

NOTE

JUDICIAL REVIEW OF ADMINISTRATIVE STAYS OF DEPORTATION: SECTION 243(h) OF THE IMMIGRATION AND NATIONALITY ACT OF 1952

I. INTRODUCTION

Section 243(h)¹ of the Immigration and Nationality Act of 1952² (Act) provides:

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.³

1. 8 U.S.C. § 1253(h) (1970).

2. 8 U.S.C. §§ 1101-1557 (1970) [hereinafter cited as Act]. For surveys of immigration law, see C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* (1972, Supp. 1975); J. WASSERMAN, *IMMIGRATION LAW AND PRACTICE* (2d ed. 1973).

3. 8 U.S.C. § 1253(h) (1970). The key words of the statutory language are "authorized," "opinion," "within," and "persecution."

Significantly, the section is in Part V of the Act, 8 U.S.C. §§ 1251-1260 (1970), which concerns deportation and adjustment of status of aliens found within the United States. Section 243, 8 U.S.C. § 1253 (1970), sets forth the process of selection of the country to which an alien may be deported. The section also makes provision for the payment of deportation expenses, *i.e.* transportation costs. 8 U.S.C. § 1253(c) - (f) (1970).

The deportable alien may designate a country to which he wishes to be deported. If that country declines to accept the alien or does not respond to the Attorney General's inquiries about accepting him, the Attorney General must order deportation to the country of which the alien is a "subject, citizen, or national," provided that country agrees to admit him. If that country refuses to accept the alien, the Attorney General may then direct deportation to any of seven possible countries: (1) "the country from which such alien last entered the United States;" (2) "the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;" (3) "the country in which he was born;" (4) "the country in which the place of his birth is situated at the time he is ordered deported;" (5) "any country in which he resided prior to entering the country from which he entered the United States;" (6) "the country which had sovereignty over the birthplace of the alien at the time of his birth;" or (7) "any country which is willing to accept such alien into its territory" if deportation

Section 243(h) appears to create a means by which a refugee or other alien, who is already within the United States, can avoid being returned to a country in which he would be subject to persecution.⁴ Such an alien seeking 243(h) relief, however, is confronted with a statute which vests great discretion⁵ in the Attorney Gen-

to any of the countries in categories 1-6 is "impracticable, inadvisable, or impossible." 8 U.S.C. § 1253(a) (1970).

The alien must be notified of his right to apply for § 243(h) relief only with regard to those countries specified by the Attorney General or his designate, the immigration judge (formerly known as a special inquiry officer). 8 C.F.R. § 242.17(c) (1976). That is, the alien is not entitled to notice of any right to apply for § 243(h) relief from deportation to a country he has designated. An alien would not logically seek deportation to a country where he would be persecuted unless he planned to raise his § 243(h) claim as a delaying mechanism. The courts have not been sympathetic to such transparently dilatory tactics. *See, e.g.,* Ng Kam Fook v. Esperdy, 209 F. Supp. 637 (S.D.N.Y. 1962), *aff'd*, 320 F.2d 86 (2d Cir.), *cert. denied*, 375 U.S. 955 (1963). In *In re Sagasti*, 13 I. & N. Dec. 771, 773 (1971), however, the Board of Immigration Appeals suggested that the special inquiry officer ask the alien whether he feared persecution in any of the countries named "regardless of whether the country is 'designated' by the alien or 'specified' by the . . . officer" and then advise him of his right to seek § 243(h) relief from deportation to "any named country." Finally, the special inquiry officer is under no obligation to hear a § 243(h) claim about a country to which he does not intend to order deportation. *In re Niesel*, 10 I. & N. Dec. 57, 59 (1962).

4. The section also includes the alien, already in the United States, whose native government changes or adopts policies that would subject him to persecution upon his return. Moreover, since the section is part of the deportation procedure, which contains an abundance of time-consuming procedural niceties, it offers many aliens the opportunity to delay, but not avoid, deportation. *See* notes 51-68 *infra* and accompanying text. For a classic example of the use of Immigration and Naturalization Service (INS or Service) and statutory procedures to delay deportation, see *Schieber v. Immigration & Naturalization Serv.*, 520 F.2d 44 (D.C. Cir. 1975).

5. *See* notes 34-50 *infra* and accompanying text. In *Obrenovic v. Pilliod*, 282 F.2d 874 (7th Cir. 1960), the court rejected the alien's argument that § 243(h) violated the doctrine of separation of powers and thus was an unconstitutional delegation of the legislative power. The court stated:

The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, 'with such opportunity for judicial review of their action as Congress may see fit to authorize.'

Id. at 876.

On its face, § 243(h) might appear either to preclude judicial review or involve matters "committed to agency discretion by law." Administrative Procedure Act (APA) § 10(2), 5 U.S.C. § 701(a)(2) (1970). Such a construction of the section is reinforced by the use of the word "opinion" and the absence of any requirement that the Attorney General find that the alien will be persecuted. *See* notes 32-50 *infra* and accompanying text. The APA's judicial review provisions, however, have not been applicable to judicial review of § 243(h) cases since at least the adoption of § 106(a) of the Act, 8 U.S.C. 1105(a) (1970), in 1961, as construed in *Foti v. Immigration & Naturalization Serv.*, 375 U.S. 217, 224-26 (1963). *See* notes 69-77 *infra* and accompanying text. Even

eral,⁶ and the reported cases suggest that 243(h) relief is not readily obtained.⁷ Questions therefore arise about what factors motivate the Attorney General to grant or withhold relief, the extent to which courts

before *Foti*, courts were reviewing the Attorney General's actions in § 243(h) cases to determine whether the alien had been afforded procedural due process. See notes 90-96 *infra* and accompanying text. The courts also reviewed claims that the Attorney General abused his discretion in denying an alien's request for relief from deportation. See, e.g., *Obrenovic v. Pilliod*, *supra*; *Kam Ng v. Pilliod*, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961). No court since *Foti* has suggested that judicial review is precluded in § 243(h) cases. Indeed, some courts have broadened the scope of review to include review of the evidence under the substantial evidence on the whole record test. See notes 200-23 *infra* and accompanying text.

6. The Attorney General has delegated his discretion under the Act to the Commissioner of the INS. 8 C.F.R. § 2.1 (1976). The Commissioner may redelegate any of his received authority to employees of the INS, including immigration judges. *Id.* There are certain occasions when the Attorney General may review cases decided by the Board of Immigration Appeals. See 8 C.F.R. § 3.1(h) (1976); note 66 *infra* and accompanying text.

7. A careful distinction must be drawn between reported and unreported § 243(h) decisions. The initial determination by the immigration judge is not published, although portions of the officer's opinion infrequently appear in the published reports of a reviewing body. The Board publishes some of its opinions. Since the great majority of cases reviewed by the Board and the courts involve denial of relief, it is difficult to determine from that record how often an alien successfully proves his claim of persecution before an immigration judge. The Board can reverse a judge's grant of relief. See *Kam Ng v. Pilliod*, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961). Moreover, the INS no longer releases information on the annual number of § 243(h) applications and their disposition. From 1953 through 1956, however, there were 2,364 applications of which at least 738 were granted. PROCEEDINGS AND COMMITTEE REPORTS OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, LEGAL ASPECTS OF ASYLUM 114 n.272 (1967-1968), *citing* 1953 INS ANN. REP. 42-43, 1954 *Id.* at 42, 1955 *Id.* at 18, and 1956 *Id.* at 16. Later *Annual Reports* provided figures only for the number of § 243(h) applications: 526 in 1963, 257 in 1965, 302 in 1966, 398 in 1967, and 530 in 1968. 1963 INS ANN. REP. 13; 1965 *Id.* at 14; 1966 *Id.* at 19; 1967 *Id.* at 20; 1968 *Id.* at 20. The 1969 *Annual Report* merely noted that § 243(h) applications "decreased slightly" from the 1968 level. 1969 INS ANN. REP. 22. The 1970-1973 *Annual Reports* contain no reference to § 243(h).

Most of the reported cases do not directly reveal the circumstances that motivate the INS to grant § 243(h) relief. The cases do, however, show what is *not* sufficient to procure a stay of deportation, and thus by inference what may be sufficient. See text accompanying notes 231-63 *infra*. Finally, the forgoing figures do reveal that the number of § 243(h) applications declined in the mid-1960's and then increased after the section was amended and arguably liberalized in 1965. See text accompanying notes 42-49 *infra*. The number of reported cases has again declined in the 1970's, suggesting that if the appeal rate on denied applications has remained constant, either the INS is granting relief in more of the applications or fewer aliens are using § 243(h). Since there is no evidence in the reported cases that the courts or the Board have relaxed significantly the burden of persuasion on the applicant, the latter possibility seems more probable. This observation in turn raises the question whether § 243(h) has become a nullity for many aliens.

may review his action, and thus what, if any, are the judicially imposed limits on the exercise of his discretion.⁸

This Note will explore these questions through a review of the legislative history of section 243(h) and an analysis of the reported cases.⁹ Emphasis will be placed upon administrative practice, judicial review of Immigration and Naturalization Service (INS or Service) denials of section 243(h) relief, and the kinds of claims raised under the section. In addition, this Note will consider the place and function of the section in the Act generally and the deportation provisions specifically. Finally, attention will be given to the relationship of the section to the United Nations Protocol Relating to the Status of Refugees,¹⁰ adopted by the United States in 1968, which incorporates the 1951 Geneva Convention Relating to the Status of Refugees.¹¹

II. PRIOR AND CURRENT REFUGEE RELIEF STATUTES

Before the enactment of the Immigration Act of 1917¹² there were few restrictions on entry to the United States;¹³ hence, there was little need for specific provisions for past or potential victims of persecution. The 1917 Act, however, limited entry to literate persons, although an exception was made for illiterate persons fleeing religious persecution.¹⁴

8. A refusal to grant a stay of deportation is as much a reviewable discretionary act as the giving of such relief. *But see* quotation in text accompanying note 203 *infra*.

9. *See* note 7 *supra*.

10. 19 U.S.T. 6223, T.I.A.S. No. 6577.

11. 189 U.N.T.S. 150, 19 U.S.T. 6264.

12. Immigration Act of 1917, ch. 29, 39 Stat. 874. For a fuller discussion of the 1917 Act and the other statutes and some of the cases considered in this section of the Note, see PROCEEDINGS AND COMMITTEE REPORTS OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, LEGAL ASPECTS OF ASYLUM 64-73 (1967-1968).

13. *But see* Act of May 6, 1882, ch. 126, 22 Stat. 58 (suspension of entry of "Chinese laborers" for ten years).

14. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 877. The section established a literacy test for admission requiring the alien to be able to read thirty to forty words in the language of his choice. The religious persecution exemption stated:

[T]he following classes of persons shall be exempt from the operation of the illiteracy test, to wit: All aliens who shall prove to the satisfaction of the proper immigration officer or to the Secretary of Labor that they are seeking admission to the United States to avoid religious persecution in the country of their last permanent residence, whether such persecution be evidenced by overt acts or by laws or governmental regulations that discriminate against the alien or the race to which he belongs because of his religious faith

Id. Relief from the test was also given to the immediate relatives of citizens, resident aliens, and legally admissible clients. *Id.*

Deportable aliens¹⁵ generally had no statutory recourse for relief from deportation until the Alien Registration Act of 1940.¹⁶ In the aftermath of World War II, with its attendant large population shifts, changes of government, and the advent of the "cold war," the United States reevaluated its policies toward refugees. Certain persons¹⁷ found in Italy or sectors of Germany and Austria occupied by western Allied forces were granted entry visas to the United States.¹⁸ A "displaced person" residing within the United States¹⁹ could apply to the Attorney

15. By the Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565, 566-67, the Secretary of the Treasury was empowered to deport aliens who had entered the country under prohibited contracts to provide labor, provided such deportation occurred within a year of entry. Section 19 of the Immigration Act of 1917, ch. 29, 39 Stat. 874, 889, provided for the deportation of certain legally admitted aliens within five years of entry. Aliens who had entered illegally had to be deported within three years of entry.

16. Alien Registration Act of 1940, ch. 439, 54 Stat. 670. Before 1940, deportation was mandatory; that is, there were no forms of discretionary relief for deportable aliens. The 1940 Act permitted voluntary departure for aliens of "good moral character." In some cases in which the alien was closely related to a citizen or resident alien, deportation could be suspended. *Id.* at 672. In 1943, the 1917 Immigration Act was amended to give the Attorney General some latitude in choosing the country to which an alien would be deported:

If the United States is at war and the deportation . . . of any alien . . . shall be found by the Attorney General to be impracticable or inconvenient because of enemy occupation of the country whence such alien came or wherein is located the foreign port at which he embarked for the United States or because of other reasons connected with the war, such alien may, at the option of the Attorney General, be deported (a) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country wherein is located the government in exile, if that country will permit him to enter its territory; or (b) if such alien is a citizen or subject of a country whose recognized government is not in exile, then, to a country or any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country.

Act of July 13, 1943, ch. 230, 57 Stat. 553.

17. These persons included citizens of the Axis countries who had been victims of persecution and citizens of other countries found in Germany, Austria, or Italy as a result of population movements after the beginning of the war. Displaced Persons Act of 1948, ch. 647, § 2(c), 62 Stat. 1009, 1009-10. The Act established a series of visa preferences, including one for those persons who had fought against the Axis countries but were "unable or unwilling to return to the countries of which they are nationals because of persecution or fear of persecution on account of race, religion or political opinions." A second preference was given to persons living in refugee camps. *Id.* § 7, 62 Stat. 1009, 1012. Additionally, the 1948 Act provided visas for citizens of Czechoslovakia who had left their country after January 1, 1948, "as a result of persecution or fear of persecution. *Id.*, § 2(d), 62 Stat. 1009, 1010.

18. *Id.* The Act created 202,000 entry visas in addition to those permitted under the 1917 Act's quotas. *Id.*, § 3(a), 62 Stat. 1009, 1010.

19. A "displaced person residing in the United States" was defined as a person who

General for adjustment of his immigration status,²⁰ provided the alien could prove that he was unable or unwilling to return to his native country "because of persecution or fear of persecution on account of race, religion or political opinions."²¹ Two years later, in 1950, the predecessor of section 243(h) was added to the Immigration Act of 1917.²²

had lawfully entered the country and had been

displaced from the country of his birth, or nationality, or of his last residence as a result of events subsequent to the out-break of World War II [and could not] return to any of such countries because of persecution or fear of persecution on account of race, religion or political opinions.

Id., § 4(b), 62 Stat. 1009, 1011.

20. The section covering displaced persons already in the United States applied only to individuals who had entered the country as nonimmigrants or nonquota immigrant students. *Id.*

21. *Id.* This language in § 4(b) of the Displaced Persons Act of 1948 should be compared with that of § 243(h). See text accompanying note 3 *supra*. Arguably, the inclusion of "fear of persecution" would require a lighter burden of persuasion than "persecution" alone. See note 23 *infra* (similar language in § 2(a) of the Refugee Relief Act of 1953, ch. 336, 67 Stat. 400).

The leading case under the 1948 Act was *Lavdas v. Holland*, 139 F. Supp. 514 (E.D. Pa. 1955), *aff'd*, 235 F.2d 955 (3d Cir. 1956). An alien had left a small Greek island at age 18 because he feared conscription by Communist insurgents. While living on the island he had not been politically active. To support his claim of a fear of persecution, the alien introduced letters written five years before the 1955 deportation hearing in which several residents of the island stated their opinions, without supporting evidence, that he would be persecuted by the Communists if he returned to the island. 235 F.2d at 956-57.

The special inquiry officer of the INS rejected the petitioner's claim on the grounds that any persecution would be the result of action by the Communist party, not the government. On appeal, petitioner raised the issue whether the persecution contemplated by the Act necessarily had to be at the hands of a government. Neither the district court nor the court of appeals found it necessary to decide the question, although the former suggested in dictum that even if the petitioner's fear were well grounded, such reprisals were not sufficient to meet the statutory requirement. 139 F. Supp. at 515. Both courts took judicial notice of the decrease of insurgent activities and the establishment of a stable government in Greece by 1953. 139 F. Supp. at 515; 235 F.2d at 957. Consequently, the two courts declined to give credence to the alien's evidence of possible persecution five or six years previously. Both also noted that there was no evidence that the petitioner would be persecuted anywhere in Greece other than his native island. 139 F. Supp. at 515; 235 F.2d at 957. The court of appeals found the alien's claim particularly unconvincing since he had left the island at an early age without any history of political activity. 235 F.2d at 957.

See cases cited notes 232, 242 & 248 *infra* and accompanying text (similar reasoning by the courts and the INS in § 243(h) cases). It is important to note, however, that *Lavdas* was decided five years after the adoption of the predecessor of § 243(h). See note 22 *infra* and accompanying text. There is no evidence that considerations such as those in *Lavdas* were before the Congress in 1950 or 1952.

22. Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010, *amending*

Between 1952 and 1965 Congress used a variety of techniques for handling the problems of admitting refugees to the United States;²³

Immigration Act of 1917, ch. 29, § 20, 39 Stat. 874, 890-91, *as amended*, Act of July 13, 1943, ch. 230, 57 Stat. 553; *see note 16 supra*. The provision read: "No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall *find* that such alien would be subject to physical persecution." *Id.* (emphasis added). *See notes 33 & 93 infra* and accompanying text (legislative history and cases).

23. In addition to § 243(h), the Immigration and Nationality Act of 1952, § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970), gives the Attorney General discretion to 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.

This section was used to facilitate the entry of Hungarian refugees in 1956-57. These Hungarian parolees were later granted permanent resident status by the Act of July 25, 1958. Pub. L. No. 85-559, 72 Stat. 419. Most recently, the parole provision of the Act was used to permit the admission of Indochinese refugees after the collapse of American-supported regimes in Cambodia and South Vietnam. *See Comment, Refugee-Parolee: The Dilemma of the Indochina Refugee*, 13 SAN DIEGO L. REV. 175 (1975).

In 1953, after the expiration of the Displaced Persons Act of 1948, Congress enacted the Refugee Relief Act of 1953, ch. 336, 67 Stat. 400, which was amended by the Act of Aug. 31, 1954, ch. 1169, 68 Stat. 1044. This act provided visas, in excess of those allowed under the quota system, for "refugees," defined as one who was "out of his usual place of abode and unable to return thereto" due to "persecution, fear of persecution, natural calamity or military operations" and who sought entry to the United States from a non-Communist country. The act also covered "escapees" who were defined as persons who had fled a Communist country due to "persecution or fear of persecution on account of race, religion, or political opinion." *Id.*, § 2(a), (b), 67 Stat. 400. The Act provided a mechanism by means of congressional resolutions for the adjustment of the status of aliens lawfully in the United States who showed that they could not return to the country of their "birth, or nationality, or last residence, because of persecution or fear of persecution on account of race, religion, or political opinion." *Id.*, § 6, 67 Stat. 400, 403.

D'Antonio v. Shaughnessy, 139 F. Supp. 719 (S.D.N.Y. 1956), held that the Refugee-Relief Act included both governmental and private acts of persecution. The petitioners, who were Italian nationals, claimed that they feared persecution by Italian Communists. *Id.* at 720-21. The court compared § 6 with § 243(h) (which was then limited to "physical persecution," *see text accompanying note 38 infra*), and reasoned that the inclusion of nonphysical persecution and "fear of persecution" in § 6 "reflect[ed] a liberal and remedial purpose on the part of Congress; and it should be construed to effectuate that purpose." *Id.* at 722-23. Later cases interpreted § 6 liberally. *See, e.g.,* Leong Leun Do v. Esperdy, 309 F.2d 467 (2d Cir. 1962) (alien granted relief if he was unable to return to one of three countries described by § 6 for reasons of persecution and if he could not return to the other countries for nonpersecutory reasons); Cheng Lee King v. Carnahan, 253 F.2d 893 (9th Cir. 1958); Chung Can Foo v. Brownell, 148 F. Supp.

some of those provisions were consolidated in section 203(a)(7)²⁴ of the 1965 amendments to the Immigration and Nationality Act of 1952. That current refugee relief provision of the Act is clearly of limited scope since it applies only to aliens outside the United States. Moreover, it is unavailable to persons fleeing persecution in many parts of the world, such as the Western Hemisphere, the Indian subcontinent, Africa, and noncommunist portions of Asia. The Supreme Court has further restricted the reach of the section by construing it to be unavailable to persons who, having fled one country, have lived in another for more than a brief period before seeking entry to the United States.²⁵ For the alien-refugee already legally or illegally in the United States, section 243(h) remains, perhaps, the only means of obtaining asylum.²⁶

420 (D.D.C. 1957) (seamen on United States flag ships outside the United States entitled to relief under § 6 if otherwise qualified); *Shio Han Sun v. Barber*, 144 F. Supp. 850 (N.D. Cal. 1956) (same).

