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The Numbers Game: The Politics of U.S. Refugee Policy Toward Central America

This paper will examine United States refugee1 policy toward Central America and suggest appropriate reforms. Part I of this Comment will provide a historical overview of U.S. refugee policy concluding with a discussion of the current statutory authority on the subject. Part II will describe the influence and impact of U.S. foreign policy on U.S. immigration policy toward Central America. This section will demonstrate that U.S. refugee policy is not, as claimed by responsible authorities,2 based on broad humanitarian principles, but rather reflects presidential reaction to crisis situations characteristic of global politics. Finally, Part III will outline a bureaucratic model designed to implement a refugee program that is based on (1) the displaced refugees' need for immediate sanctuary, and (2) a uniform and nondiscriminatory application of the immigration laws.

The Charter of the United Nations, which reaffirmed faith in fundamental human rights, [and] in the dignity and worth of the human person . . . 3, is the primary source of this country's moral and legal obligation to treat all persons, regardless of alienage, in a fair and equitable manner.4 The U.S. as a signatory to the Protocol Relating to the

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1. The operative distinction between persons seeking refugee or asylum status is that refugees are situated outside the U.S., while persons seeking asylum are already in the U.S. Unless otherwise noted, this distinction will be ignored in this paper.

2. During Congressional testimony, Patricia Derian, Assistant Secretary of State for Humanitarian Affairs for the Carter Administration, suggested that U.S. concern with Latin American refugees is based on America's historical commitment to "humanitarianism" and is connected with the Administration's "Human Rights" policy. Hearings on H.R. 3056 Before the Subcomm. on Immigration Citizenship and International Law of the House Comm. on the Judiciary, Admission of Refugees, Part II: Indo-Chinese Refugees and U.S. Refugee Policy, 95th Cong., 1st and 2nd Sess. 265 (1977-78). Even President Reagan has referred to America's historic commitment to refugees fleeing oppression. 81 DEP'T ST. BULL. No. 2054, U.S. Immigration Policy, 43-44 (September 1981).


Status of Refugees of 1967 has expressly recognized the "social and humanitarian nature" of refugee policy and has agreed to apply the provisions of the 1967 Protocol "to refugees without discrimination as to race, religion or country of origin."

The United Nations Protocol, premised in large part on the Universal Declaration of Human Rights, equates the right to seek refugee or asylum status with certain fundamental rights and freedoms. Under its terms, the signatory countries have agreed to protect the personal, real, and intellectual property of all refugees. The signatory countries have also agreed to recognize a refugee's right of association, preserve free access to the courts, and protect the right to pursue gainful employment and receive public education.

Further, the U.S., by approving the Universal Declaration of Human Rights, has pledged to protect the right of any individual "to seek and enjoy . . . asylum from persecution." The U.S. has bound itself to treat all refugee applicants without any "distinction . . . on the basis of the political, jurisdictional or international status of the country or territory to which the person belongs. . . ."

Despite its obligations under international law, the authors will demonstrate that U.S. refugee policy, particularly in Central America, is devoid of humanitarian considerations. Instead, the authors will argue that refugee policy reflects the current administration's narrow perception of global politics.

**Part I**

**Historical Overview**

The history of the United States refugee policy may be described as a series of ad hoc responses to a variety of global political crises. From the large groups of refugees produced by the division of Europe

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8. Id. at 6260.
9. Id. at 6267.
10. Id.
11. Id. at 6268.
12. Id.
13. Id.
14. Id. at 6269.
15. Id. at 6271.
17. Id. art. 2.
during World War II to the recent displacement of Vietnamese, Cubans, Haitians, and Salvadorans, the U.S. has struggled with the proper limits of its role as a "humanitarian sanctuary."\textsuperscript{18}

Until 1980, U.S. refugee programs could be broadly grouped into three categories: temporary legislative responses to an isolated refugee crisis, temporary legislative responses to a general refugee class and permanent legislative responses to a general refugee class.\textsuperscript{19} As these categories reveal, refugee legislation has been passed on an \textit{ad hoc} basis in response to a specific crisis. In reviewing refugee legislation from 1948 to 1980, we see Congress' \textit{ad hoc} approach to refugee assistance and resettlement is woefully inadequate. The history of refugee legislation proves that the absence of any comprehensive scheme for the admission of refugees into the United States results in an inequitable and inefficient treatment of refugees.

\textbf{A. Displaced Persons Act of 1948}

In 1948, Congress enacted the first post-World War II legislation dealing with refugees. The Displaced Persons Act of 1948\textsuperscript{20} provided a haven for certain refugees who satisfied standards established by the United Nations.\textsuperscript{21} The Act was designed to admit victims of Nazi, fascist and Soviet repression.\textsuperscript{22}

\textbf{B. Refugee Relief Act of 1953}

Since the alien entry system did not have a specific category for refugees, they were admitted only through special congressional or executive dispensations.\textsuperscript{23} These enactments reflected a response to the immediate pressures of global politics rather than a commitment to hu-


\textsuperscript{22} Displaced Persons Act of 1948, \textit{supra} note 20, § 2(c) and (d).

\textsuperscript{23} For example, the Conference Committee for the Refugee Relief Act of 1953, \textit{see infra} note 25 and accompanying text, stated that the Act was merely, [\textit{An emergency relief measure designed to implement certain phases of American foreign policy. It is not intended to represent any precedent or commitment on the part of Congress or the Government of the United States to participate as an immigrant receiving country in any international endeavors aimed at a permanent solution of the problem of surplus populations as it now apparently exists in certain parts of Europe and Asia.}}
manitarian ideals. It is thus not surprising that the plight of anti-communists was a major factor in the passage of the Refugee Relief Act of 1953.

The Act created a special quota of visas not to exceed 205,000 and authorized the Attorney General to adjust the status of certain aliens. Aliens who wanted to adjust their status had to show actual or potential persecution and must have entered the United States prior to July 1, 1953. Additionally, they were required to establish that they would not be public charges or security risks.

