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Safe Haven for Salvadorans in the Context of Contemporary International Law—A Case Study in Equivocation

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This Article analyzes the basis for safe-haven programs for refugees fleeing war and civil strife under contemporary principles of international law. The authors trace the development of safe-haven programs in the United States and offer an analysis and critique of the Temporary Protected Status program created by the Immigration and Nationality Act of 1990. Focusing on the struggle to gain safe haven for refugees from El Salvador, the authors review the United States government's historical use of safe haven programs as a political tool. Finally, the Article looks at how other countries have responded to refugee crises and suggests a policy for the United States that is consistent with international refugee law.

INTRODUCTION

Between January 1, 1991 and June 30, 1992, approximately two hundred thousand Salvadorans living in the United States registered for Temporary Protected Status (TPS).¹ Legislation creating TPS was enacted as part of the Immigration Act of 1990² and provides

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1. IMMIGRATION LAW: A CIVIL RIGHTS ISSUE 53 (Jan. 29, 1992) (report prepared for presentation to the United States Commission on Civil Rights by the law firm of Arnold & Porter and the Washington Lawyer's Committee for Civil Rights Under Law).

2. Pub. L. No. 101-649, § 303, 104 Stat. 4978.

temporary safe haven to individuals in the United States who are refugees from conditions of general civil strife or natural disaster in their home countries.

The legislation granting TPS to Salvadorans expired on June 30, 1992. Despite a vigorous campaign to convince the United States government to redesignate El Salvador as a country whose nationals are eligible for TPS, on May 4, 1992, President Bush declined to do so, instead ordering a different program of Deferred Enforced Departure (DED) for all Salvadoran nationals registered for TPS.

Refugee experts and human rights activists had hoped that the enactment of TPS legislation signaled a change in United States policy toward grounding that policy in norms of contemporary international law and concepts of due process. The Bush administration's refusal to designate El Salvador under the general TPS statute, and its revival of an obsolete executive program of DED, is a disturbing indication that United States refugee policy is regressing from its original basis in international law.

This Article puts the passage of TPS legislation and the grant of TPS to Salvadorans into a historical and contextual framework and offers a criticism of the decision of the United States to turn back the clock on contemporary norms of international law and practice.

I. BACKGROUND

Over the last decade, few "legal" issues have been as thoroughly debated among policymakers, activists, and the general public as the proper legal status of the Central American refugee. Debate about the obligation of the United States to provide safe haven for refugees from Central American civil wars erupted shortly after the first major influx of Salvadoran refugees in 1979. Salvadoran refugees soon had company for their trek northward. Regional instability throughout Central America created a refugee crisis that eventually resulted in the migration of hundreds of thousands of Central Americans to the United States.³

In the early 1980s, as refugee flow across the southern border of the United States increased,⁴ the Immigration and Naturalization Service (INS), which has the dual function of immigration control

3. The ongoing civil war in Guatemala intensified greatly in the early 1980s, sending thousands fleeing, as did the Sandinista revolution and prolonged counterrevolutionary attacks in Nicaragua. For a history of the factors underlying this forced migration of Central Americans, see Angela D. Sante, *Central American Refugees: A Consequence of War and Social Upheaval*, in REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES 89 (Ved P. Nanda ed., 1989).

4. During the 1980s, Central American refugees had practically no opportunity to apply for refugee status through the overseas refugee program, which is based entirely on presidential discretion. DENNIS GALLAGHER ET AL., OF SPECIAL HUMANITARIAN CONCERN: U.S. REFUGEE ADMISSIONS SINCE THE PASSAGE OF THE REFUGEE ACT OF 1980

and refugee adjudication, reacted with little hospitality. The INS treated Central American refugees, for the most part, as similarly situated to Mexican immigrants. The refugees were labeled "illegal economic migrants," and the majority were shipped back to their home countries without being apprised of their right to a deportation hearing or their right to apply for political asylum.⁵

II. CHANGING DEFINITIONS OF "REFUGEE"

The Refugee Act of 1980 (Refugee Act)⁶ created a system through which refugees could apply for asylum or protection both from within the United States and from abroad. The Refugee Act, which conforms to the United Nations Convention Relating to the Status of Refugees (Convention),⁷ defines a refugee as:

Any person who is outside any country of such person's nationality . . . and who is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.⁸

Scholars have thoughtfully and forcefully argued that this narrow definition of refugee is broadening to reflect contemporary realities,

(1985). Thus, because neither a viable overseas refugee program nor a safe haven program existed, political asylum remained the only available protected status, and application for asylum in effect required the refugee to be physically present in the United States. David A. Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B.-INT'L LEGAL STUD. 91. Once in the United States, an asylum seeker may apply affirmatively to the Immigration and Naturalization Service (INS) for asylum or, if placed in a deportation proceeding, may raise eligibility for asylum as a defense. Over the last decade, the majority of Salvadoran and Guatemalan refugees applied for political asylum as a defense to deportation.

5. Many lawsuits eventually brought raised issues of U.S. refugee law and policy, but few specifically raised the issue of safe haven. One of the most important cases, however, forced the INS to desist from its practice of removing Salvadoran nationals without allowing them a hearing. *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 376-78 (C.D. Cal. 1982).

6. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.). For a concise discussion of prior law, see DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* (2d ed. 1991).

7. *Opened for signature* July 28, 1951, 19 U.S.T. 6223, T.I.A.S. No. 6577, at 606, 189 U.N.T.S. 267 [hereinafter Convention]. While the United States did not originally sign and ratify the Convention, the United States did sign and ratify the Protocol on the Convention, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 137, thereby binding it to the provisions of the Convention. The Protocol simply removed the geographic and time limitations that existed in the Convention.

8. Immigration and Nationality Act of 1980 (INA) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1982).

and that temporary safe haven for refugees who do not fit the Convention's narrow definition ("non-Convention" refugees) is becoming a customary norm of international law.⁹ While some have grounded this norm in humanitarian law¹⁰ and others in human rights law,¹¹ its development can most clearly be seen in the changing practices of individual countries, by their collective action through the United Nations,¹² and by the adoption of regional instruments.¹³

The Convention¹⁴ was drafted to address the specific problem of Eastern Europeans fleeing their homelands because of political persecution.¹⁵ Since the drafting of the Convention in 1951, patterns of worldwide refugee flow have changed dramatically, but the scope of the Convention itself remains limited to those who fear persecution if returned to their country of origin for reasons of race, religion, nationality, social group, or political opinion.¹⁶

According to the United Nations High Commissioner for Refugees (UNHCR),¹⁷ the bulk of refugees today are fleeing war, civil unrest, and famine.¹⁸ The Convention does not make allowance for these refugees within its scope.¹⁹ The UNHCR increasingly has been involved with such refugees, and this role has been unanimously supported by the members of the world community.²⁰

Efforts to modify the Convention to encompass this larger definition of refugee have thus far been unsuccessful.²¹ International

9. Joan F. Hartman & Deborah Perluss, *Non-Refoulement and Humanitarian Refugees: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 857 (1986).

10. Karen Parker, *The Rights of Refugees Under International Humanitarian Law*, in REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES 33 (Ved P. Nanda ed., 1989).

11. Todd Howland, *A Comparative Analysis of the Changing Definition of a Refugee*, 5 N.Y.L. SCH. J. HUM. RTS. 33 (1987).

12. Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211 (1991).

13. See, e.g., Paul Weis, *The Convention of the Organization of African Unity Governing the Specific Aspects of Refugee Problems in Africa*, 3 HUM. RTS. J. 449 (1970).

14. Convention, *supra* note 7.

15. See, e.g., Atle Grahl-Madsen, *Refugees and Refugee Law in a World in Transition*, 1982 MICH. Y.B. INT'L LEGAL STUD. 291.

16. In 1967 the geographical limitation present in the 1951 Convention was removed. Protocol Relating to the Status of Refugees, entered into force Oct. 4, 1967, 19 U.S.T. 6223. See *supra* note 7.

17. The United Nations approved the Statute of the Office of the High Commissioner for Refugees with G.A. Res. 428, U.N. GAOR, 5th Sess., Supp. No. 20, at 46, U.N. Doc. A/1775 (1950).

18. See, e.g., *Report of the Economic and Social Council: Situation of Human Rights in El Salvador*, U.N. GAOR, 39th Sess., Annex, Agenda Item 12, U.N. Doc. A/39/636 (1984).

19. Gunning, *supra* note 12, at 240.

20. For an interesting and detailed discussion of these developments, see Gunning, *supra* note 12, at 240-46.

21. See, e.g., the 1967 Declaration on Territorial Asylum, G.A. Res. 2312, U.N. GAOR, 22d Sess., Supp. No. 16, at 81, U.N. Doc. A/6716 (1967) in 62 AM. J. INT'L L.

treaty law has lagged behind changes in regional instruments and in individual state laws and practices that more appropriately define the term "refugee" to include all forced migrants.

