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Note

IMMIGRATION AND NATURALIZATION SERVICE v. ELIAS-ZACARIAS: PARTIALLY CLOSING THE DOOR ON POLITICAL ASYLUM

INTRODUCTION

In Immigration and Naturalization Service v. Elias-Zacarias, the Supreme Court held that the United States government could legally deport an alien whose desire to remain neutral in his country's civil war had exposed him to threats of violence and forced conscription into a guerrilla army. The Court found that the alien's neutrality did not constitute a "political opinion" for the purposes of protection under federal immigration law. Therefore, the alien could not be considered a "refugee" eligible for political asylum in the United States.

This case marks a significant narrowing of the definition of "refugee" and will make it harder for applicants for political asylum to prove that they have suffered "persecution on account of... political opinion." The Elias-Zacarias Court also rejected the standard of review for administrative decision-making used by the majority of the courts of appeals in reviewing whether an alien can statutorily be considered a "refugee." In so doing, the Court established a standard of review that closely approximates an abuse of discretion standard, effectively limiting the ability of the federal courts to oversee executive branch immigration policies. Elias-Zacarias clearly marks a turning away from the Court's traditional reluctance to interpret immigration statutes in a way that results in the deportation of an alien with a questionable claim.

2. Id. at 814.
3. See id. at 816.
4. See id.
5. See id. at 815.
6. Id.
This Note describes the status of federal immigration law regarding political asylum preceding the *Elias-Zacarias* decision. It then explores the Court's reasoning behind its decision in *Elias-Zacarias*. Finally, this Note concludes by considering the decision's potential impact on immigration policy and other areas of law.

I. Statement of the Case

Jairo Jonathan Elias-Zacarias fled his native Guatemala when he was eighteen years old, after two armed guerrillas threatened to force him to join their anti-government efforts. The guerrillas, wearing uniforms and with handkerchiefs masking their identities, came to Elias-Zacarias's home and asked him to join their movement. He refused "because the guerrillas were against the government and he was afraid that the government would retaliate against him and his family if he did join the guerrillas." The guerrillas accepted his refusal but promised to return later. He left two months after the guerrillas first appeared, fearing that the guerrillas would "take [him] and kill [him]" if he refused them again.

After being apprehended in July 1987 for "entering the United States without inspection," Elias-Zacarias attempted to avoid deportation using two strategies authorized by federal immigration law: asylum and withholding of deportation. While the asylum test is the easier of the two to meet, only withholding of deportation is nondiscretionary.

To gain political asylum under section 208 of the Immigration and Nationality Act (INA), aliens must show that they are refugees according to the statutory definition. Section 101 of the INA defines "refugee" as:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-

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9. See id. at 814.
10. Id.
11. See id. at 814-15.
13. See *Elias-Zacarias*, 112 S. Ct. at 816 n.2; id. at 817 (Stevens, J., dissenting).
14. Id. at 814.
15. See id.
founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

Even if an alien meets this standard, the government has discretion to refuse the refugee asylum.

To gain a withholding of deportation, aliens must show that their "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." If an alien meets this test, the government has no discretion because the statutory language is mandatory. Aliens may not be deported to the country which poses the threat; however, they may be deported to another country where the risk is not present.

Aliens applying for asylum or withholding of deportation are protected by certain due process requirements. Under the INA, aliens are entitled to a hearing before an immigration judge from the Immigration and Naturalization Service (INS). They are also entitled to appeal the immigration judge's decision to the Board of Immigration Appeals (BIA or the Board) and, if necessary, to appeal the BIA ruling to a federal court of appeals.

In Elias-Zacarias, the immigration judge denied the alien's application for asylum on the grounds that the guerrillas had neither threatened Elias-Zacarias nor returned to his home as they had promised. At his appeal to the BIA, however, Elias-Zacarias produced a letter from his father that mentioned several return visits by

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17. See 8 U.S.C. § 1158(a) (1988). The section reads:
The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

Id.

19. See id. ("The Attorney General shall not deport . . . ").
21. See Bolanos-Hernandez v. INS, 767 F.2d 1277, 1281 n.4 (9th Cir. 1984) (explaining the two ways in which an alien can have an INS judge review his request: by submitting a written request to the local INS director before formal proceedings begin, or by filing the request with the docket clerk after formal proceedings begin).
the guerrillas.\textsuperscript{24} Despite this new evidence, the Board held that Elias-Zacarias had not shown an objective basis for his fears.\textsuperscript{25} It found that there was no evidence of a pattern of conscription on the part of the guerrillas in Guatemala. As a result, the Board affirmed the immigration judge’s ruling.\textsuperscript{26}

The Court of Appeals for the Ninth Circuit reversed the decision of the BIA,\textsuperscript{27} finding that Elias-Zacarias had proven an objective basis of fear by establishing that there existed a pattern of forced conscription in his native land.\textsuperscript{28} The court first determined that conscription of an unwilling person by a nongovernmental group was a form of persecution intended to be protected by the INA.\textsuperscript{29} The Ninth Circuit then carefully reviewed the BIA’s refusal to grant Elias-Zacarias refugee status and re-applied the federal requirements, this time to the alien’s benefit.\textsuperscript{30}

The Supreme Court granted certiorari\textsuperscript{31} and reversed the decision of the Ninth Circuit by a six-to-three vote in a concise opinion by Justice Scalia.\textsuperscript{32} Narrowly reading the language in section 208 requiring “persecution on account of . . . political opinion,” the Court held that Elias-Zacarias’ neutrality was not a “political opinion” and, therefore, he had not sufficiently demonstrated a “well-founded fear” of persecution due to a political opinion.\textsuperscript{33} The Court also indicated that greater deference was to be accorded to the BIA decision than that given by the Ninth Circuit.\textsuperscript{34} In his dissent, Justice Stevens, joined by Justices Blackmun and O’Connor, determined that Elias-Zacarias did possess a “well-founded fear” of persecution based upon his adoption of a neutral position in Guatemala’s civil war.\textsuperscript{35}

\textsuperscript{24} See Zacarias v. INS, 921 F.2d at 847.
\textsuperscript{25} See Elias-Zacarias, 112 S. Ct. at 815.
\textsuperscript{26} See id. at 815 (noting that the Ninth Circuit “treat[ed] the BIA’s denial of the motion to reopen as an affirmance on the merits of the Immigration Judge’s ruling”).
\textsuperscript{27} Zacarias v. INS, 921 F.2d 844 (9th Cir. 1990), rev’d, 112 S. Ct. 812 (1992).
\textsuperscript{28} See id. at 848 & n.4 (citing a State Department advisory letter warning of dangerous conditions in Guatemala).
\textsuperscript{29} Id. at 849-52.
\textsuperscript{30} Id. at 848 (finding that the cumulative evidence “convince[s] us that the Service’s interpretation of the letter is not supported by substantial evidence”).
\textsuperscript{32} Elias-Zacarias, 112 S. Ct. at 815.
\textsuperscript{33} Id. at 816.
\textsuperscript{34} Id. at 815.
\textsuperscript{35} See id. at 817-20 (Stevens, J., dissenting).
II. SUMMARY OF THE REASONING

In Elias-Zacarias, the Court first addressed the alien's argument that he was expressing a political opinion by refusing to join the guerrillas. The Court rejected this proposition on two grounds. First, the Court argued that a person could wish to avoid forced conscription for any number of reasons, many of which were not political in nature. Justice Scalia, writing for the majority, used Elias-Zacarias' own testimony—that his refusal to join the guerrillas was motivated by his fear of government retaliation—to show that Elias-Zacarias was not attempting to make a political statement. Second, the Court rejected the proposition that a decision to remain neutral was itself an "affirmative expression of a political opinion" intended to be protected from persecution. Justice Scalia stated that this notion "seems to us not ordinarily so."

