

Michigan Law Review

Volume 85 | Issue 1

1986

Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters

Lynda J. Oswald
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Courts Commons](#), [Immigration Law Commons](#), [Legislation Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Lynda J. Oswald, *Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 MICH. L. REV. 152 (1986).

Available at: <https://repository.law.umich.edu/mlr/vol85/iss1/4>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTES

Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters

Fifteen times in the past quarter-century, the Attorney General has decreed that aliens of certain nationalities could temporarily remain in the United States regardless of their visa status.¹ Government officials have characterized these grants of blanket extended voluntary departure (EVD)² as a means of protecting aliens from life-threatening conditions in their homelands.³ The Attorney General's actions were apparently undertaken for humanitarian reasons⁴ and went largely un-

1. Government figures vary on this point. According to H.R. REP. NO. 1142, 98th Cong., 2d Sess., pt. 1, at 54 (1984), blanket extended voluntary departure (EVD) has been granted to nationals from Cuba, the Dominican Republic, Czechoslovakia, Chile, Cambodia, Vietnam, Laos, Lebanon, Ethiopia, Uganda, Iran, Nicaragua, Afghanistan, and Poland. The Immigration and Naturalization Service (INS) excludes the Dominican Republic from the list, but adds Hungary and Rumania. Immigration and Naturalization Service, U.S. Dept. of Justice, Asylum Adjudications: An Evolving Concept and Responsibility for the Immigration and Naturalization Service 67-68 (June and Dec. 1982) (mimeo) [hereinafter INS, Asylum Adjudications] (copy on file at *Michigan Law Review*). See note 40 *infra*. Gordon and Rosenfield state that extended voluntary departure was also granted to Yugoslavians, but they provide no documentation for this inclusion. 1A C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 5.3e(6a) (1981).

2. Case-by-case extensions of voluntary departure, see notes 25-32 *infra* and accompanying text, under 8 C.F.R. § 242.5(a)(3) (1986), see note 24 *infra*, are sometimes referred to as "extended voluntary departure." See, e.g., *Bolanos v. Kiley*, 509 F.2d 1023, 1026 (2d Cir. 1975); *United States ex rel. Bartsch v. Watkins*, 175 F.2d 245, 247 (2d Cir. 1949); *Akbari v. Godshall*, 524 F. Supp. 635, 644 (D. Colo. 1981); 2 C. GORDON & H. ROSENFELD, *supra* note 1, § 7.2a. *En masse* grants of indefinite voluntary departure are also referred to as "extended voluntary departure." See, e.g., *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 594 F. Supp. 502, 505 (D.D.C. 1984), *affd. in part, revd. in part*, 804 F.2d 1256 (D.C. Cir. 1986); 1A C. GORDON & H. ROSENFELD, *supra* note 1, § 5.3e(6a); INS, Asylum Adjudications, *supra* note 1, at 65. This Note uses EVD to refer only to this latter type of relief.

3. See note 152 *infra*. The INS describes EVD status as follows:

Nationals from many countries visit, study, or do business in the United States regularly. From time to time unexpected crises — war, political upheaval, etc. — occur in the home country which could jeopardize the lives of visitors in the United States if they returned during the crises. In such situations, acting on specific State Department recommendation, the Attorney General has permitted foreign nationals in the United States to remain until conditions in their home country stabilize. Usually the State Department cites civil war, invasion by foreign nationals, etc., as precipitating factors in its recommendations to the Justice Department. The Attorney General then authorizes extended voluntary departure status for a specified period for nationals of the requisite country.

The status is a temporary one, granted for varying periods, reviewed and then extended or terminated at the end of that time. The action is a blanket determination, that is, all nationals of a particular country who are in the United States are covered.

INS, Asylum Adjudications, *supra* note 1, at 65.

4. See note 152 *infra* and accompanying text; see also 1A C. GORDON & H. ROSENFELD, *supra* note 1, § 5.3e(6a) (describing EVD as "temporary sanctuary"). But see note 153 *infra* (government has asserted that EVD is granted for other reasons).

noticed by the public.⁵

Recently, however, the Attorney General denied EVD status to Salvadoran nationals,⁶ despite the perilous conditions faced by those forced to return to El Salvador.⁷ This denial has sparked controversy in the press⁸ and one court case — *Hotel & Restaurant Employees Union, Local 25 v. Smith*.⁹ For the first time, the source and nature of

5. This lack of public notice is exemplified by the dearth of published material on the subject. See generally T.A. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 726-43 (1985) (presentation of general EVD concept and study of proposed use of EVD for Salvadoran aliens); I.A. C. GORDON & H. ROSENFELD, *supra* note 1, § 5.3e(6a) (one-page summary of EVD concept in an eight-volume treatise on immigration law); A. LEIBOWITZ, IMMIGRATION LAW AND REFUGEE POLICY § 5.05, at 5-156 to 5-160 (1983) (one page synopsis with reproductions of two news articles on specific instances where EVD was granted); Note, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295, 309-33 (1985) (historical look at the issue and discussion of the potential for extending EVD to Salvadorans). The denial of EVD status to Salvadorans did cause a flurry of articles in the press. See note 8 *infra*.

6. See *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 563 F. Supp. 157, 159 (D.D.C. 1983), *motion for summary judgment granted*, 594 F. Supp. 502 (D.D.C. 1984) ("Plaintiff seeks to challenge . . . the failure of the Attorney General and the Immigration and Naturalization Service (INS) to grant [Salvadorans] extended voluntary departure."); Letter from William F. Smith, Attorney General, to Representative Lawrence J. Smith (July 19, 1983), reprinted in Memorandum of Points and Authorities in Support of Defendants' Motion for Partial Summary Judgment at Exhibit D, *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 563 F. Supp. 157 (D.D.C. 1983) (No. 82-2203) [hereinafter Defendants' Memorandum] ("I have concluded that the present circumstances do not warrant a granting of 'extended voluntary departure' to El Salvadorans presently in the United States illegally.")

7. The Department of State's 1984 Country Report on El Salvador states:

Human rights conditions in El Salvador are strongly affected by the ongoing civil strife. The achievement of a stable public order sufficient to protect individual rights has been disrupted by guerrilla and military operations, partisan hatreds, acts of revenge, fear, and a prevailing uncertainty characterized by violence. This situation contributes to, and is complicated by, the ineffective operation of the judicial system, caused in part by corruption and intimidation.

DEPT. OF STATE, 99TH CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984, at 512-13 (Joint Comm. Print 1985). Authorities agree that over 40,000 noncombatants have been killed in El Salvador over the last five years. See, e.g., *Extended Voluntary Departure Issues: Hearings on § 377 Before the Subcomm. on Immigration Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 111 (1985); *Temporary Suspension of Deportation of Certain Aliens, 1984: Hearing on H.R. 4447 Before the Subcomm. on Immigration, Refugees, and International Law*, 98th Cong., 2d Sess. 29-30 (1984) [hereinafter *Hearing on H.R. 4447*]. See generally Note, *The Agony and the Exodus: Deporting Salvadorans in Violation of the Fourth Geneva Convention*, 18 N.Y.U. J. INTL. L. & POLITICS 703, 719-25 (1986) (description of human rights abuses in El Salvador). Reports suggest that Salvadorans forced to return to El Salvador from the United States face even greater dangers than those who never left the country. ACLU, NATIONAL IMMIGRATION AND ALIEN RIGHTS PROJECT, SALVADORANS IN THE UNITED STATES: THE CASE FOR EXTENDED VOLUNTARY DEPARTURE, appendix III (Rpt. No. 1, Dec. 1983).

8. See, e.g., *Shelter for Refugees*, L.A. Times, Apr. 29, 1985, at 4, col. 1; *Insensitivity on Refugees*, L.A. Times, Feb. 25, 1985, § 2, at 4, col. 1; *Salvadorans Rebuffed on Special Immigration Status*, Wash. Post, Sept. 27, 1984, at A9, col. 1; *It's Wrong to Deport Salvadorans Right Now*, N.Y. Times, Aug. 19, 1983, at A20, col. 4; Abrams, *Diluting Compassion*, N.Y. Times, Aug. 5, 1983, at A23, col. 1; *Restaurant Union Challenges Federal Immigration Policy*, Wash. Post, June 16, 1983, at A1, col. 1; *Why Poles but Not Salvadorans?*, N.Y. Times, May 31, 1983, at A20, col. 1; *U.S. is Condemned Over Salvadorans*, N.Y. Times, May 21, 1983, at A5, col. 1; *Deporting Salvadorans*, Wash. Post, Apr. 2, 1983, at A14, col. 1; *Salvadorans Forced Back into "Hell,"* N.Y. Times, Mar. 3, 1983, at A26, col. 5.

9. 563 F. Supp. 157 (D.D.C. 1983), *motion for summary judgment granted*, 594 F. Supp. 502

EVD status are being examined and questioned. Unfortunately for Salvadorans and similarly situated aliens, the United States District Court for the District of Columbia granted summary judgment for the defendants in *Employees Union*, finding that EVD is "a matter of the Attorney General's absolute discretion on issues of foreign and prosecutorial policy"¹⁰ and thus not subject to judicial review beyond an initial examination into whether the Attorney General's decision had a rational basis.¹¹ In so holding, the *Employees Union* court ratified the extrastatutory nature of this status and recognized broad, nearly unbridled discretion in the Attorney General.

In refusing to review the Attorney General's decision, the *Employees Union* court followed the traditional restrictive view of judicial involvement in immigration law, which assumes that immigration matters are entitled to substantial judicial deference.¹² This view, which has dominated our legal tradition for the past century, is now being challenged by a new vision of immigration law marked by heightened judicial scrutiny and a recognition of the rights accruing to aliens simply because of their intrinsic human worth.¹³ This Note argues that, because of the important interests at stake, EVD is more properly examined under this incipient legal tradition.

Part I of this Note defines EVD and distinguishes it from related forms of deportation relief. Part II describes the *Employees Union* court's holding. The evolution of American perceptions of immigration law is laid out in Part III and the concept of "communitarianism" is explored. Part IV investigates the source of EVD and concludes that EVD arises not from the discretionary enforcement of the immigration laws, but from the voluntary departure provisions of the Immigration and Nationality Act of 1952 (INA).¹⁴ Thus, Part V finds that EVD determinations should be subject to narrow judicial review for abuse of discretion under the Administrative Procedure Act (APA)¹⁵ and urges that a "reasons requirement" be imposed on the Attorney General. Part VI concludes by integrating EVD into the communitarian model.

(D.D.C. 1984), *affd. in part, revd. in part*, 804 F.2d 1256 (D.C. Cir. 1986). The court noted that "the issue presented . . . , that of judicial review of the Attorney General's determination regarding a grant of EVD, is one of first impression in the Courts." 594 F. Supp. at 505. [As this Note was going to press, the Court of Appeals for the District of Columbia Circuit affirmed the district court's grant of summary judgement to the defendants on the EVD issue in the *Employees Union* case. See Author's Postscript, notes 204-09 *infra* and accompanying text.—Ed.]

10. 594 F. Supp. at 504.

11. 594 F. Supp. at 508.

12. See notes 91-96 *infra* and accompanying text.

13. See notes 97-105 *infra* and accompanying text.

14. 8 U.S.C. §§ 1101-1503 (1982).

15. Administrative Procedure Act of 1946, 5 U.S.C. §§ 551-559, 701-706 (1982 & Supp. II 1984).

I. VOLUNTARY DEPARTURE, EXTENSIONS OF VOLUNTARY DEPARTURE, AND EVD DEFINED AND DISTINGUISHED

The concept of EVD is not well-understood.¹⁶ A major cause of the confusion surrounding this relief is the terminology used; even the INS staff apparently has difficulty distinguishing voluntary departure, extensions of voluntary departure, and extended voluntary departure from each other.¹⁷ Although these forms of deportation relief are conceptually related, they have different objectives and effects.

The INA gives the Attorney General discretionary authority to grant voluntary departure status to deportable aliens.¹⁸ The Act permits the Attorney General to grant this status both to aliens already involved in deportation proceedings¹⁹ and to aliens for whom deportation hearings have not yet been held.²⁰ An alien who voluntarily departs the United States avoids several discommodious legal consequences²¹ and, unlike a deported alien, need not obtain special permission to reapply for admission within the next year.²² Aliens granted this status who do not fall into one of the special categories

16. Over one-half of the 40 INS staff members interviewed for an INS report stated that they had never heard of EVD. Not a single field officer was able to name the countries to which EVD then applied. INS, *Asylum Adjudications*, *supra* note 1, at 66.

17. See INS Wire of Feb. 6, 1984, *reprinted in* 61 INTERPRETER RELEASES 103 (1984) (internal memorandum distinguishing "extensions" of voluntary departure from EVD). Several commentators have urged the renaming of EVD as a solution to the confusion. See notes 197-98 *infra* and accompanying text.

18. See 8 U.S.C. § 1252(b) (1982), quoted in note 20 *infra*, and 8 U.S.C. § 1254(e) (1982), quoted in note 19 *infra*. Voluntary departure originally evolved through the ad hoc practices of administrative officers. The Alien Registration Act codified the practice in 1940. 2 C. GORDON & H. ROSENFELD, *supra* note 1, § 7.2a.

19. With exceptions not relevant here,

[t]he Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

8 U.S.C. § 1254(e) (1982) (emphasis added).

20. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings . . . need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title *if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized . . .*

8 U.S.C. § 1252(b) (1982) (emphasis added).

21. Unlike deportation, voluntary departure (1) "avoids the stigma of compulsory ejection;" (2) "facilitates the possibility of return to the United States;" (3) "often entails the certainty of speedy return;" and (4) "enables the applicant to select his own destination." 2 C. GORDON & H. ROSENFELD, *supra* note 1, § 7.2a, at pp. 7-18 to 7-19; *see also* *Tzantarmas v. United States*, 402 F.2d 163, 165 n.1 (9th Cir. 1968) (discussing benefits of voluntary departure), *cert. denied*, 394 U.S. 966 (1969); Comment, *Suspension of Deportation: Illusory Relief*, 14 SAN DIEGO L. REV. 229, 253-54 (1976) (same).

22. 8 U.S.C. § 1182(a)(16) (1982) provides that aliens who have been deported are excluded from admission into the United States for one year unless the Attorney General consents to their application for readmission.

discussed below²³ (which allow for "extensions") must leave the United States within thirty days unless "meritorious circumstances" are present.²⁴

INS regulations permit the granting of extensions of voluntary departure status to certain aliens.²⁵ For example, an alien who meets the other statutory requirements and "in whose case the district director has determined there are compelling factors warranting grant of voluntary departure"²⁶ may be granted an extension of voluntary departure.²⁷ Other classes of aliens who may receive extensions of voluntary departure status include aliens who have been granted asylum but who have not been granted parole or stay of deportation,²⁸ certain nonimmigrant aliens who have lost such status solely because of private bills introduced on their behalf,²⁹ and certain aliens admissible to the United States who meet other conditions as well.³⁰ The INS officer must generally grant the status in specific increments of time³¹ and his or her decision is not subject to administrative appeal.³²

23. See text at notes 25-32 *infra*.

24. With exceptions not relevant here, "any grant of voluntary departure shall contain a time limitation of usually not more than 30 days, and an extension of the original voluntary departure time shall not be authorized except under meritorious circumstances." 8 C.F.R. § 242.5(a)(3) (1986).

