

Michigan Journal of International Law

Volume 3 | Issue 1

1982

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David A. Martin
University of Virginia

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Recommended Citation

David A. Martin, *The Refugee Act of 1980: Its Past and Future*, 3 MICH. J. INT'L L. 91 (1982).
Available at: <https://repository.law.umich.edu/mjil/vol3/iss1/5>

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The Refugee Act of 1980: Its Past and Future

David A. Martin*

International law is rich with provisions governing a nation's treatment of refugees within its borders; it says very little about obligations to refugees on another country's soil.¹ In general, nations have been extremely resistant to international legal requirements regarding initial admission of refugees, no matter how severe the persecution they flee nor how shameful the squalor of the camps where they initially find haven.

The United States' enactment of the Refugee Act of 1980,² although stopping well short of a fixed international commitment to admit refugees, reflects precisely the opposite priorities. The major focus during the legislative process was on constructing a framework for deciding which refugees to bring to the United States from overseas, and how many. The lack of a strict legal obligation to do so mattered little, for the Act establishes a generous framework and probably assures each year a high level of admissions of refugees screened and selected abroad. Scant attention was directed, however, to the other half of the issue, the problem of asylum: how shall the United States treat people who reach the country's shores on their own and then claim to be refugees, entitled to all the protections international law provides, most particularly to protection against expulsion to their homelands? How will their *bona fides* be determined, fairly and without undue delay? Within six weeks of enactment in March 1980, events revealed starkly the inadequacy of the basic provisions for asylum seekers, when thousands of Cubans began arriving in Florida. The press and the general public conceived of these arrivals as "refugees." When the new Refugee Act failed to supply clear guidance on their immigration status or on programs available for their care, disillusionment with the Act spread,³ fed by the general confusion of the U.S. response to the influx.

* David A. Martin is assistant professor of law at the University of Virginia. From 1978 to 1980 he served as special assistant to the assistant secretary for human rights and humanitarian affairs at the Department of State, where he was deeply involved in the department's work on the Refugee Act of 1980. The author wishes to acknowledge the thoughtful research assistance of Michael R. Calabrese.

The shortcomings of the asylum provisions should not obscure the legitimate accomplishments of the Refugee Act of 1980. On the matters it addressed squarely—relating principally to U.S. programs to move selected refugees from distant overseas camps and provide for effective resettlement in the United States—its sections reflect sound choices from among difficult alternatives. Even with regard to asylum for direct arrivals, the Act made some useful changes, although one might now wish that Congress had used the Act as the occasion for a thorough review of asylum procedures and standards.

Offered here is a description of the key provisions of the Refugee Act, suggesting why they took the shape they did and outlining the major difficulties that remain in crafting and sustaining effective refugee and asylum policies.

BACKGROUND

To understand why 1980 brought the United States a new refugee law, one only need examine the refugee situation in the autumn of 1978, and the statutory provisions then available to cope with it. Other times might serve equally well, but it was then that the Carter Administration bowed to the inevitable and began to draft its own detailed proposal for legislation, a proposal ultimately sent to Capitol Hill in March 1979.

At the time, U.S. refugee programs formed a scattered and unruly, if admirably humanitarian, collection. Indochinese refugees claimed most of the headlines. In 1975 the United States had resettled 130,000 refugees who escaped as Saigon was falling. Many in Congress and the Administration had thought that that action spelled the end of the United States' Indochinese refugee problem. The events of late 1978 disabused them of that view. Large commercial ships bearing thousands of fleeing Vietnamese appeared in the South China Sea, seeking a nearby country that would accept their human cargo. Overwhelmed with the refugees already in camps, some nations stiffly resisted landings. Public outcry in the United States grew. The Administration had authorized admission of 25,000 Indochinese refugees in June 1978. It became clear that autumn that a new authorization would be needed before year's end.⁴

At the same time, the Soviet Union, tacitly acceding to American and world pressure, allowed a major increase in the number of Jews permitted to emigrate. Their exit visas stated Israel as their destination, and the first groups that had left, beginning in 1972, went to that nation in overwhelming proportions. By 1978, however, increasingly aware that the United States would tolerate or even welcome such a practice, Soviet emigrants, upon reaching Vienna, were breaking off in growing numbers from their

Israel-bound colleagues and heading for the United States. Nearly two-thirds of the 1978 emigrants opted for the United States, and the *de facto* U.S. policy was to accept all who chose to come.⁵

Cuba had long been the largest contributor of refugee populations to the United States. Although the so-called freedom flights, which had brought 270,000 Cubans to U.S. shores since the flights' inception in 1965, had ended in 1973,⁶ that experience was not forgotten. The drafters of the new legislation knew that they must provide for those cases where the United States might choose to accept refugees directly from their country of origin. Even without the freedom flights, there remained a steady trickle into the United States of Cuban refugees who applied for admission at U.S. refugee program posts in Europe. And a change in Cuban policy in November 1978 would soon generate direct movements from Cuba once again: Castro was suddenly willing to release 1,500 political prisoners and their families.⁷ A relative handful of refugees from other countries joined the America-bound flow: Eastern Europeans, Iraqi Christians, Ethiopians, Lebanese, Chilean and Argentine political prisoners, and others. In October 1978, overall refugee admissions were running at an annual level of 50,000, soon to rise.⁸

These wide-ranging refugee admissions ostensibly transgressed the limits of the immigration laws. Congress had enacted only one specific provision for such admissions, section 203(a)(7) of the Immigration and Nationality Act (INA).⁹ Passed in 1965 as part of a major revision of the INA,¹⁰ it permitted the "conditional entry" of only 17,400 refugees annually.¹¹ Moreover, the restrictions were not solely quantitative. Only those fleeing either a Communist country or a country in the general area of the Middle East qualified. When pressures built for admission of more than this annual quota, or of refugees thoughtless enough to flee non-Communist regimes outside the Middle East, the executive branch had to resort to creative use of a different provision, section 212(d)(5) of the INA, granting the attorney general the power to parole aliens into the United States.¹²

The parole provision hardly reads like a refugee law, and indeed it has always had many uses outside the refugee field.¹³ It speaks of parole as temporary permission to cross U.S. borders, granted in the discretion of the attorney general. The 1978 refugees, however, were undeniably coming for a permanent stay. Moreover, since events overseas generated admission decisions, the president and the secretary of state, rather than the attorney general, were usually the important decision makers.

A president first invoked the parole power for a large group of refugees in 1956, in response to the Hungarian crisis. That decision enjoyed widespread congressional support, but an undercurrent of opposition to the use of parole for large groups began to grow, until it seemed to triumph in

1965. The committee reports accompanying the major immigration amendments that year sternly reminded the executive branch that parole's "original intention" was to ameliorate hardship in isolated individual cases. The reports further pronounced an "express intent" that parole no longer be used to admit refugees, since the new legislation made permanent provision for such persons in the section establishing conditional entry.¹⁴ Rarely have such pointed statements in legislative history had so little effect. In the very speech that accompanied his signing of the 1965 amendments—a ceremony held at the base of the Statue of Liberty—President Johnson announced the start of a massive new refugee parole program, the Cuban freedom flights.¹⁵

President Johnson's boldness did not carry over to his successors. Although they still used the parole power, on occasion, to admit refugees, they consulted routinely with the two Judiciary Committees before authorizing paroles. And often later administrations could not bring themselves to assert that such paroles were wholly legitimate, even though the clear pattern of administrative practice, bolstered by congressional acquiescence and funding support (which had been consistently provided despite some grumbling), would have furnished a respectable foundation for such an argument.¹⁶ Even the Nixon Administration, not notoriously shy about exercising broadly discretionary executive powers, apologized for its use of the parole power to admit refugees and promised that the practice was only temporary.¹⁷

The House Judiciary Subcommittee with jurisdiction over refugee matters provided the principal forum for executive branch hand-wringing. Congressman Joshua Eilberg, who had succeeded to the chair in 1973, regularly secured from administration witnesses admissions that refugee paroles rested on a dubious foundation.¹⁸ The litany of mutual doubts was familiar, but the witnesses kept returning for more paroles, and just as regularly they gained the acquiescence of Chairman Eilberg and his subcommittee.

Eilberg's counterpart on the Senate side, Senator Edward Kennedy, also expressed dissatisfaction with the provisions governing refugee admissions, but for different reasons. He saw the conditional entry provision as far too inflexible. He chafed at the cautious and stingy use of the parole power by successive administrations, leaving the United States, he believed, with an inadequate, piecemeal response to refugee crises around the world.¹⁹

Provisions governing assistance to refugees presented an equally unruly prospect. The Migration and Refugee Assistance Act of 1962²⁰ opened a broad range of federally funded domestic programs to refugees, if they came from the Western Hemisphere²¹—a formulation that clearly meant Cubans. Cubans who arrived in 1978, as in prior years, benefited from the

extensive public assistance, language and occupational training, and health and education programs authorized in the legislation. By 1978, however, another feature of the 1962 Act had engendered resentment against the Cubans and against Florida, where most had settled. That Act contained no provision for termination of the special 100 percent federal funding of cash and medical assistance for Western Hemisphere refugees. Some Cubans were still benefiting from such federal largesse even though they had been in the United States a decade or more and were otherwise completely assimilated. Finally, in 1978 the Administration succeeded in negotiating with a tenacious Florida congressional delegation a six-year phaseout of the special funding. But no statute embodied that agreement; it took the more tenuous form of a mention in an Appropriations Committee conference report.²²

The same 1962 Act authorized contributions to international refugee organizations and also a program of assistance for other (Eastern Hemisphere) refugees, but only while they were overseas.²³ The fall of Saigon in 1975, therefore, necessitated special legislation to assist in the care of the refugees who came to the United States. The Indochina Migration and Refugee Assistance Act of 1975 made the full range of programs authorized for Cubans by the 1962 Act applicable to Vietnamese and Cambodian nationals.²⁴ A year later, Congress had to catch up with reality by extending those same provisions to Laotian refugees.²⁵ The 1975 Act had an explicit termination date. Pressed by representatives from the states most heavily burdened, however, Congress repeatedly extended the cutoff date, each time altering the termination formula.²⁶ Termination was proving to be nearly as vexing a problem as it had been with the Cubans.

