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THE DIVERSIFICATION OF PROTECTION LAWS IN THE UNITED STATES

Evangeline G. Abriel*

INTRODUCTION

International refugee law is in the midst of transformation. The pressure placed on countries of asylum by the great number of people seeking protection¹ has led to contentions that the definition of refugee should be changed to cover a wider range of people seeking protection,² that refugee protection should be principally a matter of regional concern,³ that emphasis should be placed on controlling the root causes to

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1. See Guy S. Goodwin-Gill, 5 INT'L J. REFUGEE L. 1, 10 (1993) (observing that there are eighteen million refugees worldwide and another twenty-four million internally displaced persons; that is, one in every 135 human beings on earth).

2. Mel Gurtov, *Refugees in the Post-Cold War Era*, 28 WILLAMETTE L. REV. 849, 854 (1992); see Isabelle R. Gunning, *Expanding the International Definition of Refugee: A Multicultural View*, 13 FORDHAM INT'L L.J. 35, 68 (1989-90) (observing that the historical development of the three goals of the U.N. Charter provides an impetus for changing the definition of refugee); Michael G. Heyman, *Redefining Refugee: A Proposal for Relief for the Victims of Civil Strife*, 24 SAN DIEGO L. REV. 449, 482 (1987) (suggesting that the definition of refugee should not be specifically defined so as to avoid any limiting effect); James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 164 (1990) (arguing that the U.N. Convention definition of refugee fails to reflect the full range of circumstances that give rise to involuntary migration); James A.R. Nafziger, *Refugee Law: A Commemorative Introduction*, 28 WILLAMETTE L. REV. 703, 708 (1992) (calling for a definition of refugee that is based on urgent human need rather than cause of plight); see also Eduardo Arboleda, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, 3 INT'L J. REFUGEE L. 185, 185 (1991) (opining that the internationally accepted definition of refugee is inadequate).

3. T. Alexander Aleinikoff, *State-Centered Refugee Law: From Resettlement to Containment*, 14 MICH. J. INT'L L. 120, 135 (1992).

cut off refugee flows,⁴ and that repatriation is preferable to asylum as a durable solution.⁵

Refugee law in the United States⁶ is also changing, and our current refugee law consists of a surprising number of diversified programs. After describing some of those programs, this article cautions that we must be aware of the drawbacks as well as the benefits of a diversified system. Those drawbacks include unwieldiness, unpredictability, and apparent violation of U.S. obligations under the United Nations Convention and Protocol Relating to the Status of Refugees. These drawbacks weaken the U.S. system of protection.

I. THE CURRENT SYSTEM OF PROTECTION IN THE UNITED STATES

United States immigration law contains both general and specialized programs for the protection of persons seeking safety. The general programs begin with the basic definition of refugee,⁷ adopted from the

4. *Id.* at 121, 125-30; Luke T. Lee, *The Preventive Approach to the Refugee Problem*, 28 WILLAMETTE L. REV. 821, 821 (1992); Ved P. Nanda, *International Law and the Refugee Challenge: Mass Expulsion and Internally Displaced People*, 28 WILLAMETTE L. REV. 791, 793-94 (1992).

5. Nafziger, *supra* note 2, at 708; Nanda, *supra* note 4, at 794-95.

6. The author uses the terms "refugee law" and "system of protection" to mean all legislative, regulatory, and executive measures for the protection of persons fleeing problems in their countries. Professor Alexander Aleinikoff has suggested using the term "the law of involuntary migration" to describe these measures.

7. Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(42)(A) (1988). Section 101(a)(42) of the INA provides that:

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such circumstances as the President after appropriate consultation (as defined in § 297(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion....

Id.

"Refugee" is defined differently by the Organization of African Unity (OAU) and the Organization of American States (OAS). In addition to including the defini-

1951 United Nations Convention relating to the Status of Refugees (Refugee Convention)⁸ and the 1967 United Nations Protocol relating to the Status of Refugees (Protocol).⁹ Refugees are persons who have a well-founded fear of persecution in their countries on the basis of their race, religion, political opinion, nationality, or membership in a particular social group.¹⁰ Refugees seeking entry into the United States may apply under the overseas processing program.¹¹ They may also apply within the United States or at the borders. In the latter case, the refugees are said to be applying for "asylum"¹² and, if the INS grants their application, they are known as "asylees."

In addition to providing for asylum, U.S. immigration law prohibits refoulement, which is the returning of persons to a place where their life or liberty would be in jeopardy on account of their race, religion, na-

tion of refugee found in the 1951 United Nations Convention and the 1967 Protocol, the OAU's 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa defines "refugee" as "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order, in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality." Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, art. I, ¶ 2, 1001 U.N.T.S. 45, 47. The 1984 Cartagena Declaration on Refugees includes in the term refugee both the U.N. Convention definition and "persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights, or other circumstances which have seriously disturbed public order." Eduardo Arboleda, *Refugee Definition in Latin America: the Lessons of Pragmatism*, 3 INT'L REF. L. 185 (1991).

8. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

9. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (1968) [hereinafter Protocol]. The United States did not accede to the Convention, but it did accede to the Protocol. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438 n.21 (1987) (U.S. definition of refugee comes from the Convention and Protocol). The Protocol provides that nations ratifying it also bind themselves to honor Articles 2 through 34 of the Convention. Protocol, *supra* art. 1(1).

10. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42)(A) (1988).

11. INA § 207, 8 U.S.C. § 1157(c)(1) (1988).

12. INA § 208, 8 U.S.C. § 1158(a) (1988).

tionality, political opinion, or membership in a particular social group.¹³ This relief is called "withholding of deportation."

Refugee status, asylum, and withholding of deportation were intended to deal with individual claims of persecution. They do not address general protection for people fleeing dangers in their countries other than persecution. This gap in coverage was filled by the enactment of Temporary Protected Status (TPS) in the Immigration Act of 1990.¹⁴ Under TPS, the Attorney General is authorized to designate certain nationalities or groups of persons who are within the United States and who cannot return safely to their countries because of natural disaster, armed conflict, or other extraordinary and temporary conditions that prevent them from returning safely.¹⁵ Persons granted TPS are allowed to remain in the United States for a certain period of time.¹⁶ The 1990 Act prohibits subsequent legislation that would allow persons granted TPS to adjust their status to lawful temporary or permanent resident status, absent the affirmative vote of three-fifths of the Senate.¹⁷ The Immigration Act of

13. INA § 243(h), 8 U.S.C. § 1253(h) (1988). Section 243(h) of the INA provides that:

The Attorney General shall not deport or return any alien (other than an alien described in section 241(a)(4)(D)) [aliens who participated in Nazi persecutions or genocide] to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 243(h)(1), 8 U.S.C. § 1253(h) (1988).

This provision parallels article 33(1) of the Refugee Convention, which provides 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, [or] membership of [sic] a particular social group or political opinion." Refugee Convention, *supra* note 8, at 176.

14. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

15. Immigration Act of 1990, Pub. L. No. 101-649, § 302, 104 Stat. 4978 (codified at INA § 244A (1992), 8 U.S.C. § 1254a (Supp. IV 1992)). The Attorney General may grant temporary protected status, which includes protection from deportation and employment authorization, to aliens who are nationals of a foreign state where the Attorney General has designated that the return of the aliens to the state would pose a serious threat to their personal safety, or if, because of earthquake, flood, drought, epidemic, or other environmental disaster, the foreign state is unable temporarily to handle the return of its nationals and the foreign state has officially requested designation, or if the Attorney General finds that there are extraordinary and temporary conditions in the foreign state which prevent its nationals from returning there in safety, unless the Attorney General finds that permitting the aliens to temporarily remain would be contrary to the national interest of the United States. *Id.*

16. INA § 244A(a)(1) (1992), 8 U.S.C. § 1254a(a)(1) (Supp. IV 1992).

17. INA § 244A(h)(2) (1992), 8 U.S.C. § 1254a(a)(h)(2) (Supp. IV 1992).

1990 specifically provided TPS to Salvadorans.¹⁸ When their TPS expired, the Salvadorans were given a special status called "Deferred Enforced Departure."¹⁹ The Attorney General has also extended TPS to Liberians, Lebanese, Kuwaitis, and Bosnians.²⁰

Aside from the basic framework of refugee status, asylum, withholding of deportation, and, now, temporary protected status, U.S. immigration law contains a growing number of specific protection remedies which apply to particular groups of people and particular types of situations. These particularized protection programs are discussed below.

One of the first particularized programs in recent memory was the Cuban Adjustment Act (CAA),²¹ enacted in 1966 but never codified. Under the CAA, Cubans who have been inspected and admitted or paroled into the United States and who have been physically present in the United States for at least one year may adjust their status to permanent resident.²² There is no requirement that Cubans apply for asylum to qualify for adjustment under the CAA.

More recent particularized protection programs are the Chinese Student Protection Act (CSPA) and other measures directed exclusively toward nationals of the People's Republic of China.²³ The CSPA allowed certain nationals of the People's Republic of China (PRC) who

18. Immigration Act of 1990, Pub. L. No. 101-649, § 303, 104 Stat. 4978.

19. 57 Fed. Reg. 28700 (1992); *U.S. Will Defer Departures of Salvadorans, But Will Not Extend TPS*, 69 INTERPRETER RELEASES 600, 600-01 (1992); *U.S. to Extend Deferred Departure of Salvadorans, Sources Say*, 70 INTERPRETER RELEASES 557, 557 (1993); *INS Announces Salvadoran DED Extension*, 70 INTERPRETER RELEASES 705, 705-07 (1993); *INS Formally Extends DED for Salvadorans*, 70 INTERPRETER RELEASES 787, 787-88 (1993); *INS Memo Outlines Procedures for Issuing OSCs to TPS Salvadorans*, 69 INTERPRETER RELEASES 87, 87-88 (1992).

20. TPS was granted to Liberians, Lebanese, and Kuwaitis on March 27, 1991. *Temporary Protected Status by Country Chart*, 70 INTERPRETER RELEASES 1394, 1394 (1993). TPS for Liberians has been extended until March 28, 1995. 59 Fed. Reg. 9997-98 (1994). TPS for Lebanese was terminated on April 9, 1993. *INS Implements Lebanese TPS Termination*, 70 INTERPRETER RELEASES 215, 215 (1993). TPS for Kuwaitis was terminated effective March 27, 1992. Termination of Designation of Kuwait under Temporary Protected Status Program, 57 Fed. Reg. 2930-32 (1992). TPS has been granted to Bosnians until August 10, 1994. 70 INTERPRETER RELEASES at 1394.

21. Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

22. *Id.*

23. Chinese Student Protection Act (CSPA), Pub. L. No. 102-404, 106 Stat. 1969 (1992). The INS published interim regulations implementing the CSPA in the Federal Register. 58 Fed. Reg. 35832, 35839 (July 1, 1993) (codified at 8 C.F.R. § 245.9 (1993)).

arrived in the United States by April 11, 1990, to apply for permanent resident status.²⁴ The CSPA was the culmination of executive and legislative actions concerning the Chinese in the aftermath of the Tiananmen Square events in June of 1989.²⁵

A third specialized program is the Lautenberg Amendment.²⁶ This Amendment modified the definition of "well-founded fear of persecution" for certain nationals of the former Soviet Union, Vietnam, Laos, and Cambodia.²⁷ If these foreign nationals fall within one of the desig-

24. CSPA § 2(a). To qualify under the CSPA, a PRC national must (1) be covered by an April 11, 1990, executive order signed by President Bush that protected certain PRC students already in the United States, (2) have resided continuously in the United States since April 11, 1990, and (3) have been physically present in the PRC for no longer than 90 days after April 11, 1990. *Id.* § 2(b). The application for permanent resident status must have been filed between July 1, 1993, and June 30, 1994. *Id.* § 2(e); see Laura F. Reiff et al., *The Chinese Student Protection Act of 1992; New Developments and Controversial Issues*, 70 INTERPRETER RELEASES 929, 929 (1993) (explaining the recent developments and issues surrounding the CSPA); *INS Plans Implementation of Chinese Student Protection Act*, 70 INTERPRETER RELEASES 587, 587-88 (1993) (detailing the regulations required to implement the CSPA).

25. Following the Tiananmen Square massacre in Beijing on June 1989, Congress passed H.R. 2712, the Emergency Chinese Immigration Relief Act of 1989, which would have waived the home residence requirement of INA § 212(e), 8 U.S.C. § 1182(e), for certain nationals of the People's Republic of China (PRC), deferred the departure of all PRC nationals in the U.S., and granted work authorization to all F, J, and M category students from the PRC who were in lawful status as of June 5, 1989. *Congress Passes Bill to Help Chinese Students*, 66 INTERPRETER RELEASES 1290, 1290-91 (1989). President Bush vetoed the bill, but ordered administrative relief for PRC nationals instead. That relief included deferred departure until January 1, 1994, for most PRC nationals in the United States. *President Vetoes Chinese Student Bill, Offers Administrative Relief Instead*, 66 INTERPRETER RELEASES 1313, 1313 (1989). The President's veto narrowly survived attempts of both houses of Congress to override it. *President's Veto of Chinese Student Bill Narrowly Upheld*, 67 INTERPRETER RELEASES 113, 113 (1990). On April 11, 1990, the President issued Exec. Order No. 12711, 55 Fed. Reg. 13897-898 (1990), formalizing the administrative relief provisions described above. *Bush Issues Executive Order to Protect PRC Nationals*, 67 INTERPRETER RELEASES 433, 434-34 (1990). The CSPA continues the relief set forth in the executive order.

26. Sections 599(d) and (e) of Pub. L. No. 101-167, 103 Stat. 1195 (1989), were extended by the Foreign Operations Appropriations Bill for Fiscal Year 1993, Pub. L. No. 102-391, § 582(b)(1)(A), 106 Stat. 1633 (1992). The amendment is in effect until October 1, 1994. *Id.*

27. For many years prior to 1988, the INS automatically granted Soviet nationals' applications for refugee status. 135 CONG. REC. S8379 (daily ed. July 20, 1989) (statement of Sen. Lautenberg); ALEINIKOFF AND MARTIN, IMMIGRATION PROCESS AND

nated groups, assert a fear of persecution, and show a credible basis for it, they are considered to have demonstrated a well-founded fear of persecution for the purposes of refugee status.²⁸ The designated groups include Soviet Jews, Evangelical Christians, and members of the Ukrainian Orthodox Church.²⁹ A "credible basis for concern" could be the inability to study or practice religious beliefs or ethnic heritage, denial of access to educational institutions, adverse treatment in the workplace stemming from prejudicial attitudes toward members of the person's group, and persecution of similarly situated individuals in the person's geographic locale.³⁰ The Lautenberg Amendment was intended to lessen the standard of proof for establishing a well-founded fear of persecution for persons falling within its provisions.³¹

In addition to the legislative protection programs, there are executive and administrative measures that provide relief for particular groups. An example of an administrative remedy was the memorandum order from then-Attorney General Edwin Meese, III, issued in July 1987. The memorandum directed the Immigration and Naturalization Service (INS) to

POLICY 723-24 (2d ed. 1991). In 1988, however, the United States began to apply the definition of refugee found in the Refugee Act of 1980 to Soviet applicants, and large numbers of applications were denied. *Id.* at 724. Some members of Congress believed that the application of the refugee definition to Soviet nationals and the subsequent denials of their refugee applications indicated that the cases were not being thoroughly or correctly processed. 135 CONG. REC. S8392 (daily ed. July 20, 1989) (statement of Sen. Specter). There was also a sense that the United States had encouraged people to seek safety in this country and that it was unjust to refuse those people. *Id.* (statement of Sen. Simon) (stating that "[I]t is very clear that we have sent strong signals to people that if you want to . . . escape the Soviet Union and the anti-Semitism and the problems that have been there, our doors are open"). Beginning in 1989, legislation began to be introduced to increase the chances of Soviet applicants being guaranteed refugee or some other status in the United States. ALEINIKOFF AND MARTIN, *supra* at 725-26. This legislation culminated in the Lautenberg Amendment.

