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## Protecting Refugees and Immigrants on United States Soil but Not "in the United States": The Unique Case of the Commonwealth of the Northern Mariana Islands

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## COMMENT

### **Protecting Refugees and Immigrants on United States Soil but Not “in the United States”: The Unique Case of the Commonwealth of the Northern Mariana Islands**

*“Economically they will be a liability, socially they will present problems, and politically we will have to work out a policy of administration.”<sup>1</sup>*

ESTELLE HOFSCHEIDER†

#### INTRODUCTION

On March 24, 1976, President Gerald Ford signed Public Law 94-241, approving the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America

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1. Statement by Representative Mansfield to the United States House of Representatives, upon returning from a tour of former Japanese Mandate in Micronesia in 1947. 93 CONG. REC. 768 (1947), *quoted in* DAVID NEVIN, *THE AMERICAN TOUCH IN MICRONESIA* 71 (1977). Mansfield said: “I would prefer to have the United States assume complete and undisputed control of the mandates [most of Micronesia]. We need these islands for our future defense, and they should be fortified wherever we deem it necessary. We have no concealed motives because we want these islands for one purpose only and that is national security.” 93 CONG. REC. 768 (1947). This viewpoint conflicted with that of the Department of State, which opposed anything resembling annexation after World War II. CARL HEINE, *MICRONESIA AT THE CROSSROADS: A REAPPRAISAL OF THE MICRONESIAN POLITICAL DILEMMA* 4 (1974). This conflict of goals within the United States would characterize the United States relationship and negotiations with Micronesia and later the Marianas.

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(“Covenant”).<sup>2</sup> The Covenant was the product of over two years of negotiation, five drafts,<sup>3</sup> and several political innovations—all occurring amid controversy and criticism from, among other sources, the Congress of Micronesia<sup>4</sup> and the United Nations.<sup>5</sup> The Covenant and the resulting relationship between the United States and the newly created Commonwealth of the Northern Mariana Islands (“CNMI”) were unique for several reasons. The CNMI, which consists of fourteen small islands north of Guam between the Philippines and Japan,<sup>6</sup> was the first populated territory acquired by the United States in almost fifty years.<sup>7</sup> It was also a unique expansion of territory insofar as previous acquisitions were accomplished through either purchase or treaty with other established nations, making the Northern Mariana Islands the only *consensual* acquisition of territory in United States history.<sup>8</sup> The Covenant declared the self-governing status of the CNMI with regard to internal matters, and the sovereignty of the United States in international affairs.<sup>9</sup> It also granted

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2. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (1976) (codified as amended at 48 U.S.C. § 1801 (2006)), available at <http://www.cnmilaw.org/covenant.htm> [hereinafter Covenant].

3. Arnold H. Leibowitz, *The Marianas Covenant Negotiations*, 4 FORDHAM INT'L L.J. 19, 22 n.9 (1980).

4. The Congress of Micronesia was formed in 1965 and was composed of members from the different administrative districts of the Trust Territory of the Pacific Islands (“TTPI”), which was administered by the United States after World War II. See HEINE, *supra* note 1, at 44.

5. See, e.g., Howard P. Willens & Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L.J. 1373, 1379-80 (1977). The antagonistic manner in which negotiations were conducted with the Congress of Micronesia (and later in separate negotiations with the Marianas) was also criticized at the time for being inconsistent with the spirit of a trusteeship agreement. See Leibowitz, *supra* note 3, at 79.

6. S. REP. NO. 110-324, at 2 (2008). The islands are part of the Marianas archipelago in Micronesia, which is one of three sub-regions of the Pacific, in addition to Polynesia and Melanesia. BRUCE G. KAROLLE, ATLAS OF MICRONESIA 1 (2d ed. 1993).

7. Leibowitz, *supra* note 3, at 21.

8. JOSE S. DELA CRUZ, FROM COLONIALISM TO SELF-GOVERNMENT: THE NORTHERN MARIANAS EXPERIENCE 234 (2010).

9. Covenant, *supra* note 2, art. I §§ 103-04.

United States citizenship to CNMI residents<sup>10</sup> and delineated limitations on the applicability of the federal Constitution and federal legislation.<sup>11</sup> The Covenant, together with the federal Constitution, and the laws and treaties of the United States are the supreme law of the CNMI; thus, “the Constitution, treaties and laws of the United States will not override the Covenant, since all are supreme.”<sup>12</sup>

Unlike other United States territories and possessions, the CNMI is an “unusual entity, in that there is significant dispute over whether it is an Article IV ‘territory’ of the United States, or a unique juridical object with its constitutional roots in the treaty power or elsewhere.”<sup>13</sup> Even the Ninth Circuit has recognized that “the precise status of the Commonwealth is far from clear.”<sup>14</sup> This ambiguity was present during the congressional passage of the Covenant itself, where proponents were hoping to garner at least sixty-seven votes in the Senate, lest anyone argue that the Covenant were a treaty.<sup>15</sup> The reason for this

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10. *Id.* art. III §§ 301-04.

11. *Id.* art. V §§ 501-06.

12. MARIANAS POLITICAL STATUS COMM’N, SECTION BY SECTION ANALYSIS OF THE COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 10 (1975).

13. David A. Isaacson, *Correcting Anomalies in the United States Law of Citizenship by Descent*, 47 ARIZ. L. REV. 313, 323 n.27 (2005); see also MARIANAS POLITICAL STATUS COMM’N, *supra* note 12, at 2-3; Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 ASIAN-PAC. L. & POL’Y J. 180, 203 (2003) (arguing that United States authority to enter into Covenant negotiations did not derive from the Territorial Clause because the Marianas was part of the TTPI, which “undisputedly was not a territory of the United States, and thus not within the scope of the Territorial Clause”).

14. *Wabol v. Villacrusis*, 958 F.2d 1450, 1459 n.18 (9th Cir. 1990). The CNMI falls under the jurisdiction of the Ninth Circuit Court of Appeals, which also served as the court of last resort for local cases until 2004 when, pursuant to the Covenant, the Commonwealth Supreme Court achieved the status of a state supreme court with its decisions reviewable only by the United States Supreme Court. See Jose S. Dela Cruz & Mia Giacomazzi, *The Present Commonwealth Judiciary*, in CNMI JUDICIARY, ABOUT THE COURTS: HISTORY 34, 37-38, [http://www.justice.gov.mp/pdf/history\\_ch6.pdf](http://www.justice.gov.mp/pdf/history_ch6.pdf).

15. DON A. FARRELL, HISTORY OF THE NORTHERN MARIANA ISLANDS 604 (1991). Public Law No. 94-241 ultimately passed the Senate with sixty-six votes, just one vote shy of the sixty-seven proponents had hoped for. *Id.*

peculiar union is that it is the result of a complex compromise among the variety of competing interests within the United States government—particularly among the Departments of State, Defense, and (later) the Interior—and between the United States government and the Congress of Micronesia, the Marianas Political Status Commission (“MPSC”),<sup>16</sup> and the United Nations.<sup>17</sup> The unintended consequences resulting from this peculiar union, especially with regard to immigration and refugee protection, are a reflection of the reality governing the merger of political ideals, pragmatism, and conflicting national policy.

This Comment will examine two of these unintended consequences: (1) gaps in the protection of refugees under international human rights law, and (2) inconsistent protection for battered spouses and children of United States citizens under federal immigration law. Issues regarding refugee protection, by implicating United States treaty obligations, have received international attention and have figured prominently in the debate over local versus federal control of CNMI immigration.<sup>18</sup> By contrast, the potential problems caused by an inconsistent policy regarding battered spouses and children of United States citizens has not received much attention, if any, although it is no less significant in terms of human cost and suffering. Both issues raise serious concerns with regard to vulnerable populations that the United States has committed to protect. In both situations, immigrants find that being on United States soil does not mean the same thing as being

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16. The MPSC represented the Marianas District in negotiations with the Personal Representative of the President of the United States regarding their future political relationship through the Covenant. *See* MARIANAS POLITICAL STATUS COMM’N, *supra* note 12, at 1.

17. On one hand, Micronesia generally and the Marianas more specifically were in a strategic military location and were seen as necessary for national security purposes even well after World War II; on the other hand, the end of the War and the rise of the United Nations marked the beginning of the movement towards self-determination for former colonies. *See* DONALD F. MCHENRY, MICRONESIA: TRUST BETRAYED 26-27, 54, 56-57, 66-68 (1975); HOWARD P. WILLENS & DEANNE C. SIEMER, NATIONAL SECURITY AND SELF-DETERMINATION: UNITED STATES POLICY IN MICRONESIA (1961-1972) 1-2 (2000).

18. *See* S. REP. NO. 110-324, at 16-18 (2008).

“in the United States,” and that for some, the difference in geography could very well mean the difference between persecution and protection.

This analysis is timely and relevant in light of the controversial “federal takeover” of the CNMI’s control of immigration under the Consolidated Natural Resources Act of 2008 (“CNRA”).<sup>19</sup> The takeover, which became effective on November 28, 2009,<sup>20</sup> phased out local control over immigration and established a timeline for the full applicability of federal immigration law. It was a decision that came after more than a decade of discussions, litigation,<sup>21</sup> and local legislation,<sup>22</sup> and was largely influenced—at least officially—by federal and international concerns over the United States’ treaty obligations under the 1967 Protocol Relating to the Status of Refugees<sup>23</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>24</sup> Whether for reasons of compliance with international obligations or for other reasons such as the United States military buildup in the Pacific, national security, and labor concerns, the federal takeover of immigration signified more than a change in laws for many of the indigenous people. To some, it represented a significant limitation, if not subversion, of

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19. Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 754 (codified in part at 48 U.S.C. § 1801 (2006)).

