BEHIND THE PAPER CURTAIN: ASYLUM POLICY VERSUS ASYLUM PRACTICE

I
INTRODUCTION

> President Nixon has reemphasized the U.S. commitment to the provision of asylum for refugees and directed appropriate departments and agencies of the U.S. Government under the coordination of the Department of State, to take steps to bring to every echelon of the U.S. Government which could possibly be involved with persons seeking asylum a sense of the depth and urgency of our commitment.[1]

On November 23, 1970, as the American Coast Guard cutter *Vigilant* moored alongside a Soviet fishing trawler in American waters off Massachusetts, Simas Kudirka, a Lithuanian seaman, leapt from the Russian vessel to the deck of the *Vigilant* and requested political asylum in the United States. Uncertain of proper procedure, the captain of the cutter telephoned Boston headquarters for instructions. Admiral William Ellis replied, "Return the defector," explaining that his decision was "in the interest of not fouling up any of our arrangements as far as the fishing situation is concerned."[2] The Admiral's command was immediately carried out. Five Russians were allowed to board the American vessel, where they beat Kudirka into submission and then returned him to the Soviet trawler in the *Vigilant*'s motor launch, piloted by an American officer.

Not surprisingly, the image of the United States as a haven for the oppressed—and particularly for those fleeing communism—was sullied by the Kudirka affair. The public was outraged,[3] since the Russians were known to impose Draconian penalties against defectors. There was speculation that our callous treatment of Kudirka might be part of the price of détente and that our government was treating refugees as pawns in the game of international politics.[4]

The Administration moved quickly to allay such suspicions, reassuring Congress and the American public that the Kudirka affair was an "aberration," an administrative "snafu" which would never happen again. Deputy Under Secretary of State for Administration William Macomber stressed that "the his-

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1. 37 Fed. Reg. 3447 (1972).
2. *Attempted Defection by Lithuanian Seaman, Simas Kudirka: Hearings Before the Subcomm. on State Dep't Organization and Foreign Operations of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. 216 (1970) [hereinafter cited as *Kudirka Hearings*].
3. N.Y. Times, Dec. 2, 1970, at 10, col. 1; *see Kudirka Hearings*, *supra* note 2, at 1, 27.
4. N.Y. Times, Dec. 2, 1970, at 10, col. 1.

toric role America has played as a refuge for the oppressed, from the very beginning of our tradition, is still our role."[5] Other Administration officials insisted that the United States did not have, nor had it ever had, a policy of returning refugees to countries where they would be persecuted and that the United States policy on political asylum was one of concern for all victims of political persecution, regardless of American relations with the regimes from which the refugees were fleeing. Human lives, insisted the administration, were not being sacrificed for détente or any other facet of our foreign policy.[6] According to State Department officials, the criteria which successful applicants for asylum must meet are applied evenhandedly to those who seek asylum from any country on the globe: they must be fleeing from a repressive regime and demonstrate a "well-founded fear" that political, religious, or racial persecution would face them upon return.[7]

The State Department's explanation of the Kudirka incident in particular and of American asylum policy in general apparently satisfied most critics, and the subject was soon forgotten.[8] But although the official explanation was accurate enough in some respects, it was quite misleading in others. Spokesmen for the State Department presented a strong case that government policy on granting asylum is uniformly just and humane, but an examination of U.S. asylum practice in cases other than the Kudirka affair raises strong doubts.

The Kudirka incident was indeed an "aberration," not because the seaman was callously returned to a totalitarian regime, but because he was returned to a *communist* regime. In an interview, Louis Wiesner, director of the State Department's Office of Refugee and Migration Affairs (ORM), noted with accuracy: "Historically, we have granted asylum or have failed to return people to any communist regime except Yugoslavia."[9] Humanitarian treatment of refugees from communist countries has continued to the present, and asylum requests are rarely denied. A State Department spokesman recently confirmed that the pattern of grants and denials has continued to be present.[10] Refugees from Iran, Chile, Haiti, the Philippines, and other repressive noncommunist governments are not welcomed with open arms in this country. Indeed, gaining asylum in the United States from dictatorships friendly to the United States is much more difficult than gaining asylum from communist countries. This pat-

5. *Kudirka Hearings*, *supra* note 2, at 17.

6. *See id.* at 126, 127, 142.

7. Interview with Christian Pappas, State Dep't Asylum Officer, in Washington, D.C. (Nov. 5, 1974).

8. There is a happy postscript to the Kudirka affair. On July 18, 1974, the State Department ruled Kudirka an American citizen on the grounds that his mother had been born in the United States. The Soviets released Kudirka shortly thereafter, and he came to the United States in November, 1974.

9. Interview with Louis Wiesner, Director of the State Dep't Office of Refugee and Migration Affairs, in Washington, D.C. (Nov. 29, 1974).

10. Letter from Shepard C. Loman, Director of Programs and Asylum Division, Office of the Department of State, to the author (postmarked March 15, 1977). Immigration lawyers who specialize in asylum have stated that, to their knowledge, there has been no change in the pattern of asylum grants and denials. Telephone interviews with attorneys David Carliner and Ira Gollobin (Dec. 15, 1977).

tern of discrimination demands close scrutiny of the "depth and urgency of our commitment" to humanitarian asylum practice. President Carter's avowed concern for human rights and his appointment of a more liberal Immigration Commissioner, Leonel Castillo, offer some hope for the development of a more evenhanded asylum program than is revealed by our treatment of refugees to date.

II
CHILEANS, IRANIANS, AND HAITIANS

A. Chilean Refugees

The response of the United States government to victims of the Chilean junta provides a striking example of the "depth and urgency of our commitment" to refugees from a noncommunist government in our own hemisphere. Compelling humanitarian arguments for granting asylum to a group of exiled Chileans and "detainees" still in Chile were answered by this country with indifference, timidity, and delay.

Although the Immigration and Nationality Act of 1965[11] makes no specific provision for admitting refugees from the Western Hemisphere, the Act does empower the Attorney General to "parole" refugees into the United States for "emergent reasons" or if the admission is deemed in the interest of the United States.[12] The parole provision has been employed to bring in refugees following various political upheavals over the past twenty years: Hungarians after the abortive revolt in 1956; Cubans after the Castro revolution; Czechoslovakians after the Soviet invasion of 1968; British Asians expelled from Uganda in 1972; 130,000 South Vietnamese in 1975. In each case, the United States made an immediate and vigorous response to the emergency through the parole authority.

In September, 1973, Chile suffered its own political upheaval, but in this case, the American response was neither immediate nor vigorous. Under the junta, which overthrew the government of Marxist President Salvador Allende Gossens in a bloody coup on September 11, thousands of Allende sympathizers were summarily imprisoned, and many were tortured or executed. When the junta took power, many of the 13,000 foreign nationals who had been enjoying the sanctuary of the Allende regime became political refugees overnight. These foreign nationals were joined over the next two years by 18,000 Chileans who streamed from Chile into Peru, Argentina, and other countries to escape the Chilean dictatorship.

It is now well documented that the United States government sought to "destabilize" the Allende Administration.[13] If American efforts contributed to the ultimate success of the coup—and it is widely believed that they did[14]—it

11. 8 U.S.C. §§ 1101-1362 (1970).
12. 8 U.S.C. § 1182(d)(5) (1970).
13. Petras & La Porte, Jr., *Can We Do Business With Radical Nationalists? Chile: No*, 7 FOREIGN POL'Y 132 (1972).
14. N.Y. Times, Sept. 8, 1974, § 1, at 1, col. 6; NEWSWEEK, Oct. 10, 1977, at 31-32.

would seem that the United States government had a special responsibility to the Chilean refugees and the political prisoners of the junta. A vigorous effort by the American government to provide sanctuary for the victims of the new regime was in order. This effort never materialized. Charles Gordon, former general counsel to the Immigration and Naturalization Service (INS), characterized the government's behavior toward Chilean refugees as "a terrible thing,"[15] and Deputy Secretary of State Robert Ingersoll admitted that as of April, 1975, "our performance has been poor."[16] By February, 1976, there had been only minor improvement.

During the coup and in the days that followed, Chile was shaken by mass arrest, street fighting, and executions. Many sought safety in the embassies of foreign nations, and hundreds were taken in at the Swedish, French, and other European and Latin American embassies. On January 3, 1974, a United Nations observation team reported that 1,800 non-Chileans and 500 Chileans still remained in refuge in embassies.[17] According to one observer, very few of these desperate people looked to the American embassy for sanctuary since they did not expect to be taken in there. "It is not our custom to grant 'diplomatic asylum' [asylum in an embassy],"[18] said Frank L. Kellogg, who at the time of the coup was Special Assistant for Refugee and Migration Affairs. Kellogg went on to explain that diplomatic asylum is of dubious status in international law and is generally practiced only by Latin American states.

But in Chile, sanctuary was also provided by European embassies. Furthermore, diplomatic asylum is not without precedent in American practice. The United States granted diplomatic asylum to Cardinal Mindszenty in Hungary[19] and was prepared to provide asylum in its Johannesburg consulate for attorney Joel Carlson, defender of black political prisoners.[20] State Department guidelines on asylum policy explicitly state that "[i]mmediate temporary refuge . . . may be granted in extreme or exceptional circumstances wherein the life or safety of a person is put in danger."[21] Circumstances in Chile at that time were clearly "extreme" and "exceptional," and the lives and safety of those who sought refuge in embassies were certainly "in danger." In the interest of humanitarianism, our embassy in Chile could have offered some people "temporary refuge" if the United States government had chosen to do so.[22]

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15. Interview with Charles Gordon, former General Counsel to the Immigration and Naturalization Service, in Washington, D.C. (June 25, 1975).

16. Recently declassified letter from Deputy Secretary of State Robert Ingersoll to Attorney General Edward H. Levi (Apr. 23, 1975).

17. N.Y. Times, Jan. 12, 1974, at 6, col. 1.

18. Interview with Frank Kellogg, Special Assistant to the Secretary of State for Refugee and Migration Affairs, in Washington, D.C. (June 24, 1975).

19. 35 U.S. Dep't of State Bull. 800 (1956).

20. Interview with Donald F. McHenry, former Foreign Service Officer in South Africa and Special Assistant to Secretary of State William Rogers, in Washington, D.C. (Nov. 15, 1974).

21. *General Policy for Dealing With Requests for Asylum by Foreign Nationals: Hearings Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 295 (1973).

22. The New York Times reported the refusal of the U.S. embassy in the Philippines to grant asylum to former Philippine President Diosdado Macapagal on the grounds that he was not in actual danger of arrest. N.Y. Times, Apr. 2, 1976, at 1, col. 2.

The Congress of the United States showed no more inclination to become involved in a rescue operation than had the embassy. Within days of the coup, as the dimensions of the Chilean refugee crisis were becoming apparent, Senator Edward Kennedy and Congressman Robert Drinan introduced measures designed to admit Chilean refugees into the United States, but both were unsuccessful.[23] Congress took no initiative to alleviate the refugee problem. There was no strong congressional constituency to work on behalf of refugees from noncommunist regimes, and these particular refugees were regarded with suspicion because many of them had been aligned with the Marxist Allende and some were politically to Allende's left.

