

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: IMMIGRATION & NATURALIZATION SERVICE,
Petitioner v. JUAN ANIBAL AGUIRRE-AGUIRRE
CASE NO: 97-1754 C.2
PLACE: Washington, D.C.
DATE: Wednesday, March 3, 1999
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 IMMIGRATION & NATURALIZATION :

4 SERVICE, :

5 Petitioner :

6 v. : No. 97-1754

7 JUAN ANIBAL AGUIRRE-AGUIRRE :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, March 3, 1999

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:04 a.m.

14 APPEARANCES:

15 PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor

16 General, Department of Justice, Washington, D.C.; on
17 behalf of the Petitioner.

18 NADINE K. WETTSTEIN, ESQ., Washington, D.C.; on behalf of
19 the Respondent.

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

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 97-1754, Immigration and
5 Naturalization Service v. Juan Anibal Aguirre.

6 Ms. Millett.

7 Is that the correct pronunciation of your name?

8 MS. MILLETT: Yes.

9 ORAL ARGUMENT OF PATRICIA A. MILLETT

10 ON BEHALF OF THE PETITIONER

11 MS. MILLETT: Mr. Chief Justice, and may it
12 please the Court:

13 In the Immigration and Nationality Act, Congress
14 expressly invested in the Attorney General the authority
15 to determine whether an alien who has committed a serious,
16 nonpolitical crime should be denied withholding of
17 deportation. Congress further made clear that once the
18 Attorney General has serious reasons for considering that
19 such a crime occurred, the bar on withholding is
20 mandatory.

21 The issue in this case is whether the Attorney
22 General, through the Board of Immigration Appeals, had
23 serious reasons for considering that respondent's acts of
24 burning buses, destroying private stores, and hitting,
25 binding, and stoning innocent civilians constituted

1 serious nonpolitical crimes.

2 QUESTION: What, by the way, if you have a
3 chance, are we supposed to do about the fact that the
4 individual now says that isn't a correct translation; he
5 didn't stone any individuals. What he said was, he threw
6 stones against the side of the bus or something to stop
7 the bus, but they didn't actually throw stones at
8 individuals, which might be important. What should we do
9 about that?

10 MS. MILLETT: First of all, we disagree it is
11 important, but even if the Court considered that it was,
12 the respondent has filed a motion to remand with the Board
13 of Immigration Appeals and, I think consistent with this
14 Court's decision in Stone v. INS, this Court can go ahead
15 and proceed to review the judgment that's before it and
16 allow that motion to proceed on its own track.

17 QUESTION: Well, this tape question is a very
18 late-in-the-day thing, is it not?

19 MS. MILLETT: It most certainly is. It didn't
20 appear until the brief in opposition in this Court, and
21 that was --

22 QUESTION: It wasn't presented to the Ninth
23 Circuit at all.

24 MS. MILLETT: Not at all, even though the same
25 counsel represented Mr. Aguirre there, but that -- again,

1 the motion is pending before the Board of Immigration
2 Appeals. We believe it should have no impact on this
3 Court's resolution of this case, or ability to proceed and
4 decide this case.

5 QUESTION: Now, it is suggested by the
6 respondent that somehow the board's and the Government's
7 interpretation of the statutory standard differs in some
8 way from that recommended pursuant to the convention and
9 the protocol that bind other nations generally.

10 MS. MILLETT: Uh-huh.

11 QUESTION: The language in the convention and
12 protocol looks about the same, but they say the Handbook
13 somehow establishes a more egregious standard. How have
14 other countries interpreted the protocol and the
15 convention, do we know?

16 MS. MILLETT: In this particular regard, on the
17 question of balancing the risk of persecution there are a
18 couple of other things --

19 QUESTION: Uh-huh, yes.

20 MS. MILLETT: -- the Ninth Circuit required that
21 haven't, as far as we know, been addressed by other
22 countries.

23 But on the question of balancing the risk of
24 persecution --

25 QUESTION: Yes.

1 MS. MILLETT: -- there are two courts that have
2 directly ruled on it, and they are split. The Canadian
3 court applied the balancing test that is recommended in
4 the Handbook, without saying that it was compelled, but
5 choosing to apply it.

6 The British House of Lords has held that the
7 balancing test does not apply, so we have a one-one split.

8 The respondent -- or, I'm sorry, the United
9 Nations High Commissioner in his amicus brief also cites a
10 decision from the French Commissioner of Refugees in a
11 case called Pham, P-h-a-m. That case, however, did not --
12 first of all, has been vacated, and secondly did not
13 address the serious nonpolitical crime exception. It
14 addressed Article 33's particularly serious crime of
15 sexual --

16 QUESTION: Is that question, whether there are
17 serious reasons for considering that a particular offense
18 qualifies as serious and nonpolitical, is that a question
19 of fact or law, do you think?

20 MS. MILLETT: Well, it has two tiers. Whether
21 the test the Attorney General has adopted for identifying
22 serious nonpolitical crimes could, of course, be reviewed
23 for whether -- its consistency with the statute, but
24 because of the language that the Attorney General may
25 determine, and because of the serious reasons for

1 considering language, that would be an extremely
2 deferential review.

3 If the test is legally correct, then the
4 application of any facts in the record in a given case
5 would be -- against that test would be reviewed for
6 substantial evidence.

7 QUESTION: Is the U.N. convention binding on the
8 United States?

9 MS. MILLETT: The convention is not. The
10 proto -- the United States is a party to the protocol
11 relating to the status of refugees, and that has
12 incorporated virtually all of the provisions of the
13 convention, including this definition of refugee,
14 which includes -- this portion of its definition of
15 refugee, which includes a serious nonpolitical crime
16 exception. The only thing that is not carried over is the
17 original limitations, original European limitations on the
18 definition of refugee.

19 QUESTION: Is the Handbook incorporated in the
20 protocol?

21 MS. MILLETT: No, it is not. In fact, we --
22 nothing -- nothing in the text of the protocol or the
23 convention mentions, let alone compels, balancing the risk
24 of persecution.

25 QUESTION: Nor in our statute. Is that protocol

1 self-executing?

2 MS. MILLETT: No, it is not, and so even -- I
3 guess even if it did, if the Attorney General's reasonable
4 interpretation was that that had not been effectuated via
5 United States law, again that would not become --

6 QUESTION: We need a statute that implements it.
7 If we don't have a statute that says you take into account
8 the degree of persecution that will be received at home,
9 then there just isn't a statute that does that.

10 MS. MILLETT: Absolutely, although again --

11 QUESTION: The protocol doesn't do that either,
12 does it? It's just the Handbook that sets up this
13 balancing test, so there's no inconsistency. In fact, our
14 statute seems to be very close to the protocol. There
15 isn't a significant difference between those two.

16 MS. MILLETT: No, there is absolutely no, as we
17 see, tension between the protocol or the convention and
18 the United States law and the Attorney General's
19 interpretation of that. The only question is whether we
20 are inconsistent with a recommendation in a Handbook
21 written by the United Nations High Commissioner of
22 Refugees.

23 QUESTION: Why is that a question at all?

24 MS. MILLETT: Because that's what the Ninth
25 Circuit relied on.

1 QUESTION: Oh.

2 MS. MILLETT: It's not our question.

3 (Laughter.)

4 QUESTION: Well --

5 MS. MILLETT: We, in fact, agree and think it

6 should not be a question. The Attorney General was, of

7 course, entitled to give that document weight if she

8 chooses in interpreting the statute, but is not bound by

9 it.

10 QUESTION: Well, now, as I understand the --

11 QUESTION: Go on.

12 QUESTION: As I understand the respondent, they

13 say, well, you can't really talk about McMullen

14 proportionality, the seriousness of the crime in light of

15 the political objectives, if you don't also talk about

16 persecution, which I take it you're going to tell us is a

17 non sequitur, or --

18 MS. MILLETT: Yes, that would be our position.

19 The test for a serious nonpolitical crime and

20 the proportionality test that that applies are tests that

21 focus on the character of the crime itself.

