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ASYLUM ADJUDICATIONS: DO STATE DEPARTMENT ADVISORY OPINIONS VIOLATE REFUGEES' RIGHTS AND U.S. INTERNATIONAL OBLIGATIONS?

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I. INTRODUCTION

Over 16,622 applications for political asylum in the United States were filed during fiscal year 1985¹—more than four times the number that were filed in 1978.² At the end of fiscal year 1985, 126,000 other applications were still pending.

A successful applicant must meet the burden of demonstrating a well-founded fear of persecution if returned to his or her home country.³ However, before an adjudicating officer can determine whether an applicant has met that burden, the officer must send the application to the State Department for its opinion.⁴ The brief conclusory opinion of the State Department is often dispositive of the entire application because many adjudicating officers give great deference to the opinion and rarely rule against its conclusions.⁵ The introduction of advisory opinions into the asylum decisionmaking process permits political considerations that are irrelevant to the merits of a particular application to play a persuasive role. The issue addressed here is whether this procedure violates the refugee's

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1. STATISTICS DIV., IMMIGRATION & NATURALIZATION SERV. (INS), Asylum Cases Filed with District Directors, Table dated Oct. 23, 1985. Figures are based on asylum cases filed with district directors since October 1984. The figures represent only the number of applications filed, not the number of individuals seeking asylum since an applicant can file for his/her spouse and children.

2. *Id.* For breakdown by year, see TABLE 1, *infra* text accompanying note 172. The number of applications has declined markedly since 1981 as the massive Cuban influx of that year gets processed.

3. 8 C.F.R. § 208.5 (1985). See generally Note, *The Right of Asylum Under United States Immigration Law*, 33 U. FLA. L. REV. 539, 547-55 (1981) (discussing the applicant's burden of proof and the various types of evidence upon which decisions are based).

4. 8 C.F.R. §§ 208.7, 208.10(b) (1985).

5. See IMMIGRATION & NATURALIZATION SERV., ASYLUM ADJUDICATIONS: AN EVOLVING CONCEPT AND RESPONSIBILITY FOR THE IMMIGRATION AND NATURALIZATION SERVICE 62 (June 1982) [hereinafter cited as INS, ASYLUM ADJUDICATIONS] (copy available from the author). One INS official remarked: "I would never, never overrule the State Department." *Id.* However, comments from other officials were more critical of the State Department. For further discussion, see *supra* notes 209-238 and accompanying text.

right to have an asylum claim fairly considered and United States treaty obligations not to return a refugee to a country where his or her life or freedom would be threatened.

Traditionally, the United States has welcomed those fleeing persecution in their homelands. Since America is a nation of immigrants, many of whom have fled religious and political persecutions, this tradition is firmly embedded in the American character.⁶ Even with the enactment of the first immigration laws, Congress made exceptions for otherwise deportable aliens who would be persecuted for political opinions if returned.⁷

The passage of the Refugee Act of 1980 (Act)⁸ reaffirmed the American tradition of embracing those who face persecution at home. The Act established a procedure for applying for asylum⁹ and adopted a new definition of "refugee,"¹⁰ eliminating the statutory bias favoring those fleeing Communist countries.¹¹ The Act was also intended to bring United States law into conformity with international treaty obligations under the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol).¹²

However, after the Act's passage the Immigration and Naturalization Service (INS) was inundated with applications for asylum. It was expected that there would be only 5,000 asylum applications

6. Since 1776, the United States has admitted approximately 50,000,000 immigrants, of which 2,000,000 were characterized as refugees. See CONGRESSIONAL RESEARCH SERV., U.S. IMMIGRATION LAW & POLICY 1952-1979, at 15-25 (1979); S. REP. NO. 256, 96th Cong., 1st Sess. 6 (1979).

7. See, e.g., Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477, 477; Act of Aug. 3, 1882, ch. 376, § 4, 22 Stat. 214, 214; Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1804, 1804; Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 898, 899; Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 877. The current provision is found in the Immigration and Nationality Act of 1952, § 243(h) (codified as amended at 8 U.S.C. § 1253(h) (1982)).

8. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C. (1982)).

9. Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 105 (1980) (codified at 8 U.S.C. § 1158 (1982)).

10. Pub. L. No. 96-212, § 201(a), 94 Stat. 102, 102-03 (1980) (codified at 8 U.S.C. § 1101(a)(42) (1982)).

11. See Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (1965), repealed by Pub. L. No. 96-212, §203(b)(5), 94 Stat. 102, 107 (1980). Previously, refugees gained admittance through the seventh preference, conditional entry, if aliens could demonstrate that "because of persecution . . . on account of race, religion or political opinion they have fled (I) from any Communist country or Communist-dominated county or area, or (II) from any country within the general area of the Middle East . . ." See also *infra* notes 43-49 and accompanying text.

12. United National Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 622, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter cited as Protocol]. The Protocol was ratified by the United States on Oct. 4, 1968. 114 CONG. REC. 29,607 (1968).

each year,¹³ and in 1979 only 5,801 applications were filed.¹⁴ By contrast, sixteen months after the Act took effect, 53,000 applications had been filed.¹⁵ Marielitos fleeing Cuba accounted for the bulk of the surge in applications. Refugees from recent events in Poland, El Salvador, Nicaragua, Iran, Iraq, Ethiopia, Lebanon, and Afghanistan, along with those from continuing repression and economic malaise in Haiti and Guatemala, also contributed to the surge and, together with the Cubans, account for ninety percent of the pending applications.¹⁶ By October 1983 there were 165,998 applications pending.¹⁷

The political response to this surge affected the implementation of the Act's facially neutral definition of "refugee" and led to objectionable executive policies designed to thwart the flow of refugees from certain countries. A few examples illustrate this point. First, by Presidential proclamation, the United States began an interdiction program allowing the Coast Guard to intercept and board certain vessels to determine whether those vessels contained undocumented aliens bound for the United States.¹⁸ Though the undocumented aliens that enter by sea are predominantly Cubans and Haitians, this program only affected Haitians since Haiti is the only country that has agreed to accept those interdicted.¹⁹ Second,

13. See IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE COMM'R OF IMMIGRATION & NATURALIZATION 9 (1978). Section 209(b) of the INA, 8 U.S.C. § 1159(b) (1982) provides that only 5,000 asylees can adjust their status to permanent residents in any given year after residing in the country for one year. Though these provisions do not limit the number that can be granted asylum status, they do indicate what was thought would be the ordinary number of asylum petitioners.

14. INS, ASYLUM ADJUDICATIONS, *supra* note 5, at 18. (In 1978 only 3,702 asylum applications were filed. *Id.*) See also TABLE 1, *infra* text accompanying note 170.

15. See TABLE 1, *infra* text accompanying note 172.

16. Percentages were derived by the author using data from Asylum Cases Filed with District Directors, FY 1983, STATISTICS DIV., INS.

17. *Id.*

18. Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981); Exec. Order 12,324, 46 Fed. Reg. 48,109 (1981). In 1984, 2,501 Haitians were returned under the interdiction program. This represented 73% of all the Haitians returned since interdiction was started in 1981. See U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984, 99th Cong., 1st Sess. (Jt. Comm. Print 1985) 574.

19. See REPORT OF THE COMM'N ON IMMIGRATION & NATIONALITY LAW OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, THE FUTURE OF POLITICAL ASYLUM IN THE UNITED STATES 7 (April 1984) [hereinafter cited as REPORT, FUTURE OF POLITICAL ASYLUM] (citing diplomatic letters dated September 23, 1981, exchanged between the governments of the United States and Haiti) (copy of the report available from the author). For the international law implications of the interdiction program, see Sohn, *Interdiction of Vessels on the High Seas*, 18 INT'L LAW. 411 (1984).

the Attorney General has implemented an alien detention policy²⁰ that allows him to detain certain undocumented aliens, initially just Haitians,²¹ indefinitely without possibility of parole, in contrast to past procedures applied to aliens not likely to abscond or pose security risks.²² This policy is intended to discourage other aliens from coming to the United States and claiming asylum, since such action results in virtual imprisonment.²³ Third, discretionary application of the extended voluntary departure status to Poles and not to Salvadorans, though the civil strife in El Salvador appears to be worse than that in Poland, evidences a political motivation behind the decision.²⁴

Many have charged that political considerations work their way not only into the general policy decisions described above, but also into the individual State Department advisory opinions.²⁵ This criticism is supported by the fact that aliens applying for asylum from

20. 8 C.F.R. §§ 212.5, 235.3 (1985). For an extensive discussion on the legal impact of the new policy, see Levy, *Detention in the Asylum Context*, 44 U. PITT. L. REV. 297 (1983).

21. The policy was challenged as discriminatory since it was initially applied only to Haitians. See *Vigile v. Sava*, 535 F. Supp. 1002 (S.D.N.Y.), *rev'd sub nom. Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982); see also REPORT, FUTURE OF POLITICAL ASYLUM, *supra* note 19, at 8; FAGEN, APPLYING FOR POLITICAL ASYLUM IN NEW YORK: LAW, POLICY, AND ADMINISTRATIVE PRACTICE 25-26 [hereinafter cited as FAGEN, APPLYING FOR POLITICAL ASYLUM] (Apr. 1984) (Occasional Papers No. 41, sponsored by the New York Research Program in Inter-American Affairs at New York University) (available from the author).

22. Before the new detention policy went into effect, it was customary practice to parole aliens awaiting a determination of their claims. In 1958 the Supreme Court approved of this practice, stating:

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

Leng May Ma v. Barber, 357 U.S. 185, 190 (1958).

23. A new detention center in Oakdale, Louisiana will greatly increase the ability of INS to detain large numbers of aliens. Arthur Helton, Director of the Political Asylum Project of the Lawyers' Committee for Human Rights, charges that the result of the detention policy is that "many people who would deserve asylum do not even try to reach our shores. Others, equally deserving, are encouraged to leave and return to places where they face persecution." N.Y. Times, Mar. 14, 1986, at A27, col. 3.

24. See *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 594 F. Supp. 502 (D.D.C. 1984) (upholding the Attorney General's decision not to grant extended voluntary departure to Salvadorans); FAGEN, APPLYING FOR POLITICAL ASYLUM, *supra* note 21, at 43-46.

25. See FAGEN, APPLYING FOR POLITICAL ASYLUM, *supra* note 21, at 56; Scanlan, *Who is a Refugee? Procedures and Burden of Proof Under the Refugee Act of 1980*, in 5 IN DEFENSE OF THE ALIEN 23, 27-31 (1982) [hereinafter cited as Scanlan, *Who is a Refugee?*]; REPORT, FUTURE OF POLITICAL ASYLUM, *supra* note 19, at 4-6; Alcinikoff, *Time for Reform*, 29 LAW QUADRANGLE NOTES—U. MICH. L. SCH. 20, 23-24 (1984) [hereinafter cited as Alcinikoff,

countries friendly to the United States or countries with whom the United States has a strong interest in maintaining good relations are less successful than aliens fleeing Communist countries.²⁶ It appears that certain nationals are more likely than others to obtain asylum simply because the State Department wishes to avoid having to recognize important friendly nations as human rights abusers, while it gains political mileage by granting asylum to refugees from Communist countries.

This article will examine the problems inherent in the use of State Department advisory opinions in asylum adjudications, and will propose some alternative procedures that would enable INS officers and immigration judges to use the vast resources of the State Department without sacrificing fairness to the individual applicant. Before examining those problems, however, it is necessary to examine briefly the history of United States asylum law to put the current procedures for obtaining asylum into context.

II. POST-WAR REFUGEE LAW

The right to asylum emerged out of an uneven, though discernible, movement toward addressing the serious international problems that have stemmed from the large number of refugees fleeing persecution since the end of the Second World War.²⁷ Immediately after the war, millions of displaced persons were either

Time for Reform]; Note, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125, 1132-33 (1980) [hereinafter cited as Note, *Right of Asylum*]; Helton, *Second-Class Refugees*, N.Y. Times, Apr. 2, 1985, at A27, col 2.

26. See *infra* notes 172-176 and accompanying text; see also Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 253-54 (1984) [hereinafter cited as Helton, *An Unfulfilled Promise*], (citing 1983 INS statistics showing that from Communist-dominated countries, 78% of the Russians, 64% of the Ethiopians, 53% of the Afghans, and 44% of the Romanians received asylum, while less than 11% of the Filipinos, 14% of the Pakistani, 2% of the Haitians, 2% of the Guatemalans, and 3% of the Salvadorans received asylum). These rates have not changed significantly, as is evidenced in the FY 1985 statistics. See TABLE 2, *infra* text accompanying note 173.

27. See also Carlin, *Significant Refugee Crises Since World War II and the Response of the International Community*, 1982 MICH. Y.B. OF INT'L LEGAL STUD. 3 [hereinafter cited as Carlin, *Significant Refugee Crises*]; see generally Anker & Posner, *The Forty-Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981) (analysis of U.S. legal response to refugee and asylum policy issues in the post-World War II period); Evans, *The Political Refugee in the United States Immigration Law and Practice*, 3 INT'L LAW. 204 (1969) (a discussion of the history of general asylum law and policy); Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B. OF INT'L LEGAL STUD. 91 [hereinafter cited as Martin, *Refugee Act*]; (developmental analysis of key provisions of the Refugee Act); Speer, *America's Post-War Refugee Measures: A Sketch of Executive and Legislative Action*,

unwilling or unable to return to their homelands.²⁸ Numerous international organizations were established to coordinate the resettlement of refugees from Europe and elsewhere.²⁹ The United States, Canada, Australia, and Brazil permitted hundreds of thousands to immigrate from the European refugee camps. In the United States, domestic legislation modified immigration procedures to cope with the tide. The Displaced Persons Act of 1948³⁰ enabled up to 202,000 qualifying refugees to immigrate.³¹ The International Refugee Organization (IRO) succeeded in resettling 1,038,000 people before it was dissolved in 1951.³²

With the emergence of Cold War politics came a significant change in the character of the European refugee situation. Refugees from Eastern Europe posed special problems as they accumulated in the border areas of Western European countries, aggravating already poor East-West relations. In 1950 the United Nations General Assembly passed a resolution creating the Office of the High Commissioner for Refugees (UNHCR), responsible for the protection of refugees who could not count on their nations of origin for protection.³³ In 1951 the United Nations Convention Relating to the Status of Refugees (Convention)³⁴ established a durable

4 INT'L LAW. 709 (1970) (comprehensive summary of postwar and ad hoc refugee programs). For prewar history of refugees in the international community, see Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33 INT'L & COMP. L.Q. 348 (1985) (tracing development of pre-Convention definitions of refugees).

