Admission of Refugees and Asylees Under the Law: Reports on Current United States Procedures and Policies, and their Origins, with Recommendations for Change

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and Refugee Policy

by

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Table of Contents

TABLE OF CONTENTS

[Note: Issue Summaries on American Indian Aspects of Immigration Policy are being submitted separately.]

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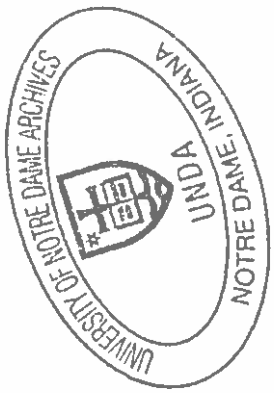

"CASE STUDIES" SEGMENT

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THE SELECT COMMISSION ON IMMIGRATION

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BY

THE CENTER FOR CIVIL AND HUMAN RIGHTS

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THE ROOTS OF CURRENT REFUGEE AND ASYLUM POLICY

The specific recommendations made by the Center for Civil and Human Rights in the First Final Report and in the pages that follow all have as their starting point the Refugee Act of 1980,[1] a law that should help to make United States policy toward refugees who are within the United States and those who still remain outside the nation's borders more consistent, more humanitarian, and less prone to ad hoc decision-making which emphasizes narrow ideological concerns at the expense of deserving applicants who are fleeing the wrong country or happen to belong to the wrong political party. Yet the Center's willingness to suggest some sweeping changes in the administration of the Refugee Act, -- and even to amend the Act itself in order to implement those changes -- is based on a perception of American refugee policy which looks beyond the Refugee Act to its historical antecedents, and beyond the stated purposes of present law to the institutional presuppositions of those administering it.

In the Center's view, the ideological bias of pre-1980 law was so great that a considerable adjustment will have to be made if that bias is not to continue to dominate all phases of refugee decision-making. Thus, as the case studies which follow will demonstrate, that ideological bias, although to an extent validated by the law, had extra-legal roots which reflected not

only the political thinking of the majority of Congress during the cold war era, but also the attitudes which have characterized the Department of State from the time that President Eisenhower took office[2] through the present day. The Refugee Act has changed many of the express terms of prior law, but has not necessarily had a major effect on the attitudes of those in State brought up under the earlier dispensation and now participating in refugee allocation decisions, or in the issuance of those "advisory opinions" which so strongly affect the granting of asylum to particular aliens. Nor, for that matter, has the Refugee Act had time yet to exercise a major effect on the similar attitudes of many INS officers, although INS is currently entrusted with screening all refugees and all asylum applicants. The promise of the Refugee Act is thus to some extent provisional, its ultimate sucess to be measured by the degree to which those administering it make their decisions primarily on the basis of an applicant's "well-founded fear of persecution,"[3] rather than on the traditional basis of his or her place on the left-right political spectrum.

1. Refugee Admissions from 1917 until the Displaced Person Act of 1948: The Effect of National Origin Quotas.

Prior to 1948, the United States had nothing resembling a refugee policy. Prior to World War I, no need for such a policy existed, since with the exception of laws discriminating against Asians, there were few restrictions on ordinary immigration. In the interval between World War I and World War II, the United States policy toward ordinary immigration changed dramatically.

Pressures on a job market unable to easily accomodate thousands of returning veterans fostered a rekindling of the xenophobia which had first emerged as a potent force in the 1880's, and encouraged the spread of political isolationism.[4] Concern over the influx of foreign labor focussed -- as it did in earlier times in Frederick Engel's England[5] and James K. Blaine's New York[6] -- on those perceived as most willing to work at cutthroat wages, thus depressing the general work market. The Immigration Act of 1917 established no quotas per se, though it continued to exclude immigrants from Asia and "natives of [certain] islands . . . adjacent to the Continent of Asia."[7] However, to reduce immigrant flow, and protect the labor force from "undesireable" foreigners, the Act added to existing exclusionary clauses an "illiteracy test,"[8] raised the tax on immigration to $8 a head,[9] reiterated and strengthened earlier provisions against the importation of "contract laborers,"[10] and established a presumption that only specially-skilled aliens would be admitted.[11] In 1921, Congress limited immigration further by inaugurating the first "national origin quota,"[12] applicable to all seeking admission from outside of North and South America, and the Carribean. The quota adopted permitted the immigration in any given year of "3 percentum of the number of foreign-born persons of [any covered] nationality resident in the United States as determined by the United States census of 1910."[13] It did not permit any immigration "from the so-called Asiatic barred zone."[14] In 1924, the quota base was redefined as "2 percentum of the number of foreign-born individuals of [any covered] nationality as determined by the United States

census of 1890,"[15] with provisions made for redetermining that quota in three years' time according to national origins' population distribution in 1920.[16] The net effect of these successive laws was to effectively bar all immigration from the Far East, and to severely limit immigration from Southern and Eastern Europe, which had supplied the greatest number of immigrants in the three decades from 1890 to 1920.[17]

