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The Endless Debate: Refugees Law and Policy and the 1980 Refugee Act

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NOTE

THE ENDLESS DEBATE: REFUGEE LAW AND POLICY AND THE 1980 REFUGEE ACT

I. INTRODUCTION

A. *Refugees at Center Stage*

Refugee policy has been one of the contradictory strains running through American foreign policy since World War II. Its development reflects our changing understanding of national self-interest in the face of radical and gradual change around the world and our willingness to extend special generosity to certain groups of desperate uprooted peoples. Out of this mixture of motives has developed a hybrid creature known as refugee law, a field more overtly responsive to political shifts than many others but a field that nonetheless looks to traditional concepts of law for guidance.

On March 17, 1980, President Carter signed the Refugee Act of 1980[1] (Refugee Act) thus concluding several years of work and study by Congress, the Executive, and voluntary agencies in drafting a comprehensive approach to admitting refugees abroad and resettling them in cities of the United States. The Refugee Act modernized the definition of *refugee* in United States law, established a system of shared responsibility between Congress and the Administration in admitting refugees, and provided a framework for federal economic and educational assistance in refugee resettlement to localities.

Although the Refugee Act was intended to resolve political debate over refugee policy and law for years to come, the debate has actually intensified. Like other works of synthesis, the Refugee Act serves to amend past errors rather than to predict future trouble spots. Most significantly, waves of asylum seekers from the Caribbean, Central America and even remote parts of Asia, Africa and Europe have challenged the basic premise of the Refugee Act: that refugees would be admitted in an orderly process after gaining approval and visas from United States authorities overseas.[2]

New political realities have run roughshod over prior assumptions. Five years ago, 3,702 aliens in the United States applied for asylum, but in the 12 months following the passage of the Refugee Act, more than that many applied each month.[3] Between April and September 1980, approximately

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[1] Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C. (1982)).

[2] *See Hearings on the Caribbean Refugee Crisis: Cubans and Haitians Before the Senate Judiciary Comm.*, 96th Cong., 2d Sess. 25-51 (1980) (statement of Victor H. Palmieri, U.S. Coord. for Refugee Affairs).

[3] *Hearings on S. 1765 Before Subcomm. on Immigration and Refugee Policy of the Senate Judiciary Comm.*, 97th Cong., 1st Sess. (1981) (statement of Doris Meissner, Acting Comm'r of the Immigration and Naturalization Service (INS)) (available on microfiche through 1982 Congressional Information Service, (CIS) ANN. AB., No. S521-44.1), *reprinted in condensed form in* Meissner, *Proposed Revisions in Asylum Procedures and Law*, INS REP., Spring-Summer-Fall 1, 1 (1981) [hereinafter cited as Meissner Testimony].

125,000 Cubans sailed from Mariel Harbor to Key West, Florida.[4] In that same year, the Immigration and Naturalization Service (INS) apprehended about 15,000 Haitians without visas, many of whom applied for asylum,[5] along with large numbers of Salvadorans,[6] Ethiopians,[7] and Iranians[8] either with invalid visas or with no visas at all. Until the Refugee Act, America's declared refugee policy was expressly anti-Communist, but the new law abandoned the Cold War refugee definition of a generation ago for the nonpartisan definition of the United Nations Convention on Refugees. The question being asked by these refuge seekers is whether anything has changed.

Recent events have provoked considerable disagreement among the branches of government as to ways in which to deal with the mass asylum problem. To the Carter Administration, the 1980 Mariel-Key West flotilla was a major international crisis. First it welcomed the refugees, then it sought to stem the tide by arresting boat captains and impounding their fishing boats. Eventually the President used the Attorney General's emergency parole power authorized by the Immigration and Nationality Act of 1952[9] (INA) to admit the Cubans[10] despite the fact that the elimination of mass refugee parole was one of the main goals of the Refugee Act.[11] The Reagan Administration issued an executive order for the interdiction of boats outside the territorial waters of the United States "when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States Law."[12] Over the past few

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[4] Copeland, *The 1980 Cuban Crisis: Some Observations*, J. OF REFUGEE RESETTLEMENT, Aug. 1981, at 22.

[5] NEWSWEEK, Feb. 1, 1982, at 28. The magazine's cover story, characteristic of popular reporting of this issue, shows a black man in prison denim peering through a wire fence. The headline: The Haitians: Refugees or Prisoners?

[6] The Plain Dealer, Feb. 10, 1982, at 1-A, col. 7.

[7] N.Y. Times, Jan. 27, 1982, at A3, col. 3 (Chicago ed.).

[8] *See generally* Meissner Testimony, *supra* note 3, at 1.

[9] Pub. L. No. 414, 66 Stat. 163 (1952) (codified as amended in sections of titles 8, 15, 18, 22, 49, & 50 U.S.C. (1982)).

[10] INA, § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1982). *See infra* note 25 and accompanying text.

[11] *See* Refugee Act of 1980, § 203(f), 8 U.S.C. § 1182(d)(5)(B) (1982) (amending INA, § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976)); Kennedy, *The Refugee Act of 1980*, INT'L MIGRATION REV., Spring- Summer 1981, at 141-56 (Symposium on Refugee Asylum: Policy and Legislative Developments).

The decision not to admit the Cubans as refugees represented a change in United States refugee policy in that for the first time the Mariel Cubans were not classified as escapees from communism but as migrants from the Caribbean. This paved the way for the joint consideration of Haitians and Cubans.

[12] Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981). The Reagan Administration also sponsored the Emergency Interdiction Act to give statutory authority to such interdictions on the high seas. *See* S. 1765, 97th Cong., 1st Sess., 127 CONG. REC. S11,993 (daily ed. Oct. 22, 1981) (Omnibus Immigration Control Act) [hereinafter cited as Administration bill]. This bill did not pass during the 1981-82 session and has been overshadowed by the

years federal courts in California and Florida have issued major injunctions against the Immigration and Naturalization Service in class action suits on behalf of tens of thousands of asylum seekers.[13]

In addition to the detention of thousands of Haitians, Salvadorans and others who are potential candidates for refugee status under United States law, there has been an ongoing political debate in Congress over bills that would make it more difficult for undocumented people to stay in the United States. On the last day of the 97th Session of Congress the House failed to reach a vote on a major immigration and asylum bill—the Simpson-Mazzoli bill[14]—that had already passed the Senate. Slightly different versions of this bill were reintroduced in Congress in February 1983.[15]

B. Summary

Refugee policy and law have developed largely in an ad hoc manner, as the nation has responded to crises around the world with both altruism and political self-interest. Against the foreground of refugee and asylum claims by unfortunate individuals there has been an unending struggle among the three branches of the United States government to make the rules for handling these claims.

Part II discusses the way refugee policy became a weapon in the Cold War and the formal abandonment of that approach with the adoption of the 1980 Refugee Act. Part III contains an analysis of the claims of individuals fleeing authoritarian regimes friendly to the United States; the interplay of political and humanitarian factors in the case of El Salvador; and an inquiry into the reasons why individuals become refugees. Part IV focuses on the statutes and regulations that govern the withholding of deportation and the granting of asylum; it touches on the inherent conflict between foreign policy dealing with state-to-state relations and individual claims of persecution, the judiciary's power to review decisions of the State Department and the INS, and the current debate in Congress

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Simpson-Mazzoli bill which omits the provision empowering the President to seize ships. *See infra* note 14.

[13] Among the cases that will be discussed in greater detail are Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd and modified sub nom.* Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982) (enjoining INS from summary asylum hearings held to violate due process of law); Louis v. Nelson, 544 F. Supp. 973 (S.D. Fla. 1982) (ordering release from detention of Haitian asylum applicants on grounds that INS rulemaking violated the law and failed to give fair notice to those affected by substantive rule); Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal. 1982) (imposing on INS requirements of providing notice to Salvadorans of right to apply for asylum and of other procedural rights).

[14] The Immigration Reform and Control Act of 1982 was introduced on March 17, 1982, by Senator Alan Simpson and Representative Romano Mazzoli as S. 2222 and H.R. 5827, 97th Cong., 2d Sess., 128 CONG. REC. S2306 (daily ed. Mar. 17, 1982).

[15] *See infra* note 163.

over new legislation on illegal immigration and asylum procedures. Part V concerns the specific rights and privileges afforded the beneficiaries of United States refugee law and the proposed solutions devised to permit several hundred thousand Cubans and Haitians to remain in the United States without recognizing their persecution claims. This part also discusses two important cases that have placed limits on the power of the INS to treat potential asylum applicants in summary fashion. The conclusion suggests that although there may be costs involved in limiting governmental discretion to deal with refuge-seekers in the most expedient fashion, the best long-range resolution to the debate now underway is to allow the parties to it to continue exploring the American commitment to providing a haven for refugees in a changing world.

II. Development of Refugee Policy

Modern American refugee law is the child of the mass population dislocation and the ideology-charged atmosphere that followed World War II. Migration to the United States had been radically limited by the Immigration Act of 1924.[16] In an effort to stabilize Western Europe and provide homes for a half-million homeless people,[17] Congress enacted a series of statutes in the post-World War II decades authorizing visas over and above ordinary immigration quotas.[18]

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[16] The National Origins Act, Pub. L. No. 68-139, 43 Stat. 153 (1924) (repealed 1952). The Act reduced annual immigration quotas to 2% of the number of persons of any nationality in the United States in 1890. This resulted in a considerable drop in immigration, especially of nationalities that had arrived in large numbers after the 1890 census, such as Eastern and Southern Europeans.

[17] In his Special Message to Congress on Admission of Displaced Persons, President Truman wrote: "The German economy, so devastated by war and so badly crowded with the return of people of German origin from neighboring countries, is approaching an economic suffocation which in itself is one of our major problems." Pub. Papers: Harry S. Truman 328 (1947) [hereinafter cited as Special Message].

[18] Chief among these were the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (ultimately granting 400,000 visas to refugees and displaced persons in Europe; originally these visas were meant to count against country quotas, but the Act permitted the mortgaging of present entries against future numbers, and these future mortgaged quotas were expunged by the Refugee-Escapee Act of 1957); the Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400 (permitting 254,000 non-quota visas to be granted to refugees, escapees and expellees); the Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639 (codified as amended in scattered sections of 8 U.S.C. (1982)) (extending the use of unclaimed visas for European refugees, expellees and escapees and for refugees from the Middle East); the Fair Share Act of 1960, Pub. L. No. 86-648, 74 Stat. 504 (codified as amended in scattered sections of 8 U.S.C. (1982)) (pledging that the United States would take 25% of all refugees who were resettled by other countries under mandate of the United Nations High Commission on Refugees).

A. Persecution and Ideology

The Displaced Persons Act of 1948 adopted the refugee definition[19] used by the International Refugee Organization (IRO), the United Nations agency which helped dislocated survivors of World War II. This definition focused on persecution as the key factor in determining status as a refugee. To be eligible for IRO assistance, one had to prove "persecution or fear based on reasonable grounds of persecution because of race, religion, nationality or political opinions."[20] This approach was adopted in somewhat expanded form in the 1951 United Nations Convention Relating to the Status of Refugees,[21] the refugee Magna Carta, which is still the basic international statement on the rights and status of refugees.

Under the Truman and Eisenhower Administrations the main thrust of United States foreign policy was the containment of communism. Refugee policy was an ideological weapon in the Communist-Free World competition.[22] Under the Refugee Relief Act of 1953, Congress specified that refugees must come from communist or communist-dominated countries,[23] a criterion of American refugee policy which departed from the nonpartisan approach of the IRO's successor, the United Nations High Commission on Refugees (UNHCR).

Both the Displaced Persons Act and the Refugee Relief Act contained

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[19] Displaced Person Act of 1948, § 2(b), 62 Stat. 1009, 1009.

[20] IRO Constitution, *opened for signature* Dec. 15, 1946, 62 Stat. 3037, 3050, T.I.A.S. No. 1846, 18 U.N.T.S. 3, 19. The relationship between the IRO and United States law has recently surfaced in denaturalization proceedings of persons accused of collaborating with the Nazis in persecuting civilians. The Displaced Persons Act made those who "assisted the enemy in persecuting civil populations" ineligible for visas, and service as a concentration camp guard was prima facie evidence of such persecution under the IRO. Federenko v. United States, 449 U.S. 490, 512 (1981). In *Federenko* and in United States v. Demjanjuk, 518 F. Supp. 1362 (N.D. Ohio 1981), persons who fled the Ukraine and later worked as concentration camp guards were found to have obtained American citizenship by material misrepresentation through reliance on IRO displaced person status erroneously given and through non-disclsoure of their activities during the war.

[21] *Adopted and opened for signature* July 28, 1951, 189 U.N.T.S. 150 [hereinafter cited as Refugee Convention]. The Refugee Convention applied the term *refugee* to persons so defined under a number of previous refugee arrangements, as well as the IRO Constitution, and added persecution on grounds of "membership of a particular social group" to the valid grounds for obtaining refugee status. *Id.* at 151. The United States did not sign the Refugee Convention but did sign the accompanying Protocol adopted by the United Nations in 1967. See *infra* note 30.

[22] *See, e.g.*, Special Message, *supra* note 17, at 329. "These are people who oppose totalitarian rule . . . and who because of their burning faith in the principles of freedom and democracy have suffered untold privation and hardship. Because they are not communists and are opposed to communism they have staunchly resisted all efforts to induce them to return to communist controlled areas." *Id.* President Eisenhower used similar ideas in his recommendation of emergency legislation for refugee admissions. "These Refugees and Escapees searching desperately for freedom look to the free world for haven." PUB. PAPERS: DWIGHT D. EISENHOWER 191 (1952).

[23] Refugee Relief Act of 1953, § 2(a)-(c), 67 Stat. 400, 400.

sunset provisions,[24] and in subsequent years, when an administration wanted to admit refugees, it used emergency powers there being no express statutory authority. The INA authorized the Attorney General to use discretionary power to "parole" otherwise inadmissible aliens into the United States.[25] Although not originally intended to be used in refugee admissions, under section 212(d)(5), parole became the mechanism by which the government enacted the refugee component of its foreign policy. Beginning with 925 World War II orphans in 1956 and 32,000 Hungarians a year later, one million refugees including Cubans, Indochinese, Soviets and Ugandans have been paroled into the country.[26]

In 1965, Congress amended the INA to provide for the admission of refugees as part of the regular admission process. Refugees became the seventh category in the preference system adopted by the 1965 amendments, with six percent of all visas allotted to refugees.[27] Refugee status was available to persons fleeing communism and the Middle East.[28] While Cold War antagonisms were by then muted by the ideals of peaceful coexistence, American foreign policy continued to view persecution as the exclusive province of communism.[29]

The United Nations General Assembly adopted the Protocol Relating to the Status of Refugees[30] in 1967. The Protocol is an international treaty incorporating the substance of the 1951 Refugee Convention, under

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[24] The Displaced Persons Act provided for above-quota visas to be mortgaged against future national quotas for two fiscal years. Displaced Persons Act of 1948, § 3(a), 62 Stat. 1009, 1010.

The Refugee Relief Act of 1953 limited the total number of nonquota immigrant visas available to 205,000 with the expectation that the program would terminate no later than June 1957. Refugee Relief Act of 1953, §§ 3, 19, 67 Stat. 400, 401, 407.

[25] Section 212(d)(5) of the INA gave the Attorney General discretion to allow aliens into the country "temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest." 8 U.S.C. § 1182(d)(5) (1982).

[26] INS REP., Fall 1979, at 1-3.

[27] Act of Oct. 3, 1965, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 913 (repealed 1980). The seventh preference did not take effect until 1968 and was not extended to the Western Hemisphere until the INA amendments of 1976 which ended hemispheric inequities of the past.

[28] *See* Note, *Refugees Under United States Immigration Law*, 24 CLEV. ST. L. REV. 528, 540-41 (1975).

[29] The United States is not alone in mixing refugee policy and foreign policy. The Soviet Constitution of 1977 reads: "The USSR affords the right of asylum to aliens persecuted for the defense of workers' interests and the cause of peace, for participation in revolutionary and national liberation movements and for progressive social and political, scientific or other creative activity." KONSTITUTSIA (OSNOVNOI ZAKON) SOYUZA SOVYETSKIKH SOTSIALISTICHESKIKH RESPUBLIK (Constitution (Basic Law) of the Union of Soviet Socialist Republics) art. 38 (USSR). This definition, which focuses on activities deemed in the Soviet national interest, also runs counter to the nonpartisan approach to asylum and persecution in the Refugee Convention.

[30] *Opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter cited as Refugee Protocol or Protocol].

which the signatories assume binding international obligations with regard to refugees. When he transmitted the Protocol to the Senate for approval as a treaty, President Johnson wrote that although assent would not alter American law, it would promote "our traditional role of leadership" in refugee assistance and would generally increase awareness of the plight of refugees.[31] The Protocol, which was approved by the Senate and entered into force on November 1, 1968, has been held to be a self-executing treaty and is part of the statutory framework of rights available to persons claiming fear of persecution.[32]

American accession to the Protocol pointed out the discrepancy between *our* anti-Communist definition of persecution and the universal definition found in the Refugee Convention.[33] This fact generated court challenges to INS actions and regulations. But a more important impetus to overhaul the United States refugee policy and law was provided by the Vietnam war and the attendant conflict between the Executive and Congress. In the wake of the American withdrawal from Vietnam, tens of thousands of refugees poured into Southeast Asia. The United States felt an obligation to assist these refugees, and the only method available, short of a new statute, was parole, which entailed Executive discretion as to which and how many refugees to admit.[34]

B. The 1980 Refugee Act

In 1978 Congress began to search for a new format to reinstate legislative control over this country's refugee policy.[35] The 1980 Refugee Act represents its attempt to unite congressional initiative in refugee policymaking with Executive flexibility in responding to emergencies. The Refugee Act provides for a system of consultation prior to the start of each fiscal year, under which the President reports to Congress on the world refugee picture. On the basis of this report, Congress authorizes the "normal flow" refugee admissions for the upcoming year.[36] Refugee ad-

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[31] PUB. PAPERS: LYNDON B. JOHNSON 868 (1968).

[32] *In re* Dunar, 14 I. & N. Dec. 310, 313 (1968).

[33] *Id.*

[34] Between 1975 and 1979, 290,075 Indochinese refugees were paroled into the United States. INS REP., Fall 1979, at 3.

[35] S. REP. No. 256, 96th Cong., 2d Sess. 2-3, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141, 142-43 [hereinafter cited as SENATE JUDICIARY REPORT].

[36] The Act makes provision for both a "normal flow" number of refugees and an emergency admission of refugees. For 1980, 1981 and 1982, the President was authorized to admit 50,000 normal flow refugees per year, with consultation mandatory for any numbers in excess of 50,000. For 1981, 1982, and 1983, refugee authorizations after consultation were 217,000, 140,000, and 90,000, respectively. Presidential Determinations No. 80-28, 45 Fed. Reg. 68,365 (1980); No. 82-1, 46 Fed. Reg. 55,233 (1981); and No. 83-2, 47 Fed. Reg. 46,483 (1982). Details of the consultation method are contained in § 207(a)-(d) of the INA, 8 U.S.C. § 1157(a)-(d) (1982). The experience to date is that the President asks for greater numbers of refugee authorizations, Congress asks for fewer, and a compromise figure is

missions are separate from other quotas.

