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WHEN IS THERE GOING TO BE A UNITED STATES LAW GOVERNING THE
ADMISSION OF REFUGEES AND ASYLUM SEEKERS?

I. INTRODUCTION

Legal critics and scholars have stated that "immigration to the United States is out of control."¹ Similar comments specifically directed at refugees in the late 1970's compelled the Carter Administration and Congress to attempt to formulate a systematic and procedurally just refugee policy for the United States. Those efforts resulted in the Refugee Act of 1980.² The Act has been described as "the most comprehensive United States law ever enacted concerning refugee admissions and resettlement."³ Commentators have observed that the Refugee Act establishes "the basis for a refugee policy that considers the existing limitations on our nation's resources and the practical problems in administering such a program while ... placing primary emphasis on 'special humanitarian concerns.'"⁴

Despite the laudable intentions of the drafters of the legislation, the Act's shortcomings soon became

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⁴ Id.
evident. By the end of 1980, 125,000 Cuban and 15,000
Haitian "boat people" had entered the United States
illegally, seeking political asylum. Never before had the
United States received such a massive influx of persons
seeking asylum. This event, in combination with the impact
created by a total of 808,000 legal immigrants, refugees and
special entrants admitted into the United States in 1980,
quickly led to the realization that implementation of the
Refugee Act would be more difficult than anticipated.

Even a peripheral glance at recent statistics indi-
cates that the United States is presently in the midst of a
refugee crisis. The Refugee Act currently provides for
admission of 50,000 refugees annually. The actual
refugee quota is established annually by the President in
consultation with Congress. In sharp contrast to the
estimates of the Refugee Act, actual refugee admissions
ranged from a high of 200,000 in 1980, to 161,000 in 1981
and 93,000 in 1982.

These bleak statistics led Congress to seek a more
extensive revision of the nation's immigration laws than that
offered by the 1980 Act. Currently, legislation "restruc-
turing" existing immigration law is pending House approval.
The legislation is commonly referred to as the "Simpson-
Mazzoli Immigration Reform and Control Act of 1983."

Two bills, one sponsored by the House of Representa-
tives, and the other by the Senate, share the same basic

5. Martin, supra note 1, at 34.
6. See supra note 2, at § 1157(a)(1).
7. Id.
goals. The objectives of both bills are to curb illegal immigration, to offer amnesty to a large number of immigrants already present in the United States and to create an asylum\textsuperscript{10} procedure more responsive to the present refugee crisis than that offered by the Refugee Act of 1980.

This comment will trace the development of United States refugees\textsuperscript{11} and asylum laws. In addition, the policies underlying past, current and proposed immigration laws will be analyzed.

II. HISTORY

The history of United States immigration law is indicative of efforts by American lawmakers to balance foreign policy considerations with humanitarian concerns. Although informal measures were taken prior to 1882,\textsuperscript{12} The Immigration Act of August 2, 1882\textsuperscript{13} is generally viewed as the first immigration statute. The Act of 1882 was designed to prevent the routine transfer to the United States of "undesirables" such as criminals and paupers from other

\textsuperscript{10} Asylum is a remedy offered "[t]hose who reach the United States on their own, entering either illegally or on a nonimmigrant visa and who then claim protection against return, hav[ing] their claims reviewed under the asylum provisions of the [Refugee] Act." Martin, The Refugee Act of 1980: Its Past and Future, in Transnational Legal Problems of Refugees 96 (D. Levy ed. 1982) [hereinafter cited as Past and Future].

\textsuperscript{11} The refugee provisions of the Refugee Act are applicable to those individuals "who are screened and selected overseas and brought to the United States by the U.S. Government ..." Past and Future, supra note 10, at 96.

\textsuperscript{12} Immigration Act of March 3, 1875, 18 Stat. 477 (amended 1882). This law prohibited the entry to the United States of convicts and prostitutes.

countries. This Act established a head tax of 50 cents per immigrant to be enforced by the Secretary of the Treasury.

With few exceptions, the United States consistently maintained an open door policy towards immigrants prior to the enactment of the Immigration and Nationality Act of 1917. Earlier legislation had little impact on the majority of immigrants who flocked to the United States in unprecedented numbers.

The Act of 1917 imposed for the first time a literacy requirement upon all aliens over the age of 16. However, persons fleeing religious prosecution in their native countries were exempt from these requirements. The Act of 1917 also established the "Asiatic Barred Zone," which restricted the entry of Orientals.

14. Id. The Act of 1882 reinforced an 1875 Supreme Court decision rendering state immigration laws unconstitutional due to their infringement on Congress' pre-emptive rights to control foreign commerce.

15. By the end of the 18th century, it was felt that it was America's "mission" to offer the oppressed asylum and protection of their right to freedom. This perspective was reinforced by America's commitment to manifest destiny during the 19th century, a period of mass immigration. Immigrants were desperately needed for this country's "settlement, defense and economic well-being." Congressional Research Service of the Library of Congress, A Brief History of U.S. Immigration Policy, 223 EPW 6-7 (1980) [hereinafter cited as History]. Exceptions to the open door policy include The Chinese Exclusion Act of May 6, 1882, ch. 126 § 1, 22 Stat. 58 (repealed 1943) and The Alien Contract Labor Laws prohibiting the execution of labor contracts involving the importation of aliens. Act of Feb. 26, 1885, ch. 164, § 2, 23 Stat. 332; 8 U.S.C. 141, Act of Feb. 23, 1887, 24 Stat. 414 (amended 1888).


17. In the first decade of the 20th century, immigration to the United States reached an all time high of 8,795,386. The years 1911-1920 witnessed the second highest influx to the United States recorded: 5,735,811. History, supra note 15, at 15.

This Act is a landmark in the history of immigration law. For the first time, the American public through its representatives, made the choice to substitute a comparatively restrictive U.S. immigration policy for an open door policy. Congress has imposed increasingly stringent limitations since that time.

