Vanderbilt Journal of Transnational Law

Volume 18
Issue 4 *Fall 1985*

Article 4

1985

The Refugee Act of 1980--What Burden of Proof: Controversy Lives on After "Stevic"

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THE REFUGEE ACT OF 1980—WHAT BURDEN OF PROOF: CONTROVERSY LIVES ON AFTER *STEVIC*

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I. INTRODUCTION

Prior to 1980, the United States had a discriminatory immigration policy primarily based on geographical, numerical, and ideo-

* The United States Supreme Court granted certiorari in INS v. Cardozo-Fonseca, 767 F.2d 1448 (9th Cir. 1985), just as this Article went into publication. *See* 54 U.S.L.W. 3546 (U.S. Feb. 25, 1986) (No. 85-782); *see also infra* note 213. The question presented for review is whether an alien's burden of proof in establishing eligibility for political asylum is equivalent to his burden of proof in establishing eligibility for withholding of deportation. 54 U.S.L.W. at 3546.

logical considerations.[1] In an effort to eliminate the discriminatory aspects of this policy, Congress enacted the Refugee Act of 1980 (the Refugee Act).[2] Congressional sponsors of the Refugee Act sought to establish a coherent and more humanitarian immigration policy.[3] Many problems arising since the enactment of the Refugee Act, however, have thwarted the development of such a policy. One of these problems is the lack of a well-defined, reasonable burden of proof that an alien must meet before he will be granted either asylum or withholding of deportation under the Immigration and Nationality Act of 1952 (the INA)[4] as amended by the Refugee Act.

When an alien seeks withholding of deportation, he must establish a "clear probability" that he would face persecution if he were to return to his homeland.[5] When an alien seeks asylum, on the other hand, he first must qualify as a "refugee," which is defined as an alien having a "well-founded fear" that he would be persecuted if he were to return to his homeland.[6] If an alien meets the refugee definition, then the Attorney General has discretion to grant or deny the refugee asylum.[7] The United States circuit courts of appeals have disagreed on whether these two burdens of proof are quantitatively different or whether the terms are simply an innocuous difference in language.[8]

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1. *See* Anker & Posner, *The Forty Year Crisis: A Legislative history of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 10 (1981) [hereinafter cited as Anker & Posner, *Legislative History*].

2. Pub. L. No. 96-212, 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 102 (codified in scattered sections of 8 U.S.C.).

3. Congress intended the Act to bring the United States into compliance with the United Nations Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force with respect to the United States Nov. 1, 1968) [hereinafter cited as Protocol]. *See* Comment, *Refuge in America: What Burden of Proof?*, 17 J. MAR. L. REV. 81, 96-98 (1984) [hereinafter cited as Comment, *Refuge in America*]. *See generally* Anker & Posner, *Legislative History*, *supra* note 1 (discussing in detail the legislative history of the Act).

4. Pub. L. No. 82-414, 66 Stat. 163 (current version at 8 U.S.C. §§ 1101-1503 and in scattered sections of 18 U.S.C., 22 U.S.C., 31 U.S.C., 49 U.S.C. (1982)).

5. *See, e.g.*, INS v. Stevic, 104 S. Ct. 2489, 2501 (1984); Dally v. INS, 744 F.2d 1191, 1195 (6th Cir. 1984); Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977). 8 U.S.C. § 1253(h) (1982) governs withholding of deportation.

6. *See, e.g.*, Bolanos-Hernandez v. INS, 767 F.2d 1277, 1282 (9th Cir. 1985). 8 U.S.C. § 1158 (1982) provides for asylum.

7. *Bolanos-Hernandez*, 767 F.2d at 1282.

8. *Compare* Rejaie v. INS, 691 F.2d 139 (3d Cir. 1982) (same burden under

Because of the conflicting views among the circuits of the appropriate burden of proof, the United States Supreme Court granted certiorari in *Stevic v. Sava*.[9] Although immigration practitioners hoped that the Court in *Stevic* would finally resolve the controversy, the *Stevic* decision did not conclusively set forth the necessary burden of proof for asylum cases.[10] The only clear holding of *Stevic* was that the clear probability standard remains the proper burden of proof for aliens seeking withholding of deportation under section 243(h) of the INA and that clear probability means "more likely than not."[11] Because of this narrow holding, debate rages on in the lower courts over the appropriate burden of proof in asylum cases and over the comparability of that burden of proof with the burden in cases that involve the withholding of deportation.[12]

This Article explores the burden of proof debate. First, it delves into the historical developments leading up to the Refugee Act then focuses on the Refugee Act's legislative history and on case law prior to the Supreme Court's decision in *Stevic*. Second, the Article discusses the *Stevic* opinion and the interpretation of *Stevic* in subsequent circuit court decisions. Third, it analyzes *Stevic* and the subsequent cases. The Article concludes with a look at what the future holds for the Refugee Act.

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both standards) *with* Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982) (clear probability requires greater showing), *rev'd sub nom.* INS v. Stevic, 104 S. Ct. 2489 (1984). *See also* Reyes v. INS, 693 F.2d 597 (6th Cir. 1982) (adopting Second Circuit's approach in *Stevic*), *vacated*, 747 F.2d 1045 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2173 (1985).

9. 678 F.2d 401 (2d Cir. 1982), *rev'd sub nom.* INS v. Stevic, 104 S. Ct. 2489, 2492 (1984).

10. *See* Helton, *Stevic: The Decision and Its Implications*, 3 IMMIGRATION L. REP. 49 (1984) [hereinafter cited as Helton, *Stevic Implications*]; Steinberg, *The Standard of Proof in Asylum Cases After I.N.S. v. Stevic*, 13(4) IMMIGRATION NEWSLETTER 1 (1984) [hereinafter cited as Steinberg, *The Standard After Stevic*].

11. INS v. Stevic, 104 S. Ct. at 2498, 2501.

12. *Compare* Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1985) (clear probability heavier burden than well-founded fear) *with* Sotto v. INS, 748 F.2d 832 (3d Cir. 1984) (same burden under both standards).

II. HISTORICAL OVERVIEW

A. A Brief Overview of the United States Asylum Law Before 1968

Before 1968, United States asylum law developed through responses to crises rather than through planned implementation of comprehensive policy objectives.[13] During this time period, aliens could seek refuge in the United States in only one of three ways: (1) withholding of deportation;[14] (2) conditional entry;[15] or (3) Attorney General's parole power.[16]

The withholding of deportation provision of the INA applied to aliens already in the United States, but did not reach those aliens seeking refuge at United States borders.[17] To qualify under the

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13. *See* Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REFORM 243, 243-44 (1984) [hereinafter cited as Helton, *Unfulfilled Promise*].

14. 8 U.S.C. § 1253(h) (1964). This provision was enacted as § 243(h) of the INA. It read as follows:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution. . . .

Id.

15. The Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 912-13 (1965) (codified at 8 U.S.C. § 1153(a)(7)(A)(i) (1976) (repealed 1980)). An alien's entry into the United States was "conditional" because aliens could acquire permanent resident status only after spending two years in the United States. This amendment created the first permanent basis for refugee admissions. Until Congress passed the 1980 Refugee Act, however, only persons from specific countries could apply for asylum. Comment, *Political Asylum and Withholding of Deportation: Defining the Appropriate Standard of Proof Under the Refugee Act of 1980*, 21 SAN DIEGO L. REV. 171, 175 (1983) [hereinafter cited as Comment, *Political Asylum*].

16. INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1964) provided:

> The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

17. *See Stevic*, 104 S. Ct. at 2493; Leng May Ma v. Barber, 357 U.S. 185 (1958).

withholding of deportation provision prior to 1968, the alien definitely had to show a "clear probability of persecution" if he were to return to his home country.[18] Until 1965, physical persecution had to be involved.[19] Even if the alien did show a clear probability of persecution, the statute gave the Attorney General discretion to reject the claim.[20] Because this was a discretionary grant of power by Congress, the courts could only review the Attorney General's actions under an abuse of discretion standard.[21]

While the withholding of deportation provision only affected aliens already in the United States, the conditional entry provision, as the forerunner of the current asylum provision, focused on admission of refugees who were still in other countries.[22] In fact, aliens within the United States could not apply for asylum.[23] Under the limited scope of the conditional entry provision, only potential refugees from communist or communist-dominated countries, or countries in the Middle East, could apply.[24] An alien had to convince an Immigration and Naturalization Service (INS) officer that he had been persecuted or that he feared persecution because of his race, religion, or political opinion.[25] Because eligibility determinations generally occurred outside of the United States, judicial review of the INS decision ordinarily did not take place.[26] The Board of Immigration Appeals (BIA) and lower level hearing officers, however, did review these cases.[27] These deci-

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18. *See, e.g.*, Lena v. INS, 379 F.2d 536, 538 (7th Cir. 1967); *In re* Joseph, 13 I. & N. Dec. 70 (B.I.A. 1968); *In re* Tan, 12 I. & N. Dec. 564 (B.I.A. 1967). *See also* Helton, *Unfulfilled Promise*, *supra* note 13, at 244-45.

19. Immigration and Nationality Act § 243(h). Before 1965, an alien had to show that substantial harm would result to his being. Mere economic or social harm would not satisfy the definition. *See* Note, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV., 1125, 1127 (1980) [hereinafter cited as Note, *Asylum*].

20. *See* Helton, *Unfulfilled Promise*, *supra* note 13, at 244.

21. *Id.* The alien's position in this matter was further complicated by the Board of Immigration Appeals' (BIA) stringent application of the standard. *Id.* at 244 n.8.

22. *See* Comment, *Political Asylum*, *supra* note 15, at 175.

23. *Id.*

24. Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984).