22 Whether someone later faces a risk of

23 persecution for protected status or protected conduct has

24 no bearing on whether an earlier committed crime had a

25 serious nonpolitical character. It either was or was not

1 a serious nonpolitical crime when it was committed, and
2 the fact that a risk of persecution materializes doesn't
3 change that.

4 QUESTION: Why not? That is to say, why -- you
5 might think -- normally words in statutes have a context,
6 and suppose a person -- your idea is you're just going to
7 list every crime in the U.S. Code and put it on two lists,
8 it's serious or not serious.

9 Well, I -- why wouldn't you in this kind of
10 situation, where you say a person, let's say, has a minor
11 drug offense that you might consider serious. Well,
12 doesn't it make a difference whether we consider it
13 serious for the purpose of the statute, whether that's
14 seriousness because you called it that, it's so serious
15 that it means the person will be sent back to the same
16 country where he'll be killed immediately, as compared
17 with, he'll be sent back to the same country rather than a
18 different country, where he will serve 1 day's
19 imprisonment?

20 I mean, I might think -- you tell me -- if this
21 person's going to be killed because I have to send him
22 back to the same country, I don't think that that previous
23 marijuana crime is such a big deal. If you tell me, well,
24 we're going to send him back to the same country rather
25 than a different country, and all that will happen, he'll

1 spend 7 hours in a cell, I'll say, well, okay, I'll give
2 it to you.

3 I mean, why not make that kind of all-factors
4 considered? You're doing that with nonpolitical.

5 MS. MILLETT: The first thing to keep in mind
6 is, the question in this case is whether the Attorney
7 General is compelled by the statute or the convention to
8 adopt that approach. Whether or not one thinks it would
9 be a good approach to adopt, she most definitely is not,
10 in our opinion, by the text, legislative history, drafting
11 history of either the statute or the convention and
12 protocol.

13 The second thing to keep in your mind is, you
14 mentioned the history of terms. The term nonpolitical
15 crime does have a history. It's a term with meaning in
16 immigration -- I'm sorry, in international law and in
17 extradition law, and the balancing that the Attorney
18 General has used to identify whether something is
19 political or nonpolitical draws upon that history, but it
20 is still -- both of them are describing the crime itself.

21 The risk of persecution doesn't change the
22 crime. The question is whether it's a serious
23 nonpolitical crime --

24 QUESTION: Ms. Millet, may I clarify -- ask you
25 to clarify one thing, because I think when Justice Breyer

1 said, it's just you list everything in the U.S. Code as
2 serious or not serious, do I understand correctly that in
3 defining what is a nonpolitical crime, that the Attorney
4 General is in sync with the Handbook, that the dissonance
5 comes up only at the tail end on the question of, do you
6 then balance against the risk of persecution.

7 But I thought in defining what is a nonpolitical
8 crime it isn't simply a matter of going through the U.S.
9 Code and saying this is serious and this is less serious.

10 MS. MILLETT: No, that is correct. That is
11 correct, and sometimes the analysis of serious and
12 nonpolitical can overlap, but it's -- as I explained, the
13 term nonpolitical and the definition that the Attorney
14 General has adopted is consistent with the Handbook, is
15 consistent with the Ninth Circuit's at least prior
16 articulation --

17 QUESTION: But the Attorney General rejects the
18 gross disproportionality test, as I understand it.

19 MS. MILLETT: The Attorney General rejects the
20 notion that things have to be tantamount to atrocious
21 conduct.

22 QUESTION: Yes.

23 MS. MILLETT: How --

24 QUESTION: Which I take it is what the Ninth
25 Circuit was getting at on the second reason that it --

1 MS. MILLETT: Yes. That is how we interpreted
2 that.

3 QUESTION: Ms. Millett, do I have to give the
4 Attorney General's interpretation deference if I think the
5 Attorney General's interpretation may be wrong for a
6 reason quite different from the reason that respondent
7 here says?

8 Specifically, I don't care what the Handbook
9 says. I care what Congress passed and what the fair
10 meaning of our statute is. And, frankly, when I -- I find
11 it quite incredible that we are adopting an interpretation
12 that takes into this country people who commit any crime
13 at all, even murder, so long as it's for a political
14 reason, and so long as it's not disproportionate.

15 Now, there's a totally different reading of
16 political -- non -- I mean, I've never heard nonpolitical
17 crime. It's the opposite of a political crime. And my
18 normal understanding of a political crime is a crime whose
19 definition -- it's not the motivation of the criminal in
20 committing a murder. It's rather, the very definition of
21 the crime is a political crime, such as the law in Cuba
22 under which some journalists have just gone to jail
23 because they criticized the Government in the press, a law
24 that prohibits criticism of the Government, perhaps a law
25 that prohibits -- even a law that prohibits treason.

1 But when you're committing a crime that is
2 independently criminal -- murder, rape, whatever -- the
3 fact that you're doing it for a political motive, why
4 should that make any difference as to whether we want
5 those people in this country? We don't allow those things
6 to be done for political motives in this country. Do we
7 want to admit immigrants who have that philosophy?

8 MS. MILLETT: Well, that is a choice again for
9 Congress and the executive branch, particularly Congress
10 to make.

11 QUESTION: Well, all Congress said was,
12 nonpolitical crime, and that's a perfectly reasonable
13 interpretation of what a political crime consists of. In
14 fact, I think it's the more normal one. It's not, you
15 know, well, I murdered somebody, but it was proportionate.
16 It was really sort of necessary for my political goal.
17 We're admitting people on those bases?

18 MS. MILLETT: The question would be if -- the
19 way in which that would come up, and sometimes there are
20 things that are so -- how serious it is can be factored
21 into whether or not it can even be accepted as
22 nonpolitical. Again, the history of the term political or
23 nonpolitical is a contextual inquiry, and the more drastic
24 means that are employed is often a factor.

25 On the other hand, someone who attempted to kill

1 Hitler during World War II, or if they'd even, in fact,
2 succeeded, would not necessarily have to be excluded from
3 a country under this definition. And there are --

4 QUESTION: What about Lee Harvey Oswald, who
5 succeeded in killing President Kennedy? Is that a
6 political crime?

7 MS. MILLETT: I don't think that would be the
8 position of the United States, and I don't know whether it
9 was a political motive --

10 QUESTION: Well, no, but I mean --

11 (Laughter.)

12 QUESTION: -- backing off and looking at it --

13 MS. MILLETT: Right. Right.

14 QUESTION: -- as an act of someone -- an
15 assassin, but who disagreed with the President and wanted
16 him out of the way. Could that be a political crime?

17 MS. MILLETT: Could the acts of an assassin ever
18 be considered a political crime? I think yes, the
19 Attorney General would have the discretion to do that
20 under this statute.

21 QUESTION: To assassinate Queen Elizabeth, to
22 take a current and quite likely --

23 (Laughter.)

24 QUESTION: -- scenario, that, we'd have -- we'd
25 just weigh it, was it proportionate, you know. Could he

1 have achieved his end by some lesser means, maybe
2 assassinating somebody else?

3 (Laughter.)

4 QUESTION: I find it extraordinary that that's
5 what we're going to go through in deciding whether to
6 admit people.

7 MS. MILLETT: Well, again, Justice Scalia, even
8 if this Court finds it extraordinary, the question is what
9 Congress and the executive branch have determined. This
10 is a question of --

11 QUESTION: No. No, it isn't. If it's
12 extraordinary, you shouldn't interpret the statute that
13 way.

14 MS. MILLETT: If it's permitted by the plain
15 language -- it is not foreclosed. It is not foreclosed by
16 the plain language of the statute or the plain language of
17 the convention. In fact, we believe that that is the type
18 of deference that the Attorney General was granted
19 under --

20 QUESTION: All right, but Ms. Millett, has the
21 Attorney General ever, let's say, given a favorable
22 interpretation to an allegedly political crime when the
23 political objective was at least not an acceptable
24 political objective to the Government of the United
25 States?