In 1978 as well, the increased numbers of Soviet refugees were beginning to strain the resources of the voluntary agencies that had assisted them in the past without special federal assistance after arrival. The Appropriations Committees stepped into the breach. They attached a rider to the fiscal 1979 foreign assistance appropriations act, making twenty million dollars available through the Department of Health, Education and Welfare for assistance to refugees not otherwise eligible, primarily Jewish refugees from the Soviet Union.²⁷

This motley collection of assistance programs afforded numerous occasions for disputes between the executive and legislative branches over levels and types of assistance, and it fueled complaints that refugee programs discriminated unfairly among refugee groups. Use of the parole power to admit refugees also remained controversial. Although large paroles were essential, given what came to be seen as unrealistic ceilings on conditional entry, parole consultations were almost guaranteed to be unpleasant, particularly the sessions held with the House subcommittee. As rapidly growing refugee flows forced a shortening of the intervals

between parole consultations, interbranch friction flared. Predictably, the need for supplemental budget requests mushroomed, and the congressional funding committees joined the chorus of dissatisfaction.²⁸ The two branches found themselves increasingly at odds in trying to cope with unpredictable refugee developments using the somewhat haphazard collection of statutory provisions.

These combined frustrations account for the surprisingly wide consensus that new legislation was needed. Outside lobbying played at most a minor role; their own unhappy experience with the process furnished the key executive and congressional figures with ample motivation for hammering out the Refugee Act of 1980 and seeing it through to enactment.

KEY PROVISIONS

The Refugee Act follows earlier practice in preserving two quite separate schemes for extending protection and aid to people allowed to reside in the United States because of the likelihood of persecution in their homelands. The treatment of those who are screened and selected overseas and brought to the United States by the U.S. Government is controlled by the refugee provisions of the Act. Those who reach the United States on their own, entering either illegally or on a nonimmigrant visa, and who then claim protection against return, have their claims reviewed under the asylum provisions of the Act. Although the two categories overlap in some important respects and are rarely kept distinct in the popular conception of "refugees," lumping the two together only generates unnecessary confusion. The following discussion keeps them separate, treating the refugee provisions first.

Refugees—Immigration Status and Federal Assistance

One who enters the United States under government programs for movement of refugees from overseas is immediately given documentation showing "refugee" status—a new immigration status created by the Refugee Act.²⁹ Like conditional entrants under the old procedures, refugees must submit to reinspection by the Immigration and Naturalization Service (INS) after an initial period before gaining entitlement to permanent resident alien status. The Act reduces the conditional period to one year, however, and it reflects an expectation that virtually all refugees will qualify for adjustment at that time. The grant of permanent resident status is retroactive, so that refugees, in general, will qualify for citizenship five years after arrival (four years after adjustment of their status).³⁰ Section

212(a) of the INA³¹ contains a lengthy list of qualitative requirements that aliens must meet to be admissible—addressing factors such as health, literacy, ability to be self-supporting, or past membership in the Communist Party. The Refugee Act waives six of these requirements for all refugees, and authorizes the attorney general to waive most other requirements when justified by individualized humanitarian considerations.³² The Act solves the federal assistance riddle by making all refugees in this country equally eligible, regardless of their origin, and by tying termination to the individual's arrival date rather than to the beginning of U.S. concern for a particular refugee group. Each refugee will qualify for the most costly types of special federal funding for three years after arrival. Thereafter, each is remanded, in most respects, to whatever forms of cash and medical assistance the state makes available to its other residents.³³

These changes represent marked improvements over the system that previously applied to conditional entrants and refugee parolees. They are ancillary, however, to the Act's resolution of the major issues that have troubled U.S. refugee policy since World War II: how many people will the United States admit as refugees, and who will be chosen for admission from among the millions of refugees in the world?

Refugees—How Many?

The Act establishes a base line of 50,000 refugees to be admitted annually. Before the beginning of the fiscal year, however, the president can act to raise that "normal flow" level, following congressional consultations, upon a finding that such action is justified by humanitarian concern or the national interest.³⁴ By October 1 of each year, therefore, a formal Presidential Determination will establish a fixed level of new admissions, usable for budgeting and resettlement planning. But refugee flows will not always obey September's projections, and the Act provides an outlet for new crises. An "unforeseen emergency refugee situation" can form the basis for new consultations with Congress at any time during the fiscal year, leading to a new Presidential Determination fixing additional refugee admission numbers.³⁵

Why did the Act not simply set a 50,000 base line and leave all possible overflows to the emergency admission procedures? Such, in fact, was the original Administration approach, approved by President Carter in April of 1978 and conveyed at that time to the Judiciary Committees in summary form.³⁶ The answer requires an understanding of the precise concerns underlying the Act.

By 1978, Congress had grown especially restive with frequent paroles. Particularly within the House Judiciary Subcommittee and the two Appropriations Committees, a suspicion developed that tenderhearted refugee

program officials at the State Department were following a nickel-and-dime approach to refugee admissions: seek the highest admissions the market would bear, foreswear advance prognostications about future flows, and come back to the Congress for another parole consultation and more money when desparate overseas conditions created the climate for another dime's worth of admissions. That perception was largely unfair. The refugee problems of 1978 outpaced everyone's expectations. Nevertheless, the perception had its impact, and it rubbed off on some members of the Administration team, particularly at the White House and the Justice Department. As a result, they and their congressional counterparts sought assurance that no emergency admission provision would be as open-ended as the parole power had been.

Congressman Eilberg had started the latest effort for a new refugee law by introducing his own bill early in 1977.³⁷ It set annual admissions at 20,000 and specified in detail the circumstances justifying new emergency admissions, up to an additional 20,000 refugees. Senator Kennedy countered early in 1978 with his own—predictably more flexible—bill, setting the baseline nonemergency figure at 40,000.³⁸ When the Administration took its long awaited stand on the issue in April of 1978, it upped the ante to 50,000, linking the number, shortsightedly, to its then-current plans for 1978 refugee admissions.³⁹ Fifty thousand would be a firm ceiling, subject to breach only in true emergencies. Although the bill fixed no numerical limit on emergency admissions, Administration spokesmen stressed that the emergency provision could be invoked only as "the result of *new, unforeseen* emergency conditions."⁴⁰

The April announcement proved the Administration's devotion to avoiding the haphazard nickel-and-dime increments of the past. But problems were buried that would soon surface. What if the world were afflicted with a massive new refugee exodus that stretched over several years? In the first year, the United States could respond using the emergency power, but thereafter could hardly claim that the problem was "unforeseen." Total admissions would have to drop back to 50,000 the following October 1, in the midst of what might be a major resettlement effort. Some had pressed this point in internal Administration debates before the April announcement, but without success.

By February 1979, when the Administration was putting the finishing touches on its proposed bill, events brought home to Administration players the concerns they had overlooked. Fifty thousand refugee admissions seemed fine in April, but by February new paroles had taken the annual admissions rate over 100,000. It would have been intolerable to make 100,000 a new statutory baseline. Those involved truly hoped that such a rate was aberrational, although most were resigned to it as an aberration that would continue for several years. It would be equally intolerable,

though, to take a proposal to Congress that made 50,000 seem a reasonable normal flow number, in the midst of annual admissions far above that level. Could the emergency provision be stretched instead, perhaps removing unforeseeability as a requirement for invoking the emergency admission power? In light of the April assurances, such a move would have brought congressional condemnation as a revival of the old unbridled parole discretion.

Administration drafters hit upon a different approach, and the Congress ultimately accepted it without major alteration.⁴¹ Rather than abandon the 50,000, they simply altered its significance. This normal flow number could be adjusted upward for foreseeable refugee needs, one time per year only, through timely action taken by the president before October 1 following consultation with Congress. Since the Act necessarily retained the emergency provisions—to deal with refugee problems that truly were not foreseen when the normal flow number was fixed—the resulting structure is complex. Almost by accident, however, the evolution traced above produced a creature surprisingly well adapted to the climate in which it would have to function.

Earlier refugee admission schemes foundered in criticism because all were subject to sharply incompatible demands. Members of Congress and the public have generally wanted refugee programs to be flexible, so as to meet new crises effectively. But at the same time, they have wanted no surprises—that is, they have demanded planning and control. Flexible provisions, especially the parole authority, have drawn condemnation since at least 1965 for seeming to place the executive branch's admission decisions beyond control. When Congress sought to reimpose control, it often did so through fixed statutory ceilings like the annual limit of 17,400 on conditional entry. But events soon outran the ceilings, and the imperative of flexibility reasserted itself.

The Refugee Act reconciles these needs by employing careful procedural requirements rather than fixed ceilings. The executive branch can exceed the 50,000 guideline, but it must ensure that most breaches of the ceiling are foretold by October 1, to give all the actors—Congress, executive branch agencies, local governments, and voluntary resettlement agencies—the best possible forecast for the coming year. The Act puts teeth in this assurance by denying to the executive the power later to increase admissions, unless such increases stem from truly unforeseen emergency situations.⁴² The Act also requires the executive, for the first time, to assemble planning data previously compiled only haphazardly, and to deliver them to Congress before beginning consultations on increased admission levels. Such data must include details on refugee populations worldwide, responses by other nations, U.S. resettlement and admission plans, cost estimates, and a judgment about foreign policy, economic, social, and

demographic impact.⁴³ Flexibility is preserved but within a procedural discipline that should go far in meeting the need for planning and control.

A measure of the strength of this scheme for setting admission levels is the warm acceptance it received from the Select Commission on Immigration and Refugee Policy, chartered by Congress to review in detail the full sweep of U.S. immigration laws. The Commission has recommended retention of the basic refugee admission structure which the Act creates.⁴⁴ But the Commission's deliberations reveal the major remaining problem. How can the United States reconcile the Refugee Act's disciplined but open-ended process with growing pressures for fixed limits on overall immigration?⁴⁵ Should refugee admissions beyond some baseline figure force a reduction in other immigration, or can the United States allow those admissions to remain outside annual ceilings?⁴⁶

The issue of numerical limitations surfaced during the consideration of the Refugee Act. Senator Walter Huddleston pointedly raised the question of overall limits in the Senate; Congressman F. James Sensenbrenner championed the cause in the House Judiciary Committee deliberations. That committee came within one vote of adopting a Sensenbrenner proposal that would have reduced quota immigration by one immigrant for every two refugees admitted in excess of 50,000, with the reduction to take effect in the succeeding fiscal year.⁴⁷

The ceiling issue admits of no easy solution. Sound national planning in the midst of rapidly growing world population warrants reasonable population targets established in advance, apart from the pressures and exigencies that may be felt in the midst of a particular crisis. Advocates of a generous refugee policy have a hard time disputing that proposition, at least when it is considered in the abstract. Senator Huddleston continues his efforts in Congress to establish an overall ceiling, and the steady growth in his support indicates the appeal of such a ceiling.⁴⁸ Refugee advocates, nonetheless, harbor the concern that such a ceiling, however wise in principle, would only provide a rallying point and a high-minded rationale for those who seek tight restrictions on refugee admissions for nativistic or selfish reasons. Can these views be reconciled? A test of the two sides' strength is more likely than reconciliation, and any legislative proposals resulting from the Select Commission's work may well provide the battleground.

