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INS v. Elias-Zacarias: Political Asylum, "Plain Meaning," and the Labyrinth of Formalism

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CASE COMMENTS

INS v. ELIAS-ZACARIAS: POLITICAL ASYLUM, "PLAIN MEANING," AND THE LABYRINTH OF FORMALISM

When *I* use a word, Humpty Dumpty said, in a rather scornful tone, it means just what *I* choose it to mean—neither more nor less.[1]

I. INTRODUCTION

More than 14 million people in the previous two decades have fled coercive governments which afford little protection for fundamental human rights.[2] The emmigration of these political refugees represents a long-standing, international tragedy.

In 1951, the international community created a framework for mitigating this suffering: the United Nations Convention Relating to the Status of Refugees (the 1951 Convention).[3] In an effort to

1. THROUGH THE LOOKING GLASS, THE COMPLETE WORKS OF LEWIS CARROLL 196 (1939).

2. Leonard B. Sutton, *Political Asylum and Other Concerns: Some Reflections on the World, Yesterday, and Today*, 19 DENV. J. INT'L L. & POL'Y 475, 475-76 (1991); Dr. Keith W. Yundt, *International Law and the Latin American Political Refugee Crisis*, 19 INTER-AM. L. REV. 137, 139-40 (1987); Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551, 559-71 (1985); Animesh Ghoshal & Thomas M. Crowley, *Refugees and Immigrants: a Human Rights Dilemma*, 5 HUM. RTS. Q. 327, 343-46 (1983); Amelia C. Fawcett, *U.S. Immigration and Refugee Reform: a Critical Evaluation*, 22 VA. J. INT'L L. 805, 806 (1982). *But see* Robert Weiner, *The Agony and the Exodus: Deporting Salvadorans in Violation of the Fourth Geneva Convention*, 18 INT'L L. & POL'Y 703, 703-04.

3. Convention Relating to The Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter The 1951 Convention].

conform United States immigration law with existing international norms, Congress enacted the Refugee Act of 1980, governing an alien's eligibility for political asylum.[4]

The Act defines an alien as a refugee eligible for asylum provided that she can demonstrate that she has, at the very least, " 'a well-founded fear of persecution' in [her] home country on account of race, religion, nationality, membership in a particular social group, or political opinion."[5]

The United States Supreme Court recently addressed the meaning of "persecution on account of . . . political opinion," section 208(a) of the 1980 Refugee Act: a question which it left unanswered in *INS v. Cardoza-Fonseca*.[6]

The Immigration and Naturalization Service (INS) apprehended Jairo Jonathan Elias-Zacarias in 1987, after he fled Guatemala and illegally entered the United States.[7] Elias-Zacarias unsuccessfully sought both withholding of deportation and political asylum[8] on the grounds that his resistance to the Guatemalan guerrillas' recruiting efforts demonstrated a reasonable and credible fear of persecution if he were to return.[9] The Court in *INS v. Elias-Zacarias*, 921 F.2d 844 (9th Cir. 1990), *rev'd*, 112 S. Ct. 812, 814 (1992) held that, in discretionary asylum proceedings under section 208(a) of the 1980 Refugee Act, a "generalized political motive underlying the guerrillas' forced recruitment"[10] of an alien seeking asylum was insufficiently "political" to warrant a fear of persecution on account of political opinion.[11]

This Case Comment examines the Supreme Court's treatment

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4. Immigration and Nationality Act, Pub. L. No. 96-212, § 203(e), 94 Stat. 102 (1980) (amending Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952)) [hereinafter Refugee Act of 1980] (codified as amended at 8 U.S.C. §§ 1101(a)(42)(A) (1988)). The Act provides that:

> the Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of §§ 1101(a)(42)(A).

Id.

5. 8 U.S.C. §§ 1101(a)(42), 1158(a) (1988).

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

7. INS v. Elias-Zacarias, 921 F.2d 844 (9th Cir. 1990), *rev'd*, 112 S. Ct. 812, 814 (1992).

8. *Id.*

9. *Id.* at 814-15.

10. *Id.* at 816.

11. *Id.*

of the controlling immigration statutes and international treaty obligations. It discusses the *Elias-Zacarias* decision's effectiveness, as an answer to the unresolved issues of the 1987 *Cardoza-Fonseca* decision concerning the "well-founded fear of persecution" standard. It gives special emphasis to Justice Steven's dissent, which points to inconsistencies in the standard articulated by the majority, and suggests that the *Elias-Zacarias* decision effectively represents a withdrawal from *Cardoza-Fonseca*'s more "liberal" asylum standard.

This Case Comment will argue that, in the context of current Central American political unrest, the Supreme Court's standard is unnecessarily strict, confuses the underlying reasons for immigration with those for asylum, and fails to implement the principal goals of the 1980 Refugee Act, effectively frustrating legislative intent and engaging in the very judicial law-making which it purports to avoid.

II. Historical Background of Political Asylum

A. *Refugee Law Prior to 1968*

Traditionally, the United States has, in various forms, offered refuge to aliens fleeing persecution.[12] Our nation, after all, is a composite of immigrants. Nevertheless, a dual tension has characterized the United States immigration policy: society's almost sacrosanct respect for fundamental human rights versus the national interest in protecting its own citizen's rights. The expansion and contraction of statutory restrictions on immigrant composition and quantity has reflected this tension.[13]

The Displaced Persons Act of 1948[14] represented the first post-war, statutory authorization to provide relief specifically to refugees.[15] Four years later, Congress passed the Immigration and

12. Note, INS v. Cardoza-Fonseca: *Establishment of a More Liberal Asylum Standard*, 37 Am. U. L. Rev. 915, 915 (1988); Jacqueline Reardon, Case Comment, *Applying an Objective Standard to Determining a "Well-Founded Fear of Persecution,"* M.A. A26851062 v. Immigration and Naturalization Service, 858 F.2d 210 (4th Cir. 1988), *reh'g en banc granted*, 866 F.2d 660 (4th Cir. 1989), 13 Suffolk Transnat'l L.J. 855, 857 (1990). *See* Amelia A. Fawcett, *U.S. Immigration and Refugee Reform: A Critical Evaluation*, 22 Va. J. Int'l L. 805, 807-809 (1982).

13. *See generally* Reardon, *supra* note 12, at 857-58.

14. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (repealed 1952) (the Act provided both privileges and restrictions).

15. Richard R. Silver, Note, *Will* I.N.S. v. Cardoza-Fonseca *Affect the Ninth Circuit*

Nationality Act[16] which, in section 243(h), granted the United States Attorney General the discretion to withhold deportation, provided an alien could demonstrate a "clear probability" or "likelihood" of "physical persecution" were she returned to her home country.[17] Such relief was generally available to aliens who were unlawfully in the United States and subject to deportation.[18] Section 212(d)(5) of the Act gave the Attorney General the discretion to parole, as a temporary measure, any alien in the United States because of desperate circumstances for reasons which were "strictly in the public interest."[19] While both provisions entrusted the Attorney General with substantial discretion, the parole standard drew criticism as too susceptible to United States foreign policy and an unacceptable bedrock for long-term United States refugee policy.[20]

In 1965, Congress amended section 243(h) of the Act.[21] A more expansive stipulation to protect those persecuted because of "race, religion, or political opinion" replaced the requirement of "physical persecution."[22] The amendments also created a provision, section 203(a)(7), for conditional refugee admission from a wider geographic area than previously allowed, including limited numbers of aliens fleeing Communist countries.[23]

B. Refugee Law Between 1968 and 1980

In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees (the Protocol).[24] The Pro-

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Court of Appeal's Review of Asylum and Withholding of Deportation Cases?, 10 LOY. L.A. INT'L & COMP. L.J. 197, 217 (1988).

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

17. Immigration and Nationality Act, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214 (1952) (codified as amended at 8 U.S.C. § 1253(h) (1988)).

18. *Id.* Exceptions included those aliens who had either participated in the persecution of another or who were convicted of a serious crime and represented a danger to the community. *Id.*

19. *See id.* at § 212(d)(5), 66 Stat. 163, 188 (1952) (codified as amended at 8 U.S.C. § 1182(d)(5) (1988)).

20. STAFF OF SENATE COMM. ON THE JUDICIARY, 96TH CONG., 1ST SESS., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 28 (Comm. Print 1979).

21. Immigration and Nationality Act Amendments of Oct. 3, 1965, Pub. L. No. 89-236, § 11, 79 Stat. 911, 918 (1965).

22. *Id.*

23. *Id*; Silver, *supra* note 15, at 202.

24. Protocol Relating to The Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter The Protocol]. The Protocol incorporates articles 2 through 34 of

tocol, a multilateral treaty, has been the principal international guide for protecting refugees worldwide.[25] The Protocol binds parties to "comply with the substantive provisions of articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees . . . ."[26]

C. The Refugee Concept Under the Protocol

One of the Protocol's key elements is its clarification of the term, "refugee." Article 1(2) states that a "refugee" is one who:

> owing to a well-founded fear of being persecuted, for reasons of race, religion, nationality, membership in 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.[27]

In addition, article 33 of the Protocol provides for entitlement to relief, if the alien can prove a threat to her "life or freedom" be-

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the 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

25. *See* MAGNA CARTA FOR REFUGEES (1951); Carol Wilson, Note, *Well-founded Fear of Persecution-The Standard of Proof in Political Asylum Resolved, or Is It?*: I.N.S. v. Cardoza-Fonseca, 22 U.S.F. L. REV. 385 (1988).

26. INS v. Stevic, 467 U.S. 407, 416 (1984). Although the United States is not a party to the 1951 Convention, United States accession to the Protocol mandates compliance with the Convention provisions. *See* Barry Sautman, *The Meaning of "Well-Founded Fear of Persecution" in United States Asylum Law and in International Law*, 9 FORDHAM INT'L L.J. 483, 491-92 n.27 (1986); Elwin Griffith, *Asylum and Withholding of Deportation—Challenges to the Alien After the Refugee Act of 1980*, 12 LOY. L.A. INT'L & COMP. L.J. 515, 517 (1990). Nevertheless, by binding parties to undertake the application of articles 2 through 34 of the Convention, the Protocol incorporates the Convention into United States law through *reference*. S. REP. No. 256, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S.C.C.A.N. 141, 144. Both the Senate and the President approved the Protocol in 1968. The Protocol, *supra* note 24. But the Protocol is executed only to the extent that Congress passes specific implementing legislation, thus, the 1980 Refugee Act. Erik J. Davenport, Note, *Cardoza-Fonseca: Supreme Court Takes Initiative to End Current Inequities in Law of Asylum*, 18 CAL. W. INT'L L.J. 179, 183 (1987). *But see* Raymond W. Valori, Note, *Substantive Rights Accorded Refugees Interdicted on the High Seas*: Haitian Centers Council v. McNary, 24 U. MIAMI INTER-AM. L. REV. 367, 386-90 (1993) (certain articles of the Convention, as incorporated by the Protocol, are self-executing and, thus, require no implementing legislation).