The Refugee Act contains special provisions for additional emergency admissions for which consultation with Congress is required.[37] The parole of refugees under section 212(d)(5) is expressly precluded unless the Attorney General determines that compelling reasons exist for not using either the normal flow or emergency admission channels.[38] The Refugee Act also eliminates ideological and geographic restrictions on the refugee definition by adopting the terminology of the United Nations Refugee Convention. Emphasizing this point, President Carter stated upon signing the Refugee Act that it provides "a new admissions policy that will permit fair and equitable treatment of refugees in the U.S. regardless of their country of origin."[39]

All refugee and asylum provisions—the issuance of refugee visas under INA section 207, the granting of asylum under INA section 208 and the withholding under INA section 243(h) of deportation in order to avoid persecution—have been brought into conformity with those of the United Nations Refugee Convention. Under current United States law, a refugee is now a person who has been persecuted or has a well-founded fear of persecution "on account of race, religion, nationality, membership in a particular social group or political opinion."[40]

Mere proof that an individual falls within the refugee definition does not, of course, guarantee admission to the United States. The United States can hardly be expected to provide a haven for ten to fifteen million refugees throughout the world. The Refugee Act specifies that admissions will "be allocated among refugees of special humanitarian concern to the United States."[41] Both the Senate and House Judiciary Committees, which reported the Refugee Act, cautioned against a restrictive definition of the terms "humanitarian concern to the United States," although a greater sensitivity to human rights considerations at the expense of foreign policy is suggested.[42] As some predicted, however, the changed termi-

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found.

[37] *See supra* note 36.

[38] *See supra* note 11. While President Carter may have acted within the letter of the law in paroling the Cubans as entrants and not refugees, it would seem he violated the spirit of the law, which was to encourage congressional involvement in refugee affairs.

[39] PUB. PAPERS: JIMMY CARTER 503 (1980-81).

[40] INA, § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1982).

[41] INA, § 207(a)(3), 8 U.S.C. § 1157(a)(3) (1982).

[42] The Senate Judiciary Committee stated:

> The bill does not, and cannot, explicitly define what refugees are deemed to be "of special concern to the United States." . . . However, the past can, and will, serve as a guide. . . . Group refugee admissions have generally been concerned with classes of refugees from countries where, for example, the United States has had strong historic or cultural ties, or where we have been directly involved or have had treaty obligations. We have also admitted refugees to promote family reunion; to respond to human rights concerns embodied in the Universal Declaration of

nology has not automatically translated into changed refugee admission practices.[43] Refugee quotas since the Refugee Act indicate that preference continues to be given to persons fleeing communism in Indochina and Eastern Europe, while refugees from Latin America, the Caribbean and Africa have received scant consideration.[44]

III. Challenge to the Refugee Definition

A. *Alternatives to Persecution*

Although the new definition of *refugee* in the Refugee Act represents a genuine step away from past stereotypes, would-be refugees have not been content to applaud politely. In many cases people seeking protection from persecution represent nationalities that have not been favored by United States refugee or immigration policies in the past.[45] In pressing their claims, refugees are challenging a policy which is a generation old and a conception of refugeehood that denies special consideration to persons fleeing civil war or mass poverty attributable in part to policies of friendly authoritarian regimes. In geopolitical terms, they are confronting an East-West refugee policy and asserting for consideration a North-South policy.[46]

The idea that persecution is the hallmark of the refugee emerged after

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Human Rights; to fulfill foreign policy interests; and, when no other country has responded to the needs of the homeless, we have opened our door.

Senate Judiciary Report, 1980 U.S. Code Cong. & Ad. News, at 146-47.

[43] *See, e.g.*, Note, *Behind the Paper Curtain: Asylum Policy versus Asylum Practice*, 7 N.Y.U. Rev. L. & Soc. Change 107, 127 (1978). Particularly revealing here are reports of discussions with anonymous U.S. State Department officials.

[44] In FY 1981 actual refugee admissions by area were: Asia (125,000); USSR (14,300); Africa (2,200); Latin America/Caribbean (2,000); East Europe (6,500); Middle East (4,000)—a total of 154,000, well below the 211,000 authorized. Cohodas, *Committee Starting Work on Immigration Law Reform*, 1981 Cong. Q. Weekly Rpt. 2067, 2068. Authorizations for FY 1982 were: Asia (100,000); East Europe and USSR (29,000); Africa (3,000); and for FY 1983: East Asia (64,000); East Europe and USSR (15,000); Near East and South Asia (6,000); Africa (3,000); Latin America/Caribbean (2,000). Presidential Determinations 80-28, 82-1 and 83-2 *supra* note 36.

[45] It has been noted that the present immigration preference system, which emphasizes family ties, perpetuates the current ethnic mix in the United States by limiting immigration to nationalities of citizens and legal permanent residents. Because there has been minimal official immigration from countries such as Haiti or El Salvador in the past, legal immigration through existing channels on any significant scale is not available to citizens of those countries. For example, in the year ending September 30, 1977, only 251 preference immigrants arrived from Haiti compared to over 15,000 each from China, Korea and the Philippines. 1977 INS Ann. Rep. 45, 46.

[46] James Nafziger notes that while restrictive emigration is an issue over which Western nations criticize Eastern nations, rigid immigration policy is an area in which the East can strike back at the West. Nafziger, *The Right of Migration Under the Helsinki Accords*, 1980 S. Ill. U.L.J. 395, 409.

World War II.[47] Even today *refugee* is both a popular word and a legal term of art, and the two are used interchangeably by governments and laymen.[48] It must be presumed, for example, that the UNHCR, which follows the Refugee Convention, does not apply its own definition of persecution strictly when it estimates that there are sixteen countries in the world that are each providing temporary or permanent homes for 100,000 or more refugees.[49]

Certain international refugee instruments take a broader view as well. The Organization of African Unity defines *refugee* both as one fleeing persecution and as one who "owing to external aggression, occupation, foreign domination or events seriously disturbing public order . . . is compelled to leave his place of habitual residence. . . ."[50]

Persecution has been highlighted in most (although not all) United States refugee legislation. Displaced persons under the 1948 Act were not necessarily persecutees but also people uprooted by World War II;[51] the 1953 Refugee Relief Act extended eligibility to persons fleeing military operations as well as those fleeing persecution;[52] and the 1965 amendments made refugees from natural calamities eligible for seventh preference status.[53] None of these exceptions to the general rule is incorporated into the Refugee Act of 1980. The refugee bill that originated in the Senate did refer to "displaced persons," as persons displaced in their own country by civil or military disturbance or arbitrary detention.[54] This terminology was rejected by the House, perhaps out of fear that deviation from an emphasis on political persecution would open the floodgates to

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[47] 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 188-89 (1968).

[48] *See, e.g.*, S.J. Res. 61, 97th Cong., 1st Sess., 127 CONG. REC. S3419 (daily ed. Apr. 7, 1981), calling on the President to proclaim African Refugee Relief Day to focus attention on African refugees escaping the "ravages of armed conflict, drought and political unrest." *Id.* at S3419.

[49] *Refugees: A Joint Publication of the United Nations High Comm'r for Refugees and U.S. Voluntary Agencies*, Fall 1981, at 7. Heading the list are Pakistan (with approximately 2 million refugees), the United States (849,000), Somalia (approximately 700,000), and the Sudan (500,000).

[50] O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, art. I, § 2, *reprinted in* A. GRAHL-MADSEN, TERRITORIAL ASYLUM 163, 164 (1980).

[51] Displaced Persons Act of 1948, § 2(b), (c), 62 Stat. 1009, 1009, incorporating pt. I, § A, 2, 3 of annex I to the IRO Convention.

[52] Refugee Relief Act of 1953, § 2(a), (b), 67 Stat. 400, 400 (distinguishing refugees—people fleeing persecution, natural calamity or military actions—from escapees and expellees as those fleeing persecution only).

[53] INA, § 203(a)(7), 79 Stat. 911, 913 (repealed 1980). This provision required a Presidential directive in order to be effective. None was ever issued. *See also* Act of Sept. 2, 1958, Pub. L. No. 85-892, 72 Stat. 1712 (allotting non-quota refugee visas to Portuguese nationals uprooted by floods, volcanoes and earthquakes in the Azores).

[54] H. R. CONF. REP. No. 781, 96th Cong., 2d Sess. 19 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 160, 160 [hereinafter cited as HOUSE CONFERENCE REPORT].

migrants instead of refugees. Even so, the House Committee felt compelled to state that the new definition of *refugee* would not result in a wholesale refugee influx.[55] The Conference Committee decided to include persons subjected to persecution in their homelands, but not displaced persons per se.[56]

B. The El Salvador Debate

The refugee definition has an effect on policy that extends beyond individual case determinations to general presumptions about groups of aliens. The civil unrest in El Salvador has placed this issue in sharp perspective. While there is a history of illegal immigration to the United States from El Salvador, the recent civil war in that Central American country has substantially increased the number of uprooted Salvadorans throughout the Americas.[57] The INS has treated these people as illegal migrants, either persuading them to depart voluntarily or subjecting them to mandatory deportation.[58]

In April 1981, Senator Kennedy asked the State Department to take into account the violence in El Salvador in assessing the nature of the Salvadoran influx. Although he implied that the Salvadoran refugees might not necessarily meet the terms of the refugee standard, Kennedy asked the State Department to recommend to the INS "blanket voluntary departure" for Salvadorans.[59] Under this relaxed policy, which has been extended in the past to other groups seeking haven from civil strife,[60] no Salvadoran would be forced to return to El Salvador. Instead,

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[55] H. R. REP. No. 608, 96th Cong., 1st Sess. 10 (1979), *reprinted in* CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONG. SELECTED READINGS ON U.S. IMMIG. POLICY AND LAW 318, 327 (1980).

[56] INA, § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1982). The extension of refugee status to persons persecuted in their homeland appears to be of more theoretical than practical benefit.

[57] The Central American Refugee Center in Washington estimates that there are 500,000 Salvadorans living illegally in the United States. From October 1980 through September 1981 the INS apprehended 15,901 Salvadorans without immigration documents. The Plain Dealer, March 19, 1982, at 14-A col. 1. *See also Report of United Nations High Comm'r for Refugees Mission to Monitor INS Asylum Processing of Salvadoran Illegal Entrants—September 13-18, 1981, reprinted in* 128 CONG. REC. S827 (daily ed. Feb. 11, 1982) [hereinafter cited as *Report of Comm'r*].

[58] *Report of Comm'r*, 128 CONG. REC. at S829 (daily ed. Feb. 11, 1982).

[59] Letter from Senator Edward M. Kennedy, Ranking Minority Member, Senate Jud. Comm. Subcomm. on Immigration and Refugee Policy to Alexander M. Haig, Jr., Sec. of State (April 6, 1981), *reprinted in* 128 CONG. REC. S831 (daily ed. Feb. 11, 1982). Voluntary departure is the immigration status of an alien who is deportable but who is permitted to stay in the United States until he or she departs voluntarily, that is, chooses to leave by a certain deadline. *See* 8 C.F.R. § 242.5 (1983). Blanket voluntary departure refers to the extension of this status to members of a class, usually deportable nationals of a given country.

[60] Groups that could not meet the § 203(a)(7) refugee test but were accorded blanket

such refugees could stay in the United States until the situation changes in El Salvador, without being subjected to the burden of proof of a reasonable fear of persecution.[61] Although State Department recommendations are not binding on the INS, all blanket grants of voluntary departure made in recent years have been based on State Department recommendations.[62]

A State Department letter in response to Senator Kennedy's letter illustrates the type of factors that enter into the State Department's assessment of a potential refugee situation.[63] The State Department noted that both the Refugee Protocol and the Refugee Act place upon the asylum-seeker the burden of showing a well-founded fear of persecution. While the State Department deplored the level of violence in El Salvador, it concluded that the "wide-spread fighting, destruction and breakdown of public services"[64] had not reached the condition it had in Nicaragua, Lebanon or Uganda when blanket voluntary departure had been recommended for nationals of those countries. The letter contended that Salvadorans illegally in the United States "who were not involved in political or military activities before their departure, would not face, upon

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voluntary departure include Ethiopians (from May 1977 to November 1981); Ugandans (April 1978 to the present); Iranians (April 1979 until November 1980) and Nicaraguans (June 1979 to September 1980). Letter from David Crosland, Acting INS Comm'r, to Senator Edward Kennedy (May 1, 1981), *reprinted in* 128 CONG. REC. S831 (daily ed. Feb. 11, 1982) [hereinafter cited as Crosland-Kennedy letter]; N.Y. Times, Jan. 27, 1982, at A4, col. 1 (Chicago ed.). Blanket voluntary departure was granted to Polish nationals on December 13, 1981, until at least March 31, 1982, at which time the INS planned to reevaluate the state of martial rule in Poland. The Plain Dealer, March 19, 1982, at 14-A, col. 1. This policy was later extended until December 31, 1982. On December 18, 1982, the State Department sent a letter to the Attorney General requesting that a further six-month extension be authorized. The letter noted that Senator Charles Percy, Chairman of the Senate Foreign Relations Committee supported the extension and cited an estimate that 200,000 Poles were permitted to remain in Western Europe after the imposition of martial law in Poland. "It may be at least six months before the United States and other western countries will be able to ascertain whether the Polish government is truly prepared to allow the Polish people the exercise of their human rights." 60 INTERPRETER RELEASES 20 (1983). On December 20, 1982, the INS central office officially notified all INS offices of an extension in deferred departure until June 30, 1983. *Id.*

From January 15 to April 15, 1981, in response to particularly intense fighting in El Salvador, the State Department requested the INS to suspend action on Salvadoran asylum requests; however, this decision was of limited scope since only a small percentage of Salvadorans facing expulsion had applied for asylum at the time. *Report of Comm'r*, 128 CONG. REC. at S829 (daily ed. Feb. 11, 1982); letter from Alvin Paul Drischler, Acting Ass't Sec. for Cong. Relations, to Senator Edward Kennedy (April 17, 1981), *reprinted in* 128 CONG. REC. S831 (daily ed. Feb. 11, 1982) [hereinafter cited as Drischler-Kennedy letter].

[61] A special inquiry officer may, "in his discretion," authorize suspension of deportation or voluntary departure "under such conditions as the district director shall direct." 8 C.F.R. § 244.1 (1982).

[62] Crosland-Kennedy letter, *supra* note 60.

[63] Drischler-Kennedy letter, *supra* note 60.

[64] *Id.*

return, any more danger than is faced by their compatriots who never left. . . ."[65] The letter concluded that Salvadorans do not flee "*solely* to seek haven in this country,"[66] which it seemed to hold determinative on the issue of whether they could meet the refugee definition. Considering the fact that the Reagan Administration was at the time seeking congressional approval for military assistance to the government of El Salvador by showing a fair record on human rights, it would be unrealistic to think that this Administration policy did not color the State Department's views.

Although the UNHCR uses the same definition of *refugee* as the United States government does, its refugee determinations do not bear the same link to national foreign policy interests as do those of a sovereign state. Perhaps for this reason, the UNHCR mission that investigated the conditions of Salvadorans in the United States in September 1981 reached different conclusions about the nature of the Salvadoran exodus. The mission found that the flow of Salvadorans to the United States bears a "direct causal relationship with the internal strife in El Salvador."[67] Noting that the return of Salvadoran refugees, either by deporta-

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[65] *Id.*

[66] *Id.* (emphasis added).

[67] *Report of Comm'r*, 128 CONG. REC. at S827 (daily ed. Feb. 11, 1982). In late 1981 the Senate and House discussed the status of Salvadoran refugees as part of their consideration of amendments to the International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, 95 Stat 1519 (codified as amended in titles 5, 5 app., 7, 8, 10, & 22 U.S.C. (1982)). The House amendment recommended a blanket grant of extended voluntary departure to Salvadorans who requested such a stay. The Senate bill contained no such provision. 127 CONG. REC. H9642 (daily ed. Dec. 30, 1981). The Conference Committee recommended a compromise which was approved as § 731 of the International Security and Development Cooperation Act of 1981.

> It is the sense of the Congress that the administration should continue to review, on a case-by-case basis, petitions for voluntary extended departure made by citizens of El Salvador who claim that they are subject to persecution in their homeland, and should take full account of the civil strife in El Salvador in making decisions on such petitions.

International Security and Development Cooperation Act of 1981, § 731, 8 U.S.C. § 1157 note (1982). The INS has specific authority to grant voluntary departure "on account of civil war or catastrophic circumstances" under its internal operations instructions. INS OPERATIONS INSTRUCTIONS No. 242.10(f)(3) (1981). This congressional recommendation resembles a State Department recommendation to the INS made in 1976 with regard to Lebanese nationals at the height of the civil war in that country. *See* Crosland-Kennedy letter, *supra* note 60.

As the legislative branch sought ways of contributing to the debate on the application of the theory of refugee rights to a pressing human drama, an equally significant weighing process was occurring between the INS and the judiciary.

Several class action suits which were filed in the Southwest by Salvadorans resulted in injunctions against the INS for failure to observe obligations undertaken by the United States pursuant to the United Nations Protocol, which were codified in the 1980 Refugee Act. *See* Nunez v. Boldin, 537 F. Supp. 578 (S.D. Tex. 1982); Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal. 1982).

tion or by voluntary departure without advice of the right to apply for asylum, and the wholesale denial of asylum applications appeared to be the result of "deliberate policy established by U.S. authorities in Washington," the mission concluded that these practices "would appear to represent a negation of . . . United States . . . responsibilities assumed upon its adherence to the Protocol."[68]

The contrast between these two views—that of the State Department and that of a United Nations agency—raises the underlying issue: how is one to assess individual motives for flight and fear of return in the context of mass migration?

C. *Refugee Motives*

The distinction between those who flee persecution and those who flee poverty is clearly articulated by Norwegian scholar Atle Grahl-Madsen.

> A person who leaves his home country for economic reasons may properly be called an "economic migrant" or a "migrant for employment" . . . . The fact that in many democratic countries economic conditions are better and the standard of living higher than in many countries under dictatorship has given rise to the term "economic refugee" . . . . This is, however, a misnomer and should be avoided.
>
> The qualities of "economic migrant" and "political refugee" do not mutually exclude each other, but an "economic migrant" who is also a "political refugee" is not an "ordinary migrant" . . . . *The difference between the "ordinary migrant" and the "political refugee" is that whereas the former is capable of having a normal relationship with the authorities of his home country, the latter is not.*[69]

This theoretically clear distinction between political refugees and economic migrants becomes clouded when one attempts to translate it into reality. Motives for migration are inevitably a mix of economic, social and political considerations all bound together by an existential decision to abandon one life and to seek a new one elsewhere. This is certainly true of immigrants who come directly to the United States under the present preference system based on family reunification and national economic development policy. And it is no less true of those who flee *en masse* and without documents.

