

## NOTE

### *Cardoza-Fonseca*: SUPREME COURT TAKES INITIATIVE TO END CURRENT INEQUITIES IN LAW OF ASYLUM\*

#### INTRODUCTION

The disregard of human rights, and the resulting persecution of innocent persons has been responsible for developing the concept of flight and asylum as the ultimate human right.<sup>1</sup> Asylum has been recognized for hundreds of years; its existence is based on man's historically inhumane treatment of his fellow man.<sup>2</sup> The abundance of international treaties and resolutions seeking to mitigate human suffering serves as a sad reminder that the violation of human rights continues throughout the world.

The purpose of this Note is to examine the recent case of *INS v. Cardoza-Fonseca*<sup>3</sup> in light of international treaties, domestic legislation, and United States policy governing the granting of refugee status and asylum in the United States. This Note compares the standards and policies governing the grant of refugee status and asylum as provided in the United Nations Protocol Relating to the Status of Refugees,<sup>4</sup> with that treaty's legislative implementation in the United States.<sup>5</sup>

This comparison is intended to illustrate inherent inequities in U.S. law concerning the granting of political asylum and to demonstrate the significance of the *Cardoza-Fonseca* decision in curtailing lower court confusion regarding the proper standard for determining an individual's eligibility for asylum. This Note will

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1. A. GRAHL-MADSEN, TERRITORIAL ASYLUM (1980).

2. For an excellent historical survey of the right of asylum, see 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 10-11 (1966).

3. 107 S. Ct. 1207 (1987).

4. Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

5. The Refugee Act Pub. L. No. 96-212, 94 Stat. 102 (1980)(codified at 8 U.S.C. §§ 1101-1251 (1982)).

further suggest that although *Cardoza-Fonseca* is a victory for those seeking asylum in the United States, the decision ultimately may be eroded by political pressure from the Executive branch disfavoring asylum applications from persons fleeing governments supported by the United States. Further erosion may occur as a result of the Attorney General's broad discretionary power to deny asylum.

In conclusion, this Note recommends procedures and policies which would bring the application of U.S. law into greater conformity with the United Nation's Protocol, and further the cause of human rights. However, before a meaningful understanding of *Cardoza-Fonseca* is possible, it is necessary to understand the concepts of "refugee" and "political asylum" in the world arena, and their relationship to U.S. law.

## I. RELATIONSHIP OF INTERNATIONAL LAW TO DOMESTIC LAW IN U.S. COURTS

In the U.S. Constitution, recognition of domestic and international treaties is found in Article VI, Section 2, which provides that:

All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.<sup>6</sup>

Furthermore, while not mentioned in the Constitution, customary international law has also been recognized as a part of United States domestic law.<sup>7</sup> There is also authority that customary law has the same status as treaty law.<sup>8</sup> Thus, both treaties and, to some extent, international resolutions bind U.S. courts, and should be given great weight in interpreting domestic legislation concerning those instruments.

### A. *Political Asylum in the World Arena and the United States*

The traditional right of asylum<sup>9</sup> is understood as the right of a state to grant asylum. The world community, however, has only re-

6. U.S. CONST. art. VI, § 2.

7. *The Paquete Habana*, 175 U.S. 677 (1900); *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981); see *infra* note 14.

8. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 102 comment j (Tent. Draft No. 1, 1980).

9. The word "asylum" is derived from the Greek word "asylon," a-, without syle,

cently become aware of the individual's right of asylum.<sup>10</sup> An individual's right to asylum has, at least in principle, been recognized in several international instruments. Article Fourteen of the Universal Declaration of Human Rights states that "[e]veryone has the right to seek and enjoy in other countries asylum from persecution."<sup>11</sup> The Declaration as a whole is couched in broad, nontechnical language and is clearly intended to apply to "everyone."<sup>12</sup> While not a treaty, and therefore without the immediate force of international law, this resolution has been referred to as "the Magna Carta of contemporary international human rights law."<sup>13</sup> Many of its principles have been transmuted from mere resolution into binding customary international law.<sup>14</sup>

Article 27 of the American Declaration of the Rights and Duties of Man provides that "[e]very person has the right . . . to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreement."<sup>15</sup> This Declaration further demonstrates international recognition of an individual's right of asylum.

In 1951, the Convention Relating to the Status of Refugees was opened for signature.<sup>16</sup> Among other things, the Convention established a definition of "refugee," which was made applicable to events occurring in Europe before January 1, 1951.<sup>17</sup> In 1967, the

right of seizure. "Asylum" means "without the right of seizure." WEBSTER'S NEW WORLD DICTIONARY 91 (1962).

10. See *supra* note 2. The International Court Justice in the *Asylum Case* defined asylum as "only the normal exercise of . . . territorial sovereignty." 1950 I.C.J. 266. On the other hand, the right of asylum as a right for the individual may be established in provisions of municipal law.

11. G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948).

12. R. LILlich, INVOKING INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC COURTS 6 (1985):

[t]he Government of the United States presumes that whenever a treaty has been duly concluded and ratified by the acknowledged authorities . . . , an obligation is thereby imposed upon each and every department of the Government, to carry it into complete effect, according to its terms, and that on the performance of this obligation consists the due observance of good faith among nations.

13. R. LILlich, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 42 (1985).

14. Customary international law is established by showing a widespread practice by states of conforming to an alleged rule, together with evidence that they have followed this practice because they believe that they are under a normative obligation to comply with that rule. In *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980), the U.S. Court of Appeals cited the Declaration in concluding that "official torture is now prohibited by the law of nations."

15. O.A.S. Off. Rec. OEA/Ser. L/V/II 23, doc. 21, rev. 6, signed May 2, 1948.

16. Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 137.

17. *Id.* art. 1(A)(2). The convention was established to account for the refugees of

United Nations Protocol Relating to the Status of Refugees (Protocol)<sup>18</sup> was opened for signature, and in 1968 the United States signed it. The Protocol incorporated the terms of the Convention Relating to the Status of Refugees,<sup>19</sup> and expressly provides that its provisions are not limited to European events prior to 1951.<sup>20</sup> Unlike a resolution, the Protocol is a treaty and has the force of law in the United States upon its ratification.<sup>21</sup>

### B. *The Protocol Relating to the Status of Refugees*

The United States has maintained a poor record of ratification with regard to international human rights treaties.<sup>22</sup> However, its ratification of the Protocol Relating to the Status of Refugees is a significant step forward in U.S. policy.<sup>23</sup> Under the Constitution, the Protocol as ratified has the force of domestic law and is not, at least in theory, subject to the uncertainties found in customary international law.<sup>24</sup>

Among other things, the Protocol establishes a definition of “refugee.” The term “refugee” applies to any person who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion.”<sup>25</sup> The Protocol’s definition of “refugee” is of primary importance in asylum cases since eligibility for asylum is dependent upon

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#### WWII.

18. Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter Protocol]. The Protocol was ratified by U.S., Oct. 4, 1968; see 114 Cong. Rec. 29, 607 (1968).