28. Carlin, *Significant Refugee Crises*, *supra* note 27, at 5-9.

29. The United Nations Relief and Rehabilitation Administration (UNRRA), UNRRA Agreement, Nov. 9, 1943, 57 Stat. 1164, E.A.S. 352; the International Refugee Organization (IRO), Dec. 15, 1946, 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 3; United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA), G.A. Res. 302, U.N. Doc. A/1251 (1949); Office of the United Nations High Commissioner for Refugees (UNHCR), G.A. Res. 428, 5 U.N. GAOR Supp. (No. 20) 46, U.N. Doc. A/1775 (1950).

30. Pub. L. No. 80-774, 62 Stat. 1009 (1948).

31. *Id.* § 3. All persons were required to meet the immigration requirements imposed by the 1924 Immigration Act and to be unable to return home because of persecution or fear of persecution on account of race, religion, or political opinion. Though the original act was quite limited in who could qualify because the priority scheme of the 1924 Act did not treat all Europeans equally, subsequent amendments to the Act permitted more to enter. *See* Act of June 16, 1950, ch. 262, § 4, 64 Stat. 219; Act of June 28, 1951, ch. 167, § 1, 65 Stat. 96.

32. *See* IRO, *supra* note 28; Carlin, *Significant Refugee Crises*, *supra* note 27, at 6.

33. *See* UNHCR, *supra* note 29.

34. United Nations Convention Relating to the Status of Refugees, *done* July 28, 1951, 189 U.N.T.S. 137 [hereinafter cited as Convention]. The Convention was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held in Geneva from July 2 to July 25, 1951, and entered into force on April 22, 1954.

definition of a refugee, though the Convention applied only to those displaced as a result of events occurring before January 1, 1951. It defined a refugee as a person who

owing 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, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.³⁵

Though the United States did not accede to the Convention, in 1968 it did accede to the 1967 Protocol Relating to the Status of Refugees (Protocol),³⁶ which incorporated the Convention's definition of a refugee and removed the restriction to persons displaced as a result of pre-1951 events.³⁷

Before the United States accession to the 1967 Protocol, asylum relief was granted to aliens otherwise ineligible to remain in the United States by the discretionary withholding of deportation under section 243(h) of the Immigration and Naturalization Act of 1952 (INA).³⁸ Before the Attorney General could exercise his discretion and withhold deportation, the refugee had to show that he would be subjected to "physical" persecution if returned home.³⁹

Section 212(d)(5) of the 1952 Act also granted the Attorney General the discretion to "parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission."⁴⁰ Before the Attorney General's parole power under this section was severely restricted by the Refugee Act of

35. Convention, *supra* note 34, at art. 1, § A(2). Note the similarity to the definition found in the 1948 Displaced Persons Act, *supra* note 30.

36. Protocol, *supra* note 12.

37. *Id.* at art. 1, § 2.

38. Pub. L. No. 82-414, ch. 477, § 243(h), 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1253(h) (1982)). The relief is now mandatory for those who qualify, and "well-founded fear" of persecution has replaced "physical" persecution.

39. *Id.*

40. *Id.* § 212(d)(5) (codified as amended at 8 U.S.C. § 1182(d) (5) (1982)). This parole authority was used generally for applicants from Eastern Europe and was used in 1956 to admit 32,000 Hungarians into the U.S. See Schmidt, *Development of United States Refugee Policy*, INS REPORTER, Fall 1979, at 1, 1.

1980,⁴¹ this broad discretion was used many times to allow large numbers of refugees to flee adverse circumstances, most notably from Hungary, Western Europe, Cuba, and Indochina. Once the Attorney General began paroling these refugees, it became apparent that their stay in the United States would not be temporary. Special legislation was required to regularize the status of each group of parolees by permitting them to adjust their status to permanent residence.⁴²

In 1965 Congress amended the INA to change the old section 243(h) requirement of "physical persecution" to "persecution on account of race, religion, or political opinion."⁴³ However, the 1965 changes to section 243(h) did not affect the Attorney General's discretionary power to deny the relief if he so chose. After the United States' accession to the 1967 Protocol, many felt that this discretion, as well as other United States immigration laws and policies, had to be changed for the United States to be in compliance with the Protocol.⁴⁴

In 1970 the highly publicized "Kurdika Affair" highlighted the need to change United States laws and policies to enable the system

41. Pub. L. No. 96-212, § 203(f), 94 Stat. 102, 107-08 (1980) (codified at 8 U.S.C. § 1182(d)(A), (B) (1982)).

42. See Pub. L. No. 85-559, 72 Stat. 419 (1958) (authorizing Hungarian refugees paroled into the U.S. to adjust status after two-year residence); Pub. L. No. 86-648, 74 Stat. 504 (1960) (Fair Share Refugee Act) (permitting 20,000 refugees, predominately Western Europeans, paroled under UNHCR Mandate to adjust status after two-year residence); Pub. L. No. 89-732, 80 Stat. 1161 (1966) (authorizing all paroled Cubans who arrived after Jan. 1, 1959, to adjust status after two-year residence); Pub. L. No. 95-145, 91 Stat. 1223 (1977) (authorizing paroled Indochinese refugees to adjust status after two-year residence); Pub. L. No. 95-412, 92 Stat. 907 (1978) (authorizing all refugees who were paroled before Sept. 30, 1980, to adjust status after two-year residence).

43. Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918 (1965) (current version, after the Refugee Act of 1980 made the Attorney General's discretionary power to withhold mandatory relief for those who qualified, at INA § 243(h), 8 U.S.C. § 1253(h) (1982)). The 1965 changes to § 243(h) generated much favorable comment. See, e.g., Frank, *Effect of the 1967 Protocol on the Status of Refugees in the United States*, 11 INT'L LAW. 291, 293 (1977) [hereinafter cited as Frank, *Effect of the 1967 Protocol*].

44. See generally Frank, *Effect of the 1967 Protocol*, *supra* note 43, at 294-302; Helton, *An Unfulfilled Promise*, *supra* note 26, at 246-50 (discussing the uneven and inconsistent application of the 1967 Protocol); Note, *Right to Asylum*, *supra* note 25, at 1127-32 (discussing the views of the BIA on § 243(h) since U.S. accession to the 1967 Protocol); Note, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. REV. L. & SOC. CHANGE 107, 131-34 (1978) [hereinafter cited as Note, *Behind the Paper Curtain*] (discussing the reasons behind Congress' failure to make greater reforms in this area); Comment, *Political Refugees and the United States Immigration Laws: Further Developments*, 66 AM. J. INT'L L. 571 (1972) (discussing judicial and administrative trends in interpreting § 243(h)).

to cope with United States obligations to refugees under the Protocol.⁴⁵ That event underscored the need to create a coherent asylum policy to ensure that the United States would not be remiss in its obligations not to return an alien to a country where he or she would be persecuted.

The limitation in the definition of those entitled to refugee-type relief also needed change. The 1965 amendments to the INA added a seventh preference, conditional entry status, to the six occupational and familial preferences for legal immigration.⁴⁶ Conditional entry, however, was available only to those fleeing Communist countries or countries from the general area of the Middle East. But the Protocol's definition of "refugee" was still broader in scope and contained no ideological or geographical bias, requiring relief from persecution for all refugees. Though some members of Congress were aware of the need to change the definition of refugee as early as 1973,⁴⁷ it was not until 1980 that United States law appeared to be in compliance with the Protocol.⁴⁸ Although theoretically no change was necessary since the Protocol was a treaty capable of superseding prior inconsistent laws,⁴⁹ unambiguous statutory provisions would systematize the procedure, better ensuring compliance.

45. Kurdika was a Lithuanian seaman who jumped aboard a U.S. Coast Guard vessel while his Russian vessel was tied alongside in U.S. territorial waters for discussion on fishing rights. The Coast Guard permitted the Soviets to come aboard and forcibly return Kurdika to his ship without an opportunity to claim asylum. The event focused attention on the incoherency of U.S. asylum procedure, forcing the Secretary of State to issue a policy statement that all future political asylum requests be given full consideration under the provisions of the Protocol. 37 Fed. Reg. 3447 (1972), *modified in* Public Notice 728, 45 Fed. Reg. 70,621 (1980).

46. Pub. L. No. 89-236 § 3, 79 Stat. 911, 913 (1965) (*repealed by* Pub. L. 96-212, 94 Stat. 102, 107 (1980)). Though the relief was originally limited to refugees from Communist countries or a county in the general area of the Middle East, this provision was expanded by Congress in 1976 (Act. of Oct. 20, 1976, Pub. L. No. 94-571, 90 Stat. 2703), and again in 1978 (Act. of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907), and made available to 17,400 refugees per year, regardless of their origin.

47. See 119 CONG. REC. 35,734-37 (1973) (statements of Sen. Kennedy introducing S. 2643 that proposed a definition of refugee similar to that of the Protocol); 119 CONG. REC. 31,454-55 (1973) (statements of Rep. Eilberg introducing H.R. 981); see also *Western Hemisphere Immigration: Hearings on H.R. 981 Before House Subcomm. No. 1 of the Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973) in which witnesses commended the bill's employment of Protocol language. *Id.* at 249-50, 258-59, 304, 306, 326.

48. See *infra* notes 53-60 and accompanying text.

49. Since the Protocol incorporated the substantive provisions of the Convention, it also was a treaty and, as a treaty, became part of the supreme law of the land under article VI, clause 2 of the United States Constitution. Frank, *Effect of the 1967 Protocol*, *supra* note 43, at 296; Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping*

III. THE REFUGEE ACT OF 1980⁵⁰

The primary aim of the Refugee Act of 1980 was to provide comprehensive and systematic relief to a broad class of refugees fearing persecution in their country of origin. Congress stated:

[I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States.⁵¹

It was hoped that the Refugee Act would put an end to the geographical and ideological bias of previous refugee admissions and focus instead on the broader humanitarian concern for those fleeing persecution anywhere.⁵² Most important to this objective was the adoption of a facially neutral definition of refugee.⁵³ Congress

U.S. Immigration Policy, 45 LAW & CONTEMP. PROBS. 163, 170 (1982); cf. Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984) (focusing on customary international law).

50. Pub. L. 96-212, 94 Stat. 102 (1980).

51. *Id.* § 101(a), 94 Stat. at 102.

52. See Anker & Posner, *supra* note 27, at 11; SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, FINAL REPORT 158 (1981). Endorsing the adoption of the Protocol definition of refugee, the Commission stated that

[b]y emphasizing persecution and fear of persecution without regard to national origins, the Refugee Act establishes criteria based on special humanitarian concerns. The Act thus provides needed flexibility in defining refugee status in accordance with a universal standard that is not bound by specific ideological or geographic criteria which were used in earlier definitions.

Id. The 1965 amendments to the INA created a seventh preference, conditional entrance status, enabling refugees from Communist countries and countries in the general area of the Middle East to gain admittance. Pub. L. No. 89-236, 79 Stat. 911 (1965) (*repealed in part* by Refugee Act of 1980) (current version codified at 8 U.S.C. §§ 1157-59 (1982)). See also Anker & Posner, *supra* note 27, at 17-20.

For historical background on the creation of the Select Commission, see Kennedy, *Foreward*, 19 SAN DIEGO L. REV. 1, 2-6 (1981).

53. The definition under the Refugee Act is

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

made clear its intent that the definition be the same as the Protocol definition.⁵⁴ Though the language in the Refugee Act is not identical with that of the Protocol (the Protocol being more concise), in substance the two definitions are consistent.⁵⁵

Changing the section 243(h) withholding of deportation provisions was important to ensuring compliance with United States obligations under the Protocol.⁵⁶ Article 33 of the 1951 Convention, incorporated into the 1967 Protocol, mandates that the contracting state not return a refugee to a country where his or her life or freedom would be threatened,⁵⁷ but prior to the 1980 amendments section 243(h) left the decision of whether to withhold deportation to the discretion of the Attorney General.⁵⁸ The Refugee Act modified section 243(h) to require the Attorney General not to return any

Refugee Act of 1980, INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1982).

54. Protocol, *supra* note 12. There is much support for this interpretation in the legislative history. *See, e.g.*, 126 CONG. REC. 3,757 (1980) ("The new definition makes our law conform to the United Nations Convention and Protocol.") (statement of Sen. Kennedy); *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 27 (1979) (effect of the Act is "the replacing of the existing definition of refugee with the definition which appears in the United Nations Convention and Protocol") (statement of Rep. Fish).

55. Compare INA § 101(a)(42)(A), *supra* note 53, with the Protocol definition, as it modified the Convention definition, *supra* text accompanying notes 34-37.

56. *See* H.R. REP. NO. 608, 96th Cong., 1st Sess. 18 (1979) (the change was "necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements").

57. Convention, *supra* note 34, at art. 33. Article 33 provides:

Prohibition of Expulsion or Return ("Refoulement")

1. 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, or membership of a particular social group or political opinion.

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

58. *See generally*, Note, *The Right to Asylum Under United States Immigration Law*, 33 U. FLA. L. REV. 539, 547 (1981) (observing that the 1980 amendments prevent the Attorney General from exercising discretion if s/he finds that an alien's "life or freedom would be threatened"); Note, *Section 243(h) of the Immigration and Nationality Act of 1952 as Amended by the Refugee Act of 1980: A Prognosis and a Proposal*, 13 CORNELL INT'L L.J. 291 (1980) (arguing that even though § 243(h) withholding of deportation was made mandatory to those who could show that they were refugees from persecution, the Attorney General nonetheless has the power to decide who is a refugee; thus, the relief § 243(h) provides is still not as much as Article 33 mandates).

alien to a country where he or she would be persecuted, and extended the relief to aliens in both deportation *and* exclusion proceedings.⁵⁹ Though Congress believed that United States law already comported with the mandatory non-return (nonrefouler) provisions of Article 33 of the Convention, it felt that the changes were necessary to clarify the legal obligations imposed by the Protocol.⁶⁰

The Act eliminated the geographical and ideological bias of the seventh preference conditional entry and severely limited the Attorney General's power to parole large numbers of refugees.⁶¹ It was hoped that these two changes would help standardize the refugee programs⁶² by eliminating many of the political elements that had influenced past relief actions.⁶³

Though not required under the Protocol, Congress authorized the Attorney General to establish an asylum procedure⁶⁴ for those aliens who qualify under the definition of refugee⁶⁵ and are already physically present within the United States. This procedure provided under INA section 208 is distinct from the withholding of deportation set out under section 243(h). The decision under section 208 whether to grant asylum status to an alien already in the United States, even if that alien meets the definition of refugee, is left to the

59. Section 243(h) (1), codified at 8 U.S.C. § 1253(h) (1982), provides: "The Attorney General *shall not* deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* (emphasis added). The regulations make clear that the section also applies to the excludee. 8 C.F.R. §§ 208-10(a) (1985). See also S. REP. NO. 256, 96th Cong., 1st Sess. 17, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 515, 531.