25. 8 C.F.R. § 242.5(a)(3) (1986).

26. 8 C.F.R. § 242.5(a)(2)(viii) (1986).

27. 8 C.F.R. § 242.5(a)(3) (1986); see also note 147 *infra* and accompanying text (describing provisions of INS Operations Instructions on extensions of voluntary departure).

28. 8 C.F.R. § 242.5(a)(2)(vii) (1986).

29. 8 C.F.R. § 242.5(a)(2)(v) (1986).

30. Voluntary departure may be granted to any alien who is statutorily eligible: . . . (vi) who is admissible to the United States as an immigrant and: (A) Who is an immediate relative of a U.S. citizen, or (B) is otherwise exempt from the numerical limitation on immigrant visa issuance, or (C) has a priority date for an immigrant visa not more than 60 days later than the date show [sic] in the latest Visa Office Bulletin and has applied for an immigrant visa at an American Consulate which has accepted jurisdiction over the case, or (D) who is a third-preference alien with a priority date earlier than August 9, 1978, or (E) who is the beneficiary of an approved sixth-preference petition who satisfies Examinations without another petition that he/she can qualify for third preference and who cannot obtain a visa solely because a visa number is unavailable, and who has a priority date earlier than August 9, 1978

8 C.F.R. § 242.5(a)(2) (1986). Other classes of aliens who are eligible for voluntary departure include aliens who are natives of contiguous territories who are not within the class described above, 8 C.F.R. § 242.5(a)(2)(i) (1986), any alien whose application for extension for stay as a nonimmigrant is being denied, 8 C.F.R. § 242.5(a)(2)(ii) (1986), aliens who have voluntarily surrendered to the INS, 8 C.F.R. § 242.5(a)(2)(iii) (1986), and aliens with valid travel documents and confirmed reservations to leave the United States within 30 days, 8 C.F.R. § 242.5(a)(2)(iv) (1986).

31. The status usually may be granted in increments of one year. See 8 C.F.R. § 242.5(a)(3) (1986). However, certain categories of aliens who are admissible as immigrants may receive the status in increments of 30 days, while other categories of aliens may receive an indefinite grant of that status. *Id.*

32. "An appeal shall not lie from a denial of an application of voluntary departure under this section, but the denial shall be without prejudice to the alien's right to apply for relief from deportation under any provision of law." 8 C.F.R. § 242.5(b) (1986).

No statute or regulation explicitly sanctions the granting of “blanket” extended voluntary departure (EVD) to all nationals of a specific country. Rather, the privilege has evolved through INS practice since 1960, when the INS conferred EVD status upon Cubans.³³ EVD differs from extensions of voluntary departure in two significant respects: (1) EVD is granted to aliens who are temporarily unable to return to their home country because of dangerous conditions there³⁴ and (2) the determination does not usually involve individual evaluations, but rather applies to all nationals of the country involved who are within the United States.³⁵ Grants of EVD status permit the United States to extend temporary aid to aliens without requiring it to grant them permanent status.³⁶ EVD grants also conserve the Attorney

33. See note 40 *infra*.

34. See IA C. GORDON & H. ROSENFELD, *supra* note 1, § 5.3e(6a), at pp. 5-47 to 5-48; INS, Asylum Adjudications, *supra* note 1, at 65. But see note 153 *infra* (Attorney General has recently asserted that foreign policy considerations control EVD determinations); note 43 *infra* (EVD granted to Silva letterholders for domestic policy reasons).

35. See INS, Asylum Adjudications, *supra* note 1, at 65 (“The action is a blanket determination, that is, all nationals of a particular country who are in the United States are covered.”); IA C. GORDON & H. ROSENFELD, *supra* note 1, § 5.3e(6a), at pp. 5-47 to 5-48; A. LEIBOWITZ, *supra* note 5, § 5.05, at p. 5-156.

EVD is not always granted on a “blanket” basis, however. On occasion it has been granted on a “case-by-case” basis. For example, INS instructions regarding Lebanese nationals stated:

In view of the continuing civil strife in Lebanon, INS officers, on a case-by-case basis, should view sympathetically requests for extended voluntary departure received from nationals of Lebanon in the United States who have overstayed, where such requests are based upon compelling humanitarian need. There is no blanket policy to grant extended voluntary departure in these cases.

INS Policy Statement No. 016 (Feb. 12, 1976), reprinted in *INS Declines EVD for Lebanese but Re-Issues 1976 Policy Memo*, 62 INTERPRETER RELEASES 899 (1985). The INS Commissioner stated that case-by-case EVD grants were more appropriate in this instance “because of the highly adverse immigration effects of a blanket grant of extended voluntary departure, and the availability of other remedies for nationals of Lebanon.” Letter from Alan C. Nelson, INS Commissioner, to James Abourezk (Aug. 13, 1985), reprinted in 62 INTERPRETER RELEASES 920 (1985).

36. Through grants of EVD,

[t]he United States is able to meet its international treaty obligations regarding potential refugees and provide a “safe haven” while at the same time not granting permanent residency to large groups of aliens outside of regular immigration channels or forcing foreign nationals to renounce their homeland in order to avoid what may be a relatively short-lived crisis.

A. LEIBOWITZ, *supra* note 5, § 5.05, at p. 5-157; see also INS, Asylum Adjudications, *supra* note 1, at 66. Aliens granted EVD status are still eligible to apply for other types of deportation relief. See INS Wire of Feb. 6, 1984, *supra* note 17, at 104 (“While the Attorney General’s determinations to grant ‘EVD’ are binding as to enforcement actions involving individuals of the specified nationality, both favorable and unfavorable determinations on EVD leave unchanged the availability of discretionary relief for individual aliens under the Act and regulations.”). The INS has a standard letter which informs aliens who have been denied asylum, but who are of a nationality covered by EVD, of their eligibility for that status. See 62 INTERPRETER RELEASES 256 (1985) (reprint of letter). INS officers believe that asylum applications from nationals who have been afforded EVD should not be processed while the aliens retain that status. One officer stated: “A few people might have problems, . . . but overall it would save us a whole lot of trouble. Right now it’s almost impossible to adjudicate these claims. If you turn them down, you can’t deport them. They only file again, saying conditions in the home country have changed.” INS, Asylum Adjudications, *supra* note 1, at 70. State Department personnel disagree, however. “It would be

General's enforcement resources since an individual response to each dislocated alien is no longer required.³⁷ The aliens benefit by being allowed to stay in the United States until conditions in their home country improve³⁸ even though they may not have met the more stringent requirements for refugee status.³⁹

EVD status has been granted to nationals from fifteen countries and today still applies to nationals from five countries.⁴⁰ The Attor-

a bigger pull factor. Adjudicating the claims, even though you can't send anyone back, is a big deterrent." *Id.*

37. See Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment on the Issue of Extended Voluntary Departure at 32, *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 563 F. Supp. 163 (D.D.C. 1983) (No. 82-2203) [hereinafter Plaintiffs' Opposition].

38. See also note 134 *infra* (work authorization and other benefits available to aliens granted EVD status).

39. "Refugee" is defined as a person who is either outside his or her country of nationality or habitual residency, or, under special circumstances, within that country, and who suffers from "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (1982). The procedure by which asylum may be granted to an alien found to be a refugee within the meaning of 8 U.S.C. § 1101(a)(42)(A) (1982) is outlined in 8 U.S.C. § 1158 (1982). In addition, the Refugee Act of 1980 further provides that: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (1982). For a general discussion of U.S. law regarding refugees, see T.A. ALENIKOFF & D. MARTIN, *supra* note 5, at ch. 8; Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B. INTL. LEGAL STUD. 90; Note, *Membership in a Social Group: Salvadoran Refugees and the 1980 Refugee Act*, 8 HASTINGS INTL. & COMP. L. REV. 305 (1985).

40. As stated in note 1 *supra*, government statistics vary. The chart below reflects the information submitted by the United States as Exhibit E attached to Defendants' Memorandum, *supra* note 6. The information in parentheses indicates areas in which INS, Asylum Adjudications, *supra* note 1, at 67-68, differs significantly from the Government's data.

COUNTRY	DATE EVD GRANTED	DATE EVD TERMINATED	NOTES
Cuba	11/29/60	11/02/66	<i>See</i> Pub. L. No. 89-732.
Dominican Republic*	10/18/66	04/26/78	For aliens arriving between 04/24/65 and 06/03/66.
"Western Hemisphere"*	07/01/68	12/31/76	Granted to certain individuals with visa preference dates from 07/01/68 to 12/31/76 in response to an order entered in <i>Silva v. Levi</i> , Civ. Action No. 76-C-4268 (N.D. Ill.).**
"Western Hemisphere"	08/82	01/31/83	"Second grant."
Czechoslovakia	08/21/68	12/30/77	(From 1977-1981, EVD granted in one-year increments. Extensions now determined on case-by-case basis.)
Chile	04/09/71	12/30/77 (05/18/71)	
Cambodia	04/04/75	10/28/77	<i>See</i> Pub. L. No. 95-145.
Vietnam	04/04/75	10/28/77	<i>See</i> Pub. L. No. 95-145.
Laos	07/09/75	10/28/77	<i>See</i> Pub. L. No. 95-145.

ney General's procedure for granting this status is simple. Upon receiving a State Department recommendation,⁴¹ the Attorney General

(Lebanon)	(02/12/76)	(Still in effect)	(INS views requests "sympathetically" on a case-by-case basis.) [<i>See Legislative Relief For Salvadorans and Nicaraguans Receives Renewed Consideration</i> , 63 INTERPRETER RELEASES 626, 627 [hereinafter <i>Legislative Relief</i>] (EVD still in effect as of 07/28/86).]
Ethiopia	07/12/77	Still in effect.	[<i>See Legislative Relief, supra</i> (EVD still in effect as of 07/28/86).]
(Hungary)	(12/30/77)	(04/81)	(From 12/30/77 to 04/81, EVD granted in one-year increments. Since 04/29/81, extensions decided on case-by-case basis.)
(Rumania)	(12/30/77)	(04/81)	(From 12/30/77, to 04/81, EVD granted in one-year increments. Since 04/29/81, extensions decided on case-by-case basis.)
Uganda	06/08/78	Still in effect.	[Scheduled to expire 09/30/86; see INS Wire of July 31, 1986, reprinted in 63 INTERPRETER RELEASES 649 (1986).]
Iran	04/16/79 Renewed: 08/06/79	12/13/79	(Case-by-case determinations still in effect today.)
Nicaragua	07/03/79 Renewed: 08/29/79 01/04/80 07/01/80	09/28/80	(Case-by-case determinations in effect today.)
Mexico	12/31/79	08/25/81	Granted for certain second preference visa holders in response to an order entered in <i>Contreras v. Bell</i> , Civ. Action No. 80-1590 (N.D. Ill.).
Afghanistan	12/02/80	Still in effect.	[<i>See INS Wire of Dec. 2, 1980, reprinted in 62 INTERPRETER RELEASES 106 (1985)</i> (current policy on Afghans); <i>Legislative Relief, supra</i> (EVD still in effect as of 07/28/86).]
Poland	12/23/81 Renewed: 03/25/82 06/21/82 12/20/82 06/30/83	Still in effect.	[Scheduled to expire 12/30/86; see INS Wire of June 18, 1986, reprinted in 63 INTERPRETER RELEASES 539 (1986)]

* These countries were not included on the INS list.

** See note 43 *infra*.

41. The INS states that the Attorney General acts "on a specific State Department recom-

authorizes EVD status for a specific period of time for all aliens affected. The Attorney General usually conveys his decision by a directive either (1) instructing INS officials to consider "sympathetically" requests for discretionary relief by the affected aliens⁴² or (2) instructing INS officials not to begin deportation proceedings against those aliens or, if an alien has already received a deportation order, not to enforce departure.⁴³

II. *HOTEL & RESTAURANT EMPLOYEES UNION, LOCAL 25 V. SMITH*

Despite the lack of explicit authority for his actions,⁴⁴ the Attorney General granted EVD status to various groups of aliens over a

mentation," INS, Asylum Adjudications, *supra* note 1, at 65, and that "[t]he Attorney General has always accepted the State Department's recommendation, even though it might be only a brief paragraph or two." *Id.* at 70-71.

Government officials accept the role of the State Department in these determinations as proper, even though Congress has neither mandated nor sanctioned the practice. *See, e.g.*, Letter from Senator Edward Kennedy to Alexander Haig, Secretary of State (Apr. 6, 1981), *reprinted in* 128 CONG. REC. 1702 (1982) ("Clearly, the Immigration Service must await a formal recommendation from the Department of State prior to initiating a policy of automatically granting stays of voluntary departure."); Letter from William F. Smith, Attorney General, to Representative Lawrence J. Smith (July 19, 1983), *reprinted in* Defendants' Memorandum, *supra* note 6, at Exhibit D ("There have been occasions when the Attorney General, in consultation with the Secretary of State, has determined to delay temporarily expulsion of aliens [of] particular nationalities.").

42. *See, e.g.*, INS Wire of Dec. 12, 1978, *reprinted in* 55 INTERPRETER RELEASES 85 (1978) ("The civil strife in [Lebanon] continues and this is to reaffirm that officers should, on a case by case basis, view sympathetically requests for extended voluntary departure where such requests are based on compelling humanitarian need.").

43. *See, e.g.*, INS Wire of Jan. 21, 1982, *reprinted in* 59 INTERPRETER RELEASES 85 (1982) (emphasis in original):

Service action shall not be taken to enforce departure to Poland, prior to March 31, 1982, of Polish nationals who are residents or former residents of Poland and *who indicate an unwillingness to return to Poland* at the present time under the unstable conditions currently existing there. Extensions of temporary stay may be granted to those non-immigrants who qualify for such extensions. If an application is denied, the Polish national's departure shall not be enforced prior to March 31, 1982. Polish nationals who are located as deportable aliens will be permitted to remain until March 31, 1982. Deportation hearings will be postponed until after March 31, 1982, for those Polish nationals for whom OSC's [orders to show cause] have been issued and hearings have not commenced. Those hearings for Polish nationals which have commenced shall go forward; however, departure shall not be enforced prior to March 31, 1982. In those cases where a final order of deportation has been entered, departure shall not be enforced prior to March 31, 1982.

See also INS Wire of July 12, 1982, *reprinted in* 59 INTERPRETER RELEASES 456 (1982) (INS instructions on EVD for Ethiopians).

The Attorney General did deviate from his usual practice when, after the Senate passed an immigration bill, he granted EVD to Silva letterholders (most of whom were Mexican nationals) in anticipation of the House passing a similar bill legalizing their presence in the United States. As INS, Asylum Adjudications, *supra* note 1, at 68 n.*, notes:

This action was unique in that it was the first time blanket extended voluntary departure was granted primarily for domestic policy considerations rather than a crisis in the foreign national's homeland; it was also the first time the Attorney General acted unilaterally without a specific recommendation from the Department of State.

See generally Staff Report, *The Silva Case*, in U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, STAFF REPORT OF THE SELECT COMMISSION ON IMMIGRATION & REFUGEE POLICY, app. D at 71 (1981) [hereinafter SCIRP].