25. *Id.*

26. Helton, *Unfulfilled Promise*, *supra* note 13, at 245.

27. An immigration judge makes the initial determination on an alien's application for withholding of deportation and/or asylum. 8 C.F.R. § 242.8 (1985). Decisions by the immigration judge are appealable to the Board of Immigration Appeals. 8 C.F.R. § 242.21 (1985). The alien can appeal the BIA's determination

sions indicated that the burden of proof standard for this provision was considerably lower than the clear probability burden used in withholding of deportation cases.[28] Congress, however, repealed the conditional entry provisions in 1980.[29]

The third manner in which aliens could seek entry into the United States was through the Attorney General's parole power. This provision gave the Attorney General discretion to "parole" an alien into the United States for a limited time for emergency reasons.[30] The parole authority generally had neither the numerical restrictions like those imposed under the conditional entry provision, nor did it have the geographic and ideological limitations which accompanied the withholding provision.[31] Although the parole power did not have these restrictions, the Attorney General generally used the power only to admit persons fleeing communist countries.[32]

B. The 1968-1980 Period

1. *Accession to the Protocol*

In 1968 Congress appeared to liberalize United States immigration policy when it acceded to the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol).[33] The Protocol officially bound its signatories to articles 2 through 34 of the Convention Relating to the Status of Refugees (Convention).[34] The Protocol is significant because its language appears to lessen the burden on an alien seeking withholding of deportation and/or asylum. The Protocol defines a refugee as one who:

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directly to a United States Court of Appeals. 8 U.S.C. § 1105a (1982).

28. *See In re* Ugricic, 14 I. & N. Dec. 384 (1972); *In re* Adamska, 12 I. & N. Dec. 201 (1967); *In re* Tan, 12 I. & N. Dec. 564 (B.I.A. 1967); *see also* Stevic v. Sava, 678 F.2d at 405.

29. *See* Refugee Act § 203(b), 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 107, amending 8 U.S.C. § 1153.

30. Immigration and Nationality Act § 212(d)(5) (current version at 8 U.S.C. § 1182(d)(5)(A) (1982)).

31. *See* Helton, *Unfulfilled Promise*, *supra* note 13, at 245-46.

32. *See* Helton, *Stevic Implications*, *supra* note 10, at 51.

33. Protocol, *supra* note 3; *see* Comment, *Political Asylum*, *supra* note 15, at 177; Note, *The Right of Asylum Under United States Immigration Law*, 33 U. FLA. L. REV. 539, 544 (1981) [hereinafter cited as Note, *The Right of Asylum*].

34. *Signed* July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150 [hereinafter cited as Convention]; Protocol, *supra* note 3, art. I, § 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268 (section binding signatories).

> 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 is unable or, owing to such fear, is unwilling to return to it.[35]

The Protocol also proscribes, through incorporation of the Convention, any action by a signatory to return a refugee to any territory "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[36]

The provisions of the Protocol differ from then-existing United States immigration law in a number of ways.[37] First, the well-founded fear language of the refugee definition in the Protocol appears to be more lenient than the clear probability standard imposed on aliens seeking relief under the withholding of deportation provision.[38] Second, prior United States law defined persecution as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as

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35. Protocol, *supra* note 3, art. I, § 2, 19 U.S.T. at 6225, 606 U.N.T.S. at 268. This definition expanded the refugee definition found in the Convention by eliminating a requirement that the person must have become a refugee because of world events occurring prior to 1951. *Compare id. with* Convention, *supra* note 34, art. I, § A(2), 19 U.S.T. at 6261, 189 U.N.T.S. at 152. The United States, however, never acceded to the Convention itself. *See Stevic*, 104 S. Ct. at 2494 n.9; *see also* Comment, *Political Asylum*, *supra* note 15, at 177. The United Nations has published a practical guide to assist in making refugee status determinations under the Convention or the Protocol. *See* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) [hereinafter cited as U.N. HANDBOOK]. An entire section of the Handbook is devoted to interpreting the Convention and Protocol terms.

36. Convention, *supra* note 34, art. 33, § 1, 19 U.S.T. at 6276, 189 U.N.T.S. at 152 (incorporated by reference at Protocol, *supra* note 3, art. I, § 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268).

37. Comment, *Political Asylum*, *supra* note 15, at 177-78; Note, *The Right of Asylum*, *supra* note 33, at 544.

38. Stevic v. Sava, 678 F.2d at 405. The Convention's history indicates that the drafters intended for the new standard to be less stringent. United Nations Economic and Social Council, *Report of the Ad Hoc Committee on Statelessness and Related Problems* 39 (E/1618; E/AC 32/5) (1950); *see also* U.N. HANDBOOK, *supra* note 35, ¶ 38-45.

offensive."[39] In contrast, the Protocol more simply defines persecution as a threat to one's life or freedom.[40] Third, under the Protocol, an alien may apply for asylum if he originally left his home country in flight from persecution or if he is unable to return because of circumstances of persecution that have arisen since his departure.[41] In contrast, an alien could apply for asylum under prior United States law only if the alien fled his home country specifically to avoid persecution. Fourth, the Protocol does not contain the ideological and geographical limitations that were previously imposed by United States law.[42] Last, the Protocol strictly limits the Attorney General's discretion to deport an alien who qualifies as a refugee. Under the Protocol, the Attorney General has discretion to deport only if he has reasonable grounds to believe that the alien presents a national security risk or if the alien has been convicted of a serious crime and constitutes a potential danger to the community.[43] Conversely, prior United States law granted the Attorney General broader discretion.

Although the Protocol appears to be a liberalization of United States law that existed in 1968, the legislative history of the Protocol's Senate ratification seems to indicate that the United States Government did not intend to liberalize the law. Both the Senate and the executive branch apparently thought that the Protocol did not significantly change the existing United States immigration law.[44] Senate Majority Leader Mansfield, a Senate sponsor of the Protocol ratification, testified that the Protocol "would not impinge adversely upon the Federal and State laws of

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39. Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969).

40. *See* Convention, *supra* note 34, art. 33, § 1, 19 U.S.T. at 6276, 189 U.N.T.S. at 176 (incorporated by reference at Protocol, *supra* note 3, art. I, § 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268). Obviously, an alien would have less difficulty in establishing a threat to his freedom under the Protocol definition than he would have in establishing an oppressive infliction of suffering or harm as required under earlier United States law.

41. *See* 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.24(A)(b) (1979).

42. *See id.; supra* notes 13-32 and accompanying text.

43. Convention, *supra* note 34, art. 33, § 2, 19 U.S.T. at 6276, 189 U.N.T.S. at 176 (incorporated by reference at Protocol, *supra* note 3, art. I, § 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268).

44. *See Stevic*, 104 S. Ct. at 2494; *see also* Helton, *Unfulfilled Promise*, *supra* note 13, at 246-47. *But see* Comment, *Refuge in America*, *supra* note 3, at 98-99 & n.102 (language of Senate hearings on Protocol is ambiguous and susceptible to various interpretations).

this country."[45] A State Department official also specifically testified that "existing regulations which have to do with deportation would permit the Attorney General sufficient flexibility to enforce the provisions of this convention which are not presently contained in the Immigration and Nationality Act."[46]

2. *Administrative and Judicial Review*

While the legislative history of the Protocol ratification indicates that Congress did not intend to change the existing immigration laws, some courts, nevertheless, began to apply the Protocol's "well-founded fear" burden to withholding of deportation cases. Courts adopted the standard despite the absence of additional congressional action because of the flexibility in the withholding of deportation provision.[47] In contrast, the BIA rejected this approach, instead opting to retain the clear probability standard.[48] Although some courts agreed with the BIA's decision,[49] other courts held that the Protocol ratification did change the withholding burden to a lesser well-founded fear burden.[50] Still other courts concocted various adaptations of the two standards.[51]

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45. 114 CONG. REC. 29,391 (1968) (statement of Sen. Mansfield).

In U.S. v. Gold Mountain Coffee, Ltd., No. 84-6-00858, slip op. 84-117, (Ct. Int'l Trade Oct. 16, 1984), the court specifically ruled that forfeiture of goods under § 592 is not an ordinary remedy in addition to monetary penalties imposed under that section. Furthermore, the court ruled that Customs should not circumvent § 592's limitations on seizure by resorting to other statutory remedies, such as civil arrest of imported merchandise.

46. COMM. ON FOREIGN RELATIONS, REPORT ON PROTOCOL RELATING TO REFUGEES TO ACCOMPANY EX. K, S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 8 (1968) (statement of Elizabeth McDowell of the State Department's Office of the Legal Advisor); *accord* 114 CONG. REC. 27,757 (1968) (President's message transmitting the Protocol); 114 CONG. REC. 27,844 (1968) (statement of Laurence A. Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs, Department of State).

47. Helton, *Unfulfilled Promise*, *supra* note 13, at 247.

48. *See, e.g., In re* Dunar, 14 I. & N. Dec. 310 (B.I.A. 1973) (discussing legislative history of Protocol ratification and concluding that clear probability was still the proper burden in withholding cases); *In re* Joseph, 13 I. & N. Dec. 70 (B.I.A. 1968).

49. *See, e.g.*, Martineau v. INS, 556 F.2d 306, 307 (5th Cir. 1977); Cisternas-Estay v. INS, 531 F.2d 155, 159 (3d Cir.), *cert. denied*, 429 U.S. 853 (1976); Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971).

50. *See, e.g.*, Pereira-Diaz v. INS, 551 F.2d 1149 (9th Cir. 1977); Zamora v. INS, 534 F.2d 1055 (2d Cir. 1976).

51. *See, e.g.*, Henry v. INS, 552 F.2d 130, 131 (5th Cir. 1977) ("probable per-

Most courts never really addressed the possible distinctions between the two standards. Two courts, however, expressly considered the issue, and they came to opposite conclusions. The Fifth Circuit in *Coriolan v. INS*,[52] concluded that the well-founded fear burden was less stringent than the clear probability standard.[53] In contrast, the Seventh Circuit in *Kashani v. INS*[54] held that the two standards "will in practice converge."[55]

3. *Administrative Reaction to Embarrassment*

This general confusion and lack of a coherent and humanitarian asylum policy, even after adoption of the Protocol, culminated in an event which dramatically exemplified the policy's illogical results. In 1970, in an incident known as the Kudirka Affair, a Lithuanian sailor leaped on board a United States Coast Guard ship from a Soviet fishing boat.[56] This incident took place while both the Coast Guard cutter and the Soviet fishing vessel were in United States territorial waters. The sailor immediately requested asylum in the United States, but the INS denied his request without conducting any investigation because the sailor was technically in the United States when he requested asylum.[57] Instead of providing refuge for Kudirka, the United States government allowed five Soviet sailors to come on board the Coast Guard ship to forcibly return him to the Soviet ship. The sailors proceeded to physically whip him into submission, and they carried him back to the Soviet vessel wrapped inside a blanket.[58]

The immense embarrassment of this incident eventually led the United States Department of State to issue a declaration stating that under the Protocol, all asylum requests must be given full

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secution"); Shkukani v. INS, 435 F.2d 1378, 1380 (8th Cir.), *cert. denied*, 403 U.S. 920 (1971); Kovac v. INS, 407 F.2d 102, 105 (9th Cir. 1969) ("probability of persecution").

