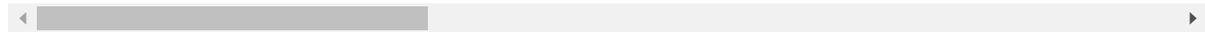


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INS v. CARDOZA-FONSECA

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United States Supreme Court

INS v. CARDOZA-FONSECA(1987)

No. 85-782

Argued: October 7, 1986Decided: March 9, 1987

Section 243(h) of the Immigration and Nationality Act (Act) requires that the Attorney General withhold deportation of an alien who demonstrates that his "life or freedom would be threatened" thereby on account of specified factors. The above-quoted phrase requires a showing that "it is more likely than not that the alien would be subject to persecution" in the country to which he would be returned. In contrast, 208(a) of the Act authorizes the Attorney General, in his discretion, to grant asylum to a "refugee," who, under 101(a)(42)(A) of the Act, is unable or unwilling to return to his home country because of persecution or "a well founded fear" thereof on account of particular factors. At respondent illegal alien's deportation hearing, the Immigration Judge applied the 243(h) "more likely than not" proof standard to her 208(a) asylum claim, holding that she had not established "a clear probability of persecution" and therefore was not entitled to relief. The Board of Immigration Appeals (BIA) affirmed, but the Court of Appeals reversed, holding that 208(a)'s "well-founded fear" standard is more generous than the 243(h) standard in that it only requires asylum applicants to show either past persecution or "good reason" to fear future persecution. Accordingly, the asylum claim was remanded so that BIA could evaluate it under the proper legal standard.

Held:

The 243(h) "clear probability" standard of proof does not govern asylum applications under 208(a). Pp. 427-449.

(a) The plain meaning of the statutory language indicates a congressional intent that the proof standards under 208(a) and 243(h) should differ. Section 243(h)'s "would be threatened" standard has no subjective component, but, in fact, requires objective evidence that it is more likely than not that the alien will be subject to persecution upon deportation. In contrast, 208(a)'s reference to "fear" makes the asylum eligibility determination turn to some extent on the alien's

subjective mental state, and the fact that the fear must be "well founded" does not transform the standard into a "more likely than not" one. Moreover, the different emphasis of the two standards is highlighted by the fact that, although Congress simultaneously drafted 208(a)'s new standard and amended 243(h), it left 243(h)'s old standard intact. Pp. 430-432. [480 U.S. 421, 422].

(b) The legislative history demonstrates the congressional intent that different standards apply under 208(a) and 243(h). Pp. 432-443.

(c) The argument of the Immigration and Naturalization Service (INS) that it is anomalous for 208(a) to have a less stringent eligibility standard than 243(h) since 208(a) affords greater benefits than 243(h) fails because it does not account for the fact that an alien who satisfies the 208(a) standard must still face a discretionary asylum decision by the Attorney General, while an alien satisfying 243(h)'s stricter standard is automatically entitled to withholding of deportation. Pp. 443-445.

(d) The INS's argument that substantial deference should be accorded BIA's position that the "well-founded fear" and "clear probability" standards are equivalent is unpersuasive, since the narrow legal question of identity is a pure question of statutory construction within the traditional purview of the courts, and is not a question of case-by-case interpretation of the type traditionally left to administrative agencies. Pp. 445-448.

767 F.2d 1448, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a concurring opinion, post, p. 450. SCALIA, J., filed an opinion concurring in the judgment, post, p. 452. POWELL, J., filed a dissenting opinion, in which REHNQUIST, C. J., and WHITE, J., joined, post, p. 455.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Kuhl, Bruce N. Kuhlik, and David V. Bernal.

Dana Marks Keener argued the cause for respondent. With her on the brief was Bill Ong Hing. *

[Footnote *] Briefs of amici curiae urging affirmance were filed for the United Nations High Commissioner for Refugees by Ralph G. Steinhardt; for the American Civil Liberties Union et al. by Carol Leslie Wolchok, Burt Neuborne, Lucas Guttentag, Jack Novik, and Robert N. Weiner; for the American Immigration Lawyers Association by Ira J. Kurzban; for the International Human Rights Law Group et al. by E. Edward Bruce; and for the Lawyers Committee for Human Rights et al. by Richard F. Ziegler, Arthur C. Helton, Samuel Rabinove, Richard T. Foltin, Ruti G. Teitel, Steven M. Freeman, and Richard J. Rubin. [480 U.S. 421, 423].

JUSTICE STEVENS delivered the opinion of the Court.

Since 1980, the Immigration and Nationality Act has provided two methods through which an otherwise deportable alien who claims that he will be persecuted if deported can seek relief. Section 243(h) of the Act, 8 U.S.C. 1253(h), requires the Attorney General to withhold deportation of an alien who demonstrates that his "life or freedom would be threatened" on account of one of the listed factors if he is deported. In *INS v. Stevic*, 467 U.S. 407 (1984), we held that to qualify for this entitlement to withholding of deportation, an alien must demonstrate that "it is more likely than not that the alien would be subject to persecution" in the country to which he would be returned. *Id.*, at 429-430. The Refugee Act of 1980, 94 Stat. 102, also established a second type of broader relief. Section 208(a) of the Act, 8 U.S.C. 1158(a), authorizes the Attorney General, in his discretion, to grant asylum to an alien who is unable or unwilling to return to his home 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." 101(a)(42), 8 U.S.C. 1101(a)(42).

In *Stevic*, we rejected an alien's contention that the 208(a) "well-founded fear" standard governs applications for withholding of deportation under 243(h). ¹ Similarly, today we reject the Government's contention that the 243(h) standard, which requires an alien to show that he is more likely than not to be subject to persecution, governs applications for asylum under 208(a). Congress used different, broader language to define the term "refugee" as used in 208(a) than it used to describe the class of aliens who have [\[480 U.S. 421, 424\]](#) a right to withholding of deportation under 243(h). The Act's establishment of a broad class of refugees who are eligible for a discretionary grant of asylum, and a narrower class of aliens who are given a statutory right not to be deported to the country where they are in danger, mirrors the provisions of the United Nations Protocol Relating to the Status of Refugees, which provided the motivation for the enactment of the Refugee Act of 1980. In addition, the legislative history of the 1980 Act makes it perfectly clear that Congress did not intend the class of aliens who qualify as refugees to be coextensive with the class who qualify for 243(h) relief.

I

Respondent is a 38-year-old Nicaraguan citizen who entered the United States in 1979 as a visitor. After she remained in the United States longer than permitted, and failed to take advantage of the Immigration and Naturalization Service's (INS) offer of voluntary departure, the INS commenced deportation proceedings against her. Respondent conceded that she was in the country illegally, but requested withholding of deportation pursuant to 243(h) and asylum as a refugee pursuant to 208(a).

