorney General is greater than the authority to deny admission to nonexcludable refugees.

115. One Representative stated:

We in the Congress will have to deal with the socioeconomic impacts of this bill. We will have to deal with overloaded school systems and medical clinics, scarce housing facilities, and rising welfare expenditures in our local communities. Consequently, I believe the Congress should have a major role in determining how many people will enter this country under the provisions of this bill.

Id. at 37,204-05 (statement of Rep. Moorehead); *see also* 126 CONG. REC. 4504 (1980) (statement of Rep. Danielson) ("Our Nation's commitment to resettle these refugees includes providing financial and medical assistance . . ."); 125 CONG. REC. 23,234 (1979) (statement of Sen. Kennedy) ("[T]here will be residual needs among some refugees beyond 2 years, but the committee believes these needs can be met through the other programs authorized in the bill—such as social service programs—when the 2-year limit on Federal support of cash and medical payments end."); *id.* at 23,248 (statement of Sen. Cranston) ("The task ahead of us is indeed large and it will be an expensive undertaking. There is no way to mask that fact.")

116. 125 CONG. REC. 23,240 (1979); *see also id.* at 35,815 (statement of Rep. Holtzman) ("The reason the committee adopted a more generous—and a more realistic—reimbursement formula is that decisions to admit refugees are within the exclusive province of the Federal Government and every effort must be made to minimize the financial impact on State and local governments.")

117. *See The Refugee Act of 1979: Hearing on S. 643 Before the Senate Comm. on the Judiciary*, 96th Cong. 22 (1979) [hereinafter *Senate Hearings*]. However, Congress did not limit annual asylum admissions. *See* 8 U.S.C. § 1158 (1994); *see also* H.R. REP. NO. 96-781, at 20 (1980) ("It is the intent of the conferees that prior to fiscal year 1983, Congress will review the 50,000 annual numerical limitation and take appropriate action to retain or adjust this figure."); 126 CONG. REC. 4506 (1980) (statement of Rep. Butler) ("[T]he importance of this legislation is for the Congress of the United States to retain control of the number of refugees . . .").

118. *See* 8 U.S.C. § 1522(e).

Given that medical costs are a public charge consideration,¹¹⁹ however, the INS must argue that it has more discretion to deny admission to excludable refugees under the Refugee Act than to nonexcludable ones. The INS may instead try to argue that Congress granted the Attorney General complete discretion to grant waivers of immigration exclusions even though it limited the Attorney General's discretion in the normal admission process. This argument, however, ignores how actual refugee admission decisions are made for refugees who must apply for a waiver.

The decision to grant refugee or asylee status is within the discretion of the Attorney General.¹²⁰ Under refugee and asylum application procedures, the presiding officer or immigration judge first determines whether an applicant is eligible for refugee status.¹²¹ An applicant is eligible if, *inter alia*, she meets the refugee definition,¹²² is not firmly resettled in another country,¹²³ did not engage in persecution,¹²⁴ and has not committed an aggravated felony.¹²⁵ If she is eligible for admission, but is excludable under the applicable immigration exclusions, the presiding officer or immigration judge must then decide whether the applicant merits a favorable exercise of discretion in the form of an exclusion waiver, which then entitles the refugee to admission. An officer or immigration judge must base a decision to admit or deny the refugee or asylum applicant as a matter of discretion on the "totality of the circumstances."¹²⁶ The most important factor is the harsh consequences that may result from denying an applicant resettlement because of the reasons for which she fled her country of origin in the first place.¹²⁷

The waiver decision is one part of the decision to exercise discretion to admit a refugee. An applicant's excludability under one of the waivable exclusions is a negative discretionary factor that must be considered under the totality of the circumstances test articulated in the Board of Immigration Appeals' decision in *Matter of Pula*.¹²⁸ Other factors that the Attorney General must weigh in the admission decision measure the strength of the refugee's claim to be a refugee of "special humanitarian concern."¹²⁹ The waiver decision is not distinct from the decision to exercise discretion favorably to admit an applicant.¹³⁰ While the presiding officer or immigration

119. See *supra* Part I.

120. See *Matter of Pula*, 19 I. & N. Dec. 467, 471 (B.I.A. 1987).

121. See *id.* at 474.

122. See 8 U.S.C. § 1101(a)(42).

123. See 8 C.F.R. § 207.1(b) (1995).

124. See 8 U.S.C. § 1101(a)(42).

125. See *id.* § 1157(c)(3).

126. *Matter of Pula*, 19 I. & N. Dec. 467, 473 (B.I.A. 1987).

127. See *id.* at 474 ("[T]he danger of persecution should generally outweigh all but the most egregious of adverse factors.").

128. See *id.* at 473-74.

129. 8 U.S.C. § 1157(a)(3).

130. Under the asylum procedures, an applicant for asylum does not submit a request for a waiver separate from her request for asylum. See 8 C.F.R. § 208.3(b) (1995). In contrast, if a refugee is excludable,

judge must decide whether to waive an exclusion before deciding to admit an applicant, there is no reason, in the statutes or otherwise, why the Attorney General should be granted more discretion for this one step of decisionmaking.

