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A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise

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I. Introduction

The United States traditionally has proclaimed itself a generous and compassionate nation in terms of refugee protection. As Ronald Reagan stated upon accepting the Republican nomination for presidency: “Can we doubt that only a divine Providence placed this land, this land of freedom, here as a refuge for all those people in the world who yearn to breathe free? Jews and Christians enduring persecution behind the Iron Curtain, the boat people of Southeast Asia, Cuba, and Haiti.”

Despite these optimistic words, it is widely understood that our nation’s resources are limited. Therefore, it is necessary to restrict immigration to the United States to admit only the number of individuals who can be assimilated successfully. With an estimated eighteen million refugees in the world, a dramatic increase from only 1.4 million in 1960, refugee issues have emerged in the forefront of national politics and media news. In response to the current influx of refugees onto American soil, many Americans have asserted that the United States has reached the limit of its capacity to accommodate and assimilate immigrants. Further, it is argued that immigration poses a substantial threat to American economic and social welfare. Yet human rights supporters persistently have maintained that as a democratic world leader, the United States has a duty to provide refuge for those fleeing persecution due to their religious or political convictions. As a nation founded by immigrants, the United States is bound to its promise to provide protection indiscriminately for the “huddled masses yearning to breathe free,” as expressed by poet Emma Lazarus’ words inscribed on the Statue of Liberty. The intense debate surrounding refugee policy in the United States has led scholars to label it accurately the “civil rights movement of our time.”

Historically, Congress has been assigned the difficult task of re-

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[5] Id.


sponding to humanitarian appeals for aid and attempting to ensure the fair treatment of all immigrants. A necessary element of these decisions has included limiting refugee admissions which, left unbridled, would pose serious threats to national security. The U.S. government has met these challenges with varying degrees of success. The 1965 Amendments to the Immigration and Nationality Act were the first attempt by Congress to legislatively establish a channel for the admission of refugees. To overcome technical barriers to refugee admissions contained in the 1965 Amendments, the executive branch developed the use of the Attorney General's "parole authority" to admit large numbers of refugees.

The increasing recognition of the political bias underlying refugee admissions policy and the increasing tension caused by the extensive use of parole authority led to the adoption of the first comprehensive body of refugee legislation in 1980. Through formally adopting the United Nation's Protocol, the Refugee Act of 1980 endeavored to set a uniform and just standard for the admission of refugees.

The Refugee Act was originally conceived to grant asylum on the basis of humanitarian principles, balancing the individual merits of each case and executive discretion. An examination of the refugee admissions policies of the United States during the 1980s, however, does not indicate a dramatic change in American policy towards refugees. During the 1980s, a Reagan administration task force took affirmative steps to regain control of American borders through enforcing stiff sanctions against employers of illegal immigrants and through the detention of illegal aliens. Even more controversial, however, is the Haitian interdiction program which continues to enable the forced return of thousands of Haitians seeking asylum in the

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8 See infra notes 32-37 and accompanying text.
9 See infra Part III.
11 See infra notes 126-58 and accompanying text.
14 Id.
15 See infra notes 277-90 and accompanying text.
16 See infra notes 290-98 and accompanying text.
17 See LAWYER'S COMMITTEE FOR HUMAN RIGHTS, THE IMPLEMENTATION OF THE REFUGEE ACT OF 1980: A DECADE OF EXPERIENCE 3 (1990). While these actions were calculated to deter illegal immigration for the purpose of employment, thousands of those aliens have been locked in inhumane detention facilities including a significant number who have colorable asylum claims. Id.
United States.\textsuperscript{18}

Over the past several decades, Congress and the President have responded frequently to international refugee crises.\textsuperscript{19} However, history clearly shows that the appeals that have been heeded the most frequently are those which advance American political objectives.\textsuperscript{20} To a great extent, the decision of what constitutes a "well-founded fear" of persecution continues to be decided on the basis of the prevailing U.S. political agenda.\textsuperscript{21}

Part II of this Comment provides an overview of the historical origins of current U.S. refugee law, focusing on America's pragmatic response to the refugee crisis in Europe following the Soviet Revolution of 1917. Significant developments in emergency refugee legislation from 1948 to 1957 are discussed in Part III. Part IV analyzes the emergence of the parole authority of the Attorney General as a major vehicle for the mass admission of refugees. The unfettered use of parole authority by the Executive branch allowed U.S. foreign policy to dominate refugee admissions during the Cold War, as discussed in Part V. Part VI examines events leading up to the adoption of comprehensive refugee legislation in 1980 and analyzes the Refugee Act of 1980's success in establishing a uniform system of admissions. Finally, Part VII makes recommendations for change.

II. The Origins of Refugee Law: 1790-1940

A. Federal Control of Immigration

Federal legislation regulating the influx of immigrants to the United States can be traced to the late 18th century. Initially, the scope of the federal government's power with respect to immigration was narrowly prescribed.\textsuperscript{22} Until the Act of 1875, the primary function underlying federal regulations was achieving uniformity among the various states and coordinating their respective immigration procedures.\textsuperscript{23}

In general, immigration to the United States in the 18th century was relatively unrestricted.\textsuperscript{24} The lack of public opposition to the flow of newcomers is explained by the prevailing belief that the immigrants

\textsuperscript{18} See infra notes 336-47 and accompanying text.
\textsuperscript{19} See infra notes 89-246 and accompanying text.
\textsuperscript{20} See infra notes 89-246 and accompanying text.
\textsuperscript{21} See infra notes 91-252 and accompanying text.
\textsuperscript{23} See id. at 11. For example, in 1790, a national rule was passed which required residence for two years before naturalization and prevented particular states with more lenient naturalization requirements from forcing unwanted immigrants upon other states. Id.
\textsuperscript{24} Lawrence H. Fuchs, Immigration, Pluralism and Public Policy: The Challenge of the Pluribus to the Unum, in U.S. Immigration and Refugee Policy 294 (Mary M. Kritz eds., 1982) (analyzing the changing social perception of immigrants throughout U.S. history and the need for a new theory of civic unity which incorporates cultural pluralism).
would be absorbed readily by the dominant Anglo-Saxon culture. The vast majority of the immigrants spoke English, were of Protestant descent, and originated from Northern Europe. Their similarities to the existing American population made their cultural assimilation more realistic, thereby subduing hostility to their arrival.

However, restrictionist sentiment was apparent as early as 1753 when President Franklin complained, "this in a few years will become a German colony: instead of their learning our language we must learn theirs, or live as in a foreign country." President Franklin's warnings foreshadowed the dramatic change in public opinion and the growing political debate surrounding immigration issues that would emerge during the 19th century. In the early 1800s, the composition of immigrants arriving into the United States dramatically shifted. An increasing percentage of immigrants were from Catholic countries in southern and eastern Europe. In 1840, one-third of all immigrants were of Catholic descent. That number had increased to one-half by 1850.

As immigration became more controversial, the federal government's role in controlling it increased. In *Chae Chan Ping v. United States*, the Supreme Court declared that authority over immigration matters is a fundamental prerogative of the federal government. The Court reasoned that "[j]urisdiction over its own territory . . . is an incident of every independent nation. It is a part of its independence." If the U.S. government could not exercise this authority, "it would be to that extent subject to the control of another power."

With the exception of a brief period of expansion during the Civil War due to a demand for labor, the federal government asserted its control over the states by enacting a series of laws that restricted immigration. These laws were a departure from former regulation of immigration law by the states which sought only to regulate and control admissions. Instead, the new federal laws asserted the responsibility of the federal government for immigration matters and sought to exclude entirely specific classes of individuals.
The Immigration Act of 1875 marked the beginning of direct federal restriction of immigration. The Act endeavored to eliminate the problems associated with Chinese immigration. It strictly prohibited the entry of any Asian nationals without their consent and excluded those convicted in their own country of felonious crimes. In 1882, Congress imposed further limitations on immigration through its adoption of the Chinese Exclusion Act. The Chinese Exclusion Act went further than any previous limitation by suspending the eligibility for immigration of individuals of Chinese descent for ten years.

In the years following the Chinese Exclusion Act, federal restrictions on refugee admissions became increasingly comprehensive. Generally, the U.S. government imposed three types of limitations on immigration: (1) the exclusion of specific groups of immigrants, barriers to immigration, such as literacy tests or tests of economic self-sufficiency, and (3) the regulation of immigration through national origins quotas.

By adopting the Immigration Act of 1917, Congress endeavored to codify existing immigration law. The Act also responded to the concern that American standards were being lowered by the influx of uneducated immigrants by incorporating a literacy requirement. In addition, the Immigration Act of 1917 established the “Asiatic barred zone,” a provision which made Asians completely ineligible for immigration to the United States.

During the 1930s, in response to the flood of Central American immigrants, the State Department ordered strict enforcement of a provision of the Immigration Act of 1917 that restricted the admission of “persons likely to become a public charge.” The “public charge”
clause denied admission to immigrants who appeared to lack the financial means to support themselves while living in the United States.\textsuperscript{52} Laborers from Central America (and elsewhere) were restricted further by a contract-labor provision of the Immigration Act of 1917 that prohibited foreign nationals from entering into contracts for labor with American citizens or companies.\textsuperscript{53} Therefore, even if an immigrant could show that he was able to support himself economically by employment in the United States, he would be denied admission due to a violation of the contract-labor provision.\textsuperscript{54} The combination of these two provisions effectively denied admission to all immigrants except the rare few who were wealthy or had an individual willing to provide support in the United States.\textsuperscript{55}

Four years after the enactment of the Immigration Act of 1917, the Quota Act was adopted as a temporary limitation on immigration in an attempt to restrict immigration from certain areas.\textsuperscript{56} Thereafter, quotas became a mechanical basis of restriction designed to proportionately reflect American national origins.\textsuperscript{57} The Quota Act set forth percentages of immigrants eligible for admission from both northern and southeastern Europe based on percentages derived from the U.S. Census Bureau.\textsuperscript{58} However, immigration from the western European countries remained unrestricted.\textsuperscript{59} In 1924, Congress made the temporary quota system permanent by adopting the National Origins Act.\textsuperscript{60} The National Origins Act became a significant element of U.S. immigration policy and continued to pose technical barriers to the admission of refugees until 1965.\textsuperscript{61} Because it based admissions on nationality, the quota system originally established by the Quota Act has been widely criticized for elevating the issues of race, ethnic prejudice and assimilation above any concerns for human suffering or the desperate situation of particular refugees.

\textsuperscript{52} See Immigration Act of 1917, supra note 48, at 876.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} ZUCKER & ZUCKER, supra note 1, at 17.
\textsuperscript{56} Act of May 19, 1921, ch. 8, 42 Stat. 5 (1921).
\textsuperscript{57} Id. at 5-6.
\textsuperscript{58} The Quota Act provides in pertinent part:

[T]he number of aliens of any nationality who may be admitted under the immigration laws of the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the Census of 1910.

