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Promised Land or Land of Broken Promises?
Political Asylum in the United States

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Promised Land or Land of Broken Promises? Political Asylum in the United States

Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore, Send these, the homeless, tempest-tossed, to me: I lift my lamp beside the golden door *

INTRODUCTION

Many refugees¹ seek political asylum² in the United States.³ Although historically refugees have come from outside our hemisphere,⁴ the more recent influx of aliens claiming refugee status


¹ For a definition of refugee, see infra note 51 and accompanying text. Although figures vary, the number of refugees in the world is estimated to be between 11 and 13 million persons. M. LeMay, FROM OPEN DOOR TO DUTCH DOOR: AN ANALYSIS OF U.S. IMMIGRATION POLICY SINCE 1820 121 (1987) (worldwide refugee population estimated between 12 and 13 million); Statement by Secretary Schultz, DEP’T ST. BULL., Vol. 87, No. 2128, p. 47 (November 1987)(Secretary Schultz estimates worldwide refugee population to be over 11 million).

² Applications for political asylum are governed by 8 U.S.C. § 1158(a) (1982) and 8 C.F.R. § 208 (1987). For a discussion of the technical aspects of a request for political asylum, see infra notes 84-120 and accompanying text.

³ There were more than 16,622 applications for political asylum filed in 1985. Statistics Div., Immigration & Naturalization Serv (INS) asylum cases filed with district directors, table dated Oct. 23, 1985. In addition, 126,000 other applications were still pending at the end of Fiscal Year 1985. Preston, Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees’ Rights and U.S. International Obligations?, 45 Md. L. Rev 91 (1986). One of the reasons for the large number of pending applications is the inefficiency of the INS in processing applications. For example, in 1981, the INS decided 50 asylum requests, leaving a backlog in excess of 5000 cases. M. LeMay, supra note 1, at 132. For a discussion of these problems of the INS, see id. at 125-36. Prior to the enactment of the Refugee Act of 1980, there was no formal process for aliens in the United States to request political asylum. INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 1211 n.4 (1987). One of the purposes of the 1980 Act was “to provide a permanent and systematic procedure for the admission to this country of refugees.” Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

is from within the western hemisphere.\(^5\) This new development has caused a variety of problems, both legal\(^6\) and political,\(^7\) for the federal government.\(^8\)

Prior to the passage of the Refugee Act of 1980,\(^9\) attempts to deal with problems of refugees were made on an ad-hoc basis,\(^10\) the primary goal being to aid those fleeing from governments which the United States opposed.\(^11\) The major objective of the Refugee Act was to make asylum decisions on a politically neutral basis.\(^12\) This goal has not been reached, however, as asylum claims are still determined primarily by American political interests.\(^13\) For example, since 1980, aliens fleeing communist governments are still more likely to have their political asylum claims granted.\(^14\)

First, this Note examines the statutory\(^15\) and administrative\(^16\) framework for the processing of asylum claims. Then, the role of the judiciary in overseeing this process is discussed.\(^17\) Finally,
the Note concludes that the Refugee Act of 1980 has not succeeded in creating a politically neutral process for the granting of asylum claims. Changes are suggested which might effectuate this goal.

I. STATUTORY FRAMEWORK OF REFUGEE LAW

A. Refugee Law Prior to 1980

Historically, refugee law has been characterized by ad-hoc decision making. The admission of refugees into the United States traditionally has been dealt with through the political process. Early statutes clearly favored refugees from communist countries. Prior to the Refugee Act of 1980, American refugee law reflected a concern with political ideology rather than humanity.

Several early statutes specifically referred to political ideology. For example, the purpose of the Displaced Persons Act of 1948 was to aid persons "fleeing Fascist or Soviet persecution." In addition, the Refugee Relief Act of 1953 served to

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18 See infra notes 167-93 and accompanying text.
19 See infra notes 194-200 and accompanying text.
20 Scanlan, supra note 10, at 847
21 Kurzban, supra note 4, at 867-78. In particular, under section 212(d)(5) of the Immigration & Nationality Act of 1952, the Attorney General could permit aliens to be paroled into the United States. 8 U.S.C. § 1182(d)(5) (1982). This section was amended in 1980 by adding a new section to reflect changes brought by the Refugee Act of 1980. For the text of the current statute, see infra note 33.
22 Kurzban, supra note 4 at 867-68.
24 See generally Helton, supra note 13; Kurzban, supra note 4; Posner, Comments and Recommendations on Proposed Reforms to United States Immigration Policy, 36 U. MIAI. L. REV. 883 (1981-82); Preston, supra note 3, at 91-95; Scanlan, supra note 10.
27 Kurzban, supra note 4, at 868.
"expedite the admission of refugees" from communist countries. In 1952, "refugee" was defined to explicitly include people fleeing communist regimes. This preference continued throughout later amendments.

Ideological preferences were illustrated by three methods used to admit refugees or to allow refugees to remain in the United States: parole, withholding of deportation, and political asylum. The parole authority allows presidents to permit large numbers of aliens into the United States. For example, this power was used to admit 31,000 Hungarian refugees in 1956 and 1957, 690,000 Cuban refugees between 1962 and 1979, and more than 200,000 refugees from Indo-China between 1975 and 1979. As a general rule, however, presidents have not used the parole power to admit refugees from nations with close ties to the United States.