28. ALEINIKOFF AND MARTIN, *supra* note 27, at 726.

29. Pub. L. No. 101-167, § 599(d), 103 Stat. 1195 (1989), as amended by the Foreign Operations Appropriations Bill for Fiscal Year 1993, Pub. L. No. 102-391, § 582(b)(1)(A), 106 Stat. 1633 (1992).

30. H.R. CONF. REP. NO. 344, 101st Cong., 1st Sess. 73-74 (1989).

31. *See, e.g.*, 135 CONG. REC. S8379 (daily ed. July 20, 1989) (statement of Sen. Lautenberg) (explaining the need to lessen the standard of proof for finding a reasonable fear of persecution); 136 CONG. REC. S6840 (daily ed. May 23, 1990) (statement of Sen. Lautenberg); 135 CONG. REC. S8390 (daily ed. July 20, 1989) (statement of Sen. Kennedy); 138 CONG. REC. S9736 (daily ed. July 2, 1992) (statement of Sen. Biden).

not deport Nicaraguans who had a well-founded fear of persecution, to grant work authorization to every Nicaraguan entitled to it, to expedite Nicaraguan applications for employment authorization, and to encourage Nicaraguans to apply for reopening of their denied asylum claims under *INS v. Cardoza-Fonseca*³² and for legalization.³³ While the actual directives of the memorandum did not relax the standards for asylum and withholding of deportation, the memorandum was perceived as requiring enhanced consideration for Nicaraguan claims.³⁴

An example of an executive measure was the executive order requiring interdiction of vessels bearing Haitians seeking to enter the United States. In September, 1981, the United States and Haiti entered into an agreement allowing the United States to intercept Haitian vessels and return them to Haiti.³⁵ Pursuant to the agreement, President Reagan ordered that the entry of undocumented aliens arriving at U.S. borders from the high seas be suspended and prevented by interdiction of certain vessels carrying such aliens.³⁶ Under this order, Coast Guard cutters halted vessels from Haiti and interviewed the passengers to determine whether their asylum claims merited parole into the United States.³⁷

After the fall 1991 military coup in Haiti, however, the Bush Administration began detaining interdicted Haitians in Guantanamo Bay, Cuba, in order to screen their asylum claims. Later, President Bush issued an Executive Order, commanding that all interdicted persons be returned immediately to Haiti. President Bush instructed that the order should not be construed as requiring any procedures to determine whether a person is a refugee.³⁸ The order also authorized the Attorney General, in his

32. 480 U.S. 421 (1987).

33. The legalization program, enacted in the Immigration Reform and Control Act of 1986, allowed persons who had been present in the United States under illegal alien status since January 1, 1982, to adjust their status to temporary permanent resident and, later, to lawful permanent resident. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394 (codified as amended at INA § 245A, 8 U.S.C. § 1255a (1988)).

34. *Meese Announces Immigration Policy for Nicaraguans*, 64 INTERPRETER RELEASES 821, 821 (1987).

35. Letter from the Haitian Secretary of State for Foreign Affairs to the American Ambassador, Sept. 23, 1981, 33 U.S.T. 3562, T.I.A.S. No. 10241.

36. Proclamation No. 4865, 46 Fed. Reg. 48107 (1981); Exec. Order No. 12324, 46 Fed. Reg. 48109-110 (1981).

37. Exec. Order No. 12324, 46 Fed. Reg. 48109-110 (1981).

38. Exec. Order No. 12807, 57 Fed. Reg. 23133-134 (1992) (revoking Exec. Order No. 12324, 46 Fed. Reg. 48109-110 (1981)); see *Clinton to Continue Haitian Forced Return Policy for Now*, 70 INTERPRETER RELEASES 85, 85 (1993) (reporting

unreviewable discretion, to decide whether a refugee should be returned.³⁹

The Haitian interdiction policy under the Reagan and Bush Administrations has been widely criticized,⁴⁰ and advocates for the Haitians have sought protection through the courts. The United States Supreme Court recently upheld the interdiction policy.⁴¹

The Administration has recently announced a further modification on its Haitian policy. Haitians interdicted at sea by U.S. vessels will now be given the choice of either returning to Haiti or being sent to a refugee camp outside the United States. Only those Haitians who go through processing at the INS asylum processing center in Haiti will be allowed to proceed to the United States.⁴²

The Haitian situation has also led to legislative activity in Congress. Members of Congress have proposed remedial measures such as granting temporary protected status for Haitians in the United States, allocating additional refugee slots for Haitians, suspending interdictions and returns of vessels, and extending the U.S. Government's obligation to not return refugees to a country where they might be harmed to territorial limits outside of the United States.⁴³

that the Bush Administration's policy of returning Haitians to their country would be continued).

39. 57 Fed. Reg. 23133-134, *supra* note 38.

40. See *OAS Issues Resolution Condemning Haitian Interdictions*, 70 INTERPRETER RELEASES 529, 529 (1993) (reporting on the OAS response to the Clinton Administration's policy of continuing the Haitian interdiction program); Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIGR. L.J. 1, 1 (1993) (examining the imperfect explanation of the United States on the immigration policy toward Haitians); Andrew I. Shoenholtz, *Aiding and Abetting Persecutors: The Seizure and Return of Haitian Refugees in Violation of the U.N. Refugee Convention and Protocol*, 7 GEO. IMMIGR. L.J. 67, 67 (1993) (describing the U.S. interdiction policy against Haitians as anti-humanitarian).

41. *Sale v. Haitian Refugees Centers Council*, 509 U.S. ___, 113 S. Ct. 2549 (1993); see *Supreme Court Upholds Policy to Intercept Haitians*, 70 INTERPRETER RELEASES 818, 818-20 (1993) (reporting that the U.S. Supreme Court upheld the Clinton Administration's policy of "intercepting Haitians on the high seas and returning them to their homeland without a hearing").

42. National Immigration Law Center, *Immigrants' Rights Update*, vol. 8, no. 6 at 1 (Aug. 15, 1994).

43. Haitian Refugee Fairness Act, H.R. 3663, 103d Cong., 1st Sess. (1993); Haitian Refugee Protection Act of 1993, H.R. 1307, 103d Cong., 1st Sess. (1993). See *Congressional Panel Passes Haiti Bill; Court Vacates Injunctions*, 69 INTERPRETER RELEASES 181, 181-84 (1992) (observing that the House of Representatives approved a

The measures described above and others like them⁴⁴ create a diversified and particularized system of protection. The following section of this article examines the benefits and drawbacks of such a system.

II. THE ADVANTAGES AND DISADVANTAGES OF THE DIVERSIFIED SYSTEM OF THE UNITED STATES

There are obvious advantages to a diversified system of protection. There are also disadvantages to such a system, however, and we should be aware of both the advantages and disadvantages.