Article VI, Section 2 of the U.S. Constitution provides that:

> [a]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

27. The Protocol, *supra* note 24, art. 1, sec. 2 at 6261.

cause of her "refugee" attributes.[28]

Although Congress initially believed that the Immigration and Nationality Act would not need amendment to comply with the Protocol, it later found that section 203(a)(7) was ill-suited to realize these Protocol guidelines.[29] Most critically, section 203(a)(7) failed to provide any alien already within the United States borders with an asylum application procedure. Withholding of deportation and asylum applications were procedurally indistinguishable.[30]

D. The 1980 Refugee Act

The 1980 Refugee Act amended the Immigration and Nationality Act of 1952 by, at last, incorporating a definition of refugee which acknowledged the "plight of homeless people all over the world."[31] The legislative history of the Refugee Act indicates that harmonization with United States international treaty obligations under the United Nations Convention and Protocol was a vital objective.[32] Congress adopted these standards to promote neutral, non-ideological decision-making by the INS by increasing an alien's procedural, rather than substantive, rights.[33] Several courts have looked to the Office of the United Nations High Commis-

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28. The Protocol, *supra* note 24, art. 33 at 6276; Shane M. Sorenson, Note, Immigration and Naturalization Service v. Cardoza-Fonseca: *Two Steps In The Right Direction*, 3 ADMIN. L.J. 95, 102 (1989).

29. *See* S. REP. No. 256, 96th Cong., 1st Sess. 2-3 (1979) (in a letter to Secretary of State Cyrus Vance and others, Senator Edward Kennedy described the need "to establish a long range refugee policy" that treated all fairly and assisted all equally); *see also* S. REP. No. 256, *supra* note 26, at 144-45; STAFF OF SENATE COMMITTEE ON THE JUDICIARY, 96TH CONG., 1ST SESS., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 28 (Comm. Print 1979).

30. The INS revoked the 1974 regulation which allowed aliens to apply for asylum, 8 C.F.R. § 108 (1975), upon enactment of the 1980 Refugee Act which provided greater procedural safeguards. *See* 8 U.S.C. §§ 1101-1503 (1988).

31. The Refugee Act of 1980, *supra* note 4; S. REP. No. 256, *supra* note 26, at 142.

32. *See Admission of Refugees into the United States, Part II: Hearings Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. 15 (1978); S. REP. No. 256, *supra* note 26, at 144; S. REP. No. 590, 96th Cong., 2d Sess., 19, 20 (1980); H.R. REP. No. 781, 96th Cong., 2d Sess. 19, 20 (1980) (adopting the definition of refugee contained in Article 1(2) of the Protocol and replacing the previously restrictive eligibility requirements of § 203(a)(7) of the Immigration and Nationality Act); 8 U.S.C. § 1101(a)(42)(A) (1988).

33. Heather A. Joys, Immigration and Naturalization Service v. Cardoza-Fonseca: *The Illusion of a Liberal Standard in Asylum Adjudication*, 7 WIS. INT'L L.J. 231, 238 (1988) (arguing that the increased procedural rights have done little to favorably impact refugee status).

sioner for Refugees (UNHCR) for guidance in interpreting these new asylum standards.[34]

Neither the Act nor any single case has distinguished the degree of persecution required for relief under the asylum provision from that required under the withholding of deportation provisions.[35] Further, the Act has generated considerable litigation because of its implicit rejection of more general, humanitarian bases for relief for aliens fleeing war-torn or economically ruined nations.[36] Nevertheless, by conferring greater procedural safeguards for fair and humane treatment of refugees escaping persecution, the Refugee Act brought important changes in United States immigration law.[37]

1. Asylum Under Section 208(a)

Most notably, the Act establishes the first separate provision for asylum.[38] Section 208(a) gives the Attorney General discretion to grant asylum to any alien who fits within the 1951 Convention's definition of "refugee."[39]

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34. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, ¶ 80-83, U.N. Doc. HCR/IP/4, U.N. Sales No. E.79.II.1 (1979) [hereinafter U.N. HANDBOOK]. The *U.N. Handbook* does not have the force of law. However, both the Bureau of Immigration Affairs and the United States courts have referred to the *U.N. Handbook* in interpreting the Protocol. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987).

35. INS v. Cardoza-Fonseca, 480 U.S. at 439-40; Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1283 n.13 (9th Cir. 1984); Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969). *See generally* Comment, *The Need for a Codified Definition of "Persecution" in the United States Refugee Law*, 39 STAN. L. REV. 187 (1986).

36. Mark R. von Sternberg, *Emerging Bases of "Persecution" in American Refugee Law: Political Opinion and the Dilemma of Neutrality*, 13 SUFFOLK TRANSNAT'L L.J. 1, 3 (1989).

37. The Protocol, *supra* note 24, art. 1, 19 U.S.T. 6223, 606 U.N.T.S. 267.

38. The Refugee Act of 1980, *supra* note 4, at § 208(a) (codified as amended at 8 U.S.C. § 1158(a) (1988)); Silver, *supra* note 15.

39. Refugee Act of 1980, at § 208(a). Section 1253(h)(1) denies an applicant withholding of deportation and section 1158(a) denies an applicant asylum under the Act if the alien has: (1) been "firmly resettled" in a third country, (2) participated in persecution of others, (3) been convicted of a "serious crime" and constitutes a "danger" to the community or the United States, (4) been considered to have committed a "serious political crime" prior to entering the United States, or (5) been deemed a "danger" to United States security. *Id.* at § 208.8(f)(iii) - (vi) (codified as 8 U.S.C. § 1158(a)(iii) - (iv)). The practical significance of section 208(a) is that once the Board of Immigration Appeals (BIA) concludes that an applicant meets the provision's requirements, that applicant can seek the approval of the United States Attorney General to remain in this country. The decision to allow the applicant to remain under section 208(a) is ultimately that of the Attorney General. *Id.*

The controversial "well-founded fear of persecution" standard first appeared in this Act.[40] This standard has both objective and subjective components. The objective component requires direct evidence of a credible, specific threat which demonstrates the reasonableness of an applicant's fear.[41] The subjective component requires the applicant to demonstrate that he genuinely holds this fear.[42]

2. Withholding of Deportation Under Section 243(h)

This Act makes the previously discretionary withholding of deportation mandatory, provided an alien meets the statutory requirements.[43] The applicant must show that her "life or freedom would be threatened" were she deported to her home country.[44] In *INS v. Stevic*, the United States Supreme Court construed section 243(h) to require that an alien "establish a clear probability of persecution" and emphasized that the Refugee Act did not change the "clear probability" standard.[45]

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40. The 1980 Refugee Act states that a refugee is "any person who is outside any country of such person's nationality . . . and is unable or unwilling to return to . . . that country because of persecution or well-founded fear of persecution on account of race, religion, nationality, membership in particular social group, or political opinion." The Refugee Act of 1980, *supra* note 4; *see also* 8 U.S.C. 1101(a)(42)(A) (1988).

41. Diaz-Escobar v. INS, 782 F.2d 1488, 1492 (9th Cir. 1986).

42. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1283 at n.11 (9th Cir. 1984) (quoting Stevic v. Sava, 678 F.2d 401, 406 (2d Cir. 1982) (citing OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, ¶ 80-83, U.N. Doc. HCR/IP/4, U.N. Sales No. E.79.II.1 (Sept. 1979))).

43. The Refugee Act of 1980, *supra* note 4, § 1253(h)(1). As amended, § 12533(h) provides:

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

44. The Refugee Act of 1980, *supra* note 4, § 1253(h)(1). This standard is grounded in the United Nations Convention on the Status of Refugees, art. 33.1:

> no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

The Convention, *supra* note 3, art 33.1, 189 U.N.T.S. 137.

However, the United States, while withholding deportation to the alien's home country, may deport the alien to another country. *See, e.g., In re* Salim, 18 I. & N. Dec. 311, 315 (BIA 1982) (withholding deportation to Afghanistan but deporting alien to Pakistan); *In re* Portales, 18 I. & N. Dec. 239, 242 (BIA 1982). The burden of proof is on the alien to show that "it is more likely than not" that the alien would be persecuted if deported to his home country. INS v. Stevic, 467 U.S. 407, 429-30 (1984).

45. INS v. Stevic, 467 U.S. at 413.

III. Well-Founded Fear of Persecution: Conflict Among the Circuits Resolved?

A. *The Conflict*

While *INS v. Stevic* may have determined the criterion for withholding of deportation, the Board of Immigration Appeals (BIA) and the United States Courts of Appeals for the Third and Sixth Circuits continued to treat the evidentiary standards for asylum and deportation as equivalent,[46] notwithstanding the Supreme Court's dicta in Stevic suggesting that the standard for deportation was more rigorous.[47] The Eleventh,[48] Ninth,[49] Seventh,[50] Fifth,[51] and Second[52] Circuits took the position that the standards for withholding of deportation and for asylum were distinguishable.

B. INS v. Cardoza-Fonseca

In 1987, the Supreme Court addressed the ambiguity between the "well-founded fear of persecution" and "clear probability" standards in *INS v. Cardoza-Fonseca*.[53] In denying her applications, the immigration judge and the BIA applied the same "clear probability of persecution" standard to both Luz Marina Cardoza-Fonseca's applications for asylum and for withholding of deportation to Nicaragua.[54] On appeal to the Ninth Circuit, Cardoza argued that the lower court erred in applying a "more likely than not" rather than a "well-founded fear of persecution" standard to

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46. *See* Matter of Acosta, BIA Int. Dec. 2986 (Mar. 1, 1985); Sankar v. INS, 757 F.2d 532, 533 (3d Cir. 1985) (the court held that the BIA did not abuse its discretion when it construed the requirements for establishing a "clear probability" to be the equivalent of those for "well-founded fear of persecution"); Reyes v. INS, 673 F.2d 1087 (9th Cir. 1982); Dally v. INS, 744 F.2d 1191 (6th Cir. 1984); *see also* Sautman, *supra* note 26 at 491-523; Tracy Anne Kane, Case Comment, *Aliens—Standard for Asylum—Well-Founded Fear of Persecution Affirmed as the Appropriate Burden of Proof Required of Aliens Applying for Asylum*, Immigration and Naturalization Service v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987), 12 Suffolk Transnat'l L.J. 431, 438 (1988); Elaine Moye Whitford, Note, Immigration and Naturalization Service v. Cardoza-Fonseca: *The Last Word on the Standard of Proof for Asylum Proceedings?* 13 N.C. J. Int'l & Com. Reg. 171, 177-79 (1988).

