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POLITICAL ASYLUM UNDER THE 1980 REFUGEE ACT: AN UNFULFILLED PROMISE

Arthur C. Helton*

Three years after the passage of the Refugee Act of 1980,¹ its mandate that uniform and neutral standards be utilized in the asylum adjudication process remains unfulfilled. Rather, the Act's mandate is subservient to foreign and domestic policy considerations which continue to dominate asylum decision making. Indeed, the standards and practices used in the asylum process, including alien interdiction and detention programs, have served to jeopardize the very right of asylum.

Unless Congress and the Immigration and Naturalization Service (INS) act to implement the Refugee Act of 1980, the right of asylum will remain mired in domestic and international politics. Part I of this Article reviews the history and development of asylum law in the United States which culminated in the passage of the Refugee Act of 1980. It analyzes the failure of the responsible administrative authorities to follow the dictates of the law — a circumstance which prompted the passage of the Act and which now threatens to subvert the right to asylum in the United States. Part II considers the impact on asylum seekers of new alien interdiction and detention programs, and the legality of those programs under domestic and international law. Finally, Part III makes specific recommendations, including proposals for changes in the administration of asylum law in the United States, with a view toward depoliticizing the process and ensuring prompt and fair adjudications.

I. ASYLUM LAW PRIOR TO 1968

The United States has traditionally had one of the most generous and compassionate refugee programs. Nonetheless, the history of asylum and refugee law in this country prior to 1969 is essentially a saga of reaction to crises as they arose² and of ideological and geographical

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1. Pub. L. No. 96-212, 94 Stat. 102 (1980).

2. See, e.g., The Displaced Persons Act, Pub. L. No. 80-774, 62 Stat. 1009 (1948). This legislation was enacted to address mass migration in the wake of World War II.

biases.³ Before 1968, there were three procedures, each with different standards, under which aliens could seek refuge in the United States.

A. *Withholding of Deportation*

Under the Immigration and Nationality Act of 1952,⁴ the Attorney General was authorized to "withhold deportation of any alien . . . to any country in which in his opinion the alien would be subject to physical persecution."⁵ Under this discretionary authority to decline to deport an alien from the United States, the Board of Immigration Appeals of the Department of Justice⁶ developed strict limiting principles. The "favorable exercise of discretion" was limited to "cases 'of clear probability of persecution of the particular individual petitioner'."⁷ The "clear probability" standard, furthermore, was stringently applied.⁸

The application of this limiting principle was reviewable by courts only for administrative abuse of discretion. The standard of review was quite deferential. Even where "[t]he Attorney General's course of conduct . . . shows consistency in the various cases," his ungenerous

3. See, e.g., The Displaced Persons Act, Amendments of 1950, Pub. L. No. 81-555, 64 Stat. 219 (1950); H.R. REP. NO. 581, 81st Cong., 1st Sess. 15 (1949) (acknowledging the use of the law to accept political dissidents from communist countries); see also Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

4. Pub. L. No. 82-414, 66 Stat. 163 (1952) (current version at 8 U.S.C. § 1101 (1982)) [hereinafter cited as 1952 Act].

5. 1952 Act § 243(h), 66 Stat. 163, 214 (1952) (current version at 8 U.S.C. § 1253(h) (1982)). Prior to 1965, an alien had to establish that he or she would be subject to "physical persecution" to be eligible for withholding. In 1965, "physical persecution" was replaced by "persecution on account of race, religion, or political opinion." Immigration and Nationality Act, 1965 Amendments, Pub. L. No. 89-236, § 11, 79 Stat. 911, 918 (1965) (current version at 8 U.S.C. § 1253(h) (1982)) [hereinafter cited as 1965 Amendments]. This change was considered by Congress to be in harmony with the 1951 United Nations Convention relating to the Status of Refugees, even though the United States had not formally acceded to the Convention. See *In re Tan*, 12 I. & N. Dec. 564 (BIA 1967).

6. The Board is defined by statute. It is a creature of regulation and a delegate of the Attorney General. 8 C.F.R. § 3.1(a) (1983). The decisions of the Board cited in this Article, unless otherwise indicated, have been designated as "precedents." 8 C.F.R. § 3.1(g) (1983).

7. *In re Joseph*, 13 I. & N. Dec. 70, 72 (BIA 1968) (citation omitted); see also *Lena v. INS*, 379 F.2d 536, 538 (7th Cir. 1967); *In re Tan*, 12 I. & N. Dec. 564, 568 (BIA 1967).

8. See, e.g., *In re Tan*, 12 I. & N. Dec. 564 (BIA 1967) (voluminous documentation of abuse of ethnic Chinese in Indonesia, letters from relatives, and an attack on the family business ruled insufficient); *In re Koojoo*, 12 I. & N. Dec. 215, 217 (BIA 1967) (Iranian president of student anti-Shah organization denied withholding despite findings of "no doubt" that alien was "prominently involved" in political activities in the United States, and that it was "likely" that he had been so identified by the government of Iran); See also *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *modified*, 676 F.2d 1023 (5th Cir. 1982). In *Haitian Refugee Center*, the district court found evidence of systematic and serious persecution by the Haitian government throughout the cases reviewed, yet not one applicant had met the "clear probability" standard. For example, one woman's father had been killed by Ton Ton Macoutes, who had come to arrest her just after she had fled. Another woman had been jailed after the murder of her husband and her son. 503 F. Supp. at 474-510.

interpretation of the law in a particular case was deemed insufficient cause to hold that he had abused his discretion.⁹

B. Conditional Entry Status

The second procedure, conditional entry, was enacted in 1965¹⁰ and principally concerned the admission of refugees from overseas. The INS could grant this status to aliens who could demonstrate that they had fled a communist or Middle Eastern country because of persecution based on race, religion, or political opinion.¹¹ There was a numerical ceiling on admissions, and relief was strictly limited by ideology and geographic location.¹²

Judicial review was ordinarily precluded, since most of the eligibility determinations were made abroad and few eligible aliens had been able to come to the United States. Although the precedents are rare,¹³ it is apparent that the conditional entry standard was more lenient than the withholding standard.¹⁴

C. Parole Power of the Attorney General

In 1952, the Attorney General was granted authority to "parole" aliens temporarily into the country "for emergent reasons or for reasons deemed strictly in the public interest."¹⁵ This procedure was also used to admit refugees from overseas. In contrast to conditional entry, there were no numerical limitations. In contrast to withholding, there were

9. *Lena v. INS*, 379 F.2d 536, 538 (7th Cir. 1967).

10. 1965 Amendments § 3, 79 Stat. 911, 913 (1965) (repealed at 94 Stat. 102, 107 (1980)).

11. *Id.* Section 3 allowed the INS to grant conditional entry status to aliens who could demonstrate that

(i) because of persecution . . . on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made

12. See 8 C.F.R. § 235.9(a) (1983), which limits the countries in which conditional entry visas could be processed to Austria, Belgium, France, Germany, Greece, Hong Kong, Italy, and Lebanon.

