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THE U.S. POLITICAL ASYLUM PROGRAM: AN ADMINISTRATIVE ANALYSIS

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INTRODUCTION

At the heart of any consideration of immigration law lies the tension between sovereignty and humanitarian concerns. This tension creates contradictory impulses in immigration policy formulation. A nation may seek to exclude certain outsiders, rationalizing that with such actions it protects its citizens from depletion of economic and political resources. Simultaneously, a nation may wish to include other outsiders with whom it would like to share the protections and benefits of its political community.

Despite the clear exclusionary thrust of recent U.S. immigration policy and its attempts to preserve the integrity of U.S. sovereignty,¹ there does exist a statutory enunciation of the inclusionary aspect of U.S. immigration policy. In the Refugee Act of 1980, Congress affirmatively provided protection within U.S. borders to persons persecuted in other countries.² The Act reflects "one of the oldest themes in American history—welcoming homeless refugees to our shores. It gives statutory meaning to our national commitment to human rights and humanitarian concerns."³

The task of administering political asylum determinations has been delegated to the Immigration and Naturalization Service (INS), an agency with an historical and institutional bias toward the exclusion of non-U.S. citizens.⁴ This Comment looks to whether the INS effectively executes the inclusionary mandate of the Refu-

1. On signing the Immigration Reform and Control Act (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986) into law, President Reagan stated: "In the past 35 years our nation has been increasingly affected by illegal immigration. This legislation takes a major step toward meeting this challenge to our sovereignty." President's Statement, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 5856-1. "Future generations of Americans will be thankful for our efforts to humanely regain control of our borders and thereby preserve the value of one of the most sacred possessions of our people: American citizenship." *Id.* at 5856-4. In 1985, Attorney General Edwin Meese noted before the House Immigration sub-Committee that "[w]e cannot fairly speak of ourselves as a sovereign nation if we cannot responsibly decide who may cross our borders." (quoted in H.R. CONF. REP. NO. 682(I), 99th Cong., 2d Sess. 46, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5650. The Attorney General is the government official ultimately responsible for INS decisionmaking. See Refugee Act of 1980, § 243(h)(1), Pub. L. No. 96-212, 94 Stat. 102, 107 (1980) (codified as amended at 8 U.S.C. § 1253(h)(1) (1982) [hereinafter § 243(h)]) ("The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.") See Refugee Act of 1980, § 208(a), Pub. L. No. 96-212, 94 Stat. 102, 107 (1980) (codified as amended at 8 U.S.C. § 1158(a) (1982) [hereinafter § 208]) ("The Attorney General shall establish a procedure for an alien . . . irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of [the Act's definition].")

2. Pub. L. No. 96-212, 94 Stat. 102 (1980) [hereinafter Refugee Act].

3. S. REP. NO. 256, 96th Cong., 1st Sess., reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 141 (legislative history).

4. See *infra* notes 97-101 and accompanying text.

gee Act, and if not, how effective realization of the Congressional intent behind the Act may be structured.

The INS is considered an "agency" for purposes of administrative law.⁵ While there is no question that the federal immigration apparatus is relatively unique among federal administrative agencies,⁶ it does not necessarily follow that these claims of *sui generis* status should insulate the INS from limitations placed on administrative agencies in other contexts. I take the position that the appropriateness of INS actions in political asylum determinations are productively examined within the framework of an aggressive administrative law analysis.

There are two levels to such an administrative law inquiry. First, how does the INS abuse the discretion delegated to it by Congress, and what standard administrative law techniques may be used to structure this discretion? Second, where none of the three branches of U.S. government are willing to intervene and structure INS discretion, to what extent does INS decisionmaking violate basic constitutional principles of separation of powers and due process? The first level of the analysis is essentially statutory, evaluating INS decisionmaking processes in light of the general Administrative Procedure Act (APA)⁷ requirements, and the statutes which enable the INS to make political asylum determinations.⁸ The second level focuses on constitutional constraints on government action, constraints which are necessary to the organization of a democratic society.

Effective analysis of the INS decisionmaking process in political asylum determinations first requires an understanding of the convoluted nature of the process. Toward that end I present background of U.S. asylum policy, a look at the Refugee Act mandate and provisions, and a brief account of asylum determinations themselves. After the presentation of background, I then proceed with the statutory and constitutional analysis of INS decisionmaking legitimacy.

5. *Blackwell College of Business v. Attorney General*, 454 F.2d 928, 933 (D.C. Cir. 1971) (cited in K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1:2, 6 (2d ed. 1978)).

6. Ludd, *The Essentiality of Judicial Review: Toward a More Balanced Understanding of Administrative Discretion in American Government*, in *ADMINISTRATIVE DISCRETION AND PUBLIC POLICY IMPLEMENTATION* 16 (D. Shumavon & H. Hibbeln eds. 1987).

7. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§ 501 to 576, §§ 701 to 703 (1982) [hereinafter APA]).

8. Immigration and Nationality Act, Pub. L. No. 82-414 § 243(h), 66 Stat. 163, 214 (1952) (current version at 8 U.S.C. § 1253(h) (1982)) [hereinafter INA] (emphasis added)).

I. U.S. STATUTORY PROTECTION OF PERSECUTED ALIENS

A. *Background of U.S. Asylum Policy*

The first federal law limiting immigration was passed in 1875. The law made immigration unlawful for certain "obnoxious persons," principally convicts and prostitutes.⁹ Congress, however, recognized exceptions to these laws for persons convicted of political offenses.¹⁰ In so doing, it formulated its first official notions of political asylum, although dedication to the support and welcome of persons politically oppressed in their homelands had been expressed as a public value since the birth of the republic.¹¹

These early forms of asylum were granted largely as a "product of administrative grace,"¹² on an *ad hoc* basis with no statutory foundation to the exercise of the wide-ranging discretion. The Displaced Persons Act of 1948 did recognize the need to grant shelter to persons fleeing persecution.¹³ But not until the 1950's did Congress attempt to structure methods for applying its recognition of political exceptions to the limitations of immigration law.

The massive economic and political dislocations following World War II forced the international community to address immigration issues in a dramatic way. Domestic U.S. efforts to construct a system of application for political exceptions to immigration laws

9. 18 Stat. Pt. 3 477, Ch. 141, § 5. The law also prohibited the "importation" of indentured Asian servants. See Whelan, *Principles of U.S. Immigration Policy*, 44 U. PITT. L. REV. 447, 448 n.3 (1983) ("The United States refrained from exercising any control over immigration until 1875. At that time, there was some question whether the federal government had authority over immigration (as distinct from naturalization), since no such power is granted to it in the Constitution. The Supreme Court, however, imputed such a power as an 'incident of sovereignty,' [in] *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889), [by] in effect reading contemporary international legal norms into the federal Constitution."). See, also, NATIONAL LAWYER'S GUILD, IMMIGRATION LAW AND DEFENSE, 2-1, *History of Immigration Legislation in the United States*, § 2:1 (1988) ("There are no records of immigrants in North America before the fifteenth century. Since then, with the exception of Native American peoples, every United States citizen is either an immigrant or a direct descendant of an immigrant.")

10. "SEC. 5. That it shall be unlawful for aliens of the following classes to immigrate into the United States, namely, persons who are undergoing a sentence for conviction in their own country of felonious crimes *other than political or growing out of or the result of such political offenses.*" Act of March 3, 1875, Ch. 141, 18 Stat. 477 (emphasis added); "SEC. 4. That all foreign convicts *except those convicted of political offenses*, upon arrival, shall be sent back to the nations to which they belong and from whence they came." Act of August 3, 1882, Ch. 376, 22 Stat. 214 (emphasis added).

11. "Two hundred years ago, George Washington announced that the nation would receive 'the oppressed and persecuted of all Nations And Religions; whom we shall welcome to a participation of all our rights and privileges . . .'" *Developments in the Law, Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1289 (1983) [hereinafter *Developments — Aliens*] (quoting Washington's letter to an association representing recent Irish immigrants, reprinted in 27 THE WRITINGS OF GEORGE WASHINGTON 254 (J. Fitzpatrick ed. 1938)). Indeed, in early U.S. history, states would compete for alien immigrants. *Id.* at n.2.

12. D. MARTIN, MAJOR ISSUES IN IMMIGRATION LAW 78 (1987).

13. Displaced Persons Act, Pub. L. No. 774, 62 Stat. 1009 (1948).

differed markedly in philosophy to parallel international efforts. On the international level, the United Nations drafted the Convention Relating to the Status of Refugees in response to "profound concern for refugees" and the desire to "assure refugees the widest possible exercise of . . . fundamental rights and freedoms."¹⁴ The Convention assumed the task of revising and consolidating previous international agreements on the status of refugees. The parties to the Convention agreed to define a refugee as a person unable or unwilling to return to her homeland in light of a "well-founded fear of being persecuted for reasons of race, religion, nationality [or] membership of a particular social group or political opinion."¹⁵ Article 33 of the Convention is the specific prohibition of "refoulement" of refugees. The article reads in part: "No 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."¹⁶ The only discretion allowed the host country was to deport the refugee 1) if there were reasonable grounds to regard her as a danger to the security of the country or 2) if she had been convicted of a particularly serious crime.¹⁷

The United States was not, however, a signatory to the U.N. Convention. Formulation of U.S. immigration policy in the early fifties was guided instead by domestic security concerns and the rhetoric of McCarthyism. The first statutory attempts to structure political asylum determinations were housed in the Internal Security Act of 1950 and the Immigration and Nationality Act of 1952 (INA), more commonly known as the McCarran-Walter Act.¹⁸ Congress adopted this last piece of legislation over President Truman's veto. In the message accompanying his veto, the President wrote, "[s]eldom has a bill exhibited the distrust evidenced here for citizens and aliens alike. . . ."¹⁹ In the INA section which guided political asylum policy (the provision allowing authorities to withhold deportation of an alien who would be persecuted if she returned to her homeland) this distrust was reflected in wide grants of discretion afforded the Attorney General in making determinations of persecution.

In the Internal Security Act of 1950,²⁰ Congress had outlined a

14. Preamble to the United Nations Convention Relating to the Status of Refugees 189 U.N.T.S. 137, 150 (1954) [hereinafter U.N. Convention].

15. U.N. Convention, art. 1(A)(2)(emphasis added).

16. *Id.* at art. 33.

17. *Id.*

18. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930, 931 (1987).

19. *Id.* at 945.

20. Pub. L. No. 81-831, 64 Stat. 987 (1950).

prohibition of refoulement not very different from the prohibition contained in the U.N. Convention: "No aliens shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution."²¹ But this language was changed considerably when the provision was moved into the Immigration and Naturalization Act of 1952: "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 physical persecution and for such period of time as he deems to be necessary for such reason."²² It has been suggested that the motive for the change was a response to court decisions that tended to place a heavy fact-finding burden on the Attorney General under the provision.²³ But whatever the motive, the straightforward effect of the language change was to broaden the statutory grant of discretion afforded the Attorney General in these determinations.²⁴ This expansion of discretion both reiterated past tactics of *ad hoc* decision-making in asylum-type determinations²⁵ and signalled the developmental course of U.S. asylum policy. While the United Nations was attempting to depoliticize the protection of victims of persecution, the United States was expanding the decisional space within which asylum determinations could be subject to political manipulation.

In 1967, the United Nations drafted a second document affecting political asylum policy, the U.N. Protocol Relating to the Status of Refugees.²⁶ The Protocol had been drafted with the purpose of removing certain date restrictions to the causes of refugee status included in the 1951 Convention.²⁷ "The 1967 Protocol is of a dual nature: it is supplementary to the 1951 Convention for States parties to the Convention, and it constitutes an independent instrument for States acceding to the Protocol, which are not parties to the

21. *Id.* at 1010, Ch. 1024, § 23.

22. INA § 243(h) Ch. 477, 66 Stat. 163,214 (1952).

23. T. ALEINIKOFF & D. MARTIN, IMMIGRATION PROCESS AND POLICY 639 (1985). As an example of the burden imposed, see *Harisiades v. Shaughnessy*, 187 F.2d 137, 142 (2d Cir.), *aff'd on other grounds*, 342 U.S. 580 (1951) ("[B]efore the appellant can be deported, the Attorney General must . . . find he will not be subjected to physical persecution in the country to which he is to be sent."))

24. Where Congress had specifically mandated in 1950 that no alien would be deported upon a certain determination by the attorney general, in the 1952 the decision not to deport became completely discretionary. Even if, in the opinion of the Attorney General, the possibility of physical persecution did exist, the Attorney General could still, within his arguably appropriate discretion, deport the applicant under the statute.

25. See *supra* note 12 and accompanying text.

26. United Nations Protocol Relating to the Status of Refugees, Jan. 31 1967, 606 U.N.T.S. 267 [hereinafter U.N. Protocol].

27. Weis, *The 1967 Protocol Relating to the Status of Refugees and Some Questions of the Law of Treaties*, 42 BRIT. Y.B. OF INT'L L. 39, 40-41 (1967).

Convention."²⁸ Thus, for the United States (which became a party to the Protocol in 1968 but had not participated in the Convention), the 1967 Protocol assumed the status of an independent treaty. As a party acceding to the Protocol, the U.S. became derivatively bound by the important substantive provisions stated in articles 2 to 34 of the Convention.²⁹

It is at least arguable that the INA's broad statutory grants of discretion to the Attorney General put the U.S. in violation of the clear prohibition of refoulement under Article 33 of the Convention. While it was certainly within the Attorney General's power to withhold deportation (that is, to not refouler a particular refugee), it was by no means required by the language of the act as it then read.³⁰ Nevertheless, the Senate had received testimony from the Departments of State and Justice during the ratification process indicating that it would not be necessary to amend the immigration laws if the treaty was signed.³¹ The executive advisors claimed that the U.S. laws, as they then stood, could be implemented consistently with the protocol's provisions; consequently, no law was passed.

Although the next decade experienced changes in the administration of this area of immigration law by the INS, Congress did not legislate a specific response to the international momentum of the 1967 Protocol until it passed the Refugee Act in 1980. In the meantime, the INS brought the U.S. into theoretical compliance with the Convention's nonrefoulement provision (Article 33) by loose administration of the withholding of deportation section of the INA. The not yet statutorily articulated policies of refugee protection and political asylum were also administered under the Attorney General's discretionary authority to temporarily parole aliens into the United States.³²

In 1974, in response to mounting national and international concern over asylum issues, the INS moved to fill the statutory asylum void by promulgating substantive asylum rules. Following

28. *Id.* at 50.

29. U.N. Protocol, art. I, § 1 ("The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.").

30. "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." INA § 243(h) (the 1952 language was amended in 1965, changing "physical persecution" to "persecution on account of race, religion, or political opinion . . .") Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, 918, § 11(f) (1965).

31. T. ALEINIKOFF & D. MARTIN, *supra* note 23, at 639.

32. Congressional Research Service Library of Congress, 96th Cong. 2d Sess. HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE 77 (Comm. Print 1980) [hereinafter History of the INS] (A report prepared at the request of Senator Edward M. Kennedy, Chair, Committee on the Judiciary United States Senate for the use of the Select Commission on Immigration and Refugee Policy).

U.S. accession to the U.N. Protocol, litigants had begun to argue for expanded rights under international political persecution norms.³³ Additionally, an incident regarding the abrupt return of a Lithuanian seaman attempting defection raised national concern over the lack of specific asylum procedures.³⁴ The INS formulated these pre-statutory asylum rules under the general authority granted the Attorney General to administer and enforce the laws of immigration.³⁵ However, no special immigration status was created for successful asylum claimants. In the discretionary tradition of U.S. asylum policy, the INS rules specifically recognized the district director's discretion in granting this administrative asylum.³⁶ Additionally, the rules required input from the State Department before a decision was made in a particular case.³⁷

The defeat of U.S. forces in Viet Nam in 1975 crystallized domestic concerns with the asylum policy aspect of immigration law. The nation was presented with the specific problem of Vietnamese refugees toward whom it felt a responsibility of inclusion.³⁸ More generally, following the defeat, "the administrations of Ford and Carter sought to rebuild and relegitimate the international power of the United States."³⁹ The new foreign policy emerging under former President Carter was expressed in his human rights policy which "had the express purpose of improving the position of the United States in its 'ideological competition' with the Soviet Union."⁴⁰ Under the influence of these forces, Congress committed itself to a statutory recognition of the concept of political asylum by way of the Refugee Act of 1980.

33. For example, litigants argued that the immigration agency's Board of Immigration Appeals (hereinafter BIA) standard of clear probability of persecution was too strict in light of Article 33's well-founded fear of persecution standard. The BIA reaffirmed its position, however, in *In re Dunar*, 14 I. & N. Dec. 310, 319 (1973), holding that the Protocol did not substantially effect the clear probability standard. See also T. ALEINIKOFF & D. MARTIN, *supra* note 23, at 639-40.

