Note, Requiring Notice of the Right to Apply for Asylum: *Orantes-Hernandez v. Meese*

Michael Newman*

In the Refugee Act of 1980,[1] Congress declared, "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."[2] The objective of the Act was to "provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern."[3] The Act was significant in three respects. First, it provided statutory acknowledgement of the legal concept of asylum.[4] Second, the Act brought United States' law into conformity with international law by requiring the Attorney General to withhold deportation of aliens in certain circumstances.[5] Finally, the Act expanded the statutory definition of refugee to include victims of persecution from *all* areas of the world.[6]

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1. Pub. L. No. 96-212, 94 Stat. 102, (1980) (codified as amended in scattered sections of 8 U.S.C. (1988)).

2. *Id.* § 101(a).

3. *Id.* § 101(b).

4. *Id.* § 201(b) (codified as amended at 8 U.S.C. § 1158(a) (1988)). This section reads:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee.

Id. Although United States law previously had given statutory recognition as refugees to those aliens who met the restrictive criteria set forth in section 203(a)(7) of the 1965 Amendments to 8 U.S.C., no prior statute had acknowledged an alien's universal interest in seeking asylum to avoid persecution. Immigration and Nationality Amendments of 1965, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 913 (1965) [hereinafter referred to in text as INA Amendments of 1965] (codified at 8 U.S.C. § 1153(a)(7) (1965) (amended 1980)); *see infra* notes 23-25 and accompanying text; Note, *Protecting Aliens From Persecution Without Overloading the INS: Should Illegal Aliens Receive Notice of the Right to Apply for Asylum?*, 69 Va. L. Rev. 901, 901-02 (1983).

5. *See infra* notes 59-68 and accompanying text.

6. *Id.* The Refugee Act of 1980 amended the definition of "refugee" to include:

> [A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account

In *Orantes-Hernandez v. Meese*,[7] the district court examined the significance of the above provisions and concluded they evidenced a congressional intention to provide aliens with notice of their eligibility to apply for asylum.[8] The court also found the petitioning class of Salvadoran aliens had a protected interest in that notice of which could not be deprived without due process.[9]

The court's holding in *Orantes-Hernandez* is consistent with the decisions of two district courts.[10] Three United States Courts of Appeals, however, have found no such right existed.[11]

This Note examines the district court's holding in *Orantes-Hernandez v. Meese* in light of the conflict among federal courts regarding the right of deportable[12] aliens to be notified of their eligibility to apply for asylum. Part I surveys the legislative history of the relevant provisions of the Refugee Act of 1980 and how that history has been interpreted by the courts.[13] Part II analyzes pre-*Orantes-Hernandez* case law and examines whether notice is a protected liberty or property interest of which a deportable alien cannot be deprived without due process.[14] Part III discusses the district court's holding in *Orantes-Hernandez*.[15] In Part IV, the author concludes the district court's application of the *Mathews v. Eldridge*[16] balancing formula is appropriate and effective as a flexible safeguard against national origin discrimination by the Im-

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of race, religion, nationality, membership in a particular social group, or political opinion.

§ 201(a) (codified at 8 U.S.C. § 1101(a)(42)(A) (1980)). This definition replaced the more restrictive standard of section 203(a)(7) of the INA Amendments of 1965. *See infra* notes 23-25 and accompanying text.

7. 685 F. Supp. 1488 (C.D. Cal. 1988).

8. *Id.* at 1506 ("Notification of the right to apply for asylum and for relief from deportation is mandated by the Refugee Act.").

9. *Id.* at 1506-08.

10. Nunez v. Boldin, 537 F. Supp. 578 (S.D. Tex. 1982); Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal. 1982).

11. Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984); Ramirez-Osorio v. INS, 745 F.2d 937 (5th Cir. 1984); Duran v. INS, 756 F.2d 1338 (9th Cir. 1984).

12. Courts have distinguished between deportable and excludable aliens. An excludable alien is one who has not formally "entered" the United States. Christopher Yukins, *The Measure of a Nation: Granting Excludable Aliens Fundamental Protections of Due Process*, 73 Va. L. Rev. 1501, 1504 (1987). Entering has been interpreted as coming to the United States free from official restraint and having evaded examination or inspection at the border. *Id.* at 1504-05 n.13.

A deportable alien, whether having entered legally or illegally, has been accorded due process protection. *Id.* at 1505. Excludable aliens, on the other hand, have been afforded only those protections mandated by statute. *Id.* The term "entry" is defined at 8 U.S.C. § 1101(13) (1988).

13. *See infra* notes 18-98 and accompanying text.

14. *See infra* notes 99-122 and accompanying text.

15. *See infra* notes 123-138 and accompanying text.

16. 424 U.S. 319 (1976).

migration and Naturalization Service (INS).[17]

I. Legislative History of the Asylum and Withholding of Deportation Provisions of the Refugee Act of 1980

Prior to 1980, refugees obtained admission to the United States pursuant to one of two statutory provisions. Section 212(d)(5) of the Immigration and Naturalization Act[18] authorized the Attorney General to parole aliens into the United States.[19] Between 1952 and 1980, thousands of aliens were paroled pursuant to section 212(d)(5), with the largest concentrations coming from Hungary,[20] Cuba,[21] and Indochina.[22] After 1965, refugees also entered the United States under section 203(a)(7) of the Immigration and Naturalization Amendments of 1965.[23] Section 203(a)(7) authorized the entrance of a maximum of 10,200 refugees per year under a newly created seventh preference category.[24] To qualify for admission under section 203(a)(7), an alien was required to be from a Communist-Bloc or Middle East country and "unable or unwilling to return to such country or area on account of race,

17. *See infra* notes 139-201 and accompanying text.

18. Immigration and Naturalization Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1557 (1988)).

19. *Id.* § 212(d)(5) (codified at 8 U.S.C. § 1182(d)(5) (1952) (amended 1980)). This section provided: "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States." *Id.* Section 212(d)(5) originally was enacted to authorize the parole of aliens unable to meet the stringent entry requirements of the Immigration and Naturalization Act of 1952. *See, e.g.*, Deborah Anker & Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 15 (1981). There were no numerical limitations on the Attorney General's parole power. *See* Arthur Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243, 245 (1984).

20. Between 1956 and 1958, 31,870 Hungarian refugees were paroled into the United States. Congressional Research Service, Library of Congress, 96th Cong., 1st Sess., U.S. Immigration Law & Policy: 1952-1979 18 (Comm. Print 1979) [hereinafter Refugee Policy Report]. Subsequent legislation allowed those refugees to adjust their status to permanent residents. *Id.*

21. Between 1961 and 1979, more than 600,000 Cubans entered the United States as parolees. H.R. Rep. No. 608, 96th Cong., 1st Sess. 4 (1979) [hereinafter H.R. 2816 Report].

22. Between 1968 and 1980, 290,075 Indochinese refugees were paroled into the United States. Helton, *supra* note 19, at 248 (figure compiled from Schmidt, *Development of United States Refugee Policy*, INS Rep., Fall 1979, at 1-3; *World Refugee Crisis: The International Community's Response, Report to the Committee on the Judiciary*, 96th Cong., 1st Sess. 213 (1979)).

23. Immigration and Nationality Amendments of 1965, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 913 (1965).

24. *Id.*

religion, or political opinion."[25]

The proliferation of executive branch emergency parole programs[26] and the ideological and geographic limitations of section 203(a)(7) led Congress in 1977 to begin hearings on the enactment of a comprehensive refugee bill.[27] In 1979, a series of amendments to the Immigration and Naturalization Act were introduced in the House[28] and Senate[29] as the Refugee Act of 1979. Following hearings and debates, Congress passed the Refugee Act of 1980[30] and President Carter signed it into law.[31]

A. Section 201(a)(42): Definition of Refugee

As noted above, prior to 1980, only aliens from designated countries could apply for asylum in the United States.[32] The word "asylum" itself was not used in United States immigration law prior to 1980.[33] As originally proposed, a refugee was defined as:

> [A]ny person who is outside any country of his nationality or, in the case of a person having no nationality, is outside any country in which he last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion.[34]

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25. *Id.* To qualify for relief under section 203(a)(7), aliens were required to prove that:

> (i) [B]ecause of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made.

