Taming the Asylum Adjudication Process: An Agenda for the Twenty-First Century

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The transition of the United States from a country of second asylum to first asylum has stimulated renewed debate about asylum in this country and fostered animated discussion about the need for legislative reform to address the problems associated with this country's new status. The current statutory scheme, enacted as part of the Refugee Act of 1980, is not designed to handle the many thousands of asylum applications filed by foreign nationals who are physically present in the United States without the benefit of lawful immigration status. Essentially, the discussion is about which of the many asylum seekers who manage to

* Associate Professor of Law, University of Maryland School of Law. I would like to acknowledge Professor David A. Martin's article entitled The Refugee Act of 1980: Its Past and Future, in Transnational Legal Problems of Refugees, 1982 Mich. Y.B. Int'l Legal Stud. 91, 116 (stating that "[t]he taming of the asylum process remains the major unfinished business left by the Refugee Act of 1980") as the inspiration for this article. See also David A. Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, 138 U. Pa. L. Rev. 1247 (1990) (recounting the history of the regulatory and statutory provisions for asylum as well as reforms to the existing system of adjudication proposed at the Administrative Conference of the United States (ACUS), for which Professor Martin was the ACUS consultant. The Department of Justice later adopted some of these proposals in promulgating new asylum regulations.); T. Alexander Aleinikoff, The Meaning of "Persecution" in United States Asylum Law, 3 Int'l J. Ref. L. 5, 6 (1991) (observing that we have moved from the first generation of asylum issues addressing the procedural aspects of the adjudicatory process to the second generation of asylum cases, raising issues about the substantive aspects of the system). I would like to express sincere appreciation and heartfelt gratitude to my colleagues Marley S. Weiss, Abe Dash, and Michael Millemann for their steadfast support throughout the writing of this Article. I would also like to thank my colleagues Marley S. Weiss, Bill Reynolds, and Peter Quint, who read earlier drafts of this article, for their helpful comments and suggestions. Also, I am grateful to several anonymous reviewers whose insightful comments and critiques of an earlier draft were invaluable. Any errors remain my own.
reach this country will be allowed to remain here, perhaps, permanently. Although a discretionary form of relief, asylum potentially operates as a "backdoor" to regular permanent immigration status in this country. In this article, Professor Vaughns argues that the judicial process is not well-suited to resolve the remaining issues that fuel the current asylum debate and thus there is a need for a legislative resolution. Professor Vaughns offers a reform proposal designed to provide more definitive guidelines about the substantive qualifying criteria for asylum relief which were not defined specifically in the 1980 congressional enactment. Because asylum is, after all, a matter of public policy, Professor Vaughns believes that the political forum is better suited than the judiciary to make these choices.

The judicial process is quite unsuited to deal dispositively with the many issues arising from our immigration statutes and policies. Its nature limits our vision to the alien before us and conceals from us the problems of the multitudes of aliens, both within and without the Nation, who wish to reside legally within the United States.

—Judge Sneed, dissenting in Wang v. INS

INTRODUCTION

The question of asylum and refugee protection—"this most sensitive of human claims in the international community"—is not a subject of discourse unique to the twentieth century. The vastly increased speed of communication and the availability of global transportation, however, have dramatically altered the magnitude of the

1. 622 F.2d 1341 (9th Cir. 1980) (Sneed, J., dissenting), rev'd sub nom. INS v. Jong Ha Wang, 450 U.S. 139 (1981). In a separate opinion in a case criticizing the Ninth Circuit's approach to political asylum cases, Judge Sneed wrote:

The Ninth Circuit has held that political neutrality is a political opinion for purposes of [U.S.C. § 1153(h)]. This holding eviscerates the political opinion requirement of the statute. It means that a politically inactive alien, and perhaps most illegal aliens are, may now gain the protection of asylum.

... The core idea of political activism underlies the concept of "refugee" status. We distort the meaning of an important requirement for refugee status when we permit political aloofness to serve as an active "political opinion," that endangers its holder. It also demeans the true martyr for whom asylum was intended.

It is not likely this concurring opinion will alter either the statutory or case law with which it is concerned. Nonetheless, from time to time sightings should be taken to establish one's position. Our ship appears to be at some distance from the main fleet but no reefs or shoals appear dead ahead. As a passenger, I shall go below and hope for the best.

Mendoza-Perez v. INS, 902 F.2d 760, 767-68 (9th Cir. 1990) (Sneed, J., concurring).

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problem, if not its moral dimension. No national right is more zealously guarded than the sovereign’s right to control its borders; nor is any moral principle more vehemently advocated than the human-rights-based insistence that foreign nationals fleeing life-threatening conditions in their homelands be provided refuge in neighboring countries. The challenge for nation-states in the twenty-first century will be to respond appropriately to future refugee flows of increasingly large numbers consistent with responsibilities owed members of their political communities and with international obligations.

Underlying the philosophical conflict is a more basic political and economic one. Nations close their borders to regular immigration to preserve the living standards, social contracts, and political cohesion of current citizens against the massive potential impact of unregulated arrivals. Nations with a moral commitment to allowing “refugees” to immigrate free of the normal constraints draw an increasingly fine line between those who immigrate “voluntarily” to improve their lot in life, “pulled” in by the magnet of better economic, political, and social conditions, and those who flee persecution, that is, who are “pushed” out of their country of origin. The false dichotomy between those pushed and those pulled, between “refugees” and economic migrants, underlies much of the confusion in this field. Persons whose homeland is laid waste, be it by protracted civil war, by severe climatic conditions naturally causing famine, or by severe economic deprivation, are “pushed” from their countries of origin rather than suffer the loss of their lives through

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4. See, e.g., Tina M. Campbell, Note, Immigration Law: The Role of the Supreme Court in Policy Development, 22 New Eng. L. Rev. 131, 161 (1987) (“We are a people torn between the sovereign need to protect our society and our awareness of humanitarian duty to provide safe refuge to those who have a valid claim for flight from tyranny and persecution.”). See also Kenneth D. Brill, Note, The Endless Debate: Refugee Law and Policy and the 1980 Refugee Act, 32 Clev. St. L. Rev. 117, 118 (1983-1984) (“Refugee policy has been one of the contradictory strains running through American foreign policy since World War II.”).

The controversy arises, of course, when large influxes of asylum-seekers stream across international borders or arrive “unbidden” on sovereign shores. Moreover, these individuals are more likely to be fleeing from violence and political upheaval resulting from internal strife in their homelands than from external forces of aggression. Further complicating factors are the current worldwide recession and the ever-increasing gap in wealth between the industrialized nations in which refugees seek refuge and the developing countries that produce them. Thus, even when the grant of safe haven is temporary, the likelihood of voluntary repatriation is not a real possibility once the dangerous conditions in the homeland subside.
starvation or the violence of war. It is difficult to differentiate morally between people fleeing death by the random gunfire of a civil war and those fleeing death by firing squad because they took up arms or publicly advocated political support for the wrong side. Once the policy decision to limit economic immigration has been made, however, some line must be drawn among these "emergency" immigrants, despite their equally strong claims to humanitarian succor.

This compelling human drama poses a profound dilemma, and international efforts to resolve these competing moral claims consumed the better part of the 1980s—often called "the decade of refugees."

In the United States, after years of haphazard treatment of refugee issues and piecemeal legislation, Congress was driven by the country's immigrant tradition and historic policy of "welcoming homeless refugees to our shores" to enact the Refugee Act of 1980 (Refugee Act). As the centerpiece of this new law, Congress adopted a neutral standard of eligibility for establishing refugee status, eradicating years of ideological and geographical discrimination in according protection to refugees seeking asylum in the United States.

5. All foreign nationals who enter, lawfully or otherwise, or who seek to enter the United States are presumed to be intending immigrants under the Immigration and Nationality Act of 1952 (INA). See INA §§ 101(a)(15), 214(b), 8 U.S.C. §§ 1101(a)(15), 1184(b).


8. A major purpose of the Refugee Act of 1980 is the establishment of a comprehensive refugee resettlement and assistance policy. Refugee Act of 1980 (Refugee Act), Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified at 8 U.S.C. § 1521 (1988)). Another goal is to "insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations." H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979). Indeed, § 101(a) of the Refugee Act explicitly states: It is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States.

Moreover, "special access" to refugee protection has been an imperative ever since the failure of nation-states to respond to the plight of Jews fleeing Nazi Germany.

DENNIS GALLAGHER ET AL., SAFE HAVEN: POLICY RESPONSES TO REFUGEE-LIKE SITUATIONS 3 (Refugee Policy Group 1987).


With the passage of the Refugee Act, Congress created two separate programs for refugee protection. The programs are commonly called “political asylum” (the in-state processing of asylum claims based on refugee status) and “overseas refugees” (the processing of refugee resettlement claims for entry into the United States, usually from refugee encampments abroad). These programs are not a part of the regulated flow of lawful immigration to the United States, which is fundamentally premised on the control of numbers. Moreover, the Refugee Act was “[d]rafted from the perspective of the United States as a country of "second asylum." Because political asylum is available to those already physically present inside the United States, notwithstanding their unlawful immigration status, the potential “loophole” that asylum relief poses is all too apparent. Therefore, this Article will focus specifically on the need to


11. “Political asylum” includes an affirmative grant of immigration status based on asylum relief under § 208 of the INA. An asylum-seeker may file an application with the Immigration and Naturalization Service (INS), unless the INS has commenced deportation proceedings, in which event the application may be filed in the immigration court, 8 C.F.R. § 208.4 (1991), as a form of relief from deportation.

A corollary form of asylum-like relief, which statutorily preceded § 208 governing asylum relief, is also available under § 243(h) of the INA, as amended, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in various sections of 8 U.S.C. (1988)), to foreign nationals who apply in-state. This form of relief is called “withholding of deportation.” It is also referred to as “non-refoulement,” which codifies the United States obligation under United Nations Protocol. It is usually available in deportation or exclusion proceedings but now, under the new asylum regulations, is combined with an affirmative asylum application. See 28 C.F.R. § 208.3 (1991). The § 208 form of asylum relief is available whether or not the alien is in deportation proceedings. However, unlike § 208 asylum, which accords an affirmative immigration status if relief is granted, § 243(h) relief merely prohibits the foreign national’s return to the country of persecution. In other words, the “withholding” form of relief does not prevent removal to a third country, although such an event is rare. However, in light of recent case law development, the necessity of seeking “withholding” has virtually become a nullity. Both forms of relief will be discussed more fully infra.

12. But see John A. Scanlan, Immigration Law and the Illusion of Numerical Control, 36 U. MIAI L. REV. 819, 820 (1982) (observing that the fundamental premise of United States immigration law based on numerical control is more an “illusion” than a “reality”). Professor Scanlan is chiefly concerned that bona fide refugees are most likely to be adversely affected by “this strong interest in controlling [the numbers of immigrants allowed to enter this country].” Id.


14. As Professor Martin observed in an earlier article:

Asylum constitutes a wild card in the immigration deck. No other provision of the INA opens such a broad potential prospect of U.S. residency to aliens
reform the statutory scheme in light of the potential that asylum relief poses an alternative route to regular immigration.

In enacting the asylum provisions of the Refugee Act, Congress delegated responsibility for establishing an in-state procedure for adjudicating asylum claims to the Attorney General. The Attorney General has in turn delegated this matter to the Immigration and Naturalization Service (INS). Congress no doubt contemplated that the delegated agency, in implementing the statutory provisions, would provide content to the Refugee Act’s substantive standards in the course of a case-by-case agency adjudication. Agency determinations in this particular area of the law, however, have not been met with acceptance but rather with much skepticism. In fact, critics of the Reagan and Bush administrations believe quite strongly that prohibited racial and foreign policies drove the administration of asylum adjudications and refugee policy initiatives.16 Perhaps for this reason, agency decisions in this area have spawned considerable court litigation. Not surprisingly, the current case-by-case approach to asylum adjudication has left the substantive aspects of qualifying for refugee status quite unsettled, and thus far a judicial resolution has remained elusive. Unless some kind of resolution is achieved soon, however, the chaos created by varying interpretations of the threshold criteria will dominate the adjudication process well into the next century.18

This Article offers a modest legislative proposal to revise the substantive standards governing asylum grants.17 The thrust of the proposal is intended to bring some modicum of order and stability to the


15. See, e.g., Malissa Lennox, Refugees, Racism, and Repatriations: A Critique of the United States’ Haitian Immigration Policy, 45 Stan. L. Rev. 687 (1993); see also Helton, infra note 122 (discussing foreign policy bias in refugee policy).

16. In noting that the reaction of the federal courts to the Board of Immigration Appeals’ jurisprudence in asylum decision-making “has been mixed,” Professor Aleinikoff concluded that, taken together, “the Board and the court decisions have created neither a coherent set of principles, nor a convincing theoretical approach to the issues.” T. Alexander Aleinikoff, The Meaning of “Persecution” in United States Asylum Law, 3 INT’L J. REF. L. 5, 10 (1991).

17. INA § 208(a), 8 U.S.C. § 1158(a) (Supp. II 1990). “Asylum” is the protection accorded by a state to individuals seeking such protection. ATLE GRAHL-MADSEN,
administrative decision-making process. In view of the orderly mechanism Congress created for the overseas refugee program, it seems unlikely that the legislators intended the in-state asylum program to become a vehicle for creating a whole new emergency immigrant class outside the regular system of immigration; yet that has been the practical effect. Thus, the inability to control the ever-increasing numbers of asylum-seekers, together with the burdens they impose on the receiving country, makes greater scrutiny of their applications imperative.\(^{18}\) However, this proposal is not intended to shore up the INS's seemingly harsh policies in implementing the asylum provisions. Rather, it is intended to benefit the agency and courts alike by showing more clearly congressional intent concerning who qualifies for asylum relief sought inside the United States.

Part I of the Article provides a historical backdrop by examining the classical definition of "refugee," which set the stage for the problems experienced today. To put the pertinent issues in context, Part II of the Article discusses the statutory framework and regulatory scheme established in the 1980s for the in-state treatment of asylum relief. Part II also charts the subsequent case law and regulatory policy developments that have played a critical role in focusing the asylum debate over the past decade. Part II then discusses the new issues that animate the debate in the 1990s. This exploration examines the reasons why the eighties became the decade of the refugee and why the problems of asylum relief are likely to persist throughout the nineties and on into the twenty-first century. Part II also suggests that the recent Supreme Court decision in *INS v. Elias-Zacarias*\(^{19}\) is unlikely materially to resolve the current refugee controversy. Supreme Court cases in the past, while instructive, have tended to open up further areas of debate, contributing to further confusion in the law. This new Supreme Court decision is likely to do so as well.\(^{20}\)

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20. As noted in a recent commentary on the *Elias-Zacarias* case:
   The bottom line, however, is that we know little more than before *Elias-Zacarias* was decided about the meaning of "persecution on account of political opinion" and its application to concrete cases, except that Elias-Zacarias failed to provide sufficient evidence to support his claim. The administrative agencies and the courts of appeal thus will continue in a process that already has consumed the past 10 years, with little meaningful guidance provided by the Supreme Court.
Part III of the Article provides an overview of the problem and the factors that fuel the debate. It analyzes the current situation and puts forward reasons why Congress should seize the moment to take legislative action. Part III concludes that a definitive resolution is unlikely unless clearer guidelines are provided by Congress to guide agency decision-making and to signal congressional intent to the courts with greater specificity.

Part IV of the Article discusses the shortcomings of a judicial approach to resolving asylum and refugee issues and suggests, instead, substantive legislative changes. Underlying this proposal is the recognition that the scheme enacted by the Refugee Act of 1980 was designed to adjudicate asylum claims on an individualized, case-by-case basis, but provided few guidelines for decision-making. Consequently, to the extent that large-scale refugee flows are likely to increase, we shall need either more generalized forms of refugee-like relief that are broader in scope, such as the recently enacted temporary “safe haven” legislation, or amendments of the current definitional terms to describe more precisely the governing statutory provisions for permanent asylum relief. Either way, it behooves Congress to act, lest a vast influx of emergency immigrants, or “refugees,” who do not fit so neatly into the current statutory definition, swamp the broader and more orderly immigration policies that Congress enacted for the regular flow of lawful immigration into this country.

As the twenty-first century draws near, Congress could act swiftly and bring closure to those key issues that remain. Indeed, a number of pertinent events over the past few years have made the time opportune to revisit the statutory scheme. But first, a look to the past may be instructive in setting the agenda for action.

I. A HISTORICAL PERSPECTIVE

A. The Classic Definition of Refugee

1. In General

The issues concerning refugees and political asylum are among the most controversial in immigration law today. However, the issue

21. INA § 244A, as added and amended Nov. 29, 1990, Pub. L. 101-649, Tit. III, § 302(a), of the Immigration Act of 1990, created a new program to grant “temporary protected status” (TPS) to certain aliens for whom returning to their homelands would be unsafe.

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that has stirred the most controversy is the meaning of the term "refugee" as applied in the context of the stateside political asylum program. Congress adopted the statutory definition of "refugee" almost verbatim from the classic definition contained in the International Convention on Refugee Protection drafted in 1951. That definition governs eligibility for the statutorily created programs of overseas refugee resettlement and in-state political asylum. To meet this definition under either program, an applicant must demonstrate "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or

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23. Thus far, four cases dealing with asylum issues have been argued in the United States Supreme Court over the past few years. See, e.g., 68 INTERPRETER RELEASES 1429, 1483, 1605 (1991). Of particular note, the Supreme Court heard two asylum cases (INS v. Doherty, No. 90-925, 1992 U.S. LEXIS 376 (1992) and INS v. Elias-Zacarias) in the first two months of the 1991-1992 term. In another asylum case, INS v. Canas-Segovia (No. 90-1246, filed February 6, 1991), carried over from the previous term, the government's certiorari petition was granted. On reconsideration after remand, the Ninth Circuit, in finding for the asylum applicant on the basis of the imputed political opinion theory, held that "[n]othing in Elias-Zacarias changes [the court's] analysis." Canas-Segovia v. INS, 970 F.2d 599 (9th Cir. 1992).

See also McNary v. Haitian Centers Council, Inc., No. 92-344 (involving the controversial Haitian refugee case challenging the federal government's forced return policy of Haitians interdicted on the high seas), in 70 INTERPRETER RELEASES 123 (1993). This case was argued in the Supreme Court on March 2, 1993 (decision now pending at this writing). Id. at 277-81. One of the issues to be decided in this case is whether United States refugee law applies to persons outside the United States territory. Id. at 277.

24. See, e.g., Peter H. Schuck, The Emerging Political Consensus on Immigration Law, 5 GEO. IMMIGR. L.J. 1, 7 (1991) ("What has generated the most controversy, however, is the law's brief provision relating to asylum, designed for refugees who reach U.S. territory rather than seeking resettlement from overseas."). On the other hand, little debate or controversy has arisen over the administration of the overseas refugee program. But see T. ALEXANDER ALENKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 722-31 (2d ed. 1991) (regarding the considerable public controversy caused by the more rigorous application of the refugee definition in the overseas refugee programs).


26. In 1980 Congress established two distinct programs (i.e., the overseas refugee program and the in-state asylum program) under the Refugee Act that can lead to the granting of permanent resident status to those foreign nationals who qualify as "refugees."

27. Commonly called the "overseas refugee program," this particular program provides for the admission of refugees from abroad, including financial assistance and permanent resettlement in the United States automatically after one year. INA § 207, 8 U.S.C. § 1157 (Supp. II 1990).

28. See INA § 208.
political opinion." As a practical matter, however, the classic definition is ill-suited for present-day application.

2. The Origins of the Definition

The refugee definition is a product of a bygone era. In 1951 the International Convention drafters were dealing with a known population of displaced persons generated by the prevailing political climate. As one international commentator noted, "[T]he Convention was tailored by the Western Bloc for its own purposes in dealing mainly with the Eastern European refugee situation, favouring a particular characterization of the cause of the refugee problem and a particular [political] solution." The classic definition was thus conceived at a time when the ideological alignments between politically antagonistic countries in the East and West were more clearly defined.