44. *See* Part IV *infra*.

twenty-three-year period beginning in 1960.⁴⁵ His actions went unchallenged in the courts⁴⁶ until 1983, when *Hotel & Restaurant Employees Union, Local 25 v. Smith*⁴⁷ was filed. The case was initiated by a union whose membership consisted primarily of Salvadoran nationals.⁴⁸ The impetus for the suit was the adamant refusal of the Attorney General to grant EVD status to Salvadoran nationals despite urgings by Congress⁴⁹ and the public⁵⁰ to do so.⁵¹ The plaintiff

45. See notes 1 & 40 *supra* and accompanying text.

46. See note 9 *supra*.

47. 563 F. Supp. 157 (D.D.C. 1983).

48. 594 F. Supp. at 504.

49. In May, 1981, the Justice Department responded to a request from Senator Edward Kennedy that it grant EVD status to Salvadoran nationals by stating that it had "received word from the Department of State that it [was] not in a position to recommend a blanket granting of voluntary departure for illegal Salvadorans presently in the United States." Letter from David Crosland, Acting Commissioner of INS, to Senator Edward M. Kennedy (May 1, 1981), reprinted in 128 CONG. REC. 1703 (1982). Congress then included a provision in the International Security and Development Cooperation Act, Pub. L. No. 97-113, § 731, 95 Stat. 1557 (1981), which stated:

It is the sense of the Congress that the administration should continue to review, on a case-by-case basis, petitions for extended voluntary 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.

A similar request from 89 members of the House of Representatives in April 1983 was also rejected by the Attorney General and the Secretary of State. See letters reprinted in *Hearing on H.R. 4447, supra* note 7, at 84-88. Again, Congress responded with a "sense of the Congress" resolution. Department of State Authorization Act, Fiscal Years 1984 and 1985, Pub. L. No. 98-164, § 1012, 97 Stat. 1062 (1983), provided:

(a) The Congress finds that —

(1) ongoing fighting between the military forces of the Government of El Salvador and opposition forces is creating potentially life-threatening situations for innocent nationals of El Salvador;

(2) thousands of El Salvadoran nationals have fled from El Salvador and entered the United States since January 1980;

(3) currently the United States Government is detaining these nationals of El Salvador for the purpose of deporting or otherwise returning them to El Salvador, thereby irreparably harming the foreign policy image of the United States;

(4) deportation of these nationals could be temporarily suspended, until it became safe to return to El Salvador, if they are provided with extended voluntary departure status; and

(5) such extended voluntary departure status has been granted in recent history in cases of nationals who fled from Vietnam, Laos, Iran, and Nicaragua.

(b) Therefore, it is the sense of the Congress that —

(1) the Secretary of State should recommend that extended voluntary departure status be granted to aliens —

(A) who are nationals of El Salvador,

(B) who have been in the United States since before January 1, 1983,

(C) who otherwise qualify for voluntary departure (in lieu of deportation) under section 242(b) or 244(e) of the [INA] (8 U.S.C. 1252(b) and 1254(e)), and

(D) who were not excludable from the United States at the time of their entry on any ground specified in section 212(a) of the [INA] (8 U.S.C. 1182(a)) other than the grounds described in paragraphs (14), (15), (20), (21), and (25); and

(2) such status should be granted to those aliens until the situation in El Salvador has changed sufficiently to permit their safely residing in that country.

Another "sense of the Congress" provision crept into title IV of the Simpson-Mazzoli Bill, H.R. 1510, 98th Cong., 1st Sess. § 401 (1983) (passed by the House, June 20, 1984):

It is the sense of Congress that in the case of nationals of El Salvador who otherwise qualify for voluntary departure (in lieu of deportation) under the Immigration and Nationality Act, the Attorney General shall extend the date such aliens are required to depart voluntarily

claimed that "the denial by the INS of extended voluntary departure to Salvadorans [was] arbitrary and capricious, violative of the Fifth Amendment, and contrary to the rule-making procedures of 5 U.S.C. § 553."⁵² The defendants filed motions to dismiss, arguing that (1) the plaintiff lacked standing to sue, (2) the decision to grant or deny EVD was nonjusticiable as a political question, and (3) the complaint did not state a claim upon which relief could be granted.⁵³ The court rejected each of these motions and ordered the case to proceed either to motions for summary judgment or to trial.⁵⁴

The defendants prevailed on their subsequent motion for summary judgment.⁵⁵ In its second *Employees Union* opinion, the court charac-

until such date as the Secretary of State determines that the situation in El Salvador has changed sufficiently to permit their safely returning to El Salvador.

Bills requiring the Attorney General to grant EVD status to Salvadoran nationals were introduced in both houses during the second session of the 98th Congress, *see* S. 2131, 98th Cong., 2d Sess. (1984); H.R. 447, 98th Cong., 2d Sess. (1984), and the first session of the 99th Congress, *see* S. 377, 99th Cong., 1st Sess. (1985); H.R. 822, 99th Cong., 1st Sess. (1985).

50. *See* note 8 *supra*.

51. Relatively few Salvadorans receive any kind of immigration relief in the United States. Approximately 4000 Salvadorans enter the United States illegally each month, one-quarter of whom are apprehended by the INS. S. STEPHEN, EDUCATION AND PUBLIC WELFARE DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, U.S. POLICY TOWARDS UNDOCUMENTED SALVADORANS 1 (MB82223) (May 6, 1986); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES MISSION TO MONITOR INS ASYLUM PROCESSING OF SALVADORAN ILLEGAL ENTRANTS, Sept. 13-18, 1981 [hereinafter UNHCR REPORT], *reprinted in* 128 CONG. REC. 1698, 1699 (1982) (only one of every four illegal Salvadorans is apprehended). There are an estimated 300,000 to 500,000 Salvadorans currently residing illegally in the United States. H.R. REP. NO. 1142, 98th Cong., 2d Sess. pt. I, at 2 (1984). The great majority of those caught by the INS depart voluntarily from the United States. UNHCR REPORT, *supra*, at 1701 (90% of all apprehended Salvadorans return "voluntarily" to El Salvador). Very few Salvadorans are granted asylum relief. Only one Salvadoran received asylum in Fiscal Year 1981, *id.* at 1698, prompting the UNHCR to conclude that the United States was violating its responsibilities under the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. *See* UNHCR REPORT, *supra*, at 1698. The Salvadorans have fared somewhat better in recent years. In Fiscal Year 1983, 163 requests by Salvadoran nationals for asylum relief were granted and 6576 were denied. In Fiscal Year 1984, 328 were granted and 13,045 were denied. *See* S. STEPHEN, *supra*, at 2. Nonetheless, only 2.28% of asylum requests by Salvadoran nationals were granted in Fiscal Year 1984 as compared to an average of 30% for all other nationalities. *See* Note, *supra* note 39, at 330; *see also* Note, *supra* note 7, at 705 & nn. 11, 12 (statistics on asylum applications). A number of suits were brought on behalf of Salvadorans denied refugee status, alleging various discriminatory practices and procedural improprieties by the government. For a discussion of these cases, *see* Note, *supra* note 5, at 304-09.

52. 563 F. Supp. at 162. The plaintiff sought a declaratory judgment and injunctive relief. It also alleged that the State Department routinely denied asylum applications of Salvadorans without regard to the merit of the individual claims, in violation of "the Fifth Amendment to the Constitution, the United Nations Convention and Protocol on the Status of Refugees, 8 U.S.C. § 1158, and Department of State Notice 351." 563 F. Supp. at 161.

53. 563 F. Supp. at 159.

54. 563 F. Supp. at 163.

55. *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 594 F. Supp. 502 (D.D.C. 1984). The defendants filed two motions for summary judgment: one pertaining to the EVD claim and the other pertaining to the asylum procedures claim. Both were granted.

terized EVD as an exercise of prosecutorial discretion⁵⁶ and found that it was not subject to judicial review under the provisions of the APA.⁵⁷ Therefore, in the court's view, the plaintiff had no grounds for claiming relief.

As the first judicial pronouncement on EVD, *Employees Union* is an important indication of how this status is viewed in the judiciary. The court interpreted grants of EVD as responses to foreign and domestic policy considerations,⁵⁸ rather than as manifestations of humanitarian concern for the safety and well-being of the aliens involved. The court found both constitutional⁵⁹ and statutory⁶⁰ bases for the Attorney General's power to grant EVD, despite the clear extra-statutory nature of EVD status.⁶¹

The court began by stating that "[t]he Constitutional foundation

56. The court stated that EVD is "a matter of the Attorney General's prosecutorial discretion, after his review of the evidence, to suspend, or . . . not to suspend enforcement of the immigration laws in a specific case." 594 F. Supp. at 507. The court followed the parties' leads in classifying EVD in this manner. The defendants had characterized EVD as "an extraordinary form of relief arising not from the various rights and remedies specifically provided by the [Immigration and Nationality Act of 1952], but from the Executive's discretionary authority in the formulation and implementation of prosecutorial and foreign policy." Defendants' Memorandum, *supra* note 6, at 2. They asserted that "[t]he 'benefit' enjoyed by members of an alien class for which [EVD] has been granted is the ability, through deferred prosecution of the deportation provisions, to extend their stay in the United States." *Id.* at 26. Hence, they argued, the authority to grant EVD lies in "the Executive's broad constitutional authority [to exercise] prosecutorial discretion as to the proper enforcement of federal law." *Id.* at 19 n.13. The plaintiff acquiesced in the defendants' description of EVD as an exercise in prosecutorial discretion, stating that the issue presented was "the reviewability of an agency's enforcement discretion." Plaintiffs' Opposition, *supra* note 37, at 13; *see also* T.A. ALEINIKOFF & D. MARTIN, *supra* note 5, at 727 (EVD "is essentially an exercise of prosecutorial discretion"). This Note argues that EVD is not properly viewed as an exercise of prosecutorial discretion. *See* Part IV.A *infra*.

57. *See* notes 71-76 *infra* and accompanying text. The court did review the Attorney General's decision to determine if it was "rationally based" in accordance with the rule laid out in *Fiallo v. Bell*, 430 U.S. 787, 794-96 (1977). The court found that the Attorney General's decision was rationally based upon "foreign policy considerations" as well as several other factors, including:

- (i) the number of illegal Salvadoran aliens currently in the United States, (ii) the current crisis in generally controlling the "floodtide" of illegal immigration, (iii) the prospect of encouraging further illegal immigration, (iv) the effect of such illegal immigration upon this country's limited law enforcement capabilities, social services and economic resources, and (v) the availability under the Immigration and Nationality Act of alternate avenues of relief, such as asylum.

594 F. Supp. at 508.

58. 594 F. Supp. at 505. The court stated that EVD is a term not found anywhere in the Immigration and Nationality Act or in the applicable regulations. Rather, the term Extended Voluntary Departure describes the Attorney General's discretion in determining the circumstances of both foreign and domestic policy which may give rise to a discretionary decision to grant a temporary suspension of deportation proceedings to members of a particular class of illegal aliens. As such, EVD is based on the prosecutorial discretion of the Attorney General after consultation or advice received from the State Department.

594 F. Supp. at 505.

59. *See* note 65 *infra* and accompanying text.

60. *See* note 68 *infra* and accompanying text.

61. *See* note 70 *infra* and accompanying text.

for grants of EVD derives from the Executive's express and inherent authority in the areas of both foreign and prosecutorial policy."⁶² The court noted that the "regulation of aliens" was "intricately interwoven" with the plenary power over foreign affairs constitutionally vested in the Executive branch.⁶³ Moreover, regulation over immigration is "an inherent executive power."⁶⁴ Thus, in the court's eyes, the Attorney General was constitutionally authorized to execute foreign policy by granting this status to aliens.

The court then noted that under the Constitution, discretionary matters, including those in the immigration area, are governed by "the plenary, if not exclusive authority" of the executive branch.⁶⁵ The decision to deport (or not to deport) is a matter of "prosecutorial discretion"⁶⁶ and, as the Supreme Court has noted, the constitutional authority to exercise such discretion reaches its zenith in the area of immigration law.⁶⁷

Finally, the *Employees Union* court found a statutory basis for grants of EVD in the INA, which authorizes the Attorney General to "establish such regulations . . . and perform such other acts as he deems necessary for carrying out [the administration and enforcement of the Act]."⁶⁸ Since, in the court's view, grants of EVD were "rationally related"⁶⁹ to the duties imposed upon the Attorney General by the Act, his exercise of discretion in this area was valid, even though EVD is neither statutorily condoned or mandated.⁷⁰

62. 594 F. Supp. at 505.

63. 594 F. Supp. at 505 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)). Article II, § 2 of the Constitution places responsibility for the conduct of foreign affairs in the executive branch.

64. 594 F. Supp. at 505 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950)).

65. 594 F. Supp. at 505 (citing *United States v. Nixon*, 418 U.S. 683, 693 (1974)).

66. 594 F. Supp. at 505 (citing *Johns v. Department of Justice*, 653 F.2d 884, 893 (5th Cir. 1981); *Weisburg v. Department of Justice*, 489 F.2d 1195, 1201 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974)).

67. 594 F. Supp. at 505 (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 596-97 (1952); *Ludecke v. Watkins*, 335 U.S. 160, 164 (1948)). Since EVD status merely postpones application of the deportation provisions of the INA, the court found EVD to be no more than "an exercise of the Executives [sic] 'pure enforcement power.'" 594 F. Supp. at 505 (quoting *Attorney Gen. v. Irish People, Inc.*, 684 F.2d 928, 948 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983)).

68. 594 F. Supp. at 505-06 (quoting 8 U.S.C. § 1103(a) (1982)).

69. 594 F. Supp. at 506 (quoting *Fook Hong Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970)). The federal courts have used this reasonable relationship test in the immigration law area to uphold the Attorney General's discretionary decisions to impose differing reporting requirements on nonimmigrant alien students on the basis of nationality, *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980), to extend the stay of a nonimmigrant alien, *Unification Church v. Attorney Gen.*, 581 F.2d 870, 877-78 (D.C. Cir.), *cert. denied*, 439 U.S. 828 (1978), to restrict employment of nonimmigrant alien students, *see Ahmed v. United States*, 480 F.2d 531, 533-34 (2d Cir. 1973); *Pilapil v. INS*, 424 F.2d 6, 11 (10th Cir.), *cert. denied*, 400 U.S. 908 (1970), and to deny aliens admitted without a visa eligibility to apply for permanent resident status, *Fook Hong Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970).

70. The court stated that "the fact that EVD is extrastatutory in no way effects [sic] its

Having located the source of the Attorney General's power to grant EVD status, the court went on to state that two provisions of the APA prevented judicial review of the Attorney General's decision to deny this relief to Salvadoran nationals.⁷¹ First, the APA subjects to review only "[a]gency action made reviewable by statute a final agency action for which there is no other adequate remedy in a court"⁷² Since EVD is not made reviewable by statute and since aliens denied this status retain the full panoply of procedures and appeals available in deportation proceedings, the *Employees Union* court found that the APA precluded judicial review.⁷³

Second, the APA also prohibits judicial review of agency action "committed to agency discretion by law."⁷⁴ This provision applies where " 'statutes are drawn in such broad terms that in a given case there is no law to apply.' "⁷⁵ The court found that, because of EVD's extrastatutory nature, there was "indeed 'no law to apply.' "⁷⁶

The court thus concluded that EVD was simply not the type of agency action in which courts should interfere.⁷⁷ It emphasized that because EVD involves prosecutorial discretion, which is necessarily broad,⁷⁸ and because immigration is intertwined with the conduct of foreign affairs, an area in which the courts are loath to intervene,⁷⁹ the Attorney General's decision could be subject to no more than limited review for abuse of discretion.⁸⁰ The court went on to find that even

validity as a discretionary action under the Act." 594 F. Supp. at 506. Further, the court noted, "[t]his Circuit has held that the Act 'need not specifically authorize each and every action taken by the Attorney General, so long as his action is reasonably related to the duties imposed on him.'" 594 F. Supp. at 506 (quoting *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980)).