13. The only reported cases prior to 1968 are *In re Adamska*, 12 I. & N. Dec. 201 (BIA 1967) (Polish visitor); *In re Lalian*, 12 I. & N. Dec. 124 (BIA 1967) (Iranian visitor); and *In re Frisch*, 12 I. & N. Dec. 40 (BIA 1967) (Yugoslavian student).

14. See *Cheng Fu Sheng v. Barbar*, 269 F.2d 497, 499 (9th Cir. 1959) (construing the term "fear of persecution" in the Refugee Relief Act of 1953 as "in sharp contrast" to the stringent withholding of deportation provision); see also *In re Ugritic*, 14 I. & N. Dec. 384, 385-86 (BIA 1972) (finding conditional entry to require but "good reason to fear persecution"); *In re Adamska*, 12 I. & N. Dec. 201, 202 (BIA 1967) (holding conditional entry to be "substantially broader" than the pre-1965 withholding).

15. 1952 Act § 212(d)(5), 66 Stat. 163, 188 (1952) (current version at 8 U.S.C. § 1182(d)(5)(A) (1982)).

no ideological or geographic limitations. In practice, however, as the following table shows, the parole power was used almost exclusively to bring in those fleeing communism.

PRE-1968 USE OF PAROLE POWER¹⁶

<u>Non-Communist</u>	<u>Total Authorized</u>
Europe (1956)	925
 <u>Communist</u>	
Hungary (1957)	32,000
Cuba (1960-67)	185,487
Chinese-Hong Kong (1962)	15,000
USSR (1963)	224
	<hr/> 232,711

D. The Protocol relating to the Status of Refugees

In 1968, the United States became a party to the 1967 United Nations Protocol relating to the Status of Refugees (Protocol).¹⁷ The United States thereby bound itself to apply the provisions of the Protocol,¹⁸ which defines a "refugee" as a person who has a "well-founded fear of being persecuted" based on "race, religion, nationality, membership in a particular social group or political opinion."¹⁹

The sponsors of the Protocol, and expert witnesses who appeared before the Senate Foreign Relations Committee, guaranteed unequivocally that ratification "would not impinge adversely upon the Federal and

16. Compiled from Schmidt, *Development of United States Refugee Policy*, INS REPORTER, Fall 1979, at 1-3; *World Refugee Crisis: The International Community's Response, Report to the Committee on the Judiciary*, 96th Cong., 1st Sess. 213 (1979) [hereinafter cited as *World Refugee Crisis*].

17. The Protocol relating to the Status of Refugees was opened for signature on January 31, 1967. 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter cited as Protocol]. It was ratified by the United States on October 4, 1968. 114 CONG. REC. 29,607 (1968). The Protocol expressly incorporates the terms of the Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 [hereinafter cited as Convention].

18. S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 1 (1968); Letter of Submittal, Message from the President of the United States transmitting the Protocol relating to the Status of Refugees, S. EXEC. DOC. No. K., 90th Cong., 2d Sess. v (1968); see *In re Dunar*, 14 I. & N. Dec. 310, 313 (BIA 1973).

19. Protocol, *supra* note 17, at art. I, § 2; Convention, *supra* note 17, at art. I, § A(2). According to the Protocol, a "refugee" is a person who

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having nationality and being outside the country of his former habitual residence, is unable or owing to such fear, is unwilling to return to it.

State laws of this country."²⁰ In particular, Eleanor McDowell of the State Department's Office of the Legal Advisor stated in her testimony before the Committee that "existing regulations which have to do with deportation would permit the Attorney General sufficient flexibility to enforce the provisions of this convention which are not presently contained in the Immigration and Nationality Act."²¹

This flexibility proved to be limited; the Protocol was not followed in practice. Rather, immigration authorities continued to adhere to traditional, restrictive standards, as a review of post-Protocol asylum practice demonstrates.

1. *Post-Protocol withholding of deportation*— The withholding of deportation provision, as amended in 1965, authorized the Attorney General "to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of his race, religion or political opinion and for such period of time as he deems to be necessary for such reason."²² The considerable flexibility permitted under the withholding provision could have accommodated the new refugee standard. However, although the Board of Immigration Appeals limited negative exercises of discretion,²³ it retained the "clear probability" standard.²⁴

Furthermore, a clear consensus regarding the appropriate refugee eligibility standard failed to appear among the courts that reviewed withholding of deportation determinations. Some used the "well-founded fear" standard.²⁵ Others used the "clear probability" standard.²⁶ Still others employed an assortment of hybrid standards.²⁷

20. 114 CONG. REC. 29,391 (1968) (statement of Sen. Mansfield); *accord* 114 CONG. REC. 27,757 (1968) (Message from the President transmitting the Protocol); 114 CONG. REC. 27,758 (Letter of submittal from the Department of State); 114 CONG. REC. 27,844 (1968) (statement of Laurence A. Dawson of the Department of State).

21. S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 8 (1968).

22. 1965 Amendments § 11, 79 Stat. 911, 918 (1965) (amending 1952 Act § 243(h), 66 Stat. 163, 214 (1952)) (current version at 8 U.S.C. § 1253(h) (1982)); *see also supra* note 5.

23. The Board explained in *In re Dunar*, 14 I. & N. Dec. 310, 322 (BIA 1973), that although cases interpreting § 243(h) speak of the Attorney General's discretion, "we know of none in which a finding has been made that the alien has established the clear probability that he will be persecuted and in which § 243(h) withholding has nevertheless been denied in the exercise of administrative discretion." *But see In re Liao*, 11 I. & N. Dec. 113, 117-19 (BIA 1965) (holding it was not an abuse of discretion to deny withholding of deportation despite immigration judge's reference to "considerable evidence" to support respondent's claim of likelihood of persecution upon return to Formosa).

24. *In re Joseph*, 13 I. & N. Dec. 70, 72 (BIA 1968).

25. *Pereira-Diaz v. INS*, 551 F.2d 1149, 1154 (9th Cir. 1977); *Zamora v. INS*, 534 F.2d 1055, 1058 (2d Cir. 1976); *Paul v. INS*, 521 F.2d 194, 200 (5th Cir. 1975).

26. *Martineau v. INS*, 556 F.2d 306, 307 (5th Cir. 1977); *Pierre v. United States*, 547 F.2d 1281, 1289 (5th Cir.), *vacated and remanded to consider mootness*, 434 U.S. 962 (1977); *Cisternas-Estay v. INS*, 531 F.2d 155, 159 (3d Cir. 1976); *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971).

27. *Henry v. INS*, 552 F.2d 130, 131 (5th Cir. 1977) ("probable persecution"); *Daniel v.*

On rare occasions, the courts addressed the issue squarely. In *Kashani v. INS*, the Seventh Circuit opined that "the 'well founded fear' standard contained in the Protocol and the 'clear probability' standard which this court has engrafted onto section 243(h) will in practice converge."²⁸ In *Coriolan v. INS*, however, the Fifth Circuit explained that the Protocol standard, as viewed by the Board, "suggest[ed] at least a slight diminution in the alien's burden of proof."²⁹ Thus, though some attention was paid to the new Protocol standard, it was applied unevenly and inconsistently.

