The Disproportionate Effect of the Entry Fiction on Excludable Aliens
I. Introduction

Since 1980 thousands of refugees have come to the United States seeking refuge from either economic or political strife in their homelands. Quite often, refugees arrive “destitute and desperate, bereft the family ties or special skills that facilitate assimilation.” Traditionally, the United States has welcomed refugees,

1 E. Hull, Without Justice For All 137 (1985). An economic refugee is one who flees his or her home to escape poverty. The U.S. government, in most instances, considers refugees from Haiti, El Salvador, and other Third World countries to be economic refugees.

2 Id. at 139. A political refugee is one who would face persecution if returned to his or her home country. The distinction between economic and political refugees is not always clear.

3 Id. at 116.
this welcome being a source of great national pride. However, the days of the invisible border are over. Alarming growth in illegal immigration and the mass flow of refugees from world trouble spots such as Cuba, Haiti, El Salvador, and Afghanistan have sparked public debate on how America should treat illegal aliens as well as the new flow of refugees.

The saga of refugees who flee to the United States is often a harrowing tale of danger. Upon arrival in the United States, all refugees are required to present themselves at a port of entry for processing. In the United States a port of entry is most often located at either an airport or a border patrol station. At the port of entry the Immigration and Naturalization Service (the “INS”) will determine whether a refugee should be admitted or excluded from the United States. There are various grounds for refusing to admit a refugee. The grounds range from physical or mental disorders to criminal activity and polygamy. Exclusion is particularly harsh on refugees who flee to the United States from countries where they suffer persecution. One of the thirty-three grounds for exclusion provided by the Immigration and Nationality Act (the “INA”) is that aliens who lack proper entry documentation will be excluded. In most instances, refugees do not have the proper entry documents and are immediately found excludable by the INS.

Once the INS determines that a refugee is excludable, the refugee is usually detained pending an exclusion hearing before an immigration judge. If the judge finds the refugee excludable, the refugee may appeal the decision to the Board of Immigration Appeals (the “BIA”). The BIA’s decision may be appealed to the federal courts. The refugee who is denied permission to enter the United States must either pursue other means of entry or face immediate deportation.

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4 Id. (Quoting from “Text of Reagan’s Speech Accepting the Republicans’ Nomination”, THE NEW YORK TIMES, July 18, 1980, at 8). “Can we doubt that only a divine providence placed this land, this land of freedom, here as a refuge for all those people who yearn to breathe free? Jews and Christians enduring persecution behind the Iron Curtain, the boat people of Southeast Asia, Cuba, and Haiti.”


9 8 C.F.R. § 236.7(a).

Under current law a refugee who claims he will be persecuted if returned to his home country can obtain relief in one of two ways. The refugee can seek discretionary asylum or mandatory withholding of deportation. In order to be eligible for asylum an alien must establish a "well founded fear" of persecution in his home country. If his request for asylum is denied the refugee will be immediately deported back to his home country, unless he can obtain a Withholding of Deportation under section 243(h) of the INA. This is not likely because in order to be eligible for section 243(h) relief a refugee must show a "clear probability" of persecution if deported.

The question of what constitutes an entry into the United States is of great importance to refugees who attempt to challenge the denial of their admission into the United States. An excludable alien is one who has not made an entry into the United States. On average over 100,000 aliens are refused visas and excluded from entering the United States each year.

An excludable alien, although physically present in the United States, is considered to have been detained at the border. This is the entry fiction, a legal fiction that an alien, although physically inside of the country, is treated as if he had not entered. The immigration laws make a distinction between those aliens who have "come to our shores seeking admission . . . and those who are within the U.S. after an entry, irrespective of it's [sic] legality." Due to the entry fiction, illegal aliens are subject to a deportation hearing

12 8 U.S.C. § 1253(h) (Withholding of Deportation or Return).
15 This Note uses the term refugee or excludable refugee to refer to an alien who is fleeing persecution or fear of persecution in his or her homeland, and has been denied permission to enter the United States. An undocumented alien is one who has entered the United States illegally. "The term 'alien' means any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3).
17 Garcia-Mir v. Smith, 766 F.2d 1478, 1484 (11th Cir. 1985); see generally Jean v. Nelson, 727 F.2d 957, 969 (2d Cir. 1984).
18 The entry fiction, as applied, can be used to deny admission both to a returning resident alien, and to those who are seeking admission for the first time.
19 Leng May Ma v. Barber, 357 U.S. 185, 187 (1958); see also Garcia-Mir, 766 F.2d at 1484. ("Deportable aliens, on the other hand, have succeeded in either legally or illegally entering this country.").
and as a result are accorded more procedural and substantive rights than an excludable alien. "Excludable aliens have fewer rights than do deportable aliens, and those seeking initial admission to this country have the fewest of all."20

While there are legitimate reasons for making a distinction between certain classes of aliens,21 the entry fiction disproportionately favors aliens who enter the United States illegally and punishes aliens who attempt to enter the United States by following routine immigration procedures.