One legal issue that has arisen in this context is whether an asylum policy should distinguish between those who flee to escape persecution and those whose fear of return is based on the desire to avoid persecution. This was especially important under the now-repealed seventh preference

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[68] *Report of Comm'r*, 128 CONG. REC. at S827 (daily ed. Feb. 11, 1982).

[69] 1 GRAHL-MADSEN, *supra* note 47, at 75-76 (emphasis added).

category which included flight as an element of refugee eligibility.[70] A series of administrative and court decisions addressed the issue of flight in the context of the distinction between persecution and legitimate prosecution for illegal departure. Several views emerged. The restrictive view looks to the individual's motives at the time of flight as determinative. This appears to be the State Department approach to Salvadoran refugees. Another view looks to the motives for seeking asylum. The most liberal view ignores the motives of the individual asylum seeker and examines the general practice of the refugee's home state in inflicting penalties.

In *In re Janus & Janek*,[71] a 1968 case involving an application for the withholding of deportation to Czechoslovakia, the Board of Immigration Appeals (BIA) enunciated the restrictive test:

> A person whose departure from an Iron Curtain country is devoid of political motivation, or whose decision not to return is unrelated to the politics of that country (e.g., the person who finds better economic opportunity here, or enters into a marital relationship with a resident alien or United States citizen) is not entitled to a section 243(h) stay solely on the basis that he may face criminal prosecution for overstay.[72]

Although the BIA acknowledged that the prior expression of political opposition is not mandatory to prove politically motivated flight and conceded that the withholding of deportation should not be limited to "persons who climbed under fences or swam rivers at night,"[73] its decision rests on the idea that the dispositive issue in granting or denying asylum is the individual's motive for fleeing. *Janus & Janek* appears to hold that unless an individual's departure is political, he cannot be considered a refugee *even if* the treatment he will face upon return home would constitute persecution. Beyond that harsh dictum lies the presumption that motives are cognizable. It is not coincidental that *Janus & Janek* was decided at a time when there were relatively few requests for asylum.[74] Recent events have highlighted the problem of comprehending such motives and judicial opinions on the subject appear to be changing. For example, in 1977, in *Coriolan v. I.N.S.*,[75] the Fifth Circuit considered a case involving the withholding of deportation of two Haitians. The court reviewed the distinction between persecution for the crime of illegal depar-

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[70] INA, § 203(a)(7), 79 Stat. 911, 913 (repealed 1980).

[71] 12 I. & N. Dec. 866 (1968).

[72] *Id.* at 876.

[73] *Id.*

[74] In 1971, for example, there were only 440 asylum requests. *See* Cohodas, *supra* note 44, at 2069.

[75] 559 F.2d 993 (5th Cir. 1977).

ture and prosecution and impliedly rejected the *Janus & Janek* test.[76] Noting that "[i]t is not political persecution, for instance, to punish for violation of a fairly administered passport law,"[77] the *Coriolan* court chose, nonetheless, to focus on the state's response and the individual's motives. "The motive test, after all, does *not* test whether the government's motive for persecution is political."[78] Despite this skepticism, the *Coriolan* court decided the case on other grounds and suggested that the motive test may be a "useful device for distinguishing more probable claims from less. . . ."[79]

Not surprisingly, the case which appears to have gone farthest in rejecting an inquiry into motive for flight in an asylum claim was a class action suit on behalf of several thousand people, *Haitian Refugee Center v. Civiletti*,[80] where the district court posed the question: how would these plaintiffs be treated if returned to Haiti?[81] Although the court did not expressly overrule *Janus & Janek*, it did engage in a fundamentally different form of inquiry. Upon finding that returnees would be subjected to various forms of reprisals and oppression, the court simply presumed political flight. In what appeared to be a change in the standard approach of placing the burden on the applicant, *Haitian Refugee Center* shifted the burden to the government: "Until INS can definitely state which Haitians will be [subject to reprisals upon deportation] and which will not, the brutality and bloodletting is its responsibility."[82] On appeal, this unusually emotional judicial language was decisively rejected by the Fifth Circuit as "harmful dictum."[83] It might be argued, however, that the dis-

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[76] *Id.* at 1000. *See* Note, Coriolan v. Immigration and Naturalization Service: *A Closer Look at Immigration Law and the Political Refugee*, 6 SYRACUSE J. OF INT'L L. & COMM. 133 (1978).

[77] 559 F.2d at 1000.

[78] *Id.*

[79] *Id.* The *Coriolan* court cites two other Fifth Circuit cases to demonstrate how the court's thinking evolved over a short time. In Paul v. I.N.S., 521 F.2d 194 (5th Cir. 1975), the court explicitly adopted the two-pronged test which examined the motive for flight and the state's response, used in *Janus & Janek*, 12 I. & N. Dec. 866 (1968). Two years later in Henry v. I.N.S., 552 F.2d 130 (5th Cir. 1977), the court ignored the motive for flight completely.

[80] 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom.* Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

[81] 503 F. Supp. at 475.

[82] *Id.* at 510.

[83] 676 F.2d at 1042. The appeals court remarked that the district court had not been asked to determine the merits of the asylum claims, but only whether the INS had violated due process and equal protection in administering the accelerated processing of asylum applications in the Haitian Program of 1978. The threshold test for the validity of the Haitian asylum claims did not require such a sweeping appraisal of conditions in Haiti, but only a determination of whether the Haitians had more than a frivolous claim. The Fifth Circuit also stressed that INS procedures "clearly place the burden of proof on the asylum applicant." *Id.*

trict court's finding did not represent a final shift in the burden of proof, but only a shift to the INS to rebut evidence that Haiti today is characterized by an endemic state of persecution so that many if not all who return would experience a well-founded fear of persecution. This type of presumption is standard procedure in the granting of refugee status to members of groups targeted for refugee benefits.

Despite some judicial reluctance to focus on motive for departure, the State Department generally addresses this issue in its country profiles which form the basis for policy decisions in cases of substantial population movement.[84] And since State Department advisory opinions are mandated in hearings on asylum and withholding of deportation, the issue of motivation cannot be overlooked.

One approach to intent or motive in a context of mass flight may be derived by analogy to individual cases. Where a person has actually been penalized for political views, or nationality, or any of the recognized grounds for a finding of persecution, both the BIA and the courts have presumed politically motivated flight and found a reasonably grounded fear of persecution upon return.[85] But when the asylum applicant has not suffered individual persecution, the courts have been less willing to make such a presumption.[86] As the BIA stated in *Janus & Janek*:[87] "[W]e have not regarded with favor an applicant whose first indication of opposition to the political regime of the country he left is made after arrival in the United States."[88]

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[84] *See* Drischler-Kennedy letter, *supra* note 60 and accompanying text.

[85] *In re* Janus & Janek, 12 I. & N. Dec. 866 (1968) (expression of opposition resulted in dismissal from school); Kovac v. I.N.S., 407 F.2d 103 (9th Cir. 1969) (job discrimination after refusal to become informer).

[86] This has been particularly striking in the handling of claims that a well-founded fear of persecution derives from actual persecution of relatives. *See In re* Francois, 15 I. & N. Dec. 534 (1975) (allegations by Haitian that father and other family members were murdered for political reasons not sufficient for withholding of deportation under § 243(h)); Hyppolite v. I.N.S., 382 F.2d 98 (7th Cir. 1967) (allegations that father was murdered and concern that police searching for applicant in Haiti not sufficient for § 243(h) relief).

[87] 12 I. & N. Dec. 866 (1968).

[88] *Id.* at 872. This was the primary assumption in *In re* Taheri, 14 I. & N. Dec. 27 (1972), where an Iranian student from a well-to-do family came to the United States with a valid student visa and subsequently joined the Confederation of Iranian Students. After the Confederation was banned by the Shah, Taheri applied for asylum, but the INS denied the application, focusing on the applicant's nonpolitical reasons for initially leaving Iran. After an appeal and remand with instructions to consider the significance of the ban of the Student Confederation, the INS again denied the relief on the grounds that students have an obligation to return home and should not be encouraged to repudiate that duty because of the ease with which they could get involved in political activity in the United States. *Id.* app. at 40 (*In re* Behroozi & Taheri, July 10, 1973). A State Department letter was cited as persuasive by the INS. *Id.* app. at 36 (*In re* Behroozi & Taheri, July 10, 1973). The BIA has ruled otherwise on occasion, however. In *In re* Zedkova, the BIA held that a temporary departure by an individual with no past history of political activity *plus* a change in government (here the Soviet invasion of Czechoslovakia) constituted a "constructive flight" suffi-

The reason for such suspicion is that a person seeking refugee status is held to a standard of good faith. Grahl-Madsen describes the rule applying to signatories of the Refugee Convention as follows:

> [W]e may have to draw a distinction among . . . those who unwittingly or unwillingly have committed a politically pertinent act, and those who have done it for the sole purpose of getting a pretext for claiming refugeehood. The former may claim good faith, the latter may not. The principle of good faith implies that a Contracting State cannot be bound to grant refugee status to a person who is not a *bona fide* refugee.[89]

In cases of mass flight, very few refuge-seekers are active members of a political opposition, although they may represent religious or ethnic minorities. Perhaps their chief motive is the unconscious "propensity to migrate" that has existed throughout human history.[90] But it would be incorrect to suggest that flight under these circumstances is a pretext for claiming refugeehood. The problem is to determine whether the act of flight is legally relevant to the later political persecution. If so, it is proper to read political motive into an unwitting act. This would conform to the general rule that "the behavior of the persecutors is decisive with respect to which persons shall be considered refugees."[91]

In countries with undemocratic political regimes, the expression of a dissident opinion may be quite dangerous.[92] This fact is clearly recognized in Congress's decision to augment the United Nations Convention's refugee definition and include persons detained arbitrarily in their own countries. But refugee status is not restricted to martyrs. If an individual can demonstrate that flight was a manifestation of an opinion that would have resulted in persecution if expressed, should he be denied asylum if persecution would ensue upon deportation? The problem with answering in the negative is that this would mean that all but the oligarchs in such a country are potential refugees. While this conclusion may actually de-

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cient to make the applicant eligible for refugee status under § 203(a)(7). 13 I. & N. Dec. 626, 628 (1970). Despite the apparent judicial inconsistency, there appears to be an underlying political coherence at work here. Members of the BIA are not immune to the presumptions of current American foreign policy.

[89] 1 GRAHL-MADSEN, *supra* note 47, at 252.

[90] Davis, *The Migrations of Human Populations*, SCI. AM. Sept. 1974, at 92-93. Davis theorizes that technological inequality has been the engine of human migration throughout history. It might be noted that one characteristic that unites the vast bulk of ordinary immigrants, refugees and asylum claimants is that they come from socioeconomic systems in which the standard of living is considerably lower than that of the United States.

[91] 1 GRAHL-MADSEN, *supra* note 47, at 251-52.

[92] In *Coriolan*, the court stated that the immigration judge made a dubious assumption that because a Haitian does not belong to a political organization and has opinions that do not differ from those of the majority of the populace, he may not have a valid fear of persecution. 559 F.2d 993, 1000-01.

scribe American refugee policy toward communism, it is now being put to the test by people fleeing rightist dictatorships.[93]

D. Economic Motives

Most problematic in this regard is the claim that persecution takes the form of mass poverty imposed as a means of political control and enrichment of the ruling elite. Poverty alone does not constitute persecution, but there are forms of economic deprivation that have been held tantamount to persecution. In *Daunt v. Hurney*,[94] the Third Circuit discussed economic proscription:

> Economic sanctions that may tend to lead to social ostracism, or deny one an opportunity to obtain and enjoy some of the social niceties and physical comforts certainly [do not constitute physical persecution. But] . . . [t]he denial of an opportunity to earn a livelihood . . . is the equivalent of a sentence to death by means of slow starvation and none the less final because it is gradual.[95]

Here, the emphasis is on economic hardship imposed by the state against one individual,[96] but by analogy one may consider an entire class of people as persecuted if, for example, their standard of living is sufficiently low and the rate of infant mortality sufficiently high *and* this can be attributed to policies that treat political opposition as political dissent. Under such an analysis, economic refugees would not be distinguished so much from political refugees as from economic migrants.

Until quite recently, American foreign policy had been premised on the East-West struggle as the prime issue in the world today. This has begun to change, and national refugee policy will undoubtedly become increasingly sensitive to North-South issues as the effects of the "propensity to migrate" become more pronounced. There is general agreement that the United States cannot accommodate all the refugees in the world. But it is also obvious that refugees within walking and boating distance of American borders present a special case. The mass influx from the Caribbean and Central American areas over the past few years has shown this

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[93] For a discussion of Haiti's compliance with its own constitution, see Tompkin, *A Criminal at the Gate: A Case for the Haitian Refugee*, 7 BLACK L.J. 387, 392-96 (1982).

[94] 297 F.2d 744 (3rd Cir. 1961).

[95] *Id.* at 746.

[96] 1 GRAHL-MADSEN, *supra* note 47, at 208-09. The author summarizes the distinction between cases of economic hardship that may be considered persecution and those that may not. In the former category are complete economic proscription, systematic denial of employment, denial of all work commensurate with training and denial of a reasonable wage. Insufficient to show persecution are economic disadvantage resulting from reduced pay, denial of promotion, assignment to undesirable work, expropriation of property as part of a general policy and measures to apportion resources in short supply. *Id.* If poverty alone were enough to warrant refugee status, most of the world would be eligible.

starkly. When the INS and the State Department attempted to apply the principles of individual burden of proof in a mass context, they could not do so without overstepping either the bounds of due process guaranteed in administrative regulations or the rights guaranteed by the Refugee Protocol. Not only may it be theoretically impossible to determine motives in a mass migration, it may be practically impossible as well.

One of the main reasons given for not expanding the refugee definition to encompass others besides political persecutees is that this would open the floodgates to the kind of economic migrants that our immigration system has sought to exclude. The Brandt Commission on International Development Issues (1980) takes a different view, concluding that "[r]efugee problems are not caused by population pressure. Their roots lie in intolerance, political instability and war."[97] A refugee definition based strictly on persecution spoke to the ideology-charged atmosphere of World War II and its aftermath. It may be that the realities of the 1980's will yield a new approach to both the definition of *refugee* and to the choice of beneficiaries of American refugee policies. Current talk of a "Marshall Plan for the Caribbean" may be evidence that a kind of political reorientation is occurring. Just as the Marshall Plan brought stability to Europe to stem the flow of refugees, such an aid plan for the Americas would seem to be the most effective long-range method of response to the human flood that has challenged United States refugee policy.[98]

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[97] INDEP. COMM'N ON INT'L DEV. ISSUES UNDER THE CHAIRMANSHIP OF WILLY BRANDT, NORTH-SOUTH: A PROGRAMME FOR SURVIVAL 113 (1980).

[98] Such a plan would represent both continuity and change in United States refugee policy. Like the plan for the rehabilitation of Europe after World War II, it is aimed at inculcating democratic values and preventing a takeover by forces sympathetic to Communist ideas or what today is called "Marxist-Leninist dictatorship." Further, it recognizes that massive population dislocation causes political unrest. But in the case of Central America, United States foreign and refugee policy has a more direct interest in stemming the tide of refugees who do not knock first but simply enter. Testifying before the Senate Foreign Relations Committee on March 25, 1982, Deputy Secretary of State Walter J. Stoessel, Jr. discussed the Reagan Administration's Caribbean aid plan in a way that knit together the two factors that have consistently stood behind United States refugee policy—humanitarian interests and *realpolitik*. The plan would serve United States interests, Stoessel stated, by "alleviating the root causes of human misery which have stimulated a major and sustained flow of people from the Caribbean basin into the United States." N.Y. Times, Mar. 26, 1982, at A6, col. 6 (late city ed.).

The Senate did not take up the Administration's Caribbean Basin Initiative before adjournment on December 23, 1982. Among the reasons for the failure to develop a coherent United States policy on this issue was the conflict between sectional and parochial interests within the United States and the general national interest in stemming the refugee tide. Thus one House of Representatives bill, H.R. 7397, which would have provided the duty free entry into the United States of goods manufactured in the Caribbean, met with stern resistance from sectors of the United States economy that benefited from tariffs on Caribbean products.

On December 22, 1982, President Reagan vowed to press for passage in 1983 of an integrated development/refugee plan for the region. *See generally*, Murray, *Caribbean Trade*

IV. Legal Avenues for Asserting Asylum Claims

The foregoing discussion has centered on the underlying concept of *refugee* as a person incapable of maintaining a normal relationship with his country of origin. Beyond this general connotation, the term *refugee* has a specific meaning in United States law. A refugee is one who obtains special immigration benefits because of his status while outside this country. This type of *refugee* may be contrasted to the *asylee* who is already in the United States when special benefits are accorded.

Within the broader field of refugee law, asylum is "the protection which a State grants on its territory . . . to a person who comes to seek it."[99] Over the years a variety of procedures have developed in the United States, whereby a person present here could ask to remain in order to avoid persecution in his own country. These include a stay of deportation under section 243(h) of the INA, a grant of asylum (from 1974 until 1980 under INS regulations and now, under section 208 of the INA) and other provisions that may be viewed as adjuncts to overall refugee policy.[100]

A. *Withholding of Deportation—INA Section 243(h)*

The right to have deportation withheld for fear of persecution dates back to 1950 when the then-current Immigration Act of 1917 was amended to require the Attorney General to withhold deportation to any country upon a finding that the alien would suffer physical persecution there.[101] Congress retained this provision in the INA of 1952 as section 243(h) but changed the requirement to discretionary authority and relieved the Attorney General of the need to make a finding on the issue of persecution; instead he was to render an opinion.[102] These provisions generated numerous lawsuits concerning the nature of the Attorney General's discretion[103] and the interpretation of "physical persecution."[104]

Plan Dies in the Senate, 1982 Cong. Q. Weekly Rpt. 3095.

[99] This definition was adopted by the Institute of International Law in 1950. 45 Am. J. Int'l L. 15 (Supp. 1951).

[100] Extended voluntary departure has already been discussed. *See supra* notes 60-68. The INA permitted up to one-half of all seventh preference numbers to be applied to eligible refugees from Communist or Middle East countries who were physically present in the United States. INA, § 203(a)(7), 8 U.S.C § 1153(a)(7) (1976) (repealed 1980). In addition, parole under § 212(d)(5) was a discretionary means of affording asylum to various categories of persons, such as alien crewmen alleging persecution who seek relief under 8 C.F.R. § 253.1(f) (1983).

[101] Internal Security Act of 1950, Pub. L. No. 81-831, § 23, 64 Stat. 987, 1010 (current version at 8 U.S.C. § 1253(h) (1982)).

[102] 8 U.S.C. § 1253(h) (1982). *See* Note, *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration and Nationality Act of 1952*, 1976 Wash. U.L.Q. 59.

