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# Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980

John A. Scanlan\*

## I. Introduction

Does the United States possess the means to insure that individual aliens at or within its national boundaries having a "well-founded fear of persecution"<sup>1</sup> will not be returned to their country of origin? Do the political branches of government—particularly the United States Congress—possess adequate means of regulating the influx of those fearful of persecution and seeking admission from abroad? Do the nation's obligations under domestic<sup>2</sup> and international<sup>3</sup> law toward the first group—those seeking "asylum,"<sup>4</sup> "withholding of deportation,"<sup>5</sup> or "non-refoulement"<sup>6</sup>—render impossible overall control of refugee admissions even if stringent limits are imposed on those making application from abroad?

These three questions have been pertinent since 1968, when the United States first obligated itself "not to expel or return" aliens at or within its borders whose "life or freedom would be threatened on account of [their] race, religion, nationality, membership in a particular social group or political opinion."<sup>7</sup> Yet these questions have become more pertinent in the aftermath of the Refugee Act of 1980 (the 1980 Act),<sup>8</sup> which has at least theoretically more clearly delineated the rights of those seeking asylum, and opened the doors wider for those applying for admission as "refugees."<sup>9</sup> In the wake of recent events in Indochina, Africa, and the Caribbean, the greater legal pertinence of these questions has been

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1 The Immigration and Nationality Act of 1952, § 101(a)(42)(A), (B), as added by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (to be codified at 8 U.S.C. § 1101(a)(42)(A), (B)) [sections of the Immigration and Nationality Act added or amended by the Refugee Act of 1980 hereinafter cited as INA (amended 1980)]. See text accompanying notes 69-70 *infra*.

2 See INA §§ 208, 243(h) (amended 1980) (to be codified at 8 U.S.C. §§ 1158, 1253(h)).

3 In 1968, the United States entered into a multilateral treaty acceding to the Protocol Relating to the Status of Refugees, of 31 January 1967 [hereinafter cited as the 1967 Protocol], 19 U.S.T. 6223, T.I.A.S. No. 6577 (1968). The effect of this treaty is to adopt the substantive provisions, as subsequently modified, of the Convention Relating to the Status of Refugees, July 28, 1951, No. 2545, 189 U.N.T.S. 137 [hereinafter cited as the 1951 Convention]. Article 33 of the 1951 Convention prohibits the expulsion or return of most refugees from a country of first asylum. See text accompanying notes 72-82 *infra*.

4 This is the term employed in INA § 208 (amended 1980) (to be codified at 8 U.S.C. § 1158). It is essentially equivalent to the term "non-refoulement," derived from article 33 of the 1951 Convention. See note 5 *infra*. In international usage, "asylum" has a broader meaning, roughly equivalent to a right of entry and subsequent continued residence.

5 See INA § 243(h) (amended 1980) (to be codified at 8 U.S.C. § 1253(h)). The term is discussed more fully in the text accompanying note 69 *infra*.

6 Article 33(1) of the 1951 Convention forbids a "Contracting State" to "expel or return (*refouler*") refugees covered by its terms.

7 1951 Convention, *supra* note 3, art. 33 § 1, as modified by 1967 Protocol, *supra* note 3, art. I, § 2.

8 Section 208 was added to the INA, and INA § 243(h) was substantially modified by the Refugee Act of 1980 §§ 201(b), 203(e), Pub. L. No. 96-212, 94 Stat. 102. Both changes were intended to bring United States refugee law into conformity with international standards. H.R. REP. NO. 781, 96th Cong., 2d Sess. 20 (1980) [hereinafter referred to as the "Conference Report"].

9 The current definition of "refugee" continued in INA § 101(a)(42) (amended 1980) (to be codified at 8 U.S.C. § 1101(a)(42)) replaces the one formerly implied by INA § 203(a)(7), 8 U.S.C. § 1153(a)(7)

matched by a growing awareness of the immensity and intractability of the worldwide refugee problem, and its capacity to affect United States immigration policy, social service delivery systems, and the attitudes of those competing with refugees for social services and for jobs.

Historically, the United States has led the world in willingness to admit immigrants.<sup>10</sup> Yet for at least one hundred years that willingness has competed with widespread public sentiment in favor of limiting immigrant flow.<sup>11</sup> Since the beginning of World War I, legislation has limited the number of immigrants admitted.<sup>12</sup> Since the end of World War II, governmental responses to the national awareness of worldwide refugee problems have permitted a number of refugees to enter the United States outside of the mandated immigration system. Noting this disparity between authorized and actual admissions,<sup>13</sup> the drafters of the 1980 Act established a new, flexible provision regulating the flow of refugees applying from outside the country. Immigration and Naturalization Act (INA) section 207,<sup>14</sup> enacted as part of the 1980 Act, thus establishes a separate "quota" for such refugee admissions. This quota is independent of the "quota" for ordinary "preference" immigrants.<sup>15</sup> It is to be determined annually by the President after "appropriate consultation" with Congress.<sup>16</sup> No statutory upper limits on the refugee quota are imposed,<sup>17</sup> and that quota does not in any way regulate the admission of aliens first entering the country and then seeking asylum, although such asylum seekers are granted specific rights under the Act.

According to its drafters, the 1980 Act is not designed to "really increase our annual immigration flow,"<sup>18</sup> and merely provides a "more rational, stable and equitable Federal policy for the admission of refugees to this country and for assistance to them within the United States."<sup>19</sup> Such a policy was envisioned as "coherent and comprehensive,"<sup>20</sup> rather than reactive and "ad hoc."<sup>21</sup> This policy was designed to replace a narrow political and geographical definition of ref-

(1965) (repealed). Under that former "seventh preference," only aliens from "communist-dominated" countries or the Middle East were eligible for refugee status.

10 Since 1776, the United States has admitted approximately 50,000,000 persons as immigrants. Of these, at least 2,000,000 were admitted as "refugees," "displaced persons," or the like. *See* CONGRESSIONAL RESEARCH SERVICE, U.S. IMMIGRATION LAW & POLICY 1952-1979, 15-25 (1979); S. REP. NO. 256, 96th Cong., 1st Sess. 6 (1979).

11 *See generally* E. HARPER & F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 3-48 (3d ed. 1975).

12 Act of Feb. 5, 1917, Pub. L. No. 64-301, 39 Stat. 874 (imposed literacy requirement designed to limit immigration); Act of May 19, 1921, Pub. L. No. 67-5, 42 Stat. 5 (imposed national origins quota limiting the number of slots available to immigrants from particular countries; system remained in effect through 1965, despite two major recodifications of immigration law).

13 *See* H. REP. NO. 608, 96th Cong., 1st Sess. 2-5 (1979).

14 INA § 207 (amended 1980) (to be codified at 8 U.S.C. § 1157).

15 Non-refugees applying for admission are limited by the numerical limitations set forth in INA § 201(a) (amended 1980) (to be codified at 8 U.S.C. § 1151). Under current law, 270,000 ordinary immigrant visas will be issued in any fiscal year.

16 INA § 207(a) (amended 1980) (to be codified at 8 U.S.C. § 1157(a)) provides for a determination of the annual refugee quota by the President "after appropriate consultation" with Congress. Through fiscal year 1982, the President will be permitted to admit up to 50,000 refugees annually without submitting to consultation as to the *number*, although he will still have to consult about the allocation of that number among applicants from different countries.

17 *Id.*

18 S. REP. NO. 256, 96th Cong., 1st Sess. 6 (1979).

19 H. REP. NO. 608, 96TH CONG., 1ST SESS. 6 (1979) (testimony of former Secretary of State Cyrus Vance).

20 *Id.* at 1.

21 S. REP. NO. 256, 96th Cong., 1st Sess. 9 (1979).

ugee with a broader "humanitarian" definition<sup>22</sup> and to substitute a congressionally monitored executive designation of refugee admission numbers for the past practice of indirectly generating those numbers in the office of the Attorney General, the Immigration and Naturalization Service (INS), and the State Department through grants of large-scale group parole.<sup>23</sup>

However, even as the 1980 Act went into effect, its ability to regulate refugee flow and provide humane standards for admission in a "coherent and comprehensive" manner was called into question by a unique combination of circumstances. The circumstances included the continued large-scale migration of Indochinese from southeast Asia into the United States, a continued flow of Haitian "boat people" to Southern Florida, and a sudden influx of somewhat similar "boat people" from Cuba. Coming during a time of deep domestic economic and political malaise, these large-scale movements of real and potential refugees have generated unprecedented concern about United States refugee policy and about the efficacy of the 1980 Act.

Such concern stems largely from the sheer magnitude of the number of refugees involved. Although completely reliable statistical comparisons cannot be drawn before 1965, when immigration from the Western Hemisphere was first directly regulated,<sup>24</sup> between 1948 and 1978 total annual legal immigration averaged about 330,000 persons per year, and never exceeded 462,315 persons per year.<sup>25</sup> In 1980, the total number of immigrants approached 800,000.<sup>26</sup> Of these immigrants, at least 375,000 entered as "refugees" or sought refugee status after entering by formally or informally seeking "asylum."<sup>27</sup> The number of those granted or seeking refugee status was not entirely unprecedented: 400,000 "displaced persons" were admitted to the United States over a five-year period after World War II.<sup>28</sup> In the first eighteen years of the Castro regime, nearly 700,000 Cuban refugees entered the United States.<sup>29</sup> Authorized refugee admissions from 1948 through 1979 exceeded 1,700,000;<sup>30</sup> prior to 1965 legislation repealing the "national origins" quota formula, more than one-eighth of the post-World War

22 H. REP. NO. 608, 96th Cong., 1st Sess. 1 (1979).

23 Statistics for actual and authorized parole use through 1979 are contained in S. REP. NO. 256, 96th Cong., 1st Sess. 6 (1979).

24 Prior to passage of the Act of Oct. 3, 1965, 79 Stat. 911, unlimited immigration was permitted from countries of the Western Hemisphere. The Act put in place a prospective quota on Western Hemisphere visas which went into effect on July 1, 1968. The Act of Oct. 20, 1976, Pub. L. No. 94-571, 90 Stat. 2703, had the effect of withdrawing all special treatment for Western Hemisphere applicants, and of creating a "one world" system.

25 CONGRESSIONAL RESEARCH SERVICE, *supra* note 10, at 25, 85.

26 This figure is based on authorized immigration of 280,000 quota aliens, authorized immigration of 234,500 refugees, unauthorized entry of at least 150,000 aliens who may be eligible for statutory asylum under INA § 208 (amended 1980) (to be codified at 8 U.S.C. § 1158), and the entry of perhaps 120,000 aliens who are close relatives of American citizens and hence may be admitted as non-quota immigrants under the provisions of 8 U.S.C. § 1151(b) (1976) (INA § 201(b)).

