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Elias-Zacarias v. INS: Neutrality as a Form of Political Opinion

Amy DelPo

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**Elias-Zacarias v. INS: Neutrality as a Form of Political Opinion**

I. Introduction

Guatemalans were fleeing violence in their war-torn country long before the armed, masked men came to Jairo Jonathan Elias-Zacarias one evening in 1987. In fact, the battle between the military and the guerrillas would displace more than one million Guatemalans inside the country by the end of that year and force tens of thousands of others to run to Mexico or the United States.¹ These people fled for good reason: between 1954 and 1988, more than one hundred thousand Guatemalan civilians were arbitrarily killed by the government (more than half of those between 1978 and 1988) and countless more (thirty-five thousand between 1978 and 1988 alone) were “disappeared.”²

So when the Elias-Zacarias family saw the men lurking in the dusk near their home, they knew they were in danger.³ And when the guerrillas approached and asked the young man and his father to join them, the family knew the time had come for 18-year-old Jairo Jonathan to come to grips with his country’s civil war.⁴ Instead of choosing a side, however, he did what many before him had done: he fled the country.⁵ His parents urged him to run to the United States,⁶ but when he entered this country in July of 1987, agents for the Immigration and Naturalization Service (INS) apprehended him the same day he crossed the border.⁷ For five years, Elias-Zacarias fought deportation, arguing both to the Board of Immigration Appeals (BIA) and to the United States Court of Appeals for the Ninth Circuit that conditions in his homeland were such that he might be killed for his political beliefs if he returned.⁸ He argued that guerrillas threatened his life for trying to remain neutral in their war against

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² Id. See infra note 31.
⁴ Id.
⁵ Id.
⁶ Id.
⁷ Id.
⁸ The BIA dismissed Elias-Zacarias’ first appeal on procedural grounds. The Board denied his motion to re-open, but addressed the merits of his case. The BIA concluded that there was no evidence that the guerrillas engaged in forced recruitment and that Elias-
Elias-Zacarias’ fight to stay in this country ended in 1992 when the United States Supreme Court ruled against him, saying that he had failed to show that the guerrillas were persecuting him on account of his political opinion and that he was therefore ineligible for asylum.10

Elias-Zacarias’ fate depended on a statute enacted by Congress to inject humanitarian principles into this country’s immigration policy. The Refugee Act of 198011 was to give “statutory meaning to our national commitment to human rights and humanitarian concerns.”12 Congress wanted to create an immigration policy that would reflect this country’s commitment to caring for people who looked to the United States as a “safe haven.”13 Unfortunately for Elias-Zacarias, the Supreme Court refused to take a humanitarian approach to his case.

This Note analyzes the Court’s holding in INS v. Elias-Zacarias and concludes that, in addition to being unrealistic, the Court’s decision was contrary to Congressional intent for two reasons: First, the ruling perpetuates the discrimination that Congress was trying to eliminate from this country’s immigration policy when it enacted the Refugee Act; and second, the Court’s ruling does not reflect the human rights ideal that was a driving force behind the Refugee Act.14 This Note surveys the background law by focusing on the dispute between the BIA and the Ninth Circuit over how to deal with forced recruitment and neutrality cases.15 This Note concludes that the Ninth Circuit’s reasoning, and not that of the Supreme Court or the BIA, best reflects the purpose of the Refugee Act.16

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Zacarias had not proved the existence of any threats. Zacarias v. INS, 921 F.2d 844, 851 (9th Cir. 1990).

The Ninth Circuit overruled the BIA, finding that the guerrillas did engage in forced recruitment and that they had threatened Elias-Zacarias. For these reasons, the court held that Elias-Zacarias qualified as a refugee under the Refugee Act. Id.

9 Resp’t Br., supra note 3, at 2.
13 Senate Report, supra note 12, at 142.
14 See infra notes 174-75 and accompanying text.
15 The Ninth Circuit hears an unusually large number of immigration cases because of demographics (California is believed to have the largest undocumented alien population of any state) and the presence of a major Immigration and Naturalization detention center. Carolyn P. Blum, The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980, 23 SAN DIEGO L. REV. 327, 329 n.10 (1986).
16 See infra notes 176-78 and accompanying text.
II. INS v. Elias-Zacarias

A. Background

Guatemala's political and cultural woes go back more than four-hundred years. The ancestors of the Guatemalan Indians were the Mayans. Before the Conquistador invasion in 1524, they enjoyed an advanced civilization. Since that time, however, the natives of Guatemala have been dominated by the Lados (people who are of mixed or pure Spanish descent).

Until 1944, the country was run by dictators. In that year, a reformist Ladino coalition established a democratic government with free elections, free speech, and a free press. This lasted until 1954, when the U.S. Government arranged to overthrow the elected president. The military took over and ruled for more than thirty years — an era of terror marked by hundreds of thousands of killings and disappearances and reports of torture. Between 1982 and 1983, the army burned at least one village per week; during the late 1980s, the army destroyed 444 villages. In 1986, the military restored the civilian government. In doing so, however, the military did not give up its hold on power. As then-President Mario Vinicio Cerezo Arevalo said at his inaugural address, "I remind you that I have received the government, but not the power."

