

5-1-1983

## Compassion Fatigue: The Expansion of Refugee Admissions to the United States

Roger J. LeMaster

Barnaby Zall

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>



Part of the [Immigration Law Commons](#)

---

### Recommended Citation

Roger J. LeMaster and Barnaby Zall, *Compassion Fatigue: The Expansion of Refugee Admissions to the United States*, 6 B.C. Int'l & Comp. L. Rev. 447 (1983), <http://lawdigitalcommons.bc.edu/iclr/vol6/iss2/4>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# Compassion Fatigue: The Expansion of Refugee Admissions to the United States

by Roger J. LeMaster  
and Barnaby Zall

## I. INTRODUCTION

The United States is the most generous country in the world in admitting immigrants and refugees for permanent resettlement.<sup>1</sup> In 1980, the United States admitted 800,000 immigrants and refugees,<sup>2</sup> more than twice as many as were admitted by the rest of the world combined.<sup>3</sup> Some consider this level of admissions too large,<sup>4</sup> while others want even larger admissions.<sup>5</sup> As a result, battles have been waged between those who want to admit more immigrants and those who want reasonable limitations on immigrant admissions.<sup>6</sup>

Since World War II, much of this debate has centered on the admissions of refugees, people who seem the epitome of the "huddled masses . . . yearning to breathe free," in the spirit of the poem on the Statue of Liberty.<sup>7</sup> Unfortunately,

---

\* Legislative Counsel, Office of U.S. Senator Walter D. Huddleston, (D-Ky.). B.A., M.A., University of Kentucky (Patterson School of Diplomacy and International Commerce); J.D., University of Miami (Fla.); M.L.T., Georgetown University Law Center.

\*\* Director of Government Relations, Federation for American Immigration Reform (FAIR), Washington, D.C. B.A., Pomona College; student, the National Law Center, George Washington University.

1. Teitelbaum, *Right Against Right*, 59 FOREIGN AFF. 24 (1980) [hereinafter cited as Teitelbaum].

2. SENATE COMM. ON THE JUDICIARY, IMMIGRATION REFORM AND CONTROL, S. REP. NO. 485, 97th Cong., 2d Sess. 4 (1982).

3. Teitelbaum, *supra* note 1, at 24. This number of people is larger than the population of the 10 smallest cities in the United States. WORLD ALMANAC AND BOOK OF FACTS 243-61 (1978).

4. Some organizations, such as Negative Population Growth, suggest that the level of immigration to the United States should be limited to the number of people who emigrate, or leave the country each year, *i.e.*, between 30,000 and 50,000 per year. Mann, *Christian Sci. Monitor*, July 17, 1981, at 22, cols. 1-3 (Donald Mann is the president of Negative Population Growth). Other organizations, such as the Federation for American Immigration Reform (FAIR), the most widely known group supporting restrictions on immigration, and the National Audubon Society, a large environmental organization, suggest ceilings on legal immigration below 400,000 per year. II Immigration Rep. No. 2, at 1 (Apr. 1981); *see also* 128 CONG. REC. S10349 (daily ed. Aug. 12, 1982).

5. The proponents of increased immigrant admissions into the United States sometimes have difficulty in being seriously considered, as indicated by this report from a Senate subcommittee hearing: "We would be more interested . . . in having a national quota of a million. [Laughter]." *The Preference System: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess., 165 (1981) (statement of Arnold Torres, Executive Director, League of United Latin American Citizens).

6. *See, e.g.*, 128 CONG. REC. S10307-10375, S10425-10507 (daily ed. Aug. 12-13, 1982).

7. J. FARRELL, GIVE US YOUR POOR at iii (1975).

this area of immigration reform does not generate the type of well-reasoned debate which is necessary for an objective and productive reform of federal statutes, since the admission of refugees is a very complex, highly technical, yet extremely emotional topic. Only recently have Americans come to realize that compassion for refugees may have limits forced by this Nation's capability to absorb more people and the escalating number of migrants throughout the world.<sup>8</sup>

U.S. laws regarding the admission of refugees spring largely from four sources consisting of early refugee admissions programs (largely post-World War II),<sup>9</sup> the 1952 Immigration and Nationality Act<sup>10</sup> and its 1965 Amendments,<sup>11</sup> the 1968 United Nations "Protocol Relating to the Status of Refugees"<sup>12</sup> and its corresponding Convention of 1951,<sup>13</sup> and the 1980 Refugee Act.<sup>14</sup> In many ways, these laws increased the number of aliens admitted to the United States and enhanced the ability of aliens to claim "rights" to admission and benefits. In contrast to the early refugee programs which admitted refugees within the structure prescribed by the then-current immigration laws, the Refugee Act of 1980 has been described as an unlimited presidential power to admit aliens without numerical limitation, and without regard to other immigration laws.<sup>15</sup>

The present U.S. refugee law is so vague and unworkable that the system actually serves the interests of very few people, and certainly not the interests of the country as a whole. The few who prosper under this system are those who work in the multi-billion dollar refugee resettlement industry,<sup>16</sup> and those few aliens who happen to be in countries favored by the Department of State for some short-term foreign policy goal.<sup>17</sup> This result is not what was intended by those working on the Refugee Act of 1980, and has led to calls for revisions of the 1980 law.<sup>18</sup>

8. *Who Are Refugees?*, Washington Post, July 6, 1982, at A16, col. 1.

9. See, e.g., The Displaced Persons Act, Pub. L. No. 774, 62 Stat. 1009 (1948); The Refugee Relief Act, Pub. L. No. 203, 67 Stat. 400 (1953), amended by Act of Aug. 31, 1954, Pub. L. No. 751, 68 Stat. 1044; and, The Fair Share Refugee Act, Pub. L. No. 86-648, 74 Stat. 504 (1960). See also Anker & Posner, *The Forty-Year Crisis: A Legislative History of the Refugee Act*, 19 SAN DIEGO L. REV. 9 (1981) [hereinafter cited as Anker & Posner].

10. Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163.

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

12. 19 U.S.T. 6223, T.I.A.S. No. 6577.

13. Done at Geneva, Switzerland, July 28, 1951; 189 U.N.T.S. 150. The United States never adopted the 1951 Convention.

14. Act of Mar. 17, 1980, Pub. L. No. 96-212, 94 Stat. 109.

15. 126 CONG. REC. S16467 (daily ed. Dec. 12, 1980) (remarks of Sen. Walter D. Huddleston).

16. 128 CONG. REC. S10352 (daily ed. Aug. 12, 1982) (remarks of Sen. Bennett Johnston).

17. 128 CONG. REC. S10449 (daily ed. Aug. 13, 1982) (remarks of Sens. Dale Bumpers and Walter D. Huddleston).

18. 129 CONG. REC. S55 (daily ed. Jan. 25, 1983) (statement of Sen. Walter D. Huddleston).

A result of this failure to construct and control an effective refugee admissions policy is a perception by foreign governments that the generosity of the American people in accepting refugees is a weakness to be exploited,<sup>19</sup> as in the 1980 exodus from Cuba and the continuing insistence of Southeast Asian countries that the United States take more and more refugees from a war almost ten years after U.S. involvement ended.<sup>20</sup> The American people are growing increasingly restive about this uncontrolled situation; one expert observer has termed the ripening resentment "compassion fatigue."<sup>21</sup> This increasingly hostile attitude may grow large enough to threaten our traditional welcome for all immigrants; it is the fear of such a backlash which drives many of those viewed by critics as restrictionists.<sup>22</sup>

This Article examines U.S. refugee law. Specifically, the author examines the four sources of U.S. refugee law and analyzes the effectiveness of each and the impact each has on the level of United States refugee admissions. Such analysis leads to the conclusion that the United States lacks a consistent, forward-looking, coordinated policy governing refugee admissions and resettlement. Until the United States develops a comprehensive policy on immigration, the problems of refugee admissions will only worsen.<sup>23</sup>

## II. THE SOURCES OF U.S. REFUGEE LAW AND POLICY

U.S. refugee law and policy springs from four major sources.<sup>24</sup> These sources are: (1) early refugee admission and resettlement programs; (2) the 1952 Immigration and Nationality Act and its first set of comprehensive amendments in 1965; (3) the 1968 United Nations Protocol on the Status of Refugees, along with its parent 1951 Geneva Convention on the Status of Refugees; and (4) the 1980 Refugee Act. Each of these sources has provided a stimulus for the next step toward increasing refugee admissions. The cumulative effect of these policies is that refugee admissions to the United States are not effectively limited.

---

19. *Id.* at S56.

20. *Immigration and the Missing Mail*, N.Y. Times, Mar. 1, 1981, at A18, col. 1. The top refugee official for the Carter Administration described the dilemma facing the United States as: "Ladies and Gentlemen of this committee, I suggest to you that this is a form of guerrilla warfare, using people as bullets, and it needs to be seen as such." *Caribbean Migration: Oversight Hearings Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 36 (1980) (statement of Ambassador Victor Palmieri).

21. Sen. Alan K. Simpson, *Additional Views*, in SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST REPORT OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, appendix B at 409 (1981).

22. 127 CONG. REC. S2591 (daily ed. Mar. 24, 1981) (remarks of Sen. Walter D. Huddleston).

23. See 126 CONG. REC. S16467 (daily ed. Dec. 12, 1980) (remarks of Sen. Walter D. Huddleston); 128 CONG. REC. S10350 (daily ed. Aug. 12, 1982).

24. See notes 9-14 *supra*.

### A. *Early Refugee Programs*

The problem of refugees has been with civilized man for centuries.<sup>25</sup> In early American history, through the end of the nineteenth century, refugees were treated little different from other immigrants; once an immigrant had paid his fare and passed health or other inspections required by passenger carrier statutes, no other requirements needed to be met.<sup>26</sup> Even after the first restrictions on immigration to the United States were enacted in 1875, refugees were treated like other immigrants, screened only for the same proscribed characteristics which prompted the exclusion of other immigrants with the same beliefs or problems.<sup>27</sup>

After the creation of the national origins system of limiting immigrants of certain nationalities in the Immigration Acts of 1921 and 1924,<sup>28</sup> all aliens, whether fleeing persecution or not, had to be counted against the quota for the nationality of the country in which they were born or counted for nationality purposes.<sup>29</sup> If a nationality quota was filled, no alien, even one fleeing persecution, could enter the United States without special Congressional legislation. This adherence to quotas led to the turning away of some refugees from Nazi-controlled Europe.<sup>30</sup>

Only after World War II did the United States admit large numbers of refugees in an organized fashion, perhaps because of a new sense of responsibility for world events, but more probably because the number of refugees sky-

25. The Israelites were forced to flee from Egypt as refugees in Biblical times. *Exodus* 3:12. For a discussion of American immigration history which stresses the willingness of the American people to accept more immigrants, see STAFF REPORT OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, 97TH CONG., 1ST SESS. 167-281 (Comm. Print 1981) [hereinafter cited as STAFF REPORT]. The staff of the Select Commission was presenting the arguments for continuing legal immigration at a relatively high level while trying to restrict illegal immigration.