1 MS. MILLETT: I'm having a little --

2 QUESTION: Have we rewarded the enemies of our
3 side, for example, during the Cold War -- when the
4 Attorney General looks to what is, let's say, the
5 political motivation, the political side of the equation,
6 does the Attorney General simply count as political those
7 political objectives which are acceptable to the
8 Government of the United States at the time?

9 MS. MILLETT: It's a larger inquiry than that,
10 and for example, with the hypothetical about Queen
11 Elizabeth, the Attorney General will also consider the
12 structure of the country in which -- first of all, we
13 think it's perfectly -- the Attorney General is free to
14 consider political relations in this aspect of the test.

15 QUESTION: So that somebody who tries to
16 assassinate Saddam Hussein, with whom we're having a
17 current disagreement, and who fails, and then wants to
18 come here and get refugee status, we would take the
19 position, the Attorney General would take the position
20 possibly that that's -- that that person is admissible,
21 because we're having a disagreement with the regime?

22 MS. MILLETT: I hesitate to identify any
23 particular leader or country or anything in a way that
24 would suggest we would open the doors for killing or not,
25 and in fact often an assassination --

1 QUESTION: Well, I just want to know if that's
2 possible --

3 MS. MILLETT: But whether --

4 QUESTION: -- under your view.

5 MS. MILLETT: I mean, actually, historically in
6 the late 1800s and early 1900s, the political offense
7 exception to extradition often had in mind the lone
8 assassin who would go and shoot a head of State, but
9 the --

10 QUESTION: So --

11 MS. MILLETT: The Attorney General would not --

12 QUESTION: So the answer is yes, that person
13 would be admissible, given refugee status, possibly?

14 MS. MILLETT: The -- given -- the question is
15 withholding of deportation, not refugee status. Possibly,
16 yes, but what would the Attorney General consider --

17 QUESTION: I mean, you like Kennedy, you don't
18 like Hitler. It's a question of where Saddam falls in --
19 you know, in that --

20 (Laughter.)

21 MS. MILLETT: What's more important -- what is
22 important --

23 QUESTION: -- on that graph.

24 MS. MILLETT: In the -- what is important for
25 the Attorney General to consider and has considered, in

1 fact in the Doherty case that came before this Court a few
2 years ago, is whether there is a -- how there's -- the
3 means chosen relates to the ability to express and
4 obtain -- express political views and obtain political
5 change in a given country.

6 In the United Kingdom, which was at issue in
7 Doherty, the Attorney General concluded that it was a
8 critical or an important factor that there are peaceful
9 means for changing Government and expressing views in that
10 country.

11 There may be countries and there may be times in
12 this world when there will be a country and there is no
13 way of safely protesting, expressing your view, or
14 changing the Government, except through violence.

15 Now, that does not mean that all violence will
16 be proper, or will be acceptable.

17 QUESTION: I was going to suggest that this line
18 of inquiry takes us somewhat far afield from the issues in
19 this case, but maybe it doesn't. Must we confront in this
20 case the issue whether or not the political motivation of
21 the crime bears on its political character, as opposed to,
22 on the other hand, defining a category of crimes, speech,
23 protest, that are political? Must we do that in this
24 case?

25 MS. MILLETT: I don't think there's any question

1 that political motive is one factor, but it is not the
2 exclusive or driving factor. The question is whether it's
3 a serious nonpolitical crime, not a serious nonpolitical
4 criminal, and so the inquiry --

5 QUESTION: But it seems to me that as soon as
6 you agree to that, and I -- certainly that's the Attorney
7 General's position, the question is not how political it
8 was, but whether it was nonpolitical, and as soon as
9 you've got any political ingredient in the incident
10 involved, it cannot be described as totally nonpolitical.

11 MS. MILLETT: That is not something we agree
12 with at all, Justice Stevens. The term nonpolitical
13 crime, as interpreted by the Attorney General, is a term
14 with a history, and we're focusing on the crime, not the
15 criminal. And the history in international law, and in
16 particular in extradition law, is a contextual inquiry.
17 It's quite clear that countries -- in fact, the French
18 test is an objective test that doesn't look at motivation
19 at all.

20 QUESTION: Are you telling me that every case,
21 every crime involving the burning of a couple of buses
22 would always be nonpolitical?

23 MS. MILLETT: No, but there's not a bright line
24 of yes it would be, or no it would not be for political.
25 but what is clear is that the fact that they have a

1 political motivation alone is not going to make that a
2 political crime, any more than blowing up a Federal day
3 care center in Oklahoma City is going to be considered
4 political.

5 QUESTION: Let me be sure I understand your
6 position. The motivation, is it the motivation required
7 to satisfy a statutory element of what the crime -- how
8 the crime is defined, or is it the motivation of the
9 particular person who seeks withholding or deportation?

10 MS. MILLETT: Motivation is one factor in
11 deciding what that -- if what the person did qualifies as
12 a nonpolitical crime. It is only one factor.

13 QUESTION: But it's the motivation of the
14 individual, not necessarily the term motive as used in the
15 statutory definition of the crime, is that right?

16 MS. MILLETT: Yes. Oh, it's -- for mens rea,
17 you mean, or --

18 QUESTION: Well, whatever the -- whatever the
19 term, mens rea, or intent, or malice, whatever. It's not
20 that term that you're talking about. You're talking about
21 the subjective intent of the defendant in the particular
22 case.

23 MS. MILLETT: The subjective political motive
24 is -- yes --

25 QUESTION: Okay.

1 MS. MILLETT: -- is one factor, although again,
2 in this contextual inquiry on the nature, of whether
3 something is a political or nonpolitical crime, we look
4 not only, again, at the motivation, but at the nature of
5 the crime, and one factor that has been critically
6 important in that analysis historically, and is now for
7 the Attorney General, is whether civilians have been the
8 target. And a political motivation that takes -- that
9 vents its political anger on innocent civilians, as
10 occurred here, is -- carries a heavy presumption in
11 international law and in the eyes of the Attorney General
12 that it is non --

13 QUESTION: Ms. Millett --

14 QUESTION: But I --

15 QUESTION: -- let me go back to Justice
16 Kennedy's question, because I am frankly getting lost.

17 I thought that it was the position of both the
18 Attorney General and even the Ninth Circuit that we are
19 dealing with a nonpolitical crime, and that the only
20 question is, given that nonpolitical status of the crime,
21 for whatever reason -- I think Justice Scalia has
22 suggested maybe it was the wrong reason for typing it a
23 nonpolitical, but anyway, I thought that the Attorney
24 General's position and the Ninth Circuit was, this falls
25 in that category, but you still have to weigh the

1 persecution. I thought that's what this case was about.

2 MS. MILLETT: Well, there were a couple of
3 other -- it's not absolutely clear to me where the other
4 two factors of the Ninth Circuit mentioned the
5 atrociousness and the necessity and success, where they
6 come into this calculus. But certainly on a question of
7 balancing the risk of persecution, it's only been argued
8 about deciding whether or not it's serious.

9 And again, our position is not only that it is
10 not compelled in any means by the statutory language,
11 indeed it's a strained one, but also to keep in mind that
12 adopting such a balancing test would result in a
13 complicated matrix of withholding judgments under which
14 you're going to be having varying degrees of seriousness
15 of the crime weighed against varying gradations of actual
16 threats to life and liberty, and the nature of those
17 judgments reviewed by courts all over the country. And
18 the Attorney General has determined that not -- because
19 it's not compelled by the language, she elects not to
20 impose that interpretive and administrative thicket on the
21 withholding provision.

22 I would like to --

23 QUESTION: But you're already willing to make
24 the, it seems to me, more difficult determination of how
25 necessary it was for the political objective. I mean,

1 that requires a knowledge of the political situation in
2 the country and so forth and so on. That seems to me even
3 harder than these other factors.

