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## A Critical Analysis of Refugee Law

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# A Critical Analysis of Refugee Law\*

IRA J. KURZBAN\*\*

*A review of immigration law and history reveals that the United States admits large numbers of refugees from communist countries, but grants entrance to a disproportionate few from noncommunist states. The author interprets these figures to mean that the government uses the refugee admissions process as a ploy to accomplish political objectives. This article exposes the inequity in the admissions process by examining the legislative and executive responses to the refugee problem. Although many had hoped that the Refugee Act of 1980 would eliminate the political bias in refugee policy, the author suggests that the Act, in fact, institutionalizes preexisting political biases.*

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## I. INTRODUCTION

In early April 1980, thousands of Cuban nationals crashed the gates to the Peruvian Embassy in Havana seeking to emigrate from Cuba. On April 14, President Jimmy Carter, citing the humanitarian goals of immigration law,<sup>1</sup> agreed to allow 3,500 Cubans to

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\* The author wishes to thank Bradshaw Lotspeich for his assistance in the preparation of this article.

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1. Immigration and Nationality Act of 1952 (McCarran-Walter Act), ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1503 (1976 & Supp. V 1981)) [hereinafter cited as INA]. The President has authority to order the admission of refugees for special humanitarian reasons. See, e.g., 47 Fed. Reg. 46,483 (1982) (admission of persons in Vietnam with past or present ties to the United States).

come to the United States.<sup>2</sup> In the succeeding days, however, this benevolent policy proved to be a pretext for the political considerations that actually prompted the administration's reaction.<sup>3</sup>

The American government's response to the Cuban refugee<sup>4</sup> influx demonstrates the tractability of immigration policy to political judgment. This phenomenon is not new. Since 1948,<sup>5</sup> our government has used the refugee admissions process for political purposes. The result is a selection and admission process that is

2. President Carter's early pronouncements presaged the decision:

The President remains deeply concerned for the safety and freedom of the 10,800 Cubans who are seeking asylum in the Peruvian Embassy in Havana.

....

... The problem of Cuban refugees is one for all the Americas as well as the world. ....

....

... This humanitarian crisis requires an immediate international response.

The world also looks to Cuba to assure humanitarian conditions for the refugees pending their evacuation. ....

President's Designation of 3,500 Cubans in the Peruvian Embassy in Havana, PUBLIC PAPERS OF THE PRESIDENTS, 1 JIMMY CARTER 1980-1981, at 682-83 (Apr. 14, 1980).

3. See *infra* notes 94-97 and accompanying text.

4. As defined in the Refugee Act of 1980,

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

Pub. L. No. 96-212, § 201(a)(42), 94 Stat. 102, 102 (codified at 8 U.S.C. § 1101(a)(42) (Supp. V 1981)).

The Act provides a statutory definition of "refugee" that corresponds to the definition in the United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150, 152 [hereinafter cited as U.N. Convention]. The United States adopted articles 2-34 of the Convention when it acceded to the United Nations Protocol on the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 622 (1968), T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter cited as U.N. Protocol]. For a discussion of how the U.N. Protocol has modified United States immigration law, see *infra* notes 54-59 and accompanying text.

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

promoted and ultimately molded by the unique value of refugees as political metaphors of alleged communist oppression.

The Refugee Act of 1980<sup>6</sup> reflects the government's most recent attempt to establish objective criteria for determining refugee admissions. Although much heralded as the end of the political use of the refugee process,<sup>7</sup> the Act actually embodies executive choice.<sup>8</sup> Try as it might, Congress has failed to remedy the most pressing problem plaguing our admissions program: the absence of legal standards to define refugee status, thereby allowing the wholesale infusion of political biases into a purportedly neutral policy.

This article explores the politicization of the refugee admissions process. An examination of the legislative and executive responses to refugee problems (Part II) provides the backdrop for a look at current refugee policy and the most recent legislation governing refugee admissions (Part III).

## II. THE LAW CIRCUMSCRIBING REFUGEE ADMISSIONS

### A. *A Historical Overview of Refugee Law*

Political considerations have long governed the refugee admissions process. In the early 1900's, Congress established qualitative criteria for immigration.<sup>9</sup> The statutes limited or excluded the admission of certain classes of refugees, such as anarchists, illiterates, and vagrants.<sup>10</sup> Eventually, the per-country quotas of the Act of May 19, 1921<sup>11</sup> supplemented these qualitative standards. The quotas established by this Act and later legislation<sup>12</sup> favored refu-

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6. Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 and 22 U.S.C. (Supp. V 1981)).

7. As explained by co-sponsor Senator Kennedy, the Act "establishes . . . a comprehensive U.S. refugee resettlement and assistance program . . . . The basic purpose of the bill . . . is . . . to help insure greater equity in our treatment of refugees and displaced persons and to establish a more orderly procedure for their admission into the United States in reasonable numbers." 125 CONG. REC. S2630 (daily ed. Mar. 13, 1979); see also S. REP. NO. 256, 96th Cong., 1st Sess. 2, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141, 142 (The United States should establish a refugee "policy which will treat all refugees fairly and assist all refugees equally.").

