

The Role of the Judiciary in Alien Admissions

by Mark Gibney*

I. INTRODUCTION

By now, the proposition that courts help to make public policy comes as no surprise to lawyers and political scientists.¹ One of the landmark decisions by the Supreme Court, *Brown v. Board of Education*,² made this clear thirty years ago. The proper extent of judicial policymaking is still debated, for example, the propriety of Judge Garrity's role in desegregating the Boston school system,³ or Judge Johnson's active voice with regard to the administration of the Alabama prison system.⁴ Nevertheless, the proposition that we have a system of shared powers in which the judiciary is an active partner is commonly accepted.

More noteworthy, then, are situations in which the courts do not play an active role in making policy. This article examines such a phenomenon, focusing on the role courts have played in immigration law, particularly alien admissions. The first section of this article looks at the courts' deference in the area of normal flow, or what might also be termed non-refugee, alien admissions. This is "immigration" in the widest sense. Since 1965, the United States has followed this avenue of admissions to implement a policy based largely on reuniting families.⁵ The second section of the article looks at refugee admissions.⁶ In both areas the courts have deferred to the political branches, particularly in non-

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1. See generally D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); *SUPREME COURT ACTIVISM AND RESTRAINT* (S. Halpern & C. Lamb ed. 1982).

2. 347 U.S. 483 (1954).

3. See generally J. ROSS & W. BERG, *I RESPECTFULLY DISAGREE WITH THE JUDGE'S ORDER: THE BOSTON SCHOOL DESEGREGATION CONTROVERSY* (1981).

4. See A. NEIER, *ONLY JUDGMENT*, chap. 11 (1982).

5. Immigration and Naturalization Act [hereinafter cited as INA] § 203(a), 8 U.S.C. § 1153(a) (1980). Approximately ninety-four percent of immigrants admitted to the United States have some kind of family connection. Immigration and Naturalization Service, Dept. of Justice, 1981 Statistical Yearbook of the Immigration and Naturalization Service Table 4, at 7.

6. Most nations accept the definition of "refugee" in the 1951 Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150. There, a refugee is defined as one who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to avail himself of the protection of that country . . ." In 1968, the United States became a signatory to the U.N. Protocol on Refugees. In 1980, U.S. law was amended to conform to the U.N. definition. Refugee Act of 1980 § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1980).

refugee alien admissions. This article examines the stated rationales for this deference, and then questions whether continued deference is warranted under the depoliticized alien admission system the United States has adopted. Special attention is given to the proposed provisions on judicial review of asylum claims in the Simpson/Mazzoli bill,⁷ Congress' latest attempt to tackle immigration reform. Apart from being a rare instance of in-depth Congressional examination of alien admission matters, Simpson/Mazzoli is of interest because of its resistance to a more active judicial role in this area.

Although the law of alien admissions is vital in its own right, it has larger implications for the role of the judiciary. Political and legal analysts should begin to frame a more comprehensive theory of what role the judicial branch might, or should, play in the growing area of domestic public policy problems that have international implications.⁸ This article questions why the courts readily remove themselves from policy areas that cut across the international and domestic spheres.

II. NON-REFUGEE ALIEN QUESTIONS

Decisions regarding foreign relations seem to severely test the premise that the federal government is made up of shared powers and a system of checks and balances.⁹ Robert Johansen, one of the few political scientists to treat this subject, has written:

Too many interests within the United States Executive branch, Congress and the judicial branch are all on the same (national) side of the global issues. Instead of the threefold separation of powers extant on domestic questions, there is a threefold concentration of mutually reinforcing powers on global issues.¹⁰

Johansen's remarks ring true, at least for the judiciary. Judicial deference, particularly noticeable in the area of alien admissions, has left the political branches with free rein.¹¹ Whether a more active judiciary would have helped to prevent our xenophobic past¹² is an academic, though interesting, proposition.

7. S. 529, 98th Cong., 1st Sess. (passed in the Senate on May 18, 1983); H.R. 1510, 98th Cong. 1st Sess. (passed in the House on June 20, 1984). This legislation eventually died in conference committee.

8. The leading work in this area is L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972), which supports the status quo of judicial deference.

9. See *The Federalist* No. 51 (J. Madison); U.S. CONST. ARTS. I, II, III.

10. R. JOHANSEN, *THE NATIONAL INTEREST AND THE HUMAN INTEREST* 381 (1980). See also A. MILLER, *DEMOCRATIC DICTATORSHIP* (1981).

11. One interesting piece of scholarship in this area is Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1952). Hart not only argues that courts should exercise more power in the immigration field, but also that courts already exercise more discretion than they give themselves credit for.

12. Xenophobic is an appropriate term considering the tradition of excluding Asians from the United States, and the long-standing bias in favor of Northern Europeans under the national-origins

Peter Schuck has suggested that because Congress essentially shaped the legal dimensions of our national community, the end product displayed narrow parochial values.¹³ Implicit in Schuck's argument is the idea that judicial involvement might have brought about different results in our immigration system.

A. *Judicial Deference*

By the late nineteenth century judicial deference in alien admissions matters was established. In the 1889 *Chinese Exclusion Case*,¹⁴ the Supreme Court refused to overturn a federal statute which excluded Chinese laborers from this country, despite the fact their exclusion was in direct contravention of the Burlingame Treaty of 1868 and the supplemental treaty of 1880. The Supreme Court relied on the rationale that a nation has an absolute right to control entry into its territory. This deference to the political branches continued in the 1893 case of *Fong Yue Ting v. United States*,¹⁵ where Congress and the Court went a step farther and approved legislation requiring the removal of Chinese resident aliens from this country. The question in *Fong* involved a statute¹⁶ that attempted to deport lawfully admitted Chinese aliens who had not obtained a certificate of residence bearing the signature of a credible white witness within one year after the act's passage. The Court upheld the act and set forth the judiciary's role this way:

The question whether, and upon what conditions these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.¹⁷

Nearly a century later the Court, in *Fiallo v. Bell*, was faced with the question of the validity of Congress' definition of a parent-child relationship, for immigration purposes.¹⁸ Under the Congressional standard, illegitimate children enjoyed

quota system from 1921 to 1965. For a good discussion of past immigration practices, see Fuchs & Forbes, *Immigration and U.S. History — The Evolution of the Open Society*, SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 1981 [hereinafter cited as SELECT COMMISSION]. The landmark work in this area is J. HIGHAM, *STRANGERS IN THE LAND* (1955).

13. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 14 (1984).

14. 130 U.S. 581 (1889).

15. 149 U.S. 698 (1893).

16. Act of May 5, 1892. "An act to prohibit the coming of Chinese persons to the United States."

17. *Id.* at 731.

18. *Fiallo v. Bell*, 430 U.S. 787 (1977).

a parent-child relationship with their mothers, but not with their fathers. The Court employed language nearly identical to that in *Fong* to describe the judicial role.¹⁹

One of the more illustrative statements in this area, Justice Frankfurter's opinion in *Galvan v. Press*,²⁰ shows dissatisfaction with the result, but also disinclination to steer the judiciary in a different direction:

In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress . . . much could be said for the view were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime it might fairly be said also that the ex post facto Clause, even though applicable only to punitive legislation, should be applied to deportation . . . But the slate is not clean. As to the extent of the power of Congress under review, there is not merely a page of history, but a whole volume.²¹

The *Galvan* case was decided only one week after the Court in *Brown v. The Board of Education* had wiped the slate clean in another area of the law.²² In the area of alien admissions, however, the slate is apparently still cluttered with the residue of earlier cases. Examination is needed to see whether this clutter is still necessary.

B. *Explaining Judicial Deference*

At the base of judicial deference in alien admissions is the notion that the power to exclude aliens is given to the political branches. This power is nowhere explicitly stated.²³ Professors Martin and Aleinikoff have set forth three possible rationales for this unstated power to exclude.²⁴ First, examining the powers expressly given in the Constitution, the authors mention the following: the

19. *Id.* at 792.

At the outset it is important to underscore the limited scope of judicial review inquiry into immigration legislation. This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.

Id. (citations omitted).

20. 347 U.S. 522 (1954).

21. *Id.* at 530-31 (citations omitted). It should be noted that, notwithstanding the above-quoted language, Justice Frankfurter joined Justice Jackson's powerful dissent in *Shaughnessy v. Mezei*, 345 U.S. 206 (1953). See *infra* text accompanying note 56.

22. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 324.

23. See Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957 (1982).

24. D. MARTIN & T. ALEINIKOFF, *IMMIGRATION AND NATIONALITY* (West publishing forthcoming).

commerce power,²⁵ the naturalization power,²⁶ the war power,²⁷ the migration and importation clause,²⁸ the general welfare clause,²⁹ the "foreign affairs" power,³⁰ and the Tenth Amendment.³¹ Martin and Aleinikoff then turn to a possible extraconstitutional rationale such as that used in *United States v. Curtiss-Wright Export*.³² Finally, no doubt unsatisfied by these rationales,³³ the authors apply a rationale for exclusion based on the notion of national self-preservation and self-definition.³⁴ In short, courts have a number of alternative propositions from which they may deduce that the political branches of the federal government have the power to exclude aliens, although it is not clear whether those propositions are well-founded. We are thus faced with a situation in which the power of the political branches to exclude aliens is perhaps suspect but which has nevertheless prompted an extra measure of judicial deference.³⁵

Analysis of the problem is much more difficult because the courts themselves do not fully explain which rationale has led to their deference. Instead, the usual pattern is to employ boilerplate language found in cases decided over the past century.³⁶ In fact, one might suppose that the lack of a solid foundation for the powers of the political branches in this area explains the courts' failure to provide a more searching analysis.

C. *Focusing on Foreign Affairs as a Rationale for Deference*

In a recent review of immigration law, Peter Schuck has attempted to explain

25. *Id.* at 41.

26. *Id.* at 43.

27. *Id.* at 44.

28. *Id.*

29. *Id.* at 47.

30. *Id.* at 48.

31. *Id.* at 53.

32. *U.S. v. Curtiss-Wright Export*, 299 U.S. 304, 315 (1936). "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." *Id.* The Court reached this conclusion by arguing that before separation from Great Britain, the states in this country did not possess powers in the international arena. This power was held exclusively under the crown and it passed directly to the national government after independence. *Id.*

33. D. MARTIN & T. ALEINIKOFF, *IMMIGRATION AND NATIONALITY* (West Publishing forthcoming) at 45.

34. *Id.* at 61. Michael Walzer writes: "the right to choose an admissions policy is . . . not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. What is at stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination." M. WALZER, *SPHERES OF JUSTICE* 61 (1983).

35. For a criticism of judicial deference in this area, see Note, *Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1315 (1983) ("[N]o necessary connection exists between the conclusion that the power to exclude aliens is an inherent attribute of sovereignty and the further conclusion that both the judicial branch and the protective provisions of the Constitution are impotent in the exclusion setting.").

36. See *Fiallo*, 430 U.S. at 792.

judicial deference to the political branches in immigration matters.³⁷ Surprisingly, Schuck dismisses foreign policy and national security as possible rationales for judicial deference.³⁸ Instead, he argues that judicial deference is better explained by the idea that immigration matters represent basic questions of national unity and concern.³⁹ To ignore the Court's fear of interfering in foreign policy matters, however, is to overlook the most plausible explanation of judicial deference in the area of alien admissions. For example, in *Harisiades v. Shaughnessy*,⁴⁰ a case upholding the deportation of several long-term U.S. resident aliens who had been Communist Party members decades before the deportation action, the Supreme Court observed:

[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.⁴¹

In *Fiallo v. Bell*,⁴² the petitioners attempted to distinguish the 1950s cases involving national security⁴³ from the case at hand involving classifications of illegitimate children. The Court rejected this distinction,⁴⁴ stating:

We find no indication in our prior cases that the scope of judicial review is a function of the nature of the policy choice at issue. To the contrary, since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the judiciary.⁴⁵

Justice Brennan's majority opinion, in *Baker v. Carr*,⁴⁶ discussed the judiciary's role in the field of foreign relations:

There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution

37. Schuck, *supra* note 13, at 14-18.

38. *Id.* at 17.

