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PERSECUTION ON ACCOUNT OF POLITICAL OPINION: "REFUGEE" STATUS AFTER *INS v. Elias-Zacarias,* 112 S. Ct. 812 (1992).

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Abstract: In *INS v. Elias-Zacarias,* the Supreme Court examined the definition of "refugee" under the Refugee Act of 1980 and found that harm from refusing to join a guerrilla organization is not "persecution on account of political opinion" as defined under that Act. This decision is incompatible with the intent of the Refugee Act of 1980 and creates onerous burdens of proof for aliens seeking asylum. This Note analyzes the Court's reasoning and concludes that Congress should enact legislation nullifying the Court's decision.

"In this area of the law . . . we do well to eschew technicalities and fictions and to deal instead with realities."

-Justice Potter Stewart[1]

One evening Jairo Jonathan Elias-Zacarias' family noticed two masked and uniformed men with machine guns lurking outside of their home.[2] The men identified themselves as members of the anti-government guerrilla movement and attempted to persuade Elias-Zacarias and his family to join their organization.[3] Elias-Zacarias and his family repeatedly stated that they did not wish to join the revolutionary movement.[4] The masked guerrillas finally left saying that they would be back and the family should "think it [over] well."[5]

Afraid the guerrillas would return to abduct and kill him, Elias-Zacarias fled Guatemala and sought asylum in the United States.[6] Under the Refugee Act of 1980, the Attorney General has discretion to grant asylum to those aliens who have a "well-founded fear of persecution on account of political opinion."[7] The Board of Immigration Appeals found that Elias-Zacarias did not have a "well-founded fear of persecution," and the Court of Appeals for the Ninth Circuit reversed.[8] In denying Elias-Zacarias relief, the Supreme Court deter-

1. Costello v. INS, 376 U.S. 120, 131 (1964).

2. Zacarias v. INS, 921 F.2d 844, 847 (9th Cir. 1990), *rev'd,* INS v. Elias-Zacarias, 112 S. Ct. 812 (1992).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *See generally* 8 U.S.C. §§ 1101(a)(42), 1157–59, 1253(h), 1521–24 (1988).

8. *Zacarias,* 921 F.2d at 847.

mined that he did not fear persecution "on account of political opinion."[9]

In *INS v. Elias-Zacarias,*[10] the Supreme Court increased the evidentiary burden of asylum applicants trying to show that they face persecution "on account of political opinion." This Note analyzes the Supreme Court's opinion in the context of the Refugee Act of 1980 governing asylum procedures, the various interpretations of the "on account of political opinion" standard, and the Court's interpretation of this standard. The Note concludes that the Court relied on faulty reasoning and ignored standard canons of statutory construction. Finally, this Note recommends that Congress enact legislation to remedy the problems created by the *Elias-Zacarias* decision.

I. CURRENT UNITED STATES REFUGEE LAW: THE REFUGEE ACT OF 1980

The Refugee Act of 1980 (Refugee Act)[11] created, for the first time in U.S. immigration law, an asylum status for persons fearing persecution upon return to their home country.[12] The Refugee Act gives the Attorney General discretionary power to grant asylum[13] to any applicant who meets the threshold definition of "refugee."[14] The Act defines "refugee" as "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 a well-founded fear of persecution

9. INS v. Elias-Zacarias, 112 S. Ct. 812, 815, 817 (1992).

10. 112 S. Ct. 812 (1992).

11. Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1101(a)(42), 1157–59, 1253(h), 1521–24 (1988)).

12. Prior to the Refugee Act, U.S. immigration law was governed by the Immigration and Nationality Act (INA), ch. 477, §§ 101(a), 207, 243(h), 66 Stat. 163, 181, 214 (1952). The Refugee Act amended the INA. For a comprehensive discussion of the changes made by the Refugee Act, see 2 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 33.01[3] (1990).

13. Once an applicant receives asylum status ("asylee"), that applicant may be eligible for an adjustment to permanent residence status after residing in the United States for one year, 8 U.S.C. § 1159 (1988), and may potentially become a citizen. Although the number of adjustments is subject to numerical limitations, there is no corresponding limit on the number of initial grants of asylum that may be made. THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 735 (2d ed. 1991). Asylum status, however, may be terminated due to changes in the political climate of the alien's home country. Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,* 19 SAN DIEGO L. REV. 9, 62 (1981).

14. 8 U.S.C. § 1158(a) (1988).

on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ."[15]

The Refugee Act codifies the United States' obligations under the 1967 United Nations Protocol Relating to the Status of Refugees (UN Protocol).[16] Congress adopted the UN Protocol's definition of "refugee"[17] in the Refugee Act in order to protect international human rights[18] and further U.S. humanitarian traditions.[19]

II. PERSECUTION "ON ACCOUNT OF POLITICAL OPINION"

The Attorney General has discretion to grant or deny asylum status. Most asylum cases, however, are decided by the factfinder on the threshold matter of the alien's substantive eligibility for relief—whether the alien meets the definition of "refugee."[20] This determination is not within the discretionary power of the Attorney General.[21] Rather, this issue is a mixed question of fact and law for the immigration and appellate courts to decide.[22] The definition of refugee, therefore, has engendered an abundance of litigation.[23] To be considered a "refugee" for asylum purposes, a person potentially must show (1) a

15. *Id.* § 1101(a)(42)(A). Unlike the grant of asylum, the determination of whether an alien is a refugee is *not* within the discretion of the Attorney General. *See* Sagermark v. INS, 767 F.2d 645, 649 (9th Cir. 1985), *cert. denied,* 476 U.S. 1171 (1986).

16. Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (modifying the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137) [hereinafter UN Convention]. In 1968, the United States became party to the UN Protocol, and, as such, became bound by the substantive provisions of the UN Convention. *See* GORDON & MAILMAN, *supra* note 12, § 33.01[1]. Congress, relying on executive branch testimony that existing U.S. law sufficiently conformed to the obligations of the UN Protocol, did not amend the INA. ALEINIKOFF & MARTIN, *supra* note 13, at 732–33. Congress soon discovered, however, that existing immigration law did not comply with the Protocol's requirements, and, as a remedy, Congress enacted the Refugee Act. *See* GORDON & MAILMAN, *supra* note 12, § 33.01[3]. It should be noted, however, that the Protocol does not *require* that signatory nations create an asylum procedure. INS v. Cardoza-Fonseca, 480 U.S. 421, 429 n.8 (1987).