Among regional instruments, the Organization of African Unity's Convention Governing the Special Aspects of Refugee Problems in Africa (OAU Convention) is the most comprehensive. The OAU Convention defines a refugee as follows:

[E]very person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.²²

This approach was followed in the Cartagena Declaration, under which a refugee was defined broadly to include those who flee their country because of "generalized violence," "international conflicts," or "serious disturbances of public peace."²³ Many states, for example, Uganda, Zimbabwe, and Sweden, have incorporated this broader definition of a refugee into their domestic statutes.²⁴

The United States has publicly indicated its subscription to the idea that safe haven for non-Convention refugees is an international obligation. For example, in 1979, when Thailand accepted neighboring Cambodians fleeing civil strife as refugees, the United States Secretary of State described the action as "correct," and members of Congress described the Thai government's response as "fulfill[ing] internationally recognized standards for assisting and protecting Indochinese refugees."²⁵

Despite its public position on the international refugee crisis, in its domestic practice, the United States has been slow to safeguard protections for non-Convention refugees. TPS for Salvadorans was the product of the collective effort of activists and advocates, who spent

822 (1968) and the ill-fated *Elaboration of a Draft Convention on Territorial Asylum*, U.N. GAOR, 30th Sess., Annex, Agenda Item 81, U.N. Doc. A/10177 (1975).

22. *Organization of African Unity: Convention on Refugee Problems in Africa*, 8 I.L.M. 1288, 1290 (1969).

23. Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551, 592-93 (1986) (quoting the Cartagena Declaration on Refugees, Nov. 22, 1984 (on file with the *San Diego Law Review*)).

24. See Gunning, *supra* note 12, at 242-43.

25. Isabelle R. Gunning, *Expanding the International Definition of Refugee: A Multicultural View*, 36 FORDHAM INT'L L.J. 35, 53 (1989) (citing 79 DEP'T ST. BULL. 10 (Dec. 1979); STAFF OF SENATE SUBCOMM. ON IMMIGRATION AND REFUGEE POLICY OF THE COMM. OF THE JUDICIARY, 97TH CONG., 2D SESS., REFUGEE PROBLEMS IN SOUTH-EAST ASIA: 1981, at 20 (Comm. Print 1982)).

hundreds of thousands of hours over the last decade working to obtain safe haven for Salvadoran refugees. In order to understand the achievement TPS represents, it is instructive to examine other attempts by advocates to bring United States treatment of refugees into line with international legal norms. Four principal avenues have been used: the courts, the sanctuary movement, the administration, and Congress.²⁶

A. The Courts

Traditional litigation strategies were employed, with varying degrees of success, to obtain safe haven for Salvadorans both in the representation of individuals, usually as a claim for political asylum in the context of a deportation hearing, and in class action litigation.

1. Individual Advocacy

The first major test of the Refugee Act came in the early 1980s with the arrival of thousands of Central Americans. For those seeking safe haven in the United States, the Refugee Act created only one option: political asylum. Immigration judges narrowly construed the 1980 Act and the 1951 definition upon which it was based, and this resulted in a dismally low success rate for Salvadoran asylum seekers, averaging about one to three percent of total cases.²⁷

Accordingly, advocates constantly searched for new theories to gain safe haven for clients who had fled civil war. One of the most popular strategies was a motion for *nonrefoulement* ("no return"). Motions were most frequently based on the Geneva Conventions of 1949²⁸ and customary international law.²⁹ The majority of

26. Legislative, legal, and community-sanctuary efforts to obtain or provide safe haven for Salvadoran nationals were usually linked with efforts to obtain or provide that status for Guatemalans as well. See, e.g., Michele Altemus, *The Sanctuary Movement*, 9 WHITTIER L. REV. 683 (1988).

Nicaraguans usually were not included in this effort because the reception they received in the United States was very different from that received by the Salvadorans and Guatemalans. The Nicaraguans enjoyed a favorable treatment from the INS. Often Nicaraguans' political asylum approval rating averaged significantly higher than that of Salvadorans and Guatemalans. See, e.g., Peter Koehn, *Persistent Problems and Political Issues in U.S. Immigration Law and Policy*, in REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES 67 (Ved P. Nanda ed., 1989) [hereinafter Koehn, *Persistent Problems and Political Issues*]. See generally PETER KOEHN, REFUGEES FROM REVOLUTION: U.S. POLICY AND THIRD-WORLD MIGRATION (1991).

27. E.g., Koehn, *Persistent Problems and Political Issues*, supra note 26.

28. E.g., Geneva Convention Relative to Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3364, 75 U.N.T.S. 287 (4th Geneva Convention) (entered into force Oct. 21, 1950).

29. These theories have generated extensive law review commentary. See, e.g., Karen Parker, *The Rights of Refugees Under International Humanitarian Law*, in REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES 33 (Ved P. Nanda ed., 1989); Perluss & Hartman, supra note 23.

nonrefoulement motions were simply denied by immigration judges and went no further. However, a few cases did wend their way through the justice system.³⁰

In 1985, an immigration judge in Harlingen, Texas held that Jesus Medina, a Salvadoran, had a private right to relief from deportation in the form of *nonrefoulement* based on the Geneva Conventions of 1949.³¹ Unfortunately, the Board of Immigration Appeals (BIA) overturned the immigration judge's decision and thus seriously set back the attempt to gain safe haven status for Salvadoran refugees through individual deportation hearings.³² The BIA held that neither the Geneva Convention Relative to the Protection of Civilian Persons in Time of War nor customary international law creates a potential remedy from deportation other than that provided by the Immigration and Nationality Act. This meant that, according to the BIA, the only form of relief available to individuals seeking safe haven was to show eligibility for political asylum by meeting the definition of "refugee" provided by the Refugee Act and the Convention.³³

The first *nonrefoulement* case to reach a federal appellate court was that of Blanca Rosa Echeverria Hernandez, a Salvadoran who fled her native land because of the civil war. In a significant blow to the theory and application of *nonrefoulement* in the United States, on January 14, 1991, a panel of the Ninth Circuit ruled against Ms. Echeverria Hernandez. In a wide-ranging decision that took a restrictive view of international law, three themes can be extracted. First, the Ninth Circuit took the position that the Refugee Act preempted the application of international law to deportation cases; second, it concluded that the Geneva Convention applied only to international armed conflicts, and thus was not applicable to the Salvadoran situation; and third, the court found that customary international law is merely one of a number of sources of legal standards to be consulted in the absence of any other kind of legal authority.³⁴

30. Interview with Edward J. Flynn, Legal Director of Central American Refugee Center (CARECEN), Los Angeles, California (Nov. 15, 1991).

31. *In re* Jesus del Carmen Medina in Deportation Proceedings, No. A26-949-415 (July 25, 1985). While legally this ruling was a major victory, the respondent (the person under deportation proceedings) was denied relief from deportation because he had not factually met his burden of proof that the Geneva Conventions actually applied to the situation in El Salvador.

32. *In re* Medina, 19 I. & N. Dec. 734 (BIA Oct. 7, 1988).

33. *Id.*

34. *Echeverria-Hernandez v. INS*, 923 F.2d 688 (9th Cir.), *vacated on other grounds*, 946 F.2d 1481 (9th Cir. 1991). See *infra* note 35 and accompanying text.

The Court of Appeals decision did not fully consider the difficult and complex issue of when a principle of international law reaches the status of a binding custom. In fact, the court ignored expert opinion, as well as official statements and actions, that indicated a customary principle had evolved, or at least was in the process of evolving, concerning safe haven for refugees who do not meet the Convention definition. The decision created an impediment for the development of *nonrefoulement* as a legal principle.

On November 5, 1991, the Ninth Circuit, sitting en banc, reversed the earlier panel's decision as being gratuitous, given the previous passage of TPS for Salvadoran nationals.³⁵ In so holding, the court left open the question of whether the principle of *nonrefoulement* had achieved the level of custom, and so allowed the law to develop unhindered by the panel's decision.