71. 594 F. Supp. at 506.

72. 5 U.S.C. § 704 (1982).

73. 594 F. Supp. at 506.

74. 5 U.S.C. § 701(a)(2) (1982).

75. 594 F. Supp. at 506 (quoting S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945)).

76. 594 F. Supp. at 507. The court noted that:

The factors involved in determining the propriety of judicial review of an agency's exercise of discretion are the breadth of the discretionary power, the administrative expertise as balanced against judicial competence to evaluate the action at issue, whether there exists meaningful criteria by which a court may evaluate the action, and whether the decision is one based on policies to which a court must defer to the political branches.

594 F. Supp. at 507 (citations omitted).

77. 594 F. Supp. at 507.

78. 594 F. Supp. at 507.

79. "[M]atters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Regan v. Wald*, 468 U.S. 222, 242 (1984) (citation omitted), quoted in *Employees Union*, 594 F. Supp. at 507; see also notes 62 & 63 *supra* and accompanying text.

80. This Court cannot claim to have the expertise needed to decide such issues of foreign policy, and will defer to the Executive, to whom this area has been Constitutionally entrusted. Only in the case of a clear abuse of discretion may a Court impose its judgment over that of the Executive in a case such as the one at bar.

594 F. Supp. at 507 (citations omitted).

this narrow review was unavailable, noting that a court can review for abuse of discretion only where a standard exists by which to gauge the executive's action.⁸¹ The *Employees Union* court found that no such standard exists for EVD, rejecting plaintiff's argument that a "humanitarian" standard had evolved as a result of the pattern of past EVD grants by the Attorney General.⁸² Therefore, the court found that the Attorney General's decision not to grant EVD status to Salvadoran nationals was not subject to judicial review.⁸³

The *Employees Union* court's analysis of the scope of judicial review available to EVD claims is consistent with the teachings of the past century of immigration law.⁸⁴ As the next Part discusses, however, immigration law is undergoing a gradual transformation. Determination of the scope of judicial review available in cases such as *Employees Union* depends at least in part upon how the American legal system views the status of aliens. In dismissing EVD as an unreviewable exercise of prosecutorial discretion, the *Employees Union* court embraced the traditional conception of immigration law, which emphasizes the limited rights of aliens and affords extreme judicial deference to the legislative and executive branches in immigration matters.⁸⁵ This view is ultimately unsatisfying because it ignores both the substantive nature of EVD and the impact of the Attorney General's decision on aliens such as the Salvadorans. The nascent concept of "communitarianism,"⁸⁶ on the other hand, suggests a more sensitive way of analyzing the competing interests involved in EVD claims.

III. THE EVOLUTION OF IMMIGRATION LAW

Immigration law has long occupied a unique place in American jurisprudence. Despite the transformations wrought by increased judi-

81. 594 F. Supp. at 507.

82. 594 F. Supp. at 508. The court stated that not only did the standard not exist, but that the standard would be too difficult to define and enforce if it did:

For a Court to order EVD in this case would set a far-reaching precedent, wholly within the prerogatives [sic] of Congress, and might then apply to all situations of widespread fighting, destruction and the breakdown of public services and order throughout the world. Also, such situations as famine, drought, or other natural disasters might at any time also raise "humanitarian" concerns, wherever they might occur. To require the Attorney General to grant blanket EVD status to all such nationals would be to open up irresponsibly the floodgates to illegal aliens, without regard to foreign policy and internal immigration concerns, or, of equal importance, to the concerns of American working men and women in the United States and our taxpayers generally.

594 F. Supp. at 508.

83. 594 F. Supp. at 508. The court also found that the Salvadorans had not been denied due process as a result of the Attorney General's refusal to grant them EVD status, 594 F. Supp. at 508-09, and that summary judgment was appropriate since plaintiff failed to refute defendants' statement of material facts. 594 F. Supp. at 509-10.

84. See Part III.A *infra*.

85. See notes 91-96 *infra* and accompanying text.

86. See notes 97-105 *infra* and accompanying text.

cial activism and the expansion of constitutional protections in other areas of law in recent decades, immigration law has remained surprisingly untouched.⁸⁷ The “insularity” of immigration law has, however, come under increasing attack by legal scholars.⁸⁸ As a result, immigration law is slowly changing as perceptions of aliens and their relationship to American society change. This evolution has important implications for the nature of EVD and the procedural safeguards due it.

A. *The Development of American Immigration Policy*

The evolution of American immigration policy is closely tied to the changing social, economic, and political milieus of the country. Professor Schuck has identified three stages in the development of American immigration policy.⁸⁹ From the beginning of the Republic to the 1880s, a “liberal ideology,” which recognized the “moral worth and dignity” of the individual and his right to a role in society, resulted in an immigration policy that actively recruited mass immigration.⁹⁰

As the United States ceased being a land of endless frontiers and

87. Immigration has long been a maverick, a wild card, in our public law. Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system. In a legal firmament transformed by revolutions in due process and equal protection doctrine and by a new conception of judicial role, immigration law remains the realm in which government authority is at the zenith, and individual entitlement is at the nadir.

Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984); see also Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141, 1144 (1984) (“[u]ntil recently law has been the handmaiden of immigration policy”).

88. See, e.g., Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (Supreme Court should cease affording special deference to Congress in immigration matters); Ludd, *The Essentiality of Judicial Review: Toward a More Balanced Understanding of Administrative Discretion in American Government*, in ADMINISTRATIVE DISCRETION AND PUBLIC POLICY IMPLEMENTATION 14 (1986) [hereinafter Ludd, *Balanced Understanding*]; Ludd, *Administrative Discretion and the Immigration and Naturalization Service: To Review or Not to Review?*, 8 THURGOOD MARSHALL L. REV. 65, 65 (1983); Schuck, *supra* note 87, at 3 n.12 (citing scholars who have attacked the current privileged position of immigration law); Verkuil, *supra* note 87, at 1144.

89. Schuck, *supra* note 87, at 2-4.

90. *Id.* at 2. Schuck states:

The liberalism of America's first century conceived of persons as autonomous, self-defining individuals possessing equal moral worth and dignity and equally entitled to society's consideration and respect. This entitlement was in principle universally shared, a natural right deriving not from the particularities of one's time, place, or status, but from one's irreducible humanity.

Id.; see also *Developments in the Law — Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1292-93 (1983) [hereinafter *Developments*] (“The liberal view is that the fulfillment of the individual comes not in participating in the public life of the State, but in choosing and pursuing her own goals in private life.”) (footnotes omitted).

Schuck perhaps paints too rosy a picture of early immigration policy. As a government study noted, a certain measure of xenophobia existed in the United States from its first days. This distrust manifested itself in restrictive naturalization laws and virulent rhetoric against certain ethnic and religious groups. See SCIRP, *supra* note 43, at 161-200.

limitless growth and developed instead into an urban and industrial society with more restricted growth, liberal ideology faded. Fundamental economic, political, and social changes gave birth to a new ideology of "restrictive nationalism," which manifested itself in a legal order Schuck terms "classical immigration law."⁹¹ Exclusionary reactions to immigrants⁹² resulted in an ideology which altered the source of aliens' rights and duties. Under liberal ideology, an alien's rights and duties were seen to stem from his or her right to freely contract with others. Under restrictive nationalism, however, the alien's legal status was defined by "the national government's consent to allow the alien to enter and remain, which consent could be denied or withdrawn on the basis of arbitrary criteria and summary procedures that often transgressed liberal principles."⁹³

Not surprisingly, the first pronouncements of judicial restraint in the immigration area came in the early years of classical immigration law. The Supreme Court recognized early the plenary power of Congress in the immigration field⁹⁴ and made sweeping denials of its own power to control the legislature's actions.⁹⁵ The result is an exagger-

91. Schuck, *supra* note 87, at 3.

92. *Id.* ("Liberal values were challenged by an array of exclusionary impulses — racist and class-based opposition to Chinese laborers, nativist xenophobia, religious bigotry, and political reaction against radical movements drawing upon new immigrant groups.") (footnote omitted). See generally Note, *supra* note 39, at 306-09 (describing early immigration legislation).

93. Schuck, *supra* note 87, at 3 (footnote omitted). Schuck identifies three causes of the shift to classical immigration law. First, the focus of immigration shifted from Protestant, northern or western European nations to Catholic, eastern or southern European countries, and the Orient. Americans reacted with a rising well of distrust of these racially and religiously "different" aliens. *Id.* at 5-6. For a more detailed account of the reaction to the changing face of American immigration, see SCIRP, *supra* note 43, at 161-200. The reaction to Asian immigration was particularly violent. In fact, the start of the classical immigration period can almost be marked by the passage of the Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), the first racist, restrictionist immigration statute enacted in the United States.

Second, American society developed a new "nationalistic" sense as it matured into an industrialized world power, leading to an increased sense of national autonomy and world leadership. Schuck, *supra* note 87, at 6. Finally, restrictionist immigration policy grew out of the nation's conception of its own sovereignty: "Sovereignty entailed the unlimited power of the nation, like that of the free individual, to decide whether, under what conditions, and with what effects it would consent to enter into a relationship with a stranger." *Id.* Thus, the only obligations the government was perceived as owing to an alien were those it voluntarily undertook. *Id.*

94. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893) (aliens are "subject to the power of Congress to expel them or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest"); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

The immigration power has historically been vested in the legislative branch of the government. See *Kleindienst v. Mandel*, 408 U.S. 753, 767 (1972) (quoting *Galvan v. Press*, 347 U.S. 522, 531 (1954)) ("[T]hat the formulation of [immigration and naturalization] policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our federal government."); 1 C. GORDON & H. ROSENFELD, *supra* note 1, §§ 1.5a, 2.2a.

95. *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) ("[If Congress] considers the pres-

ated judicial deference to laws governing the admission, exclusion, and deportation of aliens which persists to the present.⁹⁶

The restrictive tide of classical immigration law has only recently shown signs of receding. Professor Schuck has identified an emerging ideological shift in immigration law, in which the focus is not on the government's omnipotent sovereignty, but rather on the "essential and equal humanity" of individuals.⁹⁷ Under this "communitarian" vision of immigration law, the government's duties extend "to all individuals who manage to reach America's shores, even to strangers whom it has never undertaken, and has no wish, to protect."⁹⁸ Communitarianism reaches back to liberal ideology to find that all individuals possess certain universal rights simply because they are human beings. This new view emphasizes the "social interactions and commitments" between

ence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, . . . its determination is conclusive upon the judiciary."). The Court's denial of its own power in this area remains good law today:

At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. Our cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Our recent decisions have not departed from this long-established rule.

Fiallo v. Bell, 430 U.S. 787, 792 (1977) (citations omitted); *accord* *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 340 (1909). The Court has afforded similar deference to administrative officials as well. *See* *INS v. Miranda*, 459 U.S. 14, 19 (1982) (per curiam) ("[T]he INS is the agency primarily charged by Congress to implement the public policy underlying [immigration] laws. Appropriate deference must be accorded its decisions.") (citations omitted); *INS v. John Ha Wang*, 450 U.S. 139, 145 (1981) (per curiam).

96. This judicial deference has been termed the "plenary power" doctrine. *See generally* Legomsky, *supra* note 88 (discussing plenary power doctrine, which the Supreme Court has cited in declining to review immigration laws for compliance with substantive constitutional limits). Laws affecting aliens' rights and obligations (e.g., their eligibility for welfare programs or their duty to serve in the armed forces) are subject to limited review for rationality if challenged as discriminatory. *Mathews v. Diaz*, 426 U.S. 67, 82-83 (1976); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960); *see also* Legomsky, *supra* note 88, at 256. The courts will also review congressional actions regarding deportation to ensure that the aliens are afforded procedural due process. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *The Japanese Immigrant Cases*, 189 U.S. 86, 100 (1903) (dictum); *see also* Legomsky, *supra* note 88, at 259. Although the plenary power doctrine applies only to congressional actions, its effects have been extended to cover INS actions in some instances. *Id.* at 257. In reviewing administrative decisions in the immigration field, courts generally will inquire only as to whether the decision was irrational or in bad faith. *See, e.g.,* *Bertrand v. Sava*, 684 F.2d 204, 211-13 (2d Cir. 1982); *El-Werfalli v. Smith*, 547 F. Supp. 152, 153 (S.D.N.Y. 1982). For a discussion of the possible rationales for this deference, *see* Schuck, *supra* note 87, at 14-18; *Developments, supra* note 90, at 1314-22.

97. Schuck, *supra* note 87, at 4. This shift has been noted by other authors as well. *See, e.g.,* Legomsky, *supra* note 88, at 306-07; Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 193-200 (1983); Verkuil, *supra* note 87, at 1143-44 (adopting Schuck's classification of the history of immigration law); *Developments, supra* note 90, at 1289-90 (adopting a somewhat different classification, but stating that aliens' rights can be viewed in two ways: as augmenting the national welfare or as intrinsic to their human worth).

98. Schuck, *supra* note 89, at 4.

aliens and the government as the source of the government's duty toward those aliens, rather than governmental consent.⁹⁹

Communitarianism is by no means an established approach to immigration law.¹⁰⁰ Yet the pressures for change¹⁰¹ are mounting, and the first faint flickerings of this new ideology are apparent.¹⁰² Thus, we see decisions that imply that long-term resident aliens are members of our national community and thus entitled to various rights,¹⁰³ decisions evidencing increased judicial assertiveness,¹⁰⁴ and decisions creating increased procedural and substantive rights for deportable and detained aliens.¹⁰⁵

99. Communitarianism is, of course, subject to varying definitions. As one scholar noted:

Communitarianism is a hazy term used to describe any number of different political theories, which may range from conservative Burkean notions to radical left conceptions of the state. Several ideas, however, that seem central to most accounts, are relevant to an understanding of citizenship. Communitarian theory begins with individuals situated in a real society, not in a hypothetical state of nature or on the brink of contract. The individual is seen as an "encumbered" self. He is defined — or constituted — in part by his relationships, roles, and allegiances. His relationship with the state is based on his identification with and immersion in the society's history, traditions, and core assumptions and purposes. If the bywords of liberal theory are freedom, choice, and consent, the bywords of communitarian theory are solidarity, responsibility, and civic virtue. The operative metaphors for the state are "family," "community," or "a people." From the communitarian perspective, citizenship is seen as an organic relationship between the citizen and the state.

Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1494 (1986) (footnote omitted). An analysis of the merits of the competing definitions is beyond the scope of this Note. Thus, this Note adopts Professor Schuck's definition.

