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NOTES AND COMMENTS

Political Refugees: A Study in Selective Compassion

[W]hether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-semitism or anti-catholicism, the responsibility belongs to Congress . . . the underlying policies of what classes of aliens shall be allowed to enter are for Congress exclusively to determine, even though such determination may be deemed to offend American traditions.¹

I. INTRODUCTION

A persistent theme of American political tradition has been that the Republic has always opened its doors in welcome to the homeless, persecuted and oppressed of other lands. Officially, the Department of State is deeply committed to the principle of asylum,² and to the tenet that “[i]f the Department considers that, in any individual case, there is any doubt concerning the safe return of an applicant to his [or her] homeland, we will err on the side of the applicant and recommend that he be allowed to remain in the United States.”³

A study of both administrative⁴ and court decisions involving the issue of asylum reveals, however, that the claimant bears a heavy burden of proof in demonstrating to the satisfaction of the Immigration and Naturalization Service [hereinafter INS], or the

1. *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring).

2. The word does not appear in the Immigration and Nationality Act. As defined by the general counsel for the Immigration and Naturalization Service [hereinafter INS], [i]t is the grant of a temporary haven . . . to those in fear of persecution because of race, religion or political opinion, and is inherent in the United Nations Convention on Refugees to which the United States is a signatory. The grant is accorded under the appropriate vehicle available under the immigration laws.

Presentation of Sam Bernsen, Seminar of American Branch, International Law Association (Nov. 15, 1975), reprinted in 52 INTERPRETER RELEASES 407, 410 (1975). This note is concerned with “asylum” as used in the sense described above.

3. Presentation of James L. Carlin, Annual Conference of the Association of Immigration and Nationality Lawyers, in San Francisco (April 27—May 1, 1976), reprinted in 53 INTERPRETER RELEASES 149, 152 (1976) [hereinafter cited as Carlin].

4. It should be noted that not all decisions of the Board of Immigration Appeals are published. Applicable regulations provide only that “[t]he decision of the Board shall be in writing and copies thereof shall be transmitted by the Board to the Service and a copy shall be served upon the alien” 8 C.F.R. § 3.1(f) (1977).

State Department, that his fear of persecution is a valid one. While classification as a refugee⁵ under United States law is no small achievement for any applicant, certain assumptions operate to prejudice the claims of political refugees from non-communist countries and to facilitate the claims of escapees from communist-dominated states.

The unspoken assumption that an escapee from a communist-dominated state is by definition a political refugee while a person fleeing another form of government is more likely an opportunist, has had serious consequences in many immigration cases where asylum is requested. This comment will discuss limitations inherent in the structure of the Immigration and Nationality Act⁶ [hereinafter the Act] and provide a comparative analysis of decisions of the Board of Immigration Appeals [hereinafter the Board] and the courts, demonstrating different standards for the two classes of refugees.

II. LIMITATIONS INHERENT IN THE STRUCTURE OF THE IMMIGRATION AND NATIONALITY ACT

The Act neither defines the word "refugee," nor does it provide specifically for political asylum as a matter of right. It does, however, set forth limited procedures whereby a person fleeing political persecution may enter or remain in the United States. Two of the provisions, conditional entry and parole, are used to admit persons who would otherwise be excludable for lack of proper documentation. A third, waiver of deportation, may provide relief for persons within the United States who have been determined to be deportable.⁷

5. The INS, in 8 C.F.R. § 223a.1 (1977), has adopted the definition of "refugee" contained in Article 1 of the Convention Relating to the Status of Refugees, *done* July 28, 1951, 19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 150 (as modified by Article I of the Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267) [hereinafter cited as U.N. Refugee Convention & Protocol]. Article I of the Convention, as incorporated in and amended by the Protocol, defines a refugee as any person who "[o]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . ." *Id.* art. I.

6. Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101—1503 (1970) as amended [hereinafter cited as the Act].

7. The regulations also contain a provision which specifically relates to alien crewmen: Any alien crewman refused a conditional landing permit or whose conditional landing permit has been revoked who alleges that he cannot return to a Communist, Communist-dominated or Communist-occupied country because of fear of persecution [sic] in that country on account of race, religion or political opinion shall be

A. Conditional Entry

Under Section 203(a)(7) of the Act,⁸ the Attorney General of the United States⁹ may, in his discretion, grant conditional entry to individuals fleeing persecution. This section, requiring a flight resulting from actual or anticipated persecution, is available only to refugees from communist or communist-dominated countries, or countries within the general area of the Middle East.¹⁰ As a result, this section cannot be invoked by any refugee from Africa or the Indo-Pakistani subcontinent nor was it initially available to refugees from any country in the Western Hemisphere. The 1976 amendment to the Act extends the application of Section 203(a)(7)

removed from the vessel or aircraft for interrogation. Following the interrogation, the district director having jurisdiction . . . may in his discretion authorize parole of the alien crewman into the United States under the provisions of § 212(d)(5) of the Act

8 C.F.R. § 253.1(f) (1977).

Additionally, the amendment to § 212(e) of the Immigration and Nationality Act (8 U.S.C. 1182(e)) permits the Attorney General to waive the two year foreign residency requirement for persons previously admitted to the United States as non-immigrants for study or research under § 101(a)(15)(J) of the Act where the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion or political opinion. 8 U.S.C. § 1182(e) (1970), *as amended by* Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-484, Title VI, § 601(a), (c), (d), 90 Stat. 2301.

Finally, although there is no reference to asylum in the Act, certain procedures for requesting it are outlined in 8 C.F.R. § 108 (1977).

8. Section 203(a)(7) (8 U.S.C. § 1153(a)(7) (1970)), *as amended by* Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 4, 90 Stat. 2705, states:

[c]onditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 1151(a)(ii) of this title, to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode

The scope of this comment does not include the latter provision on natural catastrophe as it is not related to the issue of political persecution.

9. By administrative regulation, the authority of the Attorney General is delegated to the District Director of the INS. 8 C.F.R. § 103.1(n) (1977).

10. The Act defines the Middle East as, "the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south." 8 U.S.C. § 1153(a)(7) (1970), *as amended by* Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 4, 90 Stat. 2705. In *Patel*, 13 I. & N. Dec. 113 (1968), it was held that Kenya is not within the Middle East under the section.

to the Western Hemisphere,¹¹ but only Cubans, as nationals of the sole communist nation in the hemisphere, may enter under this section.

Procedures for obtaining a conditional entry permit indicate that Congress and the Immigration and Naturalization Service assume that political refugee status is, as a practical matter, synonymous with flight from a communist state.¹² The refugee must establish, for example, that the application is made in a non-communist or non-communist-dominated country.¹³ Administrative regulations provide that applications for conditional entry be made only from Austria, Belgium, France, Germany, Greece, Italy, Lebanon or Hong Kong.¹⁴ With the exception of Lebanon, the geographic proximity of communist nations to these countries suggests that they were chosen to facilitate the entry procedure for escapees from Eastern Europe, the Soviet Union and China. Conditional entry, then, is virtually useless to refugees from non-communist states.¹⁵

B. Parole

The Attorney General also, in his discretion, may allow the parole of individuals lacking proper documentation into the United States.¹⁶ Although the relief available under the parole provision of

11. Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 2, 90 Stat. 2703, amending 8 U.S.C. § 1151 (1970).

12. Procedures and requirements for application for asylum are described in Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 INT'L LAW. 204 (1969).

13. Section 203(a)(7) of the Act (8 U.S.C. § 1153(a)(7)) provides in pertinent part that conditional entry visas will be made available to "aliens who satisfy an [INS] officer at an examination in any non-Communist or non-Communist-dominated country . . ." that their claims are meritorious. This requirement, taken together with the limitations on the countries from which application can be made (*see note 14 infra* and accompanying text), raises the inference that the claimant will have fled a communist country prior to making his asylum claim.

14. "Applications for conditional entry may be filed only by aliens who are physically present within one of the designated countries." Inspection of Persons Applying For Admission: Conditional Entries, 8 C.F.R. § 235.9(a) (1977).

15. Refugees from non-communist countries may apply under the provision only if they are from countries which fall within the somewhat arbitrary definition of the Middle East. *See note 10 supra*.

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

the Act is not limited in theory, it is limited in fact. Originally intended as a remedy in individual hardship cases,¹⁷ the parole power has been used to admit large groups of refugees during the last twenty years. In each instance, the President, not the Attorney General, decided whether to admit these groups. After the 1956 October uprising in Hungary, President Eisenhower directed that the Attorney General exercise the parole power to admit some 15,000 Hungarians;¹⁸ in 1961, President Kennedy initiated a program for the entry of great numbers of Cubans¹⁹ and the following year he again exercised this power in admitting Chinese fleeing the mainland;²⁰ following the fall of Saigon in 1975, President Ford authorized the entry of Indochinese refugees;²¹ and, most recently, President Carter authorized Attorney General Bell to exercise the parole power to admit 2,000 additional Indochinese refugees per month.²² Although humanitarian concerns undoubtedly inhered in

Immigration and Nationality Act of 1952, § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970).