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29 Kurzban, supra note 4, at 868. The statute provided: "[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." Id. at 868 n.22 (quoting 8 U.S.C. at § 1153(a)(7) (1980)).

30 Id. at 869.

31 Id.


33 (5)(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.


34 Kurzban, supra note 4, at 870-71.

35 Id. at 871.

36 Id. An additional 124,786 Cubans came from Mariel in 1980, and most of them were admitted under the parole authority. Id. at 871 n.32.

37 Id. at 872.

38 Id.
The criteria for withholding deportation has broadened over time. Originally, deportation was withheld only if the alien would be subjected to "physical persecution" upon returning to his or her homeland. The standard was later broadened to include "persecution on account of race, religion, or political opinion," and was further expanded by the Refugee Act of 1980.

Prior to the Refugee Act of 1980, political asylum was an informal and ad-hoc process, existing only in the administrative regulations of the Immigration and Naturalization Service (INS). The Refugee Act of 1980 formalized and structured the process of granting asylum.

B. The Refugee Act of 1980

The purpose of the Refugee Act of 1980 was to fulfill obligations under international law by making domestic law con-
sistent with the United Nations Protocol Relating to the Status of Refugees. In 1968 the United States agreed to this Protocol, which bound the parties to certain provisions of the United Nations Convention Relating to the Status of Refugees. The most important provision in the Protocol is the definition of a refugee. Refugee is defined as an individual who

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

When the United States agreed to the above Protocol, the President and the Senate apparently thought there was no need to change existing law to be consistent with this definition of refugee. At most, it was thought that any necessary modifications could be made through the administration of refugee claims by the Attorney General. Commentators have argued that the United States did not understand the effect of this new definition of refugee. As one commentator has stated:

It took years for the United States to realize the effect of this new definition. Between 1968 and 1980, the immigration laws were in disarray. For example, in the early 1970's a Lithuanian seaman named Simar Kudirka jumped off a Soviet trawler and was plucked from the sea by either the United States Coast Guard or Navy. Not knowing what to do with him, the rescuers

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49 The United States was not a signatory to the Convention. INS v. Stevic, 467 U.S. 407, 416 n.9 (1984).
50 Helton, supra note 13, at 250-51.
51 This definition is in article 1.2 of the Protocol.
52 Stevic, 467 U.S. at 417 (The President and Senate believed the protocol was largely consistent with existing law.).
53 Id. at 417-18.
54 See, e.g., Posner, supra note 24, at 884.
informed Washington that Mr. Kudirka was saying something about asylum. They must have contacted someone at the Immigration and Naturalization Service (INS) which, at the time, had neither procedures nor forms for asylum requests. Nobody knew how to deal with Mr. Kudirka's asylum request, so the United States sent him back to the Soviet Union. The Soviets, in turn, sent Mr. Kudirka to Siberia.

Members of Congress were disturbed about this incident and demanded that the United States create an asylum procedure. So the Immigration and Naturalization Service created a form, number I-589. But between 1971, when Kudirka was sent back to the Soviet Union, and 1980, when the Refugee Act of 1980 was passed, no one quite knew what to do with the form. The INS promulgated some regulations, but nothing in the immigration laws addressed asylum. Finally, members of Congress, disillusioned with the ability of the INS and the Justice Department to fulfill the spirit of the Protocol, enacted the Refugee Act of 1980.

Motivated by humanitarian concerns, Congress liberalized the definition of refugee. A refugee was defined as one who was unable or unwilling to return to his or her country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

The procedure for resolving asylum claims was also established in the 1980 Act, which gives the Attorney General the power to establish a procedure for aliens to apply for asylum. The Attorney General is authorized to grant asylum, in his or

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55 Many commentators state this incident led members of Congress to be more concerned with the actions of the INS. See, e.g., Preston, supra note 3, at 98-99.
56 Posner, supra note 24, at 884-85.
57 Helton, supra note 13, at 249-50.
58 Id. The Senate Report on the Refugee Act of 1980 stated the new law was to "give[ ] statutory meaning to our national commitment to human rights and humanitarian concerns." S. REP. No. 256, 96th Cong., 2d Sess. at 1-3.
59 Scanlan, supra note 10, at 855; see S. REP No. 256, 96th Cong., 2d Sess. at 1-3.
60 Scanlan, supra note 10, at 853 n.146.
her discretion, if the alien meets the new definition of a refugee. The 1980 Act also amended the Attorney General’s authority to withhold deportation under section 243(h) of the Immigration and Nationality Act of 1952. This amendment removed the Attorney General’s discretion in deciding whether to withhold deportation, and required the Attorney General not to deport or return any alien if that alien’s life or freedom would be threatened on “account of race, religion, nationality, membership in a particular social group, or political opinion.” The amendment was also passed in order to comply with United States Protocol obligations requiring a state not to expel or return a refugee when his or her life or freedom would be endangered on grounds stated in the amendment.

Although Congress clearly intended the Refugee Act of 1980 to remove the ideological bias in admitting refugees, the Act did not define the standard for determining refugee admission. As a result, there has been a continuing controversy over the proper standard for processing claims under section 208(a) and section 243(h). Some commentators believe this omission allowed what was to be a neutral process to be subverted into a process dominated by political and ideological biases.

