

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner v. JAIRO JONATHAN ELIAS ZACARIAS

CASE NO: 90-1342

PLACE: Washington, D.C.

DATE: November 4, 1991

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   IMMIGRATION AND NATURALIZATION :

4   SERVICE, :

5                   Petitioner :

6               v. :   No. 90-1342

7   JAIRO JONATHAN ELIAS ZACARIAS :

8   - - - - -X

9                               Washington, D.C.

10                              Monday, November 4, 1991

11               The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   10:05 a.m.

14   APPEARANCES:

15   MAUREEN E. MAHONEY, ESQ., Deputy Solicitor General,  
16       Department of Justice, Washington, D.C.; on behalf of  
17       the Petitioner.

18   JAMES ROBERTSON, ESQ., Washington, D.C.; on behalf of the  
19       Respondent.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 90-1342, Immigration &  
5 Naturalization Service v. Jairo Jonathan Elias Zacarias.  
6 Ms. Mahoney.

7 ORAL ARGUMENT OF MAUREEN E. MAHONEY

8 ON BEHALF OF THE PETITIONER

9 MS. MAHONEY: Mr. Chief Justice and may it  
10 please the Court:

11 The Court of Appeals for the Ninth Circuit held  
12 that the respondent's fear that he would be kidnapped by  
13 guerrillas to serve in their military in Guatemala  
14 rendered him a refugee eligible for asylum in the United  
15 States. We request this Court to reverse that decision  
16 and to uphold the board's order of deportation for two  
17 reasons that I'd like to briefly outline.

18 First, the court of appeals did not apply the  
19 correct legal definition of the term, persecution on  
20 account of political opinion. That term -- the precise  
21 language of that term -- has been a part of the United  
22 States immigration laws for decades, and more than 20  
23 years ago it was interpreted by the board to require a  
24 showing that the persecutor's motive would be to inflict  
25 injury for the specific purpose of punishing him for



1 adherence to political views that are offensive, to single  
2 him out --

3 QUESTION: Was this argument made below?

4 MS. MAHONEY: Your Honor, yes, the argument was  
5 made. The board -- in the closing argument of the -- in  
6 the proceeding before the immigration judge the counsel  
7 for the Service specifically said that the respondent had  
8 failed to satisfy his burden of showing that he had been  
9 singled out based upon his political opinions.

10 Similarly, in the court of appeals there was a  
11 reference to that argument, and I would submit that it  
12 wasn't more fully briefed simply because between the time  
13 of the decision of the board and the time of the court of  
14 appeals there had been some intervening Ninth Circuit  
15 decisions which made it pretty clear that they had  
16 rejected the definition of persecution on account of  
17 political opinion that the board had historically applied.

18 QUESTION: You're arguing this almost by  
19 implication, aren't you?

20 MS. MAHONEY: Your Honor, no, it was raised.  
21 The board has very express language in its opinion that  
22 there was no basis to infer. In fact, they say that it  
23 could hardly be inferred that the guerrillas approached  
24 the respondent because they found his political beliefs to  
25 be offensive.

1           It very definitely -- and it referenced two  
2   other decisions of the board, the matter of Vigil and also  
3   matter of Maldonado-Cruz which had been reversed by the  
4   Ninth Circuit thereafter, which relied precisely on these  
5   grounds -- the definition of persecution on account of  
6   political opinion -- and there --

7           QUESTION: Ms. Mahoney, isn't it possible under  
8   this statute, that the applicant can demonstrate that he  
9   had a well-founded fear of persecution, even though the  
10   actual motive of the persecutor may be something he can't  
11   prove?

12           MS. MAHONEY: Your Honor, there is no question  
13   that the standard of proof is a well-founded fear, and  
14   yes, it is theoretically possible that a guerrilla could  
15   in fact have a motive that did not constitute an intent to  
16   persecute, but if the objective evidence would support a  
17   reasonable inference that that was the motive, then  
18   certainly an alien could prevail.

19           But what is important here is that I believe  
20   that the issue of the standard of proof and the legal  
21   definition have been collapsed, and that it's important to  
22   establish first what is the legal definition to determine  
23   whether or not the board's decision was correct under that  
24   definition, since the board and not the Court of Appeals  
25   for the Ninth Circuit has to draw the

1 inference -- inferences from the facts.

2 In this case, Your Honor, I don't think it's  
3 necessary to -- to really articulate precisely what the  
4 standard of proof is, because there's really no reasonable  
5 inference on this record that the purpose of the  
6 guerrillas in seeking out the respondent was to punish him  
7 for political beliefs. None of the indicia of that kind  
8 of conduct are present on this record.

9 QUESTION: Is it just the initial -- is it just  
10 the initial approach of the guerrillas that's controlling?  
11 I had thought that the respondent's position was that he  
12 would be in jeopardy because of his having rejected their  
13 initial approach and what they might do to him in the  
14 future --

15 MS. MAHONEY: That's correct, Your Honor.

16 QUESTION: And it seems to me that this is  
17 the -- his situation. It may change quite drastically  
18 once he's turned them down.

19 MS. MAHONEY: I'd like to clarify what this  
20 record shows about that issue, Your Honor. The Ninth  
21 Circuit specifically found that the respondent had a  
22 well-founded fear that he would be kidnapped and forced to  
23 serve. They did not find that he had a well-founded fear  
24 that his mere refusal for having served would result in  
25 his ultimate execution.

1           He testified at the hearing that he had a fear  
2   that he would be forced to serve, and he also suggested he  
3   had a fear he might be killed, but there was no objective  
4   evidence of that whatsoever, and on appeal the Ninth  
5   Circuit, I believe, found that he had a well-founded fear  
6   that he might be kidnapped because there was some  
7   objective evidence to support that.

8           The State Department had submitted a report that  
9   indicated that forcible recruitment does occur in  
10  Guatemala, but that same report that the Ninth Circuit  
11  accepts in part found that that practice did not support a  
12  claim that -- that he would be singled out on the basis of  
13  his political opinion. In other words --

14           QUESTION: Well, if he had a well-founded fear  
15  that he would be killed, I take it that would be  
16  sufficient?

17           MS. MAHONEY: No, Your Honor, I would not say  
18  that it would be sufficient. It would then be necessary  
19  to determine whether or not the purpose that the  
20  guerrillas would have for killing him in response to the  
21  refusal was to punish him for his political beliefs, or  
22  whether it still was just yet another measure to try to  
23  enlist more soldiers.

24           I would say, though, that that -- the question  
25  of that inference becomes somewhat different than the one



1 that's presented on this record, where the only question  
2 is what -- is it reasonable to infer that the purpose of  
3 kidnapping him for refusal to serve is a -- an intent to  
4 punish him for his political beliefs, or is it simply to  
5 compel compliance with the request that they made for him  
6 to join their military? That's the situation that this  
7 record, as the Ninth Circuit has found it, presents.

8 I'd like to turn again to the definition.

9 The -- there is a suggestion by the parties that there is  
10 no requirement that motive be proven, or that it even is  
11 an element of the definition, that instead it is simply  
12 sufficient if the respondent had a political opinion that  
13 caused him to engage in the activity which now subjects  
14 him to harm, and that that is persecution on account of  
15 political opinion.

16 As I referenced, that has never been the  
17 definition -- the articulated definition of persecution on  
18 account of political opinion throughout the history of our  
19 immigration laws and, in particular, this Court, in  
20 Cardoza-Fonseca and in Stevic, found that a controlling  
21 principle of interpretation of the refugee definition and  
22 the withholding of deportation was its conclusion that  
23 Congress intended to incorporate the preexisting practice  
24 prior to 1980 with respect to the terms that were used in  
25 that definition.