The disproportionate effect of the entry fiction encourages illegal entry into the United States. According to the Governmental Accounting Office, an illegal alien "has little chance of being located and deported."22 United States law prohibits illegal entry,23 but paradoxically encourages illegal entry by poor enforcement of immigration laws and by awarding illegal entrants more procedural and substantive rights than those seeking legal admission. The question remains, "[s]hould aliens be allowed to sneak across the Rio Grande, or slip in unnoticed across the Canadian border, and then expect to benefit from the Constitution's many procedural safeguards?"24 Meanwhile, refugees fleeing war torn countries of the Middle East and Central America are denied admission and returned to their homeland to face persecution or even death. It is this paradox that will be the focus of this Note.

Initially, this Note will examine the history of the entry fiction, its purpose, and the parameters of entry under current immigration law. Next, it will briefly outline the plenary power of Congress over immigration. The Note will then examine and compare the differing treatment accorded illegal (deportable) aliens in a deportation hearing and excludable refugees in an exclusion hearing. In doing so, the Note will attempt to show how the definition of entry under current immigration law favors illegal aliens over refugees fleeing persecution. In addition, the Note will examine the procedures for asylum and withholding of deportation under current law. The

20 Garcia-Mir, 766 F.2d at 1484.
21 The reasons for the "entry fiction" are considered in more detail infra at note 37 and accompanying text.
23 8 U.S.C. § 1251(a)(2) provides that "[a]ny alien (including an alien crewman) shall, upon the order of the Attorney General, be deported who entered the United States without inspection or at anytime or place other than as designated by the Attorney General . . . ."
24 E. Hull, supra note 1, at 110.
Note will briefly review the historical backdrop of the immigration of refugees into the United States, and then discuss the standard of persecution a refugee must establish for relief under the provisions of the Refugee Act of 1980. Also, the Note will review the Immigration Reform and Control Act of 1986 (the "IRCA") and show how the IRCA reinforces the argument that the entry fiction has a disproportionate effect on refugees. In conclusion, the Note will propose and advance arguments supporting a change in the current definition of entry, so that an illegal entry will be considered as no entry at all. The result of this proposal would be to treat illegal aliens in the same manner as excludable refugees, thereby eliminating the patent unfairness of the entry fiction under current immigration law.

II. THE ENTRY FICTION

A. What Constitutes an Entry Into the United States

Whether an alien has made an entry into the United States is important in determining the constitutional status of an alien who mounts a challenge to the denial of his or her admission into the United States. An excludable alien, although physically present in the United States, is considered to have been detained at the border. On the other hand, a deportable alien has made an entry, regardless of its legality. An alien in a deportation hearing is entitled to more procedural and substantive rights than an alien in an exclusion hearing.

1. Early History

Prior to the Immigration and Nationality Act of 1952 there was no statutory definition of entry. As a result, courts struggled to define what constitutes an entry for immigration purposes. An early decision of the Supreme Court suggested that an alien who simply crossed the border makes an entry into the United States. In 1933

the Supreme Court defined entry as "any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." This definition formed the basis for the definition provided in the INA.

2. Current Law

The INA defines entry as "any coming of an alien into the United States from a foreign port or place or from an outlying possession, whether voluntary or otherwise . . . [p]rovided, that no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process . . ." Judicial interpretations have further refined this definition. The mere physical presence of an alien within the United States does not constitute an entry for immigration purposes. For example, simply crossing the border or arriving at a port of entry does not constitute an entry where the alien is detained pending a formal request for admission. Rather, in order for there to be a valid entry the alien must be physically present and free from official restraint. This definition was expanded in Cheng v. I.N.S. The Cheng court defined entry as either crossing the territorial limits of the U.S. and being inspected and admitted by an immigration officer, or intentionally evading inspection coupled with freedom from official restraint. This definition of entry was adopted by BIA in 1984. This current BIA definition entitles an alien who illegally entered the United States to a deportation hearing rather than an exclusion hearing.

31 See Shaughnessy v. Mezei, 345 U.S. 206, 213 (1953) (detainment at Ellis Island is not entry into the United States).
33 534 F.2d 1018 (2d Cir. 1976).
34 Id. at 1019.
The entry fiction must exist in order to allow the United States to handle the influx of aliens. The immigration laws attempt to balance the rights of aliens, who have no connection to the United States, with the interests of the United States in controlling the composition of its population. The United States has long been regarded as the promised land for the weak and oppressed of the world. However, it is inconceivable that the United States could accommodate all those who wish to enjoy its bounty. Consequently, a system of immigration controls must exist to admit some and exclude others.

