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Section 243(h) of the Immigration and Nationality Act of 1952 as Amended by the Refugee Act of 1980: A Prognosis and a Proposal

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NOTES

SECTION 243(h) OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 AS AMENDED BY THE REFUGEE ACT OF 1980: A PROGNOSIS AND A PROPOSAL

In theory, the United States will not deport aliens to states in which they would be subject to political persecution. Until 1980, section 243(h) of the Immigration and Nationality Act[1] empowered, but did not expressly require, the Attorney General[2] to withhold deportation of aliens who would be persecuted in the destination state. The Refugee Act of 1980[3] amended section 243(h)[4] to eliminate this form of executive discretion. This amendment, however, will provide little solace to political refugees.

The superseded section 243(h) failed to safeguard aliens adequately because it vested the executive with a second form of discretion: discretion in determining the likelihood that an alien will be persecuted. Neither the language of the amendment nor its legislative history reveal any congressional intent to reduce or to eliminate this discretion. The amendment's failure to change the procedure by which aliens petition for section 243(h) relief prevents it from protecting aliens sufficiently.

This Note suggests restructuring this procedure. After outlining the deportation process, it discusses revised section 243(h) in light of its predecessor and inquires whether the 1980 amendment will increase the accessi-

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1. Immigration and Nationality Act of 1952, § 243(h), 8 U.S.C. § 1253(h) (1976) (amended 1980). Prior to its amendment in 1980, § 243(h) provided:

> The Attorney General *is authorized* to withhold deportation of any alien within the United States to any country in which *in his opinion* the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

(emphasis added).

2. The Attorney General has delegated his authority under the 1952 Act to the Commissioner of the Immigration and Naturalization Service (INS). 8 C.F.R. § 2.1 (1980). References in this Note to the Attorney General's discretion under § 243(h) include this delegated discretion.

3. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (to be codified at 8 U.S.C. §§ 1101-1523).

4. *Id.* § 203(e) (to be codified at 8 U.S.C. § 1253(h)).

bility of section 243(h) relief. Analogizing to the extradition process, this Note then proposes a structural alteration in the procedure for claiming section 243(h) relief.

I

THE DEPORTATION PROCESS

The sole object of deportation is the removal of undesired aliens.[5] U.S. government officials are locating increasing numbers of deportable aliens[6] and holding them for formal proceedings.[7] The volume of routine cases necessitates a streamlined administrative process "largely immune from judicial control."[8] The process begins when an alien is served with an order to appear before an immigration judge[9] and show cause why he should not be deported.[10] The immigration judge conducts a hearing and determines whether the Immigration and Naturalization Service (INS) has established deportability by "clear, unequivocal and convincing evidence."[11] If the immigration judge determines that an alien is deportable, the alien may appeal the decision to the Board of Immigration Appeals (Board) within ten days.[12] This appeal normally exhausts the alien's administrative remedies.[13]

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5. I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 76 (1971).

6. The general classes of deportable aliens are listed in Immigration and Nationality Act of 1952, § 241, 8 U.S.C. § 1251 (1976). The Act establishes approximately 700 grounds for deportation from the United States. *Dep'ts of State, Justice and Commerce Appropriations for 1954: Hearings on H.R. 4974 Before the Subcomm. of the Senate Comm. on Appropriations,* 83d Cong., 1st Sess. 250 (1953) (statement of A.R. Mackey).

7. In the ten years from 1967 to 1977, the number of cases referred to the forty immigration judges for formal hearings more than tripled, to 56,093. [1977] INS ANN. REP. 31. Ninety-two percent of the over one million deportable aliens located by INS officers in 1977 were Mexican nationals. *Id.* at 14.

8. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953). The deportation procedure is outlined in Immigration and Nationality Act of 1952, § 242, 8 U.S.C. § 1252 (1976), and 8 C.F.R. § 242 (1980). *See also* text accompanying notes 9-17 *infra.*

9. "Immigration judge" is interchangeable with the older term "special inquiry officer." 8 C.F.R. § 1.1(*l*) (1980). Immigration judges are not judicial officers; they are within the purview of the Office of the Commissioner of the INS. They are empowered to determine deportability and may order temporary withholding of deportation under § 243(h) of the 1952 Act. 8 C.F.R. § 242.8(a) (1980).

10. 8 C.F.R. § 242.1(b) (1980).

11. 8 C.F.R. § 242.14(a) (1980). This criterion describes the burden of proof upon the INS rather than the scope of judicial review. The Court in Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 285 (1966), found that this burden, although less stringent than the "reasonable doubt" standard used in criminal cases, is appropriate because of the "drastic deprivations" that may follow deportation.

12. 8 C.F.R. § 242.21 (1980). The Attorney General appoints the Board and delegates his authority under the immigration laws to it. 8 C.F.R. § 3.1(a)(1) (1980). A former chairman of the Board contends that since the role of the Board is quasi-judicial and not prosecutorial, the Board should be given statutory standing. Roberts, *The Board of Immigration Appeals: A Critical Appraisal,* 15 SAN DIEGO L. REV. 29, 44 (1977-78).

13. The Attorney General may review Board decisions if he wishes to do so or if requested

An alien may seek judicial review of "final orders of deportation" in a court of appeals.[14] A reviewing court must treat the administrative agency's findings of fact as conclusive "if supported by reasonable, substantial, and probative evidence on the record considered as a whole."[15]

A deportable alien has one opportunity to designate the destination state.[16] If the designated state refuses to accept him, or if the Attorney General concludes that deportation to the designated state would be prejudicial to the interests of the United States, the Attorney General has discretion to choose the destination state.[17]

In recognition of the effectiveness of deportation, states have come to prefer it to extradition[18] as a vehicle to return fugitives to competent jurisdictions for trial.[19] Extradition is far more cumbersome than deportation.[20] Extradition is usually available only if permitted by a treaty between the

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to do so by the Board Chairman, the majority of the Board, or the Commissioner of the INS. The alien has no right of appeal to the Attorney General. 8 C.F.R. § 3.1(h) (1980).

14. Immigration and Nationality Act of 1952, § 106(a), 8 U.S.C. § 1105a(a) (1976). An order by an immigration judge is final unless appealed or certified to the Board. 8 C.F.R. § 242.20 (1980). Board decisions are final unless reviewed by the Attorney General. 8 C.F.R. § 3.1(d)(2) (1980).

Section 106(a) was added to the Immigration and Nationality Act in 1961 to make the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1976), inapplicable to deportation proceedings. Congress sought to thwart aliens' efforts to delay deportation by successive dilatory appeals through the federal courts. Section 106(a) eliminated suit in district courts as the initial step in the process of judicial review. *See* Foti v. Immigration & Naturalization Serv., 375 U.S. 217, 224-26 (1963).