8. See *infra* notes 82-103 and accompanying text.

9. Immigration Act of 1917, ch. 29, 39 Stat. 874, as amended by Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.); Act of Mar. 26, 1910, ch. 128, 36 Stat. 263; Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898; Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213.

10. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875-78 (repealed 1952).

11. Ch. 8, 42 Stat. 5 (repealed 1952).

12. *E.g.*, Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, as amended by Act of

gees from communist countries whose plight proved to be politically advantageous to American interests. By the end of World War II, the laws regulating refugee admissions were obviously a product of political pressures and not humanitarian concerns.

The cold war was just beginning when Congress enacted the Displaced Persons Act of 1948.<sup>13</sup> This Act proposed to provide sanctuary for those fleeing Fascist or Soviet persecution.<sup>14</sup> Technical cutoff dates, however, precluded the issuance of a substantial number of visas to persons, particularly Jews, who had fled Fascist oppression.<sup>15</sup> Subsequent amendments to the Act in 1950<sup>16</sup> exposed Congress's intent to use refugee law as a vehicle for cold war policies. The amendments furthered political objectives by permitting anticommunist refugees living within the People's Republic of China and the Soviet Union or its satellites to obtain visas.<sup>17</sup> Overall, the underlying goals of the Displaced Persons Act were consistent with our foreign policy objectives. Admitting Eastern European refugees into the United States achieved the twin aims of relieving our Western European allies' economic burdens, and publicizing the discontent among the citizens of communist countries.

The Refugee Relief Act of 1953<sup>18</sup> reflected the cold war mentality even more explicitly than did the Displaced Persons Act.<sup>19</sup> The 1953 legislation contained provisions to expedite the admission of refugees fleeing communist-dominated countries in Europe and the Soviet Union.<sup>20</sup> Amendments to the Immigration and Nationality Act of 1952<sup>21</sup> continued this policy by expanding the definition of "refugee escapee" to include people in flight from communist or communist-dominated countries.<sup>22</sup> Thus, for the first

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June 16, 1950, ch. 262, 64 Stat. 219; Act of June 28, 1951, ch. 167, 65 Stat. 96 (repealed 1957).

13. *Id.*

14. Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 13 (1981).

15. *Id.*

16. Act of June 16, 1950, ch. 262, 64 Stat. 219 (repealed 1966).

17. See H.R. REP. NO. 581, 81st Cong., 1st Sess. 15 (1950); Anker & Posner, *supra* note 14, at 13 n.16.

18. Ch. 336, 67 Stat. 400 (1953), amended by Act of Aug. 31, 1954, ch. 68, Stat. 1044.

19. Ch. 647, 62 Stat. 1009 (1948).

20. Ch. 336, § 4(a), 67 Stat. 400, 401; see H.R. CONF. REP. NO. 1069, 83d Cong., 1st Sess., reprinted in 1953 U.S. CODE CONG. & AD. NEWS 2122, 2122-24. The congressional delegates assured the public that the 1953 Act was "an emergency relief measure designed to implement certain phases of American foreign policy. It is not intended to represent any precedent or commitment . . . ." *Id.* at 2122-23.

21. Ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

22. Act of Sept. 11, 1957, Pub. L. No. 85-316, § 15(c)(1), 71 Stat. 639, 643 (codified at 8

time, Congress defined "refugee" ideologically.

In 1965 Congress incorporated the definition of "refugee escapee" into the Immigration and Nationality Act,<sup>23</sup> which provided for quotas<sup>24</sup> on the annual admission of refugees from the Eastern Hemisphere. Although previous legislation provided for the admission of refugees from particular regions,<sup>25</sup> the 1965 amendments to the Immigration and Nationality Act established a nonspecific, permanent refugee admissions process. Nevertheless, even these admission requirements were delineated along ideological and geographical lines; refugees were admitted into the United States if they fled from either communist or communist-dominated countries or a country within the general area of the Middle East.<sup>26</sup> Although Congress incorporated these refugee admissions within the general preference system of immigration admissions, the government allocated visas only for persons fleeing the Eastern Hemisphere.<sup>27</sup>

### B. *The Legislative and Executive Responses to the Refugee Problem*

Through the use of parole, deportation, and asylum powers, the executive branch also has manipulated refugee admissions to satisfy cold war objectives. Of course, the President generally cannot manipulate refugee admissions unless the Congress provides

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U.S.C. § 1153(a)(7) (repealed 1976)). Section 15(c)(1) provides:

[T]he term "refugee-escapee" means any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee (A) from any Communist, Communist-dominated, or Communist-occupied area, or (B) from any country within the general area of the Middle East, and who cannot return to such area, or to such country, on account of race, religion, or political opinion.

*Id.* For a discussion of section 15(c)(1), see GORDON & ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 2.54 (1967); *cf.* *Ishak v. District Director, INS*, 432 F. Supp. 624 (N.D. Ill. 1977) (alien denied permanent residence status because of failure to prove a valid fear of persecution).

23. The 1965 amendments to the Immigration and Nationality Act incorporated section 15(c)(1) as section 203(a)(7), known as the "conditional entry" provision. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 913 (codified at 8 U.S.C. § 1153(a)(7) (repealed 1976); see *infra* note 61).