The 1920s brought the end of World War I, and the first quantitative changes in the immigration laws of the United States. The Temporary Quota Act of 1921, and the Immigration Act of May 26, 1924 provided a "national origins quota," wherewith Congress limited the number of available slots for Eastern Hemisphere immigrants. The purpose of the national origins quota was to maintain a balance of various races and nationals in the population. Americans advanced various rationales to support numerical limitations ranging from the fear of a vast influx of European war refugees to the view that the "biologically inferior and superior" would be integrated into society through unrestricted entry.

During the 1930s, immigration to the United States declined dramatically from 4,107,209 in the 1920's to a total of 528,431 in the 1930s. This decrease is attributed to the Depression as well as to the increasingly stringent United States immigration laws.

19. Immigration Act of May 19, 1921, ch. 8, 42 Stat. 5 (expired 1924).
21. The Forty Year Crisis, supra note 3, at 10 n.18. The national origins quota formula, effective July 1, 1929, allowed for an annual quota of any nationality which was "a number which bears the same ratio to 150,000 as the number of inhabitants in the United States in 1920 having that national origin bears to the number of white inhabitants of the United States in 1920, with a minimum quota of 100 for each nationality." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 37 (1952).
22. See supra note 15, at 18.
Immigration laws enacted between 1930 and the 1980s vividly reflect Congress' constant struggle to balance foreign policy considerations against traditional humanitarian values. The balance weighed heavily in favor of the latter values after World War II, when Congress enacted the Displaced Persons Act of 1948. This law granted permanent resident status to 15,000 individuals already present in the United States and an additional 400,000 persons immigrating through the end of 1951. However, aliens not admitted under this temporary measure had the burden of proving the likelihood that deportation to their native countries would subject them to racial, religious or political persecution.

The Displaced Persons Act was the first refugee legislation enacted in the United States. The Act caused immigrant admissions to double from 528,431 during the 1930s to 1,035,039 in the 1940s.

The Internal Security Act of 1950 manifested a humanitarian concern for individuals seeking political asylum in the United States. That Act summarily denied the Attorney General the authority to deport any alien who


25. 354,804 of the 1,033,039 immigrants admitted to the United States during the 1940s were from the Western Hemisphere. History, supra note 15, at 19.

would be subject to physical persecution in his or her homeland. However, the alien had the burden of establishing the likelihood of physical persecution, which was left undefined by the statute.  

Two years later, Congress passed a major recodification and revision of existing immigration and nationality law. The new immigration law, entitled the Immigration and Nationality Act of 1952 (INA), maintained the essential elements of the Acts of 1917, 1921 and 1924. INA also incorporated an amended version of the Internal Security Act of 1950 within section 243(h). In contrast to the Act of 1950, INA section 243(h) granted the Attorney General broad discretion with regard to the power to deport. In addition, the INA made no specific provision for admission of refugees.

During the decade, 1951-1960, immigration reached 2,515,479, the highest level since the 1920s. The proportion of Western Hemisphere entrants in relation to those from the Eastern Hemisphere also increased, with 1 million of the 2.5 million immigrants originating in the Western Hemisphere.


28. Immigration and Nationality Act of June 27, 1952, ch. 477, tit. I, § 101, 66 Stat. 166, ch. 477, 66 Stat. 163 (current version at 8 U.S.C. 1101 (Supp. V 1983)). The national origins formula of the earlier statutes were combined with a four category preference system applicable to the allocations of visas to Eastern Hemisphere countries. No numerical limitations were placed on immigrants from the Western Hemisphere.

29. Section 243(h) later became the statutory basis for withholding deportation due to persecution under federal law.


31. Id.
Less than 50 percent of the immigrants entering during the 1950s were admitted through the quota system. Most immigrants gained admittance under temporary enactments or as "nonquota immigrants" from the Western Hemisphere. The realization that the national origins quota system was not functioning adequately precipitated a major reformation of the immigration laws in 1965.32

Major refugee admissions outside the system during the 1950s further showed a need to reform the immigration system. The Refugee Relief Act of August 7, 195333 and the August 31, 195434 amendments authorized the entrance of 214,000 refugees from war-ravaged Europe and "escapees" from Communist-dominated countries.

The Refugee-Escape Act of 195735 allowed the admission of certain aliens eligible under the Refugee Relief Act and persons deemed "refugees-escapees," who fled persecution in Communist or Middle East countries.

Individuals fleeing Communist-dominated countries in the Eastern Hemisphere and Middle East countries were admitted under The Fair Share Law,36 enacted on July 14, 1960, and later under the Immigration and Nationality Act.37 An estimated 19,700 refugees were admitted under the 1960 legislation.

32. Id. at 22.
37. See supra note 28.
From 1959 until the 1980s, approximately 700,000 Cuban refugees entered the United States. They were admitted as "Communist refugees" through various means.\textsuperscript{38}

Congress amended the INA in 1965,\textsuperscript{39} repealing the national origins quota. The 1965 amendments placed an annual ceiling on Eastern Hemisphere immigration of 170,000, with a 20,000 per country limit. The seven-pronged preference system placed priority on family reunification, attracting needed skills and on refugees, respectively. As of July 1, 1968, Western Hemisphere immigration was also limited by an annual ceiling of 120,000. Western Hemisphere immigration was not restricted, however, by per-country limits or a preference system.

