Discrimination in Asylum Law: The Implications of *Jean v. Nelson*

INTRODUCTION

U.S. immigration law grants the Attorney General discretionary authority to admit (parole) otherwise inadmissible aliens into the country in cases of emergency.[1] This parole statute does not explicitly prohibit the Attorney General from using race or national origin as a basis for denying parole to an alien. On June 26, 1985, the Supreme Court decided *Jean v. Nelson*,[2] a case that challenged the Attorney General's use of his parole discretion.

The Haitian petitioners, who were part of a large influx of undocumented and unadmitted aliens seeking asylum in the United States, were incarcerated by the Immigration and Naturalization Service ("INS") at various federal detention facilities pending disposition of their asylum applications. The Haitians claimed that, in denying them parole, the INS violated their rights under the equal protection clause of the fifth amendment by discriminating against them on the basis of race and national origin.[3] The case reached the Court after an appellate court ruled that the Haitians could not challenge the government's detention policy, since they had no constitutional rights with respect to admission and parole in the United States.[4]

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1. Immigration and Nationality Act § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) (1982):
   > The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.
2. Jean v. Nelson, 105 S. Ct. 2992 (1985).
3. *Id.* at 2994.
4. The petitioners claimed that the INS violated the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA) by changing the policy of general parole for undocumented aliens seeking admission to a policy of general detention without parole for aliens who could not present a prima facie case for admission. They further alleged that this restrictive policy violated the equal protection guarantee of the fifth amendment. The district court held for the petitioners on the APA claim, thus invalidating the new policy and releasing over one thousand Haitians held in detention. However, the district court found that the petitioners had failed to prove discrimination based on race or national origin and therefore denied the equal protection claim. Louis v. Nelson, 544 F. Supp. 973 (S.D. Fla. 1982), *aff'd in part, rev'd in part sub nom.*, Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), *vacated as moot in part on reh'g, rev'd in part on reh'g*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 105 S. Ct. 2992 (1985).

   The Appellate Court Panel, in a strongly-worded opinion, affirmed the district court on the APA claim, and reversed on the equal protection claim finding that there had been

The Court refused to rule, however, on the equal protection claim. Instead, the case was decided solely on statutory grounds. Justice Rehnquist, writing for the majority, argued that neither the parole statute nor the INS regulations that implement it authorizes discrimination on the basis of race or nationality. The case was therefore remanded to allow the district court to determine whether lower-level INS officials had in fact discriminated in violation of the statute.[5]

The Court's decision may have disappointed many who had hoped that the Constitutional issue would be settled, but its refusal to extend equal protection rights to aliens is hardly surprising. Aliens have traditionally enjoyed only those rights that Congress has specifically afforded them.[6] The

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discrimination against the petitioners' class. Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), *vacated as moot in part on reh'g, rev'd in part on reh'g*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 105 S. Ct. 2992 (1985) (known as Jean I). The INS then promulgated a new rule, using proper APA procedures, prohibiting consideration of race or national origin in parole decisions.

The appellate court siting en banc found that the APA claim was moot because the government was no longer detaining Haitians under the old policy. However, it again reversed on the discrimination claim, refusing to acknowledge any equal proteetion rights for aliens: "[T]here is little question that the Executive has the power to draw distinctions among aliens on the basis of nationality." Jean v. Nelson, 727 F.2d 957, 978 n.30 (11th Cir. 1984), *aff'd*, 105 S. Ct. 2992 (1985) (known as Jean II).

5. In *Jean v. Nelson*, the Supreme Court said: "On remand the District Court must consider: (1) whether INS officials exercised their discretion under sec. 1182 (d)(5)(A) to make individualized determinations of parole, and (2) whether INS officials exercised this broad discretion under the statutes and regulations without regard to race or national origin." Jean v. Nelson, 105 S. Ct. at 2999.

6. Congressional power to discriminate in immigration law has been recognized since the first immigration statutes were subjected to judicial scrutiny. *See* The Chinese Exclusion Case, 130 U.S. 581 (1889). Immigration law was considered an inherently political field, not within the province of the courts and therefore immune from Constitutional review. Thus the Supreme Court in United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) asserted, "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

This harsh doctrine was reiterated by the Supreme Court in Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953), where a resident alien was excluded from the U.S. on unstated security grounds and stranded on Ellis Island because no other country would take him. The Court held: "Whatsoever our individual estimate of that policy and the fears on which it rests, respondent's right to enter the United States depends on the Congressional will, and courts cannot substitute their judgment for the legislative mandate." *Id.* at 216; *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952). In his concurrence in *Harisiades*, Justice Frankfurter stated:

> But whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress. . . . But the underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American traditions and may, as has been the case, jeopardize peace.

Id. at 597 (Frankfurter, J., concurring).

More recently, courts have continued to uphold Congressional power to discriminate on the basis of race or national origin in immigration law against all Constitutional challenges. *See* Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980); Hatai v. INS, 343 F.2d 466, 467 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965). Despite the

Court's refusal to address the Constitutional issue, however, should not overshadow the far-reaching implications of the decision it did make—implications that go beyond the relatively narrow issue of parole. This Note will argue that the Court's decision necessitates dramatic changes in the way asylum law in general is implemented. The first section discusses the relevant legislative history of immigration law to show that Rehnquist is correct in seeing firm nondiscriminatory intent behind the parole statute. More importantly, that section will show that such intent governs not only parole law, but asylum law as well.

The second section argues that, because the INS is prohibited by statute from discriminating in asylum cases, two areas of current INS practice must be restructured in order to bring them into conformity with statutory intent. The first area concerns the INS practice of basing asylum decisions on advisory opinions of the State Department. The second involves the standard of review used by appellate courts in determining whether asylum decisions involve invidious discrimination.

I. IMMIGRATION LAW AND STATUTORY INTENT

Rehnquist's majority opinion in *Jean v. Nelson* asserts that Congress intended the parole statute to be free from invidious discrimination. His only support for this assertion, however, is negative: nationality-based criteria are simply absent from the statute. Hence, he concludes, it "must be neutral as to race or national origin."[7] This absence-implies-neutrality argument prompted Marshall, in his dissenting opinion, to charge Rehnquist with deliberately avoiding the Constitutional issue by "creat[ing] out of whole cloth nonconstitutional constraints on the Attorney General's discretion to parole aliens into this country . . . ."[8] Rehnquist's failure to offer positive support for his conclusion is not surprising, according to Marshall, "for an examination of the regulations themselves, as well as the statutes and administrative practices governing the parole of unadmitted aliens, indicates that there are no nonconstitutional constraints on the Executive's authority to make national-origin distinctions."[9]

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civil rights movement and recent strides toward equality for all citizens, Congress retains the power to discriminate against aliens in any manner it chooses. This tradition prompted the court in Dunn v. INS, 499 F.2d 856, 858 (9th Cir. 1975), *cert. denied,* 419 U.S. 1106 (1975), to make an observation that remains true today:

> It is firmly established that Congress has the power to exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to the country, establish regulations for sending out of the country such aliens as come here in violation of law and commit the enforcement of such provisions to the appropriate executive officers.

See generally Jean v. Nelson, 105 S. Ct. at 2999-3012 (Marshall, J., dissenting).

7. Jean v. Nelson, 105 S. Ct. at 2999.

8. *Id.* at 3000.