The government now seeks some kind of accord with the left-wing guerrillas, but it is unlikely that any progress will be made until the human rights abuses stop. For now, such a possibility seems remote because the military's human rights violations continue.

B. Facts of the case

Just before dark in January 1987, Elias-Zacarias' parents saw two men with machine guns lurking near their home. The men eventu-
ally approached. Although they had handkerchiefs covering their faces, they identified themselves as guerrillas and asked Elias-Zacarias and his parents to join them in their war against the government. The family refused. Elias-Zacarias explained his family’s fear: “If you join the guerrillas . . . then you are against the government. You are against the government and if you join them then it is to die there. And, then the government is against you and against your family.” The guerrillas promised to return, and Elias-Zacarias concluded that they would “take me and kill me” if he remained neutral. Seeing no solution to his dilemma, he fled the country.

The INS apprehended Elias-Zacarias the same day he entered the United States near Nogales, Arizona. Agents placed him in detention and initiated deportation proceedings. Elias-Zacarias acknowledged his deportability, but requested that his deportation be withheld. He claimed he was a refugee within the meaning of the Refugee Act and was therefore eligible for political asylum. In order to qualify for refugee status, Elias-Zacarias had to show that he had a well-founded fear of persecution because of his political beliefs.

C. Holding

The issue before the Supreme Court was whether the guerrillas’
threats constituted "persecution on account of . . . political opinion." In a 6-3 decision, the Court concluded that they did not. The Court's reasoning was simple: Not only had Elias-Zacarias failed to show any political motivation for his own actions, but he also failed to show that the guerrillas threatened him specifically because of his political beliefs. Because there was no evidence that Elias-Zacarias' politics had anything to do with his refusal to join the guerrillas or with their threats against him, the Court could not grant him political asylum.

In an opinion written by Justice Scalia, the Court found that the record showed only that Elias-Zacarias was afraid — and nothing more. He had refused the guerrillas, not because he disagreed with them, but because he feared government retaliation. There were no politics involved. The Court seemed to view Elias-Zacarias as just one of many Guatemalans who did not want to become enmeshed in the country's bloody civil war, something that was potentially lethal regardless of the victim's political bent. "Even a person who supports a guerrilla movement might resist recruitment for a variety of reasons," the Court said. "[F]ear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few." Unfortunately for Elias-Zacarias, fear on its own — no matter how well-founded — is not enough to support an asylum claim.

The Court then rejected the Ninth Circuit's conclusion that, regardless of Elias-Zacarias' reasons, the guerrillas' motive in recruiting him was political, thus satisfying the Refugee Act's test. In discounting the circuit court's reasoning, Justice Scalia wrote that the statute addresses "persecution on account of the victim's political

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40 Id. at 816.
41 Id.
42 Id.
43 Id. The Ninth Circuit barely addressed the issue of political opinion, dispensing with the question in one sentence:

[T]he threat to Elias was for political as opposed to personal reasons; the BIA did not suggest that the individual guerrillas who appeared at his door had a personal quarrel with Elias, and in any event, there is no evidence to rebut the common sense presumption that the guerrillas were interested in recruiting Elias to further the group's political goals.

Zacarias v. INS, 921 F.2d 844, 852 (9th Cir. 1990) (emphasis in original).
44 Elias-Zacarias, 112 S. Ct. at 816.
45 Id.
46 Id.
47 Id. at 815-16.
48 Id. at 816. But see Resp't Br., supra note 3, at 6 ("This case is not about displaced persons fleeing from general conditions of civil strife in a war-torn country. This is a case about one individual — Jairo Jonathan Elias-Zacarias — who had a political opinion, who acted on it, and who fears that if he returns home he will be taken and killed because of his politically-motivated act.").
49 See infra notes 86-88 and accompanying text.
50 Elias-Zacarias, 112 S.Ct. at 816.
opinion, not the persecutor's. . . . Thus, the mere existence of a generalized 'political' motive underlying the guerrillas' forced recruitment is inadequate to establish . . . the proposition that Elias-Zacarias fears persecution on account of political opinion."51

The Court found troubling the lack of affirmative action taken by Elias-Zacarias.52 The guerrillas were angry with him, not because of something he had done, but because of something he had not done.53 This defeated Elias-Zacarias' claim because neutrality is not "ordinarily" an affirmative expression of political opinion.54

Most important to the Court's holding, however, was that Elias-Zacarias failed to show that the guerrillas were doing anything more than trying to fill their ranks.55 If Elias-Zacarias' own affirmatively expressed political beliefs were not at the root of the guerrillas' anger, then asylum could not be granted.56 The persecutor's motive, the Court said, is critical.57 A person seeking asylum must show some link between the guerrillas' intent and his political opinion, whether by direct or circumstantial evidence, in order to win.58