27 Not all those who may be eligible for asylum have either sought it, or applied for withholding of deportation under INA § 243(h) (amended 1980) (to be codified at 8 U.S.C. § 1153 (h)). See text accompanying notes 46-48 *infra* for a discussion of this point.

28 "Through June 30, 1953, 399,698 persons were admitted to the United States under the Displaced Persons Act of 1948, as amended." E. HARPER & F. AUERBACH, *supra* note 11, at 17.

29 S. REP. NO. 256, 96th Cong., 1st Sess. 6 (1979).

30 The statistic is based on (1) the history of the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, and its extensions, the Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400, and (2) the figure provided by S. REP. NO. 256, 96th Cong., 1st Sess. 6 (1979). *Id.*

II aliens entering the United States were refugees.<sup>31</sup> But the United States' apparent intention to continue admitting at least 200,000 refugee applicants each year,<sup>32</sup> including 14,000 each month from Indochina,<sup>33</sup> is unique. The arrival on the shores of the United States of approximately 130,000 Cubans<sup>34</sup> and 10,000-15,000 Haitians<sup>35</sup> seeking or likely to seek asylum is also unique.<sup>36</sup>

More than any other immigrant group, the Cuban and Haitian "boat people" have tested the regulatory capacity of the 1980 Act and have called into question the utility of its more humane refugee definition. Concern about both these issues has become more acute due to the uncertain status of these aliens and the special difficulties they pose for host communities. Because the Cuban and Haitian boat people apply for refuge only after disembarking in the United States, they fit squarely within new statutory provisions governing the grant of "asylum." Although the language of the 1980 Act is not free of ambiguity, Congress clearly intended that *any* individual eligible for the protection of article 33 of the 1951 Convention Relating to the Status of Refugees<sup>37</sup> be eligible for asylum in the United States under INA section 208.<sup>38</sup> Asylum is thus a right or privilege personal to every applicant "physically present in the United States or at a land border,"<sup>39</sup> provided he or she meet the statutory definition of refugee.<sup>40</sup> No limit is placed on the admission of "asylees" under the Act, although a limit is

31 See Tables at 111 CONG. REC. 24771 (1965). More than half of all immigrants entering the United States during this period came outside the national origins quota system. *Id.* at 24772 (remarks of Sen. Ellender).

32 Under the allocation report submitted to Congress in April, 1980, the number of refugees to be admitted under INA § 207 (amended) (to be codified at 8 U.S.C. § 1157) for fiscal year 1980 was 234,500. 126 CONG. REC. S3961 (daily ed. Apr. 21, 1980). Allocation figures for fiscal year 1981, as reported in September, 1980, were 217,000. 126 CONG. REC. S12988 (daily ed. Sept. 19, 1980).

33 See note 32 *supra*.

34 This was the figure recited on December 5, 1980 by then-Ambassador Victor H. Palmieri, the U.S. Coordinator for Refugee Affairs, at the Conference on World Hunger and Refugees held at the Institute of Politics and Government, University of Southern California.

35 Ambassador Palmieri indicated that over 11,000 Haitians had arrived. See note 35 *supra*. The number may now be higher.

36 The INS's inability to process all applicants for asylum when they arrived in the United States created a backlog of cases which may take a year to clear. Processing of asylum claims by Haitians in the Southern District of Florida is enjoined pending adoption of new INS procedures by Judge King's decision in Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980). Since the special status of "Cuban/Haitian entrant" was established on June 20, 1980 (and renewed on Dec. 29, 1980), many Cubans eligible for that status have not reported back to the INS for asylum processing.

37 See note 3 *supra*.

38 According to the Conference Report, the asylum and withholding of deportation provisions adopted

provided for withholding deportation of aliens to countries where they would face persecution, unless their deportation would be permitted under the U.N. Convention and Protocol Relating to the Status of Refugees.

The House amendment provided a similar withholding procedure unless any of four specific conditions (those set forth in the aforementioned international agreements) were met.

The Conference substitute adopts the House provision with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol. The Conferees direct the Attorney General to establish a new uniform asylum procedure under the provisions of this legislation.

H.R. REP. NO. 96-781, 96th Cong., 2d Sess. 20 (1980).

39 INA § 208(a) (amended 1980) (to be codified at 8 U.S.C. § 1158(a)).

40 The definition for refugee provided in INA § 101(a)(42) (amended 1980) (to be codified at 8 U.S.C. § 1101(a)(42)) is applicable to the admission of statutory refugees under both INA §§ 207 and 208 (amended 1980) (to be codified at 8 U.S.C. § 1157, 1158). However, a somewhat different "refugee" definition is implied in INA § 243(h) (amended 1980) (to be codified at 8 U.S.C. § 1253(h)). See text accompanying notes 69-82 *infra*.

placed on the number of asylees permitted to adjust their status to that of "permanent resident" in any given year.<sup>41</sup> In other words, although indirect control may be exerted in processing individual applications, no direct means of controlling asylee flow exists. Procedures for processing asylee applications are currently in place,<sup>42</sup> but have not proved adequate to handle the large number of individuals already claiming, or likely to claim, asylum. Also, the procedures have proved inadequate or inequitable in substantively determining who is or is not a refugee. Difficulties in implementing the law's asylum provisions led the Carter administration to bypass them, at least temporarily, by creating a special "Cuban/Haitian entrant" designation.<sup>43</sup> This designation gives Cubans and Haitians who arrived in the United States before June 20, 1980<sup>44</sup> leave to remain in the country until July 15, 1981.<sup>45</sup> Most Cubans and Haitians have not yet filed their asylum applications,<sup>46</sup> or their applications are still pending.<sup>47</sup> Thus, most have not yet had the refugee definition applied to determine their eligibility to remain. Measures have been introduced in Congress which would grant the Cubans and Haitians permanent residence without ever being subjected to application of the refugee definition.<sup>48</sup>

Such *ad hoc* processing, so far removed from the "coherent and comprehensive" objectives of Congress, has engendered a widespread belief that the United States has no refugee policy, that refugee admissions are completely out of control, and that Congress lacks effective means of regulating administrative discretion. This belief has been intensified by the relationship refugee admissions bears to overall immigration and by growing public concern over large numbers of "illegal" or "undocumented" aliens entering the United States and its weakened job market.<sup>49</sup> Tensions between the new arrivals and other groups in society have arisen in a number of places.<sup>50</sup> These tensions have been aggravated by growing competition over limited social service resources. Until October 10,

41 INA § 209(b) (amended 1980) (to be codified at 8 U.S.C. § 1159(b)) specifies:

Not more than five thousand of the refugee admissions authorized under section 207(a) in any fiscal year may be made available by the Attorney General, in the Attorney General's discretion and under such regulations as the Attorney General may prescribe, to adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum

42 See 8 C.F.R. § 208.1-.15 (1981). Such regulations are mandated by § 204(d)(2) of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 109.

43 Announcement of Ambassador Victor H. Palmieri, U.S. Coordinator of Refugee Affairs (June 20, 1980).

44 *Id.*

45 See 2 REFUGEE REPORTS, Jan. 9, 1981, at 3 (Am. Pub. Welfare Ass'n). The parole extension applies to Cubans and Haitians who arrived to October 10, 1980. The parole of June 20, 1980 applied only to those who arrived prior to the date of the parole.

46 See note 36 *supra*.

47 *Id.*

48 On August 5, 1980, S. 3013 was introduced at President Carter's behest. This bill would have permitted "Cuban/Haitian entrants," at the Attorney General's discretion, to adjust their status after two years of physical presence in the United States. Senator Edward Kennedy introduced a substitute measure (Amendment No. 1962) which would have had substantially the same effect. 126 CONG. REC. S12825-829 (daily ed. Aug. 5, 1980).

49 The basis of this concern is ably presented in Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the United States*, 59 FOREIGN AFFAIRS 21-59 (Fall 1980).

50 Tensions in Miami, Florida and Fort Chaffee, Arkansas have received extensive media coverage. Each of the major television networks devoted segments of their nightly news programs to the disturbances at Fort Chaffee. Stories in *Time* and *Newsweek*, initially favorable to asylum-seeking Cubans on their "voyage to freedom" (see, e.g., *Sea Lift from Cuba to Key West*, NEWSWEEK, May 5, 1980, at 59), laid increasing emphasis on the "chaos created by the sudden influx" (*Open Heart, Open Arms*, TIME, May 19, 1980, at

1980, when special authorizing legislation was passed, federal reimbursement to states for aid extended to "Cuban/Haitian entrants" was entirely *ad hoc* and more limited than the reimbursement allowed under the 1980 Act.<sup>51</sup>

Sheer numbers of refugees, an asylum system overloaded by "boat people" and an economically hardpressed citizenry displaying increasingly "nativist" attitudes all spell serious trouble for the 1980 Act. Not only is its implementation hampered; its continued political acceptability is seriously threatened. Yet the Act marks the nation's first attempt to deal systematically with an immense international problem,<sup>52</sup> and brings domestic refugee admission standards into line with those prevailing in most Western democracies since 1951<sup>53</sup> and binding on the United States under international law since 1968.<sup>54</sup> By emphasizing humanitarian rather than political criteria for admission, the 1980 Act has the potential to focus the nation's generosity on those fearful of imprisonment, torture, or execution abroad. However, such potential can be realized only if the Act can be made to work. Answering the three questions posed at the beginning of this article will go a long way toward determining whether the 1980 Act can be made to work.

## II. Controlling Asylee Admission

### A. Statutory Provisions and International Obligations

Individuals seeking asylum (asylees) have available to them several distinct, but not entirely separate, options. They may seek statutory asylum under INA section 208, seek statutory withholding of deportation under INA section 243(h),<sup>55</sup> or appeal to the treaty obligations the United States has assumed under the 1967 Protocol Relating to the Status of Refugees.<sup>56</sup>

14), "the rapidly growing backlash" (*The Cuban Tide Is A Flood*, NEWSWEEK, May 19, 1980, at 29), and "[r]efugees on the rampage" (*Impatient for Freedom*, TIME, June 16, 1980, at 29).

Tensions involving Indochinese refugees have been less severe, and less widely reported. Antagonism in Denver between Vietnamese and Hispanics in 1979 was given some network coverage. More recent tension between the same groups in Los Angeles has gone largely unreported.