1           One of those terms was persecution on account of  
2     political opinion, and in 1973 the board, in a case called  
3     Matter of Dunar, specifically used this articulation. The  
4     board said Congress sought generally to shield aliens from  
5     the actions of their own home governments in singling them  
6     out for punitive treatment, not because of their  
7     individual misconduct or demerits, but solely because they  
8     are members of dissident or unpopular minority groups.

9           Congress sought to establish a preference for a  
10    very special category of people, not just anyone who might  
11    be subject to injury in war-torn countries, but those who  
12    were more in the nature of martyrs, those who had either  
13    political beliefs or religious beliefs that were deeply  
14    held and that were not tolerated by the societies that  
15    they lived in.

16           QUESTION: Would you clarify something for me?  
17    The statute doesn't speak directly to it, but is there any  
18    limitation on who the persecutor must be? Does it have to  
19    be an act of the sovereign or can a nongovernmental group  
20    meet the definition?

21           MS. MAHONEY: Your Honor, the definition does  
22    not say, but again, the pre --

23           QUESTION: Then what is your position?

24           MS. MAHONEY: The position is that the  
25    preexisting board practice that we presume Congress relied

1 upon when it used these terms was that it could be a group  
2 that was not under the control of the government, in other  
3 words, that was out of control, that the government  
4 couldn't in any way sort of keep from inflicting severe  
5 harms on its population.

6 QUESTION: Could it be a Mafia group in Sicily?

7 MS. MAHONEY: Yes, Your Honor, it could be a  
8 Mafia group in Sicily if the government is simply  
9 incapable of keeping their conduct under control. I think  
10 there has to be a substantial showing, and usually, Your  
11 Honor, I think it comes about in the circumstances where  
12 there is some suggestion also that the government may not  
13 even want to control --

14 QUESTION: Could it --

15 MS. MAHONEY: The particular group.

16 QUESTION: It still has to be on account of  
17 political beliefs.

18 MS. MAHONEY: Absolutely, Your Honor, or  
19 religion, or --

20 QUESTION: And I'm not sure how much the Mafia  
21 is interested in political beliefs.

22 MS. MAHONEY: Well, I'm not sure what the Mafia  
23 does, but what -- what I would reference there is that if,  
24 for instance, they single out a different nationality for  
25 adverse treatment that's -- that sort of thing, but -- but

1     yes, Your Honor, it absolutely has to be for one of the  
2     purposes that Congress prohibited. There are only five.  
3     Congress did not say that persecution that is inflicted or  
4     injury that is inflicted for any reason other than these  
5     five makes you a refugee. In fact, it said only these  
6     five purposes.

7             QUESTION: Didn't the -- didn't the immigration  
8     judge here find that -- that this person refused to join  
9     the revolutionaries because he didn't want to go against  
10    the current government?

11            MS. MAHONEY: No -- well, Your Honor, the  
12    immigration judge found that he had a fear that he would  
13    be harmed if he went against the current government. In  
14    other words, there is a difference between a --

15            QUESTION: Well, isn't that -- if he didn't want  
16    to disagree with the current government, isn't that a  
17    brand of political belief?

18            MS. MAHONEY: It could be, Your Honor, if what  
19    he said --

20            QUESTION: Well, why wasn't it here?

21            MS. MAHONEY: It was not, Your Honor, because he  
22    was very explicit in his testimony that the reason he did  
23    not want to go against the government was not because he  
24    believed in their policies or thought what they were doing  
25    was right --



1 QUESTION: No, but he didn't want --

2 MS. MAHONEY: But that he didn't want to suffer  
3 harm.

4 QUESTION: Well, he still was against -- he was  
5 in a sense saying, I'm with the government, and I would  
6 think the revolutionaries who were against the government  
7 might think that's a bad attitude to have.

8 MS. MAHONEY: Well, Your Honor, I think that his  
9 testimony is clear that he did not express sympathy with  
10 the policies of his own government, he simply expressed  
11 fear. He said he was afraid that he would be killed or  
12 that he would be harmed either by the guerrillas or by the  
13 government, and that is not a political opinion, that  
14 is a --

15 QUESTION: May I -- may I interrupt you for just  
16 a -- supposing a voter says the reason I'm voting for  
17 candidate X is because I'm afraid of the harm of losing my  
18 job? Would that be a political opinion?

19 MS. MAHONEY: I don't --

20 QUESTION: That's the only reason for my vote,  
21 and that people are voting that particular way. They want  
22 to avoid that particular harm. They don't -- they don't  
23 understand the economic theory --

24 MS. MAHONEY: Right.

25 QUESTION: And the various political dialogues

1     that go on, but that's the single thing that motivates  
2     their choice. How would that be different from this?

3             MS. MAHONEY: Well, Your Honor, I don't think  
4     that is the type of political opinion that Congress was  
5     referring to. The whole history of this term, persecution  
6     on account of political opinion, was directed at the  
7     dissidents of totalitarian regimes who were silenced  
8     through physical torture and imprisonment because they  
9     dared to adhere to a different belief.

10            QUESTION: Well, maybe they just wanted to avoid  
11     the harm that was associated with that kind of activity.

12            MS. MAHONEY: The political dissidents?

13            QUESTION: Yes.

14            MS. MAHONEY: Well, the political dissidents  
15     generally did express their views, and that's what led to  
16     their harm, and that's why Congress sought to protect  
17     them. Even if we could say that the respondent in this  
18     case had a political opinion, it still does not support an  
19     inference that that caused the guerrillas to single him  
20     out for punishment. The -- the important point here is,  
21     what is the purpose --

22            QUESTION: No, but you carry it one step  
23     further. You -- you make the same argument even if they  
24     intended to kill him for not joining up.

25            MS. MAHONEY: That is correct, Your Honor, I

1 would make that argument, because the inference -- it  
2 would depend on the facts of the record, and I think we'd  
3 have to have the facts of record regarding the way in  
4 which this was done.

5 But if, for instance, Your Honor, they killed  
6 everyone who refused to join, even if the person made it  
7 quite clear that they had been an active guerrilla --  
8 excuse me, an antiguerrilla person or a proguerrilla  
9 person, in other words, with regard to what the person's  
10 political viewpoints were, then the inference would still  
11 be that they may well be simply trying to enforce a system  
12 of deterrence in order to field soldiers and not to  
13 specifically try to suppress that belief, and that's what  
14 this section of the law --

15 QUESTION: Ms. Mahoney, suppose we agree with  
16 you that they applied the wrong standard, why shouldn't we  
17 send the case back to have them apply the right standard?  
18 Why should we try to decide it here?

19 MS. MAHONEY: Well that -- that would certainly  
20 be a possible outcome, Your Honor. I would say that,  
21 given the way that the Ninth Circuit in this and other  
22 cases, though, has approached the question of forcible  
23 recruitment, it is possible -- a possible reading of the  
24 opinion that even if it understood the correct standard,  
25 that it would still nevertheless apply a legal presumption

1     that the guerrillas are motivated to punish for political  
2     beliefs simply based upon their forcible recruitment, but  
3     it certainly would be a possibility.

4             QUESTION: Well, you -- you say they -- they  
5     would apply -- couldn't we tell them not to apply that?

6             MS. MAHONEY: Certainly. Yes, Your Honor, that  
7     would be a proper disposition of the case.

8             QUESTION: Ms. Mahoney \* let me make sure I  
9     understand you. You're saying \* with respect to the  
10    subject matter, \* that the, in this case that the  
11    guerrillas have acted, that you believe that he takes the  
12    position he did as a result of his political opinion, and  
13    number two, he's got to prove that that was his political  
14    opinion -- in other words, that they were correct about  
15    that. Am I right, \* he's got two positions?