Id. An application pursuant to section 203(a)(7) could be made only through an immigration officer in a noncommunist or noncommunist-dominated country. Anker & Posner, *supra* note 19, at 18; *see* 8 C.F.R. § 235.9(a) (1989).

26. *See supra* notes 18-22.

27. *See, e.g.*, Anker & Posner, *supra* note 19, at 33-42; *see generally* Elizabeth Hull, Without Justice for All: The Constitutional Rights of Aliens 115-19 (1985).

28. S. 643, 96th Cong., 2d Sess., 125 Cong. Rec. 4863 (1979).

29. H.R. 2816, 96th Cong., 1st Sess., 125 Cong. Rec. 4816 (1979).

30. The bill passed in the House by a margin of 267 to 192. 126 Cong. Rec. 4508 (1980). The bill was adopted unanimously in the Senate. 126 Cong. Rec. 3758 (1980).

31. Refugee Act of 1980: President's Statement On Signing S. 643 Into Law, 1 Pub. Papers of Jimmy Carter: 1980-81 503 (March 18, 1980).

32. *See, e.g.*, Cheryl Edwards, *Political Asylum and Withholding of Deportation: Defining the Appropriate Standard of Proof Under the Refugee Act of 1980*, 21 San Diego L. Rev. 171, 175 (1983).

33. *See* Note, *supra* note 4, 901 n.5; S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979) [hereinafter S. 643 Report].

34. *The Refugee Act of 1979: Hearing on S. 643 Before the Comm. on the Judici-*

The definition of refugee proposed in section 201(a) essentially mirrored that of Article I of the 1951 United Nations Convention Relating to the Status of Refugees,[35] to which the United States acceded by becoming a signatory to the 1967 United Nations Protocol relating to the Status of Refugees[36] in 1968.[37]

During committee hearings on the Act, witnesses suggested improvements for the proposed definition.[38] Both House and Senate committees adopted amendments incorporating those suggestions.[39] The resulting definitions were substantially different. The Senate definition included displaced persons,[40] while the House definition included persons still within their own country and *excluded* persons who participated in the persecution of any person

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ary, 96th Cong., 1st Sess. 73-74 (§ 201(a) (1979)) [hereinafter *S. 643 Hearings*]. *The Refugee Act of 1980: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees and International Law of the Comm. of the Judiciary*, 96th Cong., 1st Sess. 5-6 (§ 201(a)) (1979) [hereinafter *H.R. 2816 Hearings*].

35. July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

36. Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

37. Article I of the 1951 Convention defines "refugee" as any person who:

> As a result of events occurring before 1 January 1951 and owing to 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

1951 Convention, *supra* note 35, at 152.

38. In the Senate Hearings, Ingrid Walter, Chair, Committee on Migration and Refugee Affairs of the American Council of Voluntary Agencies, stated:

> We would hope the Congress will be able to find a mechanism which would permit victims of natural disasters to be admitted to the United States as refugees in those relatively infrequent, yet nonetheless compelling circumstances, when returning to their homes or when finding new homes elsewhere is not possible.

S. 643 Hearings, *supra* note 34, at 51-52.

During the House Hearings, David Carliner of the ACLU observed that "[t]he definitions of the statute don't now require that a person make his application within a third country, but in fact it would be impossible for a person in a country where he is suffering persecution to be precleared, screened, or processed by the Immigration and Naturalization Service." *H.R. 2816 Hearings*, *supra* note 34, at 187. Whitney Ellsworth and Hurst Hannum of Amnesty International criticized "the omission from the term 'refugee' of any reference to displaced persons or detainees who may reasonably fear persecution while still within their own country." *Id.* at 169. Congresswoman Elizabeth Holtzman queried Michael Egan, Associate Attorney General, why, unlike the 1967 Protocol, persons who engaged in persecution were not excluded from the definition. *Id.* at 71.

39. S. 643, 96th Cong., 1st Sess., 125 Cong. Rec. 23226 (1979); S. 643 Report, *supra* note 33, at 20 (§ 101(a) (42)); H.R. 2816, 96th Cong., 1st Sess., 125 Cong. Rec. 37199 (1979); H.R. 2816 Report, *supra* note 21, at 38, (§ 101(a) (42)).

40. S. 643. 96th Cong., 1st Sess., 125 Cong. Rec. 23226 (1979); S. 643 Report, *supra* note 33, at 20 (§ 101(a) (42) (B)).

"on account of race, religion, nationality, membership in a particular social group, or political opinion."[41] The conference committee adopted the House definition of refugee with the proviso that persons persecuted within their own country would be considered refugees only if so designated by the President in "special circumstances."[42]

Statements from the Act's sponsors and witnesses at the committee hearings make clear that the final definition of "refugee" was intended to be equitable and nondiscriminatory. As noted in the Senate Report, the definition "repeals the current immigration law's discriminatory treatment of refugees by providing a new definition of refugee that recognizes the plight of homeless people all over the world."[43] The new definition was intended to eliminate the "geographical and ideological restrictions" which existed under the former definition.[44]

B. Section 208: Asylum Procedure

As originally introduced, the Refugee Act contained no direct reference to asylum nor did it provide any direction regarding how the proposed refugee provision[45] would be administered. During hearings in the Senate[46] and the House,[47] witnesses objected to these omissions. In addition, some witnesses recommended the right to apply for political asylum, in and of itself, should be included in the Act.[48]

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41. H.R. 2816, 96th Cong., 1st Sess., 125 Cong. Rec. 37199 (1979); H.R. 2816 Report, *supra* note 21, at 38 (§ 101(a)(42)(B)) (emphasis added).

42. S. 643, 96th Cong., 2nd Sess., 126 Cong. Rec. 3570 (1980); Refugee Act of 1980: Conference Report, S. Rep. No. 590, 96th Cong., 2d Sess. 2 (§ 201) (1980) [hereinafter Conference Report].

43. S. 643 Report, *supra* note 33, at 1.

44. *Id.* at 4.

45. *See supra* note 33 and accompanying text.

46. Ingrid Walter, Chair, Committee on Migration and Refugee Affairs of the American Council of Voluntary Agencies for Foreign Service, objected to the proposed legislation because it "does not provide for uniform procedures relating to the granting of asylum to and proscribing deportation or return or [sic] refugees to countries where they have a fear of persecution. Indeed the very concept of asylum is missing from the bill." *Id. See S. 643 Hearing*, *supra* note 34, at 52.

47. A number of witnesses at the House hearings objected to the lack of a specific procedure. David Carliner of the ACLU noted that "[a]lthough the right of asylum has been regarded as an historic tenet of American political policy, it has not been set forth in any statutory provision." *H.R. 2816 Hearings*, *supra* note 34, at 186. Wells Klein, Senior Vice Chair, Committee on Migration and Refugee Affairs, proposed the addition of a provision that stated "[t]he Attorney General shall establish a uniform procedure for an alien, regardless of his status, applying for asylum who is physically present in the United States, and shall admit any such alien for lawful permanent residence who meets the definition of a refugee." *Id.* at 250.