To support her request under 243(h), respondent attempted to show that if she were returned to Nicaragua her "life or freedom would be threatened" on account of her political views; to support her request under 208(a), she attempted to show that she had a "well-founded fear of persecution" upon her return. The evidence supporting both claims related primarily to the activities of respondent's brother who had been tortured and imprisoned because of his political activities in Nicaragua. Both respondent and her brother testified that they believed the Sandinistas knew that the two of them had fled Nicaragua together and that even though she had not been active politically herself, she would be interrogated about her brother's whereabouts and [\[480 U.S. 421, 425\]](#) activities. Respondent also testified that because of her brother's status, her own political opposition to the Sandinistas would be brought to that government's attention. Based on these facts, respondent claimed that she would be tortured if forced to return.

The Immigration Judge applied the same standard in evaluating respondent's claim for withholding of deportation under 243(h) as he did in evaluating her application for asylum under 208(a). He found that she had not established "a clear probability of persecution" and therefore was not entitled to either form of relief. App. to Pet. for Cert. 27a. On appeal, the Board of Immigration Appeals (BIA) agreed that respondent had "failed to establish that she would suffer persecution within the meaning of section 208(a) or 243(h) of the Immigration and Nationality Act." *Id.*, at 21a.

In the Court of Appeals for the Ninth Circuit, respondent did not challenge the BIA's decision that she was not entitled to withholding of deportation under 243(h), but argued that she was eligible for consideration for asylum under 208(a), and contended that the Immigration Judge and BIA erred in applying the "more likely than not" standard of proof from 243(h) to her 208(a) asylum claim. Instead, she asserted, they should have applied the "well-founded fear" standard, which she considered to be more generous. The court agreed. Relying on both the text and the structure of the Act, the court held that the "well-founded fear" standard which governs asylum proceedings is different, and in fact more generous, than the "clear probability" standard which governs withholding of deportation proceedings. 767 F.2d 1448, 1452-1453 (1985). Agreeing with the Court of Appeals for the Seventh Circuit, the court interpreted the standard to require asylum applicants to present "'specific facts' through objective evidence to prove either past persecution or 'good reason' to fear future persecution." *Id.*, at 1453 (citing *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (CA7 1984)). [\[480 U.S. 421, 426\]](#). The court remanded respondent's asylum claim to the BIA to evaluate under the proper legal standard. We granted certiorari to resolve a Circuit conflict on this important question. ² 475 U.S. 1009 (1986). ³ [\[480 U.S. 421, 427\]](#).

II

The Refugee Act of 1980 established a new statutory procedure for granting asylum to refugees. 4 The 1980 Act added a new 208(a) to the Immigration and Nationality Act of 1952, reading as follows:

"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 1101(a)(42)(A) of this title." 94 Stat. 105, 8 U.S.C. 1158(a).

Under this section, eligibility for asylum depends entirely on the Attorney General's determination that an alien is a [480 U.S. 421, 428] "refugee," as that term is defined in 101(a)(42), which was also added to the Act in 1980. That section provides:

"The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . ." 94 Stat. 102, 8 U.S.C. 1101(a)(42).

Thus, the "persecution or well-founded fear of persecution" standard governs the Attorney General's determination whether an alien is eligible for asylum. 5

In addition to establishing a statutory asylum process, the 1980 Act amended the withholding of deportation provision, 6 [480 U.S. 421, 429] 243(h). See *Stevic*, 467 U.S., at 421, n. 15. Prior to 1968, the Attorney General had discretion whether to grant withholding of deportation to aliens under 243(h). In 1968, however, the United States agreed to comply with the substantive provisions of Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees. See 19 U.S.T. 6223, 6259-6276, T.I.A.S. No. 6577 (1968); see generally *Stevic*, supra, at 416-417. Article 33.1 of the Convention, 189 U.N.T.S. 150, 176 (1954), reprinted in 19 U.S.T. 6259, 6276, which is the counterpart of 243(h) of our statute, imposed a mandatory duty on contracting States not to return an alien to a country where his "life or freedom would be threatened" on account of one of the enumerated reasons. 7 See infra, at 441. Thus, although 243(h) itself did not constrain the Attorney General's discretion after 1968, presumably he honored the dictates of the United Nations Convention. 8 In any event, the 1980 Act removed the Attorney General's discretion in 243(h) proceedings. 9 [480 U.S. 421, 430].

In *Stevic* we considered it significant that in enacting the 1980 Act Congress did not amend the standard of eligibility for relief under 243(h). While the terms "refugee" and hence "well-founded fear" were made an integral part of the 208(a) procedure, they continued to play no part in 243(h). Thus we held that the prior consistent construction of 243(h) that required an applicant for withholding of deportation to demonstrate a "clear probability of persecution" upon deportation remained in force. Of course, this reasoning, based in large part on the plain language of 243(h), is of no avail here since 208(a) expressly provides that the "well-founded fear" standard governs eligibility for asylum.

The Government argues, however, that even though the "well-founded fear" standard is applicable, there is no difference between it and the "would be threatened" test of 243(h). It asks us to hold that the only way an applicant can demonstrate a "well-founded fear of persecution" is to prove a "clear probability of persecution." The statutory language does not lend itself to this reading.

To begin with, the language Congress used to describe the two standards conveys very different meanings. The "would be threatened" language of 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. ¹⁰ See *Stevic*, supra. In contrast, the reference to "fear" in the 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the [480 U.S. 421, 431]. ¹¹ "The linguistic difference between the words 'well-founded fear' and 'clear probability' may be as striking as that between a subjective and an objective frame of reference. . . We simply cannot conclude that the standards are identical." *Guevara-Flores v. INS*, 786 F.2d 1242, 1250 (CA5 1986), cert. pending, No. 86-388; see also *Carcamo-Flores v. INS*, 805 F.2d 60, 64 (CA2 1986); 767 F.2d at 1452 (case below).

That the fear must be "well-founded" does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the standard into a "more likely than not" one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place. As one leading authority has pointed out:

"Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp. . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return." 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 180 (1966).

This ordinary and obvious meaning of the phrase is not to be lightly discounted. See *Russello v. United States*, 464 U.S. 16, 21 (1983); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 198-199 (1976). With regard to this very statutory scheme, we have considered ourselves bound to "assume "that the legislative purpose is expressed by the ordinary meaning of the words used."" *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (quoting *American Tobacco Co. v. Patterson*, [480 U.S. 421, 432]. 456 U.S. 63, 68 (1982), in turn quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

The different emphasis of the two standards which is so clear on the face of the statute is significantly highlighted by the fact that the same Congress simultaneously drafted 208(a) and amended 243(h). In doing so, Congress chose to maintain the old standard in 243(h), but to incorporate a different standard in 208(a). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, supra, at 23 (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (CA5 1972)). The contrast between the language used in the two standards, and the fact that Congress used a new standard to define the term "refugee," certainly indicate that Congress intended the two standards to differ.