19. See *supra* note 16.

20. See *supra* note 17.

21. See *supra* note 6 and 12 and accompanying text.

22. Significant human rights treaties and resolutions not yet ratified include: Convention on the Prevention and Punishment of the Crimes of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); International Covenant of Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, 660 U.N.T.S. 195; American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36.

23. See *supra* note 18.

24. See *supra* note 14 and accompanying text.

25. Protocol, art. I, § 2. The Protocol defines “refugee” as a person, who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having nationality and being outside the country of his former habitual residence, is unable or owing to such fear, is unwilling to return to it.

whether or not one fits its criteria.

Of further importance is the Protocol's prohibition of refoulement.<sup>26</sup> Article 33, section 1, provides that:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>27</sup>

Although the Protocol was ratified in 1968, it was not until 1980 that Congress passed legislation implementing its provisions. This legislation is referred to as The Refugee Act of 1980 (Act).<sup>28</sup>

## II. THE REFUGEE ACT OF 1980

The Refugee Act was designed to establish a comprehensive program for refugee admissions. It replaces an older, piecemeal system which limited refugee eligibility to those who had fled Communist countries or the Middle East because of persecution or natural disasters.<sup>29</sup> The Act repealed the prior law's discriminatory treatment of refugees by adopting the Protocol's apolitical definition of "refugee." That definition both recognizes the plight of homeless people all over the world and accords refugees the same immigration status given all other immigrants.<sup>30</sup> Furthermore, the Act established new procedures for granting asylum to aliens in the United States.<sup>31</sup>

The Refugee Act is codified in the Immigration and Nationality Act (INA). INA section 208(a) authorizes the Attorney General to establish procedures for aliens physically present in the United States to apply for asylum. An alien may be granted asylum only if

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26. Article 33 of the Protocol defines "refoulement" as "expulsion or return."

27. Similar language appears in art. 22, § 8 of the American Convention of Human Rights. See *supra* note 22.

28. See *supra* note 5.

29. Staff of Senate Comm. on the Judiciary, 96th Cong., 1st Sess., U.S. Immigration Law and Policy: 1952-1979, at 86-89 (Comm. Print 1979). Prior to the Immigration and Nationality Act's amendment in 1980, the law provided specifically for the conditional entry of 17,400 refugees under the seventh preference category. The preference system limits the number of available visas to countries on a first-come, first-served basis. Eligibility for seventh preference entry was limited to refugees who had fled Communist countries or the Middle East due to persecution and natural disaster.

30. 125 Cong. Rec. S2630 (daily ed. Mar. 13, 1979) (statement of Sen. Kennedy). The Refugee Act amended the Immigration and Nationality Act [hereinafter INA] by revising the procedures by which asylum and withholding of deportation are granted.

31. INA § 208, 8 U.S.C. 1158. Prior to the Act, there was no specific policy dealing with asylum procedures.

the Attorney General determines that the alien falls within the Act's definition of "refugee."<sup>32</sup>

The alien carries the burden of proof in establishing his status as a refugee in order to be considered for asylum.<sup>33</sup> The district director of the alien's port of entry may approve or deny the asylum application in the exercise of his discretion.<sup>34</sup> Thus, under current law, an alien who fulfills the Act's definition of "refugee" will be eligible merely for consideration for asylum, but has no statutory right to such a status. This broad discretion granted to the district director undermines not only the spirit of the Protocol, but also Congress' attempt to repeal the discriminatory treatment of refugees in prior law.<sup>35</sup>

Along with a grant of asylum, a primary remedy from deportation is "withholding of deportation."<sup>36</sup> The alien has a statutory right to apply for withholding of deportation during the course of deportation proceedings.<sup>37</sup> Withholding of deportation is governed by INA section 234(h) and provides that:

The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such *alien's life or freedom would be threatened* in such a country on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>38</sup>

Thus, an alien may avoid deportation if the conditions of either section 208 or 243(h) are met.

32. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a).

The term "refugee" means (A) any person who is outside any country of such person's nationality or, . . . is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. . . . (emphasis added).

33. Procedures promulgated by the Attorney General for granting asylum are codified in the Code of Federal Regulations. Asylum Procedures, 8 C.F.R. § 208 (1986).

34. 8 C.F.R. § 208.8 (1986).

35. See *supra* note 29 and accompanying text.

36. INA § 243(h), 8 U.S.C. § 1153(h). Withholding of deportation is mandated if an "alien's life or freedom would be threatened upon return on account of race, religion, nationality, membership in a particular social group or political opinion."

37. 8 C.F.R. § 208.3(b) (1986). This section also provides that "[a]sylum requests made after institution of exclusion or deportations proceedings shall be . . . considered as requests for withholding exclusion or deportation pursuant to § 243(h) of the Act."

38. INA § 243(h) was amended in 1980 to conform with the Protocol's prohibition of refoulement, art. 33, § 1. (emphasis added).

### A. *A Comparison of INA Section 208 Asylum and INA Section 243(h) Withholding of Deportation*

An alien can be denied asylum or withholding of deportation under particular circumstances. Aliens are ineligible for withholding of deportation under section 243(h) if they:<sup>39</sup> (1) have “ordered, incited, assisted or otherwise participated in the persecution of others”;<sup>40</sup> (2) have been convicted of a “particularly serious crime” and constitute a danger to the “community of the United States”;<sup>41</sup> (3) appear to have committed a serious, nonpolitical crime outside the United States prior to entry;<sup>42</sup> or (4) pose a “danger to the security of the United States.”<sup>43</sup> Likewise, aliens are ineligible for asylum under section 208 if they:<sup>44</sup> (1) fall within any of the four enumerated categories above; (2) are not refugees within the meaning of INA section 101(a)(42)(A);<sup>45</sup> (3) have been firmly resettled in a foreign country;<sup>46</sup> or (4) are given an outstanding offer of resettlement by a third nation and such resettlement is in the public interest.<sup>47</sup>

INA section 243(h) departs from INA section 208 in two other significant ways. First, once it is determined that an alien’s life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion, the Attorney General “shall not deport or return the alien.” Thus, unlike the grant of asylum, a grant of withholding of deportation is not discretionary, but is expressly mandated on the fulfillment of

39. INA § 243(h)(2), 8 U.S.C. § 1253(h)(2).

40. *Matter of McMullen*, Int. Dec. 2967 (B.I.A. 1984). Respondent had participated in the persecution of individuals who opposed the Provisional Irish Republican Army, and therefore was statutorily ineligible for both asylum and withholding of deportation.

41. *Matter of Rodriguez-Coto*, Int. Dec. 2985 (B.I.A. 1985). Applicant convicted of a “particularly serious crime” and found to “constitute a danger to the U.S.,” therefore grant of asylum and withholding of deportation denied. *See also* *Matter of Carballe*, Int. Dec. 3007 (B.I.A. 1986).

42. *Matter of McMullen*, Int. Dec. 2967 (B.I.A. 1984). Where respondent’s acts were out of proportion to his political goals, his conduct provided serious reason or considering that he had committed serious non-political crimes prior to his arrival in the U.S., therefore he is ineligible for relief of asylum or withholding of deportation. 8 C.F.R. § 208.8(f)(1)(v) (1986).

