Persecution Based on Political Opinion: Interpretation of the Refugee Act of 1980

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Persecution Based on Political Opinion: Interpretation of the Refugee Act of 1980

The repression was an act of policy, decided upon by a group of men who knew their original plans had gone awry. . . . It was necessary to spread an atmosphere of terror. We have to create the impression of mastery.¹

Since long before becoming an independent country, the United States has been a place where a person could seek refuge. Over the years, millions have come to the U.S. to seek a better life. Some have immigrated due to poor economic conditions in their home countries; others have come to escape religious, ethnic, or political persecution. This Note focuses on immigrants fleeing actual or feared persecution on account of their political opinions or affiliations.

The Refugee Act of 1980 determines the rights of individuals seeking to remain in the U.S. because of persecution based on their political opinion.² Refugees who meet the statutory requirements cannot be deported to the country from which they fear persecution, and they may be eligible for political asylum. Unfortunately, U.S. courts and administrative agencies have not provided a consistent interpretation of the phrase “persecution based on political opinion.” No clear standard defines the treatment that constitutes persecution, nor is there a test to determine what qualifies as political opinion. The Supreme Court has examined the burden of proof standard that must be met in order to qualify under the Act, but has yet to attempt to define the phrase “persecution based on political opinion.”³ The Board of Immigration Appeals (BIA), the administrative body charged with determining the eligibility

³ The Court, however, granted certiorari in the case of Zacarias v. INS, 921 F.2d 844 (9th Cir. 1990), cert. granted, 111 S. Ct. 2008 (1991). The Court did not engage in a complete exploration of political persecution, for it limited argument to the single question of whether forced participation in a guerrilla organization necessarily constitutes persecution on account of the person’s political opinions. For fuller discussion of Zacarias, see infra notes 172-78, 306-26 and accompanying text. [The case was decided as this issue went to press. See INS v. Elias-Zacarias, No. 90-1342, 1992 WL 6768 (U.S. Jan. 22, 1992). Ed.]
status of those seeking asylum, and the U.S. circuit courts of appeals have been left on their own to interpret the Act.

Section I of this Note will describe the Refugee Act and the procedures for gaining asylum based on political opinion. It will examine who has the power, the courts or the BIA, to interpret the Refugee Act and the degree of deference courts should give to administrative determinations of fact and law. The Note will then consider current interpretations of "persecution based on political opinion," both by the BIA and by circuit courts of appeals. Section II will examine the legislative history of the Refugee Act and the international documents and interpretive sources upon which the Act was based. Finally, Section III will propose solutions for some of the problems plaguing the BIA and the courts.

This Note argues that Congress passed the Refugee Act to codify the United States' obligations under the United Nations Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees, and that BIA and court interpretations of the Act do not satisfy the United States' obligations under these treaties. In interpreting the Act, the courts and the BIA should, when possible, rely on the U.N. Handbook on Criteria and Procedures for Determining Refugee Status ("U.N. Handbook"), a document promulgated by the Office of the United Nations High Commissioner for Refugees and intended to guide adjudicators in determining refugee status. Otherwise, the courts and the BIA should rely on the broad purposes of the Refugee Act and on the U.N. Convention and Protocol in general.

I. The Refugee Act of 1980

The Refugee Act governs asylum procedures and creates two avenues of relief for an alien facing deportation. First, the Attorney General has discretion to grant asylum if an alien is a "refugee" within the meaning of section 1101(a)(42) of Title 8 of the U.S. Code. The Act defines "refugee" as:

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 group, political opinion, or some other reason.


The Act requires the Attorney General to establish procedures for aliens in the U.S. to apply for asylum. If deportation proceedings have not begun, an alien may apply for asylum from a District Director of the Immigration and Naturalization Service (INS). If such proceedings have begun, or if the District Director denied the alien's application for asylum, the asylum application will be considered by the immigration judge handling the deportation proceeding. If a judge has already ordered deportation, an alien can move to reopen proceedings to consider a claim for asylum. Denials of asylum claims can be appealed to the Board of Immigration Appeals and subsequently to the circuit court of appeals in either the circuit where the administrative proceedings were conducted or in the circuit in which the alien was residing. A successful applicant is eligible for permanent residence after one year.

Under the second form of relief, withholding of deportation, if the Attorney General concludes that a refugee's "life or freedom would be threatened" in his home country, under section 243(h) of the Act, the refugee cannot be deported to that country. If an alien meets this requirement, the Attorney General has no discretion and must withhold deportation. However, the alien will not necessarily be allowed to stay in the U.S. The Attorney General may still deport the alien to a third country willing to accept the alien.

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9. 8 C.F.R. §§ 208.1, 208.3(a) (1990). See generally INA §§ 236, 242, 8 U.S.C. §§ 1226, 1252 (1988). Exclusion proceedings are applied against an alien seeking admission to the U.S., while deportation proceedings are held to determine whether an alien in the U.S. should be expelled.
10. 8 C.F.R. §§ 208.1, 208.3(b), 208.9 (1990).
11. Id. § 208.11.
12. Id. § 3.1(b).
13. INA § 106(a), 8 U.S.C. 1105(a) (1988). BIA decisions are appealed to circuit courts of appeals if related to final orders of deportation. All other orders relating to exclusion and deportation proceedings can be reviewed through habeas corpus petitions in federal district court. Id. § 106(b), 8 U.S.C. § 1105(b) (1988).
14. Id. § 209(h), 8 U.S.C. 1159(b) (1988). Prior to obtaining permanent residence, an asylum grant may be revoked if the situation in the alien's home country changes so that the alien no longer meets the definition in section 1101(a)(42). Id. at § 208(b), 8 U.S.C. 1158(b) (1988).
15. Id. § 243(h), 8 U.S.C. 1253(h) (1988). ("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 a country on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .")
16. An application for withholding of deportation can be made only in exclusion or deportation proceedings. 8 C.F.R. § 208.3(b) (1990). A decision on withholding of deportation applications is made pursuant to the same provisions as an asylum request. See supra notes 8-14 and accompanying text.
Thus, the Attorney General has discretion under the Refugee Act to grant asylum to refugees who have been persecuted or have a "well-founded" fear of persecution on account of their political opinions and cannot deport an alien to his home country if his "life or freedom would be threatened" there.

For the first few years following the passage of the Refugee Act, lower courts split concerning the burden of proof that an alien must meet to be eligible for asylum or for withholding of deportation. In 1984, the Supreme Court in *INS v. Stevic*[^17] settled the withholding of deportation issue and determined that an alien must prove that "it is more likely than not that the alien would be subject to persecution" if deported to his home country in order to be entitled to withholding of deportation under section 243(h).[^18] The Court in *Stevic*, however, failed to determine the burden of proof that an alien must satisfy to be eligible for asylum, that is, how likely persecution must be for an alien's fear to be "well-founded."[^19]

Finally in 1987 the Court, in *INS v. Cardoza-Fonseca*,[^20] answered the question left open in *Stevic*. It refused to apply the "more likely than not" standard to an alien seeking asylum.[^21] A petitioner for asylum need only show that persecution is a "reasonable possibility."[^22] The Court was unwilling to give a more concrete definition to the phrase "well-founded" and wrote that the term can "only be given concrete meaning through a process of case-by-case adjudication."[^23] The Court stated, however, that "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place."[^24] *Cardoza-Fonseca* also implied that a one in ten chance would be sufficient to create a reasonable possibility.[^25]

After *Stevic* and *Cardoza-Fonseca*, the probability of persecution determines the required burden of proof in both asylum eligibility and entitlement to withholding of deportation cases. *Stevic* requires an alien to show that the probability of persecution is "more likely than not" to be entitled to withholding of deportation. *Cardoza-Fonseca* holds that an

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[^18]: Id. at 429-430. The alien had argued that the well-founded fear standard in section 208(a) of the Refugee Act also applied to applications for withholding of deportation under Section 243(h). *Id.* at 428.
[^19]: Compare Carcamo-Flores v. INS, 805 F.2d 60 (2nd Cir. 1986); Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985); and Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984) with Sankar v. INS, 757 F.2d 532, 533 (3rd Cir. 1985) (holding that the two standards were identical).
[^21]: Id. at 423. The Court stated that "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 a right to withholding of deportation under § 243(h)." *Id.* at 423-24.
[^22]: Id. at 440. ("[S]o 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.") (citation omitted).
[^23]: Id. at 448.
[^24]: Id. at 431.
[^25]: Id. at 440.
alien need only show a reasonable possibility of persecution to meet the requirement of a "well-founded" fear necessary for asylum eligibility. Thus, if an alien can show sufficient probability of persecution to warrant withholding of deportation, he or she is also eligible for asylum. Conversely, if an alien cannot prove he or she is eligible for asylum, he or she will never be able to satisfy the requirements of withholding of deportation.

The Court has stated that one reason for placing a higher burden of proof on refugees seeking withholding of deportation is the mandatory nature of the relief.\textsuperscript{26} The reasonable possibility standard in asylum eligibility cases is sufficient because the Attorney General has discretion to reject an alien's petition for asylum even if he or she meets the statutory criteria.

The Attorney General has delegated to the BIA the authority to determine whether an alien meets the standards for one or both forms of relief.\textsuperscript{27} Whether an alien meets the statutory requirements for one or both forms of relief is first a question of fact. Once the facts are determined, the BIA must determine whether the alien's situation falls within the scope of the Act.

The BIA and the circuit courts often have widely different views on the meaning of the Refugee Act.\textsuperscript{28} If the BIA and a circuit court disagree, the circuit court's interpretation controls within the circuit's jurisdiction. But the BIA may, and often does, maintain its interpretations in cases arising in other circuits. Some circuits have granted broad deference to the BIA's findings of fact and interpretations of the Refugee Act. Other circuits have deferred to the BIA only on questions of fact and have reviewed questions of law \textit{de novo}. One circuit even scrutinizes factual determinations. The proper level of deference shown to the BIA by the circuit courts is important because the more deferential the circuit courts are, the more powerful the BIA (and through it, the current political administration) becomes in terms of guiding U.S. refugee policy.\textsuperscript{29}

A. Deference to BIA Findings and Interpretations

1. Factual Findings

The Supreme Court has stated that courts must review factual findings of an administrative agency under a substantial evidence test.\textsuperscript{30} Agency findings of fact are not to be overturned if there is substantial evidence in the record to support the agency's decision.\textsuperscript{31} Most circuit courts have used this substantial evidence test to review BIA determinations of

\textsuperscript{26} Id. at 439, 449-50.
\textsuperscript{27} 8 C.F.R. § 3.1(a) (1990).
\textsuperscript{28} See infra notes 48-181 and accompanying text.
\textsuperscript{29} See infra notes 245-65 and accompanying text for full discussion.
\textsuperscript{30} Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
\textsuperscript{31} Id. at 490.
fact. The Ninth Circuit in *Diaz-Escobar v. INS*, stated that "we may not reverse the BIA simply because we disagree with its evaluation of the facts, but only if we conclude that the BIA evaluation is not supported by substantial evidence." Moreover, the court held that "[a]ll the substantial evidence standard requires is that the BIA's conclusion, based on the evidence presented, be substantially reasonable."

Although all the circuits agree on the standard, their applications of the standard differ. The First Circuit uses a "deferential" substantial evidence test, while the Sixth Circuit refers to the test as a "clearly erroneous" standard. While it is unclear whether a deferential substantial evidence test and a clearly erroneous test differ, it appears that the First and Sixth Circuits use a more deferential test that the Ninth Circuit, at least where the BIA or immigration judge finds an alien's testimony not credible. The Ninth Circuit has held that an immigration judge "who rejects testimony for lack of credibility must offer a 'specific, cogent' reason for the rejection." The court will then evaluate whether the reasons are "valid grounds" for finding the alien not credible. The Ninth Circuit has also held that "the IJ [Immigration Judge] must not only articulate the basis for a negative credibility finding, but those reasons must be substantial and must bear a legitimate nexus to the finding."

2. Legal Conclusions

In *Chevron v. Natural Resources Defense Council*, the Supreme Court announced the basic standard governing the deference circuit courts must give to the legal interpretations of administrative agencies. In *Chevron*, Justice Stevens articulated a two-prong inquiry:

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 of the statute . . . . [I]f 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

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32. See, e.g., *Alvarez-Flores v. INS*, 909 F.2d 1, 3 (1st Cir. 1990); *Arteaga v. INS*, 856 F.2d 1227, 1228 (9th Cir. 1988).
33. 782 F.2d 1488 (9th Cir. 1986).
34. Id. at 1493.
35. Id. See also *Turcios v. INS*, 821 F.2d 1396 (9th Cir. 1987). The substantial evidence test requires review of the whole record. "Substantial evidence is more than a mere scintilla and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 1398.
39. Id. at 1142.
40. *Aguilera-Cota v. INS*, 914 F.2d 1375, 1381 (9th Cir. 1990).
on a permissible construction of the statute.\footnote{Id. at 842-43.}

Courts will use traditional methods of statutory interpretation\footnote{See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). The Court cites the plain language doctrine and the use of legislative history as two of the ordinary canons of statutory construction. \textit{Id.} at 449. If the plain language appears to settle the question, then the legislative history should be examined only for a clear contrary intent that would rebut the strong presumption that Congress “expresses its intent through the language it chooses.” \textit{Id.} at 432 n.12.} to decide whether Congress expressed a clear intent or whether the statute in question is ambiguous. If the court decides that Congress had a clear intent, that intent will be given effect.\footnote{\textit{Chevron}, 467 U.S. at 843 n.9: \textit{The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress has an intention on the precise question at issue, that intention is the law and must be given effect.}} If Congress’ intent is not clear, circuit courts must defer to an agency’s interpretation if it is reasonable.