52. 559 F.2d 993 (5th Cir. 1977).

53. *Id.* at 997 n.8.

54. 547 F.2d 376 (7th Cir. 1977).

55. *Id.* at 379.

56. *See generally* O'Brien, *The Kudirka Affair: Bringing Sanity to the Laws of Asylum*, 8 HUM. RTS. 38 (1980); *see also* CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES, 96th Cong., 1st Sess. 7 (1980).

57. *See supra* text accompanying note 23.

58. O'Brien, *supra* note 56, at 39-40.

consideration, regardless of whether the applicant was physically inside or outside of the United States.[59] Finally, in 1974, the INS promulgated new regulations which allowed aliens physically present in the United States to apply for asylum.[60] These new regulations, however, proved to be far short of the reform needed to cope with the subsequent heavy influx of Indochinese, Cubans, and Haitians into the United States. Consequently, the United States Government responded inadequately to the challenges created by the subsequent influx of immigrants.[61]

4. *The Legislative Response to Administrative and Judicial Inaction*

Shortly after ratification of the Protocol, some members of Congress began to realize that the INS planned to continue with the same course of action as if the Protocol had not changed anything.[62] To remedy this situation, members of Congress, in 1969 and 1970, introduced three bills proposing changes in the refugee provisions.[63] All of the bills provided a new definition for "refugee" that did not include geographical or ideological restrictions. Specifically, the language of Senator Kennedy's and Congressman Feighan's bill most closely aligned with the actual language of the Protocol because it eliminated the Attorney General's discretionary power and enlarged the bases of persecution under which an alien could seek asylum.[64] Conversely, bills separately sponsored

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59. General Policy Statement, 66 DEP'T ST. BULL. 124 (1972), *reprinted in* 37 Fed. Reg. 3447 (1972); *see also* Comment, *Political Asylum*, *supra* note 15, at 179.

60. *See* 39 Fed. Reg. 41,832 (1974) (superseded by the Refugee Act of 1980); Note, *The Right of Asylum*, *supra* note 33, at 545.

61. *See* S. REP. No. 256, 96th Cong., 1st Sess. 3, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141, 143; *see also* Comment, *Political Asylum*, *supra* note 15, at 179.

62. *See* Helton, *Stevic Implications*, *supra* note 10, at 52.

63. Senator Kennedy introduced one bill in the Senate. *See* S. 3202, 91st Cong., 1st Sess., 115 CONG. REC. 36,964 (1969). Congressman Feighan introduced the House version of this same bill. *See* H.R. 15,093, 91st Cong., 1st Sess., 115 CONG. REC. 36,942 (1969) (companion to S. 3202). Two other Congressmen introduced two more pieces of legislation in the House. *See* H.R. 17,370, 91st Cong., 2d Sess., 116 CONG. REC. 13,823 (1970) (sponsored by Congressman Rodino); H.R. 9112, 91st Cong., 1st Sess., 115 CONG. REC. 6731 (1969) (sponsored by Congressman Celler). *See generally* Anker & Posner, *Legislative History*, *supra* note 1, at 20-30 (outlining reform proposals made between 1970 and 1976).

64. *See* Anker & Posner, *Legislative History*, *supra* note 1, at 22.

by Congressmen Rodino and Celler kept those provisions in much the same form as they had been.[65] Congressman Rodino's bill also endorsed much greater use of the Attorney General's parole power, while the Kennedy/Feighan bill provided for use of parole only in emergency situations and for temporary periods of time.[66]

A House Judiciary Subcommittee conducted hearings on all three House bills in July and August 1970.[67] Testimony showed that the sponsors had three major objectives: (1) to enact a refugee definition which would lead to a more appropriate admissions policy; (2) to set forth new and less stringent numerical limitations on admission; and (3) to develop a refugee admissions procedure that would give Congress more control of the entire process.[68] Most of the testimony on the Kennedy/Feighan bill was favorable, including that of State Department and Justice Department witnesses.[69] That bill was voted out of the House Judiciary Committee with a favorable recommendation; however, the Senate Subcommittee on Immigration and Naturalization killed the bill in the Senate.[70] Neither Congressman Rodino's nor Congressman Celler's bill received a favorable recommendation by the House Judiciary Committee.[71]

In 1973 Congressman Rodino reintroduced a bill that was similar to his earlier legislation.[72] This time, however, the new bill's refugee definition was much closer to the Protocol's definition.[73]

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65. *Id.*

66. *Id.* at 23-24.

67. *Immigration: Hearings on H.R. 9112, H.R. 15,092 and H.R. 17,370 Before Subcomm. No. 1 of the House Comm. on the Judiciary,* 91st Cong., 2d Sess. (1971) [hereinafter cited as *INA Hearings*].

68. Anker & Posner, *Legislative History, supra* note 1, at 22.

69. *See INA Hearings, supra* note 75, at 161 (testimony of Barbara M. Watson, Administrator of Bureau of Security and Consular Affairs). The State Department's only apparent reservation about the bill was the foreign policy implications of such a change. *Id.* at 168.

70. *See* Anker & Posner, *Legislative History, supra* note 1, at 25. Senator James Eastland (D-Miss.) chaired that subcommittee as well as the full Senate Judiciary Committee. Senator Eastland, an ardent opponent of refugee reform efforts, used his power to prevent any favorable action on S. 3202. Senator Kennedy, as Chairman of the Subcommittee to Investigate Problems Connected with Refugees and Escapees, possessed no legislative jurisdiction over the bill. *Id.* at 25 n.71. Refugee reform legislation (i.e., the Refugee Act of 1980) did not pass until 1980—two years after Senator Eastland resigned from the Senate.

71. *Id.* at 25.

72. H.R. 981, 93d Cong., 1st Sess., 119 CONG. REC. 61 (1973).

73. *See* Anker & Posner, *Legislative History, supra* note 1, at 25.

This new bill retained the previous bill's provision concerning the exclusive use of the Attorney General's parole power as the sole means of refugee admission into this country.[74] Hearings on the bill resulted in significant changes in the bill's parole provision.[75] The Subcommittee adopted amendments limiting use of the parole provision to "exceptional or emergency circumstances."[76] Rodino's new bill also emphasized immigration reform in the Western Hemisphere.[77] As amended, the bill also proposed a much broader and nondiscriminatory refugee policy, and it created a Western Hemisphere refugee preference without any ideological restrictions.[78] On September 26, 1973, after a favorable committee recommendation, the full House of Representatives passed H.R. 981.[79] The Senate companion bill, however, once again died a quiet death, buried somewhere deep within the confines of the Senate Judiciary Committee.[80]

In 1975 members of Congress introduced three more immigration reform bills.[81] Hearings on these proposals brought out growing congressional concern over the ad hoc nature of emergency parole decisions made by the Attorney General.[82] Congressman

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74. H.R. 981, *supra* note 72, § 9.

75. *See generally Western Hemisphere Immigration: Hearings on H.R. 981 Before the Subcomm. No. 1 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 246-57 (1973) (testimony of Francis L. Kellogg, Special Assistant to Secretary for Refugee and Migration Affairs, Dep't of State; and Laurence A. Dawson, Senior Adviser on Refugee Affairs, on the parole provision).

76. H.R. REP. No. 461, 93d Cong., 1st Sess. 11 (1973).

77. Anker & Posner, *Legislative History*, *supra* note 1, at 25. Although the earlier 1965 Amendments presented significant changes, they did not seek conformity of the Western and Eastern Hemisphere preference systems. *Id.* at 20.

78. *Id.* at 26-27.

79. 119 CONG. REC. 31,477 (1973).

80. *See* Anker & Posner, *Legislative History*, *supra* note 1, at 28; note 70, *supra*

81. H.R. 367, 94th Cong., 1st Sess., 121 CONG. REC. 193 (1975) (sponsored by Congressman Eilberg); H.R. 981, 94th Cong., 1st Sess., 121 CONG. REC. 504 (1975) (sponsored by Congressman Rodino); H.R. 10,323, 94th Cong., 1st Sess., 121 CONG. REC. 33,719 (1975) (the Administration's bill).

82. *Western Hemisphere Immigration: Hearings on H.R. 367, H.R. 981, and H.R. 10,328 Before the Subcomm. on Immigration, Citizenship and International Law House Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess. 73-74 (1975-76) [hereinafter cited as *Hearings on H.R. 367*]. Congressman Eilberg was the new Chairman of the House Judiciary Subcommittee holding hearings on the proposed refugee reform legislation. Anker & Posner, *Legislative History*, *supra* note 1, at 29.

Eilberg, in particular, urged adoption of uniform standards and criteria in this area including more congressional involvement.[83] The House Judiciary Committee also recognized that in light of the recent problems and then-existing trouble spots around the world, further study might be necessary before adopting the Protocol refugee definition.[84] Upon the recommendation of Congressman Eilberg, the committee agreed to sever the refugee provisions from the three bills.[85] Having postponed consideration of the bulk of the immigration reform proposals by severing the refugee definition provisions, the Committee quickly reported out a noncontroversial bill which, although subsequently enacted into law,[86] did little to help the situation.[87]

In 1976 the evacuation, parole, and resettlement of 130,000 Indochinese again highlighted the immense problems of an immigration policy relying so heavily on ad hoc parole decisions.[88] At this time, Congress became increasingly concerned with the executive branch's use of the parole power to circumvent the statutory limitations on the number of aliens that could be allowed into the United States. This concern culminated with more congressional hearings[89] and with consideration of two more pieces of legislation that sought to institute refugee policy reform.[90] These

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83. *Hearings on H.R. 367, supra* note 82, at 74.

84. *Id.* at 74-75; *see also* Anker & Posner, *Legislative History, supra* note 1, at 29 & n.91 (discussing problems encountered with Chilean and Indochinese parole programs during the preceding year).

85. *Hearings on H.R. 367, supra* note 82, at 74.

86. Act of Oct. 20, 1976, Pub. L. No. 54-571, 1976 U.S. CODE CONG. & AD. NEWS (90 Stat.) 2703.

87. The bill extended the seventh preference, a provision of the 1965 Amendments, to Western Hemisphere aliens; however, the bill retained the narrow refugee definition. Anker & Posner, *Legislative History, supra* note 1, at 27-28.