C. Migration and Refugee Assistance Act of 1962

Amid mounting criticism of Congress for its failure to implement a comprehensive and permanent refugee admission policy, Congress enacted the Migration and Refugee Assistance Act of 1962. The stated purpose of this legislation was to assist the "movement of refugees and migrants and to enhance the economic progress of ... developing countries." Although couched in broad humanitarian language, the bill was a specific legislative response to the resettlement needs of Cubans displaced by the Castro-led revolution of 1958.

The Migration and Refugee Assistance Act and its 1965 Amendments served as the U.S. refugee policy for almost 20 years.

The 1965 Amendments established the first permanent authority for the admission of refugees, created a "seventh preference" by


27. Id. § 6 at 403.

28. Id. § 7(c) at 404.

29. Id. § 11 at 405.


32. The program is still in operation and as recently as 1980, over $1 billion was appropriated to assist refugee resettlement in the U.S. U.S. Refugee Programs, Hearings before the Senate Comm. on Judiciary, 96th Cong., 2nd Sess. 155-56 (1980).

33. In signing legislation that would give practical effect to the preferences already carved out for Cuban refugees, President Johnson stated that those "people of Cuba . . . [seeking] refuge here in America will find it . . . [and] . . . we Americans will welcome these Cuban people. For the tides of history run strong, and in another day they can return to their homeland and find it cleansed of terror and free from fear." 53 Dep't St. Bull. 1374, at 662-63 (Oct. 25, 1965).


which political refugees from communist countries were granted conditional entry to the United States, and established eligibility standards for the new refugee preference. According to the plain language of the statute, entrants under the seventh preference could only be selected on strict ideological and geographical qualifications. In order to enter the U.S. under this provision, an alien had to show that 1) he left a communist or middle eastern country; 2) in a manner amounting to flight; 3) the flight was caused by fear of or actual persecution; and 4) he is unwilling or unable to return to the country.

**D. Refugee Act of 1980**

Prior to World War II, we did little as a nation to provide a safe haven for those threatened with persecution or death because of their race, religion, nationality, or political views. But the Refugee Act of 1980 was designed, in large part, to conform domestic criteria for refugee admissions to international standards.

During the 1960’s and 1970’s, a series of bills was introduced in Congress in response to the call for a comprehensive refugee policy. These bills, *inter alia*, defined “refugee,” established flexible numerical guidelines, and created a formal structure for processing refugee applications. Congress, nevertheless, resisted formulating a comprehensive refugee policy, and action on the bills was deferred for another decade.

When 130,000 refugees from southeast Asia relocated in the U.S. in 1976, calls for refugee reform were once again heard in the halls of Congress. In commenting on the principles underlying U.S. refugee policy, Senator Edward Kennedy observed that “(f)or many years, the American people have responded generously and compassionately to the needs of homeless people” and that the Refugee Act of 1979 would introduce for the first time “greater equity in our treatment of

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36. *Id.*
37. *Id.*
38. *Id.*
refugees and displaced persons.”

Describing U.S. refugee policy as “a patchwork of different programs that evolved in response to specific crises,” then U.S. Coordinator for Refugee Affairs Dick Clark suggested that the Refugee Act of 1979 will make “sweeping changes in the existing piecemeal approach” by introducing “a comprehensive and long-term” refugee policy.

The avowed purpose of the Refugee Act of 1980 was to recognize “the historical policy of the United States, to respond to the urgent needs of persons subject to persecution in their own homelands” and to establish “a permanent and systematic procedure for the admission to this country of refugees.”

The Refugee Act of 1980 has failed to achieve its stated purpose—the fair and equitable treatment of all refugees. This failure is directly attributable to U.S. foreign policy considerations that continue to influence our refugee policy. A striking example of this influence is U.S. immigration policy toward Central America.

A review of the United States refugee policy toward Central America shows that applicants from Communist countries find it much easier to obtain refugee status than those fleeing right-wing dictatorships. Numerous administrations have suggested that applicants from right-wing countries have far weaker cases than those from communist countries. This contention is unpersuasive and unsubstantiated, particularly in light of the political repression which is widespread in

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48. See S. REP. NO. 256, 96th Cong., 1st Sess. 6, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141, 146 (Table 1—Historical Summary of Refugee Parole Action).

Public relations campaigns have played a dominant role in eliciting widespread support for the admission of large numbers of Indo-Chinese and Cubans. In 1979, when the Cambodian refugee pipeline was turned on, the Carter Administration’s efforts centered on granting asylum to “Freedom Fighters.” 79 DEP’T ST. BULL. 2024 (Mar. 1979) at 22. The same anti-communist motivation prompted President Johnson to welcome Cuban refugees at the foot of the Statue of Liberty, 53 U.S. DEP’T ST. BULL. 1374 at 661-63 (Oct. 25, 1965), and President Carter to accept them with open arms at the end of their “voyage to Freedom.” 80 DEP’T ST. BULL. 2038 at 69-70 (May 14, 1980).

This pattern indicates the Administration’s willingness to admit refugees fleeing Communism even though statutory quotas are being undermined. Prior special legislation, admitting refugees fleeing Communist countries all followed considerable debate about the wisdom of admitting refugees outside of the ordinary quota system. See The Act of July 25, 1958, Pub. L. No. 85-559, 72 Stat. 419 (repealed 1965) and the Displaced Persons Act of 1948, Ch. 647, 62 Stat. 1009, amended by the Act of June 16, 1950 (repealed 1957).
most Central American countries. 

In granting refugee status to the refugee population of non-Communist Central America, United States foreign policy decision-makers have traditionally encountered the dilemma of whether the principles of humanitarianism should prevail over the United States' political; economic, and military interests in the Central America region. While the U.S. has welcomed refugees seeking freedom from repression and economic deprivation, this policy has been limited to refugees from Communist countries.

The Justice Department has severely restricted parole admissions when a refugee comes from a non-Communist country whose government has diplomatic ties with the United States. Haitians and El Salvadorans, fleeing regimes supported by the United States have been denied complete access to this country.

In order to preserve its political and economic interests in Central America, the United States has adopted an aggressive foreign policy stance that does not have as its focal point the preservation of democratic ideals. Instead, its foreign policy is geared toward supporting regimes that provide the most stable investment environment for the

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49. The State Department has itself recognized the prevalent nature of political violence in countries like El Salvador. See 81 Dep't St. Bull. 2055 (Oct. 1981).