The INS believed that there was no difference between the standard to be used for processing asylum claims and requests for the withholding of deportation. The INS adopted a standard that required the refugee, in either case, to prove a “clear probability of persecution.” It was apparent, however, that

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63 Id. at § 1253(h). The earlier statute had stated the Attorney General could withhold deportation if 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.” Id. at § 1253 (1976 & Supp. 1981).
64 This broadens the reasons for withholding deportation.
65 19 U.S.T. at 6276; see Stevic, 467 U.S. at 416-17
66 Kurzban, supra note 4, at 867
67 Id.
68 This section contains the definition of refugee embodied in 8 U.S.C. at § 1101(a)(42)(A).
69 This section is the withholding of deportation provision codified at id. at § 1253(h).
70 See generally Kurzban, supra note 4; Preston, supra note 3.
72 Stevic, 467 U.S. at 424.
this standard was more lenient in some cases than in others.\textsuperscript{73} Over time, courts began to oversee the process, and the standard began to change. Two standards eventually emerged, one applicable to each process.\textsuperscript{74} Claims under section 243(h) (withholding deportation) were determined by a "clear probability of persecution"\textsuperscript{75} while requests under section 208(a) (political asylum) were governed by a "well-founded fear of persecution."\textsuperscript{76} The courts of appeal were divided over this issue,\textsuperscript{77} however, and confusion regarding the appropriate standard to be applied resulted.\textsuperscript{78} The Supreme Court has attempted to resolve this confusion,\textsuperscript{79} although some controversy continues.\textsuperscript{80} The Court held the "well-founded fear" standard applies to section 208 proceedings\textsuperscript{81} while the "clear probability" standard applies to section 243(h) proceedings.\textsuperscript{82}

II. ADMINISTRATIVE PROCEDURES FOR POLITICAL ASYLUM CLAIMS

The procedures for processing political asylum claims are contained in 8 C.F.R. § 208.\textsuperscript{83} The political asylum application,
made on Form I-589, may include the applicant, as well as the applicant's spouse and children. The application is made either to an INS district director or to an immigration judge if exclusion or deportation proceedings have begun. Requests for political asylum made to an immigration judge are also considered to be requests for the withholding of exclusion or deportation under section 243(h).

The applicant has the burden of proving either persecution or a well-founded fear of persecution because of "race, religion, nationality, membership in a particular social group, or political opinion." The regulation does not distinguish standards for claims under section 243(h) and section 208(a).

When application for political asylum is made to the district director, the applicant must request an advisory opinion from the State Department’s Bureau of Human Rights and Humanitarian Affairs (BHRHA). There is continuing controversy over the role of these opinions in granting political asylum. Many commentators argue that the opinions allow the State Department to subvert the neutral principles behind the Refugee Act of 1980. Arthur C. Helton, Director of the Political Asylum Project for the Lawyer's Committee for International Human Rights, argues that aliens fleeing from communist countries are far more likely to be granted asylum than those fleeing from regimes supported by the United States—"irrespective of their

proposed new regulations which would take immigration judges out of the political asylum process. After significant opposition to these proposed regulations, they were withdrawn, and the INS is redrafting new proposed regulations. For a discussion of these proposed regulations, see Helton, Proposed Regulations on Asylum: An Improvement or Retrogression, Nat’l L.J. Feb. 8, 1988, at 18 (Helton also argues asylum claims should be removed from the INS and given to a separate agency.).

8 C.F.R. § 208.2 (1987).
Id. at § 208.3(a).
Id. at § 208.3(b).
Id.
Id. at § 208.7.
9 For a discussion of the two standards, see infra notes 123-62 and accompanying text.
8 C.F.R. at § 208.5.
Id.
Id. at § 208.7.
See, e.g., Preston, supra note 3.
See infra notes 167-78 and accompanying text.
human rights records." Helton, quoting from an internal INS report which substantiates the importance of the State Department in these decisions, states:

In some cases, different levels of proof are required of different asylum applicants. In other words, certain nationalities appear to benefit from presumptive status, while others do not. For example, for an El Salvadoran national to receive a favorable advisory opinion, he or she must have a "classic textbook case." On the other hand [the State Department] sometimes recommends favorable action where the applicant cannot meet the individual well-founded fear of persecution test. This happened in December 1981 a week after martial law was declared in Poland. Seven Polish crewmen jumped ship and applied for asylum in Alaska. Even before seeing the asylum applications, a State Department official said "We're going to approve them." All the applications, in the view of the INS senior officials, were extremely weak. In one instance, the crewman said the reason he feared returning to Poland was that he had once attended a Solidarity rally (he was one of the more than 100,000 participants at the rally). The crewman had never been a member of Solidarity, never participated in any political activity, etc. His claim was approved within 48 hours.

Other commentators argue, however, that the State Department is better equipped to evaluate an alien's request for asylum since the Department is most aware of the political and social events taking place in any given country. Rudolph W Giuliani argues that the State Department serves as the "eyes and ears [of the United States] in the rest of the world." Consequently, the BHRHA report must be carefully considered in asylum cases. Regardless of whether it should be, the State Department is involved in this process. The district director will not make a decision until he or she has received the BHRHA report.

