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Perlera-Escobar v. Executive Office For Immigration: Political Asylum and the Question of Neutrality

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PERLERA-ESCOBAR v. EXECUTIVE OFFICE FOR IMMIGRATION: POLITICAL ASYLUM AND THE QUESTION OF NEUTRALITY

I. INTRODUCTION

In its recent decision denying asylum to an alien from El Salvador,¹ the Court of Appeals for the Eleventh Circuit (Eleventh Circuit) has raised an important question about the limits of the political asylum doctrine in the United States: namely, whether neutrality constitutes a political opinion for the purposes of political asylum. Under the Refugee Act of 1980 (Refugee Act),² aliens are entitled to asylum³ if such aliens can demonstrate that they possess a well-founded fear of persecution in their native country, including persecution based upon their

1. *Perlera-Escobar v. Executive Office For Immigration (EOIR)*, 894 F.2d 1292 (11th Cir. 1990).

2. Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified at 8 U.S.C. §§ 1101(a)(42), 1157-1159, 1253(h), 1521-1524 (1982)) [hereinafter Refugee Act] (amending the Immigration and Nationality Act, ch. 477, §§ 101(a), 207, 243(h), 66 Stat. 163, 166, 181, 214 (1952)) [hereinafter Immigration Act]. See Linda D. Bevis, Note, "*Political Opinions*" of Refugees: *Interpreting International Sources*, 63 WASH. L. REV. 395 (1988) [hereinafter Bevis].

3. Section 208(a) of the Refugee Act (as codified in 8 U.S.C. § 1158(a)), gives the United States Attorney General the discretion to grant asylum to any alien who qualifies as a refugee. A refugee is defined as: "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion." This definition appears in § 101(a) of the Refugee Act (codified in 8 U.S.C. § 1101(a)(42)(A) (1982)). Section 243(h) of the Refugee Act (codified in 8 U.S.C. § 1253(h)), requires the Attorney General to withhold the deportation of any alien whose life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. See Jeffrey L. Romig, Note, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PRRt. L. REV. 295 (1985) [hereinafter Romig].

Asylum differs from withholding of deportation in several respects. First, a successful asylum applicant obtains a secure status, unlike an alien who is successful under section 243(h) (withholding of deportation), who may be deported to his or her native country if the likelihood of persecution subsides, or who may be deported to a country where persecution is less likely. Second, a withholding of deportation hearing can be conducted without a State Department advisory opinion, while an asylum hearing cannot. Richard K. Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?*, 45 MD. L. REV. 91, 106 (1986) [hereinafter Preston]. Finally, the standard of proof is higher in withholding of deportation cases than in asylum cases because withholding is mandatory for qualified applicants, whereas asylum is discretionary. See *infra* note 4.

political opinions.⁴

In *Perlera-Escobar v. Executive Office For Immigration*, the court limits the scope of asylum relief based on persecution for political opinion by holding that neutrality does not constitute a political opinion for the purposes of political asylum proceedings.⁵ Thus, the Eleventh Circuit will deny relief to aliens who claim to fear persecution for their political opinions if such aliens have never articulated a political opinion other than one of neutrality.⁶ As a result, any aliens who seek asylum in the Eleventh Circuit based on fear of political persecution must demonstrate both that their fear is well-founded and that they have a political opinion other than that of political neutrality.⁷

The question of whether neutrality constitutes a political opinion for the purposes of asylum is one of first impression in the Eleventh Circuit. In *Perlera-Escobar*, the Eleventh Circuit denied asylum to a native of El Salvador who had once been affiliated with a guerrilla group but who subsequently claimed to be neutral in the Salvadoran civil war.⁸ In its decision, the court specifically noted that the Eleventh Circuit has "not adopted" the position of the Court of Appeals for the Ninth Circuit (Ninth Circuit), which has held that neutrality does constitute a political opinion for the purposes of political asylum.⁹

Perlera-Escobar is an important decision because an enormous number of aliens illegally enter this country each year fleeing from countries whose state-of-affairs is both unstable and very dangerous.¹⁰ Some of these aliens, including Mr. Escobar,

4. The standard of proof is higher for withholding of deportation than for asylum. An applicant for asylum must demonstrate a well-founded fear of persecution, which requirement can, under some circumstances, be met with as little as a 10% chance of persecution. An applicant for withholding of deportation, on the other hand, must demonstrate a clear probability of persecution. In other words, he or she must demonstrate that persecution is more likely than not to occur. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (definition of sufficient evidence to meet burden of proof). For an in-depth, pre-*Cardoza-Fonseca*, analysis of the burden of proof issue, 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 (1986) [hereinafter Sautman].

5. 894 F.2d 1292, 1298 (11th Cir. 1990). See *infra* note 149, regarding the definition of neutrality.

6. *Perlera-Escobar*, 894 F.2d at 1298.

7. *Id.*

8. *Id.* at 1293-94.

9. *Id.* at 1297 n.4.

10. The number of applications for asylum filed each year far exceeds the original expectations of the Immigration and Nationalization Service (INS). After the Refugee

are convicted of felonies in the United States and thus do not merit asylum here. However, many other aliens, who are not criminals, may be able to demonstrate that they are victims of persecution resulting from a civil war in which they are neutral. The decision in *Perlera-Escobar* that neutrality does not constitute a political opinion means almost certain deportation for such people.

In reaching its conclusion, the Eleventh Circuit expressed doubt as to whether the courts are qualified to determine what constitutes a political opinion.¹¹ Historically, the United States asylum policy has been affected by its foreign policy needs at a given time.¹² As a result, the Eleventh Circuit has suggested that perhaps determination of what constitutes a political opinion is an exercise that is outside the competence of the judiciary and would best be left to the "political" branches of government.¹³

This Comment will address several aspects of *Perlera-Escobar*. Part IV will argue that the courts are well qualified to determine what constitutes a political opinion for the purposes of political asylum. Part V will argue that the Eleventh Circuit was incorrect in determining that neutrality does not constitute a political opinion for the purposes of political asylum. It will also argue that the Ninth Circuit is correct in requiring that an alien's opinion of neutrality must have been articulated in his or her native country, because this ensures that the alien's neutrality is the actual basis for the persecution. Additionally, Part V will recommend that the statutory grant of discretion should be exercised to deny asylum to any alien who is convicted of a felony, despite the existence of a well-founded fear of persecution. Finally, Part VI will argue that the Eleventh Circuit was incorrect in concluding that the guerrillas did not impute an "incorrect" political opinion to Mr. Escobar.

II. BACKGROUND

Even though persecution on account of political opinion is a

Act was passed, INS estimated that only 5,000 applications would be filed each year. Instead, 16 months after the Refugee Act took effect, 53,000 applications had been filed. In 1985 alone, over 16,622 applications were filed. By the end of 1985, 126,000 other applications were still pending. Preston, *supra* note 3, at 91-93. Thus, it is clear that the standards developed by the courts for asylum adjudication are very important.

11. *Perlera-Escobar*, 894 F.2d at 1299.

12. See *infra* notes 89-93 and accompanying text.

13. *Perlera-Escobar*, 894 F.2d at 1299.

statutory basis for asylum, there is currently no universally accepted definition of political opinion for asylum purposes in the United States. In enacting the Refugee Act, one of Congress' main purposes was to conform United States refugee law to the United Nations 1967 Protocol Relating to the Status of Refugees,¹⁴ to which the United States acceded in 1968.¹⁵ The Congressional definition of refugee is therefore virtually identical to that developed by the United Nations.¹⁶ In pertinent part the Refugee Act defines a refugee as someone who has fled his or her home country "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion"¹⁷

Unfortunately, the Refugee Act does not define what constitutes a political opinion for the purposes of asylum. As a result, the courts that have encountered this issue have had to formulate their own definition. The courts have been aided in asylum adjudication by the 1979 publication of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status (Handbook)*.¹⁸ However, since the Handbook does not explicitly define the term "political

14. United Nations Protocol Relating to the Status of Refugees (1967 Protocol), Jan. 31, 1967, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

15. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987); *Arteaga v. INS*, 836 F.2d 1227 (9th Cir. 1988); see also *Bolanos-Hernandez v. INS*, 749 F.2d 1316 (9th Cir. 1984).

16. *Cardoza-Fonseca*, 480 U.S. at 424.