By the Act of July 14, 1960, Pub. L. No. 86-648, § 1, 74 Stat. 504, Congress permitted parole into the United States of "refugee-escapees" who were residing in a noncommunist country of which they were not nationals and who were receiving assistance from the United Nations High Commissioner for Refugees. "Refugee-escapees" had been defined in 1957 as certain persons from Communist countries or the Middle East. Act of Sept. 11, 1957, Pub. L. No. 85-316, § 15(c), 71 Stat. 639, 642-44.

24. 8 U.S.C. § 1153(a)(7) (1970) provides:

Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 1151(a)(ii) of this title, to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they 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 (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between the including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: *Provided*, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

25. *Rosenberg v. Yee Chien Woo*, 402 U.S. 49 (1971).

26. Although the number of § 243(h) claims apparently is small, *see* note 7 *supra*, a total of 30,907 refugees were admitted to the United States in 1973 under the other provisions of the Act described in note 23 *supra*. Of these, 20,634, or over two-thirds, were from Cuba. (Cuban parolees may seek adjustment of their status to that of a

III. LEGISLATIVE HISTORY OF SECTION 243(h)

The apparently limited reach of section 243(h), when taken with its discretionary character, raises the question whether Congress intended the section to afford significant relief to persons seeking asylum in the United States.²⁷ The sparse and ambiguous legislative history of the section provides little information for an answer.

Presumably, in 1950 Congress was aware of the language in the Displaced Persons Act of 1948²⁸ about the "persecution" and "fear of persecution" of refugees. Congress also had before it a lengthy report of the Senate Committee on the Judiciary, setting out the results of an investigation of the immigration system.²⁹ The report described an informal INS administrative practice of withholding the entry of a

permanent resident when they fulfill the requirements of the Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161). The majority of the remaining refugees were from Russia, China, Eastern Europe, and Spain. STATISTICAL ABSTRACT OF THE UNITED STATES 101 (1974). These figures underscore the selectivity of the refugee provisions of the Act. Section 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970), see note 23 *supra*, can be used to accommodate large numbers of persons displaced from a particular country, as in the cases of the Hungarian, Cuban, and Indochinese refugees. Although § 243(h) is not designed to reach such large scale population shifts, it is arguably the only refugee-relief portion of the Act that on its face does not discriminate on the basis of national origin. Thus, it is crucially important to many individual refugees.

It is, of course, possible to argue that § 243(h) is not a refugee-relief measure at all. That is, the section is not intended to accommodate persons or groups actively fleeing persecution; rather, it is designed to meet the needs of isolated individuals already in the country who may not, originally, have been motivated by persecution to flee their native countries. This argument, however, is based upon a narrow definition of "refugee," which looks to the reasons for leaving a country rather than the reasons for avoiding a return to it. It is better to classify a person as a refugee at the time—and for as long as—his remaining in or returning to his country of birth or citizenship becomes problematic for reasons of potential physical, political, religious, economic, racial or other objective persecution. Given this definition of "refugee," § 243(h) is clearly a refugee-relief statute.

27. More generally, § 243(h) and the other refugee-relief sections of the Act raise the question whether meaningful provisions for asylum are compatible with a quota system that severely limits entry to this country. A fundamental tension exists between the largely economically-motivated exclusionary provisions of the Act and the nation's presumed public ideology of protecting political and religious freedoms. Given the national practice prior to the adoption of limits on immigration, it is difficult to argue that such an ideology finds meaning only within the boundaries of the country. This tension is further exacerbated by the requirements of foreign policy; the *realpolitik* imperatives of a world power undercut both the public ideology and the practical effect of the refugee provisions.

28. See notes 17-21 *supra* and accompanying text.

29. S. REP. NO. 1515, 81st Cong., 2d Sess. (1950).

deportation order if the alien would be subject to "political persecution" in the country to which he would be deported.³⁰ The report specifically noted that such aliens had no statutory right to asylum in the United States.³¹ With at least this information before it, Congress amended the Immigration Act of 1917 to require the Attorney General to suspend deportation when he *found* that an alien would be subjected to *physical* persecution in the country to which he would be returned.³² No attempt was made in the statute or accompanying House and Senate reports to explain the function or purpose of the section or to define "physical persecution."³³

When the immigration laws were extensively revised in 1952,³⁴ section 243(h) was first proposed in a form that required a suspension of deportation to any country where the Attorney General "shall in his discretion find" that the alien would be subject to physical persecution.³⁵

30. *Id.* at 640. The *Report* stated that the alien was usually given twelve months to make a voluntary departure from the United States, although the period could be extended. It was estimated that this practice involved forty or fifty cases a year. *Id.*

31. *Id.*

32. Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 87, amending the Immigration Act of 1917, ch. 29, § 20, 39 Stat. 874, as amended, Act of July 13, 1943, ch. 230, 57 Stat. 553. See text quoted note 22 *supra*.

Four elements of this predecessor of § 243(h) should be noted. First, the Attorney General was *required* to suspend deportation if he made a finding of physical persecution. Suspension was not, therefore, entirely discretionary. Second, the section mandated a suspension of deportation as opposed to the stay of deportation provided in § 243 (h). Arguably a stay is more temporary than a suspension. Third, the Attorney General had to make a *finding* of physical persecution. Thus, he had to make provisions for evidentiary hearings and other procedural formalities which were another curb on discretion. Fourth, a suspension could be granted only upon a finding of physical persecution. This requirement was in contrast with the provisions of the Displaced Persons Act of 1948, see notes 17-21 *supra* and accompanying text, which spoke of "persecution" and "fear of persecution."

33. The only reference to the section in the legislative history is remarkably unilluminating: "It is further provided that no alien shall be deported to any country in which the Attorney General finds that such alien would be subjected to physical persecution." H.R. REP. No. 3112, 81st Cong., 2d Sess. 59 (1950).

34. The revision produced the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1557 (1970).

35. H.R. REP. No. 1365, 82d Cong., 2d Sess. 191 (1952). The proposed text read: "No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall in his discretion find that such alien would be subjected to physical persecution."

The conflict between a required suspension and a discretionary finding is obvious. Equally anomalous is the concept of a discretionary finding. The significance of the proposed language is its indication that Congress early intended to give the Attorney

During the extensive legislative hearings on the 1952 Act, several witnesses urged that proposed section 243(h) be amended to specify clearly that relief could be given when the persecution was a result of the alien's race, religion, or political beliefs.³⁶ No such changes were adopted, but when the section emerged from Conference Committee, it had been significantly altered:

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.³⁷

The conference report contained no explanation of these changes.³⁸ Clearly, however, this language, which was enacted by Congress,³⁹ greatly enhanced the Attorney General's discretion in granting relief.⁴⁰ He was merely "authorized," not required, to stay deportation; the finding requirement was replaced by the much more flexible provision for an "opinion."⁴¹ Once more, the legislative history gave no definition of the term "physical persecution."

When the Act was amended in 1965, section 243(h) was again subjected to brief consideration and significant modification. During the legislative hearings on the various amendments to the Act, at least two witnesses recommended that the word "physical" be deleted because it established too restrictive a standard.⁴² One witness also urged that

General more discretion in granting relief than he was allowed under the 1950 amendments to the Immigration Act of 1917. See notes 22 & 32 *supra*.

36. *Joint Hearings on S. 716, H.R. 2379 & H.R. 2816 before House Judiciary Comm.*, 82d Cong., 1st Sess. 449, 539-40, 628, 681 (1952). The witnesses represented the Americans for Democratic Action, the National Council of Jewish Women, the Common Council for American Unity, and the Association of Immigration and Nationality Lawyers. The witnesses appear not to have been concerned about the quality of the persecution (*i.e.* whether it was physical or nonphysical), but with the causes of the persecution. Mrs. Effenbein of the National Council of Jewish Women asked that the section include "discrimination" as well as persecution. She further stated that the Council believed that

aliens should not be deported to countries where they have no emotional or cultural ties, and where, because of economic inequalities in this world, they might through our instrumentality be placed in situations comparable to slave labor.

Id. at 539-40.

37. H.R. REP. NO. 2096, 82d Cong., 2d Sess. 55 (1952).

38. *Id.*

39. Immigration and Nationality Act of 1952, § 243(h), 66 Stat. 163, 214.

40. The courts quickly recognized this increased discretion. See, *e.g.*, *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392, 394 (2d Cir. 1953).

41. For an early discussion of the significance of these changes, see *id.*

42. *Hearings on S. 500 Before the Subcomm. on Immigration and Naturalization of*

the standard of section 243(h) be changed to the alien's "well-founded fear of persecution,"⁴³ so that 243(h) would better comport with the 1951 Geneva Convention Relating to the Status of Refugees.⁴⁴ When the section was reported to the floor of the House, the only change from its 1952 version was the removal of the word "physical;" the accompanying House Report laconically noted that "techniques of persecution are not limited to bodily violence alone."⁴⁵

On the floor, however, Representative Poff offered a prepared amendment which added the phrase "on account of race, religion or political opinion" after the word "persecution."⁴⁶ Noting that the proposed bill deleted the word "physical," Mr. Poff stated:

I can understand and appreciate the purpose of this change. The clause "physical persecution" is entirely too narrow. It is almost impossible for the alien under an order of deportation to assemble the quantum of evidence necessary to discharge his burden of proof.

On the other hand, I suggest that the word "persecution" standing alone may be too broad in concept and too flexible in definition. It seems to me that between these two extremes there should be some reasonable middle ground. My amendment seeks to approach that middle ground. First it broadens beyond the boundaries of physical persecution but it narrows the word "persecution" by limiting the scope of its interpretation to three specifics; namely persecution on account of race, persecution on account of religion, or persecution on account of political opinion.⁴⁷

Representative Poff added that his amendment brought section 243(h) into verbal conformity with section 203(a)(7).⁴⁸ The amendment passed without further comment or debate.⁴⁹

This legislative history gives only vague clues to the congressional purpose in enacting and amending section 243(h). In 1952 Congress

the Senate Comm. on the Judiciary, 89th Cong., 1st Sess., pt. 2, at 535, 887 (1965). The two witnesses represented the American Friends Service Committee and the Association of Immigration and Nationality Lawyers.

43. *Id.* at 535; *Hearings on H.R. 2580 Before Subcommittee No. 1 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 217 (1965).

44. 189 U.N.T.S. 150, 19 U.S.T. 6264.

45. H.R. REP. No. 745, 89th Cong., 1st Sess. 22 (1965).

46. 111 Cong. Rec. 21802 (1965) (amendment offered by Representative Poff).

47. *Id.* at 21804 (remarks by Representative Poff).

48. *Id.* For the text of § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1970), see note 24 *supra*.

49. For the text of § 243(h), 8 U.S.C. § 1253(h) (1970), see text accompanying note 3 *supra*.

obviously desired to extend the scope of the Attorney General's discretion and eliminate the need for a finding. In 1965 Congress intended to recognize some forms of persecution beyond those that were merely physical. Indeed, Representative Poff's language suggests that he and Congress sought to expand the kind and amount of evidence an alien could introduce by enlarging the classes of persecution for which relief might be granted. But while the 1965 amendments might thus be construed to have liberalized section 243(h), there is no indication of any congressional intent to change the alien's burden of persuasion, which, although unarticulated in the section or its legislative history, had, by 1965, been shown in reported cases to be very onerous.⁵⁰ Given this important absence of change and the continuation of the Attorney General's great discretion, it is readily arguable that although Congress expanded the kinds of persecution contemplated by section 243(h) it did little to alter the practical effect of the section's operation.

50. See notes 181-99 *infra* and accompanying text. "Burden of persuasion" and "quantum of evidence" are used interchangeably throughout this Note; technically, the latter defines the extent of the former.

If § 243(h) is construed to vest broad discretion in the Attorney General, then it might be fallacious to speak of any burden of persuasion on an alien. Presumably, under an expansive construction of the section, evidence that satisfied even the most rigorous burden of persuasion would not guarantee the grant of relief, while in other cases a stay might be granted on little or no evidence. Although the forgoing statement is extreme, it does not present a logically impossible result under the section, especially given the uncertainty about the reach and standards of judicial review for abuse of administrative discretion. See notes 152-80 *infra* and accompanying text. See also text accompanying note 86 *infra*.

It is unlikely, however, that a court would construe the section to vest such extensive discretion in the Attorney General. Since the section affects important individual interests, and since Congress must have enacted and amended § 243(h) to provide relief for at least some aliens, it is arguable that the Attorney General's discretion is limited and that his actions are subject to some degree of judicial review. The problem thus becomes determining for which aliens relief is or should be provided. At this juncture, considerations of the burden of persuasion are relevant. A distinction must be drawn, however, between the burden of persuasion the alien must satisfy before the Attorney General and the judicial review thereof. See notes 181-98 *infra* and accompanying text. If, as argued here, § 243(h) does not give the Attorney General unlimited discretion and judicial review is not precluded, see note 5 *supra*, then that review must be made pursuant to identifiable standards, including some means of considering the alien's evidence and its evaluation by the agency. It follows that the agency should have its own uniformly applied standards for weighing the alien's evidence.

In practice, the courts have attempted to articulate the burden of persuasion the alien must meet. See notes 185-96 *infra* and accompanying text. Some courts have also reviewed the alien's evidence under the substantial evidence test. See notes 200-23 *infra* and accompanying text.

IV. STATUTORY MECHANICS OF SECTION 243(h)

The operation of section 243(h) must be understood in its statutory context. Since the section is found in the deportation chapter of the Act,⁵¹ it is not available to persons who are excludable⁵² from the United States or to persons admitted to the country on conditional entry permits or on parole.⁵³ To satisfy the section's requirement that he be "within the United States," the alien must have entered the country, legally or illegally. "Entry" is a word of art in the Act; it requires

51. See note 3 *supra*.

52. See, e.g., *Leng May Ma v. Barber*, 357 U.S. 185 (1958); *Dong Wing Ott v. Shaughnessy*, 247 F.2d 769 (2d Cir. 1957). Excludable aliens are defined in great detail in § 212(a) of the Act, 8 U.S.C. § 1182(a) (1970). They include aliens who are mentally defective, insane, sexual deviates, drug addicts, chronic alcoholics, paupers, polygamists, prostitutes, anarchists, or communists, as well as aliens who have been convicted of crimes of "moral turpitude," aliens who have been previously deported, and aliens who fall within many other conditions or statutes. Exclusion procedures are set forth in § 236 of the Act, 8 U.S.C. § 1226 (1970), and 8 C.F.R. § 236 (1976).

By its terms, § 243(h) is not available to excludable aliens who are not considered to be "within the United States." See, e.g., *Long May Ma v. Barber*, 357 U.S. 185 (1958); *United States ex rel. Kordic v. Esperdy*, 386 F.2d 232 (2d Cir. 1967); *Wong Hing Goon v. Brownell*, 264 F.2d 52 (9th Cir. 1959).

53. Section 203(a)(7) of the Act, 8 U.S.C. § 1153(a)(7) (1970), see text quoted note 24 *supra*, and § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970), see text quoted note 23 *supra*, provide two means by which aliens may be granted conditional or paroled entry into the country. Many cases also arise under § 252 of the Act, 8 U.S.C. § 1282 (1970), which provides for the conditional entry of alien seamen. In an early case, *United States ex rel. Szlajmer v. Esperdy*, 188 F. Supp. 491 (S.D.N.Y. 1960), the court held that a seaman, who had made a legal conditional entry under the section and then had his permit revoked, was entitled to apply for 243(h) relief. Thereafter, the Attorney General issued regulations granting similarly-situated seamen hearings on their claims:

Any alien crewman refused a conditional landing permit or whose conditional landing permit has been revoked who alleges that he cannot return to a Communist, Communist-dominated or Communist-occupied country because of fear of persecution in that country on account of race, religion, or political opinion shall be removed from the vessel or aircraft for interrogation. Following the interrogation, the district director having jurisdiction over the area where the alien crewman is located may in his discretion authorize parole of the alien crewman into the United States under the provisions of section 212(d)(5) of the Act. If parole is not authorized, the crewman shall be returned to the vessel or aircraft on which he arrived in the United States.

8 C.F.R. § 253.1(f) (1976). The countries encompassed by this regulation are far fewer than those within the scope of § 243(h). Later cases explicitly rejected or failed to follow the *Szlajmer* rationale. *Immigration & Naturalization Serv. v. Stanistic*, 395 U.S. 62 (1969) (seamen with revoked entry permit not "within" the United States; 8 C.F.R. § 253.1(e), now § 253.1(f), comports with the Act and provides the alien with procedural due process); *Vucinic v. United States Immigration & Naturalization Serv.*, 243 F. Supp. 113 (D. Ore. 1965); *Glavic v. Beechie*, 225 F. Supp. 24 (S.D. Tex. 1963), *aff'd*, 340 F.2d 91 (5th Cir. 1964).

physical presence in the country plus inspection and "admission by an immigration officer" or "actual and intentional evasion of inspection at the nearest inspection point."⁵⁴ In addition, the alien must be free from restraint while in the country; for example, he must not be in custody, under surveillance, or admitted on parole.⁵⁵

Deportation of an alien who has entered the United States may occur for the reasons set forth in section 241 of the Act.⁵⁶ Deportation procedures are prescribed in section 242 of the Act⁵⁷ and the corresponding sections of the Code of Federal Regulations.⁵⁸ The process begins when the alien is served with an order to appear before an immigration judge of the INS and show cause why he should not be deported.⁵⁹ At the hearing, the alien has the right to be represented by counsel, but not at government expense.⁶⁰ A finding that the alien is

54. *Matter of Pierre*, Interim Decision No. 2238, at 3 (Oct. 5, 1973), citing *United States v. Vasilatos*, 209 F.2d 195 (3d Cir. 1954), *Lazarescu v. United States*, 199 F.2d 898 (4th Cir. 1952), *United States ex rel. Giacone v. Corsi*, 64 F.2d 18 (2d Cir. 1933), and *Morini v. United States*, 21 F.2d 1004 (9th Cir. 1927), cert. denied, 276 U.S. 623 (1928).

55. *Matter of Pierre*, Interim Decision No. 2238, at 4 (Oct. 5, 1973), citing *United States v. Vasilatos*, 209 F.2d 195 (3rd Cir. 1954), and *Lazarescu v. United States*, 199 F.2d 898, (4th Cir. 1952). *Pierre* involved a small, overloaded boat of persons fleeing Haiti. They were rescued, nearly drowned, by a ship enroute to the United States. Instead of evading the INS inspectors, the refugees remained on the ship when it reached Florida where the inspectors determined that the Haitians were without entry visas and hence inadmissible. They were thus denied relief under § 243(h), for although they were in the United States, they had not entered the country. That is, being in the United States is not equivalent to being "within" the United States. The Board did note that applicants for admission to the United States and excluded aliens could present evidence of feared persecution to the district director of the INS under § 212(d)(5) of the Act, 8 U.S.C. § 1182(d)(5) (1970), and 8 C.F.R. § 121.5(a) (1973). Interim Decision No. 2238, at 6.

56. 8 U.S.C. § 1251 (1970). The grounds for deportation are numerous and involve behavior or status both before and after entry into the country. See generally Wasserman, *Grounds and Procedures Relating to Deportation*, 13 SAN DIEGO L. REV. 125 (1975).

57. 8 U.S.C. § 1252 (1970).

58. 8 C.F.R. § 242 (1976).

59. 8 C.F.R. § 242.1 (1976). Generally, the hearing will occur no less than seven days after the issuance of the order. *Id.* At any time after the beginning of the deportation process, the alien may be apprehended and placed in custody upon the issuance of a warrant of arrest at the discretion of the district director. 8 C.F.R. § 242.2 (1976). Before the commencement of the hearing, the alien may apply for permission to depart the country voluntarily. 8 C.F.R. § 242.5 (1976).