24. S. REP. NO. 256, 96th Cong., 1st Sess. 6 (1979), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141, 146.

25. See *supra* notes 13-22 and accompanying text.

26. Act of Sept. 11, 1957, Pub. L. No. 85-316, § 15(c)(1), 71 Stat. 639, 643 (codified at 8 U.S.C. § 1153(a)(7) (repealed 1976)).

27. S. REP. NO. 256, *supra* note 24, at 4, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 144.

him with the requisite legal authority and tools. Indeed, as the preceding section demonstrates, the legislative branch is equally susceptible to political pressures in formulating refugee admission procedures. This section illustrates how the political parochialism of the President and Congress is specifically reflected in modern-day refugee law.

## 1. PAROLE

Section 212(d)(5) of the Immigration and Nationality Act of 1952<sup>28</sup> empowers the Attorney General to permit aliens to be paroled into the United States. Although Congress originally intended for the Justice Department to use this parole authority for the temporary admission of individual aliens on an emergency basis,<sup>29</sup> it quickly became the chosen vehicle for admitting refugees

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28. INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976), *amended by* Refugee Act of 1980, Pub. L. No. 96-212, § 203(f), 94 Stat. 102, 107 (codified at 8 U.S.C. § 1182(d)(5)(A), (B) (Supp. V 1981)). Until 1980, this section provided:

The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976). Section 212(d)(5) now provides:

(A) The Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

INA § 212(d)(5), 8 U.S.C. § 1182(d)(5)(A), (B) (Supp. V 1981).

29. "The parole provisions were designed to authorize the Attorney General to act only in *emergent, individual, and isolated situations*, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law." S. REP. NO. 748, 89th Cong., 1st Sess. 17, *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3328, 3335 (emphasis added).

into the United States *en masse*. The Eisenhower administration's decision to use the parole authority to admit 15,000 Hungarian refugees following the crisis there in 1956 typified this tendency.<sup>30</sup>

The almost unlimited political utility of the parole mechanism became increasingly apparent as new crises arose. Between 1962 and April 1979, over 690,000 Cuban refugees entered the United States under the Attorney General's parole authority.<sup>31</sup> This figure does not include over 120,000 Cuban refugees who came from Mariel between April and September 1980, almost all of whom were admitted into the United States pursuant to the same parole authority.<sup>32</sup>

The Cuban parole program deserves special attention here because of the large number of refugees involved and the government's willingness to relax the admission requirements.<sup>33</sup> The Immigration and Naturalization Service (INS) allowed the family and friends of those Cubans desiring to enter the United States to seek waivers of the nonimmigrant visas normally granted to refugees.<sup>34</sup> Once paroled into this country, a Cuban alien could achieve per-

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30. President Eisenhower announced on December 1, 1956 that 15,000 refugees would be admitted on a temporary parole basis. Additionally, the government allocated 6,500 immigration visas to Hungarian refugees under an accelerated procedure. COUNCIL ON FOREIGN RELATIONS, *THE UNITED STATES IN WORLD AFFAIRS* 1956, at 345 (R. Stebbins ed. 1957); DWIGHT D. EISENHOWER, *THE WHITE HOUSE YEARS—WAGING PEACE: 1956-1961*, at 97-98 (1965). During 1956-1957, the Eisenhower administration paroled into the United States over 31,000 Hungarians. The Act of July 25, 1958, Pub. L. No. 85-559, 72 Stat. 419 (repealed 1965), permitted all of the Hungarian parolees to become permanent residents if they satisfied the qualitative requirements of the Immigration and Nationality Act. *See Immigration: Hearings on H.R. 7700 Before the Subcomm. No. 1 on the Judiciary of the House Comm. on the Judiciary*, 88th Cong., 2d Sess. 484-86 (1964); *see also* N.Y. Times, Dec. 7, 1956, § 1, at 1, col. 3 (President mobilizes air- and sealfight to bring Hungarian parolees to the United States); N.Y. Times, Dec. 2, 1956, § 1, at 36, col. 2 (President exceeded numerical restrictions of law by giving broad interpretation to emergency provision for admission of refugees).

31. S. REP. NO. 256, *supra* note 24, at 6, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141, 146.

32. *See, e.g.*, RESEARCH DIV., METROPOLITAN DADE COUNTY PLANNING DEP'T, CUBAN AND HAITIAN REFUGEES (1981); *Haitians, Cubans, and the New Refugee Act*, 9 IMMIGRATION NEWSLETTER 8-14 (May-June 1980). Cubans from Mariel started arriving in Key West, Florida, on April 21, 1980, and by May were coming ashore at a rate in excess of 20,000 a week. Approximately 90% of the refugees arrived by June 8, 1980. By the end of the year, the government reported that 124,786 documented Cubans had arrived. RESEARCH DIVISION, METROPOLITAN DADE COUNTY PLANNING DEP'T, CUBAN AND HAITIAN REFUGEES at 1; *see also* U.S. DEP'T OF COMMERCE, 1981 STATISTICAL ABSTRACT OF THE UNITED STATES 90.