The Court then rejected Elias-Zacarias' claim that threatened conscription constitutes "persecution" under the statute. The guerrillas' policy of forced recruitment, according to the majority, stemmed from a desire and need to fill their army with additional bodies rather than from any dissatisfaction with the political beliefs of the conscriptees. The Court interpreted the "ordinary meaning" of the statute's language to require that the persecution be "on account of" the "victim's political opinions, not the persecutor's." Thus, Elias-Zacarias failed to meet the standard.

In so holding, the Court placed a heavy burden on the asylum-seeker, indicating that Elias-Zacarias must show "compelling" evi-

36. Id. at 816.
37. See id. at 815-16. See also infra text accompanying note 121.
38. Id. at 816.
39. Id.
40. Id.
41. See id. at 816 n.2.
42. Id.
43. Id. at 816 ("[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 . . . ."). Even if the Court had found his neutrality to be a valid political opinion protected by the statute, Elias-Zacarias would still have failed to meet the standard because the Court found that his neutrality was not the cause of the persecution. Justice Scalia explained:

[W]e need not decide whether the evidence compels the conclusion that Elias-Zacarias held a political opinion. Even if it does, Elias-Zacarias still has to establish that the record also compels the conclusion that he has a "well-founded fear" that the guerrillas will persecute him because of that political opinion, rather than because of his refusal to fight with them.

Id.
idence for reversal of the BIA decision.\textsuperscript{44} That is, the Court required him to prove that the BIA's ruling was not "reasonable."\textsuperscript{45} The Court quoted for emphasis the portion of the INA that requires a court of appeals to affirm a BIA decision that is "supported by reasonable, substantial and probative evidence on the record considered as whole."\textsuperscript{46} In interpreting that language, the Court examined past cases and concluded that Elias-Zacarias could succeed "only if the evidence presented by Elias-Zacarias was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed."\textsuperscript{47}

III. LEGAL CONTEXT

The two legal strategies used by Elias-Zacarias—seeking asylum and withholding of deportation—exist in statutory form in the Refugee Act of 1980 (Refugee Act).\textsuperscript{48} The Refugee Act marked a major change in federal immigration law. Prior to its passage, withholding of deportation was subject to the discretion of the Attorney General.\textsuperscript{49} The Refugee Act removed the Attorney General's discretion, making withholding of deportation mandatory for eligible aliens,\textsuperscript{50} thereby bringing United States law into conformance with United Nations guidelines.\textsuperscript{51} In addition, passage of the Refugee Act reflected a strong congressional intent to create a more systematic, consistent and humanitarian asylum policy.\textsuperscript{52} Congress wanted to

\textsuperscript{44} Id. at 815 n.1 ("To reverse the BIA finding we must find that the evidence not only supports that conclusion, but compels it . . . .").

\textsuperscript{45} Id. at 817 ("[I]f he seeks to obtain judicial reversal of the BIA's determination, he must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.").

\textsuperscript{46} Id. at 815 (quoting 8 U.S.C. § 1105a(a)(4) (1988)).

\textsuperscript{47} Id. (citing NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939)).


\textsuperscript{52} See David A. Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, 138 U. PA. L. REV. 1247, 1261-62 (1990) ("[O]ne theme is clear from the legislative
ensure that American immigration policy would no longer be determined on an ad hoc basis, which had resulted in both ideologically-slanted and arbitrary decisions.53

Despite passage of the Refugee Act, critics have charged that the United States government’s asylum policy has remained biased and overly strict. The government has narrowly interpreted the refugee definition to exclude thousands of potential refugees.54 For example, the Bush Administration found the thousands of Haitians fleeing their country during the last decade to be in search of “economic betterment, not political shelter.”55 This made deportation possible. The result in many cases has been that refugees from countries friendly with the United States have an exceedingly more difficult time obtaining asylum than those refugees from countries toward whom the United States is hostile.56

A. Supreme Court Clarifications

The Refugee Act created many uncertainties that the courts have slowly clarified. For example, the Refugee Act did not define the standards of proof by which aliens must make their cases for asylum and withholding of deportation.57 Section 243(h) mandates

history. Congress intended the refugee standards to be applied neutrally and without ideological bias, in contrast to certain repealed refugee provisions that had made special provision for persons fleeing Communist countries.”); see also Richard K. Preston, Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees’ Rights and U.S. International Obligations?, 45 Md. L. Rev. 91, 100 (1986) (“It was hoped that the Refugee Act would put an end to the geographic and ideological bias of previous refugee admissions and focus instead on the broader humanitarian concern for those fleeing persecution anywhere.”).

53. See Cavosie, supra note 49, at 425. Cavosie explained: “Congress intended, by adopting the Convention/Protocol definition, to eliminate the ideologically biased approach that had previously characterized refugee determinations. In doing so, it gave notice to immigration authorities that their compliance would be closely monitored . . . .” Id. (citations omitted). See also Bolanos-Hernandez v. INS, 767 F.2d 1277, 1280 (9th Cir. 1984) (describing “our national commitment to human rights and humanitarian concerns”). The Refugee Act also constituted another chapter in the historic battle between Congress and the President for control of the country’s immigration policy. See Deborah E. Anker & Michael H. Posner, The Forty Year Crisis: A Legislative History of the Refugee Act of 1980, Immigration & Nationality Symposium, 19 San Diego L. Rev. 9, 10-12 (1981).

54. Fragomen & Bell, supra note 48, at 193-94.

55. Amy Wilentz, Deep Voodoo, The New Republic, Mar. 9, 1992, at 18, 20. During the 1980s, only 11 of 24,000 Haitians were admitted to the United States. Id.


57. Neither section in the Refugee Act of 1980 defines the standard to be used. See Stevic, 467 U.S. at 421-22 (“The amended § 243(h) . . . makes no mention of a probability of persecution or a well-founded fear of persecution. In short, the text of the
withholding of deportation when an "alien's life or freedom would be threatened."\[^{58}\] In *Immigration and Naturalization Service v. Stevic*,\[^{59}\] the Court found that the "would be threatened" language requires aliens to show a "clear probability" of a risk\[^{60}\] and that the persecution was "more likely than not to occur."\[^{61}\]

Section 101 of the INA required that aliens show a "well-founded fear" of persecution in order to be considered refugees for purposes of asylum.\[^{62}\] The government required the same standard of proof in asylum cases as in withholding of deportation cases.\[^{63}\] However, both the Ninth and Seventh Circuits disagreed with the standard advocated by the government and claimed that the language indicated a more generous standard.\[^{64}\] The Supreme Court agreed with these courts in *Immigration and Naturalization Service v. Cardoza-Fonseca*, holding that the "well-founded fear" language established a different and less stringent requirement than the "clear

\[^{58}\] statute simply does not specify how great a possibility of persecution must exist to qualify the alien for withholding of deportation."). See also id. at 424 ("[T]he Refugee Act itself does not contain any definition of the 'well-founded fear of persecution' language contained in § 101(a)(42)(A)."").


\[^{61}\] 60. Id. at 413.

\[^{62}\] 61. Id. at 424 ("[W]e do not think there is any serious dispute regarding the meaning of the clear-probability standard under § 243(h) case law. The question under that standard is whether it is more likely than not that the alien would be subject to persecution."). The *Stevic* Court relied heavily on the fact that the statute required that the alien "would" face persecution, rather than "might" or "could." Id. at 422. Because § 243(h) did not mention "refugee" or refer to § 101, "there is no textual basis in the statute for concluding that the well-founded-fear-of-persecution standard is relevant to a withholding of deportation claim under § 243(h)." Id. at 423-24.