One of the advantages of a diversified approach is that it serves more people in ways that are perhaps more precisely suited to their needs. The approach's specificity may be a first step toward making refugee law in the United States "facilitative," that is, focused on aiding refugees in effectuating their choices.⁴⁵ Moreover, it is generous: it reflects the United States' historic welcome to persons in need.⁴⁶

bill that would prohibit forced repatriations for six months); *House Judiciary Committee Approves Haitian Relief Bill*, 69 INTERPRETER RELEASES 214, 214-17 (1992) (noting that the House of Representatives approved the Haitian Refugee Protection Act of 1992); *House Approves Bill Suspending Haitian Repatriations*, 69 INTERPRETER RELEASES 249, 249-51 (1992) (reporting that legislation prohibiting forced repatriations of Haitians was approved). *See also*, *House Subcommittees Hold Hearing on Haitian Policy, Bill Clears Subcommittee*, 69 INTERPRETER RELEASES 732, 732-34 (1992) (stating that H.R. 5360, the International Refugee Protection Act of 1992, provides that nonrefoulement would apply to individuals outside the territorial boundaries of the United States).

44. Other diversified protection programs under United States law include the Orderly Departure Program, established in 1979 in response to the flood of people fleeing Vietnam, *U.S. Raises Number of Monthly Interviews under ODP*, 68 INTERPRETER RELEASES 470, 470-72 (1991); the provision of immigrant visas to 1,000 displaced Tibetans in India and Nepal for the fiscal year 1991, Immigration Act of 1990, Pub. L. No. 101-649, § 134, 104 Stat. 4978, 5001 (codified as amended at 8 U.S.C. § 1153 (Supp. IV 1992)); the granting of additional immigrant visas to residents of Hong Kong who are employed in particular capacities by certain U.S. businesses operating in Hong Kong, Immigration Act of 1990, Public Law No. 101-649, 104 Stat. 4978, § 124, as amended by Section 302(b)(5) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Act of Dec. 12, 1991, Pub. L. No. 102-232, 105 Stat. 1733; and the granting of special immigrant status to certain aliens employed at the United States Mission in Hong Kong, Immigration Act of 1990, Public Law No. 101-649, § 152, as amended by Section 302(d)(1) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Act of Dec. 12, 1991, Pub. L. No. 102-232, 105 Stat. 1733.

45. Aleinikoff, *supra* note 3, at 138.

46. Former INS General Counsel Grover Joseph Rees, III argues that refugee

Another advantage of the diversified approach flows from what is often considered to be a drawback—the interjection of foreign policy goals into refugee policy. The benefit here is that if we are going to allow foreign policy goals and ideological biases to play a role in protection provisions, we should at least be open about it. Our current diversified approach, with various protection remedies added specifically for particular groups or nationalities, is more candid about the role of foreign policy and ideological biases.⁴⁷

A third advantage of the diversified approach is its flexibility. Several of the protection programs, the Lautenberg Amendment and the special measures concerning the mainland Chinese, for example, were in reaction to specific events that Congress thought it needed to address. The lack of response by the United States to refugees fleeing Nazi Germany⁴⁸ is very present in the country's memory, and the current diversified programs form part of a continuing effort to ensure that the United States has the necessary means to respond appropriately to similar situations in the future. The drawback here, however, is that the reactive nature of these measures allows the United States to put off efforts to draft a lasting policy that can be applied to various types of situations.⁴⁹

advocates should build on this generosity by encouraging that it be spread to nationalities or groups not covered by the diversified programs, rather than criticizing the existing programs.

47. See Deborah Anker & Carolyn P. Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in INS vs. Cardoza-Fonseca*, 1 INT'L J. REFUGEE L. 67, 80 (1989) (advising that normative political judgments regarding the political legitimacy of the government in question, if they are made, be made openly); see also Hathaway, *supra* note 2, at 180 (1990) (stating that current refugee law gives a false impression of universal, humane concern without necessarily affording any real protection).

48. See RICHARD BREITMAN & ALAN M. KRAUT, *AMERICAN REFUGEE POLICY AND EUROPEAN JEWRY, 1933-1945*, 236-249 (1987) (outlining Franklin D. Roosevelt's policy toward Jewish refugees after the Holocaust); LEONARD DINNERSTEIN, *AMERICA AND THE SURVIVORS OF THE HOLOCAUST 1-8* (1982) (detailing the U.S. policy toward European Jews after World War II).

49. See Carolyn Waller & Linda M. Hoffman, *United States Immigration Law as a Foreign Policy Tool: The Beijing Crisis and the United States Response*, 3 GEO. IMMIGR. L.J. 313, 358-59 (1989) (describing the U.S. immigration policy in response to the Beijing crisis as reactive); Mark P. Gibney, *Foreign Policy: Ideological and Human Rights Factors*, in *REFUGEES AND THE ASYLUM DILEMMA IN THE WEST* 36, 40 (Gil Leoscher ed., 1992) (contending that the policy of admitting Soviet refugees gives the appearance of responding to a crisis, but in actuality, it avoids the more difficult question of how to assist Soviet society in restructuring itself so that its

A reactive refugee policy is not new in U.S. history. The diversification in the current protection programs is surprisingly reminiscent of U.S. refugee law between the end of World War II and the enactment of the Refugee Act of 1980,⁵⁰ when U.S. refugee law was a series of temporary responses to emergency crises.⁵¹ These responses include both laws pertaining to specific groups of persons⁵² and extensive use of the Attorney General's power to parole individuals into the United States.⁵³ The first permanent statutory refugee program was established by the 1965 Amendments to the Immigration and Nationality Act (INA),⁵⁴ which provided for the use of up to six percent of the total Eastern Hemisphere immigration quota for the conditional entry of refugees from Communist-dominated countries and the Middle East under a new, seventh preference category.⁵⁵ One of the main purposes of the Refugee Act of 1980 was to end the *ad hoc* system that had existed.⁵⁶

people do not want to leave).

50. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

51. Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 12, 16 (1981); see Arthur C. Helton, *Political Asylum under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 243 (1984) (stating that "[t]he history of asylum and refugee law prior to 1969 is essentially a saga of reaction to crises as they arose and of ideological and geographical biases").

52. See, e.g., Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (providing protection for certain displaced laborers from states conquered by Germany and for certain refugees, particularly those who fled Nazi, Fascist, or Soviet persecution); Refugee Relief Act of 1953, Pub. L. No. 82-203, 67 Stat. 400 (allowing admission of refugees including victims of natural calamities and those from communist-dominated parts of Europe and the Middle East); Fair Share Law of 1960, Pub. L. No. 86-643, 74 Stat. 504 (authorizing the Attorney General to admit a "fair share"—25% of similar refugees resettled in nations other than the United States); Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121 (providing for resettlement needs of Cubans and to establish better funding and coordination for international refugee assistance programs).

53. Beginning in 1956, some 38,000 Hungarian refugees were resettled in the United States after the Attorney General admitted them under the parole power. Anker & Posner, *supra* note 51, at 15. After 1965, thousands of Cubans were paroled into the United States. *Id.* at 19. In 1976, over 130,000 refugees were evacuated from Indochina, most of whom were paroled and resettled in the United States. *Id.* at 30. Thousands of Vietnamese were paroled into the United States beginning in 1977. *Id.* at 31.

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

55. Section 203(a)(7) of the Immigration and Nationality Act was repealed by 8 U.S.C. § 1101(c)(7) (1980). Anker & Posner, *supra* note 51, at 17.