9. *Id.* (footnote omitted).

Rehnquist and Marshall are both correct: the parole statute and regulations are facially neutral with regard to discrimination; and the parole statutes, regulations, and practices do not place explicit constraints on the Attorney General's discretion.[10] But Marshall wrongly infers a statutory construction permitting parole decisions to be based on race or national origin. This would be the case only if the history of parole legislation revealed no congressional intent to bar such discrimination. A careful examination of the relevant legislative history, however, reveals that immigration law has made steady progress from highly restrictive to explicitly nondiscriminatory policies. The culmination of this process was the Refugee Act of 1980, which brought U.S. policy into conformity with international law. Under the Act, parole and asylum statutes are clearly intended to preclude invidious discrimination.[11]

What follows is a discussion of some major developments in the history of U.S. immigration law. These developments reveal a general trend toward fairer, less discriminatory policies.

A. The Trend Toward Non-Discrimination

The history of U.S. immigration law has until very recently consisted of legislation designed to deny entry to any alien who did not meet highly specific racial, ethnic, or cultural criteria. Historically these statutes, far from proscribing discrimination on the basis of race or national origin, have in some cases required it. During the past three decades, however, Congress and the Executive have made concerted efforts to bring immigration law into greater conformity with the ideals of fair and equitable treatment that inspired civil rights legislation. These ideals demand that a person not be discriminated against on the basis of her race or national origin. Three important developments demonstrate this steady, if gradual, progress: The Immigration and Nationality Act of 1952 (the McCarran-Walter Act), the Immigration and Nationality Act Amendments of 1965, and The Refugee Act of 1980.

1. The Immigration and Nationality Act of 1952

The Immigration and Nationality Act of 1952[12] is perhaps more significant because of the debate it caused before and after its passage than for any

10. *See* Immigration and Nationality Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1982) (the statute) and 8 C.F.R. § 212.5 (1986) (the regulation). Note that under 8 C.F.R. § 212.5(a)(2)(C)(v), parole can be granted to "[a]liens whose continued detention is not in the public interest as determined by the district director."

11. "Invidious" in this context is meant to refer to discrimination based upon race and national origin. Hereafter, I shall simply mean "discrimination" to refer to the invidious sort.

12. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (1952).

positive contribution toward eliminating discriminatory immigration policies. While the Act repealed one section that had totally excluded Orientals,[13] and was therefore heralded as having removed racial discrimination,[14] it also left discriminatory practices effectively in place by preserving national origin quotas. These quotas, which were introduced into law in 1921, had no other purpose than to maintain the ethnic composition of the national population.[15] Quotas for those within the "Asia-Pacific triangle,"[16] for example, were based on ancestry rather than birthplace.[17]

The intense debate over the Act's restrictive policies did not subside after its passage. President Truman, over whose veto the Act became law, immediately denounced the national origins quota system as being unworthy of American ideals because it "discriminates, deliberately and intentionally, against many of the peoples of the world."[18] Although unsuccessful with his veto, Truman laid the foundation for an eventual repeal of the national origins system with the creation of a presidential commission. In its 1953 report, "Whom We Shall Welcome," the commission found that "the major disruptive influence in our immigration law is the racist and national discrimination caused by the national origins system," and that the present system should be replaced with a "unified quota system, which would allocate visas without regard to national origin, race, creed, or color."[19]

Repeated calls for reform during the next decade, however, went unheeded. Immigration policy between 1952 and 1965 consisted of "ad hoc legislation to meet the problems and political pressures of the time."[20] Discrimination persisted.

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13. H.R. REP. No. 1365, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS, 1653, 1665, 1679.

14. S. REP. No. 1137, 82d Cong., 2d Sess. 3 (1952): "[T]he instant bill makes several significant changes. Among these are the following: (1) A system of selective immigration within the national origins quota system is established, geared to the needs of the United States. (2) Racial discrimination and discrimination based upon sex are removed."

15. Immigration and Nationality Act of 1952, ch. 477, § 201(a), 66 Stat. 163, 175 (1952) (amended 1965):

> The annual quota of any quota area shall be one-sixth of 1 per centum of the number of inhabitants in the continental United States in 1920, which number, except for the purpose of computing quotas for quota areas within the Asia-Pacific triangle, shall be the same number heretofore determined under the provisions of section 11 of the Immigration Act of 1924, attributable by national origin to such quota area . . . .

16. The Asia-Pacific triangle embraces countries from Pakistan to Japan and the Pacific islands north of Australia.

17. Immigration and Nationality Act of 1952, ch. 477, § 202(b), 66 Stat. 163, 175-76 (1952) (amended 1965).

18. The President's Veto Message, June 25, 1952, *reprinted in* THE PRESIDENT'S COMM'N ON IMM. AND NAT., WHOM WE SHALL WELCOME 277 (submitted Jan. 1, 1953).

19. THE PRESIDENT'S COMM'N ON IMM. AND NAT., WHOM WE SHALL WELCOME 263 (submitted Jan. 1, 1953).

20. E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 489 (1981).

2. Immigration and Nationality Act Amendments of 1965

The movement for reform surged after the 1960 election of President Kennedy. While still a senator in 1958, Kennedy published *A Nation of Immigrants* in which he criticized the national origins quota system for having "strong overtures of an indefensible racial preference."[21] As President, he introduced legislation to end the quota system. After Kennedy's assassination, his successor, Lyndon Johnson, took up the bill. In the wake of Johnson's 1964 landslide electoral victory, the national origins standard was abolished by the Immigration and Nationality Act Amendments of 1965.[22] The Amendments established a "new system of preferential admissions based upon the existence of a close family relationship with U.S. citizens or permanent resident aliens, and upon the advantage to the United States of the special talents and skills of the immigrant . . . ."[23]

The Amendments were one of three complimentary bills passed early in Johnson's presidency, the others being the Civil Rights Act of 1964[24] and the Voting Rights Act of 1965.[25] The intent of Congress in passing the 1965 immigration amendments was clear. In reference to the bill, Senator Fong said,

> Last year we enacted the historic Civil Rights Act of 1964, which was designed to wipe out the last vestiges of racial discrimination against our own citizens . . . . As we move to erase racial discrimination against our own citizens, we should also move to erase racial barriers against citizens of other lands in our immigration laws.[26]

Fong found that Congress was "seeking an immigration policy reflecting America's ideal of the equality of all men without regard to race, color, creed or national origin . . . ."[27] Fong's sentiments were echoed in statements of other senators and officials who condemned the national origins quota system as "un-American" and "totally alien to the spirit of the Constitution," and who praised the new bill for its recognition of individual rights.[28]

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21. JOHN F. KENNEDY, A NATION OF IMMIGRANTS 77 (1964).

22. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

23. S. REP. No. 748, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS, 3328, 3329. *See also Explanation in Question and Answer Form of the Imm. Act of October 3, 1965, Subcomm. No. 1 of the House Comm. on the Judiciary,* 89th Cong., 1st Sess. 3 (1965).

24. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

25. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

26. *Hearings on S. 500 Before the Subcomm. on Imm. and Nat. of the Senate Comm. on the Judiciary, pt.1,* 89th Cong., 1st Sess. 44-45 (1965).