50. Speaking before the Committee of the Judiciary, Senator Kennedy stressed the significance of a controlled refugee policy by pointing out that “refugee problems are of deep concern to the American people . . . because refugees pose critical foreign policy problems for us and the international community.” He further stated that “massive refugee movements can unbalance peace and stability as much as any arms race or political or military confrontation.” Hearings on U.S. Refugee Programs Before the Comm. on the Judiciary, 96th Cong., 2d Sess. 2 (1980) (Statement of Sen. Edward Kennedy). The Refugee Act of 1980 gave the Attorney General great flexibility in establishing admissions criteria. As a result, much greater attention was focused on the problems of refugees fleeing from Communist domination.

51. Under the parole authority vested in the Attorney General by Section 212(d)(5) of the Immigration and Nationality Act (INA), prior to its amendment by Section 203(f)(3) of the Refugee Act of 1980, a total of 230,700 refugees were admitted into the United States. Of this total, only 5,000 refugees were admitted from non-Communist countries. Included in this small group were the Middle East (2,500), Africa (1,500) and Latin America (1,000). Id. at 72. The remainder of the total admittees were fleeing communist regimes: Indochinese (168,000), Soviet Union (33,000), Eastern Europe (5,000) and Cuba (16,000). Hearings, supra note 114 at 72.


continuing profitability of U.S. business interests. The present administration maintains that political stability in Central America is essential to our economy and national security. It has suggested that only through an extensive military and economic assistance program in El Salvador can “private investment . . . [be] mobilized to fulfill its role as the engine of development” in Central America. Consequently, Central American regimes have been supported in spite of the fact that their policies conflict with American notions of democracy and humanitarianism.

Central American countries have been plagued by political turmoil and repression, causing the flight of a massive refugee class seeking shelter and protection in other countries. Offering the United States as the country of first refuge would amount to a de facto vote of no confidence by the United States against the repressive regimes of this region. Therefore, the State Department tends to deny asylum in order to avoid antagonizing those governments which are supported militarily and economically by the U.S., even if by denying asylum, humanitarian principles are sacrificed.

PART II
UNITED STATES REFUGEE POLICY AS A REFLECTION OF AN EXECUTIVE DOMINATED REFUGEE POLICY

Policymaking by the same set of decision-makers can lead to inconsistent results. For example, when Congress refused to enact special legislation to admit Hungarian refugees in 1956, President Eisenhower resorted to his parole power to admit them. Subsequent decision-making, including that affecting “Cuban-Haitian entrants” has followed a similar response pattern: the President admits or excludes significant numbers of refugees outside the applicable statutory scheme, and Congress ratifies the President’s decision through special ex post facto legislation.

This scheme permits Presidents to make decisions on broad for-
eign policy grounds while Congress is mixed in the bureaucratic decision-making process. Subsequently, Congress discounts its part in the process, since its constituents are either indifferent or opposed to large-scale refugee admissions. By linking parole admissions to anti-communist sentiment, successive administrations have managed to defuse restrictionist concerns. Yet because these refugees entered the United States in the name of the "national interest" under reasonably controlled circumstances, their admission posed no political liability. The use of this political subterfuge by successive administrations has made the inconsistent application of humanitarian principles less apparent to the public.

However, in 1979, this decisionmaking scheme strained under the stress of the Haitian refugee crisis. The same vision of "national interest" that regarded Cubans as welcome, deemed Haitians as automatically excludable. That policy ignored the relative hardships and

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60. Refugee migration into the United States has grown with increasing magnitude in spite of a strong and growing anti-refugee public sentiment. A 1979 Roper poll on the subject of refugees showed only 12 percent of the population wanted to raise the number of refugees admitted annually while a mere 14 percent felt any obligation to assist Indochinese refugees because of our involvement in Vietnam. See 125 CONG. REC. 25041 (1979).

This characteristic resistance to large scale migrations has manifested itself in the form of legislative inertia which has evolved into an institutional abdication of power to the Executive for the purpose of avoiding political responsibility. In light of this legislative inertia, the Executive branch has acted quickly to admit record numbers of refugees all in the name of the "national interest." Similarly, restrictionist concerns have been diffused by linking refugee admissions to the totalitarian acts of some Communist regimes.

For example, the Assistant Secretary of State for Inter-American Affairs, speaking before the Subcommittee on Immigration and Refugee Policy, distinguished between the Cuban and Haitian migrations. The former migration was characterized as a "sudden massive outflow" of people that could "only occur in a totalitarian state"; while in the latter situation we were simply dealing with a "friendly government" which wished to bring illegal migration occurring "as a result of individual decisions," under control. The national interest considerations in deterring similar Cuban exodus in the future was highlighted when it was described as the "ultimate... in manipulation" with an intent to commit an unfriendly act against another country. See United States as a Country of Mass First Asylum: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Comm. on the Judiciary, 97th Cong., 1st Sess. 3-4 (1981) (statement of Thomas O. Enders, Assist. Sec. of State for Inter-American Affairs).
dangers members of each group faced if forced to return to their own countries. Cubans had easier access to the U.S., even under the more restrictive "seventh preference"\textsuperscript{61} definition, while Haitians have been denied entry to the U.S. under the more liberal definition promulgated by international law\textsuperscript{62} and incorporated in the Refugee Act of 1980.\textsuperscript{63}

Similarly, the entry of Indochinese refugees into this country at the rate of 14,000 per month put considerable strain on the resettlement process. This strain was aggravated by the \textit{ad hoc}, executive-dominated refugee admissions pattern that had been established; whereby admissions decisions frequently were made before federal funding commitments were in place. Congress grew more restive about the continued use of "parole" to admit large groups of refugees because (1) it conferred a power on the executive not statutorily intended,\textsuperscript{64} and (2) it helped defeat coordinated planning for resettlement purposes.\textsuperscript{65} The Refugee Act of 1980 attempted to meet these concerns. The Act liberalized the definition of a refugee,\textsuperscript{66} attempted to restrict the use of executive parole,\textsuperscript{67} and provided for formal "consultation" between the executive and legislative branches in arriving at a yearly "allocation" for refugee admissions.\textsuperscript{68}

The passage of the Refugee Act of 1980 ushered in a new era of regulation of refugee admissions marked by increased intergovernmental coordination, executive accountability, and congressional input into admissions decisions. By expanding the refugee definition,\textsuperscript{69} Congress broadened the number of potential entrants. Yet, by instituting a formal allocation process for determining refugee numbers and countries of refugee origin, and by establishing a 50,000 entrant per year base refugee figure,\textsuperscript{70} Congress also demonstrated its intention to regulate the number of yearly admittees by removing such policy decisions from the realm of presidential foreign policy decisionmaking and improving regulation and coordination of refugee admissions.