88. *See generally id.* at 30-42 (discussing Indochinese Parole Program and congressional reaction).

89. *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship and Int'l Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Hearings on Admission*]; *Admission of Refugees into the United States, Part II: Hearings on Indochinese Refugees and U.S. Refugee Policy Before the Subcomm. on Immigration, Citizenship and Int'l Law of the House Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. (1977-78) [hereinafter cited as *Admission, Part II*].

90. H.R. 3056, 95th Cong., 1st Sess., 123 CONG. REC. 3431 (1977); H.R. 7175, 95th Cong., 1st Sess., 123 CONG. REC. 14,648 (1977). H.R. 7175 was the successor

hearings illustrated the growing clash between the executive and legislative branches. The House Subcommittee, led by Congressman Eilberg, pushed for formal statutory consultation provisions in which the executive branch would have to consult Congress before exercising its parole power. The Administration, on the other hand, complained that even informal consultation requirements hindered its ability to handle emergency situations.[91]

Congress illustrated its growing exasperation with the executive branch by amending the refugee reform bills to further restrict the executive branch's power. Congress amended the bills by placing numerical limitations on the executive branch's use of its emergency parole powers, by restricting the executive branch's use of its parole power to two specific categorical situations, and by allowing Congress much more control over emergency refugee programs.[92] Appearing before the Subcommittee, Administration witnesses argued that the executive branch needed flexibility to respond appropriately to international refugee crises. According to these witnesses, the new provisions in the reform bills would frustrate the needed flexibility.[93] Representatives of agencies that provided voluntary assistance to refugees also testified against these new provisions.[94] While the refugee reform bills in general, and these new provisions in particular, received significant atten-

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to H.R. 3056. Anker & Posner, *Legislative History*, *supra* note 1, at 33.

91. *See Hearings on Admission*, *supra* note 89, at 1, 67-70. The Ford Administration had agreed not to exercise its parole power if either the House or Senate Judiciary Committee voted against its use by a majority vote. The Carter Administration, however, refused to be bound by that agreement. *See* Anker & Posner, *Legislative History*, *supra* note 1, at 31-32 & n.107.

92. Anker & Posner, *Legislative History*, *supra* note 1, at 34. One of the new provisions provided for a legislative veto of any exercise of the Attorney General's parole power. *Id* at 35. A similar legislative veto provision, which allowed one House of Congress to override the Attorney General's decision to suspend the deportation of an alien, was already in another section of the INA. *See* 8 U.S.C. § 1254(c)(2) (1982). This latter provision led to the United States Supreme Court's landmark decision in INS v. Chadha, 462 U.S. 919 (1983). *Chadha* involved a legislative veto that overturned the Attorney General's decision to suspend deportation of an alien. The Court held that the legislative veto provision was an unconstitutional usurpation of authority that the United States Constitution had specifically delegated to the executive branch. 462 U.S. at 954-55, 959.

93. *See, e.g., Admission, Part II*, *supra* note 89, at 23 (statement of Attorney General Griffin Bell).

94. *See, e.g., Hearings on Admission*, *supra* note 89, at 124-25.

tion,[95] neither was formally enacted into law.

The next piece of significant legislation was the Refugee and Displaced Persons Act of 1978[96] proposed by Senator Kennedy on March 15, 1978. By giving the executive branch even more discretion than the executive branch wanted, this proposal differed radically from past congressional attempts to restructure the refugee policy.[97] This obvious political move to force the Administration to come forth with specific reform proposals proved to be successful. The Administration unveiled its proposals on the last day of congressional hearings on the proposed legislation.[98] These proposals basically reiterated the previous testimony of Administration officials.[99] Although the Subcommittee did not adopt either Senator Kennedy's bill or the Administration's proposals, the hearings concluded on a positive note with both sides agreeing to work together toward a consensus, a comprehensive reform package to be introduced during the next session of Congress.[100]

C. Asylum Law — 1980 and Beyond

1. *The Refugee Act of 1980*

The negotiations between the executive branch and Congress to draft a consensus immigration reform bill were successful. Senator Kennedy introduced the compromise bill, S. 643,[101] in the Senate in 1979. Congressman Rodino and Congresswoman Holtzman sponsored the companion bill, H.R. 2816,[102] in the House. The bill contained a proposed refugee definition almost identical

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95. *See* Anker & Posner, *Legislative History*, *supra* note 1, at 41.

96. S. 2751, 95th Cong., 2d Sess., 124 CONG. REC. 6978 (1978).

97. For specific provisions of S. 2751, see Anker & Posner, *Legislative History*, *supra* note 1, at 41 n.150.

98. *See Admission, Part II*, *supra* note 89, at 216.

99. For specifics of the Administration's proposals, see Anker & Posner, *Legislative History*, *supra* note 1, at 42.

100. *See Admission, Part II*, *supra* note 89, at 220.

101. S. 643, 96th Cong., 1st Sess., 125 CONG. REC. 4863 (1979). Senator Kennedy had become the Chairman of the Senate Judiciary Committee due to Senator Eastland's resignation. *See* Anker & Posner, *Legislative History*, *supra* note 1, at 42 n.153. For a detailed discussion of Senator Kennedy's role in immigration reform, see Kennedy, *The Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141 (1981).

102. H.R. 2816, 96th Cong., 1st Sess., 125 CONG. REC. 4816 (1979). Congressman Rodino was Chairman of the House Judiciary Committee, so the new bill had *both* Judiciary Committee Chairmen as sponsors.

to the refugee definition in the Protocol.[103] The bill also addressed the numerical and categorical limitations problem by restricting the executive branch's emergency parole authority and requiring certain congressional consultation.[104] Furthermore, the bill extended the withholding of deportation provision to apply to exclusion proceedings as well as deportation proceedings[105] and to include "nationality [and] membership in a particular social group" as additional bases of persecution.[106] Finally, although the bill did not expressly limit the Attorney General's parole authority, the specific provisions of the bill regarding parole made it clear that the executive branch should only use its parole power in very limited instances.[107]

The Senate Judiciary Committee[108] and the House Subcommittee on Immigration, Refugees and International Law held hearings on the respective bills.[109] These hearings focused on five general areas: (1) the proper definition of a refugee; (2) the appropriate numerical limitations on the use of the parole power; (3) the proposed changes in the withholding of deportation provision of the INA; (4) the benefits of a statutory asylum provision; and (5) the proper consultation procedure.[110]

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103. *See* H.R. 2816, 96th Cong., 1st Sess., § 201(a), 125 CONG. REC. 37,242 (1979).

104. *Id.* § 201(b). These congressional consultation requirements, however, were not as extensive as those that Congressman Eilberg had proposed and did not include a legislative veto provision. Anker & Posner, *Legislative History*, *supra* note 1, at 44.

105. H.R. 2816, *supra* note 103, § 203(e); Anker & Posner, *Legislative History*, *supra* note 1, at 45. "Excludable aliens" are those considered to have stopped at the border even though they physically are present in the United States. Note, *Asylum*, *supra* note 19, at 1128; *see* 8 U.S.C. § 1182 (1982).

106. H.R. 2816, *supra* note 103, § 203(e).

107. *See* Anker & Posner, *Legislative History*, *supra* note 1, at 45.

108. Senator Kennedy, in an effort to gain more power on immigration reform, abolished the Senate Subcommittee on Immigration when he became Chairman of the full Judiciary Committee. *See* Anker & Posner, *Legislative History*, *supra* note 1, at 45 n.172.

109. *See The Refugee Act of 1979: Hearings on S. 643 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979); *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979).

110. Anker & Posner, *Legislative History*, *supra* note 1, at 45-46. For an overview of the committee hearings on these five points, see *id.* at 46-50. An in-depth discussion of the numerical allocations and the consultation procedures

The hearings resulted in several amendments that were incorporated into the Senate and House reports on the bill.[111] The House Committee amended its version to add a provision specifically including detainees and political prisoners in the definition of a refugee.[112] The Senate version contained an amendment bringing displaced persons within the refugee definition.[113] The House report's definition of a refugee also expressly excluded any alien who had persecuted others.[114] Additionally, both the Senate and the House established a statutory asylum provision.[115] The House version gave the Attorney General discretionary authority to grant asylum, while the Senate made the grant mandatory if the alien qualified under the statute.[116] Lastly, both the Senate and House Committee rejected the discretionary element in the withholding of deportation provision and provided mandatory withholding of deportation for an alien qualifying under the statute.[117]

The differences between the House and Senate versions of the bill, as well as some additional amendments that were added during House and Senate floor action,[118] made a conference committee necessary. The Conference Committee opted essentially for the House version of the refugee definition.[119] The final draft defined a refugee as:

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are beyond the scope of this Article.

111. S. REP. No. 256, 96th Cong., 1st Sess. (1979); H.R. REP. No. 608, 96th Cong., 1st Sess. (1979).

112. *See* Anker & Posner, *Legislative History, supra* note 1, at 50-51 & n.203. Detainees and political prisoners are defined as "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 who has a well-founded fear of persecution . . . ." H.R. REP. No. 608, *supra* note 111, at 38.

113. Anker & Posner, *Legislative History, supra* note 1, at 51. Displaced persons were defined as "any person who [has] been displaced by military or civil disturbance or uprooted because of arbitrary detention, and who is unable to return to his usual place of abode." S. REP. No. 256, *supra* note 111, at 20.

114. H.R. REP. No. 608, *supra* note 111, at 10.

115. *See id.* at 17, S. REP. No. 256, *supra* note 111, at 9.

116. *Compare* H.R. REP. No. 608, *supra* note 111, at 17-18 *with* S. REP. No. 256, *supra* note 111, at 9.

117. *See* H.R. REP. No. 608, *supra* note 111, at 18; S. REP. No. 256, *supra* note 111, at 17.

118. For a discussion of floor action in both chambers, see Anker & Posner, *Legislative History, supra* note 1, at 56-60.

119. S. REP. No. 590, 96th Cong., 2d Sess. 19 (1980).

> 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. . . .[120]

The definition also included displaced persons by allowing the President to designate certain individuals within their own country as refugees under certain conditions.[121] Finally, the bill expressly excluded anyone who had persecuted or participated in the persecution of another individual.[122]

The Conference Committee also adopted the House version of the statutory asylum provision that read as follows:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.[123]

The Committee chose this version to give the Attorney General discretion in deciding whether to grant asylum. The Conference Committee rejected the Senate version that would have required a grant of asylum to be mandatory for aliens qualifying as refugees.[124]

Further, the Conference Committee adopted the provision mandating withholding of deportation for all aliens qualifying under the withholding of deportation statute.[125] The Committee, however, established four exceptions to the mandatory withholding of deportation rule.[126] These exceptions coincided with those

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120. *Id.* at 24 (codified at 8 U.S.C. § 1101(a)(42)(A) (1982)).