39. *Id.*

40. 342 U.S. 580 (1952).

41. *Id.* at 588-89.

42. 430 U.S. 787 (1977).

43. In addition to *Harisiades*, see *Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Shaughnessy v. Mezei*, 345 U.S. 206 (1953).

44. It is noteworthy that Schuck uses *Fiallo* to support his argument that foreign relations considerations do not explain judicial deference. Schuck, *supra* note 13, at 17 n.84.

45. *Fiallo*, 430 U.S. at 796 (citations omitted).

46. 369 U.S. 186 (1961).

of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislative; but many such questions uniquely demand single-voiced statements of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, or its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.⁴⁷

D. Critique of Judicial Deference

1. "Political" Alien Admission Matters

There is a compelling logic to the petitioners' argument in *Fiallo* that only a distinct group of alien issues involves foreign relations questions. The *Chinese Exclusion Case*⁴⁸ is perhaps the most obvious example of matters of foreign relations permeating the entire political and historical setting in which the case was decided. In fact, the Court itself recounted at length the negotiations between China and the United States on the matter of admitting Chinese to the United States.⁴⁹

These deeply embedded foreign relations concerns were also present in some of the Court's most noteworthy cases of the 1950's. For example, in *Harisiades*, Justice Jackson pointed to the political drama that served as background:

There is no denying that as world convulsions have driven us towards a closed society the expulsion power has been exercised with increasing severity, manifest in multiplication of grounds for deportation, in expanding the subject classes from illegal entrants, and in greatly lengthening the period of residence after which one may be expelled.⁵⁰

In a rather ominous tone Justice Jackson deals with some of these political considerations:

Under the conditions which produced this Act, can we declare that congressional alarm about a coalition of Communist power without and Communist conspiracy within the United States is either a fantasy or a pretense? This Act was approved by President Roosevelt June 28, 1940, when a world war was threatening to involve us, as

47. *Id.* at 211-12 (citations omitted).

48. 130 U.S. 581 (1889).

49. *Id.* at 590-601.

50. 342 U.S. at 588.

soon it did. Communists in the United States were exerting every effort to defeat and delay our preparations. Certainly no responsible American would say that there were then or are now no possible grounds on which Congress might believe that Communism in our midst are inimical to our society.⁵¹

Two other landmark decisions of the McCarthy period, *Knauff*⁵² and *Mezei*,⁵³ have obvious foreign relations implications. In *Knauff*, the petitioner, a European married to a naturalized U.S. citizen, was seeking entry into the United States for the first time. The Court addressed the question whether the Attorney General could exclude Knauff without a hearing, on the ground that her admission would be prejudicial to the United States. The Court, finding that the Attorney General's actions were legal, concluded: "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."⁵⁴ The Court's harsh decision should be viewed within the framework of the "national emergency"⁵⁵ that existed when these procedures were adopted.

In *Mezei*, a resident alien who had lived in the United States for twenty-five years, left the United States for nineteen months to care for his ailing mother. When he attempted to come back to the United States he was denied entrance without a hearing. As in *Knauff*, the Court in *Mezei* took some pains to place the case within the context of the Cold War, noting, for example, that Mezei's trip took him behind the "Iron Curtain."⁵⁶

David Martin has recently argued that immigration matters have political consequences for our international relations which courts are ill-equipped to consider.⁵⁷ This position is supported by two cases that arose out of the Iranian hostage crisis.⁵⁸ The first, *Malek-Maraban v. Immigration and Naturalization Service*,⁵⁹ involved a federal regulation excluding Iranians from certain voluntary departure provisions. The second, *Narenji v. Civiletti*,⁶⁰ dealt with the validity of singling out Iranian students in the United States for disparate registration requirements.

There should be little doubt that both *Narenji* and *Malek*, as well as cases like

51. *Id.* at 590.

52. 338 U.S. 537 (1950).

53. 345 U.S. 206 (1953).

54. *Knauff*, 338 U.S. at 544 (quoting *Nishimura Ekie v. United States*, 142 U.S. 651 (1891); *Ludecke v. Watkins*, 335 U.S. 160 (1948)).

55. *Knauff*, 338 U.S. at 546.

56. *Mezei*, 345 U.S. 206, 214 (1953).

57. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 211 (1983).

58. *Id.* at 211 n.169.

59. 653 F.2d 113 (4th Cir. 1981).

60. 617 F.2d 745 (D.C. Cir. 1980), *cert. denied*, 446 U.S. 957 (1980).

Mezei, *Harisiades*, *Knauff*, and the *Chinese Exclusion Case*, involve matters which might have some bearing on issues that could be loosely termed foreign relations. At times, immigration matters have profoundly influenced U.S. relations with other countries. For example, relations between Japan and the United States were severely strained after the exclusion of Japanese nationals under the "Gentleman's Agreement" of 1907.⁶¹ Using such an example, however, to support the general proposition that all alien admission questions are inextricably bound up with foreign relations is unwarranted.⁶²

The possible foreign relations connection in cases like *Fiallo* is difficult to discern.⁶³ Another puzzling example of judicial deference occurred in *Matthews v. Diaz*.⁶⁴ In *Diaz*, the Court upheld a Medicare statute which differentiated between resident aliens who had lived in this country for more than five years and those who had not.⁶⁵ Oddly enough, in a companion case to *Diaz*, *Hampton v. Mow Sun Wong*,⁶⁶ the Court explicitly rejected a foreign relations argument, albeit in a different context. In *Mow Sun Wong* the Court decided whether the INS could exclude aliens from Civil Service jobs absent express congressional or executive action to that effect. In this case, the Civil Service Commissioner had promulgated regulations in the belief that the President might use different treatment of various alien groups as a bargaining tool in foreign negotiations. In an uncharacteristic move the Supreme Court questioned the utility of such a rule promulgated by the Commissioner who had no apparent foreign relations authority. The Court struck down this regulation, pointing out the severe impact such a regulation would have on an already disadvantaged class.⁶⁷

2. The Depoliticization of Alien Admissions

A better result in many of these cases would be a frank admission by the courts that the political nature of alien admissions has largely disappeared. The slate has in fact been cleaned, not by the courts but by the political branches. Looking

61. See R. STORRY, JAPAN AND THE DECLINE OF THE WEST IN ASIA 1894-1943 128 (1979).

62. In the recent case of *Regan v. Wald*, 282 L.Ed.2d 171 (1984), the Court considered the constitutionality of certain travel restrictions to Cuba. Justice Rehnquist employed the familiar language of judicial deference to the political branches in matters of foreign affairs. Significantly, and perhaps unintentionally, Justice Rehnquist also displayed an excellent grasp of foreign policy issues in his opinion.

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

64. 426 U.S. 67 (1976). "Since decision in these matters may implicate our relations with foreign powers." *Id.* at 81.

65. This statutory requirement had the bizarre effect of limiting participation in this program to those who were aliens by choice. Rosberg, *supra* note 22, at 285.

66. 426 U.S. 88 (1976).

67. *Id.* at 102. It should be noted that within a few months of the Court's decision President Ford issued an executive order barring aliens from employment in the civil service except "when necessary to promote the efficiency of the service in specific cases or for temporary appointments." Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (1976).

at the entire field of alien admissions from the late nineteenth century until the present, the change is easily discerned. Until 1965, alien admissions were admittedly saturated with political considerations. The Immigration Acts of 1921,⁶⁸ 1924,⁶⁹ and 1952⁷⁰ all sought to exclude certain races of people who were deemed undesirable by the political community of the United States. These were all political decisions, made by political actors, for decidedly political reasons.⁷¹ Any court might very well hesitate to jump into this political thicket.

Justice Frankfurter's concurring opinion in *Harisiades* exemplifies the kind of logic courts employ:

Though as a matter of political outlook and economic need this country has traditionally welcomed aliens to come to its shores, it has done so exclusively as a matter of political outlook and national self-interest. This policy has been a political policy, belonging to the political branches of Government, wholly outside the concern and the competence of the judiciary. Accordingly, when this policy changed and the political and law-making branch of this Government, the Congress, decided to restrict the right of immigration about seventy years ago, this Court thereupon and ever since has recognized that the determination of a selective and exclusionary immigration policy was for the Congress and not for the judiciary.⁷²

To paraphrase Justice Frankfurter, maintaining open borders and restricting immigration are both political decisions. It would follow from this logic that if Congress passed a law stating that immigration was no longer a political area, which is what it has implicitly done, the Court could argue that this too was a political statement requiring a "hands off" approach.

Beginning in 1965, with the abandonment of the national origins quota system,⁷³ Congress did much to depoliticize the entire area of alien admissions.⁷⁴ Although the new seventh preference (for refugees) in that Act⁷⁵ limited its scope to individuals who were fleeing from either Communist regimes or countries of the Middle East, the Act is better known for instituting a procedure

68. Immigration Restriction Act, ch. 8, 42 Stat. 5 (1921).

69. World War Veterans' Act, ch. 320, 43 Stat. 1068 (1924).

70. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (amended by Immigration Act of 1965). Pub. L. No. 89-236, 79 Stat. 911 (1965).

71. For a good account of these acts, see Fuchs & Forbes, *supra* note 12. For an insightful discussion of political considerations in U.S. refugee policy, see H. MULLALY, UNITED STATES REFUGEE POLICY 1789-1956 (1960). Mullaly gives a particularly good account of U.S. internal security concerns in the 1953 Refugee Act.

72. *Harisiades*, 342 U.S. at 596.

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

74. See A. SCHWARTZ, THE OPEN SOCIETY (1968) (describing President Kennedy's desire for an immigration system far removed from the political system of the past).

75. 8 U.S.C. § 1153(a)(7) (1976) *repealed by* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (to be codified in scattered sections of 22 U.S.C. 8).

whereby people of all nationalities would be accorded the same treatment in gaining admission into the United States.⁷⁶

Under the 1965 Act's policy of equal treatment, political considerations, in general, should be irrelevant. The government's argument in the 1976 case of *Mow Sun Wong*, suggesting the executive may make political decisions to treat certain nationals more favorably than others, is directly contrary to the law in effect since 1965. This is not to say that political considerations will never play a part in alien admissions. *Narenji* and *Malek* point to the contrary. However, *Narenji* and *Malek* should be recognized as exceptions.⁷⁷ Of course, it could be argued that Congress has the power to change the system once again. Perhaps U.S. citizens and their representatives will want to exclude Chinese nationals again,⁷⁸ or perhaps they will feel uncomfortable that the majority of aliens admitted to the United States are not caucasian.⁷⁹ Nevertheless, until alien admission decisions become political decisions once again, courts should not continue to act on the false premise that nothing has changed since the nineteenth century. In short, the political branches have signalled the judiciary that "politics as usual" was to end in 1965, but for some unexplained reasons the courts have generally maintained a pre-1965 level of review and analysis.