20. 8 C.F.R. § 1.1(bb) (2010).

21. In 2009, the CNMI sought a permanent injunction of the implementation of the Consolidated Natural Resources Act as it applied to the CNMI. The district court concluded that under the provisions of the Covenant, specifically Section 503, Congress was clearly authorized to enact the challenged provisions of the CNRA. *Northern Mariana Islands v. United States*, 670 F. Supp. 2d 65, 69, 73, 91 (D.D.C. 2009).

22. For example, the Act of Jan. 8, 2004, 2003 N. Mar. I. Pub. L. 13-61, available at [http://www.cnmilaw.org/pdf/public\\_laws/13/pl13-61.pdf](http://www.cnmilaw.org/pdf/public_laws/13/pl13-61.pdf), amended the Commonwealth Entry and Deportation Act of 1983 to comply with United States treaty obligations under the 1967 Protocol relating to the Status of Refugees and the Convention against Torture.

23. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

24. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, was the result of pressure to conform to these United States international obligations. S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85, 2003 N. Mar. I. Pub. L. 13-61.

the sovereignty that inspired the Marianas position during political status negotiations and one of the founding principles of the Covenant itself.<sup>25</sup>

Part I of this Comment will provide a brief political background of the Marianas and the negotiations leading to the signing of the Covenant. Part II will examine immigration law in the CNMI prior to the CNRA and some of the legal issues that have arisen out of the unique U.S.-CNMI political relationship—in particular, the ability of battered spouses and children to self-petition for adjustment of status under the Immigration and Nationality Act (“INA”).<sup>26</sup> Finally, Part III will focus on the controversy surrounding the development of a refugee protection system in the CNMI, how the protection offered differs from that which is afforded to refugees and asylees under the INA, and the future of refugee protection in light of the CNRA.

## I. BACKGROUND

After World War II, the rule of law in conjunction with self-determination became the primary goal of the United Nations with regard to newly liberated colonial and territorial possessions in Micronesia. Micronesia, which lies in the North and Central Pacific Ocean, is composed of 2100 islands in three island archipelagoes spread across approximately three million square miles of ocean.<sup>27</sup> Prior to World War II, nearly all of these territories, including the Marianas, were controlled by the Japanese imperial

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25. See, e.g., Gemma Q. Casas, *Indigenous Group Says Federalization Violates NMI Right to Self-Government*, MARIANAS VARIETY, Mar. 13, 2009, at 8, available at <http://www.mvariety.com/2009031215339/local-news/indigenous-group-says-federalization-violates-nmi-right-to-self-government.php>. During the Covenant negotiations, the distinction between a “commonwealth” and a “territory” was carefully considered by the people of the Northern Marianas. They ultimately chose a commonwealth relationship with the United States because it “provide[d] assurances of local self-government which would not be available under a traditional territorial relationship.” MARIANAS POLITICAL STATUS COMM’N, *supra* note 12, at 2-3.

26. Immigrant and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. § 1101). The current version of the INA (2010) may be accessed on the website of the United States Citizenship and Immigration Services (“USCIS”), <http://www.uscis.gov>.

27. WILLENS & SIEMER, *supra* note 17, at 1.

administration.<sup>28</sup> They were subsequently captured by American military forces, enabling the American military victory in the Pacific theater<sup>29</sup> and ultimately, the war. In 1947, the islands were combined to form the Trust Territory of the Pacific Islands (“TTPI”)<sup>30</sup> and placed under American administrative control per a trusteeship agreement with the United Nations Security Council.<sup>31</sup> The TTPI was originally divided into five, and then later six administrative districts: the Marianas, the Marshalls, Ponape, Truk, Yap, and Palau. Although politically united, the people of Micronesia were far from unified, with nine distinct languages and even more numerous local customs.<sup>32</sup>

Such was the setting into which the United States government entered with the goal of unifying diverse interests under an American policy that, although varying occasionally, always *officially* emphasized some form of permanent association with the United States.<sup>33</sup> Notable opposition in the beginning came from the Department of State—which opposed anything resembling annexation—

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28. See *About the CNMI*, NORTHERN MARIANA ISLAND COUNCIL FOR THE HUMANITIES, <http://www.nmihumanities.org/section.asp?navID=9> (last visited Mar. 29, 2011). A notable exception is the island of Guam, which is the southernmost island in the Marianas archipelago. “Geographically, culturally, and ethnically, Guam and the Northern Mariana Islands are a single entity whose political separation is ‘an accident of modern colonial history.’” Willens & Siemer, *supra* note 5, at 1375 (quoting S. REP. NO. 94-433, at 17 (1975)). Guam became a United States territorial possession along with the Philippines and Cuba after the Spanish-American War in 1898, and it was occupied for a short period of time by the Japanese during World War II, from December 10, 1941 to July 21, 1944. See PEDRO C. SANCHEZ, *GUAHAN GUAM: THE HISTORY OF OUR ISLAND* 75, 171 (1988). Through the Organic Act of Guam, passed by the United States Congress in 1950, Guam became an “unincorporated territory.” *Id.* at 302, 304. The rest of the Marianas, including what is now the CNMI, went from Spain to Germany via purchase in 1899, and then to Japan via League of Nations mandate following World War I. See *About the CNMI*, *supra*.

29. The *Enola Gay* departed from the neighboring island of Tinian, where the atomic bombs were housed. See MCHENRY, *supra* note 17, at 55.

30. The TTPI covered all of Micronesia except the United States territory of Guam, the independent republic of Nauru, and the British-held Gilbert Islands. NEVIN, *supra* note 1, at 43.

31. WILLENS & SIEMER, *supra* note 17, at 1.

32. HEINE, *supra* note 1, at 49; NEVIN, *supra* note 1, at 45; WILLENS & SIEMER, *supra* note 17, at 20.

33. HEINE, *supra* note 1, at 58.

and the military, backed by the United States Congress—which sought permanent control of Micronesia for national security reasons.<sup>34</sup> There was such disagreement between the two departments that military leaders and both Democratic and Republican senators from the Senate Naval Affairs Committee attended the San Francisco Conference of the United Nations in order to “‘make sure,’ lest the American delegation waver on the point regarding United States interests in the former Japanese-mandated islands.”<sup>35</sup> By the end of the conference, the TTPI, to be administered by the United States, was declared a “strategic trust,” which placed it under aegis of the UN Security Council, where the United States had veto power instead of the General Assembly.<sup>36</sup> It was the sole “strategic trust”—all other trusteeship agreements went to the now-defunct United Nations Trusteeship Council.<sup>37</sup>

In 1961, responsibility for the administration of the TTPI passed from the United States Navy to the Department of the Interior. Although formal administration was no longer controlled by the Department of Defense, military interest for control of Micronesia persisted amid growing international pressures—particularly from the United Nations—for the self-determination of former colonies. Ruth Van Cleve, former Director of the Interior’s Office of Territories from 1964 to 1969, described well the predicament faced by the United States:

[W]hile close and permanent association between the United States and the Trust Territory was regarded as acceptable to the U.S. Congress, that status would almost surely have encountered extreme hostility at the United Nations. Any political status for the Trust Territory that would be easily acceptable at the United

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34. *Id.* at 4.

35. *Id.* at 4, 9 (quoting JAMES N. MURRAY, JR., *THE UNITED NATIONS TRUSTEESHIP SYSTEM* 36 (1957)).

36. Willens & Siemer, *supra* note 5, at 1375 & n.7.

37. See Joseph E. Fallon, *Federal Policy and U.S. Territories: The Political Restructuring of the United States of America*, 64 PAC. AFF. 23, 29 (1991). The designation as a strategic trust “allowed the United States to exercise virtually complete control over the territory.” MCHENRY, *supra* note 17, at 6.

Nations would, on the other hand, then have encountered extreme hostility in the U.S. Congress.<sup>38</sup>

Adding to the tension between United States security strategy and United Nations diplomacy was the formation of the Congress of Micronesia in 1965, partly as a result of dissatisfaction with the continued neglect of development programs,<sup>39</sup> and partly as a result of Micronesians returning from higher education abroad—desiring a greater role in decision making processes governing their political destiny.<sup>40</sup>

In 1972, Saipan and the Marianas District sought to negotiate separately with the United States. The United States, anticipating this move, accepted the request and immediately began separate negotiations.<sup>41</sup> This separation from the Congress of Micronesia and the willingness of the United States to negotiate separately caused considerable consternation among the remaining five districts, which saw this as weakening the bargaining position of Micronesia as a whole.<sup>42</sup> The United Nations was likewise suspicious and had originally questioned the legitimacy of the new arrangement.<sup>43</sup> In response, the United States emphasized that according to the terms of the Trusteeship Agreement, it was to consider the wishes of the “peoples” of Micronesia; and that the Marianas, which was recognized as being distinct from the rest of Micronesia, had spoken and had asked of their own accord to enter into separate status negotiations.<sup>44</sup> Despite opposition, by 1975 the Congress of Micronesia and the United Nations had accepted the Marianas secession, leaving no real opposition to the

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38. MCHENRY, *supra* note 17, at 22 (quoting RUTH G. VAN CLEVE, *THE OFFICE OF TERRITORIAL AFFAIRS* 142 (1974)).

