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Abstract

In 1987, the US Supreme Court ruled in Cardoza-Fonseca that the well-founded fear of persecution standard under the 1980 Refugee Act is different from and more generous than that of “clear probability”, or balance of probability, which had been imposed by administrative authorities. This article reviews subsequent developments in asylum decision-making at the Board of Immigration Appeals, and contrasts it with the jurisprudence of the US Court of Appeals for the Ninth Circuit. Many anticipated that the Supreme Court decision would lead to increasing attention to issues of credibility and discretion; in fact, although credibility remains important, the scope of discretion has been narrowed, and more restrictive approaches to the conceptions of persecution and political opinion have been adopted. The article illustrates the contrasting approach of the Ninth Circuit which, it argues, is more in tune with political realities. If conflict with the Court is to be avoided, the authors suggest that the Board of Immigration Appeals may well have to engage more directly and more deeply in political and human rights judgments relating to countries of origin.

1. Introduction

Just over one year ago, the United States Supreme Court gave its decision in INS v. Cardoza-Fonseca,1 holding that the standard of proof in

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persecution cases under the asylum statute was 'well-founded fear' of persecution, a standard distinctly different and more generous than the 'clear probability' standard of proof that had been imposed by the administrative immigration authorities. The decision was hailed by some members of the immigration bar, civil rights and human rights groups, as tremendously significant. It not only appeared to ease the burden for asylum claimants, but in finding that both statutory language and international law constrained administrative action, the decision represented a rare assertion of judicial authority in the immigration area. This article reviews interesting and, in some respects, surprising developments in asylum decision-making at the Board of Immigration Appeals ('BIA' or 'Board') since the Supreme Court's historic decision. This article also examines some contrasting jurisprudence in the United States Court of Appeals for the Ninth Circuit, the most active federal court reviewing administrative decisions in this area.

2 Sec. 208, Immigration and Nationality Act (INA), 8 U.S.C. sec. 1158 provides for a discretionary grant of asylum where an alien can establish he or she is a refugee—that is, that he or she has a 'well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group and political opinion.' See sec. 101 (a) (42) INA, 8 U.S.C. sec. 1101 (a) (42). Asylum confers a status which can lead to permanent residence in the United States. Withholding of deportation, pursuant to sec. 243(h) INA, 8 U.S.C. sec. 1253(h) provides for a mandatory prohibition against deportation or return to a country where an alien's 'life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group or political opinion.' This form of protection only precludes deportation to the persecuting country but does not prevent return to any third country, or confer a permanent status in the United States. For a more complete discussion, see Anker, Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980 28 Va. J. Int'l L. 1, 1-6 (1987).

3 The Court had earlier upheld the clear probability standard as appropriate to sec. 243(h) adjudications in INS v. Stevic, 467 U.S. 407 (1984).

4 For a century, U.S. courts have consistently held that the plenary power of the political branches over immigration requires extreme judicial deference, often including deference to the actions and determinations of administrative officials. See e.g. Fong Yue Ting v. U.S. 149 U.S. 698 (1893); INS v. Abdu, 485 U.S. —, 108 S. Ct. —, — (1988). (INS officials must exercise especially sensitive political functions that implicate questions of foreign relations and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context). The Supreme Court's relatively non-deferential stance in Cardoza-Fonseca is attributable to the strong Congressional policy expressed in the asylum statute, the foundation of that policy in international law, and the fact that the Court's scope of review was broadened by its review of a 'question of law' and a statutory eligibility requirement.

5 The Board of Immigration Appeals has nationwide jurisdiction over appeals from decisions of Immigration Judges, who are administrative hearing officers in deportation and exclusion cases. The jurisdiction of the immigration judges includes applications for withholding of deportation and certain asylum cases. There are over 60 immigration judges in district offices throughout the United States. Appeals from decisions of the Board of Immigration Appeals in deportation cases can be made to the United States Federal courts of appeal. This article refers to some unpublished decisions of the Board of Immigration Appeals. Only a small proportion of the Board's decisions are officially published and designated as precedent decisions. See T. Aleinikoff and D. Martin Immigration: Process and Policy 91–93, 569–685 (1985).

6 The large number of immigration cases, in general, and asylum cases, in particular, in the Ninth Circuit is predominantly the result of two factors: the large number of asylum seekers
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Even when Cardoza-Fonseca was first decided, it was not clear to many observers that the Court's ruling would result in a more generous asylum policy. Following the decision, some experienced immigration practitioners, as well as government officials, predicted that a major effect of the liberalization of the standard of proof would be an increased emphasis on the credibility determination (an area over which courts have traditionally deferred to administrative and other first-tier decisionmakers), and on discretionary denials for those who had established eligibility for asylum under the well-founded fear standard. A focus on credibility and discretion in asylum cases seemed both likely or, at least, permissible under the Court's holding in Cardoza-Fonseca, and consistent with trends in Board decision-making before the Cardoza-Fonseca opinion was issued.