43. *Matter of Frentescu*, Int. Dec. 2906 (B.I.A. 1982). Withholding of deportation as well as asylum not available to an alien who, having been convicted by a final judgment of a “particularly serious crime, constitutes a danger to the community of the United States.”

44. INA § 208(b), 8 U.S.C. § 1101(a)(42)(B); 8 C.F.R. § 208.8(f) (1986).

45. *Rosenberg v. Woo*, 402 U.S. 49 (1971). Where the applicant is not subject to persecution, he does not meet the definition of refugee.

46. *Matter of Portales*, Int. Dec. 2905 (B.I.A. 1982). Applicant granted refuge status while in Peru and permitted to live in that country without restrictions held to be “firmly resettled,” and therefore not entitled to refugee status in the United States.

47. 8 C.F.R. § 208.8(f)(2) (1986).

the conditions in section 243(h).

Second, unlike the procedure to grant asylum, section 243(h) does not employ the term “refugee” as defined in INA section 101(a)(42)(A). Hence, the “well-founded fear of persecution” provision is not incorporated into the “withholding of deportation” remedy. This last distinction suggests that there are two different standards by which grants of asylum and grants of withholding of deportation are determined.<sup>48</sup>

### B. Differing Standards Between Sections 208 and 243(h)

To be eligible for asylum under INA section 208(a), an alien must establish that he or she is a “refugee” under INA section 101(a)(42)(A).<sup>49</sup> Whether or not one is a refugee is determined by whether the applicant is a victim of persecution or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>50</sup> Thus, the applicable standard for a grant of asylum is a “well-founded fear of persecution.”

The most thorough description of the phrase “well-founded fear of persecution” is contained in the United Nations’ *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*.<sup>51</sup> The *Handbook* has been recognized by the courts, including the Board of Immigration Appeals (BIA),<sup>52</sup> as a useful tool in providing an internationally recognized interpretation of the Protocol.<sup>53</sup> The *Handbook* places great emphasis on the state of mind of an individual applying for asylum. It notes that the phrase “well-founded fear” constitutes two distinct elements, the first “fear,” and the second “well-founded,” and implies that it is not only the

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48. Although INA § 243(h) was amended to conform to the Protocol’s prohibition of refoulement, it did not employ the term “refugee” as provided in the protocol. It is noteworthy that article 42 of the Protocol provides that no State shall make reservations as to article 1 or 33. As amended, INA § 243(h) does not provide a “well-founded fear of persecution” standard, or any other standard upon its face by which a determination to withhold deportation can be made. See *supra* note 38 and accompanying text.

49. See *supra* note 32.

50. *Id.*

51. HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES. Geneva, 1979 [hereinafter *Handbook*].

52. Appeal is made from the immigration court to the BIA, from which appeal is made to the U.S. Court of Appeals.

53. *Matter of Acosta*, Int. Dec. 2986 (B.I.A. 1985); *Zavala Bonilla v. INS*, 730 F.2d 562, 567 n.7 (9th Cir. 1984).



frame of mind of the person concerned that determines his refugee status, but that his frame of mind must be supported by an objective situation.<sup>54</sup> The *Handbook*'s emphasis however is placed on the subjective element of "fear." Therefore, "determination of refugee status will primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin."<sup>55</sup> Despite the *Handbook*'s clear definition, the BIA and several circuit courts attempting to reach a definitive interpretation of the phrase "well-founded fear" had arrived at conflicting results.<sup>56</sup>

On the other hand, INA section 243(h) withholding of deportation does not employ the term "refugee," and hence the standard of a "well-founded fear of persecution" is not applicable to it.<sup>57</sup> In *INS v. Stevic*,<sup>58</sup> the U.S. Supreme Court held that the applicable standard in determining a grant of withholding of deportation is a "clear probability of persecution."<sup>59</sup> Thus, the question under this standard is "whether it is more likely than not that the alien would be subject to persecution."<sup>60</sup> The court, while specifically declining to interpret the standard of "well-founded fear of persecution,"<sup>61</sup> stated that "[f]or purposes of our analysis, we may assume . . . that the well-founded fear standard is more generous than the clear probability of persecution standard. . . ."<sup>62</sup>

### C. In the Aftermath of *Stevic*

Because a grant of withholding of deportation is not discretionary and results in a prohibition of refoulement,<sup>63</sup> it is reasonable that a person invoking this remedy should be required to show, as a factual matter, that persecution would be more likely than not. With regard to asylum, however, many courts, including the BIA, had concluded that even though a grant of asylum is discretionary and does not result in a prohibition of refoulement, the asylum

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54. *Handbook*, *supra* note 51, at paragraph 38.

55. *Id.* paragraph 37.

56. See *infra* notes 71-80 and accompanying text.

57. See *supra* note 48 and accompanying text.

58. 467 U.S. 407 (1984).

59. *Id.* at 422.

60. *Id.* at 424.

61. *Id.* at 430. "We do not decide the meaning of the phrase 'well-founded fear of persecution' which is applicable . . . to requests for discretionary asylum."

62. *Id.* at 425.

63. INA § 243(h)(1) & (2).

seeker must still show that persecution is more likely than not.<sup>64</sup> This interpretation clearly ignored the subjective element of the well-founded fear standard.<sup>65</sup> Thus, by declining to define the meaning of “well-founded fear” in *Stevic*, the Supreme Court perpetuated the inconsistent use of the standard applied in asylum cases in both the circuit courts and the BIA.

For example, in *Matter of Acosta*,<sup>66</sup> the BIA adhered to its pre-*Stevic* view when it held that a “well-founded fear of persecution” means:

[T]hat an individual’s fear of persecution must have its basis in external, or objective, facts that show there is a realistic likelihood he will be persecuted upon his return to a particular country.<sup>67</sup>

The BIA established a four-part test to determine if an applicant had met the standard of a “well-founded fear of persecution.” The applicant was required to show that: (1) he possesses a belief or characteristic that the persecutor targets for punishment; (2) the persecutor is aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor is inclined to inflict the punishment.<sup>68</sup>

In effect, the BIA’s adoption of an objective definition of a “well-founded fear” had presented an almost insurmountable burden of proof upon the alien, with little regard to the subjective element of the standard.<sup>69</sup> Ironically, under the BIA’s interpretation of the asylum standard, the alien was required to prove the subjective intentions of his persecutors, while substantiating his own fears with external, objective facts. Hence, the BIA had equated the more generous well-founded fear standard with that of the clear probability of persecution standard required in withholding of deportation cases.<sup>70</sup> This result was clearly contrary to the spirit of the Protocol as evinced by the *Handbook*, and resulted in untold hardship and injury to persons denied a grant of asylum.<sup>71</sup>

64. See *supra* note 62 and accompanying text.

65. See *supra* notes 54-55 and accompanying text.

66. Int. Dec. 2986 (B.I.A. 1985).

67. *Id.* at 21.

68. *Id.* at 22.

