The Conscientious Objector Applying for Political Asylum: Forced to Bear Arms and the Brunt of M.A. A26851062 v. INS

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I. Introduction

Few questions challenge the fundamental principles of the United States more than whether an alien may base a claim for political asylum on conscientious objection. The United States has long recognized the right to conscientious objection. Yet, when conscientious objection arises in the context of a foreign national seeking political asylum, United States policymakers and legislators must consider the maintenance of its relations with other governments. Indeed, the

1. The United States may consider an alien for asylum if the alien has a well-founded fear of persecution in his or her home country. To be eligible for asylum, the applicant must qualify as a refugee, as defined by 8 U.S.C. § 1101(a)(42) (1988). See infra part III.A.

2. Exemption of conscientious objectors from military service is a privilege granted by act of Congress. Selective Service Act, 50 U.S.C. app. § 456(j) (1988). Under the Selective Service Act, conscientious objection must extend to participation in all wars, based on “religious training and belief.” Id. In this Note, the definition of “conscientious objection” is broader, and is based on the UNITED NATIONS HIGH COMMISSIONER ON REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) [hereinafter HANDBOOK]. According to the Handbook, an objection may be based on political convictions, as well as “religious training and belief.” An objection need not extend to all wars; it may be based upon particular wars or military actions. In the context of this Note, the term “conscientious objectors” shall specifically refer to those who would rather flee their home country than face compulsory service in a military unit that participates in activities that violate the objector’s religious, moral, or political convictions.

3. Conscientious objection hearkens from the early colonial period in the United States and was well established by the time of the Revolutionary War. For an historical discussion of conscientious objection in the United States from 1757 to 1967, see CONSCIENCE IN AMERICA (Lillian Schlissel ed., 1968). The earliest conscription law of the 1900s limited the exemption to members of “peace churches,” whose religions required abstention from all military service. See Act of May 18, 1917, ch. 154, 40 Stat. 78 (repealed 1919). The current statute, as interpreted by the United States Supreme Court, is much broader than earlier conscription laws. It provides exemption for those individuals who object to participation in all wars, based on “religious training and belief.” See 50 U.S.C. app. § 456(j); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163, 176 (1965) (“religion” encompasses moral and ethical beliefs in pacifism that are held with the strength of traditional religious convictions).

implications of conscientious objection cannot fully be discernable until they are considered in the context of an alien's assertion of personal convictions as the basis for a political asylum application. Denials of asylum applications may ultimately mean the difference between life and death.

The manner in which the United States decides the question of asylum for an alien conscientious objector is critical to the international resolution of the issue since many foreign nations consider the United States a leader in asylum issues. Accordingly, United States decisions command broad influence on the refugee policies of other nations.

It may be argued, however, that other nations should not look to the United States as the policy-making power with respect to political asylum issues. It may further be contended that the United States has failed to faithfully demonstrate its commitment to the fundamental right of individual conscience when it reviews applications for asylum.

In March 1990, the Fourth Circuit decided *M.A. v. INS* ("M.A. II"), a case that presented two primary issues: (1) the proper legal standard to apply to draft resisters who seek refugee status; and (2) the degree of deference that the federal courts owe to the Board of Immigration Appeals ("Board") when deciding motions to reopen deportation proceedings. The first issue raises the additional questions of when a nation's enforcement of its conscription laws becomes unjustified, and when a draft evader may lawfully refuse to serve because the military commits acts condemned by the interna-

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5. The United States Committee for Refugees recognized the critical role the United States plays in the refugee arena:

In a 1982 draft internal report on asylum adjudications, the [Immigration and Naturalization Service] recognized the pivotal role of the United States: "As with other issues, the United States is called upon to play a leadership role, for not only will our policies and decisions impact on the people of our own nation but they will serve as the international standard by which many other Western nations will evaluate their own actions." It is not only Western nations who will note the conduct of the United States toward asylum seekers. In Southeast Asia, in Africa, in Pakistan, where millions have found refuge, [United States] standards will not be ignored.


6. *Id.*

7. 899 F.2d 304 (4th Cir. 1990) (en banc) [hereinafter *M.A. II*]. In *M.A. II*, petitioner's attorney, William Van Wyke, filed a formal motion to have petitioner's real name abbreviated to the initials "M.A." This was done so that "terrorists" in El Salvador would not be able to trace the allegations charged by M.A., in the event that he was sent back to El Salvador. Telephone Interview with William Van Wyke, Member of the District of Columbia Bar (Feb. 12, 1991) [hereinafter Telephone Interview].

8. *M.A. II*, 899 F.2d at 305.
tional community. Faced with these issues, the Fourth Circuit was poised to become the first and only federal court to determine the direct applicability of the United Nations’ *Handbook on Procedures and Criteria for Determining Refugee Status*" ("Handbook") to an alien claiming political asylum based on his refusal to perform military service.

Based on its interpretation of the Handbook’s applicable paragraphs, the Fourth Circuit, in an en banc 6-5 decision, concluded that M.A. was not a refugee for asylum purposes. The court held that the Board properly denied M.A.’s motion to reopen his deportation proceedings for the purpose of requesting political asylum, and thus affirmed the Board’s decision ordering M.A.’s deportation.

This Note first discusses the factual background of *M.A. II*. Next, it provides the historical backgrounds of political asylum, in general, and of the Handbook. Additionally, this Note reviews and criticizes the Fourth Circuit’s analysis in *M.A. II*. Specifically, this Note demonstrates how the Fourth Circuit incorrectly decided *M.A. II* and created an improper legal standard to apply to alien draft resisters who seek refugee status. This Note argues that the Fourth Circuit gave undue deference to the Board in cases involving motions to reopen deportation proceedings. Although the Fourth Circuit correctly recognized the Handbook as controlling authority, the Fourth Circuit misinterpreted and incorrectly applied Handbook paragraphs 167 through 174. The Fourth Circuit’s decision is erroneous to the extent that the Handbook paragraphs it examined clearly recommend

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10. Interestingly, the 6-5 en banc opinion was split down political party lines. The American Bench: Judges of the Nation (Marie T. Hough et al. eds., 5th ed. 1989). The six-person majority was exclusively comprised of Republican appointees, while the five-person minority consisted of Democratic appointees. Id. The majority included Judge Chapman, Judge Wilkins, Judge Wilkinson (all three appointed by President Reagan), Judge Russell, Judge Widener (both appointed by President Nixon), and Judge Hall (appointed by President Ford). Id. The minority included Judge Ervin, Judge Murnaghan, Judge Phillips, Judge Sprouse (all four appointed by President Carter), and Judge Winter (appointed by President Johnson). Id.


12. Id. at 312.
refugee status for conscientious objectors similarly situated to M.A. Furthermore, this Note asserts that the Fourth Circuit overemphasized the procedural posture of the case, thereby clouding the pure legal issues before the court. Finally, this Note attacks the manner in which the court hid behind the procedural wall it erected, so that it could deny the effects its decision would have on evidentiary issues in political asylum proceedings.

II. STATEMENT OF THE CASE

Petitioner M.A. fled his native El Salvador in 1982. He entered the United States illegally in February 1982. On February 22, 1984, the Immigration and Naturalization Service ("INS") initiated deportation hearings against M.A. At his deportation hearing, M.A. conceded that he had entered the United States without inspection, admitted deportability, and asked the INS to permit him to voluntarily leave the United States. On the advice of counsel, M.A. did not request political asylum. Rather, he specifically identified El Salvador as his "country of choice" for deportation, and stated that he had no fear of returning there. The immigration judge granted M.A.'s request to leave the United States voluntarily, and set September 16, 1984, as the departure deadline. On January 15, 1985, however, M.A. had still not departed from the United States. He was consequently apprehended by the INS, and detained in the Baltimore, Maryland city jail.