During the first year of the new Refugee Act the government allo-
cated 230,700 refugee slots—a figure considerably in excess of any previous levels. During the second year, however, the allocation was slightly reduced to 217,000 slots.

A. The Role of the State Department

Under current administrative regulations, an alien may only seek refugee status if he or she is within a class so designated by the President. Having satisfied this requirement, the alien/applicant must appear in person before an immigration officer (or the American Consulate) to articulate the facts relevant to his or her application. The application is then forwarded to the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the State Department which issues an advisory letter. The letter discusses the human rights conditions in the applicant's country of origin and the likelihood of individual persecution.

The involvement of the State Department in this decision making process has been severely criticized, because of both its cursory review of applications and its politically biased position on human rights conditions in particular countries. For example, the Ninth Circuit in Kasravi v. Immigration Naturalization Services upheld the deportation of an Iranian student but questioned the reliability of State Department reports on human rights violations in a particular country. In consid-

73. As explained earlier, the critical difference between a refugee and an asylee is that a refugee is a person seeking entry to the U.S., while an asylee is a person already in the United States. The administrative processes outlined in our recommendations would apply equally to both classes of aliens.
74. The regulations summarily allow the President to determine the number of aliens who will be admitted as refugees on humanitarian grounds. 8 C.F.R. § 207.1(a) (1983). The Administration favors the use of discretionary factors such as "close association with the United States" and the "public interest." 46 Fed. Reg. 45116, 45117 (1981) (as codified at 8 U.S.C. § 1157 (1982)).
75. 8 C.F.R. § 207.2(b) (1983). This requirement is limited to alien applicants over the age of 14 years.
76. Id.
77. Before a final decision is made on any refugee decision, the INS must obtain an advisory opinion from the State Department. These opinions, the Select Commission noted, are:
[B]ased on written evidence taken from INS interviews with the applicant and appraisals by the Department's regional experts, [and] often determine an applicant's status. An applicant, however, is severely limited in his/her ability to rebut a State Department opinion since efforts to obtain documentation or the testimony of government officials may be restricted.

The Commission explained, in a footnote, that "[a]n asylum applicant's efforts to obtain official documentation or the testimony of government officials may be resisted on claims of privilege under Executive Order 11652. Select Comm. Report, infra note 93 at 170.

78. 400 F.2d 675 (9th Cir. 1968).
79. Id. at 677 n.1.
ering a State Department report on human rights in Iran during the bloody Mohammed Reza Shah Pahlavi regime, the Kasravi court commented, that:

Such letters 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 with nations throughout the world. . . .

No hearing officer or court has the means to know the diplomatic necessities of the moment, in the light of which the statement must be weighed. 80

B. The Need for Change

The Refugee Act has to an extent depoliticized the admissions process and provided refugees with more absolute protection. This development has not, however, supplanted foreign policy-national security considerations in refugee admissions decisions with principles of humanitarianism consistent with our country's notions of democracy.

Decisions on refugee visa allocations continue to be guided by an east-west political model. The refugee admissions process continues to be used as an executive tool to further the political objectives of successive administrations. A comparison of the admissions process for persons seeking political asylum demonstrates its politicization. Through the use of parole powers, the executive branch has manipulated refugee admissions to further its anti-communist sentiments. 81 Given the government's parole powers and its very broad discretion to shape refugee policy, it is doubtful whether the refugee admission process can be used to assist those aliens most in need of help. The Reagan administration's specific emphasis on the desirable type of refugee may well justify the repeal of some of the most important provisions of the Refugee Act of 1980.

The present government has made highly public, selective efforts

80. Id.

81. The power of parole has historically been used to admit anti-Communist Asians, Chinese, Soviet Jews and Eastern Europeans. See S. REP. NO. 256, 96th Cong., 1st Sess. 6, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 41, 146. The Ford and Carter administrations also paroled a large number of refugees from the Far East. For example, between 1975 and 1979 the Executive paroled more than 200,000 Indochinese refugees into this country. Id. at 146. The policy of favoring refugees fleeing Communist regimes has had continued vitality during the Reagan administration. Speaking before the Senate at a hearing on refugee admissions, Acting Attorney General Smith recommended that 172,000 refugees be admitted in fiscal year 1982 and that 100,000 of this total should come from Indo-China. 39 CONG. Q. W. REP. 2067, 2068 (1981); Kurzban, supra note 52. Haitians and Salvadorans have been denied similar protections and have generally been denied asylum. See supra note 60 and accompanying text. For a review of the executive branch "cold war" orientation toward refugee policy, see Kurzban, supra note 52 at 872 (1982).
to "interdict" undocumented aliens at the border. For example, the interdiction of Haitian vessels on the high seas, although in violation of international law, was technically legal under United States law. The Reagan administration's proposed "Immigration Emergency Act" would reserve the right to interdict ships, although it would refrain from doing so "except in the most compelling circumstances." Less formal interdiction of Salvadoran and Haitian asylum applicants, who have been detained and incarcerated pending formal adjudication of their claims, has been occurring only since President Reagan took office.

For example, while the Reagan Administration has used its parole...
powers to admit large numbers of anti-communist refugees, it has also used asylum and withholding of deportation processes as legal hurdles to impede the entry of thousands of refugees fleeing from non-communist repressive regimes such as Haiti and El Salvador. The administration has manipulated these procedures to exclude refugees seeking shelter from non-Communist countries whose entry into this country would not be in our "national interest."