[103] *Compare* United States *ex rel.* Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953) (the court may not substitute its judgment for the Attorney General's), *with* Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963) (Attorney General's standard of discretion subject to judi-

The 1965 amendments to the INA, which brought about a number of significant liberalizations, replaced the "physical persecution" standard with a different yardstick—"persecution on account of race, religion or political opinion."[105] From a policy point of view, this change reflected both a modified perception of the nature of Soviet methods of political control in the post-Stalin era and a desire to lighten the burden of proof on the asylum applicant.[106] The 1965 amendment did not alter the Attorney General's power to enforce or withhold deportation in his discretion upon a showing that return to a country of origin would result in persecution.

With the accession of the United States to the Refugee Protocol in 1968, persons subject to deportation obtained another avenue of relief upon a showing of a well-founded fear of persecution. Article 33 of the United Nations Convention, which was incorporated in the Protocol, states: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[107]

The linguistic discrepancy between the discretionary nature of section 243(h) of the INA and the mandatory injunction against expulsion in article 33 provoked questions as to which standard would apply. In *In re Dunar*, the Board of Immigration Appeals undertook an extensive review of this issue and concluded that article 33 "effected no substantial changes in the application of 243(h), either by way of burden of proof, coverage, or manner of arriving at decisions,"[108] basing this conclusion largely on presidential documents and testimony given at Senate hearings to the effect that the Protocol conferred no new rights on aliens. The BIA noted, however, that in no case known to it "was a denial of relief sustained as a valid exercise of discretion in the face of a finding that the alien would probably be persecuted."[109]

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cial review).

[104] *Compare* Blazina v. Bouchard, 286 F.2d 507 (3d Cir. 1961) (physical persecution means confinement, torture or death), *with* Dunat v. Hurney, 297 F.2d 744 (3d Cir. 1961) (denial of opportunity to earn a living may be physical persecution).

[105] Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918 (1965) (codified as amended in scattered sections of 8 U.S.C. (1982)).

[106] Congressman Feighan, Chairman of the House Committee that proposed the amendment, stated on the House floor in support of the change that "[t]yranny over the mind and spirit of a person has been demonstrated as more fearsome than the ancient methods of torture which characterized the Communist takeover of many countries of Central and East Europe." 111 CONG. REC. 21,584, 21,586 (1965).

[107] Refugee Protocol, *supra* note 30, 19 U.S.T. 6223, 6276. In his transmittal letter to the Senate, President Johnson spoke of this provision as "[f]oremost among the humanitarian rights which the Protocol provides." PUB. PAPERS: LYNDON B. JOHNSON 868-69 (1968).

[108] 14 I. & N. Dec. 310, 323 (1973).

[109] *Id.* The BIA argued that because the "humanitarian values" in § 243(h) distinguish

The prevailing rule at the time is stated in *Kasravi v. I.N.S.*,[110] where it was held that the INS as a delegatee of the Attorney General retained "broad discretion" to determine section 243(h) eligibility and that judicial review of this administrative decision was to be based on the lowest level of scrutiny available.[111] Kasravi, an Iranian, claimed he would be persecuted if deported to Iran and argued that the immigration judge had abused his discretion in not finding the plaintiff's claim within the ambit of the statute. The court disagreed with Kasravi's premise:

> By finding that the petitioner is not "statutory eligible" for relief it might *appear* that the special inquiry officer was making a finding of fact based upon an evaluation of the record before him. If such a finding of fact were required by the statute, the decision of the Attorney General would be subject to review in order to determine whether such finding were supported by reasonable, substantial and probative evidence. . . . However, Congress has made it abundantly clear by the express wording of the statute that no such finding is contemplated or required. It left to the broad discretion of the Attorney General the authority to suspend deportation in such cases and the questions of both eligibility and merit (if there be a difference) are part and parcel of this administrative determination.[112]

As part of the general effort to bring United States refugee law into conformity with the Refugee Convention, Congress in 1980 amended section 243(h) to read: "The Attorney General shall not deport or return" any alien who proves to be a refugee under the Act.[113] As must have been expected, this change resurrected the challenge to the discrepancy between section 243(h) and article 33 that the BIA thought it had put to rest in *Dunar*.

1. The *McMullen* Case

In *McMullen v. I.N.S.*,[114] an ex-member of the provisional wing of the Irish Republican Army claimed that he would be persecuted by his former comrades for his apostacy if deported to Ireland. The immigration judge was persuaded by McMullen's case, but the BIA reversed on the

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that section from other provisions for discretionary relief such as § 244 (suspension of deportation and voluntary departure), § 245 (adjustment of status) and § 249 (waiver of grounds for inadmissibility), the latter provisions require first a decision as to eligibility and then an exercise of discretion, while § 243(h) permits discretion only as to the likelihood of persecution. *Id.* at 322-23.

[110] 400 F.2d 675 (9th Cir. 1968).

[111] *Id.* at 677.

[112] *Id.* (emphasis added).

[113] INA, § 243(h), 8 U.S.C. § 1253(h) (1982).

[114] 658 F.2d 1312 (9th Cir. 1981). *See In re* McMullen, 17 I. & N. Dec. 542 (1980).

grounds that the immigration judge had erred in interpreting the evidence that the Irish government would not be able to control McMullen's potential persecutors. In responding to the appeal to the Ninth Circuit, the INS acknowledged that the new wording of section 243(h) eliminates its discretion to withhold deportation if persecution is found to be likely, but, relying on *Dunar*, contended that it retained discretion to determine whether or not persecution is likely. McMullen argued that the "shall not deport" language deprived the INS of discretion on both counts. The court agreed with the asylum seeker and implicitly overruled *Dunar*, stating:

> A factual determination is now required, and the board must withhold deportation if certain facts exist. This change requires judicial review of the Board's factual findings if the 1980 amendment . . . is to be given full effect. Agency findings arising from public, record producing proceedings are normally subject to the substantial evidence standard of review.[115]

The key to this change is that the agency must make a finding of fact as to whether the alien will suffer persecution if deported. The issues that now must be resolved are: first, what is the burden of proof and what evidence is needed to sustain this burden; and second, what is the standard of review by the court.

It is a basic tenet of United States immigration law that an individual seeking a benefit bears the burden of proof in establishing eligibility.[116]

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[115] 658 F.2d at 1316. Since Congress stated that its intent in rewording § 243(h) was to bring the terminology of United States law into line with the Refugee Convention, one may question whether *Dunar* was a valid interpretation of previous law. At the time, the United States had already acceded to the Refugee Protocol and its binding obligations.

[116] *See* 8 U.S.C. § 1361 (1982) (burden of proof on alien to prove general eligibility for immigration benefits); 8 C.F.R. § 208.5 (1983) (burden of proof upon asylum applicant to show that he/she meets the refugee definition and other terms of asylum eligibility); *id.* § 242.17 (in application for withholding deportation "respondent has the burden of satisfying" the special inquiry officer that he will be persecuted upon deportation). *But see id.* § 207.1 (applicants for refugee status may apply at overseas INS office if they believe they fall within one of the groups of "special humanitarian concern" designated by the President); *id.* § 207.3 (burden of proof explicitly stated not in terms of proof of persecution but in terms of proof that a waiver of denial of eligibility should be granted for "humanitarian purposes, to assure family unity, or in the public interest.").

The standard of proof required inspired some disagreement. The Refugee Act speaks of "well-founded fear" of persecution. INA, § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1982). In the past, the burden of proof "beyond a troubling doubt" has been held to be too onerous. Paul v. I.N.S., 521 F.2d 194, 196 (5th Cir. 1975). However, *In re* Dunar, 14 I. & N. Dec. 310, 318-19 (1973), held that "clear probability of persecution" did not differ meaningfully from "well-founded fear" in that both require an objective test.

Recent cases have discussed the burden of proof in different ways. *See* McMullen v. I.N.S., 658 F.2d 1312, 1319 (9th Cir. 1981) (burden to prove probable persecution); Almirol v. I.N.S., 550 F. Supp. 253, 256 (N.D. Cal. 1982) (INS failure to inquire into reasonableness of fear of persecution and exclusive emphasis on actuality of persecution ruled improper);

But proof of what might or might not occur in the future is at best speculative. The applicant for refugee status can scarcely be expected to marshal a case with evidence and witnesses if he has fled, often with little more than his clothing. In many cases, particularly when application for refugee status is made at overseas offices of the INS, proof of eligibility requires little more than an appearance before an immigration official to answer a few questions and establish non-excludability. The INS, following the lead of the State Department, has in effect taken notice that conditions in a particular country are such that the asylum-seeker need only prove that he falls within a certain group.[117] The applicant has had his personal case proved for him. Generally the countries that fall into this category are those that have been foreign policy adversaries of the United States. In other cases, the burden of proof on the individual is more onerous, since he must show that there is a persecutor and that he is a potential target. This is most difficult if he comes from a country that United States foreign policy does not presume to be hostile to its own citizenry.

a. The Role of the State Department

As the agency charged with the making of foreign policy, the State Department is given an important role in the determination of asylum and the withholding of deportation claims. In both cases the INS must request an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs (BHRHA) in the Department of State.[118] As noted earlier in the case of decisions to grant blanket voluntary departure status, State Department recommendations are persuasive to the INS.[119]

Concerning judicial review, in an early test of section 243(h), the Sec-

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Stevic v. Sava, 678 F.2d 401, 409 (2d Cir. 1982) (to merit asylum 1980 Refugee Act requires "well-founded fear" of persecution, a standard falling far short of "clear probability"); Rejaie v. I.N.S., 691 F.2d 139, 146 (3d Cir. 1982) (expressly rejecting the *Stevic* court's statutory history, concluding that "well-founded fear" standard same as "clear probability").

On February 28, 1983, the Supreme Court granted the government petition for certiorari to review *Stevic* in Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982), *cert. granted*, ___ U.S. ___, 103 S.Ct. 1249 (1983). For a detailed look at the issue and more cases see Steinberg, *The Standard of Proof in Asylum Cases*, IMMIGRATION J., Autumn 1982, at 8.

[117] The author has had numerous conversations with refugees from the USSR and Eastern Europe who attest to the pro forma nature of interviews conducted by INS officers at the United States consulate in Rome.

[118] The INS district director must request an advisory opinion in all cases. 8 C.F.R. § 208.7 (1983). The immigration judge is obliged to request a BHRHA opinion if the applicant has not previously applied to the district director. *Id.* § 208.10. If an asylum application has already been made and an opinion received, the immigration judge is not to request a second letter unless, in his discretion, he finds that circumstances have changed since the receipt of the first opinion. Under INS Operations Instructions No. 242.17(c), the procedures to be followed in determining a § 243(h) claim are to follow those used in asylum applications. Presumably they would be based on the procedures followed by the immigration judge.

[119] *See supra* note 60 and accompanying text.

ond Circuit justified limiting judicial review of a deportation order on the grounds that "the very nature of the decision . . . the (Attorney General) . . . must make concerning what the foreign country is likely to do is a political issue into which the courts should not intrude."[120] As long as the wording of section 243(h) granted discretionary power to the Attorney General, courts concluded that they were barred from reviewing findings of fact because none were required. Nonetheless, the courts did address the issue of the reliability and value of State Department opinions. In particular, the Ninth Circuit has issued several decisions on the topic and has noted the inherent problems, both procedural and substantive, in using opinions based on area profiles to determine whether a particular individual will suffer persecution. In *Kasravi*,[121] the Ninth Circuit noted:

> Such letters from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world. The traditional foundation required of expert testimony is lacking; nor can official position be said to supply an acceptable substitute. No hearing officer or court has the means to know the diplomatic necessities of the moment, in the light of which the statements must be weighed.[122]

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[120] United States *ex rel.* Dolenz v. Shaughnessy, 206 F.2d 392, 395 (2d Cir. 1953).

This "political question" doctrine rests on an idea expounded in the aftermath of the Mexican Revolution in Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) ("[t]he conduct of foreign relations of our Government is committed by the Constitution to the Executive and the Legislative—the 'political'—Departments of the government; and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."). In that case, the Court held that the political question doctrine was not based on lack of jurisdiction but rather on a fear of embarrassing the government and jeopardizing peaceful relations.

A more flexible approach was urged by an activist court in Baker v. Carr, 369 U.S. 186 (1962). This case concerned legislative control over apportionment but included strong dictum about foreign policy. The Court noted:

> It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible judicial consequences of judicial action.

Id. at 211-12.

[121] Kasravi v. INS, 400 F.2d 675 (9th Cir. 1968).

[122] *Id.* at 677 n.1. *See* Paul v. I.N.S., 521 F.2d 194, 205 (5th Cir. 1975) (Godbold, J., dissenting) (questioning the presumption that the State Department is always reliable; noting that a State Department telegram, upon which an immigration judge relied and which the BIA stated came from a "reliable, knowledgeable and competent source," was ultimately shown to be wrong and uninformed); Khalil v. District Director, 457 F.2d 1276 (9th Cir. 1972); Hosseinmardi v. I.N.S., 405 F.2d 25 (9th Cir. 1969).

This reasoning does not fault the State Department for practicing diplomacy. Rather it questions the relevance and weight of a statement based on diplomatic exigencies in an individual asylum case. The State Department functions at the level of state-to-state relations, while an asylum claim necessarily pits the individual against the state.

Arguments for the value of State Department materials stress the Department's expertise and access to information. In *In re Francois*[123] for example, the BIA ruled that an immigration judge had erred in excluding from evidence in a section 243(h) proceeding the State Department correspondence used in an earlier asylum claim. The Board noted that "the Department of State may have access to information regarding the conditions in a foreign country which may not be available from any other source."[124]

The most extensive review to date of State Department materials occurred in *Haitian Refugee Center*.[125] Called on to determine whether asylum applicants had been denied due process, the court considered whether the political question doctrine prevented it from making independent findings of fact on conditions in Haiti.[126] After rebuffing a State

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[123] 15 I. & N. Dec. 534 (1975).

[124] *Id.* at 536. While the State Department's access to information may make it a valuable resource in asylum determinations, the applicant may not in all cases be allowed to see that information. Regulations provide that whenever a BHRHA opinion is used in a decision it is to be included in the record and the applicant is to have a right to inspect, explain or rebut the evidence. 8 C.F.R. § 208.8(d) (1982). If the material is sensitive, however, the State Department may classify it under Exec. Order No. 12065, in which case the applicant is denied access to it. 3 C.F.R. § 190 (1978). In a withholding of deportation proceeding, when classified information is received from the State Department, the applicant is entitled only to know whether it concerns general conditions in a foreign country or the applicant personally. 8 C.F.R. § 242.17(c).

[125] Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd and modified sub nom.* Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

[126] 503 F. Supp. at 470-73. The plaintiffs contended that the State Department improperly permitted foreign policy considerations to influence its review of asylum applications. The State Department acknowledged that a court could inquire into the means by which the Department adhered to procedures, regulations and laws to which it is bound, but argued that for the court to engage in an inquiry of its own as to conditions in Haiti would be to subject foreign policy to judicial review.

Although the case was brought on the issue of discriminatory handling of asylum claims, the court looked first to § 243(h) and the Refugee Protocol to find the underlying legal principles upon which asylum is granted. Although it reviewed decisions which were discretionary on the part of the INS district director, the court argued it was obliged to conduct a "limited examination" of the evidence used by the district director. *Id.* at 473.

In rejecting the State Department's claim that an independent inquiry into Haitian conditions would be a judiciary intrusion, the court referred to the act of state doctrine enunciated in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), where the judiciary announced it would not examine the validity of an act of state by a sovereign government barring "a treaty or other unambiguous agreement regarding controlling legal principles." *Id.* at 428. This holding, which involved Cuba's expropriation of American-owned sugar companies, prompted Congress to pass the "Sabbatino" Amendment, which requires courts

Department contention that such an inquiry would be an improper foray into the political realm, the court subjected State Department materials, particularly a report on the treatment of deportees to Haiti, to a rigorous methodological and factual analysis. The court appeared to place greater faith in findings admitted into evidence of professional investigators such as Amnesty International and the Lawyers' Committee for International Human Rights.[127] The court determined that in not granting asylum the INS showed "profound ignorance, if not an intentional disregard" of conditions in Haiti.[128]

On appeal the INS argued that the review court should not have reached that conclusion because conditions in Haiti were irrelevant to a determination of procedural rights during asylum hearings. In *Haitian Refugee Center v. Smith* the Fifth Circuit adopted a compromise and held that an examination of Haitian conditions is relevant only to show "the scope of evidence available" to substantiate applicants' claims, but not to permit judicial resolution of the underlying asylum claim.[129] Because of this limitation, the court declined to consider the government's renewed claim that the district court overstepped its bounds in taking up foreign policy matters.

Until the 1980 changes in the wording of section 243(h), a decision to withhold deportation was subject to judicial review on grounds of procedural due process.[130] The question whether the decision was based on "relevant factors" permitted a limited examination of evidence, but not a weighing of arguments.[131]

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to consider whether an act of expropriation by a foreign state violates international law unless the executive explicitly asks the court to refrain from such an inquiry. Pub. L. No. 88-633, 78 Stat. 1013 (codified at 22 U.S.C. § 2370(e) (1976)). The amendment was a controlling factor in the decision rendered against the Cubans in Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967). In *Farr*, the court noted that the amendment effected a "reversal of presumptions" about a court's judgment of an act of state. *Id.* at 181. Rather than presume not to inquire, the courts should presume to inquire precisely because Congress has mandated such an inquiry by passing the amendment.

Although the court in *Haitian Refugee Center* did not spell out its conclusions completely, it appears to hold by analogy that the passage of the withholding statute and the accession to the Refugee Protocol reverse the presumption that the courts are not to inquire about otherwise political questions that fall within the purview of the statute and Protocol. Furthermore, because neither the statute nor the Protocol includes a clause empowering the government to ask the court not to make such an inquiry, the State Department's claim of judicial intrusion in foreign policy is overridden by the requirements of the statute and the Protocol.

[127] 503 F. Supp. at 482-88.

[128] *Id.* at 510.

[129] 676 F.2d 1023, 1042 (5th Cir. 1982).

[130] Henry v. I.N.S., 552 F.2d 130, 131 (5th Cir. 1977).

[131] *Haitian Refugee Center*, 503 F. Supp. at 473 n.55 (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).

b. The Ninth Circuit's Analysis

It was against this background that the *McMullen* court considered the 1980 Refugee Act.[132] Observing that the "charge of the agency [had changed] from discretion to the imperative," the court ruled that the evidence must be subjected to a different examination altogether.[133] Specifically, the court focused on the BIA's failure to support its decision by substantial evidence in light of McMullen's elaborate and lengthy testimony.

The INS contended that McMullen's evidence as to the general state of affairs in Ireland was irrelevant, since the petitioner bears the burden of showing that he personally will suffer persecution.[134] But the INS had built its own case on general State Department evidence as to the general situation in Ireland and the contention that McMullen's personal testimony was self-serving. The court held this insufficient. Instead, it shifted the burden onto the INS to controvert McMullen's personal testimony and specific evidence about IRA terrorism and reprisals.[135]

The test proclaimed by *McMullen* would place upon the INS the burden of rebutting the asylum claimant's case and then submitting to a court inquiry as to whether the BIA finding is reasonable. While it may be quite difficult for a reviewing court to come to more than tentative conclusions as to the personal testimony of the applicant, such a standard of review will necessitate consideration of evidence about conditions in a foreign country. The court did limit its inquiry by saying that it would not "review the facts de novo," that "deference to agency expertise is still applicable" and that the review is limited to substantial evidence on the record.[136] Nevertheless, this standard provides for considerably more involvement by the judiciary than has been practiced in the past.