A focus on credibility and discretion in asylum cases seemed both likely or, at least, permissible under the Court's holding in Cardoza-Fonseca, and consistent with trends in Board decision-making before the Cardoza-Fonseca opinion was issued. Both credibility and discretion based denials would result in decisions turning, to a large extent, on issues tangential to the underlying claim of persecution. In the case of credibility based rulings, the applicant's testimony could be dismissed as generally untrustworthy and unbelievable: therefore, no substantive inquiry would be necessary into the merits of his or her claim. Where discretion was in issue, a claim could be denied either despite the establishment of a well-founded fear, or irrespective of it.

The Ninth Circuit encompasses the western states of California, Arizona, Nevada, Oregon, Washington, Idaho, and Montana. California is believed to have the largest undocumented non-national population of any state in the United States; in particular, 350,000-400,000 Central Americans, many of whom seek asylum in the United States, are believed to live there. Most potential asylum-seekers from Central America have arrived in the United States since conflicts in the region increased in 1979-1980. See San Francisco Chronicle, Nov. 28, 1985, at 1, col. 1. From 1980-1986, Central Americans were the petitioners in almost two-thirds of the reported asylum and withholding of deportation cases in the Ninth Circuit. In 1985 alone, almost ninety per cent of the unreported asylum and withholding cases concerned petitions for review by Central Americans.

The Executive Office of Immigration Review does not publish statistics on the outcomes of asylum decisions and thus the most telling evidence of the impact of the Cardoza-Fonseca decision remains unavailable.

In Cardoza-Fonseca, the Court recognized that the applicant's subjective fear is an explicit and important aspect of the asylum determination. In interpreting the statutory 'well-founded fear' language, the Court stated 'that the fear must be "well-founded" does not alter the obvious focus on the individual's subjective beliefs ...' 485 U.S. — , 107 S. Ct. at 1213 (1987). Credibility clearly is a critical element in the evaluation of subjective fear.

The Court in Cardoza-Fonseca discussed similarities between the grant of discretionary authority in asylum, and in various forms of discretionary deportation relief, where the Court generally has given broad range to the Attorney General's exercise of discretion. See 485 U.S. — , 107 S. Ct. at 1220 (1987); But see Anker supra note 2 at note 194 and accompanying text (analysing the Court's decision as consistent with a limited conception of the role of discretion in asylum).

See generally Anker, supra note 2.

See e.g. Matter of Salim 18 I. & N. Dec. 311 (BIA 1982) (denying asylum on discretionary grounds despite the fact that the applicant had established eligibility based on his persecution claim). Like asylum, most forms of discretionary relief are divisible between, on the one hand, statutory eligibility requirements; and, on the other hand, a further provision for the actual
Instead, what has happened since Cardoza-Fonseca is a reversal of the previous trend. In a major turnaround, the Board has significantly limited the scope of discretion to deny asylum to eligible applicants. Although it has continued to emphasize the importance of the credibility determination, the Board has shifted the focus to credibility problems that are both major and central to the applicant’s claims. Indeed, fewer administrative decisions may rest exclusively—or explicitly—on an assessment of the applicant’s credibility. Rather than discretion or credibility, the Board has utilized another basis for denying many asylum claims; namely, a narrowing conception of persecution and political opinion under the statute. Denial on the merits, while hardly a new premise for Board decisions, has been more frequently relied upon and more fully elaborated in post-Cardoza-Fonseca decisions. The Board’s more restrictive and often context-blind view of political opinion and persecution has once again, as in Cardoza-Fonseca, brought the Board into conflict with the federal courts, or more particularly with the United States Court of Appeals for the Ninth Circuit. In contrast to the Board’s approach, the Ninth Circuit has interpreted the statutory terminology to accommodate the realities of political conflicts and politically-motivated persecution in Central American and Caribbean nations.

2. Discretionary Denial: A New Emphasis on Balancing and An Affirmative Presumption

Before Cardoza-Fonseca, the Board had established a number of precedents which had the effect of making most misrepresentations in the entry process by an asylum applicant a very strong negative discretionary factor, that weighed heavily towards denial of asylum as a matter of discretion. Use of a false passport to gain airline passage, or mis-

exercise of discretion. The alien must establish statutory eligibility without which discretion cannot be exercised. However, relief can be denied on discretionary grounds without a finding on eligibility. See INS v. Rios-Pineda, 471 U.S. 44, 449-50 (1985); INS v. Bagamasbad, 429 U.S. 24, 26 (1976) (per curiam).

12 For example, in Matter of Acosta, a pre-Cardoza-Fonseca Board decision dealing comprehensively with a variety of issues under the asylum statute, the Board was already applying a strict interpretation to the meaning of political opinion. ‘[T]he requirement of “persecution on account of political opinion” refers not to the ultimate political end that may be served by persecution but to the belief held by an individual that causes him to be the object of the persecution.’ Int. Dec. No. 2986 at 26 (BIA 1985). After Cardoza-Fonseca, the Board overruled that aspect of Acosta equating the well-founded fear and clear probability standards, but approved the general definition of persecution articulated in that decision. Matter of Mogharabi Int. Dec. No. 3028 at 11 (BIA 1987). For the definition of persecution in Acosta, see infra note 51.