On January 21, 1985, one day before his planned deportation, M.A. claimed for the first time that he feared persecution in El Salvador due to his political and moral views. Through new counsel, M.A. filed a motion with the INS to reopen his case, in order to re-

13. HANDBOOK, supra note 2, paras. 167-74.
15. M.A. II, 899 F.2d at 305-06. M.A. entered the country "without inspection;" that is, he did not enter at a visa checkpoint. In fact, M.A. crossed the Rio Grande River to enter the United States. Telephone Interview, supra note 7.
17. Id.
18. Id.
19. Id.
20. Id.
22. M.A. II, 899 F.2d at 306. M.A. asserted his fear of persecution after obtaining new counsel. Id.
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quest political asylum.\textsuperscript{23} The motion asserted that, due to the ineffective assistance of M.A.'s former counsel, M.A. failed to present the asylum application before the close of deportation proceedings.\textsuperscript{24} An immigration judge denied M.A.'s request,\textsuperscript{25} and the Board affirmed the judge's decision.\textsuperscript{26} On appeal, the Fourth Circuit reversed and remanded on the ground that M.A. had a reasonable explanation for not requesting asylum at the initial hearing.\textsuperscript{27}

On remand, M.A. presented a new petition for reopening, a renewed application for asylum, and additional evidence in support of the renewed application.\textsuperscript{28} The sole issue before the immigration judge was whether M.A. presented a prima facie case for political asylum, such that his deportation proceeding could be reopened to allow proof of his eligibility.\textsuperscript{29} M.A. asserted that he left El Salvador "to avoid serving in its violent military."\textsuperscript{30} He alleged that, as part of the government's deliberate policy, the Salvadoran military committed "'systematic and widespread' human rights violations against the citizens of El Salvador."\textsuperscript{31} To corroborate these general charges, M.A. presented evidence from Amnesty International and Americas Watch.\textsuperscript{32} To prove that his fears were personal, M.A. claimed to have witnessed the results of this violence.\textsuperscript{33} Specifically, he claimed that

\begin{itemize}
\item\textsuperscript{23} \textit{Id.}
\item\textsuperscript{24} \textit{Id.} M.A.'s new counsel also sought a ten-day continuance to prepare a prima facie claim of eligibility for asylum consideration. \textit{Id.}
\item\textsuperscript{25} \textit{Id.}
\item\textsuperscript{26} \textit{Id.}
\item\textsuperscript{27} \textit{M.A. I}, 858 F.2d at 212. The court further found that the immigration judge abused his discretion in denying M.A. ten days to augment his asylum claim. \textit{Id.} Judicial review of a final deportation hearing order normally obtains by petition for review in a United States court of appeals. 8 U.S.C. § 1105a(a) (1988).
\item\textsuperscript{28} \textit{M.A. II}, 899 F.2d at 306.
\item\textsuperscript{29} \textit{M.A. I}, 858 F.2d at 212-13.
\item\textsuperscript{30} \textit{M.A. II}, 899 F.2d at 306.
\item\textsuperscript{31} \textit{Id.}
\item\textsuperscript{32} \textit{Id.} at 312. Amnesty International was founded in 1961 in response to a growing number of people who were imprisoned for political reasons. Ann Durrell, \textit{The Conscience of Amnesty}, CAN. LAW., 21-22 (Oct. 1980). The mandate of Amnesty International is to non-violently oppose torture, capital punishment, and the detention of individuals for their political or religious beliefs, or ethnic or racial origins. Amnesty International calls these individuals "prisoners of conscience." \textit{Id.} at 22. Both Amnesty International and Americas Watch have condemned the Salvadoran military and security forces for committing violent acts against all sectors of Salvadoran society. \textit{M.A. II}, 899 F.2d at 312. They report that the Salvadoran military engages in "extrajudicial execution on noncombatant civilians, individual death squad-style killings, 'disappearances,' arbitrary detention and torture." \textit{Id.} Moreover, they contend that the military violence is carried out pursuant to a deliberate policy of the Salvadoran government, designed to further that government's political interests. \textit{Id.}
\item\textsuperscript{33} \textit{M.A. II}, 899 F.2d at 306.
\end{itemize}
he had passed through a morgue and had seen "mutilated, decapitated, bruised, and gunned bodies." M.A. further stated that the military had killed three of his relatives, that a member of the civilian patrol had once threatened him, and that soldiers had twice beaten him. Collectively, these general and personal claims evidenced his fear that if he returned to El Salvador and failed to serve in the military, he would be tortured and possibly killed as an opposition sympathizer.

Despite the introduction of this evidence, the immigration judge denied the new motion to reopen, and held that M.A. failed to meet his evidentiary burden of making out a prima facie case for asylum eligibility. The Board affirmed, supporting its conclusion with the internationally recognized principle that it is not persecution for a country to require military service of its citizens. The Board further reasoned that M.A. did not come within one of the narrow exceptions to this well-settled policy. The Board based its conclusion on its determination that M.A. did not show that the violence represented the policy of the Salvadoran government, or that the violence was condemned by recognized governmental bodies. The Board also held that M.A. failed to show that military service would force him to be associated with the alleged atrocities, or that his refusal to serve would result in disproportionately severe punishment. Finally, the Board found that M.A.'s claims lacked factual support and were "simply too speculative."

34. Id.
35. Id. M.A. claimed that one cousin was killed by the army for participation in an antigovernment demonstration; another cousin was killed by the guerilla army; and his brother-in-law's brother was killed by a "death squad" for providing food to guerillas. Id.
36. Id. M.A. alleged that National Guardsmen beat him twice at roadblocks, once for being suspected of covert political activity, and once for no apparent reason. Id. at 325 (Winter, J., dissenting). M.A. further alleged that a friend once recruited him to serve as a spy for the army but, after attending several meetings with military representatives, he refused to participate, despite his knowledge that others who were uncooperative had been killed by the government. Id.
37. Id. at 306. This prima facie evidentiary burden is a prerequisite to reopening, pursuant to 8 U.S.C. § 1158 (1988). Id.
38. M.A. II, 899 F.2d at 306; see also Selective Draft Law Cases, 245 U.S. 366, 378 (1918).
39. M.A. II, 899 F.2d at 306. For a discussion of the narrow exceptions to the rule that a sovereign has the absolute right to raise and maintain armies, see infra text accompanying notes 71-79.
40. M.A. II, 899 F.2d at 306.
41. Id.
42. Id. at 306-07.
A panel of the Fourth Circuit again reversed the Board’s order. The panel determined that M.A. had, in fact, made out the prima facie case of refugee eligibility to justify reopening. Thus, the panel held that M.A. was entitled to consideration for political asylum, based on his sincere objections to participating in the Salvadoran armed forces. On January 5, 1989, the Fourth Circuit granted the Justice Department’s request for a rehearing en banc, based on the Department’s position that M.A.’s case presented an issue of “exceptional importance” that could have “an enormous potential impact” on United States asylum law. The Fourth Circuit reversed the court’s panel decision by a 6-5 vote, thereby affirming the judgment of the Board. Accordingly, M.A. was ordered deported to El Salvador. This Note addresses the Fourth Circuit’s en banc decision.

III. THE HISTORICAL BACKGROUND OF POLITICAL ASYLUM

This section of the Note provides an historical background of political asylum. It first addresses how the asylum process operates pursuant to federal statutes and regulations, and further discusses how different legal authorities define the term “refugee.” Additionally, this section compares how the Handbook, federal statutes, and federal regulations address political asylum in the refugee context.

A. The Refugee Concept and Political Asylum Under the 1980 Refugee Act

Although a detailed description of how an alien applies for political asylum is beyond the scope of this Note, a brief analysis of the process is helpful to the discussion of M.A. II. The Refugee Act of 1980 ("Refugee Act"), as amended by the Immigration Act of

In pertinent part, the Refugee Act provides:

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

Thus, whether or not an applicant is eligible for political asylum under the Refugee Act turns on whether the alien is a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42)(A). The Refugee Act adopted the Protocol's definition of "refugee" to include any person who is outside any country of such person's nationality.
or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.\(^5\)

In sum, the Refugee Act confers on the Attorney General and his delegates\(^5\) discretionary powers to grant asylum to an alien present in the United States, if that alien satisfies the statutory definition of refugee. Hence, political asylum involves a two-step process. Initially, the immigration authorities must decide whether the applicant meets the statutory requirements of asylum eligibility. Then, the Attorney General and his delegates may exercise their discretion to either withhold or deport the alien.

Since Congress enacted the Refugee Act, courts have struggled to define the scope of the term "refugee." As would be expected, the INS has emphatically argued for a narrow scope that limits the categories of individuals entitled to Refugee Act protection, or for an interpretation that increases the asylum applicant’s burden of proof.\(^5\) Also as expected, the Board generally affirms the immigration judges’ decisions. However, federal courts frequently reverse the Board.\(^6\) Thus, the scope of the Refugee Act is unsettled.