This system should operate in a fair and just manner. The immigration laws should strive to admit those who have a connection to this country or who possess some special skill or knowledge that is helpful to the United States. Furthermore, the immigration laws should provide a fair method by which the oppressed and persecuted can gain entrance to this country. For the most part, the entry fiction is a necessary and proper device for excluding certain aliens. However, it is unfair and unjust for this country to allow illegal aliens, who subvert the immigration laws, to receive more procedural and substantive protection than refugees who are fleeing persecution and presents themselves for legal admission. Such a process conflicts with the immigration system and undermines the intent of the Congress. 37

III. Plenary Power of Congress Over Immigration

A. National Sovereignty

The power to exclude or deport aliens is not explicitly granted to Congress by the Constitution. 38 However, in the Chinese Exclusion Case, 39 the Supreme Court for the first time held "[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign

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38 The Constitution makes scant reference to the power of the legislative or executive branch over immigration. Article I grants Congress power "[t]o regulate commerce with foreign nations" (§ 8, cl. 3), "[t]o establish a uniform rule of naturalization", (Id. cl. 4), "[t]o define and punish"... "offences against the law of Nations." (Id. cl. 10).
39 130 U.S. 581 (1889).
powers delegated by the Constitution . . . . " Subsequent decisions by the Supreme Court reinforce this holding. In Knauff v. Shaughnessy, the Supreme Court rejected the petitioner’s argument that certain immigration legislation was void as an unconstitutional delegation of power. The Court reasoned that “[t]he exclusion of aliens is a fundamental act of sovereignty . . ." and thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to the Attorney General.

At issue in the Chinese Exclusion Case was an act of Congress which prohibited Chinese laborers from entering the United States. The Supreme Court upheld the statute. The Court concluded that the power of the government to exclude aliens is a fundamental right of national sovereignty, and if Congress decided to exclude Chinese persons, then such action was valid. The Court reasoned that the power of Congress to exclude aliens was available “at anytime when, in judgment of the government, the interests of the country require it . . . .”

Similarly, in Fong Yue Ting v. United States, the Supreme Court upheld the plenary power of Congress to deport aliens from the United States. In this case, three Chinese laborers failed to apply for a certificate of residence pursuant to an act of Congress. The petitioners were arrested and held for deportation proceedings. The Court, in affirming the dismissal of a writ of habeas corpus, reasoned that “[t]he power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same [sovereign] power.”

40 Id. at 609.
42 Id. at 543.
43 130 U.S. 581.
44 Id. at 589. The Act prohibited Chinese laborers from entering the U.S. if they had departed before the Act was passed. The petitioners claimed that the act violated existing treaties between the U.S. and China.
45 Id. at 609.
46 Id.
47 Id.
48 149 U.S. 698 (1893).
49 Id. at 699.
50 Id. at 704.
51 Id. at 713.
The *Fong Yue Ting* holding was confirmed in *Harisiades v. Shaughnessy*, in which the Supreme Court upheld the deportation of a resident alien who had joined the communist party after he arrived in the United States. The Court stated that the power to deport is inherent in every sovereign nation: "[s]uch is the traditional power of the nation over the alien and we leave the law on the subject as we find it." In addition to excluding aliens based on race, the Supreme Court has in recent years upheld the power of Congress to exclude aliens on the basis of political views and sexual preference. As a result Congress can set whatever terms it desires for the admission, exclusion and deportation of aliens. This is true even if such criteria would be unconstitutional if applied to citizens of the United States.

While the source of the federal government's power over immigration may be attacked on a number of theories, it seems

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33 Id. at 587-88.
34 Id. at 588.
35 See e.g., *Lem Moon Sing v. U.S.*, 158 U.S. 538 (1895); *Wong Wing v. U.S.*, 163 U.S. 228 (1896). However, the power to exclude aliens on the basis of race was eliminated in 1965, 8 U.S.C. § 1152(a)(1976) provides that "[n]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence . . . ."
36 *Kleindienst v. Mandel*, 408 U.S. 753 (1972). Kleindienst involved a Marxian philosopher (Mandel) who was denied admission pursuant to 8 U.S.C. § 1182(a)(28)(D). That section denies entry to those who advocate or publish "the economic, international, and governmental doctrines of world communism." American University professors brought suit, contending that the statute was unconstitutional because it denied them of "hearing and meeting with Mandel in person," 408 U.S. at 760, and as such violated their first amendment rights. The Court, relying on the plenary power of Congress and the limited review of the courts in such matters, disagreed. The Court held that when the Attorney General decides for a legitimate and bona fide reason to exclude aliens from entering the United States "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." Id. at 770.
37 See *Boutilier v. I.N.S.*, 387 U.S. 118 (1967) (the Supreme Court upheld the deportation of an excludable alien who was a homosexual).
38 338 U.S. at 609 (1889). See also *Fong Yue Ting v. U.S.*, 149 U.S. 698, 705 (1893) ("It is an accepted maxim of International law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self preservation, to forbid the entrance of foreigners within its dominion, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." (quoting *Nishimura*, 142 U.S. at 659).
39 *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").
certain that whether derived from the implied powers of the Constitution or accepted principles of international law, the federal government's power over immigration is supreme.