Three years after \textit{Chevron}, in \textit{Immigration and Naturalization Service v. Cardoza-Fonseca},\footnote{\textit{Id.} at 446.} the Supreme Court examined both the Refugee Act and the proper level of deference for the BIA’s interpretation of the law. The Court rejected the BIA’s interpretation of the Act and concluded that Congress’ intent on this issue could be determined both through traditional methods of statutory construction, and by examining the legislative history behind the Refugee Act.\footnote{\textit{Id.} at 448.} The Court, however, said that some of the terms in the Refugee Act are ambiguous. Ambiguities can only be resolved through case-by-case adjudication, and courts must respect the administrative agency’s interpretation.\footnote{Canas-Segovia v. INS, 902 F.2d 717, 721 (9th Cir. 1990), petition for cert. filed, No. 90-1246, 59 U.S.L.W. 3565 (U.S. Feb. 6, 1991); Maldonado-Cruz v. INS, 883 F.2d 788, 791 (9th Cir. 1989); Arteaga v. INS, 836 F.2d 1227, 1228 (9th Cir. 1988); Desir v. Ilchert, 840 F.2d 723, 726 (9th Cir. 1988).} The Ninth Circuit finds support for its position in the Supreme Court’s statement in \textit{Cardoza-Fonseca} that “[t]he judiciary is the final authority on issues of statutory construction . . . .”\footnote{\textit{Cardoza-Fonseca}, 480 U.S. at 447-48 (citing \textit{Chevron}).} The Ninth Circuit appears to believe that the courts can ascertain Congress’s intent in most applica-
tions of the Refugee Act by using ordinary statutory construction methods and by examining the relevant legislative history.

The First, Fifth and Eleventh Circuits, which also rely on Cardoza-Fonseca for support, have come to opposite conclusions. They agree that questions of law must be reviewed *de novo*, but argue that where Congress uses ambiguous terms, such as "well-founded," the courts should defer to reasonable agency interpretations. These circuits have concluded that Congress was ambiguous or expressed no intent towards specific applications of the Refugee Act. Thus, deference to the BIA is appropriate.

The remainder of this section will examine the various interpretations of the Refugee Act and, in particular, the words "persecution" and "political opinion."

B. Persecution

1. BIA Approach

The Board of Immigration Appeals has taken a hard-line position on granting asylum and withholding of deportation. An alien must satisfy a high standard in order to show a well-founded fear or clear probability of persecution. Most BIA cases look only at whether an alien meets the less onerous "well-founded" fear test for asylum eligibility, for if the BIA concludes that the test is not met, there is no need to analyze a claim for withholding of deportation, which requires a higher burden of proof. Thus, except where noted otherwise, the following material relates to claims of asylum eligibility.

To be eligible for asylum, an alien must first show that the harm he or she fears is persecution. Next, the alien must show either past persecution or a well-founded fear of future persecution. The BIA includes both objective and subjective components in its well-founded fear test. To meet the subjective component, the alien's fear must be genuine.

The BIA has held that the objective component is essentially a reasonable person test. A well-founded fear is established if a reasonable person in the alien's circumstances would fear persecution. To meet the objective component, it must also be shown that:

50. See Alvarez-Flores v. INS, 909 F.2d 1, 3 (1st Cir. 1990); Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1296 (11th Cir. 1990); Campos-Guardado v. INS, 809 F.2d. 285, 289 (5th Cir. 1987).

51. *In re Mogharrabi*, Interim Decision No. 3028, at 8 (BIA 1987).

52. *Id.*

53. *Id.* See also Cruz-Lopez v. INS, 802 F.2d 1518 (4th Cir. 1986). The Court here quoted the Board:

[T]he 'well-founded fear' test requires the alien to establish that he has a subjective fear of returning and that his fear has enough of a basis in specific facts to be considered 'well-founded' upon objective evaluation. The alien must offer 'specific facts' detailing a 'good reason' to fear persecution, or establishing an objectively reasonable 'expectation of persecution.'

*Id.* at 1522.
(1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort;
(2) the persecutor is already aware, or could easily become aware, that the alien possesses this characteristic;
(3) the persecutor has the capability to punish the alien; and
(4) the persecutor has the inclination to punish that alien.\textsuperscript{54}

Under the BIA test, harm caused by general upheaval, strife, civil wars or random widespread violence does not meet this test even if the alien has good reason to fear he or she will suffer some harm. Harm of this type is not persecution because there is no belief or characteristic that a persecutor seeks to overcome. The BIA has held that an alien must show specific threats directed at the alien personally and that "political upheaval" affecting "the populace as a whole" is not persecution.\textsuperscript{55} Even specific threats to an alien are not always sufficient if there is widespread violence in the alien's home country.\textsuperscript{56}

It is unclear from the BIA's opinions whether an alien must provide independent corroborating evidence, in addition to his or her own testimony, to be eligible for asylum or entitled to withholding of deportation. In some cases the BIA has held that an alien's fear of persecution must have "its basis in external, or objective, facts" and that an alien's uncorroborated statements will not be sufficient to meet the alien's burden of proof.\textsuperscript{57} In other cases, at least where an alien is applying for asylum and thus must meet a lesser standard of a "reasonable possibility" of persecution, the BIA has held that corroborating evidence may not be needed.\textsuperscript{58}

Even though it is apparently accepted that corroborating evidence is not always required, an alien's personal testimony will rarely suffice, unless he or she is from a country which the U.S. recognizes as persecuting its citizens. If an alien is from a Communist country, a country occupied by Communist forces (such as Afghanistan before Soviet withdrawal), or from a country opposed to the U.S., such as Iran, an alien's personal testimony may be sufficient.\textsuperscript{59} Other cases suggest that where

\textsuperscript{54} In re Mogharrabi at 11.
\textsuperscript{55} In re Martinez-Romero, Interim Decision No. 2872 (BIA 1981).
\textsuperscript{56} Bolanos-Hernandez v. INS, 767 F.2d 1277, 1284 (9th Cir. 1984). ("[T]he Board concluded that the specific threat against Bolanos' life was merely 'representative of the general conditions in El Salvador.'").
\textsuperscript{57} In re Acosta, Interim Decision No. 2986, at 21 (BIA 1985). (The Board equated the burden of proof for withholding of deportation that for asylum, holding that the standard for both was a clear probability of persecution). See also Turchos v. INS, 821 F.2d 1396, 1402 (9th Cir. 1987) ("The INS contends that Turchos's application is insufficient because he failed to introduce corroborative evidence.''); Doe v. INS, 867 F.2d 285, 290 (6th Cir. 1989) ("[F]ear was not well-founded because the respondent has relied on his own uncorroborated statements.'").
\textsuperscript{58} In re Mogharrabi at 10. (Lack of corroborating evidence is not necessarily fatal to an alien's claim).
\textsuperscript{59} Id. In granting asylum to an alien from Iran, the BIA stated:
Where the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, careful consideration should be given to that fact in assessing the applicant's claim. A well-
an alien is from a country whose government is friendly to the U.S. or which the U.S. does not wish to embarrass, independent evidence may be required. This suggests that the Board will require more evidence from an alien who is from a country not normally associated with persecution or a country that the U.S. government does not wish to brand as a human rights violator.

The BIA also takes a hard-line approach in its treatment of such factors as a government's awareness of the political opinions held by the alien, the ability of the alien to remain in the country of persecution after initial incidents of persecution, the holding of a passport by an alien, and threats to an alien's family. Although in one case, the BIA indicated that an alien could prove a well-founded fear by showing that his or her government knew or could become aware of the political opinions held by the alien, the BIA has cited as a negative factor the fact that an alien's government is unaware of the political opinions held by the alien. If the alien has been able to obtain a passport from his or her government, the BIA will not view this favorably. The same is true if the alien remained in his or her country unharmed after an initial incident of persecution. Finally, attacks on a member of an alien's family will not necessarily persuade the BIA that an alien has a well-founded fear, as the fear is not based on specific, individualized threats.

2. Judicial Approach
Despite the lack of Supreme Court guidance, the circuit courts have agreed on a general definition of the word "persecution." The Ninth

founded fear, in other words, can be based on what has happened to others who are similarly situated.

Id. at 10-11.

60. See In re Dass, Interim Decision No. 3122, at 7 (BIA 1989). (Background information may be necessary to evaluate the "plausibility and accuracy of the applicant's claim" where the alien was from India).

61. See In re Chang, Interim Decision No. 3107, at 12 (BIA 1989) (Personal testimony of Chinese alien was not enough to "provide a plausible and coherent account of the basis of his asylum claim.").

62. In re Mogharrabi at 11.

63. See Garcia-Ramos v. INS, 775 F.2d 1370 (9th Cir. 1985). The court affirmed the Board's denial of withholding of deportation because Garcia failed to show that he was harassed, arrested, or that the government was aware of his political activities. Id. at 1373.

64. Turcios, 821 F.2d at 1401-02 ("[T]he [Immigration Judge] placed great weight on Turcios' . . . obtaining a passport and cedula (apparently an identification card held by all Salvadorans), and leaving the country. The IJ reasoned that if the government had wanted to rearrest Turcios, it would not have issued him a passport and cedula.").

65. See Ramirez-Rivas v. INS, 899 F.2d 864, 870 (9th Cir. 1990), petition for cert. filed, No. 90-1223, 59 U.S.L.W. 3535 (U.S. Jan. 31, 1991) (The INS argued that the government had an opportunity to persecute the applicant in the two and a half years between the first incident of persecution and departure date and did not and, therefore, the applicant's fear must not be reasonable); Turcios, 821 F.2d at 1401 (IJ placed great weight on Turcios remaining in El Salvador for several months after his release from prison).

66. Ramirez-Rivas, 899 F.2d at 872.
Circuit articulated the prevailing view in *Desir v. IIchert*:67

The statutory term "persecution" or "well founded fear of persecution" has been defined in this Circuit as encompassing more than just restrictions or threats to life and liberty. Most simply, we have stated that persecution involves "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive." Persecution is found "only when there is a difference between the persecutor's views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate."68

Applying this definition, however, has proved problematic. Like the BIA, the circuit courts rarely find it necessary to analyze both asylum and withholding of deportation claims. The courts, with few exceptions, find either (a) that an alien has not shown a well-founded fear of persecution and thus, *a fortiori*, is not entitled to withholding of deportation, or (b) that the alien has met the requirement that persecution be more likely than not, and thus he or she becomes entitled to withholding of deportation and eligible for asylum. Except where noted, in cases cited in this Section, courts are addressing claims of asylum eligibility and, consequently, the well-founded fear test.

The Refugee Act states that to qualify as a refugee one must show past persecution or a "well founded fear of [future] persecution."69 While determining whether conduct qualifies as persecution is often difficult, an alien who can show past persecution is clearly eligible for consideration for asylum and entitled to withholding of deportation.70 The courts have had more trouble interpreting the phrase "well-founded fear of persecution." The alien must show both that his fear is well-founded and that what he fears qualifies as persecution.71 Courts generally agree with the BIA that there are subjective and objective components to "well-founded."72 The subjective part of the test is satisfied by showing that the fear is genuine.73 The objective component resembles a reasonable person test. The alien must show that a reasonable person in his or her position would fear persecution.74 The alien's fear "must have some basis in the reality of the circumstances; mere irrational

67. 840 F.2d 723 (9th Cir. 1988).
68. Id. at 726-27 (citations omitted).
70. Aguilera-Cota v. INS, 914 F.2d 1375, 1379 (9th Cir. 1990) ("Evidence establishing past persecution . . . is usually sufficient to satisfy the objective component of the well-founded fear standard.").
71. See Desir, 840 F.2d at 729.
72. Alvarez-Flores v. INS, 909 F.2d 1, 5 (1st Cir. 1990); M.A. A26851062 v. INS, 899 F.2d 304, 311 (4th Cir. 1990) ("The term 'well-founded fear' requires an examination both of the subjective feelings of the applicant for asylum and the objective reasons for the applicant's fear."); De Valle v. INS, 901 F.2d 787, 790 (9th Cir. 1990).
73. De Valle, 901 F.2d at 790; Alvarez-Flores, 909 F.2d at 5.
74. M.A. A26851062, 899 F.2d at 311; Guevara-Flores v. INS, 786 F.2d 1242, 1249 (5th Cir. 1986).
apprehension is insufficient . . . ." 75 In addition, the alien bears the burden of showing that his or her fear of persecution is well-founded. 76

The circuits disagree over how much evidence is needed to prove persecution and whether the alien must provide objective evidence in addition to his or her own testimony. The circuits also disagree as to whether perceived threats must be specifically directed at the individual, whether an alien can show the requisite probability of persecution if the potential persecutor is unaware of the alien's political views, and as to the relevance of threats to the alien's family or the possession of a passport by an alien.

a. Specificity of Threats

Most circuits agree that an alien must face threats directed specifically at him or her as an individual. 77 An alien must show specific objective facts 78 and cannot rely on "speculative conclusions or vague assertions." 79 Therefore, evidence of anarchy, 80 upheaval, 81 and poor economic conditions 82 will not support a finding of a well-founded fear of persecution.

Nevertheless, the Fourth Circuit has not required that threats be directed at the individual seeking asylum. In M.A. A26851062 v. INS, the court interpreted the Refugee Act to require an applicant to produce facts supporting a well-founded fear, but not necessarily facts demonstrating that the applicant was singled out or specifically threatened. 83 This may suggest that an alien would be able to show a well-founded fear of persecution if the threat was general or if the applicant could independently prove the specific objective evidence.