The dissent sharply criticized the majority for its "narrow" and "grudging" view of political opinion under the act.59 Justice Stevens' dissenting opinion was unequivocal in concluding that neutrality can indeed be an expression of a person's political views.60 "A political opinion can be expressed negatively as well as affirmatively," he wrote in an opinion joined by Justices Blackmun and O'Connor.61 "A refusal to support a cause — by staying home on election day, by refusing to take an oath of allegiance, or by refusing to step forward at an induction center — can express a political opinion as effectively as an affirmative statement or affirmative conduct."62

The implication that a victim had to choose sides in a war in 51 Id.
52 Id.
53 Id.
54 Id.
55 Id.
56 Id. The dissent takes the contrary view. "It does not matter to the persecutors what the individual's motivation is. The guerrillas . . . do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause." Id. at 819 (Stevens, J., dissenting) (quoting Bolanos-Hernandez v. INS, 767 F.2d 1277, 1287 (9th Cir. 1985)).
57 Id. at 817.
58 Id. The dissent disagrees with this, saying that the victim does not have to prove why his persecutors are after him, only that he has a "well-founded fear of persecution on account of . . . political opinion." Id. at 820 (Stevens, J., dissenting). "[T]he applicant meets this burden if he shows that there is a 'reasonable possibility' that he will be persecuted on account of his political opinion." Id. (Stevens, J., dissenting).
59 Id. at 818 (Stevens, J., dissenting).
60 Id. (Stevens, J., dissenting).
61 Id. (Stevens, J., dissenting).
62 Id. (Stevens, J., dissenting).
order to qualify for asylum under the Refugee Act troubled the dis-
senters. 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 poli-
cies of both, would frustrate one of the basic objectives of the Refu-
gee Act of 1980 — to provide protection to all victims of persecution
regardless of ideology.64

The dissent acknowledged that fear motivated Elias-Zacarias,
but regarded this fear as irrelevant.65 The fear behind Elias-
Zacarias' opinions did not make those opinions any less political.
"Even if the refusal is motivated by nothing more than a simple de-
sire to continue living an ordinary life with one's family," Stevens
wrote, "it is the kind of political expression that the asylum provi-
sions of the statute were intended to protect."66 Stevens urged flexi-
bility when interpreting the Refugee Act and said that any doubts
should be resolved in favor of the person seeking asylum.67 He
noted that calling Elias-Zacarias a refugee would not open the immi-
grant flood gates, for the final determination of asylum would still
be left to the Attorney General.68

III. Background law

A. The Refugee Act of 1980

Prior to 1980, the United States' refugee law was stuck in time.
This country's immigration policy was designed for the post-World
War II world when people from Communist regimes in Eastern Eu-
rope and oppressive regimes in the Middle East fled to the United
States.69 By 1980, this policy of the early Cold War was thought to
be outdated and unfair. As Senator Edward Kennedy remarked:
The refugees of tomorrow, like the refugees of today, will continue
to look to the United States for safe haven and resettlement oppor-
tunities — and our Government will continue to be called upon to
help. Yet all agree that the present law and practice is inadequate,
and that the piecemeal approach of our Government in reacting to
individual refugee crises as they occur is no longer tolerable.70

Congress responded with the Refugee Act,71 which eliminates
discriminatory restrictions. The Refugee Act "implements an ideo-
logically and geographically neutral policy toward refugees, amend-

63 Id. (Stevens, J., dissenting).
64 Id. (Stevens, J., dissenting) (quoting Bolanos-Hernandez v. INS, 767 F.2d 1277,
1286 (9th Cir. 1985)).
65 Id. (Stevens, J., dissenting).
66 Id. (Stevens, J., dissenting).
67 Id. at 820 n.7 (Stevens, J., dissenting).
68 Id. at 818-19 (Stevens, J., dissenting).
69 Senate Report, supra note 12, at 144.
70 Senate Report, supra note 12, at 143.
71 Refugee Act, supra note 11.
ing language in the Immigration and Nationality Act that granted refugee status solely to persons fleeing communist or Middle Eastern regimes.”

The Act's drafters intended to create a humanitarian policy that underscored the country's commitment to human rights. The Refugee Act governs procedures for delaying deportation and for granting asylum. Congress redefined “refugee,” hoping the new definition would recognize "the plight of homeless people all over the world."

A refugee is any person who faces persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion.” The victim must establish that he or she has suffered persecution or has a “well-founded” fear of persecution. As one commentator explained: “Congress intended the term ‘refugee’ to include all persecuted, homeless, and defenseless persons who flee harsh, tyrannical, or oppressive regimes. Political detainees and prisoners of conscience are also considered refugees.”

The Attorney General must halt the deportation of any alien who establishes refugee status. This is mandatory. Once this has been shown, the refugee may then request asylum. Unlike the deportation, however, the grant of asylum is discretionary. The Attorney General may deny the request, even if the refugee has shown the requisite fear.