39. See HEINE, *supra* note 1, at 56. The period from 1951 to 1961 was commonly referred to as the “Rust Territory.” DAVID DAMAS, *BOUNTIFUL ISLAND: A STUDY OF LAND TENURE ON A MICRONESIAN ATOLL* 41 (1994).

40. See HEINE, *supra* note 1, at 44.

41. Willens & Siemer, *supra* note 5, at 1373, 1378 & n.20.

42. See HEINE, *supra* note 1, at 53.

43. See Willens & Siemer, *supra* note 5, at 1379 & n.28, 1380.

44. *Id.* at 1380 n.29.

Covenant forming a political union between the Northern Mariana Islands and the United States.<sup>45</sup>

Both the United States and the Marianas District had an interest in a closer alliance. On the United States side, the military interest was still present since the Marianas, perhaps more than the other islands in Micronesia, was strategically important in the past and possibly in the future. Saipan was the site of CIA operations in Micronesia.<sup>46</sup> Guam, which had a United States military base, proved militarily indefensible on its own during World War II,<sup>47</sup> and it was also geographically a part of the Marianas archipelago. The District's location in the northwest corner of Micronesia also made it closer than most of the other islands to various Asian countries of interest, such as Japan and China—but not close enough to be too vulnerable.<sup>48</sup> If not in Micronesia, the closest military bases to Asia on United States soil would be in Hawaii, which would be too far.<sup>49</sup>

On the Marianas side, there was also much interest in a closer relationship with the United States for several reasons. First, there was a desire for reunification with Guam, which shared the same language and culture with the rest of the Marianas.<sup>50</sup> Second, there were talks of opening a military base on the island of Tinian, which was

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45. *Id.* at 1380 & n.31.

46. NEVIN, *supra* note 1, at 78.

47. *See id.* at 72.

48. *See id.*

49. MCHENRY, *supra* note 17, at 69-70. Although the United States had military bases in several Asian countries, Defense officials saw a need for facilities on United States-controlled soil in the Pacific in case these countries expelled the United States military from their territory, and also because certain military activities were restricted in some Asian countries. *Id.* at 69.

50. *See* James A. Branch, Jr., *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?* 9 DENV. J. INT'L L. & POL'Y 35, 55 (1980). In 1969, the people of Guam voted against reintegration with the rest of the Marianas. FARRELL, *supra* note 15, at 543. The people of the Northern Marianas, however, still voted in favor of integration. *Id.* There are several theories as to why Guam voted against reunification, including lack of information and a fear of a weaker economy. *See id.* at 543-46.

seen as a potential revenue-generator.<sup>51</sup> Third, the Marianas was seen as particularly distinguished from the rest of Micronesia—culturally and economically.<sup>52</sup> Finally, as a result of the United States policy of insulating Micronesia, specifically the Marianas, from any other outside influence, the Marianas was economically dependent on the United States and did not really have any other model upon which to base its governance.<sup>53</sup>

Although the Marianas District was more receptive to ideas of integration, negotiations with the United States were not always without incident, and a final agreement took over two years and five drafts.<sup>54</sup> The Marianas, which if the Covenant were accepted would become a “commonwealth,” felt that there should be a distinction between a commonwealth and a territory, with more powers of self-government afforded to a commonwealth.<sup>55</sup> The United States, by contrast, desired no such distinction.<sup>56</sup> The Marianas wanted to reserve the ability to unilaterally terminate the agreement, a request which the United States denied.<sup>57</sup> Instead, mutual consent became the guiding principle of the Covenant. As critics point out, this agreement does not follow United Nations guidelines for either “free association” or “integration.”<sup>58</sup> It is not a compact for free association since there is a mutual consent provision, nor is it an agreement for integration because, although residents were granted United States citizenship,

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51. See MCHENRY, *supra* note 17, at 65. Micronesians have generally favored United States military presence, in part for economic reasons. *Id.* at 68.

52. See Willens & Siemer, *supra* note 5, at 1379.

53. The CIA base that was on Saipan meant not only economic advantages for the Marianas more than for other Micronesian districts, it also meant the area was highly restricted for “security reasons.” See MCHENRY, *supra* note 17, at 57. According to one author, the United States had “consciously frozen out other influences,” which included barring trade until 1974, two years after separate negotiations with the Marianas District began, and making it difficult for people to travel outside the region. NEVIN, *supra* note 1, at 25; see also HEINE, *supra* note 1, at 56-57.

54. Leibowitz, *supra* note 3, at 22 n.9.

55. *Id.* at 24-25.

56. *Id.*

57. See *id.* at 60.

58. Fallon, *supra* note 37, at 27-28.

they lack the ability for full participation in the government process—they have no representatives in the United States Congress and they are ineligible to vote for President unless they move to and establish residency in one of the several states.<sup>59</sup> Nevertheless, the process towards a political union, albeit ambiguous, continued between the parties and on June 17, 1975, 78.8% of the eligible voters in the Northern Marianas voted in favor of the Covenant.<sup>60</sup> A month later the Covenant was approved by the United States House of Representatives.<sup>61</sup>

Although the Covenant passed in the House easily, it was met with some opposition in the Senate. Opposition included senators who preferred that the Marianas be a part of Micronesia, and some who thought that this separate agreement was a violation of UN guidelines on self-determination.<sup>62</sup> Others felt that the Covenant would unfairly benefit the Marianas compared to other states, and still others felt the land restrictions to those of Northern Marianas descent were unconstitutional since United States citizens of Northern Marianas descent could purchase land on the mainland United States, but United States citizens who were not of Northern Marianas descent could not purchase land in the Commonwealth.<sup>63</sup>

To overcome opposition, negotiators on both sides lobbied individual senators. The Department of Defense also publicly supported the Covenant and issued a statement asserting that “[p]olitically, economically, and militarily, it is in the national interest of the United States to be capable of maintaining an equilibrium of power in the East Asia and Pacific region” and that this would require a “credible presence on the part of the United States, particularly in a military sense—to demonstrate resolve . . . to protect economic interests.”<sup>64</sup> In February of 1976, more than seven months after the Covenant had cleared the House, the Senate passed the resolution with sixty-six votes supporting

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59. *See id.* at 26 & n.4, 27-29.

60. FARRELL, *supra* note 15, at 600.

61. *Id.* at 601.

62. *Id.* at 602.

63. *Id.*

64. *Id.* at 603 (quoting Robert Ellsworth, then Deputy Secretary of Defense, U.S. Department of Defense).

the Covenant.<sup>65</sup> Exactly one month after the Senate vote, President Ford signed Public Law 94-241 and the Commonwealth of the Northern Mariana Islands became the newest member in the American political family.<sup>66</sup>

## II. IMMIGRATION LAW PRIOR TO THE CNRA AND VAWA SELF-PETITIONERS

Article V, Section 503 of the Covenant expressly states that the immigration and nationality laws of the United States “will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement.”<sup>67</sup> This local authority over immigration was a major distinguishing feature of the U.S.-CNMI relationship that differentiated it from any other territorial relationship, including that with the Commonwealth of Puerto Rico.<sup>68</sup> Exceptions to the inapplicability of United States immigration and naturalization laws are found in Section 506:

(a) [T]he Northern Mariana Islands will be deemed to be a part of the United States under the Immigration and Nationality Act, [8 U.S.C. 1101], as amended . . . to the extent indicated in each of the following Subsections of this Section.

(b) With respect to children born abroad to United States citizen or non-citizen national parents permanently residing in the Northern Mariana Islands the provisions of Sections 301 and 308 of [the INA] will apply.

(c) With respect to aliens who are “immediate relatives” . . . of United States citizens who are permanently residing in the Northern Mariana Islands all the provisions of [the INA] will apply . . .<sup>69</sup>

According to the MPSC, which negotiated the Covenant on behalf of the Marianas, Subsection (a) emphasized the limited applicability of the INA only to address “certain

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65. *Id.* at 604.

66. *Id.* at 605.

67. Covenant, *supra* note 2, art. V § 503(a).

68. MARIANAS POLITICAL STATUS COMM’N, *supra* note 12, at 55-56.

69. Covenant, *supra* note 2, art. V §§ 506(a)-(c).

problems [that] could arise which would be bothersome and annoying to the people of the Northern Marianas”<sup>70</sup>—namely, how to deal with children born outside of the United States or the CNMI to United States citizen or non-citizen national parent(s),<sup>71</sup> and how to deal with immediate relatives of United States citizens permanently residing in the CNMI.<sup>72</sup> Subsections (b) and (c) were deemed necessary to ensure that these groups would not be considered aliens.<sup>73</sup> Overall, Section 506 was intended to be supplementary to the immigration laws of the CNMI.<sup>74</sup>

Because the INA was for the most part inapplicable, the language of the statute did not expressly include the CNMI in the definition the “United States,” nor did it expressly exclude it: “[t]he term ‘United States,’ except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.”<sup>75</sup> This definition of the “United States” would become particularly problematic for immigrant victims of severe domestic abuse who wanted to escape the violence in their homes, but still wanted to maintain their “immediate relative” status and eventually naturalize as United States citizens.

In general, the INA requires that immigration petitions be filed by either an employer or relative. Because this

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70. MARIANAS POLITICAL STATUS COMM’N, *supra* note 12, at 62.