27. *Id.*

28. *See id.* at 11 (statement of Attorney General Katzenbach), 47 (statement of Secretary of State Dean Rusk), 127 (statement of Senator Hugh Scott), 165 (statement of Senator Paul Douglas) and 217 (statement of Senator Robert Kennedy). *See also Hearings Before Subcomm.*

When he signed the new bill Johnson pointed to the fairness of the new legislation. It repealed a system that, in his words, "violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit . . . ."[29]

The Amendments eliminated national quotas and anti-Oriental discrimination[30] but they maintained hemispheric quotas. A ceiling of 170,000 was placed on immigrants from the Eastern Hemisphere with a limit of 20,000 per foreign state. The Western Hemisphere had a limit of 120,000 on a first-come-first-served basis.[31] This last vestige of statutory discrimination was removed by Congress in 1978 when a single world-wide ceiling of 290,000 was established with no preference system or per-country advantage given to either hemisphere. The establishment of a world-wide ceiling was declared to be "the ultimate step in eliminating distinctions based upon an individual's place of origin."[32]

B. The Refugee Act of 1980

1. Parole

When Congress originally granted parole authority to the Executive in 1952, it was simply an administrative device to permit aliens conditional entry while their ultimate legal status was determined.[33] A Congressional committee report at the time explained the intent of this provision as follows:

> The committee believes that the "broader discretionary authority is necessary to permit the Attorney General to parole inadmissible aliens into the United States in emergency cases, such as the case of an alien who requires immediate medical attention before there has been an opportunity for an immigration officer to inspect him, and in cases where it is strictly in the public interest to have an inadmissible alien present in the United States, such as, for instance, a witness for purposes of prosecution.[34]

No. 1 of the House Comm. on the Judiciary, 88th Cong., 2d Sess. 723 (1964), where the Secretary-Treasurer of the AFL-CIO, James B. Carey, quotes the AFL-CIO Declaration in support of the bill.

29. T. ALEINIKOFF & D. MARTIN, IMMIGRATION PROCESS AND POLICY 55 (1985).

30. S. REP. No. 748, 89th Cong., 1st Sess., *reprinted in,* 1965 U.S. CODE CONG. & AD. NEWS 3328, 3333.

31. *Id.* at 3332, 3336, 3338.

32. H.R. REP. No. 1206, 95th Cong., 2d Sess. 11-12 (1978) (letter from Assist. Sec. of State, Douglas J. Bennett), *quoted* in CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 96TH CONG., 1ST SESS., U.S. IMM. LAW AND POLICY: 1952-1979, 66 (Comm. Print 1979).

33. Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980,* 56 NOTRE DAME LAW. 618, 630 (1981).

34. H.R. REP. No. 1365, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS, 82d Cong., 2d Sess. 1653, 1706.

Congressional intent to the contrary notwithstanding, parole power was repeatedly used to bring large groups of refugees into the country when the 1965 preference system proved inadequate.[35]

While the 1965 legislation and its subsequent amendments eliminated discriminatory language from U.S. immigration law, they did not provide adequate means of resolving the growing problem of refugees seeking asylum in the U.S. The numbers and types of refugees often did not meet the statutory limits and guidelines established for given categories.

The 1965 Amendments established a new preference category in addition to the six categories based on family ties and skills of the alien. Under the new seventh preference, "conditional entry" was granted to refugees who could establish that they had "fled" persecution in a "Communist or Communist-dominated country," or a "country within the general area of the Middle East."[36] Such entry was termed "conditional" because its beneficiaries did not receive immigrant visas, but, rather, a somewhat more "tenuous status" subject to later adjustment.[37]

This status was virtually identical to parole. However, because of the severe restrictions under the seventh preference, the Executive could admit few aliens without resorting to the broader parole authority. As a consequence, the Executive was able to use its parole authority for humanitarian purposes and to promote ideologically-based foreign policy objectives. Eisenhower first used the parole authority to bring in 30,000 Hungarian refugees in 1956. People fleeing Cuba and Indochina were among the post-1965 beneficiaries of parole.[38] But this parole authority also allowed for the possibility that the Executive could exercise its discretion in a discriminatory manner without having to answer to Congress.

The Refugee Act of 1980 closed the refugee-parole loophole. The seventh preference was repealed and a new section was added to the original parole provision that explicitly prohibits paroling a refugee unless "the Attorney General determines that compelling reasons in the public interest with respect to that *particular* alien require that the alien be paroled. . . ."[39] So as not to leave the President without power to decide which refugees he wants to admit, the 1980 Act established a refugee quota system in addition to the

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35. *See generally* ALEINIKOFF & MARTIN, *supra* note 29, at 235.

36. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (amending Immigration and Nationality Act of 1952, ch. 477, § 203, 66 Stat. 163, 178-79 (1952)) (amended 1980). This section also allowed admission of "persons uprooted by catastrophic natural calamity," but it was never used. *Id.*

37. ALEINIKOFF & MARTIN, *supra* note 29, at 622.

38. Statistics on use of the parole power can be found in: Note, *The Indefinite Detention of Excluded Aliens: Statutory and Constitutional Justifications and Limitations,* 82 MICH. L. REV. 61, 74 n.49 (1983-84).

39. Immigration and Nationality Act § 212(d)(5)(B), 8 U.S.C. § 1182(b)(5)(A) (1982) (emphasis added).

quotas already in place for "normal" immigration. These refugee ceilings for specific countries or regions are determined by the President in consultation with Congress.[40] The Act allows consideration of foreign policy as well as humanitarian interests in the consultation process; parole is therefore no longer needed as an ideological tool. The 1980 Act returned parole to its role as an emergency device to be used solely in individual cases.

The parole statute does not explicitly prohibit the Attorney General from making racial or national origins distinctions when exercising his discretion. Instead, it provides implicit standards for its exercise which have nothing to do with race or national origin. The failure to include this prohibition in the letter of the law may have been due to an oversight on the part of Congress, or it may have been due to Congress' belief that it was not necessary to state explicitly what it had elsewhere made clear. Either way, the statute's facial neutrality requires interpretation. To interpret the neutral language as congressional permission for the Attorney General to discriminate would be to ignore the wider context of Congressional intent when it enacted the 1980 Act. It is unfortunate that Rehnquist, who is known for meticulously applying statutes in conformance with the intent of Congress, did not support his thesis in *Jean v. Nelson* with specific references to legislative history. He apparently did not think that Congressional intent was even debatable, given that the INS itself agreed that such discrimination is prohibited in parole cases.[41]

2. Asylum

The Court's decision in *Jean v. Nelson* would probably be worth little more than a footnote in judicial history if its implications did not go beyond the administration of parole. As Marshall noted in his dissent, "[the Court's] restrictive view of discretionary authority with respect to parole decisions . . . will presumably affect the scope of [the Attorney General's] permissible discretion in areas other than parole decisions."[42] Marshall was correct in this prediction, but incorrect in thinking that this view was "adopted in the face of no authoritative statements limiting such discretion."[43] For, if legislative history makes clear the nondiscriminatory intent of the parole statute, it makes that intent even clearer with respect to the asylum statute.

Prior to the Refugee Act of 1980,[44] U.S. immigration law contained only

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40. *Id.* at § 207, 8 U.S.C. § 1157 (1982). Note that under § 207(e)(6) of the Immigration and Nationality Act, foreign policy considerations can be used to determine refugee ceilings. Thus the exercise of Executive discretion based upon ideology was transferred by the 1980 Act from the parole area to determination of quotas.