100. Schuck notes that "communitarianism in immigration law is as yet only embryonic, tentative, and fragmentary." Schuck, *Immigration Law and the Problem of Community*, in CLAMOR AT THE GATES 298 (N. Glazer ed. 1985). Certainly, this ideological shift is apparent only at the lower federal court level and has shown no signs of appearing in the Supreme Court yet. See Legomsky, *supra* note 88, at 304; Schuck, *supra* note 87, at 58-59; *Developments, supra* note 90, at 1313. Moreover, since the executive branch actually sets immigration policy, it should be noted that the Reagan administration has thus far shown little intention of adopting this view.

101. Schuck discusses five structural pressures for changes: the constraining of American foreign policy, economic changes, increases in refugee and asylum claims, large numbers of illegal aliens, and political shifts caused by changes in the ethnic make-up and geographical concentration of minority groups. Schuck, *supra* note 87, at 35-47. He identifies several ideological pressures for change as well: "altered beliefs about the meaning of justice, the rightness or wrongness of certain actions, and the proper role of law and of particular legal institutions in society." *Id.* at 34. See generally *id.* at 47-53.

102. Schuck identifies seven elements of classical immigration law undergoing this ideological transformation:

(1) the restrictive ideal of national community; (2) the principle of judicial deference; (3) the extraconstitutional status of exclusion; (4) the broad federal power to classify aliens; (5) the civil nature of the deportation sanction; (6) the detention power; and (7) the integration of adjudication and enforcement.

Id. at 7-8.

103. See *Plyler v. Doe*, 457 U.S. 202 (1982) (states obligated to provide public education to undocumented school-age aliens). Although, as Schuck notes, *Plyler* involved invalidation of a state, not a federal, law, it nonetheless has important implications for the notion of a national community, since the Court ordered a state to provide a social benefit to aliens whose presence in the United States was in direct violation of federal law. See Schuck, *supra* note 87, at 54-58.

104. Schuck discusses *Employees Union* in this context. See note 178 *infra*.

105. See Schuck, *supra* note 87, at 62-65.

The increased infusion of moral values into law that necessarily accompanies communitarianism has important procedural implications.¹⁰⁶ Traditionally, aliens were perceived as having few or no procedural rights.¹⁰⁷ If we admit that aliens are entitled to some procedural protection, however — either by virtue of their ties to the United States¹⁰⁸ or simply because of their basic humanity — we are forced to consider competing interests: the alien's interest in avoiding arbitrary government decisionmaking¹⁰⁹ versus the government's interest in avoiding fiscal and administrative burdens¹¹⁰ and in preventing the entry of aliens not entitled to the benefits of our society.¹¹¹ EVD presents a revealing opportunity to consider these individual and governmental concerns in the context of discretionary decisionmaking by the Attorney General.

B. *The Application of Communitarianism to EVD*

In denying judicial review in *Employees Union*, the court adopted the classical view of immigration law. EVD, like most forms of discretionary relief, has no procedural safeguards provided by statute or regulation.¹¹² Moreover, discretionary decisions to suspend enforcement of the deportation laws have traditionally been considered nonreviewable exercises of prosecutorial discretion.¹¹³ In effect, the *Employees Union* court weighed the interests of the two parties involved and found the scales grossly lopsided. On one side, it had an exercise of prosecutorial discretion by the Attorney General involving immigration and, impliedly, foreign affairs — interests traditionally subject to extremely narrow review. On the other side, it had a demand for judicial review by a group traditionally deemed to have only those limited rights the government chooses to grant it.

An examination of EVD through the lens of the communitarian-

106. See generally Verkuil, *supra* note 87.

107. The Supreme Court has long held that aliens being deported are entitled to a modicum of procedure. See *The Japanese Immigrant Cases*, 189 U.S. 86 (1903) (aliens in deportation process entitled to due process protection). Aliens seeking entry to the United States have no such right, however. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.") (citations omitted); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

108. See Verkuil, *supra* note 87, at 1149-53 for a suggestion of how those ties might be measured.

109. *Id.* at 1149.

110. *Id.*

111. *Id.* at 1155.

112. See generally Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293 (1972).

113. See *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976) (no judicial review of decision to deny deferred departure status); *cf.* notes 56 & 67 *supra* and accompanying text.

ism view of immigration law, however, reveals that the Salvadoran nationals have important interests at stake that can be protected only by judicial review. Salvadoran nationals, though present illegally in the United States, have a very strong interest in not being returned to the dangers of their homeland.¹¹⁴ That interest should not be disregarded and, at the very least, entitles the Salvadorans to procedural fairness. Though few would argue that these aliens have an incontrovertible right to remain in the United States, the judicial deference traditionally accorded immigration law seems misplaced in this instance. If we examine the nature of EVD grants more critically, we see that *Employees Union* involved precisely the sort of governmental action which should be subject to judicial review.

IV. THE SOURCE OF EVD

An examination of the source of the Attorney General's power to grant EVD status reveals that this relief is not merely a gratuitous decision not to enforce the immigration laws, but rather an affirmative action conferring special benefits on the aliens involved. Thus, the *Employees Union* court's characterization of EVD as "prosecutorial discretion" is conclusory; application of such a label enables the court to avoid examining the underlying reasons for the Attorney General's decision and to ignore the substantive impacts of this status on the aliens who receive it.¹¹⁵

A. EVD as Prosecutorial Discretion

The *Employees Union* court's characterization of EVD as an exercise of prosecutorial discretion is accurate in one sense. The INS has neither the fiscal nor the administrative resources to initiate deportation hearings against every illegal alien it finds in the United States.¹¹⁶ Thus, the INS exercises prosecutorial discretion in deciding which aliens will be excused from deportation proceedings and in setting the terms and duration of their stay.¹¹⁷ This discretion has become more focused as the INS has created specific forms of discretionary deportation relief and has promulgated standards for granting that relief.¹¹⁸ It

114. See note 7 *supra*.

115. In all fairness to the *Employees Union* court, it had no reason not to classify EVD as prosecutorial discretion, since the parties themselves used that label. See note 56 *supra*. The arguments set forth in this Note, for example, were not before the court.

116. The National Academy of Sciences estimates that there are 2 to 4 million illegal aliens in the United States. See N.Y. Times, June 25, 1985, at A14, col. 1. Other studies estimate that illegal aliens number about 3.5 to 6 million. See, e.g., S. REP. NO. 485, 97th Cong., 2d Sess. 4 (1982); GENERAL ACCOUNTING OFFICE, PROBLEMS AND OPTIONS IN ESTIMATING THE SIZE OF THE ILLEGAL ALIEN POPULATION ii (1982).

117. See Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144, 146 (1975).

118. See 1A C. GORDON & H. ROSENFELD, *supra* note 1, § 5.3e (discussing various forms of prosecutive relief for aliens facing deportation); see also Gordon, *Ameliorating Hardships Under*

is misleading, however, to analogize too closely these forms of discretionary relief to the most common form of prosecutorial discretion — that which arises in the criminal context.

The judiciary has generally accorded great deference to exercises of prosecutorial discretion in the criminal setting.¹¹⁹ Courts assume that a prosecutor's resources are so limited that he or she cannot prosecute all offenders¹²⁰ and that, in any event, leniency is warranted in some cases.¹²¹ A number of other factors may influence the prosecutor's decision to charge, including uncertainty about the defendant's guilt,¹²² the perceived likelihood of conviction,¹²³ and the potential for deterrence of others.¹²⁴ Because the courts consider these matters to be exclusively within the prosecutor's discretion, his or her decision is virtually unreviewable.¹²⁵

An agency's determination to enforce or not "involves a complicated balancing of a number of factors"¹²⁶ similar to those found in the criminal setting:

[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action

the Immigration Laws, 367 ANNALS 85 (1966); Keane, *Changing Concepts in Discretionary Relief*, 12 I & N REP. 30 (1964); Roberts, *Relief from Deportation: Discretion and Waivers*, 55 INTERPRETER RELEASES 184, 187 (1978).

119. *See, e.g.*, *United States v. Lovasco*, 431 U.S. 783, 784-85, 792-96 (1977) (affirming prosecutor's discretion to delay filing charges for eighteen months pending results of good-faith investigation); *United States v. Thompson*, 251 U.S. 407, 412-15 (1920) (affirming prosecutor's discretion to present charges to second grand jury after first grand jury has declined to indict); *United States v. Ruggiero*, 472 F.2d 599, 606 (2d Cir. 1973) (affirming prosecutor's discretion in determining what to charge), *cert. denied*, 412 U.S. 939 (1973).

120. *See, e.g.*, *United States v. Saade*, 652 F.2d 1126, 1136 (1st Cir. 1981); *United States v. Catlett*, 584 F.2d 864, 868 (8th Cir. 1978); Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525 (1981).

121. *See, e.g.*, *Newman v. United States*, 382 F.2d 479, 481-82 (D.C. Cir. 1967); Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. ILL. L.F. 88, 101-02.

122. Kaplan, *The Prosecutorial Discretion — A Comment*, 60 NW. U. L. REV. 174, 178 (1965).

123. *See, e.g.*, *United States v. Heilman*, 614 F.2d 1133, 1139 (7th Cir. 1980), *cert. denied*, 447 U.S. 922 (1980); *United States v. Scott*, 521 F.2d 1188, 1195 (9th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976); Kaplan, *supra* note 122, at 180.

124. *See, e.g.*, *United States v. Saade*, 652 F.2d 1126, 1136 (1st Cir. 1981); *United States v. Catlett*, 584 F.2d 864, 868 (8th Cir. 1978).

125. *See, e.g.*, *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974) (judicial review of prosecutorial discretion available only where defendant meets the "heavy burden" of showing both that others similarly situated were not prosecuted and that he was selected for prosecution on an unconstitutional basis); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973) ("[T]he manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute make the choice not readily amenable to judicial supervision."); 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 9.1, at 217-18 (2d ed. 1979).

126. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

at all.¹²⁷

Likewise, agency exercises of prosecutorial discretion are subject to very limited review for abuse of discretion.¹²⁸

The analogy between prosecutorial discretion in the criminal context and prosecutorial discretion in the agency context collapses upon close examination, however. The two settings give rise to exercises of discretion which are fundamentally different. An exercise of prosecutorial discretion in a criminal setting is directed toward past behavior; the act has already occurred and only the societal interest in punishing the guilty remains.¹²⁹ Exercises of prosecutorial discretion in the agency setting, on the other hand, can be proactive, not merely reactive, in effect.¹³⁰ As Justice Marshall noted, "[t]he interests at stake in review of administrative enforcement decisions are . . . more focused and in many circumstances more pressing than those at stake in criminal prosecutorial decisions."¹³¹

The Attorney General's decision to grant or deny EVD status well exemplifies this phenomenon. A decision to forego prosecution in a criminal case preserves the status quo; the potential defendant, who is presumed innocent until proven guilty, remains innocent.¹³² A grant of EVD, on the other hand, is not merely a decision "to suspend en-

127. 470 U.S. at 831.

128. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985) (court can review agency decision to enforce to determine whether agency exceeded its statutory powers); *United States v. Sacco*, 428 F.2d 264, 271 (9th Cir. 1970) ("The conscious exercise of selectivity in enforcement [of alien registration laws] is not in itself a constitutional violation where it is not further alleged that 'the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.'") (citation omitted), *cert. denied*, 400 U.S. 903 (1970). The Supreme Court has erected a presumption of nonreviewability for agency decisions *not* to enforce, stating that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Heckler*, 470 U.S. at 832 (emphasis in original). See also Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1509-11 (1983).

129. *Heckler v. Chaney*, 470 U.S. 821, 847 (1985) (Marshall, J., concurring) ("Criminal prosecutorial decisions vindicate only intangible interests, common to society as a whole, in the enforcement of the criminal law. The conduct at issue has already occurred; all that remains is society's general interest in assuring that the guilty are punished.").

130. Cf. Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42, 72 (1976) (arguing that nonpriority program is unlike criminal prosecutorial discretion in that the program is a special program conferring benefits "based on individual equities").

131. *Heckler*, 470 U.S. at 848. In this case, Justice Marshall noted in response to an agency refusal to act that

requests for administrative enforcement typically seek to prevent concrete and future injuries that Congress has made cognizable . . . or to obtain palpable benefits that Congress has intended to bestow Entitlements to receive these benefits or to be free of these injuries often run to specific classes of individuals whom Congress has singled out as statutory beneficiaries.

470 U.S. at 847-48 (citations omitted). A similar rationale would apply to agency decisions to act.

132. See Vorenberg, *supra* note 120, at 1525.

forcement of the immigration laws,"¹³³ but rather is an affirmative action conferring important legal privileges on the aliens involved. All aliens in the relevant class, regardless of their legal status, are entitled to remain in the United States while the grant remains in effect and are eligible to receive work authorization from the INS during their stay.¹³⁴ Although the aliens are technically deportable, a grant of EVD allows them to conduct their affairs in any manner they choose as long as they remain in the United States.¹³⁵ Recipients of EVD thus acquire significant advantages which belie the notion that they are merely passive beneficiaries of the Attorney General's discretionary decision to eschew prosecution.

The *Employees Union* court's failure to investigate fully the nature of EVD did a grave disservice to the Salvadoran nationals by allowing the Attorney General to hide behind the cloak of prosecutorial discre-

133. *Employees Union*, 594 F. Supp. at 507; see note 56 *supra* and accompanying text; cf. Letter from William F. Smith, Attorney General, to Representative Lawrence J. Smith (July 19, 1983), reprinted in Defendants' Memorandum, *supra* note 6, at Exhibit D (describing EVD as a temporary delay in the expulsion of aliens of a certain nationality).

134. INS regulations provide that certain classes of aliens are eligible to be employed in the United States without specific employment authorization. 8 C.F.R. § 109.1(a) (1986). Aliens granted voluntary departure under 8 C.F.R. § 242.5(a)(2)(viii) (1986), see text at note 26 *supra*, must apply for work authorization under 8 C.F.R. § 109.1(b)(6) (1986) and

may be granted permission to be employed for that period of time prior to the date set for voluntary departure including any extension granted beyond such date. Factors which may be considered in granting employment authorization to an alien who has been granted voluntary departure:

- (i) Length of voluntary departure granted;
- (ii) Dependent spouse and/or children in the United States who rely on the alien for support;
- (iii) Reasonable chance that legal status may ensue in the near future; and
- (iv) Reasonable basis for consideration of discretionary relief.

8 C.F.R. § 109.1(b)(6) (1986). The INS manual reveals that work authorizations are issued automatically to aliens granted extensions of voluntary departure: "Aliens who have been granted . . . voluntary departure due to temporary inability to return to their home country because of civil war or catastrophic circumstances there, should be advised of their status by letter The letter should state that . . . employment has been authorized" IMMIGRATION AND NATURALIZATION SERVICE, OPERATING INSTRUCTIONS, REGULATIONS & INTERPRETATIONS § 242.10(e)(3) (Apr. 4, 1979). Likewise, the directives notifying the INS field offices of the Attorney General's decision to grant EVD typically provide for work authorization in accordance with the voluntary departure provisions. See, e.g., INS Wire of June 15, 1983, reprinted in 60 INTERPRETER RELEASES 484 (1983) ("Those Polish nationals whose departure has been deferred until December 31, 1983 and who establish appropriate need may be authorized permission to work, as provided in 8 C.F.R. 109.1(b)."); see also INS Wire of May 1, 1984, reprinted in 61 INTERPRETER RELEASES 330 (1984) (work authorizations for Ugandans granted EVD); INS Wire of July 12, 1982, reprinted in 59 INTERPRETER RELEASES 456 (1982) (work authorizations for Ethiopians granted EVD). The authors of one book noted that "there is no special program [available to aliens granted EVD] for federal assistance like that available to refugees . . . , but it may be that EVD beneficiaries qualify for other general public assistance programs otherwise closed to 'illegal aliens.'" T.A. ALEINIKOFF & D. MARTIN, *supra* note 5, at 728 (citations omitted).