47. INS v. Stevic, 467 U.S. at 424-25.

48. Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985).

49. Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984).

50. Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984).

51. Guevara Flores v. INS, 786 F.2d 1242 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1565 (1987).

52. Carcamo-Flores v. INS, 805 F.2d 60 (2d Cir. 1986).

53. INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987).

54. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1450 (9th Cir 1985).

her section 208(a) asylum application.[55] Reversing the BIA decision, the Ninth Circuit endorsed a "well-founded fear" standard previously articulated in *Bolanos-Hernandez v. INS*[56] to distinguish the "possibility" of persecution from that of "probability."[57]

1. The Majority Opinion

The United States Supreme Court resolved the jurisdictions' doctrinal conflict by holding that the standard in asylum cases was that of a "well-founded fear of persecution" rather than the "clear probability" test.[58] The Court noted that an asylum applicant could "have a well-founded fear of an event happening when there is a less than 50% chance of the occurrence taking place."[59] Hence, the *Cardoza-Fonseca* decision separated the standard applied to asylum applications from that for withholding of deportation.[60]

However, the focus of the Court's inquiry was largely upon the Protocol, the 1980 Refugee Act, and the legislature's intent. Referring to the relevant language of the 1980 Refugee Act,[61] Justice

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55. *Id.* at 1450.

56. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1287 (9th Cir. 1984).

57. Cardoza-Fonseca v. INS, 767 F.2d at 1450-53. The Court of Appeals for the Ninth Circuit construed the statutory language of section 208(a) to mean that the burden of proof for asylum was not limited to direct threats to life or freedom. Rather, the court reasoned that such burden rested upon whether there had been a showing of a subjective fear. The court stated that under the well-founded fear standard, an applicant had to establish "specific facts through objective evidence to prove either past persecution or 'good reason' to fear future persecution." *Id.* at 1453 (quoting Carvajal-Munoz v. INS, 743 F.2d 526, 574 (7th Cir. 1984)).

58. INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987).

59. *Id.* at 431. To elucidate this point, the Court cited a hypothetical offered by a refugee law authority:

> [l]et us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp. . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return.

Id. (quoting 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)).

60. *Id* at 436-37. *See generally* Linsley J. Barbato, *A Lighter Burden For Refugees: The Well-Founded Fear Standard Of* Immigration and Naturalization Service v. Cardoza-Fonseca, 4 CONN. J. INT'L L. 209, 229-31 (1988); Kane, *supra* note 46, at 431.

61. Immigration and Nationality Act, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952) (codified as amended at 8 U.S.C. § 1182(d)(5) (1988)). Justice Stevens also reasoned that Congress' rejection of a Senate bill which would have limited asylum eligibility to only those aliens also eligible for withholding of deportation signalled congressional intent to maintain different standards for the two separate forms of relief. INS v. Cardoza-Fonseca, 480 U.S. at 441.

Stevens stated that " 'fear' in the section 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien."[62] The Court found support for this "plain" reading by examining the Act's legislative history.[63]

While the Court expressly declined to specify how the "well-founded fear or persecution" standard should be applied,[64] it concluded, after examining various international law sources, that there was "simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening."[65] Citing *INS v.*

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62. INS v. Cardoza-Fonseca, 480 U.S. at 430-31.

63. INS v. Cardoza-Fonseca, 480 U.S. 421, 432-33 (1987) (relying on Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984)); *Id.* at 447-48 (Justice Stevens concluded that the judiciary, rather than the INS agency, was the final authority to interpret statutes).

Justice Scalia, in his concurring opinion disagreed with the Court's "exhaustive investigation" of the Act's legislative history of the Act, arguing that where "the language of a statute is clear, that language must be given effect," short of a "patent absurdity." *Id.* at 452-53 (Scalia, J., concurring).

When a court should independently give content to statutory interpretation and when the court should defer to an agency's construction of that governing statute has been a long-standing debate. Under one line of cases, the court will defer to the agency interpretation, applying a "reasonableness" standard, provided that interpretation has a "reasonable basis in law." *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984); American Tobacco Co. v. Patterson, 456 U.S. 63 (1982); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980). The opposing line of cases ignores deference and actively interprets statutes to ensure their correct application. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Russell v. United States, 464 U.S. 16 (1983); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956). For further discussion, see generally Sorenson, *supra* note 28; Gilbert Hahn, III, Note, *Perfecting the Partnership: Structuring the Judicial Control of Administrative Determinations of Questions of Law*, 31 VAND. L. REV. 91 (1978). Some jurists argue that the determination of the proper scope of judicial review, in practice, rests upon the result desired. *See* AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 712 (1980) (Marshall, J., dissenting).

64. The Court stated, "[w]e do not attempt to set forth a detailed description of how the well-founded fear test should be applied." INS v. Cardoza-Fonseca, 480 U.S. at 448.

65. *Id.* at 440. The Court relied on the Protocol and the *U.N. Handbook* in concluding that Congress intended to create a different standard:

> [i]n interpreting the Protocol's definition of "refugee" we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, September, 1979). The Handbook explains that "[i]n general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there."

Id. at 438-39 (quoting U.N. HANDBOOK, *supra* note 34, at 12-13, ¶ 942).

Stevic,[66] the Court explained that "a moderate interpretation of the 'well-founded fear' standard would indicate that 'so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.' "[67] Congress did not intend, through amending the INA, to diminish the refugee eligibility standards.[68] Rather, it sought to remedy the previous law's political and geographical limitations.[69]

2. The Dissent

Justice Powell, joined by Chief Justice Rehnquist and Justice White, argued that the BIA's interpretation of sections 208 and 243 was "reasonable."[70] Justice Powell stated that "[b]ecause both standards necessarily contemplate some objective basis, I cannot agree with the Court's implicit conclusion that the statute resolves this question on its face."[71] Moreover, because the BIA had been delegated the "responsibility for making these determinations" and had examined more immigration cases than the Court will ever review, the BIA was best qualified to evaluate whether the applicant met the evidentiary burden.[72] Last, the dissent strongly disapproved of the Court's reference to international law documents as persuasive authority.[73]

3. The Concurring Opinions

a. Justice Blackmun

In his concurring opinion, Justice Blackmun stressed the ma-

66. 467 U.S. 407, 424-25 (1984).

67. INS v. Cardoza-Fonseca, 480 U.S. at 440.

68. INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987); Joys, *supra* note 33, at 238.

69. *Id.* at 436-37 (citing S. REP. No. 256, 96th Cong., 2d Sess., 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 141, 157 and H.R. REP. No. 608, 96th Cong., 2d Sess. 9 (1979)). *See generally* Joys, *supra* note 33, at 238; Note, *Immigration Law: Political Asylum*, 101 HARV. L. REV. 340, 342 (1987).

70. INS v. Cardoza-Fonseca, 480 U.S. at 460-61 (Powell, J., dissenting).

71. *Id.*

72. *Id.*

73. INS v. Cardoza-Fonseca, 480 U.S. 421, 464 (1987). Justice Powell argued that reference to materials interpreting the Protocol were only "marginally relevant" because statements made by the United Nations High Commissioner for Refugees "have no binding force." *Id.* (Powell, J., dissenting). Refugee status eligibility was solely up to the contracting state's to determine. *Id.* (citing the U.N. HANDBOOK, *supra* note 34).

jority's explanation that "an examination of the subjective feelings of an applicant coupled with an inquiry into the objective nature of the articulated reasons for fear"[74] was the appropriate test for deriving the meaning of the "well-founded fear" standard. Further, Justice Blackmun strongly suggested that, in formulating this standard in the context of the 1980 Refugee Act, the INS refer to the Protocol as a valuable interpretive device.[75]

b. Justice Scalia

Justice Scalia agreed with the Court's narrow holding that the standards applied to asylum applications and to withholding of deportation applications were distinct.[76]* However, Justice Scalia concurred rather than join the majority in its judgment because he disapproved of the Court's exhaustive investigation of the legislative history of an enactment which was clear on its face.[77] Second, Justice Scalia strongly disagreed with the Court's discourse on whether INS's assessment of "well-founded fear" merited deference.[78] He argued that, in light of the Court's settled interpretation of *Chevron*,[79] the Court need not even explore the issue of deference to the INS's interpretation because that interpretation clearly differed from Congress' expressed intent in the 1980 Refugee Act.[80]

4. The Significance of the Court's Reliance on International Norms

The Court's reference to both the Protocol and the Handbook on Procedures and Criteria for Determining Refugee Status[81] is

74. *Id.* at 450 (Blackmun, J., dissenting).

75. *Id.* at 450-51.

76. *Id.* at 452.

77. *Id.* at 452-53.

78. *Id.* at 453 (referring to 446 n.30).

79. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

80. INS v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987) (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. at 842-43). Justice Scalia stated that Chevron "has been an extremely important and frequently cited opinion" which stands for the proposition that "courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent." *Id.* at 454. The Court's interpretation of Chevron was "an evisceration" of its well-established meaning. *Id.*

81. U.N. HANDBOOK, *supra* note 34, § v. Published only shortly before the enactment of the 1980 Refugee Act, the *U.N. Handbook* is a useful guide in determining the Protocol's meaning which, in turn, gives content to the Refugee Act of 1980. *See* Mary Jo Paulette-

perhaps *Cardoza-Fonseca*'s most important signal to lower courts. In its effort to give content to the United States asylum standard, the Court evaluated numerous international documents to which the United States is not even a signatory;[82] thus, evincing judicial recognition of international standards as persuasive authority.[83]

Although the Court stated that it was not suggesting "that the explanation in the [*U.N. Handbook*] has the force of law or in any way binds the INS with reference to the asylum provisions of § 208(a)," it did describe the *U.N. Handbook* as a significant guide "in construing the Protocol, to which Congress sought to conform."[84] The Court confirmed that Congress' unmistakable purpose in enacting the 1980 Refugee Act was to harmonize U.S. refugee law with the Protocol.[85] *A fortiori*, the Court seemed to suggest that the BIA must apply an asylum standard which followed the Protocol. Nevertheless, its words were cautious.