41. Jean v. Nelson, 105 S. Ct. at 2992, 2998.

42. *Id.* at 3005.

43. *Id.*

44. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

two provisions specifically designed to assist refugees. Neither of these provisions dealt adequately with the increasingly large number of refugees seeking protection in the U.S.

The first provision permitted "conditional entry" visas to be granted to aliens who "because of persecution or fear of persecution on account of race, religion, or political opinion . . . have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and . . . are unable or unwilling to return to such country or area on account of race, religion, or political opinion . . . ."[45] This statute, reflecting the ideological bias of its 1950's cold war origins, became largely irrelevant in the face of the massive influx of refugees from Southeast Asia, Latin America, and the Caribbean during the 1960's and 1970's.

The second provision pertaining to refugees, adopted initially in 1950, was the Withholding of Deportation statute section 243(h), according to which

> [t]he Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.[46]

This statute, then, did not provide a positive grant of refuge; it merely promised not to send the alien back to his homeland.

Section 243(h) did not give broad-based protection to refugees. First, the statute applied only to "deportable" aliens—persons who enter the U.S. illegally, or who enter legally but later become deportable because, for example, they overstay a visa. The statute did not apply to "excludable" aliens—persons who are deemed never to have entered the U.S. even if physically present (for example, an alien on his way to an inspection station within the U.S. border).[47] Second, section 243(h) was discretionary: an alien who could prove he had been persecuted could still be denied relief if the Attorney General so chose.

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45. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (amending Immigration and Nationality Act of 1952, ch. 477, § 203(a)(7), 66 Stat. 163, 178-79 (1952) (amended 1980). *See also* ALEINIKOFF & MARTIN, *supra* note 29, at 622.

46. Immigration and Nationality Act of 1952, ch. 477, § 243(h), 66 Stat. 163, 214 (1952) (as amended by Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 243(h), 79 Stat. 911, 918 (1965)) (amended 1978). The section was again amended in 1978 to disallow the withholding of deportation of aliens who aided Nazi persecution. Immigration and Nationality Act Amendments of 1978, Pub. L. No. 95-549, § 103, 92 Stat. 2065, 2066 (1978) (amended 1980). *See* Note, *The Right of Asylum Under United States Law,* 80 COLUM. L. REV. 1125, 1127 (1980).

47. *See* Note, *The Right of Asylum Under United States Law,* 80 COLUM. L. REV. 1125, 1128 (1980). For a more complete explanation see ALEINIKOFF & MARTIN, *supra* note 29, at 315. "Entry" is statutorily defined at Immigration and Nationality Act § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1982).

The Refugee Act of 1980 made drastic changes in both of these provisions. The Act made section 243(h) mandatory rather than discretionary. Thus, "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[48]

Second, the Act eliminated the ideologically-charged "conditional entry" visas and created a new Asylum statute, section 208. Unlike section 243(h), section 208 went beyond mere withholding of deportation to establish an alien's positive right to remain in the country "in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee" according to the following definition:

> 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 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 . . . .[49]

The import and intent of this new legislation becomes clear only when examined in the context of the congressional desire to bring U.S. law into conformity with international refugee policy established by the U.N. A brief look at the development of that policy will make the context clear.

In 1951 the U.N. established its Convention Relating to the Status of Refugees, which the U.S. has failed to ratify. This Convention, intended as a response to the post-war problem of displaced persons,[50] limited its definition of "refugee" to those whose "well-founded fear of being persecuted" arose "[a]s a result of events occurring before 1 January 1951."[51] Under article 33 of the Convention, ratifying nations may not *"refoule"* (return) a refugee "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." Like section 243(h) in U.S. immigration law, this article did not establish a refugee's right to stay in a host country; it only provided a right to non-*refoulement*—a right not to be returned. However, it apparently applied only to aliens who under U.S. law would be "excludable" rather than "deportable."

The 1951 Convention is nondiscriminatory. The U.N. explicitly based the Convention on two principles: "(1) that there should be as little discrimi-

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48. Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1982).

49. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1982).

50. R. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 62-63 (1984).

51. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 152 [hereinafter Convention].

nation as possible between nationals, on the one hand, and refugees, on the other; and (2) that there should be no discrimination based on race, religion or country of origin among refugees."[52] This nondiscriminatory intent was in the spirit of the U.N. charter, which was entered into force in 1945 to promote and encourage "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[53]

Refugee problems, however, did not diminish with the resettlement of post-war displaced persons. The U.N. responded to the problem by adopting the Protocol Relating to the Status of Refugees of 31 January 1967. The Protocol modified the Convention by eliminating the time limitation on granting refugee status. The words "[a]s a result of events occurring before 1 January 1951" were deleted from the definition of "refugee." The rest of the 1951 Convention was left virtually intact.[54] The U.N. Protocol provided a guide to nations, along with a moral imperative for nations to respond to the growing refugee crisis. The U.S. responded. It ratified the Protocol in 1968 and thereby became committed to the nondiscriminatory refugee provisions of the U.N.

Ratification of the Protocol required the U.S. to update its asylum law. The Refugee Act of 1980 was designed to correct the deficiencies of U.S. refugee policy by providing ongoing mechanisms for admission of and aid to refugees. That commitment is reflected in the language of Withholding of Deportation statute, section 243(h), and the Asylum statute, section 208, which incorporates the definition of "refugee" at section 101(a)(42). Both sections are virtually identical to the corresponding provisions of the U.N. Protocol.[55] The only significant difference is that the Protocol requires only that a refugee not be deported to his homeland, while section 208 provides the refugee an actual grant of asylum.

Congressional debate and committee reports on the 1980 Act reveal Congress' intent in enacting the legislation. The Act was to be free from racial and national origin discrimination and to conform to the U.N. Protocol.[56]

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52. UNITED NATIONS, THE UNITED NATIONS AND HUMAN RIGHTS 57 (1978) *reprinted in* Goldman & Martin, *International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law*, 5 HUM. RTS. Q. 302, 310 (1983).

53. U.N. CHARTER, art. 55.

54. Protocol Relating to the Status of Refugees, January 31, 1967, 606 U.N.T.S. 267, 268 [hereinafter Protocol].

55. *Compare* Protocol, *supra* note 54, at 267 (article 1, provision 2) *with* Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1982) *and compare* Protocol *supra* note 54, at 176 (article 33) *with* Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1982).

56. *See* 125 CONG. REC. 35,813 (1979) (statement of Rep. Holtzman): "The bill before the House today . . . will mandate equity in our treatment of all refugees; it will bring us into conformity with our international legal obligations . . . ." *Id.* at 35,816; (statement of Rep. Rodino): "In essence, this legislation would broaden the definition of persons who may be admitted as refugees under normal immigration to conform to the U.N. Convention and Protocol

As the Senate report on the Act pointed out, the new definition "eliminates the geographical and ideological restrictions now applicable to conditional entrant refugees. . . . Also, the new definition will bring United States law into conformity with our international treaty obligations under the United Nations Protocol . . . ."[57]

C. *Asylum and Discretion: A Problem of Interpretation*

The historical evidence leaves little doubt that Congress intended all provisions of the 1980 Act to be free of invidious discrimination. The doubt that remains arises because of the language Congress used in writing the Asylum and Withholding statutes. Section 243(h) makes withholding of deportation mandatory, while section 208 seems to make granting of asylum discretionary. One could argue, therefore, that the former requires nondiscrimination in conformance with the U.N. Protocol, whereas the latter does not.