75. Guevara-Flores, 786 F.2d at 1249.
76. See Espinoza-Martinez v. INS, 754 F.2d 1536, 1539 (9th Cir. 1985).
77. Gumbol v. INS, 815 F.2d 406, 411 (6th Cir. 1987) (alien must show that "he as an individual will be subject to persecution") (quoting Dolores v. INS, 772 F.2d 223, 225 (6th Cir. 1985)); Espinoza-Martinez v. INS, 754 F.2d 1536, 1540 (9th Cir. 1985) (alien must "introduce some specific evidence to show that such persecution, if carried out, would be directed toward him as an individual."); Carvajal-Muñoz v. INS, 743 F.2d 562, 573 (7th Cir. 1984) (alien must offer specific facts "that this particular applicant will more likely than not be singled out for persecution."); Chavarria v. Department of Justice, 722 F.2d 666, 670 (11th Cir. 1984).
78. De Valle v. INS, 901 F.2d 787, 790 (9th Cir. 1990) (alien "must show 'specific' facts through objective evidence.") (citations omitted); Cruz-Lopez v. INS, 802 F.2d 1518, 1521 (4th Cir. 1986).
79. Kaveh-Haghigy v. INS, 783 F.2d 1321, 1323 (9th Cir. 1986) (quoting Maroufi v. INS, 772 F.2d 597, 599 (9th Cir. 1985)).
80. Martinez-Romero v. INS, 692 F.2d 595, 595-96 (9th Cir. 1982) (stating that if anarchy sufficed to entitle the alien to withholding of deportation, then the entire population of El Salvador could remain in the U.S. if they were to enter).
81. Subramaniam v. INS Dist. Dir., 724 F. Supp 799, 802 (D.Colo. 1989) ("Generalized conditions of dislocation, such as might be caused by famine, earthquake or war, do not entitle a person to refugee status.").
82. See Youssefinia v. INS, 784 F.2d 1254, 1261 (5th Cir. 1986); Raass v. INS, 692 F.2d 596, 596 (9th Cir. 1982).
83. M.A. A26851062 v. INS, 899 F.2d 304, 311 (4th Cir. 1990) (an alien must show that his or her fear has "enough basis in specific facts to be considered 'well-founded' upon objective evaluation. The alien must offer 'specific facts' detailing a 'good reason' to fear persecution.") (citations omitted).
fear by providing evidence that members of his or her family, group, or people holding similar political opinions have been persecuted.

Courts have differed widely on the weight to accord evidence concerning a country's general level of violence or evidence of widespread human rights abuses. The general rule states that "[a]llegations based only on the general climate of violence in the country are insufficient" and that an applicant must show individual, specific hardships rather than the difficulties of an entire nation. Despite this general statement, the Fifth and Ninth Circuits have taken a liberal approach, holding that general conditions in a country are relevant in determining whether fear is well-founded. It would appear that in these circuits, if an alien can show that there is a high level of violence in his or her home country, he or she may be able to support a claim of a well-founded fear with less specific facts of individual harassment than would otherwise be necessary.

The Fourth Circuit has taken the opposite approach. In *Cruz-Lopez v. INS*, the petitioner, Marvin Cruz-Lopez, an immigrant from El Salvador, offered evidence of the general level of violence and chaos in his country to show that he would face persecution if deported. The court not only rejected the evidence as insufficient, but also suggested that in a country where violence is widespread, even a specific threat may not be enough to show a well-founded fear. Evidently, the court felt that the greater the general level of violence, the more likely a threat was a random occurrence and not targeted at the individual specifically. In the Fourth Circuit it may be necessary, therefore, to show additional incidents of individualized threats when there is a high level of violence in a country.

b. Corroborating Testimony

Must an alien substantiate claims of fear of persecution with independent corroborating evidence or testimony? Most circuits say yes, holding that because personal testimony is self-serving, it will not be sufficient to prove a well-founded fear of persecution. Nevertheless, the Ninth Cir-

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84. *Cruz-Lopez v. INS*, 802 F.2d 1518, 1521 (4th Cir. 1986).
85. See *Kaveh-Haghigy v. INS*, 783 F.2d 1321, 1323 (9th Cir. 1986).
86. See *Barraza Rivera v. INS*, 913 F.2d 1443, 1448 (9th Cir. 1990) ("[G]eneral information concerning oppressive conditions is relevant to support specific information relating to an individual's well-founded fear of persecution.") (quoting *Zavala-Bonilla v. INS*, 730 F.2d 562, 564 (9th Cir. 1984)); *Ganjour v. INS*, 796 F.2d 832, 837 (5th Cir. 1986); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1283 n. 11 (9th Cir. 1984) ("conditions in the [alien's] country of origin, its laws, and the experiences of others . . . are relevant") (quoting *Stevic v. Sava*, 678 F.2d 401, 406 (2nd Cir. 1982)).
87. 802 F.2d 1518 (4th Cir. 1986).
88. Id. at 1519-20.
89. Id. at 1521.
90. See *Gumbol v. INS*, 815 F.2d 406, 409, 412 (6th Cir. 1987) (finding petitioner's personal testimony alone insufficient to show a clear probability of future persecution); *Farzad v. INS*, 809 F.2d 123, 125 (5th Cir. 1986) (per curiam) (petitioner's own testimony insufficient without external evidence). See also *Mendoza-
circuit has held that corroborating evidence is not required if the alien's testimony is credible, at least when an alien seeks asylum. The court in Bolanos-Hernandez v. INS recognized that evidence supporting persecution is often difficult or impossible to obtain:

[T]he imposition of such a requirement would result in the deportation of many people whose lives genuinely are in jeopardy. Authentic refugees rarely are able to offer direct corroboration of specific threats. 'It is difficult to imagine what other forms of testimony the petitioner[s] could present other than [their] own statement[s].' Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.

c. Awareness of Political Opinions Held

A third issue that has divided appellate courts is whether an alien must show that the persecutor is aware of his or her political activities or opinions. Some circuits have held that it is sufficient to show that a government or other group would persecute an individual if it were aware of his or her political activity or political opinions. The U.S. District Court for the District of Colorado in Subramaniam v. District Director, INS, cited the BIA's four-part test as a "workable explication" of the "well-founded" standard. The first two prongs state that an alien meets the objective component of the test if:

1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort [and];
2) the persecutor is already aware, or could easily become aware, that the alien possesses this characteristic.

The First Circuit in Alvarez-Flores v. INS, citing the same language as Subramaniam, held that it would be sufficient for an applicant to show that the persecutor could become aware of the alien's beliefs.

Other circuits hold this to be insufficient. The Fifth Circuit suggests that even extensive political activity opposing the government is insufficient to prove a well-founded fear when the government is not yet aware

Perez v. INS, 902 F.2d 760, 766 (9th Cir. 1990) (Sneed, J., concurring) ("Such evidence [an alien's own testimony] is highly subjective, and being filtered through the lens of the alien's experience, it may be distorted. Accordingly, every circuit but this one [the Ninth Circuit] has required external corroborating evidence.").

91. Barraza-Rivera v. INS, 913 F.2d 1443, 1449 (9th Cir. 1990) ("An alien's credible and persuasive testimony, standing alone, may establish eligibility for political asylum and withholding of deportation."); Beltran-Zavala v. INS, 912 F.2d 1027, 1030 (9th Cir. 1990) ("Once credibility has been accorded to Beltran's testimony, corroborative evidence is not required.").

92. 767 F.2d 1277 (9th Cir. 1984).

93. Id. at 1285 (quoting McMullen v. INS, 658 F.2d 1312, 1319 (9th Cir. 1981)).


95. Id. at 801. (quoting In re Mogharrabi, Interim Decision No. 3028, at 11 (BIA 1987)) (emphasis added).

96. 909 F.2d 1 (1st Cir. 1990).

97. Id. at 4.
of the alien’s activities or beliefs.\textsuperscript{98}

The Ninth Circuit has offered one solution to this dilemma by holding that without proof that the potential persecutor is aware of his or her activities or beliefs, an alien cannot show a clear probability of persecution necessary for withholding of deportation, but may still be able to show a reasonable possibility of persecution necessary to be eligible for asylum. In \textit{García-Ramos v. INS},\textsuperscript{99} the applicant García, a native of El Salvador, claimed that he was a member of the Frente Popular de Liberación (the Popular Front for Liberation or “FPL”), a “leftist political group opposed to the government.” He further claimed to have participated in numerous activities opposed to the government, such as disseminating propaganda, painting slogans, and stealing food to distribute to the poor.\textsuperscript{100} Nevertheless, he could not show that the government was aware of his activities. The court held that while “García’s evidence does not rise to the degree of probability of persecution we have held to be sufficient for section 243(h) relief [withholding of deportation],”\textsuperscript{101} the possibility that the government might learn of his activities or membership in FPL was sufficient to establish a reasonable possibility of persecution, the standard for asylum eligibility.\textsuperscript{102}

d. Persecution by Unknown Groups

Courts generally agree that persecution does not necessarily have to come from the government in order to create a well-founded fear. The Ninth Circuit, in \textit{Zacarias v. INS},\textsuperscript{103} stated the general view that persecution can come from any “entity which the government is ‘unwilling or unable to control.’”\textsuperscript{104} This entity could be renegade elements of the government\textsuperscript{105} or guerrilla-type groups.\textsuperscript{106}

The courts take different approaches, however, when an alien cannot determine the source of the feared persecution. In \textit{Maldonado-Cruz v. Department of Immigration and Naturalization},\textsuperscript{107} the Ninth Circuit held that a “clear probability that an alien’s life or freedom is threatened, without any indication of the basis for the threat, is generally insufficient

\begin{footnotesize}
\textsuperscript{98} See \textit{Bahramnia v. INS}, 782 F.2d 1243, 1248 (5th Cir. 1986), \textit{cert. denied} 479 U.S. 930 (1986).
\textsuperscript{99} 775 F.2d 1370 (9th Cir. 1985).
\textsuperscript{100} \textit{Id.} at 1372.
\textsuperscript{101} \textit{Id.} at 1373.
\textsuperscript{102} \textit{Id.} at 1374.
\textsuperscript{103} 921 F.2d 844 (9th Cir. 1990), \textit{cert. granted}, 111 S. Ct. 2008 (1991).
\textsuperscript{104} \textit{Id.} at 849 (quoting \textit{McMullen v. INS}, 658 F.2d 1312, 1315 n.2 (9th Cir. 1981)).
\textsuperscript{105} \textit{See Beltran-Zavala v. INS}, 912 F.2d 1027, 1030 (9th Cir. 1990) (alien was found eligible for asylum where he feared persecution from uncontrollable Salvadoran death squads); \textit{Lazo-Majano v. INS}, 813 F.2d 1432, 1434 (9th Cir. 1987).
\textsuperscript{106} \textit{See Zacarias}, 921 F.2d at 844, 849 (persecution need not come from the government and may be from a nongovernmental guerrilla group); \textit{Maldonado-Cruz v. Department of Immigration & Naturalization}, 883 F.2d 788, 791 (9th Cir. 1989); \textit{Bolanos-Hernandez v. INS}, 767 F.2d 1277, 1284 (9th Cir. 1984).
\textsuperscript{107} 883 F.2d 788 (9th Cir. 1989).
\end{footnotesize}
to constitute 'persecution.'"\textsuperscript{108} The same circuit came to the opposite conclusion a year later in \textit{Aguilera-Cota v. INS}.\textsuperscript{109} The court stated that:

Aguilera's inability to identify the precise source of the threat [does not] render his fear of persecution less justifiable; in fact, an anonymous note may cause even greater anxiety than a signed one, since the case of an anonymous threat one cannot identify the potential source of harm...\textsuperscript{110}

As in the case of an alien's political activities or opinions, the different results could be a function of the type of relief that the alien seeks. In \textit{Maldonaldo-Cruz}, the alien sought withholding of deportation whereas in \textit{Aguilera-Cota}, the alien sought asylum. It is possible that the court was distinguishing the two cases and saying that failure to identify the source of persecution is fatal to a claim for withholding of deportation, but not to a claim of asylum eligibility.

e. Other Miscellaneous Factors

The circuits have disagreed on three additional factors: (1) possession of a passport by an alien; (2) time spent in the country of persecution once initial persecution has occurred; and (3) threats to one's family.

Some courts have suggested that an alien's ability to obtain a passport or exit visa shows that the government does not wish to persecute him or her.\textsuperscript{111} The Ninth Circuit in \textit{Turcios v. INS},\textsuperscript{112} however, held that a government may wish simply to eliminate political opposition either by persecution or by allowing dissidents to leave.\textsuperscript{113} Judge Pregerson, in a dissenting opinion in \textit{Saballo-Cortez v. INS},\textsuperscript{114} observed that "to say that the authorities let Saballo-Cortez leave is a far cry from concluding that they would welcome his return."\textsuperscript{115}

The fact that an alien continued to live in his or her home country after initial incidents of persecution is often cited as evidence that his or her fear is not well-founded.\textsuperscript{116} The Ninth Circuit, however, has recog-
nized that an alien may be able to remain in his or her home country without further problems but may still have good reasons to fear persecution. A period of unmolested residence alone should not defeat an alien's claim. In *Ramirez-Rivas v. INS*, the court held that:

[E]vidence of a short period without persecution is relevant but not sufficient to undermine an otherwise strong case. Even refugees in the clearest danger of persecution may be able to avoid the authorities for some time before they leave the country. The Immigration Act should not be read to require that a refugee's persecutors be in hot pursuit of him as he flees the country.

Courts have seemed quite willing to extend protection to aliens who can show that members of their families have been subjected to persecution. Protection has been extended even where the alien has not shown that threats were directed at him or her personally, possibly creating an exception to the requirement that an alien show specific individual threats. However, courts may use a lack of threats to one's family as evidence that the alien's fear of persecution is not well-founded. For example, the Ninth Circuit stated in *Rodriguez-Rivera v. INS* that the fact that an alien's family in El Salvador suffered no harassment after the alien had fled the country undercut his claim of a well-founded fear of persecution.

If an alien can show that he or she would face persecution, he or she has satisfied only the first step. Regardless of the level of persecution, the alien must show that the persecution is because of his or her political opinions.