17. On the intent of Congress in drafting the parole provision, see Comment, *Refugee-Parolee: The Dilemma of the Indo-China Refugee*, 13 SAN DIEGO L. REV. 175 (1975). Originally, the Act restricted the parole remedy to those aliens who required medical treatment in the United States. The House Report states that:

broader discretionary authority is necessary to permit the Attorney General to parole inadmissible aliens into the United States in emergency cases, such as the case of an alien who requires immediate medical attention . . . and in cases where it is strictly in the public interest to have an inadmissible alien present in the United States, such as, for instance, a witness or for purposes of prosecution.

H.R. REP. NO. 1365, 82d Cong., 2d Sess., reprinted in 2 U.S. CODE CONG. & AD. NEWS 1653, 1706 (1952). A further indication of the intent of the drafters was the statement of one of the members of the committee, Rep. Michael Feighen, who said: "it [the parole statute] was intended as a remedy for individual hardship cases, no more, no less." HOUSE SUBCOMM. ON IMMIGRATION AND NATURALIZATION OF THE COMM. ON THE JUDICIARY, STUDY OF POPULATION AND IMMIGRATION PROBLEMS, Ser. 13, 88th Cong., 2d Sess. 160 (1964) [hereinafter cited as HOUSE SUBCOMM. REP.].

Finally, in 1965, the Senate Committee Report on revisions in the Act reaffirmed that parole was designed to allow the Attorney General to act only in emergent, individual and isolated situations, and not for the immigration of classes or groups outside of the limit of the law. S. REP. NO. 748, 89th Cong., 1st Sess. 17 (1965).

18. Presidential Directive of Dec. 1, 1956, 103 CONG. REC. 1355 (1957).

19. HOUSE SUBCOMM. REP., *supra* note 17, at 106. Parole of a large number of Cubans has worked a hardship on other Western Hemisphere applicants as the INS has, since 1968, charged more than 290,000 such Cuban refugees to the Western Hemisphere quota, thereby reducing the number of visas available to other persons. In 1976 the Attorney General ordered that Cubans not be charged to the Western Hemisphere quota, but in the case of *Silva v. Levy*, No. 76-C-4268 (N.D. Ill. Nov. 1976) plaintiffs contended that in spite of this policy change, the Attorney General had failed to make available to the plaintiffs, Western Hemisphere applicants for permanent resident visas, the thousands of visa numbers charged to the Western Hemisphere quota between 1968 and Oct. 1, 1976 on behalf of Cuban refugees.

20. 46 DEP'T STATE BULL. 994 (1962).

21. 33 CONG. Q. WEEKLY REP. 839 (1975).

22. NEWSWEEK, April 17, 1978, at 70.

these situations, these presidential decisions were reflective of and intimately connected with United States foreign policy during the relevant periods.²³ Moreover, the mere fact that these programs involved so many individuals creates substantial doubt as to whether each individual was required to present evidence of actual or anticipated persecution.²⁴

Significantly, the parole power has never been used to admit a comparable number of refugees fleeing non-communist dictatorships. The most glaring omission in recent years has been the distinct lack of a meaningful program of parole for the thousands of refugees from Chile following the overthrow of President Allende by the military junta in September of 1973.²⁵ Immediately after the coup, the Department of State maintained that no Chileans had applied for asylum.²⁶ In hearings before the Senate Subcommittee on Refugees, the Assistant Secretary of State for Latin American Affairs revealed, however, that no Chileans had sought refuge at the American Embassy at the outbreak of violence because the United States government does not ordinarily grant diplomatic asylum in its embassies abroad.²⁷ Those who felt themselves endangered went elsewhere.²⁸

The Department of State informed the Subcommittee that a

23. Foreign policy and humanitarian concerns have always been intertwined. For example, President Eisenhower sent a special message to Congress on Jan. 31, 1957, in which he stated:

[t]housands of men, women, and children have fled their homes to escape Communist oppression. They seek asylum in countries that are free. Their opposition to Communist tyranny is evidence of a growing resistance throughout the world. Our position of world leadership demands that, in partnership with the other nations of the free world, we be in a position to grant that asylum.

Cited in Berdo v. INS, 432 F.2d 824, 835 n.3 (6th Cir. 1970). In a letter to the President of the Senate on July 21, 1961, President Kennedy was more explicit: "[t]he successful re-establishment of refugees . . . is importantly related to free world political objectives. These objectives are: (a) continuation of the provision of asylum and friendly assistance to the oppressed and persecuted; (b) the extension of hope and encouragement to the victims of communism and other forms of despotism . . ." 46 DEP'T STATE BULL. 104 (1962).

24. In excess of 600,000 Cubans and 130,000 Indochinese have been admitted under parole. 53 INTERPRETER RELEASES 149, 150 (1976).

25. Salvador Allende was elected President of Chile on September 4, 1970, as the candidate of the Unidad Popular. R. SANFORD, *THE MURDER OF ALLENDE AND THE END OF THE CHILEAN WAY TO SOCIALISM* 67 (1975).

26. *Hearing on Refugee and Humanitarian Problems in Chile Before the Subcomm. to Investigate the Problems Connected with Refugees and Escapees of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. 31 (1973) [hereinafter cited as *Senate Chile Refugee Subcomm.*].

27. *Id.*

28. *Id.*

parole program for Chileans would probably be unnecessary.²⁹ However, witnesses recently returned from Chile, testified that the number of persons endangered³⁰ by the Pinochet³¹ regime potentially numbered two hundred thousand.³² More than a year later the State Department disclosed a denial of entry visas to one hundred twenty Chileans who had requested them since the military coup.³³ As its sole justification for this refusal, the Department representative stated, "[t]he United States is not nor can it be responsible for everything that happens in Latin America. It is not nor was it responsible for the course of events in Chile."³⁴ Yet the United States had not previously found it necessary to accept responsibility for the course of events in Hungary, China, or Cuba in order to parole large numbers of refugees from those countries. The State Department acknowledged, moreover, that this lack of sympathy for Chilean refugees was caused, at least in part, by their support of a Marxist president.³⁵ Hence, many of them may well have been excludable

29. [T]he Department does not believe a parole program for political refugees is warranted at this time. Chileans in the United States can apply for political asylum if they fear political persecution were they to return to Chile. Regular immigration procedures are available for Chileans who might wish to leave Chile because they disagree with the present regime.

Id. at 32.

30. For an account of the excesses of the Pinochet regime, see R. SANFORD, *supra* note 25, ch. 6, "The Inferno." In 1976, three years after the coup, the United Nations General Assembly called on Chile to take all measures to restore basic human rights and fundamental freedoms. United Nations investigators concluded that "[t]he enormity of the inroads on human rights could be judged by the fact that some estimate the total number of arrests and detentions since [the coup] at approximately 100,000." 13 U.N. Chronicle No. 1 55, 57 (Jan. 1976).

31. General Augusto Pinochet Ugarte led the military coup which overthrew Allende on September 11, 1973. A. URIBE, *THE BLACKBOOK OF AMERICAN INTERVENTION IN CHILE* 148 (1975). For a more complete discussion of the events leading up to the coup see Velasco, *The Allende Regime in Chile: An Historical and Legal Analysis* (pts. 1-3), 9 LOY. L.A.L. REV. 480, 711, 961 (1976).

32. To the best of our knowledge, there were more than 200,000 members of the different political parties which composed the Unidad Popular. Some of these people also held positions of responsibility within the government, ordinarily in their area of professional expertise. In addition, there were large numbers of political independents who continued to work in important positions after the change from the Frei to the Allende administration. Potential political refugees could come from any or all of these groups.

Senate Chile Refugee Subcomm., *supra* note 26, at 32 (statement of Adam and Pat Garrett-Schesch).

33. 1974 FACTS ON FILE Y.B. 520.

34. *Id.*

35. The State Department concluded its report to the Senate Subcommittee investigating the Chilean situation with the statement that "[i]t is probable that a significant number of Chilean refugees applying for admission to the United States would be excludable under Section 212(a)(28) of the Immigration and Nationality Act dealing with the political associa-

under those provisions of the Act dealing with political associations and subversives.³⁶

Legislators have attempted to provide concrete and substantial relief for Chileans but proposed bills have encountered staunch criticism from both the State and Justice Departments and ultimately have died in Committee.³⁷ On August 3, 1977 Senator Abourezk recounted the history of attempts to gain relief for Chileans in his remarks accompanying the introduction of Senate Bill 1995:

The United States has established parole programs for Chileans in the past; unfortunately they have been limited and largely fruitless efforts. The first program for heads of families was established in June 1975, to assist Chileans in Chile. It was not until October 1976 that the first refugees under the program began arriving. The second parole program, established in October 1976, is for Chilean refugees in Argentina. As of this May, no Chilean refugee has entered the United States under this current program.