\textsuperscript{59} Id. at 6.
\textsuperscript{60} See id.
While the U.S. government was enacting laws to tighten its borders, European countries were attempting to accommodate the one and one-half million victims displaced by the 1917 Soviet Revolution. In addition, in 1924, a new group of refugees was created in Turkey as Armenians were being persecuted by the Turkish government. Years later, the government of Iraq began the brutal persecution of the minority Assyrian population. The refugee population also expanded to include Jews with the onset of Nazi persecution in Germany. Despite widespread violence and the masses of displaced persons, European governments did not consolidate efforts to ensure the safety and welfare of the European refugee population. Legally, the refugees who scattered across Europe were not distinguished from other illegal immigrants. Thus, they too were subject to deportation and many were imprisoned for violating border laws.

In 1949, in response to the European refugee crisis, the General Assembly of the United Nations established the office of the United Nations High Commissioner for Refugees (UNHCR). After its formation, the UNHCR promulgated the 1951 Convention Relating to the Status of Refugees, which limited refugee status to those persons displaced during World War II. The UNHCR expanded the definition of refugee, in the 1967 Protocol Relating to the Status of Refugees, to include those suffering from persecution unrelated to the war.

C. The U.S. Response

In the wake of World War II in 1945, a U.S. State Department report described the situation in Europe as "one of the greatest population movements of history. . . . 20 to 30 million of the people of Europe already [have been] torn from their moorings by the terrific impact of war." The immigration laws of the United States at that

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62 ZUCKER & ZUCKER, supra note 1, at 13-14.
63 Id. at 15.
64 Id. at 16.
65 Id. at 17.
66 While there was no single consolidated effort, many countries did provide temporary legal residence. Id. at 14. Further assistance was given by a minority of host governments through the issuance of work permits. Id.
67 Id.
68 Id.
70 See 1951 Convention, supra note 13.
72 LOESCHER & SCANLAN, supra note 1, at 1. Those uprooted who were able to move to Allied zones of military occupation were living in desperate situations in areas where housing and basic infrastructure had been destroyed. Id.
time did not recognize refugee status for persons seeking admission due to political persecution. The Immigration Act of 1917 provided only two exceptions: those fleeing from religious persecution; and immediate family members of admissible foreign nationals. Since the 1930s, the United States had considered admitting refugees as a special class of immigrants. However, the U.S. government was still unwilling to consider the option of permanent resettlement in the United States. The American response to the developing situation in Europe remained pragmatic.

The restrictionist posture of the United States following World War II was altered largely through the efforts of leaders of the Jewish-American community. Jewish-Americans recognized that, while repatriation was unrealistic for most displaced persons after World War II, it was impossible for those who had suffered Nazi persecution. Instead, they required a resettlement program that would permit them to reestablish their lives permanently. As a result of a combination of reports concerning the hardships suffered by displaced persons in Europe and pressure from the Jewish-American community, President Truman set up consular offices in American zones and ordered that visas for those displaced during World War II be allotted out of existing but unused annual quotas.

However, restrictionist attitudes in Congress prevailed and revealed the emerging discriminatory patterns of U.S. refugee policy. Congress was fearful of the social and economic impact that a more generous treatment of Jewish refugees would have on the United States. Several Congressmen were overtly anti-semitic. Despite the pleas of several Congressmen concerning Jewish refugees, particularly concerning the plight of Jewish children in war-torn Europe, Congress even rejected proposals to grant visas to Jewish refugee children.

73 See ZUCKER & ZUCKER, supra note 1, at 6.
74 See 1917 Act supra note 48, at 877.
75 Id. at 891.
76 See LOESCHER & SCANLAN, supra note 1, at 210.
77 Id. at 3. The U.S. government primarily responded with emergency relief consisting of food and clothing. Id.
79 See LOESCHER & SCANLAN, supra note 1, at 4-7.
82 See DINNERSTEIN, supra note 78, at 137-38.
83 Id. One Democratic senator stated, “I am ashamed to say that frequently it is said in the Halls of Congress: They are nothing but Communists, nothing but Jews — hated, despised, unwanted spawn from the Old World.” Id. at 138 (citing minutes of the CCDP Executive Committee Meeting).
84 House Comm. on Immigration and Naturalization, Admission of German Refugee Children,
Efforts to aid Holocaust survivors were hindered further with the emergence of the Cold War. Congress adopted the view that refugees could play an invaluable role in resisting Communism.\textsuperscript{85} U.S. refugee policy was seen by members of Congress as a form of psychological warfare in the developing conflict between the United States and the Soviet Union. Instead of enacting refugee legislation designed to provide protection for those most in need of it, immigration policy came to be used as a tool to advance the interests of democracy.\textsuperscript{86} The U.S. government believed that by encouraging migration out of Soviet countries, the United States could undermine Soviet leaders. Asylum came to be offered as an incentive for defection.\textsuperscript{87}

III. The Development of U.S. Refugee Legislation: 1948-1957

A. The Displaced Persons Act of 1948

The first major legislative enactment with respect to the admission of refugees was the Displaced Persons Act of 1948.\textsuperscript{88} The Displaced Persons Act was enacted specifically as temporary emergency legislation in response to the refugee crisis in Europe following World War II.\textsuperscript{89} The Act has been the subject of great criticism.\textsuperscript{90} Instead of protecting the victims of Nazi persecution, it singled out those fleeing from communist or communist-dominated nations as the most deserving of refugee status.\textsuperscript{91}

Although there were attempts to minimize technical barriers, the practical limitations imposed by the exclusionary provisions of the quota system continued to apply to those seeking refuge in the United States after World War II.\textsuperscript{92} Generally, the nationalities requiring the most relief were those which had been given low admission numbers

\textsuperscript{85}See Loescher & Scanlan, supra note 1, at 24.

\textsuperscript{86}Id.

\textsuperscript{87}Id. at 23-24.


\textsuperscript{89}See Loescher & Scanlan, supra note 1, at 19-24.

\textsuperscript{90}Loescher & Scanlan, supra note 1, at 21 (stating that because the Displaced Persons Act was fraught with restrictions designed to favor groups other than surviving Jews it produced a storm of public protest).

\textsuperscript{91}Id.

\textsuperscript{92}The Displaced Persons Act of 1948 allowed no new admissions, but did permit "quota mortgaging." In other words, it provided for borrowing against immigration quotas allotted for future years. See Displaced Persons Act, supra note 88, at 1010. The Displaced Persons Act did, however, grant special relief to orphan children. Id.
according to national origin.\textsuperscript{93} Although a large percentage of the existing quotas could not be filled, the U.S. government remained unwilling to create a specific preference for refugee admission.\textsuperscript{94}

A significant limitation on the admission of Jewish displaced persons was imposed through the incorporation of cut-off dates.\textsuperscript{95} The Displaced Persons Act required that those who applied for visas show that they entered Allied zones on or before December 22, 1945.\textsuperscript{96} This arbitrary cut-off date had the effect of denying the benefit of the Act to the great number of Jews who had fled the Soviet Union or Poland after this date.\textsuperscript{97} This provision also had the effect of excluding all recent refugees from the benefit of the Act.\textsuperscript{98} As a result of the inclusion of cut-off dates, visas were denied to ninety percent of the displaced Jews.\textsuperscript{99}

The remaining eligible ten percent were also besieged by restrictions. Two other provisions in the Displaced Persons Act had the effect of significantly reducing the number of Jews eligible for admission. The first required that forty percent of all refugees originate from nations “de facto annexed by a foreign power.”\textsuperscript{100} Because the majority of Holocaust survivors departed from Germany, a nation not “under foreign domination,” almost half of the total slots for resettlement in the United States were not available to Jewish displaced persons.\textsuperscript{101}

The second limiting provision was included in response to a shortage of American agricultural workers. Thirty percent of the refugees admitted were required to have agricultural skills.\textsuperscript{102} Those who had acquired other skills in demand in the United States were assigned a subordinate preference.\textsuperscript{103} Since displaced persons from the Baltic regions generally were known as skilled agricultural workers, this provision gave a marked advantage to refugees coming from Soviet-domi-
nated areas.\textsuperscript{104} Despite a storm of public outcry, the Displaced Persons Act was signed reluctantly into law in 1948 by President Truman.\textsuperscript{105} Upon signing the Act, President Truman stated that "[i]n its present form this bill is flagrantly discriminatory. It mocks the American tradition of fair play."\textsuperscript{106} Popular criticism caused the Act to be amended in 1950 and 1951. Both of these amendments had the effect of loosening the severe restrictions imposed by the original Act.\textsuperscript{107}

\textbf{B. The McCarran-Walter Act of 1952}

The discriminatory and self-serving immigration policies of the 1940s continued in the 1950s, although the concern for "fairness" was more frequently expressed in the Congressional debates.\textsuperscript{108} In 1951, a principal subject of legislative action was the revision of the Quota Act.\textsuperscript{109} The McCarran Bill offered to curb the element of racial discrimination in the immigration process while also encouraging the admission of persons with needed skills.\textsuperscript{110} Several Congressmen opposed the bill on the grounds that it created new elements of racial discrimination and failed to adequately allow for the admission of refugees.\textsuperscript{111} Despite the growing concern for an additional preference for refugees, the McCarran-Walter Act overcame a presidential veto and became law in 1952.\textsuperscript{112}

The Act's adoption severely confined the expansion of refugee protection in the United States. Through establishing the quota system initiated by the Quota Act of 1921, the new Act once again posed serious technical obstacles to refugee admission. Recognizing these limitations, President Truman pressured for emergency legislation in

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{104} Loesch & Scanlan, supra note 1, at 20.
\item \textsuperscript{105} Id. at 21.
\item \textsuperscript{106} See Signing of the DP Act, supra note 99, at 21.
\item \textsuperscript{107} There were two major changes that extended the protection of the Displaced Persons Act. An Act to Amend the Displaced Persons Act of 1948, Pub. L. No. 81-555, 64 Stat. 219 (1950). One amendment consisted of extending the act to those fleeing China. \textit{Id.} at 222. Another revised the cut-off dates for arrival into Allied zones to allow a person displaced since January 1, 1945 to be eligible for resettlement in the United States. \textit{Id.} at 219.
\item \textsuperscript{108} See Loesch & Scanlan, supra note 1, at 24.
\item \textsuperscript{109} See Hutchinson, supra note 22, at 305.
\item \textsuperscript{110} The proposed preference system was composed of four classes, including:
\begin{itemize}
\item [(A)] \textit{first preference of 50 percent to high qualifications, a second preference of 30 percent plus any unused portion of the first and third classes to parents and citizens of at least twenty-one years of age, a third preference of 20 percent plus any unused portion of classes one and two spouses and children of aliens lawfully admitted for permanent residence, and a fourth class to receive any remaining unused portion of a national quota in the allocation of which preference of not more than 25 percent of the total was to go to brothers, sisters, sons and daughters of citizens.}
\end{itemize}
\textit{Id.} at 303-304.
\item \textsuperscript{111} \textit{Id.} at 304. The bill was also criticized due to its vague requirements for admission.
\end{enumerate}
\end{footnotesize}
order to meet the demands of European refugees.\textsuperscript{113}