This problem of interpretation was at issue in *INS v. Stevic*.[58] The Court held that the standard of proof used for granting asylum is different from that for withholding of deportation. The language of section 208 calls for proof of a "well-founded fear of persecution" while the standard for section 243(h) was found to be a "clear probability of persecution."

The distinction drawn by the Court between the two required standards of proof is spurious[59] and rests upon what immigration scholar John Scanlan has called a "deficient reading of the legislative history."[60] There is no evidence that Congress took this distinction into account when it wrote the 1980 Act.[61] There is sound evidence, on the other hand, that Congress sought

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. . . ." *Id.* at 35,820 (statement of Rep. Chisholm): "This redefinition eliminates the current geographical and ideological restrictions which limit the designation of refugee status to persons fleeing Communist or Middle Eastern countries and brings U.S. law into conformity with the internationally accepted definition of "refugee" as articulated by the 1951 U.N. Refugee Convention and the Protocol which was ratified by the United States in 1968." *See also* 126 CONG. REC. 3756 (1980) (statement of Sen. Kennedy): "This legislation will also insure greater equity in our treatment of all refugees. It will rationalize and write into the statute how we respond to refugee emergencies. And it will make our law conform to the United Nations Convention and Protocol Relating to the Status of Refugees, which we signed in 1969." *See also* SENATE AND HOUSE COMMS. ON THE JUDICIARY, 97TH CONG., 1ST SESS., U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 158 (Joint Comm. Print 1981): "By emphasizing persecution and the fear of persecution without regard to national origin, the Refugee Act establishes criteria based on special humanitarian concerns."

57. S. REP. No. 256, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141, 144.

58. 104 S. Ct. 2489 (1984).

59. ALEINIKOFF & MARTIN, *supra* note 29, at 665.

60. Lecture by Professor John Scanlan, Immigration Law Class, Indiana University (Nov. 1985).

61. *See* H. CONF. REP. No. 781, 96th Cong., 2d Sess. 20, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 160, 161, where the conference refers to both withholding and asylum

to conform immigration law to U.N. treaty obligations. "There is no doubt that Congress intended the definition of 'refugee' in the 1980 Act to conform to that in the Protocol."[62] The Court's distinction is also contrary to the way the INS itself treats the two provisions. The INS takes the standard of proof in both provisions to be identical. In fact, it requires aliens to fill out the same forms whether they are applying for withholding of deportation, asylum, or both.[63]

Discretionary language in the asylum statute, therefore, does not imply that the Attorney General's discretion permits him to make distinctions based upon race or national origin. Congress as well as the INS intend that the two statutes be treated the same in this respect.

The 1980 Refugee Act reflected a growing international awareness that all citizens of the world have the right to be treated equally. Seen in this context, it would be difficult to maintain that U.S. asylum law was intended to be applied in other than a nondiscriminatory fashion. If there were any lingering doubts about this, *Jean v. Nelson* should allay them, for the legislative history that supports the conclusion that the parole statute is nondiscriminatory does the same for the asylum statute.

II. Implications of Nondiscriminatory Intent of Asylum Statutes

Although the Court's analysis of legislative history in *Jean v. Nelson* was lacking, its conclusions were accurate. By affirming the nondiscriminatory intent of the parole statute, and by extension, the asylum statute, the Court in effect served notice that racial or nationality discrimination against any asylum applicant would not be tolerated. If the Court's decision is to be more than mere words, practical changes must be made at the administrative level of asylum adjudication to ensure mechanisms are in place to prevent discrimination. Two areas especially in need of reform are discussed in this section.

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without distinguishing them. Note also that both provisions derive from the United Nations Convention as amended by the Protocol. Asylum section 208 is taken from article I and withholding section 243(h) is taken from article 33. *See supra* note 55 and accompanying text.

62. *See* Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 251 (1984).

63. Matter of Acosta, Interim Dec. No. ____, slip op. at 19-20 (B.I.A. March 1, 1985), *reprinted in* ALEINIKOFF & MARTIN, *supra* note 29, at 668. Further, immigration scholars have recommended that the two sections be combined to eliminate the confusion. *See* Scanlan, *supra* note 33, at 637. *See also, How Do We Distinguish Who is Entitled to Asylum in the United States and Who is Not?, Hearings before the Subcomm. on Imm. and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 10-11 (1981) (statement of Doris Meissner).

A. State Department Advisory Opinions

Asylum regulations require that the INS district director request an advisory opinion from the State Department's Bureau of Human Rights and Humanitarian Affairs for each asylum applicant.[64] This requirement appears innocuous since it applies equally to every applicant. In practice, however, these advisory opinions may be subject to discriminatory use, contrary to statutory intent and the *Jean v. Nelson* mandate.

Evidence to document an asylum claim can be difficult to garner. Refugees in some cases flee their homelands with nothing more than the clothes on their backs. The Office of United Nations High Commissioner for Refugees recognized this problem and publishcd the "Handbook" for implementing the U.N. Protocol. The Handbook says lack of evidence makes it "frequently necessary to give the alien the benefit of the doubt," but that the alien's statements "must not run counter to generally known facts."[65] As a source of generally known facts about a particular country, the U.S. State Department undoubtedly has some expertise. Its advisory opinions, therefore, can provide important information to help the INS document asylum claims. By supplying factual details about political conditions in a given country, for example, the State Department can help the INS determine the credence of an asylum applicant's claims. Theoretically, "advisory opinions are not binding on the INS, but are merely recommendations" intended to assist the INS in doing its job.[66]

The practical use made of these advisory opinions, however, in fact far exceeds the theoretical rationale behind them. For the INS does not usually regard State Department advisory opinions as mere recommendations, but as dispositive of the case at hand.[67] The appellate court in *Zamora v. I.N.S.*

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64. 8 C.F.R. § 208.7 (1986).

65. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, 48 (1979) [hereinafter Handbook].

Authority for the Handbook is established by the Protocol at article 2 and the Convention at article 35. Protocol, *supra* note 54, at 270; Convention, *supra* note 51, at 176. *See also* Stevic v. Sava, 678 F.2d 401, 405-06 (2d Cir. 1982), *rev'd sub nom.* INS v. Stevic, 104 S. Ct. 2489 (1984): "The *Handbook* is a response to requests for guidance as to the Protocol's requirements and is based on the High Commissioner's 25 years of experience, the practices of governments acceding to the Protocol and literature on the subject."

66. Hotel and Restaurant Employees Union, Local 25 v. Smith, 594 F. Supp. 502, 514 (D.D.C. 1984). *See generally id.* at 510-14.