51 The President shall exercise authorities with respect to Cuban and Haitian entrants which are identical to the authorities which are exercised under [INA §§ 411-414 (amended 1980) (to be codified at 8 U.S.C. §§ 1522-1524)] . . . . The authorizations provided [by INA § 414 (amended 1980) (appropriations necessary for provision of initial resettlement assistance, cash and medical assistance, and child welfare services)] . . . shall be available to carry out this section without regard to the dollar limitation contained in [INA § 414(a)(2) (amended 1980)]

Refugee Education Assistance Act of 1980 § 501(a)(1), Pub. L. No. 96-422, 94 Stat. 1799, 1809. Before this authorization was issued, all payments made to cover the expenses of Cuban and Haitian entrants were *ad hoc* and made under a broad interpretation of presidential authority. See Presidential Determination Nos. 80-16, 80-18, 80-24, 45 Fed. Reg. 28079, 29787, 62007 (1980).

52 There are "13-16 million officially designated refugees" in the world. Teitelbaum, *supra* note 49, at 44. Experts at a conference on the "Transactional Legal Problems of Refugees," held at the University of Michigan on January 30-31, 1981, agreed that the unofficial number is considerably higher.

53 Signatories of the 1951 Convention, *supra* note 3, included, *inter alia*, Belgium, Denmark, the Federal Republic of Germany, France, Greece, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, and the United Kingdom.

54 See note 3 *supra*.

55 The 1980 revisions of INA § 243(h) (to be codified at 8 U.S.C. § 1253(h)), by adopting language qualifying the circumstances under which the Attorney General may "deport or return" (emphasis added) an alien, has made the withholding provision applicable to excludées as well as deportées. This change is reflected in the new regulations. See 8 C.F.R. §§ 208.3(b), 208.10(f) (1981) (asylum claims synonymous or not synonymous with claims requesting withholding of "exclusion or deportation").

56 Under prior regulations, the right of individual asylum seekers to assert rights set forth in articles 32

INA section 208(a)<sup>57</sup> vests authority to grant asylum in the Attorney General. By regulation, the authority to grant asylum is vested in the district director of the INS, an immigration judge, or both. In each instance, however, the Bureau of Human Rights and Humanitarian Affairs (B.H.R.H.A.) of the State Department is afforded the right to render an "advisory opinion."<sup>58</sup> The regulations provide for an initial hearing before the district director<sup>59</sup> if exclusion or deportation hearings have not been initiated.<sup>60</sup> Claimants at any port of entry, including those at land borders, may appear before the district director rather than receive an immediate exclusion hearing. Extension of the pre-exclusion hearing right to all applicants at ports of entry signals a significant departure from prior law.<sup>61</sup> Extension of such a right also accords with Congress's intent that uniform procedures be established permitting "all asylum applicants an opportunity to have their claims considered outside a deportation and/or exclusion proceeding, provided the order to show cause has not been issued."<sup>62</sup> Claimants already involved in exclusion or deportation proceedings may still raise their asylum claims in exclusion or deportation hearings before an immigration judge.<sup>63</sup>

Technically distinct from the statutory asylum provisions are provisions granting "withholding of deportation"—or withholding of exclusion in the case of aliens deemed to be "at the gates" rather than physically present in the United States.<sup>64</sup> As under earlier regulations, an application for withholding of exclusion or deportation under INA section 243(h) is treated as a request for asylum, and must be brought during the exclusion or deportation hearing.<sup>65</sup> Any person failing to raise an asylum claim during the hearing may have the hearing reopened to consider the asylum claim only if she can "reasonably explain the failure to request asylum prior to the completion of [the original hearing]."<sup>66</sup> As under earlier regulations, the applicant's claim will be evaluated pursuant to advisory opinions rendered by B.H.R.H.A.<sup>67</sup> However, under the new regulations, the district director is denied authority to rule on claims "clearly meritorious or clearly lacking in substance" without first requesting B.H.R.H.A. advisory opinion.<sup>68</sup>

Asylum applicants and applicants for withholding of deportation and exclusion must demonstrate they are in fact "refugees." INA section 101(a)(42)(A) defines a "refugee" as

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and 33 of the 1951 Convention, *supra* note 3, as applicable through accession to the 1967 Protocol, *supra* note 3, was set forth explicitly. See 8 C.F.R. §§ 108.2, .3 (1979) (withdrawn).

57 "The Attorney General shall establish a procedure . . . to apply for asylum, and the [applicant] alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such an alien is a refugee within the meaning of section 101(a)(42)(A)." INA § 208(a) (amended 1980) (to be codified at 8 U.S.C. § 1158).

58 8 C.F.R. § 208.1-.15 (1981).

59 In actual practice, all such interviews are conducted by designated agents of the district director, who vary from region to region.

60 8 C.F.R. § 208.3 (1981).

61 *Cf.* 8 C.F.R. § 108.1 (1979) (no pre-exclusion hearing right).

62 125 CONG. REC. S12008 (daily ed. Sept. 6, 1979) (remarks of Sen. Edward Kennedy).

63 8 C.F.R. § 208.3, .10 (1981).

64 See *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980).

65 8 C.F.R. § 208.3(b), .10 (1981).

66 8 C.F.R. § 208.11 (1981).

67 8 C.F.R. § 208.7 (1981).

68 Compare 8 C.F.R. § 208.7 (1981) with 8 C.F.R. § 108.1 (1979).



any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

Section 101(a)(42)(B) includes within the refugee definition certain persons fearful of persecution still within their country of origin.<sup>69</sup> The section 101(a)(42) definition applies directly to those seeking statutory asylum. INA section 243(h), however, also defines "refugee" to the extent withholding is available only if "the Attorney General determines that [an applicant's] life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>70</sup> Despite slight differences between INA sections 101(a)(42) and 243(h), and despite pre-1980 case law distinguishing withholding of deportation from asylum,<sup>71</sup> Congress clearly intended that no substantive distinction be made under the 1980 Act in determining eligibility for either.

The interchangeability of asylum and withholding of deportation results largely from the fact that the present asylum section was designed, and the present withholding section was revised, to meet the obligations imposed by the United Nations Convention and Protocol Relating to the status of Refugees.<sup>72</sup> As modified by the Protocol, the Convention contains a refugee definition substantially identical to the definition in INA section 101(a)(42)(A).<sup>73</sup> Although it

69 INA § 101(a)(42)(B) (amended 1980) (to be codified at 8 U.S.C. § 1101(a)(42)(B)) includes within its refugee definition:

[I]n such special circumstances as the President after appropriate consultation . . . may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or has a well-founded fear of persecution [for the reasons enumerated in § 101(a)(42)(A)].

70 8 U.S.C. § 1253(h) (Supp. 1978).

71 See, e.g., *Fleurinor v. INS*, 545 F.2d 129, 134-35 (5th Cir. 1978):

Deportable aliens who seek to remain in the country have at least two legal options available to them. First, they may apply for asylum . . . .

The second option is a petition for withholding a deportation under § 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h). A "feared persecution" claim under § 243(h) of the Act is entirely different from an "asylum claim," [see *Zamora v. INS*, 534 F.2d 1035, 1059-60 (2d Cir. 1976)] . . . in that the former is part and parcel of the deportation proceeding. An asylum claim, on the other hand, can obviate the need for any deportation proceedings at all.

72 H.R. REP. NO. 781, 96th Cong., 2d Sess. 20 (1980); H.R. REP. NO. 608, 96th Cong., 1st Sess. 9 (1979); S. REP. NO. 256, 96th Cong., 1st Sess. 4 (1979).

73 The 1951 Convention, *supra* note 3, defines a "refugee" as a person who

[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

1951 Convention, *supra* note 3, art. 1, § A(2).

Article I, § 2 of the 1967 Protocol, *supra* note 3, removes all reference to events occurring before

contains no provision for asylum as that term is defined in current United States law,<sup>74</sup> the Convention does state that “[n]o Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>75</sup> This provision is the source of the current language of INA section 242(h)(1). The scope of the Convention provision is limited by a *proviso* which states:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.<sup>76</sup>

Section 243(h)(2) contains a similar, although arguably broader, *proviso*:

[The prohibition against denying withholding of deportation or exclusion] shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.<sup>77</sup>

INA section 208, controlling the grant of statutory asylum, contains no such *proviso*. However, the regulations provide for denial of asylum if the applicant (1) “is not a refugee within the meaning of section 101(1)(42) of the act,”<sup>78</sup> (2) “[h]as been firmly resettled in a foreign country,”<sup>79</sup> (3) is subject to “an outstanding offer of resettlement by a third nation, [provided that] resettlement in a third nation is in the public interest,”<sup>80</sup> or (4) falls within any of the four conditions of the section 243(h) *proviso*.<sup>81</sup>

Because the substantive provisions of the Convention and Protocol are binding on the United States as a treaty obligation,<sup>82</sup> the fact that the Convention *proviso* is clearly more limited than that of the INA section 208 regulations and may be more limited than that of INA section 243(h) is likely to lead to future interpretation problems and litigation. However, the general parallelism of the asylum, withholding of deportation and exclusion, and article 33 non-*refoulement* provisions suggests a legal standard under which any alien who is presently in the

January 1, 1951, making the definition applicable to those fearful of persecution because of events occurring anywhere in the world at any time.

<sup>74</sup> See note 4 *supra*.

<sup>75</sup> 1951 Convention, *supra* note 3, art. 33, § 1 (italics added).

<sup>76</sup> *Id.*, art. 33, § 2.

<sup>77</sup> INA § 243(h)(2) (amended 1980) (to be codified at 8 U.S.C. § 1253(h)(2)).

<sup>78</sup> 8 C.F.R. § 208.8(f)(1)(i) (1981).

<sup>79</sup> 8 C.F.R. § 208.8(f)(1)(ii) (1981).

<sup>80</sup> 8 C.F.R. § 208.8(f)(2)(1981).

<sup>81</sup> 8 C.F.R. § 208.8(f)(1)(iii)-(vi) (1981).

<sup>82</sup> 19 U.S.T. 6223 (1968), T.I.A.S. No. 6577. Prior asylum regulations gave applicants the right to assert their claims under the provisions of articles 32 and 33 of the 1951 Convention, *supra* note 3. See 8 C.F.R. §§ 108.2, .3 (1979).

United States and not a criminal or human rights violator can assert a claim for protection.