2. *Post-Protocol parole*—The Attorney General's parole power was also flexible enough to accommodate the ideologically neutral Protocol standard. In practice, however, as the following table shows, ideology continued to dominate decision making.

USE OF PAROLE POWER, 1968-80³⁰

<u>Non-Communist</u>	<u>Total Authorized</u>
Latin America (excl. Cuba) (1975-78)	4,400
Uganda (1972-73)	1,750
Lebanon (1978)	<u>1,000</u>
	7,150
<u>Communist</u>	
Cuba (1968-78)	232,666
USSR (1970-77)	17,200
USSR and Eastern Europe (1978-79)	61,924
Czechoslovakia (1970)	6,500
Indochina (1975-79)	<u>290,075</u>
	608,365

The admission of only 7,150 non-Communists indicates that although the Attorney General could have admitted refugees regardless of ideology, it remained the single most important concern.

The only efforts to implement the Protocol were regulatory in nature. In 1972, the Department of State issued regulations permitting aliens to seek sanctuary in the United States and abroad.³¹ The INS issued

INS, 528 F.2d 1278, 1279 (5th Cir. 1976); Khalil v. INS, 457 F.2d 1276, 1277 n.3 (9th Cir. 1972) ("would be persecuted"); Shkukani v. INS, 435 F.2d 1378, 1380 (8th Cir.), cert. denied, 403 U.S. 920 (1971); Gena v. INS, 424 F.2d 227, 232 (5th Cir. 1970) ("likely" persecution); Kovac v. INS, 407 F.2d 102, 105 (9th Cir. 1969) ("probability of persecution").

28. 547 F.2d 376, 379 (7th Cir. 1977).

29. 559 F.2d 993, 997 n.8 (5th Cir. 1977).

30. Compiled from Schmidt, *supra* note 16; *World Refugee Crisis*, *supra* note 16.

31. 37 Fed. Reg. 3,447 (1979).

regulations in 1974 establishing formal asylum procedures that recognized the applicability of the Protocol.³² In practice, however, immigration authorities were still frustrating implementation of the Protocol and acting inconsistently with its generous underlying humanitarian philosophy.

3. *Congressional concern about the failure to follow the Protocol*—After 1968, members of Congress increasingly sought to ensure compliance with the Protocol.³³ The need for reform was particularly highlighted by the so-called “Kurdica Affair” in 1970, in which a Lithuanian sailor who had jumped ship was returned to his vessel without an opportunity to seek asylum.³⁴ Specifically, legislators introduced bills to require the INS to conform its standards and practices to those of the Protocol, applying a consistent steady pressure for change from 1973 until the passage of the 1980 Act.³⁵ Congressional debate centered on the refugee standard.³⁶ Indeed, it was the subject of most of the hearings, and even representatives of the Departments of State and Justice recognized the difference between the stringent “clear probability” standard and the Protocol standard. The Justice Department, while supportive of the basic tenets of the refugee provision, believed that “the ‘well-founded fear of persecution’ should be limited to the ‘well-founded fear of persecution in the opinion of the Attorney General.’ The Department believe[d] that . . . [otherwise] it would be entirely subjective with the alien claiming refugee

32. 39 Fed. Reg. 41,832 (1974).

33. See, e.g., S. 3202, 91st Cong., 1st Sess., 115 CONG. REC. 36,965-71 (1969).

34. See CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 96TH CONG., 2D SESS., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 16 (Comm. Print 1980).

35. In 1973, Senator Kennedy introduced S. 2643, which was referred to the Committee on the Judiciary, 119 CONG. REC. 35,734 (1973). The definition of the term “refugee” was patterned closely on the Protocol definition. 119 CONG. REC. at 35,735, 35,737.

That same year, the House held extensive hearings on H.R. 981. See *Western Hemisphere Immigration: Hearings on H.R. 981 Before House Subcomm. No. 1 of the Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973). Witnesses noted with evident gratification the usage of the Protocol terminology. *Id.* at 249-50, 258, 304, 306, 326; see also 119 CONG. REC. 31,360 (1973) (statement of Rep. Eilberg introducing the bill on the House floor); 119 CONG. REC. 31,454-55 (1973).

In 1975, in introducing S. 2405, Senator Kennedy said, the act of 1965 was only the beginning of an important task It failed to resolve a number of issues relating to immigration It was generally recognized at the time that additional legislation would soon be needed. And this failure to act over the past decade has . . . been detrimental to fulfilling the intent of the 1965 Act 121 CONG. REC. 29,947 (1975). The bill proposed to excise the 1965 ideological biases and to include the Protocol definition of refugee.

36. Most of the hearings concerned H.R. 367 and H.R. 981, both of which brought the definition of refugee in line with the Protocol. See *Western Hemisphere Immigration: Hearings on H.R. 367, H.R. 981, and H.R. 10323, Before the House Subcom. on Immigration, Citizenship and International Law of the Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess. (1976). The eventual 1976 amendments, however, changed little. They were essentially a compromise after sponsors of more comprehensive legislation failed to gain the required support.

status whether his fear of being persecuted was well-founded [or not].”³⁷

The refugee standard was raised specifically as a topic in hearings in 1977. Congresswoman Holtzman, ultimately the co-sponsor of the 1980 legislation, stated her concern with the narrow application of the law:

[W]hen Congress creates a statutory scheme and does not really specify how that scheme is to be implemented it can be thwarted by the executive branch. I am concerned because although I think the definition [of refugee] in this bill is an excellent one and even though it states what person will be a refugee if he or she has a well-founded fear of persecution, we don't specify how that well-founded fear is to be ascertained.

. . . .³⁸

As a lawyer, Congresswoman Holtzman appreciated that a stringent application can eviscerate the most generous legislation.³⁹

In 1978, Congressman Eilberg, expressing Congress's growing impatience with the failure to fulfill the spirit of the Protocol, stated that “[f]or years we have received assurances . . . from the Justice Department . . . that criteria, guidelines, and regulations would be promulgated . . . so we would not have to go through the necessity of moving legislation. Yet this has never taken place.”⁴⁰ The stage was set for comprehensive legislation.

II. THE REFUGEE ACT OF 1980

The Refugee Act of 1980⁴¹ established a standard for uniform and nonideological refugee eligibility. Congress intended this new standard to be compatible with the humanitarian traditions and international obligations of the United States. Central to the Act was a statutory definition of “refugee” which conformed to that of the Protocol. A refugee was defined as

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is

37. *Id.* at 18.

38. *Policy and Procedures for the Admission of Refugees into the United States: Hearings on H.R. 3056 Before the House Subcomm. on Immigration, Citizenship, and International Law of the Comm. on the Judiciary, 95th Cong., 1st Sess. 127 (1977)* (statement of Rep. Holtzman).