According to the Refugee Act, the Attorney General cannot exclude a refugee applicant who is not otherwise excludable on the basis that the applicant is likely to become a public charge.¹³¹ The language of the Refugee Act does not provide the Attorney General with unlimited discretion; she cannot apply public charge questions to deny or grant a refugee visa.

While the lesser level of protection afforded HIV-positive refugees may not seem a significant distinction on its face, the implications are enormous. If the INS can deny a refugee waiver based on public charge concerns, it can also deny a waiver based on the labor certification requirements and immigrant documentation requirements. All three of these exclusions¹³² are mandatorily waived for refugee applicants in the Refugee Act.¹³³ Extended to its logical conclusion, the INS's claimed waiver authority could have dramatic repercussions. Take, for instance, the rather common case of a refugee who suffers from a mental disorder due to torture. This disorder, which causes the refugee to be a threat to herself, would justify a public health exclusion.¹³⁴ Under the logic adopted by the INS, it could exclude her for nothing more than an inability to provide documentation of her identity.¹³⁵ Or take the example of a refugee who was a member of the Communist Party in Afghanistan and who is excludable as a former member of a Communist Party.¹³⁶ If a seventy-year-old refugee with a physical disability that affects her ability to earn a living was a member of the Communist Party, the INS could deny a waiver of the exclusion on the basis that the refugee is likely to become a public charge, even if the INS concludes that her membership in the Communist Party is not a reason to exclude her.¹³⁷

Congress surely could not have intended this result when it granted the Attorney General the discretion to waive exclusion provisions under the Refugee Act. One primary purpose of passing the Refugee Act was to limit the discretion of the Attorney General.¹³⁸ By considering public charge issues in

she must submit a waiver request to the officer in charge of deciding whether to grant a refugee visa. *See id.* § 207.3. However, it is the Attorney General who promulgated these procedures, not Congress. Thus, even if one concludes that the refugee waiver process is one distinct step in the decision to grant or deny a visa, it is one subset of the entire discretionary decision, not a separate decision process altogether.

131. *See* 8 U.S.C. § 1157(c)(3).

132. *See id.* § 1182(a)(4) (public charge exclusion); *id.* § 1182 (a)(5) (labor certification exclusion). *id.* § 1182(a)(7)(A) (immigrant documentation exclusion).

133. *See id.* § 1157(c)(3).

134. *See id.* § 1182(a)(1)(A)(ii)(I).

135. *See id.* § 1182(a)(7)(A)(i).

136. *See id.* § 1182(a)(3)(D)(i).

137. *See id.* § 1182(a)(4).

138. *See* Anker & Posner, *supra* note 95, at 48-50, 52-56.

the refugee waiver process, the INS is considering factors that Congress could not have intended to make relevant to refugee resettlement decisions.

D. The 1993 Codification of the HIV Exclusion Did Not Expand the Attorney General's Authority to Deny HIV Waivers to Refugees

To salvage the INS HIV Rule as a legitimate exercise of administrative discretion, Congress's 1993 codification of the HIV public health exclusion would have to demonstrate express congressional intent to make the public charge exclusion applicable to HIV waiver applicants or to afford the Attorney General discretion to apply the public charge exclusion to HIV-positive refugees. The legislative history of the 1993 codification of the HIV exclusion reveals that Congress sidestepped the debate over how the HIV exclusion should apply to refugees. Absent an express intention to change the HIV waiver process under the Refugee Act, neither courts nor the INS should infer from the legislative history of the 1993 codification an implicit intention to alter the Refugee Act as a general immigration exclusion.

Some contend that, with the codification of the HIV exclusion in 1993, Congress explicitly intended to allow cost considerations to play a role in the admission of HIV-positive refugees.¹³⁹ It is uncontested that the major impetus for the codification was President Clinton's proposal to remove HIV-positive status from the list of communicable diseases listed under the public health exclusions¹⁴⁰ at a time when parole was pending for 222 HIV-positive asylum seekers detained at Guantanamo Bay, Cuba.¹⁴¹ It seems counterintuitive, given this fact, to conclude that Congress did not intend to exclude all HIV-positive aliens, including HIV-positive refugees.

Only the actual test applied by courts to determine when a piece of legislation overrides an earlier statute can resolve the legitimacy of the INS HIV Rule. In the absence of explicit overruling by subsequent legislation, repeal by implication is only inferred by courts when two statutes are irreconcilable.¹⁴² Courts have found that intent to overrule a statute should not be construed from statements made by members of Congress after the

139. See Pardo, *supra* note 111, at 535.

140. See Bartz, *supra* note 21, at 160; *supra* text accompanying notes 6–7.

141. See Jason W. Konvicka, Note, *Give Us Your Tired, Your Poor, Your Huddled Masses . . . Except When They Have HIV: An Analysis of Current United States Immigration Policy Regarding HIV-Positive Aliens in Light of Guantanamo Bay*, 27 U. RICH. L. REV. 531, 542 (1993); McCormick, *supra* note 4; Pendleton, *supra* note 79, at 299.