C. Political Opinion

1. BIA Approach

In addition to the hard-line approach taken by the BIA with respect to proving persecution, the BIA has limited the types of persecution or
harm that will qualify as persecution based on political opinion. This limitation revolves around four main issues: (1) whether neutrality qualifies as an expression of political opinion; (2) whether persecution for a trait or belief not held by the alien is persecution based on political opinion; (3) whether conscription by government and non-government groups constitutes persecution, and (4) whether prosecution can qualify as persecution based on political opinion.

a. Political Neutrality

The BIA looks unfavorably on assertions that political neutrality falls within the statutory definition of persecution based on political opinion. In most cases, the BIA has flatly held that a request for political asylum cannot be predicated on an alien's claim of neutrality. However, in a circuit that has conditionally or explicitly accepted political neutrality as an expression of political opinion, the BIA has modified its approach. In these cases, it has assumed that neutrality may qualify as a political opinion, but has required the alien to show "that he has articulated and affirmatively made a decision to remain neutral, and that he has received a threat or could be singled out for persecution because of his neutrality opinion."125

b. Imputed Political Opinion

The BIA is also hesitant to recognize the doctrine of imputed opinion. The BIA has held that an alien does not have a well-founded fear of persecution based on political opinion if he or she holds no opinion, or holds an opinion different from that attributed to him or her, even when the persecutor believes that the alien holds such an opinion and persecutes the alien for that reason.126 In Turcios v. INS, Turcios was threatened based on "his employment and presumed support of the government," even though he had expressed no opinion. The court held that "the BIA and IJ failed to recognize that Aguilera fell within the definition of refugee because of his imputed 'political opinion.'"127

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123. See Perlera-Escobar v. Executive Office for Imm., 894 F.2d 1292, 1298 (11th Cir. 1990) ("[T]he BIA has declined to apply the principle that a desire to remain neutral is an expression of a political opinion for purposes of asylum and withholding of deportation.") (citing In re Maldonado-Cruz, Interim Decision No. 3041, at 11 (BIA 1988), rev'd, 883 F.2d 788 (9th Cir. 1989)); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1984) ("The government contends the Bolanos' decision to remain politically neutral is not a political choice.").


125. Umanzor-Alvarado v. INS, 896 F.2d 14, 15 (1st Cir. 1990) (quoting the BIA). See also Novoa-Umania v. INS, 896 F.2d 1, 3 (1st Cir. 1990) (stating that the court shared the Board's assumption that neutrality may qualify as political opinion in "appropriate circumstances").

126. See Aguilera-Cota v. INS, 914 F.2d 1375 (9th Cir. 1990). The petitioner was threatened based on "his employment and presumed support of the government," even though he had expressed no opinion. The court held that "the BIA and IJ failed to recognize that Aguilera fell within the definition of refugee because of his imputed 'political opinion.'" Id. at 1379.
arrested after talking to a known leftist professor and suspected guerrilla. The BIA found that even if Turcios's testimony was credible, he was not persecuted because of his political opinion. "The INS contends that Turcios's arrest, torture, and confinement were not based upon a political opinion because . . . Turcios disclaimed any involvement in politics or guerrilla insurgency."¹²⁸

c. Conscription

The BIA has consistently held that a government has the right to require military service of its citizens.¹²⁹ Punishment for refusal to perform military service is generally held not to be persecution and is not motivated by political opinion.¹³⁰ The BIA recognizes two exceptions to this general rule: (1) when the government punishes an individual or a group disproportionately for refusal to serve in the military due to the political opinions held by such a person or group, or (2) when the government forces individuals in the military to perform inhuman acts.¹³¹ If an alien falls within one of these two exceptions, punishment for desertion or draft evasion will qualify as persecution due to political opinion.

The BIA has made the second of these two exceptions quite difficult to meet. The military atrocities must be so commonplace that they can be characterized as official policy of the government.¹³² In addition, the international community must have condemned the military for committing acts contrary to the basic rules of human conduct. The BIA, however, has refused to accept reports of atrocities from nongovernmental organizations such as Amnesty International and Americas Watch.¹³³ The BIA has made no exception for conscientious objectors, unless a government's conscription laws are carried out in a persecutory manner and conscientious objectors are singled out for persecution.¹³⁴

The BIA appears to have held that insurgent military groups have many of the same rights as recognized governments. Thus, those who are forcibly impressed by guerrilla groups cannot claim to be victims of political persecution.¹³⁵ Nor can those who desert guerrilla groups and

¹²⁷. 821 F.2d 1396 (9th Cir. 1987).
¹²⁸. Id. at 1401. See also Blanco-Lopez v. INS, 858 F.2d 531 (9th Cir. 1988). The Salvadoran government believed the petitioner to be a guerrilla and attempted to persecute him for it. The BIA rejected the alien's claim for relief because the false charges arose out of a personal dispute. Id. at 533-34.
¹²⁹. See In re Virgil, Interim Decision No. 3050, at 9 (BIA 1988) ("It is a long-established principle of international law that a sovereign government has the right to draft its citizens and maintain an army for the purpose of self defense.").
¹³⁰. Id. at 10.
¹³². Id. at 6-7.
¹³³. Id. at 7.
¹³⁴. See In re Canas, Interim Decision No. 3074, at 12-13 (BIA 1988). See also Canas-Segovia v. INS, 902 F.2d 717, 723 (9th Cir. 1990), petition for cert. filed, No. 90-1246, 59 U.S.L.W. 3565 (U.S. Feb. 6, 1991) ("The BIA gave great weight to the facially neutral characteristics of the Salvadoran conscription policy.").
¹³⁵. See In re Virgil, at 8:
fear retribution claim they are being persecuted because of their political opinions. The argument is that guerrilla groups are acting as legitimate military groups pursuing neutral policies and maintaining discipline, and thus any punishment would not be related to the deserter's political opinion.

d. Prosecution

The BIA maintains that legitimate prosecution of accused criminals is not persecution. The BIA presumes that prosecutions are legitimate, and if "the government has some reason to believe—no matter how slight—that a person has engaged in criminal activity, then any action the government takes under that belief—no matter how harsh—is 'legitimate' and cannot amount to persecution." The BIA's approach apparently includes crimes based on opposition to the government, although the BIA has made an exception for attempting to overthrow a government where a coup was the only means to effect political change.

2. Judicial Approach

The courts have uniformly held that persecution alone is not enough to create eligibility for asylum or withholding of deportation. The persecution an alien fears must be motivated by the alien's political activity or political opinion. Courts have generally agreed that activities such as party membership, participation in political demonstrations, and membership in anti-government unions are political activity. Unlike the BIA, courts also agree that an alien need not necessarily hold an opinion to fear persecution. What is critical is that the persecuting

The purpose of this recruitment, however, is to further the guerrillas' objective of overthrowing the Salvadoran Government; the intent of the recruitment is not the persecution of young Salvadoran males on account of one of the five grounds listed in the Act.

136. See Perlera-Escobar v. Executive Office Imm., 894 F.2d 1292, 1296 (11th Cir. 1990) (holding that the BIA determined that the retribution feared from guerrillas for having deserted them was not persecution based on political opinion).
137. See Blanco-Lopez v. INS, 858 F.2d 531, 534 (9th Cir. 1988).
138. Ramirez-Rivas, 899 F.2d at 867-68 (describing the INS's argument).
139. See In re Izatula, Interim Decision No. 3127, at 8 (BIA 1990) (holding that prosecution for assisting mujahedin was persecution where Afghanistan citizens were not able peacefully to change their government); but see Perlera-Escobar, 894 F.2d at 1296-97 (upholding Board's determination that punishment for association with Salvadoran guerrillas was not political persecution but legitimate prosecution).
140. Hernandez-Ortiz v. INS, 777 F.2d 508, 516 (9th Cir. 1985) ("A clear probability that an alien's life or freedom is threatened, without any indication of the basis for the threat, is generally insufficient ....").
141. See, e.g., García-Ramos v. INS, 775 F.2d 1370, 1374 (9th Cir. 1985) (holding that evidence of membership and activities in persecuted political groups demonstrates political activity).
142. See, e.g., Saballo-Cortez v. INS, 761 F.2d 1259, 1264 (9th Cir. 1984) (denying eligibility for relief where the alien did not demonstrate political activity).
143. See, e.g., Zavala-Banilla v. INS, 730 F.2d 562, 563-65 (9th Cir. 1984).
group believe that the alien holds such a view.\textsuperscript{144}

Courts have disagreed over (1) whether neutrality is an expression of political opinion; (2) whether persecution of those resisting military conscription, either by the government or anti-government groups, is politically motivated; and (3) whether prosecution can be a pretext for persecution.

a. Neutrality

No other question concerning refugees has divided the appellate courts as has the question of whether political neutrality qualifies as an expression of political opinion. No less than four distinct positions on this issue can be identified.

The Ninth Circuit, in Bolanos-Hernandez,\textsuperscript{145} was first to accept the proposition that political neutrality could be an expression of political opinion. Bolanos-Hernandez, a native of El Salvador, claimed his life was in danger because he refused to join an anti-government guerrilla group.\textsuperscript{146} The government argued, and the BIA agreed, that a decision to remain politically neutral is not a political choice.\textsuperscript{147} In rejecting the government's position, the court stated:

When a person is aware of contending political forces and affirmatively chooses not to join any faction, that choice is a political one . . . . A rule that one must identify with one of two dominant warring political factions in order to possess a political opinion . . . would frustrate one of the basic objectives of the Refugee Act of 1980—to provide protection to all victims of persecution regardless of ideology.\textsuperscript{148}

The Ninth Circuit went even further in Maldonado-Cruz,\textsuperscript{149} holding that simply refusing to join a guerrilla group is sufficient to express neutrality.\textsuperscript{150}

The Eleventh Circuit has taken the extreme opposite position. In Perlera-Escobar,\textsuperscript{151} the court explicitly rejected the idea that neutrality

\textsuperscript{144} See Ramirez-Rivas v. INS, 899 F.2d 864, 867 (9th Cir. 1990) (Political persecution under § 243(h) "includes persecution not only on account of political opinions that the alien actually holds, but also on account of opinions that the persecutor falsely attributes to the alien.").

\textsuperscript{145} 767 F.2d 1277 (9th Cir. 1984).

\textsuperscript{146} Id. at 1280.

\textsuperscript{147} Id. at 1286. The government argued that a decision to remain neutral is always apolitical. In the alternative, the government sought to require that an alien prove that he or she chose neutrality for political reasons. The court rejected both contentions. Id.

\textsuperscript{148} Id.

\textsuperscript{149} 883 F.2d 788 (9th Cir. 1989).

\textsuperscript{150} Id. at 791. See also Arteaga v. INS, 836 F.2d 1227 (9th Cir. 1988). Arteaga was asked to join a guerrilla group and was "threatened with kidnapping or conscription" if he refused. The court held that refusal to join the guerrillas demonstrated his lack of support for the guerrillas and "his adoption of a neutral position towards both sides in the Salvadoran civil war." Id. at 1251.

\textsuperscript{151} 894 F.2d 1292 (11th Cir. 1990).
can qualify as political opinion.\textsuperscript{152} The court held that to adopt such a position "would create a sink hole that would swallow the rule [that persecution must be politically motivated]."\textsuperscript{153}

The First and Fourth Circuits fall somewhere in between these two extreme positions. The Fourth Circuit has declined either to accept or to reject the idea of neutrality.\textsuperscript{154} It has, however, suggested that if it accepted the theory of neutrality, it would at least require, as does the BIA, that an alien "show that he has affirmatively made a decision to remain neutral" and has or could be singled out because of his neutrality.\textsuperscript{155}

The First Circuit has agreed with this formulation,\textsuperscript{156} but has created an additional test. In \textit{Novoa-Umania},\textsuperscript{157} the court stated that to prove a claim of neutrality, an alien must show that a reasonable person would fear one of the following:

(1) that a group with the power to persecute him intends to do so specifically because the group dislikes neutrals, or (2) that such a group intends to persecute him because he will not accept its political point of view, or (3) that one or more such groups intend to persecute him because each (incorrectly) thinks he holds the political views of the other side.\textsuperscript{158}

As the third part of the \textit{Novoa-Umania} test shows, persecution because of neutrality and the doctrine of imputed opinion may overlap. In areas of intense civil war, such as El Salvador, attitudes such as "you're either with us or against us" may be prevalent. In such cases, it would not be unusual for one side or both to assume that a neutral party supported the other side.

\section*{b. Military Conscription}

\subsection*{(1) Government}

As a general proposition, courts will not question a government's draft or conscription policy.\textsuperscript{159} A government has the right to draft its citizens and to prosecute those who refuse military service.\textsuperscript{160} Courts agree that even if punishment for refusal to serve in the army can be called persecution, it is not because of political opinion.\textsuperscript{161} "Absent

\begin{itemize}
\item \textsuperscript{152} \textit{Id.} at 1297 n.4. ("This circuit has not adopted the Ninth Circuit's belief that political neutrality is a political opinion for purposes of the Act.")
\item \textsuperscript{153} \textit{Id.} at 1298.
\item \textsuperscript{154} \textit{Cruz-Lopez v. INS}, 802 F.2d 1518, 1520 n.3 (4th Cir. 1986) (because alien did not meet the requisite probability of persecution, the court declined to express an opinion).
\item \textsuperscript{155} \textit{M.A. A26851062 v. INS}, 899 F.2d 304, 315 (4th Cir. 1990).
\item \textsuperscript{156} \textit{Umanzor-Alvarado v. INS}, 896 F.2d 14, 15 (1st Cir. 1990) (adopting the formulation of the BIA).
\item \textsuperscript{157} 896 F.2d 1 (1st Cir. 1990).
\item \textsuperscript{158} \textit{Id.} at 3.
\item \textsuperscript{159} \textit{M.A. A26851062}, 899 F.2d at 312 ("International law and Board precedent are very clear that a sovereign nation enjoys the right to enforce its law of conscription . . . .").
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Umanzor-Alvarado}, 896 F.2d at 15.
\end{itemize}
exceptional circumstances, it is not the place of the judiciary to evaluate the political justifications of the actions of foreign governments.\textsuperscript{162} The courts, unlike the BIA, have created numerous exceptions to this strict rule. The first exception is for those with genuine pacifist beliefs or religious objections to military service. In reversing the BIA, the Ninth Circuit has held that refusal to perform military service due to religious beliefs "places [the alien] in a position of political neutrality..."\textsuperscript{163} The First Circuit has held that "genuine pacifist beliefs" may entitle an alien to an exception, but the alien must show that he "affirmatively made a decision to remain neutral."\textsuperscript{164} Since many of the circuits have either rejected or not addressed the issue of neutrality, it seems that this exception is far from universally accepted. Even where it is accepted, circuits may differ drastically on the amount of proof required.