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95 Helton, supra note 13, at 253-54.
96 Id.
97 Id. at 254 (quoting Immigration and Naturalization Service, Asylum Adjudications: An Evolving Concept and Responsibility for the INS, 59n (1982)).
98 Panel Discussion, supra note 6, at 939.
99 Id.
100 Id.
The district director has the discretion either to grant or to deny a request for asylum. 101 The decision, which must be in writing, 102 may not be appealed. 103 If the decision is based upon the BHRHA opinion, however, that opinion, unless classified, 104 becomes part of the record. The applicant then has an opportunity to "inspect, explain, and rebut the opinion." 105 Asylum is granted for a period of one year. 106 If the application for asylum is denied, 107 the alien may renew the request "before an immigration judge in exclusion or deportation proceedings." 108

Asylum requests before an immigration judge, also made on Form I-589, are processed in almost the same way as those before the district director. The judge must also request a BHRHA opinion, 109 unless such an opinion was already requested and received in an earlier proceeding. 110 The judge may request a second opinion, however, when circumstances in the specific country have substantially changed and when the second opinion would "materially aid" the decision-making process. 111 Evidence may be presented to the judge by both parties. 112 The INS may present classified evidence off the record. 113 The applicant must be informed of the character of this evidence, 114 and the judge may disclose this evidence to a limited degree. 115 The judge's decision to grant or deny asylum 116 may be appealed.

101 8 C.F.R. at § 208.8(a).
102 Id. at § 208.8(b).
103 Id. at § 208.8(c).
104 Id. at § 208.8(d).
105 Id.
106 Id. at § 208.8(e). After this one year, the applicant may apply and qualify for permanent residence status under id. at § 209.2. Asylum can also be terminated under id. at § 208.15 if conditions have changed in the applicant's homeland, if the applicant poses a threat to United States security, or if the applicant was not eligible for asylum in the prior proceeding.
107 Id. at § 208.8(f).
108 Id. at § 208.9.
109 Id. at § 208.10(b).
110 Id.
111 Id.
112 Id. at § 208.10(c).
113 Id.
114 The applicant must be told if the evidence relates to the "political, social, or other conditions" of a country or if the evidence relates to the individual applicant. Id.
115 Id. at § 208.10(d).
116 If granted asylum, the applicant may eventually qualify for permanent status under id. at § 209.2.
to the appropriate court of appeal. Such an appeal, however, is taken under traditional administrative law procedures.

III. JUDICIAL OVERSIGHT OF THE PROCEDURE FOR POLITICAL ASYLUM

The major controversy in asylum cases based on section 208(a), and in the withholding of deportation cases based on section 243(h), has been the appropriate standard for determining the merits of the claims. Although this controversy existed prior to the passage of the Refugee Act of 1980, it was limited to determining the appropriate standard for section 243(h) claims. Since 1980, however, two additional issues have emerged. First, what is the standard for section 208(a) claims?; and second, did the Refugee Act of 1980 change the standard of review for section 243(h) claims? It is necessary to examine each of these standards separately, and then determine whether the two standards are meaningfully different.

A. The Well-Founded Fear of Persecution Standard in Section 208(a)

The "well-founded fear" standard emerges from the definition of a refugee, which requires an alien claiming refugee status to be unwilling to return to his or her homeland because of persecution or a well-founded fear of persecution. "Fear of persecution" appears to require a subjective test—the refugee must be actually afraid that he or she will be persecuted upon returning home. "Well-founded fear," however, appears to

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117 Before an appeal is made to the court of appeals, there is an administrative appeal before the Board of Immigration Appeals. Id. at §§ 3.0-.8.

118 See, e.g., Shahandeh-Pey v. INS, 831 F.2d 1384 (7th Cir. 1987). The Court held it was required to reverse the Board's decision if the decision was "arbitrary, capricious, or an abuse of discretion." Id. at 1387. The Board's action is to be upheld unless "it was made without a rational explanation, inexplicably departed from established policies, or resulted from an impermissible bias such as invidious discrimination against a particular race or group." Id. (quoting Achacoso-Sanchez v. INS, 779 F.2d 1260, 1265-66 (7th Cir. 1985)).


120 Id. at 416-20.


122 Vides-Vides v. INS, 783 F.2d 1463, 1469 (9th Cir. 1986).
require an objective test—the alien's fear must be reasonable.  

The United States Supreme Court considered the above issue in *INS v. Cardoza-Fonseca*. Luz Marina Cardoza-Fonseca, a citizen of Nicaragua, came to the United States as a visitor in 1979. The INS began deportation proceedings against her when she overstayed her visit and refused to depart voluntarily. Conceding she was an illegal alien, Cardoza-Fonseca requested relief under section 208(a) and section 243(h), alleging she would be persecuted and her life would be threatened if she were returned to Nicaragua. Her claim was primarily based upon the activities of her brother, who had been tortured and imprisoned in Nicaragua because of his political views. Since the Sandinistas knew that she and her brother had fled together, Cardoza-Fonseca feared she would be tortured and interrogated as to her brother's whereabouts if she returned to Nicaragua. She did admit, however, that she had never been politically active herself.

