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The Right of Asylum Under United States Immigration Law

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THE RIGHT OF ASYLUM UNDER UNITED STATES IMMIGRATION LAW*

The United States has traditionally provided a sanctuary to persons fleeing persecution in their native lands.[1] Under section 243(h) of the Immigration and Nationality Act of 1952,[2] and the United Nations Protocol Relating to the Status of Refugees[3] (U.N. Protocol), an alien[4] otherwise subject to deportation,[5] who would be persecuted if returned to his country of origin qualifies for asylum as a refugee.[6] Authority to withhold deportation of an alien, based on

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DEDICATION

I dedicate this work to the memory of my late brother Jonathan Norton Roth, who died at age 26 this summer following completion of his first year at the University of Florida's Holland Law Center. To me he was not only the older brother, but my closest friend and companion as well. I always looked up to him as a model of sincerity, morality, and compassion. Although he died at a relatively young age his zest for living enabled him to experience a richness of life enjoyed by few.

*EDITOR'S NOTE: This note is the co-winner of the *Gertrude Brick Law Review Apprentice Prize* for the best student note submitted in the Spring quarter 1981.

1. President Kennedy, in a letter to then Secretary of Health, Education, and Welfare, Abraham Ribicoff, spoke of the "tradition of the United States as a humanitarian sanctuary." PUB. PAPERS, John F. Kennedy 17-18 (1961). This paper will focus on the provisions of U.S. asylum law applicable to aliens already within the United States, rather than requests for asylum abroad or on embassy premises. The former is referred to as territorial asylum, while the latter is referred to as diplomatic asylum. *See* 2 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 5 (1972).

2. 8 U.S.C. §1253(h) (1952), *as amended by* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

3. *Opened for signature* Jan. 31, 1967, 19 U.S.T. 622 (1968), T.I.A.S. No. 6577, 606 U.N.T.S. 267. A treaty made by the President with the advice and consent of the Senate is the supreme law of the land. U.S. CONST. art 6, cl. 2.

4. The term alien applies to any person who is not a citizen or national of the United States. 8 U.S.C. §1101(a)(3) (1976). An alien may be granted permission to lawfully reside in the United States as an immigrant, or be entitled to remain in the United States as a nonimigrant. *Id.* §1201(a). The focus of this paper, however, is upon the alien who has entered the United States illegally or without authorization, and is subject to deportation under 8 U.S.C. §1251(a)(2) (1976).

5. The term deportation refers to the removal of an alien from the United States because his presence is deemed inconsistent with the public welfare. Frank, *Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States*, 11 INT'L LAW. 291, 292 (1977). Illegal aliens facing deportation include criminals, drug traffickers, prostitutes, subversives, anarchists, illiterates, paupers, mental defectives, carriers of communicable diseases, ship jumpers, those failing to abide by the relevant regulations, and persons without proper entry documents. 8 U.S.C. §1251 (1976).

6. As distinguished from persons who have fled natural disasters, those who have fled racial, religious or political persecution may be described as political refugees. The former have found territorial asylum in the United States by a grant of the government for humanitarian reasons and not under asylum law. *See* Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 INT'L LAW. 204, 204-05 (1969). For a discussion of the general concept of the refugee in international law, *see generally* 1 A. GRAHL-MADSEN, *supra* note 1, §10; Weis, *The Concept of the Refugee In International Law*, 87 J. DU DROIT INT'L 928 (1960).

his refugee status, is vested in the Board of Immigration Appeals (the Board), a quasi-judicial body responsible only to the Attorney General.[7]

Although the asylum provisions are based on a commitment to human rights, the manner in which the Board and courts have applied them belies this commitment. Various factors contribute to the disparity between asylum law in theory and in practice. Because Congress has historically responded to the problem of political refugees on an ad hoc basis, the policy that has emerged is less than a coherent and comprehensive national program. Moreover, in the legislation that has been enacted, Congress has failed to provide the Board and the courts with guidelines for determining when an alien should be granted asylum. Accordingly, the Board and the courts have formulated their own criteria for determining when an alien has demonstrated a prima facie case of persecution, and hence established his status as a refugee entitled to asylum under section 243(h) and the U.N. Protocol. The first section of this note, after examining the history of asylum law in the United States, evaluates the criteria used by the Board and the courts to determine when persecution has been shown by the alien. This section will also demonstrate that such criteria have been imposed selectively on the basis of unspoken foreign policy considerations.

In practice, United States asylum law has fallen short of the commitment to human rights it is supposed to reflect by lagging in its adherence to the U.N. Protocol. In order to bring United States asylum law into conformity with the U.N. Protocol, Congress enacted the Refugee Act of 1980.[8] The second section of this note will assess the impact of the Refugee Act upon the burden of proof traditionally imposed upon the alien attempting to establish his status as a refugee by both the Board and courts. This note will demonstrate that the burden of proof required by the Board and the courts is substantially heavier than that properly required under the Refugee Act of 1980 and the U.N. Protocol.

Another factor which contributes to the gap between United States asylum law as applied, and the Refugee Act of 1980, is the limited judicial review accorded findings of the Immigration and Naturalization Service (INS). The final section of this note will review the restrictions courts have traditionally placed upon judicial review of INS decisions and demonstrate that such standards are overly deferential to the INS in view of the changes made in asylum law by the Refugee Act of 1980.

History of Statutory and Treaty Provisions Relating to the Admission of Refugees

Until the twentieth century, entry into the United States was virtually unrestricted.[9] The Immigration and Nationality Act of 1917,[10] however, limited

7. The Board is a separate division of the Department of Justice. 8 C.F.R. §3.1 (1980).

8. Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §1101 et seq. (Supp. IV 1980)).

9. Congressional Research Service of the Library of Congress, Review of U.S. Refugee Resettlement Programs and Policies, 96th Cong., 2d Sess. 1 (1980) [hereinafter cited as Library of Congress Report on Refugees].

10. Immigration and Nationality Act of 1917, ch. 29, 39 Stat. 874 (current version at 8

immigration by requiring proof of literacy. Although persons fleeing religious persecution were not required to meet the literacy requirement,[11] refugees were generally treated indistinctly from other immigrants during this period.

Due to the great number of persons uprooted by World War II, Congress enacted a series of measures intended to supplement existing immigration law. The Displaced Persons Act of 1948[12] provided for the adjustment to permanent resident status of 15,000 displaced persons already living in the United States and the admission of another 400,000.[13] Aliens admitted or whose status was adjusted under this statute were required to demonstrate the likelihood of persecution on account of race, religion, or political opinions if asylum was not granted.[14] Two years later, Congress passed the Internal Security Act of 1950,[15] which required the Attorney General to withhold the deportation of any alien whom the Attorney General determined would be subject to physical persecution in his country of origin.[16] The burden of proving the likelihood of physical persecution, which was neither defined by the statute nor the legislative history,[17] was on the alien.

In an attempt to consolidate previous immigration laws and practices, Congress passed the Immigration and Nationality Act of 1952.[18] The Act incorporated an amended version of the Internal Security Act of 1950 as section 243(h),[19] which became the statutory basis for withholding deportation due to

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U.S.C. §1101 (1976), *as amended by* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980)). For a discussion of the 1917 Act and some of the other statutes considered in this section, see PROCEEDINGS AND COMMITTEE REPORTS OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, LEGAL ASPECTS OF ASYLUM 64-73 (1967-1968).

11. Immigration and Nationality Act of 1917, ch. 29 §3, 39 Stat. 877 (1917).

12. Act of June 25, 1948, ch. 647, 62 Stat. 1009 (1948), *as amended by* Act of June 16, 1950, ch. 262, 64 Stat. 219 (1950); Act of June 28, 1951, ch. 167, 65 Stat. 96 (1951) (repealed 1957).

13. The Displaced Persons Act applied to citizens of the Axis countries who had been victims of persecution, as well as citizens of other countries who were located in Germany, Italy, or Austria after the war. Displaced Persons Act of 1948, ch. 647 §2(c), 62 Stat. 1009. The Act also provided visas for citizens of Czechoslovakia who fled the 1948 Communist coup. *Id.* §2(d), 62 Stat. 1010.

14. Displaced Persons Act of 1948, ch. 647, §2(d), 62 Stat. 1010.

15. Act of Sept. 23, 1950, ch. 1024, 64 Stat. 987 (*amending* the Immigration Act of 1917, ch. 29, §20, 39 Stat. 874) (current version at 8 U.S.C. §1253(h) (1976)).

16. *Id.* §23, 64 Stat. 1010. The provision reads, "no alien shall be deported under any of the provisions of this Act to any country in which the Attorney General shall find that such alien would be subject to physical persecution." *Id.*

17. Legislative history of the statute reveals that Congress did not attempt to define physical persecution. *See* H.R. REP. No. 3112, 81st Cong., 2d Sess. 9 *reprinted in* [1950] 2 U.S. CODE CONG. & AD. NEWS 3886, 3912. However, the Immigration and Naturalization Service held in 1958 that "[p]hysical persecution contemplates incarceration or subjection to corporal punishment, torture or death based usually on one's race, religion or political opinions." Matter of Kale, I. & N. Dec. A 9-555-532 (May 1958), *quoted in* Diminich v. Esperdy, 299 F.2d 244, 246 (2d Cir. 1961).

18. Ch. 477, 66 Stat. 163 (codified in scattered sections of 5, 8, 18, 22, 31, 49 & 50 U.S.C. (1976)).

19. Ch. 477, §243, 66 Stat. 212 (1952) (current version at 8 U.S.C. §1253(h) (Supp. IV 1980)). This provision stated: "[t]he 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

persecution under federal immigration law.[20] Unlike the Internal Security Act of 1950, section 243(h) emphasized the discretionary nature of the Attorney General's authority to withhold deportation.

Between 1952 and 1965, Congress adopted a series of measures to deal with

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be subject to physical persecution and for such a time as he deems necessary for such reason." *Id.*

20. *Id.* The Immigration and Nationality Act also included defector and parole provisions. The defector provision permited the immigration of former Communist Party members if they could demonstrate their membership was involuntary, occurred while they were less than sixteen, or at least five years prior to application for a visa. Ch. 477, §212(a)(28)(J) (1952) (currently codified at 8 U.S.C. §1182(a)(28)(I) (1976)). The parole provision incorporated into statutory law authorization for the temporary parole of aliens into the United States, which had been an administrative practice of long standing. Ch. 477, §212(d)(5) (1952) (currently codified at 8 U.S.C. §1182(d)(5) (1976)). This section grants the Attorney General discretion to parole any alien into the United States temporarily, in emergencies, or for reasons deemed strictly in the public interest. *Id.* Parole has traditionally been used as the primary basis for the admission of large numbers of refugees into the United States. *See* LIBRARY OF CONGRESS REPORT ON REFUGEES, *supra* note 9, at 8. For example, it was used to admit Hungarian refugees following the Hungarian revolt in 1956, to admit most of the 360,000 Indo-Chinese refugees who entered the United States between 1975 and 1980, and to admit over 690,000 Cubans who entered the United States during the past decade. For a discussion of the use of parole authority, *see generally* Note, *Refugees Under United States Immigration Law*, 24 CLEV. ST. L. REV. 528 (1975).