Refugees—Which Ones?

Estimates place the number of refugees and displaced persons in the world as high as fourteen million.⁴⁹ How should the United States choose which of these will be favored with resettlement in this country?

United Nations Definition of "Refugee"

As a first step, the Act limits resettlement to those who meet the United Nations definition of "refugee," derived from the 1951 Convention relating to the Status of Refugees: a person outside his or her homeland, unable or unwilling to return or otherwise claim its protection because of persecution or a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.⁵⁰ This definition forms the basis for a growing body of international law which, in the view of the bill's proponents, deserved to be strengthened and built upon.⁵¹ There was little controversy over the definition's adoption. Indeed, because its use eliminated the geographic restrictions that marred the conditional entry provisions, it was widely welcomed.

In some respects, however, this definition serves to narrow eligibility for U.S. programs, because it excludes certain people who had been eligible under earlier refugee legislation and, indeed, who are popularly thought of as "refugees." The UN definition does not embrace those who flee natural disasters, nor, in most cases, those displaced by military operations or civil strife.⁵² (People who stream away from a battlefield generally are not fleeing persecution targeted at them, but rather are seeking personal safety.) The theory behind this technical limitation on the refugee category is apparently that the bombs will cease falling, the floods will recede, but persecution is implacable. Obviously such a generalization has sharp limits, but, as an exceedingly general rule of thumb, the theory is useful. It distinguishes those uprooted persons who are more likely to be able to pick up the pieces of their lives again in the place where they originated, and who therefore have less need of resettlement in a distant land. The drafters of the Refugee Act sought ways to contain the claims on inevitably limited U.S. resettlement opportunities, and this restriction provided one such method.

Little thought was given during consideration of the Refugee Act, however, to the difficulty inherent in making the individualized and fine-grained determination of likely persecution which the UN definition seems to require. This submerged problem receives closer attention below in the discussion of asylum determinations, also governed by the same UN definition.

In-Country "Refugees"

A person may flee his or her home under a genuine threat of persecution, but does not become a refugee under the United Nations definition until departure from his or her national territory. The definition expressly requires that the individual be "outside the country of his nationality"⁵³—a limitation that reflects a classical reluctance of international law to concern

itself with the treatment of individuals inside their own national borders. Even though expanded international action to promote human rights has substantially eroded that classical view,⁵⁴ the definition's distinction retains some utility, especially in classifying a problem as a refugee question rather than a human rights matter and in fashioning national or international responses accordingly.

This aspect of the UN definition posed certain difficulties in the drafting of the Refugee Act. Historically, some of the largest groups resettled as refugees by the United States had moved directly from their home countries to U.S. soil, via the Cuban freedom flights or the Saigon evacuation. Under the UN definition, however, these people were not "refugees" when the United States decided to bring them here, for they had not crossed the boundaries of their homelands.

The Administration's original response to this problem, conveyed to the Congress in April of 1978, was to abide by the wooden limits of the UN definition, but explicitly to preserve the parole power for use in direct movements to the United States.⁵⁵ As Administration drafting progressed through the winter of 1978-79, the irony of this position gained wider recognition. The new refugee legislation was meant to create a new and disciplined decision structure. To exclude from that structure certain movements of people threatened with persecution, solely because of the inflexibility in a definition, hardly made sense, particularly when such people traditionally made up a dominant proportion of U.S. refugee programs. Moreover, the drafters could not count on continued congressional willingness to tolerate such broad scope for the parole power.

In its final draft legislation, the Administration responded by leaving the UN definition intact, but removing all procedural provisions requiring that applicants for U.S. refugee programs meet the definition at the time of approval for ultimate resettlement in the United States.⁵⁶ Under this framework, U.S. officials would still screen applicants in the home country for compliance with the "well-founded fear of persecution" test and also for satisfaction of any other criteria of U.S. programs, but applicants would not formally have to satisfy all portions of the UN definition until they reached the United States. By then, of course, they would be outside the country of their nationality.

Unfortunately, after the draft legislation was introduced, the Administration did a weak job in explaining this new wrinkle to the Congress. Key congressional figures saw the Administration approach as a gimmick and never proclaimed themselves persuaded that the Administration's scheme would work. As a result, Congress chose instead to confront the problem head-on by expanding the statutory definition of "refugee" through addition of a Part B.⁵⁷ Part A remains essentially the classic UN definition. Part B extends to persons within their own country who are persecuted or who

have a well-founded fear of persecution. Congress retained a concern, however, that such a change might flood U.S. consulates with applications from people claiming imminent persecution by their own governments and hoping to secure a spot on the next flight to the United States.⁵⁸ Part B, therefore, was channeled narrowly. Persons within their own country and facing persecution will meet the definition only “in such special circumstances as the President after appropriate consultation [with the Congress] . . . may specify.”

In practice, for Part B of the definition to take effect with respect to a given country, the president must make special provision in the Presidential Determination that sets admission numbers and allocates those numbers among refugee groups. The first two Presidential Determinations under the Act have included such a specification, but have limited it to certain persons in Vietnam, Argentina, and Cuba.⁵⁹ This restricted use of Part B has provoked criticism. Some critics feel that the United States should be more aggressive in offering refugee admissions in order to secure release of political prisoners, or to arrange for protection and removal of persons ousted in a coup or threatened by one faction or another in a civil war.⁶⁰

Each of those aims is worthy, but the president's cautious employment of the definition's Part B is warranted. First, release of political prisoners to exile is at best a mixed victory for U.S. policy. Human rights activism, by both governments and nongovernmental organizations, may build effective world pressure on a regime to release certain political prisoners. If released in their own country—and there have been many such releases in recent years—the former prisoners may remain a visible symbol and a constant spur to continued human rights efforts within the country. Shipped overseas, however, they may find themselves reduced to voices crying from a distant wilderness, having lost access to their countrymen. The United States should not be too quick to invite oppressive regimes to rid themselves of those they regard as troublemakers by exiling them to our shores.

Second, even in circumstances where release into exile of a certain political prisoner makes sense, forcing that release into the refugee mold may prove counterproductive. The United States cannot accept a person as a refugee without officially finding that he or she is subject to persecution. The home government may be willing to accede to emigration but quite unwilling to accept the formal label of persecutor in the process.

Third, when a country is riven by civil war or in the midst of a coup d'état, as a practical matter there is little the United States can do to protect people by brandishing Part B of the definition. The history of U.S. decisions to move potential persecution victims directly to the United States testifies to these practical limits. Those movements have always required

either a secure area from which to load the refugees, as in Saigon in 1975, or explicit host government agreement, as in the Cuban freedom flights or the release of Argentine political prisoners. In the midst of a coup or civil war, presidential invocation of Part B of the definition would only expose graphically the limits of U.S. action in such a troubled situation. Absent a willingness to send in the Marines to establish a secure area, U.S. refugee resettlement efforts generally will be confined to those individuals able to escape their national borders. Conceivably the United States could shelter some within the American embassy but could not hope to move them to this country without the cooperation of forces effectively controlling the surrounding area.⁶¹ Indeed, attempted sheltering might only invite an invasion of the embassy.⁶²

Clearly, Part B of the refugee definition was designed to be used. But its addition to the statute has occasioned overly expansive hopes. It must be employed selectively, with eyes open to its practical limits and to the risks that hasty invocation will prove counterproductive.

Allocation

The UN refugee definition, as modified, establishes the universe of persons eligible for immigration to the United States as refugees. But this remains an enormous universe, running to many millions of people. Some additional method was needed to select those who would actually gain admission.

Which Model? One possible selection model plainly was not to be followed: the model represented by section 203(a)(7) of the INA, the conditional entry provision. Scorn for that system surfaced repeatedly during the deliberations on refugee legislation, in both the executive and legislative branches. The restriction to persons fleeing Communist or Middle Eastern countries drew widespread condemnation as ideological and geographic discrimination. The new theme would be equity,⁶³ but equity is a trickier concept to honor sensibly than many of its proponents have acknowledged.

At one point it appeared that reaction to the shortcomings of conditional entry might swing the admission provisions to a second model at the opposite extreme. The bill Congressman Eilberg introduced in 1977 ostensibly made all refugees anywhere equally eligible for U.S. resettlement, subject only to the bill's overall ceiling of 20,000.⁶⁴ Applicants would simply apply at U.S. facilities overseas and convince a U.S. officer that they satisfied the UN definition. Resettlement spaces would then go chronologically to qualifying applicants based on time of application, much as regular quota immigration is regulated.

This feature of the Eilberg bill provoked alarm among officials working on the Administration response.⁶⁵ A purely chronological system might easily force a refugee in Southeast Asia, for example, who fled torture,

escaped under harrowing conditions, and was only grudgingly granted first asylum in a meager refugee camp, to wait for years while others ahead of him or her in line, who perhaps had received several resettlement offers and in any event could await U.S. resettlement in more comfortable conditions elsewhere in the world, were first admitted.

A chronological system would foreclose any claim of invidious discrimination, to be sure, and it would ensure equity in its purest abstraction by removing any possibility of distinctions based on politics or nationality. But these virtues would come at too high a cost, for the system would also preclude distinctions that ought to be made. Not all refugee situations are created equal. Some groups face greater perils than others. Some find immediate asylum in a willing and hospitable neighboring country without drastic cultural differences. Some enjoy a wider range of resettlement options or may have greater hope of eventual repatriation. And some, because of language, culture, or historical ties, for example, may be better positioned to resettle successfully in the United States, while others, for the same reasons, might have brighter prospects in other resettlement countries. Such distinctions are relevant. To ignore them in the name of equity is to render that concept hollow and mechanical.