Although the 1965 amendments embody a variety of temporary refugee measures\textsuperscript{40} and immigration laws\textsuperscript{41} enacted between 1952 and 1965, the term "physical persecution" was eliminated. An amended version of section 243(h) was substituted, which read:

\textsuperscript{38} History, supra note 15, at 37.
\textsuperscript{39} The Immigration and Nationality Act Amendment of October 3, 1965, 79 Stat. 911 (current version at 8 U.S.C. §§ 1101, 1151 and note, 1152-1157, 1181, 1182 and note, 1201, 1202, 1204, 1259, 1322, 1351 (1976)).
\textsuperscript{40} The Refugee Relief Act of August 7, 1953, ch. 336, 67 Stat. 400 (expired 1956). The Refugee Relief Act was proposed after the expiration of the Displaced Persons Act. See supra note 22. The purpose of the Refugee Relief Act was to facilitate the immigration of persons fleeing Communist countries and to offer refuge to victims of natural calamities. The 209,000 visas issued under the Act were specifically offered those refugees rather than to those eligible under the "national origins quota."
\textsuperscript{41} The Refugee-Escape Act of September 11, 1957, 71 Stat. 639 (repealed in part 1952) (current version at 8 U.S.C. § 1101, 1153, 1434 (1976)). This Act was incorporated in the "1965 Amendments as INA Section 203(a)(7), entitled the "conditional entry" provision. The conditional entry provision restricted the influx of refugees to the United States to those fleeing Communist or Middle Eastern countries. The conditional entry provision was amended by the Refugee Act of 1980 to eliminate ideological and geographic restrictions. See, supra note 2.
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.42

In order to provide a systematic and uniform approach to the "world-wide refugee crisis," the United States ratified the United Nations Protocol Relating to the Status of Refugees in 1968.43 (U.N. Protocol). The U.N. Protocol defined a refugee as any person who

[owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or 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 unwilling to return to it.]44

An individual who satisfied this definition could apply for political asylum in the country where he resided.45


45. There are several exceptions, including those who have committed a crime under international law or acts contrary to the purposes and principles of the United Nations. Protocol art. I, § F(a),(c). Also excluded from the definition are those who have committed a "serious nonpolitical crime" outside the country offering asylum prior to entering that country, id. § F(b); those who have voluntarily resettled in the land of their nationality.
Article 33, the Protocol's basic asylum provision, specifies that

No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

This right of asylum is inapplicable to refugees outside the borders of a contracting country. Additionally, the asylum provisions of article 33 are not extended when "reasonable grounds" exist to regard an alien as a danger to the security of the country, or when he has been convicted of a particularly serious crime such as would indicate that the alien would pose a threat to the community.

A second asylum provision within the U.N. Protocol forbids the expulsion of a refugee lawfully within the country unless he poses a threat to national security or public order.

In addition, INA section 243(h) was expanded by the provisions of the U.N. Protocol, which incorporated the Protocol's definition of refugee, "one unwilling or unable to return to his country because of a well-founded fear of persecution."

The class of refugees was enlarged to include those persecuted on the basis of

(repatriation), id. § c(1),(2),(4); those who have voluntarily resettled in a new country, id. § c(3); and those under the protection of the United Nations High Commissioner for Refugees, id. § D.

46. Protocol, supra note 41, at art. 1, § 1 which correlates with Convention, supra note 43, at art. 33. Article 33 establishes right of "refoulment," which is a right to be returned, as opposed to an affirmative right to stay, in the host country. Therefore, asylum by the contracting state is not inoperative if the alien is able to relocate within a third country willing to accept and protect him against persecution by his native country. If no other country will provide sanctuary, the alien has a right to remain as long as the persecution continues.

47. Protocol, supra note 41, at art. 33, § (2).
48. Id.
49. Id. at art. 32.
50. See supra note 42.
their nationality or membership in a particular social group.51 The term "persecution" is defined within the U.N. Protocol as a threat posed to an individual's life or freedom.52

Under the 1965 Amendments, section 243(h) permitted an otherwise qualified alien to be denied asylum by the Attorney General.53 Article 33 of the U.N. Protocol, however, prohibits the deportation of any alien to which the new definition of refugee was applicable. Also, the 1965 Amendments distinguished between "deportable aliens"54 and "excludable aliens,"55 extending section 243(h) only to deportable aliens.56 In comparison, the Protocol applies to all qualified aliens present within a country.

Under the United States Constitution, ratification of the Protocol by the government in 1968 rendered it the "supreme law of the land."57 However, changes in United States immigration law caused by ratification of the Protocol were ignored by the Board of Immigration Appeals (the Board) as well as by the courts.58 The Congress and the Administration at the time the U.N. Protocol was ratified

51. See supra note 44.
52. See supra note 43.
53. See supra note 43. The Attorney General's discretion to deport an alien meeting the U.N. Protocol's refugee criteria was eliminated.
55. See 8 U.S.C. §§ 1221-1227 (1976). Excludable aliens are those physically present within the United States but who are treated as having been stopped at the border.
56. See supra note 54.
57. U.S. Const. art. VI provides that together with the Constitution and laws of the United States, "all treaties made or which shall be made, under the authority of the United States shall be the supreme law of the land." U.S. Const. art. VI.
apparently believed that United States immigration law did not require any change.59

In 1972, a mandate issued by the Department of State ordered that all asylum requests be considered whether they were made from within the United States or from abroad.60 This development, in combination with the 1974 issuance of regulations by the Board61 permitting all aliens physically present in the country to apply for asylum, seems to indicate an acknowledgement of executive and judicial error in failing to previously recognize the narrow and outmoded nature of the "pre-U.N. Protocol" immigration policy of the United States.

In the 1970's, the ambivalence of immigration policy seen in the historical enactment of temporary measures to deal with fluctuating numbers of immigrants, changes in U.S. foreign policy, and the apparent tension between the branches of the government involved in the immigration process resulted in a steady increase of the vast number of immigrants admitted to the United States each year. In order to understand the reasons for President Carter's proposed legislation in March 1979, later to become the Refugee Act of 1980,62 an examination of the refugee situation in the late 1970's is imperative.

In 1975, 130,000 Indochinese refugees were resettled in the United States after they fled Saigon. In response, Congress passed the Immigration and Nationality Act

59. For examples of statements made by Executive Branch officials and Senator Proxmire that the Protocol would not interfere with present immigration law, see In re Dunar, 14 I.&N. Dec. 310 (1973).
62. See supra note 2.
Amendments of 1976. The amendments applied an increased per-country limit and a version of the seven-category preference system to the Western Hemisphere. The ceilings became 170,000 for the Eastern Hemisphere, and 120,000 for the Western Hemisphere. The United States admitted an additional 25,000 Indochinese in June 1978. When thousands more fleeing Vietnamese requested political asylum in late 1978, the United States was obliged to seek authorization to admit the additional Indochinese immigrants.