The Refugee Act of 1980, however, was designed to sharply curtail the use of parole authority, so that subsequent emergency legislation was required to grant parolees permanent status. The Refugee Act provides: "The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to the particular alien require that the alien be paroled into the United States rather than be admitted as a refugee . . . ." Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified at 8 U.S.C. §1182(d)(5)(b) (Supp. IV 1980)). This enables the President to respond to an unforeseen emergency refugee situation by designating such persons as refugees, and admitting a fixed number into the United States on that basis. *Id.* at 94 Stat. 103 (1980) (codified at 8 U.S.C. §1157((b) (Supp. IV 1980)). The President may utilize this power only after appropriate consultation with Congress, when justified by "grave humanitarian concerns" or the "national interest". *Id.* On April 14, 1980, President Carter relied on the Act to admit 3,500 Cubans who had taken sanctuary at the Peruvian Embassy in Havana. 45 Fed. Reg. 28079 (1980). However, President Carter did not rely on the Refugee Act to admit the 120,000 "Freedom Flotilla" Cubans who arrived in the United States by boats from Mariel, Cuba. Instead, the Carter administration admitted them as applicants for political asylum, which required the INS to process their applications individually subsequent to their arrival. According to the *New York Times*, Jack H. Watson, Jr., special assistant to the President for Intergovernmental Affairs, stated that since the President was not admitting the Cubans under the Refugee Act's emergency provisions, consultation with Congress was unnecessary to set the number ultimately admitted. *New York Times*, May 21, 1980, at 24, col. 1. Because the Cubans were not admitted as refugees, they were ineligible for any of the special resettlement assistance provided for under the new Act. Subsequently, on June 20, 1980, the State Department announced a Cuban-Haitian entrant program that would give special parole status to Cubans who entered the country between April and June 19, 1980, and to the Haitian boat people who entered the United States up to June 19, 1980, thereby making such persons eligible for special assistance benefits. Later, this special status was extended to all Cuban and Haitian refugees arriving before October 10, 1980. *See Haitians, Cubans, and the New Refugee Act*, 9 IMMIGRATION NEWSLETTER 8-14 (May-June 1980).

refugee problems.[21] In 1965, in order to consolidate these and other measures dealing wth immigration law,[22] Congress amended the Immigration and Nationality Act.[23] The 1965 amendment also responded to criticisms that the term "physical persecution" was unduly narrow,[24] by replacing it with the phrase "persecution on account of race, religion, or political opinion."[25]

In 1968, the United States ratified the U.N. Protocol[26] which incorporated the provisions of the 1951 Convention Relating to the Status of Refugees.[27] The U.N. Protocol defined refugee as any person who

> [o]wing to a 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 un-

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21. In 1953, after the expiration of the Displaced Persons Act, Congress enacted the Refugee Relief Act, to expedite the admission of refugees escaping from Iron Curtain countries. Refugee Relief Act of 1953, Pub. L. No. 203, 67 Stat. 400, *amended by* the Act of Aug. 31, 1954, Pub. L. No. 751, 68 Stat. 1044. In 1957, Congress passed the Refugee-Escapee Act, authorizing the issuance of immigrant visas to "refugee-escapees," defined as victims of racial, religious, or political persecution fleeing from communist or communist-dominated countries or a country in the general area of the Middle East. Pub. L. No. 85-316, §15(c)(1), 71 Stat. 643 (1957).

22. The 1965 amendments to the Immigration and Nationality Act incorporated the Refugee-Escapee Act of 1957 as section 203(a)(7), known as the "conditional entry" provision, which was then amended by the Refugee Act of 1980 to rémove the ideological and geographic restrictions. Pub. L. No. 96-212, 94 Stat. 102 (1980). For a discussion of section 203(a)(7), *see* Evans, *supra* note 6, at 221-25; Evans, *Political Refugees and United States Immigration Laws: A Case Note*, 62 AM. J. INT'L. L. 921, 921-24 (1968); Note, *supra* note 20, at 530.

23. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified at 8 U.S.C. §§1101-1557 (1976)).

24. Presidents Truman, Eisenhower, Kennedy, and Johnson expressed dissatisfaction with the stringent terms of the Immigration and Nationality Act of 1952. *See* Evans, *supra* note 6, at 220. The President's Commission on Immigration and Naturalization, appointed by President Truman in 1952, severely criticized the Act in its report stating: "The United States is one of the few major democratic countries of the free world whose present laws impede and frequently prevent providing asylum." PRESIDENTS COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME 118 (1953). The amendment that deleted the term "physical persecution" was offered by Representative Poff, who stated: "The clause physical persecution is entirely too narrow. It is almost impossible for the alien under an order of deportation to assemble the quantum of evidence necessary to discharge his burden of proof." 11 CONG. REC. 21804 (1965).

25. It is doubtful whether the 1965 amendments actually altered the alien's burden of proof. *See* Note, *Judicial Review of Administrative Stays of Deportation: Section 243(b) of the Immigration and Nationality Act of 1952*, 1976 WASH. U.L.Q. 59, 71 (1976); Comment, Coriolian v. Immigration & Naturalization Service: *A Closer Look at Immigration Law and the Political Refugee*, 6 SYRACUSE J. INT'L L. & COM. 133, 155 (1978). *But see* Kovac v. Immigration & Naturalization Serv., 407 F.2d 102, 106 (9th Cir. 1969). The court in *Kovac* reasoned that the 1965 amendment lightened the burden on applicants by removing the requirement that they show threatened bodily harm. *Id.*

26. See note 3 *supra*.

27. The Convention afforded protection to persons who had become refugees owing to events prior to 1951. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 [hereinafter cited as Convention]. The United States was not a signatory to the 1951 Convention.

> willing to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or unwilling to return to it.[28]

One who qualifies as a refugee within the meaning of the United Nations definition is entitled to apply to the government of the country where he is residing for asylum.[29] The U.N. Protocol also establishes the right of "refoulment," which provides that a refugee cannot be returned to a country where he would face persecution.[30]

The language of the U.N. Protocol expands section 243(h) of the Immigration and Nationality Act of 1952 in several ways. First, unlike section 243(h), a definition of "refugee" was provided. Under the U.N. Protocol, a refugee is defined as "one unwilling or unable to return to his country because of a well-founded fear of persecution."[31] Second, the class of refugees was broadened to include those persecuted for reasons of nationality or membership in a particular social group.[32] Additionally, the term "persecution" was defined as a threat to one's life or freedom.[33] Finally, the Attorney General's discretion to deport an individual who meets the U.N. Protocol's definition of refugee was removed.[34]

Despite these apparent changes in section 243(h), the Board and the courts steadfastly refused to acknowledge that the U.N. Protocol modified the asylum law of the United States in any manner.[35] The primary reason for this interpretation was that at the time of ratification neither Congress nor the administra-

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28. The U.N. Protocol adopted the definition of refugee that appeared in the 1951 Convention. U.N. Protocol, *supra* note 3, art. I, §1 (corresponds to Convention, *supra* note 27, art. 1, §2).

29. U.N. Protocol, *supra* note 3, art. 33 (corresponds to Convention, *supra* note 27, art. 1, §2). The U.N. Protocol contains another basic asylum provision that prohibits the expulsion of a refugee who is lawfully within the territory of the contracting state, except on grounds of national security or public order. *Id.* art. 32. However, this provision has little practical significance because courts have held that it does not affect aliens illegally within the country who are subject to deportation. *See, e.g.*, Chim Ming v. Marks, 505 F.2d 1170 (2d Cir. 1974); Kan Kam Lin v. Rinaldi, 361 F. Supp. 177, 183-85 (D.N.J. 1973), *aff'd per curiam*, 493 F.2d 1229 (3d Cir.), *cert. denied*, 419 U.S. 874 (1974).

30. U.N. Protocol, *supra* note 3, art. I, §1 (corresponds to Convention, *supra* note 27, art. 33). It states: "No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion. *Id.*

31. See note 28 *supra.*

32. See note 30 *supra.*

33. See note 28 *supra.*

34. See note 31 *supra.* U.N. Protocol establishes two exceptions to the prohibition against expulsion of a refugee: (1) when there are reasonable grounds for regarding the alien as a danger to the security of the country in which he is residing, or (2) where the alien's previous conviction of a serious crime constitutes a danger to the security of the country. U.N. Protocol, *supra* note 3, art. I, §1 (corresponds to Convention, *supra* note 27, art. 33, §2).

35. *See, e.g.*, Pierre v. United States, 547 F.2d 1281, 1288 (5th Cir. 1977); *In re* Dunar, 14 I & N. Dec. 310 (1973).

tion believed that the U.N. Protocol required any change in current immigration law.[36]

In 1970, an incident known as the Kurdica affair[37] dramatized the need to reform asylum procedures. A Soviet sailor jumped from his ship to an American ship while both vessels were in the territorial waters of the United States. The sailor was returned to his ship without having been afforded the opportunity to present an application for asylum. Two years later, the Department of State declared that the U.N. Protocol required that all asylum requests be considered, whether made within the United States or abroad.[38] In 1974, the Board followed the State Department's lead and issued regulations allowing all aliens physically present in the country to apply to the Immigration and Naturalization Service for asylum.[39]

These administrative attempts to liberalize and standardize refugee admission procedures resulted in the Refugee Act of 1980.[40] By replacing the ad hoc admission practices which had characterized asylum law in the past[41] with uniform procedures, Congress intended to establish a comprehensive refugee program[42] which would apply to all refugees equally.[43] Additionally, the Refugee Act of 1980 was intended to give statutory meaning to human rights and humanitarian concerns that were not reflected in the Immigration Act of 1952.[44]

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36. Statements by Executive Branch officials and Senator Proxmire indicated that the Protocol would not interfere with or require alterations in existing law. Examples of such statements can be found in *In re* Dunar, 14 I. & N. Dec. 310 (1973).

37. For a discussion of the Kurdica Affair, and the legal issues involved when refugees flee their country by sea, see LIBRARY OF CONGRESS REPORT ON REFUGEES, *supra* note 9, at 16; Evans, *Political Refugees and United States Immigration Laws: Further Developments*, 66 AM. J. INT'L L. 571, 572 (1972); O'Brien, *Bringing Sanity to U.S. Asylum Laws*, 8 HUMAN RIGHTS 38 (1980); Pugash, *The Dilemma of the Sea Refugee: Rescue Without Refuge*, 18 HARV. INT'L L.J. 577 (1977).

38. 37 Fed. Reg. 3447 (1972).

39. 8 C.F.R. §108 (1980). The Refugee Act of 1980 required new asylum procedures. Refugee and Asylum Procedures, 45 Fed. Reg. 35,359 (1980).