48. Whitney Ellsworth and Hurst Hannum of Amnesty International stated

The Senate[49] and House[50] committees responded to these criticisms by amending the bill to require that the Attorney General establish a uniform procedure for considering asylum applications.[51] Under the proposed House provision, the decision to grant orderly asylum status would be left to the Attorney General even if an alien met the definition of refugee.[52] The House Report stated the provision was included to "insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law."[53] In contrast, the Senate provision mandated a person be accorded asylum if she met the definition of refugee.[54] The Senate Report suggested the procedure set up by the Attorney General "include a provision allowing all asylum applicants an opportunity to have their claims considered outside a deportation and/or exclusion proceeding, provided the order to show cause has not been issued."[55]

"[w]hile it may not be appropriate to spell out in detail the procedures under which an alien may claim asylum, the right to apply for political asylum should be included within the terms of the legislation." *H.R. 2816 Hearings*, *supra* note 34, at 170. David Carliner of the ACLU testified that "[m]any people in this situation have been granted what we call asylum under the parole authority of the Attorney General. I believe it would be useful to include this as a substantive right in the provisions of the statute setting forth the procedures relating to applications for asylum." *Id.* at 188.

49. *See* S. 643 Report, *supra* note 33, at 9.

50. *See* H.R. 2816 Report, *supra* note 21, at 17.

51. The Senate Committee version stated:

> The Attorney General shall establish a uniform procedure for an alien physically present in the United States, irrespective of his status, to apply for asylum, and the alien *shall* be granted asylum if he is a refugee within the meaning of section 101(a)(42)(A) and his deportation or return would be prohibited under section 243(h) of this Act.

S. 643 Report, *supra* note 33, at 26 (§ 207(b)(1)) (emphasis added). The House committee version stated:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and 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 101(a)(42)(A).

H.R. 2816 Report, *supra* note 21, at 44 (§ 208(9)) (emphasis added).

52. H.R. 2816, 96th Cong., 1st Sess., 125 Cong. Rec. 37199 (1979); H.R. 2816 Report, *supra* note 21, at 44 (§ 208(a)); *see, e.g.*, Richard Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?*, 45 Md. L. Rev. 91, 102-03 (1986).

53. H.R. 2816 Report, *supra* note 21, at 17.

54. S. 643, 96th Cong., 1st Sess., 125 Cong. Rec. 23226 (1979); S. 643 Report, *supra* note 33, at 26 (§ 207(B)(1)); *see, e.g.*, Richard Silver, *Will INS v. Cardoza-Fonseca Affect the Ninth Circuit Court of Appeals Review of Asylum and Withholding of Deportation Cases?*, 10 Loy. L.A. Int'l & Comp. L.J. 197, 221 (1988); INS v. Cardoza-Fonseca, 480 U.S. 441, 441-42 (1980).

55. S. 643 Report, *supra* note 33, at 9.

The House-Senate Conference Committee adopted the House committee's version of the bill.[56] As passed, section 208 is substantively identical to Article 34 of the 1951 Convention, which provides that the "[c]ontracting [s]tates shall as far as possible facilitate the assimilation and naturalization of refugees."[57] In neither provision is the implementing authority mandated to accept persons who meet the definition of refugee.[58]

C. Section 243(h). Withholding of Deportation

Senator Edward Kennedy, the sponsor of the Senate bill, S. 643, noted the proposed legislation would "make our law conform to the United Nations Convention and Protocol Relating to the Status of Refugees."[59] The 1967 United Nations Protocol[60] incorporated the 1951 Convention Relating to the Status of Refugees.[61] Article 33 of the 1951 Convention declared, "[n]o Contracting State *shall* expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[62] Under the proposed section 243(h), however, the Attorney General would be *authorized* to withhold deportation of an alien to any country "where such alien's life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion."[63] Thus, the decision to deport or accept a refugee would be left to the discretion of the executive branch.

A number of witnesses criticized the discrepancy between the mandatory nature of the 1951 Convention and 1967 Protocol and the discretionary nature of proposed section 243(h).[64] Such criti-

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56. S. 643, 96th Cong., 2nd Sess., 126 Cong. Rec. 3571 (1980); Conference Report, *supra* note 42, at 20.

57. 1951 Convention, *supra* note 35, at 176; *see* Silver, *supra* note 54, at 221; INS v. Cardoza-Fonseca, 480 U.S. 421, 441 (1987).

58. *See* 1951 Convention, *supra* note 35, at 176; *see also* Silver, *supra* note 54, at 221; *Cardoza-Fonseca*, 480 U.S. at 441.

59. *S. 643 Hearings*, *supra* note 34, at 2.

60. 1967 Protocol, *supra* note 36.

61. 1951 Convention, *supra* note 35.

62. *Id.* at 176. (emphasis added).

63. *S. 643 Hearings*, *supra* note 34, at 82-83.

64. A. Whitney Ellsworth and Hurst Hannum observed:

> Despite the mandatory nature of the United States' obligations under international law, the language of section 243(h) is merely permissive . . . and also makes no distinction between refugee-asylees and other aliens. The suggested language is not in conformity with the requirements of the Convention and Protocol and is inconsistent with the historic policy of the United States "to respond to the urgent needs of

cism was based on the fear that the executive branch would abuse its discretion and exclude politically undesirable aliens.[65] In response, both the Senate[66] and House[67] committees amended section 243(h) to make withholding of deportation mandatory. The House-Senate Conference Committee adopted the House version of section 243(h).[68]

The legislative history of the Refugee Act is silent on the specific question of whether Congress intended notification to accompany the right of asylum and withholding of deportation created by sections 208 and 243(h).[69] Congress' intent to aid refugees in a nondiscriminatory fashion, however, pervades the Act.[70] As Sena-

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> persons subject to persecution in their homelands" which is set forth in Title I of the Act.
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> Amnesty International would therefore strongly urge that section 243(h) be amended to require the Attorney General to withhold deportation or return of any refugee who falls within the new definition of that term in section 201(a) of the proposed legislation.

H.R. 2816 Hearings, *supra* note 34, at 169.

65. At the Senate Committee hearings, Ingrid Walters, Chair, Committee on Migration and Refugee Affairs of the American Council of Voluntary Agencies, stated, "we believe that alternative language should be used in section 243(h) to put that section more in conformity with the UN Convention and Protocol, we suggest the following: The Attorney General *shall not* deport." *S. 643 Hearings*, *supra* note 34, at 52 (emphasis added).

During the House Committee hearings, A. Whitney Ellsworth and Hurst Hannum of Amnesty International stated that such an amendment "would underscore and emphasize domestically the United States' obligation to find a safe refuge for legitimate political refugees rather than to permit the Attorney General, for whatever reasons, to return them to a country where they face persecution." *H.R. 2816 Hearings*, *supra* note 34, at 169.

66. Section 243(h), as amended by the Senate committee, stated:

> The Attorney General shall not deport or return any alien . . . to any country where such alien's life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion unless deportation or return would be permitted under the terms of the United Nations Protocol Relating to the Status of Refugees.

S. 643, 96th Cong., 1st Sess., 125 Cong. Rec. 23227 (1979); S. 643 Report, *supra* note 33, at 29.

67. Section 243(h)(1), as amended by the House committee, stated:

> The Attorney General shall not deport or return any alien (other than an alien described in section 241(a)(19)) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

H.R. 2816, 96th Cong., 1st Sess., 125 Cong. Rec. 37200 (1979); H.R. 2816 Report, *supra* note 21, at 47.

68. S. 643, 96th Cong., 2nd Sess., 126 Cong. Rec. 3572 (1980); Conference Report, *supra* note 42, at 7.

69. Note, *supra* note 4, at 908 ("At best, the Refugee Act's legislative history is ambiguous on the question of whether Congress intended the INS to give all aliens notice of the right to apply for asylum.").

70. Mary Jane LaPointe, *Discrimination in Asylum Law: The Implications of Jean v. Nelson*, 62 Ind. L.J. 127, 139 (1986) ("The historical evidence leaves little

tor Kennedy observed, "[t]his legislation will . . . insure greater equity in our treatment of all refugees."[71]

D. Judicial Interpretation of the Refugee Act of 1980

Courts that have addressed the question have disagreed whether notification is mandated by the Refugee Act of 1980. Two district courts required notification.