III

The message conveyed by the plain language of the Act is confirmed by an examination of its history. ¹² Three aspects of that history are particularly compelling: The pre-1980 experience under 203(a)(7), the only prior statute dealing with asylum; the abundant evidence of an intent to conform the definition of "refugee" and our asylum law to the United Nations Protocol to which the United States has been bound [480 U.S. 421, 433]. since 1968; and the fact that Congress declined to enact the Senate version of the bill that would have made a refugee ineligible for asylum unless "his deportation or return would be prohibited by 243(h)."

The Practice Under 203(a)(7).

The statutory definition of the term "refugee" contained in 101(a)(42) applies to two asylum provisions within the Immigration and Nationality Act. ¹³ Section 207, 8 U.S.C. 1157, governs the admission of refugees who seek admission from foreign countries. Section 208, 8 U.S.C. 1158, sets out the process by which refugees currently in the United States

may be granted asylum. Prior to the 1980 amendments there was no statutory basis for granting asylum to aliens who applied from within the United States. 14 Asylum for aliens applying for admission from foreign countries had, however, been the subject of a previous statutory provision, and Congress' intent with respect to the changes that it sought to create in that statute are instructive in discerning the meaning of the term "well-founded fear."

Section 203(a)(7) of the pre-1980 statute authorized the Attorney General to permit "conditional entry" to a certain number of refugees fleeing from Communist-dominated areas or the Middle East "because of persecution or fear of persecution on account of race, religion, or political opinion." 79 [480 U.S. 421, 434]. Stat. 913, 8 U.S.C. 1153(a)(7) (1976 ed.). The standard that was applied to aliens seeking admission pursuant to 203(a)(7) was unquestionably more lenient than the "clear probability" standard applied in 243(h) proceedings. In *Matter of Tan*, 12 I. & N. Dec. 564, 569-570 (1967), for example, the BIA "found no support" for the argument that "an alien deportee is required to do no more than meet the standards applied under section 203(a)(7) of the Act when seeking relief under section 243(h)." Similarly, in *Matter of Adamska*, 12 I. & N. Dec. 201, 202 (1967), the Board held that an alien's inability to satisfy 243(h) was not determinative of her eligibility under the "substantially broader" standards of 203(a)(7). One of the differences the Board highlighted between the statutes was that 243(h) requires a showing that the applicant "would be" subject to persecution, while 203(a)(7) only required a showing that the applicant was unwilling to return "because of persecution or fear of persecution." 12 I. & N., at 202 (emphasis in original). In sum, it was repeatedly recognized that the standards were significantly different. 15

At first glance one might conclude that this wide practice under the old 203(a)(7), which spoke of "fear of persecution," is not probative of the meaning of the term "well-founded fear of persecution" which Congress adopted in 1980. Analysis of the legislative history, however, demonstrates that Congress added the "well-founded" language only because that was the language incorporated by the United Nations Protocol to which Congress sought to conform. See *infra*, at 436-437. Congress was told that the extant asylum procedure [480 U.S. 421, 435] for refugees outside of the United States was acceptable under the Protocol, except for the fact that it made various unacceptable geographic and political distinctions. 16 The legislative history indicates that Congress in no way wished to modify the standard that had been used under 203(a)(7). 17 [480 U.S. 421, 436]. Adoption of the INS's argument that the term "well-founded fear" requires a showing of clear probability of persecution would clearly do violence to Congress' intent that the standard for admission under 207 be no different than the one previously applied under 203(a)(7). 18

The United Nations Protocol.

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, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States [480 U.S. 421, 437] acceded in 1968. 19 Indeed, the definition of "refugee" that Congress adopted, see *supra*, at 428, is virtually identical to the one prescribed by Article 1(2) of the Convention which defines a "refugee" as an individual 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."

Compare 19 U.S.T. 6225 with 19 U.S.T. 6261. Not only did Congress adopt the Protocol's standard in the statute, but there were also many statements indicating Congress' intent that the new statutory definition of "refugee" be interpreted in conformance with the Protocol's definition. The Conference Committee Report, for example, stated that the definition was accepted "with the understanding that it is based directly upon the language of the Protocol and it is intended that

the provision be construed consistent with the Protocol." S. Rep. No. 96-590, p. 20 (1980); see also H. R. Rep., at 9. It is thus appropriate to consider what the phrase "well-founded fear" means with relation to the Protocol.

The origin of the Protocol's definition of "refugee" is found in the 1946 Constitution of the International Refugee Organization (IRO). See 62 Stat. 3037. The IRO defined a "refugee" as a person who had a "valid objection" to returning to his country of nationality, and specified that "fear, based on reasonable grounds of persecution because of race, religion, nationality, or political opinions . . ." constituted a valid objection. See IRO Constitution, Annex 1, Pt. 1, C1(a)(i). The term was then incorporated in the United Nations Convention [480 U.S. 421, 438]. Relating to the Status of Refugees, 20 189 U.N.T.S. 150 (July 28, 1951). The Committee that drafted the provision explained that "[t]he expression 'well-founded fear of being the victim of persecution . . .' means that a person has either been actually a victim of persecution or can show good reason why he fears persecution." U. N. Rep., at 39. The 1967 Protocol incorporated the "well-founded fear" test, without modification. The standard, as it has been consistently understood by those who drafted it, as well as those drafting the documents that adopted it, certainly does not require an alien to show that it is more likely than not that he will be persecuted in order to be classified as a "refugee." 21

In interpreting the Protocol's definition of "refugee" we are further guided by the analysis set forth in the Office of the [480 U.S. 421, 439]. United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979). 22 The Handbook explains that "[i]n general, the applicant's fear should be considered well founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there." Id., at Ch. II B(2)(a) 42; see also id., 37-41.

The High Commissioner's analysis of the United Nations' standard is consistent with our own examination of the origins of the Protocol's definition, 23 as well as the conclusions of [480 U.S. 421, 440]. many scholars who have studied the matter. 24 There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening. See supra, at 431. As we pointed out in *Stevic*, a moderate interpretation of the "well-founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility." 467 U.S., at 424 -425.