As the distress of foreign nationals in Chile and of Chilean exiles continued to mount in the months following the coup, the American government remained aloof. When the junta declared that all foreign nationals staying in Chile must be out of the country by February, the United Nations Office of the High Commissioner for Refugees (UNHCR) urgently appealed for help to members of the United Nations. A number of countries responded generously, but the United States was not one of them. While West Germany, France, and Sweden each took in between 800-1100 refugees, the United States accepted only 26 out of about 150 people who had applied for admission to the United States through UNHCR.[24] According to an ORM official, most of the 26 were "not political refugees, but merely people fleeing the general disorder." He explained that the "real" refugees did not even apply for asylum in the United States.[25] They knew it was against U.S. policy to admit anyone who could be legally barred as a communist or "subversive."[26] Thus, ironically, those who were most liable to persecution had they remained in Chile, and who were therefore priority candidates for political asylum, could not even be considered under the U.S. asylum program. Of course, they could have been legally paroled into the country under the Act's parole provision[27] which, according to Charles Gordon, is "designed for the admission of those who are otherwise excludable."[28] But the Immigration and Naturalization Service had consulted with Congress on a proposal to admit foreign nationals from Chile and, on the basis of congressional response and its own predisposition, decided against admitting Marxists and communists.

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23. On September 25, 1973, Drinan proposed H.R. 10525, a bill to authorize issue of 50,000 special immigrant visas, but only to Chilean citizens. H.R. 10525, 93d Cong., 1st Sess., 119 CONG. REC. 31407 (1973). Drinan urged on the House floor "that the United States give the same treatment to those suffering persecution in Chile as we have given to the Hungarian freedom fighters and the refugees from Fidel Castro's Cuba." 119 CONG. REC. E6043 (appendix, Sept. 25, 1973). The bill died in the House Judiciary Committee. Kennedy's measure, S. 2643, suffered a similar fate in the Senate Judiciary Committee. S. 2643, 93d Cong., 1st Sess., 119 CONG. REC. 35734 (1973).

24. *Refugee and Humanitarian Problems in Chile, Part III: Hearing Before the Subcomm. to Investigate Problems Connected with Refugees and Escapees of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 32-33 (1975).

25. Interview with Christian Pappas, *supra* note 7.

26. *Id.* The legal barrier against admission of communists is contained in Immigration and Nationality Act, 8 U.S.C. § 1182(a)(28) (1970).

27. 8 U.S.C. § 1182(d)(5) (1970).

28. Interview with Charles Gordon, *supra* note 15.

A year after the coup, in August, 1974, the United Nations High Commissioner for Refugees, Prince Sadruddin Aga Khan, urgently appealed to the United States to grant asylum to a substantial number of the 4,000 Chilean exiles who had been temporarily accepted by Peru and now needed to be resettled.[29] Then, on September 11, 1974, General Augusto Pinochet Ugarte, the Chilean chief of state, announced that virtually all of the political prisoners who had been "detained" in Chile would be released and expelled if foreign governments would offer them asylum.[30] Stirred by Sadruddin's appeal and Pinochet's announcement, officials of the Office of Refugee and Migration Affairs dispatched two "action memos," on September 17 and November 7, urging the State Department to seek speedy admission of Chilean exiles in Peru and detainees still in Chile.[31] But it was not until April 23—over eight months after the U.N. High Commissioner's appeal and seven months after the Pinochet announcement—that the State Department formally proposed a group asylum program to the Attorney General, who had the legal authority to act.[32] Finally, on June 26, two months after the department's proposal was made, Attorney General Edward H. Levi replied with qualified approval of a much more modest program than that originally requested.

The State Department's formal proposal was delayed and modified for two reasons. First, the Immigration and Naturalization Service and General Leonard Chapman, the former Marine commandant who heads the INS, were unalterably opposed to the Department's original suggestion that the Chilean exiles be brought in as a group. In an interview, General Chapman confirmed that the State Department's group-parole proposal was whittled down to one of case-by-case admission. The proposal to admit the refugees as a group, before screening in their present location, said Chapman, would have meant that the United States could not have subsequently expelled an undesirable person without violating the United Nations Protocol Relating to the Status of Refugees.[33] In that case, he said, the only alternative would have been to restrict or jail a refugee who was found undesirable after admission on group parole. Citing instances of restriction in the Vietnam group, Chapman argued that no such problems would arise in case-by-case admission since screening would occur before the refugee arrived in the United States.[34]

Second, the State Department had decided to engage in "preliminary consultation" with the House and Senate immigration subcommittees before sending a formal proposal to the INS. Beginning in November, 1974, these consultations dragged on for a period described by Dale de Haan of the Senate

29. State Dep't Fact Sheet on Parole of Chilean Refugees in Peru, n.d.

30. State Dep't Fact Sheet on Parole of Chilean Detainees/Refugees, n.d.

31. The State Department has refused to make either memorandum available on the grounds of "national security."

32. Washington Post, June 8, 1975, at A4, col. 1. Interview with Leonard Chapman, Commissioner of INS, in Washington, D.C. (Oct. 18, 1975). *See* 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. 268 (in force Oct. 10, 1967).

33. Interview with Leonard Chapman, *supra* note 32.

34. *Id.*

Subcommittee on Refugees and Escapees as "unprecedentedly long."[35] De Haan believes that the delay was a tactic designed to cloak a lack of resolve within the Administration. "There was no clear policy," said de Haan. "Some wanted to give them asylum and some did not. . . . Hence, no action was taken at State—except for consultation—until the end of April."[36]

Although there is truth in de Haan's assertion, Congress must bear some responsibility for prolonging the consultations. One retired State Department official pointed out that, although Congress has no official veto power over refugee parole proposals, members of Congress "have ways of getting back at us if they don't like what we do, or think we are paying insufficient attention to their views."[37] And General Chapman confirmed that the INS has never, to his knowledge, exercised its authority to admit refugees if preliminary consultation showed congressional opposition. Furthermore, he doubted that the INS would ever do so.[38]

In the Chilean case, a great deal of time was consumed in trying to overcome strong congressional resistance to the State Department proposal. Some subcommittee members took advantage of a congressional recess to forestall formal consideration of the matter for as long as possible. Several members of Congress expressed concern about endangering "national security" by admitting communists, Marxists, or Allende sympathizers.[39] Others argued that the American economy might be unduly burdened in view of the existing unemployment situation and the large number of aliens already in the country.[40]

State Department representatives went to great lengths trying to overcome these objections. They assured the doubters that the immigration act would be complied with and that no communists or "subversives" would be admitted. There would be no "blanket admission" of Chileans. Finally, they argued that the number of admissions contemplated was only about 400 families—hardly enough to have a serious effect on the economy.[41] In the end, though, congressional attitudes were still mixed:

> Chairman Eastland in the Senate . . . and . . . Edward Hutchinson, the ranking Republican on the House Judiciary Committee, appear to be opposed to a parole program for those refugees in Chile and those in Peru. . . .
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> Chairman Kennedy of the Senate Subcommittee enthusiastically supports a program of parole for both groups. . . .
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> The House Subcommittee has indicated support for parole of refugees physically in Chile, but [has] declined to indicate support for those in Peru.[42]

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35. Interview with Dale de Haan, Counsel to the Senate Subcommittee on Refugees and Escapees, in Washington, D.C. (Dec. 2, 1974).
36. *Id.*
37. Interview with Christian Pappas, *supra* note 7.
38. Interview with Leonard Chapman, *supra* note 32.
39. Interview with Christian Pappas, *supra* note 7.
40. *Id.*
41. *Id.*
42. Letter from Deputy Secretary of State Robert Ingersoll to Attorney General Edward H. Levi (Apr. 23, 1975).

This lack of congressional consensus did not offer much guidance to the administration in formulating a policy for dealing with the refugees.

Despite the State Department's own delay, Deputy Secretary Ingersoll's letter of April 23, 1975, formally proposing to Attorney General Levi that he parole a limited number of "refugees/detainees" on a case-by-case basis, sounded a compelling note: "The conditions under which the refugees/detainees are living continues to deteriorate. . . . It is imperative that we act expeditiously to implement this program."[43] Nevertheless, it took the Attorney General two months to reply. The Justice Department undertook its own consultation with Congress and met the same reservations that had been encountered by the State Department. When asked about this duplication of effort, General Chapman replied that the INS, not the Department of State, had the ultimate legal and political responsibility for admitting aliens.[44] Chapman wanted to be doubly sure that Congress did not approve the program under consideration. Further delay was caused by the South Vietnamese refugee crisis in May which absorbed the time of everyone concerned for weeks. Frank Kellogg explained that the Vietnamese crisis was a clear emergency, while the Chilean case was less urgent.[45] Considering reports that detainees in unknown numbers were being quietly executed by the Pinochet regime, his reasoning was far from convincing.

In his June 26th reply to Ingersoll, the Attorney General finally agreed to consider parole of up to 400 Chilean detainees and refugees.[46] Cases soon began arriving at the American consulates in Santiago and Lima, but it was the middle of August before three special consular officers and one immigration official were assigned to work exclusively on the cases there. The screening process improved, but countless hours were spent flying up and down the long Chilean coast and into the mountains of Peru to interview applicants and check their backgrounds. Although Vietnamese refugees were generally cleared in two or three weeks, it often took six weeks for American officials in Santiago and Lima to complete security clearances and send their recommendations concerning Chilean refugees to the State Department.[47] Once the recommendations had been forwarded to Washington, securing INS approval and locating a sponsor for each refugee and his or her family took up to an additional two months. Even then, the Chilean government could delay granting an exit decree, making it impossible for the refugee to leave the country. On October 18, 1975, almost four months after the Attorney General had approved the program, the first Chilean refugee finally arrived in the United States. By mid-January, 1976, seven months after the program began, only twenty-five cases (76 people) had

43. *Id.*
44. Interview with Leonard Chapman, *supra* note 32.
45. Interview with Frank Kellogg, *supra* note 18.
46. Interview with Leonard Chapman, *supra* note 32.
47. *Id.* By January, 1976, 94 cases involving 248 people had been forwarded to Washington, and 27 of these carried a recommendation for denial (15 by the INS representative, 1 by the State Department representatives, and 11 by both agencies). In 6 additional cases, field representatives were asked to reconsider recommendations that were, presumably, positive. *Id.*

been approved and only ten families (27 people) had arrived in the United States.[48]

The delays in initiating the parole program and in processing the applications prolonged the suffering of those requesting asylum; together with the narrow scope of the program, they also reduced the number of applicants. By the time the American program began, many of those who were eligible had gone to other countries. Because of their leftist political views, a number of the refugees preferred settling in other countries if they were able to do so. Looking upon the United States as a right-wing country which had played a large role in the downfall of the Allende government, few of these detainees were eager to seek belated American offers of asylum.[49] The number of applicants was further reduced by the United States' widely-known prohibition against admitting former communists. Moreover, the American parole program in Chile had been closely restricted to applicants who were actually in jail or under strict house arrest. Those who had been released from detention but were still under surveillance and living in fear of future persecution were not eligible.[50] The INS is currently considering relaxing the standards for the parole program; however, if such revisions are not forthcoming, one State Department official has expressed doubts whether the program will even reach the limited target of 400 families.[51] As of January, 1976, only 389 cases had been submitted and there have been very few new applications since that time.[52]

The most that can be said for American policy regarding the Chilean detainees is that a program was adopted, but that it was too little and too late.[53] The numerous delays while the State Department, the INS, and Congress tried to formulate and coordinate their policies caused many detainees to suffer in prison far longer than necessary. Those delays were inexcusable, particularly in contrast to the urgency with which Vietnamese refugees were handled and the swiftness with which the INS extended the visas of the 400 to 600 Chileans who sought asylum in the United States in the months following the election of Allende.[54] Certainly, the Chilean asylum program comes nowhere close to meeting the objectives urged by Deputy Secretary of State Ingersoll. The program neither improves the U.S. national image nor "demonstrate[s] that the United States' concern for refugees extends to all persons in need, irrespective of the nature of the government from which they are fleeing."[55]

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48. *Id.*

49. Interview with State Dep't Desk Officer (name withheld by request), in Washington, D.C. (Jan. 20, 1975). *See also* Washington Post, June 8, 1975, at A4, col. 1.