These programs have failed primarily because of the long waiting period from the time of the application to the time of entry. For example, Chileans who fled to Argentina were told to register with the Office of the United Nations High Commission for Refugees before they filed their parole applications. *Unfortunately this office has been burgled twice and the files containing the identity and the location of Chilean refugees stolen. Several Chileans disappeared after their files were taken.* Thus it is understandable why Chileans are hesitant now to register with the High Commissioner's office.³⁸

The treatment accorded Chileans, as contrasted with that accorded those groups fleeing communist nations, demonstrates that the remedy of parole continues to be invoked on the basis of political expe-

tions and activities of persons being considered for entry into the United States." *Senate Chile Refugee Subcomm.*, *supra* note 26, at 32.

36. As enumerated in § 212(a)(28)(C) of the Act, those political beliefs or activities which render an alien excludable include:

aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or any other totalitarian party of any State of the United States, [or] of any foreign state, . . . (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt

Immigration and Nationality Act of 1952, § 212(a)(28)(C), 8 U.S.C. § 1182(a)(28)(C) (1970) (emphasis added).

37. 123 CONG. REC. H2972 (daily ed. April 4, 1977).

38. 123 CONG. REC. S13454 (daily ed. August 3, 1977) (remarks of Sen. Abourezk) (emphasis added).

diency as perceived by the Executive Branch of the government, rather than on the basis of individual hardship or persecution.

C. Waiver of Deportation

Aliens within the United States determined to be deportable may apply for relief in the form of waiver of deportation,³⁹ the granting of which is discretionary with the Attorney General.⁴⁰ This remedy is unavailable to those refugees denied relief under the parole or conditional entry provisions. They are excludable because they have not technically effected an "entry" into the United States, notwithstanding their physical presence here.⁴¹ Although "entry" is statutorily defined as "any coming of an alien into the United States . . ."⁴² administrative authority treats the word as a term of art comprising several elements: "(1) a crossing into the territorial limits of the United States, i.e. physical presence; plus (2) inspection and admission by an immigration officer . . . ; or (3) actual and intentional evasion of inspection at the nearest inspection point . . . , coupled with (4) freedom from restraint."⁴³ "Entry" is thus interpreted to mean that an alien is either physically present and

39. The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

Immigration and Nationality Act of 1952 § 243(h), 8 U.S.C. § 1253(h) (1970).

40. It is the position of the Department of Justice that the Attorney General's determinations in this area are entirely discretionary, subject to a limited review by the courts. Almost invariably the courts have adopted this approach. Gordon, *Summaries of Judicial Decisions*, in IMMIGRATION AND NATIONALITY ACT WITH AMENDMENTS AND NOTES ON RELATED LAWS 221, 244 (6th ed. 1969).

41. *But see* 8 C.F.R. § 108.2. Denial of an asylum claim does not preclude using § 243(h) of the Act in subsequent expulsion proceedings. Applicants who have been denied are deemed not to have effected an entry and are therefore subject to exclusion rather than expulsion (deportation). "[S]ection 243(h) is unavailable to excluded aliens, and the fact of parole creates no variance from this principle." *Rogers v. Quan*, 357 U.S. 193, 196 (1958).

42. 8 U.S.C. § 1101(a)(13) (1970) states: [t]he term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise"

43. *Pierre*, 14 I. & N. Dec. 467, 468 (1973) (citations omitted). The result of this classification is that those claimants who immediately present themselves to the INS for inspection are penalized and not permitted to apply for relief in the form of waiver of deportation. Those who intentionally evade inspection and effect one or more illegal entries may apply for relief but discretion may possibly not be exercised in their favor on the ground that they have been dishonest in evading the Service. *Hamad v. INS*, 420 F.2d 645 (D.C. Cir. 1969).

"The restraint may take the form of surveillance, unbeknownst to the alien; he has still not made an entry despite having crossed the border with the intention of evading inspection, because he lacks the freedom to go at large and mix with the population." *Pierre*, 14 I. & N. Dec. at 469, *citing* *Ex Parte Chow Chok*, 161 F. 627 (N.D.N.Y.), *aff'd* 163 F. 1021 (2d Cir. 1908).

officially admitted, or is physically present and has escaped detection by the authorities. Under either alternative, if one of the elements is lacking, there is no "entry" and the alien is subject to exclusion rather than expulsion proceedings.

The legal fiction of entry and the resulting distinction between excludable and deportable aliens has serious consequences in asylum cases because an excludable alien cannot assert rights under the United States Constitution.⁴⁴ Thus, although Section 243(h) of the Act is not discriminatory on its face, relief under this provision is unavailable for the two major classes of refugees provided for in the Act. Furthermore, as discussed hereinafter, this provision has been so construed that different standards have evolved with respect to refugees fleeing communist, as opposed to non-communist, governments.

III. CONSTRUCTION OF THE STATUTE

While the structure of the Immigration and Nationality Act tends to deny recognition of *bona fide* political refugees in non-communist countries, interpretation and construction of the pertinent sections frequently serve to compound the problems of these refugees.

Since each case is decided on a combination of factors, it is often difficult to isolate any one fact or circumstance as determinative of the result. However, a close analysis of recurring issues reveals a pattern of inconsistencies in reasoning and construction which are traceable to the nature of the government accused of persecution, and result in certain assumptions regarding that government by the courts, the administrative law judges, and the State Department.⁴⁵

44. See notes 131-60 *infra* and accompanying text.

45. In comparing the decisions involving refugees from communist-dominated states with those involving non-communist dictatorships, the author does not contend that the approved applications of refugees from communism were necessarily without merit. Nor does she contend that aliens claiming to be refugees from communism have never been denied asylum. Rather, she wishes to demonstrate how the Act and its construction operate in such a way as to place a great burden on aliens seeking asylum from rightist governments. Consistent with that hypothesis, the cases in which refugees from communist states have been denied may be accounted for in the following ways: (1) the case predates the change from a requirement of physical persecution to persecution on account of race, religion, or political opinion. The requirement of physical persecution was eliminated by amendment of § 11(f) of the Act by the INA Amendment Act of October 3, 1965, 79 Stat. 918, (*amending* 8 U.S.C. § 1253(h) (1952)). See *Batistic v. Pilliod*, 286 F.2d 268 (7th Cir. 1961) and *Blazina v. Bouchard*, 286 F.2d 507 (3d Cir. 1961); (2) the claimant had not sufficiently demonstrated his or her nascent anti-communist beliefs. See *Kerkai v. INS*, 418 F.2d 217 (3d Cir. 1969), *cert. denied*, 397 U.S. 1067 (1970), where the court enumerated the communist organizations of

A. Judicial Review

Theoretically, under any of the pertinent sections,⁴⁶ the ambit of judicial review⁴⁷ is limited to deciding whether there has been an abuse of discretion.⁴⁸ In a case denying the claims of a substantial number of Haitians fleeing the regime of Jean-Claude Duvalier,⁴⁹ the court stated that the "discretionary judgment of a political department is reviewable by us only for abuse of discretion."⁵⁰

However, the cases indicate that this standard is not uniformly applied. In a case involving a Hungarian "freedom fighter,"⁵¹ the court stated,

[b]ut while the discretion of the courts should not be substituted for the discretion to be exercised by the Attorney General, as provided by law, nevertheless, [w]e do say that there must be a hearing which will give assurances the discretion of the Attorney General shall be exercised against a background of facts fairly contested in the open.⁵²

The full testimony of claimant's expert witness, although admitted, had not, as the court acknowledged, persuaded the Board. Never-

which petitioner had been a member before her arrival from Hungary, and stated that, "[w]hile she indicates that she did not believe in the Communist Party philosophy, she did not attempt to withdraw from the Party until 1967, when her request was refused." *Id.* at 218; (3) the claimant had abused a previous grant of discretionary relief and had not raised the persecution claim until the last moment. *See Antolos v. INS*, 402 F.2d 463 (9th Cir. 1968). While there is no discussion in *Antolos* of the factual contentions of the persecution claim, it is significant that the petitioner had previously been granted voluntary departure and had failed to depart. His persecution claim was not raised until after an Order to Show Cause had been issued.

46. Immigration and Nationality Act, § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1970); Immigration and Nationality Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970); Immigration and Nationality Act, § 243(h), 8 U.S.C. § 1253(h) (1970).

47. Section 106(a) of the Act (8 U.S.C. § 1105(a)) provides for review of final deportation orders by petition for review in the United States Court of Appeals, while § 106(b) provides that final orders of exclusion are reviewable by habeas corpus proceedings in the District Court and not otherwise. Section 106(a) & (b) were added to the original Act by the Immigration and Nationality Act Amendments of 1961, Pub. L. No. 87-301, § 5(a)&(b), 75 Stat. 651 (1961).