4 MS. MILLETT: And so the Attorney General is
5 here opposing the adoption of a necessity test.

6 QUESTION: Is it right --

7 QUESTION: May I ask you --

8 QUESTION: No, please go ahead.

9 QUESTION: May I ask you this question about the
10 BIA's application of what it at least understood was the
11 Attorney General's test?

12 The BIA stated in a rather conclusory way that
13 here the, let's say the political character of the crime
14 was outweighed by its seriousness, which it described as
15 being great enough to come to the attention of the warring
16 or the contending parties in Guatemala, which sounds to me
17 as though it's saying, whenever the crime, given its
18 political motivation, is effective in getting the
19 attention of the political contenders, they've gone too
20 far, that the criminality by definition at that point
21 outweighs whatever political character they might have --
22 it might have. So it sounds as though, to put it crudely,
23 nothing fails like success, seems to be the reasoning of
24 the BIA here.

25 Would it be appropriate, even if we do not

1 accept the Ninth Circuit's opinion, to send it back to the
2 circuit, presumably to be sent back to the BIA to explain
3 its reasons for concluding, as it did here, a little
4 better than that conclusory reasoning that I've just
5 characterized as if you're successful enough you
6 necessarily fail under the statute? Would that be
7 appropriate?

8 MS. MILLETT: No, it would not, for two reasons.
9 First of all, it's the Ninth Circuit that wants to look at
10 necessity and success, not the board. The board's
11 reference to the fact --

12 QUESTION: Well, I thought -- did I
13 mischaracterize the board? I didn't mean to.

14 MS. MILLETT: Well, I -- the board's
15 reference -- the board's reference to the level,
16 attracting the attention of the Governments was not to say
17 you're disqualified because of that, but to use that to
18 describe how much violence was involved against civilians
19 here. There was sufficient violence against civilians
20 that it would attract this atten -- this level of
21 attention, so that is again evidence this was not, as the
22 Ninth Circuit characterized, minimal or harmless
23 violence --

24 QUESTION: So you're saying it was emphasizing
25 the violence rather than the merely criminal character of

1 what was being done.

2 MS. MILLETT: The level of violence targeted at
3 civilians is what was done.

4 I would like to reserve the --

5 QUESTION: May I just ask one -- I know that you
6 want to reserve some time for rebuttal. Are you saying
7 that the crime is grossly out of proportional to the
8 political objectives?

9 MS. MILLETT: Violence against civilians, in
10 this case, yes, the board --

11 QUESTION: And that's the test?

12 MS. MILLETT: I'm sorry. Is -- I'm sorry.

13 QUESTION: And that's the test?

14 MS. MILLETT: The test is either proportion -- a
15 proportionality between the objective and the means used,
16 or -- or atrociousness.

17 I would like to reserve the balance of my time.

18 QUESTION: Thank you, Ms. Millett.

19 Ms. Wettstein, we'll hear from you.

20 ORAL ARGUMENT OF NADINE K. WETTSTEIN

21 ON BEHALF OF THE RESPONDENT

22 MS. WETTSTEIN: Mr. Chief Justice, and may it
23 please the Court:

24 I'd like to pick up on the point we just left
25 off with Ms. Millett, that in answer to Justice Kennedy's

1 question the Court does not have to grapple or decide on
2 the difficult, what is a political crime, what is not a
3 political crime. The issue really facing the Court is
4 whether or not the Board of Immigration Appeals properly
5 reversed the decision of the immigration judge.

6 QUESTION: Well, the issue before us is whether
7 the court of appeals correctly decided this case, isn't
8 it, and there are -- the question presented is whether the
9 court of appeals erred in reversing the decision of the
10 BIA. Maybe you see it as the same thing, but it isn't
11 quite the same.

12 MS. WETTSTEIN: Well, Your Honor --

13 QUESTION: If the Ninth Circuit was wrong, even
14 if the BIA was wrong, that does not mean that we would
15 simply say, go back to the BIA.

16 MS. WETTSTEIN: Your Honor, the BIA -- rather,
17 the court of appeals gave three reasons for reversing the
18 BIA, and two of those three reasons were that the board
19 did not correctly apply its own test set out in the Matter
20 of McMullen, which is a BIA decision setting forth the
21 standards for determining serious nonpolitical crime.

22 And to just clarify with Justice Ginsburg for a
23 moment, nobody says that this is a political crime.
24 Everyone said that this was a -- rather, no one said it's
25 a nonpolitical crime. Everyone said it's a political

1 crime. The board -- the immigration judge held that it
2 was a political crime. The Board of Immigration Appeals
3 did not say that it was on balance. It said on balance
4 that it was too serious to be political, but it didn't say
5 that the motives were unpolitical, or nonpolitical.

6 In other words, the board misapplied its own --
7 well, the board purported to apply the McMullen test, and
8 it did not apply the five factors of the McMullen test, it
9 only concluded as to one factor.

10 QUESTION: I really find that difficult to
11 follow, because the McMullen test was a test that was said
12 on the way to saying that the applicant there did not
13 qualify for any dispensation. So to take a test that
14 picks somebody who doesn't qualify, and then you say, but
15 now somebody else who wasn't a terrorist, isn't a
16 terrorist and therefore didn't satisfy those factors.

17 I just don't think that you can get very far
18 from taking a case that says, this person has these five
19 characteristics and he's out, then say that means well,
20 when you don't have those five characteristics you're in.
21 I really don't think that McMullen can be worked that way
22 in reverse.

23 MS. WETTSTEIN: Your Honor, McMullen mirrors and
24 incorporates the Handbook standard, paragraph 152 of the
25 Handbook, which sets out five tests, and when you apply

1 those tests in this case --

2 QUESTION: I thought the board has always said,
3 up until the other case, that it isn't taking any position
4 on this balancing. It notes that that's the position that
5 the Handbook takes, but as far as I know, there has never
6 been a time when the board said, we embrace that test.

7 MS. WETTSTEIN: Well, Your Honor, there are two
8 different kinds of balancing here. Perhaps if we separate
9 them, that might be clearer. There's a balancing, the so-
10 called balancing in paragraph 152 of the Handbook, if we
11 may call it that, and that really is -- provides five
12 tests for the political-nonpolitical question.

13 And then there's the separate question in
14 paragraph 156 of the Handbook, which is whether or not you
15 consider the risk of persecution once you have already
16 determined that the crime is --

17 QUESTION: Isn't it agreed that the Attorney
18 General and the United States are not bound by the
19 Handbook?

20 MS. WETTSTEIN: Yes, Your Honor, that's
21 certainly agreed, but the board has adopted the paragraph
22 152 in the matter of McMullen, so it wouldn't necessarily
23 be bound otherwise, but --

24 QUESTION: That balancing is a balancing of
25 what?

1 MS. WETTSTEIN: It's a balancing of the
2 political-nonpolitical question, Your Honor. It includes
3 the motivation of the actor, whether or not the crime was
4 out of proportion, whether or not there's a causal link
5 between the acts and the goals, whether or not the crime
6 was atrocious.

7 So in answer to some of the Court's questions
8 earlier --

9 QUESTION: Do you mean, it's out of proportion
10 to the political objections --

11 MS. WETTSTEIN: That's right.

12 QUESTION: -- objectives, or out of proportion
13 to the common law character of the crime?

14 MS. WETTSTEIN: Whether the act is out of
15 proportion to the goals. The question in 15 -- in the 152
16 Handbook is whether or not this is a political crime, so
17 if it's out of proportion, I think that was some of
18 what -- an answer to some of your questions earlier about
19 killing someone that, you may have a valid political goal,
20 but if you overstep your bounds, if you did too much to
21 meet that goal, then the crime loses its political
22 character. It becomes a nonpolitical crime.