Today, the 1951 United Nations Convention and its update, the 1967 Protocol Relating to the Status of Refugees, remain the prin-

29. INA § 101(a)(42).
30. Also, the universal definition of "refugee" may be unduly restrictive in the context of the overseas program. See, e.g., Aleinikoff & Martin, supra note 24, at 717 (asking whether it is sound policy to continue using the same definition for the overseas program given that the Convention and Protocol do not require that their signatory states admit anyone.)
31. The United Nations sponsored a Conference of Plenipotentiaries in 1951 to address the need for legal protection of refugees. U.N. Convention, opened for signature July 28, 1951, 189 U.N.T.S. 137. See supra note 10. Article 1 of the U.N. Convention expressly confers protection only on refugees from events that occurred prior to January 1, 1951. Id. at 152. As stated by Professor Martin, "This framework shamed itself in the world's woefully inadequate response in the 1930s and 1940s to those who were fleeing Nazi persecution. From the ashes of World War II arose an international structure that signalled a determination, measured but genuine, to do more for refugees." Martin, Reforming Asylum, supra note 14, at 1253-55.
34. A Convention participant has written:
As one who has participated in the drafting of the Convention, I can say that the drafters did not have specific restrictions in mind when they used this terminology. Theirs was an effort to express in legal terms what is generally considered as a political refugee. The Convention was drafted at a time when the cold war was at its height. The drafters thought mainly of the refugees from Eastern Europe and they had no doubt that these refugees fulfilled the definition they had drafted.
Paul Weis, Convention Refugees and De Facto Refugees, in AFRICAN REFUGEES AND THE LAW 15, 15 (Ghoran Melander & Peter Nobel eds., 1978). Moreover, the drafters feared that a majority of the nation-states would not become signatories to the Convention unless its definition was circumscribed. Thus, it would seem that the main concern at the Convention was adopting a definition that would be universally accepted.
Principal international instruments benefiting refugees. The nonrefoulement (i.e., nonreturn) provisions of these international agreements mandate that no alien who is likely to be persecuted shall be returned to his or her homeland. Although nation-states are bound by the principle of nonrefoulement (which does not require a permanent right of resettlement), they retain discretion regarding both the grant of asylum (i.e., permanent resettlement) and the conditions under which asylum may be obtained or terminated. Nonetheless, most countries have incorporated, with slight modifications, the United Nations Convention definition into their domestic laws and policies, usually providing for permanent refugee resettlement through the grant of asylum.

However, as noted above, this definition is limited to a demonstration of persecution based on the five enumerated categories. While the United States may be bound by international treaty to give certain protection rights to refugees, this treaty does not require the granting of asylum, whether as temporary refuge or permanent residence in this country, contrary to established domestic laws reflecting immigration policies. Therefore, the nonrefoulement obligation (i.e., no return to a country where the refugee is likely to be persecuted) is the most that international agreements guarantee. This obligation does not require the permanent resettlement of refugees (or the granting of asylum to those seeking it).

Protocol updates the protection accorded under the U.N. Convention to persons who became refugees as a result of events occurring after January 1, 1951. The Protocol changes the 1951 time line in Article 1 and incorporates Articles 2 through 34 of the Convention.


37. INA § 234(h). In 1968 the United States became a party to the Protocol thereby obligating itself—like the other signatories—to apply the Protocol's non-refoulement requirement. This obligation is, however, country specific. Although in 1968 the statutory codification of that obligation was expressed in discretionary terms (a carryover from the 1952 enactment of the INA), today this obligation is set forth in § 243(h) of the INA. This section thus mandates the withholding of any alien's deportation if the alien demonstrates by a "clear probability" that his or her life or freedom would be threatened if returned to his or her homeland.


40. Goodwin-Gill, supra note 38, at 104-05.


3. The Concept of "Refugee" in International Law

At the international level, refugee law is considered "a means of institutionalizing societal concern for the well-being of those forced to flee their countries, grounded in the concept of humanitarianism and in basic principles of human rights." It is a well-settled maxim of international law, however, that separate "sovereign" states have the right to refuse to grant asylum. In other words, "[i]nternational law cannot compel protection decisions inconsistent with national interests." So, at the domestic level, refugee law does not fully embody either humanitarian or human rights principles.

In fact, "[t]he concept of "refugee" reaches a dead-end as human rights law because it collides with the principle of national sovereignty." Moreover, given that the forces that create "refugees"—whether political or economic—make voluntary repatriation unlikely, the most frequently advocated "durable" solution in today's climate is permanent resettlement. However, permanent resettlement is unlikely to be a satisfactory solution. In the United States, as in most other countries, permanent resettlement is available only to those foreign nationals who establish refugee status under the statutory or classic definition. Individuals fleeing the general upheaval, turmoil, and strife caused by war, violence, economic deprivation, or natural disaster in their homelands do not ordinarily qualify for protection

41. For general treatments of the international law relating to refugees, see Goodwin-Gill, supra note 38; Atle Grahl-Madsen, The Status of Refugees in International Law (1966).
43. See supra discussion accompanying notes 38-40. The twentieth century introduced new social forces that critically narrowed . . . historical avenues of escape in the course of a single generation: a new racism made conversion impossible and a universal network of immigration restrictions rendered physical flight extremely difficult. Hence, complete control of the globe by sovereign nation states has made possible the expulsion of men from civilization.
45. Hathaway, supra note 42, at 178.
46. Id. at 132.
48. Norman L. Zucker & Naomi Flink Zucker, The Guarded Gate: The Reality of American Refugee Policy 49 (1987) (stating that although the preferred solution is repatriation, "[t]he forces that create refugees—wars, political turmoil, tyrannical and totalitarian regimes—are not easily undone," and thus the refugee cannot be repatriated until the cause of her flight has been removed.).
49. See generally Andrew E. Shacknowe, Who Is a Refugee?, 95 Ethics 274 (1985) (discussing the commonly accepted variations on the concept of "refugee"). One of the more important conceptions is that found in the 1969 Convention of the Organization of African Unity (OAU) on refugee problems in Africa. The OAU definition restates the U.N. Convention definition and then expands coverage of "refugee" to include every person who, owing to external aggression, occupation, foreign domination
under the classic definition without evidence of individual or particularized persecution. This being so, the need for permanent solutions to the problem of refugee protection for those fleeing countries in the Western Hemisphere and seeking refuge in the United States today is likely to increase in the years ahead as new crises erupt. The ad hoc treatment that seemingly characterized the approach Congress took in the 1980s, like the treatment previously accorded overseas refugees, can no longer suffice.

or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.


49. Many have advocated an expansion of the classic definition of refugee to include "displaced persons" who are fleeing situations involving external or internal armed conflicts. See, e.g., Carlos Ortiz Miranda, Toward a Broader Definition of Refugee, 20 Cal. W. Int'l L.J. 315, 323-24 (1990).

50. See, e.g., David A. Martin, The End of De Facto Asylum: Toward a Human and Realistic Response to Refugee Challenges, 18 Cal. W. Int'l L.J. 161 (1987) (Refugees and asylum-seekers are most likely to come from Central America, "a deeply troubled region.").

51. For example, in the mid-eighties legislation was lobbied for, and finally accorded, to grant "safe-haven" legislation specifically to Salvadorans in the Immigration Act of 1990. More recently, calls for legislation granting safe-haven relief to protect Haitian nationals in light of the recent controversy surrounding the Bush administration's policy of forced repatriation—at a time of considerable internal strife and violence in their homeland—emanated from several congresspeople and at least one court of appeals judge. See Haitian Centers Council, Inc. v. McNary, No. 92 CV 1258, 1992 U.S. Dist. LEXIS 8452 (E.D.N.Y. 1992) (calling international guarantees "a cruel hoax" unless Congress enacted legislation ensuring protection). In fact, several bills were introduced in Congress last year to ban forced repatriation of Haitian refugees. See, e.g., H.R. 3844, reported in 69 INTERPRETER RELEASES 181, 249-51 (entitled the "Haitian Refugee Protection Act of 1992," it was "the first congressional response to the Bush administration's efforts to repatriate Haitians interdicted at sea"). In response to further government action, other legislative measures to counteract the United States government's policy of forced repatriation have been introduced but, apparently, their passage during the term of the 102nd Congress was unlikely. See, e.g., 69 INTERPRETER RELEASES 1236 (1992).
B. The State of Refugee Protection Prior to 1980

1. In General

Historically, refugee movements—largely a European phenomenon occurring in the wake of the Cold War—did not significantly impact United States refugee law. The United States, although a country of immigration, was not a country of first asylum. Over the ensuing years, however, many Western countries, including the United States, witnessed unprecedented levels of migration from third world countries. In the forty years since the drafting of that international convention on refugees, the concept of refugee and the problems associated with refugee protection have changed dramatically. A survey of the statutory and administrative treatment accorded refugees and asylum-seekers prior to 1980 reveals the volatile and evolving nature of refugee protection.

2. The Statutory Treatment of Overseas Refugees

Since the end of World War II, the statutory provisions governing overseas refugee admissions have changed frequently. Throughout

52. From the beginning of the twentieth century, civil and religious strife, regional upheavals, war, and repression have driven European refugee movements back and forth across the continent. Much more than the United States (or Canada), Europeans are accustomed to providing refuge for first asylum political exiles. However in Western Europe and Canada, as in the United States, treatment of the newly arriving would-be refugees is controversial. The safe haven policies and practices developed in other industrialized countries originate and have evolved in a different historical context, and reflect a different set of expectations from those of the United States.

Gallagher et al., supra note 8, at 55.

53. “First asylum” refers to countries to which large numbers of refugees arrive directly. See generally Goran Melander, Basic Differences in Refugee Policy in Western Europe and North America, 9 In Defense of the Alien 97, 97-98 (L. Tomasi ed., 1986).


the 1950s, the congressional approach was to enact statutes in response to known refugee problems.\textsuperscript{58} Then, in 1956, beginning with the Hungarian Revolution and continuing until the late seventies after the fall of Saigon, several administrations utilized the Attorney General's parole power under the regular immigration statute to admit large groups of refugees.\textsuperscript{60} However, this power was used predominantly to bring in refugees from communist or communist-controlled countries.\textsuperscript{60}

In 1965, when Congress enacted an immigration measure eliminating the Eurocentric national quota restrictions as part of the regular immigration selection system (a year after the enactment of the historic Civil Rights legislation),\textsuperscript{61} Congress also adopted an additional category, popularly called "conditional entry." This measure provided for a permanent resettlement program for the admission of refugees from overseas.\textsuperscript{62} To qualify for admission under this particular refugee assistance program, however, an applicant had to establish that he or she had "fled" persecution on account of race, religion, or political opinion in a "Communist or Communist-dominated country" or a "country within the general area of the Middle East."\textsuperscript{63} In other words, geopolitical factors characterized refugee


\textsuperscript{59} The INA includes a parole provision, which gives the Attorney General the authorization to parole aliens into this country temporarily for "emergent reasons or for reasons deemed strictly in the public interest." 8 U.S.C. § 1182(d)(5)(A). Historically, parole was used primarily for the admission of large numbers of refugees into the United States. See generally Nicholas B. Kap, Note, Refugees Under United States Immigration Laws, 24 CLEV. ST. L. REV. 528 (1975) (discussing both parole and conditional entry of refugees). Currently, there is a statutory prohibition on the use of the Attorney General's power to parole refugees into the United States unless there are compelling reasons to do so with respect to a "particular alien." INA § 212(d)(5)(B).

\textsuperscript{60} See Arthur C. Helton, Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise, 17 MICH. J. L. REF. 243, 248 (1984) (noting that from 1968 through 1980, parole was used to admit 7,150 people from noncommunist countries and 608,365 from communist countries).

\textsuperscript{61} Congress replaced the national quota restrictions with an immigration preference system based primarily on family reunification and employment categories. For a detailed discussion of the former immigrant categories under United States law, see CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 2.17-2.18 (rev. ed. 1990). In addition to the category of immediate relative status, the basic two groups of categories were further delineated into six preference groups. A seventh preference was made available to those seeking entry from abroad as refugees. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (amending § 203(a)(7) of the INA).

\textsuperscript{62} ALEINIKOFF & MARTIN, supra note 24, at 709.

\textsuperscript{63} Id. (citing Immigration and Nationality Act Amendments of 1965, Pub. L.
admissions prior to 1980. And although this new category was intended to be a permanent statutory provision to admit refugees on a more formal basis (replacing the old ad hoc arrangements), it was numerically limited and linked to regular immigration. Thus, conditional entry of refugees, also known as the “seventh preference,” eventually proved to be unsatisfactory for refugee admissions purposes.64

3. The Administrative Practice of Asylum

In contrast, asylum relief was solely a creature of administrative regulation prior to 1980.65 No statutory procedure governed the administrative practice available to asylum-seekers already in the United States before that time.66 Their applications were governed by regulations promulgated by the INS pursuant to the Attorney General’s authority under the regular immigration statute.67 Like the overseas refugee admissions program, those asylum grants were dominated by ideology, even though the former channels for asylum-like relief were never formally subject to the same limitations. Not surprisingly, administrative grants of relief were strongly influenced

No. 89-236, 79 Stat. 911, 913 (amending § 203(a)(7) of the INA)). Also, this new provision was numerically limited, allowing for only six percent of the annual numerically limited immigration numbers. Id.

64. In the late 1970s, however, Congress began to tire of the use by the executive branch of the Attorney General’s broad parole power under the regular immigration statute to admit large numbers of refugees from overseas. But see Doris M. Meissner, Reflections on the Refugee Act of 1980, in The New Asylum Seekers: Refugee Law in the 1980s 57 (David A. Martin ed., 1986).

Because of the inadequacy of [the conditional entry provision], the Attorney General’s parole authority increasingly came to be used to admit people when serious refugee crises arose requiring the admission of large numbers. The parole authority at the time gave virtually total discretion to the Attorney General to admit persons to the United States. As such, it provided a highly flexible, responsive tool for the government to meet urgent humanitarian needs. Nevertheless, successive Attorneys General uniformly balked at invoking it to authorize large-scale admission programs. They agonized over whether its use exceeded the proper scope of executive power, because admission of persons to the United States has traditionally been a jealously guarded statutory power of Congress.

Id. at 57-58 (footnote omitted). The time was thus ripe for legislative attention in the area of refugee law, given the interest of both the Congress and the Carter administration in viable reform measures.


66. Note, however, that § 243(h) could have been viewed as asylum-like relief. See Zavala-Bonilla v. INS, 730 F.2d 562, 563 n.1 (9th Cir. 1984).

by cold war politics.68

Prior to 1974, no regulation had afforded an asylum-seeker even an opportunity to apply for an affirmative grant of asylum while in the United States. Of particular note in the history of the administrative practice of asylum was a 1970 international incident involving Simas Kudirka, a Lithuanian crewman who had jumped ship from a Russian vessel that came in contact with the United States Coast Guard and who sought asylum in the United States.69 It was a classic East-West confrontation, and its political and humanitarian overtones predictably produced media attention and congressional outrage.70 This event, seemingly, was the trigger for the establishment of the formal state-side administrative practice of asylum that was in place from 1974 until 1980.

At the time of the international incident the only statutory provision covering aliens within this country who sought relief on the basis of persecution in their native countries was contained in section 243(h) of the Immigration and Nationality Act of 1952 (INA).71 This statutorily created provision was called “withholding of deportation” (considered to be an asylum-like provision) and provided for the nonreturn of an alien to a country where the alien was likely to be persecuted “on account of race, religion, nationality, membership in a particular social group, or political opinion” in the exercise of the Attorney General’s discretion.72 Although this provision had been in place since 1952, it was unavailable to Kudirka because his

68. See Aleinikoff & Martin, supra note 24, at 732 (“With respect to the asylum-type relief available prior to 1980, successful asylum claimants were, in overwhelming proportions, refugees from communist countries.”).


70. Aleinikoff & Martin, supra note 24, at 733 (“More significant changes in the actual implementation of political asylum protections came in the wake of the Kudirka incident in 1970.”).

71. See INA § 243(h)(1) (1991). The provision that had been in place since 1952 gave the Attorney General discretion to withhold the deportation (or return) of aliens subject to persecution. “Section 203(e) of the Refugee Act of 1980 amended the language of § 243(h), basically conforming it to the language of Art. 33 of the United Nations Protocol.” INS v. Stevic, 467 U.S. 407, 421 (1984). However, “section 243(h), both prior to and after amendment, makes no mention of the term ‘refugee’; rather, any alien within the United States is entitled to withholding if he meets the standard set forth.” Id. at 422. Furthermore, the changes made to this section were not considered to be substantive in nature but rather just a conforming amendment “for the sake of clarity.” Id. at 428.

request for political asylum did not arise in the context of a deportation proceeding. Furthermore, no formal apparatus—administrative or otherwise—was in place to grant Kudirka political asylum affirmatively. As a result of this gap in statutory and administrative coverage, the Lithuanian crewman was returned to the Russians. In the wake of this international incident, the Nixon administration launched a major review of the political asylum apparatus. Eventually formal immigration regulations were promulgated in 1974, providing for affirmative asylum relief to foreign nationals applying while in the United States.

4. The Prelude to Legislative Reform

Such was the availability of state-side asylum relief and refugee resettlement from abroad prior to the enactment of the legislative reform measure that later became known as the Refugee Act of 1980. The inability of the 1965 statutory arrangement of conditional entry to provide more comprehensive relief for overseas refugee assistance, together with the executive branch’s dissatisfaction with its efforts to respond quickly to the growing refugee emergencies, forged a partnership in the legislative arena that led to the enactment of the new refugee law in 1980.

The Refugee Act proposal presented Congress with an opportunity to curtail the executive branch’s plenary power under the immigration laws to admit refugees from abroad without accountability or legislative oversight. The Refugee Act proposal, also presented the executive branch with higher numerical ceilings to deal with refugee emergencies than had been afforded under the old seventh preference. During the enactment process, Congress and the executive branch thus “struggled to find a statutory framework that would provide a reasonable degree of control and predictability, while at the same time retaining adequate flexibility to respond to new crises.”

73. In other words, the former version of § 243(h) of the Act was only applicable to an alien unlawfully within the United States who was in a deportation proceeding. Stevic, 467 U.S. at 415 (citing Leng May Ma v. Barber, 357 U.S. 185 (1958)).
74. See ALENIKOFF & MARTIN, supra note 24, at 733.
75. See 8 C.F.R. § 108 (1976). Note also that this process eventually resulted in formal regulations and guidelines. The INS regulations, issued in 1974, were the first to spell out in detail the procedures to be followed when applying for political asylum.
76. ALENIKOFF & MARTIN, supra note 24, at 694.
II. THE LEGAL FOUNDATION: COMPONENTS OF UNITED STATES ASYLUM LAW

A. The Refugee Act of 1980

1. In General

The Refugee Act,\(^77\) the first comprehensive piece of refugee legislation, created order out of the piecemeal treatment that had previously governed the statutory provisions of refugee protection and the formal administrative practice of asylum relief.\(^78\) The Refugee Act thus brought permanent and systematic statutory treatment of refugees and asylum-seekers under United States immigration laws, amending the INA.\(^79\)

The emphasis on order and accountability in the overseas statutory scheme is instructive as to whether Congress would have intended that asylum be an open-ended procedure without the necessary controls currently in place under the overseas refugee program. Further, the executive branch had informed the legislators that the statutory proposal did not differ substantially from the administrative practice for asylum already in place.\(^80\) Many observers have since acknowledged that asylum was a legislative afterthought. Notwithstanding the lack of attention legislators paid to the asylum provisions, the Refugee Act did establish for the first time formal statutory procedures for adjudicating asylum claims of persons inside United States borders.\(^81\) Concerning asylum relief, this statutory provision is probably the single most important aspect of the Refugee Act next to the neutral standard that governs eligibility for refugee status.


\(^79\) See generally Anker & Posner, supra note 78.