In 1953, Congress' primary objective centered on a renewed attack upon the quota system. In response to President Truman's pressure, a bill was introduced that sought to replace the McCarran-Walter Act and provide an additional preference that would allow fifteen to twenty-five percent of all immigrant admissions to be based on refugee status.\textsuperscript{114} However, because Congress was still comprised largely of those members who had been responsible for the overturn of the presidential veto of the McCarran-Walter Act, the bill subsequently was rejected.\textsuperscript{115}

\textbf{C. \textit{Refugee Relief Act of 1953}}

Instead of replacing the McCarran-Walter Act, a compromise was reached with the passage of the \textit{Refugee Relief Act of 1953}.\textsuperscript{116} The \textit{Refugee Relief Act} was proposed as a temporary measure to allow entry to special non-quota immigrants in times of international crisis. It was not, however, intended to establish the United States' guarantee of a permanent program of refugee admission.\textsuperscript{117} Congressman Walter emphatically opposed the bill, stating that it undermined the objectives of the McCarran-Walter Act and that a generous refugee admissions policy was detrimental to national security.\textsuperscript{118} On the other hand, several members of Congress had taken note of the United States' unique role in the protection of refugees and supported the bill.\textsuperscript{119} Most importantly, President Eisenhower's demand for emergency relief legislation was tied to a warning that the proposed Act would address important American concerns about the prevention of the spread of communism.\textsuperscript{120}

While refugee status under the \textit{Refugee Relief Act} was broadly defined,\textsuperscript{121} legislative history reveals that the Act was motivated by for-
eign policy concerns. Congressional records indicate that the legislation was passed primarily out of a concern for European stability. In 1957, the Refugee Relief Act was amended to conform more closely to U.S. foreign policy objectives. Section 15(c)(1) of the amended Act redefined a refugee to include one who departed from any "Communist, Communist-dominated, or Communist occupied area."

IV. The Emergence of Parole Authority

A. The Hungarian Revolution

The Soviet invasion of Hungary played a primary role in shaping U.S. refugee policy. In 1956, the Soviet army entered Hungary and quashed a new, anti-communist government that had been installed after a popular uprising. Approximately 200,000 Hungarians left their homeland and fled to Austria and Yugoslavia. In response, the United States rushed in large quantities of relief supplies to the Hungarian "freedom fighters."

President Eisenhower's reaction to the emerging Hungarian refugee situation in Europe reflected the Cold War policies towards refugee admission initiated after World War II. By assisting the Hungarian refugees, the Eisenhower administration believed that the United States could express its support for the liberation movement and thereby undermine Soviet leadership.

Hungarian refugees were admitted to the United States pursuant to the parole authority of the Attorney General. Initially, the American public was opposed to the flood of Hungarian immigrants. The government initiated a propaganda campaign to calm public opposition and enhance the media image of Hungarian "freedom fight-

thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life.

Id. 122 See LOESCHER & SCANLAN, supra note 1, at 45.
123 See id. In support of the Act, one Congressman stated, "We are now . . . faced with problems which have an important impact upon the health and stability of friendly countries in Europe . . . [and which] are creating situations in certain parts of Europe which gravely endanger the objectives of American foreign policy." Id. (citing Emergency Immigration Program Hearings, 83rd Cong., 1st Sess. 5-6 (1953) (statement of General Walter Bedell Smith, Acting Secretary of State).
125 Id. at 643. The refugee definition also included those fleeing from any Middle Eastern country. Id.
126 See ZUCKER & ZUCKER, supra note 1, at 31-32.
127 LOESCHER & SCANLAN, supra note 1, at 50.
128 Id.
129 Id. at 54.
130 See ZUCKER & ZUCKER, supra note 1, at 31-32.
131 LOESCHER & SCANLAN, supra note 1, at 54.
132 Id. at 55-57.
133 Id. at 56.
Vice-President Nixon was sent on a special mission to Vienna in order to control "mounting criticism by dramatizing the seriousness of the problem." Upon his return, reports were issued in which the Vice-President stressed the high quality, skills and trustworthiness of the Hungarian refugees.

According to the limitations imposed by the McCarran-Walter Act, the Hungarian immigration quota had only limited slots available. Therefore, on November 26, 1958, President Eisenhower took an unprecedented step towards the expansion of executive authority in refugee policy, announcing his decision to "parole" thousands of Hungarian refugees into the United States.

The Eisenhower administration's authority to initiate the Hungarian parole program was derived from a 1952 statute that provides in relevant part:

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

The parole program initiated under Eisenhower has been the subject of great debate. In particular, the use of parole authority to admit large numbers of refugees has been criticized. Legislative history reveals that parole authority was intended to be limited strictly to the admission of an individual refugee, and only when obtaining congressional approval was impractical. As Congressman Feighan, a member of the drafting committee for the statute granting the executive parole authority, stated, "[i]t was intended to be used as a remedy

\[134\] Id. at 57.
\[135\] Id.
\[136\] Id.
\[137\] Id. at 55. Hungarian quotas had been mortgaged to exceed the numbers allowable for several years. Id.
\[138\] Id. at 55-56. Parole entry does not bestow the legal benefits of formal admission, rather, those admitted under parole authority are treated as if they were stopped at the border. Id. at 55; see, e.g., Shaughnessy v. United States ex. rel. Mezei, 345 U.S. 206 (1953) (holding as a matter of law that a parolee is an "entrant" alien and therefore is not entitled to constitutional protection).
\[141\] Id. at 190 (stating that "[t]he continued use of parole authority by the executive branch to admit large numbers of refugees indicates that the parole statute should be amended to prevent further abuse").
\[142\] LOESCHER & SCANLAN, supra note 1, at 55-56.
for individual hardship cases, no more, no less.\textsuperscript{143} The admission of mass numbers of Hungarian refugees was clearly beyond the scope of the discretionary powers originally granted.\textsuperscript{144} Contrary to its previously expressed intention, in 1960 Congress adopted the Fair Share Refugee Law,\textsuperscript{145} that granted the Attorney General the authority to parole large groups of refugees.\textsuperscript{146}

The propriety of the Eisenhower administration's admission of Hungarian refugees is also questionable in light of the disproportionately large numbers of Hungarian refugees admitted to the United States in comparison to other host nations.\textsuperscript{147} Furthermore, the vast majority of Hungarian refugees did not qualify as refugees under the definition provided by the 1953 Refugee Relief Act. At that time, it was not certain that the Soviets would remain in Hungary.\textsuperscript{148} Moreover, only a small number of those who fled Hungary actually were involved with the Hungarian liberation movement.\textsuperscript{149} While the Hungarians who stayed faced the brutality of Soviet domination and many were sent to work camps throughout Russia, few of the thousands who fled Hungary had a legitimate fear of persecution as required by the requirements of the 1953 Act.\textsuperscript{150}

Despite the growing conflict over its expanding use, Congress did not challenge the executive branch's expansive use of parole authority.\textsuperscript{151} Actions that had formerly been taken only after Congressional approval became a regular aspect of the Executive's refugee policy. Because no standardized procedures were adopted to regulate its use, refugee admission under the parole power of the Attorney General was manipulated readily by foreign policy.\textsuperscript{152} Furthermore, due to the discretionary nature of parole power, it was outside of the scope of judicial review. After its discovery in 1956, parole authority became a primary means of concealing the ad hoc nature of refugee admissions.\textsuperscript{153}

\textsuperscript{144} In total, 38,000 Hungarian refugees were admitted under the parole authority of the Attorney General. \textit{Forty Year Crisis}, supra note 97, at 15-16 n.26.
\textsuperscript{146} \textit{Forty Year Crisis}, supra note 97, at 16 n.27.
\textsuperscript{147} LOESCHER & SCANLAN, supra note 1, at 51-52. In total, the United States admitted 38,121 Hungarian refugees for resettlement. \textit{Id.} at 52. Great Britain accepted approximately 21,000, France accepted 13,000, and West Germany accepted 15,000. \textit{Id.}
\textsuperscript{148} \textit{Id.} at 51.
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} at 56.
\textsuperscript{152} \textit{See infra} part V.A.
\textsuperscript{153} \textit{See infra} part V.A.
B. The Ascendance of Fidel Castro in Cuba

In 1959, Fidel Castro established a communist government in Cuba.\(^{154}\) As a result, between 1959 and 1961, approximately 125,000 Cubans arrived in the United States.\(^{155}\) As in the case of the Hungarian refugees, the U.S. government's support for Cuban refugee admission was based largely on Cold War politics.

The Kennedy Administration used parole authority to admit hundreds of thousands of Cuban refugees.\(^{156}\) The United States pursued a generously passive policy with respect to the processing of Cuban claims for asylum.\(^{157}\) As U.S.-Cuban relations worsened, the U.S. consular office disregarded routine criminal checks for those applying for visas.\(^{158}\) Furthermore, no attempts were made by the Coast Guard to turn back undocumented Cubans.\(^{159}\) The admission of refugees under the parole authority in excess of the quota limits established by the McCarran-Walter Act became an accepted aspect of U.S. refugee policy.\(^{160}\)

The U.S. government also provided more financial assistance programs to help establish Cubans in the United States than it had to any other group of refugees.\(^{161}\) Congress recognized that international conflicts would continue to create a need for refugee assistance and that temporary emergency legislation was insufficient. In June 1962, Congress enacted the Migration and Refugee Assistance Act.\(^{162}\) This Act marked Congress' first endeavor to provide ongoing relief to a defined group of refugees. It provided relief for the resettlement of Cubans as well as international assistance programs to be administered by the President to meet unexpected refugee developments.\(^{163}\)

During the 1970s, the effectiveness of U.S. immigration policy as a means of controlling the spread of Communism was widely questioned.\(^{164}\) Contrary to Congress' intentions, it became apparent that the Castro regime actually benefited from U.S. policy by the removal of

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\(^{154}\) See, e.g., Loescher & Scanlan, supra note 1, at 61.

\(^{155}\) Id.

\(^{156}\) See Loescher & Scanlan, supra note 1, at 68. Almost 250,000 Cubans arrived in America between 1959 and 1962. See id. at 70. By 1980, approximately 750,000 Cubans had entered the United States. See Zucker & Zucker, supra note 1, at 106.

\(^{157}\) Loescher & Scanlan, supra note 1, at 61.

\(^{158}\) Id.

\(^{159}\) Id.

\(^{160}\) See Forty Year Crisis, supra note 97, at 16 (stating that "by 1961 and 1962 the practice of wholesale parole of refugees was adopted").

\(^{161}\) See Zucker & Zucker, supra note 1, at 105.