48. As noted in *Carrasco-Favela v. INS*, 563 F.2d 1220 (5th Cir. 1977), "decisions of this Court indicate that review is limited to determining whether the denial of relief was arbitrary, capricious, or an abuse of discretion and whether the petitioner was accorded full procedural due process rights." *Id.* at 1222 n.5.

49. *See Dernis, Haitian Immigrants: Political Refugees or Economic Escapees?*, 31 U. MIAMI L. REV. 27 (1976). Jean-Claude Duvalier became President for Life of Haiti upon the death in 1971 of his father Francois (Papa Doc) Duvalier, the previous President for Life.

50. *Pierre v. United States*, 547 F.2d 1281, 1287 (5th Cir. 1977).

51. *Berdo v. INS*, 432 F.2d 824 (6th Cir. 1970). Ironically, Berdo's initial exclusion was based on his membership in the Communist Party of Hungary.

52. *Id.* at 845, *citing* *Paktorovics v. Murff*, 260 F.2d 610, 615 (2d Cir. 1958).

theless, the court reversed in claimant's favor.⁵³

If expanded judicial review has proven insufficient to achieve the desired result, some courts have gone so far as to ignore precedent. This license is reflected in a recent Second Circuit decision⁵⁴ wherein a prior case⁵⁵ admittedly on point was rejected. Holding in favor of petitioner, a refugee from the People's Republic of China, the court declared: "*stare decisis* should not govern in a case like this where a man's life is involved."⁵⁶

B. *Economic Disadvantage as a Ground for Asylum*

A common problem facing refugees from non-communist countries is the assumption on the part of the INS that they have come to the United States to seek work rather than asylum. As a result, claims of persecution, however severe the physical manifestations, are underplayed or discounted as self-serving statements. In a recent case,⁵⁷ the court deemed suicide alone as insufficient to prove fear of persecution. "The suicide of one [claimant] and attempted suicide of another is not, without more, and contrary to petitioners' contention, evidence of their fear or indicative that their fear is well-founded or politically motivated This is especially true where so many Haitians come to this country seeking economic relief."⁵⁸ The court assumed that Haitians come to the United States primarily to improve their economic position, and therefore cast a jaundiced eye toward claims of other motivations. This fact, coupled with the difficulty of substantiating and documenting claims of persecution, places Haitian claimants at a severe disadvantage.

Neither the United Nations Convention Relating to the Status of Refugees nor the Protocol⁵⁹ disqualifies an alien merely for seeking

53. 432 F.2d at 834, 849.

54. *Fong Foo v. Shaughnessy*, 234 F.2d 715 (2d Cir. 1955).

55. *Moon v. Shaughnessy*, 218 F.2d 316 (2d Cir. 1954).

56. 234 F.2d at 718. The court stated that:

since life and liberty are here at stake, this court may reconsider its previous decision in the Moon case, if it now appears that there we overlooked any significant factor

The Attorney General . . . found as a fact that appellant would not be 'subject to physical persecution' by the Chinese Communist government.

Id. "On the basis of a fact which we know judicially, an administrative determination of the contrary fact is arbitrary and capricious." *Id.* at 719. The court also noted that since the Moon case *Fornio* was no longer accepting refugees, so appellant would have to go to Communist China. *Id.* at 720.

57. *Paul v. INS*, 521 F.2d 194, 201 (5th Cir. 1975).

58. *Id.* at 201 (citation omitted).

59. U.N. Refugee Convention & Protocol, *supra* note 5.

employment or refuge in a particular country, so long as the alien nevertheless has a well-founded fear of persecution upon return to the home country. The argument that an analogous standard should be applied in the United States has been made and rejected.⁶⁰ Many thousands of Cuban refugees were members of the professional and merchant classes,⁶¹ and may have sought entry for economic reasons as well; that is, to retain the privileges which they had enjoyed in Cuba prior to Castro's revolution. The "economic relief" rationale has not, however, been used to exclude these refugees.⁶²

A second aspect of the economic disadvantage issue concerns the judicial attitude toward assertions that a claimant returned to his home country would be subjected to menial labor because of his political views. In *Kasravi v. INS*,⁶³ the petitioner, an Iranian student vociferous in his opposition to the Shah, claimed he would be unable to obtain work in the film industry or a related area if returned to Iran. The court found this claim insufficient insofar as he had shown "no more than economic disadvantage."⁶⁴ In *Berdo v. INS*,⁶⁵ however, the court was influenced by claimant's contention that he had been demoted, reduced in pay, and assigned menial tasks "inconsistent with his skill as a mechanic" because of his reluctance to join the Hungarian Communist Party.⁶⁶ Similarly, in *Kovac v. INS*,⁶⁷ a Yugoslav crewman claimed that when he refused to cooperate with the police, his employment was terminated and he was unable to procure another position for which he was trained. He testified that "the reason he ceased working on shore and started working on ships was to obtain a home for his family."⁶⁸ The court

60. Brief for Appellant at 42, *Pierre V. United States*, 547 F.2d 1281 (5th Cir. 1977).

61. L. HOLBORN, *REFUGEES: A PROBLEM OF OUR TIME* 582, 588 (1975).

62. See R. FAGEN, *CUBANS IN EXILE* (1968). "Both critics and defenders of the Cuban revolution agree that those who have left the island do not represent a cross section of the total population . . . [I]t is obvious to almost all concerned that a disproportionate number of refugees come from the middle and upper strata of prerevolutionary society." *Id.* at 16. Although Fagen cautions against simplistic socio-economic conclusions, his data on the motivation of Cubans in coming to the United States bears out the hypothesis that retention of privilege was a significant factor. For example, an occupational comparison of the Cuban work force and Cuban refugees revealed that professional and semi-professional persons are overrepresented among the exiles. *Id.* at 19, Table 2.1. Furthermore, actual threat of political persecution—including imprisonment, disruption of daily life, and harassment due to failure to integrate into the revolution—accounted for the primary motivation of less than half of the responding exiles. *Id.* at 90, Table 6.2.

63. 400 F.2d 675 (9th Cir. 1968).

64. *Id.* at 676.

65. 432 F.2d 824 (6th Cir. 1970).

66. *Id.* at 827.

67. 407 F.2d 102 (9th Cir. 1969).

68. *Id.* at 107.

found this to be consistent with his claim of persecution.⁶⁹ It appears, then, that evidence of economic disadvantage carries greater weight in establishing political persecution when the persecuting government is communist in nature.

C. *Political Activity in the United States*

In the cases of political refugees claiming to fear persecution resulting from activities within the United States in opposition to their native regimes, the courts have consistently denied refugee status to claimants from non-communist countries. In denying relief, the courts have relied upon statements or opinion letters from the State Department assessing the probability of persecution in a given country. In the case of Iranian students opposed to the Shah, these letters have expressed the view that such students have participated in anti-Shah activities "solely in order to make a case for staying their deportation."⁷⁰ The letters invariably contain the view that "opposition to the Shah's regime without more does not subject an individual to persecution, whether the opposition occurred in Iran or abroad."⁷¹ This view is sustained despite the acknowledgment that "[t]here is no doubt that respondent has been prominently involved in this movement [opposition to the Shah] and it seems likely that he is known as a participant by the government of Iran."⁷²

In contrast are decisions involving refugees from communist countries who after arrival in the United States have criticized the regime in their home country. One such case⁷³ involved a Czechoslovakian claimant who was a voluntary member of the Communist Party. Claiming to have initially doubted Party goals after the Hungarian uprising, he propagandized against his government after arriving in the United States. He gave interviews critical of the Czech regime to the FBI, Radio Free Europe and the Czech language press. In upholding his claim the Board stated, "[w]e have little doubt that at least some, if not all, of these facts are known to the Czech government."⁷⁴ Unlike cases involving Iranian opposition to the Shah, the Board did not here suggest that the claimant had fabricated his opposition solely to make a case for staying deportation.

69. *Id.*

70. *Hosseinmardi v. INS*, 405 F.2d 25, 27 (9th Cir. 1968).

71. *Kojoory*, 12 I. & N. Dec. 215, 218 (1967).

72. *Id.* at 217.

73. *Janus & Janek*, 12 I. & N. Dec. 866 (1968).

74. *Id.* at 871.

In both cases the Board acknowledged that the claimants' political activities within the United States were known to the home government. Yet the two cases reached different results, at least in part because in the Iranian case the Board impliedly accepted the State Department view that dissidents would not be persecuted,⁷⁵ while in the Czech case the Board's perception of the Czech government⁷⁶ led to the conclusion that persecution would occur if the claimants were deported.⁷⁷

Another comparison of a case involving a Czech with one involving an Iranian illustrates that political activity within the United States may disqualify an otherwise eligible person from asylum. In *In re Zedkova*,⁷⁸ a claimant who departed Czechoslovakia voluntarily and for personal reasons, deciding not to return home after the Russian invasion of 1968, was found eligible for conditional entry. To achieve this eligibility, the court construed the requirement in section 203(a)(7) of the Act concerning actual flight to include one who has avoided, abandoned or forsaken a danger or evil.