40. See note 28 *supra*. The Refugee Act was introduced at the beginning of the 96th Congress by Senator Kennedy, Chairman of the Senate Judiciary Committee, Representative Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, and Representative Elizabeth Holtzman, Chairwoman of the House Judiciary Subcommittee on Immigration, Refugees, and International Law. *See* LIBRARY OF CONGRESS REPORT ON REFUGEES, *supra* note 9, at 36.

41. *See* SEN. REP. NO. 95-256, 96th Cong., 2d Sess. 4 *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 515.

42. *See* LIBRARY OF CONGRESS REPORT ON REFUGEES, *supra* note 9, at 35. In addition to providing for the admission of refugees, the Act provided for their resettlement. Refugee Act of 1980, *supra* note 8, §§411, 412 (codified at 8 U.S.C. §§1151, 1152 (Supp. IV 1980)).

43. In a letter sent to Secretary of State Vance, Senator Kennedy emphasized the need to establish a national refugee policy that would treat all refugees equally and fairly. He stated: "I believe there is an urgent need for the United States to begin to take the steps necessary to establish a long range refugee policy—a policy which will treat all refugees fairly and assist all refugees equally. Such a national refugee policy is clearly lacking. . . ." SEN. REP., *supra* note 41, at 516. Also consider Ambassador Clark's statement, which noted the need for a permanent and systematic procedure for dealing with refugee admission. *Id.* at 518.

44. *Id.* at 515.

The Refugee Act instituted major reforms in current United States immigration law. Most significantly, the Act provided a statutory definition of refugee which corresponded to the definition in the U.N. Protocol.[45] The Refugee Act also established an asylum provision in the Immigration Act for the first time.[46] Under the new section 208 of the Immigration Act, the Attorney General is authorized to grant asylum to any alien who meets the new definition of refugee.[47] Moreover, the section established a separate asylum procedure independent of a deportation or exclusion hearing.[48] Contrary to past law, this provision provides all aliens physically present within the United States an opportunity to apply for asylum, regardless of their immigration status.[49]

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45. The Refugee Act of 1980 amended section 243(h) of the Immigration and Nationality Act to conform to the terms embodied in the U.N. Protocol and U.N. Convention Relating to the Status of Refugees. Section 201(a) defines a refugee as "a person outside his country of nationality or country of most recent residence, who is persecuted or has a well-founded fear of persecution on the grounds of race, religion, nationality, membership of a particular social group or political opinion." Refugee Act of 1980, *supra* note 8, §201 (codified at 8 U.S.C. §1101(a)(42) (Supp. IV 1980)). Persons who have participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group or political opinion are excluded from the definition of refugee. *Id.*

Under the Refugee Act, the President, after appropriate consultation with Congress, may confer refugee status on persons physically present within their country of nationality who are persecuted or have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Refugee Act of 1980, *supra* note 8, §207 (codified at 8 U.S.C. §1156 (Supp. IV 1980)). The Senate and House Judiciary Committees added this language to section 201(a) to provide the United States with the additional flexibility necessary to respond to all instances of persecution. LIBRARY OF CONGRESS REPORT ON REFUGEES, *supra* note 9, at 37.

Furthermore, the Refugee Act of 1980 repealed the "conditional entry" provision of the Immigration Act, which applied only to persons fleeing communist countries or the area of the Middle East. Refugee Act of 1980, *supra* note 8, §203(b)(1) (partially repealing 8 U.S.C. §1152 (1976)).

46. Refugee Act of 1980, *supra* note 8, §208 (amending 8 U.S.C. §1158 (1976)).

47. 8 U.S.C. §1158 (Supp. IV 1980). *See also* LIBRARY OF CONGRESS REPORT ON REFUGEES, *supra* note 9, at 53.

48. 8 U.S.C. §1158 (Supp. IV 1980). Note the distinction between exclusion proceedings and deportation proceedings. *Compare* 8 U.S.C. §1158(a) (Supp. IV 1980) *with* 8 U.S.C. §1251 (Supp. IV 1980). An alien subject to the latter must be "in the United States." The term of art "in the United States" requires physical presence in the country plus inspection and admission by an immigration officer, or actual and intentional evasion of inspection. *See* Mackler & Weeks, *The Fleeing Political Refugee's Final Hurdle — The Immigration and Nationality Act*, 5 N. KY. L. REV. 9, 10-11 (1978). Therefore, if an alien furtively crosses the border without inspection by an immigration officer, he is subject to deportation. On the other hand, aliens subject to exclusion are not considered to be "in the United States," despite their actual presence. For instance, an alien who is prevented from entering the United States by official action, for example, at an airport, is regarded as "stopped at the boundary", and therefore subject to an exclusion proceeding. *See* Kaplan v. Tod, 267 U.S. 228 (1925).

49. Under former law, only a deportable alien could avail himself of the protections of §243(h) and the U.N. Protocol. *See, e.g., In re* Pierre, I. & N. Int. Dec. No. 2238 (Oct. 5, 1973). Under current law, the distinction between deportation and exclusion is without practical significance because section 243(h) relief is available to both excludable and deportable aliens. 8 U.S.C. §1253(h) (Supp. IV 1980). *See also* LIBRARY OF CONGRESS REPORT ON REFUGEES, *supra* note 9, at 53.

The Refugee Act of 1980 also amends section 243(h) of the Immigration Act to conform to the language of the U.N. Protocol.[50] The Attorney General, upon a finding that an alien's "life or freedom would be threatened", may no longer exercise discretion but instead must withhold deportation of that alien.[51] Section 243(h) now substantially conforms to article 33 of the U.N. Protocol, which prohibits the expulsion of a bona fide refugee from a member state.[52]

NATURE OF PERSECUTION

An alien attempting to qualify for asylum under section 243(h) or article 33 of the U.N. Protocol must establish his status as a refugee. This requires the alien to demonstrate that persecution is likely if he is returned to his native country.[53] Proof of persecution is, therefore, an indispensible element of an asylum claim under section 243(h) or the U.N. Protocol. Consequently, it is necessary to understand precisely what evidence the Board and courts consider significant in determining if persecution exists.

The Board's task of determining what evidence is sufficient to constitute a prima facie case of persecution is complicated by the lack of guidelines for determining the existence of persecution. The Immigration Act and the U.N. Protocol merely promulgate the broad principles that persecution must occur on account of race, religion, nationality, or membership in a political or social group. No other criteria are enumerated by either the statute or the Protocol to delineate the evidence necessary to prove persecution.[54] The task is further complicated by the Board's determination that asylum applications must be decided individually.[55] Nonetheless, an evaluation of the cases reveals certain types of evidence upon which the Board generally bases its decisions. The evidentiary patterns deemed to be the most significant are: the extent of the applicant's prior political activity in his native country,[56] the extent of the applicant's political activity after entering the United States,[57] a history of

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50. Refugee Act of 1980, *supra* note 8, §203e (codified at 8 U.S.C. §1253(h) (Supp. IV 1980)). The Refugee Act of 1980 substitutes "persecution" with "life or freedom would be threatened," and adds "nationality" and "membership in a particular social group" to the existing terms of "race, religion, and poltical opinion." *Id. See also* SEN. REP., *supra* note 41, at 530.

51. 8 U.S.C. §1253(h)(1) (Supp. IV 1980). "The Attorney General shall 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." *Id.*

52. See note 30 *supra.*

53. In other words, the burden of proof is upon the alien. 8 C.F.R. §242.17(c) (1980).

54. In *In re* Sihasale, I. & N. Int. Dec. No. 1565 at 531, 532 (March 23, 1966), the Board rationalized the lack of standards for determining persecution as necessary to preserve flexibility and administrative discretion. *Id.* at 531.

55. *Id.*

56. *See, e.g.*, Chi Sheng Liu v. Holton, 297 F.2d 740, 742 (9th Cir. 1962).

57. *See, e.g.*, Hamad v. Immigration & Naturalization Serv., 420 F.2d 645, 647 (D.C. Cir. 1969); Hosseinmardi v. Immigration & Naturalization Serv., 405 F.2d 25, 27 (9th Cir. 1968); Asghari v. Immigration & Naturalization Serv., 396 F.2d 391, 392 (9th Cir. 1968).

personal political persecution by the native government,[58] the commission of a serious non-political crime by the applicant in his native country,[59] the political motivation of the applicant in fleeing his native country,[60] the probable consequences that face the applicant upon return,[61] and the conditions under which the applicant left his native country.[62] These patterns of evidence, however, are applied inconsistently, largely due to unspoken foreign policy considerations. The following discussion will examine these evidentiary patterns which shape the determinations made by the Board and courts.

Government v. Private Persecution

Generally, the Board has construed section 243(h) and the U.N. Protocol to require persecution at the hands of the government, or sources connected with the government.[63] Nevertheless, the Board is occasionally faced with persecution stemming from private parties who are totally independent of the government. In this situation, the standard is uncertain. *In Re Tan*[64] involved a member of a Chinese minority group who claimed he would be subjected to mob violence if returned to Indonesia. The Board took the position that "mob action may be a ground for staying deportation where it is established that a government cannot control the mob."[65] In *In re Pierre*,[66] however, the Board qualified its previous position by stating that if the government attempts to control mob violence, the likelihood of the applicant being harmed is insufficient to constitute persecution.[67] Furthermore, the Board placed the burden of proof on the applicant to establish that the government was unwilling or unable to contain the mob violence.

The heavy burden of proof imposed by the Board places the asylum applicant in a difficult position. This burden is unreasonably stringent since it is unlikely that the ordinary applicant will have the resources necessary to demonstrate that his government will make no attempt to curtail mob action. Moreover, the government may make a mere pretense at attempting to control the mob. Thus, despite the theoretical possibility of relief provided by the *Pierre* decision, relief in this situation has rarely been granted.[68]

58. *See, e.g.*, Lena v. Immigration & Naturalization Serv., 379 F.2d 536, 537 (7th Cir. 1967) (requiring clear probability of persecution of the particular individual).

59. *See, e.g.*, MacCaud v. Immigration & Naturalization Serv., 500 F.2d 355, 359 (2d Cir. 1974).

60. *See, e.g.*, Chi Sheng Liu v. Holton, 297 F.2d 740, 742 (9th Cir. 1962).

61. *See, e.g., In re* Shirinian, 12 I. & N. Dec. 392, 394 (1967).

62. *See, e.g.*, Asghari v. Immigration & Naturalization Serv., 396 F.2d 391, 392 (9th Cir. 1968); Hyppolite v. Immigration & Naturalization Serv., 382 F.2d 98, 99 (7th Cir. 1967).

63. *E.g., In re* MacCaud, I. & N. Int. Dec. No. 2226, at 8 (Sept. 7, 1973).

64. 12 I. & N. Dec. 564, 567 (1967).

65. *Id.* at 568.

66. I. & N. Int. Dec. No. 2433 at 461 (1975).

67. *Id.* at 462.