34. Seaman Simas Kurdika had escaped from a Russian ship to a Coast Guard cutter in U.S. territorial waters in 1970 during a discussion of fishing rights between the two ships. The Coast Guard allowed Soviet personnel to come aboard, to seize Kurdika, and to forcibly return him to the Soviet vessel. The resulting outcry forced the Nixon Administration to review asylum procedures. See T. ALEINIKOFF & D. MARTIN, *supra* note 23, at 640-41. The review led to the promulgation of the 1974 rules creating a substantive rule asylum policy. 39 Fed. Reg. 28439 (1974) (adopted as modified Dec. 3, 1974) (codified at 8 C.F.R. § 208) (and amended after passage of the Refugee Act in 45 Fed. Reg. 37394 (1980) and 48 Fed. Reg. 20684 (1983)(1988)).

35. See *supra* note 8, 66 Stat. at 173.

36. 39 Fed. Reg. 41832 (1974) (codified as amended at 8 C.F.R. § 208.8(a) (1988)) ("The district director may approve or deny the asylum application in the exercise of discretion.") (45 Fed. Reg. 37394 (1980) as amended at 48 Fed. Reg. 20684 (1983)).

37. *Id.* (codified as amended at 8 C.F.R. § 208.7 (1988)).

38. See generally Comment, *Can the Boat People Assert a Right to Remain in Asylum?*, 4 U. PUGET SOUND L. REV. 176 (1980).

39. Rodriguez Beruff, *Puerto Rico and the Militarization of the Caribbean*, 1979-1984, 10 CONTEMP. MARXISM 68, 70 (1985).

40. *Id.* at 70-71.

B. *The Refugee Act of 1980*

1. *The Mandate and Problems of Discretion*

In recognition of the fact that the INA did not address the "national commitment to human rights and humanitarian concerns," Congress passed the Refugee Act in 1980.⁴¹ The Refugee Act was designed to explicitly legalize what the U.S. had done for refugees "by custom and on an ad hoc basis."⁴² Congress enunciated its statutory asylum formulation in this general context of refugee policy law. It mandated a uniform process for asylum determinations, "improving and clarifying the procedures for determining asylum claims filed by aliens who are physically present in the United States."⁴³ It also created a uniform immigration status for successful asylum applicants, thus improving the previous practice which "often left the refugee in uncertainty as to his own situation and . . . sometimes made it more difficult . . . to secure employment and enjoy other rights to which he is entitled under the Protocol."⁴⁴

Under the mantle of the newly articulated asylum program, Congress also included a revised version of the INA's "withholding of deportation" process. While the INA section 243(h) had permitted the Attorney General to withhold deportation of an otherwise deportable alien on the ground that she might be subject to persecution in her homeland,⁴⁵ the Refugee Act revision *prohibited* the Attorney General from deporting an alien if the Attorney General determined the alien would be persecuted.⁴⁶ The revision was meant to bring U.S. asylum law explicitly in line with the U.N. Protocol requirements and the U.N. Convention's prohibition of refoulement in Article 33.⁴⁷ The actual result of the revision, how-

41. S. REP. NO. 256, 96th Cong., 1st Sess., reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 141 (legislative history).

42. *Id.*

43. *Id.* at 149.

44. *Id.*

45. See *supra* note 23 and accompanying text.

46. INA § 243(h)(1), 94 Stat. 107 (1980) (codified as amended at 8 U.S.C. § 1253(h)(1)), ("The Attorney General *shall not deport or return any alien . . .* if the Attorney General determines that such alien's life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion.") (emphasis added).

47. See *supra* notes 16-17 and accompanying text. There had been some disagreement between the Senate and the House regarding the language of this provision.

The Senate bill provided for withholding deportation of aliens to countries where they would face persecution, unless their deportation would be permitted under the U.N. Convention and Protocol Relating to the Status of Refugees. The House amendment provided a similar withholding procedure unless any of four specific conditions . . . were met. The Conference substitute adopt[ed] the House provision with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.

ever, was to create within the Refugee Act's new uniform asylum procedure two distinct paths toward protection: section 208 asylum and section 243(h) withholding of deportation.

The asylum program is further complicated by the fact that Congress included the program in legislation primarily concerned with general refugee policy. In reality, political asylum and overseas refugee policy are two distinct programs, with distinct policy justifications.

The two programs are similar to the degree that both overseas refugee settlement and grants of political asylum deal with persons threatened with persecution in their homelands. The programs, however, function in distinctly different ways. Deliberate policy choices are made by the U.S. under the overseas refugee program⁴⁸ according to numerical ceilings and selection criteria.⁴⁹ The President in this program affirmatively chooses the people and the political reasons for qualification for refugee status and admission.⁵⁰ The political asylum and nonrefoulement provisions, on the other hand, present an essentially reactive program. The provisions respond to the initiative of applicants who have found their way either to a U.S. consulate, the U.S. border, or the interior. The program is externally initiated, hence the reality of the number of applications will never precisely correspond to prescriptive ceilings set for political admissions.⁵¹ An inevitable tension thus arises between the standards that Congress deems worthy for political protection as a matter of law, and the restrictive application of standards by the executive to meet admissions quotas deemed protective of sovereignty interests.⁵²

H.R. CONF. REP. NO. 781, 96th Cong. 2d Sess. 20 (1980) (joint explanatory statement of the Committee of Conference), 1980 U.S. CODE CONG. & ADMIN. NEWS 161 (legislative history).

48. Refugee Act § 207, *supra* note 2.

49. See, e.g., T. ALEINIKOFF & D. MARTIN, *supra* note 23, at 624 (quoting Presidential Determination No. 83-11).

50. "If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a), the President may fix a number of refugees to be admitted to the United States . . . in response to the emergency refugee situation." Refugee Act § 207(b), *supra* note 2. As an additional distinction, asylum status is not as protective as refugee status. First, there is a "greater emphasis on continuing review of conditions in the asylee's home country." Second, grants of asylum status come in one year increments, forcing periodic INS review. T. ALEINIKOFF & D. MARTIN, *supra* note 23, at 641.

51. Although the overseas refugee section 207 lists ceilings for 1980-82, Refugee Act § 207(a)(1), *supra* note 2, and for future determinations of ceilings, § 207(a)(2), and although section 209 places a 5,000 person limit on the annual number of section 207 refugees who may adjust their status to permanent residence, there is no explicit ceiling or limit in the statute to the number of section 208 asylees who may be admitted each year.

52. D. MARTIN, *supra* note 12, at 78.

The distinctions between the two policies are particularly important in this Comment's analysis. Immigration agency discretionary authority comes into play in the implementation of the asylum program, not the overseas refugee program. Within the overseas program, the INS merely supervises compliance with Presidential determinations of eligibility.⁵³ Within the political asylum program, the immigration agency has the discretion to determine the critical fact of eligibility itself, as well as whether exceptions to that eligibility apply.⁵⁴

2. *Implementation of the Mandate*

The broad spirit of the Refugee Act is clearly inclusionary, an explicit commitment to humanitarian concerns that, until 1980, had been statutorily ignored.⁵⁵ Not only does this spirit pervade the specialized provisions of asylum policy, but the spirit is actually amplified in the asylum and withholding sections. Whereas the President has the authority to determine which victims of what persecution are to be allowed protection under the overseas refugee policy, asylum applicants have the theoretical opportunity to establish their cases under objective standards, without having their individual applications subjected to general policy pressures.

Beyond this theory, however, a look at the actual language of sections 208 and 243(h) reveals structural problems in the provisions which obscure the aggressive inclusionary intent evinced in the legislative history of the Act and open the discretionary space in which policy pressure *may* be brought to bear on the individual case. The very fact of the existence of two separate provisions within the program has allowed courts to focus on distinctions in standards of proof required to establish persecution under each section rather than address more serious implementation of mandate issues.⁵⁶ The distinctions that courts draw between the nature of the status afforded applicants under sections 208 and 243(h) further complicate the program.⁵⁷

Aside from the distinction between asylum and nonrefoulement,

53. 8 C.F.R. § 207 (1988).

54. 8 C.F.R. § 208 (1988).

55. See *supra* notes 2-3 and notes 41-47 and accompanying text.

56. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) ("Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical.").

57. Section 243(h) is said to provide a lesser form of relief than does section 208: Nonrefoulement, governed by section 243(h), is country-specific — that is, it protects only against return to the threatening country. It does not preclude deportation to a nonthreatening third country [footnote omitted]. Nor does it necessarily entail other benefits, such as work authorization, public assistance, eventual permanent resident rights, or even freedom of movement within the sheltering country. Section 208 . . . entails a regularized immigration status. D. MARTIN, *supra* note 12, at 81.

ment in international law (a distinction which is not meant to penalize an alien), it may seem unclear why two provisions with such similar definitional requirements should exist with such different implementational requirements, particularly in light of the fact that "the vast majority of successful applicants for withholding of deportation under 243(h) do in fact receive asylum as well."⁵⁸ But as the U.S. Supreme Court recently noted, "the legislative history of the 1980 Act makes it perfectly clear that Congress did not intend the class of aliens who qualify as refugees to be coextensive with the class who qualify for § 243(h) relief."⁵⁹

Breaking the provisions down into the evidentiary and discretionary requirements which an applicant must satisfy in order to receive asylum protection reveals the disparity between the administrative reality of the asylum program and the asylum vision put forth by Congress.

There are two levels to a successful section 208 asylum application. The alien must first show that she meets the definition of refugee as set forth in the Refugee Act: a person unable to return to her homeland due to a "well-founded fear of persecution."⁶⁰ The definition is based on the international law definition articulated in the U.N. Convention⁶¹ and is incorporated in section 208 procedure by the provision's explicit use of the word "refugee."⁶² But even where an alien has successfully demonstrated that she has a "well-founded fear of persecution" for section 208 purposes, the administrator has the discretion, in a second level determination, to deny the relief. Under the language of the provision, therefore, asylum status is actually granted only where the administrator is satisfied both that the alien has a well-founded fear of persecution and, in the administrator's judgment, the alien *deserves* refugee status.⁶³

58. *Id.* at 82.

59. *Cardoza-Fonseca*, 480 U.S. at 424 (1987).

60. Refugee Act § 101(a)(42)(A), *supra* note 2 (The actual definition reads: "any person who is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .") (emphasis added).

61. See *supra* notes 14-17 and accompanying text.

62. "[T]he alien may be granted asylum . . . if . . . such alien is a *refugee* within the meaning of section 101(a)(42)(A)." Refugee Act § 208(a), *supra* note 2 (emphasis added).

63. The actual language of the section reads "in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee . . ." Refugee Act, § 208(a). In practice, of course, these determinations are made by immigration administrators whose discretion is authorized through the Attorney General by several layers of subdelegation. At least one commentator has questioned the constitutional legitimacy of the subdelegation of this discretion. K. DAVIS, *supra* note 5, at 200-04, § 8:10. In any case, the layers of subdelegation focus the issue of unguided discretion exercised in a perfunctory manner by over 7,000 immigration employees, not the theoretically omniscient Attorney General of the statute.

On the other hand, section 243(h), as revised in the Refugee Act, *requires* an administrator to withhold deportation of an alien once she has established that her "life or freedom would be threatened in [her country of origin] on account of race, religion, nationality, membership in a particular social group, or political opinion."⁶⁴ The explicit removal of discretion from the administrator would seem to guarantee strict application of objective procedure to applicants under this provision. However, section 243(h)(2) specifies a list of exceptions under which the mandatory protection does not apply.⁶⁵ Although limiting language does exist in Article 33 of the U.N. Convention,⁶⁶ Congress *expanded* the limitations in the statute beyond those envisioned under international law.⁶⁷ In the process, the statute impliedly opens a new realm of effective discretion to the administrator, who has wide latitude to decide how the section 243(h)(2) exceptions should apply.⁶⁸

Distinctions between the two programs are also evident in the Supreme Court's interpretation of the appropriate standard of proof required for each program. The Supreme Court has construed the standard of proof of potential persecution under section 243(h) as a "clear probability of persecution,"⁶⁹ which is a more difficult standard of proof for an applicant to meet than section 208's "well-founded fear of persecution."⁷⁰ The Court felt the distinction was necessary because the language of section 243(h) does not use the

64. Refugee Act, § 243(h)(1), *supra* note 2.

65. INA, § 243(h)(2) (as amended at Refugee Act, Pub. L. 96-212, 94 Stat. 107 § 203(e)(1980) ("Paragraph (1) shall not apply to any alien if the Attorney General determines that — (A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; (B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States; (C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or (D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.").

66. U.N. Convention, art. 33, § 2 ("The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.")

67. Refugee Act, *supra* note 65, the § 243(h) exceptions expand the Article 33 exceptions by 1) excluding an alien determined to have been a persecutor herself, and 2) by excluding an alien where there is a "serious reason for considering that the alien has committed a serious nonpolitical crime outside the United States," whether or not she has been convicted of that crime by a final judgment.

68. Whether an official determines a person to have assisted in the persecution of another, to constitute a danger to the U.S. community, or whether a serious crime committed by that person is to be seen as political or nonpolitical, is closely linked to prevailing foreign policy rhetoric. There are no objective standards to guide these sort of determinations, unless the last exception's "reasonable grounds" reference constitutes an objective standard.

69. *INS v. Stevic*, 467 U.S. 407, 430 (1984).

70. *See infra* notes 140-152 and accompanying text.

word "refugee."⁷¹ Hence, it reasoned, section 243(h) could not be said to incorporate the "well-founded fear" standard of the Act's refugee definition.

As section 243(h) is a direct response to and enactment of international law on nonrefoulement as articulated in the U.N. Convention, it seems odd that the provision changes the crucial Article 33 language prohibiting the refouler of refugees by retaining language which prohibits refouler of aliens, thereby detaching itself from the refugee definition. The refugee definition and its explicit reference to a subjective well-founded fear standard is the heart of the 1980 legislation. The change of one word removes the withholding provision from its protection. "While the terms 'refugee' and hence 'well-founded fear' were made an integral part of the § 208(a) procedure, they continued to play no part in § 243(h)."⁷² An equally rational construction of the language, however, relies on the historical point that section 208 language was created in the positive historical framework of international human rights concerns, while the traditional section 243(h) was formulated in the cradle of McCarthyism. The very force behind the Congressional move to make the provision mandatory, indeed to pass the new Refugee Act at all, should therefore extend the incorporation of international law standards to the domestic U.S. law. Under this argument, retention of the traditional language of "alien" instead of the international "refugee" is the result of sloppy drafting, not affirmative choice of evidentiary standards.

Thus, while the Court explicitly noted that "the text of the statute simply does not specify how great a possibility of persecution must exist to qualify the alien for withholding of deportation,"⁷³ it chose the "clear probability" standard simply because the INS administratively resorted to that test in pre-1968 deportation withholding determinations.⁷⁴

The sheer complexity of evidentiary standards, discretionary grants, and status determinations within asylum determinations, predicts a complicated administrative process within the immigration agency. The analysis of the administration is complicated further by the administrative law issue of discretion control: a conceptual morass in its own right.

71. The section refers to an "alien," not a "refugee." See *supra* note 1 for the text of Refugee Act, § 243(h)(1).

72. *Cardoza-Fonseca*, 480 U.S. at 430 (1987).

73. *Stevic*, 467 U.S. at 421-22 (1984).

74. *Id.* at 414-15.

II. THE ASYLUM PROGRAM AGAINST AN ADMINISTRATIVE LAW BACKGROUND

A. *Background of Agency Organization*

Though the INS is unique in the substance of its administrative mandate,⁷⁵ and to a certain extent unique in its organizational structure, the immigration apparatus is a federal administrative agency. It is therefore susceptible to the same administrative law constraints as are, for example, the Federal Trade Commission, the Social Security Administration, and the Environmental Protection Agency.⁷⁶ The governmental functions served by administrative agencies may be said to fall into two general categories, regulatory and nonregulatory.⁷⁷ Regulatory agencies supervise and mediate private sector activity both as friend⁷⁸ and foe⁷⁹ to U.S. business. Nonregulatory agencies operate primarily within the public sector, overseeing functions that private market activity cannot adequately perform.⁸⁰ Nonregulatory agencies further divide by type into those that perform police power functions (functions of law and order, defense, public health, etc.)⁸¹ and those that provide the service machinery supporting the modern welfare state.⁸²

It is unclear how the INS should be characterized among other

75. See generally Ludd, *supra* note 6.

76. As a qualification, however, applications of administrative law do vary according to the substance of the statutory mandate. See Levin, *Federal Scope of Review Standards: A Preliminary Restatement*, 37 ADMIN L. REV. 95 (1985). It should also be noted that there is disagreement among commentators as to whether "administrative law" even exists outside of distinct areas of substantive law, for example, Elliott, *The Dis-Integration of Administrative Law: A Comment on Shapiro*, 92 YALE L.J. 1523, 1528 (1983) ("What I question is whether it makes sense to think in terms of a unitary, overarching 'trans-substantive' administrative law that controls all governmental decisionmaking.") This Comment proceeds with the view that the structural guidelines afforded by this "overarching" analysis are precisely what are needed to accomplish a steady analysis of the broad, relatively unsupervised, powers of administrative agencies in general, and the shifting applications of the political asylum mandate in particular.

77. See G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 743 (3d ed. 1986).

78. See S. TOLCHIN AND M. TOLCHIN, *DISMANTLING AMERICA THE RUSH TO DEREGULATE* 12 (1983) (noting that the original purpose of regulatory agencies such as the Federal Trade Commission, the Interstate Commerce Commission, and the Federal Communications Commission was "to protect business from the vagaries of the market place.").