In its April 1978 statement of position on refugee legislation, the Administration, therefore, took explicit aim at such a nonselective system. The Administration emphasized that any acceptable bill must allow for priority allocation of admissions to groups or classes of refugees "of special concern to the United States."⁶⁶ Under the Administration proposal, allocations to such groups would be made periodically by the executive branch, and could be changed easily in response to changing conditions. Congress would be informed of allocations, but would play no formal role. Ultimately, Congress accepted this third model, selective yearly allocations, but imposed more extensive procedural requirements. Under the Act, allocations may be established or changed only by formal Presidential Determination following congressional consultation, as elaborately defined in the Act.⁶⁷ Congress also altered the phrase governing allocations to read: "refugees of special *humanitarian* concern to the United States."⁶⁸

There have been efforts to read great significance into the addition by Congress of the adjective "humanitarian." But the word change offers little assistance in deriving standards for judging whether any given allocation decision is proper under the Act. Any refugee resettlement program is animated, at least in part, by a humanitarian spirit. But Congress plainly intended to authorize selectivity, and selectivity is in many ways antithetical to a truly humanitarian response. The House committee report explains that the change was meant to emphasize that the "plight of the refugees themselves . . . should be paramount." But paramount is not exclusive, and

the report itself supplies a lengthy list of other factors appropriately considered in the allocation process (such as family, cultural or historical ties, or past U.S. involvement in, or treaty relations with, the country of origin).⁶⁹ Nor does the Act mandate choices divorced from foreign policy considerations. Section 207(e) specifically directs the Administration to report to Congress the expected impact of refugee programs on the "foreign policy interests of the United States."

It was often suggested that the legislation should list the precise factors to govern allocations, perhaps by providing a statutory definition of "special concern" or "special humanitarian concern."⁷⁰ Congress ultimately rejected that approach, convinced by over twenty years of experience with refugee paroles that the conditions generating admission decisions could not be comprehensively catalogued. Any such specification was susceptible to early obsolescence. Witness the fate of conditional entry itself, a provision which was conceived in its day as a precise statement of the refugees who were of concern to the United States.⁷¹ Both Judiciary Committee reports on the Refugee Act, noting the need to maintain flexibility, state that the phrase cannot be defined.⁷² "Special humanitarian concern" is therefore best understood as a term of art indicating that a difficult political choice will be made each year by the political branches of the government based on shifting assessments of political and humanitarian factors, again within the procedural discipline imposed by the Act.

The Refugee Act thus rejects "discrimination" of the type embodied in the discredited conditional entry model—frozen statutory limits on the groups of refugees to whom the United States would ever offer resettlement. But it plainly endorses continued selectivity in the distribution of admission offers, selectivity adjustable over time. Complete denial of resettlement to certain groups, especially if other solutions to that particular refugee problem are available, could be entirely consistent with the Act. The point of the Act was not to make it possible for every refugee to compete for an opportunity to resettle in the United States. Its purpose was to create a sound structure for deciding how best to *target* finite U.S. admission slots to alleviate refugee suffering worldwide.

Of course, what appears to the decision maker as careful selection may appear to the advocate of an excluded group as raw discrimination. Therein lies the source of the continuing political battles that are inevitable under the Act. The price of the flexibility deemed essential is acceptance of that continued political controversy. As a result, it is too strong to claim, as the committee reports and many advocates have done, that the Act finally establishes a "comprehensive" refugee policy for the United States.⁷³ It does not, for it does not set numerical limits nor identify the groups or people who will be offered resettlement. Instead, it establishes a procedural

framework for yearly decisions, by the president in consultation with the Congress, as to what the policy will be.

In What Detail? The allocation structure created by the Act works as follows. The documents sent to Congress in advance of consultations set forth the president's proposed allocation of refugee numbers. Congress, acting through senior members of the Judiciary Committees who meet in person with the president's representatives, conveys its views on allocation, as well as on total admission levels. Following consultations, the formal Presidential Determination then specifies not only the number of refugee admissions for the coming fiscal year, but also the allocation of numbers among the selected refugee groups. Any change in the stated allocation will require a new consultation, including a new submission of the extensive documentation mandated by section 207(e).

Neither the statute nor the legislative history dictates the level of detail required in the specification of refugee groups who are to receive allocations. To date, those allocations have been remarkably general, broken down essentially by continent. The latest Presidential Determination allocates 168,000 admissions to Indochinese refugees, 33,000 to Soviet refugees, and then far smaller amounts to other groups identified only as follows: "Eastern Europe, Near East, Latin America, Africa."⁷⁴ At various points the more detailed consultation document suggests priorities to be applied within each such category. For example, with respect to non-Cuban Latin American refugees, first priority goes to political prisoners and their families, second to refugees under the protection of the UN High Commissioner for Refugees (UNHCR), and third to family reunification cases. Nothing states, however, that others in Latin America meeting the refugee definition are not of "special humanitarian concern;" ostensibly, they simply assume a place farther back in line. Moreover, these suggested priorities are not binding in the same manner as the breakdown incorporated in the Presidential Determination. These priorities can be altered by action of the executive branch alone, since the requirement in section 207 for formal advance consultation with Congress governs only amendment of the allocations shown in the Determination.

The current, broadly general approach to allocation certainly maximizes the executive branch's flexibility to respond to changing needs within the designated regions. Moreover, by setting up a system where virtually no refugee is formally excluded from "special humanitarian concern," the executive branch has been able to finesse the political complaints almost certain to be heard from the partisans of any excluded groups. It has clearly said "yes" in a major way to U.S. resettlement of certain groups, but it has not mustered the fortitude to say an unequivocal "no" to others. This luxury, however, is unlikely to last, for several reasons.

First, Congress has in the past gone to great lengths in reviewing precise

breakdowns of parole authorizations—demanding, for example, resettlement from Southeast Asia of a higher percentage of Khmer refugees as compared to Vietnamese.⁷⁵ The legislative history of the Act suggests that Congress subjected allocations to the Act's formal consultation requirements (rejecting the information-only approach of the Administration's proposed bill) precisely because it expected to retain a major voice in the detailed decision.⁷⁶ If Congress begins to perceive the current generality of Presidential Determinations as a threat to its role, it may well insist on more precise specification as a means of restoring its authority.

Second, serious administrative problems are cropping up in the implementation of the current allocations. For example, although only 4,500 refugee admission numbers have been allocated to that area known as the Near East, any person in the area who meets the refugee definition theoretically qualifies for one of those 4,500 numbers, subject only to waiting in line. United States consular officers in Pakistan, therefore, have been swamped with applications from the Afghan refugees in that country.⁷⁷ Although the consultation document states a vague preference for persons with family ties or other relations to the United States, nothing in that priority system gives the officer a basis for refusing to consider any particular application, even if the refugee alleges no U.S. ties and therefore has no realistic chance of claiming one of the 4,500 spaces. The officer's only apparent task is to determine whether the individual indeed meets the UN refugee definition and then to place the file in the appropriate priority category. An intolerable backlog is likely, which observers may blame on the Act rather than on the strikingly broad allocation categories chosen to implement it. The Refugee Act, in any event, affords a straightforward remedy: more detailed allocations employing criteria that permit early rejection of defined classes of applications.

The third reason for more precise delineation of allocation categories may be the most important. The current practice may complicate the process of working out local solutions to refugee problems. International diplomacy has sometimes succeeded in securing arrangements for voluntary repatriation. For example, over 120,000 Zairians repatriated from Angola to Zaire and nearly 200,000 Arakanese Moslems returned from Bangladesh to Burma in 1978 and 1979.⁷⁸ In neither case was U.S. resettlement even a remote prospect. Today that possibility is dangled before all the refugees in those areas. The surge of applications by Afghans certainly suggests that such U.S. bait—however illusory because of limited admission slots—may well change the political equation and make voluntary repatriation harder to arrange, or perhaps stiffen the resistance of first-asylum countries to long-term resettlement in place. Narrower allocations, including, where appropriate, flat denials of admission allocations to some groups, may be necessary to avoid such a result. Resettlement of refugees

to distant lands is rarely a good solution, and it is widely viewed only as a last resort. The United States has no stake in eroding that perception by profligate, but illusory, offers of U.S. resettlement to the refugee populations of entire continents.

Asylum

The Accomplishments

The Carter Administration's proposed legislation would have made only technical changes in the provisions of the INA relating to asylum. Formerly, the one section directly applicable afforded the attorney general discretion to withhold deportation if the alien would be subject to persecution.⁷⁹ The Administration proposal extended that discretion to apply in exclusion as well as deportation cases, and altered the phrasing, but not the substance, of the standard the claimant must meet.⁸⁰ Regulations promulgated under the attorney general's general authority over immigration, however, had made asylum available in exclusion cases for several years, so the change was of minor significance.⁸¹

In a March 1979 letter to the secretary of state commenting on the draft bill, the U.S. Office of the UNHCR expressed support for most of the refugee provisions, but discreetly suggested that more should be done with regard to asylum. Noting that the United States is a party to the Protocol relating to the Status of Refugees (and hence derivatively bound by the operative provisions of the Convention relating to the Status of Refugees),⁸² the UNHCR urged that these commitments be reflected in mandatory, rather than discretionary, provisions of U.S. law. Some private refugee and human rights organizations picked up on the theme.⁸³ Both houses of Congress were receptive, and with Administration cooperation, more detailed provisions were drafted and included in the final version.

The statute now expressly forbids returning an individual, in any form of proceeding, to any country where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion—virtually verbatim the *nonrefoulement* obligation of Article 33 of the Convention. Exceptions, designed to track the sometimes vague language of the exceptions to the Convention, remove from the protection of the statute spies, dangerous criminals, persons who have themselves engaged in persecution, and certain others.⁸⁴

The Refugee Act made one other major beneficial change respecting asylum. Under the old practice, no immigration status was clearly available for successful asylum applicants, and the word "asylum" appeared nowhere in the INA. Depending on when the applicant was apprehended by INS or at what stage of the proceedings the asylum claim proved successful, the applicant might have been granted parole, extended voluntary

departure, or stay of deportation.⁸⁵ Since these administrative categories were designed for other uses, the documentation received by the successful asylum applicant often did more to obscure than to reveal his or her entitlement to remain in the United States indefinitely.

The Refugee Act remedied this situation by adding a new section 208 to the INA.⁸⁶ It not only mentions asylum explicitly but in essence creates a new, unique immigration status. A person granted this "asylum" status should qualify for federal assistance of the same type available to those who enter as "refugees." Obtaining asylum status also begins a process that can lead eventually to lawful permanent resident status. The provisions governing adjustment of status, however, differ significantly from those that apply to refugees. An asylee, for example, must show that he or she still meets the refugee definition at the time of adjustment; he or she is ineligible if there has been a change of conditions in the home country dissipating the threat of persecution. On the other hand, adjustment of status is nearly automatic for persons in refugee status after physical presence in the United States for one year, regardless of developments in the home country. No numerical ceiling limits grants of permanent residence to refugees once they have been admitted, but only 5,000 asylees may adjust in any given year, and the attorney general has discretion to lower that number or to halt adjustments altogether.⁸⁷

A Minor Improvement

Title IV of the Refugee Act also nibbled at the edges of what remains a troublesome aspect of U.S. asylum processing—namely, provision for care and assistance for individuals while their asylum claims are under review. Suppose INS finds a person landing on a Florida beach, without visa or passport, after journeying from his home in a Caribbean nation. He asks immediately for asylum. What is his status? He cannot lay claim to the U.S. immigration status labeled "refugee," for he was not selected in accordance with section 207 of the INA. He would like to win "asylum" status under section 208, but that can come only after he has proved that his alleged fear of persecution is well-founded, a process that may take months or even years. In the meantime, the mere lodging of an asylum application does not erase the ostensible illegality of his presence here. He is an illegal alien.