56. See Joan Fitzpatrick & Robert Pauw, *Foreign Policy, Asylum, and Discretion*,

The current use of *ad hoc* legislation and executive actions, however, differs from that occurring before the Refugee Act of 1980 because we now have established programs for extending protection to persons in need. The enactment of the 1980 Refugee Act providing for refugee status, asylum, and withholding of deportation, and the later enactment of TPS, create a system that should cover most refugee problems without resorting to *ad hoc*, diversified programs.

In addition to the reactive nature of the diversified programs, the diversified approach has at least seven further disadvantages. First, the diversified approach creates an unreliable system of protection because it is prone to abrupt changes. For example, in his memorandum of disapproval vetoing the Emergency Chinese Immigration Relief Act of 1989, President Bush directed that enhanced consideration be given to individuals from any country seeking asylum based upon their country's policy of forced abortion or coerced sterilization.⁵⁷ The INS promulgated an interim rule implementing the President's directive in January 1990.⁵⁸ New asylum regulations promulgated in July 1990, however, did not mention asylum claims based upon family planning practices.⁵⁹ The

28 WILLAMETTE L. REV. 751, 755 (1992) (observing that Congress intended the Act to be free from political influences); see also Anker & Posner, *supra* note 51, at 32-33 (asserting that the absence of a coherent refugee policy prior to the Refugee Act of 1980, as demonstrated by the sporadic, *ad hoc* granting of parole, created needless uncertainties for voluntary agencies and U.S. officials participating in resettlement; confused other nations, causing them to become less motivated to share in refugee relief; and worsened the plight of the refugees themselves); *INS v. Stevic*, 467 U.S. 407, 425 (1984) (stating that Congress meant for the Refugee Act of 1990 to eliminate piecemeal approach to refugee admissions).

57. GEORGE BUSH, MEMORANDUM OF DISAPPROVAL FOR THE BILL PROVIDING EMERGENCY CHINESE IMMIGRATION RELIEF (Nov. 30, 1989), reprinted in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE BUSH 1611 (Office of Federal Register, National Archives and Records Administration, 1990). The President issued this memorandum of disapproval after he vetoed H.R. 2712, the Emergency Chinese Immigration Relief Act of 1989, which would have waived the two-year home residency requirement for J-1 exchange visitors from the People's Republic of China. *President Vetoes Chinese Student Bill, Offers Administrative Relief Instead*, 66 INTERPRETER RELEASES 1313, 1313 (1989). President Bush later issued Exec. Order No. 12711, 55 Fed. Reg. 13897 (1990), which provided enhanced consideration for persons from any country who feared coerced abortion or sterilization if they returned home.

58. 55 Fed. Reg. 2803 (1990).

59. 55 Fed. Reg. 30674-688 (1990) (codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, 253); see Arthur Helton, *Final Asylum Rules: Finally*, 67 INTERPRETER RELEASES 789, 789 (1990) (commenting on the final rule's effect on the Refugee Act of 1980).

Justice Department has not issued a final rule concerning asylum based upon family planning practices,⁶⁰ and many consider the January 1990 interim rule to have been superseded.⁶¹

A second example of the changes that can occur in particularized protection programs is the Administration's shift in its response to Cubans seeking refuge in the United States. For nearly thirty years, the United States allowed almost all Cubans who reached its shores to remain here.⁶² In August, 1994, Cuban President Fidel Castro changed his policy of preventing people from leaving Cuba and began to allow Cubans to leave freely.⁶³ Thousands of Cubans left their country following that change in emigration policy, totalling more than 10,000 between August 19 and 26, 1994, alone.⁶⁴ On August 19, 1994, President Clinton ended the U.S. policy of admitting nearly all Cubans who sought entry by ordering that the United States Coast Guard pick up Cubans attempting to reach the United States and take them to the U.S. naval base at Guantanamo Bay, Cuba, for screening of their asylum claims.⁶⁵

The Administration's proposals for easing the problem of the Cuban exodus demonstrate the United States' growing reliance on diversified protection programs. The Administration initially proposed the granting of permanent resident status to cousins and grandparents, as well as par-

60. In January 1993, then Attorney General Barr signed a final rule that reiterated the provisions of the January 1990 rule. The comments to the rule stated explicitly that the effect of the rule was to supersede *Chang. Guo Chun Di v. Carroll*, 842 F. Supp. 858, 846 (E.D. Va. 1994); see also Office of the General Counsel, INS, *Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion—Addendum*, 70 INTERPRETER RELEASES 510 (April 12, 1993). That rule was withdrawn from the *Federal Register* when President Clinton took office. *Guo Chun Di v. Carroll*, 842 F. Supp. at 864.

61. *Matter of G—*, Int. Dec. No. 3215 (BIA 1993).

62. Thousands of Cubans have been paroled into the United States since 1965. Anker and Posner, *supra* note 51, at 19; ALEINIKOFF AND MARTIN, *supra* note 27, at 709. In the Mariel boatlift of 1980, 120,000 Cubans made their way to the United States. *Flight From Cuba: the Overview*, N.Y. TIMES, Aug. 20, 1994, at 1. Under the Cuban Adjustment Act, *supra* note 21 and accompanying text, Cubans who have been inspected and admitted to the United States and who have been physically present in the United States for at least one year may adjust their status to permanent resident.

63. *U.S. Rejects Castro's Proposals for Talks*, N.Y. TIMES, Aug. 26, 1994, at A6.

64. *Id.*

65. *U.S. Considers Mainland Sites for the Cubans*, N.Y. TIMES, Aug. 24, 1994, at A1; *Flight form Cuba: the Overview*, N.Y. TIMES, Aug. 20, 1994, at A1.

ents; spouses, children, and siblings, of Cuban-Americans and the granting of refugee status to some Cubans even if they did not meet the statutory standards for that status.⁶⁶ The Cuban exodus was stemmed in September 1994 by an agreement between the United States and Cuba that Cuba would stop its citizens from fleeing their country on makeshift rafts and boats in exchange for the U.S. promise to accept at least 20,000 new Cuban immigrants each year.⁶⁷

A third drawback to the diversified approach is that it can result in disputes between government agencies. A case in point is the disagreement between the INS and the Board of Immigration Appeals (BIA) with respect to the treatment of asylum claims based upon the PRC's "one family, one child" family planning policy. In August 1988, then-Attorney General Edwin Meese, III, issued a memorandum providing guidelines for the INS to consider asylum requests from Chinese nationals who claim that they oppose the PRC's birth control policy.⁶⁸ In 1989, the BIA rendered its decision in *Matter of Chang*, holding that coercive family planning policies, unless applied in a discriminatory manner, were not persecution.⁶⁹ Under orders from President Bush,⁷⁰ the Justice Department in January 1990 published an interim rule requiring the INS give "enhanced consideration" to asylum applicants who expressed a fear of persecution based on their country's policy of forced abortion or sterilization.⁷¹ The interim rule was not included in the final asylum regulations issued in July 1990.⁷² In November 1991, then-INS General Counsel Grover J. Rees, III, issued a memorandum reiterating that, under INS and Justice Department policy, coercive family planning policies were to be considered persecution on account of political opinion.⁷³ The BIA, however, has upheld its *Matter of Chang* deci-

66. *U.S. Will Propose Reducing Barriers to Cuba Migrants*, N.Y. TIMES, Aug. 30, 1994, at A1. Under current law, U.S. citizens may request permanent resident visas only for their parents, spouses, children, and siblings. INA § 203(a), 8 U.S.C. § 1153(a).

67. *Cuba Vows to End Exodus in Return for a Rise in Visas*, N.Y. TIMES, Sept. 10, 1994 at A1.

68. *Attorney General to Decide Validity of Chinese Family Planning Asylum Claims*, 70 INTERPRETER RELEASES 1558, 1560 (1993).

69. *Matter of Chang*, Int. Dec. No. 3107 (BIA 1989).