60. 8 C.F.R. § 242.10 (1976). The hearing is conducted by a special inquiry officer (more recently labelled an immigration judge, see 8 C.F.R. § 1.1(e) (1976)). This officer has authority to determine deportability, order deportation, grant relief under §

deportable must be supported by clear, unequivocal, and convincing evidence.⁶¹ During the hearing the alien must be advised of his right to apply for section 243(h) relief from deportation to countries specified by the immigration judge.⁶² The alien may then be granted no more than ten days within which to make an application.⁶³ The application

shall consist of respondent's⁶⁴ statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to

243(h), and certify his decisions to the Board for review. 8 C.F.R. § 242.8 (1976). Another immigration officer, known as the trial attorney, may be assigned to the hearing to present evidence in behalf of the INS. 8 C.F.R. § 242.9 (1976).

It is significant to note that the special inquiry officers are a particularly overburdened lot. It is estimated that there are as many as eight million aliens illegally in the United States. St. Louis Post Dispatch, Feb. 23, 1975, § B, at 1, col. 1 (Statement of Commissioner of the INS). In Fiscal Year 1973, 655,968 deportable aliens were located in the United States. (88 per cent of the total were Mexican.) 568,005 of these aliens were required to depart without the issuance of a formal deportation order. Of the remainder, 42,054 cases were referred to special inquiry officers for hearings which represents a doubling of referrals in five years. The officers also held 1,743 exclusion hearings in fiscal 1973. In the same period the Board received 2,060 applications for review. 1973 INS ANN. REP. 9, 15-16. During Fiscal Year 1972, the INS employed 31 special inquiry officers (a decrease of 3 from 1964) and 25 trial attorneys. No increase in staff was planned for fiscal 1973. *Hearings Before a Subcomm. of the House Comm. on Government Operations*, 93d Cong., 1st Sess., pt. 1, at 40 (1973).

61. *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276 (1966); 8 C.F.R. § 242.14(a) (1976). In *Woodby*, the Court construed § 242(b)(4), 8 U.S.C. § 1252(b)(4) (1970), which states: "No decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." The Court said that the word "valid" indicated that the standard established the scope of judicial review, not the burden of proof upon the INS. Noting the "drastic deprivations that may follow when a resident of this country is compelled by our government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification," the Court required that clear, unequivocal and convincing evidence support a deportation order. 385 U.S. at 285, 286 (emphasis added).

62. 8 C.F.R. § 242.17(c) (1976). See note 3 *supra*. If the alien elects to claim asylum under the United Nations Protocol Relating to the Status of Refugees, see notes 264-99 *infra* and accompanying text, rather than § 243(h), different procedures apply. See *Yan Wo Cheng v. Rinaldi*, 389 F. Supp. 583, 586-87 nn.6-8 (D.N.J. 1975), re-printing INS Operations Instructions OI 108.1(f)(1)-(3). If an alien's request for asylum under the Protocol is rejected, he still may seek § 243(h) relief. 389 F. Supp. at 587 n.8.

63. 8 C.F.R. § 242.17(c) (1976).

64. The alien is known as the "respondent" during the proceedings. 8 C.F.R. § 242.1(a) (1976).

persecution on account of race, religion, or political opinion as claimed.⁶⁵

If the immigration judge's decision on the application is adverse, the alien is allowed ten days to file an appeal with the Board of Immigration Appeals (Board).⁶⁶ The respondent alien may also file a motion to reopen his deportation or 243(h) hearing to present new evidence.⁶⁷ Motions to reopen a deportation hearing to make an initial 243(h) application are sharply limited if the original ten day period for filing a 243(h) claim has passed.⁶⁸

V. JUDICIAL REVIEW

A. *Jurisdiction for Review*

Under section 106(a) of the Act an alien may seek review by a court of appeals of a final deportation order,⁶⁹ provided he has exhausted his

65. 8 C.F.R. § 242.17(c) (1976).

66. 8 C.F.R. § 242.21 (1976). See 8 C.F.R. § 3.1(b) (1976) for the appellate jurisdiction of the Board. The Board may also hear cases by certification from any officer of the INS. 8 C.F.R. § 3.1(c) (1976). Although Board decisions are generally final, 8 C.F.R. § 3.1(d)(2) (1976), cases can be reviewed by the Attorney General when he so directs or when requested by the Chairman or majority of the Board or the Commissioner of the INS. 8 C.F.R. § 3.2 (1976).

67. 8 C.F.R. § 242.22 (1976) provides that a motion to reopen will not be granted unless the special inquiry officer is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing

68. 8 C.F.R. § 242.17(c) (1976) states that no motion to reopen for the purpose of providing the respondent with an opportunity to make an application under 8 C.F.R. § 242.17 be granted if respondent's right to make such application was fully explained to him by the special inquiry officer, and he was afforded an opportunity to do so at the hearing, unless circumstances have arisen thereafter on the basis of which the request is being made.

The Board also rarely grants motions to reopen to apply for discretionary relief. See 8 C.F.R. § 3.2 (1976).

69. Immigration and Nationality Act § 106(a), 8 U.S.C. § 1105(a) (1970). This review must be sought within six months of the entry of the final order. Orders of the immigration judges are final except in the cases of appeal or certification to the Board, 8 C.F.R. § 242.20 (1976), in which event the Board's decision is final unless reviewed by the Attorney General. 8 C.F.R. § 3.1(d)(2), (h)(1) (1976); see note 66 *supra*.

Section 106(a) was added to the Act in 1961. Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 651. Before then, judicial review of deportation orders and discretionary relief began in district courts. Section 243(h) cases were often habeas corpus proceedings or actions for declaratory or injunctive relief. In 1955, the Supreme Court made the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 706 (1952), applicable to deportation proceedings. *Shaughnessy v. Pedreiro*, 349 U.S. 48

administrative remedies.⁷⁰ Review is upon the whole administrative record on which the deportation order is based; the Attorney General's findings of fact are conclusive if supported by "reasonable, substantive, and probative evidence on the record considered as a whole."⁷¹

Although section 106(a) is clearly applicable to the judicial review of final deportation orders, the circuits split, shortly after the section's adoption in 1961, on the issue whether it gave the courts original jurisdiction for review of denials of discretionary relief⁷² that were ancillary to the deportation determination.⁷³ In *Foti v. Immigration & Naturalization Service*,⁷⁴ the Supreme Court resolved the split by holding that judicial review of discretionary suspensions of deportation under section 244(a)⁷⁵ was placed in the courts of appeal by section

(1955). By using these provisions and repeated habeas corpus actions, aliens could delay deportation for years. For a discussion of such dilatory tactics and how they motivated Congress to enact § 106(a), see *Foti v. Immigration & Naturalization Serv.*, 375 U.S. 217, 224-26 (1963).

Section 106(a) establishes a mechanism for judicial review of deportation proceedings and precludes the application of the Administrative Procedure Act in that area. Section 106(a) does not, however, apply to other portions of the Act. Section 106(a)(9), 8 U.S.C. § 1105(a)(9) (1970), does permit an alien "held in custody pursuant to an order to deportation" to obtain judicial review of his custody in a habeas corpus proceeding. In his petition, however, the alien must indicate whether the validity of his deportation order has been upheld in any prior judicial proceeding, civil or criminal. If it has been upheld, the petition will not be entertained unless new grounds are alleged or the prior proceeding was inadequate. 8 U.S.C. § 1106(c) (1970).

70. Immigration and Nationality Act § 106(c), 8 U.S.C. § 1105(c) (1970).

71. Immigration and Nationality Act § 106(a)(4), 8 U.S.C. § 1105(a)(4) (1970).

72. Other forms of discretionary relief include the suspension of deportation and adjustment of status to permanent resident for certain classes of aliens who have been continuously present in the United States for seven or ten years, Immigration and Nationality Act § 244(a), 8 U.S.C. § 1254(a) (1970), *quoted* in note 75 *infra*; permission to make a voluntary departure (unlike the alien who is deported, one making a voluntary departure may later legally reenter the country), Immigration and Nationality Act § 244(e), 8 U.S.C. § 1254(e) (1970); and adjustment of the status of a legally admitted nonimmigrant to that of a permanent resident, Immigration and Nationality Act § 245(a), 8 U.S.C. § 1255(a) (1970).

73. *Foti v. Immigration & Naturalization Serv.*, 308 F.2d 779 (2d Cir. 1962), *rev'd*, 375 U.S. 217 (1963) (§ 106(a) did not confer original jurisdiction on the courts of appeals for review of § 244(a) discretionary relief); *Blagaic v. Flagg*, 304 F.2d 623 (7th Cir. 1962) (§ 106(a) did grant courts of appeals original jurisdiction in § 243(h) discretionary relief cases).

75. 8 U.S.C. § 1254(a) (1970):

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien unlawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(a) is deportable under any law of the United States except the provisions

106(a).⁷⁶ Then, in dictum the court added:

[I]t seems rather clear that all determinations made during and incident to the administrative proceedings conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals, such as orders denying voluntary departure pursuant to § 244(e) and orders denying the withholding of deportation under § 243(h), are likewise included within the ambit of the exclusive jurisdiction of the Courts of Appeals under § 106(a).⁷⁷

Three years later in *Woodby v. Immigration & Naturalization Service*,⁷⁸ the Court held that in a deportation hearing the INS had to show that an alien was deportable with clear, unequivocal, and convincing evidence.⁷⁹ Courts, in reviewing an INS deportation decision, however, must only determine whether the deportation order is supported by reasonable, substantial, and probative evidence on the record as a whole.⁸⁰ Since *Woodby* dealt with the burden of proof on the Attorney General in a deportation hearing, it is inapplicable in a 243(h) determination, in which the alien bears the burden of persuasion.⁸¹ That burden on the

specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent resident; or

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

76. 375 U.S. at 227.

77. 375 U.S. at 229. Although the Court's statement about § 243(h) was dictum it has been followed by all lower courts and the INS. In a later case, *Giova v. Rosenberg*, 379 U.S. 19 (1964), the Court found that section 106(a) includes jurisdiction to order the reopening of § 242(b), 8 U.S.C. § 1252(b) (1970), deportation proceedings.

78. 385 U.S. 276 (1966). For the Court's reasoning, see note 61 *supra*.

79. 385 U.S. at 285.

80. *Id.*; Immigration and Nationality Act § 106(a)(4), 8 U.S.C. § 1105(a)(4) (1970).

81. *Hyppolite v. Immigration & Naturalization Serv.*, 382 F.2d 98, 99 (7th Cir. 1967). "Burden of proof" in this Note is used to combine the concepts of burden of production and burden of persuasion. Both are placed on the alien in 243(h) cases. See note 50 *supra* for a consideration of the burden of persuasion problem.

alien is substantial, but variously articulated.⁸² Similarly, the standards for the judicial review of the alien's proof (if the court will admit that it can undertake such a review) are unclear and conflicting.⁸³

B. *Scope of Judicial Review*

The INS and the Board view section 243(h) as conferring broad discretionary power upon the Attorney General with very limited judicial review by the courts.⁸⁴ In *In re Sihalale*,⁸⁵ the Board maintained that the

favorable exercise of relief is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. The very wording of the law provides freedom of decision, to wit: the possibility of denial on purely discretionary grounds.⁸⁶

Earlier in *In re Liao*,⁸⁷ the Board said that in reviewing the findings of a special inquiry officer it would look only to "whether the alien has had a fair opportunity to present his case, whether the Attorney General

82. See notes 188-99 *infra* and accompanying text.

83. *Id.*

84. In an early case, *Cakmar v. Hoy*, 265 F.2d 59 (9th Cir. 1959), decided before the adoption of § 106(a) and during the period when the Administrative Procedure Act was applicable to deportation proceedings, the INS maintained that § 243(h) determinations were "by law committed to discretion" under the Administrative Procedure Act, 5 U.S.C. § 1009 (1952). The INS did admit that the courts could intervene if (1) the Attorney General refused to act at all; (2) if his actions were "completely capricious. (This, we believe, governs the situation of denial of relief simply because a man has curly hair);" (3) if the Attorney General acted under "fraudulent" circumstances; and (4) if the Attorney General's acts were *ultra vires*. 265 F.2d at 61 (emphasis original).

85. 11 I. & N. Dec. 531 (1966).

86. *Id.* at 532. See note 50 *supra*. The language in the Board's opinion comes directly from *Jay v. Boyd*, 351 U.S. 345 (1956), a § 244(a) suspension of deportation case. The statutory language stated that the Attorney General "may, in his discretion" suspend deportation. Looking to those words, the Court said:

It does not restrict the considerations which may be relied upon or the procedure by which the discretion should be exercised. Although such aliens have been given a right to a discretionary determination of an application for suspension . . . a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace.

Id. at 354. There is no evidence the Court intended for this statement to apply to § 243(h) cases. Since § 243(h) cases involve not merely deportation but also potentially life-endangering persecution, it is arguable that the Attorney General's discretion should not be absolute, that it should be hedged with standards and judicial review. Of course, it can be argued that a denial of § 244(a) relief will in certain cases involve similar consequences.

87. 11 I. & N. Dec. 113 (1965).

or his delegate has exercised his discretion and whether there has been an error of law in the proceeding."⁸⁸ Since the Attorney General had "wide latitude" in his disposition of a claim, the Board reasoned that there was no question whether substantial evidence supported his exercise of discretion.⁸⁹

Until the early 1960's most courts adopted a similarly restricted scope of review which was confined to issues of procedural due process and abuse of discretion.⁹⁰ In the early 1960's some courts began to review the Service's construction of the statutory language.⁹¹ Finally, in the late 1960's several courts expanded the scope of review to include a determination whether the Attorney General's action was supported by substantial evidence on the whole record.⁹² These developments are reviewed in the following subsections.

1. *Due Process*

The courts have not been reluctant to review section 243(h) cases to ensure the provision of procedural due process to the alien.⁹³ Virtually all cases decided under the section hold or state in dicta that the alien is entitled to due process, a hearing, or fair consideration of his 243(h) application.⁹⁴ An important early case, *United States ex rel. Dolenz v. Shaughnessy*,⁹⁵ suggested that the courts' role in 243(h) cases should be

88. *Id.* at 119.

89. *Id.*

90. See notes 93-138, 152-80 *infra* and accompanying text.

91. See notes 129-51 *infra* and accompanying text.

92. See notes 200-23 *infra* and accompanying text.

93. Under the predecessor statute of § 243(h), see note 32 *supra*, the courts required a hearing on the alien's claim, since the Attorney General was supposed to make a finding. *United States ex rel. Chen Ping Zee v. Shaughnessy*, 107 F. Supp. 607, 610 (S.D.N.Y. 1952). The same court also required that there be some statement or indication in the alien's file to contradict his statement that he would be subject to physical persecution. *Id.* at 611. In *Sang Ryup Park v. Barber*, 107 F. Supp. 603, 604 (N.D. Cal. 1952), the court held that when the record showed abundant evidence that an alien would be subject to physical persecution, the Attorney General had to rebut with "competent evidence" to the contrary. *Contra*, *United States ex rel. Dolenz v. Shaughnessy*, 107 F. Supp. 611 (S.D.N.Y.), *aff'd.*, 200 F.2d 288 (2d Cir. 1952), *cert. denied*, 345 U.S. 928 (1953).

94. See, e.g., *Antolos v. Immigration & Naturalization Serv.*, 402 F.2d 463 (9th Cir. 1968); *Kasravi v. Immigration & Naturalization Serv.*, 400 F.2d 675 (9th Cir. 1968); *Kam Ng v. Pilliod*, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961); *United States ex rel. Leong Choy Moon v. Shaughnessy*, 218 F.2d 316 (2d Cir. 1954); *Granado Almerda v. Murff*, 159 F. Supp. 484 (S.D.N.Y. 1958).

95. 206 F.2d 392 (2d Cir. 1953).

limited to assuring due process. Specifically, the court said that the alien had a right to present his evidence and have it considered by the Attorney General.⁹⁶ The court reasoned that the scope of judicial review had to be restricted since "the very nature of the decision [the Attorney General] must make concerning what the foreign country is likely to do is a political issue into which courts should not intrude."⁹⁷ This "political issue" rationale for limited judicial review was persuasive for nearly a decade after the *Dolenz* decision.⁹⁸

Apart from *Dolenz*, the decisions reveal little about what constitutes due process and a fair hearing. In *United States ex rel. Paschalidis v. District Director*,⁹⁹ the court held that an alien was entitled to present

96. *Id.* at 395.

97. *Id.* Political, or more precisely foreign policy, considerations are undoubtedly involved in many § 243(h) cases. These factors, however, are very rarely even mentioned by the courts or the Board. One exception is *In re Liao*, 11 I. & N. Dec. 113 (1965), in which a military officer of the Republic of China (Taiwan) entered the United States to receive military training pursuant to an agreement between the two countries. Before returning to Taiwan, the respondent resigned his commission and remained in the United States without INS permission. The special inquiry officer at the deportation hearing stated that

since the respondent entered the United States as a member of the Armed Forces of one of our allies, pursuant to a mutual defense effort, solely to receive training for the purpose of strengthening that ally and the defenses of the United States he should not be granted relief which would defeat that purpose.

Id. at 115, quoting unpublished opinion of special inquiry officer. The Board found no error as a matter of law that the special inquiry officer's opinion rested "to some degree" on foreign policy considerations. *Id.* at 119-20.

Similar facts were involved in *In re Lee*, 13 I. & N. Dec. 236 (1969), in which the Board approved a special inquiry officer's denial of adjustment status under § 245, noting that a grant of adjustment would harm the military training program. Section 243(h) relief was also denied. In another case involving the attempt of a Formosan military officer to remain in the United States, Justice Douglas noted the possible dangers confronting the alien upon deportation.

These petitioners, who have denounced the Chiang Kai-shek regime as a "police state," will most assuredly either face a firing squad on their return or receive heavy sentences. Any person critical of the regime is called a "defector." The list of political victims of Taipei's intolerance is too long and the secret military trials of dissidents too notorious for me to acquiesce in denial of certiorari here.

Cheng Tu Sheng v. United States Immigration & Naturalization Serv., 393 U.S. 1054 (1969) (Douglas, J., dissenting from denial of certiorari).

98. *E.g.*, *Obrenovic v. Pilliod*, 282 F.2d 874 (7th Cir. 1960); *Sunjka v. Esperdy*, 182 F. Supp. 599 (S.D.N.Y.), cert. denied, 364 U.S. 815 (1960).

99. 143 F. Supp. 310, 313 (S.D.N.Y. 1956). The special inquiry officer declined to recess the hearing until the respondent could present the first-person testimony of a witness who was an attorney then engaged in a trial.

the "best available evidence," even though the proceedings might be slightly delayed until that evidence could be offered.

Due process issues have been raised about letters submitted to the INS by the United States Department of State or the diplomatic service or government of the country to which an alien may be deported.¹⁰⁰ Two cases involved Iranian students who, while in the United States, took part in political activities or demonstrations against the Shah of Iran. In both cases the special inquiry officers accepted into the record similar Department of State letters alleging that the aliens would not suffer persecution upon their return to Iran. In *Kasravi v. United States Immigration & Naturalization Service*,¹⁰¹ the letter was not an issue, but the court devoted a footnote to questioning the competency of such letters in section 243(h) cases.¹⁰² The respondent alien in *Hosseinmardi v. Immigration & Naturalization Service*¹⁰³ challenged the admission of the letter into the record and the special inquiry officer's reliance upon it, since the alien was denied the opportunity to cross-examine its author and no foundation had been laid regarding the author's expertise on Iranian affairs. The court sustained the Board's denial of 243(h) relief and, relying upon an earlier case,¹⁰⁴ found no error in admitting the letter.¹⁰⁵ On petition for rehearing, however, the court, in dictum, admitted the unreliability of such letters and further conceded that "[i]t

100. In an early case, *Sang Ryup Park v. Barber*, 107 F. Supp. 605 (N.D. Cal. 1952), the court found little evidentiary merit in a letter from the South Korean Ambassador to the United States stating that no physical persecution was possible in South Korea. The court noted that

[n]o other reply could reasonably be expected. By it the Attorney General did not receive any more evidence of information . . . than he had before. Such a statement obviously could be obtained for the asking in every case. . . .

Id. at 607 (emphasis original).

101. 400 F.2d 675 (9th Cir. 1968).

102. *Id.* at 677 n.1. The court stated:

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. No hearing officer or court has the means to know the diplomatic necessities of the moment, in the light of which the statements must be weighed.

103. 405 F.2d 25, 27 (9th Cir. 1968).

104. *Namkung v. Boyd*, 226 F.2d 385 (9th Cir. 1955). See note 113 *infra* and accompanying text.

