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# DUE PROCESS AND THE DEPORTABLE ALIEN: LIMITATION ON STATE DEPARTMENT PARTICIPATION IN WITHHOLDING OF DEPORTATION INQUIRY\*

Section 243(h) of the Immigration and Nationality Act of 1952 provides that the Attorney General may withhold deportation when it appears that an alien will be persecuted "on account of race, religion, or political opinion" in the country designated for deportation.<sup>1</sup> In the course of a 243(h) inquiry, it has been the practice of the Attorney General's delegates<sup>2</sup> to consider opinion letters from the Office of Refugee and Migration Affairs of the State Department (ORM) concerning whether the alien is likely to be persecuted.<sup>3</sup> Recently, however, the admissibility of these recommendations has been severely criticized.<sup>4</sup> In *Zamora v. INS*,<sup>5</sup> the Court of Appeals for the Second Circuit, while ruling that ORM letters may be admitted, imposed two significant limitations on their use. The Second Circuit stated that the letters should no longer purport to conclusively determine whether

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<sup>1</sup> Section 243(h) of the Immigration and Nationality Act provides:

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

8 U.S.C. § 1253(h) (1970). See generally Note, *Protecting Deportable Aliens from Physical Persecution: Section 243(h) of the Immigration and Nationality Act of 1952*, 62 YALE L.J. 845 (1953).

<sup>2</sup> A special inquiry officer, also denominated an immigration judge, 8 C.F.R. § 1.1(1) (1976), is the person empowered to act as the Attorney General's delegate in a § 243(h) inquiry. *Id.* § 242.8(a). See *United States ex rel. Watts v. Shaughnessy*, 206 F.2d 616 (2d Cir. 1953); *Feng Yeat Chow v. Shaughnessy*, 151 F. Supp. 23 (S.D.N.Y. 1957).

<sup>3</sup> Recommendations from the ORM initially are given after an alien has requested political asylum. The asylum proceeding is separate and distinct from withholding of deportation pursuant to § 243(h). See notes 9-10 and accompanying text *infra*.

<sup>4</sup> See *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975); *Hosseinmardi v. INS*, 405 F.2d 25 (9th Cir. 1969); *Kasravi v. INS*, 400 F.2d 675 (9th Cir. 1968).

<sup>5</sup> 534 F.2d 1055 (2d Cir. 1976).

a particular alien will be persecuted, but rather should consist of a finding of whether the country to which the alien is to be deported persecutes the class of persons to which the applicant belongs.<sup>6</sup> Additionally, the panel indicated that the basis for the views expressed in these letters should be revealed.<sup>7</sup>

The *Zamora* litigation originated when the Zamoras, citizens of the Philippines, overstayed their visas in the United States and became subject to deportation proceedings.<sup>8</sup> On February 14, 1973, subsequent to institution of proceedings against them, the Zamoras applied to the district director of the INS in New York for a grant of political asylum.<sup>9</sup> The district director provided the ORM with a summary of the asylum application and requested its recommendations.<sup>10</sup> Following receipt of an ORM letter indicating that the Zamoras' application should be denied,<sup>11</sup> the

<sup>6</sup> *Id.* at 1067.

<sup>7</sup> *Id.*

<sup>8</sup> Florentino Zamora arrived in the United States in October 1970 on a nonimmigrant business visa. As a result of extensions, he was authorized to remain until October 30, 1971. His wife Maria and their son Roberto entered in January 1971 as visitors for pleasure. They also received several extensions and were allowed to stay in the United States until January 15, 1972. After the expiration of the extensions, however, they were subject to deportation. Section 241(a)(2) of the Immigration and Nationality Act, which provides the statutory authorization to deport people in the Zamoras' position states:

Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who

. . . .  
(2) . . . is in the United States in violation of this chapter or in violation of any other laws of the United States. . . .

8 U.S.C. § 1251(a)(2) (1970).

<sup>9</sup> Political asylum is permission to remain in the United States, granted by the Attorney General to an alien who is able to establish that he would be persecuted upon return to his home country. See *Yan Wo Cheng v. Rinaldi*, 389 F. Supp. 583, 586-88 (D.N.J. 1975). A request for asylum may be made prior to, during, or after a deportation hearing. See *id.* at 586-87 nn. 6-8, *reprinting in pertinent part* Immigration and Naturalization Service, Current Laws; Title 8, Code of Federal Regulations; Operations Instructions; and Interpretations § 108.1(f)(1)-(3) (1972) [hereinafter cited as Operations Instructions].