16            MS. MAHONEY: No, Your Honor. There would  
17    certainly be circumstances where a person who had no  
18    political opinion at all or religious belief might well  
19    have a well-founded fear that a persecutor would impute  
20    that characteristic or belief to them.

21            QUESTION: \* It's the belief in the mind of the  
22    person.

23            MS. MAHONEY: That's correct, but Your Honor,  
24    I'd also like to clarify that the belief in the mind of  
25    the persecutor is not some extraordinary standard of



1 proof. We're talking about inferences that can be drawn  
2 on a record. In other words -- and not the specific  
3 persecutor, but rather the group. In other words --

4 QUESTION: Excuse me, and how is it the belief  
5 in the mind of the persecutor that's determinative? The  
6 statute says, a well-founded fear of persecution on these  
7 bases. Surely it's his state of mind that counts. Now,  
8 his state of mind has to be well-founded, but it could be  
9 well-founded but erroneous, so that in fact the state of  
10 mind of the persecutor has nothing to do with it, does it?

11 MS. MAHONEY: I'm sorry, Your Honor, he has to  
12 have a well-founded fear about the persecutor's state of  
13 mind. In other words --

14 QUESTION: Yes, but the actual state of the  
15 persecutor's mind is not determinative.

16 MS. MAHONEY: I'm -- yes, Your Honor, that's  
17 correct. It's not -- in other words, the persecutor may  
18 have a different state of mind, but if there is a  
19 well-grounded, a reasonable fear that the persecutor's  
20 state of mind is to punish for political opinion, that  
21 would satisfy the act.

22 I say the persecutor's state of mind is being  
23 controlling, meaning that the fear about the persecutor's  
24 state of mind is what governs. It's not the -- it's not  
25 the applicant's --

1 QUESTION: I'd suggest that's a confusing way to  
2 put it.

3 MS. MAHONEY: I -- I'm sorry, Your Honor.

4 QUESTION: It's his state of mind that's  
5 controlling, really.

6 MS. MAHONEY: Well, but it's -- it's not enough  
7 that he simply fears that what he's going to suffer feels  
8 like persecution. He has to have a well-founded fear  
9 based on objective facts that the reason this injury will  
10 be inflicted is because of the persecutor's motive to  
11 punish him for a proscribed reason, and that's --

12 QUESTION: \* But the victim does not have to  
13 have that reason in fact?

14 MS. MAHONEY: Does the persecutor have to have  
15 that reason?

16 QUESTION: The victim --

17 MS. MAHONEY: No.

18 QUESTION: Does not have to have that reason in  
19 fact, on your theory?

20 MS. MAHONEY: No, the victim wouldn't have to if  
21 there was substantial -- if there was a -- a reason to  
22 believe that the persecutor would impute that  
23 characteristic or opinion, and his certainly has happened  
24 in the past and can happen in the future.

25 QUESTION: So --

1 MS. MAHONEY: The --

2 QUESTION: So that even though the object of the  
3 statute, as you said a moment ago, was to protect those  
4 who take conscientious political positions, in fact on  
5 your theory the statute will -- can protect a great many  
6 other people, too?

7 MS. MAHONEY: Yes, Your Honor, it could, if --  
8 to the extent that there are people who the persecutor  
9 might perceive to be within that group, they would be  
10 protected, but I think in the ordinary case the objective  
11 facts would usually just give rise to a well-founded fear  
12 where the person is, in fact, within that group.

13 In fact, even the handbook that the U.N. High  
14 Commissioner has done indicates that ordinarily, to  
15 establish a claim for persecution on account of political  
16 opinion, you'd have to show that you have that political  
17 opinion and that political opinion has become -- has come  
18 to the attention of the authorities, because usually it's  
19 not going to be a well-founded fear that you're going to  
20 be persecuted for a political opinion that you do not  
21 have.

22 QUESTION: Ms. Mahoney --

23 QUESTION: \* That's an issue of evidence.

24 MS. MAHONEY: Yes, it is, Your Honor, and it is  
25 an issue of evidence to be resolved by the board. The

1 board is the -- is the finder of fact in this case, and as  
2 long as it applies the correct standards and the  
3 inferences it draws are not unreasonable and not  
4 unsupported by the record, those inferences are binding,  
5 and they were binding in this case.

6 QUESTION: Does that mean that -- oh, excuse me.  
7 Go ahead.

8 QUESTION: Would you go so far as to require  
9 that he express his belief in favor of the government in  
10 power to these guerrillas?

11 MS. MAHONEY: Oh, no, Your Honor. No. It is  
12 not critical that he express his belief, as long as there  
13 is --

14 QUESTION: How old was this man?

15 MS. MAHONEY: Your Honor, I believe he was 18.

16 QUESTION: He's no John Dockerty, is he?

17 MS. MAHONEY: No, Your Honor, he is no John  
18 Dockerty, and the Government has never said otherwise.  
19 The question here is simply, what is the class of refugees  
20 eligible for the grant of asylum? There was -- it's very  
21 important that that class not be expanded far beyond the  
22 bounds that Congress intended for --

23 QUESTION: But I think it's important, however,  
24 that we put ourselves in the place of a 17-year-old  
25 confronted by two guerrillas with, what, machine guns?



1 MS. MAHONEY: Yes, Your Honor. Even if we did,  
2 Your Honor, Mr. -- the respondent in this case in fact has  
3 never testified that he believed that he was --

4 QUESTION: Well, that has to be your position.

5 MS. MAHONEY: But there has to be objective  
6 facts to support the well-founded character of his fear  
7 that the reason for the persecution would be based upon  
8 his political beliefs, and Your Honor --

9 QUESTION: His fear has to be at the time that  
10 he wants asylum, isn't it?

11 MS. MAHONEY: Yes, Your Honor. He has -- he has  
12 to have a fear that when he returns, correct --

13 QUESTION: Yes. Yes.

14 MS. MAHONEY: That -- that he would be subjected  
15 to the injury that he claims.

16 QUESTION: No matter what his attitude was when  
17 he refused conscription.

18 MS. MAHONEY: That's correct, Your Honor.

19 QUESTION: But do I correctly understand that if  
20 the objective evidence would support the inference that  
21 the guerrillas treated people who refused to enlist or  
22 join voluntarily as political enemies, that then the  
23 statute would apply?

24 MS. MAHONEY: If that was the purpose of the  
25 punishment? In other words, that the -- the reason that

1       they were imposing the punishment --

2               QUESTION:   That they would regard those who  
3       refused to join up upon request as political enemies.

4               MS. MAHONEY:   Your Honor, I think the term,  
5       political enemies may be --

6               QUESTION:   Well, as having an unacceptable  
7       political opinion?

8               MS. MAHONEY:   Yes, Your Honor.   If --

9               QUESTION:   Then the statute would apply?

10              MS. MAHONEY:   If the evidence -- if the board  
11       concluded that the evidence supported a well-founded fear  
12       that that was the reason, then yes, the statute would  
13       apply.

14              QUESTION:   And would -- would objective evidence  
15       of a series of punishments being inflicted upon people who  
16       refused to join up justify that conclusion?

17              MS. MAHONEY:   No, Your Honor --

18              QUESTION:   It would not?

19              MS. MAHONEY:   Because on this record there's no  
20       indication that that punishment was being inflicted  
21       differentially on people depending upon what their  
22       political viewpoint --

23              QUESTION:   No, but I've said I've defined the  
24       political -- the political opinion being that you don't  
25       agree with it, that the fact that you will not join up is

1 sufficient evidence of having an unsatisfactory political  
2 opinion to the guerrillas.