50. Interview with Leonard Chapman, *supra* note 32.

51. Interview with State Dep't Desk Officer, *supra* note 49.

52. *Id.*

53. On March 27, 1978, four and one-half years after the coup in Chile, the Carter Administration announced that up to 500 refugees from Chile and Argentina would be paroled into the United States. The announcement raised hopes that a more liberal and even handed refugee policy was forthcoming. N.Y. Times, Mar. 31, 1978, at 1, col. 6.

54. Interview with Christian Pappas, *supra* note 7.

55. Letter from Deputy Secretary of State Robert Ingersoll to Attorney General Edward H. Levi (Apr. 23, 1975).

There have been few court cases involving Chilean asylum appeals, because most Chilean refugees have been in distress in Chile and their admission into the United States is not legally required under American or international law. Chileans who happened to be in America at the time of the coup have had difficulty gaining asylum. According to a State Department official, many had requested asylum from the Allende regime, which made it even more difficult to establish a well-founded claim of being persecuted by the junta.[56] *Cisternas-Estay v. Immigration and Naturalization Service*[57] illustrates this difficulty. A Chilean married couple, having initially sought asylum from the Allende government, continued to seek it after the coup. They called a press conference, denounced oppression under Pinochet, and then reiterated their asylum claim on grounds that they would be subject to loss of citizenship and other persecution in Chile. The junta had recently issued a proclamation "forbidding crimes against the 'essential interests' of Chile by nationals living abroad"[58] and the petitioners claimed that their press conference would be construed as such a crime and would be used against them. They also submitted documentary evidence of widespread oppression in Chile. An Immigration District Director denied asylum, relying in part on a letter from the State Department which recommended denial of the Cisternas-Estay request and three others. The letter "noted that the Allende government in Chile had been removed from power" and concluded that "there was no basis for granting political asylum."[59] The Board of Immigration Appeals upheld the decision on the ground that the aliens had failed to carry their burden of proof that there was a "clear probability" of their being persecuted under the Pinochet regime.[60] The Court of Appeals for the Third Circuit sustained the decision because grants of asylum are discretionary and reversible only if the alien proves abuse of discretion, *i.e.*, that the Board's decision was "arbitrary, capricious, or illegal."[61] In order to establish such abuse, Cisternas-Estay would have had to prove the animosity of the junta to them.[62] Since they failed to do so, they were ordered deported.

The appeals court added that "[t]here is nothing in the record to undermine the Board's position that the press conference was 'staged' to acquire 243(h) relief."[63] Thus, ascertaining sincerity of motive was judged to be within the discretion of the INS. Interestingly, Immigration and State Department officials often justify granting asylum to communist country refugees whose motives are economic on grounds that overstaying their visas would likely result in criminal prosecution and/or harassment if they were returned home.[64] The

56. Interview with State Dep't Desk Officer, *supra* note 49.
57. 531 F.2d 155 (3d Cir.), *cert. denied*, 429 U.S. 853 (1976).
58. *Id.* at 158.
59. *Id.* at 157.
60. *Id.* at 159.
61. *Id.*
62. *Id.*
63. *Id.*
64. Interview with Richard Jameson, State Dep't Office of Refugee & Migration Affairs, in Washington, D.C. (Nov. 29, 1974).

prospect of criminal prosecution was not taken seriously in *Cisternas-Estay* and did not lead to a similar result. In the eyes of the courts, discrepancies in outcome such as these do not amount to an arbitrary and capricious abuse of discretion.

B. Iranians

The plight of Iranian student dissidents already in the United States, although less extreme than that of the Chileans, raises disturbing questions about the sincerity of U.S. committments to refugees from regimes with which our government wishes to maintain close ties. Most of the Iranians applying for political asylum are members of the militantly anti-Shah Iranian Student Association who have overstayed their allotted time and are subject to deportation. They appeal for asylum under § 243(h) of the Immigration and Nationality Act[65] on the grounds that they would be subject to persecution if they were sent back to Iran.

The Iranian government is well known for its repression of political opposition, as a good many official American sources will admit—off the record.[66] Just as Russia has its KGB and South Africa its Special Branch, the Shah has SAVAK, considered to be "one of the most pervasive and feared secret police organizations in the world."[67] The SAVAK is reported to employ between 30,000 and 60,000 full-time agents and to have at least three million Iranian informers at its disposal.[68] Charges of brutal treatment of dissenters by the SAVAK have been documented,[69] and it is estimated that there are more than 20,000 political prisoners in Iranian jails.[70] According to reliable sources, many Iranian dissidents have disappeared and have never been heard from again.[71]

Thus, most of the students applying for asylum have good reason to fear their deportation from the United States. Many of them have engaged in repeated protest activities against the Shah's regime. They know that their activities are carefully noted by the Iranian government and will be held against them. In 1971, for example, a group of protesting Iranian students ransacked their government's consulate in San Francisco.[72] They were arrested and fined by the American authorities, but soon afterward, the Iranian government published a list of known participants and declared that upon their return to Iran they would be subject to further punishment. According to Christian Pappas of the Office of Refugee and Migration Affairs, this would probably mean "a long, harsh term of solitary confinement."[73] An Iranian embassy official confirmed

65. 8 U.S.C. § 1253(h) (1970).

66. Interview with State Dep't Near East specialist (name withheld by request), in Washington, D.C. (June 11, 1975).

67. NEWSWEEK, Oct. 14, 1974, at 56-61. SAVAK is the Persian acronym for "National Intelligence and Security Organization."

68. *Id.* at 61.

69. AMNESTY INTERNATIONAL, ANN. REP. 297-98 (1977).

70. NEWSWEEK, Oct. 14, 1974, at 61.

71. Interview with State Dep't Near East specialist, *supra* note 66.

72. N.Y. Times, Oct. 16, 1971, at 4, col. 4.

73. Interview with Christian Pappas, State Dep't Asylum Officer, in Washington, D.C. (Aug. 4, 1975).

that his government has pressed the United States to return Iranians who have violated Iranian law and that such activities as protest marches and demonstrations in front of the Kennedy Center during a visit of the Shah—perfectly legal activities in the United States—constituted "insulting the Shah and the Iranian government"—a punishable violation in Iran. He expressed the opinion that the United States is being "unduly tolerant" toward the activities of those people who are here on student visas "for the purpose of study, not politics," and made it clear that those who had "insulted" their country while abroad would be punished upon return.[74] One American government source pointed out that political dissidents who have returned voluntarily have been arrested and harassed and many have disappeared permanently.[75] There seems little doubt, on the basis of the evidence, that Iranian dissidents do qualify for asylum on the grounds (stipulated in the United Nations Protocol on the Status of Refugees,[76] to which the United States is a signatory) that they have a "well-founded fear of being persecuted"[77] in Iran.

Yet, almost without exception, asylum requests have been denied to Iranians. According to Christian Pappas, about thirty Iranians requested asylum between 1971 and August, 1975, but few if any of the applications were granted.[78] The inevitable question becomes why the Iranians are denied asylum when, as one knowledgeable official has admitted, many applicants from Eastern Europe with far weaker cases are almost automatically granted that status.[79] In journalistic and State Department circles, it is often observed that the wishes of the Shah of Iran carry considerable weight with American policy-makers. Oil talks and America listens. Or as one observer put it, "whatever the Shah wants, the Shah gets."[80] One informed government source explains that granting asylum to dissident students would be official confirmation that the Iranian government persecutes its own people. "The government of Iran objects strenuously to our granting asylum to its citizens," he says. "They would consider it a slap in the face. Thus, our policy is to oppose grants of asylum to the Iranian applicants for the sake of relations with Iran."[81]

The case of the asylum applicants who vandalized the Iranian consulate in 1971 clearly illustrates the general attitude of the Shah's administration and the customary response of the United States. In its objection to any asylum grants, the Iranian government implied that it was its sovereign right to punish the students in Iran. American officials were faced with a dilemma. If they granted

74. Interview with Iranian Embassy Official (name withheld by request), in Washington, D.C. (Aug. 12, 1975).

75. Interview with State Dep't Near East specialist, *supra* note 66.

76. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 (in force Oct. 10, 1967).

77. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6261, T.I.A.S. No. 6577, 189 U.N.T.S. 152.

78. Interview with Christian Pappas, *supra* note 73.

79. Interview with State Dept. East European Desk Officer (name witheld by request), in Washington D.C. (June 11, 1975).

80. Conversation with Thomas Hughes, former head of State Dep't Intelligence and Research, now Director, Carnegie Endownment for International Peace, in Washington, D.C. (June 5, 1975).

81. Interview with State Dep't Near East specialist, *supra* note 66.

asylum to the student dissidents (who had already been punished under American law), they would risk damaging American relations with Iran; if they deported the dissidents to almost certain further prosecution in Iran, they would violate international agreements and contradict America's professed tradition of providing refuge for the oppressed.

What one State Department official termed a "cynical-realist"[82] solution was found in 1971: the Iranians would not be granted asylum, but neither would they be returned to Iran; they would be allowed to stay in the United States under a "voluntary departure" status. Subsequent requests for asylum have generally been dealt with by granting this voluntary-departure status. At first glance, this course of action appears to be a humane compromise, but in actuality, those refugees who are on voluntary-departure status are living in a state of limbo. Unlike conditional-entry status, voluntary-departure status cannot be adjusted to permanent residence. According to David Carliner, an immigration attorney who has represented a number of Iranian asylum applicants, the government never allows Iranians to remain here indefinitely under voluntary-departure status.[83] Deploring the "sleazy" treatment of the Iranians, he argues that the government is actually undermining the law by denying a secure status to those seeking refuge. He maintains that there is little security under a status which "can be revoked at any time."[84] In addition to suffering from this lack of security, the alien in voluntary-departure status may soon find himself without economic security and with little opportunity to better his position. Proposed legislation[85] which would punish an employer for hiring illegal aliens is already having an impact on those in voluntary-departure status as well as those here illegally. Political refugees are viewed as unwelcome competitors for scarce jobs during a period of serious domestic unemployment.[86]

A number of Iranians have appealed their asylum denials in the courts to force an examination of the issues surrounding their requests.[87] The State Department has been very disturbed by these appeals, for, according to one of its Near East specialists, the Iranian government mistakenly believes that the Administration can control the courts.[88] Any court decision which overturned official recommendations and granted asylum to some Iranians would be just as offensive to the Shah as an outright asylum grant by the Administration. As one official put it, "The Shah would become very, very angry. At the very least, he'd reprimand Ambassador Helms or President Ford. The atmosphere would be tense, and this might affect U.S. business prospects, the price or availability of oil, and so on. The Shah could be very, very nasty."[89] Unwilling to incur

82. *Id.*
83. Interview with David Carliner, Iranian asylum specialist, in Washington, D.C. (June 25, 1975).
84. *Id.*
85. H.R. 1663, 95th Cong., 1st Sess., 123 CONG. REC. 325 (1977); H.R. 4646, 95th Cong., 1st Sess., 123 CONG. REC. 1874 (1977); H.R. 6560, 95th Cong., 1st Sess., 123 CONG. REC. 3473 (1977).
86. N.Y. Times, Feb. 17, 1977, at 14, col. 1.
87. *See, e.g.*, Kasravi v. INS, 400 F.2d 675 (9th Cir. 1968).
88. Interview with State Dep't Near East specialist, *supra* note 66.
89. *Id.*

such royal wrath and its possible economic consequences, the State Department has used every possible subterfuge to prolong the cases and prevent a resolution. When the case of the Iranian students who had vandalized the Iranian consulate went to court, apprehension increased in the State Department. If the Iranian students presented a persuasive case and were granted asylum by the court, it was feared that the precedent would bring on a deluge of new appeals by other Iranians. As a consequence, American relations with the Shah were bound to suffer.