67. *How Do We Determine Who is Entitled to Asylum in the United States and Who is Not?, Hearings Before the Subcomm. on Imm. and Refugee Policy of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. 123 (1981) (prepared statement of John A. Scanlan). "[T]he present system—in which the Bureau of Human Rights and Humanitarian Affairs (B.H.R.H.A.) of the Department of State comments 'individually' on each asylum application *via* an 'advisory opinion' which is not individually composed, *and which cannot be, given present B.H.R.H.A. staffing levels,* and in which INS personnel customarily regard such 'advisory opinions' as

noted this fact when it upheld a denial of asylum and found that improper consideration of State Department advisory opinions constituted harmless error.[68] The *Zamora* court observed that the State Department is the "obvious source of information on general conditions in the foreign country," but that its recommendations "do both too little and too much." The opinions "give little or nothing in the way of useful information about conditions in the foreign country," yet they "recommend how the district director should decide the particular petitioner's request for asylum," creating a "risk that such communications will carry a weight they do not deserve."[69] The *Zamora* court found that State Department opinions should be admissible in asylum cases as a source of information on conditions of persecution in a country, but that these opinions should not attempt to give adjudicative facts regarding a particular case.[70] State Department practices have not conformed to the *Zamora* dictates and "still typically take a position on the merits of the individual application under review."[71]

An "individualized" determination made by the State Department is usually a mere form letter with little detailed information.[72] Such letters by and large are "conclusory and unenlightening."[73] The State Department cannot possibly process claims individually, given current staffing levels and the volume of applications.[74] Even if an alien should have the resources to do so, she will have difficulty refuting State Department information, since the basis for a State Department opinion is not usually disclosed either to the alien or to the INS.[75]

Immigration judges almost invariably follow State Department opinions, however, because they lack expertise on conditions in foreign countries, are overworked,[76] and probably believe that the State Department knows best. In the words of one INS adjudicator: "I would never, never overrule the State Department."[77]

The Refugee Act of 1980 was designed to be ideologically neutral in asylum cases, but current use of State Department advisory opinions calls this theoretical neutrality into question.[78] Aliens of different nationalities are

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dispositive (as we have been repeatedly told that they do)—is by its very nature unfair." (Emphasis in original).

68. Zamora v. INS, 534 F.2d 1055 (2d Cir. 1976).

69. *Id.* at 1062-63.

70. *Id.*

71. ALEINIKOFF & MARTIN, *supra* note 29, at 704.

72. *Id.*

73. Helton, *supra* note 62, at 261.

74. Scanlan, *supra* note 33, at 628.

75. Asylum Procedures, 8 C.F.R. § 208.10(b)-(d) (1986). The regulations allow "classified" information in State Department opinions to be "non-record." *Id.*

76. Scanlan, *Who is a Refugee? Procedures and Burden of Proof Under the Refugee Act of 1980*, 5 IN DEFENSE OF THE ALIEN 30 (1983).

77. Helton, *supra* note 62, at 261.

78. *Id.*: "[T]he ideological allocation of asylum, once expressly recognized by statute, continues in practice under the 1980 Refugee Act."

accorded disparate treatment.[79] Nancy Merritt, chairperson of the American Association of Immigration Lawyers commented: "People come to me, and even if they have a truly tragic story of oppression, the first question you have to ask is, 'What country are you from?' " Merritt concluded that if that country is not on the State Department's friendly list, receiving asylum is nearly impossible.[80]

Because the State Department is a political institution, subject to partisan pressures, its objectivity is questionable. As political scientist Elizabeth Hull observes, "if the President certifies that Haiti, for instance, or El Salvador, is making progress in the area of human rights, the State Department can scarcely concede that an applicant for asylum from either country risks political persecution without embarrassing and even countering the Administration."[81]

An appellate court reached the same conclusion in *Kasravi v. INS*,[82] a case involving an Iranian student's petition for withholding relief under section 243(h). The *Kasravi* court noted that the only evidence offered in opposition to the petition was a "perfunctory letter written by a State

79. *See* U.S. Department of Justice, Immigration and Naturalization Service, *Asylum Cases Filed with District Director by Selected Countries Fiscal Year 1984*, 33 INS REPORTER 10 (1985) for statistics on grants of asylum for fiscal year 1984:

Nationality	Pending Begin '84	Received	Granted	Denied	Pending End '84
Total All Countries	165,998	24,295	8,278	32,344	138,601
Afghanistan	598	153	186	269	175
Cuba	115,162	3,401	16	472	121,937
El Salvador	13,501	5,455	328	13,045	1,335
Ethiopia	1,410	415	305	1,014	307
Guatemala	629	510	3	758	267
Haiti	5,487	2,163	23	352	7,265
Iran	9,661	3,488	5,017	3,216	3,213
Iraq	508	118	38	289	206
Lebanon	577	418	16	518	288
Nicaragua	11,708	4,807	1,018	7,274	1,644
Poland	1,843	852	721	1,482	476
Romania	318	159	158	246	76
USSR	91	44	45	43	29

80. Korn, *Hiding in the Open*, STUDENT LAW., Jan. 1986, at 25 (interview with Nancy Merritt). This article also contains an analysis of the INS statistics found in note 79 *supra*:

> In 1981 and 1982, 1,139 Salvadorans applied for asylum and only 67 (5.8 percent) were granted it. In 1983, two percent of Salvadoran asylum applications were granted, according to statistics complied [sic] by the Center for Constitutional Rights. Approval rates for refugees from Soviet block countries run from 29 percent for Poles and 78 percent for Soviets. In 1984, 13,000 Salvadorans were denied asylum upon application and 328 (2.5 percent) were approved according to State Department statistics. The approval total ranks fourth among national refugees to this country. In contrast to Salvadorans, 8,000 Nicaraguans—from a country not deemed friendly by the United States—applied for asylum in 1984, and 1,000 (12.5 percent) were approved. From all countries in 1984, 8,000 asylum cases were approved (20 percent) and 32,000 were denied.

Id.

81. E. HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 122 (1985).

82. 400 F.2d 675 (9th Cir. 1968).

Department official concluding generally that an Iranian student would not in all likelihood be persecuted for activities in the United States."[83] Although the court upheld the INS officer's discretionary authority to deny the student relief,[84] it strongly criticized use of State Department opinions:

> Not only does this letter lack persuasiveness, but the competency of State Department letters in matters of this kind is highly questionable. . . . Such letters from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world. The traditional foundation required of expert testimony is lacking; nor can official position be said to supply an acceptable substitute.[85]

If INS adjudicators continue to be required by regulation to request advisory opinions from the State Department, the source of these opinions must be considered in light of the potential for politically-motivated discrimination.

The U.N. Handbook suggests that an examiner in an asylum case "use all the means at his disposal to produce the necessary evidence in support of the application."[86] If asylum decisions are to be more than "rubber stamps" for the State Department, then current use of such opinions must be re-evaluated. An examiner should use all the information at his disposal to determine the credibility of the petitioner's claim including, for example, information from the U.N. High Commissioner for Refugees, church groups, international human rights organizations, as well as the State Department.[87] Documenting intentional discrimination is difficult,[88] but the current reliance on State Department advisory opinions in asylum adjudication does not meet the nondiscriminatory requirements articulated in *Jean v. Nelson*: "individualized determinations . . . without regard to race or national origin."[89]

B. Standard of Review in Asylum Cases

When a federal court has the opportunity to review a decision made by an immigration judge,[90] the standard of review used can determine the

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83. *Id.* at 676-77.

84. Note that this case was prior to the Refugee Act of 1980, so Withholding of Deportation § 243(h) was discretionary. *See supra* notes 46-48 and accompanying text. Under today's statute, the outcome in *Kasravi* would likely have been different.

85. *Id.* at 677 & 677 n. 1.