### B. *Problems with Implementing the Right of Asylum*

When the 1980 Act was introduced, its proponents believed the number of applicants for asylum in any year would not exceed 5,000.<sup>83</sup> This figure exceeded the number of applicants in any year under the regulations in effect from 1974 to 1979.<sup>84</sup> Provisions in the new Act permitting the Attorney General to adjust asylees' status to that of "permanent resident" incorporated the 5,000 limit.<sup>85</sup> However, in 1980, some 130,000 Cubans, 11,000 Haitians, and perhaps 15,000 Salvadorans, Ethiopians, Iranians, and Nicaraguans either entered the United States as potential asylum seekers or applied for asylum.<sup>86</sup> Given the current unrest in the Caribbean and Latin America, it is likely that for the foreseeable future 45,000-50,000 potential asylees will continue to arrive in the United States each year.<sup>87</sup>

In recognizing international standards for protecting asylum applicants while projecting an unrealistically low level of refugee flow, the 1980 Act failed to establish a bureaucracy capable of handling the applicants or potential applicants arriving in 1980 or in the future. An administrative breakdown has occurred in INS's initial processing of applications and in the State Department's issuance of "advisory opinions." Further breakdowns are likely to occur as rejected applicants seek judicial review of their applications in federal courts.<sup>88</sup>

Some of the breakdowns are legally significant because they cause delays which may impair applicants' due process rights. Six months after their arrival in the United States, most Haitian and Cuban boat people either had not filed asylum applications<sup>89</sup> or had not had their applications processed.<sup>90</sup> Yet unless the agency evaluating individual claims is expanded and made significantly more efficient, the prospects for speeding processing of claims is not bright.<sup>91</sup>

Other breakdowns have raised questions about the fundamental fairness of

83 Interview with an officer in the State Department, Washington, D.C., conducted by the author and Gilbert D. Loescher (May 18, 1980).

84 *Id.* However, in another interview conducted at the State Department by the author and Gilbert D. Loescher (May 18, 1980), it was revealed that over 19,000 asylum claims were pending as of November 30, 1979. That figure suggests that refugee flow increased dramatically after the 1980 Act was reported in 1979.

85 INA § 209(b) (amended 1980) (to be codified at 8 U.S.C. § 1159(c)).

86 For information as to Cubans and Haitians, *see* notes 34-35 *supra* and accompanying text. Statistics about other potential asylum seekers are not precise, but are based upon unpublished INS memoranda and statements made in Washington by State Department and INS personnel to the author and Gilbert D. Loescher.

87 *See* J. Scanlan and G. Loescher, *Mass Asylum and American Foreign Policy* (1981) (unpublished).

88 The asylum provisions of the 1980 Act have not yet been tested. Successful attacks on the procedures employed under prior law have halted all processing of Haitian asylum claims in the Southern District of Florida. *See* *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980); *Sannon v. United States*, 460 F. Supp. 458 (S.D. Fla. 1978); *Sannon v. United States*, 427 F. Supp. 1270 (S.D. Fla. 1977).

89 Interviews conducted in Miami by the author of INS officials (Aug. 6, 1980). Subsequent communications with attorneys closely involved with the processing of asylum claims suggest that few such claims have actually been heard since August, 1980.

90 *See* notes 88-89 *supra*.

91 Even if claims are resolved, continued incarceration of denied applicants may raise serious legal questions requiring immediate action. A recent district court decision has ruled indefinite incarceration in such circumstances illegal. *See* *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980).

the asylum decisionmaking process. The burden of showing a "well-founded fear of persecution" rests on the individual applicant,<sup>92</sup> although nothing in the law or practice of other asylum granting countries prohibits presumptions supporting a finding of persecution if certain human rights violations are endemic to a nation.<sup>93</sup> Although it is entrusted with the duty of evaluating individual asylum claims,<sup>94</sup> the INS is required to seek an "advisory opinion" from the State Department in every case.<sup>95</sup> Most INS agents' lack of knowledge about human rights conditions abroad and lack of formal training in asylum law<sup>96</sup> raise serious questions about their ability to adequately process asylum applications. In one federal judge's view, the INS's failure to follow its own operating instructions during the 1978 "Haitian Program" resulted in a systematic rejection of all Haitian asylum applications<sup>97</sup> and a systematic denial of all Haitian applicants' due process rights.<sup>98</sup> As a result, all INS operations in Miami involving Haitians were placed under close judicial supervision.<sup>99</sup>

Questions must also be raised about the State Department's practices for somewhat different reasons. Because those in the State Department advising the INS have access to considerable information about human rights conditions abroad, they have at least a general knowledge of patterns of persecution in particular countries. Yet the sheer volume of current applications makes it impossible for the State Department to process claims individually rather than by country.<sup>100</sup> In making broad recommendations based on conditions in particular countries, the State Department tends to emphasize its primary commitment to furthering United States foreign policy objectives and maintaining good relations with allies and trading partners, and thus to minimize humanitarian concerns. This emphasis is particularly strong because in most instances an advisory opinion is not issued until after the applicant's claim has passed through B.H.R.H.A. and been processed by the State Department officer responsible for the particular country or region involved. Thus, in the past asylum has been authorized because of the United States' political differences with the country of refugee origin,

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92 8 C.F.R. § 208.5 (1981).

93 The United Nations' guidelines for evaluating asylum claims clearly provide for the use of presumptive group determinations. See, e.g., OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 13 (1979). See also I A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW, 145-50 (Leyden: 1971).

94 The asylum procedures mandated by § 204(d)(2) of the Refugee Act of 1980, Pub. L. No. 96-218, 94 Stat. 102, 108, are by law established by the Attorney General, under whose authority the INS operates. Despite this fact, refugee admissions have been an interagency concern for a considerable period of time.

95 8 C.F.R. §§ 208.7, .10(b) (1981).

96 Interviews with INS officials by the author in Washington, D.C. (June 5, 1980) and Miami, Florida (Aug. 6, 1980).

97 Record at 138-39, Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980).

98 *Id.* at 139.

99 As a result of the decision in *Sannon*, the INS has been under court order to afford all Haitians applying for asylum in the Southern District of Florida the names of attorneys who will protect their due process rights. After *Sannon* and *Haitian Refugee Center*, neither excludées nor deportees in that district can be summarily expelled from the United States.

100 The presence of one INS officer in B.H.R.H.A. responsible for handling all asylum claims meant that during the peak of the Haitian and Cuban migration, thousands of files sat unopened in the State Department for months. After a cursory review in B.H.R.H.A., they were automatically referred to the relevant regional desks. Even before the onset of the crisis, some 19,000 asylum cases were pending. Interview with State Department officer in Washington, D.C. conducted by the author and Gilbert D. Loescher (May 18, 1980).

even though particular claimants have had no colorable fear of persecution.<sup>101</sup> Likewise, even after passage of the 1980 Act, asylum has been recommended against in blanket fashion because of the State Department's desire not to undermine governments perceived as friendly.<sup>102</sup> Although bad public policy and technically not legal, granting asylum when the facts do not warrant it is not likely to raise practical legal difficulties since neither those granted asylum nor the government agencies involved are likely to pursue the issue in court.<sup>103</sup> Refusing to recommend asylum when the facts do warrant it raises more difficulties, since a disappointed applicant may be able to show either in a federal district<sup>104</sup> or circuit<sup>105</sup> court that a negative State Department recommendation constituted a due process violation.

In *Zamora v. Immigration and Naturalization Service*,<sup>106</sup> the United States Court of Appeals for the Second Circuit reviewed the admissibility of State Department recommendations unfavorable to particular aliens seeking withholding of deportation in INS administrative proceedings. Although it found the appellants deportable on other grounds, the court took sharp issue with the practice of admitting into evidence State Department recommendations purporting to address the "adjudicative facts"<sup>107</sup> upon which an individual claim might turn, while presenting "little or nothing in the way of useful information about conditions in the foreign country."<sup>108</sup> According to the court, such conclusory negative recommendations deprive the appropriate administrative bodies of their adjudicatory role and, "[p]articularly in the light of the difficulties confronting the alien in proving his case, [may increase the] risk that such communications will carry a weight they do not deserve."<sup>109</sup> Recent blanket recommendations that the INS refuse to grant asylum to residents of El Salvador, Iran<sup>110</sup> and, until very recently, Haiti suggest that the State Department still may not be fulfilling its proper function in processing asylum applications.

### C. Parole: An Alternative to Asylum

The difficulties associated with determining the refugee status of large numbers of potential asylum applicants can be temporarily avoided by provisionally admitting aliens who might claim asylum and delaying determination of their

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101 For example, asylum claims by all aliens alleging they feared persecution if they returned to Poland were automatically granted. Interviews with INS officials conducted by Gracia Berg (May 20, 1980).

102 According to a knowledgeable State Department source, no asylum applications by applicants from El Salvador had been approved by the State Department. Interview conducted by Gilbert Loescher (May 19, 1980). As of February 17, 1981, the United States had also refused to grant "extended voluntary departure" to Salvadorans in the country seeking asylum.

103 It is by no means clear that any other potential plaintiff would have the interest in the outcome of such a suit necessary for a court to find standing. *But see* Kleindienst v. Mandel, 408 U.S. 753 (1972) (suit brought by person issuing invitation to alien excluded from the United States).

104 8 U.S.C. § 1105a(b) (1976) (INA § 106(b)) does not permit those subject to exclusion to appeal a negative administrative decision, but does permit an excludee denied asylum a *habeas corpus* hearing to show denial of due process.

105 8 U.S.C. § 1105a(a) (1976) (INA § 106(a)) permits a final administrative denial of withholding of deportation to be appealed to the United States Court of Appeals.

106 534 F.2d 1055 (2d. Cir. 1976).

107 *Id.* at 1063, citing K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 at 413 (1958).

108 *Id.*

109 *Id.*

110 Interviews with INS and State Department officials conducted by the author and Gilbert D. Loescher (May 18-19 and June 5, 1980).

claims. Between April and June of 1980, when the majority of the Cuban boat people arrived in Florida, the INS could not possibly determine which among those arriving had been subjected to, or were fearful of, persecution in Cuba. Even had the State Department or the INS intended to rubber-stamp automatic denials of asylum for Cuban applicants, litigation then pending in the Southern District of Florida involving Haitians rendered it extremely likely that mass denials would be appealed to the courts.<sup>111</sup> Immediate resolution of new and pending Haitian claims was impractical for much the same reason, although evidence suggests the government desired to deny the Haitian claims routinely.<sup>112</sup> For political reasons, President Carter did not choose to classify the new Cuban and Haitian arrivals as statutory refugees under INA section 207(b).<sup>113</sup> Lacking any other means of affording them a regular status, the President initially did nothing. But on June 20, 1980, through the office of Ambassador Victor H. Palmieri, the United States Coordinator for Refugee Affairs, President Carter issued a declaration establishing the new status of "Cuban/Haitian entrant."<sup>114</sup> That status, due to last six months<sup>115</sup> but later extended six additional months,<sup>116</sup> resembles administrative parole, under which over one million refugees were admitted to the United States from 1956 to 1979.<sup>117</sup>

Parole is an administrative device permitting aliens conditional entry while their ultimate legal status is determined.<sup>118</sup> When used at the Attorney General's discretion to permit individuals who are not refugees to remain in the United States and at liberty pending resolution of a temporary and unexpected situation whereby the individuals are in the United States without a visa,<sup>119</sup> parole poses few legal difficulties. However, when used to afford temporary residence to large numbers of aliens possibly eligible to apply for asylum or able to seek statutory refugee status by applying for it from abroad, parole may violate both the spirit and the letter of the 1980 Act. Clearly, a violation exists if the government does not deem the parole granted to be temporary, but instead uses it as a vehicle for admitting potential asylum applicants as eventual permanent residents without the necessity of determining the validity of their individual fear of persecution. Calling parole a "special status" or transferring authority to grant parole to someone other than the Attorney General—such as the Coordinator for Refugee Affairs—will not avoid the legal difficulties associated with its improper use.