14 See generally Anker supra note 2 at 1-49.
representations to U.S. officials to gain access to the United States and the asylum process, were virtually *per se* bases for denial of asylum as a matter of discretion, even where the applicant established a ‘clear probability’ of persecution for the purpose of obtaining withholding of deportation relief under section 243(h) of the Act. The Board also viewed any contact that the applicant had with a third country, no matter how minimal, as a discretionary basis for denial of asylum. Rather than enter or attempt to enter the United States, the Board held in effect that most asylum applicants could or should use the overseas U.S. refugee admissions process and be subject to the numerical and nationality limitations of those programmes. Indeed, in unpublished decisions, the Board seemed to hold that any irregularity in the manner of entry of an asylum applicant—including entry without authorized status, use of a smuggler (a factor inevitably associated with most Central American claims), or ‘avoidance’ of the overseas process (even where, as in Central America, there was no programme for overseas admission)—created a presumption of denial on discretionary grounds.\(^\text{15}\)

This trend was substantially modified in late 1987, with the decision in *Matter of Pula*.\(^\text{16}\) The Board held that the applicant’s use of a false passport was only one factor to be weighed in the discretionary balance. It also found that, in making the discretionary determination, the adjudicator must consider the quality of the applicant’s contact and status in any third country through which he travelled, or in which he resided, before coming to the United States to apply for asylum. Most importantly, *Pula* effectively reversed the negative bias of previous decisions. In contrast with its earlier position that any misrepresentation created a presumption of denial, the Board in *Pula* effectively adopted an affirmative presumption, holding that ‘the danger of persecution should generally outweigh all but the most egregious of adverse factors.’\(^\text{17}\) This limit on discretion had been advocated in various public policy forums, before the Board and in federal courts. For example, in *Hernandez-Ortiz v. INS*, the Ninth Circuit expressed the view that

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\ldots\text{where the Board has not identified alternative sources of refuge, it can deny asylum only on the basis of genuine compelling factors—factors important enough to warrant returning a bona fide refugee to a country where he may face a threat of imminent danger to his life and liberty.}\(^\text{18}\)
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The decision in *Pula* still leaves open the possibility for future discretionary denials based on the applicant’s manner of entering the

\(^{15}\) See *supra* note 2.

\(^{16}\) Int. Dec. No. 3033 (BIA 1987).

\(^{17}\) *Id.* at 10.

\(^{18}\) 777 F.2d 509, 519 (9th Cir. 1985).
United States; it is clear, however, that the Board has retreated from its earlier position that any manner of entry factor can provide a virtually automatic basis for denial of asylum on discretionary grounds. 19

3. Credibility: New Problems

The Board’s post-Cardoza view of the credibility determination has also clearly changed, but far less dramatically than its reassessment in Pula of the discretionary aspect of asylum. Unlike discretion, credibility continues as an important basis for denial, but the focus and emphasis have shifted. In the immediate aftermath of the Supreme Court’s ruling, the Board began to move in a positive direction, holding that negative credibility rulings could not be based on testimonial discrepancies, or misrepresentations peripheral to the central concern of asylum: the claim of persecution itself. But more recently, the Board has begun to sever the credibility determination from the assessment of the persecution claim, thereby avoiding making explicit credibility rulings. This approach is fundamentally problematic, and conflicts with Ninth Circuit decisions which have consistently acknowledged the importance of an evaluation of credibility to a ruling on the merits of the asylum claim.

The Cardoza-Fonseca decision focused on the subjective fear of the applicant as a critical element in establishing a well-founded fear of persecution. 20 A determination of the credibility of the applicant is fundamental in that context; a critical question is the evaluation of, and weight to be accorded to, the applicant’s own testimony, where it is essentially the only evidence produced in support of the persecution claim. 21 Before Cardoza-Fonseca was decided, the Board had suggested that an applicant’s own testimony might be sufficient to sustain an asylum claim. 22 In Matter of Mogharrabi, 23 the Board’s first precedent decision following Cardoza-Fonseca, the Board seemed to lay to rest any lingering notion that an applicant’s uncorroborated testimony can be

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19 For a critique of the limitations of Pula, see generally Anker supra note 2. As this article goes to press, there are some indications that the Board is diluting the impact of Pula. See e.g., In Re Chavday, A26639909 (unpublished dec.) (BIA 1988) (negative factors for discretionary denial of Indian Hindu’s asylum application included lack of evidence of present persecution, despite evidence of past persecution; and the applicant’s ‘safe haven’ in Iran, despite the lack of a right to remain and his forced departure from Iran because of the government’s mistreatment of Hindus).

20 485 U.S. —, 107 S. Ct. at 1213; see supra note 8.

