Refugee Reset: Mid-Year Increases to the U.S. Refugee Admissions Target

January 28, 2021
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I. Introduction

After four consecutive years of sharp cuts, refugee resettlement in the United States has fallen to its lowest level since Congress created the modern system for admitting refugees in 1980. The unprecedented decimation of the United States Refugee Admissions Program (“USRAP”) during the worst refugee crisis on record has left many wondering what can be done in the short term to reverse course. U.S. law provides a solution. The goals of the USRAP are regularity and flexibility, and although, before the start of each fiscal year the president sets the number of refugees to be admitted during the upcoming year (“the presidential determination”), that figure is not set in stone. Current law grants the president clear legal authority to admit additional refugees through a revised mid-year presidential determination.

This paper provides an overview and background of the presidential power under Immigration and Nationality Act (“INA”) section 207(b) to increase refugee admissions during the fiscal year. It explores the legislative history of the statute, details four historical examples of this power being used by presidents of both parties, and analyzes the substantive requirements of the process. This review reveals that the president's power to admit additional refugees after an initial presidential determination is precedent, lawful, and in keeping with the powers Congress intended the president to exercise.

II. The Refugee Act of 1980

The Refugee Act of 1980 provided a permanent, uniform procedure for refugee admissions and authorized federal assistance to resettle refugees. The system created by the Refugee Act, USRAP, replaced the erratic approach to refugee admissions and resettlement that had characterized U.S. refugee policy since World War II. Prior to 1980, the primary response of presidential administrations to emergency refugee situations was for the Attorney General to parole large groups of refugees into the United States. But this ad hoc approach, coupled with the lack of a regular refugee admissions process, meant that presidents waited for mass migration events to occur in order to fashion refugee policy, even if the administrations knew well in advance of a crisis that there would likely be refugee flows from the given country or region. The Refugee Act changed that.

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1 The statutory language that is now 8 U.S.C. § 1157(b) is also commonly referred to as Immigration and Nationality Act (INA) Section 207(b). For ease of understanding, “207(b)” will be used consistently throughout this paper.

A. Statutory Text on Refugee Admissions Numbers

The primary mechanism by which the U.S. government sets the refugee admissions target for the succeeding fiscal year is the presidential determination process established by Immigration and Nationality Act Section 207(a)(2), which provides in relevant part:

\[ \text{The number of refugees who may be admitted under this section in any fiscal year...shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.} \]

In other words, before each fiscal year, the president issues a determination outlining the number of refugees to be admitted that year. But the president’s power to admit refugees doesn’t stop there.

Owing to the unpredictability of global events and the need for a flexible system capable of adapting to changes on the ground, Congress wrote a safety valve into the law to allow the president to admit additional refugees above the annual presidential determination, subject to certain conditions. These are codified in INA section 207(b), which states:

\[ \text{If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a), the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection.} \]

The meaning of these provisions are inherently subjective, as the power to make these determinations belongs to the president, but an examination of the legislative history and historical uses of this power sheds light on how presidents of both parties have interpreted and exercised this statutory authority to increase refugee admissions.
B. The Presidential Determination Process in Action

Between the fiscal years of 1980 and 2016, the average presidential determination was more than 95,800 refugees per year. The four years of the Trump Administration, however, saw that number fall precipitously to historic lows. President Obama’s final presidential determination allowed the admission of 110,000 refugees. In his first weeks in office, President Trump cut that number to 50,000, and continued to lower it in subsequent years: from 50,000 in FY2017 to 45,000 in FY2018, then to 30,000 in FY2019, then to 18,000 in FY2020, and finally to just 15,000 in FY2021. Each of these figures was, at the time of its issuance, the lowest presidential determination in American history. It is important to note that the presidential determinations do not represent the number of refugees actually admitted each year, which has been far lower than the actual determination in certain years. For instance, in FY2020 only 11,814 refugees were admitted, far below the 18,000 determination.

The presidential determination process established by the Refugee Act allows the president to set the annual refugee target pursuant to INA 207(a), but also increase (not decrease) that number mid-year pursuant to INA 207(b). As the legislative history of the Refugee Act shows, maintaining a degree of presidential flexibility is a key component of the system.

III. Legislative History of the Refugee Act

During the consideration of the Refugee Act, Congress focused on certain broad areas of concern that help elucidate the meaning of the president’s power to set annual and mid-year refugee admissions targets.

A. Setting an Annual Refugee Goal Based on “Humanitarian Concerns”

A primary goal of the Refugee Act was to repeal the ideological and geographical discriminatory treatment of refugees under immigration law at the time. In crafting the Refugee Act, Congress adopted a broader definition of “refugee,” one that matched the definition under the United Nations

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3 FY2017, which included the transition from Barack Obama to Donald Trump, saw President Obama’s original 110,000 refugee determination replaced with President Trump’s 50,000 refugee determination partway through the fiscal year.