As a result, he is subject to incarceration while U.S. officials consider his claim, but unless he seems to pose some danger, INS more likely will grant a form of short-term parole that allows him to be at large in the community pending further processing. Under INS's 1980 asylum regulations, he probably will receive authorization to work, absent a most unlikely finding by the INS district director that his asylum claim is frivolous.⁸⁸ This type of temporary parole, however, still leaves him subject to statutory provisions

passed to prevent illegal aliens from claiming various types of public assistance.⁸⁹ Until his asylum application is adjudicated favorably, he remains for these purposes an illegal entrant.

Those restrictive statutory provisions were not enacted with asylum applicants in mind, but the drafters of Title IV of the Refugee Act worried that any change to allow full-scale assistance to all applicants might simply induce floods of dubious asylum applications. Plainly that worry would abate if final rulings rejecting meritless asylum claims could be expected promptly. But the drafters knew that under existing law tenacious litigants could block final orders of deportation for years, and they saw nothing to guarantee against similar delays in the future. Title IV therefore takes only a small step. It authorizes federal reimbursement to state and local public agencies for expenditures made in providing certain social services to a limited, finite group of asylum applicants, those who had applied for asylum before November 1, 1979, and who were not subject to a final deportation or exclusion order at the time of the expenditure. In practice, this measure principally relieved Florida, which had carried the burden of assistance to several thousand Haitians.

Obviously this limited step is only a stopgap. New applicants for asylum will continue to arrive, and a certain percentage doubtless will require assistance from some source while awaiting adjudication. Their presence clearly constitutes a federal responsibility, for states neither patrol the coastal waters nor adjudicate asylum claims. Significant further movement toward full assistance to applicants is unlikely, however, until the United States has in place a system that assures prompt finality in asylum adjudications. Such a system would reduce the assistance problem to a manageable scale, for assistance would then be extended, in most cases, for only a few months until final adjudication. If the application for asylum were granted, the applicant would graduate to eligibility for all programs available to asylees. If not granted, prompt expulsion would ensue. Any incentive to file a questionable application in order to claim benefits would disappear. Solving the assistance problem thus hinges on solving the adjudication problem, a matter treated below.

Relation to Refugee Determinations in Overseas Programs

Two other lingering problems overshadow the accomplishments sketched above. First, the Refugee Act expressly links the grant of asylum to the applicant's satisfying Part A of the statute's refugee definition.⁹⁰ There is nothing surprising in this linkage, since Part A essentially restates the Convention definition, which by treaty already governed asylum determinations.⁹¹ A problem arises, however, because this is exactly the definition that sets the threshold qualifications for the U.S. overseas refugee pro-

grams.⁹² Critics have charged vociferously that the *de facto* standard applied overseas is far more relaxed than that applied to asylum applicants.⁹³ Vietnamese boat people, they claim, benefit from a presumption that all who risked their lives at sea faced persecution at home and therefore meet the refugee definition. Yet Haitians, who also crossed the seas in flimsy boats but happened to land directly in the United States, enjoy no similar presumption. To claim asylum, they must show more than the simple fact of flight or the existence of human rights abuses in Haiti. They must provide evidence that they themselves are likely to be singled out for persecution on return, and their stories will be minutely scrutinized.

These critics are right. There is, *de facto*, a difference in the application of the "well-founded fear of persecution" standard.⁹⁴ Administration pronouncements often try to dodge the issue by pointing to the formal (but routine) INS finding that the UN refugee definition is met by each beneficiary of overseas programs. As the provisions are actually administered, however, the UN definition poses a significantly higher hurdle for asylum applicants. Overseas refugee staffs devote very little attention to the question of likely persecution;⁹⁵ INS and State Department officials involved in passing on asylum claims examine that issue in great detail.⁹⁶

The interesting question, however, is what conclusions to draw from this revelation of a dual standard. In quest of consistency, one might relax the scrutiny of asylum claims, thereby reducing the showing of likely persecution required of an applicant. A demonstration that the home government often abuses human rights, for example, might be sufficient without any demonstration that the individual is a likely target. But the practical consequences of such a change in asylum scrutiny could easily be enormous.

Asylum constitutes a wild card in the immigration deck. No other provision of the INA opens such a broad potential prospect of U.S. residency to aliens without the inconvenience of prescreening or selection. An alien may enter in flagrant disregard of U.S. immigration laws, but if he meets the asylum test, he is entitled to stay in the United States indefinitely and to advance toward permanent residence here. By the very nature of the UN Protocol commitment, the United States is not entitled to apply other criteria in deciding whether to extend this protection—criteria such as family ties, other U.S. connections, or employment skills, routinely applied to other intending immigrants. If the alien proves a well-founded fear of persecution, then, by law, he or she cannot be returned to the home country.

This system need not be alarming, if wisely administered. Asylum became an immigration law loophole for good reasons. Returning people to situations where they are almost sure to face persecution, no matter how they reached U.S. shores, would flatly contradict American tradition.⁹⁷ But

if it becomes too easy to establish entitlement to asylum, if the United States does not stringently require the applicant to show solid reasons why he or she is likely to be singled out for persecution on return, then great numbers of illegal aliens would probably be happy to surface and claim the benefits of asylum. The United States is also accessible to thousands more in the Caribbean, Central America, and, conceivably, in South America, who would leave countries with poor enough human rights records to make any claim to asylum at least initially plausible.

Because the "well-founded fear of persecution" standard is the only criterion the Protocol permits parties to apply (assuming that the applicant is neither a spy nor a criminal), there are strong incentives to administer that standard with scrupulous care and to insist on more than a showing of general abuses by the home government. The UNHCR handbook on determination of refugee status generally indicates such a circumscribed and individualized standard,⁹⁸ and American judicial decisions support that approach.⁹⁹ A relaxation of asylum scrutiny is thus unlikely.

The second option for bringing consistency to U.S. application of the UN refugee definition is to tighten scrutiny overseas. In fact, large populations in temporary asylum areas probably do contain many who could not prove entitlement if subjected to asylum-type scrutiny. Particularly as it becomes known that the United States and other attractive countries are resettling large numbers from the first-asylum camps, migrants are surely drawn there for reasons other than fear of persecution.¹⁰⁰

Any tightening in overseas scrutiny, however, would require a much greater commitment of staff and resources. As asylum processing demonstrates, establishing with reasonable confidence that an applicant fears persecution and that the fear is well-founded requires careful interviewing, steps to verify the events claimed as the basis of the fear, and ultimately a difficult assessment of the applicant's credibility. American field staff is already stretched thin in applying the other, more accessible, screening criteria currently employed.¹⁰¹ Devoting additional resources to a more finely-tuned application of the refugee definition is not worthwhile, for a simple reason. Finding a Vietnamese national in Malaysia or an Eastern European in Frankfurt to be a refugee within the UN definition furnishes only the first step in a process that may or may not lead to resettlement in the United States. Physical distance virtually assures that that person will not come to the United States unless selected for the resettlement program, and the Refugee Act's allocation provisions clearly authorize the use of other screening criteria. The practical imperative for stringent application of the refugee definition is therefore minor. Screening can be done, and in its most important respects will continue to be done, on the basis of other criteria.

The availability of other screening criteria overseas, coupled with the

inevitable difficulty and expense entailed in scrupulous application of the refugee definition in any context, amply justifies the *de facto* difference in application of the "refugee" definition. And justified or not, the divergence is quite likely to continue.

As long as the statute, however, formally applies the same definitional test to asylum and refugee determinations, this inconsistency will remain a powerful fulcrum for complaints about denials of asylum. The only adequate remedy for the problem would be an amendment to the Act to separate the two standards, recognizing forthrightly the different imperatives that govern review of the respective applicants' compliance with the refugee definition.¹⁰²

Adequacy of Current Procedures

A second fundamental problem with current U.S. asylum policy is, in the long run, more important. What procedures should this country use to make the difficult determination whether an applicant qualifies for asylum? On this critical question the UN Convention and Protocol give remarkably little guidance.

The procedures for making that determination are now established by regulation, and the regulations have changed several times over recent years.¹⁰³ The current procedure calls for a *mélange* of decisions—either binding or advisory—by INS district directors, immigration judges, and the State Department.¹⁰⁴ In section 208 of the INA, added by the Refugee Act, Congress provided a new statutory basis for these procedures and, via directives contained in a committee report, called for minor changes that would reinstate a larger role for the district directors.¹⁰⁵ At no time during consideration of the Refugee Act, however, did the executive or the legislative branch take a measured look at the overall system for decision making in asylum cases. And in fairness, the system's ailments were not fully apparent until after the Act's passage, when drastically increased arrivals of Cubans and Haitians coincided with major court decisions, rendered in long-pending litigation involving Haitians, that presaged lengthy new delays.¹⁰⁶

A comprehensive reexamination is needed because the current system has largely broken down. Litigation can too easily delay asylum cases and interrupt processing at too many different stages.¹⁰⁷ Final orders are hard to achieve. Moreover, even when final decisions are reached, the current system is not widely enough regarded as reliable to ensure that the political leaders will be willing to deport unsuccessful claimants. This hesitation reflects a deep-seated national ambivalence about the proper treatment of illegal entrants who come from countries such as Haiti and Cuba, where life is demonstrably unfree, but who have not proven that they are likely to be targeted for persecution if returned. Much of the disorder in the U.S.

response to the 1980 Cuban influx may be traced to that ambivalence—a feeling that the recently concluded deliberations on the Refugee Act had done little to dispel, in view of the scant attention devoted to asylum questions.¹⁰⁸

This is not the occasion to canvass alternative procedures for adjudicating asylum claims.¹⁰⁹ Mention should be made, however, of the imposing difficulties a nation faces in fashioning a process that works expeditiously but fairly, for the asylum determination rests on uniquely elusive grounds. It will usually turn on facts which are strikingly inaccessible by comparison with other matters routinely adjudicated by U.S. courts and agencies. Applicants typically base their claims on events in a distant land, about which the U.S. Government may otherwise have no information—matters such as their own past political activities, or abuses visited on them or their families and friends. Bona fide applicants are unlikely to have left their homelands with corroborating documentation in hand or with supporting witnesses.¹¹⁰ On the other hand, fraudulent applicants can probably count on the government's inability to produce evidence disproving their stories.¹¹¹ Asylum determinations therefore often revolve critically around a determination of the applicant's credibility. Moreover, even if past events can be established with some certainty, the crucial determination does not stem directly from these factual findings of the classical sort. Instead, one must venture into the realm of prediction to decide whether a claimed fear of future persecution is well-founded. Reasonable people can disagree in good faith about whether a given showing of the prevalence of persecution in the home country makes a particular applicant's fear well-founded. Applications present a continuum, running from clearly legitimate claims, through borderline cases from countries where all residents are exposed to some risk of persecution, to fanciful fears and bogus applications. The process, however, demands a flat yes or no answer in each case. Because of the large gray area, political considerations—the U.S. Government's hostility or friendship for the allegedly persecuting regime—might easily affect the results. And even where the government is committed to avoiding that practice, it will be hard-pressed to prove that political considerations did not intrude.