33. *See* Woytych, *The Cuban Refugee*, 16 I. & N. REP. 15 (1967) (relaxing the refugee admissions process to enable disgruntled Cubans to enter the United States represented but another political attack launched against the Castro regime following the severance of diplomatic relations in 1961).

34. *Id.* at 16.

manent resident status after he had lived here for at least two years.<sup>35</sup>

The Ford and Carter administrations also used the parole program to admit substantial numbers of refugees from the Far East. Between 1975 and mid-1979, more than 200,000 Indo-Chinese refugees entered the United States under the parole authority.<sup>36</sup> Parole programs also have been established to admit anticommunist Chinese,<sup>37</sup> Soviet Jews,<sup>38</sup> Ugandan Asians,<sup>39</sup> and Eastern Europeans.<sup>40</sup>

In sharp contrast to the preferential treatment accorded Cubans and other parolees fleeing from communist countries,<sup>41</sup> the Justice Department has denied or severely restricted parole admissions when cold war objectives might be thwarted. This generally is the case when a refugee comes from a noncommunist country whose government has diplomatic ties with the United States. For example, following the overthrow of the Allende government, the Attorney General administered the Chilean parole program very restrictively, allowing few Chileans to enter this country.<sup>42</sup> Haitians and El Salvadorans, fleeing regimes supported by the United States, have been accorded even worse treatment.<sup>43</sup> Rather than

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35. Act of Nov. 2, 1966, Pub. L. No. 89-732, § 1, 80 Stat. 1161, 1161, amended by Act of Oct. 20, 1976, Pub. L. No. 94-571, § 8, 90 Stat. 2703, 2706; Act of Mar. 17, 1980, Pub. L. No. 96-212, § 203(i), 94 Stat. 102, 108 (codified as amended at 8 U.S.C. § 1255 (1976 & Supp. V 1981)) (amended to permit residency one year after entry).

36. S. REP. NO. 256, *supra* note 24, at 6, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 146.

37. *Id.*

38. *Id.*; DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, 1973 ANNUAL REPORT 5.

39. S. REP. NO. 256, *supra* note 24, at 6, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 146.

40. *Id.*

41. The Reagan administration has continued the policy of favoring refugees fleeing communist regimes. For example, Attorney General Smith in his testimony before the Senate recommended setting a limit of 173,000 refugee admissions in 1982, of which 100,000 would come from Indo-China. Cohodas, *Committees Starting Work on Immigration Law Reform*, 39 CONG. Q.W. REP. 2067, 2068 (1981).

42. The government paroled fewer than 2,000 Chileans into the United States between 1975-1977. S. REP. NO. 256, *supra* note 24, at 6, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 146. For an excellent discussion of the Chilean program and the surrounding controversy, see Note, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. REV. L. & SOC. CHANGE 107 (1978).

43. The presence and processing of Haitians in Miami, Florida became a problem in 1978. By June of that year, 6,000 to 7,000 Haitians had asylum applications pending with the INS. After the Service accelerated deportation hearings and the processing of asylum applications, the Haitians brought an action alleging discrimination and violation of their due process and equal protection rights. The United States District Court for the Southern District of Florida held that the Haitians' claims were valid and that those Haitians whose

establish parole programs for these groups of refugees, the United States government has incarcerated them and, in most instances, denied them asylum.<sup>45</sup>

## 2. WITHHOLDING OF DEPORTATION

The broad criteria used by government to admit refugees through parole programs differ radically from the strict and narrow requirements established by the INS to withhold deportation due to fear of persecution. Originally, section 23 of the Internal Security Act of 1950<sup>46</sup> empowered the Attorney General to withhold the deportation of any alien whose return to his homeland would subject him to "physical persecution." Congress eventually codified this criterion in section 243(h) of the Immigration and Nationality Act of 1952.<sup>47</sup> Although slightly modified by the courts,<sup>48</sup> section

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applications for asylum had been rejected could not be deported until they were given a fair opportunity to present their claims for asylum. *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *modified sub nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (INS violated due process rights of Haitians to seek asylum in the United States).

During 1981 the influx of Haitians accelerated. Beginning in July, arriving Haitians were sent to detention centers to await possible deportation. In September the flow of Haitians abated as President Reagan gave United States Navy vessels the authority to interdict ships carrying undocumented aliens into the United States. *See Cohodas, supra* note 41, at 2069. The detained Haitians were released in mid-1982 after the United States District Court for the Southern District of Florida held that the government's detention program did not comply with the Administrative Procedure Act. *Louis v. Nelson*, 544 F. Supp. 1004 (S.D. Fla. 1982).

Refugees from El Salvador have faced similar treatment by the INS. In *Nunez v. Boldin*, 537 F. Supp. 578 (S.D. Tex. 1982), the INS held El Salvadorans in a detention center and restricted their access to legal assistance. Further, the government screened the correspondence of the detainees. The district court held that the government activity constituted a violation of the refugees' fundamental rights, and enjoined the INS from engaging in these restrictive practices. Additionally, the court established the right of the detainees to know that they were entitled to apply for political asylum in the United States. *See also Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982).