The immigration judge found Cardoza-Fonseca had not shown a clear probability of persecution, and, therefore, was not entitled to relief under either section 208(a) or section 243(h). The Board of Immigration Appeals affirmed. The United States Court of Appeals for the Ninth Circuit reversed, finding these two sections were governed by different standards and the immigration judge had been mistaken in evaluating both claims under the "clear probability" standard. The Supreme Court affirmed, finding the section 243(h) standard does not govern asylum claims under section 208(a).

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123 *Id.*
125 Voluntary departure is governed by 8 U.S.C. § 1254(e) (1982).
126 The Nicaraguans who overthrew the Somoza regime in 1979 were members of the Sandinista National Liberation Front (FSLN). Their name is in honor of Augusto Ce'sar Sandino, who led a guerrilla movement against United States Marines from 1927 until 1933 when the troops were withdrawn from Nicaragua. Sandino was assassinated in 1934. For a discussion of the Sandinistas, see O'Brien, *God and Man in Nicaragua*, 258-2 THE ATLANTIC MONTHLY 50 (1986); Kornbluh, *Sandino's Legacy*, reprinted in UNITARIAN UNIVERSALIST SERVICE COMMITTEE, *A JOURNEY TO UNDERSTANDING* 183 (rev. ed. 1987).
127 *Cardoza-Fonseca*, 107 S. Ct. at 1209-10.
The majority opinion, written by Justice Stevens, found that Congress intended the two proceedings to be governed by different standards, and that the clear meaning of the statutory language in section 208(a) is that the "well-founded fear of persecution" standard applies. Contrasting the language of section 208(a) with section 243(h), Justice Stevens wrote:

The "would be threatened" language of § 243(h) has no subjective component, but instead requires the alien to establish by objective evidence that it is more likely than not that he or she will be subject to persecution upon deportation. In contrast, the reference to "fear" in the § 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien.

The different emphasis of the two standards is significantly highlighted by the fact that the same Congress simultaneously drafted § 208(a) and amended § 243(h). In doing so, Congress chose to maintain the old standard in § 243(h), but to incorporate a different standard in § 208(a).

The majority also found the legislative history of section 208(a) to support the application of two different standards. The additional arguments offered by the government were found to be unpersuasive.

Justice Powell dissented, finding that there was no practical distinction between the above two standards. Justice Powell

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130 The opinion was joined by Justices Brennan, Marshall, Blackmun, and O'Connor.

131 Cardoza-Fonseca, 107 S. Ct. at 1213.

132 Id. at 1222.

133 Id. at 1212-13.

134 Id. at 1213-19.

135 The Government had argued that the structure of the Act required a decision in its favor since it did not make sense that section 208(a), which provides greater benefits than section 243(h), would have a lower standard. The Court stated this argument failed because an alien who meets the standard in section 208(a) merely qualifies for a possible exercise of the Attorney General's discretion in granting asylum. An alien who meets the section 243(h) standard, however, is automatically entitled to the withholding of deportation. Id. at 1219. The Government also argued that BIA's construction that the two standards were identical was entitled to substantial deference. The Court rejected this argument, finding this issue was one of pure statutory construction. Id. at 1220-21.

136 Justice White and Chief Justice Rehnquist joined in the dissent.

137 Cardoza-Fonseca, 107 S. Ct. at 1225-26 (Powell, J., dissenting).
accepted the argument of the Board of Immigration Appeals (BIA) that:

One might conclude that a "well-founded fear of persecution," which requires a showing that persecution is likely to occur, refers to a standard that is different from "a clear probability of persecution," which requires a showing that persecution is "more likely than not" to occur. As a practical matter, however, the facts in asylum and withholding cases do not produce clear-cut instances in which such fine distinctions can be meaningfully made. Our inquiry in these cases, after all, is not quantitative, i.e., we do not examine a variety of statistics to discern to some theoretical degree the likelihood of persecution. Rather our inquiry is qualitative: we examine the alien's experiences and other external events to determine if they are of the kind that enable us to conclude the alien is likely to become the victim of persecution. In this context, we find no meaningful distinction between a standard requiring a showing that persecution is likely to occur and a standard requiring that persecution is more likely than not to occur. Accordingly, we conclude that the standards for asylum and withholding of deportation are not meaningfully different, and, in practical application, converge.

Justice Powell argued that if an alien could establish a basis for his or her fear of persecution, he or she would usually be eligible for relief under either statute. Justice Powell believed the majority erred in not understanding that the "well-founded" language clearly required objective support of the alien's fear.