\[^{64}\] 63. The use of identical standards made practical sense given that the BIA frequently considered asylum and withholding of deportation applications simultaneously. Until 1980, the BIA had only reviewed withholding cases. FRAGOMEN & BELL, supra note 48, at 199. The Refugee Act gave jurisdiction over asylum cases for the first time to the BIA. See *Carvajal-Munoz v. INS*, 743 F.2d 562, 566-67 (7th Cir. 1984). At deportation hearings, the INS treated asylum requests as applications for both asylum and withholding of deportation. FRAGOMEN & BELL, supra note 48, at 199. Therefore, for each alien the BIA sought to apply the same standard of proof for both the asylum and withholding of deportation decisions.

\[^{65}\] 64. For asylum applications, the Ninth Circuit stated that the Refugee Act of 1980 had lessened the standard to one of "well-founded fear" which was more generous than the "clear probability" standard. See Bolanos-Hernandez v. INS, 767 F.2d 1277, 1282 (9th Cir. 1984) (citing Stevic v. Sava, 678 F.2d 401 (9th Cir. 1982)). The Seventh Circuit stated that the "well-founded fear" standard for asylum was virtually identical to the "clear probability" standard used for withholding of deportation. *Carvajal-Munoz*, 743 F.2d at 574-75.
probability” approach. The Court felt that an alien’s fear could be “well-founded” even where the risk of persecution was less than fifty percent. Thus, different standards of proof are mandated for asylum and withholding of deportation applications.

B. Remaining Uncertainties

Despite the Stevic and Cardoza-Fonseca decisions, there remained ambiguous language in the Refugee Act to which the circuit courts gave varying interpretations. The terms that have led to a disparity among the circuits are “well-founded fear” and “refugee.” In addition, there was continuing disagreement among the circuits as to the proper standard of review for BIA decisions.

1. Well-Founded Fear.—Although the Supreme Court decided in Cardoza-Fonseca that “well-founded fear” meant something less than “clear probability,” it refused to define the term any further,

66. Id. The Cardoza-Fonseca Court explained:
That the fear must be “well-founded” does not alter the obvious focus on the individual’s subjective beliefs, nor does it transform the standard into a “more likely than not” one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.
Id. The majority relied heavily on the legislative history of the Refugee Act and the desire of the Congress to adopt the United Nation’s definition of “refugee.” Id. at 436-41. The Court stated: “There is simply no room in the United Nations’ definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of the event happening.” Id. at 440.
67. No other country utilizes two different standards. See Martin, supra note 52, at 1264.
The next set of questions in the asylum area requiring resolution by the federal courts include further interpretation of the definition of a refugee, the meaning of “persecution,” as well as “social group” and “political opinion” concepts, and the proper ambit of discretion in asylum adjudications.
Id. at 51.
69. Cardoza-Fonseca, 480 U.S. at 448 (“We do not attempt to set forth a detailed description of how the ‘well-founded fear’ test should be applied. Instead, we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical.” (footnotes omitted)). In its earlier decision, INS v. Stevic, the Court used more precise language in describing what was meant by “well-founded fear.” The Stevic Court noted that “[a] more moderate position is that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.” 467 U.S. 407, 424-25 (1984). The Cardoza-Fonseca Court reiterated the Stevic Court’s “reasonable possibility” language. See Cardoza-Fonseca, 480 U.S. at 440. See also Gibney, supra note
other than to note that it included both subjective and objective components. In turn, some of the circuit courts have adopted contradictory definitions of "well-founded fear." The Ninth and Seventh Circuits have differing standards for the extent to which a subjective fear must be supported by objective facts. The Fifth Circuit has emphasized the objective component, finding that a "well-founded fear" exists if "a reasonable person in the applicant’s circumstances would fear persecution." Similarly, the BIA has adopted this "reasonable person" definition of "well-founded fear".

56. at 32 (declaring that the Cardoza-Fonseca Court left unanswered the question of "what does constitute a 'well-founded fear' of persecution?").

70. "[T]he reference to 'fear' in the § 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien." Cardoza-Fonseca, 480 U.S. at 430-31. In his dissent, Justice Powell pointed out that the implications of the phrase "well-founded," as it modifies "fear," had not been fully considered. He wrote, "If anything about these statutes is clear, it is that a 'well-founded fear' is something more than a 'fear.'" Id. at 456 n.1 (Powell, J., dissenting). He added that "the Court gives short shrift to the words 'well-founded,' that clearly require some objective basis for the alien's fear." Id. at 459. The Supreme Court has yet to decide the extent to which the subjective element must be buttressed by objective evidence of actual or potential persecution in the applicant's home country.

71. See Cavosie, supra note 49, at 429-30 (discussing the "reasonable person" test promulgated after Cardoza-Fonseca). See also Martin, supra note 52, at 1270 ("[T]his phrase can also take on a variety of shapes, from highly expansive to narrowly crabbed, often depending, it seems, on whether the speaker wishes to include or exclude a particular group of claimants.").

72. The Ninth Circuit has required a relatively low standard of proof, stating that an alien’s subjective fear can establish the necessary proof if supported by general indications of conditions in the home country. See Mendoza Perez v. INS, 902 F.2d 760, 762 (9th Cir. 1990) ("We have allowed '[a]n alien's own testimony regarding the threats [to] establish[ ] a clear probability of persecution, if credible and supported by general documentary evidence that the threats should be considered seriously.'") (quoting Artiga Turcios v. INS, 829 F.2d 720, 723 (9th Cir. 1987)). See also Rodriguez-Rivera v. INS, 848 F.2d 998, 1001 (9th Cir. 1988) (stating that both subjective and objective components must be found); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1283 n.11 (9th Cir. 1984) ("We believe that an evaluation of whether an alien has a well-founded fear includes consideration of the applicant's state of mind."). In contrast to the Ninth Circuit, the Seventh Circuit has required a showing of much more specific objective evidence and has indicated that an applicant's mere claim of persecution is insufficient to meet the "well-founded fear" requirement. Carvajal-Munoz v. INS, 745 F.2d 562, 576-77 (7th Cir. 1984) ("[W]hen objective, corroborative evidence does not exist, petitioner's testimony must describe credibly and persuasively specific, detailed facts that demonstrate actual persecution on one of the specified grounds or give rise to an inference that some other good reason exists for petitioner to fear persecution on one of those grounds."). See also Cavosie, supra note 49, at 415 (describing the interrelation between the subjective and objective components of the test as follows: " 'Fear' is a state of mind and, therefore, subjective. It is qualified, however, by 'well-founded,' apparently dictating an objective determination." (footnotes omitted)).

73. Rojas v. INS, 937 F.2d 186, 189 (5th Cir. 1991) (citing Guevara Flones v. INS, 786 F.2d 1242 (5th Cir. 1986), cert. denied, 480 U.S. 930 (1987)).
fear." The Second, Third, Fourth and Seventh Circuits are in accord with the BIA's and Fifth Circuit's approach. Perhaps the strictest requirement for showing a "well-founded" fear is that of the Sixth and Tenth Circuits, which have required aliens to show that they possessed "good reason to fear persecution" on one of several specified grounds. Thus, as one commentator has summarized, "there remains considerable room for dispute over just how much more of a showing" is required to prove a "well-founded fear."