3 MS. MAHONEY: If there --

4 QUESTION: Then the mere fact you didn't join --

5 MS. MAHONEY: If there was objective evidence of  
6 that, in other words if the State Department reported that  
7 guerrillas say that that's the reason that they do this --

8 QUESTION: They don't have to say it, they act  
9 in a particular way in respect to people who act by not  
10 joining up. Isn't that objective evidence?

11 MS. MAHONEY: No, I don't believe so, Your  
12 Honor. That's just simply not a reasonable inference that  
13 that is -- that that's the purpose of imposing the  
14 punishment. I mean, this Court, in a series of cases, has  
15 confronted the question of what is the purpose of  
16 punishing people for refusal to in -- to join the Army,  
17 and in the Gillette case in particular, the issue was, was  
18 there a purpose to punish him for his religious views  
19 because he wasn't allowed an exemption, and this Court  
20 said no.

21 The only reasonable inference -- the only  
22 reasonable inference is he's being punished because he  
23 refused to join, and the purpose is to field an army, and  
24 that is the same purpose the guerrillas had in this case.  
25 It is simply not reasonable to infer that, when all

1 they're doing is going and kidnapping them to force their  
2 compliance with their request that what they're really  
3 doing is trying to suppress and wipe out a political  
4 viewpoint that is hostile to --

5 QUESTION: And all it takes to change our whole  
6 immigration law is for the leader of the guerrillas to  
7 say, he who is not with us is against us, and if he says  
8 that, automatically, these are -- they're all being  
9 persecuted for their religious views? Is that what the  
10 law is, really?

11 MS. MAHONEY: Your Honor, I don't think  
12 that -- that it would be just like that. I think it would  
13 have to be the objective evidence of record, but it is --  
14 but it would be a factor.

15 QUESTION: Well, you have a record. Somebody  
16 comes in and testifies, the leader of the guerrilla said,  
17 he who is not with us is against us, and automatically all  
18 of these people who refused to be impressed into service  
19 suddenly have political asylum. That's the position the  
20 Government's taking?

21 MS. MAHONEY: No, Your Honor. I don't  
22 believe --

23 QUESTION: I thought that's what you just said.

24 MS. MAHONEY: I -- I'm trying to clarify that if  
25 they just say, he who's not with us is against us, I don't



1 think that's the same as saying we're going to punish you  
2 for your political beliefs.

3 But if there is -- if there is some evidence  
4 that the board could say -- supported the conclusion that  
5 the purpose was not to field the army -- for instance, if  
6 there was -- if it could be shown that only those people  
7 with hostile views to the guerrillas were forcibly  
8 recruited, whereas those with progovernment  
9 guerrillas -- proguerrilla views were left in their homes  
10 if they voluntarily refused, that may well support an  
11 inference that what they're doing is singling out  
12 political enemies for adverse treatment, but there's --

13 QUESTION: Let me -- let me ask you this. Does  
14 this assume that the facts are the guerrillas \*. He says  
15 no. The guerrillas then make it plain by whatever means  
16 that they're going to kill him, kidnap him, persecute him  
17 in some way. Has he made a case under the statute?

18 MS. MAHONEY: No, Your Honor.

19 QUESTION: No. In other words, what he's got to  
20 show is not merely that the guerrillas are angry because  
21 he would not join up. He's got to show, if I understand  
22 what you're saying, based on further evidence than I have  
23 indicated in my hypo, that the guerrillas infer that the  
24 reason he didn't join up is that he holds a substantive  
25 political position which is inimical to them. Isn't that

1     what you're saying that he's got to prove?

2             MS. MAHONEY:   Plus one more step, Your Honor.

3     Even if they believe that he has a view that is hostile to  
4     them, that itself is not sufficient to convert their  
5     purpose from being one of recruitment to being one --

6             QUESTION:   Oh, right.   In other words --

7             MS. MAHONEY:   Of punishing him for that view.

8             QUESTION:   -- that's got to be the purpose for  
9     their -- \*

10            MS. MAHONEY:   That's correct, Your Honor, and  
11     that's a fundamental step that sort of defies common sense  
12     on this record.

13            QUESTION:   Now, all he has to show is a  
14     reasonable possibility of this?

15            MS. MAHONEY:   The standard of proof that the  
16     board has used is whether or not a reasonable person would  
17     fear that the persecution is being inflicted for this  
18     reason.

19            QUESTION:   Well, that's a pretty liberal  
20     standard, is it not, in favor of the alien?

21            MS. MAHONEY:   It is a liberal standard --

22            QUESTION:   And we interpret the statute  
23     liberally in favor of the alien applicants?

24            MS. MAHONEY:   Your Honor, it is a liberal  
25     standard, and the board has found it met on many

1 occasions, but not in this case.

2 QUESTION: And -- and also, I suppose if the  
3 Attorney General does not want to grant asylum in a  
4 particular case, there is still discretion to deny it.

5 MS. MAHONEY: Yes, Your Honor, there is, but  
6 the -- as soon as the eligibility is expanded to persons  
7 who make no greater showing than the respondent in this  
8 case, there then are -- there's the potential of millions  
9 of additional applicants for asylum flooding into the  
10 country and, in addition, making it more difficult for  
11 refugees from outside the country to obtain admission into  
12 the country.

13 QUESTION: But -- but how do you square the  
14 board's almost blanket presumption that these guerrilla  
15 groups did not have that purpose with the reasonable  
16 possibility? If the alien fears there's a reasonable  
17 possibility -- and Fonseca even has a numerical  
18 calculation of this which is very deferential to the  
19 alien -- it seems to me the case still has to go back for  
20 them to assess that reasonable possibility.

21 MS. MAHONEY: Well, Your Honor, they -- they  
22 said -- the language that they used in this case is that  
23 this record could hardly support a view, and I believe  
24 that under any standard of proof, even one that is -- that  
25 is more liberal than the one the board uses would not

1 support an inference. It's just not a rational inference  
2 on this record, because it is not what the alien  
3 subjectively fears, it's what a reasonable person would  
4 fear based upon the objective record, and that does not  
5 support it.

6 I'd like to save the remaining time for  
7 rebuttal, if I could.

8 CHIEF JUSTICE REHNQUIST: Very well, Ms.  
9 Mahoney. Mr. Robertson, we'll hear from you.

10 ORAL ARGUMENT OF JAMES ROBERTSON

11 ON BEHALF OF THE RESPONDENT

12 MR. ROBERTSON: Thank you, Mr. Chief Justice,  
13 and may it please the Court:

14 5 years ago, in the Cardoza-Fonseca case, the  
15 Immigration Service argued to this Court that it was  
16 impossible to think about the well-founded fear standard  
17 except in terms of more likely than not or more probable  
18 than not. The Court didn't find it impossible. The Court  
19 held that the BIA had got it wrong in requiring asylum  
20 applicants to prove a clear probability of persecution and  
21 found that, indeed, the reasonable -- the well-founded  
22 fear standard could be met by something less than  
23 50 percent and perhaps even as little as 10 percent.

24 QUESTION: Well -- well, do you have any quarrel  
25 with the legal standards that the Solicitor General has



1 set forth here?

2 MR. ROBERTSON: To the extent that the -- the  
3 Solicitor General requires there to be something more than  
4 the inference that this reasonable -- that this young man  
5 had about his fear, yes, we do quarrel about it, but in  
6 theory -- in theory the, well --

7 QUESTION: But Ms. -- Ms. Mahoney's  
8 interpretation of the statutory requisites, I take it, is  
9 satisfactory with you? It's just a matter of how we apply  
10 them?