105. 405 F.2d at 27.

might well have been improper had the Board given substantial weight to those generalities without corroboration or further inquiry."¹⁰⁶

Recently, in *Paul v. United States Immigration & Naturalization Service*,¹⁰⁷ respondents challenged the entry in the hearing record of a written statement by the Department of State's Office of Refugees and Migration. The statement asserted that the respondents had made no claim of prior persecution in Haiti; hence, they had no "valid claim" for asylum.¹⁰⁸ In fact, the aliens had made many claims of prior persecution.¹⁰⁹ The court noted that the State Department's statement was "nonresponsive"¹¹⁰ to the respondent's claims but held that entry of the statement did not render the hearing unfair. The court reasoned that the immigration judge and Board had based their decisions only upon the aliens' evidence, since nothing in the record indicated that the State Department's statement had had any influence.¹¹¹ The language of the court suggests, however, that the Service and Board would be ill-advised to rely openly upon similar State Department recommendations, at least when the alien is unable to test the authors' reliability by cross-examination or interrogatories.¹¹²

A letter from a South Korean consular official was at issue in *Namkung v. Boyd*¹¹³ because it was admitted to the record after the hearing was closed and the respondent was denied a reopening for rebuttal. The court found no error and reasoned that the Attorney General could properly consider any information available, including confidential information that the alien had no opportunity to hear or

106. 405 F.2d at 28.

107. 521 F.2d 194 (5th Cir. 1975).

108. *Id.* at 196 n.3.

109. *Id.* at 200, 202-04.

110. *Id.* at 200.

111. *Id.*

112. *Id.* at 199-200. Although the *Paul* and *Hosseinmardi* decisions foreclose the Service's and Board's open reliance upon certain State Department recommendations, it is likely that the realities of interagency communication and cooperation are such that State Department interests and recommendations will continue to have significant weight, albeit undisclosed, in INS and Board decisions. Since the INS and Board may consider information not revealed to the alien, *see* text accompanying notes 118-23 *infra*, it will be possible to shield formal or informal State Department communications from later judicial scrutiny even though such communication may have had great significance in the INS or Board decision.

113. 226 F.2d 385 (9th Cir. 1955). The alien was a member of the Korean Communist Party. The letter in question stated that there would be no persecution if the respondent had "truly repented" and returned to South Korea for "mercy and guidance." *Id.* at 387.

rebut.¹¹⁴ Not surprisingly, the Board has taken a similar position. In *In re DeLucia*,¹¹⁵ the respondent sought to argue that a letter from an Italian government official was inadmissible since the alien had no opportunity to cross-examine the writer. The Board responded that because section 243(h) relief is discretionary, an alien does not have, as a matter of right, the privilege of cross-examination. Moreover, according to the Board, the Attorney General could consider "any information" that would assist the formation of his "opinion."¹¹⁶ More recent regulations indicate that the Service has adopted a less restrictive position.¹¹⁷

The right of the Attorney General to consider information other than that adduced at the hearing has been the target of judicial challenge. In *Jay v. Boyd*,¹¹⁸ a section 244¹¹⁹ case, the Supreme Court countenanced the use of confidential information by the INS when disclosure would be harmful to the United States. Two later cases permitted the Service to withhold from the alien only material endangering national security, at least in the hearing stage.¹²⁰ Subsequently adopted regulations im-

114. *Id.* at 388-89.

115. 11 I. & N. Dec. 565, 578, *aff'd on other grounds sub nom.* *De Lucia v. Immigration & Naturalization Serv.*, 370 F.2d 305 (7th Cir. 1966), *cert. denied*, 386 U.S. 912 (1967).

116. 11 I. & N. Dec. at 578. The language in the *Paul* and *Hosseinmardi* decisions may, however, indicate that *De Lucia* and *Namkung* are no longer strong precedent. *See also* 8 C.F.R. § 242.17(e) (1976), *quoted in* note 121 *infra*.

117. 8 C.F.R. § 103.2(2) (1976):

If the decision will be adverse to the applicant or petitioner on the basis of derogatory evidence considered by the Service and of which the applicant or petitioner is unaware, he shall be advised thereof and offered an opportunity to rebut it and present evidence in his behalf before the decision is rendered, except that classified evidence shall not be made available to him. . . . In exercising discretionary power when considering an application or petition, the district director or officer in charge, in any case in which he is authorized to make the decision, may consider and base his decision on information not contained in the record and not made available for inspection by the applicant or petitioner, provided the regional commissioner has determined that such information is relevant and classified under Executive Order No. 11652 . . . as requiring protection from unauthorized disclosure in the interest of national security.

118. 351 U.S. 345 (1956).

119. *See* note 75 *supra*.

120. *Milutin v. Bouchard*, 370 U.S. 292 (1962); *Radic v. Fullilove*, 198 F. Supp. 162 (N.D. Cal. 1961). *Radic* is interesting since the court appeared to believe that the § 243(h) hearing should be understood as an adversary proceeding rather than merely a chance for the alien to present his claim and evidence—the position of the *Dolenz* court, *see* notes 95-97 *supra* and accompanying text. The *Radic* court reasoned that

the right to a hearing embraces *not only the right to present evidence in support of one's position, but also a reasonable opportunity to know the claims*

plemented those decisions.¹²¹ Even if the alien has access to the information used against him, it may be of little value if his opportunity to cross-examine or challenge its source is limited.¹²² Furthermore, the alien's chance to rebut with additional evidence may be severely restricted by the Service's regulation about reopening hearings.¹²³

Another kind of due process challenge was raised in *Dombrovskis v. Esperdy*¹²⁴ in which the respondent, a Yugoslavian seaman, argued that the Service's use of its unpublished decision in *In re Kale*¹²⁵ as precedent for the handling of the 243(h) claims of all Yugoslavian seamen denied him individual consideration of his case on the merits. The court denied the alien's motion for summary judgment¹²⁶ and in a later opinion accepted the INS position that *Kale* was used in conjunction with an assessment of the particular evidence in each alien's claim.¹²⁷ Thus, there was no denial of due process.

of the opposing party with the privilege of seeking to refute those claims. The right to be heard and the right to contest opposing evidence are equal and coexisting rights, and both are essential to procedural due process This right [to contest opposing evidence] was, in my opinion, inviolate in the absence of a showing that the disclosure of those documents would be harmful to the security or well being of the United States

198 F. Supp. at 165 (emphasis original). Few courts have been willing to follow completely the *Radac* rationale that the § 243(h) hearing is a true adversary proceeding.

121. 8 C.F.R. § 242.17(e) (1976):

The trial attorney . . . may submit information not of record to be considered by the special inquiry officer provided that the special inquiry officer or the Board has determined that such information is relevant and is classified under Executive Order No. 11652 . . . as requiring protection from unauthorized disclosure in the interest of national security. When the special inquiry officer receives such non-record information he shall inform the respondent thereof and shall also inform him whether it concerns conditions generally in a specified country or the respondent himself. Whenever he believes he can do so consistently with safeguarding both the information and its source, the special inquiry officer should state more specifically the general nature of the information in order that the respondent may have an opportunity to offer opposing evidence.

122. See text accompanying notes 114-17 *supra*.

123. See regulations quoted in notes 67-68 *supra* and accompanying text.

124. 195 F. Supp. 488 (S.D.N.Y. 1961). See also note 269 *infra*.

125. *In re Kale*, No. A9 555 532 (INS, April 23, 1958) (unpublished opinion of the Assistant Commissioner of the Enforcement Division), reprinted in part in *Dombrovskis v. Esperdy*, 195 F. Supp. 488, 491-92 (S.D.N.Y. 1961). Because of the number of § 243(h) claims by Yugoslav seamen, the Service suspended action on all such claims while it gathered information on the internal situation in Yugoslavia. That material was set forth in the *Kale* decision, which denied relief and which was distributed to all service officers with an attached letter requiring that all pending Yugoslavian seamen cases be determined according to the criteria in *Kale*. 195 F. Supp. at 492.

126. 195 F. Supp. at 496.

127. *Dombrovskis v. Esperdy*, 209 F. Supp. 673 (S.D.N.Y. 1962).

Few other due process issues have been litigated in section 243(h) cases, and upon analysis due process challenges have produced only limited restraints upon the Attorney General's procedures or exercise of discretion. The hearing and other procedural requirements may delay deportation, but in no way do they ease or clarify the burden of persuasion the alien must meet.¹²⁸

2. *Errors of Law and Statutory Construction*

In a few cases the courts have been willing to reverse a decision of a special inquiry officer or the Board on a finding that the statute has been misconstrued. All of these cases have involved the construction of the terms "physical persecution" or "persecution." In *Blazina v. Bouchard*,¹²⁹ the Third Circuit defined "physical persecution" to mean "confinement, torture, or death inflicted on account of race, religion, or political viewpoint."¹³⁰ Later that year, the same circuit was confronted in *Dunat v. Hurney*¹³¹ with the claim of a Yugoslavian seaman that he would be denied *all* employment upon his return to his native country. The INS had held that economic deprivation did not amount to "physical persecution," but the court reversed, saying

[t]he denial of an opportunity to earn a livelihood . . . is the equivalent of a sentence to death by means of starvation and none the less final because it is gradual. The result of both is the same, and it is one that Congress, motivated by the humanitarian instincts . . . certainly hoped to avoid when subsection 243(h) was enacted.¹³²

Dunat was the first 243(h) case to reverse a decision of the Attorney General for an "error of law"¹³³ or misconstruction of the statute and was quickly followed by *Sovich v. Esperdy*.¹³⁴ There, the special inquiry

128. See note 50 *supra* and notes 185-99 *infra* and accompanying text.

129. 286 F.2d 507 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961).

130. *Id.* at 511.

131. 297 F.2d 744 (3d Cir. 1961).

132. *Id.* at 746. Interestingly, the court also suggested in dictum that once given proof of persecution, the INS "must entertain and exercise its discretion in the manner prescribed by Congress." *Id.* at 748. (emphasis added).

133. *Id.* at 749 (emphasis deleted).

134. 319 F.2d 21 (2d Cir. 1963). *Sovich* had escaped from Yugoslavia in 1956. After a year in an Italian refugee camp, he obtained a job on a Panamanian ship from which he entered the United States. Deportation proceedings began after he overstayed the period authorized by his entry permit. In support of his § 243(h) claim, *Sovich* testified that while in Yugoslavia he had opposed the Communist government on religious and political grounds, made statements to friends against the government, been questioned and warned against further opposition by government officials, and made several

officer had denied relief by construing the statute to contemplate persecution visited upon the alleged offender in the form of corporal punishment, torture or death because of race, religion or political opinion. Here the punishment which the applicant fears he might suffer would apparently be after conviction for a crime [defection from Yugoslavia] cognizable under the recognized juridical system. That is not persecution.¹³⁵

The *Sovich* court, citing *Dunat*, found that it had the authority to review the standards used by the Attorney General in evaluating 243(h) claims to determine whether he was exercising his discretion within the statutory limits.¹³⁶ The court said that the special inquiry officer had misconstrued the statute or its standards in three respects. First, by assuming that conviction for an illegal departure under a "recognized juridical system" was never physical persecution, the special inquiry officer overlooked the possibility that such a system could be perverted to achieve persecutory ends, particularly if the imprisonment were for many years.¹³⁷ Second, it was erroneous to presume that punishment for

attempts to escape (before succeeding). He expressed fear of imprisonment for his escape, statements, and belief upon any return to Yugoslavia. *Id.* at 23.

135. *Sovich v. Esperdy*, 319 F.2d 21, 24 (2d Cir. 1963), quoting unpublished opinion of the special inquiry officer.

136. 319 F.2d at 25-27.

Reason as well as authority supports the position that the standards employed by the Attorney General in exercising his discretion under § 243(h) are subject to judicial review. The Attorney General's assessment of the conditions obtaining in any particular country, is, of course, a political matter, a "question of fact." It is equally clear, we believe, that the standards by which those conditions are to be judged—what Congress meant by the expression "physical persecution"—is a question of law. For the courts to rule upon that issue is not an intrusion into the Attorney General's discretion. It is rather an interpretation of the statutory prerequisites to any proper exercise of his discretion.

Id. at 26-27.

The court admitted that in some cases the interpretation of a statute might be within the realm of administrative expertise. No such problem, however, was to be found in § 243(h) which,

like its predecessor statute, reflected the humanitarian intent of Congress that aliens should not be expelled from our shores into the hands of totalitarian regimes unwilling to recognize even elementary standards of human decency. Neither the Attorney General nor his delegates in the Immigration and Naturalization Service are better able than we to gauge the bounds of that Congressional concern, and thus to define the limits within which the Attorney General's discretion is to operate.

Id. at 27 (emphasis added).

137. *Id.* at 28-29.

We do not suggest that any incarceration for even political crimes, such as the one here involved, would constitute physical persecution under § 243(h).

illegal departure, under the facts presented in Sovich's case, would not be politically motivated or would not constitute punishment "because of . . . political opinion."¹³⁸ Finally, the special inquiry officer had failed to include confinement, as required by the *Blazina* decision,¹³⁹ among the forms of possible persecution.¹⁴⁰ The court therefore remanded the case so that a renewed application for relief could be considered under the correct standards.¹⁴¹

In a somewhat self-contradictory dissent¹⁴² Judge Moore argued that the Attorney General alone had the "competence" to determine the meaning of "physical persecution."¹⁴³ He based this conclusion on the long history of judicial recognition of the executive and legislative branches, "plenary" power to exclude and expel aliens¹⁴⁴ and the executive's special capacity to evaluate the political conditions in foreign countries where probable persecution is alleged. Such determinations "are closely related to the conduct of our foreign relations and involve political assessments and judgments which the courts have no competence to review."¹⁴⁵ While this argument is representative of the judicial

However repugnant to our own concept of justice, a brief confinement for illegal departure or for political opposition to a totalitarian regime would not necessarily fall within the ambit of Congress's special concern in enacting this provision. We are unwilling to believe, however, that Congress has precluded from relief under § 243(h) an alien threatened with long years of imprisonment, perhaps even life imprisonment, for attempting to escape a cruel dictatorship. Such a construction of the statute would attribute to Congress an insensitivity to human suffering wholly inconsistent with our national history.

We hold, therefore, that the Attorney General, through his delegate, erroneously construed the limits of his discretion in ruling that imprisonment for illegal departure may never constitute "physical persecution" within the purview of § 243(h).

Id. at 29 (emphasis original).

138. *Id.* at 28

139. *Blazina v. Bouchard*, 286 F.2d 507 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961).

See text accompanying note 130 *supra*.

140. 319 F.2d at 28.

141. *Id.* at 29.

142. At one point Judge Moore said that as a first step the Attorney General must make "factual findings as to whether the statutory prerequisites of eligibility have been met." *Id.* at 32. Then he remarked, "the determination of whether an alien would be subject to physical persecution is not simply a decision of a factual question. It is the opinion of the Attorney General that is to control." *Id.* at 33.

143. *Id.* at 34.

144. *Id.* at 32, citing *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), *Carlson v. Landon*, 342 U.S. 524 (1952), *Yamataya v. Fisher*, 189 U.S. 86 (1903), *Fok Young Yo v. United States*, 185 U.S. 296 (1902), and *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892).

145. 319 F.2d at 34.

attitude prevailing until the early 1960's, it is more applicable to judicial review of INS factual determinations than to the review of the standards used by the service or its construction of the statute.

After the 1965 amendment of section 243(h),¹⁴⁶ the Ninth Circuit in *Kovac v. United States Immigration & Naturalization Service*¹⁴⁷ reviewed the Board's construction of "persecution on account of race, religion or political opinion." In evaluating Kovac's claim of possible economic persecution, the Board had applied the *Dunat*¹⁴⁸ standard under which relief could be granted only if the alien proved he would be denied all means of earning a living. The court looked to the language and the legislative history¹⁴⁹ of the 1965 amendment and found the Board's standard to be erroneous. According to the court, Congress intended to

effect a significant, broadening change in section 243(h) which would lighten the burden imposed on applicants for asylum by removing the requirement that they show threatened bodily harm. This intent seems especially relevant to cases of alleged economic persecution. The burden of showing a probable denial of *all* means of earning a livelihood arose from the necessity of showing bodily harm. It was a particularly difficult burden for an alien to discharge, and resulted in the denial of relief in cases of economic persecution though the harassment was substantial.

The amendment thus eliminated the premise upon which courts construing the old statute—and the Board in this case—based the rule that, to come within the reach of section 243(h), a denial of employment opportunities must extend to all means of gaining a livelihood. The amended statute shifts the emphasis from the consequences of the oppressive conduct to the motivation behind it. An alien is now eligible for the humanitarian relief provided by the statute if he can show that, if deported, he would probably suffer persecution because of race, religion, or political opinion.¹⁵⁰

146. See notes 42-49 *supra* and accompanying text.

147. 407 F.2d 102 (9th Cir. 1969). Kovac, a Yugoslavian of Hungarian extraction, had been trained as a chef. Because he refused to spy for the Yugoslavian secret police upon Hungarians in Yugoslavia he lost his job as a chef and was unable to find employment as a cook. He eventually obtained a position on a Yugoslavian ship and deserted in the United States. He alleged that he would be imprisoned upon return to Yugoslavia because his desertion would be considered a denunciation of communism; furthermore, he would be unable to find suitable employment. *Id.* at 104.

148. See notes 131-32 *supra* and accompanying text.

149. See notes 42-49 *supra* and accompanying text.

150. 407 F.2d at 106-07.

Consequently, under amended section 243(h) a “probability of deliberate imposition of substantial economic disadvantage upon a alien for reasons of race, religion or political opinion is sufficient to confer upon the Attorney General the discretion to withhold deportation.”¹⁵¹

Kovac is, however, the only decision since 1965 in which a court has reversed the Attorney General on grounds of misconstruction. There appears to have been no other litigation on the issue whether the 1965 amendments worked a significant liberalization of the standards of persecution incorporated under the section.

3. *Abuse of Discretion; Arbitrary and Capricious Action*

In addition to reviewing for adequate due process and proper agency construction of the statutory language, the courts may also review for abuse of discretion and arbitrary or capricious action by the Attorney General.¹⁵² With the exception of the cases discussed below, no court has found either abuse of discretion or arbitrary or capricious action in the denial of section 243(h) relief. Indeed, one must look elsewhere to find any discussion or definition of the terms.¹⁵³

151. *Id.* at 107 (emphasis added).

152. *See, e.g.,* *Shkukani v. Immigration & Naturalization Serv.*, 435 F.2d 1378, 1382 (8th Cir.), *cert. denied*, 403 U.S. 920 (1971); *Kerkai v. Immigration & Naturalization Serv.*, 418 F.2d 217 (3d Cir. 1969), *cert. denied*, 397 U.S. 1067 (1970); *Siu Fung Luk v. Rosenberg*, 409 F.2d 555 (9th Cir.), *cert. denied*, 396 U.S. 801 (1969); *Hosseinmardi v. Immigration & Naturalization Serv.*, 405 F.2d 25 (9th Cir. 1968); *Asghari v. Immigration & Naturalization Serv.*, 396 F.2d 391 (9th Cir. 1968); *Hyppolite v. Immigration & Naturalization Serv.*, 382 F.2d 98 (7th Cir. 1967); *Lena v. Immigration & Naturalization Serv.*, 379 F.2d 536 (7th Cir. 1967); *Morin v. Bouchard*, 311 F.2d 181 (3d Cir. 1962); *United States ex rel. Fong Foo v. Shaughnessy*, 234 F.2d 715 (2d Cir. 1955).

The courts do not appear to draw any distinctions between abuse of discretion and arbitrary or capricious action.

153. Professor Jaffe has suggested that,

[b]roadly stated an abuse of discretion is an exercise of discretion in which a relevant consideration has been given an exaggerated, an “unreasonable” weight at the expense of others. The “letter” has been observed; the “spirit” has been violated. Discretion implies a “balancing”; where the result is eccentric, either there has not been a balancing, or a hidden or mayhap improper motive has been at work. . . . Judge Magruder has put it well as “a clear error of judgment in the conclusion . . . reached upon a weighing of the relevant factors.”

L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 586-87 (1965) (emphasis supplied by Prof. Jaffe), *citing* *McBee v. Bomar*, 296 F.2d 235, 237 (6th Cir. 1961). *McBee*, however, involved the abuse of discretion by a court in not granting a motion for a continuance.