This is not to argue that all political factors have been removed from non-refugee alien admissions. The exclusion and deportation provisions⁸⁰ may have traces of political factors, particularly in the "subversives" category.⁸¹ However, such provisions are not "political" in the same sense the past quota system was. Present-day exclusions do not single out any particular country the way the

76. The one exception is that colonies are treated differently, with an allotment of 600 visas. INA § 202(e), 8 U.S.C. § 1152(e) (1976).

77. On a related theme, the court in *Narenji* stated, "[t]his court is not in a position to say what effect the required reporting by several thousand Iranian students who may be in this country illegally, will have on the attitude and conduct of the Iranian government." *Narenji*, 617 F.2d at 748. Few members of the political branches, however, would possess such knowledge. It is less important that the courts become experts on foreign affairs than that they have some knowledge of the international events in question, and are alert that the political branches do not overstep constitutional or statutory bounds.

78. It should be pointed out that Congress' ability to systematically exclude nationals of another country is in some doubt. Rosberg argues that such a law could not be upheld in light of the interests that U.S. citizens have in seeing that their relatives are eligible for admission. Rosberg, *supra* note 22, at 327. Henkin does not take a definite position, but questions who would have standing to challenge such a law. HENKIN, *supra* note 8, at 258.

79. See SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, FINAL REPORT AND RECOMMENDATIONS 96 (1981). The six countries currently sending the largest numbers of legal aliens to the United States are China and Taiwan, Korea, Cuba, the Philippines, and Mexico.

80. INA § 212(a)(1-33), 8 U.S.C. § 1182(a)(1-33) (1976); INA § 241(a)(1-18), 8 U.S.C. § 1251(a)(1-18) (1976).

81. INA § 212(a)(28-29), 8 U.S.C. § 1182(a)(28-29), excludes individuals who are anarchists or communists or who seek the overthrow of the U.S. government, and INA § 241(a)(6-7), 8 U.S.C. § 1251(a)(6-7), makes anarchists and communists deportable.

pre-1965 system did.⁸² The political branches have cast strong doubt on the political nature of most alien admissions.⁸³

Another reason to question the judiciary's general hesitancy in alien admission matters is that in some instances the Supreme Court has taken an active role, although the Court's own logic would dictate continued deference. One such area of increased activism involves the "re-entry" doctrine.⁸⁴

E. *Judicial Activism in Related Areas*

1. The "Re-entry" Doctrine

The 1933 case of *Volpe v. Smith*⁸⁵ provides an example of the Court's old deferential role in re-entry cases. A resident alien who had lived continuously in the United States for twenty-two years before making a "brief visit"⁸⁶ to Cuba was excluded when he attempted to return to the United States. The Supreme Court agreed with the Immigration and Naturalization Service's determination that this was a re-entry, and it upheld the exclusion of Volpe because he had committed a crime of moral turpitude: counterfeiting U.S. money, nineteen years after he originally came to the United States. It is interesting to note that, because the statute of limitations had passed for deportation, exclusion under the re-entry doctrine was the only way to effect Volpe's removal.

In *Rosenberg v. Fleuti*,⁸⁷ the Court began to modify this stringent standard. In this case, the resident alien had entered the United States in 1952 and had remained in the United States except for one brief sojourn to Mexico that lasted a matter of hours. The question presented was whether this brief visit to Mexico and attempted re-entry into the United States constituted an "entry" for purposes of the statute. The Court maintained that a more meaningful interruption of residence was necessary to meet the standards of the law.⁸⁸

A strongly worded dissenting opinion in *Fleuti* pointed out that precedent, the plain meaning of the statute, and legislative history, all led to the conclusion that

82. Recently, the United States and Cuba reached an agreement under which more than 20,000 Cubans are to enter the United States as normal flow immigrants. Schmidt, *For Cubans Excluded, A Long Way Out — Or In*, N.Y. Times, Dec. 16, 1984, at 2E, col. 3.

83. STAFF REPORT, DEPARTMENTS OF JUSTICE, LABOR AND STATE, U.S. INTERAGENCY TASK FORCE ON IMMIGRATION POLICY 23 (1979) ("[W]ith the possible exception of Mexico, immigration is not normally a crucial issue in our bilateral relations with other countries.").

84. In INA § 101(a)(13), 8 U.S.C. 1101(a)(13) (1976), "entry" is defined as "any coming of an alien into the United States . . . except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended by him or reasonably intended or reasonably to be expected by him." *Id.*

85. 289 U.S. 422 (1933).

86. *Id.* at 423.

87. 374 U.S. 449 (1963).

88. *Id.* at 460-62.

even such an innocuous trip and attempted return was an "entry." The dissent also pointed out that even the respondent himself did not question whether the return was an "entry."⁸⁹

The Court has not stopped here. Last term, in the 1983 case of *Landon v. Plasencia*,⁹⁰ the Supreme Court expanded the re-entry exception. Plasencia was a resident alien who had entered the United States in 1970. In 1975, she traveled to Mexico for several days and upon her return to the United States she was arrested attempting to smuggle illegal aliens. Although the Court stated that the proper action was an exclusion and not a deportation hearing,⁹¹ the Court introduced a new concept. By virtue of the respondent's previous residence in this country, the Court decided, she should be accorded certain due process rights. The case was remanded but the message to the lower courts seems clear: a narrower reading of "entry" is required for persons with past ties to this country.

As in all other alien cases, the Court in *Fleuti* and *Plasencia* employed the boilerplate language of judicial deference.⁹² However, in neither case did the Court play a passive role with respect to congressional intent. The rationale for the increased judicial role here is that a resident alien should be provided more due process rights than an alien seeking initial entry. Unfortunately, these cases fail to explain why the reasons for judicial deference in the initial entry cases do not compel judicial deference here. One might imagine that, to be consistent, the Court could ignore due process considerations and instead focus on the foreign relations concerns and the need to speak with a single national voice in re-entry cases. Obviously, the Court is no longer willing to take this approach, nor should it. The end result is deference and one set of criteria for some "entries," but much less deference and the application of other criteria for other "entries."⁹³

2. Deportation

Another area of immigration law that is at times difficult to reconcile with the principle of judicial deference is the area of deportation. Deportation can be divided into two separate areas. As a procedural matter, aliens facing deportation have been afforded greater due process rights than aliens facing exclusion. The *Japanese Immigrant Case*⁹⁴ established a standard of due process in deporta-

89. *Id.* at 464 (Clark, J., dissenting).

90. 103 S.Ct. 321 (1982).

91. Since the proper action was an exclusion, section 101(a)(13) applied. *Id.* at 326-27.

92. "Control over matters of immigration is a sovereign prerogative, largely within the control of the executive and legislature." *Plasencia*, 103 S.Ct. at 330. "Congress unquestionably has the power to exclude all classes of undesirable aliens from this country, and the courts are charged with enforcing such exclusion when Congress has directed it." *Fleuti*, 374 U.S. at 461.

93. Compare Martin, *supra* note 57, at 211 (arguing foreign relations concerns are so intertwined in immigration matters that courts should stay out). The author's point is that Martin espouses the idea that foreign relations questions dominate, but he conveniently ignores this argument when he frames his concentric circle theory of due process.

94. 189 U.S. 86 (1903).

tion cases. The Court's opinion again noted the absolute right of the political branches to control the admission of aliens. The Court also maintained, however, that an alien who has entered the United States, and become a part of its jurisdiction and population, could not be deported without the right to be heard, even if the initial entry was illegal.⁹⁵ This principle has been steadily expanded, often by the courts, over the course of this century.⁹⁶

Although the judiciary has accorded the political branches more deference in matters of substance, it has not remained silent. For example, in the area of deporting "subversives," the judiciary and the political branches have held a long discourse. In *Kessler v. Strecker*,⁹⁷ the Court held that an alien who had become a member of the Communist Party after entering the United States, but who had left the Party prior to arrest, was not deportable under the 1918 Act.⁹⁸ In 1940, Congress responded to *Kessler* by providing for deportation of any alien who had been a member of a subversive group "at any time" after entering the United States.⁹⁹ The Court upheld this Act in *Harisiades*.¹⁰⁰ Congress extended this policy on subversives in the Subversive Activities Control Act in 1950.¹⁰¹ This Act listed the Communist Party by name and made membership in or affiliation with the Party a basis for deportation.¹⁰² The Court responded to the harshness of this standard by requiring a "meaningful association" with the Party.¹⁰³ In short, there has been give and take between the branches of government in the deportation area, an exchange too often lacking in other areas of alien admissions. Moreover, the Court has played an important part in the development of deportation policy.

Another example of Supreme Court activism in deportation matters was exhibited in *Woodby v. Immigration and Naturalization Service*.¹⁰⁴ *Woodby* was a consolidation of two deportation cases. In both instances the burden of proof used in the administrative hearings was either not established, or it was "reasonable, substantial and probative evidence."¹⁰⁵ The Court reviewed the legislative history and concluded that the "reasonable, substantial and probative evidence"

95. The Court's concern for due process in the *Japanese Immigration Case* has an unusual aspect, since the hearing provided was conducted in English, and was consequently incomprehensible to the plaintiff, who did not speak the language.

96. See generally 1A C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 5.5-5.13 (1982).

97. 307 U.S. 22 (1939). On the question of the deportation of subversives, see T. ALEINIKOFF & D. MARTIN, *supra* note 24, at ch. 6.

98. *Id.* at 30.

99. Alien Registration Act, ch. 439, 54 Stat. 670 (1940).

100. 342 U.S. at 596.

101. Subversive Activities Control Act, ch. 1024, 64 Stat. 987 (1950).

102. *Id.* at ch. 1006, 1008.

103. See *Rowoldt v. Perfetto*, 355 U.S. 115, 120 (1957); *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 476-77 (1963).

104. 385 U.S. 276 (1966).

105. *Id.* at 279, 281.

language in the statute referred to the scope of judicial review, not the burden to be applied on the administrative level.¹⁰⁶ The Court went on to explain that Congress had not yet addressed the question of the degree of proof required at that level.¹⁰⁷ Finally, with an activism seldom displayed in this general area, the Court noted that questions of the burden of proof in administrative hearings are traditionally left with the judiciary.¹⁰⁸

The judicial branch has also taken an active role in the area of the suspension of deportation. In a *per curiam* opinion,¹⁰⁹ the Supreme Court admonished the circuit courts for substituting their own version of "extreme hardship" for that of the Immigration Judge and the Board of Immigration Appeals:¹¹⁰

The crucial question in this case is what constitutes "extreme hardship." These words are not self-explanatory, and reasonable men could easily differ as to their construction. But the Act commits their definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.¹¹¹

Notwithstanding this reprimand, a number of lower federal courts have continued to engage in close scrutiny of denials of deportation suspension.¹¹² Again, what is noteworthy about these developments of the law is the judiciary's active participation in making some aspects of immigration policy.

F. Summary

An overview of the judiciary's role in non-refugee alien admission matters reveals not only a general deference to the political branches, but also some

106. *Id.* at 282-84.

107. *Id.* at 286.

108. *Id.* at 284.

109. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981).

110. The statutory language reads as follows:

[T]he Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of any alien who applies to the Attorney General for suspension of deportation and — (1) is deportable under any law of the United States except the provisions 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 of 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 residence.

INA § 244(a), 8 U.S.C. § 1254(a) (1976). The activism displayed in this area might be better explained on the basis that claims for suspension of deportation are quite similar, and often made at the same time, as asylum claims.

111. *Wang*, 450 U.S. at 144.