\(^{163}\) Id. The Act was also significant in that it provided a nondiscriminatory definition of refugee. "In omitting any special reference to refugees from communist-dominated areas or 'cold war' responsibilities, the statute also broadened out national perspective on the original and cause of refugee movements, and implies our willingness to assist all who had fled their homes." Forty Year Crisis, supra note 97, at 17.

\(^{164}\) See Loescher & Scanlan, supra note 1, at 76-77, 170-71.
dissidents. Although evidence indicated that the United States' Cuban refugee policy was largely ineffective, the historic Mariel boat lift brought almost 130,000 Cubans to the United States in 1980. Critics asserted that government expenditures that had been used to fund airlifts and care for Cuban refugees could be better spent on under-funded domestic welfare programs.

C. The Immigration and Nationality Amendments of 1965: Creation of a Seventh Preference for Refugees

In 1965, the opposition to the McCarran-Walter Act was finally successful. The 1965 Amendments to the Immigration and Nationality Act marked a dramatic transition in U.S. refugee policy. Immigration opportunities for people of every nation were equalized through the abolition of the national origins quota system. The 1965 Amendments gave priority to family members of U.S. residents and immigrants with needed skills. Most significantly, under a “Seventh Preference,” the 1965 Amendments were the first to recognize that refugee suffering is an ongoing phenomenon by providing a permanent statutory basis for the admission of refugees. Therefore, the 1965 Amendments provided some authority to admit a specified number of refugees each year. However, a significant barrier to admission was imposed as only six percent of the total immigration slots were available for refugees.

The most significant aspect of the new legislation was its overt ideological bias. Despite the recent atrocities of the Holocaust in Europe, Congress gave special status to those fleeing communist-dominated states. The 1965 Amendments codified the geopolitical definition

\[165\] Id. at 170. Mariel is a port in Cuba.

\[166\] Id. at 77-78. When it was discovered that the airlifts had brought in “a number of criminals and other undesirables,” popular backlash against Cuban refugees developed throughout the United States. Id. at 170. Public dissatisfaction also increased because a greater portion of the Cubans entering were elderly or disabled, and therefore became immediately eligible for Medicare and Medicaid benefits. Id. at 77-78.

\[167\] See 1965 Amendments, supra note 10.

\[168\] The 1965 Amendments state:

No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence [with limited exceptions] . . . provided, that the total number of immigrant visas and the total number of conditional entries made available to natives of any single foreign state . . . shall not exceed 20,000 in any fiscal year.

Id. at 911-12.

\[169\] Id. at 913.

\[170\] Id.

\[171\] Id.

\[172\] Id. The 1965 Amendments require that applicants for asylum show that “(i) [B]ecause of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion.” Id.
of refugee which had emerged in response to the Cold War by requiring that the applicant depart from a communist or communist-dominated nation.\textsuperscript{173} By officially equating the concept of "refugee" with anti-communist policy, the 1965 Amendments created a permanent ideological basis for admission.

In the 1965 Amendments, Congress also made clear its intent to exert its authority over refugee matters.\textsuperscript{174} Under existing law, parole power was limited to "emergent, individual, and isolated situations, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of law."\textsuperscript{175} However, Congress' attempt to bring the admission of refugees within the framework of existing law was largely unsuccessful. The permanent refugee admission provision was inadequate due to its inflexibility to refugee crises.\textsuperscript{176} Parole authority continued to be used by the executive branch to supplement existing channels of admission.\textsuperscript{177}

V. The Impact of the Cold War

A. The Expansion of Parole Authority

Between World War II and 1980, of the 1.4 to 1.5 million refugees admitted into the United States, less than two thousand were from non-communist states in Latin America and Africa.\textsuperscript{178} During the 1970s, the staggering disparity in the number of those admitted from communist and non-communist nations indicates the tremendous influence that Cold War ideology exerted on U.S. refugee policy. As the following table indicates, the domination of foreign policy considerations in refugee matters continued to be facilitated by the extensive use of parole authority throughout the 1970s:

\textsuperscript{173} Id. The 1965 Amendments also provided an exemption for victims of natural calamities as designated by the President. \textit{Id.}

\textsuperscript{174} See \textit{Forty Year Crisis}, supra note 97, at 18.

\textsuperscript{175} S. REP. No. 748, 89th Cong., 1st Sess. 17 (1965).

\textsuperscript{176} See infra notes 230-38 and accompanying text.

\textsuperscript{177} See infra notes 234-45 and accompanying text.

\textsuperscript{178} The Implementation of the Refugee Act of 1980: A Decade of Experience, supra note 17, at 2.
Use of Parole Power, 1968-80179

<table>
<thead>
<tr>
<th>Non-Communist</th>
<th>Total Authorized</th>
</tr>
</thead>
<tbody>
<tr>
<td>Latin America (excluding Cuba)</td>
<td>4,440</td>
</tr>
<tr>
<td>(1975-78)</td>
<td></td>
</tr>
<tr>
<td>Uganda (1972-73)</td>
<td>1,750</td>
</tr>
<tr>
<td>Lebanon (1978)</td>
<td>1,000</td>
</tr>
<tr>
<td>Total</td>
<td>7,150</td>
</tr>
<tr>
<td>Communist</td>
<td></td>
</tr>
<tr>
<td>Cuba (1968-78)</td>
<td>232,666</td>
</tr>
<tr>
<td>USSR (1970-77)</td>
<td>17,200</td>
</tr>
<tr>
<td>USSR and Eastern Europe (1978-79)</td>
<td>61,924</td>
</tr>
<tr>
<td>Czechoslovakia (1970)</td>
<td>6,500</td>
</tr>
<tr>
<td>Indochina (1975-79)</td>
<td>290,075</td>
</tr>
<tr>
<td>Total</td>
<td>608,365</td>
</tr>
</tbody>
</table>

B. The Duvaliers' Reign: The Haitian Refugee Crisis

Almost thirty years after the American occupation of Haiti, Haitian refugees began entering American ports at a time when Cuban immigration had reached an unprecedented rate.180 In 1957, the first significant number of Haitians requested political asylum in the United States upon the ascendance to power of Francois Duvalier's military regime.181 In 1964, Francois Duvalier had the Haitian constitution amended to grant him a life term in office.182 In 1971, he passed his presidency on to his son, Jean-Claude Duvalier.183

Under the Duvaliers' rule, dissidents were silenced systematically.184 From the time that Jean-Claude Duvalier ascended to power in 1972 until 1980, there was a continuous influx of Haitians traveling to America by boat.185 In contrast to the Cubans who were entering the United States at roughly the same time, the Haitian refugees encountered severe obstacles to admission.186 The United States refused to relax immigration laws in response to the violent political climate in


180 Malissa Lennox, Comment, Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy, 45 Stan. L. Rev. 687, 699-700 (1993). The United States' occupation of Haiti lasted until 1934. Id. at 695. The United States ruled in a manner similar to previous Haitian dictators, id. at 696; few citizens had the opportunity to participate in the political process. Id. at 695 n.69. The U.S. failure to introduce democratic ideals during its occupation of Haiti is a factor which led to the Haitians' later acceptance of the Duvalier regime. See id.


182 Lennox, supra note 180, at 697.

183 Id.

184 Id.

185 See Loescher & Scanlan, supra note 1, at 80.

186 Id.
Haiti.\textsuperscript{187} Of the estimated thirty thousand refugees who entered the United States before 1980, it is estimated that only twenty-five to fifty of the Haitian applicants were granted asylum.\textsuperscript{188}

In \textit{Haitian Refugee Center v. Civiletti}, the U.S. District Court for the Southern District of Florida noted the disturbing difference in the numbers of Haitians and Cuban applicants granted political asylum.\textsuperscript{189} The \textit{Civiletti} court explained that “\textit{[p]rior to the most recent Cuban exodus, all of the Cubans who sought political asylum . . . were granted asylum routinely. None of the over 4,000 Haitians processed during the INS ‘program’ at issue in this lawsuit were granted asylum. No greater disparity can be imagined.”\textsuperscript{190} The staggering difference in the numbers of Haitians and Cubans admitted before 1980 dramatically reveals the impact of foreign policy on immigration decisions.\textsuperscript{191}

Despite evidence to the contrary,\textsuperscript{192} Haitian refugees seeking asylum in the United States worked against a powerful presumption that they were not victims of persecution.\textsuperscript{193} In \textit{Paul v. INS}, the Fifth Circuit denied asylum to nine Haitian applicants.\textsuperscript{194} Basing its determination on a single magazine article appearing in \textit{The New Yorker} magazine, the Paul court reasoned that “\textit{[m]any Haitians seek refuge in this country, not for political reasons, but for economic ones.”\textsuperscript{195}

The Seventh Preference established by the 1965 Amendments, requiring departure from a communist or communist-dominated nation, added another substantial political bias to immigration policy.\textsuperscript{196} The effect of the ideologically-based system was not merely to give an advantage to Cuban refugees, but also “to make it virtually impossible for

\textsuperscript{187} \textit{Loescher \& Scanlan, supra note 181, at 12.}

[S]teps to relax immigration rules for Cubans, including the practice of waiving the visa requirement altogether, and the passage of legislation in 1966 to grant earlier arrivals “permanent resident” status were not taken for the Haitians. Even the most “political” of the Haitians . . . were thus denied the certain asylum granted most Cubans.

\textit{Id.}\textsuperscript{\textsuperscript{188} \textit{Loescher \& Scanlan, supra note 1, at 80. No official statistics are available concerning the number of Haitian refugees admitted between 1950 and 1980. Id. at 80 n.46. The estimate in the text above is based on newspaper reports and Congressional testimony. Id.}\textsuperscript{\textsuperscript{189} 503 F. Supp. 442 (S.D. Fla.), aff’d 614 F.2d 92 (5th Cir. 1980).}\textsuperscript{\textsuperscript{190} Id. at 451.}\textsuperscript{\textsuperscript{191} See \textit{Id.}\textsuperscript{\textsuperscript{192} \textit{See Loescher \& Scanlan, supra note 1, at 80 n.45. A 1973 Report by Amnesty International stated:}}

\textit{Haiti’s prisons are still filled with people who have spent many years in detention without ever being charged or brought to trial. Amnesty International remains seriously concerned with the continued repression of dissent in Haiti and the denial of human and legal rights . . . . In fact those prisons are death traps . . . [and] find a parallel with the Nazi concentration camps of the past but have no present-day equivalent.}\textsuperscript{\textsuperscript{193} \textit{Id. (quoting Amnesty International Report (1975)).}}\textsuperscript{\textsuperscript{194} See \textit{Id. at 82; Paul v. INS, 521 F.2d 194, 196 (5th Cir. 1975).}}\textsuperscript{\textsuperscript{195} Paul v. INS, 521 F.2d at 196 (5th Cir. 1975).}\textsuperscript{\textsuperscript{196} Id. at 199.}\textsuperscript{\textsuperscript{197} See infra notes 167-77 and accompanying text.}}
any Haitian, on an individual basis, to demonstrate that he or she was genuinely fearful of persecution.”