70. Memorandum of Disapproval for the Bill Providing Emergency Chinese Immigration Relief, PUB. PAPERS (Nov. 30 1989), reprinted in 66 INTERPRETER RELEASES 1331-32 (1989).

71. 55 Fed. Reg. 2803 (1990).

72. 67 INTERPRETER RELEASES 817 (1990).

73. 69 INTERPRETER RELEASES 297 (1992).

sion in several recent cases.⁷⁴ Because of the dispute between the BIA and the INS on this issue, the BIA certified two of those decisions to the Attorney General.⁷⁵ The Attorney General, however, declined to review the cases.⁷⁶

In August, 1994, the INS implemented a new policy in regard to nationals of the People's Republic of China (PRC) who allege persecution based on the PRC's coercive family planning practices. Under the new policy, persons who are not eligible for asylum may receive stays of deportation if they express a "credible fear" of the PRC's policies.⁷⁷ In the INS memorandum outlining the new policy, the INS Deputy Commissioner instructed INS officials to follow the BIA's decisions in *Matter of Chang* and *Matter of G* in assessing claims for asylum based upon coercive family planning practices.⁷⁸ Thus, the conflict between the Board and the INS approaches appears to have been resolved. This kind of lengthy dispute between government agencies, however, lowers

74. *Matter of G—*, Int. Dec. No. 3215 (BIA 1993); *Matter of Chu*, No. A71 824 281 (unreported decision of the BIA 1993) and *Matter of Tsun*, No. A71 824 320 (unreported decision of the BIA 1993). See *Attorney General to Decide Validity of Chinese Family Planning Asylum Claims*, 70 INTERPRETER RELEASES 1558, 1560 (1993).

75. 70 INTERPRETER RELEASES, *supra* note 60, at 1558; see 8 C.F.R. § 3.1(h)(1)(ii), (stating that the Board shall refer to the Attorney General for review of its decision all cases which, *inter alia*, the Chairman or a majority of the Board believes should be referred to the Attorney General for review).

In his memorandum for the Attorney General, dated June 23, 1993, David L. Milhollan, the Chairman of the BIA, asks the Attorney General to review the Board's decisions in *Matter of Chu* and *Matter of Tsun* to resolve the status of *Matter of Chang*, "so that there can be as uniform an application of the law as possible by Service officers, the immigration judges, and the Board." 70 INTERPRETER RELEASES, *supra* note 74, at 1558.

76. *Attorney General Fails to Decide Chinese Family Planning Asylum Cases*, 70 INTERPRETER RELEASES 1631, 1631-32 (1993) (reporting that it was unnecessary for the Attorney General to decide the legal dispute between the Board and the INS because the BIA had found that the respondents in both cases had failed to present credible evidence in support of their asylum claims).

77. *New Policy Helps Chinese Persecuted Under Family Planning Policies*, 71 INTERPRETER RELEASES 1027 (Aug. 8, 1994). To be eligible for this humanitarian relief, the claimant (1) must be faced with imminent danger of forced abortion or involuntary sterilization upon return to the PRC; (2) must have suffered or would suffer severe harm for refusing to submit to an abortion or sterilization; or (3) must have suffered or would suffer severe harm because he or she violated other "unreasonable" family planning restrictions. *Id.* at 1028.

78. *INS Sends Instructions on New Chinese Asylum Seekers Policy*, 71 INTERPRETER RELEASES 1056, 1057 (Aug. 15, 1994).

the agencies' credibility and impedes the development of clear standards.⁷⁹

Fourth, the diversified approach is stop-gap, rather than comprehensive. The U.S. diversified approach still does not cover everyone who needs protection. There is still no general protection for individuals who flee human rights abuses imposed for a reason other than persecution based on one of the five enumerated grounds.⁸⁰

Fifth, because many of the U.S. protection programs are aimed at particular nationalities or groups, the diversified approach allows foreign policy concerns to continue to intrude into refugee and protection determinations. Refugee and asylum law in the United States has never been free of foreign policy implications. The law has been plagued since shortly after the enactment of the Refugee Act of 1980⁸¹ with accusations that it is not neutrally administered.⁸² Moreover, some foreign

79. See *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 867 (E.D. Va. 1994) (commenting that the different administrative pronouncements on asylum claims based on PRC coercive family planning produce "an administrative cacophony undeserving of judicial deference").

80. The International Convention against Torture prohibits signatory states from expelling, returning, or extraditing a person to another state where there is a reasonable basis to believe that the person would be tortured. *United Nations Convention against Torture and other Cruel, Inhumane, or Degrading Treatment or Punishment*, G.A. Res. 46, U.N. GAOR, 39th Sess., Annex, art. 3, at 4, U.N. Doc. A/RES/39/46 (1984). The Torture Victim Protection Act contains certain of the signatories' obligations, but does not include the non-refoulement provision. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (Supp. IV 1992)); see Gunning, *supra* note 2, at 71-72 (arguing that an expanded definition of refugee is needed in order to protect human rights).

81. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

82. See Johnson, *supra* note 40, at 7, 9 (1993) (arguing that the Attorney General exercised his discretion generally to deny relief to those fleeing nations deemed to be friendly with the United States and admitting refugees from "unfriendly" countries); Deborah Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims before the Immigration Court*, 2 INT'L J. REFUGEE L. 252, 255 (1990) (concluding that ideological preferences and political judgments continue to influence asylum adjudications in the immigration courts); Peter H. Schuck, *The Emerging Political Consensus on Immigration Law*, 5 GEO. IMMIGR. L.J. 23 (1991) (suggesting that Americans try to choose who will immigrate to the United States so that they can feel a sense of control over the American way of life); Gibney, *supra* note 49, at 40 (asserting that a large number of Soviet and Vietnamese refugees admitted by the United States for foreign policy reasons do not have a "well-founded fear of persecution," which hurts the would-be immigrants from other countries who may need protection more urgently);

policy objectives are built into the law. For example, refugee admissions are determined in accordance with U.S. national interests,⁸³ and TPS is not to be granted if it would be contrary to U.S. national interests.⁸⁴ The current diversified programs in the United States, however, take into

Doris M. Meissner, *Political Asylum, Sanctuary, and Humanitarian Policy*, in THE MORAL NATION: HUMANITARIANISM AND U.S. FOREIGN POLICY TODAY 123, 140 (Bruce Nichols & Gil Loescher eds., 1989) (contending that U.S. refugee policy has remained a mirror of its foreign policy); Doris M. Meissner, *Reflections on the Refugee Act of 1980*, in THE NEW ASYLUM-SEEKERS: REFUGEE LAW IN THE 1980S 57, 63 (David A. Martin ed., 1988) (stating that high disapproval rates of Salvadoran asylum applications furthered U.S. foreign policy); Arthur Helton, *Political Asylum under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 243 (1984) (arguing that the Act's objective of establishing a neutral asylum process has been undermined by U.S. domestic policy, U.S. foreign policy, and the U.S. practice of incarcerating aliens); H.R. REP. NO. 244, 101st Cong., 2d Sess., pt. 2, at 4 (1989) (finding that INS adjudication of Salvadoran and Nicaraguan asylum applications have violated statutory, regulatory, and treaty requirements); GEN ACCT. OFF., ASYLUM: UNIFORM APPLICATIONS OF STANDARDS UNCERTAIN—FEW DENIED APPLICANTS DEPORTED 22 (1987) (finding unexplained disparities between the rates of approval for Salvadorans and for Poles and Iranians). A frequently-raised example of disparate treatment is the comparison of U.S. treatment of Cuban refugee applicants and Haitian refugee applicants. Johnson, *supra* note 40, at 12. Recent changes in the U.S. policy towards Cuban refugee applicants, however, has lessened, if not ended, this disparity. *Supra* note 65 and accompanying text.