23 QUESTION: Is there in the Handbook or, more
24 particularly, are there in previous board opinions --
25 think of previous board opinions. Is there anything in

1 those opinions that either says directly, or says by
2 incorporating the Handbook, that in deciding whether a
3 particular crime is political or not political, one will
4 look to see -- and these are the -- whether or not the
5 nonpolitical part is a) disproportionate, b) grossly
6 disproportionate, or c) some other set of words.

7 What in the previous board's opinion either says
8 directly, or through incorporating the Handbook, whether
9 that standard should be proportionate, grossly
10 disproportionate, or some other set of words. And, if so,
11 what does it say?

12 MS. WETTSTEIN: Well, McMullen, Your Honor, is
13 the chief board decision about this. This has not -- this
14 issue has not come up very often in the board. There are
15 some early cases in the early eighties with Marielito
16 Cubans. This issue did not really come up with those, in
17 those cases.

18 There have been -- this issue has come up in the
19 extradition context, and there are some district court
20 cases in a case called Doherty and also in McMullen, where
21 extradition was refused because they were political
22 crimes, and --

23 QUESTION: Why isn't the test not whether the
24 board has followed an earlier precedent of its own, but
25 whether the board's action conforms to the statute? Why

1 does the Ninth Circuit say the board is wrong for not
2 following McMullen if, in fact, the board's decision is
3 consistent with the statute? McMullen isn't part of the
4 statute.

5 MS. WETTSTEIN: No, Your Honor, but McMullen is
6 the board's own decision deciding what the statute means,
7 and --

8 QUESTION: Well, to whom do we owe deference
9 here, to the Attorney General, or to board precedent, or
10 what?

11 MS. WETTSTEIN: Well, Your Honor, to return to
12 the Chief Justice's question earlier, the question is, was
13 the court of appeals correct. And the court of appeals
14 said, here are the tests that you have laid out, and here
15 is circuit law, and here is how these tests are supposed
16 to be applied, and you did not correctly apply them in
17 this case.

18 QUESTION: Well, is there any room for
19 interpretation of the statute here, and if so, do we look
20 to the Attorney General's interpretation and give it
21 deference, or what do we do?

22 MS. WETTSTEIN: Well, you certainly can do that,
23 Your Honor. The statute itself only says, serious
24 nonpolitical crimes. So the Court could say you don't
25 like the McMullen test, and you think some other test

1 should apply. But, of course, no one was able to apply
2 that new test in this case, so then a remand would be
3 appropriate if you --

4 QUESTION: The board is a creature of the
5 Attorney General, is it not?

6 MS. WETTSTEIN: That's correct.

7 QUESTION: I mean, she can overrule anything it
8 does.

9 MS. WETTSTEIN: Right, but she has not done that
10 here. The Attorney General, neither on the 156 political
11 crime balancing nor on the risk of persecution balancing,
12 the Attorney General has not issued any precedent
13 decisions on either of these questions. Her decision is
14 limited to McMullen, and in the McMullen decision the risk
15 of persecution balancing did not come up.

16 QUESTION: Well, doesn't it apply here -- to go
17 back to the Chief Justice's question, is there some reason
18 that the most basic rule of administrative law wouldn't
19 apply, namely, an agency cannot change its decision
20 without focusing on it? You have to follow your own
21 rules. An agency has to follow its own rules.

22 If that really hornbook rule applies, then I
23 would have thought, since there's certainly nothing in
24 this one paragraph --

25 MS. WETTSTEIN: Right.

1 QUESTION: -- of the BIA's decision that
2 purports to change anything, I would have thought the
3 question would be whether it's consistent with its prior
4 rules. Of course it can change those rules, if it wants,
5 but it hasn't.

6 MS. WETTSTEIN: That's correct.

7 QUESTION: And that's why I asked you, what is
8 the prior rule. Is the prior rule adopt the Handbook? Is
9 the prior rule the word grossly disproportionate, or is
10 the prior rule something else, because whatever that prior
11 rule is, I guess they should have applied it here in the
12 one paragraph, so what is it?

13 MS. WETTSTEIN: Well, yes, Your Honor, I think
14 the Government would agree that the prior rule is Matter
15 of McMullen, and there has been no other decision by the
16 Attorney General.

17 QUESTION: Well, are -- do you agree with
18 Justice Breyer that an agency could not come out
19 differently in a particular case from the way it had
20 before without some sort of an elaborate procedure?

21 MS. WETTSTEIN: Well, Your Honor, since McMullen
22 is -- was the precedent decision here, I think if the
23 board --

24 QUESTION: Well, supposing this were just the
25 Attorney General, you know, not a BIA or something like

1 that, the Attorney General under the -- and last year she
2 says, well, I think McMullen is right, then this year she
3 says, well, no, I'm not -- I'm going to back away from
4 McMullen some.

5 MS. WETTSTEIN: She certainly could do that.

6 QUESTION: Is there some administrative law rule
7 that says she can't do that?

8 MS. WETTSTEIN: Well, Your Honor, she has, in
9 fact, done that in a case where --

10 QUESTION: Aren't you going to answer yes to
11 that, that an agency does have to focus on it?

12 MS. WETTSTEIN: Well, the Attorney General, Your
13 Honor, is -- has authority over the Board of Immigration
14 Appeals. As you've noted, the board is a creature of the
15 Attorney General, so at least under the statute she can
16 overrule a decision the Board of Immigration Appeals has
17 made.

18 QUESTION: Without focusing on it, even.
19 Without focusing on it. That's what Justice Breyer --

20 MS. WETTSTEIN: Without focusing on it.

21 QUESTION: Does Arizona Grocery apply --

22 QUESTION: Yes. Justice Breyer wants you to
23 adopt the position that an agency cannot alter its course
24 from a prior adjudication without focusing specifically on
25 that adjudication.

1 MS. WETTSTEIN: Well --

2 QUESTION: Now, if you say that you agree with
3 Justice Breyer, I'm going to ask you what case you have in
4 mind that says --

5 QUESTION: Arizona Grocery. You say Arizona
6 Grocery is the hornbook --

7 (Laughter.)

8 MS. WETTSTEIN: Arizona Grocery.

9 (Laughter.)

10 MS. WETTSTEIN: Arizona Grocery.

11 QUESTION: It's, an agency has to follow its own
12 rules.

13 MS. WETTSTEIN: Well, we don't even have to
14 reach that here, of course.

15 QUESTION: The agency does have to follow its
16 own rules --

17 QUESTION: Right.

18 MS. WETTSTEIN: Right.

19 QUESTION: -- in the sense of regulations.

20 QUESTION: Arizona Grocery had no regulations.

21 MS. WETTSTEIN: Well, I don't think we even have
22 to reach that here, because the board did not purport to
23 change its policy.

24 QUESTION: Well, I thought here the board had
25 taken the position in McMullen and in this case that the

1 question of whether a crime is a political offense is
2 primarily one of fact. I mean, that is primarily a fact
3 issue, and the board here determined as a matter of fact
4 that it was one that followed the language of the statute.

5 MS. WETTSTEIN: Uh-huh, that it was -- the
6 criminal nature outweighed the political nature.

7 QUESTION: Right.

8 MS. WETTSTEIN: But Your Honor, that's all they
9 said. They just simply announced it, and they violated
10 another cardinal principle of administrative law that the
11 agency is supposed to show that it reasoned and not merely
12 reacted, and here the agency just simply concluded, so it
13 isn't as if they overturned McMullen, or -- they purported
14 to apply McMullen, but they did not adequately apply --
15 they did not --

16 QUESTION: Well, have we applied some special
17 rule in the area of fact determination that says they have
18 to explain it, or can they just determine the facts, and
19 do we owe some deference to that factual determination?

20 MS. WETTSTEIN: Well, Your Honor, in this case,
21 certainly if they had properly applied the tests they
22 would have reached a separate -- a different result. They
23 simply concluded that the political element outweighed the
24 criminal element, but if they had considered whether
25 Mr. Aguirre had political motivation, whether there was a

1 link between his acts and the goals, they would have
2 reached a separate decision.