121. *Id.* (codified at 8 U.S.C. § 1101(a)(42)(B) (1982)).

122. *Id.*

123. *Id.* at 21 (codified at 8 U.S.C. § 1158(a) (1982)).

124. Anker & Posner, *Legislative History*, *supra* note 1, at 62; *see also supra* note 116 and accompanying text.

125. S. REP. No. 590, *supra* note 119, at 20.

126. The exceptions are when:

> (A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, mem-

set forth in the Protocol.[127] The new withholding of deportation provision read as follows:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[128]

The Committee's inclusion of the words "or return" in the new provision extended coverage to excludable aliens as well as those legally within the country.[129] Finally, the Conference Committee repealed the conditional entry provisions.[130]

The Conference Committee then returned its report to the individual chambers for final action. Most of the House debate focused on the Conference Committee's deletion of the legislative veto provision from the consultation requirements of the bill which raised the ire of several House members.[131] One member even suggested returning the bill to the Conference Committee with instructions to "clean it up and do it right."[132] This conflict regarding the legislative veto provision almost resulted in the loss of the entire bill. The House finally approved the measure on March 4, 1980, by a vote of only 207 to 192 with 34 members abstaining.[133] The Senate's reception of the Conference Commit-

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bership 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 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.

8 U.S.C. § 1253(h)(2) (1982).

127. *See* Convention, *supra* note 34, arts. 31, 33, 19 U.S.T. at 6275-76, 189 U.N.T.S. at 174, 176 (incorporated by reference at Protocol, *supra* note 3, art. I, § 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268).

128. S. REP. No. 590, *supra* note 119, at 7 (codified at 8 U.S.C. § 1253(h)(1) (1982)).

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

130. Refugee Act § 203(b)(1), 94 Stat. at 107.

131. *See* Anker & Posner, *Legislative History*, *supra* note 1, at 63.

132. 126 CONG. REC. 4498 (1980) (statement of Congressman Butler).

133. *Id.* at 4508.

tee report was in marked contrast to that of the House.[134] With little debate the Senate unanimously approved the measure on February 26, 1980.[135] The President then signed the Refugee Act of 1980 into law on March 17, 1980.[136]

2. *BIA and Court Response to the Refugee Act*

The BIA wasted little time in dashing the hopes of Refugee Act proponents who wanted a more humanitarian approach to refugees under United States law.[137] Before enactment of the Refugee Act, the BIA had admitted that the "good reason to fear persecution" test under the conditional entry provision[138] was less stringent than the "clear probability of persecution" test under the withholding of deportation provision.[139] Yet, after enactment of the Refugee Act, the BIA viewed the "well-founded fear of persecution" language in the new refugee provision as interchangeable with the stringent clear probability test applied to withholding of deportation claims. In short, the BIA applied the clear probability standard to claims for withholding of deportation *and* claims for asylum.[140] Thus, the burden on the alien actually *in-*

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134. *See* Anker & Posner, *Legislative History*, *supra* note 1, at 64.

135. 126 CONG. REC. 3758 (1980).

136. 94 Stat. 118 (1980).

137. *See* Anker & Posner, *Legislative History*, *supra* note 1, at 11, 48-49, 60. Commentators generally agree that Congress intended to create equivalent eligibility standards under the asylum and withholding of deportation provisions. Congress meant for the lesser "well-founded fear of persecution" burden to apply to both provisions. *See, e.g.*, Helton, *Unfulfilled Promise*, *supra* note 13, at 252; Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618, 625 (1981); Comment, *Refuge in America*, *supra* note 3, at 101; Note, *Asylum*, *supra* note 19, at 1137; Note, *A Comparative Overview of the Vietnamese and Cuban Refugee Crises: Did the Refugee Act of 1980 Change Anything?*, 6 SUFFOLK TRANSNAT'L L.J. 25, 46 (1982).

138. 8 U.S.C. § 1153(a)(7)(A)(i) (1976). *See supra* notes 22-29 and accompanying text.

139. *See, e.g.*, *In re* Janus, 12 I. & N. Dec. 866, 876 (B.I.A. 1968); *In re* Tan, 12 I. & N. Dec. 564, 569-70 (B.I.A. 1967).

140. *See, e.g.*, *In re* Martinez-Romero, 18 I. & N. Dec. 75 (B.I.A. 1981); *In re* Lam, 18 I. & N. Dec. 15 (B.I.A. 1981); *In re* Rodriguez-Palma, 17 I. & N. Dec. 465 (B.I.A. 1980).

The continuing role of ideology in asylum determinations further frustrated the Refugee Act proponents. INS statistics for the 1983 fiscal year show that 78% of all Russian applicants, 64% of all Ethiopian applicants, and 53% of all Afghan applicants received asylum. Meanwhile only 11% of all Filipine appli-

creased under the BIA's interpretation of the Refugee Act.

Stevic v. Sava[141] was the first case to interpret the Refugee Act's effect on the burden of proof issue. *Stevic* involved a Yugoslav citizen who came to the United States to visit his sister. His sister had married a citizen of the United States and was a permanent resident of the same country.[142] Stevic did not leave the United States when his visa expired. The immigration judge ordered Stevic deported. During this time, Stevic requested neither asylum nor withholding of deportation.[143]

Stevic later moved to reopen his deportation proceedings for purposes of pursuing a withholding of deportation claim under the INA.[144] The immigration judge denied this motion and the BIA affirmed, stating that Stevic had not shown a clear probability of persecution if he were returned to Yugoslavia.[145] Stevic did not appeal the BIA decision. He later filed another motion to reopen his hearing before the BIA.[146] The BIA denied this motion on the same grounds.[147] Stevic appealed this decision to the Second Circuit, arguing that due to the recent passage of the Refugee Act, the BIA had applied the wrong burden of proof in the second request for reopening.[148]

In *Stevic* the Second Circuit extensively reviewed the legislative history of the Refugee Act.[149] It focused on the changes in the relevant statutory language of the withholding of deportation provision. The court noted Congress' intention to conform to the

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cants, 2% of all Haitian applicants, 2% of all Guatemalan applicants, and 3% of all Salvadoran applicants were afforded this privilege. Helton, *Unfulfilled Promise*, *supra* note 13, at 253 (citing INS statistics on file with that author).

141. 678 F.2d 401 (2d Cir. 1982), *rev'd sub nom.* INS v. Stevic, 104 S. Ct. 2489 (1984).

142. *Id.* at 402.

143. *Id.*

144. Stevic claimed that his participation in an anti-Communist organization while in the United States would subject him to persecution if he were returned to Yugoslavia. *Id.* at 403.

145. *Id.*

146. Stevic also sought habeas corpus relief in the United States District Court for the Southern District of New York. Stevic appealed the denial of habeas corpus relief, and the Second Circuit consolidated it with his appeal of the BIA's action. *Id.* at 402-03. For the court's treatment of the habeas corpus appeal, see *id.* at 404.

147. *Id.* at 403-04.

148. *Id.* at 404.

149. *Id.* at 404-09.

Protocol, and expressed serious doubts that Congress intended to create a stiffer burden of proof than the burden previously applied under the old conditional entry provision.[150] The *Stevic* appellate court concluded that the Refugee Act had changed the burden of proof in withholding of deportation cases to the lesser standard of a well-founded fear of persecution. Thus, the court remanded the case to the BIA for a determination based on the "well-founded fear" burden of proof.[151] The court made no effort to elaborately define well-founded fear, but recommended that the BIA look to legislative intent, the U.N. Handbook,[152] and past experience in making its determination.[153]

The Third Circuit in *Rejaie v. INS*,[154] was the second court of appeals to confront the burden of proof issue. The petitioner in *Rejaie* was an Iranian who came to the United States in 1978 to attend school. He did not want to return to Iran upon the expiration of his visa for fear of persecution by the Ayatollah Khomeini's regime. Accordingly, he sought withholding of deportation under section 243(h) of the INA. An immigration judge found him deportable.[155] The BIA, in reviewing the immigration judge's decision, required that Rejaie prove a clear probability of persecution.[156] He appealed, claiming that the proper standard of proof was a well-founded fear of persecution.[157]

Like the Second Circuit in *Stevic*, the Third Circuit in *Rejaie* also looked at the legislative history of the Refugee Act.[158] In

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150. *Id.* at 408-09.
151. *Id.* at 409.
152. *See supra* note 35.
153. *Stevic*, 678 F.2d at 409.
154. 691 F.2d 139 (3d Cir. 1982).
155. *Id.* at 141.
156. *Id.* at 140.
157. *See id.* at 142.
158. *Id.* at 142-45. The Supreme Court recently held that unexplained delay in processing an importer's § 618 petition for mitigation did not deprive the importer of property without due process of law in violation of the Fifth Amendment. In United States v. Von Neumann, ___ U.S. ___, 106 S. Ct. 610 (1986), an importer's automobile was seized when he failed to declare it to Customs in violation of 19 U.S.C. § 1497. Customs returned the vehicle after 14 days, when the importer posted a bond, and it imposed and collected a mitigated penalty some 36 days after the importer filed its § 618 petition. Justice Brennan, writing for a unanimous Court, held that the § 618 mitigation process was "constitutionally irrelevant", since the statute ". . . simply grants the [Treasury] Secretary the discretion not to pursue a complete forfeiture despite the Government's en-

Rejaie, however, the court focused on different parts of the history not considered by the Second Circuit in *Stevic*. In particular, the *Rejaie* court emphasized a portion of the House report which stated: *"Although [section 243(h)] has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the committee feels it desirable, for the sake of clarity, to conform the language of that section to the Convention."*[159] In other words, the court felt that the amendments to section 243(h) in the Refugee Act were merely procedural rather than substantive.[160]

The majority also expressed three major criticisms of the Second Circuit's opinion in *Stevic*. First, the *Rejaie* court claimed that the Second Circuit in *Stevic* attributed too stringent a test to the clear probability burden.[161] Second, the *Rejaie* court, unlike the *Stevic* court, claimed that prior case law established the equivalence of the two burdens.[162] Third, the *Rejaie* court criticized the *Stevic* court's analysis of the legislative history of the Refugee Act.[163] The *Rejaie* court concluded that there was no difference in the burdens of proof that should be applied to withholding of deportation claims and asylum claims. Finally, the court held that the clear probability test should be applied in the *Rejaie* decision.[164]

Reyes v. INS[165] was the next case addressing the burden of proof issue. *Reyes* involved a Filipino who entered the United States as a nonimmigrant exchange student. When she did not

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titlement to one." 106 S. Ct. at _____, and is not an essential step in the extinguishment of an importer's property right.

