

# COMPASSION VERSUS SELF-INTEREST: WHO SHOULD BE GIVEN ASYLUM IN THE UNITED STATES?

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*One of the consequences of being a society that considers itself a global ideal of freedom and prosperity is the powerful attraction this ideal holds for millions of nationals of other countries that suffer from widespread injustice and poverty. For the United States the result has been unprecedented pressure on and questioning of its immigration policies generally, highlighted by thousands of evocative pleas for political asylum. Facing a dilemma of conscience and self-interest, United States officials have tried to fashion a policy that accommodates both concerns. W. Scott Burke, an official who has helped formulate such policies in the Reagan Administration, explains the difficulty of this problem and defends the government's solution in this thought-provoking article.*

Who shall be permitted to enter and to live in the United States poses a classic American dilemma. On the one hand, there is sympathy among Americans for would-be immigrants. Americans are generous and want to help those who are poor and politically oppressed. On the other hand, the desire to help the world's poor and oppressed clashes with the belief of most Americans that substantial immigration is undesirable and economically threatening to their interests.<sup>1</sup> Opposition to immigration is

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1. Similar NBC and Gallup polls show that opposition to immigration is high and has increased since the nineteen-sixties. In 1965, 33 percent favored decreased immigration. In 1977 42 percent did so, and in 1981, 65 percent.

According to a March 1981 *Los Angeles Times* poll, a sizeable majority believes "illegal aliens take more from the United States economy through social services and unemployment than they contribute to the United States economy through taxes and productivity (62 percent to 18 percent). The belief that illegal aliens hinder the economy was highest among the poor. Forty-seven percent of those whose incomes were less than \$10,000 believed that illegal aliens take jobs away from Americans, while only 29 percent of those with incomes over \$30,000 believed this to be true.

A Roper poll in March 1982 showed that most Americans favor a decrease in immigration to the United States. Sixty-six percent favored a decrease, 23 percent favored the present level

especially strong among the poor, blacks, and even among those who share the ethnic background of most illegal aliens, American Hispanics.

Many of us would like to help the untold tens of millions of people from every corner of the world who desire American prosperity and freedom and who dream of immigrating to this country. Unfortunately, the United States is no longer a frontier in need of more people, but a developed nation with serious economic problems, high unemployment and limited resources necessary for further development.<sup>2</sup> Congress has attempted to reconcile these conflicting desires through reform of American immigration law, most recently in the Simpson-Mazzoli bill, which has been pending since 1981.

### REFUGEES AND ASYLEES

Refugees, those fleeing persecution in their homeland, are the potential immigrants who evoke the most sympathy from Americans.<sup>3</sup> Refugees are of two kinds: those living abroad and those already present in America. The former may be admitted to the United States by the Immigration and Naturalization Service (INS) under a complex procedure established under the Refugee Act of 1980.<sup>4</sup> The number admitted is determined in annual high-level consultations between the Executive Branch and the judiciary committees of the House and Senate.<sup>5</sup> The other kind of potential

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and 4 percent favored an increase. In 1982, the Federation for American Immigration Reform (FAIR) commissioned a poll of blacks and Hispanics on immigration issues. Substantial majorities of blacks, (66 percent) Hispanic citizens (66 percent) and all Hispanics (60 percent) favor penalties and fines for employers who hire illegal aliens. They favor increased funding for the Border Patrol (blacks: 69 percent; Hispanic citizens: 63 percent; all Hispanics: 61 percent), and tougher restrictions on illegal immigration (blacks: 71 percent; Hispanic citizens: 64 percent; all Hispanics: 57 percent). They also believe that illegal aliens take jobs Americans might take (blacks: 82 percent; Hispanic citizens: 66 percent; all Hispanics: 58 percent). Reported in *Immigration Report*, FAIR, Vol. IV, No. 11, August 1983, 1, 2-3.

2. A recent study by Dr. Donald L. Huddle, professor of economics, Rice University, supports concerns that illegal immigration is costly to the United States economy and harms the poor and minorities most. The study indicates that "for every 100 illegal aliens working in the United States, 65 United States workers lose their jobs." He estimates that 55 million illegal aliens are working in the United States, displacing 3.5 million Americans. Of those displaced, 72 percent were covered by unemployment insurance, the yearly cost of which is \$18 billion. Another \$7 billion is spent in social welfare payments to those not receiving unemployment, plus the cost of food stamps and lost tax revenue. "Amnesty Plan for Illegal Aliens Seen as Costly," *The New York Times*, 4 January 1983, p. A20.
3. To be a refugee or asylee in America confers substantial benefits. Any refugee physically present in the United States for one year receives permanent residence, the penultimate step to citizenship, regardless of developments in their home country. There is no numerical ceiling on refugees awarded permanent residence. Asylees receive this adjustment of status at the rate of 5,000 per year. (Such persons are also entitled to public assistance.) 8 U.S.C. 1159(b) (1980).
4. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (Codified as 8 U.S.C. Sec. 1157-1159 (1980)).
5. 8 U.S.C. Sec. 1157(a)(1)-(2), (d), (e) (1980).

refugee is someone already present in America who applies for asylum. Controversy arises principally over the latter group.

The Refugee Act of 1980 substantially altered United States law on refugees.<sup>6</sup> It establishes two classes — “refugees” and “asylees.” It defines refugees and asylees the same way, and establishes a threshold test to determine who is eligible to be granted asylum here:

(1) Any person who is outside any country of such person’s nationality or, in the case of a person having no nationality is outside any country in which such person last habitually resided, and who 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*, or

(2) In such circumstances as the President after appropriate consultation . . . may specify, any person who is within the country of such person’s nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is *persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion* (emphasis added).<sup>7</sup>

This language means that applicants must show that they have been persecuted or that there is a reasonable likelihood that they will be singled out for persecution in their homeland for the stipulated reasons. If this language were interpreted broadly, virtually anyone from the Third World could qualify as an asylee or refugee. Prior to the passage of the Refugee Act of 1980, only persons from communist or Middle Eastern countries were defined as “refugees.”<sup>8</sup> Under the current standard, every applicant must have some grounds for the fear that he or she will be singled out

6. Extended discussion of the Refugee Act of 1980 is beyond the scope of this article. See David A. Martin, “The Refugee Act of 1980: Its Past and Future,” reprinted from *Transnational Legal Problems of Refugees, 1982 Michigan Yearbook of International Legal Studies*, pp. 91-123; Deborah E. Anker and Michael H. Posner, “The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,” *San Diego Law Review* 19 (1981).

7. 8 U.S.C. Sec. 1101(a)(42) (1976 & Supp. IV 1980).

8. This definition was set forth in the Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639 (1957), 8 U.S.C. 1153 (1979). Before 1970, the Department of State played no formal role in the asylum decision-making process. President Nixon, however, issued a directive providing that the Department of State should offer the INS its views on doubtful asylum requests. It was thought that the Department could help assure that conditions within the country from which asylum was sought would be taken fully into account. The Department of State and the INS agreed that State would review and give its views on all domestic asylum applications which the INS found to be of doubtful merit. They also agreed that the Department would have the opportunity to review, and comment if it so desired, on applications which the INS rejected as clearly without merit. This referral procedure was formalized in the Code of Federal Regulations (CFR) and spelled out in INS Operating Instructions which cited the responsible action office in the Department of State as the Office of Refugee, and Migration Affairs in the Bureau of Human Rights and Humanitarian Affairs.

for persecution. It is not sufficient for applicants to assert that they do not want to return to their homeland because it is communist, at war, or suffers from random violence or extreme economic deprivation. If it were, tens or hundreds of millions of people could qualify. Congress never intended to permit this. If individual grounds were not required, anyone could become an asylee and stay here indefinitely simply by applying.