Uncertainty in the courts as to which claims nullifying a deportation order are subject to exclusive jurisdiction of the courts of appeals has generated confusion as to the proper forum for an appeal. *See generally* Note, *Jurisdiction to Review Prior Orders and Underlying Statutes in Deportation Appeals,* 65 VA. L. REV. 403 (1979).

15. Immigration and Nationality Act of 1952, § 106(a)(4), 8 U.S.C. § 1105a(a)(4) (1976). This limited scope of judicial review is to be distinguished from the burden of proof on the INS at the administrative level. *See* note 11 *supra.*

16. Immigration and Nationality Act of 1952, § 243(a), 8 U.S.C. § 1253(a) (1976). Giving aliens an opportunity to designate the country to which they wish to be deported reflects the limited aim of deportation: ousting unwanted aliens.

17. *Id.* The Attorney General's choice of destination is ultimately circumscribed by the necessity of finding a country willing to accept the alien. International law imposes an obligation to accept a person only upon an individual's national state. I. SHEARER, *supra* note 5, at 78.

18. The extradition process is discussed in text accompanying notes 78-88 *infra.*

19. Commentators have noted this expansion of the use of deportation proceedings at the expense of more formal extradition proceedings. *See, e.g.,* M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 184 (1974); I. SHEARER, *supra* note 5, at 87, 89; Evans, *The Apprehension and Prosecution of Offenders: Some Current Problems,* in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 493-94, 507 (A. Evans & J. Murphy eds. 1978).

20. *See generally* I. SHEARER, *supra* note 5, at 89; Evans, *supra* note 19, at 495-96.

requested and requesting states,[21] and many extradition treaties are obsolete.[22] Success may be jeopardized by political and economic factors.[23] Most importantly, however, much of extradition's inconvenience stems from the duty of the requested state to protect the alien's rights.[24]

Deportation that results in placing an alien in the custody of a state anxious to prosecute him is termed de facto extradition.[25] Since the accused's political views may affect the outcome of a criminal trial, de facto extradition poses a grave threat to the political offender. De facto extradition, however, does not bar deportation from the United States.[26] Thus, if political asylum is denied,[27] the only potential protection for the deportable

21. *See* note 79 *infra.*

22. See, for example, Evans, *supra* note 19, at 508-09, for recommendations on updating extradition treaties to control more effectively the recent international terrorist problem.

23. *See id.* at 495-96.

24. An extraditee has the right, defined by extradition treaty, not to be extradited for a political offense. *See, e.g.,* Extradition Treaty, Dec. 3, 1971, United States-Canada, art. 4(1)(iii), 27 U.S.T. 983, T.I.A.S. No. 8237; Extradition Treaty, July 12, 1930, United States-Germany, art. IV, 47 Stat. 1862, T.S. No. 836, *quoted in* note 81 *infra.* The political offense exception is discussed in text accompanying notes 80-83 *infra.*

Additionally, an extraditee has the right to be tried only for the offenses specified in the extradition request. This so-called specialty doctrine is discussed in Note, *Toward a More Principled Approach to the Principle of Specialty,* 12 CORNELL INT'L L.J. 309 (1979). Extraditees are further protected by the doctrine of double criminality, which forbids extradition unless the offense is a crime in the requested as well as the requesting state. *See* M. BASSIOUNI, *supra* note 19, at 329-52. Safeguards built into the structure of the U.S. extradition process are discussed in text accompanying notes 84-88 *infra.*

25. Shearer distinguishes "de facto extradition" from "disguised extradition." The former term connotes a genuine coincidence between the result of deportation and criminal prosecution, while the latter term is defined as a deportation "used with the prime motive of extradition." I. SHEARER, *supra* note 5, at 78.

26. In United States *ex rel.* Giletti v. Comm'r of Immigration, 35 F.2d 687 (2d Cir. 1929), an Italian anti-fascist became subject to deportation after shooting a fascist in a political brawl. Affirming the deportation order, Judge L. Hand wrote:

> The record does show that by his conduct here he has apparently exposed himself to criminal prosecution in Italy, for which he is subject to an imprisonment of between 5 and 15 years. His offenses are apparently political, for which he could not be extradited. True, this does not prevent us from ridding ourselves of his presence for crimes committed here. . . .

Id. at 689. *See also* Evans, *Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice,* 40 BRIT. Y.B. INT'L L. 77, 85 & n.5 (1964).

27. A key feature of the Refugee Act of 1980 is its establishment of an asylum provision in U.S. immigration law. A new § 208 of the Immigration and Nationality Act authorizes the Attorney General to grant asylum in his discretion if he determines the alien is a refugee as defined in § 101(a)(42)(A) of the Refugee Act. Refugee Act of 1980, Pub. L. No. 96-212, § 208, 94 Stat. 102 (to be codified at 8 U.S.C. § 1158); *id.* § 101(a)(42)(A) (to be codified at 8 U.S.C. § 1101(a)(42)). The new asylum provision gives aliens an opportunity to have their asylum claims considered outside a deportation or exclusion hearing, provided the order to show cause has not been issued. Section 243(h) remains an essential provision for aliens who fail to claim asylum before deportation proceedings are initiated, or whose asylum claims are denied.

alien who fears political persecution in the destination state is section 243(h).

II

SECTION 243(h)

Congress recently revised section 243(h) to prohibit the Attorney General from deporting most aliens who qualify as refugees under article 1 of the United Nations Convention Relating to the Status of Refugees.[28] Revised section 243(h) reads:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[29]

The revision was "necessary so that U.S. statutory law clearly reflects our

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28. Convention Relating to the Status of Refugees, *done* July 28, 1951, 19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 150 [hereinafter cited as Convention on Refugees]. By acceding to the Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, the United States obligated itself to the bulk of the Convention. Article 33 of the Convention provides:

> 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 [for] 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.

19 U.S.T. at 6276, T.I.A.S. No. 6577 at 54, 189 U.N.T.S. at 176.

The Convention defines "refugee" in Article 1, § a(2) as any person who

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

19 U.S.T. at 6261, T.I.A.S. No. 6577 at 39, 189 U.N.T.S. at 152. The drafters of the Refugee Act of 1980 adopted the Convention's definition of refugee in § 101(a)(42) of the Act in order to formalize existing practices and reflect the United States' humanitarian concern for refugees. H. REP. No. 608, 96th Cong., 1st Sess. 9-10 (1979).

29. Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102 (to be codified at 8 U.S.C. § 1253(h)). The statute provides further:

> 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 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;

legal obligations under international agreements."[30] Since the legislators believed that the United States met its international obligations under the prior law,[31] however, they apparently envisioned few changes in the application of the provision.[32]

A. EXECUTIVE DISCRETION

Prior section 243(h)[33] granted the Attorney General two distinct types of discretion.[34] First, it authorized—but did not require—him to withhold deportation of aliens in certain circumstances.[35] Second, it allowed the

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(C) there are serious reasons for considering that the alien has committed a serious non-political 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.