17. *Cardoza-Fonseca,* 480 U.S. at 437; Anker & Posner, *supra* note 13, at 11. Although the Refugee Act's definition is slightly different from the Protocol's, no substantive change was intended. Amelia C. Fawcett, Note, *U.S. Immigration and Refugee Reform: A Critical Evaluation,* 22 VA. J. INT'L L. 805, 814 n.38, 816 (1982).

18. 114 CONG. REC. 29,608 (1968) (statement of Sen. Proxmire).

19. 126 CONG. REC. 4501 (1980) (statement of Rep. Rodino); *id.* at 3756 (statement of Sen. Kennedy).

20. Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980,* 28 VA. J. INT'L L. 1, 4 (1987).

21. *See supra* note 15.

22. *See* Maldonado-Cruz v. Dep't of Immigration & Naturalization, 883 F.2d 788, 791 (9th Cir. 1989).

23. ALEINIKOFF & MARTIN, *supra* note 13, at 739–40.

well-founded fear of persecution (2) on account of (3) political opinion.[24]

Much of the early controversy surrounding the definition of "refugee" focused on the meaning of "well-founded fear."[25] The Board of Immigration Appeals (BIA)[26] initially used a strict definition of "well-founded fear,"[27] reducing the number of successful refugee applicants. The Supreme Court, however, in *INS v. Cardoza-Fonseca,*[28] relaxed the evidentiary burden on asylum applicants.[29] The Court found that a liberal interpretation of "well-founded fear" was more in keeping with congressional intent.[30] After *Cardoza-Fonseca,* it was easier for these applicants to meet the threshold definition of "refugee"[31] and thus be eligible for discretionary grants of asylum.

In response to this more liberal standard, the BIA increased the evidentiary burden necessary to prove persecution "on account of" one of the enumerated elements.[32] This change offset the more lenient standards under the "well-founded fear" test set out in *Cardoza-Fonseca.*[33] Consequently, the "on account of" element has become a critical focus of asylum jurisprudence.[34]

The controversy over the meaning of the "on account of political opinion" element frequently arises in cases where anti-government

24. *See supra* note 15 and accompanying text.

25. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 425–26 (1987).

26. The Board of Immigration Appeals is a panel appointed by the Attorney General. The BIA mainly hears appeals from immigration judge decisions. For a full discussion of the BIA's structure, see ALEINIKOFF & MARTIN, *supra* note 13, at 111–14.

27. The BIA initially said that to prove a "well-founded fear" of persecution, an alien had to show a "clear probability" of persecution. *Cardoza-Fonseca,* 480 U.S. at 430. A "clear probability" of persecution is defined as "evidence establishing that it is more likely than not that the alien would be [persecuted]." INS v. Stevic, 467 U.S. 407, 429–30 (1984).

28. 480 U.S. 421 (1987).

29. *Id.* at 449. The *Cardoza-Fonseca* Court said the "well-founded fear" standard does not require a showing that persecution was "more likely than not." *Id.* at 449. Rather, "as long as an objective situation is established by the evidence, . . . it is enough that the persecution is a reasonable possibility." *Id.* at 440 (quoting *Stevic,* 467 U.S. at 424–425).

30. *Id.* at 445.

31. *Id.* at 450 (stating that asylum applicants no longer have to "prove that it is more likely than not that they will be persecuted if deported").

32. Deborah E. Anker & Carolyn Patty Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in INS v. Cardoza-Fonseca,* 1 INT'L J. REFUGEE L. 67, 70 (1989); Derek Smith, Note, *A Refugee By Any Other Name,* 75 VA. L. REV. 681, 705 (1989).

33. Smith, *supra* note 32, at 705 ("As a result [of the BIA's reformulation of the 'on account of' standard], many applicants may be denied asylum regardless of whether they can prove a well-founded fear of harm."); *see also* T. Alexander Aleinikoff, *The Meaning of "Persecution" in U.S. Asylum Law in* REFUGEE POLICY: CANADA AND THE UNITED STATES 295 (H. Adelman ed., 1991).

34. Aleinikoff, *supra* note 33, at 309.

guerrillas forcibly conscript persons into their military forces.[35] This has resulted in the formation of two opposing camps, represented by the BIA and the Ninth Circuit Court of Appeals.[36] The BIA has concluded that harm for resisting forced conscription is not persecution "on account of political opinion."[37] The Ninth Circuit disagrees.[38]

A. The BIA: Harm From Refusing to Join a Guerrilla Organization Does Not Necessarily Constitute Persecution "On Account Of Political Opinion"

According to the BIA, harm inflicted upon a person for refusing to join a guerrilla organization does not necessarily make that person a "refugee" within the statutory definition. Persecution is "on account of political opinion" only when: (1) the victim actually holds an affirmative ideological viewpoint and (2) the persecutor finds this opinion offensive and seeks to overcome it through persecution.[39] Merely resisting guerrilla conscription is not sufficient to show that the victim had the necessary offensive political opinion.[40] Similarly, general political motivation on the part of the persecutor is not sufficient to show that the persecutor is motivated by a desire to overcome the victim's specific political opinion.[41]

The BIA addressed this issue in *In re Maldonado-Cruz.*[42] Maldonado had been kidnapped by the El Salvadoran guerrillas and forced to participate in military operations. He later escaped from the guerrillas and fled to the United States seeking asylum.[43] Maldonado claimed that he feared persecution due to his political opinion of neutrality.[44] The BIA asserted that although Maldonado did fear persecution, this persecution was not due to any political opinion he held.[45]

35. *See, e.g.*, Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987), *cert. denied,* 484 U.S. 826 (1987); Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985); Bolanos- Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984); *In re* Maldonado-Cruz, 19 I. & N. Dec. 509 (BIA 1988), *rev'd,* Maldonado-Cruz v. INS, 888 F.2d 788 (9th Cir. 1989); *In re* Vigil, 19 I. & N. Dec. 572 (BIA 1988); *In re* Acosta, 19 I. & N. Dec. 211 (BIA 1985).

36. In addition to the Ninth Circuit, only the First and Eleventh Circuits have specifically interpreted "on account of political opinion" in the context of forced conscription. Both courts adhere to the BIA's position. *See* Novoa-Umania v. INS, 896 F.2d 1 (1st Cir. 1990); Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292 (11th Cir. 1990).