68. *See, e.g., In re* Ugricic, I. & N. Int. Dec. No. 2211 (1972); *In re* Frish, 12 I. & N. Dec. 40 (1967) (relief denied where applicants were persecuted for their religious practices by private individuals); *In re* Eusaph, 10 I. & N. Dec. 453 (1964) (relief denied to Moslem minority who feared persecution from Hindu majority in India).

Political or Minority Status of Applicant

Membership in a minority group is in itself insufficient to establish refugee status.[69] Government laws or policies that discriminate against persons because of their membership in a minority group, however, tend to create a prima facie case of persecution.[70] Furthermore, the Board has distinguished purposeful discrimination from persecution based on general restrictions of individual freedoms. In the latter case, the Board has been reluctant to find persecution.[71] This distinction has been attributed to the Board's occasional willingness to give more weight to foreign policy considerations than to the evidence at hand.[72]

Political Motivation of Departure

Generally speaking, in order to qualify for asylum the alien must demonstrate that he would face persecution in his homeland because of his political beliefs.[73] Mere economic hardship to the alien or his family if returned to his home country is insufficient to demonstrate persecution,[74] unless the alien can demonstrate that the economic deprivation is politically motivated.[75] Further, the Board has required that a refugee's motivations for fleeing his homeland be political in nature.[76]

The manner in which the Board has applied the political motive test has been the subject of recent criticism.[77] In *Coriolan v. Immigration & Naturalization Service*[78] the court distinguished between the government's motive for

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But see Rosa v. Immigration & Naturalization Serv., 440 F.2d 100, 103 (1st Cir. 1971) (finding no evidence that Congress intended that relief under 243(h) should depend on the presence of de jure power if a strong minority has sufficient de facto power to act without effective hinderance).

69. Shubash v. Immigration & Naturalization Serv., 450 F.2d 345 (9th Cir. 1971).

70. *See* Note, *supra* note 20, at 548 (citing Unreported Decision, No. A17-648-866 (1973) (holding that the actions of the Israelis in controlling the activities of Palestinian Arabs would subject Palestinians to persecution if deported to the Gaza Strip)).

71. *See, e.g., In re* Liadakis, 10 I. & N. Dec. 252 (1963).

72. *See* Evans, *Reflections Upon the Political Offense in International Practice*, 57 AM. J. INT'L L. 1, 7 (1963) (noting that the alien's rights will be affected by the political climate).

73. *E.g.*, Paul v. United States Immigration & Naturalization Serv., 521 F.2d 194, 196 (5th Cir. 1975); Khalil v. Immigration & Naturalization Serv., 457 F.2d 1276, 1277 (9th Cir. 1972); Gena v. Immigration & Naturalization Serv., 424 F.2d 227, 232 (5th Cir. 1970); Kovac v. Immigration & Naturalization Serv., 407 F.2d 102, 104-05, 107 (9th Cir. 1964); *In re* Ugricic, I. & N. Int. Dec. No. 2211 (1972); *In re* Janus & Janek, I. & N. Int. Dec. No. 1900 (1968).

74. Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961).

75. *E.g.*, Chien Woo v. Rosenberg, 295 F. Supp. 1370 (S.D. Cal. 1968), *aff'd*, 419 F.2d 252 (9th Cir. 1969), *rev'd*, 402 U.S. 49 (1971). *See also* Kovac v. Immigration & Naturalization Serv., 407 F.2d 102, 107 (9th Cir. 1969) (holding persecution exists when there is probability of deliberate imposition of substantial economic disadvantage on an alien for reasons of race, religion, or political opinion). The *Kovac* court broadly defined persecution as the infliction of suffering or harm upon those who differ in race, religion, or political opinion in a way regarded as offensive. *Id.* at 106.

76. *See, e.g., In re* Joseph, 13 I. & N. Dec. 70 (1968); *In re* Janus & Janek, I. & N. Int. Dec. No. 1900 (1968).

77. *See, e.g.*, Evans, *supra* note 37, at 581.

78. 559 F.2d 993, 1001 (5th Cir. 1977). *See generally* Comment, *supra* note 25.

persecution and the individual's motive for fleeing. The court suggested the focus should properly be upon the government's motive and that the Board's concentration on the individual's motive for fleeing had the potential to exclude claims properly within the ambit of the statute.[79]

The problems associated with the interpretation and application of the motive test may derive from the Board's attempt to establish a political-economic dichotomy. In *Haitian Refugee Center v. Civiletti*,[80] a Florida district court recognized that economics are not easily discernible from politics. The court took notice of a recent Congressional Research Service study which concluded that the causes of Haiti's poverty were interwoven with its political problems.[81] The court adopted this and declared that Haiti's economic problems are a manifestation of oppression and an outgrowth of its politics. It is arguable, therefore, that the Board's attempts to draw clear lines between economics and politics is unrealistic and ultimately unfair to the applicant.[82]

Moreover, there is evidence that the political-economic motivation test has been applied unevenly. This is particularly apparent when the INS' treatment of Haitians is compared to its treatment of Cubans.[83] The INS has presumed that Haitian refugees are economically motivated, thus placing them under a heavy burden to prove their political motivations, or in reality, to disprove their economic motivations.[84] In contrast, Cubans have entered the United

79. 559 F.2d at 1001. The court's emphasis on the government's motive is consonant with the view expressed by Grahl-Madsen that under the U.N. Protocol, persecution should depend primarily on the behavior of the persecutor, not the persecuted. He argues that victims of arbitrary persecution should qualify as refugees under article 33. *See generally* A. GRAHL-MADSEN, *supra* note 1, at 180-81.

80. 503 F. Supp. 442 (S.D. Fla. 1980).

81. *Id.* at 508.

82. *Id.* at 509. The court concluded: "To broadly classify all of the class of plaintiffs as 'economic refugees', as has been repeatedly done, is therefore somewhat callous. Their economic situation is a political condition." *Id.*

83. *See* S. REP. No. 55, 96th Congress, 2d Sess. 14 (1980). Senator DeConcini emphasized the different treatment INS accorded the Haitians as compared to the Cubans in his comment to Secretary Vance stating: "If you are a boat refugee from Cuba, INS automatically considers you a refugee. If you are a boat refugee from Baby Doc's Haiti, INS automatically considers you an illegal alien coming to the United States for economic purposes." *Id. See also Hearing Before Senate Judiciary Comm. on Caribbean Refugee Crisis: Cubans and Haitians*, 96th Cong., 2d Sess. (1980) [hereinafter referred to as *1980 Hearings*]. Senator Metzenbaum remarked to Ambassador at Large Victor H. Palmieri: "I think there is a general feeling that there is a different kind of treatment, and I think there are racial overtones . . . the reality of the situation is that the two groups are being treated differently." *Id.* at 34. *See generally* Dernis, *Haitian Immigrants: Political Refugees or Economic Escapees?*, 31 U. MIAMI L. REV. 27 (1976) (discussing the dichotomy between treatment of Haitians and Cubans); *N.Y. Times*, Oct. 17, 1976, at 56, col. 3 (discussing INS attitudes toward Haitian applicants).

84. On July 11, 1978, the INS Director of Intelligence issued a memo stating without qualification "that the Haitian refugees are 'economic' not political refugees, and that if they are too well received, others will be encouraged to immigrate." Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 513 (S.D. Fla. 1980). On July 14, 1978, Charles Sava, Associate Commissioner of Enforcement of the INS, sent a memo to Mario Noto, Deputy Commissioner of the INS stating the "best most practical deterrent to [the Haitian] problem is expulsion [from the United States]." *Id.* at 514. The court noted that the memoranda discussed above

States under the presumption that their flight was politically motivated.[85]

The double standard that the Haitians have been victims of invariably stems from United States foreign policy considerations.[86] These considerations are based on a traditional Cold-War bias which automatically characterizes aliens fleeing from communist nations as bona fide refugees.[87] The Board's unequal treatment of refugees violates the spirit, if not the letter, of the U.N. Protocol and Refugee Act of 1980, which grants asylum to refugees fleeing persecution regardless of their country of origin.

Past Political Activity

The Board has considered an alien's past political activity within his native country to be evidence of his political motivation.[88] Often, however, the alien's failure to engage in political activity has been used to undermine his claim.[89] Because the applicants are fleeing from totalitarian states in which there are limited opportunities for political expression and great risks accompanying political dissent, it seems unreasonable for the Board to equate political motivation with political activism.[90]

Another infirmity in the political activity test is that individuals may be politically persecuted despite their lack of political activity. This is especially true when a regime engages in indiscriminate persecution of the general population. In *Coriolan*, which involved a political persecution claim of a Haitian, the court noted that persecution can exist where there is no political activity because a large number of persons are imprisoned indiscriminately due to technical mistakes, personal grudges, or very minor offenses.[91] The court re-

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"originated with the highest officials in INS. . . . All of that evidence, viewed in the light of these recommendations made at the top levels of INS, indicate that the results of the Haitian Program were intended: Asylum was not to be granted to Haitians." *Id.* at 516.

85. *See, e.g.*, THE NEW REPUBLIC, May 24, 1980, at 5-6; U.S. NEWS & WORLD REPORT, May 6, 1980, at 42; NEWSWEEK, April 28, 1980, at 45; AMERICA, May 17, 1980, at 420-21; THE CHRISTIAN CENTURY, Oct. 8, 1980, at 941-43.

86. *See* Note, *Behind the Paper Curtain: Asylum Policy versus Asylum Practice*, VII REV. L. & SOC. CHANGE 107, 124 (1978). *See generally* IMMIGRATION NEWSLETTER, *supra* note 20, at 1.

87. *See 1980 Hearings, supra* note 83, at 47, 51. The Prepared Statement of Ambassador at Large Victor M. Palmieri, states: "The Refugee Act of 1980 eliminates the ideological and geographic restrictions of the old law. No longer do our statutes give an automatic preference to persons fleeing from communism." *Id. See also* AMERICA, May 17, 1980, at 420. Msgr. Bryan O. Walsh, director of Catholic Charities for the Archdiosese of Miami, comments that while the United States has traditionally encouraged and accepted refugees from communist countries, refugees from a right-wing dictatorship have a nearly impossible task to prove their claims. *Id.*

88. *In re* Ugricic, I. & N. Int. Dec. No. 2211 (1972).

89. *See, e.g.*, Chi Sheng Liu v. Holton, 297 F.2d 740, 742 (9th Cir. 1961).

90. *See* Coriolan v. Immigration & Naturalization Serv., 559 F.2d 993, 1002 (5th Cir. 1977).