The Fourth Circuit encountered a special problem in analyzing M.A.’s claim of political asylum, based on the Refugee Act’s defini-

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58. The Attorney General has delegated his authority and discretion to reopen deportation proceedings to the INS Commissioner and to immigration judges, whose decisions are then reviewable by the Board. 8 U.S.C. § 1103 (1988); 8 C.F.R. §§ 2.1, 242.8(a), 242.21 (1991).
60. One need only look at the procedural posture of the case at issue to see disparate opinions between the Board and the courts. For other examples of inconsistent opinions, see Blanco-Lopez v. INS, 858 F.2d 531 (9th Cir. 1988) (reversing the Board’s holding that beatings and death threats against a Salvadoran accused of gun-running did not constitute persecution); Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984) (reversing the Board’s holding that an alien who suffered a direct and credible threat against his life on account of his desire to remain neutral was not eligible for relief); Barraza-Rivera v. INS, 913 F.2d 1443 (9th Cir. 1990) (reversing the Board’s decision that an alien, who based his persecution claim on his objection to participation in unconscionable acts, was not eligible for asylum).
tion of "refugee." This problem stemmed from the fact that M.A.'s fear of persecution claim was based largely upon his status as a draft evader. The definition of "refugee" adopted by the Refugee Act does not explicitly include aliens who base their applications for political asylum on a refusal to serve in a home country's military. Thus, if a court is to conclude that the definition of "refugee" includes a conscientious objector, the conclusion must be based on authority outside of the Refugee Act's text.

B. The Refugee Concept Under the Handbook

The idea that an individual who evades compulsory military service for reasons of conscience may be a "refugee," and thereby eligible for political asylum, has its genesis in the Handbook. The Handbook identifies deserters and individuals avoiding military service as a special category of refugees. Specifically, the Handbook recommends refugee status for individuals who flee their home countries to avoid serving in the military against their "genuine political, religious or moral convictions, or . . . valid reasons of conscience."

The United Nations General Assembly established the Office of the United Nations High Commissioner for Refugees ("UNHCR") and charged it with the "duty of supervising the application of the provisions" of the Protocol. The UNHCR prepared the Handbook to help guide member states in applying the Protocol. Since its preparation, the Handbook has been widely circulated and approved by governments, including the United States.

62. HANDBOOK, supra note 2, para. 170.
63. Id. paras. 167-74.
64. Id. para. 170.
66. Id.; see also Protocol, supra note 54, art. II, ¶ 1.
While United States courts and administrative agencies are not bound by the Handbook, they regard it as an internationally respected instrument for resolving refugee issues. In fact, the Fourth Circuit, in M.A. II, noted that the Handbook provided "significant guidance" in the court's review of the issues before it.

The Handbook's recommendation of refugee status for conscientious objectors is an exception to the well-settled rule that a sovereign nation enjoys the right to enforce its draft laws, and that penalties for evasion are not considered persecution. Despite this tradition, the Handbook provides, in paragraphs 167 through 174, that refugee status should be granted where (1) refusal to serve in the military results not in normal draft evasion penalties, but in disproportionately severe punishment based on race, religion, nationality, membership in a particular social group, or political opinion; or (2) the alien's desertion or failure to serve is based on "genuine political, religious or moral convictions, or... valid reasons of conscience."

With regard to the first exception, the Handbook states that, although governments may punish an individual for the criminal offense of draft evasion or desertion, the government may not discrimi-
natorily apply the punishment.\textsuperscript{74} The \textit{Handbook} recognizes the possibility that a government might severely punish an individual because of race, religion, nationality, social group membership, or political opinion. Such action, according to the \textit{Handbook}, transforms the punishment into persecution.\textsuperscript{75}

The second exception addresses conscientious objectors and was at issue in \textit{M.A. II}.\textsuperscript{75} It acknowledges the fundamental democratic principle that a state should respect the divergent beliefs and opinions of its citizenry, and that punishing individuals for obeying the dictates of their consciences constitutes persecution.\textsuperscript{76} Specifically, the \textit{Handbook} provides:

\begin{quote}
[T]he necessity to perform military service may be the \textit{sole ground} for a claim to refugee status, i.e., when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to \textit{valid reasons of conscience}.\textsuperscript{77}
\end{quote}

The \textit{Handbook} further states:

Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft evasion . . . . Where, however, the type of military action, with which an individual does not wish to be associated, is \textit{condemned by the international community as contrary to basic rules of human conduct}, punishment for desertion or draft evasion could, in light of all other requirements of the definition, in itself be regarded as persecution.\textsuperscript{78}

The plain language of the \textit{Handbook}’s recommendation makes a distinction between the individual who refuses military service for legitimate reasons of conscience and the individual who simply refuses military service due to “dislike of military service or fear of combat.”\textsuperscript{79} Thus, a court considering the issue of conscientious objection as a basis for political asylum must balance the state’s right to raise and maintain armies against the rights of the individual. When the individual’s refusal is not based on reasons of conscience, the state’s

\textsuperscript{74} Id. para. 169; see also Musalo, supra note 9, at 856.

\textsuperscript{75} The \textit{Handbook} and federal precedent recognize that the line between prosecution and persecution is not clear. \textit{Handbook}, supra note 2, para. 57 (“The distinction [between prosecution and persecution] may, however, occasionally be obscured . . . .”); see Musalo, supra note 9, at 856.

\textsuperscript{76} \textit{Handbook}, supra note 2, paras. 170-73; see also Musalo, supra note 9, at 856.

\textsuperscript{77} \textit{Handbook}, supra note 2, para. 170 (emphasis added).

\textsuperscript{78} Id. para. 171 (emphasis added).

\textsuperscript{79} Id. para. 168; see also Musalo, supra note 9, at 856.
interest in maintaining its military should generally prevail. However, the Handbook suggests that the balance shifts when the state’s right is weighed against society’s interest in nurturing and encouraging the moral conscience of the individual. In these cases, the Handbook suggests that democratic values dictate that the state should refrain from requiring individuals to act in a manner that is contradictory to their consciences, whenever possible.

Broad democratic policy notwithstanding, the Handbook does require that aliens who apply for asylum eligibility based upon refusal to perform military service meet specific criteria. First, applicants must demonstrate that their convictions are genuine and that their home country does not recognize these convictions. Second, alien conscientious objectors must establish that the military action with which they do not wish to be associated is “condemned by the international community as contrary to basic rules of human conduct.”

IV. REASONING OF THE COURT

This section of the Note discusses the manner in which the Fourth Circuit analyzed M.A.’s case, eventually deciding to affirm the Board’s decision ordering M.A.’s deportation. This section first describes the court’s decision to review M.A.’s asylum claim, using an abuse of discretion standard. It then discusses the court’s conclusion that M.A. failed to present a prima facie case against deportation, based on this abuse of discretion standard.

A. Standard of Review for Reopening Hearings

The Fourth Circuit, sitting en banc, began its analysis of M.A.’s case by emphasizing the significance of the case’s procedural posture—that M.A. requested asylum in the context of a motion to reopen finalized deportation proceedings. This posture was important because the immigration statutes do not require or even explicitly contemplate reopening procedures. Instead, the Attorney General

80. HANDBOOK, supra note 2, para. 171. The constitution of El Salvador states that military service is compulsory for all Salvadoran males between the ages of 18 and 30. M.A. I, 858 F.2d at 216 n.5. Although M.A. was over 30 when he was eventually deported, the Salvadoran constitution further provides that, “in case of need,” all Salvadorans suitable for performing military tasks shall be soldiers. Another Salvadoran law requires all Salvadoran men between the ages of 18 and 50 to serve in times of war. Id.

81. HANDBOOK, supra note 2, para. 171.


83. Id.
promulgated motions to reopen finalized deportation proceedings through regulations enacted in his discretion under the immigration statutes.\textsuperscript{84}

Relying on the Supreme Court's decision in \textit{INS v. Abudu},\textsuperscript{85} the majority articulated three independent grounds upon which the Board can deny a motion to reopen.\textsuperscript{86} First, the Board may deny a motion because the movant failed to establish a prima facie case of asylum eligibility.\textsuperscript{87} Second, the Board may deny a motion because the movant failed to comply with the regulatory requirements of 8 C.F.R. § 3.2\textsuperscript{88} or § 208.11.\textsuperscript{89} Finally, the Board may deny a motion to reopen solely on discretionary grounds, even if the movant satisfies the first two grounds.\textsuperscript{90}

At issue in \textit{M.A. II} was whether M.A. established a prima facie case of eligibility for asylum.\textsuperscript{91} The majority noted that, although the Supreme Court in \textit{Abudu}\textsuperscript{92} explicitly declined to address the standard of review for a denial of reopening based on this ground, it concluded that an abuse of discretion standard was appropriate for the other two grounds upon which the Board could have based its denial.\textsuperscript{93}

In the absence of Supreme Court guidance, the majority concluded that it would review M.A.'s asylum claim using an abuse of discretion standard.\textsuperscript{94} The Fourth Circuit relied on the same reason-
ing the Supreme Court used in *Abudu* to justify an abuse of discretion standard for the other two grounds. First, the language of the regulations treats reopening as an "extraordinary remedy." The Board may suspend final judgment and address the merits of an immigration claim only in the "most clearly meritorious cases," leaving factual determinations to the Board. Further, the extraordinary nature of the remedy was implicit in the regulation's negative language that "motions to reopen 'shall not be granted' unless certain showings are made."