135. See *Resettlement of Cuban Refugees*, 41 INTERPRETER RELEASES 98, 99 (1964); cf. SENATE COMM. ON THE JUDICIARY, SUBCOMM. TO INVESTIGATE PROBLEMS CONNECTED WITH REFUGEES AND ESCAPEES PURSUANT TO S. RES. 66, 88TH CONG., 1ST SESS., RESETTLEMENT OF CUBAN REFUGEES 1 (Comm. Print 1963) (introduction by Sen. Hart).

tion. Though most forms of deportation relief are properly termed "prosecutorial discretion,"¹³⁶ this term does not mean that the actions are automatically immune from judicial review. Despite the judiciary's general reluctance to review discretionary decisions,¹³⁷ the courts will intervene in cases of "clear abuse of discretion."¹³⁸ To determine the scope of judicial review that should be applied to EVD decisions, it is necessary to identify the underlying statutory authority for the grants.

B. *The Statutory Source of EVD*

The Attorney General's authority to grant EVD has never been challenged; therefore, the source of this power has never been fully examined. Closer scrutiny reveals that EVD is actually a group application of another form of administratively-provided deportation relief — extensions of voluntary departure.

EVD, like all other variations of voluntary departure, originates in the INA provisions which empower the Attorney General with discretionary authority to grant voluntary departure.¹³⁹ The Act sets basic eligibility requirements which the alien must meet before he or she will be considered for this relief.¹⁴⁰ Award of the status to eligible aliens is solely within the discretion of the immigration authorities.¹⁴¹

In addition to this "routine" type of voluntary departure,¹⁴² the INS has created extensions of voluntary departure.¹⁴³ As mentioned in Part I, this relief is granted in a number of situations,¹⁴⁴ including cases where deportation of the alien would result in excessive hardship.¹⁴⁵ Although the regulations are vague,¹⁴⁶ the Operations Instructions indicate that aliens who are temporarily unable "to return to their home country because of civil war or catastrophic circumstances there"¹⁴⁷ may receive a one-year extension of voluntary depart-

136. See note 117 *supra* and accompanying text.

137. See note 167 *infra* and accompanying text.

138. See note 166 *infra* and accompanying text.

139. See note 18 *supra*.

140. These requirements vary, depending upon whether the alien is requesting voluntary departure before, during, or after deportation proceedings, but, in general, they go to the moral worthiness of the alien. See notes 19 & 20 *supra*. See generally 2 C. GORDON & H. ROSENFELD, *supra* note 1, § 7.2.

141. See, e.g., *Gomez-Fernandez v. INS*, 316 F.2d 732 (5th Cir.), *cert. denied*, 375 U.S. 942 (1963); *Hegerich v. Del Guercio*, 255 F.2d 701 (9th Cir. 1958); *United States ex rel. Ciannamea v. Neelly*, 202 F.2d 289 (7th Cir. 1953).

142. See notes 18-24 *supra* and accompanying text.

143. See notes 25-32 *supra* and accompanying text.

144. See notes 25-30 *supra* and accompanying text.

145. See notes 26 & 27 *supra* and accompanying text.

146. See text at note 26 *supra*.

147. INS, OPERATIONS INSTRUCTIONS, REGULATIONS & INTERPRETATIONS § 242.10(e)(3) (Apr. 4, 1979).

ture and employment authorization.

The Attorney General has delegated his authority to grant these various types of voluntary departure to certain INS officials.¹⁴⁸ Their determinations are made on an individual basis and, like grants of voluntary departure, involve a two-step process. The official must first determine whether the alien meets the preliminary standards for eligibility set forth in the statute and regulations. Once the alien has been found to meet the criteria for consideration, the official then has discretion to grant him or her relief.¹⁴⁹

EVD is nothing more than an *en masse* grant of extensions of voluntary departure made by the Attorney General, rather than by his subordinates. Although the wording of the statutory authority for voluntary departure seems to contemplate individual¹⁵⁰ rather than *en masse* determinations, the Attorney General is entitled to make blanket grants as well.¹⁵¹ What the Attorney General is *not* entitled to do is to alter the parameters of his discretion at will and without adequate explanation.

Although the Attorney General has never formulated any standards regarding his exercise of discretion in this area, he has nonetheless created a de facto standard through his past grants of EVD. Past grants of this status have always been accompanied by explanations of the "humanitarian" reasons militating for such status.¹⁵² The criteria

148. See 8 C.F.R. § 242.5(a)(1) (1986).

149. See 2 C. GORDON & H. ROSENFELD, *supra* note 1, § 7.1b, at pp. 7-9 to 7-13.

150. See notes 19 & 20 *supra*.

151. In *Fook Hong Mak v. INS*, 435 F.2d 728 (2d Cir. 1970), the Second Circuit established that administrators vested with discretionary authority may exercise that authority through blanket, rather than individual, determinations. 435 F.2d at 730; see also *Yuk-Ling Wu Jew v. Attorney General*, 524 F. Supp. 1258, 1260-61 (D.D.C. 1981) ("A congressional grant of discretion to accord or revoke an immigration privilege does not trigger a requirement that each such proceeding be considered on a case by case basis."); cf. *Kurlan v. Callaway*, 381 F. Supp. 594, 596 (S.D.N.Y.), *aff'd. in part and rev'd. in part*, 510 F.2d 274 (2d Cir. 1974) (state executive may exercise his discretion on either a blanket or a case-by-case basis). The Attorney General may determine that "one paramount element creates such 'likeness' that other elements cannot be so legally significant as to warrant a difference in treatment." *Fook Hong Mak*, 435 F.2d at 730. This principle is particularly applicable to EVD, since the "one characteristic" which entitles the "group to favorable treatment despite minor variables," 435 F.2d at 730, is readily apparent. If conditions in the home country are so dangerous as to warrant EVD status for the nationals, case-by-case determinations become a time-consuming administrative burden. A blanket grant is an efficient and sensible response, since it relieves the field officers from the procedural formalities of individual determinations in cases in which the outcome is certain.

152. See, e.g., Letter from A.P. Drischler, Acting Assistant Secretary of State for Congressional Relations, to Senator Edward Kennedy (Apr. 17, 1981), reprinted in 128 CONG. REC. 1702 (1982) ("While fighting in some areas has been severe, El Salvador has not suffered the same level of wide-spread fighting, destruction and breakdown of public services and order as did for example, Nicaragua, Lebanon or Uganda at the time when voluntary departure was recommended by the Department [of Justice] and granted by INS for nationals of those countries."); INS Wire of Jan. 21, 1982, reprinted in 59 INTERPRETER RELEASES 85 (1982) ("Service action shall not be taken to enforce departure to Poland, . . . at the present time under the unstable conditions currently existing there."); INS Wire of July 3, 1979, reprinted in 56 INTERPRETER RELEASES 325a (1979) ("Service action shall not be taken to enforce departure to Nicaragua, prior to De-

used in granting this status have effectively defined the class to which the Attorney General may, in his discretion, extend EVD.¹⁵³

cember 31, 1979, of Nicaraguan nationals . . . *who indicate an unwillingness to return to that country* at the present time under the unstable conditions currently existing there.”) (emphasis in original); INS Wire of Aug. 29, 1979, *reprinted in* 56 INTERPRETER RELEASES 436 (1979) (“The Department of State has recommended against the forcible return to Nicaragua of any Nicaraguan nationals . . . due to the unsettled conditions in Nicaragua.”); INS Wire of Dec. 4, 1978 (copy on file at *Michigan Law Review*) (“The civil strife in that country [Lebanon] continues.”); Letter of William P. Clark, Deputy Secretary of State, to Doris Meissner, Acting Commissioner of INS (Aug. 8, 1981) (copy on file at *Michigan Law Review*) (“Since Ethiopia’s revolution took place in 1974 the Department of State has been recommending to the INS that . . . because of unsettled conditions in Ethiopia, Ethiopians whose asylum applications were not approved should not be deported to Ethiopia . . .”).

Gordon and Rosenfield have also noted that the Attorney General sometimes grants EVD status to “nationals of countries undergoing active hostilities or other dangerous conditions.” 1A C. GORDON & H. ROSENFELD, *supra* note 1, § 5.3e(6a), at p. 5-48. The INS itself has described EVD as “an administratively clean and effective response for our government to make to what are generally temporary but unsafe circumstances in other countries that are likely to improve with time.” INS, Asylum Adjudications, *supra* note 1, at 71. This also seems to be the view taken by many members of Congress. *See, e.g.,* *Hearing on H.R. 4447, supra* note 7, at 10 (statement of Rep. Moakley) (“The issue here is not administration foreign policy toward El Salvador The issue today is a humanitarian one. . . . [W]e are deciding, in light of all of the documented human rights violations in El Salvador, whether it is safe, humane, and just to deport Salvadoran refugees back to their homeland.”); *id.* at 49 (statement of Rep. Gejdenson) (EVD “is a humanitarian decision, not a political one.”). Congressmen expressed this view in connection with earlier grants of EVD as well. For example, debate on H. Res. 304 (urging EVD status for Poles) exemplified congressional preoccupation with the humanitarian aspects of EVD. *See* 127 CONG. REC. 31,493 (1981) (statement of Mr. Rodino) (“[F]avorable action on this resolution would be a clear expression of our humanitarian commitment to these individuals and a recognition of our obligation not to return them, at this time, to Poland.”); *id.*, at 31,494 (statement of Mr. Richmond) (“Our Nation’s humanitarian tradition demands that we not expel those whose lives would be threatened by deportation and it is, therefore, imperative that we permit Polish citizens to remain here until they can safely return home.”); *id.* (statement of Mr. Broomfield) (“[I]t is the humanitarian obligation of the United States to insure that Poles visiting or working in the United States are not thrust back into Poland now.”).

153. The Attorney General has denied that any criteria for granting the status exist. *See, e.g.,* Defendants’ Memorandum, *supra* note 6, at 16 (“Plaintiffs erroneously assume that grants of ‘extended voluntary departure’ are governed exclusively by conditions within the country(ies) in question . . . and that it is both possible and proper to draw country-by-country comparisons between the Executive’s determinations concerning ‘extended voluntary departure.’”); Letter from George P. Shultz, Secretary of State, to William F. Smith, Attorney General (June 23, 1983) *reprinted in* Defendants’ Memorandum, *supra* note 6, at Exhibit C (“[T]he extent of civil unrest alone does not determine the Department’s view toward the granting of EVD to nationals of a particular country. The Department invariably considers a number of factors in deciding whether to recommend the granting of EVD in any particular case, and the granting of EVD may meet different objectives in different cases.”). The Attorney General stated that:

[I]t is true . . . that “extended voluntary departure” has been granted to nationals of Ethiopia, Nicaragua, Poland, and Uganda, at times when such countries were experiencing significant civil disturbances. It is inaccurate, however, to assume that there exists any specific criterion or criteria, such as the occurrence of violence or political instability, by which grants of “extended voluntary departure” are determined. . . . The decisions made as to “extended voluntary departure” are reached on a situation by situation basis and are not readily susceptible to comparison or generalization. Each determination is based on examination of a variety of factors unique to each country’s situation.

Letter from William F. Smith, Attorney General, to Representative Lawrence J. Smith (July 19, 1983) *reprinted in* Defendants’ Memorandum, *supra* note 6, at Exhibit D.

The government has asserted that EVD serves primarily as a foreign policy tool. *See* Memorandum from William F. Smith, Attorney General, to William Clark (Apr. 16, 1983), *quoted in* Plaintiffs’ Opposition, *supra* note 37, at 63 n.14 (emphasis added):

In denying EVD to Salvadorans, however, the Attorney General has attempted to redefine the class. Foreign and domestic policy con-

Historically, a grant of extended voluntary departure to a particular national group by the Attorney General has always been based on a recommendation of the Department of State resulting from its assessment of conditions in a particular country and the foreign policy implications of U.S. Government action in repatriating nationals of that country who are in the United States.

[The Department of] Justice has never independently established an extended voluntary departure program as the need for and implications of such a decision are fundamentally foreign policy in nature.

Granting extended voluntary departure to nationals of one country does not justify or require such a grant to nationals of another country where, while the situation may or may not be similar, the foreign policy benefits or issues may be adjudged to be different.

The general perception of extended voluntary departure is that it is invoked as a humanitarian gesture to protect temporarily persons who are in the U.S. and subject to return when conditions of civil strife or social or political turmoil arise in their homeland. While humanitarian factors have always loomed large in extended voluntary departure decisions, State's recommendation has, with varying degrees, been based on foreign policy grounds.

The plaintiffs in *Employees Union* argued, however, that the government's assertion that EVD is merely a foreign policy tool is no more than a post-hoc rationalization formulated after the filing of the complaint in that case, *see* Plaintiffs' Opposition, *supra* note 37, at 63-64, since humanitarian concerns, not foreign policy objectives, were asserted in connection with earlier grants of EVD. *See* note 152 *supra*. While it is true that the granting of EVD may have some influence upon relations between the United States and the involved country, the impact is likely negligible, as the government itself has recognized. *See, e.g.*, Draft Questions and Answers for Elliot Abrams (Feb. 5, 1982, 3:00 p.m. press briefing), *quoted in* Plaintiffs' Opposition, *supra* note 37, at 62:

[QUESTION]: Is it not true that if you were to grant asylum or voluntary departure status to a high proportion of applicants for many or all of the Salvadorans in the US [sic], in effect you would be disparaging the stability and ability of the Salvadoran Government to protect its citizens? Would this not undermine the Administration's policy of support for the Duarte government?

[ANSWER]: The decision to grant asylum or voluntary departure unavoidably reflects upon the conditions currently existing in the homeland of the persons affected. In the case of El Salvador, you must remember that a civil war is occurring. That the government cannot maintain perfect order in such circumstances is unsurprising and does not necessarily reflect poorly on it or its leaders. When these facts are considered, I cannot see how the Administration's policy could be harmed.

The granting of EVD to nationals of both Nicaragua and Lebanon at a time when these countries were engaged in favorable relations with the United States further illustrates that EVD has, in the past, functioned as humanitarian relief and not as a pejorative denouncement of the governments involved. In fact, the Salvadoran Ambassador to the United States stated that El Salvador "view[s] with great sympathy the U.S. policy of granting 'extended departure' status" to Salvadoran nationals, thus diminishing the likelihood that a grant of EVD would be deleterious to U.S.-Salvadoran relations. Eastham, *Salvadorans Seek U.S. Asylum from U.S.-Backed Regime*, United Press International, Mar. 20, 1982 (available on NEXIS). Moreover, as one commentator noted, the Salvadoran government "should not be too surprised or offended" to find out that the U.S. government believes El Salvador to be unsafe for civilians, given the critical State Department reports on human rights in that country filed with Congress. *See* Note, *supra* note 5, at 330-31.