91. *Id.* (quoting from Amnesty International). *See also Foreign Assistance and Related Agencies Appropriations for 1981, Testimony before the House Subcomm. on Foreign Operations*, 96th Cong., 2d Sess., 170 (1980). Dale Swartz, Lawyer's Committee For Civil Rights Under Law, noted the arbitrary nature of the Ton Ton Macoutes (Haitian secret police) activities. *Id.* at 175. Swartz cited the case of Patrick Lemoine, a Haitian arrested "only because of his friendship to a person who allegedly was in a political organization that did not

jected an INS interpretation of section 243(h) which required political activity as proof of political motivation. The court reasoned that Congress could not have intended to refuse sanctuary to people who were victims of a government that persecuted indiscriminantly.[92]

Similarly, the court in *Haitian Refugee Center*[93] disregarded the political activity requirement. Instead, the court concentrated on evidence of the overall political situation in Haiti.[94] From an evaluation of that evidence, the court concluded that all persons who have fled Haiti and were subsequently returned were treated by the Haitian government as traitors and therefore subjected to persecution.[95] Thus, the court in *Haitian Refugee Center* implicitly recognized that persecution is not necessarily related to expression of political opinion.

The Board's application of the political activity test, like that of the political motivation test, is dependent upon the applicant's native country.[96] For example, although the INS has consistently required Haitians and other refugees from right wing dictatorships to demonstrate political activity,[97] the Board has presumed persecution in the case of applicants fleeing communist countries, even absent a showing of political activity. For example, in *In re Janus & Janek*,[98] a case involving defectors from Communist Czechoslovakia, the Board assumed political motivation without requiring the alien to show prior political activity.[99] The Board admitted that a person who has not expressed opposition to the political regime before departure is not automatically excluded from relief if he can show that his departure was politically motivated and that any consequences he faces upon return are political in nature.[100] In practice, however, there has clearly been a more tolerant attitude toward refugees fleeing communist countries.[101]

Political Activity Within the United States

Although the Board considers political activity engaged in prior to an alien's departure from his native country probative of his political motivation,

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exist." *Id.* at 176. Franz Boltaire, of the Canadian Foreign Assistance Agency testified that the government in Haiti "arrests a lot of people for gossip, for anything. . . ." *Id.* at 172.

92. 559 F.2d at 1004.

93. 503 F. Supp. 442 (S.D. Fla. 1980).

94. *Id.* at 475-510.

95. *Id.* at 475, 482.

96. See note 83 *supra*, documenting the disparity between the INS' treatment of Haitians and Cubans, respectively. *See also* Note, *supra* note 25, at 113; Note, *supra* note 86, at 107-08 (stating that gaining asylum in the United States from dictatorships friendly to the United States is much more difficult than obtaining asylum from communist countries).

97. See Note, *supra* note 86, at 121-24.

98. 12 I. & N. Dec. 866, 873 (1968).

99. *Id.* at 875. The Board accepted Janus' testimony that he left Czechoslavakia because of his opposition to the communist system, despite the fact that Janus' first indication of opposition to the government was made after his arrival in the United States. *Id.* at 872, 875. Janek, however, was able to document past political dissent in Czechoslavakia, and therefore was able to meet the Board's traditional test of demonstrating political opposition in the foreign country. *Id.* at 871-72.

100. *Id.* at 876.

101. *See* Note, *supra* note 86, at 121-24.

such activity is disregarded or even viewed with some skepticism if it occurs after the alien enters the United States.[102] In *Ashari v. Immigration & Naturalization Service*,[103] an Iranian student claimed his participation in anti-Shah organizations and demonstrations in the United States would subject him to persecution if deported.[104] The court, noting that opposition to the Iranian government does not per se result in persecution, denied relief.[105] Similarly, in *Cisternas-Estay v. Immigration & Naturalization Service*,[106] the Third Circuit accepted the Board's determination that a public show of opposition to the Chilean junta made by aliens residing in the United States was staged in order to obtain asylum.[107]

Although in some cases the Board and the courts might be justified in concluding that political activities were staged, strict adherence to this approach may exclude meritorious as well as fabricated claims.[108] Furthermore, this approach chills an alien's constitutionally protected freedom of expression.[109] Once again, the Board applies this test unevenly, favoring applicants fleeing communist countries.[110]

Persecution for Non-Political Crimes

Both the U.N. Protocol and the Refugee Act of 1980 deny asylum to applicants who have committed a "serious political crime" in their homeland.[111] The Board is therefore required to distinguish between violations of law that

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102. *See, e.g.*, Cisternas-Estay v. Immigration & Naturalization Serv., 531 F.2d 155 (3d Cir. 1976), *cert. denied*, 429 U.S. 853 (1976) (denying Chilean's asylum application); Schieber v. Immigration & Naturalization Serv., 520 F.2d 44 (D.C. Cir. 1975) (denying Polish alien's application for asylum); Hosseinmardi v. Immigration & Naturalization Serv., 405 F.2d 25 (9th Cir. 1968) (denying Iranian's asylum application); Asghari v. Immigration & Naturalization Serv., 396 F.2d 391 (9th Cir. 1968) (denying Iranian's application for asylum).

103. 396 F.2d 391 (9th Cir. 1968).

104. *Id.* at 392.

105. *Id.*

106. 531 F.2d 155 (3d Cir. 1976).

107. *Id.* at 157. The applicants and their counsel held a press conference attacking the denial of liberties in Chile.

108. This potential for excluding apparently meritorious claims is evident in the denial of asylum claims of Iranian students who were politically active in opposition to the Shah. *See, e.g.*, Hosseinmardi v. Immigration & Naturalization Serv., 405 F.2d 25 (9th Cir. 1968); Asghari v. Immigration & Naturalization Serv., 396 F.2d 391 (9th Cir. 1968). Amnesty International documents supported their claims that they would likely be persecuted for political opposition by SAVAK if deported to Iran. *See* AMNESTY INTERNATIONAL, ANNUAL REPORT 255-56 (1978).

109. *See, e.g.*, Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964).

110. It is well-settled that overt political actions taken by aliens in the United States against their native regimes do not usually establish grounds for withholding deportation. Nevertheless, where the individuals' criticism of the home state extended to statements made to the F.B.I., Radio Free Europe, and the Czech language press in the United States, such activity would be grounds for withholding deportation. *In re* Janus & Janek, I. & N. Int. Dec. No. 1900 (1968) at 7-8.

111. Protocol, *supra* note 3, art. 33. The Refugee Act of 1980 incorporates this condition. Refugee Act of 1980, *supra* note 8, §203(e) (codified at 8 U.S.C. §1253(b) (Supp. IV 1980)).

are essentially criminal in nature and those which are political.[112] The problems in drawing this distinction are particularly acute when an alien claims that he will be persecuted for violating his native government's travel restrictions.[113] Generally, the Board has treated these laws as non-political. Therefore, punishment is considered a criminal sanction and not persecution. In *Janus & Janek*,[114] the Board qualified its position by distinguishing travel laws that are essentially political in nature, such as statutes that prohibit defection, from laws which are aimed primarily at travel control, which are criminal sanctions.[115] The Board, however, confused the political-criminal distinction by stating that not every "statute imposing criminal sanctions for unauthorized travel outside of a particular country must be devoid of political implications."[116] According to the Board's reasoning, therefore, a statute that imposes travel restrictions may be valid, although political in nature.[117] This position contradicts the political-non-political dichotomy which both the U.N. Protocol and the Refugee Act of 1980 attempt to create.[118] The Board's approach, however, has not been universally accepted. For example, the Supreme Court has held[119] that a statute which made the unauthorized departure from a country a crime infringed upon the universal right of travel.[120]

The legality of an applicant's departure from his native country is also considered by the Board and courts as a factor independent of the political-non-political crime distinction.[121] Where the applicant departed with his government's permission, rather than illegally, the Board has been suspect of the alien's claim.[122] The Board, however, has not consistently adhered to this approach. In *Janus & Janek*,[123] the alien's legal departure from Czechoslovakia and subsequent overstay in America was viewed as a factor contributing toward a favorable disposition of his claim.[124] It is worthwhile to note that the Board declined to apply the general standard in the case of defectors from an Eastern Bloc country. This exemplifies the different standards employed by the INS

112. The United States follows the traditional interpretation of political offense, which requires that the act be part of an organized political activity and be directed against the State. See Note, *Political Asylum in the United States: A Failure of a Human Rights Policy*, 9 RUT.-CAM. L.J. 133, 143-44 (1977). *See also* Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded*, 355 U.S. 848 (1958) (holding that in order to be a political offense the act must be against the government itself).

113. Kerki v. Immigration & Naturalization Serv., 418 F.2d 217 (3d Cir. 1969) (overstayed exit permit); *In re* Shirinian, 12 I. & N. Dec. 392 (1967).

114. I. & N. Int. Dec. No. 1900 (1968).

115. *Id.* at 873.

116. *Id.*

117. *Id.*

118. See text accompanying note 140 *infra*.

119. Aptheker v. Secretary of State, 378 U.S. 500 (1964).

120. *Id.* at 514.

121. *E.g.*, Asghari v. Immigration & Naturalization Serv., 396 F.2d 391, 392 (9th Cir. 1968); Hyppolite v. Immigration & Naturalization Serv., 382 F.2d 98, 100 (7th Cir. 1967).

122. When the applicant's presence in the United States is predicated upon a contractual agreement to return to his native country, as in student exchange programs, his case for withholding deportation is considerably weakened. *See* Evans, *supra* note 37, at 560-74.

123. I. & N. Int. Dec. No. 1900 (1968).

124. *Id.* at 874-75.

depending on whether the applicant is fleeing from a communist country or from a right-wing government which has a friendly relationship with the United States.[125]

A review of the evidentiary patterns suggests that despite the lack of well-defined standards, the Board applies the tests it does have in an often inflexible manner, without examining all the relevant evidence.[126] Too often the Board places undue emphasis on one of its tests, to the exclusion of other important factors.[127] Moreover, because its standards are so imprecise, the Board often bases its decision on intangible and subjective factors, such as a determination of the sincerity of a particular applicant.[128] Thus, it is apparent that the Board must establish more uniform, yet flexible guidelines for determining whether persecution exists.

Regardless of the fairness of the standards which the Board may develop, they will be ineffective if applied selectively on the basis of unspoken foreign policy considerations.[129] In the absence of congressional authorization, the Board should confine itself to the letter and intent of the Refugee Act of 1980 and the U.N. Protocol. An application of the law based on equality, the expressed intent of Congress, and guided by a humanitarian commitment to human rights, would certainly be more in accord with the spirit of the U.N. Protocol and the Refugee Act of 1980.[130]

BURDEN OF PROOF

Prior to the 1980 amendment, section 243(h) required an applicant to prove he "would be subject to persecution on account of race, religion or political opinion."[131] The Board and the courts interpreted this language as requiring a "clear probability"[132] of persecution specifically directed at the applicant. The

125. See note 83 *supra*.

126. *See, e.g.*, Hosseinmardi v. Immigration & Naturalization Serv., 405 F.2d 25 (9th Cir. 1968); Asghari v. Immigration & Naturalization Serv., 396 F.2d 391 (9th Cir. 1968) (political activity in America of Iranian students insufficient to withhold deportation based on fear of prosecution in Iran). By rigid application of the traditional standard, which views with suspicion political activity by the alien upon his arrival in America, the courts have often failed to give adequate consideration to evidence supporting an alien's contentions.