2. Definition of "Refugee."—The "refugee" definition in section 101 of the Refugee Act contains several undefined terms, which the Court had never explored until the Elias-Zacarias decision. Specifically, the terms "persecution," "social group" and "political opin-

74. See In re Mogharrabi, 19 I. & N. Dec. 439, 445 (BIA, 1987) ("[A]n applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution."). The BIA has taken the definition of "well-founded fear" one step further by enumerating four elements: (1) The alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is aware or could become aware that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien. See In re R—O—, No. A-28779166, 1992 BIA LEXIS *5, at *4-5 (Apr. 22, 1992).

75. Melendez v. United States Dep't of Justice, 926 F.2d 211, 215 (2d Cir. 1991) (quoting Guevara Flores v. INS, 786 F.2d 1242, 1249 (5th Cir. 1986), cert. denied, 480 U.S. 930 (1987)). The Second Circuit explained that "once subjective fear is demonstrated, the applicant need only show that such fear is grounded in reality to meet the objective element of the test." Id.

76. Janusiak v. INS, 947 F.2d 46, 47 (3rd Cir. 1991) (applying the "reasonable person" test for determining the existence of "well-founded fear").

77. M.A. v. INS, 899 F.2d 304, 311 (4th Cir. 1990) (following the BIA's "reasonable person" approach to establish the type of objective evidence necessary to constitute a subjective "well-founded fear" of persecution).

78. Zulbeari v. INS, 963 F.2d 999, 1000 (7th Cir. 1992) (requiring an alien to show "a good reason to fear that he or she will be singled out for persecution") (citation omitted).

79. Youkhanna v. INS, 749 F.2d 360, 362 (6th Cir. 1984) (holding that, while the well-founded fear standard is more generous than the "clear probability" standard, an alien "must still present specific facts through objective evidence if possible, or through his own persuasive, credible testimony, showing actual persecution, or detailing some other good reason to fear persecution on one of the specified grounds") (quoting Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984)); Kapcia v. INS, 944 F.2d 702, 707 (10th Cir. 1991) (requiring that the alien present "specific facts" through "objective evidence" to show there is a "good reason to fear political prosecution").

80. Martin, supra note 52, at 1272.

ion" have spawned controversy and confusion. In general, the Ninth Circuit broadly interpreted the language to make it easier for aliens to obtain refugee status, while the INS strictly interpreted the language.

Addressing the political situations in a number of countries, one commentator recognized "the difficulties of proving individualized persecution in countries where political oppression is non-specific." For that very reason, the Ninth Circuit has found that in some circumstances political neutrality may constitute "political opinion" for purposes of political asylum and deportation. The Ninth Circuit also recognized that a persecutor could easily interpret a person's neutrality as an expression of political opposition and hostility. The First, Fourth, Fifth, and Seventh Circuits

82. See The Refugee Act of 1980 §§ 101(a)(42)(A), 243(h), 8 U.S.C. §§ 1101(a)(42)(A), 1253(h) (1988). See Cavosie, supra note 49, at 416-17 ("Persecution based on 'political opinion' is perhaps less readily definable than that based on any of the previous categories."). As other commentators have explained:

The most troublesome issues arise with regard to the last two bases for persecution: [membership in a particular social group and political opinion]. Administrative bodies have been reluctant to identify various discrete but loosely defined groupings as social groups; among those that have been rejected are young males in El Salvador, and members of a taxi cooperative in the same country. The Board of Immigration Appeals, in the latter case, held that persecution of a social group must be motivated by a desire to stamp out an immutable or common characteristic shared by group members that is so fundamental to identity or conscience that the members should not be required to change in order to avoid persecution.

FRAGOMEN & BELL, supra note 48, at 205.


In many countries, persons feel compelled by conscience to resist a regime they believe is oppressive. They may condemn such regime through active resistance, stated neutrality, silence, or refusal to enter military service. They may even have hostile opinions attributed to them that are not their own.

Id. 84. See Lazo-Majano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987).

85. Id. The Ninth Circuit stated:

At times in the history of persecution the victims have been persons who did not share the prejudices and enthusiasms of their persecutors. Their opinions have been politically unacceptable only because of the opposition and hostility the persecutors have read into their silence or noncommitment to the persecutors' opinions.

Id. See also Desir v. Ichert, 840 F.2d 723, 728 (9th Cir. 1988) ("The relationship between victim and persecutor is especially significant in situations where the petitioner may not have overtly given any expression to his opinions, but because of particular acts or circumstances, certain opinions are attributed to him.").

86. See Alvarez-Flores v. INS, 909 F.2d 1, 8 n.6 (1st Cir. 1990). The First Circuit accepted, for the sake of argument, that "neutrality" constituted a valid "political opin-
have taken note of, but have not adopted, the Ninth Circuit's finding.\textsuperscript{90} The government, however, rejected the Ninth Circuit's finding, requiring instead some overt political activity on the part of the applicant.\textsuperscript{91} Neither the courts of appeals nor the INS clearly distinguished between aliens who had been overtly neutral (e.g., a vocal conscientious objector) and those who had quietly chosen not to take sides.

Additionally, the Ninth Circuit found that "persecution on account of... political opinion" can be based on the political motives of the persecutor.\textsuperscript{92} That is, a guerrilla group's attempt to conscript citizens would be political persecution if the guerrillas' general purpose was political. The Eleventh Circuit found that proposition dangerously expansive.\textsuperscript{93} Similarly, the government recently argued that this interpretation would allow "draft dodgers" to be eli-
3. Standard of Review.—Finally, the courts of appeals have differed over the standard of review for BIA asylum decisions. The Refugee Act gave the Attorney General discretion to grant asylum to an alien, and the courts unanimously reviewed that decision on an abuse of discretion basis. However, a majority of courts, namely the Second, Fourth, Fifth, Sixth, Seventh, motive on the part of a guerrilla group “would create a sinkhole that would swallow the rule.”

94. Petitioners’ Brief at *37, Elias-Zacarias (No. 90-1342) (LEXIS, GENFED library, Brief File). The government stated:

Substituting the persecutor’s politics for the applicant’s removes an essential limit on the definition of “refugee” under the Act. Since guerrilla groups by definition have political goals (overthrowing the incumbent government), any person they attempt to coerce into performing military service would have a “well-founded fear of persecution on account of political opinion.”

95. With respect to review of withholding of deportation cases, however, the intermediate appellate courts have unanimously agreed that the 1980 Act requires a heightened standard of review. See, e.g., McMullen v. INS, 658 F.2d 1312, 1316 (9th Cir. 1981) (“A factual determination is now required, and the Board must withhold deportation if certain facts exist . . . . We conclude that factual findings under § 243(h) are subject to review under the substantial-evidence test.”). See also Bolanos-Hernandez v. INS, 767 F.2d 1277, 1282 n.8 (9th Cir. 1984) (finding that the 1980 Act established a “heightened, substantial evidence standard of review” for withholding of deportation decisions). The Seventh Circuit has held similarly, as have “the majority of other circuits that have addressed the matter.” Carvajal-Munoz v. INS, 743 F.2d 562, 569 (7th Cir. 1984). Whether this is the appropriate standard of review for withholding of deportation cases has yet to be addressed by the Supreme Court.

96. See Saleh v. United States Dep’t of Justice, 962 F.2d 234, 238 (2d Cir. 1992); Kapcia v. INS, 944 F.2d 702, 708 (10th Cir. 1991); Kaczmarczyk v. INS, 933 F.2d 588, 593 (7th Cir.); cert. denied, 112 S. Ct. 583 (1991); Melendez v. United States Dep’t of Justice, 926 F.2d 211, 218 (2d Cir. 1991); Ipina v. INS, 868 F.2d 511, 513 (1st Cir. 1989); Cruz-Lopez v. INS, 802 F.2d 1518, 1519 n.1 (4th Cir. 1986); Youkhanna v. INS, 749 F.2d 360, 362 n.2 (6th Cir. 1984).