112. See, e.g., *Ravanchio v. Immigration and Naturalization Service*, 658 F.2d 169 (3d Cir. 1981); *Reyes v. Immigration and Naturalization Service*, 673 F.2d 1087 (9th Cir. 1982).

judicial activism. Judicial deference exists primarily in matters of initial entry. The standard argument given for the judiciary's passive attitude is that immigration matters are inextricably intertwined with the making of foreign policy. This premise has been questioned here on the bases that: 1) alien admission policies have changed considerably since 1965 with the abandonment of the national origins quota system, 2) the considerations the Court paid deference to in cases like *Fiallo* were not really "political," nor do they involve any question pertaining to foreign relations, and 3) the courts have taken an active role in other areas of alien admissions.

The new principle that seems to be emerging is that the Court will be more sensitive to the resident alien's past ties with the United States¹¹³ in determining what process is due.¹¹⁴ Such considerations are indeed important. Yet it is difficult to reconcile that principle with the boiler plate language requiring courts to stay out of the entire area of immigration.

What appears to be illogical is that "due process" considerations based on an alien's relationship with the United States do not prompt a greater judicial role in *Fiallo* and *Diaz* situations. The Court could easily assent to whatever "connections" the political branches thought were necessary between the alien and the United States. The reason such a result is possible is that not enough thought has been given to the basic premise of judicial abdication in this area. The lack of foreign policy or foreign relations concerns in many immigration cases is generally disregarded. It is one thing to repeat the expression that the courts should remove themselves from issues of international concern; it is quite another to test this proposition in a searching analysis. In particular, not enough attention has been given to why immigration matters raise rather innocuous policy questions to issues having international implications. Moreover, the reasoning behind the courts' abstinence from any kind of involvement in matters of international concern needs to be seriously developed.

The next section examines the courts' role in the area of refugee relief. This area has also been marked by instances of both judicial deference and judicial activism, although the trend seems to be going in the latter direction.

III. JUDICIAL DEFERENCE IN REFUGEE RELIEF

For most of U.S. history no clear distinction was made between refugee¹¹⁵ and non-refugee situations. Individuals either met the national criteria or they did

113. The alien's future ties with the United States can also be quite important. In *Plyler v. Doe*, 102 S.Ct. 2382 (1982), the Court struck down a Texas statute that excluded children of illegal aliens from public schools. At the base of the Court's opinion was the idea that these uneducated children might grow up to be nonfunctioning members of U.S. society.

114. *Landon v. Plasencia*, 103 S.Ct. 321, 329 (1982).

115. For a good discussion of U.S. refugee, asylum, and non-refoulement practice, and the close interrelationship of each, see Note, *The Right to Asylum Under United States Law*, 80 COLUM. L. REV. 1125 (1980). It should be noted that these terms are sometimes interchangeable, although in this article they are distinguished when necessary.

not, regardless of their needs.¹¹⁶ After World War II, however, there was a perceived need to admit refugees qua refugees. Since that time the United States has pursued a different admission policy solely for refugees, although it has done so in an ad hoc manner. Legislative attempts have often proven to be poorly designed for the exigencies of the day (The Displaced Persons Acts¹¹⁷), or the future (The Refugee Act of 1980¹¹⁸). In addition, refugee policy has been fragmented by repeated use of the Attorney General's parole power,¹¹⁹ to admit large numbers of refugees.¹²⁰ Until recently the one constant in U.S. refugee policy has been the courts' hands-off approach.¹²¹ The rationales employed are similar to those in the non-refugee alien area. The second section of this article focuses on the courts' role in the area of refugee relief. The author points out some changes in the practice of deference, examines whether such changes are needed, and argues for a more active judiciary. Essentially the argument is that the way the courts perform their vital governmental functions in other contexts should be the norm in the area of refugee relief.

A. Detention

One of the most direct challenges to executive authority has been the courts involvement in the mass detention of aliens claiming refugee status in the United States. Prior to 1954, the Immigration and Naturalization Service's policy was to detain all incoming aliens at the point of entry, pending a determination of admissibility.¹²² From 1954 to 1981 the INS reversed this policy and paroled

116. The most extreme example of this happened in 1939, when the U.S. Congress defeated a bill to rescue 20,000 children from Nazi Germany, despite the willingness of U.S. families to sponsor them, on the ground that the children would exceed the German quota. See Fuchs & Forbes, *supra* note 12, at 199.

117. Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009 as amended by Act of June 16, 1950, ch. 262, 64 Stat. 219; Act of June 28, 1951, ch. 167, 65 Stat. 96 (*repealed* 1957). For an account of the ill designed, and arguably racist, admission standards for refugees after World War II, see L. DINNERSTEIN, *AMERICA AND THE SURVIVORS OF THE HOLOCAUST* (1982).

118. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 109 (1980). The reference here is to the fact that only a few months after the signing of this act its provisions were ignored in order to deal with the Mariel freedom flights. See 126 CONG. REC. H4517 (daily ed. June 4, 1980) (statement of Rep. McClory).

119. See generally Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865 (1982).

120. Hungarian Freedom Fighters were admitted in the 1950s under this power, Cubans in the 1960s, 1970s and 1980s (after the Refugee Act of 1980). Vietnamese were paroled into the United States in the mid- and late 1970s. See generally S. REP. NO. 256, 96th Cong., 1st Sess. 1, 5-6, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141, 146.

121. The best examples of this approach are found in § 243(h) cases such as *Lenz v. INS*, 379 F.2d 536 (7th Cir. 1967); *Cheng Kai Fu v. INS*, 386 F.2d 750 (2d Cir. 1967); *Khalil v. INS*, 457 F.2d 1276 (9th Cir. 1972). The old wording of § 243(h) of the Immigration and Naturalization Act of 1952, 8 U.S.C. § 1253(h) was: "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." The new § 243(h) removes this discretion from the Attorney General. See *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981); see also *infra* note 187 and accompanying text.

122. For an overview of INS policy, see *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1981), *aff'd in part on rehearing*, 727 F.2d 957 (11th Cir. 1984) (en banc), *cert. granted*, 105 S.Ct. 563 (1984).

aliens into this country, pending the admissibility determination. Reacting to a sharp upswing in illegal Caribbean migration, however, the INS resorted to a facsimile of its 1954 detention policy in 1981.

The change between pre-1954 and post-1981 detention has not been in INS policy but in the courts' scrutiny of it. One noteworthy example of this new judicial scrutiny occurred in *Orantes-Hernandez v. Smith*.¹²³ This was a class action suit brought by a group of Salvadorans who claimed to be fleeing political persecution, torture, and death in El Salvador. The plaintiffs challenged a number of INS practices, including: 1) using coercive tactics to cause members of the class to accept "voluntary" departure, 2) failing to advise members of the class of their right to apply for political asylum and their right to a hearing prior to deportation, 3) denying counsel by refusing to recognize counsel's authority to revoke voluntary departure agreements and by limiting class members' access to counsel and legal information, and 4) placing detained class members into solitary confinement without first providing a hearing on the propriety of such punishment.¹²⁴

On all but the confinement issue, the court held in favor of the Salvadorans. The court severely criticized INS law enforcement and detention practices with regard to Salvadorans, and it set forth in great detail the manner in which the INS was to operate in the future with this group.¹²⁵

An even stronger incursion into INS autonomy was allowed in *Fernandez-Roque v. Smith*.¹²⁶ *Fernandez-Roque* involved the issue of continued incarceration of excludable aliens where immediate exclusion is not possible.¹²⁷ Cubans who came to the United States as part of the Freedom Flotilla in 1980, but who had been incarcerated since the time of their arrival, challenged the government's action. The array of due process rights the court granted to this group of excludable aliens was wider than that enjoyed by deportable aliens, or even U.S. Citizens challenging revocation of parole after a criminal conviction.¹²⁸

Although not every jurisdiction is willing to go as far as *Fernandez-Roque*,¹²⁹ the discernible trend is moving towards a much stronger judicial role involving detention matters.¹³⁰ One possible explanation for this is the courts' unwilling-

123. 541 F. Supp. 351 (C.D. Cal. 1982).

124. *Id.* at 357.

125. *Id.* at 385-88.

126. 567 F. Supp. 1115 (N.D. Ga. 1983).

127. Approximately 2,700 of the 125,000 Cubans who came to the United States in 1980 have been determined to be excludable. Efforts are now under way to return these individuals to Cuba. See Schmidt, *For Cubans Excluded, A Way Out*, N.Y. Times Dec. 6, 1984 at 2E, col. 3.

128. Schuck, *supra* note 13, at 70-71.

129. See *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1981), *aff'd in part on rehearing*, 727 F.2d 957 (1984), *cert. granted*, 105 S.Ct. 563 (1984). In this case, the 1981 detention policy was severely criticized but then reimposed on different legal grounds. See also *Isktyaq v. Nelson*, No. 82-2288 (E.D.N.Y. filed Oct. 4, 1983).

130. See *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

ness to allow unconstitutional practices to occur within U.S. borders.¹³¹ Unlike the claims of the overseas applicant for asylum or non-refugee admission, the claims of the alien incarcerated in the United States pose an American public policy problem that directly confronts all policymakers in this country, including the judiciary.

B. Foreign Policy Challenges

An even clearer indication of the judiciary's changing role in the area of refugee relief is the fact that certain lower courts have not been intimidated by the need to pass judgment on some aspect of political life in another country. Although this phenomenon appears in recent federal court decisions, sound precedent existed for such judicial determinations of conditions in other countries. For example, the 1964 case of *United States v. Esperdy*¹³² involved a habeas corpus petition brought by a Haitian citizen who had been detained in the United States after a denial of a stay of deportation. The court relied on a series of New York Times articles on political conditions in Haiti to sustain the writ, and overturn the denial of a stay of deportation.¹³³ Similarly, in *Coriolan v. INS*,¹³⁴ the Fifth Circuit held that the claims of two Haitians, whom the INS was seeking to deport to Haiti, had not been adequately evaluated.¹³⁵ The court decided that the INS had not considered additional evidence, to wit, an Amnesty International report documenting widespread persecution in Haiti.¹³⁶ In *United States v. Shaughnessy*,¹³⁷ the Second Circuit took judicial notice of persecutions by the Chinese government,¹³⁸ and overturned an INS denial of a stay of deportation to the People's Republic of China.

Recent asylum cases have gone well beyond these few examples of judicial activism. For example, in *Orantes-Hernandez v. Smith*,¹³⁹ a district court in California admitted evidence concerning conditions in El Salvador. The court decided that it could not evaluate the seriousness of the alleged injury without examining evidence on conditions in El Salvador presented by both plaintiff and defendant.¹⁴⁰ After examining a great deal of testimony, State Department reports, and findings by organizations like Amnesty International, the court in *Orantes-Hernandez* concluded:

131. This policy did not seem to matter in many of the Court's previous cases such as *Mezei* and *Knauff*.

132. 234 F. Supp. 611 (S.D.N.Y. 1964).

133. *Id.* at 616-17.

134. 559 F.2d 993 (5th Cir. 1977).

135. *Id.* at 1003.

136. *But see* *Fluerinor v. INS*, 585 F.2d 129 (5th Cir. 1978) (an Amnesty International report has no bearing on the individual petitioner's claim).

137. 234 F.2d 715 (2d Cir. 1955).

138. *Id.* at 718.

139. 541 F. Supp. 351 (C.D. Cal. 1982).

140. *Id.* at 355 n.4.