4 President Trump’s slashing of the FY2017 refugee admissions ceiling was preliminarily enjoined, see Hawaii v. Trump, 859 F.3d 741, 776 (9th Cir. 2017); see also Trump v. Int’l Refugee Assistance Project, 137 S. Ct 2080 (2017) (granting certiorari and partially staying that preliminary injunction), which is why more than 50,000 refugees were in fact admitted in FY2017.


Convention Relating to the Status of Refugees which the United States acceded to in 1968. In doing so, Congress was plainly aware that more persons would qualify for refugee status. Congress wanted to raise the annual limitation on regular refugee admissions while ensuring a role for itself in the operation of the refugee program.

Congress agreed to set the refugee goal at 50,000 for fiscal years 1980-82, only to be set higher if the president determined, before the beginning of the respective fiscal year and after appropriate consultation with Congress, that admission of a specific number of refugees was justified by humanitarian concerns or otherwise in the national interest. For each fiscal year after 1982, the Refugee Act would allow the president to set the number of refugees admitted without the 50,000 default. Congress came to these procedures after numerous debates and proposed amendments. For example, in discussing how many and which refugees would be admitted through this new program, the Senate and House debated using the terms “special concern to the United States who will be in need of resettlement” and “special relationship to the United States,” before landing on “special humanitarian concern”.

The legislative history illustrates that “humanitarian concern” is intended to emphasize the humanitarian nature of refugee admissions as the cornerstone of USRAP, allowing greater flexibility to admit refugees in response to emerging humanitarian situations. “Grave humanitarian concerns” can include situations where refugees’ lives are in immediate jeopardy or their personal safety is threatened, although in practice the provision has been used more broadly to address unforeseen refugee flow situations. The language Congress ultimately adopted also deemphasizes the need for the US to have a “special relationship” with the individual or group of refugees, which in turn highlights that refugee admissions based on historical relationship, or economic or social ties to the US is of secondary concern.

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7 See 125 Cong. Rec., 96th Congress, 1st Session (1979) Sept. 6, 1979, Debated; Amended; Passed Senate.
8 Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-239, 79 Stat. 911 (1965) created a permanent refugee admission quota with narrow geographical limits derived, in part, from the earlier national origin quota. To work around these restrictions, the United States relied on the Attorney General’s parole authority to allow refugees to enter the country. See generally Anker and Posner, pp. 12-42.
11 See Amendment 527 and 529 in 96 S. 643 - Referred to Committee House Sep. 10, 1979.
12 8 U.S.C. § 1157(a)(3), see Amendment 528 in 96 S. 643 - Referred to Committee House Sep. 10, 1979, and 96 H.R. 2816 - Reported in House Nov. 9, 1979. See also H.R. Rep. No. 96-608 (1979) at 13 (explaining that the phrase “special concern” was changed to “special humanitarian concern” in what became 8 U.S.C. § 1157(a) “to emphasize that the plight of the refugees themselves, as opposed to national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States”).
13 8 U.S.C. § 1157(b), see also Dec. 13, 1979, Made special order (H.Res. 499); Debated in House (H.R. 2816).
B. Statutory Congressional Consultation Requirement

The legislative history also reflects the longstanding tension between the executive branch and Congress over control and oversight of refugee admissions, following the extensive use of ad hoc parole authority by attorneys general in previous decades. One of the key debates in the years prior to the passage of the Refugee Act was the extent to which the executive branch would be required to consult with members of Congress before admitting groups of refugees. Some members of Congress sought a greater degree of congressional authority over this refugee admissions process, but over the course of multiple bills, it became clear that the House and Senate were divided on this issue, with the Senate more willing to defer to executive authority. As a result, by the time the Refugee Act passed in 1980, the legislature had surrendered several attempts at increased congressional control over refugee admissions from earlier drafts, particularly regarding emergency admissions.

In earlier bills, Congress had proposed numerical and categorical limitations on mid-year emergency refugee admissions, which would be additionally restricted to those that would “significantly promote the national interest.” In earlier bills, Congress had proposed numerical and categorical limitations on mid-year emergency refugee admissions, which would be additionally restricted to those that would “significantly promote the national interest.” Additionally, “consultation” would be defined as “personal contact” between the president and members of the judiciary committees, the executive branch would be required to provide the requested information about the emergency refugee situation at least two weeks in advance of the meeting, and the president would not be allowed to move ahead to admit refugees until receiving a response from the committees. The parole process, which had until that point been the primary mechanism for the admission of refugees, would be amended to explicitly prohibit the parole of refugees, and, in multiple bills, the House proposed a legislative veto over all refugee admissions decisions.

By the final passage of the Refugee Act, Congress had abandoned several of these requirements. The final text, as codified in INA 207(b) included no numerical limitations on mid-year emergency refugee admissions. However, the president would be limited to admitting refugees under a revised determination for a period not to exceed twelve months - thereby preserving the importance of the annual presidential determination process. A consultation requirement remained in the final bill, but Congress struck the two-week advanced notification deadline for providing information, as well as several other requirements.