79. See *id.* at 16-17 (considering regulatory agencies as adversaries to business, e.g., the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Product Safety Commission. These "new agencies [are] closely identified with their public interest constituencies.").

80. See Steiner, *Public Expenditure Budgeting*, in *THE ECONOMICS OF PUBLIC FINANCE* 248 (1974) (distinguishing three types of public goods which form the base of agency public action, and describing those public goods in terms of their relationship to the market place) (quoted in G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 77 at 10-11).

81. For example, the Federal Bureau of Investigation, various agencies within the Defense and State Departments, and the Environmental Protection Agency.

82. For example, the Social Security Administration.

agencies. The agency is not what one would normally call "regulatory," yet the language of immigration policy has been traditionally steeped in the regulation metaphors of "flow" and "importation,"⁸³ characterizing the persons processed by the organization more as goods than as human beings. While the agency does not confer physical benefits in the same way a service agency does, the immigration authorities do distribute the "benefit" of temporary U.S. residency to victims of persecution successful in their section 208 or 243(h) applications.⁸⁴ Finally, an account of "la Migra" activity by an undocumented person within the United States would describe a classically aggressive law and order function.⁸⁵ Nevertheless, the organization of the INS bureaucracy, which administers the political asylum program, is distinct from the organization of the INS enforcement branches.⁸⁶ Although commonly referred to as the INS, the agency which administers political asylum determinations as part of its duties actually divides into two parts: the Immigration and Naturalization Service (INS) and the Executive Office for Immigration Review (EOIR). The INS is considered an "agency" for purposes of administrative law, even though it is a part of the Department of Justice.⁸⁷ The EOIR serves an immigration adjudica-

83. See, e.g., S. REP. NO. 256, 96th Cong., 2d Sess. 5 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 145 (legislative history) ("Section 207 provides for a normal flow of refugees, not to exceed 50,000 each year, except as provided to meet emergency situations . . ."); see also, Act of March 3, 1875, 18 Stat. pt. 3, Ch. 141, § 2 at 477 (prohibiting the "importation" of indentured Asian servants).

84. "We're here to serve people," INS Western Regional Commissioner Harold Ezell has said on numerous occasions regarding the agency's role in administering the amnesty provisions of the Immigration Control and Reform Act of 1987. McDonnell, *Border Patrol's Dual Role of Amnesty, Enforcement Stirs Tension*, L.A. Times, April 10, 1988, § II, at 13, col. 1. As a challenge to Ezell's claim, see *Harold Ezell: Enemy of the Immigrant*, L.A. Weekly, Nov. 13-19, vol. 9, no. 51 at 20. See also Becklund, *Angry Lawmaker Asks INS to Fire Ezell*, L.A. Times, Oct. 30, 1987, § 1, at 37, col. 4.

85. See, e.g., *Border Patrol's Dual Role*, supra note 84.

86. The Border Patrol, along with the investigative, detention and intelligence arms of the agency, operate within the Office of Enforcement, headed by the Associate Commissioner for Enforcement "who is responsible for planning, developing, directing, coordinating, and reporting on Service enforcement programs." 8 C.F.R. § 100.2(b)(1) (1988). Offices of the Regional Commissioners are organizationally distinct, with each Regional Commissioner "responsible for the administration and enforcement of [immigration laws] within their assigned geographic areas of activity." 8 C.F.R. § 100.2(d) (1988). This includes supervision of Border Patrol sector within the region, however, as well as the smaller geographic divisions of "districts." *Id.* Hence the concern regarding overlapping functions.

The INS Commissioner is the agency's principle officer. 8 CFR § 100.2(a) (1988). The Commissioner's authority to "direct the administration of the Service and to enforce the [Immigration and Nationality] Act" is delegated directly from the Attorney General. 8 C.F.R. § 2.1 (1988). The Commissioner may redelegate his authority "to any other officer or employee of the Service." *Id.* The Commissioner, with this authority, delegates powers co-extensive to his own to a Deputy Commissioner who in turn delegates to various associate commissioners heading department for enforcement, management and regional commissioners. See generally 8 CFR § 100.2 (1988).

87. *Blackwell College of Business v. Attorney General*, 454 F.2d 928, 933 (D.C. Cir. 1971). See supra note 5 and accompanying text.

tion function, and is organized separately from the INS within the Department of Justice. The Office includes the Board of Immigration Appeals and the corps of immigration judges.⁸⁸

The INS is governed internally by its own substantive and procedural rules, as well as the requirements of the immigration statutes.⁸⁹ The EOIR is not bound by INS rules, except where the rules refer to its office explicitly.⁹⁰ The EOIR is governed instead by limited statutory provisions,⁹¹ adjudicatory precedent, and federal court decisions.

The federal immigration agency has expanded greatly in size and responsibility since its inception as the Bureau of Immigration in 1891.⁹² Its growth escalated particularly rapidly after 1940. The character of the agency has evolved parallel to the concerns which have motivated the formulation of immigration policy. Yet, the "INS's increased responsibilities [have] been accompanied by a lack of organizational stability Each shift reflected a perceived change in the agency's focus as expressed in immigration law."⁹³

In the late nineteenth century the agency was located in the Treasury Department and the laws sought to exclude certain categories of "undesirables."⁹⁴ Reflecting the desire to limit the numbers of immigrants entering the United States, the agency shifted its organization to the Department of Labor in 1913 and Congress passed the *Quota Act* of 1924⁹⁵ in response to the "inundation" concerns. In 1940, the move to the Justice Department reflected the new concern of internal security as a motivation for immigration restrictions. Via the 1952 Immigration and Nationality Act, fears of the inadvertent admission of subversives have statutorily sur-

88. 8 CFR §§ 3.9-3.10 (1988). Immigration Judges are formally known as special inquiry officers, 8 CFR § 1.1(l) (1988), and conduct exclusion and deportation hearings, as well as any other proceedings assigned by the Attorney General. 8 CFR § 3.10 (1988).

89. See, e.g., 8 C.F.R. § 3.1 (explanation of the role and structure of the Board of Immigration Appeals); 8 C.F.R. § 208.10 (1988) (role of immigration judges in political asylum determinations in deportation and exclusion hearings). See generally, D. MARTIN, *supra* note 12, at 83-84.

90. See, e.g., 8 U.S.C. § 1252 (1982).

91. Two other distinct offices do have some say in the formulation of refugee and political asylum policy: the U.S. Coordinator for Refugee Affairs with the rank of Ambassador at Large, 8 U.S.C. § 1525 (1982), created in the Refugee Act of 1980, Title III, Part A, and the Associate Commissioner of Examinations within the INS, 8 CFR § 100.2(c)(3) (1988). But this analysis is principally concerned with the role of district directors within the INS and adjudicatory officials within the EOIR in political asylum determinations. It is before these officials that actual adjudications of asylum and nonrefoulement are made.

92. Efforts to consolidate immigration control in the federal government had begun in 1864. See HISTORY OF THE INS, *supra* note 32, at 6.

93. See *id.* at 3. See generally *id.* at ch. 11.

94. D. MARTIN, see *supra* note 12.

95. Quota Act of 1924, Ch. 190, 43 Stat. 153 (1924) (codified as amended at 8 U.S.C. § 1151 *et. seq.* and 18 U.S.C. § 1546 (1982)).

vived to this day, along with the everpresent concern of "inundation."⁹⁶

B. Agency Function and Discretion

"An administrative agency draws its basic substantive and procedural authority — and limitations — from the 'organic' legislation that creates and empowers it."⁹⁷ Congress supplements "organic" statutory mandates like the Refugee Act and the INA with administrative procedural laws that apply generally to federal agencies.⁹⁸ Chief among this legislation is the Administrative Procedure Act (APA)⁹⁹ passed in 1946 to corral the mushrooming authority of New Deal agencies. Critics of agency power during the period (often for thinly disguised reasons of disagreement with the substance of the agency missions) had attacked the "haphazard deposit of irresponsible agencies and uncoordinated powers" as an uncontrolled "fourth branch" of government.¹⁰⁰ The statutory administrative procedures were developed as a means of supervising the "often unresponsive infrastructure of . . . bureaucrac[y]," and its power over people's lives.¹⁰¹

The APA requires specific procedures in the critical areas of agency policy formulation (in rulemaking and adjudicatory functions) and judicial review of agency determinations.¹⁰² The procedures were developed to respond to the three principal areas of concern regarding agency conduct: "the exercise of power to adjudicate in individual cases; the scope of review of administrative action by the courts; and the exercise of delegated power to legislate by rules and regulations."¹⁰³

96. See, e.g., INA, *supra* note 8, at § 212(a)(27)-(29) (general classes of aliens *ineligible* to enter the U.S. for political reasons). The following is fairly typical language: "Aliens [shall be excluded who] . . . engage in any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States, by force, violence, or other unconstitutional means." § 212(a)(29)(B). This section also precludes admission of aliens whose political activities fall within the scope of the Subversive Activities Control Act of 1950, Pub. L. No. 831, 64 Stat. 987 (1950) "There exists a world Communist movement which . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration . . . , espionage, sabotage, terrorism . . . to establish a Communist totalitarian dictatorship in the countries throughout the world." *Id.* at § 2, *Necessity for Legislation*.

97. G. ROBINSON, E. GELLHORN, H. BRUFF, *supra* note 77, at 32.

98. *Id.*

99. APA, *supra* note 7.

100. PRESIDENT'S COMMISSION ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 40 (1937), *cited in* G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 77, at 33.

101. Ludd, *supra* note 6, at 15.

102. APA, 5 U.S.C. § 553 (rulemaking), § 554 (adjudications), § 706 (scope of review).

103. G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 77, at 33 (quoting PRESIDENT'S COMMISSION, *supra* note 100).

Of major importance in all areas of administrative law is the issue of discretion and the "separation of distinctly political and distinctly administrative activities."¹⁰⁴ In theory, "politics is the expression of the will of the people, whereas, administration is the execution of that will."¹⁰⁵ Thus, still in theory, Congress reflects the "will of the people" by making political decisions and agencies implement these decisions. In practice, Congress delegates or forfeits¹⁰⁶ discretionary power to federal administrative agencies to effectively formulate policy within the highly complex modern administrative state.¹⁰⁷ An administrator with discretion is a government official with the "power to determine the substance of public policy,"¹⁰⁸ a quasi-legislative and unavoidably political function.

Though discretion may thus be considered the locus of agency power, the exercise of agency discretion is relatively undramatic: an administrative choice between two or more options, any of which would be appropriate under the organic statute. An agency is said to abuse its discretion when it acts inconsistently with its mandate.¹⁰⁹ To the extent that an agency moves completely beyond the province of its delegated powers, it ceases to abuse its discretion and begins to violate its mandate.¹¹⁰ The task, therefore, of an aggressive administrative law analysis will be to pinpoint the instance of discretionary abuse, and to focus the moment of mandate violation.

C. *The Exercise of Discretion*

Administrative agencies formulate the administrative policies to support their programs by means of discretionary rulemaking and adjudication processes. The explicit and implicit grants of discretion to immigration administrators in sections 208 and 243(h) refer to both these processes. Where the INS seeks to announce broad prospective policy regarding the administrative development of procedure, it makes rules.¹¹¹ Where the INS and EOIR seek to

104. Shumavon, *Introduction*, in *ADMINISTRATIVE DISCRETION AND PUBLIC POLICY IMPLEMENTATION* 4 (D. Shumavon & H. Hibbeln ed. 1986).

105. *Id.*

106. *Id.* at 3 ("While forfeiture may be thought of as the result of the inherent difficulty of obtaining agreement in the bargaining and compromise milieu of the legislature, delegation is better conceptualized as a deliberate abrogation of politically perilous decisions").

107. See e.g. Ludd, *supra* note 6, at 14, "[C]ontemporary citizens from birth to death seem to be engulfed by a highly complex and often unresponsive infrastructure of state and federal bureaucracies."

108. See Shumavon, *supra* note 104, at 3.

109. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676-88 (1975).

110. See *id.* at 1682 ("A second theme of contemporary criticism of agency discretion has been the agencies' asserted failure affirmatively to carry out legislative mandates and to protect the collective interests that administrative regimes are designed to serve.")

111. G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 77, at 35.

structure policy in terms of case-by-case precedent, they make administrative choices in individual adjudications.¹¹²

1. Rulemaking

Congress affirmatively mandates the procedural development of the asylum program in section 208(a) of the Refugee Act.¹¹³ But the basic organizational structure within which rulemaking operates is mandated by the Immigration and Naturalization Act of 1952 (INA).¹¹⁴ Professor Davis has noted that the broad discretionary grants in the INA are structured to work against the alien.¹¹⁵ The institutional exclusionary bias of the INS grows out of this structure, a system organizationally hostile to the admission of aliens into the United States.¹¹⁶ Notwithstanding this institutional bias, asylum rules are formulated in the same organizational context as other INS rules, and in the same traditions of discretion exercise.¹¹⁷

Agency rulemaking is governed by the Administrative Procedure Act which outlines the procedural requirements for rule implementation and specifies the internal binding effect of a rule on an agency.¹¹⁸ Substantive rules carry the force of law.¹¹⁹ If an applicant can show that agency noncompliance with its own substantive rules,¹²⁰ the applicant may have an agency decision reversed.

The substantive rules that the INS has developed for the asylum program are essentially procedural.¹²¹ The rules channel appli-

112. *Id.* The specific areas of explicit and implicit discretion in adjudications include determinations of eligibility and desert in section 208, and the applicability of exceptions in section 243(h). See *supra* notes 64-76 and accompanying text.

113. "The Attorney General shall establish a procedure for an alien . . . to apply for asylum." Refugee Act, § 208(a), *supra* note 2 (codified at 8 U.S.C. 1158(a) (1982)).

114. K. DAVIS, *supra* note 5, at § 8:10, 200.

115. An example of this hostile internal agency attitude in the specific context of deportation withholding may be witnessed in the 1954 INS Annual Report which characterizes claims of physical persecution as an obstacle to be overcome in pursuit of the agency's duty to deport: "[S]tatistics of deportations accomplished fail to tell the story of obstacles to be overcome — obstacles such as claims of physical persecution, administrative stays, court actions, difficulties in obtaining travel documents, applications for suspension of deportation." 1954 I.N.S. ANN. REP. 2 (quoted in S. MASANZ, *supra* note 32, at 69).

116. See *supra* note 1.

117. See generally 8 C.F.R. §§ 1-499 (organizational structure of the immigration agency) (1988).

118. APA, 5 U.S.C. § 553 (1982).

119. G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 77, at 36, "Substantive rules have the force of law (the British aptly call them 'subordinate legislation') because they are based on statutory authority to adopt rules to flesh out the often bare bones of statutory command."

120. In the APA mandated procedure of informal rulemaking, an agency must publish notice of a proposed rule, give interested persons the opportunity to comment, and provide a concise statement of purpose along with the final promulgation. APA § 5, 5 U.S.C. § 553(b)-(c) (1982).

121. See generally 8 C.F.R. § 208 and § 242.17(c) (1988).

cations, but deliberately avoid structuring the individual administrator's decisionmaking process. Following the defeat of one attempt to internally structure INS decisionmaking processes in this area, administrators explained that such rules may "become so rigid as to amount to an abuse of discretion [in themselves] It is impossible to foresee and enumerate all of the favorable or adverse factors which may be relevant and should be considered in the exercise of administrative discretion."¹²² By reiterating Congressional delegations of discretion within the rules without structuring that discretion, the INS reinforces its essentially unsupervisable power.

Although the INS has consistently refused to promulgate rules which will structure its decisionmaking processes, the agency does recognize the need to at least formulate guidelines in its more complex determinations. The INS has implemented these guidelines in the form of "interpretive rules," the INS Operations Instructions.¹²³ But the agency has persistently stated that the Operations Instructions are not binding on agency conduct.

Most federal circuits have agreed with the INS in this regard: an agency determination contrary to guidelines which would have benefited an applicant do not "confer upon th[ose] individuals enough of a benefit so as to require all INS District Directors to follow the agency's own internal mandates."¹²⁴ The Ninth Circuit, a circuit handling a large percentage of the judicial review burden of immigration agency decisionmaking, at one point held that the Operations Instructions "clearly and directly [affect] substantive rights — the ability of an individual subject to its provisions to continue residence in the United States."¹²⁵ In reaction to this decision, the INS redrafted the language of the Operating Instructions section which had been held to confer those judicially enforceable rights. Certain mandatory district director decisions were changed to dis-

122. 46 Fed. Reg. 9, 119 (1981) (cancelled January 28, 1981). Toward the end of the Carter Administration, various amendments to the substantive immigrations rules had been proposed in order to "place in our regulations the discretionary criteria we use in making administrative decisions." 44 Fed. Reg. 36, 187 (1979) (proposed June 21, 1979). Essentially, the 1979 rules would have made certain previously unenforceable guidelines substantive, and therefore binding, as to their legal effect. But in 1981, eight days after the inauguration of a new, more conservative president, the proposed rules were withdrawn.

123. IMMIGRATION AND NATURALIZATION SERVICE, CODE, OPERATIONS INSTRUCTIONS, REGULATIONS, AND INTERPRETATIONS (1982) [hereinafter Operations Instructions]. The title page of the Operations Instructions contains the qualification "(For Instructional Purposes Only) Officer Development Training Facility."