No one has the right to be granted asylum, under either the Refugee Act of 1980, or the United Nations treaties relating to refugees.<sup>9</sup> Some commentators and courts have argued to the contrary.<sup>10</sup> But as one United Nations High Commission on Refugees (UNHCR) officer recently wrote, "[w]ith few exceptions, states grant asylum solely in the exercise of their sovereignty."<sup>11</sup> On the other hand, although no one has a right to asylum in this country, the United States has pledged not to deport refugees to countries where they would be endangered (*refoulement*).<sup>12</sup> This provision does not, however, resolve the controversy surrounding refugee status, nor does it prohibit deportation of illegal aliens who are not refugees.

The federal regulations promulgated under the Refugee Act of 1980 define current asylum procedures.<sup>13</sup> The INS decides who receives asylum in the United States. Applications are filed with the INS, setting forth information about the would-be refugee. INS officers interview applicants. The INS sends the applications to the Office of Asylum Affairs of the Bureau of Human Rights and Humanitarian Affairs of the Department of State (HA). HA evaluates the applications, relying heavily on the United Nations Handbook on Refugees<sup>14</sup> and on knowledge of events in the applicant's homeland. HA consults the geographic bureau of the State Department concerned with the applicant's country. A United States

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9. The 1951 Convention Relating to the Status of Refugees, done at Geneva, Switzerland, 28 July 1951, 189 N.T.S. 150, (never adopted by the United States) (hereinafter cited as the Refugee Convention); and the 1968 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577 (ratified by the United States in 1968).

10. See, e.g., Note, "The Right of Asylum Under United States Law," *Columbia Law Review* 80 (1980): 1125.

11. Joachim Henkel, "International Protection of Refugees," in Lydio F. Tomasi, ed., *In Defense of the Alien*, Vol. V, "Refugee and Territorial Asylum, Proceedings of the 1982 Legal Conference on Refugees and International Asylum, 25 & 26 March 1982," (Center for Migration Studies, 1983), p. 55.

12. Refugee Protocol, article 33(1) provides: "No contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers or 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." See Scott M. Martin, "Non-Refoulement of Refugees: United States Compliance with International Obligations," *Harvard International Law Journal* 23 (1983): 357.

13. 8 CFR Parts 207, 208, 209, and 245, "Aliens and Nationality; Refugee and Asylum Procedures."

14. *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Geneva: United Nations High Commissioner for Refugees, September 1974).

Embassy abroad may be consulted (and is always directed to keep the application confidential) when it is necessary to seek special information or to verify an applicant's assertions. American embassies are directed to keep these inquiries confidential and not to reveal that any foreign national has applied for asylum. HA sometimes requests more information from the INS. The Department of State finally sends an advisory opinion to the INS, recommending for or against a grant of asylum. The INS usually follows the Department of State's advice. This is because there is little question about the merits of the vast majority of applications, which either make a clear case for asylum, or more likely, make no case. Moreover, INS respects the special knowledge of the Department of State of events in foreign countries. Nevertheless the final decision belongs to the INS, which sometimes contradicts the Department of State's recommendations.

The number of asylum applications has increased enormously since the passage of the Refugee Act of 1980. In 1978, there were 3,700 applications for asylum filed with the United States. There are now nearly 170,000 pending from nationals of over 100 countries.<sup>15</sup> The numbers filed have continued to accelerate over the past three years. The United States now receives them at the rate of 1,500-3,000 per month.

Any alien, legal or illegal, present in the United States can apply for asylum. There is no penalty for filing a frivolous or abusive asylum application. Indeed, applications from illegal aliens are actually rewarded by a stay of two to five years in the United States.<sup>16</sup> Virtually anyone can create for himself *de facto* refugee status and admission to the United States simply by filing a claim.

#### THE ABUSE OF ASYLUM

Refugees and asylees are difficult to deal with because there are so many of them (at least 10 million at present),<sup>17</sup> because some of them will enter the United States by whatever means available, and because those who come from poor, oppressed countries can and do seek refugee status even though they do not fear persecution. Refugees and all others who want to enter the United States can do so legally, as *bona fide* immigrants or

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15. The INS and the Department of State have upgraded personnel dealing with asylum and have increased resources to resolve these applications. The State Department had a backlog of about 13,000 cases in mid-1982. This was eliminated by August 1983. The INS has doubled its output of cases.

16. In fiscal year 1983, asylum applications were pending from nationals of 109 countries, including France, West Germany, Netherlands, Sweden, Switzerland, and the United Kingdom, countries which few would allege engage in political persecution.

17. Ford Foundation, *Refugees and Migrants: Problems and Program Responses*, (Ford Foundation, August 1983), p. 7.

refugees; or illegally, by crossing our borders surreptitiously or by overstaying legally obtained non-immigrant visas. The number of refugees in the world will probably increase due to new wars, insurgencies and waves of oppression. Therefore, more *bona fide* refugees will probably desire entry to the United States. They will compete for entry with those who seek economic opportunity and freedom, but do not face persecution.

Many asylum applicants came to the United States after passing through other countries where they could have received sanctuary. Salvadorans, for instance, can and do obtain sanctuary in Mexico, Honduras or Nicaragua. Many apply for asylum in the United States only after their apprehension by the INS, years after they arrived here illegally and obtained employment. Many come from very poor, over-populated countries whose governments view emigration to America as a means to alleviate economic pressures. It is no coincidence that Háiti and El Salvador are among the most densely populated and poorest countries in the Western Hemisphere.<sup>18</sup> Indeed, recent newspaper interviews with illegal Salvadoran aliens indicate that they came here for economic reasons, not to avoid persecution.<sup>19</sup> Advocates for asylum applicants rarely mention these basic facts of how their clients came here, where they came from, and how they happened to apply for asylum.

This is not to say that anyone who comes to the United States, partly on economic grounds, and applies for asylum should be rejected. Many *bona fide* refugees would choose to come to this country because of its prosperity. Thus the distinction between an economic migrant and a refugee is not always easy. Cases on the extreme are common: on the one hand, those who have never been persecuted, who never were politically active and who left their homeland solely for economic reasons; and on the other hand, those who have suffered maltreatment and are likely to be persecuted if they returned to their homeland.

18. Haiti is the poorest country in the Western Hemisphere, with an average per capita annual income of \$250 in the city and less than \$100 in rural areas. Its area is about the same as Maryland, and it has a population of approximately 6 million. Its population density of 536 per square mile is among the highest in the world. El Salvador, about the size of Massachusetts and Connecticut combined, is the smallest and most densely populated country in Central America, with an average per capita annual income of about \$700. Nina K. Solarz, "Haiti and El Salvador Pose Large Questions," in *World Refugee Survey 1982* (U.S. Committee for Refugees, 1982), pp. 20, 30.