Professor Berger has said that

[i]t is no more possible to encompass the scope of “arbitrariness” within a

The cases involving the suspension of deportation have indicated some of the content of the abuse of discretion standard of review. In *United States ex rel. Kaloudis v. Shaughnessy*,¹⁵⁴ the court said that it could not review the Service's discretionary decision to deny an alien a voluntary departure unless "it affirmatively appears that the denial has been actuated by considerations Congress could not have intended to

single definition than to define satisfactorily "reasonable care" or "due process" or "fraud." Basically arbitrariness consists of action that is unreasonable under all the circumstances. A few criteria, which by no means exhaust the possibilities, can be drawn from the cases. Arbitrary action may be colored by improper motivation; it may be action which has an impermissible basis, as when Republicans or redheads are denied an equal opportunity to do business with the government; or action which is unsupported by evidence, or turns on failure to consider relevant evidence, even in the presence of plenary discretion.

Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 82-83 (1965) (footnotes omitted). Of particular interest is Professor Berger's statement that action unsupported by evidence is an abuse of discretion. The cases cited by Professor Berger suggest that a finding or conviction unsupported by any evidence constitutes a violation of due process. *Id.*, cases cited at 59 n.20, 71 n.84. It is unclear whether "unsupported by evidence" also includes inappropriate (*i.e.*, not supportive of the finding) or insufficient evidence. The latter possibility, of course, merges with the substantial evidence standard, a different scope of review. See notes 228-30 *infra* and accompanying text.

Drawing upon the work of Professors Jaffe and Berger, one student commentator has made the following observations about the concept of abuse of discretion:

"Abuse of discretion . . ." . . . mean[s] more than that the agency, after considering and weighing all the relevant facts, struck a balance different from that which the court would have reached. . . . [A]dministrative agencies are vested with discretion by Congress primarily because of their expected expertise in divining and effectuating congressional policy. The agency's expertise is probably only of value so long as it weighs those considerations, and only those considerations, which Congress intended that it take into account in effectuating the legislative policy. Thus, if an agency were to include within its consideration irrelevant factors, or if it were to exclude a factor which Congress intended it to consider in enforcing federal policy, it would have "abused" its discretion, because: 1) the agency would no longer be acting under the congressional mandate; and 2) its value as an expert body—the reason for deference by the courts and for congressional trust—would be lost.

A third way in which an agency might abuse its discretion would be to give unreasonable weight to one or more relevant factors. Congress presumably did not, and possibly could not, delegate authority to an agency to act arbitrarily or capriciously. Thus, if an agency reached a completely unreasonable result after weighing the relevant facts, the court should set that finding aside.

Comment, *Abuse of Discretion: Administrative Expertise vs. Judicial Surveillance*, 115 U. PA. L. REV. 40, 41-42 (1966) (footnotes omitted). The problem with applying this analysis to a § 243(h) case, of course, is the absence in the statutory language or legislative history of any clear indication of the "relevant factors." See also Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 368 (1968); note 169 *infra*.

154. 180 F.2d 489 (2d Cir. 1950) (L. Hand, C.J.).

make relevant."¹⁵⁵ While the *Kaloudis* court did not specifically tie its test to the abuse of discretion concept, that connection was subsequently made by the same circuit in *Wong Wing Hang v. United States Immigration & Naturalization Service*.¹⁵⁶

Wong Wing Hang involved an alien's appeal from the Service's denial of a section 244(a)¹⁵⁷ suspension of deportation. That section, although not specifically requiring any findings of fact by the Attorney General before the grant of a suspension, does set forth factual criteria (period of residency, good moral character, hardship) that the alien must satisfy before relief may be obtained. In *Wong Wing Hang*, Judge Friendly outlined a two-step review process of section 244(a) cases. First, the Service's findings of fact "on which a discretionary denial of suspension is predicated must pass the substantial evidence test."¹⁵⁸ Second, presuming the alien's evidence satisfied the statutory criteria for suspension, the court would review the Attorney General's exercise of discretion in denying relief; a denial could be reversed if it constituted an abuse of discretion or arbitrary or capricious action.¹⁵⁹ Judge Friendly

155. *Id.* at 491.

156. 360 F.2d 715, 719 (2d Cir. 1966).

157. See text quoted in note 75 *supra*.

158. 360 F.2d at 717. Judge Friendly drew this conclusion from a footnote in *Foti*:

In the instant case the special inquiry officer not only found that petitioner failed to meet the eligibility requirements for suspension of deportation, since no hardship would result from his deportation, but further indicated that, even had the hardship requirement been met, relief would have been denied as a discretionary matter. Since a special inquiry officer cannot exercise his discretion to suspend deportation until he finds the alien statutorily eligible for suspension, a finding of eligibility and an exercise of (or refusal to exercise) discretion may properly be considered as distinct and separate matters. And since the finding of eligibility involves questions of fact and law, paragraph (4) of § 106(a) might be read to require this finding to be based on substantial evidence in the record. . . . However, we need not pass on this question here. And, of course, denial of suspension of deportation as a discretionary matter is reviewable only for arbitrariness and abuse of discretion, and thus could hardly be within the procedural and evidentiary requisites of paragraph (4).

Foti v. Immigration & Naturalization Serv., 375 U.S. 217, 228-29 n.15 (1963).

159. 360 F.2d at 718. Judge Friendly's reasoning is interesting. He begins by noting that § 106(a) does not provide a standard of review for the exercise of agency discretion. Section 106(a), however, was intended by Congress to "implement and apply" § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1970), to deportation cases. The APA's "abuse of discretion" scope of review provision would apply provided the Service's action is not one "committed to agency discretion by law." Although Congress had amended § 244(a) by substituting a requirement that the Attorney General form an "opinion" rather than make a "finding" on the issue of hardship, both the Service and the courts had countenanced judicial review of the discretionary determination. Hence, review was not precluded. 360 F.2d at 717-719.

Judge Friendly's assertion that § 106(a) was designed to "implement and apply" the

then went on to explore the meaning of the term "abuse of discretion." He noted that there were two arguable meanings, the first being "a sort of 'clearly erroneous' concept" best used in reviewing discretionary judicial action.¹⁶⁰ According to the second concept, discretion is abused "only when the action 'is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view' under discussion."¹⁶¹ Judge Friendly found the latter concept more appropriate for reviewing administrative action and developed it by adding:

[t]he denial of suspension to an eligible alien would be an abuse of discretion if it were 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."¹⁶²

Wong Wing Hang thus distinguished judicial review of the Attorney General's findings of fact that may establish eligibility for discretionary relief from judicial review for abuse of the actual exercise of discretion. Even in some section 244 cases the distinction may be hard to maintain;¹⁶³ in section 243(h) cases it is often difficult to tell how, if at all, the courts could readily distinguish between the two levels of review of fact and discretionary action. Unlike section 244, section 243(h) contains few factual prerequisites for a suspension; thus, there is less material for a court to call, by analogy, a finding and review with the substantial evidence test. Evidence of possible persecution in a foreign nation is often much less objective than evidence of residence, good

Administrative Procedure Act to deportation cases appears to contradict the Supreme Court's analysis in *Foti v. Immigration & Naturalization Serv.*, 375 U.S. 217, 224-26. See note 69 *supra*.

160. 360 F.2d at 718.

161. *Id.*, citing *Delno v. Market St. Ry.*, 124 F.2d 965, 967 (9th Cir. 1942).

162. 360 F.2d at 719, citing *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950). The Second Circuit recently reaffirmed its two step analysis and definition of abuse of discretion in a case involving the denial of a voluntary departure. *Bolanos v. Kiley*, 509 F.2d 1023 (2d Cir. 1975) (Friendly, J.).

163. See *Rassano v. United States Immigration and Naturalization Serv.*, 492 F.2d 220, 227 (7th Cir. 1974). The court held that the Attorney General had abused his discretion in finding that the respondent had failed to establish his good moral character. The court's discussion indicated that the abuse was in the finding of facts, not the exercise of discretion. Since the finding of some facts is a prerequisite to the exercise of discretion and any abuse, the two-step *Wong Wing Hang* review process will in some, but not all cases, seem artificial.

moral character, and hardship in the United States. Moreover, Congress consciously wrote any requirement of a factual finding by the Attorney General out of section 243(h).¹⁶⁴ Perhaps for these reasons, courts, until recently,¹⁶⁵ did not employ the *Wong Wing Hang* analysis in 243(h) cases. As a consequence, however, courts that claimed to be reviewing for abuse of discretion were very imprecise in explaining the contents or process of their analysis. Most of the courts appear to have reviewed the evidence closely and then found no abuse.¹⁶⁶ Other courts stated that they could not substitute their opinion on the facts for that of the Attorney General, but then went on to look at the facts in the record to see if the denial of relief was supported by a "reasonable foundation," "ample evidence," or some other similar evidentiary standard¹⁶⁷ and hence was not an abuse of discretion.¹⁶⁸ That is, review for abuse of discretion seems to have involved some degree of review of the facts.¹⁶⁹

164. See text accompanying notes 34-41 *supra*.

165. See text accompanying notes 200-23 *infra*.

166. See, e.g., cases cited note 151 *supra*.

167. See notes 181-84 *infra* and accompanying text.

168. E.g., *Khalil v. District Director of the United States Immigration & Naturalization Serv.*, 457 F.2d 1276 (9th Cir. 1972); *Antolos v. United States Immigration & Naturalization Serv.*, 402 F.2d 463 (9th Cir. 1968); *Polites v. Sahli*, 302 F.2d 449 (6th Cir.), *cert. denied*, 371 U.S. 916 (1962), *Kam Ng v. Pilliod*, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961); *United States ex rel. Contisani v. Holton*, 248 F.2d 737 (7th Cir. 1957), *cert. denied*, 356 U.S. 932 (1958).

169. The question of the extent to which judicial review of administrative action for abuse of discretion constitutes a review of the evidence remains ambiguous. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Supreme Court considered the meaning of judicial review of agency action for abuse of discretion under § 10(e)(G)(1) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1970). To find that an action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"

the court must consider whether the decision was based on a consideration of the *relevant factors* and whether there has been a clear error of judgment. . . .

Although this inquiry into the *facts* is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

401 U.S. at 416 (emphasis added). The "relevant factors" language comes from *McBee v. Bomar*, 296 F.2d 235, 237 (6th Cir. 1961). The Court's language can be construed to mean that the reviewing court should look to the facts in the record to determine whether the agency considered the relevant factors (economic and environmental in *Overton Park*) in taking its action. Failure to consider such factors would be an abuse of discretion. It should be noted, however, that judicial scrutiny of agency consideration of relevant factors sweeps more broadly than Judge Friendly's definition in *Wong Wing Hang* of the scope of review for abuse of discretion. See text accompanying notes 160-62 *supra*.

Under the *Overton Park* analysis the key problem for the courts becomes whether

Three section 243(h) cases have found abuse of discretion or arbitrary or capricious action. *United States ex rel. Mercer v. Esperdy*¹⁷⁰ involved a convoluted set of facts and procedure. The court found the special inquiry officer's refusal to reopen respondent's hearing to evaluate her 243(h) application to be arbitrary and capricious since there had been no substantive determination of the application, something the court believed necessary because the claimed potential physical persecution could involve "the very life" of the respondent.¹⁷¹ In addition, the court found the evidence offered in the respondent's application to be "compelling enough to lend at least prima facie credence to [her] assertions and to compel an administrative decision on their

(and arguably how) the agency *considered* the relevant factors, particularly when no factual findings are required and the administrative record is incomplete. In *Overton Park*, the Court remanded the case for review on the whole record which, if it was incomplete, could be supplemented by requiring testimony from the agency officials who made the decision. In § 243(h) cases, remand and testimony by INS officers would be unlikely, for the Service requires a full record with opinions in virtually all deportation matters. And, in fact, the reported Board decisions in § 243(h) cases show that the alien's evidence is usually weighed and rebutted. The Board normally indicates the factors used in reaching its decision.

For a consideration of the scope of review issue in *Overton Park*, see *The Supreme Court—1970 Term*, 85 HARV. L. REV. 3, 315-25 (1971). The Court reaffirmed the *Overton Park* exposition of review for abuse of discretion in *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). Although *Overton Park* and *Bowman* involved the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 706 (1970), which are not applicable to the review of § 243(h) cases, there is no reason to believe that the Court would impose a different definition of review for abuse of discretion in deportation cases.

170. 234 F. Supp. 611 (S.D.N.Y. 1964). The respondent was a Haitian who had been ordered deported after withdrawing a § 243(h) application. She was permitted a voluntary departure but failed to leave as scheduled. She was therefore placed upon a flight to Haiti, but because of bad weather the plane was diverted to Miami and the flight terminated. There respondent was mistakenly admitted as a nonimmigrant for pleasure; she remained in the United States until she was again apprehended by the INS and ordered to show cause why she should not be deported. Before the hearing, the respondent filed a § 243(h) application including an affidavit outlining the anti-Duvalier activities of her family and their search for asylum in foreign embassies and the United States. No hearing was held, and six months later the order to show cause was cancelled on the grounds that the original deportation order was still outstanding because no deportation had been accomplished and therefore no new entry to the United States was effected. Ms. Mercer then sought a reopening of her original deportation hearing so she could present her § 243(h) claim. The motion was denied by the special inquiry officer because the evidence sought to be presented supposedly had been available at the time of the original hearing, and no new circumstances had arisen warranting a reopening. The respondent, after having her appeal dismissed by the Board, sought a writ of habeas corpus. *Id.* at 612-14.

171. *Id.* at 615.

validity.”¹⁷² The court also held the special inquiry officer’s decision to be an abuse of discretion because he had failed to take administrative notice of the repressive conditions in Haiti, facts widely reported in the press.¹⁷³

Similarly, in *United States ex rel. Fong Foo v. Shaughnessy*,¹⁷⁴ Judge Frank took judicial notice of the “ruthless behavior” of the government of the People’s Republic of China toward supporters of the former Nationalist government and found the INS decision that the respondent would not be physically persecuted to be arbitrary and capricious.¹⁷⁵ Although the reasoning of the court was clearly correct, the result—given the facts—was arguably incorrect, because the respondent, a long-time supporter of the Nationalist government, had refused to execute the documents required to permit his deportation to Taiwan and had, instead, raised his section 243(h) claim in terms of deportation to the mainland.¹⁷⁶ This was clearly a delaying tactic of the sort courts should not tolerate.¹⁷⁷

Finally, in *Kovac v. Immigration & Naturalization Service*,¹⁷⁸ the Ninth Circuit found that the Board’s decision was arbitrary and capricious because it was founded upon a “patent misconstruction of the record” rather than a weighing of the evidence.¹⁷⁹ Although the court did

172. *Id.* The court was particularly concerned with the evidence regarding the respondent’s brother who had been active in antiDuvalier politics in Haiti and, after fleeing the country, had been involved in various antiDuvalier refugee organizations.

173. *Id.* at 616-17.

174. 234 F.2d 715 (2d Cir. 1955) (Frank, J.).

175. *Id.* at 718-19. Judge Frank stated:

On the basis of a fact which we know judicially, an administrative determination of the contrary fact is arbitrary and capricious, and therefore administrative action grounded on that finding is outside the administrative discretion conferred by the statute.

Id. at 719.

Fong Foo is also cited for its dictum:

[a] statute should, if possible be so construed as not to be—or come close to the brink of being—unconstitutional. This statute [§ 243(h)] comes close to that brink and perhaps goes over it, if interpreted to give the Attorney General, or any of his subordinates, arbitrary power.

Id. at 720.

176. *Id.* at 717.

177. See note 4 *supra*.

178. See notes 147-51 *supra* and accompanying text.

179. 407 F.2d at 107. Kovac had testified that he had ceased working on shore and had taken a job on a ship in order to obtain a home for his family. The Board said that this testimony “completely belied” his claim of persecution. The court, on the other

not elaborate upon the point, it would seem that the Board should explain in its opinion how it evaluates the evidence and construes the record to avoid reversal for taking arbitrary and capricious action. Such a requirement is basically one of due process, that is, the necessity for a "reasoned decision."¹⁸⁰

Whatever the meaning of abuse of discretion in section 243(h) cases, it is evident that very few aliens can satisfy its requirements and obtain reversal of an INS denial of a stay of deportation.

4. *Review of Evidence*

The courts appear to review the evidence in 243(h) cases in three distinguishable ways. First, many courts that claim to be reviewing for abuse of discretion look to the facts in the record and set them out at some length in their opinions.¹⁸¹ In the context of reviewing for abuse of discretion, the Seventh Circuit has said, in at least four cases, that it will not substitute its opinion for the Attorney General's if his "reasons" for denying relief are "sufficient on their face."¹⁸² "Reasons"

hand, read the testimony to mean that Kovac had taken the seamen's job because persecution made it impossible to find work on shore and support his family. *Id.*

180. *See Wong Wing Hang v. Immigration & Naturalization Serv.*, 360 F.2d 715 (2d Cir. 1966).

181. *See* cases cited note 152 *supra*. *See also* note 169 *supra*.

182. *Lena v. Immigration & Naturalization Serv.*, 379 F.2d 536, 637 (7th Cir. 1967); *Chao-Ling Wang v. Pilliod*, 285 F.2d 517, 520 (7th Cir. 1960); *Obrenovic v. Pilliod*, 282 F.2d 874, 876 (7th Cir. 1960); *Kam Ng v. Pilliod*, 279 F.2d 207, 210 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961).

Lena, a Turkish citizen of the Greek Orthodox religion, claimed he would be persecuted in Turkey for his religious beliefs. His testimony and other evidence revealed, however, that the Greek Orthodox religion was practiced by other individuals in Turkey and that he had not been prevented from attending church or working. Nor had he been arrested while living in Turkey. 379 F.2d at 537-38. In *Chao-Ling Wang*, a Nationalist Chinese naval officer in the United States for military training overstayed his visa and claimed he would be physically persecuted upon return to Taiwan. The special inquiry officer apparently discussed the nature of the Nationalist government and determined it was "not a police state." The court did not disagree and added that a military prosecution for desertion was not comprehended within § 243(h). 285 F.2d at 518, 520. *Obrenovic* involved a Yugoslavian citizen who offered as grounds for possible physical persecution his service in the Chetniks during World War II, his postwar arrest, a letter from his wife in Yugoslavia, and the facts that he had secured his passport surreptitiously and had written an antigovernment article. The INS officer described conditions in that country and found the respondent's evidence not "convincing." The court agreed. 282 F.2d at 875. In *Kam Ng*, the alien claimed he would be returned to the People's Republic of China if he were deported to Hong Kong. Neither the INS officer or the court could find any reason to believe the contention. 279 F.2d at 209.

as used in the opinions appear to be equivalent to findings of fact.¹⁸³ The Ninth Circuit requires that the decision of the Service or Board be based upon a "reasonable foundation."¹⁸⁴ Neither circuit has articulated the content of its standard; thus, the facts of the cases are the only clues to the meanings of the standards as applied.

A second form of review of the evidence appears to occur when the courts determine that the alien has not met his burden of proof of persecution. (When the courts discuss "burden of proof" they usually mean both the burden of persuasion and the burden of production). This review occurs, in some cases, in conjunction with a review for abuse of discretion. Given the circumstances of most aliens in this country fighting deportation, the burden of proof is onerous, if not impossible, in practice. The Board acknowledged some of the problems facing a typical respondent who

has the obligation to set forth the conditions relating to her personally which support her anticipation of persecution. Characteristically, she

183. See, e.g., *Lena v. Immigration & Naturalization Serv.*, 379 F.2d 536, 537-38 (7th Cir. 1967).

184. *Khalil v. District Director of the United States Immigration & Naturalization Serv.*, 457 F.2d 1276, 1277 (9th Cir. 1972); *Chi Sheng Liu v. Holton*, 297 F.2d 740 (9th Cir. 1962).

Khalil involved a citizen of the United Arab Republic who came to the United States as a personal servant of another Egyptian. She and her employer claimed she would be persecuted for her anti-communist beliefs. The court noted that the respondent and her witnesses presented no factual support for her claim, "hence the INS was not clearly wrong in discounting the conclusory statements of danger and determining that Khalil had failed to sustain her burden of proof." 457 F.2d at 1278. The court here appears to have equated "reasonable foundation" with the administrative determination to disregard particular elements of the respondent's evidence and the alien's failure generally to meet her burden of persuasion. Analytically, a reasonable foundation should require more than the failure of the alien's proof for the concept suggests some sort of affirmative burden on the Service. In practice, however, the distinction is not fully recognized. Certainly in cases in which the claim is patently without merit and advanced only as a delaying tactic, it would be inappropriate to burden the Service with pointless rebuttal. More problematic are the cases in which the alien raises a claim with at least some foundation in fact or based upon comprehensible fear.