In only one case has an advocate been able to use international law to gain safe haven for an individual fleeing a country in the midst of a civil war. On August 24, 1990, a District of Columbia immigration judge, basing his decision on the doctrine of necessity (which, for example, allows a ship to seek a port in a storm without being considered a trespasser or in violation of immigration laws), ruled that the principle of nonreturn to a country in the midst of civil war constituted a customary international legal principle that must be applied in deportation proceedings. This decision was, however, based on the premise that international law prohibits deportation, as opposed to requiring safe haven.³⁶ While the INS appealed the decision, the case was administratively closed as a result of the passage of TPS and was never ruled upon by the BIA.³⁷

2. Class Actions

In addition to individual advocacy, two class action suits have been brought to attempt to achieve safe haven for Central American Refugees. In *Hotel & Restaurant Employees Union, Local 25 v. Smith*,³⁸ a group of Salvadorans challenged the Attorney General's failure to grant Extended Voluntary Departure status (EVD)³⁹ to

35. *Echeverria-Hernandez v. INS*, 946 F.2d 1481 (9th Cir. 1991).

36. *In re Maria Elana Santos*, No. A29-564-781 (Immigr. Judge, Washington, D.C., Aug. 24, 1990). The immigration judge distinguished his holding from that of the BIA's decision in *Medina* by finding that a person fleeing has no right to choose the country of refuge and that these persons can be deported to a third safe country; they simply cannot be returned to their home country.

37. Interview with William Van Wyke, attorney for Ms. Santos, Washington, D.C. (Dec. 4, 1991).

38. 594 F. Supp. 502 (D.D.C. 1984), *aff'd in part and rev'd in part*, 804 F.2d 1256 (D.C. Cir. 1986), *aff'd*, 846 F.2d 1499 (D.C. Cir. 1988).

39. Extended Voluntary Departure Status (EVD) was a blanket temporary suspension of the deportation process and the precursor to Temporary Protected Status (TPS).

Salvadorans. Prior to this suit, the Attorney General, acting without a statute, had granted EVD on fifteen occasions to nationals from countries experiencing civil war or civil unrest.⁴⁰

The class action was unsuccessful. The court expressly declined to "impose a humanitarian standard on the Attorney General's exercise of discretion," adding that it did not want to "open up irresponsibly the floodgates to illegal aliens."⁴¹

In *American Baptist Churches v. Meese*,⁴² individuals, church groups, and refugee organizations joined together in asserting that: (i) the United States was violating international law by deporting Salvadorans and Guatemalans to countries in the midst of civil war, (ii) sanctuary activities are protected under the First Amendment, (iii) EVD was being applied in a discriminatory fashion; and (iv) the 1980 Refugee Act was being applied in a discriminatory fashion to Salvadoran and Guatemalan asylum seekers.

The first two claims were rejected,⁴³ but in a historic settlement, the INS conceded its discriminatory application of the asylum provisions of the Refugee Act.⁴⁴ Although the *American Baptist Churches* settlement fundamentally changed the asylum review process, it also served to reinforce the idea that refugees who do not meet the narrow definition found in the Convention and the 1980 Refugee Act presently have no recourse within the United States system.

B. *The Sanctuary Movement*

While efforts to obtain safe haven for Central Americans did not find success in the courts, communities of faith sought to protect individual refugees from INS detection and deportation by founding

A discussion of EVD follows in notes 52-64 *infra* and accompanying text.

40. THOMAS A. ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 728 (1985).

41. *Hotel & Restaurant Employees Union*, 594 F. Supp. at 508.

42. *American Baptist Churches v. Meese*, C-85-3255 RFP (N.D. Cal. Oct. 6, 1988).

43. *American Baptist Churches v. Meese*, 712 F. Supp. 756 (N.D. Cal. 1989).

44. *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991). The settlement involved in this case has had a tremendous impact on Salvadoran and Guatemalan asylum adjudications in this country, as it requires the INS to readjudicate the asylum claims of each member of a class estimated to number as many as 500,000. Debbie Smith, *Unprecedented Victory for Guatemalan and Salvadoran Asylum Applicants: American Baptist Churches Settlement Agreement*, 14 *IMMIGR. J.* 27, 27-29 (1991).

the sanctuary movement, one of the most controversial social movements of the 1980s.⁴⁵

Essentially, the sanctuary movement was based on a difference of interpretation of United States international legal obligations. The government took the position that it had no legal obligation to Central American refugees other than the narrow protections of the Refugee Act. Sanctuary activists, however, saw the international legal principle of safe haven as supporting their actions.⁴⁶

The sanctuary movement reached its peak in the fall of 1986. At that point more than three hundred churches and synagogues had declared themselves places of sanctuary,⁴⁷ as well as twenty-two cities and two states that had declared themselves to be places of refuge for Central Americans.⁴⁸ While the sanctuary movement cited a traditional religious basis for its actions, the movement also frequently relied on international law, arguing that the United States was violating its international obligation by forcibly repatriating refugees to war-torn countries.⁴⁹

The response of the Justice Department was to prosecute sanctuary activists. International law and the principle of safe haven were unsuccessfully used as a defense in the various sanctuary trials, and a number of activists were eventually convicted of violating United States immigration laws.⁵⁰ In many ways the convictions, and the failure of the international legal defense, had a profound psychological impact on the movement and can be considered a turning point. After that point the nature of the sanctuary movement changed, and while increasingly dispersed, many former members of the movement began to focus their collective energies on change within the system.⁵¹

45. ANN CRITTENDEN, *SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND THE LAW IN COLLISION* (1988).

46. See generally Jorge L. Carro, *Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CIN. L. REV. 747 (1986); Elizabeth Hull, *The Sanctuary Movement: The Fight of the Cross and the Flag*, *MIGRATION TODAY*, Vol. 13, No. 5, 1985, at 6-16.

47. BASTA (Feb. 1986) (BASTA was a newsletter of the Sanctuary movement).

48. For a more detailed explanation, see Todd Howland & Richard Garcia, *The Refugee Crisis and the Law: The "City Sanctuary" Response*, in *REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES* 185 (Ved P. Nanda ed., 1989).

49. For an overview of the movement and a thorough account of the religious tradition of sanctuary, see IGNATIUS BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES* (1985).

50. See, e.g., *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989), cert. denied, 111 S. Ct. 751 (1991).

51. From that point on, few new churches declared themselves places of sanctuary and some of the city sanctuary declarations were repealed. Interview with Richard Garcia, Director of Centro de Asuntos Migratorios, San Diego, California (Apr. 1, 1992).

C. *The Executive Branch*

From the time the first Salvadoran arrived to seek refuge from civil war, the United States administration had the means available to provide safe haven. While EVD has no specific statutory basis, various administrations have, since 1960, used their discretion to apply immigration laws to provide EVD to nationals of fifteen countries because of civil unrest in their homelands.⁵² Until recently, EVD has been the only humanitarian relief available to "non-Convention" or war refugees who find themselves in the United States.⁵³

According to former Acting INS Commissioner Doris Meissner, the decision whether to grant EVD is based on two factors: the conditions in the country under consideration and United States interests in a particular case.⁵⁴ The State Department usually initiates a grant of EVD by sending a letter to the Attorney General describing "conditions in the country under consideration and explain[ing] why return by its nationals from the United States in the normal course should be suspended."⁵⁵

52. EVD has been used to provide safe haven to refugees from countries including Ethiopia, Uganda, Poland, Iran, Afghanistan, and Nicaragua. See THOMAS A. ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 840-53 (2d ed. 1991).

53. *Id.* Prior to the use of Deferred Enforced Departure (DED) for Salvadorans, discussed *infra* at Section IV, the administration had used one other program to protect an entire class of refugees, the DED program for certain Chinese nationals following the massacre at Tiananmen Square in May 1989. See *infra* notes 96-103 and accompanying text.

54. H.R. REP. NO. 627, 100th Cong., 2d Sess. 7 (1988).

55. Letters from Secretary of State George Schultz and Attorney General William French Smith support the idea that the criteria for EVD included more than just a consideration of country conditions. The State Department "invariably considers a number of other factors in deciding whether to recommend the granting of EVD in any particular case, and the granting of EVD will meet different objectives in different cases." Letter from George P. Schultz, Secretary of State, to William French Smith, Attorney General (June 23, 1983), *reprinted in* Memorandum of Points and Authorities in Support of Defendants' Motion for Partial Summary Judgment, Jt. App. tab 17, at 1, *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 563 F. Supp. 157 (D.D.C. 1983) (No. 82-2203) [hereinafter Defendants' Memorandum]. The Attorney General went so far as to say that there are no specific criteria. Letter from William French Smith, Attorney General, to members of Congress who wrote the Attorney General and Secretary of State asking for EVD for Salvadorans (July 19, 1983), *reprinted in* Defendants' Memorandum, *supra*, Jt. App. tab 18, at 1. The existence of violence or political instability is not necessarily sufficient grounds for instituting EVD. The Attorney General listed a number of other considerations that might affect the decision. These include the existence of a third country of safe haven and the adequacy of other immigration remedies.