39. H.R. 3056 is specifically cited in the legislative history of the 1980 Act as the genesis of that law. H.R. REP. NO. 608, 96th Cong., 1st Sess. 7 (1979).

40. *Hearings on the Admission of Refugees into the United States, II, Before the Subcomm. on Immigration, Citizenship and International Law of the Comm. on the Judiciary, 95th Cong., 1st & 2d Sess. 15 (1978)* (statement of Rep. Eilberg).

41. Pub. L. No. 96-212, 94 Stat. 102 (1980).

outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion⁴²

Conditional entry was eliminated⁴³ and the new refugee standard was adopted to determine claims for asylum⁴⁴ and claims for withholding of deportation.⁴⁵

There is no doubt that Congress intended the definition of "refugee" in the 1980 Act to conform to that in the Protocol.⁴⁶ During hearings, the derivation of the term was often mentioned and never questioned. Indeed, this intent was emphasized in the report of the Senate Judiciary Committee and debate on the Senate floor.⁴⁷

Similarly, throughout House consideration of the bill, references were made to "the fundamental change under the legislation . . . , the replacing of the existing definition of refugee with the definition which appears in the U.N. Convention and Protocol"⁴⁸ The definition was changed to excise ideological bias from immigration law and to facilitate bringing refugees into this country by requiring that only a well-founded

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

43. Pub. L. No. 96-212, § 202, 94 Stat. at 107.

44. INA § 208(a), 8 U.S.C. § 1158(a) (1982).

45. INA § 243, 8 U.S.C. § 1253(h) (1982). Under 8 C.F.R. § 208.3(b) (1983), asylum requests are to be "considered as requests for withholding exclusion or deportation pursuant to Section 243(h) of the Act." See also *In re Matelot*, I. & N. Int. Dec. No. 2927 (Nov. 1, 1982); *In re Portales*, I. & N. Int. Dec. No. 2905 (May 14, 1982); *In re Castellon*, 17 I. & N. Dec. 616 (BIA 1981).

The language of § 243(h) was amended to track in relevant part the language of Article 33 of the Convention. Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107. Moreover, in acceding to the Convention/Protocol in 1968, the Executive assured that Section 243(h) could accommodate the non-refoulement obligation imposed by Article 33. See S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 8 (1968). Article 33 in turn defines the term "refugee" as used in the Protocol. This analysis is supported by the general purpose of the Refugee Act to utilize uniform standards to allocate refuge in the United States. The different standards used in withholding, conditional entry, and parole were to be unified. *Refugee Act of 1980 — Conference Report*, S. REP. No. 590, 96th Cong., 2d Sess. 20 (1980) (Joint Explanatory Statement of the Committee of Conference).

46. See, e.g., 126 CONG. REC. 3,757 (1980) (statement of Sen. Kennedy: "The new definition makes our law conform to the United Nations Convention and Protocol").

47. *The Refugee Act of 1979 — Report*, S. REP. No. 256, 96th Cong., 1st Sess. (1979); 125 CONG. REC. 23,231 (1979).

48. *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 27 (1979) (statement of Griffin B. Bell, Attorney General of the United States) [hereinafter cited as *Refugee Act Hearings*]; see also *id.* at 43, 168, 169, 248, 251, 280, 284, 291, 357, 361, 383, 393; 125 CONG. REC. 35,813-26 (1979). Before the 1980 Act, the term "refugee" had not been defined by statute. The definition was derived from a composite of the procedures through which refuge was available — withholding of deportation, conditional entry, and the parole power.

fear of persecution be established.⁴⁹ Congress emphasized its concern over the intransigence of immigration authorities in the past and expressed its intention to monitor compliance in the future: "The Committee intends to monitor closely the Attorney General's implementation of the [asylum] section so as to insure the rights of those it seeks to protect."⁵⁰

A. *The Refugee Standard*

Even though Congress emphasized the uniform, nonideological standard through the enactment of the Refugee Act of 1980, immigration authorities continued to follow the "clear probability" standard.⁵¹ For example, in one case, the Board denied withholding despite documentary evidence confirming the applicant's defection from the Provisional Irish Republican Army (PIRA) and the nature and activities of the PIRA, finding under the "clear probability" standard that the alien had not demonstrated that the Irish government could not control the PIRA.⁵² The Court of Appeals reversed, explaining that the standard applied had been virtually "impossible" to satisfy.⁵³

More recently, the Board has developed a hybrid formulation requiring that, in order to be eligible for refugee status, "an alien must demonstrate a clear probability that he will be persecuted if returned to his country or a well-founded fear of such persecution."⁵⁴ There is a suggestion now that the Board has conformed its practice to the standard under the Protocol and Refugee Act.⁵⁵ According to an internal management report prepared in 1982 by the INS, however, the Service still adheres in practice to the "clear probability" standard.⁵⁶

49. See *Refugee Act Hearings*, *supra* note 48, at 169, 284 (testimony of A. Whitney Elsworth and Hurst Hannum); *Briefing on the Growing Refugee Problem; Implications for International Organizations, Hearing Before the Subcomm. on International Organizations of the Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 4-5 (1979) (statement of Dick Clark, U.S. Co-ordinator of Refugee Affairs).

50. H.R. REP. No. 608, 96th Cong., 1st Sess. 18 (1979).

51. See, e.g., *In re McMullen*, 17 I. & N. Dec. 542 (BIA 1980), *rev'd*, 658 F.2d 1312 (9th Cir. 1981).

52. *Id.*

53. *McMullen v. INS*, 658 F.2d 1312, 1319 (9th Cir. 1981); see also *Marroquin-Manriquez v. INS*, 699 F.2d 129 (3d Cir. 1983) (withholding denied by the Board where the applicant had been involved in a student political organization, a member of which had been killed, and the alien had been linked to the killing; and where three expert witnesses testified in support of the applicant's claim), *petition for cert. filed*, 52 U.S.L.W. 3091 (U.S. Apr. 7, 1983) (No. 82-1649).

54. *In re Portales*, I. & N. Int. Dec. No. 2905, at 4 (May 14, 1982) (citations omitted).

55. See *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), *cert. granted*, 103 S. Ct. 1249 (1983) (No. 82-973). The Supreme Court granted certiorari at the government's request, presumably to resolve a conflict between the Second, Third, and Sixth Circuits on the refugee standard. See *Reyes v. INS*, 693 F.2d 597 (6th Cir. 1982); *Rejaie v. INS*, 691 F.2d 139 (3d Cir. 1982). *Stevic* was orally argued before the Court on December 6, 1983.