Commenting on *McMullen*, Ira Kurzban, a leading attorney in numerous cases including the *Haitian Refugee Center* class action suits,[137] warned against an overly generous interpretation of *McMullen*:[138]

> Unlike McMullen, other asylum applicants may take little solace from the Ninth Circuit's opinion. McMullen had a good, well-documented case, but the typical Iranian, Haitian or Salvadoran who does indeed have a *bona fide* and well founded fear of perse-

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[132] McMullen v. I.N.S., 658 F.2d 1312 (9th Cir. 1981).

[133] *Id.* at 1319.

[134] *Id.* at 1317. The court stated: "The INS did not submit evidence of its own which indicated that any of McMullen's exhibits were inaccurate, nor did it submit independent evidence showing McMullen's lack of credibility." *Id.*

[135] *Id.*

[136] *Id.* at 1319. This is the standard of review mandated by the landmark case of Universal Cameron Corp. v. NLRB, 340 U.S. 474 (1951).

[137] *See supra* note 13.

[138] Kurzban, *How the BIA Views the 1980 Refugee Act—Narrowly*, IMMIGRATION J., Nov.-Dec. 1981, at 13.

> cution will ordinarily have little more than his own testimony and perhaps some newspaper or magazine articles describing the persecution of others like him to back up his own story.[139]

For practitioners, it may be most important to determine what type of outside evidence will be given greatest credence by the court. While popular and journalistic evidence as to conditions in a foreign country may continue to be viewed with suspicion by the courts,[140] it may be that materials by professional organizations such as Amnesty International will be weighed on an equal basis with State Department materials for their general reliability and method of inquiry in both asylum and section 243(h) stay of deportation cases.[141]

In the history of the interplay among the three branches of government involving refugee matters, *McMullen* may mark a turning point. For the first time a court has sanctioned the weighing of evidence of conditions in

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[139] *Id.* at 14. Russell Ezolt, a staff attorney for the Cleveland office of the INS, expressed the view that INS attorneys had unnecessarily lost *McMullen*. Ezolt contended that regardless of his persecution claim, McMullen should have been deportable because he took part in the persecution of others while a member of the Provisional IRA, thus making him ineligible for any refugee benefits. Interview with Russell Ezolt (May 26, 1982).

[140] *See* Henry v. I.N.S., 552 F.2d 130, 131-32 (5th Cir. 1977) (unsubstantiated claims not probative); *In re* Martinez-Romero, I.N.S. Interim Decision No. 2872 (1981) (nine newspaper articles on general conditions in El Salvador not sufficient evidence). *But see* Paul v. I.N.S., 521 F.2d 194, 199 (5th Cir. 1975) (journalistic accounts used by court to *disprove* Haitians' claims); United States *ex rel.* Mercer v. Experdy, 234 F. Supp. 611 (S.D.N.Y. 1964) (newspaper accounts of Haitian conditions grounds for judicial notice and reopening of INS proceedings).

[141] *See* McMullen v. I.N.S., 658 F.2d 1312, 1318 (9th Cir. 1981) (Amnesty International (AI) report on Ireland among evidence submitted in successful withholding claim); Coriolan v. I.N.S., 559 F.2d 993, 1002-04 (5th Cir. 1977) (reconsideration of report by AI on Haiti permitted). *But see In re* Williams, 16 I. & N. Dec. 697 (1979) (same 1976 AI report held less credible, probative and timely as to current conditions in Haiti than State Department reports submitted to INS and Congress); Fleurinor v. I.N.S., 585 F.2d 129 (5th Cir. 1978) (same AI report that was found sufficient for reconsideration in *Coriolan* held not so material as to warrant reconsideration).

There have recently been several cases in which an immigration judge has granted asylum despite a State Department advisory opinion to the contrary. In *In re* A-, File No. A23108407 (Dec. 10, 1982), a Nicaraguan with ties to the Somoza regime convinced the immigration judge with no amount of documentary evidence that she had a well-founded fear of persecution from the Sandinista regime. The judge paid special attention to the 1979 publication of the UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 UNITED NATIONS CONVENTION and the 1967 Protocol Relating to the Status of Refugees. *See* 60 INTERPRETER RELEASES 26-29 (1983).

In an opinion dated December 8, 1982, another immigration judge granted asylum and withholding of deportation to an Afghan woman despite an adverse BHRHA opinion. The judge noted that such letters are merely advisory. This case is especially interesting in that it may be one of the few in which a person denied refugee status was ultimately granted asylum. In this instance the applicant presented newspaper articles, letters, affidavits and, most persuasive, a certificate from the UNHCR declaring her to be a refugee within the mandate of that organization. *See* 60 INTERPRETER RELEASES 106-10 (1983).

a foreign country to determine the reasonableness of a fear to return and face persecution. Unlike Judge King in *Haitian Refugee Center*, whose enthusiasm in going beyond official State Department sources seemed to stem from heartfelt pity for the plight of the applicants (which may have led to what the appellate court referred to as his exceeding his authority), the opinion in *McMullen* is phrased in more legalistic terms. *McMullen*, additionally, opens the door for the serious contention that evidence introduced by the State Department may be inherently flawed by the concerns of *realpolitik*. Although this would in effect increase the practical burden on the INS by making it go outside generalized State Department country profiles to rebut a claim for asylum, such an approach may well adhere more closely to the standards required by the Refugee Protocol and the 1980 Refugee Act.

B. Asylum—INA Section 208

Just as the courts are struggling to resolve the conflicts between the law and its execution by administrative agencies, the Congress has recently taken an active interest in the procedures for determining asylum claims. As is generally the case, by the time Congress gets involved, the issue has come to a head.

1. Politics and Administrative Procedure

Until 1980, the affirmative right to seek asylum was an appendage of other immigration provisions;[142] any procedures devised came about in the absence of express legislative guidance. The smaller number of applicants discouraged congressional interest. It was at the cabinet and agency level that the right to seek asylum received its definition. In response to the Kudirkas episode in 1971, when a Soviet seaman of Lithuanian descent sought refuge on an American ship and was turned over to his commanding officers, the State Department instituted the first general guidelines on asylum.[143] A public notice issued in early 1972 stated: "The request of a person for asylum or temporary refuge shall not be arbitrarily refused by U.S. personnel."[144] Two years later, the INS proposed regulations on granting asylum pursuant to the Attorney General's mandate to administer immigration laws.[145] These regulations underwent frequent

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[142] For a discussion of parole and conditional entry as asylum procedures, see *supra* note 100.

[143] *See* Note, *The Fleeing Political Refugee's Final Hurdle*, 5 N. KY. L. REV. 9 (1978).

[144] Dep't of State Public Notice No. 351, 37 Fed. Reg. 3447 (1972).

[145] The interim rules were presented for public comment on August 7, 1974, in 39 Fed. Reg. 29,439 (1974). In response to comments received, the INS amended the rules when promulgating them in final form. 8 C.F.R. § 108 (amended 1978, 1979, repealed 1981). These changes stipulated that the INS district director was required to seek an advisory opinion from the State Department on all applications save those clearly lacking in sub-

revisions in the ensuing years.[146] One commentator expressed the view that by 1980 the regulations provided for a procedure "consistent with the humanitarian objectives of the asylum policy of the United States."[147]

The Refugee Act of 1980 for the first time mandated legislatively that the Attorney General establish an asylum procedure for persons within the country who met the refugee definition.[148] The change was more one

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stance or those which are clearly meritorious. If the applicant was denied because his application was clearly lacking in substance, the State Department was to be notified within 30 days and given an opportunity to respond favorably; any enforced departure was to be delayed for 30 days. If the application was denied despite a favorable State Department recommendation, the case was to be certified to the INS regional commissioner. The second change was a formal statement that a denial of asylum did not preclude a future withholding of deportation claim under § 243(h) or articles 32 and 33 of the Refugee Protocol. 8 C.F.R. § 108.1, 108.2 (1981) (revoked in 46 Fed. Reg. 45,116 (1981)).

[146] The principal change entailed the transfer of jurisdiction to the immigration judge over asylum claims made after the start of exclusion and deportation proceedings. These changes were finalized in 43 Fed. Reg. 40,802 (1978) and 44 Fed. Reg. 21,258 (1979). *See generally* 55 INTERPRETER RELEASES 369-78 (1978).

[147] Smyth, *Immigration and Nationality Law*, 1980 ANN. SURV. OF AM. L. 237, at 248. Commenting on the significance of these changes, the INS stated that the older system, under which exclusion or deportation proceedings had to be adjourned if an asylum application was advanced, constituted an unnecessary duplication of effort that worked "to the detriment of the alien because his status remain[ed] in doubt and to the detriment of the Service which [was] unable to resolve the proceedings within a reasonable length of time." 43 Fed. Reg. 40,879 (1978).

[148] INA, § 208, 8 U.S.C. § 1158 (1982). Theoretically both refugees and asylees must meet the same standards. *See supra* notes 116-17. Both groups must not be firmly resettled in another country. 8 C.F.R. § 207(b) (1983) (for refugees); *Id.* at §§ 208(f)(ii)-208.14 (for asylees). Whereas refugees inadmissible under INA § 212(a)(27) (security risks), § 212(a)(29) (subversives), § 212(a)(33) (Nazi collaborators) and § 212(a)(23) (narcotics traffickers) are excluded with no possibility of waiver under 8 C.F.R. § 207.3, the grounds for mandatory denial of an asylum application are parallel but not clearly spelled out. Those grounds include being a security risk and having criminal convictions for particularly serious crimes. *Id.* at § 208.8(f)(iv), (v).

In practice there is a form of presumption in favor of the applicant for refugee status who falls within a category that might be called a group refugee pool—groups identified as of special humanitarian concern to the United States such as Vietnamese or Soviet Jews. The individual burden of proof, however, is applied strictly to asylum applicants.

In a conversation with the author, E.B. Duarte, director of the INS Outreach Program, explained one reason for the different approach to applicants for asylum and for refugee status. Since some applicants for asylum have left their home country with a valid passport and have obtained a visa from the United States consulate in their home country, there is a presumption that these people are capable of maintaining a normal relationship with their own government. In most cases, persons applying for refugee status have not received United States visas (except for Vietnamese permitted to leave under the Orderly Departure Program agreed upon by Washington and Hanoi, and for political prisoners from Cuba and Argentina) and are applying for United States immigration benefits while in a more precarious situation. Telephone interview with E.B. Duarte, Director of INS Outreach Program (May 26, 1982).

While there may be a logic behind this distinction in some cases, it does not respond to the problem posed when refugees come directly to the United States.

of form than substance since no specific guidance was given. New regulations were published in interim form on June 2, 1980, and were made final on February 9, 1983.[149] Under the regulations adopted pursuant to the Act, asylum requests are divided into two categories: those made after exclusion or deportation proceedings have been instituted, and all others. In the latter situation, the INS district director has jurisdiction; in the former case, the immigration judge does.[150]

Under this system any person not yet subject to any kind of expulsion proceeding may apply for asylum at the discretion of the district director,[151] regardless of whether he is legally in the United States. Should the application be denied by the district director, no appeal lies within the INS system.[152] A review of this final action may be taken to the district court under the Administrative Procedure Act.[153]

Aliens against whom exclusion proceedings (that is, aliens not officially "in" the country) or deportation proceedings are brought may raise an asylum claim in the course of the proceeding.[154] Such a claim is automatically considered to be an application for withholding of exclusion or deportation under section 243(h).[155] Should the decision of the immigration

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[149] 48 Fed. Reg. 5885 (1983). It might be noted that although two allied chapters of INS Regulations, 8 C.F.R. § 207 (Admission of Refugees) and 8 C.F.R. § 209 (Adjustment of Status of Refugees and Aliens Granted Asylum), were revised in response to public comment and finalized in 46 Fed. Reg. 45,116 (1981), asylum procedures were not finalized for two more years. There must have been a flood of comments, considering the extensive and detailed comments cited by the INS revised asylum procedures in 1979. *See* 44 Fed. Reg. 21,253-59 (1979). The INS noted only that a number of commentators suggested a return to the old system under which the district director heard all asylum claims in a less adversarial climate than that of an exclusion or deportation hearing. The INS noted that it appreciated the concerns of those who fled countries with arbitrary judicial systems and sympathized with their uneasiness in appearing before a judge. Nonetheless, the INS further limited the jurisdiction of the district director. Under the present regulations, even if an application for asylum is pending before the district director, upon initiation of an exclusion or deportation proceeding, the applicant must resubmit his application to the immigration judge. 48 Fed. Reg. 5885 (1983). *See generally* Note, *U.S. Asylum Procedures: Current Status and Proposals for Reform*, 14 CORNELL INT'L L.J. 405 (1981).

[150] 48 Fed. Reg. 5885 (1983). *See supra* note 149.

[151] 8 C.F.R. § 208.8(a) (1983).

[152] *Id.* at § 208.8(c).

[153] 5 U.S.C. § 704 (1982). *See, e.g.*, I.N.S. v. Stanisic, 395 U.S. 62, 68 n.6 (1969) (citing other cases to the effect that the district court has jurisdiction as long as the INS has not ordered deportation under § 242 of the INA).

[154] 8 C.F.R. § 208.10(a) (1983).

[155] Although the definition of persecution in asylum and withholding cases is the same, there are several important distinctions between the two. An asylum claim will be denied if the petitioner has been firmly resettled in a third country, whereas firm resettlement is immaterial in cases of withholding of deportation to a particular country. But withholding is temporary and dependent upon the discretion of the Attorney General as to terms and duration, while asylum carries a more explicit status. There may also be differences in eligibility for social welfare programs that depend on an applicant's residing under the color of law with intent to remain in the United States.

judge be adverse to the claimant, exclusion or deportation proceedings are reinstituted. An appeal from a final deportation order lies first with the Board of Immigration Appeals[156] and then with the circuit court of appeals.[157] An exclusion appeal lies only with the Board; a final order from the BIA may be reviewed judicially only in a habeas corpus proceeding.[158] It is thus possible for an individual to have a claim for asylum adjudicated three times—once before the district director, once before the immigration judge as an asylum claim and again as a section 243(h) claim—before it goes up for appeal and judicial review.

In adjudicating asylum claims, directors and immigration judges must request an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs of the State Department.[159] This represents an innovation introduced after the Refugee Act. Previously, the district director was obligated to request State Department views only in clearcut cases.[160] And despite problems in accepting these opinions as dispositive, it can be argued that the present system is somewhat fairer to the asylum seeker in that the district director must get a second opinion in all cases. Unfortunately, it is also a significant bureaucratic burden on both the INS and the State Department.[161]

The INS developed this complex procedure with no direct congressional input other than the general guidance on rule making, decision making and judicial review contained in the Administrative Procedure Act. The recent flood of asylum applications has provoked both the Executive and Congress to propose that asylum procedures conform to what is perceived to be the national interest. Here again, the debate over refugee law, specifically asylum procedures, is a reflection of the debate over refugee, immigration, and foreign policy in general.

2. The Simpson-Mazzoli and the Reagan Administration Bills Compared

The Reagan Administration sponsored the Omnibus Immigration Control Act in October, 1981.[162] This bill was never reported out of commit-

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[156] 8 C.F.R. § 3.1(b) (1983).

[157] In 1961, the INA was amended to provide for the exclusive review of all final orders of deportation by courts of appeals. 8 U.S.C. § 1105(a) (1982). The purpose of this change was to eliminate abuse of judicial review as a delaying tactic. *See generally Haitian Refugee Center*, 503 F. Supp. at 457-62 nn.28-40.

[158] INA, § 106(b), 8 U.S.C. § 1105(b) (1982). After completion of an exclusion or deportation hearing, a request for a reopening to consider asylum will be granted only if the applicant produces a reasonable explanation for failing to raise the issue earlier. 8 C.F.R. § 208.11 (1983).

[159] *See supra* note 118.

[160] *See supra* note 145.

[161] *See, e.g.*, Meissner Testimony, *supra* note 3.

[162] Administration bill, *supra* note 12. Introduced by Senator Thurmond and Representa-

tee but did provide a backdrop for the more viable Immigration Reform and Control Act of 1982. Popularly called the Simpson-Mazzoli bill, it was hotly debated throughout 1982 and won Senate approval but died on the House floor on the day before the 97th Congress adjourned. On that day, representatives gave Representative Mazzoli a standing ovation for his efforts to bring the bill to a vote. In keeping with the promises of both Senator Simpson and Representative Mazzoli, the bills were reintroduced in February 1983 and hearings began on March 1, 1983.[163]

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tive Rodino, the bill contained 10 titles representing a comprehensive effort to stem the flow of undocumented aliens to the United States by means of penalizing employers who hired unauthorized aliens, encouraging undocumented aliens in this country to legalize their status by amnesty provisions, increasing the power of the government to turn away undesirables and streamlining the adjudication process within the INS, especially in the area of asylum.

[163] On March 17, 1982, the Immigration Reform and Control Act of 1982 was introduced in the Senate by Senator Alan Simpson as S. 2222, 97th Cong., 2d Sess., 128 CONG. REC. S2218 (daily ed. Mar. 17, 1982) (summary of major provisions). The bill was introduced in the House by Representative Romano Mazzoli as H.R. 5827, 97th Cong., 2d Sess. (1982) [hereinafter cited as Simpson-Mazzoli I]. This bill was less extreme than the Administration bill in that the high seas interdiction and immigration emergency provisions were omitted. Additionally, many of the proposals that favored efficiency at the expense of due process in the asylum area were toned down. On the other hand, the Simpson-Mazzoli bill sought stricter numerical limits on overall immigration, more onerous penalties for hiring unauthorized aliens and added a national identity card for employment authorization.

The Senate passed S. 2222 on August 17, 1982, by a wide margin: 80-19. 128 CONG. REC. D1098 (daily ed. Aug. 17, 1982). The bill received bipartisan support, perhaps most significantly from Senator Kennedy, an important voice in refugee and asylum matters in general and ranking minority member on the Senate Judiciary Immigration and Refugee Policy Subcommittee. *See* 128 CONG. REC. S2220 (daily ed. Mar. 17, 1982).

In the House of Representatives, the bill was assailed by some 300 amendments as well as organized opposition from various quarters, including the Black Congressional Caucus, which opposed strict asylum and exclusion provisions. *See* 1982 CONG. Q. WEEKLY RPTR. 3097. Hispanics also opposed the bill, fearing that employer sanctions would result in discrimination against Spanish speaking individuals. *See* Pear, *Congress Revives Immigration Issue*, N.Y. Times, Feb. 22, 1983, at A9, col. 1.