The Court emphasized that it was deciding only the narrow question of whether the asylum and withholding of deportation standards were distinct; not "the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts."[86] It also stated that the Act entrusted the BIA with any "gap-filling" of the admittedly-ambiguous "well-founded fear" standard.[87] Lower courts

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Toumert, Note, Immigration and Naturalization Service v. Cardoza-Fonseca: *Liberalizing United States Asylum Law*, 10 HOUS. J. INT'L L. 295, 314 (1988).

82. INS v. Cardoza-Fonseca, 480 U.S. at 436-40 (citing Constitution of the International Refugee Organization, sec. C, annex 1, Pt. 1, § C1(a)(i)). *See* 62 Stat. 3037; The 1951 Convention, *supra* note 3; UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, REPORT OF THE AD HOC COMMITTEE ON STATELESSNESS AND RELATED PROBLEMS 37 U.N. Doc. E/1618, E/AC.32/5 (1950); INTERNATIONAL REFUGEE ORGANIZATION, MANUAL FOR ELIGIBILITY OFFICERS, No. 175, ch. IV, annex 1, pt. 1, § C19, at 24 (1950).

83. INS v. Cardoza-Fonseca, 480 U.S. at 439, n.22.

84. *Id.*

85. *Id.* at 436. *See* H.R. REP. No. 608, 96th Cong., 1st Sess. 9 (1979). The House stated:

> [t]he Senate bill provided for withholding of deportation of aliens to countries where they would face persecution, unless their deportation would be permitted under the United Nations Convention Relating to the Status of Refugees.

The House amendment provided a similar withholding procedure:

> [we] adopt the House provision with the understanding that it is based directly upon language of the Protocol and it is intended that the provision be construed consistent with the Protocol.

Id.

86. INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987). The Court stated that it would leave the development of the standard to the "process of case-by-case adjudication." *Id.*

87. *Id.*

were instructed to "respect the interpretation of that agency to which Congress [had] delegated the responsibility for administering" the immigration program.[88]

Yet, it also directed the lower courts to follow the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[89] If, as the Court concluded, Congress intended that U.S. refugee law conform with the Protocol, the agency responsible for developing the "well-founded fear" standard would be violating clear congressional intent should its articulated standard not comport with the Protocol.[90] That the Court did not specifically state this could reflect a decision not to belabor the obvious. It could also reflect an inference to which the Court did not wish to leap. The *Cardoza-Fonseca* decision necessarily left unresolved future issues surrounding the "well-founded fear" standard's meaning, its need for uniform application, and the extent to which the courts must ensure BIA compliance with the Protocol.[91]

C. *The Asylum Standard Since* Cardoza-Fonseca

The BIA's first published decision following *Cardoza-Fonseca*, *Matter of Mogharrabi*,[92] applied a reasonable person test to the "well-founded fear" of persecution standard.[93] Like the Ninth Cir-

88. *Id.* (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. at 843, (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974))).

89. *Id.* at 449 (citing INS v. Errico, 385 U.S. 214, 225 (1966); Costello v. INS, 376 U.S. 120, 128 (1964); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

90. In contrast to Justice Scalia's proposed broad reading of Chevron, Justice Stevens adhered to a narrow reading that statutory ambiguity, standing alone, did not automatically create a presumption of a congressional delegation of lawmaking authority. *Id.* at 445; Sorenson, *supra* note 28, at 125. The majority's reluctance to so willingly infer a delegation of lawmaking authority from the congressional to the executive branch has strong Constitutional underpinnings. *See* U.S. CONST., art. I, § 7.

91. "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, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." INS v. Cardoza-Fonseca, 480 U.S. at 445, n.29 (quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. at 837). *But see*, Silver, *supra* note 15, at 228; Note, Immigration and Naturalization Service v. Cardoza-Fonseca: *The Last Word on the Standard of Proof for Asylum Proceedings?*, 13 N.C.J. INT'L L. & COM. REG. 171, 182 (1988) (failure to define the "well-founded fear" standard will perpetuate ambiguity and inconsistency in its application).

92. Matter of Mogharrabi, Int. Dec. No. 3028 (BIA, June 12, 1987).

93. *Id.* at 442, 447.

cuit in *Cardoza-Fonseca*,[94] the BIA applied the distinction between "possibility" and "probability" of persecution[95] previously articulated in *Bolanos-Hernandez v. INS*.[96] The BIA relied on the objective and subjective components of the "well-founded fear" standard previously articulated in *Diaz-Escobar* and *Stevic*.[97] Citing *Matter of Acosta*,[98] the BIA applied a four prong test to determine whether an alien's fear was objectively reasonable: (i) the alien's possession of either a belief or trait which the persecutor seeks to punish, which the persecutor is (ii) easily able to discover, (iii) capable of punishing, and (iv) inclined to punish.[99] Hence, the conditions of the nation which the applicant fled were highly relevant.[100] Moreover, the BIA held that, where an alien's testimony was the only accessible evidence of persecution, it was sufficient so long as it agreed with the applicant's general account.[101] Notably, the BIA referred to the *U.N. Handbook* in arriving at this decision.[102]

However, shortly after *Cardoza-Fonseca*, the Ninth Circuit in *Corado Rodriguez v. INS*[103] reversed the BIA's denial of an applicants' motion to remand for a hearing on their asylum and withholding of deportation claims, expressing great skepticism of the BIA "catch-all" standards.[104] The Ninth Circuit required the BIA,

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94. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1450-53 (9th Cir. 1985).

95. Matter of Mogharrabi, Int. Dec. 3028 at 447.

96. Bolanos-Hernandez v. INS 767 F. 2d 1277, 1281, 1288 (9th Cir. 1984).

97. Matter of Mogharrabi, Int. Dec. 3028, 442-44 (BIA, June 12, 1987) (citing Diaz-Escobar v. I.N.S., 782 F.2d 1488, 1492 (9th Cir. 1986); INS v. Stevic, 467 U.S. 407 424-25 (1984)) (holding that an alien must prove both the subjective and objective elements of a fear of persecution are present).

98. Matter of Acosta, Int. Dec. 2986 (BIA, March 1, 1985).

99. Matter of Mogharrabi, Int. Dec. 3028 at 446 (citing Acosta, Int. Dec. No. 2986 at 226).

> [A]lthough our decision in Matter of Acosta has been effectively overruled by INS v. Cardoza-Fonseca, . . . insofar as Acosta held that the well-founded fear standard and the clear probability standard may be equated, much of our decision remains intact and good law. Indeed, we still find in Acosta some guidance regarding the meaning of a well-founded fear.

100. *Id.* at 446; Joys, *supra* note 33, at 248.

101. *Id.* at 446; Joys, *supra* note 33, at 248.

102. Matter of Mogharrabi, Int. Dec. 3028, 446 (BIA, June 12, 1987). The BIA, even before the *Cardoza-Fonseca* decision, looked to the *U.N. Handbook* for guidance in interpreting the Protocol and the Refugee Act of 1980. *See e.g., In re* Matter of Frentescu, 18 I & N Dec. 244, 246 (BIA 1982); Matter of Rodriguez-Palma, 17 I & N Dec. 465 (BIA 1980).

103. Corado Rodriguez v. INS, 828 F.2d 622 (9th Cir. 1987).

104. *Id.* at 627. The Ninth Circuit was specifically addressing the government's argument that irrespective of whether the BIA evaluated the applicants' claim in terms of proving a "clear probability," a "realistic likelihood," or "valid reason to fear" persecution, the

henceforth, to state explicitly that it was applying a more generous asylum standard.[105]

The Fourth Circuit attempted to define that standard in *M.A. A26851062 v. INS*[106] by focusing on "what proportion of objective and subjective evidence [was] necessary to support a well-founded fear, and specifically how much objective evidence must be adduced to render the subjective fear 'well founded.' "[107] The applicant based his claim that he feared persecution primarily upon the fact that he evaded the draft in El Salvador.[108] The Court referred extensively to the *U.N. Handbook* to discern M.A.'s refugee status as a draft evader.[109] Having carefully weighed M.A.'s affidavit and supporting evidence[110] that the military with tacit government approval brutalized its opponents,[111] the Fourth Circuit concluded that M.A.'s failure to serve in the military might qualify him as a

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BIA made the correct determination. "The BIA frequently inserts the catchall statement set forth above in its asylum decisions." *Id.* at 627-28 (citing Vides-Vides v. INS, 783 F.2d 1463, 1468 (9th Cir. 1986)); Rebollo-Jovel v. INS, 794 F.2d 441, 446 (9th Cir. 1986); Cardoza-Fonseca v. INS, 767 F.2d 1448, 1450 (9th Cir. 1985)).

105. Corado Rodriguez v. INS, 828 F.2d at 627. "Normally we would accept an assertion that petitioners do not qualify for relief irrespective of the standard used as an indication that the Board assessed the claim under differing standards and found it wanting under each." *Id.* However, where the Board "repeatedly" failed to distinguish between the asylum and withholding of deportation standards, "it is likely that [the Board] is assessing the claim only under the more demanding test." *Id.*

106. 858 F.2d 210 (4th Cir. 1988), *reh'g granted*, 866 F.2d 660 (4th. Cir. 1989), *rev'd*, 899 F.2d 304 (4th Cir. 1990).

107. *Id.* at 213.

108. *Id.* at 213.

109. *Id.* at 214. The *U.N. Handbook* "recognizes draft evaders as a distinct group for purposes of determining refugee status." U.N. HANDBOOK, *supra* note 34. Draft evaders were refugees if they were able to show that they would "suffer disproportionately severe punishment for the military offen[s]e on account of his race, religion, nationality, membership of a particular social group or political opinion." M.A. A26851062 v. INS, 858 F.2d at 215 (citing U.N. HANDBOOK, *supra* note 34, ¶ 169).

> There are, however, also cases where the 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.

Id. at 215 (quoting U.N. HANDBOOK, *supra* note 34, ¶¶ 170-71).

110. "Such statements should be accepted as true 'where they establish factual circumstances with specificity, are not speculative, and do not conflict with petitioner's other evidence.' " M.A. A26851062 v. INS, 858 F.2d at 217 (citing Carvajal-Munoz v. INS, 743 F.2d 562, 577 (7th Cir. 1984)). The court also relied upon supporting statements by Dr. Charles Clements, who practiced medicine in El Salvador from March 1982 to February 1983, and William M. Leo Grande, Director of Political Science at the School of Government and Public Administration at American University in Washington, D.C. *Id.* at 217.