11 MR. ROBERTSON: Well, Your Honor, I think that  
12 she -- she says that the standard is applied the same way.  
13 The problem is that the Board of Immigration Appeals has  
14 not been applying them the same way. They have, in fact,  
15 been using presumptions in place of evaluations.

16 QUESTION: All right, but it's a matter of  
17 application in this case that we're -- that we're  
18 concerned with, then?

19 MR. ROBERTSON: It -- it is a matter --

20 QUESTION: You will agree with Ms. Mahoney's  
21 statements of the legal requisites to show political -- a  
22 well-founded fear of persecution by reason of political  
23 opinion?

24 MR. ROBERTSON: Not, Your Honor, if that  
25 standard requires both a specific showing of the political

1 opinion of the applicant and a specific showing that  
2 the -- that the purpose, the specific purpose of the  
3 persecution which is feared, and which, after all, hasn't  
4 happened yet, will be specifically to punish the applicant  
5 for that political opinion. That standard -- that  
6 standard is, in our submission, impossible as a practical  
7 matter to meet in the real-life cases --

8 QUESTION: Well, we deal with inferences and  
9 probabilities and likelihoods.

10 MR. ROBERTSON: Well, Your Honor, we do deal  
11 with these inferences, and if -- and if the standard is  
12 expressed in terms of the inferences that can be drawn,  
13 yes, we have no problem with the -- with the -- with the  
14 basic -- with the basic standard.

15 QUESTION: But he -- but he -- but his  
16 well-founded fear has to be of prosecution on account of  
17 his political beliefs?

18 MR. ROBERTSON: That's right, Your Honor, and a  
19 well-founded fear, reasonable standard --

20 QUESTION: Which --

21 MR. ROBERTSON: Runs all the way through this --

22 QUESTION: Which may be -- which in fact may be  
23 baseless?

24 MR. ROBERTSON: Well, if it is baseless, Your  
25 Honor -- if it is baseless, then -- then it is not

1 well-founded. I mean, we're --

2 QUESTION: All right. All right. But I

3 MR. ROBERTSON: The well-founded issue --

4 QUESTION: But I -- in the -- but it may be that  
5 he -- the fact is that -- it may be that the fact is that  
6 he would never be prosecuted for anything, let alone his  
7 political beliefs.

8 MR. ROBERTSON: It -- that is a possibility,  
9 Your Honor. That is why the well-founded fear standard --

10 QUESTION: Yes.

11 MR. ROBERTSON: -- requires only that he  
12 reasonably believe it and that the possibilities, indeed,  
13 may be considerably less than 50 percent.

14 In the Cardoza-Fonseca case the Court laid out a  
15 set of facts that left very little doubt that a reasonable  
16 person might have a well-founded fear if the chances are  
17 only 1 in 10.

18 QUESTION: What -- what about -- is there any  
19 requirement that he actually have a political opinion?

20 MR. ROBERTSON: Your Honor, no.

21 QUESTION: I mean, it doesn't say well-founded  
22 fear of persecution on account of supposed political  
23 opinion, but it says, on account of political opinion.

24 MR. ROBERTSON: It --

25 QUESTION: Doesn't he have to have a political

1 opinion?

2 QUESTION: He -- he does not, Your Honor, and I  
3 take the -- I take the position of the Government to be  
4 essentially in agreement with that, although they --

5 QUESTION: I'm not sure. I thought Ms. Mahoney  
6 said that the board has -- has required that there be an  
7 actual political opinion.

8 MR. ROBERTSON: Your Honor, the --

9 QUESTION: And she seemingly said that  
10 with -- with approval.

11 MR. ROBERTSON: There is -- there is in the  
12 cases -- this case does not present these facts, because  
13 there is a political opinion on the record of this case,  
14 but there are cases --

15 QUESTION: What -- what is the -- the political  
16 opinion on the record here?

17 MR. ROBERTSON: The political opinion on the  
18 record is established by the -- by the alien's testimony  
19 that he didn't want to be against the government. That's  
20 what he said at his immigration hearing. That -- that  
21 testimony was believed by the immigration judge --

22 QUESTION: Well, he --

23 MR. ROBERTSON: And specifically found credible.

24 QUESTION: Is that a political opinion, to say I  
25 do not want to have political opinion? Is that a



1 political opinion? You say, I do not want to have a  
2 political opinion. Is that a political opinion? He  
3 didn't say he wanted to be for the government, either. He  
4 didn't want to be for the guerrillas, or against the  
5 guerrillas. He did not want to be against the government.  
6 How does one not have a political opinion if that's a  
7 political opinion?

8 MR. ROBERTSON: Well, Your Honor, I -- I have  
9 trouble with how one does not have a --

10 QUESTION: I think you do.

11 MR. ROBERTSON: A political opinion --

12 QUESTION: Is this -- \*

13 MR. ROBERTSON: But in this particular case, the  
14 statement, I don't want to be against the government, is  
15 clearly a -- a political opinion.

16 QUESTION: \* We don't know -- so far as the  
17 record indicates, he came to that conclusion because he  
18 thought the government was going to hurt him and he didn't  
19 want to get hurt, but doesn't the statute in referring to  
20 political opinion refer to some kind of a substantive  
21 opinion about the merits of a position, and if that is so,  
22 then what he has indicated here is a political judgment  
23 that he's made, but not the espousal of a substantive  
24 political opinion.

25 MR. ROBERTSON: Your Honor, the Government

1 attempts to look at this as a judgment on his part that  
2 it's not a good idea for him to be on the  
3 guerrillas' -- but from his point of view -- and remember  
4 the statute requires to look at it from his point of  
5 view -- from his point of view, it's a political opinion.

6 He's a 19-year-old kid. It is as much of a  
7 political opinion as we require any of our citizens to  
8 have when they walk in to the polling place and pull the  
9 levers.

10 QUESTION: \* Well are you saying that -- are  
11 you -- are you implying that -- that for the -- for the  
12 guerrillas to take the position that he who is not for us  
13 is against us is -- is a sufficient inference about  
14 political opinion \*. They don't have to know why he's not  
15 \* for us, and it certainly doesn't mean the government \*  
16 has to claim that he has to be not for them. If he's not  
17 for them -- if they can simply say, if you are not with  
18 us, you are against us, that is an espousal of -- or that  
19 is a basis for inferring a political opinion that you  
20 espouse, that's all that's got to be proved. Is that your  
21 position?

22 MR. ROBERTSON: All that has -- yes. I think  
23 that's correct, Your Honor. If -- if I follow the  
24 question correctly, that is -- he is for us -- he who is  
25 not for us is against us would be more than enough.

1 QUESTION: That is -- \*

2 MR. ROBERTSON: That -- well the -- yes, Your  
3 Honor, because the political opinion in this case is  
4 manifested -- is manifested by the applicant's refusal to  
5 join the guerrillas. Now, the threat that's on the  
6 record -- and we should not forget this threat, from which  
7 a number of inferences come -- the threat that was made  
8 was made after the refusal to join, I'm not going to join  
9 you, we're leaving, we're coming back, think it over well.

10 QUESTION: Right. Well that's -- I mean  
11 that's -- that's -- that's a good point of evidence, but  
12 isn't it the case, then, it is not the \* broader concept  
13 of political opinion as you suggest, that anyone who  
14 disagrees with an organization capable of persecution and  
15 who is then persecuted will always automatically qualify  
16 as being persecuted or having fear of persecution because  
17 of political opinion?