2. The Statutory Framework

In adopting the United Nations Convention definition of "refugee," the Refugee Act repealed the old, numerically and geopolitically limited conditional-entry category,\(^\text{82}\) thus establishing a uniform, neutral standard for refugee status under the two statutorily created programs of political asylum and overseas refugee resettlement.\(^\text{83}\) Although Congress clearly intended this non-ideological standard to be compatible with the humanitarian traditions and international obligations of the United States, all who qualified as refugees—regardless of the specific program—were not intended to be accorded affirmative immigration status.\(^\text{84}\)

The Refugee Act therefore established, primarily, a systematic procedure for determining the number of refugees to be admitted each year under new section 207 of the INA.\(^\text{85}\) Refugee admissions from overseas are accomplished through a consultative process involving the legislative and executive branches.\(^\text{86}\) Not all who meet the statutory definition of "refugee" are to be considered eligible for admission to the United States, however.\(^\text{87}\) Moreover, the executive branch is explicitly prohibited from using the Attorney General’s parole power to admit refugees, thus closing "the [pre-1980] refugee-parole loophole permanently by adding subparagraph (B) to

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83. Helton, supra note 60, at 250-52. As noted in the introduction: Three years after the passage of the Refugee Act of 1980, its mandate that uniform and neutral standards be utilized in the asylum adjudication process remains unfulfilled. Rather, the Act's mandate is subservient to foreign and domestic policy considerations which continue to dominate asylum decision-making.

84. See generally, Anker & Posner, supra note 78.

85. Refugee Act, Pub. L. No. 96-212, 94 Stat. 103 § 201(b); INA § 207, 8 U.S.C. § 1157 (1982). The Refugee Act, in effect, "established a third broad admission structure governed by a decision-making system quite different from quota immigration and the numerically unlimited system for immediate relatives." ALEINIKOFF & MARTIN, supra note 24, at 710.

86. See INA § 207(d), 8 U.S.C. § 1157 (1988 & Supp. II 1990). As Professors Aleinikoff and Martin note: The Refugee Act repealed the old, numerically limited seventh preference in its entirety. It had become apparent that a single fixed ceiling, applicable every year, simply would not fit the variable needs created by the rise and fall of refugee flows. At the same time, congressional drafters were unwilling to leave refugee admissions totally ungoverned by numerical limits in some systematic fashion. ALEINIKOFF & MARTIN, supra note 24, at 710.

87. Each year the President, exercising a power specifically delegated by Congress, announces how many of these refugees will be admitted into the United States. Id. at 711.
Refugees admitted pursuant to this statutory scheme have usually awaited their turn in internationally sponsored refugee camps in countries of first asylum while the United States government processed their applications. On the other hand, the in-state asylum program permits the processing of claims of asylum-seekers already physically present in the United States, notwithstanding their illegal entry or unlawful status at the time of application.

In that regard, the Refugee Act added a new section 208 to the INA, providing for refugee protection and establishing what amounted to a new immigration status, "asylee," to be made available outside the regular system of immigration preferences. Like the overseas program, this particular statutory scheme does not contemplate that all who qualify will be accorded asylee status. After

88. Id. at 350 ("That provision forbids the paroling of refugees except in isolated individual cases for individually compelling reasons.").


92. As noted by the Supreme Court in the landmark decision INS v. Cardoza-Fonseca, 480 U.S. 421 (1987):

It is important to note that the Attorney General is not required to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that "the alien may be granted asylum in the discretion of the Attorney General."

Id. at 428 n.5 (emphasis added).

In addition, the Court quoted House Report No. 608, supra note 82, on this particular issue as follows:

The Committee carefully considered arguments that the new definition might
eligibility for political asylum has been established, asylee status may be granted only at the Attorney General's discretion. When applicants demonstrate that they have a "well-founded fear of persecution" on account of one of the enumerated categories if returned to their homelands, however, discretion is rarely denied in current practice.\textsuperscript{93} Thus, in contrast to refugees admitted under the overseas program, successful asylum applicants (i.e., those who demonstrate their refugee status) are accorded lawful immigration status (i.e., "asylee") without having to await "their turn in line."\textsuperscript{94} Even though few applicants have been granted asylee status, deportation of asylum-seekers is rare, thus creating the potential for a new class of immigrants not currently authorized under the INA.\textsuperscript{95}

The Refugee Act also transformed the old section 243(h),\textsuperscript{96} the "withholding of deportation" provision discussed above, from discretionary to mandatory to assure its compliance with the United States treaty obligation of nonrefoulement.\textsuperscript{97} Although the language of this

\begin{quote}
expand the numbers of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb. However, merely because an individual or group comes within the definition will not guarantee resettlement in the United States.
\end{quote}

\textit{Id.} at 444. But the House Report was still focused on the overseas program and thus failed to consider a situation in which an expansive definition might attract large numbers of potential asylum-seekers who may be denied asylum and remain to become a part of yet another undocumented group of aliens in need of lawful immigration status. In the case of the Salvadorans, Congress passed safe-haven legislation, discussed infra, to accord them lawful status temporarily.

\textsuperscript{93} As Professors Aleinikoff and Martin note, some observers feared that discretionary denials of asylum to eligible asylum-seekers would increase. \textit{Aleinikoff & Martin, supra} note 24, at 799 (citing Deborah E. Anker & Carolyn P. Blum, \textit{New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in INS v. Cardoza-Fonseca,} 1 \textit{Int'l J. Ref. L.} 67 (1989)). However, such was not the case when the Board of Immigration Appeals (BIA) revisited this issue. \textit{See supra} note 126.

\textsuperscript{94} The potential for permanent residence in the United States after one year as an asylee is available as well, although not automatically, as with the overseas program. \textit{Compare INA} § 209(a) (overseas refugee program) \textit{with} INA § 209(b) (political asylum program).


\textsuperscript{96} INA § 243(h), Pub. L. No. 96-212, Tit. II, 94 Stat. 107 § 203(e) (Mar. 17, 1980).

\textsuperscript{97} As amended by the Refugee Act, the INA provides that "[t]he 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." INA § 243(h)(1), 8 U.S.C. § 1253(h)(1) (1988 & Supp. II 1990). The "withholding" remedy is \textit{mandatory} for aliens who prove that deportation would threaten their lives or freedom on account of any of the same five grounds set forth in the INA refugee definition under § 101(A)(42). \textit{See INA} § 243(h), 8 U.S.C. § 1253(h) (providing that the Attorney General "shall" withhold deportation of persons proving statutory eligibility). The Refugee Act transformed § 243(h) into a mandatory provision, albeit "country-specific." Also, although technically called requests for "withholding of deportation," such requests are considered, and actually are, requests for asylum. \textit{In re Salim}, 18 I. & N. Dec. 311 (BIA 1982); \textit{Aleinikoff & Martin, supra} note 24, at 665. For disqualifying
amended provision differs slightly from that found in section 208(a), the difference is merely a matter of degree. Those seeking asylum relief under the current statutory scheme would ordinarily present the same evidentiary proof that is needed to qualify for withholding of deportation.

Significantly, however, the standard of proof for withholding of deportation relief under section 243(h) is greater than that required for establishing eligibility for asylum relief under section 208. This difference in the quantum of proof is the result of case law development, which is discussed more fully below. The standards of evidentiary proof therefore differ depending on the particular type of relief claimed, even though the same evidence is used for both claims. Nonetheless, in asylum cases, the applicant need only establish a “well-founded fear of persecution,” which is considered to be a more lenient standard than the restrictive “clear probability” of persecution that the applicant must establish to “withhold” his or her deportation.

In any event, for those asylum-seekers applying within the United States (or at a port of entry or land border), two provisions under the regular immigration statute accord refugee protection. Either section 208 or section 243(h)(1), or both, are available to an alien who fears persecution.\(^8\) In fact, under the appropriate regulations, an asylum claim is treated as including a request for relief under the withholding provision.\(^9\) Ultimately, which persons are accorded asylum or withholding under the pertinent INA provision depends in large measure on the degree of persuasiveness of the evidentiary


98. Note that formerly “withholding” relief could only be sought in deportation proceedings. However, under the new asylum regulations, all applications for asylum are also treated as applications for withholding. See 8 C.F.R. §§ 208.3(b), 208.4 (1992). Also, an asylee is given an indefinite right to remain in the United States and, at the end of one year in asylee status, may apply for permanent residence. INA § 209, 8 U.S.C. § 1159; 8 C.F.R. § 208.22 (1991). In contrast, persons granted withholding are given only the right not to be deported to a specific country for as long as the threat of persecution lasts; a grant of withholding does not allow for permanent resettlement in the United States, and the person may be deported at any time to a third country where no threat of persecution exists, although that rarely happens. See INA § 243(h), 8 U.S.C. § 1253(h); 8 C.F.R. § 208.22 (1992).

Other aspects of asylum and withholding are similar. Applicants for both forms of relief may be granted interim employment authorization while their applications are pending. 8 C.F.R. § 208.7 (1992). Both asylees and persons granted withholding are automatically granted employment authorization. 8 C.F.R. § 208.20 (1991).

proof presented at a hearing on the claims.\textsuperscript{100}

\textbf{B. The Regulatory Scheme}

1. \textit{In General}

Comparatively few applications for asylum were being filed at the time of enactment of the Refugee Act.\textsuperscript{101} Because asylum was considered less important than the overseas program, the Refugee Act essentially codified (or rather deferred to) the regulatory scheme for asylum adjudications that had existed since the aftermath of the Kudirka incident in the seventies. As noted above, little attention was paid to the enactment of the statutory provisions governing asylum. Thus, there was no awareness or concern that the statutorily created process might eventually disrupt the overall scheme of orderly admissions under the regular immigration system then in place. Consequently, asylum-seekers who managed to enter the United States lawfully or otherwise, or apply at United States borders after 1980, could rely on statutory authority for the adjudication of their claims. Not long after the measure’s passage, however, the asylum situation changed dramatically. All involved in the process of asylum adjudications soon recognized the inadequacy of the statutory scheme established for the in-state treatment of asylum applications.

2. \textit{The Process Post-Enactment}

For the first ten years after the passage of the Refugee Act, interim regulations\textsuperscript{102} governed the asylum adjudicatory process. In 1990, the Department of Justice issued final asylum regulations, after holding them in abeyance for nearly three years.\textsuperscript{102} Principally, the cause for delay was the proposed elimination of the role of the


\textsuperscript{101} Aleinikoff, \textit{supra} note 13, at 184, 184 n.11.

\textsuperscript{102} Notably, the interim regulations, published shortly after the passage of the Refugee Act, remained in effect until the final regulations, originally published in 1987, became effective in 1990.

\textsuperscript{103} 8 C.F.R. § 208.1(a), 55 Fed. Reg. at 30680 (1990). These regulations were delayed after they were first issued in 1987 due to an uproar over the “two bites of the apple” issue, which involved the removal of the immigration judges from the adjudication process. See generally Arthur C. Helton, \textit{The Proposed Asylum Rules: An Analysis}, 64 INTERPRETER RELEASES 1070-80 (1987). Although judicial review in the federal courts remained available to unsuccessful applicants, immigration judges are not a part of the enforcement-minded INS. Immigration judges are considered independent adjudicators who conduct more formal evidentiary-type hearings in which the asylum applicant may be represented by counsel at his or her expense. On the other hand, affirmative administrative procedures before an asylum officer are likely to be less formal, nonadversarial interviews at which counsel for the alien may or may not participate fully.
immigration courts in deciding asylum cases.\textsuperscript{104} The new asylum regulations, which became effective on October 1, 1990, have received, for the most part, favorable commentary.\textsuperscript{105} However, the problem of asylum does not lie with the recently promulgated regulations, although the delay in issuance of their final form may have contributed to the present considerable backlog of asylum applications.

Prior to the enactment of the 1980 refugee law, less than 2000 asylum applications were being filed annually.\textsuperscript{106} One month after the Refugee Act was signed into law, approximately 125,000 Cubans participating in the Mariel boatlift began to arrive in Florida.\textsuperscript{107} Over the years, the number of applications increased exponentially. In the early 1980s, the number of annual asylum applications rose to almost 50,000.\textsuperscript{108} Today the number of asylum applications is in the hundreds of thousands. Few persons denied asylum are being deported.\textsuperscript{109} Undoubtedly, the dramatic increase in asylum applications over the pre-Refugee Act numbers was cause for alarm among administration officials, who viewed this new form of lawful immigration status as a vehicle for aliens intent on abusing the process by filing "frivolous claims to forestall return to their home countries."\textsuperscript{110} Some consider this view both alarmist and inaccurate. It is nevertheless true that the number of asylum-seekers is likely to increase rather than decrease over time, with a potential effect of disrupting the regulated immigration process.

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\textsuperscript{104} Smith & Hake, supra note 100, at 3 n.19.
\textsuperscript{105} See generally Arthur C. Helton, \textit{Final Asylum Rules: Finally}, 67 Interpreter Releases 789-794 (1990). These new asylum regulations will be discussed more fully infra in Part III.
\textsuperscript{106} See Meissner, supra note 64, at 60. Note that this number was considered "an all-time high, in the system at that time." \textit{Id.}
\textsuperscript{107} \textit{Id.} See also T. Alexander Aleinikoff, \textit{Aliens, Due Process and "Community Ties": A Response to Martin}, 44 U. Pitt. L. Rev. 237, 253 (1983).
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} General Accounting Office, supra note 95.
\textsuperscript{110} Aleinikoff, supra note 13, at 185. Another concern that "[t]his extraordinary increase in the number of pending asylum claims" posed to the administration, in addition to the filing of frivolous claims, was the possibility that they "may seriously tax procedures established for a far smaller flow. The overburdening of the process may result in substantial delays and proceedings that threaten the accuracy of the determinations." \textit{Id.} Administration critics, in contesting the administration's view, contended that yet another concern about the present process was "the accuracy and fairness of the decision-making process." \textit{Id.} This particular concern has been largely addressed by the 1990 implementation of the new asylum regulations.
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3. The Ramifications of Immigration

The regulation of immigration is an area of public law within the plenary power of the sovereign.111 When Congress enacted the Refugee Act, the new law was incorporated into the 1952 immigration statute, which regulates the entry and expulsion of noncitizens.112 Even the structure of congressional committees assigned refugee matters reflects a preoccupation with immigration.113 Indeed, the bipartisan Select Commission on Immigration and Refugee Policy—a blue ribbon commission formed over a decade ago to study and report on these issues—could not complete its undertaking without due consideration of the interrelationship between these two areas of the law.114


   It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government ...


112. “[I]t must follow that if Congress has deemed it necessary to impose particular restrictions on the coming in of aliens ... it follows that the constitutional right of Congress to enact such legislation is the sole measure [of] ... its validity ....” Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 340 (1909). See also Fiallo v. Boll, 430 U.S. 787 (1977) (quoting Mathews v. Diaz, 426 U.S. 67, 80 (1976)) (recognizing that the Court had recently observed “that in the exercise of its broad power over immigration and naturalization, ‘Congress regularly makes rules that would be unacceptable if applied to citizens.’ ”).

113. For example, the House Judiciary Committee’s subcommittee on immigration is called the House Subcommittee on International Law, Immigration and Refugees. 70 INTERPRETER RELEASES 58 (1993). The subcommittee’s chairman is Rep. Romano L. Mazzoli (D-Ky.). The Senate immigration subcommittee, chaired by Sen. Edward M. Kennedy (D-Mass.), is called the Senate Judiciary Committee’s Subcommittee on Immigration and Refugee Affairs. Id.

   As international law has moved in this century “from an essentially negative code of rules of abstention to positive rules of cooperation,” its potential overlap with domestic statutory regimes has become pronounced. Even a partial list of recent international concerns—gender and race discrimination, restrictive business practices, environmental protection, and labor rights—suggests the extent to which the international community may attempt to regulate matters that historically have been the exclusive subject of domestic legislation.


114. Public Law 95-412, passed on October 5, 1978, established the Select Commission on Immigration and Refugee Policy “to study and evaluate ... existing laws,
Asylum is therefore highly anomalous. It is, after all, the only basis for obtaining lawful permanent status outside the regular system of immigration selection, exclusive of refugee admissions under the overseas refugee program.\textsuperscript{115} Professor David Martin has appropriately called asylum the “wild card” of immigration, a “loophole” in the regular system of family and occupational preferences, creating “backdoor immigration.”\textsuperscript{116} Although intended as a discretionary policies, and procedures governing the admission of immigrants and refugees to the United States and to make such administrative and legislative recommendations to the President and to the Congress as are appropriate.” SELECT COMMITTEE ON IMMIGRATION AND REFUGEE POLICY, FINAL REPORT AND RECOMMENDATIONS ON U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (1981).

Indeed, the Select Commission on Immigration and Refugee Policy offered several suggestions on the subject of future “mass first asylum” situations:

Until 1980, the U.S. experience with asylum consisted of infrequent requests from individuals or small groups, which generally met with favorable public reaction. Then, last year, the sudden, mass arrival of [125,000] Cubans seeking asylum, added to the continuing arrival of Haitian boats, resulted in national dismay, consternation and confusion. Considering the possible recurrence of mass first asylum situations and the exponential growth in new asylum applicants other than Cubans and Haitians, the Select Commission has made a series of recommendations as to how the United States should attempt to manage such emergencies. These recommendations stem from the view of most Commissioners that:

* The United States, in keeping with the Refugee Act of 1980, will remain a country of asylum for those fleeing oppression.
* The United States should adopt policies and procedures which will deter the illegal migration of those who are not likely to meet the criteria for acceptance as asylees. Therefore, asylee policy and programs must be formulated to prevent the use of asylum petitions for “backdoor immigration.”
* The United States must process asylum claims on an individual basis as expeditiously as possible and not hesitate to deport those persons who come to U.S. shores—even when they come in large numbers—who do not meet the established criteria for asylees.

\textit{Id.} at 165 (citation omitted).

115. Because of the ability to control how many are admitted under the overseas program, this aspect of refugee protection is not viewed as aberrational to the regular immigration system. Much like those awaiting visa availability under the ordinary system of immigration, refugees must likewise await their turn.


Asylum claims were the new wild cards in the deck. Aliens with no real chance of gaining legal admission to the United States might get a foot in the door by filing for asylum. Few could meet the law’s requirement that they show a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” But virtually anyone (especially with a lawyer) could hope to delay formal expulsion long enough—certainly for months often for years—to gain some other form of relief or to melt into the large clandestine world of undocumented aliens. Asylum claimants thus had everything to gain and nothing to lose.
form of relief, in actual practice asylum is rarely denied once eligibility has been established.\textsuperscript{117} However, the sovereign's plenary power has the potential for trumping asylum in "the immigration deck of cards"\textsuperscript{118} if the numbers continue to overwhelm the orderliness of the process and Congress elects to act.\textsuperscript{119}

Determining who and how many are permitted to enter and remain as members of the body politic are decisions that go to the very heart of a nation's identity and the concept of statehood.\textsuperscript{120} While it seems inevitable that restrictive immigration policies will hamper the goal of protecting asylum-seekers, the issue must be addressed. The intersection of immigration law and refugee policy is unavoidable.

4. The Unfulfilled Promise

The passage of the new refugee law was hailed as a significant milestone in human rights, a promise of fair and equitable treatment for all refugees without any geopolitical biases.\textsuperscript{121} But complicating matters in the asylum debate is the widely held view that the present system is politically biased, compromising the intended goal of neutrality in the adjudication process.\textsuperscript{122} Although the current United

\textit{Id.} (footnote omitted).

\textsuperscript{117} Moreover, even though a person may be denied asylum, it is unlikely that he or she will ever be deported. Thus, as has happened in the past, the passage of special legislation to correct the problem—such as the Cuban-Haitian entrants classification in the mid-eighties—is a distinct possibility. This type of legislation would be necessary to accord lawful status to individuals who have managed to rebuild their lives in the United States after arriving or entering without lawful status. See IRCA § 202 (uncodified) (as amended by Pub. L. No. 100-525 § 2(i), 102 Stat. 2609 (Oct. 24, 1988)) (permitting those qualifying as Cuban-Haitian entrants to adjust to permanent resident status). For earlier forms of similar relief for those previously admitted as refugees under the executive branch's parole power, see Act of July 25, 1958, Pub. L. No. 85-559, 72 Stat. 419 (providing for adjustment of status of Hungarians); Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (providing similar adjustment opportunities for the earlier arrival of Cubans).

\textsuperscript{118} Martin, \textit{The Refugee Act}, supra note 14, at 112.

\textsuperscript{119} The 103rd Congress may yet pass comprehensive legislation in the area of asylum reform. The House Subcommittee on International Law, Immigration, and Refugees recently held a hearing on three bills (H.R. 1153, H.R. 1355, and H.R. 1679) involving asylum and immigration pre-inspection processes. See generally 70 INTERPRETER RELEASES 581-87 (1993). The Senate Subcommittee on Immigration and Refugee Affairs plans to hold hearings later this year on various asylum issues. Id. at 352.