56. IMMIGRATION AND NATURALIZATION SERVICE, ASYLUM ADJUDICATIONS: AN EVOLVING CON-

Admittedly, the "clear probability" standard is extremely difficult to meet. "If we use that all the time," said a district director, "no one would be given asylum." Another person said, "The claimant said his father was murdered. He had a newspaper article showing a picture of someone he said was his father and two other men in Iran being lynched. But I don't know if it's his father. He's also got an affidavit from a friend who was present describing the executions. But the friend could be lying." The claim was denied.⁵⁷

The current refugee standard is the subject of considerable discussion within the Service. One lawyer quoted in the report stated:

[A] well-founded fear of persecution seems to me to be a standard that is easier to meet, and more in keeping with the actual level of proof that a person could reasonably be expected to present. I would translate this standard in colloquial terms as: 'If what the person says is true, would I fear going back there?' Under the clear probability test, you would say, 'I absolutely can't go back'.⁵⁸

In August 1983, the Service issued overseas refugee processing guidelines which utilize the "well-founded fear" standard.⁵⁹

B. The Continuing Role of Ideology

Ideology also continues to dominate asylum decision making, translating into ready asylum grants for applicants who flee from Communist-dominated regimes, and into far less generous grants to those who flee regimes with which the United States has good relations, irrespective of their human rights records. Statistics provided by the INS for fiscal year 1983 support this conclusion. For example, seventy-eight percent of the Russian, sixty-four percent of the Ethiopian, fifty-three percent of the Afghan, and forty-four percent of the Romanian cases decided received political asylum, all involving persons fleeing Communist-dominated regimes. On the other hand, asylum was granted in less than eleven percent of the Philippine, twelve percent of the Pakistani, two percent of the Haitian, two percent of the Guatemalan and three percent of the Salvadoran cases.⁶⁰

CEPT AND RESPONSIBILITY FOR THE IMMIGRATION AND NATURALIZATION SERVICE 54 (June & December 1982) [hereinafter cited as INS ADJUDICATIONS]. A copy of the report is available from the author.

57. *Id.* at 54-55.

58. *Id.* at 55.

59. A copy of the guidelines is available from the author.

60. A copy of the statistics is available from the author.

El Salvador provides a good illustration. Our government has identified significant foreign policy interests with the government of El Salvador.⁶¹ As a matter of foreign policy, therefore, our Executive branch (which includes the State Department and the INS) has every incentive to characterize the situation in El Salvador as an improving one — an image that would be jeopardized by granting asylum to Salvadorans. An internal INS report confirms that ideology continues to be part of the asylum calculus:

In some cases, different levels of proof are required of different asylum applicants. In other words, certain nationalities appear to benefit from presumptive status, while others do not. For example, for an El Salvadoran national to receive a favorable advisory opinion, he or she must have a "classic textbook case." On the other hand [the State Department] sometimes recommends favorable action where the applicant cannot meet the individual well-founded fear of persecution test. This happened in December 1981 a week after martial law was declared in Poland. Seven Polish crewmen jumped ship and applied for asylum in Alaska. Even before seeing the asylum applications, a State Department official said "We're going to approve them." All the applications, in the view of INS senior officials, were extremely weak. In one instance, the crewman said the reason he feared returning to Poland was that he had once attended a Solidarity rally (he was one of the more than 100,000 participants at the rally). The crewman had never been a member of Solidarity, never participated in any political activity, etc. His claim was approved within 48 hours.⁶²

C. *Domestic Policy Considerations*

Domestic policy considerations have encroached upon the asylum area as well. The United States has sought to deter asylum applicants by intercepting them on the high seas and returning them to their home countries before they reach our shores, by imprisoning them once they arrive, and sometimes by depriving them of a fair opportunity to present their claims.

1. *Interdiction*— By presidential proclamation in September 1981,⁶³ the United States initiated an interdiction program which permits Coast

61. Until 1983, our Administration actually had to certify to Congress periodically that El Salvador had shown progress in the area of human rights. International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, 95 Stat. 1519 (1981).

62. INS ADJUDICATIONS, *supra* note 56, at 59 n.*.

63. Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981); Exec. Order 12,324, 46 Fed. Reg. 48,109 (1981).

Guard vessels to intercept and board United States registered vessels, as well as certain foreign vessels, and to make inquiries to determine if passengers are undocumented aliens bound for the United States. If so, they then can be returned to the country from which they came, provided they are not political refugees. They do not have access to counsel to assist in their identification as refugees.⁶⁴

The only country with which an agreement has been made in the interdiction program is Haiti. Approximately 500 Haitians have been intercepted under the interdiction program. Not one has been found entitled to seek refugee status in the United States, and all have been returned to Haiti.⁶⁵

Interdiction represents a radical departure from normal inspection and inquiry procedures which afford an alien the opportunity to present his or her case, through counsel, to an immigration judge.⁶⁶ As to refugees, interdiction runs afoul of the obligations under the domestic withholding provision and its international law correlative — Article 33 of the Protocol relating to the Status of Refugees — to refrain from refoulement.⁶⁷ This is the duty not to expel or return a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.

A refugee who would otherwise undergo persecution might be returned upon interdiction without any recourse simply because of an inability to articulate the reasons feared, or to persuade an on-ship inspector that the fear is well-founded, or simply because he or she is afraid to speak to authorities. This is particularly so since there would be no access to counsel under these circumstances.

A refugee fleeing persecution after a stressful and surreptitious journey often lacks the documentary resources, the psychological reserve, and even perhaps the willingness to persuade someone of the integrity of his or her asylum claim. Indeed, the *Handbook on Procedures and Criteria for Determining Refugee Status* of the United Nations High Commissioner for Refugees,⁶⁸ used by the United States in the analysis of asylum claims,⁶⁹ emphasizes the difficulties experienced by aliens

64. See Proclamation No. 4865, *supra* note 63; Exec. Order 12,324, *supra* note 63.

65. See diplomatic letters dated September 23, 1981, exchanged between the governments of the United States and Haiti. Copies of the letters are available in the author's files. See also Miami Herald, June 15, 1983, at 1, col. 1.

66. See 8 U.S.C. §§ 1226-1227, 1362 (1982).

67. 8 U.S.C. § 1253(h) (1982); Protocol, *supra* note 17, at art. I, § 1; Convention, *supra* note 17, at art. 33.

68. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) [hereinafter cited as HANDBOOK].

69. See *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), cert. granted, 103 S. Ct. 1249 (1983) (No. 82-973); *In re Frentescu*, I. & N. Int. Dec. No. 2906 (June 23, 1982); *In re Rodriguez-Palma*, 17 I. & N. Dec. 465 (BIA 1980).

in pursuing asylum at a national border: "[The applicant for refugee status] finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own."⁷⁰ The *Handbook* recommends taking special care in processing such applications.⁷¹

2. *Detention*— In the summer of 1981, the United States embarked upon a new alien detention policy. Prior to 1981, traditional administrative practice regarding the detention of aliens seeking admission to the United States, at least since Ellis Island closed in 1954, had been to release them absent a demonstrable security risk or likelihood of absconding.⁷² This practice applied to aliens with or without a passport or visa, as well as to applicants for political asylum in the United States. The Supreme Court in 1958 explained:

The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond Certainly this policy reflects the humane qualities of an enlightened civilization.⁷³

The liberal release practice changed dramatically in the summer of 1981. In particular, Haitians who arrived in Florida during that summer were immediately confined without consideration of whether they were security risks or likely to abscond.⁷⁴ This change in policy corresponded to an announcement by the Commissioner of the Immigration and Naturalization Service that "in the future, undocumented aliens arriving in the United States who do not choose to depart voluntarily

70. HANDBOOK, *supra* note 68, at ¶ 190. The *Handbook* explains why applicants may be hesitant to express their claims, even before the proper authorities. "A person, who because of his experiences, was in fear of the authorities in his own country may still feel apprehensive *vis-a-vis* any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case." *Id.* at ¶ 198.