Whatever the decision-making structure ultimately chosen, the time to undertake a thorough review of alternate systems and to begin building a consensus about asylum policy is now. The backlog of unresolved asylum applications is expanding, owing both to a surge in new applications and to litigation that prevents final disposition of old ones.¹¹² The backlog tempts more people to come to the United States, as they learn that even if apprehended, illegal entrants who apply for asylum seemingly never suffer deportation. American citizens perceive the same phenomenon and find it less than pleasing. The government's inability to reach final, en-

forceable decisions on asylum applications fuels a spreading sense that immigration policy is out of control.¹¹³ Ultimately that perception threatens a backlash against the entire asylum commitment, if people give up in frustration on mending the asylum loophole and turn instead to solutions that close the loophole altogether.¹¹⁴ And any such reaction threatens to bring with it sharp reductions in other U.S. resettlement programs as well.

For this reason, not only those who oppose all immigration or who are anti-Haitian or anti-Cuban or hostile to any other group of potential asylum applicants have an interest in repairing the asylum loophole to restore its originally intended size. Those who favor continuing a generous program of refugee immigration may well have the greatest stake in crafting decision-making procedures that work and are perceived to work, procedures that say yes or no to asylum applicants promptly and then make that decision stick.¹¹⁵ The taming of the asylum process remains the major unfinished business left by the Refugee Act of 1980.

NOTES

¹ See, e.g., Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. As of June 1, 1980, 83 nations are parties to either the Convention or Protocol or both. See generally A. GRAHL-MADSEN, TERRITORIAL ASYLUM 40, 61-68 (1980).

² Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (to be codified in scattered sections of 8, 22 U.S.C.).

³ See, e.g., Mailman, *Refugee Act of 1980 Becoming Obsolete?* 184 N.Y.L.J. at 1, col. 1 (July 2, 1980).

⁴ See CONGRESSIONAL RESEARCH SERVICE, 96TH CONG., 2D SESS., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 13-14 (Comm. Print, Senate Comm. on the Judiciary, 1980) [hereinafter cited as PROGRAMS AND POLICIES].

⁵ *U.S. Refugee Programs: Hearing Before the Sen. Comm. on the Judiciary*, 96th Cong., 2d Sess. 11 (1980) (statement of Sec'y of State Cyrus Vance); *id.* at 135, 192 (statistics on resettlement of Soviet refugees).

⁶ A REPORT OF THE CUBAN-HAITIAN TASK FORCE, A-7 (R. Bowen ed. November 1, 1980).

⁷ See PROGRAMS AND POLICIES, *supra* note 4, at 15; *U.S. Refugee Programs*, *supra* note 5, at 84-5.

⁸ See IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, 1978 ANNUAL REPORT OF THE COMMISSIONER OF IMMIGRATION AND NATURALIZATION 45 (1978).

⁹ 8 U.S.C. § 1153(a)(7) (1976) (repealed by the Refugee Act of 1980).

¹⁰ Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911.

¹¹ As originally enacted, § 203(a)(7) made 10,200 admissions available annually to refugees (6 percent of the 170,000 Eastern Hemisphere admissions established by the 1965 INA amendments). By the end of 1978, Congress had amended the INA to provide a single worldwide preference system, and refugees then claimed 17,400 admissions annually (6 percent of the worldwide ceiling of 290,000). See PROGRAMS AND POLICIES, *supra* note 4, at 11.

Congress made refugee entry conditional because of concern that overseas screening of refugees might be inadequate. All conditional entrants had to be reexamined after two years in the United States for a second review of admissibility. 8 U.S.C. § 1153(g)-(h) (1976)

(repealed by the Refugee Act of 1980). Only upon clearing that review did they qualify for permanent resident alien status. Those who failed the review were processed for removal not under the deportation provisions of the INA, but under the relatively less cumbersome exclusion provisions. Technically, conditional entrants were not "admitted" to the United States. Under a legal fiction, they, like parolees, were considered as though they were still at the border applying for admission; thus, they were expelled via exclusion, not deportation proceedings. See 1 C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 2.54 (rev. ed. 1980); *id.* at vol. 1A, § 5.1. In fact, only a tiny percentage of conditional entrants ever failed to qualify in the delayed review procedure, but the "conditional" label sometimes impaired employment prospects or prevented state licensing for certain occupations. See S. REP. NO. 96-256, 96th Cong., 1st Sess. 8 (1979); H. R. REP. NO. 96-781, 96th Cong., 2d Sess. 21 (1980). For a comprehensive and helpful summary of the law then applicable, see Evans, *The Political Refugee in United States Law and Practice*, 3 INT'L LAW. 204 (1968).

¹² 8 U.S.C. § 1182(d)(5) (1976) (amended by § 203(f) of the Refugee Act of 1980 to limit parolage of groups of refugees).

¹³ See 1 C. GORDON & H. ROSENFELD, *supra* note 11, at § 2.54; *Ma v. Barber*, 357 U.S. 185 (1958).

¹⁴ See S. REP. NO. 748, 89th Cong., 1st Sess. 17 (1965); H. R. REP. NO. 745, 89th Cong., 1st Sess. 15-16 (1965); 111 CONG. REC. 21,771 (1965) (remarks of Rep. Richard Poff). Congressman Emanuel Celler, Chairman of the House Judiciary Committee, left no doubt that the 1965 ceiling on conditional entries was meant to apply as well to Cuban refugees. 111 CONG. REC. 21,806-07 (1965) (remarks of Rep. Celler). It is far from clear, however, that the original intention of the parole provision was as limited as the 1965 reports state. See H. R. REP. NO. 1661, 85th Cong., 2d Sess. 30 (1958); *Admission of Refugees on Parole: Hearings on H. J. Res. 397 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 86th Cong., 1st & 2d Sess. 12-13, 45 (1959-60) (remarks of Reps. Francis Walter and Michael Feighan); *Application of Paktorovics*, 156 F. Supp. 813, 816 (S.D.N.Y. 1957) (1956 parole of Hungarian refugees was entirely proper under § 212(d)(5) of INA), *rev'd on other grounds, sub nom. U.S. ex rel. Paktorovics v. Murff*, 260 F.2d 610 (2d Cir. 1958).

¹⁵ See 1 WEEKLY COMP. OF PRES. DOC. 364-67 (Oct. 3, 1965); *id.* at 470-74 (Nov. 15, 1965).

¹⁶ See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965); *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965).

¹⁷ See *Immigration: Hearings on H.R. 9112, H.R. 15092, H.R. 17370 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 58, 227-28 (1970).

¹⁸ See, e.g., *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and International Law, House Comm. on the Judiciary*, 95th Cong., 1st Sess. 75, 89-90 (1977); *id.*, Part II, 95th Cong., 1st & 2d Sess. 13-15, 240-41 (1977-78). See also H.R. REP. NO. 93-461, 93d Cong., 1st Sess. 11-12, 34 (1973).

¹⁹ See 125 CONG. REC. S12,007 (daily ed. Sept. 6, 1979) (remarks of Sen. Edward Kennedy); S. REP. NO. 96-256, 96th Cong., 1st Sess. 2-3 (1979) (quoting letter from Sen. Kennedy to Sec'y of State Cyrus Vance).

²⁰ Pub. L. No. 87-510, 76 Stat. 121 (codified at 22 U.S.C. §§ 2601-05 (1976)) (amended by the Refugee Act of 1980).

²¹ 22 U.S.C. § 2601(b)(3)-(6) (1976) (repealed by the Refugee Act of 1980).

²² H. R. REP. NO. 95-538, 95th Cong., 1st Sess. 20 (1977).

²³ 22 U.S.C. §§ 2601(b)(1), (2) (1976) (amended by the Refugee Act of 1980).

²⁴ *Indochina Migration and Refugee Assistance Act of 1975*, Pub. L. No. 94-23, 89 Stat. 87 (1975).

²⁵ Act of June 21, 1976, Pub. L. No. 94-313, 90 Stat. 691.

²⁶ Act of Oct. 28, 1977, Pub. L. No. 95-145, § 201, 91 Stat. 1223; Act of Oct. 30, 1978,

Pub. L. No. 95-549, § 201, 92 Stat. 2065; Act of Nov. 13, 1979, Pub. L. No. 96-110, § 3, 93 Stat. 843.

²⁷ Foreign Assistance and Related Programs Appropriations Act, 1979, Pub. L. No. 95-481, tit. III, 92 Stat. 1591 (1978).

²⁸ See, e.g., S. REP. No. 95-1194, 95th Cong., 2d Sess. 121 (1978); H.R. REP. No. 95-1754, 95th Cong., 2d Sess. 15 (1978).

²⁹ Immigration and Nationality Act, § 207(c), 8 U.S.C.A. § 1157(c) (June 1980 Supp.) [hereinafter cited as INA]. See H.R. REP. No. 96-608, 96th Cong., 1st Sess. 16 (1979).

³⁰ INA § 209(a), 8 U.S.C.A. § 1159(a) (June 1980 Supp.).

³¹ 8 U.S.C. § 1182(a) (1976).

³² INA §§ 207(c)(3), 209(c), 8 U.S.C.A. §§ 1157(c)(3), 1159(c) (June 1980 Supp.).