17. See *supra* note 3 for the entire definition of refugee.

18. *Office of the United Nations High Commissioner For Refugees, Handbook on Procedures and Criteria for Determining Refugee Status* (Sept. 1979) [hereinafter *Handbook*]. The Handbook was published in 1979 as a guide to the governments that acceded to the 1951 Refugee Convention or 1967 Protocol in determining refugee status. For its analysis of the 1967 Protocol definition of a refugee, it relies on the experience of the United Nations High Commissioner for Refugees, which includes literature about refugees and current knowledge of national practices regarding refugees. See *Bevis, supra* note 2, at 399. Thus, the Handbook offers further definition to refugee status based on persecution for political opinion.

According to the Handbook, while persecution for political opinion implies that an alien holds an opinion that either has been expressed or has come to the attention of the authorities, there may be situations in which the alien has not expressed his or her opinions. *Handbook* at n.82. An alien is not required to show that the persecuting parties in his or her home country knew of his or her opinions. *Id.* at n.83. The mere fact of refusing to avail himself or herself of the protection of his or her government, or of refusing to return, might reveal the alien's true state of mind and give rise to an inference of fear of persecution. *Id.*

While the Handbook does not have the force of law and is not a binding authority, the Supreme Court has recognized its usefulness as a guide in construing the 1967 Protocol to which Congress has attempted to conform. See *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22.

opinion," the courts have reached differing conclusions. Thus, a neutral alien's chances of receiving asylum depends as much on which circuit hears the case as on the probability of persecution.

The Ninth Circuit has concluded that neutrality constitutes a valid political opinion for political asylum purposes.¹⁹ This is an important decision because a large majority of the applications for asylum are decided in the Ninth Circuit.²⁰ The court first reached this conclusion in 1984 in *Bolanos-Hernandez v. INS*.²¹ In *Bolanos-Hernandez*, the Ninth Circuit held that "choosing to remain neutral is no less a political decision than is choosing to affiliate with a particular faction Just as a nation's decision to remain neutral is a political one, so is an individual's."²²

In *Bolanos-Hernandez*, the petitioner had severed his ties to right-wing organizations in El Salvador, and had subsequently refused to join the guerrillas despite their threats to his life.²³ Bolanos-Hernandez testified that he desired to "remain neutral and not be affiliated with any particular group."²⁴

After recognizing that Bolanos-Hernandez had a sufficient reason to fear harm, the Ninth Circuit turned to the issue of whether such harm would be on account of Bolanos' position of neutrality and whether this would amount to persecution on account of political opinion.²⁵ In concluding that Bolanos's neutrality was a political opinion for which he would be persecuted, the court stated that, "[w]hen a person is aware of contending political forces and affirmatively chooses not to join any faction, that choice is a political one."²⁶ The court added that requiring someone to identify with one of two dominant factions in order to possess a political opinion, when many people might be op-

19. *Bolanos-Hernandez v. INS*, 749 F.2d 1316, 1325, 1326 (9th Cir. 1984). See also *Arteaga v. INS*, 836 F.2d 1227 (9th Cir. 1988); *Turcios v. INS*, 821 F.2d 1396 (9th Cir. 1987).

20. A WESTLAW search revealed 38 recent asylum cases in which the political opinion question was addressed. Twenty-seven of these cases were reviewed in the Ninth Circuit. There is no immediately apparent reason for this practice, since both the Court of Appeals for the Fifth Circuit and the Court of Appeals for the Eleventh Circuit are as proximate as the Court of Appeals for the Ninth Circuit to Latin America and the Caribbean.

21. 749 F.2d 1316 (9th Cir. 1984), *amended*, March 1, 1985.

22. *Id.* at 1324, 1325.

23. *Id.* at 1318.

24. *Id.* at 1319.

25. *Id.* at 1324.

26. *Id.* at 1325.

posed to the policies of both groups, would defeat one of the main objectives of the Refugee Act, which is protect anyone who suffers from persecution, regardless of their ideology.²⁷

The Ninth Circuit's position that neutrality is a valid political opinion has continued to evolve in the years following *Bolanos-Hernandez*.²⁸ The Ninth Circuit now requires aliens to demonstrate that they have affirmatively decided to remain neutral, and that this position has been articulated in some manner.²⁹

The position of the Court of Appeals for the First Circuit (First Circuit) is that in appropriate circumstances, neutrality may fall within the scope of political opinion under the Refugee Act.³⁰ In order to fall within the statute's terms, the alien must demonstrate that a reasonable person would fear one of the following: (1) that a group with the power to persecute the alien intends to do so specifically because the group dislikes neutrals; (2) that such a group intends to persecute the alien for not accepting its political point of view; or (3) that one or more such groups intend to persecute the alien because each (incorrectly) thinks the alien holds the political views of the other side.³¹

Realistically, the chances are slim that the First Circuit will grant asylum to an alien whose fear of persecution is based on a position of neutrality. On its face, the test developed by the First Circuit appears to be inclined toward granting asylum to neutrals who can establish a well-founded fear of persecution based on their neutrality. However, while recognizing that neu-

27. *Id.*

28. See *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985) ("irrelevant whether a victim's political view is neutrality . . . or disapproval of the acts or opinions of the [persecutor]"); *Arteaga v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985) (refugee not required to prove an allegiance to a particular political faction in order to establish a political opinion); *Del Valle v. INS*, 776 F.2d 1407, 1413-14 (9th Cir. 1985) (alien's conduct may reflect his or her neutral convictions and articulate a political opinion); *Vides-Vides v. INS*, 836 F.2d 1227 (9th Cir. 1988) (resistance by Salvadoran to guerrilla recruitment expressed unwillingness to support the guerrilla cause and the adoption of a neutral position toward both sides in the Salvadoran civil war); *Canas-Segovia v. INS*, 902 F.2d 717, 728 (9th Cir. 1990) ("[a]n expression of political neutrality is no less an expression of political opinion than is the decision to affiliate with an organized political faction.")

29. Also, that he or she has received a threat or would be singled out for persecution because of the opinion of neutrality. See *supra* note 19.

30. *Novoa-Umania v. INS*, 896 F.2d 1, 3 (1st Cir. 1990).

31. *Id.* The First Circuit further requires, in accordance with the Board of Immigration Appeals (BIA) requirements, that the alien has articulated or affirmatively made a decision to remain neutral. *Umanzor-Alvarado v. INS*, 896 F.2d 14, 15 (1st Cir. 1990).

trality may constitute a political opinion in some situations, the First Circuit has also indicated that it will accord great respect to the findings of the Board of Immigration Appeals (BIA) in each case.³² The BIA has made it clear that it will not recognize neutrality as a political opinion in cases outside the Ninth Circuit.³³ Thus, it is likely that an alien, even one with a stronger case than Mr. Escobar, has little hope of receiving asylum in the First Circuit based on a fear of persecution on account of political neutrality.

The Court of Appeals for the Fourth Circuit (Fourth Circuit) has not expressed a definite opinion on whether neutrality constitutes a political opinion. However, two recent cases have indicated that the Fourth Circuit is reluctant to grant asylum to an alien who fears persecution based solely on a position of political neutrality.³⁴

There are several problems which face the courts. First, while there may be situations in which it is possible for a person to exist as a political neutral, this will not be true in all cases. In situations such as that in El Salvador, it may be impossible to exist as a neutral since both sides are aggressively vying for civilian support.³⁵ Situations like that in El Salvador are especially troubling because the civilian populations are bearing much of the brunt of the fighting.³⁶ In addressing such situations, the Eleventh Circuit has expressed its concern whether "the political implications underlying the alien's fear rise to the level of 'political opinion' within the meaning of the statute or whether those conditions constitute the type of civil strife outside the intended reach of the statute."³⁷ In other words, the pertinent issue is whether the harm the alien fears is the same as that which everyone else in the country fears.

Even for courts that believe neutrality is a valid political

32. *Umanzor-Alvarado*, 896 F.2d at 14; *Novoa-Umania v. INS*, 896 F.2d at 3.

33. The BIA has indicated that it will limit the applicability of *Bolanos-Hernandez* to cases arising in the Ninth Circuit, at least in cases where the alien's opinion of neutrality was expressed during his or her deportation hearing in the United States. See Brief for Respondent at 33, *Perlera-Escobar v. EOIR*, 894 F.2d 1292 (11th Cir. 1990) (No. 89-5064). See also *Matter of Vigil*, Int. Dec. 3050 at 6-7 (BIA March 17, 1988).