19. Robert Lindsey, "A Flood of Refugees from Salvador Tries to Get Legal Status," *The New York Times*, 4 July 1983, pp. 1, 8. According to this article, interviews with Salvadorans in Los Angeles and Washington "tended to support the Administration's belief that economic considerations were a major factor in propelling them to this country." *Ibid.* p. 8. One Salvadoran illegal alien stated, "In El Salvador there is no work." Another said, "We were looking for opportunity." *Ibid.* A lawyer for Salvadoran asylum applicants stated, "recently, it's just people fleeing the battles, not politically oriented people. I think most of the people who were in danger got out earlier, and we're getting the general population of the country." *Ibid.*

But a significant number fall between the two extremes. Unless all such cases are to be accepted or rejected, which would be manifestly unfair, a dividing line must be established between those entitled to asylum and those not. To receive asylum, an applicant should demonstrate some level of personal risk. If this "threshold of risk" is too low, it would "authorize the relocation of the entire population" of repressive countries.<sup>20</sup> In order to prevent abuse of asylum, the threshold must be maintained at a reasonable level. Applicants must show not only that there is persecution in their homelands, "but also some reason why that government is likely to single the applicant out for such treatment."<sup>21</sup>

The abuse by illegal aliens and their attorneys of the United States asylum system is widely recognized. Lawyers and public officials sometimes even urge aliens to file frivolous asylum claims. One Congressman recently advised an alien whose temporary visa was about to expire to apply for asylum in order to stay in the United States. "It is not important that your application would meet the criteria" for asylum, the lawmaker wrote. "It is important, however, that processing of such an application is time-consuming and serves the purpose of delaying any further action by the Immigration and Naturalization Service to insist on your departure from the United States."<sup>22</sup>

America's asylum laws are also abused even by hostile foreign governments. The communist government of Cuba was directly responsible for the "Mariel boatlift" of 1980, the most serious breach of United States immigration law in recent times. The American government was incapable of preventing this influx of over 100,000 people, including thousands of criminals and mental patients, some extremely dangerous.

Despite the incontrovertible fact that our asylum laws are being flouted, some Americans react with frustration or anger when their government denies the asylum requests of certain nationalities. Such reactions are not confined to one end of the political spectrum. Conservatives frequently resent denials of those from communist countries, and liberals often oppose rejection of applicants from countries ruled by right-wing regimes. This can be explained by three factors. First, sympathy for those who come from a poor, oppressed country is heightened when an applicant is physically present in the United States, publicly seeking help and alleging fear of returning to his homeland. Second, some Americans oppose deportation

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20. Subcommittee on Immigration, Refugees, and International Law of the House Committee on Judiciary, 7 June 1983, (testimony of Professor David A. Martin, University of Virginia School of Law).

21. *Ibid.*, p. 6.

22. Stephen Engelberg, "Aliens Seek Asylum to Delay Deportation," *Dallas Morning News*, 20 February 1983, p. 1A.

of those who share their ethnic background, whether or not their asylum applications are meritorious. Third, Americans often oppose deportation when they dislike the government of an applicant's country or oppose American policy towards it. Such opposition is a means of condemning the foreign government or opposing the Administration's policies.<sup>23</sup>

These critics often receive support in Congress or the media and generate support for exceptional policies towards a favored nationality group. The two policies most often urged are (1) "blanket" grants of asylum or a relaxed or more "generous" standard of evaluating asylum applications; or (2) "extended voluntary departure" (EVD), the "temporary" suspension of deportation of otherwise deportable illegal aliens.<sup>24</sup> Members of Congress and the public have urged these policies during the past two years for nationals of Poland, Haiti, El Salvador, Guatemala, Nicaragua and Sri Lanka. They favor blanket asylum, relaxed standards of asylum or EVD because they apparently believe it is wrong to return illegal aliens to countries suffering from civil war, widespread random violence, or oppressive right-wing or communist governments.<sup>25</sup>

Asylum and EVD policy have constituted a virtual cornucopia of litigation. The courts have struggled with such issues as the definition of a "refugee," the burden of proof on asylum applicants, whether the government has discriminated against one or another nationality and other issues. The government has won more cases than it has lost.<sup>26</sup>

23. Dan Dale of the Chicago Religious Task Force on Central America, for instance, states: "It's clear that the majority of the American people don't support intervention in Central America, and sanctuary is a clear way to say no." Kathy Barber Hersh, "A Refugee for Refugees," *Mother Jones*, January 1984, p. 60. The "sanctuary" movement offers support for illegal aliens from El Salvador and Guatemala. Misapprehension of the facts probably plays a role in generating opposition to United States asylum policy. One prominent intellectual journal reported that "Since May 1981 a total of seven Salvadorans have been granted asylum, 265,000 were turned down, and 8,393 cases are pending." *The New Leader* (1 November 1982): 3. In fact, in fiscal year 1982, 69 Salvadorans were granted asylum, 1,012 were rejected and 22,314 were pending.
24. EVD was granted for varying periods to nationals of Cuba after the Castro takeover, Chile after the overthrow of Allende, Uganda after Idi Amin's depredations, Lebanon in 1976, Ethiopia after the start of the Marxist reign-of-terror, Nicaragua after the fall of Somoza, Iran after the fall of the Shah, Poland after the military takeover, and of Afghanistan after the Soviet invasion.
25. James Hoffman, Assistant Director for Immigration Affairs, U.S. Catholic Conference, for instance, believes that the asylum law is being applied "much too strictly." He argues, "They say there should be singling out of the individual by the country from which he fled. I think that if a person looking at a situation, says, 'If I were in his shoes, I'd flee too,' then the applicant should not have to prove that his government knows about him and would kill him immediately upon his return." Leslie Maitland Werner, "A Torrent of Requests for Asylum," *The New York Times*, 7 July 1983, p. B6. Mr. Hoffman did not state how many aliens would qualify for asylum in the United States. It would appear that virtually the entire population of many countries would be encompassed by the standard he advocates.
26. It is not the purpose of this article to analyze the many cases on asylum and EVD. This has been done very competently elsewhere. See, e.g., Lemaster and Zoll, "Compassion Fatigue: The Expansion of Refugee Admissions to the United States," *Boston College International and Comparative Law Review* 6 (1983): 447; and Edward A. Smith III, Note, "Persecution Abroad as Grounds



## BLANKET OR RELAXED ASYLUM STANDARDS

Although it is very difficult to refuse people from countries in which Americans would not want to live, it would be discriminatory and illegal to grant blanket asylum to all who apply from a particular country or to adopt a standard of review for some aliens different from that used for other nationalities. The law establishes one standard of asylum for everyone, and requires case-by-case determinations of eligibility and a showing by applicants that they meet the required standard.

The courts have been enlisted by advocates of certain nationalities seeking asylum. The last word has not been spoken on the scope of the Refugee Act of 1980 and the rights and principles thereunder. However, the courts generally have rebuffed efforts to force the Executive Branch to grant asylum to nationality groups because of general violence or instability in applicants' homelands. The United States Court of Appeals for the Ninth Circuit declared:

If we were to agree with petitioner's contention that no person should be returned to El Salvador because of the reported anarchy present there now, it would permit the whole population, if they could enter this country some way, to stay here indefinitely. There must be some special circumstances present before relief can be granted.<sup>27</sup>

The same court also rejected the concept that economic deprivation constituted persecution entitling an alien to asylum. It stated that "the relief of asylum in the United States depends on something more than generalized economic disadvantage at the destination."<sup>28</sup>

Nevertheless, some commentators have suggested asylum for anyone from an economically backward society. Dean Stephen B. Young of the Hamline University School of Law, for instance, argues that:

Circumstances can arise where one's economic situation is so desperate, so permanent and so dependent on a hostile government that seeking escape suggests itself as a compelling alternative. Under these circumstances we may conclude that persecution has occurred and refugee status deserved. When a regime is bad enough people will leave. Flight itself and no more is a *prima facie* index of an intolerable social order.<sup>29</sup>

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for Withholding Deportation: The Standard of Proof and the Rule of the Courts," *Fordham International Law Journal* 6 (1982-83): 100.