26. The Steerage Act, 3 Stat. 488 (1819) set minimum standards for accommodations for immigrants aboard passenger vessels, and required ship captains to compile information about their passengers. In the 30 years between 1830 and 1860, 4,500,000 immigrants came into the United States; 5 million more arrived between 1860 and 1880; and 5,250,000 came to America in the decade of the 1880's. E. HARPER & F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 6 (3d ed. 1975).

27. The Act of Mar. 2, 1875, 18 Stat. 477, created the first bars to entry of aliens, defining convicts and prostitutes as persons who were to be excluded from the United States. The Chinese Exclusion Act, 22 Stat. 58 (1882), was the first racially-based immigration restriction, barring Chinese immigration, except for teachers, students, merchants and tourists. Over the next 20 years, several other laws were passed, barring additional classes of aliens from entry, including a ban on alien contract laborers in the Foran Act, 25 Stat. 332 (1885), and a ban on anarchists in the Act of Mar. 3, 1903, 32 Stat. 1213.

28. The First Quota Law of 1921, Pub. L. No. 67-5, 42 Stat. 5; The Johnson-Reed or Immigration Act of 1924, Pub. L. No. 68-139 43 Stat. 153.

29. The First Quota Law was the first limit on the number of immigrants who could enter the United States. The Johnson-Reed Act created the nations of origin system, under which the number of aliens of a given nationality was limited to a percentage of immigrant visas equal to the proportion of that ethnic nationality to the entire American population. The limit and system created by these two laws lasted, although changed a great deal in the end, until 1955. See sources cited in note 28 *supra*.

30. STAFF REPORT, *supra* note 25, at 198.

rocketed, far outstripping the international ability to absorb.<sup>31</sup> World War II produced millions of persons fleeing war-ravaged Europe, many of whom were temporarily placed by the occupying powers in refugee camps established and operated by the United Nations.<sup>32</sup> The United States aided the United Nations

31. The United States resettled hundreds of thousands of refugees between 1945 and 1960. President Truman admitted 49,000 World War II refugees under the preference system on December 28, 1945. The Displaced Persons Act, Pub. L. No. 774, 62 Stat. 1009 (1948), eventually brought in 399,698 refugees, "mortgaged" or counted against future national origins system quotas.

The Act of July 29, 1953, Pub. L. No. 83-162, 67 Stat. 229, which admitted 500 orphan children as refugees, was the first of the refugee relief acts to avoid the national origins system altogether. The Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400, amended by Act of Aug. 31, 1954, Pub. L. No. 83-749, 68 Stat. 1044, authorized 214,000 non-quota admissions.

The Refugee-Escape Act of 1957, Pub. L. No. 85-316, 71 Stat. 639, codified a new definition of refugee: a refugee is a person who escaped or is escaping persecution from a Communist or Middle Eastern country. This definition of a refugee remained in place until the Refugee Act of 1980. The text of the definition, as it read in 1979, was:

[A]liens who satisfy an immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (III) are not nationals of the countries or areas in which their application for conditional entry is made; . . .

8 U.S.C. 1153(a)(7) (1979).

In 1960, the World Refugee Year, Congress passed the "Fair Share Refugee Act," Pub. L. No. 86-648, 74 Stat. 504 (1960) which established a program to admit to the United States under the Attorney General's discretionary "parole power," *i.e.*, an administrative relief power to admit aliens temporarily under 8 U.S.C. 1182(d)(5), some of the World War II refugees remaining in camps operated by the United Nations High Commissioner for Refugees. *See* note 67 *infra*. The U.S. portion of this international resettlement effort was limited to one-quarter of those resettled by all other countries.

President Kennedy used this "parole power" in 1961 and 1962 to admit 62,600 Cubans fleeing Fidel Castro's revolution and 15,000 Chinese from Hong Kong. Kennedy also sponsored the Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121, which made permanent the Attorney General's power to "parole" certain refugees left in United Nations camps into the United States and which consolidated authorizations for several refugee programs into one omnibus package.

Until the Refugee Act of 1980, the United States continued to accept large numbers of refugees from other countries, usually through special legislation. *See* Migration and Refugee Assistance Act, Pub. L. No. 87-510, 76 Stat. 121 (1962); The Indochina Migration and Refugee Assistance Act, Pub. L. No. 94-23; 89 Stat. 87 (1975), repealed by Section 312 of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 109. *See* HARPER & AUERBACH, *supra* note 26, at 14-37; CONGRESSIONAL RESEARCH SERVICE, 96TH CONG., 1ST SESS., UNITED STATES IMMIGRATION LAW AND POLICY: 1952-79 OF THE SENATE COMM. ON THE JUDICIARY 15-18 (Comm. Print 1979). "[M]uch of the legislative action in the decade [the 1950's] involved liberalizing the admission of various refugee and immigrant groups for temporary periods of time." *Id.* at 15.

President Truman disagreed with this theory. In his veto message for the 1952 Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 [hereinafter cited as the INA], later overridden by Congress, Truman said:

The inadequacy of the present quota system has been demonstrated since the end of the war, when we were compelled to resort to emergency legislation to admit displaced persons. If the quota system remains unchanged, we shall be compelled to resort to similar emergency legislation again, in order to admit any substantial portion of the refugees from communism or the victims of overcrowding in Europe.

H.R. Doc. No. 520, 82d Cong., 2d Sess. 3 (1952).

32. STAFF REPORT, *supra* note 25, at 202.

effort to resettle these refugees both in the United States and in other countries.<sup>33</sup> In addition, during the twenty years following the end of World War II the United States unilaterally admitted 38,000 people fleeing the crushed Hungarian uprising against invading Soviet troops, and 600,000 Cubans fleeing the Communist takeover of that island.<sup>34</sup>

### B. *The Immigration and Nationality Act of 1952*

In 1952, as part of the national anti-Communist sentiment of the time,<sup>35</sup> Congress passed the Immigration and Nationality Act, also known as the McCarran-Walter Act or the INA.<sup>36</sup> This statute remains the fundamental U.S. immigration law today. Although the INA consolidated many of the scattered immigration laws previously passed by Congress,<sup>37</sup> it did not make special considerations for refugees beyond what was in existing programs. The INA did provide a special provision, known as Section 243(h), for aliens who alleged that, if they were deported to their home countries, they would be persecuted upon their return.<sup>38</sup>

33. See note 31 *supra*.

34. The Hungarian Refugees Act, Pub. L. No. 85-559, 72 Stat. 419 (1958); Act of November 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161.

35. The 1950 Senate Judiciary Committee report, "The Immigration and Naturalization Systems of the United States," which outlined Senator Pat McCarran's plans for the bill which would later become the INA, pointed out that the major concern of the Committee was subversion. Immigration laws were to be used as a bulwark against communism:

The conclusion is inescapable that the Communist Party and the Communist movement in the United States is an alien movement, sustained, augmented and controlled by European Communists and the Soviet Union. The severance of this connection and the destruction of the life line of communism becomes, therefore, substantially an immigration problem.

SENATE COMM. ON THE JUDICIARY, THE IMMIGRATION AND NATURALIZATION LAWS OF THE UNITED STATES, S. REP. NO. 1515, 31st Cong., 2d Sess. 757 (1950).

36. Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163.

37. Dozens of laws passed since the previous immigration consolidation act in 1924 were replaced by the 1952 INA. Some of these laws included: (1) Section 8(a)(1) of the Philippine Independence Act of 1934, Pub. L. No. 73-127, 48 Stat. 456 (quota of 50 for Philippine Islands); (2) Act of December 17, 1943, Pub. L. No. 78-199, 57 Stat. 600 (special quotas of 205 for Chinese); (3) Act of July 2, 1946, Pub. L. No. 79-483, 60 Stat. 416 (persons or races indigenous to India made eligible for immigration and naturalization); (4) The Registry Act of 1929, Pub. L. No. 70-962, 45 Stat. 1512 (legislation of the status of aliens who resided illegally in the United States for at least eight years prior to enactment); and (5) The Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (excluding alien members of Communist or totalitarian parties, allowing deportation of some aliens; and allowing some aliens to avoid being deported to a country where they would face persecution).

38. 8 U.S.C. 1253(h) (1952). This section was derived from earlier law, notably the Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987. The present text of section 243(h), after amendment by the Refugee Act of 1980 reads:

(1) The Attorney General shall not deport or return any alien (other than an alien [who was a Nazi who persecuted others]) to a country if the Attorney General determined 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.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that —  
(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any

The first major revision of the INA, in 1965,<sup>39</sup> did provide special treatment for refugees. The 1965 Amendments created a special quota category for refugees, providing that 17,400 refugees were to be admitted each year.<sup>40</sup> This provision in the 1965 Amendments was the first U.S. immigration law that allowed incoming refugees to receive permanent residence in the United States without special Congressional legislation for each group of refugees admitted.

### C. *The 1968 United Nations Protocol on Refugees*<sup>41</sup>

In 1951, the United Nations proposed a Convention Relating to the Status of Refugees.<sup>42</sup> The Convention was adopted by many countries, but not by the United States.<sup>43</sup> In 1967, the United Nations, taking note of the continuing presence of refugees in the world since 1951, proposed a Protocol to the earlier Convention.<sup>44</sup> In rather perfunctory fashion, the United States agreed to the Protocol.<sup>45</sup>

---

person on account of race, religion, nationality, membership in a particular social group, or political opinion;

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

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

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

8 U.S.C. 1253(h) (1980).

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

40. 8 U.S.C. 1153(a)(7) (1965), repealed by Section 203 of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 109.

41. 19 U.S.T. 6223, T.I.A.S. No. 6577; U.N.T.S. 8791. See generally Jaeger, *A Succinct Evaluation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, in SYMPOSIUM DES DIAKONISCHEN WERKES DER EVANGELISCHEN KIRCHE IN DEUTSCHLAND IN ZUSAMMENARBEIT MIT DEM INTERNATIONALEN VERBAND FÜR INNERE MISSION UND DIAKONIE ÜBER RUNDSATZIRAGEN DER INTERNATIONALEN SOLIDARITÄT BEI DER AUFNAHME UND INTEGRATION AUSLÄNDISCHER FLÜCHTLINGE, (STUTTGART, NOV. 25-27, 1980). See also Note, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125 (1981) [hereinafter cited as *The Right of Asylum*]; CONGRESSIONAL RESEARCH SERVICE, 96TH CONG., 1ST SESS., WORLD REFUGEE CRISIS: THE INTERNATIONAL COMMUNITY'S RESPONSE OF THE SENATE COMM. ON THE JUDICIARY, 6-12 (Comm. Print 1979).