Id.

30. H. REP. No. 608, 96th Cong., 1st Sess. 18 (1979).

31. "Although [§ 243(h)] has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, *for the sake of clarity,* to conform the language of that section to the Convention." *Id.* (emphasis added).

32. Congress intended, however, to broaden the class of aliens that may make § 243(h) claims. By removing the language "within the United States," *see* note 1 *supra,* Congress made § 243(h) relief available to aliens in exclusion as well as deportation proceedings. S. REP. No. 256, 96th Cong., 1st Sess. 17, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 515, 531.

33. The language in § 243(h) creating the Attorney General's discretion was added in 1952. Immigration and Nationality Act of 1952, ch. 477, tit. II, ch. 5, § 243(h), 66 Stat. 163 (current version at 94 Stat. 102 (1980) (to be codified at 8 U.S.C. § 1253(h))). The precursor to § 243(h) provided: "No alien *shall* be deported under any provisions of this Act to any country in which the Attorney General *shall find* that such alien would be subjected to physical persecution." Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987 (current version at 94 Stat. 102 (1980) (to be codified at 8 U.S.C. § 1253(h))) (emphasis added). Most courts construed § 23 to require the Attorney General to find as fact that an alien raising a persecution claim would not be subject to persecution in the destination state before allowing him to be sent there. *See* United States *ex rel.* Harisiades v. Shaughnessy, 187 F.2d 137, 142 (2d Cir. 1951), *aff'd,* 342 U.S. 580 (1952); United States *ex rel.* Watts v. Shaughnessy, 107 F. Supp. 613, 615 (S.D.N.Y. 1952). *But see* United States *ex rel.* Dolenz v. Shaughnessy, 107 F. Supp. 611 (S.D.N.Y.), *aff'd,* 200 F.2d 288 (2d Cir. 1952), *cert. denied,* 345 U.S. 928 (1953). The statute's "mandatory inflection" allowed the Attorney General no discretion to deport aliens he found would be subject to persecution. Sang Ryup Park v. Barber, 107 F. Supp. 605, 606-07 (N.D. Cal. 1952).

34. Support for the idea of distinguishing between discretion in determining the likelihood of persecution and discretion to grant § 243(h) relief can be found in United States *ex rel.* Kordic v. Esperdy, 386 F.2d 232, 239 (2d Cir. 1967), *cert. denied,* 392 U.S. 935 (1968), *rehearing denied,* 395 U.S. 941 (1969).

35. Prior to the 1980 revision of § 243(h), courts and commentators considered the effect of article 33 of the Convention on Refugees, *see* note 28 *supra,* on this discretion. The Board of Immigration Appeals ruled that the mandatory language of article 33 did not limit or supersede § 243(h). *In re* Dunar, 14 I. & N. Dec. 310, 323 (1973). The fifth circuit has ruled that "accession to the [Convention] . . . was neither intended to nor had the effect of substantively altering the statutory immigration scheme." Pierre v. United States, 547 F.2d 1281, 1288 (5th Cir.), *vacated,* 434 U.S. 962 (1977) (remanded for consideration of mootness issue). *See also*

Attorney General to determine whether such circumstances—potential subjection to racial, religious, or political persecution in the destination state—existed in a given case.[36]

The amendment to section 243(h) removes the first type of discretion by replacing the phrase "[t]he Attorney General is authorized to withhold deportation" with "[t]he Attorney General shall not deport."[37] This change should have little impact since this form of discretion was never relied on to deny relief.[38] Neither the 1980 statute nor its legislative history, however, reflect any congressional intent to limit the Attorney General's exercise of the second type of discretion in evaluating the consequences of deportation for each alien.[39]

Revised section 243(h) does not expressly confer discretion,[40] but some measure of executive discretion inheres in the procedure that aliens follow

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Coriolan v. Immigration & Naturalization Serv., 559 F.2d 993, 997 (5th Cir. 1977) (Attorney General would refuse to withhold deportation of alien who demonstrates probability of persecution only in the exceptional situations mentioned in article 33(2)). *But see* Note, *Immigration Law and the Refugee—A Recommendation to Harmonize the Statutes with the Treaties,* 6 CAL. W. INT'L L.J. 129, 152 (1975-76).

36. [The text of § 243(h)] unequivocably dictates that the determination whether an alien will be subject to persecution is committed to the Executive's sound discretion. This express congressional mandate contemplates that the Executive shall have discretion to determine not only whether an alien, if deported, would be subjected to certain acts, but also whether those acts constitute persecution.

Moghanian v. United States Dep't of Justice, 577 F.2d 141, 143 (9th Cir. 1978) (concurring opinion). The concurring opinion called the existence of this latter discretion the "unstated premise" of the Ninth Circuit's § 243(h) decisions. *Id.*

37. *Compare* the revised version of § 243(h), *quoted in* text accompanying note 29 *supra, with* prior § 243(h), *quoted in* note 1 *supra.*

38. While the section 243(h) cases . . . speak in terms of the Attorney General's discretion, we know of none in which a finding has been made that the alien has established the clear probability that he will be persecuted and in which section 243(h) withholding has nevertheless been denied in the exercise of administrative discretion.

In re Dunar, 14 I. & N. Dec. 310, 322 (1973).

39. In a television interview, Congresswoman Elizabeth Holtzman, co-sponsor of the legislation, stressed the importance of removing the first form of discretion, but did not acknowledge the second:

[In addition to establishing an asylum policy], [t]he other important thing that the bill does, hich [sic] I think brings us into line with our obligations under the U.N. protocol on refugees, is that it prohibits the Attorney General from . . . deporting somebody who has sought political asylum back to a country where that person will be persecuted. Right now that is wholly discretionary.

The MacNeil/Lehrer Report, Library No. 1074, Show No. 5094, transcript at 8 (November 8, 1979).

40. *Compare* § 243(h) *with, e.g.,* Immigration and Nationality Act of 1952, § 242(g), 8 U.S.C. § 1252(g) (1976) (allowing Attorney General discretion to grant deportable aliens voluntary departure in lieu of deportation); *id.* § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976), *as amended by* Refugee Act of 1980, Pub. L. No. 96-212, § 203(f), 94 Stat. 102 (to be codified at 8 U.S.C. § 1182(d)(5)) (allowing Attorney General qualified discretion to parole refugee aliens into the United States).

in petitioning for section 243(h) relief.[41] Although the availability of relief hinges on a factual determination that deportation would endanger the alien, administrative personnel make no formal findings of fact.[42] Moreover, in reaching a decision, they may consider confidential information that is unavailable to both reviewing courts and the alien.[43]

Although courts have no explicit congressional mandate to do so, they could restrict administrative discretion by interpreting the revised section 243(h) to require the Attorney General to make formal findings of fact in each case.