In *Stevic*, we dealt with the issue of withholding of deportation, or nonrefoulement, under 243(h). This provision corresponds to Article 33.1 of the Convention. 25 Significantly though, Article 33.1 does not extend this right to everyone who meets the definition of "refugee." Rather, it provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership or a particular social group or political opinion." 19 U.S.T., at 6276, 189 U.N.T.S., at 176 (emphasis added). Thus, Article 33.1 requires that an applicant satisfy two burdens: first, that he or she be a "refugee," i. e., prove at least a "well-founded [480 U.S. 421, 441]. fear of persecution"; second, that the "refugee" show that his or her life or freedom "would be threatened" if deported. Section 243(h)'s imposition of a "would be threatened" requirement is entirely consistent with the United States' obligations under the Protocol.

Section 208(a), by contrast, is a discretionary mechanism which gives the Attorney General the authority to grant the broader relief of asylum to refugees. As such, it does not correspond to Article 33 of the Convention, but instead corresponds to Article 34. See *Carvajal-Munoz*, 743 F.2d, at 574, n. 15. That Article provides that the contracting States "shall as far as possible facilitate the assimilation and naturalization of refugees. . . ." Like 208(a), the provision is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible. Also like 208(a), an alien must only show that he or she is a "refugee" to establish eligibility for relief. No further showing that he or she "would be" persecuted is required.

Thus, as made binding on the United States through the Protocol, Article 34 provides for a precatory, or discretionary, benefit for the entire class of persons who qualify as "refugees," whereas Article 33.1 provides an entitlement for the subcategory that "would be threatened" with persecution upon their return. This precise distinction between the broad class of refugees and the subcategory entitled to 243(h) relief is plainly revealed in the 1980 Act. See *Stevic*, 467 U.S., at 428, n. 22.

Congress' Rejection of S. 643.

Both the House bill, H. R. 2816, 96th Cong., 1st Sess. (1979), and the Senate bill, S. 643, 96th Cong., 1st Sess. (1979), provided that an alien must be a "refugee" within the meaning of the Act in order to be eligible for asylum. The two bills differed, however, in that the House bill authorized the Attorney General, in his discretion, to grant asylum to any refugee, whereas the Senate bill imposed the additional [480 U.S. 421, 442]. requirement that a refugee could not obtain asylum unless "his deportation or return would be prohibited under section 243(h)." 26 S. Rep., at 26. Although this restriction, if adopted, would have curtailed the Attorney General's discretion to grant asylum to refugees pursuant to 208(a), it would not have affected the standard used to determine whether an alien is a "refugee." Thus, the inclusion of this prohibition in the Senate bill indicates that the Senate recognized that there is a difference between the "well-founded fear" standard and the clear-probability standard. 27 The enactment of the House bill rather than the Senate bill in turn demonstrates that Congress eventually refused to restrict eligibility for asylum only to aliens meeting the stricter standard. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub [480 U.S. 421, 443]. silentio to enact statutory language that it has earlier discarded in favor of other language." *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 392-393 (1980) (Stewart, J., dissenting); cf. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974); *Russello v. United States*, 464 U.S., at 23 .

IV

The INS makes two major arguments to support its contention that we should reverse the Court of Appeals and hold that an applicant can only show a "well-founded fear of persecution" by proving that it is more likely than not that he or she will be persecuted. We reject both of these arguments: the first ignores the structure of the Act; the second misconstrues the federal courts' role in reviewing an agency's statutory construction.

First, the INS repeatedly argues that the structure of the Act dictates a decision in its favor, since it is anomalous for 208(a), which affords greater benefits than 243(h), see n. 6, *supra*, to have a less stringent standard of eligibility. This argument sorely fails because it does not take into account the fact that an alien who satisfies the applicable standard under 208(a) does not have a right to remain in the United States; he or she is simply eligible for asylum, if the Attorney General, in his discretion, chooses to grant it. An alien satisfying 243(h)'s stricter standard, in contrast, is automatically entitled to withholding of deportation. 28 In *Matter of Salim*, 18 I. & N. Dec. 311 (1982), for example, the Board held that the alien was eligible for both asylum and withholding of deportation, but granted him the more limited remedy only, exercising its discretion to deny him asylum. See also *Walai v. INS*, 552 F. Supp. 998 (SDNY 1982); *Matter [480 U.S. 421, 444] of Shirdel*, Interim Decision No. 2958 (BIA Feb. 21, 1984). We do not consider it at all anomalous that out of the entire class of "refugees," those who can show a clear probability of persecution are entitled to mandatory suspension of deportation and eligible for discretionary asylum, while those who can only show a well-founded fear of persecution are not entitled to anything, but are eligible for the discretionary relief of asylum.

There is no basis for the INS's assertion that the discretionary/mandatory distinction has no practical significance. Decisions such as *Matter of Salim*, *supra*, and *Matter of Shirdel*, *supra*, clearly demonstrate the practical import of the distinction. Moreover, the 1980 Act amended 243(h) for the very purpose of changing it from a discretionary to a mandatory provision. See *supra*, at 428-429. Congress surely considered the discretionary/mandatory distinction important then, as it did with respect to the very definition of "refugee" involved here. The House Report provides:

"The Committee carefully considered arguments that the new definition might expand the numbers of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb. However, merely because an individual or group comes within the definition will not guarantee resettlement in the United States." H. R. Rep., at 10.

This vesting of discretion in the Attorney General is quite typical in the immigration area, see, e. g., *INS v. Jong Ha Wang*, 450 U.S. 139 (1981). If anything is anomalous, it is that the Government now asks us to restrict its discretion to a narrow class of aliens. Congress has assigned to the Attorney General and his delegates the task of making these hard individualized decisions; although Congress could have crafted a narrower definition, it chose to authorize the Attorney [\[480 U.S. 421, 445\]](#). General to determine which, if any, eligible refugees should be denied asylum.

The INS's second principal argument in support of the proposition that the "well-founded fear" and "clear probability" standard are equivalent is that the BIA so construes the two standards. The INS argues that the BIA's construction of the Refugee Act of 1980 is entitled to substantial deference, even if we conclude that the Court of Appeals' reading of the statutes is more in keeping with Congress' intent. [29](#) This argument is unpersuasive. [\[480 U.S. 421, 446\]](#).

The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical. [30](#) In *Chevron* [\[480 U.S. 421, 447\]](#). *U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), we explained:

"The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional [\[480 U.S. 421, 448\]](#). intent. [Citing cases.] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.*, at 843, n. 9 (citations omitted).

The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like "well-founded fear" which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling "any gap left, implicitly or explicitly, by Congress," the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. See *Chevron*, *supra*, at 843, quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). But our task today is much narrower, and is well within the province of the Judiciary. We do not attempt to set forth a detailed description of how the "well-founded fear" test should be applied. [31](#) Instead, we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical. [32](#) [\[480 U.S. 421, 449\]](#).