37. *See infra* notes 39–58 and accompanying text.

38. *See infra* notes 59–72 and accompanying text.

39. *See infra* notes 42–58 and accompanying text.

40. *See infra* notes 42–58 and accompanying text.

41. *See infra* notes 46–58 and accompanying text.

42. 19 I. & N. Dec. 509 (BIA 1988).

43. *Id.* at 511.

44. *Id.* at 516.

45. *Id.* at 517.

The BIA claimed Maldonado had not established a "principled position of neutrality" because the evidence showed his fear of persecution was based on his desertion and not on his neutrality.[46] The BIA determined that the guerrillas were not interested in Maldonado's reasons for deserting, and furthermore, that the guerrillas did not attribute to him any political opinion which they found offensive.[47] The BIA reasoned that guerrilla organizations need to control their members and exercise discipline. Consequently, the BIA established a presumption that persecution is not normally motivated by a desire to punish people for their political opinions.[48] The BIA determined that Maldonado faced persecution not because of any political opinion that he held, but rather because the guerrillas needed to maintain discipline.[49]

The BIA adhered to this same position in *In re Vigil.*[50] Vigil, a young Salvadoran, feared conscription by the anti-government guerrilla forces. Following several acts of guerrilla and government violence in his home town,[51] Vigil decided "to stay completely quiet and neutral."[52] Although Vigil actually held a principled position of neutrality, the BIA found that he did not fear persecution because of this opinion as he had not expressed to anyone his desire to remain neutral.[53] According to the BIA, had Vigil resisted recruitment, he would have faced persecution because he inhibited the political goals of the guerrillas[54] and not because of his opinion of neutrality.[55]

In *Vigil,* the BIA made a distinction between "politically motivated harm" (harm because the victim is impeding the guerrillas' political goals) and "harm to overcome an offensive political opinion" (harm because guerrillas are offended by the victim's specific political opinion).[56] The BIA invoked a presumption that the harm is politically

46. *Id.* at 516.

47. *Id.* at 514.

48. *Id.* at 514–15, 517; *see also* Peter Butcher, Note, *Assessing Fear of Persecution in a War Zone,* 5 GEO. IMMIGR. L.J. 435, 460 n.152 (1991); Paul B. Hunker III, Note, *Conflicting Views of Persecution On Account Of Political Opinion: The Ninth Circuit and the Board of Immigration Appeals,* 5 GEO. IMMIGR. L.J. 505, 508 (1991); Smith, *supra* note 32, at 703–04.

49. *Maldonado-Cruz,* 19 I. & N. Dec. at 515.

50. *In re* Vigil, 19 I. & N. Dec. 572 (1988).

51. *Id.* at 575–76.

52. *Id.* at 575.

53. *Id.* at 577.

54. *Id.* at 577 ("The purpose of this recruitment . . . is to further the guerrilla's [political] objective of overthrowing the Salvadoran Government.").

55. *Id.*

56. Hunker, *supra* note 48, at 514; *see Vigil,* 19 I. & N. Dec. at 577.

motivated.[57] Politically motivated harm, however, does not constitute persecution "on account of political opinion."[58]

Thus, according to the BIA, persecution "on account of political opinion" occurs only when the persecutor wishes to harm the asylum applicant for the applicant's offensive political opinion. Refusing to join a guerrilla organization is not sufficient to show an offensive opinion. In the absence of evidence to the contrary, the BIA presumes the guerrillas' motives for harming the applicant are to further their own political goals rather than punish the applicant for that applicant's specific ideological opinion. This conduct does not constitute persecution "on account of political opinion."

B. The Ninth Circuit: Harm for Refusing to Join a Guerrilla Organization Necessarily Constitutes Persecution "On Account Of Political Opinion"

The Ninth Circuit advocates a view of "on account of political opinion" that is more favorable to the person seeking asylum. First, the Ninth Circuit holds that a mere refusal to join a guerrilla organization is an expression of a political opinion.[59] Once the person engages in this overt act of refusal, the Ninth Circuit will presume: (1) that the overt act offends the guerrillas since it impedes their political goals and (2) that the guerrillas are politically motivated to harm the individual in order to overcome the individual's political opinion.[60] According to the Ninth Circuit, this constitutes persecution "on account of political opinion."

In *Maldonado-Cruz v. U.S. Dep't of Immigration and Naturalization,*[61] the Ninth Circuit reversed the BIA and held that refusing to join the guerrillas was a manifestation of a political opinion.[62] Although Maldonado had not verbally expressed his deliberate choice to remain neutral,[63] his refusal to join the guerrillas was an overt manifestation of his neutrality. The court recognized this as a statement of a political opinion.[64] According to the Ninth Circuit, the act of refusing to join the guerrillas is properly recognized as an expression of a

57. Butcher, *supra* note 48, at 460; Hunker, *supra* note 48, at 508.

58. *In re* Acosta, 19 I. & N. Dec. 211, 234–35 (BIA 1985).

59. *See infra* notes 61–67 and accompanying text.

60. *See infra* notes 68–72 and accompanying text.

61. 883 F.2d 788 (9th Cir. 1989).

62. *Id.* at 791.

63. *Id.* (finding that "Maldonado had not aligned himself politically with either the guerrillas or the military").

64. *Id.*

political opinion because it impedes the guerrillas' political objectives and thus motivates the guerrillas to harm the actor.[65]

Furthermore, the Ninth Circuit does not require applicants to show that their refusal to join the guerrillas was for political reasons. The court refuses, for two reasons, to inquire into the applicant's motives for acting. First, individuals act for many complex reasons. The task of determining whether a choice was sufficiently based on political principles is beyond the realm of the courts' powers.[66] Second, the guerrillas are not concerned with an individual's particular motivations. They are only concerned with acts that constitute overt manifestations of political opinions.[67]

Once applicants show that they engaged in overt acts from which political opinions may be inferred,[68] the Ninth Circuit presumes that persecution is on account of these political opinions.[69] The Ninth Circuit's opinion in *Arteaga v. INS*[70] best articulates this view. In *Arteaga,* the applicant fled El Salvador after several guerrillas came to his house in an attempt to recruit him.[71] Finding that Arteaga faced persecution "on account of political opinion," the court determined that it was irrelevant whether the guerrillas wanted to conscript Arteaga to fill their ranks or punish him for his neutrality. The court only required that the guerrillas' motives be political. It was clear to the court that forced conscription is politically motivated.[72] Thus, the court held that once the applicant manifested a political opinion, the court would assume that the guerrillas' motives for harming that person were political. This constituted persecution "on account of political opinion."