Yet it was from Southern and Eastern Europe, and from Southwestern Asia, that a great percentage of the world's inter-world war refugees and displaced persons (the distinction was not clarified in international law until 1951) flowed.[18] The Russian revolution displaced a large number of White Russians and Armenians;[19] Greeks and Turks were also displaced by war.[20] A series of League of Nations resolutions, conventions, and treaties promulgated between 1921 and 1928 enlisted substantial international support for many of the Russians and Armenians, including the issuance of special "Nansen passports" to them by 53 countries.[21] The League and the domestic legislative bodies of a number of European nations also took action to alleviate the distress of those fleeing from Greece and Turkey, including the admission of some as refugees.[22] However, the United States was signatory to no international instrument, and passed no domestic law to aid or to specially admit members of either category. Instead, they were only admissible under the limited framework of the national origins quota system.

That system did not discriminate against residents of Western Europe, or against Jews as a religious group.[23] Yet even a comparatively-favored country, such as Germany, had a very

limited number of quota slots available to it. In the 1930's, a new refugee crisis emerged when Jews began fleeing the religious persecution of Hitler's Germany, and when residents of foreign regions integrated into the expanding "fatherland" sought to avoid their new status as members of a cultural minority. The League of Nations again promulgated instruments concerning the status of these refugees, and the United States again refused to accede to any of them.[24] Nor did it officially relax existing quotas to make room for any additional German immigrants, though humanitarian motives and the effect of a court order limiting the right to deport stateless persons without a country of refuge[25] had the combined effect of permitting some non-quota German Jews to overstay their statutory leave.[26]

Although the United States began to address itself to the problems of refugees during and immediately after World War II, lending its support in 1943 to the formation UNRRA,[27] allocating funds to particular groups, of refugees and displaced persons, and harboring some few individuals not admissible under existing quotas, no attempt was made to address the problem within the context of the immigration law until 1948. Until that time, the only immigration law provisions having any technical applicability were two that first appeared in the Immigration Act of 1917, but which created no new quota numbers, and were never -- to the Center's knowledge -- widely used.

The first of those provisions, which survived the recodifications of the Immigration Act of 1924 and 1940, provided for a waiver of the "illiteracy test" for:

> [a]ll aliens who shall prove to the satisfaction of the proper immigration officer or to the Attorney General that they are seeking admission to the United States to avoid religious persecution in the country of their last permanent residence, whether such persecution be evidenced by overt acts or by laws or governmental regulations that discriminate against the alien or the race to which he belongs because of his religious faith.[28]

Courts interpreting this provision granted the requested waiver when the applicant was able to show that he or she was the potential victim of persecution clearly religious[29] in origin, rather than of generalized civil strife.[30]

The second provision, which did not reappear in 1924, simply stated: "nothing in this act shall exclude, if otherwise admissible, persons convicted or who admit the commission, or who teach or advocate the commission, of an offense purely political."[32] The Center has uncovered no gloss of this provision, nor any evidence that it ever served as the basis of an actual admission.

The Displaced Person Act of 1948 thus emerged out of a legal void, prompted by the tremendous dislocation in Europe in the aftermath of World War II. It permitted 400,000 "eligible Displaced Persons" to enter the United States.[33] "Displaced person" was defined as it was in "Annex I of the Constitution of the International Refugee Organization."[34] According to that definition, all displaced persons were those forced to depart from their place of habitual residence as a result of the actions of Nazi or Faccist regimes during World War II.[35] The "eligibility" requirement under the Act limited this definition somewhat, including those fleeing from the new Communist regime in

Czechoslovakia,[36] but otherwise restricting admission to Austrians and Germans, or to those involuntarily brought to Austria, Germany, or Italy.[37] To prove that he was eligible, each applicant had to show that he was "not . . . firmly resettled," was otherwise admissible to the United States, and would neither become a public charge nor displace an American worker form his or her employment.[38] Further, the Act, did not abolish the existing national origins quota limitations; instead, "displaced persons" were granted special visas chargeable against quota limits for future years. As a result, some quotas were oversubscribed hundreds of years into the future.[39]

Summarizing, it can thus be said that the Displaced Persons Act of 1948 was the first legislative reflection of strong American concern about "refugees;" that that concern manifested itself within the framework of a particular historical circumstance -- World War II and its aftermath; that it extended to a large number of people in a very small part of the world; and that the manifestation was to some extent artifically shaped to conform to the exacting standards of a "national-origins quota" philosophy of immigration control. It seems likely that those who drafted the Act foresaw the possibility that its mortgaging of quota numbers far into the future would eventually be legislatively overturned -- as indeed it was in 1957.[40]

2. Refugee Policy and Law, 1948-1967: Ideology as the Basis of Admission.

Between the signing of the Displaced Persons Act of 1948 and the 1967 Protocol Concerning the Status of Refugees, the United

States admitted several hundred thousand refugees who were not "D.P.'s." It also adopted what was, in effect, the first coherent national policy toward such admissions. That policy took the national origins of potential refugees into account; but it did so primarily for global political reasons, rather than for reasons relating to ethnic or racial prejudice, or overt concern with protecting the United States job market. The '50s and '60s, to generalize broadly, were marked by a several-staged retreat from the national origins-quota mentality which had dominated over-all national immigration policy since the end of World War I, and by the adoption of standards for refugee admissions which were both implicitly and explicitly ideological in nature.