142. See *Norfolk & W. Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1985) (noting that repeal of antitrust laws by implication disfavored); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1977) (noting that repeal by implication not permissible unless two statutes are irreconcilable); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (explaining that repeal by implication should only be upheld where two statutes cannot mutually coexist); *Rosenberg v. United States*, 346 U.S. 273, 294 (1953) (holding partial overlap of statutes on same subject matter does not justify repeal by implication).

enactment of the statute.¹⁴³ Indeed, the D.C. Circuit has ruled that statements made during congressional floor debates unconnected with the passage of a statute should not be construed as express intent to overrule an earlier statute absent explicit statutory language in the subsequent law.¹⁴⁴ Unless Congress expressly indicated in the text of the 1993 HIV exclusion that it intended to codify the administrative INS HIV Rule or intended to apply public charge concerns to HIV-positive refugees, statements by members of Congress in floor debates cannot support an implicit overruling of the Refugee Act's prohibition on applying the public charge exclusion to refugees. Given this legal standard, whether members of Congress expressed their disdain for HIV-positive refugees is irrelevant to the question of whether the Refugee Act waiver is still legitimate law. Under the D.C. Circuit's analysis, only an explicit statement in text of the HIV exclusion passed in 1993 could change the application of the exclusion to refugees through the Refugee Act.

In 1993, President Clinton expressed an intent to remove HIV from the list of "dangerous contagious diseases" listed in the public health exclusions.¹⁴⁵ Following this announcement, a group of senators lead by Senator Nickles introduced Amendment 37 to Senate Bill 1, the National Institute of Health Revitalization Act of 1993.¹⁴⁶ Amendment 37 codified the designation of HIV infection as a communicable disease of public health significance under the public health immigration exclusions. The text of the new HIV exclusion does not even mention the Refugee Act or the Attorney General's waiver authority.¹⁴⁷ The legislative history of the 1993 HIV exclusion highlights the paucity of support for the notion that it amends the Refugee Act.

Refugees were mentioned only seven times in the Senate debate and nine times in the House debates in over forty pages of congressional discussion of

143. See, e.g., *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 471 n.6 (1994) (noting views of Congress on meaning of statute passed by earlier Congress not accorded weight in statutory construction); *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) (noting post hoc statements by congressional committees are not given significant weight in statutory construction); *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980) (holding congressional remarks on statute passed by another Congress have little weight in statutory construction); *Hazardous Waste Treatment Council v. United States E.P.A.*, 886 F.2d 355, 365 (D.C. Cir. 1989) (noting that postenactment statements by members of Congress cannot be considered in determining meaning of statute); *Tinch v. Walters*, 765 F.2d 599, 602 (6th Cir. 1985) (holding views of Congress should be given little weight in statutory construction of statute passed by previous Congress); *Quarles v. St. Clair*, 711 F.2d 691, 705 (5th Cir. 1983) (noting even explicit postenactment, retrospective statements of legislative intent should not be controlling).

144. See *Colorado v. United States Dep't of Interior*, 880 F.2d 481, 490 (D.C. Cir. 1989).

145. See Hiltz, *supra* note 6, at A17.

146. See 139 CONG. REC. S1707-08 (daily ed. Feb. 17, 1993) Amendment 37 (proposed by Sens. Nickles, Dole, Kassebaum, Helms, Gramm, Lott, Coats, Mack, Craig, Bond, and Coverdell) required a report of the estimated medical costs to the United States of admitting persons with HIV. This report was to include a breakdown of the costs to States and municipalities and an assessment of how well the public charge provision was working as an exclusion. It also required a separate report on the cost implications of refugees entering, or likely to enter, the United States with HIV, and a comparison of the costs of aliens with other health afflictions with the costs of HIV-positive aliens admitted to the United States. See *id.* at S1708.

147. See 8 U.S.C. § 1182(c)(3) (1994).

the HIV exclusion.¹⁴⁸ The small number of congressional representatives who even mentioned refugees illuminates the lack of intent to affect how the HIV exclusion, as a general immigration law, was supposed to apply to refugees. Senator Kennedy first raised the issue of how the HIV exclusion could affect refugee applicants directly when he said:

But what the supporters of the Nickles amendment are saying . . . is you have 268 black Haitians in Guantanamo Bay Many of them have been found to be in credible fear of persecution or death if they go back in Haiti. The proponents of this amendment say, "Send them back. Send them back. We do not care."¹⁴⁹

In response, Senator Donald Nickles said, "[R]efugees, when they come in and seek asylum in the United States, are automatically eligible for welfare packages including Medicaid. I did not realize that until recently. I am just saying I am concerned about the cost. That is 215 people."¹⁵⁰ He went on to argue that all refugees are eligible for Medicaid, so the costs would be enormous if all refugees were admitted.¹⁵¹ Senator Jesse Helms opposed admitting Haitian refugee applicants held at Guantanamo Bay because he did not think they were refugees. He argued that "they are not applying for immigration through normal channels. This administration obviously considers Haitians to be political refugees."¹⁵²