The legal difficulties associated with parole's improper use stem from a dis-

111 See *Haitian Refugee v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980) for a discussion of the procedural devices available to obtain judicial review of arbitrary INS action. See also *Zamora v. INS*, 534 F.2d 1055 (2d Cir. 1976).

112 As recently as April, 1980, the official position of the State Department was that *all* Haitians entering the United States came as "economic migrants," rather than "political refugees." See 126 CONG. REC. S3961 (daily ed. Apr. 21, 1980) (report of the U.S. Coordinator of Refugee Affairs to Congress). In January, 1980, the United States refused to accept as refugees a number of Haitian journalists expelled from Haiti for clearly political reasons.

113 Such a course had been recommended by Senator Edward Kennedy in a May 20, 1980 letter to President Carter, reprinted in 126 CONG. REC. S6436-37 (daily ed. June 26, 1980).

114 Announcement of Ambassador Victor H. Palmieri, U.S. Coordinator of Refugee Affairs (June 20, 1980).

115 *Id.*

116 See note 36 *supra*.

117 1,027,407 aliens had been paroled into the United States as refugees as of May 31, 1979—an average of 44,670 per year. S. REP. NO. 256, 96th Cong., 1st Sess. (1979).

118 *Leng Ma v. Barber*, 357 U.S. 185, 187 (1957).

119 E. HARPER & F. AUERBACH, *IMMIGRATION LAWS OF THE UNITED STATES* 505 (3d ed. 1975).

pute between the legislative and executive branches of government dating back to the early 1960's. The dispute has assumed a new legal dimension since the passage of the 1980 Act. The Attorney General's parole power was not originally designed to accommodate refugee flow.<sup>120</sup> But prior to the Act of October 3, 1965,<sup>121</sup> a restrictive national origins quota system was in effect under the INA which severely limited the immigrant slots available to those applying from most countries,<sup>122</sup> and which made no special provisions for refugees. To admit Hungarians in the 1950's and Cubans in the early 1960's, the Eisenhower, Kennedy, and Johnson administrations each employed parole to evade the strictures of the INA. Congress was aware of the practice, and on a number of occasions registered its tacit approval, either by passing subsequent legislation adjusting parolees' status to that of permanent resident<sup>123</sup> or by authorizing the resettlement of individuals whom the United Nations determined to be refugees and entering the United States as parolees.<sup>124</sup> Yet congressional spokesmen instrumental in drafting the INA registered concern that parole was being used in a manner not intended by Congress—that it had become a vehicle for large-scale admissions not otherwise authorized by statute.<sup>125</sup>

Congress abolished the national origins quota system in 1965. The subsequent formula established an overall quota for Eastern Hemisphere admissions,<sup>126</sup> permitted up to 20,000 annual admissions from any country in the Eastern Hemisphere,<sup>127</sup> and, for the first time, set aside a specific percentage of the hemispheric total for individuals meeting an implied refugee definition.<sup>128</sup> Speaking on the floor of Congress, Senator Edward Kennedy, the bill's floor manager, indicated that the new refugee provision (the "seventh preference")<sup>129</sup> was meant to be exclusive and that refugee admission figures would not be further inflated through the use of parole.<sup>130</sup> These sentiments were echoed in the House Report.<sup>131</sup> Reflecting these concerns, the statute as enacted repealed ear-

120 *Id.* at 504-10.

121 8 U.S.C. § 1151 (1976).

122 Prior to amendment, INA § 201(a) provided that for any "quota area," immigration be restricted to one-sixth of one percent of the number of inhabitants from that area in the continental United States in 1920. 66 Stat. 163 (1952). The quota was less generous for those from the "Asia-Pacific Triangle." Each quota area was entitled to a minimum of 100 allotted slots. *Id.*

123 Act of Aug. 21, 1958, Pub. L. No. 85-700, 72 Stat. 694 (adjustment of status for Hungarians); Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (adjustment of status for Cubans); Act of Oct. 28, 1977, Pub. L. No. 95-145, 91 Stat. 1233 and Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907 (adjustment of status for Indochinese).

124 In 1960, the United States agreed to accept one-quarter of the refugees still without permanent asylum in Europe. Act of July 14, 1960, 74 Stat. 504 ("Fair Share Refugee Act"). *See also* Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121 (repealed by Act of Oct. 3, 1965).

125 *See, e.g., Hearings on H.J. Res. 397 before Subcomm. No. 1 of the House Judiciary Comm., 86th Cong., 2d Sess. 45 (1960)* (remarks of Rep. Feighan) *quoted in* E. HARPER & F. AUERBACH, *supra* note 11, at 505.

126 Act of Oct. 3, 1965, Pub. L. No. 89-236, § 1, 79 Stat. 911.

127 *Id.* § 2, 79 Stat. 911, 911-12.

128 INA § 207(a)(3) (repealed) was available to those who had departed a "communist dominated" area of the "general area of the Middle East" because of "persecution or fear of persecution on account of race, religion, or political opinion." *Id.*, 79 Stat. 913.

129 INA § 203(a) originally contained six preferences allocating percentages of the annual immigration limit on a priority basis to aliens related to United States citizens and residents or possessing certain job skills. A seventh preference, INA § 203(a)(7) (repealed), allotted six percent of the annual limit to refugees, who were, however, only admissible as conditional entrants.

130 *See, e.g., 111 CONG. REC.* 24227 (1965) (statement of Sen. Edward Kennedy).

131 H. REP. NO. 745, 89th Cong., 1st Sess. 15 (1965), *cited in* E. HARPER & F. AUERBACH, *supra* note 11, at 507.

lier legislation obligating the United States to "parole in" certain aliens the United Nations deemed to be refugees,<sup>132</sup> although it retained the language of the parole provision itself.

Even as the 1965 legislation was being signed, however, a new influx of Cubans was beginning. Many Cubans were not eligible to become immigrants under the new restrictions placed on Western Hemisphere immigration.<sup>133</sup> The Johnson administration responded by "paroling in" over 168,000 Cubans and by seeking special legislation permitting these parolees to adjust their status to that of permanent resident.<sup>134</sup> Congress obliged.<sup>135</sup> Congress also obliged in 1976, 1978, and 1979 when similar requests were made to permit other Western Hemisphere and Indochinese refugees to adjust their status.<sup>136</sup> Yet as the handling of the Indochinese migration and the smaller migrations of Ugandans and Soviet Jews all illustrate, congressional acceptance of parole as an admissions device was tempered with concern that the President could unilaterally employ parole to evade all INA limitations regardless of prevailing political sentiment. In handling the parole decisions involving all these groups, the President and ranking members of the House and Senate judiciary committees consulted informally, and Congress approved the parole decisions actually reached.<sup>137</sup>

It is in the context of this history that the parole provisions of the 1980 Act must be analyzed, and their relevance to the Cuban/Haitian entrant designation evaluated. Despite some of the liberal features of the 1965 Act, the seventh preference—which permitted only 10,200 annual refugee admissions when first enacted and only 17,400 when it went out of existence<sup>138</sup>—could not handle the large numbers of refugees seeking admission and having some claim on United States generosity. The 20,000 persons per country ceiling on annual admissions constituted another statutory barrier to a more generous national refugee policy reflecting the will of the President, the Congress and (to a limited extent) the American people.<sup>139</sup> Parole, adequately overseen by Congress and followed by adjustment of status legislation, was perceived as a necessary but legally suspect method of implementing a generous refugee policy.

The 1980 Act was designed to provide more direct means of meeting policy

132 *Id.*

133 Those restrictions did not go into effect until June 30, 1968. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 21, 79 Stat. 911, 920-21.

134 These Cubans were part of a larger flow which had reached nearly 700,000 by mid-1979. See J. Scanlan & G. Loescher, Admission of Refugees and Asylees under the Law CC-24; CC-26-29 (Report to the Select Commission on Immigration and Refugee Policy, 1980) (unpublished).

135 Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1611 (adjustment of status for Cubans).

136 See note 123, *supra*.

137 E. HARPER & F. AUERBACH, *supra* note 11, at 508-09. The account given there is supported by recent interviews with State Department officials conducted by the author and Gilbert D. Loescher.

138 Initially, the seventh preference applied only to Eastern Hemisphere refugees. The preference system was not in effect with respect to Western Hemisphere applicants. The Act of October 20, 1976, Pub. L. No. 94-571, 90 Stat. 2703, applied both preferences and country limitations to Western Hemisphere applicants. The Western Hemisphere ceiling, in effect since 1968, was not used prior to 1976 in determining the seventh preference "quota."

139 The most extensive attitudinal survey on refugee admission prior to the passage of the 1980 Act was a Roper poll conducted in September, 1979. That poll indicated substantial support for *lowering* (46% approval), rather than *raising* (12% approval), the number of Indochinese refugees admitted, primarily on the grounds that refugees were "too great an economic burden" (37% agreement) and that the "needy in our country" should be helped first (45% agreement). See 125 CONG. REC. S12905 (daily ed. Sept. 18, 1979).



objectives and to close the loophole under which large numbers of people had been admitted to the United States without regard to the strict provisions of the law. By redefining "refugee" to conform to international standards, the 1980 Act eliminated questions about the admissibility of persons subject to persecution in countries not in the Middle East or under communist domination. By allowing an entirely separate, flexible annual quota for refugees applying from abroad, the 1980 Act permits large-scale refugee admissions if they are deemed to be in the national interest. By establishing a method for revising the annual refugee quota, the 1980 Act established a means of responding quickly to "emergency situations."<sup>140</sup> And by requiring that all refugee quota numbers be subject to congressional review through a statutorily-defined "consultation" process<sup>141</sup> before being allocated among refugee "sender" nations,<sup>142</sup> the 1980 Act formalized congressional input that had been customary, but not required, under the former parole regime.