Nevertheless, according to the Cardoza-Fonseca decision, it is clear that the standard required for determining claims for political asylum under section 208(a) is different from the standard under section 243(h). The Court did not clearly articulate how the section 208(a) standard is met, except that the "alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country" The Court found

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138 Id. at 1226-27 (quoting In re Acosta, Interim Decision # 2986 (BIA Mar. 1, 1985)).
139 Id. at 1227.
140 Id. at 1227-28.
141 Id. at 1222.
the standard could only be given meaning through a "case by case adjudication."\textsuperscript{142} Apparently disturbed by the majority's approach, Justice Blackmun wrote a concurring opinion which addressed the appropriate sources for determining the standard.\textsuperscript{143} He argued that the agency should engage in "an examination of the subjective feelings of an applicant for asylum coupled with an inquiry into the objective nature of the articulated reasons for the fear."\textsuperscript{144} Of course, once the applicant has met the lower standard of a well-founded fear of persecution, he or she is only entitled to consideration for political asylum by the Attorney General. In contrast, a favorable determination under section 243(h) entitles the alien to remain in the United States.\textsuperscript{145}

**B. The Clear Probability of Persecution Standard Under Section 243(h)**

Prior to the United States' consent to the United Nations Protocol Relating to the Status of Refugees,\textsuperscript{146} there was no doubt that the standard governing whether an alien was eligible for the withholding of deportation was a "clear probability of persecution."\textsuperscript{147} After the Protocol,\textsuperscript{148} and particularly after the passage of the Refugee Act of 1980, there was debate over whether the clear probability standard was still applicable.\textsuperscript{149} In *INS v. Stevic*,\textsuperscript{150} the Supreme Court unanimously held "the 'clear probability of persecution' standard remains applicable to § 243(h) withholding of deportation claims."\textsuperscript{151}

Predrag Stevic, a citizen of Yugoslavia, entered the United States in 1976 to visit his sister.\textsuperscript{152} Deportation proceedings began after Stevic overstayed his visa. In December 1976, Stevic con-

\textsuperscript{142} Id. at 1221.
\textsuperscript{143} Id. at 1223 (Blackmun, J., concurring).
\textsuperscript{144} Id. at 1223.
\textsuperscript{145} 8 U.S.C. § 1253(h) (1982).
\textsuperscript{146} 19 U.S.T. 6223, T.I.A.S. No. 6577
\textsuperscript{147} Stevic, 467 U.S. at 414-15.
\textsuperscript{148} 19 U.S.T. 6223.
\textsuperscript{149} Id. at 421-28.
\textsuperscript{151} Id. at 430.
\textsuperscript{152} Id. at 409-10.
sented to voluntary departure within sixty days. In January 1977, Stevic married an American citizen. His new wife filed a petition for a visa which was approved. Five days after the marriage, Mrs. Stevic was killed in an automobile accident and the visa petition was automatically revoked. After being ordered to surrender for deportation, Stevic moved to reopen the deportation proceedings under section 243(h), stating that he had a well-founded fear of persecution if he were returned to his homeland. The immigration judge denied the motion. The Board of Immigration Appeals affirmed, finding that Stevic's claim failed to demonstrate a clear probability of persecution.

The Supreme Court found the statutory language of section 243(h) did not specify how great the possibility of persecution must be to qualify for the withholding of deportation. Given the "would" language of the statute, however, the Court inferred that at least a likelihood of persecution was required. The Court also noted that section 243(h) did not refer to refugees in its text or amended text and did not contain the "well-founded fear" language of section 208(a). Consequently, the well-founded fear of persecution standard is not applicable to a claim under section 243(h). The question under this statute, the Court stated, is whether "it is more likely than not that the alien would be subject to persecution."

Therefore, it is now settled that the section 243(h) clear probability of persecution standard is a higher standard than the well-founded fear of persecution standard of section 208(a). An alien who meets the standard of section 243(h) will meet the section 208(a) standard. The Supreme Court, however, has not answered the question of whether these standards are in fact meaningfully different.

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153 Id. Stevic's fear was based upon his participation in an anti-communist organization after his marriage, and that his father-in-law had been imprisoned and ultimately committed suicide in Yugoslavia. Id. at 410.
154 Id. at 411-12.
155 Id. at 421-22.
156 Id. at 422.
157 Id. at 423-24.
158 Id. at 429-30.
159 Hernandez-Ortiz v. INS, 777 F.2d 509, 514 (9th Cir. 1985).
160 See infra notes 163-66 and accompanying text.
C. What Is Required to Meet the Standards Under Section 243(h) and Section 208(a)?

In order to qualify for relief under either section 208(a) or section 243(h), an alien must be able to provide some objective support for his or her claim.\(^6\) Although there is no requirement that an alien present documentary or corroborative support for his or her fear, he or she must be able to show the reasonableness of that fear.\(^6\) That showing will be judged, in actual practice, on the basis of foreign policy considerations. This is because the reasonableness of the claim is highly influenced by the State Department in section 243(h) proceedings\(^6\) and by the Attorney General's ability to reject section 208(a) applications.\(^6\) Thus, foreign policy considerations, and in particular, ideological biases, still enter into these decisions, despite the attempted neutrality of the Refugee Act of 1980.

IV THE ROLE OF IDEOLOGY IN ASYLUM CASES

Perhaps the best way to illustrate the role of ideology in granting political asylum is to look at requests from selected countries. An examination of the approval rate of asylum applications involving different countries reveals the probable role of ideology in these decisions.\(^6\)

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>APPROVAL RATE (FY 1983-86)</th>
<th>APPROVAL RATE (FY 1987)</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Countries</td>
<td>23.3%</td>
<td>54.0%</td>
</tr>
</tbody>
</table>

\(^6\) This is true regardless of whether the standard is a clear probability of persecution or a well-founded fear of persecution.