The Convention and Protocol are reprinted in STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 96TH CONG., 2D SESS., IMMIGRATION AND NATIONALITY ACT WITH AMENDMENTS AND NOTES ON RELATED LAWS 157-71 (7th ed. Comm. Print 1980) [hereinafter cited as INA and RELATED LAWS].

42. Done at Geneva, Switzerland, July 28, 1951; 189 U.N.T.S. 150.

43. The reasons why the United States did not adopt the 1951 convention are not clear. Perhaps the provisions of the 1950 Internal Security Act (Pub. L. No. 81-831, 64 Stat. 987) which forbade deporting an alien to a country where he would be persecuted were thought sufficient to achieve the purposes of the Convention. In any case, the 1952 INA included a provision, 8 U.S.C. 243(h), which contained language very similar to that of the Convention.

44. See note 41 *supra*.

45. The Senate expended little energy in consenting to ratification of the Protocol; it acted unanimously after one brief committee hearing and with almost no floor debate. See 14 CONG. REC. 29,607-08 (1968); S. EXEC. REP. NO. 14, 90th Cong., 2d Sess. 3-19 (1968). Two other conventions were considered by the Senate Committee on Foreign Relations at the hearing. *Id.* at 3 (remarks of Sen. Sparkman). *The Right of Asylum*, *supra* note 41, at 1131 n.42.



The most important provisions of the Protocol for purposes of this analysis were the definition of "refugee"<sup>46</sup> and Article 33,<sup>47</sup> which together prohibited any signatory country from returning ("*refoulement*"<sup>48</sup>) any person to a country where his life or freedom would be threatened on account of his "race, religion, nationality, membership in a particular social group or political opinion."<sup>49</sup> These Protocol provisions are similar to Section 243(h) of the INA,<sup>50</sup> the U.S. provision which prohibits repatriation to a country where a person would be persecuted. In fact, during the brief consideration of the Protocol, the Administration and Congressional Committees made it clear that accession to the Protocol was to make no change in existing U.S. policy or rights granted to aliens in U.S. legislation.<sup>51</sup>

46. The United Nations definition of refugee, as amended by the 1968 Protocol, reads:

[T]he term "refugee" shall apply to any person who: . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.

Protocol Relating to the Status of Refugees, Art. 1, 19 U.S.T. 6223, T.I.A.S. No. 6577 (1968).

47. The text of Article 33 reads:

Prohibition of Expulsion of 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, 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 as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

*Id.* art. 33.

48. "Refoulement" is the term the United Nations uses to describe the forced return of a person to the jurisdiction of another country. In the context of this analysis, "refoulement" represents deportation of an alien from the United States, or return after exclusion proceedings are completed.

49. See definition of refugee in note 46 *supra*.

50. 8 U.S.C. 1253(h).

51. S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 8 (1968) (statement of Lawrence Dawson, Acting Deputy Director, Office of Refugees and Migration Affairs, United States Department of State); 14 CONG. REC. 27,757 (1968) (remarks of Sen. William Proxmire). See also 1 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE 5-177 (1980); Frank, *The Effect of the 1967 U.N. Protocol on the Status of Refugees in the United States*, 11 INT'L L. J. 327, 329 (1978).

A few months after the United States agreed to the Protocol, the U.S. Supreme Court said: "[I]t is premature to consider whether, and under what circumstances, an order of deportation might contravene the Protocol and Convention Relating to the Status of Refugees to which the U.S. acceded on November 1, 1968." *Immigration and Naturalization Service v. Stanisic*, 395 U.S. 62, 80 n.22 (1969).

Before the Refugee Act of 1980, the Second, Third and Fifth Circuit Courts of Appeal held that the U.S. immigration laws concerned were not affected by the Protocol. *Chim Ming v. Marks*, 367 F. Supp. 673 (S.D.N.Y. 1973), *aff'd per curiam*, 505 F.2d 1170 (2d Cir. 1974) (rejected crewman's claim that the Protocol affected his refugee status for Determination of deportability); *Kan Kam Lin v. Rinaldo*, 361 F. Supp. 177 (D.N.J.), *aff'd per curiam*, 493 F.2d 1229 (3d Cir. 1973), *cert. denied*, 419 U.S. 374 (1974) (rejected crewman's claims under Protocol); *Pierre v. United States*, 547 F.2d 1281 (5th Cir. 1977) (rejected claims of Haitian emigre that Protocol limited discretion of Immigration and Naturalization Service).

Nevertheless, some commentators have seized upon the Protocol as having defined a new "right," that of an alien *claiming* persecution from virtually any cause not to be deported from the United States.<sup>52</sup> As Article 33 suggests, there is a limited "right" in international law for refugees not to be deported to countries where they would be persecuted, yet not all aliens desiring admission to the United States are eligible for refugee status, nor is the "right" one which allows an alien to avoid deportation altogether. This new "right" should not be overstated; there is no right in international law for an alien to force his way into the United States as a permanent resident. The Protocol, and the American accession to the Protocol, were recognitions of the concurrence of generous long-standing U.S. practice and the United Nations model for countries to follow that practice, rather than they were the formative crucibles of a new "right."<sup>53</sup> Thus, the Protocol, while not a ground for a new "right," was a step toward institutionalizing a refugee flow and a powerful impetus toward further increasing refugee admissions to the United States.

#### D. *The Refugee Act of 1980*<sup>54</sup>

The culmination of four decades of expansion of refugee admissions and claims<sup>55</sup> came in the Refugee Act of 1980.<sup>56</sup> The Refugee Act, which amended

After the Refugee Act of 1980, the U.S. District Court in Atlanta found no significant difference between the provisions in Article 33 of the Protocol and those of 8 U.S.C. 1253(h). *Fernandez-Roque v. Smith*, 539 F. Supp. 925, 934-35 (N.D.Ga. 1982). But the court said that if there were any significant variance between the Refugee Act and the Protocol, the Refugee Act would control. *Id.* at 35 n.28; see *United States v. Postal*, 589 F.2d 862, 878-79 n.25 (5th Cir. 1979), *cert. denied*, 444 U.S. 832 (1979) ("subsequent federal legislation overrides prior self executing treaty provisions.")

52. Anker & Posner, *supra* note 9, at 75-89 (presenting, in detail, proposals designed to insure that any application for asylum would receive multiple hearings or reviews, a process which could take years); *The Right of Asylum*, *supra* note 41.

Some commentators have argued that aliens fleeing from natural disasters, such as volcanic eruptions and earthquakes, should be given refugee status: "[W]hen the disaster constitutes a continuing threat to human life and aid to the stricken area cannot restore an acceptable standard of living, then the distinction between natural disaster victims and refugees fearing persecution becomes arbitrary and inhumane." Parker, *Victims of Natural Disasters in United States Refugee Law and Policy*, in *TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES*: 1982 MICH. Y.B. INT'L LEGAL STUD. 137-38 (1982) [hereinafter cited as MICH. Y.B.].

While there might be some merit in the idea that Americans should provide aid to victims of natural disaster, poverty, economic hardship and other afflictions which fall short of persecution, the refugee program of the United States is now directed at persecution rather than these other troubles. Since refugee status is a means of obtaining permanent residence in the United States without recourse to the regular immigration system, the system should not be expanded.

53. See generally Protocol Relating to the Status of Refugees, Art. 33, 19 U.S.T. 6223; T.I.A.S. No. 6377 (1968).

54. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 109.

55. An alien may claim refugee status by appearing before a U.S. official, usually from the Immigration and Naturalization Service (INS), outside the United States. 8 C.F.R. 207 (1981). An alien already present in the United States must apply for asylum instead of refugee status. 8 U.S.C. 1158 (1980).

the INA of 1952, provided a definition of refugee which is even more broad than that in the United Nations Protocol,<sup>57</sup> created three new ways for a President to admit unlimited numbers of refugees to the United States,<sup>58</sup> established a new procedure for granting asylum and authorized massive refugee resettlement programs.<sup>59</sup>

### 1. Definition of Refugee Under the Refugee Act of 1980

Prior to the enactment of the Refugee Act of 1980, the term "refugee" was defined in the Refugee-Escapee Act of 1957.<sup>60</sup> That Act defined "refugee" narrowly, providing that only persons who came from Communist-dominated and Middle Eastern countries could be refugees.<sup>61</sup> The new definition of "refugee" under the Refugee Act of 1980 is broader than the United Nations Protocol definition. Although both define refugee as a person who is persecuted on the basis of similar factors, the new U.S. definition does not require a refugee to leave his or her country before attaining refugee status. This change in

Often a charitable organization or a "volag" (see text accompanying note 80 *infra*) will help the alien apply for refugee status.

Simply demonstrating persecution or a well-founded fear of persecution is usually not enough for an alien to be transported to and admitted by the United States as a refugee; the Department of Justice has promulgated policy directives establishing priority categories for refugee admissions from Southeast Asia based on prior contact with the United States. *U.S. Refugee Program: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (Sept. 21, 1981) (unpublished) (statement of Doris Meisner, Acting Commissioner, Immigration and Naturalization).

56. See generally Martin, *The Refugee Act of 1980: Its Past and Future*, in MICH. Y.B., *supra* note 52, at 91 (views of a Carter Administration draftsman of the Refugee Act proposals) [hereinafter cited as Martin]; Anker & Posner, *supra* note 9 (views of proponents of expanded refugee admissions).

57. The term "refugee" means (A) 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, or (B) in such circumstances as the President after appropriate consultation (as defined in section 207(c) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. 1101(a)(42) (1980). The United Nations definition of refugee does not contain an analogue to subparagraph (B): a person who has not yet left his or her home country.

58. 8 U.S.C. 1157 (1980).

59. 8 U.S.C. 1522 (1980).

60. 8 U.S.C. 1153 (1979). This definition was established by the Refugee-Escapee Act, Pub. L. No. 85-316, 71 Stat. 639 (1957).

61. See note 31 *supra*.

definition made millions of people worldwide eligible for refugee status in the United States.<sup>62</sup>

## 2. Procedure for Admitting Refugees Under the Refugee Act of 1980

The Refugee Act of 1980 established a new procedure to be used by the President in deciding how many refugees to admit.<sup>63</sup> The new procedure provides the President with three new methods to admit refugees, in addition to those in use before 1980.<sup>64</sup> Those new methods are: (1) a "normal flow" admission level of 50,000 refugees each year;<sup>65</sup> (2) a "consultation process" under which the President may admit an unlimited number of refugees by declaring his intentions before each fiscal year;<sup>66</sup> and (3) an emergency clause, which allows the

62. The official Department of Justice estimate for fiscal year 1983 is that there are 7,500,000 refugees in the world today. U.S. DEPT. OF STATE, COUNTRY REPORTS ON THE WORLD REFUGEE SITUATIONS: REPORT TO CONGRESS FOR FISCAL YEAR 1983, at 4 (1982) [hereinafter cited as COUNTRY REPORTS].