Our analysis of the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history, lead inexorably to the conclusion that to show a "well-founded fear of persecution," an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country. We find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien. See *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

Deportation 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. In enacting the Refugee Act of 1980 Congress sought to "give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." H. R. Rep., at 9. Our holding today increases that flexibility by rejecting the Government's contention that the Attorney General may not even consider granting asylum to one who [\[480 U.S. 421,](#)

450]. fails to satisfy the strict 243(h) standard. Whether or not a "refugee" is eventually granted asylum is a matter which Congress has left for the Attorney General to decide. But it is clear that Congress did not intend to restrict eligibility for that relief to those who could prove that it is more likely than not that they will be persecuted if deported.

The judgment of the Court of Appeals is

Affirmed.

Footnotes

[[Footnote 1](#)] We explained that the Court of Appeals' decision had rested "on the mistaken premise that every alien who qualifies as a 'refugee' under the statutory definition is also entitled to a withholding of deportation under 243(h). We find no support for this conclusion in either the language of 243(h), the structure of the amended Act, or the legislative history." *INS v. Stevic*, 467 U.S., at 428 .

[[Footnote 2](#)] Compare *Carcamo-Flores v. INS*, 805 F.2d 60 (CA2 1986); *Guevara-Flores v. INS*, 786 F.2d 1242 (CA5 1986), cert. pending, No. 86-388; *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (CA9 1985) (case below); *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (CA7 1984); *Youkhanna v. INS*, 749 F.2d 360, 362 (CA6 1984); with *Sankar v. INS*, 757 F.2d 532, 533 (CA3 1985).

The Third Circuit is the only Circuit to decide since our decision in *INS v. Stevic*, 467 U.S. 407 (1984), that the standards remain identical. It reached this conclusion, however, not because post-*Stevic* analysis compelled it, but because it considered itself bound by its pre-*Stevic* decision in *Rejaie v. INS*, 691 F.2d 139 (1982). See *Sankar*, supra, at 533.

[[Footnote 3](#)] We have considered whether this case has been rendered moot by the recent enactment of the Immigration Reform and Control Act of 1986. Pub. L. No. 99-603, 100 Stat. 3359. While nothing in that Act affects the statutory provisions related to asylum or withholding of deportation, Title II of the 1986 Act creates a mechanism by which certain aliens may obtain legalization of their status. Section 201(a) of the 1986 Act establishes that, with certain exceptions, an alien who has resided continuously in the United States in an unlawful status since before January 1, 1982, is entitled to have his or her status adjusted to that of an alien lawfully admitted for temporary residence. An alien who obtains this adjustment of status under the new Act is then eligible for a second adjustment to the status of permanent resident after a waiting period of 18 months. See 245A(a). An alien who obtains permanent residence status through this route is not, however, eligible for all benefits usually available to permanent residents. For example, aliens who obtain permanent residence through this program are not eligible for certain public welfare benefits for five years after the grant of the new status. See 245A(H).

The record indicates that respondent may well be eligible for eventual adjustment of status if she makes a timely application after the Attorney General establishes the procedures for administering Title II. It would therefore appear that respondent might become a permanent resident by invoking the new procedures even if she is unsuccessful in her pending request for asylum. Nonetheless the possibility of this relief does not render her request for asylum moot. First, the legalization provisions of the 1986 Act are not self-executing, and the procedures for administering the new Act are not yet in place. Even if the benefits were identical, therefore, [480 U.S. 421, 427]. there is no way of knowing at this time whether respondent will be able to satisfy whatever burden is placed upon her to demonstrate eligibility. Cf. *INS v. Chadha*, 462 U.S. 919, 937 (1983). Second, respondent might be able to obtain permanent residence through the asylum procedure sooner than through the legalization program; if she satisfies certain conditions, she may become eligible for adjustment of status to that of permanent resident 12 months after a grant of asylum. See 8 CFR 209.1-209.2 (1986). Under Title II of the new Act, by contrast, there is an 18-month waiting period. In light of these factors, we are persuaded that the controversy is not moot.

Nor do we believe that the new Act makes it appropriate to exercise our discretion to dismiss the writ of certiorari as improvidently granted. The question presented in this case will arise, and has arisen, in hosts of other asylum proceedings brought by aliens who arrived in the United States after January 1, 1982, or who are seeking entry as refugees from other countries. The importance of the legal issue makes it appropriate for us to address the merits now.

[[Footnote 4](#)] Prior to the amendments, asylum for aliens who were within the United States had been governed by regulations promulgated by the INS, pursuant to the Attorney General's broad parole authority. See n. 14, *infra*. Asylum for applicants who were not within the United States was generally governed by the now-repealed 203(a)(7) of the Act, 8 U.S.C. 1153(a) (7) (1976 ed.). See *infra*, at 433.

[[Footnote 5](#)] It is important to note that the Attorney General is not required to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that "the alien may be granted asylum in the discretion of the Attorney General." 208(a) (emphasis added). See *Stevic*, 467 U.S., at 423, n. 18; see also *infra*, at 441-444.

[[Footnote 6](#)] Asylum and withholding of deportation are two distinct forms of relief. First, as we have mentioned, there is no entitlement to asylum; it is only granted to eligible refugees pursuant to the Attorney General's discretion. Once granted, however, asylum affords broader benefits. As the BIA explained in the context of an applicant from Afghanistan who was granted 243(h) relief but was denied asylum:

"Section 243(h) relief is 'country specific' and accordingly, the applicant here would be presently protected from deportation to Afghanistan pursuant to section 243(h). But that section would not prevent his exclusion and deportation to Pakistan or any other hospitable country under section 237(a) if that country will accept him. In contrast, asylum is a greater form of relief. When granted asylum the alien may be eligible for adjustment of status to that of a lawful permanent resident pursuant to section 209 of the Act, 8 U.S.C. 1159, after residing here one year, subject to [\[480 U.S. 421, 429\]](#) numerical limitations and the applicable regulations." *Matter of Salim*, 18 I. & N. Dec. 311, 315 (1982).

See also *Matter of Lam*, 18 I. & N. Dec. 15, 18 (BIA 1981).

[[Footnote 7](#)] Article 33.1 of the Convention provides: "No 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." 189 U.N.T.S. 150, 176 (1954), 19 U.S.T. 6259, 6278, T.I.A.S. No. 6577 (1968).

[[Footnote 8](#)] While the Protocol constrained the Attorney General with respect to 243(h) between 1968 and 1980, the Protocol does not require the granting of asylum to anyone, and hence does not subject the Attorney General to a similar constraint with respect to his discretion under 208(a). See *infra*, at 440-441.