<sup>10</sup> A grant of political asylum is authorized under 8 C.F.R. §§ 108.1-2 (1976). Unless the petition for asylum is "clearly meritorious or clearly lacking in substance," the District Director of the INS is expressly required to solicit the opinion of the State Department concerning the merits of the application. *Id.* § 108.2. Operations Instructions have been promulgated by the INS establishing the procedure to be followed in evaluating requests for asylum. These instructions specifically direct that the district director's request for State Department assistance be sent to the ORM. See Operations Instructions, *supra* note 9, at §§ 108.1(f)(1)-(3). If the district director's denial of approval of the application for asylum is based, in any degree, upon the State Department opinion, the letter must be made part of the record of the proceeding and the alien must be afforded an opportunity for rebuttal. 8 C.F.R. § 108.2 (1976).

<sup>11</sup> The ORM opinion letter stated that the State Department did not find that the Zamora family [had] made a valid claim to asylum . . . . [The Department believed] that the Zamora family would be able to live in the Philippines at this time free of restraints other than those imposed on all Philippine citizens . . . . On the basis of the information thus far submitted, [the Department was] unable to

district director refused to grant political asylum. On May 24, 1974 a deportation hearing was commenced before an immigration judge.<sup>12</sup> During the hearing the Zamoras, having conceded deportability,<sup>13</sup> applied for withholding of deportation. The immigration judge, as required by regulation,<sup>14</sup> undertook a 243(h) inquiry within the deportation hearing proper. After the petitioners offered evidence pertinent to the likelihood of persecution,<sup>15</sup> the government was permitted to introduce the ORM letter recommending denial of asylum.<sup>16</sup> The immigration judge found that the Zamoras had failed to establish the likelihood of persecution upon return to the Philippines. While noting the recommendation of the ORM, the judge stated that it had not influenced him in reaching this conclusion.<sup>17</sup> The Zamoras appealed to the Board of Immigration Appeals, the appellate tribunal in INS administrative actions.<sup>18</sup> Upon examining all the evidence

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conclude that the Zamora family should be exempted from regular immigration procedures on the grounds that they would suffer persecution on account of race, religion, nationality, political opinion, or membership in a particular social group should they return to the Philippines.

534 F.2d at 1057, quoting Letter from the ORM to the District Director, INS (Feb. 27, 1974) (brackets supplied by *Zamora* court).

<sup>12</sup> Immigration and Nationality Act § 242(b), 8 U.S.C. § 1252(b) (1970), provides:

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation.

The terms "special inquiry officer" and "immigration judge" are used interchangeably. 8 C.F.R. § 1.1(1) (1976).

<sup>13</sup> 534 F.2d at 1057.

<sup>14</sup> 8 C.F.R. § 242.17(d) (1976) provides in pertinent part:

An application under this section shall be made only during the [deportation] hearing and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability. The respondent shall have the burden of establishing that he is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion.

Prior to 1962, the regulations governing withholding of deportation provided only for a postdeportation hearing motion wherein the hearing officer was authorized merely to make recommendations to the regional commissioner of the INS. 22 Fed. Reg. 9798 (1957) (current version at 8 C.F.R. § 242.17(d) (1976)). See 1 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 5.16(b), at 5-188 (1976).

<sup>15</sup> The Zamoras offered testimony concerning the general suppression of civil liberties in their homeland, their involvement in demonstrations for which other participants had been jailed, and the fears which they entertained because of the general political situation in the Philippines. To support further their assertions, the Zamoras also introduced newspaper articles and advertisements depicting political repression in the Philippines. 534 F.2d at 1058.

<sup>16</sup> See note 11 *supra*.

<sup>17</sup> 534 F.2d at 1058. The immigration judge quoted from the ORM opinion in noting that the Zamoras' request for asylum had been denied, but then stated that his own evaluation did not rely at all upon the ORM recommendation.

<sup>18</sup> The Board of Immigration Appeals is an administrative body composed of five members appointed by the Attorney General. 8 C.F.R. § 3.1(a)(1) (1976). The regulations provide that the Board shall have jurisdiction over all appeals arising from a 243(h) hearing. *Id.* § 3.1(3)(b).

presented, the Board found that the petitioners would not be persecuted if deported and therefore dismissed the appeal.<sup>19</sup> In reaching this decision, the Board also noted the communication sent by the ORM without, however, disclaiming any reliance upon it. Following dismissal of their appeal, the Zamoras petitioned the Second Circuit for review of the Immigration Board's decision.<sup>20</sup>

The petitioners' major contention before the Second Circuit was that the ORM letter, elicited in response to their request for asylum, was erroneously admitted in the 243(h) hearing.<sup>21</sup> Judge Friendly, writing for a unanimous court,<sup>22</sup> declared that the primary source of the problem lay in the interplay of the asylum and withholding provisions.<sup>23</sup> The court noted that although the letter is adjudicative in form, its admissibility in the asylum proceedings presents no serious due process question since the alien is still entitled to a 243(h) inquiry.<sup>24</sup> According to Judge Friendly, the due

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<sup>19</sup> The Board, unlike the immigration judge, may have relied on the State Department information since in its opinion it stated:

We have reviewed the record . . . and conclude that the decision was correct. In an official communication to the Service the State Department indicated its belief that the Zamora family would be able to live in the Philippines free of restraints, other than those imposed on all Philippine citizens by the terms of various martial law decrees.