127. *See, e.g.*, Coriolan v. Immigration & Naturalization Serv., 559 F.2d 993 (5th Cir. 1977). The court discussed the Board's overemphasis of the alien's political motive and political activity to the exclusion of a consideration of the government's motive. *Id.* at 1000. The court also criticized the Board's overemphasis on the requirement of personal persecution instead of considering the general political climate. *Id.* at 1002-03.

128. *See* Note, *supra* note 20, at 547.

129. *See* Evans, *supra* note 6, at 232 (discussing the impact of the political factor in the withholding of deportation where the deportable alien chose as his destination a country with whom the United States had no diplomatic relations). *See also* Evans, *supra* note 72, at 7.

130. *See* SEN. REP., *supra* note 41, at 515 (stating that the Refugee Act of 1980 "gives statutory meaning to our national commitment to human rights and humanitarian concerns . . .").

131. Immigration and Nationality Act of 1952, ch. 477, §243, 66 Stat. 212 (1952) (codified at 8 U.S.C. §1253(h) (amended by Refugee Act of 1980, *supra* note 8, §203(e)).

132. *E.g.*, Hyppolite v. Immigration & Naturalization Serv., 382 F.2d 98, 100 (7th Cir. 1967); Lena v. Immigration & Naturalization Serv., 379 F.2d 536, 538 (7th Cir. 1967); Cheng

most serious problem confronting an alien who applied for withholding of deportation under section 243(h) was presenting sufficient evidence of persecution.[133]

In practice, aliens have had difficulty in meeting this standard of proof for two reasons.[134] First, the Board has required objective evidence of persecution,[135] a task beyond the resources of ordinary applicants. Moreover, the testimony of the applicant and his witnesses, standing alone, has usually been considered insufficient to meet the burden of proof.[136] Second, the alien must demonstrate that he will probably be subject to persecution if returned to his native land.[137] Consequently, evidence of the general state of persecution in the alien's homeland has usually not been deemed sufficient to satisfy the burden of proof.[138] The Fifth Circuit, however, has been more receptive to evidence of general persecution within the alien's country. In *Coriolan v. Immigration & Naturalization Service*,[139] the court took judicial notice of the general political conditions in Haiti and remanded a Haitian's claim to the Board to enable the

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Kai Fu v. Immigration & Naturalization Serv., 380 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). Other courts have required evidence establishing the "probability" of persecution. *See, e.g.*, Daniel v. Immigration & Naturalization Serv., 528 F.2d 1278, 1279 (5th Cir. 1976); Shkukani v. Immigration & Naturalization Serv., 435 F.2d 1378, 1380 (8th Cir. 1971); Hamad v. Immigration & Naturalization Serv., 420 F.2d 645, 647 (D.C. Cir. 1969).

133. "[T]he burden of proving that deportation will lead to persecution rests with the alien." Martineau v. Immigration & Naturalization Serv., 556 F.2d 306, 307 (5th Cir. 1977) (citations omitted).

134. *See* Evans, *supra* note 37, at 580 (Immigration Officers take a strict and negative view of pleas of anticipated persecution). *See also* Coriolan v. Immigration & Naturalization Serv., 559 F.2d 993, 1001 (5th Cir. 1977) (observing that almost all claims by Haitians are unsuccessful); Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 529 (S.D. Fla. 1980) (taking notice of the heavy burden of proof the INS imposes on Haitian applicants and stating that the burden was "simply too high").

135. *E.g.*, *In re* Dunar, 14 I. & N. Dec. 310, 319.

136. *E.g.*, *In re* Kogoory, 12 I. & N. Dec. 215 (1967).

137. *E.g.*, Fleurinor v. Immigration & Naturalization Serv., 585 F.2d 129, 134 (5th Cir. 1978) (requiring that Haitian applicant provide evidence that the Haitian government remembers him).

138. *See, e.g.*, Cheng Kai Fu v. Immigration & Naturalization Serv., 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1980) (requiring the alien to show he would be singled out as an individual by the government authorities and suffer persecution therefrom to establish persecution); *In re* Joseph, 13 I. & N. Dec. 70, 72 (Nov. 29, 1968) (citing Lena v. Immigration & Naturalization Serv., 379 F.2d 536 (2d Cir. 1962)).

Generally, claims that aliens' relatives have been persecuted in the past are insufficient to prove clearly the probability of persecution to the applicant. *See, e.g.*, *In re* Frisch, 12 I. & N. Dec. 40 (1967) (applicant's father imprisoned for crimes against the state insufficient). *But see* United States *ex rel.* Mercer v. Esperdy, 234 F. Supp. 611 (S.D.N.Y. 1964) (persecution of aliens' family sufficient to establish persecution).

139. 559 F.2d 993 (5th Cir. 1977). Political persecution, as defined by this court, may include general political conditions, and is not limited to repression of overt acts. *Id.* at 1002. *See also* United States *ex rel.* Mercer v. Esperdy, 234 F. Supp. 611, 616 (S.D.N.Y. 1964) (judicial notice taken of the general conditions in Haiti); *In re* Guillaumette Files A-20 123 312, A-20 124 313 (April 18, 1974) (a man considered persona non grata by an absolute ruler need not have engaged in any specific conduct); *In re* Joseph, 13 I. & N. Dec. 70 (1968) (citing *Esperdy*, as authorized for taking judicial notice of the general conditions in the country).

applicant to present an Amnesty International report on human rights in Haiti.[140] Similarly, in *Haitian Refugee Center v. Civiletti*,[141] the federal district court reasoned that no asylum claim could be examined adequately without an understanding of the conditions existing in the applicant's homeland.[142] Accordingly, the court took notice of the Amnesty International report and extensively reviewed other evidence concerning political conditions in Haiti. From this evidence the court inferred that although not every alien deported to Haiti will be persecuted, persecution is a substantial danger.[143] Taking into account the general conditions which exist in the applicant's homeland is more reasonable than a strict requirement that the applicant demonstrate personal persecution. It is unlikely that the applicant will be able to prove that his government would remember him to persecute him after his return,[144] particularly where several years have lapsed due to time-consuming litigation.[145]

Notwithstanding rare exceptions, aliens have generally been unable to meet the required burden of proof under section 243(h). Perhaps due to this difficulty, applicants began to turn to article 33, the non-refoulment provision of the U.N. Protocol, for relief.[146] Article 33 requires only that the alien justify a "well-founded fear" of persecution rather than present objective evidence of persecution.[147] It wasn't until 1973, however, that the Board considered the effect of the U.N. Protocol upon the burden of proof traditionally required by section 243(h).[148]

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140. The majority indicated that a report by a private organization concerning general conditions, rather than petitioner's own circumstances, might satisfy the burden of proof. 559 F.2d at 1002.

141. 503 F. Supp. 442 (S.D. Fla. 1980).

142. *Id.* at 475.

143. *Id.* at 482. The court ruled that an INS plan to deport Haitian refugees *en masse* was "offensive to every notion of constitutional due process and equal protection." *Id.* at 532.

144. See text accompanying note 137 *supra.*

145. Section 207(c)(4) of the Immigration and Nationality Act, 8 U.S.C. §1156 (1976), *as amended* by the Refugee Act of 1980 *supra* note 8, §207(c)(4), provides that a refugee's status may be terminated if he or she was not a refugee at the time of admission into the United States. It appears that the judicial requirement of "probable persecution today" conflicts with this provision, since it requires that refugee status be determined at the time of admission.

146. The issue of the effect of the U.N. Protocol upon the applicant's burden of proof was first considered in Muskardin v. Immigration & Naturalization Serv., 415 F.2d 865, 867 (2d Cir. 1969). The petitioner claimed the U.N. Protocol represented a liberalization of the Congressional attitude toward those who claim asylum as refugees. The court responded to this contention ambiguously stating: "This factor may well have been a proper consideration in guiding the discretion of the Special Inquiry Officer. It provides no ground for our reversal of his exercise of discretion." *Id.*

The Supreme Court noted the effect of the U.N. Protocol in Immigration & Naturalization Serv. v. Stanisic, 395 U.S. 62 (1969) noting that it was "premature to consider whether and under what circumstances, an order of deportation might contravene the U.N. Protocol and Convention Relating to the Status of Refugees, to which the United States acceded to on November 1, 1968." *Id.* at 79 n.22.

147. The U.N. Protocol protects the alien from persecution based on race, religion, nationality, membership of a particular social group, or political opinion.

148. *See generally* Frank, *supra* note 5, at 291. Frank, a career officer of the United States Department of Justice, Immigration and Naturalization Service, concluded that the U.N.

In *In re Dunar*,[149] the applicant argued that according to the language of article 33, an alien need only prove that he had a subjective "well-founded fear" of persecution. Therefore, aliens were relieved from the burden of showing a clear probability of persecution through objective evidence.[150] The Board, however, rejected the contention that the "well-founded fear" language contained in the Protocol establishes a lesser burden of proof than section 243(h) traditionally required.[151] Relying upon the legislative history[152] of the U.N. Protocol and the views of the State Department,[153] the Board interpreted the "well-founded fear" test as requiring objective evidence indicating a "realistic likelihood" that the alien would be persecuted if deported. According to the Board, the burden of proof required by the U.N. Protocol's "well-founded fear" standard was essentially co-extensive with the "clear probability" test of section 243(h).[154] Several circuit courts of appeal subsequently adopted the Board's reasoning.[155]

Protocol had little effect upon section 243(h) of the Immigration and Nationality Act. *Id.* at 304.

149. 14 I. & N. Dec. 310 (1973).

150. *Id.* at 319.

151. *Id.*

152. *Id.*

153. The Board quoted the statement of Laurence Dawson, the State Department's Representative to the Senate Foreign Relations Committee, who said: "Accession does not in any sense commit the contracting state to enlarge its immigration measures for refugees." *Id.* at 317 (citing S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 6 (1976)).

The Board also referred to the Secretary of State's letter to President Johnson which stated: "[Article 33] [sic] is comparable to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. Section 1254 [sic], and it can be implemented within the administrative discretion provided by existing regulations." *Id.* at 319 (citing S. EXEC. K. 90th Cong., 2d Sess. VIII (1967)). The Board considered Senate ratification of the U.N. Protocol a symbolic recognition of human rights and an impetus for encouraging other nations with less liberal immigration policies to reform their laws. *Id.* at 314 (citing President Johnson's message to the Senate, S. EXEC. K, 90th Cong., 2d Sess. III (1967)).