69. See *supra* notes 54-55 and accompanying text.

70. See *supra* note 62 and accompanying text.

71. *Handbook*, *supra* note 51, paragraph 37. “Determination of refugee status will primarily require an evaluation of the applicant’s statements rather than a judgment on the situation prevailing in his country of origin.” The *Handbook* places great emphasis on the

The Third Circuit had also concluded that asylum and withholding standards were identical. In *Sankan v. INA*,<sup>72</sup> the court rejected the dicta in *Stevic* that the standard for asylum is more generous than that of withholding, pointing instead to the Supreme Court's specific refusal to rule on the meaning of "well-founded fear of persecution" for asylum purposes.

In *Nasser v. INS*,<sup>73</sup> the Sixth Circuit equated asylum and withholding standards, requiring that the alien show and corroborate with evidence that he would be "singled out" for persecution based on corroborating evidence.

In *Garcia-Mir v. Smith*,<sup>74</sup> the Seventh Circuit also adopted the BIA's interpretation of a "well-founded fear" by equating it with the withholding standard.

In contrast to these decisions, other circuit courts distinguished the evidentiary standard between asylum and withholding of deportation. The Fifth Circuit recognized the proper standard by which asylum claims are established in *Guevara v. Flores*,<sup>75</sup> when it held:

An alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country. In so holding, we stand with the Sixth,<sup>76</sup> the Seventh,<sup>77</sup> and the Ninth Circuits<sup>78</sup> which have previously determined that the "*well-founded fear of persecution*" standard imposed on asylum applicants differs from the "*clear probability of persecution*" standard imposed by *Stevic* on aliens who seek withholding of deportation.<sup>79</sup>

Furthermore, conflicting conclusions were reached among the panels of the Sixth<sup>80</sup> and Seventh Circuits<sup>81</sup> as to the applicable standard in asylum cases. Thus, one panel of the Seventh Circuit

subjective element of the asylum standard since many persons fleeing their persecutors have little or no direct evidence to satisfy the objective element of the standard.

72. 757 F.2d 532 (3d Cir. 1985).

73. 744 F.2d 542 (6th Cir. 1984).

74. 766 F.2d 1478 (7th Cir. 1985).

75. 786 F.2d 1242 (5th Cir. 1986).

76. *Youkhanna v. INS*, 749 F.2d 360, 362 (6th Cir. 1984) (clear probability of persecution standard applies only to petitions for withholding of deportation).

77. *Carvajal-Munoz v. INS*, 743 F.2d 562, 574-75 (7th Cir. 1984) (burden on asylum applicant is similar, but not identical, to that imposed by the clear probability standard).

78. *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1283 (9th Cir. 1984) (clear probability of persecution required for withholding of deportation, but alien seeking asylum need only establish a valid reason for fear).

79. *Guevara*, 786 F.2d at 1249 (emphasis added).

80. *Youkhanna*, 749 F.2d at 362. In contrast, the court concluded that an asylum claim could be established through the "persuasive, credible testimony" of the alien, "showing actual persecution or good reason to fear persecution."

81. *Carvajal-Munoz*, 743 F.2d at 574-575.

adopted the language of the Supreme Court in its *Stevic* dicta, that a “reasonable possibility” of persecution is sufficient to back up a well-founded fear, as opposed to the likelihood or probability necessary to support a withholding claim.<sup>82</sup>

This brief survey of case decisions reveals the striking disharmony which existed among the circuit courts, and at times, among their various panels, both before and after *Stevic*. Because of the unjust results which accrued from the narrow interpretation of the Refugee Act’s provision on asylum,<sup>83</sup> and conflict among lower courts, the issue of the proper standard for asylum became ripe for consideration by the Supreme Court.

### III. *INS v. Cardoza-Fonseca*: A TIME FOR CHANGE

After the *Stevic* decision, any further confusion as to the proper standard for asylum applicants was put to rest in *Immigration and Naturalization Service v. Cardoza-Fonseca*.<sup>84</sup> In this case, the respondent, Luz Marina Cardoza-Fonseca, had entered the United States in 1979 as a visitor from Nicaragua. After remaining in the United States longer than permitted, the INS commenced deportation proceedings against her. Although respondent conceded that she was in the country illegally, she requested withholding of deportation pursuant to section 243(h), and asylum as a refugee pursuant to section 208(a).<sup>85</sup> To support her claim for withholding of deportation, the respondent attempted to show that if she were returned to Nicaragua, her “life or freedom would be threatened” on account of her political views. To support her claim for asylum, she attempted to show that she had a “well-founded fear of persecution” upon her return.<sup>86</sup> She presented evidence that her brother had been tortured and imprisoned because of his political activities in Nicaragua, and that if returned, her own political opposition to the Sandinistas would be exposed. Based on these facts, respondent

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82. *Id.*

83. *Matter of Acosta*, Int. Dec. 2986 (B.I.A. 1985). Asylum applicant was a founder of a taxi co-op in El Salvador in which other co-founders had been murdered. Because applicant could not show that he had been singled out for a persecution he was denied a grant of asylum.

84. *Immigration and Naturalization Service v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987). Stevens, J., delivered the opinion of the Court, in which Brennan, Marshall, Blackmun, and O’Conner, J.J., joined. Blackmun, J., filed a concurring opinion. Scalia, J., filed an opinion concurring in the judgment. Powell, J., filed a dissenting opinion, in which Rehnquist, C.J., and White, J., joined.

85. *Id.* 107 S. Ct. at 1209.

86. *Id.*

claimed that she would be interrogated and tortured if returned.<sup>87</sup>

The Immigration Judge applied the same standard in evaluating the respondent's claim for withholding of deportation as he did in evaluating her application for asylum.<sup>88</sup> The Judge found that she had not established "a clear probability of persecution" and therefore was not entitled to either form of relief.<sup>89</sup> The BIA affirmed, holding that respondent had failed to establish that she would suffer persecution within the meaning of section 208(a) or 243(h).<sup>90</sup> On appeal to the Ninth Circuit Court of Appeal, respondent did not challenge the BIA's decision regarding withholding of deportation. However, she argued that the Immigration Judge and BIA erred in applying the "more likely than not" standard of proof from section 243(h) to her section 208(a) asylum claim.<sup>91</sup> Relying on both the text and structure of the Act, the Ninth Circuit held that the lower courts erred by not applying the "well-founded fear" standard to the asylum proceedings, and that such a standard is "more generous, than the 'clear probability' standard which governs withholding of deportation proceedings."<sup>92</sup> The court interpreted the standard to require asylum applicants to present "specific facts" through objective evidence to prove either past persecution or "good reason" to fear future persecution.<sup>93</sup> The court remanded respondent's asylum claim to the BIA to evaluate it under the proper legal standard. The U.S. Supreme Court granted certiorari to resolve circuit conflicts concerning the standard.<sup>94</sup>

#### A. *The Majority's Interpretation of the Well-Founded Fear Standard*

Writing for the majority, Justice Stevens noted that the "persecution or well-founded fear of persecution" standard governs the Attorney General's determination of whether an alien is eligible for asylum since eligibility for asylum depends on the Attorney General's determination of whether an alien is a "refugee" under INA section 101(a)(42)(A).<sup>95</sup> Stevens went on to note that the 1980

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87. *Id.* at 1209-1210.