B. THE ALIEN'S BURDEN

At the administrative level, the burden of proving likely persecution rests on the alien.[44] Courts articulate the severity of this burden differently,[45] and it appears to vary depending on relations between the United

41. Finding discretion from mandatory terms in a statute is hardly unprecedented. For instance, in Montgomery v. Ffrench, 299 F.2d 730 (8th Cir. 1962), the court considered a claim that a Korean national was eligible to enter the United States as an "eligible orphan." The applicable statute, like revised § 243(h), dictated that the Attorney General grant relief upon making a certain factual determination: " '. . . After an investigation of the facts in each case, the Attorney General *shall,* if he *determines* the facts stated in the petition are true . . . approve the petition. . . .' " 299 F.2d at 735 (quoting 8 U.S.C. § 1205(b) (repealed 1961)) (emphasis added). The court held that the factual determination was committed to the discretion of the Attorney General, and therefore was not subject to judicial review. *Id. See also* 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 8.14, at 8-92 & n.2 (1980).

42. Under the predecessor of § 243(h), the Attorney General had to make a finding of likely persecution. *See* note 33 *supra.* The finding requirement—and the need for attendant procedural formalities—was eliminated by the 1952 Act. *See, e.g.,* United States *ex rel.* Dolenz v. Shaughnessy, 206 F.2d 392, 394-95 (2d Cir. 1953). Immigration judges normally recite factors influencing their determinations, but conclusory and imprecise statements often hamper judicial review. *See, e.g.,* Coriolan v. Immigration & Naturalization Serv., 559 F.2d 993, 997-1002 (5th Cir. 1977).

43. *See* notes 60-63 *infra* and accompanying text.

44. 8 C.F.R. § 242.17(c) (1980).

45. In Kashani v. Immigration & Naturalization Serv., 547 F.2d 376, 379 (7th Cir. 1977), the court required that an alien demonstrate "a 'clear probability' that he will be persecuted if he is deported." (quoting Lena v. Immigration & Naturalization Serv., 379 F.2d 536, 538 (7th Cir. 1967)).

A second articulation of the alien's burden requires a "well-founded fear" of persecution. *See, e.g.,* Pereira-Diaz v. Immigration & Naturalization Serv., 551 F.2d 1149, 1154 (9th Cir. 1977) (alien returned to Portugal despite fear of persecution by Communists).

The *Kashani* court recognized the similarity of the two standards. "We hold that an alien claiming a 'well-founded fear of persecution' must either demonstrate that he actually has been a victim of persecution or that his fear is more than a matter of his own conjecture. . . . Thus, the 'well-founded fear' standard . . . and the 'clear probability' standard . . . will in practice converge." 547 F.2d at 379.

See generally Note, *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration and Nationality Act of 1952,* 1976 WASH. U.L.Q. 59, 97-100.

States and the destination state.[46] Indeed, the congressional hearings on section 243(h) produced testimony that claims for stays of deportation are handled on a "most political basis."[47]

Precisely what constituted "persecution" under prior law was unclear.[48] The question of whether the alien had to prove a motive behind the feared persecution constituted a further ambiguity. Although the statute required "persecution on account of race, religion or political opinion,"[49] at least one court suggested that establishing a motive for likely persecution was not crucial to attaining relief.[50]

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46. *See* EVANS, *supra* note 19, at 499, 500; Note, *supra* note 45, at 112-13; 13 TEX. INT'L L.J. 327, 338 (1977-78). The burden seems more onerous when the potential destination state is a military ally (*e.g.,* Philippines), a major trading partner (*e.g.,* until 1979, Iran), or a country from which many people are fleeing for economic reasons (*e.g.,* Haiti). The burden seems least onerous if the alien has fled a Communist nation (*e.g.,* Cuba). *See* Note, *supra* note 45, at 113; 13 TEX. INT'L L.J., *supra,* at 338 n.87. If the potential destination state is an ally and has a democratic government, the alien's burden of persuasion may be insurmountable. *See, e.g.,* MacCaud v. Immigration & Naturalization Serv., 500 F.2d 355, 359 (2d Cir. 1974) (deportation to Canada upheld despite alien's claim of potential persecution for his work with French Canadian separatists).

47. *See Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary,* 96th Cong., 1st Sess. 191 (1979) (statement of David Carliner, general counsel of the American Civil Liberties Union) (contrasting treatment of aliens from Haiti and Cuba).

48. In *In re* Dunar, 14 I. & N. Dec. 310 (1973), the Board adopted the threat to life or freedom formulation from article 33 of the Convention on Refugees, *see* note 28 *supra,* as the test for persecution. The Ninth Circuit defined the term differently: "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive." Kovac v. Immigration & Naturalization Serv., 407 F.2d 102, 107 (9th Cir. 1969). In Moghanian v. United States Dep't of Justice, 577 F.2d 141 (9th Cir. 1978), the INS urged the Ninth Circuit to adopt the *Dunar* test. The court rejected the invitation, preferring "the more lenient definition of 'persecution' found in *Kovac.*" *Id.* at 142 (dictum).

49. From 1952 through 1965, § 243(h) stipulated only that an alien must demonstrate "physical persecution." Immigration and Nationality Act of 1952, ch. 477, tit. II, ch. 5, § 243(h), 66 Stat. 163 (amended 1980). In 1965, Congress deleted "physical persecution" and substituted "persecution on account of race, religion, or political opinion." Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911 (amended 1980). Of the 1965 amendment, the *Kovac* court said, "[t]he amended statute shifts the emphasis from the consequences of the oppressive conduct to the motivation behind it." 407 F.2d at 107.

50. In Paul v. United States Immigration & Naturalization Serv., 521 F.2d 194, 196-97 (5th Cir. 1975), the Fifth Circuit ruled that "[i]n order to qualify for discretionary withholding of deportation, the applicants must prove their departure . . . was politically motivated and that on return they face persecution for reasons political in nature."

Two years later, however, in Coriolan v. Immigration & Naturalization Serv., 559 F.2d 993, 1004 (5th Cir. 1977), the court cast doubt on the continued validity of its earlier assertion in *Paul:* "We cannot believe . . . that Congress would have refused sanctuary to people whose misfortune it was to be the victims of a government which did not require political activity or opinion to trigger its oppression." *See also* 13 TEX. INT'L L.J., *supra* note 46, at 334-38.