Attorney General William French Smith transmitted the Administration's original bill to Congress. He also pledged his support for the Simpson-Mazzoli bill despite the difference between it and the Administration bill, and the fact that the Administration bill was still pending on the floor of Congress at the time Simpson-Mazzoli I was introduced. *See* 128 CONG. REC. S2218 (daily ed. Mar. 17, 1982) (statement of Senator Simpson). A cynic might argue that the Reagan Administration proposed its initial bill to lay ground for a bill that might ultimately meet its needs; it has been suggested that the unexpected support for the Simpson-Mazzoli bill may have stemmed from the fear "that if this bill is not supported, a bill containing some much more extreme provisions may become law." 59 INTERPRETER RELEASES 248 (1982).

On February 17, 1983, Senator Simpson reintroduced the bill that was passed by the Senate on August 17, 1982. S. 529, 98th Cong., 1st Sess. (1983) [hereinafter cited as Simpson-II]. Representative Mazzoli introduced H.R. 1510, 98th Cong., 1st Sess. (1983) which is identical to the bill approved by the House Judiciary Committee on September 22, 1982 [hereinafter cited as Mazzoli-II]. Both bills are entitled The Immigration Reform and Control Act of 1983. For summaries of the key provisions and statements by the sponsors, see

A number of provisions of both bills are a direct attempt to cope with the backlog in both the INS and the State Department resulting from the volume of asylum applications. By the time the Simpson-Mazzoli bill was introduced, the number of pending cases had climbed to 140,000.[164]

Title IV of the Administration bill—the Fair and Expeditious Appeal, Asylum and Exclusion Act—and Part C of the original Simpson and Mazzoli bills—Adjudication Procedures and Asylum—propose explicit asylum procedures that either carve out exceptions to general practice under the Administrative Procedure Act or repeal changes adopted in conformity with the Refugee Act.

It has been argued that the current structure of the INS does not provide for the effective processing of asylum petitions because inspectors are often poorly informed about conditions in the applicant's country of origin[165] and because asylum claims are frequently raised in an adversarial context during exclusion or deportation proceedings.[166] The Administration bill met this particular objection by separating asylum claims from other immigration matters, in particular expulsion proceedings, and by creating a new class of INS employees: asylum officers.[167] Under the Administration bill, these officers would be trained to conduct formal, nonadversary interviews to determine whether the applicant met the standards of eligibility set in the Refugee Act.

The Simpson-Mazzoli bill follows this lead insofar as it separates asy-

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129 CONG. REC. H570, S1342 (daily ed. Feb. 17, 1983). In submitting the House version of the bill, Representative Mazzoli stated that "[t]e bill contains elements which virtually every analyst of immigration reform believes are necessary if we are to bring order out of the present immigration chaos." 129 CONG. REC. at H570.

[164] 129 CONG. REC. H570 (daily ed. Feb. 17, 1983). The Cuban/Haitian Temporary Resident Act, part of the Administration bill, contained provisions to eliminate fully half of the burden on the INS by legislative fiat, granting temporary resident status to an estimated 140,000 Cubans and Haitians in the United States before the start of 1981, of whom at least 50,000 had filed for asylum. H.R. REP. NO. 1218, 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3810, 3826; Meissner Testimony, *supra* note 3, at 1. To unburden the INS, the bill provided for the automatic denial of all pending asylum applications by persons in the class affected and prohibited anyone holding such status from applying for asylum. Administration bill, § 304, 127 CONG. REC. at S11,996 (daily ed. Oct. 22, 1981).

The Simpson-Mazzoli bill also provided for the Attorney General to use discretion in granting temporary resident status to all those with the status of Cuban/Haitian (status pending), the ad hoc classification granted by the Carter Administration at the time of the Mariel Flotilla. Simpson-Mazzoli-I, *supra* note 163, § 301.

[165] *See Haitian Refugee Center*, 503 F. Supp. at 527-29 (pointing out that inspectors who conducted interviews received no briefings or special information about Haiti).

[166] Posner and Kaplan, *Who Should We Let In*, HUMAN RIGHTS, Summer 1981, 14, 50.

[167] Administration bill, § 403, 127 CONG. REC. at S11,996 (daily ed. Oct. 22, 1981). Asylum determinations would be completely separated from decisions by the district director and the immigration judge. This would be reinforced by the restriction that asylum officers would not be permitted to engage in any investigation or prosecution of exclusion or deportation cases.

lum hearings from all others. However, it goes one step further in specifying that INS officials who handle asylum applications are to be administrative law judges (ALJ's), specifically trained in international relations and international law but who have not previously adjudicated INS cases. More significantly, though, the Simpson-Mazzoli bill provides for a full adversary hearing with a right to cross examination and a written record.[168]

Under the Administration bill, the asylum seeker was permitted to retain counsel at no expense to the government, but the attorney was not allowed to advocate for his client and a case could not be rescheduled to permit an attorney to attend.[169] Neither past nor present asylum regulations mention the right to counsel, but the courts have spoken of the right to be represented by an attorney in an asylum hearing as a basic due process right. In *Haitian Refugee Center*, for example, the court emphasized that mass scheduling of asylum interviews was prejudicial to the Haitians' rights to adequate legal representation.[170] And *Louis v. Meissner*, another Haitian class action suit, ruled that the detention of Haitians in remote centers in Texas and West Virginia "thwarted the statutory and regulatory rights" to be represented in exclusion proceedings and, by extension, in the asylum claims that might arise during such hearings.[171]

The Simpson-Mazzoli bill expressly provides for full-scale representation by an attorney during an asylum hearing.[172] No doubt the change is due in part to the legal profession's adverse response to the way the Administration bill would have tied the hands of lawyers.[173] The Administration bill would have done away with the requirement that an opinion be sought from the State Department in each case. Instead, the decision whether to request information from any government agency would have been left to the discretion of the asylum officer.[174] The Simpson-Mazzoli

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[168] Simpson-Mazzoli-I, *supra* note 163, § 124.

[169] Administration bill, § 403, 127 CONG. REC. at S11,996 (daily ed. Oct. 22, 1981).

[170] 503 F. Supp. at 523-26. Although the findings as to representation by counsel refer principally to the fact that the treatment of Haitians was discriminatory as compared to the treatment of other asylum seekers, there is a strong due process argument along with the equal protection analysis in the repeated discussion of "adequate representation."

[171] 530 F. Supp. 924 (S.D. Fla.) (temporary restraining order granted), *rev'd in part*, 532 F. Supp. 881 (S.D. Fla. 1981) (on standing issues).

[172] Simpson-Mazzoli-I, *supra* note 163, § 124.

[173] For an example of the type of criticism aimed at the Administration bill, see letter to the editor, John Shattuck and Wade J. Henderson, N.Y. Times, Jan. 15, 1982, at 26A, col. 4 [hereinafter cited as Shattuck-Henderson letter]. The authors of this letter are, respectively, Director and Legislative Counsel of the American Civil Liberties Union's Legislative Office.

[174] Administration bill, § 403, 127 CONG. REC. at S11,996 (daily ed. Oct. 22, 1981). Special training of the asylum officer should overcome the current problem of ignorance on the part of immigration inspectors as to conditions in the country of origin. Nevertheless, it would be wise to mandate some kind of participation by the State Department, both to keep the State Department apprised of the INS involvement in an issue that clearly impinges on

bills do not mention the BHRHA but state that "procedures set forth in this section shall be the sole and exclusive procedure for determining asylum,"[175] which seems to obviate the present INS requirement for a BHRHA reference.

3. Judicial Review

The underlying impulse which unites both the Administration bill and the Simpson-Mazzoli bills is the curtailment of administrative appeal and judicial review of asylum decisions. Only fifteen years before, when President Johnson transmitted the Refugee Protocol to the Senate for advice and consent, he wrote that United States accession might promote more liberal refugee laws in other hesitant countries. Now, faced with uninvited refugee seekers, the law makers are seeking to slow the migration by denying to asylum seekers the traditional guarantees of procedural review which were previously permitted to aliens and citizens alike.

Under the Administration bill, a determination by an asylum officer would not be subject to any administrative review, other than by discretionary certification requested by the INS Commissioner or the Attorney General.[176] As part of its general overhaul of INS appeal and review procedures, Simpson-Mazzoli would subject an ALJ's asylum decision to review by a newly constituted six-member United States Immigration Board. This board would replace the current three-member Board of Immigration Appeals and would review cases under a standard of "substantial evidence on the record as a whole."[177] This is a deferential reasonableness test currently used in the judicial review of final administrative acts.

Judicial review would be virtually eliminated under both bills. Under the Administration bill, review provisions under the Administrative Procedure Act were expressly eliminated, and a court could consider an asylum claim only in a challenge to exclusion or deportation. The standard of review at that time would have been limited to guarding against an arbitrary, capricious or illegal ruling.[178] Under Simpson-Mazzoli as originally introduced in 1982 and reintroduced in the Senate in 1983, judicial review is expressly eliminated as to final orders on asylum applications, except in habeas corpus petitions.[179] This would prevent the review of an asylum denial during a circuit court review of a deportation order. This

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foreign policy and to offer supervision to asylum officers who will be caught up in demanding face-to-face interviews with desperate people.

[175] Simpson-Mazzoli-I, *supra* note 162, § 124.

[176] Administration bill, § 403, 127 CONG. REC. at S11,996 (daily ed. Oct. 22, 1981).

[177] Simpson-Mazzoli-I, *supra* note 162, § 123. Under present law the Board may exercise "such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case." 8 C.F.R. § 3.1(d) (1983).

[178] Administration bill, § 403(d), 127 CONG. REC. at S11,996 (daily ed. Oct. 22, 1981).

[179] Simpson-Mazzoli-I, *supra* note 163, § 123; Simpson-II *supra* note 163, § 123.

restrictive approach was rejected in the House of Representatives. The bill reintroduced by Representative Mazzoli in February 1983 (which is the same as the one reported out of the House Judiciary Committee in September 1982) would permit the review of asylum decisions in the circuit court as part of the review of an exclusion or deportation order.[180]

The significance of these changes is that they would take back what *McMullen* and the Refugee Act gave in guaranteeing an impartial review of asylum claims in order to offset any built-in bias of determinations as to persecution made by the political arms of government. Under the Administration bill, for example, withholding of deportation would have been eliminated as a separate form of relief,[181] and section 243(h) would be subsumed by asylum proceedings.[182] This would replace the mandatory injunction against deportation adopted in the Refugee Act with the pre-1980 standard and its attendant conflict with the Refugee Protocol. In a statement made upon introduction of the bill, Senator Thurmond professed that this standard would satisfy the requirements of article 33 of the United Nations Convention and suggested that it is "incongruous to have a mandatory withholding provision and a discretionary asylum provision."[183]

The Simpson bill now pending in the Senate would have the same effect, for although it does not expressly repeal section 243(h), it does do so in practice because section 243(h) is amended to conform with procedures applicable to asylum claims under section 208.[184] The House version of the bill, which permits judicial review of asylum applications, would apparently use the substantial evidence test.[185]

As part of its overall attempt to expedite the resolution of immigration matters, the Administration bill proposed reduced time limits for appeals of deportation orders and all other INS administrative decisions.[186] In addition, there was a sharp reduction in the amount of time available to an alien to apply for asylum. From the moment exclusion or deportation proceedings began, the alien would have fourteen days in which to petition for asylum. In the absence of such a timely claim, only a clear showing of changed circumstances in the country of origin would suffice to waive this

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[180] Mazzoli-II, *supra* note 163, § 123.

[181] Administration bill, § 406, 127 CONG. REC. at S11,996 (daily ed. Oct. 22, 1981).

[182] *Id.* § 403, 127 CONG. REC. at S11, 996.

[183] 127 CONG. REC. S12,065, S12,66 (daily ed. Oct. 22, 1981) [hereinafter cited as Thurmond Statement]. Senator Thurmond's conclusion does not necessarily follow because withholding deportation may entail granting fewer benefits than granting asylum.

[184] Simpson-Mazzoli-I, *supra* note 163, § 124; Simpson-II, *supra* note 163, § 124.

[185] Mazzoli-II, *supra* note 163, § 123.

[186] The Administration bill reduces from six months to 30 days the time limit for appealing any deportation order or any other administrative action. Administration bill, §§ 401, 402, 127 CONG. REC. at S11996 (daily ed. Oct. 22, 1981).

time limit.[187] Simpson-Mazzoli retains these provisions[188] despite concerns that they "will require many aliens to apply for asylum long before it is determined that they are inadmissible or deportable in the first

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[187] *Id.* § 403, 127 CONG. REC. at S11,996. Summary exclusion proceedings might also deprive certain individuals of the right to raise asylum claims altogether. A proposed amendment to § 235(b) of the INA would give immigration officers extensive powers, unreviewable both within the INS and by the judiciary, to exclude crewmen, stowaways and aliens lacking proper entry documents. *Id.* § 404, 127 CONG. REC. at S11,996. It is not exactly clear under the Administration proposal how the initial interview between the alien and the immigration officer would affect the asylum claim. In his letter of transmittal to Congress, Attorney General Smith wrote that the initial questioning would be conducted by an asylum officer but that no written transcript would be made (as distinguished from the actual asylum hearing when a record of the proceedings would be kept). This procedure is not indicated in the wording of the Administration bill. Letter from Attorney General William French Smith to the Vice President of the United States (transmitting the Omnibus Immigration Control Act (updated)), *reprinted in* 127 CONG. REC. S12,084-85 (daily ed. Oct. 22, 1981).

Under the Simpson-Mazzoli bill, summary exclusion can be prevented by presentation of proper documents, a reasonable basis for legal entry or an application for asylum. Simpson-Mazzoli-I, *supra* note 163, § 121.

In her testimony before Congress, Acting INS Commissioner Meissner stated that "transit without visa" aliens who decide to seek asylum would not be permitted to submit applications. In anticipation of criticism that this policy might violate the non-refoulement provisions of the Refugee Convention, Meissner argued that these aliens are free to travel to their intended destination to seek asylum there. Meissner Testimony, *supra* note 3, at 3.

Concern over this phenomenon arose recently in the case of citizens from Afghanistan whose attempts to obtain asylum in the United States prompted amendment of INS and Bureau of Consular Affairs regulations to withdraw transit visa privileges for Afghans. *See* 8 C.F.R. § 212.1(e) (1983); 22 C.F.R. § 41.6(e) (1983). The State Department explained the problem as follows:

> Aliens accepted for transit without a visa are not required to be in possession of a valid visa in order to effect passage through the United States en route to an ultimate destination. In recent months, however, citizens of Afghanistan believing they have a claim to refugee status have tried to circumvent refugee procedures abroad by using the transit without visa waiver privilege to enter the United States and immediately applying for asylum as refugees. The Department has verified cases in which Afghan citizens whose applications for United States refugee and/or visa status had been denied at U.S. missions abroad have entered the United States without visas. Other cases concern Afghan citizens who destroyed their travel documents and onward tickets on aircraft in flight to prevent continuation of their travel beyond the United States. These Afghan citizens remain in the United States pending adjudication of applications for political asylum. Several groups have already reached the United States under these circumstances and it is believed probable that another large group is about to follow.

47 Fed. Reg. 5990, 5990 (1982).

[188] Simpson-Mazzoli-I, *supra* note 163, at §§ 123, 124. There had been some confusion in the language of the Administration bill which led Acting INS Commissioner Meissner to tell Congress that an alien would have to seek asylum within 14 days of any entry inspection in order to prevent belated claims by persons who enter "ostensibly for the purpose of seeking asylum" and then avoid the "very authorities who may grant asylum." Meissner Testimony, *supra* note 3 at 2. The Simpson-Mazzoli bill clarified this matter by stating directly that an alien must apply for asylum within 14 days from the date of service of notice instituting an expulsion proceeding.

place."[189]

The spirit behind both the Administration bill and the various Simpson and Mazzoli bills is that "an alien seeking entry has only those rights which Congress determines should be extended to him."[190] Immigration is an area in which Congress has near plenary power to set standards. Nearly a century ago the Supreme Court upheld the exclusion of Orientals from immigration to the United States under the argument that a state's right to exclude aliens "is part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power."[191] Although Congress has subsequently determined that United States immigration laws should not discriminate on the basis of race, there is no reason why, barring some superior authority, Congress could not reverse itself. Quite recently the Supreme Court held that in matters of immigration "Congress regularly makes rules that would be unacceptable if applied to citizens."[192]

The Universal Declaration of Human Rights speaks of a right to seek and enjoy asylum but not of a right to be granted asylum.[193] The Refugee Convention, which now has the force of law in the United States, does provide binding obligations not to return an alien to a frontier where he will face persecution, but says nothing of procedure or acceptable due process standards.[194] Critics of the Administration's proposed asylum and exclusion procedures attacked the bill for "favor[ing] . . . efficiency at the expense of fairness and fundamental due process,"[195] and instead suggested the creation of an independent immigration judiciary to expedite the adjudication of claims with adequate legal representation. Most controversial, perhaps, is the critics' proposal that the system include "an effective right of appeal, with an independent review board composed of members from the United States Government, the United Nations High Commission for Refugees and nongovernmental agencies concerned with refugee issues."[196] At a time when the prestige of the United Nations has fallen quite low in the United States, this smacks of unreality, but it may not be out of line with the spirit of the Refugee Convention.

While not as harsh as the response to the Reagan Administration bill, commentary on Simpson-Mazzoli has criticized the elimination of federal court jurisdiction to review asylum cases and, inspired by Haitian and

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[189] 59 INTERPRETER RELEASES 256 (1982).

[190] Thurmond Statement, 127 CONG. REC. at S12,067 (daily ed. Oct. 22, 1981) (citing Knauff v. Shaughnessy, 338 U.S. 537 (1950)).

[191] The Chinese Exclusion Case, 130 U.S. 581, 603-04 (1889).

[192] Matthews v. Diaz, 426 U.S. 67, 80 (1976).

[193] Universal Declaration of Human Rights, art. 14, G.A. Res. 217A, U.N. Doc. A/810 (1948).

[194] Refugee Convention, *supra* note 21, at art. 33.

[195] Shattuck-Henderson letter, *supra* note 173.

[196] *Id.*

Salvadoran class action suits, the lack of a statutory requirement that aliens arriving at the border be advised of their right to counsel should they wish to raise a claim for asylum.[197] Just as the courts' independent inquiry into an individual's claim of persecution would provide the surest protection of a refugee's claim to asylum, the right to appeal to an impartial body is basic to the fair resolution of asylum issues. A case may be made that such a review or, at the very least, an advisory review, is mandated by the Refugee Protocol.

Regardless of the form in which Simpson-Mazzoli is eventually passed, the terms of the debate indicate that we are entering a new era. The majority sentiment in Congress appears to be that a lack of firm guidance has permitted the courts and the INS to battle over the proper asylum procedures and in the process thousands of people became mired in court cases that never reached substantive issues. The amnesty provisions of the bills represent a fresh start both for the aliens and for the INS. It might be, however, that in cutting back on due process rights asserted by the courts and officially incorporated into United States law from the Refugee Protocol, Congress will simply invite a new round of litigation and delay.