45. In 1982 INS granted asylum to 7 Haitians; denied asylum to 112 Haitians; and had 6,035 Haitian applications for asylum pending at the end of the year. In the same year, INS granted asylum to 69 El Salvadorans; denied asylum to 1,178 El Salvadorans; and had 22,314 El Salvadoran applications for asylum pending at the end of the year. IMMIGRATION AND NATURALIZATION SERVICE REPORT: ASYLUM APPLICATIONS FOR FISCAL YEAR 1982.

46. Ch. 1024, § 23, 64 Stat. 987, 1010 (1950) (amending Immigration Act of 1917, ch. 29, § 20, 39 Stat. 874, 890) (current version at 8 U.S.C. § 1253(h) (Supp. V 1981)).

47. INA § 243(h), 8 U.S.C. § 1253 (1976 & Supp. V 1981).

48. For example, in *Leng May Ma v. Barber*, 357 U.S. 185 (1958), the Court held that § 243(h) of the Immigration and Nationality Act applies only to aliens already in the United States, and that this category does not include aliens who have been released on parole pending a determination of the alien's admissibility. If the government finds that the alien is ineligible for entry and orders him excluded, then the provisions of § 243(h) are not appli-

243(h) remained the controlling test for withholding deportation for thirteen years.

In 1965, after four administrations had expressed concern that the "physical persecution" standard was unduly restrictive,<sup>49</sup> Congress amended section 243(h) to permit the Attorney General to withhold deportation if *he* believed that the alien in question "would be subject to persecution on account of race, religion, or political opinion" upon return to his native country.<sup>50</sup> Only if the particular alien faced a "clear probability" of persecution could this discretion be favorably exercised.<sup>51</sup> Although the law no longer limited persecution to physical forms, it did grant the Attorney General broad discretion to withhold deportation<sup>52</sup> and imposed a rigorous burden of proof on an alien seeking to obtain asylum.<sup>53</sup>

The United States adoption in 1968 of the United Nations Protocol Relating to the Status of Refugees<sup>54</sup> did not lower the standard of proof necessary to establish persecution and, therefore, did not make it easier for an alien to seek political asylum to avoid deportation.<sup>55</sup> Thus, aliens from noncommunist countries had to satisfy a rigorous burden and standard of proof to successfully petition the government to withhold their deportation.<sup>56</sup>

Although the Refugee Act of 1980<sup>57</sup> sought to apply the U.N. Protocol, it is questionable whether the Act has changed the standard of proof required for the grant of relief under section 243(h).<sup>58</sup> Section 201(a)(42)<sup>59</sup> adopted the definition of "refugee"

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cable to the case. *Id.* at 187-89.

49. Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 INT'L LAW 204, 220 (1969); see also 111 CONG. REC. H21,803-04 (daily ed. Aug. 25, 1965) (remarks of Congressman Poff, sponsor of amendment to section 243(h)).

50. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918 (codified as amended at 8 U.S.C. § 1253(h) (1976 & Supp. V 1981)); see *supra* note 47; see generally Evans, *supra* note 49, at 225-48.

51. See, e.g., *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *Lena v. INS*, 379 F.2d 536, 538 (7th Cir. 1967).

52. See *Kasrari v. INS*, 400 F.2d 675, 677-78 (9th Cir. 1968).

53. See *infra* note 67.

54. See U.N. Protocol, *supra* note 4.

55. See, e.g., *Pierre v. United States*, 547 F.2d 1281 (5th Cir.), *vacated and remanded to consider mootness*, 434 U.S. 962 (1977); *In re Dunar*, 14 I. & N. DEC. 310 (Apr. 17, 1973).

56. *Cisternas-Estay v. INS*, 531 F.2d 155 (1976); *Gena v. INS*, 424 F.2d 227 (1970).

57. Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C. (1976 & Supp. V 1981)).

58. *Rejaie v. INS*, 691 F.2d 139 (3d Cir. 1982). But see *Stevic v. Sava*, 678 F.2d 401, 406 (2d Cir. 1982), *cert. granted sub nom. Stevic v. INS*, 51 U.S.L.W. 3627 (U.S. Mar. 1, 1983) (No. 82-973).

59. Pub. L. No. 96-212, § 201(a)(42), 94 Stat. 102, 102, 8 U.S.C. § 101(a)(42) (Supp. V 1981); see *supra* note 4.

contained in the U.N. Protocol, and section 243(h) underwent modification to conform to article 33 of the U.N. Convention.<sup>60</sup> Unfortunately, the narrowly drawn strict legal barriers to admission remain.

### 3. POLITICAL ASYLUM

The inquiry in withholding of deportation and asylum cases is often similar. As in withholding cases, the decision whether to grant political asylum used to lie within the Attorney General's discretion.

Prior to the enactment of the Refugee Act of 1980, asylum existed only by virtue of INS regulations, which provided that asylum could be requested before the District Director of INS.<sup>61</sup>

The Refugee Act of 1980 substantively changed the procedures used by aliens to obtain political asylum. The broad authority of the President under section 207(b)<sup>62</sup> to grant refugee status re-

60. Section 243(h) now reads:

(1) 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.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

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

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

INA § 243(h), 8 U.S.C. § 1253(h) (1976 & Supp. V 1981).