Also in 1978, almost two-thirds of the Jews authorized to emigrate from the Soviet Union on a large scale basis beginning in 1972, sought admission to the United States instead of resettling in Israel, the original destination for the majority. The U.S. maintained an open door policy to the refugees throughout this influx.

Even after the "freedom flights" from 1965 to 1973, Cuba continued to be the largest contributor of refugees to the United States. In November 1978, Castro released 1,800 political prisoners and their families. The total refugee admissions in October 1978, soon to increase,

64. History, supra note 15, at 25.
68. Past and Future, supra note 10, at 93 citing Programs supra note 66, at 15; U.S. Refugee Programs, supra note 64, at 84-85.
was 50,000, which, in addition to those previously mentioned, included Eastern Europeans, Iraqi Christians, Ethiopians, Lebanese, Chilean and Argentine political prisoners.

Again, the response of Congress was to circumvent the immigration system to admit the refugees. A new law enacted in 1978 combined the separate Eastern and Western Hemisphere ceilings into a worldwide ceiling of 290,000 with a single preference system.69

III. THE PAROLE POWER

Section 203(a)(7) of the 1965 Amendment to the INA provided an annual limit of only 17,400 refugees to be admitted.70 Those refugees numbering above this limit or not meeting the 203(a)(7) criteria could be "paroled" into the United States within the discretion of the Attorney General under INA section 212(d)(5).71

Parole was not originally designed to accommodate a large influx of refugees.72 However, in order to

70. 8 U.S.C. § 1153(a)(7) (1976) (repealed). This section entitled the "conditional entry" provision authorized the admission of 17,400 refugees each year who were fleeing a Communist or Communist dominated country or a country in the Middle East. Conditional entrants, like parolees, were not technically admitted into the United States. They were viewed as applying from the border for entrance. Thus, if denied admission they were expelled via exclusion, not deportation. See Past and Future, supra note 10, at n.11, citing 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.54 (rev. ed. 1980); id. at Vol. 1A § 5.1.
71. 8 U.S.C. § 1182(d)(5) (1976) (amended by § 203(f) of the Refugee Act of 1980 limiting parole of groups of refugees). Parole is an administrative device used to grant aliens temporary entry into the United States pending determination of their legal status. Like conditional entrants, parolees are not deemed legally admitted within "the United States" and so are subject to exclusion as opposed to deportation proceedings. See Leng Ma v. Barber, 357 U.S. 185, 190 (1957).
72. Id.
circumvent the restrictive national origins quota system in effect until the Act of 1965 which did not specifically provide for refugees, Presidents Eisenhower, Kennedy and Johnson invoked the parole power to admit large numbers of Hungarians (in the 1950s) and Cubans (in the early 1960s). Congress responded to this use of the parole power by adjusting the status of the parolees to permanent resident or by providing resettlement for refugees, who were granted parolee status once they were physically present within the U.S.

The draftsmen of the INA were dissatisfied with the use of parole for other than its intended purpose and feared that parole would become an executive device to avoid INA procedure by admitting large numbers of refugees. Continued doubts about "parole exploitation" resulted in routine informal Presidential consultations with the House and Senate Judiciary Committees during the Nixon and Carter administrations. These informal consultations did not curb the use of parole, as evidenced by congressional approval of adjustments in the status of

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74. Id. at 631.
76. The United States offered political asylum to one-quarter of the European refugees without permanent resident status in Europe as of 1960. Immigration Act of July 14, 1960, supra note 36.
78. Past and Future, supra note 10, at 94.
groups of Western Hemisphere and Indochinese refugees in 1976, 1978 and 1979. 79

IV. FEDERAL AID TO REFUGEES AND ASYLEES

United States law governing monetary assistance to refugees in the past also reflects the improvisational approach of U.S. immigration law. Increasing tension in this area resulted in the implementation of a new United States immigration policy in the late 1970's.

Before the new policy was implemented, the Migration Act of 1962 80 had offered a wide range of federally funded domestic programs to immigrants from the Western Hemisphere. 81 Difficulties in determining an expiration date led the Congress to pass laws from 1974 through 1976 continuing the program for an indefinite period of time. 82 Some Cubans were able to benefit from the program ten years or more after they were otherwise completely resettled. 83 The program is finally scheduled to terminate in 1984, twenty-two years after its inception. 84

The Migration Act of 1962 also provided for distribution of assistance to international organizations and Eastern

79. See supra note 57.
81. It has been frequently been suggested that the labeling of this program was a mere facade to offer aid to Cuban immigrants. See Past and Future, supra note 10, at 94. See also Elgass, Federal Funding of United States Refugee Resettlement Before and After the Refugee Act of 1980 in Transnational Legal Problems of Refugees 108 (Levy ed. 1982) [hereinafter cited as Federal Funding].
83. Past and Future, supra note 10, at 95.
Hemisphere refugees who were overseas. In 1975, the Indochina Migration and Refugee Assistance Act of 1975 extended the aid programs of the Migration Act of 1962 to Vietnamese and Cambodians refugees. The following year, an identical assistance package was extended to Laotian refugees and Congress again struggled with the incessant problem of establishing an expiration date for the aid. In 1978, twenty million dollars was also made available to aid Soviet refugees because of the depleted resources of the voluntary agencies which previously rendered aid.

This increased refugee flow to the United States and mounting problems caused by the inconsistent views of U.S. immigration policy held by the various branches of the Government, coupled with increasing public disfavor toward admitting additional refugees, ultimately led to the enactment of the Refugee Act of 1980.