27. *Martinez-Romero v. Immigration and Naturalization Service*, 692 F.2d 595, (9th Cir. 1982).

28. *Raass v. Immigration and Naturalization Service*, 692 F.2d 596, (9th Cir. 1982).

29. Stephen B. Young, "Who is a Refugee," in *In Defense*, p. 44.

Dean Young suggests that the intent to persecute could be "imputed" to a government, and could arise "not only from a conscious intent to harm (malfeasance) but also from misfeasance and nonfeasance. Sustained mismanagement of the economy would indicate the presence of mind in the ruler, responsible for inflicting on people unnecessary hardship."<sup>30</sup>

Dean Young argues that the United Nations International Covenant on Economic, Social and Cultural Rights establishes a "standard of duty" to determine when a government has engaged in misfeasance or nonfeasance, and transformed its citizens into refugees.<sup>31</sup> The Covenant directs states to use "the maximum of their available resources" and "all appropriate means" to realize economic progress for their citizens.<sup>32</sup>

Dean Young asserts that Haiti is one country that persecutes according to his definition: "Many there may not have a decent living or the opportunity to be promoted in their employment as the Covenant requires."<sup>33</sup> He does not explain how objective content can be given to the vague, undefined, hortatory phrases of the Covenant. In any event, hundreds of millions of people, including most of the populations of the entire Third World and the Soviet bloc suffer the deprivation of the "rights" set forth in the Covenant.<sup>34</sup>

To grant blanket asylum or to relax the standard for one nationality would be unfair to applicants from other countries. They would still be required to meet the standard set forth in the statute.<sup>35</sup> This might constitute grounds for a lawsuit against the government for discriminatory treatment and could place in doubt the legality of all determinations by the government of asylum applications.

#### ACCUSATIONS OF BIAS

Those who favor special treatment of a particular nationality of asylum applicants sometimes accuse the INS and the Department of State of bias

30. *Ibid.*, p. 45.

31. *Ibid.*, p. 46.

32. International Covenant on Economic, Social and Cultural Rights, Annex to G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) at 49, UN Doc. A/6316 (1966).

33. Young, "Who is a Refugee?," p. 46.

34. In countries where most of the population suffer extreme poverty, "economic oppression and deprivation are not related to any of the five bases of persecution specified by the general definition and would not qualify the oppressed and deprived for refugee status." Gilbert Jaeger, "The Definition of 'Refugee': Restrictive versus Expanding Trends" *World Refugee Survey 1983* (U. S. Committee for Refugees), p. 7.

35. The precise weight of the burden of proof upon the applicant is a subject of dispute among commentators and even among the courts. See discussion, Lemaster and Zoll, "Compassion Fatigue," pp. 463-64, n. 99. See also, John A. Scanlan, "Who is a Refugee? Procedures and Burden of Proof Under the Refugee Act of 1980," in *In Defense*, pp. 23-37; Sandra J. Lamar, Note, "Those Who Stand at the Door: Assessing Immigration Claims Based on Fear of Persecution," *New England Law Review* 18 (1982-1983): 395.

in applying the asylum law and regulations.<sup>36</sup> In fact, it is the refusal of the government to show bias in favor of certain nationalities that angers many critics. Despite this apparent conundrum, they claim that the United States routinely grants asylum to those from communist or other governments with which we are not friendly, and denies applications from countries whose governments we support. Similar claims suggest that the U.S. government approves very few applications from countries with which we have close relations because of political considerations or other nefarious motives.<sup>37</sup> They claim, for instance, that the United States does not grant Salvadoran applicants asylum because we are afraid to criticize the Salvadoran government by determining that some of its citizens genuinely fear persecution.<sup>38</sup> One attorney for Salvadoran asylum applicants alleges that asylum requests "are decided on geopolitical considerations."<sup>39</sup> Others

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36. Arthur C. Helton, director of the political asylum project of the Lawyers Committee for International Human Rights asserts that "Political considerations continue to animate asylum decision-making in violation of the law." *New York Times*, 4 August 1983, p. B14. Two prominent immigration lawyers write that the government refuses "to apply fairly the laws governing political asylum." Ian Bernstein and Michael H. Posner, "Asylum's Cold War Remnant," *New York Times*, 11 June 1983, p. A26. Messrs. Bernstein and Posner distort asylum statistics to support their criticisms of the government. They write that in fiscal year 1982, "only three Haitians were granted political asylum (out of more than 5,000 Haitian applicants), two Pakistanis (out of 234) and four Filipinos (out of 381)." *Ibid.* They slightly understate the numbers granted for those nationalities, but more importantly, they fail to note that most of the applications they mention are still pending and have not been resolved. The correct figures for fiscal year 1982 are: Haiti: 7 granted, 122 denied, 6,035 pending; Pakistan: 3 granted, 91 denied, 490 pending; and Philippines: 4 granted, 67 denied, 582 pending.
37. Arthur C. Helton states that the "U.S. tends to dismiss Haitian asylum claims because 'we don't want Haitian boat people getting jobs' in this country." *Wall Street Journal*, 11 August 1983, p. 19. Mr. Helton has strongly criticized the Administration's efforts to limit illegal entry to the United States by Haitian boat people as sinister. "The abuses in the government's Haitian program," he writes, "are more than merely jobs measures. Not only does there seem to be racial overtones, but the rights of all refugees are jeopardized." Letter, *Wall Street Journal*, 7 September 1983, p. 31. Wade Henderson, legislative counsel to the American Civil Liberties Union in Washington suggests that "in the Haitians' case a large part of the problem was that they were black." *New York Times*, "Rights Groups See Bias in Policies on Refugees," 4 August 1983, p. B14. Claudia Slovinsky of the National Lawyer's Guild asserts that the reason Haitians are denied asylum "has to do with race — that they are black people." "200 New York Lawyers are Working Free to Aid Haitian Refugees," *New York Times*, 9 June 1983, p. A24. A prominent Washington immigration lawyer is reported to allege that asylum applications are "denied for political reasons." *Washington Post*, 19 June 1983, p. A16. Messrs. Bernstein and Posner, "Asylum's Cold War Remnant," state that "the prejudgment against applicants from non-communist countries is obvious — a bias that has little to do with the merits of individual applications."
38. Peter Schey, of the National Center for Immigrants Rights Inc., declares that Salvadoran asylum applications are rejected because "It would be viewed as essentially being insulting to the Salvadoran government and its U.S.-trained armed troops for the Administration to concede that any significant number of Salvadoran political asylum applications are meritorious." "Asylum Rights Policy Keeps More Salvadoran Aliens in U.S.," *Los Angeles Times*, 8 September 1983, Part II, p. 6.
39. *Wall Street Journal*, 11 August 1983, p. 1. This same attorney, however, tacitly supports Administration claims that most Salvadoran applicants fail to make an individual showing of a

assert that "in most cases, persons seeking asylum from a communist government we oppose receive a positive State Department recommendation, while those from a non-communist government receive a negative recommendation."<sup>40</sup> The facts show that these allegations are false.

The United States does grant Salvadoran applications for asylum, albeit a low proportion of the total. The United States government is sympathetic towards genuine refugees from El Salvador. The Administration accepted as refugees up to 200 beneficiaries (including family members) of the recent Salvadoran amnesty. The Administration strongly criticizes Salvadoran human rights conditions in its annual human rights reports, in regular reports to Congress, and in direct representations to Salvadoran officials.