In *Nunez v. Boldin*,[72] a class of Guatemalan and Salvadoran detainees requested a temporary injunction requiring the INS to notify detainees of their right to apply for political asylum.[73] The district court found that the INS had not advised detained aliens of their right to apply for political asylum prior to voluntary departure[74] nor prior to the issuance of an order to show cause.[75] The court observed that the INS' failure to notify rendered the 1967 Protocol and Refugee Act of 1980, as well as the intent behind them, ineffective.[76] The court concluded:

> What is obvious to the [c]ourt at this point is that the United States has, by treaty, statute, and regulations, manifested its intention of hearing the pleas of aliens who come to this country claiming a fear of being persecuted in their homelands. The intention is not necessarily stated as granting the privilege of asylum to all who come to this country but of hearing those pleas.[77]

Accordingly, the *Nunez* court issued a temporary injunction requiring the INS to notify Salvadoran and Guatemalan detainees of

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doubt that Congress intended all provisions of the 1980 Act to be free of invidious discrimination."); Michael Nelson, *Halting a National Sacrilege: Aliens Should Be Given Notice of Their Right to Apply for Political Asylum*, 9 Loy. L.A.L. Comp. L.J. 81, 91 (1986) ("Congress' desire to help refugees is manifest throughout the Act.").

71. 126 Cong. Rec. 3756 (1980) (statement of Sen. Edward Kennedy).

72. 537 F. Supp. 578 (1982).

73. *Nunez*, 537 F. Supp. at 578-79. Plaintiffs were detained at the INS detention facility at Los Fresnos, Texas. *Id.* at 580.

74. If an alien establishes that she is willing and has immediate means to depart from the United States promptly, an immigration judge may authorize the alien to depart voluntarily from the United States. 8 U.S.C. § 1252(b)(5) (1988).

75. Under current procedures, the asylum application may be filed with the district director provided the order to show cause has not been issued. 8 C.F.R. § 208.3(a) (1989); *see* Orantes-Herandez v. Smith, 541 F. Supp. 351, 376 (C.D. Cal. 1982). Asylum requests made after the institution of exclusion or deportation proceedings must be filed with the immigration judge. 8 C.F.R. § 208.3(b) (1989).

Formal deportation proceedings are commenced by the filing of an order to show cause with the immigration judge. 8 C.F.R. § 242.1(b) (1989). At that time, the alien is informed of her right to free legal services and her right to remain silent. 8 C.F.R. § 242.1(c) (1989).

76. *Nunez*, 537 F. Supp. at 584.

77. *Id.*

their right to apply for political asylum in the United States.[78]

In *Orantes-Hernandez v. Smith*,[79] Salvadoran aliens filed for class certification and for a preliminary injunction against specified practices of the INS, including coercing aliens to sign voluntary departure forms without advising them that they could apply for political asylum.[80] Considering the plaintiffs' contention that the Refugee Act of 1980 required the INS to notify class members of their right to apply for political asylum, the court observed that "congressional desire to provide assistance to deserving refugees is apparent throughout the Act."[81] The court rejected the INS' argument that sufficient notice was afforded by the issuance of the order to show cause, because if aliens depart voluntarily, they are afforded no procedural protection.[82] The court concluded the INS procedure of having aliens sign voluntary departure forms without being notified of their right to apply for asylum frustrated the intent behind the Refugee Act of 1980.[83]

Three United States Courts of Appeals, however, have found that notification is not required to effectuate congressional intent. The Eleventh Circuit, in *Jean v. Nelson*,[84] concluded that because Congress made no direct reference in the Refugee Act of 1980 to a notice procedure, that right could only be required if it were inherent in the establishment of the asylum procedure itself.[85] The court did not find this to be the case because "Congress provides many opportunities to the people of this country without requiring the government to publicize their availability."[86] In *Ramirez-*

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78. *Id.* at 587.

79. 541 F. Supp. 351 (C.D. Cal. 1982).

80. *Id.*

81. *Id.* at 374; *see* Note, *The Right of Asylum Under United States Law*, 80 Colum. L. Rev. 1125, 1131-32 (1980).

82. Orantes-Hernandez v. Smith, 541 F. Supp. at 375-76. The court noted that under current INS regulations, an asylum request made after the institution of exclusion or deportation proceedings is also considered a request for withholding pursuant to section 243(h). *Id.* at 375; *see* 8 C.F.R. § 208.3(b) (1989).

The court observed that "[t]he order to show cause brings with it the procedural protection of the right to counsel and the right to remain silent." Orantes-Hernandez v. Smith, 541 F. Supp. at 376. However, the court noted that none of these protections is of any use to "the class member who departs voluntarily without ever hearing that asylum might be available." *Id.*

83. *Id.*

84. 727 F.2d 957 (11th Cir. 1984).

85. *Id.* at 982.

86. *Id.* The court noted that "[i]t has never been held, for example, that the government must inform individuals that they have the right to sue the government for tort claims, or the right to seek educational loans or public assistance." *Id.*

Indeed, the court observed, such a requirement might actually serve to frustrate Congressional intent to preserve aliens with a well-founded fear of persecu-

Osorio v. INS,[87] the Fifth Circuit considered whether the INS, in *all* deportation proceedings, must inform each alien of her right to petition for asylum.[88] The court found section 243(h) was essentially a conforming amendment rather than one that affirmatively required notice.[89] The court relied on the testimony of David Crosland, Acting Commissioner for the INS, who had stated that aliens, "are interviewed as to why they came here. If they have questions that would flag asylum claims such as fear of persecution upon being returned . . . those persons are told what their rights are."[90] Since the INS notifies an alien of her right to petition for asylum if it appeared she might be persecuted, the *Ramirez-Osorio* court concluded the INS procedures were reasonable and consistent with Congressional intent.[91] In *Duran v. INS.*,[92] deportation proceedings were instituted against two Philippine citizens.[93] Having admitted deportability at a hearing, they were granted voluntary departure.[94] Rather than departing, however, one filed a motion to reopen the deportation proceeding, charging he had not been informed of his right to asylum.[95] Finding *Ramirez-Gonzalez v. INS*[96] controlling, the Ninth Circuit held that pursuant to C.F.R. section 242.17,[97] notice of the right to asylum is required

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tion since "[i]f the volume of asylum claims rises significantly, the INS may feel compelled to rely more and more on group profiles and less on individual evidence and credibility." *Id.* at 983 (quoting Note, *supra* note 4, at 924).

87. 745 F.2d 937 (5th Cir. 1984).

88. Jose Irene Ramirez-Osorio and Jose Ismael Rubio, citizens of El Salvador, were detained after entering the United States. *Id.* at 938. Both were ordered to appear before an immigration judge at the Los Fresnos Service Processing Center in Texas and ordered to show cause why they should not be deported. *Id.* Neither expressed a fear of persecution upon returning to El Salvador. *Id.* at 939.

89. *Id.* at 943. The court concluded "[t]he amendment neither changed the measure of entitlement to asylum nor the placement of the responsibility for making that decision." *Id.*

90. *Caribbean Migration: Oversight Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 225 (1980) (statement of David Crosland) (quoted in *Ramirez-Osorio*, 745 F.2d at 941-42 n.6).

91. *Ramirez-Osorio*, 745 F.2d at 944-45.

92. 756 F.2d 1338 (9th Cir. 1985). The Ninth Circuit originally found that notice was required. Brief for Defendant at 20, Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988). The INS petitioned for *en banc* rehearing. *Id.* On April 2, the original decision was withdrawn and a new decision was issued. *Id.*

93. 756 F.2d at 1339. Deportation proceedings were instituted against Leonillo and Shirley Duran. *Id.* Both had overstayed their visas. *Id.*

94. *Id.*

95. *Id.*

96. 695 F.2d 1208 (9th Cir. 1983). In *Ramirez-Gonzales*, the court found that 8 C.F.R. § 242.17(c) did not, by its terms, require notice of the right to apply for asylum. *Id.* at 1212.