Despite these negative comments about HIV-positive refugees, not one senator proposed changing the admission or waiver process for refugees. In fact, some of the Senate discussion of refugees as a distinct group focused on the availability of an exclusion waiver. Senator Alan Simpson argued that the exclusion "does not affect refugees who are admitted under another provision which allows waivers of medical exclusion."¹⁵³ Senators Nancy Kassebaum and Kennedy both commented that the HIV exclusion is waivable under current administrative practice, and that administrative practice would not be affected by the Amendment.¹⁵⁴ Thus, no discussion in the Senate reveals an

148. See 139 CONG. REC. H2729-33, H2736, H2738-39 (daily ed. May 25, 1993); 139 CONG. REC. H1203-10 (daily ed. Mar. 11, 1993); 139 CONG. REC. S1761-67 (daily ed. Feb. 18, 1993); 139 CONG. REC. S1707-29 (daily ed. Feb. 17, 1993).

149. 139 CONG. REC. S1712 (daily ed. Feb. 17, 1993).

150. *Id.* at S1719.

151. See 139 CONG. REC. S1762 (daily ed. Feb. 18, 1993).

152. 139 CONG. REC. S1722 (daily ed. Feb. 17, 1993) (statement of Senator Helms). Senator Helms also argued:

[U]nder the law anyone granted refugee status is automatically given welfare. . . . [I]f we allow the 300 or so AIDS-infected refugees at Guantanamo entry we are looking at a potential cost to the taxpayers of \$20 million in medical bills alone, and that is just the tip of the iceberg.

Id.

153. *Id.* at S1729.

154. See 139 CONG. REC. S6883 (daily ed. May 28, 1993).

explicit intention to change the admission process or administrative practice governing refugee HIV waivers.

In the House of Representatives, Representative Henry Waxman expressed dismay that refugees with HIV would be subject to a different standard than refugees without HIV.¹⁵⁵ Representative Waxman asked, "Should we turn them back to certain execution and persecution, or should we accept them on the basis which the United States has accepted refugees in the past?"¹⁵⁶ Representative Robert Dornan argued that a holding area such as Guantanamo Bay offered a solution to the problem. In defending the differential treatment of refugees with HIV, Representative Dornan said, "I want to be humane, but I am not going to let in communicable diseased people into this country, because it will kill as sure as you and I stand here. And we want our constituents to respect us."¹⁵⁷ Representative John Cunningham skirted the issue by arguing that "law based on individual specifics is bad law. It is going to cost us down the line for these AIDS patients beyond what we are already saturated with."¹⁵⁸ Like the Senate discussion, the House discussion lacked any proposals to change the refugee admission process or the availability of HIV waivers for refugees.

Despite the negative comments of a few representatives, there is no evidence in the legislative history that Congress intended to change the availability of HIV waivers under the Refugee Act or to codify the existing INS practice of applying the INS HIV Rule. Commenting on the conference committee report, Representative Romano Mazzoli stated:

Regulations, policies, and practices have developed with regard to waivers of exclusion, testing requirements, and health-related questioning. The conferees, by requiring that HIV be included among the list of excludable diseases until such time as Congress shall remove it, have taken the position that waiver, questioning, and testing decisions should continue to be left to the discretion of the Attorney General. Thus, the conference report does *not* codify any current policies or practices concerning those authorities.¹⁵⁹

In addition, at least three senators relied on the availability of a waiver for refugees when they voted for the exclusion.¹⁶⁰

Neither the 1993 HIV exclusion itself nor the legislative history of the exclusion in congressional floor debates supports the conclusion that Congress

155. See 139 CONG. REC. H1204 (daily ed. Mar. 11, 1993).

156. *Id.* at H1208.

157. *Id.* at H1209.

158. *Id.*

159. 139 CONG. REC. H2739 (daily ed. May 25, 1993) (emphasis added) Representative Thomas Bliley noted that "[w]aiver authority under the current law remains unchanged" *Id.* at H2736

160. See *supra* text accompanying notes 153–54 (noting comments of Senators Kassebaum, Kennedy, and Simpson).

expressly intended to change the previous law or to codify administrative practices regarding refugee exclusion waivers. The legislative enactment of the HIV exclusion, without an express overruling of the 1980 Refugee Act, will not support the argument that the INS is acting within the bounds of its discretion in interpreting its authority to apply the public charge exclusion.

In sum, the INS HIV Rule is a public charge exclusion because it is used to exclude aliens based on the cost of admitting them. The application of this administrative regulation to refugees violates the plain language of the Refugee Act and its legislative purpose of eliminating public charge issues from the refugee admission process. The codification of the HIV exclusion as a general immigration law does not in and of itself indicate an express intention on the part of Congress to change how the general public health exclusions are applied to refugees, nor does the legislative history of the HIV exclusion establish any express congressional intent to change the policy under the Refugee Act of exempting refugees from the public charge exclusion. It therefore does not make the INS HIV Rule a legally valid exercise of administrative discretion.