The Board declined to apply this construction in the case of *In re Taheri*,⁷⁹ which involved an Iranian student. The claimant, who had indulged in vehement activity against the Shah within the United States, contended that he, like Zedkova, had "fled"⁸⁰ within the meaning of the conditional entry provision, insofar as interven-

75. *Kojoory*, 12 I. & N. Dec. at 219. In addition, *Kojoory* was chapter president of the outlawed Iranian Student Association and had picketed the Shah during his visit to the United States in 1964. Such activities are clearly more of an embarrassment to the American government than the giving of an anti-communist interview to Radio Free Europe.

76. *Berdo v. INS*, 432 F.2d at 847. The court referred to the Board's statement that Communist Party line was stronger in Czechoslovakia than in Hungary and that one of the controlling factors that justified the different results reached in the *Janek* case was that *Janek* was Czech and *Berdo* was Hungarian. *Id.*

77. In *Berdo* petitioner publicly admitted after his departure from Hungary that he had killed a Russian soldier in the street fighting which occurred during the 1956 uprising. The court concluded that based on this statement petitioner would be subject to imprisonment if returned to Hungary. Although such trial and punishment had indeed become a probability as a result of the public admission, the court did not discuss the fact that the Hungarian authorities had not acted on this incident from 1956 to 1964, probably because they had no knowledge of the facts of the incident prior to *Berdo's* admission while he was in the United States.

78. 13 I. & N. Dec. 626 (1970).

79. 14 I. & N. Dec. 27 (1972).

80. The applicant stated that:

I fled from Iran, within the meaning of *Matter of Zedkova*, . . . I have taken part in the activities of the Confederation of Iranian Students. The Confederation was recently outlawed by the Iranian Government. I have also been arrested for an anti-Iranian Government demonstration at the Consulate of Iran in San Francisco.

14 I. & N. Dec. at 28.

ing events had rendered return to his home country impossible. The Regional Commissioner initially held the case distinguishable on the ground that Iran, unlike Czechoslovakia, had not been invaded by a foreign country.⁸¹ The District Court remanded the case for reconsideration on the ground that the commissioner's distinction was one of detail rather than principle.⁸² It was ultimately held that in invading the Iranian consulate in San Francisco, the claimant had been involved in criminal acts violative of United States law, thus providing a rational basis for denial of his application.⁸³ This holding ignored specific provisions of the Act which define those criminal offenses resulting in deportation, and which exclude crimes such as those committed by the claimant.⁸⁴ The Board, then, failing to apply the standard established in *Zedkova*, denied asylum on the basis of a minor criminal conviction directly resulting from the claimant's political protest at the Iranian consulate.

D. *The Problems in Evidence*

Rules of evidence are not applicable to deportation hearings.⁸⁵ By administrative regulation, a determination of deportability is invalid unless clear, unequivocal and convincing evidence demonstrates the truth of the facts alleged as grounds for deportation.⁸⁶ However, an individual applying for waiver of deportation bears the burden of showing a well-founded fear of persecution.⁸⁷ As discussed hereinafter, this burden is especially difficult for refugees from non-communist countries to sustain because judicial evaluation of evi-

81. *Id.* at 29.

82. *Id.* at 34.

83. *Id.*

84. Claimant plead guilty to a charge of false imprisonment and served thirty-five days in jail. *Id.* at 28. An alien commits a deportable offense where he is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial.

Immigration and Nationality Act of 1952, § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1970). Whether the section is applicable to the particular charge involved is questionable, in that there was no indication that Taheri's crimes involved "moral turpitude." Moreover, the court did not even cite this section, but relied instead on the bare fact of conviction to deny refugee status to Taheri.

85. *Bufalino v. Holland*, 277 F.2d 270 (3d Cir.), cert. denied, 364 U.S. 863 (1960).

86. 8 C.F.R. § 242.14(a) (1977).

87. *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

dence may differ according to the government accused.

Courts will more likely take judicial notice of unfavorable political conditions in the home country of a claimant from a communist nation perceived as an adversary of the United States. In the case of a Chinese refugee for example, the court stated,

I think we can and should take judicial notice of the notorious and virtually indisputable fact of the ruthless behavior of the Communist governments in China and Russia, so that almost surely a Chinese, known to have allied himself with the Formosa government, will be tortured and exterminated if found on the mainland of China.⁸⁸

In a case involving Haitians fleeing the Duvalier regime, on the other hand, the court refused to take such notice. "To require the INS to take administrative notice of conditions in Haiti would confer 'blanket asylum status'[⁸⁹] on those who are not in fact political refugees."⁹⁰

The doctrine of judicial notice in immigration cases poses inherent dangers by providing a means for the judges' political perceptions to influence the outcome at the claimant's expense. In the foregoing cases, Chinese claimants were essentially defined as *bona fide* refugees because of the court's perception of conditions in China, while Haitians were denied the benefit of judicial notice as a means of proving fear of persecution.

A second evidentiary problem involves statements by claimants and witnesses supporting an application for asylum. Refugees frequently arrive in the United States without documentation of their claims of persecution other than their own affidavits of personal experience. Many Haitians, for example, arrive by night in small boats⁹¹ with little knowledge of English, and with neither the money nor the opportunity to obtain counsel prior to an interview with an Immigration Officer. Statements made upon arrival regarding their purpose for coming to the United States may be misconstrued and later used against them. Fearing the Immigration Officer, some

88. *Fong Foo v. Shaughnessy*, 234 F.2d 715, 718 (2d Cir. 1955).

89. The court's concern with the obligation to confer blanket asylum status is misplaced. Even where judicial notice of conditions in Haiti is taken, claimants may still be burdened by ambiguous evidentiary standards. See *Hyppolite v. INS*, 382 F.2d 98 (7th Cir. 1967).

90. Anderson, *The Haitians of New York*, *NEW YORKER MAGAZINE*, March 31, 1975, at 60, as quoted in *Paul v. INS*, 521 F.2d 194, 199 (5th Cir. 1975). In an earlier case, *Hyppolite v. INS*, 382 F.2d 98 (7th Cir. 1967), the Special Inquiry Officer took judicial notice of conditions in Haiti, but found that petitioner had not sustained her burden of proof by showing that she would be persecuted for her political opinions. *Id.* at 100.

91. Brief for Appellant at 6, 7, *Pierre v. United States*, 547 F.2d 1281 (5th Cir. 1977).

have initially stated that their purpose was to find employment. When they later submit affidavits of political persecution, these affidavits are dismissed as self serving.⁹²

Those claimants able to present the testimony of one or more expert witnesses discover that the weight accorded such testimony may differ depending upon the official State Department position on conditions within the claimant's home country. *In re Kojoory*⁹³ illustrates this double standard. The Board therein recognized that the Iranian government was probably aware of petitioner's activities in opposition to the Shah. Claimant's expert witness, who had worked on a high level with the government of Iran,⁹⁴ stressed that Iran was a police state lacking civil liberties. He testified that the secret police organization (SAVAK) had considerable power to imprison and even kill people without answering to higher authority.⁹⁵ However, a State Department letter maintained that opposition to the Shah's regime does not subject an individual to persecution.⁹⁶ The Board thereafter rejected Kojoory's claim.⁹⁷

An opposite result was reached in a case involving a refugee from Communist Hungary.⁹⁸ Petitioner's expert witness was a fellow Hungarian emigre, employed as a legal specialist in the European Law Division of the Library of Congress. He testified that petitioner's recent admission that he had killed a Russian soldier would result in a trial for murder, conspiracy, and counter-revolutionary activities. This testimony had not persuaded the Board, but did persuade the court.⁹⁹

In some instances, judicial assumptions regarding the nature of certain governments have led to rejection of even those affidavits submitted by an agency of the United States government. In *Fong Foo v. Shaughnessy*,¹⁰⁰ the court, having taken judicial notice of communist cruelty, discounted the affidavit of an INS attorney stating that Chinese who had been deported to communist China "were not there molested."¹⁰¹ The court replied, "[n]ote the vague-

92. Paul v. INS, 521 F.2d at 201.

93. 12 I. & N. Dec. 215 (1967).

94. The witness, a Dr. Norton Kristy, had worked with an oil consortium and the government of Iran in the making of overall plans for the development of Iran. *Id.* at 218.

95. *Id.*

96. *Id.*

97. *Id.* at 219-20. *Accord*, Hosseinmardi v. INS, 405 F.2d 25 (9th Cir. 1968).

98. Berdo v. INS, 432 F.2d 824 (6th Cir. 1970).

99. *Id.* at 847.

100. 234 F.2d 715 (2d Cir. 1955).

101. *Id.* at 720.

ness of that statement. Affiant does not say whether those persons were anti-Communists.”¹⁰² In protecting the escapee from Communism, then, the court accorded greater weight to selected evidence in order to achieve the desired result.