21 There is an important distinction between the question of whether the testimony will satisfy the burden of proof in asylum, and whether that testimony is credible and believable. Court opinions often confuse determinations of credibility with an assessment of the applicant’s ability to satisfy the burden of proof, engaging in the process of weighing the sufficiency of the evidence, rather than evaluating the actual believability of the applicant’s testimony.


dismissed as inherently self-serving. The Court's emphasis on subjective fear and the relative generosity of the asylum statute, to some extent favour giving the applicant the benefit of the doubt when evaluating and weighing his or her testimony. Although the Board did not clearly embrace this 'benefit of the doubt' approach, in Mogharrabi the Board, for the first time, did clearly hold that

[T]he lack of [corroborative] evidence will not necessarily be fatal to the application. The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear

The immediate impact of Cardoza-Fonseca on the Board's view of credibility is evident from a comparison of the unpublished credibility rulings of the Board in 1985 with a sampling of those issued in 1987 after the Supreme Court's decision. A 1985 study of unpublished Board asylum and withholding of deportation decisions concluded that 'throughout the unpublished caselaw, considerations peripheral to the alien's testimony regarding the persecution claim itself are factored into the credibility determination.' In 1985 Board decisions, for example, a widely cited reason for negative credibility findings was the same factor that counted against the applicant on discretion. The Board considered the applicant's lies to INS officials or commission of some misrepresentation in the entry process as evidence of 'little regard for the truth', so that testimony as to the merits of the persecution claim could be largely discounted. In contrast, 'past dishonesty' was not a significant credibility factor in any of the 1987 cases reviewed. Instead,

24 In a previous Board decision, Matter of McMullen, 17 I & N Dec. 542 (BIA 1980), the Board had reversed the Immigration Judge and found the applicant's testimony 'self-serving' and hence not credible. This finding was overruled by the circuit court. See McMullen v. INS, 638 F.2d 1312, 1319 (9th Cir. 1981) (holding that BIA could not discredit applicant's uncontroverted testimony without at least suggesting what further evidence the Board would require). In Matter of Acosta, the Board apparently modified its position in McMullen by ruling, that, without an explicit negative credibility ruling, an Immigration Judge could not dismiss an applicant's testimony solely because it is 'self-serving'. Int. Dec. No. 2986 at 10.

25 Matter of Mogharrabi, Int. Dec. No. 3028 at 10. The Board's solicitude for uncorroborated testimony, however, was qualified. The Board emphasized that '...every effort should be made to obtain such [corroborative] evidence' and that 'the lack of corroborative evidence does not necessarily mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.' Id. (citing United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 1979).

26 See Anker and Bernstein, 'Unpublished Asylum and Withholding Decisions at the Board of Immigration Appeals: 1985' (hereinafter '1985 Unpublished Asylum and Withholding Decisions') (unpublished manuscript available through the author). The 1985 study analysed all asylum decisions issued by the Board that year; the post-Cardoza 1987 cases discussed in this article are a sample of unpublished opinions in which the credibility issue is emphasized.

27 Anker and Bernstein, supra note 26 at 17.
inconsistencies between the testimony and the written application, or contradictory testimony, were the major credibility related reasons for denials in the sample of post-Cardoza cases. Moreover, whereas earlier cases had focused on inconsistencies that were often peripheral to the applicant’s claim, the 1987 decisions have held, at least in principle, that ‘trivial’ inconsistencies in the alien’s testimony, unrelated to his or her ‘overall claim of persecution’, are insufficient to discredit an otherwise ‘detailed, believable account of events’.28

This change in the Board’s approach to credibility represents an effort to conform to the Supreme Court’s ruling, as well as to Ninth Circuit jurisprudence, such as Plateros-Cortez v. INS, in which the Court of Appeals addressed inconsistencies as a basis for an adverse credibility ruling.29 In that case, the Board’s decision denying asylum was premised on the applicant’s inconsistent statements regarding the date of his departure from El Salvador, the date of his prior deportation from the United States, and the site of the assassination of his employer. The court reversed and found the applicant eligible for asylum, ruling that these inconsistencies had ‘little or no relevance to the merits’ of the applicant’s case—that he had been detained, tortured and threatened in El Salvador.30

This view—that inconsistencies not central to the persecution claim cannot form the basis for a negative credibility ruling—was recently reinforced in Vilorio-Lopez v. INS.31 In the Board’s decision, asylum was denied on the basis of an adverse credibility ruling by the Immigration Judge, which arose from conflicts between testimony of the applicant and that of his cousin regarding the year of a death squad action against them, the length of time the men hid from the death squad, and whether payment was made for their accommodation during hiding. Overruling the Immigration Judge and the Board, the court held that these were minor inconsistencies ‘which reveal nothing about an asylum applicant’s fear for his safety.’32

Ninth Circuit decisions not only hold that some inconsistencies or misrepresentations are irrelevant to the applicant’s persecution claim. They also recognize that the experience of fleeing persecution creates