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14 Anker and Posner, p. 37.
16 Ibid, pp. 34-35.
17 8 U.S.C. § 1157(b).
as some of the more burdensome reporting requirements proposed in earlier bills.\textsuperscript{18} Moreover, the executive branch would not need to wait for a response from the judiciary committees to proceed with emergency admissions, as the Senate explicitly emphasized that it did not want to create “...a statutory definition of what action is required...to conclude the consultation process.”\textsuperscript{19}

Perhaps the most significant proposed amendment - a congressional veto power over refugee admissions - was dropped, first for emergency admissions\textsuperscript{20} and eventually for the annual determination process as well, which was a significant factor in the narrow passage of the Refugee Act in the House of Representatives.\textsuperscript{21}

Since becoming law in 1980, the emergency refugee admissions provisions of 207(b) have been invoked several times by presidents of both parties to increase refugee admissions beyond the annual presidential determination for that year.

IV. Previous Mid-Year Changes to the Refugee Target

Since 1980, four U.S. presidents have invoked 207(b) to raise the refugee admissions goal during the fiscal year.\textsuperscript{22} Each of the following examples help to flesh out the historical scope and purpose of 207(b) authority, and make clear that the president has the power to increase the goal without waiting for the fiscal year to expire.

A. April 15, 1980: 3,500 Cuban refugees

The first invocation of 207(b), in fact the first invocation of any provision of INA 207 at all, came shortly after the passage of the Refugee Act. The Refugee Act authorized a phasedown of 75 percent of the Cuban Refugee Program for FY1980 and a few weeks after it became law, thousands of Cubans entered the Peruvian embassy in Havana to seek asylum.\textsuperscript{23} The crowd quickly surpassed

\textsuperscript{18} 8 U.S.C. § 1157(e)(7) (“...To the extent possible, information described in this subsection shall be provided at least two weeks in advance of discussions...”) (emphasis added). In contrast, the Refugee Act of 1977 (H.R. 2056), for example, included a requirement for “detailed reports as to each alien admitted under the emergency provisions.” See Anker and Posner, p. 35 fn 119.

\textsuperscript{19} Anker and Posner, p. 54.

\textsuperscript{20} Ibid, p. 58.

\textsuperscript{21} Ibid, p. 63.


10,000 refugees, and in response President Carter issued Presidential Determination No. 80–16 (April 14, 1980), which states:

“Pursuant to Section 207(b) of the INA as amended, I determine that an unforeseen emergency refugee situation exists, that the admission in response to the emergency refugee situation of 25 to 33 percent of the persons who have taken sanctuary at the Peruvian Embassy in Havana, up to a maximum of 3,500 refugees, is justified by grave humanitarian concerns and is otherwise in the national interest, and that the admission to the United States of these refugees cannot be accomplished under subsection 207(a) of the INA.”

Two weeks later, President Carter signed the first Presidential Determination under the annual 207(a) process; it allocated an additional 16,000 slots for Cuban refugees. This use of 207(b) allowed the Carter administration to respond quickly to an emergent situation at the Peruvian Embassy, although the Cuban refugee crisis had been escalating for several months, even before passage of the 1980 Refugee Act, and would continue to escalate in the following months.

B. May 20, 1988: 15,000 Eastern European and Soviet refugees

In May 1988, President Reagan issued Presidential Determination No. 88–16 (May 20, 1988), which allocated an additional 15,000 slots for Eastern European and Soviet refugees, doubling the refugee admissions number for that region made at the beginning of the fiscal year and raising the total refugee goal to 87,500. In the report accompanying the determination, the U.S. Coordinator for Refugee Affairs Jonathan Moore affirmed that the increase was unforeseen and necessary “primarily because the number of Armenians being permitted to leave the Soviet Union ha[d] increased dramatically since the end of FY1987...[and] the number of Jews being permitted to leave the Soviet Union, which increased earlier in FY1987, ha[d] remained high.” The United States could not accommodate these increased numbers within the original presidential determination for FY1988,

25 “Proposed Refugee Admissions and Allocations for Fiscal Year 1980 in Accordance with the Refugee Act of 1980; Appendix A: Emergency Admission of Cuban Refugees,” 126 Cong. Rec. 8419-8420 (1980); Robert Pear, “U.S. Policy on Cuban Refugees: Background and Prospects”, The New York Times (May 7, 1980), https://timesmachine.nytimes.com/timesmachine/1980/05/08/111240745.pdf?pdf_redirect=true&ip=0. Also see Letter from Victor Palmieri to Sen. Ted Kennedy, Cong. Rec. 8409 (April 16, 1980) (“This projected level of admissions includes the up to 3,500 Cubans about whom telephonic consultations were undertaken with an appropriate member of your staff last week, while the Congress was in recess.”), suggesting the additional Cuban refugees were included in Presidential Determination No. 80-17 of May 1, 1980.
26 Presidential Determination No. 88-16 of May 20, 1988, 53 FR 21405; also see Presidential Determination No. 88-01 of October 5, 1987, 52 FR 42073.
as the “numbers originally authorized for Eastern Europe and the Soviet Union [were] being fully utilized by groups anticipated at the start of the fiscal year.”