B. Limited Judicial Inquiry

Judicial decisions hold consistently that "Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."\(^6\) Moreover, the Supreme Court has emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over [the admission of aliens to the country]."\(^7\) Adding to the broad powers of the federal government is the "limited scope of judicial inquiry into immigration legislation."\(^8\) Supreme Court cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control."\(^9\) It is within this model of governmental power, relatively free from judicial scrutiny, that the "entry fiction" operates to the disadvantage of excludable refugees.

IV. EXCLUSION VERSUS DEPORTATION

A. Comparison of Treatment

If an immigration official determines that an alien has not made an entry into the United States, the alien will be detained pending an exclusion hearing. However, if the alien is found to have entered the United States, regardless of the legality of the entry, then he is subject to a deportation hearing. An alien in a deportation proceeding is entitled to significant procedural and substantive rights that are not available to excludable refugees.

An alien in a deportation hearing may claim protection of the Fifth Amendment's due process clause.\(^{10}\) A deportable alien is considered to be within the borders of the United States and thus

\(^{6}\) *Boutilier*, 387 U.S. at 125.


\(^{8}\) *Id.* 430 U.S. at 792.

\(^{9}\) *Id.* (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)).

\(^{10}\) The 5th Amendment provides that "no person shall be ... deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.
entitled to constitutional protection. An excludable alien is considered a non-person for constitutional protection, because pursuant to the entry fiction, he is considered to have been detained at the border. An excludable alien is entitled only to the due process afforded by Congress. As Justice Murphy noted, in his concurring opinion in Bridges v. Wixon, the “Bill of Rights is futile authority for the alien seeking admission for the first time to these shores.” Cases are legion holding that excludable aliens are not entitled to due process under the Fifth Amendment.

The Supreme Court reaffirmed this view in Landon v. Plasecia. The Landon Court noted that “an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application . . . .” Other cases suggest that some due process is due excludable aliens. However, no court has awarded excludable aliens the same due process rights accorded to deportable aliens. Moreover, Landon can be distinguished from cases suggesting that excludable aliens have rights, as it deals with a returning resident alien, and not with an alien seeking admission for the first time.

The INA provides excludable aliens minimal due process protections. Excludable aliens are entitled to a hearing before an immigration judge. At that hearing they are permitted to present evidence on their own behalf, to examine and object to evidence against them, and to cross-examine witnesses presented by the government. The aliens are permitted the assistance of counsel at the

66 Yick Wo v. Hopkins, 118 U.S. 356 (1886) (The guarantees of the 14th Amendment extend to all persons within the territorial jurisdiction of the United States.).
67 Garcia-Mir, 766 F.2d at 1484.
68 Knauff, 338 U.S. at 544.
70 Id. at 161 (Murphy, J., concurring).
71 See e.g., Kwong Hai Chew v. Colding, 344 U.S. 590, 600 (1953) (excludable aliens are not within the protection of the 5th Amendment).
73 Id. at 32.
74 Moret v. Karn, 746 F.2d 989 (3d Cir. 1984) (once procedural protections against termination of aliens' parole are in place, the INS' failure to follow its own directives is actionable); Amanullah v. Nelson, 811 F.2d 1 (1st Cir. 1987) (outside the context of admission and exclusion procedure, excludable aliens have some due process rights); Agustin v. Sava, 735 F.2d 32 (2d Cir. 1984) (absence of adequate translation of political asylum proceedings denied excludable due process to excludable alien); Yiu Sing Chun v. Sava, 708 F.2d 869, 877 (2d Cir. 1983) (in dicta, the court notes a refugee with a well founded fear of persecution may well enjoy some due process rights).
75 8 U.S.C. § 1226(a).
76 8 C.F.R. § 236.2(a).
exclusion hearing. They may appeal an order of exclusion to the Board of Immigration Appeals. A final order of exclusion may be appealed by a writ of habeas corpus to the federal courts. However, these protections pale in comparison to those enjoyed by an alien in a deportation hearing.