[[Footnote 9](#)] As amended, the new 243(h) provides: "The Attorney General shall not deport or return any alien . . . 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 [\[480 U.S. 421, 430\]](#) social group, or political opinion." 8 U.S.C. 1253(h)(1) (emphasis added).

[[Footnote 10](#)] "The section literally provides for withholding of deportation only if the alien's life or freedom 'would' be threatened in the country to which he would be deported; it does not require withholding if the alien 'might' or 'could' be subject to persecution." *Stevic*, 467 U.S., at 422.

[[Footnote 11](#)] The BIA agrees that the term "fear," as used in this statute, refers to "a subjective condition, an emotion characterized by the anticipation or awareness of danger." *Matter of Acosta*, Interim Decision No. 2986, p. 14 (Mar. 1, 1985) (citing Webster's Third New International Dictionary 831 (16th ed. 1971)).

[[Footnote 12](#)] As we have explained, the plain language of this statute appears to settle the question before us. Therefore, we look to the legislative history to determine only whether there is "clearly expressed legislative intention" contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses. See *United States v. James*, 478 U.S. 597, 606 (1986); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In this case, far from causing us to question the conclusion that flows from the statutory language, the legislative history adds compelling support to our holding that Congress never intended to restrict eligibility for asylum to aliens who can satisfy 243(h)'s strict, objective standard.

[[Footnote 13](#)] The definition also applies to 209, 8 U.S.C. 1159, which governs the adjustment of status of refugees after they have been granted asylum.

[[Footnote 14](#)] Such a procedure had been authorized by regulation since 1974, see 8 CFR pt. 108 (1976), but it was administered by INS District Directors rather than the BIA. As we noted in *Stevic*, these "regulations did not explicitly adopt a standard for the exercise of discretion on the application, but did provide that a denial of an asylum application 'shall not preclude the alien, in a subsequent expulsion hearing, from applying for the benefits of section 243(h) of the Act and of Articles 32 and 33 of the Convention Relating to the Status of Refugees.' 8 CFR 108.2 (1976)." 467 U.S., at 420, n. 13. In 1979, the regulations were amended to confer jurisdiction over asylum requests on the BIA for the first time. *Ibid.*

[[Footnote 15](#)] See also *Matter of Janus and Janek*, 12 I. & N. Dec. 866, 876 (BIA 1968). On the District Director level, where 203(a)(7) claims were generally processed, see n. 14, *supra*, this distinction was also recognized. In *Matter of Ugricic*, 14 I. & N. Dec. 384 (1972), a District Director articulated the test under 203(a)(7) as whether the applicant could prove that "he was persecuted or had good reason to fear persecution." *Id.*, at 385-386.

[[Footnote 16](#)] See S. Rep. No. 96-256, p. 9 (1979) (hereafter S. Rep.) (substantive standard for asylum is not changed); H. R. Rep. No. 96-608, p. 9 (1979) (hereafter H. R. Rep.) (discussing geographic limitations); Hearings before the House Subcommittee on International Operations of the Committee on Foreign Affairs on H. R. 2816, 96th Cong., 1st Sess., 72 (1979) (remarks of David Martin).

[[Footnote 17](#)] The INS argues that Congress intended to perpetuate the standard being used in the informal parole proceedings under the regulations, see n. 14, *supra*, not the asylum procedure under 203(a)(7). Until 1979 the regulations provided no standard, but they were amended in 1979 to provide that the applicant has the "burden of satisfying the immigration judge that he would be subject to persecution." 8 CFR 108.3(a) (1980). This standard was identical to the one that was set forth in the regulations for the treatment of applications for withholding of deportation. See 8 CFR 242.17(c) (1980).

The argument that Congress intended to adhere to the standard used in the informal parole proceedings cannot be squared with Congress' use of an entirely different formulation of the standard for defining "refugee" - one much closer to 203(a)(7), than to 243(h) (the statute which was the focus of the standard developed in the 1980 regulations). Moreover, to the extent that Congress was ambiguous as to which practice it sought to incorporate, it is far more reasonable to conclude that it sought to continue the practice under 203(a)(7), a statutory provision, than to adhere to the informal parole practices of the Attorney General, a matter in which Congress had no involvement.

The Government relies on the following passage from the Senate Report to support its contention that Congress sought to incorporate the standard from the parole proceedings - not from 203(a)(7):

"[T]he bill establishes an asylum provision in the Immigration and Nationality Act for the first time by improving and clarifying the procedures for determining asylum claims filed by aliens who are physically present in the United States. The substantive standard is not changed." S. Rep., at 9.

The bill that the Senate Committee was discussing indeed made no change in the standards to be applied to applications for asylum from aliens within the United States; the Senate version explicitly incorporated the same standard as used in 243(h). See *infra*, at 441-442. But the Senate version [[480 U.S. 421, 436](#)] was rejected by Congress, and the well-founded fear standard that was adopted mirrored 203(a)(7), not 243(h).

JUSTICE POWELL'S claim that the House Report also sought to incorporate the informal asylum standard is unfounded. *Post*, at 462-463. As the passage he quotes and the context plainly indicate, the House Report referred to "means of entry" - an issue dealt with under 203(a)(7), not the asylum regulations. See H. R. Rep., at 10. The Committee's reference to the Attorney General's asylum procedures, seven pages later in the text, in a discussion labeled "Asylum," and not even dealing with the definition of "well-founded fear," see *id.*, at 17, certainly does nothing to support JUSTICE POWELL'S conclusion.

[[Footnote 18](#)] Although this evidence concerns application of the term "refugee" to 207, not 208, the term is defined in 101(a)(42), and obviously can have only one meaning. JUSTICE POWELL suggests that the definition of "well-founded fear" be interpreted as incorporating the standard from the asylum regulations, rather than the standard from 203(a)(7), because "[i]t is more natural to speak of 'preserving' an interpretation that had governed the same form of relief than one that had applied to a different form of relief," *post*, at 462 (emphasis added). Since the definition in 101(a)(42) applies to all asylum relief - that corresponding to the old 203(a)(7) as well as that corresponding to the old Attorney General regulations - it is difficult to understand how JUSTICE POWELL reasons that it is likely that Congress preserved the "same form of relief" (emphasis added). The question is: the "same" as which? Our answer, based on Congress' choice of language and the legislative history, is that Congress sought to incorporate the "same" standard as that used in 203(a)(7).

[[Footnote 19](#)] See H. R. Conf. Rep. No. 96-781, p. 19 (1980); H. R. Rep., at 9; S. Rep., at 4.