This increase in the FY1988 refugee goal illustrates how 207(b) has allowed previous administrations to respond to concurrent refugee crises in the middle of a fiscal year. Initially, the Reagan administration had considered reallocating the slots reserved in the original presidential determination for Southeast Asian refugees to accommodate the increase in Armenian and Jewish refugees. Thailand, which was managing a mass increase in arrivals of Vietnamese refugees by boat, strongly opposed this option, and U.S. officials feared that the Thai government would respond to such a reallocation by turning away Vietnamese refugees. The invocation of 207(b) enabled the Reagan administration to address this “unforeseen emergency refugee situation” without a significant tradeoff; as the New York Times Editorial Board argued, “two important humanitarian concerns are involved here; both can be met at once.”

C. June 19, 1989: 25,500 Eastern European and Soviet refugees

In October 1988, President Reagan set the refugee admission goal for FY1989 at 94,000, with 24,500 slots allocated for refugees from Eastern Europe and/or the Soviet Union. George H.W. Bush took office on January 20, 1989, a third of the way through the 1989 fiscal year. On March 23, 1989, the Emergency Refugee Act of 1989 was introduced in the House, which put pressure on the new administration to increase the refugee target for FY1989 by 28,000, with 19,000 of the additional slots reserved for refugees from the Soviet Union. After consultation between Congress and the Bush Administration, the government settled on raising the total refugee goal by 22,500 via 207(b) and shifting 3,000 slots away from the existing allocation for East Asia, to set aside a total of 25,500 additional slots for Soviet refugees. This was carried out in mid-June, when President Bush issued Presidential Determination No. 89–15 (June 19, 1989), which more than doubled the allocation for Eastern European and Soviet refugees from 24,500 to 50,000 and raised the total refugee ceiling from 94,000 to 116,500.

As in the previous year, the rationale offered by the administration to Congress was that “[a]dditional refugee admissions numbers are required because the number of Soviets being permitted

28 Id.
to leave the Soviet Union and apply for refugee admission to the United States...has increased dramatically since the FY1989 admissions ceiling was established.\footnote{Report to Congress Concerning the President’s Proposal to Raise the Fiscal Year 1989 Refugee Admissions Ceiling,” 135 Cong. Rec. 10296 (1989).} In other words, the requisite unforeseen refugee situation was not a new crisis, but rather a new opportunity to resettle refugees created by the exit policies of the Soviet Union.

This use of 207(b) is notable as well because President Bush invoked his authority to increase the refugee goal in response to the inadequacy of the presidential determination he had inherited from his predecessor, and his emergency determination under 207(b) explicitly superseded aspects of President Reagan’s prior 207(a) determination.

D. August 12, 1999: 13,000 Kosovar refugees

At the height of the Kosovo refugee crisis in 1999, President Clinton issued Presidential Determination No. 99–33 (August 12, 1999), which increased the refugee admissions goal for FY1999 from 78,000 to 91,000 in order to accommodate Kosovar refugees.\footnote{Presidential Determination No. 99–33 of August 12, 1999, 64 FR 47341.} This was the final step in a series of actions the Clinton administration took to address the humanitarian crisis in the Balkans over the course of 1999. When President Clinton issued the original presidential determination for FY1999 on September 30, 1998, the campaign of ethnic cleansing in Kosovo was in full force, and members of the U.S. administration had begun to push for military action against Serbia.\footnote{“A Kosovo Chronology,” PBS Frontline, https://www.pbs.org/wgbh/pages/frontline/shows/kosovo/etc/cron.html.} The scale of the refugee crisis, however, escalated at the beginning of 1999 with more than 430,000 people displaced from Kosovo between March 24 and April 5, raising the total number of refugees and internally displaced persons in that conflict to more than 920,000 by mid-April.\footnote{“Kosovo Crisis Fact Sheet #18,” USAID (April 7, 1999), https://reliefweb.int/report/albania/kosovo-crisis-fact-sheet-18; “GUANTANAMO MAY (OR MAY NOT) HOLD KOSOVAR REFUGEES, RENO EXPECTED TO REDESIGNATE KOSOVO TPS AS CRISIS CONTINUES,” 76 No. 14 Interpreter Releases 549 (April 12, 1999), https://www.westlaw.com/document/ll8a31cea1232e11d1c9209d68a20b39a3a/view/fulltext.html?transitiomType=Default&contextData=(sc.Default)&VR=3.0&RS=cbt1.0.}