97. 8 C.F.R. § 242.17(a) (1989) states "[t]he immigration judge shall inform the respondent of his or her apparent eligibility to apply for any of the benefits enu-

only when the special inquiry officer, rather than the alien, designates the country to which the alien will be deported.[98]

Thus, while two district courts found notice mandated by the Refugee Act, no circuit court has reached a similar conclusion. The Fifth, Ninth, and Eleventh Circuits have been unwilling to extend the right of asylum to include notification.

II. Due Process

The Supreme Court has held due process protections apply to deportable aliens.[99] The Court has recognized a deportation hearing involves "issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."[100] The due process clause applies, however, only if a government action will deprive an individual of a life, liberty, or property interest.[101] After a protected interest is implicated, "the question remains what process is due."[102]

Examining whether an asylum applicant had a protected interest, the district court in *Haitian Refugee Center v. Civiletti* [103] noted that "[i]n a very graphic sense, the political asylum applicant who fears to return to his homeland because of persecution has raised the specter of truly severe deprivation of life, liberty, and property: in this case, harassment, imprisonment, beatings, torture and death."[104] In *Haitian Refugee Center v. Smith*,[105] the Fifth Circuit considered a class action filed by 4,000 Haitians seeking

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merated in this paragraph and shall afford the respondent an opportunity to make application therefor during the hearing."

98. *Duran*, 756 F.2d at 1341. The court observed that 8 C.F.R. § 242.17(a) (1989) provides that the special inquiry officer shall inform aliens of their *apparent* eligibility to apply for asylum or withholding. *Id.* Unless the petitioner puts information before the judge to make such eligibility "apparent," this duty does not come into play. *Id.* (quoting United States v. Barreza-Leon, 575 F.2d 218, 222 (9th Cir. 1978)).

99. In *The Japanese Immigrant Case*, 189 U.S. 86, 100 (1903), the Court noted "this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in due process of law." In Mathews v. Diaz, 426 U.S. 67 (1977), the Court observed "there are literally millions of aliens within the jurisdiction of the United States. The fifth amendment, as well as the fourteenth amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law." *Id.* at 77.

100. Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950).

101. Ronald D. Rotunda, John E. Nowak & J. Nelson Young, 2 Treatise on Constitutional Law: Substance and Procedure 202 (1986).

102. Morrisey v. Brewer, 408 U.S. 471, 481 (1972).

103. 503 F. Supp. 442 (S.D. Fla. 1980).

104. *Id.* at 455.

105. 676 F.2d 1023 (5th Cir. 1982).

political asylum.[106] The court found that section 208 and the regulations promulgated pursuant to it, in conjunction with section 243(h) and the 1967 Protocol, demonstrated a clear congressional intent to create, "at a minimum, a constitutionally protected right to petition our government for political asylum."[107] The court did not address whether notification was included within the contours of this right.

In *Nunez v. Boldin*, the district court confronted the question of whether notification of the right to asylum was necessary to satisfy the requirements of due process.[108] Citing *Civiletti*, the *Nunez* court concluded, "[t]he interest of an alien with the same fear [as an asylum applicant] is no less simply because, not knowing he has the right, he has not filed an application for asylum."[109]

The *Nunez* court further observed that notification had been required in a number of other due process contexts.[110] The court applied the test set forth by the Supreme Court in *Mathews v. Eldridge*.[111] The *Mathews* test balanced three factors to determine what process was due: the private interest of the individual, the risk of erroneous deprivation of such interest pursuant to the current procedures and the value of additional safeguards, and the burden that would be imposed on the government by the additional requirement.[112] The *Nunez* court found that the detainee's

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106. *Id.* at 1026.

107. *Id.* at 1038; *see* David Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165, 187 (1983) ("At least since enactment of the Refugee Act of 1980, the federal legal provisions governing asylum claims fit this mold rather well, and justify a conclusion that the applicant's interest amounts to 'property' or 'liberty' under the Supreme Court's rules.").

108. Nunez v. Boldin, 537 F. Supp. 578, 584 (S.D. Tex. 1982).

109. *Id.* at 584; *see* Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 455 (S.D. Fla. 1980).

110. The court relied on Holbrook v. Pitt, 643 F.2d 1261, 1281 (7th Cir. 1981) (court required notice to housing project tenants of their right to receive retroactive housing benefits) and Finberg v. Sullivan, 634 F.2d 50, 62 (3rd Cir. 1980) (court required notice to a debtor not only of an attempt to garnish an account, but also notice of legal exemption to which she might be entitled). *Nunez*, 537 F. Supp. at 584.

111. 424 U.S. 319 (1976).

112. *Nunez*, 537 F. Supp. at 586. The exact wording of the Court provides for consideration of three factors:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

interest was *not* to be returned to a country where he feared persecution or death.[113] The court stated the current INS procedures did not assure that genuine asylum claims would be heard and concluded notice would remedy this deficiency.[114] Examining the additional administrative and financial burden entailed, the court reasoned that notifying detainees of their right to apply for asylum was an insignificant imposition.[115]

In *Jean v. Nelson*, the Eleventh Circuit rejected the holding in *Nunez*, finding the Refugee Act of 1980 did not create any substantive interest in notification.[116] The court held that while the Supreme Court has recognized some statutorily created substantive entitlements, in this case the dispensation of the benefit was clearly at the discretion of the INS and thus no protected interest was created.[117]

In *Ramirez-Osorio v. INS*, the Fifth Circuit rejected the petitioners' request that the INS be required in *all* deportation proceedings to inform each alien of his or her right to petition for asylum.[118] Examining the petitioners' claims that they were deprived of a constitutionally protected interest, the court found that, even assuming such an interest existed, the resulting due process requirements did not include a right to notification. The court refused to read *Finberg* and *Holbrook* as broadly as the *Nunez* court.[119] Noting that a counterbalance of administrative necessity was conspicuously absent from those cases,[120] the court refused to provide a blanket notice.[121] The court concluded there was "no basis for discounting the INS judgment that it would generate such large numbers of frivolous claims as to imperil its purpose."[122]

Thus, prior to *Orantes-Hernandez v. Meese*, only the district

113. Nunez v. Boldin, 537 F. Supp. 578, 584 (S.D. Tex. 1982).

114. *Id.* The court observed that a "majority of detainees are completely uneducated as to INS procedures. They do not speak the English language, nor can they read the English language asylum application required for consideration." *Id.* at 586.

115. "The [c]ourt is of the opinion, however, that. . . [the possibility of unworthy claims] does not override the need for those with worthy claims to have them heard." *Id.* at 586.

116. Jean v. Nelson, 727 F.2d 957, 981-82 (11th Cir. 1984).

117. *Id.* at 981. The circuit court considered the impact of § 243(h). *Id.* at 981 n.33. It found "this provision does not create a substantive entitlement to asylum, but simply to relief from deportation to that country." *Id.*

118. Ramirez-Osorio v. INS, 745 F.2d 937, 944-47 (5th Cir. 1984).

119. *See supra* notes 103-07 (*Nunez* court discussing right to political asylum).

120. *Ramirez-Osorio*, 745 F.2d at 946.

121. The court pointed out that in both *Holbrook* and *Finberg* the costs associated with providing notice were minimal. *Id.* A requirement of blanket notice, however, would result in an increase in meritless claims. *Id.*

122. *Id.*

court in *Nunez* found notification was necessary to satisfy the requirements of due process. Neither the Fifth nor the Eleventh Circuit was willing to interpret the respective provisions of the Refugee Act of 1980 so expansively.