These types of claims are heard through the Executive Office for Immigration Review, which consists of immigration judges and the BIA. The immigration judges have jurisdiction over the asylum applications and are required to request an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs of the Department of State after each claim has been filed. If a judge denies a claim, the refugee can appeal to the BIA. If the BIA dismisses the appeal, the refugee can then take his case to the United States Court.

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73 Senate Report, supra note 12, at 141.
74 Senate Report, supra note 12, at 142.
76 Id.
77 Bevis, supra note 72, at 397.
79 Id.
80 Id.
81 See generally Carrillo, supra note 32, at 10-11 (discussing the treatment of Central Americans in the Refugee Act and the Immigration and Nationality Act). Carrillo notes that the Attorney General has denied 97% of asylum applications from Central America.
82 von Sternberg, supra note 78, at 2 n.9.
83 von Sternberg, supra note 78, at 2 n.9.
84 von Sternberg, supra note 78, at 2 n.9.
of Appeals in that jurisdiction.  

**B. The Ninth Circuit and the BIA**

The Refugee Act poses special problems when an alien seeks asylum from a country in the midst of civil war or revolution, for in such places, everyone's life is overshadowed by danger. A generalized fear of violence, however, will not make someone a refugee under the Act. No matter how real or dangerous or appalling the threat of violence might be, the victim who cannot tie it into one of the act's five categories — political opinion, race, religion, nationality, or social group — is not a refugee under the Act. People seeking asylum must show that they are somehow special — that they have been "singled out." Mere victimization is not enough.

The circuit courts and the BIA have long struggled with cases involving an asylum seeker who can show no overt manifestation of political opinion, such as membership in an organization or participation in protests. Neutrality, it seems, is a very tricky issue. In such cases, there is no affirmative act on which to hang a decision — no bright line to show exactly why the victim has been targeted. Commentator Mark R. von Sternberg described the dilemma this way: "The distinction between the passive victim of violence and the actual proponent of political value inviting persecution becomes extremely difficult to draw. At what point, the cases ask, does mute suffering at the hands of an oppressor become active resistance and thus assume the mantle of political opinion." This dilemma has caused division between the Ninth Circuit and the BIA. Both have struggled to determine the point where non-participation in a conflict actually becomes an expression of political

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86 *Id.* at 3. *See also* Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985) (a mere threat to the asylum-seeker's life or freedom will only constitute "persecution" under the Refugee Act if there is a clear indication that the basis for the threat is related to one of the statute's factors).
87 *Id.*
88 *See, e.g.*, Campos-Guardado v. INS, 809 F.2d 285, 286-87 (5th Cir. 1987) (asylum seeker who had witnessed a violent crime involving rape and murder in her home country and had been threatened by the perpetrator with death if she revealed his identity did not sufficiently establish political persecution to qualify as a refugee).
89 von Sternberg, *supra* note 78, at 3.
90 This Note focuses on Ninth Circuit cases because the other circuits have not considered the issue in depth. The First, Fourth and Eleventh Circuits have acknowledged that neutrality can constitute political opinion in some circumstances, but have never granted asylum on this basis. Arthur C. Helton, *The Criteria for Refugee Protection and Asylum in the United States*, 433 PLI/LIT 205 (1992). *See* Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1298 (11th Cir. 1990) (petitioner's fear of persecution by guerrillas for being deserter is not "on account of" political opinion); Alvarez-Flores v. INS, 909 F.2d 1, 5 (1st Cir. 1990) (court declined to decide whether neutrality constituted political opinion). As a result, the BIA, which applies the law of the circuit where the alien resides, uses the neutrality doctrine only in Ninth Circuit cases.
opinion that is encompassed by the Refugee Act. Cases involving forced recruitment by guerrillas sharply define each side's point of view.\textsuperscript{91}

In general, the BIA has not been sympathetic to asylum seekers who fear such recruitment, no matter how well-founded that fear might be.\textsuperscript{92} Matter of Maldonado-Cruz,\textsuperscript{93} decided in 1988, is the BIA's leading case on this issue.\textsuperscript{94} In 1983, guerrillas in El Salvador kidnapped Maldonado-Cruz and some of his friends.\textsuperscript{95} Several days later, they forced Maldonado-Cruz to fight in an action against his own village.\textsuperscript{96} During this operation, one of his friends was shot as he tried to leave the guerrillas.\textsuperscript{97} A few days after this incident, Maldonado-Cruz managed to escape, and he fled to his parents' house, where he stayed for only a few hours before leaving for San Salvador.\textsuperscript{98} While waiting for a bus, he ran into some neighbors from his village who told him that the guerrillas were looking for him.\textsuperscript{99} Nevertheless, he eventually made it to the United States.\textsuperscript{100}

Maldonado-Cruz sought asylum on two grounds: first, that the guerrillas would either harm or kill him because of his desertion; and second, that the government might punish him for his membership in the guerrilla forces.\textsuperscript{101}

In denying Maldonado-Cruz's asylum application, the BIA said that the general issue in such cases could usually be framed in this way: "[W]hether the political implications underlying an alien's fear of harm rise to the level of 'political opinion' within the meaning of the statute or whether those conditions constitute the type of civil strife outside the intended reach of the statute."\textsuperscript{102} The Board looked to the guerrillas' motivation in this case and concluded the persecution was not political and therefore was outside the Refugee Act's scope.\textsuperscript{103} "In analyzing a claim of persecution made in the

\textsuperscript{91} In contrast, the BIA and the courts have uniformly held that forced conscription by a government does not constitute political persecution. A sovereign government has the right to draft its citizens into the military, and a person fleeing from such a draft will not be granted asylum. Matter of Vigil, Interim Decision 3050, at 578 (BIA 1988).