Aliens who lose their right to reside in the United States through a deportation hearing are entitled to extensive substantive rights. In a deportation hearing for, example, illegal aliens may designate the country to which they prefer to be sent. The INA provides that:

[The deportation of an alien in the United States . . . shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States.]

This relief is not available to excludable refugees. Excludable refugees are not in the United States within the meaning of the INA. Excludable aliens are immediately deported. Deportation is to the country in which the alien boarded the vessel or aircraft on which he arrived in the United States. This is of special significance to alien-refugees who may face persecution if returned to their homeland. Such a mandatory provision encourages refugees to make an illegal entry into the United States.

Generally, a deportable alien cannot be detained for more than six months after an order of deportation. The INA provides that once a final order of deportation is made against an alien, "[t]he Attorney General shall have a period of six months from the date of such order, or if judicial review is had, then from the date of the final order of the Court, within which to effect the alien's departure

77 8 U.S.C. § 1362. The right to counsel is more a matter of form than substance. Most aliens cannot afford counsel.
78 8 U.S.C. § 1226(b).
79 8 U.S.C. § 1105a(b).
81 Id.
82 Id. The statute expressly provides that such relief is available to aliens who are "in the United States." The entry fiction provides that excludable aliens have not entered the United States but are considered to have been detained at the border.
83 8 U.S.C. § 1227(a).
84 8 U.S.C. § 1252(c).
from the United States . . . .”85 No statute prevents the detention of excludable aliens beyond six months.86

An alien in a deportation hearing may appeal for one or more types of discretionary relief that are not available to the excludable refugee, including voluntary departure, suspension of deportation, and stay of deportation. In general, discretionary relief must be applied for during the deportation hearing.87 Such an application does not constitute a concession of deportability.88 As with most forms of discretionary relief, the burden is on the alien to show that he meets the statutory requirements.89 Moreover, even if the alien does meet this burden, the district director may still deny relief.90 The district director will only be overruled if he abuses his discretion. Thus, a decision will only be overturned if the denial was made without “rational explanation,” not in conformity with “established policies” or the decision rested on an “impermissible basis” such as discrimination.91

A deportable alien may be entitled to voluntary departure.92 The INA provides that:

[the Attorney General may, in his discretion, permit any alien under deportation proceeding . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection].93

This type of relief is important for two reasons. First, voluntary departure enables the alien to select his or her own destination. Second, an alien who is granted voluntary departure is not considered to have been deported and thus that alien may re-apply for admission to the United States.94 An alien who has been deported may not re-enter the United States for a period of five years.95 An

85 Id.
86 The prolonged detention of excludable aliens has received extensive legal and media attention. The detention of Mariel Cubans has spawned both law suits and riots.
87 8 C.F.R. § 242.17(e).
88 Id.
89 Id.
90 Id.
91 Wong Wing Hang v. I.N.S., 360 F.2d 715, 718 (2d Cir. 1966).
93 8 U.S.C. § 1254(e).
94 8 C.F.R. § 243.5.
95 Id.
excludable alien is not entitled to voluntary departure because the INA only refers to aliens who are in the United States. As a result, the alien will be returned to the country from where he came. Moreover, he will be considered deported and consequently will not be able to re-apply for admission for a period of five years.

A deportable alien may be entitled to a Suspension of Deportation.\(^\text{96}\) The INA provides that the "Attorney General may, in his discretion, suspend deportation and adjust the [aliens] status to that of an alien lawfully admitted for permanent residence . . . ."\(^\text{97}\) In order to qualify for a suspension, the alien must (i) apply to the Attorney General for a suspension of deportation, (ii) show that he is deportable under any law of the United States, (iii) show that he has been physically present in the United States for a period of not less than seven years, (iv) prove that he was and is a person of good moral character, and (v) prove that his departure would result in "extreme hardship to the alien or to his spouse, parent, or child, who is a citizen . . . ."\(^\text{98}\) The purpose of this section is to protect those aliens who have been present in the United States for a long period of time from the harsh consequences of deportation. Once again such relief is not available to excludable refugees.

In a deportation hearing the burden is on the government to show by "clear, unequivocal, and convincing evidence" that the alien is deportable.\(^\text{99}\) In an exclusion hearing the burden is on the alien to show that he is not subject to exclusion.\(^\text{100}\) The only exception to this rule arises when the issue of illegal entry is involved. In such cases, the burden is on the alien to show he has not made an illegal entry.\(^\text{101}\) However, not all illegal aliens have entered this country illegally. Many aliens have been properly admitted but have remained in the United States after expiration of their entry permits or visas. Because there is no question of illegal entry, the burden is on the government to show by "clear, convincing, and unequivocal evidence"\(^\text{102}\) that an alien is deportable.