71. Under the INA, a “non-citizen national” is a United States national but not a United States citizen. While all United States citizens are considered United States nationals, a very narrow category of persons are considered United States nationals, but *not* United States citizens. These include persons born in or having ties with “an outlying possession of the United States” (i.e., American Samoa and Swains Island), as well as those in the CNMI who opted for non-citizen national status instead of United States citizenship under Section 302 of the Covenant. See *Certificates of Non Citizen Nationality*, U.S. DEPT OF STATE, BUREAU OF CONSULAR AFFAIRS, [http://www.travel.state.gov/law/citizenship/citizenship\\_781.html](http://www.travel.state.gov/law/citizenship/citizenship_781.html) (last visited Mar. 30, 2011).

72. MARIANAS POLITICAL STATUS COMM’N, *supra* note 12, at 62-63.

73. *Id.* at 63.

74. *Id.* at 62.

75. *Ahmed v. Goldberg*, No. Civ.A. 00-0005, 2001 WL 1842399, at \*5 n.19 (D. N. Mar. I. May 11, 2001) (quoting the INA, 8 U.S.C.A. § 1101(a)(38) (1999)). 8 U.S.C.A. § 1101(a)(38) (2010) now includes “the Commonwealth of the Northern Mariana Islands.”

process is heavily dependent on the United States citizen or lawful permanent resident (“LPR”)<sup>76</sup> relative, it is often used as a tool of abuse for many immigrant victims of domestic violence.<sup>77</sup> Immigrants can be particularly vulnerable to abuse due to differences in language, unfamiliarity with the law, and separation from family and friends in their home country; these differences in turn can adversely affect access to resources and can create greater isolation for immigrant victims of abuse than for non-immigrant victims.<sup>78</sup> When children are involved, immigrant victims may also be more reluctant to leave abusive relationships or to report abusive spouses. For instance, if the immigrant victim is not lawfully present in the United States and the abuser is either a United States citizen or LPR, the abuser may threaten to report the victim to immigration officials or to have the victim deported while the children remain in the United States with the abuser.<sup>79</sup> If the abuser is a non-citizen and the victim reports the abuse to the police, there is a possibility that the abuser will be subject to deportation or removal, which can then lead to other consequences, such

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76. According to United States Citizenship and Immigration Services (“USCIS”), a “Lawful Permanent Resident (LPR)” is defined as “[a]ny person not a citizen of the United States who is residing in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant. Also known as ‘Permanent Resident Alien,’ ‘Resident Alien Permit Holder,’ and ‘Green Card Holder.’” *U.S. Dep’t of Homeland Sec. Glossary Definition of “LPR”*, USCIS, <http://www.uscis.gov> (follow “RESOURCES” hyperlink; then follow “Glossary” hyperlink; then follow “Lawful Permanent Resident (LPR)” hyperlink) (last visited Mar. 30, 2011).

77. *Fact Sheet: USCIS Issues Guidance for Approved Violence Against Women Act (VAWA) Self-Petitioners*, USCIS, <http://www.uscis.gov> (follow “NEWS” hyperlink; then follow hyperlink to fact sheet under 04/22/2008) (last visited Mar. 30, 2011) [hereinafter USCIS Guidance for Self-Petitioners].

78. Cecilia Menjivar & Olivia Salcido, *Immigrant Women and Domestic Violence: Common Experiences in Different Countries*, 16 GENDER & SOC’Y 898, 903-06 (2002); see also *Information on the Legal Rights Available to Immigrant Victims of Domestic Violence in the United States and Facts about Immigrating on a Marriage-Based Visa Fact Sheet*, USCIS, <http://www.uscis.gov> (follow “NEWS” hyperlink; then follow “Fact Sheets” hyperlink; then follow hyperlink to fact sheet under 01/11/2011) (last visited Mar. 30, 2011).

79. Lori L. Cohen, *Representing Immigrant Victims of Domestic Violence*, in LAWYER’S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM 309, 311 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 5th ed. 2006), available at <http://www.courts.state.ny.us/ip/womeninthecourts/DV-Lawyers-Manual-Book.pdf>.

as loss of a source—sometimes the only source—of income and retaliation against the victim’s family members abroad.<sup>80</sup>

In the CNMI, immigrant spouses face the same vulnerabilities, and the reasons for remaining in abusive relationships likewise are no different. Many of these families include children who were born in the CNMI and who are unfamiliar with any other culture or any language other than English. Economic realities also play a role in the reluctance to leave. Battered spouses—usually women—who came from developing countries do not want to return to severe poverty with their United States citizen children who could at least receive public assistance in the CNMI and the opportunity, at least it is hoped, for a better life; but more importantly, they do not want to risk the possibility of leaving the child or children behind with the abusive spouse.

In response to the problem of abusive family members using immigration status as a tool of coercion, the Violence Against Women Act (“VAWA”)<sup>81</sup> passed by the United States Congress allows abused spouses and children the opportunity to “self-petition” or independently seek legal immigration status in the United States.<sup>82</sup> The first step in that process is filing an I-360 Petition with the United States Citizenship and Immigration Services (“USCIS”).<sup>83</sup> There are seven requirements that every applicant must meet in order to qualify to become a self-petitioner<sup>84</sup>:

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80. *See id.* at 312. A conviction for a crime of domestic violence, stalking, child abuse, or violation of an order of protection can make an immigrant removable. *Id.*

81. Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (codified as amended at 42 U.S.C. § 13701 note (2006)).

82. *See* USCIS Guidance for Self-Petitioners, *supra* note 77.

83. *See Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant*, OMB No. 1615-0020, USCIS, <http://www.uscis.gov/files/form/i-360.pdf> (last visited Mar. 30, 2011) [hereinafter Form I-360]. This form is used by a variety of other groups or “special immigrants” such as religious workers, armed forces members, physicians, and Iraq or Afghani nationals who served as translators for the United States Armed Forces.

84. *Instructions for Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant*, OMB No. 1615-0020, 6, USCIS, <http://www.uscis.gov/files/form/i-360instr.pdf> (last visited Mar. 30, 2011) [hereinafter Instructions for Form I-360].

(1) The applicant must currently be the “spouse or child of an abusive U.S. citizen or lawful permanent resident”;<sup>85</sup>

(2) The applicant must be “eligible for immigrant classification based on that relationship”;<sup>86</sup>

(3) The applicant must be “[currently] residing in the United States or have resided in the United States with the U.S. citizen or lawful permanent resident abuser in the past”;<sup>87</sup>

(4) The applicant must “[h]ave been battered by or have been the subject of extreme cruelty” perpetrated by the United States citizen or lawful permanent resident spouse during the marriage; or be the “parent of a child who has been battered by or has been the subject of extreme cruelty perpetrated by [the applicant’s] abusive citizen or lawful permanent resident spouse during [the] marriage;” or else the applicant must have been battered or have been the subject of extreme cruelty perpetrated by the citizen or lawful permanent resident parent while living with the parent;<sup>88</sup>

(5) The applicant must be “a person of good moral character”;<sup>89</sup>

(6) The applicant must be “a person whose removal or deportation would result in extreme hardship” to the applicant or the applicant’s child if applicant is a spouse;<sup>90</sup> and

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85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* Section 101(f) of the INA describes the classes of aliens who are statutorily ineligible to be considered persons of good moral character. See Interoffice Memorandum from William R. Yates, Assoc. Dir. of Operations, USCIS, to Paul E. Novak, Dir., Vermont Serv. Ctr. (Jan. 19, 2005), available at [http://www.uscis.gov/files/pressrelease/GMC\\_011905.pdf](http://www.uscis.gov/files/pressrelease/GMC_011905.pdf) (last visited Mar. 30, 2011) (describing the unique situation of domestic violence and the availability of waivers for certain conduct that adversely affects a finding of good moral character).

90. Instructions for Form I-360, *supra* note 84, at 6.

(7) If the applicant is an abused spouse, that the marriage with the abusive citizen or lawful permanent resident spouse was entered into “in good faith.”<sup>91</sup>

The legal issue with abused immigrant spouses and children in the CNMI was that in order to be eligible to apply as self-petitioners using the I-360, they must have been currently residing in, or at one time have resided with the abuser “in the United States.”<sup>92</sup> According to the INA (pre-CNRA), the “United States” when used in a geographical sense did not expressly include the CNMI.<sup>93</sup> This reasoning became the basis for the rejection of an I-360 submitted on behalf of an applicant residing in the CNMI. Compounding the disappointment surrounding this decision and confounding victims’ advocates was the fact that earlier I-360 petitions from applicants in the CNMI had been approved by USCIS;<sup>94</sup> thus, to reject an application based on geographical ineligibility simply did not make any sense.

Furthermore, the decision to leave a violent relationship or to risk the suspicion of leaving through filing a self-petition is often a dangerous process. It is especially dangerous for immigrants in the CNMI, where the largest island of Saipan is about thirteen miles long and six miles wide, and where there are only two other smaller islands to which they could lawfully flee with only a CNMI entry permit.<sup>95</sup> For this reason, the denial of a petition based on a geographical technicality was also a halt in the progress towards greater protection of domestic violence victims, as well as a perpetuation of the cycle of violence against women and children.

Although the CNMI was not expressly included in the geographical definition of the “United States,” the answer to the legal question of whether “immediate relatives” of citizens and LPRs residing in the CNMI could file VAWA

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91. *Id.*

92. *Id.*

93. *See supra* note 75 and accompanying text.

94. *See* Interview with Jane Mack, Marianas Directing Attorney, Micronesian Legal Servs. Corp., in Saipan, CNMI (June 8, 2009).