88. *Id.* at 1210.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1211.

Refugee Act removed the Attorney General's discretion in withholding of deportation proceedings, while at the same time, the term "refugee", and hence the "well-founded fear" standard, was made an integral part of asylum procedure.<sup>96</sup>

The government argued that even though the "well-founded fear" standard is applicable to asylum applicants, the only way an applicant can demonstrate a "well-founded fear of persecution" is to prove a "clear probability of persecution."<sup>97</sup>

Justice Stevens rebutted this argument by noting that:

[t]he language Congress used to describe the two standards conveys very different meanings. The "would be threatened" language of section 243(h) has no subjective component, but instead requires the alien to establish by objective evidence that it is more likely than not that he or she will be subject to persecution upon deportation.<sup>98</sup>

The court noted in contrast, that "the reference to 'fear' in the section 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien."<sup>99</sup> "That the fear must be 'well-founded' does not alter the obvious focus on the individuals subjective beliefs, nor does it transform the standard into a 'more likely than not' one."<sup>100</sup> "One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place."<sup>101</sup>

Although the BIA agreed that the term "fear" refers to "a subjective condition, an emotion characterized by the anticipation or awareness of danger",<sup>102</sup> in essence, the government's contention was that the "fear" of return must be based on the chance that persecution would be more likely than not. Thus, where the chance of persecution was less than 51% upon return, the degree of fear harbored by the alien would be insufficient to gain a grant of asylum. This argument was squarely rejected by the majority on the ground that even if a one in ten chance of death or imprisonment were to exist in a country, "it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual

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96. *Id.* at 1212.

97. *Id.*

98. *Id.* at 1212-1213.

99. *Id.* at 1213.

100. *Id.*

101. *Id.*

102. *Id.* at 1213 n.11.

return.”<sup>103</sup>

After discussing the ordinary and obvious meaning of the phrases, the majority noted that “[t]he different emphasis of the two standards which is so clear on the face of the statute is significantly highlighted by the fact that the same Congress simultaneously drafted section 208(a) and amended section 243(h).”<sup>104</sup> Under general rules of statutory construction, the majority found the standards to differ since “it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.”<sup>105</sup>

### *B. Majority’s Examination of the Refugee Act’s History, the Protocol and Rejection of Senate Bill S.643*

The majority then examined the history of the Act, first looking to the practice prior to its passage in 1980,<sup>106</sup> then to the United Nations Protocol Relating to the Status of Refugees,<sup>107</sup> and finally, congressional rejection of Senate Bill S. 643.

#### 1. History of Refugee Act

Prior to the 1980 amendments, there was no statutory basis for granting asylum to aliens who applied from within the United States.<sup>108</sup> However, under INA section 203(a)(7), the Attorney General could permit “conditional entry” to refugees fleeing communist-dominated areas or the Middle East. The majority noted that the standard for “conditional entry” was “unquestionably more lenient than the ‘clear probability’ standard applied in section 243(h) proceedings,”<sup>109</sup> and required only a showing that the applicant was unwilling to return because of persecution or fear of persecution. Thus, section 203(a)(7) provided an acceptable standard under the Protocol, except for the fact that it made various unacceptable geographic and political distinctions. “The legislative history” thus “indicates that Congress in no way wished to modify the standard that had been used under section 203(a)(7).”<sup>110</sup>

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103. *Id.* at 1213 (quoting I A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 180 (1966)).

104. *Cardoza-Fonseca*, 107 S. Ct. at 1213.

105. *Id.*

106. *See supra* notes 29-31 and accompanying text.

107. *See supra* notes 16-18 and accompanying text.

108. INA § 203(a)(7). *See supra* note 31.

109. *Cardoza-Fonseca*, 107 S. Ct. at 1214.

110. *Id.* at 1215.

## 2. The Protocol

The majority then examined the United Nations Protocol, and found that one of Congress' primary purposes in passing the 1980 Act was to bring U.S. refugee law into conformity with the 1967 Protocol Relating to the Status of Refugees.<sup>111</sup> As such, "[t]he Conference Committee Report, for example, stated that the definition [of "refugee"] was accepted 'with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.'<sup>112</sup> The majority found that the Committee which drafted the provision intended the "well-founded fear of being a victim of persecution" to mean that one has actually been a victim of persecution or can show good reason why he fears persecution.<sup>113</sup> Having found the 1967 Protocol to incorporate the "well-founded fear" test without modification, the standard "certainly does not require an alien to show that it is more likely than not that he will be persecuted in order to be classified as a 'refugee.'<sup>114</sup> The majority found additional support for its conclusion in the *Handbook on Procedures and Criteria for Determining Refugee Status*.<sup>115</sup> After noting that the United Nations High Commissioner's analysis of the "well-founded fear" standard was consistent with the majority's own examination, Justice Stevens stated:

There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening.<sup>116</sup>

The majority reasoned that "so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."<sup>117</sup> "Thus, as made binding on the United States through the Protocol", section 208(a) "provides for a precatory, or discretionary, benefit for the entire class of persons who qualify as 'refugees' whereas" section 243(h) "provides an entitlement for the subcategory that 'would be threatened' with perse-

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111. See *supra* note 4.

112. *Cardoza-Fonseca*, 107 S. Ct. at 1216; S. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980); see also H.R. Rep. No. 9, 96th Cong., 2d Sess. (1980).

113. *Cardoza-Fonseca*, 107 S. Ct. at 1216.

114. *Id.* at 1217.

115. See *supra* note 51 and accompanying text.

116. *Cardoza-Fonseca*, 107 S. Ct. at 1217.

117. *Id.*



cution upon their return.”<sup>118</sup>

### 3. Rejection of Senate Bill S.643

A third source relied upon by the majority in interpreting the proper standard for asylum was Congressional rejection of Senate Bill S. 643.<sup>119</sup> To be eligible for asylum, the House Bill<sup>120</sup> provided that an alien must be a “refugee” to gain asylum, and such a grant was within the Attorney General’s discretion. The Senate Bill imposed the additional requirement that the refugee would not obtain asylum unless “his deportation or return would be prohibited under section 243(h).”<sup>121</sup> The majority concluded that while neither bill affected the standard used to determine whether an alien is a “refugee,” the Senate’s inclusion of the section 243(h) standard to cover asylum was recognition that there is a difference between the “well-founded fear” standard and the clear probability standard.<sup>122</sup> Thus, “enactment of the House Bill rather than the Senate Bill [demonstrated] that Congress eventually refused to restrict eligibility for asylum only to aliens meeting the stricter standard.”<sup>123</sup>

The government argued that the two standards should be identical since section 208(a) affords greater benefits than section 243(h).<sup>124</sup> However, the majority noted that while asylum affords greater benefits than withholding of deportation, one who satisfies the definition of refugee does not have the right to remain in the United States, but “is simply *eligible* for asylum, if the Attorney General, in his discretion, chooses to grant it.”<sup>125</sup> Thus, the majority concluded that “[t]here is no basis for the Government’s assertion that the discretionary/mandatory distinction has no practical significance.”<sup>126</sup>

The Government further argued that the BIA’s interpretation of the Refugee Act is entitled to substantial deference, even if the intent of Congress would compel a finding that the asylum standard

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118. *Id.* at 1218.