111. M.A. A26851062 v. INS, 858 F.2d 210, 217-18 (4th Cir. 1988).

political refugee.[112] M.A. had to establish that "his sincere refusal to participate in the actions of the Salvadoran Armed Forces, and the likelihood that he [would] be punished for his refusal to serve."[113]

Thus, the Fourth Circuit relied extensively on the *U.N. Handbook* and the factual context of the applicant's home country. The court demonstrated that, rather than having to prove M.A.'s specific threats, proof of objective facts of possible persecution was sufficient for political asylum consideration.[114] This decision effectively extended the *Cardoza-Fonseca* holding.[115]

On January 5, 1989, the Fourth Circuit granted a rehearing *en banc*, accepting the Justice Department's argument that the issues presented in M.A.'s case might substantially alter United States asylum law.[116] The court reversed the previous panel's decision, affirmed the BIA judgment, and ordered M.A.'s deportation to El Salvador.[117]

This decision redefined a liberalized standard of a general "fear of possible persecution," based on lengthy reference to the *U.N. Handbook* and other international documents.[118] The "well-

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112. *Id.*

113. *Id.* at 215-16; U.N. HANDBOOK, *supra* note 34, ¶¶ 170-71 (stating that draft evaders, while recognized as a distinct group for purposes of refugee status, are not considered "persecuted" when penalized for such evasion). However, if the military actions conflict with one's "political, moral religious, or moral convictions, or to valid reasons of conscience," and are "condemned by the international community" one may be a refugee. M.A. A26851062 v. INS, 858 F.2d at 215-16 (citing U.N. HANDBOOK, *supra* note 34, ¶¶ 170-171).

114. M.A. A26851062 v. INS, 858 F.2d at 215-16. M.A. included Americas Watch and Amnesty International's documentary evidence which "presents an 'additional reason to take the threat seriously.'" *Id.* (citing Hernandez-Ortiz v. INS, 777 F.2d 509, 515 (9th Cir. 1985) (quoting Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984)).

115. *See* Reardon, *supra* note 12; *cf.* Leon Wildes, *The Dilemma of the Refugee: His Standard for Relief*, 4 Cardozo L. Rev. 353, 377 (1983) (INS is over-burdened).

116. M.A. A26851062 v. INS, 866 F.2d 660 (4th Cir. 1989). *See* John A. Detzner, *Aliens—Political Asylum—Eligibility of Salvadoran Draft Evader for Refugee Status—Refusal to Associate with Military Force That Engages in Internationally Condemned Acts of Violence*, 83 AM. J. INT'L L. 384, 385 (1989).

117. M.A. II, 899 F.2d 304, 307 (4th Cir. 1990). Interestingly, the six judges comprising the majority were Republican appointees (Judges Chapman, Hall, Russell, Widener, Wilkins, and Wilkinson), while the five-judge minority comprised Democratic appointees (Judges Ervin, Murnaghan, Phillips, Sprouse, and Winter). *See* THE AMERICAN BENCH: JUDGES OF THE NATION (Marie T. Hough et al. eds., 5th ed. 1989); Corii D. Berg, Note and Comment, *The Conscientious Objector Applying For Political Asylum: Forced To Bear Arms And The Brunt of* M.A. A26851062 v. INS, 14 LOY L.A. INT'L COMP. L.J. 139, 141 n.10 (1991).

118. Other Ninth Circuit decisions followed the Fourth Circuit. *See* Vilorio-Lopez v. INS, 852 F.2d 1137 (9th Cir. 1988) (evidence must demonstrate specific facts to prove either

founded fear" standard has since evolved into requirements that the alien have a genuine fear of political persecution[119] which is reasonably possible,[120] demonstrated "by credible, direct, and specific evidence in the record."[121]

IV. *INS v. ELIAS-ZACARIAS*: CLARIFICATION OF THE "WELL-FOUNDED FEAR" OF PERSECUTION STANDARD?

A. *Facts and Procedural History*

In January, 1987, two armed, uniformed guerrillas came to the home of 18-year-old Jairo Jonathan Elias-Zacarias and his parents, to recruit them for anti-government activities.[122] The family refused to join.[123] The guerrillas promised to return.[124] At the end of March, 1987, Jairo Jonathan Elias-Zacarias fled his native country, Guatemala.[125]

In July, 1987, the INS apprehended Elias-Zacarias for illegally entering the United States.[126] During his deportation proceedings, he acknowledged his deportability and unsuccessfully requested withholding of deportation and political asylum.[127] The immigration judge concluded that Elias-Zacarias was ineligible for both political asylum and withholding of deportation because he failed to demonstrate actual persecution or a "well-founded fear of persecution" on account of race, religion, nationality, or membership in a particular social group.[128]

The BIA summarily dismissed his appeal on procedural

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past persecution or good reason to fear future persecution); Barraza Rivera v. INS, 913 F.2d 1443 (9th Cir. 1990) (a showing of genuine fear satisfies the subjective component of the "well-founded fear" standard, while the objective component is satisfied by credible, specific evidence to show that the fear is reasonable and there is a reasonable possibility of persecution); Del Valle v. INS, 901 F.2d 787 (9th Cir. 1990) ("well-founded fear" means that a reasonable person in the asylum applicant's circumstances would fear persecution if returned to his native country).

119. Rodriguez-Rivera v. INS, 848 F.2d 998 (9th Cir. 1988).

120. Rivas v. INS, 899 F.2d 864 (9th Cir. 1990).

121. Jalali v. INS, 921 F.2d 280, 282 (9th Cir. 1990) (quoting Diaz-Escobar v. INS, 782 F.2d 1488, 1492 (9th Cir. 1985)).

122. INS v. Elias-Zacarias, 921 F.2d 844 (9th Cir. 1990), *rev'd*, 112 S. Ct. 812, 814 (1992).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. INS v. Elias-Zacarias, 112 S. Ct. 812, 814 (1992).

128. 8 U.S.C. §§ 1101(a)42, 1158(a) (1988).

grounds, notwithstanding Elias-Zacarias' motion to reopen his deportation hearing to submit new evidence,[129] showing that following his departure, the guerrillas twice returned to his family to recruit him.[130]

1. The Immigration Judge and the BIA Decisions

The BIA denied reopening on the ground that this new evidence did not (i) show that the outcome of his deportation hearing would change or (ii) establish a *prima facie* showing of asylum eligibility.[131] The BIA rejected Elias-Zacarias' assertion that the continuing efforts to intimidate and recruit him and his family created a "well-founded fear of persecution" if he remained in Guatemala.[132]

2. The Ninth Circuit Opinion

The U.S. Court of Appeals for the Ninth Circuit reversed on appeal, holding that acts of conscription, even by a nongovernmental group, were sufficient to establish persecution, or its fear, on account of political opinion.[133] The Ninth Circuit agreed that the applicant's refusal to become involved with any political faction was a political opinion.[134] The court held that the guerrillas' motivation for kidnapping was political persecution, refusal to become involved with any political faction was, itself, affirmative expression of a political opinion, and Elias-Zacarias possessed a "well-founded fear" of persecution because of that opinion.[135]

The INS petitioned the Supreme Court for a writ of *certiorari*.[136] The Court granted *certiorari* to clarify the meaning of "persecution on account of . . . political opinion" in section

129. INS v. Elias-Zacarias, 112 S. Ct. at 815.
130. *Id.*
131. *Id.*
132. INS v. Elias-Zacarias, 112 S. Ct. 812, 815 (1992).
133. *Id.*
134. INS v. Elias-Zacarias, 921 F.2d 844, 850 (9th Cir. 1990).
135. Attempts by a guerrilla organization to conscript a person into its forces represented "persecution on account of . . . political opinion." INS v. Elias-Zacarias, 112 S. Ct. at 815. "The person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." INS v. Elias-Zacarias, 921 F.2d at 850.
136. INS v. Elias-Zacarias, 112 S. Ct. at 815.

101(a)(42).[137]

B. The Decision

1. The Majority Opinion

The Supreme Court reversed the Ninth Circuit and held that a "generalized 'political' motive underlying the guerrillas' forced recruitment" of Elias-Zacarias was insufficient, within the meaning of section 101(a)(42), to warrant a fear of persecution for political opinion.[138]

In a brief majority opinion, Justice Scalia rejected the Court of Appeals finding that the guerrillas' kidnappings were politically motivated. He explained that the refusal to fight with the guerrillas was not political expression, and that the fear of persecution because of that refusal was not a fear of political persecution.[139]

Next, Justice Scalia relied on the "ordinary meaning" of section 101(a)(42) to conclude that Elias-Zacarias' forced recruitment to carry on a war against the Guatemalan government was not "persecution on account of political opinion."[140] While Elias-Zacarias argued that the guerrillas' political opinion was the source of his persecution, Justice Scalia explained that it was the victim's political opinion, not the persecutor's, which was dispositive.[141] Finally, Elias-Zacarias must still show that he possessed a "well-founded fear" of persecution by the guerrillas precisely "*because of* [his] political opinion, rather than because of his mere refusal to fight with them."[142]

2. The Dissent

Justice Stevens agreed with the Ninth Circuit's conclusion that Elias-Zacarias had a "well-founded fear" of persecution because of a political opinion, whether it was expressed negatively or

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137. INS v. Elias-Zacarias, 112 S. Ct. 812, 815 (1992).

138. *Id.* at 816.

139. *Id.*

140. *Id.*

141. "If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion." *Id.*

142. INS V. Elias-Zacarias, 112 S. Ct. 812, 816 (1992) (emphasis added).

affirmatively.[143] Moreover, even refusal to support a cause "motivated by nothing more than a simple desire to continue living an ordinary life with one's family"[144] was precisely that kind of political expression which "the asylum provisions of the statute were intended to protect."[145]

Justice Stevens pointed to the inconsistency between the majority's methodology in arriving at its narrow construction of "political opinion" and that taken by the majority in *INS v. Cardoza-Fonseca*.[146] He argued that the construction of "political opinion" articulated by Justice Scalia effectively created an evidentiary burden for asylum cases, indistinguishable from that of withholding of deportation.[147] He reminded the Court that the underlying reasoning of the *Cardoza-Fonseca* decision would have easily resolved "any doubts concerning the political character" of Elias-Zacarias' refusal to join the guerrillas.[148]

Justice Stevens concluded the record amply supported a finding that Elias-Zacarias' refusal was expressive conduct that constituted a political opinion within the meaning of section 208(a).[149]

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143. *Id.* at 817-18 (Stevens, J., dissenting).