³³ See INA § 412(d)(2)(A), (e)(1), 8 U.S.C.A. § 1522(d)(2)(A), (e)(1) (June 1980 Supp.).

The Act also provides explicit statutory basis for the Office of the United States Coordinator for Refugee Affairs, appointed by the president, Refugee Act of 1980, § 301, 8 U.S.C.A. § 1525 (June 1980 Supp.). President Carter had established such an office by directive a year earlier.

³⁴ INA § 207(a)(1), 8 U.S.C.A. § 1157(a)(1) (June 1980 Supp.). After fiscal year 1982, the 50,000 baseline disappears and all normal-flow refugee admissions will be based on a pre-October 1 Presidential Determination. See note 41 *infra*. INA § 207(a)(2), 8 U.S.C.A. § 1157(a)(2) (June 1980 Supp.).

The bill originally passed by the House included a provision permitting a one-house legislative veto of executive decisions to increase refugee admissions. The conferees chose the Senate version, causing the House nearly to defeat the conference report. 126 CONG. REC. H1519-29 (daily ed. March 4, 1980). The version enacted thus formally leaves the ultimate decision to the president, once he or she has complied with the consultation procedures, whatever the congressional reaction. But in view of the need for funding and Congress' ultimate power to enact blocking legislation, presidents are most unlikely to approve admissions evoking widespread opposition during consultation.

Moreover, congressional consultation is not as onerous a duty as it might at first appear, since the Act actually requires only a meeting involving the president's Cabinet-level designee and members of the Judiciary Committee—a practice carefully modeled on the precedent of consultations regarding refugee paroles. See H.R. REP. No. 96-608, 96th Cong., 1st Sess. 14-16 (1979). A hearing must be held in most cases, and the committees are required to publish the substance of the consultations in the Congressional Record. INA § 207(d),(e), 8 U.S.C.A. § 1157 (d), (e) (June 1980 Supp.).

³⁵ INA § 207(b), 8 U.S.C.A. § 1157(b) (June 1980 Supp.).

³⁶ *Admission of Refugees into the United States, Part II: Hearings Before the Subcomm. on Immigration, Citizenship and International Law, House Comm. on the Judiciary, 95th Cong., 1st & 2d Sess. 216-20 (1977-78)* (Statement of INS Comm'r Leonel J. Castillo).

³⁷ H.R. 3056, 95th Cong., 1st Sess. (1977). Based on initial reactions to that proposal, Rep. Eilberg introduced a modified version a few months later. H.R. 7175, 95th Cong., 1st Sess. (1977).

³⁸ S. 2751, 95th Cong., 2d Sess. (1978).

³⁹ *Admission of Refugees, supra* note 36, at 218, 222-23.

⁴⁰ *Id.* at 217 (emphasis added). See *id.* at 242 (statement of Asst. Sec'y Patricia M. Derian).

⁴¹ The Administration bill, introduced as S. 643 and H.R. 2816, 96th Cong., 1st Sess. (1979), retained 50,000 as a baseline indefinitely. Although Administration witnesses stressed that the United States would not feel obligated to take 50,000 refugees each year, some members of Congress worried that the 50,000 would nevertheless become a floor on refugee admissions; it clearly was not going to operate as a ceiling, at least not for several years. Under Senator Walter Huddleston's leadership, the 50,000 figure was "sunsetted" to end after fiscal

year 1982, a date chosen to allow the Congress time to consider the report of the Select Commission on Immigration and Refugee Policy, due in March 1981. *See* 125 CONG. REC. S12,015-17, 12,021 (daily ed. Sept. 6, 1979); *id.* at H12,369-70 (daily ed. Dec. 20, 1979). The amendment was largely cosmetic, however, since only the *baseline* figure changes; the president retains full authority, even after FY 1982, to set the *actual* admission level as high as he or she chooses, following congressional consultation.

42 The curtailment of the parole power further reinforces the assurance; a new subparagraph forbids use of the parole power for groups of refugees. That provision was carefully crafted so that parole could still be used in individual cases based on compelling reasons relating to a particular refugee. For example, a person would not be barred, simply because he or she happened to be a refugee, from parole to undergo urgent medical treatment or to testify in a criminal prosecution. *See* INA § 212(d)(5)(B), 8 U.S.C.A. § 1182(d)(5)(B) (June 1980 Supp.). *See* H.R. REP. NO. 96-781, 96th Cong., 2d Sess. 20 (1980).

43 INA § 207(e), 8 U.S.C.A. § 1157(e) (June 1980 Supp.).

44 SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 157-60 (1981) (final report) [hereinafter cited as SELECT COMMISSION REPORT].

45 *See generally* Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the United States*, 59 FOREIGN AFF. 21 (1980).

46 SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, 96TH CONG., 2D SESS., SECOND SEMI-ANNUAL REPORT TO CONGRESS 193 (Joint Comm. Print 1980).

47 *See* 125 CONG. REC. S12,015-17, 12,021 (daily ed. Sept. 6, 1979) (remarks of Sen. Walter Huddleston); *id.* at H12,375, 12,391-95 (daily ed. Dec. 20, 1979) (Sensenbrenner amendment); H.R. REP. NO. 96-608, 96th Cong., 1st Sess. 60 (1979) (additional views of Rep. F. James Sensenbrenner).

48 *See* S. CON. RES. 94, 96th Cong., 2d Sess. (1980) (Huddleston "sense of the Congress" proposal to limit all FY 1980 admissions to 650,000). A revised and watered-down version was attached by the Senate to other legislation. Forty-three senators, however, voted to retain the tougher language urging a firm ceiling of 650,000 for FY 1980. *See* 126 CONG. REC. S7342-61 (daily ed. June 18, 1980). *See also* note 114 *infra*.

49 *See U.S. Refugee Programs: Hearing before the Sen. Comm. on the Judiciary*, 96th Cong., 2d Sess. 65 (1980) (part of Administration submission for first consultation required under Refugee Act).

50 INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (June 1980 Supp.).

51 *See* Convention relating to the Status of Refugees, *supra* note 1, art. 1(A)(2), as modified by the Protocol, *supra* note 1, art. I. The Act modifies the Convention definition in small ways, but evidently no substantive change was intended. *See* H.R. REP. NO. 96-781, 96th Cong., 2d Sess. 20 (1980) (conference report on the Refugee Act); H.R. REP. NO. 96-608, 96th Cong., 1st Sess. 9 (1979).

52 The conditional entry provision specifically authorized inclusion of persons uprooted by natural calamity, but that subparagraph had never been invoked. 8 U.S.C. § 1153(a)(7)(B) (1976) (repealed by the Refugee Act of 1980). *See* Parker, *Victims of Natural Disasters in United States Refugee Law and Policy*, this volume.

53 Convention relating to the Status of Refugees, *supra* note 1, art. 1(A)(2).

54 *See, e.g.*, Schneebaum, *Legal Rights of Refugees: Two Case Studies and Some Proposals for a Strategy*, this volume.

55 *Admission of Refugees, Part II*, *supra* note 36, at 217 (statement of Comm'r Leonel Castillo).

56 Many earlier refugee laws contained an explicit requirement that refugees apply and obtain approval for U.S. resettlement outside the United States but in countries of which they were not nationals. *E.g.*, 8 U.S.C. § 1153(a)(7)(A)(iii) (1976) (repealed by the Refugee Act of 1980); Act of July 14, 1960, Pub. L. No. 86-648, § 1, 74 Stat. 504.

57 INA § 101(a)(42)(B), 8 U.S.C.A. § 1101(a)(42)(B) (June 1980 Supp.).

58 See 125 CONG. REC. H12,369 (daily ed. Dec. 20, 1979) (remarks of Rep. Dante Fascell).

59 Presidential Determination No. 80-17 of May 1, 1980, 45 Fed. Reg. 29,785-86; Presidential Determination No. 80-28 of Sept. 30, 1980, 45 Fed. Reg. 68,365.

60 See, e.g., Amnesty International USA, Implementation of the Refugee Act 1980 (1980) (unpublished report on file with the *Michigan Yearbook of International Legal Studies*).

61 Over 300 Cubans, who were approved for the U.S. refugee program, were forced by a mob into the U.S. mission in Havana in May 1980. Efforts to arrange for their departure proved fruitless in the face of the Cuban Government's intransigence, and the last of that group gave up and left the mission grounds several months later. N.Y. Times, Aug. 9, 1980, § 1, at 4, col. 1. U.S. policy allows "temporary refuge" in U.S. diplomatic facilities but does not follow the Latin American practice of diplomatic asylum. See Pub. Notice 351, 37 Fed. Reg. 3447 (1972), modified by Pub. Notice 728, 45 Fed. Reg. 70,621 (1980). "Temporary refuge," under international practice, is not meant to constitute protection against the authorized agents of a host government in effective control, but rather against insurgents, mobs, or renegade local commanders. 2 A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 6 (1972).

62 A son of assassinated Liberian president William Tolbert hid out in the French embassy in Monrovia for several weeks after the coup. When government officials learned his whereabouts, however, they simply marched into the mission and claimed their prisoner. See N.Y. Times, June 15, 1980, § 1 at 3, col. 2.

63 See, e.g., *U.S. Refugee Programs*, supra note 49, at 6 (statement of Sec'y Cyrus Vance).

64 H.R. 3056, 95th Cong., 1st Sess. § 2(b) (1977).

65 It is possible to read the original Eilberg bill, *id.*, in such a way as to preserve the discretion of the attorney general to give priority to certain groups over others, irrespective of the date of each refugee's application. Nevertheless, the Administration response was premised on an interpretation that the bill required acceptance of refugees in chronological order.

66 *Admission of Refugees, Part II*, supra note 36, at 218 (statement of Comm'r Leonel Castillo).

67 INA § 207(d), (e), 9 U.S.C.A. § 1157(d), (e) (June 1980 Supp.).

68 INA § 207(a)(3),(b),(c)(1), 8 U.S.C.A. § 1157 (a)(3),(b),(c)(1) (June 1980 Supp.) (emphasis added).

69 H.R. REP. NO. 96-608, 96th Cong., 1st Sess. 13-14 (1979).

70 See, e.g., *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Citizenship and International Law, House Comm. on the Judiciary*, 96th Cong., 1st Sess. 173 (1979) [hereinafter cited as *House Hearings*]; *Admission of Refugees, Part II*, supra note 36, at 235-37, 258-60.