97. See Saleh, 962 F.2d at 238; Melendez, 926 F.2d at 217-18 (joining the “majority of our sister circuits”).

98. Cruz-Lopez, 802 F.2d at 1519 n.1 (adopting the Ninth Circuit standard).

99. See Rojas v. INS, 937 F.2d 186, 189 (5th Cir. 1991) (noting that “[t]he substantial evidence standard requires only that the Board’s conclusion be based upon the evidence presented and be substantially reasonable”). See also Farzad v. INS, 802 F.2d 123, 124 (5th Cir. 1986) (“We also are satisfied that the Board’s determination that Farzad did not demonstrate a well-founded fear of persecution is supported by substantial evidence.”).

100. See Dawood-Haio v. INS, 800 F.2d 90, 97 (6th Cir. 1986) (finding that the INS had no “rational basis for determining that petitioner is not, in fact, a refugee”). However, in Doe v. INS, the Sixth Circuit held that whether an alien has a well-founded fear of persecution and thus comes under the statutory definition of a refugee eligible for asylum is a question of fact reviewable under the “clearly erroneous” standard. 867 F.2d
Eighth, Ninth, Tenth and Eleventh more closely reviewed the INS’s determination of refugee status. These circuits viewed this component of the asylum decision as a question of fact and therefore reversible if not supported by “substantial evidence.” For these courts, the substantial evidence standard allowed for close scrutiny of the BIA’s decisions. Other circuits, namely the First

285, 290 (6th Cir. 1989). This language describes a standard of review even more intensive than that of “substantial evidence.”

101. See Kaczmarczyk v. INS, 933 F.2d 588, 593 (7th Cir.), cert. denied, 112 S. Ct. 583 (1991); Balazoski v. INS, 932 F.2d 638, 640 (7th Cir. 1991). See also Carvajal-Munoz v. INS, 743 F.2d 562, 567 (7th Cir. 1984). In Carvajal-Munoz, the Seventh Circuit cautioned:

The granting of asylum, however, is discretionary under section 208, and ordinarily such a decision will be upheld unless it is found to be arbitrary, or capricious, or an abuse of discretion. We note, however, that the exercise of that discretion comes into play only after there has been a preliminary appraisal of refugee status, which involves an issue of fact. Because the abuse of discretion standard is not appropriate for reviewing factual findings regarding eligibility, we hold that substantial evidence must support the finding regarding refugee status.

Id. (citations and footnote omitted).

102. See Wojcik v. INS, 951 F.2d 172, 173 (8th Cir. 1991) (concluding that “there is substantial evidence to support the BIA’s finding that Wojcik no longer has a well-founded fear of persecution by the Polish government on account of his Solidarity activities”).

103. See Arriaga-Barrientos v. INS, 925 F.2d 1177, 1179 (9th Cir. 1991) (“We review the Board’s denial of asylum and withholding of deportation for substantial evidence. This standard is only slightly stricter than the clear error standard.”) (citations omitted). In Arriaga-Barrientos, the Ninth Circuit defined “substantial evidence” in a way that permits increased judicial oversight. See also Zacarias v. INS, 921 F.2d 844, 848 (9th Cir. 1990), rev’d, 112 S. Ct. 812 (1992) (“We review the Board’s factual findings under the ‘substantial evidence’ standard and reverse if the BIA’s findings are not substantially reasonable.”); Rodriguez-Rivera v. INS, 848 F.2d 998, 1001 (9th Cir. 1988) (“Under the substantial evidence standard, courts may not reverse the BIA simply because they disagree with its evaluation of the facts. ‘All the substantial evidence standard requires is that the BIA’s conclusion, based on the evidence presented, be substantially reasonable.’”) (citations omitted).

104. See Opoku v. INS, No. 91-9555, 1992 U.S. App. LEXIS 16735, at *3 (10th Cir. July 15, 1992) (not for publication) (“We review the factual findings underlying the BIA’s decision denying an application for asylum and prohibiting deportation for substantial evidence.”) (citation omitted); Kapcia v. INS, 944 F.2d 702, 707 (10th Cir. 1991) (also applying the substantial evidence standard).

105. See Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1296 (11th Cir. 1990) (“A factual determination by the BIA that an alien is statutorily ineligible for asylum or withholding is reviewed under the substantial evidence test.”) (citations omitted).

106. See Alvarez-Flores v. INS, 909 F.2d 1, 3 (1st Cir. 1990) (referring to the “deferential ‘substantial evidence’ standard”); Novoa-Umania v. INS, 896 F.2d 1, 4 (1st Cir. 1990) (stressing the “considerable respect” the court must give to the BIA’s determination).
and Third,\textsuperscript{107} viewed "substantial evidence" as requiring a highly deferential asylum standard. The disagreement over the meaning of "substantial evidence" reflected a wider confusion over the differences, if any, between the substantial evidence and abuse of discretion standards of review.\textsuperscript{108}

4. Court Patterns.—The most recent prior Supreme Court decision on immigration, \textit{Immigration and Naturalization Service v. Cardoza-Fonseca},\textsuperscript{109} constituted a victory for refugee advocates, establishing a more lenient standard of proof for granting asylum than that forwarded by the government.\textsuperscript{110} However, the strong conservative dissent by Justice Powell\textsuperscript{111} and the grudgingly composed concurrence by Justice Scalia\textsuperscript{112} indicated the possibility that the Court would swing in a different direction in future cases.\textsuperscript{113}

IV. Analysis

\textit{Elias-Zacarias} left untouched the Supreme Court's earlier decisions establishing standards of proof for asylum and withholding of deportation. The Court focused on the definition of "refugee" in the asylum section of the Refugee Act and the ability of the courts of appeals to review the BIA's decision as to whether a particular alien meets that definition.

\begin{itemize}
  \item \textsuperscript{107} See Janusiak v. INS, 947 F.2d 46, 47 (3rd Cir. 1991); Sankar v. INS, 757 F.2d 532, 533 (3rd Cir. 1985); Soto v. INS, 748 F.2d 832, 836-37 (3rd Cir. 1984). The Third Circuit is the only circuit to adopt the abuse of discretion standard for both steps of the asylum decision. Melendez v. United States Dep't of Justice, 926 F.2d 211, 217 (2d Cir. 1991).
  \item \textsuperscript{108} For a detailed explanation of whether the "arbitrary or capricious" standard differs from the "substantial evidence" standard, see 5 \textsc{Kenneth C. Davis}, \textsc{Administrative Law Treatise} § 29:7, 356-63 (2d ed. 1984). Professor Culp's treatise explains:
    \begin{quote}
    The law is, then, all at one time, that the one test requires more than the other, that the other requires more than the one, and that the difference between the two tests is largely semantic! If the lawmakers had a malevolent purpose of preventing clarity (as surely they do not), could they accomplish that purpose more effectively?
    \end{quote}
    \textit{Id.} at 359.
  \item \textsuperscript{109} 480 U.S. 421 (1987).
  \item \textsuperscript{110} \textit{Id.} at 448-50.
  \item \textsuperscript{111} \textit{Id.} at 455-69 (Powell, J., dissenting). Justices Rehnquist and White joined Justice Powell's dissent.
  \item \textsuperscript{112} \textit{Id.} at 452-55 (Scalia, J., concurring).
  \item \textsuperscript{113} But see Helton, \textit{supra} note 68, at 51-52 (predicting, based on the \textit{Cardoza-Fonseca} decision, that the Court would adopt a "liberal construction of such concepts as 'political opinion' and 'particular social group' as establishing bases for persecution under the refugee definition").
\end{itemize}
A. "Persecution on Account of . . . Political Opinion"

The Court decisively rejected the notion that forced conscription constituted "persecution on account of . . . political opinion." The Court gave three reasons for its adamant rejection of this proposition.