18 There really is no -- I guess what I'm saying  
19 is, if we adopt a definition as broad as you are urging on  
20 us, the condition really doesn't mean anything. All  
21 you've got to have is disagreement, and if all you've got  
22 to have is disagreement, why is that condition about  
23 political opinion in there at all?

24 MR. ROBERTSON: Well, Your Honor, because we  
25 have to have the nexus between the disagreement and --

1           QUESTION: Yeah, but you always have a nexus in  
2     your theory. All you've got to have is a disagreement in  
3     effect for whatever reason, followed by some basis to fear  
4     persecution, and the condition for political opinion has  
5     been satisfied.

6           MR. ROBERTSON: Your Honor, I don't think -- I  
7     don't think that it is quite that broad. On the facts of  
8     this case, which I need to come back to, we don't have  
9     just a disagreement and a fear of persecution. We have a  
10    disagreement, we have a disagreement with a political  
11    faction, we have a disagreement with a political faction  
12    who --

13           QUESTION: Well, it's always going to be with a  
14    political faction, isn't it?

15           MR. ROBERTSON: Yes, but this political faction  
16    was carrying machine guns and was masked.

17           QUESTION: Well, that -- that simply means that  
18    they have -- that they do have the means to persecute, but  
19    I mean, all of these disagreements are going to be with  
20    somebody who holds some political view, and who must have  
21    some means of persecuting or he wouldn't have any case to  
22    fear it.

23           MR. ROBERTSON: Well, if I may -- if I may refer  
24    to the hypothetical that was put about the Mafia, if an  
25    applicant has a political opinion about anything, and is



1 persecuted by the Mafia, it may very well be that on that  
2 hypothetical there is no nexus at all between the  
3 persecution and the political opinion.

4 QUESTION: Because the Mafia is not a political  
5 organization?

6 MR. ROBERTSON: We will assume that, if we may,  
7 here. I -- I will -- try to assume --

8 QUESTION: I mean, you're assuming it, I think.

9 MR. ROBERTSON: I will assume it for purposes of  
10 that hypothetical discussion.

11 But in this particular case, we have guerrillas  
12 who are a political faction, who are impressing,  
13 dragooning people for -- for their purposes,  
14 political -- and by the way, Justice Souter, the purposes  
15 for which the dragooning and impressing may be more than  
16 just political. They may be more than just overbearing  
17 the will of the alien. They may, indeed, be for many  
18 purposes, including the Government's argument that they  
19 are trying to fill up their ranks.

20 But to the extent that the threat of punishment  
21 of the alien is on account of -- is because of -- after  
22 and because of his refusal to join them, then the  
23 19-year-old alien looking at the situation -- the machine  
24 guns, the masks, the threat -- may reasonably conclude  
25 that he's been threatened, that he's been threatened

1 because of his political views, and that if he returns, he  
2 may very well be not only conscripted but murdered because  
3 of --

4 QUESTION: Is there -- is there any indication  
5 in the record that they cared, so long as he picked up a  
6 machine gun and shot it at -- at the people these  
7 guerrillas were fighting, that they cared what his  
8 political views were?

9 MR. ROBERTSON: That they cared --

10 QUESTION: I mean, you -- you draw no  
11 distinction between his agreement to fight alongside them  
12 and his agreeing with their political views. Is there any  
13 indication in the record that they cared at all what his  
14 views about Marxism, about capitalism, about whatever  
15 these guerrillas are fighting about might be?

16 MR. ROBERTSON: Your Honor, I think I have to  
17 answer that question no, as it's -- as it's asked.  
18 There -- there need not, indeed, be any -- anything  
19 specific in the record.

20 Indeed, in the case of Canas, the BIA --

21 QUESTION: Well, why need there not be, unless  
22 you say, you know, being afraid of -- of dying and being  
23 afraid of engaging in machine gun battles is a political  
24 view?

25 MR. ROBERTSON: That is not our position, Your

1 Honor, that being afraid of dying and engaging in machine  
2 gun battles is the political view. We rest at this point,  
3 because of the -- the record, indeed, was -- was cut off  
4 at the -- at the immigration status in a way I'll explain  
5 in a moment, but as the record now stands, we rest, as the  
6 Ninth Circuit did, on the inference that may be drawn from  
7 all of the facts; the political faction, the threats, the  
8 refusal, and fleeing the country, and -- and what he now  
9 fears, and on the State Department letter, which --

10 QUESTION: Well, I don't see the in -- I mean,  
11 the only inference I see is that they wanted people to  
12 fight alongside them, and -- and I have no reason to think  
13 that they cared whether this fellow even understood the  
14 political ramifications or what they were fighting for  
15 politically. They just wanted somebody to shoot bullets.

16 MR. ROBERTSON: I -- I suspect, Justice Scalia,  
17 that in no case will the guerrillas actually enter into  
18 the intellectual exercise of deciding what is in the mind  
19 of -- of the person they are trying to dragoon, but if he  
20 demonstrates resistance to them, they, one may reasonably  
21 infer, will conclude that he is against them, and once  
22 concluding that he is against them, they will deal with  
23 him. It is that fear of what they will do when they deal  
24 with him which is the persecution --

25 QUESTION: Well, what -- what is the --

1 MR. ROBERTSON: Inferentially on account --

2 QUESTION: What is the basis for that empirical  
3 assessment? Maybe they sought out this 19-year-old  
4 because they thought he was very reliable. He was --  
5 tended to be, maybe, antigovernment. That's why they  
6 wanted him. He said, I don't want to get involved with  
7 this.

8 MR. ROBERTSON: Well, that is not -- of course,  
9 we don't see the inflections that happened at the -- at  
10 the --

11 QUESTION: Well, but you have to show this on  
12 the record. You're asking us to make an empirical  
13 assumption that any time someone doesn't join a guerrilla  
14 movement and is punished, that the guerrillas will do so  
15 because they assume he has a political opinion, but I just  
16 don't see the empirical basis for that.

17 MR. ROBERTSON: Well, I'm actually asking the  
18 Court to affirm what the Ninth Circuit found, which was on  
19 a substantial --

20 QUESTION: Well, what was the Ninth Circuit's  
21 empirical basis, then?

22 MR. ROBERTSON: On a substantial evidence basis  
23 that there was no evidence for the finding that there was  
24 nothing. The Ninth Circuit made a substantial evidence  
25 finding on the meaning of the State Department letter, and



1     what the State Department letter says, and the Ninth  
2     Circuit held that -- that the State Department letter  
3     established, contrary to the conclusion of the BIA, that  
4     the State Department letter did establish the existence in  
5     Guatemala of armed conflict and forced conscription.

6             Now from that, it is inferential -- it is  
7     inferential from all -- from the facts and circumstances  
8     that I've already laid out and I won't repeat at great  
9     length about the masks and the machine guns.

10            QUESTION: Well, but -- but the board doesn't  
11     make the inference and the Ninth Circuit does, and I -- I  
12     take it we're as well-positioned as the Ninth Circuit to  
13     disagree with that.

14            MR. ROBERTSON: Well, Your Honor, what the  
15     board -- the reason the board, in -- in our submission,  
16     the reason the board does not make this inference is that  
17     the board has decided, in a series of cases beginning with  
18     Maldonado, right after Cardoza-Fonseca, the board has made  
19     a series of judgments about what it is guerrillas do and  
20     why they do it. And in the Maldonado case, Maldonado  
21     case -- Maldonado-Cruz case, which was the first of these  
22     post-Cardoza-Fonseca cases, what the board said was, it  
23     may be -- it may be that the guerrillas have reasons other  
24     than political ones, and holding at page 517 of the  
25     Maldonado-Cruz BIA opinion, there is an implicit

1 presumption of a legitimate basis for punishment.