119. *Id.*; 96th Cong., 1st Sess. (1979).

120. H.R. 2816, 96th Cong., 1st Sess. (1979).

121. *Cardoza-Fonseca*, 107 S. Ct. at 1218; S. Rep. 26.

122. *Cardoza-Fonseca*, 107 S. Ct. at 1218.

123. *Id.* at 1219.

124. An alien granted withholding of deportation may be deported to another country in which he does not face persecution. However, an alien granted asylum may remain in the United States and will become eligible for adjustment of status to that of a lawful permanent resident after one year of residence pursuant to INA § 209.

125. *Cardoza-Fonseca*, 107 S. Ct. at 1219.

126. *Id.*

is more generous than that for withholding of deportation.<sup>127</sup> The majority noted that the question of statutory construction is one for the courts to decide. Thus, if the interpretation of a statute “represents reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute,” it should not be disturbed “unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”<sup>128</sup> The majority, having found that Congress did not intend the two standards to be identical, found the Government’s argument unpersuasive.<sup>129</sup>

The majority went on to note that “some ambiguity in a term like ‘well-founded fear’” could be given concrete meaning through case-by-case adjudication.<sup>130</sup> Thus, the majority held that “[w]e do not attempt to set forth a detailed description of how the well-founded fear test should be applied. Instead, we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical.”<sup>131</sup> From the foregoing analysis, “it is clear that Congress did not intend to restrict eligibility for [asylum] to those who could prove that it is more likely than not that they will be persecuted if deported.”<sup>132</sup>

### C. Concurring Opinions

In a concurring opinion, Justice Blackmun emphasized his understanding that the Court’s opinion had directed the INS to the appropriate sources from which the meaning of the “well-founded fear” standard would be derived, even though the meaning would be refined in later adjudication.<sup>133</sup> These sources consist of plain meaning, the United Nations Protocol, international law and scholarly commentaries.<sup>134</sup> Justice Blackmun further noted that the process of “case-by-case adjudication” of a precise formulation of the “well-founded fear” standard was already underway by the Courts

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127. *Id.* at 1220.

128. *Id.* at 1221 n.29 (quoting *United States v. Shimer*, 367 U.S. 374, 382-383 (1961)).

129. *Id.* at 1220-1221. The majority further rejected the Government’s argument that an agency interpretation of a statute deserves substantial deference since the BIA has taken inconsistent positions through the years. “An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” *Id.* at 1221 n.30.

130. *Id.* at 1221.

131. *Id.* at 1222.

132. *Id.*

133. *Id.* at 1223.

134. *Id.*

of Appeals.<sup>135</sup> In an insightful conclusion, Blackmun stated that:

The efforts of these courts stand in stark contrast to—but, it is sad to say, alone cannot make up for—the years of seemingly purposeful blindness by the INS, which only now begins its task of developing the standard entrusted to its care.<sup>136</sup>

Justice Scalia concurred in the judgment insofar as the “well-founded fear” standard and the “clear probability” standard are not equivalent.<sup>137</sup> Justice Scalia found it “ill advised”, however, that the majority undertook an “exhaustive investigation of the legislative history of the Act where the a language of the statute was clear. “[I]f the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity.”<sup>138</sup>

#### D. *The Dissent*

Writing for the dissent, Justice Powell<sup>139</sup> argued that it has never been the BIA’s position that an alien “demonstrate an objectively quantifiable risk of persecution in their homeland that is more than 50%” before acquiring asylum.<sup>140</sup> Ironically, Justice Powell further stated that the “BIA has concluded that there is no practical distinction between the objective proofs an alien must submit to be eligible for these two forms of relief.”<sup>141</sup> Finding the “BIA’s interpretation of the statute reasonable,” the dissent argued that the BIA’s decision should be affirmed.<sup>142</sup> In granting the BIA’s interpretation substantial deference, the dissent quoted from the BIA’s decision in *Matter of Acosta*.<sup>143</sup> In that case the BIA found that an alien must establish a “well-founded fear of persecution” by evidence which demonstrates that:

(1) the alien possess a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.<sup>144</sup>

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135. *Id.*

136. *Id.*

137. *Id.* at 1223-24.

138. *Id.* at 1224.

139. *Id.* at 1225. (Rehnquist, C.J., and White, J., joined).

140. *Id.*

141. *Id.*

142. *Id.*

143. Int. Dec. 2986 (B.I.A. 1985).

144. *Id.*

As noted earlier, this four-part test requires proof of facts which would demonstrate a realistic likelihood of persecution. However, in effect, it requires the alien to prove the subjective intentions of his persecutors, while substantiating his own fears with external, objective facts. Thus, the dissent appeared willing to defer to agency interpretation regardless of the plain language and legislative history of the statutes governing asylum.

The dissent further stated that “[t]he Court notes that the language of section 208(a) differs from the language of section 243(h) in that it contemplates a partially subjective inquiry. From this premise, the Court moves . . . to the conclusion that the objective inquiries under the two sections necessarily are different.”<sup>145</sup> Thus, the dissent argued in effect, that the term “well-founded” presents an objective determination, which “in practice” is no different than the objective basis required for there to be a “clear probability” of persecution.<sup>146</sup>

Justice Powell sidestepped the majority’s emphasis on the complete term “well-founded fear” by stating that “[b]ecause both standards necessarily contemplate some objective basis, I cannot agree with the Court’s implicit conclusion that the statute resolves this question on its face.”<sup>147</sup> Justice Powell then concluded that “the character of evidence sufficient to meet these two standards is best answered by . . .” the BIA.<sup>148</sup> The dissent substantiated this conclusion on the ground that the “Attorney General has delegated the responsibility for making these determinations to the BIA,” and that the “Board has examined more of these cases than any court ever has or can.”<sup>149</sup>

While accusing the majority of ignoring the “practical realities” and concentrating on “semantic niceties,” the dissent stated that “[g]overnments rarely persecute people by the numbers.”<sup>150</sup> From this, the dissent assumed that one’s fear is not “well-founded” unless there is a “realistic likelihood” that persecution will occur.<sup>151</sup>

Although stating that the majority provided no “positive basis for arguing there is a material difference between the two standards,” the dissent failed to find a “positive basis” in its own interpretation

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145. *Cardoza-Fonseca*, 107 S. Ct. at 1227.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1228.

150. *Id.*; see *infra* notes 173-178 and accompanying text.