In short, the violent conditions in El Salvador are a matter of public record and are corroborated by all available accounts. The Court therefore believes that it can take judicial notice of the following facts without having to "second guess" the Executive Branch's analysis of events in El Salvador, as feared by defendants: (1) El Salvador is currently in the midst of a widespread civil war; (2) the continuing military actions by both government and insurgent forces create a substantial danger of violence to civilians residing in El Salvador; and (3) both government forces and guerrillas have been responsible for political persecution and human rights violations in the form of unexplained disappearances, arbitrary arrests, torture, and murder.¹⁴¹

The judicial activism and the method of inquiry in *Orantes-Hernandez* had been adopted with even greater vigor by a federal district judge in Florida in *Haitian Refugee Center v. Civiletti*.¹⁴² Judge King begins his opinion by simply stating: "This case involves thousands of black Haitian nationals, the brutality of their government, and the prejudice of ours."¹⁴³ The background for this case was the arrival of thousands of "boat people" from Haiti in 1980. The complaint alleged discrimination by the INS against Haitians, involving both their substantive claims to asylum and the procedure by which their claims were heard. After a long and critical review of INS procedures, the court ordered a halt to the expedited "Haitian program"¹⁴⁴ for hearing asylum claims.¹⁴⁵ The court completely rejected the findings of a special State Department team that had reported little oppression and persecution in Haiti.¹⁴⁶ The court did, however, rely on other State Department findings on conditions in Haiti.¹⁴⁷ The personal testimony of Haitians seemed to greatly influence Judge King in arriving at his finding of widespread persecution in Haiti. Judge King's opinion presents page after page of such testimony, which gave not only a moving account of conditions facing these individuals, but also a telling portrayal of Haitian life.¹⁴⁸ Judge

141. *Id.* at 358.

142. 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom.* *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

143. 503 F. Supp. at 450.

144. For an extended discussion of how Judge King perceived the "Haitian Program," see *id.* at 510-32.

145. *Id.* at 532.

146. *Id.* at 482 ("The State Department Report stands out in stark contrast with all other evidence presented on the treatment of returnees.").

147. "Haiti has been accurately described as 'the most oppressive regime in the hemisphere.'" Dx 25 at 10 (quoting Jerry DeSantillana, State Department Country Officer for Haiti); *accord* Dx 74 at Tab E (International Commission of Jurists), *THE REVIEW* 3 (Dec. 1977) ("the most ruthless and oppressive regime in the world"). *Id.* at 475.

148. Judge King's opinion is replete with such testimony. The following is an example:

[My husband] was working at Customs in Port-au-Prince, He kept telling me that they

King's findings of fact went so far as to describe political, economic, and social conditions in Haiti, as well as the regime's motives.¹⁴⁹

Much of Haiti's poverty is a result of Duvalier's [Dictator, or President for Life, François "Baby Doc" Duvalier] efforts to maintain power. Indeed it could be said that Duvalier has made his country weak so that he could be strong. To broadly classify all of the class of plaintiffs as "economic refugees," as has been repeatedly done, is therefore somewhat callous. Their economic situation is a political condition.¹⁵⁰

Judge King's scorn for governmental activities was by no means restricted to the political branches, U.S. or Haitian. The judge also castigated his brothers and sisters on the bench who, he argued, went to great lengths to avoid examining readily available evidence on political and social conditions in Haiti.¹⁵¹

The Fifth Circuit modified the lower court's holding, pointing out that:

The evidence concerning conditions in Haiti was relevant and admissible only for a limited purpose of showing the scope of evidence available to the plaintiffs to support their asylum claims and thus of corroborating the plaintiff's due process contention that the accelerated program [for asylum hearings] made it impossible for them to submit and substantiate their applications. We agree with the government, however, that the district judge exceeded his authority to the extent he implied by his findings a conclusion that the plaintiff's claims of fear of persecution merited the granting of asylum.¹⁵²

were talking to him about politics, that he should join the Ton Tons Macoutes [Haiti's version of a secret police organization]. . . . In '75 at midnight he left work. . . . Night had come and it was time to go to bed. They came and got him, the Ton Tons Macoutes came and took him away. . . . They left with him. They took him on Wednesday night. Thursday at 1 o'clock I went to Fort Dimanche. I went to the police station. . . . They told me they knew of no such person. I knew that if he was not released, he would be killed. So I didn't go anymore. I never saw him. . . . My son [was] in school. He was finishing up. He was complaining while he was in school. He kept complaining that if his father was still alive, his mother would not suffer so much and go through such misery. . . . He was complaining that if his father was there, and that the Ton Tons Macoutes took his father away. They took him. His schoolmates came and told me that they had picked him up at school. . . . I started screaming, saying that they child's father had died. They took my child away from me. The next day three Macoutes came and arrested me. They started knocking on the door. . . . They didn't allow me to speak. They took me and stuck me in a dungeon. They took me before the Chief of the Ton Tons Macoutes. . . . When I got there, he asked me what was wrong with me, what was my problem that I was screaming at the top of my lungs like that. . . . He said okay, and then he would send me home if I would shut my mouth and never wanted to hear anything out of me. . . . Well, if I did not shut my mouth, I would have gone the same way my child went. . . . I could not go selling anymore because I was scared. I did not have a husband or child. I was scared. I stayed there and spent a month. After a month, I saw I could no longer live.

Record at 1219-27, *Haitian Refugee Center*, 503 F. Supp. at 475-76 (testimony of Augusta Germain).

149. *Compare* Cisternas-Estay v. INS, 531 F.2d 155, 157 n.3 (3d Cir. 1976) (court relied on administrative record in order to affirm the overthrow of the Allende regime in Chile).

150. 503 F. Supp. at 509.

151. *Id.* at 462 n.39 (citing *Paul v. INS*, 521 F.2d 194, 199 (5th Cir. 1975)).

152. *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1042 (5th Cir. 1982).

It is unclear what direction lower federal courts will take on alien admission decisions, particularly in the volatile area of refugee relief. The Fifth Circuit's opinion in *Haitian Refugee Center* might prove to be the death knell for increased lower court activism. It is more likely, however, that the Fifth Circuit only felt itself obliged to temper the extreme activism of Judge King's opinion. In addition, it seems likely that courts inclined to activism will accept the Fifth Circuit's agreement that the evidence of conditions in Haiti had some purpose, as a veiled invitation. For example, the court in *Orantes-Hernandez*¹⁵³ used the language of the Fifth Circuit's opinion¹⁵⁴ in accepting similar kinds of testimony by those seeking asylum.¹⁵⁵

C. The Political Branches

Several rationales are given for judicial deference in the area of refugee relief. One is that courts lack the resources to determine the merits of the claims before them. A more telling argument is that courts lack expertise in the field of foreign relations.¹⁵⁶ These arguments presume, however, that federal judges are out-matched in resources and expertise by the political branches.

The expertise question is difficult. The INS, which makes the final determination on admissibility, is a domestic federal agency without any apparent foreign relations authority or expertise. As a result, the INS relies heavily on reports furnished by the State Department.¹⁵⁷ In *Zamora v. INS*,¹⁵⁸ Judge Friendly attacked the practice of admitting State Department reports on the basis that they contained little useful information.¹⁵⁹ By any account, the amount of information to be garnered from the State Department's conclusory statement¹⁶⁰ stands in marked contrast to the information elicited in a case such as *Haitian Refugee*

153. *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982).

154. *Id.* at 355-56 n.4.

155. *Id.* at 356-58.

156. The judiciary has also been criticized for not possessing the requisite expertise in such public policy areas as desegregation, criminal justice, and reapportionment. See generally Lamb, *Judicial Restraints on the Supreme Court*, in S. LAMB & C. HALPERN, *supra* note 1.

157. 8 C.F.R. § 208.7 (1983). But see *Hosseinmardi v. INS*, 405 F.2d 25 (9th Cir. 1968) (defect in State Department report was not fatal because the BIA had reached its decision on the insufficiency of petitioner's evidence and not the State Department report).

158. 534 F.2d 1055 (2d Cir. 1976).

159. *Id.* at 1063.

160. Judge Friendly's opinion quoted the State Department:

[The Department believed] that the Zamora family would be able to live in the Philippines at this time free of restraints other than those imposed on all Philippine citizens. . . . On the basis of the information thus far submitted, [the Department was] unable to conclude that the Zamora family should be exempted from regular immigration procedures on the grounds that they would suffer persecution on account of race, religion, nationality, public opinion, or membership in a particular social group should they return to the Philippines.

534 F.2d at 1057 (insertions in original). See also *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975) (dissenting opinion of Judge Godbold, quoting telegram from the Office of Refugee and Migration Affairs to Immigration Judge).

Center. In fact, the INS staff is frustrated with the inadequate information provided by the State Department.¹⁶¹ In *Hotel & Restaurant Emp. Union v. Smith*,¹⁶² the petitioners argued that the State Department advisory opinion process was defective because those who review such applications lack the necessary expertise on conditions in El Salvador. The court responded, not by defending the expertise of such officials, but by pointing out that such expertise is not necessary in making such determinations.¹⁶³ It is ironic that one rationale for judicial deference in the area of alien admissions is this very argument that courts lack the expertise of the political branches.

The question of resources is also unclear. For example, one commentator has pointed out the severe manpower shortages that exist in the Bureau of Human Rights and Humanitarian Affairs.¹⁶⁴ This might help explain the lack of substance in the State Department reports of which Judge Friendly spoke.

The question that needs to be addressed is how much expertise in foreign relations the judiciary needs in order to play an intelligent role in refugee relief matters. The answer that seems to be emerging is that some judges are willing to look at a great variety of evidence to discern general political and social conditions in a given country. To find widespread violence in El Salvador, for example, based on the fact that 40,000 civilians have died in the civil war in that country, would not take much expertise. What bothers the political branches is the fact that the courts' findings on conditions in other countries sometimes differ from the findings of the political branches.¹⁶⁵ At times, the courts and the State Department have reached different conclusions with regard to general conditions in certain countries.¹⁶⁶ For the most part, however, these conclusions have either come from conflicting evidence in the same general sources on which the State Department relies on or produces itself,¹⁶⁷ or else from sources that many policymakers use, such as the *New York Times* and Amnesty International. In other instances, the basis for the court's conflicting decisions comes from evidence contained in individual testimony.¹⁶⁸

D. Political Interference

State Department reports have been criticized not only for their substantive inadequacies, but also for their bias. The common criticism leveled against them

161. See INS STAFF STUDY, ASYLUM ADJUDICATIONS: AN EVOLVING CONCEPT AND RESPONSIBILITY FOR THE IMMIGRATION AND NATURALIZATION SERVICE, June 1982, reprinted in D. MARTIN & T. ALEINIKOFF, *supra* note 24, ch. 8, at 55.

162. 594 F. Supp. 502 (D.D.C. 1984).

163. *Id.* at 513.

164. Scanlan, *Regulating Refugee Flow*, 56 NOTRE DAME LAW. 618, 628 (1981).

165. *Haitian Refugee Center*, 676 F.2d at 474-510.

166. *Id.*

167. In *Orantes-Hernandez*, 541 F.Supp. at 357, the court stressed that the State Department itself found widespread killings in El Salvador.