Justice Stevens, in a concurring opinion, suggested that despite the constitutional irrelevance of the mitigation procedure, the statute implicitly commands the Secretary to act diligently. Id. at _____.

159. *Id.* at 145 (quoting H.R. REP. No. 608, 96th Cong., 1st Sess. 18 (1979)) (emphasis added by the court).

160. The Third Circuit apparently felt that the Refugee Act was merely procedural housekeeping legislation in that it effected no change in substantive United States immigration law. *See Rejaie*, 691 F.2d at 144-45.

161. *Id.* at 146.

162. *Id.* The Court relied most heavily upon Kashani v. INS, 548 F.2d 376 (7th Cir. 1977), a pre-Refugee Act case which stated that the two standards "will in practice converge." 548 F.2d at 379.

163. *See Rejaie*, 691 F.2d at 146.

164. *Id.*

165. 693 F.2d 597 (6th Cir. 1982), *vacated*, 747 F.2d 1045 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2173 (1985).

return to the Philippines upon expiration of her visa, the government instituted deportation proceedings against her. She admitted deportability, but she sought withholding of deportation under section 243(h) of the INA.[166] The immigration judge denied her request and the BIA affirmed, after applying the clear probability standard.[167] In *Reyes,* in a short opinion, the Sixth Circuit quoted *Stevic* with approval and held that the more stringent clear probability test was inappropriate after enactment of the Refugee Act.[168] This conflict among the circuits[169] led the United States Supreme Court to grant certiorari in *Stevic v. Sava.*[170] The stage was finally set for a definitive interpretation of the Refugee Act's effect on the burden of proof issue.

III. *Stevic* — Its Message and Its Interpretation

A. The Court's Opinion

When the United States Supreme Court granted certiorari in *Stevic,*[171] most observers felt that the Court would clarify whether "clear probability" remained the proper burden of proof in withholding of deportation cases under section 243(h) of the INA after the Refugee Act. Observers also hoped that the Court would set forth the proper burden for political asylum claims under Section 208(a) of the INA. The parties took the same positions as they had in the lower court. The Government argued that the two standards were interchangeable, but that if there was a difference in them, the legislative history of the Refugee Acts showed that Congress did not mean to lessen the clear probability burden in

166. *Id.* at 598.

167. *Id.* at 599.

168. *Id.* at 599-600.

169. *See also* Zavala-Bonilla v. INS, 730 F.2d 562, 563 n.1 (9th Cir. 1984) (declining to decide whether the proper burden of proof is clear probability or well-founded fear, but treating a request for political asylum filed during deportation proceedings as identical to an application for withholding of deportation); Minwalla v. INS, 706 F.2d 831, 835 n.2 (8th Cir. 1983) (declining to choose the appropriate burden of proof, but treating a section 243(h) claim as the alien's only available asylum claim).

170. 104 S. Ct. at 2492.

171. For the facts and the lower court's holding in *Stevic,* see *supra* notes 141-53 and accompanying text. The Supreme Court set the case for oral argument on Dec. 6, 1983. Butterfield, *An Array of Arguments in Stevic,* 12 Immigration Newsletter 3 (1983) [hereinafter cited as Butterfield, *Stevic Arguments*].

withholding of deportation cases. Stevic, on the other hand, argued that the standards of proof were different and that the Protocol placed only a well-founded fear burden on an alien seeking asylum or withholding of deportation.[172]

Twenty-eight parties filed amici curiae briefs in this case which came to be one of the most controversial and hotly debated cases of the term.[173] The National Immigration Project,[174] in its amicus brief, argued that Congress intended for the Refugee Act to conform to the Protocol. Accordingly, it argued that the well-founded fear burden was the appropriate standard in both section 243(h) withholding of deportation claims and section 208(a) asylum claims. It also argued that the Protocol interpreted the well-founded fear language to mean "credible evidence of a reasonable fear of persecution."[175] The National Immigration Project admitted that the well-founded fear and clear probability language had been used interchangeably at times, but argued that immigration officials required a higher level of proof under the clear probability label. Noting that the lower courts improperly applied varied formulations of the clear probability test, the brief urged the Court to discard the clear probability language.[176] The Project concluded that, in view of the possible life or death consequences of an asylum determination:

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172. *Stevic*, 104 S. Ct. at 2492-93.

173. *See* Butterfield, *Stevic Arguments*, *supra* note 171, at 3-5.

174. Twenty-two other organizations signed onto the National Immigration Project's brief rather than filing their own. *Id.* at 4. The signatories included the following: American Friends Service Committee, New England Regional Office; Asian American Legal Defense and Education Fund (AALDEF); Asian Law Caucus, Inc.; Bay Area Immigrant and Refugee Rights Project; Center for Immigrants' Rights (CIR); Central American Refugee Center (CARECEN); Central American Refugee Defense Fund (CARDF); Chicago Religious Task Force on Central America (CRTFCA); El Rescate; El Salvador Lawyers Committee of Denver; Haitian Refugee Center (HRC); Justice and Peace Office of the Archdiocese of Denver; La Raza Legal Alliance; Lutheran Immigration and Refugee Service of the Lutheran Council in the United States of America; Mexican American Legal Defense and Education Fund (MALDEF); National Center for Immigrants' Rights, Inc.; National Ministries of the American Baptist Churches in the U.S.A.; Salvador Refugee Coalition of Denver; Tucson Ecumenical Council Task Force for Central America; Unitarian Universalist Service Committee (UUSC); Washington Association of Churches; and Willamette Valley Immigration Project.
Id. at 5.

175. *Id.* at 3 (quoting National Immigration Project Brief).

176. *Id.* at 4.

> proving a well-founded fear of persecution requires than [sic] an applicant demonstrate a reasonable basis to fear persecution. The reasonableness of the fear is evaluated by considering a totality of the circumstances, including the objective background situation in the country of origin, the subjective perceptions of the applicant, and the credibility of the applicant. An asylum applicant should not be required to prove that he will be persecuted or that persecution is more probable than not. It is enough if the applicant submits evidence, which fairly evaluated, would lead a reasonable person to believe that he might be persecuted, i.e., that persecution is reasonably possible.[177]

All of the other amici briefs, including that of the United Nations High Commissioner for Refugees, advocated basically the same position.[178]

The Supreme Court began its analysis with a relatively detailed look at the legislative history and prior case law leading up to the enactment of the Refugee Act of 1980.[179] The Court then looked at the Refugee Act itself. Noting that Section 203(e) of the Refugee Act amended the language of Section 243(h) of the INA to coincide with Article 33 of the Convention, the Court found that none of these changes expressly or impliedly had changed the standard of proof necessary under section 243(h). The Court reasoned that, even with these amendments, "the text of the statute simply does not specify how great a possibility of persecution must exist to qualify the alien for withholding of deportation."[180] The Court also recognized that the language of section 243(h) does not contain the term "refugee," nor does it refer to section 101(a)(42)(A) which defines "refugee."[181]

The Court also rejected the argument that regulations promulgated under the Refugee Act established the well-founded fear burden as the appropriate standard under section 243(h). Although requests for asylum filed after institution of deportation proceedings would also be considered as requests for withholding of deportation,[182] the Court reasoned that this fact did not expand the well-founded fear burden to section 243(h) cases. In-

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177. Steinberg, *The Standard After Stevic*, *supra* note 10, at 7 (quoting from National Immigration Project Brief).

178. *See* Butterfield, *Stevic Arguments*, *supra* note 171, at 4.

179. *Stevic*, 104 S. Ct. at 2493-96.

180. *Id.* at 2496-97.

181. *Id.* at 2497-498.

182. 8 C.F.R. § 208.3(b) (1983).

stead, the regulation merely eliminated the need for filing an additional claim for withholding of deportation.[183]

Before analyzing the legislative history of the Refugee Act, the Court summarily held that "clear probability" meant that the standard was "whether it is more likely than not that the alien would be subject to persecution."[184] The Court reached this conclusion without any reference to the varying applications of the standard in past cases. The Court also dismissed the argument that the BIA had applied a clear and convincing standard in the *Stevic* case.[185] Finally, in its last statement before examining the legislative history of the Refugee Act, the Court made its only reference toward the resolution of the issue of whether the two standards are interchangeable. The Court stated, "[f]or purposes of our analysis, we may assume . . . that the well-founded-fear standard is more generous than the clear-probability-of-persecution standard. . . ."[186]

In its examination of the legislative history of the Refugee Act, the Court went to great lengths to separate the asylum provision from the withholding provision. It quoted from the House Committee report to support its basic premise that the changes to section 243(h) were merely procedural rather than substantive.[187] The Court concluded its legislative history analysis by finding that Congress did not intend for an alien to be entitled to withholding of deportation simply by qualifying as a refugee. Instead, Congress meant for the alien to qualify for withholding of deportation only after meeting the clear probability standard of proof.[188]

The Court unanimously concluded that the legislative history, the statutory language, and prior case law dictated a clear probability standard, which it defined as more likely than not, for withholding of deportation claims.[189] The Court, therefore, reversed the Second Circuit's opinion and remanded the case to be considered under the clear probability burden. It expressly refused to resolve the meaning of the well-founded fear language,

183. *Stevic*, 104 S. Ct. at 2497 n.18.
184. *Id.* at 2498.
185. *Id.* at 2498 n.19.
186. *Id.* at 2498.
187. *Id.* at 2499 & n.20.
188. *Id.* at 2500.
189. *Id.* at 2501.

stating that this case did not raise that issue.[190] Thus, by implication, the Court did not resolve the issue of whether the two standards are coterminous.

B. The Lower Courts' Interpretations

Carvajal-Munoz v. INS[191] was one of the first cases which attempted to interpret the Supreme Court's holding in *Stevic*. In *Carvajal-Munoz*, the Seventh Circuit reviewed denial of an asylum application and a withholding of deportation application. An immigration judge and the BIA both had rejected the claims by the petitioner, a native of Chile and former citizen of Argentina.[192] The court eventually upheld the BIA's result on both applications,[193] but in so doing, it outlined the procedure for determining withholding of deportation and asylum claims and the proper procedure for appellate review.