First, the Court refused to accept political neutrality as a "political opinion" within the meaning of the statute: "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. . . ." Thus, the Court rejected the Ninth Circuit's argument, expressed in Zacarias and its preceding decisions, that a conscious decision to remain politically neutral did satisfy the definition of "political opinion." The Court ignored the Ninth Circuit's concern that not recognizing political neutrality would undermine a "basic" purpose of the Refugee Act of 1980 because it would limit protection to ideological extremists.

The Court categorized Elias-Zacarias' position as apolitical and then rejected the notion that aliens could take seemingly political positions for apolitical reasons and still qualify for asylum—an idea supported by the Ninth Circuit and the dissenters in the Elias-

116. Id. However, the Court carefully noted it did not need to "decide whether the evidence compels the conclusion that Elias-Zacarias held a political opinion." Id.
117. See Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1984) ("Choosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction. . . . When a person is aware of contending political forces and affirmatively chooses not to join any faction, that choice is a political one."); Rodriguez-Rivera v. INS, 848 F.2d 998, 1004 (9th Cir. 1988) ("Political neutrality clearly may constitute political opinion within the meaning of Section 1101(a)(42)(A)."). The Ninth Circuit's view had provoked internal disagreement, with one circuit judge warning that recognizing political neutrality would "eviscerate[ ] the political opinion requirement of the statute." Mendoza Perez v. INS, 902 F.2d 760, 767 (9th Cir. 1990) (Sneed, J., concurring specially). As Judge Sneed stated, "It means that a politically inactive alien, and perhaps most aliens are, may now gain the protection of asylum." Id. He added that the inclusion of political neutrality was a "distortion of the historical purposes of asylum" and that "political activism underlies the concept of 'refugee' status." Id.
118. See Bolanos-Hernandez, 767 F.2d at 1286. The Ninth Circuit explained:
A rule that one must identify with one of two dominant warring political factions in order to possess a political opinion, when many persons may, in fact, be opposed to the views and policies of both, would frustrate one of the basic objectives of the Refugee Act of 1980—to provide protection to all victims of persecution regardless of ideology.

Id.
119. See Elias-Zacarias, 112 S. Ct. at 815-16.
Zacarias decision. Justice Scalia speculated that Elias-Zacarias' refusal to join the guerrillas could have many non-political bases, including "fear of combat, a desire to remain with one's family and friends, [and] a desire to earn a better living in civilian life . . . ."

According to the Court, the actions for which applicants claim they will be persecuted must have had a clear political motivation; that is, the aliens must have consciously attempted to make a political statement through their words or actions. In the future, this argument may be used to exclude aliens who, while lacking an actual political opinion, are mistakenly perceived as holding one.

Second, the Court determined that the "political opinion" must belong to the alien rather than the persecutor. The Court found that "[t]he ordinary meaning of the phrase 'persecution on account of . . . political opinion' in § 101(a)(42) is persecution on account of the victim's political opinion, not the persecutor's."

120. See id. at 818 (Stevens, J., dissenting) ("Even if the refusal is motivated by nothing more than a simple desire to continue living an ordinary life with one's family, it is the kind of political expression that the asylum provisions of the statute were intended to protect."); Zacarias v. INS, 921 F.2d 844, 850 (9th Cir. 1990), rev'd, 112 S. Ct. 812 (1992) ("[T]he person resisting forced recruitment is expressing a political opinion hostile to the persecutor . . . ."). In Bolanos-Hernandez, the Ninth Circuit considered the fact that the guerrillas would view the alien's motives as political even though his motivations were not, in fact, political. Bolanos-Hernandez, 767 F.2d at 1286.

121. Elias-Zacarias, 112 S. Ct. at 816. It is unclear whether the Court established a requirement that the victim's actions be based exclusively on his political opinion. Many aliens, particularly those from Central America, have "mixed motives for applying for asylum." Preston, supra note 52, at 123. Immigrants frequently flee for a difficult-to-distinguish combination of economic and political reasons. "[T]he distinction between economic and political motives is often blurred or artificial. . . . The applicant must be considered a refugee only if his primary motivation is political." Id.

122. The Court recognized this risk but did not fully evaluate it, stating only "there [is not] any indication (assuming, arguendo, it would suffice) that the guerrillas erroneously believed that Elias-Zacarias' refusal was politically based." Elias-Zacarias, 112 S. Ct. at 816.

123. See id.

124. Id. Justice Scalia used a conventional linguistic argument to justify his interpretation of the "ordinary meaning" of the statute. "If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion." Id. Thus, Justice Scalia decided that the victim's characteristics—not the persecutor's—determine the nature of the persecution.

In his limited set of examples, however, Justice Scalia ignores the full array of possible scenarios. For example, if a fundamentalist religious regime persecutes all atheists in a country, the only way possible to explain the nature of the persecution is through the religion of the persecutor. If one were to apply Justice Scalia's methodology, one could conclude that because the victim has no religion, this persecution must not be religious. Thus, in this case, Justice Scalia's analysis results in absurd conclusions.
The majority thereby rejected the Ninth Circuit's view that the politics of both victim and persecutor should be examined as part of the asylum decision. The Ninth Circuit, in an earlier decision, had refused to give the federal statute such a "restrictive or mechanical . . . construction," stating:

"Persecution" occurs only when there is a difference between the persecutor's views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate. For this reason, in determining whether threats or violence constitute political persecution, it is permissible to examine the motivation of the persecutor; we may look at the political views and actions of the entity or individual responsible for the threats or violence, as well as to the victim's, and we may examine the relationship between the two.126

The Supreme Court, however, did not hesitate to adopt this "restrictive or mechanical . . . construction." In so doing, the Court eliminated from consideration for refugee status those who lack overt political positions themselves, but who are adversely affected by groups with clear political agendas.127

Finally, the Court indicated that the persecution must stem from the persecutor's displeasure with the victim's political opinion.128 The Court found that Elias-Zacarias failed this test because the guerrillas were motivated by a desire to increase their army and not because they disliked Elias-Zacarias' neutral position.129 In Arteaga v. Immigration and Naturalization Service, the Ninth Circuit had rejected the need to examine whether the persecutor's motives towards the victim were specifically targeted at the victim's political views.130 In that decision, the Ninth Circuit required only that the general motive of the persecutor be political in nature.

125. Id.
126. Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985) (citations omitted).
127. See Gibney, supra note 56, at 33, 49 ("Under a strict reading of this definition, those fleeing wars, or seeking refuge from mass slaughter, are often not considered bona fide refugees because they are not singled out for persecution, nor is the persecution necessarily based on one of those five factors."); see also Cavosie, supra note 49, at 414 n.23 (noting that the definition does not include "persons fleeing natural disasters, war and starvation").
128. See Elias-Zacarias, 112 S. Ct. at 816.
129. Id. at 816 n.2.
130. See Arteaga, 836 F.2d 1227, 1232 n.8 (9th Cir. 1988).
It is not relevant that the guerrillas may have been interested in conscripting Arteaga to fill their ranks rather than to "punish" Arteaga's neutrality. To find political persecution, all we need inquire of the guerrillas' motive is whether that motive is political. Clearly, forced recruitment into the war against the government is politically motivated.\textsuperscript{131}

The Court's holding in \textit{Elias-Zacarias} significantly narrowed the definition of refugee. But it is important to note that the withholding of deportation section also uses the phrase "persecution on account of . . . political opinion."\textsuperscript{132} In the future, the Court's decision will undoubtedly be extended to withholding of deportation applications. The effect will be that obtaining asylum and withholding of deportation will be significantly more difficult for aliens than in the past.