534 F.2d at 1058.

<sup>20</sup> Immigration and Nationality Act § 105, 8 U.S.C. § 1105(a) (1970), grants exclusive jurisdiction to the courts of appeals to review "all final orders of deportation." The Supreme Court has interpreted this section to include determinations under § 243(h). See *Foti v. INS*, 375 U.S. 217, 229-30 & n.16 (1963). See also Note, *Judicial Review of Final Orders of Deportation*, 42 N.Y.U.L. Rev. 1155 (1967).

The Zamoras' case was joined on appeal with that of *Roberte Noel*, a Haitian, who also became deportable as a result of overstaying her authority to remain in the United States. She then applied to the INS district director for political asylum. After a letter recommending denial of asylum was received from the ORM, her application was rejected. At her subsequent deportation hearing she applied for § 243(h) relief and offered testimony on her own behalf as to her fear of persecution upon return to Haiti. The advisory opinion of the ORM was entered by the INS in opposition to her claim. Relief was denied by the immigration judge and, following the dismissal of an appeal to the Board, Noel filed a petition for review with the Second Circuit. 534 F.2d at 1058-59.

<sup>21</sup> 534 F.2d at 1059. The court noted that the petitions could have been disposed of summarily since neither petitioner had raised any objection to the introduction of the ORM opinions. *Id.* Nevertheless, finding that the case presented a recurring problem, the court felt that its "views may be useful." *Id.* In the recent case of *Daniel v. INS*, 528 F.2d 1278 (5th Cir. 1976) (*per curiam*), the Fifth Circuit was also faced with the question of admissibility of ORM asylum recommendations in a § 243(h) inquiry. The *Daniel* court apparently saw no need for an extensive discussion of the issue, and denied the aliens' petitions for review on the ground that the aliens had failed to raise any objection to the ORM recommendation during the § 243(h) inquiry. *Id.* at 1280.

<sup>22</sup> The panel consisted of Judges Friendly, Mulligan, and Gurfein.

<sup>23</sup> 534 F.2d at 1059.

<sup>24</sup> *Id.* at 1059-60, citing *Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Div.*, 312 U.S. 126, 152-53 (1941). In *Opp*, the Supreme Court stated:

The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as

process problem arises when the letter is introduced in a 243(h) inquiry. The court stated that section 243(h) neither expressly provides for ORM involvement as the asylum regulation does,<sup>25</sup> nor does it explicitly mandate the procedures guaranteed in the deportation hearing proper.<sup>26</sup> Therefore, in order to evaluate the validity of introducing the letter in the 243(h) proceeding, the Second Circuit found it necessary to ascertain the procedural framework in which the inquiry is conducted. First, the court reaffirmed the position previously propounded by the Second Circuit that an immigration judge's evaluation of section 243(h) applications that an "two step process."<sup>27</sup> The initial step involves a factual determination as to whether the alien would be persecuted if deported; the second phase consists of the actual exercise of discretion by the immigration judge based upon these findings of fact.

Judge Friendly observed that the Second Circuit had previously ruled that since the initial determination of whether the alien would be subject to persecution was based on factual findings, it was subject to review under the substantial evidence test.<sup>28</sup> Without further explanation, the *Zamora*

the requisite hearing is held before the final order becomes effective.

*Id. See Davis, The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193 (1956).

<sup>25</sup> 534 F.2d at 1060. See note 10 *supra* for a discussion of the asylum procedure.

<sup>26</sup> 534 F.2d at 1060. The procedural guarantees provided in the case of the deportation hearing proper are far more explicit than those contained in the regulations concerning § 243(h) relief. The governing provision, Immigration and Nationality Act § 242(b)(3)-(4), 8 U.S.C. § 1252(b)(3)-(4) (1970), requires in pertinent part that

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The regulatory scheme allowing for temporary withholding of deportation provides an alien with the opportunity to specify the country of his choice in the event of his deportation. Concomitantly, he must be notified of the country or countries to which he will be sent if he is rejected by the country of his choosing, or fails to make a choice. 8 C.F.R. § 242.17(c) (1976). The regulation further requires that the alien be informed of the availability of a temporary withholding of deportation under § 243(h). He is directed to present an application containing reasons in support of his claim and is required to submit to an examination under oath where he may provide evidence or information in his own behalf. The government is also authorized to present evidence, including nonrecord information undisclosed for reasons of national security. The regulation states in part:

When the special inquiry officer receives such non-record information he shall inform the respondent thereof and shall also inform him whether it concerns conditions generally in a specified country or the respondent himself. Whenever he believes he can do so consistently with safeguarding both the information and its source, the special inquiry officer should state more specifically the general nature of the information in order that the respondent may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state that such information is material to the decision.