The court first noted the discretionary aspects of the asylum provision as opposed to the mandatory nature of the withholding of deportation provision. Because of this distinction, the majority opined that the determinations for each should be made on separate records if possible. The court, however, recognized that efficiency sometimes necessitated only one record for both decisions, particularly when an alien applies for asylum after deportation proceedings have begun.[194]

The court then addressed the burden of proof necessary under each provision. It held that the clear probability standard was appropriate for the section 243(h) claim, but it concluded that the well-founded fear standard was proper under section 208(a).[195] The court relied exclusively on *Stevic* in determining the proper withholding of deportation standard, and it also relied on *Stevic* in determining the proper asylum burden.[196] Furthermore, the court held that courts should review section 243(h) claims under the substantial evidence test, rather than an abuse of discretion standard, because the grant was now mandatory if the alien quali-

190. *Id.*
191. 743 F.2d 562 (7th Cir. 1984).
192. *Id.* at 563.
193. *Id.* at 580.
194. *Id.* at 569-70.
195. *Id.* at 572-73.
196. *Id.* at 573.

fied under the statute.[197] Last, the court reasoned that the discretionary determination of whether to grant asylum must be reviewed under an abuse of discretion standard; however, the preliminary determination of whether the alien meets the definition of a refugee must be reviewed under the substantial evidence test.[198]

Hopes for uniformity after *Carvajal-Munoz* were short-lived. In *Sotto v. INS*,[199] the Third Circuit adopted a very different interpretation of *Stevic*. *Sotto* involved a citizen of the Philippines who sought political asylum under section 208(a) and withholding of deportation under section 243(h) after deportation proceedings had begun.[200] The immigration judge and the BIA denied both claims. As in *Carvajal-Munoz*, the court held that *Stevic* controlled review of the withholding of deportation claim. Thus, the court applied the clear probability standard to that claim.[201] Regarding the asylum claim, however, the court noted that *Stevic* had left the burden of proof question open.[202] The court went on to hold that, in light of this fact, its earlier decision in *Rejaie v. INS*[203] controlled on the burden of proof issue. *Rejaie* had held that the two burdens are coterminous. Therefore, the court concluded that the clear probability standard applied not only to the withholding of deportation claim but also to the asylum claim.[204] The *Sotto* court also differed from the *Carvajal-Munoz* court in that the *Sotto* court reviewed the section 243(h) claim under an abuse of discretion test rather than under a substantial evidence test.[205]

In *Youkhanna v. INS*[206] the Sixth Circuit also addressed the ramifications of *Stevic*. The petitioners, a married couple from Iraq, appealed from the BIA's denial of their asylum and with-

197. *Id.* at 569. The *Stevic* Court did not address the issue of the proper standard of judicial review.

198. *Id.* at 567.

199. 748 F.2d 832 (3d Cir. 1984).

200. *Id.* at 833.

201. *Id.* at 836.

202. *Id.*

203. 691 F.2d 139 (3d Cir. 1982). *See supra* notes 154-64 and accompanying text.

204. *Sotto*, 748 F.2d at 836; *accord* Sankar v. INS, 757 F.2d 532 (3d Cir. 1985).

205. 748 F.2d at 837.

206. 749 F.2d 360 (6th Cir. 1984).

holding of deportation claims.[207] The court adopted a position similar to the Seventh Circuit's *Carvajal-Munoz* decision on the burden of proof issue. It concluded that *Stevic* mandated a clear probability standard for the withholding of deportation claim and cited *Carvajal-Munoz* with approval in adopting a lesser well-founded fear burden for the asylum claim.[208] The court disagreed with the Seventh Circuit, however, on the judicial review standard. The *Youkhanna* court, like the Third Circuit in *Sotto*, applied an abuse of discretion standard to the section 243(h) claim.[209]

In adopting the abuse of discretion standard, the *Youkhanna* court cited *Dally v. INS*.[210] In *Dally*, a post-*Stevic* case, the petitioner appealed a BIA denial of his withholding of deportation claim.[211] The petitioner also had sought political asylum, but that issue was not on appeal. The court, however, stated in a footnote that the asylum claim had been raised after the beginning of deportation proceedings and that such claims must come under the clear probability standard. The court cited the language of the relevant regulation in support of its position.[212] Apparently, the *Dally* court's decision means that an asylum claim filed before a deportation proceeding must show a well-founded fear of persecution, while asylum claims filed after the deportation proceedings have begun must show a clear probability of persecution. No other court has adopted this novel interpretation.

The Ninth Circuit set forth its interpretation of *Stevic* in *Bola-*

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207. *Id.* at 361.

208. *Id.* at 362. This holding appears to conflict with Reyes v. INS, 747 F.2d 1045 (6th Cir. 1984), in which the court held that the clear probability standard applied to asylum and withholding of deportation claims. This apparent conflict, however, may only be the result of the *Reyes* court's improper use of the term "asylum." Although the court stated that the alien sought "asylum or withholding of deportation," it referred only to § 243(h) of the INA as the basis of the claim. *See id.* at 1046. Thus, the alien may only have applied for withholding of deportation. This interpretation receives support from Moosa v. INS, 760 F.2d 715 (6th Cir. 1985). The *Moosa* court cited both *Reyes* and *Youkhanna* in concluding that well-founded fear is a less stringent burden than clear probability. *Moosa*, 760 F.2d at 718-19; *see also* Dolores v. INS, 772 F.2d 223 (6th Cir. 1985).

209. *Youkhanna*, 749 F.2d at 362 n.2.

210. 744 F.2d 1191 (6th Cir. 1984).

211. *Id.* at 1192.

212. *Id.* at 1196 n.6. The Sixth Circuit also took this same position in *Moosa*, 760 F.2d at 719.

nos-Hernandez v. INS.[213] *Bolanos-Hernandez* involved an alien from El Salvador who illegally entered the United States in September of 1982. During deportation hearings commenced against him the following month, he requested withholding of deportation and political asylum.[214] The immigration judge denied his requests on both counts. The BIA affirmed, holding that the alien failed to meet either the clear probability or well-founded fear standard.[215] After a thorough review of the statutory framework and case law, the Ninth Circuit reversed the BIA, holding that the petitioner had established his right to withholding of deportation and that he also qualified for political asylum.[216]

In reaching this conclusion, the court first addressed the question of the proper standard of judicial review. The *Bolanos-Hernandez* court, much like the Seventh Circuit in *Carvajal-Munoz*,[217] reasoned that the mandatory nature of the withholding of deportation provision required a substantial evidence test rather than the abuse of discretion test which had been applied prior to enactment of the Refugee Act.[218] The Ninth Circuit also found that the asylum claim should receive a two-tiered standard of review. The determination of whether the alien meets the definition of a refugee should be reviewed under a substantial evidence test. If that definition is met, the court then should review the Attorney General's grant or denial of asylum under an abuse of discretion standard.[219]

The court then examined the issue of whether the well-founded fear standard is more generous than the clear probability standard. It noted that the Supreme Court in *Stevic* had assumed that well-founded fear was a less stringent burden of proof but that the Court had not actually resolved the issue. The Ninth Circuit concluded that, in fact, the well-founded fear standard did

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213. 767 F.2d 1277 (9th Cir. 1985). While the Ninth Circuit earlier confronted the effects of *Stevic* in Zepeda-Melendez v. INS, 741 F.2d 285 (9th Cir. 1984), *Bolanos-Hernandez* contains a more in-depth look at the state of United States refugee law after *Stevic*. For later Ninth Circuit cases following *Bolanos-Hernandez*, see Chatila v. INS, 770 F.2d 786 (9th Cir. 1985); Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985).

214. *Bolanos-Hernandez*, 767 F.2d at 1280.

215. *Id.* at 1283.

216. *Id.* at 1288.

217. *See supra* notes 191-98 and accompanying text.

218. *Bolanos-Hernandez*, 767 F.2d at 1282 n.8.

219. *Id.* at 1282 n.9.

not place as heavy a burden on the alien as did the clear probability standard. In so finding, the court reasoned that Congress felt that, in obtaining *mandatory* withholding of deportation, aliens should carry a higher burden than the burden required to establish eligibility for a *discretionary* grant of asylum.[220]

The court criticized the BIA for not considering the claims separately in this case. The court held that the proper procedure is first to consider the section 243(h) withholding of deportation claim under the more stringent clear probability test. If an alien meets the clear probability standard, the inquiry can stop at that point because he or she obviously also meets the well-founded fear burden applicable to the asylum claim. If, however, the alien fails to satisfy the clear probability burden, the court should determine if the alien qualifies as a refugee for asylum purposes under the lesser well-founded fear standard.[221] The court then closely scrutinized all of the evidence in the case and concluded that the petitioner satisfied both burdens of proof.[222]

IV. Analysis

A. The Failure of the Refugee Act—Who Gets the Blame?

The Refugee Act of 1980 supposedly established a uniform and nonideological refugee eligibility standard.[223] Clearly, the above discussion illustrates that, in this regard, the Refugee Act has been a dismal failure. The blame for this failure belongs both with Congress for not establishing its intentions more clearly by better drafting in the Refugee Act and with the Supreme Court for its holding in *Stevic*.

In *Stevic*, the alien and the amici curiae argued that the well-founded fear standard applied to both withholding of deportation claims and asylum requests after enactment of the Refugee Act and that the well-founded fear standard is less stringent than the clear probability standard.[224] These arguments are certainly reasonable in light of the language of the Protocol and the legislative history of the Refugee Act. This position, however, is not as

220. *Id.* at 1282-83.
221. *Id.* at 1283.
222. *Id.* at 1284-88.
223. *See* Helton, *Stevic Implications*, *supra* note 10, at 53.
224. *See supra* notes 171-78 and accompanying text.

sound as some commentators appear to believe.[225] The language from the House Committee report on the Refugee Act cited by the *Stevic* Court, although certainly not conclusive, indicates that the changes made to Section 243(h) of the INA might well have been only procedural rather than substantive. The language from the House Committee report says that "the Committee feels it desirable, for the sake of clarity, to conform the language of [section 243(h)] to the Convention."[226] The *Stevic* Court also raised a valid point when it found that the legislative history of the Refugee Act did not support the theory that Congress intended for every alien who qualified as a refugee to also be entitled to withholding of deportation.[227] Finally, the fact that Congress failed to include the well-founded fear language or the term "refugee" in its amendments to section 243(h) weakened the alien's position in *Stevic*.