\textbf{B. Standard of Review}

The Supreme Court rejected the proposition, which was held by a majority of the courts of appeals, that refugee status is a factual determination subject to a substantial evidence standard of review. Rather, it established an even more deferential standard of review for asylum and deportation cases.\textsuperscript{133} This will significantly restrict the ability of the circuit courts to reverse BIA rulings.\textsuperscript{134}

Before \textit{Elias-Zacarias}, many circuits recognized that the Refugee Act of 1980 gave the Attorney General great discretion in granting asylum.\textsuperscript{135} However, several circuits held that the threshold step to that decision—determination of whether an applicant met the defi-

\begin{itemize}
  \item \textsuperscript{131} \textit{Id.} (citations omitted).
  \item \textsuperscript{133} \textit{See Elias-Zacarias}, 112 S. Ct. at 815 (noting that the BIA decision may only be reversed if "a reasonable fact-finder \textit{would have to conclude} that the requisite fear of persecution existed" (emphasis added)). If the immigration judge, who failed to find the requisite fear, is considered by the reviewing court to be a reasonable fact-finder (which must be assumed in all but the most egregious cases), the test effectively can never be met.
  \item \textsuperscript{134} \textit{See id.} at 817 ("[T]o obtain judicial reversal of the BIA's determination [an alien] must show that no reasonable factfinder could fail to find the requisite fear of persecution.").
  \item \textsuperscript{135} \textit{See supra} note 96 for a list of circuits recognizing the Attorney General's discretion. \textit{See also} Carvajal-Munoz v. INS, 743 F.2d 562, 567-68 (7th Cir. 1984) ("[I]f the immigration judge finds that the applicant qualifies as a 'refugee,' but nonetheless decides to deny the applicant asylum in the exercise of the judge's discretion, we will not overturn the decision unless it was arbitrary, capricious, or an abuse of discretion.").
\end{itemize}
nition of "refugee"—was a question of fact.\textsuperscript{136} Under traditional rules, the test was that an administrative agency's findings of fact could be reversed if it was not supported by substantial evidence.\textsuperscript{137} The Ninth Circuit had previously applied this standard to a number of other situations involving decisions by the BIA and other administrative agencies.\textsuperscript{138} But some Ninth Circuit judges had also recognized that circuits sometimes used an abuse of discretion standard, thereby giving greater deference to the BIA rulings.\textsuperscript{139} On a policy level, some commentators decried the pattern of courts of appeals reversals of BIA decisions as improper interference that prevented the establishment of a uniform national asylum policy.\textsuperscript{140}

The Supreme Court had not resolved this disparity among the circuits. However, in his dissent in \textit{Cardoza-Fonseca}, Justice Powell espoused the more conservative view that the BIA, as an administrative agency, should be granted wide latitude.\textsuperscript{141} Justice Powell implied that the only grounds on which he would have overturned the BIA's interpretation of the statute would have been if that interpretation was "unreasonable."\textsuperscript{142} Referring to the BIA as an "expert agency," he argued that the standard of review issue for both asylum and withholding of deportation was "a question best answered

\begin{itemize}
  \item \textsuperscript{136} See \textit{supra} notes 97-105 and accompanying text.
  \item \textsuperscript{137} See \textit{NLRB v. Columbian Enameling & Stamping Co.}, 306 U.S. 292, 299-300 (1939). The \textit{Columbian Enameling} Court stated:
  \begin{quote}
  [T]his, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established.
  \end{quote}
  \textit{Id.} (citations omitted).
  \item \textsuperscript{138} See \textit{McMullen v. INS}, 658 F.2d 1312, 1316 (9th Cir. 1981) ("Agency findings arising from public, record-producing proceedings are normally subject to the substantial-evidence standard."). The Ninth Circuit also applied a more stringent standard of review when the immigration judge and BIA disagreed. \textit{Id.} at 1318.
  \item \textsuperscript{139} See \textit{Mendoza Perez v. INS}, 902 F.2d 760, 765 (9th Cir. 1990) (Sneed, J., concurring specially) ("This circuit makes it easier than any other for an alien to argue successfully that a decision by an immigration judge is not supported by substantial evidence. . . . Other circuits that have articulated explicitly the standard of review follow the abuse of discretion standard.") (citations omitted).
  \item \textsuperscript{140} See \textit{Martin, supra} note 52, at 1272-73 (noting that each circuit had established its own standards and definitions, and that "the Supreme Court is not in a position to resolve more than a handful of such disputes").
  \item \textsuperscript{141} See \textit{Cardoza-Fonseca}, 480 U.S. at 460 (Powell, J., dissenting). See also \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.}, 467 U.S. 837, 843-45 (1984). In \textit{Chevron}, Justice Stevens wrote that where Congress had implicitly delegated authority to an agency, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." \textit{Id.} at 844.
  \item \textsuperscript{142} \textit{Cardoza-Fonseca}, 480 U.S. at 461.
\end{itemize}
by an entity familiar with the types of evidence and issues that arise in such cases."\textsuperscript{143} In his Cardoza-Fonseca concurrence, Justice Scalia also expressed his concern that the majority had tolerated less deference to the BIA than was warranted.\textsuperscript{144}

Justice Scalia finally secured a majority for his deferential position in Elias-Zacarias. Without great explanation, the Court rejected the Ninth Circuit's approach and applied an abuse of discretion standard to both the refugee determination and the decision whether to grant asylum.\textsuperscript{145} The Court quoted the portion of the INA indicating that a court of appeals must affirm the agency's "findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole . . . ."\textsuperscript{146} Justice Scalia interpreted this language to mean that a court of appeals could reverse the BIA only if the evidence existed so strongly in the alien's favor that it compelled any reasonable fact-finder to find in favor of the alien.\textsuperscript{147} The Court did not explain why it read this language in this particular way. If one places emphasis on the word "reasonable," then the standard is similar to that of abuse of discretion. However, if one places emphasis on the word "substantial," the standard is closer to the Ninth Circuit's more generous substantial evidence test. Justice Scalia clearly took the former view.\textsuperscript{148}

The Court's decision will greatly limit the ability of the courts of appeals to review BIA decisions for consistency, fairness, and appropriateness. Only glaringly unreasonable decisions will be overturned.\textsuperscript{149} Thus, BIA decisions, and the ideological biases upon

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{143} See id. at 460.
\item \textsuperscript{144} See id. at 454 (Scalia, J., concurring). Justice Scalia explained: The Court first implies that courts may substitute their interpretation of a statute for that of an agency whenever, "[e]mploying traditional tools of statutory construction," they are able to reach a conclusion as to the proper interpretation of the statute. But this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation but an evisceration of Chevron.
\item \textsuperscript{145} Id. (citations omitted).
\item \textsuperscript{146} Although the Court did not expressly label the standard "abuse of discretion," Justice Scalia's construction of the "substantial . . . evidence" standard makes the two practically equivalent.
\item \textsuperscript{147} Id. at 815; 8 U.S.C. §1105a(a)(4) (1988)).
\item \textsuperscript{148} See id. at 817.
\item \textsuperscript{149} Lower federal courts have already adopted Elias-Zacarias' dictate. See, e.g., Klawitter v. INS, 970 F.2d 149, 151 (6th Cir. 1992) ("[I]n order to reverse the BIA's factual determinations, the reviewing court must find that the evidence not only supports a
\end{enumerate}
\end{footnotesize}
which they may be based, will go largely unchecked by the judiciary.\textsuperscript{150}

In addition, and perhaps more importantly, the Court's construction of the term "substantial evidence" will likely affect the judicial review of agency decisions in areas other than immigration law. Notably, the broadly applicable Administrative Procedures Act uses the same key language.\textsuperscript{151}

\textbf{C. Statutory Construction}

Before \textit{Elias-Zacarias}, the Supreme Court adhered to "the long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien."\textsuperscript{152} This policy was based on the Court's sense of the seriousness of deporting someone into a potentially dangerous position.\textsuperscript{153} After \textit{Elias-Zacarias}, this tendency is seen in the views of only a minority of the Justices.\textsuperscript{154} In \textit{Elias-Zacarias}, the Court interpreted the statutory terms "political opinion" and "persecution" in a way that substantially and adversely affects an alien with a questionable claim.