\textsuperscript{92} von Sternberg, supra note 78, at 13.

\textsuperscript{93} Matter of Maldonado-Cruz, Interim Decision 3041 (BIA 1988).

\textsuperscript{94} When the Ninth Circuit got a chance to hear Maldonado-Cruz's case, it reversed the INS' withholding of deportation. The Court said: "We hold that Maldonado's fear of persecution by the guerrillas was based on political opinion. The guerrillas are a political entity. Maldonado's refusal to join them was a manifestation of his neutrality, which is a recognized political opinion." Maldonado-Cruz v. INS, 885 F.2d 788, 791 (9th. Cir. 1989).

\textsuperscript{95} Matter of Maldonado-Cruz, Interim Decision 3041, at 511.

\textsuperscript{96} Id.

\textsuperscript{97} Id.

\textsuperscript{98} Id.

\textsuperscript{99} Id.

\textsuperscript{100} Id.

\textsuperscript{101} Id.

\textsuperscript{102} Id. at 512 (quoting Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987)).

\textsuperscript{103} Id. at 516-17.
context of a civil war, it is necessary to look to the motivation of the
group threatening harm," the BIA wrote.104 "Even though guerrillas may have the political strategy of overthrowing the government by military means, this does not mean that they cannot have objectives within that political strategy which are attained by acts of violence, but whose motivation is not related to any desire to persecute."105

Persecution under the Refugee Act only occurs where the aggressor has opinions that conflict with those of the victim, and where the aggressor acts against the victim because he or she cannot tolerate that conflict, the Board explained.106

The BIA concluded that the guerrillas were merely trying to discipline Maldonado-Cruz; their actions were those of survival, not of persecution.107 "The guerrillas need military units to operate against the government," the BIA reasoned.108 "To keep them as cohesive fighting units they must impose discipline; and an important form of discipline, common to military or para-military organizations alike, is the punishment of deserters."109

The Board noted that there was no evidence that the guerrillas found anything offensive in Maldonado-Cruz's political opinions or actions.110 "The nature of the respondent's initial encounter with the guerrillas is important because it reveals that he was not seen as an object of hatred.... [T]hey took him into their band because he was of use to them."111

The BIA's reasoning in *Maldonado-Cruz* foreshadows that of the Supreme Court four years later in *INS v. Elias-Zacarias*, in which the Court also concluded that the guerrillas' general political purpose is irrelevant.112 If they want to harm the asylum seeker simply as part of the day-to-day operations of their organization — with no concern for the victim's political beliefs — then their actions will not be considered political persecution in the statutory sense.

The BIA decided *Matter of Vigil*113 a few months after *Maldonado-Cruz* and reiterated its opinion that forced recruitment does not constitute political persecution under the Refugee Act.114 The applicant told the Board that he had a generalized fear of being forced into the guerrilla army in El Salvador and therefore was being persecuted for

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104 *Id.* at 513.
105 *Id.*
106 *Id.* at 516.
107 *Id.* at 515.
108 *Id.*
109 *Id.*
110 *Id.* at 514.
111 *Id.* at 513-14.
112 *Elias-Zacarias*, 112 S.Ct. at 816.
114 *Id.* at 577-78.
his desire to remain neutral.\textsuperscript{115} On the way to school one morning in 1979, he saw the body of a young man who had been beheaded.\textsuperscript{116} It was then that he decided to remain neutral in the civil war.\textsuperscript{117} On another occasion, friends told him that the guerrillas had come to a soccer game and had forced some of the participants to join their ranks.\textsuperscript{118} Finally, the applicant testified that there had been a street fight in his home town in 1984 between the government and the guerrillas.\textsuperscript{119} The skirmish lasted eight hours, during which time the applicant hid under his bed.\textsuperscript{120}

In rejecting the asylum application, the Board used identical reasoning as in \textit{Maldonado-Cruz}. In general, guerrillas forcibly recruit young Salvadoran males, the Board said.\textsuperscript{121} Such recruitment does not constitute political persecution because the young men are not being singled out for their political beliefs.\textsuperscript{122} "We do not view the guerrillas' interest in such persons, where the guerrillas' interest in the person is clearly limited to recruitment, to amount to 'persecution' within the meaning of the Act."\textsuperscript{123}