[[Footnote 20](#)] In the Displaced Persons Act of 1948, 62 Stat. 1009, 2(a), (d), Congress adopted the IRO definition of the term "refugee" and thus used the "fear of persecution" standard. This standard was retained in the Refugee Relief Act of 1953, 67 Stat. 400 2(a), as well as in the Refugee Escapee Act of 1957, 71 Stat. 643 15(c)(1). In 1965, when Congress enacted 203(a)(7) of the Act, it again used the "fear of persecution" standard.

The interpretation afforded to the IRO definition is important in understanding the United Nations' definition since the Committee drafting the United Nations' definition made it clear that it sought to "assure that the new consolidated convention should afford at least as much protection to refugees as had been provided by previous agreements." United Nations Economic and Social Council, Report of the Ad Hoc Committee on Statelessness and Related Problems 37 (Feb. 17, 1950) (U. N. Doc. E/1618, E/AC. 32/5 (hereafter U. N. Rep.)). In its Manual for Eligibility Officers, the IRO had stated:

"Fear of persecution is to be regarded as a valid objection whenever an applicant can make plausible that owing to his religious or political convictions or to his race, he is afraid of discrimination, or persecution, on returning home. Reasonable grounds are to be understood as meaning that the applicant can give a plausible and coherent account of why he fears persecution." International Refugee Organization, Manual for Eligibility Officers No. 175, ch. IV, Annex 1, Pt. 1, C19, p. 24 (undated, circulated in 1950).

[[Footnote 21](#)] Although the United States has never been party to the 1951 Convention, it is a party to the Protocol, which incorporates the Convention's definition in relevant part. See 19 U.S.T. 6225, T.I.A.S. No. 6577 (1968).

[[Footnote 22](#)] We do not suggest, of course, that the explanation in the U. N. Handbook has the force of law or in any way binds the INS with reference to the asylum provisions of 208(a). Indeed, the Handbook itself disclaims such force, explaining that "the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself." Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 1 (ii) (Geneva, 1979).

Nonetheless, the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes. See *McMullen v. INS*, 658 F.2d 1312, 1319 (CA9 1981); *Matter of Frentescu*, 18 I. & N. Dec. 244 (BIA 1982); *Matter of Rodriguez-Palma*, 17 I. & N. Dec. 465 (BIA 1980).

[[Footnote 23](#)] The Board's decision in *Matter of Dunar*, 14 I. & N. Dec. 310 (1973), is not particularly probative of what the Protocol means and how it interacts with the provisions of the 1980 Act. In *Dunar*, the Board was faced with the question whether the United States' accession to the Protocol modified the standard of proof to be applied under 243(h). The Board, after elaborating on the principle that treaties are not lightly to be read as superseding prior Acts of Congress, *id.*, at 313-314, found no evidence that Congress sought to modify the 243(h) standard, and therefore construed the provisions as not inherently inconsistent. Even so, the Board recognized some tension between the standards, but was satisfied that they could "be reconciled on a case-by-case consideration as they arise." *Id.*, at 321.

Whether or not the Board was correct in *Dunar*, its holding based on a presumption that the two provisions were consistent says little about how the Protocol should be interpreted absent such a presumption, and given Congress' amendment of the statute to make it conform with the Protocol. [480 U.S. 421, 440]. See *Carvajal-Munoz*, 743 F.2d, at 574 (distinguishing pre-1980 "prediction" about the relation of the standards with post-1980 analysis of Congress' actual intent).

[[Footnote 24](#)] See 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 181 (1966) ("If there is a real chance that he will suffer persecution, that is reason good enough, and his 'fear' is 'well-founded'"); G. Goodwin-Gill, *The Refugee in International Law* 22-24 (1983) (balance of probability test is inappropriate; more appropriate test is "reasonable chance," "substantial grounds for thinking," or "serious possibility"); see generally Cox, "Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status, 10 *Brooklyn J. Int'l Law* 333 (1984).

[[Footnote 25](#)] The 1980 Act made withholding of deportation under 243(h) mandatory in order to comply with Article 33.1. See *supra*, at 428-429.

[[Footnote 26](#)] Section 207(b)(1) of the Senate bill provided: "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." See S. Rep., at 26.

[[Footnote 27](#)] The 1980 Act was the culmination of a decade of legislative proposals for reform in the refugee laws. See generally Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 *San Diego L. Rev.* 9, 20-64 (1981). On a number of occasions during that period, the Government objected to the "well-founded fear" standard, arguing: "[I]t should be limited by providing that it be a 'well-founded fear in the opinion of the Attorney General.' Failure to add 'in the opinion of the Attorney General' would make it extremely difficult to administer this section since it would be entirely subjective." *Western Hemisphere Immigration, Hearings on H. R. 981 before Subcommittee No. 1 of the Committee on the Judiciary, 93d Cong., 1st Sess., 95* (1973) (statement of Hon. Francis Kellogg, Special Assistant to the Secretary of State). See also Anker & Posner, *supra*, at 25; Helton, *Political Asylum Under the 1980 Refugee Act: An*

Unfulfilled Promise, 10 Mich. J. L. Ref. 243, 249-252 (1984). In light of this kind of testimony and attention to the issue, it is unrealistic to suggest that Congress did not realize that the "well-founded fear" standard was significantly different from the standard that has continuously been part of 243(h).

[[Footnote 28](#)] There are certain exceptions, not relevant here. See, e. g., 243(h) (2)(A) (alien himself participated in "the persecution of any person . . ."); 243(h)(2)(B) (alien was convicted of "serious crime" and "constitutes a danger to the community of the United States").

[[Footnote 29](#)] In view of the INS's heavy reliance on the principle of deference as described in *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), we set forth the relevant text in its entirety:

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

"We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is [\[480 U.S. 421, 446\]](#), entrusted to administer, and the principle of deference to administrative interpretations

"has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. . . .

". . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' *United States v. Shimer*, 367 U.S. 374, 382 , 383 (1961).

"*Accord, Capital Cities Cable, Inc. v. Crisp*, [467 U.S. 691, 699 -700 (1984)].

"In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is 'inappropriate' in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a

reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make." *Id.*, at 842-845 (citations and footnotes omitted).