The 1980 Act thus eliminated the reasons for using parole for long-term entry of large refugee groups. As the Senate Report states, one of the 1980 Act's purposes was to replace "*ad hoc*" decisions made "through the use of the 'parole authority' in" the INA with decisions based on new statutory procedures.<sup>143</sup> Toward that end, Congress added to INA section 212(d)(5) a new *proviso*, which states:

The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207.<sup>144</sup>

As the reference to admissibility "under section 207"—which controls ordinary applications from abroad—indicates, it was never contemplated by the drafters of this *proviso* that parole would be used to admit applicants already in the country. Since the new statutory language was designed to abolish unregulated large-scale refugee admissions, and since prior to April, 1980 the only examples of such admissions involved the parole of aliens making application from abroad, the failure of section 212(d)(5) to address directly the situation of asylum applicants does not mean that its limitations do not apply to entrants technically admissible as asylees under section 208. Asylum and withholding of deportation questions have always been processed on an individual basis, although the standards for granting either status have frequently been less particular. Thus, the "particular alien" requirement imposed by the 1980 Act is *less* onerous in the context of ordinary refugee processing, since ordinary refugees applying for admission from abroad usually belong to groups which the United States already presumes to consist entirely of refugees. Refugees applying from abroad are thus scrutinized less intensively regarding their personal grounds for seeking refuge.<sup>145</sup>

<sup>140</sup> See INA § 207(b) (amended 1980) (to be codified at 8 U.S.C. § 1157(b)).

<sup>141</sup> See *id.* § 207(d), (e).

<sup>142</sup> Technically, the President's decision to admit up to 50,000 refugees per year is not subject to the consultation requirement under current law. But the allocation of these slots to refugees from particular countries is. Compare *id.* § 207(a)(1) with *id.* § 207(a)(3).

<sup>143</sup> S. REP. NO. 256 96th Cong., 1st Sess. 1 (1979).

<sup>144</sup> INA § 212(d)(5)(B) (amended 1980) (to be codified at 8 U.S.C. § 1182(d)(5)(B)).

<sup>145</sup> Applicants in a third country seeking refuge are required to fill out an I-590 form and to submit to an interview during which the basis of their assertion of "well-founded fear" is examined. See 8 C.F.R.

Because INA section 212(d)(5)(B) refers only to "refugee" aliens and is not intended to affect the Attorney General's authority<sup>146</sup> to parole aliens not deemed to be refugees,<sup>147</sup> potential asylum applicants whose claims have not been evaluated and whose refugee status has not been determined are not technically covered by its provisions. This technical position assumes, however, that the President has unlimited statutory power to parole large numbers of aliens, even if their basis for entry is fear of persecution, so long as the basis of this fear is not examined. Such a view is untenable in light of the 1980 Act's clear intent to bring every applicant—except in rare, individually determined instances<sup>148</sup>—within the scope of section 207's screening and allocation procedures or section 208's asylum provisions.

Unfortunately, the INA does not contain any statutorily defined status for asylum applicants who are physically present in the United States while their claims are processed. Serious differences about policy stand in the way of defining that status. Some advocate that such aliens should be granted work authorization, full social service benefits, and the liberty associated with parole.<sup>149</sup> Others urge the adoption of a system now being tried in West Germany, whereby all asylum applicants are detained pending determination of their claims.<sup>150</sup> Lacking any defined statutory status, asylum applicants still in process and potential asylum applicants who have not yet filed their claims create significant budgetary and social service difficulties for the communities and states into which they migrate. Representatives of such communities and states turn to the federal government for help.<sup>151</sup> The Carter administration's decision to create the "Cuban/Haitian entrant" status can be traced to this type of political pressure, and to the need to stabilize the situation presented by more than 140,000 Cubans and Haitians occupying a legal limbo. Given the tremendous burdens on the INS during the spring and summer of 1980, it is understandable and perhaps inevitable that the functional equivalent of parole should have been granted, despite its apparent illegality to the Haitian and Cuban boat people on a temporary basis. Congressional acquiescence in the grant<sup>152</sup> suggests no better

§ 207.1-7 (1981). The form requires little information. The result of the interview is usually predictable, since such applicants belong to groups already identified as being composed of refugees. The focus of screening is on such factors as whether the applicant has close relatives in the United States or was formerly employed by the United States government, which will determine the refugee's place on rank-order waiting lists. Asylum screening, which requires submission of an I-589 form and may also require an appearance before an immigration judge (*see* 8 C.F.R. § 208.1-15 (1981)), is considerably more rigorous in its inquiry into the basis of the asserted fear. In contrast with the I-590 form, the I-589 form contains fairly detailed questions.

146 INA § 212(d)(5) (amended 1980) (to be codified at 8 U.S.C. § 1182(d)(5)).

147 H.R. REP. NO. 781, 96th Cong., 2d Sess. 20 (1980).

148 *See* Conference Report, *supra* note 8, at 20.

149 Interview with Ron Scheinman, former coordinator of Refugee Research, Select Commission on Immigration and Refugee Policies, conducted by the author (June 5, 1980).

150 Interview with Klaus Feldman, Director of Assistance, United Nations High Commissioner for Refugees, conducted by the author (Sept. 13, 1980).

151 For example, lack of comprehensive federal aid to Dade County, Florida when the Cubans began arriving in April, 1980 led to intensive pressure to have those arriving classified as refugees for the purpose of aid. This pressure culminated in the passage of the Fascell-Stone Amendment (title V of the Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, 94 Stat. 1799, 1809) authorizing federal aid to Cuban-Haitian entrants on the same terms as statutory refugees. *See* 153 CONG. REC. H10,122 (daily ed. Sept. 30, 1980) (remarks of Rep. Fascell).

152 In the weeks following the June 20, 1980 announcement of Ambassador Palmieri, *supra* note 46, some congressional displeasure was voiced in both Houses, (*see, e.g.*, 126 CONG. REC. E3169 (daily ed. June

alternative was available.

Yet legislation proposed by the Carter administration in the waning days of the 96th Congress,<sup>153</sup> if revived by the Reagan administration, will effectively reinstitutionalize parole as a means of obtaining full immigrant status. The proposed legislation treats "Cuban/Haitian entrants" as if they belonged to earlier generations of refugee-parolees by granting them automatic adjustment to permanent resident status. Granting such status without any required screening will severely undercut the 1980 Act and impede its objective of minimizing the number of aliens choosing the United States as their country of first asylum.

#### D. *Statutory Refuge as an Alternative to Asylum*

Although technically "conditional entrants," refugees admitted under the INA section 207 statutory allocation process are automatically eligible to adjust their status to that of permanent resident after one year of physical presence in the United States.<sup>154</sup> As refugees, they are entitled to all of the benefits provided in title III, part B of the 1980 Act,<sup>155</sup> assuming their state of residence has adopted a qualified plan.<sup>156</sup>

In the usual case, such persons' status as refugees will have been determined before they enter the United States. However, there is no absolute statutory bar to granting an applicant section 207 status *after* his arrival, since that section does not prohibit the practice and since the basic refugee definition under INA section 101(a)(42)(A) specifies only that the applicant must be outside the country of his "nationality" or, lacking a nationality, the country of his last habitual residence. Taking advantage of this drafting loophole, Senator Edward Kennedy proposed in a letter to President Carter dated May 20, 1980 that those Cubans who had migrated to the United States from Mariel Bay should be treated similarly to those who had migrated from the Peruvian embassy, and should be designated section 207(b) refugees.<sup>157</sup> On June 6, 1980, Senator Kennedy introduced legislation which would have had this effect,<sup>158</sup> and on August 5, 1980, Senator Kennedy introduced a substitute to the bill proposed by the Carter administration which would have granted "Cuban/Haitian entrants" permanent resident status indirectly by designating all holding that status statutory refugees.<sup>159</sup>

For a number of reasons, recharacterizing potential asylum applicants as

24, 1980) (extension of remarks of Rep. McClory)), and in statements to the press (*see, e.g.*, remarks attributed to Representative Chisholm and Senator Huddleston, N.Y. Times, June 21, 1980, at 1, col. 6). Yet the statement of Congressman Fish which described the parole granted as "mak[ing] the best out of a bad situation" was probably more typical. 126 CONG. REC. H5453 (daily ed. June 20, 1980). There was certainly no great outcry in Congress protesting the grant, nor was any attempt made to rescind it. Ongoing informal consultation on Cuban and Haitian admissions had been in effect from the outset of the admissions crisis, primarily through hearings held in the Senate and House Judiciary Committees and through communications with members of the White House staff.

153 S. 3013, 96th Cong., 2d Sess. (1980), which did not become part of the law. The bill was modeled on earlier special adjustment of status legislation. 126 CONG. REC. S10825-24 (daily ed. Aug. 5, 1980).

154 INA § 209(a) (amended 1980) (to be codified at) 8 U.S.C. § 1159(a).

155 Refugee Act of 1980, Pub. L. No. 96-212 § 311(a)(2), 94 Stat. 102 (adding §§ 411-414 to the INA) (to be codified at 8 U.S.C. §§ 1521-1524).

156 *Id.* (adding § 412(a)(6) to the INA) (to be codified at 8 U.S.C. § 1522(a)(6)).

157 *See* note 113 *supra*.

158 *Id.*

159 Amendment No. 1962 to S. 3013, 96th Cong., 2d Sess. (1980), 126 CONG. REC. S10828 (daily ed. Aug. 5, 1980).

either ordinary<sup>160</sup> or "emergency situation"<sup>161</sup> refugees is apparently more attractive than characterizing them as parolees. To be admitted, statutory refugees of either sort must fall within the refugee slots allocated for their country of origin. The President has the authority to create new slots in emergencies, but must consult with Congress before doing so.<sup>162</sup> Admissions are either constrained by a preexisting but flexible numerical limitation, or directly monitored but not controlled by Congress. Granting statutory refugee status to potential asylum applicants does not contravene clear legislative intent as does the grant of long-term parole. Although statutory refugees must be reprocessed to obtain permanent resident status, reprocessing is essentially *pro forma* and ordinarily does not impede the adjustment of particular aliens' status.<sup>163</sup> However, absent special legislation, aliens granted asylum under INA section 208 will have a harder time adjusting status, since such adjustment is within the discretion of the Attorney General and only 5,000 slots per year are available to such adjustment.<sup>164</sup> Finally, every statutory refugee is entitled to all of the benefits provided in title III, part B of the Act, assuming a qualified state plan is in effect.<sup>165</sup>

Despite these attractive features, characterizing potential asylum applicants as statutory refugees has a number of serious drawbacks. First, granting refuge under section 207 presumes some prescreening abroad. Such prescreening involves not only a determination of refugee status, but also a personal inventory of the applicant's relatives in the United States, past associations with the United States, and special humanitarian claims on United States hospitality. Even genuine refugees must wait their turn until the allocation process makes an admissions slot available.<sup>166</sup> Declaring individuals not yet prescreened to be statutory refugees multiplies the chances that individuals not fearful of persecution will be admitted to the United States—certainly a real possibility in the case of many current Cuban and Haitian boat people. Such a process also gives individuals not yet prescreened a decided admissions advantage over those seeking refuge through appropriate channels abroad. Second, the law should encourage orderly refugee flow from holding areas outside the United States, rather than provide an incentive for coming to the United States to seek asylum. The favorable status adjustment privileges afforded statutory refugees will not provide any disincentive to those arriving in the United States as potential asylees if they have reason to believe they may be reclassified as statutory refugees. Third, by granting statutory refuge rather than parole, its administrative equivalent, or some new interim legal status, essentially permanent decisions will be made about potential asylum applicants even though public policy may demand that such decisions be postponed. Parole, at least, can be limited to some set period of time, such as six months, while statutory refuge is forever.