*Id.*

<sup>27</sup> 534 F.2d at 1060.

<sup>28</sup> *Id.* Substantial evidence has been defined as "more than a mere scintilla. It means such

court then concluded that the procedure required in the deportation hearing proper "governs at least the fact-finding portion of the section 243(h) inquiry."<sup>29</sup> In addition, the court posited that since the 243(h) inquiry must be held during the deportation hearing proper,<sup>30</sup> it is ancillary to that hearing, at least with respect to the factfinding portion, thus providing the alien with "a hearing within a hearing."<sup>31</sup> Having determined the proper procedural characterization of the 243(h) inquiry, the panel directed its attention to the admissibility of ORM opinions within this framework.

While refusing to bar the admission of ORM information, the court stated that when an ORM letter is introduced into the 243(h) proceeding its contents must be restricted to legislative facts.<sup>32</sup> Judge Friendly noted that to the extent the ORM opinions deal with "the attitude of the country of prospective deportation toward various types of former residents," they are not only admissible but extremely desirable as well.<sup>33</sup> Conversely, he asserted that when the ORM applies this information to a particular alien, it is overstepping the bounds of procedural fairness.<sup>34</sup> Nevertheless, the Second Circuit declared that even if there is an abuse of ORM authority, reversal requires a showing by the petitioner that the outcome has been

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relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

In concluding that the fact finding process must be reviewed under the substantial evidence test, the Second Circuit relied on *Wong Wing Hang v. INS*, 360 F.2d 715 (2d Cir. 1966), and *United States ex rel. Kordic v. Esperdy*, 386 F.2d 232 (2d Cir. 1967), *cert. denied*, 392 U.S. 935 (1968). *Wong Wing Hang* involved the denial of a request for suspension of deportation, a discretionary order under Immigration and Nationality Act § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1970), similar in form to withholding of deportation under § 243(h). The *Wong Wing Hang* court stated that "factual findings on which a discretionary denial of suspension is predicated must pass the substantial evidence test." 360 F.2d at 717. The *Kordic* court extended the holding of *Wong Wing Hang* to orders under § 243(h). 386 F.2d at 239.

<sup>29</sup> 534 F.2d at 1060.

<sup>30</sup> See note 14 *supra*.

<sup>31</sup> 534 F.2d at 1060.

<sup>32</sup> *Id.* at 1062-63.

<sup>33</sup> *Id.* at 1062. In order to delineate the proper role of ORM recommendations in a § 243(h) inquiry, Judge Friendly relied upon the legislative versus adjudicative fact dichotomy propounded by Professor Kenneth Culp Davis in his treatise on administrative law:

Adjudicative facts are the facts about the parties and their activities, business, and properties. . . . Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion. 534 F.2d at 1062 n.4, quoting 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958). See also Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 114-16 (1972); Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51, 78-79.

<sup>34</sup> 534 F.2d at 1063. The court noted that when the ORM applies legislative facts to the particular alien, it is usurping the adjudicative function of the immigration judge and the Board of Immigration Appeals.

influenced by such abuse.<sup>35</sup> Thus, the *Zamora* petitioners were denied relief despite the possibility of prejudicial State Department participation because the court believed that rejection of their applications was appropriate regardless of the ORM recommendations.<sup>36</sup>

The two-step process employed by the *Zamora* panel to evaluate the denial of relief under section 243(h), although previously adopted by one other circuit,<sup>37</sup> is a significant departure from the consensus of judicial opinion. A majority of the courts have held that a section 243(h) inquiry is a discretionary measure and that therefore the "full and fair" hearing requirements of the deportation hearing proper are not applicable.<sup>38</sup> A standard requiring essential fairness has generally been adhered to, and reversal has been considered appropriate only in cases where a denial of relief may be deemed "arbitrary and capricious."<sup>39</sup> This approach is exemplified by *Kasravi v. INS*,<sup>40</sup> wherein the Court of Appeals for the Ninth Circuit was faced with a situation not unlike that presented to the *Zamora* court. In *Kasravi*, a "perfunctory letter" by the ORM had been offered as the sole evidence in opposition to the petitioner's claim.<sup>41</sup> Although ques-

<sup>35</sup> *Id.* See *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975); *Hosseinmardi v. INS*, 405 F.2d 25, 28 (9th Cir. 1968) (denial of rehearing en banc).