When, at length, the Iranian asylum cases did begin to reach the courts, the Administration fought against having its recommendations overturned. According to immigration attorney David Carliner, the government argued that unless the applicants had engaged in dissent in Iran, they were not bona fide refugees.[90] The courts have agreed. *Matter of Kojoory*[91] is a case in point. The petitioner had never engaged in anti-government activity in Iran, but when he came to the United States he joined the Iranian Student Association and participated in public demonstrations against the Shah. Kojoory argued in his asylum application that his political actions in the U.S. would cause him to be persecuted if returned home. He produced an expert witness to testify that members of the Iranian Student Association who had returned to Iran in the past were, in fact, imprisoned after being convicted on allegedly "trumped up" charges. The Board held, however, that Kojoory had not carried his burden of proof: "[n]o . . . proof has been adduced of these claims other than the statements by respondent and his witness . . . ."[92] The Board believed that the State Department was a more reliable informant. The State Department insisted in a letter that "opposition to the Shah's regime without more does not subject an individual to persecution . . . ."[93] This led the Board to observe that "Respondent's application is weakened . . . by the fact that he participated in absolutely no political activity of any sort prior to coming to the United States."[94]

The federal circuit courts have been less prone than the Board to accept the State Department's pronouncement that Iranians who denounce the Shah are safe to return home; judicial unwillingness to intervene in cases of administrative discretion, however, has inhibited the circuit courts from reversing Board decisions. In *Kasravi v. Immigration and Naturalization Service*,[95] the court observed that "[s]uch letters [concerning asylum cases] from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations throughout the world. The traditional foundation required of expert testimony is lacking . . . ."[96] Nevertheless, the

90. Interview with David Carliner, *supra* note 83.
91. 12 I. & N. Dec. 215 (BIA 1967).
92. *Id.* at 218.
93. *Id.*
94. *Id.* at 219.
95. 400 F.2d 675 (9th Cir. 1968).
96. *Id.* at 677 n.1.

Kasravi court refused to rule that the Board's use of State Department recommendations is a reversible abuse of discretion. In support of this conclusion, the panel quoted *Namkung v. Boyd*:[97] "the withholding of deportation in cases where the alien fears persecution rests wholly in the administrative judgment and 'opinion' of the Attorney General or his delegate. The courts may not substitute their judgment for his."[98]

David Carliner observed that, despite its spurious line of reasoning, the Administration had generally been successful in staying the Iranian students' court appeals. He added that the Board of Immigration Appeals tended to accept the State Department argument and even ordered a number of Iranians deported to their native land.[99] Although apparently no such deportation orders were actually carried out,[100] it is ironic that an administration which professed a humanitarian asylum policy went on record as favoring deportation of these people. The United States government used voluntary departure as a measure to avoid taking a stand on principle. Faced with the decision whether or not to acknowledge that some of the Iranian student dissidents in this country were likely to be persecuted if returned to Iran and to treat these students accordingly under the law, our government chose not to do so for the sake of relations with Iran. Foreign policy considerations were allowed to intrude unduly on the practice of granting asylum. Apparently, the power of the Shah was sufficient to subvert a long-standing American tradition of concern for human rights.

C. Haitian Refugees

Like the Iranians and Chileans, the Haitian asylum applicants have found it exceedingly difficult to gain sanctuary in the United States. In recent years almost two thousand Haitians have escaped their homeland, striking out by boat for Miami.[101] Many have drowned en route. Nearly all those who survived and requested asylum in Florida were given summary hearings and declared by the INS to be ineligible for asylum.[102] Many were jailed to await expulsion and several years ago one of them, in despair over his plight, hanged himself in his cell.[103] The Haitians in Miami were joined in their asylum requests by a number of their countrymen in the United States who had overstayed their visas or had been discovered to be in illegal residence and were ordered deported by the U.S. government. Most of these Haitians appealed under the provision

97. 226 F.2d 385 (9th Cir. 1955).

98. *Id.* at 388 (quoting Dolenz v. Shaughnessy, 206 F.2d 392, 394 (2d Cir. 1953)), *quoted in* 400 F.2d at 677. *See also* Hosseinmardi v. INS, 405 F.2d 25 (9th Cir. 1968); Asghari v. INS, 396 F.2d 391 (9th Cir. 1968); Ishak v. INS, 432 F. Supp. 624 (N.D. Ill. 1977).

99. Interview with David Carliner, *supra* note 83.

100. *Id.*

101. N.Y. Times, Feb. 17, 1977, at 19, col. 1.

102. *Id.* In Sannon v. United States, 427 F. Supp. 1270 (S.D. Fla. 1977), the summary deportations ordered by the INS were declared invalid. *See* text accompanying note 117 *infra*.

103. Christian Century, Feb. 12, 1974, at 219; Miami Herald, Aug. 30, 1976, at 8, col. 1. *See Human Rights in Haiti: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 94th Cong., 1st Sess. 18 (1975) [hereinafter cited as *Human Rights in Haiti*].

of the Immigration and Nationality Act which provides withholding of deportation to those who would be subject to persecution if returned to their native land.[104]

The Immigration and Naturalization Service and the State Department, however, stated that, with very few exceptions, such claims were spurious, that the motivation of most Haitian applicants was economic, and that they were simply attempting to *immigrate* via a misuse of the asylum proceedings, thereby undermining the integrity of U.S. immigration laws.[105] This attitude is reflected in the asylum recommendations furnished by the State Department to the INS between January, 1974, and May, 1975: of the 578 Haitian asylum requests made during that period, denial was recommended for 559, and approval for only 19.[106]

Haitians' claims of persecution were given more serious consideration in *Coriolan v. Immigration and Naturalization Service*.[107] Circuit Judge Tuttle concluded that the INS had failed to adequately evaluate the aliens' claims and remanded for further proceedings. In his opinion, he suggested that the applicants might be subject to prosecution—and hence persecution—for illegal departure and that additional relevant evidence (provided by Amnesty International) should be considered in order to determine "whether Haitian political conditions are so specially oppressive that a wider range of claims of persecution must be given credence."[108]

It is difficult to determine whether the Haitian applicants actually qualify for asylum as political refugees. The United Nations Protocol Relating to the Status of Refugees defines refugees as those who harbor a "well-founded fear of being persecuted" if returned to their native land for political or religious reasons or due to membership in a particular social, ethnic, or racial group.[109] The United States and other signatories of the Protocol have pledged never to return refugees to face such persecution.[110] Yet, until recently, Haitian refugees who were intercepted at the border and determined by the INS to be "excludable" rather than "deportable"[111] have been denied a full and impartial hearing of their asylum claims.

There are significant differences between the Haitian cases and those of the Iranians and Chileans. American foreign policy does not appear to have had

104. 8 U.S.C. § 1253(h) (1970).

105. *See* N.Y. Times, Oct. 17, 1976, at 56, col. 3.

106. Data provided by the State Dep't under the Freedom of Information Act.

107. 559 F.2d 993 (5th Cir. 1977).

108. *Id.* at 1003.

109. *Done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 (in force Oct. 10, 1967). The Protocol incorporates by reference the language of the Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6261, T.I.A.S. No. 6577, 189 U.N.T.S. 152.

110. Although the Protocol speaks in terms of the subjective fears of the alien seeking asylum, at least one court has held that such fear must be grounded in the fact that the alien "actually has been a victim of persecution, or that his fear is more than a matter of his own conjecture." Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977).

111. 8 U.S.C. §§ 1252, 1225(b) (1970). Persons apprehended by authorities at entrance or those paroled under § 1182(d)(5) or allowed entrance under § 1153(a)(7) have been considered to be subject to exclusion proceedings rather than deportation.

a major influence on the outcome of the Haitian cases. Moreover, unlike many of the Chileans, Haitian asylum applicants do not bear the stigma of being a "national security threat" because of their political ideology. Few of the Haitian applicants are political at all, and this, in fact, has been the crux of their problem in gaining asylum. Since most of them were not politically active in Haiti, INS and State Department officials discount most of their claims of political persecution.[112]

Yet, almost without exception, the Haitian asylum applicants speak of arbitrary arrests, beatings, confiscations of property, and executions of relatives by the *ton ton macoutes*—agents of the Port-au-Prince regime.[113] State Department and INS authorities consistently reject such asylum requests on the grounds that the applicants are equating private banditry with government persecution in a effort to twist the provisions of the asylum law to meet their immigration needs.[114] Advocates of the Haitian asylum cause reply that the *macoutes* cannot be lightly dismissed as private bandits, since their actions contribute to the general repression on behalf of the government.[115] Regardless of the exact relationship between the *macoutes* and the government, a great many Haitians apparently make no distinction between them. Thus, it can at least be argued that they harbor a legitimate fear of government persecution.

Because of the language barrier and the cursory nature of the initial INS interviews, Ira Gollobin and other immigration lawyers have long contended that these Haitians have not been given any real opportunity to present their legitimate claims for political asylum. Furthermore, they have maintained that State Department concurrence with INS denial rulings has been almost automatic because of a prevailing assumption that Haitian asylum claims are not valid. Under the terms of federal regulations,[116] no appeal was allowed from the discretion of the District Director to approve or deny an application by these people.

Several recent events have relaxed the procedural difficulties facing the Haitians. After observing conditions in Haiti, Immigration Commissioner Leonel Castillo agreed that the Haitian cases should be given serious consideration and promised to allow them work permits. In February, 1977, in *Sannon v. United States*,[117] Judge James Lawrence King ruled that, under the Protocol, "excludable" aliens have the same right as "deportable" aliens to have their claims considered by an immigration judge. Judge King's decision has at least opened the way for the Haitians to obtain a proper hearing; but it does not, of course, concern itself with the validity of their claims. Although the procedures

112. *See In re* Pierre, Int. Dec. No. 2433 (BIA, Sept. 16, 1975). *See also* Paul v. INS, 531 F.2d 194 (5th Cir. 1975); Gena v. INS, 424 F.2d 227 (5th Cir. 1970); Hyppolite v. INS, 382 F.2d 98 (7th Cir. 1967).

113. *Human Rights in Haiti*, *supra* note 103, at 39.

114. Interview with Richard Jameson, *supra* note 64.

115. Interview with Ira Gollobin, immigration attorney specializing in Haitian asylum, in New York City (Oct. 30, 1974). Gollobin produced a number of affidavits wherein his clients described persecution suffered in Haiti at the hands of the *ton ton macoutes*.

116. 8 C.F.R. § 108 (1977).

117. 427 F. Supp. 1270 (S.D. Fla. 1977).

for seeking asylum have undergone a decided amelioration, it remains to be seen whether many of the applicants will actually be granted asylum.

III
THE DOUBLE STANDARD

The ease with which Cubans have gained asylum in the United States[118] stands in marked contrast to the difficulties which the Haitians and other non-communist country refugees have encountered. In the 1973-74 fiscal year, 11,577 Cubans were paroled into the United States, raising the total number of Cubans in this country to roughly 600,000.[119] Another 6,940 Cubans were paroled the following fiscal year.[120] The Cuban parole program still moves under the impetus of cold war foreign policy decisions made in the early sixties. The assumption continues that virtually everyone who leaves a communist country is a political refugee and that it is in the United States' interest to enhance its image as a haven from communism. So while Haitians and other applicants from rightist governments have had to prove that they are political refugees, this fact has simply been assumed when applicants are from communist countries.[121]

Whatever the eventual outcome of their cases may be, it is apparent that the Haitians have been the victims of a double standard in asylum practice. Discrimination is not confined to Haitians, Chileans, and Iranians; their cases are part of an overall pattern that extends to citizens of all noncommunist countries. None of those persons who requested sanctuary from the Philippine or South Korean dictatorships between January, 1974, and May, 1975, were granted asylum in the United States, although five of the Filipinos were allowed voluntary-departure status.[122] The State Department also recommended that asylum requests be denied to the sixteen Greeks who sought refuge before the fall of the junta on July 23, 1974, and to the eight South Vietnamese who asked asylum from the Thieu regime.[123] Yet, during this same period, scarcely any requests from Eastern European countries were denied. Cuban refugees continued to pour into the country; and after the fall of Thieu, 130,000 South Vietnamese were quickly admitted into Guam and the United States.[124]

There is some evidence that aliens who are returned to Communist China and the more "liberal" East European countries are not persecuted, as they

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118. Cubans are authorized entry into the U.S. under the Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161.