124. Ludd, *supra* note 6, at 21. See also *Pasquini v. Morris*, 700 F.2d 658, 659 (11th Cir. 1983) ("[T]he instruction cannot confer substantive rights upon aliens."); *Dong Sik Kwon v. INS*, 646 F.2d 909, 918-19 (5th Cir. 1981) ("Unlike regulations, Operations Instructions, generally, do not have the force of law. They furnish only general guidance for service employees.").

125. *Nicholas v. INS*, 590 F.2d 802, 807 (9th Cir. 1979) (referring to Operations Instruction 103.1(a)(1)(ii)), *supra* note 123.

cretionary choices.¹²⁶ The Ninth Circuit subsequently held that the new discretionary language did not confer a substantive right to the alien.¹²⁷

The very fact that the INS created Operations Instructions to guide asylum decisionmaking processes admits that the agency recognizes the need for consistent agency action in discretionary asylum determinations. In specifically formulating guidelines for the asylum program, the INS recognizes the possibility of abuse arising in asylum administration. Although INS argues, in spite of these considerations, that an administrator may not be held to the guidelines in individual determinations, this does little more than protect the abuse the Operations Instructions were drafted to avoid.

2. *Adjudication*

While the rulemaking function allows the INS to determine how asylum decisions should be made, the adjudication function allows the immigration agency to apply policy (and on occasion, formulate policy) in each individual case. In practice, individual determinations of asylum or nonrefoulement claims are made in two contexts: 1) where the claimant has initiated the process, either by application to a U.S. consul or to an INS district director,¹²⁸ or 2) where the claimant has entered the U.S. without inspection, and is apprehended by the INS, at which point she may raise her claims at a deportation hearing before an immigration judge within the EOIR.¹²⁹ This Comment focuses on the second of these contexts. Persons initiating the asylum process by effectively turning themselves over to the INS will do so only in the context of clearly perceived support by U.S. policy. These cases most often arise where an applicant originates from a country with clear political differences from the U.S.¹³⁰ In these cases, INS policy dictates the applicant be routed around the normal application process as an "immediate action case" to the Associate Commissioner for Examinations.¹³¹ In these cases, political influence works for, and not

126. For a history of the post-*Nicholas* INS activity, and the Ninth Circuit's response, see *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1009 n.2 (9th Cir. 1987).

127. *Romeiro De Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985) (quoting *Wan Chung Wen v. Ferro*, 543 F. Supp. 1016, 1018) (W.D.N.Y. 1982)).

128. 8 C.F.R. § 208.3(a) (1988).

129. 8 C.F.R. § 208.3(b) (1988).

130. Operations Instruction 208.8 lists the Soviet Union, East Germany, Romania, Poland, Hungary, Czechoslovakia, Bulgaria, Mongolia, Cuba, Albania, the People's Republic of China, North Korea, Vietnam, Laos and Cambodia as the countries whose nationals should be given special treatment when applying for U.S. asylum. See *supra* note 123, at 208.8(a)(1)-(3).

131. "Where the district director [determines] that the asylum applicant falls into the immediate action category, he [sic] will expeditiously relate the facts of the case to the Associate Commissioner, Examinations . . . [who will] alert the Service's Public Information Officer and the Department of State's operation officer, telephone 202-647-1512 of the request for asylum." Operations Instruction 208.8(b), *supra* note 123.

against, the applicant.

This unstructured nature of the decisionmaking process is more likely to result in abuse of discretion and mandate violation where political influence works against the applicant. These cases tend to arise in the second context, where the claimant has entered the U.S. without inspection and is subsequently apprehended by the INS. Furthermore, all section 243(h) claims, and the majority of section 208 asylum claims, are raised in deportation hearings. Most of these proceedings involve applicants from countries in this hemisphere with whom the U.S. maintains friendly relations.¹³²

Adjudication of deportation hearings is required by section 1252(b) of the INA.¹³³ INS regulations detail the procedure for asylum requests within a deportation hearing.¹³⁴ Asylum requests are automatically considered as simultaneous requests for nonrefoulement.¹³⁵

In *Matter of Acosta*, a lengthy 1985 BIA opinion, the Board presented its understanding of the decisionmaking process in asylum claims.¹³⁶ The Board held that to demonstrate eligibility under either provision, an alien was required to make two related showings: 1) she must meet evidentiary burdens of proof and persuasion, and 2) she must meet statutory standards of eligibility.¹³⁷

While it should be noted that many applicants from these countries do not receive asylum, the percentages of successful applications are much higher from countries the United States considers its enemies than countries with whom it is friendly. In the period from 1980-1987, the INS approved 60% of Soviet applications and 28% of the applicants from the People's Republic of China. Mann, *60% of Soviet Applications OK; Few Chinese Able to Win Political Asylum in U.S.*, N.Y. Times, Nov. 24, 1987, § 1, at 1, col. 5. The annual success rate of Soviet applications has risen as high as 80%. Neuffer, *East Bloc Couple Fighting for Asylum*, N.Y. Times, Dec. 13, 1987, § 1, at 74, col. 4. Hungary, considered by the State Department to be one of the least repressive nations in the Eastern bloc, also has one of the lowest success rates of Eastern bloc countries at 16%. *Id.* Compare these figures, however, with the 2.6% success rate of 1987 asylum applications from El Salvador, a country which held close ties to the Reagan Administration. Richardson, *Our Immigration Law Undercuts Duarte*, N.Y. Times, April 11, 1987, § 1 at 27, col. 2.

132. "The major activity against 'illegals' in this country [including would be applicants for asylum] is directed primarily against workers from Mexico, Central America, South America, and the Caribbean. This is particularly onerous because until 1968 immigration to the United States was open to Latin American and Caribbean citizens — a special status justified by the close ties of the United States with the other American countries, and by the fact that great numbers of Spanish-speaking people have been incorporated, without their consent, into the United States. After the Mexican-American War of 1848 Mexico was forced to cede more than half of its national territory to the United States, and after the Spanish-Cuban-American War of 1898 the United States took control of Puerto Rico and militarily put down the independence movement of that country." NATIONAL LAWYER'S GUILD, *supra* note 9, at § 2:8, 2-17.

133. 8 U.S.C. § 1252(b) (1982).

134. 8 C.F.R. § 208.10 (1988).

135. 8 C.F.R. § 208.3(b) (1988).

136. *In re Acosta*, Interim Dec. No. 2986 (1985).

137. *Id.* at 1.

a. *Burden of Proof*

The BIA imposes the burden of proof of persecution on the alien, although there is no statutory basis for the assignment of this burden.¹³⁸ The source of the alien's burden of proof lies in agency regulations¹³⁹ and rules formulated by the INS. In *Acosta*, the BIA claimed that "[c]ase law and the regulations have always made clear that it is the alien who bears the burden of proving that he would be subject to . . . persecution."¹⁴⁰ In support of this proposition, however, the BIA cited only a footnote in a Supreme Court case, which in turn merely cited the agency regulations.¹⁴¹ These regulations state that the "respondent [requesting withholding in the deportation hearing] has the burden of satisfying the special inquiry officer that he would be subject to persecution."¹⁴² The BIA does not move beyond this circular argument to case law which examines the appropriateness of this burden. Indeed, the Court drops the footnote cited in *Acosta* in an attempt at statutory construction. The Court admits that "the text of the statute simply does not specify how great a possibility of persecution must exist to qualify an alien" for section 243(h) relief.¹⁴³ The Court cites the burden of proof regulation to infer the necessity to establish a certain burden of *persuasion* in withholding cases "from the bare language of the provision"¹⁴⁴.

Many *bona fide* applicants, which the Act would otherwise affirmatively embrace, are excluded by the requirement that "the duty of establishing ultimately . . . the truth"¹⁴⁵ (the burden of proof) of a persecution claim should fall on an alien, beyond requirement of "convincing the court"¹⁴⁶ (the burden of persuasion) of the persecu-

138. Indeed, the language of sections 208 and 243(h) grant protection, respectively, if "the Attorney General determines that such an alien is a refugee," Refugee Act Pub. L. 96-212 § 208, 94 Stat. 105 (1980) (emphasis added), or if "the Attorney General determines that such alien's life or freedom would be threatened." INA 94 Stat. 100, § 243(h) (as amended in the Refugee Act of 1980, *supra* note 2) (emphasis added). Nowhere, not even in the general suspension of deportation provisions of the INA does the statutory language state that the alien must establish eligibility. See 8 U.S.C. § 1252 (1982).

139. 8 C.F.R. § 208.5 (1988) ("The burden is on the asylum applicant to establish that he/she is unable . . . to return to . . . the country of such person's nationality . . . because of . . . a well-founded fear of persecution . . .") and 8 C.F.R. § 242.17(c) (1988) ("The respondent has the burden of satisfying the special inquiry officer that he [sic] would be subject to persecution . . .").

140. *Acosta*, Interim Dec. No. 2986 at 6 (1985).

141. *Id.* (citing *INS v. Stevic*, 467 U.S. 407, 422 n. 16) ("[I]n order to be entitled to a withholding of deportation, the alien 'has the burden of satisfying the special inquiry officer that he would be subject to persecution.'" 8 C.F.R. § 242.17(c) (1983).")

142. 8 C.F.R. § 242.17(c) (1988).

143. *Stevic*, 467 U.S. at 421-22.

144. *Id.* at 422.

145. *BALLENTINE'S LAW DICTIONARY* 161 (3d ed. 1969) (defining burden of proof).

146. *Id.* (defining burden of persuasion).

tion by a certain standard. One must focus on the context of an asylum claim to appreciate the special problems inherent in this burden. It is unlikely that much or any corroborative evidence will be available to support a claim of asylum, particularly in the more extreme forms of persecution. Conditions of escape preclude careful assembly of documentation.¹⁴⁷ And family members and friends remaining in the allegedly hostile country may not be able to verify an applicant's claims without putting themselves in danger. The very nature of political persecution makes standard documentation of its existence virtually impossible.¹⁴⁸ Thus, in these cases "[m]uch turns on the credibility of the asylum seeker."¹⁴⁹ Where only credibility, not objective corroborative evidence, exists to support a claim, the assignment of the burden is determinative. Where the applicant is required to establish ultimate objective truth (burden of proof) instead of presenting persuasively credible truth by means of "reasonably detailed and specific information on the source and nature of the threat,"¹⁵⁰ her chances for success are slim.

b. *Burden of Persuasion*

The burdens of persuasion issue in asylum claims centers on the *degree* of likelihood that an alien would face persecution in her homeland. The issue emerges before the U.S. Supreme Court in the convoluted context of the distinction between the likelihood required in section 208 and the likelihood required in section 243(h). Although the BIA is correct in its assertion that "[a]s a practical matter . . . the facts in asylum and withholding cases do not produce clear-cut instances in which such fine distinctions [of eligibility] can be meaningfully made,"¹⁵¹ the Court has insisted on these distinctions. In section 243(h) withholding of deportation determinations, an applicant must establish a "clear probability of persecution," a standard requiring over 50% of a likelihood of persecution.¹⁵² In section 208 asylum determinations, the burden is the more generous "well-founded fear of persecution," which may rely on proof of less than a 50% probability.¹⁵³

Only when the alien meets this burden of persuasion does she establish eligibility. Eligibility requirements are found in the lan-

147. D. MARTIN, *supra* note 12, at 85.

148. *Id.*

149. *Id.* at 84.

150. *Id.* at 86.

151. *Acosta*, Interim Dec. No. 2986 at 25 (1985).

152. *Stevic*, 467 U.S. at 429-30 (the standard "requires that an application be supported by evidence establishing that it is more likely than not that the alien would be subject to persecution . . .")

153. *Cardoza-Fonseca*, 480 U.S. at 431 ("One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.").

guage of the statutory provisions.¹⁵⁴ However, both the BIA and the federal circuit courts are fond of breaking down the statutory requirements into lists of factors which the claimant must separately establish.¹⁵⁵ In order to establish eligibility, the applicant must establish the likelihood of her persecution under either the section 208 or 243(h) standard;¹⁵⁶ she must sort out conditions of general as opposed to specific persecution;¹⁵⁷ and she must attempt to move the facts of her case within the definitional categories of "persecution," "social group," "political group," and "fear."

Determination of these critical components in the individual case are *not* governed by substantive, binding immigration regulations, although hazy within the adjudicatory precedents.¹⁵⁸ That is, definitions and standards are scattered throughout the case law and BIA opinions. It is relatively easy, therefore, for immigration judges and district directors responsible for the initial determinations to be either unaware of or unconcerned with the law as it actually stands. As noted by Justice Blackmun, the efforts of the courts, in case-by-case adjudications, to develop meaningful standards in these determinations "stand in stark contrast to — but, it is sad to say, alone cannot make up for — the years of seemingly purposeful blindness by the INS, which only now begins its task of developing

154. See *supra* notes 60-68 and accompanying text.

155. To prevail on a § 243(h) withholding claim, the Ninth Circuit has ruled the claimant must establish: "1. A likelihood of persecution; i.e., a threat to life or freedom. 2. Persecution by the government or by a group which the government is unable to control. 3. Persecution resulting from the petitioner's political beliefs. 4. The petitioner is not a danger or a security risk to the United States." *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1284 (citing *Zepeda Melendez v. INS*, 741 F.2d 285, 289 (9th Cir. 1984)). To prevail on a § 208 asylum claim, an alien must establish that she meets the statutory definition of "refugee" under § 101(a)(42)(A) of the Refugee Act. The Board of Immigration Appeals has stated that the definition breaks down into four necessary components: "(1) the alien must have a 'fear' of 'persecution'; (2) the fear must be 'well-founded'; (3) the persecution feared must be 'on account of race, religion, nationality, membership in a particular social group, or political opinion'; and (4) the alien must be unable or unwilling to return to his country of nationality . . . because of persecution or his well-founded fear of persecution." *Acosta*, Interim Dec. No. 2986 at 1-2.

156. See *supra* notes 151 - 53 and accompanying text.

157. "General evidence of human rights abuses in the home country is usually not sufficient, by itself, to carry the asylum seeker's burden of proof." *D. MARTIN*, *supra* note 12, at 86 (citing *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1392 (9th Cir. 1985)). It must be shown not only that a government or organization is *willing* to persecute (established by general evidence of newspaper accounts, Amnesty International reports, or State Department analysis), but also that the individual applicant manifests a characteristic that the persecutor would *want* to attack (established by both general evidence as to the nature of past persecution and specific evidence of the claimant's particular characteristics). See *id.* at 86-88.

158. See *Cardoza-Fonseca*, 480 U.S. at 446 n.30 ("An additional reason for rejecting the Government's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years. An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1976)).

the standard entrusted to its care."¹⁵⁹

Credibility guidelines are as difficult to formulate as standards for corroborating evidence. Here, too, the INS has not attempted to structure standards beyond the Operations Instructions' reference to "[c]areful consideration [that] should be given . . . to the credibility of the applicant."¹⁶⁰ Thus, formulation of credibility standards are subjected to a wide range of Circuit guidance.¹⁶¹ These very subjective determinations are made against the background of institutional INS exclusionary bias.

Whether a statement is deemed "conclusory" may also play a part in its sufficiency as evidence. "The fact that there have been a number of threats or acts of violence against members of an alien's family is sufficient to support the conclusion that the alien's life or freedom is endangered,"¹⁶² assuming those threats may be proved. However, where the conclusory statements consist of "speculative inferences drawn from generalized events," the statements do not support a successful asylum claim.¹⁶³

The high degree of insistence on specific evidence in asylum and withholding claims (indeed within immigration adjudications generally) is anomalous in administrative law. In other administrative contexts, a "significant distinction between judicial and administrative adjudications is that agency hearings tend to produce evidence of general conditions as distinguished from facts relating solely to the respondent."¹⁶⁴ Where an agency adjudicates claims by generally considering conditions in a policy oriented manner, specific evidentiary standards in the form of substantive rules are unnecessary. But, where consideration of specific evidence is a critical part of asylum and withholding determinations, absence of binding rules which could provide enforceable guidelines not only works to prejudice the individual applicants, it also undermines agency effectiveness in fulfilling its mandate.

159. *Cardoza-Fonseca*, 480 U.S. at 452 (Blackmun, J., concurring).

160. Operations Instruction *supra* note 123, 208.4 (1981) (burden of proof). The revised Operations Instructions is even more vague in establishing a standard. See Operation Instruction Section 208.5 (1983).

161. The Ninth Circuit established the connection between corroborating evidence and credibility determinations in this way: "The existence or non-existence of corroborating evidence is a factor which can be considered However, when the alien provides credible testimony regarding persecution there is no absolute requirement that the alien provide corroboration." *Canjura-Flores v. INS*, 784 F.2d 885, 889 (9th Cir. 1985) (citations omitted). Ninth Circuit judges seem to disagree, however, over the deference which is due an immigration judge's credibility determination. *D. MARTIN, supra* note 12 at 84-85 n.420.

162. *Hernandez-Ortiz v. INS*, 777 F.2d 509, 515 (9th Cir. 1985).

163. *Maroufi v. INS*, 772 F.2d 597, 599 (9th Cir. 1985).