34. See *Figeroa v. U.S. INS*, 886 F.2d 76 (4th Cir. 1989); *Cruz-Lopez v. INS*, 802 F.2d 1518 (4th Cir. 1986).

35. See *Castaneda-Hernandez v. INS*, 826 F.2d 1526, 1528 (6th Cir. 1987).

36. Between 1980 and 1985, government security forces and right-wing death squads alone killed approximately 40,000 noncombatants. To this total must be added the untold number killed by the guerrillas. See Romig, *supra* note 3, at 300.

37. *Campos-Guardado v. INS*, 809 F.2d 285, 290 (5th Cir. 1987).

opinion, there are other issues which must be addressed. For instance, the courts must make clear what actions or words sufficiently articulate the alien's neutrality. Additionally, there will be situations where either or both sides will impute an incorrect political opinion to neutral aliens and will attempt to persecute them for it. Finally, if neutrality is a legitimate political opinion for asylum purposes, the United States could find itself overwhelmed by people fleeing their countries' problems, including some, like Mr. Escobar, who will seek asylum in the United States despite committing serious crimes here.

III. *PERLERA-ESCOBAR v. EXECUTIVE OFFICE FOR IMMIGRATION*

A. *Facts*

Jose Adalberto Perlera-Escobar was a twenty-six year old native of a small town in El Salvador.³⁸ The civil war in El Salvador reached Escobar around 1980 when a group of guerrillas entered his town, seeking food and propagandizing.³⁹ One of the guerrillas was a childhood friend of Escobar's and asked him to join them, but Escobar refused.⁴⁰ The guerrilla presence in the town prompted the arrival of a paramilitary organization known as the Esquadron de la Muerte (Death Squad).⁴¹ The Death Squad commonly extorted money from the townspeople and branded anyone who was uncooperative as a guerrilla collaborator.⁴²

In February, 1983, a different death squad attacked and wounded several of Escobar's relatives while he was out of town.⁴³ Escobar's relatives moved to San Salvador but Escobar

38. *Perlera-Escobar v. Executive Office For Immigration*, 894 F.2d 1292, 1293, 1294 (11th Cir. 1990).

39. Petitioner's Brief-in-Chief at 5, *Perlera-Escobar* (No. 89-5064).

40. *Perlera-Escobar*, 894 F.2d at 1293-94.

41. *Id.* at 1294.

42. *Id.* Escobar testified that the death squads killed many people in the town including both his cousin and his step-father's nephew, but the local army commander never took any action. See Petitioner's Brief-in-Chief at 6, *Perlera-Escobar* (No. 89-5064).

43. *Perlera-Escobar*, 894 F.2d at 1294. Escobar's grandparents and aunt had encountered problems with a death squad from a nearby town. In order to resolve their dispute, a deal was struck between Escobar's grandfather and the death squad, whereby Escobar's 14 year old aunt was exchanged for a dog, a gun, and a woman who was given to Escobar's uncle. However, the deal broke down in February 1983, leading the guerrillas to attack Escobar's relatives. *Id.*

decided to remain.⁴⁴ About two months later, members of the same death squad returned to the town.⁴⁵ After learning that Escobar was related to the family whom they had attacked, a member of the death squad told Escobar that the death squad would be looking for him in town.⁴⁶

Fearful of being kidnapped, Escobar sought the help of the childhood friend who had tried to recruit him for the guerrillas on several previous occasions.⁴⁷ This friend brought Escobar to a guerrilla camp where he was forcibly trained and "incorporated" into the guerrilla organization.⁴⁸ While Escobar was with them, the guerrillas executed two of their members who were accused of trying to escape.⁴⁹ Fearing for his life, Escobar fought with the guerrillas against the government for nine months.⁵⁰ During that time his involvement with the guerrillas became known to the government.⁵¹

In February, 1984, Escobar deserted the guerrillas and fled to San Salvador.⁵² Soon after, he encountered two guerrillas who told him that the guerrilla commander had issued orders for his arrest.⁵³ Additionally, Escobar testified that a cousin informed him that Escobar was being sought by the death squad from his home town.⁵⁴

In response, Escobar fled El Salvador and within a year he illegally entered the United States.⁵⁵ Shortly thereafter, he was informed by relatives that both the guerrillas and the death squads were looking for him.⁵⁶

In February, 1987, Escobar was convicted of three third degree felonies.⁵⁷ Facing deportation, Escobar applied for asylum,

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* During one battle, his group was photographed by journalists. Soon after, an army plane scattered leaflets over San Salvador with photos of the guerrillas, including a picture of Escobar. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* After fleeing El Salvador, Escobar arrived in Mexico, where he stayed for ten months and was granted safe haven. *Id.*

56. *Id.*

57. *Id.* at 1293. Escobar was convicted and sentenced in the Circuit Court of Gadsden County, Florida, on two counts of burglary and one count of attempted burglary. At

claiming that he would be killed by either the military or the guerrillas if he returned to El Salvador.⁵⁸ His fear of the guerrillas was based on his desertion and the fact that the guerrillas were searching for him.⁵⁹ Escobar also feared that the death squad officer had forwarded his name to the military, and that the military would in turn forward it to Salvadoran customs officials.⁶⁰ Thus, Escobar feared that he would be arrested and killed by the government if he returned to the airport in San Salvador.⁶¹

Escobar testified that he was politically neutral, saying that he did not "want to belong into [sic] the guerrilla, nor the army because I don't believe it's a just cause when fighting against my brothers."⁶² At the deportation hearing, the Immigration Judge (IJ) found Escobar to be deportable under sections 241(a)(2) and 241(a)(4) of the Immigration and Nationality Act.⁶³ However, the IJ also concluded that Escobar, though politically neutral, had a well-founded fear of persecution from both sides in the Salvadoran civil war on account of an incorrectly imputed political opinion.⁶⁴

The IJ concluded that the Salvadoran Government would seek to persecute Escobar for the political opinion he demonstrated by joining the guerrillas.⁶⁵ The IJ further concluded that the guerrillas would want to punish Escobar for deserting them and to prevent him from revealing valuable secrets about

his deportation hearing, he admitted that he had entered the country without inspection and that he had committed a crime involving moral turpitude, and was thus deportable. *Id.* See § 241(a)(4), Immigration and Nationality Act (as codified in 8 U.S.C. § 1251(a)(4) — Crimes involving moral turpitude).

58. *Perlera-Escobar*, 894 F.2d at 1293, 1294.

59. Petitioner's Brief-in-Chief at 9, *Perlera-Escobar* (No. 89-5064).

60. *Id.* at 10.

61. *Perlera-Escobar*, 894 F.2d at 1294 n.1.

62. *Id.* at 1294.

63. *Id.* at 1294, 1295.

64. *Id.* at 1295. The Immigration Judge (IJ) also concluded that Escobar had demonstrated a well-founded fear of persecution based on membership in a particular social group (the guerrillas). However, since the question of whether a former guerrilla is a member of a particular social group for purposes of asylum or withholding of deportation was not presented to the BIA, the Eleventh Circuit determined that it did not have jurisdiction to decide that question. *Id.* at 1295-96.

65. Decision of the Board of Immigration Appeals, *In re: Jose Adalberto Perlera-Escobar* [hereinafter BIA Decision] at 2. The IJ concluded that the government would be aware of Escobar's guerrilla activities since the residents of his small town knew that he had joined the guerrillas. Thus, the IJ found that, if returned, Escobar could be in constant danger of being jailed or summarily executed by the government or individual government sympathizers. *Id.*

them.⁶⁶

Despite these conclusions, the IJ exercised his discretion and denied the application for asylum.⁶⁷ This decision was based on Escobar's criminal record in the United States, his use of a false social security card and an alias, his illegal entry into the United States despite being granted safe haven in Mexico, and the fact that Escobar only applied for asylum after being apprehended by the Immigration and Naturalization Service (INS).⁶⁸ However, the IJ granted Escobar's application for withholding of deportation⁶⁹ and the INS appealed to the BIA.

After carefully reviewing the facts, the BIA concluded that Escobar had not carried his burden of proof for asylum or withholding of deportation.⁷⁰ Turning first to his fear of the guerrillas, the BIA concluded that Escobar failed to demonstrate a well-founded fear of persecution from the guerrillas based on his political opinion.⁷¹ The BIA relied on Escobar's testimony that even though he claimed he was politically neutral he had never "openly advocated" his neutrality and, thus, the guerrillas' motivation for seeking Escobar would be to punish him for deserting, not to persecute him for his political opinion.⁷²

The BIA next determined that if Escobar were arrested by the government it would not be on account of political opinion, since, once again, he had never "openly advocated his neutrality."⁷³ Thus, any retribution from a particular death squad could not be on account of Escobar's political opinion.⁷⁴

66. *Perlera-Escobar*, 894 F.2d at 1295.