In contrast, in an exclusion hearing the burden is on the alien to establish that he is "not subject to exclusion under any provision

\(^{96}\) 8 U.S.C. § 1254(a); see also 8 C.F.R. § 244.

\(^{97}\) 8 U.S.C. § 1254(a).

\(^{98}\) Id.


\(^{100}\) 8 U.S.C. § 1361.

\(^{101}\) Id. Despite the word 'any' in the statute, section 1361 has been interpreted to apply only to a deportation hearing where illegal entry is an issue. See Iran v. I.N.S., 656 F.2d 469 (9th Cir. 1981).

\(^{102}\) Woodby, 385 U.S. at 286.
of this [the INA] Chapter . . . "103 This is a heavy burden for a refugee to carry, and may prove virtually impossible in many cases. Refugees who arrive in the United States are in most instances without proper entry documentation. The INA expressly provides that aliens without proper entry documents are excludable.104 Therefore, excludable refugees must pursue other methods of admission, such as asylum, or face immediate deportation.105

As the above discussion indicates, an alien in a deportation hearing receives more substantive and procedural rights than a refugee in an exclusion hearing. As a result, the immigration laws, by providing illegal aliens better treatment in a deportation hearing, encourage illegal entry.

V. ASYLUM AND MANDATORY WITHHOLDING OF DEPORTATION

A. Current Law

Under current immigration law, an excludable refugee who claims he or she will be persecuted if deported can seek relief in two ways. First, under section 243(h) of the INA, the Attorney General is required to withhold deportation of an alien who demonstrates that his or her "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."106 Second, the alien may seek discretionary asylum under the Refugee Act of 1980.107 Section 208(b) of the INA provides that an alien may be granted asylum at the Attorney General's discretion, if the Attorney General determines that the alien is a refugee within the meaning of the INA.108 A refugee is defined by the INA as "any person who is outside any country of such person's nationality" or is "unable or

105 The discussion in the body of the Note regarding the differing treatment given to deportable versus excludable aliens is not exhaustive. There are other areas in which deportable aliens receive better treatment. Deportable aliens may appeal directly from the B.I.A. to the federal courts. 8 U.S.C. § 1105a. An excludable alien may only appeal via habeas corpus relief. 8 U.S.C. § 1105(b). Moreover, in a deportation hearing the alien is entitled to seven days notice, whereas in an exclusion hearing there is no notice requirement. 8 C.F.R. § 242.1(b). See In re Salazar 17 I. & N. Dec. 167, 169 (BIA 1979)(notice given at an exclusion hearing is sufficient).
unwilling to return to or unwilling to avail himself or herself of the protection of, that country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ."109 Accordingly, the burden is on the asylum applicant to establish that he or she has a well founded fear of persecution on account of any of the enumerated reasons.

Application for asylum may be made either to the district director of the INS or, if exclusion or deportation hearings have begun, to the immigration judge.110 The district director may approve or deny the request for asylum at his or her discretion.111 Decisions by the district director are not subject to review.112 In general, a request for asylum will be denied if, (a) an alien is not a refugee within the meaning of the Refugee Act; (b) the alien has been firmly resettled in a foreign country; (c) the alien assisted in the persecution of any other person; (d) the alien has been convicted of a serious crime; (e) the alien has committed serious non-political crime outside of the United States; or (f) the alien poses a danger to United States security.113 Decisions of the immigration judge may be appealed to the Board of Immigration Appeals.114 An excludable alien may appeal an order of the BIA to the federal courts by writ of habeas corpus.115 If asylum is granted, it may be terminated if an alien is no longer a refugee within the meaning of the INA, or if circumstances change in the country in which the alien last resided.116

B. Historical Backdrop

1. Prior to 1968

In order to have a better understanding of the problem of illegal immigration and asylum, a brief review of the treatment of refugees in the United States is necessary. Prior to 1968 there was limited legislation which authorized the Attorney General to withhold deportation of an otherwise deportable alien due to the fact

110 8 C.F.R. § 208.3(a)(b).
111 Id.
112 8 C.F.R. § 208.8(a).
113 8 C.F.R. § 208.8(c).
114 8 C.F.R. § 208.8(f).
115 8 C.F.R. § 3.1(b)(1).
that the alien would be subject to persecution if returned to his native country.\footnote{117} Section 243(h) of the INA provided relief only to those aliens who were within the United States after an entry regardless of the legality of the entry.\footnote{118} Before being amended by the Refugee Act of 1980, section 243(h) of the INA provided that “\textbf{t}he Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.”\footnote{119} Such relief was denied to aliens who were “at the border seeking refuge in the United States.”\footnote{120}