60. H. R. REP. NO. 608, 96th Cong., 1st Sess. 18 (1979) ("Although [§ 243(h)] has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it desirable, for the sake of clarity, to conform the language of that section to the Convention."); S. REP. NO. 590, 96th Cong., 2d Sess. 20 (1980) (the amendments to § 243(h) were made "with the understanding that it is based directly upon the language of the Protocol and it is intended that the language be construed consistent with the Protocol").

61. Refugee Act of 1980, INA § 203(e). Currently, the Attorney General cannot parole into the U.S. any refugee unless there is a compelling reason in the public interest to do so. INA § 212(d)(5)(A) & (B), 8 U.S.C. § 1182(d)(5)(A) & (B) (1982).

62. See, Note, *The Right of Asylum Under United States Immigration Law*, 33 U. FLA. L. REV. 539, 545, nn. 40-44 and accompanying text (1981).

63. Prior to the Refugee Act, the Attorney General (whose position is highly political) through his parole power would admit large numbers of refugees, usually from Communist countries like Hungary, the Soviet Union, Cuba, Vietnam, and Cambodia. See generally, Martin, *Refugee Act*, *supra* note 27, at 92-96.

64. Refugee Act of 1980, INA § 208 (codified at 8 U.S.C. § 1158 (1982)).

65. *Id.* § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A), *supra* note 53.

discretion of the Attorney General.⁶⁶

Overseas refugees are treated differently. Though they may meet the statutory definition of a refugee,⁶⁷ they are subject to certain numerical restrictions.⁶⁸ The number of overseas refugees to be admitted each year is determined by the President, after consultation with Congress, before the beginning of each fiscal year.⁶⁹ This number is independent of other quotas regulating the flow of immigrants and can be increased by the President if an unforeseen refugee situation arises.⁷⁰ Once the ceiling on the number of refugees to be admitted is set, barring any unforeseen situations, the President must allocate the number among various competing classes of refugees that qualify as "refugees of special humanitarian concern to the United States."⁷¹

If an overseas refugee is resettled in the United States and has been physically present for a year, that refugee can apply for admission as an immigrant and will no longer be required to return to his or her country once the threat of persecution abates.⁷² When a refugee applies for admission as an immigrant, the refugee benefits from an automatic waiver of certain exclusionary criteria found in INA section 212(a) that would make ordinary applicants for immigration inadmissible.⁷³

Though the 1980 Refugee Act established a facially neutral definition of a refugee, the results of asylum adjudications pursuant to section 208 of refugees already in the United States, and withholding of deportation decisions under section 243(h), along with the State Department evidence, suggest that nonneutral factors play a role in the outcome of these claims.

66. *Id.* § 208(a), 8 U.S.C. § 1158(a).

67. *See id.* § 101(a)(42)(a), 8 U.S.C. § 1101(a)(42)(A).

68. *See id.* § 207, 8 U.S.C. § 1157.

69. *Id.* § 207(a)(2), 8 U.S.C. § 1157(a)(2).

70. *Id.* § 207(b), 8 U.S.C. § 1157(b).

71. *Id.* § 207(a)(3), 8 U.S.C. § 1157(a)(3).

72. *Id.* § 209(a), 8 U.S.C. § 1159(a).

73. *Id.* § 207(c)(3), 8 U.S.C. § 1157(c)(3); *id.* § 212(a), 8 U.S.C. § 1182. The provisions of § 212(a) that are waived are: (14) (labor qualifications), (15) (likely to become a public charge), (20) (lack of proper documents), (21) (lack of proper immigrant visa), (25) (literacy requirement), and (32) (unaccredited medical school graduates). Moreover, the Attorney General may waive other exclusionary criteria of § 212(a) "for humanitarian purposes, to assure family unit or when it is otherwise in the public interest." *Id.* § 107(c)(3), 8 U.S.C. § 1157(c)(3).

IV. CURRENT ASYLUM AND WITHHOLDING OF DEPORTATION PROCEDURES AND LEGAL STANDARDS

There are now two methods by which one who is physically present in the United States and faces persecution in his or her homeland can secure refugee status. The alien can either apply for asylum under section 208(a) or, if deportation or exclusion proceedings have been initiated, the alien can request withholding of deportation under section 243(h).⁷⁴ Though technically distinct, these two methods often converge⁷⁵ and involve the same factual determination.⁷⁶ However, the standards of proof⁷⁷ and the standards of appellate review⁷⁸ may not be the same.

Currently there is much confusion as to whether the legal standard for establishing eligibility under section 208(a) is the same as or is less stringent than the standard applied pursuant to section 243(h).⁷⁹ Recently, in *Matter of Acosta*,⁸⁰ the Board of Immigration

74. See *supra* notes 59 & 64 and accompanying text.

75. See 8 C.F.R. § 208.3(b) (1985) ("Asylum requests [pursuant to § 208(a)] made after the institution of exclusion . . . proceedings shall . . . be considered as requests for withholding exclusion or deportation pursuant to section 243(h) of this Act."); see also *Matter of Martinez-Romero*, 18 I. & N. Dec. 75 (BIA 1981).

76. To qualify for relief under INA § 208(a) or § 243(h), the alien must show he or she is avoiding persecution; however § 208(a) requires the alien to be a refugee, i.e., unwilling to return home because of a "well-founded fear of persecution," 8 U.S.C. § 1101(a)(42)(A)(1982), while under § 243(h), the alien must show that his "life or freedom would be threatened," 8 U.S.C. § 1253(h) (1982).

77. INA § 208(a). See also *INS v. Stevic*, 467 U.S. 407 (1984) (holding that an alien must establish a "clear probability" of persecution under § 243(h), avoiding a ruling on the distinction between "well-founded fear" of persecution and "clear probability" of persecution, and noting that it was not a request for asylum under § 108(a)).

78. See *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1282 n. 8 (9th Cir. 1984), stating: Because the form of relief available under section 243(h) is no longer discretionary [since the passage of the Refugee Act], the limited abuse of discretion standard of review that we applied to decisions under the former section . . . is no longer applicable. The mandatory language of the amended section requires us to review the BIA's denial of an application for a prohibition against deportation under a heightened, substantial evidence standard of review.

See also *Ananeh-Firempong v. INS*, 766 F.2d 621, 629 (1st Cir. 1985) (noting that references to the Board's discretionary power have been made under a motion to reopen a petitioner's claim for discretionary relief); *Zepeda-Melendez v. INS*, 741 F.2d 285, 289 (9th Cir. 1984) (denying refuge under § 243(h) to alien seeking to maintain political neutrality within his homeland); *McMullen v. INS*, 658 F.2d 1312, 1316 (9th Cir. 1981) (holding that factual findings under the Refugee Act of 1980 are subject to review under the substantial evidence test).

79. Compare *Sotto v. INS*, 748 F.2d 832, 836 (3rd Cir. 1984) ("Since a request to withhold deportation is frequently joined with a request for asylum in the context of deportation proceedings, it is fitting to apply *congruent* standards.") (emphasis added) and *Rejaie v. INS*, 691 F.2d 139, 146 (3d Cir. 1982) (well-founded fear "equates with" clear probability) with *Carvajal-Munoz v. INS*, 743 F.2d 562, 574-75 (7th Cir. 1984)

Appeals (BIA) held that

as a practical matter of the showing contemplated by the phrase "a well-founded fear" of persecution [for section 208(a) relief] converges with the showing described by the phrase "a clear probability" of persecution [for section 243(h) relief] Accordingly, we have not found a significant difference between the showings required for asylum and withholding of deportation.⁸¹

Confronted with conflicting opinions in different federal circuits, the BIA simply blazed out on its own and found the two standards to be more or less the same.⁸² This action was harshly criticized by the Ninth Circuit in *Cardoza-Fonseca v. INS*.⁸³ There the court reversed and remanded a BIA decision on the ground that it was improper to apply the "clear probability of persecution" standard to section 208(a) asylum claims.⁸⁴ The court condemned the Board's action in *Acosta*, stating "the Board appears to feel exempt from the holding of *Marbury v. Madison* . . . and not constrained by circuit court opinions."⁸⁵ Since the Supreme Court has granted the Solicitor General's petition for certiorari in *Cardoza-Fonseca*,⁸⁶ the issue may finally be settled.⁸⁷

A. INA Section 243(h) Withholding of Deportation

Once an alien is found to be deportable by an immigration judge, a specific country is designated as the country of deportation. If the alien believes he or she would be subject to persecution if

("Although [the 'well-founded fear'] evidentiary burden is very similar to that connected with the 'clear probability' standard, it is not identical.") and *Youkhanna v. INS*, 749 F.2d 360 362, (6th Cir. 1984) ("[The 'well-founded fear'] standard does require less than the 'clear probability' standard applied to . . . section 243") and *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453-54 (9th Cir. 1985) ("clear probability" and "well-founded fear" standards not identical and it is error to apply the stricter "clear probability" standard to § 208(a) claims and not the "more generous" "well-founded fear" standard).

80. Interim Dec. No. 2986 (BIA Mar. 1, 1985).

81. *Id.* at 5 (citations omitted).

82. *Id.* at 6.

83. 767 F.2d 1448 (9th Cir. 1985).

84. *Id.* at 1455.

85. *Id.* at 1454.

86. *INS v. Cardoza-Fonseca*, 767 F.2d 1448 (9th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3546 (U.S. Feb. 25, 1986) (No. 85-767). See generally *Interpreter Releases*, Feb. 28, 1986, at 187 (discussing the importance of the Supreme Court's grant of the petition for certiorari in *Cardoza-Fonseca*).

87. This issue was left open by the Court in *INS v. Stevic*, 467 U.S. 407 (1984); see *supra* note 77.

deported to the designated country, he or she must submit an application for temporary withholding of deportation within ten days of the deportation order.⁸⁸ The burden is on the alien to establish that he or she "would be subject to persecution on account of race, religion, or political opinion."⁸⁹ Once this is established, section 243(h) requires the Attorney General not to deport or return the alien to any country where that "alien's life or freedom would be threatened."⁹⁰ However, "[a] grant of section 243(h) relief is merely a stay of deportation. Should substantial changes occur in the country from which such relief is granted, or if, for other reasons, the grant should need to be reevaluated, the [INS] can move for reopening."⁹¹

The Supreme Court has recently considered the question of what showing an alien must make to be entitled to relief. In *INS v. Stevic*,⁹² the Court held that "an alien must establish a clear probability of persecution to avoid deportation under Section 243(h)."⁹³ The Court "deliberately avoided any attempt to state the governing standard [for section 243(h) relief] beyond noting that it requires that an application be supported by evidence establishing that it is more likely than not that the alien would be subject to persecution."⁹⁴

Section 243(h) relief differs from section 208(a) asylum status in several important respects. First, a section 243(h) hearing can be conducted without a State Department advisory opinion.⁹⁵ Second, an alien who is successful under section 243(h) does not obtain a secure status, as does a section 208(a) asylee, and may be deported to his or her country of national origin or another country where persecution is less likely.⁹⁶ And, finally, the standard of review is more stringent. Since section 243(h) relief is made mandatory for those that qualify,⁹⁷ unlike the discretionary nature of section 208(a)

88. 8 C.F.R. § 242.17(c) (1985).

89. *Id.*

90. INA § 243(h), 8 U.S.C. § 1253(h) (1982).

91. *Matter of Lam*, 18 I. & N. Dec. 15, 16 n.2 (BIA 1981).

92. 467 U.S. 407 (1984).

93. *Id.*

94. *Id.* at 429-30.

95. *Compare* 8 C.F.R. § 242.17(c) (1985) *with* 8 C.F.R. §§ 208.7, 208.10(b) (1985).

96. *See Matter of Salim*, 18 I. & N. Dec. 311 (BIA 1982) (though the applicant's claim for withholding of deportation to Afghanistan was upheld, the court stated that "[s]ection 243(h) relief is 'country specific' and . . . that section would not prevent his exclusion and deportation to Pakistan or any other hospitable country if that country will accept him.") *Id.* at 315.

97. *See supra* notes 56-60 and accompanying text.

relief, courts have found that "the new mandatory language of section 243(h) justifies replacing the abuse-of-discretion standard."⁹⁸

B. *INA Section 208(a) Asylum*

Before the passage of the Refugee Act, no statutory asylum status existed. The broad use of parole and seventh preference conditional entry were the typical procedures available to those fleeing persecution.⁹⁹ Also, after 1972 the INA regulations provided a haphazard asylum procedure on request before a district director.¹⁰⁰

1. *Application Procedure.*—Currently, section 208(a) vests authority in the Attorney General to grant asylum to a refugee already in the United States.¹⁰¹ This authority is delegated to both INS district directors and immigration judges by regulation.¹⁰² An applicant for asylum, if not already in exclusion or deportation proceedings, may apply to the district director by filing an I-589 form.¹⁰³ If exclusion or deportation proceedings have been instituted, the applicant must file the I-589 form with the docket clerk of the immigration court.¹⁰⁴

Besides requiring basic personal background information, the I-589 requests information necessary to support a claim of a well-

98. *McMullen v. INS*, 658 F.2d 1312, 1316 (9th Cir. 1981). *Accord Espinoza-Martinez v. INS*, 754 F.2d 1536, 1539-40 (9th Cir. 1985).

99. In 1952 the Attorney General was granted the authority to parole into the United States any alien "for emergent reasons deemed strictly in the public interest." Immigration and Naturalization Act, § 212(d)(5), 66 Stat. 163, 188 (1952). (For examples of its use, see *supra* note 41.) The Refugee Act restricted this power by stating that "[t]he Attorney General may not parole . . . an alien who is a refugee. . . ." Pub. L. 96-612, 94 Stat. 102, 108, INA § 212(d)(5)(B) (codified at 8 U.S.C. § 1182(d)(5)(B) (1982)). The conditional entry status, created in 1965, see *supra* note 43, was repealed entirely by the Refugee Act, Pub. L. 96-212, 94 Stat. 102, 107 (1980).

100. 8 C.F.R. § 108 (1972); *Sannon v. United States*, 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated* 566 F.2d 104 (5th Cir. 1978).