86. Handbook, *supra* note 65, at 47.

87. Scanlan, *supra* note 76, at 36.

88. Note, *supra* note 47, at 1132:

> The persistence of covert discretionary elements in asylum decisions is also evident in the disparate treatment accorded aliens of different nationalities. Documenting an intentionally discriminatory pattern in this connection is difficult, since the INS and the Board do not expressly refer to considerations of geographic origin, economic status, or political allegiance. Nonetheless, some considerations of domestic and foreign policy seem clearly to influence many asylum decisions.

89. Jean v. Nelson, 105 S. Ct. at 2999.

90. The standard of review issue hinges in part on whether asylum cases are reviewable at

outcome of the appeal. If the question before the court is whether the judge "abused his discretion," the review will not be intensive, since the appellate court needs assurance only that the judge did not act arbitrarily or irrationally. If, on the other hand, the question is whether substantial evidence existed to support the judge's decision, then the reviewing court must take a more intensive look at the nature of the evidence. This section will argue that the "substantial evidence test" must be used in review of asylum decisions to protect petitioners against invidious discrimination.

Prior to 1980, "courts traditionally reviewed asylum denials using an 'abuse of discretion' test—theoretically the review standard most deferential to the administrative agency whose action is under scrutiny."[91] As noted earlier, section 243(h) became mandatory under the 1980 Act. Some reviewing courts found that the standard of review could no longer be the "abuse of discretion" test, because discretion no longer existed under the statute. These

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all in federal court. Under Immigration and Nationality Act, § 106(b), 8 U.S.C. § 1105a (1982), final orders of "exclusion" can obtain judicial review only through habeas corpus proceedings. An alien who has made no "entry" into the U.S. is not deportable under Immigration and Nationality Act § 241, 8 U.S.C. § 1251 (1982), but rather is "excludable" under Immigration and Nationality Act § 212, 8 U.S.C. § 1182 (1982 & Supp. III 1985). Thus an asylum applicant who is merely excludable, but not deportable, can gain access to federal court only if he is seeking release from custody. For example, an alien who has applied for asylum at a consular office overseas and had his application denied cannot petition to have the denial reviewed by a federal court in the U.S. But if the alien had managed to illegally enter the U.S. and was caught and placed in detention, he could petition to have his asylum denial reviewed in federal court in habcas corpus proceedings. *See, e.g.*, Sarkis v. Nelson, 585 F. Supp. 235 (E.D.N.Y. 1984) where an appellate court reviewed an asylum denial in a habeas corpus proceeding.

Another avenue also exists to obtain review of an asylum decision in federal court. Under Immigration and Nationality Act § 106, 8 U.S.C. § 1105a (1982), all "final orders of deportation" are reviewable by a federal court of appeals. In Foti v. INS, 375 U.S. 217, 229 (1963), the Supreme Court held that the term "final orders of deportation" was meant to include not only the actual order of deportation, but all orders closely related to the deportation proceeding. Therefore, the court of appeals in Carvajal-Munoz v. INS, 743 F.2d 562, 567 (7th Cir. 1984) found "no problem with undertaking direct review of asylum decisions made by immigration judges in the context of deportation proceedings (citation omitted)," since the deportation and asylum issues so closely relate.

This avenue of review, then, could be used to get an asylum claim into federal court in conjunction with a deportation claim. One type of deportaton order that is reviewable in federal court is a denial of "withholding of deportation" under Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1982). Since asylum applications are normally filed along with claims for withholding of deportation, a federal court of appeals could review the denials of both claims together. *See, e.g.*, Bolanos-Hernandez v. INS, 749 F.2d 1316 (9th Cir. 1984).

So, under current immigration law, an asylum denial is reviewable in federal court in a habeas corpus proceeding or in conjunction with a deportation proceeding. An excludable alien who cannot avail himself of either of these proceedings cannot get an asylum denial reviewed in federal court. His only avenue for appeal is within the agency itself. This situation favors aliens who sneak into the U.S. and are either held in physical custody or subject to deportation, and disfavors aliens who use proper channels to apply for asylum. The Senate has debated measures to rectify this injustice, but the full debate is beyond the scope of this Note.

91. ALEINIKOFF & MARTIN, *supra* note 29, at 700-01. *See, e.g.*, Kasravi v. INS, 400 F.2d at 677 (9th Cir. 1968), a suspension of deportation case, where the court found that the scope of review did not permit it to "substitute its opinion for that of the Attorney General (citation omitted)."

courts chose to employ the more stringent "substantial evidence" test to determine "whether the agency's determination . . . [was] substantially supported."[92]

The standard of review under section 208 is also potentially troublesome. Some courts have used a two-tiered approach. On one tier, the substantial evidence test is used to determine whether an alien has a well-founded fear of persecution. If the court finds that he does, it proceeds to the second tier and applies the abuse of discretion test to determine whether the Attorney General exceeded his discretion in denying the alien's asylum claim. As the court explained in *Bolanos-Hernandez v. INS:*

> As we do when reviewing other non-discretionary agency determinations . . . we apply a substantial evidence test when reviewing the factual finding whether an alien has demonstrated a well-founded fear of persecution. When refugee status has been established, we review the Attorney General's grant or denial of asylum under the abuse of discretion standard that we apply to other discretionary actions of the BIA [Bureau of Immigration Affairs].[93]

Under this two-tiered approach, section 208 asylum claims and section 243(h) withholding claims are treated the same with respect to the factual matter of whether an alien qualifies for relief under the statute. The substantial evidence test is used in both cases. In section 208 asylum claims, however, "if the immigration judge finds that the applicant qualifies as a 'refugee,' but nonetheless decides to deny the applicant asylum in the exercise of the judge's discretion," the reviewing court "will not overturn the decision unless it was arbitrary, capricious, or an abuse of discretion."[94]

Other courts have avoided the two-tiered approach and continue to employ only the "abuse of discretion" standard.[95] The *Marroquin-Manriquez v. INS* court, for example, specifically disavowed the two-tiered approach. The court found that the substantial evidence test ignored the expertise of the immigration judge.[96]

The *Jean v. Nelson* decision implies that the Attorney General's discretion is irrelevant in a discrimination inquiry. The decision thereby clarifies the appellate court's role in reviewing asylum denials. Since the only way to uncover discriminatory practices is to look at all the evidence, the *Jean v.*

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92. McMullen v. INS, 658 F.2d 1312, 1316 (9th Cir. 1981). The *McMullen* court determined that: "The role of the reviewing court necessarily changes when the charge to the agency changes from one of discretion to an imperative." *Id. See also* Chavarria v. U.S. Dept. of Justice, 722 F.2d 666, 670 (11th Cir. 1984).

93. Bolanos-Hernandez v. INS, 749 F.2d at 1321 n.9 (citations omitted). *See also* Carvajal-Munoz v. INS, 743 F.2d at 567; Sarkis v. Nelson, 585 F. Supp. at 238.

94. Carvajal-Munoz v. INS, 743 F.2d at 567-68.

95. *See* Marroquin-Manriquez v. INS, 699 F.2d 129, 133 (3d Cir. 1983), *cert. denied,* 467 U.S. 1259 (1984); Sotto v. INS, 748 F.2d 832, 837 (3d Cir. 1984).

96. Marroquin-Manriquez v. INS, 699 F.2d at 133 n.5.

Nelson decision requires the substantial evidence standard of review to be used exclusively in appeals based upon alleged discrimination.