Because the Executive and State Department considered refugees to already enjoy the protections of the U.N. Protocol, the Board reasoned that the rights of aliens would not be lessened by its adoption. *Id.* at 317 (citing testimony of Laurence Dawson, State Department Representative, before the Senate Foreign Relations Committee, S. EXEC. REP. No. 14, 90th Cong., 2d Sess., 6 (1967)). *See also United States Deposits Accession to Protocol on Status of Refugees*, 59 DEP'T STATE BULL. 538 (1968) (remarks by Ambassador Wiggins); Letter of Transmittal From President Johnson to the Senate, August 1, 1968, S. EXEC. K., 90th Cong., 2d Sess., III (1968).

154. 14 I. & N. Dec. at 319. Also see text accompanying note 162 *supra*, discussing the burden of proof typically required of the alien by the Board and courts.

155. Pierre v. United States, 547 F.2d 1281, 1284 (5th Cir. 1977) (Haitian aliens argued unsuccessfully that the U.N. Protocol vests in all bona fide refugees an absolute right against return to a country in which he fears political persecution); Kashani v. Immigration & Naturalization Serv., 547 F.2d 376, 379 (7th Cir. 1977) (an alien claiming a well-founded fear of persecution under the Protocol must demonstrate that he has actually been a victim of persecution or that his fear is more than a conjecture. The alien can discharge his burden of proof only by objective evidence, the same standard of proof that section 243(h) requires).

Additionally, the Board's decision in *Dunar* was followed by two other federal courts in cases involving Chinese seamen who had entered the United States illegally. The seamen argued that they were entitled to remain in the United States under Article 32 of the U.N.

Effect of Refugee Act of 1980 on Alien's Burden of Proof

The legislative history of the 1980 Refugee Act expressly contradicts *Dunar* and its progeny to the extent that they stood for the proposition that the "well-founded fear" language of the U.N. Protocol requires no change in the alien's traditional burden of proof.[156] Rather, by amending the language of section 243(h) to conform to that of the U.N. Protocol, Congress intended to adopt a lower burden of proof than the traditional "clear probability" test imposed.[157] A lower burden of proof is also consistent with the Act's intent to provide a statutory meaning to the United States' commitment to human rights and humanitarian concerns not reflected in past immigration laws or practices.[158]

Courts applying current asylum law should require a standard of proof that is consistent with the "well-founded fear" language of the U.N. Protocol and section 243(h). In interpreting this standard a reasonable basis test would be appropriate.[159] If the court, based upon the alien's testimony, and any other relevant evidence, including evidence of the general conditions in his homeland, finds that a reasonable basis for the alien's fear of persecution exists,

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Protocol, which provides that no contracting state may expel an alien lawfully within the territory. The court in Kan Kam Lin v. Rinaldi, 361 F. Supp. 177 (D.N.J. 1973), *aff'd*, 493 F.2d 1229 (3d Cir. 1974), rejected the aliens' claims, holding that the terms "lawfully within the territory" contained in Article 32 were co-extensive wth traditional theories of legal presence under the present immigration law. *Id.* at 186. Chim Ming v. Marks, 505 F.2d 1170 (2d Cir. 1974), also relied on the legislative history of the U.N. Protocol, concluded that the U.N. Protocol did not change the interpretation of current immigration law, and reached the same result. *Id.* at 1171.

156. *See* SEN. REP., *supra* note 41, at 518 (stating that the new refugee definition will bring United States law into conformity with the U.N. Protocol without damaging international treaty obligations). *Id.* at 535 (stating that section 243(h) is based directly upon the language of the U.N. Protocol and it is intended that the provision be construed consistent with the U.N. Protocol). *See also* LIBRARY OF CONGRESS REPORT ON REFUGEES, *supra* note 9, at 80 (letter of Senator Kennedy to President Carter stating that the Refugee Act will make United States law conform to the Protocol).

157. *See* LIBRARY OF CONGRESS REPORT ON REFUGEES, *supra* note 9, at 80. Several commentators have taken the position that the new refugee definition incorporating the "well-founded fear of persecution" language of the U.N. Protocol requires a liberal interpretation. *See, e.g.*, 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 145 (1965) (the Protocol requires a liberal interpretation of the refugee's burden of proof); Evans, *supra* note 38, at 585 (United States' committment to the U.N. Protocol is an inducement for a liberalized interpretation of Section 243(h)); Comment, *Immigration Law and the Refugee: A Recommendation to Harmonize Statutes with Treaties*, 6 CALIF. W. INT'L L.J. 129, 152 (1975) (stating that the "well-founded fear" definition should require a lesser burden of proof than that traditionally imposed by the courts under section 243(h)).

158. *See* Evans, *supra* note 37, at 571-85 (discussing the extreme difficulty of the §243(h) applicant in overcoming the "clear probability" of persecution requirement).

159. *See* LEGISLATIVE HISTORY, *supra* note 8, at 515. Senator Kennedy, sponsor of the Act, expressed the view that America must remain a haven for refugees and be generous in its response to them. *See* HEARING ON U.S. REFUGEE PROGRAMS BEFORE THE SENATE COMM. ON THE JUDICIARY, 96th Cong., 2d Sess., at 353-54 (1980). In Kashini v. Immigration & Naturalization Serv., 547 F.2d 376 (7th Cir. 1977), counsel for the applicant urged the application of such a test.

asylum should be granted.[160] Although not eliminating the alien's burden of proof, this test would significantly reduce it by freeing the alien from the burden of providing objective evidence of persecution directed specifically at him.[161]

Scope of Judicial Review

An illegal alien,[162] subject to deportation[163] by the INS has the right under both section 243(h) and the U.N. Protocol to apply to a special inquiry officer for asylum.[164] If the special inquiry officer denies the alien's claim, the alien may then appeal to the Board of Immigration Appeals.[165] A final decision of the Board is binding on the INS and direct review of such a decision by the court of appeals is proper.[166] The court of appeals, however, exercises only limited judicial review of the Board's decision.[167] The court's limited judicial review is attributable to the discretionary nature of the Board's decisions regarding deportation.[168] Even if the alien satisfies all the requirements of the statute, the Board may still exercise its discretion and deport him.[169] Thus, appellate courts may review section 243(h) claims for abuse of discretion and arbitrary and capricious action.[170] Typically, courts will refuse to upset

160. *See* Roberts, Asylum and Current Refugee Determinations, 53 Int. Rul. No. 20 (May 25, 1976) asserting that it is not necessary for the asylum applicant to prove that he would actually face persecution upon return, but rather he must establish that his fear of being persecuted, based on previous activities or other factors, is a reasonable one.

161. See Evans, *supra* note 37, at 571-85 (stating that the greatest obstacle to section 243(h) applicants is their inability to adduce sufficient evidence to sustain their claims).

162. See note 4 *supra*.

163. See note 5 *supra*.

164. 8 C.F.R. §103.1(h) (1981).

165. See note 7 *supra*.

166. The denial of a section 243(h) claim is treated as a final order. Foti v. Immigration & Naturalization Serv., 375 U.S. 217, 229-30 (1963). The jurisdiction of the Court of Appeals is exclusive. 8 U.S.C. §1105(a) (1976).

167. *See, e.g.*, Carlson v. Larden, 342 U.S. 524 (1952); Muskardin v. Immigration & Naturalization Serv., 415 F.2d 865 (2d Cir. 1969); Kasravi v. Immigration & Naturalization Serv., 400 F.2d 463 (9th Cir. 1968); Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961); United States *ex rel.* Dolenz v. Shaughnessy, 107 F. Supp. 611 (S.D.N.Y.), *aff'd* 200 F.2d 288 (2d Cir. 1952), *cert. denied*, 345 U.S. 928 (1953).

168. *See, e.g.*, United States *ex rel.* Dolenz v. Shaughnessy, 353 U.S. 72, 78 (1957); Paul v. Immigration & Naturalization Serv., 529 F.2d 1278, 1280 (1st Cir. 1976) (quoting Hamad v. Immigration & Naturalization Serv., 420 F.2d 645 (D.C. Cir. 1969)); Goon Wing Wah v. Immigration & Naturalization Serv., 386 F.2d 292 (1st Cir. 1967); Conceiro v. Marks, 360 F. Supp. 454, 457 (S.D.N.Y. 1973) (quoting Wong Wing Hang v. Immigration & Naturalization Serv., 360 F.2d 715, 719 (2d Cir. 1966)).

169. United States *ex rel.* Dolenz v. Shaughnessy, 353 U.S. 72, 78 (1957). Appellate courts have followed the reasoning of *Shaughnessy*. *See, e.g.*, Wong Wing Hang v. Immigration & Naturalization Serv., 360 F.2d 715, 719 (2d Cir. 1966); United States *ex rel.* Kaloadis v. Shaughnessy, 180 F.2d 484, 491 (2d Cir. 1950).

170. *See, e.g.*, Fleurinor v. Immigration & Naturalization Serv., 585 F.2d 129, 133 (5th Cir. 1978); Henry v. Immigration & Naturalization Serv., 552 F.2d 130, 131 (5th Cir. 1977); Aalund v. Marshal, 461 F.2d 710, 711 (5th Cir. 1972); Shkukani v. Immigration & Naturalization Serv., 435 F.2d 1378, 1380 (8th Cir.), *cert. denied*, 403 U.S. 920 (1971); Jarecha v. Immigration & Naturalization Serv., 417 F.2d 220, 224 (5th Cir. 1969); Kam Ng v. Pilliod, 279

Board orders if supported by a "reasonable foundation"[171] or "substantial evidence in the record considered as a whole."[172] In practice, courts treat the orders of the INS with considerable deference and section 243(h) appeals have rarely been successful.[173]

Unfortunately, the decisions of the INS are often based upon political and foreign policy concerns.[174] By deferring to the INS, the courts are permitting the introduction of criteria outside the scope of section 243(h) and the U.N. Protocol. Therefore, asylum claims are often not determined in conformity with domestic and international law.

Due Process

In addition to reviewing INS decisions for abuse of discretion, courts have been willing to review section 243(h) cases to ensure that the alien has been afforded procedural due process.[175] Traditionally, the reviewing courts have focused on whether the alien was offered a fair hearing, fair consideration of his claim, and the right to present evidence. Recently, due process challenges have focused on the admissibility of State Department recommendations to the Board concerning the merits of an applicant's asylum claim.[176]

F.2d 207, 210 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961); Kan Kam Lin v. Rinaldi, 361 F. Supp. 177, 187 (D.N.J. 1973), *aff'd*, 493 F.2d 1229, *cert. denied*, 419 U.S. 874 (1974). These courts did not make any distinction between arbitrariness and abuse of discretion.

171. *E.g.*, Khalil v. Immigration & Naturalization Serv., 457 F.2d 1276 (9th Cir. 1972).

172. *E.g.*, Berdo v. Immigration & Naturalization Serv., 432 F.2d 824, 848 (6th Cir. 1970); Gena v. Immigration & Naturalization Serv., 424 F.2d 227, 233 (5th Cir. 1970); Jarecha v. Immigration & Naturalization Serv., 417 F.2d 220, 225 (5th Cir. 1969). *See also*, Hyppolite v. Immigration & Naturalization Serv., 382 F.2d 98, 99 (7th Cir. 1967); Lena v. Immigration & Naturalization Serv., 379 F.2d 536, 537 (7th Cir. 1967); Kam Ng v. Pilliod, 279 F.2d 207, 210 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961) (the decisions of the INS must stand if sufficient on their face).