V. The Status of Refugees, Asylees and Asylum Applicants

Refugee law and policy may be divided into two basic areas. The first, which has been discussed until this point, concerns the definition of eligible parties and the rules for establishing eligibility. The second area, which complements the first, involves the granting of resettlement opportunities to refugees and asylees. Both political and humanitarian considerations are involved in these policies.

From a humanitarian point of view, there can be no true asylum from persecution until the individual can begin life anew and know that his sojourn will not be disrupted in the normal course of events. Among the rights that are most crucial in this regard are the right to work and to receive various welfare services, the right to adjust one's status, and, in the process of applying for asylum, the right to due process of law.[198]

In terms of policy, the treatment of refugees is a part of the larger problem of incorporating aliens into the political system to avoid the po-

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[197] Representative of the response of the legal profession was that of the American Bar Association which resolved that it opposed "legislative proposals relating to immigration and naturalization that would limit the rights of persons subject to retain counsel and to exclusion, deportation or asylum proceedings to retain counsel and to enjoy full representation." American Bar Association Summary Action of the House of Delegates 20 (Feb. 1983).

[198] These rights are envisaged in general terms in article 26 of the Refugee Convention: "Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances." 189 U.N.T.S. 150, 172.

larization of society into two classes: those with full rights and those with fewer. In addition, refugees fleeing regimes that constrain independent thought or expression may bring special talents and energies to the country of refuge.[199]

A. *On Parole*

Under the Displaced Persons Act of 1948 and the Refugee Relief Act of 1953, refugees were admitted as a special category of aliens. Before admission, each refugee had to obtain sponsorship and assurances of decent housing and suitable employment that would not displace an American worker. Adjustment of parole status to that of permanent resident required establishing a fear of persecution and good moral character for the preceding five years, a recommendation by the Attorney General and a concurrent resolution by both houses of Congress.[200]

Refugee parole bore certain similarities to the status provisions under the first two post-war refugee acts. Parolees were not permanent residents and were subject to grounds for excludability upon application for adjustment of status.[201] However, parole differed in numerous ways from the status of displaced persons and Refugee Relief Act beneficiaries. It has been held that parole is not an admission to the United States but a means for allowing provisional status to otherwise inadmissible aliens.[202]

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[199] The contributions to America of refugee scientists, scholars, dancers and artists from pre-war Germany and from Eastern Europe in the post-war era, from Albert Einstein to Henry Kissinger and Mikhail Baryshnikov are immeasurable.

[200] The Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009; the Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400. In both cases the refugee had to sign a good faith pledge to take the job found for him by his sponsor and was liable to deportation should he become a public charge within five years from a cause that antedated his arrival in the United States.

Sponsorship has remained a feature of refugee law under the Refugee Act. The original regulations promulgated pursuant to the Act stated that refugee status would not be authorized "until assurances of employment and housing in the United States for a period of one year are presented." 8 C.F.R. § 207.2(b) (1981) (superseded). Comments submitted to the INS after publication of the interim rules suggested eliminating sponsorship, but the INS argued that "it would be improper to allow refugees to enter this country without providing an orderly program under which these refugees would be assured transportation to their destination, housing, and assistance in this country." 46 Fed. Reg. 45,116 (1981). The final regulations make provisions for agency sponsorship and specify only that transportation be provided. "Each applicant must be sponsored by a responsible person or organization." 8 C.F.R. § 207.2(d) (1983).

[201] INA, § 212(a)(1)-(33), 8 U.S.C. § 1182(a)(1)-(33) (1982) (grounds for refusal of a visa).

[202] Leng May Ma v. Barber, 357 U.S. 185 (1958) (parolee found ineligible for § 243(h) withholding of deportation). This situation has been changed by amendment of § 243(h) under the 1980 Refugee Act to require the Attorney General not to "deport or return" a refugee to a place where his life or freedom would be threatened. INA, § 243(h), 8 U.S.C. § 1253(h) (1982).

The parolee is not within the country and hence is subject to exclusion rather than deportation. This peculiarity of American law results in the rather ironic situation where a parolee, who has entered the country legally, may become subject to exclusion proceedings while an alien who enters the country illegally is deportable for entering improperly. The distinction between exclusion and deportation may be significant since the former proceeding affords far fewer due process rights than does the latter.[203]

Because they entered without congressional authorization, refugee parolees required specific statutory authorization to adjust their status.[204] Under the Fair Share Act of 1960,[205] parole was authorized by congressional statute for a limited period to eliminate the remaining refugee camps in Europe. The Act included provisions for refugee-parolees admitted under its terms to adjust their status to that of permanent resident after two years.[206]

This general approach to refugee admissions was adopted in the 1965 INA amendments which established the seventh preference for refugees.[207] The concept was the same as parole, but Congress chose the term "conditional entrant" because the term parole has undesirable connotations.[208] The two-year wait before a refugee became eligible for permanent residence status remained.

B. The Refugee Convention

American accession to the Refugee Protocol brought United States refugee practice into potential conflict with its treaty obligations. Article 32 of the Refugee Convention restricts the parties from expelling "a refugee lawfully in their territory save on grounds of national security or public order."[209] Since parolees and conditional entrants were not "lawfully" in

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[203] In deportation proceedings, the government bears the burden of proving deportability, but in exclusion proceedings, the alien must prove that he is not excludable. Whereas aliens are covered by the due process clause of the Constitution, persons undergoing exclusion proceedings must be given a fair hearing, but not full due process. Japanese Immigrant Case, 189 U.S. 86 (1903); Knauff v. Shaughnessy, 338 U.S. 537 (1950).

It has been argued that this distinction is more theoretical than real because excludability at the time of entry is a common ground for deportation. The alien must establish the circumstances of his entry, or he is presumed to be in the country illegally. *See* INTERAGENCY TASK FORCE ON IMMIGRATION POLICY, STAFF REPORT (1979).

[204] *See, e.g.*, Act of July 25, 1958, Pub. L. No. 85-559, 72 Stat. 419 (permitting Hungarian parolees of 1956 to adjust their status to permanent resident after two years).

[205] H.R. J. Res. 397, 745 Stat. 504 (1960).

[206] *Id.* at 505.

[207] Act of Oct. 3, 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (current version at 8 U.S.C. § 1153(a)(7) (1982)).

[208] S. REP. No. 748, 89th Cong., 1st Sess. 2, *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3328, 3335.

[209] *See supra* note 21.

the territory, they might have been subject to exclusion on grounds other than those specified in article 32. This potential conflict was addressed in *In re Dunar*, where the Board of Immigration Appeals reviewed the Senate's adoption of the Refugee Protocol and concluded that it would not be a violation of article 32 to deport an alien who met the refugee definition but had overstayed a visa after entering the country legally.[210] Were this not so, the BIA argued, a refugee would become a permanent resident without going through established administrative channels.[211] While it did not explicitly deal with parolees or conditional entrants in its decision, the BIA's acceptance of a strict interpretation of "lawful" could have resulted in exclusion of refugees on grounds other than national security or public order. The BIA felt that this problem was only theoretical and not real, however, since it accepted State Department assurances that refugees would not be excluded for such grounds as mental illness resulting in institutionalization or becoming a public charge.[212]

The reason for immediately denying immigrant status to refugees was that refugee applicants often lacked the necessary documentation to fall within the inspection requirements for admission. As a result, the actual procedure whereby refugee parolees and conditional entrants became permanent resident aliens was not the typical adjustment of status, such as that available to persons previously inspected for nonimmigrant visas, but admission by inspection.[213] At the time of inspection, refugee applicants for permanent resident status had to prove again that they were not excludable. In recognition of the fact they they had been in the United States for at least two years, refugees were eligible to "roll back" the date at which their permanent residence became effective to the date of arrival in this country.[214]

C. *The Refugee Act of 1980*

The initial Senate version of the 1980 Refugee Act sought to eliminate the distinction between refugees and other immigrants by granting permanent resident status to normal flow refugees.[215] This would have benefited refugees in several ways. First, it would have eliminated the potential conflict with article 32 of the Refugee Convention by placing refugees

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[210] 14 I. & N. Dec. 310, 315-18 (1973).

[211] *Id.* at 315-16.

[212] *Id.* at 318.

[213] *See, e.g.*, 8 C.F.R. § 235.9(e) (1983) (parolees and conditional entrants to be examined for admissibility).

[214] In *In re* Calka, 17 I. & N. Dec. 430 (1979), the BIA rejected an application for adjustment of status under INA, § 203(g), by an alien who had previously been granted voluntary departure and subsequently gained conditional entry status, on the grounds that the two-year period of eligibility for rollback begins only after refugee status is obtained.

[215] SENATE JUDICIARY REPORT, 1980 U.S. CODE CONG. & AD. NEWS, at 147-49. The Senate adopted unchanged the bill as originally drafted by the Administration.

within the country from the start. Conditional entry and parole resulted in a curious anomaly: although refugees were authorized to obtain welfare benefits since they were in the country under color of law with the intent to remain, the acceptance of such benefits such as SSI or general relief would make them technically ineligible for admission or to adjust their status.[216] Second, it would have eliminated other problems stemming from the lack of permanent resident status. Although refugees were given work authorization, employers were sometimes hesitant to hire a refugee with parole status. Moreover, some state licensing authorities limit the rights of non-permanent resident aliens.[217]

Despite these arguments, the House Committee favored retaining a gap in time between physical entrance and legal admission. Representative Holtzman expressed the fear that the direct admission of refugees as permanent residents would seriously impair the ability of the INS to screen arrivals, particularly against potential security threats and drug dealers.[218]

The 1980 Refugee Act represents a compromise between the House and Senate views. A new status, *refugee*, has been created, and persons admitted as refugees "shall be required to appear before an immigration officer one year after entry in order to determine his/her admissibility."[219] In actuality this means that refugees may apply for permanent resident status after a year. The Refugee Act exempts refugees from certain grounds for exclusion,[220] most significantly the literacy[221] and public charge

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[216] In *In re* Vindman, 16 I. & N. Dec. 131 (1977), an INS regional commissioner refused to adjust to permanent residence the status of refugees who were receiving welfare benefits and were hence excludable under INA, § 212(a)(15), 8 U.S.C. § 1182(a)(15) (1982) (likely to become a public charge). This conflict between admissibility as a refugee but inadmissibility to permanent residence on the grounds of becoming a public charge has been eliminated by provisions of the Refugee Act exempting refugees from that section.

[217] SENATE JUDICIARY REPORT, 1980 U.S. CODE CONG. & AD. NEWS, at 147. The committee was impressed by concerns expressed by representatives of voluntary agencies that work in resettlement, who stated that the lack of permanent resident status would interfere with acculturation.

[218] H.R. REP. No. 608, 96th Cong., 1st Sess. 16 (1979).

[219] 8 C.F.R. § 209.1(a) (1983). The procedure remains that of admission by inspection.

[220] The grounds exempted are labor certification requirement which had previously been expressly applicable to seventh preference refugees, INA, § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1982); travel document and visa requirements, *id.* § 212(a)(20), (21), 8 U.S.C. § 1182(a)(20), (21); and restrictions on medical graduates from unaccredited schools, *id.* § 212(a)(32), 8 U.S.C. § 1182(a)(32). *See also infra* notes 221-22.

[221] The literacy test first appeared in § 3 of the Immigration Act of Feb. 5, 1917, as a means of restricting immigration, but persons seeking admission "to avoid religious persecution" were exempted from this requirement. Ch.29, 39 Stat. 874, 877 (repealed 1952). There were unsuccessful attempts to extend the exemption to persons fleeing political and racial persecution. *See* E. HUTCHINSON, A LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1789-1965 at 524 (1981). Section 212(b) of the INA exempts immediate family of admissible aliens and refugees fleeing religious persecution from the test, but not until the 1980 Refugee Act were all refugees excepted from this requirement. 8 U.S.C. § 1182(b) (1982).

grounds.[222] With the exception of grounds involving national security, other grounds for exclusion may be waived "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."[223] This provision parallels the initial granting of a refugee visa with one important difference: in the case of the visa, no appeal lies from the overseas immigration officer's failure to grant a discretionary waiver, whereas in the case of a refugee's applying for adjustment of status, an appeal from a determination of inadmissibility lies in an exclusion hearing.[224]

D. Asylum Status

In addition to the provision in the 1980 Refugee Act for granting asylum, there is a provision for granting an adjustment of asylum status to that of permanent resident. In the past, persons obtaining asylum were granted individual parole or indefinite voluntary departure.[225] In both cases the INS could authorize employment, and asylees were eligible for certain social entitlement programs. But there were no provisions in the law for adjustment of status.

The Refugee Act provides for the adjustment of up to 5,000 asylees to permanent resident status each year,[226] which sum is to be deducted from the number of congressionally mandated refugee admissions. Asylees have the benefit of the same statutory exceptions to grounds for exclusion as refugees.[227]

Under regulations promulgated by the INS, asylees are obligated to be interviewed each year to determine continuing eligibility.[228] After the publication of interim regulations, the INS received comments questioning the statutory authority for granting asylum for only one year and suggesting that the annual interview should be waived unless the INS contemplates termination of asylum status.[229] In response, the INS interpreted the Refugee Act to require annual inspection as part of the general mandate to provide for effective resettlement and absorption of admitted refugees.[230]

It is noteworthy that one of the changes made in the final rules is the

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[222] The exemption of refugees from § 212(a)(15) of the INA will mean that refugees who receive public assistance can adjust their status. 8 U.S.C. § 1182(a)(15) (1982). *See supra* note 216. This provision should be read together with the other provisions of the Refugee Act which provide for extensive reimbursement to states for public monies spent on support and resettlement.

[223] INA, § 208(c), 8 U.S.C. § 1182(c) (1982).

[224] 8 C.F.R. § 209.1 (1983).

[225] SENATE JUDICIARY REPORT, 1980 U.S. CODE CONG. & AD. NEWS, at 148.

[226] INA, § 209(b), 8 U.S.C. § 1159(b) (1982).

[227] *See supra*, notes 220-22.

[228] 8 C.F.R. § 208.8(e)(1) (1982).

[229] 46 Fed. Reg. 45,117 (1981).

[230] *Id.*

provision of a waiting list for asylum recipients who wish to adjust their status.[231] With up to 50,000 applications tendered each year for asylum and no limit on the number of asylum applications that may be granted, provision for 5,000 status adjustments each year appears quite insignificant. It has been suggested that because asylum applications may take years to adjudicate, the provision for rolling back the date at which permanent residence takes effect by only one year may be unfair. The response to this reasoning has been that the time spent waiting for the granting of refugee status is not counted toward eligibility for permanent resident status. While it is true that there are Indochinese who have waited years in camps in Southeast Asia, recognition that an asylum applicant already in the United States has different concerns would not necessarily be inappropriate.

An important part of the Refugee Act concerns provision for the resettlement of refugees.[232] This entails the development and financing of orientation, language instruction, job training and other programs. The Refugee Act expressly limits the benefits of these programs to refugees and excludes asylees.[233] One possible reason for this is that the Refugee Act did not envisage the kind of mass asylum experience that has arisen in the past few years.

E. Special Status for Cubans and Haitians

At the time of the Cuban influx in 1980, a question arose as to the treatment of those arriving in southern Florida by fishing boat.[234] If they were singled out as a group of special concern to the United States, the members might have enjoyed the less rigorous burden of proof usually placed on refugees as opposed to asylees. Also, they would have become eligible for the refugee resettlement assistance provided in the Refugee Act, and localities would have been guaranteed federal reimbursement for resettlement outlays. The key issue that had to be resolved was a determination of their rights under the law as asylum applicants. Regulations provide that "upon the filing of a non-frivolous" asylum application the district director may grant employment authorization.[235] But because an

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[231] 8 C.F.R. § 209.2(a) (1983).

[232] Title IV, ch. 2 creates an Office of Refugee Assistance to supervise the planning and financing of various programs.

[233] Section 412(a)(10) of the Refugee Act limits benefits under tit. IV to normal flow and emergency refugees. INA, § 412(a)(10), 8 U.S.C. § 1522(a)(10) (1982).

[234] Cohodas, *Cuban Rufugee Crisis May Prompt Introduction of Special Legislation*, 1980 CONG. Q. WEEKLY RPT. 1496, 1496. Senator Kennedy notes that a disagreement developed between Congress, where some members wanted to treat the boat people as emergency refugees under § 207 of the Refugee Act, and the Administration, which argued that the emergency provisions were not intended to handle refugee emergencies on American shores. Kennedy, *supra* note 11, at 153-55.

[235] 8 C.F.R. § 208.4 (1983).

applicant for asylum is not permanently residing in the United States under color of law, he is ineligible for most social service benefits.[236]

In the face of the Cuban emergency, the Carter Administration paroled the emigres not as refugees (mass refugee parole being expressly prohibited by the Refugee Act) but as a new category—entrants. The parole was extended to Haitians undergoing INS exclusion, deportation and asylum proceedings.[237] Parolees were granted work authorization and became eligible for general and medical assistance. But they were not eligible for special resettlement benefits under the Refugee Act. To provide assistance to local districts flooded with non-English-speaking newcomers, Congress enacted the Refugee Education Assistance Act in October 1980[238] to give federal reimbursement for educational and certain other resettlement expenditures.

In the past, refugee parolees were regularly granted the possibility of adjusting their status to permanent resident by special legislation. The standard requirements were proof of nonexcludability and two years' residence in the United States. Such adjustment of status is not available to the Cubans and Haitians. The Cuban/Haitian Temporary Resident Act, proposed as part of the Reagan Administration's Omnibus Immigration Control Act, included a mechanism for adjustment of status, but its terms differed considerably from the conditions applicable to refugees and asylees.[239] The Simpson-Mazzoli bills address this issue in Title III ("Legislation") and its provisions track the Administration bill very closely.[240]

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[236] *See, e.g.*, SOCIAL SECURITY CLAIMS MANUAL §§ 2333, 2375 (1981), listing eligible aliens as permanent residents, conditional entrants, refugees, asylees, parolees, Indochinese parolees, deferred status aliens (deportable but not deported for humanitarian reasons—probably § 243(h) or voluntary departure cases) and others, but not applicants for asylum.

[237] A six month parole began on June 20, 1980, and the Administration developed legislation which would have permitted adjustment of status to permanent resident after two years, on a model with past refugee experiences. The Cuban/Haitian Entrant bill (status pending) was introduced in the Senate and House on August 5, 1980, as S. 3013 and H.R. 7978, 96th Cong. 2d Sess. along with an amendment by Senator Kennedy to declare the Cubans and Haitians as outright refugees. Neither bill met with success.

[238] Pub. L. No. 96-422, 94 Stat. 1799 (1980) (current version at 8 U.S.C. § 1522 note (1982)). The very name of the bill is a further example of the general confusion in this area. The House Report noted this fact, stating: "[T]he use of the term 'Refugee' in the title of this bill and the definition used to characterize the recent Cuban and Haitian emigres does not, in any way, modify the treatment of these emigres under the Refugee Act or any other Federal statute." H.R. REP. No. 1218, 96th Cong. 2d Sess. 10, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3810, 3819.