29 804 F.2d 1127 (9th Cir. 1986).
30 Id. at 1131. See also Martinez-Sanchez v. INS, 794 F.2d 1396 (9th Cir. 1986) (confusion about date that applicant joined right-wing organization and discrepancies regarding his children not relevant to credibility finding); Damaize-Job v. INS, 787 F.2d 1232 (9th Cir. 1986) (errors in dates which resulted from language problems and typographical errors not relevant to assessment of applicant’s credibility); Canjura-Flores v. INS, 784 F.2d 885 (9th Cir. 1985) (whether potential persecutor had an oral or written list of names of applicant’s political group irrelevant); Zavala-Bonilla v. INS, 730 F.2d 562 (9th Cir. 1984) (minor inconsistencies not determinative of credibility).
31 852 F.2d 1137 (9th Cir. 1988).
32 Id. at 1142.
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psychological pressures that affect the applicant’s behaviour—and may even motivate the applicant to lie—when confronted by governmental authorities in the United States. In *Turcios v. INS*, for example, the Ninth Circuit reversed a denial of asylum where the Salvadoran applicant had lied about his nationality, telling immigration officials that he was Mexican. The court ruled that this misrepresentation should not adversely affect the assessment of his credibility with respect to the persecution claim. The context showed that the applicant lied in order to be deported to Mexico; this lent credibility to his claim; and was consistent with his overriding fear of deportation to El Salvador and re-exposure to persecution. As will be discussed below, this sensitivity to and awareness of the context of political repression and its impact on the individual is one of the hallmarks of Ninth Circuit jurisprudence, apparent also in its interpretation of ‘political opinion’ under the statute.

In some important respects, the Board has successfully adjusted its view of credibility to Ninth Circuit decisions and the Supreme Court’s ruling, but more recent trends indicate a new and problematic direction. The Board has begun to de-emphasize credibility; fewer decisions seem to rely exclusively on a negative credibility assessment. In a recent precedent decision upholding a denial of asylum, the Board held that an Immigration Judge need not make an explicit credibility ruling. This may precipitate a new conflict with the Ninth Circuit, whose rulings require a reversal and remand to the Board for credibility findings whenever the Board expressly abstains from deciding the credibility issue. The court also will require a remand to the Board when it cannot determine the basis of the Board’s ruling.

One danger in the Board’s current position is that the assessment of credibility may become an implicit, rather than a stated basis for negative rulings in asylum cases. Credibility will continue to be important in asylum decision-making, but the possibility of ‘hidden’ credibility rulings raises serious problems. Cross-cultural misunderstandings and translation errors can have a critical impact on the credibility determination. These are factors, easily hidden in the

33 821 F.2d 1396, 1400 (9th Cir. 1987).
34 Id. at 1041.
35 See Canjura-Flores v. INS, 784 F.2d 885, 889 (9th Cir. 1986); Garcia-Ramos v. INS, 775 F.2d 1370, 1371–5 (9th Cir. 1985); Arqueta v. INS, 759 F.2d 1395, 1398, n.4 (9th Cir. 1985).
37 However, the court has stated that ‘when the Board’s decision is silent on the question of credibility, and the Board has fully explained the rationale behind its decision, we will presume that the Board found the petitioner credible, and proceed to review the Board’s decision.’ CanjuraFlores, 784 F.2d 889; Damaize-Job v. INS, 787 F.2d 1332, 1338 (9th Cir. 1986).
adjudicatory process, that can be determinative of the outcome in an asylum case where the central focus is on an applicant’s subjective fear, often based solely on his or her uncorroborated testimony.

In the light of the Cardoza-Fonseca decision, the Board’s de-emphasis of discretion and credibility is surprising. Instead of these as principal bases for denials, the Board in recent months has instead based most negative decisions on a narrowing interpretation of the meaning of political opinion and persecution under the Act.

4. Narrowing Conception of the Meaning of Persecution and Political Opinion: The Board and the Ninth Circuit Conflict

In the past eight years, the Ninth Circuit has elaborated the concept of ‘political opinion’, one of the five statutory bases for asylum. In a series of cases, the court has confronted new forms of political persecution experienced by persons fleeing El Salvador, and other Central American and Caribbean nations. In consequence, the court no longer necessarily requires evidence of overt political acts, in order for an applicant to establish that his or her feared persecution is on account of political opinion. 39

First, in Bolanos-Hernandez v. INS, the court ruled that political neutrality—the deliberate refusal to join either side in the civil war in El Salvador—constituted a ‘political opinion’. 40 It held that the interpretation of ‘political opinion’ under the statute must comprehend the widespread political violence in El Salvador, and the particular forms of political repression and victimization in that country. The court stated that ‘the general climate of uncontrolled violence in El Salvador’ reinforced the applicant’s fear of threats by the guerrillas to harm him if he did not assist them. 41 The Board, in contrast, had found that the threat to Bolanos should be taken less seriously, because it was simply ‘representative’ of the general level of violence in El Salvador. 42 The court castigated the Board for this conclusion, and for its ‘ability to turn logic on its head’. 43 In subsequent decisions, the court again analysed the specific context of violence in El Salvador in assessing the merits of the applicant’s claim. In Argueta v. INS, for example, the court held that an applicant can establish a political position of neutrality, based on threats made against him by death squads in El Salvador. 44