151. *Id.*; see also *supra* notes 68-69 and accompanying text.

of legislative history that the standards are essentially the same. The dissent argued that the words “well-founded fear” are actually derived from the Attorney General’s own regulation governing applications for asylum.<sup>152</sup> Such a conclusion, in light of the Protocol’s history and its legislative implementation in the United States, is highly questionable.<sup>153</sup>

The dissent further argued that materials interpreting the Protocol are “only marginally relevant,”<sup>154</sup> since “statements by the United Nations High Commissioner for Refugees have no binding force,” and since “the determination of refugee status . . . is incumbent upon the Contracting State.”<sup>155</sup> However, while citing the *Handbook* for authority that “determination of refugee status . . . is incumbent upon the Contracting State,” the dissent suspiciously ignored the *Handbook*’s extensive emphasis on the alien’s subjective state of mind. To ignore the subjective element of “well-founded fear” is clearly contrary to the Protocol, and therefore U.S. law.<sup>156</sup>

Finally, the dissent rejected settled principles of statutory construction by criticizing the majority’s analysis of the Conference Committee’s rejection of Senate Bill S. 643.<sup>157</sup> Senate Bill S. 643 authorized the Attorney General to grant asylum only if the alien was found to be a “refugee,” and his deportation or return would be prohibited under section 243(h).<sup>158</sup> This Bill was rejected in favor of House Bill H.R. 2816,<sup>159</sup> which provided that an alien was eligible for asylum if he or she was a “refugee” under the Act.<sup>160</sup>

The dissent rejected the common sense conclusion that Congress did not intend to adopt the stricter standard provided for in Senate Bill S. 643. Instead, it argued that “[t]he language of the Senate Bill [did] not demonstrate that the Senate recognized a difference between the two standards.” The dissent appeared to argue that the true intent of the legislators was that there was no question as to wording when deciding which bill to adopt. Indeed, the dissent reasoned that “there is no reason to believe that the minor differences in wording between the Senate Bill and the Act as passed reflect a

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152. *Cardoza-Fonseca*, 107 S. Ct. at 1229.

153. *See supra* note 31.

154. *Cardoza-Fonseca*, 107 S. Ct. at 1229.

155. *Id.* at 1230 (quoting the *Handbook*).

156. *See supra* notes 6 and 12 and accompanying text.

157. *See supra* note 123 and accompanying text.

158. *Cardoza-Fonseca*, 107 S. Ct. at 1230.

159. 96th Cong., 1st Sess. (1979).

160. *See supra* note 32.

rejection of the position that there is no significant difference between the two standards.”<sup>161</sup> Thus, in rejecting settled rules of statutory construction, the dissent asserted that it will “place no weight on the Conference Committee’s choice of the language of the House Bill.”<sup>162</sup>

Having ignored the plain language and legislative history of the Act, the dissent proceeded to argue that the majority “ignored the words in which the BIA framed its decision,” and “failed to examine factual findings on which the decision rested.”<sup>163</sup> Unfortunately, the dissent missed the issue of whether the standards of asylum and withholding of deportation differ, and instead argued the weight of the respondent’s evidence.

#### IV. INEQUITIES IN ASYLUM LAW AFTER *Cardoza-Fonseca*

Although the *Cardoza-Fonseca* decision is a victory for those seeking asylum, the war may yet be lost. When confronting the BIA,<sup>164</sup> the alien faces obvious difficulties in establishing his burden of proof. Yet a more inherent difficulty exists in the nature of discretion. While a grant of asylum is purely discretionary, upon receipt of a request for asylum the district director or immigration judge must obtain an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the Department of State.<sup>165</sup> Because the BHRHA’s opinions are almost always form letters that describe general country conditions according to the State Department’s foreign policy views, and because they are heavily relied upon by Immigration and Naturalization Service (INS) officials, their use has been challenged by advocates representing applicants for asylum.<sup>166</sup> The district director’s decision to grant or deny asylum need not be based upon the BHRHA opinion. If it is however, the opinion must be made part of the record unless

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161. *Cardoza-Fonseca*, 107 S. Ct. at 1230.

162. *Id.*

163. *Id.* at 1232.

164. The alien will file an application with the district director or if deportation proceedings have been instituted, with the immigration judge. 8 C.F.R. § 208.3(a) & (b) (1986). If denied asylum by the district director, the alien will be placed under exclusion or deportation proceedings at which point asylum may again be requested. From a denial, the alien may appeal to the BIA. 8 C.F.R. §§ 208.8(3) & 208.10 (1986).

165. 8 C.F.R. §§ 208.7 & 208.10(b) (1986). The BHRHA opinion advises whether the alien should be given a grant of asylum based on the conditions in the alien’s country of nationality.

166. A. HELTON, MANUAL ON REPRESENTING ASYLUM APPLICANTS 23 (1984); *Chaverria v. U.S. Dept. of Justice*, 722 F.2d 666, 668-69 (11th Cir. 1984).

otherwise classified.<sup>167</sup> Since both the INS and Department of State are under the direction of the Executive Branch, they are subject to the foreign and domestic policies of the administration in power. As a result of this influence, advisory opinions issued by the BHRHA are often permeated with ideological bias.

Despite concerns of bias, ideology continues to dominate the asylum decision-making process.<sup>168</sup> While human rights are violated throughout the world, it is quite apparent that one's chances of gaining asylum in the United States are directly proportional to the political, economic and military interests of the United States in the alien's country of origin, and not to that country's record of human rights.<sup>169</sup>

This observation can best be demonstrated by dividing several nations from which persons have applied for asylum into two general categories. The first category represents those nations which advocate political, economic and military interests contrary to that of the United States. The second category represents those nations which the United States supports, either for political, economic or military reasons. Because the number of applicants for asylum varies from nation to nation, the chart below indicates only the percent of those aliens granted asylum from their respective nations of origin during 1986.<sup>170</sup>

The disparity in figures demonstrated in footnote 170 results from a misapplication of laws established by Congress to conform to the Protocol's provisions defining the term "refugee." Indeed, the determination of who is entitled to refugee status, and therefore asylum, is conspicuously inconsistent, and the Executive Branch of

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167. 8 C.F.R. § 208.8(d) (1986).

168. See *infra* note 171 and accompanying text.

169. See *infra* notes 173-178 and accompanying text.

170. U.S. department of Justice, Immigration and Naturalization Service: Asylum Cases Filed with the District Director Fiscal Year 1986. These figures represent the percent of applicants who applied for and received a grant of asylum in fiscal year 1986 (ending Oct. 1986). A complete copy of these statistics is on file at the offices of the California Western Law Review/International Law Journal, California Western School of Law.

Nations Which Are Not Supported by United States Interests	Percentage of Applicants Granted Asylum
Afghanistan	25
Bulgaria	100
China	38
Cuba	0.25*
Czechoslovakia	37
Ethiopia	45
East Germany	71
Iran	52
Libya	33
Nicaragua	15
Poland	39
Romania	59
Syria	44
U.S.S.R.	92
Vietnam	53
Yugoslavia	3
<b>Total Average Percentile</b>	<b>44</b>

\* *Marief Cubans entered the United States under the Attorney General's grant of parole.* INA § 212(d)(5)(B).