In a recent decision, however, the Board of Immigration Appeals scrutinized the political background of a woman who feared harm from the Haitian secret police. She did not represent herself as a political activist, but claimed to have fled Haiti because the secret police tortured her uncle and jailed her father. *In re* Williams, I. & N. Interim Dec. No. 2695, at 3-5

The revised statute does not clarify the alien's burden of persuasion. The showing required under the amended statute, that one's "life or freedom would be threatened" by deportation, appears more onerous than proving likely "persecution."[51] The language of the Convention[52] from which the amendment derives, however, suggests a reduction of the alien's burden of persuasion. Article 33 of the Convention forbids the return of a refugee to territory where his life or freedom would be threatened; the Convention defines "refugee" as a person with a "well-founded fear of being persecuted."[53] Thus, an alien with a subjective fear of persecution is arguably entitled to section 243(h) relief.[54]

Congress arguably reaffirmed the alien's burden of showing a motive behind the threat to life or freedom by expanding the list of motives to include "nationality" and "membership in a particular social group."[55] More likely, however, Congress simply redrafted section 243(h) to conform it to the Convention on Refugees without considering the motive issue.[56]

Regardless of the severity of the burden of proof, aliens face difficulties in amassing evidence of a threat to life or freedom. Although documents showing generally repressive conditions may be material,[57] an alien's failure to produce persuasive evidence that he will be singled out for persecution is fatal to his claim.[58] As a potential refugee living far from his

(March 30, 1979). The Board dismissed the appeal, indicating that, at the Board level at least, motive remains an element of an alien's claim. *Id.* at 6.

51. When the INS proferred the threat to life or freedom formulation as a definition of § 243(h) "persecution," the Ninth Circuit refused to accept what it viewed as an excessively rigorous standard. *See* note 48 *supra.*

52. *See* Convention on Refugees, *supra* note 28, art. 33.

53. *Id.* art. 1.

54. The Board, however, has held that under articles 1 and 33 of the Convention, the likelihood of persecution, not the alien's state of mind, is the crucial issue. "Clearly, the requirement that the fear be 'well-founded' rules out an apprehension which is purely subjective . . . . Some sort of a showing must be made and this can ordinarily be done only by objective evidence." *In re* Dunar, 14 I. & N. Dec. 310, 319 (1973). *See also* Kashani v. Immigration & Naturalization Serv., 547 F.2d 376, 379-80 (7th Cir. 1977), discussed in note 45 *supra.*

55. For text of the amendment, see text accompanying note 29 *supra.*

56. *See* notes 28-32 *supra.*

57. In Coriolan v. Immigration & Naturalization Serv., 559 F.2d 993 (5th Cir. 1977), the court remanded the case of Haitian refugees for consideration of a 1976 Amnesty International Report released after the Board affirmed their deportation order. But in Fleurinor v. Immigration & Naturalization Serv., 585 F.2d 129 (5th Cir. 1978), the court refused to remand a later case for consideration of the same report. "[T]he *Coriolan* decision does not establish the universal materiality of this report . . . . [W]e do not see how the Report adds anything to Fleurinor's claim that *he* will be subject to persecution upon his return to Haiti." *Id.* at 133 (emphasis in original). The Board currently considers the 1976 Report dated. *In re* Williams, I. & N. Interim Dec. No. 2695, at 10 (March 30, 1979).

58. An alien apparently must produce evidence to show that he personally, rather than as a member of a class, will be subject to persecution. *See* Moghanian v. United States Dep't of

homeland, an alien is in no position to produce the required evidence.[59]

Whereas an alien's only evidence may be his own testimony, the INS can draw on an interagency network for information to discredit the alien's claim. The INS customarily solicits reports from the State Department.[60] Immigration judges may rely on these reports,[61] especially if they forecast the likelihood of persecution of the class of persons to which the alien belongs without recommending action regarding the particular alien's request for relief.[62] Moreover, an alien often has no opportunity to refute these communications.[63]

Justice, 577 F.2d 141 (9th Cir. 1978) (Jew's assertion that he would be subject to religious persecution in Iran a mere statement of opinion); Kashani v. Immigration & Naturalization Serv., 547 F.2d 376 (7th Cir. 1977) (Iranian must prove, in addition to participation in anti-Shah agitation, a clear probability that the Iranian government would persecute him for that conduct).

59. In *Fleurinor,* the alien claimed that he had been jailed, beaten and robbed by the Haitian secret police in 1970 for alleged participation in a 1968 invasion of Haiti. He bribed his way out of prison and fled to the United States. The court said that even if the alien's claims were true, he still faced the burden of proving the Haitian government's interest in him eight years after his flight. "To prove probable political persecution today, Fleurinor would have to provide some evidence that the Haitian government remembers him." 585 F.2d at 134.

60. 1A C. GORDON & H. ROSENFIELD, *supra* note 41, § 5.16b, at 5-189.

61. In Asghari v. Immigration & Naturalization Serv., 396 F.2d 391, 392 (9th Cir. 1968), the court held that State Department advice was admissible, since it came from a "knowledgeable and reliable source." *See also* Zamora v. Immigration & Naturalization Serv., 534 F.2d 1055, 1059-63 (2d Cir. 1976); Hosseinmardi v. Immigration & Naturalization Serv., 405 F.2d 25 (9th Cir. 1968), *rehearing denied,* 405 F.2d 28 (9th Cir. 1969); Namkung v. Boyd, 226 F.2d 385 (9th Cir. 1955).

62. The *Zamora* court called the attitude of a country toward a class of former residents

> a question of legislative fact, on which the safeguards of confrontation and cross-examination are not required and on which the [immigration judge] needs all the help he can get. . . . The obvious source of information on general conditions in the foreign country is the Department of State which has diplomatic and consular representatives throughout the world.

534 F.2d at 1062.

The court described recommendations with respect to a particular alien as conclusions as to adjudicative fact. Adjudication is entrusted to the immigration judge and the Board. Yet receipt of a Department recommendation is not reversible error unless the alien can show "some likelihood" that the recommendation influenced the result. *Id.* at 1063. *Accord,* Paul v. United States Immigration & Naturalization Serv., 521 F.2d 194, 200 (5th Cir. 1975).

Current reports by independent human rights groups, when available, dilute the impact of State Department communications. *See In re* Williams, I. & N. Interim Dec. No. 2695, at 8-9 (March 30, 1979) (1977 report by International Commission of Jurists considered).

63. 8 C.F.R. § 242.17(c) (1980) allows the Board and immigration judges to consider information not of record if national security precludes disclosure. Even if disclosure is proper, nondisclosure may not be reversible error if the immigration judge states that he did not consider the information when passing on the alien's claim. *See* Pereira-Diaz v. Immigration & Naturalization Serv., 551 F.2d 1149, 1153-54 (9th Cir. 1977).

The State Department has unique access to relevant information, but Department officials must sift through this information to decide what to include in reports to the INS. "A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout

C. JUDICIAL REVIEW

Although the courts of appeals have exclusive jurisdiction to review administrative denials of section 243(h) relief,[64] the breadth of the Attorney General's discretion under prior law rendered judicial review deferential, if not ineffective.[65] Reviewing courts initially restricted their inquiry to the question of whether the alien had an opportunity to present evidence for consideration by the Attorney General.[66] The judiciary did not extend its role beyond ensuring minimal due process protections because the Attorney General's decision was "a political issue into which the courts should not intrude."[67] Although later decisions expanded judicial review to ensure the lawfulness of the administrative determination and the absence of an arbitrary or capricious use of administrative discretion,[68] aliens rarely succeeded in obtaining relief.[69]

The proper scope of judicial review under the amended statute is unclear. One line of decisions under prior law used a two-step analysis.[70]

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the world." Kasravi v. Immigration & Naturalization Serv., 400 F.2d 675, 677 n.1 (9th Cir. 1968), *quoted in* Zamora v. Immigration & Naturalization Serv., 534 F.2d 1055, 1061 (2d Cir. 1976).