A. The Phase-Out of National Origins Quotas as an Element in Refugee Policy. In 1952, the most substantial revision of United States Immigration Law since the passage of the Immigration Act of 1924 occurred. The Immigration and Nationality Act of 1952 (INA), popularly known as the McCarran-Walter Act, (which, although much amended, still remains in effect), has frequently been characterized as an extremely restrictive law. That characterization is in the main correct, but does not take into account the fact that the total numerical limitation on immigration (excluding non-quota immigrants)[41] was 150,000 under the 1924 and 1940 acts,[42] but under the formula used in 1952, was approximately 215,000.[43] Nor does it adequately deal with Section 243(h) of the INA, which for the first time authorized the Attorney General 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." Nevertheless, the INA as originally passed contained

no provisions for admitting or granting permanent resident status to refugees, retained the national origins quota system (although it substituted a new formula for computing quota slots), and continued the practice of discriminating against those from the "Asian-Pacific" triangle. Discrimination against Orientals was less absolute,[44] however, and was repealed entirely by the Act of October 3, 1965.[45]

The 1965 Act has been characterized as the most "far-reaching revision of immigration policy in the United States since the First Quota Act of 1921"[46] Among other things, it eliminated the national origins quota system, substituted a flat 20,000 annual immigration limit for every country in the eastern hemisphere, and thus abolished the last vestige of legal discrimination against Orientals and other residents of the "Asian-Pacific Triangle." It also brought residents of the Western Hemisphere within the ambit of over-all numerical limitations on immigration in any given year. However, it continued to afford such immigrants a disproportionately large share of immigration slots, both in terms of the over-all number allocated to the World-at-large, and in terms of the number of immigrants permitted to enter the United States from any country in the Western Hemisphere. Final equalization of treatment for Eastern and Western hemisphere applicants was not achieved, however, until after the passage of legislation in 1976 reducing the number of visas for applicants from any Western hemisphere country to 20,000,[47] and legislation in 1978 unifying separate Eastern and Western hemisphere sub-limitations into a single world-wide ceiling.[48]

Elimination of the national origins quota system and substitution of a single world-wide immigration ceiling and a flat annual limit of 20,000 visas for applicants from any country reflected a variety of Congressional concerns, many of which, -- such as an interest in racial justice or in responding to the demands of under-represented nationalities -- appeared to bear no relationship to refugee policy -- although it is inconceivable that one-half million Indochinese could ever have been admitted to the United States as "refugees" had the racially-restrictive policies of the past remained in effect, or that the present confusion about Cuban admissions could ever have occurred if those seeking admission from the Western hemisphere remained exempt from numerical limitation. Yet the 1965 Act also contained language which for the first time designated a specific portion of the over-all limitation on immigration as available for the admission of certain "refugees." This so-called "seventh preference" reflected the long-standing awareness of those who had sought amendment of the INA that the strictures of the national origins quota system were fundamentally at variance with the goal of responding to the human needs of "refugees," however that term might be defined. President Truman made this point in the message that accompanied his veto of the INA:

> [T]his quota system keeps out the very people we want to bring in . . . by "protecting" ourselves against being flooded by immigrants from Eastern Europe. This is fantastic. The countries of Eastern Europe . . . are . . . fenced off by barbed wire and minefields -- no one passes their borders but at the risk of his life. We do not need to be protected against immigrants from these countries -- on the contrary we want

> to stretch out a helping hand to save those . . . who are brave enough to escape . . . [This illustrates] the absurdity, the cruelty of carrying over into . . . 1952 the isolationist limitations of our 1924 law.[48a]

He also predicted that the deficiencies of the quota system would continue to manifest itself, and would lead to a stop-gap approach to refugee problems:

> The inadequacy of the present quota system has been demonstrated since the end of the war . . . If the quota system remains unchanged, we shall be compelled to resort to emergency legislation again, in order to admit any substantial [number of] . . . refugees.[48b]

A section of the report of the President's Commission on Immigration, appointed by President Truman indicated that "a potentially explosive" refugee situation contined to exist eight years after the end of World War II.[49] President Eisenhower made similar arguments in 1957 and 1960, asking in the first instance for statutory authorization to liberalize quota restrictions and parole in refugees subject to persecution by Communists,[50] and in the second, for permanent legislation addressed specifically to the admittance of refugees.[51] President Kennedy proposed specific legislation in 1963 which would have granted the president the authority to allocate up to twenty percent of the over-all immigration ceiling to refugees.[51]

However, as long as Representative Walter remained Chairman of Subcommittee No. 1 of the House Judiciary Committee, all attempts to amend the INA to systematically respond to the problem of refugee admissions failed. Lacking both a working

legal definition of refugee and a regular mechanism for admitting individuals who might fit any such definition, a succession of Presidents was forced to fashion its own implicit definition and own admission policy by dint of loopholes in the law, the assertion of an ill-defined executive authority, and a series of ad hoc special bills pushed through Congress to ratify and regularize executive decisions already made. Policy made in this fashion reflected the prevailing foreign policy concerns of the time -- concerns which were largely defined by Soviet activities and the American "Cold War" responses to them. By the time the "seventh preference" became a part of United States immigration law, a national policy had already emerged which in practical terms equated "refugee" with someone turning his or her back on Communism, and which looked with extreme suspicion on anyone undermining the common cause of the "free world" by asserting persecution at the hands of one of its member states.