Chi Sheng Liu involved an alien who first departed for the People's Republic of China where his family lived; when the plane landed in Hawaii, he disembarked and claimed possible persecution. The INS then designated Taiwan as the country to which he would be deported. The alien proceeded to raise a § 243(h) claim on the grounds that the Nationalist government was ruthless and would persecute him for earlier seeking to go to the mainland. The court said it was unaware of the "uncivilized" character of the Nationalist government which would understand his reasons for wanting originally to go to the People's Republic. 297 F.2d at 742. The court did not discuss the content or nature of the "reasonable foundation" for the INS decision, but as in *Khalil* it appears to be the failure of the alien to meet his burden of persuasion.

has available to her no better methods of ascertaining current political conditions abroad than does the average person. Hence, practically speaking, although she may ultimately have the burden of persuasion, her own testimony may be the best—in fact the only—evidence available.¹⁸⁵

As indicated by the *Kovac*¹⁸⁶ court, before the 1965 amendments of the section, the “physical persecution” standard required very substantial proof by the alien. Most courts of that period did not articulate the extent of the burden of persuasion. Instead, they looked to the evidence on the record and said it was insufficient to indicate the probability of physical persecution.¹⁸⁷

Since 1965, a few courts have developed certain verbal formulations to describe the alien’s burden of persuasion. Thus, in *Lena v. Immigration & Naturalization Service*¹⁸⁸ the court stated that the Attorney General restricted the favorable exercise of his discretion to cases of a “clear probability of persecution of the particular individual.” Other courts have been less precise. The *Kovac* court reasoned that the 1965 amendments lightened the burden on the alien but never indicated extent of the reduction.¹⁸⁹ In *Kerkai v. Immigration & Naturaliza-*

185. *In re Sihasale*, 11 I. & N. Dec. 531, 532-33 (1966).

One commentator has aptly described the quandary of the alien:

Because of his flight, a refugee may have no documentation or witnesses to relate the facts of his particular case. As a result, he may be unable to introduce evidence which sufficiently supports his position. In such a situation, the real issue becomes the claimant’s credibility.

Note, *Immigration Law and the Refugee—A Recommendation to Harmonize the Statutes with the Treaties*, 6 CALIF. W. INT’L L.J. 129, 145 (1975) (footnotes omitted).

For a discussion of the burden of proof problem in § 243(h) cases, see generally Evans, *Political Refugees and the United States Immigration Laws: Further Developments*, 66 AM. J. INT’L L. 571, 574-80 (1972).

186. See notes 147-51 *supra* and accompanying text.

187. See, e.g., *Blagaic v. Flagg*, 304 F.2d 623 (7th Cir. 1962); *Seric v. Flagg*, 303 F.2d 289, 290 (7th Cir. 1962).

188. 379 F.2d 536, 538 (7th Cir. 1967) (emphasis added). Although the court was discussing the circumstances under which the Attorney General would exercise his discretion the respondent presumably would have to provide evidence of the clear probability of his persecution to gain relief from deportation.

The same standard was applied in *Hyppolite v. Immigration & Naturalization Serv.*, 382 F.2d 98, 100 (7th Cir. 1967). The respondent alleged that she would be persecuted in Haiti, where her father had disappeared and from which her remaining family had fled. The special inquiry officer denied relief largely on the ground that the respondent had, of her own volition, previously returned to Haiti for a two month visit without incident.

189. 407 F.2d at 106-07; see text accompanying note 150 *supra*.

tion Service,¹⁹⁰ the court spoke of the requirement on the alien to "substantiate" his claim, while the court in *Hamad v. United States Immigration & Naturalization Service*¹⁹¹ spoke vaguely of the respondent's "burden of proof to establish the probability" that he would be persecuted.

The same or a more rigorous burden of persuasion is imposed upon respondents who seek to reopen a hearing to present evidence on a 243(h) claim. Courts have required the alien to show "any likelihood of success"¹⁹² on his claim, "some evidence"¹⁹³ of possible persecution, or a "probability,"¹⁹⁴ "clear probability,"¹⁹⁵ or "prima facie

190. 418 F.2d 217, 219 (3d Cir. 1969). The respondent, formerly a member of the Hungarian Communist party, said she *believed* she would be arrested for leaving that country and would have difficulty finding employment. The Board found the possible arrest would not be grounds for granting relief and that the alien would not be excluded from all employment. The court said that since the respondent had not substantiated her claims, denial of the claim was neither an abuse of discretion nor arbitrary and capricious. *Id.* at 218-19.

191. 420 F.2d 645, 647 (D.C. Cir. 1969). Hamad was a Jordanian citizen who claimed he would be persecuted in Jordan because he was opposed to the government. Moreover, while he was in the United States he had criticized King Hussein in the presence of a visiting Jordanian military officer. The Board had rejected the § 243(h) application because there was no evidence that the alien had had prior trouble with Jordanian authorities or that "any Jordanian authority had taken steps to insure that [he] would be punished if he should return to Jordan." The court agreed, saying that Hamad had not shown any "probability" of persecution. *Id.*

192. *Lam Leung Kam v. Esperdy*, 274 F. Supp. 485, 488 (S.D.N.Y. 1967). The court said that "mere conclusory statements" about dangerous conditions in Hong Kong were inadequate. *Id.*

193. *Cheung Kai Fu v. Immigration & Naturalization Serv.*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). The respondents argued that they would be subject to persecution in Hong Kong because it was possible that the People's Republic of China would take over the British colony in the future. The court found this argument "too speculative" to constitute "some evidence" of persecution. *Id.*

194. *Shkukani v. Immigration & Naturalization Serv.*, 435 F.2d 1378, 1380 (8th Cir.), *cert. denied*, 403 U.S. 920 (1971). Shkukani's home and family were in a Jordanian city occupied by the Israelis in 1967. He alleged that should he be returned to Jordan proper he would be subject to persecution because of the location of his home and because neither he nor his family supported Palestinian guerilla activities on the occupied West Bank. Neither the Board nor the court believed this allegation to be sufficient evidence of any probability of persecution. *Id.* at 1379-80.

Shkukani also is significant because it reads the *Kovac* case, see notes 147-51 *supra* and accompanying text, as exploring the meaning of "persecution" and not changing the "quantum of proof necessary to show persecution." 435 F.2d at 1380.

195. *Rosa v. Immigration & Naturalization Serv.*, 440 F.2d 100, 102 (1st Cir. 1971). The respondent was a former police sergeant during Trujillo's regime in the Dominican Republic who claimed he would be killed by a vengeful mob as soon as he arrived in that country. The court sustained the Board's finding because Rosa failed to prove the "clear

case"¹⁹⁶ of persecution.

Despite these various standards applied by the courts in defining the alien's burden of persuasion it is clear they have little practical difference—at least none that can be seen, for since 1965 the Board and INS have been reversed only once.¹⁹⁷ In the reported cases no alien has met the required burden of persuasion. This fact lends weight to the *Shkukani* court's argument that the 1965 amendments expanded the kinds of persecution that could be shown, but did not reduce the quantum of proof (that is, the burden of persuasion) required.¹⁹⁸ Most section 243(h) cases are, therefore, of the greatest interest insofar as they reveal what fact patterns the Board and courts will accept in approving a denial of relief.¹⁹⁹

probability" of persecution. Instead, he had offered only his assertions and an affidavit from the Dominican Consul General in the United States containing hearsay and unsubstantiated conclusions.

196. *MacCaud v. Immigration & Naturalization Serv.*, 500 F.2d 355, 359 (2d Cir. 1974). MacCaud, an escaped Canadian prisoner, claimed he would be beaten by Canadian prison guards for his escape and support of a Quebec liberation group. The court said that this allegation did not constitute a prima facie case of persecution sufficient to require it to approve a motion to reopen, in part because

[t]he possibility the alien will encounter physical abuse by prison guards on his return is not a basis for statutory relief since the Canadian government does not countenance such activity and since appellant must be regarded as having adequate safeguards under Canadian law.

Id. at 359.

197. *Kovac v. United States Immigration & Naturalization Serv.*, 407 F.2d 102 (9th Cir. 1969); see notes 147-51 *supra*.

198. *Shkukani v. Immigration & Naturalization Serv.*, 435 F.2d 1378, 1380 (8th Cir.), *cert. denied*, 403 U.S. 920 (1971); see note 194 *supra*.

199. See notes 231-63 *infra* and accompanying text.

As stated earlier, see note 81 *supra* and accompanying text, the *Woodby* requirement that deportability be shown by clear, unequivocal and convincing evidence does not apply to the INS in § 243(h) cases. *Hyppolite v. Immigration & Naturalization Serv.*, 382 F.2d 98, 99 (7th Cir. 1967). Nor must the Attorney General support his decision denying relief with substantial evidence the alien will not be persecuted. *Chao-Ling Wang v. Pilliod*, 285 F.2d 517, 519 (7th Cir. 1960). Moreover, no court has held that the INS is under an obligation to rebut the alien's proof before denying relief; in fact, courts have specifically rejected that contention of burden-shifting. See, e.g., *Shkukani v. Immigration & Naturalization Serv.*, 435 F.2d 1378 (8th Cir.), *cert. denied*, 403 U.S. 920 (1971).

Although the courts may be correct in refusing to accept the burden-shifting thesis, it can readily be argued on humanitarian grounds that once the alien has presented some evidence or an understandable fear of persecution the INS, in fairness, should present some countervailing material or arguments. See also notes 220-23 *infra* and accompanying text. And, in reality, this is what appears to have occurred in many Board cases in which a large portion of the opinion is often devoted to rebutting the alien's testimony and evidence. See note 211 *infra*. At times, however, the Board's arguments seem to be

A third, and substantially different, form of review of the facts clearly emerged in *Hamad v. United States Immigration & Naturalization Service*.²⁰⁰ The court said its review of Board decisions was a two-step process. First, it would review the factual findings upon which the denial of relief was based by applying the substantial evidence on the whole record test. Second, the Board's exercise of discretion in denying a stay of deportation would be reviewed for any abuses of discretion.²⁰¹

grounded more on speculation than on facts in the record. See note 252 *infra* and accompanying text. This should not be the practice when the denial of relief may have grave consequences for the alien.

200. 420 F.2d 645 (D.C. Cir. 1969); see note 191 *supra* (facts of the case).

201. *Id.* at 646-47. The origins of this analysis are curious. It was first applied in *Wong Wing Hang v. Immigration & Naturalization Serv.*, 360 F.2d 715, 717 (2d Cir. 1966), see notes 156-62 *supra*, a § 244(a) case. Then, in *United States ex rel. Kordic v. Esperdy*, 386 F.2d 232 (2d Cir. 1967), the respondent, seeking to avoid deportation to Yugoslavia, attempted to have the court apply a *Wong Wing Hang* analysis to a § 243 (h) case. The court did so indirectly by arguing that it could not say that the district court judge had applied the wrong test, even though his opinion was couched largely in terms of abuse of discretion and did not clearly reveal the two-step process. *Id.* at 239. On this precedent the *Hamad* court based its holding. 420 F.2d at 646.

The *Kordic* formulation of the test is, however, somewhat more useful than that in *Hamad*. The first step is a "factual inquiry as to the probability . . . [of] persecution," with the facts measured against the substantial evidence test. The second step is to measure the "exercise of [the District Director's or special inquiry officer's] discretion on the facts he ha[s] found" against the abuse of discretion standard. 386 F.2d at 239 (emphasis added).

The meaning and application of judicial review of substantial evidence on the whole record have been considered by many courts and commentators. Nonetheless, the standard remains imprecise. In one early case the Supreme Court stated, "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). A year later the Court added that substantial evidence "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *NLRB v. Columbian Enamelling & Stamping Co.*, 306 U.S. 292, 300 (1939).

The substantial evidence standard also reflects a degree of congressional and judicial deference to agency experience and expertise. The standard

frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute. These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency.

Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620-21 (1965) (footnotes omitted).

Thus the substantial evidence test does not mean that the court must set aside an

The court did not clearly show how Hamad's evidence and the Board's reasoning were to be measured against the substantial evidence standard; rather, it merely said that Hamad had failed to meet his burden of showing the "probability" of persecution.²⁰² Consequently, there was no need to reach the second stage of review, for "the Board had no occasion to exercise its discretion to withhold deportation of the petitioner"²⁰³

Paralleling the *Hamad*²⁰⁴ decision, one court appears to have used a

agency determination if there exists substantial evidence for an opposite conclusion. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Id.* at 620.

It is commonly stated, as in *Consolo*, that the reviewing court must not weigh the evidence, including the inferences drawn from the facts. *See id.* at 620; 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.05, at 138 (1958); Jaffe, *Judicial Review of Questions of Fact*, 69 HARV. L. REV. 1020, 1028 (1958). Nonetheless, the court must review the whole administrative record: "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). In *Universal Camera*, Justice Frankfurter attempted to explain the meaning of reviewing the whole record for substantial evidence to support the agency action:

[T]he requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of the agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

Id. at 488.

Despite all the statements by the courts, it remains difficult to specify the meaning of substantial evidence. When is evidence substantial? It is possible that the question can only be answered on a case-by-case basis. Comprehensive research and analysis of a large number of cases might, however, show what courts do when they apply the test. Such research might also reveal the content of the standard and the minimum levels of substantiality for each kind of case.

202. 420 F.2d at 647.

203. *Id.* But the Board had exercised its discretion by refusing to grant relief on Hamad's evidence. The *Kordic* court's formulation of the two-step process, *see note 201 supra*, clearly relates the exercise of discretion to the facts; denials of relief would be considered a form of discretionary action.

204. Before *Hamad*, the analysis was suggested in *United States ex rel. Kordic v. Esperdy*, 386 F.2d 232 (2d Cir. 1967). *See note 201 supra*.

variant of the two-step analysis²⁰⁵ and another has indicated it would consider the possibility of adopting the analysis when the issue is properly before the court.²⁰⁶

A problem with the *Hamad* analysis is that it finds its basic precedent in *Wong Wing Hang*,²⁰⁷ a section 244(a) case. As noted earlier,²⁰⁸ section 244(a) has precise factual eligibility criteria and is thus distinguishable from section 243(h); the former section lends itself to the two-step analysis applied by the *Wong Wing Hang* court. Whether the same analysis is as functionally applicable to a statute with few factual standards and which closely interweaves matters of fact and discretionary action is arguable.²⁰⁹ In theory, it is incorrect for a court to speak of findings of fact in 243(h) cases; the findings requirement was eliminated in 1952 to increase the Attorney General's discretion.²¹⁰ In practice, however, the Service and Board structure most of their opinions to present at least those facts that support the action taken.²¹¹

205. *Shkukani v. Immigration & Naturalization Serv.*, 435 F.2d 1278, 1380 (8th Cir.), *cert. denied*, 403 U.S. 920 (1971). The court said that the "record amply justified] the Board's finding," and that "since the Board found that the petitioner had not sustained his burden, it had no occasion to exercise its discretion" to grant relief. *Id.*, *citing Hamad*.

206. *Khalil v. District Director of the United States Immigration & Naturalization Serv.*, 457 F.2d 1276, 1278 n.4 (9th Cir. 1972).

207. See notes 156-62 *supra* and accompanying text.

208. See notes 163-64 *supra* and accompanying text.

209. Assuming that the two-step analysis is applicable to § 243(h) cases, other questions arise. Must the INS and the Board use the same analysis in making their decisions? The Board has taken the position that the *Hamad* approach applies "largely in relation to the scope of judicial review." *Matter of Dunar*, Interim Decision No. 2192, at 21 (April 17, 1973). See also notes 87-89 *supra* and accompanying text. Also, how can the courts properly evaluate a case in which the INS has relied upon confidential information that is not even on the record before the reviewing court? Given the difficulties facing many aliens in producing evidence, see text accompanying note 185 *supra*, what weight should be given to an alien's conclusory statements and speculation? How extensively should judicial notice of conditions in other countries be employed?

210. See notes 32-41 *supra* and accompanying text.

211. A reading of many Board cases suggests that it is common administrative practice for the immigration judge to counter the alien's claims with reasons, some based on evidence introduced by the INS or the alien himself, why persecution is not to be anticipated. To the extent that this informal rebuttal procedure is used to justify the denial of relief, it might be characterized as a finding of fact. *But see* note 199 *supra*.

The authors of the standard treatise on immigration law and procedure describe and reject the *Hamad* analysis:

. . . other courts have suggested that judicial review of such determination consists of two steps: first to determine whether the rejection is supported by substantial evidence that the likelihood of persecution is established; second if like-

Perhaps the most compelling argument for a *Hamad* type analysis follows from the *Foti*²¹² decision. If, as the Court suggested in dictum, section 106(a) places original jurisdiction for judicial review of 243(h) cases in the circuit courts,²¹³ then, arguably, review should be pursuant to the section 106(a)(4) standard of substantial evidence on the record. In fact, the Court suggested that analysis for section 244 cases in a footnote.²¹⁴ The weakness of this argument lies in the above noted distinctions between sections 243(h) and 244(a).

The few courts that have adopted substantial evidence review have not carefully considered its dynamics or reasons for its use. If the language of *Wong Wing Hang*,²¹⁵ as adopted by *Hamad*,²¹⁶ is applied, the INS would appear to be required to base any denial of relief upon substantial evidence of nonpersecution. Thus, if the alien failed to meet his burden of persuasion, the INS would still be required to introduce evidence showing that he would not be persecuted.²¹⁷ Or, when the alien met his burden of persuasion, the Service would have to rebut with substantial evidence of nonpersecution. But even if the INS failed to

likelihood of persecution is established, whether there was abuse of discretion in rejecting that application. [This] . . . view seems unsound, since the persecution claim, in which the statute makes the Attorney General's "opinion" decisive, does not appear susceptible to division between the statutory eligibility and discretionary aspects of other relief. The sounder approach appears to require treating the entire persecution claim as one discretionary package. Moreover, it is unlikely that the Attorney General would direct deportation to a place where he believes persecution would occur. And it is hardly likely the courts would endorse such a direction. The recognition of the discretionary character of the proceeding actually does not prevent the courts from reviewing such determinations with care, taking into account the grave issues presented.

2 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 8.17b, at 84 (Supp. 1976) (footnotes omitted). *But see* text accompanying note 86 *supra* (Board recognition of possibility of denial "on purely discretionary grounds").

212. *Foti v. Immigration & Naturalization Serv.*, 375 U.S. 217 (1963).

213. *Id.* at 229.

214. *Id.* at 228-29 n.15, *quoted in* note 158 *supra*.

215. 360 F.2d at 717-18; *see* text accompanying notes 156-62 *supra*.

216. 420 F.2d at 646.

217. One authority suggests the contrary. "When the party having the burden of proof fails to produce evidence which the tribunal believes, the finding must be in favor of the opposing party, even if the opposing party has produced no evidence." 4 K. DAVIS, *supra* note 201, § 29.06, at 148. Although Prof. Davis' assertion may accurately reflect the case law, it is logically difficult to equate the alien's failure to meet his burden of proof of persecution with the Service's showing of nonpersecution. The alien's failure of proof may be more a function of the difficulty of obtaining evidence than of the unlikelihood of persecution. This point is academic, however, if abuse of discretion, rather than substantial evidence, remains the effective scope of review. *See* text accompanying note 218 *infra*.

produce the required substantial evidence, it could deny relief,²¹⁸ an exercise of discretion that would be reviewed under the second step, the abuse of discretion test. Thus, the interposition of the substantial evidence review seems to have added nothing; the effective standard of review remains abuse of discretion.

It might appear that courts should apply only the substantial evidence scope of review in section 243(h) cases, discarding abuse of discretion review altogether. Although this procedure would have the advantage of clearly requiring courts to review the evidence, it would ignore the predominant discretionary element of the statute.

The *Hamad* analysis is thus mistaken. It has little benefit for the alien²¹⁹ and does not address the correct standard of review in a truly discretionary statute—abuse of discretion. The proper issue in section 243(h) cases remains the meaning of abuse of discretion. If that standard of review includes some degree of review of the evidence,²²⁰ it might be argued that the Attorney General abuses his discretion when relief is not granted to the alien whose claim, having met the requisite burden of persuasion, goes totally or ineffectively un rebutted by the Service. This situation would be more likely to occur if the burden of persuasion, traditionally maintained at difficult levels,²²¹ such as a “probability” or “clear probability”²²² of persecution, is reduced to a more reasonable standard, such as a “well-founded fear of possible persecution.”²²³

5. Conclusions

This discussion of the scope of review in section 243(h) cases may not be of great relevance to the larger field of administrative law. The

218. To argue that the failure of the Service to produce substantial evidence of nonpersecution would foreclose a denial of relief effectively reads discretion out of § 243(h), a result Congress clearly did not intend. See notes 34-41 *supra* and accompanying text.