61. 8 C.F.R. § 108 (1972). *See also* Sannon v. United States, 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated*, 566 F.2d 104 (5th Cir. 1978) (INS procedures were informal and often haphazard).

62. Pub. L. No. 96-212, § 207(b), 94 Stat. 102, 103 (codified at 8 U.S.C. § 1157(b) (Supp. V 1981)). Section 207(b) provides:

If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a) of this section, the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allo-

placed the Attorney General's authority to order conditional entry under section 203(a)(7). Moreover, section 208(a)<sup>63</sup> of the new Act authorized the creation of a uniform procedure to govern asylum applications. This procedure appears in regulations recently promulgated by the INS.<sup>64</sup>

Under the INS's procedures, an alien can apply for asylum with the district director who has jurisdiction over the particular port or region.<sup>65</sup> Once an alien files an application, the district director must request an advisory opinion on the application from the State Department's Bureau of Human Rights and Humanitarian Affairs.<sup>66</sup> Additionally, the INS representative must provide the alien applicant an opportunity to establish that he cannot return to his homeland or place of habitual residence because of a "well-founded fear of persecution."<sup>67</sup> The decision whether to approve or deny the asylum application lies in the discretion of the district director and is subject to agency and judicial review.<sup>68</sup>

### III. REFLECTIONS ON THE POLICY UNDERLYING REFUGEE ADMISSIONS

#### A. *A Realistic Appraisal of the Refugee Admissions Process*

A comparison of the admissions process for persons seeking political asylum or the withholding of deportation with the admissions process for those obtaining entry through parole or particularized federal legislation dramatically demonstrates the

cated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection.

*Id.* The Refugee Act also prohibits the Attorney General from paroling aliens who are refugees "unless [he] determines that compelling reasons in the public interest with respect to that particular alien require [parole] . . . ." *Id.* § 212(d)(5)(B) (codified at 8 U.S.C. § 1182(d)(5)(B) (Supp. V 1981)).

63. *Id.* § 208(a) (codified at 8 U.S.C. 1158(a) (Supp. V 1981)).

64. Aliens and Nationality, 8 C.F.R. § 208 (1983).

65. *Id.* §§ 208.1-.3.

66. *Id.* § 208.7.

67. *Id.* § 208.5. The burden is on the alien to prove probable persecution upon his or her return. *Id.* § 208.5. In practice, aliens have had great difficulty in meeting this standard of proof. The INS has a legal duty to inform an alien that he has the right to apply for asylum. *See, e.g.,* Nunez v. Boldin, 537 F. Supp. 578, 584 (S.D. Tex. 1982); Louis v. Meissner, 530 F. Supp. 924, 927 (S.D. Fla. 1981). For a thorough discussion of this standard and the near impossible obstacle it puts in the path of the would-be "refugee," see Note, *The Right of Asylum Under United States Immigration Law*, 33 U. FLA. L. REV. 539, 555-58 (1981). This article also discusses the likely effect that the definition of "persecution" contained in the Refugee Act of 1980 will have on the alien's burden of proof. *Id.* at 559-61.

68. Aliens and Nationality, 8 C.F.R. § 208.8-.10.

politicization of the immigration process. Since the end of World War II, a dual process for admitting persons seeking freedom from political or religious persecution has developed. On the one hand, there is the parole process<sup>69</sup> or the broad statutory admission powers,<sup>70</sup> which is entirely discretionary.<sup>71</sup> On the other hand, there exists a highly technical body of law with an extraordinarily high standard of proof<sup>72</sup> reserved for those seeking political asylum<sup>73</sup> or the withholding of their deportation.<sup>74</sup> The latter processes principally exclude refugees seeking shelter from noncommunist countries whose immigration to the United States would not promote cold war objectives.<sup>75</sup> Very few persons have ever successfully challenged the INS's denial of political asylum or withholding of deportation because legal standards and not political criteria guide these decisions.

In stark contrast to the legal guidelines governing asylum and deportation decisions, the establishment of a parole program for a particular nationality is not susceptible to judicial review.<sup>76</sup> Parole programs are administered by and subject to executive authority, and the decision to establish a parole program for Cubans instead of, for example, El Salvadorans, is a political decision left to the executive branch and can neither be challenged nor reviewed. In fact, these programs simply do not contain the elements that we

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69. See *supra* notes 28-45 and accompanying text.

70. See *supra* notes 9-27 and accompanying text.

71. The Chilean experience is a case in point. Many Chileans sought asylum in the United States after a military coup ousted the Allende government. The Chileans' efforts were largely futile due to our nation's concern with the evacuation of thousands of Indo-Chinese, whose requests for parole came during consideration of the Chileans' plight. In short, the neutrality of the American government's asylum policy was put to the test and it failed. See Note, *supra* note 43, at 109-17.