67. *Id.*

68. *Id.*

69. See discussion of distinction between asylum and withholding of deportation, *supra* note 3.

70. BIA Decision, *supra* note 65, at 8, 12.

71. BIA Decision, *supra* note 65, at 11.

72. BIA Decision, *supra* note 65, at 9-10.

73. BIA Decision, *supra* note 65, at 11. The BIA also asserted that the government of El Salvador, as a duly constituted and functioning government, has a legitimate and internationally recognized right to punish anyone it determines is a guerrilla. *Id.*

74. BIA Decision, *supra* note 65, at 11. Additionally, the BIA clarified its position regarding civil wars such as that in El Salvador. The BIA stated that while such conflicts are undoubtedly brutal, "the harm that may result incidentally from behavior directed at overthrowing or preventing the overthrow of a government, through acts of warfare and other violence endemic to civil wars, is not persecution, even though such acts are in furtherance of political goals." *Id.* at 12.

B. Court of Appeals for the Eleventh Circuit

The Eleventh Circuit denied Escobar's application for asylum, concluding that he had not established a well-founded fear of persecution on account of political opinion.⁷⁶

The Eleventh Circuit indicated that, as a threshold matter, defining the scope of "political opinion" is a responsibility of the "political" branches of government, stating that "[w]hat constitutes political opinion under the Refugee Act is a political question which the courts are not especially qualified to decide."⁷⁶ In light of that belief, the Eleventh Circuit accorded a presumption of correctness to the BIA's position that neutrality does not constitute a political opinion for the purposes of political asylum.⁷⁷ The court also noted that the Eleventh Circuit has "not adopted" the Ninth Circuit's belief that political neutrality is a political opinion for the purposes of the Refugee Act.⁷⁸

The court denied Escobar's contention that his desertion from the guerrillas was an articulation of a statutorily recognized opinion of political neutrality and that he would be persecuted for this opinion.⁷⁹ The court relied on the BIA's position that, in the context of a civil war, a desire to remain neutral is not an expression of a political opinion.⁸⁰ More particularly, the court stated that any interest of the guerrillas in Escobar would not be based on what he thinks or believes, but would be based on their need to "preserve unity and order in their ranks and to ensure the secrecy of their operations."⁸¹ Thus, the court found that the BIA was reasonable in finding that the desire to discipline deserters is not persecution on account of political opinion within the meaning of the statute.⁸²

Additionally, the court concluded that Escobar had failed to show that either the guerrillas or the government had imputed a political opinion to him for which they would seek to persecute

75. *Perlera-Escobar v. EOIR*, 894 F.2d 1292, 1299 (11th Cir. 1990). The Eleventh Circuit also upheld the decision of the BIA to deny withholding of deportation. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1297 n.4. In doing so, the court noted the BIA's concern that adoption of the Ninth Circuit's position would defeat the purpose of the asylum statute by creating a "sinkhole that would swallow the rule." *Id.* at 1298.

79. *Id.* at 1298.

80. *Id.*

81. *Id.*

82. *Id.*

him.⁸³ Instead, any harm inflicted on Escobar by the government would be based on their desire to prosecute him for being “a traitor” and attacking the government, rather than on his political opinion, imputed or not.⁸⁴ Any harm inflicted by the guerrillas would be a result of their need to maintain discipline in their ranks by punishing deserters, as noted earlier.⁸⁵

In sum, the Eleventh Circuit held that the BIA was reasonable in concluding that neither the government nor the guerrillas had any political interest in Escobar. As such, he had failed to demonstrate a well-founded fear of persecution on account of political opinion.⁸⁶

IV. THE POLITICAL QUESTION DOCTRINE

A. Background

In its decision in *Perlera-Escobar*, the Eleventh Circuit expressed doubt about the competence of the courts to determine what constitutes a political opinion for asylum purposes.⁸⁷ In so doing, the court raised an important question about the adjudication of such applications: is the question of what constitutes a political opinion under the Refugee Act one that is beyond the competence of the courts and thus, better left to another branch of government. Statutorily, there is no doubt that these cases are within the courts’ jurisdiction.⁸⁸ Indeed, the Eleventh Circuit has been the only circuit to express doubt about the ability of the courts to decide what constitutes a political opinion.

Traditionally, aliens’ chances of receiving refugee status in the United States were dependent on their country or origin and United States foreign policy at the time.⁸⁹ Because a refugee is,

83. *Id.*

84. *Id.* at 1299.

85. *Id.* at 1298. However, the court pointedly noted that this was based on the specific facts at hand, and that they did not “categorically hold that a former guerrilla may never show persecution ‘on account of . . . political opinion.’” *Id.* at 1299. It was simply not the case for Escobar.

86. In its opinion, the court stated that it was explicitly declining to decide whether “no opinion” constitutes an opinion under the Refugee Act, concluding that “even assuming it does, Escobar never openly articulated his position, nor has he shown that the guerrillas pursued him because of his neutrality.” *Id.* In so stating, the court incorrectly substituted the phrase “no opinion” for “neutrality.” The two are not the same. See *infra* note 149 and accompanying text.

87. *Perlera-Escobar*, 894 F.2d at 1299.

88. See Immigration Act, *supra* note 2.

89. Romig, *supra* note 3, at 314. United States foreign policy needs at a given time

by definition, a victim of persecution,⁹⁰ according someone refugee status effectively accuses that person's native government of engaging in persecution.⁹¹ Acceptance of large numbers of refugees serves to magnify the extent of another state's misbehavior while displaying one's own humanitarianism.⁹² Thus, refugee policy was traditionally a tool with which the United States could further its foreign policy interests.⁹³

It follows that the United States was reluctant to accord refugee status to aliens from those states with whom the United States was allied, or had friendly relations.⁹⁴ The downside of such a policy was that many deserving refugees found themselves denied asylum, victims of United States foreign policy needs.⁹⁵

Ostensibly, the Refugee Act eradicated any geographical or "political" limits to asylum.⁹⁶ However, in the first five years after the Refugee Act was enacted, ninety-five percent of successful asylum applicants were from Communist countries.⁹⁷ Also, the executive branch continues to place unequal geographically-

were served by Congress, which was responsible for establishing standards for asylum eligibility. A revealing example is the language of the Immigration Act, which restricted refugee status to persons fleeing persecution from communist or communist-dominated countries or any Middle Eastern country. Through this policy, the United States could proclaim its own humanitarianism while condemning its Cold War enemy, the Soviet Union. *Id.*

90. *See supra* note 2.

91. Romig, *supra* note 3, at 314 n.117.

92. Romig, *supra* note 3, at 314 n.117.

93. Romig, *supra* note 3, at 314 n.117.

94. Romig, *supra* note 3, at 314 n.117.

95. Romig, *supra* note 3, at 314 n.117.

96. *See supra* note 3.

97. Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 459 (1985) [hereinafter Note, *Political Legitimacy*]. In 1983, Russian, Ethiopian, Afghan, and Romanian approval rates for asylum were 87%, 64%, 53%, and 44%, respectively, compared to Pakistani, Filipino, Salvadoran, Haitian, and Guatemalan rates of 12%, 11%, 3%, 2%, and 2% respectively. Sautman, *supra* note 4, at 484 n.4. One report indicates that from 1980 through July 1983, 76 Salvadorans were granted asylum and over 35,000 were deported. Note, *Political Legitimacy*, *supra*, at 459 n.67. Another report indicates that in 1984, 328 Salvadorans were granted asylum, while 13,045 were denied. Sautman, *supra* note 4, at 484 n.4. By 1989, little had changed for Latin Americans. In fiscal 1989, Romanian, Russian, Chinese, and Ethiopian approval rates for asylum were 90.9%, 81.6%, 80.9%, and 65.8%, respectively, compared to Haitian, Salvadoran, Guatemalan, and Honduran rates of 3.5%, 2.3%, 1.9%, and 1.3%, respectively. AMNESTY INTERNATIONAL USA, REASONABLE FEAR, HUMAN RIGHTS AND UNITED STATES REFUGEE POLICY 18 (1990). Such a policy can have serious consequences in light of the large numbers of people entering the United States from Central American and Caribbean countries, since reports have indicated that many unsuccessful applicants for asylum have been returned to their deaths. Note, *Political Legitimacy*, *supra*, at 459.

oriented ceilings on the number of overseas aliens who may receive refugee status.⁹⁸ These ceilings serve foreign policy by limiting the extent to which the United States is forced to recognize that persecution exists in a country with which the United States maintains friendly relations.⁹⁹ At the same time, setting a higher ceiling for refugees from "unfriendly" countries allows the United States to publicize that such countries engage in persecution.¹⁰⁰ These factors suggest that foreign policy goals continue to play a role in asylum adjudication.