B. Anti-Communism as the Dominant Factor in Refugee Law: The Internal Security Act of 1950; Special Legislation and Parole; The "Seventh Preference." The "seventh preference" reserved six percent of the available annual immigration ceiling (computed on the basis of the Eastern hemisphere sub-ceiling of 170,000 in effect in 1965) to those persecuted or fearful of persecution because of race, religion, or political opinion, provided that they had fled from "any Communist or Communist-dominated country or area or from any country within the general area of the Middle East," and were "unable or unwilling to return" to their place of origin.[52] Additional provision was made in the law for

Presidential designation of disaster victims as "seventh preference" admittees; however, such individuals never constituted nor were meant to constitute a statistically significant eligibility group under the "seventh preference."[53]

The specific inclusion of the Middle East as a "special preference area appears to have been the result of an historical anomaly first spawned in 1957. The original 1965 bill, as introduced in the House, contained that designation.[54] The area so designated extended from Libya to Pakistan, and from Turkey to Ethiopia and Saudi Arabia.[55] It included the oil-producing states around the Persian Gulf, and Israel. Significant national interests in that area existed, as did a large element of instability. Yet no mention was made either in the Committee Reports or on the floor of Congress as to why these fleeing from the "Middle East" should be specially favored. Rep. Feighan, the Chairman of the House Subcommittee on Immigration and Naturalization, indicated that the statutory language was drafted to provide slots for "refugees who are victims of Communist or other totalitarian persecution."[56] Recent events in Southern and Central Africa and Indonesian, to name but a few locations not falling within the definition, provided strong examples of "other totalitarian persecution." Yet the definition of "refugee" in effect adopted in the "seventh preference" excluded such areas and included the "Middle East" only because special refugee legislation passed in 1957[57] had so defined the term "refugee-escapee."[58] Commenting on that term in the House Debate on the 1957 act, Rep. Feighan indicated that the bill before the House:

> . . . bring[s] forth an absolutely new concept of a definition of a so-called refugee-escapee. It has never been determined what such a person is or who specifically would qualify under this term. Yet under this entirely new and undefined term there is permission for approximately 14,000 people who are so-called escapee-refugees, whatever that may mean, to come into this country. They will come from the general area of the Middle East. That area is far greater than that encompassed by the Eisenhower doctrine. There were never any hearings whatever on this new definition. We heard no testimony from the Eisenhowever administration whether the President understands what this new definition means, whether it is consistent with our national policy in that critical area of the world and whether it is acceptable.
>
> The fact is, the countries and areas from which these people will come include, among others, Libya, Egypt, Turkey, Iran, Iraq, Syria Jordan, Saudi Arabia, Israel, Afghanistan, Pakistan, Ethiopia, Eritrea, Somaliland, Anglo-Egyptian Sudan, Cyprus, Lebanon, and Yemen.
>
> We have had no hearings whatever with reference to the provisions of this bill.[58a]

A number of Rep. Feighan's colleagues indicated that they shared his reservations about the bill, but indicated their willingness to accept a "quarter-loaf measure."[59] That same "quarter-loaf measure" reappeared in the 1965 Act without any discussion, as did Section 15(c)(1)(A) of the 1957 act, which became the "Communist" clause of the "seventh preference." It was not in the interests of a politically-motivated compromise to break new definitional ground in 1965.

Given the unwillingness of Congress in 1965 to adopt a "worldwide" refugee definition and admission preference, its specific inclusion of those fleeing persecution from "Communist

or Communist-dominated areas" was inevitable. Two factors combined to dictate this result, one relating to the actual source of many of the world's refugees since the end of World War II, the other to the characteristic response of the United States to Communist regimes during the entire "Cold War" period. By 1965, both of these factors had already coalesced, accounting for much of the special legislation and most of the parole decisions made since the passage of the Displaced Persons Act of 1948.