<sup>36</sup> 534 F.2d at 1063.

<sup>37</sup> See *Hamad v. INS*, 420 F.2d 645, 646 (D.C. Cir. 1969). In dismissing a petition to review orders denying § 243(h) relief, the *Hamad* court noted that if the petitioner fails to sustain his burden of proof in the factfinding stage of the process, "the Board [has] no occasion to exercise its discretion to withhold deportation . . ." *Id.* at 647. See *United States ex rel. Kordic v. Esperdy*, 386 F.2d 232 (2d Cir. 1967), *cert. denied*, 392 U.S. 935 (1968); *Wong Wing Hang v. INS*, 360 F.2d 715 (2d Cir. 1966).

<sup>38</sup> See *Khalil v. INS*, 457 F.2d 276 (9th Cir. 1972); *Kasravi v. INS*, 400 F.2d 675 (9th Cir. 1968); *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967). The Second Circuit itself has previously held that a claimant under § 243(h) is not entitled to the full procedural guarantees afforded by the deportation hearing proper. See *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392, 393-94 (2d Cir. 1953). In *Dolenz*, the court also stated that orders denying 243(h) relief could be overturned only where there had been an abuse of the Attorney General's discretion. *Id.* at 394. The Second Circuit still adheres to *Dolenz* with respect to the idea that the "requirements for a full and fair hearing generally applicable to the deportation process do not apply to the discretionary withholding procedure of § 243(h) *in toto*," and, ultimately, the Second Circuit's scope of review is still abuse of discretion. 534 F.2d at 1060 n.3. The Second Circuit has merely modified the *Dolenz* decision. It has broken the one-step approach of *Dolenz* into two and, with respect to the factfinding step, has afforded the alien the procedural guarantees applicable to the deportation hearing proper.

<sup>39</sup> The courts that have utilized the "arbitrary and capricious" standard have indicated that "essential fairness" is satisfied if the alien is permitted to submit evidence concerning persecution and such evidence is not refused consideration. *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392, 394-95 (2d Cir. 1953). See *Zupicich v. Esperdy*, 319 F.2d 774 (2d Cir. 1963), *cert. denied*, 376 U.S. 933 (1964); *Cakmar v. Hoy*, 265 F.2d 59 (9th Cir. 1959); *cf. United States ex rel. Hintopoulos v. Shaughnessy*, 233 F.2d 705 (2d Cir. 1956), *aff'd*, 353 U.S. 72 (1957) (Attorney General's discretionary power to suspend deportation is subject to test of arbitrariness). See generally 1 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE 5-185 (1976).

<sup>40</sup> 400 F.2d 675 (9th Cir. 1968).

<sup>41</sup> *Id.* at 676-77. The petitioner in *Kasravi* was a 38 year old Iranian who had entered the

tioning the competency of this type of evidence,<sup>42</sup> the *Kasravi* court nevertheless held that section 243(h) neither requires nor contemplates "a finding of fact based upon an evaluation of the record."<sup>43</sup> Rather, viewing the Attorney General's decision as being completely discretionary, the court concluded that a determination of the admissibility of the State Department communication within the 243(h) inquiry was outside the scope of review.<sup>44</sup> Notwithstanding that the Ninth Circuit forcefully denounced the reliability and competency of ORM letters, it refused to acknowledge any power on its part to deny their admission. The Second Circuit, in *Zamora*, was unwilling to reach such an incongruous result.

The rationale underlying the maxim that the courts may not substitute their opinion for that of the Attorney General, developed primarily in case law, has been based fundamentally on the express language of the Immigration and Nationality Act.<sup>45</sup> The courts have stated that the statute makes it "abundantly clear" that the decision to withhold deportation rests entirely in the unfettered discretion of the Attorney General and his delegates.<sup>46</sup> This is certainly a strong argument. The courts adhering to this

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United States on a student visa in 1954. He left school and thus became deportable in 1961. At his deportation hearing he presented evidence concerning the dictatorial tendencies of the Shah and his own vehement protest against the Iranian regime. Kasravi's position was supported by two expert witnesses. The only evidence offered by the government was a State Department opinion which stated that it was unlikely that a student who had opposed the Shah while in the United States would be persecuted upon return to Iran. *Id.*

<sup>42</sup> In discussing the use of letters from the State Department, the *Kasravi* court stated:

Such letters from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world. The traditional foundation required of expert testimony is lacking; nor can official position be said to supply an acceptable substitute. No hearing officer or court has the means to know the diplomatic necessities of the moment, in the light of which the statements must be weighed.

*Id.* at 677 n.1.

<sup>43</sup> *Id.* at 677.