64. *See* note 14 *supra* and accompanying text.

65. *See generally* Note, note 45 *supra*. For a general discussion of the role of judicial review in immigration law, see 2 C. GORDON & H. ROSENFIELD, *supra* note 41, §§ 8.1-8.30.

66. United States *ex rel.* Dolenz v. Shaughnessy, 206 F.2d 392, 395 (2d Cir. 1953).

67. *Id.*

68. Courts typically preface their review of § 243(h) claims with an admonition that their inquiry is restricted:

> Judicial review of discretionary administrative action is limited to the questions of whether the applicant has been accorded procedural due process and whether the decision has been reached in accordance with the applicable rules of law. Furthermore, the inquiry goes to the question whether or not there has been an exercise of administrative discretion and, if so, whether or not the manner of exercise has been arbitrary or capricious.

Fleurinor v. Immigration & Naturalization Serv., 585 F.2d 129, 133 (5th Cir. 1978) (quoting Henry v. Immigration & Naturalization Serv., 552 F.2d 130, 131 (5th Cir. 1977)). *See also* Paul v. United States Immigration & Naturalization Serv., 521 F.2d 194, 197 (5th Cir. 1975); Kam Ng v. Pilliod, 279 F.2d 207, 210 (7th Cir. 1960), *cert. denied,* 365 U.S. 860 (1961). Implicit in the quoted statement is the assumption that courts will review the evidence to some degree. *See Coriolan,* 559 F.2d at 998; Note, *supra* note 45, at 93, 96-105.

69. Note, *supra* note 45, at 100. The same commentator suggests that the declining number of reported cases during 1970-75 indicates that fewer aliens were using § 243(h), and raises the question whether § 243(h) has become a nullity. *Id.* at 61 n.7. Compare Judge Friendly's observation that an unusually large number of § 243(h) petitions recently reached the Second Circuit. Zamora v. Immigration & Naturalization Serv., 534 F.2d 1055, 1057 (2d Cir. 1976). The INS no longer releases statistics tabulating the number and disposition of § 243(h) claims.

70. United States *ex rel.* Kordic v. Esperdy, 386 F.2d 232 (2d Cir. 1967), *cert. denied,* 392 U.S. 935 (1968), *rehearing denied,* 395 U.S. 941 (1969), was the first case arising under § 243(h) to follow a two-step inquiry. The analysis was followed in Hamad v. United States Immigration & Naturalization Serv., 420 F.2d 645 (D.C. Cir. 1969). The Ninth Circuit said it would

The court first weighed the evidence suggesting the likelihood of persecution under the substantial evidence test.[71] If the alien met his burden of showing likely persecution, the court would then determine whether the Attorney General had abused his discretion in denying relief.[72] Since amended section 243(h) requires the Attorney General to withhold deportation if he determines that it would endanger the alien, this form of discretion is no longer the predominant feature of the statute.[73] Two-step review thus collapses into a single level of review using the substantial evidence test. This standard befits the mandatory tone of the amended statute.[74]

Although respectful of the executive's expertise in evaluating section 243(h) claims, courts were justifiably cautious about allowing the Attorney General to wield unfettered discretion under prior law. Deletion of language expressly conferring broad discretion on the Attorney General should encourage courts to intensify the "deferential . . . [but not] altogether perfunctory"[75] review often exercised under prior law.[76]

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consider applying the *Hamad* test in an appropriate case. Khalil v. Dist. Director of the United States Immigration & Naturalization Serv., 457 F.2d 1276, 1278 n.4 (9th Cir. 1972).

71. *Hamad,* 420 F.2d at 646; *Kordic,* 386 F.2d at 239.

While these two courts applied the substantial evidence test rather than the abuse of discretion standard to review the Attorney General's conclusion as to likelihood of persecution, other courts left the issue unresolved. The Fifth Circuit noted:

> The position of our court on this question is cloudy. . . . We need not resolve this ambiguity here. It is enough to recognize that judicial review of INS decisions on persecution claims is deferential, and at the same time to remember that this review ought not to be altogether perfunctory.

Coriolan, 559 F.2d at 998 n.9.

Although the substantial evidence test may be impossible to define, the *Hamad* court described it as much more demanding than the abuse of discretion test. 420 F.2d at 647. The substantial evidence test allows courts to respect administrative expertise, but requires them to review the entire record for substantial evidence supporting executive action. *See* Note, *supra* note 45, at 101 n.201.

72. *See* cases cited in note 70 *supra.*

73. *See* notes 37-39 *supra* and accompanying text.

74. Commentators rejected two-step review under the prior version of § 243(h), reasoning that the correct standard in a discretionary statute is abuse of discretion. Because prior law granted the Attorney General discretion to deny relief even if the alien showed likely persecution, the *Kordic* two-step analysis collapsed into an abuse of discretion test. 2 C. GORDON & H. ROSENFIELD, *supra* note 41, § 8.17b, at 8-116 (Supp. 1980); Note, *supra* note 45, at 105.

The suitability of a substantial evidence test for the revised statute hinges on the degree of executive discretion left intact by the 1980 amendment. The test will be difficult to apply if the Board and immigration judges continue to base their determinations on matter not of record, *see* notes 43, 60-63 *supra* and accompanying text, and continue to avoid stating findings of fact, *see* note 42 *supra* and accompanying text.

75. This is the Fifth Circuit's characterization of judicial review of § 243(h) claims. *See* note 71 *supra. See* note 70 *supra* for the D.C., Second, and Ninth circuits' characterizations.

76. More aggressive review could be exercised in at least two ways. If courts feel that discretion inheres in the Attorney General, *see* note 41 *supra* and accompanying text, they could reduce the breadth of allowable discretion and continue to test the accuracy of his determinations under an abuse of discretion test. Alternatively, courts could review the record for

Judicial review of executive dispositions of section 243(h) claims, no matter how active, may not suffice. The inscrutability of administrative decisions, the imbalance in access to evidence, and the potential influence of foreign policy objectives indicate the need for structural improvement in the procedure for seeking section 243(h) relief. As has been said in another context, "[l]iberty and freedom may frequently be preserved only at the very beginning."[77] The extradition process suggests an alternative to purely administrative proceedings.