In early April, the United States agreed to help address the crisis by evacuating up to 20,000 Kosovar refugees, after Macedonia had refused to accept additional refugees and Albania was nearing the
limits of its refugee hosting capacities. On April 21, 1999 Vice President Gore announced that the 20,000 Kosovar refugees would enter into the United States through the refugee admission program. Secretary of State Madeleine Albright announced on April 30, 1999 that the refugee admissions program would have two components—an emergency component and a normal refugee processing component. For the emergency component, the U.S. flew refugees from Macedonia to Fort Dix, New Jersey for the completion of processing, including further medical and security screenings. On May 18, 1999, President Clinton signed Presidential Determination No. 99–23, which made up to $15 million available from the U.S. Emergency Refugee and Migration Assistance (ERMA) Fund to meet urgent and unexpected humanitarian requirements associated with the Kosovo crisis and to use these funds to support requirements associated with the U.S. program to provide refuge in the United States for up to 20,000 Kosovar refugees. President Clinton did this using §2(c)(1) of the Migration and Refugee Assistance Act of 1962. Only after allocating this emergency funding, and after thousands of Kosovar refugees had passed through Fort Dix for resettlement in the U.S., did President Clinton officially increase the refugee goal under 207(b). By that point, the U.S. estimated that it would resettle 13,000 Kosovar refugees—not the 20,000, as was originally announced - by the end of FY 1999, which is why President Clinton increased the refugee goal from 78,000 to 91,000.

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37 Initially, the United States planned to remove refugees to Guantanamo Bay—where they would be unable to apply for U.S. asylum—as a temporary measure. The administration believed that this would provide immediate protection to the refugees while allowing for their eventual return to Kosovo. It would also help to avoid the perception that the U.S. was abetting the ongoing ethnic cleansing by permanently removing Kosovars from the region. However, after advocates objected to housing refugees at Guantanamo, the administration changed course. See USCRI, “Here come the Kosovars,” Refugee Reports, Vol. 20, No 5 (May 1999), https://reliefweb.int/report/albania/here-come-kosovars-may-1999#−text=The%20U.S.%20government%20said%20that%20permanent%20residents%20in%20one%20year.

38 When Vice President Gore made this announcement, he incorrectly referred to the refugees’ admission as temporary—suggesting conditional status—but they were set to be admitted as refugees under the INA. The State Department did indicate that they would “provide maximum opportunities for people to return.” See “Refugee Admissions and Resettlement Policy: Fact and Issues,” Congressional Research Service, Report for Congress (Updated May 25, 1999).


40 “Refugee Admissions and Resettlement Policy: Fact and Issues,” Congressional Research Service, Report for Congress(Updated December 6, 1999). In all likelihood, the Clinton administration began admitting Kosovar refugees before invoking 207(b) by using the slots allocated for Europe in the prior FY1999 presidential determination. When it became clear that more slots for the Europe allocation would need to be made available, the administration initiated consultations to raise the refugee admission goal under 207(b).
V. Analysis of Substantive Requirements

What can these historical examples tell us about the requirements under which the president is authorized to admit additional refugees after the issuance of the annual presidential determination? In accordance with 207(b), the following conditions must be met:

- An unforeseen emergency refugee situation exists,
- The admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest,
- The admission to the United States of these refugees cannot be accomplished under the existing refugee allocations made under 207(a), and
- Appropriate consultations have taken place.

The requirement that the existing presidential determination must be inadequate to accommodate the unforeseen emergency is self-explanatory, but what qualifies as an “unforeseen emergency refugee situation,” and what are the “grave humanitarian concerns” or “national interests” that justify the invocation of 207(b)? Moreover, what do past examples illustrate about the meaning of “appropriate consultation” with Congress as it has been applied in practice?

A. “Unforeseen Emergency Refugee Situation”

Section 207(b)(1) requires the president to determine that “an unforeseen emergency refugee situation exists” in order to raise the refugee goal in the middle of a fiscal year. The statute does not, however, define the circumstances that may constitute an “emergency refugee situation” - beyond the fact that it involves “grave humanitarian concerns or is otherwise in the national interest” - nor does it define “unforeseen.” The four historical examples illustrate that 207(b) gives the executive branch broad discretion to respond to a variety of migration-related geopolitical developments, including country conditions that were known or anticipated at the time of the issuance of the original fiscal year determination. **Unforeseen, in other words, does not mean unforeseeable. The president has the authority to change their assessment of the refugee situation,** and a new president can assess things differently than their predecessor.

On the one hand, in each previous instance there were developments that occurred during the fiscal year which were put forth as “emergency refugee situation[s].” But only President Carter’s presidential determination of April 1980 cited a specific event - namely, the rush of “persons who
have taken sanctuary at the Peruvian Embassy in Havana” - as an “emergency refugee situation.”

Each of the other three 207(b) determinations responded to a situation or a series of events that signaled a material change in a wider refugee crisis. In fiscal years 1988 and 1989, the unforeseen emergency was the increase of Soviet refugees who had access to and sought resettlement in the United States. In FY1999, President Clinton’s decision to raise the refugee goal was motivated by the intensification of the Kosovar crisis in the early spring.