The Board placed great importance on the fact that the applicant had never expressed his desire to remain neutral to anyone in El Salvador.\textsuperscript{124} Instead, he had kept quiet. This made his claim much weaker than Maldonado-Cruz's, but it gave the Board a chance to underscore the need for affirmative action to win a neutrality claim. "The respondent was not threatened by the guerrillas or the Government because of his neutrality opinion," the Board said.\textsuperscript{125} "There is no indication in the record that he ever had any direct contact with the guerrilla or government forces in El Salvador."\textsuperscript{126}

These cases illustrate the BIA's approach to forced recruitment. The Board requires that there be "a direct causal connection" between the victim's neutrality and the persecutor's motivation.\textsuperscript{127} "[I]f the persecutor's incentive is not to punish the applicant for his neutrality, then the claim must fail."\textsuperscript{128}

The Ninth Circuit takes a more liberal approach and holds that resistance to forced conscription by guerrillas can implicate the Re-
ugee Act in certain circumstances. *Bolanos-Hernandez v. INS* is the leading case on the issue. Espectacion Bolanos-Hernandez lived in El Salvador before fleeing to the United States in 1982. For two years, he was a member of a right-wing party. He also served in the army and had been a member of Escolta Militia, a civilian police squad that guards against guerrillas. Because of his membership in these organizations, the guerrillas thought Bolanos-Hernandez would be valuable to them. They wanted him to help them infiltrate the government. When he refused, they threatened to kill him. The guerrillas killed five of Bolanos-Hernandez’s friends and also threatened his brother. Believing he might be the next to die, Bolanos-Hernandez left the country eight days later. The government conceded that Bolanos-Hernandez made a commitment to remain neutral in the civil war, but nevertheless maintained that he should not be granted asylum. The Court of Appeals had to decide whether this neutrality was an expression of political opinion. In ruling in Bolanos-Hernandez’s favor, the court took a common sense approach: “Because he refused to join their cause and infiltrate the government on their behalf, the guerrillas are likely to consider him a political opponent, just as they would if he had spoken out publicly in opposition to their cause or tactics.”

The court said it was “difficult to follow” the government’s reasoning. “The government contends that Bolanos’ decision to remain politically neutral is not a political choice. There is nothing in the record to support this contention.” Neutrality is not apolitical, the court stated. “Just as a nation’s decision to remain neutral is a political one, . . . so is an individual’s. When a person is aware of contending political forces and affirmatively chooses not to join any faction, that choice is a political one.”

The Court of Appeals chastised the government for questioning Bolanos-Hernandez’s reasons for remaining neutral, calling such an inquiry “improper.” Political choices often have non-political

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129 767 F.2d 1277 (9th Cir. 1984).
130 *Id.* at 1280.
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.* at 1286.
140 *Id.* at 1280.
141 *Id.*
142 *Id.*
143 *Id.* (emphasis in original).
144 *Id.* at 1287.
roots, the court noted.\textsuperscript{145} "A decision to join a particular political party may, for example, be made to curry favor, gain social acceptability, advance one's career, or obtain access to money or positions of power."\textsuperscript{146} The court added, "[h]owever, the reasons underlying an individual's political choice are of no significance for purposes of [the Refugee Act] and the government may not inquire into them. Whatever the motivation, an individual's choice, once made, constitutes, for better or for worse, a manifestation of political opinion."\textsuperscript{147}

The court looked at the facts and decided that Bolanos-Hernandez's choice brought him within the parameters of the Refugee Act. "Bolanos was quite aware of the political situation. He had severed his ties to the right-wing organizations with which he had been affiliated," the court said.\textsuperscript{148} "However, he subsequently refused to join the guerrillas despite their threats to his life. By choosing neutrality and refusing to join a particular political faction, Bolanos expressed his opinion and took a political stance."\textsuperscript{149} These actions were "as much an affirmative expression of a political opinion as is joining a side, or speaking out for or against a side."\textsuperscript{150}

In Argueta v. INS,\textsuperscript{151} the Ninth Circuit ruled that the asylum seeker does not even have to show that he overtly manifested his neutrality. Argueta was a native of El Salvador who testified that four men threatened him at his home because they thought he was a member of a guerrilla organization.\textsuperscript{152} They told him he would disappear if he did not leave the country.\textsuperscript{153} The next day, a close friend of his was taken away by the same four men.\textsuperscript{154} Later, Argueta found his friend's body — he had been tortured and killed.\textsuperscript{155} Argueta left his country the next day.\textsuperscript{156}

The Court of Appeals ruled that Argueta established his political opinion when he testified at his hearing to his lack of agreement with, support for, or help to either side.\textsuperscript{157} The court concluded:

It is apparent the [immigration judge] erroneously assumed that it was necessary for Argueta to prove his allegiance to a particular political faction. Argueta's testimony indicated that he had affirmatively chosen to remain politically neutral. We therefore conclude

\begin{footnotes}
\item[145] Id. at 1286-87.
\item[146] Id. at 1287.
\item[147] Id. (emphasis added).
\item[148] Id.
\item[149] Id.
\item[150] Id.
\item[151] 759 F.2d 1395 (9th Cir. 1985).
\item[152] Id. at 1395.
\item[153] Id.
\item[154] Id. at 1395-96.
\item[155] Id. at 1396.
\item[156] Id.
\item[157] Id. at 1397 n.3.
\end{footnotes}
that Argueta's decision to remain neutral constituted an expression of political opinion.\textsuperscript{158}

In \textit{Arteaga v. INS},\textsuperscript{159} a young Salvadoran sought asylum because the guerrillas in his country had threatened him with conscription. When he refused to join them, asserting his desire to remain neutral, the guerrillas told him: "Even if you don't come, we'll get you."\textsuperscript{160} The Ninth Circuit ruled in favor of granting asylum, saying it "[was] not relevant that the guerrillas may have been interested in conscripting Arteaga to fill their ranks rather than to 'punish' Arteaga's neutrality."\textsuperscript{161} Thus, the court concluded, "[c]learly forced recruitment into the war against the government is politically motivated."\textsuperscript{162}

Thus, the Ninth Circuit established a broader test for this type of case than had the BIA. \textit{Bolanos-Hernandez} and its progeny allowed an asylum claim where: "(A) the applicant has undertaken some overt act from which neutrality opinion can be inferred; and (B) the persecutor wishes to punish the applicant because of this overt act, irrespective of why the applicant has acted as he has."\textsuperscript{163}

\section*{IV. Significance of Case}

In ruling against Elias-Zacarias, the Supreme Court put itself directly in line with the BIA decisions. A choice to not fight for either side in a civil war is no longer enough to qualify an applicant for refugee status; the asylum seeker must show first that he or she has affirmatively taken a position of neutrality and second that the persecution is a direct result of that neutrality (and not some other policy reason such as the guerrillas' need to recruit soldiers). The Court's decision means that men like Maldonado-Cruz and Elias-Zacarias must affirmatively express their political views rather than simply refuse to join in the war. The Court, however, does not suggest how such men are to do this and still remain alive to eventually apply for asylum. Instead, it forces people to choose one side or the other in order to have what it perceives to be a valid form of political expression.

\section*{V. Conclusion}

The Supreme Court's rationale that Elias-Zacarias' neutrality could not be political opinion because it was motivated by fear is not realistic. "The record in the present case not only failed to show a political motive on Elias-Zacarias' part; it showed the opposite," Jus-

\textsuperscript{158} \textit{id.} at 1997.
\textsuperscript{159} 836 F.2d 1227 (9th Cir. 1988).
\textsuperscript{160} \textit{id.} at 1228.
\textsuperscript{161} \textit{id.} at 1232 n.8.
\textsuperscript{162} \textit{id.}
\textsuperscript{163} von Sternberg, \textit{supra} note 78, at 34.
practice Scalia wrote.\textsuperscript{164} "He testified that he refused to join the guerrillas because he was afraid the government would retaliate against him and his family if he did so."\textsuperscript{165} Under the Court's reasoning, the only form of political opinion protected by the statute would be a pure form — the sort that might exist in a vacuum. For if the opinion were motivated by anything other than political reasoning, then it would not be the sort that would fall within the Refugee Act. In the real world, however, it is not such a simple thing to divorce politics from life. Virtually all forms of political expression have some sort of underlying, non-political motive. A person who supports a political candidate may do so because he or she thinks the candidate will bring jobs to the area or cut taxes. Would the Court say that this support was not really political because it was rooted in economic considerations? Someone may work for a political candidate, not because he or she believes in the candidate's views, but because it will help a career or mean more power. If such a person were persecuted for working for that candidate, would the Court not protect him or her simply because these political actions weren't really "political" after all?

In concluding that the guerrilla's persecution was not politically motivated, the Court tried to draw a line between persecuting someone for not joining a side (which would not be protected under \textit{Elias-Zacarias}) and persecuting someone specifically because of his neutrality (which, in theory, might be). Realistically, this line does not exist. What is neutrality if it is not refusing to fight on either side of a civil war? Nevertheless, the Court held that the guerrilla's threats were not politically motivated because they were merely trying to fill their ranks.\textsuperscript{166} This is a fallacy. The guerrillas were trying to force Elias-Zacarias to abandon his neutrality — to abandon his political opinion. Quite simply, this is political persecution.