Although there are advantages to involving Congress directly in the admission of large numbers of asylum applicants by using section 207 procedures, these

160 INA § 207(a) (amended 1980) (to be codified at 8 U.S.C. § 1157(a)).

161 INA § 207(b) (amended 1980) (to be codified at 8 U.S.C. § 1157(b)).

162 *Id.*

163 Interview with Harry J. Klajbor, Deputy Assistant Commission, Adjudications, INS, conducted by the author (June 5, 1980).

164 INA § 209(b) (amended 1980) (to be codified at 8 U.S.C. § 1159(b)).

165 INA § 412(a)(6) (amended 1980) (to be codified at 8 U.S.C. § 1522(a)(6)).

166 8 C.F.R. § 207.5 (1981).

advantages lie in greater congressional control of overall refugee numbers rather than in greater congressional ability to curtail the flow of persons seeking asylum. Relating ordinary allocation decisions for applicants seeking refuge from abroad to the probable number of individuals seeking or likely to be granted asylum will generate the best result. Using section 207 to avoid difficult asylum decisions will likely increase the number of those decisions required in the future.

#### E. *Recommendations for Refining the Asylum Process*

Changes in the law cannot overcome the immense political and demographic pressures driving people to the borders of the United States to seek asylum. Nor can changes in the law obviate the need for difficult policy decisions about how to regulate overall refugee flow in a manner consistent with humanitarian, economic, and social goals. Nevertheless, changes suggested by this article's analysis of asylum and its alternatives should make asylum procedures more equitable and workable, clarify the status of those awaiting asylum processing, and insure that the selective nature of asylum is not diluted by administrative expedients that increase rather than diminish the flow of asylum seekers.

1. INA section 212(d)(5)(B) should be amended to indicate explicitly that parole is not available under any circumstances to individuals arriving in the United States and filing asylum claims.

2. A new provision should be added to INA section 208 establishing a temporary status for individuals arriving in the United States and filing asylum claims. This provision should establish a time limit of no more than ninety days for such status, extendable only by direct congressional action. This provision should also specify the degree of freedom, job eligibility, and social service eligibility of in-process asylum applicants. The benefits provided in-process applicants should guarantee that state or local governments will not bear the burden of in-process applicant support. Provision should also be made for temporarily reinstating this status for asylum applicants whose claims have been processed and rejected, but who can not be physically repatriated to their country of origin and will not be accepted by any nonpersecutorial third country.

3. A provision should be added to INA section 208 requiring the President to "inform" Congress at regular intervals of the number of potential asylum seekers physically present in the United States, the number likely to be granted asylum, the number who may not be capable of repatriation, and the number likely to arrive in the near future.

4. Possible disparities in interpreting INA sections 243(h) and 208 should be eliminated by deleting section 243(h)(1) and integrating the exclusionary provisions of section 243(h)(2) into section 208. There is no present need for a separate withholding of deportation or exclusion section when any individual eligible for such withholding will also be eligible for statutory asylum.

5. Specific changes should be made in asylum procedures to permit a more systematic and less political evaluation of applicants' assertions of "well-founded fear of persecution." These changes should include replacement of current State Department "advisory opinions" with file "profiles" of human rights conditions in particular countries as they affect particular groups. To minimize political

factors, such profiles should be generated outside the State Department<sup>167</sup> and should draw upon the input of interested human rights groups. The use of profiles would allow factors common to a number of applicants to be evaluated without generating "individual opinions" based on broad presumptions about conditions abroad and their impact on United States foreign policy. Such profiles would provide the asylum decisionmaker with better access to the "legislative facts" noted in *Zamora*. Because the profiles would produce only general information about conditions abroad and because the right to asylum is an individual one, emphasis should be placed on the fact that the information they provide is "legislative" rather than "adjudicative." This emphasis could be provided by specifically adding to the regulations language providing that asylum is a personal right and that each applicant shall have the right to adduce evidence supporting his asylum claim despite the absence of profile information lending credibility to that claim. No changes in the INA itself would be necessary to modify asylum procedures to this extent.

### III. Controlling Admission of Those Seeking Statutory Refuge

#### A. *Statutory Provisions for Numerical Control*

The 1980 Act created a new and exclusive procedure for admitting refugees applying from outside the United States, and provided for congressional input into admission decisions. Yet INA section 207, which controls such admissions, grants principal decisionmaking power to the President by permitting him to "determine" the number of refugees admitted annually<sup>168</sup> and the allocation of those refugee slots among the refugees of the world.<sup>169</sup> The President may also "specify" which aliens still in their country of origin may be designated refugees.<sup>170</sup> In each instance, the 1980 Act permits the President to act only after the requisite "appropriate consultation" provisions are met.<sup>171</sup> But the 1980 Act provides no statutory recourse if such consultation is merely *pro forma* or entirely absent.

The consultation provisions exist to make admission of aliens claiming refuge from abroad more responsive to the domestic political process. In passing the 1980 Act, Congress sought flexibility, predictability, and executive accountability.<sup>172</sup> By requiring that a baseline admission figure for "normal flow" refugees be set after consultation between the President and Congress prior to the start of the fiscal year,<sup>173</sup> and by permitting revision of that figure to admit "emergency situation" refugees after the start of a fiscal year only after further consulta-

167 The Select Commission on Immigration and Refugee Policy, in its final report, recommended that such profiles be used and that they be generated in the Office of the United States Coordinator for Refugee Affairs. SELECT COMMISSION ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY & THE NATIONAL INTEREST, xxii 169-171 (1981). For a fuller discussion of how such profiles can be generated and used, see Scanlan and Loescher, *supra* note 134, at AB 1-7.

168 INA §§ 207(a)(1), (b) (amended 1980) (to be codified at 8 U.S.C. §§ 1157(a)(1), (b)).

169 INA §§ 207(a)(2), (3) (amended 1980) (to be codified at 8 U.S.C. §§ 1157(a)(2), (3)).

170 INA § 101(a)(42)(B) (amended 1980) (to be codified at 8 U.S.C. § 1101(a)(42)(B)).

171 For a technical exception, see note 16 *supra*.

172 See H.R. REP. NO. 608, 96th Cong., 1st Sess. 1-3 (1979); S. REP. NO. 256, 96th Cong., 1st Sess. 2 (1979).

173 As provided by INA § 207(a) (amended 1980) (to be codified at 8 U.S.C. § 1157(a)).

tion,<sup>174</sup> the 1980 Act establishes a mechanism which promotes all of these goals.

The consultation provisions are set forth in INA sections 207(d) and (e). Section 207(d) requires (1) a report by the President to the Senate and House Judiciary Committees before the start of each fiscal year predicting refugee flow, (2) periodic discussions among members of those committees and the President's designated representatives, (3) a record of the results of such "consultation," to be printed in the Congressional Record, and (4) a hearing "to review the proposed determination . . . unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals."<sup>175</sup> These requirements apply to both "normal flow" and "emergency situation" refugees. Section 207(e) specifies (1) that the discussions with the members of the judiciary committees must be carried on by "Cabinet-level representatives of the President," and (2) that such discussion must review the situation, project its costs, and set forth the basis for belief "that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest." The subsection also requires that the following information be submitted by the President's representative two weeks prior to any discussion "[t]o the extent possible":

- (1) A description of the nature of the refugee situation.
- (2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.
- (3) A description of the proposed plans for . . . [the refugees'] movement and resettlement and the estimated cost of their movement and resettlement.
- (4) An analysis of the anticipated social, economic, and demographic impact of . . . [the refugees'] admission to the United States.
- (5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees.
- (6) An analysis of the impact of the participation of the United States on the foreign policy interests of the United States.
- (7) Such additional information as may be appropriate or requested by such members.<sup>176</sup>

These provisions will provide Congress detailed advance information about refugee flow. They should also alleviate some of the difficulties of continual *ad hoc* refugee decisionmaking and provide an adequate data base for implementing title III, part (B) of the 1980 Act. Although they do not impose congressionally determined refugee allocations on the President or a one House veto of the President's own determinations,<sup>177</sup> the provisions will have the practical effect of constraining the President from making unilateral refugee decisions, provided he does not try to avoid the provisions by using some parole variant.

### B. *Obligations toward Particular Refugees under Domestic and International Law*

Although the United States has agreed to accept certain refugees from time

<sup>174</sup> As provided by INA § 207(b) (amended 1980) (to be codified at 8 U.S.C. 1157(b)).

<sup>175</sup> INA § 207(d)(3) (amended 1980) (to be codified at 8 U.S.C. § 1157(d)(3)).

<sup>176</sup> INA § 207(e) (amended 1980) (to be codified at 8 U.S.C. & 1157(e)).