The Displaced Persons Act was specifically designed to aid those in Austria, Germany, or Italy at the end of World War II who were outside of their country of origin, and were unable or unwilling to return there because of fear of political or religious persecution.[60] Although those fleeing Nazism and Fascism were technically admissible under the Act, "the majority of the [covered] displaced persons were from areas which, subsequent to the armistice, had become Communist dominated[61] President Truman, addressing Congress on July 7, 1947 in support of a displaced persons act, emphasized that it should be an exception to ordinary immigration law, drafted to aid individuals who had opposed Communism.[62]

In addition to the 400,000 D.P.'s admitted under the 1948 act and its two statutory extensions,[63] a special Refugee Relief Act was passed in 1953[64] which permitted the issuance of 214,000 non-quota visas "to refugees, escapees, expellees, parolees, and orphans."[65] The majority of those admitted under the act were "escapees" and "expellees," i.e., those who had fled the U.S.S.R., "or other Communist, Communist-dominated, or Communist-occupied

area of Europe" because of "persecution or fear of persecution,"[66] or had been "forcibly removed from or forced to flee from Albania, Bulgaria, Czechoslovakia, Estoria, Hungary, Latvia, Lithuania, Poland, Romania, Union of Soviet Socialist Republics, [and] Yugoslavia."[67] A significant minority of slots were reserved to "refugees" who were either former Polish soldiers residing in Great Britain or Italians who fled from Italian-speaking provinces amalgamated to Yugoslavia at the end of World War II.[68] "Refugee" as defined by the act made the usual reference to "fear of persecution," but added the additional grounds of displacement by reason of "natural calamity or military operations."[69] Another act already alluded[70] to provided for the abolition of D.P. quota mortgages and the admission of several thousand additional "refugee-escapees," defining that term, as has been noted, in a manner which directly foreshadowed the language of the "seventh preference." Despite the reference to the "Middle East" in that act, however, its major thrust was clear: more refugee numbers were needed to protect aliens from "Communist enslavement,"[71] and to aid them in the "striking [of] telling sledgehammer blows against the chains of their Russian dictators who dominate and occupy their native land."[72]

All of the special refugee legislation from 1948 through 1957 -- the year that Presidential parole became the major vehicle for refugee admissions -- thus was in large part a conscious response to the perceived menace of communism, as well as to the very real plight of the thousands of people who fled from Eastern Europe in the 40's, and from China in the 50's.[73] The 1965 act

to a lesser degree reflected similar political concerns, and was at least in part motivated by a desire to provide a legal framework for flight from Castro's Cuba.

As the case studies which follow show, similar concerns contributed in large part to the major parole decisions which permitted thousands of Hungarians and hundreds of thousands of Indo-Chinese and additional Cubans to enter the United States, and to the subsequent legislative decisions to grant them permanent residence status. The Center believes that these decisions were not strictly political, but always reflected a genuine humanitarian concern for individuals, many of whom had in fact been persecuted, or had a genuine and well-founded fear of persecution should they return to their country of origin. Communist regimes have never been noted for their tolerance of political dissent, and have frequently persecuted religious believers. Persecution of certain segments of the old regime was endemic in the newly-socialized countries of Eastern Europe after the war, and frequently affected those who were in no sense Fascists or human rights violaters. Similar persecution occurred in China. To combat worker discontent and national independence movements, the U.S.S.R. used military force in East Germany, Poland, Hungary, and Czechoslovakia. The Vietnamese have persecuted the Chinese in their country on ethnic grounds, and in Laos have joined the Pathet Lao in an extermination campaign against the Hmong Hill people. The former government of Kampuchea (Cambodia) -- the Pol Pot regime -- violated the basic human rights of a large portion of its citizenry and subjected many Kampucheans to exceptionally brutal persecution. In all of

these instances, a programmatic grant of refugee status to many of those who faced persecution was clearly commendable.

Yet the intermixture of political with humanitarian concerns which characterized United States refugee policy from 1948 through 1965 -- and which, as the final segment of this chapter and the later case studies on Chile, South Korea, Haiti, and Iran show, continues to affect refugee policy to the present day -- had a negative as well as a positive side. Negative effects of such a policy included a willingness to accept uncritically the assertion of any migrant from Communist-dominated parts of the world that he or she was a "refugee," despite lack of genuine confirmatory evidence. The most obvious instances of such purely political behavior have involved Russian ballet dancers, and more recently, a young Ukranian boy in Chicago. Yet genuine questions exist as to whether all of those admitted as "refugees" from Eastern Europe and the U.S.S.R. in recent years have in fact faced "persecution" or had a genuine fear of it. Such questions would not be particularly relevant if the United States had a virtually "open door" immigration policy. However, since it does not, admission of those who meet no refugee definition as "refugees" puts such admittees at an unjustifiable advantage over those required to wait long periods of time on the priority lists established for ordinary immigrants.[74] More importantly, since over-all refugee admissions, although to a degree flexible under both former practices[75] and new law,[76] are themselves limited by wide-ranging political considerations. In any given year, only a restricted number of refugees will be admitted to the United States.

The Center believes that the willingness to grant refugee status to those leaving Communist countries without regard to the actual persecution they are likely to face has the potential, if it continues, to effectively deprive individuals and groups clearly subject to persecution of any chance to enter or remain in the United States.