Nations Which Are Supported by United States Interests	Percentage of Applicants Granted Asylum
Bolivia	0
Chile	30
Costa Rica	0
Dominican Republic	0
Egypt	0
El Salvador	2.5
Greece	0
Guatemala	1
Haiti	1
Honduras	0
India	0
Iraq	15
Mexico	0
Pakistan	3
Panama	0
Philippines	10
South Africa	22
South Korea	0
Turkey	0
Uruguay	0
Venezuela	0
<b>Total Average Percentile</b>	<b>4</b>



our government plays a major role in this inequity.<sup>171</sup>

The violation of the rights of individuals by nations clearly is not limited to those countries which the United States condemns. Many nations which are supported by the United States have long histories as violators of human rights.<sup>172</sup> Personal testimony and reports indicate that the regular security and military forces in Guatemala are responsible for arbitrary arrests, torture, “disappearance” and extrajudicial executions of victims from all sectors of Guatemalan society.<sup>173</sup> Plain-clothed government forces known as “death squads” are responsible for mass extrajudicial execution in El Salvador.<sup>174</sup> To date, more than 5,000 people have “disappeared” in El Salvador, and over 40,000 murders go unsolved because “the state is incapable of prosecuting the criminals.”<sup>175</sup> Dominicans under detention suffer from beatings, whippings and other forms of torture, and many “disappear” following arrest.<sup>176</sup> Cases of torture are abundant in India, as well as “encounter killings.” Encounter killings are staged encounters by police with “extremists” (or members of the Communist Party) in which the extremists are extrajudicially executed.<sup>177</sup>

The reported cases of human rights violations are extensive, even in those nations which the United States supports. As a result of the Attorney General’s broad discretion and Executive bias, it becomes clear that many aliens with bona fide claims are denied asylum. Although *Cardoza-Fonseca* mandates that a lesser, more generous standard be applied in asylum cases, human suffering will not be mitigated unless the standard is neutrally applied to all aliens.

## V. A TIME FOR CHANGE IN U.S. POLICY

The Refugee Act was designed, among other things, to repeal the prior law’s discriminatory treatment of refugees and to provide a

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171. A. HELTON, POLITICAL ASYLUM UNDER THE 1980 REFUGEE ACT: AN UNFULFILLED PROMISE, 17 U. Mich. J.L. Ref. 243 (1984). In regard to El Salvador, the administration had to certify to Congress periodically that El Salvador has shown progress in the area of human rights in order to continue foreign aid. Thus, as a matter of foreign policy, the Executive Branch (which includes the State Department and the INS) has every incentive to characterize the situation in El Salvador as an improving one—an image that would be jeopardized by granting asylum to Salvadorans.

172. AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORTS 1986 (1986).

173. *Id.* at 152.

174. *Id.* at 143.

175. *Id.* at 144.

176. *Id.* at 142.

177. AMNESTY INTERNATIONAL, POLITICAL KILLINGS BY GOVERNMENTS 61 (1983).

comprehensive program for refugee admission.<sup>178</sup> However, current data on asylum and country condition reports reveal that the Refugee Act has not achieved its desired result. Although *Cardoza-Fonseca* is a step in the right direction, refugees applying for asylum remain subject to discriminatory treatment based on the United States' political, economic and military interests with their countries of origin. This result remains contrary to the policy advocated in the Refugee Act.<sup>179</sup> Furthermore, this result violates the spirit of the Protocol since persons fitting the definition of "refugee" are overwhelmingly denied a grant of asylum if their country of origin is supported by United States interests.<sup>180</sup>

### A. Recommended Procedures and Policies

Several changes could bring U.S. policy into conformity with the Protocol and the intent of Congress in enacting the Refugee Act of 1980.

First, in light of the discriminatory application of current law,<sup>181</sup> Congress should impose limitations upon the discretionary nature of granting asylum.<sup>182</sup> One such limitation could be achieved by removing the district directors's sole discretion of approving or denying asylum, and substituting it with that of an immigration judge's. A trained judge is far more likely to weigh the merits of each application for asylum, and to make a decision which is less influenced by the INS.<sup>183</sup>

Second, BHRHA opinions should be supplemented or replaced with more objective country reports.<sup>184</sup> Currently, many BHRHA opinions reflect White House foreign policy, and neglect actual violations of human rights and the reasonable fears caused thereby.<sup>185</sup> There exist many organizations dedicated to the cause of human rights which could provide a more accurate picture of human rights violations throughout the world.<sup>186</sup> With a grant of asylum geared

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178. See *supra* note 29.

179. *Id.*

180. See *supra* note 171.

181. See *supra* note 170 and accompanying text.

182. 8 C.F.R. § 208.8(a) (1986). The District Director may approve or deny the asylum application in the exercise of discretion.

183. In 1983, "special inquiry officers" (immigration judges) were placed under the Executive Office of Immigration Review in the Department of Justice, and are no longer answerable to the INS.

184. See *supra* note 165.

185. See *supra* note 166 and accompanying text.

186. Such organizations include: Americas Watch Committee; Amnesty International; International Human Rights Law Group; and U.S. Helsinki Watch Committee.

to actual country conditions, the asylum procedure would become more equitable, and in the process would fulfill the intent of Congress and the framers of the Protocol.

Third, the Supreme Court should take further steps to guide the INS and BIA in a direction which reflects Congressional intent when those bodies attempt to ascertain the meaning of the "well-founded fear" standard. Such guidance is proper where the INS followed for years a policy of "purposeful blindness" as to the standard of asylum entrusted to its care.<sup>187</sup>

Fourth, a procedure could be developed whereby an alien denied asylum by the district director would have an automatic right of appeal to be heard before an immigration judge. The administrative burdens of an automatic appeal could be lessened by limiting such appeals to those aliens who historically have suffered discriminatory treatment in asylum cases. Thus, an alien from Bulgaria would have no automatic right to appeal, whereas an alien from Guatemala would.<sup>188</sup> Through such a procedure, current arbitrariness in the granting of asylum could be greatly curtailed.

#### CONCLUSION

Implementation of the Refuge Act of 1980 has not fully resolved the discriminatory nature of prior law. While only a small victory for the asylum applicant, *Cardoza-Fonseca* does represent a step forward by establishing that the standard for asylum is more generous than that for withholding of deportation. Fear of persecution by its nature is a subjective emotion which knows few political boundaries. Thus, the determination of who is to be granted asylum should not be based upon narrow self interest, but on the basis of human rights violations and realistic country conditions. A more equitable application of current law would not open the "flood-gates" to hordes of aliens fearing persecution, but would instead have the effect of giving relief only to those who most need it, and yet who are unable to objectively prove that persecution would be "more probable than not."

Until steps are taken to correct the inherent inequities in current

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187. *Cardoza-Fonseca*, 107 S. Ct. at 1223 (Blackmun, J., concurring).

188. See *supra* note 171 and accompanying text.

law, the Refugee Act and Protocol will fail in their ultimate purpose.

*Erik J. Davenport\**

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\* This Note is dedicated to my late mother Kathryn, my beautiful wife Christine, and my family, without whose love, support and encouragement I would not have come this far.