There are no significant political or foreign policy advantages to the United States in denying valid political asylum claims. Indeed, when the government denies asylum applications it can expect criticism and hostility from those Americans who sympathize with the rejected applicants. If decision making were animated by political factors, the Administration could easily increase approval rates for Salvadorans and Haitians to 30 or 40 percent and eliminate most domestic criticism of its policy. Foreign governments have virtually no concern with who receives asylum in the United States. Only in the most celebrated cases would a foreign government even learn that a person had filed an asylum application. When foreign governments have sought to intervene in the evaluation of asylum applications by the State Department, they have been rebuffed.<sup>41</sup>

The fact that asylum determinations are made non-politically is reflected in the actual statistics. The United States grants applications from nationals of countries with whom our relations are friendly, including Italy, Ireland, and Egypt. Approval rates are frequently low for left-wing countries with whom our relations are not particularly warm, including Nicaragua, Cuba and Iraq.

#### STATISTICAL TABLES

The approval rates of applications for asylum vary from year to year and are unpredictable. Although the harshness of a particular regime

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well-founded fear of persecution when he argues that *all* Salvadorans should receive asylum, *i.e.*, that individual representations of fear of persecution should not be required. He states: "As far as I'm concerned anyone from the working class of El Salvador has a legitimate fear of returning." *Ibid.*

40. Carol Pryor and Maureen O'Sullivan, "U. S. Policy Unfair to Salvadorans," *The Boston Globe*, 5 July 1983, p. 23. Nicholas S. Gimbel asserts: "The ironies of the Administration's policy on political asylum make great reading. We grant asylum to individuals who complain about restrictions in their repertoire . . . but we withhold it from Caribbeans whose ambitions are economic." Letter, *The Washington Post*, 25 July 1983, p. C6.
41. Applications are kept confidential. Even the fact that an application has been made is kept secret, especially from foreign governments. They sometimes learn of an application through the press. Attempts by foreign governments to influence asylum determinations are unwelcome and greatly improve an applicant's likelihood of success.

towards dissidents may affect the outcome of asylum applications of its nationals, the standard applied is the same for all countries. Every asylum application is reviewed individually in light of the required standard, the applicant's factual assertions, and knowledge of conditions and practices in the country in question.

The United States approves a relatively low proportion of asylum applications for all countries, as the table on the next page illustrates. Afghanistan and Iran have exceptionally high approval rates because of the unique circumstances existing in those countries. If they are excluded, the overall approval rate is only about 11 or 12 percent. The rate is low because most applicants simply fail to give any basis for believing that they would be singled out for maltreatment if they returned to their homeland.<sup>42</sup>

#### CHANGES IN THE ASYLUM PROCESS

Some argue that the State Department should be removed from the determination of who receives asylum in the United States.<sup>43</sup> They claim that this would eliminate foreign policy considerations from the asylum process.

Removing the State Department from the process altogether would be inadvisable. The State Department must remain involved because it is the only American institution possessing the resources and expertise necessary to evaluate the factual assertions of asylum applicants of over a hundred nationalities. Asylum determinations "turn upon facts which are strikingly inaccessible by comparison with other matters routinely adjudicated by United States courts and agencies. Applicants typically base their claims on events in a distant land, about which the United States may have no information."<sup>44</sup> It is understandable that some fear that the Department permits foreign policy considerations to influence asylum recommendations. Yet this apprehension is without foundation. The United States government is jealous of its right to grant asylum. It has willingly endured the anger of foreign governments by rejecting official protests and granted celebrated applications from countries with which our relations were warm.

Some commentators have proposed that private groups' views about conditions in foreign countries should be given weight equal to that of

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42. One Salvadoran applicant "recently filed an asylum application acknowledging that he couldn't show he would be persecuted but pleading simply, 'I'm afraid of guerrillas.'" A Colombian argued he needed asylum because drug offenders receive "'harsh treatment' in his homeland." *Wall Street Journal*, 11 August 1983, p. 1.

43. See, e.g., Ira J. Kurzban, "Restructuring the Asylum Process," *San Diego Law Review* 19 (1981): 91; and T. Alexander Aleinikoff, "Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States," (Draft Paper, University of Michigan Law School, 16 May 1982), pp. 51-52.

44. Martin, "Refugee Act of 1980," p. 115.

## INS ASYLUM STATISTICS—FISCAL YEARS 1982 AND 1983

COUNTRY	1982			1983		
	Approved	%	Disapproved	Approved	%	Disapproved
Afghanistan	303	63.7	173	64	57.6	47
China	8	7.8	94	7	14.3	42
Cuba	1	.4	238	5	2.2	220
Czechoslovakia	13	31.7	28	14	53.8	12
El Salvador	69	6.4	1,102	113	3.7	2,914
Egypt	1	2.4	41	1	1.3	78
Ethiopia	249	44.1	316	77	31.0	171
Haiti	7	5.4	122	1	1.0	95
Iran	2,610	60.1	1,731	2,432	81.3	561
Iraq	21		434	4	2.9	128
Korea	—		—	4	80.2	1
Lebanon	7	3.2	210	1	.6	174
Nicaragua	336	25.9	962	125	8.5	1,346
Pakistan	3	3.2	91	9	14.1	55
Philippines	4	5.6	67	7	20.0	28
Poland	102	8.3	1,128	305	25.3	900
Romania	69	36.1	122	54	52.9	48
Somalia	—		—	2	4.2	46
South Africa	7	53.8	6	0	0	5
Syria	9	16.1	47	18	47.4	20
USSR	14	42.4	19	24	82.8	5
Vietnam	14	41.2	20	12	41.4	17
TOTAL	3,996	34.0	7,764	3,350	31.4	7,319
TOTAL (excluding Iran)	1,386	18.7	6,033	918	12.0	6,758
TOTAL (excluding Afghanistan and Iran)	1,083	15.6	5,860	854	11.3	6,711
						88.7
						68.6
						88.0

the State Department. This too would be ill-advised. Such groups can be biased or have unspoken agendas unrelated to determining fairly who should receive asylum. If asylum adjudicators give equal weight to private groups' opinions and apply differing basic views about circumstances in the same country, applicants will be encouraged to shop for the adjudicator most favorable to their nationality. This will insure chaos, discrimination and unfairness. Moreover, the Department of State is the government agency best suited to detect false statements in an application or the omission or concealment of facts relevant to asylum determination. Foreign service officers also are more likely to know the facts disqualifying an applicant, such as the commission of human rights violations or serious crimes.

Others have suggested that the State Department should not review all cases, but only those that are doubtful. The INS would reject frivolous cases and grant clearly meritorious ones without State Department advice. This proposal is superficially attractive but flawed. The State Department needs to review individual cases because it will detect unusual cases that other agencies are likely to overlook, e.g., if an applicant committed crimes in his homeland disqualifying him for asylum, or if he has suffered persecution at the hands of a foreign government or has some special reason to fear such maltreatment. Applicants should not oppose State Department review of all cases. The more a case is reviewed, the more likely someone will evaluate it sympathetically.