In summary, the Ninth Circuit requires applicants for refugee status to show that they engaged in overt acts from which political opinions can be inferred. The court then assumes that the persecutors' motives are political. In contrast, the BIA requires more than an act from which a political opinion can be inferred. The BIA requires that applicants actually hold political opinions, and that the guerrillas be motivated to harm applicants because the guerrillas find these particular opinions offensive. These opposing analytical viewpoints led to the

65. Hunker, *supra* note 48, at 511–12.

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

67. *Id.* at 1287.

68. *See supra* notes 61–67 and accompanying text.

69. Butcher, *supra* note 48, at 460.

70. 836 F.2d 1227 (9th Cir. 1988).

71. *Id.* at 1228.

72. *Id.* at 1232 n.8; *see generally* Hunker, *supra* note 48, at 510–12.

Supreme Court's first case dealing with the "on account of political opinion" standard.

III. *INS V. ELIAS-ZACARIAS*

A. Case History

The Immigration and Naturalization Service apprehended Elias-Zacarias when he attempted to enter the United States.[73] During his deportation proceeding, Elias-Zacarias applied for asylum.[74] The immigration judge denied him relief, and he appealed to the BIA.[75] Considering the immigration judge's decision on the merits, the BIA affirmed the decision, stating that Elias-Zacarias had not established an objective basis for his fears because he was not directly threatened.[76] The BIA concluded that Elias-Zacarias had not established a "well-founded fear" of persecution.[77]

Elias-Zacarias appealed the BIA's decision to the Court of Appeals for the Ninth Circuit,[78] and the Ninth Circuit reversed.[79] Relying on Elias-Zacarias' testimony, the court found that he met the "well-founded fear" standard as set out in *Cardoza-Fonseca.*[80] In dicta, the court also stated that "[t]he persecution is properly categorized as 'on account of political opinion,' because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the [forced conscription] is political."[81] Thus, the court found that Elias-Zacarias met the definition of a refugee and was eligible for a discretionary grant of asylum.[82] The court remanded the case to the BIA for an exercise of this discretion,[83] but the INS petitioned for, and the Supreme Court granted, certiorari.[84]

73. Zacarias v. INS, 921 F.2d 844, 847 (9th Cir. 1990), *rev'd,* 112 S. Ct. 812 (1992).

74. *Id.* at 847.

75. *Id.*

76. *Id.*; Respondent Elias-Zacarias Brief at 8, *Zacarias* (1991 U.S. Briefs LEXIS No. 90-1342).

77. Petitioner INS's Brief at 7, *Zacarias* (1991 U.S. Briefs LEXIS No. 90-1342); *see supra* notes 25–30 (discussing the "well-founded fear" standard).

78. BIA decisions are appealed to the circuit in which the controversy arose. ALEINIKOFF & MARTIN, *supra* note 13, at 745.

79. *Zacarias,* 921 F.2d at 847.

80. 480 U.S. 421 (1987). For a discussion of *Cardoza-Fonseca,* see *supra* notes 28–31 and accompanying text.

81. *Zacarias,* 921 F.2d at 850.

82. *Id.* at 855.

83. *Id.*

84. INS v. Zacarias, 111 S. Ct. 2008 (1991).

While both the BIA and Ninth Circuit decisions rested primarily on the "well-founded fear" aspect of the statutory definition of "refugee,"[85] the issue that the INS presented to the Supreme Court was whether, under the statutory definition of refugee, "a guerrilla organization's attempt to coerce a person into performing military service necessarily constitutes persecution 'on account of' that person's political opinion."[86] In *INS v. Elias-Zacarias,*[87] the Court answered this question in the negative, reversing the Ninth Circuit and upholding the BIA's decision.[88]

B. *The Supreme Court: Reinforcing the BIA's Interpretation of "On Account Of Political Opinion"*

The Supreme Court, in determining that Elias-Zacarias had not suffered persecution "on account of political opinion," specifically rejected the Ninth Circuit's dicta concerning the "on account of" standard.[89] Writing for the majority, Justice Scalia reached two conclusions. First, he concluded that the refusal to join a particular political faction was not in itself an affirmative expression of a political opinion.[90] Second, Justice Scalia found that even if Elias-Zacarias had a political opinion, he failed to prove that any persecution he faced was "on account of" that political opinion.[91]

In reaching these conclusions, the Court created two burdens of proof that asylum applicants must overcome to satisfy the Court's definition of "on account of political opinion." First, applicants for refugee status must establish that they actually possess political opinions.[92] A mere act, such as resisting forced conscription, is insufficient to establish the existence of this "political opinion."[93] Such opinions

85. *See Zacarias,* 921 F.2d at 848–50.

86. Petitioner INS Brief at 6, *Zacarias* (1991 U.S. Briefs LEXIS No. 90-1342). This issue was not directly argued before or answered by either the BIA or the Ninth Circuit. Although the Ninth Circuit decision rested primarily on the "well-founded fear" standard, the court did summarily address the "on account of" issue that the INS presented to the Supreme Court. *See supra* note 81 and accompanying text.

87. 112 S. Ct. 812 (1992).

88. *Id.* at 817.

89. *See supra* note 81 and accompanying text.

90. *Elias-Zacarias,* 112 S. Ct. at 815–16.

91. *Id.* at 816.

92. *Id.* (concluding that the statute refers to "persecution on account of the *victim's* political opinion") (emphasis added).

93. The Court says it is "untrue" that "the person resisting forced recruitment is expressing a political opinion." *Id.* at 815. Later the Court adds: "Elias-Zacarias appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. That seems to us not ordinarily so . . . ." *Id.* at 816.

can, however, be shown by proving that the applicants' motives for acting were political.[94]

Second, to satisfy the "on account of" element, applicants must establish the motives of their persecutors.[95] It is irrelevant, the Court found, that the guerrillas' motives in engaging in persecution are "political."[96] Instead, applicants must show that the guerrillas' harmful acts were motivated by the applicants' opinions, not by their actions.[97]

Justice Stevens, joined by Justices O'Connor and Blackmun, dissented. Criticizing the majority for its "narrow [and] grudging" interpretation of the statute, the dissenters found that applicants meet their burden of proof if they show that persecution on account of political opinion is a reasonable possibility.[98] Relying on Ninth Circuit analysis, Justice Stevens reasoned that an action can be the affirmative expression of a political opinion.[99] Furthermore, he found that the statute itself does not require proof of the persecutors' motives.[100] The dissent, therefore, explicitly endorsed the Ninth Circuit's interpretation of persecution "on account of political opinion."