168. See, e.g., *Orantes-Hernandez*, 541 F. Supp. at 356-58; *Paul v. INS*, 521 F.2d at 202-03 (Godbold, J., dissenting).

charges that U.S. foreign policy goals overwhelm objective fact finding.¹⁶⁹ The criticism is well-founded. Elliot Abrams gives a frank description of how asylum applications are handled in the State Department:

Each application is reviewed individually by an officer in the Office of Asylum Affairs of HA [Bureau of Human Rights and Humanitarian Affairs] and then is sent to the appropriate country desk officer in the Department. If appropriate, HA may request an opinion from the Office of the Legal Adviser or information from the U.S. Embassy in the applicant's country of nationality, or if appropriate, in a third country. *After agreement is reached* between the asylum officer in HA and the desk officer on the proposed recommendation to INS, the draft advisory opinion and applications file are reviewed by the Director of the Office of Asylum Affairs in HA, and in some cases by the geographic officer in HA or by the Deputy Assistant Secretary for Asylum and Humanitarian Affairs.¹⁷⁰

From this account, foreign policy objectives seem to have an institutionalized bias in the system. The U.S. Select Commission has advocated changing the system to make such country reports the responsibility of the U.S. Coordinator for Refugee Affairs.¹⁷¹ The Simpson/Mazzoli legislation shows a split between the two houses of Congress. Both the House and Senate versions would institute a policy of having specially trained administrative law judges do what Immigration Judges now do.¹⁷² The House version of "special training" would be far-ranging, including detailed knowledge of the 1980 Refugee Act, State Department country reports on human rights conditions, the U.N. handbook on refugee processing, and any other reputable source of "refugee or asylum information."¹⁷³ The Senate version, on the other hand, makes no provision for information other than that sent by the Secretary of State.¹⁷⁴ In short, the House version seeks to allow the new administrative law judges to consider several substantive sources in determining general conditions in other countries. In contrast, the Senate version would not allow the new administrative law judges to go beyond the bounds of the State Department's dictates. In the future we might well find the same kind of discrepancies that exist now in the conclusions of INS judges and federal district and appellate court judges who are using different data bases.

169. See Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REFORM 243, 253-54 (1984).

170. *Refugee Assistance: Hearings on H.R. 3195 Before the Subcomm. on Immigration, Refugees and International Law of the House Judiciary Committee*, 98th Cong., 1st Sess. 55 (1983) (prepared statement of Elliot Abrams, Assistant Secretary of State for Human Rights and Humanitarian Affairs) (emphasis added).

171. U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, *supra* note 79, at xlv.

172. H.R. REP. NO. 115, 98th Cong., 1st Sess. 52 (1983) [hereinafter cited as H.R. REP. 115]; S. REP. NO. 62, 98th Cong., 1st Sess. 36 (1983) [hereinafter cited as S. REP. 62].

173. H.R. REP. 115, *supra* note 172, at 57.

174. § 208(a)(3)(B)(i), S. REP. NO. 62, 98th Cong., 1st Sess. 86 (1983).

E. Depoliticization of Refugee Admissions

In the above discussion of normal flow alien admissions, it was pointed out that the political branches have gone to great lengths to depoliticize the entire field. An even stronger argument could be made that with the passage of the Refugee Act of 1980, the entire area of refugee admissions has become depoliticized as well. For example, the House Committee Report states:

By changing the standard to refugees of "special humanitarian concern" the Committee intends to emphasize that the plight of the refugees themselves, as opposed to national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States.¹⁷⁵

Professor Martin has argued that, notwithstanding the grandiose language in the Committee Reports and the Refugee Act itself, political considerations still pervade refugee concerns.¹⁷⁶ Martin points out that in 1977 a bill was introduced in Congress which would have made all refugees anywhere in the world equally eligible for U.S. resettlement, and yet this bill was soundly defeated.¹⁷⁷ Martin argues that the expressed concern with humanitarian values should be viewed within the context of other language in the report which shows that political concerns were paramount in framing this legislation.¹⁷⁸ The Refugee Act, he concludes, does not mandate choices divorced from foreign policy considerations. He points to the fact that Section 207(b) specifically directs the administration to report to Congress on the expected impact of refugee programs on U.S. foreign policy interests.¹⁷⁹ There is evidence that the State Department has not fully adapted to the new legislation.¹⁸⁰ Yearly admissions statistics also bear this out.¹⁸¹

The problem with Martin's position is that he allows the particulars of the Act to take precedence over the stated general purpose of the Act. Although the legislative history makes reference to criteria that might be viewed as maintaining a quasi-"political" system,¹⁸² the Act taken as a whole shows that the "politi-

175. H.R. REP. NO. 608, 96th Cong., 1st Sess. 13 (1979).

176. Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B. INT'L L. STUD. 91.

177. *Id.* at 98.

178. *Id.* at 105-06.

179. *Id.* at 106.

180. Posner & Kaplan, *Who Should We Let In?*, HUMAN RIGHTS 16, 19 (Summer 1981). Accord Kurzban, *supra* note 119, at 878-881.

181. Although the Refugee Act was meant to expand the scope of refugee assistance beyond communist-noncommunist considerations, the same patterns have remained. For example, in fiscal year 1981, the United States admitted 65,279 refugees from Vietnam, 11,151 from the Soviet Union, 38,194 from Kampuchea, and 19,777 from Laos. In that same year, however, the United States admitted 827 refugees from Hong Kong, 203 from Lebanon, and 243 from Greece. OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, REFUGEE RESETTLEMENT IN THE UNITED STATES 35 (Jan. 31, 1983). See also, Helton, *supra* note 169 at 253-54.

182. H.R. REP. 608, *supra* note 175, at 13:

cal" refugee policies of the past are to be abandoned.¹⁸³ Martin may also be trying to read political considerations into the Act where they do not exist. For example, as noted earlier, Martin emphasizes the fact that the executive branch must report on the foreign policy impact of refugee programs. In the first consultation between the executive branch and the Congress, the complete exchange of information on the foreign policy implications of refugee admissions was contained in this statement: "[t]he acceptance of refugees for resettlement in [sic] United States is of critical importance in furthering U.S. humanitarian as well as political and strategic objectives in the world."¹⁸⁴ Foreign policy should, of course, be considered in some instances. Present policy, however, is dominated by political considerations to the same extent pre-1980 policy was. This state of affairs does not reflect a true reading of the Act. In fact, for practical purposes, the heavy emphasis on foreign policy concerns reads the Refugee Act out of existence.¹⁸⁵

F. *A Democratic Theory of the Courts' Proper Role*

1. The Refugee Act of 1980

Courts should play a number of roles in the area of refugee relief. The most obvious role for the courts is to ensure that the purposes of the Refugee Act are carried out. Thus far a few lower federal courts have used the language in the Refugee Act to whittle away at the executive branch's discretion in implementing the Act.¹⁸⁶ For example, in *McMullen v. INS*,¹⁸⁷ the Ninth Circuit heard the case of a former Irish Republican Army informant threatened with deportation to the Republic of Ireland. The Ninth Circuit found that the new Act legislates the "substantial evidence" test for judicial review of the Attorney General's actions, rather than the less intrusive "abuse of discretion" test.¹⁸⁸ Furthermore, the court

[T]he plight of the refugees, the pattern of human rights violations in the country of origin (including the extent of persecution to which they have been subjected and the severity of the present situation), family ties, historical, cultural or religious ties, the likelihood of finding sanctuary elsewhere, and previous contact with the United States Government, have all been legitimately employed for admission to this country. Further, the United States in the past has responded generously to refugees from countries with which we have been directly involved or with which we have treaty obligations.

183. The Refugee Act is saturated with references to "humanitarian" concerns. Pub. L. 96-212, 94 Stat. 102 (1980), § 101(a) and (b); § 207(a)(1) and (a)(3); § 207(b); § 207(c)(1) and (3).

184. *Refugee Consultation for 1980*, reprinted in 126 CONG. REC. S3960 (daily ed. Apr. 28, 1980).

185. Michael Teitelbaum argues that foreign policy gambits might cause large-scale refugee flows. He argues from a rather Machiavellian perspective that refugee flows can be, and have been, used to make foreign policy points, such as the migration from Cuba. See Teitelbaum, *Immigration, Refugees and Foreign Policy*, 38 INT'L ORG. 429 (1984).

186. See, e.g., *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 374-75 (C.D. Cal. 1982); *Nunez v. Boldin*, 537 F. Supp. 578, 583-84 (S.D. Tex.), *appeal denied*, 692 F.2d 755; *Louis v. Messner*, 530 F. Supp. 924, 927-28 (1981), *modified*, 532 F. Supp. 881 (S.D. Fla. 1982).

187. 658 F.2d 1312 (9th Cir. 1981).

188. *Id.* at 1316.

also accepted the argument that under the language of the 1980 Act the Attorney General's power to deport was no longer discretionary.¹⁸⁹ On the basis of evidence of the petitioner's long standing political activities with various paramilitary organizations, the court found relief was wrongfully withheld.¹⁹⁰

A number of rationales justify a more active role for the courts in ensuring that the intent behind the Refugee Act of 1980 is implemented. For example, there is some evidence that the legislative branch is unwilling to serve as a check on the executive branch.¹⁹¹ As noted earlier, refugee admissions have continued to be overshadowed by East-West concerns. Another practice directly contrary to the legislative intent of the Act is the admission of individuals who do not meet the legislative standards for being considered a refugee.¹⁹² Many of those admitted from Southeast Asian camps are "economic migrants,"¹⁹³ and there is also evidence that U.S. policy has worked to inhibit the entry of the poorer and "less desirable" individuals from these same camps.¹⁹⁴ In short, U.S. refugee admission policy, as implemented, has allowed the admissions of many individuals who are not truly refugees while it has worked to prevent the admission of many bona fide refugees.¹⁹⁵ The judicial branch should not passively observe this state of

189. *Id.* See *supra* note 121.

190. *Id.* at 1318.

191. Congressional abdication in this area has been severely criticized. For example, Congressman Morhead observed, "[i]n passing this legislation, the Congress delegated almost absolute authority over refugees to the Executive branch. Let's make no mistake about it, according to the Refugee Act, the President can bring into the United States any number of refugees he wishes to admit." 126 CONG. REC. H4523 (daily ed. June 4, 1980). Similarly, Representative Butler's comments after the House-Senate conference had deleted a legislative veto provision over the number of refugees coming into the United States: "[t]he real issue to justify a legislative veto is because it would restore to the Congress of the United States control of the number of refugees and that is where the Constitution places it." 126 CONG. REC. H1519 (daily ed. Mar. 4, 1980). Although the Refugee Act was intended to again involve Congress in refugee affairs, this has not occurred. "Consultation," see *infra* text accompanying note 203, seems to be a fairly routine affair as the Congress seems to accept the executive's directives as the status quo. Perhaps the most blatant example that the legislative branch will give the executive branch free reign was when the provisions of the Refugee Act were completely ignored by President Carter in the Mariel freedom flights in the spring of 1980.

192. See Bach, *The New Cuban Immigrants: Their Backgrounds and Prospects*, MONTHLY LABOR REV. Oct. 1980. Bach offers empirical evidence that with each wave of Cuban "refugees," economic motivations were at least as strong as political considerations in the desire to migrate. See also G. KELLY, FROM VIETNAM TO AMERICA (1977). Kelly's data shows how the first waves of Vietnamese "refugees" were admitted more often on the basis of their ties with the United States (such as employment with a U.S. corporation or the U.S. government), than on the basis of a well-founded fear of persecution.

193. See HOUSE COMM. ON THE JUDICIARY, REFUGEE ISSUES IN SOUTHEAST ASIA AND EUROPE AND INTERNATIONAL ISSUES ON DRUG ENFORCEMENT AND ADMINISTRATIVE LAW BASED ON A FACT-FINDING TRIP TO SOUTHEAST ASIA AND EUROPE, 97th. Cong., 2nd Sess. (1982) [hereinafter cited as REFUGEE ISSUES IN SOUTHEAST ASIA].