63. 8 U.S.C. 1157 (1980).

64. Prior to the Refugee Act of 1980, refugees could only be admitted to the United States through three methods: regular immigrant admissions (8 U.S.C. 1153(a)(7) (1979)); the Attorney General's "parole power" (8 U.S.C. 1182(d)(5) (1970)); or special legislation.

65. 8 U.S.C. 1157(a)(1) (1980). This power, which expired on October 1, 1982, allowed the President to admit up to 50,000 refugees regardless of any other limitations of nationality or visa availability in the immigration laws. These admissions were outside any quota, and outside the refugee consultation process. See The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 109. The 50,000 level was never used before its expiration because the number of refugees admitted during the power's tenure was always far in excess of 50,000 (the President used his other refugee admission powers to raise admissions that high).

66. 8 U.S.C. 1157(a)(1)-(2), (d), (e) (1980). In the "consultation" process, the President must determine, before the beginning of a fiscal year, that additional refugee admissions are "justified by humanitarian concerns or otherwise in the national interest." *Id.* at (a). Once the President has decided to admit more refugees, he must consult with Congress about the admissions. The term "consultation" is defined by the statute:

[T]he term "appropriate consultation" means, with respect to the admission of refugees and allocation of refugee admissions, discussions in person by designated Cabinet-level representatives of the president with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest, and to provide such members with the following information:

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

To the extent possible, information described in this subsection shall be provided at least two weeks in advance of discussion in person by designated representatives of the President with such members.

President to admit unlimited numbers of refugees at any time.<sup>67</sup>

In addition, the Attorney General's "parole power," *i.e.*, an administrative relief power allowing an alien temporary admission to the United States,<sup>68</sup> which was intended to be significantly narrowed by the Refugee Act so that it would be used only for individuals rather than large groups,<sup>69</sup> is apparently still available to admit people who claim to be fleeing persecution. Just six weeks after the Refugee Act passed, President Carter used the parole power to admit Cubans and Haitians who fled those islands as "Cuban/Haitian entrants," a term not found in immigration law and obviously used to avoid the restrictions on parole imposed by the Refugee Act.<sup>70</sup>

### 3. Procedure for Granting Asylum

The Refugee Act of 1980 provides a new procedure for granting asylum to aliens who, although they meet the eligibility criteria for refugee status, are already within the United States.<sup>71</sup> This new asylum provision limits an alien's

8 U.S.C. 1157(c) (1980). The "substance of such consultation" is required to be printed in the Congressional Record. 8 U.S.C. 1157(d)(2) (1980).

There is no mechanism by which Congress can alter the decision of the President to admit a certain number of refugees, except by passing special legislation either cutting off the power to make such admissions or cutting off the funds necessary to pay for the admissions.

67. 8 U.S.C. 1157(b) (1980). If the President determines that "(1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugees situation is justified by grave humanitarian concerns," and (3) the refugees cannot be admitted within the levels set in the earlier consultation process, the President may decide to admit more refugees during the next 12 months even if this number is larger than the level set in the consultation before the beginning of the fiscal year. *Id.* A hearing to review the proposed new admissions need be held only if "time and the nature of the emergency refugee situation permit." 8 U.S.C. 1157(d)(2) (1980).

68. 8 U.S.C. 1182(d)(5) (1970). The "parole power" has long been used to admit refugees to the United States. *See* note 31 *supra*. Parole has been upheld by the courts as a discretionary relief mechanism, subject to limited judicial review. *Leng May Ma v. Barber*, 357 U.S. 185 (1958) (the parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted and was never intended to affect an alien's status); *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982) (Attorney General has authority to detain indefinitely an alien convicted for crimes in Cuba, and may deny parole to the alien); *Siu Fung Luk v. Rosenberg*, 409 F.2d 555 (9th Cir. 1969) (admission of an alien through parole does not constitute an "entry" into the United States, and if forced to leave, the alien is being excluded, not deported).

69. After the Refugee Act of 1980, the parole power was narrowed so that those aliens who meet the refugee definition cannot be admitted by parole, unless the Attorney General has "compelling reasons in the national interest" for bringing the alien in through parole instead of the other refugee mechanisms. 8 U.S.C. 1182(d)(5)(B) (1970).

70. Scanlan, *Regulating Refugee Flows: Legal Alternatives and Obligation Under the Refugee Act of 1980*, 56 Notre Dame Law. 618, 619-23 (1981) [hereinafter cited as Scanlan]. There was no examination made of whether these aliens were refugees and hence could not be admitted under parole (under 8 U.S.C. 1182(d)(5)(B)). President Carter's use of the parole power may have indicated his position that these aliens were not eligible for refugee status.

A discussion of some of the litigation spawned by the Mariel boatlift can be found in *Fernandez-Roque v. Smith*, 539 F. Supp. 925, 928 n.4 (N.D. Ga. 1982).

71. 8 U.S.C. 1158 (1980). Prior to the Refugee Act of 1980, the term "asylum" was not used in U.S. immigration law statutes. An alien who sought asylum in the United States could ask the Immigration

status under asylum to *temporary* residence in the United States, rather than the permanent residence granted under Section 243(h) or regular refugee admissions. Only 5,000 persons granted asylum each year are allowed to become permanent residents of the United States.<sup>72</sup>

Despite the grant of only temporary status, thousands of aliens have applied for asylum.<sup>73</sup> Petitions have been received from aliens claiming persecution from such countries as Germany, Sweden and the Netherlands.<sup>74</sup> Even if asylum is ultimately denied, many aliens know that the act of applying for asylum provides several years of residence in the United States, since the asylum process is so backlogged that even frivolous petitions may take that long to be denied.<sup>75</sup>

#### 4. Massive Benefit and Resettlement Programs

The Refugee Act of 1980 provides a new series of programs for resettlement of refugees and assimilation into American society.<sup>76</sup> Unfortunately, the programs encourage refugees to seek and remain on welfare.<sup>77</sup>

and Naturalization Service (INS) for admission under the regular immigrant quota system (8 U.S.C. 1153), under the Attorney General's "parole power" (8 U.S.C. 1182(d)(5)), or, after conceding his deportability, could ask for withholding of deportation under section 243(h) (8 U.S.C. 1253(h)). In 1978, the INS received 3,072 applications for asylum. *Immigration Reform: Hearings Before the Subcommittee on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 579 (1981) (statement of Alan Nelson, Commissioner, Immigration and Naturalization, U.S. Dept. of Justice).

72. 8 U.S.C. 1159(b) (1980). For a discussion of the evolution of the asylum proposals for the Refugee Act of 1980, see Martin, *supra* note 56.

73. Attorney General William French Smith told the Senate Judiciary Committee on September 29, 1982 that 123,000 asylum petitions were pending, up from 3,000 in 1978. *Refugee Consultation: Hearings Before the Subcomm. on Immigration and Refugee Policy of the U.S. Senate Comm. on the Judiciary* (pt. I), 97th Cong., 2d Sess. 10 (1982) (Transcript of remarks of Attorney General William French Smith) [hereinafter cited as Transcript of remarks of Attorney General William French Smith].

74. *Statistics: Asylum Cases Before the Immigration and Naturalization Service*, 3 REFUGEE REP. 8 (Sept. 10, 1982); *U.S. Refugee Program: Hearing Before the Subcomm. on Immigration Refugees and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (Sept. 21, 1981) (unpublished) (statement of Doris Meisner, Acting Commissioner, Immigration and Naturalization).

75. Martin, *supra* note 56, at 111; Transcript of remarks of Attorney General William French Smith, *supra* note 73, at 10-11.

76. 8 U.S.C. 1522 (1980). Prior to the Refugee Act of 1980, refugee resettlement programs were established by individual refugee relief legislation. See, e.g., Migration and Refugee Assistance Act, Pub. L. No. 87-510, 76 Stat. 121 (1962); The Indochina Migration and Refugee Assistance Act, Pub. L. No. 94-23, 89 Stat. 87 (1975), repealed by Section 312 of the Refugee Act of 1980.

77. "We had begun the year with a rather bleak picture of our refugee resettlement. We found, for example, that the national dependency rate for refugees was hovering around sixty-seven percent." *Refugee Consultation: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary* (pt. II), 97th Cong., 2d Sess., 81 (1982) (Transcript of remarks of David Swoap, Under Secretary of Health and Human Services, U.S. Dept. of Health and Human Services).

The reasons for this dependency are not clear, although culture shock, language difficulties and encouragement by other refugees on welfare may have some influence. In its report on the Refugee Assistance Amendments of 1982, which reauthorized expiring portions of the Refugee Act of 1980, the House Judiciary Committee discussed these problems: inadequate English language training; inadequate job training; inadequate job placement efforts by resettlement agencies and others (including

The costs for the resettlement program are enormous. In fiscal year 1982, the partial federal cost of resettling refugees was \$1,090,000,000 and this cost will remain about the same in fiscal year 1983.<sup>78</sup> The actual cost of resettling refugees is even higher since this figure does not include costs for state and local government programs, nor the costs to many federal programs which do not distinguish refugees from other recipients.<sup>79</sup>

One consequence of the creation of these massive resettlement programs was the institutionalization of a new group of organizations, funded by the federal government, which depend on a continuing flow of refugees for the maintenance of their multi-million dollar programs.<sup>80</sup> Congressional observers have begun to question whether the organizations which participate in refugee resettlement, known as voluntary organizations or "volags," are stimulating the admission of aliens not eligible as refugees in an effort to continue their programs.<sup>81</sup> In fact, these organizations are very active in the debate over refugee admissions, charging anyone who attempts to reduce refugee admissions with a failure of "compassion" or "humanitarianism."<sup>82</sup> Although such vituperative *ad hominem* arguments make discussion of refugee admission levels difficult for the participants, the discussions continue.<sup>83</sup>

This evolution in U.S. immigration laws since the end of World War II produced an enormous shift in American refugee policies. Specifically, prior to these changes, the United States admitted refugees only in the neediest situa-

confusion over whether a refugee who does not speak English well should be required to seek work anyway), scheduling of social service appointments which interrupt job searches, maldistribution of refugees around the country (*e.g.*, California has 40% of all Indochinese refugees) and encouragement from resettlement agencies to refugees to sign up for welfare. HOUSE COMM. ON THE JUDICIARY, REFUGEE ASSISTANCE AMENDMENTS OF 1982, REPORT ON H.R. 5879, H.R. REP. NO. 97-541, 97th Cong., 2d Sess. (1982) [hereinafter cited as H.R. REP. NO. 97-541].