71. *Id.* at ¶ 190.

72. *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) (citation omitted).

73. *Id.* See *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981). In *Rodriguez-Fernandez*, the Tenth Circuit explained that "[d]etention pending deportation *seems properly analogized to incarceration pending trial or other disposition of a criminal charge, and is, thus, justifiable only as a necessary, temporary measure.*" 654 F.2d at 1387 (emphasis added). The court did not find evidence that, previous to this case, a significant number of excludable aliens had been detained for long periods of time. See also *Louis v. Nelson*, 544 F. Supp. 973, 980 n.18 (S.D. Fla. 1982), *modified sub nom.* *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983), dismissed in part, *rev'd in part*, No. 82-5772, slip op. (11th Cir. Feb. 28, 1984) (en banc).

74. *Louis v. Nelson*, 544 F. Supp. 973 (S.D. Fla. 1982), *modified sub nom.* *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983), dismissed in part, *rev'd in part*, No. 82-5772, slip op. (11th Cir. Feb. 28, 1984) (en banc).

will be placed in administrative detention pending the determination of their admissibility."⁷⁵

Legal challenges, including claims that the program was discriminatory, were brought against the Haitian detention program in 1981. In New York, fifty-three Haitians alleged discrimination in their detention, initially in Miami and then after transfer to the Brooklyn detention facility.⁷⁶ The case went to trial in late January 1982, and, at that time, the Service began detaining undocumented aliens of other nationalities, including Afghans, upon arrival in New York.⁷⁷

Another legal challenge to the Haitian detention program was brought in Miami. On June 18, 1982, Judge Eugene P. Spellman ruled that the new detention policy implemented with respect to Haitians had violated the notice and comment provisions of the Administrative Procedure Act. He ordered the release of approximately 1,900 detained Haitians on June 29, 1982.⁷⁸

On July 9, 1982, in response to Judge Spellman's decision, the Service published new alien detention regulations in the Federal Register as an "interim rule," effective immediately.⁷⁹ The new regulations provided for the detention of arriving aliens without valid travel documentation (passport and/or visa). Release was limited to persons of advanced or tender age, those with medical conditions, or beneficiaries of an approved relative petition.⁸⁰

In the period permitted, fifteen comments were filed with the Service, including one from the Office of the United Nations High Commissioner for Refugees. The comments stated that the interim rule violated the Refugee Act of 1980, the Administrative Procedure Act, and the United Nations Protocol relating to the Status of Refugees. On October 19, 1982, however, the Service amended only the definition of "undocumented" aliens for the purpose of detention, and issued a final rule.⁸¹

75. Statement of the Commissioner of Immigration and Naturalization Service 9 (July 31, 1981). A copy of the announcement is available from the author.

76. *Vigile v. Sava*, 535 F. Supp. 1002 (S.D.N.Y.), *rev'd sub nom.* *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982).

77. *Ishtyaq v. Nelson*, CV. 82-2288 (E.D.N.Y. filed Aug. 4, 1982).

78. *Louis v. Nelson*, 544 F. Supp. 973 (S.D. Fla. 1982), *modified sub nom.* *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983). On appeal, the district court's procedural determination was upheld by the Eleventh Circuit. A panel of the Court of Appeals, however, went further, ruling that the Haitian detention program had been a product of intentional governmental discrimination. *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983). On August 16, 1983, at the government's request, the Eleventh Circuit granted rehearing en banc and on February 28, 1984, it issued a decision dismissing in part, reversing in part, and remanding the case with instructions, on the grounds, *inter alia*, that excludable aliens do not have "constitutional rights with respect to their applications for admission, asylum or parole." *Jean v. Nelson*, No. 82-5772, slip op., at 54 (11th Cir. Feb. 28, 1984).

79. 47 Fed. Reg. 30,044-46 (1982).

80. *Id.* at 30,045.

81. 47 Fed. Reg. 46,493-94 (1982). Prior to issuing the new regulations, the INS issued new

The detention rule has swept many asylum seekers into its net, including, for example, several Afghans who are seeking political asylum in the United States and who are being detained by the Service at a facility in New York City. Some of those Afghans have now been imprisoned for well over one year, and litigation is pending regarding the validity of their continued detention under the new rule.⁸²

International experience has demonstrated that asylum seekers frequently flee persecution in their home countries without valid travel documentation. Indeed, it would make little sense for a person fleeing persecution to seek a passport or exit visa from the persecuting government. The *Handbook* of the United Nations High Commissioner for Refugees explains that:

[A]n applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.⁸³

A detention program that focuses upon undocumented aliens falls heavily upon asylum seekers, raising a number of troubling legal questions.

Under a detention program, many arriving asylum applicants will be imprisoned pending the adjudication of their claims. Aliens are entitled, however, to apply for political asylum in the United States "irrespective" of their immigration status, i.e., whether or not they have travel documents.⁸⁴ Also, Article 31 of the Protocol relating to the Status of Refugees, to which the United States became a party in 1968,⁸⁵ prohibits the imposition of penalties "on account of their illegal entry or presence," as well as unnecessary "restrictions" on their movement.⁸⁶ A detention measure which burdens some asylum seekers with imprisonment and which penalizes them for petitioning for asylum would violate

detention policy guidelines in exclusion cases in early January 1982. Under the new guidelines, detention is the rule with release the exception for persons who have "a serious medical condition," who are pregnant, who are minors, or who have had relative petitions filed on their behalf and approved by the INS. These guidelines were revised in April 1982 regarding the release of juveniles. 59 Interpreter Releases 344, 349-50 (1982). They were revised again on June 27, 1983, to permit INS district directors to consider the release of any person who had final orders of deportation and whose departure could not likely be enforced. 60 Interpreter Releases 536-37 (1983).

82. *Ishtaq v. Nelson*, CV. 82-2288 (E.D.N.Y. filed Aug. 4, 1982). The regulations survived a motion for summary judgment in a decision on October 4, 1983.

83. *HANDBOOK*, *supra* note 68, at ¶ 196.

84. 8 U.S.C. § 1158(a) (1982).

85. *See supra* note 17.

86. Protocol, *supra* note 17, at art. 1, § 1; Convention, *supra* note 17, at art. 31.

the right to pursue asylum under the Refugee Act of 1980 and the Constitution.⁸⁷ Such detention, furthermore, would constitute a penalty and an unnecessary restriction under the Protocol.