On the other hand, the refugee situations cited in the 1988, 1989, and 1999 mid-year determinations were each a result of conditions known to the President for some time before the prior annual determinations were made. In April 1988, the report to Congress explaining the need for emergency refugee admissions acknowledged that “increased emigration from the Soviet Union results in large part from diplomatic efforts of the administration.” This justification was essentially the same reason that was cited in the report to Congress at the beginning of FY1988 for the annual presidential determination - namely, that refugee admissions from the Soviet Union were necessary because “the more liberal immigration policies adopted by the Soviet Union in 1987 resulted in an outflow of nearly 1,000 per month.” The April 1988 report to Congress, however, still argued that the phenomenon of increased emigration “could constitute an ‘unforeseen refugee emergency[.].’”

The report explained that the situation was urgent because exit permits were “valid for only a limited period of time” but made no reference to the persecution the refugees were fleeing or the potential loss of life. In other words, a Soviet refugee’s potential loss of the ability to emigrate was itself considered sufficient to justify the invocation of 207(b). The FY1988 emergency 207(b) determination itself made no mention of any details other than the numerical increase in admissions “from Eastern Europe and the Soviet Union.”

The concept of unforeseeability was illustrated further by the usage of 207(b) in 1989. At the beginning of the fiscal year, in October 1988, the Reagan administration was aware that there had been “a dramatic rise in exit permits issued to Soviet Jews and Armenians that created a greater need for refugee resettlement in the United States.” However, after President Bush came into office, the Senate Committee on the Judiciary urged him to raise the refugee goal as a result of “Soviet Jews suddenly being allowed to leave.” The formal report to Congress on the situation explained that “Jews still face many forms of discrimination [in the Soviet Union] including exclusion

41 Presidential Determination No. 80–16.
42 133 Cong. Rec. 28,335 (1987).
44 Id.
45 Presidential Determination No. 88–16.
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from schools, jobs and housing.” 48 These country conditions were used to establish the emergency situation, and no reference was made to imminent threats to personal safety, either in the Senate record or the determination itself. 49 Given the nature of diplomatic relations between the United States and the Soviet Union, referenced in both 1988 and 1989 reports to Congress, the June 1989 207(b) determination did not point to circumstances that were completely “unpredictable.” Further, the same refugee population precipitated both the 1988 and 1989 emergency determinations. Even though refugee admissions increased steadily over the two-year period, the necessity of admitting refugees was likely not completely unforeseeable, rather it represented a goal of U.S. foreign policy. 50

Finally, when President Clinton signed the annual presidential determination for FY1999 on September 30, 1998, armed conflict in Kosovo had been ongoing for nearly eight months. 51 So in this sense, the need to accommodate large numbers of Kosovar refugees was not entirely “unforeseen.” In fact, even before issuing the original FY1999 presidential determination, President Clinton signed an executive action that released $20 million of ERMA funding to meet the “urgent and unexpected needs of refugees, displaced persons, conflict victims, and other persons at risk due to the Kosovo crisis.” 52 The situation in Kosovo was already of great humanitarian concern, particularly by the spring of 1999. But the mid-year admission of additional Kosovar refugees shows that the foreseeability requirement is a flexible concept. The predictability of a change in conditions did not foreclose the use of the emergency refugee admissions provisions of 207(b).

Overall, the history of presidential usage of 207(b) shows that the standard for an “unforeseen emergency” is flexible based on the given refugee situation, and that the requirement is fulfilled so long as the President has a different understanding of the evolving refugee situation than the President did when issuing the most recent annual determination, as well as some potential adverse effect to a refugee population or benefit to the national interests of the United States.

48 Id. at 10,297.
49 Id; Presidential Determination No. 89–15.
50 134 Cong. Rec. 9401 (1988)
B. “Appropriate Consultations”

In addition to the substantive requirements, the president is obligated to undertake “appropriate consultation” with Congress, which is defined in subsection 207(e):

For purposes of this section, the term “appropriate consultation” means, with respect to the admission of refugees and allocation of refugee admissions, discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest, and to provide such members with the following information:

1. A description of the nature of the refugee situation.
2. A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.
3. A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement.
4. An analysis of the anticipated social, economic, and demographic impact of their admission to the United States.
5. A description of the extent to which other countries will admit and assist in the resettlement of such refugees.
6. An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States.
7. Such additional information as may be appropriate or requested by such members.
8. To the extent possible, information described in this subsection shall be provided at least two weeks in advance of discussions in person by designated representatives of the President with such members.

Notably, the consultation process for the use of 207(b) is the same as that for consultations as part of the 207(a) annual presidential determination process. It’s also worth noting that the obligation of a “consultation” is distinct from requiring congressional approval. As discussed earlier, the idea of including a congressional “veto” within this process was rejected during deliberations over the Refugee Act.
In all four instances in which presidents increased refugee admissions under 207(b), the congressional record shows that they only did so after some sort of consultation with members of the Judiciary Committees took place. Following these consultations in both 1988 and 1989, the Senate Committee on the Judiciary sent letters to the president affirming that the committee had completed consultations and - though not required by statute - concurred with the president’s request to increase refugee admissions. For the 1980 and 1999 determinations, while the extent of congressional consultation remains unclear, it is apparent that members of the Senate Judiciary Committee also concurred (again, even though that concurrence was not required) with the emergency admission proposals.