On the other hand, the Court was presented with ample evidence that Congress intended the lesser burden of proof for withholding of deportation claims. The Court failed to even recognize the strongest evidence of such intent. Although it noted that Congress intended to conform the withholding of deportation provision to Article 33 of the Protocol, the Court focused on the fact that the language of the amended section 243(h) does not include the term "refugee."[228] What the Court failed to address, however, was the fact that article 33—the very article after which the changes to section 243(h) were modeled—specifically includes the term "refugee."[229] The refugee language in the Protocol, coupled with the congressional intent to conform United States law with the Protocol, presented sufficient proof for the Court to discard the clear probability standard and to adopt instead a uniform approach under a lesser well-founded fear standard for both withholding of deportation claims and asylum claims.

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225. *See, e.g.*, Helton, *Stevic Implications*, supra note 10, at 53.

226. *Stevic*, 104 S. Ct. 2489 n.20 (quoting H.R. REP. No. 608, *supra* note 111, at 18).

227. *See Stevic*, 104 S. Ct. at 2500.

228. *Id.* at 2497.

229. *See* Convention, *supra* note 34, art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176 (incorporated by reference at Protocol, *supra* note 3, art. I, § 2, 19 U.S.T. at 6225, 606 U.N.T.S. at 268); *see also* Helton, *Stevic Implications*, *supra* note 10, at 53.

B. The *Stevic* Approach and Its Interpretations

Perhaps the most amazing aspect of the *Stevic* opinion is the unanimity of the Court on such a controversial issue. For nine Justices, ranging from Rehnquist on the right to Brennan on the left, to agree on an issue as politically oriented as immigration law is, at first glance, practically unprecedented. A closer look at this situation, however, provides a possible explanation of the unanimous result. The Court did not issue its opinion until six months after hearing oral arguments in the case.[230] At that time, the case was one of the oldest on the Court's docket. This delay could well indicate that the Court had reached an impasse on the asylum issue, particularly in light of the eventual extremely narrow holding in the case. The Justices apparently chose to compromise on a unanimous, very narrow opinion rather than have another fragmented opinion in an important area.[231] This theory gains further support from the fact that Justice Stevens, known as one of the "swing" Justices, wrote the opinion for the Court.

Although a fragmented opinion could have caused numerous problems in subsequent cases, the Court did not escape these problems through its narrow holding. By not resolving the issue of whether the two burdens of proof are coterminous, and if not coterminous, the proper definition of the well-founded fear standard, the Court did not address one of the major points of conflict among the circuits.[232] The Court also failed to address another important point by concluding summarily that clear probability meant "more likely than not"[233] without any examination of case law or administrative decisions. Even a cursory review of prior circuit court cases would have shown the wide range of interpretations of the clear probability test.[234] The Court should have addressed the proper interpretation of clear probability more thoroughly to provide better guidance in future cases. A final criticism of the *Stevic* opinion is that the Court did not even mention whether the BIA's withholding of deportation determination should be reviewed on a substantial evidence test or an abuse of

230. The Court heard oral arguments on Dec. 6, 1983, and issued the opinion on June 5, 1984. 104 S. Ct. at 2489.

231. *See* Steinberg, *The Standard After Stevic*, *supra* note 10, at 6 (quoting N.Y. Times, June 6, 1984, at A23, col. 2).

232. *See supra* notes 141-70 and accompanying text.

233. *Stevic*, 104 S. Ct. at 2498.

234. *See* Steinberg, *The Standard After Stevic*, *supra* note 10, at 1, 6.

discretion test.

Subsequent cases quickly demonstrated these shortcomings. The Seventh Circuit and the Ninth Circuit held that the well-founded fear burden applied to asylum cases and that it was more generous than the clear probability burden.[235] The Sixth Circuit adopted a hybrid formulation of the proper burden of proof. The Sixth Circuit suggested that the well-founded fear standard applied to asylum claims made before the start of deportation proceedings,[236] while the clear probability standard applied if asylum requests were made after the deportation proceedings had begun.[237] The Third Circuit held that the clear probability standard applied to both asylum and withholding of deportation claims.[238] Further, some courts reviewed section 243(h) claims under the substantial evidence test while others used the abuse of discretion standard.[239] All of these inconsistencies can be directly attributed to the Supreme Court's lack of guidance in *Stevic*.

Of all the post-*Stevic* cases, the Ninth Circuit's opinion in *Bolanos-Hernandez*[240] presents the most thorough and well-reasoned approach to the entire disposition of section 243(h) and section 208(a) claims. As *Bolanos-Hernandez* points out, *Stevic* mandates the use of the clear probability standard for withholding of deportation claims. Based on the legislative history and the language of the Refugee Act, a less stringent well-founded fear standard is appropriate for asylum requests.[241] First, the Immigration Judge and the BIA should determine if the alien meets the clear probability standard for withholding of deportation. If he does, the process can stop at that point because he obviously

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235. *See Carvajal-Munoz*, 743 F.2d at 573; *Bolanos-Hernandez*, 767 F.2d at 1282.

236. *See Youkhanna*, 749 F.2d at 362.

237. *See Dally*, 744 F.2d at 1196 n.6.

238. *See Sotto*, 748 F.2d at 836.

239. For a listing of cases on both sides of the issue, see *Carvajal-Munoz*, 743 F.2d at 569.

240. *See supra* notes 213-22 and accompanying text.

241. There is absolutely no support for the Sixth Circuit's position in *Dally* and *Moosa* that an asylum claim filed after the beginning of deportation should be evaluated under the clear probability standard. The footnote in *Stevic* which the Sixth Circuit cites as the basis for its position clearly does not suggest any such position. The *Stevic* court noted that "[8 C.F.R. § 208.3(b)] simply does not speak to the burden of proof issue; rather *it merely eliminates the need for filing a separate request for § 243(h) relief* if a section 208 claim has been made." *Stevic*, 104 S. Ct. at 2497 n.18. (emphasis added).

also meets the well-founded fear burden required for asylum eligibility.[242] If, however, the alien does not meet the clear probability standard, his eligibility for asylum should be determined using a lesser well-founded fear burden. A court should review the withholding of deportation determination under the substantial evidence test because the Attorney General no longer has any discretion under the withholding of deportation provision. The asylum claims should be reviewed first under the substantial evidence test to see if the alien qualifies as a refugee because that determination involves no discretion; however, the actual grant or denial of asylum by the Attorney General is discretionary and should be reviewed under the abuse of discretion standard.

C. Possible Legislative Reaction

Even if the Supreme Court finally resolves the issues left open in *Stevic*, the uniform, nonideological standard, which congressional sponsors of the Refugee Act had hoped to create, will still be only a dream. The only real solution is legislative action. One proposal currently before Congress is a provision of the comprehensive Simpson-Mazzoli immigration reform bill.[243] That bill would amend section 243(h) of the INA by adding the following paragraph:

> An application for relief under this subsection shall be considered to be an application for asylum under section 208 and shall be considered in accordance with the procedures set forth in that section.[244]

If Congress enacts this provision, it would address one of the problems with the *Stevic* decision in that section 243(h) would then include language indicating that the well-founded fear standard is relevant to that section.[245]

While the Simpson-Mazzoli provision would be better than no congressional action at all, it probably does not provide the clarity needed for the desired uniform standard. The Third Circuit's

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242. An alien most likely would want to continue pursuing the asylum claim even if he qualifies for withholding of deportation because withholding is only temporary, while asylum can possibly lead to permanent residence in the United States. *See Bolanos-Hernandez*, 767 F.2d at 1288 & n.19.

243. Simpson-Mazzoli is S. 529 and H.R. 1510 in the current session of Congress. Helton, *Stevic Implications*, *supra* note 10, at 54.

244. *See* Steinberg, *The Standard After Stevic*, *supra* note 10, at 8.

245. *See id.*; *see also Stevic*, 104 S. Ct. at 2498.

approach of treating the two standards as coterminous would not be affected by this amendment. Thus, the Third Circuit would continue to apply a more probable than not standard to both claims, while other Circuits would apply a lower well-founded fear burden to both claims. In all probability, the only way to accomplish complete uniformity is for Congress to enact a two-part amendment. First, section 243(h) should be amended by adding the phrase "the alien has demonstrated by a well-founded fear of persecution that" after the phrase "if the Attorney General determines that" and before the phrase "such alien's life or freedom." The statute then would read as follows:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that the alien has demonstrated by a well-founded fear of persecution that such alien's life or freedom would be threatened in such country. . . .[246]

The second part of the amendment should define "well-founded fear of persecution" as it is defined in the U.N. HANDBOOK.[247]

V. CONCLUSION

Both Congress and the Supreme Court must bear the blame for the failure of the Refugee Act of 1980 to establish a uniform, nonideological standard for refugee eligibility. Congress should have anticipated the possible problems with the Refugee Act and should have drafted its provisions more carefully to avoid these problems. The Supreme Court, however, had a sufficient record before it in *Stevic* to put the finishing touches on a uniform standard. While the *Stevic* holding is not totally without support, it does appear contrary to the underlying purposes of the Refugee Act. Additionally, the Supreme Court caused as many problems with what it did not hold in *Stevic* as with what it did. *Stevic's* extraordinarily narrow holding only perpetuated the long-standing confusion in the lower courts. Lower courts which must follow *Stevic* should adopt the logical approach set forth by the Ninth Circuit in *Bolanos-Hernandez* until some congressional action can be taken to correct the current confusion. The best course of action for Congress to follow would be to enact a two-part amend-

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246. *See* 8 U.S.C. § 1253(h) (1982).

247. *See* U.N. HANDBOOK *supra* note 35, ¶¶ 37-50. For an articulation of the Handbook's definition, see the National Immigration Project's proposed definition in its amicus brief in *Stevic*, *supra* note 177 and accompanying text.

ment to the INA that would insert the well-founded fear language into section 243(h) add a statutory definition for that term based upon the guidelines set forth in the U.N. HANDBOOK. Then, and only then, will the United States have a truly humanitarian refugee eligibility standard based upon the uniform, non-ideological ideals of the Protocol.

Jeffrey Scott Bivins