90. A survey on refugee admission conducted in September, 1979, indicated the public's support for lowering (46% approval) rather than raising (12% approval) the admissions of Indochinese refugees because the refugees were "too great an economic burden" (37% approval) and that the "needy in our country" should be helped first. See Cong. Rec. S12905 (daily ed. Sept. 18, 1979).
V. THE REFUGEE ACT OF 1980

The policy objectives of the Refugee Act of 1980 are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.92

The Act made major revisions in U.S. immigration law. The definition of refugee adopted by the Act in amended section 243(h) corresponds to the definition in the U.N. Protocol. Additionally, any individual eligible for protection under article 33 of the 1951 Convention relating to the Status of Refugees93 may apply for asylum in the United States under INA section 208.94 An appeal may also be made to the United States by means of treaty obligations assumed under the 1967 Protocol Relating to the Status of Refugees.95 Under the Refugee Act of 1980, the right of asylum is available to every alien "physically present in the United States or at a land border,"96 who meets the statutory definition of refugee.97

An alien who is transported from overseas to the U.S. by means of a government program is granted automatic "refugee" status under INA section 207.98 Refugees are re-evaluated for permanent resident status by the INS after a

93. See supra note 43.
94. INA § 208 (amended 1980) (codified at 8 U.S.C.A. 1158(a) (1980)).
96. Id. at § 208(a).
98. INA, § 207(c) 8 U.S.C. § 1157(c) (Supp. V. 1983).
probationary period similar to the previous "conditional entrants" status. The Act reduces the period to a year. The grant of permanent resident status is retroactive so that refugees are generally eligible five years after they enter the U.S., which is equal to four years after adjustment of status. Prior to admission, factors such as health, literacy, ability to be self-supporting and past political activities are considered. The 1980 Act authorizes admission of an applicant without considering six of these requirements and the Attorney General is authorized to waive most of the others when justified by a "humanitarian concern."

All refugees are eligible for extensive federal aid for a period of three years, calculated from their arrival date rather than according to the degree of U.S. concern for a particular displaced group. After receiving federal support for three years, the refugee's aid is terminated. After termination, the state in which the refugee resides may provide additional financial assistance in its discretion.

The 1980 Act limits resettlement in the United States to persons who are outside their country of origin and unable or unwilling to return or to otherwise seek protection because of persecution. Refugees who have a "well-founded fear of persecution" based on race, religion, nationality, membership in a particular social group or political

99. See supra note 41.
100. INA § 209(a) 8 U.S.C. § 1159(a) (Supp. V 1983).
101. INA § 212(a) 8 U.S.C. 1182(a) (1976).
102. INA § 207(c)(3), 209(c) 8 U.S.C. § 1157(c)(3) § 1159(c) (Supp. V 1983).
104. Id., (adding § 412(a)(6) to the INA) (codified at 8 U.S.C. § 1522(a)(6) (1976)).
opinion are also eligible for resettlement. This definition excludes victims of natural calamities, previously extended protection under INA section 203(a)(7)(B).

Subsection (a) of the definition of refugee is basically the same as the previous definition of refugee in the Protocol. Congress enlarged the definition but narrowed its application, by the addition of a subsection (b). Subsection (b) extends eligibility for refugee status to persecuted individuals or to individuals who have a "well-founded fear of persecution" while within their own country but only "in such special circumstances as the President after appropriate consultation [with the Congress] ... may specify." The phrase "of special humanitarian concern to the United States" was also added to the U.N. definition of refugee.

Despite the humanitarian goals of the Act of 1980, Congress' selective intent is also present. Factors such as family, cultural or historical ties, past U.S. involvement in or treaty relations with the refugee's homeland are all relevant to the decision of whether to grant a particular alien refugee status. Foreign policy is also expressly mentioned as a consideration.


106. The Refugee Act, supra note 2.

107. Subsection (a) of the refugee definition essentially reiterates the Convention definition which previously controlled asylum by the Convention definition which previously controlled asylum by treaty. INA § 208(a) 8 U.S.C., § 1157(c)(1) (Supp. V 1983).


111. INA § 207(e) 8 U.S.C.A. § 1157(3) (June 1980 Supp.).
The intent of Congress to implement a flexible system under the Act of 1980 is manifested in its failure to define "special humanitarian concern." Commentators have aptly noted that this term is best understood as a term of art indicating that a difficult political choice will be made each year by the political branches of the government based on shifting assessments of political and humanitarian factors, again within the procedural discipline imposed by the Act.\footnote{Past and Future, supra note 10, at 115.}

The purpose of the Act of 1980 was clearly to create a system which would maximize the limited U.S. resources available to ameliorate the current international refugee crisis.

As noted above, the Refugee Act of 1980 established a separate provision for asylum.\footnote{The Refugee Act of 1980 required the Attorney General to establish procedures to grant asylum to aliens physically present in the United States, at land borders or at ports of entry. To qualify for asylum, applicants must satisfy the definition of refugee provided by \textsection{208}(a) of the Refugee Act. 8 U.S.C. \textsection{1158}(a) (Supp. V. 1981). The procedures were finalized on June 2, 1980. 45 Fed. Reg. 37,392 (1980).}

Under the old structure, a successful asylum applicant was granted parole, voluntary departure or a stay of deportation. The exact status granted was dependent upon when the INS became aware of his presence or at what stage of the procedure his asylum claim was granted.\footnote{Past and Future, supra note 10, at 109 n.85 (citing 1A C. Gordon & H. Rosenfield, Immigration Law and Procedure §§ 5.16a, 7.2a (rev. ed. 1980)).}

Under the present structure, in addition to a claim for asylum under INA section 208,\footnote{See supra note 110.} an applicant may be paroled into the U.S. for compelling reasons deemed to be in the public interest.\footnote{Refugee Act, supra note 2 at \$ 201(b).} As noted above, section 243(h) of the INA grants the Attorney General discretionary power to prevent deportation of any alien if such
deportation would cause the alien's life or freedom to be threatened because of race, religion, nationality or membership in a particular social or political organization.