Finally, EVD grants, unlike grants of refugee status, can be framed in terms that do not condemn the government of the aliens involved:

Since a refugee is defined contentiously as victim or potential victim of persecution, to accept the claim of someone to qualify for refugee status is publicly to accuse some other state of engaging in persecution; to accept large numbers of refugees is to call attention to the extent of other states' misdeeds and to exhibit one's own contrasting humanitarianism. This of course is why there is official reluctance to receive refugees from friendly or allied states, however oppressive to certain of their citizens they may be . . .

Whelan, *Principles of U.S. Immigration Policy*, 44 U. PITT. L. REV. 447, 479-80 (1983).

cerns, as well as other, less well-articulated considerations, formed the basis of the decision to deny EVD status to the Salvadorans.¹⁵⁴ The *Employees Union* court found that, because the Attorney General was exercising his discretion, his decision to shift the parameters of the class eligible for EVD status was one that necessarily was not subject to judicial review.¹⁵⁵

Although discretionary actions, particularly those taken by the immigration authorities, are subject to limited review, they are not entirely precluded from judicial review. As has often been noted, "[d]iscretion does not mean license."¹⁵⁶ Agency action which abuses the discretion granted to it by Congress is impermissible. In failing to examine the Attorney General's decision for abuse of discretion, the *Employees Union* court ignored the significant interest of the Salvadorans in ensuring that their status be determined fairly.

V. REVIEWING EVD DETERMINATIONS UNDER THE APA

The *Employees Union* court stated that the APA precluded it from reviewing EVD determinations. Yet the provisions it cited do not necessarily foreclose judicial scrutiny of the Attorney General's actions. First, the court claimed that since the protections of the deportation process were still available to aliens denied EVD, judicial review was unavailable because EVD was not a "final agency action."¹⁵⁷ The APA's requirement that final agency action be taken before judicial review is available "is designed to avoid premature judicial involvement in the agency decision making process."¹⁵⁸ In addition to satisfying the pragmatic concern of providing the court with a sufficient basis for judicial review,¹⁵⁹ the requirement also ensures the agency ample opportunity to exercise the decisionmaking authority the legislature granted it.

EVD does not present these jurisprudential concerns. If the Attorney General denies certain aliens EVD status based on impermissible grounds, he has taken a final action for which there is no other adequate remedy.¹⁶⁰ The use of inappropriate criteria in the EVD deter-

154. See note 153 *supra*.

155. See note 76 *supra* and accompanying text.

156. *Sang Seup Shin v. INS*, 750 F.2d 122, 127 (D.C. Cir. 1984); see also Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 33 (1967) ("discretion is not tantamount to license"). Indeed, "[w]hile the extent of power possessed by one exercising discretion varies, in our legal system discretion usually means judgment 'guided by sound legal principles,' producing decisions made 'according to the rules of reason and justice, not according to private opinion . . .'" Sofaer, *supra* note 112, at 1349 (footnote omitted).

157. See notes 72 & 73 *supra* and accompanying text.

158. R. PIERCE, JR., S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 182 (1985).

159. *Id.* at 182-83.

160. Cf. 2 C. GORDON & H. ROSENFELD, *supra* note 1, § 7.2d, at 7-31 (denials of voluntary departure or arbitrary restrictions on the privilege are subject to judicial review).

mination will deny the aliens access to a valuable status despite the availability of other types of individualized deportation relief.¹⁶¹

The *Employees Union* court also found that the APA precluded judicial review of the Attorney General's decision to deny EVD to Salvadorans because EVD was an extrastatutory status and thus presented no standard for review.¹⁶² In so holding, however, the court ignored the standard set by the Attorney General himself through his past grants of EVD. The court should have reviewed his determination to see if it departed from his past practices in such a way as to constitute an abuse of discretion.

The APA divides all administrative actions into three categories: quasi-judicial adjudication, quasi-legislative rulemaking, and a residual category — "informal action."¹⁶³ While the APA outlines specific procedural rules and standards of judicial review for rulemaking and adjudication,¹⁶⁴ no such standards are provided for informal agency action. Thus, discretionary actions, which fall into this residuum, are typically reviewed for "abuse of discretion" in accordance with the APA's "catchall" provision.¹⁶⁵

161. The *Employees Union* court's preemptive dismissal of judicial review on this basis ignores the very real advantages accruing to aliens from a favorable exercise of EVD discretion. First, aliens derive a substantial benefit from not having to undergo deportation proceedings, regardless of the various forms of relief that may be available in that process. Cf. Verkuil, *supra* note 87, at 1153 n.61 ("[A] favorable discretionary action is a very valuable advantage, since it renders the deportation process unnecessary."). Second, and more important, aliens granted EVD receive a group status; each individual alien need not convince an immigration official to exercise his or her discretion in the alien's favor. Given the vagaries of the immigration relief processes, see Sofaer, *supra* note 112, at 1295 (finding that "inconsistency, arbitrariness and . . . waste correlate with [INS] discretionary power"), the benefits of group relief should not be underestimated.

162. See notes 81 & 82 *supra* and accompanying text.

163. See Shapiro, *supra* note 128, at 1488.

164. See 5 U.S.C. §§ 553-557, 706(2)(E) (1982).

165. 5 U.S.C. § 706 (1982) provides in relevant part: "The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be — (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." See generally Shapiro, *supra* note 128, at 1488-89. As Shapiro notes, it has become "commonplace" to point out that § 706 is in apparent conflict with § 701, which excepts "agency action . . . committed to agency discretion by law" from judicial review. *Id.* at 1489 n.11. By subjecting all agency action to judicial review except where review is barred by statute or committed to agency discretion by law, however, § 701 creates a "strong presumption" of reviewability. See also *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbot Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967). The Supreme Court has stated that the "committed to agency discretion" exception is "very narrow," *Overton Park*, 401 U.S. at 410, and that "it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 401 U.S. at 410 (quoting S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945)). See also *Barlow v. Collins*, 397 U.S. 159, 166 (1970) ("judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated"); *Local 1219, American Fedn. of Govt. Employees v. Donovan*, 683 F.2d 511, 515 (D.C. Cir. 1982) (citations omitted):

[T]he APA's exception for "agency action committed to agency discretion" shields from review only those matters for which "a fair appraisal of the legislative scheme, including a weighing of practical and policy implications of reviewability, persuasively indicates that judicial review should be circumscribed." Only when "the considerations in favor of

The judicial review provided for discretionary actions is extremely narrow. A court "can interfere only when there has been a clear abuse of discretion or a clear failure to exercise discretion."¹⁶⁶ The courts reason that where Congress has entrusted an administrator or agency with discretionary authority, the judiciary will not substitute its judgment for that of the administrator.¹⁶⁷ Nonetheless, a court can intervene to correct actions it considers "manifestly illegal, unfair, or unjust."¹⁶⁸

Although the APA does not define "abuse of discretion," courts have developed standards for this type of judicial review. In *Wong Wing Hang v. INS*,¹⁶⁹ Judge Friendly defined abuse of discretion as an action "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or . . . on other 'considerations that Congress could not have intended to make relevant.'"¹⁷⁰ The courts have established that an agency must either follow its own precedents or explain why it departs from them.¹⁷¹ "[A]n agency changing its course must supply a reasoned

nonreviewability . . . are sufficiently compelling to rebut the strong presumption of judicial review" will we conclude that judicial review is foreclosed.

Thus, "[c]ourts have continuously narrowed the category of actions considered to be so discretionary as to be exempted from review." Shapiro, *supra* note 128, at 1489 n.11.

166. United States *ex rel.* Adel v. Shaughnessy, 183 F.2d 371, 372 (2d Cir. 1950) (footnotes omitted); see also Foti v. INS, 375 U.S. 217, 228 (1963); MacKay v. McAlexander, 268 F.2d 35, 40 (9th Cir. 1959), *cert. denied*, 362 U.S. 961 (1960).

167. See, e.g., Kleindienst v. Mandel, 408 U.S. 753, 770 (1972); Kimm v. Rosenberg, 363 U.S. 405 (1960) (*per curiam*); Goon Wing Wah v. INS, 386 F.2d 292, 294 (1st Cir. 1967); Chen v. Foley, 385 F.2d 929, 934 (6th Cir. 1967), *cert. denied*, 393 U.S. 838 (1968); Kam Ng v. Pilliod, 279 F.2d 207, 210 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961); United States *ex rel.* Ciannamea v. Neelly, 202 F.2d 289, 292 (7th Cir. 1953).

168. 2 C. GORDON & H. ROSENFELD, *supra* note 1, § 8.14, at 8-123.

169. 360 F.2d 715 (2d Cir. 1966).

170. 360 F.2d at 719 (quoting United States *ex rel.* Kaloudis v. Shaughnessy, 180 F.2d 489, 491 (2d Cir. 1950)); see also Bertrand v. Sava, 684 F.2d 204, 212 (2d Cir. 1982) (standard adopted in challenge of denial of parole to Haitians); Conceiro v. Marks, 360 F. Supp. 454, 457 (S.D.N.Y. 1973) (standard applied to district director's denial of parole to an excludable political asylum applicant). Other courts have articulated similar standards in other immigration cases. See, e.g., Osuchukwu v. INS, 744 F.2d 1136, 1142 (5th Cir. 1984):

It is our duty to allow decision [sic] to be made by the Attorney General's delegate, even a decision that we deem in error, so long as it is not capricious, racially invidious, utterly without foundation in the evidence, or otherwise so aberrational that it is arbitrary rather than the result of any perceptible rational approach.

See also Sang Seup Shin v. INS, 750 F.2d 122, 125, 127 (D.C. Cir. 1984) (citations and footnote omitted):

Broad as the [Bureau of Immigration Appeals'] discretion is, however, that tribunal may not act arbitrarily or irrationally. It may not proceed at whim, shedding its grace unevenly from case to case. It must explain departures from settled policies . . . and it may not unaccountably disregard on one day considerations it held relevant on another day. . . . What determines rights in one case the Board may not ignore in the next. Discretion does not mean license.

171. See, e.g., Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (ICC departures from settled precedent regarding rate increases) (emphasis added):

The agency may flatly repudiate [prior] norms, deciding, for example, that changed circum-

analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."¹⁷² Thus, actions by the Attorney General that violate standards of fairness and rationality abuse the discretion granted him by Congress.

The *Employees Union* court, therefore, should have reviewed the Attorney General's decision to see (1) whether the determination to deny EVD status to Salvadoran nationals represented a change in policy, and (2) if the Attorney General did alter his policy, whether his alteration had a rational explanation. The court never got to the first inquiry, however. Although the Attorney General had always espoused humanitarian concerns when granting EVD in the past,¹⁷³ the *Employees Union* court declined to find that these prior practices had established a "humanitarian" standard, fearing that such a standard would "open up irresponsibly the floodgates to illegal aliens" in disregard of immigration and foreign policy considerations.¹⁷⁴

The *Employees Union* court's fear that a humanitarian standard would deprive the Attorney General of the ability to make necessary distinctions in the immigration area is unfounded. The court erroneously assumed that finding a humanitarian standard in past grants of EVD would mandate the granting of the status to all future aliens who fell within this category. But, as described earlier, most forms of discretionary immigration relief involve a two-step process.¹⁷⁵ The immigration official must first determine whether the alien meets the statutory or administrative requirements for relief. Only if the answer

stances mean that they are no longer required in order to effectuate congressional policy. Or it may narrow the zone in which some rule will be applied, because it appears that a more discriminating invocation of the rule will best serve congressional policy. Or it may find that, although the rule in general serves useful purposes, peculiarities of the case before it suggests that the rule not be applied in that case. *Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.*

172. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (footnotes omitted). This view has been consistently adopted by the courts. *See, e.g., Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (agency has a "duty to explain its departure from prior norms"); *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977) ("This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them."); *Contractors Transp. Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976); *Frozen Food Express, Inc. v. United States*, 535 F.2d 877, 880 (5th Cir. 1976); *Columbia Broadcasting Sys. v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971) (agency "duty bound to justify" facially conflicting decisions).

173. *See* note 152 *supra*. It is possible, of course, that humanitarian concerns were not the true motivation for the Attorney General's earlier grants of EVD. Nonetheless, he should be held to his own stated reasons and should not be allowed to offer post-hoc rationalizations for his actions. *See FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 100 (D.C. Cir. 1977); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

174. 594 F. Supp. at 508; *see* note 82 *supra* and accompanying text.

175. *See* notes 140 & 141 *supra* and accompanying text.

is in the affirmative does the official go on to decide whether he or she will exercise his or her discretion favorably.¹⁷⁶

Thus, making the Attorney General exercise his discretion in conformance with his past practices does not necessarily provide automatic entrance into the United States for all aliens whose countries are undergoing some sort of turmoil. The standard does not create an entitlement to the status; rather, it ensures that similarly situated aliens will have their eligibility for the status evaluated according to the same criteria. Moreover, reviewing the Attorney General's decision for abuse of discretion in this way would not create an inexorable eligibility standard which would shackle his discretion and eliminate the flexibility he needs to deal with unanticipated situations. Departures from existing precedents are permissible when they are accompanied by a rational explanation.¹⁷⁷ If factors necessitate a change in policy, the Attorney General can easily accommodate them.

Subjecting the Attorney General's decision to deny EVD to Salvadoran nationals to judicial review runs counter to the teachings of classical immigration law. However, if we look at the competing interests at stake, we see that the scales lean heavily toward affording the aliens some administrative process.¹⁷⁸ The aliens involved here have an interest in receiving accurate, nonarbitrary decisionmaking. Although the relief they seek is discretionary and they have no absolute right to that relief, these aliens deserve to receive a procedure equivalent to that afforded other similarly situated aliens.¹⁷⁹

Of course, the aliens' interest in receiving consistent, fair determinations competes with that of the government in adopting procedures which ensure fiscal and administrative efficiency,¹⁸⁰ speed, and accu-

176. See generally 2 C. GORDON & H. ROSENFELD, *supra* note 1, § 7.1(b)(3), at 7-9 to 7-13.

177. See, e.g., *Marine Space Enclosures, Inc. v. Federal Maritime Commn.*, 420 F.2d 577, 585 (D.C. Cir. 1969) (footnote omitted):

An agency may modify or even reverse its past policies and announcements, but the confidence of a reviewing court that these adjustments are made in accordance with the requirements of law is not enhanced when the prior precedents are not discussed, the swerves and reversals are not identified, and the entire matter is brushed off once over lightly.

178. Cf. Verkuil, *supra* note 87, at 1152-53 & n.61. This Note does not argue that aliens denied EVD should be allowed to assert due process or equal protection claims. As a discretionary relief for extraordinary situations, EVD does not warrant such constitutional protection. See, e.g., *id.* at 1178-79. Schuck, in fact, criticized the first *Employees Union* opinion on precisely this ground, noting that "[t]o surround [EVD] with constitutional constraints not applicable to excludable aliens generally could reduce and perhaps even eliminate its usefulness to the government and to aliens." Schuck, *supra* note 87, at 60. But, as Verkuil points out, discretionary decisions, such as EVD, do demand "some check on the regularity of agency behavior." Verkuil, *supra* note 87, at 1179. This need can be accommodated through (1) "the use of standards and rules to guide agency deciders," and (2) limited judicial and administrative review. Verkuil, *supra* note 87, at 1179 n.233.