Furthermore, as revealed in Civiletti, internal policies established by the INS have contributed dramatically to the barriers imposed on Haitian immigration. In Civiletti, the court found that procedures adopted by the INS with respect to Haitian refugees violated their constitutional right to due process. In 1978, the INS implemented an accelerated method of processing asylum claims which was applied exclusively to applicants from Haiti. Before the “Haitian Program,” immigration judges heard only between one and ten cases per day. However, under the accelerated program, Haitian asylum interviews were conducted at a rate of forty per day. Because of scheduling conflicts and a shortage of attorneys, Haitians suffered inadequate representation. In addition, although the INS Operating Instructions required the immediate suspension of a deportation hearing upon the raising of an asylum claim, directions were given to immigration judges to proceed with deportation for Haitian applicants. In essence, this practice shifted to the Haitian applicant the burden of proof on the issue of deportability and foreclosed any opportunity for raising defenses. The Civiletti court remarked that “[t]he procedure to which Haitians were subjected is roughly the equivalent of requiring a criminal defendant to concede his guilt before providing him any constitutional or statutory rights.”

The Civiletti court also noted that INS officials deliberately refused to give the Haitian refugees notice of the existence of the United Nations High Commissioner for Refugees (UNHCR), which reviews comments on applications for asylum. The United Nations had recommended that the United States provide such notice to comply with its international obligations. However, the INS determined

197 Loescher & Scanlan, supra note 1, at 82.
199 Civiletti, 503 F. Supp. at 511.
200 Id. at 512-13; see also Mathews v. Diaz, 426 U.S. 67, 77 (1976) (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law . . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.” (citations omitted)).
201 Id. at 523.
202 Id. at 524.
203 Only ten to twelve attorneys were handling the Haitian cases at the time of the “Haitian Program.” See id. Attorneys reported being scheduled to represent as many as five claims simultaneously. Id.
204 Id. at 520.
205 Id.
206 Id.
207 Id. at 515-16. The substantive provisions of the United Nations Protocol Relating to the Status of Refugees are discussed in Part VI.A. See infra Part VI.A.
208 Civiletti, 503 F. Supp. at 515.
that such notice would produce "delay" in the "processing and in the expulsions of aliens lacking meritorious claims."209 In addition, the Civiletti court found that the INS's practice of imposing on Haitian applicants a ten day time limit for the filing of asylum and withholding of deportation claims was arbitrary and discriminatory.210 The court reasoned:

No single aspect of the Program caused these results. Rather, the violations were cumulative. The abuses listed below were systematic and pervasive; for the most part they were the direct and logical result of the orders of the INS Central Office . . . . As such, each abuse is colored with the intent to expel Haitians. Taken as a whole, the Haitian Program, and all of the abuses listed below, carried out that intent.211

In addition to exposing the INS's responsibility for Haitian mistreatment, the court in Civiletti disputed the presumption that Haitian applicants are merely "economic refugees."212 The Civiletti court examined the pattern of human rights abuses in Haiti, particularly those abuses concerning Haitians repatriated by the U.S. government.213 The court indicated that "[t]he pattern of harassment and abuse . . . had been found by every group which has investigated the treatment of the returnees, with the notable exception of the State Department."214

Moreover, the Civiletti decision reveals that persecution may also take the form of economic deprivation.215 The court stated that the weakening of the Haitian economy could be considered another aspect of political persecution in Haiti.216 The policy of instilling fear in the people of Haiti led to the initial exodus of Haitian professionals, resulting in insufficient education and public services.217 By 1960, eighty percent of Haitian professionals resided in the United States, Canada, or Africa.218 Those responsible for managing Haiti's monetary system lacked a system of accounting, resulting in insecurity and

209 Id. at 515-516. The effect of the refusal to provide applicants with knowledge of the UNHCR was to grant sole discretion to the State Department regarding the selection of cases deserving of review. Id. at 516.
210 Id. at 521-522. Normally, applicants were given between ten and thirty days to make the required filings. Id. A failure to meet these deadlines would mean that an order for deportation was automatically entered. Id. at 520.
211 Id. at 519.
212 Id. at 476-86.
213 Id.
214 Id. at 481. One returnee described Fort Dimanche Prison, where he was sent upon his forced return to Haiti. He stated, "[t]he cells kept between 22 and 33 prisoners. These prisoners are detained in the nude, with no medical help . . . . At the prisons, a great percentage of the prisoners died either of tuberculosis or the consequence of torture or wounds inflicted during their time there." Id. at 493.
215 Id. at 507.
216 Id. at 507-508.
217 Id. at 509. "While many of these persons may have left because they had supported other candidates, . . . it is also true that Duvalier saw Haiti's elite as his enemy." Id. at 508.
218 Id.
corruption. As the Civiletti court explained, "[m]uch of Haiti's poverty is a result of Duvalier's effort to maintain power. Indeed it could be said that Duvalier had made his country weak so that he could be strong."  

C. The Flight from Saigon: The Indochinese Refugee Crisis

The United States' response to the refugee crisis created in Vietnam following the fall of Saigon was far more generous than its Haitian counterpart. By 1975, defeat was certain for the non-communist Indochinese nations. Following the collapse of the Nguyen Van Thieu regime, the U.S. government became dedicated to a program to rescue its Vietnamese allies. To facilitate their expedient evacuation, the Vietnamese refugee crisis was characterized as a rescue operation. Almost 130,000 Vietnamese refugees were airlifted out of Saigon prior to the communist takeover in April, 1975.

The U.S. government's response to the refugee crisis in Vietnam reveals yet another dimension of the impact of political bias on refugee policy decision-making. The impetus for government intervention in Indochina, in contrast to Hungarian and Cuban refugee policy, was not primarily Cold War politics. Instead, the United States' attempt to provide assistance to the Vietnamese refugee population stemmed from political sympathy to the former Vietnamese allies who had fought with the United States in support of the Nguyen Van Thieu regime. Many Americans felt a sense of obligation to a people that the United States had supported and then abandoned.

In 1975, reports indicated that the majority of Americans were opposed to the admission of Vietnamese refugees. The Vietnamese refugees were perceived as potential competitors for jobs and federal aid programs. President Ford attempted to assuage public opposition and overcome restrictionist sentiment. Upon signing the executive order creating the Committee on Refugees from Southeast Asia,

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219 Id. at 509.
220 Id. For a discussion of the interrelation between economic and political factors in determining refugee status, see Forty Year Crisis, supra note 97, at 68 (asserting that "[t]he motivation of the applicant and the conditions in his country of origin may involve interrelated economic and political factors").
221 Id.
222 Loescher & Scanlan, supra note 1, at 102.
223 Id.
224 Id. at 110-11.
225 Forty Year Crisis, supra note 97, at 30.
227 See Id. at 220.
228 Loescher & Scanlan, supra note 1, at 104.
229 Id. at 114.
230 Id. at 114-15.
231 Remarks of the President upon Signing Executive Order 11860 establishing the Committee on Refugees from Southeast Asia, 11 WEEKLY COMP. PRES. DOC. 531 (May 19, 1975).
the President stated that "[t]hey are people of talent, they are industrious, they are individuals who want freedom and I believe they will make a contribution now and in the future to a better America."232 Within months after the initial evacuation, thousands of Indochinese immigrants reached American shores.233

The first official request for parole by an Indochinese immigrant was made in 1976.234 The Indochinese parole program initiated under the Ford Administration is the most dramatic illustration of the inadequacy of then-existing legislation.235 With each successive group of refugees and subsequent exercise of parole power, Congress became more skeptical about the expanding Indochinese refugee parole program.236 Senator Kennedy asserted that "the Executive was put in the position of waiting repeatedly until the number of refugees in the countries of first asylum reached crisis proportions and then declaring an emergency which required yet another special program."237 Congress expressed concern over what appeared to be the limitless number of refugees to whom the United States owed an obligation.238

At Congress' request, the Ford administration issued a moratorium in which it agreed to request no further paroles of Indochinese refugees.239 However, in 1977, President Carter initiated yet another parole program involving the admission of 15,000 Indochinese refugees.240 Congress saw this use of parole power as a classic abuse of executive authority and the ad hoc administration of refugee policy.241 On March 30, 1978, President Carter authorized a plan designed to provide for the development of new refugee legislation.242 As a temporary measure until the adoption of the new laws, President Carter approved the use of parole power to admit 25,000 refugees per year.243

In 1978, it became apparent that the exodus out of Vietnam was not a result of the voluntary escape of those suffering persecution.244

232 Id.
233 See LOESCHER & SCANLAN, supra note 1, at 121.
234 Id. at 124.
235 See Forty Year Crisis, supra note 97, at 31 n.99. The author explains, "The insufficiency of the seventh preference numbers could no longer be viewed as a sporadic occurrence, but the parole authority was regularly being used as a 'supplementary' provision." Id.
237 See Forty Year Crisis, supra note 97, at 30.
238 Id. at 31.
239 Id.
240 Id.
241 Id. at 32. In 1978 and 1979, "intensive consultations occurred between the executive branch and congressional committee staff aimed at drafting a consensus refugee bill." Id. at 43.
243 Id.
244 See SUTTER, supra note 226, at 64-65. Reports indicate that thousands of Chinese minorities were forced to leave by the new government. Id.
The generous refugee policies implemented under the Carter administration were being exploited by a well-organized and profitable refugee trade. Those who profited from these operations were not limited only to members of the overseas Chinese community, who ran the refugee trade, but also Vietnamese officials who arranged for the illegal departures.

I. The Refugee Act of 1980

A. Legislative History

The 1951 United Nations Convention Relating to the Status of Refugees (the 1951 Convention) provided a foundation for the substantive provisions of the Refugee Act of 1980. Under the 1951 Convention, an individual applying for political asylum has a less stringent burden of showing refugee status than an applicant under the previous U.S. standard. Instead of establishing a "clear probability" of persecution, under Article 1 of the 1951 Convention an applicant need only show that he or she has a "well-founded fear" of persecution. Article 33 of the 1951 Convention also established the principle of "non-refoulement." By this provision, the United Nations sought to impose an affirmative duty on signatories to not repatriate any individual who faced probable persecution in their homeland.