101. Section 208(a), 8 U.S.C. § 1158(a), provides:

The Attorney General shall establish a procedure for an alien physically present in the United States . . . to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determining that such alien is a refugee within the meaning of section 1101(a) (42) (A) of this title.

For text of § 1101(a)(42)(A), see *supra* note 53.

102. 8 C.F.R. § 208.1(a),(b)(1985).

103. *Id.* §§ 208.2, 208.3(a).

104. *Id.* § 208.3(b). If the alien applying for admission has been served with notice to appear before an immigration judge or the alien has been served with an order to show cause pursuant to deportation procedure, then proceedings have been deemed instituted and the form must be filed with the docket clerk of the immigration court. See *id.* § 208.3(a)(2).

founded fear of persecution. Much of the information requested is subjective in nature, such as what the applicant thinks would happen if returned,¹⁰⁵ and what actions the applicant has taken that the applicant believes would result in persecution.¹⁰⁶ The form also seeks specific detailed information to substantiate the applicant's claims; for example, to what organizations the applicant or members of his or her family belonged, including dates of membership, positions held, purpose of organization, and the member's duties.¹⁰⁷ It also asks for the names and addresses of witnesses and documents to verify all incidents of detention, interrogation, convictions, and imprisonments.¹⁰⁸

The I-589 form is then forwarded to the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the State Department for an advisory opinion. District directors are required to request an advisory opinion.¹⁰⁹ The director is also required to note whether he or she feels the application is meritorious, without merit, or undetermined, and to include an assessment of the applicant's credibility, identifying specific areas of doubt.¹¹⁰ An immigration judge must request an advisory opinion if one has not already been obtained by a district director, or if circumstances have changed substantially since the first opinion was sent and a new one would "materially aid in adjudicating the asylum request."¹¹¹

2. *BHRHA Advisory Opinion Procedure.*—Since the burden is on the applicant "to establish that he/she is unable or unwilling to return to [his or her country] . . . because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion,"¹¹² the BHRHA will compare the information the applicant provides on the I-589 form with information available to the State Department to determine whether the applicant has met that burden. Elliot Abrams, former Assistant Secretary of State for BHRHA, described the internal process by which the determination is made:

105. INS Form I-589, Request for Asylum in the United States (Revised 3/1/81), question 31 (available from any INS district office).

106. *Id.* question 35.

107. *Id.* question 34.

108. *Id.* question 36.

109. 8 C.F.R. § 208.7 (1985).

110. I.N.S. Operations Instructions (OI) § 208.9(d) (1980) (reprinted in 4 IMMIGRATION LAW AND PROCEDURE, § 23-156.17 (C. Gordon & H. Rosenfield eds. 1984)).

111. 8 C.F.R. § 208.10(b) (1985).

112. *Id.* § 208.5.

Each application is reviewed individually by an officer in the Office of Asylum Affairs of [BHR]HA and then is sent to the appropriate country desk officer in the Department. If appropriate, [BHR]HA may request an opinion from the Office of the Legal Adviser or information from the U.S. Embassy in the applicant's country of nationality, or, if appropriate, in a third country. After agreement is reached between the asylum officer in [BHR]HA and the desk officer on the proposed recommendation to INS, the draft advisory opinion and application file are reviewed by the Director of the Office of Asylum Affairs in [BHR]HA, and in some cases by the geographic officer in [BHR]HA or by the Deputy Assistant Secretary for Asylum and Humanitarian Affairs. It is rare for individual cases to rise to more senior levels. The proposed recommendation is then signed by the Director of the Office of Asylum Affairs and sent to INS.

.....

The phrase "well-founded fear of being persecuted" is a key phrase. A knowledge of the conditions in the applicant's country of origin is an important element in assessing the applicant's credibility and whether his fear may be considered "well-founded." It is at this point where the Department of State performs a crucial, unique and irreplaceable role in assisting the INS.¹¹³

The BHRHA advisory opinion is reached by consulting various sources. Primarily, the Bureau looks at the information on the alien's I-589 asylum application. The Bureau "assumes that information presented in asylum claims is true unless it is self-contradictory or contradicts information already known to be true."¹¹⁴ If the BHRHA finds an application to be "ambiguous or confusing," then it usually recommends denial because the burden is on the alien.¹¹⁵ Unfortunately, the quality of each application varies greatly.

For information relating to the human rights conditions of the applicant's country of origin, a BHRHA asylum officer might consult

113. *Refugee Assistance: Hearings on H.R. 3195 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 55-56 (1983) (prepared statement of Elliot Abrams, Assistant Secretary, Bureau of Human Rights and Humanitarian Affairs, Department of State) [hereinafter cited as *Refugee Assistance Hearings*].

114. Avery, *Refugee Status Decision-Making: The Systems of Ten Countries*, 19 STAN. J. INT'L L. 235, 334 (1983) (citing to interview with Lawrence Arthur, Chief Asylum Officer, BHRHA, U.S. State Dep't, in Washington, D.C. (Mar. 17, 1982)) [hereinafter cited as Avery, *Refugee Status Decision-Making*].

115. *Id.*: 8 C.R.F. § 208.5 (1985).

a number of sources, including the particular State Department "country desk."¹¹⁶ Though there are no formalized instructions for processing an application,¹¹⁷ it appears that the "country desk" consultation is an integral part of the informal procedure. This consultation has been criticized because it permits foreign policy considerations to enter into the asylum decisionmaking process.¹¹⁸

Occasionally, an applicant will benefit from a blanket assumption that all within a certain class are eligible for asylum. Iranian Jews, for example, are automatically deemed to have met the test of a well-founded fear of persecution and should be granted asylum unless otherwise ineligible.¹¹⁹

D. *Asylum Adjudication Procedure*

If the applicant applied for asylum with the district director, pursuant to section 208(a), the advisory opinion is returned to be considered in the director's decision. "The district director may approve or deny the asylum application in the exercise of discretion."¹²⁰ If the decision, which must be in writing,¹²¹ is based in whole or in part on the advisory opinion, the opinion will be incorporated into the record unless the opinion contained classified information.¹²² Once the opinion is in the record, the applicant is given the opportunity to read the opinion, explain, and rebut its conclusion.¹²³ Though no appeal can be made from the district director's decision,¹²⁴ the applicant can later request asylum before an immigration judge in deportation or exclusion hearings.¹²⁵ An I-589 form must be filed with the docket clerk.¹²⁶ The immigration judge must adjourn the hearing and request an advisory opinion, if

116. Avery, *Refugee Status Decision-Making*, *supra* note 114, at 334.

117. Deposition of Jules Bassin, Office of Asylum Affairs, BHRHA, U.S. Dep't of State at 98 (Aug. 10, 1983), *Hotel & Restaurant Employees Union v. Smith*, 594 F. Supp. 502 (D.D.C. 1984) [hereinafter cited as Bassin Deposition I].

118. *See infra* notes 166-189 and accompanying text.

119. Letter from Edward H. Wilkinson, Director, Office of Asylum Affairs, BHRHA (Sept. 26, 1985) in INTERPRETER RELEASES, Oct. 18, 1985, at 1000.

120. 8 C.F.R. § 208.8(a) (1985).

121. *Id.* § 208.8(b).

122. *Id.* § 208.8(d). Classified information is suppressed under Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982).

123. 8 C.F.R. § 208.8(d) (1985).

124. *Id.* § 208.8(c).

125. *Id.* § 208.9. *See generally* INS, ASYLUM ADJUDICATIONS, *supra* note 5, at 73-76 (distinguishing immigration judges' decisions from those of the district director and identifying certain problems).

126. 8 C.F.R. § 208.3(b), § 208.10(a) (1985).

necessary, and make that opinion part of the record.¹²⁷ As with an adjudication before the district director, the applicant can inspect the opinion, explain, and rebut its conclusion.¹²⁸ If the immigration judge decides not to grant asylum, the applicant may appeal to the BIA, which can review the decision of the immigration judge, along with the immigration judge's deportation and exclusion orders.¹²⁹ It is important for an applicant to produce a substantial record for his or her claim since the BIA can review only the evidence and record of the proceeding before the immigration judge.¹³⁰ If the BIA sustains the immigration judge's final deportation or exclusion order, it can be appealed to either a United States federal district court by a writ of habeas corpus¹³¹ or, if it is a deportation order, to the United States Court of Appeals for the District of Columbia.¹³² However, the scope of review at this level is limited to an examination of alleged errors of law or procedure or an examination of the record to see if the decision was arbitrary or capricious, applying a substantial evidence standard.¹³³

Though there are various avenues an applicant can take to have the denial of his asylum claim reviewed, questions remain as to what role the advisory opinions should play. How much influence does the advisory opinion have on the outcome? How should adjudicating officers treat the opinions? How can an applicant question the opinion's probative value? And, finally, how can a reviewing court assess the influence of an advisory opinion on the asylum decisionmaker?

127. *Id.* § 208.10(b). Again, if the information is classified, it will not be made part of the record. *See supra* note 122.

128. 8 C.F.R. § 208.10(b).

129. *Id.* § 3.1(b); *see also* Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141, 1180 (1984) [hereinafter cited as Verkuil, *Immigration Procedures*] (the BIA reviews asylum decisions as raised in the course of deportation and exclusion hearings).

130. *See* Scanlan, *Who is a Refugee?*, *supra* note 25, at 31-33; Avery, *Status Decision-Making*, *supra* note 114, at 342. The applicant should try to get as much personal information relating to his or her claim into the record as possible. Newspaper articles and other independent reports of the human rights situation in the applicant's home country are also useful sources on appeal. If the advisory opinion did not recommend asylum, evidence questioning the accuracy of the opinion and the procedures used to arrive at the opinion should also be entered into the record.

131. INA §§ 106(a)(9), 106(b), 8 U.S.C. §§ 1105a(a)(9), 1105a(b) (1982); *see Flores v. INS*, 524 F.2d 627 (9th Cir. 1975).

132. INA § 106(a), 8 U.S.C. § 1105a(a) (1982).

133. Since a claim for asylum before an immigration judge is also treated as an INA § 243(h) request for withholding, which is mandatory if the applicant is eligible, 8 C.F.R. § 208.3(b), then the substantial evidence standard is appropriate. *See McMullen v. INS*, 658 F.2d 1312, 1316 (9th Cir. 1981); *see also supra* note 98 and accompanying text.

V. THE ADVISORY OPINION IN THE ADJUDICATORY PROCESS

A. *Expertise Needed*

INS officers and immigration judges deal with the entire range of immigration issues, not just asylum questions. It would be unreasonable to expect these officials to keep abreast of human rights conditions in foreign countries so that they, independently, can make informed decisions on the merits of individual claims for asylum. The purpose behind admitting advisory opinions into the adjudicatory process is more than just complying with the regulations;¹³⁴ it is also "to bring forth any information available to the State Department which supports the applicant's claim; and . . . to indicate the State Department's opinion regarding the likelihood of persecution given the specific facts presented by the applicant."¹³⁵

Because an applicant's claim turns on a finding of a subjective fear based on objective facts,¹³⁶ there is a need for information to which INS officials and immigration judges simply do not have access. Rarely are INS officials trained in the application of international refugee law.¹³⁷ New INS officials are given a two-week course on all immigration law, during which less than three hours is devoted to refugee and asylum issues.¹³⁸ Immigration judges, similarly, receive no training on international refugee law,¹³⁹ yet they must determine the merits of an applicant's claim by applying that law.

134. See 8 C.F.R. §§ 208.7, 208.10(b) (1985).

135. Matter of Exilus, 18 I. & N. Dec. 276, at 279 (BIA 1982).

136. The applicant's fear of persecution at home is necessarily a subjective fact, but for that fear to be "well-founded," however, an objective evaluation must be made. See generally Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 12-13 (1979) [hereinafter cited as UNHCR, Handbook] (stating that the determination should be based on factors such as the alien's character, background, influence, wealth, and outspokenness, as well as the laws and conditions of his/her country of origin and the experience of the applicant's friends and relatives).

137. See FAGEN, APPLYING FOR POLITICAL ASYLUM, *supra* note 21, at 17. In this study of asylum adjudications in New York City, it was discovered that the INS interviewers were not required to be formally trained in asylum problems, though some training programs did exist on a small scale elsewhere in the nation.

138. INS, ASYLUM ADJUDICATIONS, *supra* note 5, at 32. These three hours encompass the major provisions of the Refugee Act. The role of the BHRHA advisory opinion is not discussed. *Id.*

139. Avery, *Refugee Status Decision-Making*, *supra* note 114, at 332 n.849 (citing interview with authority on U.S. asylum determination system; name withheld by request).

Besides being untrained in international refugee law, INS officials and immigration judges generally have scant knowledge of the conditions in other countries. Reports indicate that INS officials lack knowledge of the political and social conditions in the countries where the asylum applicants originate.¹⁴⁰ The typical INS official "is someone who has been at INS for less than 5 years, has a B.A. degree from a state university (usually in business, education, or public administration), and has not traveled extensively or lived outside the United States."¹⁴¹ Immigration judges also lack specific knowledge of world human rights conditions. One authority remarked:

Most immigration judges are very unsophisticated in world affairs. For example, many of the judges do not understand why there would be any problem if a Pakistani married a Christian, and many do not appreciate the significance of being a Kurd in Iraq. Fortunately, most of the judges recognize their lack of knowledge—those who do not are the dangerous ones.¹⁴²

The State Department, on the other hand, specializes in compiling and interpreting information on political and social conditions in other countries. This expertise can be of invaluable assistance to INS officials and immigration judges who need information.

The State Department also specializes in politics, with which INS officials and immigration judges feel uncomfortable. One study concluded that the discomfort immigration judges experience with political questions leads to a certain amount of deference to State Department opinions:

[Immigration judges] understand they will be making possible life or death decisions on the basis of subjective impressions and with minimum evidence. Several noted the presence of political factors and pressures in asylum cases, especially with regard to the larger, more controversial groups, e.g., Salvadorans, Haitians, and Poles. None would elaborate on the nature of these political factors, and all asserted their independence of judgment, but some did express the feeling that they were being obliged to make judicial decisions which were more properly made in

140. See *Haitian Emigration, Hearings Before the House Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 15 (1976).

141. INS, ASYLUM ADJUDICATIONS, *supra* note 5, at 33.

142. Avery, *Refugee Status Decision-Making*, *supra* note 114, at 332 n. 850 (quoting U.S. system authority; name withheld by request).

the political arena, and on political grounds. For the immigration judges, as for the examination officers, political judgments are seen as the domain of the Department of State. Judges do not dispute State Department country expertise, even if they may differ with advisory opinion letters on specific cases.¹⁴³

In view of the need for expert input from the State Department and the apparent deference asylum adjudicators give to the State Department opinions, an examination of the process by which the opinions are made is necessary.