It is noteworthy that the comments that accompany INS directives granting EVD usually cite only humanitarian concerns regarding conditions in the country under consideration, while selection of nationalities has been related to political factors.⁵⁶ Advocates and commentators have argued that, through thirty years of EVD, the Attorney General has established a de facto standard based on humanitarian concern for those fleeing unstable conditions in their country of nationality, and for that reason Salvadorans were entitled to EVD.⁵⁷ In this context, petitioners have argued bias in the application of EVD to refugees fleeing only from communist countries.⁵⁸ Because of the lack of a statutory basis for EVD, however, the Attorney General has enjoyed total discretion in determining which country's nationals should benefit from it.⁵⁹

Given that the political conditions in El Salvador were comparable to, or even more severe than, those in countries whose nationals were the beneficiaries of EVD, and that the unavailability of other immigration remedies supported a grant of EVD to Salvadorans, frustration with the Department of State and the Attorney General's unwillingness to extend EVD to nationals of El Salvador grew.⁶⁰ As it did so, Congress began to lobby for Salvadoran EVD. In 1981, Senator Edward Kennedy requested that EVD be granted to Salvadorans.⁶¹ A negative response from the State Department led Congress to pass a nonbinding "Sense of Congress" resolution that

56. Linda J. Oswald, Note, *Extending Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 MICH. L. REV. 152, 177 (1986). In a press release, the State Department cited the institution of martial law as the impetus for granting EVD to Polish nationals, starting in 1981. I.N.S. Wire of Jan. 21, 1982, reprinted in 59 INTERPRETER RELEASES 85 (1982). See also Department of Justice Press Release, June 18, 1987, reprinted in 64 INTERPRETER RELEASES 771 (1987). Other grants of EVD have been based on: the continuing "civil strife" in Lebanon (INS Wire of Dec. 12, 1978, reprinted in 55 INTERPRETER RELEASES 85 (1978)); the "turmoil prevailing in" Afghanistan (INS Wire of Dec. 2, 1980, reprinted in 62 INTERPRETER RELEASES 106 (1985)); and the "circumstances currently prevailing" in Ethiopia (INS Wire of July 12, 1982, reprinted in 59 INTERPRETER RELEASES 456 (1982)).

57. Oswald, *supra* note 56, at 177.

58. See, e.g., *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 594 F. Supp. 502 (D.D.C. 1984), *aff'd in part and rev'd in part*, 804 F.2d 1256 (D.C. Cir. 1986), *aff'd*, 846 F.2d 1499 (D.C. Cir. 1988) (class action challenge to denial of EVD for Salvadoran nationals).

59. Oswald, *supra* note 56, at 177-79.

60. For example, even the Salvadoran President, Jose Napoleon Duarte, lobbied for the extension of EVD to Salvadoran nationals. He warned of possible economic crisis in El Salvador if large numbers of refugees were returned. He also stated his fear that the civil war would be prolonged in that, in his opinion, many of the refugees had sympathy for the guerrillas and would become involved in the civil war on the side of the guerrillas if returned. Nancy J. Mims, Note, *Granting Safe Haven to El Salvadoran Refugees: Moakley-De Concini Bill Offers Humanitarian Approach to Difficult Problems in the United States and Central America*, 12 SUFFOLK TRANSNAT'L L.J. 603, 613-14, 614 n.56 (1989).

61. Oswald, *supra* note 56, at 161 n.49.

the administration should "take full account of the civil strife in El Salvador" when reviewing petitions for EVD made by Salvadoran nationals.⁶² In April of 1983, eighty-nine members of Congress signed a letter written to both the Secretary of State and the Attorney General, again requesting that EVD status be granted to Salvadoran nationals. Another negative response led to a more extensive "Sense of Congress" resolution. This time Congress plainly stated that "the Secretary of State should recommend that extended voluntary departure status be granted to aliens . . . who are nationals of El Salvador [S]uch status should be granted to those aliens until the situation in El Salvador has changed sufficiently to permit their safely residing in that country."⁶³ A third "Sense of Congress" resolution was passed in 1983.⁶⁴

None of these efforts moved the administration to act. Thus, frustrated with the administration's intransigence, Congress initiated safe haven legislation for Salvadorans.

D. The Congress

Safe haven legislation was first introduced by Senator Dennis De Concini (D-Ariz.) and Representative John Joseph Moakley (D-Mass.) in 1983. While the legislation passed in the House of Representatives in various forms and on five occasions, the bill did not reach the Senate floor until 1990 due to a threat of filibuster.⁶⁵

The bill that finally passed was hammered out in conference committee as a part of the Immigration Act of 1990.⁶⁶ This legislation was a compromise with two parts, one that created a statutory basis for providing safe haven, and another that specifically provided safe haven for Salvadoran nationals.⁶⁷ The Salvadoran TPS law did not clearly tie the period of protection to the objective reality—country conditions—in El Salvador.⁶⁸

62. *Id.*

63. *Id.*

64. *Id.*

65. The threat of filibuster occurred even though the Senate Judiciary Committee approved the bill twice, once in 1988 and again in 1989. Robert Rubin, *Ten Years After: Vindication for Salvadorans and New Promises for Safe Haven and Refugee Protection*, 68 INTERPRETER RELEASES 97, 98 (1991).

66. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); INA § 244A, 8 U.S.C. § 1254a(b)(3)(A) (1990). Section 244(A)(b) grants TPS specifically to Salvadoran nationals.

67. Interview with Jim McGovern, aide to Congressman Moakley, Washington, D.C. (Dec. 10, 1990).

68. Nor did the TPS bill that passed call for a General Accounting Office study of

While seeking to institutionalize the humanitarian concern behind the practice of granting EVD, Congress also wanted to reform the practice.⁶⁹ As discussed in Section IV below, by taking one of its first available opportunities to sidestep the legislation, the Bush administration showed that Congress had failed in its original goal, primarily because the legislation was a compromise. An examination of the provisions of both the generic and the specific TPS laws is nevertheless instructive for future efforts to restore rationality and process to safe haven programs.

III. THE TPS LAW

The separate provision of the Immigration Act of 1990 designating El Salvador as a country whose nationals are entitled to TPS is of more limited scope than the generic TPS statute.⁷⁰ For example, the generic TPS statute creates a procedure for its automatic extension⁷¹ unless the Attorney General finds, during a required review, that the conditions initially giving rise to the declared protected status have changed.⁷²

The automatic extension is expressly excluded from the legislation granting TPS to Salvadorans.⁷³ As enacted, TPS for Salvadorans was scheduled to last for eighteen months, from January 1, 1991, until June 30, 1992.⁷⁴ Rather than tying TPS for Salvadorans to objective country conditions, as in the generic statute, the period of

conditions in El Salvador so that a comparison could be made between the conditions there and those in other countries whose nationals had been granted EVD, as earlier drafts had. *See* H.R. 618, 100th Cong., 1st Sess. 4-5 (1987); Mims, *supra* note 60, at 617; 63 INTERPRETER RELEASES 626, 626 (1986).

69. "While the Executive Branch is to be commended for its efforts to protect endangered aliens by granting them EVD, the Committee believes that the current safe haven (*i.e.*, EVD) program is seriously flawed and in urgent need of reform. Deficiencies include [the fact that] [t]he conditions under which safe haven may be granted, extended or terminated do not appear in any regulation." H.R. 627, 100th Cong., 2d Sess. 8 (1988). The purpose of the original TPS legislation was to "replace the practice known as extended voluntary departure . . . with a more formal and orderly mechanism for the selection, processing and registration of such individuals." *Id.* at 4. Representative Mazoli advocated adopting a statutory criterion to formalize "the utterly mysterious process currently used to grant EVD." 133 CONG. REC. H6237 (July 14, 1987).

70. Immigration Act of 1990, Pub. L. 101-649, § 303, 104 Stat. 4978 (adding INA § 244A(b)).

71. INA § 244A.

72. Immigration Act of 1990 § 302(b)(3)(C) (adding INA § 244A(b)(3)(C)). The Attorney General is permitted to consult with "appropriate agencies of the Government" (these "appropriate agencies" are not named in the statute) and to review the conditions in the designated country. Immigration Act of 1990 § 302(b)(3)(A) (adding INA § 244A(b)(3)(A)).

73. Immigration Act of 1990 § 303(c)(2) excludes subsection (b)(3) of INA § 244A, among others, from applicability to Salvadorans designated by § 303. This subsection of § 244A covers the Attorney General's "periodic review, terminations and extension of [TPS] designations."

74. The Attorney General accordingly could not mandate termination of TPS for

protection appears to have been created by legislative compromise alone. Technically, therefore, no extension would have been available. Any period of additional TPS coverage for Salvadorans would need to have been secured by the Attorney General's designation under the generic statute or through other legislation.