The question, then, is whether political concerns are so prevalent in asylum applications based on persecution for political opinion as to place them beyond the competence of the judicial branch. Analysis of this question derives from the basic constitutional concept of separation of powers.¹⁰¹ Modern political question analysis is based on the Supreme Court's 1962 decision in *Baker v. Carr*,¹⁰² in which the Court emphasized the need to separate the appropriate spheres of federal judicial power from the appropriate spheres of federal executive and legislative power.¹⁰³ In *Baker*, the Court articulated six factors, any one of which may lead to dismissal of a case as a political question: (1) a textually demonstrable constitutional commitment of the issues to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing a lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various

98. See Romig, *supra* note 3, at 315. The Overseas Admissions Program for 1985 placed a ceiling on refugee admissions from all of Latin America and the Caribbean at 3,000, while allotting 50,000 admissions to East Asia and 9,000 to Eastern Europe and the Soviet Union. *Id.*

99. Romig, *supra* note 3, at 315.

100. Romig, *supra* note 3, at 315.

101. C. WRIGHT, LAW OF THE FEDERAL COURTS (1983) [hereinafter C. WRIGHT]. The political question doctrine goes as far back as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164-66 (1803), in which Chief Justice Marshall refused to entertain political questions designated by the Constitution to the Executive and Legislative branches of the government. See C. WRIGHT, *supra*, at 75.

102. 369 U.S. 186 (1962).

103. See C. WRIGHT, *supra* note 101, at 75.

departments on one question.¹⁰⁴

In subsequent years, the Court has found most issues to be within the judicial sphere under the *Baker* standard.¹⁰⁵ Accordingly, in light of Congressional delegation of such matters to the courts,¹⁰⁶ the adjudication of political asylum cases is also within the scope of the judicial branch's competence.

B. Applying *Baker* to *Perlera-Escobar*

Application of the *Baker* political question test to *Perlera-Escobar* reveals that the determination of what constitutes a political opinion for asylum purposes is properly within the adjudicatory authority of the judicial branch.

The most important factor in this analysis is the inclusion by Congress of persecution on account of political opinion as one of the five statutory bases for political asylum.¹⁰⁷ Such inclusion indicates that Congress, in enacting the statute, does not believe that political asylum standards are so essential to United States foreign policy that they should be handled by the political branches of the government. This position is consistent with the purposes of the Refugee Act, which was specifically designed to remove ideological bias from United States immigration law.¹⁰⁸

By writing the statute so as to include persecution on account of political opinion, Congress has manifested its intent to

104. See C. WRIGHT, *supra* note 101, at 75-76.

105. See *Powell v. McCormack*, 395 U.S. 486 (1969), where the Court held that the House of Representatives had erred in refusing to seat Congressman-elect Adam Clayton Powell, despite a specific provision in Article I, Section 5 of the United States Constitution that "Each House shall be the Judge of the . . . Qualifications of its own members." The Court concluded that since it was conceded that Powell met the specified qualifications and was not excluded for failing to meet them, his exclusion on other grounds was justiciable. C. WRIGHT, *supra* note 101, at 78. Indeed, one commentator has questioned whether the political question doctrine even exists. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976). But see *Gilligan v. Morgan*, 413 U.S. 1 (1973), where the Supreme Court found a textual commitment to Congress of the power to set standards by which the states are to train the militia, indicating that the political question doctrine is not dead yet. C. WRIGHT, *supra* note 101, at 81.

106. See Refugee Act, *supra* note 2.

107. See Refugee Act, *supra* note 2.

108. See Note, *Political Legitimacy*, *supra* note 97, at 458. See also Preston, *supra* note 3, at 100; Mark von Sternberg, *Emerging Bases of "Persecution" in American Refugee Law: Political Opinion and the Dilemma of Neutrality*, 13 SUFFOLK TRANSNAT'L L.J. 1, 8 (1989) [hereinafter von Sternberg]; *Bolanos-Hernandez v. INS*, 749 F.2d 1316, 1325 (9th Cir. 1985). The legislative history of the Refugee Act indicates that it "reflects one of the oldest themes in American history — welcoming homeless refugees to our shores. It gives statutory meaning to our national commitment to human rights and humanitarian concerns." von Sternberg, *supra*, at 8.

have such issues adjudicated in the courts. Logically, then, the judicial branch cannot be said to have offended the political branches of government when those branches have provided for judicial review of administrative decisions which are arguably political.¹⁰⁹ As one district court has noted, "one cannot be said to have usurped that which one has been told to do."¹¹⁰ Furthermore, by having political asylum applications reviewed in the courts, Congress has not ceded control of foreign policy;¹¹¹ it has simply recognized the ability of the courts to function as factfinders and to adjudicate issues of domestic law.¹¹²

None of the six factors enunciated in *Baker* are present in judicial application of the statute recognizing a well-founded fear of persecution for political opinion as a basis of asylum. The fourth factor is satisfied since the courts will be fulfilling the task assigned to them by the legislature. As such, there will be no lack of respect for coordinate branches of government or any departure from an already determined policy or political decision. Additionally, there is not likely to be any "embarrassment from multifarious pronouncements by various departments on one question,"¹¹³ since decisions will necessarily be based on the facts in a given case, and thus will warrant differing conclusions. Thus, the sixth factor of the *Baker* test is also satisfied.

The first, third, and fifth factors of the *Baker* test are satisfied by the Congressional grant to the judiciary of the power to adjudicate asylum claims. It is evident that this is not an area requiring nonjudicial discretion or unquestioning adherence to a previously established political decision. Indeed, adjudication of asylum claims is in itself adherence to the decisions of the political branches. Further, there is no problem with a textual consti-

109. *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 472-73 (S.D. Fla. 1980), *aff'd as modified*, 676 F.2d 1023 (5th Cir. 1982).

110. *Id.* at 473.

111. As mentioned earlier, it is clear that through quotas and other measures, the Executive and Legislative branches still exert considerable influence over the asylum field. *See supra* notes 97 and 98.

112. Indeed, a persuasive argument could be made that failure to adjudicate political opinion cases in the courts would reflect poorly on the motives of the United States in enacting asylum laws. Such a failure would imply that the United States was more interested in providing asylum in only those cases which serve its foreign policy needs rather than in all cases in which refugees meet the statutory requirements. Such a practice would clearly violate the language and spirit of the Refugee Act. *See Note, Political Legitimacy, supra* note 97, at 458.

113. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also supra* note 102 and accompanying text.

tutional commitment of this issue to a coordinate political department. While there is nothing in the Constitution explicitly designating which branch should determine the requirements for asylum, it is not likely to be disputed that this power originates outside the courts. However, Congress has only gone so far as to include political opinion as a basis for statutory relief from persecution and has not defined it further.¹¹⁴ Thus, Congress has left the task of defining the term to the courts. If this is unsatisfactory or unintentional, Congress has the ability to change the statute.

The most complicated prong of the *Baker* test with respect to asylum cases is the requirement of judicially discoverable and manageable standards for resolving the issue. One might argue that the courts are too detached from political situations to be able to determine what constitutes a political opinion under the Refugee Act. However, in deciding what constitutes a political opinion, the courts would be acting in their usual roles as adjudicators and reviewers. They would be required to render an opinion based on readily available facts about the conditions and events in a given case.

In formulating a standard for assessing what constitutes a political opinion in a given case, the courts should look first to the general conditions in the alien's native country. This will enable the courts to determine whether a given opinion is political in the context in which it exists.

The conditions under which a given alien exists are a primary factor in causing victims of persecution to forsake the protection of their homeland and to flee to a foreign country.¹¹⁵ Relevant to each case are political, social, and economic factors such as the structure of the government, judiciary and armed forces, and the relation of these groups to an alien's life.¹¹⁶ Also, an alien's personal and family background and information about his or her religious and work habits are relevant.¹¹⁷ Additionally, reports compiled by concerned organizations such as the Law-

114. See *supra* note 3.

115. See Bevis, *supra* note 2, at 409.

116. Bevis, *supra* note 2, at 409. See also, *Handbook*, *supra* note 18, at n.41. While the structure of the government, judiciary, and armed forces are political issues in many respects, it is exactly this "political nature" which makes them essential considerations in a court's determination of whether an alien's behavior in a given situation is politically motivated.