[239] Administration bill, tit. III, 127 CONG. REC. at S11,994 (daily ed. Oct. 22, 1981). The benefits of this bill would be available to Cubans paroled into the United States between April 20, 1980, and January 1, 1981; Haitians subject to exclusion or deportation proceedings pending on December 31, 1980; Haitians paroled under § 212(d)(5) or granted voluntary departure status; and Cubans and Haitians with asylum applications pending on December 31, 1980.

[240] Simpson-Mazzoli-I, *supra* note 163, tit. III.

F. *The Simpson-Mazzoli Solution—Temporary Residence*

Under Simpson-Mazzoli, three categories of aliens without lawful status are eligible for certain types of adjustment: those in the United States illegally prior to 1978, those here prior to 1980, and those with the status of Cuban/Haitian (status pending). Potential asylees may fall into all three categories. Conceivably, there is a problem of proof when aliens are asked to establish that they entered the country prior to January 1, 1978, in order to be eligible for permanent resident status immediately, or instead to establish entry prior to 1980 in order to be eligible for any benefits at all.

Aliens in the last two categories—those who arrived illegally between 1978 and 1980 and those already registered with the INS in the ad hoc category of Cuban/Haitian (status pending)—would be eligible for the new status of temporary resident if they applied within a year of eligibility. The juridical status of temporary residents is analogous to that of the older conditional entrant in that it is two stages removed from citizenship. A temporary resident must first adjust his status to permanent resident to be eligible for eventual naturalization.

Temporary residents would be authorized to work and travel abroad but would be ineligible for federal financial assistance (with exceptions for SSI applicants and candidates for emergency medical care). A special exception is made for Cuban/Haitian (status pending) people currently receiving help under the Refugee Education Assistance Act. The law also explicitly authorizes states to make temporary residents ineligible for local financial aid programs.

The most novel element of the concept of temporary resident is its provision for the adjustment of status. Subject to the Attorney General's discretion, a temporary resident who applies within six months after receiving temporary status becomes eligible for permanent residence if he can show admissibility under section 212 of the INA with certain exceptions, and rudimentary mastery of English or progress to that end. Unlike asylees, temporary residents would not be spared meeting the literacy requirements and public charge grounds for exclusion as a matter of law, but would be dependent upon the Attorney General's discretion "for humanitarian purposes, to assure family unity or when it is in the public interest."[241]

In two ways the bill seems to incorporate the 1980's spirit into the con-

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[241] There are a few differences between Simpson-Mazzoli and the Administration bill in the status area. Under the earlier scheme, temporary residents had to register with the INS every three years, but there was no set cut-off point for adjustment of status. Rather the temporary resident had to wait a minimum of five years from entry to the United States to adjust to permanent resident. In addition, temporary residents were expressly denied the right to receive immigration benefits. Administration Bill §§ 302-03, 127 CONG. REC. at S11,995-96 (daily ed. Oct. 22, 1981).

cept of nationality and status. There are time limits that must be met to remain eligible and entitlement programs are expressly excluded. These limitations do not appear to contravene any provisions of the Refugee Convention, but viewed in the perspective of refugee policy since World War II, they do indicate a changed American outlook in the face of mass asylum claims.

The Simpson-Mazzoli bill is silent as to the possible dual application for temporary resident status and asylum, although the Administration bill expressly precluded temporary residents from applying for asylum and pre-emptively denied all pending applications. But availability of temporary status would certainly discourage asylum applications from Haitians or Salvadorans, for example, considering that the proof required for temporary status would be to show time of entrance and not persecution. Questions would remain, however, as to the status of the asylum applicant who does not gain eligibility for temporary resident status, particularly persons from the Americas arriving in 1980 or after.

Under current law, aliens in this country who have not passed through immigration channels are liable for detention and deportation while those who are stopped upon arrival in the United States are liable for detention and exclusion if they "are not clearly and beyond a doubt" entitled to land.[242] The Refugee Convention does, however, limit the freedom of the government in some ways. Article 31 provides that signatories "shall not impose penalties, on account of their illegal entry or presence, on refugees who present themselves without delay to the authorities and show good cause for illegal entry."[243] Furthermore, the signatories "shall not apply to the movements of such refugees restrictions other than those which are necessary."[244] Both sections of article 31 envision a process whereby asylum claims may be determined, and whereby the status or rights available to the asylum applicant may be defined even when he has violated the law, but no guidelines are offered.

Article 31 has not been interpreted to mean that illegal entrants may not be detained, merely that they may not be penalized. If detention is for purposes other than punishment, it is permissible.[245] This distinction between discretionary regulatory activity and punitive detention became a source of considerable controversy because of the internment of thousands of Haitian boat people across the United States following an INS policy change in 1981.[246] The version of the immigration and asylum

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[242] INA, § 235(b), 8 U.S.C. § 1225(b) (1982).

[243] *Id.*

[244] Refugee Convention, *supra* note 21.

[245] 2 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 219-23 (1972).

[246] Until 1981 the INS had an informal arrangement with the National Council of Churches to release Haitians to sponsors after medical screening. Louis v. Nelson, 544 F. Supp. 973 (S.D. Fla. 1982). More than 20,000 Haitians paroled in this manner over the previous 10 years failed to appear at exclusion hearings. N.Y. Times, June 15, 1982, at A24,

bill reintroduced in the House of Representatives provides specifically for parole from INS detention if an alien is not given an asylum hearing within 45 days.[247] This provision is not found in the bill which cleared the Senate, and it is not clear how a conference would resolve this difference.

For their part, the courts have been struggling to weigh the rights of the various parties in these situations. In March 1982, a federal district judge ruled that the detention of eight Haitians by the INS was discriminatory, largely on the basis of evidence that of the 183 non-Haitians awaiting exclusion hearings at the Brooklyn INS center between July 1981 and January 1982, 182 were freed pending resolution of their claims, while only three of the 86 Haitians were freed, all of whom were pregnant.[248] This decision, which had an emotional overtone similar to that of the district court decision in *Haitian Refugee Center*, was reversed on appeal.

G. Rights of Asylum Applicants: Louis v. Nelson *and* Orantes-Hernandez v. Smith

The status of asylum applicants to claim due process rights has been examined most thoroughly in two major class action suits involving Haitians and Salvadorans. *Louis v. Nelson* began as a request for a temporary restraining order on behalf of over 1,000 Haitians detained by the INS in remote areas of Texas, Puerto Rico and West Virginia.[249] The court restrained the INS from commencing or continuing exclusion hearings against Haitians transferred from Miami to outlying areas where there are few if any interpreters or immigration attorneys. In particular, the court noted that the INS's failure "to provide notice to the Haitians of their right to apply for political asylum at an early time . . . frustrates the Haitian's regulatory right to invoke the determination of the INS Dis-

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[247] Mazzoli-II, *supra* note 163, § 123.

[248] Vigile v. Sava, 535 F. Supp. 1002 (S.D.N.Y. 1982). The court found an abuse of discretion by the district director under INS regulations, a violation of art. 3 of the Refugee Convention (prohibiting discrimination based on race or national origin), and a violation of art. 31 (prohibiting unnecessary restrictions of free movement subject only to considerations of national security). This case was reversed in Bertrand v. Sava on the grounds that the district court substituted its judgment for that of the INS district director and that the Protocol does not afford refugee seekers rights "beyond those they have under domestic law." 684 F.2d 204, 219 (2d Cir. 1982). The Second Circuit found authority for this in Ming v. Marks, 505 F.2d 1170 (2nd Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 911 (1975).

[249] The case has had a somewhat exotic history. Louis v. Meissner, 530 F. Supp. 924 (S.D. Fla. 1981) (preliminary injunction granted); 532 F. Supp. 881 (S.D. Fla. 1982) (injunction retained, jurisdiction retained on some issues of administrative irregularity; dismissed on other issues for lack of standing and exhaustion of administrative remedies); 544 F. Supp. 973 (S.D. Fla. 198?) (permanent injunction granted); Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983) (*aff'd* on grounds of violation of Administrative Procedure Act, *rev'd* on grounds that INS did in fact discriminate against Haitians).

trict Director on the issue."[250]

After issuance of the TRO, Judge Alcee Hastings was charged with bribery and the case went to another judge to determine whether to grant an injunction. In the first rehearing, Judge Eugene Spellman dismissed most of the complaints for lack of standing but retained jurisdiction to consider the charge that INS detention policy was discriminatory and that preventing access to detainees by lawyers from the Haitian Refugee Center violated constitutional provisions of free speech.[251] The third time around, the district court held that although INS detention policies were not discriminatory in that a rational basis existed for singling out the Haitians for detention, the INS had failed to comply with notice and comment procedures of the APA in issuing a substantive rule that Haitians would have to present a prima facie claim for admission to prevent detention. The court noted in particular that:

> [t]he argument in favor of . . . [some sort of due process hearing] . . . is particularly compelling when the essence of the alien's claim for admission is based on a fear of persecution upon return to his homeland. Thus, the "choice" to voluntarily withdraw an application for admission and thereby be released from detention may not be a meaningful choice. Indeed, the Plaintiff's failure to elect this alternative indicates that detention . . . is the lesser of two evils.[252]

In the continuing saga of this litigation, the Eleventh Circuit affirmed the district court's holding and found that the INS had violated the APA by issuing a substantive rule without proper notice and comment procedures, but reversed on the issue of a denial of equal protection.[253] Holding that the Haitian plaintiffs had advanced a prima facie claim that they were subjected to discrimination as a class, the court ruled that the burden then shifted to the INS to rebut the charge, but that the "mere protestation" of the INS was insufficient.[254] This holding takes into account the fact that Congress has plenary power in immigration matters and that

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[250] Louis v. Meissner, 530 F. Supp. 924, 927 (S.D. Fla. 1981).

[251] Louis v. Meissner, 532 F. Supp. 881 (S.D. Fla. 1982).

[252] Louis v. Nelson, 544 F. Supp. 973, 978 n.14 (S.D. Fla. 1982). Several days before this decision, the INS announced it would parole Haitians represented by counsel, who had a responsible sponsor and gave acceptable assurances that they would appear at exclusion hearings. Some commentators interpret this as a face-saving move indicating that the INS expected to lose the case. N.Y. Times, June 15, 1982, at A24, col. 1. In his release order, Judge Spellman specifically stated that he based his view on the right to counsel on representations made that suitable attorneys could be found from within the ranks of the American Bar Association, the national and local chapters of the American Immigration Lawyers' Association, the Lawyers' Committee for International Human Rights and the Dade County Bar Association.

[253] Jean v. Nelson, 711 F.2d 1455, 1509 (11th Cir. 1983).

[254] *Id.* at 1501-02.

the INS, as representative of the executive branch, is the legitimate delegate of the legislature. But the law must be carried out without discrimination, the court held, and if behavior of a delegatee of congressional power is partly motivated by discrimination, which may be found by circumstantial evidence, the action is illegal. Looking to the facts of the case, the court found a "stark pattern of discrimination."[255] *Orantes-Hernandez v. Smith*, filed on behalf of the Salvadorans, raised another due process question—the right to be notified of the rights to apply for asylum and to a deportation or exclusion hearing.[256] The court permitted the introduction of considerable evidence about conditions in El Salvador, both from the State Department and other sources such as Amnesty International, to determine what potential harm to the plaintiffs might occur in El Salvador, and concluded: "Because the Refugee Act specifically confers the right to apply for political asylum, the Court is compelled to reject defendants' argument that notice of that right is not required."[257] The court enjoined the INS from coercing Salvadorans to accept voluntary departure, from failing to notify Salvadorans of the right to apply for asylum or to have a deportation hearing, from limiting access to counsel in general and specifically to revoke voluntary departure agreements, and from placing detained Salvadorans in solitary confinement without hearings. In addition, the court specified procedures to provide greater protection to class members including bilingual notifications and permission to retain copies of all notice forms received from the INS.[258]

It should come as no surprise that courts can provide keen insights into the issue of due process, and this has been especially true in the area of the special duties the state owes to potential asylum applicants. Under article 33 of the Refugee Convention, a contracting state must not send a person back across a frontier where his life or liberty will be threatened. The courts have interpreted this to mean that there is a duty to advise a potential deportee of his rights, even if he does not know them, for if a person commits a politically relevant act knowingly or even unwittingly and he will be persecuted for it, he may become a refugee. This approach conforms to the notion that neither a political act nor the opinion that spawned it needs to be educated or sophisticated. As Grahl-Madsen has written, the Refugee Convention was not "drawn up with a view to phi-

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[255] *Id.* at 1487.

[256] 541 F. Supp. 351 (C.D. Cal. 1982).

[257] *Id.* at 375.

[258] Under INS regulations, an alien found liable for deportation "shall be advised" of his right to file for withholding under § 243(h), which would seem to be consistent with the obligations assumed by the United States under the Refugee Protocol. 8 C.F.R. § 242.17(c) (1983). In *In re* Guiragossian, 17 I. & N. Dec. 161 (1979), the BIA noted, however, that notification of the right to file for withholding is not required if the deportee has designated a country to which he would accept deportation.

losophers, but in order to suit the needs of common men."[259]

VI. Conclusion

Whereas an individual human rights document such as the Refugee Convention can be based on the needs of the common man, governments have the task of articulating national interests. The 1980 Refugee Act was in the tradition of United States refugee policy in that it focused on refugee crises abroad, although it went a long way toward liberalizing that policy and bringing it into line with current international standards. The chief oversight in the Refugee Act lies in the field of asylum, where it provides no guidance as to the national interest in the case of mass asylum claims by persons with a colorable claim to refugee standing.[260] While the Refugee Act and past practice provide a de facto presumption of refugeehood for groups abroad designated as refugees by Congress or the Executive, asylum applicants have been held to a stricter test before they can meet the refugee definition. But in cases of mass asylum requests, the burden has proved unworkable both because the INS system has not been able to handle cases fairly from a procedural standpoint, and because the interplay of foreign policy and the government's view of persecution has revealed inconsistencies in our treatment of potential refugees.

The issue for the future is to determine a view of the national interest in asylum cases that will conform to our historical commitment to legality and to providing a haven for refugees and also to our country's need to control immigration and to protect foreign policy interests.

One such plan is that espoused by Senator Kennedy in the case of the Cuban, Salvadoran and Haitian influx. This would be to declare the arrivals refugees (or at least recipients of blanket voluntary departure) by legislative declaration in order to avoid the often futile job of adjudicating thousands of cases with little hope of giving each case more than summary attention. While this approach has the merit of realism, its critics contend that it would instigate rather than deter attempts to use asylum as a way to circumvent normal immigration channels. No less significant is the problem that this plan would perpetuate an essentially politicized refugee policy in which groups that do not have an American constituency are at a distinct disadvantage in winning support for their claims of persecution.[261]

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[259] 1 Grahl-Madsen, *supra* note 47, at 251.

[260] It is significant that some groups such as the Mexicans fall into a different category in this discussion. While individual Mexicans may request asylum for various reasons, there has never been a suggestion that Mexicans as a nationality require asylum either as political or economic refugees. This is in keeping with the general view that persons from countries with a record of fair observance of the International Declaration of Human Rights do not have a basis for claiming that they cannot maintain a normal relationship with their government.

[261] *See, e.g.*, letter from New York City INS employees Carl Johnson, Ignatius Gentile

Another approach is that incorporated in the immigration control bills introduced in Congress by the Reagan Administration and Congressmen Simpson, Mazzoli and others. These bills focus on control of the borders and presume that all persons entering the country without proper documents are illegal migrants. This view has its roots in the theory that a nation is sovereign over matters of immigration and perceives refugee matters as a smaller issue in the larger problem of immigration. For those who do arrive and present asylum claims, summary asylum proceedings with little or no judicial review are sought to unburden the system of the appeals.

The problem is that United States accession to the Refugee Protocol may have limited this country's absolute sovereignty in its treatment of potential refugees. And as it is ultimately up to the courts to interpret the law, foreclosing judicial review might foreclose a forum for resolving conflicting conceptions of our obligations to the United Nations. The courts have shown considerable sensitivity to these issues, and cases like *McMullen, Haitian Refugee Center, Louis v. Nelson* and *Orantes-Hernandez* have developed a kind of due process concept for asylum applicants[262] which may serve as a United States contribution to the international understanding of the rights of refugees under the Refugee Convention.

The Select Commission on Immigration and Refugee Policy published its final report after two years of study in March 1981.[263] Although it favored individualized proof in asylum cases, the Commission recommended that the standard be made similar to that used in determining refugee admissions. At the basis of such assessments would be a profile of the country from which the asylum applicant fled. In contrast to the present, where that profile comes from the State Department, the recommended profile would come from the newly established independent Coordinator for Refugee Affairs with access to State Department

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and Sheldon Dorn, members of Local 1917 of the American Federation of Government Employees, to the editor of the The Village Voice:

> The plight of the Haitians is almost entirely the result of the lack of political clout exhibited in their behalf. Crack down on illegal Mexican aliens and Lopez Portillo may turn off his oil spigots. Refuse to admit Soviet Jews as refugees, and campaign contributions will dry up. Block Eastern Europeans from staying as long as they want in this country, and the right-wing political ideologues will scream bloody murder. Even the Cuban boatlift was, at first aided and abetted by a political attempt to score points off the Castro regime and concur with the desires of a politically effective Cuban emigre population. Who cares if the Haitians are locked up? Nobody.

Feb. 23, 1982, at 3, col. 1.

[262] Anker, *Due Process and the Asylum Applicant*, IMMIGRATION J., Autumn 1982, at 19.

[263] SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS TO THE CONGRESS AND THE PRESIDENT OF THE UNITED STATES (1981).

materials.[264] The problem of asylum and refugee status is overshadowed by our intense political struggle over immigration policy, particularly the growing perception that illegal immigration of Hispanics and other minority groups will erode the political and economic stability of the nation. Perhaps immigration policy should be totally reformed. However, our past experience does not indicate that the present family unification policy which replicates the existing ethnic and racial mix in the country will be changed for a policy oriented toward the absorption of new groups from South America, Asia and Africa. But a greater sensitivity toward North-South issues in foreign policy and its companion, refugee policy, is inevitable.

As with any intensely political issue, the perception of policy is as important as the policy itself. United States foreign policy and refugee policy speak to numerous constituencies—allies, adversaries, domestic interest groups, individuals at home and abroad. Our treatment of refugees will thus inevitably take into account self-interest and human rights.

The compromise offered by the Select Commission at least looks toward these issues and adopts a middle ground between the harsh policy that favors efficiency over fairness, on the one hand, and the politically unfeasible policy of an unchecked open door, on the other. An asylum law which provides for an impartial fact-finding mechanism within the government (recognizing that foreign policy and refugee needs may conflict), coupled with the opportunity for the courts to continue to supervise those on the front line, would reflect the best aspects of America's refugee experience.

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[264] *Id.* at 172-73.