The executive branch has reacted in conflicting ways to allegations of bias in refugee determinations. In the government's brief in *INS v. Doherty*, the government contended that foreign policy is an appropriate consideration in adjudicating asylum claims. Brief for Petitioner at 14, *INS v. Doherty*, 112 S. Ct. 719 (1992); Kevin R. Johnson, *A Hard Look at the Executive Branch's Asylum Decision*, 1991 UTAH L. REV. 279, 348, 350 (1991). This argument, however, should be contrasted with the government's concession in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991). There, Guatemalan and Salvadoran plaintiffs brought suit in 1985, alleging INS bias against Salvadorans and Guatemalans in the asylum adjudication process and the Executive Office for Immigration Review. *Thornburgh*, 760 F. Supp. at 799. The government agreed to stop the deportation of most Salvadorans and Guatemalans in the United States and to readjudicate their claims for asylum. *Id.* at 799, 805. In the settlement, the government conceded that foreign policy considerations and the relationship between the United States and the government of an applicant for asylum are not relevant to the determination of whether the applicant has a well-founded fear of persecution. *Id.* at 799. The settlement may eventually affect as many as 500,000 aliens. *Judge Gives Final Approval to ABC Settlement*, 68 INTERPRETER RELEASES 151, 151 (1991).

83. The number of refugees permitted to enter the United States shall be the number that the President determines to be justified by humanitarian concerns "or is otherwise in the national interest." INA § 207(a)(2), 8 U.S.C. § 1157(a)(2) (1988).

84. INA § 244A(b)(1)(C), 8 U.S.C. § 1254a(b)(1)(C) (Supp. IV 1992).

account more than just the foreign policy considerations in determining refugee numbers and TPS designations. The programs explicitly authorize non-neutrality, in the form of special types of relief and special definitions of refugee for certain nationalities and groups of persons, and denials of access for others.

The intrusion of foreign policy concerns is undesirable for a number of reasons. Perhaps most importantly, the Refugee Act of 1980 was intended to insulate U.S. refugee and asylum determinations from the influences of politics and foreign policy and to commit the United States to neutral, non-ideologically-based determinations of refugee status.⁸⁵ Explicit provisions providing relief for selected groups appear to contradict that intent.

The Refugee Act was based upon the United Nations Convention and Protocol Pertaining to the Status of Refugees, under which the United States agreed not to discriminate in refugee determinations on the basis of race, religion, or national origin.⁸⁶ In the majority of diversified programs in the United States, however, particular countries are singled out for special protection. This practice places the United States in the position of appearing to violate at least the spirit, if not the letter, of the Convention and Protocol.

Furthermore, using refugee law as a means of implementing foreign policy is not a good use of protection resources. The United States has

85. S. REP. NO. 256, 96th Cong., 2d Sess. (1979); see H.R. REP. NO. 608, 96th Cong., 1st Sess. 9 (1979) (stating that the definition of refugee "eliminates the geographical and ideological restrictions" on refugee admissions); Anker & Posner, *supra* note 51, at 9, 11, 46, 63, 64 (discussing legislative history on this issue and noting the major emphasis of the legislation on a non-discriminatory policy); Johnson, *supra* note 40, 7, 8 & n.30 (1993) (stating that commentators are unanimous that the U.S. definition of refugee was intended to eliminate the geographical and ideological restrictions on refugee admissions); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1262 (1990) ("Congress intended the refugee standards to be applied neutrally and without ideological bias."); Schuck, *supra* note 82, at 7 ("Congress intended the [Refugee Act] to regularize the flow of humanitarian-based admissions by asserting more congressional control over the ideologically and geographically driven, ad hoc, discretionary process that had previously prevailed."); Fitzpatrick & Pauw, *supra* note 56, at 771 (noting that 132 members of Congress filed an amicus brief in *Doherty* to state that the Congressional intent of the Refugee Act of 1980 was to eliminate ideological and geographical discrimination of asylum claims); Johnson, *supra* note 82, at 291, 327.

86. Johnson, *supra* note 40, at 1, 7-8, 7 n.26 (1993) (stating that "[b]oth the Protocol and the Convention prohibit discrimination based on country of origin in refugee decisions").

alternative means of achieving its foreign policy goals, such as economic sanctions, foreign aid, and trade restrictions.⁸⁷ In contrast, refugees have very few alternatives for protection.⁸⁸

Incorporating foreign policy concerns into refugee law is also undesirable because it allows protection to become an unfriendly act.⁸⁹ If political concerns intrude into the determination of who is a refugee, this undermines the entire premise of asylum as a humanitarian act that should not offend the applicant's government.⁹⁰ Commentators have also argued that the inclusion of foreign policy in refugee and asylum decisions tends to make the United States grant protection to people

87. For example, executive orders block all property and interests of the Haitian government of Haiti located in the United States and prohibit certain translations between U.S. persons and Haiti. Haitian Transactions Regulations, 31 C.F.R. pt. 580 (1993). Countries currently subject to economic sanctions include Iraq and Cuba. Iraqi Sanctions Regulations, 31 C.F.R. pt. 575 (1993); Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (1993). Executive Order No. 12808 blocks all property of the governments of Yugoslavia, Serbia, and Montenegro in the United States. Exec. Order No. 12808, 57 Fed. Reg. 23299 (1992) (codified at 31 C.F.R. pt. 585 (1993)).

88. See Aleinikoff, *supra* note 3, at 121 (noting that refugees have no real option of returning to their original homes because of a fear of persecution and face being without a state because other countries may exercise their sovereign power to exclude them). Cf. Lee, *supra* note 4, at 822 (advocating the use of "state responsibility" to motivate countries to become aware of human rights and refugee law and to stop abusing human rights). Under state responsibility, the countries of origin would be held accountable for generating refugees because of gross human rights violations and would be expected to pay compensation to the refugees and the countries of asylum. *Id.* at 828. But see Aleinikoff, *supra* note 3, at 135 n.57 (citing James C. Hathaway as arguing that making countries of origin financially liable for generating refugees might lead to increased human rights abuses if the countries of origin prevent the escape of persecuted people to reduce their liability to the countries of asylum).

89. Fitzpatrick and Pauw, *supra* note 56, at 769 & n.124 (referring to the Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondent in Doherty); see Gunning, *supra* note 2, at 84 (commenting that an expanded definition of refugee may depoliticize the act of accepting refugees). Professor Gunning also notes that the OAU Refugee Convention makes this plain by describing a grant of asylum as "a peaceful and humanitarian act that shall not be regarded as an unfriendly act by any member State." *Id.* at 84 & n.194.