117. Bevis, *supra* note 2, at 409.

yers Committee for Human Rights and Amnesty International might provide relevant information.¹¹⁸

Concededly, information about the conditions in the alien's native country is too general to be dispositive in any given case. However, such information does help to place an asylum application within its proper context and will place judges in a stronger position from which to render a decision.

Once the court has examined the general conditions in the alien's native country, it can determine whether a person's opinion is political. Again, this would be best accomplished by viewing the alien's opinions within the context of the particular country from which the alien has fled.¹¹⁹ While the term "politics" is often used to describe government activities, it can also be applied more generally to human interaction in situations involving control or influence over allocations of material goods and spiritual values.¹²⁰ Essentially, then, the court must determine whether the opinion expressed by the alien may be perceived by the persecutor as a threat to the persecutor's ability to control the outcome of a situation, thus "politicizing" the opinion.¹²¹ By examining the general situation in a country and the details of the particular alien's everyday life, the courts are able to work with a judicially manageable standard and to satisfy this prong of the Baker test.

In sum, it is clear that there are political concerns involved in applications for asylum for persecution based on political opinion. However, the Supreme Court has stated that, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."¹²² Other courts have indicated that the political question doctrine must have flexibility when basic individual rights are involved and these courts remain unconvinced that foreign policy concerns sufficiently outweigh these rights in asylum cases.¹²³ In light of the presence of manageable standards and congressional designation of asylum cases to the courts, it is apparent that determining

118. Bevis, *supra* note 2, at 409.

119. Bevis, *supra* note 2, at 409.

120. Bevis, *supra* note 2, at 409.

121. In a case in which an alien has not openly expressed his or her opinion, or is neutral, the court may encounter the need to develop standards for articulation. This situation is treated in detail later in this Comment. See *infra* notes 146-62 and accompanying text.

122. Baker v. Carr, 369 U.S. 186, 211 (1962).

123. See Note, *Political Legitimacy*, *supra* note 97, at 468.

what constitutes a political opinion under the Refugee Act is within the competence of the courts.

V. NEUTRALITY AS A POLITICAL OPINION

In concluding that neutrality is not a political opinion for the purposes of political asylum, the Eleventh Circuit has failed to recognize that a thoughtful, affirmative position of neutrality is as political as a choice to join a particular political faction.

Political opinions arise out of an awareness and understanding of the political environment in which one exists. The development of a political opinion requires individuals to examine and consider their political environment, and to reach a decision based on that examination. Whether one chooses to support or reject the available political positions, the choice is still political. As the Ninth Circuit has recognized, "[w]hen a person is aware of contending political forces and affirmatively chooses not to join any faction, that choice is a political one."¹²⁴ The key word is "affirmative", because it demonstrates that the choice was a thoughtful and deliberate one rather than an indifferent one.

When confronted with limited choices, such as in El Salvador, individuals may determine that they do not support the aims or goals of the groups which seek support and thus may refuse to become aligned with either group.¹²⁵ This stance of "neutrality" does not render a person's choice apolitical.¹²⁶ Rather, this stance is indeed a political one, because it is a conscious rejection of political doctrines of which he or she does not approve.

Revolutionary situations often force people to make political decisions because warring factions actively seek the support of the civilian population.¹²⁷ Civil wars do not permit apathy when they occur in small countries like El Salvador, where the fighting permeates the entire country and causes heavy civilian casualties.¹²⁸ Here, apolitical people are forced to make "political" decisions about their lives. The contending forces are seeking more than just ideological support, they demand physical

124. *Bolanos-Hernandez v. INS*, 749 F.2d 1316, 1325 (9th Cir. 1984), *amended* March 1, 1985.

125. *See, e.g., id.* at 1325; *Del Valle v. INS*, 776 F.2d 1407, 1413-14 (9th Cir. 1985).

126. *See Bolanos-Hernandez*, 749 F.2d at 1324.

127. *See, e.g., Del Valle*, 776 F.2d at 1413 (civilian received three notes and phone calls from Death Squad recruiters seeking his participation as an informant).

128. *See supra* note 36.

support in the form of actual combat participation.¹²⁹

The argument that a refusal to join may be motivated not by politics, but by a desire to avoid violence, is unconvincing. Refusal to join a particular group is often countered with violent retribution because the rejected group believes the person is supporting the other side.¹³⁰ This assumption leads to many cases where the rejected group persecutes someone for an incorrectly imputed political opinion, be it one of neutrality or one that is contrary to the group's cause.¹³¹

When a neutral party is persecuted for refusing to support a particular group, this constitutes persecution on account of political opinion, even if the person is not being persecuted because the persecutor specifically dislikes neutrals.¹³² Such persecution is on account of political opinion because the victim's politics, manifested in an unwillingness to support the persecutor, is the motivation for the persecution. Even a sovereign government, which can legally conscript people, cannot force the same people to render ideological support beyond compliance with draft laws.¹³³ A neutral citizen may not agree with the government's politics and may refuse to express ideological or physical support beyond service in the army. If that person is persecuted for not "fully" supporting the government, that persecution is most definitely on account of political opinion.

Regarding situations like the one in El Salvador, it would be illogical to state that individuals who choose to remain neutral are excluded from the political arena because they are not aligned to a particular group or have not formed an alternative group.¹³⁴ To deny asylum to victims of persecution merely because they have not joined a particular political faction would thwart one of the main goals of the Refugee Act, which is to protect all victims of persecution, regardless of their ideology.¹³⁵ As the Ninth Circuit has stated, "construing 'political opinion'

129. See von Sternberg, *supra* note 108, at 5-6 n.28.

130. Even if the rejected group does not believe the person is supporting the other side, the rejected group may threaten the person with violence or death anyway. See, e.g., *Bolanos-Hernandez*, 749 F.2d at 1325 (guerrillas threatened civilian's life for not joining them); *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988) (civilian who resisted recruitment by the guerrillas was told, "even if you don't come, we'll get you.").

131. See *infra* notes 163-88 and accompanying text.

132. See *infra* notes 163-88 and accompanying text.

133. See von Sternberg, *supra* note 108, at 29.

134. See *Bolanos-Hernandez*, 749 F.2d at 1325.

135. *Id.*

in so short-sighted and grudging a manner could result in limiting the benefits under the ameliorative provisions of our immigration laws to those who join one political extreme or another; moderates who choose to sit out a battle would not qualify."¹³⁶

In denying asylum to Escobar, the Eleventh Circuit is construing the term "political opinion" in a narrow and short-sighted manner. The Eleventh Circuit did not doubt that Escobar had reason to fear harm if he returned to El Salvador.¹³⁷ Rather, the court concluded that he had not demonstrated that this fear was on account of persecution for his political opinion.¹³⁸ The court expressed its concern that "to adopt Escobar's position would allow the applicant to determine the scope of the term 'political opinion' and, therefore, would entitle almost anyone in a war-torn country to meet the statutory requirements for a grant of asylum."¹³⁹

The Fourth Circuit has taken a similar position. In *Cruz-Lopez v. INS*,¹⁴⁰ the Fourth Circuit denied asylum to a neutral Salvadoran who received a note from a guerrilla group that he would "regret it" if he did not join them.¹⁴¹ The court concluded that his position was no different from that of the large group of young urban males who had been "invited" to join the guerrilla groups.¹⁴² The court stated that "[u]nfortunately, this country cannot serve as a safe haven for all of them."¹⁴³

Both the Eleventh Circuit and the Fourth Circuit are concerned that the United States could become overwhelmed with refugees fleeing the brutality of their native countries. They are concerned that granting political asylum to neutrals will result in an unmanageable number of asylum applications. However, refusing to recognize that neutrality is a political opinion is not the correct way in which to address this issue. The courts can use other means to ensure that asylum will be extended only to

136. *Id.*

137. *Perlera-Escobar*, 894 F.2d at 1299 n.5.

138. *Id.*

139. *Id.*

140. 802 F.2d 1518 (4th Cir. 1986).

141. *Id.* at 1521.

142. *Id.* See also *Figeroa v. U.S. INS*, 886 F.2d 76 (4th Cir. 1989). In *Cruz-Lopez*, the Fourth Circuit declined to decide whether neutrality constitutes an opinion for the purposes of asylum. 802 F.2d at 1520 n.3. However, the denial of asylum in both *Cruz-Lopez* and *Figeroa* indicates that the Fourth Circuit is not inclined to conclude that neutrality constitutes a political opinion for asylum purposes.