This shift from faithful adherence to the Refugee Act of 1980 to an executive-dominated refugee policy has created a situation which is ripe for the revision of our policy toward refugees. Our refugee policy in Central America must be evenhanded in its application and separate from all executive foreign policy decisionmaking. This policy should be bureaucratic, politically blind, and immune from shifting public opinion. It should place limitations on the number of refugees permitted to seek refuge in this country.

Given the Executive branch's dominance over foreign policy and its ability to maneuver public sentiment, our politically biased foreign policy will likely continue under the existing framework of law and its administration. As presently applied, U.S. refugee policy hampers persons seeking entry as refugees and returns those who genuinely fear prosecution or death to regimes where their fears are certain to be realized.

88. In November 1981, the President announced that 140,000 refugees would be admitted in fiscal year 1982: 100,000 Asians; 20,000 from the Soviet Union; 9,000 from Eastern Europe; 5,000 from the Near East; 3,000 from Latin America and the Caribbean and 3,000 from Africa. 8 IMMIGRATION J. 20 (Mar. - Apr. 1982).
90. This is in direct opposition to several court holdings that those Haitians whose applications for asylum had been rejected could not be deported until they were given a fair opportunity to present their claims for asylum. Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980); Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982). Detained Haitians have also been released after the district court held that the government's detention program did not comply with the Administrative Procedure Act. Louis v. Nelson, 544 F. Supp. 1004 (S.D. Fla. 1982). See also Nunez v. Boldeu, 537 F. Supp. 578 (S.D. Tex 1982) (certain government activities constituted a violation of Salvadoran refugees' fundamental rights).
91. Public opinion can usually be characterized as stemming from an informed sense of ignorance - a true paradox indeed. Refugees are often regarded as taking advantage of U.S. generosity. This is because public attention tends to focus more on the expenses of feeding, caring for, and educating them, than on their motives for leaving their homeland, the United States reasons for accepting them, or the possible contributions they can make to American society. See generally, V.T. SCHETTLER, PUBLIC OPINION IN AMERICAN SOCIETY, 3-9 (1960).
PART III
THE REFUGEE AND ASYLUM REVIEW BOARD: AN ADMINISTRATIVE AND HUMANITARIAN ALTERNATIVE

Because U.S. refugee policy is plagued by narrow perceptions of global politics, executive domination, and inconsistent application of the immigration laws, the authors propose the creation of a politically independent Refugee and Asylum Review Board (RARB). Although other commentators\(^2\) and Congress\(^3\) have made similar proposals, the authors' proposal is unique in that it provides for review of U.S. Consulate decisions and the effective removal of the State Department from the decisionmaking process. The viability of such an independent and integrated governmental entity will be considered within a historical, political, and administrative context.

A. The Internal Agency Conflict

The existence of divided authority between the INS administered by the Justice Department and by the State Department creates an internal bureaucratic conflict within which the perceived notions of U.S. foreign policy prevail over humanitarian ideals. This conflict and the subsequent resolution has resulted in:

[c]onsiderable disparity in the treatment of refugees who have entered the United States at different periods of time, who have come from different parts of the world, or who are fleeing from different kinds of political regimes, both in terms of the procedures that have governed their admission to the United States, and the extent of Federal assistance that has been provided to various groups of refugees.\(^4\)

The Senate Appropriations Committee of the 96th Congress noted that "[o]perating under the direction of three major Federal agencies and through more than a dozen independent organizations the U.S. refugee . . . [policy] has become a 'crazy quilt' assemblage of overlapping and frequently competing programs."\(^5\)

Much of the tension in this area has been attributed to the Office of Refugee and Migration Affairs (ORMA) within the State Department.\(^6\) The ORMA is viewed as a consistent advocate of an impartial

\(^2\) See Kennedy, 19 SAN DIEGO L. REV. 1, 7 (1981).
\(^3\) See SELECT COMM. ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, JOINT COMM. REP. NO. 88 (1981) [hereinafter "SELECT COMM. REPORT"].
\(^5\) Id. at 16.
\(^6\) See Hanson, Behind the Paper Curtain: Asylum Policy Versus Asylum Practice, 7 N.Y.U. REV. L. & SOC. CHANGE 107, 134-140 (1978). See also Haitian Refugee Center v. Civiletti, 503
and apolitical refugee policy. However, conflict arises when the ORMA must consult with other agencies of the State Department which have different and perhaps competing goals. Desk officers of an alien/applicant's native country have the preservation of bilateral relations between the U.S. and that country as their primary goal. These officials often view "their" countries as "clients" and act as if they were duty bound to safeguard that client country's interests. Due to this "clientism," desk officers are reluctant to admit that persecution exists in their country of assignment. An additional factor which impairs the ability of the ORM to implement an impartial and equitable refugee policy is the pressure exerted by high level policymakers of the State Department where, for example, the plight of individual refugees are subsumed by the U.S. interest in military bases in Honduras and a government untainted by Marxists in El Salvador.

Despite humanitarian considerations, organizational efficiency demands the creation of an independent agency with the delegated task of reviewing all applications for refuge. Congress has long recognized the failure of the INS to effectively service its clients. The current backlog of refugee applications continues to hamper the ability of the

F.Supp. 442, 482-92 (S.D.Fla. 1980). In Haitian Refugee Center, the State Department prepared a report discussing the treatment of Haitians refused asylum in the United States. Id. at 482. According to the Court, the review team from the State Department's Bureau of Human Rights and Humanitarian Affairs, another division of the State Department, could not be viewed as trustworthy, neutral and objective, id. at 486, and the report was largely based on conclusions lacking foundation, id. at 482.

The creation within the State Department of an agency responsible for implementation of U.S. refugee policy has consistently been viewed with suspicion. In response to this general apprehension the Refugee Act of 1980 created an Office of the United States Coordinator for Refugee Affairs, but did not say that it should be located within the State Department. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 109-10 (1980) (codified in 8 U.S.C. § 1525 (1983)). The Senate Judiciary Committee in its first "consultation" under the Refugee Act of 1980, suggested that if the Office of the Coordinator for Refugee Affairs is located in the Department of State, "he may be seen as a creature of the Department and not able to bring strong coordination." United States Refugee Programs: Hearings Before the Comm. on the Judiciary, 96th Cong., 2d Sess. 46 (1980).