B. BHRHA Sources

1. *The Asylum Application.*—The I-589 asylum application is the main source of information used by the BHRHA.¹⁴⁴ If the application is ambiguous, the BHRHA generally does not recommend asylum, reasoning that the burden of proof is on the applicant to prove a well-founded fear of persecution.¹⁴⁵ Unfortunately, there are many problems with the manner in which the applications are filled out.

First, the quality and completeness of the applications vary from district to district¹⁴⁶ and the applications submitted from immigration judges are notoriously incomplete.¹⁴⁷ One study found

143. FAGEN, APPLYING FOR POLITICAL ASYLUM, *supra* note 21, at 16.

144. Deposition of Lawrence L. Arthur, Chief Asylum Officer, BHRHA, U.S. Dep't of State at 102 (Apr. 20, 1983), *Orantes-Hernandez v. Smith*, No. 82-1107 (C.D. Cal. 1982).

145. Telephone interview with Jules Bassin, Office of Asylum Affairs, BHRHA, U.S. Dep't of Justice (Apr. 26, 1985) [hereinafter cited as Bassin Interview]. *See also* 8 C.F.R. § 208.5 (1985); UNHCR, Handbook, *supra* note 136, at 47.

146. INS, ASYLUM ADJUDICATIONS, *supra* note 5, at 37 ("Some districts have officers dedicated to asylum adjudications . . . others use officers on a time available basis. Some districts complete the entire adjudication in less than 20 minutes; others spend from two to twelve hours."). One State Department staff member stated:

The biggest problem we have is the unevenness of applications . . . sent in by different district offices. If the INS officer recommends that the application be denied, why does he think it should be denied? Some of [the district] offices are great—we get very detailed views. Others couldn't seem to care less.

Id. at 60. Apparently, the Boston office produces the best applications because its staff has taken a special interest in asylum claims. Said one BHRHA officer, "Boston is tops. . . . The applications we get from them are complete, and their opinions are well reasoned and well written." *Id.* at 34; *see also* Bassin Deposition I, *supra* note 117, at 25, 117. (Only four out of 38 districts consistently furnish information from the interview of the applicant. *Id.*)

147. Bassin Interview, *supra* note 145. ("Applications from the courts are really poor. The trial attorney doesn't send in the application and there is little documentation and no interview." *Id.*)

that some INS officials "cut corners in their interviewing and recordkeeping [by] not following up on questions relevant to a particular applicant's claim, not producing an account of the interview useful to the BHRHA. . . ." ¹⁴⁸ This problem is compounded by the fact that most asylum claimants are not effectively represented by an attorney, ¹⁴⁹ do not understand their burden of showing a well-founded fear, ¹⁵⁰ and are unable to document their assertions adequately. ¹⁵¹

The cursory treatment some INS officials give the asylum application may stem from the inherent tension in the system between providing a service to refugees and enforcing the immigration laws. There is a strong enforcement mentality among many INS officials, ¹⁵² some of whom are former border patrol officers who have been lied to often and tend to disbelieve an applicant's claim. ¹⁵³ Moreover, the current delays in the system have undoubtedly prompted some aliens to claim asylum in order to delay being deported. ¹⁵⁴ INS officials, aware of the practice, may think that the poorly documented claims are frivolous and, thus, may be less likely to follow up with questions that would help an applicant establish his or her claim. The delays in the system also put pressures on INS

148. Avery, *Refugee Status Decision-Making*, *supra* note 114, at 329 (quoting from J. Scanlan, "Asylum Procedures," "Asylum Board," and "Refugee Procedure" Segments of Second Final Report Submitted to the Select Commission on Immigration and Refugee Policy AB-3 (Oct. 8, 1980)).

149. See INS, ASYLUM ADJUDICATIONS, *supra* note 5, at 42. (One examiner, doubting the efficacy of legal representation, said, "When the alien has an attorney . . . the application is usually more completely prepared. Some attorneys can help an alien prove his claim, but not many. The typical lawyer just doesn't have the training or experience. In most cases it's a waste of money.").

150. *Id.* at 43. See also UNHCR, Handbook, *supra* note 136, at 13 ("The expressions 'fear of persecution' or even 'persecution' are usually foreign to a refugee's normal vocabulary.").

151. See *Developments in the Law — Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1355 (1983); UNHCR, Handbook, *supra* note 136, at 47:

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

Id.

152. See generally U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR 40-43 (1980) (discussing studies, conducted by the INS and the President's Reorganization Project, of the conflict between the service and enforcement missions of the INS).

153. Avery, *Refugee Status Decision-Making*, *supra* note 114, at 330.

154. See generally Shuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 41 (1984) (merely by filing an asylum claim, an alien automatically wins a delay in deportation until all avenues of administrative and judicial review have been exhausted).

officials to alleviate the backlog by expediting the entire adjudicatory process,¹⁵⁵ regardless of whether the officials feel that some applications are wholly without merit.¹⁵⁶

Given this background to the BHRHA's primary source of information, it would seem difficult for the BHRHA to maintain a uniform quality to their advisory opinions.

2. *State Department Sources.*—Within the State Department the BHRHA consults a number of sources, including the annual *Country Reports on Human Rights Practices (Country Reports)*,¹⁵⁷ the various "desks" devoted to managing information from and relations with individual countries (country desks),¹⁵⁸ cable traffic,¹⁵⁹ and, occasionally, the United States embassies abroad.¹⁶⁰ With the exception of the country desk input, these sources appear to be generally reliable and informational in nature rather than political.

Though the *Country Reports* are not detailed enough to substantiate a particular claim for asylum, they are very useful for assessing

155. The INS has gone so far as to process Haitian asylum applications *en masse*. The courts have found this unlawful. See *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980).

156. The motivation behind expediting the asylum process for Haitians was to act as a deterrent to other Haitians who may wish to emigrate to the U.S. *Id.* at 514.

157. Bassin Interview, *supra* note 145. These country reports are published each February as Joint Committee Prints and are available in most libraries. The reports discuss the human rights observance in each country under various headings such as civil and political rights, torture, and arbitrary arrests. See, e.g., U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984, 99th Cong., 1st Sess. (Jt. Comm. Print 1985).

158. Bassin Interview, *supra* note 145. The country desks are necessarily political positions since the desk officer's "primary mission is to maintain the best possible bilateral relationship with the country in question." Note, *Behind the Paper Curtain*, *supra* note 44, at 107, 134.

159. Bassin Interview, *supra* note 145. The cables are a routine product of the overseas embassy staff. In deposition, asylum officer Jules Bassin describes the process with respect to El Salvador:

An embassy officer might have a conversation with somebody. He would report that. They will report—I think there are . . . weekly reports about violence, the statistics and so on. There may be other reporting on El Salvador that I am not privy to. There are instances where telegrams will come in that won't come to us because [they don't] have anything to do with refugees, aliens, or human rights.

Deposition of Jules Bassin, Office of Asylum Affairs, BHRHA, U.S. Dep't of State at 20-21 (Sept. 29, 1983), *Orantes-Hernandez v. Smith*, No. 82-1107 (C.D. Cal. 1982) [hereinafter cited as Bassin Deposition II].

160. Direct communication with overseas embassy staff is rare. Typically, the purpose would be to ask the embassy personnel to check a specific fact, such as whether a particular alien was an officer in a particular labor union. Bassin Interview, *supra* note 145.

the general human rights practices of a particular country.¹⁶¹ Australia¹⁶² and Canada¹⁶³ have found the *Country Reports* useful and consult them, along with other sources, when determining the refugee status of aliens. Yet a survey of the *Country Reports* conducted by three independent human rights organizations criticized the reports as being somewhat slanted.¹⁶⁴ The survey concluded:

Though most of the work in compiling the *Country Reports* has been carried on responsibly and effectively by the Department of State, political biases are evident in some of the reports. There is no general overstatement of human rights abuses in countries with which United States relations are not friendly. Nor is there any general understatement of abuses in countries friendly to the United States. Rather, distortions in the reporting seem to reflect efforts to further political events relating to particular countries.¹⁶⁵

The BHRHA consultation with country desk officers has been more roundly criticized as a source of political bias in the advisory opinions.¹⁶⁶ Since country desk officers are responsible for maintaining the best possible relations with their particular countries, there is a tendency to underrepresent the magnitude of human rights violations in their countries so as not to damage United States relations. This bias on the part of the desk officer is known as "clientism" and the BHRHA personnel are aware of this problem.¹⁶⁷ The desk officers themselves are aware of the special problem asylum grants create for them. One desk officer stated: "There is no question that when we grant asylum to a refugee from a government . . . with which we are friendly, that government feels that

161. Bassin Interview, *supra* note 145.

162. Avery, *Refugee Status Decision-Making*, *supra* note 114, at 247.

163. *Id.* at 267. Canada also uses the *Country Reports* in the orientation process of the officials responsible for determining refugee status. *Id.* at 263.

164. *Id.* at 335, citing AMERICAS WATCH, HELSINKI WATCH, LAWYERS COMM. FOR INT'L HUMAN RIGHTS, A CRITIQUE OF THE DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1981 (1982).

165. *Id.* For extracts of specific examples by country, see Avery, *Refugee Status Decision-Making*, *supra* note 114, at 335-36 n.878.

166. See, e.g., Aleinikoff, *Political Asylum in Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 MICH. J.L. REF. 183, 194 (1984) [hereinafter cited as Aleinikoff, *Lessons for the United States*]; Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 91, 98-99 (1981) [hereinafter cited as Kurzban, *Restructuring the Asylum Process*]; Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618, 628 (1981); Note, *Behind the Paper Curtain*, *supra* note 44, at 134-35.

167. Bassin Interview, *supra* note 145.

its reputation is slighted, its honor impugned. This can only lead to resentment and both governments lose out."¹⁶⁸ Another desk officer, commenting on a denial of an asylum claim, concluded: "We didn't grant him asylum because the United States government doesn't want to pass judgment on the internal conditions of allied countries. That would cause resentment on their part and hurt the bilateral relationship."¹⁶⁹ Even though the desk officers no longer have the input they once had in asylum grants, each advisory opinion still must be "cleared" with the desk officer.¹⁷⁰

There is no direct evidence linking the input of desk officers with subsequent INS denials of asylum claims to aliens from countries in which the United States has an interest in downplaying human rights violations. However, one commentator feels the data of actual asylum grants "create at least an appearance of political distortion in the asylum process."¹⁷¹ The following tables show the number of asylum claims filed with the district directors since fiscal year 1978 and the number of asylum claims granted from selected countries with which the United States has a significant political interest.

168. Note, *Behind the Paper Curtain*, *supra* note 44, at 134 (quoting State Department desk officer for an Asian country; name withheld by request) (interview conducted in 1975 before the current asylum procedure was established by the 1980 Refugee Act).

169. Note, *Behind the Paper Curtain*, *supra* note 44, at 135 (quoting State Department desk officer whose name was withheld by request) (interview conducted in 1975 before the current asylum procedure was established by the 1980 Refugee Act.)

170. See *Refugee Assistance Hearings*, *supra* note 113, at 55. "After agreement is reached between the asylum officer. . . and the desk officer . . . the draft advisory opinion . . . [is] reviewed by the Director of the Office of Asylum Affairs . . . signed . . . and sent to INS." *Id.* (emphasis added.)

171. Aleinikoff, *Lessons for the United States*, *supra* note 166, at 194 (1984). The Lawyers Committee for International Human Rights and Washington immigration attorney Michael Maggio blame State Department institutional biases for the political distortion in asylum grants. Hall, *Rights Group Hits Toughened Asylum Standard*, Wash. Post, Aug. 12, 1985, at A11, col. 3.

TABLE I¹⁷²
ASYLUM APPLICATIONS BY FISCAL YEAR

FY	Number of Applications
1978	3,702
1979	5,801
1980	15,955
1981	61,568
1982	33,246
1983	26,091
1984	24,295
1985	16,662

172. TABLE 1 represents the author's compilation of data from tables entitled Asylum Cases Filed with District Directors, available from STATISTICS DIVISION, INS and spanning 1978 to 1985.

TABLE 2¹⁷³
ASYLUM GRANTS FOR SELECTED COUNTRIES

Country	FY 1984			FY 1985		
	Number Decided	Number Granted	%	Number Decided	Number Granted	%
All Countries	40,622	8,278	20.4	18,757	4,585	24.4
Communist — East European:						
Bulgaria	27	14	51.9	15	5	33.3
Czechoslovakia	108	36	33.3	60	34	56.7
E. Germany (DDR)	11	8	72.7	18	6	33.3
Hungary	222	62	27.9	112	46	38.0
Poland	2,203	721	32.7	1,188	451	39.8
Romania	404	158	39.1	171	101	58.2
U.S.S.R.	88	45	51.1	56	26	33.3
Other Communist or Communist Aligned:						
Afghanistan	455	186	40.9	245	57	21.4
China	207	15	7.2	207	44	38.1
Cuba ¹⁷⁴	488	16	3.3	626	61	11.6
Ethiopia	1,319	305	23.1	574	187	31.3
Other Anti-American:						
Iran	8,233	5,017	60.9	5,179	2,779	51.3
Libya	42	11	26.2	74	54	73.0
Nicaragua	8,292	1,018	12.3	4,771	408	6.5
Western Aligned:						
Chile	46	0	0.0	19	6	31.6
Egypt	468	1	0.2	140	0	0.0
El Salvador	13,373	328	2.5	2,373	74	3.1
Guatemala	761	3	0.4	432	5	1.2
Haiti	375	23	6.1	674	4	0.6
Pakistan	231	7	3.0	68	10	14.7
Philippines	114	36	25.0	109	29	26.6

There appears to be a relationship between an applicant's being granted asylum and that applicant's coming from a Communist or anti-American country. Anomalies do exist, however, such as

173. TABLE 2 was compiled by the author using data available from STATISTICS DIV. INS. For a table of FY 1982 and FY 1983 asylum grants for a similar selection of countries, see Aleinikoff, *Lessons for the United States*, *supra* note 166, at 195.

174. The statistics for Cuba are greatly distorted by the Cuban Adjustment Act, Pub. L. 89-732, 80 Stat. 1161 (1966), which provides that any "native or citizen of Cuba . . . who has been inspected and admitted or paroled into the United States . . . and has been physically present in the United States for at least one year, may be adjusted . . . to that of an alien lawfully admitted for permanent residence . . ." Since the majority of Cuban asylum applicants benefit from this provision, which moots their asylum claim, only those whom the INS would like to deport actually have their asylum applications adjudicated.