III. CHALLENGING THE INS HIV RULE: DISCRETION GONE AWRY

While the INS has clearly overstepped its authority by implementing the INS HIV Rule, challenging the imposition of the rule is difficult because of the discretionary nature of refugee, asylum, and adjustment of status decisions.¹⁶¹ The optimal solution would be for Congress to clarify the refugee waiver provision in subsequent legislative amendments. Independent of this action, the INS should voluntarily rescind this regulation as an unwarranted contravention of the Refugee Act. Yet it seems unlikely that either of these actions will be taken in the near future. Consequently, those affected by the rule are left with the option of seeking judicial review of a waiver denial in the federal courts.

A. *Challenging the INS HIV Rule in Court: Limited Judicial Review*

Several factors limit judicial review of the INS HIV Rule.¹⁶² Refugees abroad who apply for an HIV waiver are not entitled to judicial review of waiver denials.¹⁶³ In addition, nonresident aliens located outside the United

161. See DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* 165–71 (2d ed. 1991) (discussing discretionary nature of asylum).

162. It may be possible to claim that the INS guidelines are a regulation within the meaning of the Administrative Procedure Act and therefore may be challenged on the basis that the INS did not follow the appropriate notice and comment requirements of the Administrative Procedure Act. See Bartz, *supra* note 21, at 169–70; Bean & Hilliard, *supra* note 14, at 495. For alternative views on judicial review of waiver denials, see Kerry A. Krzynowek, Note, Haitian Centers Council, Inc. v. Sale: *Rejecting the Indefinite Detention of HIV-Infected Aliens*, 11 J. CONTEMP. HEALTH L. & POL'Y 541 (1995).

163. See 8 C.F.R. § 207.3 (1995). The UNHCR has indicated that

States do not have standing to sue in U.S. courts for visa denials.¹⁶⁴ Thus refugees are effectively precluded from challenging waiver denials in U.S. courts. The only groups that can challenge the INS HIV Rule are refugees and asylees attempting to adjust to permanent resident status.

Unfortunately, the precarious status of refugees and asylees in the United States deters them from challenging the exclusion policy. The statutes and federal regulations are not clear on whether asylum status can be revoked if a refugee or asylee is found excludable during an adjustment interview. The federal regulations state that if the District Director denies an application for adjustment of status by a refugee or asylee, "[n]o appeal shall lie from the denial . . . but such denial will be without prejudice to the alien's right to renew the application" in deportation or exclusion proceedings.¹⁶⁵ This suggests that the INS believes that they may deport refugees and asylees if they are excludable. Contrary to the presumption under this regulation, the INA does not say that excludable refugees or asylees may be deported if the INS denies them permanent residence.¹⁶⁶ In addition, the refugee regulations allow termination of refugee status only if an alien was "not a refugee . . . at the time of admission."¹⁶⁷ The asylum regulation allows revocation of asylum only if the alien no longer has a well-founded fear of persecution because of changed country conditions, the alien committed fraud and was not entitled to asylum in the first place, the alien is a danger to the security of the United States, or the alien was convicted of an aggravated felony or a crime that presents a danger to the community.¹⁶⁸ Since Congress has not suggested an intention to repatriate recognized refugees, courts should not construe the INS regulations to allow repatriation simply because a refugee is HIV-positive.¹⁶⁹

Even if the ambiguity in the INS regulations does not deter a refugee or asylee, an adjustment applicant will only receive limited judicial review of a waiver denial. The decision to grant asylum status is subject to the

The INS field officer with jurisdiction over the case . . . reviews the HIV waiver application and makes a recommendation. This recommendation is certified to the INS Administrative Appeals Unit (AAU) in Washington, D.C. The AAU makes the final decision, either agreeing or disagreeing with the field officer There is no appeal from the AAU's decision

UNHCR Memo, *supra* note 14, at 2; *see also* Cimini, *supra* note 61, at 370

164. *See* Chinese Am. Civic Council v. Attorney Gen., 566 F.2d 321, 324 (D.C. Cir. 1977) (holding that aliens denied refugee status under former INA § 203(a)(7) lacked standing because they had not entered United States). It is unclear whether the INS applies the HIV exclusion to asylum applicants. If the INS does not apply the HIV Rule to asylum applicants, then they do not have a "case or controversy" upon which to base a challenge to the HIV waiver policy of the INS. *See* County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (explaining two-part test to determine mootness)

165. 8 C.F.R. § 209.2(f) (1995).

166. *See* Immigration and Nationality Act § 209, 8 U.S.C. § 1159 (1994)

167. 8 C.F.R. § 207.8; *see also* Matter of Garcia-Alzugaray, 19 I. & N. Dec. 407 (B.I.A. 1986) (affirming immigration judges' refusal to adjudicate excludability of asylee)

168. *See* 8 C.F.R. § 208.24(a).