78. A more complete estimate may be that offered by the U.S. Coordinator for Refugee Affairs, Department of State, in which fiscal year 1982 federal refugee funds totalled \$2,315,800,000. Report to the Congress on Costs for Refugees and Cuban and Haitian Entrants, reprinted in *Hearing on Refugee Admissions for Fiscal Year 1983 (Refugee Consultation) of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 38 (1982) (Transcript of statement of Sen. Alan Simpson).

79. *Id.*

80. Zucker, *Refugee Resettlement in the United States: The Role of the Voluntary Agencies*, in MICH. Y.B., *supra* note 52, at 155.

81. 128 CONG. REC. S10352 (daily ed. Aug. 12, 1982) (remarks of Sen. Johnston).

82. *Id.* S10357-58 (remarks of Sen. Edward Kennedy; letter from Wells Klein, Chairman, Committee on Migration and Refugee Services, to Sen. Edward Kennedy).

83. It is not impossible to discuss the issue forthrightly, however difficult it may seem to the actors involved. After listening to derogatory comments about Senator Huddleston, who had introduced an amendment to include refugee admissions within an overall ceiling on immigration, Senator Lawton Chiles of Florida, delivered a five-minute speech supporting controls on immigration, using the problems in his home state as an example of the devastation wrought by uncontrolled immigration. 128 CONG. REC. S10359 (daily ed. Aug. 12, 1982). Senator Simpson, who opposed the amendment, told those around him on the Senate floor that Chiles' argument was correct, that he had no answer to Chiles, and he then yielded back his remaining time for debate (Simpson nevertheless voted against the amendment). Conversation with Senate staff by one of the authors, Aug. 13, 1982.

tions. Due to the legislation in the last twenty-five years, the United States has absorbed hundreds of thousands of refugees in just a few years, with no sign of an end to the flood of admissions.<sup>84</sup>

### III. ISSUES IN REFUGEE REFORM

Although they are often charged with heartlessness or meanness of spirit,<sup>85</sup> those who desire reasonable reform of refugee policies see three major areas in which reform is necessary. These areas are: (1) reform of current policies and procedures without further legislation; (2) reform of the definition of refugee in both statutory and treaty forms; and (3) integration of refugee policy with overall policy on admissions to the United States, including population policy.

#### A. *Reform of Current Policies and Procedures Without Additional Legislation*

Reform of the existing policies and procedures under which refugees are defined, sought out, determined to be refugees and brought to the United States could be achieved through a reinterpretation of existing laws, including the Refugee Act of 1980. These changes would eliminate the need for new legislation.

The refugee program of the United States should be restored to its original intent: to aid the individual alien who is persecuted by providing refuge, with permanent residence reserved for only a few of those given temporary refuge. The many lessons taught by our history with refugee programs could be incorporated into policies and practices implementing the terms of the 1980 Act. A substantial argument can be made that the present practices of the Department of State, the Department of Justice and the Immigration and Naturalization Service, each of which has a role in the refugee process,<sup>86</sup> are not in accord with the case law interpreting American law on refugees and asylum seekers. U.S. courts have laid down some tests regarding refugees and asylum seekers against which the present policies can be measured.<sup>87</sup>

---

84. In fiscal years 1980 and 1981 alone, the United States admitted 342,804 refugees, not including more than 120,000 Cubans and Haitians who claimed asylum; Administration officials expect more than 50,000 asylum applications per year in addition to refugee admissions. H.R. REP. NO. 97-541, *supra* note 77, at 5.

85. *Turning Mean on Immigration*, N.Y. Times, Aug. 9, 1982, at A14, col. 1; Fuchs, *Immigration and Fear*, Washington Post, Aug. 6, 1982, reprinted in 128 CONG. REC. S10359 (daily ed. Aug. 12, 1982) (remarks of Sen. Paul Tsongas).

86. The Department of State generally provides information on refugee crises throughout the world (see COUNTRY REPORTS, *supra* note 62) and advises the Department of Justice about the merits of individual asylum claims. The Department of Justice, the parent agency of the INS, sets immigration policy, since the Attorney General is the official charged with most immigration powers. 8 U.S.C. 1103 (1980). The INS actually administers most immigration functions, including refugee selection and overseas processing, with delegated powers from the Attorney General. *Id.*

87. Much of the case law before the Refugee Act of 1980 dealt solely with asylum seekers, since that was the context of refugee status under 8 U.S.C. 1253(h). Since the definition of asylum under those was



An alien trying to convince the Immigration and Naturalization Service that he satisfies the definition of refugee must meet several conditions, including most importantly, actual persecution or a well-founded fear of persecution upon return to his home country on the basis of race, religion, nationality, membership in a particular social group or political opinion.<sup>88</sup> The term persecution has not been statutorily defined, although each of several changes in the INA have made changes in the terms describing the word persecution.<sup>89</sup> Even more difficult to define is the phrase "well-founded fear of persecution."<sup>90</sup> The United Nations, in its guidebook for persons determining refugee status, provides some

---

strikingly similar to present refugee definitions, the cases remain useful despite the passage of the new law. See generally Scanlon, *supra* note 70; *The Right of Asylum*, *supra* note 41; Note, *Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim*, 56 Notre Dame Law. 719 (1981) [hereinafter cited as *Basing Asylum Claims*].

88. 8 U.S.C. 1101(a)(42) (Supp. IV 1980). Two recent cases from the Ninth Circuit (a circuit notably willing to grant refugee status in the past) indicate some limits on the expansion of these five areas of eligibility. In the first case, *Martinez-Romero v. Immigration and Naturalization Service*, 692 F.2d 595 (9th Cir. 1982), the Ninth Circuit rejected a plea that no person from El Salvador should be forced to return there because of the current instability in that country:

If we were to agree with the petitioner's contention that no person should be returned to El Salvador because of the reported anarchy present there now, it would permit the whole population, if they could enter this country some way, to stay here indefinitely. There must be some special circumstances present before relief can be granted.

*Id.* In the second case, *Raass v. Immigration and Naturalization Service*, 692 F.2d 596 (9th Cir. 1982), citizens of Tonga, who asserted that they would not be able to acquire rights to land because of their lineage, were found not eligible for asylum under the refugee definition: "The relief of asylum in the United States depends on something more than generalized economic disadvantage at the destination. There is not substantial claim of a probably political persecution as decided under the heretofore decided cases." *Id.*

89. Before 1965, Section 243(b) applied only to aliens who would be subject to "physical persecution." 8 U.S.C. 1253(h) (1952). "Physical" has been held to include confinement, torture or death. *Kalatjis v. Rosenberg*, 305 F.2d 249 (9th Cir. 1962); *Blazina v. Blanchard*, 286 F.2d 507 (3d Cir. 1961). Actions found not to be physical persecution have included punishment for draft dodging (*Chao-Ling Wang v. Pilliod*, 285 F.2d 517, 520 (7th Cir. 1960)) or jumping ship (*Blazina*, 286 F.2d 507), loss of a job (*Blaziac v. Flagg*, 304 F.2d 623 (7th Cir. 1962)), or short periods of confinement, even for political crimes (*Sovitch v. Esperdy*, 319 F.2d 21, 29 (2d Cir. 1963)).

The 1965 Amendments (Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911) broadened the meaning of persecution so that it was no longer necessary to show bodily harm. *Berdo v. Immigration and Naturalization Service*, 432 F.2d 824 (6th Cir. 1970); *Kovac v. Immigration and Naturalization Service*, 407 F.2d 102, 106 (9th Cir. 1969). In addition, the Refugee Act of 1980 changed the definition to persecution on the basis of five enumerated points: race, religion, nationality, membership in a particular social group or political opinion. 8 U.S.C. 1101(a)(42) (1980).

90. One court has held that, to show persecution, an alien must demonstrate that (1) he or she participated in certain conduct, and (2) he or she would suffer serious prejudicial consequences as a result of that conduct. *Kashani v. Immigration and Naturalization Service*, 547 F.2d 376, 380 (7th Cir. 1977). The Board of Immigration Appeals, an administrative appellate body, has held that the person must be a victim of persecution or show substantial reasons why he was threatened by it. *Matter of Dunar*, 14 I & N Dec. 310 (1973). "Fear is considered well-founded if it can be established that the alien's presence has been, and would remain, intolerable in his country of origin, or would become intolerable were he to return." *Basing Asylum Claims*, *supra* note 87, at 724.

suggestions for making these determinations;<sup>91</sup> case law provides some other interpretations.<sup>92</sup> An alien with a long history of political opposition to a government, who is tortured, or who is exiled by his government should not have a difficult time demonstrating persecution or a well-founded fear of persecution upon return.<sup>93</sup>

The more difficult cases are those where the alien creates the facts which support a claim for refugee status. Many Southeast Asians and Haitians claim that their departure from their home countries will cause them to be persecuted if they return.<sup>94</sup> This claim is not new; a 1968 decision comments on such claims from those fleeing Communist countries: "The alien must show that the travel regulation is 'political' and that his own flight is 'politically motivated.'"<sup>95</sup> In another case,<sup>96</sup> two aliens from Chile who held a press conference and made statements calculated to support a claim that they had cause to fear persecution upon their return to Chile were denied refugee status. The court held that their actions were designed solely to meet the refugee eligibility criteria, and thus were designed solely to obtain asylum in the United States.<sup>97</sup> The United Nations suggests that "regard be given to whether such actions will come to the attention of the alien's home government and what the government's reaction will be."<sup>98</sup>

Courts have used a two-part test to determine whether the application for asylum is valid. The first part of the test involves *prior political activity* by the alien. If the alien can show prior political activity, the courts will usually consider the application valid.<sup>99</sup> The second part of the test considers *the motive for applying for*

91. U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 11 (1979) [hereinafter cited as HANDBOOK]. The INS, which makes most refugee determinations, does not generally refer to the Handbook. INS regulations are found at 8 C.F.R. 207 and 208 (1981). The Handbook is useful, however, to provide an international perspective on difficult questions of interpretation.

92. See notes 87, 89 & 90 *supra*.

93. See generally *Basing Asylum Claims*, *supra* note 87, and note 99 *infra*.

94. *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (E.D. Fla. 1980), *modified sub nom.*, *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (lower court judge's finding of persecution in Haiti was "harmful dictum"); Memorandum for David Crosland, General Counsel, Immigration and Naturalization Service, from the Office of Legal Counsel, Dept. of Justice, Aug. 24, 1981, at 5; *U.S. Refugee Program: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (Sept. 16, 1981) (unpublished) (statement of Doris Meisner, Acting Commissioner, Immigration and Naturalization): "[T]he political conditions in Vietnam remain such that the majority of those fleeing will likely be found to be refugees under our law."