\textsuperscript{120} See generally David A. Martin, \textit{Due Process and Membership in the National Community: Political Asylum and Beyond}, 44 U. Pitt. L. Rev. 165 (1983).


States definition did indeed eliminate the previous geopolitical biases, old habits die hard. 123. Thus, achieving the "humanitarian ideal to which our nation has been historically committed . . . has unfortunately proven elusive and controversial." 124. The Refugee Act's declaration of purpose does emphasize this country's historic policy of responding to the urgent needs of persons subject to persecution in their homelands. However, this stated purpose is more consistent with "preserving special access for refugees [from abroad]" 125. than affording new immigration opportunities for asylum-seekers inside the United States.

Furthermore, in what is perceived by some as an effort to further emasculate congressional intent in this area, a number of commentators have charged that the tendency to construe the statutory grounds for eligibility narrowly is an affront to the generosity Congress intended when it enacted the Refugee Act. Yet a narrow construction of the qualifying terms is not necessarily inconsistent with the humanitarian goals Congress intended when it eliminated the geopolitical grounds that previously governed United States refugee policy. Arguably, they are different considerations. Although Congress did indeed intend a generous policy toward refugees admitted from overseas, it is unlikely that Congress intended a statutory scheme for processing claims in-state to be used to process large numbers of asylum applications without any built-in constraints. On the contrary, by leaving the granting of asylum to agency discretion,

123. For example, critics point to the relative ease with which asylum-seekers from Eastern Europe and Cuba have traditionally been granted asylum compared to the extremely low rates of asylum grants for Haitians and Salvadorans. Helton, supra note 60. More recently, a congressional witness observed at a House Subcommittee hearing on immigration housekeeping matters, calling the Cuban Adjustment Act of 1966 a "Cold War relic," that "[f]or 30 years the Act is a monument to what this country will do when foreign policy considerations take precedent." 69 INTERPRETER RELEASES 671 (1992). For a critical review of United States refugee policy, see LOESCHER & SCANLAN, supra note 57.

Pursuing policies forged in the crucible of the cold war, the United States has grown accustomed to regarding only the opponents of Communism as deserving of rescue. In the current restrictionist era, that belief has translated into an asylum policy totally at variance with the spirit of America's refugee law, and totally alien to the belief that refugees are desperate people not pawns in a global game of chess with the Soviet Union.

Id. at 219; see also ZUCKER & ZUCKER, supra note 47, at 48-96 (1987).

124. Meissner, supra note 64, at 58-59.

125. GALLAGHER ET AL., supra note 8, at 3. At the least, it is consistent with a dominant characteristic of United States immigration policy that has existed since the pre-World War II period, when many political exiles from Nazi Germany were thereby excluded from entry. Id.
Congress no doubt intended the exercise of this discretion as a suitable restraint. However, in practice, discretionary denials are rare. Another approach is therefore necessary to address the growing concern about numbers and ensure the orderly processing of bona fide asylum claims. Ultimately this means that clear definitions of the qualifying grounds for relief must be spelled out legislatively.

The Refugee Act contemplated the granting of asylum on a discretionary basis only. In other words, the Act meant to provide a formal statutory procedure for the adjudication of a small number of asylum claims made by individuals already physically present in the United States. Not unexpectedly, perhaps, the broad and somewhat malleable language of the definitional standards has generated a significant amount of litigation and numerous court decisions on the subject.

C. Case Law Development

1. In General

Although, in passing the Refugee Act, Congress was specific about establishing a neutral standard for determining refugee status, it provided few decision-making guidelines to the Immigration and Naturalization Service, the agency charged with the Act’s implementation. This cursory approach is consistent with the scant attention paid to asylum during the legislative process—in part, no doubt,

126. In practice, establishing eligibility for asylum virtually guarantees that asylum status will be granted. See In re Pula, 19 I. & N. Dec. 467 (BIA 1987) (overruling In re Salim, 18 I. & N. Dec. 311 (BIA 1982), which placed too much emphasis on the asylum applicant’s manner of entry in circumvention of orderly refugee procedures). See also In re Soleimani, Interim Dec. No. 3118 (BIA 1989) (which “further continued a trend toward permitting favorable exercises of discretion in increasingly diverse circumstances.” ALEJNIKOFF & MARTIN, supra note 24, at 775).

127. As noted by the Supreme Court, “[t]he principal motivation for the enactment of the Refugee Act of 1980 was a desire to revise and regularize the procedures governing the admission of refugees into the United States.” INS v. Stevic, 467 U.S. 407, 425 (1984). The Court further concluded that

[the] primary substantive change Congress intended to make under the Refugee Act . . . was to eliminate the piecemeal approach to admission of refugees previously existing under § 203(a)(7) and § 212(d)(5) of the Immigration and Nationality Act, and § 108 of the regulations, and to establish a systematic scheme for admission and resettlement of refugees.


Regulations for treating political asylum requests by persons already in this country had existed for some years. As they had no explicit statutory base, it seemed tidy to add language to the Act providing the requisite authority.

Id. (footnotes omitted).

128. Indeed, as Professors Aleinikoff and Martin so aptly observe, “This language gives rise to immensely rich controversies over meaning and implementation.” ALEJNIKOFF & MARTIN, supra note 24, at 696.
because the asylum issues prominent today were not so apparent then. In creating the statutory scheme, then, the legislators expected relatively few claims to be adjudicated. As with other claims for immigration benefits, a case-by-case development of the law was understood to be a suitable approach for adjudication. Providing content to the governing language of the Refugee Act was therefore left to the agency and, ultimately, to the courts to complete. This adjudicatory approach to the processing of asylum claims consumed the better part of the last decade.

2. The First Generation of Asylum Cases

The first generation of asylum cases addressed essentially the procedural aspects of United States refugee law. Prior to the Supreme Court's first ruling in this area, commentators and the lower courts had grappled with the possibility of relaxing the evidentiary standard of proof in withholding of deportation cases in light of the passage of the Refugee Act. As noted earlier, the Refugee Act had transformed the withholding of deportation provision into a mandatory requirement upon the requisite showing of the threshold criteria. Despite contentions that the Refugee Act mandated a less stringent standard, the Board of Immigration Appeals (BIA) continued to require those applicants seeking withholding of their deportation to establish their claims by a "clear probability of

129. Initially, the concern focused on the number of applications, which was increasing exponentially. Then years of litigation over the differing standards of evidentiary proof between asylum and withholding claims ensued. Although asylum advocates won that battle, the war still rages on. Now the dichotomy between procedural and substantive aspects of asylum relief seems to hold center court, specifically the meaning of the phrase "on account of . . . political opinion."


132. Prior to 1980, withholding under § 243(h) of the INA was the only asylum-like relief available to would-be asylum-seekers. However, that relief was then available only in a deportation hearing. Also, prior to 1968 (when the United States acceded to the U.N. Protocol), it was clear that an alien in the context of a deportation hearing was required to demonstrate a "clear probability of persecution" or a "likelihood of persecution" to be eligible for withholding of deportation under § 243(h) of the INA. INS v. Stovic, 467 U.S. 407, 414-15 (1984). When Congress enacted the Refugee Act in 1980, some commentators urged that this new refugee law intended a more lenient standard of proof for withholding.

133. See supra note 97.
persecution.” In 1984, thus presented the Supreme Court with its first occasion to address this issue of statutory interpretation under the 1980 Act. To the surprise of most knowledgeable observers, the Court’s unanimous decision in Stevic deviated from the commonplace understanding the observers and the circuit courts shared about the uniformity of the governing standard under asylum and withholding. Nonetheless, the Court concluded that it found no support “in either the language of section 243(h), the structure of the amended Act, or the legislative history” that Congress intended those qualified for “refugee” status under section 208 to be entitled also to withholding of deportation under section 243(h).

In 1987, INS v. Cardoza-Fonseca afforded the Court an opportunity to answer definitively the important issue left open in the earlier Stevic case, namely whether a lesser standard of proof governed claims under section 208 of the INA. During the interim between the two Supreme Court decisions, the BIA concluded that “as a practical matter” the two standards (i.e., for asylum and withholding of deportation claims) converged. This time, however, the Court’s six-to-three decision in Cardoza-Fonseca, a landmark asylum case,

134. The “clear probability of persecution” standard was initially established as “a criterion governing the exercise of the discretion given to the Attorney General by the original wording of § 243(h)” in the early 1950s. ALENIKOFF & MARTIN, supra note 24, at 742. After the United States accession to the U.N. Protocol in 1968, many argued that the BIA was required to relax that criterion. Id. In In re Dunar, 14 I. & N. Dec. 310 (BIA 1973), the BIA disagreed, holding that the treaty worked no change in the governing standards. Id. The passage of the Refugee Act marked the renewal of this argument. Id.


136. For applicants seeking relief under § 243(h), the Court settled on a stricter standard of proof to govern withholding claims. Id. at 424-28. These cases are governed by the “clear probability” standard. Specifically, the Court determined that Congress had not intended, in enacting the Refugee Act, to apply a more lenient standard of proof in these types of cases (i.e., the mandatory form of refugee protection). Id.

137. ALENIKOFF & MARTIN, supra note 24, at 741; see also Bolanos-Hernandez v. INS, 749 F.2d 1316, 1321 n.10 (9th Cir. 1984) (listing pre-Stevic cases treating both standards as identical).

138. Stevic, 467 U.S. at 428. In INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), the Court observed that its reasoning in Stevic was “based in large part on the plain language of § 243(h)” of the INA. Id. at 430. In dicta, however, the Stevic Court intimated that the governing standard under § 208 was more generous than the one applicable to § 243(h) claims. Stevic, 467 U.S. at 425.


140. In In re Acosta, 19 I. & N. Dec. 211 (BIA 1985), the BIA surveyed the disparate court of appeals decisions that had predictably followed immediately after Stevic. In its decision, the BIA announced a unitary standard for determining § 208 claims because “the facts in asylum and withholding cases do not produce clearcut instances in which such fine distinctions can be meaningfully made.” Id. at 229.
definitively settled the hotly debated issue in finding the two standards “significantly different.”  

In Stevic and Cardoza-Fonseca, the Court did indeed settle the question of the appropriate standards of proof for establishing the threshold qualifications for protection from persecution under sections 208 and 243(h) of the INA. However, the Court’s decision, in effect, nullified the need for seeking relief under section 243(h) in recognizing a more lenient standard of proof under section 208. Furthermore, the Court left open for further case-by-case adjudication the specific contours of the more generous evidentiary standard governing asylum claims. This approach predictably prompted more litigation. Initially, the BIA responded by employing a favorable “reasonable person” test. However, not long after, critics and

141. Cardoza-Fonseca, 480 U.S. at 448 n.31 (1987). Although in dicta the Court in Stevic had suggested the answer to this question, the BIA and circuit courts were still undecided about the appropriate application of a standard for asylum cases. See Stevic, 467 U.S. at 424-25. Thus, in contrast to the withholding standard, the applicant for asylum need only establish a reasonable possibility of persecution on one of the five enumerated grounds. In Cardoza-Fonseca, the Court concluded that in choosing the phrase “well-founded fear of persecution,” governing the asylum provisions, Congress intended a more generous standard for deciding asylum relief. Because of the evidentiary proof problems associated with establishing persecution, asylum relief has become the most favored form of establishing entitlement to refugee protection. In practice, the same type of evidence would be used to establish either claim.

142. At first there was real concern that the Court’s decision left open a “troubling gap” in the law, which would permit the return of someone who had established “refugee” status under the more lenient standard but was denied asylum in the exercise of discretion and was unable to meet the more stringent standard for relief under § 243(h). See generally Anker & Blum, supra note 93. However, the BIA’s decision in In re Pula, 19 I. & N. Dec. 467 (BIA 1987), has seemingly calmed those concerns, moving away from a hard-line approach announced previously in In re Salim, 18 I. & N. Dec. 311 (BIA 1982).

143. In Cardoza-Fonseca, the Court stated:

The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like “well-founded fear” which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling “any gap left, implicitly or explicitly, by Congress,” the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. But our task today is much narrower, and is well within the province of the Judiciary. We do not attempt to set forth a detailed description of how the “well-founded fear” test should be applied.

480 U.S. at 448 (citation and footnote omitted).

144. See In re Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987). In In re Mogharrabi, the BIA moved quickly to conform its practice to Cardoza-Fonseca. After surveying the various circuits, the BIA adopted the definition of the standard that the Fifth Circuit had articulated in Guevara-Flores v. INS, 786 F.2d 1242, 1249 (5th Cir. 1986),
commentators alike began to see a trend that signaled a narrowing construction of the qualifying grounds, apparently as a counterbalance to the leniency of the evidentiary standard of proof.

Although the Cardoza-Fonseca decision ended years of litigation over the appropriate evidentiary standard of proof in asylum cases, resolution of this key issue has not led to the definitional precision needed to determine the threshold criteria for asylum relief. Initially, many knowledgeable observers applauded Cardoza-Fonseca as a landmark case for asylum-seekers. However, more than a decade has passed since the enactment of the Refugee Act, and still no definitive interpretations have been accorded its general statutory terms and phrases, such as “persecution” and “on account of,” or what criteria they entail.

3. The Second Generation of Asylum Cases

Case law development is now under way in what has been aptly labelled “the second generation of asylum cases.” This set of cases addresses the substantive content of the threshold criteria for eligibility under section 208 of the INA. Predictably, they have taken over center stage in the debate.

This second generation of cases has arisen precisely because the Refugee Act failed to define the key terms and phrases that govern the substantive threshold criteria for asylum eligibility. Whether a coherent set of principles can be established judicially to guide agency determinations in the absence of clear statutory definition remains to be seen. Litigants and commentators alike have asserted that the humanitarian purpose of the Refugee Act requires an expansive construction of governing provisions, consistent with the ameliorative benefits of the Act. In contrast, administrative officials and most courts have taken a narrow approach in interpreting the

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as a general approach to deciding § 208 cases. This standard became known as the “reasonable person” standard.

145. See Smith & Hake, supra note 100, at 13 (“Years of litigation over the burden of proof in asylum and withholding cases have not led to definitional precision . . . .”).

146. See, e.g., Sophie H. Firer, The Need for a Codified Definition of “Persecution” in United States Refugee Law, 39 Stan. L. Rev. 187 (proposing the codification of the term “persecution” because government, in effect, cannot be trusted to do the correct thing).


150. See e.g., Aleinikoff, supra note 16; Anker & Blum, supra note 93.
pertinent statutory grounds.151

One court, construing the phrase "on account of . . . political opinion," found no specific definition as to its meaning and scope expressed in the Refugee Act.152 Reading the Act's legislative history, the court concluded that Congress did not "unambiguously express an intent that the term should be construed in a particular way."153 When legislators do not define a statutory phrase, the accepted course of action for courts is to give "considerable weight" to the agency's interpretation if reasonable and consistent with the legislative purpose. Furthermore, courts are admonished not to substitute their own construction for that of the agency.154 In Cardoza-Fonseca, the Supreme Court specifically observed that judicial deference is ordinarily given to a reasonable interpretation of statutory terms propounded by the agency to which interpretation is charged.155 That would ordinarily be the case here, with the Refugee Act, because Congress did not define the key statutory phrases at the time of its enactment. But some courts, notably the Ninth Circuit, asserting that Congress intended the Refugee Act to be remedial in nature, have not given the deference usually accorded an agency's interpretation.156

Among the qualifying causes of persecution, the categories of "race," "religion," and "nationality" are relatively straightforward and therefore self-explanatory. But the remaining grounds, "membership in a particular social group" and "political opinion," are problematic because they are vague as to meaning or at least susceptible to expansive interpretations and therefore not so easily defined.

151. Because of the underlying humanitarian goals of this legislation, an admittedly narrow construction of the key terms and phrases by the administration is seemingly at odds with these goals. However, as noted earlier, the Refugee Act focused primarily on the overseas refugee program and not the in-state asylum adjudication system. See supra notes 65-75 and accompanying text.
152. Perlaza-Escobar v. Executive Office for Immigration, 894 F.2d 1292 (11th Cir. 1990).
153. Id. at 1296.
155. Cardoza-Fonseca, 480 U.S. at 448. Although the Supreme Court specifically rejected the government's heavy reliance on Chevron in Cardoza-Fonseca, it did set forth specifically the relevant text from Chevron in its entirety. Cardoza-Fonseca, 480 U.S. at 445 n.29.
156. See, e.g., Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984) (Ninth Circuit takes a vastly different approach to asylum claims than the Board of Immigration Appeals).
For example, the First Circuit, in upholding the BIA’s denial of asylum to a Salvadoran who refused to serve in his country’s army, determined that eligibility for the relief requires specific proof that persecution is on account of an individual’s political opinion and not for punishment he may suffer because of his refusal to serve.157 The Ninth Circuit, on the other hand, has interpreted the qualifying grounds quite expansively with its “imputed political opinion,” or “neutrality,” line of analysis in cases involving military conscription or forced recruitment in civil war situations.158

A literal interpretation of the phrase “on account of . . . political opinion” would suggest that the asylum-seeker must possess some opinion or belief of a nature inimical to the government or a group that the government cannot or will not control. The category “membership in a particular social group” is more obscure but has received less attention in the courts.159 Persecution on account of political opinion is the ground that has stirred the most controversy and court attention to date.160

For the most part, case law development of these two particular grounds has occurred in cases of asylum-seekers fleeing internal strife and civil war in homelands close to the United States.161 The critical concern, at least for the agency, is how far these grounds will be expanded before asylum relief is available to entire populations of countries in the Western Hemisphere. In the 1980s, the circuit courts addressed, for the most part, the claims of asylum-seekers who present themselves as “coup plotters,” “draft resisters” or

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157. See Umanzor-Alvarado v. INS, 896 F.2d 14, 15 (1st Cir. 1990) (“Insofar as this evidence shows that the Government [of El Salvador] may punish [the applicant] simply because he will not serve in the Army, however, it does not show that the Government will persecute him because of his political opinion.”).

158. See Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984). See, e.g., Alvarez-Flores v. INS, 909 F.2d 1, 6 n.4 (1st Cir. 1990) (“Apparently only the Ninth Circuit has determined that mere refusal to join the guerrillas is itself a manifestation of neutrality within the meaning of the [Refugee] Act.”).

159. Maryellen Fullerton, Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany, 4 GEO. IMMIGR. L.J. 381, 382 (1990) (commenting that this particular concept is underutilized as a definitional category for establishing refugee status). This may be the next fertile ground for dispute as to intended meanings in light of the restrictions that the Supreme Court has placed on the “political opinion” category in Elias-Zacarias, as discussed infra.

160. See generally Aleinikoff, supra note 16, at 23-28 (contending that the focus should be on the reason for the harm or threat of harm, not the fact of the harm itself). According to Professor Aleinikoff, the emphasis on the five listed factors is unduly restrictive. Id. at 23-24.