169. *See* ANKER, *supra* note 161, at 67 n.339 (noting that asylum may not be revoked unless initial grant was unwarranted or country conditions have changed).

discretionary authority of the Attorney General.¹⁷⁰ Thus a court will only review a decision to deny adjustment of status to decide if the denial was arbitrary, capricious, or an abuse of discretion.¹⁷¹ However limited the judicial review given to administrative rules and regulations is, the preceding parts of this Note suggest that a litigant has a strong cause of action for invalidating the HIV Rule under the first prong of the *Chevron* test. In instituting the HIV Rule, the INS has illegally considered factors "Congress could not have intended to make relevant."¹⁷²

B. Policy Reasons for the INS to Voluntarily Rescind the HIV Rule

The INS should rescind the application of the INS HIV Rule voluntarily as an unwise policy for two reasons. First, the rule undermines international refugee protection for HIV-positive refugees and for the most economically vulnerable refugees. Second, the exclusion lacks empirical foundation as a measure to contain health care costs.

1. Undermining International Refugee Protection

Congress passed the Refugee Act to encourage other nations to accept refugees regardless of physical condition, gender, age, or race.¹⁷³ By

170. While there have not been any reported decisions denying adjustment of status to refugees or asylees as a matter of discretion, the courts have indicated that adjustment of status for other applicants is discretionary. *See, e.g.,* *Fulgencio v. INS*, 573 F.2d 596, 597 (9th Cir. 1978) (holding that only abuse of discretion justifies overturning decision to deny adjustment); *Eun-Hee Lee v. United States*, 651 F. Supp. 1264, 1267 (D.D.C. 1987) (noting that adjustment of status is matter of discretion). Although a refugee whose status is terminated is still eligible for withholding of deportation, the burden of proof for this remedy is higher than the burden of proof for asylum status. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 444-45 (1987). Thus, if an asylee or refugee has her status revoked, there would be a direct challenge to the international obligation of nonrefoulement. *See generally* Andrew G. Pizor, Comment, *Sale v. Haitian Centers Council: The Return of Haitian Refugees*, 17 *FORDHAM INT'L L.J.* 1062 (1994) (discussing right to nonrefoulement after *Sale v. Haitian Centers Council* decision).

171. *Cf. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (noting in context of Environmental Protection Agency that regulations of congressionally created agency are controlling unless arbitrary, capricious, or manifestly contrary to statute). For a discussion of discretion in asylum and refugee law, see ANKER, *supra* note 161; Arthur C. Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 *SAN DIEGO L. REV.* 999 (1985); Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 *SAN DIEGO L. REV.* 861 (1994).

172. *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950); *see also* *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (citing *United States v. Heirs of Boisduro*, 49 U.S. (8 How.) 113, 122 (1849)); *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 6 (1932) (stating phrase must be interpreted in light of purpose of statute); *White v. INS*, 75 F.3d 213, 214 (5th Cir. 1994) (stating administrative agency interpretations are only entitled to deference when congressional intent is unclear); *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1465 (7th Cir. 1985) (holding agency rule is arbitrary when agency relies on factors Congress had not intended to consider); *Usery v. Kennecott Copper*, 577 F.2d 1113, 1117-18 (10th Cir. 1977) (noting administrative regulation should not be followed when it conflicts with design of statute or exceeds administrative authority).

173. *See Senate Hearings*, *supra* note 117, at 37 (statement of Sen. Kennedy) ("[I]t is important, as we are trying to gain support with other countries for refugees, for us to have this legislation."); 126 CONG.

considering resettlement costs, the INS regulations encourage other nations to make distinctions among individual refugees based on their earning capacity. The INS HIV Rule thus undermines congressional intent by indicating to other nations that they will be justified in resettling refugees on the basis of their health, education, or any other supposed indicators of earning capacity.

Use of the INS HIV Rule in the refugee exclusion waiver process also signals that the United States believes that all HIV-positive refugees are presumptively a burden on the health care system and thereby encourages discrimination against HIV-positive people.¹⁷⁴ The ultimate result may be that other nations will feel free to refuse resettlement to refugees on any grounds, including reasoning based upon empirically unfounded presumptions similar to those contained in the U.S. policy.¹⁷⁵

As the preceding Part demonstrates, if the Attorney General may consider public charge concerns in the waiver process, then the Attorney General may also consider other factors Congress explicitly made inapplicable to refugees. This breakdown ultimately sends a signal to other countries that once refugees may be excluded for one reason, they can be excluded for any reason at all, without regard to the humanitarian implications of the decision to exclude. The ultimate result of applying the INS HIV Rule to HIV-positive refugee applicants is to encourage other nations to deny resettlement to HIV-positive refugees or refugees with other "undesirable" characteristics. Such a result is clearly contrary to the original purpose of the Refugee Act: to encourage other nations to admit refugees on a humanitarian basis.¹⁷⁶

There is a final problem with applying the INS HIV Rule to refugees. The rule eviscerates the distinction between refugee and immigration policies. U.S. refugee policy has been based on humanitarian considerations ever since the enactment of the Refugee Act. U.S. immigration policy, on the other hand, has always been concerned with screening out undesirables and promoting the economic interests of the United States. By applying cost considerations to each individual refugee, the INS signals its willingness to treat refugees as immigrants.

Congressional failure to fight this breakdown foreshadows more measures to curtail refugee and asylum protections.¹⁷⁷ Unless Congress and the INS recognize that cost considerations are only relevant to the overall number of

REC. 4502 (1980) (statement of Rep. Fish) ("It is clearly in our self-interest to continue efforts to encourage participation of other countries in refugee resettlement efforts.").