71 See 111 CONG. REC. 24,230 (1965) (remarks of Sen. Edward Kennedy); *id.* at 21,769 (remarks of Rep. John Lindsay).

72 H.R. REP. NO. 96-608, 96th Cong., 1st Sess. 13 (1979); S. REP. NO. 96-256, 96th Cong., 1st Sess. 6 (1979).

73 See, e.g., H.R. REP. NO. 96-608, supra note 72, at 1; S. REP. NO. 96-256, supra note 72, at 1.

74 Presidential Determination No. 80-28 of Sept. 30, 1980, 45 Fed. Reg. 68,365 (1980).

75 See PROGRAMS AND POLICIES, supra note 4, at 14.

76 See H.R. REP. NO. 96-608, 96th Cong., 1st Sess. 10, (1979); 125 CONG. REC. S12,007 (daily ed. Sept. 6, 1979) (remarks of Sen. Edward Kennedy); INA § 207(d) (1),(e), 8 U.S.C.A. § 1157(d)(1),(e) (June 1980 Supp.).

77 N.Y. Times, Sept. 7, 1980, § 1, at 14, col. 1.

78 *U.S. Refugee Programs*, supra note 49, at 237, 243 (Office of the United States Coordinator for Refugee Affairs, *Overview of World Refugee Situation*, March, 1980).

79 8 U.S.C. § 1253(h) (1976) (amended by Refugee Act of 1980). See Griffith, *Deportation and the Refugee*, this volume.

80 S. 643, 96th Cong., 1st Sess., § 203(e) (1979). See *In re Dunar*, 14 I.&N. Dec. 310 (1973).

81 See 39 Fed. Reg. 41,832 (1974).

82 See note 1 *supra*.

83 See, e.g., *House Hearings*, *supra* note 70, at 169, 250.

84 INA § 243(h), 8 U.S.C.A. § 1253(h) (June 1980 Supp.).

85 See 1A C. GORDON & H. ROSENFELD, *supra* note 11, at §§ 5.16a, 7.2a.

86 8 U.S.C.A. § 1158 (June 1980 Supp.).

87 INA § 209(b), 8 U.S.C.A. § 1159(b) (June 1980 Supp.). The limitation to 5,000 is not a ceiling on the number that may initially receive asylum. It limits only the number that may be shifted from asylum status to permanent resident alien status. The adjustment ceiling was carried over from Congressman Eilberg's original bill, with little discussion, but the supporting rationale is that 5,000 would be sufficient to deal with the caseload ordinarily experienced. See, e.g., 1978 ANNUAL REPORT, *supra* note 8, at 9 (1,218 grants of asylum in FY 1978). Should the United States experience a massive influx of asylum applicants, it may not wish to hurry successful applicants on to permanent residence, since asylees, unlike permanent resident aliens, are at least theoretically subject to involuntary resettlement in a willing third country and could be returned to the home country if a change of circumstances removed the threat of persecution. Special legislation could, of course, be enacted if Congress believed speedier adjustment of status for the large group to be desirable.

88 45 Fed. Reg. 37,392, 37,394 (1980) (to be codified at 8 C.F.R. § 208.4).

89 See, e.g., 42 U.S.C. § 1382c(a)(1)(B)(ii)(1976) (limiting SSI assistance to those aliens "permanently residing in the United States under color of law"); 45 C.F.R. § 233.50; 42 C.F.R. §§ 435.402, 436.402 (1980). See generally *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977), *cert. denied*, 435 U.S. 947 (1978).

The temporary parole referred to in the text should be distinguished from the special indefinite parole granted to "Cuban-Haitian entrants," the participants in the massive influx of 1980, pending legislation authorizing ultimate permanent residence. See Bureau of Public Affairs, Dep't of State, *Cuban-Haitian Arrivals in the U.S.*, Current Policy No. 193 (1980). The latter parole has been interpreted to render such entrants eligible for federally funded assistance, see OFFICE OF THE U.S. COORDINATOR FOR REFUGEE AFFAIRS, *REFUGEE RESETTLEMENT RESOURCE BOOK 291-92* (October 1, 1980), but the interpretation is limited to the specifics of that particular parole and probably does not make other asylum applicants eligible. Congress later included in the Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, 94 Stat. 1799 (1980) specific authorization for federal assistance to Cuban-Haitian entrants, without, however, any other clarification of these persons' immigration status.

90 INA § 208(a), 8 U.S.C.A. § 158(a) (June 1980 Supp.).

91 See *In re Dunar*, 14 I. & N. Dec. 310, 320 (1973).

92 INA § 207(c)(1), 8 U.S.C.A. § 1157(c)(1) (June 1980 Supp.).

93 See generally *Caribbean Refugee Crisis: Cubans and Haitians, Hearing Before the Sen. Comm. on the Judiciary*, 96th Cong., 2d Sess. 7-46 (1980); Grahl-Madsen, *Refugees and Refugee Law in a World in Transition*, and Melander, *Nordic Refugee Law and Policy*, this volume.

94 See SELECT COMMISSION REPORT, *supra* note 44, at 163, 169-70.

95 Compare *U.S. Refugee Programs, 1981: Hearing Before the Sen. Comm. on the Judiciary*, 96th Cong., 2d Sess. 238-57 (1980) (reprinting GAO study of Indochinese refugee program processing, which reflects virtually no attention to question of likely persecution; time is devoted to establishing other program criteria such as family ties or former U.S. employment) with Suhrke, *A New Look at America's Refugee Policy*, 10 INDOCHINA ISSUES 1 (Sept. 1980) (strong indications that many Indochinese "refugees" leave for reasons other than fear of persecution). As this article goes to press, the INS practice may be changing. INS officers have held up 5000

to 6000 Indochinese cases because of questions about whether they meet the refugee definition. The State Department is contesting the change. *N.Y. Times*, May 17, 1981, § 1, at 16, col. 1.

⁹⁶ See *Haitian Migration to the U.S.*, 80 DEP'T STATE BULL. 75, 76-79 (Aug. 1980). (statement of Deputy Ass't Sec'y Stephen E. Palmer, Jr.).

⁹⁷ See SELECT COMMISSION REPORT, *supra* note 44, at 1-2, 6, 153.

⁹⁸ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 13, ¶ 45 (1979).

⁹⁹ See, e.g., *Fleurinor v. INS*, 585 F.2d 129, 133 (5th Cir. 1978); *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977).

¹⁰⁰ See, e.g., *Suhrke*, *supra* note 95.

¹⁰¹ See *U.S. Refugee Programs, 1981*, *supra* note 95, at 246-47.

¹⁰² An amendment could achieve this objective without divorcing overseas programs entirely from the persecution standard. Following an approach suggested by existing international practice in mass influx situations, see UNHCR HANDBOOK, *supra* note 98, at 13, ¶ 44, the statute could authorize the president, at his or her discretion, to provide that all members of specified groups are presumptively to be considered refugees within the UN definition, based on a determination that (1) detailed individual determinations are impractical and (2) there is good reason to believe that many members of the group would be subject to persecution if returned to the home country.

¹⁰³ 39 Fed. Reg. 41,832 (1974); 40 Fed. Reg. 3407-08 (1975); 44 Fed. Reg. 21,258-59 (1979); 45 Fed. Reg. 37,392 (1980).

¹⁰⁴ 45 Fed. Reg. 37,392, 37,394-95 (1980) (interim regulations) (to be codified at 8 C.F.R. Part 208). See also 8 C.F.R. §§ 108, 236.3, 242.17(c) (1980).

¹⁰⁵ See S. REP. NO. 96-256, 96th Cong., 1st Sess. 9 (1979).

¹⁰⁶ *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 443 (S.D. Fla. 1980) (currently on appeal to the 5th Circuit), blocked expulsion of a large class of Haitians subject to deportation. Orders in other litigation, finally vacated by the 5th Circuit, *Sannon v. United States*, 631 F.2d 1247 (5th Cir. 1980), for several years effectively prevented expulsion of all Haitians in Florida who were subject to exclusion. The tangled history of the exclusion litigation and the administrative response is recounted in *Sannon*. In the meantime, the executive branch has proposed what amounts to an amnesty for Haitians in INS proceedings as of June 19, 1980, a date later extended to October 10, 1980. 57 INTERPRETER RELEASES 498-99 (Oct. 23, 1980).

¹⁰⁷ The Carter Administration's proposed legislation to deal with the 1980 influx of Cubans and Haitians contained thoughtful provisions to alleviate this crucial problem by curtailing collateral review of asylum determinations and by speeding direct review. S. 3013, 96th Cong., 2d Sess. §§ 6, 7 (1980).

¹⁰⁸ Since there was little political support for returning Cubans (other than criminals) to Cuba, whether or not they technically qualified for asylum, few regarded the asylum process, clearly applicable under the Refugee Act, as the major avenue for resolving the issues posed by the influx. Instead numerous other proposals for special solutions were put forward. Senator Kennedy maintained that the Administration should use § 207 of the INA, added by the Refugee Act, to deal with the situation by declaring the influx an unforeseen emergency refugee situation and making refugee numbers available by Presidential Determination following consultation. See 126 CONG. REC. S10,825-29 (daily ed. August 5, 1980). This approach may not be technically foreclosed by the wording of the Act, but it is clear that the refugee and asylum provisions were considered throughout the deliberations on the bill as separate provisions applicable to distinct situations—the refugee provisions (§ 207) where overseas screening and selection are available, and the more exacting asylum review (§ 208) for persons getting to the United States on their own. See generally *The Refugee Act of 1979: Hearings*

on H.R. 2816 Before the Subcomm. on Int'l Operations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 66-72 (1979).

109 For a useful summary for the procedures used by twenty eight countries see *Note on Procedures for the Determination of Refugee Status under International Instruments, Executive Comm. of the High Commissioner's Programme*, U.N. Doc. A/AC. 96/INF. 152/Rev. 1 (1979); see also Appendix III, *Review of Foreign Laws*, this volume.

110 See, e.g., *Matter of Sihasale*, 11 I. & N. Dec. 531, 532-33 (1966).

111 The State Department's role in advising on individual asylum applications may well be limited by due process considerations. See *Zamora v. INS*, 534 F.2d 1055 (2d Cir. 1976).

112 See SELECT COMMISSION REPORT, *supra* note 44, at 165, 175-76.

113 *Id.* at 4-5.

114 Senator Huddleston, joined by seven cosponsors, introduced legislation in March 1981 that would narrow the refugee definition substantially and restrict the availability of asylum to those for whom a threat of persecution existed *before* departure from the home country. The bill also calls for plans to establish "reception centers" outside the United States to which asylum applicants would be transported. S. 776, 97th Cong., 1st Sess. § 5 (1981).

115 See SELECT COMMISSION REPORT, *supra* note 44, at 165.