95. The “Immediate Relative of Non-Alien Entry Permit” allows immediate relatives of non-alien to remain in the CNMI only and must be renewed yearly at the discretion of the CNMI Director of Immigration. 5 N. MAR. I. ADMIN. CODE § 40.1-638 (2004).

self-petitions was still not so clear, and the legal representatives for the rejected applicant argued based on the Covenant that immediate relatives were, in fact, eligible to self-petition despite the apparent lack of at least one of the essential elements of eligibility: current or past residence with the abuser “in the United States.”<sup>96</sup> Under Section 506(c) of the Covenant, the CNMI is considered part of the United States for people seeking permanent residency as immediate relatives:

With respect to aliens who are “immediate relatives” (as defined in Subsection 201(b) of the [INA]) of United States citizens who are permanently residing in the Northern Mariana Islands all the provisions of the [INA] will apply, commencing when a claim is made to entitlement to “immediate relative” status. A person who is certified by the Government of the Northern Mariana Islands both to have been a lawful permanent resident of the Northern Mariana Islands and to have had the “immediate relative” relationship denoted herein . . . will be presumed to have been admitted to the United States for lawful permanent residence as of that date without the requirement of any of the usual procedures set forth in the [INA].<sup>97</sup>

Thus, the CNMI can be considered the “United States” for purposes of “immediate relative” petitions, including petitions under VAWA.

A second argument for the eligibility of “immediate relatives” in the CNMI to self-petition is found in Section 502(a) of the Covenant, which states:

The following laws of the United States in existence on the effective date of [the Covenant] and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as

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96. See Instructions for Form I-360, *supra* note 84, at 6; Form I-360, *supra* note 83, at 8. These two arguments were made on appeal by Micronesian Legal Services Corporation (“MLSC”) on behalf of a client whose application was rejected for lack of eligibility. See Interview with Jane Mack, Marianas Directing Attorney, Micronesian Legal Servs. Corp., in Saipan, CNMI (Mar. 23, 2010). MLSC is a nonprofit legal aid organization that provides free legal assistance in civil matters to low income residents in the CNMI, the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands. *About Micronesian Legal Services Corporation*, MLSC, MICRONESIALAWHELP.ORG, <http://mlsnet.org/FM/StateAboutUs.cfm/County/%20/City/%20/demoMode/%3D%201/Language/1/State/FM/TextOnly/N/ZipCode/%20/LoggedIn/0> (last visited Mar. 30, 2011).

97. Covenant, *supra* note 2, art. V § 506(c).

otherwise provided in this Covenant: (1) [laws pertaining to federal assistance and banking as they apply to Guam]; (2) *those laws . . . which are applicable to Guam and which are of general application to the several states . . .*<sup>98</sup>

VAWA, Division B of the Victims of Trafficking and Violence Protection Act of 2000 (“VTVPA”),<sup>99</sup> amends the Omnibus Crime Control and Safe Streets Act of 1968,<sup>100</sup> which applied to Guam at the time of the Covenant and therefore to the CNMI through Section 502(a)(2) of the Covenant when it came into effect. Thus, the 1968 Act and its subsequent amendments (including VAWA) apply to the CNMI. Further evidence of the eligibility for immediate relatives to self-petition under VAWA can be inferred from the text of VAWA itself, which specifies the CNMI in the allocation of grant money for shelter services.<sup>101</sup>

Despite these two arguments, which were brought up in the appeal against the decision rejecting the self-petition from the CNMI, USCIS maintained that the language of the INA was clear that the definition of the “United States” excluded the CNMI, and that the requirement of past or current residence “in the United States” therefore could not be met. This problematic policy inconsistency was ultimately resolved informally in favor of CNMI self-petitioners during the pendency of another review.<sup>102</sup> Like many other issues arising out of the unique federal-CNMI relationship, the situation was resolved through political instead of legal reasoning. By this time, the CNRA had already passed and it would only be a matter of months before the INA would include the CNMI in the definition of the “United States,” thereby dissolving any ambiguity with regard to eligibility.

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98. *Id.* § 502(a)(1)-(2) (emphasis added).

99. Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (codified as amended at 42 U.S.C. § 13701 note (2006)).

100. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 42 U.S.C. § 3796 (2006)); *see also* Violence Against Women Act § 1101 (amending Omnibus Crime Control and Safe Streets Act).

101. Violence Against Women Act §1202(b)(1).

102. *See* Interview with Jane Mack, *supra* note 96.

### III. CONCERNS OVER REFUGEES AND THE DEVELOPMENT OF A REFUGEE PROTECTION SYSTEM

While the unintended consequences concerning victim rights and VAWA self-petitions were recent problems that were resolved rather quietly without media attention, the situation regarding refugee protection has been an ongoing international concern for over a decade, and constitutes one of the official policy reasons buttressing the argument for federal control of CNMI immigration under the CNRA. Two articles of the Covenant are relevant to the debate over the implementation of United States obligations regarding refugees in the CNMI: (1) Article I, which concerns the political relationship between the two entities and establishes the “Covenant . . . together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands” as “the supreme law” of the land;<sup>103</sup> and (2) Article V, which declared the inapplicability of most of the INA<sup>104</sup> as well as the “minimum wage provisions of [the Fair Labor Standards Act of 1938].”<sup>105</sup>

The INA and the minimum wage exemptions combined with the quota-free and duty-free status of the CNMI were specifically created to facilitate the economic development of the islands.<sup>106</sup> The exemption from United States immigration laws allowed for the mass hiring of workers, especially unskilled workers who would otherwise be unable to qualify under the INA.<sup>107</sup> These workers came from neighboring countries in Asia and were hired to work in the emerging garment, construction, and tourism industries, which could not be fully staffed by the local population of fewer than seventeen thousand people.<sup>108</sup> Local control of immigration also allowed for an easier process for tourists from Asia and other countries to physically enter the CNMI without visas or pre-screening from United States consular

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103. Covenant, *supra* note 2, art. I § 102.

104. *Id.* art. V § 503(a).

105. *Id.* § 503(c).

106. Rose Cruz Cuison, Comment, *The Construction of Labor Abuse in the Mariana Islands as Anti-American*, 6 ASIAN PAC. AM. L.J. 61, 71 (2000).

107. *Id.*

108. *Id.*

officers.<sup>109</sup> The minimum wage exemptions were created in consideration of the CNMI's young and developing economy that "[could not] support the minimum wage laws which [were] . . . based on the cost of living and the prevailing wage levels in the highly developed American economy."<sup>110</sup>

As a result of this arrangement, the economy strengthened and correspondingly, the number of workers and tourists from Asia increased dramatically.<sup>111</sup> The attractiveness of the CNMI as "U.S. soil" also increased for those who might be seeking protection as refugees, but who otherwise would not be able to enter Guam, which is only forty-five minutes from the CNMI by plane.<sup>112</sup> The CNMI was also potentially attractive to the United States government when it came to diverting boatloads of illegal immigrants from China seeking to enter Guam. According to a local newspaper reporting on one in a series of boatloads carrying undocumented Chinese illegal immigrants to the island of Tinian in April of 1999:

Aside from overcrowding at the facilities in Guam, local officials here say diverting these Chinese illegals would ease worries of the US Immigration and Naturalization Service over the growing incursions by illegal immigrants since these aliens would be automatically excluded by the CNMI immigration office. The first batch of Chinese illegals on Tinian were declared excluded since

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109. See *Northern Mariana Islands Covenant Implementation Act and Northern Mariana Islands Delegate Act: Hearing on H.R. 3079 Before the Subcomm. on Insular Affairs of the H. Comm. on Natural Resources*, 110th Cong. (2007) (statement of David B. Cohen, Deputy Assistant Sec'y, U.S. Interior for Insular Affairs), reprinted in *Cohen's Statement Before the House Subcommittee*, SAIPAN TRIB., Aug. 20, 2007, <http://saipantribune.com/newsstory.aspx?cat=3&newsID=71520> [hereinafter *Cohen's Statement*] (discussing concerns over the apparent ease with which tourists may enter the Commonwealth without a pre-screening process similar to that utilized by the federal government).

110. MARIANAS POLITICAL STATUS COMM'N, *supra* note 12, at 57-58.

111. See *id.* at 72-73.

112. See, e.g., Liberty Dones, *7 Tourists Apply for Refugee Protection*, SAIPAN TRIB., May 8, 2006, <http://saipantribune.com/newsstory.aspx?newsID=57300&cat=1>. These overstaying tourists applied in 2006, when there was already a refugee protection system in place. It is not clear how many people, if any, entered the CNMI as tourists and later sought protection prior to 2005, when the local refugee protection regulations were finally adopted.

they were considered undocumented aliens under the Commonwealth immigration laws.<sup>113</sup>

It was becoming increasingly clear that, whether through diversion, tourism, or immigration, more and more people were entering the CNMI who could potentially qualify as refugees, but there was yet no standardized process of addressing claims systematically.<sup>114</sup> Although there was an Immigration and Naturalization Service (“INS”) representative on the main island of Saipan, asylum/refugee applications were rejected and applicants were informed that no INS office would process their applications.<sup>115</sup> Reasons for the inability to process applications ranged from the near-plenary power of the CNMI over its immigration to the inability of the CNMI to grant anything like “political asylum” because such an act would be a foreign affairs function that belonged exclusively to the federal government.<sup>116</sup> This growing problem did not go unnoticed in Washington, D.C. The year before, in 1998, the Congressional Commission on Immigration Reform recommended that a system for asylum be established, but the proposal was ultimately “swept under the rug.”<sup>117</sup>

While the issue of the applicability of federal refugee/asylum laws was receding into a topic of “silent debate[ ]” in Congress,<sup>118</sup> it was resurfacing in the courts. In 2001 the Federal District Court for the Northern Mariana

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113. Cookie B. Micaller, *Another Chinese Boat Diverted to Tinian*, SAIPAN TRIB., Apr. 26, 1999, <http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=1806>. The attempts to enter Guam via boat from the CNMI continued to be problematic. See, e.g., Ferdie de la Torre, *5 More Defendants in Human Smuggling Case Plead Guilty*, SAIPAN TRIB., Jan. 26, 2010, <http://saipantribune.com/newsstory.aspx?cat=1&newsID=96759>.