U.S. policy toward refugees seeking asylum at the border was “reactive and ad hoc.”\footnote{121} In 1948, Congress passed the Displaced Persons Act of 1948 (the “DPA”).\footnote{122} The purpose of the Displaced Persons Act was to deal with the flow of refugees from Europe following World War II.\footnote{123} In 1952 Congress passed the INA\footnote{124} which allowed for parole or temporary asylum of aliens at the discretion of the Attorney General.\footnote{125} The purpose of the INA was to provide for the admission of aliens under emergency circumstances.\footnote{126} This became the principal means by which refugees entered the U.S.\footnote{127} The Attorney General was authorized under the INA to permit “conditional entry” to refugees fleeing a “communist-dominated area or the Middle East” because of fear of persecution.\footnote{128} This represented an extreme shift in U.S. refugee policy because, for the first time, aliens who were from other areas were

\footnote{117} I.N.S. v. Stevic, 467 U.S. 407, 414 n.5 (1984) (quoting the SUBVERSIVE ACTIVITIES CONTROL ACT of 1950) “No alien shall be deported under any provision of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution.”

\footnote{118} Id. at 414 n.7. This portion of the INA was amended in 1965 by eliminating “physical persecution” and inserting “persecution on account of race, religion, or political opinion.”

\footnote{119} 8 U.S.C. § 1253(h).

\footnote{120} Stevic, 467 U.S. at 415.

\footnote{121} E. HULL, supra note 1, at 119 (quoting [H. Rep. No.] 608, 96th Cong., 1st Sess. 6 (1979) (testimony of former Secretary of State Cyrus Vance) at 1, 9).


\footnote{123} See E. HULL, supra note 1, at 117.

\footnote{124} Id.

\footnote{125} Id.

\footnote{126} Id.

\footnote{127} Id. at 117–18. The Attorney General used this parole power to admit 38,000 Hungarians in 1956, 690,000 Cubans beginning in 1954, and 360,000 Indochinese between 1975 and 1980.

\footnote{128} Stevic, 467 U.S. at 415.
officially excluded.\textsuperscript{129} This led the President’s Commission of Immigration and Nationality to conclude in 1952 that “[t]he United States is one of the few major democratic countries of the free world whose present laws impede and frequently prevent asylum.”\textsuperscript{130}

2. The United Nations Protocol

In 1968 the U.S. became a party to the United Nation’s Protocol ("the Protocol") relating to the status of refugees.\textsuperscript{131} The Protocol provides a definition of refugee\textsuperscript{132} and requires signatories\textsuperscript{133} to honor the principle of non-refoulment. The principle of non-refoulment prohibits the host state from returning a refugee to a country where the refugee would face persecution.\textsuperscript{134} The Protocol was the forerunner to the Refugee Act of 1980.

From 1968 until the adoption of the Refugee Act of 1980 the BIA and most courts have consistently held that the standard a refugee must establish for relief is “clear probability” of persecution.\textsuperscript{135} In \textit{In Re Dunar}\textsuperscript{136} the BIA held that there is no substantial difference in coverage of section 243(h) of the INA (discretionary withholding of deportation) and Article 33 of the Protocol.\textsuperscript{137} The court further concluded that “Article 33 of the Protocol has effected no substantial changes in the application of section 243(h) of the INA, either by way of burden of proof, coverage, or manner of arriving at decisions.”\textsuperscript{138}

Similarly, in \textit{Kashani v. INS}\textsuperscript{139} the Seventh Circuit Court of Appeals, in dismissing a petition for review, held that an alien

\textsuperscript{129} E. HULL, \textit{supra} note 1, at 117.
\textsuperscript{130} Id. (quoting the Presidents' Commission on Immigration and Naturalization, “Whom We Shall Welcome” p. 118).
\textsuperscript{132} Id. at art. 1.2. The Protocol defines a refugee as a person 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 or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality, and being outside the country of his former habitual residence is unable or, owing to such fear is unwilling to return to it.”
\textsuperscript{133} Id. at 323.
\textsuperscript{134} E. HULL, \textit{supra} note 1, at 118.
\textsuperscript{135} \textit{Stevic}, 467 U.S. at 419 n.9. The United States is not a signatory to the Protocol. Nor did it adopt the Protocol definition of refugee until the Refugee Act of 1980.
\textsuperscript{136} \textit{Stevic}, 467 U.S. at 419 n.12.
\textsuperscript{138} Id.
\textsuperscript{139} 547 F.2d 376, 379 (7th Cir. 1977).
seeking to avoid deportation due to a "well founded fear of persecution" must meet the same standard under the Protocol as under section 243(h) of the INA which allows the Attorney General to withhold deportation. The court noted "the well founded fear standard contained in the Protocol and the clear probability standard which this court has engrafted onto Section 243(h) will in practice converge."  