“draft evaders,” “conscientious objectors,” “neutrals,” and individuals who seek to avoid “forced conscription” in a guerrilla army.\textsuperscript{162} Indeed, the Ninth Circuit has expanded the “political opinion” category so as to mandate a presumption of eligibility in certain circumstances.\textsuperscript{163} These holdings are, in effect, designed to carve out \textit{per se} rules to qualify individuals who lack the requisite characteristics on account of one of the five listed grounds or are unable to demonstrate specific or targeted persecution. Last year, one of the Ninth Circuit’s rulings found its way to the Supreme Court.\textsuperscript{164}

\textit{INS v. Elias-Zacarias,}\textsuperscript{165} another expansive interpretation of the qualifying grounds offered by the Ninth Circuit involving a “forcible recruitment” case, was the first of the second-generation asylum cases presented to the Supreme Court. At the circuit court level, the Ninth Circuit reversed the BIA’s denial of asylum to a Guatemalan who had refused to join a guerrilla group. The Ninth Circuit ruled that this refusal was an expression of political opinion and thus satisfied the statutory requirement for refugee status, establishing the Guatemalan’s eligibility for asylum relief.\textsuperscript{166} The Supreme Court, in turn, reversed, upholding the Board’s determination “in all respects;” thus concluding, in effect, that “a guerrilla organization’s attempt to coerce a person into performing military service does not \textit{necessarily} constitute persecution on account of political opinion for asylum purposes under § 101(a)(42)” of the INA.\textsuperscript{167}

In rejecting the Ninth Circuit’s use of a presumption based on the political motives of the persecutor to establish eligibility under the Act, the Court held that the asylum applicant must establish that his fear of persecution is on account of \textit{his} political opinion and not the persecutor’s. Furthermore, the Court determined that the asylum applicant failed to demonstrate that the threat of forced recruitment

\textsuperscript{162} See generally ALEINIKOFF & MARTIN, supra note 24, at 790-813.
\textsuperscript{163} Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985).
\textsuperscript{164} Another Ninth Circuit case, \textit{INS v. Canas-Segovia}, 112 S. Ct. 1152 (1992), which the Supreme Court, having previously granted certiorari, vacating the judgment in that case, remanded to the Ninth Circuit in light of its decision in \textit{INS v. Elias-Zacarias}. The Ninth Circuit recently issued its decision upholding the validity of a claim of asylum based on imputed political opinion, notwithstanding the Supreme Court’s opinion. As such, another one of the Ninth Circuit’s theories of asylum eligibility may once again find its way to the Supreme Court.
\textsuperscript{165} 112 S. Ct. 812 (1992), \textit{digested in 69 INTERPRETER RELEASES} 166 (1992).
was on account of that political opinion. The Court did not find that the statute required direct proof of the persecutor's motive, but found that it intended some evidence of motive or intent to be presented.\textsuperscript{168} Noting this, some commentators have concluded that the case is necessarily limited by its lack of evidence.\textsuperscript{169}

The Supreme Court's decision in \textit{INS v. Elias-Zacarias}\textsuperscript{270} potentially undercuts the Ninth Circuit's use of \textit{per se} rules in the other circumstances in which it has established its particular line of asylum analysis.\textsuperscript{171} The Court did not rule on the respondent's alternative grounds of eligibility, which included "neutrality" and "imputed political opinion," thus leaving open these questions for further adjudication in the lower courts.\textsuperscript{172} Nonetheless, the Court's reasoning seriously threatens the Ninth Circuit's "imputed political opinion" and "neutrality" line of analysis because the Court focused on the asylum-seeker's \textit{expressive} conduct and not the political motivations of the persecutor, while at the same time applying the plain meaning rule.\textsuperscript{173}

\textsuperscript{168} \textit{Id.} at 816-17.

\textsuperscript{169} The Court's opinion in this case is limited to its facts. In its petition for certiorari, the government articulated the issue presented as follows:

The Refugee Act of 1980 requires an alien seeking asylum to demonstrate "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42), 1158(a). The question presented is whether a guerrilla organization's attempt to coerce a person into performing military service necessarily constitutes persecution "on account of" that person's political opinion.


The Court then held that the Court of Appeals for the Ninth Circuit had no proper basis to set aside the BIA's denial of asylum to a Guatemalan youth who had fled his country after armed and masked guerrillas came to his home in an attempt to recruit him to join their forces. In so ruling, the Court focused on the asylum applicant's failure to present sufficient evidence of his reasons for refusal to join the guerrillas' cause. The Court further held that an applicant must provide some direct or circumstantial evidence of the persecutor's motive, finding that in the instant case the record was insufficient to establish the requisite evidence.

\textsuperscript{170} 112 S. Ct 812 (1992).

\textsuperscript{171} The Ninth Circuit had held that the respondent's refusal to join a guerrilla army was a form of expressive conduct that met the "on account of... political opinion" requirement. \textit{Elias-Zacarias}, 921 F.2d at 850-52. The Ninth Circuit's reasoning in this case centers on the notion that the persecutor's motive in carrying out its threats in this context was "political." \textit{Id.} at 850.

\textsuperscript{172} According to immigration lawyers interviewed about the impact of the Court's latest asylum decision, the ruling raises a whole new issue of proof requiring asylum seekers to articulate their political opinions more thoroughly. Susan Freinkel, \textit{Asylum Ruling Could Make Appeals Harder for Aliens}, \textsc{The Recorder} (San Francisco), Jan. 23, 1992, at 1.

\textsuperscript{173} In general, asylum cases involve claims of likely persecution at the hands of the government. However, it is well established case law that "persecution within the meaning of \S\ 243(h) [and \S\ 208(a)] includes persecution by non-governmental groups . . . where it is shown that the government of the proposed country of deportation is unwilling or unable to control that group." McMullen v. INS, 658 F.d 1312, 1315 n.2 (9th Cir. 1981).
The plain meaning rule amounts to a literal interpretation of the statutory words and phrases. Only what is plainly understood or written will be considered in the process of judicial construction. Such novel theories as “imputed political opinion” and “neutrality” are unlikely to pass muster under the plain meaning rule because the statutory language does not clearly contemplate their meaning. Thus, if Congress intended these expansive interpretations to be applicable in asylum cases, then it remains for Congress to expressly state so by amending the pertinent statutory provisions. Otherwise—at least at the Supreme Court level for now—the plain meaning is likely to restrict statutory construction to a literal understanding of the phrase “political opinion.” On the other hand, the plain meaning rule applied to the phrase “membership in a particular social group” is not likely to be so easily disposed of on review. In that regard, the Court is likely to give deference to the agency’s interpretation of that phrase, as mandated by the rule of *Chevron*.

Nonetheless, critics have charged that the *Elías-Zacarias* decision is contrary to congressional intent. Indeed, the dissenting opinion characterized the majority’s decision as a “narrow, grudging construction of the concept of political opinion” that is inconsistent with the Court’s prior interpretations of the Refugee Act and cited to *Cardoza-Fonseca*. However, the dissent’s reliance on this case is misplaced. Indeed, the Court’s decision in *INS v. Cardoza-Fonseca*...
established law favorable to asylum-seekers with the adoption of a more generous evidentiary standard for deciding asylum claims. However, Cardoza-Fonseca is part of the first generation of asylum cases that focused on the procedural aspects of the adjudicatory process. Moreover, this lenient approach to adjudicating asylum claims was tempered by the clear statement that the agency’s discretionary determinations would be given greater deference by the Court.\textsuperscript{177} Narrowly construing the key terms and phrases consistent with a literal interpretation could, arguably, be considered an exercise of this discretion.

In any event, the Court’s decision in Elias-Zacarias still leaves potentially major issues in the asylum debate unresolved.\textsuperscript{178} Also, the Court’s narrow interpretation of the phrase “political opinion” could affect thousands of similarly situated asylum applicants.\textsuperscript{179} Moreover, this decision could potentially affect other interpretations deemed “expansive” and, in particular, the Ninth Circuit’s “imputed political opinion” and “neutrality” grounds. If historical precedent is any guide, another asylum issue (or issues) will arise soon. Most likely there will be an effort to expand another category of the refugee definition.\textsuperscript{180} For example, as a panel of the Ninth Circuit observed in a case involving an asylum claim based on “social group,”\textsuperscript{181} “that . . . category is a flexible one which extends broadly to encompass many groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion.”\textsuperscript{182} With this potential for repeated and inconclusive judicial definition, it seems appropriate for Congress to fill in the blanks, or at least establish some outer limits for these terms through the legislative process. The case law development in asylum litigation thus far underscores the shortcomings of an adjudicatory approach for deciding the concrete meaning of terms that are so closely entwined with political overtones and immigration ramifications.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{177} INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987).
\item \textsuperscript{178} Anker et al., supra note 176.
\item \textsuperscript{179} 69 Interpreter Releases 117-18 (1992).
\item \textsuperscript{180} For example, if the Court does restrict the expansiveness of the “political opinion” category, the “membership in a social group” category remains an avenue for further expansion. That category “may be the most vague or elusive of the five factors listed in the statute.” \textit{Aleinikoff & Martin}, supra note 24, at 813. Accord Fullerton, \textit{supra} note 159, at 382-83 (noting that this category is the most underutilized in the U.N. Convention definition).
\item \textsuperscript{181} Sanchez-Trujillo v. INS, 801 F.2d. 1571 (9th Cir. 1986). In this case, the applicants argued that they feared persecution in El Salvador as members of the following group: “young, urban, working class males of military age who had never served in the military or otherwise expressed support for the government.” \textit{Id.} at 1573. Of note, “[I]t is a common theme in many Salvadoran cases in the 1980s.” \textit{Aleinikoff & Martin}, supra note 24, at 813.
\item \textsuperscript{182} Sanchez-Trujillo v. INS, 801 F.2d 1511 (9th Cir. 1986). The court further noted that the statutory words “particular” and “social” modify “group.” \textit{Id.}
\end{enumerate}
\end{footnotesize}
III. An Overview of the Problem

A. The Nature of the Problem

1. In General

Asylum relief presents an opportunity to emergency immigrants who would not otherwise qualify under the regular system of immigration. Consequently, one problem inherent in the current statutory scheme is its inability to control numbers. Presently, large backlogs of asylum applications are pending. Understandably, courts and administrative officials are reluctant to expand qualifying grounds for asylum relief without specific direction from Congress. The numerical controls built into the overseas refugee program are entirely absent from the current in-state statutory scheme of asylum adjudication. Nor are these controls likely to be effective without greater enforcement efforts at United States borders. Nonetheless, some form of control over numbers is necessary to assure continued public support for asylum in the United States.\(^\text{183}\) An overview of the problem in the context of other pertinent factors may be helpful.

2. Numbers and Control

There is a growing population of undocumented aliens,\(^\text{184}\) and until recently, opportunities for lawful immigration were extremely limited. Thus, it is doubtful that Congress intended to create a mechanism for the large-scale processing of asylum applications inside the United States. Prior to 1990, intending immigrants gained

\(^{183}\) Moreover, as Professor Martin observes, [The 1951 Convention does not guarantee asylum, in the sense of a durable lawful residence status, but] since 1951 most Western countries, to their credit, have set up asylum claims systems that essentially combine the determination of refugee status under the 1951 Convention definition with the discretionary act of providing durable status, or asylum . . . . In this sense, we have come close to a system that guarantees an individual right of asylum to those who somehow establish physical presence on the soil of such Western countries and also prove that they satisfy the Convention definition.

That these admirable features of the system go beyond the strict requirements of international law, however, should remind us of their fragility. They cannot be taken as inevitable constants. Instead, it must be an ever-present concern of wise policy to shape asylum measures, including adjudication systems, so as to maximize continued domestic support. The systems' inability to cope effectively with growing numbers of asylum seekers over the last decade now threatens that foundation.

Martin, Reforming Asylum, supra note 14, at 1256-57.

\(^{184}\) For example, in 1987 estimates of the number of aliens from Central America in the United States were as high as one million. Martin, supra note 30, at 163.
lawful admission to the United States under a selection system based on family relations or employment preferences in conjunction with current visa availability. 185 The immigration preference provisions are subject to numerical limitations and previously allowed for the immigration of only 270,000 individuals annually, exclusive of those who qualified as “immediate relatives.” However, that allocation of categories and numbers soon became overwhelmed by increasing backlogs in several of the designated categories. At the same time, increasing numbers of undocumented aliens placed additional demands on the Agency.

3. Regular Immigration Legislative Initiatives

In the early eighties, Congress debated the issue of illegal immigration and finally settled upon legislation designed to remedy the problem of undocumented workers. 186 In 1986, when the undocumented alien population was estimated to be between three and twelve million, Congress adopted a two-step approach to remedy the situation. In the first phase, an amnesty program was established for those undocumented aliens in the United States arriving before January 1, 1982. In the second phase, the imposition of employer sanctions was designed to stem one of the “pull” factors of illegal immigration. Most asylum-seekers did not benefit from this legalization program, however, because their arrival did not occur in significant numbers until after the established cut-off date. Thus, employer sanctions made jobs potentially difficult to obtain. 187 On the other hand, asylum-seekers presenting non-frivolous claims of asylum were granted this authorization pending the adjudication of their applications.

The Immigration Act of 1990, a new legislative reform measure aimed at lawful immigration, increased the availability of immigrant visas to an enlarged group of eligible individuals. The employment categories for lawful immigration were expanded further, and other particularized categories of entrants, such as applicants from countries disadvantaged by the 1965 amendments which eliminated the Eurocentric national quotas, benefitted from the new law. Notwithstanding the increased visa availability for these specified categories, however, opportunities for asylum-seekers who do not eventually qualify for asylum are still limited under the 1990 Act.

First, asylum-seekers, as a rule, do not come from countries that

187. See Martin, supra note 50 (reflecting on a probable linkage between the employer sanctions of the new IRCA measure and future asylum problems).
benefitted under the 1990 Act. Second, they are more likely to fall into the skilled or unskilled category in which the numbers of available visas are still rather low.188 In addition, concern about this country’s ability to compete with the European Community and Japan may reorient United States priorities as to who receives immigration preferences for admission into the United States. The 1990 Act, with its clear emphasis on increasing the numbers of highly skilled and professional immigrants, bears this out. Therefore, the individuals most likely to seek asylum will probably not qualify for regular immigration unless they can do so through a close family relationship. (The policy of family reunification still drives the regular immigration preference system.)

Congress long ago abandoned an open-door policy of immigration. Because the current statutory framework permits asylum seekers to apply while physically present in the United States without regard to their immigration status, some constraints on the processing of asylum applications will be necessary. This is particularly so since there presently exists no mechanisms in place to control the numbers of asylum seekers entering the United States. Therefore, a practical matter, the legislative process is best suited for this type of debate, notwithstanding its shortcomings. But as long as only broad and general criteria are in place for deciding asylum claims, the courts will determine these policy matters, and “control” of the numbers of entering emergency immigrants will be left to the courts’ decision.

B. The Current State of Asylum Adjudication and Refugee Protection

1. The Impact of the New Asylum Regulations

In 1990 the INS issued the long-awaited final asylum regulations, having operated under interim rules for nearly a decade.189 Unfortunately, the characterization of the old regulatory system of asylum adjudications as a “lengthy, redundant, and costly [procedure that]

188. See INA § 203(b)(3)(A)(i) (skilled workers), (iii) (other workers), 203(b)(3)(B) (limiting the number of visas available to unskilled workers to only 10,000 per year).
189. 55 Fed. Reg. 30,674 (1990) (replacing 8 C.F.R. pt. 208 and amending a few other sections of the regulations). Before being adopted in final form in 1990, these regulations were proposed originally in 1987 and then reissued in modified form in early 1988. Of particular note, the new regulations take the adjudicatory function from the examiners in the INS district offices and place it instead with a specialized “corps of professional Asylum Officers who are to receive special training in international relations and international law.” 8 C.F.R. § 208.1(b) (1990). However, the application must still
could still stimulate the filing of less-than-certain claims."\textsuperscript{190} May still have currency. Even though the new regulations make significant improvements in the adjudication process, they are essentially procedural and therefore unlikely to resolve the current problem in asylum, which arises from the substantive criteria of the current legal definition. Still, several aspects of the new features make the process fairer and more efficient.

The new asylum regulations have addressed the main criticism of asylum adjudications in that they replaced the State Department advisory opinions which were rendered impotent even before the new regulations. Additionally, they provide for a corps of specialized asylum adjudicators who could work more efficiently if given a more precise set of qualifying grounds. Thus, with prescribed guidelines, concerns about agency bias should be largely eliminated.

The most innovative aspect of the new regulations is the provision for new asylum officers to adjudicate applications affirmatively.\textsuperscript{191} This is the centerpiece of the new asylum regulations and, together with the corresponding establishment of the new specialization center for document control to aid decision-making, it reduces the politicizing of the process.\textsuperscript{192} These two aspects of the new regulations have received favorable comment.\textsuperscript{193} At the very least, knowledgeable observers are prepared to take a "wait-and-see" posture concerning the new regulations. However, the new process provides no definitional clarity.

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\textsuperscript{190} Aleinikoff, supra note 13, at 193: "There is no evidence that most, or even a significant number, of aliens are "abusing" the system. Of course, resolution of the 'abuse' debate will not dissolve concern with the current asylum adjudication process."

\textsuperscript{191} Id. "Most importantly, the 1990 regulations formally recognize the uniqueness and difficulty of asylum adjudication by assigning this function to a new corps of specialists who will do asylum adjudications full time." \textbf{ALEINIKOFF & MARTIN, supra} note 24, at 831.

\textsuperscript{192} \textit{See} 8 C.F.R. \S 208.1 (1990). The regulations establish a documentation center separate from the information depositories of the Department of State. In addition, they specifically authorize reliance on "other credible sources, such as international organizations, private voluntary agencies, or academic institutions." \textit{Id.} \S 208.12. The State Department still plays a role in the asylum process, albeit limited. 8 C.F.R. \S\S 208.4(a), 208.11, 236.3(b), 242.17(c)(3) (1990). In essence, the regulations have preserved an opportunity for the State Department to comment on any asylum claim, but the adjudicating official need not await receipt of an "advisory" letter before adjudicating the claim. \textit{Id.} \S 208.11. Note that the State Department's role had begun to diminish in 1988 when it decided to no longer provide an individual letter routinely in each asylum case. \textit{See} 53 Fed. Reg. 2893 (1988).

\textsuperscript{193} \textbf{ALEINIKOFF & MARTIN, supra} note 24, at 737 n.24. \textit{See also} 8 C.F.R. \S 208.12(a) (1990).
The effectiveness of the new regulations ultimately depends on whether individuals seeking asylum are members of easily identifiable groups, such as those of particular race, religion, and nationality, that are being persecuted. The phrase "on account of . . . political opinion" raises concerns because it is not a group-based category. Although the Supreme Court's decision in *Elias-Zacarias* may portend a narrowing of the category based on "political opinion," some observers view the Court's decision as underscoring only the need for greater evidentiary proof. Certainly, the question of how expansively this particular category can be read is still an open question. Consequently, as long as definitive content is missing from these terms, new and novel grounds will continue to be advanced.

2. The Effect of the New "Safe-Haven" Legislation

Promulgation of the new regulations was not the only event to affect the asylum adjudication process in 1990. As part of the new Immigration Act of 1990, Congress passed a safe-haven measure according temporary refuge to eligible foreign nationals already in this country. This new measure provides for the granting of "temporary protected status" to eligible individuals whose homelands are experiencing civil war or political upheaval. The underlying intent of this measure is that foreign nationals may stay in this country temporarily until conditions in their homeland justify termination of their status. "Safe-haven" rights are recognized under international law, but safe-haven legislation must be enacted by each nation-state to trigger relief within that state. Thus, this safe-haven-type relief

194. As Professor Aleinikoff has observed, the Act itself supports the view that Congress did not anticipate the substantial numbers of asylum applications, which have increased exponentially over the years. Aleinikoff, *supra* note 13, at 184 n.11. The original Refugee Act provided that no more than 5,000 asylees could be granted permanent resident status each year. INA § 209(b), 8 U.S.C. § 1159(b) (1988). This figure is comparable to the number of applications filed in the two years preceding the passage of the Refugee Act. Aleinikoff, *supra* note 13. Also, "[i]n 1978, 3,702 aliens filed asylum applications with the Immigration and Naturalization Service." *Id.* In 1979, 5,801 applications were filed. As a result of the Immigration Act of 1990, the number of potential grants of permanent resident status to aliens accorded asylee status was increased to 10,000. INA § 209(b), 8 U.S.C. § 1159(b) (1991). This is still a far cry from the 100,000 plus who have filed for asylum.


196. See generally Note, *Temporary Safe Haven for De Facto Refugees from War, Violence, and Disasters*, 28 VA. J. INT'L L. 509 (1988) (discussing the DeConcini-
provides protection to individuals in a broader range of circumstances than is mandated under international agreements.\textsuperscript{197} Although the measure specifically accords Salvadorans temporary protected status (TPS), a considerable lobbying effort on their behalf consumed the better part of the decade before relief was finally forthcoming.\textsuperscript{198} Yet the government may, in its discretion, accord TPS to other foreign nationals who meet the general criteria established by the Act’s provisions.\textsuperscript{199} Thus, when Congress enacted safe-haven legislation, it in effect accomplished what the refugee lobbyists had attempted to do for a long time and what some courts had presumably attempted to do with their expansive definitions of “refugee.” Although broader in scope than asylum, this new measure is not intended as a substitute for more permanent relief.\textsuperscript{200} Those eligible for asylum still must apply and receive asylum in order to remain more permanently in the United States.