114. According to another news article, eighty-nine of approximately 537 boat people held on Tinian in 1999 were sent to the United States “for potential asylum processing under the United Nations guidelines.” *INS Rejects Asylum Applications. Lawyer Jorgenson Says He May Take Court Action*, SAIPAN TRIB., Aug. 14, 1999, <http://saipantribune.com/newsstory.aspx?newsID=3255&cat=1> [hereinafter *INS Rejects Asylum Applications*].

115. *Asylum Seekers Sue US, CNMI Governments*, SAIPAN TRIB., Sept. 3, 1999, <http://saipantribune.com/newsstory.aspx?cat=1&newsID=3534>.

116. *INS Rejects Asylum Applications*, *supra* note 114.

117. *Id.*

118. *Id.*

Islands finally addressed the issue of applicability in *Ahmed v. Goldberg*.<sup>119</sup> In *Ahmed*, the plaintiffs argued that the failure of the CNMI to provide asylum/refugee regulations violated the 1967 Protocol relating to the Status of Refugees (“Protocol”) and customary international law.<sup>120</sup> With regard to the claims based directly on the Protocol, the court held that as a non-self-executing treaty, the provisions of the Protocol are not directly enforceable by a private party in court, and therefore the plaintiffs could not state a claim for relief based on those provisions.<sup>121</sup>

The court next addressed the plaintiffs’ claims based on the implementing legislation for the Protocol—the INA as amended by the 1980 Refugee Act. The court found that “the Covenant which governs the applicability of federal law to the CNMI, renders most INA provisions inapplicable to the CNMI, including the provisions for asylum and withholding of [removal].”<sup>122</sup> The court reasoned that “[t]he purpose of restricting the INA is to allow the CNMI to control its own immigration” and that “[t]his authority includes the granting of political asylum and refugee status within the CNMI because of the close nexus with immigration.”<sup>123</sup> Thus, the CNMI was not constrained by the INA and the “violation of inapplicable INA provisions would not subject the CNMI to liability.”<sup>124</sup>

The plaintiffs’ third Protocol-based argument was that the Protocol was the supreme law of the land under the Covenant and a “part of CNMI law through the CNMI’s adoption of the Restatements of Law.”<sup>125</sup> They cited Section

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119. *Ahmed v. Goldberg*, No. Civ.A. 00-0005, 2001 WL 1842399 (D. N. Mar. I. May 11, 2001). This was a consolidated case with *Liang v. Goldberg*, No. Civ.A. 99-0046, 2001 WL 1842399 (D. N. Mar. I. May 11, 2001).

120. *Ahmed*, 2001 WL 1842399, at \*3, \*5.

121. *Id.* at \*4.

122. *Id.*

123. *Id.* (citing *Tran v. CNMI*, 780 F. Supp. 709, 713 (D. N. Mar. I. 1991)).

124. *Id.*

125. *Id.*

In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the

111(1) of the Restatement (Third) of the Foreign Relations Law of the United States, which states that international agreements of the United States are the “law of the United States and supreme over the law of the several states” and that “[i]nterpretations of international agreements by the United States Supreme Court are binding on the States.”<sup>126</sup> The plaintiffs then argued that the CNMI’s lack of an asylum procedure and its discretionary *nonrefoulement* provision<sup>127</sup> were incongruous with Supreme Court interpretations of the Protocol.<sup>128</sup> In response, the district court turned to the supremacy clause of the Covenant, which refers to the “treaties and laws of the United States applicable to the Northern Mariana Islands” as being the “supreme law” of the land.<sup>129</sup> The court found that based on this clause “only *applicable* international agreements of the United States are considered to be the supreme law of the CNMI, and the Protocol [did] not appear to fall within that purview.”<sup>130</sup> The court ultimately held that because the Protocol’s implementing legislation excluded the CNMI, it could not be considered applicable federal law under the Covenant; therefore, the plaintiffs could not state a claim for relief “based on the repugnancy of CNMI law to the Protocol.”<sup>131</sup>

Finally, the plaintiffs argued that the provisions of the 1951 Refugee Convention and 1967 Protocol are a part of

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Commonwealth, in the absence of written law or local customary law to the contrary.

*Id.* at \*4 n.14 (quoting 7 N. MAR. I. CODE § 3401 (2004)).

126. *Id.* at \*4.

127. “The Attorney General *may* decline to designate as destination any country where in his opinion the excluded or deported person would be subject to persecution on account of race, religion or political persuasion.” 3 N. MAR. I. CODE § 4344(d) (2004) (emphasis added). The principle of *nonrefoulement* “guarantees that individuals have the right not to be forcibly returned to countries where they face persecution.” David Weissbrodt & Isabel Hörtreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 2 (1999).

128. *Ahmed*, 2001 WL 1842399, at \*4.

129. *See* Covenant, *supra* note 2, art. I §102.

130. *Ahmed*, 2001 WL 1842399, at \*4.

131. *Id.* at \*5.

customary international law and involve *jus cogens*<sup>132</sup> norms that are binding on the CNMI.<sup>133</sup> The court found that customary international law was applicable and that the Covenant and the INA “show no clear intent . . . to preclude” its application, nor would its application be in conflict with the plain language of the INA or the Covenant.<sup>134</sup> Following the *Charming Betsy* principle that “to the extent possible, courts must construe federal law so as to avoid violating principles of public international law,”<sup>135</sup> the court refused to “presume that Congress intended to preempt [the] application [of customary international law relating to asylum], thereby permitting the CNMI to exercise its immigration authority without regard to international standards.”<sup>136</sup> However, the court found that the plaintiffs “failed to clearly identify a ‘specific, universal and obligatory’ principle of customary international law relating to their asylum claims” and thus they “failed to sufficiently state a claim for relief.”<sup>137</sup> The court ultimately dismissed the relevant claims but granted leave to amend.

In the aftermath of *Ahmed*, more pressure was placed on the CNMI government to adopt a system that would comply with the Refugee Convention and Protocol as well as the Convention Against Torture (“CAT”), even if it did not exactly mirror the federal system. In September of 2003, the governor of the CNMI and the Department of the Interior’s Office of Insular Affairs (which administers the relationship between the United States and its territories) signed a memorandum of agreement to address federal concerns over refugee protection.<sup>138</sup> The local legislature also passed Public Law 13-61 to amend the Commonwealth Entry and Deportation Act and to require the Attorney General to

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132. “*Jus cogens* is a legal concept in international law which argues that there are rights so fundamental to society that any law which abridges them is automatically voided.” Fallon, *supra* note 37, at 29 n.15.

133. *Ahmed*, 2001 WL 1842399, at \*5.

134. *Id.* at \*6.

135. *Id.* (citing *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)).

136. *Id.* (citing *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)).

137. *Id.* at \*8.

138. See *Cohen’s Statement*, *supra* note 109.

promulgate regulations to implement the requirements of the Protocol and CAT.<sup>139</sup> The legislature emphasized, however, that it retained “exclusive jurisdiction over matters related to immigration” and stressed that “provisions set forth in the United States Code relat[ing] to immigration, asylum, or refugee status do not apply within the Commonwealth and may not be relied upon by any individual within the Commonwealth seeking relief pursuant to any such provision of the United States Code.”<sup>140</sup>

Public Law 13-61 notably removed the Attorney General’s discretion with regard to removal (i.e., deportation) if it was “more likely than not that the person’s life or freedom would be threatened in that country on account of his or her race, religion, nationality, membership of a particular social group or political opinion, or that the person would be tortured if removed to the proposed country of origin . . . .”<sup>141</sup> Under the statute, the decision of the Attorney General would be “final and unreviewable administratively or judicially.”<sup>142</sup> Although Public Law 13-61 was signed into law in January of 2004, the proposed regulations implementing the law were not adopted until September of 2004, with the final amendments being adopted in 2005, due to USCIS and United Nations High Commissioner for Refugees (“UNHCR”) dissatisfaction with the initial and amended regulations.<sup>143</sup>

The major difference between the refugee protection system that was eventually established and the United

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139. 2003 N. Mar. I. Pub. L. 13-61, §§ 1-2.

140. *Id.* § 1.

141. *Id.* § 2(d). The original provision stated: “The Attorney General may decline to designate as destination any country where in his opinion the excluded or deported person would be subject to persecution on account of race, religion or political persuasion.” *Id.*

142. *Id.*

143. See Agnes E. Donato, *CIS, UN Unsatisfied with NMI Asylum Regs*, SAIPAN TRIB., Aug. 27, 2004, <http://saipantribune.com/newsstory.aspx?cat=1&newsID=39880>. Changes to the original policy as a result of USCIS and UNHCR recommendations included allowing for qualified interpreters, extending the filing deadline from three to ten days, and instituting a review procedure for claims that are determined to be clearly unfounded. See Agnes E. Donato, *Refugee Protection Policy Adopted—Finally*, SAIPAN TRIB., Sept. 30, 2004, <http://saipantribune.com/newsstory.aspx?cat=1&newsID=40746>.