Some might argue, however, that the abuse of discretion standard is sufficient, since discrimination would be an obvious abuse of discretion.[97] This is not the case, because what is normally looked at under this standard is the *policy*, not the evidence, used by the INS adjudicator in denying a claim.

In *Haitian Refugee Center v. Civiletti*,[98] the abuse of discretion standard was used to uncover discrimination; but, the appellate court there was concerned with the INS policy of systematically denying, without regard to their individual merits, asylum claims from Haitians.[99] Although it recognized the discretionary nature of asylum relief, the court found that this discretion could not be exercised arbitrarily or capriciously.[100] The court also recognized that discrimination based on race or national origin is not allowed under the 1980 Act.[101] An extensive review of the evidence led the court to conclude that the INS had developed a "Program" to deport Haitians, thus abusing its discretion by violating the aliens' "constitutional, statutory, treaty and administrative rights."[102] This case affirmed not only the nondiscriminatory nature of asylum law, but also the limits of the Attorney General's discretion.

Haitian Refugee Center concerned an established INS policy of denying asylum to Haitians.[103] The abuse of discretion standard of review is designed to review policy decisions made by the INS. In individual cases, where no large-scale program or policy to discriminate exists, if the immigration judge can articulate a legitimate, nondiscriminatory policy reason to deny asylum, the inquiry is typically ended. The abuse of discretion standard, therefore, will not protect an individual who may suffer discrimination because of the "personal attitudes and biases of the individual decision makers."[104] This problem is exacerbated by a lack of guidelines regarding how discretion can generally be exercised in immigration law.[105]

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97. *See* Wong Wing Hang v. INS, 360 F.2d 715, 719 (2d Cir. 1966): Even prior to the Refugee Act of 1980, an immigration judge could abuse his discretion if its exercise was "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or, in Judge Learned Hand's words, on other 'considerations that Congress could not have intended to make relevant.' " *Cf.* Note, *From Mezei to Jean: Toward the Exit of the Entry Doctrine*, 22 SAN DIEGO L. REV. 1143, 1168 (1985).

98. 503 F. Supp. 442 (S.D. Fla. 1980), *judgment modified*, 676 F.2d 1023 (5th Cir. 1982).

99. *Id.* at 532.

100. *Id.* at 452.

101. *Id.* at 453.

102. *Id.* at 532.

103. *Cf.* Hotel & Restaurant Employees Union, Local 25 v. Smith, 563 F. Supp. at 163.

104. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144, 148 (1975).

105. *See id.* at 147.

To avoid discrimination in individual cases, reviewing courts must use the substantial evidence test whenever prima facie evidence of discrimination is demonstrated.[106] An immigration judge should not be able to avoid review under the substantial evidence test simply by stating, "this alien qualifies as a refugee, but I have exercised my discretion to deny him asylum."

The substantial evidence test should also be used to examine State Department advisory opinions in asylum cases in which discrimination is alleged. This test requires that evidence be on the record. It would therefore require the State Department to change its current practice of not revealing the sources of its information. The test would also preclude using State Department advisory opinions as the sole determinant of whether an alien qualifies as a refugee for asylum purposes.[107]

Until all discretionary language is removed from immigration statutes, courts will have to define the limits of discretionary authority, and the possibility of the discriminatory exercise of that authority will persist.[108] The *Jean v. Nelson* decision should decrease the range of this possibility by requiring a heightened level of judicial review regarding the factual bases for asylum decisions.[109]

CONCLUSION

The *Jean v. Nelson* decision confirmed the distance U.S. immigration law has traveled from restrictionism to a recognition of the rights of aliens as citizens of the world. By refusing to sanction discrimination in parole decisions, *Jean v. Nelson* set a precedent that affects asylum adjudication as well. To declare that asylum petitions must be evaluated in a nondiscriminatory manner is one thing; to implement this policy is another. The Court's ruling demands more than token compliance by the INS. It requires a

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106. *Cf.* Note, *supra* note 47, at 1133.

107. *Cf.* Scanlan, *supra* note 76, at 34:

> Because the law has changed, and administrative decisions must now be supported by substantial evidence on the record, continuation of the practice of soliciting advisory opinions for every applicant and the use of such opinions to support blanket denials of asylum to all claimants from particular countries, including those countries where evidence of widespread human rights violations is strong, may well constitute a systematic denial of due process.

Scanlan here refers to § 243(h) withholding claims, but as this Note argues, the substantial evidence test should also apply in § 208 asylum cases when the alien can make out a prima facie case of discrimination.

108. *See* Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999, 1019 (1985): "This injection of discretion into the asylum standard, however, threatens to swallow the right to apply for asylum in the United States."

109. The same considerations should also apply to review of parole decisions—the factual basis for a claim should be examined under the "substantial evidence" test if invidious discrimination is at issue. However, since eligibility requirements under this statute are not as clearly defined as under the asylum statute, and are not based clearly upon international law, the argument for the use of the "substantial evidence" test is harder to make, and is beyond the scope of this Note.

concerted effort by INS administrators and the judiciary to eliminate the mechanisms that make discrimination possible.

Current misuse of State Department advisory opinions in asylum cases, coupled with the courts' inconsistent application of review standards, serve to frustrate the intent of immigration law. Both the INS and appellate courts must review carefully the broad range of available evidence when considering asylum claims. Only by doing so can they honor the mandate of the Court and uphold the democratic process that has given aliens the statutory right to seek asylum without being discriminated against on the basis of their race or national origin.

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The Legal Profession Today

CHIEF JUSTICE WILLIAM H. REHNQUIST

During the past generation the manner in which law is practiced in the United States has changed dramatically in more than one way.

Within the last fifteen years alone, for example, the number of lawyers in the United States has more than doubled, from fewer than 350,000 in 1970 to nearly 700,000 today. This increase is out of all proportion to the increase in the nation's population: in 1960 there was one lawyer for every 627 people in the country, whereas today there is one lawyer for every 354 people.

Lawyers on the average today make considerably more money, even after adjustment for inflation, than they did twenty-five years ago. A recent American Bar Association Journal survey reports that the median income of lawyers responding to the survey is roughly $65,000.[1] I suspect that the percentage of gross national product going to pay for legal services has likewise increased; current estimates suggest that law firms bill close to $40 billion a year. The latest headline-making development in this area is the decision of several leading New York law firms to substantially increase their associates' compensation, and to pay additional bonuses to those who had the misfortune to work for government lawyers' salaries as law clerks for one or two years.

The structure of the firms which engage in the practice of law has also changed dramatically. Today, the median law firm size is eight lawyers, and nearly one-quarter of the lawyers work in law firms that billed between $1 and $3 million in 1985.[2] The number of firms with one hundred or more lawyers has increased from only four in 1960 to well over two hundred today. Indeed, in just the last *five* years, the number of firms with over two hundred lawyers has increased nearly four-fold, to about seventy. According to the recently adopted report of the American Bar Association Commission on Professionalism, it is not uncommon to find firms of over three hundred lawyers, with offices not only in many states but in foreign countries as well.[3] Twenty-five years ago, firms of that size and geographic diversity were simply unknown.

Young associates in large law firms today apparently work much harder,

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1. 72 A.B.A. J. 47, 50 (Sept. 1, 1986).
2. *Id.* at 47, 52.
3. *See* THE LAWYER'S ALMANAC 1986, at 2-5, 76-78 (1986).