Undoubtedly, TPS was not intended to accord relief to groups of people who are not already physically present in the United States.\textsuperscript{201} Indeed, the current crisis involving the Haitian refugees is an example of the complexities associated with this measure. The passage of “safe-haven” legislation to accommodate a broader class

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Moakley Bill, which proposed a statutory framework for what would remain discretionary executive-branch decisions to grant temporary refuge, \textit{i.e.}, “safe haven”).

\textsuperscript{197} \textsc{Aleinkoff \& Martin}, supra note 24, at 841: “Persons who flee anarchy, war or civil strife present strong humanitarian claims, at least to receive temporary permission to remain within the confines of the U.S.”

\textsuperscript{198} Note that much of the debate over safe haven focused on the situation that confronted the nationals of El Salvador in the 1980s. The question remains for the administration to decide what to do with the approximately 200,000 Salvadorans granted temporary protected status (TPS) under the Immigration Act of 1990 § 303. However, their authorized TPS expired last year in June and was not extended. Then President Bush authorized the Attorney General to grant Salvadorans deferred enforced departure (DED) for one year beyond June 30, 1992, which is, as a practical matter, the same as having TPS. 69 Interpreter Releases 600 (1992). As such, come June 1993, the new Attorney General will have to decide whether to act upon the previously issued orders to show cause. 69 Interpreter Releases 314 (1992). Currently, the departure of those in DED status has been deferred until June 30, 1993. 57 Fed. Reg. 28,700, \textit{reported in} 69 Interpreter Releases 797 (1992). According to informed sources, however, the U.S. government has tentatively decided to extend DED status to Salvadoran nationals in the United States for another 18 months beyond the current June departure date. 70 Interpreter Releases 557 (1993).

\textsuperscript{199} INA § 244A (added by § 302 of the Immigration Act of 1990).


\textsuperscript{201} The recent settlement of the claims of an estimated 150,000 undocumented Salvadoran and Guatemalan asylum-seekers in American Baptist Churches \textit{v}. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991), is unlikely to be instructive in the asylum debate because, although a landmark settlement, it only allows asylum-seekers who have been denied relief to have their claims reconsidered. This case was originally filed as a class action challenging INS treatment of asylum claims by these nationals. For a detailed discussion of the case, see 67 Interpreter Releases 1480 (1990).
of foreign nationals than is provided by the classical grounds for asylum is further support for the notion that asylum relief should not be so broadly defined. Congress has left to the agency’s discretion the designation of future groups of foreign nationals that will qualify and has allowed for a number of factors to play a role in the designation.

But this approach to refugee emergencies is not without dangers. Although safe haven status is only a temporary solution, it may become part of a more permanent problem. The grant of this status could “create a population that is in limbo for long periods and, in effect, is in a second-class situation.” An earlier observation about a similar administrative form of relief, “extended voluntary departure,” drew attention to a serious problem associated with long periods of temporary relief. Specifically, long-term relief can make it impossible to return foreign nationals to their impoverished homelands once conditions stabilize there. After many years of residing in the United States, difficult social and cultural reintegration in their homelands could make their return problematic. Another concern is that a preliminary declaration of safe-haven status—that is, not as a result of a long-term lobbying effort—will precipitate a large-scale influx. There are no easy answers or solutions. For now, even though temporary protected status has expired for Salvadorans, there is no movement afoot to commence deportation proceedings against them because they have been placed in “deferred enforced departure” status until June 30, 1993. Thus, the climate seems appropriate to

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202. As noted by the researchers in the 1987 Refugee Policy Group report: The absence of a safe haven status can also have negative repercussions on asylum, however. Some asylum applicants know that they do not have strong asylum claims, but there are few other ways to contest deportation to such countries as El Salvador. In such cases, the asylum application is itself a form of safe haven since individuals will not be deported until they exhaust all appeals. As a result, the asylum system is overloaded with cases that are not likely to succeed on their merits. Immigration officials, seeing the large number of non-meritorious claims, then tend to view the asylum system as fraught with abuses. Recognizing that some applicants have good grounds for wishing to remain in the United States, given the conditions in their home countries, some immigration officials spoke to the need for a second status that they could use to provide temporary relief.

203. Id. at 75.

204. GALLAGHER ET AL., supra note 8, at 29. The authors describe a situation involving the provision of extended voluntary departure relief to Ugandans who have remained so long in this country that they have become assimilated to the American way of life. Voluntary repatriation is an unlikely prospect for them.

205. 69 INTERPRETER RELEASES 797 (1992).
focus on a more permanent resolution of the problem.

C. A Climate for Change

1. In General

The changing political landscape and changing global demographics would seem to dictate congressional action in deciding the future direction of asylum adjudications. Moreover, the climate for fundamental legislative reform of the asylum process seems hospitable for several reasons. First, with the end of the cold war and the fall of communism, any remaining inclination to decide asylum on ideological grounds is likely to wane considerably in the nineties. Second, the 1990 asylum regulations have found apparent acceptance among knowledgeable people who seem willing to take a "wait-and-see" posture.\textsuperscript{206} Third, the safe-haven legislation of the 1990 Act\textsuperscript{207} finally accomplished in large part what supporters of the American sanctuary movement had attempted to achieve for the better part of the eighties: temporary refuge for Salvadoran nationals from a war-torn country.\textsuperscript{208}

2. Long-Term Solutions Needed

The passage of TPS is a temporary relief measure,\textsuperscript{209} not a long-term resolution of the problem.\textsuperscript{210} Its coverage is broad in scope and not intended to provide permanent resettlement of asylum-seekers in

\textsuperscript{206} See, e.g., Helton, supra note 105, at 789.

\textsuperscript{207} See generally Nancy J. Mims, Note, Granting Safe Haven to El Salvadoran Refugees: Moakley-Deconcini Bill Offers Humanitarian Approach to Difficult Problems in the United States and Central America, 12 Suffolk Transnat'l L.J. 603 (1989) (describing the history of the legislative proposal designed to address the plight of the then estimated 500,000 Salvadorans living in the United States).


\textsuperscript{209} Pub. L. No. 101-649, 104 Stat. 4978. This measure authorizes the Attorney General to extend TPS to aliens who are nationals of a country that the Attorney General finds to be in a state of "ongoing armed conflict" so that deportation to that country would pose a "serious threat" to the personal safety of the affected aliens. Section 302(b)(1)(A), 104 Stat. 5031 (codified at 8 U.S.C. § 1254(a)).

\textsuperscript{210} Note that § 302 of the Immigration Act of 1990 added a new section, 244A, authorizing the Attorney General to grant TPS to nationals of certain designated countries. Section 302(b)(1)(A), 104 Stat. 5031 (codified at 8 U.S.C. § 1254(a)). Section 303 of the 1990 Act, on the other hand, specifically designated El Salvador as a country whose nationals are eligible for TPS. Section 303, 104 Stat. 5031. Several hundred thousand undocumented Salvadorans qualified for this new status. N.Y. Times, Dec. 2, 1990, at 30. Those who qualified received 18 months of "safe haven" in the United States, along with interim work authorization. Because their TPS status was not extended, their status reverted to undocumented in June 1992 at which time they became subject to deportation. However, as noted above, they were placed in DED status and no action to deport them will be taken before June 30, 1993. See 69 Interpreter Releases 600, 707 (1992).
this country.\textsuperscript{211} Although the recent peace accords ending the war in El Salvador have brought about a relative tranquility, this pause in the asylum debate may be short-lived.\textsuperscript{212} Nonetheless, these recent events do afford the legislative policy-makers some time for reasoned reflection on the remaining asylum issues. Congress last considered asylum in a decidedly different world order and in a context of numerically insignificant grants of asylum per year.\textsuperscript{213} As long as gaps exist in interpreting the governing provisions, courts inclined to read the pertinent provisions expansively to permit grants of asylum to large groups of individuals, or narrowly with the potential of denying bona fide refugee claims,\textsuperscript{214} will continue to do so.\textsuperscript{215} By undertaking a legislative initiative to provide greater specificity in the governing

\textsuperscript{211} The TPS authorized by the Immigration Act of 1990 bears on the interpretation of the Refugee Act in one respect only. By authorizing the temporary withholding of deportation that “would pose a serious threat to [the alien’s] personal safety” (§ 302(b)(1)(A), 104 Stat. 5031, to be codified at 8 U.S.C. 1254(a)), the 1990 Act seeks an objective far broader than that of the Refugee Act: to provide a sanctuary—albeit a temporary one—from the dangers of living in a country divided by civil war. Presumably, when the fighting abates, Salvadoran nationals will be able to return to their homeland without fear of retribution or reprisal.

\textsuperscript{212} The Bush administration extended the commencement of the forced departure of Salvadoran Nationals accorded TPS (which expired June 1992) for one year only. \textit{See} 69 \textit{Interpreter Releases} 770 (1992).

\textsuperscript{213} With increasing global hostilities and a worldwide economic downtrend, all modern, industrialized states are likely to be compelled to revisit the issues of refugee protection. For example, in 1990 over 100,000 asylum applications were filed. Aleinikoff, \textit{supra} note 16, at 8-9.

\textsuperscript{214} Cases like those in the Ninth Circuit in which a large number of aliens may be eligible for asylum further suggest that Congress ought to revisit this area:

By expanding that phrase to encompass forced conscription by political factions, the Ninth Circuit has opened eligibility for asylum to every candidate for military service in countries torn by domestic strife. Needless to say, the class of such persons is large. The looming burden for the INS in processing applications from such individuals, and for the Nation in assimilating them into society, necessitates this Court’s review.


\textsuperscript{215} For example, in the words of the Eleventh Circuit Court of Appeals in Perlera-Escobar v. E.O.I.R., 894 F.2d 1292 (1990) (per curiam), the Ninth Circuit is issuing decisions that would “entitle almost anyone in a war torn country to meet the statutory requirements for a grant of asylum.” \textit{Id.} at 1299 n.5. As noted in \textit{INS Pet. for Cert. at 20, Elias-Zacarias} (No. 90-1342):

Given the number of draft-age males in countries like Guatemala, and the “incentives for draft-age males to raise asylum claims,” \textit{M.A. A26851062 v. INS}, 899 F.2d 304, 315 (4th Cir. 1990) (en banc), it is not unreasonable to expect a flood of such claims from those placed in deportation proceedings in the Ninth Circuit.

\textit{Id.} (footnote omitted).
provisions, Congress can signal more clearly to the courts its legislative intent, while assisting the agency in guiding its decision-making. Through the amendment process, Congress can modify the current statutory scheme by setting forth clear-cut standards and guidelines, informed by the "immensely rich" debate of the issues that has taken place over the past decade.\textsuperscript{216}

3. Legislative Intent and Policy Considerations

The prevailing view is that the Refugee Act evinces congressional intent to promote the humanitarian goals of asylum and refugee protection.\textsuperscript{217} While this is true, these goals cannot be implemented to the exclusion of other equally compelling considerations. In any event, humanitarian concerns have always played a pivotal role in immigration matters, and the concern for humanitarianism in asylum adjudication parallels an earlier debate over "extreme hardship" cases.\textsuperscript{218} Unfortunately, an approach to refugee protection that encourages large numbers of asylum-seekers would seriously impact current immigration policy and enforcement, complicating an already complex scenario for granting relief under a comparatively restrictive definition. Therefore, the argument for a broader definition consistent with the American tradition of welcome is, in effect, a call for a policy directive designed to include emergency immigrants or "refugees" who may not fit so neatly or qualify for classical refugee status.\textsuperscript{219}

Furthermore, there is a perception that asylum relief is easier to get in the United States because the Refugee Act has, in effect, "liberalized the grounds for seeking political asylum."\textsuperscript{220} Whatever the reasons, this country is now a country of first asylum, attracting a large number of Central Americans, and to a lesser degree Haitians, like a magnet.\textsuperscript{221} The largest concentrations of refugees today consist primarily of foreign nationals fleeing civil war, ethnic strife, or other disastrous conditions in their homelands. According to administration officials, these flights do not necessarily result from the kind of

\textsuperscript{216} ALIENKOFF & MARTIN, supra note 24, at 696.
\textsuperscript{217} See Helton, supra note 60, at 250.
\textsuperscript{218} See, e.g., ALIENKOFF & MARTIN, supra note 24, at 516-17 (discussing the handling of "extreme hardships" cases in the era following the Supreme Court's decision in INS v. Jong Ha Wang).
\textsuperscript{219} Also, these advocates argue for lenient evidentiary standards, citing the extreme consequences of an incorrect denial of asylum. See, e.g., Pirie, supra note 146, at 230.
\textsuperscript{221} See, e.g., Scanlan & Kent, supra note 3, at 65 (describing today's realities in a world characterized by great disparities that make "the Western democracies, which are comparatively wealthy, healthy, and free[,] natural magnets").
targeted persecution in their homelands that would qualify them for refugee status. Administration critics, however, charge that few asylum grants are given to bona fide applicants from countries in Central America and the Caribbean (notably Haiti) for foreign policy reasons. A measure that provides temporary refuge to foreign nationals on a group-designated basis, such as the current “safe haven” provision, is likely to be a more appropriate means of addressing future refugee emergencies than one in which countless numbers of a particular group apply individually for that relief. If the United States is to be prepared to meet the refugee challenge in the future and settle upon appropriate policy choices for the more permanent form of asylum relief, it must reconsider its immigration priorities and commitments to human rights and refugee protection through the political process.

IV. A LEGISLATIVE REFORM PROPOSAL

A. The Classic Definition Revisited

1. In General

The classic definition of “refugee”—conceived to respond to distinctly different political pressures—no longer captures the characteristics of the vast majority of asylum-seekers entering the United States today. This deficiency is what has driven the current asylum debate over whether the definitional standards should be interpreted narrowly or expansively. Consequently, the dialogue in which several circuit courts—most notably the Ninth Circuit—have engaged to define the parameters of that definition echoes the problems inherent in a definition that no longer serves its historic purpose.

2. The Problem of Modern-Day Application

As noted earlier, to qualify for “refugee” status, an asylum-seeker must demonstrate that he or she is a person unwilling to return to his or her homeland because of “persecution or a well-founded fear

222. See, e.g., Aleinikoff, supra note 16, at 5 (suggesting that the narrow interpretations of agency determinations in asylum cases appear “to stem from concern about the rising number of asylum applications, as well as from the fact that many cases turn on assertions by the applicant that cannot be easily verified”).

223. Compare Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984) and Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985) with Perlere-Escobar v. EOIR, 894 F.2d 1292 (11th Cir. 1990) and Cruz-Lopez v. INS, 802 F.2d 1518 (4th Cir. 1986).
of persecution." The persecution an applicant experiences in his or her homeland is further limited to five enumerated categories: race, religion, nationality, membership in a particular social group, political opinion, or any combination thereof. Interestingly, the first three categories are akin to the classic discrete and insular minority groups—racial, religious, and national—that Justice

224. 8 U.S.C. § 1158(a); 8 U.S.C. § 1101(a)(42)(A). A "well-founded fear" is a fear that is both genuine and objectively reasonable. Elias-Zacarias v. INS, 921 F.2d 844, 848 (9th Cir. 1990). To be objectively reasonable, there must be some reasonable possibility of persecution, but persecution does not have to be more likely than not. INS v. Cardoza-Fonseca, 480 U.S. 421, 450 (1987).

225. The Office of the United Nations High Commissioner for Refugees has issued a handbook that sets forth the criteria for determining refugee status under the United Nations Convention definition. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 1 (Geneva, 1979) [hereinafter HANDBOOK]. It states, in pertinent part, as follows:

(a) General analysis
66. In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Id. at 17. Although the Handbook has played an important role in United States asylum practice and is considered an authoritative guide to relevant standards under the United Nations treaties and hence United States law (see INS v. Cardoza-Fonseca, 480 U.S. 421, 438-39 (1987)), it has been conceived as a practical guide and not as a treatise on refugee law. HANDBOOK, supra, at 2.

226. The Handbook describes "race," in pertinent part, as follows:

(b) Race
68. Race, in the present connexion, has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage . . . . HANDBOOK, supra note 225, at 18.

227. The Handbook describes "religion," in pertinent part, as follows:

(c) Religion
71. The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience and religion . . . . 72. Persecution for "reasons of religion" may assume various forms, e.g., prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community. Id.

228. The Handbook describes "nationality," in pertinent part, as follows:

(d) Nationality
74. The term "nationality" in this context is not to be understood only as "citizenship." It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term "race." Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution. Id.

229. The Handbook describes "membership in a particular social group," in pertinent part, as follows:

(e) Membership of a particular social group

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Stone described in *United States v. Carolene Products* as requiring special protection. In other words, because of their particular minority-group-like status (i.e., status or class distinguishing them from the majority members of their political communities), they are more vulnerable to political persecution because they are different or in some fashion not tolerated.

77. A “particular social group” normally comprises persons of similar background habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality. 

*Id.* at 19.

230. The *Handbook* describes the term “political opinion,” in pertinent part, as follows:

(f) Political opinion

80. Holding political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by the authorities which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant. The political opinions of a teacher or writer may be more manifest than those of a person in a less exposed position. The relative importance or tenacity of the applicant’s opinions—in so far as this can be established from all the circumstances of the case—will also be relevant.

82. As indicated above, persecution “for reasons of political opinion” implies that an applicant holds an opinion that either has been expressed or has come to the attention of the authorities. There may, however, also be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion.

*Id.* at 19-20.


233. Moreover, although “persecution” is not defined in either the international agreements or under United States refugee law, the Ninth Circuit has offered a definition that comports with this notion of difference:

“Persecution” occurs only when there is a difference between the persecutor’s views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate.
On the other hand, the fourth category, "social group," is seemingly a catch-all classification designed to include individuals who do not readily fit into the previous three groups. International drafters undoubtedly intended this category to be flexible and open-ended. Therefore, a "social group" may include members of the majority community. Nonetheless, it is unlikely that the drafters intended all members of the majority groups to constitute the contemplated social groups subject to persecution without some characteristic that underscores their "minority-group-like status" in the majority community. As for asylum-seekers claiming persecution on account of their "political opinion," the drafters may have had in mind those martyrs or political prisoners willing to advance the cause of their political beliefs at risk to their personal safety. If so, this definition,234 with its historical roots in the persecution model, is unlikely to embrace the majority of asylum-seekers who enter or seek to enter the United States today.

Most asylum-seekers today are members of the majority populations in countries in Central America235 or the Caribbean, notably Haiti, whose governments are politically and economically unstable or experiencing some form of political upheaval, armed conflict, or civil strife. In these situations, it may be difficult to distinguish between an individual who is persecuted for the active expression of political views, an individual to whom political beliefs are imputed, and an individual who is persecuted because of the political motivations of the persecutor. Perhaps (taking moral considerations into account) there should be no distinction between those who can demonstrate individualized persecution on account of one of the five listed categories and those who are merely caught in the crossfire or

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234. Eligibility for asylum under United States law requires the applicant to demonstrate that he or she is a "refugee" within the meaning of § 101(a)(42)(A) of the INA as determined by the Attorney General. 8 U.S.C. § 1101(a)(42)(A) (1990) defines a refugee as:

any person who is outside any country of such person's nationality . . . who . . .

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.

235. Most asylum-seekers from this region come from Guatemala and El Salvador. As a matter of strategy, litigating the asylum issues has enabled these applicants to forestall their departure from this country, beginning with the American sanctuary movement of the early eighties and culminating in the landmark settlement in the ABC case. American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991). Further, Congress enacted a safe-haven measure specifically benefitting Salvadorans. In terms of the numbers already here in the United States, little else could be done. The trend may be changing in light of the recent arrival of persons without documents or false documents at John F. Kennedy Airport in New York City seeking asylum. See Lorch, supra note 161; Mehlman, supra note 161. This may be the new wave of asylum-seekers as civil strife in Central America abates somewhat.
wrongfully targeted. However, the mere fact that violent conditions exist in asylum-seekers' home countries is not sufficient, without more, to qualify them for refugee status under the classic definition.\textsuperscript{236} Some demonstration of particularized persecution must be shown.\textsuperscript{237} Therefore, as long as the present structure for asylum adjudications contemplates individualized determinations, there will be strenuous attempts to fit individuals into the threshold criteria. That likelihood is increased by the perception that asylum denials are based on improper reasons unrelated to the merits of individual claims.