IV. THE SUPREME COURT'S INTERPRETATION OF THE "ON ACCOUNT OF POLITICAL OPINION" STANDARD RELIES ON FLAWED ANALYSIS

In *Elias-Zacarias,* the Court explicitly endorsed the BIA's interpretation of "on account of political opinion." This approach is based on a number of unwarranted presumptions. Furthermore, the approach is contrary to the federal legislative scheme and inconsistent with the UN Protocol. Had the Court recognized the inherent ambiguity of the statute, it would have followed the common rules of statutory construction and looked to other interpretive aids, including the legislative history of the Refugee Act and the UN Protocol. Instead, the Court ignored these sources, thereby frustrating Congress' attempt to enact a broadly worded and widely applicable asylum statute.

94. "The record in the present case . . . failed to show a political motive on Elias-Zacarias' part . . . ." *Id.* at 816.

95. "[S]ince the statute makes [the persecutors'] motive critical, [the applicant] must provide some evidence of it . . . ." *Id.* at 817.

96. *Id.* at 816.

97. *Id.*

98. *Id.* at 818, 820 (Stevens, J., dissenting).

99. *Id.* at 818–19 (Stevens, J., dissenting).

100. *Id.* at 820 (Stevens, J., dissenting).

A. The Court Based Its Decision on Unwarranted Presumptions

The Supreme Court should not have embraced the BIA's interpretation of "on account of political opinion." Purporting to use a "plain meaning" analysis of the statute's text,[101] Justice Scalia attempts to dissect the phrase "on account of" and define the term "political opinion." In making these determinations, Justice Scalia invokes illogical presumptions.[102]

1. Resisting Forced Conscription as the Expression of a Political Opinion

First, Justice Scalia states that it is the "victim's political opinion, not the persecutor's," which is determinative of whether the persecution is "on account of political opinion."[103] Next, however, he finds that a person who resists forced recruitment is not expressing a political opinion.[104] To support this conclusion, Justice Scalia reasons that even people who support the guerrilla movement might resist conscription for many different reasons, such as a desire to remain with friends and family.[105] Elias-Zacarias, Justice Scalia concludes, did not have a political opinion because he did not show a political motive underlying his act.[106] Thus, the Court creates a presumption that persons usually act for non-political reasons. To overcome this presumption, applicants must affirmatively prove that their motives for acting are political.

The Court's reasoning ignores the fact that an individual's conscious decision to resist recruitment evidences that person's political opinion, regardless of whether that person sympathizes with the guerrillas. Even a person who is sympathetic to the guerrilla movement but refuses to join their ranks is expressing an opinion different from

101. "In construing statutes, 'we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.' " *Id.* at 816 (quoting Richards v. United States, 369 U.S. 1, 9 (1962)).

102. *See infra* notes 103–19 and accompanying text.

103. *Elias-Zacarias*, 112 S. Ct. at 816. Justice Scalia uses this plain meaning conclusion to rebut the Ninth Circuit's statement in Zacarias v. INS, 921 F.2d 844 (9th Cir. 1990), that "[t]he persecution is properly categorized as 'on account of political opinion' because . . . the persecutors' motive in carrying out the kidnapping is political." *Zacarias*, 921 F.2d at 850. Justice Scalia, however, misinterprets the Ninth Circuit's reasoning. The appeals court is not saying the guerrillas' political opinions are the focus of the statute's language. Rather, the court is saying that once the victim's political opinion has been shown (i.e. by refusing forced conscription), the guerrillas political motives are evidence supporting the inference that the guerrillas are persecuting the victim "on account of" the victim's political opinion.

104. *Elias-Zacarias*, 112 S. Ct. at 815.

105. *Id.* at 815–16.

106. *Id.* at 816.

that of the guerrillas. That person is implicitly saying that the guerrilla cause is not worth engaging in military action or risking possible death. As the Ninth Circuit explained, the act of remaining neutral is no less a political decision than the act of affiliating with a particular political faction. Drawing an analogy, the Ninth Circuit noted that "[j]ust as a nation's decision to remain neutral is a political one . . . so is an individual's."[107] Thus, it is not necessary for a person to affirmatively endorse a particular view to hold a political opinion. As the Supreme Court itself has recognized in other contexts, political opinions may be expressed in many ways, through both speech and action.[108]

2. *Imputed Political Opinions*

According to the Court, when Elias-Zacarias refused to join the guerrilla forces, he was not expressing a political opinion that offended the guerrillas.[109] The Court suggests that an opinion imputed to an applicant by a persecutor is not a "political opinion" as defined under the statute.[110] This conclusion, however, ignores reality. As one former guerrilla confessed, "[the guerrillas] say that those who do not want to collaborate (with the guerrillas) are obviously with the Army and they kill him."[111] Resisting forced conscription is usually interpreted as a manifestation of opposition.[112] Once a person affirmatively offers resistance, that person is no longer a passive player in the guerrillas' cause. The resistor is transformed into a person possessing an objectified political opinion—a political opinion that impedes the guerrillas' goals and offends their senses, thereby inviting retaliation.

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107. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1984).

108. In *Bolanos-Hernandez,* the Ninth Circuit listed five Supreme Court cases in which persons were held to have expressed non-verbal political opinions. *Bolanos-Hernandez,* 767 F.2d at 1287 (citing Spence v. Washington, 418 U.S. 405 (1974); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969); Edwards v. South Carolina, 372 U.S. 229 (1963); Thornhill v. Alabama, 310 U.S. 88 (1940)).

109. *Elias-Zacarias,* 112 S. Ct. at 815–16.

110. After determining that Elias-Zacarias failed to prove his underlying political motive for acting, the Court said, "[n]or is there any indication (assuming, arguendo, it would suffice) that the guerrillas erroneously believed that Elias-Zacarias' refusal was politically based." *Id.* at 816.