In Hernandez-Ortiz v. INS, the court further developed its analysis, and held that an individual can be persecuted because of the govern-

39 See e.g. Saballo-Cortez v. INS, 761 F.2d 1259 (Cir. 1984); Chavez v. INS, 723 F.2d 1431 (9th Cir. 1984).
40 767 F.2d 1277, 1286-7 (9th Cir. 1985).
41 Id. at 1286.
42 Id. at 1284-85.
43 Id.
44 759 F.2d 1395, 1397 (9th Cir. 1985).
ment's perception of the applicant's views, even where she does not hold an express political opinion. The court shifted the focus away from neutrality or partisanship, to the potential persecutor's perception of the applicant. It held that where a government acts against an individual member of a group without a legitimate basis, the government's actions are presumed to be politically motivated. Thus, if an alien can establish that the government believes he or she holds opposition views, the actual, subjective beliefs of that individual are irrelevant; that individual has a bona fide fear of persecution based on what is, in effect, an imputed political opinion.

The decision in Hernandez-Ortiz is noteworthy because of its realistic assessment of the nature of political persecution in El Salvador, and for the court's effort to translate that reality into legal doctrine. Ms Hernandez-Ortiz, like many other Salvadorans, alleged fear of persecution, in part, because of acts of harassment and terror against her family. Instead of dismissing these incidents as tenuously connected to the applicant, as the Board had done, the court held that, in the context of the Salvadoran conflict, the government's actions against her family were politically motivated.

The court reaffirmed this reasoning in its recent ruling in Desir v. INS. Here, the Board had denied asylum, characterizing beatings, imprisonment and assault by Haitian Ton Ton Macoutes for the purposes of extortion as a personal conflict. The court overruled, held that these actions did constitute persecution under the Act, and declared,

the Haitian government under Duvalier operated as a 'kleptocracy' or government by thievery, from the highest to the lowest level. The Ton Ton Macoutes, an elaborate network of official and semi-official security forces . . . formed the heart of the system. . . . Because the Macoutes are an organization created for political purposes, they bring politics to the villages of Haiti. To challenge the extortion by which the Macoutes exist, is to challenge the underpinnings of the political system.

The court ruled that the Haitian applicant's refusal to accede to extortion demands by the Ton Ton Macoutes, in the context of the political situation in Haiti, was an act that could be 'perceived as disloyal and subversive'. It held that 'whether the political opinion is actually held or implied makes little difference where the alien's life is equally at risk.'

45 777 F.2d 509 (9th Cir. 1985). 46 Id. at 516–17. 47 Id. at 515–17. 48 840 F.2d 723 (9th Cir. 1988). 49 Id. at 727. 50 Id. at 729. See also Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987) (holding that a threat by a military leader to report the victim as subversive constituted an imputed political opinion. But see, Campos-Guardado v. INS, 809 F.2d 283 (5th Cir. 1987) (restricting the imputed political opinion concept to 'extreme' circumstances).
One important issue that has emerged in many recent Salvadoran cases, closely related to the notion of imputed political opinion, is whether the statutory concept of persecution\(^5\) encompasses involuntary recruitment by non-governmental opposition forces. Many Salvadoran claims involve an individual who did not want to take sides in the Salvadoran civil war, but who was forcibly recruited by the guerrillas. In a recent decision, the Ninth Circuit stated that forced recruitment in these circumstances is a 'clear deprivation of liberty' and 'tantamount to kidnapping.'\(^5\)

In contrast, the Board has found that forced recruitment by the guerrillas is a normal occurrence in civil war and even, in some sense, justifiable. In *Matter of Maldonado-Cruz*, the Board denied asylum to an applicant who testified that he and a friend were kidnapped by the guerrillas and forced to participate in an operation against his village. His friend tried to escape and was killed. Maldonado-Cruz then escaped and was subsequently informed that the guerrillas were looking for him. His claim to asylum was based on fear of persecution by the guerrillas, as well as by the military forces, which he said would persecute him because they believed he was now allied with the guerrillas.\(^5\)

The Board apparently did not dispute the applicant's assertion that the threat to his life from the guerrillas was realistic. Instead, it reasoned that any harm he would suffer 'is part of a military policy of the guerrilla organization, inherent in the nature of the organization'\(^5\) and not on account of his imputed political opinion or any desire on the guerrillas' part to persecute.\(^5\) The Board analogized the guerrillas to a country which has established rules of military conduct and has a 'right ... to punish those who violate them.'\(^5\)

The Board has held that the term persecution is centrally concerned with the overt political beliefs and actions of the victim, and its test for persecution based on political opinion is set forth in *Matter of Acosta*, Int. Dec. No. 2986 (BIA 1985). That case held that the applicant's evidence must establish that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien. *Id* at 22. In *Matter of Mogharrabi*, the only modification of this test which the Board felt was required by the liberalization of the standard of proof for asylum in *Cardoza-Fonseca* was the omission of the word 'easily' from the second requirement. Int. Dec. No. 3028 at 9.