This belief -- or fear -- is augmented in significant measure by a second negative aspect of the politically-motivated refugee policy so characteristic of the 1950's and '60's, and clearly still in evidence in the 1970's. That aspect was essentially exclusionary rather than humanitarian, and elevated concepts of national security and international solidarity in response to a perceived world-Communist menance above concerns for individuals clearly subject to persecution at the hands of member states of the Western alliance, or at the hands of those who might be persuaded to join that alliance. It also discriminated against those subject to persecution from Communist-dominated countries who had too overtly identified with the new regime, even though no evidence existed that they had personally participated in the persecution of others.

Barriers to the immigration of "anarchists, or persons who believe in, or advocate, the overthrow by force or violence of the Government of the United States, or of all government, or of all forms of law, or the assasination of public officials" had first been introduced into United States law by the Act of March 3, 1903.[77] Such a provision was due to the assasination of President McKinley by a professed anarchist immigrant 18 months earlier.[78] Subversive

activity grounds for exclusion have remained a part of immigration law since that time. In 1950, however, such grounds were expanded and reinterpreted. The Internal Security Act of 1950[79] reflected strong popular sentiment that national security was threatened by the activities of communists working under "foreign direction" and "dedicated to subverting the interests of the United States to a foreign dictatorship."[80] Such sentiment was grounded in concern over recent events in Eastern Europe and China, the Rosenberg case, and allegations of subversion by Russian agents of the State Department. It was widely shared,[81] even by some of the few members of the House and Senate opposed the 1950 act,[82] generally on the grounds that if infringed on the due process rights of American citizens.[83] Hundreds of pages of debate were devoted to these due process questions, particularly as they related to the detention and registration provisions of the act. Relatively little attention was paid to the act's provisions excluding Communists.

Yet those provisions were extensive. Explaining them, the Conference Report indicated that they covered six broad categories of alien entrants, ranging from those actively "advocating or teaching the overthrow of the Government of the United States by force, violence, or other unconstitutional means," to those who might be deemed "likely to engage in espionage, sabotage, public disorder, or other subversive activity," to those "who advocate the doctrines of world communism or any other form of totalitarianism or are members of or affiliated with any organizations that advocate such doctrines."[84] "Organizations" falling within these exclusionary

clauses included those identified as "subversive" and subjected to registration requirements under Section 7 of Title I of the act.[85] The net effect of these provisions was to require exclusion of any alien who was a Communist or was deemed to be overtly sympathetic with the aims or views of the Party, even though such an alien could demonstrate a "well-founded fear of persecution."

The Immigration and Nationality Act of 1952 adopted the Communist exclusionary language of the 1950 act with but two major exceptions -- under the INA, a former member of a Communist or related subversive organization was permitted an immigrant visa, provided that its issuance was "in the public interest;" that his membership or affiliation had not existed for five years; and that during that period, he had "been actively opposed" to his former organization and its teachings.[86] Alternatively, he was permitted such a visa if his membership had terminated prior to his sixteenth birthday, or had been motivated solely and necessarily "for purposes of obtaining employment, food rations, or other essentials of living."[87] No other relaxation of communist exclusionary provisions occurred prior to 1968.[87a]

Nor was such relaxation generally advocated. Pending approval of the Refugee Relief Act of 1953, its floor manager, Senator Watkins, indicated that he "would oppose any amendment which would weaken in any way the security provisions contained in the bill."[88] He indicated that such provisions were necessary to allay the fears:

> . . . that many who will come into the United States under this program will be Communist agents with subversive intent who will seek to undermine and destroy our institutions and government. It has even been said that as many as 150,000 of those who will be brought to our shores under this legislation will be subversives.[89]

Senator McCarran indicated his disapproval of the act, stating:

> It was dangerous to the security of the United States, because it contained no adequate provisions for screening aliens who would be admitted as immigrants; and its provisions were so broad that they even included persons still behind the Iron Curtain. [emphasis added][90]

Speaking in support of the Act of September 11, 1957, which admitted additional "refugee-escapees" [defined above] and abolished the mortgage quotas of the Displaced Persons Act of 1948, Rep. Celler asserted:

> There is no change at all -- none whatsover I want to assure the members -- in the screening process provided by the Immigration and Nationality Act of 1952.[91]

Rep. Chelf supported the bill, but also supported its limited applicability to Hungarian parolees, indicating that it was necessary to check each applicant's "past political activities" before granting them permanent residence status.[92] Rep. Feighan emphasized the necessity of questionning "the political reliability" of possible admittees from "Red China . . . when the Red Chinese authorities . . . detain hundreds of United States military and civilians against their will and imprison many of them in filthy Communist jails."[93]

The legislative history of the 1965 act is devoid of statements relating refugee policy to national security concerns. In part, that may be due to the more liberal attitude of the time: despite military conflict in Vietnam and fears of a Communist take-over in the Dominican Republic, the Cold War had thawed somewhat, and anti-Communist fervor was not at the same peak it had reached during the early '50's or in the immediate aftermath of the Hungarian Revolution. Yet it must be emphasized that the 1965 act made no substantial change in refugee law, other than the grant of 10,200 annual admission slots under the "seventh preference." The implicit refugee definition in the "seventh preference" was identical with that adopted for "refugee-escapee" in 1957.