143. *Cruz-Lopez*, 802 F.2d at 1521.

true victims of political persecution, and that the asylum doctrine is not abused by undesirables such as Escobar, who are convicted of felonies in the United States.

First, it must be remembered that the grant of asylum is a discretionary function.¹⁴⁴ Thus, if there are legitimate reasons to deny asylum in a given case, the judge is not restrained by rigid rules. Mr. Escobar is a case in point. The circumstances which led to his departure from El Salvador are useful as a starting point from which to examine situations in which legitimate political neutrals may find themselves forced to flee from persecution in their native countries. In Mr. Escobar's case, it was perfectly reasonable to deny him asylum on the basis of his three felony convictions, especially in light of the fact that he was granted safe haven in Mexico but decided to illegally enter the United States. As this reasoning suggests, if there is a good reason to deny asylum in a given case, it can be done without instituting broadly sweeping doctrines that deny asylum to legitimate refugees merely because they are politically neutral.

Second, the courts can require aliens to demonstrate that their political opinions of neutrality were articulated in their native countries. The courts are concerned that many aliens who are actually "economic" refugees will undermine the purpose of the asylum doctrine by testifying in the United States that they are neutral, even though they are not actual victims of persecution.¹⁴⁵ By requiring that the alien's neutrality have been previously articulated, the courts can ensure that an alien is truly politically neutral and not merely claiming neutrality as a convenience. The main question, then, is how does one articulate his or her neutrality so as to gain the benefit of political asylum?

The Articulation Requirement

According to both the First Circuit and the Ninth Circuit, in order to demonstrate a well-founded fear of persecution on account of a political opinion of neutrality, an alien must demonstrate that he or she has somehow articulated this opinion.¹⁴⁶ Such articulation helps to satisfy the statutory require-

144. See *supra* note 3.

145. See *supra* note 78.

146. See *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984); *Umanzor-Alvarado v. INS*, 896 F.2d 14 (1st Cir. 1990); *Perlera-Escobar v. EOIR*, 894 F.2d 1292 (11th Cir. 1990).

ment that persecution be based on political opinion rather than on a personal conflict between two parties, because the persecutor must know of the victim's political position in order to be able to persecute him or her for it.¹⁴⁷ The only exception to this rule occurs where the persecutor imputes an incorrect opinion to the victim.¹⁴⁸

In denying asylum to Mr. Perlera-Escobar, the Eleventh Circuit stated that even if neutrality¹⁴⁹ were assumed to constitute an opinion under the Refugee Act, Escobar failed to articulate his position of neutrality.¹⁵⁰ This conclusion fails to recognize that a position of neutrality can be articulated as effectively by overt acts such as deserting the guerrillas, as by vocal expression.

While both the Eleventh Circuit and the First Circuit have indicated that a political opinion must be articulated,¹⁵¹ neither court has provided any guidance in determining how an alien can satisfy this requirement. The Ninth Circuit, on the other hand, has offered a very promising approach to the articulation requirement. Since its 1985 decision in *Bolanos-Hernandez*, the Ninth Circuit also has required aliens to demonstrate that their position of neutrality was articulated.¹⁵² However, in *Bolanos-Hernandez*, the court determined that an alien had articulated his neutrality by refusing to become affiliated with a particular political faction.¹⁵³ The court stated "[T]hat conduct is as much an affirmative expression of a political opinion as is joining a side, or speaking out against a side."¹⁵⁴

147. The *Handbook*, *supra* note 18, at 20 n.82, does not require that an alien's opinion of neutrality be articulated. However, since the *Handbook* is not a binding authority, the courts are within their rights in requiring that a political opinion must be articulated in some way.

148. See *infra* notes 163-88 and accompanying text.

149. In a confusing use of language, the Eleventh Circuit substituted the words "no opinion" for the word "neutrality." See *Perlera-Escobar*, 894 F.2d at 1298. The two should not be considered interchangeable since "neutrality" implies that one has considered the political alternatives and declined to embrace them, whereas "no opinion" implies that one has not considered any of the alternatives.

150. *Id.*

151. See *id.*; *Umanzor-Alvarado v. INS*, 896 F.2d 14 (1st Cir. 1990).

152. See *Bolanos-Hernandez v. INS*, 749 F.2d 1316 (9th Cir. 1984).

153. *Id.* at 1325.

154. *Id.* at 1325-26. The BIA has indicated that it will limit the applicability of *Bolanos-Hernandez* to cases arising in the Ninth Circuit, at least in cases where the alien's opinion of neutrality was expressed during his or her deportation hearing in the United States. See Brief for Respondent at 33, *Perlera-Escobar* (No. 89-5064). See also *Matter of Vigil*, Int. Dec. 3050 at 6-7 (BIA March 17, 1988).

Since *Bolanos-Hernandez*, the Ninth Circuit's position on articulation has evolved into a belief that overt acts of neutrality are as effective as spoken words in conveying one's political opinion of neutrality.¹⁵⁵ In developing its standards, the Ninth Circuit has taken a realistic view of the situations in El Salvador and similar countries.¹⁵⁶ Additionally, the Ninth Circuit's position provides an example of why the Eleventh Circuit was incorrect in concluding that Escobar never articulated his position of neutrality.

Although Escobar admitted that he never stated he was neutral while in El Salvador,¹⁵⁷ as the Ninth Circuit has shown, overt acts can convey a message of neutrality as effectively as spoken words. Escobar, having been forced to flee from the death squads, sought refuge from a friend who was a known guerrilla.¹⁵⁸ Escobar testified that it was not his intention to join the guerrillas, but rather he was forced to fight for them.¹⁵⁹ That this was an involuntary alliance is manifested in the fact that he deserted the guerrillas at the first opportunity, despite knowing that they make a practice of executing deserters.¹⁶⁰ Thus, by fleeing both the guerrillas and the death squads, Escobar articulated his desire not to be associated with either group.

Escobar's situation is a common one in a country where both the guerrillas and the government-backed forces roam the countryside seeking the support of the civilian population. Both groups have shown that they are more than willing to resort to brutality in order to gain this support.¹⁶¹ When neutral civilians

155. See, e.g., *Lopez v. INS*, 775 F.2d 1015, 1016 (9th Cir. 1985) (alien failed to make an affirmative choice of political neutrality); *Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985) (alien's testimony to Immigration Judge of desire to remain neutral and refusal, on several occasions, to join either the guerrillas or the death squads bespoke a position of neutrality); *Turcios v. INS*, 821 F.2d 1396 (9th Cir. 1987) (persecution because of an overt manifestation of political opinion is persecution because of political opinion); *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988) (alien's refusal to voluntarily join the guerrillas reflected his non-support for their cause and his adoption of a neutral position toward both sides in the civil war). For a detailed discussion of the articulation issue, see von Sternberg, *supra* note 108, at 36-43.

156. See *Bolanos-Hernandez*, 749 F.2d at 1325.

157. BIA Decision, *supra* note 65, at 11.

158. *Perlera-Escobar*, 894 F.2d at 1294.

159. *Id.*

160. Even if Escobar had willingly joined the guerrillas, he could subsequently adopt a position of neutrality and have the right to leave the guerrillas. The guerrillas do not have a sovereign right to force him to remain and fight for them. See *infra* notes 179-88 and accompanying text.

161. *Perlera-Escobar*, 894 F.2d at 1295.

are approached by either or both parties, and, through their actions, refuse to become affiliated with those parties, such refusal articulates their position of neutrality as clearly as any spoken word.¹⁶²

VI. IMPUTED POLITICAL OPINION

An alien is entitled to asylum when he or she will be persecuted on account of a political opinion which the persecutor believes the alien holds, even if the alien actually holds a different opinion.¹⁶³ In defining political opinion, the Handbook recognizes that the persecutor may attribute or impute an incorrect opinion to the alien and use it as a basis for persecution.¹⁶⁴ Thus, in determining whether an alien has a well-founded fear of persecution on account of political opinion, it is important to look at the alien from the perspective of the persecutor.¹⁶⁵ According to the Ninth Circuit, "[i]f the persecutor thinks the person guilty of a political opinion, then the person is at risk."¹⁶⁶ This doctrine is not limited to political neutrals. It applies no matter what the victim's political opinion is, so long as the persecutor incorrectly attributes a certain political opinion to the victim.