<sup>44</sup> *Id.* The court stated that the scope of its review did not permit it to "substitute its opinion for that of the Attorney General." *Id.*

<sup>45</sup> See *Khalil v. INS*, 457 F.2d 1276 (9th Cir. 1972); *Kasravi v. INS*, 400 F.2d 675 (9th Cir. 1968); *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967); *Chao-Ling Wang v. Pilliod*, 285 F.2d 517 (7th Cir. 1960).

<sup>46</sup> *Kasravi v. INS*, 400 F.2d 675, 677 (9th Cir. 1968); cf. *Jay v. Boyd*, 351 U.S. 345, 353-54 (1956) (suspension of deportation). The *Kasravi* court's determination that the Attorney General's decision is purely discretionary stemmed from the change in the statutory language. The provision for withholding of deportation that existed prior to the enactment of § 243(h) clearly did not leave the matter to the Attorney General's discretion. It stated: "No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution." Act of Sept. 23, 1950, ch. 1024, § 23, 64 Stat. 1010 (emphasis added) (current version at 8 U.S.C. § 1253(h) (1970)). The present provision does not prevent the Attorney General from deporting an alien who would be persecuted if returned to his home country, but rather authorizes him to withhold deportation in such an instance. Immigration and Nationality Act § 243(h), 8 U.S.C. §

view, however, have failed to take cognizance of certain changes in the internal regulations of the INS. While the 243(h) proceeding formerly involved a motion made before the INS district director subsequent to the formal deportation proceeding, it has now been incorporated within the deportation hearing proper and is adjudicated by the same hearing officer who conducts the deportation hearing.<sup>47</sup> Since the hearing proper is governed by the substantial evidence test, logic appears to compel that the 243(h) inquiry, or at least the factfinding portion thereof, be governed by the same scope of review.

A further argument advanced by courts holding the majority view is based upon the fact that the Attorney General has access to confidential nonrecord material.<sup>48</sup> They conclude that since this material is not available to a court, review of the Attorney General's decisional process was not intended.<sup>49</sup> The *Zamora* tribunal did not ignore this argument but instead asserted that the intent behind section 243(h) is that the decisional process be subject only to partial review, not that it be subject to no review whatsoever. While acknowledging that nonrecord material could not be reviewed, Judge Friendly felt that legislative intent would be fulfilled if review of the withholding decisional process encompassed the factfinding portion of the 243(h) inquiry and included all information which need not be withheld on national security grounds.<sup>50</sup> The court noted, moreover, that in actuality "little recourse to nonrecord materials has been had."<sup>51</sup>

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1253(h) (1970). See 14 STAN. L. REV. 861, 862 (1962). There is some evidence, however, that Congress did not intend to change the operation of the statute when it enacted the Immigration and Nationality Act in 1952. The House Report accompanying the bill stated: "The bill continues the provision in existing law to the effect that no alien shall be deported to any country in which the Attorney General finds that he would be subjected to physical persecution." H.R. REP. NO. 1365, 82d Cong., 2d Sess. (1952), reprinted in [1952] U.S. CODE CONG. & AD. NEWS 1653, 1715.

<sup>47</sup> Prior to 1961, the regulations governing withholding deportation provided merely for a postdeportation hearing motion before an INS special inquiry officer. The inquiry officer was only authorized to make recommendations to a regional commissioner of the INS. 22 Fed. Reg. 9798 (1957) (current version at 8 C.F.R. § 242.17(d) (1976)). See 1 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 5.16b, at 5-188 (1976). The post-1961 regulations, however, appear to treat the § 243(h) inquiry as ancillary to the deportation hearing proper by providing that the withholding inquiry take place within the deportation hearing. Additionally, the same immigration judge presides over the hearing proper and the 243(h) inquiry. See 8 C.F.R. § 242.17(d) (1976).

<sup>48</sup> See 8 C.F.R. § 242.17(c) (1976). The regulation provides for the use of nonrecord material if disclosure of such material would prejudice national security. Obviously, if such confidential material is utilized, the court, on appeal, will not have been privy to it. Thus, review on the merits is necessarily limited. See *Zupicich v. Esperdy*, 207 F. Supp. 574, 581 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 773 (2d Cir. 1963), *cert. denied*, 376 U.S. 933 (1964). See generally Wasserman, *The Universal Ideal of Justice and Our Immigration Laws*, 34 NOTRE DAME LAW. 1, 13-15 (1958) (decrying use of confidential material).

<sup>49</sup> See, e.g., *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392 (2d Cir. 1953), discussed in note 38 *supra*.

<sup>50</sup> 534 F.2d at 1060 n.3.