Cuba¹⁷⁵ and Nicaragua,¹⁷⁶ where one would think the political bias would favor asylum. Similarly, applicants from countries like Chile, Egypt, El Salvador, Guatemala, and Haiti all have very low success rates, perhaps because United States political concerns somehow affected the outcome. One obvious exception to this proposition is the Philippines, where the United States has a strong interest in maintaining military bases;¹⁷⁷ yet the success rate for asylum applications is surprisingly high.

There are two ways in which political considerations can distort the asylum statistics. One, which occurs when an adjudicator follows an advisory opinion recommending that a meritorious application be denied, violates Protocol obligations not to return refugees. The other occurs when an adjudicator follows an advisory opinion recommending that a nonmeritorious application be granted. This second form of distortion violates only the language of the statute and not the Protocol because granting asylum to those who do not meet the Protocol definition of a refugee is not prohibited by that treaty.¹⁷⁸

The latter kind of political distortion may be more significant than the former. The influence that an advisory opinion recommending asylum has on an adjudicator to follow the opinion may be

175. See *supra* note 174. Aleinikoff explains the Cuban anomaly thus: "The claims of most of the 125,000 Cubans who entered during the Mariel boatlift are not being adjudicated. The government is, however, adjudicating claims of persons it would like to return to Cuba, such as persons who have committed serious crimes in Cuba or in the United States."

Aleinikoff, *Lessons for the United States*, *supra* note 166, at 195 n.45.

176. Laura Dietrich, Deputy Assistant Secretary of State responsible for the BHRHA Asylum Division, explained that most Nicaraguan asylum applicants state facts that simply are not grounds for granting asylum. Dietrich, *Political Asylum: Who is Eligible and Who Is Not* (Letter to the Editor), N.Y. Times, Oct. 2, 1985, at A30, col. 2 [hereinafter cited as Dietrich, *Political Asylum*].

One court affirmed the denial of asylum and § 243(h) relief to a Nicaraguan militiaman who had produced a document indicating that he had been confined to quarters with a warning that he could be confined in the future for insubordination and political statements. The court questioned whether future persecution would occur because of the prior "minimal punishment." *Espinoza-Martinez v. INS*, 754 F.2d 1536, 1540 (9th Cir. 1985).

177. See *infra* note 189 and accompanying text. See, e.g., Lohr, *Filipinos: U.S. Bases a Problem*, N.Y. Times, Oct. 2, 1985, at A6, col. 2.

178. Laura Dietrich, however, states:

The Refugee Act of 1980 does not say that political asylum shall be granted to an individual based on U.S. foreign policy considerations or statements; it does not say that it be granted based on general conditions of poverty or civil unrest in the country of nationality; it does not even say that people fleeing communist governments shall be given asylum.

Dietrich, *Political Asylum*, *supra* note 175, at col. 3 (emphasis added).

greater than that of an opinion recommending denial. By rejecting an opinion recommending asylum, the adjudicator bears the responsibility of possibly sending a bona fide refugee into the arms of his persecutor. On the other hand, by rejecting an opinion recommending denial and thereby granting asylum, the adjudicator must bear only the responsibility of making bad determinations. The comparatively harmless consequences of deciding against a denial recommendation most likely make it easier for the adjudicator to reject this kind of recommendation.

Though the theory that a political bias enters into the asylum determination is generally supported by the statistics, other non-political factors entering into the decision to apply for asylum render it impossible to determine the actual significance of a political bias. One important factor is that economic immigrants from Latin America, including Cuba and Nicaragua, are not considered refugees under the Protocol.¹⁷⁹ The fact that many illegal aliens arrive in the United States because of economic motives may cause the asylum decisionmakers to presume that applicants from economically depressed countries like Guatemala, El Salvador, and Haiti are economic immigrants.¹⁸⁰ Though political, religious, and ethnic persecution does occur in these countries,¹⁸¹ applicants from these countries must have particularly convincing claims of persecution to overcome doubts concerning their motives for wanting to remain in the United States.¹⁸² Undoubtedly, many Guatemalan, Salvadoran,

179. See UNHCR, Handbook, *supra* note 136, at 16, distinguishing economic migrants from refugees:

A migrant is a person who, for reasons other than those contained in the definition [of a refugee], voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee.

Id.

180. See generally Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 458-64 (1985) (arguing that economic deprivation can result from political motives, thereby negating the distinction between political and economic refugees). Helton, *Second-Class Refugees*, N.Y. Times, Apr. 2, 1985, at A27, col. 2 (Guatemalans, Salvadorans); *Persecution v. Poverty: Are Haitians Refugees?* REP. CENTER PHIL. & PUB. POL'Y—UNIV. MD., Spring 1982, at 1, 1.

181. See generally U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1985, 99th Cong., 2d Sess. 542-558 (Jt. Comm. Print 1986) (Guatemala); *id.* at 514-533 (El Salvador); *id.* at 571-584 (Haiti).

182. See, e.g., INS, ASYLUM ADJUDICATIONS, *supra* note 5, at 59 n. *:

and Haitian applicants have mixed motives for applying for asylum.¹⁸³ Since the BHRHA does not assess applicants' claims in a vacuum, economic factors, along with political considerations, may distort the success rates of applicants from poor countries.

Another factor complicating the assessment of the impact of political considerations on advisory opinions is the effect that a particular applicant's immigration status has on an assessment of that applicant's credibility. For example, if the applicant is illegally present in the United States he or she is less likely to be successful. One study of asylum adjudications in New York noted:

Whatever a person may allege about the reasons he or she fears to return, [that person's] credibility is enhanced, diminished or may be utterly lost depending on immigration status. First, affirmative applications by in-status aliens have a considerably greater success rate than applications filed by people who have been apprehended by the INS. Second, asylum claimants who have entered the country legally are assumed to have greater credibility than those who have entered illegally—even if the former file for political asylum after their legal visas have expired.¹⁸⁴

Applicants from Haiti, Guatemala, and El Salvador have little incentive to file affirmatively with a district director, not only because such an action would hasten their deportation, but because it is very likely that their application would be denied.¹⁸⁵ Eastern Europeans, on the other hand, stand a better chance of securing asylum status and, thus, have greater incentive to file affirmatively. Moreover, Eastern Europeans are more likely to have entered legally as tourists or visitors, since their geographic distance from United States borders all but precludes surreptitious entry. The option of entering legally is foreclosed to Guatemalans, Haitians, and

In some cases, different levels of proof are required of different asylum applicants. In other words, certain nationalities appear to benefit from presumptive status while others do not.

For example, for an El Salvadoran national to receive a favorable advisory opinion, he or she must have a "classic textbook case."

Id.

183. The government frequently points out that applicants from these countries often pass through other countries like Mexico without applying for asylum, thus demonstrating their economic motives for coming to the U.S. But this argument fails to distinguish between the reason for leaving a country and the reason for choosing a particular country in which to apply for asylum. See Aleinikoff, *Lessons for the United States*, *supra* note 166, at 231.

184. FAGEN, APPLYING FOR POLITICAL ASYLUM, *supra* note 21, at 53.

185. *Id.* at 36; see also TABLE 2, *supra* note 173.

El Salvadorans, who are presumed to be economic migrants, and are routinely denied non-immigrant visas to enter the United States since they are deemed unlikely to return to their home countries.¹⁸⁶

A final factor making it difficult to judge the significance of political considerations in advisory opinions is that applicants must show that they are victims of individualized persecution rather than victims of generalized violence affecting the nation as a whole.¹⁸⁷ The requirement that an alien be "singled out" for persecution is a factor particularly relevant to applicants from El Salvador.¹⁸⁸ Since many applicants from El Salvador are fleeing generalized violence and not specific persecution, some of the denials of asylum status may be the result of this factor and not attributable to political factors.

Even though there are other factors that play a role in the evaluation of an asylum claim, the possibility that politically oriented foreign policy considerations are also factored in is disturbing. Not only is it morally wrong to return an alien to a country where he or she may face persecution, imprisonment, or even death in order to further United States foreign policy goals, it is also a direct violation of an international obligation.¹⁸⁹

It appears to be the input from State Department desk officers that makes foreign policy considerations a factor. As recently as 1982, one desk officer illustrated the significance of foreign policy considerations in the formulation of advisory opinions:

[The] United States defense community is convinced that

186. FAGEN, *APPLYING FOR POLITICAL ASYLUM*, *supra* note 21, at 53.

187. *See* Matter of Sibrun, 18 I. & N. Dec. 354, 359 (BIA 1983):

The type of persecution upon which asylum eligibility may be predicated is not merely that which threatens life or freedom generally; the Act requires that this qualifying persecution derive solely on account of one of the five prescribed grounds in the statute. *Generalized oppression by a government of virtually its entire populace does not come within those specific grounds.*

Id. (emphasis added).

188. *See, e.g.*, Bolanos-Hernandez v. INS, 767 F.2d 1277, 1284-86 (9th Cir. 1985) ("While we have frequently held that general evidence of violence is insufficient to trigger section 243(h)'s prohibition against deportation, not once have we considered a specific threat . . . insufficient because it reflected a general level of violence."); Chavez v. INS, 723 F.2d 1431, 1434 (9th Cir. 1984) ("Status as 'young urban male' not specific enough for political asylum"); Zepeda-Melendez v. INS, 741 F.2d 285, 290 (9th Cir. 1984) ("[O]wnership of a strategically located house . . . does not qualify as persecution based on 'race, religion, nationality, membership in a social group, or political opinion.'"); Martinez-Romero v. INS, 692 F.2d 595 (9th Cir. 1982) (general anarchy in El Salvador insufficient for asylum).

189. *See* Article 33 of the 1951 Convention incorporated into the 1967 Protocol, *supra* note 57.

we absolutely need military bases in the Philippines. Therefore, in an asylum claim by a Filipino, chances are that the desk officer is going to soften the response as much as possible. As another example, our policy toward the USSR. Were a State Department desk officer to make a recommendation in an asylum case contrary to United States policy toward the origin country at that time, it would not get very far.¹⁹⁰

The apparently unequal treatment of asylum claims has not gone unnoticed.¹⁹¹ The UNHCR noted its disapproval of the treatment of Salvadoran asylum claims, and this disapproval was brought to the attention of Congress:

The UNHCR should continue to express its concern to the United States government that its apparent failure to grant asylum to any significant number of Salvadorans, coupled with continuing large-scale forcible and voluntary return to El Salvador, would appear to represent a negation of its responsibilities assumed upon adherence to the Protocol.¹⁹²

Though the State Department is an important source of information for the BHRHA, the likelihood that State Department information is colored by foreign policy considerations is cause for concern. The objectivity of information from country desk officers is especially questionable and should be critically examined for bias.

3. *Independent Sources.*—In addition to the asylum application and State Department sources, the BHRHA has access to information from press reports, Amnesty International, the International Commission of Jurists, UNHCR, and academic publications.¹⁹³ Sometimes information from these sources is submitted along with an application and is considered then.¹⁹⁴ However, one critic has

190. Avery, *Refugee Status Decision-Making*, *supra* note 114, at 339 (quoting a State Department desk officer whose name was withheld by request).

191. *See, e.g.*, Davis, *Refugees Find a New Tormentor Here*, Wall St. J., Mar. 4, 1985, at 26, col. 3.

192. 128 CONG. REC. S827 (daily ed. Feb. 11, 1982) (remarks of Sen. Kennedy, reading UNHCR report dated Sept. 13-18, 1981). *See also* Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal. 1982) (plaintiffs succeeded in obtaining an injunction against coercive INS tactics to dissuade filing asylum claims).

193. Bassin Interview, *supra* note 145.

194. One asylum officer was somewhat critical of some of the information submitted along with the application, noting that it appears that there is a newspaper clipping service in California that sells articles on conditions in El Salvador to immigration attorneys who then attach them to the application. *Id.*

asserted that information from independent sources "is not automatically channeled into the asylum decision-making process."¹⁹⁵

C. *Adequacy of Advisory Opinion*

Although the intent behind requiring an advisory opinion is to shed some light on the genuineness of an individual's asylum claim,¹⁹⁶ in actual practice the opinions are generally too brief and too conclusory to be of much use to an asylum decisionmaker.¹⁹⁷ Much of the inadequacy of the opinions probably stems from the fact that the BHRHA asylum division is understaffed.¹⁹⁸ With only one full-time officer and six part-time officers writing a hundred opinions a day,¹⁹⁹ there is simply not enough time to read a four-page application, review supporting documents, research specific facts, and render a well-reasoned, individual opinion.

To manage the case load the BHRHA has had to streamline the process. One State Department official said:

After a while the cases all look alike. We've developed a series of form letters. There is a yes letter and two standard denial letters—one that says no and one that says no and gives a reason. Other letters deal with specifics of the countries involved like Poland.²⁰⁰

A few examples of opinions from 1982 will help illustrate the brevity of these form letters:

195. See Avery, *Refugee Status Decision-Making*, *supra* note 114, at 335 (quoting J. Scanlan, *Issues Summaries Submitted to the Select Commission on Immigration and Refugee Policy* 24 (Sept. 23, 1980)). Time constraints may limit consultation of other sources. See *infra* text accompanying notes 197-199.

196. See *Matter of Exilus*, 18 I. & N. Dec. 276, 279 (BIA 1982) (purpose of admitting opinions is to "bring forth any information available to the State Department which supports the applicant's claim" and "to indicate the State Department's opinion regarding the likelihood of persecution given the specific facts presented by the applicant") (emphasis added); cf. 8 C.F.R. § 208.10(b) (1985) (enabling an immigration judge to request a second advisory opinion if "circumstances have changed so substantially since the first opinion was provided [to the district director] that a second referral would materially aid in adjudicating the asylum request") (emphasis added). See generally Kurzban, *Restructuring the Asylum Process*, *supra* note 166, at 98 (although INS process allows applicant to apply to the district director and to the immigration judge, BHRHA links both applications to the State Department's determination of the genuineness of an asylum claim).

197. One INS official commented about the opinions: "They're too generalized. Do we really need an advisory opinion in each and every case if they're not going to address the merits of individual claims?" INS, *ASYLUM ADJUDICATIONS*, *supra* note 5, at 63.

198. In March 1985 the asylum division was processing approximately 2,000 claims a month. Bassin Interview, *supra* note 145.