2 Now, the erection of presumptions in that manner  
3 by the BIA defeats the well-founded fear standard that was  
4 articulated in -- in Cardoza-Fonseca. In effect, it says,  
5 you may be afraid of something. We'll concede that you  
6 have a well-founded fear of something, but you must now  
7 find by clear probability of some kind, or you must  
8 overcome our presumption in order for us to find that it's  
9 on account of political opinion.

10 QUESTION: Here the BIA said that any fear the  
11 respondent has -- that he -- that he may have of being  
12 harmed by them, the guerrillas, is only speculative,  
13 particularly where no evidence has been submitted to show  
14 that the guerrillas harm those who refuse their  
15 evidence -- their invitation to join them, and that this  
16 harm would amount to persecution rather than retribution.

17 Now, they didn't apply any presumption. They  
18 just found, as a matter of fact, there was -- that there  
19 was just a failure of proof. Now, what -- what basis did  
20 the -- or what standard should the Ninth Circuit apply in  
21 reviewing that -- that -- that finding that there was a  
22 lack of evidence?

23 MR. ROBERTSON: Your Honor, the Ninth Circuit  
24 applies, and I believe all the circuit courts apply, the  
25 substantial evidence test to factual findings of the BIA.

1 QUESTION: So they say -- they say the board was  
2 just plain wrong in saying there wasn't any evidence?

3 MR. ROBERTSON: Yes, well, that particular part  
4 of the opinion that you're reading from, Justice White,  
5 deals with the question of whether there is a fear of  
6 anything at all, and indeed is why the case went to the  
7 Ninth Circuit.

8 QUESTION: That's exactly right -- exactly  
9 right, let alone any -- unless there's some well-founded  
10 fear of -- of persecution of any kind, he won't get to  
11 first base --

12 MR. ROBERTSON: I -- yes, that's clearly the  
13 case.

14 QUESTION: -- and that's exactly what this  
15 finding says.

16 MR. ROBERTSON: That's clearly the case, and  
17 that's the way the case went to the Ninth Circuit, without  
18 any of this question about political opinions, by the way.

19 QUESTION: Exactly.

20 QUESTION: Isn't it true, Mr. Robertson, that  
21 the Ninth Circuit opinion reads, political opinion to be  
22 not the political opinion of the applicant, but the  
23 political opinion of the guerrilla group?

24 MR. ROBERTSON: You can read the language of the  
25 Ninth Circuit to say that, Your Honor. I submit, in our

1 submission, that the -- what the Ninth Circuit has really  
2 done is to demonstrate its inference here.

3 QUESTION: Why was the Ninth Circuit drawing  
4 inferences? It's up to the BIA to draw the inferences.

5 MR. ROBERTSON: Well, that's -- that's clear,  
6 Your Honor, but the -- but the Ninth Circuit's opinion  
7 in -- in this case discusses the threat, discusses the  
8 country conditions, discusses the country conditions,  
9 discusses the political opinion of the applicant, Elias  
10 Zacarias, and then determines that the threat was not  
11 demonstrated to be for personal reasons, was not  
12 demonstrated to be for any other reason, the INS came  
13 forward with nothing --

14 QUESTION: So the Ninth Circuit just disagreed  
15 with the finding I just read -- read to you? They say  
16 there is -- the BIA was just wrong in assessing the  
17 evidence?

18 MR. ROBERTSON: The Ninth Circuit found that  
19 there was indeed a threat of -- of a reasonable fear of  
20 persecution.

21 The Ninth Circuit said the persecution he  
22 reasonably feared was kidnapping, and did not reach,  
23 really, the question that we think is also presented by  
24 this fact -- by these facts, that he reasonably feared  
25 kidnapping, assassination, murder, because that's what he



1     said that he feared.

2             Now, Justice White, as I understand it, the  
3     Government has, indeed, conceded at this stage that there  
4     is a well-founded fear of persecution. The -- the  
5     Government says that issue is not before us. There's  
6     nothing left here, now, but the question of whether  
7     the -- the well-founded fear of persecution is on account  
8     of political opinion.

9             QUESTION: So you think the Government has  
10    conceded that the Ninth Circuit correctly found, contrary  
11    to the BIA, that there was a well-founded fear of -- of  
12    being harmed?

13            MR. ROBERTSON: I -- I take the Government's  
14    statement of -- the first part of its brief as to what is  
15    left for this Court to decide to be such a concession,  
16    yes, I do.

17            QUESTION: Mr. Robertson, you described a little  
18    earlier the decision of the Ninth Circuit as saying that  
19    there was simply no basis for the finding that there was  
20    no evidence of -- of persecution on the basis of political  
21    belief. That's how you described it, and as I understand  
22    it, it's not up to the board to find that there was no  
23    evidence of persecution, it -- it's that asylum is denied  
24    unless there is evidence of persecution.

25            In other words, it's up to the applicant to show

1 evidence of persecution, and -- and it seems to me -- I  
2 mean, you may call it a presumption if you like, but I  
3 would call it a burden of proof. It's up to the applicant  
4 to show that there was a well-grounded fear of persecution  
5 on the basis of his political belief. It's not up to the  
6 board to establish evidence to the contrary. Isn't that  
7 right?

8 MR. ROBERTSON: It is. The applicant does,  
9 indeed, have the burden of establishing his entitlement to  
10 the status. There isn't any question about that, Justice  
11 Scalia, but --

12 QUESTION: And if the evidence is in equipoise,  
13 he has not made his case. Isn't that right?

14 MR. ROBERTSON: Well, if there were any evidence  
15 on the other side, it might be in equipoise, Your Honor,  
16 but in this case there is no equipoise. The Government  
17 presented no evidence. Indeed, the Government cut off the  
18 attempt of Elias Zacarias' counsel to explain more about  
19 what it was that -- that he feared.

20 At page 6(a) of the opposition to certification  
21 in the records, there is this question and answer: "Do  
22 you have any idea what would have happened to you if you  
23 would have returned and -- if they would have returned and  
24 found you again?"

25 "Objection, Your Honor, speculative," by

1 Government counsel. "Sustained," and there was -- there  
2 was no opportunity for --

3 QUESTION: I don't know that that goes to the  
4 point that we've been discussing here. I think it's  
5 conceded that they were going to hurt him for not joining.  
6 He's going to be hurt. I don't think the Government's  
7 arguing that, that he -- that he had, or did not have a  
8 well-grounded fear of being hurt -- kidnapped, killed,  
9 injured, whatever.

10 MR. ROBERTSON: Well then -- then, Your Honor --

11 QUESTION: And that's all that question went to,  
12 not whether there was a political motivation behind it.

13 MR. ROBERTSON: Then -- then the question is, if  
14 the Court takes that much as conceded, as indeed do we,  
15 then the only question is, for what reason would he be  
16 hurt, and then, in our submission, the statute compels  
17 looking at the question through the eyes of the applicant,  
18 who is the one after all who has the fear, and is his  
19 subjective fear well-founded?

20 He knows he's got a politically motivated  
21 guerrilla band in front of him. He knows they're going to  
22 hurt him. He knows he has told them he's not going to  
23 join them. Why would they hurt him? Now, the BIA says --

24 QUESTION: I assume because he would not join  
25 them.

1 MR. ROBERTSON: Well, but, because he would not  
2 join them -- because he would not join them demonstrates  
3 to them that he's not for them, therefore he's against  
4 them.

5 QUESTION: May I ask at this point -- the  
6 question's kind of troublesome in this case. As I  
7 understand the record, both sides were supposed to be  
8 engaged in forced recruiting, the government forces as  
9 well as the guerrillas, and if you had a man precisely  
10 positioned as this one, only he had refused to join the  
11 official army and received the same threats, had the same  
12 fear, and so forth, would he be coming within the statute?