While the claimant from China profited from judicial skepticism, an absence of uniform standards regarding admissibility of evidence impacts adversely upon claimants from non-communist countries. In a case upholding a deportation order against a Haitian, the dissent noted that the Immigration Judge made no credibility findings: “[i]f the statements, or substantial parts of them, are accepted as credible, the conclusion that petitioners failed to meet the burden of proof is, to put it baldly, astonishing. Yet the Immigration Judge made no credibility findings—indeed his finding . . . implies that he accepted petitioners’ statements as true.”¹⁰³ Thus, in the absence of clear evidentiary rules, judicial bias, either personal or political, may intervene to prejudice the rights of claimants from non-communist states.

A third obstacle facing claimants from non-communist countries is the District Director’s ability to request State Department opinion letters on the likelihood that an individual will be persecuted if deported.¹⁰⁴ By established Service practice, the petitioner in such cases is not permitted to cross-examine or to submit the Department of State to discovery procedures.¹⁰⁵

Some courts have recognized the problem inherent in such evidence. The Ninth Circuit has stated:

[s]uch 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. The traditional foundation required of expert testimony is lacking; nor can official position be said to supply an acceptable substitute. No hearing officer or court has the means to know the diplomatic necessities of the moment, in light of which the statements must be weighed.¹⁰⁶

102. *Id.*

103. *Paul v. INS*, 521 F.2d at 202, 204.

104. 8 C.F.R. § 108.2 (1977) provides that “[t]he district director shall request the views of the Department of State before making his decision unless in his opinion the application is clearly meritorious or clearly lacking in substance.”

105. *Hosseinmardi v. INS*, 405 F.2d at 28.

106. *Kasravi v. INS*, 400 F.2d 675, 677 n.1 (9th Cir. 1968).

Although acknowledging the inherent unreliability of such letters, the court nevertheless admitted them into evidence. In another case decided earlier in the same year, the Ninth Circuit had stated: "[t]his advice came from a knowledgeable and competent source and was admissible" ¹⁰⁷

The Second Circuit, elucidating the prejudicial effect of such letters, has stated that the danger exists because "[t]hey do both too little and too much . . . [They] give little or nothing about conditions in the foreign country. What they do is to recommend how the district director should decide the particular petitioner's request for asylum."¹⁰⁸ Although recognizing the problems inherent in admitting these letters into evidence, the court conditioned reversal upon petitioner's ability to "show some likelihood that it [the letter] influenced the result."¹⁰⁹ The court further stated that in this case such reliance was expressly disclaimed by the Immigration Judge, although not by the Board of Immigration Appeals. Thus, once the unreliability of an opinion letter is recognized, the petitioner's claim may nevertheless be prejudiced by a subjective finding that the administrative officer did not rely upon the letter.

This emphasis upon subjective reliance can raise additional problems. In one case involving an Iranian student, for example, the court stated:

[t]he Board mentioned only one of the statements in the letter (that students returning to Iran after anti-regime activity abroad had not been subject to persecution, without additional action on their part), but . . . the thrust of the Board's decision was that the petitioner's own evidence was insufficient to discharge his burden of establishing that he would be persecuted if deported to Iran.¹¹⁰

The court thereby inferred that there had been no reliance on the

107. *Asghari v. INS*, 396 F.2d 391, 392 (9th Cir. 1968). In *Francois, I. & N. Interim Dec. No. 2458* (Dec. 15, 1975), the Board acknowledged the questionable reliability of the letters but refused to approve their universal exclusion from deportation proceedings, as "[t]he Department of State may have access to information regarding the conditions in a foreign country which may not be available from any other source. These letters can be particularly useful if they contain specific information relating directly to the alien whose case is being adjudicated." *Id.* at 3. Although the Board did not contend that the letters in question related directly to the claimant and conceded that they may have had little probative value, it concluded that such issues should go to the weight and not the admissibility of the letters as evidence. *Id.* at 3-4.

108. *Zamora v. INS*, 534 F.2d 1055, 1063 (2d Cir. 1976).

109. *Id.*

110. *Hosseinmardi v. INS*, 405 F.2d at 28.

letter although these letters would appear to carry considerable weight in such cases.¹¹¹

E. *The Narrow Definition of Political Oppression*

Under a narrow definition of political oppression, political acts are viewed as criminal offenses when committed by refugees from non-communist states. However, if refugees from communist countries have been convicted of a "political crime," their chances for asylum are increased.¹¹² If departure from the home country is politically motivated and if any consequences are political in nature, although taking the form of criminal penalties, criminal conviction does not preclude a favorable exercise of discretion.¹¹³

On the other hand, those who commit crimes against non-communist states are viewed as criminal, rather than political, offenders. In *In re Taheri*,¹¹⁴ claimant, a member of an anti-Shah student organization, invaded the Iranian consulate in San Francisco and was convicted under United States law. Subsequently, Iran announced that members of the Confederation of Iranian Students would be subject to prosecution in Iran.¹¹⁵ In denying asylum, the Board viewed the invasion of the consulate as a criminal, rather than political, offense.¹¹⁶ Moreover, the Board failed to seriously consider the announced prosecution under Iranian law for membership in the student organization.

A further illustration of the difficulty in defining the nature of a political offense is demonstrated by *In re Maccaud*.¹¹⁷ Before his last entry into the United States and during imprisonment in Canada, claimant had aided fellow prisoners in developing an awareness, and promoting the exercise, of their rights under Canadian

111. A further illustration of the way in which State Department opinion influences judicial decisions is found in *Chukumerije, I. & N. Interim Dec. No. 2453* (Nov. 26, 1975) (involving a Nigerian who had been determined to be a *bona fide* refugee by the delegation in Belgium of the United Nations High Commissioner on Refugees). The Board indicated that the Convention Relating to the Status of Refugees ceases to apply if the person is able to return to his country or former habitual residence as a result of changed circumstances. The Board's decision upholding deportation was based *entirely* on a State Department communication which pointed out that "[i]n January, 1970, at the conclusion of the [Biafran] war, the Federal Military Government declared a general amnesty, inviting Nigerians living abroad to return, and announced a policy of reconciliation and reintegration of Nigerians (mostly Ibos) who had supported the secession." *Id.* at 4.

112. *Kovac v. INS*, 407 F.2d 102 (9th Cir. 1969).

113. *Janus & Janek*, 12 I. & N. Dec. 866 (1968).

114. 14 I. & N. Dec. 27 (1972).

115. *Id.* at 39.

116. *Id.* at 40.

117. 14 I. & N. Dec. 429 (1973).

law. Some of these prisoners were members of the Quebec Liberation Front (FLQ). Claimant alleged that because of his political activity he was beaten by prison guards¹¹⁸ and would be subjected to similar ill treatment if returned to Canada. The Board rejected his contentions, stating: "[t]here is nothing in the record which shows that respondent has been or will be persecuted because of this tenuous association with the FLQ," and concluding that "[i]f he is prosecuted when he returns to Canada . . . [s]uch prosecution does not seem to be politically motivated."¹¹⁹ The Board failed to take notice of the fact that in 1970, the concern of the authorities regarding the existence and political orientation of the FLQ resulted in the declaration of martial law.¹²⁰ Hundreds of people were imprisoned for just such tenuous associations with the Quebec Liberation Front.¹²¹ The Board, deeming claimant an escaped convict, ignored the beatings he suffered in prison directly resulting from his political activities.¹²²

A second problem in narrowly defining political oppression is the resulting inability to perceive behavior of refugees from non-communist states as politically motivated, while reaching the opposite conclusion with respect to refugees from communist states. *In re Pierre*¹²³ involved a Haitian woman who claimed that her husband, a deputy in the Duvalier government, had threatened her life. In applying for asylum, she contended that because of his high political position she would be effectively foreclosed from receiving adequate legal or physical protection in Haiti. Claimant argued that this abuse of authority amounted to persecution unrestrained by the Haitian government. In rejecting her claim, the Board characterized the motivation behind her husband's actions as strictly personal rather than as an expression of governmental oppression based on

118. The guards were prosecuted, but acquitted. *Id.* at 434.

119. *Id.*

120. Prime Minister Trudeau invoked the emergency War Measures Act Oct. 16 [1970] to deal with terrorist kidnappings. It was the first occasion the act had been invoked in peace time and gave sweeping powers to the federal government. It also suspended the operation of the Canadian Bill of Rights

Under the emergency act, the FLQ was outlawed, and anyone who abetted the FLQ also became liable [T]he act suspended civil liberties for many members and supporters of the militant separatist group and for possible witnesses in investigations.

D. RISEBOROUGH, CANADA AND THE FRENCH 197 (1975).

121. *Id.* at 199.

122. The Board decision was affirmed in *Maccaud v. INS*, 500 F.2d 355 (2d Cir. 1975), the court accepting the view of the Canadian government that it would not countenance any harrassment. *Id.* at 359.