164. *G. ROBINSON, E. GELLHORN & H. BRUFF, supra* note 77, at 35.

c. *Eligibility*

The complexity of the eligibility requirements for political asylum within the United States creates its own *de facto* discretionary space in the decisionmaking process. Where a legitimate exercise of agency discretion is a choice between two or three relatively clear options, abuse of discretion is relatively easy to determine. Where, however, a particular administrative decision turns on a complicated chain of variables and political factors, difficult for even the U.S. Supreme Court to articulate, the individual administrator has a much greater opportunity for obfuscating (deliberately or inadvertently) the illegitimacy of his actions. The two paths toward asylum for aliens in the United States¹⁶⁵ present an extreme instance of such complexity, resulting in a highly effective screen for inappropriate agency decisionmaking. Indeed, the statutory provisions have been interpreted to "take away with one hand" (with vague discretionary grants and byzantine requirements) what they "give with the other" (in terms of the broad protection envisioned by the mandate):

1) Section 208 provides the greater form of relief in terms of status¹⁶⁶ but the final status determination is subject to discretion even after a positive determination of eligibility.¹⁶⁷ Section 243(h) requires a mandatory grant of protected status once eligibility is determined,¹⁶⁸ but the status granted is qualitatively much lower than that granted under a successful section 208 application.¹⁶⁹

2) Section 208 applicants need not meet the strict "probability of persecution" requirements of section 243(h) applicants,¹⁷⁰ but a completely discretionary determination of status awaits the section 208 applicant even after determination of eligibility.¹⁷¹

3) Though the U.S. *must* afford a section 243(h) applicant withholding of deportation once she establishes that she is a refugee under the Act,¹⁷² the Attorney General may determine that section 243(h) does not even apply under the four statutory exceptions.¹⁷³

165. See *supra* notes 60-74 and accompanying text.

166. See *supra* note 57. See also Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999, 1003 (1985).

167. See *supra* note 63.

168. See language of Refugee Act Pub. L. 96-212, 94 Stat. 102, § 243(h)(1) (1980), *supra* note 1.

169. See Helton, *supra* note 166, at 1009 (Where withholding of deportation, not asylum, is granted to applicants, the aliens "cannot become permanent residents or citizens, they can never petition to have close family members join them in the United States, and they cannot travel abroad without jeopardizing their status. Further, should a country ever agree to accept them, they could be immediately deported.").

170. See *supra* notes 151-53 and accompanying text.

171. See *supra* note 63.

172. See language of Refugee Act, Pub. L. 96-212, 94 Stat. 102, § 243(h)(1) (1980), *supra* note 1.

173. See *supra* note 65.

No exceptions exist in the section 208 language.¹⁷⁴

Congress created asylum status for persecuted aliens in the context of a "permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States."¹⁷⁵ While the Refugee Act does not "explicitly define what refugees are deemed to be 'of special concern to the United States,' . . . the past can, and will, serve as a guide as to what refugees have been of concern . . ." ¹⁷⁶ The Senate specifically noted several traditional factors for noting this "special concern: "strong historic or cultural ties, persons from countries with whom we have been directly involved, persons from countries with whom we have had treaty obligations, promotion of family reunion, response to human rights concerns embodied in the Universal Declaration for Human Rights, and fulfillment of foreign policy interests."¹⁷⁷ No mention or reference is made in this list to consideration of traditional immigration agency exclusionary concerns.

In all three areas of proof, persuasion, and eligibility, the INS has maintained its exclusionary biases by means of consistently rejecting attempts to structure standards. Such structure, argues the agency, diminishes agency flexibility and the ability to respond in the individual case. Not coincidentally, structured standards also diminish the *power* of the individual adjudicator in the individual case. Without structure, the individual administrator clouds his decisions with a hazy mix of rules, individual adjudications, and general policy. The federal courts are then left to determine and insist upon standards.

III. AN ADMINISTRATIVE ANALYSIS OF THE ASYLUM PROGRAM

INS abrogation of its statutory and constitutional responsibilities to implement U.S. asylum policy takes place within the un-

174. Though no exceptions exist in the section 208 statutory language, the second stage discretionary award of asylum is guided by an INS rule, 8 C.F.R. § 208.8(f)(1) (1988), whose four criteria for possible discretionary denial parallel the section 243(h)(2) statutory exceptions. Commentators express concern, however, that these section 208 rules are stretched, as are the section 243(h) exceptions, to encompass a broad range of disqualifying activity not contemplated by the statute.

The BIA began in 1982 to expand the grounds for discretionary denials beyond what would be suggested by the relevant INS regulations [footnotes omitted] . . . The major basis for discretionary denial has become . . . fraud or other misuse of the immigration laws [footnote omitted].

This is a severe approach, because most asylum seekers, by the very nature of the relief they are seeking, will not be in compliance with the usual provisions of the immigration laws.

D. MARTIN, *supra* note 12, at 82.

175. 96 U.S. CODE CONG. & ADMIN. NEWS, Vol. 2, p.146, Sen. Rep. 96-256, 6.

176. *Id.* at 146-47, Sen. Report at 6.

177. *Id.*

supervised discretionary hollows of the immigration system.¹⁷⁸ Analysis of the discretionary aspects of INS decisionmaking includes implicit as well as explicit discretionary authority.

Discretion is not limited to what is authorized or what is legal but includes all that is within the effective limits of the administrator's power. Much discretion in our system is either illegal or of questionable legality, but it continues because of a combination of lack of will and lack of capacity to get rid of the illegal element.¹⁷⁹

Due to the schizophrenic and highly political nature of the concerns which underlie the substance of immigration policy, there exists a pervasive lack of will on the part of any government branch to structure asylum policy implementation. Despite various self-protecting arguments to the contrary, there is not a corresponding lack of *capacity* on the part of the various branches of government to guide immigration decisionmaking and administration. An administrative analysis of the U.S. asylum program reveals, in a particular context, how this structure may be effected.

Areas of discretionary exercise may be controlled in order to promote the effective administration of the program, and to constitutionally balance the program's function among the branches. Professor Davis notes that discretion may be controlled in two ways¹⁸⁰: 1) it may be structured, that is, the manner of the exercise of discretion is controlled; or 2) discretion may be confined, that is, discretionary power is kept within designated boundaries.¹⁸¹ For the purposes of the present administrative analysis, the issue regarding the structure of discretion is central to the statutory inquiry. The issue of confining discretionary power informs the constitutional inquiry.

A. Structuring Discretion: The Statutory Analysis

1. The Problem of Discretion

The Refugee Act of 1980 and (less directly) the INA of 1952 enable the INS to make political asylum decisions.¹⁸² While the discretion delegated to the agency under these organic statutes is broad, it is nonetheless subject to the controls of the Administrative Procedure Act (APA), the legislation which addresses the internal

178. "The sheer power agencies exercise compels us to be concerned about the procedures through which they operate, because the procedures channel the exercise of that power." Magat & Schroeder, *Administrative Process Reform in a Discretionary Age: The Role of Social Consequences*, 1984 DUKE L.J. 301, 309 (1984). Administrative law analysts have only recently focused on discretion as a key element in these procedural concerns. *Id.*

179. K. DAVIS, *supra* note 5, at 163, § 8:3.

180. *Id.* at 169, § 8:4.

181. *Id.*

182. *See supra* notes 113-16 and accompanying text.

administrative procedures of all federal agencies.¹⁸³ The APA requires agencies to formulate rules,¹⁸⁴ and to give notice of proposed rules in answer to concerns about the democratic accountability of agency action.¹⁸⁵ The APA insists that agencies abide by certain standards of adjudication¹⁸⁶ and allows for judicial review of that adjudication process¹⁸⁷ to insure the fairness of internal agency procedures. Rulemaking is a self-structuring process by an agency, as is an agency's adherence to adjudicative process, orders and precedents. Judicial review by the federal courts is the external mechanism for correcting discretion abuse where an agency either formulates rules inconsistent with its mandate (abusing the discretion delegated to formulate implementational policy), or *refuses* to formulate rules necessary to decisionmaking, or renders decisions in the adjudication process that are inconsistent with its own rules, adjudicatory precedent, or federal law in general. This external discretion-structuring responsibility of judicial review lies at the heart of the statutory analysis of the U.S. asylum program.¹⁸⁸

The primary reason for the vast grants of discretion in U.S. immigration law in general and U.S. asylum law in particular is Congress's unwillingness to commit to the full political implications of its desire to aid victims of political and religious persecution. The notice and petition requirements of APA rulemaking provisions¹⁸⁹ provide little direct aid to persons who are the primary subjects of INS and EOIR decisionmaking: aliens who are not members of U.S. political community and therefore have no rights to U.S. democratic political participation.¹⁹⁰ Indeed, in the last one

183. See *supra* notes 118-20 and accompanying text.

184. 5 U.S.C. § 553 (1982).

185. "[A] central question for both administrative and political theory about the democratic state has been how to reconcile the existence and performance of administrative agencies with the expression of popular will that legitimate legislative governmental authority." Magat & Schroeder, *supra* note 180, at 309.

186. 5 U.S.C. § 554 (1982).

187. 5 U.S.C. § 701 to 706 (1982).

188. An "essential element of any administrative law system is that of provision for independent review of administrative action. In many ways, this is the most important of the administrative law requirements If there were no independent review, the only practical restraint would be the self-restraint of the administrator. Such a result would be contrary to the rule of law itself." Schwartz, *Fashioning an Administrative Law System*, 40 ADMIN. L. REV. 415, 428 (1988).

189. See 5 U.S.C. § 553(b) (1982) (outlining the nature and necessary elements of notice); 5 U.S.C. § 553(e) (1982) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").

190. This is not to say, however, that the notice and petition requirements for agency rulemaking do not serve a purpose in protecting the integrity of the U.S. asylum program. In August, 1987, the INS proposed changes in the adjudication of asylum claims. 52 Fed. Reg. 32553 (Aug. 28, 1987). The proposed rule would have removed asylum decisions from the adverse and open forum of standard immigration adjudication, and have placed the determinations in the hands of specially trained INS "asylum officers" who would rule on the asylum petitions in a closed hearing. Public interest organizations concerned with immigration and asylum issues objected so strenuously to

hundred years, the majoritarian force behind immigration policy in general has been exclusionary where xenophobic influences have sought to scapegoat potential immigrant populations as the source of their own economic or cultural woes. The anti-majoritarian force of judicial review is critical in this context in order to guarantee not only the justice goals of the Refugee Act, but the requirements of due process as well. While the breadth of U.S. constitutional rights which are available to non-U.S. citizens is a question of some controversy, it is clear that any person subjected to the machinery of U.S. government is guaranteed, at minimum, fair treatment by that system.¹⁹¹

The role of judicial review in assessing this fairness, and ultimately the legitimacy of agency conduct and policy formulation, is guided on one level by the scope of review allowed over agency decisionmaking in general. On another level, the scope of review which federal judges may exercise is affected by the peculiar nature of immigration and asylum policy.

The procedural concerns addressed by the federal bench in its review of asylum decisionmaking arise in very particular contexts of discretion abuse with the asylum program. The potential for mandate violation and discretion abuse exists at key points in the asylum program administration. The potential abuse is most obvious within the exercise of agency adjudicatory authority, in individual determinations of asylum status and deportation withholding. Administrative decisionmaking is highly discretionary in *ad hoc* judgments of credibility and sufficiency of the evidence that go toward establishing eligibility under either section 208 or section 243(h),¹⁹² in the explicitly and completely discretionary second stage grant of asylum to eligible section 208 applicants,¹⁹³ and in the application of section 243(h) exceptions to circumvent section 243(h) relief.¹⁹⁴

Indeed, even in deportation withholding claims, where an explicit, nondiscretionary prohibition against refoulement exists, "the practice of discretionary denial of asylum to people who are

the due process problems in 1) placing the adjudication within the INS (thereby inappropriately mixing enforcement and adjudicatory function), and 2) the closed nature of the hearing, that the proposed rules were withdrawn in October 1987.

191. "As early as *Yick Wo v. Hopkins* [118 U.S. 356 (1886)], when the Court held that all aliens are 'persons' within the meaning of the fourteenth amendment, undocumented aliens have found themselves within the group protected by that amendment's due process clause. The Court has similarly found that fifth amendment procedural due process requirements, as well as the full panoply of fifth and sixth amendment rights granted in criminal cases, protect undocumented aliens in proceedings instituted against them." *Developments — Aliens, supra* note 11, at 1445 (citing *Yick Wo*, 118 U.S. 356, 369 (1886))(footnotes omitted).

192. See *supra* notes 138-50 and accompanying text.

193. See *supra* notes 60-63 and accompanying text.

194. See *supra* notes 64-68 and accompanying text.

mandatorily protected by section 243(h) appears to be growing."¹⁹⁵ The INS may also be seen to abuse its rulemaking function by its refusal to promulgate rules which effectively control discretion. Because of the lack of internally binding regulations in highly discretionary decisionmaking processes, the agency is consequently isolated from effective external supervision.¹⁹⁶

Both rulemaking and adjudicatory functions, which are critical to implementation of the asylum program, are essentially unsupervised under the present system. But this does not mean that the discretion is unsupervisable. Judicial review has the potential of playing a strategic role in this process.

2. *Judicial Review as a Structuring Process*

The APA authorizes judicial review to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."¹⁹⁷ As one aspect of the prescribed scope of review under the APA, the reviewing court is authorized to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁹⁸ Thus, courts may structure agency discretion in its judicial capacity to review for discretion abuse. While the APA is exempt from absolute review guarantees of "agency action . . . committed to agency discretion by law,"¹⁹⁹ this section does not preclude a court from reviewing *abuse* of that articulated discretion.

Advocacy of aggressive judicial review in any context raises the standard concerns about judicial activism. At what point does review subvert the democratic process with policy formulation taking place in a nonpolitical branch of government?

The subject of the appropriate scope of judicial review in all administrative law contexts is considerably controversial. The debate may be summarized as conflict between the notion that review "provide[s] administrative agencies with the necessary direction to accomplish their statutory mandates,"²⁰⁰ and the fear that by review, the judiciary entangles itself in an inappropriate policymaking function. There is also an element of the "degree of discretion control" debate in the arguments for appropriate review standards.

195. D. MARTIN, *supra* note 12, at 82. See also *supra* note 176 for discussion of this practice.

196. See *supra* note 122 on the Reagan Administration's INS rejection of a proposed rule which would have structured certain decisionmaking processes.

197. 5 U.S.C. § 706 (1982).

198. 5 U.S.C. § 706(2)(A) (1982).

199. 5 U.S.C. § 701(a)(2) (1982). Levin, *supra* note 77, at 241.

200. Ludd, *supra* note 6, at 15.

"The arguments for tighter restrictions on the amount of discretionary power held by administrators (to avoid the possibility of abuse) are countered by the arguments for the need to allow flexibility for administrators to implement complex programs in a diverse society."²⁰¹

Moving to specific substantive areas of administrative law, "the intensity and character of judicial review will vary from one field [of administrative law] to the next."²⁰² In the context of immigration law, courts have traditionally applied a narrow and highly deferential review to immigration cases. As noted in 1976, four years before passage of the Refugee Act:

[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary."²⁰³

There are many reasons, however, for questioning this traditional deference. Regarding the foreign policy implications of immigration law, the Court has elsewhere noted that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."²⁰⁴ Concerning the changing political and economic circumstances cited by the Court as reason for deference to the political circumstances, "[r]eviewing courts are the experts on the content of procedural and substantive justice"²⁰⁵ even where they are not qualified to make substantive political decisions.

In consideration of the appropriate scope of review, the appropriate inquiry is the effect of review on the democratic process, not the seemingly "political" quality of the subject being reviewed. In

201. Shumavon, *supra* note 104, at 9. The political allegiances of these positions are misleading. While advocacy of judicial activism is a traditionally liberal position, conservative critics of industry regulations by public interest constituency agencies (e.g., the Environmental Protection Agency, and the Occupational Safety and Health Administration; see *supra* note 80) advocate aggressive review in attempts to substantively curtail these agencies' actions. Conversely, the conservative rhetoric against unsupervised agency market-interference can be used effectively in attempts to restrict bastions of overweening conservative power (e.g., the INS).

202. Levin, *supra* note 76, at 97.

203. Mathews v. Diaz, 426 U.S. 67, 81 (1976) (footnotes omitted).

204. Baker v. Carr, 369 U.S. 186, 211 (1962) ("Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." (*Id.* at 211-12) (dictum).

205. 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28:7 (2d ed. 1984) (emphasis in original).

the administrative arena, this "interplay between judicial review and democracy should not be oversimplified."²⁰⁶ Administrative agencies are themselves not politically accountable, deriving their political legitimacy through delegation from a political branch, *not* from direct election by the populous. Therefore, aggressive judicial review of an agency determination may actually promote "the representativeness of modern government . . . by helping to keep the executive branch accountable to other actors in the political system, namely Congress and the voting public . . . [and] by enforcing statutes that are themselves products of a majoritarian process."²⁰⁷

Much automatic kneejerk deference on the part of courts to review of agency decisions in general, and immigration adjudications in particular, seems to derive from a confusion on the part of judges as to their proper reviewing role. Professor Davis notes that judges underestimate the capacity to review for abuse.²⁰⁸ "A serious deficiency in the present law has grown out of the common belief that judges who are unqualified to exercise particular administrative discretion are therefore unqualified to review that administrative discretion to determine whether the agency has abused its discretion."²⁰⁹ Elsewhere, Professor Davis notes that "the harmful assumption . . . that what is highly discretionary cannot be reviewed for abuse of discretion is very common. Judges who are unfamiliar with a particular area of discretion often understandably fear to enter it."²¹⁰ The basic thrust of Professor Davis's comments regarding this type of review is that the standard for abuse of discretion need be deferential only 1) to agency determinations of *policy* where, 2) those policy determinations fall within *statutorily mandated* zones of decisionmaking. Where an agency consistently manipulates procedure in an inappropriate manner, review for abuse of discretion proves to be, in fact, a legitimately aggressive form of review.