13 MR. ROBERTSON: There is a good deal of BIA  
14 decisionmaking on that subject, Justice Stevens. I think  
15 the answer is that there's a clear distinction there  
16 between whether it is the government or not.

17 It could be persecution, if the government -- if  
18 the government wanted him --

19 QUESTION: Well, I just -- the record's exactly  
20 like this record, but it's just -- you change the side.

21 MR. ROBERTSON: If the record is exactly like  
22 this record, if what he fears is being taken out and shot,  
23 yes, it would be persecution.

24 QUESTION: Even if the government did it?

25 MR. ROBERTSON: Even if it were the government.



1 QUESTION: And instead of being shot, they were  
2 merely going to imprison him for draft evasion for 30  
3 days?

4 MR. ROBERTSON: If there were proportionality  
5 and due process by a legitimately constituted government  
6 it would not be persecution. That is --

7 QUESTION: Why not? Why not? He's against  
8 them. I mean, he is not with them, he's against them.  
9 What --

10 MR. ROBERTSON: Well, he is -- from his point of  
11 view, the result might be the same. From his point of  
12 view the result might be the same, but the cases and the  
13 established BIA jurisprudence, which we do not contest  
14 here, does draw the distinction. Indeed, if -- if I may  
15 mention before my --

16 QUESTION: It turns, I gather, on what the word  
17 persecution means. If it's officially authorized, it's  
18 not persecution within the meaning of the statute, but if  
19 it's unofficially guerrilla warfare, it is.

20 MR. ROBERTSON: If it's officially authorized,  
21 if it's prosecution, and if it's prosecution that doesn't  
22 violate international standards in some way, then it  
23 may -- then it -- then it may not qualify as persecution  
24 within the act.

25 I call the Court's attention to the Salim case.

1 The Salim case is a case in which an Afghani, a refugee,  
2 was -- was granted asylum -- actually, he wasn't granted  
3 asylum, but his refugee status was recognized as far back  
4 as 1982 on no ground except that he feared conscription in  
5 the Afghani Army, which was not controlled by Afghanistan  
6 but by the Soviet Union.

7 That was the entire -- the only basis for the  
8 Salim recognition, and the Salim case has vitality today,  
9 despite what the Government says about its being a dead  
10 letter. It is still being cited by the BIA, and it still  
11 stands for the proposition that there is a distinction  
12 between dragooning and conscripting people by legitimate  
13 governments and by rebel bands like the guerrillas.

14 It is the Salim case and the -- and the  
15 inconsistency established by the -- by the Salim case,  
16 particularly by the Salim case, that underlines the point  
17 in our brief that this is certainly not a case in which  
18 the decisions of the BIA are entitled to any deference  
19 under the -- under the Chevron standard.

20 QUESTION: Well, suppose the -- suppose everyone  
21 agreed that there was a well-founded fear that if he  
22 returned to Guatemala he would face forced recruitment by  
23 one side or the other and forced recruitment would mean  
24 kidnapping him and carrying him off and giving him a gun?  
25 Now if that's all that was proved, you -- you wouldn't

1 have made out a case under the statute, would you?

2 MR. ROBERTSON: Your Honor, our position --

3 QUESTION: Can't you just say yes or no?

4 MR. ROBERTSON: I'll answer that question no, we  
5 would not, if only forced conscription were involved.

6 QUESTION: And he -- he still has to prove some  
7 connection with -- with political belief, I suppose?

8 MR. ROBERTSON: He has to prove, but -- he has  
9 to prove some connection, some nexus between a political  
10 belief and the persecution that he fears, yes. In our  
11 view that nexus is clearly established by his political  
12 act of refusal.

13 QUESTION: Well, if he fears -- if he fears  
14 recruitment by either side, it's kind of hard to think  
15 that it's because of his political beliefs.

16 MR. ROBERTSON: That would be neutrality, Your  
17 Honor, and the Bolanos-Hernandez case and others deal with  
18 the neutrality question, and whether that is a political  
19 opinion.

20 MR. ROBERTSON: Is it? Is it?

21 MR. ROBERTSON: In our view, neutrality is a  
22 political opinion, but it's not -- but it's not an issue  
23 presented by the facts of this case.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
25 Robertson.

1 MR. ROBERTSON: Thank you, Mr. Chief Justice.

2 CHIEF JUSTICE REHNQUIST: Ms. Mahoney, you have  
3 2 minutes remaining.

4 REBUTTAL ARGUMENT OF MAUREEN E. MAHONEY

5 ON BEHALF OF THE PETITIONER

6 MS. MAHONEY: I'd like to stress that the  
7 statute uses motive, not legality, to distinguish between  
8 refugee status. It is the motive of the government or the  
9 uncontrolled group in inflicting the punishment that  
10 controls, and if this Court finds that the refusal to  
11 serve manifests a political opinion, then there's no basis  
12 to distinguish draft resisters. They, too, would have  
13 manifested a political opinion.

14 QUESTION: Yes, but they might not be  
15 persecuted, if you just enforce -- enforce a generally  
16 applicable law.

17 MS. MAHONEY: But, Your Honor, it's the motive,  
18 and if the motive is to punish them for the refusal --

19 QUESTION: Well, the motive goes to the on  
20 account of part, but it doesn't go to the word  
21 persecution.

22 MS. MAHONEY: It -- persecution also has motive  
23 within it, Your Honor. Persecution has long been defined  
24 to include an intent --

25 QUESTION: Well, what if -- what if one of the



1 elements of persecution is acting in conflict with  
2 established law?

3 MS. MAHONEY: No, Your Honor, it is not. For  
4 instance, a government might well have a law on its books  
5 that says that anyone who is found practicing the  
6 Christian faith shall be thrown into jail. That would be  
7 lawful, but it would nevertheless be persecution within  
8 the meaning of this act. It is the intentional infliction  
9 of injury for the purpose of making him suffer.

10 QUESTION: Yes, but you have to have -- I'm  
11 assuming a nondiscriminatory law.

12 MS. MAHONEY: Well, if we have a  
13 nondiscriminatory law, Your Honor -- the point here is  
14 that if the refusal to serve is itself the expression of a  
15 political opinion, then throwing someone into jail for  
16 that would be punishment for political opinion.

17 QUESTION: I don't --

18 MS. MAHONEY: Why is it -- our position is, why  
19 is it --

20 QUESTION: It wouldn't be persecution on account  
21 of political opinion, is what I'm suggesting.

22 MS. MAHONEY: Well --

23 QUESTION: It would be punishment, I agree --

24 MS. MAHONEY: But then --

25 QUESTION: But the statute doesn't use the word

1 punishment.

2 MS. MAHONEY: The question then is why is  
3 not -- why is it persecution for the guerrillas to do it,  
4 if the motive is the same? The guerrillas' motive is to  
5 field an army, just as is the government's.

6 QUESTION: Because, I say, there's an ingredient  
7 of, in accordance with a nondiscriminatory law, and they  
8 are not acting in accordance with a nondiscriminatory law.

9 MS. MAHONEY: Thank you.

10 CHIEF JUSTICE REHNQUIST: Thank you, Ms.  
11 Mahoney. The case is submitted.

12 (Whereupon, at 11:04 a.m., the case in the  
13 above-entitled matter was submitted.)  
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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

*NO. 90-1342 - IMMIGRATION AND NATURALIZATION SERVICE,*

*Petitioner, V. JAIRO JONATHAN ELIAS ZACARIAS*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *alan friedman*

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