3 So yes, I think the facts -- if it were -- was
4 just a fact determination, if they had properly applied
5 their tests, they would have reached a different
6 determination.

7 QUESTION: Well, advert if you will for a minute
8 to what the Ninth Circuit said. You -- in the first
9 place, I guess the third reason for which the Ninth
10 Circuit thought there had been error was the failure to
11 consider the seriousness of the persecution. And I think
12 you mentioned earlier that McMullen didn't involve that,
13 so that's an open question so far as McMullen goes.

14 MS. WETTSTEIN: That's right.

15 QUESTION: And quite obviously the board did not
16 in this case think that whatever the relevance of that
17 factor might be, if relevant at all, would have been in
18 favor of your client.

19 Go to the second -- I think it was the second
20 reason that the Ninth Circuit gave, and that was that the
21 board had failed to consider the possibility of a gross
22 disproportionality, or the significance of gross
23 disproportionality between the political and the common
24 law character. In McMullen, did the board adopt a gross
25 disproportionality?

1 MS. WETTSTEIN: Yes, it did, Your Honor.

2 QUESTION: Did they use that term?

3 MS. WETTSTEIN: That's right.

4 QUESTION: They used that term?

5 MS. WETTSTEIN: It applied the gross, and it
6 also applied the atrociousness test. So it applied both
7 of those tests and found that McMullen's actions, contrary
8 to Mr. Aguirre's actions, were in fact grossly
9 disproportionate and were atrocious, and --

10 QUESTION: Did they say that that was a
11 condition, that that condition always had to exist in
12 order for the crime to be nonpolitical?

13 MS. WETTSTEIN: No, Your Honor, they didn't say
14 it was a condition, but it does -- those were the tests
15 that they applied, and that again mirrors --

16 QUESTION: They considered it a relevant factor,
17 is that -- would that be a fair way to --

18 MS. WETTSTEIN: I'm sorry, Your Honor.

19 QUESTION: In McMullen did they say, look, it's
20 just one of the things that ought to be considered, is
21 there gross disproportionality or isn't there?

22 MS. WETTSTEIN: Yes.

23 QUESTION: Without saying that if you satisfy
24 that test a particular result necessarily follows.

25 MS. WETTSTEIN: That's right.

1 QUESTION: Okay.

2 MS. WETTSTEIN: They did not say, this is an
3 absolute condition, but they said, here is what we
4 consider, and what they consider mirrors the Handbook --

5 QUESTION: But they found it nonpolitical here
6 even without finding it to be atrocious. Why should they
7 then move on to consider the atrociousness factor? Having
8 found that the other factors have already rendered it
9 nonpolitical, if the atrociousness factor is not
10 essential, as you say it isn't, then what's the harm
11 that's been done?

12 They looked at the other factors and they said,
13 I look at these other -- it's nonpolitical.

14 MS. WETTSTEIN: Well, Your Honor --

15 QUESTION: I don't even have to consider whether
16 it's atrocious. Maybe it is, maybe it isn't. Who cares?

17 MS. WETTSTEIN: Uh-huh.

18 QUESTION: It's nonpolitical because of these
19 other reasons.

20 MS. WETTSTEIN: Your Honor, I don't want to
21 mischaracterize what I said. It isn't that the board in
22 McMullen said it isn't a necessary factor. Those are the
23 factors they considered. They didn't say which ones of
24 those are necessary and which ones are not --

25 QUESTION: Well, then --

1 MS. WETTSTEIN: -- so it may be that's a
2 necessary factor.

3 QUESTION: But then it seems to me the agency
4 could have done just exactly what I've said, and certainly
5 we give the agency the benefit of the doubt.

6 What -- I mean, I assume we apply a substantial
7 evidence test on all those factual matters, right, so
8 there's some evidence that could support the agency's
9 determination, is that right? Although I'm not sure the
10 Ninth Circuit did that. It seems to me they reviewed all
11 the factual determinations de novo.

12 MS. WETTSTEIN: Well, Your Honor, it isn't so
13 much a factual determination here as a procedural
14 determination. The Ninth Circuit did not reach its own
15 substantive conclusion. It simply remanded to the board
16 for it to apply its test, so it's really more procedural
17 errors.

18 QUESTION: I -- let's concentrate on what the
19 BIA did, because it seems to me that in characterizing
20 what went on here, it did even what the Handbook says, and
21 it says, in determining whether this is political or
22 nonpolitical, its closest to the political camp when
23 you're acting against the Government or Government
24 personnel, much more iffy if your target, the person
25 you're actually hitting on, is a private individual, or a

1 private company, and then weakest of all when you're
2 hitting on private individuals and you're trying to
3 produce general chaos.

4 Now, here the people who were hurt, even if just
5 temporarily, because they were lassoed and hit -- we'll
6 leave out the stones -- were private individuals. The
7 shopkeepers whose merchandize was trashed were private
8 individuals. So it seems to me that that falls in a
9 category where to call it political is highly questionable
10 even on the -- all the U.N. standards.

11 MS. WETTSTEIN: Well, Your Honor, the statute
12 does not say, and the Government seems to be trying to
13 read into the statute, the word civilians, or
14 noncivilians. The statute doesn't exempt political
15 actions taken that happen to affect civilians.

16 QUESTION: Do you agree with the statement
17 that's made in that U.N. brief that the political link is
18 strongest when the target of the activity is Government
19 personnel and property, or is that wrong?

20 MS. WETTSTEIN: I would agree with that, Your
21 Honor, but that does not mean that actions that by
22 necessity are diffused, and not as they were in
23 Guatemala -- it wasn't as if you had an armed insurrection
24 against --

25 QUESTION: But we're talking about what the

1 applicant's acts were. And the next thing I read from the
2 U.N. brief is, the link is weakest when the politically
3 motivated act -- nobody disputes that these acts were
4 politically motivated -- when the politically motivated
5 act is principally directed against private interests.

6 MS. WETTSTEIN: Mm-hmm.

7 QUESTION: And the -- whatever -- the bus was
8 privately owned, was it not?

9 MS. WETTSTEIN: Yes, Your Honor, but as in one
10 of the other amicus briefs, the buses were not just simply
11 privately owned. The Government had enormous involvement
12 in the bus --

13 QUESTION: The individuals who were on the bus
14 were just ordinary individuals. They weren't --

15 MS. WETTSTEIN: That's true, Your Honor, but of
16 course --

17 QUESTION: -- Government servants.

18 MS. WETTSTEIN: -- the goal here was to prevent
19 harm to the passengers, not to hurt the passengers. The
20 passengers were not targeted.

21 QUESTION: So that's why they burned them?

22 MS. WETTSTEIN: I'm sorry?

23 QUESTION: That's why they burned them, the
24 buses?

25 MS. WETTSTEIN: Well, no, the buses -- the

1 people were moved off the buses before the buses were
2 moved, Your Honor. That was the goal of moving the
3 passengers, so they would not be harmed. The goal was to
4 prevent greater harm to the passengers.

5 The buses were burned as a protest of the 100-
6 percent bus fare increases, which the Government approved.
7 The Government in Guatemala approves the bus fare
8 increases. It regulates the bus routes, it regulates
9 the --

10 QUESTION: What about the shopkeepers whose
11 merchandise was just trashed? Did the Government -- has
12 no -- you describe the bus transportation that's in close
13 with the Government, but these private shopkeepers who had
14 their merchandise trashed, for what reason?

15 MS. WETTSTEIN: Well, Your Honor, obviously in
16 this country in this day and age we don't like these acts.
17 These acts are offensive to us, but that's not really the
18 test. The test is, under the conditions that Mr. Aguirre
19 found himself in Guatemala, was this out of proportion to
20 his political goals?