<sup>177</sup> A one House veto over presidential allocation on determinations was proposed in the version of the Refugee Act introduced as H.R. 2816, 96th Cong., 1st Sess., on March 13, 1979. The final House bill deleted all reference to such a veto.

to time,<sup>178</sup> nothing in current domestic or international law obliges it to admit any refugee applying from outside the United States. To paraphrase an international maxim into language consistent with domestic law, no absolute right of refuge exists.<sup>179</sup> Should the President eliminate all INA section 207 refugee slots, no alien applying for refuge from outside the United States would be admissible. Even if refugee slots were available, no aliens applying from outside the country would have a right to claim one.<sup>180</sup>

Nevertheless, within the established annual admission limits, section 207 does provide loose standards limiting the class entitled to refuge, and thus creates implicit preferences for other applicants. Section 207(a) requires that when consultation is required before a numerical determination is made, the determination must be either "justified by humanitarian concerns" or "otherwise in the national interest."<sup>181</sup> Section 207(a) further requires that in allocating places to persons designated refugees before the start of the fiscal year, a determination must be made that such refugees are "of special humanitarian concern to the United States."<sup>182</sup> Section 207(b), which deals with designations made after the start of the fiscal year, requires that (1) all refugees designated at such a time be involved in "an unforeseen emergency refugee situation,"<sup>183</sup> (2) the President's response to that situation be "justified by grave humanitarian concerns or [be] otherwise in the national interest,"<sup>184</sup> and (3) "the admission to the United States of these refugees cannot be accomplished under [section 207(a)]."<sup>185</sup>

Since section 207 requires that each presidential determination involving one of these conditions precedent be made only "after appropriate consultation," terms such as "justified by humanitarian concerns," "justified by grave humanitarian concerns," "of special humanitarian concern," and "otherwise in the national interest" will in most instances be defined in an exchange of views between the legislative and executive branches. Such definitions will be responsive to a particular set of circumstances and take into account both the persecution element of section 101(a)(42) and the political pressures which favor responding definitively to some instances of persecution and less definitively or not at all to other instances. In enacting section 207, Congress wanted to avoid the strictures which rendered all applicants not from communist dominated countries or from

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178 Act of July 14, 1960, Pub. L. No. 86-648, 74 Stat. 501 ("Fair Share Refugee Act"), authorized refugees under the mandate of the United Nations High Commission for Refugees to enter the United States as parolees. The total number "could not exceed twenty-five percent of the total number of similar refugees resettled since July 1, 1959 in countries other than the United States and included 500 'difficult to resettle' cases." E. HARPER & F. AUERBACH, *supra* note 11, at 31. The Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, § 2, 76 Stat. 121, 124 extended the authority to assist U.N.-designated refugees but did not specifically address the question of their admission.

179 Focusing on the rights of aliens outside a country to enter it in order to flee persecution, and employing the international—as opposed to American—vocabulary, commentators frequently assert that there is no absolute right of asylum. For a discussion of that doctrine and its limits, see G. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 137-42 (1978).

180 A consular officer has unreviewable authority to deny a visa. See 1A C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 3.8(b) (1980). See also *id.* § 2.2(a) (excluded aliens have scant basis on which to contest Congress's exercise of its power to exclude).

181 INA § 207(a)(1) (amended 1980) (to be codified at 8 U.S.C. § 1157(a)(1)).

182 INA § 207(a)(3) (amended 1980) (to be codified at 8 U.S.C. § 1157(a)(3)).

183 INA § 207(b)(1) (amended 1980) (to be codified at 8 U.S.C. § 1157(b)(1)).

184 INA § 207(b)(2) (amended 1980) (to be codified at 8 U.S.C. § 1158(b)(2)).

185 INA § 207(b)(3) (amended 1980) (to be codified at 8 U.S.C. § 1158(b)(3)).



the Middle East *statutorily* ineligible for the seventh preference.<sup>186</sup> Yet rather than commit itself to avoiding political considerations entirely, Congress tempered political considerations with a new humanitarian emphasis.

Thus, the House Report indicated both that the insertion of the word "humanitarian" into the Act was intended "to emphasize that the plight of the refugees themselves, as opposed to national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States"<sup>187</sup> and that the new refugee definition "does not create a new and expanded means of entry, but instead . . . formalizes the policies and the practices that have been followed in recent years."<sup>188</sup> Continued reliance on criteria traditionally employed to determine which refugees ought to be admitted to the United States was among the policies specifically approved by both houses. In glossing the term "special humanitarian concern," the House placed primary emphasis on "the pattern of human rights violation in the country of origin," and less emphasis on such considerations as family, historical, cultural, religious, or treaty ties.<sup>189</sup> However, in glossing the term "special concern," the Senate placed primary emphasis on the historical, cultural, or treaty ties generating that concern, and less emphasis on such considerations as the promotion of family reunion, the response to human rights concerns, and the fulfillment of foreign policy interests.<sup>190</sup> The use of the House language in section 207(a)(3) suggests that the House list of priorities is more authoritative. Yet, although both "special concern" and "special humanitarian concern" were glossed in the Senate and House Reports respectively, neither term was deemed to have a set definition. According to the House Report:

The legislation does not—and cannot—further define this phrase [of special humanitarian concern]. The Committee believes that any attempt to do so would unnecessarily restrict future public policy decisions. The Committee recognizes that determining which refugees are of "special humanitarian concern" to the United States will be a matter to be considered, debated and decided at the time refugee situations develop.<sup>191</sup>

Nearly identical language discussing "of special concern" appears in the Senate Report.<sup>192</sup>

Whether the "concern" that justifies allocating refugee slots to members of particular groups is merely "special," or "special" and "humanitarian," much leeway exists for the President—or for the President and Congress together if "appropriate consultation" exists—in selecting admissible refugees. Despite this leeway, however, only those in fact meeting the refugee definition, that is, having "a well-founded fear of persecution" for any of the reasons specified in section 101(a)(42), are in fact legally admissible.

The statutory language regulating the flow of "emergency situation" refugees suggests that those eligible for admission under section 207(b) must meet a

<sup>186</sup> H. REP. NO. 608, 96th Cong., 1st Sess. 9 (1979).

<sup>187</sup> *Id.* at 13.

<sup>188</sup> *Id.* at 10. See also 125 CONG. REC. S12007 (daily ed. Sept. 6, 1979) (statement of Sen. Edward Kennedy).

<sup>189</sup> H.R. REP. NO. 608, 96th Cong., 1st Sess. 14-15 (1979).

<sup>190</sup> S. REP. NO. 256, 96th Cong., 1st Sess. 6 (1979).

<sup>191</sup> H.R. REP. NO. 608, 96th Cong., 1st Sess. 13 (1979).

<sup>192</sup> S. REP. NO. 256, 96th Cong., 1st Sess. 6 (1979).

stricter test. Referring to its version of that subsection, the House Report indicated:

The Committee Amendment requires that the admission of refugees under the emergency flow provision be justified by "grave humanitarian concerns." This is a stricter standard than that required for the admission of refugees under the normal flow procedures, which must be warranted by "humanitarian concerns." The Committee intends by this stricter standard to limit the emergency admission procedures to situations where the refugees' lives are placed in immediate jeopardy, where their personal safety is threatened or where there is an imminent possibility of loss of freedom.<sup>193</sup>

Yet the version drafted by the Senate and enacted into law may be less restrictive. In the Senate bill, emergency situation refugees are admissible if they are the object of "grave humanitarian concern" *or* if their admission "is otherwise in the national interest."<sup>194</sup> As in the clause governing the determination of ordinary refugee numbers, a disjunctive reference to the "national interest" provides an apparent loophole. In the first instance, the loophole is illusory because allocations of refugee slots still require a finding of "special humanitarian concern."<sup>195</sup> However, in the second instance, the loophole is real: Under a strict reading of the statute, "emergency situation" refugees are admissible if their situation is of "special" rather than "grave humanitarian concern," provided the President deems such a result "in the national interest."<sup>196</sup>

Such a loophole is not necessarily objectionable, however. There does not appear to be any valid reason for making it more difficult for a refugee to obtain admission to the United States merely because a new fiscal year has begun.<sup>197</sup> But the existence of such a loophole does suggest that terms like "grave humanitarian concern" having restrictive connotations may not always significantly restrict or control refugee flow. The distinction between "normal flow" and "emergency situation" refugees thus may be more a matter of semantics than of substance. For particular applicants not in immediate jeopardy, the insubstantiality of the distinction may prove beneficial. Yet for applicants whose lives and personal safety are threatened, in an era when annual allocations are likely to be oversubscribed, the lack of a meaningful priority under the statutory admissions criteria may prove disastrous.

#### IV. Conclusion: Recommendations for Coordinating Asylum and Statutory Refuge

This article's asylum recommendations will rationalize and expedite the asylum granting process and marginally decrease the number of asylum applicants by making asylum status less attractive. But these recommendations will not substantially affect the number of individuals arriving in the United States before seeking refuge. Nor will these recommendations abolish obligations estab-

<sup>193</sup> H.R. REP. NO. 608, 96TH CONG., 1ST SESS. 12 (1979).

<sup>194</sup> The Senate language is that adopted in the final bill. Neither the floor debate nor the Conference Report offers any enlightenment as to why this phrasing was adopted.

<sup>195</sup> INA § 207(a)(1) (amended 1980) (to be codified at 8 U.S.C. § 1157(a)(1)).

<sup>196</sup> *Id.*

<sup>197</sup> However, the budgeting process undoubtedly would be simplified if all admissions decisions were made before the close of the preceding year.

lished under both domestic and international law protecting those individuals from *refoulement* if they establish the *bona fide* nature of their refugee claims. INA section 208 asylum admissions will therefore remain substantial in the foreseeable future.

In light of these facts, two changes in section 207 statutory refuge provisions should be adopted. Both changes will better coordinate ordinary refugee and asylee admissions. The second change will also insure that the humanitarian objectives of the 1980 Act are not overshadowed by political decisions affecting the selection of refugees applying from abroad.

1. A single, flexible, annual refugee ceiling should be established covering all admissions under sections 207 and 208. Such a ceiling can be incorporated into the law by taking the following three steps. First, section 207(a)(1) should be amended to read:

Except as provided in subsection (b), the total number of refugees under this Section, and of asylees under Section 208, may not exceed that number which is specified by the President after consultation with Congress, and after a determination is made that such number is in the national interest and is justified by humanitarian concerns.

Second, a clause should be added to subsection (b) (the "emergency situation" refugee provision) permitting a revision in the ceiling after appropriate consultation "if either an unforeseen emergency refugee situation exists or an unforeseen mass asylum situation exists." Third, a definition of "unforeseen mass asylum situation" should be added specifying that the term shall include

any influx of aliens not anticipated at the time the determination under subsection (a) was made, provided that: (1) these aliens colorably meet the definition of "asylee" set forth in Section 208 or the regulations interpreting it; and (2) these aliens number at least 2,500 from any country, or 5,000 in total.

2. A single standard should be required for granting refuge to individuals applying from outside the country and meeting the refugee definition. This standard should be "in the national interest and of special humanitarian concern." A nonexclusive definition of "of special humanitarian concern" should be included in the statute. That definition should specify that

(a) Any individual who is a refugee and whose life is placed in immediate jeopardy, or whose personal safety is threatened, or who faces the imminent possibility of loss of freedom shall be deemed to be "of special humanitarian concern."

(b) Any other individual who is a refugee may be deemed "of special humanitarian concern" in the discretion of the Attorney General.

Adopting such a definition would neither create additional refugee slots nor preclude decisions tinged with political motives. But such a provision would put additional emphasis on the congressionally intended humanitarian purpose of the 1980 Act.