Based upon its findings that the immigration statutes do not contemplate reopening, and that the Attorney General's regulations generally disfavor reopening, the court concluded that it must review denials under the reopening regulations with "extreme deference." The regulations did not explicitly provide as a basis for denial the failure to establish prima facie eligibility for political asylum. Rather, the Board interpreted its own regulations to create this "prima facie" basis for denial. Because the Board created this ground for denial, its decision to deny a motion on this ground "is entitled to extraordinary respect." Moreover, since M.A.'s case involved completed administrative proceedings, the concern of threatening finality made an abuse of discretion standard even more appropriate.

The term "prima facie case" is not a buzzword that requires us to ignore the procedural posture of the case . . . and go back to square one. . . . The Board has made clear that the "prima facie" test in the reopening context is different from the prima facie test in an original proceeding, is limited to the regulations themselves, and is more difficult to satisfy than statutory eligibility.

Id. at 309-10.

95. *Id.* at 308. Using an abuse of discretion standard, the court stated that it must affirm the Board's denial of the motion to reopen, unless it "(1) was made without a rational explanation, (2) inexplicably departed from established policies, or (3) rested on an impermissible basis such as invidious discrimination against a particular race or group." *Id.* at 310 (quoting Oviawe v. INS, 853 F.2d 1428, 1431 (7th Cir. 1988) (citing Achacoso-Sanchez v. INS, 779 F.2d 1260, 1265 (7th Cir. 1985))).

96. *Id.* at 308.

97. *Id.* (citing INS v. Jong Ha Wang, 450 U.S. 139, 145 (1981)).

98. 8 C.F.R. § 3.2.

99. *M.A. II*, 899 F.2d at 308 (quoting 8 C.F.R. § 3.2).

100. *Id.* at 308-09 (citing Sang Seup Shin v. INS, 750 F.2d 122, 131 (D.C. Cir. 1984) (Starr, J., dissenting) ("The Board's discretion . . . is at its zenith in making a discretionary procedural determination [under the reopening regulations] which Congress did not see fit to enact").

101. *Id.* at 309.

102. *Id.*

103. *Id.* (citing Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980)).

104. *M.A. II*, 899 F.2d at 309.
Finally, the court explained that it had to be sensitive to the "inherently political nature" of the deportation decision. Since Congress charged the INS with implementing deportation policies, such policies were best left to that agency.

B. M.A's Failure to Present a Prima Facie Case of Well-Founded Fear

The Fourth Circuit next found that the Board did not abuse its discretion in denying M.A.'s motion to reopen his deportation proceedings, as M.A. had failed to establish a prima facie case of a "well-founded fear of persecution." The court referred to the settled rule that courts must review aliens' claims of persecution in asylum proceedings with the "well-founded fear" standard of proof. In applying the "well-founded fear" standard, courts must examine not only the subjective feelings of asylum applicants, but also the objective reasons for the fears. The Fourth Circuit held that the Board applied this standard faithfully to the language of the Refugee Act, and consistently with the pronouncements of the Supreme Court.

Specifically, the Board used a "reasonable person" approach to define the nature of objective evidence that must be adduced for a trier-of-fact to find, as well-founded, an alien's subjective fear of persecution. According to the court, the Board properly acknowledged that "international law and Board precedent clearly establish that a sovereign nation enjoys the right to enforce its laws of conscription,"

105. Id.
106. Id.
107. Id. at 311-12.
108. Id. (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 430-31 (1978)). In Cardoza-Fonseca, the Supreme Court rejected the Board's contention that applicants for political asylum must show a clear probability of persecution, which is the standard for withholding of deportation, rather than the more generous well-founded fear standard. In his concurrence to this decision, Justice Blackmun admonished the INS for its "seemingly purposeful blindness" in developing the standards for relief under the Refugee Act. Cardoza-Fonseca, 480 U.S. at 452.
110. M.A. II, 899 F.2d at 311. In fact, the Fourth Circuit had already adopted an approach very similar to Cardoza-Fonseca, in Cruz-Lopez v. INS, 802 F.2d 1518 (4th Cir. 1986), where the court held:

[The "well-founded fear" test requires the alien to establish that he has a subjective fear of returning and that this fear has enough of a basis in specific facts to be considered "well-founded" upon objective evaluation. The alien must offer "specific facts" detailing a "good reason" to fear persecution, or establishing an objectively reasonable "expectation of persecution."]

Cruz-Lopez, 802 F.2d at 1522 (citations omitted).
111. M.A. II, 899 F.2d at 311.
and that penalties for evasion are not considered persecution.”

Thus, M.A. could not claim a well-founded fear of persecution based solely on his desire not to join El Salvador's military.

As a conscientious objector, M.A. would have to come within one of the Handbook's exceptions to be eligible for asylum. In particular, M.A. would have to show that (1) he would be associated with a military whose acts were condemned by the international community as contrary to the basic rules of human conduct; or (2) his refusal to serve in the military would result in disproportionately severe draft evasion penalties, based on one of the five grounds enumerated in the Refugee Act, including race, religion, nationality, membership in a particular social group, or political opinion.

M.A. attempted to establish his entitlement to relief under the first exception, alleging that the Salvadoran military committed acts contrary to the basic rules of human conduct. The court, however, rejected this contention, and held that M.A. failed to present "cognizable evidence that the alleged atrocities he wanted to avoid were perpetrated as a result of the policies of the Salvadoran military or government." Thus, at least initially, the court required M.A. to satisfy a two-prong test to qualify for relief under the first exception: (1) M.A. was required to show cognizable proof of internationally condemned conduct performed by the state's military; and (2) M.A. was required to prove that this violence was "connected with official governmental policy." The court feared that a less stringent test would enable any alien eligible for the draft in a strife-torn country to establish a well-founded fear of persecution.

Significantly, the court rejected the primary evidence that M.A. submitted to satisfy the court's two-prong test—reports from "prominent" private organizations, such as Amnesty International and Americas Watch. These organizations reported, among other things, that military violence in El Salvador was carried out pursuant to a deliberate policy of the Salvadoran government to further its

112. Id. at 312 (citations omitted).

113. Id.


115. M.A. II, 899 F.2d at 312.

116. Id.

117. Id.

118. See id.

119. Id.

120. See supra note 32.
The court held that the Board properly refused to recognize these private reports. This conclusion was based on the court's belief that the *Handbook* required condemnation from "recognized international governmental bodies," rather than from private organizations. In fact, the court feared that any other standard would breed a host of other problems:

A standard of asylum eligibility based solely on pronouncements of private organizations or the news media is problematic almost to the point of being non-justiciable. . . . We do not know how courts are expected to evaluate the proffered explanations for various incidents of military activity or to gauge the extent to which such activity may or may not implicate official policies. We are also uncertain of the criteria by which courts would analyze the reports of private groups.

In effect, the court added a third prong to its prima facie test. It required that the violence not only be internationally condemned and part of the government's deliberate policy, but also that such condemnation come from "international governmental bodies." The majority reasoned that courts cannot declare that another country, which the international community has not condemned, engages in persecution of its citizens. That role would "transform the political asylum process from a method of individual sanctuary left largely to the political branches into a vehicle for foreign policy debates in the courts." The United States Constitution does not authorize such a role.

121. *M.A. II*, 899 F.2d at 312. The counterargument, of course, is that the military must resort to violent means to quell the unlawful actions of groups on the fringe who refuse to participate in nonviolent means of change.

122. *Id.*

123. *Id.* (emphasis added).

124. *Id.* at 313.

125. *Id.* at 312-13 (emphasis added).