194. See Suhrke, *Indo-chinese Refugees: The Law and Politics of Asylum*, ANNALS May 1983. ("The refugees most likely to remain in the ASEAN States were the uneducated, the unskilled, the handicapped — that is, those who would have the greatest difficulty in being accepted by third countries.") *Id.* at 109.

195. See REFUGEE ISSUES IN SOUTHEAST ASIA, *supra* note 193, at 94. An interesting point in the separate report of Congressmen Hall and Danielson was the contrast between the rotund and wealthy "refugees" driving up to the refugee processing center in Geneva in well-stocked mobile homes, and the individuals languishing in Southeast Asian refugee camps.

affairs.¹⁹⁶

Among the reasons why a more active judicial role in the area of refugee relief is desirable are: 1) Congress has passed refugee legislation which establishes certain criteria for the admission of refugees, 2) the Refugee Act of 1980 is a concerted effort to remove political considerations from refugee policy, 3) empirical evidence suggests that the Act is not being implemented in accordance with its legislative intent, 4) Congress has little incentive to oversee the implementation of the Act,¹⁹⁷ 5) a few federal courts have shown that INS policies need careful scrutiny, and 6) many of these same courts have shown that judges will not necessarily be out of their element in cases involving some aspects of "foreign affairs."

2. Moral and Legal Rights

One of the fallacies dominating the area of refugee relief, which might also explain judicial deference, is that those seeking refugee status do not have any legal or moral claims against the United States. Accordingly, refugees are admitted at the complete discretion of the U.S. government.¹⁹⁸ I have argued elsewhere that many refugees have a *prima facie* moral claim to be admitted to the United States.¹⁹⁹ Professor Michael Walzer has argued in a similar vein that our greatest moral duty might be to those whom we have helped to turn into refugees.²⁰⁰ Furthermore, the provisions of the Refugee Act buttress the moral claim by adding a quasi-legal claim.²⁰¹ The question is whether the moral claim,

196. The confrontation between the courts and the executive branch may sometimes be viewed as a simple conflict between the courts and lower level bureaucrats who are administering the law. See C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 77 (1969).

197. See generally M. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977); L. DODD & R. SCHOTT, *CONGRESS AND THE ADMINISTRATIVE STATE* (1979). One conclusion to be drawn from such works is that when it does pay electoral dividends, legislative oversight will not occur.

198. See *Immigration and Naturalization Service v. Predrag Stevic*, No. 82-973, 52 U.S.L.W. 4724 (June 5, 1984).

199. See Gibney, *Seeking Sanctuary: A Special Duty for the U.S.?* *COMMONWEAL* May 18, 1984 at 295. There I argued on the basis of justice as requital, that citizens of certain countries have moral claims and quasi rights against the United States because of U.S. foreign policy gambits in these other countries. Though the example used is El Salvador, the principle can be extended to countries such as Vietnam.

200. Walzer, *supra* note 34 at 49.

Toward some refugees, we may well have obligations of the same sort that we have toward fellow nationals. This is obviously the case with regard to any group of people who we have helped turn into refugees. The injury we have done makes for an affinity between us; thus Vietnamese refugees had, in a moral sense, been effectively Americanized even before they arrived on these shores.

Id.

201. The strongest ground for arguing that individuals seeking refugee status have no legal claim is that the Refugee Act speaks of the Attorney General using "discretion." § 208 of the INA, 8 U.S.C. § 1158(a) (1982) reads:

The alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A).

combined with the quasi-legal claim, gives rise to a claim that should be recognized by U.S. courts.²⁰²

An interesting counterargument would suggest that after "consultation"²⁰³ between the executive and Congress, the challenged action would fall into the first zone described by Justice Jackson in the *Steel Seizure* case.²⁰⁴ As Jackson argued, in such cases the executive branch is on its firmest ground, and courts should be particularly reluctant to interfere with the executive's policymaking.²⁰⁵ Therefore, it may be contended, after consultation, that the President and Congress have reached agreement not only on the number of refugees to be admitted, but also that those to be admitted are bona fide refugees. In short, it might be argued, the courts should not interfere. A joint Congressional-Presidential finding that the United States should admit a certain number of refugees, however, actually says nothing about the legitimacy of each individual's claim. Therefore, the mere existence of the consultation process should not cause a court to be any more wary of interfering.

A final point to consider is that domestic courts might, by default, have to carry the burden of upholding standards of international law. Richard Falk has espoused this position.²⁰⁶ Falk points out that political considerations often hold sway over principles of international law, and he takes a very realistic view that the burden of upholding general principles of international law will, of necessity, fall on unbiased domestic courts.²⁰⁷

3. The Courts Role as a Check on the Political Branches

Judge Friendly's opinion in *Zamora v. Immigration and Naturalization Service*²⁰⁸ highlights another problem for courts in the area of refugee relief. In *Zamora*, Judge Friendly noted with concern that the great weight the INS accorded to the State Department's recommendations deprived the INS of its adjudicatory and

Despite this language, the Attorney General does not have free reign. The Attorney General is bound by the statutory definition of 1101(a)(42)(A) and the legislative history of the Refugee Act, which stipulates that the plight of the refugee is to take precedence over political considerations. See *supra* text accompanying note 175. Furthermore, much, if not all, of the Attorney General's discretion is removed under the new language of § 243(h) in the Refugee Act of 1980. See *supra* note 121. In the Supreme Court's recent holding in *Pedrag Stevic*, *supra* note 198, the mandatory provisions of 243(h) were underscored.

202. One immediate problem is that some courts would simply choose not to hear such cases. See, e.g., *Pena v. Kissinger*, 409 F. Supp. 1182 (S.D.N.Y. 1976). The court in *Pena* expressed disapproval of this judicial practice, but nonetheless felt bound by precedent. See also Note, *Judicial Review of Visa Denials: Reexamining Consular Nonreviewability*, 52 N.Y.U. L. REV. 1137, 1158 (1977).

203. Immigration and Nationality Act, § 207(d), 8 U.S.C. § 1157(d) (1982).

204. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

205. *Id.* at 635-37.

206. R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964).

207. For a recent example of this, see *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

208. 534 F.2d 1055 (2d Cir. 1976).

administrative role.²⁰⁹ Implicit in Judge Friendly's remarks is the idea that such recommendations similarly deprive the judiciary of its traditional role, when such cases come under judicial scrutiny. In an extreme case where the courts did not act in their traditional role, *Shaughnessy v. Mezei*,²¹⁰ a former resident alien was excluded from re-entering the United States although neither Mezei, nor any of the courts, including the Supreme Court, were ever informed of the evidence against him.²¹¹

Judge King pointed out the difficult position the judiciary has been forced to play in the asylum area.²¹² By statute, judges are to review whether the district director has arbitrarily or capriciously denied an applicant's asylum claim. In order to understand the evidence before the district director, Judge King stated, the reviewing judge must have some grasp of the general conditions in the other country involved.²¹³ Judge King asked rhetorically how a judge could review the district director's decision without some understanding of conditions in a country such as Haiti.²¹⁴ The political question doctrine, the judge noted, is founded on the judiciary's refusal to interfere with activities wholly committed to the political branches. Judge King read the statutory provisions for review of the district director's findings, however, as an express invitation to the judicial branch to participate in the process.²¹⁵

In summary, in the area of refugee relief the judiciary is expected to operate under a different set of rules than it normally abides by. Evidence consists of conclusory statements from the State Department, which have first been cleared with the political actors in that agency. Other evidence, including the personal testimony of individuals, is accorded less weight. This description does not match the way our judiciary works, or should work.

4. Individual Claims

Judge King's opinion in *Haitian Refugee Center* exemplifies the roles courts should and should not assume in refugee cases. Although Judge King disagreed with the findings of the State Department, his disagreement should not give him license to assume the role of Secretary of State, as he seemed to do in his far-ranging conclusions concerning conditions in Haiti.²¹⁶ Some positive aspects of Judge King's opinion, however, should be underscored. For example, the

209. *Id.* See also *Carvajal-Munoz v. Immigration and Naturalization Service*, 743 F.2d 562, 253-54 (7th Cir. 1984).

210. 345 U.S. 206 (1953). See text accompanying notes 53-56.

211. 345 U.S. at 209.

212. *Haitian Refugee Center*, 503 F. Supp. at 472.

213. *Id.*

214. *Id.*

215. *Id.* at 473.

216. See *supra* text accompanying note 150.

pages and pages of testimony by individual Haitians serves as a reminder that the court was faced there with individual claims.²¹⁷ These portions of the opinion also highlight the fact that much can be learned from such personal testimony. Anonymous and widespread persecution is easily lost in the banality of its perpetuation. By focusing on individuals' accounts of how they have been treated, the court is directly confronted with the persecution in another country. Furthermore, a more reliable and complete picture of the political and social conditions in another country flows from such individual testimony.²¹⁸ While the State Department's much maligned reports take a top-down view, this kind of personal testimony offers a very insightful bottom-up version.²¹⁹

It is by no means certain that the INS shares this view. For example, in *McMullen v. Immigration and Naturalization Service*,²²⁰ the court overturned a decision by the Board of Immigration Appeals, because the Board had given little credence to the personal statements of the applicant for asylum.²²¹ The Board did not find that this applicant's statements lacked credibility; it found, simply, that such testimony is always self-serving.²²² This kind of reception for the personal statements of asylum applicants is consonant with the attitude that such statements serve no purpose and are virtually meaningless. In fact, one is tempted, as the court in *McMullen* must have been, to ask why such personal statements are taken if they are to be ignored by administrative agencies as merely self-serving.

5. Alien Protection and Public Awareness

Another important role of the courts is to increase public awareness of refugee admission questions. The Senate Committee Report for the Refugee Act stated:

The bill, when enacted, is designed for the decades to come, and what refugees will be deemed of special concern to the American

217. *Haitian Refugee Center*, 503 F. Supp. at 474-510.

218. Judge King observed:

In reaching its conclusions the court has listened to a wealth of in-court testimony, examined numerous depositions, and read hundreds of documents submitted by the parties. Much of the evidence is both shocking and brutal, populated by the ghosts of individual Haitians — including those who have been returned from the United States — who have been beaten, tortured and left to die in Haitian prisons. Much of the evidence is not brutal but simply callous — evidence that INS officials decided to ship all Haitians back to Haiti simply because their continued presence in the United States had become a problem. The manner in which INS treated the more than 4,000 Haitian plaintiffs violated the Constitution, the immigration statutes, international agreements, INS regulations and INS operating procedures. It must stop.

Id. at 452.

219. Judge Godbold's dissenting opinion in *Paul v. INS*, 521 F.2d 194, 201 (5th Cir. 1975), also relied upon, and was obviously impressed with, the personal testimony of individual Haitians.

220. 658 F.2d 1312, 1317 (9th Cir. 1981).

221. *Id.*

222. *Id.* at 1317.

people will be a public policy issue that will be, as it is now, debated and reviewed continuously by Congress, the President and *the American people*.²²³

This kind of debate has not yet taken place. Instead of sound policymaking, one finds hyperbole;²²⁴ instead of serious debate on the merits of individual or group claims, one finds bureaucratic inertia. In *Nunez v. Boldin*,²²⁵ the court decided that, at a minimum, the asylum provisions in the 1980 Act give claimants a right to be heard. By scrutinizing asylum claims, the courts would also afford claimants a broader public hearing than they generally receive now.