119. INS ANN. REP. 4 (1974).

120. INS ANN. REP. 7 (1975).

121. Interview with James Greene, Deputy Commissioner of the INS, in Washington, D.C. (July 18, 1975). Commissioner Greene was asked if he had reason to believe that Cubans returned to Havana would actually be persecuted. Greene replied, "It's just agreed upon that if they have fled from a communist government they are refugees." *Id.*

122. Figures provided by the State Department following a Freedom of Information Act request.

123. *Id.*

124. Interview with State Dep't East European Desk Officer (name withheld by request), in Washington, D.C. (June 11, 1975). Interview with Frank Kellogg, *supra* note 18.

would be in the more repressive communist states such as Bulgaria and the Soviet Union.[125] Ironically, the *uncertainty* of the fate of those who are returned to Communist China, Poland, and Czechoslovakia is the ultimate State Department justification for not returning them. But the fate of Haitians, South Koreans, Filipinos, and citizens of other noncommunist nations who are returned is also uncertain; yet this has not prevented many of them from being returned. As recently as August, 1977, ninety-seven Haitians seeking asylum were flown back to Haiti from our Guantanamo naval base in Cuba.[126] Another reason that has been given for the preferred admission of Cuban and Communist Chinese refugees is the authoritarian power of their governments.[127] This rationale would, however, deny the dictatorial nature of countries like Iran, the Philippines, and South Korea in asylum consideration.

The chief argument against admitting Haitians has been that they are economically, not politically, motivated.[128] American officials insisted that the arrival of some Haitians by way of the Bahamas proved their economic motivation in seeking asylum, since they were in no danger of persecution in the Bahamas.[129] Yet thousands of Cubans were admitted to the United States after residing in Spain, and the question of economic motivation was not considered there. No adequate justification has been advanced for treating such similar cases differently.

Frank Kellogg and some East European desk officers suggested "career limitations" in communist states, clearly an economic factor, as a basis for granting asylum.[130] This is particularly true with artists and skilled athletes. For example, the Czechoslovakian tennis star Martina Navratilova openly admitted in 1975 that, in choosing to seek political asylum, "Politics had nothing to do with my decision. It was strictly a tennis matter."[131] She was admitted without question. According to one State Department official, in the case of thousands of East Europeans, political asylum

> is used, essentially, for immigration purposes. East European countries are tight with migration, thus our immigration quotas usually can't be met. So we use the asylum mechanism for immigration purposes in an effort to equalize the situation. Most of these people are technically not eligible for asylum, but get it anyway.[132]

Richard Jameson, of the State Department Office of Refugees and Migration Affairs, and other officials cite "standardized stories" as evidence that Haitians

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125. Interviews with government officials (names withheld by request), in Washington, D.C. (June 10, 111, 1975).

126. N.Y. Times, Sept. 7, 1977, § A, at 6, col. 3.

127. Interview with Frank Kellogg, *supra* note 18.

128. *See* text accompanying notes 105-06 *supra*.

129. *Human Rights in Haiti*, *supra* note 103, at 17.

130. Interview with Frank Kellogg, *supra* note 18; interview with East European Desk Officer, *supra* note 124.

131. Boston Globe, Sept. 8, 1975, at 2, col. 2.

132. Interview with State Dep't Desk Officer (name withheld by request), in Washington, D.C. (June 11, 1975).

and Filipinos have been coached to say the correct things to qualify for asylum.[133] Yet "standardized stories" are so frequent among successful applicants from communist countries that one State Department Desk Officer suggested that those applicants may have been coached by experts in immigration law.[134]

Raul Manglapus, former Foreign Secretary of the Republic of the Philippines, said that the State Department generally assumes that Filipinos who enter this country on a visa must be on good terms with their country and their claims for political asylum are therefore usually deemed fraudulent.[135] Such reasoning overlooks the fact that some may seek a visa to speak out against their government in other countries. Government officials admit that Poles and other visitors with visas from communist countries are often allowed to claim asylum, even when their motives are rather obviously economic.[136] In nearly every instance, Haitians, Filipinos, and South Koreans have had to prove the legitimacy of their requests beyond a shadow of a doubt, although escapees from Cuba and other communist countries have almost always been accepted on faith. The double standard plainly permeates asylum practice.[137]

IV
THE LAW ON ASYLUM AND REFUGEES

The Immigration and Nationality Act replaced the old system under which countries were assigned a quota of immigrants to the United States. The new method calls for allocation of immigrant visas in an order of preference. The seventh preference provides for the conditional entry into the United States of up to 17,400 persons annually who, because of persecution or fear of persecution, have fled communist or communist-dominated countries or the "general area of the Middle East."[138] Included in this preference are also persons uprooted by what the President determines is a "catastrophic natural calamity."[139] The seventh preference discrimination in favor of refugees from communism is consistent with the immigration law's ban on admission of commu-

133. Interview with Richard Jameson, *supra* note 64.

134. *Id.*

135. Interview with Raul Manglapus, in New York City (Oct. 30, 1974).

136. Interview with State Dep't Desk Officer (name withheld by request), in Washington, D.C. (June 11, 1975).

137. *Id.* We put the question bluntly to a State Department Desk Officer: "Why is it that communist country applicants have a much easier time gaining asylum or refugee status here, while those from right-wing dictatorships have a much tougher time?" "Pal," he answered, "that's a question with a hell of a lot of implications. I mean, it gets you into political, economic, and bureaucratic issues that I'm not prepared to talk about." *Id.* The official State Department explanation that applicants from right-wing countries simply have far weaker cases than those from communist countries is unpersuasive.

138. 8 U.S.C. § 1153(a)(8)(A)(i) (1970). The Carter Administration is currently advocating increasing the refugee quota to 40,000 to avoid a constant recourse to parole. N.Y. Times, Mar. 31, 1978, at 1, col. 6.

139. Interview with Christian Pappas, State Dep't Asylum Officer, in Washington, D.C. (Oct. 19, 1974).

nists and advocates of communism.[140] On the issue of refugees who have fled because of persecution or fear of persecution in noncommunist states or states outside the "general area of the Middle East," however, the law is silent. It is almost as if noncommunist persecution was unknown to drafters of our immigration laws.

The parole provision of the Act is the only one which can be used to admit persons fleeing from other situations.[141] This provision allows the Attorney General to admit *any* refugee, including a communist, who is fleeing from any form of government in any hemisphere "for emergent reasons or for reasons deemed strictly in the public interest."[142] As Charles Gordon, former Chief Counsel for the Immigration and Naturalization Service explains, "The parole provision has no conditions. It is meant to admit those who are otherwise inadmissible."[143] In theory, the parolee is not admitted permanently but can stay only as long as the emergency exists.[144] Afterward, parolees are considered for immigrant status in the same manner as other applicants.[145] In practice, parolees have more security and, in the case of refugees from South Vietnam, may even have their eligibility for employment noted on their immigration papers. In theory, the parole provision provides the flexibility to redress the discrimination which exists in favor of refugees from communism. In practice, however, parole has been used as one more means of admitting persons fleeing communism. Most of the people who have come into the United States via parole have come from communist countries, such as Hungary, Cuba, Czechoslovakia, and South Vietnam.[146]

The fact that parole has not been broadly used to correct the discrimination against refugees from right-wing dictatorships indicates that this discrimination is based more in policy than in law. Officials with responsibility for administering the parole authority generally consider that "providing sanctuary to those escaping communism is mandated in the law."[147] The parole provision is legally available for humanitarian assistance to any refugee, but standards for its application are not spelled out explicitly. By its very ambiguity, the provision lends itself to political interpretation. There is debate between Congress

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140. 8 U.S.C. § 1182(a)(28)(C) (1970).

141. *Id.* § 1182(d)(5).

142. *Id.*

143. Interview with Charles Gordon, *supra* note 15.

144. *See* INS v. Stanisic, 395 U.S. 62, 71 (1969) (citing Leng May Ma v. Barber, 357 U.S. 185 (1958)).

145. Interview with Dale de Haan, *supra* note 35. He observed that, "The first time the parole was used for a significant number of refugees from noncommunist areas was for the Ugandan Asians." *Id.* Although the Carter Administration appears to be somewhat more liberal than its predecessors in granting parole to escapees from rightist regimes, the vast majority of Carter Administration parolees have been fleeing communism. By one estimate, the Carter Administration will parole in approximately 25,000 Indochinese refugees between April, 1978, and April, 1979. N.Y. Times, Mar. 31, 1978, at 1, col. 6.

146. Interview with State Dep't Desk Officer (name withheld by request), in Washington, D.C. (June 11, 1975).

147. Interview with Christian Pappas, *supra* note 139; interview with Louis Wiesner, *supra* note 9; interview with Richard Jameson, *supra* note 64.

and the Administration as to whether groups can be paroled into the United States. Congress expects to be consulted before major parole programs are undertaken, and some members of Congress assert that consultation is a requirement. Administration spokesmen deny any legal requirement for consultation but maintain that there is, in essence, a political requirement to do so. "We do this because it is necessary to stay on good terms with the Hill and foster a spirit of cooperation," explained a foreign service officer.[148] These consultations are conducted on an informal basis with ranking members of the House and Senate immigration subcommittees, but it is clear that the views of the members of Congress carry a great deal of weight. Through the consultation procedure, political influences often take precedence over humanitarian considerations. A State Department official, for example, acknowledged that congressional resistance to the parole of Chilean exiles in Peru was based largely on the belief that admitting them would add to the unemployment problem in the United States. "The House committee's position," added the official, "had a lot to do" with the ultimate decision to exclude the exiles.[149]

Congress is not alone in resisting liberal use of the parole authority. The Immigration and Naturalization Service and the Attorney General, by many reports, are also hesitant to authorize large-scale parole programs.[150] One reason government officials have been reluctant to use their parole authority for the benefit of escapees from right-wing dictatorships is a provision in the Act which forbids the admission of any alien who advocates communism or the overthrow of the government, or who is a Communist Party member—unless the communist activity is deemed "involuntary."[151] This provision prohibits extending asylum to many people who seek refuge from such right-wing regimes as the Chilean junta, since the chief reason for their persecution is that they are Marxists or communists.[152] While the parole provision can be used to circumvent this prohibition, it is seldom applied because of political pressure from influential members of Congress, the Justice Department, and anticommunist lobbies.

In this connection, it is important to note an apparent conflict between American asylum law and the spirit, if not the letter, of the United Nations

148. Interviews with Christian Pappas, State Dep't Asylum Officer, in Washington, D.C. (June 11, 19, 1975).

149. *Id.*

150. *Id.*; interview with Dale de Haan, *supra* note 35.