127. *Id.*

128. *Id.* at 313-14. A thorough discussion of the political question doctrine is beyond the scope of this Note. In general, a case can involve a political question where a court finds there is: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) "a lack of judicially discoverable and manageable standards for resolving it;" (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" (5) "an unusual need for unquestioning adherence to a political decision already made;" or (6) "the
Moreover, the majority questioned the veracity of the substantive information provided by Amnesty International and Americas Watch, stating that, "[a]lthough we do not wish to disparage the work of private investigative bodies in exposing inhumane practices, these organizations may have their own agendas and concerns, and their condemnations are virtually omnipresent."129

Finally, the Fourth Circuit rejected M.A.’s attempt to fall within the Refugee Act’s second exception for persecution based on race, religion, nationality, social group membership, or political opinion.130 The court reasoned that M.A. failed to show any specific threat to himself based on any one of these factors.131 Rather, the court concluded, M.A.’s claims amounted to nothing more than a fear of the general violence incidental to civil war in El Salvador.132 The court found that this fear was endemic to the entire population.133 Accordingly, M.A. was outside of the scope of the Refugee Act’s exceptions and was ineligible for asylum.134

V. CRITIQUE OF THE FOURTH CIRCUIT’S EN BANC DECISION

This section of the Note addresses three sources of error in the Fourth Circuit’s opinion. First, this section asserts that the majority improperly established an abuse of discretion standard for reviewing prima facie eligibility for political asylum proceedings. Second, it asserts that the Fourth Circuit, using this improper standard of review, failed to properly adhere to the language and mandate of the Handbook. Instead, the court required that M.A. meet additional, unwarranted criteria. Finally, this section contends that, even as M.A. sought to satisfy the court’s overly stringent test, the Fourth Circuit improperly ignored relevant and convincing evidence from Amnesty International and Americas Watch.

potentiality of embarrassment from multifarious pronouncements by various departments on one question.” Baker v. Carr, 369 U.S. 186, 217 (1962). The Fourth Circuit apparently was concerned with the fourth issue—the lack of respect due the executive and legislative branches.

129. M.A. II, 899 F.2d at 313.
131. M.A. II, 899 F.2d at 315.
132. Id. at 314.
133. Id. at 315.
134. Id.
A. A De Novo Review Is the Appropriate Standard of Review Where Denial Is Based on the Failure to Establish Prima Facie Eligibility for Political Asylum

In INS v. Abudu,135 the United States Supreme Court recognized at least three grounds upon which a Board may deny an alien's motion to reopen deportation proceedings.136 The Abudu decision would have required an abuse of discretion standard in M.A. II had the Board denied M.A.'s motion to reopen because (1) M.A. failed to introduce previously unavailable, material evidence, or reasonably explain his failure to apply for asylum initially; or (2) M.A. was not entitled to a discretionary grant of relief.137 These factors comprise the Board's discretionary authority and, if applied, properly trigger the abuse of discretion standard. However, these were not the factors upon which the Board refused to reopen M.A.'s proceedings.138 Rather, the Board considered whether M.A. adduced sufficient evidence to establish a prima facie case of refugee eligibility—that is, whether M.A. had a well-founded fear of persecution.139

In holding that M.A. failed to establish a prima facie case, the Board limited itself to an analysis of the immigration statutes,140 the Handbook,141 and the United States Supreme Court's decision in INS v. Cardoza-Fonseca.142 Based on these authorities, the Board concluded that, in order to qualify for refugee status, M.A. must show (1) a formal government policy calling for the commitment of atrocities by its military; (2) condemnation of the military action in question by international governmental bodies; and (3) that, as a member of the armed forces, M.A. would personally engage in these atrocities.143

In sum, the Board did not deny M.A.'s motion to reopen under its discretionary authority. Instead, as a matter of law, it formulated new legal rules based on its interpretation of a federal statute, a Supreme Court decision, and an authoritative international document. Having done so, as the dissenting opinion in M.A. II as-

136. Id. at 104-05; see supra notes 84-93 and accompanying text.
137. Abudu, 485 U.S. at 104-05.
138. M.A. II, 899 F.2d at 306-07. In fact, M.A. reasonably explained his failure to apply for asylum as due to ineffective assistance of former counsel. Id. at 306.
139. Id.
140. See id. at 307-11.
141. See id. at 312-14.
142. See id. at 311 (discussing INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)).
143. M.A. II, 899 F.2d at 317; see supra text accompanying notes 117-25.
served, the agency should have been accorded considerably less deference than if the agency had made factual or credibility determinations.

1. The Fourth Circuit's Abuse of Discretion Standard Diverges from Federal Precedent

The Fourth Circuit diverged from the developed asylum jurisprudence of the Ninth Circuit, the only circuit that had directly addressed the issue of what standard of review applies to a motion to reopen a deportation hearing in cases where the Board bases its decision on the movant's failure to establish a prima facie case. The Ninth Circuit, in *Maldonado-Cruz v. INS*, decided a case very similar to *M.A. II*. In *Maldonado-Cruz*, the Board dismissed the asylum application of a politically neutral Salvadoran. The Board held that, as a matter of law, the applicant's fear of persecution by either Salvadoran guerillas or the military did not constitute persecution on account of political opinion, within the meaning of the Immigration and Nationality Act ("INA") as amended by the Refugee Act. The Board based this decision solely on a legal interpretation of the INA, and did not question the petitioner's evidence or credibility. On review, the Ninth Circuit concluded that, "[b]ecause resolution of this matter involves a question of law, we review the decision of the [Board] de novo." The court held that the petitioner was entitled to a withholding of deportation.

Moreover, the Ninth Circuit, in *Ghadessi v. INS*, applied a de novo standard of review to the question of prima facie eligibility for

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> [t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

146. 883 F.2d 788 (9th Cir. 1989).

147. *Id.* at 789.

148. *Id.* at 791. *

149. *Id.*

150. *Id.* (emphasis added).

151. *Maldonado-Cruz*, 883 F.2d at 793.

152. 797 F.2d 804 (9th Cir. 1986).
reopening deportation proceedings, the same question that the Fourth Circuit faced in *M.A. II*. In *Ghadessi*, the court admitted that it generally employed an abuse of discretion standard when reviewing the Board's denial of a petition to reopen deportation proceedings to apply for asylum.  

But, the court further stated that, "when the [Board] restricts its decision . . . to whether the alien has established a prima facie case, this is the only basis for the decision that we review." This determination, the court concluded, represented a question of law, and was not a matter for the Board's discretion. Accordingly, the court considered only whether the Board's determination concerning the prima facie case was "correct." Against this standard, the Ninth Circuit held that Ghadessi established a prima facie case of a well-founded fear of persecution and was entitled to a withholding of deportation.

Most significantly, and contrary to the Fourth Circuit's reasoning in *M.A. II*, the Ninth Circuit, in *Shafiei v. INS*, applied the *Ghadessi* standard, and consequently overturned the Board's ruling on prima facie eligibility. Importantly, the *Shafiei* decision occurred after the *Abudu* decision. Therefore, *Abudu* did not change the Ninth Circuit's standard of review relating to the question of prima facie eligibility.

Thus, although the Fourth Circuit could not look to its own rulings for authority as to which standard to apply, it could have looked to, or at least acknowledged, the decisions of other circuit courts, particularly the Ninth Circuit. Instead, the Fourth Circuit ignored these decisions and created its own law, without persuasive explana-

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153. *Id.* at 805 (citing Hernandez-Ortiz v. INS, 777 F.2d 509, 513 (9th Cir. 1985)).
154. *Id.*
155. *Id.*
156. *Id.* at 805 n.2, 806.
157. *Ghadessi*, 797 F.2d at 809.
158. 877 F.2d 64 (9th Cir. 1989) (unpublished).
159. *See id.*
161. The majority's contention that the Supreme Court's decision in *Abudu* constitutes support for its determination regarding prima facie eligibility must fail. The Supreme Court did not really address the issue of what standard of review applies to a denial based on a movant's failure to establish a prima facie case of eligibility. Although the Supreme Court certainly had the opportunity to approve the Ninth Circuit's reasoning as it applied to prima facie liability in *Abudu*, it instead offered no "view of its validity," commenting only that the "untimeliness of an asylum claim may be relevant to the [Board's] decision as to the prima facie case on reopening." *Abudu*, 485 U.S. at 109, n.14. However, the Fourth Circuit mooted any consideration of M.A.'s untimeliness when it ruled that M.A. had reasonably explained his failure to apply for asylum at his original hearing. *M.A. II*, 899 F.2d at 306.
tion or support. The erroneous result notwithstanding, such total disregard for the opinions of other circuits undermines the benefits of conflicts among the circuits—that a multiplicity of judicial views contributes to the thoughtful evolution of the law. By not addressing the conflicting opinions in an honest, forthright manner, the Fourth Circuit failed to allow such evolution to take place. Moreover, its disregard for the Ninth Circuit decisions undermines the benefits of conformity within the circuits. When the circuits are split on an issue, there is the potential that different laws will be enacted in different geographic regions of the United States.

The appropriate standard for reviewing a denial by the Board to reopen, based on a failure to make a prima facie showing, remains unsettled among the circuits. Outside of the developed asylum jurisprudence of the Ninth Circuit and the sole Fourth Circuit decision of M.A. II, no circuit has addressed the issue. This Note maintains that the Ninth Circuit properly decided the issue of the applicable standard of review.