The third device available to an alien seeking asylum is a claim for discretionary relief under the U.N. Protocol Relating to the Status of Refugees. The grant of asylum under the Protocol may be approved or denied in the discretion of an officer of the INS.\(^{117}\) To be eligible under section 243(h) or article 33 of the U.N. Protocol, an alien must first establish his status as a refugee. He or she must then demonstrate the probability of persecution if he or she were returned to his or her country of origin.\(^{118}\)

If deportation or exclusion proceedings have not been initiated,\(^{119}\) an asylum applicant may apply to the district director of INS for political asylum. If the application is denied, a request for review may be made to an immigration judge.

An asylum applicant submits a form I-589 to the district director who is required to interview the applicant within 45 days.\(^{120}\) Thereafter, the Bureau of Human Rights and Humanitarian Affairs of the State Department (BHRHA) is given the option to render an advisory opinion.\(^{121}\) If the BHRHA chooses not to submit an opinion, the district director adjudicates the claim on

\(\text{117. } 8\text{ C.F.R. } \S 108\text{ (1980).}\)
\(\text{118. } 8\text{ C.F.R. } \S 242.17\text{(c) (1980). Unlike refugees, however, potential asylees must establish that they continue to meet the refugee definition at the time a request for adjustment to permanent resident status is made. Refugees receive adjustment of status almost automatically after being present in the U.S. for a year.}\)
\(\text{119. } 8\text{ C.F.R. } \S 208.3\text{ (1981).}\)
\(\text{120. } 8\text{ C.F.R. } \S 208.1\text{ (1981).}\)
\(\text{121. } 8\text{ C.F.R. } \S 208.1-15\text{ (1981).}\)
its merits.\textsuperscript{122} If an asylum request is denied, the
district director must "expeditiously" begin exclusion
proceedings or, if deportation is at issue, either grant
voluntary departure or commence deportation proceedings.
No appeal is available from the district director's
decision.

An alien may, however, renew his request for asylum
before an immigration judge. This renewal is deemed a
request for withholding exclusion or deportation pursuant
to section 243(h) of the Refugee Act.\textsuperscript{123} The judge
reviewing the application is required to obtain a BHRHA
recommendation if one has not previously been issued or, at
his discretion, if he feels that conditions have been
substantially altered since the issuance of the first
opinion, he may demand a second opinion.\textsuperscript{124} After
receiving the BHRHA opinion, the claim is determined in an
adversary hearing. The applicant may appeal a denial of
asylum or section 243(h) relief to the Board of Immigration
Appeals (BIA).

As noted above, to qualify for relief under section
243(h) or article 33 of the U.N. Protocol, an alien must
first establish that he is a refugee. The INS regulations
as well as section 243(h) place the burden of proof upon
the alien to establish the probability that he will be

\textsuperscript{122} INS O, 1 § 208.9(c) (1980).
\textsuperscript{123} 8 C.F.R. 208.3 (1981). One commentator has
explained the similarity by indicating that the "interchange-
ability of asylum and withholding of deportation is due
largely to the fact that the present asylum section was
designed and the present withholding section revised to meet
the obligations imposed by the U.N. Convention Relating to
Sess. 20 (1980); H.R. Rep. No. 608, 96th Cong., 1st Sess. 9
refugee definition of the Convention is substantively
identical to the definition in INA Section 101(a)(42)(A)."
Scanlan, supra note 73, at 625 n.72.
\textsuperscript{124} 8 C.F.R. § 208.10(b) (1981).
persecuted if he is returned to his homeland. Specific guidelines to establish a prima facie case of persecution are lacking, but article 33 and section 243(h) as amended by the 1980 Refugee Act define persecution as a threat to the alien's "life or freedom." The flexibility of the standard has led to the conclusion that the determination of a prima facie case of persecution must be decided on an individualized basis.

Prior to the amendment of section 243(h) by the Refugee Act of 1980, courts differed on the required standard of proof of persecution. Most courts required a showing by a "clear probability" of the evidence that the asylum applicant would face persecution. Other courts demanded a preponderance of the evidence standard.

Legal commentators have criticized these requirements of proof of persecution as unreasonably stringent and have urged that the standard be lowered under the Act or that the burden of proof be shifted to the government.

Reasons cited for this request for change are the alien's

125. 8 C.F.R. § 208.5 (1981) dictates that the burden is on the asylum applicant to establish that he or she is unable or unwilling to return to, or to be protected by his or her native country, or the country where he or she habitually resides, 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.


127. See Martineau v. INS, 556 F.2d 306 (5th Cir. 1977); Kashani v. INS, 547 F.2d 376 (7th Cir. 1977); Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971); in re Matter of Dunar, 14 I.&N. Dec. 310 (1973).

128. See Henry v. INS, 552 F.2d 130 (5th Cir. 1977); Daniel v. INS, 528 F.2d 1278 (5th Cir. 1976); Kovac v. INS, 407 F.2d 102 (9th Cir. 1969).

language and cultural barriers and his or her lack of familiarity with the asylum process.\textsuperscript{130} The time pressures on the applicant have also been viewed as procedurally unfair.\textsuperscript{131} Although the applicant has been required to provide objective evidence of persecution\textsuperscript{132} and to substantiate a particularized fear of persecution,\textsuperscript{133} courts have given a narrow interpretation to the relevance of extrinsic evidence.\textsuperscript{134} However, courts have increasingly considered the general political conditions of the applicant's homeland as substantiated by objective evidence and secondary materials.\textsuperscript{135}

Another significant criticism of the asylum process is the relaxed "persecution" standard applied to candidates