21 QUESTION: Suppose I agreed with you, purely for
22 the sake of argument, on three points -- two anyway.
23 Suppose I disagree -- suppose I thought the law prior to
24 this case in the board is really murky. There isn't a
25 clear rule. Assume that with me. I'm not saying whether

1 that's so, so assuming.

2 Assume, second, that this administrative law
3 judge really went into this in the greatest depth. And
4 after really going into it he says, you know, on balance
5 this is a political crime. There are some things for,
6 some against, but I think it is basically.

7 Then he gets reversed by the appellate, the BIA,
8 and they do it with one sentence, just saying, well, we
9 think it outweighs, nobody focusing on the right test,
10 nobody doing anything.

11 That's disturbing to me, if those assumptions
12 are true. What principle of law would justify my sending
13 the case back for further work by the board?

14 MS. WETTSTEIN: Your Honor, the principle that
15 you mentioned earlier, which is --

16 QUESTION: No. I've assumed that out of it,
17 because I've said that the previous -- I'm assuming -- I'm
18 going to read all that stuff, but I'm now assuming against
19 you that the previous state of the art in the board is all
20 murky. They don't have a clear rule, and there's nothing
21 that says you have to follow a rule that isn't there, so
22 if it's murky, you see -- let's assume that's all murky.

23 And now let's also assume, which I think is
24 true, that the ALJ here really went into this factually,
25 and then what I think is also true is, he gets reversed by

1 the board with a simple sentence which doesn't analyze
2 anything, which doesn't purport to say what's the right
3 test, it's nothing. It's just somebody saying, oh, you're
4 wrong.

5 MS. WETTSTEIN: Uh-huh.

6 QUESTION: Okay. Now, if all that's true, what
7 principle of law will justify your victory, which is
8 victory in the sense of getting it sent back?

9 MS. WETTSTEIN: Right. Well, Your Honor, the
10 board itself has said on numerous occasions that the
11 immigration judge's decision is itself entitled to
12 deference, because the immigration judge is the one who
13 observes the witness, and that's certainly what happened
14 here, and heard the testimony, including the mistakes in
15 the testimony.

16 QUESTION: I didn't understand that this was
17 your appeal, that what you were complaining about here is
18 the procedural failure of the board to have an adequate
19 opinion explaining its overruling of the administrative
20 law judge. Is that in your -- I don't recall reading that
21 portion of your brief.

22 MS. WETTSTEIN: Yes, it is, Your Honor, because
23 after all the court of appeals gave three reasons for
24 reversing the board. And two of those reasons, the first
25 two of those reasons were the failure to apply its

1 previous precedent and the Ninth Circuit precedent.

2 The third reason was the persecution balancing,
3 and that's what's the balance of the Government's brief
4 and, of course, the balance --

5 QUESTION: Was any -- please, let me -- was any
6 of the reasons the failure of the board to explain itself
7 in adequate detail?

8 MS. WETTSTEIN: Yes, Your Honor, it certainly
9 was. If you'd like me to point to that section of the
10 brief --

11 QUESTION: Yes, I'd -- I'd --

12 MS. WETTSTEIN: Okay.

13 QUESTION: I mean, I know they said the board
14 was wrong, but I don't think that they -- I don't recall
15 just a procedural objection. Even if the board was right,
16 they didn't have an adequate opinion, which is --

17 MS. WETTSTEIN: Beginning on page 29 of our
18 brief --

19 QUESTION: Of the --

20 MS. WETTSTEIN: -- Your Honor, there's a correct
21 standard for --

22 QUESTION: 29 of what?

23 MS. WETTSTEIN: Of -- sorry, of our brief.

24 QUESTION: Yes.

25 MS. WETTSTEIN: Of the respondent's brief,

1 and --

2 QUESTION: Was Justice Scalia asking about your
3 brief, or about the Ninth Circuit?

4 MS. WETTSTEIN: Well, I thought he was asking
5 about --

6 QUESTION: Well, both. I --

7 MS. WETTSTEIN: The issue was whether the case
8 concerned -- in other words -- we're arguing that the
9 court of appeals did not -- that the board's failure to
10 apply properly the -- it's own test was --

11 QUESTION: No, no.

12 QUESTION: That is different.

13 QUESTION: That isn't the point. Justice Breyer
14 was making a purely procedural -- and you know, I like
15 procedure. I used to teach administrative procedure.

16 (Laughter.)

17 QUESTION: And he was making a purely procedural
18 point, that even if the board was right, it didn't explain
19 itself. And I don't recall that being in this case,
20 either at the Ninth Circuit level or in your submissions
21 to the Court. Now, if it's there I --

22 MS. WETTSTEIN: I think it certainly was in the
23 court of appeals decision too, Your Honor. If we look
24 at --

25 QUESTION: If you can't find it, maybe you can

1 just file it with --

2 MS. WETTSTEIN: No, I have it here.

3 QUESTION: Do you have it there?

4 MS. WETTSTEIN: Yes. It's -- this is in the
5 petition for certiorari, page 5a, 4a and 5a. The court
6 said --

7 QUESTION: Whereabouts on the page are you going
8 to reading from?

9 MS. WETTSTEIN: Let's see, 4a on the second full
10 paragraph. First, the board looked only at the offenses
11 of Aguirre, et cetera. Under the protocol, the board
12 should have first determined the nature and purpose of
13 Aguirre's acts, that is, whether they were committed out
14 of genuine political motives -- this is in the McMullen --

15 QUESTION: That's saying that they didn't apply
16 the proper tests, which I understand that to be in the
17 case. You're saying they didn't apply the rule that the
18 board had before it.

19 But I'm not talking about whether they didn't
20 apply the proper rule. I'm just talking about the fact
21 that they didn't explain themselves. It was simply
22 unexplained, and I don't recall that being in the case.

23 MS. WETTSTEIN: Well, I think that's putting it
24 generously, Your Honor. If you say that the board did not
25 apply the proper rule, that's actually what the court

1 accused them of having done, and that's what we accuse
2 them of having done, too, but I think the question here
3 is, if they applied the proper rule but didn't explain
4 themselves correctly.

5 QUESTION: Well, but that's in -- you say the
6 question here is if they didn't explain themselves, but I
7 simply don't see that in the part of the Ninth Circuit
8 opinion you just quoted, that they are -- that the Ninth
9 Circuit is saying that, that -- they're saying several
10 reasons why the board was wrong, but as I read it, one of
11 them was not that it didn't fully -- that it didn't
12 explain itself in its opinion reversing the immigration
13 judge.

14 MS. WETTSTEIN: Well, I think, Your Honor,
15 because the Ninth Circuit assumed that there were tests in
16 place. Now, Justice Breyer's question was that, let's
17 assume there are no tests in place, but the court had a
18 test to work with, so it was not dealing with the
19 situation you suggested, which is where there's no test.

20 And then you say, well, you just didn't explain
21 yourself correctly, but in fact this is worse --

22 QUESTION: But they're still reversing the
23 immigration judge, and I understood part of Justice
24 Breyer's question to be, you know, was the board wrong for
25 reversing the immigration judge without giving any

1 explanation for doing it, and I don't see that as being in
2 the case. Do you think it is?

3 MS. WETTSTEIN: Well --

4 QUESTION: You can answer that yes or no.

5 MS. WETTSTEIN: No, Your Honor, because the
6 court had more to work with. The court had the test that
7 the board did not apply, that Justice Breyer wrote out of
8 our hypothetical. So therefore the court didn't have to
9 say, there's no test here but you just didn't explain
10 yourself, because the court had something more concrete to
11 use, which was, here's this test, you have adopted the
12 test, you didn't apply the test, go back and do it.
13 That's really what the court said.

14 QUESTION: There's one issue of at least, it
15 seems to me clear, and I think we have to decide it one
16 way or another, whatever else we decide. The Ninth
17 Circuit said, the board erred as a matter of law in
18 failing to consider the persecution that the applicant
19 might suffer if he returned to Guatemala.