<sup>51</sup> *Id.*

The *Zamora* position of limited review appears eminently more reasonable than absolute preclusion of review. Complete foreclosure of review is an overreaction to the fact that the Attorney General will occasionally rely on nonrecord material. Ultimately, of course, had the *Zamora* court not reached this conclusion with respect to review of the merits, any discussion of admissibility of ORM recommendations would have been futile. As in *Kasravi*, the Second Circuit would have been compelled to conclude that such a discussion was beyond the scope of their review power.

By requiring that the procedural guarantees afforded the alien in the deportation hearing proper be applied to the factfinding portion of the 243(h) inquiry, the Second Circuit has taken an unprecedented step. Nevertheless, adoption of this position is entirely consistent with the court's reasonable approach toward reviewability. Since the 243(h) inquiry is treated in the regulations as being ancillary to the deportation hearing proper,<sup>52</sup> if the *Zamora* court is correct in utilizing the substantial evidence test, it would seem appropriate to apply the same procedure in both the hearing proper and the 243(h) inquiry. This conclusion is supported by the fact that determinations made during and incident to the deportation hearing proper, such as orders denying withholding of deportation pursuant to section 243(h), have been held to be ancillary to the deportability issue for jurisdictional purposes.<sup>53</sup> While the Second Circuit's adoption of an ancillary theory to determine applicable procedural regulations is an extension of these holdings, it is submitted that it is not an untenable one.

In considering the admissibility of ORM opinion letters "in the context of a 'hearing,'" <sup>54</sup> the Second Circuit was able to grant at least a minimum of protection to the deportable alien.<sup>55</sup> While it is doubtless true that "concerning internal affairs of a foreign nature, the [State Department] is usually the best available source of information,"<sup>56</sup> it is also true

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<sup>52</sup> See note 47 *supra*.

<sup>53</sup> *Foti v. INS*, 375 U.S. 217 (1963). Immigration and Nationality Act § 106(a), 8 U.S.C. § 1105(a) (1970), provides that review of final orders of deportation shall be in the courts of appeals. The *Foti* Court held that orders denying § 243(h) relief were ancillary to a final deportation order for this purpose. 375 U.S. at 227. Although Chief Justice Warren also noted the possibility that the findings of fact upon which discretionary actions are based may require the support of substantial evidence, he refused to rule on this question. *Id.* at 228-29 n.15.

<sup>54</sup> 534 F.2d at 1061.

<sup>55</sup> When State Department information is used in the proceedings and the respondent is not granted the hearing rights applicable to the hearing proper, see note 26 *supra*, he is denied the opportunity to confront and rebut the evidence introduced against him. See *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975); *Khalil v. INS*, 457 F.2d 1276 (9th Cir. 1972); *Hosseinmardi v. INS*, 405 F.2d 25 (9th Cir. 1968); *Milutin v. Bouchard*, 299 F.2d 50 (3d Cir.), *vacated and remanded*, 370 U.S. 292 (1962); *Zupicich v. Esperdy*, 207 F. Supp. 574 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 773 (2d Cir. 1963), *cert. denied*, 376 U.S. 933 (1964). Through the procedure presented by the Second Circuit in *Zamora*, the alien will be afforded the opportunity to see and rebut the evidence.

<sup>56</sup> 534 F.2d at 1062.

that the ORM tends to abuse its proper function in the section 243(h) inquiry.<sup>57</sup> The *Zamora* opinion seems to have struck a balance between these considerations. It permits the immigration judge to avail himself of badly needed information concerning the policy followed by the subject country in its dealings with various types of individuals,<sup>58</sup> while protecting the alien from a possibly unsupportable adjudication of his particular case by the State Department. Additionally, the Second Circuit's determination that the basis for ORM opinions should be indicated whenever possible appears to be sound.<sup>59</sup> This will not only afford the alien a greater opportunity to rebut the information but will also furnish the courts with an informed basis from which to evaluate the validity of the ORM's determination. As the *Kasravi* panel noted, diplomatic concerns may result in a tainted State Department viewpoint;<sup>60</sup> disclosure of the basis for the Department's ultimate determination will aid in abrogating the deleterious effects of such an occurrence.<sup>61</sup>

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<sup>57</sup> The *Zamora* court, referring to the manner in which ORM opinions are currently utilized, stated:

The ones in these cases and in others that we have seen give little or nothing in the way of useful information about conditions in the foreign country. What they do is to recommend how the district director should decide the particular petitioner's request for asylum.