States asylum/refugee system under the INA is that the CNMI provided for *nonrefoulement* only, with protection similar to withholding of removal (and deferral of removal under CAT), but no equivalent to asylum, which was seen as discretionary under Article 33 of the Refugee Convention.<sup>144</sup> This distinction is significant in several regards, particularly in the burden of proof placed on applicants and the benefits afforded to recipients of either form of relief from removal. For asylum, an applicant need only establish a “well-founded fear” of persecution, which could be only a ten percent chance that the applicant would be persecuted upon return to his or her country of origin.<sup>145</sup> By contrast, applicants for withholding of removal must establish that they are “more likely than not” to be persecuted, which is a greater than fifty percent chance that they would be persecuted upon return.<sup>146</sup> Thus, the burden of proof is higher for applicants seeking withholding of removal versus asylum.

With regard to benefits, an asylee (a person granted asylum) may obtain asylum for his or her dependent spouse and minor children living in the United States, or may later bring into the United States a spouse and minor children as derivative beneficiaries, if those dependants are living abroad.<sup>147</sup> An asylee can also apply to be a lawful permanent resident (i.e., get a “green card”) after a year, which generally would mean that the asylee could become a United States citizen after five years.<sup>148</sup> No such benefits are available for those granted withholding of removal or deferral of removal under CAT.<sup>149</sup> Thus, not only is the burden of proof higher for applicants seeking withholding of removal and deferral of removal under CAT, the benefits

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144. See Marian A. Maraya, *Lawmakers Reviewing UN Asylum Treaty*, SAIPAN TRIB., Jan. 2, 2003, <http://saipantribune.com/newsstory.aspx?cat=1&newsID=25161>.

145. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 308 n.26 (2007) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987)).

146. *Id.* (citing *INS v. Stevic*, 467 U.S. 407, 423-24 (1984)).

147. *Id.* at 309.

148. *Id.*

149. *Id.*

are also fewer.<sup>150</sup> Under the CNMI system, the benefits provided for those who are granted protection from *refoulement* are limited and similar to the benefits provided under a grant of withholding of removal. Those granted protection would only be able to live in and travel within the CNMI, but nowhere else on United States soil.<sup>151</sup> This arrangement was seen as permissible in light of the CNMI's control over its own immigration, but its inability to grant citizenship or rights to enter the United States.

#### A. *Applying for Refugee Protection*

The CNMI regulations concerning *nonrefoulement* are found in Title 5, Part 900 of the Northern Mariana Islands Administrative Code (“NMIAC”), which established the Office of Refugee Protection (“ORP”) within the Office of the Attorney General.<sup>152</sup> Under the regulations, foreign nationals who have been excluded at a port of entry or who have been ordered deported by the Commonwealth Superior Court (the trial court) must receive certain advisements, such as the ability to obtain a protection hearing if there is a genuine (i.e., “not manifestly unfounded”) fear of persecution or torture if returned to the country of removal; the right to obtain representation at the applicant's expense; and the right to be provided with contact information for the CNMI Bar Association and other organizations that assist foreign nationals.<sup>153</sup> Because there

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150. The rationale for the distinctions in burden and benefits between asylum and withholding of removal rests on the discretionary nature of asylum versus the mandatory nature of withholding of removal. Whereas asylum with all its benefits is seen as a discretionary grant of relief, withholding of removal is mandatory, with few exceptions, if a person can prove that he or she will “more likely than not” suffer persecution on account of one of five enumerated grounds such as race, religion, and political opinion. 8 U.S.C. § 1101(a)(42) (2006); see Andrew Schoenholtz, *Beyond the Supreme Court: A Modest Plea to Improve Our Asylum System*, 14 GEO. IMMIGR. L.J. 541, 541 (2000). For this reason, the preferred form of relief for those who fear persecution if they return to their country of origin would be asylum, and then withholding/deferral of removal if for some reason they are ineligible for asylum (e.g., if they are convicted of certain crimes, or for non-criminal reasons, such as failure to file an application within one year of entry into the United States).

151. See Maraya, *supra* note 144.

152. 5 N. MAR. I. ADMIN. CODE § 5-40.1-906 (2004).

153. *Id.* §§ 5-40.1-914(a)(1)(i)-(iii).

are no affirmative applications<sup>154</sup> for protection under Section 5-40.1-904, applicants already present in the CNMI must stipulate to deportation if not already subject to an order of deportation from the court.

Both deportable applicants and applicants excluded at a port of entry would then undergo a hearing informally known as a “manifestly unfounded” hearing, which is usually conducted by an appointee of the CNMI Attorney General called an administrative protection judge (“APJ”).<sup>155</sup> Hearings are recorded electronically, interpreters are provided, if requested, and decisions by the APJ must be in writing.<sup>156</sup> Manifestly unfounded claims are those that are “clearly fraudulent” or else “not related to the criteria for the granting of *nonrefoulement* protection.”<sup>157</sup> If an application is deemed “manifestly unfounded,” the applicant may file a written request for review, but the decision regarding the request is final and not subject to further review either through administrative or judicial proceedings.<sup>158</sup> The applicant has the right to remain in the Commonwealth pending a decision, although he or she may be compelled to remain in detention.<sup>159</sup>

If a claim is deemed *not* manifestly unfounded, the foreign national is given the application for *nonrefoulement* protection with only ten business days to file it.<sup>160</sup> On the day the application is filed, the ORP schedules a protection

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An affirmative applicant seeks asylum on her own initiative, and voluntarily identifies herself to the Department of Homeland Security (DHS) through her application. An affirmative applicant may be either an individual who maintains a valid nonimmigrant visa . . . or a person who either overstayed her visa or entered the United States without being formally processed by an immigration official.

Ramji-Nogales et al., *supra* note 145, at 305. In contrast, “[a] defensive applicant applies for asylum after having been apprehended by DHS and placed in removal proceedings.” *Id.*

155. 5 N. MAR. I. ADMIN. CODE § 5-40.1-912 (2004). The APJ is usually an Assistant Attorney General.

156. *Id.*

157. *Id.* § 5-40.1-912(b) (2004) (emphasis added).

158. *Id.* § 5-40.1-912(c).

159. *Id.*

160. *Id.* § 5-40.1-916(a)(1).

hearing date, and the applicant's failure to appear at the hearing is considered an abandonment of the application.<sup>161</sup> Both excludable and deportable applicants may be detained or paroled into the CNMI at the discretion of the Attorney General pending a decision on their applications for protection.<sup>162</sup> Excluded persons, however, must remain in detention until they clear a fingerprinting and background check.<sup>163</sup>

Section 5-40.1-930 outlines the substantive law to be applied in adjudicating claims, and states that United States law and the law of other jurisdictions applying the treaty provisions are persuasive, but not binding authority.<sup>164</sup> Similar to establishing eligibility for withholding of removal under the INA, the burden of proof is on the applicant to prove that his or her life would be threatened on account of the five protected grounds under the INA and the Convention.<sup>165</sup> "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."<sup>166</sup> If an applicant can establish past persecution, there is a rebuttable presumption that the applicant's life or freedom would be threatened.<sup>167</sup> The burden then shifts to the government to prove by a preponderance of the evidence that there is either a fundamental change in circumstances in the country of removal or else the applicant can avoid future threat through internal relocation.<sup>168</sup>

If an applicant cannot establish past persecution, the applicant can still demonstrate that his or her life or freedom would be threatened under a "more likely than not" standard and on account of a protected ground.<sup>169</sup> Unlike the United States system, if the applicant cannot establish past persecution, the burden is on the *applicant* to prove that

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161. *Id.* §§ 5-40.1-916(d)-(e).

162. *Id.* § 5-40.1-918.

163. *Id.* § 5-40.1-920.

164. *See id.* § 5-40.1-930.

165. *Id.* § 5-40.1-930(a).

166. *Id.*

167. *Id.* § 5-40.1-930(a)(1)(i).

168. *Id.* §§ 5-40.1-930(a)(1)(i)(A)-(B).

169. *Id.* § 5-40.1-930(a)(2).

internal relocation is not reasonable, unless the persecutor is the government or the persecution is government-sponsored.<sup>170</sup> Evidence to prove persecution that is “more likely than not” includes singling out or targeting, but also—in the absence of targeting—a pattern or practice of persecuting persons similarly situated.<sup>171</sup>

### B. *Applying Under CAT*

Protections under CAT are similar to protections afforded by the United States system. Torture is defined as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>172</sup>

The definition of torture excludes “lesser forms of cruel, inhuman or degrading treatment or punishment” and “pain or suffering arising only from, inherent in or incident to lawful sanctions.”<sup>173</sup> In order to constitute torture, an act must be specifically intended to inflict the suffering; the act must be directed against a person in the offender’s custody or control; and “[a]cquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.”<sup>174</sup>

### C. *Mandatory Denial*

Applicants for both refugee *nonrefoulement* and CAT protection are subject to mandatory denials under Section 5-

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170. *Id.* §§ 5-40.1-930(a)(3)(i)-(ii).

171. *Id.* §§ 5-40.1-930(a)(2)(i)-(ii).