If El Salvador had originally been designated for TPS under the generic statute, protection would continue for as long as "conditions for such designation under this subsection continue to be met."⁷⁵ The generic TPS statute describes specific conditions, the continued presence of which should be considered in deciding whether to terminate TPS. These conditions include "ongoing civil conflict . . . [that] would pose a serious threat to [refugees'] personal safety," "environmental disaster," and most importantly, the foreign state's not being able to "handle adequately the return to the state of aliens who are nationals of the state."⁷⁶

It is undeniable that objective conditions in El Salvador have changed since the passage of TPS legislation. On January 16, 1992, the Farabundo Martí National Liberation Front (FMLN) rebel force and the Salvadoran government signed a peace agreement which was the culmination of more than one and a half years of negotiations brokered by the United Nations.⁷⁷ The accords mandate a transition to a peaceful, pluralistic society, but the transition will be complicated and lengthy. One Salvadoran newspaper has separated the implementation of the peace accords into 117 finite tasks, some of which are not even scheduled to begin until 1994.⁷⁸ For example, the peace agreement calls for a cease-fire beginning on February 1, 1992, the demobilization of the FMLN at the end of 1992,⁷⁹ and general elections including the FMLN as a legal political party in March of 1994.

Further, despite the signing of the peace accords, the continuing

Salvadorans prior to the date established by Congress. Immigration Act of 1990 § 303(a)(2).

75. INA § 244A(b)(3).

76. Immigration Act of 1990 § 302(b)(1)(A) and (B)(i),(ii) (adding INA § 244A(b)(1)(A), (B)(i),(ii)). Ironically, the Federal Register announcement by Commissioner Gene McNary of the INS cites the rationale for the DED program as El Salvador's inability to currently accommodate the repatriation of Salvadorans granted TPS. 57 Fed. Reg. 28,701 (1992). See *infra* discussion accompanying notes 101-06.

77. Marjorie Miller, *Salvador Embarking on Peace*, L.A. TIMES, Jan. 16, 1992, at A4; Richard Boudreaux, *Civil War Ends in El Salvador with Signing of Treaty*, N.Y. TIMES, Jan. 17, 1992, at A1.

78. EL MUNDO, Feb. 1, 1992, at 22-23.

79. *Id.*

human rights violations⁸⁰ indicate that the transition to peace, other than on paper, will be an arduous process. Given the fragility of the peace and the economic disarray caused by more than a decade of civil war, all political sectors in El Salvador have agreed that the country is not ready to receive a mass repatriation of refugees from the United States.⁸¹

If El Salvador were covered under the generic statute, current country conditions could be taken into account. The last reference in the statute, in particular, to the inability of a country to handle the return of refugees, would support continued protection for Salvadorans.

Further, under the generic statute, the Attorney General is permitted to designate a country if the "foreign state officially has requested designation," or

if the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens . . . from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.⁸²

El Salvador did officially request designation and publicly requested more time before a mass repatriation of refugees.⁸³

The renewal in January 1992 of TPS status for nationals of Lebanon⁸⁴ also supports the correctness of continued TPS status for Salvadorans. The notice extending TPS for Lebanese states:

I [Attorney General Barr] find that there still exist extraordinary and temporary conditions in Lebanon that prevent aliens who are nationals of Lebanon, and aliens having no nationality who last habitually resided in

80. See, e.g., INTERFAITH TASKFORCE ON CENTRAL AMERICA, LEGISLATIVE ALERT (Apr. 1992). This report compiles a troubling list of death squad activities and human rights abuses that have occurred since the signing of the peace accord.

81. In a press release dated November 21, 1991, the Farabundo Martí National Liberation Front (FMLN) announced its support for an extension of TPS. In late February 1992, President Cristiani visited President Bush and members of Congress for the express purpose of requesting an extension of TPS. *Cristiani Viaja a Washington Para Reunirse con el Presidente Bush*, LA OPINION, Feb. 24, 1992, at 3a.

82. Immigration Act of 1990 § 302(b)(1)(B)(iii), (C) (adding INA § 244A(b)(1)(B)(iii) and (C)).

83. On February 10, 1992, the Salvadoran government officially requested an extension of TPS from the United States government. *Reported on* Salvadoran television broadcast (TV 12, Feb. 12, 1992). Thereafter, President Cristiani traveled to Washington and met with President Bush to request an extension. *Reported on* Salvadoran television broadcast (TV 12, Feb. 24, 1992). Salvadoran Vice-President Merino traveled to Washington to request extension of TPS. *Reported on* Salvadoran television broadcast (TV 12, Mar. 31, 1992) (monitored by El Rescate's Human Rights Department).

84. 57 Fed. Reg. 2931 (1992). TPS for Lebanese nationals was extended from March 28, 1992 until March 28, 1993. The Federal Register notice contains an estimation by Attorney General Barr that no more than 7,500 Lebanese nationals (or aliens having no nationality who last habitually resided in Lebanon) currently were eligible for TPS. The same day, TPS protection was also extended for Liberian nationals (and aliens having no nationality who last habitually resided in Liberia), of whom Barr estimated that there were no more than 5,000 eligible for TPS. *Id.* at 2932.

Lebanon, from returning to Lebanon in safety, as a result of the continued armed conflict in that nation.⁸⁵

According to the Bush administration's reports, the human rights situation in Lebanon improved significantly in 1991.⁸⁶ While violations of human rights continued, the State Department concluded that "overall, 1991 witnessed fewer incidents of violence and greater expansion of Lebanese central government authority over Lebanese territory than at any time since the onset of civil disturbances in 1975."⁸⁷ At the time of extension of Lebanese TPS, in Lebanon, as in El Salvador, tentative peace agreements had been reached. Continuation of TPS for Lebanese nationals in light of the signing of peace accords serves only to demonstrate the administration's inconsistency in refusing to extend TPS for Salvadorans because of an accord between the government and the FMLN.⁸⁸

While the signing of the Salvadoran peace accord is significant, all sending factors—the objective country conditions—apparently must be considered under the statute before termination is appropriate. But, given the Attorney General's broad discretion under the TPS statute, the practical value of the standard for termination is questionable.

IV. THE DED PROGRAM

The campaign for a renewal of TPS for Salvadorans faced a number of complexities. First, Congress granted TPS for Salvadorans through a special act when it created a generic TPS statute. That special act did not provide a mechanism for the extension of the designation. Accordingly, only another act of Congress or a decision by the Attorney General to designate El Salvador under the TPS statute could extend the period of TPS for Salvadorans. Second, from the time of the grant of TPS to Salvadorans until its mandated expiration, major, if yet tentative, changes occurred in El Salvador. A peace accord was signed and a cease-fire was put into effect. Third, Congress provided little statutory guidance as to when, and under

85. *Id.* at 2931. This cursory statement is indicative of the administration's ability to quickly review and designate nationals for TPS when it is of interest to do so.

86. U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991, at 1485-86 (1992).

87. *Id.* at 1485.

88. On Feb. 8, 1993, acting Attorney General Stuart Gerson terminated TPS status for Lebanese nationals, citing the improved security situation. 58 Fed. Reg. 7582 (1993). This was four years after the signing of the Taif Agreement, which ended the prolonged period of civil disturbance in Lebanon.

what conditions, safe haven status should be terminated.

In a letter dated May 4, 1992, President Bush informed Salvadoran President Alfredo Cristiani:

Although we will not be able to extend Temporary Protected Status [for Salvadorans], I am happy to tell you that Attorney General Barr will be taking the necessary steps to grant Deferred Enforced Departure for Salvadoran citizens for one year beyond the expiration of their Temporary Protected Status. This will provide Salvadoran citizens the same rights to remain and work in the United States. We will carefully consider an extension next year. Let me add that when repatriations begin sometime in the future, the return of your countrymen will inevitably occur over a prolonged period.⁸⁹

Any opportunity for the Attorney General to designate El Salvador under generic TPS legislation or for Congress to specially redesignate El Salvador for TPS status, as it previously did,⁹⁰ was accordingly preempted by the Bush administration's announcement of a grant of DED to Salvadorans.

The DED program was presented as an order from President Bush to the INS to decline to enforce the deportation of Salvadorans registered for TPS until June 30, 1993.⁹¹ The Bush administration did not explain publicly why it chose to employ DED rather than to extend TPS.

Nearly two hundred thousand Salvadorans in the United States under the benefit of TPS were affected by the DED action.⁹² INS headquarters sent instructions regarding DED procedures to their field offices on May 15, 1992.⁹³ Among other requirements, registration for DED was limited to Salvadoran nationals who registered for both the first and second periods of TPS or who could "establish that the failure to reregister was for good cause."⁹⁴

89. Letter from President Bush to President Cristiani (May 4, 1992).

90. Passing such a hurdle may not be easy, especially given the tone Congress set in the Immigration Act of 1990. If Congress chooses to amend the TPS law to change the designation of a TPS beneficiary to permanent legal status or to pass a bill or resolution effecting related procedures, it must do so with a three-fifths majority in the Senate. Immigration and Nationality Act of 1980 § 244A(h)(1) and (2).