*Id.* at 1063. See *Daniel v. INS*, 528 F.2d 1278 (5th Cir. 1976); *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975); *Khalil v. INS*, 457 F.2d 1276 (9th Cir. 1972); *Hosseinmardi v. INS*, 405 F.2d 25 (9th Cir. 1968); *Cheng Fu Sheng v. INS*, 400 F.2d 678 (9th Cir. 1968) (per curiam), cert. denied, 393 U.S. 1054 (1969); *Kasravi v. INS*, 400 F.2d 675 (9th Cir. 1968); *Asghari v. INS*, 396 F.2d 391 (9th Cir. 1968). Moreover, a recent congressional investigation indicated that the efforts undertaken by the State Department to verify asylum claims made by Haitians were minimal. *N.Y. Times*, Oct. 17, 1976, § 1, at 56, cols. 3-4.

<sup>58</sup> 534 F.2d at 1062. The policy of a country toward a particular class of individuals is a question of legislative fact, rendering cross-examination and confrontation unnecessary since the alien is generally in no better position to determine this question than the average citizen. See notes 33-34 and accompanying text *supra*.

<sup>59</sup> In *Radic v. Fullilove*, 198 F. Supp. 162 (W.D. Cal. 1961), the INS had denied the petitioner relief under § 243(h) and refused to disclose the basis upon which its decision was made. In reversing and remanding the case to the INS, the court stated:

Under our form of Government the right to a hearing embraces not only the right to present evidence in support of one's position, but also a reasonable opportunity to know the claims of the opposing party with the privilege of seeking to refute those claims. The right to be heard and the right to contest opposing evidence are equal and coexisting rights, and both are essential to procedural due process.

*Id.* at 165 (emphasis omitted).

<sup>60</sup> 400 F.2d at 677 n.1. See note 42 *supra*.

<sup>61</sup> The *Zamora* court did not indicate the weight to be given an ORM recommendation when the ORM is unwilling to disclose the basis for its reviews. See 534 F.2d at 1060-61 n.3. Furthermore, since the ORM opinions, perfunctory though they may be, do conform to the regulations governing grants of asylum under which they are submitted, see notes 9-10 *supra*, the *Zamora* court seems to be requiring that the ORM submit a separate letter in the § 243(h) situation. Of course, the ORM could simply comply with the *Zamora* instructions in its original recommendation in the asylum situation although it is not required to do so by regulation. See 8 C.F.R. § 108.2 (1976).

While it would initially appear that the approach taken by the *Zamora* tribunal has provided the deportable alien who fears persecution in his homeland with a new and expansive avenue of relief, the outcome of the case serves to partially dispel this notion. The ORM recommendation complained of in *Zamora* embodied all the defects disapproved of in Judge Friendly's opinion.<sup>62</sup> Even so, the petitioners were denied relief on the ground that they had failed to sustain their burden of proof<sup>63</sup> and had not established that the ORM recommendations had influenced the disposition of the case.<sup>64</sup>

Undeniably, the Second Circuit's attempt to expand the rights and protections granted to deportable aliens by section 243(h) is laudable. This is especially so when viewed in light of the more restrictive notions embraced by the majority of circuits. The fact remains, however, that the problem lies not primarily within the judiciary, but within the strictures of the Immigration and Nationality Act.<sup>65</sup> The lengths to which the courts must go in order to provide aliens with even a modicum of relief merely reaffirms the need for a reevaluation of present legislation.<sup>66</sup> In the meantime, however, the deportable alien will have to be satisfied with the comparatively liberal procedural guarantees set forth in *Zamora*.

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<sup>62</sup> 534 F.2d at 1057, 1063. The State Department letters were perfunctory, did not describe conditions in the Philippines or Haiti, and did suggest the "appropriate" disposition of the individual petitioners' cases.

<sup>63</sup> *Id.* at 1063; *accord*, Khalil v. INS, 457 F.2d 1276 (9th Cir. 1972); Shkukani v. INS, 435 F.2d 1378 (8th Cir.), *cert. denied*, 403 U.S. 920 (1971); Hamad v. INS, 420 F.2d 645 (D.C. Cir. 1969); Hosseinmardi v. INS, 405 F.2d 25 (9th Cir. 1969).

<sup>64</sup> 534 F.2d at 1063. The statement made by the Board in dismissing the *Zamoras'* appeal indicates that there may have been reliance on the ORM letter. *See id.* at 1058. It is difficult to perceive how the petitioners are to prove that the ORM's recommendation influenced the outcome of the inquiry, especially since the court provides no indication as to what degree this showing must extend.

<sup>65</sup> The Immigration and Nationality Act has been described by one commentator as the most "stringent and discriminatory" immigration law in the free world. Wasserman, *The Universal Ideal of Justice and Our Immigration Laws*, 34 NOTRE DAME LAW. 1, 4 (1958).

<sup>66</sup> One authority calling for the reform of American immigration laws angrily insisted that the Immigration and Nationality Act "depicts us as cruel and vindictive, heedless of the opinions or good will of our allies, and oblivious of the standards of decency and fair play that mark our criminal legislation." Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 309 (1956).