By 1950, however, the United States had become skeptical of pledging unlimited support to refugees. Congress revealed its indifference to humanitarian efforts towards refugee protection through its failure to become a party to the 1951 Convention. Yet in 1967, the United States responded to international pressure and agreed to become a party to a subsequent international agreement, the United Na-

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245 Id.
246 Id. at 66-67. The refugee trade was so successful that it "soon replaced the coal industry as Vietnam's primary source of foreign exchange." Id. at 67.
247 See 1951 Convention, supra note 13.
248 Id. at 152.
249 Id. at 154. The standard under former U.S. law required a showing of "clear probability" of persecution to show a valid claim for asylum. See, e.g., Lena v. INS, 379 F.2d 536, 538 (7th Cir. 1967); Cisneros-Estay v. INS, 531 F.2d 155, 159 (3d Cir. 1976).
251 See 1951 Convention, supra note 13. The 1951 Convention provides that a Contracting state must not:
[E]xpel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.
Id. at 176.
252 See LOESCHER & SCANLAN, supra note 1, at 41.
253 Id. Mrs. Roosevelt was selected as the United States representative in the United Nations. She emphasized the limits of American generosity and warned against an "increasing tendency to drive the United Nations into the field of international relief and to use its organ as the source and center of expanding appeals for funds." Id.
tions Protocol Relating to the Status of Refugees (the Protocol). 254 The United States thereby became bound by all of the substantive provisions of the 1951 Convention. 255

According to the Protocol, the United States was required to apply the definition of refugee pursuant to Article 1 of the 1951 Convention. 256 However, the guidelines established by the Protocol were not implemented by the United States following its adoption. 257 Government officials contended that the adoption of the Protocol did not affect U.S. immigration law. 258 Furthermore, judicial interpretation crippled any impact that the new standards contained in the Protocol might have had. In Kashani v. INS, an Iranian national argued that he need not show a clear probability of persecution to gain refugee status under the Protocol. 259 Instead, he argued that the court was required to consider his “state of mind.” 260 Rejecting this standard, the Seventh Circuit determined that a “well-founded fear” of persecution as required by the Protocol can only be satisfied by objective evidence. 261 The Kashani court held that, in practice, the standard contained in the Protocol and the “clear probability” standard “converge.” 262

Decisions following the adoption of the Protocol indicate that there was no uniform standard for the determination of refugee status. Instead, the law was applied inconsistently, producing varying results. 263 Furthermore, on appeal, courts generally deferred to the discretion of the INS’s administrative authority. 264

In 1970, the “Kurdika Affair” had the effect of committing mem-

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255 The Protocol incorporated the refugee definition provided in Article 1 of the 1951 Convention. Protocol, supra note 71, at 268. In addition, signatories became bound to Articles 2-34 of the 1951 Convention. Id.
256 Article 1 of the 1951 Convention defines a refugee as one who:

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

See 1951 Convention, supra note 13, at 152.
257 See infra notes 259-265
259 Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977).
260 See id.
261 Id.
262 Id.
263 See, e.g., Kovac v. INS, 407 F.2d 102, 105 (9th Cir. 1969) (requiring “probability of persecution”); Gena v. INS, 424 F.2d 227, 232 (5th Cir. 1970) (requiring “likely” persecution).
bers of Congress to the establishment of refugee legislation. This incident involved a Lithuanian sailor who left a Soviet fishing vessel and sought asylum in the United States. Although the sailor cited an instance of previous persecution, he was immediately returned to his ship without further inquiry by Coast Guard Officials, who were unaware of the proper procedure.

Beginning in the 1970s, Congress worked to establish a comprehensive scheme of refugee law which was free of ideological and geographical bias. Congressman Peter Rodino, an advocate of reform, acknowledged the inadequacies of existing refugee law. He stated:

Since World War II, the Congress had enacted several major statutes authorizing the admission of refugees, but it was not until the 1965 amendment that a refugee provision became part of the permanent law. Although this provision was laudable, it was obvious that this provision was inadequate . . . . The position of the United States as a world leader demands that we, with other countries of the free world, be in a position to offer asylum to the oppressed. We must be able to take quick, effective, and affirmative action to permit the orderly entry into the United States of a fair share of refugees seeking freedom. We must uphold America's tradition as an asylum for the oppressed.

Senator Kennedy and Congressman Feighan introduced a bill that sought to incorporate expressly the definition of refugee as provided in the Protocol. Senator Kennedy asserted:

A comprehensive asylum policy for refugees is long overdue . . . . I would strongly suggest a definition similar to that contained in the convention relating to the status of refugees of the United Nations High Commission for Refugees. Its inclusion in the basic immigration statute is a logical extension of the accession by the United States, to the United Nations Protocol Relating to the Status of Refugees in 1968.

Congressmen complained that the discussions between Congress and President Carter concerning the 1977 parole program were informal, that refugee admission procedures were disorganized, and that there were no concrete standards for selection. Subcommittee members also complained that they were not informed of the facts of the most recent Indochinese parole program before its initiation. President Carter's decision to disregard President Ford's moratorium and

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265 For a more detailed discussion of the Kurdika Affair and its impact on the initiation of reforms in U.S. refugee legislation, see Asuncion, supra note 258, at 924 n.58.
266 Id.
267 Id.
268 See Forty Year Crisis, supra note 97 at 20-43 (discussing proposed reforms in refugee legislation leading up to the adoption of the Refugee Act).
270 Id. at 87.
271 Id.
272 See Forty Year Crisis, supra note 97, at 31-32.
273 Id. at 32.
continue the Indochinese parole program heightened congressional concern over parole power.\textsuperscript{274} In an attempt to bring the admission of refugees within the parameters of legislative authority, proposed reforms aimed to establish a system of admission with adequate numerical flexibility so that Congress would have the ability to respond to international refugee crises.\textsuperscript{275} By 1980, the stage was set for the comprehensive regulation of refugee admissions.

B. The Adoption of the Refugee Act of 1980

On March 17, 1980, Congress enacted the Refugee Act of 1980.\textsuperscript{276} During congressional debates, Congress acknowledged its intent to conform to the standards of the 1951 Convention and the Protocol.\textsuperscript{277} Congressman Rodino, in voicing his support for the legislation, described the Refugee Act as:

\begin{quote}
[O]ne of the most important pieces of humanitarian legislation ever enacted by a United States Congress . . . . By [its] deep dedication and untiring efforts, the United States has once again . . . demonstrated its concern for the homeless, the defenseless, and the persecuted peoples who fall victim to tyrannical and oppressive governmental regimes.\textsuperscript{278}
\end{quote}

The Refugee Act attempted to add flexibility to the preference system established by the 1965 Amendments and to reduce the need for parole authority.\textsuperscript{279} Under the Refugee Act, refugees are admitted through either annual resettlement quotas or emergency procedures.\textsuperscript{280} The Refugee Act provides that the “normal flow” of refugee admissions should be allotted among “refugees of special humanitarian concern.”\textsuperscript{281} For the first three years of the Refugee Act’s imple-

\begin{footnotes}

\textsuperscript{274} See supra notes 239-43 and accompanying text.

\textsuperscript{275} See Forty Year Crisis, supra note 97, at 27-28. In addition to their intention to create a flexible program, Congress sought to “avoid the creation of mass refugee parole programs without prior congressional consultation.” Id. at 28.

\textsuperscript{276} See Refugee Act, supra note 12.


\textsuperscript{278} 126 CONG. REC. 1519, 1522 (1980). Congresswoman Chisholm expressed her hope that the Refugee Act “not be tainted with ideological, geographical or racial or ethnic biases.” Id. at 1523.

\textsuperscript{279} 8 U.S.C. § 1157(a) (1994).

\textsuperscript{280} Id.

\textsuperscript{281} Id. The Act provides in relevant part:

The number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the president determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in that national interest.

Id.

In the original Senate bill the phrase did not contain the word “humanitarian,” but instead indicated resettlement for those refugees of “special concern.” See Forty Year Crisis, supra note 97, at 62. The addition of “humanitarian” in the Refugee Act emphasizes Congress’s intention that the “normal flow” refugee program be used for humanitarian purposes. Id.
mentation, the number of refugees admissible was set at 50,000.\textsuperscript{282} Subsequently, the “normal flow” of refugees has been subject to executive determination, after consultation with Congress.\textsuperscript{283}

The strict numerical limitation of the “normal flow” plan is complemented by a flexible emergency admissions procedure.\textsuperscript{284} However, Congress limited the use of parole power to individual aliens in emergency situations where “compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee.”\textsuperscript{285} Congress attempted to assure itself a substantial role in all decisions reflecting refugee admission through Section 207(e) of the Act.\textsuperscript{286} That section requires that Congress, “to the extent possible,” receive detailed information concerning the nature of the refugee situation and the number and allocation of the refugees to be admitted.\textsuperscript{287}

Significantly, the Refugee Act was the first piece of legislation to establish a procedure for the application for asylum by a person physically present within the United States, or by one who presents herself at a U.S. border.\textsuperscript{288} The Refugee Act also broadened the grounds for withholding deportation to include persecution based on social group or nationality.\textsuperscript{289}

\section*{C. The Implementation of the Refugee Act}

Since the adoption of the Refugee Act, Congress’ intent to establish a geographically and ideologically neutral system of refugee admissions has been undermined.\textsuperscript{290} As early as April 15, 1980, a report issued by the Carter Administration indicated a substantial likelihood of geopolitical bias in the administration of the Act.\textsuperscript{291} During the first half of 1980, of the 114,284 refugees admitted, only 120 were from

\begin{footnotesize}
\begin{enumerate}
\item 8 U.S.C. § 1158(a) (1994). Under the Refugee Act, parole power may still be exercised by the Attorney General. Section 1158(a) asserts: The Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien. Id.
\item 8 U.S.C. § 1158(b) (1994).
\item 8 U.S.C. § 1157(e) (1994); see also 126 CONG. REC. 3,757 (1980). Congress sought to “write into the new law the clear legislative intent of both Houses that parole authority . . . should no longer be used to admit mass numbers of refugees since the new provisions of this Act should provide ample flexibility and authority in dealing with foreseen or unforeseen refugee situations.” Id.
\item 8 U.S.C. § 1157(e) (1994).
\item 8 U.S.C. § 1158(a) (1994).
\item See infra notes 298-364 and accompanying text.
\item See infra notes 298-364 and accompanying text.
\end{enumerate}
\end{footnotesize}
Africa and 64 from Latin America. Throughout the 1980s, statistics clearly reveal that while the average approval rate was approximately twenty-five percent, the percentage approval rate for those refugees who fled communist-dominated countries was between fifty and eighty percent.