A typical case of imputed opinion is *Argueta v. INS*.¹⁶⁷ In *Argueta*, a neutral Salvadoran was incorrectly accused by the government of being involved with the guerrillas.¹⁶⁸ *Argueta* was told that if he did not leave the country immediately he would disappear, since he had been designated as the "next one."¹⁶⁹ The Ninth Circuit concluded that *Argueta* had a well-founded fear of persecution based on the incorrect political opinion which the government imputed to him.¹⁷⁰ The decision in *Argueta* is representative of the Ninth Circuit's position that persecution is properly categorized as based on political opinion when the persecutor attributes certain characteristics to the

162. See *supra* note 154; *Del Valle v. INS*, 776 F.2d at 1413-14; see also *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1987).

163. See *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985).

164. *Handbook*, *supra* note 18.

165. *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987).

166. *Id.*

167. 759 F.2d 1395 (9th Cir. 1985).

168. *Id.* at 1397.

169. *Id.*

170. *Id.* The court also concluded that his decision to remain neutral constituted an expression of a political opinion. *Id.*

victim.¹⁷¹

The First Circuit has also recognized the dangerous impact of an imputed political opinion on neutrals. In *Novoa-Umania v. INS*,¹⁷² the First Circuit stated that a neutral could establish a well-founded fear of persecution if, among other things, it was possible to demonstrate that one or more groups intended to persecute the neutral alien because each (incorrectly) thought he or she held the political views of the other side.¹⁷³

The Eleventh Circuit did not follow this line of reasoning in *Perlera-Escobar*. The court did not deny that it is possible for a person to be a victim of persecution on account of an imputed political opinion. However, the reasoning used by the court in Escobar's case indicates that it will be very difficult for unwilling recruits who desert the guerrillas to prove that their desertion would be punished for its political motivation. Regarding Escobar, the court conceded that he might have reason to fear reprisals upon returning to El Salvador.¹⁷⁴ However, the court concluded that neither the government nor the guerrillas would impute a political opinion to Escobar and seek to persecute him for it.¹⁷⁵ According considerable deference to the findings of the BIA, the court first concluded that the guerrillas' interest in Escobar was based on their need to preserve unity within the group and to ensure the secrecy of their operations.¹⁷⁶ The court then determined that any harm perpetrated on Escobar by the government would be based on the need to punish him for fighting for the rebel guerrillas rather than on his political opinion.¹⁷⁷ Both of these conclusions are ill-founded.

Regarding Escobar's fear of the guerrillas, the court failed to appreciate the guerrilla's primary motivation. The guerrillas feared that Escobar would reveal secret information about their operations. It is reasonable to conclude that they feared that the

171. See, e.g., *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985) (when the government attributes certain political opinions to an alien, persecution is properly recognized as being based on political opinion); *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988) (alien possessed political opinions because his persecutors attributed political opinions to him and regarded him as a subversive); *Lazo-Majano v. INS*, 813 F.2d at 1435 (alien suffered persecution because of one specific political opinion attributed to her by persecutor).

172. 896 F.2d 1 (1st Cir. 1990).

173. *Id.* at 3. See *supra* note 31 and accompanying text.

174. *Perlera-Escobar v. EOIR*, 894 F.2d 1292, 1299 (11th Cir. 1990).

175. *Id.* at 1298.

176. *Id.* at 1298, 1299.

177. *Id.* at 1299.

government would be the recipient of those secrets.¹⁷⁸ Thus, the guerrillas cast Escobar in the role of a government sympathizer and imputed a false opinion to him.

Further, the Eleventh Circuit erred in relying on the BIA's position that the guerrillas, as a military unit, can legitimately punish deserters.¹⁷⁹ The BIA has asserted that the guerrillas have a right to discipline their members in order to ensure cohesion within their units, even to the point of punishing deserters, just as a sovereign government does.¹⁸⁰ The BIA has concluded that the motivation of the guerrillas in such instances is apolitical and is related only to their "para-military" needs.¹⁸¹ The basic flaw in this reasoning is that it draws a false analogy between the legitimate power of the government over its recruits, and the "para-military" needs of the guerrillas.¹⁸² A legitimate government has the basic, legal authority, with some exceptions,¹⁸³ to conscript young men and enforce discipline within their ranks.¹⁸⁴ Insurgent groups, on the other hand, have no such authority.¹⁸⁵ Indeed, it is fundamental to modern international law that the police power is an exclusive prerogative of sovereign governments.¹⁸⁶ Logically then, once a recruit offers resistance to the guerrillas, he or she ceases to be a willing participant and the guerrillas have no authority to inflict any discipline or punishment.¹⁸⁷ In light of this, an alien's desertion, when politically motivated, is a manifestation of a political opinion and any reprisals from the guerrillas must be viewed as persecution for that opinion rather than as a necessary incident of their para-

178. Escobar introduced evidence showing how the guerrillas retaliate against those whom they believe provide information to the government. See Petitioner's Brief-in-Chief at 24, *Perlera-Escobar* (No. 89-5064).

179. See von Sternberg, *supra* note 108, at 28, 29.

180. See *Matter of Maldonado-Cruz*, Interim Decision 3041 (BIA 1988) at 10; von Sternberg, *supra* note 108, at 28 n.126.

181. *Perlera-Escobar*, 894 F.2d at 1297.

182. von Sternberg, *supra* note 108, at 29.

183. *Id.*; see, e.g., *Canas-Segovia v. INS*, 902 F.2d 717, 723-24 (9th Cir. 1990) (punishment of conscientious objectors to conscription may amount to persecution if refusal is based on genuine reasons of conscience).

184. von Sternberg, *supra* note 108, at 29.

185. von Sternberg, *supra* note 108, at 29. See also *Arteaga v. INS*, 836 F.2d 1227, 1232 (9th Cir. 1988).

186. von Sternberg, *supra* note 108, at 29.

187. von Sternberg, *supra* note 108, at 29. "Forced recruitment by a revolutionary army is tantamount to kidnapping, and is therefore persecution." *Arteaga*, 836 F.2d at 1232.

military needs.¹⁸⁸ Thus, when Escobar deserted the guerrillas he put them on notice of his political opinion of neutrality. Logically then, any harm perpetrated against him by the guerrillas would be persecution on account of his political choice rather than a necessary result of their illegitimate para-military needs.

The Eleventh Circuit's conclusion that the government would legitimately seek to punish Escobar as a rebel, rather than seek to persecute him for an imputed political opinion, is also incorrect. Escobar testified that he was forcibly recruited by the guerrillas. His subsequent desertion, despite the documented perils of such an act, was a demonstration of his desire not to be associated with the guerrillas. Yet, the death squads continued to view Escobar as a guerrilla and continued to hunt for him. In so doing, they imputed an incorrect political opinion to him. If Escobar had voluntarily fought against the government before deserting, then they would have a legitimate reason to punish him. Here, however, Escobar's participation was involuntary. Thus, any harm inflicted on Escobar would be persecution on account of an incorrectly imputed political opinion, and not legitimate punishment.

VII. CONCLUSION

The Eleventh Circuit has made an unfortunate decision in concluding that neutrality does not constitute a political opinion for the purposes of political asylum. Furthermore, the Eleventh Circuit is incorrect in suggesting that the courts are not qualified to determine what constitutes a political opinion. In light of Congress' specific inclusion of political opinion in the asylum statute as well as the presence of judicially manageable standards and methods for determining what constitutes a political opinion, the judicial branch is the proper forum in which to decide the political opinion question.

Further, neutrality constitutes a valid political opinion for individuals who are aware of and have considered their political choices and who have affirmatively declined to affiliate with one or more political groups. Although the various circuits have struggled with this question, the Ninth Circuit has reasonably concluded that an affirmative and articulated decision to be neutral is political in nature.

188. von Sternberg, *supra* note 108, at 47.

By requiring asylum applicants to demonstrate that their opinion of neutrality was an articulated one, the courts can ensure that such applicants are true victims of political persecution, and not merely claiming political neutrality as a convenience. Further, the courts can use their discretionary powers to ensure that the asylum process is not abused by undeserving individuals, such as convicted felons. The courts must be more willing to recognize that even if a person is not being persecuted for being neutral per se, that person could be the victim of persecution on account of an incorrectly imputed political opinion. The Ninth Circuit has adopted the most reasonable approach to the neutrality question. Absent a Supreme Court decision on neutrality, this standard should be adopted by the other circuits. The standard set forth by the Ninth Circuit will ensure that legitimate refugees receive asylum. In contrast, the standard set forth by the Eleventh Circuit in *Perlera-Escobar* ensures only that some legitimate refugees will be denied asylum.

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