174. See Mary C. Dunlap, *AIDS and Discrimination in the United States: Reflections on the Nature of Prejudice in a Virus*, 34 VILL. L. REV. 909, 912-17 (1989); Lynn Acker Starr, Note, *The Ineffectiveness and Impact of the Human Immunodeficiency Virus (HIV) Exclusion in U.S. Immigration Law*, 3 GEO IMMIGR. L.J. 87, 106 (1989).

175. See *supra* Section I.D.

176. See *supra* text accompanying note 173.

177. See *Congress' Proposed Immigration Bill: Severe New Restrictions for Asylum Seekers*, ASYLUM PROGRAM (Lawyer's Comm. for Human Rights), Oct. 10, 1995, at 1.

refugees we admit, Congress will freely pass legislation that promotes unequal treatment of refugee groups and therefore undermines the basis for international refugee protection.

2. *Health Care Costs for HIV-Positive Refugees Will Not Harm the Health Care System*

One plausible argument why the INS HIV Rule is a public health exclusion is that treating refugees who develop AIDS may create a crisis in the health care industry. There is no doubt that a major concern behind the enactment of the HIV exclusion in 1993 was the rising cost of medical care.¹⁷⁸ Requiring refugees to prove that they will not need government funding is a measure to ensure that they do not drain health care resources. It is true that the cost of HIV treatment is tremendous.¹⁷⁹ One researcher has estimated that the annual cost of treating AIDS and HIV was between \$10.3 billion and \$15.2 billion in 1995, based on an average cost of \$102,000 per patient.¹⁸⁰

While protecting health care resources is a legitimate public health rationale, the INS HIV Rule does not necessarily reduce health care expenditures; it only ensures that government funds will not be used. This, of course, places the INS HIV Rule squarely in the province of public charge considerations. The concern is not with the overall amount of health care resources used, but rather, with the burden on government Medicaid spending. HIV-positive refugees do not pose a significant threat to the health care system because the number of HIV-positive refugees likely to be admitted is not very large.¹⁸¹ The cost of detaining HIV-positive refugees at Guantanamo Bay was estimated to be between five hundred thousand and one million dollars a month.¹⁸² It is estimated that detention for two years cost the United States between twelve and fifty-five million dollars.¹⁸³ In addition, the cost of

178. See Juan P. Osuna, *The Exclusion from the United States of Aliens Infected with the AIDS Virus: Recent Developments and Prospects for the Future*, 16 HOUS. J. INT'L L. 1, 29-30 (1993).

179. See Green & Arno, *supra* note 33, at 1261 ("Lifetime medical care costs of individuals with acquired immuno deficiency syndrome (AIDS) average \$40,000 to \$75,000.").

180. See Fred J. Hellinger, *Forecasts of the Costs of Medical Care for Persons with HIV: 1992-1995*, 29 INQUIRY 356, 356 (1992). Hellinger has modified this estimate downward by \$30,000 per patient, and predicts that costs will continue to decline. Even so, the cost for treating HIV over the course of a lifetime can reach \$72,000. See Fred J. Hellinger, *The Lifetime Cost of Treating a Person With HIV*, 270 JAMA 475, 477 (1993).

181. See Memorandum from the U.S. Department of State to Charles McCance, Director, Division of Quarantine, Center for Prevention Services, Centers for Disease Control 8 (Aug. 3, 1987) (on file with the *Yale Law Journal*) ("[T]hose designated 'of special humanitarian concern' to the United States by the President . . . exhibit a very low incidence of the AIDS virus.").

182. See Andrew A. Skolnick, *Doctors Help HIV-Positive Haitian Refugees Gain Freedom from US Government Detention Camp*, 270 JAMA 563, 564 (1993).

183. I arrived at this figure by using the base cost of \$500,000 a month for two years. See *id.*; see also Creola Johnson, *Quarantining HIV-Infected Haitians: United States' Violations of International Law at*

testing all refugees for HIV, a cost born by the United States, far exceeds the medical savings gained through exclusion.¹⁸⁴

Finally, the INS HIV Rule apparently assumes that HIV-positive refugees would be unable to work to support themselves. The assumption that all persons with HIV are incapable of working recalls the assumptions made about immigrants in the early 1900s.¹⁸⁵ The INS has not provided evidence that refugees with HIV are less likely to be self-sufficient than other refugees. If the INS is truly concerned about the burden that aliens place on the health care system, it could apply the public charge exclusion to other disorders that are just as expensive as HIV.¹⁸⁶ Distinguishing HIV-positive refugees is arbitrary; other refugees are also eligible for Medicaid, special refugee medical funds, and state benefits.¹⁸⁷ The cost of providing Medicaid to a sick refugee may meet or exceed the cost of treating HIV.¹⁸⁸ Furthermore, special programs were set up under the Refugee Act to assist refugees requiring

Guantanamo Bay, 37 HOW. L.J. 305, 327 (1994) (noting that Professor Harold Koh estimated annual cost at \$55 million).