\(^6\) Diaz-Escobar v. INS, 782 F.2d 1488, 1492 (9th Cir. 1986) (alien must genuinely fear persecution and there must be "credible, direct, and specific evidence" that the fear is reasonable).

\(^6\) See supra notes 94-102 and accompanying text.

\(^6\) 8 U.S.C. § 1158(a) (1982) states that the Attorney General may grant asylum if the alien is a refugee within the meaning of id. at § 1101(a)(42)(A).

\(^6\) The figures for Fiscal Years 1983-1986 are from U.S. COMMITTEE FOR REFUGEES, DESPITE A GENEROUS SPIRIT: DENYING ASYLUM IN THE UNITED STATES (December 1986). The Fiscal Year 1987 figures were prepared by Paul Soreff, a Louisville, Kentucky, attorney involved in political asylum cases. Mr. Soreff compiled these statistics from the monthly United States Immigration and Naturalization Reports of the United States Committee for Refugees.
As these rates indicate, an alien fleeing from a communist country or a regime not supported by the United States is far more likely to be granted asylum than an alien fleeing from a United States supported regime. Given the role of the State Department in the process of granting asylum, this result is not surprising.

A good example of the discriminatory treatment in the granting of political asylum is provided by the experience of refugees from El Salvador. Salvadorans, apprehended by the INS, have alleged they have been mistreated while in INS custody. In addition, the United Nations High Commissioner on Refugees has informed the United States that it is not meeting its obligations to Salvadoran refugees under the United Nations Pro-

166 Id.
167 Asylum rates for Nicaragua, El Salvador, and Guatemala for the first four months of Fiscal Year 1988 dramatically illustrate this point. Nicaraguan refugees were granted asylum in 8.3% of the cases, while Salvadorans were granted asylum in 4.4% of the cases. Asylum was denied in all Guatemalan refugee cases. See id.
168 See supra notes 94-102 and accompanying text.
169 Helton, supra note 13, at 254.
171 The Office of the United Nations High Commissioner on Refugees (UNHCR) was established in 1951 "to provide legal protection and material assistance to refugees and to promote permanent solutions for refugee problems." U.S. Dep't of State, United States Participation in the U.N., Report by the President to the Congress for the Year 1985, at 141 (1986). This office spent $459.6 million for world-wide refugee aid in 1985. Id. The office oversees many refugee projects and monitors refugee issues through the publication of a monthly periodical entitled Refugees. The UNHCR also intervenes in legal controversies concerning refugees. For example, the UNHCR filed amicus curiae briefs with the Supreme Court in both Stevic and Cardoza-Fonseca. Goodwin, Supreme Court Rules on Asylum, Refugees, May 1987, at 8.
political asylum protocol relating to refugees. Why have refugees from El Salvador been treated in this manner? Granting asylum to large numbers of Salvadoran refugees would be inconsistent with the United States position that the government of El Salvador is improving its record of human rights violations. The practical effect of this situation is that refugees from El Salvador must have well-documented evidence to support their claim for asylum. As a practical matter, it is not reasonable to expect refugees, fleeing for their lives, to have this documentation. The result is that most Salvadoran refugees will not be able to prove their claims and will routinely be denied asylum.

Ideology is not the only explanation for the difference in treatment given to refugees from different countries. There are also explanations which relate to domestic concerns in the United States.

V Domestic Considerations in Asylum Cases

Throughout history, the United States has been able to control its borders: it was rarely a place of first refuge and it could select its refugees. In recent years, however, the situation has changed. Refugees increasingly come directly to the United States from Central America and the Caribbean Islands. With the popu-

172 Specifically, Salvadorans were not being given an adequate opportunity to apply for asylum. Comment, supra note 172, at 297.
173 Helton, supra note 13, at 254. There may be other explanations for not granting refugee status to Salvadorans, such as concern with not encouraging further refugees. See infra notes 179-93 and accompanying text. In general, the government of Canada has been far more receptive than the United States to Central American refugees, particularly to Salvadorans. The total number of refugees seeking asylum in Canada has been small despite Canadian policy of not sending refugees away once they are inside Canada. Billard, Canada: Influx of Salvadorans, Refugees, Mar. 1987, at 14. In the face of increasing numbers of refugees from Central America, it will be interesting to see if Canada retreats from this policy.
174 Helton, supra note 13, at 254.
175 Id. at 255-56.
176 Id. at 254.
177 See infra notes 180-93 and accompanying text.
178 Scanlan, supra note 10, at 858.
179 Id. For example, in 1984, the INS apprehended more than 1.2 million illegal aliens, which reflected a 34% increase over a 2-year period. The estimated number of illegal aliens in the U.S. varies from 2-4 million persons. M. Lemay, supra note 1, at 15, 123.
lation of illegal aliens growing by as much as 500,000 each year, the United States has clearly lost control of its borders.\footnote{180}{Giuliani, The Immigration Program of the Reagan Administration, 36 U. MIAMI L. REV 807 (1981-82).}