199. *Id.*

200. INS, *ASYLUM ADJUDICATIONS*, *supra* note 5, at 58 (quoting State Department official).

BHRHA "Yes" Advisory Opinion. Upon careful review of the information submitted and assuming the facts of this case as stated in the application are true, it is our view that the applicant has a well-founded fear of persecution upon return to _____ within the meaning of the United Nations Convention and Protocol Relating to the Status of Refugees.

BHRHA "No" Advisory Opinion. On the basis of the information submitted, it is our view that the application has not established a well-founded fear of persecution within the meaning of the United Nations Convention and Protocol Relating to the Status of Refugees upon return to _____

BHRHA "No (with a reason)" Advisory Opinion. On the basis of the information submitted, it is our view that the application has not established a well-founded fear of persecution within the meaning of the United Nations Convention and Protocol Relating to the Status of Refugees upon return to Egypt.

Reason: Although Egypt, according to its Constitution, is an Islamic state, the Constitution also guarantees freedom of religious expression and, to the best of our knowledge, the government adheres to this policy. Christians openly practice their religion, hold religious services, run schools and so on. Government jobs are open to all without regard to religion; businesses run by Christians flourish, etc.²⁰¹

A recent example of an actual BHRHA "no (with a reason)" advisory opinion indicates little change in style:

Upon careful review of the information submitted, it is our view that the appellant has failed to establish a well-founded fear of being persecuted upon return to Nicaragua within the meaning of the United National [sic] Protocol Relating to the Status of Refugees. In our view, the country-wide civil war and the accompanying random violence which were mainly responsible for the initial blanket grant of deferred departure for Nicaraguan nationals no longer pose the problem they once did regarding the safe return of Nicaraguans. Most of the Nicaraguans who fled to neighboring countries as a result of the hostilities have now returned. We have also noted recent improvements in the political climate and respect for human rights in Nicaragua.²⁰²

201. *Id.*

202. *Chavarria v. United States Dep't of Justice*, 722 F.2d 666, 667-68 n. 2 (11th Cir.

This 1984 advisory opinion could have applied to any Nicaraguan, underscoring the criticism that advisory opinions are not individualized.²⁰³ One BHRHA asylum officer revealed, however, that if an immigration judge requests more information in a second opinion, the BHRHA will write a longer, more elaborate opinion.²⁰⁴

In addition to time constraints, the lack of standard procedures and uniform guidelines also affects the adequacy of the opinions.²⁰⁵ As one BHRHA asylum official explained: "I have no rules, no yardstick . . . it's the totality of the application and the documents . . . present[ed]. . . ."²⁰⁶ Though applicants must provide some "objective evidence" to satisfy the objective element of well-foundedness,²⁰⁷ there are no guidelines to help the BHRHA decide how much "objective evidence" is needed. When the opinion is returned in a brief conclusory form, one is left uncertain as to the appropriate significance to attach to it. Certainly, the regulations entitle the applicant to "inspect, *explain* and rebut"²⁰⁸ the findings of the opinion, but how does one respond to an unreasoned conclusion?²⁰⁹

D. Deference Given the Advisory Opinion

In spite of the cursory treatment the BHRHA generally gives to individual asylum claims, the BHRHA recommendations are usually²¹⁰ followed by the district directors²¹¹ and immigration

1984). See also *Chatila v. INS*, 770 F.2d 786, 788 (9th Cir. 1985) (advisory opinion with a reason that is not specific to the applicant).

203. See, e.g., Scanlan, *Who is a Refugee?*, *supra* note 25, at 28; Kurzban, *Restructuring the Asylum Process*, *supra* note 166, at 98; Avery, *Refugee Status Decision-Making*, *supra* note 114, at 341.

204. Bassin Interview, *supra* note 145. This officer also noted that although the BHRHA does not have to say why a particular applicant is or is not qualified for asylum status, the attorneys are unhappy if the opinion does not give reasons.

205. Bassin Deposition I, *supra* note 117, at 80, 94, 98.

206. *Id.* at 80.

207. *Id.* at 64.

208. 8 C.F.R. §§ 208.8(d), 208.10(b) (1985) (emphasis added).

209. The lack of individualization further complicates an applicant's ability to "explain and rebut" the opinion.

210. One notable exception was overturned on appeal to a federal circuit court to conform with the opinion. See *Zavala-Bonilla v. INS*, 730 F.2d 562, 563 (9th Cir. 1984) (immigration judge denied the asylum application of an El Salvadoran union activist despite a favorable recommendation from the State Department).

211. Alan Nelson, Commissioner of the Immigration and Naturalization Service, said that in "most cases" the INS follows the opinions. Deposition of Alan C. Nelson, Commissioner, Immigration and Naturalization Service at 21 (Sept. 27, 1983), *Hotel & Restaurant Employees Union v. Smith*, 594 F. Supp. 502 (D.D.C. 1984). District Director Charles Sava explained:

judges.²¹² The Ninth Circuit even used an advisory opinion to support its finding that there was substantial evidence to support an immigration judge's determination of asylum ineligibility.²¹³ The fact is that many INS officials consider the advisory opinions dispositive of the applicant's claim.²¹⁴ One INS official stated flatly, "I would never, never overrule the State Department."²¹⁵ One authority on asylum who interviewed a number of "responsible" INS officials in Washington and Miami after the crush of asylum applications in 1980 noted that these officials regularly deferred to the State Department's conclusion. This authority said that these INS officials "acknowledged that they customarily relied on the 'advisory opinions' received from State in evaluating individual claims. INS personnel were deluged with work, they explained, and generally not expert about persecutorial conditions overseas. They were aware of no reason not to rely upon State's greater 'expertise.'"²¹⁶ It appears that INS officials follow the advisory opinions more out of deference to State Department expertise than out of respect for the quality of the opinions.²¹⁷

Though the ultimate decision of whether to grant asylum status

It is hard for me to sit here not knowing what the State Department knows In a job like this, you have to realize that you are never going to have all the information that is available up at State on various matters . . . the interchange among countries diplomacy . . . what all the tradeoffs are. . . .

FAGEN, *APPLYING FOR POLITICAL ASYLUM*, *supra* note 21, at 56 (quoting from interview with District Director Charles Sava, May 6, 1983).

212. In her survey of New York asylum procedures, Patricia Fagen noted: "In my reading of printed decisions of asylum cases in the New York Immigration Court, May 1981 - January 1982, I found two cases out of 25 in which an immigrant judge denied a request despite a favorable recommendation. Both of these were Poles." FAGEN, *APPLYING FOR POLITICAL ASYLUM*, *supra* note 21, at 60 n.12. For a discussion of the foreign policy considerations that may have played a role in favorable recommendations to Poles, see *supra* notes 166-191 and accompanying text.

213. *Chatila v. INS*, 770 F.2d at 786, 790 (9th Cir. 1985) ("Finally, the immigration judge was clearly influenced by the State Department's recommendation against the grant of asylum.").

214. See generally *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess., 80, 123 (1981).

215. INS, *ASYLUM ADJUDICATIONS*, *supra* note 5, at 62 (quoting unnamed INS official).

216. Scanlan, *Who is a Refugee?*, *supra* note 25, at 30.

217. One INS official said that the advisory opinions are "[t]he most wishy-washy bit of junk you'll ever read." INS, *ASYLUM ADJUDICATIONS*, *supra* note 5, at 62 (quoting unnamed INS official). See also, FAGEN, *APPLYING FOR POLITICAL ASYLUM*, *supra* note 21, at 16 ("For the immigration judges, as for the examinations officers, political judgments are seen as the domain of the Department of State. Judges do not dispute State Department country expertise, even if they may differ with advisory opinion letters on specific cases.").

rests with the district directors and immigration judges, that independence is rarely asserted. In one case, *Sotto v. INS*,²¹⁸ the immigration judge had followed the recommendation of the State Department so blindly that he completely failed to consider persuasive evidence, not available to the State Department when it drafted its advisory opinion, indicating that the applicant would be subject to persecution.²¹⁹ The new evidence consisted of an affidavit of a retired Philippine Air Force general that described the applicant as "a rabid anti-Marcos leader" who was placed on a wanted list as an "opposition leader."²²⁰ The affidavit said that when the applicant fled the Philippines, other members of his family were arrested and that his father had died as a result of physical punishment inflicted during his detention.²²¹ The affidavit concluded, "It is my honest opinion that if Mr. Rodolfo Sotto will step in the Philippine soil again, he will surely be arrested and detained in prison like his father and will be physically and mentally tortured"²²² The immigration judge's opinion denying Sotto's asylum claim found that there was "no evidence to show that he has been actively involved and engaged in such [antigovernment] activity."²²³ This finding reflects the advisory opinion's conclusion that "if [Sotto] can establish he is active in a meaningful way in seeking to overthrow the Marcos regime [he] would qualify . . . but until such activity is established, his application does not warrant a favorable finding on his behalf."²²⁴ The similarity between the advisory opinion and the immigration judge's finding strongly suggested that the advisory opinion played such a dispositive role in the judge's determination that the general's affidavit was not even considered.²²⁵

On the other hand, immigration judges who do assert their independence and do not find as the advisory opinion recommends run the risk of reversal for not giving appropriate deference to the advisory opinion. This is especially true when the advisory opinion recommends asylum for an applicant from a country whose nationals rarely receive favorable recommendations. In *Zavala-Bonilla v.*

218. 748 F.2d 832 (3d Cir. 1984).

219. *Id.* at 837 n. 3.

220. *Id.* at 835.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 834 n.1.

225. The circuit court remanded to the BIA "so that it may fully assess [the affidavit] in the context of all the evidence." *Id.* at 837. The circuit court also suggested that the Board seek a second advisory opinion. *Id.* at n. 3.

INS,²²⁶ an immigration judge denied an asylum claim to a Salvadoran union activist though the State Department had recommended asylum if the applicant's assertions were found to be true.²²⁷ The immigration judge found that the applicant had failed to meet her burden of proof, and the BIA affirmed.²²⁸ The Ninth Circuit reversed, questioning many of the BIA's conclusions, and stated that on remand "[t]he BIA should . . . consider, *with deference*, the State Department's advisory opinion, particularly in light of the fact . . . that Salvadoreans rarely receive a State Department opinion supportive of a political asylum application."²²⁹ In a separate footnote, the court reasoned:

[T]he BIA's opinion states that the BIA also considered Zavala-Bonilla's contentions as if they were true. The BIA nonetheless determined that Zavala-Bonilla did not qualify for asylum. However, in making this determination, the BIA *failed to consider the State Department's advisory opinion*, which states that Zavala-Bonilla qualifies for asylum if her allegations are true. The BIA's only reason for initially disregarding the advisory opinion was that Zavala-Bonilla was not credible. Once the BIA assumed that Zavala-Bonilla's contentions were true, the advisory opinion should certainly have been considered.²³⁰

One can interpret *Zavala-Bonilla* as requiring asylum adjudicators to consider the advisory opinions fully, for they risk reversal if their decision is inconsistent with the opinion under a substantial evidence theory. Or one can interpret *Zavala-Bonilla* a bit more narrowly. The case may simply stand for the proposition that advisory opinions can offer valuable and probative information regarding the merits of an asylum claim and should not be ignored without comment. In other words, the asylum adjudicator should consider the opinions with some deference.

Such deferential treatment raises interesting due process issues since the opinions are to be made part of the record like other evidence presented by the INS and the applicant.²³¹ Traditional due process requirements outside of the immigration context afford a

226. 730 F.2d 562 (9th Cir. 1984).

227. *Id.* at 563.

228. *Id.* The BIA had discounted letters from the applicant's friends supporting her claims as being "gratuitous and non-specific." *Id.*

229. *Id.* at 567 (emphasis added).

230. *Id.* at 566-67 n.5 (emphasis added).

231. 8 C.F.R. §§ 208.8(d), 208.10(b)(c) (1985).

party the opportunity to confront and cross-examine adverse witnesses.²³² However, an asylum applicant may not cross-examine the author of an advisory opinion as to the basis of the opinion. The BIA in *Matter of Exilus*²³³ found that denying an applicant the opportunity to submit interrogatories to the State Department was not violative of due process.²³⁴ The Board stated that such a submission would not "measurably improve" an applicant's claim and emphasized the administrative difficulties that submissions of interrogatories would entail:²³⁵

[W]e are not unmindful of the potential effect that submission of interrogatories would have on the already heavy workload under which the State Department now labors. It is clear that this would also excessively prolong exclusion proceedings involving asylum claims. Balancing the significant impact that submission of interrogatories would be likely to have on the efficient functioning of the government against the minimal benefit that an asylum applicant may reap, we conclude that no denial of due process results from the absence of interrogatories.²³⁶

The court appears to be applying the Supreme Court's balancing of interests approach to due process analysis found in *Mathews v. Eldridge*.²³⁷ However, though the governmental interest in minimizing administrative burdens is significant, the applicant's interest in

232. Cf. U.S. CONST. amend. VI ("in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him."). Though deportation and exclusion proceedings have traditionally been characterized as "civil" in nature, thereby making the constitutionally protected criminal procedures inapplicable, *Fong Yue Ting v. United States*, 149 U.S. 698 (1883), fifth amendment due process in certain administrative proceedings has been held to include the right to confront and cross-examine witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 269-270 (1970) (welfare recipients entitled to confront and cross-examine government witnesses before their benefits are terminated). See also *Green v. McElroy*, 360 U.S. 474, 469 (1959), in which the Court stated:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

233. 18 I. & N. Dec. 276 (BIA 1982).

234. *Id.* at 280.

235. *Id.*

236. *Id.*

237. 424 U.S. 319, 335 (1976).

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or

remaining in the United States and avoiding persecution is equally weighty. Moreover, given the great deference adjudicators give to the advisory opinions, the risk that a poorly founded advisory opinion will deprive an applicant of his or her chance to remain is great. Affording an applicant an opportunity to question the author of the advisory opinion appears to be of sufficient value to be required under the *Mathews* analysis.²³⁸ In immigration cases, however, when the *Mathews* balancing analysis "gives greater weight to the governmental interest than to the interest of the private party, the process can lead to a new species of absolutism in which whatever sort of process the government grants will be deemed 'due.'" ²³⁹

E. Advisory Opinions and Section 243(h) Withholding

Before the Refugee Act of 1980 established an asylum procedure under section 208(a),²⁴⁰ which requires district directors by regulation to request an advisory opinion,²⁴¹ INS would occasionally seek advisory opinions for the then discretionary section 243(h) relief from deportation.²⁴² In 1968 the Ninth Circuit Court of Appeals made this observation about the advisory opinions:

Such 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. The traditional foundation required of expert testimony is lacking; nor can official position be said to supply an acceptable substitute. No hearing officer or court has the means to know the diplomatic necessities of the moment,

substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

238. See generally Scanlan, *Asylum Adjudication: Some Due Process Implications of Proposed Immigration Legislation*, 44 U. PITT. L. REV. 261 (1983) (discussing the due process aspects of asylum determination and review as proposed in the House and Senate versions of the Simpson-Mazzoli Immigration Reform and Control Act of 1981).