111. Respondent Elias-Zacarias Brief at 25, *Zacarias* (1991 U.S. Briefs LEXIS No. 90-1342) (quoting commander Anita, ex- guerrilla). Another guerrilla confirmed that villagers who chose not to collaborate with the guerrillas would be killed. *Id.* at 25 (interview with captured male guerrilla).

112. Karen Musalo, *Swords into Ploughshares: Why the United States Should Provide Refuge to Young Men who Refuse to Bear Arms for Reasons of Conscience,* 26 SAN DIEGO L. REV. 849, 858 (1989).

3. *The Motives of the Persecutor*

Under the *Elias-Zacarias* analysis, applicants must first establish their political opinions.[113] Next, they must demonstrate that the guerrillas are motivated to harm them because of these political opinions.[114] In posing this second argument, the Court again invokes an unwarranted presumption. Claiming that the record does not indicate why the guerrillas want to harm Elias-Zacarias, the Court presumes that a person who resists forced recruitment will not be harmed because the guerrillas are offended by that person's act. The Court asserts that "[i]t is quite plausible, indeed likely, that the [kidnapping Elias-Zacarias feared] would be engaged in by the guerrillas in order to augment their troops rather than show their displeasure; and the killing [Elias-Zacarias] feared might well be a killing in the course of resisting being taken."[115] Consequently, to overcome this presumption, the applicant must adduce evidence showing the guerrillas' motives. Merely demonstrating the general political motives of the guerrillas, however, is not sufficient.[116] Thus, the Court seems to embrace the BIA's distinction between politically motivated harm and harm to overcome an asylum applicant's political opinion.[117]

A person may resist conscription for personal reasons, such as a desire to stay with family, or for political reasons, such as an ideological belief contrary to that of the guerrillas. Regardless of the applicant's reasons for acting, the guerrillas' motives for persecuting that person are identical in both cases.[118] The guerrillas are only concerned with an overt manifestation of a view which they find offensive—a view that impedes their political goals.[119] Politically motivated harm and harm because of a victim's political opinion are, to the guerrillas, identical. Thus, the Court is justifying its presumption that harm is generally not based on the applicant's political opinion by adopting the BIA's illogical distinction.

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113. *See supra* notes 92–94 and accompanying text.

114. According to Justice Scalia, "the statute makes [the guerrillas'] motive critical." *Elias-Zacarias*, 112 S. Ct. at 817.

115. *Id.* at 816 n.2.

116. "[T]he mere existence of a generalized 'political' motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that Elias-Zacarias fears persecution on account of political opinion . . . ." *Id.* at 816.

117. *See supra* notes 56–58 and accompanying text.

118. Hunker, *supra* note 48, at 514.

119. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1287 (1984); Hunker, *supra* note 48, at 514.

4. *Supreme Court Precedent and Presumptions in Favor of Aliens*

Finally, the Court's use of presumptions, apart from being illogical, is contrary to prior Supreme Court decisions. As the Court has noted several times, there is a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[120] This principle is especially relevant where the applicants claim that they will be subject to persecution and possible death if forced to return to their home countries.[121] Had the *Elias-Zacarias* Court adhered to this principle, it would not have relied on unwarranted presumptions to determine the meaning of "on account of political opinion." Rather, the Court would have assumed that the definition of political opinion could reasonably include acts from which political opinions are inferred. Similarly, the Court would have assumed that if the persecutors' motives are political, applicants will most likely be harmed "on account of" their political opinions.

B. *The Court Should Have Employed Other Interpretive Aids in Analyzing the Statute*

The Supreme Court should have looked to congressional intent and the UN Protocol to accurately interpret the meaning of "on account of political opinion" because the statutory language is ambiguous.[122] This ambiguity is demonstrated by two factors. First, the BIA and the Ninth Circuit have differed significantly in their interpretations of the text of the statute.[123] Second, the fact that the Court could not interpret the statute without relying on a number of unsupported presumptions indicates that the statute has no clear meaning.[124]

To determine congressional intent, the Court should examine both the context in which the statute was adopted and the underlying pol-

120. *Elias-Zacarias,* 112 S. Ct. at 819 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987), in turn, 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)).

121. *Cardoza-Fonseca,* 480 U.S. at 449.

122. NORMAN J. SINGER, SUTHERLAND STAT. CONST. §§ 45.05, 48.01, 48.04 (5th ed. 1992) (stating that courts should look to congressional intent when interpreting ambiguous statutes).

123. *See supra* notes 36–72 and accompanying text; *see also* SINGER, *supra* note 122, § 46.04 (The fact that various courts have interpreted a statute in different ways is evidence of ambiguity.); *see also supra* note 36.

124. For example, it is unclear from the face of the statute whether "political opinion" is to be so narrowly construed that it precludes imputed political opinions. *See generally, supra* notes 109–12 and accompanying text.

icy of the statute[125] so as to carry out the will of the legislature.[126] This is especially true with respect to immigration legislation where the courts owe Congress the greatest level of deference.[127]

1. *The Court's Narrow Reading of "Refugee" is Contrary to the Purpose of the Statute*

The Refugee Act is highlighted by a commitment to human rights and humanitarian concerns.[128] More specifically, the new definition of refugee established "a more universal standard based on uprootedness rather than ideology."[129] Although the legislative history for the Refugee Act does not articulate any specific meaning of "on account of political opinion,"[130] the history does indicate that Congress crafted a liberal definition of "refugee" in order to create a broad class of aliens eligible for a discretionary grant of asylum and to conform to the humanitarian purpose of the Act.[131]

In adopting a broad definition of "refugee," Congress confronted the argument that this broad definition might result in too many aliens achieving refugee status and thus eligibility for asylum. As the House Committee noted: "[we] carefully considered arguments that the new definition might expand the numbers of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb. However, merely because an individual . . . comes within the definition will not guarantee resettlement in the United States."[132] Thus, Congress realized that this liberal defini-

125. HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958) ("[A]ny judicial opinion . . . which finds a plain meaning in a statute without consideration of its purpose, condemns itself on its face."); *id.* at 1457.