91. 57 Fed. Reg. 28701 (1992).

92. 69 INTERPRETER RELEASES 600 (1992).

93. Significantly, the INS has agreed to consider DED as an extension of TPS for purposes of the *American Baptist Churches* settlement. See *supra* note 44. Refugee advocates were concerned that DED would have a "disorienting" impact on Salvadorans' rights under *American Baptist Churches* because the settlement agreement ties those rights to the end of TPS for Salvadorans. See 69 INTERPRETER RELEASES 600 (1992).

94. INS Wire, June 24, 1992, at 1. The reregistration requirement has generated substantial concern among refugee rights advocates, as failure to reregister has been acknowledged to be largely the fault of the INS. For instance, the INS failed to provide adequate notice to TPS registrants of their responsibility to reregister, in violation of the INS's own regulations. In many areas, Salvadorans were unable to reregister for TPS due to the inability of local offices to process reregistrations in a timely manner. Finally, slowness by the INS in processing work authorization applications discouraged many from reregistering, as the work authorization a person would have received would already have expired by the time it was received, or because the work authorization the person

Statements by Bush administration officials indicated that they considered the DED program for Salvadorans to be practically an extension of the previously terminated TPS period. These statements further indicated that safe haven for Salvadorans was never considered by the Bush administration to be mandated by international law. According to a senior INS official, TPS and DED are essentially similar: "Either way, [the Salvadorans] can stay in the country temporarily and work."⁹⁵

V. EXECUTIVE DISCRETION AND SAFE HAVEN PROGRAMS AFTER THE PASSAGE OF THE TPS STATUTE

The passage of the TPS statute and the Bush administration's refusal to apply it to Salvadorans raise two issues of executive discretion: first, does the TPS statute limit the plenary power of the executive branch over matters of immigration and refugee law; and second, does the TPS statute allow, explicitly or implicitly, review of the Attorney General's decisions to grant or deny TPS? These questions are germane to a discussion of TPS in the context of contemporary international law in that limitations contained in the statute, or to be extrapolated through interpretation of the statute, may adversely affect the ability of the United States to integrate principles of international law into its refugee policy.

A. *Limitation of Presidential Power*⁹⁶

The DED program was implemented through a directive of the President rather than by legislation or designation by the Attorney General. The issuance of an executive order regarding a safe haven program raises questions about the permissible extent of presidential discretion, given the existence of legislation that (i) speaks directly to the issue the President is attempting to regulate, and (ii) provides that the program it initiates is the exclusive means of granting safe haven status.

DED is not a new program, nor does it represent the first time the

was holding was already valid through the end of the TPS period. SALVADORAN TPS BULLETIN OF THE NATIONAL IMMIGRATION, REFUGEE & CITIZENSHIP FORUM (July 3, 1992) [hereinafter SALVADORAN TPS BULLETIN].

95. 69 INTERPRETER RELEASES 600 (1992).

96. The issue of shared power between the executive branch and Congress in immigration matters has been extensively debated without a clear resolution. See, e.g., THOMAS A. ALENIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 1-39 (1985).

executive branch has ignored legislative attempts to proscribe refugee policy. President Bush created a similar program to offer ongoing safe haven to Chinese nationals in the United States at the time of the Tiananmen Square massacre.⁹⁷ At the same time that Bush vetoed legislation permitting Chinese students to waive foreign residency requirements under the terms of their non-immigrant visas, he directed the INS to take measures that would provide the same benefits as contained in the proposed legislation.

The Chinese DED program was initiated by Bush's announcement that the United States government would give "sympathetic review" to requests by students from the People's Republic of China for extensions of stay.⁹⁸ On June 6, 1989, Attorney General Thornburgh directed INS Commissioner Alan C. Nelson to defer the enforced departure of the Chinese students.⁹⁹ President Bush's veto on November 30, 1989 of H.R. 2712, the "Emergency Chinese Immigration Relief Act of 1989," was outlined in a "Memorandum of Disapproval" wherein the President set out with more detail the delayed departure program offered to the Chinese students.¹⁰⁰

The Chinese program was enacted prior to the passage of TPS legislation in November 1990. While the Bush administration's reservation to itself of the power to grant safe haven status by vetoing legislation that had the same effect may have been questionable, its conduct in creating a Salvadoran DED program when a statute exists indicated a stubborn insistence on treating safe haven matters as solely within executive discretion.

Like the Chinese program, the Salvadoran DED program was announced by President Bush. President Cristiani's release of the letter to the Salvadoran press took the Bush administration, particularly the INS, by surprise.¹⁰¹ In the *Federal Register* notice published on June 26, 1992, the DED program was stated as a directive to the INS.¹⁰² Although not stated as an executive order, the publication of this directive in the *Federal Register* gave it the same effect as an

97. 69 INTERPRETER RELEASES 600 (1992). The order prevented the INS from deporting People's Republic of China nationals (primarily students) and their dependents who were in the United States between June 5, 1989, the date the Tiananmen Square massacre began, and the date the order was signed and whose nonimmigrant visas expired before June 6, 1990.

98. James Gerstenzang, *Bush Halts Arms Sales Over China Repression*, L.A. TIMES, June 6, 1989, at A15.

99. Official correspondence from Attorney General Richard Thornburgh to INS Commissioner Alan C. Nelson, dated June 6, 1989. This directive of the Attorney General was implemented with INS Cable CO 243.69-P (June 7, 1989).

100. Presidential Memorandum of Disapproval, 25 WEEKLY COMP. PRES. DOC. 1853 (Nov. 30, 1989).

101. SALVADORAN TPS BULLETIN, *supra* note 94.

102. 57 Fed. Reg. 28,701 (1992).

executive order.¹⁰³

The *Federal Register* notice stated the reason for the implementation of the program to be El Salvador's inability to "accommodate the repatriation of approximately 150,000 people granted TPS."¹⁰⁴ The generic TPS statute, however, recognizes this factor as allowing a designation by the Attorney General.¹⁰⁵ Rather than issuing an executive order, President Bush's correct course would have been to instruct the Attorney General to designate Salvadorans for TPS. The Attorney General himself would not have had the discretion to ignore the statute and grant DED to Salvadorans. The TPS statute provides that TPS is the "exclusive authority" (*i.e.*, the sole remedy) of the Attorney General to permit persons to remain in the United States temporarily because of their particular nationality.¹⁰⁶ No principle of constitutional law would seem to permit the President to order the Attorney General to do something that the Attorney General could not do himself.

B. Limitation of the Attorney General's Power

The statute's provision for exclusivity of remedy and traditional constitutional jurisprudence establishes the limit of executive discretion to create additional safe haven programs. The statute on its face, however, gives the Attorney General virtually unlimited discretion in the administration of the TPS statute by providing that "there is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection."¹⁰⁷

103. Directives by the Bush administration to ignore provisions of statutes have been thoroughly criticized on the ground that such directives are a refusal by the executive branch to uphold its obligation contained in Article III, section 3, clause 3 of the United States Constitution, to "take care that the Laws be faithfully executed." See, e.g., Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381-84 (1986) (criticizing Director of Office of Management and Budget David Stockman's directive to all heads of executive departments and agencies to disregard certain provisions of the Competition in Contracting Act of 1984); Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers*, 57 GEO. WASH. L. REV. 627, 690 ("A literal reading of the Take Care Clause confirms that it is the President's duty to ensure that officials obey Congress' instructions; the Clause does not create a presidential power so great that it can be used to frustrate a statutory intention.").

104. 57 Fed. Reg. 28,701 (1992).

105. See *supra* note 74 and accompanying text.

106. INA § 244A(g). The statute also provides that the program implemented with respect to Chinese nationals will not be affected by this provision.