144. *Id.* at 818.

145. *Id.*

> Choosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction. Just as a nation's decision to remain neutral is a political one, *see, e.g.*, Neutrality Act of 1939, 22 U.S.C. §§ 441-65 (1982), so is an individual's. When a person is aware of contending political forces and affirmatively chooses not to join any faction, that choice is a political one.

Id. (quoting Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1984)) (Stevens, J., dissenting).

146. *Id.*

147. INS V. Elias-Zacarias, 112 S. Ct. 812, 818 (1992). In INS v. Cardoza-Fonseca, Justice Stevens explained, the Court endorsed a much lower evidentiary burden for asylum applications. "[I]t is clear that Congress did not intend to restrict eligibility for [the asylum] relief to those who could prove that it is more likely than not that they will be persecuted if deported." *Id.* (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 449-50 (1987)).

148. INS v. Elias-Zacarias, 112 S. Ct. at 818. Congress enacted the 1980 Refugee Act with a clear intent to conform with the Protocol and to afford the United States greater flexibility in mitigating the political and religious refugee crisis. *Id.* (citing INS v. Cardoza-Fonseca, 480 U.S. at 449-50).

149. *Id.* at 819. Justice Stevens also pointed to the applicant's explanation for his refusal to join the guerrillas that "[i]f you join the guerrillas . . . then you are against the government. You are against the government and if you join them then it is to die there. . . . And then the government is against you and your family."
Id. at 819 n.5 (quoting App. to Brief in Opposition 5a).

"The statute speaks simply in terms of a political opinion and does not require that the view be well developed or elegantly expressed." *Id.* at 819 n.5 (Stevens, J., dissenting).

He rejected the Government's comparison of Elias-Zacarias' statements with those of a draft evader.[150] The statute only required that the applicant demonstrate "that there [was] a 'real possibility' that he [would] be persecuted on account of his political opinion.[151] It did not require the applicant's political opinion be exact, "well developed, or elegantly expressed."[152]

V. Political Opinion and the "Well-Founded Fear" Standard

The majority opinion in *Elias-Zacarias* is curious because it relies upon unusual methodology and interpretation of precedent not predominantly used by the Supreme Court.

A. The Majority's "Plain Meaning" Methodology for Statutory Construction Is Inconsonant with Earlier "Plain Meaning" Methods

"Plain meaning" is an approach to statutory construction which relies on the "probable meaning of the 'plain' text, construed according to standard dictionaries, rules of grammar and syntax, and the overall statutory structure."[153] Justice Scalia's methods of implementing the plain meaning rule of statutory construction in *Elias-Zacarias* are inconsistent with those previously employed by the Court.[154] They differ most conspicuously from the

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150. *Id.* The dissenting opinion explained the long-standing INS rejection of those applicants who evade selective service laws, irrespective of their political motivation. "[I]t is not persecution for a country to require military service of its citizens." *Id.* at 819 n.6 (quoting Matter of A-G, 19 I & N Dec. 502, 506 (BIA 1987)). It rebutted the oversimplification of the Government's argument:

> It does not matter to the persecutors what the individual's motivation is. The guerrillas in El Salvador do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause. They are concerned only with an act that constitutes an overt manifestation of a political opinion. Persecution because of that overt manifestation is persecution because of a political opinion.

Id. (quoting Bolanos-Hernandez, 767 F.2d 1277, 1287 (9th Cir. 1984)).

151. *Id.* at 820 (citing INS v. Cardoza-Fonseca, 480 U.S. at 440 (quoting INS v. Stevic, 467 U.S. 407, 425 (1984)).

152. *Id.* at 820.

153. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 342 n.38 (1991).

154. The plain meaning rule has been a " 'soft' rule—the plainest meaning can be trumped by contradictory legislative history." William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. Rev. 621, 626 (1990). *See* American Tobacco Co. v. Patterson, 456 U.S.

Cardoza-Fonseca decision.[155]

First, in construing section 101(a)(42), Justice Scalia relies upon *Richards v. United States*[156] for the proposition that "[i]n construing statutes, 'we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.' "[157] Yet *Richards* was decided, more accurately, upon the notion that where Congress has made no formal expression regarding the terms within the statute requiring interpretation, "a section of a statute should not be read in isolation from the context of the whole Act,[158] and that in fulfilling [the Court's] responsibility in interpreting legislation, '[the Court] must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.' "[159]

Had the majority employed this *Richards v. United States* plain meaning methodology, the Court would have necessarily relied, as in *Cardoza-Fonseca*, upon the statute as a whole and upon its object and policy. Equally, the Court would have referred to the *U.N. Handbook*. The majority makes no such reference to the statute as a whole, nor does it make any reference to *any* international document to determine whether its interpretation even approximates the object and policy of the law. Given that the very title of the 1980 Refugee Act evinces its purpose of regulating the international refugee, it is extraordinary that an opinion which purports to rely on the methods of legislative interpretation first articulated in *Richards v. United States* is so conspicuously bare of any reference to international documents.

Richards v. United States, therefore, is curious precedent for the *Elias-Zacarias* majority's actual method of interpretation. It

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63, 75 (1982) (citing Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 26 (1977)); INS v. Phinpathya, 464 U.S. 183 (1984).

155. While the Cardoza-Fonseca Court's analysis began with the statutory language, the Court expanded its search for the "plain meaning" of section 208 to legislative history and international documents with emphasis upon legislative intent. Cardoza-Fonseca, 480 U.S. 421, 431-32 & n.12, 436, 441-43 (1987).

156. 369 U.S. 1, 9 (1962).

157. INS v. Elias-Zacarias, 112 S. Ct. at 816 (quoting Richards v. United States, 369 U.S. at 9).

158. Richards v. United States, 369 U.S. at 11 (citing NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957) (alternative holding).

159. Richards v. United States, 369 U.S. at 11 (citing Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956) (quoting United States v. Boisdore's Heirs, 8 How. 113, 122 (1849))).

unquestionably signals a shift to a new plain meaning approach to interpreting political opinion.

Second, the majority's methodology is, without even relying on the tenets of *Richards v. United States*, exceedingly formalistic and promotes inconsistency. Justice Scalia indiscriminately ignores congressional intent, standard dictionaries, or overall statutory structure in arriving at his "ordinary" meaning of political opinion, as is normally required for plain meaning interpretation.[160] Yet, because the assessment of which particular meaning is "plain" necessarily embodies judicial discretion, the Court typically reviews the statute's legislative history or the language of the entire statute to insure that its plain reading does not lead to absurdity, extraordinary ambiguity in its application, or conflict with the statute's purpose.[161]

The majority's formalism renders Justice Scalia's plain meaning methodology arbitrary and internally inconsistent. He argues that "political opinion" has an ordinary meaning and then defines it; yet, that definition is demonstrably ambiguous. Lower courts reviewing asylum cases have interpreted "political opinion" in disparate ways.[162] Justice Scalia does not address these dissimilar read-

160. The majority opinion stated that "[t]he ordinary meaning of the phrase 'persecution on account of . . . political opinion' in Sec. 101(a)(42) is persecution on account of the victim's political opinion, not the persecutor's." INS v. Elias-Zacarias, 112 S. Ct. at 812.

161. "[W]e 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'" Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 47 (1989) (quoting Richards v. United States, 369 U.S. 1, 9 (1962)). But the Court also refers to "the 'object and policy' of the statute." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. at 47 (citing Mastro Plastics Corp. v. NLRB, 350 U.S. at 285 (quoting United States v. Boisdore's Heirs, 8 How. 113, 122, (1849))). *See* Huddleston v. United States, 485 U.S. 681 (1988); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988) (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987)) ("[I]n the process of drafting a comprehensive scheme of reform Congress failed to address specifically how the mechanics of the [CSRA] would function in certain situations, and the judicial task therefore is 'to look to the provisions of the whole law, and to its object and policy.'"); Lindahl v. Office of Personnel Management, 479 U.S. 768, 793-94 (1985) (citing Meyer v. Department of HHS, 666 F.2d 540, 542 (1981) (quoting Richards v. United States, 369 U.S. at 11 (1962))); Tennessee Valley Authority v. Hill, 437 U.S. 153 (1976).

162. *See* Barraza Rivera v. INS, 913 F.2d 1443 (9th Cir. 1990) (holding that punishment based on objection to participation in inhumane acts as part of forced military service is "persecution" within the meaning of 8 U.S.C. § 1101(a)(42)(A)); Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987) (alien must show that she was persecuted because of any political opinion which her persecutors believed she had); Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987) (in determining whether an applicant has a well-founded fear because of a political opinion, one must look at the victim from the persecutor's perspective; if the persecutor thinks the person is guilty of a political opinion, then the person is at risk); Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985) (persecution must have occurred because of

ings. Moreover, he provides no explanation for how he selected *his* particular "ordinary" meaning of "political opinion."

In short, Justice Scalia takes a demonstrably ambiguous term, "political opinion," announces that it has a plain meaning, and then assigns one without explaining the basis for his particular assignment. That the Supreme Court is the ultimate arbiter of federal actions[163] does not dispense with its concomitant responsibility to provide principled, reasoned decisions.[164] Plain meaning methodology requires the Court to inquire into Congress' intent and explain that interpretation whenever a demonstrably ambiguous concept is ascribed its plain meaning.[165] Therefore, this majority's plain meaning approach frustrates the very method which seeks to simplify statutory interpretation by determining the most common meaning of the words creating the subject statute.

Third, the new plain meaning methodology applied to define political opinion resembles arbitrary line-drawing. Even under Justice Scalia's plain meaning doctrine, where the words are demonstrably not self-explanatory the search for meaning expands beyond those words.[166] There is nothing in the text of section 101(a)(42) itself which supports the majority's determination over any other.[167]

The majority's disregard for legislative history is an effort to give greatest effect only to concrete evidence of legislative intent[168] and avoid judicial law-making.[169] However, efforts to avoid judicial

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the victim's political beliefs); Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985) (under political asylum cases, it is permissible to examine the persecutor's motivation; and the court looks to the political views of both the persecutor and the victim); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1287 (9th Cir. 1984) (remaining neutral is no less a political opinion than choosing to affirmatively act upon a political opinion).

163. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

164. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 28-31 (1949); K. N. LLEWELLYN, THE BRAMBLE BUSH 34-35, 42 (1981).