151. 8 U.S.C. § 1182(a)(28) (1970). *See* Berdo v. INS, 432 F.2d 824 (6th Cir. 1970). In *Berdo*, a Hungarian sought political sanctuary but was denied refugee status or parole by the INS on the grounds that he had been a Communist Party member and was therefore inadmissable under 8 U.S.C. § 1182(a)(29(C)(iv) (1970). Berdo argued that he had been forced to join the Party to avoid economic deprivation, and, unbeknown to the Party, had participated in the 1956 anti-Soviet revolt. The court sided with Berdo and held that unwilling Party membership (membership "devoid of [all] political implications" and "meaningful association"), combined with anti-government activity such that he would be subject to severe penalties if he returned, excepted him from exclusion. This is an important judicial gloss on the Act, but it appears never to have been extended to Communist Party members from noncommunist countries.

152. Interview with Edward O'Connor, Deputy Commissioner of the INS, in Washington, D.C. (June 26, 1975).

Protocol Relating to the Status of Refugees,[153] acceded to by the United States in 1968 with the disclaimer that U.S. domestic law would take precedence in cases of conflict. The Protocol defines "persecution" more broadly than does U.S. law. Signatories pledge not to return to their native countries those who would face persecution stemming from "race, religion, nationality, membership of a particular social group or political opinion . . . ."[154] Thus, the Protocol extends its coverage for the victims of persecution on a worldwide basis, while the U.S. immigration law confines itself chiefly to communist country refugees.[155] More important, there is "tension," as one ORM official puts it,[156] between the Protocol and the section of the U.S. immigration act that bars communists and "subversives."[157] The Protocol, this official admits, prohibits discrimination against refugees on the basis of their political beliefs. It would appear that when the United States does not use the parole provision for the benefit of de facto refugees who are excludable under the definitions of the U.S. law—even deporting some of them to face possible persecution—the United Nations Protocol may be violated.

Aliens already in the United States who wish to request asylum and are ineligible under the seventh preference generally seek withholding of deportation, which can be granted at the discretion of Justice/Immigration under section 243(h) of the Act.[158] Most asylum court cases involve aliens' claims that, if deported home, they would be subject to "persecution on account of race, religion, or political opinion."[159] Once asylum is denied by the District Director of Immigration, the applicant must appeal first to the Board of Immigration Appeals, and then has recourse to the federal circuit court of that region.[160] Thus, in section 243(h) litigation, the circuit courts have had an opportunity to influence political asylum law and policy.

Nevertheless, displaying traditional reluctance to interfere with the exercise of administrative discretion, federal judges have made little use of this opportunity. A congressional grant of discretion is intended to bestow wide leeway upon the bureaucracy. Out of respect for legislative intent and an unwillingness to become embroiled in policy decisions, judges have imposed severe restrictions on their intervention in asylum cases.[161] The courts have generally

153. *Done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

154. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6261, T.I.A.S. No. 6577, 189 U.N.T.S. 152.

155. Seventh preference was confined exclusively to the eastern hemisphere until Oct. 20, 1976, when Congress passed an immigration amendment which applied seventh preference to the Middle East. Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 3(3), 90 Stat. 2703 (codified at 8 U.S.C.A. § 1152(e) (Supp. 1977)).

156. Interview with State Dep't official (name withheld by request), in Washington, D.C. (Sept. 26, 1974).

157. 8 U.S.C. § 1182(a)(28) (1970).

158. *Id.* § 1253(h). Legal requirements for acquiring refugee status under seventh preference, *id.* § 1153(a)(7), are much less stringent than under § 1253(h). *See In re* Adamaska, 12 I. & N. Dec. 201 (Reg. Comm'r, 1967).

159. Interview with Ira Gollobin, *supra* note 115.

160. 8 U.S.C. § 1253(h) (1970).

161. *See* Sunjka v. Esperdy, 182 F. Supp. 599, 601 (S.D.N.Y.), *cert. denied sub nom.* Ron-

held in section 243(h) cases that INS asylum decisions can be reversed only if they were "arbitrary and capricious," or not "reached in accordance with the applicable rules of law" and hence violative of due process.[162]

It is exceedingly difficult for an alien to establish that discretion has been abused under section 243(h). Proving a "clear probability of persecution" in the initial immigration proceedings is difficult enough;[163] it is harder still for the alien to prove in court that immigration officials have abused their discretion. In effect, petitioners must convince the court that the evidence of likely persecution presented to the INS was so persuasive that the failure to withold deportation was a blatant misuse of authority.[164] To this end, aliens who have engaged in political activities in America directed against their home governments have claimed that: (1) such actions would likely subject them to persecution if deported home, and (2) the failure of immigration officials to acknowledge this danger constitutes an abuse of discretion. By and large, the courts have rejected such arguments.[165] In *Matter of Nghiem*,[166] the Board stated: "For the most part [we have] not considered that joining protest groups and making public statements after entering the United States supports a withholding of deportation under section 243(h). Many aliens have attempted to build up a 243(h) case by this sort of activity."[167] Exceptions to this line of Board decisions appear to have involved only communist country refugees.[168]

Some asylum applicants have also claimed that the INS abuses its discretion by relying on State Department recommendations to deny asylum, and particularly on State Department recommendations based upon secret information. The applicants' argument here is often that State Department recommendations are tainted with bias, for reasons of foreign policy, and that it is impossible to refute secret information. Judicial reaction to these arguments has been mixed but the courts have seldom reversed the Board of Immigration Appeals. Some courts have insisted that the Board must not rely on State Department asylum recommendations, while imposing the burden of proving reliance upon the alien.[169] Other courts have upheld the right of Immigration officials, pur-

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cevich v. Esperdy, 364 U.S. 815 (1960), for an explicit disavowal of interference with foreign policy decision-making.

162. Paul v. INS, 521 F.2d 194, 197 (5th Cir. 1975) (quoting Jarecha v. INS, 417 F.2d 220, 224 (5th Cir. 1969) (quoting Kam Ng v. Pilliod, 279 F.2d 207, 210 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961))).

163. Lena v. INS, 379 F.2d 536, 538 (7th Cir. 1967).

164. United States *ex rel.* Kordic v. Esperdy, 276 F. Supp. 1, 3 (S.D.N.Y.), *aff'd*, 386 F.2d 232 (2d Cir. 1967).

165. Hosseinmardi v. INS, 391 F.2d 914 (9th Cir. 1968); Zamora v. INS, 534 F.2d 1055 (2d Cir. 1976). For Board decisions on the issue of political activity in the U.S., *see In re* Kojoory, 12 I. & N. Dec. 215 (BIA, 1967).

166. 11 I. & N. Dec. 541 (BIA, 1966).

167. *Id.* at 544.

168. *In re* Janus and Janek, 12 I. & N. Dec. 866 (BIA, 1968). *See also* Berdo v. INS, 432 F.2d 824 (6th Cir. 1970), in which a federal circuit court actually reversed a discretionary decision by the INS.

169. Paul v. INS, 521 F.2d 194 (5th Cir. 1975). In Zamora v. INS, 534 F.2d 1055 (2d Cir. 1976), Judge Friendly allowed the Board to rely on State Department information but not on its direct recommendation to grant or deny asylum.

suant to federal regulations, to rely on information which is not disclosed to the alien.[170] In some cases, the circuit courts have stated explicitly that the initial asylum decision must not be interfered with for political reasons—*e.g.*, "the . . . question . . . involves a decision as to foreign policy traditionally left to the executive branch of the government."[171]

As a result of the courts' refusal to intervene significantly in the exercise of administrative discretion under section 243(h), gaining asylum under that provision has proven extremely difficult. In 1968, Professor Alona Evans reviewed 100 section 243(h) cases and concluded that "prospects for relief are very limited."[172] Review of subsequent cases suggests that this conclusion remains valid today.[173] It is relatively rare for communist country aliens to be placed in deportation proceedings at all, according to State Department and Immigration officials.[174] It is mainly those who are seeking refuge from noncommunist regimes who are placed in deportation proceedings and must carry the heavy burden of proof which the courts impose under section 243(h).

V
CONGRESSIONAL REFORM EFFORTS

Since 1966, a handful of legislators, led by Senator Edward M. Kennedy and Congressman Peter W. Rodino, Jr., have introduced measures during each Congress designed to remedy some of the more glaring defects in the 1965 immigration act.[175] Although there were differences between the Kennedy and Rodino bills, they shared three major goals: (1) to substitute the United Nations Protocol definition of refugee for the more restrictive statutory definition presently being used; (2) to make the adjustment of status to "permanent resident alien" with full work privileges easier for parolees and refugees now in voluntary-departure status who must exist in limbo, subject to deportation at a moment's notice; and (3) to extend the refugee "preference" category to the western hemisphere, providing a better mechanism for dealing with the worldwide refugee problem. The more liberal Kennedy bill has never come close to passing despite repeated efforts in successive Congresses since the enactment of the Immigration and Nationality Act of 1965. In the Ninetieth

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170. 8 C.F.R. § 242.17(c) (1977). *See* Namkung v. Boyd, 226 F.2d 385 (9th Cir. 1955). *Accord*, Hosseinmardi v. INS, 405 F.2d 25 (9th Cir. 1968); Asghardi v. INS, 396 F.2d 391 (9th Cir. 1968); Kasravi v. INS, 400 F.2d 675 (9th Cir. 1968).

171. Sunjka v. Esperdy, 182 F. Supp. 599, 601 (S.D.N.Y.), *cert. denied sub nom.* Roncevich v. Esperdy, 364 U.S. 815 (1960).

172. Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 INT'L LAW. 204, 253 (1969).

173. *See* Gena v. INS, 424 F.2d 227 (5th Cir. 1970); Paul v. INS, 521 F.2d 194 (5th Cir. 1975); Cisternas-Estay v. INS, 531 F.2d 155 (3d Cir. 1976); Zamora v. INS, 534 F.2d 1055 (2d Cir. 1976); *In re* Pierre, Int. Dec. No. 2433 (BIA, Sept. 16, 1975).

174. Interview with Christian Pappas, *supra* note 139; interview with Louis Wiesner, *supra* note 9; interview with Edward O'Connor, *supra* note 152; interview with James Greene, *supra* note 121.

175. S. 2643, 93d Cong., 1st Sess., 119 CONG. REC. 35734 (1973); S. 3827, 93d Cong., 2d Sess., 120 CONG. REC. 25404 (1974); S. 2405, 94th Cong., 1st Sess., 121 CONG. REC. 29947 (1975); H.R. 981, 93d Cong., 1st Sess., 119 CONG. REC. 61 (1973).

through the Ninety-Fourth Congresses, the Kennedy reform bill died in the immigration subcommittee of the Senate Judiciary Committee. On the House side, Rodino's H.R. 981 was better received. It passed in two successive Congresses, only to be shelved when it reached the Senate subcommittee. After hearings in the Ninety-Fourth Congress, H.R. 981 was stripped of all but its most uncontroversial reform proposal, the extension of the preference system to the western hemisphere. Reported out as a clean bill, H.R. 14535, this measure was enacted as the Immigration and Nationality Act Amendments of 1976.[176] The more extensive reforms contained in the Kennedy proposal, which were deleted from the Rodino bill, have little chance of success in the near future.

To understand why the more liberal bills are repeatedly rejected by the committee, one must consider the make-up of the immigration subcommittee and the attitudes of the public and the Congress toward immigration reform. First, the members of the Senate immigration subcommittee, on the whole, have been much more politically conservative than the Congress at large. "Senator James O. Eastland blocks this legislation," says one staff member, "in part for ideological reasons, but basically because he just doesn't care."[177] This staff member adds that Eastland's attitude has generally been shared by other members of the immigration subcommittee, such as John L. McClellan and Strom Thurmond, who regard the present law, with its parole provision, as adequate.[178] The subcommittee is not the sole cause of Congress' failure to reform the asylum law. Senate Democrats re-elect Eastland to the chairmanship of the Judiciary Committee each year, with full knowledge of the policies he will pursue. The Democrats take little interest in immigration reform or improvement of the political asylum and refugee admission systems; hence, they fail to encourage Senator Eastland and his subcommittee to pass the reform bills out of committee.