In making its decision, the \textit{Elias-Zacarias} Court focused almost exclusively on the words of the statute itself, with little acknowledgement of the intent and history behind the language. An "ordi-

\textsuperscript{150} See also Abedini v. INS, 971 F.2d 188, 191 (9th Cir. 1992); Sivaainkaran v. INS, 972 F.2d 161, 163 (7th Cir. 1992).

\textsuperscript{151} This would be contrary to the legislative intent of the Refugee Act of 1980. \textit{See S. REP. No. 96-256, 96th Cong., 2d Sess. 4 (1980), reprinted in 1980 U.S.C.C.A.N. 141, 144 ("[T]he new statutory definition ... eliminates the geographical and ideological restrictions now applicable to conditional entrant refugees ... ").

\textsuperscript{152} \textit{See Administrative Procedure Act, ch. 324, § 7, 5 U.S.C. § 556(d) (1988) (providing for "consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence").


\textsuperscript{154} \textit{See also Costello v. INS, 376 U.S. 120, 128 (1964) (stating that "accepted principles of statutory construction in this area of the law [are] to resolve that doubt in favor of the petitioner"); id. at 148 (White, J., dissenting) ("I have no quarrel with the doctrine that where the Court is unable to discern the intent of Congress, ambiguities should be resolved in favor of the deportee ... ").

\textsuperscript{155} INS v. Errico, 385 U.S. 214, 225 (1966) ("[T]he doubt should be resolved in favor of the alien" even when the statute's literal interpretation argues otherwise.). \textit{But see INS v. Phinpathya, 464 U.S. 183, 196 (1984) (holding that the "continuous presence requirement" for an alien to qualify for suspension of deportation should be strictly interpreted as allowing no exceptions).

\textsuperscript{156} \textit{Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("We resolve the doubts in favor of [the alien] because deportation is a drastic measure and at times the equivalent of banishment or exile.").

\textsuperscript{157} \textit{Elias-Zacarias}, 112 S. Ct. at 819 (Stevens, J., dissenting) (The Court "should resolve any doubts concerning the political character of an alien's refusal to take arms against a legitimate government in favor of the alien.").
nary meaning" approach had surfaced periodically in the Court's previous statutory construction decisions.\(^{155}\) This interpretive technique, however, earned only limited recognition with regard to immigration law prior to **Elias-Zacarias.**\(^ {156}\) Yet, Justice Scalia's **Cardoza-Fonseca** concurrence provided a preview of its emerging form.

Rejecting the majority's willingness to consider "'clearly expressed legislative intention' contrary to [the statutory] language,"\(^ {157}\) Justice Scalia in **Cardoza-Fonseca** asserted that the Court should never go beyond the clear, "'plain meaning' of statutory language in the "absence of patent absurdity."

Where the words themselves are unambiguous, examination of the legislative history is "gratuitous" and inappropriate.\(^ {159}\)

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155. See Richards v. United States, 369 U.S. 1, 9 (1962) ("[W]e must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."). See also **Cardoza-Fonseca**, 480 U.S. at 431 ("With regard to this very statutory scheme [of immigration], we have considered ourselves bound to 'assume' that the legislative purpose is expressed by the ordinary meaning of the words used.") (quoting INS v. Phinpathya, 464 U.S. 183, 189 (1984), in turn quoting American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982), in turn quoting Richards v. United States, 369 U.S. 1, 9 (1962)).

156. See **Cardoza-Fonseca**, 480 U.S. at 457 (Powell, J., dissenting). Justice Powell argued in favor of strictly interpreting the words "well-founded" as they were used to modify "fear." Id. Compare **Costello v. INS**, 376 U.S. 120, 124 (1964) (refusing to consider statutory language regarding denaturalization "plain" when the petitioner's and the INS's interpretations were "both possible readings of the statute") with **Phinpathya**, 464 U.S. at 189-96 (using the plain meaning doctrine to hold that "Congress meant what it said" regarding the INA's continuous presence requirement, and adding "when Congress in the past has intended for a 'continuous physical presence' requirement to be flexibly administered, it has provided the authority for doing so").

157. **Cardoza-Fonseca**, 480 U.S. at 432 n.12. In other immigration cases, this interpretative approach has been persuasively forwarded. See **Phinpathya**, 464 U.S. at 198 (Brennan, J., concurring). Justice Brennan explained:

> It is a hornbook proposition that "[a]ll laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

*Id.* (quoting United States v. Kirby, 7 Wall. 482, 486-87 (1869)). See also **Costello**, 376 U.S. at 133-34 n.1 (White, J., dissenting) ("This Court has repeatedly stressed the principle that in construing statutes 'the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.'") (quoting United States v. Whitridge, 197 U.S. 135, 143 (1905).

158. **Cardoza-Fonseca**, 480 U.S. at 452-53 (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."). Taken to an extreme, however, Justice Scalia's analyses could lead to absurd conclusions. See supra note 124.

159. **Cardoza-Fonseca**, 480 U.S. at 453 (Scalia, J., concurring).
In *Elias-Zacarias*, the Court adopted and reaffirmed this method of statutory construction,\(^{160}\) despite apparent ambiguities in the pivotal terms. Justice Scalia focused purely on the text of the INA statute and its plain meaning. He held, "The ordinary meaning of the phrase 'persecution on account of . . . political opinion' in [section] 101(a)(42) is persecution on account of the victim's political opinion, not the persecutor's.”\(^{161}\) In so finding, he made an important statutory distinction where none existed previously by rejecting the Ninth Circuit's interpretation of the crucial statutory language.\(^{162}\) Further, Justice Scalia quite possibly may have circumvented the congressional intent behind the Refugee Act of 1980 to prevent ideologically slanted and arbitrary decisions.\(^{163}\)

**Conclusion**

The *Elias-Zacarias* decision will make avoidance of deportation and qualification for political asylum more difficult for aliens who fear political persecution. They will be required, at their first administrative hearing, to show that they have a "well-founded fear" of persecution which is the direct result of an actual, explicit and conscious political statement on their part. In addition, the courts will have diminished authority to oversee decisions of the BIA. The standard of review is now virtually solidified as abuse of discretion for the entire decision, including the determination of whether an alien meets the definition of "refugee." No longer will immigration statutes be applied to favor aliens.

The reach of *Elias-Zacarias* will extend beyond immigration disputes. The Court's decision decreases the ability of federal courts to look behind statutory language to reveal deeper meanings and legislative intent. Justice Scalia's fixation on the "plain meaning" of the actual words themselves has won a majority position.

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160. See *Elias-Zacarias*, 112 S. Ct. at 816 ("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.' " (quoting Richards v. United States, 369 U.S. 1, 9 (1962))).

161. Id.

162. See supra notes 117-121 and accompanying text.

163. See supra notes 48-56 and accompanying text.
The editors of *Maryland Law Review* dedicate this issue to the memory of Juanita Jackson Mitchell