165. Eskridge, *supra* note 153; INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).

166. Eskridge, *supra* note 153. Some scholars commend Justice Scalia's refusal to consider legislative background materials, as not having the force of law, in an attempt to preserve the separation of legislative and judicial functions. Eskridge, *supra* note 154, at 671 (citing A. Scalia, *Speech on Use of Legislative History*, delivered between fall 1985 and spring 1986 at various law schools (copy on file with U.C.L.A. Law Review office)).

167. The 1980 Refugee Act provides that an alien who demonstrates that he has either been persecuted or possesses " 'a well-founded fear of persecution' in his home country on account of race, religion, nationality, membership in a particular social group, or political opinion" is a refugee and eligible for asylum consideration. 8 U.S.C. § 1101 (a)(42)(1988). The language is clearly open-ended.

168. Eskridge, *supra* note 154, at 668-69.

169. *Id.* at 655; INS v. Cardoza-Fonseca, 480 U.S. 421, 441 (1987) ("Judges interpret

law-making can create arbitrary results. Arbitrariness, irrespective of how unintended, can embrace judicial law-making. These efforts to refrain from judicial law-making emphasize text at the full expense of *con*text—the 1980 Refugee Act's object of mitigating an international refugee crisis created by governments which afford little protection for human rights.

Fourth, the majority's decision is void of reference to the very document with which this Court stated the 1980 Refugee Act must conform: the Protocol.[170] Assessing the plain meaning of political opinion within the Act should logically guide the Court to those international documents which it judges as useful devices in making political asylum interpretations.[171] It is extraordinary that the Court makes no reference to either the Protocol or the overall structure of the Act.

The change in methodology between the two decisions seems rooted in a shift in authorship. Justice Scalia has adopted the standard which he earlier proposed in his concurring opinion for *Cardoza-Fonseca*. This posits a more stringent approach to discerning the plain meaning of section 101(a)(42) of the 1980 Refugee Act.[172]

Undeniably, the majority's method of interpreting political opinion avoids the problems created by reference to legislative history which, within the context of current problems the statute must address, may be either obsolete or wholly misleading.[173] Nevertheless, all methods of statutory interpretation embrace judicial discretion; they vary only in degree.[174]

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laws rather than reconstruct legislators' intentions.") (Scalia, J., concurring).

170. INS v. Cardoza-Fonseca, 480 U.S. at 441.

171. Like draft resistance, resistance to coercion by an insurgent group could qualify under the "inhumane conduct" exception to the general rule in the *U.N. Handbook* that draft resistance is not a form of persecution. U.N. HANDBOOK, *supra* note 34, ¶¶ 164-74.

172. Justice Scalia harshly criticized the majority's methodology in his concurring opinion. "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." INS v. Cardoza-Fonseca, 480 U.S. at 445 n.29 (quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984)).

173. Eskridge, *supra* note 154, at 688-89.

174. *Id.*

> It is mildly counterintuitive that an approach asking a court to consider materials generated by the legislative process, in addition to statutory text (also generated by the legislative process), canons of construction (generated by the judicial process), and statutory precedents (also generated by the judicial process), leaves the court with more discretion than an approach that just considers the latter three sources.

Id.

The majority's methods are not neutral. Its methods necessarily import policy choices.[175] In the arena of political asylum, those methods have international ramifications which the majority disregards. Because Article III of the Constitution defines the federal courts as forums for resolving real cases and controversies,[176] any methodology which ignores the context in which those controversies arise is an expedient, but ineffective, Article III forum. Last, interpretive rules which "ignore[ ] legislative intent . . . impose undue burdens on the legislative process, hindering the ability of the democratic branches to function effectively."[177] In light of the desperate conditions under which political refugees are applying for asylum, such formalism separate from context is disastrous.

B. The Majority's Construction of Political Opinion Is in Conflict with its "Plain Meaning"

The majority's decision erroneously distinguishes affirmatively from negatively expressed political beliefs. First, Justice Scalia argues that the victim's act of refusal alone is not political expression.[178] Yet, as Justice Stevens states, this construction of political opinion disagrees with fundamental notions of political expression protected by the First Amendment.[179] In short, the Court fails to apply the same reasoning to evaluate Elias-Zacarias' political opinions which it has historically used to evaluate political opinion cases.

The First Amendment protects acts of refusal not because they constitute crystalline political beliefs. Rather, acts of refusal are protected under the First Amendment because they are inte-

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175. Eskridge, *supra* note 154, at 688-91.

> Interpretation is a social process of construction, not a scientific process of discovery. Method can channel the argumentation and suggest information to be considered, but it cannot dictate all that goes on in statutory, or any, interpretation. Discourse about the new textualism ought to consider this timeless theme of the relationship of truth and method, for it goes to the heart of the formalist/anti-formalist debate in statutory interpretation.

Id. at 691.

176. U.S. CONST. art. III, § 2, cl. 1.

177. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 291 (1989).

178. INS v. Elias-Zacarias, 112 S. Ct. 812, 816 (1992).

179. *Id.* at 818-19 n.5. *See, e.g.*, Neutrality Act of 1939, 22 U.S.C. §§ 441-65 (1988) [hereinafter Neutrality Act] (recognizing a nation's decision to remain neutral as a political decision); Wooley v. Maynard, 430 U.S. 705 (1977) (state's interest in promoting an appreciation of history, individualism, and state pride is not "ideologically neutral").

gral to the individual's freedom of political self-expression.[180] The Supreme Court does not predicate protection for individual acts of *refusing* to salute an American flag or to display a state motto on one's license plate upon the presence or absence of fully-formed political opinions.[181] Political neutrality is a deeply embedded principle of our legal system. It merits protection not because it constitutes affirmative expression of political beliefs, but because it represents self-expression falling within political contours.[182] As Justice Douglas noted, "[t]he First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief."[183] Thus, the majority's reading of political opinion squarely contradicts political opinion jurisprudence.

Second, the majority creates an artificial dichotomy within the political opinion concept to distinguish the beliefs of the persecutor from the victim's.[184] Within Justice Scalia's view, victims who affirmatively express their political opinions satisfy the "well-founded fear" standard; victims having no crystalline political belief, irrespective of the persecutor's political motivation, do not. Politicians meet these requirements. University professors, celebrities, and other empowered, well-educated groups probably also fit

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180. In West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), for example, the Court reasoned that the First Amendment protected public schoolchildren from a State's attempt to coerce them to salute and pledge allegiance to the United States flag. The key to Barnette is that the Court did not engage in the superfluous inquiry into the personal politics of the schoolchildren who asserted their right to protection from compelled participation in saluting; rather, the Court correctly focused upon the acts of the officials who attempted to "prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 628.

181. *Id.* at 628; Wooley v. Maynard, 430 U.S. 705 (1977).

182. *See, e.g.*, Neutrality Act, *supra* note 179; West Virginia State Bd. of Educ. v. Barnette, 319 U.S. at 628 (the Bill of Rights protects an individual from state compulsion to salute and pledge allegiance to the United States flag because there is no evidence that remaining passive during a salute ritual creates a "clear and present danger"); Elrod v. Burns, 427 U.S. 347 (1976) (the First Amendment protects individuals from compulsion to associate with a political party); Wooley v. Maynard, 430 U.S. at 705 (the state cannot criminally punish individuals who cover a state motto, "Live Free or Die," which they find repugnant to their moral, political, and religious beliefs); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (the state cannot compel an individual to contribute to support an ideological cause which he may not condone because the First Amendment also protects the rights of dissenters).

183. Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952) (Douglas, J., dissenting).

184. The majority relies upon illustrations of persecution in which the distinctions between the beliefs of the persecutor and victim were obvious. "If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion." INS v. Elias-Zacarias, 112 S. Ct. 812, 816 (1992).

within the majority's concept. Children[185] and illiterate indigenous populations,[186] on the other hand, currently used as pawns in the political struggle between factions, probably fail Justice Scalia's test. They lack the elite's opportunities to become "political." In short, Justice Scalia construes political opinion so narrowly that it filters out all victims of persecution by coercive governments except the well-educated, politically active. Only this class of individuals has enough power to withstand their own government's pressures as they affirmatively express themselves, ensuring their safe harbor within the latest United States creation of "political opinion."

C. *Judiciary Usurping Congressional Authority*

The *Elias-Zacarias* decision superimposes a constraint on political opinion which previously existed in neither Supreme Court First Amendment nor immigration case law.[187] Moreover, Justice Scalia's asylum guidance is highly artificial because (i) it clearly contradicts both the letter and spirit of the *Cardoza-Fonseca* decision,[188] (ii) does nothing to clarify the demonstrably "less-than-plain meaning" of the "well-founded fear" standard,[189] and (iii)

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185. Jonathan Power, *The Littlest Victims of Abuse, of Torture — and of Murder*, MIAMI HERALD, Oct. 28, 1992, at A17 (massacre of 100 children in Central African Republic by Emperor Bokassa in 1979 and documented evidence of torture of children of political opponents in Saddam Hussein's Iraq in an effort to keep the parents silent); HUMAN RIGHTS WATCH, HUMAN RIGHTS IN IRAQ: MIDDLE EAST WATCH 47-49 (1990).

186. Sam Dillon, *Rights Advocates in Peru Criticize Report From U.S.*, MIAMI HERALD, Aug. 22, 1991, at A10 (375 documented appearances in the year since President Alberto Fujimori took office); Patrick McDonnell, *The ABCs of Freedom*, L.A. TIMES (San Diego), Oct. 20, 1991, at B1 (during the last eleven years, more than 1 million Guatemalans, many of whom are illiterate, have been driven to foreign exile). *See* AMERICAS WATCH COMMITTEE, HUMAN RIGHTS IN GUATEMALA: NO NEUTRAL ALLOWED (1988). By 1982, United Nations estimated at least 25,000 refugees in border camps in southern Mexico; Catholic Church of Guatemala estimated that one million of a total of seven million Guatemalans had been displaced by the conflict; other church sources claimed that there were more than 500,000 displaced persons within Guatemala City alone. *Id.*

187. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. at 624; Wooley v. Maynard, 430 U.S. at 705.

188. INS v. Cardoza-Fonseca, 480 U.S. at 436 (citing S. REP. No. 256, 96th Cong., 2d Sess. 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. and H.R. REP. No. 608, 96th Cong., 2d Sess. 9 (1979)); Joys, *supra* note 33, at 238; Monroe Leigh, Note, *Immigration Law-Asylum-Well-Founded Fear of Persecution:* Immigration and Naturalization Service v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987), 81 AM. J. INT'L L. 654 (1987).