3. The Refugee Act of 1980

In 1980 Congress passed the Refugee Act. Under the Refugee Act the language of section 243(h) was amended to conform to Article 33 of the United Nations Protocol. First, the amendment to the INA changed the discretionary authority of the Attorney General under the old section 243(h) to that of mandatory withholding of deportation. Second, the Refugee Act required the Attorney General to determine that an alien's "life or freedom would be threatened" rather than that the alien "would be subject to persecution." Finally, the Refugee Act includes "nationality" and "membership in a particular social group" as causes of persecution. However, none of the changes explicitly changed the standard of proof (clear probability of persecution) that an alien must meet in order to be entitled to mandatory withholding under the amended version of section 243(h).

The amendments to the INA by the Refugee Act make no mention of "refugee" as does INA section 208(b)'s asylum provision. The original version of section 243(h) only referred to aliens who were "within" the United States as being entitled to withholding under the INA. Prior to 1980 an excludable alien could not apply for relief under 243(h). Rather, such relief was only possible in a
C. Well Founded Fear versus Clear Probability of Persecution.

There has been much debate over what standard of proof the alien must establish to be granted asylum under section 208(b).\textsuperscript{151} It is generally accepted that under section 243(h) the alien must establish a "clear probability" of persecution to avoid deportation.\textsuperscript{152} However, what standard must be established under section 208(b) has been a subject of debate among the circuits.

The reasons for this conflict center on the general understanding that the "well founded fear" standard is more generous than the "clear probability" standard required under section 243(h).\textsuperscript{153} The BIA\textsuperscript{154} and the Third Circuit\textsuperscript{155} agree that the standard to be established under either section 208(b) or section 243(h) are identical. In both cases, the plaintiff must show a clear probability of persecution in order to be entitled to relief.

If the clear probability standard is a more difficult standard to meet than the well founded fear standard, an alien who cannot meet the clear probability standard will be denied both asylum and withholding of deportation. However, if the standards differ, aliens could establish a claim for asylum though they would be denied a withholding of deportation. Recently the Supreme Court decided this issue in \textit{I.N.S. v. Cardoza-Fonseca}.\textsuperscript{156} In Cardoza-Fonseca, the Court held that the "well founded fear" standard under section 208(b) (asylum), was not the same as the "clear probability" of persecution under 243(h), which authorized mandatory withholding of deportation.\textsuperscript{157}

In Cardoza-Fonseca, the respondent, a thirty eight year old Nicaraguan, illegally entered the United States by overstaying her visitor's permit.\textsuperscript{158} The respondent declined the Immigration and Nat-

\textsuperscript{150}See supra notes 27–37 and accompanying text for a discussion of entry. Illegal entry is a valid entry for immigration purposes pursuant to the entry fiction.


\textsuperscript{152}Stevic, 467 U.S. at 419.

\textsuperscript{153}Cardoza-Fonseca, 107 S. Ct. at 1210.

\textsuperscript{154}Id. The BIA in the present case applied the same standard, (clear probability), to both the asylum and withholding of deportation claim.

\textsuperscript{155}Sankar v. INS, 757 F.2d 532, 533 (3d Cir. 1985).

\textsuperscript{156}107 S. Ct. 1207 (1987).

\textsuperscript{157}Id. at 1209.

\textsuperscript{158}Id.
uralization Services' offer of voluntary departure and as a result deportation proceedings were commenced against her. Respondent admitted that she was in the country illegally and instead sought asylum under section 208(b) of the Refugee Act and withholding of deportation under section 243(h) of the INA. In order to support both of her requests, the respondent presented evidence that her brother had been tortured and imprisoned due to his political beliefs in Nicaragua. Respondent contended that due to both her and her brother's opposition to the Sandinistas she would be tortured if forced to return.

Respondent's requests for asylum and withholding of deportation were denied by the Immigration Judge and by the BIA. The Immigration Judge and the BIA considered the standards under sections 208(a) and 243(h) to be identical. On appeal to the Ninth Circuit, the respondent claimed that both "the Immigration Judge and the BIA erred in applying the 'more likely than not' standard of proof from section 243(h) to her section 208(b) asylum claim." Rather, the respondent claimed they should have applied the "well founded fear" standard to her asylum claim. This was based on respondent's belief that the well founded fear standard was more generous. The Ninth Circuit agreed. The Supreme Court granted certiorari and affirmed.

The Supreme Court rejected the government's argument that there is no difference between the "well founded fear" test and the "would be threatened" test of section 243(h). First, the language used by Congress in describing the two standards conveys different meanings. "[T]he 'would be threatened' language of section 243(h) has no subjective component, but instead requires the alien to establish by objective evidence that it is more likely than not that he or she will be subject to persecution upon deportation."