95. *In re Janus & Janek*, 12 I & N Dec. 866, 876 (1968).

96. *Cisternas-Estay v. Immigration and Naturalization Service*, 531 F.2d 155 (3d Cir. 1976).

97. *Id.*

98. HANDBOOK, *supra* note 91, at 22.

99. *Kovac v. Immigration and Naturalization Service*, 407 F.2d 102, 106 (9th Cir. 1969) (crewman with prior political activity could show persecution); *Hosseinardi v. Immigration and Naturalization Service*, 405 F.2d 25 (9th Cir. 1968) (student without prior political activity was denied asylum).

The alien has the burden of proving to the INS that he would be subject to persecution as claimed. 8 C.F.R. 208.5. A controversy has arisen among federal circuits as to how much an applicant must demonstrate to substantiate a finding of persecution or a well-founded fear of persecution. Prior to the

*refugee status*. If the alien cannot show prior political activity, the courts will inquire into the motives for the application, and for the facts which support the claim.<sup>100</sup> One court required a showing that: (1) the alien show that his departure was politically motivated; and (2) that he faced persecution for *political reasons* upon return to his homeland.<sup>101</sup> If either test is satisfied, courts will uphold the application. If neither is satisfied, courts will deny the application.

One court has criticized the motive test for failure to consider the motives of the homeland government in taking action against the alien.<sup>102</sup> In exploring the government's motives, one commentator suggests three factors to determine whether the action is prosecution or punishment for an illegal act and, thus, not grounds for refugee status, or persecution:<sup>103</sup> (1) the presence of a valid non-political law conforming to the general standards of the nation;<sup>104</sup> (2) the nature of the judicial system;<sup>105</sup> and (3) conformity of the law and the punishment to human rights standards (notably uniformity of application and with a reasonable type and length of punishment).<sup>106</sup>

Refugee Act of 1980, the standard of proof required in most cases was a showing of a "clear probability of persecution." *Lena v. Immigration and Naturalization Service*, 379 F.2d 536, 538 (7th Cir. 1967).

Some commentators have contended that this "clear probability" standard was too difficult for aliens to meet. *Sheridan, Coriolan v. INS: A Closer Look at Immigration Law and the Political Refugee*, 3 I & N L. Rev. 559, 564 (1979-1980). The debate among circuits today is over the effect of the Refugee Act of 1980 on the "clear probability" standard.

The Second and Sixth Circuits say that the Refugee Act of 1980 loosened the "clear probability" standard. *Reyes v. Immigration and Naturalization Service*, 693 F.2d 597 (6th Cir. 1982); *Stevic v. Immigration and Naturalization Service*, 678 F.2d 401 (2d Cir. 1982), *petition for cert. granted*, 51 U.S.L.W. 3627 (U.S. Mar. 1, 1983) (No. 82-973) ("clear probability" standard violated the "tenor and spirit" of the Refugee Act of 1980, so a standard "far short" of a clear probability of persecution should be used). The Third Circuit rejected the approach of the earlier Second Circuit decision and upheld the use of the "clear probability" standard even after the Refugee Act of 1980. *Rejaie v. Immigration and Naturalization Service*, 691 F.2d 139 (3d Cir. 1982).

The effect of weakening the "clear probability" standard would be dramatic. If the "far short" of a clear probability test, proposed by the Second Circuit in *Stevic*, was adopted, it is unclear what an alien applicant for refugee status would have to prove. Since the "far short" test could arguably be satisfied by an alien who demonstrates that there is a remote chance that he would have been persecuted, the INS would probably be unable to find that a person was not eligible to be a refugee, and the distinction between classes of immigrants (refugees or immigrants) would be even further eroded.

100. *Cisternas-Estay*, 531 F.2d at 155.

101. *Paul v. Immigration and Naturalization Service*, 521 F.2d 194 (5th Cir. 1975).

102. *Coriolan v. Immigration and Naturalization Service*, 559 F.2d 993, 1000 (5th Cir. 1977).

103. *Basing Asylum Claims*, *supra* note 87, at 727.

104. The U.N. High Commissioner for Refugees (UNHCR) holds that punishment alone, though for a political act, does not make an alien eligible for refugee status if the punishment conforms to the general law of the nation. HANDBOOK, *supra* note 91, at 20.

105. Where a recognized judicial system with appropriate safeguards for human rights administers punishment for a recognized nonpolitical offense, an alien so punished is not being persecuted. *Sovich v. Esperdy*, 319 F.2d 21, 28 (2d Cir. 1963). The UNHCR agrees: "It should be recalled that a refugee is a victim — or potential victim — of injustice, not a fugitive from justice." HANDBOOK, *supra* note 91, at 15.

106. *Sovitch*, 319 F.2d at 21. "[E]xcessive or arbitrary punishment will amount to persecution." HANDBOOK, *supra* note 91, at 20.

Unfortunately, the U.S. government has been extremely lax in applying these doctrines to many refugee cases. The most flagrant violation of these doctrines comes from Southeast Asia. For several years, the Department of State has persisted in removing hundreds of thousands of Indochinese who did not qualify for refugee status despite complaints from other governments and from other American personnel responsible for approving refugee applications.<sup>107</sup>

The abuse of refugee policy reached its pinnacle in 1981 when Attorney General William French Smith, at the urging of Secretary of State Alexander Haig, declared that all migrants coming out of Laos, Cambodia and Vietnam would be "presumed" to be refugees.<sup>108</sup> In effect, this presumption meant that the Administration's foreign policy goals were to be substituted for the refugee law which Congress passed just the year before.

U.S. Senator Walter D. Huddleston was the first member of Congress to challenge this new policy. Sen. Huddleston introduced legislation calling for a complete Congressional investigation of the new Administration policy.<sup>109</sup> Shortly thereafter, the Office of Legal Counsel at the Department of Justice issued a legal opinion at the request of the Immigration and Naturalization Service which concluded that the Attorney General did not have the authority to make this kind of presumption.<sup>110</sup> The Office of Legal Counsel determined that refugee status had to be decided on a case-by-case basis rather than by presuming a class of persons are refugees.<sup>111</sup> As criticism of the Attorney General's action mounted, he reversed his decision presuming Southeast Asians to be refugees and new guidelines for determining refugee status were issued.<sup>112</sup>

The rationales underlying the effort by the State Department to force the new presumption of refugee status were that the spectacle of the departure of thousands of Southeast Asians was embarrassing and discrediting to the Communist government of Vietnam and that the only remaining friendly government in the area, Thailand, was demanding that the United States remove the

---

107. Smith, *Pull Factor Gets the Push*, FAR E. ECON. REV., July 17, 1981, at 26 [hereinafter cited as Smith]; Special Correspondent, *According to an Internal UNHCR Report, the United States Encourages the Exodus of Indochinese in Order to Destabilize the Governments of the Peninsula*, Le Monde, July 8, 1981, at 4; SPECIAL REFUGEE ADVISORY PANEL, U.S. DEP'T OF STATE, THE INDOCHINESE REFUGEE SITUATION: REPORT TO THE SECRETARY OF STATE (Aug. 12, 1981).

108. Letter from U.S. Secretary of State Alexander Haig, Jr. to Attorney General William French Smith (Apr. 30, 1981); Letter from Attorney General Smith to Secretary Haig (May 20, 1981); Unclassified Memorandum Order from Acting Commissioner Doris Meisner, INS to District Director, INS, Hong Kong (May 27, 1981) ("Persons coming out of Vietnam, Laos, and Cambodia . . . are to be presumed to be refugees by INS").

109. 127 CONG. REC. S8194 (daily ed. July 22, 1981).

110. U.S. Dept. of Justice, Office of Legal Counsel, Memorandum for David W. Crosland, General Counsel, INS, regarding Interpretation of the Refugee Act of 1980 (Aug. 4, 1981).

111. *Id.*

112. *Annual Refugee Consultation for 1982: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess., 12-14 (statement of Attorney General William French Smith) (1981).

refugee responsibility from their shoulders.<sup>113</sup> Little or no consideration was given to the domestic impact of refugee resettlement. This attitude, which ignores domestic consequences of refugee resettlement, continues today in policy discussions surrounding refugee admissions.<sup>114</sup>

The substitution of policy for law is not a new phenomenon in refugee admissions discussions. Prior Attorneys General did the same thing before the Refugee Act was passed, using the Attorney General's parole power.<sup>115</sup> Congress had intended that the parole authority be used only for individual cases, but it had been repeatedly used to admit large numbers of aliens.<sup>116</sup> Attorney General Griffin Bell called the misuse of the parole power an "end-run" on the law.<sup>117</sup>

Clearly, then, there is a great deal of improvement possible in existing policies with regard to refugee definitions, without any need for new legislation. The simplest improvement would be for the Executive branch to strictly apply the law, rather than operating by contradictory policy. An example of how strict application of the law might ease U.S. refugee problems without new legislation is in the initial determinations of which aliens are eligible for refugee status.<sup>118</sup>

Another example of a possible improvement through strict application of the law is full compliance with the Refugee Act of 1980 requirement that studies be conducted regarding the impact of refugee resettlement on the United States and its people.<sup>119</sup> Past compliance with such public disclosure requirements has been ludicrously incomplete; the domestic impact statement for resettling 234,000 refugees in one year reads, in its entirety: "Despite the difficulty that refugees have created in some parts of the country, we expect that they will make a positive contribution to the United States as have refugees before them."<sup>120</sup>

Former Deputy Secretary of State Warren Christopher, in a speech to the Organization of American States, suggested four measures which could be undertaken by any nation to improve refugee problems: (1) discouragement of

113. See Smith, *supra* note 107.

114. Examination of the statements of Administration representatives at the fiscal year 1983 refugee consultation meeting (which sets the level of refugee admissions for the next fiscal year), held on September 29, 1982 before the Senate Committee on the Judiciary, discloses very few domestic considerations among the reasons given for admitting refugees. Goals which were cited included: "humanitarian and foreign policy interests . . . that the principle of first asylum be preserved; that refugees admitted to this country qualify under the definitions and criteria established in the [Refugee] Act; and that those resettled in the United States achieve integration and independence within our society as quickly as possible." Transcript of remarks of Attorney General William French Smith, *supra* note 73, at 4.

115. Martin, *supra* note 56, at 92-96; Congressional Research Service, Education and Public Welfare Division, Memorandum — Parole Provision of the INA (July 1977).

116. See note 115 *supra*.

117. 125 CONG. REC. S4252 (daily ed. Apr. 10, 1979), quoting *Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 95th Cong. 2d Sess. (Nov. 28, 1978) (unpublished) (statement of Attorney General Griffin Bell, U.S. Dept. of Justice).