This congressional apathy is lamentable but wholly predictable, since there is no significant public constituency pressuring the Congress to reform the political asylum system. Those who would benefit most from broadening and liberalizing the asylum laws—the Chileans, Filipinos, Haitians, and other refugees from noncommunist countries—have little political influence in the United States. They are either in difficulty abroad or they are in the United States under precarious circumstances. They cannot vote, and they do not have an entrenched influential ethnic community to work on their behalf. In this respect, refugees from communist countries have a considerable advantage. Aided by the Displaced Persons Act of 1948,[179] a great many refugees were admitted into the United States, and most quickly achieved a secure immigration status. They established roots and prospered economically, and thus are

176. Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (codified at 8 U.S.C.A. § 1101 (Supp. 1977)). See U.S. State Dep't Bull. 839 (Nov. 22, 1976) for President Ford's statement upon signing the bill.

177. Interview with congressional staff member (name withheld by request), (Dec. 2, 1974).

178. *Id.*

179. Pub. L. No. 80-774, 62 Stat. 1009 (1948).

now in a position to help their fellow countrymen who escape and seek sanctuary in the United States. The Czech-American, Polish-American, Hungarian-American, Russian-American, and other such communities have achieved considerable economic and political power. Familiar with immigration law, members of these communities can recommend attorneys and advise new arrivals on the best methods of acquiring refugee status. More important, through such organizations as the Tolstoy Foundation and the American Fund for Czechoslovak Refugees, they can serve as sponsors and guarantee that new arrivals will not become public charges. The sponsorship system serves to decrease resistance from those who favor the restriction of immigration.

The law on asylum and the entrenched infrastructure which has grown up around the law undoubtedly contribute to the ease with which communist country aliens gain sanctuary here. But these factors must be considered in conjunction with the cold war atmosphere in which they originated. After World War II, granting asylum to communist country refugees became a tool of American cold war foreign policy. John Haynes of the State Department's Bureau of Security and Consular Affairs said during a 1959 congressional hearing:

> From a strictly economic point of view, I suppose it might be better if nobody came into this country; but there are other factors that cannot be overlooked and one . . . is the *impact on our foreign policy, of the necessity of this country maintaining a role where we are the leader of the anti-Soviet, anti-Communist camp.*
>
> We have to make some gestures to these people who are symbols of those who have left communism. We cannot . . . at the same time claim leadership in this field and say when they come out, 'This is entirely a problem for the other countries of the free world because they have less population or they have less [*sic*] economic problems than we do.'[180]

In the cold war atmosphere, congressional restrictionists were unable to prevent the enactment of measures for the relief of communist country refugees, but they succeeded in keeping these programs on a temporary basis between 1949 and 1965 and in forestalling proposals to assist refugees from other than communist regimes. Proponents of asylum programs, however humanitarian some of their motives may have been, were forced by political circumstances to phrase their arguments in terms of cold war foreign policy.

Another by-product of the cold war which has a continuing effect on American asylum practice is the policy of maintaining strong, bilateral relationships with anti-communist dictatorships. In cold war parlance, these countries were part of the "free world," and therefore persecution within their borders was officially ignored. Thus, considerations of foreign policy as well as powerful domestic interests have a substantial impact on asylum practice. These political influences are frequently exerted through Congress, which not only has the responsibility for passing asylum and refugee legislation but also the

180. *Admission of Refugees on Parole: Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 86th Cong., 2d Sess. 17 (1959-1960) (emphasis added).

power to effect its implementation.[181] Influence is also exerted, however, through the various arms of the political asylum bureaucracy.

VI
THE BUREAUCRACTIC MAZE

Humanitarian goals are too frequently lost sight of in the bureaucratic maze which is entrusted with carrying out political asylum programs. Authority for administering the political asylum system has been divided among agencies which are likely to be diverted from impartial consideration of asylum requests and refugee programs by foreign and domestic political pressures.

The Office of Refugee and Migration Affairs (ORM) within the State Department has been the most consistent advocate of a truly humanitarian asylum program. ORM tries to ensure that policy regarding asylum requests and programs is as apolitical as possible. Unfortunately, however, ORM officials cannot operate in a political vacuum; they must cooperate with other branches of the State Department, which have distinctly different priorities. The State Department desk officer of an alien's native country must be consulted in each asylum case. The desk officer's primary mission is to maintain the best possible bilateral relationship with the country in question; therefore, he is often unwilling to admit that persecution occurs there. Louis Wiesner, Director of ORM, minimizes the significance of this "clientism,"[182] but others in the Department state that it has a definite effect. One State Department officer says that clientism has been a clear factor in the denial of asylum to Iranians and that it has probably influenced the consistent denial of asylum to Taiwanese, Filipinos, South Koreans, and, before May, 1975, South Vietnamese.[183] In brief interviews, each of several State Department desk officers for countries governed by right-wing dictatorships de-emphasized the degree of political repression in "his" regime, questioned the motives of those seeking asylum, and stressed how few asylum cases actually came across his desk. For example, one desk officer for an Asian country, expressing relief that few citizens from "his" country request asylum, stated: "There is no question that when we grant asylum to a refugee from a government . . . with which we are friendly, that government feels that its reputation is slighted, its honor impugned. This can only lead to resentment against the United States and both governments lose out."[184] Another commented on the denial of asylum to an appli-

181. This power is not spelled out in legislation. According to Christian Pappas of ORM, former Immigration Commissioner Leonard Chapman, and Dale de Haan of the Senate Refugee Subcommittee, Congress insists on being consulted on major asylum policy decisions, and the Administration does consult with members of Congress and take their views into account. Interview with Christian Pappas, *supra* note 139; interview with Leonard Chapman, *supra* note 32; interview with Dale de Haan, *supra* note 35.

182. Interview with Louis Wiesner, *supra* note 9.

183. Interview with State Dep't official (name withheld by request), in Washington, D.C. (June 11, 1975).

184. Interview with State Dep't Desk Officer (name withheld by request), in Washington, D.C. (June 9, 1975).

cant who, in the desk officer's words, "may have had problems" if sent home: "We didn't grant him asylum because the United States government doesn't want to pass judgment on the internal conditions of allied countries. That would cause resentment on their part and hurt the bilateral relationship."[185] This officer also explained why the State Department had turned down South Vietnamese students requesting asylum from the Thieu regime before the fall of Saigon in May, 1975. "We were closely linked with Saigon and couldn't very well pass judgment on her internal political practices."[186] The greater the diplomatic importance of any given country, the greater the likelihood the State Department will deny asylum in order to avoid antagonizing that country, even at the expense of humanitarian interests. Therefore, a change of policy regarding Haiti, whose foreign policy importance is minimal,[187] should be less controversial than one directed at Iran or South Korea.

ORM faces another obstacle from supervision by superiors who are often less concerned with the plight of refugees than with other issues, such as Iranian oil and American bases in the Philippines or Spain. One State Department source intimated that Secretary Kissinger, not unlike his predecessors, wanted "to avoid damaging our bilateral relationships through grants of asylum,"[188] and hence presented a great obstacle to a more impartial consideration of asylum requests. In this connection, a congressional source suggested that the initial delay of one year in even considering a refugee program for Chilean refugees stemmed, at least in part, from a high-level State Department decision to make sure that the Pinochet junta was "stable" and did not object.[189] Highly placed officials in the State Department who take a positive interest in refugee programs often do so with the intent to use these programs as a tool of foreign policy. Humanitarian purposes *may* be served in the process, but they are frequently secondary and sometimes they are totally ignored.

Although the recommendations of the State Department carry great weight in the political asylum system, it is the Justice Department—primarily the Immigration and Naturalization Service—which has the last word in most asylum requests and in all grants of asylum by parole. If foreign policy considerations exert an influence on the political asylum system through the State Department, domestic political pressures are channeled into the system through the Justice Department and the INS. "Quite frankly," said one State Department observer, "the people at Immigration do not think in humanitarian terms. Their concern is the difficulty in dealing with so many aliens in the United States."[190] The INS is charged with enforcing the immigration statutes which,

185. Interview with State Dep't Desk Officer (name withheld by request), in Washington, D.C. (June 17, 1975).

186. *Id.*

187. Interview with State Dep't Asylum Officer (name withheld by request), in Washington, D.C. (Oct. 14, 1974).

188. Interview with State Dep't Near East expert (name withheld by request), in Washington, D.C. (June 11, 1975).

189. Interview with congressional staff member (name withheld by request), in Washington, D.C. (June 13, 1975).

190. Interview with Christian Pappas, *supra* note 139.

since the 1920's, have been intended to restrict the flow of immigrants into the United States. Immigration officials must also cope with the illegal entry of hundreds of thousands of aliens into the United States and with the possible abuse of the political asylum process by many aliens whose basic motivation may be economic, social, or professional. Moreover, according to one State Department official, the INS is highly responsive to domestic economic pressures. He maintains that, in light of the current high level of American unemployment, the INS is intent on "keeping the number of aliens coming in, both legal and illegal, both refugees and immigrants, to the absolute minimum."[191] President Carter's appointment of Leonel Castillo as the new Commissioner of Immigration suggests an effort to liberalize the INS. In addition to improving the procedures for Haitian asylum applicants, Castillo has advocated amnesty for illegal aliens now in the United States. But restricted immigration is still the law of the land and institutional habits change slowly. The INS remains, therefore, a bastion of restrictionism.

The INS "hard line" on refugee admission is entirely consistent with what appears to be the opinion of a majority of Americans. The growing intensity of public pressure to keep the lid on immigration is indicated in recent opinion polls. In April, 1975, a poll conducted in metropolitan Washington, D.C., showed that 58 percent of the sampling favored a reduction in immigration in contrast to only 44 percent in 1973.[192] The public, however, appears unable to distinguish between immigrants and political refugees. A national Gallup poll of April, 1975, revealed that, primarily for economic reasons, 52 percent of the American public opposed granting sanctuary to South Vietnamese refugees, even though the collapse of Saigon to communist forces appeared imminent.[193] Consequently, the Administration may find it difficult to liberalize its Haitian policy to any great extent without arousing public ire. It seems unlikely that restrictionist forces would accept large numbers of additional permanent resident aliens without a fight.[194]

According to one government source, INS officials initially "raised hell" over the Administration's plan to grant sanctuary to some 130,000 Vietnamese.[195] In a June, 1975, interview, Deputy Commissioner of the INS Edward O'Connor was convinced that the intent of the immigration statutes was being undermined by paroling in so many South Vietnamese refugees.[196] But highly placed State Department officials were firmly committed to a far-reaching refugee program in this instance, and they prevailed over any dissent

191. *Id.*

192. Washington Post, Aug. 4, 1975, at A6, col. 1.

193. *Id.*

194. In Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977), Judge Coleman vehemently dissented from the majority's decision to invalidate a deportation order and remand the case to allow consideration of evidence of political persecution in Haiti. He stated that petitioners "had the burden of demonstrating a 'clear probability' of being persecuted" and observed that the majority opinion did nothing to stem the tide of illegal immigration which was overwhelming the country. *Id.* at 1005.