The most visible proof of this fact was seen in the 1980 Mariel Boat Lift.\footnote{181}{Scanlan, supra note 10, at 859.} More than 130,000 Cuban refugees arrived in the United States within a five-month period,\footnote{182}{Id.} shattering the illusion that the United State could control its borders.\footnote{183}{Id. at 858.} Although the Carter Administration generally welcomed the Cubans,\footnote{184}{Id. at 850.} the Reagan Administration has taken a hard-line approach to asylum claims of people fleeing to the United States from Cuba, Haiti, or Central America.\footnote{185}{114 U.S. Immigration and Refugee Policy, 17 WEEKLY COMP. PRES. DOC. 829 (July 30, 1981). More recently, Secretary of State George Schultz stated: I have the greatest respect for those who say that the United States should do even more for I know their sentiment reflects the fundamental value Americans place on helping others in need. This goal, however, must be realized within the framework of an international system of authority and responsibility. Humane first-asylum practices are the responsibility of the entire family of civilized nations, but they are implemented under the sovereign authority of each nation state to establish its own immigration policy and to control its own borders. Statement by Secretary Schultz, supra note 1, at 52 (emphasis added).}{Helton, supra note 13, at 256-57} President Reagan has stressed the importance of having the authority to decide who qualifies for refugee status.\footnote{186}{711 F.2d 1455, 1509 (11th Cir. 1983), aff'd, 472 U.S. 846 (1985).}

This hard-line approach could be observed during the summer of 1981 when the Reagan Administration announced a policy of alien detention.\footnote{187}{Helton, supra note 13, at 256-57} Prior to this time, illegal aliens were routinely released unless they represented a security risk or were likely to abscond.\footnote{188}{Id. at 858.} The new policy, however, placed illegal aliens in detention until their admissibility to the United States was determined.\footnote{189}{Id. at 850.} This policy ultimately was upheld by the United States Court of Appeals for the Eleventh Circuit in Jean v Nelson.\footnote{190}{Id.}
Commentators have attempted to explain the new approach by referring to the political views of the Reagan Administration as harsh and discriminatory. Such characterization, however, is probably too simplistic. The problems facing the United States at its borders are new and formidable, and certainly do not lend themselves to ready solutions.

VI. SHOULD ASYLUM CLAIMS BE PROCESSED WITHOUT REFERENCE TO POLITICAL IDEOLOGY?

There is probably no way to remove political ideology from the political asylum process. Ultimately, the granting of a refugee's claim for asylum is the recognition that the refugee's home country has treated, or is likely to treat, its own citizen in an unfair and improper manner. Clearly, this is an explicit political value judgment. The issue, then, is how this judgment should be made.

One author argues that this decision should be made by courts which would determine the degree and kind of harm a foreign government inflicts upon its citizens. Since courts routinely make these kinds of inquiries, judges should be able to determine the relevant facts. The more difficult issue, however, is the kind of harm that is illegitimate. One possible standard is that a legitimate government action is an exercise of power in the interest of its citizens and not in the interest of its leaders or a small group of citizens. Judges should make the decisions based on the general condition of the country and on the particular circumstances of the refugee.

The above standard may effectuate the goals of the Refugee Act of 1980. First, such a standard would lessen the role of the

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191 The Haitians were the first black refugees to seek asylum in any great number, and they were treated differently than any other refugees. Bruck, Springing the Haitians, AM. LAW., Sept. 1982, at 35. In addition, the Haitians were generally unskilled in the workforce. This is in contrast to refugees like the Vietnamese, who were well-educated and members of the old Vietnamese middle class. M. LeMAY, supra note 1, at 115.
193 Id.
194 Id.
195 Id.
196 Id. at 468-71.
Executive Branch in the asylum process. If judges were to make the factual determinations related to the legitimacy of political institutions, the role of the State Department would change. Although the department might still have a role, such as giving the government information about a given nation, a judge could balance that information against information from other sources. As it now stands, the State Department's opinion is often decisive in the asylum determination.  

Second, the above standard for legitimacy or illegitimacy of governmental action would more fairly grant asylum to those persons who observe it the most. The present system favors those fleeing communist governments and is unfair to aliens fleeing right-wing, oppressive regimes.

Third, making decisions with reference to the general conditions in a country would make the asylum process fairer. For example, the fact that all or most citizens of a given country are subject to persecution should be a major factor in proving that a specific individual is likely to be persecuted.

There are ways to improve the fairness of the asylum process. As the United States faces an increasing number of refugees, however, the focus may change from how to deal with refugees to how to ensure political and economic stability in our own hemisphere. Such a focus might help to alleviate the underlying causes of refugees.

CONCLUSION

Passage of the Refugee Act of 1980 was a landmark event in United States' refugee law. Its promise of a neutral process for the consideration of asylum claims was a bold step in the movement toward human rights and human freedom. Yet its promise remains unfulfilled as political ideology continues to govern claims for asylum, and the United States continues to face the problem of being a nation of first refuge. If asylum

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197 See supra notes 94-102 and accompanying text.
198 As the law stands now, an alien must show specific hardship and allege specific facts related to him or her. The alien cannot make general assertions based upon a country's overall violence or persecution. See, e.g., Kaveh-Haghigy v. INS, 783 F.2d 1321, 1323 (9th Cir. 1986).
decisions could be made by courts free of United States foreign policy considerations, however, the goal of the Refugee Act of 1980 may be reached.

Davalene Cooper