97. Hanson, supra note 96 at 134.
98. Id.
99. Id.
100. Id.
101. Id. at 135.
102. See supra notes 3-17 and accompanying text.
Attorney General and the INS to respond to cries for help in an expeditious and efficient manner. The administrative agencies are so tasked by the large number of applicants and current backlog, that they are unable to provide a meaningful review of pending refugee applications as mandated by U.S. law.105

Until recently, the U.S. experience with asylum consisted of infrequent requests for sanctuary from individuals or small groups.106 These requests usually met with public approval and were easily managed.107 This situation has changed with the massive influx of Vietnamese, Cuban, and Haitian refugees. In view of the recent exodus of Salvadorans and Hondurans, and the threat of even greater migration as the political conditions worsen there, our government must implement a well defined, long-term plan in response to the looming refugee crisis.

B. The Refugee Act of 1980 and the Current Administration

As part of the allocation process established under the Refugee Act of 1980, the Carter administration proposed 231,700 and the Reagan administration proposed 217,000 refugee admissions in fiscal years 1980 and 1981, respectively.108 In 1980, only 20,500 visas were allocated for refugees from Latin America and, of this number, 19,500 were specifically reserved for Cubans.109 In 1981, a meager 4,000 visas were allocated for Central American refugees.110 In 1982, the Reagan administration lowered these numbers to 173,000 total refugee visas and only allocated 2,000 for Latin America and the Caribbean.111 To account for the small allocation for Latin America and the Caribbean, the State Department explained that the region has historically resettled its own refugees and does not, therefore, require U.S. assistance.112

Yet, Attorney General William French Smith was forced to admit that as many as 30,000 people fled from Nicaragua to the U.S. during the

105. The U.S. has historically embraced the ideal of an individualized, case-by-case review of all immigration applications. In testimony before Congress, then Acting Commissioner of the INS Doris Meissner stated that the INS is required to make its decisions on a case-by-case basis and that its "procedures insure that each claim is adjudicated on an individual basis." Hearings on Refugee Consultation before the Subcomm. on Immigration, Refugees and International Law, House Comm. on the Judiciary, 97th Cong. 2d Sess. (1981) (statement of Doris Meissner, Acting Commissioner, I.N.S.).

107. Id.
108. Id. at 162. The 231,700 figure does not include Cuban/Haitian entrants.
109. Id.
110. Id.
112. Id. at 58.
last few years of the Anastasio Somoza regime. It is clear from these allocations that the Reagan administration has determined that the only Central American refugees the U.S. will accept are from Communist Cuba. Implicit in this allocation is the understanding that the U.S. is willing to close its eyes to the human rights records of those Central American regimes that are U.S. allies.

The reasons for the subversion of this process by the Reagan administration is clear enough when examined in the context of the prevailing political climate. For example, at about the same time he proposed these visa allocations, the President was engaged in a bitter fight with Congress over military aid to Central America, particularly to the Jose Napoleon Duarte regime in El Salvador and the F. Rios Montt regime in Guatemala. Ten million in military aid had already been allocated to El Salvador for fiscal year 1981 when the Reagan administration requested an increase to $24-40 million for fiscal year 1982. Disappointed with reductions in 1983, President Reagan has asked that military appropriations for U.S. worldwide military operations be re-allocated to El Salvador. In advocating for increased military aid to El Salvador, the Reagan administration deemphasized the existing social and political conditions since, as part of the appropriations process, Congress is required to examine the human rights conditions in the country requesting American military aid. Consequently, the then Acting Assistant Secretary of State for Inter-American Affairs told Congress that 1) the Unified Revolutionary Directorate (described as the Marxist guerrilla forces) in El Salvador had little popular support, 2) agrarian land reform was underway, and 3) human rights conditions were improving.

These contentions were challenged by former U.S. Ambassador to El Salvador Robert White who noted that indiscriminate internal violence in El Salvador was rampant and suggested that until the Salvadoran government displayed "a real intention to improve their performance in the human rights field, it seems to me that we are associating ourselves with a military that has one of the worst reputations in the world."

113. Id. at 31.
117. See 1982 House Appropriations Hearings, supra note 114, at 254-55.
118. Id.
119. Id. at 11.
120. Id.
The perceived threat of "international communism"121 was the motivation behind the position the administration adopted. It would have been inconsistent for the President to allocate visas for refugees from countries such as El Salvador, Guatemala, and Honduras given its statements about the human rights situation in those countries.122, 123

In conclusion, the present administration has completely subverted the goals of and abused the power it was granted under the Refugee Act of 1980. The promise of equity under the immigration laws for persons forced to leave their own countries is in danger of being extinguished. The proposed Refugee and Asylum Review Board (RARB) is designed to fulfill the promise of equitable treatment of persons seeking entry to the United States. The need to depoliticize our refugee policy is the most critical justification for the creation of an independent agency which would review all refugee applications. Because its mem-

121. Acting Assistant Secretary of State for Inter-American Affairs John H. Bushnell cast the picture in El Salvador in terms of the historic east-west conflict:

On January 10, 1981, the Marxist guerrilla forces of El Salvador under the command of the Cuban organized Unified Revolutionary Directorate, the DRU, began their so called "final offensive" to topple the Duarte Government. But the situation in El Salvador was very different from that of Somoza's Nicaragua. The Salvadoran people rejected the DRU's call for an insurrection in El Salvador. Unlike in Nicaragua, the government forces were not faced with entire cities rising up and workers striking in support of the Marxists. The people of El Salvador chose to go to work, effectively turning their backs on the guerrilla groups who claimed to lead them. Government forces were able to win a significant victory over internationally supplied Marxist forces in El Salvador.

Statement of John H. Bushnell, id. at 256 (emphasis added).

122. At this time most of this nation was in shock and Congress was outraged by the failure of the Duarte junta to investigate the murders of four American churchwomen. In a blistering letter addressed to President Reagan, the Senate Committee on Foreign Relations expressed, "grave concern over the Administration's policy regarding the Salvadoran Government's investigation of the murders of the four American churchwomen in early December. Although Administration and Salvadoran officials contend that such an investigation is proceeding, our attention is called to evidence which leads us to have serious doubts. Information, both publicly and privately conveyed to us, indicates that the Salvadoran Government is not conducting a vigorous investigation and is ignoring evidence produced by the FBI."