The dramatic differences between the numbers of approved refugees departing from politically "unfriendly" regimes and those originating from policy-neutral countries reveals the continuing influence of foreign policy on refugee policy decision-making. The table below illustrates the impact of political bias on refugee admission:

<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>Ethiopia</td>
<td>29.3%</td>
<td>47.3%</td>
</tr>
<tr>
<td>Lebanon</td>
<td>2.4%</td>
<td>26.4%</td>
</tr>
<tr>
<td>Poland</td>
<td>34.0%</td>
<td>47.4%</td>
</tr>
<tr>
<td>Romania</td>
<td>51.0%</td>
<td>59.7%</td>
</tr>
<tr>
<td>Haiti</td>
<td>1.8%</td>
<td>0.0%</td>
</tr>
<tr>
<td>Afghanistan</td>
<td>37.7%</td>
<td>26.2%</td>
</tr>
<tr>
<td>Iran</td>
<td>60.4%</td>
<td>67.4%</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>14.0%</td>
<td>83.9%</td>
</tr>
<tr>
<td>El Salvador</td>
<td>2.6%</td>
<td>3.6%</td>
</tr>
<tr>
<td>Guatemala</td>
<td>0.9%</td>
<td>3.8%</td>
</tr>
</tbody>
</table>

Three fundamental aspects of current refugee policy are largely responsible for the continuing ideological bias following the enactment of the Refugee Act: (1) the lack of guidelines regarding the proper definition of refugee, resulting in inconsistent and restrictive requirements for the standard of proof required in order to establish refugee status; (2) major flaws in the Department of Justice's implementation of the Refugee Act; and, (3) judicial disregard for the legislative intent of Section 203(e) of the Refugee Act prohibiting the return of refugees to places of persecution.

(1) Restrictive Application of the Standard of Proof Requirements

Under the Refugee Act, a refugee must establish a "well-founded fear" of persecution. The failure of the Refugee Act to establish an

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292 Id.
295 Id.
296 See infra notes 300-326 and accompanying text.
297 See infra notes 327-36 and accompanying text.
298 See infra notes 337-64 and accompanying text.
299 Under the Refugee Act, a refugee is defined as: [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution because of race, religion, nationality, memberships in a particular social group, or political
ideologically neutral standard of refugee eligibility stems largely from the vague guidelines contained in the Refugee Act concerning the appropriate evidentiary standard of proof for showing a “well-founded fear.” The lack of uniform procedures for adjudicating asylum claims has left district directors and immigration judges without guidance as to how they should exercise their discretion. In the absence of administrative guidance, the Refugee Act allows an alarming degree of judicial discretion in the determination of the substantive standards required for refugee eligibility.

An examination of recent decisions reveals the courts’ struggle to interpret essential provisions of the Refugee Act. In INS v. Stevic, the Supreme Court distinguished between two separate burdens of proof for the withholding of deportation and the establishment of a claim for asylum. He argued that provisions regarding refugee status under the Refugee Act and the Protocol are determinative in the context of deportation as well as asylum and, therefore, that the relatively generous standard of a “well-founded fear” of persecution must be applied to his case. However, the Supreme Court determined that the legislative history of the Refugee Act indicates that Congress intended it to apply only to claims for asylum. The Court stated, “[t]he primary substantive change Congress intended to make under the Refugee Act, and indeed in our view the only substantive change even relevant to this case, was to eliminate the piecemeal approach to the admission of refugees.”

According to the rule of Stevic, aliens residing within the United States are required to show a clear probability of persecution to establish a claim for the withholding of deportation. Those claiming asy-

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8 U.S.C. § 1101(a)(42) (1994); see also Forty Year Crisis, supra note 97, at 66-69 (arguing that the essential determination of refugee status under the Refugee Act hinges on an assessment of individual and subjective facts).

300 See THE IMPLEMENTATION OF THE REFUGEE ACT OF 1980: A DECADE OF EXPERIENCE, supra note 17, at 44.
301 Id.
302 Id. The Board of Immigration Appeals has also provided little guidance. Id. Because almost all of their published decisions uphold denials, adjudicators are only shown “numerous instances of when asylum should not be granted, and only scarce instances of when a grant of asylum is warranted.” Id. at 45 (emphasis in original). Under this system, an appellate judge has almost no authority on which to rely to reverse a finding. Id.
305 Id. at 410.
306 Id. at 413.
307 Id. at 421-25.
308 Id. at 425 (emphasis in original).
lum, however, need only show a "well-founded fear" of persecution. Despite its explanation of these two distinct standards, however, the Supreme Court in *Stevic* failed to define the more lenient standard of a "well-founded fear" of persecution.\(^{309}\)

The difficulty of meeting the clear probability test for withholding deportation is illustrated by a case involving an Iranian applicant, adjudicated by a district director of the INS.\(^{310}\) The director recalled:

The claimant said his father was murdered. He had a newspaper article showing a picture of someone he said was his father and two other men in Iran being lynched. But I don't know if it's his father. He's also got an affidavit from a friend who was present describing the executions. But the friend could be lying.\(^{311}\)

Another director admitted, "[i]f we used [the clear probability test] all the time, no one would be given asylum."\(^{312}\)

Despite the rule of *Stevic*, courts continued to apply the clear probability standard to asylum claims. One year after the Supreme Court handed down its opinion in *Stevic*, the Board of Immigration Appeals in *In re Acosta* held that the standard contained in the Protocol and the clear probability standard are "identical."\(^{313}\) Similarly, in *Sotto v. INS*, the Third Circuit determined that because in *Stevic* the Supreme Court "refused to decide the meaning of the phrase 'well-founded fear' of persecution," the former asylum standard of clear probability remains in effect.\(^{314}\)

While a majority of courts agree that the well-founded fear test is more lenient than the clear probability test, the proper evidentiary burden required to establish a well-founded fear of persecution has not been established.\(^{315}\) In 1984, the Seventh Circuit in *Carvajal-Munoz v. INS* distinguished between the standard for withholding deportation and the standard for granting asylum.\(^{316}\) To establish a claim for asylum, the *Carvajal-Munoz* court required a showing of previous persecution.\(^{317}\) The court emphasized that this evidentiary standard may be met through the respondent's testimony if that testimony includes specific facts.\(^{318}\)

In *Bolanos-Hernadez v. INS*, the Ninth Circuit also found that the well-founded fear test governing asylum claims is a more lenient stan-

\(^{309}\) *Id.* at 430.
\(^{310}\) *Unfulfilled Promise*, supra note 179, at 253.
\(^{311}\) *Id.* (citing Immigration and Naturalization Service, Asylum Adjudications: An Evolving Concept and Responsibility for the Immigration and Naturalization Service 54 (June & December 1982)).
\(^{312}\) *Id.*
\(^{314}\) *Sotto v. INS*, 748 F.2d 832, 836 (3d Cir. 1984).
\(^{315}\) *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984).
\(^{316}\) *See infra* notes 316-26 and accompanying text.
\(^{317}\) *Id.*
\(^{318}\) *Id.*
However, the court determined that mere assertions of "possible fear" are insufficient to satisfy the requirements for asylum. The court stated that foreign nationals applying for asylum would qualify only if they could establish "the existence of a valid reason for fear." Two years later, in *Diaz-Excobar v. INS*, the Ninth Circuit applied an even more demanding standard for the granting of asylum by requiring "credible, direct, and specific evidence" of a reasonable fear of persecution.

Recent decisions regarding El Salvadoran applicants indicate the tractability of the well-founded fear test to serve foreign policy objectives. In one Board of Immigration Appeals controversy, an applicant from El Salvador claiming asylum based on his forced conscription into the military had to establish not only that a violation of international human rights standards had occurred, but also that the military's action represented the "government policy" of the El Salvadoran government. Under this decision, applicants for asylum have the additional burden of showing "evidence of condemnation of military action by international governmental bodies, not merely by nongovernmental organizations." Since recent State Department reports have indicated that El Salvador has "shown progress in the area of human rights," the Board of Immigration Appeals' restriction of El Salvadoran refugee status is consistent with American foreign policy objectives.

(2) Practice Under the Refugee Act

Another significant reason for the failure of the Refugee Act is Congress' failure to provide the Department of Justice with the necessary resources to ensure that asylum judges and immigration directors are provided with sufficient training and information. Furthermore, INS regulations require district directors and judges to obtain an opinion letter from the State Department's Bureau of Human Rights and Humanitarian Affairs before making a determination.

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319 767 F.2d 1277, 1280 (9th Cir. 1984). Bolanos, a citizen of El Salvador, had testified that he had been a member of a right-wing party in El Salvador for two years. He was threatened when he refused to join the guerrillas. Five of his friends were killed after their refusal to join. *Id.*

320 *Id.* at 1283 n.11.

321 *Id.* at 1283.

322 792 F.2d 1488, 1492 (9th Cir. 1986).


324 *Id.* at 41 (citing *In re A-G*, Interim Dec. No. 3040 BIA 1987)).

325 *Id.*

326 *Unfulfilled Promise*, supra note 179, at 254 n.61.


328 THE IMPLEMENTATION OF THE REFUGEE ACT OF 1980: A DECADE OF EXPERIENCE, supra note 17, at 29. Most countries, including Canada, France, and Germany, have offices respon-
This requirement enables the State Department to inject a strong element of foreign policy into the immigration process through advisory opinions.\textsuperscript{329} These advisory opinions continue to play a large role in shaping refugee policy and often serve as opinions on the ultimate question of whether a refugee has a legitimate claim of persecution.\textsuperscript{330} Therefore, asylum decisions remain largely the prerogative of the State Department acting under the authority of the INS.\textsuperscript{331}

A striking example of the influence of advisory opinions is the treatment of El Salvadoran claims.\textsuperscript{332} A confidential INS report states:

\begin{quote}
Certain nationalities appear to benefit from presumptive status, while others do not. For example, for an El Salvadoran national to receive a favorable advisory opinion, he or she must have a "classic textbook case." On the other hand [the State Department] sometimes recommends favorable action where the applicant cannot meet the individual well-founded fear of persecution test. This happened in December 1981 a week after martial law was declared in Poland. Seven Polish crewman jumped ship and applied for asylum in Alaska. Even before seeing the asylum applications, a State Department official said "We're going to approve them." All of the applications, in view of INS senior officials, were extremely weak. In one instance, the crewman said the reason he feared returning to Poland was that he had once attended a Solidarity rally (he was one of more than 100,000 participants at the rally). The crewman had never been a member of Solidarity, never participated in any political activity, etc. His claim was approved within 48 hours.\textsuperscript{333}
\end{quote}

In addition to the extensive influence of the State Department in refugee processing, the sheer volume of claims that must be heard and the judge recruitment process have contributed to the inadequacy of the refugee admissions process. In recent years, due to the accelerated deportation policy many judges adjudicated over fifty-five asylum claims in one day.\textsuperscript{334} In order to ensure the processing of these increased numbers of claims, asylum interviews were shortened from an hour to only fifteen minutes.\textsuperscript{335} Furthermore, a majority of the judges responsible for determining refugee status that are separate from their foreign ministries. \textit{Id.} at 2 n.4.

\textsuperscript{329} \textit{Id.} at 2. The opinions are often prepared through the State Department officer in each country. Due to the fact that the officer is closely involved with the "conduct of diplomacy" of a particular country, his or her recommendations are largely influenced by foreign policy concerns unrelated to refugee status. \textit{Id.} at 23.