The second major exception to the broad statement that governments have a right to enforce their draft laws is in the area of human rights violations. The Fourth and Ninth Circuits have held that prosecution for desertion or draft evasion is persecution based on political opinion if the alien is "required to engage in inhuman conduct"\textsuperscript{165} or act "contrary to the basic rules of human conduct."\textsuperscript{166} The two circuits, however, would apply this exception quite differently. In character with its decisions in other cases covering different aspects of political asylum, the Ninth Circuit would probably rely on the credibility of the alien's testimony of inhuman conduct, and apparently would not require independent corroboration of military atrocities.\textsuperscript{167}

The Fourth Circuit's test is much less generous. In \textit{M.A. A26851062 v. INS},\textsuperscript{168} the court basically adopted the position of the BIA. The court held that "an alien will be considered eligible for asylum in those rare cases in which . . . the alien would be associated with a military whose acts are condemned by the international community as contrary to the basic rules of human conduct. . . ."\textsuperscript{169} The standard is much more difficult to meet than it appears. The court first requires that the "violence be connected with official government policy."\textsuperscript{170} Thus, under the Fourth Circuit's standard, if an alien has the misfortune

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\textsuperscript{162} Kaveh-Haghigy v. INS, 783 F.2d 1321, 1323 (9th Cir. 1986).
\textsuperscript{163} Canas-Segovia v. INS, 902 F.2d 717, 728 (9th Cir. 1990), \textit{petition for cert. filed}, No. 90-1246, 59 U.S.L.W. 3565 (U.S. Feb. 6, 1991). The court was influenced by the U.N. High Commissioner for Refugee's argument that "refusal to bear arms is a uniquely political statement." \textit{Id.} at 728 n.23.
\textsuperscript{164} Umanzor-Alvarado, 896 F.2d at 15.
\textsuperscript{165} Barraza-Rivera v. INS, 913 F.2d 1443, 1451 (9th Cir. 1990).
\textsuperscript{166} \textit{M.A. A26851062 v. INS}, 899 F.2d 304, 312 (4th Cir. 1990).
\textsuperscript{167} \textit{See supra} notes 91-93 and accompanying text.
\textsuperscript{168} 899 F.2d 304 (4th Cir. 1990).
\textsuperscript{169} \textit{Id.} at 312.
\textsuperscript{170} \textit{Id.} "It is inevitable that there will be acts of misconduct during war, especially during civil war." The court seemed concerned that without a requirement that such violence be connected with official government policy almost any male of draft age from a country at war could show a well-founded fear of persecution. \textit{Id.}
to be drafted into an unofficial group such as a renegade "death squad," any punishment he might suffer for refusal to obey an order requiring inhuman conduct or for desertion would not qualify as persecution based on political opinion. The court has also held that before such an exception will be granted, government atrocities must be officially condemned by international bodies, and that condemnation from a nongovernmental organization such as Amnesty International and Americas Watch will not be sufficient.\textsuperscript{171} Forcing aliens to prove both that official policy encourages human rights violations and that atrocities have been officially condemned sets a near impossible standard. It is hard to see how an alien could meet such a standard short of showing official condemnation by the United Nations.

(2) Anti-Government Groups

American courts, unlike the BIA, have generally refused to recognize the right of foreign anti-government groups to conscript troops and punish deserters and draft evaders, a right that they have willingly acknowledged must be granted to recognized foreign governments. Most courts have come to the conclusion that, as "nongovernmental groups lack legitimate authority to conscript persons into their armies, their acts of conscription are tantamount to kidnapping and constitute persecution."\textsuperscript{172} In a major departure from this general rule, the Eleventh Circuit in \textit{Perlera-Escobar v. Executive Office for Immigration}\textsuperscript{173} has followed the BIA position, holding that "harm and threats that may incidentally result from behavior meant to achieve a political objective, be it the overthrow of the existing government or, alternatively, the defense of the government against armed insurrection, is not persecution on account of political opinion."\textsuperscript{174} Based on this general position, the court has held that neither forced recruitment by the government nor by guerrilla groups constitutes persecution based on political opinion.\textsuperscript{175} Similarly, the Eleventh Circuit has said that punishment of deserters of guerrilla units

\textsuperscript{171} \textit{Id.} at 312-13. "A standard of asylum eligibility based solely on pronouncements of private organizations or the news media is problematic almost to the point of being non-justiciable." \textit{Id.} at 313. Presumably, the court here was worried that this would force the judiciary to make policy choices better left to the executive branch: condemning foreign governments as human rights abusers. It could also cast doubt on U.S. foreign policy, and might allow any private organization claim of human rights abuses to serve as a basis for asylum eligibility.

\textsuperscript{172} Zacarias v. INS, 921 F.2d 844, 849 (9th Cir. 1990). \textit{See also} Arteaga v. INS, 836 F.2d 1227 (9th Cir. 1988). Arteaga was threatened with forced conscription into a guerrilla group. The court held that Arteaga decided not to join the guerrilla group for political reasons and that overbearing his will would be political persecution. "It is not relevant that the guerrillas may have been interested in conscripting Arteaga to fill their ranks rather than to 'punish' Arteaga's neutrality." \textit{Id.} at 1232 n.8.

\textsuperscript{173} 894 F.2d 1292 (11th Cir. 1990).

\textsuperscript{174} \textit{Id.} at 1297.

\textsuperscript{175} \textit{Id.}
fails to qualify as political persecution.\textsuperscript{176}

The Supreme Court granted certiorari in the case of Zacarias v. INS, which presented the opportunity to resolve this split among the circuits.\textsuperscript{177} The Court agreed to decide whether forced participation in a guerrilla organization necessarily constitutes political persecution.\textsuperscript{178}

c. Prosecution
Courts have been hesitant to interfere with the application of another country's laws, or to term prosecution as persecution. Not only does a government generally have the right to prosecute an individual accused of criminal activity, but it has been noted that "it is not the place of the judiciary to evaluate the political justifications of the actions of foreign governments."\textsuperscript{179}

The Ninth Circuit has been the most willing to scrutinize the prosecutorial actions of foreign governments. It has created a presumption of politically motivated action when the government exerts military force upon individuals or groups without reason to suspect that a particular individual or group has engaged in criminal activity.\textsuperscript{180} The court has also held that when "a government harms or punishes someone without undertaking 'any formal prosecutorial measures,' it engages in persecution not legitimate prosecution."\textsuperscript{181}

Having described the procedures for obtaining asylum and withholding of deportation, and having examined the various interpretations of the Refugee Act by the BIA and the circuit courts of appeals, this Note will now examine interpretive sources that should guide adjudicators in their decision-making process.

II. Interpretive Sources
This Section will examine the legislative history of the Refugee Act of 1980, international sources upon which the Act was based, and other international sources that were intended to be interpretive guides.

A. Legislative History
The Refugee Act states that Congress was motivated to pass the Act by the enduring "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."\textsuperscript{182}

\textsuperscript{176} Id. at 1298. The court argued that punishment for desertion is simply a means of enforcing discipline, which any paramilitary group must be able to do if it is to survive. \textit{Id.}

\textsuperscript{177} Zacarias v. INS, 908 F.2d 1452, 1456 (9th Cir. 1990), \textit{cert. granted}, 111 S. Ct. 2008 (1991).

\textsuperscript{178} See \textit{infra} notes 306-27 and accompanying text.

\textsuperscript{179} Kaveh-Haghigy v. INS, 783 F.2d 1321, 1323 (9th Cir. 1986).

\textsuperscript{180} Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985).

\textsuperscript{181} Ramirez-Rivas v. INS, 899 F.2d 864, 868 (9th Cir. 1990).

Congress sought to provide "statutory meaning to our national commitment to human rights and humanitarian concerns."\(^{183}\)

Senator Edward Kennedy, the chief sponsor of Senate Bill 643, which eventually became the Refugee Act of 1980, stated that the Act would "make our law conform to the United Nations Convention and Protocol Relating to the Status of Refugees, which we signed in 1969."\(^{184}\) Kennedy also stated that "[t]his Act gives statutory meaning to our national commitment to human rights and humanitarian concerns . . . [and will] insure greater equity in our treatment of all refugees."\(^{185}\)

Representative Elizabeth Holtzman, the sponsor of House Bill 2816, the House counterpart to Senate Bill 643, speaking on the conference report reconciling the House and Senate versions of the Bill, stated that "the conference report adopts the House definition of the term 'refugee,' which essentially conforms to that used under the United Nations Convention and Protocol Relating to the Status of Refugees."\(^{186}\) She later stated that "the conferees intend that the new sections be implemented consistent [sic] with those international documents."\(^{187}\)

The Refugee Act marked the first time that asylum provisions had been codified in U.S. law. Asylum had previously only been available administratively.\(^{188}\) The Act modified the Immigration and Nationality Act of 1952 by codifying a definition of "refugee,"\(^{189}\) and eliminating the geographical and ideological preferences that dominated the prior system.\(^{190}\) The purpose of the Act was "to move away from ad hoc refugee admission procedures and to create mechanisms to resolve the ongoing friction between the Executive and Congress over control of and standards for refugee admissions."\(^{191}\) By including a definition of "refugee" that paralleled that in the U.N. Convention and Protocol, the Act removed ideology from the system by "requiring that only a well-founded fear of persecution be established."\(^{192}\) It is clear, therefore, that the Congress intended the Refugee Act to conform to the U.S.'s international obligations concerning refugees.

The international sources upon which the Refugee Act was based, the U.N. Convention and Protocol, and their interpretive sources, are therefore critical in determining the proper interpretation of the Act.

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\(^{184}\) 126 CONG. REC. 3756 (1980).

\(^{185}\) Id.

\(^{186}\) Id. at 4499.

\(^{187}\) Id. at 4500.

\(^{188}\) Id.

\(^{189}\) Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101-1157 (1952)).


\(^{191}\) Id. at 12.


The Convention Relating to the Status of Refugees (Convention) was first signed in 1951. 193 In the preamble to the Convention, the United Nations recognized as one of its principles that “human beings shall enjoy fundamental rights and freedoms without discrimination,” and that the U.N. has “manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of those fundamental rights and freedoms.” 194

Article 1 of the Convention states that the term “refugee” shall apply to any person who:

[as] a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. 195

The Convention does not grant a right of asylum to those who qualify as refugees, but requires individual states to respect the basic rights of refugees. It requires states to show respect for the religious freedom of refugees at least to the extent shown to their own citizens. 196 It also requires states to treat a refugee at least as well as other aliens with respect to property rights, 197 access to courts, 198 employment opportunities, 199 and education 200 as well as granting refugees other rights against discrimination. 201 Article 3 states that these provisions shall apply “to refugees without discrimination as to race, religion, or country of national origin.” 202

Although the United States has never formally become a party to the Convention, the U.S. signed, and the Senate ratified, the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol). 203 The Protocol makes Articles 2 through 34 of the Convention binding upon its signatories. The Protocol also eliminates any restriction that the fear of persecution relate to events that occurred prior to 1951, and requires that the Protocol be applied without geographic

193. See Convention, supra note 4.
194. Convention, supra note 4, 19 U.S.T. 6260.
195. Id. at 6261.
196. Id. at 6264, art. 4.
197. Id. at 6267, art. 13.
198. Id. at 6268, art. 16.
199. Id. at 6269, arts. 17,18.
200. Id. at 6271, art. 22.
201. See generally id. at 6264-76, arts. 4-34.
202. Id. at 6264.
limits.\textsuperscript{204}

The Convention and Protocol are important because they express a desire to protect the lives and fundamental rights of "refugees" and create a uniform definition of "refugee": one who has a well-founded fear of persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion.\textsuperscript{205} While the Convention and Protocol do not grant a refugee the right of asylum, they require that signatories use the recognized definition of refugee when determining an alien's status, and require that signatories conduct refugee policy without territorial or ideological bias. In addition, the Protocol requires parties to the agreement to cooperate with the Office of the United Nations High Commissioner for Refugees (UNHCR).\textsuperscript{206} This suggests that any guidance given by the UNHCR should be highly influential in interpreting the Protocol and Convention.

C. \textit{Handbook on Procedures and Criteria for Determining Refugee Status}

The \textit{U.N. Handbook}, published in 1979 by the Office of the United Nations High Commissioner for Refugees, was intended to be an interpretive guide to the Convention and Protocol. In particular, the \textit{Handbook} gives guidance to interpreting the definition of refugee and the phrase "political opinion."