Turning back to the ways that courts have determined agency abuse of discretion, we note specific structuring efforts which courts may comfortably effect within their nonpolitical role.

Of particular interest for the purposes of immigration agency activity review is the D.C. Circuit's opinion in the Three Sisters Bridge case.²¹¹ The court demonstrated the power of review "to require that discretionary decisions be based only upon those factors that the legislature as a whole [had] authorized or directed the

206. Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258, 271 (1986).

207. *Id.*

208. 5 K. DAVIS, *supra* note 205 § 28:7 at 283.

209. *Id.*

210. *Id.* at 288.

211. D. C. Federation of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971) *cert. denied* 405 U.S. 1030 (1972).

agency to consider" in demanding that a Secretary of Transportation make a particular discretionary decision "without regard to the irrelevant factor of political pressure."²¹²

The parallel of irrelevant political pressure to political asylum and withholding decisions is clear. While the statutory provisions authorizing relief enumerate the strict requirements for eligibility, the Congress nowhere states that considerations of whether the allegedly persecuting country is a friend or enemy of the United States should be taken into account in an individual determination. The practice, as authorized in the Operations Instructions,²¹³ of routing immediate action cases to the Associate Commissioner for Examinations, and therefore around the normal processes of adjudications, has the actual effect of *de facto* consideration of irrelevant factors.²¹⁴ Indeed, the Instructions specifically state that an immediate action case is "a request . . . for asylum which is politically sensitive or involves the possibility of forced repatriation."²¹⁵ The statistics of successful applicants from countries recognized as U.S. enemies versus successful applicants from countries conceived to be U.S. friends reveal this *de facto* consideration even if the factor is not specifically mentioned in the individual adjudication.²¹⁶

As a further factor justifying review, the Court recognized an agency's "clear error of judgment" as an abuse of that agency's discretion.²¹⁷ In determination of "whether the agency had an adequate factual basis for its decision,"²¹⁸ the reviewing court should assess the reasonableness of an agency's consideration of asylum facts as well as consideration of asylum law. In the context of persecution, it is critical that some type of assessment of the facts necessary to establish eligibility be performed outside of the exclusionary institutional bias of the immigration apparatus. While the courts will want to maintain some level of a deference toward facts as assessed by the trial adjudicator, federal court judges may insist on remand that additional facts be entered.²¹⁹ Next, though

212. E. GELLHORN & B. BOYER, *ADMINISTRATIVE LAW AND PROCESS* 72 (2d ed. 1981).

213. Operations Instructions, § 208.8. See *supra* note 123 and accompanying text for explanation of the Operations Instructions.

214. The Operations Instructions list the specific countries whose citizens are specifically defined as immediate action cases: the Soviet Union, East Germany, Romania, Poland, Hungary, Czechoslovakia, Bulgaria, Mongolia, Cuba, Albania, the People's Republic of China, North Korea, Vietnam, Laos, Cambodia, and all communist countries. See *supra* note 123 § 208.8.

215. Operations Instructions, *supra* note 123 at § 208.8(a)(1).

216. See *supra* notes 130-32 and accompanying text.

217. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 416 (1971).

218. E. GELLHORN & B. BOYER, *supra* note 212, at 73.

219. Some commentators express skepticism that this sort of particularized court review for abuse of discretion may not effect long term agency change. This position notes that in another highly discretionary area of immigration law, suspension of deportation in non-asylum contexts, "the techniques employed by the courts to control the

the INS Operations Instruction as interpretive rules may not bind the agency as a matter of administrative law,²²⁰ a discretionary decision clearly in violation of standard agency operating procedure may constitute abuse of discretion, whether or not the interpretive rule confers enforceable benefit upon the particular claimant.²²¹ Much practical structuring of immigration agency decisionmaking may be accomplished simply by judicial insistence on consistency in administrative policy formulation. Exasperated judges often comment in judicial asides about the official insouciance of the immigration apparatus.²²² Opinions which specifically outline the inconsistencies and obfuscation of agency asylum policy have the power to force the agency to structure internal lines of at least minimal cohesiveness. Further, court remand "to the agency for a fuller statement of reasons rather than reversing the decision"²²³ requires the agency to articulate its discretionary processes which then, as precedent, bind the agency in future determinations.

Additionally, courts have in certain contexts required "agencies to issue administrative rules before taking particular actions."²²⁴ In the context of a state housing agency's action, the Second Circuit held that "due process requires that selections among applicants be made in accordance with 'ascertainable standards.'"²²⁵ Although the second circuit case is not generally cited as authority "for reviewing courts to compel agency rulemaking because the Court expressly declined to decide the case on constitutional grounds,"²²⁶ another case did reverse a Bureau of Indian Affairs denial of benefits precisely because the agency had never articulated its policy to the public through rules or precedents:

[I]t is essential that the legitimate expectations of these needy Indians not be extinguished by what amounts to an unpublished ad hoc determination of the agency that was not promulgated in accordance with its own procedures The denial of benefits

Board's exercise of discretion may prove ineffective [T]he Board may evade the teeth of the standard simply by taking care to include language suggesting that . . . effect of all the evidence presented by the alien was insufficient to establish hardship [one eligibility criterion for suspension of deportation]." *Developments — Aliens, supra* note 11, at 1397 (1983).

220. *See supra* note 124 and accompanying text.

221. *See supra* notes 125-26 and accompanying text as examples of the courts to find conferable benefits under the Operating Instructions.

222. *See, e.g.*, Justice Blackmun's concern with "the years of seemingly purposeful blindness by the INS, which only now begins its task of developing the standard entrusted to its care." *Cardoza-Fonseca*, 480 U.S. at 452 (Blackmun, J., concurring); Justice Steven's reference to the "inconsistency of positions the BIA has taken through the years." *Cardoza-Fonseca*, 480 U.S. at 446 n.30; Judge Reinhardt's remark that "we are mystified by the Board's ability to turn logic on its head." *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1284 (9th Cir. 1985).

223. *E. GELLHORN & B. BOYER, supra* note 212, at 78.

224. *Id.* at 79.

225. *Holmes v. N.Y. Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968).

226. *E. GELLHORN & B. BOYER, supra* note 212, at 80.

to these respondents under such circumstances is inconsistent with "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. [citation omitted] Before benefits may be denied to these otherwise entitled Indians, the BIA [Bureau of Indian Affairs] must first promulgate eligibility requirements according to established procedures."²²⁷

Despite the conceded difference in status between the Native Americans and the alien victims of persecution who are subject to the administration of U.S. asylum law, the fact remains that both are statutorily entitled to benefits after eligibility is established and discretion has been applied.

As a final illustration of the Court's willingness to creatively bend rules of traditional deference, I suggest a look at the "selective service cases" from the late 1960's.²²⁸ While these cases are not directly analogous to political asylum cases, consider the striking similarities in the concerns underlying both:

- 1) Federal courts are reviewing federal agency decisions.
- 2) The courts are reviewing conduct in both cases by agencies whose decisionmaking processes are influenced by strong foreign policy components.
- 3) The result of an unsuccessful claim cannot in either case be characterized as a straightforward "penalty" (induction or deportation to conditions of persecution), though the eventual result of either may well be loss of the claimant's life.
- 4) Decision makers in both situations deny eligibility, and thereby force an indirect punishment, for reasons unrelated to statutory requirements for that eligibility.²²⁹

227. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

228. See *Breen v. Selective Serv. Bd.*, 396 U.S. 460 (1970); *Gutknecht v. U.S.*, 396 U.S. 295 (1970); *Oestereich v. Selective Serv. Sys.*, 393 U.S. 233 (1968); *Wolff v. Selective Serv. Bd.*, 372 F.2d 817 (2d Cir. 1967). In these selective service cases, various petitioners had their deferment status changed by the Selective Service Board (an administrative agency) following the registrants' protests of the Vietnam War. The Board had used its discretionary power to classify the young man as "delinquent" and thus susceptible to reclassification. The Court allowed review of the Board decisions, despite a statutory provision precluding review (Military Selective Service Act of 1967, 81 Stat. 100 (codified at 50 U.S.C.App. § 10(b)(3)), on the ground that the petitioners would not otherwise receive a fair hearing of their claims. Once the Court accepted jurisdiction, it ruled on the merits of the cases that reclassification on the basis of an determination of delinquency involved a clear departure by the Board from its statutory mandate. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 365-72 (2d ed. 1973).

229. The Selective Service Board changed a registrant's draft classification, thus denying exemption status, because of his unrelated protests against the Vietnam war, and the Board's determination of his consequent "delinquency." In asylum determinations, the immigration agency has considered "fraud" as a factor in discretionary denials of asylum to otherwise eligible aliens, a factor not specified for benefit denial by the Refugee Act, just as benefit denial for "delinquency" was not authorized by the enabling draft statute. See *supra* note 174 for discussion of BIA use of "fraud" as a factor.

In *Oestereich v. Selective Service Board*, a divinity student returned his registration certificate to the government as a protest of the U.S. involvement in the war in Vietnam.²³⁰ Although statutorily eligible for IV-D (student exemption from the draft) status, the Selective Service Board changed his classification to I-A, and ordered him to report for induction. One provision of the Selective Service Act had explicitly granted this student's exemption from the draft.²³¹ Another provision, however, provided there should be no pre-induction judicial review of classification or processing of any registrant, thus leaving the divinity student without any pre-induction remedy. Ruling that "[o]nce a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption,"²³² the Court remanded the case to the District Court, providing the student an opportunity to prove the alleged facts.

Thus, even in the face of an explicit statutory provision denying judicial review, the Court has refused to abdicate its review role because of textual literalness. "[S]uch literalness does violence to the clear mandate of [the provision] governing the exemption."²³³

Political asylum has been historically considered an exemption from prevailing exclusionary immigration law.²³⁴ The Refugee Act of 1980 provides with clear statement of purpose the eligibility requirements for individuals to establish that eligibility. To allow the broad and unstructured discretion of administrative officers to "[do] violence to the clear mandate . . . governing the exemption" is to abdicate proper judicial function and subvert the democratic process.²³⁵

3. *Judicial Review of Asylum Determinations*

A denial of asylum or withholding in a deportation hearing is appealed first to the BIA and then directly to a federal circuit court of appeals. Denials of withholding (section 243(h) claims) are generally reviewed under a substantial evidence standard.²³⁶ This type of review considers whether there is substantial support for the agency's decision (a theoretically even more demanding standard than review for abuse of discretion). Courts justify this higher standard in section 243(h) decisions by reference to the determinative

230. *Oestereich v. Selective Service Board*, 393 U.S. 233, 234 (1968).

231. 62 Stat. 611, § 6(g) (1948).

232. *Oestereich*, 393 U.S. at 237.

233. *Id.* at 238.

234. See *supra* notes 9-11 and accompanying text.

235. *Oestereich*, 393 U.S. at 238.

236. See D. MARTIN, *supra* note 12, at 84 (citing *Chavarria v. Department of Justice*, 722 F.2d 666, 670 (11th Cir. 1984); *McMullen v. INS*, 658 F.2d 1312, 1316-17 (9th Cir. 1981).

nature of eligibility in these cases: relief is mandatory if the alien is eligible.²³⁷ Denials of asylum claims are subjected to two-tier review: eligibility findings are reviewed for substantial evidence, and the discretionary denial is reviewed for abuse of discretion.²³⁸ Presumably the substantial evidence review of first stage eligibility determinations is justified as it may be balanced against the more deferential abuse review of the agency's discretion.

Thus the courts proceed in their review role with a dual standard: review for substantiality of evidence, which remedies inappropriate judgments in the particular case, and review for discretion abuse, which may prescriptively structure agency decisionmaking processes in general, as well as provide individual adjudication protection.

In the specific context of review of political asylum and withholding decisions, unquestioned deference to BIA determinations is particularly problematic. Because of the complicated "political" nature in these determinations, and because the mandate is new and distinct, the courts must not abdicate their review role without careful consideration of the appropriateness of review. While the courts probably should respect agency interpretations of certain obviously ambiguous terms "which can only be given concrete meaning through a process of case-by-case adjudication,"²³⁹ "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."²⁴⁰ The Court in *Cardoza-Fonseca* notes a specific reason for rejecting deference in these cases. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view. . . . The BIA has answered the question of the relationship between . . . [243(h) and 208 standards] in at least three different ways."²⁴¹

Beyond review of the application of the particular asylum and withholding provisions to the individual case, the courts have the power to consider the mandate of the enabling statute, and whether the agency implements that mandate.²⁴² Though the courts have construed certain statutory provisions regarding determination

237. D. MARTIN, *supra*, note 12 at 54.

238. *Id.* citing *Cruz-Lopez v. INS*, 802 F.2d 1518, 1519 n.1 (4th Cir. 1986); *Vides-Vides v. INS*, 783 F.2d 1463, 1466 (9th Cir. 1986); *Carvajal-Munoz v. INS*, 743 F.2d 562, 567-68 (7th Cir. 1984).

239. *Cardoza-Fonseca*, 480 U.S. at 448.

240. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984) (quoted in *Cardoza-Fonseca*, 107 S. Ct. at 1221).

241. *Cardoza-Fonseca*, 480 U.S. at 446 n.30 (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

242. See *supra* notes 228-35 and accompanying text.

standards in the Refugee Act,²⁴³ there has been no attempt at straightforward judicial construction of the statutory mandate of the purposes of asylum and withholding. Because of the distinct, inclusive nature of these provisions within the larger exclusionary body of immigration law, such a construction would do much to confine the nature of the political asylum discourse in individual determinations to statutorily appropriate issues.

A clear example of a factor which would fall outside the scope of appropriate agency consideration would be recent BIA reliance on evidence of fraud and misuse of the immigration process as the basis for discretionary denial of asylum.²⁴⁴ The language of section 208 of the Refugee Act explains that "[t]he Attorney General shall establish a procedure for an alien . . . irrespective of such alien's status, to apply for asylum . . ."²⁴⁵ Reasonable judicial construction could easily hold that the alien's status here includes the undocumented status of aliens who have entered the U.S. without inspection, thereby abusing immigration procedure in their flight from persecution. Additionally, a court might infer that the principal Congressional motivation to include the "irrespective of status" phrase was to protect precisely those people the BIA would exclude because of procedural irregularities. For victims of the extreme versions of persecution, the safety and life of one's family and self take a rational precedence over obedience to neutral procedures. Other examples of factors falling outside agency authority of consideration are (lest they go unremarked) race and political opinion.²⁴⁶

In addition to construction of the asylum provisions, judicial construction of the statutory purpose of section 243(h) relief could accomplish much in the reintegration of international law requirements of nonrefoulement into individual withholding determinations. The BIA is fond of pointing out in asylum and withholding decisions, that international law may be implemented by each nation as each nation sees fit.²⁴⁷ But in the process of the development

243. See, e.g., *INS v. Stevic*, 461 U.S. 407 (1984); *Cardoza-Fonseca*, 480 U.S. 421 (1987).

244. See *supra* note 174.

245. Refugee Act, § 208(a), *supra* note 1.

246. "Critics [of INS asylum decisions] say uneven treatment can be seen in the widely divergent rates of success of different nationalities in applying for asylum. In fiscal 1988, which ended Sept. 30 for the federal government, 3 percent of Salvadoran applications for asylum were approved, compared with 47 percent for Poles and 75 percent for Iranians." Kindleberger, *U.S. Asylum Decisions Questioned*, *Boston Globe*, Jan. 14, 1989, Metro Sec. at 25. Haitian asylum applications are rarely granted because the U.S. government considers Haitians to be economic as opposed to political refugees. Thus, while race is not an overt factor in INS asylum decisionmaking, it must be noted that the applicants with the lowest chance for success in the asylum lottery are people of color, Latinos and persons of African descent. See also *supra* note 133.