Some scholars have suggested that the UNHCR should have a central, formalized role in determining who receives asylum in the United States. One UNHCR official stated in 1982 "it is hoped that, in the context of the new legislation now under consideration in Congress, an appropriate form for UNHCR's participation in the procedures for the determination of refugee status will be found."<sup>45</sup> This would be imprudent. Determining which aliens can enter and stay in a country is a fundamental attribute to sovereignty. It should be surrendered with great caution. Frequent consultations with the UNHCR are desirable. Its advice should be solicited and carefully considered, but its authority over American immigration policy should not be formalized or increased.

The UNHCR is an admirable organization. Its current leadership and the senior staff presently assigned to the United States are able, fair, experienced and well-intentioned. But there is no guarantee that this will always be true. The United Nations and many of its agencies have become politicized and hostile to the West and to America. This trend is unlikely

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45. Henkel, "International Protection of Refugees," p. 61. Switzerland, Germany, Austria, Italy and France all provide for UNHCR involvement in asylum determinations. *Ibid.*

to change. It would be unwise for the United States to increase its vulnerability to future attack and abuse by UN agencies.

### ASYLUM ABUSE IN OTHER DEVELOPED COUNTRIES

Most Western countries have experienced the same kind of abuse of their asylum systems as the United States. This phenomenon reflects the widespread desire among those in the Third World to use any available means to come to prosperous, free countries. Canada, for instance, has a backlog of 7,000 claims for asylum.<sup>46</sup> Canada's top immigration official recently wrote that Canadian law has been used "by some individuals to prolong their stay in Canada even though there is no basis for their claim."<sup>47</sup> The United Kingdom has experienced a 250 percent increase in the number of asylum claims since 1979.<sup>48</sup> Italy's senior immigration officer recently said that Italy "is today experiencing an unprecedented wave of clandestine immigration (primarily people who overstay their visas) and of asylum seekers and 'false' refugees."<sup>49</sup> The Federal Republic of Germany experienced a sharp increase in asylum claims after it banned the recruitment of foreign workers in 1973, as the "asylum process was being abused to circumvent restrictions on worker immigration."<sup>50</sup>

In 1976, 5,000 aliens applied for asylum in Germany, in 1980, 108,000. Since the asylum process was tightened in 1980, the numbers have declined sharply, to an expected 20,000 in 1983.<sup>51</sup> A UNHCR official writes that "a significant number of the applicants took advantage of the asylum procedures for purely economic reasons, since even those whose claims were obviously unfounded were entitled to stay and work in the country until their applications were finally rejected. This, however, could be up to five years, or even longer."<sup>52</sup>

46. German Marshall Fund, *Summary of International Conference on Common Problems in Administering Immigration and Refugee Problems, 8 June 1983, Session II, Adjudicating Asylum Claims*, "The Situation in Canada," p. 14, (Statement of Honorable Lloyd Axworthy, Canadian Minister for Employment and Immigration).

47. Canadian Ministry of Education and Immigration, *Immigration Levels, 1983-85, Questions and Answers*, 1 November 1982, p. 23. The Minister for Employment and Immigration of Canada also wrote: "I am convinced that the solution to this problem is a system of refugee determination that will enable a final decision to be made quickly. This would remove the incentive for abusive claims and alleviate the hardships valid claimants now face." Ibid.

48. *Refugee Problems, Session II, Adjudicating Asylum Claims*, "The Situation in the United Kingdom," p. 13, (Statement of Mr. R. A. McDowell, senior principal and head of refugee group, Home Office, United Kingdom).

49. *Refugee Problems, Session I, Illegal Immigration: Administration of Employer Sanctions and Worker Identification*, "The Situation in Italy," p. 6, (Statement of Ambassador Viori Traxler, General Director for Emigration and Social Affairs, Italian Ministry of External Affairs).

50. *Refugee Problems, Session II, Adjudicating Asylum Claims*, "The Situation in the Federal Republic of Germany," p. 11, (Statement of Dr. Eckert Schiften, Ministerial Director For Refugee and Humanitarian Affairs, Ministry of the Interior, Federal Republic of Germany).

51. Ibid.

52. Henkel, "International Protection of Refugees," p. 62.



In 1982, Sam Macphee, Australia's Minister of Immigration and Ethnic Affairs announced a proposed new immigration policy designed to distinguish economic migrants from refugees. He stated:

. . . a proportion of people now leaving their homelands were doing so to seek a better way of life rather than to escape from some form of persecution. In other words, their motivation is the same as over one million others who apply annually to migrate to Australia. To accept them as refugees would in effect condone queue-jumping as migrants.<sup>53</sup>

Most Western countries reject a high proportion of asylum applications. In 1982 Italy, for instance, accepted about 15 percent of applications filed, and in 1981, it accepted only 6.5 percent.<sup>54</sup> During the first six months of 1983, Britain accepted about 20 percent of asylum applications filed, and rejected about 65 percent, while 15 percent were withdrawn.<sup>55</sup>

The UNHCR has recognized the serious problem of abusive asylum applications. The UNHCR Subcommittee on International Protection recently reported that "the number of unfounded claims has become disproportionately high and . . . a significant percentage of such claims are to be considered as manifestly unfounded or abusive."<sup>56</sup> The UNHCR report also recognized that economic migrants are submitting asylum claims "as a means of circumventing normal immigration regulations."<sup>57</sup> This, the report suggests, is probably caused by the world-wide economic recession which prompts emigration from less developed countries.<sup>58</sup> The report states:

Many would-be immigrants to those countries have consequently resorted to spurious claims to refugee status in order to secure admission or avoid deportation. Even if their applications are eventually denied, filing such applications secures for applicants the opportunity to remain in the country at least for the duration of the determination procedure . . . A number of national authorities have noted that long delays in the determination procedure may also serve as an added incentive for the filing of spurious applications.<sup>59</sup>

53. Quoted in Young, "Who is a Refugee?," in *In Defense*, p. 38.

54. Traxler, "The Situation in Italy," p. 14.

55. Statement of R. A. Macdowell to the author, 1983.

56. Follow-Up on Earlier Conclusions of the Subcommittee, The Determination of Refugee Status with Regard to the Problem of Manifestly Unfounded or Abusive Applications, Subcommittee of the Whole on International Protection, Executive Committee of the High Commissioner's Programme, 34th Session, EC/SEP/29, 26 August 1983, p. 2.

57. *Ibid.*

58. *Ibid.*

59. *Ibid.*

## EXTENDED VOLUNTARY DEPARTURE

EVD is a temporary suspension of the enforcement of immigration laws, an extraordinary exercise by the Attorney General of his discretion not to deport otherwise deportable illegal aliens. EVD is granted to an entire nationality or class of illegal aliens. For as long as it is in effect, the affected nationals will not be returned to their country. It means that anyone of that nationality who could somehow get to the United States could stay as long as the status was in effect. If it is not particularly difficult for an affected nationality to come to this country, the effect upon illegal immigration of a grant of EVD could be enormous. To, in effect, invite anyone to come to the United States from such a country might stimulate "an ever-growing influx of economic migrants."<sup>60</sup>

Unlike asylum, no standard exists to determine when EVD should be applied. It is granted at the Attorney General's discretion, usually upon the advice of the Secretary of State. A variety of factors influence the Attorney General's decision, including the foreign policy and immigration interests of the United States and humanitarian considerations. It is unavoidably a matter of judgment; a determination of the national interest of the United States in a particular country at a particular point in time.