2. A De Novo Standard of Review Does Not Threaten Finality in Asylum Proceedings

The Fourth Circuit's fear of unsettling finality is unconvincing. There is little support for the notion that a de novo standard would threaten the Board's interest in finality. The Fourth Circuit, relying on Abudu, acknowledged that the Board may deny reopening to those applicants who (1) fail to reasonably explain their inability to timely assert political asylum; (2) neglect to present new evidence; or (3) do not convince the Board that they will ultimately prevail on the merits. Clearly, the Board possesses a great degree of unfettered discretion in making its determinations. These provisions provide sufficient safeguards and significant hurdles for a petitioner to over-


163. Id. at 1213.

164. In Etugh v. INS, 921 F.2d 36 (1st Cir. 1990), the First Circuit addressed the uncertainty in this area of the law and cited Ghadessi as the controlling law for the Ninth Circuit. Id. at 38. However, the First Circuit did not have to decide which standard to apply since, under either a de novo or an abuse of discretion standard, the court would have affirmed the Board's determination that Etugh failed to establish a prima facie case. Id. at 39.

165. M.A. II, 899 F.2d at 308.

166. See AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION LAW AND BUSINESS § 10.5(e)(3), at 10-37 (1990) ("Questions of statutory construction rarely arise with regard to motions to reopen a final order of deportation even if a prima facie case is presented. It may
come. Applicants will rarely manage to satisfactorily explain a failure to assert a fear of persecution at the initial proceeding. Further, even rarer are the applicants who can explain their dilatoriness, at which point the Board forgoes its discretionary option of denying motions and rules on the prima facie case. Therefore, by the time applicants jump through all of the difficult procedural hoops, the number of cases decided purely on the prima facie showing should be quite small. As a result, a de novo review of that determination will only minimally affect the reopening process. This scant effect is a small price to pay, given the importance of ensuring a fair opportunity to develop and present asylum cases.

3. The Political Question Argument Is Irrelevant in Asylum Proceedings

That the court must defer to the Board because of the "inherently political nature" of the deportation decision is an inappropriate conclusion. It is ironic, as the dissenting opinion in M.A. II pointed out, that the court should fear infringement on a political decision that is not supposed to be political at all.

The Fourth Circuit's erroneous judgment in framing M.A.'s deportation decision as a political question can best be understood in an historical context. Before Congress passed the Refugee Act, the United States' definition of refugee was largely based on a national perception of a world framed by the Cold War. Until the passage of the Refugee Act, refugees were defined more by their countries of origin than by the circumstances that caused them to leave. Specifically, prior immigration law favored refugees fleeing from persecution in communist or "communist-dominated" countries, or from the gen-

properly decide that the relief sought would not be granted even assuming statutory eligibility because discretion would not be exercised in favor of the alien.").

167. See id.
168. Id.
169. Id.
170. See id.
171. M.A. II, 899 F.2d at 309.
172. Id. at 319 (Winter, J., dissenting); H.R. REP. No. 608, 96th Cong., 2d Sess., at 13 (1979), reprinted in 1980 U.S.C.C.A.N. 141 (under the Refugee Act, "the plight of the refugees themselves, as opposed to national origin or political considerations, should be paramount in determining which refugees are to be admitted to the United States" (emphasis added))).
eral area of the Middle East. Although the Protocol required that the United States, as a signatory, not deport refugees to any country where they would face persecution, the United States continued to utilize a refugee provision that made distinctions based on the country of origin. Congress' primary purpose in enacting the Refugee Act was to remove ideological bias in asylum determinations. The legislative history of the Refugee Act emphasizes that "the plight of the refugees themselves, as opposed to national origin or political considerations, should be paramount in determining which refugees are to be admitted to the United States." Moreover, Congress intended the Refugee Act to give "statutory meaning to our national commitment to human rights and humanitarian concerns." Under the Refugee Act, the United States must grant refugee status to anyone who meets the requirements of 8 U.S.C. § 1101(a)(42)(A). In Cardoza-Fonseca, the Supreme Court affirmed the neutrality of the Refugee Act, indicating that its promulgation made refugee status determinations based upon geographic and political distinctions absolutely unacceptable.

Notwithstanding congressional intent that the INS and Board apply the Refugee Act neutrally, both the statistics and critics of the United States asylum program indicate that the Refugee Act has not been so applied. According to figures covering fiscal year 1990, the approval rate for asylum cases filed with INS district directors was as follows: China, 91.1%; Soviet Union, 82.4%; Romania, 54.9%; Afghanistan, 38.8%; Nicaragua, 16.2%; and El Salvador, 2.5%. The overall approval rate for the period was 14.7%.

175. See supra note 54.
176. See generally ALEINIKOFF & MARTIN, supra note 4.
177. Cardoza-Fonseca, 480 U.S. at 435.
180. See Anker & Posner, supra note 52, at 34-56 (discussing Congress' concerns with and desire to control executive branch dominance of asylum and refugee policy).
181. Cardoza-Fonseca, 480 U.S. at 421.
183. See Asylum Cases, supra note 182, at 12. The statistics were even more dramatic when M.A. II was argued. According to figures covering the first three quarters of 1987, the
A viable argument can certainly be made that the great disparity in these figures is attributable, in part, to the fact that more applicants come from Central America, and particularly from El Salvador.\(^{184}\) It is likely that, by virtue of the larger number of applicants, there is also a larger percentage of meritless claims. However, it would be intellectually dishonest to attribute the disparity entirely to these factors, and to ignore the suggestion that the INS has allowed an impermissible taint of ideology into the asylum process.\(^{185}\) Rather, the statistical disparities illustrate that political considerations and foreign policy goals have invaded the asylum process.\(^{186}\) By resurrecting the notion that deportation decisions are "inherently political,"\(^{187}\) the Fourth Circuit dragged the United States a decade backward, and, more importantly, denied M.A. the protection of the law to which he was entitled. Further, by recognizing conscientious objectors as eligible

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\(^{184}\) In fact, during fiscal year 1990, Salvadorans filed 8648 cases with INS district directors, the most filed by any country. See Asylum Cases, supra note 182, at 12.


\(^{186}\) The passage of the Immigration Act of 1990, supra note 51, arguably undermines the argument that political considerations should not invade the asylum process, because, in fact, they have. Section 302 of the Act establishes procedures for establishing "temporary protected status" for nationals of certain countries who have suffered as a consequence of internal armed conflict, natural disaster, or other extraordinary circumstances of temporary duration. Immigration Act of 1990 § 304 (to be codified at 8 U.S.C. § 1254a). The aliens will be authorized to accept employment, but will not have lawful permanent residence or other long-term status under the immigration laws. Id. Section 303 specifically designates El Salvador as a country whose nationals will receive temporary protected status. Id. § 303. Thus, while the author argues that refugee decisions should be made without reference to the alien's country of origin, applicants similar to the petitioner in *M.A. II* will be treated preferentially under the Immigration Act of 1990. Nevertheless, the Act does not help asylum applicants from all countries, and, in any case, it is only a temporary remedy.

Ironically, preferential treatment for Salvadoran aliens comes at a time when El Salvador's civil war, which has plagued the country for 11 years, decimating the countryside and killing 75,000 Salvadorans, may finally be coming to an end. John J. Goldman & Kenneth Freed, Cristiani, Rebels in Salvador Pact, L.A. TIMES, Sept. 25, 1991, at A1.

\(^{187}\) *M.A. II*, 899 F.2d at 309.
for political asylum, the courts, rather than infringing on congres-
sional decision-making powers, would be effectuating congressional
intent.