The distortion of the threshold qualifying criteria in asylum litigation is similar to the litigation activity that occurred after the Supreme Court's decision in \textit{Fiallo v. Bell}.\textsuperscript{238} In \textit{Fiallo}, the Court upheld congressional line-drawing in denying the fathers, but not the mothers, of illegitimate offspring (and vice versa) the ability to accord immigration benefits under the INA, notwithstanding the bona fides of their relationships.\textsuperscript{239} This bright line—no doubt carrying some outdated moral overtones—was intended to deal with the possibility of fraud and the concern that establishing immigration benefits on the grounds of putative fatherhood may be too difficult. The Court specifically directed the litigants to seek relief from Congress, indicating that these matters were essentially political and subject to limited court review only, not intervention. Those litigating complained that applicants who could establish the bona fides of the "father and child" relationship were denied the opportunity to do so. Consequently, the cases that followed attempted to "squeeze" paternal relationships into other qualifying statutory definitions, such as

\begin{enumerate}
\item \textsuperscript{236} See, e.g., Martinez-Romero v. INS, 692 F.2d 595, 595-96 (9th Cir. 1982), in which the court, affirming the denial of asylum by the BIA to a national of El Salvador, succinctly stated as follows: If we were to agree with the petitioner's contention that no person should be returned to El Salvador because of the reported anarchy present there now, it would permit the whole population, if they could enter this country some way, to stay here indefinitely. There must be some special circumstances present before relief can be granted.
\item \textsuperscript{237} \textit{Id.} at 595-96.
\item \textsuperscript{238} 430 U.S. 787 (1977).
\item \textsuperscript{239} See, e.g., De Los Santos v. INS, 690 F.2d 56 (1982) (upholding the agency's full equality of rights requirement for legitimization purposes under the Act); Delgado v. INS, 473 F. Supp. 1343, 1348 (S.D.N.Y. 1979) (critical of the agency's full equality of rights requirement under the Act as inconsistent with "the foremost policy underlying the granting of [immigration preferences]"); Kaliski v. District Director, 620 F.2d 214 (9th Cir. 1980) (court treated beneficiary as "legitimated" son under California law even though petitioner, now domiciled in California, and son both lived in Yugoslavia at the critical time for legitimization purposes under the Act).
\end{enumerate}
“stepchild” or “legitimated” child.240 It is anticipated that the legislative intervention of the 1986 amendments to the INA, providing for the recognition of most relationships between fathers and their illegitimate offspring for immigration purposes, will greatly reduce this litigation.241

3. The Shortcomings of a Judicial Approach

The process of judicial review is evolutionary in nature. It is a deliberative process that contemplates a broad delegation to the agency to fill in the contours of general terms. An agency’s interpretation of statutes, if reasonable, is usually given due deference.242 Given the plenary nature of the sovereign’s power over its borders, immigration determinations have been viewed as largely discretionary with only limited review in the courts. In asylum adjudication, therefore, widely varying statutory interpretations in individual cases may camouflage widely varying viewpoints—political or otherwise—about who should qualify for refugee status. As Professors Aleinikoff and Martin observe, “When the standard is this vague, there remains plenty of room for manipulation, by those who favor a less generous policy as well as by those who favor a more generous one.”243 In the distant past, an adjudicative approach to resolving the differences in interpretation may have proved satisfactory, but this is not the case in immigration today.

For example, lower courts have become increasingly interventionist in “extreme hardship” cases in recent years.244 As the regular immigration system became less and less able to meet current immigration needs, individual litigants turned to the courts for justice. At the same time, the usual deference to the agency’s interpretations was given less and less readily because of a growing mistrust of the INS. This mistrust grew more pronounced during the eighties, as the Reagan administration implemented controversial policies designed to stem the tide of asylum-seekers coming into this country.245

240. ALEINIKOFF & MARTIN, supra note 24, at 690.
241. Id.
243. ALEINIKOFF & MARTIN, supra note 24, at 690.
244. “Faced with what they deemed to be compelling humanitarian concerns, the courts have distinguished, explained, and misunderstood [Supreme Court precedent in the area].” Id. at 627. See also Note, Developments in the Law—Immigration Policy and the Rights of Aliens, 96 HARV. L. REV. 1286, 1396 (1983).
245. See generally ALEINIKOFF & MARTIN, supra note 24, at 832-39. When the Reagan administration implemented these new policies of deterrence, critics quickly asserted that the government had acted improperly to exclude eligible asylum-seekers for political reasons contrary to congressional intent. See, e.g., Helton, supra note 60; see also Arthur C. Helton, The Legality of Detaining Refugees in the United States, 14 N.Y.U. REV. L. & SOC. CHANGE 353 (1986).
Although asylum litigation has been instructive, it has produced less than satisfactory results in resolving the fundamental issues. Thus far, an adjudicatory approach has resulted in several splits in the circuits on the key issues, and several issues still remain open questions. As a rule, the Supreme Court has not spoken with sufficient clarity in resolving asylum issues. To date, further resolution in the Supreme Court has been necessary with each issue that the Court has seemingly resolved.

Notwithstanding the complexities of the legislative process, a legislative approach has several advantages over reliance upon the courts to resolve the remaining key issues. First, issues in immigration law tend to defy definitive court resolution. As Professor Peter Schuck observed, immigration is the only area of American law that has remained immune to the kind of ongoing case law development found in other areas. What case law there is requires judges to defer to statutes and agency determinations. Thus, the formal role of the judiciary is ordinarily quite limited. Second, the traditional role of the courts is not that of policy makers. As a rule, changes in the law occur incrementally and then only at the margins. Even

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246. For example, in INS v. Elias-Zacarias, the Supreme Court did not decide whether “neutrality” or “imputed” political opinion qualified for asylum relief under the definition. INS v. Elias-Zacarias, 112 S. Ct. 812 (1992).

247. Smith & Hake, supra note 100.

248. For example, with INS v. Stevic, 467 U.S. 407 (1984), the problem of two standards of proof for persecution claims arose. Before, all who participated in the debate assumed that one or the other standard was applicable to both claims. Then, with INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), the Court ordained the development via case-by-case determination, instead of providing guidelines.


251. E.g., INS v. Wang, 450 U.S. 139, 145 (1981). See also, e.g., Fallo v. Bell, 430 U.S. 787, 792 (1977) (Congressional power “largely immune” from judicial review); but see id. at 793 n.5 (accepting a “limited” judicial responsibility to review even those congressional decisions concerning the exclusion of aliens).

252. To the extent that these remaining issues implicate other policy considerations, the legislative and executive branches of government have a greater claim to making policy choices than the judiciary. Chevron, 467 U.S. at 843.

253. Laurence H. Silberman, Chevron—The Intersection of Law & Policy, 58
though the Supreme Court’s decision in INS v. Elias-Zacarias may have clarified at least one aspect of the underlying legal standards,\footnote{254} animated congressional action is still necessary to give more definitive expression to the characteristics of who should qualify for asylum relief and under what circumstances in this “politically charged” area of the immigration law.\footnote{255}

Another shortcoming of the judicial process in resolving the debate is that judges are, as a rule, generalists.\footnote{256} Agencies or adjudicatory bodies, on the other hand, are specialists in their area of responsibility.\footnote{257} Moreover, they have a broader perspective on the impact of their determinations because they deal with a broader group of individuals seeking administrative relief on a regular basis. In short, agency adjudicators are able to see the big picture. As Judge Goodwin wrote in a dissenting opinion to an immigration case involving the issue of “extreme hardship” (the most litigated issue before asylum issues supplanted its reign),\footnote{258} persistent resort to the courts “is likely to shift the administration of hardship deportation cases from the Immigration and Naturalization Service to this


254. The Court’s decision in this case has most likely determined the extent the phrase “on account of political opinion” may be interpreted to include an individual who has not expressed or made known to reasonably likely persecutors any particular political beliefs or views the asylum-seeker may hold individually. However, because the Court essentially concluded that the applicant’s evidence was insufficient in this case, it is not entirely clear that this clarity has been reached on the issue of how broadly the phrase can be interpreted. Specifically, the Ninth Circuit, on remand from the Supreme Court, concluded in Canas-Segovia v. INS, 970 F.2d 599 (9th Cir. 1992), that persecution based on imputed political opinion was still a valid basis for relief after the Court’s decision in INS v. Elias-Zacarias.

255. \textit{But see} Legomsky, supra note 22, at 2014:
A multiplicity of judicial views contributes to the thoughtful evolution of the law. If the occasional split between circuits raises a sufficiently important issue for which consistency is desirable, the Supreme Court can restore the needed uniformity. In discharging that function, the Court may evaluate the diverging viewpoints of the lower courts. Access to differing views is unusually valuable in an area as politically charged as asylum. Such debate is essential in cases whose outcomes often depend on deeply-held personal notions of social obligation, foreign policy, national community, and our nation’s place within, and obligations to, the world community.


This expertise [agency familiarity with and sophistication about the statutes they are charged with administering] is assumed to result not only from the frequency of an agency’s contact with the statute, but also from its immersion in day-to-day administrative operations that reveal the practical consequences of one statutory interpretation as opposed to another.

\textit{Id.}

258. \textit{See generally} Aleinikoff & Martin, supra note 24, at 620-38.
court."259 This appears to be the situation with asylum today. Moreover, local factors may influence case outcomes in a region that is more affected by the influx of asylum-seekers than others. Which persons receive relief may therefore depend on the sheer fortuity of geography.

Lastly, as noted above, courts address only the particulars of the case before them. The Ninth Circuit attempted to establish per se rules for a particular set of circumstances. However, the Supreme Court, in Elias-Zacarias, found those rules not contemplated by the statute.

In the final analysis, asylum involves policy choices. Asylum is not mandated by international obligations. Further, it implicates domestic policy issues, matters that are largely left to the political departments of government. The result is that limited immigration opportunities in general require some "hard look" approaches to immigration benefits eligibility. Thus, the decision as to which persons qualify for refugee relief ought to be played out in a political setting. For example, Congress can determine whether "draft resisters" or "neutrals" should be accorded asylum relief and, if so, under what circumstances. The courts are simply not equipped to undertake this kind of political debate.

B. The Basic Contours

1. In General

Until Congress acts to clarify "existing adjudicatory practice,"260 the problem of defining appropriate contours for the legal standards that have heretofore provided grist for court litigation will continue unabated. "Ambiguous legislation, as the ambiguity appears in a given case, typically suggests that Congress has not concretely resolved the policy issue that the case presents."261 That is the problem here.262

261. Silberman, supra note 253, at 823.
262. The commentator further opines:
Or it may be that a particular eventuality or series of events was simply not foreseen—even dimly. Or it may be that the legislative draftsmen were less than exacting so that congressional policy decisions were not reflected precisely in the legislation (or in the legislative history). Although deference may seem most appropriate when Congress chooses language that implies deference, in all of these circumstances, to a greater or lesser extent, whoever interprets the
Admittedly, there is value in setting forth general and broad language when little is known about the contours of specific terms or definitional standards. This approach allows for reflection in defining the correct parameters of the governing provisions. However, resolution in a deliberative (i.e., judicial) fashion is not necessarily the wiser course at this juncture. Present-day refugee crises require a more definitive approach. Moreover, a legislative process would seem better suited to entertain the kind of policy (i.e., political) debate the asylum issues have thus far engendered. It is not the point of this Article to argue for a lesser role of the courts. On the contrary, it is entirely appropriate for courts to review agency determinations that transgress the stated legal parameters, or are incorrect, or are tantamount to an abuse of discretion. But in the area of asylum, this review needs legislative guidance concerning the basic contours of the pertinent provisions.

2. The Substantive Content

All things considered, Congress should, in effect, take a narrow-construction approach in amending the pertinent statutory provisions. Specifically, the INA should be amended to more clearly define what is intended by the relevant terms. Under the present statutory scheme, “on account of . . . political opinion,” followed by “on account of . . . membership in a particular social group,” are the two categories listed under the refugee definition that have received the most attention in the literature and the courts. The remaining categories are self-explanatory; no doubt, meeting the threshold criteria is a fairly straightforward proposition for the asylum-seeker who can establish refugee status on the basis of one of the first three categories. These particular grounds have not been hotly debated in courts or the literature, and they are unlikely to be the subject of debate in the foreseeable future.

The “political opinion” ground is the most common basis for an

statute will often have room to choose between two or more plausible interpretations. That sort of choice implicates and sometimes squarely involves policy making. The agencies—even the independent ones—have superior political standing to the life-tenured federal judiciary in performing that policy making function.

Id. 263, Indeed, the Supreme Court recognized the value of this approach in deciding the appropriate standard of proof for asylum claims when the Court declined to dictate how the lowered standard of proof ought to be implemented. INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987).

264. See also HANDBOOK, supra note 225, ¶¶ 66-86 at 17-21 for the Handbook’s guidelines on appropriate criteria for determining eligibility under these five enumerated categories.

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asylum claim in the United States today.\textsuperscript{265} "Membership in a particular social group" may be the most vague and elusive of the five enumerated categories. Because of its vagueness, the "social group" category is used less often, but its flexible nature may be utilized more in the future. Thus, the need to provide clarity here is paramount. The listed categories still seemingly underscore the distinct "minority group" quality of the qualifying criteria.\textsuperscript{266} As the government has argued, unless narrowly construed, the "social group" and "political opinion" categories have the potential for including whole nations of people.\textsuperscript{267} Indeed, this was undoubtedly the basis for congressional reluctance during earlier legislative sessions to accord safe-haven relief to Salvadorans who were fleeing their war-torn nation.\textsuperscript{268}

In judging asylum claims based on "membership in a particular social group," the BIA has imposed the following standard: "the common characteristic that defines the group . . . must be one that the members of the group cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."\textsuperscript{269} Commentators view this category as a flexible catch-all that broadly encompasses "many groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion."\textsuperscript{270} This was "a common theme in many Salvadoran cases in the 1980s."\textsuperscript{271} Interestingly, a Ninth Circuit panel ruled

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{265} See, e.g., Linda D. Bevis, Note, "Political Opinions" of Refugees: Interpreting International Sources, 63 WASH. L. REV. 395, 395 (1988) (noting that no interpretation of "persecution on account of political opinion" is consistently applied in United States asylum law).
\item \textsuperscript{266} For example, consider the plight of the Eta people of Japan. Although they may look no different from other Japanese people, they are considered outcasts (i.e., "viewed as a racial minority") and are the target of discriminatory treatment in Japan. Maureen Graves, From Definition to Exploration: Social Groups and Political Asylum Eligibility, 26 SAN DIEGO L. REV. 739, 803 (1989) (citing M. HANE, PEASANTS, REBELS, AND OUTCASTS 139-43 (1982)).
\item \textsuperscript{267} See, e.g., Appellant's Pet. for Writ of Cert. at 9, INS v. Elias-Zacarias, 112 S. Ct. 812 (1992) (No. 90-1342). See also Aleinikoff, supra note 15, at 9:
\begin{itemize}
\item The Board clearly recognizes that liberal readings of the asylum provisions will only increase the number of applications; and, indeed, given the level of international instability, such interpretations could render a large portion of the world's population eligible for asylum.
\end{itemize}
\item Id.
\item \textsuperscript{268} Mims, supra note 207.
\item \textsuperscript{269} In re Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985).
\item \textsuperscript{270} Sanchez-Trujillo v. INS, 801 F.2d 1571, 1573 (9th Cir. 1986).
\item \textsuperscript{271} Aleinikoff & Martin, supra note 24, at 813. See also Graves, supra note 266, at 748 (noting that "international drafting history and other states' interpretations—both before and after 1980—make plain that 'social group' was intended to be
\end{itemize}
\end{footnotesize}
that there were limits to the phrase's expansiveness. The BIA, however, has no doubt required the quality of "immutability" as a way to circumscribe an otherwise "catch-all" qualifying category.

The "political opinion" category has been the most fertile ground for expanding the definition in civil war situations. As the Handbook indicates, some expression of political beliefs, whether communicated to the persecutor or not, is what is seemingly intended. However, the plain meaning of that phrase would suggest political views and beliefs and not merely political circumstances or motivations. Thus, Congress should underscore this interpretation by specifically incorporating it into a new definition section of the amended statutory provisions. As Judge Sneed has written, to conclude otherwise "demeans the true martyr for whom asylum was intended." Therefore, to the extent the present system encourages manipulation of asylum law by either side, filling in the contours of the statutory gaps in content ought first to be debated in the political arena and not the courts. Thus, Congress should amend the asylum provisions by setting forth more precise criteria or guidelines for determining asylum applications in the form of a definition section.

The definition section would specifically address the terms of the

interpreted broadly").

272. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1573 (9th Cir. 1986). Here, the court rejected the claim of a Salvadoran that he was a member of the following group: "young, urban, working class males of military age who had never served in the military or otherwise expressed support for the government." The court reasoned as follows:

The statutory words "particular" and "social" which modify "group," indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead, the phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary association relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.

Id. at 1576 (footnote omitted).

273. See, e.g., Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984) (triggering the application of neutrality as an "imputed political opinion" under the refugee definition); but see M.A. v. INS, 899 F.2d 304, 315 (4th Cir. 1990) (en banc) (stating that "[i]t is unclear whether neutrality can be considered a "political opinion" within the meaning of the Refugee Act"); Perlira-Escobar v. EOIR, 894 F.2d 1292, 1298 (11th Cir. 1990) (stating that "[i]n the context of a civil war ... the BIA has declined to apply the principle that a desire to remain neutral is an expression of a political opinion for purposes of asylum and withholding of deportation"). The court further stated that an expansive interpretation of the meaning of "political opinion" would "create a sinkhole that would swallow the rule." Perlira-Escobar, 894 F.2d at 1298.

Further, BIA member Heilman, vigorously dissenting in a case in which the BIA reluctantly followed Ninth Circuit precedent, states that "the only reason to speak in terms of imputed political opinion is to 'pigeon-hole' the case within one of the five categories set forth in the law for asylum." ALENKOFF & MARTIN, supra note 24, at 805 (citing In re Juan (BIA 1989), an unpublished Board opinion).

274. Mendoza-Perez v. INS, 902 F.2d 760, 767-68 (9th Cir. 1990) (Sneed, J., concurring).
classic "refugee" definition for purposes of asylum relief. For instance, the "on account of" doctrine might be limited to those asylum-seekers who demonstrate the kind of refugee status within the scope of section 101(a)(42)(A) of the INA denoting the idea of political activism. Definition of this kind would establish congressional intent as to asylum eligibility and allow courts to satisfy themselves that each determination was consistent with congressional intent.

Interestingly, only African states have adopted a definition broad enough to accommodate categories of need not covered by the United Nations Convention definition. However, as one international scholar has suggested, "African solidarity and mutual assistance in the name of independence was a moral imperative. Ethnic groups frequently cut across state boundaries and made it easy to accept new arrivals. Repatriation, moreover was—and is—a frequent solution." This is not the case in the United States. Here, numbers still matter in the asylum debate. Indeed, numbers are the reason advocated for the narrow, grudging construction of the qualifying terms. Once the decision is made that numbers are important, then control of those numbers is a matter for public debate. However, because asylum may be sought even by unlawful entrants under present law, some other control mechanism must be in place.

Presently, there is no clear definition of "persecution." This may be appropriate, given the endless variety of situations the term might cover. However, whether or not persecution has occurred is a decidedly different question from whether or not the reason for the persecution falls within one of the five qualifying categories. The latter should remain a matter to be decided on a case-by-case basis. Thus, for asylum purposes only, a more restrictive definition of the five

275. Some clarity on the issue of imputed political opinion is needed. Even though the individual may not hold political views inimical to the government, if the evidence establishes those views are indeed imputed to the individual, then it is probably sufficient to qualify him or her for asylum on account of political opinion. But this situation is likely to arise because the individual is engaged in some sort of political activity in which the likelihood of imputation of the political views of another is apparent.


277. Suhrke, supra note 48, at 160. The author further notes that, because these refugee movements did not "typically flow from very poor to very rich states," the refugees had no strong incentive to remain in the country of first asylum once the conflict ceased in their homelands. Id.