247. "Construction of the United Nations Protocol . . . [citation omitted] is left by that agreement to each state that is party to the Protocol; accordingly, the various international interpretations of the Protocol . . . are useful tools in construing our obligations

of convoluted exceptions and security requirements to section 243(h)(2), the INS and BIA may consider factors which place the U.S. in violation of the U.N. Protocol:²⁴⁸

Congress intended to avoid any such result, and the legislative history states explicitly that the exceptions are to be construed consistently with exceptions to the Protocol's protections [citations omitted]. But the wording of § 243(h)(2)(A), disqualifying those who have "ordered, incited, assisted or otherwise participated in" persecution of others is extraordinarily broad. To what provisions in the Convention does it correspond?²⁴⁹

Though the BIA may confidently state that "international interpretations of the Protocol are . . . [not] controlling as to construction of the Refugee Act of 1980,"²⁵⁰ federal court constructions of the Refugee Act *are* binding on immigration agency determinations.²⁵¹

B. *Confining Discretion: The Constitutional Analysis*

Stated broadly, administrative analysis at the constitutional level is an investigation of the constraints on government action that are necessary to the organization of democracy. These constitutional constraints are applicable to agency action and decision-making to the extent that most of the work of government in our complicated contemporary society takes place within these administrative bodies.²⁵² Administrative agencies as repositories of vast government power were unforeseen by the Constitution's framers when they structured our federal system.²⁵³ Constitutional legitimacy of agency organization and conduct, as well as of the decisions which occur within that structure, must therefore be assessed by insistence on the classic constitutional guarantees of government fairness in the separation of powers and due process doctrines in particular administrative contexts.²⁵⁴ Though the entrenched nature of federal administrative agencies in modern society make their *de facto* constitutional status almost more certain than that of the

. . . , but they are neither binding upon the United States, nor controlling as to construction of the Refugee Act of 1980." *Acosta*, Interim Dec. No. 2986 at 1.

248. T. ALEINIKOFF & D. MARTIN, *supra* note 23, at 642.

249. *Id.*

250. *Acosta*, Interim Dec. No. 2986 at 1.

251. Note the complicating procedural fact that a particular federal circuit court's opinion is binding only on BIA and immigration judge decisions within that circuit. Immigration agency decisionmaking outside of a particular circuit may follow a completely contradictory rule where there is a conflict among the circuits on a particular issue, or if the governing circuit has not yet addressed the issue. Of course, U.S. Supreme Court decisions are binding on all relevant agency decisionmaking processes.

252. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 575 (1984).

253. *Id.*

254. Yeazell, *Administrative Law*, ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 27 (1986).

three traditional branches of government,²⁵⁵ recent efforts at "[r]evisiting the constitutional status of . . . agencies" reflect a revival of concern in these structural constitutional issues in administrative law.²⁵⁶ Although "agencies are empowered and constrained principally by statutes rather than by direct constitutional grants and limitations of power[,] . . . generally applicable constitutional commands . . . set bounds for what the legislature may authorize agencies to do."²⁵⁷

While a statutory analysis seeks to control administrative decisionmaking by *structuring* the discretion exercised by administrators (by requiring formal guidance of administrative choice) a constitutional analysis seeks to control administrative decisionmaking by *confining* discretion to constitutionally legitimate channels of fair and balanced procedure.²⁵⁸ A constitutional analysis considers the structural integrity of a system of decisionmaking, that is, the degree to which that system is organized according to constitutional notions of separation of powers and due process. A constitutional analysis contemplates justice as "the first virtue of social institutions"²⁵⁹ and requires constitutional integrity in these work structures of government.

The Constitution, embodying as it does national values commonly held above and beyond decisions made in particular adjudications, requires a level of "structural justice" to ensure operational reinforcement of these values.²⁶⁰ Not only do persons subjected to the administrative decisions of a U.S. agency have the right to be treated fairly (whether or not they are U.S. citizens),²⁶¹ but nonsubjected U.S. citizens may legitimately demand that the structures of our government be organized in ways that are commensurate with basic constitutional values. Given "the pervasive and recurring equation between the irregular and the oppressive,"²⁶² we may insist on norms of regularity which "reduce the helplessness of individuals and groups by limiting their dependence on distant and inaccessible centers of implacable authority."²⁶³

This idea of systemic integrity and regularity is particularly important in the immigration law context. The persons subjected to the system are not yet members of our political community. They do not hold rights of political participation to control the immigra-

255. Anderson, *Revisiting the Constitutional Status of the Administrative Agencies*, 36 AM. UNIV. L. REV. 277, 279 (1987).

256. *Id.*

257. G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 77, at 31.

258. K. DAVIS, *ADMINISTRATIVE LAW*, *supra* note 5 at §§ 8.4, 167.

259. J. RAWLS, *A THEORY OF JUSTICE* 3 (1971).

260. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 17:1, 1673-77 (2d ed. 1988).

261. *See supra* note 191 and accompanying text.

262. L. TRIBE, *supra* note 260 at 630.

263. *Id.* at 631.

tion process which substantially affects their lives. They do not have a stable, ready claim on the full spectrum of U.S. constitutional rights protections. To insist that the constitutionality of government conduct be established in the individual case by persons who may not invoke full constitutional protections predicts (perhaps guarantees) that a certain level of constitutionally illegitimate activity may never be challenged.

The doctrines of separation of powers and of due process are specifically significant in the administrative law context. Ideas underlying both doctrines have been raised in the statutory analysis section in consideration of fairness in individual adjudications.²⁶⁴ Here, we examine the two doctrines in a more general way.

1. *Separation of Powers*

The doctrine of separation of powers is a central principle of any system of constitutional government.²⁶⁵ As it has developed in U.S. constitutional law, the doctrine is intended to hold that "the major branches of government should be kept separate and limited to their own functions"²⁶⁶ in the belief that there are "unique functions appropriate to each branch."²⁶⁷ Mere separation of the functions and powers of government, however, is not considered sufficient to guarantee the progressive balance of our system. Instead, the founders realized the additional necessity to balance the branches of government so that the departments "be [so far] 'connected and blended' to ensure that each has some constitutional control over the others."²⁶⁸ The doctrine, therefore, demands a separation of function *and* power as a guarantee to constitutional balance and limits in government. The doctrine also incorporates a notion of checks and balances which focuses on the continuous struggle among the branches which denies any of them "the capacity ever to consolidate all government authority in itself."²⁶⁹

Separation of powers concerns in administrative law are not raised by straightforward incursions of one government branch into the rightful province of another. Rather, uncontrolled agency conduct disrupts the balance of powers inherent in constitutional gov-

264. Where aggressive judicial review questions agency policy formulation in areas of discretion, to what extent does the judiciary intrude on legislative function (separation of powers concerns)? See *supra* notes 200-10 and accompanying text. Where agency adjudicators abuse their discretion by consideration of inappropriate factors in asylum eligibility determinations, to what extent has due process been violated by the decision? See *supra* notes 165-77 and accompanying text.

265. See, e.g., Vile, *Separation of Powers*, 4 ENCYCLOPEDIA OF AMERICAN CONSTITUTIONAL LAW 1659 (1986).

266. *Id.* at 1661.

267. *Id.* at 1659.

268. *Id.* at 1661, quoting Madison, *The Federalist* 48 in THE FEDERALIST PAPERS.

269. Strauss, *supra* note 252, at 578.

ernment where the branches overlap. Where the three constitutional branches neglect to confine agency action within legitimate boundaries, administrators effectively stake out a "fourth branch" of government,²⁷⁰ a political hollow in which the government may exercise power in possibly illegitimate ways.²⁷¹

As applied to administrative agencies, the separation of powers doctrine does not seek to "locate administrative and regulatory agencies within one of the three branches."²⁷² Rather, the doctrine examines "the formulation and specification of the controls that Congress, the Supreme Court and the President may exercise over administration and regulation."²⁷³ Underlying the consideration of these controls is a tension between appropriate and inappropriate political influence, as well as between political and nonpolitical supervision.

More than the political and nonpolitical supervision of agencies serving different functions, "[c]ongress and the president both serve to legitimize the operation of the federal bureaucracy by directing and monitoring agency actions and thereby render administrative power accountable to constitutional institutions."²⁷⁴ The federal courts review the products of administrative power post hoc to ensure that the process and results have conformed to constitutional norms of acceptability. The difference between political and nonpolitical controls lies more in the nature of the supervision itself. "[P]residential and congressional relationships with the agencies" bear "a highly political and informal cast."²⁷⁵ Judicial determinations regarding the legitimacy of agency function are necessarily formal and reflective, removed from the forces of daily political turmoil. Additionally, "[j]udicial pronouncements on presidential au-

270. See *supra* note 100 and accompanying text.

271. In the early years of Congressional delegation to executive administrators, the structural separation of powers issue (that is, the place of the agency in the divided federal system of government) was of foremost concern to the Court. Yeazell, *supra* note 254, at 29. With the dramatic episodes of expansion of agency size and power in New Deal legislation, and even more recently in the renaissance of regulatory enactment in the early 1970's, analysts and courts began to accept the structural position of agencies in government, and focused on due process requirements in agency procedures. Recently, however, modern analysts have begun to question this traditional acceptance of agency action and the rise of bureaucratic discretion considered necessary as a "practical response to the inability of . . . separated governmental powers to deal effectively with the policy challenges" which confront government. G. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 5 (1987).

272. Strauss, *supra* note 252, at 579. See also G. ROBINSON, E. GELLHORN, & H. BRUFF, *supra* note 77, at 31-32 ("Separation of powers principles . . . must be understood as broad allocations of functional responsibility, whose central relevance is to defining the appropriate spheres of the three constitutional branches of government and the relations of the branches to the subordinate agencies . . .").

273. Strauss, *supra* note 252, at 579

274. G. BRYNER, *supra* note 271, at 78.

275. Strauss, *supra* note 252, at 580.

thority vis-a-vis the agencies, and vis-a-vis Congress, are few.”²⁷⁶ Regarding the appropriateness of political supervision itself, the issue may be framed as a tension between the necessity of accountability for government power to representative institutions versus the potentially oppressive and shortsighted weight of majoritarian influence. One commentator notes that in recent years, in general administrative contexts, issues of balance within the political sphere, that is between Congress and the President, have superceded the political-nonpolitical questions of judicial activism.²⁷⁷ In the administration of U.S. asylum policy, these possible controls and their limitations break down as follows.

a. *Congressional Controls*

To the extent that Congress makes broad unstructured delegations of authority to administrative agencies, it passes important policymaking functions beyond the supervision of a politically accountable legislature. Having delegated authority, however, if Congress attempts to step in and correct a perceived abuse of an agency’s mandate, Congress may overstep the bounds of its legislative function by “executing” its own laws, or by inappropriately legislating a result in a particular case.²⁷⁸ Although, in the immigration context, the plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question, the means that Congress chooses to attempt this exercise of authority is open to question.

i. *Control of Congressional Delegations*

Central to the examination of prescriptive Congressional control of agency activity is the consideration of legislative responsibility. Unstructured delegations of authority to agencies allow Congress to “accommodate warring [political] factions without undertaking to reconcile them. This is arguably a failure of Congress

276. *Id.*

277. Anderson, *supra* note 255, at 290-91. Professor Anderson suggests reasons for this shift in focus. “Perhaps the Supreme Court did not back up the lower courts after its activist decision in *Citizens to Preserve Overton Park v. Volpe* [401 U.S. 402 (1971)] and instead discouraged judicial activism in cases such as *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* [435 U.S. 519 (1978)]. Perhaps activist judicial review of administrative action pales beside activist presidential intervention in administrative decisionmaking.” (footnotes omitted).

278. This concern of limiting Congressional activity to legislative function is expressed specifically, for example, in the constitutional prohibition of bills of attainder in Art. I, § 9, cl. 3. As expressed by the Supreme Court, the function of the bill of attainder prohibition serves “as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature.” *United States v. Brown*, 381 U.S. 437, 442 (1965)(quoted in L. TRIBE, *supra* note 260, at 657, § 10-6).

to meet its article I responsibilities.²⁷⁹ "To legislate is to make normative policy choices, and broad delegations are defective because they leave basic normative issues unanswered and thus within the realm of the delegate."²⁸⁰ Not since the New Deal, however, has the Court voided delegations as being overbroad.²⁸¹ Nevertheless, many commentators, and at least one Supreme Court (now chief) justice,²⁸² favor the resuscitation of the so called delegation (or nondelegation) doctrine, a practice which would allow the courts reviewing legislation to require a structure or limit in Congressional delegations of authority to administrative agencies.

Critics of the doctrine claim that no manageable test exists for judicial enforcement of structured delegation.²⁸³ Supporters of a revitalized version of the doctrine suggest, however, that there are specific standards which might be applied. One view holds that "Congress should not delegate *any* legislative powers," given an appropriate understanding of this legislative function.²⁸⁴ Interestingly enough, a return to the delegation doctrine is urged by both conservative and progressive forces in administrative law. Conservatives wish to circumvent the overweening power of regulatory agency force which constrains the market and its industries. Public interest attorneys, frustrated by challenges to agency rulemaking and the "difficulty in identifying and enforcing strong congressional . . . policies in the face of deferential judicial review and strong executive branch intervention,"²⁸⁵ also seek tighter controls on delegation where a Congressional mandate runs counter to existing executive policy.

Regardless of the motivation for a new and improved version of the doctrine, there is a great potential in judicial control of delegation as "an effective judicial tool . . . focus[ing] on the totality of

279. "All legislative Powers herein granted shall be vested in a Congress." U.S. CONST., art. I, § 1.

280. Gellhorn, *Returning to First Principle*, 36 AM. UNIV. L. REV. 345, 347 (1987).

281. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

282. See *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J. concurring) ("If we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it. It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for the purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge . . . [A] declaration that [this delegation provision] constitutes an invalid delegation to the [executive branch] would preserve the authority of Congress.")

283. See, e.g., Stewart, *Beyond Delegation Doctrine*, 36 AM. UNIV. L. REV. 323, 324 (1987).

284. Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. UNIV. L. REV. 355, 358 (1987). Schoenbrod's test has been summarized as follows: "Congress' delegation must be sufficiently precise to avoid transferral of policymaking functions or discretionary power to agencies." (quoted in *Anderson, supra* note 255, at 282.)

285. *Anderson, supra* note 255, at 282.

protections against arbitrariness, including both [procedural] safeguards and standards."²⁸⁶

Considerations of delegation control are precisely relevant to the discretionary grants to the Attorney General in the U.S. political asylum program.²⁸⁷ While Congress is politically committed to the inclusion of foreign victims of certain forms of persecution, it avoids tough political choices regarding the realities of this inclusion by delegation of broad discretion to an executive officer. This avoidance by delegation does not simply complicate the mode of asylum policy implementation. Considering that during the past eight years (since the passage of the Refugee Act) the national executive administration has actively sought to undercut any inclusionary force in immigration policy, the overbroad delegation in political asylum decisions leads to an effective executive cancellation of the mandate by administrators who are institutionally biased against its requirements. While individual exercises of the discretion may seem legitimate in the narrow context of individual case review, clearly the broader purpose of the legislation has failed to be realized. Judicial remand to Congress for clarification of the delegated discretion could effectively require 1) an explanation of the relation of the asylum and withholding provisions (one to the other), 2) the relation of U.S. asylum policy to the requirements of international law, and 3) a more precise formula for the determination of eligibility. Articulation of the relationship of asylum and withholding of deportation would allow courts to focus on mandate implementation, not on hair-splitting distinctions of legislative intent inherent in particular word choices. In an affirmative Congressional reconciliation of the statute with international law standards of refugee protection, the legislature could restrict the exception to section 243(h) relief, and structure or eliminate the second stage section 208 discretionary decision of status. In a Congressionally articulated formula for eligibility, the Court might demand an explanation of the degree of probability of persecution necessary to establish eligibility,²⁸⁸ as well as an explicit assignment of the burden of proof with the creation of a presumption of persecution which would lie with the application, and which the government would have to rebut with specifically mandated forms of evidence.²⁸⁹ All these clarifications would allow courts the opportunity to review for effective agency compliance of legitimate procedures, and indeed would require judicial consideration of INS action instead of letting the courts hide in their acts of deference.

286. Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713-20 (1969).

287. See *supra* note 63.

288. See *supra* notes 73-74 and 151-59 and accompanying text.

289. See *supra* notes 138-50 and accompanying text.

ii. Congressional Oversight

To what degree may the legislative body itself ensure that the discretion be properly exercised where Congress has delegated discretion to an agency? In an enabling statute, congress may require an agency to "report and wait" on particular determinations, giving the legislature a chance to intervene with new legislation, should it feel so compelled.²⁹⁰ It may enact "sunset legislation" which would terminate specific agency functions without enactment of renewed statutory authorization.²⁹¹

Short of substantive statutory change, Congress may influence agency administration by effective use of its appropriations power, and by use of Congressional committees to investigate agency actions, both broad and in relation to particular adjudications.²⁹² However, the Supreme Court's 1983 invalidation of one form of such technically nonlegislative Congressional action, the legislative veto,²⁹³ suggests that post-legislative supervision of power delegations to agencies by the legislature are constitutionally problematic.

The legislative veto is a device whereby a statutory delegation of power is accompanied by "a condition that agency action implementing the statute [] be effective only if not vetoed by a [congressional] resolution . . . within a set period."²⁹⁴ Use of the legislative veto had allowed Congress to void a particular agency action without having to pass new legislation, and the subsequent burdens of the legislative process, namely passage by both houses and presentation to the president. In immigration administration, the veto had tended to work against applicants, as Congress generally reversed agency decisions which had granted, not denied, legal residency to an alien. In fact, the case in which the Court overruled the use of the legislative veto was just such a case. In *INS v. Chadha*, 462 U.S. 919 (1983), an East Indian born in Kenya attempted to legalize his U.S. residency after overstaying his student visa. The immigration agency approved his application, but Congress, in only one of its houses, the House of Representatives, passed a resolution reversing the agency's decision. The resolution was passed in conformation with the legislative veto provision of the Immigration and Nationality Act²⁹⁵ and as such was not submitted to the Senate nor to the President for his approval.