[We] fear that the United States may be in a position of supporting a government which by its stonewalling on the issue of the investigation, supports terrorism committed by its own security forces. And, in this instance, it would be an instance of government-supported terrorism against four American women of the Church who have dedicated their lives to helping the people of El Salvador.


123. For a view directly contrary to the Administration's, see the detailed fact-finding report submitted by the House Committee on Appropriations. There, it was noted that "U.S. military support for the Duarte regime in El Salvador is a mistake, directly contrary to our own ideals and national interest, and very similar to the early days of U.S. involvement in Vietnam." Id. at 83-85. It was further noted that "[s]pecial circumstances apply to Salvadoran refugees now in the United States who request political asylum or who came to the U.S. illegally and who fear they will be harmed if forced to return home at the present time." Id. at 84. See also the discussion of Nicaragua, id. at 55, and Guatemala, id. at 27.
bers would be appointed for extended terms and would develop objective criteria for refugee admissions, the RARB would remove refugee policy from the unstable influences of public opinion and arbitrary executive actions. By vesting in one agency the power currently shared by various federal agencies, the U.S. could embark on a consistent, fair, and effective immigration policy.  

C. Review of the Initial Denial of Petitions for Sanctuary: A Case for Due Process

In order to function as the final administrative authority over applications for refugee or asylum status, the RARB must exist within a well-defined structure of procedural rules that satisfy due process requirements. An examination of the procedures now in effect may provide perspective on this issue.

Under the current regulations, an individual seeking asylum has two courses available depending on whether or not deportation or exclusion proceedings have been initiated. If deportation or exclusion proceedings have not begun, the applicant must apply to the district director of the INS at a port of entry and, if his request is denied, may appeal to a district judge. The district director is required to immediately initiate deportation or exclusion proceedings if the request is denied. If deportation or exclusion hearings have been initiated, the applicant can only seek asylum status before an immigration judge where such a request is treated as a request to withhold deportation or exclusion.

An alien outside the U.S. border seeking entry to the U.S. as a refugee must file the appropriate application with either an overseas INS officer or the U.S. Consulate in that country. Such decisions, however, are not amenable to judicial review.

124. This part of the paper substantially expands on a model suggested by Peter J. Levinson. See Levinson, A Specialized Court for Immigration Hearings and Appeals, 56 NOTRE DAME LAW. 644 (1981).

125. 8 C.F.R. § 208.1 (1981).

126. Id. at § 208.8(f)(3,4).

127. Id. at § 208.3.

128. 8 C.F.R. § 207.1 (1983).

129. In Ventura-Escamilla v. I.N.S., 647 F.2d 28 (9th Cir. 1981), the American Consulate in Tijuana denied the appellants' visa application and they sought review. Id. at 29-30. The Ninth Circuit held that such a review was “beyond the jurisdiction of the Immigration Judge, the BIA, and this court [the U.S. District Court and Court of Appeals] since the court cannot substitute its judgment for that of Consul, acting pursuant to valid regulations promulgated by the Secretary [of State], on the issue of whether a visa should be granted or denied.” Id. at 32. The Ventura-Escamilla court explained that the doctrine of nonreviewability of a Consul’s decision on visa applications has its foundation in the inherent power of Congress to regulate the admission of aliens and the delegation of this power, by Congress, to Consular officials. Id. at 30-31. Although Consular decisions are exempted from judicial review, the decisions are subject to an
Both the formal appeal process in asylum cases and the informal appeal process in refugee matters have been criticized because of the associated delay.\textsuperscript{130} The delay has the dual effect of undermining confidence in immigration policy and inviting large-scale migration where entry is either secured through fraud or is based on the assumption that entry constitutes permanent settlement.\textsuperscript{131}

While aliens outside the U.S. are arguably not "persons" under U.S. law and not entitled to substantive and procedural due process under the Constitution,\textsuperscript{132} the exemption of Consular decisions from appellate review constitutes a denial of an important benefit, integral to the American system of justice, [visa to enter the U.S.] which should entitle the denied party to judicial review.\textsuperscript{133} The informal review system currently under operation does not provide consistent and adequate review of visa denials.

Under the model proposed by the authors, the alien applicant would have the right to seek immediate review of visa denials by either the INS or the U.S. Consulate. The right of immediate review in the RARB would eliminate the burdensome and time-consuming administrative appeal process in asylum cases.

The RARB could be constituted under Article I power of Congress to create tribunals inferior to the Supreme Court.\textsuperscript{134} The members of the RARB would be appointed for fifteen-year terms by the President because he has historically appointed Article I Judges.\textsuperscript{135} The initial appointment process is, therefore, subject to political manipulations by the President. Partisan political consideration could, however, be limited by requiring the President to select the RARB in equal numbers from both political parties and by staggering the terms of the members after the initial appointment. Another device for eliminating bias in the appointment process could be an advisory commission which would recommend or evaluate candidates for RARB membership. Because of his inherent or delegated appointment power,\textsuperscript{136} such recommendations or evaluations would not be binding on the President.

\textsuperscript{130} Select Comm. Report, infra note 93, at 175.
\textsuperscript{131} Id.
\textsuperscript{133} Select Comm. Report, supra note 93, at 253.
\textsuperscript{134} U.S. Const. art. I, § 8, ch. 9.
\textsuperscript{135} See, e.g. 10 U.S.C. § 867(a)(1)(1983).
\textsuperscript{136} U.S. Const. art. II, § 2.
They would, nonetheless, compel the President to appoint members of the RARB on the basis of competence rather than their political beliefs.

Under the proposed model, the U.S. Consulate or INS would conduct a cursory examination of the refugee or asylum application and would have the power to immediately approve the application in compelling cases. Such a provision would permit the INS or U.S. Consulate to assist an individual who was in immediate danger. Other than this emergency provision, the singular role of the INS and the U.S. Consulate would be to serve as a processing center for refugee or asylum applications. Because there exists a danger that the INS or U.S. Consulate will begin to summarily grant applications based on the applicant's geographic origin or political beliefs, their initial decision would still be subject to de novo review by the RARB.