126. SINGER, *supra* note 122, § 45.05.

127. Fiallo v. Bell, 430 U.S. 787, 792 (1977). The Supreme Court endorsed this approach in INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). Noting that "[t]here is obviously some ambiguity in a term like 'well-founded fear'," *id.* at 448, the *Cardoza-Fonseca* Court employed the legislative history and UN Protocol as interpretive aids. This approach was especially appropriate because "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 447 (quoting Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 n.9 (1984)). Unlike the *Cardoza-Fonseca* Court, the *Elias-Zacarias* Court completely ignored the congressional intent behind the "on account of political opinion" language.

128. *See* Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 101, 102 (codified as Congressional Declaration of Policies and Objectives at 8 U.S.C. § 1521 (1988)); S. REP. No. 256, 96th Cong., 2d Sess. 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141.

129. *The Refugee Act of 1979: Hearings on S. 643 Before the Senate Comm. on the Judiciary,* 96th Cong., 1st Sess. 9 (1979).

130. Hunker, *supra* note 48, at 515–16.

131. *Cardoza-Fonseca,* 480 U.S. at 424–25.

132. H.R. REP. No. 608, 96th Cong., 1st Sess. 9 (1979).

tion of refugee would create a broad class of aliens eligible for asylum but refused to fashion a narrower definition of refugee to rectify this potential problem. Instead, Congress authorized the Attorney General to determine which, if any, eligible refugees should be denied asylum.[133]

The *Elias-Zacarias* Court frustrates the humanitarian purpose of the Refugee Act by dissecting the definition of refugee and turning each element into a separate burden of proof. The Court significantly reduces the number of aliens who will be able to meet the definition of "refugee," thus violating Congress' intent to create a broad class of aliens who meet the definition of "refugee" and are thus eligible for asylum.[134] Furthermore, the *Elias-Zacarias* Court ignores Congress' intent that discretionary grant of asylum—not a strict definition of "refugee"—be the factor limiting the potential number of eligible aliens.[135]

2. *The Supreme Court's Interpretation of Refugee is Inconsistent with the Definition of "Refugee" as Set Forth in the UN Protocol Relating to the Status of Refugees*

The legislative history of the Refugee Act also indicates that Congress intended the definition of "refugee" to be construed in accordance with the UN Protocol.[136] The *Handbook on Procedures and Criteria for Determining Refugee Status* (*Handbook*)[137] is the primary tool for interpreting the definition of "refugee" as set forth in the UN

133. *Cardoza-Fonseca,* 480 U.S. at 444–45. Congress addressed this potential "floodgate" problem in other ways. Although there is no numerical limitation to the number of applicants that may be granted asylum in a particular year, *see supra* note 13, there is a ceiling on the number of "asylees" who can adjust their status to that of a permanent resident alien. GORDON & MAILMAN, *supra* note 12, §§ 33.01[3], 34.04[4].

134. Indeed, when the BIA attempted to narrow this class of aliens through a strict definition of "well-founded fear," the *Cardoza-Fonseca* Court criticized the interpretation as violating congressional intent. *Cardoza-Fonseca,* 480 U.S. at 444–45, 449–50.

135. *See supra* notes 132–33 and accompanying text.

136. In the final conference report on the Refugee Act, the committee stated that the "bill incorporated the internationally-accepted definition of refugee contained in the U.N. Convention and Protocol Relating to the Status of Refugees." S. REP. NO. 590, 96th Cong., 2d Sess. 19 (1980), *reprinted in* 1980 U.S.C.C.A.N. 141. When discussing the withholding of deportation provision, the committee noted the "understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." *Id.* at 20; *see also* Anker & Posner, *supra* note 13, at 46 ("The intent to implement a broad . . . refugee policy embodied in the new UN definition was evidenced during committee and subcommittee hearings in both houses."); *Cardoza-Fonseca,* 480 U.S. at 437.

137. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (Geneva, 1979) [hereinafter HANDBOOK]. The HANDBOOK is a fifty-three page "explanation of the definition of the term 'refugee'." *Id.* at 1.

Protocol.[138] Although the *Handbook* does not have the force of law in U.S. courts, both the BIA and federal courts have consistently deferred to the *Handbook* in interpreting refugee law.[139]

a. *The* Handbook *Does Not Require Applicants to Sustain the Unreasonable Burden of Proving Persecutorial Motive*

In explaining the general principles of refugee status, the *Handbook* states, "[r]ecognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee."[140] The *Handbook* takes a realist approach, viewing the term "refugee" not as an abstract evidentiary standard but rather as a recognition of a person's circumstances and surroundings.

Drawing upon its realist approach, the *Handbook* does not require persons seeking refugee status to bear unreasonable burdens of proof. The *Handbook* notes that applicants are rarely able to prove every aspect of their case[141] and that many times applicants are unaware or confused as to the exact circumstances surrounding their persecution.[142] The *Handbook* recognizes the special situations of applicants and the inherent difficulty in obtaining evidence to support their claims.[143] Consequently, the *Handbook* does not require applicants to prove the exact motives of their persecutors.[144] Furthermore, where lingering ambiguities exist and the applicant's testimony is credible, the *Handbook* advises courts to draw inferences in favor of the applicant.[145]

Contrary to the *Handbook's* provisions, the *Elias-Zacarias* Court requires applicants to bear unreasonable burdens of proof. Requiring

138. *Id.* at 1–2.

139. Musalo, *supra* note 112, at 853 (citing seventeen federal and six BIA cases using the HANDBOOK in interpreting the 1980 Refugee Act). See *Cardoza-Fonseca,* 480 U.S. at 439 n.22.

140. HANDBOOK, *supra* note 137, at 9, ¶ 28.

141. "[I]t is hardly possible for a refugee to 'prove' every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized." *Id.* at 48, ¶ 203; *id.* at 47, ¶ 196.

142. "Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail." *Id.* at 17, ¶ 66; *id.* at 13, ¶ 46.

143. *Id.* at 47, ¶ 197.

144. "While the definition speaks of persecution 'for reasons of political opinion' it may not always be possible to establish a causal link between the opinion expressed and the related measures suffered or feared by the applicant. Such measures have only rarely been based expressly on 'opinion'." *Id.* at 19, ¶ 81; *see also, id.* at 47, ¶ 197; J. HATHWAY, THE LAW OF REFUGEE STATUS 137 (1991).