195. Interview with Christian Pappas, *supra* note 139.

196. Interview with Edward O'Connor, *supra* note 152.

from the INS. As a rule, however, the restrictionist point of view within the INS has carried considerable weight. Several State Department sources maintain that the closed-door policy at the INS continually blocks a liberal use of the parole authority to aid refugees.[197] One of these sources added that unless the State Department can present a compelling foreign policy reason over and above any humanitarian obligations to admit a group of refugees, the INS is likely to veto or at least water down the proposal.[198] According to some officials, it was resistance within the INS as much as any other factor which delayed first the proposal and then the implementation of a Chilean refugee program. This resistance also played an important part in the decision to restrict admission of the Chilean exiles in Peru.[199]

Deputy Commissioner O'Connor revealed serious reservations about the admission of Chilean refugees. He denied that what the Chairman of the House Subcommittee on Immigration and the Attorney General had agreed to could really even be called a "program," and he expressed particular opposition to taking in any of the exiles in Peru. O'Connor explained that "once they cross the border into Peru, they're no longer subject to persecution and their problem becomes economic."[200] This extraordinary statement is in direct contradiction to both international and American law on asylum. Technically, one becomes a refugee after he has left his native country, and he continues to be a refugee until permanently resettled. O'Connor's statement exemplifies the tendency of immigration officials to define "refugee" as narrowly as possible, thus allowing the exclusion of greater numbers of aliens from the United States.

The response of the INS to the Chilean parole proposal also demonstrates an extreme concern with "internal security" in considering the admission of prospective asylum applicants. Expressing a representative view, O'Connor stated, "We can't let America become the dumping ground for communists or agitators."[201] Thus, although the Attorney General has the authority to parole in any alien he sees fit to admit,[202] the INS, the Attorney General himself, and (to a lesser degree) the State Department, with congressional support, have consistently resisted the use of parole for leftists, as in the case of the Chileans.

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197. Interview with Christian Pappas, *supra* note 139; interview with State Dep't Near East expert (name withheld by request), in Washington, D.C. (June 11, 1975).

198. Interview with Christian Pappas, *supra* note 139.

199. *Id.* The debate within the government over the scope of the parole authority continued in 1978 as increasing numbers of Indochinese "boat people" sought refuge in America. Secretary of State Vance, and the State Department Asylum Division, backed by lobby groups such as the International Rescue Committee, insisted that the parole authority can be used to admit groups of refugees. They cited past cases of group parole for Hungarians, Cubans, and Indochinese as precedents which support continuation of the practice. On the other hand, Attorney General Bell, INS officials, and House and Senate Immigration Committee Chairmen Eilberg and Eastland maintain that group parole is not mandated in the law. Justice Department officials argue that, because the Constitution gives Congress jurisdiction over immigration, and because Congress has not clearly delegated group parole authority to the Administration, group parole is unconstitutional. *See* N.Y. Times, Mar. 31, 1978, at 1, col. 6.

200. Interview with Edward O'Connor, *supra* note 152.

201. *Id.*

202. 8 U.S.C. § 1182(d)(5) (1970).

Humanitarian aims in the asylum system are often frustrated not only by the political character of the agencies which administer the program but also by the division of authority among the agencies. When there is no focal point of authority, only a massive exodus such as occurred in Hungary, Czechoslovakia, or Vietnam can elicit a coordinated response from the government. Without such an impetus, the wheels turn slowly, it is difficult to pin down responsibility, and the possibilities for "buck-passing" are unlimited. One State Department official admits that, although in many instances the Department is the determining agency in an asylum case, it has the "built-in, bureaucratic cop-out of saying, 'INS is legally responsible.' "[203] The INS, on the other hand, can always say that it depends on the State Department for information on these cases. Both the State Department and the INS often shift the responsibility to Congress which, they maintain, makes the laws, exerts pressure, and delays making decisions. As the Kennedy refugee subcommittee pointed out in its report in 1969: "[L]egitimate human concerns . . . have been placed in heavy subordination to common political interests. The situation has fostered neglect and indecision where action was needed."[204] The subcommittee's statement is as true today as it was in 1969.

VII
TOWARD A MORE HUMANITARIAN ASYLUM SYSTEM

The government of the United States has an explicit humanitarian ideal concerning asylum and has made international commitments to grant asylum with impartiality.[205] But in the face of pragmatic political considerations, our government is not adhering fully to its obligations or to its ideals. Congress contributes to the problem by not specifically mandating a permanent asylum program on a worldwide basis. The bureaucratic mechanism for administering the asylum program, divided between the State Department and the Justice Department, is often diverted by foreign and domestic political pressure from an impartial consideration of asylum requests and refugee programs.

For those seeking sanctuary from other than communist regimes, the impact of these policies can be extremely harsh. Political refugees, after all, are not just statistics in reports; they are men and women who may be subject to torture and long prison terms. Asylum decisions are more than a tug of war between government agencies—they are sometimes a matter of life and death. They may be, said Edward Ennis of the American Civil Liberties Union, "the most important decision[s] in respect of an alien that can be made in his or her lifetime, and indeed, approval of such an application may involve all that makes life worth living for the applicant."[206]

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203. Interview with Christian Pappas, *supra* note 139.

204. *U.S. Assistance to Refugees Throughout the World: Findings and Recommendations of the Subcomm. to Investigate Problems Concerned with Refugees and Escapees of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 57 (1969).

205. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 (in force Oct. 10, 1967).

206. Letter from Edward Ennis, attorney, American Civil Liberties Union, to the author (Oct. 18, 1974).

A. *Reforming The Law*

The present law relating to refugees is complex, ambiguous, and exceedingly difficult to administer. One frustrated official said, "The Immigration and Nationality Act is one of the worst laws ever written. It's outdated and has been amended to death until it contradicts itself."[207] Certain reforms could contribute to the establishment of a rational and impartial legal framework for political asylum.

Congress should acknowledge legislatively that the suffering of political refugees is a worldwide phenomenon and that political persecution can occur under any dictatorial form of government, communist or noncommunist. The definition of refugee must be expanded to include all those throughout the world who have a reasonable fear of persecution because of "race, religion, nationality, membership of a particular social group or political opinion" as expressed in the United Nations Protocol.[208] The parole authority can be retained to provide flexibility to the system; but the authority to parole should be clearly stated, and the role of Congress—whether it be simply to advise or to have the right of veto—should be spelled out.

Finally, the exclusion of refugees on the basis of their political beliefs must end. Aliens who have employed terrorism or genocide to further an ideology should probably be excluded outright. Others who have actively participated in the suppression of human rights and democratic processes should be ineligible unless they can show that they have voluntarily renounced the use of force for political ends. But a belief alone should not be grounds for denying asylum; the current "ideological test" should be eliminated. All but the last of these proposals have been included in either the Kennedy or Rodino bills,[209] presented repeatedly in recent years, only to be killed in the Eastland committee. They have the support of many people in the bureaucracy who find the present law endlessly frustrating. But in view of the present power structure in Congress, the prospects for enacting any of these reforms remain extremely slim without strong and enthusiastic administrative support.

Admitting refugees without regard to their political beliefs has not been proposed in any reform introduced in Congress. Contrary to the fears of many American officials, representatives of the French, West German, and Swedish governments, which admitted sizable numbers of Marxist refugees following the Chilean coup, report that the refugees posed no national security problems.[210] Frank Kellogg, Special Assistant to the Secretary of State for Refugee and Migration Affairs, and others in the United States government seem to fear that Chilean Marxists and similar refugees (even if screened to keep out terrorists),

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207. Interview with Richard Jameson, State Dep't Office of Refugee & Migration Affairs, in Washington, D.C. (Sept. 26, 1974).

208. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6261, T.I.A.S. No. 6577, 189 U.N.T.S. 152.

209. *See* S. 2405, 94th Cong., 1st Sess., 121 CONG. REC. 29947 (1975); H.R. 981, 93d Cong., 1st Sess., 119 CONG. REC. 61 (1973).

210. Interviews with government representatives from France (June 3, 1975); from West Germany (July 2, 1975); from Sweden (June 19, 1975), in Washington, D.C. (names of diplomats withheld by request).

might use first amendment liberties to undermine American democracy.[211] This implies a lack of faith in the civil liberties upon which our nation is founded.

Immigration attorney Charles Gordon agrees that the anticommunist exclusionary provisions of the Immigration Act should be eliminated. "They're antiquated," he said, "they must go. We should only exclude those who directly threaten United States security—you know, the bomb throwers."[212] The proposal to end exclusion of refugees on ideological grounds is not likely to meet with congressional approval in the near future, but its enactment would bring our asylum law much closer to the spirit of our humanitarian ideals.

Legal reforms could clarify the intent of the asylum program, but in any law there will be room for administrative maneuvering and for political interest to have its influence. It is probably impossible to prevent political influences from having some impact on the asylum program, yet many government officials agree that such influences detract from humanitarian goals.[213]

B. A New Bureau of Refugee Assistance

As long as authority remains divided between the Department of State and the Department of Justice, it is almost inevitable that perceived imperatives of foreign policy and restricted immigration will take precedence over humanitarian considerations. There are several ways in which this authority could be consolidated. One independent agency could be established to administer the asylum and refugee program. This agency could also be given primary responsibility for aiding refugees abroad. Since the State Department and the INS have legitimate concerns about political asylum and refugee admission, both could serve the new agency in an advisory capacity. But the independent bureau would have the administration of a humanitarian asylum program as its chief goal and would be less subject to unwarranted interference. If the head of a Bureau of Refugee Assistance could be made a post of stature, to be filled by presidential appointment and congressional confirmation, and if the parole authority could be transferred to the holder of this post, then the new bureau might have enough power to counter the political forces which now detract from a humanitarian asylum practice.

An alternative for improving the asylum and refugee administration is to transfer all authority for the program from the Immigration and Naturalization Service to the State Department Office of Refugee and Migration Affairs. This transfer would avoid the disadvantage of creating still another bureaucracy. There are numerous people in ORM and elsewhere in the State Department who want the asylum program to be nonpolitical;[214] this reorganization might accomplish this goal. The success of any new program also depends on the

211. Interview with Frank Kellogg, *supra* note 18.

212. Interview with Charles Gordon, *supra* note 15.

213. *Id.*; interview with Dale de Haan, *supra* note 35; interview with State Dep't Desk Officer (name withheld by request), in Washington, D.C. (June 9, 1975).

214. Interview with State Dep't Desk Officer (name withheld by request), in Washington, D.C. (June 9, 1975); interview with State Dep't Near East expert (name withheld by request), in Washington, D.C. (June 11, 1975).

recognition and support it receives. The apathy of the public and the Congress toward political asylum can only be overcome by forceful leadership. The press should take a greater responsibility for making people aware of the problems of refugees.

The criticism of American asylum practice expressed in this Note is not intended to single out any individual or any group in the government for blame. Nor is it intended as an indictment of the entire refugee program. Over the years, the United States government has been of great assistance to many people in dire need of help; and within the government service there are many people who are dedicated to carrying out the program in a humanitarian spirit. Nor do these reform proposals call for the United States to take in all the suffering people in the world. That is clearly impossible. Each asylum applicant, however, should be able to have his or her case considered with compassion on its own merits and each refugee group produced by political crises abroad should receive humanitarian consideration, regardless of the regime from which it is fleeing. Our government should live up to its obligations and its ideals; it should apply its program of political asylum impartially to all bona fide refugees on the basis of their needs rather than for the sake of some political advantage.

State Department clientists state that they "cannot pass judgment on the internal affairs of friendly governments by granting asylum to their refugees."[215] Perhaps it would be beneficial, not only for the refugees but also for the country, if the United States did go on record as making precisely such a judgment. Our government would not be telling those nations how to conduct their own affairs but would simply be reasserting a long-standing commitment to the support of human rights and democratic forms of government. That commitment has been weakened by looking the other way too long in our relations with right-wing dictatorships.

CHRISTOPHER T. HANSON

215. Interviews with State Dep't Desk Officers (names withheld by request), in Washington, D.C. (June 9, 17, 1975).