*Artsunga v. INS*, 836 F.2d 1227, 1232 (9th Cir. 1988).

*Int. Dec. No. 3041 (BIA 1988).*

*Id.* at 7.

The respondent's problem is not that the guerrillas are motivated to hate him because of political views they "impute" to him, but rather it is that he has breached their discipline in a way that cannot remain unpunished. *Id.* at 12. The Board reasoned that '[e]ven though guerrillas may have the political strategy of overthrowing the government by military means, this does not mean that they cannot have objectives within that political strategy which are attained by acts of violence, but whose motivation is not related to any desire to persecute.* *Id.* at 7.

*Id.* at 12.
that 'there is an implicit presumption of a legitimate basis for punishment.'

As to Maldonaldo-Cruz’ claim that the government would persecute him because of his unwilling involvement with the guerrillas, the Board held that

If the government of El Salvador has received information implicating the Respondent as a guerrilla, then it has a legitimate right to seek him out and determine whether he is indeed involved with such an organization . . . If a citizen of the United States is alleged to belong to a clandestine organization which is operating in the United States and is engaged in violent activity to further its political goal, federal authorities would properly seek him out. The Government of El Salvador has a legitimate right to take similar action.

What is most disturbing about this most recent interpretation of persecution is the Board’s efforts to justify governmental, and even guerrilla repression, as inevitable and even legitimate in the context of a civil war. The Board’s position comes close to holding that the more pervasive the violence—and perhaps incidents of repression—within a country, the more difficult it will be to prove an individualized persecution claim. The Board has attempted to define persecution based on political opinion exclusively in terms of the individual and of the subjective political motives of the alleged persecutor and victim. In Maldonaldo-Cruz and other Salvadoran and Haitian cases, the Board has insisted on assessing these individual motivations, while apparently avoiding a judgment on the human rights conditions in the country from which the applicant has fled. In Maldonaldo-Cruz, the Board found that the actions of the Salvadoran government were legitimate, but gave no ruling regarding the human rights record of the Salvadoran government and its military and paramilitary forces. It held, in effect, that governments have the right to detain and question suspected members of armed resistance movements, and guerrilla movements have a right to recruit members; whatever punishment is meted out to deserters is not politically motivated. In so holding, the Board ignored critical facts in Maldonaldo-Cruz’ case. Maldonaldo-Cruz claimed that he had not only been forcibly recruited, but also faced death because of his desertion from guerrilla ranks. He claimed not only that he faced detention and questioning by the government because of his involuntary association with the guerrillas, but also death because of his suspected affiliation.

By ignoring these facts, the Board purported to make a neutral and general judgment about the legitimacy of governmental action. Yet, in

57 Id. at 13.
58 Id. at 13-14.
59 This is precisely the approach criticized by the Ninth Circuit in Bolanos-Hernandez v. INS, 767 F.2d 1277, 1281–5 (9th Cir. 1984). See supra text accompanying notes 40–42.
60 Matter of Maldonaldo-Cruz, Int. Dec. 3041 at 4.
other contexts—such as Iran and Afghanistan—the Board has clearly made judgments regarding the political legitimacy of particular governmental and opposition action, when ruling in favour of the applicant on the merits of his persecution claim. In Matter of Mohibi, for example, the Board sustained the asylum claim of an Afghan applicant, which was based in part on his refusal to join ‘the Soviet controlled Afghan army’ and on his participation in an opposition movement. The Board found that the opposition forces had a right to use violence in their rebellion, when that rebellion was viewed in the context of ‘[t]he overall picture . . . of a troubled nation engaged in civil strife . . . marked by endemic human rights abuses.’ In Matter of Mogharrabi, the Board upheld an Iranian asylum claim where there was minimal evidence of any individual political activity by the applicant. The Board also required little, if any, affirmative proof of Iran’s persecution of persons in circumstances similar to Mogharrabi’s. The Board simply stated, ‘The Service does not dispute that opponents of the Ayatollah Khomeini are often persecuted for their opposition.’

In Afghan and Iranian cases, the Board has made the very political judgments it seeks to avoid in Salvadoran and other cases. United States asylum policy has long been criticized for using ideological double standards in assessing persecution claims. Perhaps the normative political judgments that are implicit (and even inevitable) in political asylum cases might best be made openly, so that the real concerns that inform political asylum decision-making—a judgment regarding the political legitimacy of the government in question—can be subject to public scrutiny and judicial review.