To qualify as a refugee, an alien must have a "well-founded" fear of persecution.\textsuperscript{207} The \textit{U.N. Handbook} states that since "fear is subjective, the definition involves a subjective element in the person . . . . Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment of the situation prevailing in his [or her] country of origin."\textsuperscript{208} The \textit{Handbook} then discusses the "well-founded" component of the test, noting that an alien's "frame of mind must be supported by an objective situation."\textsuperscript{209} In establishing the objective level of fear, it is not necessary for those adjudicating the alien's claim to condemn his or her home country. But the alien's testimony cannot be reviewed without an inquiry into the conditions of his or her country of origin. "Knowledge of conditions in the applicant's country of origin . . . is an important element in assessing the applicant's credibility."\textsuperscript{210}

The \textit{U.N. Handbook} points out that an alien can have a well-founded fear without having personally been the victim of persecution.\textsuperscript{211} The experiences of his or her friends and relatives or members of an alien's race or social group may lead the alien justifiably to believe that he or

\begin{itemize}
\item \textsuperscript{204} \textit{Id.} at 19 U.S.T. 6225.
\item \textsuperscript{205} See \textit{supra} note 192 and accompanying text.
\item \textsuperscript{206} Protocol, \textit{supra} note 4, 19 U.S.T. at 6226.
\item \textsuperscript{207} Convention, \textit{supra} note 4, 19 U.S.T. at 6261, art. 1(A)(2).
\item \textsuperscript{208} \textit{U.N. Handbook}, \textit{supra} note 5, at 11, para. 37.
\item \textsuperscript{209} \textit{Id.} at 11, para. 38.
\item \textsuperscript{210} \textit{Id.} at 12, para. 42.
\item \textsuperscript{211} \textit{Id.} at 13, para. 43.
\end{itemize}
she will be persecuted in the future.\textsuperscript{212} An alien must, though, show "good reason why he individually fears persecution."\textsuperscript{213} The \textit{U.N. Handbook} suggests that adjudicators should consider all factors and not place undue weight upon any one factor.\textsuperscript{214} For example, the possession of a valid passport by an alien should not necessarily indicate that he or she does not have a well-founded fear.\textsuperscript{215} While the passport may suggest that the country does not intend to persecute the alien, there are many other reasons why an alien may have a passport, including the possibility that the country is unaware of the alien's political opinions or that the country simply wishes to get rid of undesirables.\textsuperscript{216}

A threat to life or freedom of the alien on account of the alien's political opinion is always persecution.\textsuperscript{217} Other serious violations of human rights would also constitute persecution.\textsuperscript{218} Whether such harm or threats constitute persecution must be determined by the individual circumstances in each case. The subjective element discussed previously would be important.\textsuperscript{219} In addition, the \textit{Handbook} suggests that there may be occasions where certain acts alone would not amount to persecution, but could equal persecution when combined with other factors such as the general climate of the country.\textsuperscript{220}

For persecution to qualify as political persecution, an alien must show that he or she holds opinions different from those of the government and that he or she has "a fear of persecution for holding such opinions."\textsuperscript{221} If a government falsely attributes opinions to an alien for which he or she will be persecuted, this will also suffice.\textsuperscript{222} The opinions held by an alien must generally be known by the government before the treatment of a person will qualify as political persecution.\textsuperscript{223} It is possible, however, that an alien may have strongly held opinions but has yet to express them, or has expressed them but they have yet to come to the attention of the government. In such cases, if it is reasonable to assume that the government will soon become aware of the alien's opinions, the alien's fear can be considered well-founded.\textsuperscript{224}

\begin{thebibliography}
\bibitem{212} Id. at 13, para. 43.
\bibitem{213} Id. at 13, para. 45.
\bibitem{214} Id. at 48, para. 201.
\bibitem{215} Id. at 13, para. 47.
\bibitem{216} Id. at 13-14, paras. 47, 48.
\bibitem{217} Id. at 14, para. 51.
\bibitem{218} Id. The \textit{Handbook} does not, however, specify what these serious violations are.
\bibitem{219} Id. at 14, para. 52.
\bibitem{220} Id. at 14, paras. 52, 53. The \textit{Handbook} suggests that prejudicial actions, such as discrimination, when combined with other factors, such as a general atmosphere of insecurity in the country of origin, may justify a claim of a well-founded fear of persecution.
\bibitem{221} Id. at 19, para. 80.
\bibitem{222} Id. The requirement that persecution be politically motivated presupposes that the government is aware of the alien's political opinions "or [political opinions] are attributed to the applicant." Id.
\bibitem{223} Id.
\bibitem{224} Id. at 20, para. 82.
\end{thebibliography}
The *U.N. Handbook* acknowledges the right of governments to require their citizens to perform military service and to punish draft evaders and deserters,\(^\text{225}\) but the *Handbook* also recognizes exceptions. If the punishment for draft evasion is disproportionately severe because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion, it is persecution.\(^\text{226}\) Paragraph 172 states that an alien may be able to establish a claim of refugee status if he or she can show that refusal to perform military service is based on genuine religious or moral convictions.\(^\text{227}\) This suggests that the *U.N. Handbook* would recognize refugee status for conscientious objectors.\(^\text{228}\) The *U.N. Handbook* would also recognize an exception when an alien could show that he or she would have been required to engage in acts “contrary to basic rules of human conduct.”\(^\text{229}\)

The *U.N. Handbook* recognizes that prosecution by a government may be a pretext for persecution based on political opinions. If the prosecution is due to an alien’s political opinion, it is clearly political persecution.\(^\text{230}\) However, if the prosecution is based upon a politically motivated act and the punishment is in accordance with the general laws of a country, such prosecution is not necessarily political persecution. “Whether an apolitical offender can also be considered a refugee will depend upon various other factors. Prosecution for an offence may, depending upon the circumstances, be a pretext for punishing the offender for his political opinions or the expression thereof.”\(^\text{231}\)

Prosecution may amount to persecution if the punishment is excessive.\(^\text{232}\) Prosecution under a law that does not conform to accepted human rights standards would also be persecution.\(^\text{233}\) In addition, the application of the law, rather than the law itself, may provide a pretext for persecution.\(^\text{234}\)

The *U.N. Handbook* provides additional general principles applicable to all asylum adjudications. The *Handbook* recognizes that it may be

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225. *Id.* at 39-40, para. 167.
226. *Id.* at 40, para. 169.
227. *Id.* at 40, para. 172.
228. *See id.* at 40, para. 170.

[T]he necessity to perform military service may be the sole ground for a claim to refugee status, i.e., when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

*See also id.* at 40-41, para. 173. (“The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in light of more recent developments in this field.”)

229. *Id.* at 40, paras. 170, 171.
230. *Id.* at 20, para. 84.
231. *Id.* at 20, paras. 84, 85.
232. *Id.* at 15, para. 57.
233. *Id.* at 16, para. 59.
234. *Id.* The *Handbook* cites as an example prosecution for distribution of pamphlets, which could be a “vehicle for the persecution of the individual on the grounds of the political content of the publication.” *Id.*
difficult or impossible for an alien to provide documentary evidence to substantiate a claim of persecution, and that it is not unusual for an alien to have only his or her own testimony as evidence.\(^{235}\) In light of this, where the applicant's testimony appears credible, he or she should be given the benefit of the doubt.\(^{236}\) Paragraph 197 goes farther, explicitly stating that a requirement of corroborating evidence should be relaxed in view of the inherent proof problems that the alien faces.\(^{237}\)

The interpretive sources show that the U.N. Convention and Protocol formulated a definition of the term "refugees" binding upon its signatories, and that the Refugee Act has codified that definition into U.S. law. The *U.N. Handbook* was designed to interpret the requirements of the Convention and Protocol, and the legislative history behind the Refugee Act shows that the Act was intended to codify the U.S.'s international obligations stemming from these treaties. The remainder of this Note will analyze the effect this should have on specific factual situations in asylum adjudications.

### III. Analysis

There are several areas of disagreement between the BIA and the circuit courts, and within the circuits themselves. This Note argues that reliance upon the general purposes of the Refugee Act and upon the international interpretive sources provides solutions to many of these disagreements. Part A of this Section argues that Congress, in passing the Refugee Act, intended to bring U.S. law into conformance with the international obligations of the United States, and that the *U.N. Handbook* should be used to determine the extent of those international obligations. Part B analyzes the BIA's role in formulating U.S. refugee policy and argues that the BIA has not implemented the Congressional mandate, but has instead pursued its own political agenda. Part C looks at specific areas of disagreement between the BIA and the courts and proposes solutions based upon the *U.N. Handbook* and the general purposes of the Refugee Act of 1980.

#### A. Congressional Intent and the International Obligations of the United States

Congress, in passing the Refugee Act, expressed a clear intent to bring U.S. law into conformance with its international obligations under the

\(^{235}\) Id. at 47, para. 196.

Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.

*Id.*

\(^{236}\) Id.

\(^{237}\) Id. at 47, para. 197.
United Nations Convention and Protocol.\textsuperscript{238} Indicative of this intent are statements of promoters of the Act\textsuperscript{239} as well as the use of the definition of the term "refugee" identical to the definition employed by the U.N. Convention and Protocol.\textsuperscript{240}

The U.N High Commissioner for Refugees (UNHCR) promulgated a handbook designed to help adjudicators determine whether an alien should qualify as a "refugee" under the Protocol and Convention and thus be eligible for asylum and entitled to withholding of deportation. The UNHCR is a venerable seventy-year-old United Nations' office whose purpose is to formulate U.N. policy towards refugees.\textsuperscript{241} Signatories to the Protocol are required to cooperate with the UNHCR.\textsuperscript{242} This suggests that the Protocol requires its signatories to consider the \textit{U.N. Handbook} in determining the asylum status of aliens and to follow the guidance of the \textit{U.N. Handbook} whenever relevant. In addition, the \textit{U.N. Handbook} was published in 1979, one year before the Refugee Act became effective. Given that the Act was intended to conform U.S. law to that required under international treaties, and the fact that Congress was aware of the \textit{U.N. Handbook} at the time the Act was passed,\textsuperscript{243} it is reasonable to believe that Congress intended asylum adjudicators to rely on the \textit{U.N. Handbook} whenever possible. Although the BIA and the courts have recognized the \textit{U.N. Handbook} as a persuasive guide, the extent to which courts and the BIA have relied on the \textit{U.N. Handbook} has varied significantly.\textsuperscript{244}

\textbf{B. The Role of the BIA}

The BIA has become an influential force in formulating U.S. refugee policy. The Attorney General has delegated to the BIA the authority to determine whether an alien meets the statutory definition of "refu-
or whether an alien faces a clear threat to life or freedom necessary to be entitled to withholding of deportation.\textsuperscript{246} Adjudications of asylum applications are very much fact-based and decisions often come down to issues of credibility.

It is not unusual for an alien to be unable to present corroboratory witnesses or documentary evidence of persecution. It would also be unusual for the group or government that the alien has accused of persecution to appear in a U.S. court to refute the alien's claims. Thus, the BIA may be forced to decide the issue solely on the testimony of the alien. If the BIA finds the alien not to be credible, the alien has lost. When the legal issues are clear, credibility becomes the only issue.

Because most asylum cases turn on questions of credibility, some courts have limited the deference given to the BIA's determinations of fact in order to retain some judicial control. The Ninth Circuit's attempt at judicial oversight seems reasonable.\textsuperscript{247} This formulation, requiring specific reasons for negative findings of credibility, gives the court an adequate record upon which to review immigration judge and BIA findings, while giving deference to finders of fact who are best able to make factual determinations. Requiring specific reasons for findings of non-credibility may also separate some questions of law from questions of fact.\textsuperscript{248}

In addition to deciding questions of fact, the BIA must interpret the Refugee Act of 1980. Even if an alien is credible, the BIA must determine if the alien meets the statutory requirements of a "refugee" as a matter of law. The BIA must decide such issues as whether neutrality is an expression of political opinion and the effect of persecution from a nongovernmental group. Relying on general concepts of administrative law, courts have shown deference to "reasonable" agency interpretations of law.\textsuperscript{249} Consequently, the BIA has assumed a powerful role as a maker of refugee policy.

Generally, the BIA has restricted the scope of the Refugee Act. First, the BIA makes it difficult to prove a well-founded fear of persecu-

\textsuperscript{245} An alien is eligible for a discretionary grant of asylum if he or she meets the definition of refugee. See 8 U.S.C. § 1158 (1988).

\textsuperscript{246} A clear threat to life or freedom is the standard an alien must meet in order to be entitled to withholding of deportation. 8 U.S.C. § 1253(h) (1988). The Supreme Court has interpreted this standard to indicate that the alien must show that it is more likely than not that he or she will face persecution if deported to his or her home country. See supra notes 17-19 and accompanying text.

\textsuperscript{247} See supra notes 33-35 and accompanying text.

\textsuperscript{248} For example, an Immigration Judge's findings that an alien's testimony is not credible could indicate that the judge finds as a matter of law that the alien's uncorroborated testimony is not credible. Requiring reasons for findings of non-credibility helps to separate questions of fact (is the alien believable?) from questions of law (is corroborating evidence required for an alien's testimony to be credible?).

\textsuperscript{249} See supra notes 41-50 and accompanying text. Whether this deference to administrative agencies is a good idea is an issue beyond the scope of this Note. It is clear, however, that through the doctrine of deference the BIA has assumed a powerful role in U.S. refugee policy.
tion. The alien must show that the accused persecutors have made specific, direct threats towards the alien as an individual, and must present corroborating evidence to support these allegations. If the alien possesses a passport, or was able to remain in the country after initial incidents of persecution, the BIA cites these factors as evidence of a lack of a well-founded fear (or lack of a willingness by the persecutor to persecute).

Even if the alien shows a well-founded fear of persecution, he or she must still prove the persecution is politically motivated. The BIA makes this difficult by refusing to allow neutrality to qualify as political opinion. Those who evade a draft in their home countries or who face criminal prosecution cannot qualify as being politically persecuted, except within narrow exceptions. The BIA has even declared that persecution by guerrilla groups is not politically motivated when limited to conscription or military discipline. This narrow view of the Refugee Act of 1980 is supported neither by the legislative history of the Act nor by the U.N. Convention and Protocol, on which the Act was based.