145. HANDBOOK, *supra* note 137, at 47–48, ¶¶ 196, 203.

applicants to show the subjective beliefs of a persecutor increases an already onerous burden upon persons fleeing their homes, usually in haste and without time to gather documents or other supporting evidence.[146] Many times the persecutors' beliefs will be irrational and erratic. Furthermore, the applicant will not know whose motives the courts will find relevant—the specific guerrillas harming the victim, the guerrilla organization as a whole, or perhaps only the leaders of the anti-government group. This burden is further increased when the Court draws unwarranted presumptions against the applicants.[147]

b. The Handbook *Employs a Broad Reading of "Political Opinion"*

The *Handbook* also defines "political opinion" in a broad manner. First, the *Handbook* states that a person may fear persecution because of a political opinion even if that opinion has not yet been expressed.[148] Second, a mere act or refusal to act can constitute the expression of a political opinion. According to the *Handbook,* the actor does not have to express this opinion in writing or words. The applicant's actions can disclose true opinions, giving rise to a legitimate fear of persecution.[149] Thus, under the *Handbook's* standards, refusing to join guerrilla forces could easily be deemed the expression of a political opinion. As noted, the Court's narrow interpretation of the term "political opinion" is contrary to the *Handbook's* more liberal standard and creates an almost insurmountable burden for the applicant.[150]

V. THE ROAD TO REFORM: A LEGISLATIVE PROPOSAL

In summary, the Supreme Court erred in upholding the BIA's construction of the "on account of political opinion" language. Validating this interpretation, the Court created presumptions that ignore both reality and Supreme Court precedent. Furthermore, the Court's "narrow, grudging"[151] interpretation violates the ameliorative provisions of the Refugee Act and the broad, realistic principles of the *Handbook.*

The *Elias-Zacarias* decision will effectively preclude most asylum applicants from meeting the substantive threshold requirement for a

146. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984); Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review,* 73 MINN. L. REV. 1205, 1208 (1989).

147. *See supra* notes 101–121 and accompanying text.

148. HANDBOOK, *supra* note 137, at 20, ¶ 82.

149. *Id.* at 20, ¶ 83.

150. *See supra* notes 103–12, 148–49 and accompanying text.

151. *INS v. Elias-Zacarias,* 112 S. Ct. 812, 818 (1992) (Stevens, J., dissenting).

discretionary grant of asylum.[152] Congress should reaffirm the United States' commitment to humanitarian goals and enact legislation recognizing the difficulties facing those persons who flee their homes for fear of persecution.[153] Congress should direct the INS to promulgate guidelines for interpreting the definition of "refugee." These rules of construction should follow the substantive provisions of the *Handbook.*

A. Rules of Construction

To guide the INS to the relevant sections of the *Handbook,* Congress should emphasize and clarify four factors relevant to the refugee determination. First, persons should be able to demonstrate political opinions through affirmative acts. Second, the persecutors' motives should be relevant to, but not required for, the refugee inquiry. Third, when ambiguity or uncertainty arises, presumptions should favor the applicant for refugee status. Finally, the "well-founded fear" standard should be the central focus for determining whether an applicant meets the definition of refugee. While the first three factors have been addressed above, the fourth factor requires further elaboration.

B. Benefits of Focusing on a "Well-Founded Fear" Standard

According to the *Handbook,* "well-founded fear" is the key phrase in the definition of refugee.[154] Justice Stevens, in his *Elias-Zacarias* dissent also adopts this position. Drawing upon *Cardoza-Fonseca,* Justice Stevens says that "the applicant meets [his] burden if he shows that there is a reasonable possibility that he will be persecuted on

152. Although Elias-Zacarias sought refugee status based on his "political opinion," the Supreme Court's decision will also affect those aliens seeking asylum based on persecution "on account of race, religion, nationality, [and] membership in a particular social group." 8 U.S.C. § 1101(a)(42)(A) (1988). Four weeks after the Court's *Elias-Zacarias* decision, the Supreme Court vacated the Ninth Circuit's judgment in Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990), *cert. granted, and vacated by,* 112 S. Ct. 1152 (1992), and remanded the case for further consideration in light of *Elias-Zacarias.* In *Canas-Segovia,* the Ninth Circuit held that the applicants, who applied for asylum based on their fear of persecution on account of religion, did not have to establish the intent or motive of the persecutor. *Id.* at 726. Thus, *Elias-Zacarias* has sweeping implications.

153. The 101st Congress has attempted to override many of the Supreme Court's recent decisions construing federal statutes. William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions,* 101 YALE L.J. 331, 332 (1991) (noting that eight recent Court opinions have been modified by congressional legislation). Indeed, the Immigration Act of 1990 was, in part, an attempt to override the Supreme Court interpretation of the INA in Boutilier v. INS, 387 U.S. 118 (1967). Eskridge, *supra,* at 332 n.3. Thus, it is not unlikely that Congress will take note of *Elias-Zacarias*—a decision which clearly violates the spirit of the Refugee Act.

154. HANDBOOK, *supra* note 137, at 11, ¶ 37.

account of his political opinion."[155] Thus, the political opinion of the victim and the motive of the persecutor become elements relevant to whether the applicant has a reasonable fear of persecution. They are not, in themselves, required burdens of proof for the applicant to overcome. Adopting this approach would fulfill the legislative goal of focusing asylum on "uprootedness rather than ideology."[156] In the words of the House Committee, the purpose of the Refugee Act is to "emphasize that the plight of the refugees themselves as opposed to . . . political considerations should be paramount in determining which refugees are to be admitted to the United States."[157] Refocusing on the "well-founded fear" standard will halt needless litigation on minute details of the statutory text, and will place the asylum emphasis where Congress intended it to be—within the discretionary power of the Attorney General.

VI. CONCLUSION

The *Elias-Zacarias* decision is inconsistent with the spirit of the Refugee Act and the UN Protocol. Requiring asylum applicants to prove both the existence of their political opinion and the motives of their persecutors is illogical and unreasonably burdensome. To rectify these Court-created ills, Congress should direct the INS to promulgate statutory construction regulations that are consistent with the *Handbook*. This approach will refocus refugee determinations on the "well-founded fear" standard, thus promoting the humanitarian ideals underlying the Refugee Act of 1980.

155. *Elias-Zacarias*, 112 S. Ct. at 820 (Stevens, J., dissenting).

156. *The Refugee Act: Hearings on S. 643 Before the Sen. Comm. on the Judiciary*, 96th Cong., 1st Sess. 9 (1979).

157. H.R. REP. No. 608, 96th Cong., 1st Sess. 13 (1979).