184. See Douglas Scott Johnson, Note, *The United States' Denial of the Immigration of People with AIDS*, 6 TEMP. INT'L & COMP. L.J. 145, 149-50 (1992).

185. See, e.g., *Tambara v. Weedin*, 299 F. 299 (9th Cir. 1924) (excluding alien as likely to become public charge because he appeared to be deaf); *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922). The *Sakaguchi* court noted that:

If there were in this case any evidence whatever of mental or physical disability or any fact tending to show that the burden of supporting the appellant is likely to be cast upon the public, we should have no hesitation in saying that the conclusion of the board of special inquiry would be unassailable in a court.

Id. at 916; see also Margulies, *supra* note 44, at 539. Yet, because of the long incubation period of HIV most HIV-positive people are asymptomatic for five to eight years. See Sarah N. Qureshi, *Global Ostracism of HIV-Positive Aliens: International Restrictions Barring HIV-Positive Aliens*, 19 MD J. INT'L L. & TRADE 81, 84 (1995); Fernandez, *supra* note 13, at 84-85. The assumption that people with HIV are incapable of self-support only reinforces ostracism and discrimination against people with HIV. See Dunlap, *supra* note 174, at 912-17 (1989).

186. A Canadian report found that treatment of immigrants with heart disease emigrating to Canada would cost \$23.2 million over ten years, while treating immigrants with AIDS would cost \$18.5 million. See Cimini, *supra* note 61, at 384. The cost of treating nonlymphocytic leukemia over a five-year period is estimated at \$193,000 for transplantation and \$136,000 for chemotherapy. See H. Gilbert Welch & Eric B. Larson, *Cost Effectiveness of Bone Marrow Transplantation in Acute Nonlymphocytic Leukemia*, 321 NEW ENG. J. MED. 807, 807 (1989). The cost of liver transplantation in 1984 was estimated at \$250,000 per life year, and the cost has risen since that time. See 86 J. NAT'L CANCER INST. 415 (1994); see also David V. Schapira et al., *Intensive Care, Survival, and Expense of Treating Critically Ill Cancer Patients*, 269 JAMA 783, 783 (1993) (finding that cost per year of life gained was \$82,845 for patients with solid tumors and \$189,339 for patients with hematologic cancers); Thomas J. Smith et al., *Efficacy and Cost Effectiveness of Cancer Treatment: Rational Allocation of Resources Based on Decision Analysis*, 85 J. NAT'L CANCER INST. 1460, 1460 (1993) (summarizing other studies on cost of cancer treatment); Konvicka, *supra* note 141, at 545-46 (arguing that overall cost of treating heart disease for immigrants is higher than cost of treating HIV). In comparison, the annual costs for arthritis care are above \$150 billion and the annual expenditures on cancer care in 1990 were \$35 billion. See *Costs for Arthritis Care Hit \$150 Billion and Keep Rising*, AM. MED. NEWS, Dec. 11, 1995, at 16; Smith, *supra*, at 1460.

187. See *Overview of Aliens' Eligibility for Federal Programs*, 14 IMMIGR. L. REP. 109, 109 (1995).

188. The mean Medicare payment in the last year of life for all recipients was \$13,316 in 1988. See Ezekiel J. Emanuel & Linda L. Emanuel, *The Economics of Dying*, 330 NEW ENG. J. MED. 540, 540 (1994). In contrast, the mean Medicaid payments to AIDS patients over the entire course of the illness in 1986 was \$11,972. See Roxanne Andrews et al., *Longitudinal Patterns of California Medicaid Recipients with Acquired Immunodeficiency Syndrome*, 13 HEALTH CARE FINANCING REV. 1, 7 (1991).

medical attention.¹⁸⁹ Preserving health care resources is not a reason to deny HIV-positive refugees access to these programs.

IV. CONCLUSION

The current INS policy regarding HIV waivers not only reflects a profound misunderstanding of the 1980 Refugee Act, but also reveals a lack of accountability in the administration of immigration law. The INS has overstepped its authority by considering public charge concerns in the HIV exclusion waiver process for refugees, and refugees and asylees applying for permanent resident status. The INS HIV Rule is a unique administrative regulation; for the first time ever, the INS is using a public charge concern as a criterion for waiver eligibility.

While HIV may present unique health cost concerns that justify considering public charge issues, Congress explicitly stated in the Refugee Act that the public charge exclusion does not apply to refugees. As an administrative agency subject to the will of Congress, the INS has no authority to make a unilateral decision to extend the scope of the public charge exclusion to include HIV-positive refugees. If Congress wants to change the admission criteria to ensure the self-sufficiency of individual refugees, it should do so expressly through legislative action.

To impose the burden of this extraconstitutional exercise of power on refugees and asylees, groups that are uniquely vulnerable to abuse because their members are stateless, is both unconscionable and contrary to the basic principle that a democratic government abides by the rule of law. It is not the prerogative of any executive agency to contravene express congressional mandates simply because it can do so without getting caught by the courts or reprimanded by Congress.

189. See Bartz, *supra* note 21, at 157–58.