III. *Orantes-Hernandez v. Meese*

In *Orantes-Hernandez v. Meese*,[123] the district court considered whether the INS should be required to issue permanently the so-called "*Orantes* advisal" notifying Salvadorans of their right to asylum.[124] The court noted that a substantial number of Salvadorans who flee El Salvador possess a well-founded fear of persecution and that human rights abuses are suffered by a cross-section of Salvadoran society.[125] The court further observed that the vast majority of Salvadorans who are apprehended sign voluntary departure[126] agreements that commence a summary removal process. Thus, Salvadorans are deprived of a deportation hearing, the only forum in which they could seek political asylum and withholding of deportation.[127] These voluntary departure agreements were procured by the INS from Salvadorans by using numerous coercive techniques, including outright threats and misrepresentations.[128]

The *Orantes-Hernandez* court found that in light of the coercive practices of the INS, the intent of the Refugee Act can only be effectuated by giving Salvadorans notice of their right to apply for asylum.[129] Distinguishing *Jean v. Nelson*, the district court stated that although Congress provides many opportunities without requiring the government to publicize their availability, few opportu-

123. 685 F. Supp. 1488 (C.D. Cal. 1988).

124. *Id.* at 1506-08.

125. *Id.* at 1491. The court noted a substantial number of Salvadorans who flee El Salvador and enter the United States have a good faith claim to asylum. *Id.* The types of persecution include: arbitrary arrest, torture including use of electric shock, beatings, rape, "disappearances," extra-judicial executions, abductions, threats against family members, forced ingestion of food, false imprisonment, sleep deprivation, mass killings, and forced relocation. *Id.* at 1492.

126. *See* 8 U.S.C. § 1252(b) (1988) that provides, in part:

> [I]n the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title if such alien *voluntarily departs* from the United States at his own expense as hereinafter authorized.

Id. (emphasis added).

127. Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1494 (C.D. Cal. 1988).

128. *Id.*

129. *Id.* at 1506.

nities arise in circumstances as perilous as those in which Salvadorans find themselves.[130]

The district court in *Orantes-Hernandez v. Smith* had not considered plaintiff's argument that the Refugee Act confers a statutorily protected interest in notice of asylum that could not be deprived without due process.[131] In *Orantes-Hernandez v. Meese*, however, the court addressed this issue and found that withholding of deportation is a "separate interest which is jeopardized by the administrative voluntary departure process."[132] To resolve the due process issue, the court applied the *Mathews v. Eldridge* balancing test.[133] Applying the first part of the test, the court found that "the right to a deportation hearing and the various rights associated therewith, including the right to apply for political asylum, constitute a substantial liberty interest."[134] The court also found the INS pattern of encouraging Salvadorans to accept voluntary departure and discouraging them from applying for political asylum made the likelihood of deprivation great.[135] The court noted the representation relied on in *Ramirez-Osario*, that INS officials *were* flagging likely successful asylum applicants, simply was not true in the case of Salvadorans.[136] Finally, the court found that furnishing notice of the right to seek political asylum imposed no substantial burden on the government.[137]

The court distinguished *Ramirez-Osorio*, noting that *Ramirez-Osorio* dealt only with the issue of blanket notice for *all* aliens. While the *Ramirez-Osorio* court found such a blanket notice would impose a substantial burden on the government, the *Orantes-Hernandez* court concluded the burden was outweighed by the Salvadorans' interest and the risk of erroneous deprivation. The court observed, "[t]he calculation of the *Mathews* balancing test could be quite different for other nationalities."[138]

IV. A Flexible Standard for Preventing INS Discrimination

The district court in *Orantes-Hernandez* rejected a blanket notice requirement and, instead, endorsed a flexible method for ascertaining whether congressional intent was effectuated and

130. *Id.*
131. Orantes-Hernandez v. Smith, 541 F. Supp. 351, 378 n.33 (C.D. Cal. 1982) ("it is not necessary to employ this form of due process analysis").
132. Orantes-Hernandez v. Meese, 685 F. Supp. at 1506.
133. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).
134. Orantes-Hernandez v. Meese, 685 F. Supp. at 1507.
135. *Id.*
136. *Id.* at 1508.
137. *Id.*
138. *Id.*

whether due process was satisfied. In both cases, the court's inquiry focused on the nature and extent of the discrimination against the alien class. Using this framework, *Orantes-Hernandez v. Meese* not only assails INS national origin discrimination but also takes into consideration the difficulties of administering notice to all aliens.

A. INS Discrimination

Although the definition of refugee in section 201(a)(42) of the Refugee Act of 1980[139] appears to be ideologically neutral, in practice the INS has continued to favor aliens from those nations which were given preferential status under section 203(a)(7) of the INA Amendments of 1965.[140] Whether or not an alien receives asylum is more often determined by the relationship between the home country and the United States than by the facts of his or her individual case.[141] Eastern European and Soviet emigrés face lower standards in establishing not only threat severity[142] and specificity[143] but also motivation.[144]

State Department participation also serves to politicize the asylum process. For each asylum application, the State Depart-

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139. *See supra* note 6.

140. *See supra* notes 23-25 and accompanying text.

141. *See* Hull, *supra* note 27, at 121-22; Christopher Hanson, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. Rev. L. & Soc. Change 107, 124-26 (1978); Sophie Pirie, *The Need for a Codified Definition of "Persecution" in United States Refugee Law*, 39 Stan. L. Rev. 187, 200-07 (1986); Helton, *supra* note 19, at 243-54; LaPointe, *supra* note 70, at 142-43. These commentators are supported by the asylum application statistics compiled by the government for 1984:

Applications	Pending	Received	Granted	Denied
Afghanistan	589	153	263	269
Bulgaria	33	10	19	13
Czechoslovakia	139	55	51	72
El Salvador	13,501	5,455	503	13,045
GDR	19	15	18	3
Hungary	276	78	82	160
Rumania	318	159	192	246

INS, 1984 Statistical Yearbook of the Immigration and Naturalization Service 77-78 (Table Ref. 3.3).

Thus, while in Afghanistan nearly an equal number of applications in 1984 were granted as were denied, in El Salvador twenty-six times as many applications were denied as were granted.

142. Pirie, *supra* note 141, at 202-04 ("As a general matter, aliens from communist-controlled countries face lenient threat content and severity requirements.").

143. *Id.* at 204-05 ("Threat specificity plays an important role in persecution determinations because strict threat specificity requirements can deny protection to potential victims of random attacks on a defined social group.").

144. *Id.* at 205-07. Many Eastern European and Soviet emigrés face more lenient political motivation requirements. *Id.* at 206.

ment's Bureau of Human Rights and Humanitarian Affairs (BHRHA) provides the INS with an advisory opinion.[145] In theory, the BHRHA operates separately and independently from the heavily politicized country embassy and desk officer stations.[146] In practice, however, the BHRHA relies on information provided by the embassy outposts and country desk officers.[147] Thus, the advisory opinions bias the asylum process against refugees from friendly nations.[148]

The treatment of Salvadoran aliens provides one of the most vivid illustrations of the biases in operation. As one commentator observed, "[i]f the United States were to acknowledge that Salvadoran aliens were political refugees under our Refugee Act's standard of proof, it would be openly admitting that the current U.S. policy in El Salvador is flawed."[149] The State Department Country Reports continue to paint El Salvador as a country with an improving political climate and few problems with human rights abuses.[150] The picture presented by Amnesty International and the Organization of American States (OAS), however, is quite different.[151] In addition, El Salvador remains one of only five countries where the United Nations has established a procedure for particularized reporting on human rights violations.[152]

The specific conduct of the INS also demonstrates this bias. Aliens from El Salvador were informed that "Salvadorans do not get asylum"[153] or that only guerrillas or soldiers can qualify for

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145. 8 C.F.R. § 208.7 (1989).

146. *See* Pirie, *supra* note 141, at 212; Hanson, *supra* note 141, at 134.

147. *See* Pirie, *supra* note 141, at 213; Hanson, *supra* note 141, at 134-35.

148. *See* Hull, *supra* note 27, at 122.