179. See Verkuil, *supra* note 87, at 1152-53 & n.61.

180. *Id.* at 1149.

racy.¹⁸¹ Because of these governmental interests, the courts are hesitant to require any agency, including the INS, to create standards or to make rules.¹⁸² Yet EVD graphically illustrates the dangers inherent in such a deferential approach. The Attorney General has never articulated standards for grants of EVD; indeed, he has never formalized the status in any way. Allowing the Attorney General to exercise unfettered discretion in this area simply because he chooses not to circumscribe his discretion creates a *reductio ad absurdum*: the Attorney General has unlimited discretion because he has stated that he has unlimited discretion. If there are no standards, formal or otherwise, guiding his discretion and no judicial review is available, the Attorney General in effect has unchecked power to allow any groups of aliens he selects to stay in the United States for indeterminate periods. The potential for abuse — through discriminatory decisions or decisions based on factors not contemplated by Congress when it drafted the INA — is great.

The INS has long been criticized for its deficiency in articulating standards to constrain and guide its discretion.¹⁸³ Although not all types of administrative discretion need to be checked,¹⁸⁴ EVD is precisely the type of status that requires such limitations. Unless the Attorney General sets standards for the granting of EVD status, the public has no means of evaluating his decisions or of determining whether he is acting in a discriminatory manner. The result is a decision that is not perceived as fair or legitimate, either by the public or by the aliens involved.

Making the Attorney General publicly articulate the reasons for his modification or exception would provide legitimacy for that decision. First, a “reasons requirement” would force the Attorney General to consider his decision more carefully, and force him to confront his own motives for modifying the standards for relief.¹⁸⁵ Second, it would increase his sense of accountability by forcing him to bear the full political costs of his decision. Such a requirement would place a burden on the Attorney General only where his policy change is based on impermissible grounds.¹⁸⁶

181. *Id.* at 1164.

182. *Id.* at 1178.

183. See, e.g., *Ameier v. INS*, 438 F.2d 1028 (3d Cir.), cert. dismissed, 404 U.S. 801 (1971); Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 92-97 (1983); Roberts, *supra* note 117, at 158 & n.60; Sofaer, *supra* note 112, at 1313.

184. See, e.g., Sofaer, *supra* note 112, at 1295-97 (constraints on discretion not required where consequences of discretion are unimportant, other controls are present or standards cannot be effectively articulated).

185. See Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 78 (1976).

186. See Note, *Violations By Agencies of Their Own Regulations*, 87 HARV. L. REV. 629, 649 (1974).

Requiring the Attorney General to state his reasons for departing from his standard would also yield important safeguards for the aliens involved. First, it would provide a basis for judicial review to ensure that the departure was not an abuse of discretion.¹⁸⁷ Second, an open record of past criteria would help ensure that similarly situated aliens would be able to obtain equivalent treatment in the future.¹⁸⁸

Aliens, like all other participants in our society, have a fundamental interest in being free from arbitrary governmental action.¹⁸⁹ When standards are not present, the affected aliens have no idea what type of proof they should marshal to support their requests for relief,¹⁹⁰ nor do they have any way of gauging whether their applications were treated fairly. The end result is increased costs, both for the eligible aliens, who may have been discriminated against, and for the INS, which faces potentially stricter judicial scrutiny as a result of its lack of standards.¹⁹¹

VI. COMMUNITARIANISM REVISITED

How, then, is judicial review of EVD decisions consistent with the current infusion of communitarian standards in immigration law? As noted earlier,¹⁹² immigration law presents an opportunity for "administrative abuse and lawlessness" unparalleled in other areas of public law.¹⁹³ The *Employees Union* court's decision that EVD is an unreviewable exercise of prosecutorial discretion illustrates the potential dangers caused by unwarranted judicial deference. In effect, the court said that the Attorney General was free to create a form of deportation relief not sanctioned by the INA and that he could, by virtue of his own refusal to articulate standards or other criteria, grant or deny that status unhindered by any legal constraints.

187. *See id.* at 642.

188. *See id.*

189. *Cf.* K. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 43 (1951) ("justice demands . . . that like men be treated alike in like conditions"); Ludd, *Balanced Understanding*, *supra* note 88, at 22; *Developments*, *supra* note 90, at 1297-98.

190. *See* Roberts, *supra* note 117, at 152.

191. *See* Verkuil, *supra* note 87, at 1205.

192. *See* note 88 *supra* and accompanying text.

193. Schuck, *supra* note 87, at 81-82:

Few areas of public law are so susceptible to administrative abuse and lawlessness as immigration law. The INS is among the most insular and chronically understaffed of federal agencies; it is vulnerable to manipulation and neglect by Congress and to political reprisals by powerful employer interests opposed to vigorous law enforcement. Aliens, the nominal clients of the system, are politically and economically weak, unfamiliar with legal forms, procedures, and the language, and often reluctant or unable to assert their rights. . . . [A]liens often exist in a kind of social vacuum, outside any structures of institutional, programmatic, administrative, or professional support.

INS decisions, moreover, have low visibility; they occur in isolated adjudicatory contexts in which their larger policy consequences, if any, are fragmented and thus difficult to discern or monitor.

Such unbridled discretion may be countenanced by those embracing the traditional restrictive view of immigration law. But in view of the essential life and liberty interests at stake in EVD decisions, anyone who admits the fundamental humanity of aliens must be offended by the notion that the Attorney General has boundless discretion to bestow such an important status in any manner he wishes.

Increased judicial assertiveness in this area is necessary to preserve the integrity of immigration law. The solution is not to surround EVD with inflexible constitutional requirements.¹⁹⁴ Rather, the courts should require the Attorney General to state clearly his criteria for determining EVD eligibility and should demand rational explanations for any deviations from the stated policy.¹⁹⁵ Determinations as to which aliens will receive EVD status must ultimately rest with the Attorney General. The courts nonetheless should play an active role in ensuring that the procedures by which those determinations are made are perceived as accurate, fair, and legitimate, both by the aliens affected and by the public as a whole.

CONCLUSION

Requiring the Attorney General to apply an administratively fair procedure to his EVD eligibility determinations will enhance the perceived legitimacy of his actions and will force him to bear the full public costs of his actions — both undeniably important interests. In the end, however, aliens such as the Salvadorans will gain little practical benefit from such a requirement. The Attorney General will still have the discretionary power to deny them the relief they seek even though they qualify for the status — he will just have to do it in a procedurally fair way.

Many have urged that Congress enact special legislation granting EVD status to Salvadorans.¹⁹⁶ While such a suggestion would solve the dilemma that these particular aliens currently face, it would do nothing for future aliens who find themselves in a similar situation. Rather, comprehensive new legislation is needed to combat the problems now associated with EVD.

First, EVD should be renamed to alleviate the confusion now associated with the name.¹⁹⁷ “Temporary safe haven” has been suggested

194. See note 178 *supra*.

195. See Schuck, *supra* note 87, at 84 (footnote omitted):

Where life and liberty interests collide with powerful foreign policy, law enforcement, or other governmental interests, courts should seek relatively flexible solutions, such as “clear statement” requirements or remands to the agency with instructions to develop new approaches, rather than finding refuge in rigid constitutional rulings.

196. See, e.g., Note, *supra* note 5, at 331-33.

197. See notes 16 & 17 *supra* and accompanying text. INS, Asylum Adjudications, *supra* note 1, at 69, also made this point:

“Extended voluntary departure sounds like jargon,” said one individual. “If we have a pro-

by many, since this term "highlight[s] the temporary nature of the program and its humanitarian intent."¹⁹⁸ More than just cosmetic changes are needed, however. Congress should specifically grant the Attorney General the power to grant this status, thus removing any doubts as to either the legitimacy or the source of his authority.¹⁹⁹ The humanitarian objective of the status should be made clear, and perhaps its scope should be broadened to include aliens whose countries are experiencing natural catastrophes, not just political upheaval.²⁰⁰ It would be undesirable and impractical to set concrete legislative standards for determining when EVD status should be granted. The United States cannot possibly grant relief to nationals from every country undergoing civil unrest. Congress can, however, by articulating guidelines and by requiring the Attorney General to issue findings along with his determination, curtail the likelihood of EVD being reduced to a mere foreign policy tool in the hands of the executive branch. Finally, the procedures governing grants of EVD should be standardized. A cut-off date should be assigned to each grant to deter further illegal emigration from that country,²⁰¹ and INS

gram where we grant people temporary safe refuge or safe haven for limited periods of time, why not call it that. Safe haven or temporary refuge is something people can understand."

198. INS, Asylum Adjudications, *supra* note 1, at 72. The INS suggested using either the term "temporary refuge" or "safe haven," but noted that "[t]he term temporary refugee is also used by the State Department for those foreign nationals given refuge in U.S. embassies and consulates overseas." *Id.* "Safe haven" has been proposed by others as well. See, e.g., *Refugee Assistance: Hearings on H.R. 3195 Before the Subcomm. on Immigration, Refugees, and International Law of the Comm. on the Judiciary*, 98th Cong., 1st Sess. 103 (1983) [hereinafter *Refugee Assistance*] (statement of T.A. Aleinikoff).

199. As Professor Aleinikoff has noted, congressional establishment of EVD would allow the United States to extend temporary protection to persons of humanitarian concern without either distorting the definition of "refugee" in our laws or increasing the number of aliens who seek permanent residence here. It would provide a statutory basis for administrative practices that have developed without careful thought or congressional oversight. It would foster public debate on issues that have previously been handled out of the public eye.

Refugee Assistance, *supra* note 198, at 103.

200. Although EVD has never been defined as applying to nationals of countries suffering from natural disasters, this appears to be a logical extension of EVD's scope. At one time, United States immigration law provided for "conditional entry" of aliens who had "been forced to flee their homes as a result of serious natural disasters, such as earthquakes, volcanic eruptions, tidal waves, and in any similar natural catastrophes." S. REP. NO. 748, 89th Cong., 1st Sess. 16, reprinted in 1965 U.S. CODE CONG. & ADMIN. NEWS 3328, 3335; see Act of Oct. 3, 1965, Pub. L. No. 89-236, § 203(a)(7)(B), 79 STAT. 911, 913 (1965). Aliens were never able to use this provision because of the regulatory and statutory barriers erected. See Note, *Victims of Natural Disasters in U.S. Refugee Law and Policy*, 1982 MICH. Y.B. INTL. LEGAL STUD. 137, 140. The provision was repealed by the Refugee Act of 1980, § 203(c)(3), leaving the victims of natural disasters without relief under U.S. law. One commentator has suggested that such aliens should be granted refugee status: "[W]hen the disaster constitutes a continuing threat to human life, and aid to the stricken area cannot restore an acceptable standard of living, then the distinction between natural disaster victims and refugees fearing persecution becomes arbitrary and inhumane." Note, *supra*, at 137-38. A better solution would be to permit these aliens to enter the United States under a grant of EVD, thus enabling the U.S. government to require them to leave when conditions in the home country have stabilized.

201. This was one of the major concerns espoused by the Attorney General and the Secretary

officials should be well-informed as to the Attorney General's decisions.²⁰²

EVD will always carry political overtones simply because it is impossible for the United States to grant EVD status to all of the multitude of aliens whose countries are experiencing political or other internal disruptions. But even though the United States cannot grant relief to all, it can ensure that its decisions are fair and evenhanded. Only open acknowledgement of the standards for this relief can preserve its integrity, for "[s]ecret law . . . has no place in any decent system of justice."²⁰³

AUTHOR'S POSTSCRIPT

As this Note was going to press, the Court of Appeals for the District of Columbia Circuit handed down its decision in the *Employees Union* appeal.²⁰⁴ The appellate court, like the lower court, applied the traditional view of immigration law, finding that "EVD is an extra-statutory remedy and that the decision to award or to withhold it for citizens of a particular nation lies squarely within the discretion of the Attorney General."²⁰⁵ The court of appeals agreed with the district court that the APA precluded judicial review of EVD determinations, noting that such determinations were neither made reviewable by statute nor were final agency actions for which there was no other adequate judicial remedy.²⁰⁶ The appellate court also declined to find that EVD grants were controlled by a "humanitarian" standard, fearing that imposition of such a standard would "impermissibly curtail" the exercise of the Attorney General's discretion.²⁰⁷ Although the court

of State in connection with the Salvadoran petition for EVD. See, e.g., Letter from William F. Smith, Attorney General, to George P. Shultz, Secretary of State (June 23, 1983), reprinted in Defendants' Memorandum, *supra* note 6, at Exhibit C ("[B]ased on past experience, the Department has concluded that a grant of EVD is, if not a magnet, at least an inducement to members of the beneficiary nationality to seek to enter the United States by any means, since they can avoid deportation."); Letter from William F. Smith, Attorney General, to Representative Lawrence S. Smith (July 19, 1983), reprinted in Defendants' Memorandum, *supra* note 6, at Exhibit D ("[T]here are hundreds of thousands of illegal Salvadoran aliens already in the United States. This is but one facet of the current crisis in which our country is experiencing a floodtide of illegal immigrants. A grant of 'extended voluntary departure' to the Salvadorans undoubtedly would encourage the migration of many more such aliens.").

202. See note 16 *supra*.

203. K. DAVIS, DISCRETIONARY JUSTICE 110 (1969).

204. *Hotel & Restaurant Employees Union, Local 25 v. Attorney General*, 804 F.2d 1256 (D.C. Cir. 1986).

205. 804 F.2d at 1272. Although the court of appeals affirmed the district court's grant of summary judgment to the defendants on the EVD issue, it reversed the district court's grant of summary judgment on the asylum issue. The appellate court found that the district court should have stayed the defendants' motion for summary judgment on the asylum issue, pending completion of discovery on the procedures used to process asylum claims. The court remanded the asylum issue to the district court. 804 F.2d at 1270.

206. 804 F.2d at 1271.

207. 804 F.2d at 1271.

acknowledged that "an agency may not arbitrarily grant or withhold statutorily created and defined remedies,"²⁰⁸ it found that "[a]n agency's exercise of inherent, extra-statutory discretion . . . is quite another matter."²⁰⁹ Thus, the court of appeals, like the district court, refused to limit the Attorney General's discretion, or even to require him to articulate his standards for granting EVD status.

— Lynda J. Oswald

208. 804 F.2d at 1271 (citations omitted).

209. 804 F.2d at 1271. The court did contemplate a narrow standard of review for EVD decisions. The majority opinion rejected Judge Silberman's concurring argument that EVD is nonreviewable under the APA because EVD is "committed to agency discretion by law" within the meaning of 5 U.S.C. § 701(a)(2) (1982). Instead, the majority stated:

We agree that there is no meaningful standard in this case, but decline to insulate all decisions concerning EVD from review on the far-reaching theory that they are "committed to agency discretion by law." That position would effectively insulate all EVD decisions, even ones that may be animated by illegal discriminatory animus, from review. Instead, . . . decisions made by the Congress or the President in the area of immigration are subject to a narrow standard of review.

804 F.2d at 1272 (citing *Fiallo v. Bell*, 430 U.S. 787, 796 (1977); *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976)). It appears that the court might limit this review to determinations which are not facially legitimate. See 804 F.2d at 1271-72 ("Where Congress has not seen fit to limit the agency's discretion to suspend enforcement of a statute as to particular groups of aliens, we cannot review facially legitimate exercises of that discretion.").