278. GOODWIN-GILL, supra note 38, at 40.
enumerated categories would be consistent with other policy considerations and not necessarily inconsistent with international obligations.\textsuperscript{279}

When a more expansive definition is needed, Congress might delegate to the agency rule-making authority for determining situations that go beyond the import of the plain language of the categories. For example, the term "social group" was seemingly intended by the United Nations convention drafters as a "catch-all" category. To the extent that Congress wishes to permit a more flexible interpretation, it could leave to the agency, through the rule-making process which contemplates public opinion, the definition of the specific contours of this particular phrase. However, Congress could indicate its intent in the definitions section as to whether any expansiveness should be limited to members of a social group who are treated like minorities within their country. (For example, the Eta people in Japan.) Yet, a restrictive definition of some kind is essential for the term "political opinion" because it is not susceptible to a minority-group-like status interpretation as it contemplates more specific conduct or activity. Otherwise, the system will be placed under impossible strain. International scholars have recognized this potential for over-loading the system and have offered other "durable" solutions.\textsuperscript{280} But because resettlement is the preferred solution for those seeking asylum in the industrialized states, only a restrictive definition would seem to be appropriate.

A separate but perhaps more important issue is the need for temporary refuge. Congress has addressed this issue with the recent enactment of a much-lobbied-for safe-haven measure. However, the provision essentially leaves to the discretion of the Attorney General, in consultation with other agencies, the question of which foreign nationals will be accorded temporary protected status in the future. Compassionate responses are to be commended, but there are no easy answers. On the contrary, there are only very hard political choices. Had clear-cut guidelines been in place, the kind of "hard-line" decisions that critics now complain about might have been avoided.\textsuperscript{281}

\textsuperscript{279} International agreements only mandate non-refoulement and leave the matter of a more permanent asylum measure to the nation-state.

\textsuperscript{280} See, e.g., Hathaway, supra note 42, at 134 (recommending that nation-states "dispense with a formal universal commitment to the provision of secure conditions of exile" and instead emphasize "regional and interest-driven protection in tandem with a general obligation to share the burden of addressing refugee needs"); see also J.-P. L. Fonteyne, Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees, 8 Austl. Y.B. Int'l L. 162, 166-67 (1983) (addressing the need for "an effective international refugee policy" of burden-sharing in light of the problems associated with the phenomenon of mass flows of asylum-seekers, regardless of their universal classifications).

\textsuperscript{281} See also David A. Martin, Comparative Policies on Political Asylum: Of
3. The Benefits of Statutory Guidelines

The agency's role is typically one in which it makes determinations left largely to its discretion by Congress in order to decide the contours or parameters of the available relief.282 This is particularly so in the area of immigration because these matters are inherently the product of the plenary power of the sovereign and immune from judicial scrutiny.283 Because of the uniquely compelling issues that surround asylum adjudications and the ongoing debate, this process is extremely difficult to accomplish unless the decision-making is somewhat circumscribed.

In setting forth the criteria for agency decision-making with clarity and precision, Congress can, in effect, legislatively depoliticize the process. Charges that the agency is manipulating the process to achieve its enforcement goals might abate if the qualifying grounds were less susceptible to misinterpretation.284 More importantly, precise criteria would reduce the need for discretionary and arbitrary decisions. But precise criteria are more than a matter of "administrative convenience."285 They increase the likelihood that similarly situated individuals will be treated similarly. Of course, the problem of assessing the credibility and ultimate predictive value of the evidentiary presentations still remains, but the provision for specialized adjudicators in the new asylum regulations should enhance the integrity of these determinations.

The application of precise criteria to the in-state asylum program could counterbalance the perception that asylum-seekers entering the United States by means of their geographical proximity do so to the disadvantage of those who must await abroad for processing under the overseas refugee program. In tightening the criteria for in-state allocation of refugee status to those who have conceptually "jumped the queue," the agency can lessen the perceived disadvantages of not being in the right geographical location.

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Facts and Law, 9 In Defense of the Alien 105, 108 (1987) (noting that "restrictive legal doctrine is a compensating mechanism—compensating for inadequate means within the system to assess the facts of the case competently"). In these situations, the decision-makers would be required to deal appropriately with the credibility issues once the criteria are prescribed with specificity.


284. See Aleinikoff, supra note 16, at 10 (noting that more clarity is needed in the underlying legal standards (or qualifying grounds)).

When a narrow statutory definition is used to fill in the contours of the definitional standards, asylum presents less opportunity for an end-run around the regular immigration system. It should be emphasized that the question of whether the applicant has a bona fide asylum claim remains quite separate; but, to the extent that the construction is narrowed to discrete groups, information on the treatment of these groups in foreign countries is more easily gathered. This works both ways: the ultimate predictive judgment that comes to bear on whether there is a reasonable possibility of persecution in an individual case is aided by the group-based evidence, with the result that the tremendous evidentiary burden carried by the asylum-seeker is lessened.

Once an interpretation extends past the "ordinary and common sense" understanding of an intended meaning, a great number of variables (i.e., policy considerations) come into play. There may be reason to take account of these variables. After all, if a neighbor is fleeing life-threatening conditions in his or her homeland, why should the reasons that caused the flight matter? Yet, the international community answered that question some forty years ago when it adopted a uniform definition of "refugee" that limited protection to persecution on account of five listed grounds.

4. The Rationale for a Legislative Approach

Over the past decade, significant improvements have been achieved in immigration administration at the legislative level. But none of these improvements have dealt directly with the substantive aspects of the asylum process. Congress may prudently be taking a "wait-and-see" approach, following the recent asylum regulations. However, this cautious posture may not be appropriate in light of the increased numbers of asylum-seekers. Even though relatively few are granted asylum, their numbers could create a "magnet" effect, drawing others. It is significant that a dispute over numbers is still at the core of the asylum debate.

Because the Supreme Court is likely to continue to apply the plain meaning rule in interpreting the asylum provisions, any amendment to the statutory language to provide greater clarity as to congressional intent will guide the courts directly in their review of the


287. Note that the recent asylum regulations do much to ensure a more fair and efficient process of asylum adjudication. See Martin, Reforming Asylum, supra note 14, at 1276-80. Still, the specter of numbers out of control remains a constant reminder that a more substantive reform measure is needed.
agency's decisions. As a rule, "[i]f the intent of Congress is clear that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 288 Unfortunately, this rule, stated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council* is less clear about interpretation of statutes when congressional intent is not plainly discoverable. Nonetheless, to the extent the issue is close or, rather, ambiguous, *Chevron* commands that the court defer to a reasonable administrative interpretation. Courts have been less inclined to do so in this particular area, however. Distrust of the agency has arisen due to a perception that political influences guide administrative decision-making policies. As a result, courts have often substituted their own judgment for the agency's as to who ought to receive a grant of asylum. "

A legislative initiative that established more precise parameters to guide the agency's discretion would be likely to bolster the deference that courts usually accord an agency's interpretation of the statutes it administers and enforces. In other words, under the new asylum order as dictated by Congress, with more definitive criteria for deciding asylum cases, reviewing courts ought to be able to limit their role to ensuring that agency determinations are made in fair proceedings, under clearly articulated standards consistent with the applicable law. 289

Presently, too few asylum-seekers will qualify under the international definition unless the definitional standards are expanded legislatively to include them. 290 This is particularly so in light of *INS v. Elias-Zacarias*, the Supreme Court's most recent asylum decision.


I acknowledge that the administrative actions of the INS and the BIA do not always inspire the casual observer with confidence. This is regrettable. Our sporadic forays into the area, blinded as we must be by the nature of the judicial process, are not likely to improve the situation.

Id.

290. See generally *Diver*, supra note 285, at 108 (arguing that courts should exercise broad deference to administrators' choice of rule formulations, intervening to make sure the rules are fair and applied properly). In asylum cases (as with other humanitarian-based immigration relief measures), courts will usually intervene, under the guise of interpreting the law, to provide relief that is not necessarily contemplated by the statute. This has been the situation involving immigration matters because litigants in particular, and courts, are essentially mistrustful of the INS, the agency charged with rule-making authority in the area of asylum law.

291. *See Isabelle R. Gunning, Expanding the International Definition of Refugee:*
As one observer has commented, the Court’s ruling leaves unresolved what is to be done for those people who manage to escape the dangerous conditions in their homelands to seek refuge in the United States. Moreover, because the governing standards are vague and difficult to apply, there is ample room for controversy about whether political considerations have intruded on the decisions. Thus, if the courts are unable to provide clarity in this area, Congress needs to settle the dispute with clear-cut guidelines. Congress is the appropriate body to resolve the issues because of the policy choices implicated in the asylum debate.

As suggested earlier, Congress did not contemplate that the current statutory scheme would accommodate large influxes of asylum-seekers. The primary concern of Congress was to codify provisions in the statute that would ensure the availability of political asylum for individuals physically present in the United States who may or may not be in lawful status. Essentially, the legislators delegated the establishment of the asylum adjudication process to the Attorney General. Therefore, other than generalities about the purpose of refugee protection, it is unlikely that any congressional intent can be found concerning the specific content of the asylum provisions. In addition, as noted above, the recent passage of safe-haven legislation providing for temporary protected status to large groups of people is only a partial, short-term solution. Moreover, Congress has left the granting of temporary protected status in future cases to the agency.

*A Multicultural View*, 13 *Fordham Int'l L.J.* 35 (1989-1990) (describing how two hypothetical women from the same country might be treated differently in terms of qualifying under the international definition of “refugee”):

Both of these hypothetical women are representative of the plight of hundreds of thousands of forced migrants. While both would be commonly perceived as “refugees,” there is a disparity in their treatment under prevailing international [footnote omitted] law. Although international law would recognize the city dweller as a refugee due to her “well-founded fear of being persecuted,” it would not recognize the village dweller because her fear stems solely from war and civil strife.

*Id.* at 35 (footnote omitted). The author goes on to argue that the international definition of “refugee” should be expanded to include the village dweller as well, because both face the possibility of death. *Id.*

292. *High Court Restrictive on Political Asylum*, *Wash. Times*, Jan. 23, 1992, at A3 (quoting Warren Leiden, Executive Director of the American Immigration Lawyers Association). A counter view was offered by Dan Stein, Executive Director of the Federation of America for Immigration Reform: “Asylum . . . was designed to provide temporary protection to people in danger, not as a fast way around immigration quotas.” *Id.*

293. *Aleinikoff & Martin, supra* note 24, at 695.

294. *See INA § 208(a) (1990)* (stating that it is the A.G. who shall establish a procedure, in stark contrast to the more statutory-prescribed procedure set forth in § 207 for the overseas refugee program).

295. *See Immigration Act of 1990 § 302, 8 U.S.C. § 1254(a) (Supp. II).* Also, this provision is another indication that Congress intended to leave these kinds of policy choices (i.e., nationals to whom temporary refuge will be accorded) to the Executive
A legislative intervention designed to craft greater specificity into the statutory provisions is not without its pitfalls. But the process of adjudication on a case-by-case basis does not appear to be suitable for handling large numbers of asylum applications, and this is reflected in the low numbers of grants. Courts have become involved in deciding what are essentially policy issues. As Judge Sneed noted, courts see only the one case before them and are not in the position of the agency, which handles volumes. More important, the inherent mistrust of the agency in promulgating appropriate criteria, and the accusation of political manipulation of the process, virtually compel legislative intervention.

A legislative approach is appropriate also because courts are unlikely to settle an asylum matter for very long, if history is any indicator. This is primarily because current case law has developed under a set of circumstances that was not originally designed to accommodate the new refugee movements and the increased numbers

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Branch and not the courts.

296. See, e.g., Silberman, supra note 253, at 825:

Finding a specific congressional intent is particularly unlikely if the agency is applying statutory language that calls for an administrative judgment, such as what is “feasible” or “probable.” But often there is also ambiguity when statutes are extensively detailed, because the more Congress writes the more difficulty it seems to have making legislation clear. That should not be all that surprising when one thinks about it: the more detailed the instructions drafted in an effort to anticipate every twist and turn that a regulation will undergo, the more likely it is—given the difficulty in predicting human behavior—that a draftsman will create ambiguity.

Id. That is why I suggest that the legislative process be informed by the current case law, international guidelines, and commentary on the meaning and content of the qualifying criteria. Nonetheless, some measure of clarity is needed if for no other reason than to establish whether asylum determinations are to be broadened or narrowed.

297. See, e.g., Mark G. Yudof, Equal Educational Opportunities and the Courts, 51 Tex. L. Rev. 411, 413 (1973) (noting, in the context of issues of educational inequalities, that “courts are institutionally incapable of performing a full-fledged legislative role”).


299. Four years after the Refugee Act’s passage, the Supreme Court decided Stevic. Leading up to that first asylum decision were several circuit splits. The intervening three years leading up to the Court’s landmark asylum decision in Cardoso-Fonseca brought about a number of circuit splits as well. Although the Court’s decision in Elias-Zacarias seemed to narrow the legal definition for asylum, courts are still pursuing expansive readings of the phrase “on account of... political opinion.” See, e.g., Canas-Segovia v. INS, 970 F.2d 599 (9th Cir. 1992) (holding that persecution based on imputed political opinion is still a valid basis for relief after the Supreme Court's decision in INS v. Elias-Zacarias.) Asylum issues will continue to arise because courts will continue to feel the tension between policy considerations (inherently political) and humanitarian concerns.
of asylum-seekers.\textsuperscript{300}

Now that the new asylum regulations have reformed many procedural aspects of the adjudication process, a more substantive reform measure would seem in order. What now remains is a legislative prescription for more clarity in defining the qualifying grounds for eligibility. With more precise terms and definitions, the agency can focus its attention on its primary role of administering and implementing immigration laws and the courts can focus their attention on review, ensuring agency compliance with congressional intent.

There is a current fear that an expansive interpretation of asylum law will open the floodgates of immigration. Simultaneously, there is more information available about refugee movements and the numbers likely to fill the various categories designated as eligible for asylum relief. Both are reasons for Congress to act. Although a narrow or restrictive construction of the definitional standards would address current concerns, a narrow construction need not be inconsistent with the original intent of the universal definition. Moreover, a highly specific legislative proposal would direct the agency's decision-making in a predictable way, allowing for greater scrutiny by the courts, but less court intervention.

In addition to directing agency discretion, congressionally enacted guidelines or criteria would contain the unpredictability of courts that are inclined to activism. Thus, to the extent that the Supreme Court is moving in the direction of adopting the "plain meaning" rule for purposes of statutory interpretation in general, and immigration law in particular, these guidelines are needed.\textsuperscript{301}

More important, legislative closure of the remaining key asylum issues will afford an opportunity to consider categories of refugees who do not fit the convention definition. Applying outdated and inadequate asylum provisions would almost certainly be inconsistent with

\textsuperscript{300} From the Refugee Policy Group Report:

Less often has this country been a place of first asylum, with political exiles arriving unbidden on our shores. However, direct arrival of political migrants has been increasingly a factor in U.S. immigration policy during the past two decades, beginning with the Cuban exiles of the 1960's. In fact, within a few months of passage of the Refugee Act of 1980, 125,000 Cubans arrived on our shores and sought refuge. Since then thousands of others from throughout the world have sought safe haven in the United States. Some have sought political asylum; many others remain illegally in this country, requesting relief from deportation only if they are apprehended.

\textit{Gallagher et al., supra} note 8, at 2.

\textsuperscript{301} Of particular note here is the Supreme Court's opinion in \textit{INS v. Phinpathya}, 464 U.S. 183 (1984), in which the Court rejected a lenient agency interpretation because it was considered to be at odds with the plain meaning of a congressional enactment. A subsequent Congress, however, "overturned" the Court's decision by amending the provision in question to allow for a more lenient approach to relief. In any event, the Court in \textit{Phinpathya} essentially said that if Congress meant what the agency interpreted their intent to be, then Congress should have specifically stated so in clear language.
the intent of Congress in 1980 and ineffective in resolving the current problems of protection.\footnote{At the international level this issue is being played out as well. Thus, the international community may reconvene as it did in 1951 to fashion a more appropriate definition for refugee protection or adopt durable solutions and accords among nation-states to resolve the problem. See Mary M. Kritz, \textit{Introduction Overview, in U.S. Immigration and Refugee Policy: Global and Domestic Issues} 1, 11 (Mary M. Kritz ed., 1983) ("The shifting international realities of the world may require new concepts, categories, and definitions appropriate to transnational movements of population."); see also Suhrke, \textit{supra} note 48, at 169-70 (concluding that the current United Nations definition has its limitations and thus recommending that studies of "the causes of refugee movements, determinants of public policy, and alternative strategies to resettlement" be pursued).}

We are all members of one global community, and we cannot say that one individual is more deserving of safe haven than another.\footnote{As observed by refugee scholars: Our analysis of contemporary refugee movements [has] delineated three sociological types of refugees: (1) the activist, (2) the target, and (3) the victim... What all three have in common is fear of immediate violence—violence resulting from conflict between state and civil society, between opposing armies, or conflict among ethnic groups or class formations that the state is unable or unwilling to control. Whether the individuals are activists or passive bystanders simply caught in the conflict is immaterial from the point of view of their immediate security. Their need clearly could be the same regardless of the cause, and has demonstrably been so in many of the cases analyzed. It follows that in a historical and normative sense, the three types of refugees are equally deserving. The activist, the target, and the victim have an equally valid claim to protection from the international community. Aristide R. Zolberg et al, \textit{Escape from Violence: Conflict and the Refugee Crisis in the Developing World} 269 (1989). But a line must be drawn between those accorded asylum and those denied relief. By adopting the United Nations Convention definition as the legal standard in the United States, Congress has delineated the qualifying categories even further.} As a practical matter, however, United States immigration law is not based on an open border policy. Therefore, it is unlikely that any refugee policy based solely on humanitarian factors will outweigh considerations of domestic policies that may conflict. Although the temptation to contract the definition is undeniable, the inevitable sympathy that refugees evoke will exert a counter pressure for more expansive coverage or other types of refugee-like relief.

\section*{Conclusion}

While the approach recommended here does not aspire to solve all the problems, a judicial resolution of the issues is problematic for all
of the reasons discussed above. Until the global community addresses the issue of refugee protection more comprehensively, this proposal affords Congress an opportunity to bring some semblance of order to the asylum adjudication process. A legislative approach at this juncture would provide more structure to the agency's adjudication process by bringing greater clarity to the requisite threshold criteria. At the same time, providing this clarity would also constrain agency discretion. Thus, in addition to being guided in its asylum determinations, the agency would also, in effect, be relieved of the necessity of using its own interpretations of the refugee definition as a ruse to control United States borders, as administration critics have contended. Ultimately then, this approach may restore some measure of trust in agency determinations by providing directive statutory language less susceptible to varying interpretations.

Notwithstanding the specific proposal recommended here, a legislative approach to resolving the problem would afford all interested parties an opportunity to participate in the political process. For the most part, the legislative process has worked thus far in establishing much needed immigration reform and temporary refugee relief for those who have fled civil war and violence in their homelands. Congress can draw on the diverse fund of legal commentaries and judicial views on the issues affecting asylum adjudications. Furthermore, this approach could potentially curtail judicial intervention, allowing more expeditious adjudication, predictability, and ultimately a reduction of the present applications backlog. None of the above is intended to suggest that the legislative task will not be without its problems; the very nature of asylum adjudication is fraught with human and social policy complexities.

As more and more asylum-seekers from nearby nations reach United States borders, the inherent tension between the American immigrant tradition based primarily on family reunification and United States obligations under international law will continue to strain public support for comprehensive asylum relief. In recommending an approach that revamps the substantive aspects of the process, all partisans can redirect their energies toward formulating a policy able to address the plight of the refugees who seek refuge in the United States today.

Finally, the real concern of the federal, as well as local and state

304. As once observed:
Asylum law is complicated. There is much confusion in the case law as to
where one question ends and the next begins, and every decision puts a unique
spin on the analysis. The analytical structure of many opinions should be taken
with a grain of salt.
Smith & Hake, supra note 100, at 19.
305. Martin, Reforming Asylum, supra note 14, at 1249.
306. See ALEINIKOFF & MARTIN, supra note 24, at 692.
governments, is the numbers of asylum-seekers likely to enter the United States without authorization and the inability to control those numbers and their impact on local communities. The asylum debate is, as a practical matter, about public policy choices. However, it is ultimately about the orderliness of the governing process and its ability to control the entry of emergency immigrants who do not fit the classical definition. The political branches of an enlightened government are better suited than the courts or administrative agencies to make these choices.