149. Pamelia Barnett, *United States Political Asylum for Salvadoran Refugees: A Continuing Debate*, 8 Hous. J. Int'l. L. 131, 141 (1985); *see* Leonel Gomez, *The Politics of Salvadoran Refugees* in 7 In Defense of the Alien 151-55 (1985).

150. The State Department reported that in El Salvador, "[a]lthough flawed, the security forces' human rights record has improved substantially since the early 1980's." Department of State Country Report on Human Rights Practices for 1988, 101st Cong., 1st Sess. 553 (Joint Committee Print 1989).

151. Amnesty International reported that, during 1988, "[t]here was increased activity by so-called 'death squads', which the government said were outside their control but which were widely alleged to be composed of police and military personnel operating both in uniform and in plain clothes." Amnesty Int'l Report 1989, at 120. They noted that the death squads were responsible for abductions, "disappearances," and politically motivated killings of suspected opponents of the government. *Id.* OAS reported that, in 1989, the commission was informed of numerous summary executions of persons supposedly connected with the government. OAS, Annual Report of the Inter-American Commission on Human Rights 1988-1989, at 166 (1989).

152. *See* Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1492 (C.D. Cal. 1988).

153. *Id.* at 1495.

asylum.[154] Even after the INS was required to notify Salvadorans of their right to apply for asylum,[155] the government failed to do so in a substantial number of cases.[156] In addition, INS agents continued to engage in threats and misrepresentations in coercing Salvadorans to sign voluntary departure agreements.[157]

B. INS Discrimination and Congressional Intent

National origin discrimination by the INS frustrates the intent of the Refugee Act of 1980. Upon introducing the Act in the House, Representative Holtzman noted, "[t]he bill before the House today will . . . mandate equity in our treatment of all refugees; it will bring us into conformity with our international legal obligations."[158] The disparate treatment of Salvadoran aliens is in contravention of the spirit of equality and non-discrimination that pervades the Act.

In addition, the 1951 Convention Relating to the Status of Refugees, upon which much of the Refugee Act of 1980 was based, mandates nondiscrimination.[159] Article 3 of the 1951 Convention states, "[t]he [c]ontracting [s]tates shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."[160] The United Nations observed that "[t]he Convention is based on two principles: (1) that there should be as little discrimination as possible between nationals, on the one hand, and refugees, on the other; and (2) that there should be *no discrimination* based on race, religion or country of origin among refugees."[161]

By becoming a signatory to the 1967 Protocol, the United States substantively committed itself to a policy of nondiscrimination among refugees.[162] Congress codified that commitment into United States law by modeling the Refugee Act of 1980 around the

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154. *Id.*

155. In *Orantes-Hernandez v. Smith*, the court issued a preliminary injunction requiring the INS to notify aliens that they had a right to be represented by an attorney, a right to a deportation hearing, a right to apply for political asylum, and a right to request voluntary departure. Orantes-Hernandez v. Smith, 541 F. Supp. 351, 387-88 (C.D. Cal. 1982).

156. Plaintiffs' Post Trial Reply Brief at 447, Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988).

157. Orantes-Hernandez v. Meese, 685 F. Supp. at 1494.

158. 125 Cong. Rec. 35813 (1979) (statement of Rep. Elizabeth Holtzan).

159. *See, e.g.*, LaPointe, *supra* note 70, at 137-39; Hull, *supra* note 27, at 118.

160. 1951 Convention, *supra* note 36, at 156.

161. U.N., The United Nations and Human Rights 69 (1984) (emphasis added); *see* LaPointe, *supra* note 70, at 137-38; U.N. Charter; Article 55 of Charter art. 55.

162. *See, e.g.*, LaPointe, *supra* note 70, at 138.

1967 Protocol.[163]

> The Supreme Court, in *INS v. Cardoza-Fonseca*[164] stated:
> If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.[165]

The court in *Orantes-Hernandez v. Meese* recognized that INS discrimination against Salvadorans frustrated the Act's intent.

C. *INS Discrimination and Due Process*

1. Liberty or Property Interest?

The district court's finding that notice to Salvadorans is an interest protected by due process is consistent with Supreme Court precedent. The Supreme Court has found in a number of cases that petitioners had a sufficient interest in specific benefits to require due process notice. In *Mullane v. Central Hanover Trust Co.*,[166] the Court examined the sufficiency of a New York law that required only notice by publication.[167] The Court held that, with regard to known beneficiaries, a more extensive form of notice is warranted to conform with the requirements of due process.[168] A later case, *Memphis Light, Gas & Water Division v. Craft*,[169] drew on the analysis in *Mullane* and found the property interest of municipal utility recipients was substantial enough that the service could not be terminated without notification of a procedure for challenging disputed bills.[170] In each of the above cases, the Court determined potential recipients could not be deprived of benefits without due process.

The district court in *Orantes-Hernandez v. Meese* relied on many of the considerations the Supreme Court had relied on in *Mullane* and *Memphis*. The Court in *Memphis* based its determination, in part, on the lack of sophistication of those likely to receive the benefit. The Court observed, "this skeletal notice did not

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163. *See id.*

164. 480 U.S. 421 (1987).

165. *Id.* at 436.

166. 339 U.S. 306 (1950).

167. *Id.* at 308-09 (the state of New York only provided notice by publication to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund); *see, e.g.*, Note, *supra* note 4, at 913.

168. *Mullane*, 339 U.S. at 318-19. The Court found that "[t]he statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.* at 319.

169. 436 U.S. 1 (1978).

170. *Id.* at 13-15; *see, e.g.*, Note, *supra* note 4, at 913.

advise them of a procedure for challenging the disputed bills. . . . such notice may well have been adequate under different circumstances . . . here, however, the notice is given to thousands of customers of various levels of education, experience, and resources."[171] Similarly, in *Orantes-Hernandez v. Meese*, the district court examined the potential Salvadoran applicants' frequent illiteracy and lack of understanding of asylum procedures.[172] The court concluded, "the evidence establishes that many Salvadorans do not know of the right to asylum before they come to the United States."[173]

The Supreme Court has recognized that state or federal laws can create substantive entitlements to government benefits which warrant constitutional protection as "liberty" or "property" interests.[174] In a number of cases in which the Supreme Court examined statutory language similar to 243(h), the Court found a liberty or property interest existed. In *Logan v. Zimmerman Brush Co.*,[175] the Court held the failure of the Illinois Fair Employment Practices Commission to comply with a statute that stated, "[w]ithin 120 days of the proper filing of a charge, the Commission *shall* convene a fact finding conference," deprived the claimant of a property right.[176] The Court concluded, "[w]hile the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[177]

In *Greenholtz v. Nebraska Penal Inmates*[178] and *Board of Pardons v. Allen*,[179] the Court examined state parole statutes that mandated parole unless the parole board determined an inmate failed to satisfy certain conditions.[180] In both cases, the Court found the statutes created a protected interest although the parole was, to a large degree, at the discretion of the parole boards.[181] The Court in *Allen* found that "[s]ignificantly, the Montana stat-

171. *Memphis*, 436 U.S. at 15 n.15; *see Ramirez-Osorio*, 745 F.2d at 945 (quoting *Memphis*, 436 U.S. at 15 n.15); Note, *supra* note 4, at 913.

172. Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1507 (C.D. Cal. 1988); *see, e.g.*, Note, *supra* note 4, at 913.

173. Orantes-Hernandez v. Meese, 685 F. Supp. at 1507.

174. *See* Jean v. Nelson, 957, 727 F.2d 981 (11th Cir. 1984).

175. 455 U.S. 422 (1982).

176. *Id.* at 427, 433 (emphasis added); *see, e.g.*, Note, *supra* note 4, at 911.

177. 455 U.S. at 432 (quoting Vitel v. Jones, 445 U.S. 480, 490-91 n.6 (1980).