173. *But see* Kovac v. Immigration & Naturalization Serv., 407 F.2d 102, 108 (9th Cir. 1969); United States *ex rel.* Fong Foo v. Shaughnessy, 234 F.2d 715, 718-19 (2d Cir. 1955) (finding the Board's decision denying relief from deportation arbitrary and capricious); United States *ex rel.* Mercer v. Esperdy, 234 F. Supp. 611, 615 (S.D.N.Y. 1964).

174. *See* Kasravi v. Immigration & Naturalization Serv., 400 F.2d 675 (9th Cir. 1968); Hosseinmardi v. Immigration & Naturalization Serv., 405 F.2d 25 (9th Cir. 1968) (considering State Department recommendations against asylum for Iranian critics of the Shah); United States *ex rel.* Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953) (stating that the Board's determination of asylum was a political issue beyond the scope of the courts); *In re* Liao, 11 I. & N. Dec. 113 (1965) (soldier of Republic of China (Taiwan) denied asylum on basis it would damage the mutual defense effort and negate the purpose of strengthening the defense of an ally).

175. *See, e.g.*, Fleurinor v. Immigration & Naturalization Serv., 585 F.2d 129, 133 (5th Cir. 1978); Henry v. Immigration & Naturalization Serv., 552 F.2d 130, 131 (5th Cir. 1977); Aalund v. Marshall, 461 F.2d 710 (5th Cir. 1972); Jarecha v. Immigration & Naturalization Serv., 417 F.2d 220, 224 (5th Cir. 1969); Kasravi v. Immigration & Naturalization Serv., 400 F.2d 675 (9th Cir. 1968); Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961).

176. *See, e.g.*, Zamora v. Immigration & Naturalization Serv., 534 F.2d 1055, 1058-63 (2d Cir. 1976); Paul v. Immigration & Naturalization Serv., 521 F.2d 194, 199-200 (5th Cir. 1975); Cisternas-Estay v. Immigration & Naturalization Serv., 531 F.2d 155, 160 (3d Cir. 1975), *cert. denied*, 429 U.S. 853 (1976); Berdo v. Immigration & Naturalization Serv., 432 F.2d 824, 849

Traditionally, the INS has requested the opinion of the State Department regarding the merits of an applicant's persecution claim.[177] The State Department has responded with letters of recommendation. This correspondence invariably introduces political and foreign policy issues into the asylum proceedings, potentially interfering with a determination of the case on its merits. Considering the foreign policy responsibilities of the State Department, it is doubtful that any information it supplies is truly objective.[178] Furthermore, because the State Department is not required to disclose the recommendation to the applicant, he is denied any realistic opportunity to refute the State Department's conclusions.[179] Moreover, the applicant is not allowed to cross examine or direct interrogatories to the author of the letter.[180]

The detrimental effect that this correspondence often has on an alien's asylum claim is illustrated by *Hosseinmardi v. Immigration & Naturalization Service*.[181] In *Hosseinmardi*, several Iranians objected to deportation on the grounds that they would be persecuted in Iran because of their anti-Shah activities. State Department letters admitted into the record concluded that the Iranians would not be persecuted if returned to Iran and recommended that the asylum requests be denied. Although the State Department's conclusion was suspect due to the important strategic relationship that existed between the United States and Iran at that time and the well documented activities of the Shah's secret police,[182] the alien's claim that his inability to cross-examine the author of the State Department letter violated procedural due process was rejected.[183] Upon rehearing, however, the court conceded the potential unreliability of the letter and stated that its introduction would have been im-

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(6th Cir. 1970); Kasravi v. Immigration & Naturalization Serv., 400 F.2d 675, 677 (9th Cir. 1968).

177. Section 243.3(b), Immigration and Naturalization Service, Operating Instructions (April 7, 1971).

178. The Ninth Circuit has questioned the competency of the State Department letters stating: "[s]uch letters from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world." Kasravi v. Immigration & Naturaliztaion Serv., 400 F.2d 675, 677 n.1 (9th Cir. 1968).

179. 8 C.F.R. §103.2(2) (1976) provides: "In exercising discretionary power when considering an application or petition, the district director or officer in charge, in any case in which he is authorized to make the decision, may consider and base his decision on information not contained in the record and not made available for inspection by the applicant or petitioner, provided the regional commissioner has determined that such information is relevant and is classified under Executive Order No. 11652 . . . as requiring protection from unauthorized disclosure in the interest of national security." *See also* Jay v. Boyd, 351 U.S. 345 (1956).

180. *See, e.g.*, Hosseinmardi v. Immigration & Naturalization Serv., 405 F.2d 25, 27 (9th Cir. 1968); DeLucia v. Immigration & Naturalization Serv., 370 F.2d 305, 309 (7th Cir. 1966), *cert. denied*, 386 U.S. 912 (1967); Namkung v. Boyd, 226 F.2d 385, 387 (9th Cir. 1955).

181. 405 F.2d 25, 27 (9th Cir. 1968). *See also* Ashari v. Immigration & Naturalization Serv., 396 F.2d 391, 392 (9th Cir. 1968).

182. AMNESTY INTERNATIONAL, *supra* note 108, at 255-56.

183. 405 F.2d 25 (9th Cir. 1968). *See also* Namkung v. Boyd, 226 F.2d 385 (9th Cir. 1955).

proper if the Board had given it "substantial weight" without further inquiry.[184]

Other courts have acknowledged the intrinsic unreliability of State Department recommendations.[185] For example, in *Zamora v. Immigration & Naturalization Service*,[186] the court noted that such letters may be accorded undue weight and disapproved of the Board's consideration of them. Nonetheless, the court permitted the admission of the recommendation on the grounds that the asylum applicant failed to show that it influenced the Board's decision.[187]

While the decision-maker is prohibited from openly giving substantial weight to the State Department recommendation,[188] its impact on the ultimate decision is inevitable. By requiring the applicant to prove that the decision-maker was, in fact, influenced by the letter, the court saddles the applicant with an unreasonable burden. Judicial concern that the Board may be improperly influenced by such recommendations would be more adequately alleviated by prohibiting their admission altogether.[189] Alternatively, the applicant should be fully apprised of all the information given to the Board by the State Department and provided with the opportunity to cross-examine and present interrogatories to the author of such correspondence. This would furnish the applicant with due process guarantees characteristic of other judicial settings.[190]

The great deference the courts have accorded the decisions of the INS may no longer be necessary. The Refugee Act of 1980, in amending section 243(h) to conform to the U.N. Protocol, appears to eliminate the discretionary authority of the Attorney General to deport a refugee who meets the requirement of the statute.[191] In order to conform to the mandatory language of section 243(h), the courts should revise their standards of judicial review to insure that the decisions of the INS are based upon the requirements of the statute[192] and not upon political or foreign policy considerations.

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184. 405 F.2d at 28.

185. Paul v. Immigration & Naturalization Serv., 521 F.2d 194, 200 (5th Cir. 1975) (although the court rejected the alien's claim that the admissibility of the State Department letter violated due process, it found the letter to be erroneous in its statement of the alien's claims).

186. 534 F.2d 1055 (2d Cir. 1976).

187. *Id.* at 1063. The court observed in dictum that the letters have contributed little or no useful information about conditions in the foreign country. *Id.*

188. See text accompanying notes 185 and 187 *supra*.

189. In *Zamora*, the court noted in a footnote that it "disapprove[d] of the receipt in evidence of the opinions of the [State Department] with respect to the probable persecution of the particular alien. . . ." 534 F.2d at 1062 n.5 (2d Cir. 1976). The court, however, admitted the letter into evidence, since the petitioner failed to prove that the letter influenced the result of the decision-maker. *Id.* at 1063.

190. Although deportation proceedings are civil, rather than criminal in nature, it seems fair to extend some of the same constitutional safeguards provided in criminal proceedings to deportation proceedings given the potential life and death consequences of deportation.

191. The Attorney General is now forbidden from deporting otherwise deportable aliens if the alien's life or freedom is threatened. 8 U.S.C. §1253(a)(1) (Supp. IV 1980).

192. As of this writing, no court has considered the question of whether section 243(h), *as amended* by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), requires a

CONCLUSION

The success or failure of a section 243(h) claim may mean the difference between life and death for an alien. Thus, it is imperative that each applicant be provided with the fullest opportunity to present his claim in a judicial or administrative setting that is fair and impartial, as mandated by section 243(h) and the U.N. Protocol. Unfortunately, the application of the law in practice often falls short of that goal. Foreign policy considerations and domestic political pressures continue to inject an element of bias into asylum proceedings. The result is often a less favorable disposition of claims of applicants fleeing right-wing governments friendly towards the United States than applicants from communist nations. International treaty obligations and federal law require the United States to give full consideration to all applicants with meritorious claims, regardless of the exigencies of foreign policy or domestic politics. The courts should endeavor to apply the law of asylum in a manner that is uniform and fair, guided only by the provisions of section 243(h), and the U.N. Protocol, as well as a humanitarian commitment to providing a safe haven for victims of persecution.

In order to assist the courts in accomplishing this goal, Congress should supply guidelines for determining what constitutes a prima facie case of persecution. Furthermore, Congress or the courts should lighten the burden of proof upon the applicants in order to make it more realistic and reasonable. Specifically, all State Department communications to the Board concerning an applicant's case should be made part of the public record, and the applicant should have the opportunity to cross-examine the author of the communications. Moreover, the alien should be allowed to introduce evidence to counter the State Department views, including reports by private groups or citizens living in the foreign country in question. Congress should also permit the courts a wider scope of judicial review of section 243(h) claims; one that is in conformity with the existing domestic and international law. Such a standard should entail a truly meaningful examination of the record that would provide the applicant with a reasonable opportunity to challenge the Board's findings at the appellate level.

Undoubtedly, future litigation will test whether the application of section 243(h) and the U.N. Protocol is in conformity with the Refugee Act of 1980. For the present, Congress and the courts should institute the necessary changes to assure that section 243(h) and the U.N. Protocol may become more than hollow symbols of a humanitarian commitment to human rights.

DAVID ROTH

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change in the standard of judicial review. However, in Brathwaite v. Immigration & Naturalization Serv., 633 F.2d 657 (2d Cir. 1980), the court noted in a footnote that it has traditionally applied a substantial evidence test to opinions of the Attorney General under section 243(h) of the Act, 8 U.S.C. §1253(h). *Id.* at 659 n.5. Nevertheless, the court observed that the Refugee Act of 1980 made the withholding of deportation mandatory when an alien meets specified conditions. *Id.* The footnote implies that the court would alter its standard of review to conform to the non-discretionary language of section 243, *as amended* by the Refugee Act of 1980, *supra* note 8.