107. Immigration Act of 1990 § 302(a) (adding INA § 244(b)(5)(A)). The Act also provides that the Attorney General *may* designate any foreign state for TPS *only if*

The INS has traditionally enjoyed broad discretion in matters of immigration and naturalization.¹⁰⁸ Even with the explicit bar to review contained in the statute, however, the Attorney General's discretion may be tempered by the reluctance of some courts to give the executive branch or an administrative agency unencumbered discretion. Even when a statute appears on its face to block judicial recourse, as does the TPS statute, courts have not only considered the language of the statute, but they have also considered the statutory history, common sense, policy, and concern for the risk that the absence of judicial review may extend an invitation to exceed conferred powers and disregard statutory requirements.¹⁰⁹ Courts have attempted to guard constitutional rights in spite of a permeable shield blocking judicial review.¹¹⁰

Judicial review has proceeded in spite of an explicit bar on review, when constitutional claims arise through the apparent usurpation of delegated legislative power.¹¹¹ An explicit bar to judicial review has been limited to bar review of only factual determinations, "while permitting review to determine whether there ha[s] been a substantial departure from important procedural rights, a misconstruction of governing legislation, or some like error going to the heart of the administrative determination."¹¹²

Even simple factual determinations are subject to judicial review in spite of a clear and convincing intent to bar judicial review when an administrative decision is an error of fact. In this case the error constitutes a mistake of law and would be subject to judicial review.¹¹³

the Attorney General finds that certain conditions are present. *Id.* § 244A(b)(1). The use of the word "may" indicates that the Attorney General is able to designate a country when the requisite conditions exist, but is not required to do so.

108. As was set out clearly in *Fiallo v. Bell*, 430 U.S. 787 (1977), "the power to expel or exclude aliens [has long been recognized] as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial controls." *Id.* at 792 (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)).

109. *See, e.g.*, *Ralpho v. Bell*, 569 F.2d 607, 617-18 (D.C. Cir. 1977).

110. In *Ralpho* this meant that the statute in question was to be read in a manner consistent with the Constitution. *Id.* (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)).

111. *Owens v. Hills*, 450 F. Supp. 218, 221 (N.D. Ill. 1978). The statute at issue provided:

The Secretary shall by regulations prescribe the terms and conditions under which expenditures and payments may be made under the provisions of this section, and his decisions regarding such expenditures or payments, and the terms and conditions under which the same are approved or disapproved, shall be final and conclusive and shall not be subject to judicial review.

Nevertheless, the district court held that the mandate of judicial review was required to prevent the unlawful delegation of legislative power.

112. *Lindahl v. Office of Personnel Management*, 470 U.S. 766, 780 (1985) (citing *Scroggins v. United States*, 397 F.2d 295, 297 (1968)).

113. *Ralpho v. Bell*, 569 F.2d 607, 624 (1977).

The Attorney General's decision to grant TPS, under the generic statute, is to be made by consulting information from other sources, including the State Department. Although the statute provides the Attorney General with extreme latitude in the interpretation of the facts gathered and advice rendered, a rational interpretation of any given set of facts must have limits.

A brief review of the history of TPS in its prior form, EVD, shows that the safe haven provision has been the exclusive domain of the executive branch. Accordingly, safe haven has been consistently used for political purposes, in spite of the apolitical mandate contained in the Immigration and Nationality Act of 1980. The codification of this humanitarian measure in TPS ensures that there is a standard by which to monitor the actions of the Attorney General in its implementation. The power of the Attorney General to grant or deny EVD turned on the broad discretion delegated by Congress.¹¹⁴

This broad discretion and the absence of a voice from Congress were the underlying reasons for the courts' past refusal to review the Attorney General's continuing neglect of the plight of the Salvadorans fleeing to this country.¹¹⁵ The passage of the specific TPS legislation for Salvadorans and the general TPS legislation for other designated nationalities addressed the plight of Salvadorans and other nationals who legally fall short of qualifying for asylum, and thereby acted to displace some of the broad executive discretion of the executive branch. As the TPS program makes the executive branch the protagonist, however, there must be guarantees of due process in the implementation of the program. A TPS program devoid of due process guarantees and judicial review would be little improvement over the absence of a TPS statute. If the statute is taken on its face, without an understanding of the congressional intent in its enactment and of the history of the movement finally leading to the promulgation of TPS, then the executive branch is allowed once again complete discretion in the enactment of the program and again the grant of, or refusal to grant, protective status will be subject to the whims of the executive branch and its foreign policy priorities. Decisions made in regard to the TPS program must therefore

114. INA § 103(a), 8 U.S.C. § 1103(a): "The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens . . ."

115. *Hotel and Restaurant Employees Union, Local 25 v. Attorney General*, 804 F.2d 1256, 1271-72 (D.C. Cir. 1987). "Where Congress has not seen fit to limit the agency's discretion to suspend enforcement of a statute as to particular groups of aliens, we cannot review facially legitimate exercises of that discretion." *Id.*

be carried out in an evenhanded manner.¹¹⁶ In making its decisions, an administrative agency must rely on those factors put forward for consideration by Congress; it must consider the important aspects on which each decision depends and must offer an explanation for each decision, especially those decisions running counter to the evidence before the agency.¹¹⁷

VI. THE EXTENSION OF TPS AND INTERNATIONAL LAW

The generic TPS statute and the TPS legislation for Salvadorans reflect a sense on the part of the United States that an obligation exists to recognize "non-Convention" refugees. Considering that the United States has repeatedly criticized other countries for failing to live up to their international legal responsibility when they have turned away,¹¹⁸ forcibly repatriated, or deported those persons fleeing civil war or famine,¹¹⁹ the refusal to grant Salvadorans a continued period of TPS, in accord with country conditions, was disingenuous and inconsistent with the most modern norms of international law.

The avoidance of forced repatriation of those unwilling to return to their homeland is a basic tenet of international refugee law.¹²⁰ Whether affecting a Convention or a non-Convention refugee, the act of forced repatriation can be considered a serious breach of a state's international legal obligations.¹²¹ Most international and regional instruments are written in terms of the "voluntary repatriation" of refugees. Thus, the international community considers the termination of protection or invocation of a cessation clause an extremely serious act.¹²²

For example, the Organization of African Unity Convention (OAU Convention)¹²³ contains elaborate provisions for voluntary repatriation. Its focus is not on a specific set of factors that may result

116. "[T]he District Director [of the INS] cannot, consistent with the character and obligation of administering justice impartially, decide in contrary ways two cases which are identical in every essential respect." *Del Mundo v. Rosenberg*, 341 F. Supp. 345, 348 (C.D. Ca. 1972).

117. *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 812-14 (D.C. Cir. 1983).

118. This has been particularly true of United States criticisms of the treatment received by the Vietnamese Boat People. See, e.g., Robert P. Vecchi, *Don't Let the Boat People Drown*, N.Y. TIMES, Mar. 7, 1988, at A19.

119. See generally Robert F. Gorman, *U.S. Refugee Policy in Africa*, in REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES 115 (Ved P. Nanda ed., 1989).

120. ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 303 (1966).

121. *Id.*

122. Office of the United Nations High Commissioner for Refugees (UNHCR), Inter-Office Memorandum No. 90 (May 2, 1990).

123. See *supra* note 22.

in termination of protected status, but rather on establishing conditions that will eventually facilitate the voluntary repatriation of the refugees. The OAU Convention mandates that countries of origin and countries of refuge work together to promote and expedite the creation of conditions that will make voluntary repatriation possible.¹²⁴ Other regional instruments have followed this integrated approach to termination of protected status.¹²⁵

On the international level, the United Nations Convention Relating to the Status of Refugees establishes legal norms for cessation of status as a Convention refugee, as does the UNHCR Handbook¹²⁶ and the UNHCR statute.¹²⁷ The cessation clauses found in these documents are derived from the 1946 Constitution of the International Refugee Organization, which defines the conditions under which "refugees" and "displaced persons" will become or will cease to become the concern of the organization, and these clauses remain relevant to both Convention and non-Convention refugees.¹²⁸

Article 1(C)(5) of the Convention provides that cessation applies to a refugee who, among other reasons, "can no longer, because the circumstances in connection with which he has become a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality."

The drafters of the Convention envisaged that before the cessation clause could be invoked, at least three conditions must exist. First, the change in the refugees' home country must be politically significant; that is, there must be a significant democratic reform of all elements of the state apparatus, including free and democratic elections, a government committed to human rights, and an independent judiciary able to provide a fair and open trial to accused persons and

124. See, e.g., M.R. Rwelamira, *Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problems in Africa*, 1 INT'L J. REFUGEE L. 557 (1989).

125. *The International Conference on Indo-Chinese Refugees, Geneva, June 13-14, 1989, Declaration and Comprehensive Plan of Action*, states every effort will be made to create the conditions for voluntary repatriation. U.N. Doc. A/CONF.148 (Apr. 26, 1989). This idea is echoed in *International Conference on Central American Refugees (CIREFCA), Guatemala City, May 29-31, 1989, Declaration and Concerted Plan of Action*, U.N. Doc. A/44/527 (1989).

126. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS* (1979).