Many in Congress and elsewhere have suggested that EVD be granted to favored nationalities. Since 1982 they have urged that EVD be granted to Central Americans, including Salvadorans, Guatemalans and Nicaraguans. Congress has debated EVD for Salvadorans several times since 1982 and the United States District Court for the District of Columbia is currently considering a lawsuit to compel the government to grant EVD to Salvadorans.<sup>61</sup>

In 1982, Senator Dennis DeConcini introduced a resolution expressing the sense of the Senate the EVD should be granted to Salvadoran illegal aliens in the United States.<sup>62</sup> He observed that EVD had been granted within the past five years to aliens from other countries and suggested that the difference between those states and El Salvador "is our own government's relations with those of other governments. I believe that the true source of the State Department's reluctance to recommend granting [EVD to Salvadorans] is the view that this would reflect adversely on our nation's policy of assisting the Duarte government in El Salvador."<sup>63</sup> The Senator did not explain how EVD for Salvadorans could reflect more

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60. Elliott Abrams, "Diluting Compassion," *The New York Times*, 5 August 1983, p. A23.

61. *Hotel and Restaurant Employees Union, Local 25, v. William French Smith*, CA No. 82-2203 (D.D.C. filed 1982).

62. S. Res. 336, 97th Cong., 2nd Sess. (9 March 1982).

63. 128 *Congressional Record*. S1820 (9 March 1982).

adversely upon the Salvadoran government than the Administration's frequent public reports on the human rights abuses in El Salvador and its demands upon the Salvadoran government to improve.<sup>64</sup>

In 1983, 89 Congressmen wrote to the Attorney General and the Secretary of State urging that EVD be granted to Salvadoran illegal aliens.<sup>65</sup> The Congressmen observed that El Salvador "is undergoing civil strife which has resulted in many refugees and internally displaced people."<sup>66</sup> They wrote that they hoped this would be "a temporary situation" and requested "as a humanitarian response, our government offer Salvadoran refugees temporary sanctuary until the war in El Salvador is over."<sup>67</sup>

In response, the Departments of State and Justice undertook a broad review of this issue. After this study was completed, the Secretary of State wrote to the Attorney General urging that EVD not be granted to Salvadorans.<sup>68</sup> The Attorney General, citing the Secretary's advice and other reasons, determined not to grant EVD. Both officials subsequently wrote to the 89 Congressmen to explain their positions on this issue.<sup>69</sup>

The Secretary of State emphasized foreign policy and immigration considerations in his recommendation against EVD. He noted that "the degree of civil strife varies greatly in different parts of El Salvador," and that "civil unrest alone" is not determinative.<sup>70</sup> He emphasized that the United States is seeking to reduce civil strife, establish democracy and cut down on human rights abuses in El Salvador.<sup>71</sup> He stated that these efforts are "the most constructive in light of American foreign policy interests with respect to El Salvador and other countries in the region."<sup>72</sup> He also argued the EVD would "lead inevitably to expectations that EVD should be granted to nationality groups from other countries experiencing problems similar to El Salvador," and that this would "present the United States with great difficulties because of the prevalence of war, violence and extreme poverty throughout the world."<sup>73</sup> The Secretary expressed concern that EVD would "probably constitute a magnet inducing members of the beneficiary nationality to enter the United States illegally."<sup>74</sup>

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64. Senator DeConcini introduced a similar sense of the Senate resolution in 1983. S. Res. 156, 98th Cong., 1st Sess. (26 May 1983).

65. Letter from 89 Congressmen to George P. Shultz, 28 April 1983.

66. *Ibid.*

67. *Ibid.*

68. Letter from George P. Shultz to William French Smith, 23 June 1983.

69. Letter from George P. Shultz to John Joseph Moakley, 30 July 1982; letter from William French Smith to Lawrence J. Smith, 19 July 1982.

70. Shultz letter of 30 July 1982, p. 1.

71. *Ibid.*, pp. 1-2.

72. *Ibid.*, p. 2.

73. *Ibid.*

74. *Ibid.*

The Attorney General relied upon the Secretary's counsel and was especially concerned with immigration factors. He stated that there are already hundreds of thousands of illegal Salvadoran aliens in the United States and that EVD "undoubtedly would encourage the migration of many more such aliens."<sup>75</sup> He also observed that there are "adequate alternatives by which the Salvadoran nationals may seek relief . . . including application for asylum."<sup>76</sup> The Administration's response met with mixed reactions. Senators DeConcini and Durenberger introduced another sense of the Senate resolution which the Senate debated in September 1983.<sup>77</sup> Senator DeConcini criticized the State Department's refusal to support EVD, asserting that the Department "ignores the crucial testimony of Americans who have been to El Salvador and, more importantly, the Salvadorans who have entered this nation . . . in favor of a carefully tailored, impersonal overview of the situation in El Salvador."<sup>78</sup>

Senator Simpson opposed the resolution. He argued that most Salvadorans in the United States "are economic migrants, and they come here without a valid claim to persecution in the event they should return or be deported . . . no evidence has been found that these returnees are harmed."<sup>79</sup> He acknowledged that returnees face "the same violence that every resident" faces, but that "there is clear evidence that there is no governmentally-sanctioned program to target or harass the returning Salvadorans simply because they have been in the United States of America."<sup>80</sup>

Senator Huddleston opposed the resolution as "an open recruitment for new refugees to come into this country."<sup>81</sup> Senator Simpson agreed: "extended voluntary departure may well have the effect . . . of drawing additional Salvadorans to this country to take advantage of that status."<sup>82</sup> He also argued that the INS "would not be able to see to it that the Salvadorans would leave the country, which is the purpose of extended voluntary departure, after the conditions in their country have changed."<sup>83</sup> The Senate subsequently voted to table the resolution by a vote of 59 to 26.<sup>84</sup> Later in the year, however, a sense of the Congress resolution favoring EVD was inserted in Conference in the State Department authorization bill and adopted by both houses.

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75. Smith letter of 19 July 1982, p. 2.

76. *Ibid.*

77. Senate Resolution 156, introduced 26 May 1983, offered as amendment to S. 1342, 22 September 1983, *Cong. Record*, S12735.

78. *Ibid.*

79. *Ibid.*

80. *Ibid.*

81. *Ibid.*, S12737.

82. *Ibid.*, S12740.

83. *Ibid.*

84. *Ibid.*, 12741.

Many of the same arguments are used to support EVD for Salvadorans as for blanket asylum or the application of a relaxed standard.<sup>85</sup> Attorneys for Salvadorans advocating EVD argue that "the State Department refuses to consider EVD status for El Salvador because it would be an embarrassing contradiction to acknowledge the danger of death and violence to returning Salvadorans while also asking Congress to support the Salvadoran government because it is improving its human rights effort."<sup>86</sup> Those favoring EVD have argued that Salvadorans deported to their homeland face death upon their return because of their stay in the United States. They have been unable to offer substantial evidence in support of this allegation and must ignore that emigration to the United States by Salvadorans is a common and long-standing practice.<sup>87</sup>

The staff of the Senate Subcommittee on Immigration and Refugee Policy issued a report in September 1983 which reviewed "conditions that might bear on the question of whether the United States should adopt a policy of granting extended voluntary departure to Salvadorans."<sup>88</sup> The report stated that, despite extensive efforts by "many private and religious groups to determine whether Salvadoran returnees were persecuted, no evidence has been found to document that they are harmed."<sup>89</sup>

Some have argued that the United States should grant EVD to Salvadorans because they are different from other illegal aliens. They argue that the United States is responsible for those who leave El Salvador because it aids the Salvadoran government.<sup>90</sup> This argument ignores the fact that

85. See, e.g., Sid. L. Mohn, "Central American Refugees: The Search for Responses," in *World Refugee Survey 1983*, pp. 44-45.