118. See text accompanying notes 107-17 *supra*.

119. 8 U.S.C. 1157(c) (1980). See note 38 *supra*.

120. 126 CONG. REC. S16466 (daily ed. Dec. 12, 1980).

policies by governments which encourage large-scale displacements of their people; (2) prompt repatriation of displaced persons, instead of permanent resettlement of refugees; (3) international sharing of any remaining refugee resettlement burden; and (4) elimination of partisan or ideological polemics from discussions of refugee problems.<sup>121</sup> Christopher's measures could be implemented by the United States without new legislation.

One seemingly obvious improvement would be to remove most, if not all of the political considerations from refugee decisions. Refugee admissions should be based on the special responsibility of the United States to act upon humanitarian concerns. Because of the long-term effects of refugee admissions on the nation, they should not be used as tools to obtain short-term foreign policy or political advantages. However, the most important improvements will come only when refugee programs are integrated with an overall policy on immigration to the United States. Only then will refugee program administrators have the guidance necessary to implement refugee policies which do not damage the national interest.

#### B. *Reform of the Definition of Refugee*

U.S. refugee policy is currently dominated by definitions of refugees which are overbroad. These definitions spring from international treaties and from the Refugee Act of 1980,<sup>122</sup> which is similar to the international definition. But these international definitions are predicated on international refugee resettlement patterns, not on the very different programs of the United States. Thus, these definitions are unsuited for the United States refugee programs.

The United Nations Protocol on Refugees is predicated on "non-refoulement," the prohibition against returning an alien to a country where his or her life or freedom would be threatened.<sup>123</sup> The Protocol does not require per-

---

121. Christopher's full recommendations were:

First, Large-scale displacements of persons should be discouraged in the name of humanity and international order. I can imagine no justification — political, social, racial, or religious — for a government to induce large numbers of its citizens to flee their homeland. Second, Persons displaced from their homelands should be repatriated, as promptly as conditions permit. Permanent resettlement should not be accepted as the inevitable result of crisis, for such permanent displacement may serve neither the welfare of the individuals or the nations concerned. The repatriation of persons following the end of the fighting in Zimbabwe and Nicaragua demonstrates that there are effective and human alternatives to permanent resettlement. Third, International procedures must be devised to solve the problems which arise when permanent resettlement becomes necessary. In such situations, the task of resettlement should be shared on an equitable basis so that no single nation or group of nations is faced with the entire refugee burden. Any system for resettlement must take into account that displaced persons are truly an international problem requiring an international solution. Fourth, Our efforts must be focused on the fundamental issues involved. These issues are too serious to be made the subject of partisan or ideological polemics.

*Id.*

122. See text accompanying notes 53-84 *supra*.

123. Art. 33 of the Protocol, *reprinted in INA AND RELATED LAWS, supra* note 41, at 167. See note 46 *supra*.

manent immigrant status for refugees. The Protocol does not require signatories to admit all refugees; it requires only that they not mistreat those present in their countries.<sup>124</sup> The Protocol does not speak to permanent resettlement or other forms of immigration. And, it is the Protocol which served as the basis for the new American definition of refugee.

Such a pattern may be well-suited for most countries, where immigration is rare in modern times.<sup>125</sup> But U.S. refugee policies are not like those of most other countries. Most countries of refuge provide temporary homes for refugees, and permanent resettlement for only a few. The United States does exactly the opposite; the vast majority of refugees brought to this country are resettled here permanently. In fact, under U.S. law, refugees become immigrants by acquiring permanent resident status after only one year of temporary residence here.<sup>126</sup>

The refugee definition used by the international community was designed for a different situation than occurs in the United States today. The international definition encompasses people who should be protected from persecution when their own governments are unwilling or unable to provide such protection. Clearly far more people need to be protected from maltreatment while temporarily residing in a foreign land than need to be given permanent residence in the United States. Such a broad definition, designed to prevent harm to refugees, need not be applied to an immigration program such as the United States operates for refugees.

A new and more appropriate U.S. refugee definition should be fashioned and combined with a new provision to provide refugees temporary refuge. Two changes need to be made in refugee statutes to provide such a reform. First, a new process for providing temporary refuge *and repatriation* when appropriate should be created and used for the majority of refugees brought to this country.<sup>127</sup> Second, the current refugee definition should be narrowed to indicate

124. Chapter V of the Protocol, *reprinted in INA AND RELATED LAWS, supra* note 41, at 166-67.

125. *See* notes 1 & 2 *supra*.

126. 8 U.S.C. 1159 (Supp. IV 1980).

127. To some degree, the new asylum process created by the Refugee Act (8 U.S.C. 1158 (Supp. IV 1980)) is a model for such a plan. Under this provision, an unlimited number of aliens can remain in the United States until conditions in their home countries change sufficiently to allow their return without fear of persecution. Only 5,000 asylees per year can be adjusted to permanent residence. 8 U.S.C. 1159 (Supp. IV 1980). Unfortunately, these sections apply only to aliens found within the United States or at a port of entry into the United States. Hence, most refugees would not be covered by this program.

A similar plan for refugees could be made by eliminating section 209 (8 U.S.C. 1159) from the statute, thus keeping all refugees in a temporary residence status, and then adding a review and termination of status provision for refugees similar to that for aliens granted asylum. 8 U.S.C. 1158(b) (Supp. IV 1980). The asylum termination provision provides that the Attorney General may terminate an alien's grant of asylum if he determines that the alien is no longer a refugee because of changes in circumstances in the alien's home country. *Id.* Refugees are not now subject to such a review, but become permanent residents after one year regardless of new conditions in their homelands. 8 U.S.C. 1159(a) (Supp. IV 1980).

that eligibility for refugee status is limited to those who can demonstrate a clear probability of persecution or of a well-founded fear of persecution based on the five statutory classes of refugees: race, religion, nationality, social group membership or political opinion.<sup>128</sup> Such a policy would allow the United States to maintain its historical generosity in refugee admissions, while not overburdening this country with overwhelming demands for refugee status, with commensurate pressure by other nations to accept more refugees. This policy would enable the United States to remove refugees from danger while maintaining the integrity of its immigration process.

If a new temporary refugee classification, as suggested above, is created, some might argue that the United States could apply strict standards to the refugees brought in under the new permanent residence for refugee program and less restrictive standards for those given temporary refuge. Unfortunately, such an approach would probably result in eventual admission of the temporary refugee group as permanent residents. The United States has never been able to keep any group of persons, no matter how ill-suited for immigration, temporarily in this country without eventually making those people permanent residents.<sup>129</sup> Each group soon finds champions for its cause who trumpet the seeming necessity of legalizing the status of those people. The best example in recent times of this tendency is the "Cuban/Haitian entrants," several thousand of whom were criminals.<sup>130</sup> Though few were given asylum and few would have a chance to satisfy the criteria for asylum, President Carter proposed legislation to grant permanent residence to them only a few months after their entry.<sup>131</sup> Although

---

A less sweeping change might be to retain the discretion of the Attorney General to adjust some refugees to permanent residence (under 8 U.S.C. 1159(a)), but to lengthen the required residence to three or five years, provide a periodic review and termination of status provision similar to 8 U.S.C. 1158(b), and only adjust the refugees to permanent residence after an attempt at repatriation. Such a procedure would balance the desire for reducing the permanent burden on the United States, with both the desire to provide refuge and the perpetual unwillingness of the United States to maintain aliens in temporary resident status without grants of permanent residence.

128. 8 U.S.C. 1101(a)(42) (Supp. IV 1980). The refugee definition itself is quite specific about which aliens are to be considered refugees. The scope of the definition is sweeping, encompassing millions of aliens worldwide, yet the attempts to add still more people to the list of eligibles cannot be expected to cease. Congress is not likely to add: "And we really mean it!" to the statute, but oversight hearings and reports could be used to indicate Congressional concern about the problem. Senator Alan Simpson, Chairman of the Senate Immigration Subcommittee, has pledged oversight hearings on the implementation of the Refugee Act in the spring of 1983. 128 CONG. REC. S10355 (daily ed. Aug. 12, 1982).

129. See, e.g., *Refugee Adjustment Acts*, listed in INA AND RELATED LAWS, *supra* note 41, at 154-57.

130. The estimates of the number of criminals present in the Cuban boatlift of the spring of 1980 varies, but a recent estimate of 5,000 in the Wall Street Journal may be reasonable. Nazario, *Cubans Jailed in U.S. Start a Court Fight*, Wall St. J., Jan. 21, 1983, at 25, col. 2. Approximately 1,100 of these Cubans are still being held in the federal penitentiary at Atlanta, Georgia. *Id.*

131. S. 3013, 96th Cong., 2d Sess. (1980). The bill did not become law. 126 CONG. REC. S10825 (Aug. 5, 1980). At least one commentator has opposed this type of legislation: "Granting such status without any required screening will severely undercut the 1980 Act and impede its objective of minimizing the number of aliens choosing the United States as their country of first asylum." Scanlan, *supra* note 70, at 635.



the President's proposal failed, subsequent proposals for legalizing one or another group of illegally-resident aliens have always included similar legalization for the "entrants" as well.<sup>132</sup>

Nevertheless, the statutes governing refugees should mirror the realities of the modern world. Resettlement programs should not be governed by definitions designed for temporary refuge situations; the statute should be amended to conform U.S. programs to the needs of the world and this country.

### C. *Integration of Refugees into an Overall Immigration Policy*

The most important goal for reform of refugee policies should be the integration of refugee policy into a national policy on immigration. Because refugees are given immigrant status,<sup>133</sup> and the impact on the country of refugee admissions is similar to the impact of immigration, refugee policy should be part of an overall immigration policy.

The United States must set a national policy on immigration and enforce it. Since immigration now makes up half of American population growth,<sup>134</sup> and will soon make up *all* of this country's population growth,<sup>135</sup> an immigration policy will be a *de facto* population policy. Refugee admissions have as much or more impact on population as other immigrant admissions. Since refugees often have relatives overseas, refugees can have a substantial impact on demands for future immigrant visas.<sup>136</sup> Thus, in setting a goal for immigration, the United States will, in effect, be setting the country's future level of population. Any immigration policy, therefore, must contain a substantial consideration of population impact and demographics.

#### 1. The Huddleston Amendment

Recently, an attempt to subsume refugee policy within immigration policy was defeated by the U.S. Senate, but only after intense lobbying by the Department of State against the proposal.<sup>137</sup> The measure was an amendment to the Immi-

132. See, e.g., Title III of S. 2222/H.R. 6514, 97th Cong., 2d Sess. (the Immigration Reform and Control Act of 1982). Although this amnesty proposal would have excluded illegal immigrants who arrived in the United States after January 1, 1980, Cuban/Haitian entrants who arrived later in 1980 could also be included.