72. See *supra* notes 56, 58 & 67 and accompanying text.

73. See *supra* notes 61-68 and accompanying text.

74. See *supra* notes 46-60 and accompanying text.

75. The government has used the asylum and withholding of deportation processes as legal hurdles to impede the entry of thousands of refugees fleeing noncommunist repressive countries such as Haiti and El Salvador. See, e.g., *Louis v. Nelson*, 544 F. Supp. 973 (S.D. Fla.), *aff'd in part, rev'd in part*, No. 82-5772 (11th Cir. Apr. 12, 1983); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *modified sub nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

76. An alien does not legally enter the United States until the government has granted his parole request. See *Leng May Ma v. Barber*, 357 U.S. 185, 189 (1958). If denied parole, the alien is categorized as "excluded" and may not be accorded the same rights as citizens, residents, or deportable aliens. But see *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981); *Louis v. Nelson*, 544 F. Supp. 973 (1982). The Supreme Court of the United States has recognized the constitutionality of procedures governing excludable aliens. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

generally consider necessary to a "legal system."<sup>77</sup>

The lack of legal standards to evaluate parole programs leaves them susceptible to inconsistent and politically partial management. For example, in determining parole or asylum for Haitian or El Salvadoran refugees, the government has not applied the same criteria it used to decide the fate of Cubans or Indo-Chinese who previously sought parole.<sup>78</sup> That these comparisons are not made by the government is not surprising. The parole process purposely diverts certain refugees, most notably those from communist countries, from the legal system, thereby ensuring that they will be admitted irrespective of the validity of their individual claims. The effective intent of this purposeful exclusion is to select and favor particular groups of refugees. Thus, while the United States has admitted hundreds of thousands of refugees from Asia and Eastern Europe before 1980,<sup>79</sup> it has admitted less than 10,000 refugees from Africa,<sup>80</sup> probably the most refugee-ridden continent in the world.<sup>81</sup>

B. *The Refugee Act of 1980: Part of the Solution or Part of the Problem?*

An end to the use of refugee admissions for political purposes appeared to be in sight when Congress enacted the Refugee Act of 1980.<sup>82</sup> Congress passed the Act with the intent of eliminating the traditional biases in refugee programs<sup>83</sup> by adopting the facially neutral standard of the United Nations Protocol Relating to the Status of Refugees.<sup>84</sup> The Act eliminated the broad parole authority traditionally exercised by the Attorney General<sup>85</sup> and ostensibly limited the use of parole under section 212(d)(5) to a case-by-case

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77. See, e.g., H. HART, *THE CONCEPT OF THE LAW* (1961).

78. See generally *Haitians, Cubans, and the New Refugee Act*, 9 IMMIGRATION NEWSLETTER 1 (May-June 1980). For a discussion of various INS memos reflecting prejudgment of the Haitians' asylum claims, see *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 513-16 (S.D. Fla. 1980), modified *sub nom.* *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

79. See *supra* notes 36-40 and accompanying text.

80. S. REP. NO. 256, *supra* note 24, at 6, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 146.

81. See Szulc, *The Refugee Explosion*, N.Y. Times, Nov. 23, 1980, § 6 (Magazine), at 136.

82. Pub. L. No. 96-212, 94 Stat. 102.

83. See *supra* note 7 and accompanying text.

84. See *supra* note 4; *supra* notes 59-60 and accompanying text.

85. Pub. L. No. 96-212, §§ 207(b), 212(d)(5)(B), 94 Stat. 102, 103, 108; see *supra* note 62 and accompanying text.

basis.<sup>86</sup>

Contrary to the expectations of its sponsors,<sup>87</sup> however, the Refugee Act of 1980 has institutionalized rather than eliminated political choice. Although the structure of the Act restricts parole under 212(d)(5), it now permits the executive branch to establish annual parole programs. The President has the authority to designate, each year, the geographic locations and number of refugees or persons of special humanitarian concern who may enter the United States.<sup>88</sup> The number of refugees admitted annually has varied since passage of the Act, but generally less than five percent of the admissions have come from noncommunist areas.<sup>89</sup> In November 1981, the President announced that 140,000 refugees would be admitted in fiscal year 1982: 100,000 persons from Asia, 20,000 from the Soviet Union, 9,000 from Eastern Europe, 5,000 from the Near East, 3,000 from Latin America and the Caribbean, and 3,000 from Africa.<sup>90</sup> This distribution mirrors the pattern of allocations for the admission of refugees established before passage of the Refugee Act of 1980.<sup>91</sup>

The statistics on refugee admissions for the last two years prove that a neutral selection process is not at work. The fact that the United States admits proportionately few refugees from the countries with the largest refugee populations proves that point.

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86. Pub. L. No. 96-212, § 212(d)(5)(B), 94 Stat. 102, 108 (codified at 8 U.S.C. § 1182(d)(5)(B) (Supp. V 1981)).

87. See *supra* note 7 and accompanying text.

88. Pub. L. No. 96-212, § 207(a), 94 Stat. 102, 103 (codified at 8 U.S.C. § 1157(a) (Supp. V 1981)). Section 207(a) provides:

(1) [T]he number of refugees who may be admitted under this section in fiscal year 1980, 1981, or 1982, may not exceed fifty thousand unless the President determines, before the beginning of the fiscal year and after appropriate consultation . . . that admission of a specific number of refugees in excess of such number is justified by humanitarian concerns or is otherwise in the national interest.