[[Footnote 30](#)] An additional reason for rejecting the INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years. An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view. *Watt v. Alaska*, 451 U.S. 259, 273 (1981); see also *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

The BIA has answered the question of the relationship between the objective 243(h) standard and the fear-based standard of 203(a)(7), 208, and the United Nations Protocol in at least three different ways. During the period between 1965, when 203(a)(7) was enacted, and 1972, the BIA expressly recognized that 203(a)(7) and 243(h) prescribed different standards. See *supra*, at 433-434. Moreover, although the BIA decided in 1973 that the two standards were not irreconcilably different, see *Matter of Dunar*, 14 I. & N. Dec. 310 (1973), as of 1981 the INS was still instructing its officials to apply a "good reason" test to requests for asylum from aliens not within the United States. See Dept. of Justice, INS Operating Instructions Regulations TM 101, 208.4, p. 766.9 (Nov. 11, 1981) (explaining that "well-founded fear" is satisfied if applicant "can show good reason why he/she fears persecution"). In 1984, when this case was decided by the BIA, it adhered to the view that the INS now espouses - complete identity of the standards. In 1985, however, the BIA decided to reevaluate its position and issued a comprehensive opinion to explain its latest understanding of the "well-founded fear" standard. *Matter of Acosta*, Interim Decision No. 2986 (Mar. 1, 1985).

In *Acosta*, the BIA noted a number of similarities between the two standards and concluded that in practical application they are "comparable" or "essentially comparable," and that the differences between them are not "meaningful," but the agency never stated that they are identical, equivalent, or interchangeable. On the contrary, the *Acosta* opinion itself establishes that the two standards differ. In describing the objective component of the asylum standard, the BIA concluded that the alien is not required to establish the likelihood of persecution to any "particular degree of certainty." *Id.*, at 22. There must be a "real chance" that the alien will become a victim of persecution, *ibid.*, but it is not necessary to show "that persecution is more likely than not" to occur." *Id.*, at 25. The *Acosta* opinion was written after we had decided in *Stevic* that the 243(h) standard "requires that an application be supported by evidence establishing that it is more likely than not that the alien would be subject to persecution," 467 U.S., at 429-430. The decision in *Acosta* and the long pattern of erratic treatment of this issue make it apparent that the BIA has not consistently agreed, and even today does not completely agree, with the INS's litigation position that the two standards are equivalent.

[[Footnote 31](#)] How "meaningful" the differences between the two standards may be is a question that cannot be fully decided in the abstract, but the fact that Congress has prescribed two different standards in the same Act certainly implies that it intended them to have significantly different meanings.

We cannot accept the INS's argument that it is impossible to think about a "well-founded fear" except in "more likely than not" terms. The Board was able to do it for a long time under 203(a)(7), see *Matter of Tan*, 12 I. & N. Dec. 564 (1967); *Matter of Adamska*, 12 I. & N. Dec. 201 (1967), and has apparently had little trouble applying the two separate standards in compliance with the recent Courts of Appeals' decisions. See, e. g., *Matter of Sanchez and Escobar*, Interim Decision No. 2996 (Oct. 15, 1985).

[[Footnote 32](#)] JUSTICE POWELL argues that the Court of Appeals should be reversed for a different reason - that it misinterpreted the BIA's decision. See [480 U.S. 421, 449], *post*, at 465-468. This issue was not raised in any of the parties' briefs, and was neither "set forth" nor "fairly included" within the question presented in the petition for certiorari. See this Court's Rule 20.1. The question presented asked:

"Whether an alien's burden of proving eligibility for asylum pursuant to Section 208 (a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158 (a), is equivalent to his burden of proving eligibility for withholding of deportation pursuant to Section 243 (h) of the Act, 8 U.S.C. 1253 (h)." Pet. for Cert. (l).

This question cannot be read as challenging the Court of Appeals' determination that the BIA in fact required respondent "to demonstrate a clear probability of persecution in order to be declared eligible for asylum." 767 F.2d, at 1454. We therefore decline to address the issue. See *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60, n. 2 (1981); *Irvine v. California*, 347 U.S. 128, 129 (1954).

JUSTICE BLACKMUN, concurring.

I join the Court's opinion and judgment. Thus, I accept its "narrow" conclusion that "the Immigration Judge and the BIA were incorrect in holding that the [standards for withholding of deportation and granting asylum] are identical." Ante, at 448. In accordance with this holding, the Court eschews any attempt to give substance to the term "well-founded fear" and leaves that task to the "process of case-by-case adjudication" by the INS, the agency in charge of administering the immigration laws. *Ibid.* I write separately and briefly to emphasize my understanding that, in its opinion, the court has directed the INS to the appropriate sources from which the agency should derive the meaning of the "well-founded fear" standard, a meaning that will be refined in later adjudication. This emphasis, I believe, is particularly needed where, as here, an agency's previous interpretation of the statutory term is so strikingly contrary to plain language and legislative history.

Thus, as the Court observes, ante, at 430-431, the very language of the term "well-founded fear" demands a particular type of analysis - an examination of the subjective feelings of an applicant for asylum coupled with an inquiry into the objective nature of the articulated reasons for the fear. Moreover, in describing how, in the 1980 Act, Congress was attempting to bring this country's refugee laws into conformity with the United Nations Protocol, the Court notes that the Act's definition of refugee, wherein the "well-founded fear" term appears, ante, at 427, tracks the language of the [480 U.S. 421, 451]. Protocol. See ante, at 436-437. Such language has a rich history of interpretation in international law and scholarly commentaries. See ante, at 437-440, and nn. 20, 24. While the INS need not ignore other sources of guidance, the above directions by the Court should be significant in the agency's formulation of the "well-founded fear" standard.

Finally, in my view, the well-reasoned opinions of the Courts of Appeals, that almost uniformly have rejected the INS's misreading of statutory language and legislative history, provide an admirable example of the very "case-by-case adjudication" needed for the development of the standard. Although the Court refers to a conflict among these courts, see ante, at 426, n. 2, with one exception, see *ibid.*, all the Courts of Appeals that have addressed this question have concluded that the standards for withholding of deportation and granting asylum are not the same. Rather, differences in opinion have arisen as to the precise formulation of the "well-founded fear" standard. *Such differences can arise only when courts or agencies seriously grapple with the problems of developing a standard, whose form is at first given by the statutory language and the intimations of the legislative [480 U.S. 421, 452]. history, but whose final contours are shaped by the application of the standard to the facts of specific cases. The efforts of these courts stand in stark contrast to - but, it is sad to say, alone cannot make up for - the years of seemingly purposeful blindness by the INS, which only now begins its task of developing the standard entrusted to its care.

[Footnote *] See, e. g., *Carcamo-Flores v. INS*, 805 F.2d 60, 68 (CA2 1986) ("What is relevant is the fear a reasonable person would have, keeping in mind the context of a reasonable person who is facing the possibility of persecution, perhaps including a loss of freedom or even, in some cases, the loss of life"); *Guevara-Flores v. INS*, 786 F.2d 1242, 1249 (CA5 1986), cert. pending, No. 86-388 ("An alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country"); *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1452-1453 (CA9 1985) (case below) ("In contrast, the term 'well-founded fear' requires that (1) the alien have a