239. *Id.* at 267.

240. See *supra* notes 64-66 and accompanying text.

241. 8 C.F.R. §§ 208.7, 208.10(b) (1985); see also *supra* notes 109-118 and accompanying text.

242. Before 1980 the State Department only reviewed politically sensitive or difficult asylum applications. One State Department official would like to return to that procedure. INS, ASYLUM ADJUDICATIONS, *supra* note 5, at 60.

in light of which the statements must be weighed.²⁴³

In spite of the court's sentiments regarding the competency of the advisory opinions, later that same year the Ninth Circuit in *Hosseinmardi v. INS*²⁴⁴ suggested that the admissibility of advisory opinions was proper as long as the courts reach their own conclusions as to the merits of an asylum claim and do not rely solely on the advisory opinion. The court said, "The generalities regarding conditions in [the foreign country] which appear in the letter were severely challenged by petitioner's expert witness. It might well have been improper had the Board given substantial weight to those generalities without corroboration or further inquiry."²⁴⁵

In 1976 in *Zamora v. INS*,²⁴⁶ the Second Circuit declined to reverse an asylum denial, noting that the admission of a State Department advisory opinion was not improper, since the applicant failed to "show some likelihood that it influenced the result."²⁴⁷ In dicta, however, the court asserted that though the State Department has an advisory role to play in the asylum process, it should not be determinative of individual cases. Judge Friendly wrote:

The obvious source of information on general conditions in the foreign country is the Department of State. . . . While there is undoubted truth in the observation [that there is] *some likelihood of the Department's tempering the wind in comments concerning the internal affairs of a foreign nation*, it is usually the best available source of information We therefore see no bar to the admissibility of statements of the Department of State . . . [regarding] the extent to which the nation of prospective deportation engages in "persecution" . . . and [that] reveal, so far as feasible, the basis for the views expressed, but do not attempt to apply this knowledge to the particular case²⁴⁸

The court based this position on the distinction between adjudicative and legislative facts, continuing:

243. *Kasravi v. INS*, 400 F.2d 675, 677 n.1 (9th Cir. 1968).

244. 405 F.2d 25 (9th Cir. 1968).

245. *Id.* at 28. See also *Paul v. INS*, 521 F.2d 194, 200 (5th Cir. 1975) (upholding a denial of asylum though the State Department opinion erroneously stated an applicant's claim, and noting that the applicant's objections to the opinion "might be persuasive if it appeared from the record that [the opinion] influenced the decision of the Immigration Judge and the Board of Immigration Appeals").

246. 534 F.2d 1055 (2d Cir. 1976).

247. *Id.* at 1063.

248. *Id.* at 1062 (emphasis added).

The difficulty with introducing [State Department] letters into hearings under Section 243(h) is that they do both too little and too much. *The ones in these cases and others that we have seen give little or nothing in the way of useful information about the conditions in the foreign country.* What they do is to recommend how the district director should decide the particular petitioner's request for asylum. When these letters are introduced into the Section 243(h) inquiry, they present [the State Department's] conclusion as to an adjudicative fact, based . . . solely on the alien's own statements and phrased in the very language of the Section 243(h) standard. Adjudication in the withholding process is, however, the task of the [immigration judge] and the Board of Immigration Appeals. Particularly in light of the difficulties confronting the alien in proving his case, *there is a risk that such communications will carry a weight they do not deserve.*²⁴⁹

Recently, in *Hotel & Restaurant Employees Union v. Smith*,²⁵⁰ the District Court for the District of Columbia downplayed the significance of *Zamora* and expressed a contrary opinion regarding the appropriateness of the State Department input, stating: "[T]he advisory opinion process is reasonable and proper, and in no way 'tainted.' The opinions are issued by a sufficiently trained and guided official, there is adequate expertise available, and each application receives a reasonable period of review related to the amount of information the application provides."²⁵¹

On the other hand, the Seventh Circuit Court of Appeals in *Carvajal-Munoz v. INS*²⁵² cited *Zamora* with approval and cautioned the INS against considering individual-specific advisory opinions in section 243(h) withholding hearings.²⁵³ The court noted that although advisory opinions must be considered when determining section 208(a) asylum claims, there is no provision for considering such opinions in the section 243(h) context. The court emphasized that the factors to be considered for each of these forms of relief is somewhat different and reiterated the *Zamora* court's caution that admitting "these same advisory opinions in a Section 243(h) hearing presents the 'risk that such communications will carry a weight they do not deserve' and thus impair the fairness of the hearing when the

249. *Id.* at 1062-63 (emphasis added).

250. 594 F. Supp. 502 (D.D.C. 1984).

251. *Id.* at 514.

252. 743 F.2d 562 (7th Cir. 1984).

253. *Id.* at 570, 576.

State Department opinion suggests the outcome of a particular case."²⁵⁴ The court suggested that immigration judges make the section 208(a) asylum decision at a separate hearing from the section 243(h) withholding decision, and if holding two separate hearings is impractical, make separate administrative records upon which each decision was made.²⁵⁵

Given the fact that there are currently only fifty-five immigration judges deciding all immigration issues, it is unlikely that judicial resources will be expended to afford an asylum applicant two separate hearings. Moreover, considering the great deference that immigration judges give the advisory opinions in section 208(a) claims,²⁵⁶ it appears equally unlikely that immigration judges would reach a section 243(h) decision independent of the BHRHA's opinion.

The introduction of advisory opinions into the section 243(h) decision process raises the broader issue of whether the United States intends to uphold its obligations under the Protocol not to return refugees.²⁵⁷ Congress, in passing the Refugee Act of 1980, clearly intended to fulfill its obligations under the Protocol by making section 243(h) relief mandatory for those qualifying as refugees.²⁵⁸ Though a refugee under the Protocol is defined in politically neutral language,²⁵⁹ the current use of State Department advisory opinions introduces political considerations into the refugee status determination.²⁶⁰ Foreign policy considerations simply should not be factors in determining whether a particular individual is a refugee.

To allow political factors to influence the decisionmaking process violates not only international law, but domestic federal law as well. Though courts "cannot interfere with political decisions which the United States as a sovereign nation chooses to make in the interpretation, enforcement, or rejection of treaty commitments which affect immigration,"²⁶¹ the courts cannot permit a practice that

254. *Id.* at 576.

255. *Id.* at 570.

256. *See supra* notes 210-239 and accompanying text.

257. Protocol, *supra* note 12, art. 33. For text of article 33, see *supra* note 57.

258. *See supra* notes 57 & 59.

259. For definition, see *supra* text accompanying note 35.

260. BHRHA consultations with State Department country desk officers is the most obvious source of political input. *See supra* notes 166-189 and accompanying text.

261. *United States v. Elder*, 601 F. Supp. 1574, 1581 (S.D. Tex. 1985) (refusing to dismiss an indictment of a defendant charged with unlawfully transporting undocumented aliens since it is up to the Attorney General, and not a private citizen, to decide

clearly frustrates the congressional intent behind the 1980 amendments. Ignoring the effect that the United States accession to the Protocol in 1968 had upon domestic immigration law, the 1980 Refugee Act provides an independent basis upon which to challenge the current procedure. The statutory definition of a refugee found in section 101(a)(42)(A)²⁶² mirrors the Protocol definition. This reflection was intentional.²⁶³ Therefore, if the statute does not permit political factors to enter into the refugee status decisionmaking process, it should be impermissible to admit these factors through the back door by regulation.²⁶⁴

V. RECOMMENDATIONS AND PRESCRIPTIONS

Much can be done to improve the asylum process without drastically changing current procedure. First, a reduction in the number of frivolous claims would reduce both the pressure to deal with the current backlogs, by resolving claims expediently, and the skepticism that prejudices those who apply for asylum after deportation or exclusion proceedings have been initiated.²⁶⁵ Many believe this reduction could be achieved if the proposed amnesty for undocumented aliens is passed by Congress. Strict penalties for attorneys who abuse the asylum procedure simply to buy their clients more time should be enforced in order to reduce the number of meritless applications filed by aliens acting upon advice of counsel. Disciplinary proceedings could be instituted against an abusing attorney after a complaint is filed by the INS or an immigration judge alleging three instances of clearly meritless applications filed by that attorney. Applicants should be required to get their signature notarized to impress upon them the seriousness of the application. Strict penalties should be enforced against those applicants who lie on the application, and applicants should be specifically apprised of what those penalties are before they begin filling out the application.²⁶⁶

who is a refugee); *cf.* *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (emphasizing the political nature of immigration laws); *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

262. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1982). For text of definition, see *supra* note 53.

263. See *supra* note 54.

264. The INA does not require BHRHA advisory opinions. The advisory opinions enter the asylum adjudication process by regulation only. See 8 C.F.R. §§ 208.7, 208.10(b) (1985).

265. Some of the many asylum applicants who have filed in Miami have denied any persecution and admit that they came to the United States to work.

266. The current application requires the applicant to sign under a general warning

Second, the application itself should be improved. The responses elicited from the application are of paramount importance since they are the BHRHA's primary source of information. The questions relating to an applicant's "well-founded fear of persecution" should be more elaborate and placed at the beginning. The space for answering these questions should be enlarged to encourage applications to explain in greater detail the basis upon which they seek asylum. The application should stress the importance of documentation and should list examples of the types of documents considered most useful.

Third, the application should be filled out under the supervision of an interviewer trained in refugee law. It should be stressed that the interviewer's role would be to serve the alien and is separate from the other enforcement functions of the INS. The assistance of a trained interviewer is especially important for applications filed with an immigration judge since these applications have been notoriously incomplete.²⁶⁷ Finally, detailed guidelines for properly interviewing an asylum applicant should be distributed to every regional office to promote uniformity of quality.

Reforming the BHRHA decisionmaking process could greatly improve the usefulness of State Department information and reduce the impact of foreign policy considerations on asylum decisions. The first step toward reforming the process would be to create comprehensive guidelines that clearly spell out the procedure for compiling information relevant to a particular alien's application. BHRHA consultations with the highly political country desk officers would be limited to memos detailing a country's general human rights practices or to memos on particular asylum applications. This would reduce the likelihood of foreign policy considerations influencing the BHRHA's opinion. Finally, greater reliance on independent sources of human rights information such as Amnesty International, the International Commission of Jurists, and press reports would dilute the influence of State Department foreign policy considerations.

Some commentators believe that the BHRHA should cease rendering "individualized" opinions. Ira Kurzban, an immigration attorney, argues that leaving the decision of whether to render an opinion to State Department discretion would speed up the asylum

that states: "Under penalties of perjury, I declare that the above and all accompanying documents are true and correct to the best of my knowledge and belief."

267. See *supra* note 147 and accompanying text.

process and, at the same time, utilize the State Department's resources when necessary.²⁶⁸ John Scanlan, of the Center for Civil and Human Rights at Notre Dame Law School, suggests that BHRHA and State Department input be eliminated altogether.²⁶⁹ Rather than have individual findings, Scanlan proposes the establishment of an "Asylum Advisory Board," independent of the State Department, to generate human rights "profiles."²⁷⁰ An alien complying with these profiles would be rebuttably presumed to be eligible for asylum.

The proposed profile system is not without its critics. One State Department official believes that a profile system ignores not only the need for individual consideration, but could lead to the filing of frivolous claims.²⁷¹ This official argues that potential applicants will break the code quickly as to what type of refugee qualifies for the special presumption under a general profile. This would encourage not only those who meet the profile to emigrate though they have not been persecuted, but would encourage others to lie and tailor their applications to fit one of the profiles.

Immigration textbook author and University of Michigan law professor T. Alexander Aleinikoff proposes the creation of an independent federal agency for adjudicating asylum claims and the elimination of the State Department's advisory role altogether.²⁷² After an intensive study of the French and West German asylum processes, Aleinikoff concludes that an independent asylum adjudicating agency would develop its own expertise and therefore be less reliant on the State Department.²⁷³ Under his proposal, the State Department would be a source of information on conditions in other countries and not the decisionmaker.²⁷⁴

Arthur Helton, director of the Political Asylum Project for the Lawyers' Committee for International Human Rights, believes that the State Department should stop issuing opinions that go to the ultimate issue, but should, instead, simply provide information on

268. Kurzban, *Restructuring the Asylum Process*, *supra* note 167, at 91, 111.

269. See Scanlan, *Who is a Refugee?*, *supra* note 25, at 36; Scanlan, *Regulating the Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618, 637-38 (1981).

270. Scanlan, *Who is a Refugee?*, *supra* note 25, at 36.

271. Bassin Interview, *supra* note 145.

272. Aleinikoff, *Lessons for the United States*, *supra* note 166, at 183, 235-36.

273. *Id.* at 236.

274. *Id.*

conditions in individual countries to the adjudicators.²⁷⁵ This is perhaps the best middle ground between general group profiles and conclusory individual opinions.

The current system produces opinions that are both too general and too specific. Some individualization is necessary to better assess the merits of an individual claim. The typical opinion, however, consists of a simple conclusion that a particular individual has or has not demonstrated a "well-founded fear of persecution" along with a brief discussion of the general conditions of the applicant's home country. The law generally disfavors the introduction of legal conclusions on the ultimate issue into evidence.²⁷⁶ Therefore, the BHRHA should cease issuing opinions concluding whether a particular alien has or has not established a "well-founded fear of persecution" since such a dispositive finding rests with the adjudicator, not the BHRHA.

Instead, the opinions should discuss the degree of persecution a particular group faces in a particular country; then the opinion should discuss the likelihood that a particular applicant would be persecuted. This would inform the adjudicator without usurping his or her power to decide the ultimate issue.

Changing the way in which advisory opinions are produced and presented to asylum adjudicators, along with modifying the application procedure, would be an uncomplicated, inexpensive way of improving the current system. Reducing the input of State Department desk officers and increasing the input of independent information sources would greatly reduce the impact of political considerations on the adjudication process and bring that process closer to that which was intended under the Protocol and the 1980 Refugee Act. Implementing these recommendations would reduce the number of frivolous claims, while increasing the quality of investigation and assessment of an individual's fear of persecution.

275. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 MICH. J.L. REF. 243, 263 (1984).

276. C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 12 (E. Cleary 2d ed. 1972).