**However, the details of these prior emergency consultations reveal that this requirement need not be particularly burdensome.** Preceding President Carter’s emergency determination process for certain Cuban refugees, a letter from the U.S. Coordinator for Refugee Admissions to the committee said that “telephonic consultations were undertaken with an appropriate member of [the committee’s] staff last week” regarding the Cuban situation because Congress was in recess.

Thus, consultation via telephone with a single member was sufficient to satisfy the consultation requirement.

In 1988, the consultation on President Reagan’s emergency determination consisted of discussions between the Secretary of State and members of the Senate Judiciary Committee. The committee concurred with the emergency determination “on the condition that the . . . issues involved will be thoroughly reviewed at a hearing scheduled . . . with [the] Secretary of State[.]” Based on this consultation, it seems as though the committee was willing to schedule a more detailed hearing regarding “foreign policy, humanitarian, and fiscal issues[,]” after the “consultation” and approval of the request. This demonstrates that the consultation itself can be done relatively quickly in order to facilitate the increased admissions, while more detailed information can come later.

The following year, the 207(b) consultation process took on a different character because the House of Representatives also introduced the Emergency Refugee Act of 1989 to admit more refugees.

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57 126 Cong. Rec. 8,407, 8,409 (1980).
58 134 Cong. Rec. 9,403 (1988).
59 Id.
and transfer funding to assist in their admissions.\textsuperscript{60} The Committee held a hearing on the bill that seemed to serve concurrently as part of the consultation process.\textsuperscript{61} The Senate also introduced legislation to double the number of Soviet refugees admitted in FY 1989,\textsuperscript{62} and threatened that it would be “forced to act” if the administration did not admit more refugees expeditiously but ultimately was able to consult with the attorney general.\textsuperscript{63} Following this hearing, the Senate and House Judiciary Committees consulted with the President’s representatives, and concurred in his recommendations.\textsuperscript{64} The history of this consultation process emphasizes that even when Congress is eager to act, the responsibility to adjust the refugee admissions goal lies primarily with the President; as members of the Senate Judiciary Committee noted in their letter to President Bush in May 1989, “the legislative history of The Refugee Act makes abundantly clear [that] the decision to admit refugees is a Federal one.”\textsuperscript{65}

The history of the consultation process for the FY1999 mid-year determination to protect Kosovar refugees is murkier. In April 1999, President Clinton invoked 207(b) and ordered his Secretary of State to consult with Congress on emergency refugee admissions. The determination was formally issued on August 12, 1999, and states that it was made “after appropriate consultations with the Congress,” but as of this writing the exact extent of those consultations remains unclear.\textsuperscript{66} In a hearing before the Senate Judiciary Committee on the regular refugee admissions process for FY2000, Julia V. Taft, Assistant Secretary of State, expressed some regret over the process, testifying that “[U]nfortunately, due to the time constraints, it was not possible to do full Congressional consultation this past time, but we certainly will correct that in the future.”\textsuperscript{67} Nonetheless, the consultations were sufficiently appropriate for the issuance of the FY1999 emergency presidential determination.

The consultations in these situations demonstrate the flexibility built-in to the statutory consultation requirement. While Congress can request more information and hearings, a brief, even telephonic, discussion with members of the relevant committees has been sufficient to satisfy this requirement.

\textsuperscript{60} H.R. 1605, 101st Cong. (1989).
\textsuperscript{62} S. 489, 101st Cong. (1989)
\textsuperscript{63} 135 Cong. Rec. 10,294 (1989).
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} 135 Cong. Rec. 10,295 (1989).
\textsuperscript{67} Presidential Determination No. 99–33 of August 12, 1999, 64 FR 47341.
\textsuperscript{67} Statement of Julia V. Taft, Assistant Secretary of State, Bureau of Population, Refugees, and Migration, Department of State, Annual Refugee Consultation Hearing before the Subcommittee on Immigration of the Committee on the Judiciary, United States Senate, August 4, 1999, p. 4 et seq. https://www.govinfo.gov/content/pkg/CHRG-106shrg67480/pdf/CHRG-106shrg67480.pdf.
VI. Emerging Refugee Situations since 1999

INA 207(b) has not been invoked by a sitting president since the Kosovo refugee crisis in 1999. However, during the Obama administration, some immigration advocates encouraged the president to initiate 207(b) proceedings and declare an emergency refugee situation in response to the concurrent crises in Syria and Central America.68 To the extent the Obama administration was willing to address the Syrian refugee crisis, it did so through the normal annual consultation process. In September 2015, President Obama pledged to admit at least ten thousand Syrian refugees in FY2016, a goal which the U.S. achieved.69 Regarding Central America, rather than declaring an emergency refugee situation, President Obama decided to expand the Central American Minors (CAM) program to admit not only unaccompanied children but certain family members as well.70

While President Obama did not increase refugee admissions under 207(b), he did authorize ERMA designations in response to refugee crises throughout his administration.71

VII. Conclusion

An analysis of the Refugee Act of 1980, including an examination of the history that led to its creation and past precedents from multiple and bipartisan administrations, establishes a picture of the president's broad legal authority to bolster refugee admissions in times of emergency. In creating the current refugee admissions system, Congress sought to both regularize annual refugee admissions and give the president the flexibility to respond to refugee emergencies. The law requires the president to make a determination that an emergency situation exists and that admitting refugees in response thereto is justified by grave humanitarian concerns or is otherwise in the national interests of the United States, but as the text suggests and the historical practice confirms, the president's authority to raise the refugee admissions target mid-year is both broad and flexible.