The majority in *Chadha* concluded that use of the legislative veto in this case disrupted the Congressional-Executive balance²⁹⁶

290. G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 77, at 103.

291. *Id.*

292. *Id.* at 81-82.

293. *INS v. Chadha*, 462 U.S. 919 (1983).

294. G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 77, at 86.

295. § 244(c)(1), codified at 8 U.S.C. § 1254(c)(2).

296. *Chadha*, 462 U.S. at 946-51.

with its abrogation of the presentment clauses²⁹⁷ and the bicameralism requirement.²⁹⁸ Justice Powell in his concurrence felt that Congress "assumed a *judicial* function in violation of the principle of separation of powers" with the legislative veto exercise.²⁹⁹ Regardless, the Court forced contemporary consideration of the nature of appropriate legislative function. In that particular round, the function was fairly limited to the specific process of legislation subject to "step-by-step, deliberate and deliberative process."³⁰⁰

After *Chadha*, formal post-legislative Congressional functions would seem to fall outside this constitutional limit. This restriction of direct Congressional post hoc control of its authority delegations is yet another argument for Congressionally articulated delegation standards under a renewed delegation doctrine. Such specifics will only be accomplished in the national legislature by the continued focus on prescriptive legislative responsibility to affirmative implementation of its laws.

b. *Executive Controls*

Administrative agencies, in their role as implementors of legislation, find themselves technically organized within the executive branch of government. The force of a separation of powers analysis in consideration of appropriate executive function does not lie, however, in this executive claim of "sovereignty" over administrative agencies. Rather, "its vitality . . . lies in the formulation and specification of the controls that [the branch] . . . may exercise over administration"³⁰¹ Viewed in this way, appropriate executive controls over agency conduct consider the effect that a President, and by extension his own administration, may have on agency exercise of government power.

Under the Reagan administration, "[t]he President, through budget proposals, appointments, vacancies, enforcement priorities, and review of individual agency decisions . . . [] extended the influence of the White House to an extent unimaginable only a few years ago."³⁰² Professor Houck continues this description of the Reagan administration's control of federal agencies which

began with transition teams that well before inauguration day had completed an agenda for the reorientation of the agencies The President proposed no monies for unfavored programs,

297. U.S. CONST., art. I, § 7, cls. 2 & 3 (requiring that all legislation be presented to the President before becoming law).

298. U.S. CONST., art. I, §§ 7, 9 (requiring that no law be effective without passage by a prescribed majority in both houses of Congress).

299. *Chadha*, 462 U.S. at 960 (Powell, J., concurring) (emphasis added).

300. *Id.* at 959.

301. Strauss, *supra* note 252, at 579.

302. Houck, *President X and the New (Approved) Decisionmaking*, 36 AM. UNIV. L. REV. 535, 535 (1987).

halved the budgets of others, refused to spend monies actually budgeted, made no nominations for unfavored positions, made no effort to enforce unfavored laws, and appointed agency heads whose primary qualification, indeed whose only qualification in common, was a field-tested hostility to the statutory missions that Congress had entrusted to them."³⁰³

The most straightforward control exercisable by the chief executive over agency administration is the appointment power.³⁰⁴ In the administration of asylum policy, not only does the President appoint his own Attorney General, the cabinet level officer "charged with the administration and enforcement of . . . laws relating to the immigration and naturalization of aliens,"³⁰⁵ the President also has the power to appoint the Commissioner of the Immigration and Naturalization, the officer who "*direct[s]* the administration of the [INS] and . . . enforce[s] the [INA] and all other laws relating to the immigration and naturalization of aliens."³⁰⁶

In the informal world of presidential-agency relations, however, less direct political influence has at least as powerful a possibility of subordinating agencies to an administration's policies. In recognition of this subordination, particularly rampant in the last eight years, and devastating to all areas of immigration policy, commentators have suggested a number of specific proposals to channel potentially inappropriate executive influence over agency action. White House communications with agencies during periods of rulemaking might be required to be in the public record.³⁰⁷ More expansively, Congress might require that all White House influence of agency decisionmaking be disclosed.³⁰⁸ However, these sorts of appeals to Congressional checks on Presidential authority run afoul of the current trend in separation of powers analysis which tends to limit the legislative role in favor of the executive. As if the march toward the Imperial Presidency has needed help in the last eight years, recent abstracted administrative inquiry has attempted to develop a "limit on Congress's authority to create the structure of government,"³⁰⁹ shifting this authority to the executive branch. Advocacy of aggressive judicial review of specific instances of this authority shift would fare no better given the enormity of the influence of the past administration's federal court appointments. For our purposes, appeal to yet another constitutionally mandated pres-

303. *Id.* at 537-38 (footnotes omitted).

304. U.S. CONST., art. II, § 2, cl. 2.

305. 8 U.S.C. § 1103(a).

306. 8 C.F.R. § 2.1, 8 U.S.C. § 1103(b) (emphasis added).

307. See Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 504 (1979).

308. Houck, *supra* note 302, at 549.

309. Strauss, *supra* note 252, at 640.

idential duty and the conscience of the new Bush Administration may prove more effective.

The president has a constitutional duty to "take Care that the Laws be faithfully executed."³¹⁰ The fidelity required by this duty is to the mandate of the particular law being implemented. Where the president subordinates an agency to its own administration's policy, and the agency has been enabled by policies in contradiction with those of the administration, the president potentially violates this constitutional command. Inappropriate political decisions, that is, decisions made under the influence of forces not prescribed by articulated process, may be unavoidable at levels of administration where subjective decisions will be guided by an overarching sense of loyalty to a present government. Nevertheless, extreme cases of abuse should not only be reviewable by the courts as abuse of discretion, but consistent abuse should be affirmatively addressed by the President under the "faithful execution" clause.

In specific political asylum determinations, persistence of inappropriate political influence clearly violates the broad mandate of the Refugee Act. No where in the statute does Congress state that political asylum will be provided only to persons fleeing communist countries, or that anti-communist regimes are incapable of persecuting their citizens. Indeed, the reliance of the Act on formulations of international law standards and United Nations documents would seem to require political neutrality in these issues. If this influence was only operating in individual adjudications, it would be virtually impossible to establish, outside of reliance on statistics of approved applications.³¹¹ But in the very rules formulated by the INS governing asylum determinations, the agency *requires* inappropriate influence of the executive branch by mandating State Department input regarding general evidence of persecution in an asylum claimant's home country.

"[T]he district director shall in all [asylum] cases request an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the Department of State."³¹² Immigration judges are also required to seek an advisory opinion where the asylum application rises in the context of a deportation hearing.³¹³ "[I]n almost every case the State Department's advice is deemed conclusive."³¹⁴ Commentators find this advisory opinion requirement troubling. "Such conclusory pronouncements simply serve to continue the practice of ideological allocation of asylum which the

310. U.S. CONST. art. II, § 3.

311. See *supra* note 131.

312. 8 C.F.R. § 208.7.

313. 8 C.F.R. § 208.10(b).

314. Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REF. 183, 193 (1984).

Refugee Act of 1980 was designed to change."³¹⁵ The advisory opinion practice probably violates due process requirements of fairness in individual determinations as 1) the nearly always determinative opinion is drafted in the State Department in a procedure which deprives the applicant of the opportunity to present her case, and 2) the opinions are essentially pro forma products of lower level staff iterations of prevailing national policy.³¹⁶ Central to examination of inappropriate executive control of an agency determination, however, as well as inappropriate political influence in that process, Aleinikoff notes that

[t]he presentation of every asylum case to the country desk allows the intrusion of political factors into asylum decisions since country desk officers have strong views about the effect that recognizing or not recognizing claims could have on the achievement of American foreign policy objectives.³¹⁷

Where the mandate runs counter to the executive version of that policy, such instances of a given administration's use of its political weight in individual implementations of a Congressional mandate completely disrupt the structural balance of asylum determinations. One moderate suggestion for reorganization of the process would be to cancel the rules requiring State Department input, and allow the State Department to intervene only where the information would be available to the alien and her counsel, as well as the INS.³¹⁸ However, Professor Aleinikoff suggests an even more dramatic structural reform of the asylum program. Comparing the asylum program in Germany and France to the U.S. program, Aleinikoff notes that

[a] serious problem with the present American asylum system is the widely shared perception that it is politically biased. The German and French experiences demonstrate that no governmental agency is fully immune from political pressures. But the general perception in both [these] countries is that the federal asylum agencies are *largely* free from political influence. No such perception exists in the United States Establishment of an agency outside the Department of Justice and not dependent upon the State Department would help eliminate the appearance of, and potential for, political influence in the asylum process.³¹⁹

Such a dramatic organization reform might be implemented by the executive branch in a new administration, or by Congress with new legislation. Combined with Congressional articulation of the appropriate discretion exercise in its delegation to the head of our

315. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 263 (1984).

316. Aleinikoff, *supra* note 314, at 194.

317. *Id.*

318. See Helton, *supra* note 315, at 263.

319. Aleinikoff, *supra* note 314, at 235.

hypothetical asylum agency, implementation of affirmative inclusionary protection of persecution victims may approach the commands of the Refugee Act mandate. In the meantime, we are left once again with the courts as the constitutional conscience of government processes.

c. *Judicial Controls*

Where "the central fact of legislative-executive management of oversight relationships with the agencies is the extent to which behavior is determined by political factors rather than law,"³²⁰ judicial responsibility in supervision of agency conduct is precisely legal. Beyond issues of political expediency or administrative efficiency, the courts must determine whether general and specific agency exercises of government power comport with statutory and constitutional law. This last aspect of legal responsibility, that is, the federal courts' "power to interpret and enforce the Constitution as law,"³²¹ is the critical factor in this part of the administrative analysis. Even in the face of pragmatic administrative requirements of daily government and professions of administrative expertise, the courts must recognize that "the fact that a given . . . procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objective — or the hallmarks — of democratic government . . ."³²²

The principle limit on federal court consideration of constitutional legitimacy lies in the Article III cases and in the controversies requirement. An important point of the limitation is to ensure that the Court does not move beyond appropriate judicial function, that is, consideration of "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process,"³²³ and to keep the Court out of the business of the other branches. Within these separation of powers type limitations, the Court must then turn to adjudicate the constitutionality of the function of power separation in cases before it. The Court must evaluate the constitutional integrity (or lack of it) of a particular system in the context of how it affects an individual within the system's grasp.

It is the federal judiciary's responsibility to indicate the power imbalances among the coordinate branches which (as noted in the above sections) affect asylum adjudications. In the context of legitimate judicial review of asylum appeals, the Court has the opportu-

320. Strauss, *supra* note 252, at 592.

321. L. TRIBE, *supra* note 260, at 23, § 3-1.

322. *INS v. Chadha*, 462 U.S. 919, 944 (1983).

323. L. TRIBE, *supra* note 260, at 67, § 3-7.

nity to declare overbroad the Congressional delegations of discretion to the Attorney General in sections 208 and 243(h), to note the inappropriate and unconstitutional influence of the State Department in asylum decisionmaking, to construe the asylum program's mandate as affirmatively inclusionary, and therefore violated by INS administration. Yet, though courts are the experts on these aspects of procedural justice,³²⁴ "Congress . . . is the expert on ways of legislating so that the Court should defer."³²⁵ In consideration of political asylum cases, it is critical that the judiciary carefully evaluate its impulses to defer. The arguments that federal courts should resist knee-jerk deference to asylum policy formulations that applied in the statutory analysis apply here as well.³²⁶ Indeed, as the Court in the Constitutional analysis is not restricted by the review standards of the APA, arguments for resistance to deference are even stronger here. Even where "foreign policy choices" favor a particular case, such appropriately "political" functions "are fully constrained by the Constitution's protections for individuals in article I, § 9, and the Bill of Rights."³²⁷ Though the courts are limited by the cases and controversies requirement to particularized considerations of constitutional integrity, such considerations require an aggressive review in cases like political asylum adjudication, where the normal channels of representation and participation do nothing to protect the noncitizen applicants subject to the U.S. government procedures.³²⁸

2. *Due Process*

Due Process guarantees of fairness are one of the few constitutional protections directly available to aliens subjected to the machinery of the immigration agency.³²⁹ Because the two due process clauses explicitly refer to "persons," not "citizens,"³³⁰ no political community membership is necessary to invoke the requirements of constitutional procedural integrity.

Recent court due process analysis has focused on the sufficiency of the interest (life, liberty, or property) which the clause is

324. *See supra* note 205.

325. Schoenbrod, *supra* note 284, at 388.

326. *See supra* notes 203-10 and accompanying text.

327. L. TRIBE, *supra* note 260, at 225, § 4-4.

328. *See United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938) (citations omitted) and discussion of its requirements in J. ELY, *DEMOCRACY AND DISTRUST* 75-88 (1980).

329. *See supra* note 191.

330. U.S. CONST. amend. V, "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV "nor shall any State deprive any person of life, liberty, or property, without due process of law." The XIVth amendment reference to due process protection of persons directly following its reference to the privileges and immunities protection of citizens highlights the fact that the distinction was not an arbitrary one.

invoked to protect. Not surprisingly, the Court has tended to narrow the scope of these interests in recent years. This includes the interests cognizable in an administrative due process inquiry, such as the right to a hearing, property rights, liberty interests, and fairness in the rulemaking process.

There is something broader at stake, however, in a responsible due process investigation of agency action than description of individual causes of constitutional action, which demands fairness of procedures above and beyond fair application of those procedures in the individual case. Under this view, the due process clause is an "interpretive placeholder around which or within which to structure our most general constitutional conversations about the evolution of American government."³³¹ Particularly where government decisionmaking affects the interests of persons on a mass scale, attempts to minimize their "helplessness and dependence . . . may require courts to go beyond remedies that individual poor people must invoke on their own."³³²

Though the Court has moved away from the promise of procedural justice found in the process cases of the early 1970's,³³³ as well as away from a vision of due process as a doctrine with "a prominent role . . . in the definition of government's relationships with individuals,"³³⁴ and instead toward a notion of "administrative due process as social-cost accounting,"³³⁵ the Court does seem "prepared . . . to look beyond the traditional adversary model for procedures to restrain arbitrary government action and thus fulfill the ideal of governmental regularity . . ."³³⁶

The specific ways in which these structural notions of due process as guarantees of government regularity³³⁷ may be used to assess the integrity of immigration agency organization have been addressed in the sections above as that organization affects asylum program implementation. Rather than provide an independent basis for review of the legitimacy of INS conduct and organization, however, a broad due process inquiry seeks to organize the questions courts should ask regarding that legitimacy. Whether or not a

331. J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 8 (1985) (quoted in Diver, Book Review, *The Wrath of Roth*, 94 *YALE L.J.* 1529, 1530 (1985)).

332. L. TRIBE, *supra* note 260, at 762, § 10-19.

333. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

334. L. TRIBE, *supra* note 260, at 760-61, § 10-19.

335. *See* Mashaw, *Administrative Due Process as Social-Cost Accounting*, 9 *HOFSTRA L. REV.* 1423 (1981). The title of this article refers to the test in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1975) for the constitutionality of administrative procedures as a balance of private interests and government cost in protecting those interests, a clear move away from the process cases and their notion of statutory entitlement.

336. L. TRIBE, *supra* note 260, at 765, § 10-19.

337. *See generally* L. TRIBE, *supra* note 264, at 629 § 10, *The Model of Governmental Regularity*.

particular exercise of discretion is arguably valid, whether or not a particular applicant may prove the circumstances of persecution, whether or not arcane statutory interpretation can define fear and oppression sufficient to support an administrative claim, due process doctrine requires a level of systemic integrity in an institution of U.S. government before the system may be descend on any person within its grasp.

CONCLUSION

For all intents and purposes, the implementation of the Refugee Act's affirmatively inclusionary mandate has yet to be realized. Victims of persecution who apply to our country for protection find the success of their applications depends on U.S. foreign and domestic policy considerations, not on the merits of their cases.

That the INS refuses to effectively implement this law is not surprising given its institutional bias toward exclusion. What is shocking is the refusal on the part of the Constitutional branches of government to intervene, in the face of the clear statutory command, to set straight the structures of this particular aspect of U.S. government authority. Though this Comment has dealt specifically with the immigration provisions of the asylum program, I sincerely hope that it may encourage efforts to investigate the statutory and constitutional legitimacy of INS conduct in other areas of immigration policy implementation. A constitutional democracy such as our own should not stand for the sorts of organizational abuse applied to persons not members of our political community, even in the face of xenophobic and majoritarian force which would "democratically" dictate exclusion.

*DAWN ABERG*³³⁸

338. Third year student, UCLA School of Law. I would like to thank my friends and fellow review workers for their patience during the writing of this Comment, to thank the staff of the UCLA Law Library, and to thank the advisor for the immigration issues in this piece, Professor Isabelle Gunning. Most of all, I would like to thank my children, Ariel and Max, for their unending support and tolerance of their mother.

This Comment is dedicated to the thousands of victims of persecution who currently seek the protections of our constitutional democracy. May they be successful in their search for freedom.