A detention program would mean prolonged imprisonment for many arriving asylum applicants. Although indefinite imprisonment of aliens by itself may be legally infirm,⁸⁸ it has particularly adverse consequences for asylum seekers. Imprisonment during the asylum adjudication process makes representation by counsel difficult, and prolonged imprisonment may force refugees to return to countries where they will be persecuted.⁸⁹ Such is the experience of the Haitians who have "chosen" to return to Haiti. After being imprisoned under onerous conditions, frequently in facilities designed for short-term detention, some Haitians have given up their right to apply for political asylum. One Haitian who returned "voluntarily" in June 1982 told a federal judge:

After 11 months in detention in the United States, I wish to return to Haiti. My decision is based on the fact that, over the past month, I have become very depressed and ill and have not been able to receive medical treatment. I wish to state that this decision to leave in no way indicates a change from my previous position of fearing political persecution upon return. I fully expect that I may be mistreated or even killed upon my return to Haiti. However, I would rather die in my own country than remain in prison in the United States without any indication that I will ever be released.⁹⁰

A detention program that deters refugees from exercising their right to apply for asylum would be inconsistent with legal obligations not to return them to territories where they would be likely to suffer persecution.⁹¹

87. See *Yiu Sing Chun v. Sava*, 708 F.2d 869, 877 n.25 (2d Cir. 1983); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1037-39 (5th Cir. 1982); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 374-76 (C.D. Cal. 1982); *Nunez v. Boldin*, 537 F. Supp. 578, 584-87 (S.D. Tex.), *dismissed*, 692 F.2d 755 (5th Cir. 1982), *cf.* *Jean v. Nelson*, No. 82-5772, slip op. (11th Cir. Feb. 28, 1984) (en banc).

88. *Soroa-Gonzales v. Civiletti*, 515 F. Supp. 1049 (N.D. Ga. 1981); see *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981).

89. A 1,000 bed long-term alien detention facility is under construction at Oakdale, Louisiana. 60 Interpreter Releases 156 (1983). Oakdale is located in rural southwest Louisiana, and lawyers in this relatively remote area are scarce. Unrepresented asylum seekers will likely simply languish in detention.

90. *Detention of Aliens in Bureau of Prison Facilities: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 63-69 (statement of Arthur C. Helton). The affidavit is available from the author.

91. See 8 U.S.C. § 1253(h) (1982); Protocol, *supra* note 17, at art. I, § 1; Convention, *supra* note 17, at art. 33.

3. *Implementation problems*— The manner in which the law has been administered has also deterred arriving aliens from applying for asylum. Often asylum seekers are denied a fair opportunity to present their claims, and fair consideration of those claims once presented. In the context of Haitian and Salvadoran cases, federal courts have found numerous instances in which employees of the INS have sought to coerce or mislead aliens into not applying for asylum or into abandoning their claims once filed.⁹²

The prevalence of domestic immigration policy considerations in the asylum process is recognized in the internal INS report, which explains that:

By law, refugees and asylees must both meet the same statutory definition. However, in both instances the standard appears to be less strict for refugees overseas than it is for asylum applicants in the United States. . . .

This double standard often results in anomalies between nationality groups and even among members of the same nationality depending upon physical location. For example, at the beginning of [fiscal year] 1982 INS accepted 99% of the Ethiopians presented overseas for admission to the United States as refugees while rejecting more than 45% of the Ethiopian claims for political asylum in the United States. Similarly, before the imposition of martial law, acceptance rates for Polish refugees overseas was about 75-80% while denial rates for Polish asylum claimants topped 50% in some months.⁹³

Differentiating between asylees and refugees in this fashion contravenes the neutral principles for decision making established by the Refugee Act. In the view of an immigration judge quoted in the report, “[a]sylum is a political, not a legal animal. As a sovereign nation, we exercise the right to decide who enters and can stay on our shores. We have created our own problems by not applying strict enough standards and by bowing to pressure from special interest groups.”⁹⁴ No statement could be more at odds with the mandate of the Refugee Act.

The United States is not immune from the worldwide phenomenon of large numbers of displaced persons and refugees moving across borders, and, shortly upon its enactment, the 1980 Act was sorely tested

92. *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982); *Nunez v. Boldin*, 537 F. Supp. 578 (S.D. Tex.), *dismissed*, 692 F.2d 755 (5th Cir. 1982); see *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *modified*, 676 F.2d 1023 (5th Cir. 1982).

93. INS ADJUDICATIONS, *supra* note 56, at 80; see also Martin, *The Refugee Act of 1980: Its Past and Future*, 3 MICH. Y.B. INT'L LEGAL STUD., TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 9, 112 (1982).

94. INS ADJUDICATIONS, *supra* note 56, at 55.

in this regard. Statistics provided by the INS⁹⁵ indicate that in fiscal year 1980, 15,955 aliens arrived in the United States and applied for political asylum. The numbers, moreover, continued to mount. In 1981, 63,202 aliens applied for asylum, and in 1982, 37,027 applied. In 1983, however, only 8,423 asylum cases were filed.⁹⁶ Despite the decrease, 165,998 asylum cases were reported as pending in the United States at the end of 1983.⁹⁷

The INS has chosen to simply not decide many pending cases. Asylum cases have a relatively low priority in the Service. The information provided by the INS shows that 598 applications were completed in 1980, 4,521 applications were completed in 1981, and 12,064 applications were completed in 1982. Only 9,798 cases were completed in 1983.⁹⁸ On the other hand, in 1981, the Service received 1,880,000 petitions and applications for various immigration benefits, and processed 1,770,000 of those matters.⁹⁹

Additionally, the INS has held only two in-service programs for some of its asylum officers, and only one program has been held for immigration judges.¹⁰⁰ The lack of instruction on asylum standards, furthermore, has had an especially pernicious effect. As indicated previously, the right of asylum in the United States historically has been clouded by foreign relations considerations. The Refugee Act of

95. Copies of the statistics are available from the author.

Another way that the right of asylum has been limited recently is through the development in 1982 of the concept that asylum may be denied as a matter of "discretion." See *In re Salim*, I. & N. Int. Dec. No. 2922 (Sept. 29, 1982), in which the Board denied asylum (but granted withholding of deportation) to an Afghan refugee on the ground that he had circumvented the overseas refugee admission process in coming to the United States, and it has not yet been the subject of judicial challenge. The precise scope of the doctrine has yet to be worked out. A broad interpretation would state an exception that would swallow whole the right of asylum.

96. Copies of the statistics are available from the author. In May 1983, the INS began to keep statistics based on the number of asylum cases filed instead of the number of aliens applying for asylum, thereby eliminating from the count derivative applications concerning the family members of principal applicants. There are no statistics for asylum applications in the immigration court in fiscal year 1983. The reduction in applications in 1983, however, is likely not attributable in any significant degree to the lack of immigration court statistics for that period. There are only 55 immigration judges in the United States. In a three-month period in 1982, the only period for which statistics are available, only 468 cases were resolved in the immigration court.