(2) [T]he number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

(3) Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation.

*Id.* For an excellent and thorough discussion of the provision's legislative development, see Anker & Posner, *supra* note 14, at 43-51. Translated into practical terms, the Refugee Act of 1980 gives the President virtually absolute discretion over refugee admissions.

89. IMMIGRATION J. 20 (Mar.-Apr. 1982).

90. *Id.*

91. *Id.*

For example, the largest concentration of refugees in the world is in Africa,<sup>92</sup> and substantial numbers of refugees presently seeking asylum are from the Caribbean and Latin America—particularly El Salvador and Haiti. Yet the 1982 State Department reports accompanying the refugee admissions allocations fail to mention Haitians and Central Americans and limit African admission to but a few thousand.<sup>93</sup>

The Refugee Act of 1980 not only institutionalizes political choice as the primary criterion for allocating refugee admissions, but it also fails to curb the extensive use of the parole power. Politics and parole apparently are complementary concepts, as demonstrated by the results of the massive Cuban exodus in 1980.<sup>94</sup> Less than a month after passage of the Act, over 120,000 Cuban refugees began to enter the United States as parolees.<sup>95</sup> Although section 212(d)(5) mandated that the government review each parole application individually,<sup>96</sup> the Carter administration simply circumvented this requirement by designating the Mariel Cubans as entrants rather than refugees.<sup>97</sup>

In summary, the substance of the Refugee Act of 1980 continues to permit refugee admissions to serve political objectives.<sup>98</sup> Moreover, continued reliance on sections 243(h) and 208 of the Immigration and Nationality Act to determine the fate of a relatively small number of persons seeking admission provides the dual function of creating the appearance of formal legal standards in the refugee admissions process, while diverting attention from the vast numbers of refugees who are admitted on a nonformal and nonlegal basis. The withholding and asylum processes serve as a convenient method for determining the claims of refugee groups whose admission does not serve political objectives.<sup>99</sup> The standard and burden of proof in these cases is weighted so heavily against the applicants—given their usual backgrounds and legal resources—that the rejection of their claims is almost always

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92. See *supra* notes 80-81 and accompanying text.

93. IMMIGRATION J. 20 (Mar.-Apr. 1982).

94. See *supra* notes 1-4 & 32 and accompanying text.

95. *Id.*; N.Y. Times, May 21, 1980, at 24, col. 1.

96. See *supra* note 86 and accompanying text.

97. N.Y. Times, May 21, 1980, at 24, col. 1 (remarks of Jack R. Watson, Jr., Special Assistant to the President for Intergovernmental Affairs).

98. See *supra* notes 88-97 and accompanying text.

99. The INS routinely makes its decisions on the basis of political considerations, especially foreign policy. See Note, *supra* note 67, at 561 n.174.

assured.<sup>100</sup>

The Refugee Act, however, does perform a significant ideological function. By adopting the United Nations Protocol standard<sup>101</sup> for refugees, the Act satisfies the demand of our legal system for a facially neutral criterion for admission. Gone is the prior distinction between the standard for determining eligibility for a discretionary grant of asylum<sup>102</sup> and the standard for determining eligibility for conditional entrants under 203(a)(7). A uniform definition of "refugee" replaces these disparate standards. In doing so, this purportedly impartial criterion reinforces the traditional ideological belief<sup>103</sup> that the United States can and should be a haven for refugees from all parts of the world, regardless of their political origins; in practice, however, it does nothing to eliminate the traditional use of refugees for cold war purposes.

#### IV. CONCLUSION

For years, the refugee admissions process has been used to further political objectives rather than to assist those aliens most in need of help. Admissions decisions reflected a cold war mentality that effectively transformed immigration policy into mere propaganda. That the process was susceptible to this manipulation was due to the lack of objective legal standards to govern admissions decisions; consequently, the government had unbridled discretion to shape refugee policy. With the enactment of the Refugee Act of 1980, many hoped that refugee admissions would finally become an apolitical tool capable of alleviating the suffering of thousands of persecuted people abroad. Although the Act valiantly attempts to achieve this objective—section 212(d)(5) is a case in point—it still falls short of its appointed task because its provisions are easily circumvented and the executive branch has too much discretionary authority.

One method for revising the current refugee admissions process would be to end the duality between the formal United Nations definition for the admission of refugees and the substantive selection, along ideological lines, of the actual refugees admitted. To accomplish this goal, the government must assess the total ref-

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100. *Id.* at 555-60; *supra* notes 56, 58 & 67 and accompanying text.

101. *See supra* notes 4, 54-60 and accompanying text.

102. The discretionary power was previously authorized by section 203(a)(7) and is now currently authorized by section 207 of the INA.

103. This traditional belief is emblazoned on the Statue of Liberty: "Give me your tired, your poor, your huddled masses yearning to breathe free . . . ."

ugee populations from each continent and then devise a proportionate share system of visa allocations relating to the number of refugees from that continent. In this way, Africa and Latin America, both of which have been traditionally and recently disfavored, would receive a substantially greater and fairer allotment of visa allocations. A system devised along these lines would enhance the integrity of the refugee process by minimizing its traditional use as a political fulcrum.