\textsuperscript{130} Kurzban, supra note 129, at 109.
\textsuperscript{131} Id. at 108. An applicant may be required to file a claim within ten days after appearing before an immigration judge or fourteen days from when he is first brought under exclusion or deportation proceedings.
\textsuperscript{132} See In re Dunar, 14 I.\&N. Dec. 310, 319, Conolan v. INS, 559 F.2d 993 (5th Cir. 1977); Zamora v. INS, 534 F.2d 1055, 1062 (2d Cir. 1976).
\textsuperscript{133} See Fleurinor v. INS, 585 F.2d 129 (5th Cir. 1978); Henry v. INS, 525 F.2d 130 (5th Cir. 1977); Paul v. INS, 521 F.2d 194 (5th Cir. 1975); Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1980); U.S. v. Holton, 248 F.2d 737 (7th Cir. 1947), cert. denied, 356 U.S. 932 (1958).
\textsuperscript{134} See Fleurinor v. INS, 585 F.2d 129 (5th Cir. 1978); Matter of Martinez-Romero, I.D. No. 2872 (1981).
\textsuperscript{135} See Conolan v. INS, 559 F.2d 993 (5th Cir. 1977) (general political conditions in Haiti considered and Haitian's claim remanded to the Board for consideration of an Amnesty International report on human rights in Haiti.) Id. at 1002. Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980). (The federal district court held that no asylum claim could be properly adjudicated without examination of the political conditions existing in the applicant's homeland. The court took judicial notice of the Amnesty International report and thoroughly reviewed other evidence of political conditions in Haiti. The court decided that persecution was a substantial danger to many aliens deported to Haiti.) Id. at 475 and 482. McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981). (Evidence of the inability of the government of the Republic of Ireland to control the PIRA considered in Court of Appeal's decision to withhold deportation of former Provisional Irish Republican Army (PIRA) member due to likelihood of political persecution should he be returned to Ireland.)
for refugee status under the U.S. overseas program in comparison to the standard applied to asylum seekers. Although both groups are required to meet the definition of refugee specified under subsection (a) of the Refugee Act, a de facto difference in the application of the "well-founded fear of persecution" standard exists.

The application which candidates to a U.S. overseas program complete, form I-590, is much less scrutinizing than the form I-589 completed by an asylum applicant. Form I-590 requires less background information than does Form I-589. Refugee applicants and asylum seekers alike, must submit to a screening process to determine the validity of their "well-founded fear of persecution" claims but the rigor of the former interview is much less severe than that of the latter.

For example, a refugee applicant is almost automatically accepted to the United States. Applicants generally originate from countries already targeted as areas to be provided refuge by the United States. The interviewer considers such factors as whether the applicant has close relatives in the U.S. or whether he or she was ever a U.S. government employee. These factors will determine the refugee's priority on rank-order waiting lists. An asylum applicant, on the other hand, may have to appear before an immigration judge, and is typically subject to more intense evaluation as to whether his or her fear of persecution is in fact "well-founded." Although this inconsistency may change, the different standard is not unreasonable or unfounded. Applicants

136. See supra note 106.
137. 8 C.F.R. § 207.1-7 (1981).
139. Id.
to the overseas programs are selected by the U.S. as a group before they apply individually.141

The heavy burden of proof borne by the potential asylum seeker and the sliding scale for the "well-founded fear of persecution" test are justified by the delicate balance the United States must maintain between foreign policy and the evaluation of individual asylum applicants. Additionally, the only criteria applied to asylum applicants is the well-founded fear of persecution requirement, which is derived from the broad humanitarian objectives of the Refugee Act. To lower the standard for asylum seekers would increase the already high rate of immigration influx to the U.S.

The problems associated with the implementation of the Refugee Act of 1980 demand more stringent standards for alien admission to the United States. The Act sought to terminate use of the parole power and in so doing, created the comprehensive United States immigration policy noted above.142

Section 207 of the INA gives the President authority to put a ceiling on the number of refugees admitted annually, and to decide from which countries the refugees will be chosen to fill available slots. The President also has the authority to designate aliens overseas to be given refugee status. The ultimate decisions in each of these instances may be reached only after proper executive consultation with the Congressional Committees on the Judiciary.143 Thus, the parole power has been

141. Past and Future, supra note 10, at 113.
142. See supra note 91.
143. INA § 207(d)(e) (amended 1980) (codified at 8 U.S.C. § 1157(a) (1976)). Section (d)(I) requires in normal
theoretically eliminated. Only a few months after the Refugee Act of 1980 was enacted, however, the parole power was nevertheless a viable administrative device. In addition, the provisions of the Act of 1980 were not capable of dealing with current asylum seekers and refugees demands upon the United States.

Continued large-scale migration of Indochinese from Southeast Asia, the landing of the Haitian "boat people" in Southern Florida and the incessant flow of Cuban migrants severely strained the smooth implementation of the Act. The average legal immigration between the years 1948 and 1978 is best estimated to have been 330,000 persons annually, reaching a peak of 462,315. In stark contrast, the total number of immigrants for the year 1980 was almost 800,000. This figure includes 375,000 refugees


145. This estimate is achieved by considering the authorized immigration quota of 280,000 aliens and 234,500 refugees, unauthorized entry of at least 150,000 aliens who were potentially eligible for IA § 208 asylum (amended 1980) (codified at 8 U.S.C. § 1158) and the admission of
or individuals who applied for refugee status after entering by formal or informal application for asylum. 146

In 1980, the President's proposal to continue admissions at an all-time high of at least 234,500 refugee applicants annually 147 and the arrival in the U.S. of 125,000 Cubans and 15,000 Haitian asylum seekers, 148 presented the U.S. with a unique situation. 149 The Carter administration circumvented the INA procedure 150 and established a special "Cuban/Haitian entrant" status. 150 By means of this status, the Cubans and Haitians were granted indefinite parole status and became eligible for half of the normal benefits awarded refugees under the Refugee Act of 1980. 151

VI. CONCLUSION

The Refugee Act of 1980 did not obviate the parole device. In light of the "unforeseen emergency" created by the Cuban/Haitian refugee crisis, the use of parole by the Carter Administration effectively sanctioned its continued 152 existence, despite the expressly stated goal of the Refugee Act of 1980 to end the ad hoc immigration policy of the United States.