178. 442 U.S. 1 (1979).

179. 482 U.S. 369 (1989).

180. *Greenholtz*, 442 U.S. at 12; *Allen*, 482 U.S. at 380-81; *see, e.g.*, Note, *supra* note 4, at 909.

181. *Greenholtz*, 442 U.S. at 12; *Allen*, 482 U.S. at 380-81; *see, e.g.*, Note, *supra* note 4, at 909.

ute, like the Nebraska statute [considered in *Greenholtz*], uses mandatory language ("shall") to creat[e] a presumption that parole release will be granted."[182] Section 243(h), like the parole statutes in *Greenholtz* and *Allen*, mandates an action once the factfinder has made an "inherently subjective and predictive" decision.[183]

In *Jean v. Nelson*, the Eleventh Circuit discounted the argument that section 208 created a substantive entitlement, concluding that dispensation under that provision was clearly discretionary.[184] Likewise, in *Ramirez-Osorio*, the Fifth Circuit characterized section 243(h) as a conforming amendment which created no substantive entitlement.[185] In *Allen*, however, the Supreme Court rejected an analogous argument that parole statutes did not constitute a protected interest simply because of the discretionary nature of the provision.[186] The Court cited its decision in *Hewitt v. Helms*,[187] in which it observed:

> [P]etitioners argue, with considerable force, that these terms must be read in light of the fact that the decision whether to confine an inmate to administrative segregation is largely predictive, and therefore that it is not likely that the State meant to create binding requirements. But on balance we are persuaded that the repeated use of explicit mandatory language in connection with requiring specific substantive predicates demand a conclusion that the state has created a protected liberty interest.[188]

The Supreme Court has recognized that statutes which allocate a benefit chiefly at the discretion of the administrator can still create a protected liberty or property interest if phrased in mandatory language.

2. What Process Is Due?

In *Orantes-Hernandez v. Meese*, the district court adopted an analysis for distinguishing what process is due among nationalities pursuant to *Mathews v. Eldridge*. By this method, the behavior of the INS itself is a factor that may influence whether a nationality is accorded notification.

Application of the *Mathews* test requires the court balance three factors. On the side of aliens, two factors are considered: (1)

182. *Allen*, 482 U.S. at 377.

183. *See id.* at 381 (noting that the Court in *Greenholtz* recognized that parole-release decision is inherently subjective and predictive).

184. Jean v. Nelson, 727 F.2d 957, 981 (11th Cir. 1984).

185. Ramirez-Osorio v. INS, 745 F.2d 937, 945 (5th Cir. 1984).

186. *Allen*, 482 U.S. at 377-78.

187. 459 U.S. 460 (1983) (Court examined inmate segregation statute).

188. *Id.* at 472.

the importance of the liberty or property interest at stake; and (2) the risk of erroneous deprivation of the opportunity to apply for asylum and the extent to which the risk can be reduced by notification.[189] On the government's side, the court must measure the governmental interest in avoiding the increased administrative and fiscal burdens which result from increased procedural requirements.[190]

Under the analysis in *Orantes-Hernandez*, aliens have a substantial liberty interest in their claims for political asylum and relief from deportation *regardless* of their nationality. Although it has been suggested that aliens' personal interests be discounted because they compose the "outermost ring of membership" in the national community by virtue of their complete absence of prior community affiliation,[191] an objective evaluation of aliens' stakes results in a measure that is, indeed, extremely high.[192] An alien wrongfully denied an opportunity to apply for asylum faces incarceration, torture, or death. The Supreme Court recently noted, in dicta, that "[d]eportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."[193] In this context, few individuals have a higher interest at stake.

The fulcrum of the *Orantes-Hernandez* analysis is the flexibility of the second *Mathews* factor. In measuring the likelihood of erroneous deprivation, the district court emphasized three characteristics unique to Salvadorans: (1) many Salvadorans are totally ignorant of the concept of asylum;[194] (2) a substantial number of class members have *bona fide* claims to asylum or withholding;[195] and (3) the voluntary departure procedure used by the INS jeopardized the ability of the Salvadorans to seek asylum and withholding of deportation.[196] With respect to other nationalities, these three factors may or may not be present.

In the case of Salvadorans, the INS' use of voluntary depar-

189. *See* Rotunda, *supra* note 101, at 265.

190. *See id.*

191. Martin, *supra* note 107, at 216. Martin suggests "levels" of community membership which should be taken into consideration in evaluating an alien's interest: (1) citizens; (2) lawful permanent residents; (3) applicants for admission. *Id.* at 208-16.

192. *See* T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. Pitt. L. Rev. 237, 248-49 (1983).

193. INS v. Cardoza-Fonseca 480 U.S. 421, 449 (1987).

194. Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1507 (C.D. Cal. 1988).

195. *Id.*

196. *Id.*

ture agreements as well as their repeated misrepresentations and outright threats to Salvadoran aliens greatly increases the likelihood of erroneous deprivation. The likelihood of erroneous deprivation would not be as great in the case of nationalities which have not been the subject of such hostile treatment. Indeed, some nationalities specifically have been treated more favorably. Aliens of a number of nationalities have been granted "extended voluntary departure" status permitting them to remain within the United States even if deportable by law.[197] In addition, the INS currently has a policy of according "sensitive handling" to aliens from fourteen communist countries.[198]

The last factor, the administrative and financial burden the notice requirement imposes on the government, is also fixed under the *Orantes-Hernandez* analysis. Unlike the blanket requirement rejected in *Ramirez-Osorio*, notice limited to the class of detained Salvadorans does not present the danger of substantially burdening the government with asylum claims.[199]

By adopting a flexible approach to deciding what process is due, the district court accurately applied the *Mathews* balancing test. The difficulty of the district court's analysis is that it necessitates judicial fact-finding with respect not only to INS procedures toward aliens of each respective nationality but also to each country's political climate.[200] In light of the severity of the consequences resulting from INS discrimination, however, this added judicial burden is a small price to pay.

V. Conclusion

Upon convening the Hearings on the Refugee Act of 1980 in the House, sponsor Elizabeth Holtzman observed:

> There is a broad consensus that our refugee policy up to this time has been haphazard and inadequate . . . [i]n good measure, our country's humanitarian tradition of extending a welcome to the world's homeless has been accomplished in spite of, not because of, our laws relating to refugees.[201]

197. Brief for Plaintiff at 423, Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988). Since 1960, nationals from Cuba, the Dominican Republic, Czechoslovakia, Chile, Cambodia, Vietnam, Laos, Lebanon, Ethiopia, Iran, Nicaragua, Uganda, Poland, Afghanistan and Mexico have been granted this status. *Id.*

198. *Id.* at 425. The countries are East Germany, Rumania, Poland, Hungary, Czechoslovakia, Bulgaria, Mongolia, Cuba, Albania, the People's Republic of China, North Korea, Vietnam, Laos, and Cambodia. *Id.*

199. Orantes-Hernandez v. Meese, 685 F. Supp. at 1508.

200. Brief for Plaintiff at 357, Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988).

201. *H.R. 2816 Hearings*, *supra* note 34, at 1.

Although Congress was for the most part silent regarding the extent of the right to asylum and withholding provided by sections 208 and 243(h), the spirit of nondiscriminatory aid to refugees pervades the Act. In addition, adherence to the 1967 Protocol as codified in the Refugee Act of 1980 requires notice be given to aliens unlikely to be apprised of that right. The district court in *Orantes-Hernandez* properly found the treatment of Salvadoran refugees ignored congressional intent.

A number of courts have fashioned a due process right to asylum. By measuring on a case-by-case basis the likelihood of an alien's erroneous deprivation of this interest, the district court in *Orantes-Hernandez* adopted a flexible standard for determining whether notification is required. This application not only creates an incentive for the INS to treat refugees in an equitable fashion, it also creates a flexible safeguard for protecting the right of aliens to asylum.