A fear of admitting Communists or subversives thus played a significant role in defining United States refugee policy during the Cold War era. What must be emphasized is that this fear extended to individuals with Marxist views from non-Communist parts of the world, and affected American attitudes toward dissidents or those who supported leftist government in areas of the world perceived as part of the "western alliance" or part of the United States' "sphere of influence." The Center has documented this point extensively in the case studies that follow. It has not, however, had the opportunity to research as thoroughly as it would like the tendency still prevalent in the middle '60's -- and clearly still influential in the Department of State today -- of identifying all opponents of right-wing military rule as subversives who for that reason should not be admitted to the

United States as refugees.[94] It should underline that point, however, to note that interspersed with consideration of the 1965 ammendments to the INA are frequent passages in the Congressional Record devoted to the situation prevailing in the Dominican Republic at the time, a situation in which the United States sent in troops to avoid a "Communist take-over" of the country.[95] Although several hundred thousand Cubans were admitted as "seventh preference" refugees or paroled into the United States in the middle and late '60's, no effort was made during that period to extend extensive refuge to the opponents of Trujillo, Somoza, or Duvalier.

3. Refugee Policy, 1967-1980: Survival of Ideological Concerns in a More Humanitarian Era.

The case studies which follow are divided into two categories, one of which deals with United States refugee policy toward those seeking admission from Communist-dominated countries, the other of which deals with similar applicants from countries not Communist-dominated. Much of the information in the first set of studies deals with events that occurred before 1967. Most of the information in the second set relates to fairly recent events, and analyzes refugee policy in the light of post-1967 law. The First Final Report submitted to the Select Commission and the chapters of this report outlining current refugee and asylum procedures and proposing changes also focus on recent events and recent law, with special emphasis on the Refugee Act of 1980. Therefore, only a short summary will be provided here of recent

legal and policy developments, and the events that prompted them. However, four major points will be stressed: the United States has evolved a new statutory definition of "refugee" not limited by specific ideological or legal concerns; it has through statute and treaty obligated itself not to expel most refugees who meet this definition if they reach the United States; it has had to process an unprecedented number of claims from individuals who have in fact reached the United States and are colorable refugees (called "asylees" under INA § 208, as promulgated by the Refugee Act of 1980); and both in the processing of these applicants and the decisions to accept refugees making application from third-countries, political factors have continued to play a major role.

A. Depoliticization of United States Refugee Law. In 1951, the United Nations adopted a general definition of "refugee," applicable to those subject to persecution before January 1, 1951 in either Europe[96] -- or, at a contracting state's option," in Europe or elsewhere."[97] The definition encompassed all who

> . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[98]

It also adopted a general prohibition against "expell[ing] or return[ing] a refugee in whatever 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."[98a] For any person threatened with expulsion, it guaranteed due process protection.[98b]

Under these United Nations provisions, no nation was obliged to permit any alien to enter its territory, although the promulgation of a definition clearly was meant to encourage refugee admissions. But once a refugee did in fact enter the territory of a Contracting State, he or she was afforded substantial protection. The United States, however, never acceded to the Convention establishing these provisions. Until 1980, the only provisions of American law regulating ordinary out-of-country refugee admissions were those already discussed -- most notably the "seventh preference" of INA § 203(a)(7), and the admission of refugees under INA § 212(d)(5), permitting the Attorney General to "parole in" aliens on a nominally temporary basis. Parole was not legally restricted to those meeting the ideological and geographical restrictions imposed by the "seventh preference;" yet prior to 1972 it was seldom -- if ever -- granted to refugee groups except those fleeing Communist persecution. Until 1980, the only provision of domestic law governing the expulsion of refugees already within United States territory was INA § 243(h), which authorized the Attorney General, <u>at his discretion</u>, to withhold the <u>deportation</u> (not exclusion) of those who would be subject to what was originally called "physical persecution,"[99] and was later called "persecution on account of race, religion, or political opinion."[100] In 1967, however, the United Nations promulgated a Protocol which reasserted the substantive provisions

of the 1951 Convention.[101] The United States acceded to this Protocol in 1968,[102] and thus assumed an obligation by treaty to afford due process to, and not to expel, most refugees within the United States. The conflict between the apparently broader protection afforded such refugees under the treaty and that afforded by INA § 243(h) was litigated on a number of occasions. The view of the Board of Immigration Appeals has consistently been that Article 33 of the 1951 Convention in no sense broadened either the class of parties eligible to seek withholding of deportation (which traditionally did not include those subject to "exclusion" rather than "deportation"), or the rights of those seeking withholding with respect to burden of proof or the decision-making procedures employed.[103] The lower court panels in the federal system have split on this question,[104] and it has never been definitively resolved by the Supreme Court of the United States.[105]

The relationship between INA § 243(h) and Article 33 of the 1951 Convention has become something of moot point since the passage of the Refugee Act of 1980. That act promulgated a statutory right of asylum for those within the United States which appears in all material respects to conform with the right granted by Article 33. Statutorily-mandated regulations implementing this right of asylum have recently been implemented. Under asylum regulations in effect from 1974 through 1978,[106] however, that relationship was crucial, since such regulations arguably did not cover everybody covered under Article 33, arguably did not afford those so covered all of the due process rights covered by Article 32, and clearly permitted the District Director discretionary authority to withhold asylum not contemplated in Article 33.