B. The Case Against the Fourth Circuit's Test for Establishing the
Prima Facie Case of Well-Founded Fear

In order for an alien to reopen a deportation hearing to include a
request for political asylum, the individual must present a prima facie
case of eligibility for relief.\footnote{8 C.F.R. § 103.5 (1991); Hernandez-Ortiz, 777 F.2d at 513.} An alien establishes a prima facie case
for refugee status when the alien presents "affidavits or other docu-
mentary evidence" that, if true, demonstrate a well-founded fear of
persecution, based on race, religion, nationality, membership in a par-
ticular social group, or political opinion.\footnote{8 C.F.R. § 103.5; Hernandez-Ortiz, 777 F.2d at 513.} It cannot be disputed that
\textit{M.A. II} presented a special problem for the Fourth Circuit's analysis
of a prima facie case, because the Protocol, Convention, and Refugee
Act do not explicitly address conscientious objectors.\footnote{See supra Section III.}

The \textit{Handbook}, however, contains eight paragraphs describing
situations in which it would be appropriate for aliens who have fled
their countries to avoid compulsory service to be granted refugee sta-
tus, and thus be eligible for asylum.\footnote{HANDBOOK, supra note 2, paras. 167-74.} In fact, the \textit{Handbook} identifies deserters and individuals avoiding military service as a special
category of refugee.\footnote{Id.} Although the \textit{Handbook} acknowledges that
draft evasion should not \textit{generally} provide a basis upon which individu-
als may qualify for refugee status, it also notes that there are times
when such status should be granted.\footnote{See supra text accompanying notes 71-79, which describes when such refugee status
should nevertheless be granted.} Moreover, the \textit{Handbook} pro-
vides that the "necessity to perform military service may be the \textit{sole
ground} for a claim to refugee status."\footnote{HANDBOOK, supra note 2, para. 170 (emphasis added).} Specifically, the \textit{Handbook}
explains that such status should be granted when an applicant can
show that compulsory military service would require the applicant's
participation in military action "contrary to his genuine political, reli-
gious or moral convictions, or to \textit{valid reasons of conscience}."\footnote{Id. (emphasis added).} For
individuals, like M.A., who object based on political convictions, the
\textit{Handbook} adds one additional requirement: the applicant must

\begin{itemize}
\item \footnote{8 C.F.R. § 103.5 (1991); Hernandez-Ortiz, 777 F.2d at 513.}
\item \footnote{8 C.F.R. § 103.5; Hernandez-Ortiz, 777 F.2d at 513.}
\item \footnote{See supra Section III.}
\item \footnote{HANDBOOK, supra note 2, paras. 167-74.}
\item \footnote{Id.}
\item \footnote{See supra text accompanying notes 71-79, which describes when such refugee status
should nevertheless be granted.}
\item \footnote{HANDBOOK, supra note 2, para. 170 (emphasis added).}
\item \footnote{Id. (emphasis added).}
demonstrate that the "type of military action, with which [the objector] does not wish to be associated is condemned by the international community as contrary to basic rules of human conduct."196

Despite the majority's professed adherence to the Handbook in M.A. II, the text of the relevant Handbook paragraphs does not contain the three additional requirements engrafted by the majority. Thus, the majority created a new test, requiring applicants in M.A.'s position to demonstrate (1) a formal official policy of the government in question that promotes human rights violations; (2) condemnation of the military actions by international governmental bodies; and (3) that the individual will be compelled to engage personally in inhuman conduct as part of his military service.197 These additional requirements do not appear in the Handbook, nor does the majority point to any authority suggesting that the United Nations intended to include them in the Handbook. In fact, logic dictates that the majority’s additional requirements have no foundation, since their inclusion would substantially vitiate any recognition of conscientious objection as a viable basis for political asylum—a conclusion the United Nations could not possibly have intended.

1. A Requirement That Governments Adhere to a Formal Policy of Human Rights Violation Has No Basis in the Refugee Act or the Handbook

To qualify for refugee status based on political convictions, the majority in M.A. II first required that the government in question adhere to a formal policy of violating human rights and international law.198 Such a requirement has no foundation in the Refugee Act or the Handbook. In fact, the Handbook speaks only of the "type of military action,"199 and does not mention governmental policy with respect to such action. As the dissenting opinion in M.A. II pointed out, "the requirement that the Salvadoran government issue an official policy of torture or indiscriminate killing can never be satisfied; no government wishing to remain even remotely connected with the international community would openly advocate such a policy."200 Similarly, in Bolanos-Hernandez v. INS,201 the Ninth Circuit noted

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196. Id. para. 171 (emphasis added).
198. Id. at 312-13.
199. HANDBOOK, supra note 2, para. 171.
201. 767 F.2d 1277 (9th Cir. 1984).
that "persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution."202 Rather, it should be sufficient that M.A. and others similarly situated show that their home governments are unwilling or unable to control the offending groups.203

The "unwilling or unable" standard is entirely workable as an exclusive standard for courts to adjudicate asylum claims. In fact, there are several factors by which courts could measure whether a home government is "unable or unwilling" to control an offending group. Namely, courts could consider the prevalence or pervasiveness of offending conduct. Clearly, sporadic instances of atrocities should not be conclusive evidence of a government's inability to control an offending group. Every war, by definition, will spawn barbarities of varying degrees. However, where charges of offensive conduct are voluminous and widespread, it is not a far leap of faith to surmise that a home government, for whatever reason, is unable or unwilling to control an offending group.

Furthermore, courts could consider a home government's record of capturing, trying, and convicting the members of an offending group as evidence of that country's commitment to curbing human rights violations. If, for example, there is no correlation between claims of atrocities and the prosecution of their perpetrators, courts could reasonably question the sincerity of that country's efforts to curtail these violations. Similarly, if there is no correlation between the number of prosecutions and the number of successful prosecutions, courts could question that country's sincerity.

Nevertheless, the majority in M.A. II feared that "any male alien of draft age from just about any country experiencing civil strife could establish a well-founded fear of persecution, unless the court required the asylum applicant to prove that the violence is connected with official government policy."204 In reaching this conclusion, however, the majority failed to acknowledge that there are other hurdles to overcome before an applicant can obtain refugee status. First, the applicant must show that the government in question is unwilling or unable to control the offending group, which, in M.A.'s case, was the

202. Id. at 1285.
203. See Lazo-Majano v. INS, 813 F.2d 1432, 1434 (9th Cir. 1987) (persecution by a single member of the armed forces that the Duarte government could not control provided a basis for a well-founded fear); Bolanos-Hernandez, 767 F.2d at 1284 (applicant for asylum must show "[p]ersecution by the government or by a group which the government is unable to control").
204. M.A. II, 899 F.2d at 312 (emphasis in original).
armed forces. Second, the applicant must show that the international community has condemned this military action. Third, the applicant must show specific objective evidence that he or members of his group have been, or will be, subjected to persecution. Thus, the majority opinion disregarded the hurdles already set in place, and added another, more stringent evidentiary burden.

2. A Requirement That Condemnation Come from an International Governmental Body Is Unfounded

The Handbook provides that refugee status may be granted when the military action with which the individual does not wish to be associated is "condemned by the international community as contrary to basic rules of human conduct." While it is true that the term "international community" may certainly include the United Nations or "recognized international governmental bodies," the Handbook does not imply that these bodies represent the sole sources of international opinion and that asylum applicants must wait for such declarations, exclusively, to avoid deportation. As the dissent in M.A. II pointed out, if the Board or a court ignores the evidence supplied by private agencies, "producing evidence of international condemnation would often be virtually impossible." Additionally, as the First Circuit correctly noted in Ananeh-Firempong v. INS, "unless an alien were allowed to rely upon [outside, non-governmental] sources, it is difficult to see how he or she could make out a case of political or social repression in a distant land." There will be few instances where the executive body of any government will publicly make statements about its allies' humanitarian violations, since a "finding that persecution is likely reflects official skepticism about the willingness or ability of a foreign government to guarantee a modicum of civilized

205. McMullen v. INS, 658 F.2d 1312, 1315 (9th Cir. 1981).
207. See Figeroa v. INS, 886 F.2d 76, 80 (4th Cir. 1989); see also Cruz-Lopez v. INS, 802 F.2d 1518, 1522 (4th Cir. 1986).
209. The United Nations has, in fact, "expressed deep concern at the situation of human rights in El Salvador." M.A. II, 899 F.2d at 322 n.8 (Winter, J., dissenting) (quoting United Nations General Assembly Resolution No. 401139 (Dec. 13, 1985)). In 1985, the United Nations stated that "a situation of generalized warlike violence continues to exist . . . and that the number of political prisoners and abductions has increased." Id.
210. M.A. II, 899 F.2d at 312.
211. Id. at 323 (Winter, J., dissenting).
212. 766 F.2d 621 (1st Cir. 1985).
213. Id. at 628.
behavior."214 Accordingly, accepting the Board’s and the majority’s contention that only condemnation by governmental bodies should be persuasive renders meaningless Handbook paragraph 171.