In interpreting “well-founded fear of persecution” and “political opinion,” the BIA seems to be pursuing its own political agenda (or that of the Reagan and Bush administrations), despite explicit prohibitions by the Protocol and clear contrary legislative intent. BIA policy appears to have regional and ideological biases. Commentators, judges, and even the U.S. General Accounting Office have suggested that the administrative agencies responsible for making asylum decisions have failed to follow the Refugee Act of 1980, which requires a neutral, unbiased refugee policy. Aliens from Communist countries and countries on poor terms with the U.S. stand a far greater chance of gaining asylum than

250. See supra notes 51-66 and accompanying text.
251. See supra notes 55-61 and accompanying text.
252. See supra notes 62-66 and accompanying text.
253. See supra notes 123-39 and accompanying text.
254. See supra notes 123-25 and accompanying text.
255. See supra notes 129-34 and accompanying text.
256. See supra notes 135-36 and accompanying text.
257. The specific areas where BIA interpretations of the Refugee Act depart from the intent of the Act as shown by the legislative history and other interpretive sources will be examined in the next section. See infra notes 266-305 and accompanying text.
258. See Helton, supra note 192 (asserting that foreign and domestic policy concerns jeopardize the neutral standards of the Refugee Act); M.A. A26851062 v. INS, 899 F.2d 304, 320 (4th Cir. 1990) (Winter, J., dissenting) (“The congressional directive to apply the Refugee Act neutrally has not been respected. . . .”); Jeffrey L. Romig, Comment, Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States, 47 U. Pitt. L. Rev. 295 (1985) (suggesting that the political aspects of granting asylum to Salvadorans have influenced the INS and the courts to interpret the refugee law very strictly); United States General Accounting Office, Briefing Report to the Honorable Arlen Spector, United States Senate, Asylum: Uniform Application of Standards Uncertain - Few Denied Applicants Deported (1987) [hereinafter GAO Report] (finding significant differences by country in 1984 asylum approval rates).
those from countries friendly with the U.S.\textsuperscript{259} Studies show that aliens from El Salvador, the Philippines, Pakistan and Guatemala are rarely granted asylum, while those from Romania, Poland, Afghanistan, and Iran have a high probability of success.\textsuperscript{260}

The BIA’s ideological and territorial biases are illustrated in its treatment of aliens claiming persecution by their government through forced participation in anti-government activities. In \textit{In re Maldonado-Cruz},\textsuperscript{261} the BIA rejected an El Salvador applicant’s claim of government persecution based on forced participation in guerrilla activities. The BIA held that the El Salvadoran government has the legitimate power both to investigate and to detain civilians suspected of having ties with a guerrilla organization, which is derived from the government’s right to protect itself.\textsuperscript{262} In what can only be regarded as ideological bias, the BIA has accepted similar claims from applicants from Cuba and Afghanistan, concluding that fear from forced membership in a subversive group was well-founded.\textsuperscript{263} The BIA made no mention of the government’s rights vis-à-vis members of guerrilla groups.\textsuperscript{264}

The BIA has thus assumed a very powerful role in shaping U.S. refugee policy. The fact-based nature of asylum adjudications and the deference shown to BIA decisions on questions of law have given the BIA the final word in many asylum cases. The narrow view of the Refugee Act taken by the BIA, and the continuing role that ideology plays in asylum adjudications show that the BIA has departed from the intent of the drafters of the Act.\textsuperscript{265} For the U.S. to fulfill its international obligation...
tions, the BIA and the political administration must remove ideology from the system or the courts must step in when the BIA oversteps its bounds.

C. Application of the *U.N. Handbook*

The balance of this Note examines specific factual circumstances that have caused disagreements between the BIA and the circuit courts, and shows how these disagreements can be resolved by referring to the *U.N. Handbook* and the general purposes of the Refugee Act.

1. Persecution

a. Specificity of Threats

An alien should not have to show that he or she has specifically been threatened or targeted for persecution in order to prove a well-founded fear of persecution. The words “well-founded” in the definition of refugee appear to require an objective component; and requiring an alien to show specific facts supporting and explaining the reasons for his or her fear does not seem unreasonable. But it seems quite possible for one to show a “reasonable” fear without showing that the feared persecutor had already targeted the alien. The alien may deduce from persecution of friends or family that he or she may also be slated for persecution. He or she may also spot a pattern of persecution common to those with similar traits.

Paragraph 43 of the *U.N. Handbook* supports this view and states that an alien can have a “well-founded fear without showing that he has personally been the victim of persecution.” The *Handbook* implies it is sufficient to show good reason for the alien personally to fear persecution, but does not require evidence of specific incidents of persecution towards the alien. It is contrary to the spirit of the Refugee Act of 1980 and the Convention and Protocol to require an alien to wait until he or she is actually targeted before concluding the alien has a “reasonable fear.”

An alien seeking a withholding of deportation should be required to show greater specificity of threats than an alien seeking asylum. Withholding of deportation requires that an alien show a higher probability of persecution than an alien must show for asylum. This difference in standards suggests that more specificity should be required when seeking withholding of deportation than when asserting eligibility of asylum; because the more specific the threat, the more likely the harm will occur.

446 n.30 (1987); M.A. A26851062 v. INS, 899 F.2d at 320, 321. See also Smith, supra note 260, at 720. (“Because the Refugee Act was intended to create an ideologically neutral asylum process . . ., the Board has a responsibility to eliminate actual and apparent political and foreign policy influences from its decisions whenever possible.”).

266. U.N. HANDBOOK, supra note 5, at 13, para. 43.

267. Id. at 13, para. 45.

268. See supra notes 17-26 and accompanying text.
The specificity of threats should be considered along with the general level of violence in the alien's home country. The greater the level of violence in a country, the more likely that one who has received threats, or whose friends or family have been threatened, will actually be persecuted. Thus, the specificity of threats required for a determination of a "well-founded fear of persecution" should depend upon the relief desired and the level of violence in the alien's home country.

No court has adopted the approach that this Note suggests. However, the Ninth Circuit approaches this standard with respect to the level of violence in the alien's home country. The Ninth Circuit has held that the level of violence is relevant in deciding whether an alien's fear is well-founded and that an alien need show less specific threats when there is a high level of violence. The Fourth Circuit panel opinion in M.A. A26851062 v. INS adopted the approach espoused by this Note regarding the specificity of threats required. The Fourth Circuit would require an alien only to show specific reasons supporting a well-founded fear, not to show threats to him or her specifically. These two approaches should be combined with an examination of the relief the alien is seeking. This approach would comply with Paragraph 42 of the U.N. Handbook, which requires that the general conditions of a country be considered, as well as Paragraph 44, which declares that the alien need not individually have been threatened.

b. Corroborating Testimony

It is easy to see why some courts and the BIA have required an alien to produce corroborating evidence to support a claim of a well-founded fear of persecution. Judges and administrators fear that without a requirement of corroboration thousands of potential refugees would flood the United States and overwhelm the system. Aliens would have incentive to fabricate stories of harsh treatment.

Nevertheless, requiring corroboration not only violates specific language in the Handbook stating that aliens should receive the benefit of the doubt, but also prevents qualified aliens from gaining refugee status.

269. The U.N. Handbook supports this view. See U.N. HANDBOOK, supra note 5, at 12, para. 42. ("The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation.")

270. See supra note 86 and accompanying text.

271. See supra note 83 and accompanying text.

272. U.N. HANDBOOK, supra note 5, at 12, para. 42.

273. Id. at 13, para. 43. Refugee determinations "need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded." Id.

274. See supra notes 57-61, 90 and accompanying text.

275. U.N. HANDBOOK, supra note 5, at 47, para. 196.
Moreover, it appears logical to assume that the greater the fear of persecution an alien has, the less time and ability the alien has to gather documentary evidence of persecution, assuming such evidence exists.\textsuperscript{276} Even though an alien’s personal testimony is self-serving, it is hard to determine what other type of evidence most aliens could produce. Placing the burden of proof on the alien would be a sufficiently strict standard to prevent the flood of aliens that some courts (and the BIA and the administration) fear. Personal testimony is self-serving in any trial or proceeding, but this fact is not normally used to hold, as a matter of law, that a claimant has not met his or her burden of proof. Indeed, in an area where an alien’s personal testimony may be the only evidence, requiring corroboration is not feasible. This position has been explicitly adopted by the Ninth Circuit.\textsuperscript{277}

In addition, immigration judges who find an alien’s testimony unbelievable should be required to give reasons for such a finding. Without requiring such findings, politics can easily enter the determination. The BIA could find the alien unbelievable simply because he or she is from a country not normally associated with violence and persecution or because the alien is from a country that the current administration does not wish to embarrass.\textsuperscript{278} Requiring reasons for findings of non-credibility also provides an adequate record for judicial review.\textsuperscript{279}

c. Awareness of Political Opinions Held

Although it seems logical to conclude that political persecution cannot occur unless the persecutor is aware of the alien’s political belief, the standard for asylum does not require persecution, but only a well-founded fear of persecution. It is quite possible to be afraid that one’s government will at some future point discover one’s political opinions and engage in persecution based on those opinions. The reasonableness of fear grows proportionately with the level of the alien’s political activity and fame. This view is clearly indicated by the *Handbook*.\textsuperscript{280}

A sound interpretation would allow the BIA and the courts to grant relief without requiring the alien to show that the potential persecutor

\textsuperscript{276} See id. at 47, para. 196. ("[A]n applicant may not be able to support his statements by documentary or other proof . . . . In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.") See also Developments in the Law - Immigration Policy and the Rights of Aliens, 96 HARV. L. REV. 1286, 1355 (1983) (interpreting the objective evidence component to require corroborating testimony would erect a “virtually insuperable barrier to the attainment of refugee status”).

\textsuperscript{277} See Beltran-Zavala v. INS, 912 F.2d 1027, 1030 (9th Cir. 1990); Barraza-Rivera v. INS, 913 F.2d 1443, 1449 (9th Cir. 1990); Bolanos-Hernandes v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984). See also supra notes 91-93 and accompanying text. 278. See supra notes 59-61, 256-60 and accompanying text. 279. Id. 280. U.N. HANDBOOK, supra note 5, at 13, para. 43. ("The situation of each person must, however, be assessed on its own merits. In the case of a well-known personality, the possibility of persecution may be greater than in the case of a person in obscurity.")
was informed of the alien’s beliefs. However, it would require that the alien show a higher level of political activity or notoriety if the alien is seeking withholding of deportation than asylum. This approach was adopted by the Ninth Circuit in *García-Ramos v. INS.*\(^{281}\) The court held that because the El Salvadoran government was unaware of García-Ramos’s political activities, he could not qualify for withholding of deportation, but was eligible for asylum.\(^{282}\)

d. Persecution by Unknown Groups

Courts and the BIA have generally agreed that persecution need not come from the alien’s government. The alien need only show that the government is unwilling or unable to control the persecutor, as may be the case with government sponsored “death squads” or guerrilla groups.\(^{283}\) Considerable disagreement has occurred when the alien is unable to pinpoint the cause of the feared persecution. Given the standard for asylum eligibility set by the Supreme Court in *Cardoza-Fonseca,* suggesting that a one in ten chance of persecution might be enough to make persecution a reasonable possibility,\(^{284}\) it is difficult to determine why courts would require an alien seeking asylum to identify the source of his or her fear. Certainly an alien could show a ten percent chance of persecution by showing he or she had received a threat and that others who had received similar threats were subsequently persecuted.

It is fundamentally different when an alien is seeking withholding of deportation. Simply offering evidence of a threat with no proof of its source would rarely meet the required more-likely-than-not standard, though there may be an exception when an alien could show that an overwhelming number of anonymous threats were acted upon. Again, the Ninth Circuit has apparently accepted this approach.\(^{285}\)

e. Other Miscellaneous Factors

The *U.N. Handbook* states that possession of a passport should not defeat an otherwise meritorious claim.\(^{286}\) Possession of a passport by an alien should be one of many factors considered by adjudicator. Some courts and the BIA have given passport possession considerable weight.\(^{287}\) There are many valid reasons an alien could have a passport and still have a well-founded fear of persecution.\(^{288}\)

\(^{281}\) 775 F.2d 1452 (9th Cir. 1990).
\(^{282}\) See supra notes 99-102 and accompanying text.
\(^{283}\) See supra notes 103-06 and accompanying text.
\(^{285}\) See supra notes 107-10 and accompanying text.
\(^{287}\) See supra notes 64, 111 and accompanying text.
\(^{288}\) See supra notes 112-15 and accompanying text. For example, the alien’s government may not yet be aware of the alien’s political activities or beliefs, or the government may permit the alien to leave the country, but would persecute the individual if he or she remained in the country.
Similar reasoning applies to a lack of threats to one's family and an alien's ability to live in the same location after an initial incident of persecution. The BIA and some courts have used these factors to find that an alien's testimony is not credible, or that his or her fear is unfounded. Again, there are many explanations for these factors. These factors should only be minor factors considered as part of the overall situation that the alien faces, and should be given little weight. For the most part, the Ninth Circuit agrees with this approach.

2. Political Opinion
   a. Neutrality

In recent years, courts have gradually accepted the idea that neutrality is an expression of political opinion, though they remain divided as to how to apply the concept. The UNHCR has recognized that neutrality can be a form of political opinion and that if an alien is persecuted due to his or her neutrality, it is political persecution. In light of this, the BIA and those circuits which have not adopted the doctrine of neutrality should do so.

Questions concerning the application of neutrality still remain, however. Must an alien prove that he or she has affirmatively adopted a position of neutrality, and has made his or her position of neutrality public, so that the persecuting group is aware of his or her neutrality? In answering this question, the doctrine of "imputed opinion" and problems of awareness overlap with neutrality. In countries with intense civil war, it is not unusual for one side to believe that those who do not support their cause support the opposing side. In such a case, an alien may fear persecution from either the government or the opposing side, or both, and such persecution would be political persecution. It is also unrealistic to expect that one who adopts a neutral stance will announce his position to the group that may persecute him. An alien may reasonably fear that either or both sides in a conflict will, at a future time, discover his neutral position or impute to him the beliefs of the opposing side. These cases should be analyzed in the same manner as awareness of any other political opinion.