219. There might be some benefit to the substantial evidence standard of review insofar as it requires the making of a complete record in all hearings.

220. See notes 152-53, 169 & 181-84 *supra* and accompanying text.

221. See notes 185-99 *supra* and accompanying text.

222. See notes 188-96 *supra* and accompanying text.

223. This suggested standard is in accord with the United Nations Protocol on Refugees to which the United States is a signatory. See notes 264-69 *infra* and accompanying text. The Board has refused to apply this reduced standard. See text accompanying notes 288-90 *infra*.

section gives the Attorney General great discretion and provides few standards for judicial review. Moreover, the Administrative Procedure Act is not directly applicable. The section 243(h) cases may, therefore, be *sui generis*.

Nonetheless, the manner in which the courts have analyzed the 243(h) cases may reflect judicial behavior in other administrative law matters. The court with a 243(h) case must decide initially how much discretion is vested in the Attorney General. This process was particularly evident in the early cases such as *Dolenz*²²⁴ and the statutory construction cases of the 1960's.²²⁵ After discerning the limits of discretion, the court will use the substantial evidence²²⁶ or abuse of discretion²²⁷ scope of review. Whether there is any difference between the two standards as applied cannot be determined from the section 243(h) cases. In other contexts, however, it is often asserted that the substantial evidence test "afford[s] a considerably more generous review than the 'arbitrary and capricious'" or abuse of discretion tests.²²⁸ Other courts and commentators have found no significant difference.²²⁹

Given this confusion of authority and the ability of the courts to manipulate verbal formulae to reach preferred results, it might be

224. See notes 95-98 *supra* and accompanying text.

225. See notes 129-51 *supra* and accompanying text.

226. See notes 200-23 *supra* and accompanying text.

227. See notes 157-80 *supra* and accompanying text.

228. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 143 (1967).

229. See, e.g., *Wood v. United States Post Office Dep't*, 472 F.2d 96 (7th Cir. 1973).

In *Wood*, the court observed:

Under the "arbitrary and capricious" standard, our review is confined to the question of whether there is a "rational basis" in the evidence for the conclusions and inferences which the service drew. If we were to apply the substantial evidence test, we would seek to determine whether "a reasonable mind might accept [the evidence] as adequate to support a conclusion" or inferences. . . . It is questionable whether different quantities of evidence would be needed to fulfill these two standards.

Id. at 99 n.4. Two commentators have similarly noted that "in an evidentiary context the level of required support seems about the same whether the 'substantial evidence' or 'arbitrary' test is used." Scalia & Goodman, *Procedural Aspects of the Consumer Products Safety Act*, 20 U.C.L.A.L. REV. 899, 935 n.138 (1973). Scalia and Goodman discuss the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A), (E) (1970). They observe that

the "substantial evidence" test has acquired a vague reputation as the more demanding standard of review without appreciation of the fact that it is only rationally applicable to an "on-the-record" proceeding. . . . The essential constraint of the "substantial evidence" test is not that it requires a higher degree of support for an agency determination . . . but rather, that it requires this support to be contained within the confines of the public record

Id. at 934.

desirable for courts, when possible,²³⁰ to discard the two terms and look simply to the rationality of the evidentiary basis for the agency's decision. This approach would not limit the courts' ability to shape the course of review. By adjusting the burden of persuasion and shifting the burden of production at appropriate times, courts could continue to balance considerations of agency convenience and expertise against the needs and circumstances of the person subject to agency action. Policy factors underlying the allocation of these burdens could thus be articulated without the verbal contortions often found in distinguishing and applying the substantial evidence and abuse of discretion standards.

VI. EVIDENCE PATTERNS

Since the courts, whether reviewing for substantial evidence or abuse of discretion, do look at the evidence in the record, it is important to understand what kinds of evidence have under the prevailing burden of persuasion been insufficient to produce a reversal of the Service's or Board's denial of relief. Similarly, it is necessary to explore the kinds of evidence the Board finds to be significant or insignificant in its decisions which often go unreviewed by the courts. The following patterns, singly or in combinations, have been used as evidence of the limited likelihood of future persecution or have been insufficient evidence of past persecution to permit reversal: (1) church membership or attendance in a communist country, or affiliation with a minority religious group in other nations—in both cases coupled with no personal persecution while respondent was living in the country in question;²³¹ (2) no

230. See note 229 *supra*.

231. *E.g.*, *Kerkai v. United States Immigration & Naturalization Serv.*, 418 F.2d 217 (3d Cir. 1969), *cert. denied*, 397 U.S. 1067 (1970) (Catholic in Hungary); *Sadeghzadeh v. Immigration & Naturalization Serv.*, 393 F.2d 894 (7th Cir. 1968) (Catholic minority in Iran); *Lena v. Immigration & Naturalization Serv.*, 379 F.2d 536 (7th Cir. 1967) (Greek Orthodox minority in Turkey); *Morin v. Bouchard*, 311 F.2d 181 (3d Cir. 1962) (church membership in Yugoslavia); *Blagaic v. Flagg*, 304 F.2d 623 (7th Cir. 1962) (church attendance in Yugoslavia); *Blazina v. Bouchard*, 286 F.2d 507 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961) (religious beliefs in Yugoslavia); *Zupicich v. Esperdy*, 207 F. Supp. 574 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 773 (2d Cir.), *cert. denied*, 376 U.S. 933 (1963) (Catholic in Yugoslavia); *Sunjka v. Esperdy*, 182 F. Supp. 599 (S.D.N.Y. 1960), *cert. denied*, 364 U.S. 815 (1961) (Catholic in Yugoslavia).

In *Zupicich* and *Lena* the courts distinguished between persecution of the individual and inimical state action directed against the church proper or its hierarchy. Only the former sufficed to establish the particularized, individual persecution required by § 243(h). The distinction may, in reality, overlook the communal or associational significance of religious affiliation and activity to many individuals. It is hard to

prior arrest or persecution of the alien or his family;²³² (3) permission to depart from or return to native country without incident or renewal of passports;²³³ (4) sufficient governmental stability, safeguards, or police protection such that violence against the respondent by individuals or mobs is unlikely;²³⁴ (5) imprisonment for nonpolitical crimes, including the attempt to seek asylum in the United States;²³⁵ (6) no past or future foreclosure from all employment;²³⁶ (7) speculation regarding

see how any state action that substantially impaired the ability of a religious hierarchy to meet the congregational and individual religious needs of its members could not be construed as persecution affecting the individual.

232. *E.g.*, *Lena v. Immigration & Naturalization Serv.*, 379 F.2d 536 (7th Cir. 1967); *Morin v. Bouchard*, 311 F.2d 181 (3d Cir. 1962); *Blagaic v. Flagg*, 304 F.2d 623 (7th Cir. 1962); *Zupicich v. Esperdy*, 207 F. Supp. 574 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 773 (2d Cir.), *cert. denied*, 376 U.S. 933 (1963); *Granado Almeida v. Murff*, 159 F. Supp. 484 (S.D.N.Y. 1958) (Cuban opponent to Batista dictatorship permitted to retain a government job; several imprisonments for no more than a few hours each). In *United States ex rel. Cantisani v. Holton*, 248 F.2d 737 (7th Cir. 1957), *cert. denied*, 356 U.S. 932 (1958), the respondent introduced evidence that he had been physically attacked and injured by communists in his native Italian village. The court permitted deportation since the alien was not required to return to his village, but could go anywhere in Italy.

233. *E.g.*, *Asghari v. Immigration & Naturalization Serv.*, 396 F.2d 391 (9th Cir. 1968); *Hyppolite v. Immigration & Naturalization Serv.*, 382 F.2d 98 (7th Cir. 1967); *Granado Almeida v. Murff*, 159 F. Supp. 484 (S.D.N.Y. 1958).

234. *E.g.*, *MacCaud v. Immigration & Naturalization Serv.*, 500 F.2d 355 (2d Cir. 1974), *see note 196 supra*; *Rosa v. Immigration & Naturalization Serv.*, 440 F.2d 100 (1st Cir. 1971); *Kalatjis v. Rosenberg*, 305 F.2d 249 (9th Cir. 1962).

235. *E.g.*, *MacCaud v. Immigration & Naturalization Serv.*, 500 F.2d 355 (2d Cir. 1974); *Kerkai v. United States Immigration & Naturalization Serv.*, 418 F.2d 217 (3d Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970) (arrest in Hungary for overstaying visit in United States not a basis for granting relief); *Blagaic v. Flagg*, 304 F.2d 623 (7th Cir. 1962); *Blazina v. Bouchard*, 286 F.2d 507 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961); *Zupicich v. Esperdy*, 207 F. Supp. 574 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 773 (2d Cir.), *cert. denied*, 376 U.S. 933 (1963); *Civadelic v. Bouchard*, 185 F. Supp. 439 (D.N.J. 1960); *United States ex rel. Miletic v. District Director of Immigration & Naturalization*, 108 F. Supp. 719 (S.D.N.Y. 1952).

It is likely that for some aliens an attempt to obtain asylum in the United States would not be greatly appreciated by their native governments. The attempt to find asylum is often a political act, and subsequent imprisonment, therefore, is quite clearly persecution for expression of political opinion. Of course, the INS and the courts probably fear that the granting of relief in many such cases would open the door to a flood of claims, many of little merit.

236. *E.g.*, *Kerkai v. United States Immigration & Naturalization Serv.*, 418 F.2d 217 (3d Cir. 1969), *cert. denied*, 397 U.S. 1067 (1970); *United States ex rel. Kordic v. Esperdy*, 386 F.2d 232 (2d Cir. 1967). *But see Kovac v. Immigration & Naturalization Serv.*, 407 F.2d 102 (9th Cir. 1969).

The *Kovac* result that persecution is the "deliberate imposition of substantial economic disadvantage" is more reasonable than requiring the deprivation of all economic advantages and employment opportunities. 407 F.2d at 107.

a future takeover of the government by communists;²³⁷ (8) antigovernment activities or denunciations of native country's government while in the United States;²³⁸ (9) the continued nonpersecution of the alien's family in his native country after he seeks asylum in the United States;²³⁹ (10) possible military service in the native country;²⁴⁰ (11) refusal to join the governing party or participate in party activities;²⁴¹ and (12) no prior political activity by alien in his native country.²⁴²

A survey of reported Board decisions provides some indication of what factual circumstances are adequate for the Board to stay deportation. Many cases conform to the evidence patterns set forth in the

237. *E.g.*, *Cheng Kai Fu v. Immigration & Naturalization Serv.*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968) (Hong Kong falling to the People's Republic of China); *Cakmar v. Hoy*, 265 F.2d 59 (9th Cir. 1959) (Turkey overrun by Russia). In *Holz v. Immigration & Naturalization Serv.*, 309 F.2d 452 (9th Cir. 1962), the respondent argued that he would be persecuted since West Germany might send him on to his native Romania. The court found no evidence that that would happen.

238. *E.g.*, *Scheiber v. Immigration & Naturalization Serv.*, 520 F.2d 44 (D.C. Cir. 1975); *Hamad v. Immigration & Naturalization Serv.*, 420 F.2d 645 (D.C. Cir. 1969); *Hosseinmardi v. United States Immigration & Naturalization Serv.*, 405 F.2d 25 (9th Cir. 1969); *Asghari v. Immigration & Naturalization Serv.*, 396 F.2d 391 (9th Cir. 1968); *Blazina v. Bouchard*, 286 F.2d 507 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961).

This is possibly the most problematic area under § 243(h). An alien who will be persecuted for his statements and actions while in the United States would clearly seem to be the victim of political persecution. But if relief were generally allowed in these cases, aliens from many countries could enter the United States, make a few perfunctory antigovernment statements, and be assured of a stay of deportation. The statute would become relatively meaningless. The *Blazina* court pointed toward a possible solution. There the alien made his statements only in the United States and had done nothing in Yugoslavia. Thus the Board or a court might be justified in granting relief when the alien could show antigovernment actions in his native country as well as the United States. This approach, however, has two flaws. Proof or disproof of antigovernment actions in the native country would often be very difficult. Second, the extent of the repression in the alien's native country might be so great that any reasonable person would not engage in antigovernment activities until well beyond its boundaries.

239. *E.g.*, *Siu Fung Luk v. Rosenberg*, 409 F.2d 555 (9th Cir. 1969), *cert. denied*, 396 U.S. 801 (1969); *United States ex rel. Cantisani v. Holton*, 248 F.2d 737 (7th Cir. 1957), *cert. denied*, 356 U.S. 932 (1958); *United States ex rel. Miletic v. District Director of Immigration & Naturalization*, 108 F. Supp. 719 (S.D.N.Y. 1952).

240. *E.g.*, *Petrovic v. Pilliod*, 282 F.2d 877 (7th Cir. 1960); *Glavic v. Beechie*, 225 F. Supp. 24 (S.D. Tex. 1963), *aff'd*, 340 F.2d 91 (5th Cir. 1964).

241. *E.g.*, *United States ex rel. Kordic v. Esperdy*, 386 F.2d 232 (2d Cir. 1967); *Morin v. Bouchard*, 311 F.2d 181 (3d Cir. 1962); *Blagaic v. Flag*, 304 F.2d 623 (7th Cir. 1962); *Civadelic v. Bouchard*, 185 F. Supp. 439 (D.N.J. 1960).

242. *E.g.*, *Chi Sheng Liu v. Holton*, 297 F.2d 740 (9th Cir. 1962); *Blazina v. Bouchard*, 286 F.2d 507 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961); *United States ex rel. Miletic v. District Director of Immigration & Naturalization*, 108 F. Supp. 719 (S.D.N.Y. 1952).

preceding paragraph,²⁴³ and relief has been denied. Other cases, however, present unusual claims, an analysis of which underscores the Service's very narrow construction of the section. For instance, foreign policy considerations sometimes appear to carry more weight than the respondent's evidence.²⁴⁴ Restrictions on individual freedoms are not necessarily considered to constitute persecution.²⁴⁵ Thus, in *In re Surzycki*,²⁴⁶ the Board stated:

[t]here are many totalitarian governments in the world today which do not brook dissent of any nature. We do not feel that an alien who feels compelled to espouse in his native country beliefs which are looked upon with disfavor by his government is thereby being persecuted if the government acts against him.²⁴⁷

The Board also usually construes the section to require that the persecution be "at the hands of the government, unless the government

243. *E.g.*, *In re Tan*, 12 I. & N. Dec. 564 (1967) (Indonesian citizen of Chinese descent not persecuted while living in Indonesia; allowed to leave the country without difficulty; family still in Indonesia and not seriously injured in anti-Chinese riots); *In re Kojoory*, 12 I. & N. Dec. 215 (1967) (no prior persecution; family not persecuted; nonpolitical while in Iran; antigovernment activities in United States insufficient to stay deportation); *In re Ngheim*, 11 I. & N. Dec. 541 (1966) (antigovernment statements while in United States insufficient); *In re Banjeglav*, 10 I. & N. Dec. 351 (1963) (imprisonment for desertion of ship is not persecution); *In re Cavlov*, 10 I. & N. Dec. 94 (1962) (nonpolitical; family not persecuted).

244. *In re Lee*, 13 I. & N. Dec. 236 (1969); *In re Liao*, 11 I. & N. Dec. 113 (1965). See note 97 *supra* and accompanying text. Gordon and Rosenfield suggest that the language of the statute makes it

clear that this determination involves the exercise of the Attorney General's discretion. Moreover, in requiring an appraisal of conditions in a foreign country the statute to some extent contemplates a political decision in which the executive finding may be entitled to dominant weight.

1 C. GORDON & H. ROSENFELD, *supra* note 2, § 5.166, at 5-123 to 124 (1972) (footnotes omitted).

245. See, *e.g.*, *In re Liadakis*, 10 I. & N. Dec. 252 (1963) (Greek law would cause the Jehovah's Witness alien to be imprisoned if he fulfilled his religious duty to proselytize). The Board stated that

[a]lthough at times particular aspects of questions arising under section 243(h) should be considered in the light of standards in this country rather than those in the country in question, we do not believe the statute contemplates that unless aliens will enjoy within their own country the same type, degree, and extent of religious and individual freedom they enjoy here deportation may be withheld. . . . Wherever possible, consistent with the purposes of the statute, considerable latitude should be extended to the foreign law.

Id. at 254-55.

246. 13 I. & N. Dec. 261 (1969). The case involved a Polish intellectual in the United States for advanced study.

247. *Id.* at 262; *accord*, *In re Tayeb*, 12 I. & N. Dec. 739 (1968).

cannot control the persecutors.”²⁴⁸ Thus, the chance that the alien would be injured in ethnic conflict, either as an intended victim or innocent bystander, is insufficient to constitute persecution “when there is a reasonable showing . . . that the government in power does make an attempt to control such incidents.”²⁴⁹ Persecution must be directed at the particular *individual* because of his race, religion, or political beliefs.²⁵⁰ The Board has also been inclined to believe that the alien’s

248. *In re MacCaud*, Interim Decision No. 2226, at 8 (Sept. 7, 1973).

249. *In re Tan*, 12 I. & N. Dec. 564, 567 (1967) (Chinese minority in Indonesia subject to mob persecution); *accord*, *In re Rodriguez*, 10 I. & N. Dec. 488, 490 (1964) (“The provisions of this statute do not cover injuries which may befall one who happens to be in the vicinity of an outbreak of mob violence, even though the mob is aroused by factors commonly associated with persecution of the nature outlined”); *In re Eusaph*, 10 I. & N. Dec. 453 (1964) (Moslem feared persecution in Hindu India because of India-Pakistan conflict over Kashmir).

But see Rosa v. Immigration & Naturalization Serv., 440 F.2d 100 (1st Cir. 1971). In *Rosa*, the court looked to the legislative history of the 1965 amendments to § 243(h), *see notes 41-49 supra* and accompanying text, and found no evidence to suggest that Congress intended to distinguish between persecution by governments and other groups, at least when “a strong minority has sufficient de facto political power to carry out its purposes without effective hindrance.” *Id.* at 102.

250. *In re Tan*, 12 I. & N. Dec. 564 (1967); *In re Diaz*, 10 I. & N. Dec. 199 (1963). *Diaz* involved a supporter of former Dominican Republic dictator Trujillo. He claimed he would be a victim of mob action as an innocent bystander or as a result of mistaken identity. The Board said that § 243(h) covered neither of these possibilities.

In the aftermath of the American CIA-induced assassination of Trujillo and the collapse of his government, many of his police and military personnel sought refuge in the United States. In *In re Torres-Tejeda*, 10 I. & N. Dec. 435 (1964), a former head of the Dominican secret police argued that he would probably be killed by a mob, and, even if he were tried for his crimes, could not get a fair trial. *Id.* at 437. The Board denied relief and took administrative notice of the decline of mob violence in the Dominican Republic (this was a year before the American invasion to restore stability); the Board also said it “believe[d]” the respondent would get a fair trial. Moreover, the Board thought the alien’s police activities were not so political in nature that their punishment, probably by death, would constitute physical persecution. *Id.* at 439.