A more reasonable interpretation of paragraph 171 would allow an applicant to show that the military action that the applicant seeks to avoid violates the fundamental rules of humanitarian law. The United Nations has laid out these fundamental rules very clearly.215 The minimum standards articulated by the United Nations include: (1) the affirmative obligation to treat persons not active in the military actions humanely; and (2) the absolute prohibition of murdering, mutilating, torturing, or treating cruelly said persons, or passing sentences and carrying out executions without previous judgment pronounced by a regularly constituted court.216 Alternatively, the Re- statement (Third) of Foreign Relations provides:

A state violates international law if . . . it practices, encourages, or condones

(a) genocide,
(b) slavery or slave trade,
(c) the murder or causing the disappearance of individuals,
(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(g) a consistent pattern of gross violations of internationally recognized human rights.217

Additionally, both Amnesty International and Americas Watch have been on the forefront of developing human rights laws, and their reports have long been considered authoritative sources of international law. Thus, in Coriolan v. INS,218 the Fifth Circuit reasoned that, although the opinion of Amnesty International is not precedential law in the Fifth Circuit or to the INS, it is “certainly relevant” and its “materiality . . . is surely beyond dispute.”219

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214. Legomsky, supra note 162, at 1209.
216. Id.
218. 559 F.2d 993 (5th Cir. 1977).
219. Id. at 1002-03.
3. Permitting the Introduction of Non-Governmental Reports Is Not Tantamount to the United States' Disapproval of Another Country's Policy

The majority's argument that the inherently political nature of the dispute forbids it from considering nongovernmental reports is entirely vacuous. By permitting asylum applicants to proffer evidence of condemnation from private organizations, a court does not indicate its approval of such opinions, but merely recognizes that a "reasonable person" could fear persecution should the conditions reported actually exist. Even if a court decides that an alien has a well-founded fear, such a determination only suggests that one individual fears persecution. Such a finding is not tantamount to a United States declaration that the government in question is an international outlaw. Furthermore, it is reasonable to assume that the average foreign sovereign is at least knowledgeable of the basic underpinnings of our tripartite system of government. With this knowledge, the foreign government would understand that the pronouncements of our relatively independent judiciary do not necessarily represent the policy of the United States government, in general, or of its legislative or executive branches, in particular. Even if foreign states perceive a court's judgment as an approval of the opinions of private organizations, Congress has explicitly empowered the federal judiciary to do just that—to review and, if necessary, correct INS determinations of the asylum standard.

Perhaps the most compelling response to the majority's nonjusticiability argument is that the courts and the United States are committing hypocrisy by refusing to consider all relevant evidence, in fear that they may be indirectly criticizing a government currently friendly to the United States. As Judge Breyer of the First Circuit so poignantly said, "To offer refuge to those faced with genuine threats of persecution but to forbid them to offer journalistic accounts, expert opinions, and third-party reports in their efforts to prove it would simply 'sound the word of promise to the ear but break it to the hope.'"

220. See supra text accompanying notes 105-06.
221. M.A. II, 899 F.2d at 323 n.11 (Winter, J., dissenting).
222. Id. at 323.
223. See 8 U.S.C. § 1105a(a) (final orders of deportation, and the basis for these orders, are reviewable by United States courts of appeals).
224. Ananeh-Firempong v. INS, 766 F.2d 621, 628 (1st Cir. 1985).
C. The Majority's Contention That the Salvadoran Government Did Not Threaten M.A. Specifically Is Unfounded

The majority in *M.A. II* noted that, to satisfy the well-founded fear test, a court must find that an applicant has a genuine subjective fear of persecution, and that an objective basis, sufficient to render that fear reasonable, exists.\(^\text{225}\) Unquestionably, M.A. fled El Salvador because of fear generated by his personal experiences with the military.\(^\text{226}\) Thus, M.A. satisfied the subjective component of the well-founded fear test. As to the objective component, an asylum applicant must provide "specific and objective facts," detailing a "good reason" to fear or "reasonably expect" persecution.\(^\text{227}\) M.A. provided detailed descriptions of the Salvadoran repression against both his family and himself,\(^\text{228}\) as well as compelling affidavits in support of his petition.\(^\text{229}\)

Nevertheless, the majority found M.A.'s evidence insufficient to prove that the military threatened him personally or that it would force him to commit the condemned acts if he returned to his country.\(^\text{230}\) The burden the majority placed on M.A. and other applicants similarly situated is overwhelming. Evidence of persecution can be unusually inaccessible.\(^\text{231}\) The most knowledgeable witnesses and the

\(^{225}\) *M.A. II*, 899 F.2d at 311.

\(^{226}\) See *supra* text accompanying notes 30-36.

\(^{227}\) *Figeroa*, 886 F.2d at 80.

\(^{228}\) See *supra* text accompanying notes 36-38.

\(^{229}\) Dr. Charles Clements, who practiced medicine in El Salvador for one year and interviewed at least 60 government soldiers released after capture by the guerillas, stated:

> I was told by prisoners that they are taught to kill women and children because women are potential factories for more guerillas, and children are seeds of the guerillas. I was told that it was common practice to torture known guerillas and that it was not unusual that women who were considered sympathizers with guerillas would be raped. I have seen prisoners as young as 15 years old who were in the regular army. When asked why they participated in search and destroy operations in which many innocent civilians are killed, they explained that to show any sign of hesitation or reluctance is to invite personal danger from superiors. When asked why they do not desert, they repeatedly told me that they have seen pictures of deserters posted in their barracks along side pictures of their families bearing such inscriptions as "killed in the cross fire."

*M.A. I*, 858 F.2d at 217.

William M. Leo Grande, Director of Political Science at the School of Government and Public Administration at American University in Washington, D.C., said:

> To be a man of military age and not to have served in the Armed Forces, in addition to fled [sic] the country, is enough to create the suspicion the individual is an opponent of the government. And to be suspected of being an opponent of the government in El Salvador, is to be in grave danger.

*Id.*

\(^{230}\) *M.A. II*, 899 F.2d at 314.

\(^{231}\) Legomsky, *supra* note 162, at 1208.
most probative documentary evidence for deportation hearings might be overseas.\textsuperscript{232} In the rush of fleeing, refugees often lack the time and foresight to gather crucial documentation.\textsuperscript{233} Furthermore, even if the applicant has access to witnesses, those witnesses may be unwilling to testify on the applicant's behalf, for fear of retaliation.

The burden the majority placed on applicants also contravenes basic judicial precedent. In \textit{Cardoza-Fonseca v. INS},\textsuperscript{234} the Ninth Circuit recognized that

refugees sometimes are in no position to gather documentary evidence establishing specific or individual persecution or a threat of such persecution. Accordingly, if documentary evidence is not available, the applicant's testimony will suffice if it is credible, persuasive, and refers to "specific facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution . . . .\textsuperscript{235}"

\section*{VI. Conclusion}

The Fourth Circuit incorrectly decided \textit{M.A. A26851062 v. INS}, and created an improper legal standard to apply to draft resisters seeking refugee status. The Fourth Circuit gave undue deference to the Board in cases involving motions to reopen deportation proceedings. Further, and perhaps most importantly, the Fourth Circuit misinterpreted and incorrectly applied the \textit{Handbook} to M.A. The \textit{Handbook} clearly recommends refugee status for conscientious objectors, like M.A. At the very least, the Fourth Circuit's decision in \textit{M.A. II} indicates the ambiguous status of aliens who fear persecution due to their objections to obligatory military service. Eleven years ago, Congress enacted the Refugee Act to bring the United States into compliance with the 1967 United Nations Protocol and Convention.\textsuperscript{236} The \textit{Handbook} "provides significant guidance in construing the Protocol."\textsuperscript{237} This same \textit{Handbook} explicitly includes the conscientious objector as a worthy recipient of refugee status. Thus, under the Refugee Act, conscientious objectors, like M.A., should be entitled to refugee status. The Fourth Circuit's refusal to recognize the relationship between the Refugee Act, the Protocol, and the \textit{Hand-
book, while claiming strict adherence to the Handbook, is contradictory and devastating to M.A. and others in M.A.'s position.

The M.A. II decision should alert Congress to the need for a clarification of its refugee policy. Just as Congress formerly attempted to conform the United States' immigration policy to its international obligations, the present Congress should do the same, but more explicitly. If courts do not recognize that the definition of "refugee" encompasses the conscientious objector, Congress should add "valid reasons of conscience" to the current list of grounds for refugee status. This addition would protect aliens who have "valid reasons of conscience" for not serving in compulsory military service and who have well-founded fears of persecution on this account. Such an addition would not only preserve the original thrust of the Refugee Act, but, more importantly, it would preserve the lives of many individuals.

Although M.A. was deported to El Salvador, his particular whereabouts are presently unknown. And, while it may be that M.A. has returned to a less terrifying and threatening El Salvador than he had feared, it may also be worse than he had imagined. Whatever the reality M.A. faced upon his return, one cannot ignore the bottom line—that the United States sent back a man who may be or may already have been persecuted, imprisoned, or even killed for adhering to his religious, political, or moral convictions. The M.A. II decision undermines the humanitarian ideals expressed by the Refugee Act, the values of individual conscience, the protection of religious freedom, and the broader ideal of recognizing conscientious objection as a fundamental human right. The United States should not tolerate such a result.

Corii D. Berg*

238. Telephone Interview, supra note 7.

* To my wife Cari, I dedicate this Note to you for your love, understanding, and, most of all, for your sense of humor throughout law school. And to my extended family, thank you for your support and encouragement over the last three years.