III

THE EXTRADITION PROCESS

The purpose of extradition is to return fugitive criminals to jurisdictions competent to try and punish them for designated crimes.[78] Recognizing the severe consequences of restoring a person to a state anxious to prosecute him, states have implemented procedures designed to safeguard individual liberties.[79]

The "political offender" exception from extradition[80] is analogous to section 243(h) relief from deportation. U.S. extradition treaties[81] expressly

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evidence supporting the executive's determination. In either event, courts would force the Attorney General to demonstrate a firmer basis for his disposition of § 243(h) claims.

77. Jimenez v. Aristeguieta, 290 F.2d 106, 108 (5th Cir. 1961) (Brown, J., concurring specially).

78. I. SHEARER, *supra* note 5, at 90.

79. *See* note 24 *supra*. Like most states, the United States extradites only by treaty. Factor v. Laubenheimer, 290 U.S. 276, 287 (1933); 18 U.S.C. § 3181 (1976). The United States has signed extradition treaties with 93 states. 18 U.S.C.A. § 3181 (West Supp. 1980). The typical U.S. extradition treaty enumerates extraditable offenses. If a state establishes probable cause to believe that a person committed an extraditable offense, the United States will restore the accused to the requesting state for trial. M. BASSIOUNI, *supra* note 19, at 515-18.

80. There is no generally accepted definition of "political offense." *See* M. GARCÍA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 76, 93 (1956); Evans, *supra* note 19, at 497. Extradition treaties exempt the "political offender" without clarifying the term. A judicial definition, consistently quoted by American courts, is "[a]ny offense committed in the course of or furthering of civil war, insurrection or political commotion." *In re* Ezeta, 62 F. 972, 998 (N.D. Cal. 1894) (quoting John Stuart Mill). For a general discussion of the political offense exception, see M. BASSIOUNI, *supra* note 19, at 370-429.

81. The extradition treaty between the United States and the Federal Republic of Germany contains a fairly typical provision:

> The provisions of the present Treaty shall not import a claim of extradition for any crime or offense of a political character, nor for acts connected with such crimes or offenses. However, a willful crime against human life except in battle or an open combat, shall in no case be deemed a crime of political character, or an act connected with crimes or offenses of such a character.

Extradition Treaty, July 12, 1930, United States-Germany, art. IV, 47 Stat. 1862, T.S. No. 836, at 6.

prohibit the return of a fugitive if he will face trial for a political offense.[82] The process the United States uses to determine an alien's extraditability makes the political offense exception more accessible than its deportation analogue.[83]

In the United States, extradition proceedings involve both the executive and judicial branches from the outset.[84] A state seeking extradition presents a requisition to the State Department and files a complaint in federal district court.[85] The potential extraditee appears before an extradition magistrate who, unlike an immigration judge, is a judicial officer.[86] The magistrate determines whether the offense charged is extraditable under the

82. *See* note 81 *supra.*

Theoretically, courts should determine the applicability of the political offender exception by examining "the circumstances attending the crime at the time of its commission and not . . . the motives of those who subsequently handle the prosecution." Ramos v. Diaz, 179 F. Supp. 459, 463 (S.D. Fla. 1959). Because extradition is at least in part a political decision, however, the motivation of the requesting state can, in practice, be central to the determination of extraditability. One court noted that the political offender exception may be applied "with greater liberality where the demanding state is a totalitarian regime seeking the extradition of one who has opposed that regime in the cause of freedom." *In re* Gonzalez, 217 F. Supp. 717, 721 n.9 (S.D.N.Y. 1963).

The indefinite scope of the political offender exception has led one commentator to advocate eliminating it in favor of the use of the asylum mechanism to avoid returning those sought for crimes of conscience. Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence,* 20 HARV. INT'L L.J. 61, 87-88 (1979). An alternative to eliminating the exception is to change its focus from the nature of the offense to the consequences of extradition for the extraditee. The European Convention on Extradition, *done* Dec. 13, 1957, 359 U.N.T.S. 273, prohibits extradition "for an ordinary criminal offence" if the requested state believes that factors of "race, religion, nationality or political opinion" either motivated the request or will "prejudice" the extraditee's position after extradition. *Id.* art. 3(2), 359 U.N.T.S. at 278. Changing the focus of inquiry as suggested would help the United States meet its international obligation under article 33 of the Convention, *see* note 28 *supra,* not to return a refugee to any state where his life or freedom would be threatened.

83. *See* Evans, *supra* note 19, at 500.

84. The executive branch exclusively controlled extradition proceedings until 1842, when the Webster-Ashburton Treaty committed the United States to incorporating a judicial hearing as an essential component of the extradition process. M. BASSIOUNI, *supra* note 19, at 505; I. SHEARER, *supra* note 5, at 198.

A few countries retain a system of exclusive executive control (*e.g.,* Ecuador, Portugal, Spain, and the Eastern European countries). In other states the executive receives nonbinding judicial direction (*e.g.,* Belgium, Mexico, Japan and Peru). M. BASSIOUNI, *supra* note 19, at 505-06; I. SHEARER, *supra* note 5, at 198-99.

"[I]t seems to be beyond question that constitutionally impartial organs are better fitted to decide questions affecting individual liberties than the organs more closely geared to governmental policy. Those few States which still adhere to sole executive control in extradition matters acquire thereby a growingly reactionary appearance." I. SHEARER, *supra* note 5, at 197-98.

85. M. BASSIOUNI, *supra* note 19, at 511. For an overview of United States extradition procedure, see *id.* at 511-37.

86. The extradition magistrate may be "any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State." 18 U.S.C. § 3184 (1976).

applicable treaty. If this threshhold requirement is met, he then determines whether the requesting state has presented competent evidence to justify holding the accused to await trial for the offense. Only if the magistrate finds sufficient evidence to believe that the accused committed an extraditable offense will he certify the charge to the executive branch.[87]

The magistrate's decision to deny extradition is binding on the executive; the extradition proceedings end. The magistrate's decision to grant extradition, however, is subject to the discretion of the Secretary of State.[88] Thus, the Secretary and the magistrate must agree to grant extradition before a fugitive can be extradited to the requesting state.

IV

STRUCTURAL REFORM

The extradition procedure provides a model for structural improvement of section 243(h). Absent certification by the judiciary, the executive may not exercise its discretion to extradite.[89] This key feature of the extradition process could be employed to protect the potential deportee claiming a likelihood of persecution.

As under the current procedure, a deportable alien would appear before an immigration judge to show cause why he should not be expelled.[90] If the immigration judge finds the alien deportable and rejects a section 243(h) claim, the alien should be entitled to a de novo judicial hearing to determine whether he has demonstrated eligibility for section 243(h) relief. Any state or federal judge could serve as deportation magistrate.[91] The magistrate would conduct an adversary proceeding, weighing evidence submitted by the alien and the INS. If the magistrate concluded that the alien had shown eligibility for section 243(h) relief, the alien could not be deported to any country where his life or freedom would be threatened. The INS could, however, seek deportation to an alternate destination. If the magistrate concluded that the alien had not shown a need for section

87. Benson v. McMahon, 127 U.S. 457, 462-63 (1887); 18 U.S.C. § 3184 (1976).

88. The need for flexibility in the exercise of Executive discretion is heightened in international extradition proceedings which necessarily implicate the foreign policy interests of the United States. Thus, while Congress has provided that extraditability shall be determined in the first instance by a judge or magistrate, 18 U.S.C. § 3184, the ultimate decision to extradite is "ordinarily a matter within the exclusive purview of the Executive."