In re Stojkovic, 10 I. & N. Dec. 281 (1963), involved an alien who had escaped from Yugoslavia and, while living in France, was hired as a mercenary for Trujillo and given Dominican citizenship. After the fall of Trujillo, he was arrested, imprisoned, and then put on a plane with his Dominican passport and a ticket to France. The Board refused to accept the respondent’s argument that he had been deported since he had been allowed to keep his passport. *Id.* at 283. The Board went on to speculate that the alien had retained all Dominican civil rights, that upon his return to that country he would be imprisoned but only briefly as before, and that he would probably be allowed to leave again or he would be deported. *Id.* at 284-86. The Board provided no foundation for its speculation. On the point of the respondent’s fear of mob violence, the Board merely noted that he had suffered no such violence in the past. The *Stojkovic* opinion can hardly be called reasoned; the instance of this sort of decision alone should, given the grave consequences of persecution, be sufficient to inspire closer judicial scrutiny of denials of § 243(h) claims.

low status, for example, a farmer or office clerk, in his native country makes it unlikely he will be subject to persecution.²⁵¹

In addition to its narrow construction of section 243(h), the Board appears occasionally to have been inconsistent in its evaluation of evidence. Thus, although it rejects speculation or conclusory statements by aliens, the Board has occasionally lapsed into speculation about the consequences of deportation in order to find that no persecution will result.²⁵²

In another case the Board gave weight to a witness' testimony about political conditions in a country she had not visited in nine years,²⁵³ but in a nearly concurrent case gave no weight to the similar testimony of a witness who had last visited the country in question five years earlier.²⁵⁴ Although in many cases the Board will look to the nonpersecution of the alien's family as evidence that the respondent will not be persecuted, in *In re Bukowska*²⁵⁵ the Board passed over without significant comment the alien's father's problems with Polish authorities. These examples should not be taken as criticism of the Board: the fault lies in the statute whose standards are so imprecise that the Board must resort to largely subjective evaluations of the evidence.²⁵⁶

The handful of cases in which the Board has granted a stay of deportation reveal no distinct evidentiary patterns. In *In re Joseph*²⁵⁷ the Haitian respondent presented evidence of his involvement in antiDuvalier politics in Haiti and the United States and of his imprisonment and beatings (shown by scars) in Haiti. The Board took administrative notice of the conditions in Haiti and said that the evidence of the alien and his witnesses established a clear probability of persecution. In *In re Janus and Janek*²⁵⁸ the aliens testified to their opposition to the Czech

251. *E.g.*, *In re Diaz*, 10 I. & N. Dec. 199 (1963); *In re Cavlov*, 10 I. & N. Dec. 94, 96 (1962).

252. *Compare In re Tayeb*, 12 I. & N. Dec. 739, 742 (1968) (failure to produce documented evidence), and *In re Perez*, 10 I. & N. Dec. 603 (1964) (speculation), with *In re Vardjan*, 10 I. & N. Dec. 567 (1964), and *In re Stejkovic*, 10 I. & N. Dec. 281 (1963) (speculation by Board).

253. *In re Adamska*, 12 I. & N. Dec. 200 (1967) (Poland).

254. *In re Kojoory*, 12 I. & N. Dec. 215 (1967) (Iran).

255. 10 I. & N. Dec. 49 (1962).

256. Consequently, Congress should amend § 243(h) to provide clearer standards, or courts should exercise closer scrutiny of Board decisions.

257. 13 I. & N. Dec. 70 (1968).

258. 12 I. & N. Dec. 866 (1968).

government, their defection and antigovernment propaganda, and their conviction in absentia for defection. Despite the Board's attempt to distinguish politically and nonpolitically motivated refugees and their conviction under defection statutes,²⁵⁹ the case remains difficult to distinguish from many earlier ones in which relief was denied.²⁶⁰ Two other cases in which the Board granted relief involved a Cuban refugee²⁶¹ and an Egyptian Jewish physician.²⁶²

This description of cases is most helpful in suggesting what is not sufficient evidence to obtain section 243(h) relief. The cases themselves tell us very little about the quality and amount of evidence the alien must present. Clearly he must show a substantial probability of persecution, generally by a government. The alien must also show that he will be singled out for the persecution. If the alien can document past antigovernment activity and persecution of himself and his family, relief is more probable than if he merely speculates on future events. It would also seem that the respondent's burden of persuasion is lighter if his native country is one not recognized by the United States, such as Cuba, or is out of favor, such as Haiti.²⁶³ The burden is virtually impossible when the country at issue is a military ally, for example, Taiwan, or a major trading partner, such as Iran. Given these political realities and the distinct problems confronting the alien in documenting his claim, it is arguable that section 243(h) is at best only a form of selective relief. At worst, it is an instrument of foreign policy, largely unrelated to the original, presumably humanitarian, intent of Congress. This conclusion may explain why the number of reported 243(h) cases has declined significantly in the last five years.

259. *Id.* at 876-77.

260. See note 235 *supra* and accompanying text.

261. *In re Alfonso-Bermudez*, 12 I. & N. Dec. 225 (1965). The respondent testified about his antiCastro activities in Cuba and his difficulty leaving the country. The special inquiry officer and Board took administrative notice of the kind of government existing in Cuba. *Id.* at 227.

262. *In re Salama*, 11 I. & N. Dec. 536 (1966). The Board described Egyptian discrimination against its Jewish population.

263. Recently, however, the Service has become reluctant to grant § 243(h) relief to Haitian refugees. See *Paul v. United States Immigration & Naturalization Serv.*, 521 F.2d 194 (5th Cir. 1975). In *Paul*, both the Service and the Fifth Circuit ignored the alien's claim of substantial persecution in Haiti and reasoned that the respondents had fled Haiti to obtain employment and better living conditions in the United States. The *Paul* case should be read in conjunction with a popularized account of the INS-Haitian refugee problem. Powers, *The Scandal of U.S. Immigration: The Haitian Example*, Ms., Jan. 1976, at 62.

VII. UNITED NATIONS PROTOCOL ON REFUGEES

Perhaps as a result of the limited success of the litigated claims under section 243(h), a few cases have recently arisen under the United Nations Protocol Relating to the Status of Refugees,²⁶⁴ adopted by the United States in 1968, which incorporates the 1951 Geneva Convention Relating to the Status of Refugees.²⁶⁵

The Convention, as modified by the Protocol, defines a refugee as one who

owing to *well-founded fear* of being persecuted for reasons for race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²⁶⁶

Article 32, section 1, of the Convention requires that "[t]he Contracting States shall not *expel* a refugee *lawfully* in their territory save on the grounds of national or public order."²⁶⁷ Finally, Article 33, section 1, requires that

[n]o 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.²⁶⁸

An alien in the United States must make a request for asylum under the Protocol to the INS which conducts a hearing to determine the facts. The facts as there established are forwarded to the Department of State for an opinion about whether refugee status should be granted, and the

264. 19 U.S.T. 6223, T.I.A.S. no. 6577.

265. 189 U.N.T.S. 150, 19 U.S.T. 6260.

266. Art. I, § a(2), 189 U.N.T.S. 152, 19 U.S.T. 6260, 6261, *as modified by Art. I. § 2*, 19 U.S.T. 6223, 6225.

267. 189 U.N.T.S. 150, 19 U.S.T. 6260, 6275 (emphasis added).

268. *Id.* at 176, 19 U.S.T. 6260, 6276. Article 31, § 1, *id.* at 174, 19 U.S.T. 6260, 6275, covers some refugees illegally in a contracting state:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of the article, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

INS notifies the alien of the State Department decision.²⁶⁹ At least two cases have been litigated in which the alien has attempted to claim refugee status under the Protocol. In a third case the Board has dealt with the impact of the Protocol on Section 243(h).

In *Kam Kan Lin v. Rinaldi*²⁷⁰ alien crewmen overstayed the twenty-nine day limit of their conditional entry permits. All were natives of mainland China, and they were ordered to be deported to Hong Kong. After the deportation hearings they filed their claims under the Protocol, all of which were denied by the State Department.²⁷¹ In seeking review,²⁷² the plaintiff aliens, who clearly were not "lawfully" in the country,²⁷³ argued that the Article 32 phrase "lawfully in their territory" should not be defined as "lawfully . . . pursuant to the immigration laws of that territory." That construction would make the Protocol "nugatory," for an alien "lawfully" in the United States would have no reason to request asylum.²⁷⁴ The court rejected that argument by noting that aliens "lawfully but temporarily present could apply for asylum under the terms of the Protocol."²⁷⁵ The court also looked to the legislative history of the United States' adoption of the Protocol²⁷⁶ and the drafting of the Convention,²⁷⁷ which clearly indicated that "lawfully" was to be construed according to the immigration or other relevant law of each contracting state. Finally, in granting the Service's motion for a summary judgment, the court stated

269. This process is described in *Chim Ming v. Marks*, 367 F. Supp. 673, 680 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 1170 (2d Cir. 1974).

In the case of Chinese who have fled the People's Republic of China and lived in Hong Kong prior to seeking asylum in the United States, the State Department has established a policy of denying all such requests so long as the alien will be deported to Hong Kong and will be accepted there. These cases are handled by the INS without referral to the State Department. 367 F. Supp. at 680-81.

270. 361 F. Supp. 177 (D.N.J. 1973), *aff'd*, 493 F.2d 1229 (3d Cir.), *cert. denied*, 419 U.S. 874 (1974).

271. *Id.* at 179-82.

272. The plaintiff aliens claimed jurisdiction for review under 5 U.S.C. §§ 702-06 (1970), 8 U.S.C. § 1329 (1970), and 28 U.S.C. § 2201 *et seq.* (1970). The court appears to have found jurisdiction under 8 U.S.C. § 1329 (1970). 361 F. Supp. at 182.

273. 361 F. Supp. at 183.

274. *Id.* at 184.

275. *Id.*

276. S. EXEC. REP. NO. 14, 90th Cong., 2d Sess. 8 (1968), *cited in* 361 F. Supp. at 185.

277. 361 F. Supp. at 186, *citing* Ad Hoc Committee on Statelessness and Related Problems, Report, U.N.E.S.C.O.S.O.C., at 47, U.N. Doc. E/1618 Corr. 1; E/AC. 32/5 Corr. 1 (March 2, 1950); Ad Hoc Committee on Statelessness and Related Problems, Report, U.N.E.S.C.O.S.O.C. at 11, U.N. Doc. E/1850; E/AC. 32/8.

it is apparent that, should aliens be granted asylum on the basis of possible persecution with no regard to the legality of their entry, the present immigration laws and quotas imposed by this country would be devastatingly effected [*sic*].²⁷⁸

*Chim Ming v. Marks*²⁷⁹ involved similar facts, issues, and result. Upon appeal, the Second Circuit, in affirming the federal district court's decision, noted that Article 33 of the Convention²⁸⁰ protected even the alien unlawfully in the United States from being returned to a country where he would be persecuted. The court added that the protection provided by Article 33 was "further supported" by section 243(h).²⁸¹ The court's opinion thus reflected an inherent conflict in the Convention as construed by the courts. That is, the Convention applies primarily to refugees lawfully in the country, but Article 33 prevents deportation of a refugee unlawfully in the country to nations where his life or freedom would be endangered. Since many potential refugees may enter the United States unlawfully, and most nations are unwilling to accept deportees other than their own citizens, the question of interest becomes whether the Convention's definition of refugee²⁸² when taken with Article 33 supercedes or works a liberalization of section 243(h).

That issue was fully explored by the Board in *In re Dunar*²⁸³ and answered in the negative. *Dunar* was a Hungarian citizen who had entered the United States as a nonimmigrant visitor and had remained longer than his visa permitted. At his deportation hearing he first entered a section 243(h) claim and then withdrew it and instead sought refugee status under the Protocol.²⁸⁴ In the first part of its opinion, the Board studied the legislative history of the Protocol and other materials and arrived at the lawful-unlawful presence distinction relied upon by the courts in *Chim Ming* and *Kan Kam Lin*.²⁸⁵ The Board therefore found the respondent not to be eligible for asylum under the Protocol because he was unlawfully in the country, even though he might,

278. 361 F. Supp. at 186. Ironically, after using this course of action the respondents were cut off from seeking § 243(h) relief since the time for filing an application, 10 days, see 8 C.F.R. § 242.17(c) (1976), had passed.

279. 367 F. Supp. 673 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 1170 (2d Cir. 1974).

280. See note 268 *supra* and accompanying text.

281. 505 F.2d at 1172.

282. See note 266 *supra* and accompanying text.

283. Interim Decision No. 2192 (April 17, 1973). For another discussion of *Dunar*, see Note, *supra* note 185, at 143-47.

284. Interim Decision No. 2172 at 2.

285. *Id.* at 5-14.

arguendo, be considered a refugee.²⁸⁶ The Board maintained that to allow an alien unlawfully in the country to claim Protocol protection would undercut the quota system and permanent resident provisions of the Immigration and Nationality Act, something Congress could not have intended.²⁸⁷ Thus a refugee under the definition of the Protocol and Convention could be deported, although not to a country where he would be persecuted.

Dunar also argued that the definition of refugee in the Protocol and Convention altered the breadth of coverage of section 243(h) and the burden of proof required thereunder. Specifically, Dunar maintained that all an alien now need show was that he had, in the Convention's terms, "a well-founded fear of being persecuted;" thus his state of mind was at issue, and he no longer needed to prove a clear probability of persecution.²⁸⁸ The Board rejected that thesis by reasoning that since the fear had to be "well-founded," it could not be "purely subjective. A fear which is illusory, neurotic, or paranoid, however sincere does not meet this requirement."²⁸⁹ The Board went on to say that

[s]ome sort of a showing must be made and this can ordinarily be done only by objective evidence. The claimant's testimony as to the facts will sometimes be all that is available; but the crucial question is whether the testimony, if accepted as true, makes out a *realistic likelihood* that he will be persecuted. The burden of coming forward with the requisite evidence is obviously the claimant's. And if all he can show is that there is a merely conjectural possibility of persecution, his fear can hardly be characterized as "well-founded."²⁹⁰

The Board also reasoned that the definition of refugee under the Protocol, which added persecution by reason of "nationality" and "membership of a particular social group" to 243(h)'s categories of race, religion, and political opinion, did not create any conflict with section 243(h)'s "beneficent purposes." That is, Congress intended to protect aliens from "the actions of their own home governments in singling them out for punitive treatment, not because of their individual misconduct or demerits, but solely because they are members of dissi-

286. *Id.* at 14.

287. *Id.* at 14.

288. *Id.* at 15.

289. *Id.*

290. *Id.* at 16 (emphasis added). It is unclear whether the Board was saying that the alien had, under the Protocol, a burden of persuasion measured as a "realistic likelihood" rather than the "clear probability" or similar standards under § 243(h). The former might, in theory, be lighter.

dent or unpopular minority groups."²⁹¹ Thus the Protocol was entirely compatible with section 243(h) and did not enlarge its coverage.

Finally, the Board confronted Article 33 of the Convention which prohibits the deportation of any refugee to a country where his "life" or "freedom" would be threatened for any of the reasons set out in the definition of refugee.²⁹² The Board felt there was no real conflict with section 243(h). "We are satisfied that distinctions in the terminology can be reconciled on a case by case consideration"²⁹³

Dunar then argued that Article 33 allowed the Attorney General no room to exercise discretion; that is, its provisions were mandatory and therefore clearly conflicted with section 243(h) which has been construed to give broad discretion to the Attorney General. The Board maneuvered around this problem with murky reasoning: The cases that speak of "broad discretion" "contemplate the manner in which the Attorney General arrives at his opinion and the limited scope of judicial review, rather than the eligibility—discretion dichotomy" found in section 244 cases.²⁹⁴ Those cases that apply the same dichotomy to section 243(h) have done so in relation to the scope of review.²⁹⁵ The entire 243(h) process is a discretionary determination of the probability of persecution.²⁹⁶ Once the likelihood of persecution is established, deportation is stayed; there have been no cases in which relief has been denied after sufficient proof of probable persecution.²⁹⁷ Thus there is no conflict with the mandatory relief under Article 33, under which the probability of persecution must also be established.

The Board's construction of the Convention, which effectively transmutes it into section 243(h), has not yet been tested in a reported court decision, so that the *Dunar* analysis might be vulnerable. "Well-founded fear" need not be read as narrowly as the Board would wish. Fear is a subjective condition, and under the Convention it is an element that must be considered. Fear plus some evidence or grounds therefor can be construed and applied to create a much more reasonable burden of persuasion for the alien than the rigorous "clear probability" standard. Such a lightened burden would be more realistic given the problems of

291. *Id.* at 17.

292. See note 266 *supra* and accompanying text.

293. Interim Decision No. 2192 at 18.

294. *Id.* at 20.

295. *Id.* at 21.

296. *Id.*, citing G. GORDON & H. ROSENFELD, *supra* note 2, § 5-16b, at 5-124 (1972).

297. Interim Decision No. 2192 at 22.

supplying objective evidence confronting the alien. Any alien attempting to argue that "well-founded fear" is a lighter burden should, however, carefully search the history of the drafting of the convention for evidence of the framers' intent. In addition, the practice of other contracting states in construing the phrase must be investigated.

In addition, the Board is arguably incorrect in stating that Article 33 does not affect the Attorney General's discretion. The Article is couched in absolute terms "No Contracting State shall expel or return . . . a refugee in any manner whatsoever . . ." to countries where his "life or freedom would be threatened."²⁹⁸ Section 243(h), however, merely "authorizes" the Attorney General to withhold deportation when in his "opinion" persecution is likely. Thus, despite the Board's disclaimers in *Dunar* and in the absence of strict judicial review, section 243(h) can permit a discretionary decision to deport when the likelihood of persecution exists. That discretion cannot co-exist with the language of the Article. Indeed, it has been argued that the Protocol supersedes section 243(h).²⁹⁹ At the very least, Article 33 could be read to require the Service to rebut the alien's proof which has satisfied the burden of persuasion. Moreover, such a duty to rebut would reduce the possibility that the Service could make a purely discretionary decision—perhaps on the bases of political consideration, undisclosed infor-

298. 189 U.N.T.S. 150, 176, 19 U.S.T. 6260, 6275; see text accompanying note 263 *supra*.

299. Note, *supra* note 185, at 151-52:

If any section of the Immigration and Nationality Act is ripe for supercession, it is section 243(h). . . . Repeal by implication, which would be required in this case, is not favored by the courts, and requires a "positive repugnancy" between the terms of the statute and treaty. But where the enactments cover the same area, and it is not possible to give effect to both, a later enactment must prevail if it is self-executing. This is particularly true where that enactment is broad and its terms are clear and explicit so that it can be seen to cover the entire area.

The terms of article 33 meet the supercession requirements. First, both it and section 243(h) cover the same area: the prevention of expulsion of a refugee to a country where he will be subjected to persecution. Second, the requisite "positive repugnancy" exists between the concepts "well-founded" fear of persecution, and "clear probability of persecution." Because the "well-founded" concept would require a lesser burden of proof, the requirements of article 33 should be less stringent than those of section 243(h). Third, it does not appear possible to give effect to both enactments without radically altering the interpretation of section 243(h) or watering down article 33. Finally, the United States adhered to the Protocol, a self-executing treaty, after Congress enacted section 243(h).

Id. (footnotes omitted). The author of the Note also argues that Article 33 grants a refugee a "substantive right," while § 243(h) creates only "procedural" rights, for example, the right to a hearing. *Id.* at 146 (emphasis original).

mation, or State Department recommendations—to return the alien. The absolute language of the Article thus requires a decision on the record and reduces, if not eliminates, any latitude in the exercise of discretion.

VIII. CONCLUSIONS

Section 243(h) vests significant discretion in the Attorney General and his delegates in an area of ultimate importance—literally, life and death—to a small number of persons each year. Although the courts have imposed a few constraints on the exercise of that discretion, they have generally given the Attorney General great latitude in its exercise, despite the nature of the individual interests involved and the paucity of standards within the statute to guide him. It is possible that the ineffectiveness of judicial review in section 243(h) cases has limited the significance of the section as a form of relief for refugees; certainly the number of reported cases has declined markedly in the last half-decade. This fact raises the question of whether section 243(h) has become a virtual nullity. If so, that is contrary to what the Board in *Dunar* described as Congress' "beneficent" intention. But what was the congressional intent? At best the legislative history is unclear. It can only be supposed that Congress did not intend to legislate a nullity, that Congress placed the section in the Act to provide meaningful relief for individuals fleeing what they reasonably perceived to be persecution.³⁰⁰

If section 243(h) is not to become and remain meaningless, one of three things must occur. First, Congress could amend the section to supply functional standards; in the process, Congress should make its intent clear. Second, Congress or the courts could reduce the burden of persuasion on the alien. Finally, litigation designed to test the conformity of section 243(h) with the Protocol and Convention could lead to important changes in the application of the section. In any case, there is a need to make more reasonable the burden of proof upon the alien. Without that, section 243(h) is likely to become a meaningless sentence buried in the Act.

Finally, it must be asked whether a rational system of political asylum, open to all persons with cognizable claims, is compatible with an immigration policy based on quotas and restricted entry.³⁰¹ A

300. See note 50 *supra*.

301. See note 27 *supra* and accompanying text.

relatively open and equitable policy for refugee relief would obviously undercut the quota system. Moreover, it is unlikely that a fair and meaningful policy toward refugees is compatible with America's present role as a superpower.³⁰² That role necessitates political alliances, relationships, and conflicts that may very well render it impossible for the United States to serve as a humanitarian refuge for some of the world's displaced.

302. *Id.*