97. Copies of the statistics are available from the author. This statistic, however, is somewhat overstated. The information provided by the Service indicates that of the 165,998 pending cases, over two-thirds concerned nationals of countries which had been given special temporary immigration status, including 115,162 Cubans and 1,843 Poles. See 60 Interpreter Releases 2, 484, 971, 972 (1983); 59 Interpreter Releases 85, 260, 445, 659-60 (1982); 57 Interpreter Releases 305-06, 498-99 (1980).

98. See *supra* note 96.

99. 1981 ATT'Y GEN. ANN. REP. 160. This is the most recent year for which such statistics are available.

100. INS ADJUDICATIONS, *supra* note 56, at 32-34, 73-76. A second program for selected asylum officers was held in December 1983. A program was held for immigration judges at a week-long conference in November 1983 in Miami. A copy of the program agenda is available from the author.

1980 sought to introduce ideologically neutral standards to determine refugee status. Absent training and the development of any independent expertise, however, asylum officers and immigration judges are forced to rely almost exclusively upon the required "advisory" opinions of the Department of State regarding whether or not the applicant has a well-founded fear of persecution.¹⁰¹ Such opinions are conclusory and unenlightening in that the information upon which they are based is ordinarily disclosed neither to the asylum seeker nor the immigration adjudicator. It is not surprising, therefore, that State Department opinions are followed virtually invariably by the INS.¹⁰² In the words of one INS adjudicator: "I would never, never overrule the State Department."¹⁰³ Consequently, the ideological allocation of asylum, once expressly recognized by statute, continues in practice under the 1980 Refugee Act.

III. RECOMMENDATIONS

The new alien interdiction and detention programs violate the rights of refugees. The focus of reform should not be on deterrence, which may result in the return of refugees to territories where they face persecution. Rather, the focus should be on establishing a fair and expeditious asylum adjudication system.

A. Recruitment and Training

Traditionally, immigration judges have come from the ranks of the INS. Judges inculcated with the law enforcement ethos of the INS sometimes lack sensitivity to the rights of aliens. Immigration judges, therefore, should be recruited from outside as well as from inside the INS.

Also, immigration judges and other immigration adjudicators should be instructed in the law and history of human rights and refugees.¹⁰⁴ In addition to initial instruction, adjudicators should be exposed to different perspectives through creative in-service training programs. This ongoing training should involve groups such as the Office of the United Nations High Commissioner for Refugees (UNHCR), the international organization charged with supervising the compliance of state parties with the Protocol,¹⁰⁵ as well as advocates of the rights of asylum seekers.

101. See, e.g., 8 C.F.R. §§ 208.7, 208.10(b) (1983).

102. INS ADJUDICATIONS, *supra* note 56, at 62, 63.

103. *Id.* at 62.

104. See S. 529, introduced into the Senate, 129 CONG. REC. S1342-46 (daily ed. Feb. 17, 1983); H.R. 1510, introduced into the House, 129 CONG. REC. H570-72 (daily ed. Feb. 17, 1983). Under both bills, administrative law judges would be given special training in international relations and law.

105. See G.A. Res. 428 (v), 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950).

B. *Department of State Involvement*

The State Department should not provide opinions on the ultimate question to be decided in individual cases — whether the alien has a well-founded fear of persecution. Such conclusory pronouncements simply serve to continue the practice of ideological allocation of asylum which the Refugee Act of 1980 was designed to change. Should the State Department wish to make information on conditions in individual countries available to the immigration adjudicator, then that information should be revealed to the INS, as well as to the alien and his or her counsel. Only through such disclosure can proper weight be given to the position of the State Department.

C. *The Involvement of the United Nations High Commissioner for Refugees*

One desirable procedural safeguard in the review of agency asylum determinations is formal involvement in the process by the United Nations High Commissioner for Refugees. Such a role would depoliticize the process and encourage independent review of asylum determinations.

The role of the UNHCR in the determination of refugee status varies from country to country. In Belgium, the Minister of Foreign Affairs has delegated the determination of refugee status to the UNHCR,¹⁰⁶ while in Italy, Somalia, and Tunisia, the UNHCR is one of the decision makers in the process.¹⁰⁷ In seven other countries, the UNHCR is represented on an advisory commission that interviews applicants and makes recommendations to the final decision maker.¹⁰⁸ In Spain, the UNHCR is consulted before a decision on refugee status is made, and in Austria the UNHCR may express its views prior to a decision.¹⁰⁹

Other countries facilitate UNHCR oversight of the refugee determination process by various methods. For example, the UNHCR is informed of all applications for refugee status in Austria, Greece, and

106. Note on Procedures for the Determination of Refugee Status Under International Instruments, U.N. Doc. A/AC.96/INF.152/Rev.3, at ¶ 20 (1981). Before the application reaches UNHCR, the Aliens Office of the Ministry of Justice determines whether the application has been submitted within legal time limits and whether Belgium is a proper asylum country. *Id.* at ¶ 21.

107. In Italy, the UNHCR is one of three members on a Joint Eligibility Commission which determines refugee status. *Id.* at ¶ 75. The UNHCR is an *ex officio* member of the Committee for Refugee Acceptance in Somalia. *Id.* at ¶ 122. Applicants for refugee status in Tunisia normally apply first to UNHCR for a refugee certificate, and then are recognized as refugees by the Tunisian authorities. *Id.* at ¶¶ 145-146.

108. The UNHCR has an advisory role on the commission in Australia, Djibouti, and Portugal. *Id.* at ¶¶ 12, 52, 112. In New Zealand and Senegal, the UNHCR representative may submit his or her views to the commission. *Id.* at ¶¶ 102, 117. He or she is an active participant in the meetings of the Canadian advisory committee. *Id.* at ¶ 37. In Zambia, the UNHCR representative may question applicants and record dissenting opinions. *Id.* at ¶ 177.

109. *Id.* at ¶¶ 17, 127.

New Zealand,¹¹⁰ while in West Germany, a UNHCR representative may attend applicant interviews with the federal official who decides on applications.¹¹¹ A role for UNHCR in the United States would serve to rationalize a now overly politicized asylum process.

Conclusion

Despite the enactment of the Refugee Act of 1980, the integrity of the right to asylum in the United States is threatened. The Act continues to be subverted through legally questionable practices of interdiction, detention, and unfairness in the adjudication process. The right to asylum itself is under attack. We hear often of a "crisis" in asylum in America. That crisis, however, lies not in the increasing numbers of asylum seekers, but in whether the right of asylum can withstand the expedient policy solutions which until now governed the process. Full and fair implementation of the Refugee Act requires the depoliticization of the asylum process, the recognition of the uniform Protocol standard, and above all, the acknowledgement of the minimal individual rights and dignity of asylum seekers. Only then will the promise of the Refugee Act be fulfilled.

110. *Id.* at ¶¶ 7, 12, 17, 72, 102. The UNHCR may contact and assist applicants in Algeria, Australia, Greece, Morocco, and New Zealand: *Id.* at ¶¶ 7, 17, 72, 92, 102.

111. *Id.* at ¶ 67.