189. *See supra* notes 160-61 and accompanying text. Elias-Zacarias merely states what political opinion is *not*.

usurps congressional authority.[190]

That political asylum standards expand or contract is not the greatest objection to this particular constriction. Immigration and asylum standards in this nation have historically followed politics.[191] Rather, it is the institution and its methodology which is most objectionable. If asylum standards are to be narrowed, they should be done so expressly and by the legislative branch, entrusted with the power to set those standards.[192] For the Court to assume that role is to undermine its very legitimacy.[193]

Only the legislative branch provides the requisite forum where all of the issues surrounding asylum modification are subject to the political process. This political process is essential because the credibility of our immigration position, domestically and internationally, hinges upon the extent to which there is representation of all Americans' interests.[194]

D. The Impact of Elias-Zacarias *on Asylum Determinations*

While the majority intended its political opinion distinction to delineate political asylum's scope to provide uniformity in application, it is arbitrary, divisive, and necessarily leads to inequitable results. It does so because it is built on two fundamentally erroneous assumptions that (i) persecution is sufficiently rational that the persecutor's and victim's beliefs are actually distinguishable and (ii) that political persecution is always directed at the victim's beliefs. These are questionable assumptions which promote uncer-

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190. *See* Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953) (The Court has long recognized the "power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.").

191. Elizabeth Midgley, *Comings and Goings in U.S. Immigration Policy, in* THE UNAVOIDABLE ISSUE, U.S. IMMIGRATION POLICY IN THE 1980S 41, 41-69 (Demetrios G. Papademetriou & Mark J. Miller eds., 1983); MICHAEL C. LEMAY, FROM OPEN DOOR TO DUTCH DOOR 1-19 (1987).

192. Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) ("[T]he power over aliens is of a political character and therefore subject only to narrow judicial review."); Galvan v. Press, 347 U.S. 522, 529 (1954) (While "much could be said for the view" that due process limits congressional power over immigrants to some degree, "the formulation of these policies is entrusted exclusively to Congress" and this is "firmly embedded in the legislative and judicial tissues of our body politic . . . .").

193. Galvan v. Press, 347 U.S. at 529.

194. *See* Mark J. Miller & Demetrios G. Papademetriou, *Immigration Reform: The United States and Western Europe Compared, in* THE UNAVOIDABLE ISSUE, U.S. IMMIGRATION POLICY IN THE 1980S, 271, 292-95 (Demetrios G. Papademetriou & Mark J. Miller eds., 1983).

tainty in an area of immigration law which sorely needs to promote consistency and fairness.

These assumptions are questionable because persecutors seek not to eliminate their victims' political beliefs but to eliminate their own perception of those beliefs. Contrary to Justice Scalia's assertion, millions of Jews suffered not because of *their* beliefs, but because of their *persecutors'* erroneous beliefs about who they were, what they thought, and what they practiced.[195] The questionable assumptions on which the *Elias-Zacarias* decision hinges aggravate already uncertain circumstances, within already uncertain standards, because of the familiar theme on which political asylum is premised—the mitigation of an international immigration crisis resulting from governments' arbitrary denial of basic human rights. This theme is best illustrated and most compelling in the case of Guatemalan political refugees.

Guatemala is a useful case study because it illustrates the complex interrelationship between the three undercurrents of political opinion: government, subversive politics, and political oppression. Guatemala illustrates why the majority's distinctions between the political beliefs of the persecutor and the victim are inherently artificial dichotomies.

Guatemala typifies political turmoil. Amnesty International estimates that, from the early to mid-1980s alone, some 50,000 Guatemalans were killed.[196] Since 1980, roughly one out of eight Guatemalan citizens has fled their home into exile.[197] The Inter-American Commission on Human Rights reported in 1991 that during the first quarter of that year, there were 585 complaints of "extrajudicial executions" and 113 *desaparecidos*.[198] More than

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195. LENI YAHIL, THE HOLOCAUST: THE FATE OF EUROPEAN JEWRY 1932-1945, 34-52 (1990). "Hatred of the Jews is not a function of their behavior or deeds; it is an entirely irrational phenomenon and, thus, not given to explication or rectification by means of reason." *Id.* at 34.

196. James North, *Fiction Illuminates Brutal Facts On Central America*, CHI. TRIB., Jan. 20, 1992, at C3. The Organization of American States (OAS) reported that there were 700 unresolved cases of disappearances in the first six months of 1988 and 621 confirmed political assassinations between January and September of that year. Debbie Sontag, *Flare-Up of Violence Troubles Guatemalans*, MIAMI HERALD, Mar. 30, 1989, at A17.

197. McDonnell, *supra* note 186. *See* AMERICAS WATCH COMMITTEE, *supra* note 186; *see also*, AMERICAS WATCH COMMITTEE, GUATEMALA: A NATION OF PRISONERS 1-5 (1984).

198. OAS INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 1991 ANNUAL REPORT 206 (1992) (Office of the Archbishop of Guatemala reported 575 extrajudicial executions, 236 murders, and 144 forced disappearances).

half seek asylum from Mexico and the United States.[199] The Americas Watch and the Washington-based Council on Hemispheric Affairs categorize Guatemala as this hemisphere's worst human rights violator.[200]

Yet Guatemalans, and refugees from other countries whose governments are considered "emerging democracies,"[201] have a less than five percent rate of approval under political asylum.[202] Applicants from countries with whom the United States is at odds, by contrast, have a greater than thirty percent approval rate.[203] The *Elias-Zacarias* "political opinion" dichotomy raises an already difficult hurdle. The majority's opinion is unfortunate but accurate testimony to the quintessential American perspective. While failing to expressly apply American political opinion reasoning to the *Elias-Zacarias* case, the majority, nevertheless, unwittingly predicates their persecutor-victim political opinion dichotomy on American assumptions about one of our most unique and jealously protected rights—our freedom to express. Because the majority of Guatemalans, unlike Americans, are indigenous, illiterate, and politically powerless, they *must survive* by being imperceptible.[204] Their political anonymity is their linchpin to subsistence. Most likely to be politically persecuted, the disenfranchised are the least willing to express *any* opinion, and, today, the least likely to meet this Court's narrow political opinion asylum standard.

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199. McDonnell, *supra* note 186.

200. AMERICAS WATCH COMMITTEE, *supra* note 186; Sontag, *supra* note 196.

201. The U.S. State Department correctly describes Guatemala as an "emerging democracy." Sontag, *supra* note 196.

202. R.A. Zaldivar, *House of God Collide with Law in Aiding Aliens Fugitives Find Safety, But Price May Be High*, MIAMI HERALD, Oct. 21, 1985, at A1.

203. *See id.* (citing acceptance rates of 2.5 percent for Salvadorans, 12 percent for Nicaraguans, 33 percent for Poles, 41 percent for Afghans, and 25 percent for all nationalities); *see also* U.S. Dep't Justice, Immigration and Naturalization Service, *Asylum Cases Filed with District Director by Selected Countries Fiscal Year 1984*, 33 INS REPORTER 10 (1985) (statistics on grants of asylum for fiscal year 1984).

204. McDonnell, *supra* note 186; AMERICAS WATCH COMMITTEE, *supra* note 186, at 7. The principal casualties of the conflict in Guatemala and the government's counterinsurgency campaign "have been the lives, cultures, and traditions of Guatemala's Indians. One of the 23 linguistic groups, the Ixil of El Quiche, has been all but wiped out as a cultural entity." *Id.*; Marco Antonio Sagastume, *On Human Rights in Guatemala, in* GUATEMALA: TYRANNY ON TRIAL 73 (Susanne Jonas et al. eds. & trans., 1984); *see also*, AMNESTY INTERNATIONAL, GUATEMALA: THE HUMAN RIGHTS RECORD 1-3, 53-61, 128-41 (1987).

VI. CONCLUSION

The *Elias-Zacarias* decision marks a withdrawal from *Cardoza-Fonseca*'s political asylum standard. As Justice Stevens argues, the rigid plain meaning methodology used to derive a narrow construction of political opinion effectively recreates an evidentiary standard for asylum indistinguishable from that of withholding of deportation. Thus, *Elias-Zacarias* limits the impact of *Cardoza-Fonseca* and frustrates the purpose of the 1980 Refugee Act.

As a nation, we are the progeny of immigrants and necessarily the beneficiaries of immigration.[205] Yet we are obliged to balance these interests against our interests in protecting the rights of our current citizens. Thus, efforts of a uniquely immigrant society to engage in "gatekeeping" create a most fundamental paradox.

United States "asylum" raises complex, emotionally-charged issues.[206] Yet, a democracy purportedly rooted in equality, law, and order must apply ideologically-neutral asylum policies or risk great social costs.[207] That political asylum standards must be equitable and uniform does not spontaneously make them so.[208] As a society, we must begin to ask the difficult, less-than-politically correct questions. As members of an international community, we must do so with a conscious distinction between immigration and political

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205. When the Swedish Academy of Sciences announced its Nobel Prize winners in 1984, of the four American winners, three were immigrants: Henry Taub, Chemist; S. Chandras Ekhar, Physicist; and Gerard Debreu, Economist. *See* Laurence H. Fuchs, *The Search for a Sound Immigration Policy: A Personal View, in* CLAMOR AT THE GATES 18, 319 n.1 (Nathan Glazer ed., 1985). "This kept with the pattern that more than 30 percent of all living American Nobel Prize winners [are] immigrants, as are 25 percent of the members of the American National Academy of Science." *Id.* at 18.

206. *Id.* at 18.

207. *See* Miller & Papademetriou, *supra* note 194:

> At the bottom of the debate on numbers, limits, and the "desirable" ethnic composition of migrant flows to any advanced industrial democracy is a basic concern with the future ethnic, cultural, and linguistic profile of the society in question. Although American concern over this is often couched in perfectly neutral terms, the fear is of an unduly Hispanic United States fifty or one hundred years from now.

Id. at 292.

> To echo the 150-year old predictions of Alexis de Tocqueville and to paraphrase Gunnar Myrdal . . ., the greatest threat to national unity—the continuing "American Dilemma"—is the pervasive and historical racism of American society. The myth of cultural pluralism usually works well only when race does not intrude as a variable.

Id. at 295.

208. *See generally* Fuchs, *supra* note 205, at 20.

asylum. Until then, political asylum remains an enduring issue in search of culturally durable standards. Its resolution rests in the legislative branch and the will of the American people, not judicial textualism and syntax.

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