146. All aliens eligible for asylum have not as yet applied for withholding of deportation under INA § 243(h) (amended 1980) (codified at 8 U.S.C. § 1153(h)).
148. Martin, supra note 71, at 34.
149. Scanlan, supra note 73, at 621. See also Martin, supra note 1, at 31.
150. Id.
151. Id.
152. Scanlan, supra note 73, at 634.
But what will prevent the United States from responding in a similar manner some other unforeseen refugee crisis? The future of the procedures established under the Refugee Act of 1980 for the processing of asylum applicants has been prophetically stated:

An administrative breakdown has occurred in INS' initial processing of applications and in the State Department's issuance of 'advisory opinions.' Further breakdowns are likely to occur as rejected applicants seek judicial review of their applications in federal courts.\footnote{153}

Additionally, the Roper Poll of June 1980 reflects the American public's sentiment supporting an "all-out effort" (91 percent approval) to stop illegal immigration and a reduction in the number of legal immigrants and refugees (80 percent approval).\footnote{154} In addition to the procedural problems accompanying the application of current immigration law under the Act of 1980 and the heavy public backing of a decrease in immigration flow to the U.S., a third significant reason to restructure United States immigration laws is provided by the startling statistic that almost one-half of today's population growth is attributed to immigration.\footnote{155}

On May 18, 1983, the Senate passed "wide-ranging immigration reform[s]" in Senate Bill 529,\footnote{156} the Immigration Reform and Control Act of 1983. The Senate Bill is similar in many respects to House Bill 1510,\footnote{157} the Proposed Immigration Reform and Control Act of 1983. Together, these bills are commonly referred to as the "Simpson-
Mazzoli Immigration Reform and Control Act of 1983" (Simpson-Mazzoli Bill). 158

Objectives of the Simpson-Mazzoli bill, proposed by the 98th Congress include the following:

1) Control of illegal immigration by
   a) the imposition of fines and criminal penalties against employers who have illegal aliens and those who transport illegal aliens to the United States;
   b) streamlining present procedures for asylum, deportation and exclusion cases;
   c) the provision of additional border guards and Immigration and Naturalization (INS) personnel;

2) Provision of an annual ceiling on legal immigration;

3) Legalization of approximately two to four million illegal aliens currently in the United States;

4) Provision of new controls and numerical limitations on legal immigration. 159

The proposed legislation also limits judicial review of asylum decisions. 160

Legislation identical to House Bill 1510, as introduced in the 98th Congress died in the lame-duck session of the 97th Congress. 161 A bill which mirrored Senate Bill 529, as introduced in the 98th Congress passed the Senate in 1982. 162

158. See supra notes 156 and 157.
159. Id.
160. Id.
The House Bill failed for a variety of reasons, including opposition from Hispanic, religious and civil rights sectors, organized labor organizations and the United States Chamber of Commerce.\footnote{163. Cohodas, Immigration Reform Measure Dies in House, 40 Cong. Quart. 3097 (1982).} The major controversy hindering passage of the bill was the threat of sanctions against employers who knowingly hire illegal aliens.\footnote{164. Cohodas, Senate Passes Immigration Reform Bill, 41 Cong. Quart. 1006-07 (1983).}

In an effort to pass some form of improved immigration control, Congress decreased employer surveillance in the 1983 version. The 1983 "reforms" make employer verification voluntary until an employer is caught harboring illegal aliens. One commentator suggests that requiring aliens seeking employment to produce identification papers will encourage the use of fraudulent identification.\footnote{165. Harwood, Immigrant Bill Alien to Reality, N.Y. Times, September 5, 1983, § A at 19, col. 4 [hereinafter cited as Alien].}

The amnesty provisions of the bill have also been criticized. The inability of the INS to detect fraudulent amnesty applications due to a shortage of investigators may cause a flood of immigrants to flock to the U.S.\footnote{166. Id.} This flood of immigrants would cause the breakdown of INS enforcement procedures.\footnote{167. Id.} The reforms do not eliminate the parole power. The amnesty provisions effectively parole into the U.S. some two to four million aliens eligible for legalization under the bill.\footnote{168. Id. See also Cohodas, Three House Committees Alter Immigration Legislation, 41 Cong. Quart. 1312-13 (1983).} The new
legislation also has the identical shortcomings of the present immigration law-asylum procedures which overburden the INS, causing administrative breakdown and an unsystematic approach to immigration control.

Congress is aware of the inability of existing immigration laws to cope with contemporary dilemmas. The United States Senate Committee on the Judiciary recently reported that "reform is imperative."\textsuperscript{169} Reformation of existing immigration laws is admittedly a burdensome and difficult task. In order to enact new immigration laws, Congress must overcome obstacles such as special-interest lobbyists, the lack of natural borders preventing unauthorized entry into the United States, budgetary limitations and a persistent reticence to abandon a traditional humanitarian perspective.

But, shouldn't the "Immigration Reform and Control Act of 1983" consist of measures which will truly "reform" and control immigration to the United States? The proposed legislation does not provide an adequate solution to the inability of the United States to control its own borders. The costs of implementation of the proposed law are certain to be exorbitant. The proposed law provides incentive for illegal aliens to seek amnesty in this country, while employer sanctions contained in the measure are ineffective. Additionally, "it seems ludicrous to be granting amnesty to millions of illegal aliens at a time when our country is suffering from such high unemployment."\textsuperscript{170}

Perhaps an international resolution of the immigration problem is more appropriate, as Senator Kennedy

The proper response is presently unclear.

This comment recognizes the urgency of the situation, but suggests at the same time that the Simpson-Mazzoli bill is a far cry from the systematic approach to U.S. immigration law originally sought, and which is now so desperately needed. The proposed legislation displays the current Congressional perception that "some solution is better than no solution at all." Before taking further steps to enact the "Immigration Reform and Control Act of 1983," Congress should take note of a recent criticism leveled at the measure:

... considering the uncertain consequences of Simpson-Mazzoli, Congress would do well to think twice before grasping at this straw--even if it is the only straw in town.172

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171. See supra note 169, at 133-40.
172. Alien, supra note 165.