20 We have, as was noted, a square conflict. The
21 House of Lords goes one way on that, a lower court in
22 Canada goes the other way on that. We are being asked to
23 decide that question of law. The House of Lords decided
24 as crisply as it could the crime either is or is not
25 political when committed. Its character cannot depend on

1 consequences the offender may -- actually would suffer if
2 he returned.

3 Mustn't we decide at least that question, either
4 the Canada court is right, or the House of Lords is right?
5 You said we don't have to --

6 MS. WETTSTEIN: No, Your Honor. In fact, the
7 Attorney General has not determined that question, so it
8 may be appropriate to remand to the Attorney General to
9 determine that question in the first instance, whether, in
10 fact, the risk of persecution needs to be considered when
11 you're applying this exclusion ground, so this Court
12 certainly does not have to reach that question.

13 QUESTION: Well, I'll ask for clarification
14 whether indeed it's true that the Attorney General has not
15 resolved that issue.

16 MS. WETTSTEIN: Right. The only precedential
17 decision that the Government cites for that position is
18 Matter of Rodriguez-Coto, Your Honor, which is a 1985
19 decision, has never been cited again for that principle,
20 and in fact --

21 QUESTION: It's never been rejected, and it's a
22 flat-out statement, right in the thing, we reject the
23 balancing test.

24 MS. WETTSTEIN: Well, Your Honor, the case did
25 not -- rejected the balancing test for two different

1 exclusion grounds, and it did not -- the case itself did
2 not deal with this exclusion ground, and it has never come
3 up subsequently. And the Attorney -- so there has never
4 been an opportunity, in fact, the board here in this case
5 didn't decide it, either, so there's never been an
6 opportunity for the Attorney General to make a decision.

7 Now, the Attorney General could have drafted
8 regulations adopting one position or another, but that has
9 not happened, so there actually is no precedent.

10 QUESTION: Well, you point to the ambiguity in a
11 statement that we reject any interpretation of the phrase,
12 particularly serious crime, serious nonpolitical crime,
13 which would vary with the nature of the -- of evidence of
14 persecution.

15 MS. WETTSTEIN: Right. No, Your Honor, I'm not
16 saying the language itself they use there is ambiguous.
17 I'm simply saying that the board -- that was -- this was
18 not the issue in that case, and so it's dictum for that
19 reason. It's also dictum for the other reason that the
20 board had three other reasons for its decision in that
21 case before it got to this. That case dealt with --

22 QUESTION: Well, am I wrong in getting the
23 picture that the board has twice said, it's an open
24 question with us? One said, in dicta, it's closed, we're
25 rejecting it.

1 MS. WETTSTEIN: That's correct, Your Honor, and
2 I think the board would say it was not bound by Rodriguez-
3 Coto if it wanted to reach the opposite decision.

4 Thank you.

5 QUESTION: Thank you, Ms. Wettstein.

6 Ms. Millett, you have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF PATRICIA A. MILLETT

8 ON BEHALF OF THE PETITIONER

9 QUESTION: Is it true that the Government has no
10 position on the balancing test, the third ground of the
11 Ninth Circuit's decision?

12 MS. MILLETT: Absolutely not. The position was
13 taken in Rodriguez-Coto, it needed to be taken there
14 because he had committed crimes in Cuba and in the United
15 States; those had to be addressed and, if nothing else,
16 the Attorney General's position is clearly reflected in
17 our brief in this case.

18 Now, the reason it was not mentioned
19 specifically in the board's decision is -- I would like
20 this Court to keep in mind that the respondent didn't file
21 a brief before the Board of Immigration Appeals, so before
22 this Court sends it back for the board to do it again,
23 please keep that in mind.

24 Secondly, on the question of the test, and was
25 it correctly applied, and consistently, I'd like to refer

1 the Court to petition appendix 17a, 18a, where the test is
2 quoted. The carry-over paragraph at the top of 17a, right
3 near the end, in evaluating the political nature of a
4 crime, we consider it important that the --

5 QUESTION: 17a of the petition?

6 MS. MILLETT: Petition appendix. We consider it
7 important that the political aspect of the offense
8 outweigh its common law character.

9 Where the phrase grossly out of proportion comes
10 in is simply in the next sentence as an example of
11 something that would be outweighed. Grossly out of
12 proportion is not the test. It is proportionality or
13 atrociousness. The Ninth Circuit made it, and, and we
14 believe that they should not have done that.

15 Second, the discussion in the following
16 paragraph, right under analysis and conclusions, and then
17 on the next page, 18a, there's an entire paragraph saying
18 why that balancing was struck against the respondent in
19 this case.

20 Now, not only did they not file a brief, but --
21 it is our position that some crimes don't require a lot of
22 explanation, and that masked men wielding sticks, lobbing
23 stones, forcing people out of stores, destroying stores,
24 and splashing gasoline on buses and setting them on fire
25 doesn't require a lot more than what the board said here.

1 QUESTION: With all that, suppose it were
2 established crystal clear that if this person is sent back
3 to Guatemala he will be horribly tortured, the answer
4 would still be the same?

5 MS. MILLETT: The answer under the withholding
6 of deportation provision would be the same. However, as
7 we reference in our reply brief, there is now a torture on
8 convention that the United States is a party to, and that
9 the Immigration and Naturalization Service has recently
10 issued regulations on, and that sets up a procedure --

11 QUESTION: Convention on Torture, you mean.

12 MS. MILLETT: Convention on Torture.

13 QUESTION: There are those of us who think that
14 there should be torture for a convention, maybe --

15 (Laughter.)

16 MS. MILLETT: I apologize, Convention on
17 Torture. And that sets up the regulations, which I would
18 be happy to lodge with the Court if it's interested, set
19 up a procedure called deferral of removal for someone who
20 is disqualified from withholding of deportation, but
21 meet -- can show and meet the convention's definition of
22 torture.

23 QUESTION: What's bothering me, and I can't
24 quite get my hands on it, is this -- is purports to be, as
25 it's presented, an argument about what standard to apply.

1 But looking at the paragraph that you just read,
2 and the Ninth Circuit, it may be that everybody agreed on
3 what the standard was, and it's that McMullen standard,
4 and this is really a case about whether or not that BIA
5 board applied the standard that they purported to apply.

6 MS. MILLETT: The problem is that --

7 QUESTION: And if I read through this record and
8 come to that conclusion, I'm not sure what to do. That's
9 why I ask the question.

10 If this isn't really a case where people are
11 disagreeing about standards, at least in the political --
12 they may be on the serious word, the word serious, but
13 they may not be on the word political. It may be grossly
14 disproportional is what they mean.

15 MS. MILLETT: The problem is that in addition to
16 balancing the risk of persecution the Ninth Circuit added
17 two new factors, and it is not at all clear to us that
18 those are not intended to weigh upon this political
19 analysis. Two new factors to add on top of this
20 disproportionate analysis.

21 QUESTION: Which are?

22 MS. MILLETT: One is changing the or atrocious
23 to and atrocious, or and approaching atrociousness.

24 Secondly is necessity and success. Now, maybe
25 they would come under both factors, but it's -- I think

1 it's critically important that this Court hold that the
2 Attorney General is not compelled to adopt those
3 standards.

4 Thank you.

5 CHIEF JUSTICE REHNQUIST: Thank you,
6 Ms. Millett.

7 The case is submitted.

8 (Whereupon, at 11:14 a.m., the case in the
9 above-entitled matter was submitted.)

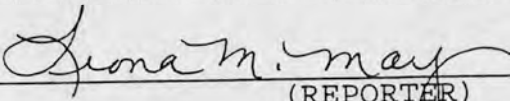
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IMMIGRATION & NATURALIZATION SERVICE, Petitioner v. JUAN ANIBAL AGUIRRE-AGUIRRE

CASE NO: 97-1754

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