In addition to being unrealistic, the Court passed down a decision that has policy implications that contravene congressional intent. One of the goals of the Refugee Act was to eradicate immigration restrictions based on geography.\textsuperscript{167} Unfortunately for many Latin Americans, however, this historically has not been the case. American immigration policy seems to fluctuate with American foreign policy. For example, in the first three quarters of 1987, the approval rate for asylum cases filed with the INS was as follows: Nicaragua, 83.9 percent; Iran, 67.4 percent; Romania, 59.7 percent; Afghanistan, 26.2 percent; Guatemala, 3.8 percent; and El Salvador, 3.6 percent.\textsuperscript{168} In 1984, the INS approved 66 percent of the Iranian

\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} See \textit{supra} note 72 and accompanying text.
\textsuperscript{168} M.A. \textit{v.} INS, 899 F.2d 304, 320 (4th Cir. 1990) (Winter, J., dissenting).
requests and 49 percent of the Polish requests, but only two percent of the El Salvadoran requests.\textsuperscript{169} As Judge Winter of the Fourth Circuit noted, "Even assuming that the . . . discrepancy may be explained partially by the fact that more applicants (and more meritless claims) come from El Salvador and other Latin American countries, these statistics suggest an impermissible infusion of ideology into the asylum process."\textsuperscript{170}

The Court's holding in this case can only exacerbate this problem by making it virtually impossible for people fleeing Latin America to meet the refugee standard.\textsuperscript{171} Commentator Arthur C. Helton pointed out, "[T]he specific-intent requirement that the Court in Elias-Zacarias implied from the statute may narrow the scope of refugee protection unduly. Such an intent may be difficult to establish, even indirectly from the circumstances, if other plausible objectives could be attributed to the persecutor — for example, raising military forces or enforcing discipline in guerrilla groups."\textsuperscript{172} A significant number of countries are enmeshed in this type of civil unrest, a great many of them in Central America.\textsuperscript{173}

The Court's holding also ignores the Refugee Act's human rights directive. Legislative history shows that both the House and the Senate wanted a humanitarian approach to refugee admissions.\textsuperscript{174} Congress hoped that "the plight of the refugees themselves, as opposed to national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States."\textsuperscript{175}

Because it recognized the human element of these neutrality cases, the decisions of the Ninth Circuit better served congressional intent. With its common sense approach to political opinion, the appellate court accepted that politics may be based on any range of human emotions.\textsuperscript{176} Add fear from a threat by a guerrilla group that practices forced recruitment, and the result could very well reach the

\textsuperscript{169} Id. (Winter, J., dissenting).

\textsuperscript{170} Id. (Winter, J., dissenting).

\textsuperscript{171} Immigration rights groups criticized the decision, saying that the case could affect thousands of refugees from a number of countries, including Guatemala, El Salvador, Sri Lanka and Afghanistan. Arthur C. Helton, director of the Lawyers Committee for Human Rights, said that the ruling "subverts the protective purposes of the Refugee Act of 1980." Ruth Marcus, Justices Deny Asylum to Guatemalan Refugee, WASH. POST, Jan. 23, 1992, at A8.

\textsuperscript{172} Arthur C. Helton, Justices Seem to Give INS the Benefit of the Doubt, NAT'L L.J., Apr. 20, 1992.

\textsuperscript{173} These countries include Angola, Ethiopia, Namibia, Uganda, Colombia, El Salvador, Guatemala, Honduras, Bangladesh and Libya. von Sternberg, supra note 78, at 4 n.16.


\textsuperscript{175} Id. (quoting HOUSE REPORT ON THE REFUGEE ACT OF 1979, H.R. REP. NO. 608, 96th Cong., 1st Sess. 13 (1979) (emphasis added)).

level of political persecution. As Judge Reinhardt said in *Bolanos-Hernandez*,

> It should be obvious that the significance of a specific threat to an individual's life or freedom is not lessened by the fact that the individual resides in a country where the lives and freedom of a large number of persons are threatened. If anything... that fact may make the threat more serious or credible.¹⁷⁷

That court noted that, in the end, political motive in such countries really does not matter. "Because [Bolanos-Hernandez] refused to join their cause... the guerrillas are likely to consider him a political opponent, just as they would if he had spoken out publicly in opposition to their cause or tactics."¹⁷⁸

Allowing Elias-Zacarias refugee status would not have created a dangerous situation wherein all people fleeing forced recruitment would be allowed into the United States.¹⁷⁹ The Attorney General's discretion would continue to be a check on such a problem. Indeed, Congress intended for this to be so:

> The [House] committee 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 or group comes within the definition will not guarantee resettlement. ... Congress has assigned to the Attorney General and his delegates the task of making those hard individualized decisions; although Congress could have crafted a narrower definition, it chose to authorize the Attorney General to determine which, if any, eligible refugees should be denied asylum.¹⁸⁰

The countries of Central America are mired in civil wars. Often, people are forced to do more than simply stand by and let the fighting continue around them. Brought face-to-face with political reality either by government oppression or guerrilla forced recruitment, they are given an impossible choice between two violent factions. Many choose to not choose and flee the country. These are the people whom the Supreme Court has left in limbo: those who would choose peace over violence, life over death.

**Amy DelPo**

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¹⁷⁷ *Id.* at 1285.
¹⁷⁸ *Id.* at 1286.
¹⁷⁹ The Bush administration had warned that allowing Elias-Zacarias to win would lead to a flood of refugees from countries enmeshed in civil wars. Marcus, *supra* note 171.