Different standards should be used depending on whether the alien is persecuted for neutrality by government or anti-government groups. When the persecuting group is the alien's government, the courts

289. See supra notes 65-66, 116-21 and accompanying text.
290. See supra notes 116-21 and accompanying text. It is possible that the alien was able to hide from the authorities for some time or that the government was an inefficient persecutor.
291. See supra notes 113-22 and accompanying text.
292. See supra notes 145-58 and accompanying text.
293. See Canas-Segovia v. INS, 902 F.2d 717, 828 n. 23 (9th Cir. 1990) (quoting UNHCR argument in an amicus brief that "the refusal to bear arms is a uniquely political statement").
294. See supra notes 280-82 and accompanying text.
should use the same methods to analyze claims of neutrality as any other claim of political persecution.

If the persecutor is an anti-government group, the standard should be slightly different. In many cases, persecution from an anti-government group will resemble government persecution. For example, the group may harass the alien because he or she does not support it or because it believes that the alien supports the other side. In these cases, persecution from anti-government groups should be treated the same as persecution from the alien's government. In other cases, the harm an alien fears is not torture or death, but forcible impressment into the ranks of the anti-government group. As suggested by the Ninth Circuit, forcible recruitment by groups other than a legitimate government should be considered political persecution.\textsuperscript{295} Simply refusing to join an anti-government group should be enough to establish neutrality, due to the fact the guerrilla groups do not have the legitimate conscription powers that recognized governments have.

b. Military Conscription

i. Government

The right of a foreign government to pursue a legitimate draft or conscription policy must be accepted. But it is also clear that there should be exceptions to this rule. The \textit{U.N. Handbook} recognizes exceptions where individuals are punished more harshly for draft evasion or desertion due to their political opinions.\textsuperscript{296} When aliens are punished arbitrarily or more harshly because of their political opinions, this is prima facie persecution.\textsuperscript{297} These types of cases should be viewed as persecution based on political opinion.

The BIA and all courts have adopted the \textit{U.N. Handbook}'s rule granting an exception for draft evaders and deserters when their military engages in inhuman acts.\textsuperscript{298} The courts and the BIA, however, disagree over how much evidence should be required and what types of evidence will be allowed.\textsuperscript{299} When an alien claims that members of his or her country's military are forced to commit atrocities, courts must give this special consideration, since accepting the alien's claim will brand the country as a human rights violator. But when courts or the BIA require that an alien prove the atrocities are part of official government policy or require that the country's military be condemned by the international community, they exceed what is required by the \textit{U.N.}

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\textsuperscript{295} \textit{See supra} note 172 and accompanying text.
\textsuperscript{297} \textit{Id}.
\textsuperscript{298} \textit{See supra} notes 132-34, 165-173 and accompanying text.
\textsuperscript{299} \textit{Id}.
\end{flushright}
Requiring evidence of official policy may set a standard that can never be reached, as “no government wishing to remain even remotely connected with the international community would openly advocate such a policy.” Paragraph 171 of the *U.N. Handbook* requires only that the military acts be “condemned by the international community,” not condemned by international governmental bodies, as some courts and the BIA would require. The opinions of recognized groups such as Amnesty International and Americas Watch should be afforded considerable weight when deciding if the international community has condemned a country’s military.

**ii. Guerrilla/Anti-Government Groups**

Guerrilla groups do not and should not have the same authority to conscript and discipline troops as legitimate governments. Therefore, if an alien is persecuted for refusing to join or for leaving an anti-government group, he or she should be considered a victim of political persecution.

c. Prosecution

Recognized governments have the right to adopt and enforce their laws, but there are limits on what a government can do in the name of prosecution. Prosecution for holding a certain political belief or opinion is clearly persecution based on political opinion. Further, courts should follow the Ninth Circuit’s lead in holding that when governments engage in prosecution without evidence of a crime, political persecution should be presumed.

**IV. Conclusion**


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300. *See M.A. A26851062 v. INS, 899 F.2d 304 (4th Cir. 1990)* (majority requiring proof of formal, official government policy to engage in human rights violation and condemnation by international governmental bodies).

301. *Id.* at 322 (Winter, J., dissenting). *See also U.N. HANDBOOK, supra note 5, at 40, para. 171 (discussing only the type of military action, but making no mention of a requirement of governmental policy).*

302. *M.A. A26851062, 899 F.2d at 312. See supra notes 168-71 and accompanying text.*

303. *M.A. A26851062, 899 F.2d at 323 (Winter, J., dissenting)* ("[N]ongovernmental groups such as Amnesty International and Americas Watch have been full and active participants in the development of human rights law, and their writings have long been considered a valid source of international law."); *see also Coriolan v. INS, 559 F.2d 993, 1002-03 (5th Cir. 1977)* ("[T]he opinion of Amnesty International is conclusive neither upon this court nor upon the Immigration and Naturalization Service . . . [b]ut the evaluation in this report is certainly relevant.")

304. *See supra note 172 and accompanying text.*

305. *See supra notes 180-81 and accompanying text.*
trations, through their delegate, the Board of Immigration Appeals, have departed from these obligations by narrowly interpreting the Refugee Act of 1980. The courts, by showing broad deference to the BIA, have acquiesced in this departure from the United States' international obligations and the original intent of the drafters of the Refugee Act.

In order to facilitate the determination of a refugee's status, the U.N. High Commissioner for Refugees promulgated the *Handbook on Criteria and Procedures for Determining Refugee Status*. The *Handbook* should be used as a guide in interpreting the Refugee Act by both the BIA and courts. Where possible, the BIA and courts should rely on the *Handbook* to provide an interpretation of "well-founded fear of persecution" and "political opinion." When the *Handbook* and Protocol do not provide assistance, courts should consider the basic purposes behind the Act by examining its legislative history.

Developing clear standards in areas of dispute that have been identified, and recognizing the effect these various factors have on the type of relief sought, will help to conform the United States' refugee policy to international law. By reviewing BIA interpretations of the Act, courts can ensure that the BIA's interpretations do not depart from the Congressional mandate. Such a process will help remove politics from asylum decisions and move towards the system envisioned by Senator Kennedy, a system free from territorial and ideological biases. Following these recommendations would likely result in more aliens becoming eligible for asylum. This would force the BIA and the Attorney General to exercise the discretion granted them by the Refugee Act. The Attorney General and the BIA may, in exercising their discretion, still refuse to grant asylum to eligible aliens. In such cases, the United States' asylum policy may still not conform to international standards. This dilemma, however, then would become a problem for Congress and not the courts. Unless the U.S. changes its course and conforms to its obligations under international law, the U.S. will cease to be the world's protector of the persecuted.

**Epilogue**

As this issue went to press, the Supreme Court decided the case of *INS v. Elias-Zacarias*, reversing the Ninth Circuit's ruling. Although the case purports to decide only the narrow question of whether forced military service in a guerrilla organization necessarily constitutes "persecution on account of . . . political opinion" under the Immigration and Nationality Act, the case may have a more profound effect. The Court narrowly construed the words "political opinion," showed broad deference to the determinations of the BIA, and implicitly raised the

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307. Zacarias v. INS, 921 F.2d 844 (9th Cir. 1990).
standard necessary to be eligible for political asylum. Moreover, the Court essentially rejected the suggestion made by this Note that the legislative history of the Refugee Act and the international documents upon which the Act was based should guide interpretation of the legislation.

The facts of the case can be briefly summarized. Jairo Jonathan Elias-Zacarias, a native of Guatemala, claimed that in January 1987 two armed, uniformed guerrillas came to his home and asked him and his parents to join their group. When Zacarias and his parents refused, the guerrillas told them to think the matter over and that they would return. Zacarias feared that the government would retaliate if he joined the rebels, and that the guerrillas would persecute him if he did not join them. In July 1987, Zacarias fled to the United States, and was later detained by the INS. The immigration judge handling the deportation hearing denied Zacarias’s request for political asylum on the grounds that he failed to demonstrate a well-founded fear of persecution on account of his political opinions. The BIA dismissed Zacarias’s appeal despite Zacarias’s claim that he could adduce new evidence that since his departure for the United States, the guerrillas had returned twice to his parents’ house in an effort to persuade him to join them. The Ninth Circuit then reversed the BIA’s decision, holding that forced participation in a guerrilla group necessarily constitutes persecution because it is “tantamount to kidnapping.” Furthermore, such acts of conscription by guerrilla groups are entitled to the statutory classification of “political” persecution because (a) “the person resisting forced recruitment is expressing a political opinion hostile to the persecutor,” and (b) “the persecutors’ motive in carrying out the kidnapping is political.”

In a six-to-three decision, the Supreme Court reversed the Ninth Circuit. Justice Scalia, announcing the decision of the Court, refused to look beyond the words of the statute. In order to fall within the meaning of the words “persecution on account of . . . political opinion,” the Court held, an applicant for political asylum must show, first, that he or she has a firmly held political opinion and, second, that he or she is persecuted because of that opinion.

Accordingly, even if Zacarias had been able to show that the politically motivated guerrilla group forced him to join them and would kill or torture those refusing to join them, under Justice Scalia’s reading of the Refugee Act, Zacarias could not be eligible for political asylum, unless he could show (a) that he in fact held a firm political opinion and (b) that it was because of this political opinion that the guerrillas would kill him.

Justice Scalia’s interpretation of the words “on account of . . . political opinion” appears to differ from the standard used previously in most circuits. Courts of appeals have generally considered persecution

310. See Zacarias, 921 F.2d at 847.
311. Id. at 849.
312. Id.
313. Id.
to be “political” whenever it is politically motivated or when there is a
difference of political opinion between the persecutor and the alien. The Court’s reading in Elias-Zacarias threatens to eliminate several types
of claims that, until now, provided a basis for political asylum. The doc-
trine of imputed opinion would appear to be in jeopardy. Claims
based on fear of persecution where the potential persecutor is unaware
of political opinions held by the alien might also fail. It is unclear,
moreover, how the Court would view asylum applications based on a
claim of neutrality.

Justice Scalia found it unnecessary to decide whether Zacarias held
any political opinion, because Zacarias failed to show that he held a well-

founded fear “with the degree of clarity necessary to permit reversal [by
an appellate court] of a BIA finding to the contrary.”

Setting what appears to be a new standard of review of administra-
tive decisions, at least in the area of asylum applications, the Court held
that the BIA’s determination that Zacarias was ineligible for asylum must
be upheld if “supported by reasonable, substantial, and probative evi-
dence on the record considered as a whole,” and can be reversed
only if “the evidence was such that . . . a reasonable factfinder would
have to conclude that the requisite fear of persecution existed.”

Under the newly announced standard, a circuit court cannot reverse a
BIA decision denying asylum eligibility unless a reasonable factfinder
would necessarily conclude that the alien satisfied the statutory require-
ment. This would appear to be a much higher standard than the sub-
stantial-evidence standard used by most circuits. Even worse for
aliens challenging BIA denials of asylum eligibility, the Court’s opinion
blurs the distinction between agency determinations of fact on the one
hand and of questions of law on the other.

It is also likely that the Court has effectively raised the standard of
asylum eligibility. In Cardozo-Fonseca the Supreme Court held that
those seeking asylum need only show a reasonable possibility of perse-

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314. See supra notes 140-78 and accompanying text.
315. See supra notes 126-28, 144 and accompanying text.
316. See supra notes 94-102 and accompanying text.
317. See supra notes 145-58 and accompanying text.
319. Id. at *2 (quoting 8 U.S.C. § 1105(a)(4) (1988)).
320. Id. at *2-3.
321. See supra notes 30-40 and accompanying text.
322. See supra notes 245-65 and accompanying text on the role of the BIA. The Court makes no attempt to distinguish between factual determinations made by the BIA and resolutions of legal questions; nor does the Court suggest that the BIA pro-
vide reasons for finding that Zacarias’s fear is not well-founded, as the Ninth Circuit had required. See supra notes 38-40 and accompanying text. Problems may arise if, as happened in this case, an alien is simply found not to have a well-founded fear of persecution on account of his or her political opinion. If the BIA summarily rejects an alien’s appeal, an appellate court might be unable to determine whether the alien failed to present testimony evidencing a well-founded fear or that the alien was ineligible for asylum as a matter of law.
cution and that a one-in-ten chance of persecution would qualify.\textsuperscript{324} It would seem that the evidence that Zacarias presented (three visits to his home in an effort to recruit him), coupled with an advisory letter from the State Department acknowledging that Guatemalan guerrilla groups engage in forcible recruitment,\textsuperscript{325} would satisfy a requirement of showing a one-in-ten chance of persecution. Thus, it would appear that the Supreme Court has in effect backed away from the Cardozo-Fonseca standard by making it more difficult to reverse BIA denials of asylum eligibility.

Justice Scalia’s approach to statutory construction, relying almost solely on the strict, literal meaning of the words used in the statute, would appear to preclude an approach to asylum cases advocated by this Note. The Court ignored the legislative history, which indicates that the Refugee Act was intended to codify the United States obligations under the U.N. Protocol and Convention.\textsuperscript{326} Furthermore, by focusing solely on the literal meaning of the statute the Court avoided any need to examine the \textit{U.N. Handbook}.\textsuperscript{327}

The likely effect of \textit{INS v. Elias-Zacarias} is to make it much more difficult for aliens to prove that they are eligible for asylum. As a result of this decision, an alien, already in the unenviable position of having left his homeland out of fear of persecution for his beliefs, may now be forced to return home to face those he fears. Prior to entering the U.S., those hoping to obtain asylum may be required somberly to reflect upon and to decide their political beliefs, announce their views publicly, and to gather indisputable evidence that some group will certainly persecute them for their beliefs. This does not reflect the intent of Congress, nor does it fulfill U.S. obligations under the U.N. Convention, Protocol, or the \textit{U.N. Handbook}.

\textit{Gregory S. Porter}

\textsuperscript{324} \textit{Id.} at 440.
\textsuperscript{325} See Zacarias v. INS, 921 F.2d 844, 847-48 (9th Cir. 1990).
\textsuperscript{326} See supra notes 182-92 and accompanying text.
\textsuperscript{327} See supra notes 207-37 and accompanying text.