90. One example of the perception of grants of refugee status as an unfriendly act is the response of Cuban President Fidel Castro, referring to the U.S. policy on Cuban refugee applicants, stated that "Anyone can see that the country cannot allow these things to happen and just sit back with folded arms." *Silent Castro Puzzling U.S. Aides*, N.Y. TIMES, Aug. 24, 1994, at A9.

who do not truly need it and to deny protection to people who truly do need it.⁹¹

A sixth drawback of diversification is that diversified programs directed toward specific nationalities or groups have an unavoidable effect on persons of the same nationality or group who are outside the United States. Such programs can send a signal to persons outside the United States that this country is willing to offer them resettlement options. This both exacerbates the problems in dealing with large refugee outflows and is unfair to persons receiving the signal, who may leave their countries at great personal risk in an attempt to seek safety in the United States.⁹²

For example, while the political and economic conditions in Cuba and Mr. Castro's relaxation of emigration rules are clearly the primary causes of the current mass exodus of Cubans from their country, the United States' decades-long acceptance of Cubans who reach its shores is at least a contributing factor to that exodus and to the human tragedies that have resulted from it.⁹³ Our acceptance of earlier Cuban arrivals encourages their countrymen to expect that this country will continue to welcome Cubans. One goal of the recent change in the U.S. policy

91. See Gibney, *supra* note 49, at 40 (asserting that the vast majority of Soviets and Vietnamese do not have a well-founded fear of persecution and should not be granted refugee status). In granting them refugee status, the United States deprives other, more deserving individuals an opportunity for resettlement in this country. *Id.* For example, the United States is not offering resettlement to hundreds of thousands of refugees flooding out of Iraq. *Id.*; see 138 CONG. REC. S9721 (daily ed. July 2, 1992) (statement of Sen. Simpson) (arguing that because of changes in the Soviet Union during 1991 and 1992, there was no justification for extension of the Lautenberg Amendment); Waller and Hoffman, *supra* note 49, at 359 ("Nevertheless, the United States Government has responded dramatically to the needs of some groups—the airlift out of Vietnam after the fall of Saigon—and refused even to acknowledge the needs of others, Salvadorans and Guatemalans, for example").

92. See *House Judiciary Committee Approves Haitian Relief Bill*, 69 INTERPRETER RELEASES 215, 216-17 (1992) (noting concern shown by some members of the House Judiciary Committee in debates on the proposed Haitian Refugee Protection Act of 1992); Meissner, *Reflections on the Refugee Act of 1980*, *supra* note 82, at 59 (stating that the humanitarian response of resettlement tends to stimulate increases in the refugee flow); *New Policy Helps Chinese Persecuted Under Family Policies*, 71 INTERPRETER RELEASES, 1027, 1082 (Aug. 8, 1994) (noting the impact upon Chinese nationals of U.S. policies concerning the PRC family planning practices).

93. *Scores of Cubans, in Flight, Perish in the Florida Straits*, N.Y. TIMES, Aug. 24, 1994, at A1; *Flight From Cuba: the Overview*, N.Y. TIMES, Aug. 19, 1994, at A1.

towards Cuban refugee applicants is "demagnetization," or the dissuading of attempts to enter the United States.⁹⁴

Seventh, the diversified approach weakens the basic structure of refugee, asylum, withholding of deportation, and temporary protected status in the United States. In most cases, the relief provided by the diversified programs could also have been achieved under the basic structure.⁹⁵ If the diversified programs are enacted and implemented where the basic structure would suffice, eventually the basic structure, which operates or should operate on a neutral basis, will be used less often. Nonuse, coupled with the administrative and judicial tendency to narrow the definition of refugee,⁹⁶ will cause the basic structure to become less and

94. *Flight From Cuba: the Overview*, N.Y. TIMES, Aug. 21, 1994, at A1 (stating that "By supplanting the visions of Miami with those of rough tents and cots at an American base at Guantanamo Bay, the Administration hopes to keep Cubans from deciding that the rewards of flight are worth the great risks. . . . [Mr. Clinton] has learned the virtue of 'demagnetizing' the United States").

95. For example, the interim regulation concerning asylum requests based upon coerced family planning practices, 55 Fed. Reg. 2803 (1990) was intended to correct the BIA's determination in *Matter of Chang* that the PRC's enforcement of family planning practices such as forced abortion and sterilization does not constitute persecution on the basis of political opinion, unless it is applied with discriminatory or persecutory motives. *New Rules on Aliens Fleeing Forced Abortions or Sterilization*, 67 INTERPRETER RELEASES 117, 117 (1990). Very good arguments can be made, however, that those practices do constitute persecution on the basis of political opinion. See *Asylum Requests Based Upon Coercive Family Planning Practices*, INS Gen. Couns. Mem. (November 7, 1991), reprinted in 69 INTERPRETER RELEASES 311 (1992) (interpreting that resistance to the PRC's population control policy constitutes persecution on account of imputed political opinion); *Guo-Chun Di*, 842 F. Supp. at 874 (holding that "an individual's expression of his or her views in opposition to a country's coercive population control measures may constitute a 'political opinion'" for purposes of INA § 101(a)(42)(A)).

96. Recent decisions of the United States Supreme Court and the BIA show a tendency to apply the standards for asylum and for withholding of deportation in a very narrow manner. In *INS v. Elias-Zacarias*, ___ U.S. ___, 112 S. Ct. 812, 816 (1992) the Supreme Court found that aliens who feared persecution by the guerrillas in El Salvador because of the aliens' refusal to join the guerrillas had not demonstrated that they would be persecuted because of their political opinion.

The BIA has also tended toward narrow definitions of the phrases "persecution" and "on the basis of political opinion" for purposes of asylum and withholding claims. For example, in *Matter of Maldonado-Cruz*, the Board held that a government has an internationally-recognized right to protect itself and, therefore, a legitimate right to investigate and detain individuals suspected of aiding or belonging to such an organization. Interim Decision No. 3041 (BIA 1988), *rev'd Maldonado-Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989). Such investigation does not constitute persecution on the basis of political opinion. *Id.* at 511-17; *Matter of R*, Interim Decision No. 3195

less functional. The United States should strengthen the basic structure, rather than weaken it through the addition of particularized, temporary programs.

CONCLUSION

The current diversified approach to protection in the United States is beneficial because it expands the protection given to persons seeking safety and provides appropriate remedies for specific needs. In particular, the addition of temporary protected status to the framework of asylum, refugee status, and withholding of deportation fills a void in the protection laws of the United States. These four programs provide a system that should be, if used as intended, reliable and relatively predictable.

We should be very cautious, however, in allowing diversification to extend to the point of singling out specific nationalities or groups for individualized measures of relief, such as the easing of the refugee standards for the mainland Chinese and for former Soviets under the Lautenberg Amendment, or for denial of access, such as the interdiction of and refusal to consider asylum claims from Haitians on the high seas. Such particularized programs are very susceptible to the harmful intrusion of foreign policy considerations, to the ruin of neutral adjudications, and create an unpredictable and unwieldy protection scheme. We should limit particularized programs of protection to those few instances where

(BIA 1992), *remanded sub nom.* *Rana v. Moschorak*, No. CV 93-0274 (C.D. Cal. July 15, 1993). In the same decision, the Board held that a guerrilla organization's mistreatment of a person who deserts from it, even one who was dragooned into service, is not persecution, but rather is control and discipline of its members. *Id.* *But see* *Matter of Izatula*, Interim Decision No. 3127 (BIA 1990); *Dwomoh v. Sava*, 696 F. Supp. 970, 979 (S.D.N.Y. 1988) (each holding that the general rule that prosecution for an attempt to overthrow a lawfully-constituted government does not constitute persecution is inapplicable in countries where a coup is the only way to bring about political change). *See also* Carolyn Patty Blum, *License to Kill: Asylum Law and the Principle of Legitimate Governmental Authority to "Investigate its Enemies"*, 28 WILLAMETTE L. REV. 719 (1992).

The Board has also rigorously scrutinized asylum and withholding claims for evidence that mistreatment of the claimant was because of his race, religion, nationality, political opinion, or membership in a particular social group. For example, in *Matter of T*, Interim Decision 3187 (BIA 1992), the Board found that an opposition organization mistreated the applicant simply to help satisfy its need for supplies and manpower, rather than on account of one of the five enumerated grounds. The Board appears to continue this rigorous scrutiny despite its holding that an asylum applicant need not establish the exact motivation of a persecutor where different grounds for actions are possible. *Matter of Fuentes*, 19 I & N Dec. 658, 662 (BIA 1988).

the basic structure of refugee status, asylum, withholding of deportation, and TPS cannot provide adequate relief.