Although this is not a traditional function of the courts, a great deal of political science literature on interest groups suggests that resource poor groups will often, out of necessity, turn to the courts for relief.²²⁶ This general trend in the area of asylum relief is particularly compelling.²²⁷ No natural constituency exists for asylum issues. Therefore, pluralist assumptions about the natural protection of interests completely break down here.²²⁸

G. The Courts' Role More Specifically

1. Martin and Aleinikoff

Professors Martin and Aleinikoff recently have advanced some interesting ideas for different roles that courts should play in the area of alien affairs.²²⁹

223. SEN. REP. NO. 96-256, 96th Cong., 2d Sess. 6 (1979).

224. One instance of hyperbole is the insistence that asylum claims threaten to swamp the judicial branch. Alex Aleinikoff has argued that of the supposed backlog of 160,000 asylum cases, the government has no intention of adjudicating 120,000. Most of these 120,000 cases concern undocumented Cubans and Haitians whose status will be regularized under pending congressional legislation. Aleinikoff also points out that the stock argument that "economic migrants" are making frivolous claims and thereby causing the backlog is unsupported. Three-quarters of the applications for asylum have been filed by individuals from Cuba, Iran, El Salvador, Nicaragua, Poland, Afghanistan, the People's Republic of China, Ethiopia, Haiti, Iraq, and Lebanon. Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REF. 183, 187, 191-92 (1984).

225. 537 F. Supp. 578 (S.D. Tex. 1982), *appeal denied*, 692 F.2d 755 (5th Cir. 1982), *modified*, Ramirez-Osorio v. INS, 745 F.2d 937 (5th Cir. 1984).

226. See, e.g., J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM (1978); Vose, *Litigation as a Form of Pressure Group Activity*, reprinted in BORZOI READER ON AMERICAN POLITICS (1971); Burke, *The Political Evolution of Interest Group Litigation*, paper presented at the annual meeting of the American Political Science Association, Washington D.C., 1980.

227. This sentiment is also expressed in J. ELY, DEMOCRACY AND DISTRUST 161 (1980). But see Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. REV. 446, 466 (1981), where the author observes:

Even aliens, who are excluded from formal participation in the political process, have varied opportunities to influence the political process and to enlist the support of others who identify with them or whose interests are intertwined with theirs.

Id.

228. See generally D. TRUMAN, THE GOVERNMENTAL PROCESS (2d ed. 1971); E. SCHATTSCHEIDER, THE SEMISOVEREIGN PEOPLE (1975).

229. Martin, *supra* note 57. Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237 (1983).

They differ on the question of the due process procedures that should be accorded an applicant for asylum. In *Matthews v. Eldridge*,²³⁰ the Supreme Court established a test balancing the private and governmental interests at stake in an official action, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value of other procedural safeguards.²³¹ Both Martin and Aleinikoff apply the *Matthews v. Eldridge* standard, but with different results. Martin argues that while the claimant's interest in obtaining asylum might always appear important, that factor is redundant, since the issue in asylum proceedings is the weight of the individual's interest itself.²³² In other words, the weight of the interest is unknown until the hearing is held. Aleinikoff holds the opposite view. He likens asylum to criminal proceedings in the sense that an erroneous decision will have disastrous results.²³³ In one case an innocent person will be made to unduly suffer and in the other an individual will be sent back to his home country to face persecution. Aleinikoff's conclusion is sound. As discussed above, a more active judiciary in non-refugee alien matters is needed. In light of the particular difficulties in refugee matters, however, the need for judicial activism is even greater.²³⁴

Martin and Aleinikoff agree in supporting a greater role for the courts in the area of the suspension of deportation.²³⁵ They argue that because of the political biases of immigration judges,²³⁶ and the pressures exerted by INS district directors,²³⁷ courts must provide a counterbalance.²³⁸ It is uncertain whether Martin and Aleinikoff are willing to offer a judicial counterbalance for other instances of INS bias. Such a result is dictated by the desperate need for fair procedures. Judicial activism, however, would probably result in a complete overhaul of the system.²³⁹

230. 424 U.S. 319 (1976).

231. *Id.* at 348-49.

232. Martin, *supra* note 57 at 22-23.

233. Aleinikoff, *supra* note 229 at 248-52.

234. See Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping US Immigration Policy* 45 No. 2 LAW & CONT. PROBS. 163, 182-85 (1982).

235. See INA § 243(h), 8 U.S.C. § 1253(h), discussed *supra* note 121.

236. See Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 8 (1980).

237. See D. MARTIN & T. ALEINIKOFF, *supra* note 24, at 66, where the authors contend:

In a very real sense it is likely that he [Immigration Judge] views his mission as consistent with, if not important to, the mission of the agency: that is, the efficient enforcement of the immigration laws.

This claim is based on the fact that today's Immigration Judges are frequently yesterday's INS law enforcers. See *Matter of Exame*, Board Immig. Appeals Interim Decision #2920. In *Exame*, the petitioner unsuccessfully sought to have the Immigration Judge removed on the basis that the Judge had formerly been an INS trial attorney and investigator in similar cases. See also *Asylum Adjudication: Hearings Before the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary*, 97th Cong., 2d Sess. 270 (1981) (prepared statement of Anthony DeGaeto, President, Association of Immigration Judges). An example of the partiality of Immigration Judges is the role they played in the Haitian Program, which served as the basis for the lawsuit in *Haitian Refugee Center*.

238. *Id.* at 64-69.

239. Judicial activism might counteract many instances of INS bias: from the determination of who is

2. The Simpson/Mazzoli Bill

This article has attempted to argue for a greater judicial role in immigration and refugee affairs. In this regard it is critical of current policy proposals. The Simpson/Mazzoli bill is a throwback to an earlier era in its attempts to narrow the courts role in immigration and refugee issues. As noted earlier, both versions of Simpson/Mazzoli would replace present day immigration judges with a system of administrative law judges, although the individuals serving in the new capacity might well remain the same.²⁴⁰ In addition, the current Board of Immigration Appeals would be replaced by an independent United States Immigration Board.²⁴¹ These changes would constitute advances in terms of fair procedure. The role assigned to the judiciary, however, would be greatly diminished. Of the two bills, the House version envisions a less radical change.²⁴² The Senate bill, on the other hand, limits judicial review of asylum adjudications to the constitutionally guaranteed right of habeas corpus, and to those instances where the Attorney General reverses or modifies a decision of the U.S. Immigration Board.²⁴³

a bona fide refugee, *Hatian Refugee Center*, 676 F.2d 1023, to the treatment of those claiming asylum status, *id.*, *Orantes-Hernandez*, 541 F. Supp. 351; to the political considerations in the State Department's advisory opinions. See also J. CREWDSON, *THE TARNISHED DOOR* (1983).

240. The House version calls for a retraining for Immigration Judges who will now become administrative law judges. This retraining is supposed to correct any previous biases. Section 124(a)(2), H.R. REP. 115, *supra* note 172, at 12. The Senate once held a different position. The version of Simpson/Mazzoli that passed the Senate in 1982 stated:

An individual who has served as a special inquiry officer under this title before the date of the enactment of the Immigration Reform and Control Act of 1982 may not be designated to hear applications under this section.

S. REP. NO. 485, 97th Cong., 2d Sess. 74 (1982) S. 2222 § 208(a)(2). The version of Simpson/Mazzoli that passed the Senate in 1983, however, allows for retraining. SEN. REP. 62, *supra* note 172, at 85 (citing S. 529 § 208(a)(2)).

241. See H.R. REP. 115, *supra* note 172, at 52-53; SEN. REP. 62, *supra* note 172, at 35-36.

242. The House Report is somewhat unclear, but it certainly provides a greater role for courts than the Senate version.

The Committee Amendment sets forth the scope of review in asylum cases. First, the asylum applicant could challenge the jurisdiction of the administrative law judge or the U.S.I.B. which rendered the decision. Such a challenge could involve, for example, an allegation that the administrative law judge who conducted the proceeding was not specially trained in asylum matters. . . . Second, the alien could challenge the procedures by which the hearing was conducted on the ground, for example, that he was denied access to counsel. Third, the alien could challenge the legality or constitutionality of the statutes, rules, or regulations which governed the asylum process. Fourth, the alien could attack the determination on its merits, arguing that the determination was arbitrary or capricious. In this regard, it should be noted that the substantial evidence test would not apply. Of course, the U.S.I.B. and the courts should give great weight to any factual determinations or decision on the merits rendered by the administrative law judge.

H.R. REP. 115, *supra* note 172, at 54-55.

243. Compare the House Report, *id.*, with the Senate Report:

For all cases involving asylum, the bill provides for extensive administrative consideration, within the Justice Department but independent of the Immigration and Naturalization Service. . . . Consistent with the practices of most other countries, there will be no right of further review on the issue of asylum. . . . Some persons have indicated concern that judicial review of asylum decisions of the United States Immigration Board will not be available unless the

Simpson/Mazzoli recognizes the biases and faults in the present U.S. immigration and refugee system, but it proposes that these biases and faults can be restrained or removed from the system by strengthening the administrative framework. Narrowing judicial review of alien causes might, at first glance, have some merit, especially if one believes that courts are, or will be, swamped by a great number of asylum claims.²⁴⁴ The analysis of this issue, however, should start with an examination of the judiciary's role in the system of government generally. Once the general principles are established, they can then be applied to the specific area of alien admissions. The analysis is faulty if it ignores the principles underlying judicial activism in other areas.

IV. CONCLUSION

In general, courts have avoided activism and accorded deference to the political branches in the area of alien admissions. Recently, however, some courts have allowed themselves a more active role, particularly in the area of refugee relief. The common rationale for judicial deference in the context of alien admissions is that courts should not interfere with issues involving foreign relations. This article questions the connection between alien admissions and foreign policy. This article has attempted to argue that the occasional connection between foreign affairs and alien admissions has now been severed by the depoliticization of both avenues for admission. The fear of a renewed connection is insufficient grounds to support a general rule of judicial deference. Finally, it is argued that many judges have been both willing and competent to make straightforward determinations of conditions and activities in other countries.²⁴⁵

The courts have been able to avoid involvement in alien admission matters because the bias or unfairness in admission procedures has not been evident. It is a delusion to think that immigration and refugee issues can safely be left with the political branches and that they will provide fair solutions that reflect U.S. constitutional values. This article emphasizes the need for a more active role for the courts. The proposed Simpson/Mazzoli legislation, on the other hand, would substitute a strengthened administrative mechanism for the role currently

Attorney General reverses or modifies the Board's decision. . . . It is true that a review will not be available comparable to that provided in INA section 106(a) for non-asylum deportation cases. . . .

SEN. REP. 62, *supra* note 172, at 12-13. The report goes on to observe that some general review could be provided through habeas corpus proceedings. *Id.*

244. *But see* Aleinikoff, *supra* note 224.

245. An analogous situation would be the evolving judicial role with regard to sovereign immunity. In 1976 the United States enacted into law the "restrictionist" view of sovereign immunity which allows other nations to be sued in U.S. courts for their commercial operations. 28 U.S.C. § 1330 (1982). In addition, this same legislation vested sovereign immunity decisions exclusively with the courts themselves, and not the political branches. See H.R. REP. NO. 1487, 94th Cong., 2nd Sess. 12-13, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6611-12.

played by some courts. It is often said that judicial involvement in public policymaking interferes with the powers exercised by the political branches. Courts can play their role in making public policy by ensuring that the political branches follow the intent of existing legislation and our constitutional values. In this way, courts can contribute to fair and even-handed implementation of public policy in the immigration and refugee area.

A larger question, related to this discussion, concerns the role courts should assume in matters that contain both domestic and international policy elements. Very little scholarly attention has been paid to this question, which will only grow in importance, as more matters contain both elements. The system of checks and balances should not be discarded, and judicial deference substituted, whenever a policy problem has international implications.