133. 8 U.S.C. 1150 (Supp. IV 1980). One year after entry, refugees are to be granted permanent residence in the United States.

134. L. BOUVIER, *THE IMPACT OF IMMIGRATION ON U.S. POPULATION SIZE*, at inside front cover (1981).

135. Golliber & Olson, *Immigration and Its Impact on U.S. Population*, Module One QUIC Data — Quick Information for Citizens, § 4, The Environmental Fund, Washington, D.C. (this information is available in a real time variable computer program accessible on IBM microcomputers).

136. An example of this "multiplier effect" of one refugee applying for the admission of relatives can be found in Garcia & White, *Dominican Family Networks and United States Immigration Policy: A Case Study*, 13 INT'L MIGRATION REV. 264, 266-73 (1979).

137. 128 CONG. REC. S10349-10361 (daily ed. Aug. 12, 1982).

gration Reform and Control Act of 1982.<sup>138</sup> This amendment by Senator Walter D. Huddleston would have included refugees within a flexible ceiling on all immigrants.<sup>139</sup> The effect of the amendment would have been to reduce other immigrant admissions by the number of refugees admitted in the previous fiscal year.

Opponents of the measure made two attacks on the Huddleston amendment. First, opponents charged that it would pit refugees against intending immigrants and that, in any such battle, refugees would lose to well-entrenched immigrant lobbies.<sup>140</sup> Second, opponents asserted that refugees are not immigrants and should be treated differently.<sup>141</sup> Neither of these allegations can withstand scrutiny.

The Huddleston amendment did not alter the refugee consultation (setting the admission levels) or the refugee admission processes. Refugees would receive special treatment, not available to most other immigrants. In fact, although a ceiling of 425,000 would be set on total admissions in a fiscal year, *any* number of refugees could be admitted, so refugees could not lose chances for admission to other groups of immigrants. Nor would the immediate families of United States citizens have to compete with refugees, since their admissions would not be limited either. Some other groups of immigrants would have to wait longer for entry if there were large numbers of refugees, but, under most circumstances, the number of visas available to those immigrants would be close to the 270,000 per year available today.<sup>142</sup>

---

138. S.2222/H.R. 6514, 97th Cong., 2d Sess., passed by the U.S. Senate on Aug. 17, 1982, 128 CONG. REC. S10618-10619 (daily ed. Aug. 17, 1982).

139. Unprinted Amendment #1227, S.2222, 97th Cong., 2d Sess., 128 CONG. REC. S10349 (daily ed. Aug. 12, 1982). The Simpson/Mazzoli bill contained a complex "ceiling" provision which would have limited non-refugee immigrant admissions to the United States to a variable amount near 425,000 per year. The number of immigrant visas available to "immediate relatives" of United States citizens (defined in a U.S.C. 1151 as children and spouses of all citizens, and parents of citizens over 21 years old) and certain other small groups of immigrants, (hereinafter referred to immediate relatives) is not limited in any year. The number of admissions of immigrants other than immediate relatives would be limited to 425,000 less the number of visas used by immediate relatives during the year before. For example, if in 1984, 125,000 immediate relatives are admitted, in 1985, only 300,000 other immigrant visas will be available. Since immediate relatives are not limited, any number of immediate relatives can be admitted in 1985.

Senator Walter D. Huddleston introduced an amendment which would have added refugees to the group of immigrants who are not limited, but whose visas are subtracted from those available to other immigrants. The number of refugees admitted in the prior year would reduce the number of immigrant visas available to non-immediate relatives. There would be no limit on refugee admissions other than that set by the refugee consultation process (under 8 U.S.C. 1157): number of refugees could enter in one year, so long as that number is set in consultation with Congress. The number of refugees admitted would be balanced by reduced levels of other immigration.

140. *See, e.g.*, 128 CONG. REC. S10356-10358 (daily ed. Aug. 12, 1982) (remarks of Sen. Kennedy).

141. *Id.*

142. 8 U.S.C. 1151(a) (1980). Under current law, the admission of immediate relatives and refugees does not reduce the 270,000 visas available.

Regarding the second attack on this amendment, section 209 of the INA<sup>143</sup> provides that refugees become immigrants after one year. While opponents said that different rationales brought refugees and immigrants to the United States (humanitarianism on the one hand, and a desire to reunify families on the other),<sup>144</sup> in fact, the legal significance of a refugee entry, after one year, is exactly the same as the entry of an immigrant.

Nevertheless, the Huddleston amendment generated significant controversy. Media attention was generally negative and often distorted;<sup>145</sup> the refugee resettlement organizations which depended on a refugee flow for millions of dollars of federal funds lobbied intensely against the measure.<sup>146</sup> And in a final blow, the Reagan Administration, confronted with pre-voting indications of a close vote, threatened to veto the entire bill if the Huddleston amendment passed.<sup>147</sup> The amendment was defeated.<sup>148</sup>

Soon thereafter, a related amendment by Senator Dale Bumpers of Arkansas to limit refugee admissions nearly passed.<sup>149</sup> The Bumpers amendment concerning refugees came the closest to passing of any contested amendment to the bill.<sup>150</sup> The near passage of the Bumpers amendment on refugees and the intense lobbying necessary to turn back the Huddleston amendment demonstrated how strong were the feelings about the lack of control over refugees after the Refugee Act of 1980. As a result, Senator Alan Simpson, the Chairman of the Senate Immigration Subcommittee, has pledged Congressional hearings in the 98th Congress on problems in the refugee area.<sup>151</sup>

Simpson's promise was consistent with a decision of the Chairman of the House Immigration Subcommittee, Congressman Romano Mazzoli of Kentucky. Mazzoli's Subcommittee refused to reauthorize portions of the Refugee Act

143. 8 U.S.C. 1159 (Supp. IV 1980).

144. See, e.g., 128 CONG. REC. S10358 (daily ed. Aug. 12, 1982) (letter from Roger P. Winter to Sen. Kennedy).

145. See, e.g., *Turning Mean on Immigration*, N.Y. Times, Aug. 9, 1982, at A14, col. 1.

146. Letters circulated by the refugee resettlement industry appear at 128 CONG. REC. S10357-10358 (daily ed. Aug. 12, 1982). See also notes 80-83 *supra*.

147. The characterization of the Huddleston amendment as a "killer amendment," *i.e.*, one whose passage would doom the host bill, was made by representatives of the Administration during debate on the Senate floor to one of the authors and to every available senator.

148. Roll call vote #317 Leg., 128 CONG. REC. S10361 (daily ed. Aug. 12, 1982).

149. Unprinted Amendment #1235, 128 CONG. REC. S10447-10453 (daily ed. Aug. 13, 1982).

150. The closeness of the vote on the Bumpers amendment could be attributed to several factors, the most important of which was the unexpected introduction of the amendment which prevented the opposition from mobilizing their forces as they had with the Huddleston amendment (Senator Huddleston had served notice of his intention to introduce his amendment several weeks before the bill was brought to the Senate floor).

Several amendments passed over the objection of the Administration (though no other amendment carried the "killer amendment" label given to Senator Huddleston's) and one amendment, by Senator S. I. Hayakawa to declare English the official language of the United States, passed over the objections of Senator Simpson. 128 CONG. REC. S10482 (daily ed. Aug. 13, 1982).

151. 128 CONG. REC. S10355 (daily ed. Aug. 12, 1982).

which expired at the end of fiscal year 1982 for the full three-year period requested by the Administration. Instead, the Subcommittee approved a one-year reauthorization to insure that the Congress would have a chance to thoroughly examine many of the problems associated with the refugee program, including the distortions of the refugee definition.<sup>152</sup>

Unfortunately, there seems to be no corresponding pledge for considering an overall immigration policy.<sup>153</sup> To deal piecemeal with refugee problems and immigration concerns will simply cause a continuation of past problems. A better approach would be to prepare a national immigration policy, including population and refugee concerns, and submit it to Congress for approval.<sup>154</sup>

#### IV. CONCLUSION

This Article has illustrated the need for reform in the refugee policies of the United States. The current refugee admissions program is in disarray, following the enactment of a monumental piece of legislation, the Refugee Act of 1980. The effects of the new law are still reverberating in the system, causing confusion in the courts, the Executive branch and Congress, as well as in the minds of commentators and refugee program administrators. This confusion does not serve the interests of potential refugees or the American people. Those whose interests it serves are those in the business of resettling refugees or aliens who have no other chance to immigrate to the United States.

The necessary reforms can be started without additional legislation. Strict adherence to time-proven policies and the terms of the new statutes will solve some problems, as will international acceptance of sharing of the burdens of refugee crisis resolution. The real solutions, however, must come from new

---

152. SENATE COMM. ON THE JUDICIARY, REFUGEE ASSISTANCE AMENDMENTS OF 1982, S. REP. NO. 638, 97th Cong., 2d Sess. 4-5 (1982).

153. The Simpson/Mazzoli bill, the Immigration Reform and Control Act of 1982 (S.2222/H.R. 7357, 97th Cong., 2d Sess.) was an attempt to answer many immigration problems, but it did not deal with refugee problems. The Huddleston and Bumpers amendments (*see* notes 139, 149 *supra*), attempts to include refugee material in the bill, were defeated by the Senate. The House failed to fully consider the bill, and the House leadership withdrew it from consideration in the dying house of the post-election "lame duck" session of the 97th Congress. 128 CONG. REC. H10354 (daily ed. Dec. 18, 1982).

154. At least one other country uses a system such as the one proposed here. In Canada, the Ministry of Immigration and Labour prepares a multi-year projection of immigration needs and plans and submits the proposal to Parliament for approval. The Ministry examines the labor needs of the country, the domestic and foreign policy programs of the government, the international commitments (*e.g.*, to take refugees), and several related areas, in order to form a recommendation about what Canadian immigration levels should be for the next five years. Although the recommendations submitted to Parliament are generally short-term, the examination and projection of needs are mid- and long-term as well. Refugee admissions are included as an integral part of Canadian immigration policy, and the Parliament can debate and adjust refugee admission levels along with other immigration policies. This kind of forward-looking system could also work for the United States. *See generally* RECRUITMENT AND SELECTION BRANCH, CANADA EMPLOYMENT AND IMMIGRATION COMMISSION, THE IMMIGRATION LEVELS PLANNING PROCESS (1982).

legislative initiatives, including descriptions of new temporary refuge systems and careful monitoring of those who benefit from continuing flows of refugees to the United States.

The most long-lasting and effective reform is the integration of refugee policy with other parts of U.S. immigration policy. Only when the United States devises, and effectively implements, an overall immigration policy, including long-range planning for refugee admissions and resettlement, will this country have a chance for real progress in solving its refugee and immigration crises.