\textsuperscript{330} \textit{Id.} at 11. The State Department advisory reports often conflict with other reports offering information relating to human rights abuses. See, e.g., Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 482 (S.D. Fla.), aff'd 614 F.2d 92 (5th Cir. 1980). With respect to the Haitian refugees, the court stated, "The State Department Report stands out in stark contrast with all other evidence presented . . . . It is the only evidence suggesting that [Haitians returning to Haiti] are not mistreated . . . ." \textit{Id.}

\textsuperscript{331} \textbf{The Implementation of the Refugee Act of 1980: A Decade of Experience, supra} note 17, at 11.

\textsuperscript{332} See \textit{Unfulfilled Promise}, supra note 179, at 254.

\textsuperscript{333} \textit{Id.}

\textsuperscript{334} Lennox, supra note 180, at 700.

\textsuperscript{335} \textit{Id.} Through the accelerated program, "the INS had effectively denied Haitian de-
are recruited directly from within the INS, which fosters a restrictive treatment of refugee claims.\textsuperscript{336}

\section*{(3) Interpretation of the Non-Refoulement Provision}

The U.S. government's forced repatriation of thousands of Haitians over the past decade dramatically reveals the failure to establish an ideologically and politically impartial body of refugee law. The Haitian Migrant Interdiction Program originated in 1981 in response to a steady influx of Haitian refugees into the United States as a result of the oppressive Duvalier Regime.\textsuperscript{337} The Reagan administration entered into a bilateral agreement with Jean-Claude Duvalier which allowed U.S. officials to board Haitian vessels on the high seas outside of territorial waters and question individuals on board regarding their immigration status.\textsuperscript{338} In order to ensure the protection of refugees, the INS was instructed to screen each individual before they were returned to determine if a credible fear of persecution existed.\textsuperscript{339} The Haitian government assured the United States that repatriated Haitians would not be punished for their departure.\textsuperscript{340} In return, Haitian aid was increased by \$11.5 million.\textsuperscript{341} Thereafter, President Reagan issued a proclamation whereby he directed the Coast Guard to intercept Haitian vessels and return passengers to Haiti.\textsuperscript{342} The Haitian Migration Interdiction Program initiated under President Reagan was the first U.S. attempt to control immigration to the United States through Coast Guard blockades.\textsuperscript{343} Both domestic and international human rights supporters vigorously criticized the use of such extraordinary measures to prevent refugees from reaching U.S. shores.\textsuperscript{344}
While the economic condition in Haiti is troubling, poverty alone cannot explain the dramatic increase of Haitians applying for asylum in the United States since Aristide’s overthrow. Given the violent coup of Aristide in 1991, Haitians applying asylum warrant serious consideration. However, the United States continues to maintain that those fleeing Haiti are primarily “economic refugees” rather than the victims of political persecution. In May 1992, President Bush expanded the Haitian Interdiction Program through the Kennebunkport Order. The order gave the Attorney General unreviewable discretion in determining whether a refugee should be repatriated. The most objectionable aspect of the order, however, was its failure to provide procedures to identify those with a credible fear of persecution. The Coast Guard was instructed to return Haitians without a hearing or counsel. As a presidential candidate, Clinton was a staunch critic of the treatment of Haitian refugees. However, despite his promises to suspend the program, the interception of Haitian vessels continued under the Clinton administration.

In recent years, the forced repatriation of Haitian refugees has been challenged on the basis of the non-refoulment provision set forth in the 1951 Convention and incorporated in the Refugee Act. In the landmark decision, Sale v. Haitian Centers Counsel, the Supreme Court held that the non-refoulment provision applies “only in the context of domestic procedures within U.S. territory.” Finding that the protection of refugees.” Id. (citing Amicus Curiae Brief for Appellant at 3, Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350 (2d Cir. 1992)).

Closed Borders, supra note 339, at 881. The author states, “Haitians’ determination to flee their homeland despite the risk to their lives indicates something far greater than mere economic motivation. Such determination demonstrates a fear of persecution in Haiti. And such determination by so many suggests that, in the eyes of refugees, life in Haiti was too dangerous to be tolerated.” Id.

Refugees, Racism, and Reparations, supra note 180, at 705.

President Bush advanced three reasons for forcibly returning the Haitian refugees. Id. at 704-07. He asserted that Haitian refugees are “economic” and not political refugees. Id. Second, he suggested that the interdiction program was implemented “out of a concern for their safety and a desire to discourage them from attempting the perilous ocean journey to the United States.” Id. at 706. Finally, Bush stated that those returned to Haiti generally did not suffer persecution and therefore could be safely repatriated. Id. at 706-07.

Closed Borders, supra note 339, at 877.

The order directed that it was not to be construed “to require any procedures to determine whether a person is a refugee.” Id.

Id.

Clinton referred to the Bush administration’s policy towards the Haitians as a “cruel policy of returning Haitian refugees to a brutal dictatorship without an asylum hearing.” Anthony Lewis, Abroad at Home: The Two Clintons, N.Y. TIMES, February 22, 1993, at A1.

Id. President Clinton explained his change in position, stating “[t]here is a difference between political and economic refugees.” Id.


113 S.Ct. at 2560.
non-refoulment provision of the Refugee Act did not have extraterritorial application, the Court reasoned that “return” is analogous to “deport” and therefore, the provision only applies to exclusion and deportation proceedings.\(^{355}\) The majority in Sale did, however, acknowledge that gathering fleeing refugees and returning them to the country they desperately sought to escape “may even violate the spirit of Article 33 . . .”.\(^{356}\)

In his powerful dissent Justice Blackmun recalled:

The Convention that the Refugee Act embodies was enacted largely in response to the experience of Jewish refugees in Europe during the period of World War II. The tragic consequences of the world’s indifference at that time are well known . . . The refugees attempting to escape from Haiti do not claim a right of admission to this country. They do not even argue that the Government has no right to intercept their boats. They demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse and death.\(^{357}\)

In May 1994, after considerable international and domestic pressure, the Clinton administration ordered an end to the Haitian Migration Interdiction Program.\(^{358}\) However, the U.S. reaction to the recent exodus of Cubans, indicates that the interdiction policy remains a viable response to international refugee crises.\(^{359}\) In 1994, Cuban vessels were stopped and sent to detention centers in the United States and a U.S. Naval base at Guantánamo Bay, Cuba.\(^{360}\) An estimated 30,000 Cubans were intercepted during August and May of 1994.\(^{361}\) Cuban nationals arriving in the United States received the same treatment as other refugee applicants and were required to demonstrate “a well-founded fear” of persecution.\(^{362}\) The Clinton administration’s response to the Cuban refugee crisis received sharp criticism, particularly from the Cuban-American community.\(^{363}\) In September 1994, the Clinton administration agreed to guarantee the admission of a minimum of 20,000 Cubans annually.\(^{364}\)

\(^{355}\) Id. at 2560.

\(^{356}\) Id. at 2565.

\(^{357}\) Id. at 2577.

\(^{358}\) Closed Borders, supra note 339, at 881. Randall Robinson, Executive Director of TransAfrica, was instrumental in effecting the change in the Clinton Administration’s position with respect to Haiti. Susan Page, Lobbyist’s Fast Over Haiti Stirs Black Caucus, St. LOUIS-DISPATCH, May 6, 1994, at 5B. Robinson began a hunger strike on April 12, 1994, which lasted 23 days, in protest of the continued interdiction program. Id. He explained, “To do less makes the United States and our President complicit in the killing of Haitians as they are thrown back into the killing fields of their country.” Id.

\(^{359}\) Closed Borders, supra note 339, at 884.

\(^{360}\) Id. at 885.

\(^{361}\) Id. at 884.

\(^{362}\) Id. at 886; see also supra notes 154-66 and accompanying text.

\(^{363}\) Closed Borders, supra note 339, at 885 n.154. Protesters objected to Clinton’s policy of detaining Cuban refugees and called for an invasion of Cuba. Id.

\(^{364}\) Id. at 886. Unlike the Haitians, the Cuban refugees benefited from a large and active Cuban-American community that assured their preferential treatment by the United States.
VII. Conclusion and Recommendations

A review of decisions since the adoption of the Refugee Act indicates a continuing debate over the proper role of foreign policy in refugee determinations. While Congress' efforts in enacting the Refugee Act are laudable, they were perhaps misguided and unrealistic. Given the critical nature of asylum adjudications, remedial measures are urgently needed:

(1) Congress should provide sufficient funding and resources for adequate training and a channel of recruitment for judges who have had no previous experience within the INS. This will ensure that immigration judges will not be predisposed to reject legitimate applicants and also have the ability to recognize false claims.

(2) Legislative history reveals that the evidentiary burden should be lower than the clear probability standard and that generally oppressive conditions and the applicant's subjective state of mind must be given greater weight. Until the ambiguities inherent in the current asylum standards are clarified, case-by-case interpretations that ultimately defer to political policy concerns will continue. The Department of Justice must be required to promulgate fact-specific standard guidelines for judges to interpret the appropriate test of a "well-founded fear" of persecution. In order to effect its intent, Congress must also amend the Refugee Act as necessary to provide further clarification and guidance.

(3) Judges should be required to be well advised of the underlying legislative intent regarding each provision of the Refugee Act. Furthermore, Congress should also take steps to ensure that the judiciary is interpreting the Refugee Act in accord with legislative purpose.

(4) Judges should not be required to request and rely on advisory opinions from the State Department. Instead, information and statistics regarding country conditions must be made available through an independent and unbiased source. If an advisory opinion is requested, judges should be cautioned against regarding the opinion as conclusive evidence in support of or against an applicant's claim. Instead, judges must be trained to weigh the merits of each individual case when making their determination of a well-founded fear of persecution.

(5) A greater degree of discretion should be granted on appeal of asylum claims. BIA judges must take affirmative steps to ensure that the interpretation of the Refugee Act is in line with Congressional intent.

(6) Finally, the interception and forced repatriation of those potentially fleeing persecution must end. The humanitarian spirit of the Protocol and the Refugee Act reflects a goal of protecting human life.

As one commentator stated, "We know of no other agreement between the U.S. and another country that guarantees that a minimum number of nationals of that country will be admitted to the U.S." Id. at 887 n.157 (citing 71 Interpreter Releases 1213 (1994)).
To realize this goal, the Supreme Court and Congress must extend the application of the non-refoulment provision to international seas.

An overview of immigration law in the United States reveals an emerging pattern of political and ethnic bias that is inconsistent with democratic ideals. Allowing foreign policy discretion in asylum decision-making not only encourages arbitrary results and violates the spirit of neutrality as set forth in the Protocol, but also has severe consequences for those who would otherwise gain admittance to the United States. In promulgating the Refugee Act, Congress attempted to establish a comprehensive scheme for the admission of refugees based on the individual merits of each case. In doing so, Congress recognized the proper role of the United States in alleviating the plight of victims of persecution. It is clear, however, that the Refugee Act is only a first step towards achieving a system of refugee admission that is free of ideological bias. The U.S. government must be reminded that America’s strength lies in its cultural diversity and respect for human rights. Congress and the Supreme Court must continue to work to ensure that the role of foreign policy in refugee determinations is eliminated.

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