The RARB would have two separate divisions: the Review Board and the Appeals Council. The Review Board would evaluate refugee or asylum applications on an individual basis. The INS or U.S. Consulate would inform the Attorney General that the applicant has asked for asylum or refugee status in the U.S. before or at the time the application is sent to the RARB. If the Attorney General wishes to challenge the application, he must present evidence contrary to that offered by the applicant, although the applicant would still have to prove actual or threatened fear of persecution in his or her country of origin. Because persons seeking refugee status could not realistically be expected to appear before the RARB, the RARB would have the authority to approve or deny the application on the basis of affidavits or supporting documents. In the case of an asylum applicant, the RARB would have the authority to order oral argument if it would assist in the final disposition of the case. In such a situation, the applicant would be afforded full due process protection including the right to be represented, present evidence, and cross-examine witnesses. Because the opportunity to appear in person might give an applicant for asylum an unfair advantage over an applicant for refugee status, the RARB would have the authority to contact the refugee applicant directly and require him or her to produce additional documents or affidavits relevant to the case. If the RARB initiates direct contact, it would inform the Attorney General, who would have a right to challenge or oppose the requested documents.

If the Review Board of the RARB denies the applicant's petition for asylum or refugee status, he or she could seek review by the Appeals Council of the RARB. The role of the Appeals Council is pivotal because under the proposed model there is no right to a review of RARB decisions in the Court of Appeals. Under the proposed model, the applicant could receive both an impartial and timely review of a
Review Board decision. Through the selection process previously outlined, the Appeals Council would maintain the impartiality associated with review in the Court of Appeals. Because the Appeals Council would be part of an integrated administrative body, it would review decisions of the Review Board in a more expedient manner than would be possible in the Court of Appeals.

In order to obtain review by the Appeals Council, an applicant whose petition for asylum has been denied would be required to institute a formal appeal to the Appeals Council since he or she is already in the U.S. A denial by the Review Board for refugee status would, however, receive automatic review because applicants located outside the U.S. cannot avail themselves of legal processes.

Under the proposed model, the applicant could obtain review in the United States Supreme Court if the Appeals Council denies the petition. This would prevent the RARB from becoming an insulated judicial body. There is precedent for such a procedure within the Military Justice System. Although the Court of Military Appeals has been seen as an independent tribunal and has regularly struck down military laws and regulations, it was the court of last resort for members of the armed forces until the passage of the Military Justice Act of 1983. Under the Military Justice Act of 1983, service members denied relief in the Court of Military Appeals may petition for Supreme Court review. Similarly, asylum and refugee applicants could seek Supreme Court review of petition denials by the RARB. Because review would be through the discretionary writ of certiorari and court appeals by the U.S. would be controlled by the Solicitor General, impact on the Supreme Court's docket would not be substantial. The Supreme Court could, therefore, correct RARB practices, procedures, or policies that are inconsistent with specific provisions of the immigration law or general legal principles.

D. The RARB and the Visa Allocation Process

Under the current system, visa allocations are made on a country-by-country basis. Under the proposed model, this practice would be abandoned. Under our proposal, visas would be allocated for designated types of victims without regard for the country of origin. Al-

139. Id.
140. Under existing practice, certain groups are presumed to qualify as refugees. Such a determination is made every time the President allocates a certain number of refugees to be admitted during the coming fiscal year from designated countries. SELECT COMM. REPORT, supra note 93, at 162-63.
though the 1981 Select Commission on Immigration and Refugee Policy did not recommend the complete abandonment of the current system, it did approve a supplementary provision under which visas would be provided for certain victims of persecution regardless of their geographic origin.  

Although the RARB's principal responsibility will be to review refugee and asylum applications, an important adjunct function will be to develop objective criteria by which visa allocations are made and refugees admitted into the U.S. We propose that the RARB be directly involved in the "consultation process" established by the Refugee Act of 1980.  

Under our proposal, the President would still be responsible for designating the number admitted annually but would not be able to designate the specific countries from which we will accept refugees. Once the President determined the number of refugees to be admitted in a given year, the RARB would be free to allocate that number without any geographic designation.
persons under death threat) and at certain groups within particular countries (i.e. Indians in Guatemala and members of the Bahai faith in Iran).

CONCLUSION

Although many aspects of the RARB are beyond the scope of this comment, "the creation of an independent asylum board to oversee the entire asylum process . . . [has] merit." The creation of such an independent agency to implement and administer the Refugee Act of 1980 would reduce the State Department's and the President's power to use refugee law as a tool of foreign policy. Moreover, the RARB would encourage consistent and comprehensive treatment of refugees by the United States—a system that would be both equitable and efficient. By establishing the RARB we may be able to live up to our public image as a haven for the persecuted members of the global family and begin to fulfill the naked promises of the Refugee Act of 1980.

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147. See Kennedy, Foreword, 19 SAN DIEGO L. REV. 1, 7 (1981).
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### Persons Admitted into the United States under Various Refugee Resettlement Programs 1945-1980

| Presidential Order of December 22, 1945 | 40,324 |
| Displaced Persons Admitted            | 352,260 |
| Displaced Persons Adjusting under Section 4 | 3,670 |
| German Ethnics                        | 53,766 |
| Refugee Relief Act of 1953             | 189,021 |
| Act of July 29, 1953 (Orphan Resettlement) | 466 |
| Act of September 11, 1957             | 29,462 |
| Act of July 25, 1958 (Hungarian Parolees) | 30,751 |
| Act of September 2, 1958 (Azores and Netherland refugees) | 22,213 |
| Act of September 22, 1959 (Section 2 refugee relatives) | 1,820 |
| Act of July 14, 1960 (refugees/escapees) | 19,754 |
| Act of October 3, 1965 (conditional admittance of refugees) | 106,088 |
| Act of November 2, 1966 (Cuban refugees) | 342,324 |
| Boatlift of 1980 (Cuban refugees)      | 150,000 |
| **TOTAL**                             | 1,341,919**1** |

1. Of the nearly 2 million refugees admitted during 1945-1966, only 274 were from Central America.