172. *Id.* § 5-40.1-930(b)(1)(i).

173. *Id.* §§ 5-40.1-930(b)(1)(ii)-(iii).

174. *Id.* §§ 5-40.1-930(b)(1)(v)-(vii).

40.1-932, although applicants otherwise eligible for CAT protection will be granted a deferral of removal.<sup>175</sup> Applications for refugee or CAT protection are subject to mandatory denial if the applicant “ordered, incited, assisted or participated in the persecution of others” on account of one of the protected grounds;<sup>176</sup> if the applicant was “convicted of a particularly serious crime and the APJ determines that the applicant constitutes a danger to the community;”<sup>177</sup> if “[t]here are serious reasons for believing that the applicant has committed a serious nonpolitical crime outside the Commonwealth, prior to arrival”;<sup>178</sup> and if “[t]here are reasonable grounds to believe that the individual is a danger to the safety or security of the Commonwealth.”<sup>179</sup>

#### D. *Benefits of Protection*

Any “grant of protection is for an indefinite period” and, *unlike* asylum under the INA, a grant of protection “does not bestow upon an applicant a right [or route] to remain permanently in the Commonwealth.”<sup>180</sup> Applicants also do not have a right to work in the Commonwealth at the time they request protection, but they may request temporary work authorization “before a final decision, meaning all appeals have been exhausted, is made on their case if ninety calendar days have passed since the initial request for protection . . . or if they have been granted a conditional grant of protection.”<sup>181</sup> Protection grantees have no permanent work authorization, and temporary work authorization must be renewed annually upon a finding of continued refugee status by the CNMI Attorney General.<sup>182</sup>

Grantees and derivative beneficiaries have a right to travel, but must obtain advance permission from the ORP.<sup>183</sup>

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175. *Id.* § 5-40.1-930(b)(4).

176. *Id.* § 5-40.1-932(b)(1)(i)(A).

177. *Id.* § 5-40.1-932(b)(1)(i)(B).

178. *Id.* § 5-40.1-932(b)(1)(i)(C).

179. *Id.* § 5-40.1-932(b)(1)(i)(D).

180. *Id.* § 5-40.1-938.

181. *Id.* § 5-40.1-940.

182. *Id.* § 5-40.1-948.

183. *Id.* § 5-40.1-942.

Derivative protection for immediate family members is another significant difference between the CNMI and the United States system because only those immediate family members who are present in the Commonwealth at the time of the application for protection can receive derivative protection.<sup>184</sup> Grantees and derivative beneficiaries have a right to assistance and are eligible for public benefits.<sup>185</sup>

#### E. Appeals

The government or the applicant may appeal within fifteen business days a decision to grant, deny, or terminate protection.<sup>186</sup> The Attorney General has discretion to “[r]estrict review to the existing record; [p]ermit or request legal briefs or supplement the record with new evidence; [h]ear oral argument; or [h]ear the matter de novo.”<sup>187</sup> The decision of the Attorney General is final and not subject to further administrative or judicial review.<sup>188</sup>

### IV. CONTINUING CONCERNS AND THE FUTURE OF REFUGEE PROTECTION IN THE CNMI

It is evident from the regulations implementing refugee and CAT protection that the CNMI system does not offer a stable situation for those fleeing persecution, and it arguably includes certain disincentives, such as the requirement that derivative beneficiaries be physically present in the Commonwealth at the time of application. It also maintains a system in which geography remains significant and even decisive—those eligible to remain “in the United States” because they qualify under the lower standard for asylum are not eligible to remain in the CNMI and will be returned because they cannot meet the higher “more likely than not” standard.

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184. *Id.* § 5-40.1-944. This issue has received some notice in the press. See Ferdie de la Torre, *Family of Person Granted Refoulement Protection Not Covered By Protection*, SAIPAN TRIB., Mar. 2, 2007, <http://saipantribune.com/newsstory.aspx?cat=1&newsID=66186>.

185. 5 N. MAR. I. ADMIN. CODE § 5-40.1-952.

186. *Id.* § 5-40.1-936.

187. *Id.* §§ 5-40.1-936(d)(1)-(4).

188. *Id.* § 5-40.1-936(f).

Although the regulations addressed the basic issues regarding compliance with the Refugee Convention, the Protocol, and CAT, concerns persisted over the administration of the system, but were included within the larger framework of federal dissatisfaction with CNMI immigration policies generally. This time, however, federal dissatisfaction was reinforced by the resurgence of military interest in Micronesia, and especially in the Marianas. The United States had begun a major military buildup on the 212-square mile island of Guam and began planning the transfer of 8000 marines and their dependents from Okinawa for a military presence of 20,500 troops and personnel and an additional 9000 dependents over a period of ten years.<sup>189</sup> According to a report by the United States Government Accountability Office (“GAO”), this buildup is part of “a major realignment” planned by the Department of Defense to move other Navy, Air Force, and Army units to Guam.<sup>190</sup> Federal concern over CNMI immigration then became linked with national security,<sup>191</sup> and human rights issues such as refugee protection and concern over human trafficking became more prominent in debates. The need for federal control of immigration was subsequently framed in terms of human rights and protecting refugees.<sup>192</sup> According

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189. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-722T, DEFENSE INFRASTRUCTURE: PLANNING EFFORTS FOR THE PROPOSED MILITARY BUILDUP ON GUAM ARE IN THEIR INITIAL STAGES, WITH MANY CHALLENGES YET TO BE ADDRESSED 11 (2008), *available at* <http://www.gao.gov/new.items/d08722t.pdf>.

190. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-791, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS: MANAGING POTENTIAL ECONOMIC IMPACT OF APPLYING U.S. IMMIGRATION LAW REQUIRES COORDINATED FEDERAL DECISIONS AND ADDITIONAL DATA 13 (2008), *available at* <http://www.gao.gov/new.items/d08791.pdf>.

191. *See* S. REP. No. 110-324 at 3-4 (2008).

In a post-9/11 environment, and given the CNMI's location and the number of aliens that travel there, we believe that continued local control of the CNMI's immigration system presents significant national security and homeland security concerns.

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... With the planned military buildup on Guam, the potential for smuggling aliens from the CNMI into Guam by boat is a cause for concern.

*Cohen's Statement, supra* note 109.

192. “The CNMI's alleged failure to effectively implement the Refugee Protection Program has become a linchpin in convincing U.S. lawmakers to

to a report by the Deputy Assistant Secretary of the Interior for Insular Affairs before the House Subcommittee on Insular Affairs:

[I]f the Federal Government cannot verify that the CNMI is administering its refugee protection program in a manner that accords with U.S. compliance with international treaty obligations, then extending the protections available under U.S. immigration law to cover aliens in the CNMI may be the only way to ensure that compliance. However, making aliens in the CNMI eligible to apply for protection in the U.S. is a potentially serious problem if the CNMI maintains control over its immigration system . . . [because] the U.S. could be required to provide refugee protection to aliens who have been admitted to the CNMI through a process controlled not by the Federal Government . . . . This is a strong argument in favor of Congress taking legislative action . . .

<sup>193</sup>

In 2008 Congress passed the CNRA, which included the gradual phasing in of federal control over immigration in the CNMI and extended the INA to the CNMI such that presence in the CNMI under the INA is considered presence “in the United States.” The transition period began on November 28, 2009, and is scheduled to end, with few exceptions, on December 31, 2014.<sup>194</sup> Regarding asylum, the CNRA makes asylum applications under Section 208 of the INA inapplicable until the end of the transition period.<sup>195</sup> This provision adopts the recommendation of Senate Report 324, which suggested making Section 208 inapplicable during the transition period “given the uncertainties inherent in changing the CNMI immigration regimen.”<sup>196</sup> From a strategic perspective, the inapplicability of Section 208 with its lower standard of proof would reduce the number of people who can receive protection and the

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approve the CNMI federalized immigration bills.” *Cohen Yet to Get AGO Response to Refugee Protection Concerns*, SAIPAN TRIB., Aug. 14, 2007, <http://saipantribune.com/newsstory.aspx?cat=1&newsID=71329>.

193. *Cohen’s Statement*, *supra* note 109.

194. Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, § 702(a), 122 Stat. 754, 854-55 (codified as amended at 48 U.S.C. 1806 (2006)).

195. *Id.*

196. S. REP. No. 110-324, at 18 (2008) (generally approving bill S. 1634, but recommending that the bill be changed to prevent the application of the asylum provisions of the INA until after the transition period in 2014).

additional benefits of asylum because they would have to apply under withholding of removal standards and likewise receive those benefits. Because the number of foreign nationals will be reduced significantly through the phasing out process during the transition period, the number of people who will be able to even apply for asylum in 2014 will likewise be significantly reduced.

#### CONCLUSION

The problems surrounding the protection of immigrants and refugees on United States soil but not “in the United States” for INA purposes are just two of the many unintended consequences resulting from the political wrangling that occurred after World War II in Micronesia and later in the Marianas, where emerging human rights, decolonization, and self-determination norms competed with United States military and local economic interests to produce the Covenant. Addressing the legal issues arising out of the unique federal-CNMI relationship involved, and will likely continue to involve, political “solutions” devised by the political branches more than legal reasoning crafted by the judiciary. Although the CNRA attempts to address some of these unintended consequences—at least with regard to immigration—its effect, especially on refugees, is still unknown, especially for those who could qualify under asylum standards if they were “in the United States,” but who will be rejected because the INA asylum provisions will not apply until 2014.