86. "Restaurant Union Challenges Federal Immigration Policy, *The Washington Post*, 19 June 1983, p. A1.

87. Some EVD proponents have misstated or invented facts to support their arguments. The Chicago Religious Task Force, for instance, wrote: "Over forty-thousand [Salvadorans] alone have been killed, many indiscriminately, since January 1979. And 30 percent of all refugees forcibly returned to El Salvador from the United States and Mexico, testified Amnesty International recently before the United States Senate, have been tortured, maimed or murdered upon their return." *Basta*, Sanctuary Organizer's Nuts and Bolts Supplement, No. 1, undated, p. 203. Amnesty International denied having so testified. "I am stating for the record that none of the facts and figures attributed to Amnesty International in the organizer's guide published by the Chicago Religious Task Force are accurate. I assume that the Chicago Religious Task Force received their information from a secondary source which had not been in direct contact with us." Letter to Patrick Burns, Federation for American Immigration Reform, from Rona Ellen Weitz, Area Coordinator for Latin America, Amnesty International, 23 June 1983.

88. Staff Report, *Refugee Problems in Central America*, prepared for the use of Subcommittee on Immigration and Refugee Policy, Committee on the Judiciary, United States Senate, September 21, 1983, p. 1.

89. *Ibid.*, p. 7.

90. "Obviously the most painful piece of this puzzle is that the United States bears some responsibility for the violence in El Salvador. It is not our fault that Poles are being oppressed, that Afghans are being killed, that Chinese are starving. But it is, to some extent, our fault that there is violence in El Salvador." Molly Ivins, "Deporting Salvador Refugees Imperils Their Lives,"

American policy is designed to encourage developments in El Salvador that will make it a more desirable place to live. Although we do give substantial military assistance, two-thirds of our aid is economic. Even the military aid is designed to prevent the takeover by communists, who have almost always in the past in other countries created massive waves of refugees after they assumed power. We are encouraging the development of a democratic society and the rule of law in El Salvador.

Some, although admittedly not nearly enough, progress has been made in the most difficult of circumstances. American efforts to improve circumstances in El Salvador and therefore lessen the reason for people to leave that country contrast with the Salvadoran insurgents' intentional policy of seeking to destroy their country's economy through sabotage and war.

If EVD were granted to Salvadoran illegal aliens, the government would encounter rising pressure to do the same for nationals of countries suffering similar ills. This policy, while legal, would be highly imprudent. There are simply too many such countries. There are at present nearly 30 ongoing wars and insurgencies involving hundreds of millions of people. There probably will be many more such conflicts in the future.

EVD proponents argue that EVD is only temporary. They assert that once the events impelling it have changed, those benefiting can be returned to their homeland.<sup>91</sup> This is doubtful. EVD beneficiaries who have spent appreciable time as United States residents are likely to demand to be allowed to stay permanently. Those who now favor EVD will probably insist that aliens who have been here legally and set down roots should not be deported.<sup>92</sup>

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*Dallas Times Herald*, 16 December 1982, p. 1C. Senator Durenberger argues that "the United States bears a certain responsibility for the noncombatant deaths because of our support for the Salvadoran government and military." Cong. Rec., 22 September 1983, S12738. According to such logic, whenever the United States helps a country resist takeover by communist insurgents, it would be responsible for accepting the entire population of that country.

91. Pryor and Sullivan, "U.S. Policy is Unfair," for instance, write that though EVD "does not grant permanent asylum, it would, however, let Salvadorans remain in this country temporarily, until conditions in El Salvador improve to the point that they can return without fear of persecution or death. Since, unlike political asylum, it is granted to an entire group, it is also a more practical and economic way of dealing with the numbers of people involved." Mary Solberg of the Lutheran Immigration and Refugee Service states that EVD "would merely grant a temporary safe haven to people whose life in their own country is in danger." Lindsey, "Flood of Refugees," p. 8.
92. See discussion in Lemaster and Zoll, "Compassion Fatigue," pp. 468-70. "The United States has never been able to keep any group of persons, no matter how ill-suited for immigration, temporarily in this country without eventually making those people permanent residents. Each group soon finds champions for its cause who trumpet the seeming necessity of legalizing the status of those people." *Ibid.*, p. 469 (citations omitted).

## THREATS TO AMERICAN GENEROSITY

America's record of generosity to those fleeing persecution is the finest in the world. For years we have accepted for permanent resettlement more refugees than all other nations combined. We give far more aid to international refugee organizations than any other country. Public support for our generous refugee and asylum policies depends upon our accepting reasonable numbers of people and upon respect for U.S. laws determining who qualifies. The large-scale abuse of the American legal system by economic migrants and illegal aliens who wish to extend their stay in the United States creates widespread cynicism towards the asylum system and undermines public support for our generous attitude towards those who are genuinely fleeing repression.<sup>93</sup>

Senator Alan K. Simpson, Chairman of the Senate Subcommittee on Immigration and Refugee Policy, argues that if government policies do not temper compassion for less fortunate aliens with concern for the national interest of the United States, "there is a substantial risk that in the long run the American people will be unable or unwilling to respond at all."<sup>94</sup> He states that "compassion fatigue" already exists.<sup>95</sup> Some scholars argue that this "increasingly hostile attitude may grow large enough to threaten our traditional welcome for all immigrants."<sup>96</sup>

To admit as refugees or asylees favored nationalities who do not meet the legal standard would politicize the asylum process. It would guarantee that thenceforth every group would seek similar special treatment. This ultimately would lead to the collapse of any standard and the destruction of any coherent policy towards refugees and asylees.

To grant EVD to Salvadorans, Guatemalans or Nicaraguans would

93. Dale Frederick Swartz, of the National Forum on Immigration and Refugee Policy, Washington, D. C., writes that:

The failures of past policies crystallized by the Mariel exodus and coupled with growing economic uncertainty and ethnic and racial tension, have created an ugly mood, especially in Miami. Many innocent people, including the most disadvantaged of American citizens and many of the refugees themselves, have suffered greatly. And, dangerously, the backlash of resentment against others has come to dominate the political atmosphere. Politicians, interest groups and others feel more pressure either to echo such sentiments or condemn them, thereby increasing the tension, the rhetoric and the accusations on all sides.

"First Asylum and Governance," in *In Defense*, p. 72.

94. Alan K. Simpson, "A Delicate Balance," in *In Defense*, p. 124. Senator Simpson also states that "The American people are being told each day that it is absolutely imperative that this group or these peoples be admitted to the U.S. . . . But I have a strong impression that the American people begin to feel overwhelmed. That does not bode well." *Ibid.*

95. *Ibid.*

96. Lemaster and Zoll, "Compassion Fatigue," p. 449.

encourage illegal immigration from countries so close to our border. It might also set a precedent that whenever a country suffers from widespread random violence, extreme poverty or a civil war, EVD should be granted. In a world likely to be cursed with violence, poverty and war for many years to come, this would be disastrous.

Determining who should be permitted to stay in the United States will be difficult and controversial so long as there are vast numbers of people who want to come here and limited capacity and willingness to accept them. Because we cannot take everyone, we must choose some and reject more. Choosing is an unpleasant task, especially when those rejected come from poor or violent countries. But the sad fact is that much of the world, and billions of people, live in countries that are violent, poor and oppress their citizens. The United States has no choice but to enforce its laws and to say no to those who are not legally entitled to come or stay here.