71 For the complete reports on ERMA use under the Obama Administration, see Appendix II.
Congress did include limits on this power. The president must consult with Congress in the exercise of this authority. Further, INA section 207(b) limits any such emergency admissions to one year, ensuring consultation with Congress occurs at least annually. But when an unforeseen situation arises, or a new administration inherits a refugee crisis that the existing annual refugee determination fails to adequately address, 207(b) authorizes the president to act with substantial latitude to protect refugees and advance the national interests of the United States.
Appendix I: Primary Cited Documents

Copies of the following primary documents, including presidential determinations and Congressional records, are available at: https://refugeerights.org/207b-paper-appendix-links/.

Presidential Determinations:
1. Presidential Determination No. 80–16 (April 21, 1980)
2. Presidential Determination No. 88–01 (October 5, 1987)
3. Presidential Determination No. 88–16 (May 20, 1988)

Congressional Consultation Documents:
2. Senator Kennedy's Statement at Judiciary Committee Hearing on United States Refugee Programs (April 21, 1980)
3. FY 1988 Refugee Admissions Congressional Consultations (October 1987)
4. Letter to the President from Senators Kennedy, Thurmond, and Simpson (April 26, 1988)
6. FY 1989 Refugee Admissions Congressional Consultations (October 1988)
7. Letter to the President from Senators Biden and Kennedy (May 26, 1989)
8. Report to Congress Concerning the President's Proposal to Raise the Fiscal Year 1989 Refugee Admissions Ceiling (May 1989)
9. Statements of Senators Abraham and Kennedy, Annual Refugee Consultation Hearing before the Subcommittee on Immigration of the Committee on the Judiciary, United States Senate, (August 4, 1999)
Appendix II: Uses of Non-207(b) Emergency Appropriations Since 1999

Each time the president wishes to draw additional funds from the Emergency Refugee & Migration Assistance Fund, they must issue an executive order effecting the withdrawal. The following are examples of ERMA withdrawals under the Obama Administration that were not part of the formal 207(b) emergency admissions process.

a. In FY2016, $70 million was drawn from the Fund.

b. In FY2013, $15 million was drawn from the Fund to provide shelter, health care, education, and protection to internally displaced persons (IDPs) in Syria and Syrian refugees in neighboring countries.

c. In FY2012, $36 million was drawn from the Fund:

   i. $10 million provided shelter, protection, and health and nutrition assistance to IDPs in Mali and Malian refugees throughout the region.

   ii. $26 million addressed the humanitarian needs of Sudanese refugees in South Sudan and Ethiopia who fled conflict in the Southern Kordofan and Blue Nile States of Sudan.

d. In FY2011, $52.6 million was drawn from the Fund:

   i. $12.6 million addressed the needs of those displaced as a result of violence and insecurity in Côte d’Ivoire, including shelter, protection, and water/sanitation support.

   ii. $15 million supported humanitarian needs resulting from unrest in Libya, including emergency evacuation of third country nationals.

   iii. $15 million provided assistance and protection to those affected by conflict in Côte d’Ivoire and Libya.

   iv. $10 million provided critical humanitarian assistance to Somali refugees in Ethiopia, Kenya, and Djibouti, including emergency nutritional support, access to water, health care, and essential non-food items.

e. In FY2010, $75.5 million was drawn from the Fund:

   i. $33 million extended the Dadaab/Ifo refugee camp in Kenya, established a food distribution center for Somali refugees in Kenya, and averted serious food pipeline breaks in Africa, the Middle East, Asia, and South America.

   ii. $9.5 million provided shelter, warm clothing, health care, and services assisting victims of sexual violence to returned refugees and IDPs in Kyrgyzstan.
iii. **$33 million** provided emergency shelter, food, clean water, and health care to Afghan refugees and Pakistanis displaced as a result of the floods in Pakistan.

f. In FY2009, $42.6 million was drawn from the Fund:
   
i. **$8.3 million** assisted Pakistani, Afghan, and Georgian conflict victims.
   
ii. **$6 million** provided assistance and protection to Congolese IDPs and refugees in Uganda and southern Sudan as a result of the crisis in the Democratic Republic of the Congo (DRC).
   
iii. **$20.3 million** addressed humanitarian needs related to conflict in Gaza.
   
iv. **$8 million** provided shelter to IDPs and health care to the wounded due to the crisis in Pakistan.