Peroff v. Hylton, 563 F.2d 1099, 1102 (4th Cir. 1977) (quoting Shapiro v. Secretary of State, 499 F.2d 527, 531 (D.C. Cir. 1974), *aff'd sub nom.* Comm'r v. Shapiro, 424 U.S. 614 (1976)).

89. *See* notes 87-88 *supra* and accompanying text.

90. *See* notes 9-10 *supra* and accompanying text.

91. This would parallel the eligibility requirements for an extradition magistrate. *See* note 86 *supra.*

243(h) relief, he would certify the case to the Attorney General. The alien could then renew his claim of probable persecution and seek discretionary relief from the Attorney General.

One possible problem with this approach is that it would encourage frivolous claims. Combating delaying tactics has been a persistent problem in immigration law. Aliens realize that they can delay their deportation with protracted appeals.[92] Lawyers and other "professionals" mislead aliens into believing they have meritorious claims for admission into the United States.[93] The problem of abuse of the immigration laws must be countered by stricter control over these counsellors.[94] The prevalence of dilatory tactics alone does not justify denying aliens access to section 243(h) relief.

Another potential problem with this proposal is that the number of hearings might overburden the judiciary. This result could be minimized by spreading section 243(h) hearings among state and federal judicial officers. Even if this proposal would require additional appointments, the cost is justified by the importance of the interests protected.[95]

The potential problems with the proposal are practical; its principal advantage is procedural fairness. In a judicial hearing the alien would

92. *See, e.g.,* Schieber v. Immigration & Naturalization Serv., 520 F.2d 44 (D.C. Cir. 1975) (court recounted alien's success in staving off deportation for over fourteen years).

93. *See* Blum, *Unscrupulous Professionals Prey on Captives of Immigration Maze,* N.Y. Times, Jan. 15, 1980, § A, at 1, col. 2 (third in a series of five articles entitled *The Tarnished Door: Crisis in Immigration*). In one particularly shocking example of misconduct, a former INS investigator advised Iraqi immigrants to buy a plane ticket to Panama or Mexico routed through Boston or New York. Once the Iraqis landed at American airports, the "consultant" slipped past customs officials and advised his clients to seek political asylum. "I knew they wouldn't ultimately be given political asylum, . . . [b]ut I thought this was a valid delaying tactic they could use, and one that was well within the law." *Id.* § B, at 5, col. 4.

94. Increasingly, courts penalize lawyers who engage in dilatory appeals or assert frivolous claims under the immigration laws. *See, e.g.,* Der-Rong Chour v. Immigration & Naturalization Serv., 578 F.2d 464 (2d Cir. 1978), *cert. denied,* 440 U.S. 980 (1979) ($1000 damages and double costs assessed against alien and his lawyer where no colorable basis for relief sought); Acevedo v. Immigration & Naturalization Serv., 538 F.2d 918 (2d Cir. 1976) (double costs assessed against lawyer where meritless appeal made solely as delaying tactic). The statutory bases for assessing costs against counsel are 28 U.S.C. §§ 1912, 1927 (1976).

8 C.F.R. § 292.3(a) (1980) lists fourteen grounds for which the Board, with the Attorney General's approval, may suspend or disbar an attorney or other individual from practice before the INS and Board. *See* Koden v. United States Dep't of Justice, 564 F.2d 228 (7th Cir. 1977) (affirming one year suspension of lawyer who employed runners to solicit clients and received payment without performing services).

Additional avenues to explore in the drive to eliminate frivolous claims are greater self-regulation by the immigration bar, vigorous prosecution of violations of the Code of Professional Responsibility, and conspiracy actions against those who induce aliens to enter or remain in the United States illegally.

95. In light of the immigration judges' workload, an increase in manpower to consider § 243(h) claims seems already overdue. *See* figures in note 7 *supra.*

enjoy the benefits of the rules of evidence and a true adversary proceeding. Congress has failed to clarify the alien's burden of proof; the judiciary could quickly define this burden if given initial cognizance of section 243(h) claims.

The proposal does not eliminate the executive's voice in processing political persecution claims. The State Department's estimate of conditions in the destination state, if presented as evidence, would be considered by the deportation magistrate. If the magistrate certified the claim to the executive, the Attorney General would still have discretion to withhold, or attach conditions to, deportation.

Indeed, foreign policy makers may favor the idea. Under current procedures, the executive risks offending the destination state if it grants an alien section 243(h) relief. By allowing a judicial officer to grant section 243(h) relief, the proposed structure absolves the executive of the political embarrassment attendant to questioning the destination state's bona fides.[96]

CONCLUSION

The availability of relief under revised section 243(h) may still depend less on individual need than on fortuities such as a politically disfavored or notoriously irresponsible destination state. Deportation may spell death, torture, or prolonged imprisonment for an alien whose political beliefs offend an authoritarian regime. By deporting aliens with meritorious section 243(h) claims, the United States undermines the national and international legal systems, as well as individuals' human rights. Furthermore, allowing deportation to serve as disguised extradition subverts the extradition process and retards impetus for its reform. Given the American commitment to safeguarding human rights,[97] continued inaccessibility to section 243(h) relief is unacceptable.

By rewriting section 243(h) to conform it to the Convention on Refugees, Congress has given courts an opportunity to reevaluate whether United States practice complies with its international obligations. The mandatory language of the revised statute invites judicial reinterpretation to ensure the availability of relief. This Note has suggested the possibility of tinkering with executive discretion, the alien's burden of proof, and judicial review.

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96. *See* I. SHEARER, *supra* note 5, at 192.

97. *See* Carter, *The President's Commencement Address at the University of Notre Dame*, 53 NOTRE DAME LAW. 9, 11 (1977-78); Vance, *Human Rights and Foreign Policy*, 7 GA. J. INT'L & COMP. L. 223, 224 (1977). *But see* Szasz, *The International Legal Aspects of the Human Rights Program of the United States*, 12 CORNELL INT'L L.J. 161 (1979).

Several obstacles to section 243(h) relief, however, seem intrinsic to the law's procedural structure. The executive branch, while evaluating the likelihood that a state will violate an individual's human rights, must devise and implement U.S. foreign policy toward that state. If these duties appear to conflict, officials may subordinate the individual's rights to perceived larger goals. Restructuring the statute to allow full participation by the judiciary would be responsive to the importance of section 243(h) relief.

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