123. I. & N. Interim Dec. No. 2433 (Sept. 16, 1975).

race, religion or political opinion.¹²⁴ This result was contrary to dicta in a previous decision approving the concept that non-governmental persecution could be included within the ambit of section 243(h) of the Act.¹²⁵ The Board failed to recognize that although the husband's motives may have been personal, the woman's oppression was in essence political. Her husband's governmental position allowed him to threaten her life without fear of sanction.

Similarly, in *Gena v. INS*,¹²⁶ the court adopted the hearing officer's statement that claimant "fears only the action of one person in the TonTon Macoute, (the Haitian secret police), [who] apparently became enamoured of the respondent's wife and sought to take advantage of his position to harass or incarcerate respondent."¹²⁷ The court apparently failed to realize that neither individual nor political rights can exist if a semi-official police agency member is allowed to use official status to harass and intimidate citizens with impunity in their most intimate relationships.¹²⁸

The above-mentioned courts rejected claims of persecution because the claimants feared only one person and this fear was personally motivated. The result was different, however, in *Loi Leung v. INS*,¹²⁹ involving a Chinese crewman and resident of Hong Kong who asserted a claim of political refugee status. The court reversed the Board's rejection of his claim on the ground that the Board had erred in disregarding a proffered affidavit. Claimant therein stated that he had jumped ship because of threats from "a 'member' of the 'Communist' Seaman's Union provoked by Loi Leung's expression of his anti-communist views."¹³⁰ It appears, then, that if a claimant fears one individual, that fear is unlikely to be construed as politically motivated unless the feared individual is a communist. A narrow definition of political persecution combined with a restrictive judicial attitude towards evidence presented by refugees from non-communist countries substantially limits relief to these refugees under current provisions of the Act.

124. *Id.*

125. Tan, 12 I. & N. Dec. 564, 567 (1967).

126. 424 F.2d 227 (5th Cir. 1970).

127. *Id.* at 230.

128. "Haiti's 'tranquility' is largely a surface phenomenon . . . repression and officially sanctioned terrorism—carried out by the dreaded TonTons Macoutes and a newer, U.S. trained force called the Leopards—remain the order of the day." 91 CHRISTIAN CENTURY 219 (Feb. 27, 1974), cited in Dernis, *supra* note 48, at 29.

129. 531 F.2d 166 (3d Cir. 1976).

130. *Id.* at 168.

F. Sovereign Rights and the Constitution

Generally, alien applicants claiming political persecution are afforded limited constitutional protection because their entry into the United States continues to be viewed not as a right, but as a privilege which can be conditioned or withdrawn.¹³¹ The inequity of this concept is reflected in *Galvan v. Press*,¹³² wherein a Mexican living in the United States for over thirty years was deported because he had been a member of the Communist Party from 1944 to 1946. Membership in the Party did not constitute a specific ground for deportation until passage of the Internal Security Act of 1950.¹³³ Thus, as Justice Douglas emphasized in his dissent, the only charge against this alien was an act which was lawful when performed.¹³⁴ The deportation order was upheld on the rationale that policy formulation regulating alien entry is peculiarly concerned with governmental political conduct and entrusted exclusively to Congress, constitutional embarrassments notwithstanding.¹³⁵

Limitations of the Act are accentuated when the provisions are compared with those of the United Nations Convention and Protocol Relating to the Status of Refugees.¹³⁶ The Convention provides a substantive right of "non-refoulement" (non-return) for a *bona fide* refugee.¹³⁷ In contrast to the Immigration and Nationality Act, this right is not conditioned on a requirement of actual flight, there is no limitation on the type of government or part of the world involved, and there is no disqualifying concept of resettlement.¹³⁸

131. Although the right-privilege distinction has been abandoned in other areas of the law, *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970), it still prevades alienage cases. See *Pierre v. United States*, 547 F.2d 1281, 1287 (5th Cir. 1977).

132. 347 U.S. 522 (1954). Although *Galvan* is not an asylum case, it illustrates the extreme deference to political mandate in alienage cases, and has never been expressly overruled.

133. 64 Stat. 987, 1006, 1008 (1950).

134. *Galvan v. Press*, 347 U.S. at 533 (Douglas, J., dissenting).

135. *Id.* at 530-31.

136. U.N. Refugee Convention & Protocol, *supra* note 5.

137. Article 32 provides that "[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order." U.N. Refugee Convention & Protocol, *supra* note 5, art. 32, 19 U.S.T. 6275, T.I.A.S. No. 6577 at 53, 189 U.N.T.S. 174.

Similarly, Article 33 mandates that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." 19 U.S.T. 6276, T.I.A.S. No. 6577 at 54, 189 U.N.T.S. 176.

138. A judicially imposed requirement for applicants under § 203(a)(7) of the Act, as amended, (8 U.S.C. § 1153(a)(7) (1970)), is that the claimant must not have resettled in some other country since fleeing his homeland. *Rosenberg v. Yee Chien Woo*, 402 U.S. 49 (1971).

Limitations inherent in the Act and imposed through judicial interpretation have resulted in the assertion of constitutional arguments during recent years. Moreover, the United Nations Convention and Protocol Relating to the Status of Refugees were acceded to by the Senate in 1968. It has been argued that Articles 32 and 33 thereby have the force and effect of law, vesting in aliens certain rights presently unavailable under the Act.¹³⁹

In *Pierre v. United States*,¹⁴⁰ petitioners argued that Article 33 of the Convention creates an absolute right of "non-refoulement" (non-return) vesting in refugees a conditional liberty right protected under the due process clause of the Fifth Amendment.¹⁴¹ The Fifth Circuit, however, dismissed these contentions, holding that Article 33 does not deprive the INS of its discretion to exclude refugees,¹⁴² and vests no liberty right in the alien.¹⁴³ This interpretation is problematic in two respects.

First, in reaching its conclusion, the court relied on the legislative history regarding the accession to the Protocol. However, the court misconstrued this history as requiring no change in the administration of immigration policy. The Board has similarly concluded that the Senate did not contemplate effectuation of radical change in existing immigration laws.¹⁴⁴ In fact, general representations to induce affirmative Senate action indicated that our immigration laws already embodied the humane provisions for refugees fostered by the Convention and Protocol.¹⁴⁵ President Johnson, in forwarding the Protocol to the Senate for approval, stated as fact that "most refugees in this country already enjoy the protection and rights which the Protocol seeks to secure for refugees in all countries."¹⁴⁶ Yet these representations regarding the scope of the Protocol were and are factually inaccurate. As discussed above, the Protocol is broader than the Act, its application would eliminate many prob-

139. See, e.g., Brief for Appellant at 45, 49, *Pierre v. United States*, 547 F.2d 1281 (5th Cir. 1977).

140. 547 F.2d 1281 (5th Cir. 1977).

141. *Id.* at 1287.

142. *Id.* Interestingly, James L. Carlin, of the Office of Refugee and Migration Affairs, Department of State, in referring to the right of non-refoulement under Article 33, has implied that the Attorney General's discretion has been limited by accession to the Protocol: "the discretionary authority of the Attorney General under section 243(h) of the Immigration and Nationality Act is now qualified and fortified since our accession to the Protocol in 1968 . . . by this mandatory prohibition against refoulement." Carlin, *supra* note 3, at 20.

143. 547 F.2d at 1289-90.

144. *Id.* at 1288, citing *Dunar, I. & N. Interim Dec. No. 2192* (Apr. 17, 1973).

145. 547 F.2d at 1288.

146. 114 CONG. REC. 24628 (1968).

lems presently faced by refugees from non-communist nations.

Second, the court in *Pierre* mistakenly relied upon decisions of the Second and Third Circuits¹⁴⁷ in holding that Article 33 vests no rights in the alien. These decisions turned on the issue of whether lawful presence in the United States is a prerequisite to relief under Article 32 of the Convention, not whether Article 33 creates an absolute, substantive right of non-return.¹⁴⁸

Although law relating to the effect of the Convention and Protocol is evolving on a case-by-case basis, current cases portend a trend toward bringing the treaties within the Act, rather than changing the Act to conform with the intent of the treaties. In *In re Francois*,¹⁴⁹ the Board recognized that relief under Article 33 does not depend on the refugee's lawful presence.¹⁵⁰ The significance of that conclusion was undermined by a finding that, although the claimant might apply for relief, he had not met his burden of proof on the persecution claim under section 243(h). The Board stated that the murder of the claimant's father, step-father and other members of the family by the Duvalier regime, and the burning of the family home were not indicative of any interest on the part of the government in the claimant himself.¹⁵¹

In *Kashani v. INS*,¹⁵² this elusive standard of proof again destroyed the claim of an Iranian applicant. The claimant asserted that under section 243(h) and the Protocol, the Attorney General has discretion only in determining whether the claimant's state of mind regarding fear of persecution is reasonable. The court rejected this contention, reasoning that "the 'well-founded fear' standard contained in the Protocol and the 'clear probability' standard which this court has engrafted onto section 243(h) will in practice con-

147. 547 F.2d at 1288, citing *Ming v. Marks*, 367 F. Supp. 673 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 1170 (2d Cir. 1974); and *Kan Kam Lin v. Rinaldi*, 361 F. Supp. 177 (D.N.J. 1973), *aff'd*, 493 F.2d 1229 (3d Cir.), *cert. denied*, 419 U.S. 874 (1974).