127. See *supra* note 17.

128. UNHCR GENERAL LEGAL ADVICE UNIT—DIVISION OF REFUGEE LAW AND DOCTRINE, *NOTE ON THE INTERPRETATION OF ARTICLE 1(C)(5), (6) OF THE 1951 CONVENTION AND OF PARAGRAPH 6(A)(E), (F) OF THE STATUTE OF THE OFFICE OF UNHCR* 3 (March 1990).

to prosecute human rights abuses effectively. Second, the change must be truly effective: rhetorical commitments are insufficient. Further, it should not be assumed that effective change can take place in a short period of time, especially after years of abuse. Cessation cannot be invoked simply because of progress that is being made, even observable progress. Finally, the change must be durable and shown to be so.¹²⁹ Adopting the international legal standard, a number of states have amended their domestic legislation to allow non-Convention refugees to remain in the country of refuge until it is possible for them to return to their home country in dignity and without danger.¹³⁰

The domestic legislation of other states, while not explicitly providing for non-Convention refugees, also focuses on the termination of the sending factors for the refugee flow. For instance, Canada's refugee legislation provides that "[a] person ceases to be a Convention refugee when the reasons for the person's fear of persecution in the country that the person left, or outside of which the person remained, cease to exist."¹³¹

The TPS statute demonstrates that Congress is cognizant of these principles. The language of the TPS statute is parallel to that used in the OAU Convention and in the Cartagena Declaration.¹³² It is noteworthy that the generic TPS statute also focuses on the end of the objective factors that necessitated the protection, in that it mandates protection until conditions for the designation are no longer met.¹³³

Certain patterns can be discerned in the application of the cessation clause to individual states following the end of an armed conflict or extensive civil unrest. On only eight occasions has the cessation of refugee protection been invoked in this context. Guinea-Bissau successfully declared its independence from Portugal on September 24, 1973. In April 1974, independent status was officially recognized by Portugal. By September 1975, the UNHCR considered that conditions had sufficiently changed to invoke the cessation clause.¹³⁴ Angola's independence, on the other hand, was also recognized by Portugal in 1974, but not until June 1979 did the UNHCR deem

129. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 199-205 (1991). See also JESUIT REFUGEE SERVICE/CANADA, *INCREASED FAITH? REPATRIATIONS AND DEPORTATIONS TO EL SALVADOR, A HUMAN RIGHTS STUDY* (1991) (discussing the cessation clause as applied to El Salvador).

130. *Report on 35th Session of the Executive Committee of the High Commissioner's Programme*, U.N. Doc. A/AC.96/651 (1984).

131. Immigration Act, 1976-1977, R.S.C., ch. I-2 (1985), amended by 1988 S.C. 905, ch. 35 § 2(2)(e) (Can.).

132. All three protect war refugees and victims of civil unrest and natural disaster.

133. 8 U.S.C. § 1254a(b)(3)(A) (Supp. II 1990).

134. See UNHCR IOM/38/75 - BOM/48/75 (Dec. 1, 1975).

conditions sufficiently changed to merit application of the cessation clause.¹³⁵ Conditions changed rapidly enough in Zimbabwe that the UNHCR applied the cessation clause a little less than a year following the permanent end of hostilities.¹³⁶

One of the few examples from the Americas is Argentina. President Raul Alfonsin was elected in 1983, bringing an official end to seven years of repressive military rule. The restoration of constitutional rule was considered to be solid enough by 1985 that the UNHCR applied the cessation clause to Argentine refugees.¹³⁷

The process of change of circumstances may be "subtle and reflected over a number of years by legal reforms and gradual improvements in human rights,"¹³⁸ and so no arbitrary period of time should be used to determine when the cessation clause should be applied. In fact, the Director of UNHCR's Division of Refugee Law and Doctrine has stated that "it is noteworthy that neither the end of some wars nor some political developments have yet been considered sufficient to warrant the application of the cessation clause to hundreds of thousands of refugees."¹³⁹

Cessation determinations must be made on a case-by-case basis; they must evaluate relevant country conditions, such as the implementation of the terms of a peace accord and the rate of reconstruction.¹⁴⁰ As a rule of thumb, the UNHCR advocates that individual states allow refugees to remain in the country of refuge for two years after an armed conflict or civil war ends.¹⁴¹ While host countries are usually suffering from "compassion fatigue" by the time the armed conflict ends in the sending country, the High Commissioner for Refugees has asked host countries to have sufficient patience to allow adequate reconstruction to occur to make repatriation a viable, durable solution.¹⁴²

135. See UNHCR IOM/22/79 - BOM/20/79 (June 15, 1979).

136. See UNHCR IOM/4/81 - BOM/4/81 (Jan. 14, 1981).

137. See UNHCR IOM/84/84 - FOM/79/84 (Nov. 13, 1985).

138. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 51 (1985).

139. UNHCR IOM/90 at 6 (May 2, 1990).

140. Application of these principles has not always been smooth, but problems usually can be traced to the failure to create a durable solution. The most frequent problem encountered in repatriations has been inadequate reconstruction. See generally U.S. COMMITTEE FOR REFUGEES, *WHEN REFUGEES WON'T GO HOME: THE DILEMMA OF CHADIANS IN SUDAN* (1987).

141. Telephone interview with Fernando Chang-Muy, Senior Legal Advisor, UNHCR, Washington, D.C. (Sept. 10, 1991).

142. Dr. Sadako Ogata, UNHCR, *Refugees: Challenges of Humanitarianism in the 1990's*, Address Sponsored by the Asia Society (April 3, 1992) (transcript on file with the *San Diego Law Review*).

Lessons from other forced mass migrations teach the importance of truly durable solutions that coordinate with reconstruction efforts to ensure refugees' ability to return safely and with dignity to their homeland.¹⁴³ While the success of mass repatriations has been greatest when dislocation has been shortest, the conditions the refugees find upon return are of great importance to repatriation.¹⁴⁴

Many Salvadoran refugees have been in the United States for several years. The length of their dislocation, combined with the difference in economic standards and the present lack of economic opportunities in El Salvador, will mean that the success of repatriation, both for individual refugees and for El Salvador as a country, will be uncertain until *all* the root causes of the refugee flow have been eliminated. Lasting and successful repatriation of Salvadorans will accordingly be tied to both full implementation of the peace accords and El Salvador's reconstruction efforts.

The period of TPS for Salvadorans should depend upon the rate of transition and reconstruction in El Salvador. In determining this period, a comparison must be made between the conditions in El Salvador and those in other countries to which refugees have been safely repatriated. For example, if the implementation of the peace accords progresses smoothly, and reconstruction efforts are successful, the protection period could be similar to that of Zimbabwe: approximately one year following the permanent end of the armed conflict.¹⁴⁵ If difficulties in implementation of the accords and reconstruction occur, the period of protection could be similar to that of Angola: more than four years following the permanent end of the armed conflict. The decision to end safe haven must not be made arbitrarily.

CONCLUSION

The TPS statute was a weak attempt by Congress to set limits on executive discretion in refugee matters by imposing some minimum standard of compatibility with developing international law. Normally, decisions to grant or deny safe haven status should be made in accordance with the law based on objective factors related to country conditions.

To end the TPS program for Salvadorans in June of 1992, before the peace accords came to fruition and before the mandated changes

143. See, e.g., Gorman, *supra* note 119, at 115.

144. *Id.*

145. The final cessation of hostilities in El Salvador was marked by the demobilization of the FMLN on Dec. 15, 1992. This date had been postponed from October because of delays in the implementation of the peace accords. As of March 15, 1993, the FMLN has refused to destroy its remaining surface-to-air missiles, citing governmental noncompliance with the peace accords.

in country conditions occurred, was premature. The Bush administration's method of continuing a kind of safe haven status for Salvadorans, by executive order, shows that Congress did not achieve its goal of creating a clear depoliticized standard for safe haven designations with the passage of the TPS laws. President Bush's announcement of DED for Salvadorans indicates that safe haven remains a matter of politics and not of international law.

President Clinton's campaign promise to reverse the Bush administration's interdiction policy for Haitian refugees was a hopeful signal that the new administration would respect international law and humanitarian principles in granting safe haven to persons fleeing conditions of civil strife. Clinton's failure to keep his campaign promise and his decision to maintain the present policy for at least the first six months of his administration demonstrate the need to take the issue of safe haven status out of political hands.

The decision whether to extend the DED program, or a new designation of TPS for Salvadorans, will be made by the Clinton administration in the next several months. This Article has argued that conditions in El Salvador have not changed sufficiently to warrant a forced return. Regardless of the Clinton administration's decision, however, the United States government's treatment of the issue of safe haven has highlighted the weaknesses of the TPS statute. Congress should revise the statute by reducing the absolute discretion of the Attorney General, to end once and for all the predominance of short-run political expediency over sound refugee law and policy grounded in contemporary international standards.