61 Matter of Mohibi, A27 497 579, slip op. 5 (BIA 7/27/87).
62 Id.
64 Id. at 11.
65 The Board’s decision in Matter of A.G., Int. Dec. No. 3040 (BIA 1987) is somewhat of an exception. There the applicant claimed conscientious reasons for not serving in the military. He testified that he considered the Salvadoran military ‘terrorist’, and that his ‘moral values’ prevented him from serving in an army ‘which engaged in violations of human rights.’ Id. at 4. The applicant submitted extensive documentary evidence regarding human rights violations in El Salvador. The Board dismissed this evidence (which included a report from the Americas Watch) since it came from a ‘private, unofficial body’ and does not constitute evidence of condemnation by recognized international governmental bodies, which would be necessary at a minimum for us to accept this argument. Id. As this article goes to press, the United States Court of Appeals for the Fourth Circuit issued a decision overruling the Board in this case; see M.A. v. INS, (No. 88–3004), 29 Sept. 1988.
67 See Note, Political Legitimacy in the Law of Political Asylum 99 Harv. L. Rev. 450, 469, 471 (arguing that the normative political judgments which necessarily underlie decisions on political asylum claims should be made explicit, and that the requirement that an applicant demonstrate that he or she would be individually singled out for persecution is ‘indefensible’).
5. Conclusion

The effect of the Supreme Court's ruling in *Cardoza-Fonseca* on decision-making at the Board of Immigration Appeals is an important and fascinating example of administrative response to judicial supervision. On the one hand, *Cardoza-Fonseca* has clearly resulted in some refocusing of the major bases for decisions in asylum cases. On the other hand, it is not clear that the Supreme Court's decision has resulted in any substantial change in the numbers and kinds of cases in which asylum has been granted or denied.

Many commentators predicted that, after the Supreme Court's liberalization of the standard of proof, the Board would move towards discretionary and credibility-based denials; with more cases turning on issues tangential to the persecution claim itself. Instead, recent Board decisions have focused on the statutory legal standards: the meaning of persecution and political opinion. The Board's jurisprudence contrasts sharply with that of the Ninth Circuit, which has interpreted these statutory standards in a manner sensitive to both political context and individual circumstances. If further conflict with the Ninth Circuit is to be avoided, the Board may well be obliged to engage itself more directly and more deeply in the normative political and human rights judgments that have long been the central dilemma of United States asylum policy.

Résumé

En 1987, la Cour suprême de États-Unis a statué lors de l'affaire *Cardoza-Fonseca* que le principe d'une crainte fondée de persécution aux termes de la Loi de 1980 sur les réfugiés est différente et plus généreuse que la règle de la probabilité claire ou de la probabilité relative appliquée par les autorités administratives. Cet article passe en revue les développements ultérieurs en matière de décisions concernant l'asile au sein du 'Board of Immigration Appeals' et met en parallèle la jurisprudence de la Cour d'Appel des États-Unis pour le 'Ninth Circuit'. Nombre de personnes pensaient que la décision de la Cour suprême se traduirait par une attention accrue aux problèmes de la
crédibilité et de la discrétion; en fait, bien que la crédibilité reste importante, la portée de la discrétion a été réduite, et des approches plus restrictives aux concepts de la persécution et de l’opinion politique ont été adoptées. L’article illustre l’approche différente du ‘Ninth Circuit’ qui, à son sens, s’harmonise mieux avec les réalités politiques. Pour éviter tout conflit avec la Cour, l’auteur suggère que le ‘Board of Immigration Appeals’ s’engage plus directement et plus résolument à porter des jugements politiques et à prendre position sur le respect des droits de l’homme dans les pays d’origine.

Resumen

En 1987, la Corte Suprema de Estados Unidos, con ocasión del caso Cardoza-Fonseca, dictaminó que el principio de un fundado temor de persecución según el Acta sobre Refugiados de 1980 es diferente y más generoso que aquél de ‘clara probabilidad’ o de probabilidad relativa impuesto por las autoridades administrativas. Este artículo examina las evoluciones posteriores en la toma de decisiones concernientes al asilo por parte del Board of Immigration Appeals (Consejo de Apelaciones de Inmigración) y establece su paralelo en la Jurisprudencia de la Corte de Apelaciones de Estados Unidos para el Ninth Circuit (Circuito Noveno). Muchos contaban con que la decisión de la Corte Suprema conduciría a aumentar la atención prestada a los problemas de credibilidad y de discreción; de hecho, si bien es cierto que la credibilidad es aún importante, el ámbito de la discreción se ha visto reducido y se han adoptado enfoques más restrictivos a los conceptos de persecución y de opinión política. El artículo ilustra el enfoque contrastante del Ninth Circuit, que, a su juicio, está más a tono con las realidades políticas. Los autores sugieren que, para evitar conflictos con la Corte, el Board of Immigration Appeals debería tomar una posición más directa y más resuelta en lo que respecta a juicios políticos y concernientes a derechos humanos en los países de origen.