In addition to granting a more certain and more extensive right of asylum to those within the United States, the Refugee Act of 1980 also abolished the "seventh preference,"[107] substituted a general definition of refugee modelled on the 1951 U.N. definition[108] (but in accord with the 1967 Protocol, with no geographical or temporal limitations), and took the entire refugee admission process out from under the over-all numerical limitations on ordinary immigration.[109] The Refugee Act also continued a slow trend away from the broad exclusion of Communists and Communist-sympathizers mandated by the Internal Security Act of 1950. That trend was promoted by a 1978 law abolishing the registration of subversive organizations requirement.[110] It was carried a step further in the Refugee Act by the new provisions of INA § 207(c)(3). Under that subsection, most grounds for exclusion under INA § 212(a)(28) -- the Communist and subversive section -- are now waivable by the Attorney General if the applicant is a refugee.

B. Persistence of Ideological Concerns in Current Practice. Developments in the law are not always matched by immediate developments in practice. Nothing in the new Refugee Act requires the President to ignore political factors in making allocations under which Refugees seeking admission from third countries will be admitted to the United States. Nor, as is indicated later in this report,[111] does the Center believe that such political factors should be entirely ignored when admitting refugees not yet in the United States. As has been noted, however,

a valid concern does arise when the grounds for decision-making with respect to such applicants become so heavily political that specious or marginal refugees are admitted at the expense of those facing more probable and more severe persecution.

In the case studies which follow, the Center will show that the great majority of those admitted to the United States as out-of-country refugees over the past fifteen years have been Indo-chinese, Cubans, and Soviet Jews. It will show that the priority given members of these groups reflects a continuation of those policies coined by Congress during the Cold War era already discussed, but now carried forward largely under Department of State direction. In detailing the use of the "seventh preference," of parole and subsequent adjustment of status, and of INA § 207 procedures as the means of admitting these refugees, the Center will not (except in the case of recent Cuban arrivals) say that these techniques were misused, although it will express reservations about their applicability to Soviet Jews who appear to have been "firmly resettled" in Israel prior to seeking admission to the United States. The Center believes that whatever the political motivation, humanitarian considerations did play a role in these admissions procedures, and that those humanitarian considerations were compelling with respect to the refugees from Indochina. However, by contrasting these positive admission choices with the lack of an out-of-country refugee admissions policy for aliens in other countries, particularly Chile and South Korea, the Center will suggest that the persistence of Cold War criteria -- when they have the effect of shutting doors on individuals threatened

with severe and almost certain persecution, and when such exclusion is justified solely on ideological grounds -- should give rise to grave concern.

However, as the case studies and First Final Report make clear, a growing number of refugee applications in recent years have come not from those seeking admission from third-countries, but from those who have already reached the United States, and are seeking "withholding of deportation" or what the Refugee Act of 1980 characterizes as "asylee" status. The practical difficulties of processing large numbers of claims lodged by such applicants are discussed below in chapters on "Present Asylum Procedures" and a "Proposed Asylum Board." Yet as the case studies show -- and particularly as the case studies evaluating the reception of Haitian, Iranian, and South Korean applicants show -- additional problems are created by a long-standing unwillingness on the part of the Department of State to divorce political considerations from the "advice" they give INS when evaluating asylum or withholding of deportation applications. Such political considerations have traditionally reflected the pre-1968 left-right political dichotomy noted above, whereby those fleeing Communism are specially favored, and those fleeing right-wing regimes are regarded with extreme suspicion and saddled with a burden of proof respecting their "fear of persecution" which is often in practical terms impossible to meet. The Center believes that the changes wrought by the United States' accession to the 1967 Protocol ought to have led to a substantial reevaluation of the asylum criteria administratively employed long before the passage

of the Refugee Act of 1980. Such a reevaluation properly would have questionned the breadth of the Attorney General's discretion not to grant asylum or not to withhold deportation in situations where an applicant clearly met the Article 33 definition. It would also have questionned whether there was any warrant for requiring those fleeing right-wing regimes to show more about the persecution they feared than their anti-Communist counterparts. The lack of such a reevaluation between 1967 and 1980, coupled with extensive recent interviewing and some first-hand observation of post-Refugee Act of 1980 asylum processing, leads the Center to believe that the statutory changes wrought by that recent act may not be fully effective in eliminating ideology as a basis for asylum decisions. In the Center's view, the persistence of such ideologically-motivated decision-making is highly probable, given the perhaps-inevitable political ambience of the Department of State and the persistence of Cold War concerns there. Whether or not such concerns are well-founded is, in the Center's view, irrelevant; what is relevant is that their persistence not deform or subvert the proper implementation of the Refugee Act of 1980, which is designed in part to prohibit the refoulement of any individual having a "well-founded fear of persecution."