148. *Id.* Representatives of other Haitian claimants enjoyed a brief victory a few days prior to the decision in *Pierre*. In *Sannon v. United States*, 427 F. Supp. 1270 (S.D. Fla. 1977), the court held that an asylum claim under Article 33 of the Protocol constitutes an assertion of a privilege to enter and as such can be litigated in exclusion proceedings and appealed to the Board. The court asserted that the distinctions drawn in 8 C.F.R. § 108 between excludable and deportable aliens find no justification in the Protocol or in logic, and place the excludable alien at a disadvantage by providing only a summary and non-appealable procedure to adjudicate his claim. The case was remanded to provide the Haitians a full and fair adversary hearing. 427 F. Supp. at 1276-77. Unfortunately, the contra holding in *Pierre*, as a decision of the Fifth Circuit, is binding on the *Sannon* court.

149. I. & N. Interim Dec. No. 2458 (Dec. 15, 1975).

150. *Id.* at 6.

151. *Id.* at 6-7.

152. 547 F.2d 376 (7th Cir. 1977).

verge."¹⁵³ In effect, then, the claimant under the Protocol must meet the more stringent requirements of section 243(h).

Although persons held deportable may now apparently raise Article 33 claims, the Board has not allowed such claims by *excludable* aliens. *In re Cenatice*¹⁵⁴ is a recent example of this position. In *Cenatice*, the Board held that Article 33 claims could not be raised in an exclusion proceeding because, as a prerequisite to raising such a claim, an alien must have effected an "entry" into the United States¹⁵⁵ which, by definition, never occurs in an exclusion case.¹⁵⁶

The applicants then argued that to deny hearing of refugee claims in exclusion proceedings was violative of due process and equal protection under the Fifth Amendment, and that their exclusion and subsequent deportation would constitute cruel and unusual punishment under the Eighth Amendment.¹⁵⁷ Stating that it was not within its province to pass on the constitutionality of the statutes, the Board nonetheless noted that excludable aliens are not entitled to equal protection or due process.¹⁵⁸ The claim of right to counsel was denied on the same basis; moreover, it was noted that the right to counsel may not apply to preliminary investigations.¹⁵⁹ The appeal was dismissed.

The reason for this apparent reluctance to probe the substantive issues involved lies in the Fifth Circuit's admission that:

153. *Id.* at 379.

154. I. & N. Interim Dec. No. 2571 (Mar. 28, 1977). In *Cenatice*, thirteen Haitians arrived by boat in Miami and applied for admission as refugees. They were detained under § 235(b) of the Act (8 U.S.C. § 1225(b) (1970)), which provides that "[e]very alien . . . who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry" In spite of the explicit requirement of 8 C.F.R. § 235.6(a) that the aliens immediately be given notice of referral to an immigration judge, this was not done for eleven months, during which time the Haitians remained in detention. Despite the Immigration Judge's recitation that the applicants had applied to the district director for asylum under 8 C.F.R. § 108.1, copies of the applications and decision denying their claim did not appear in the record.

155. The Board reiterated that detention of an alien pending a determination of admissibility does not legally constitute an entry and that relief under § 243(h) is unavailable. I. & N. Interim Dec. No. 2571 at 5. *E.g.*, *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958). The only permissible procedure for asylum is that found in 8 C.F.R. 108.1 & 108.2, and a decision thereunder is not appealable to the Board.

Turning to the question of the unavailability at an exclusion proceeding of a refugee claim under Article 33, the Board cited *Pierre*, in reiterating that it was the intent of Congress that existing procedures be followed, and that such claims could not be raised at an exclusion hearing. I. & N. Interim Dec. No. 2571 at 8.

156. See notes 41-43 *supra* and accompanying text.

157. I. & N. Interim Dec. No. 2571 at 8-9.

158. *Id.* at 9.

159. *Id.*

Congress clearly has the power to draw distinctions between classes of aliens which, if drawn among classes of citizens, would appear to violate the equal protection clause or other constitutional rights

In light of the established power of Congress to make such distinctions among classes of aliens, the question becomes whether Congress or its delegates abuse that power when making a distinction between the class of aliens who have made entry and those who have not. Clearly constitutional protections cannot be afforded to the entire population of the world, and some distinction is necessary We decline to upset this distinction which lies within the jurisdiction of the political branches of government.¹⁶⁰

CONCLUSION

In the twenty-five years since Justice Frankfurter acknowledged the cruelty of our immigration laws,¹⁶¹ little has changed. The courts continue to defer to the plenary power of Congress to decide who may or may not enter, notwithstanding consequential injury to refugees from non-communist states. Judicial deference to the political branches of government has resulted in an abdication of the duty to review constitutional issues involving political refugees, and has thereby rendered the Constitution subordinate to foreign policy interests. While the courts decline to interfere with the political branch, the political and executive departments exercise discretion in a prejudicial manner with a minimum of accountability. Such discretion may take the form of executive exercise of the parole power or State Department opinion letters reflecting foreign policy considerations rather than the objective danger to individual refugees.¹⁶² A more subtle danger to political refugees is the judiciary's own perceptions and biases as to world politics.

Recent Congressional reform initiatives¹⁶³ have failed to pro-

160. *Pierre v. United States*, 547 F.2d at 1290.

161. See note 1 *supra* and accompanying text.

162. See *Taheri*, 14 I. & N. Dec. 27 (1972) where the Office of Refugee and Migration Affairs urged that the applications for refugee status by foreign students who came originally to the United States not for political asylum but for education be examined with extreme care for policy reasons; *Tayeb*, 12 I. & N. Dec. 739 (1968) where relief was denied on the basis of State Department advice that the approval of the application would have an adverse effect on relations with the Government of Libya; *Nghiem*, 11 I. & N. Dec. 541 (1966) where claimant opposed the Diem and Khanh regimes in South Vietnam. The Agency for International Development requested the enforced departure of respondent Nghiem, even though that constituted an exception to the then current policy of not requiring departure of applicants pending completion of the exchange visitor program.

163. On May 7, 1976, Rep. Eilberg of Pennsylvania introduced legislation to reform United States refugee policy and procedures. Mr. Eilberg complained that "the entire proce-

duce serious changes in basic assumptions regarding the nature of political oppression. Unless and until that questioning and re-evaluation process occurs, political refugees in general, and refugees from non-communist states in particular, will continue to be subjected to capricious and arbitrary treatment.

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ture is completely arbitrary . . ." and "decisions to admit certain categories of refugees are too often based on: Foreign policy considerations, pressures from special interest groups, or the positions of small numbers of individuals within the executive branch, or for that matter within the Congress." 122 CONG. REC. H4112 (daily ed. May 7, 1976). The proposed bill would adopt, with slight modification, the Protocol definition of refugees and would authorize the admission of 20,000 refugees annually. *Id.* at H4113. See 54 INTERPRETER RELEASES 100-01 (1977). On February 22, 1977, H.R. 3056 was reintroduced and set for hearing on February 24, 1977.

However, due to "considerable opposition . . . from both the government and the private sector" to certain provisions of H.R. 3056, Rep. Eilberg introduced a "clean" version of the bill, H.R. 7175, on May 13, 1977. 123 CONG. REC. H4448 (daily ed. May 13, 1977); 55 INTERPRETER RELEASES 4 (1978). See generally 54 INTERPRETER RELEASES 296 (1977).

While the bill purports to reform the procedures for entry of refugees, the additional Congressional controls proposed in H.R. 7175 would only serve to exacerbate the problems of refugees from non-communist states.

First, while the new bill would permit relief to refugees from non-communist persecution under the conditional entry provision of the Act, the overall quota for political refugees would only be increased to 20,000 per year. This increase of 14.9 percent from the present yearly maximum would not accommodate the newly eligible class of refugees. Statement of William Waterman, Jr., on behalf of the National Lawyers' Guild, *Hearings on H.R. 7175 Before the House Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 2d Sess., reprinted in 7 IMMIGRATION NEWSLETTER Mar.-Apr. 1978 at 11.

Second, the bill would add a new subparagraph, 243(h)(2)(A), which would deprive the Attorney General of discretion to withhold deportation of aliens within the United States who have effected an illegal entry. *Id.* at 10.

Third, proposed new section 207(a)(3)(B) bars the admission of a refugee where "the alien's primary motivation for seeking admission under this subsection is improvement of his economic condition." *Id.* at 11.

The two latter provisions are inconsistent with the intent of Article 33 of the Protocol, see note 137 *supra*, and would operate to codify the existing prejudicial approach toward political refugees from repressive non-communist regimes.

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