

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

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*I.N.S. V. AGUIRRE-AGUIRRE: ASYLUM FOR
POLITICAL OFFENDERS*

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Abstract. The Supreme Court has agreed to consider *I.N.S. v. Aguirre-Aguirre*, a case that focuses on granting asylum to participants in political protests and uprisings. Under the Immigration and Nationality Act, an alien who commits a serious nonpolitical offense abroad is barred from asylum in the U.S., but there is controversy over applying this bar to politically-motivated common crimes, such as assault and destruction of property.

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I.N.S. v. Aguirre-Aguirre: Asylum for Political Offenders

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Summary

The Supreme Court has agreed to consider *I.N.S. v. Aguirre-Aguirre*, a case that focuses on granting asylum to participants in political protests and uprisings. Under the Immigration and Nationality Act, an alien who commits a serious nonpolitical offense abroad is barred from asylum in the U.S., but there is controversy over applying this bar to politically-motivated common crimes, such as assault and destruction of property. In addressing this controversy, the Court may decide how political conditions in a foreign country are to affect our standards for protecting dissidents who commit crimes as part of their political activities. Also at issue is how closely courts may examine administrative determinations on what crimes constitute disqualifying offenses.

On October 5, 1998, the U.S. Supreme Court agreed to consider the case of *I.N.S. v. Aguirre-Aguirre* (121 F.3d 521 (9th Cir. 1997)). This case concerns the standards for providing a safe haven in the U.S. for aliens who have committed politically-motivated crimes abroad. Aside from its possible foreign affairs implications, the Supreme Court's decision in *Aguirre* should clarify the approach courts should take in examining administrative denials of protection in other political offense cases.

Facts. Juan Anibal Aguirre-Aguirre (*hereinafter* Aguirre) entered the U.S. illegally in 1993. Prior to entry, Aguirre promoted student protests in Guatemala against higher bus fares and the alleged failure of the government to investigate student deaths. These protests at times involved forcibly removing passengers from buses, burning buses, and "trashing" stores. Aguirre also was politically active in Guatemala apart from the student protests. On facing deportation from the U.S., Aguirre claimed that he would be seriously harmed if returned to Guatemala because of his political activities there.

Asylum under U.S. immigration law. The Immigration and Nationality Act of 1952 (INA), as amended, protects aliens here who face persecution abroad due to their race, religion, nationality, political opinion, or membership in a particular social group. The primary form of protection is *asylum*, a discretionary remedy that may be granted to an

alien with a well-founded fear of persecution. Related to *asylum* is the remedy of *withholding of removal*, which is relief that is premised on a likelihood of persecution abroad. Both *asylum* and *withholding of removal* are unavailable under certain circumstances. These include instances in which "there are serious reasons for believing that the alien has committed a serious nonpolitical offense" prior to arriving here.

Prior decisions. During deportation proceedings, an immigration judge granted Aguirre both *asylum* and *withholding of deportation*. This decision was based upon the weight of the evidence presented and a conclusion that prospective threats against Aguirre were all politically-motivated and not based on his having committed common crimes. Subsequently, the Board of Immigration Appeals (BIA) reversed the immigration judge's decision, concluding that "the criminal nature of [Aguirre's] acts outweigh their political nature" and that the ire of the students "manifested itself disproportionately in the destruction of property and assaults on civilians."

In a 2-1 decision, a panel of the United States Court of Appeals for the Ninth Circuit overturned the BIA and agreed with the immigration judge. Interpreting the "serious nonpolitical offense" disqualification, the two-judge majority held that it first needed to examine whether Aguirre's activities were closely linked to a political purpose or, instead, were motivated primarily by personal reasons or personal gain. After finding that Aguirre's acts were politically-motivated, the majority examined whether they were "grossly out of proportion to the alleged objective." Contrasting Aguirre's acts to the bombings and maiming involved in Irish Republican Army cases the Ninth Circuit previously had considered, the majority concluded that Aguirre's act were not of such an "atrocious nature" as to disqualify him from relief. Finally, the majority held that the BIA had erred in failing to take the severity of prospective persecution in Guatemala into account before finding that Aguirre's conduct barred him from our protection. In dissent, a third judge characterized Aguirre's activities as unnecessarily violent and stated that the U.S. should not be a haven for "thugs."

Issues for the Supreme Court. The Supreme Court will determine whether the Ninth Circuit erred in overturning the BIA's decision to bar relief on "serious nonpolitical crime" grounds. In making this determination, the Court may be required to address several subsidiary issues, including:

- How free are the courts to substitute their own interpretation of "serious nonpolitical offense" for that of the BIA? A leading Supreme Court decision suggests that courts should defer to a reasonable agency interpretation of a statute it administers, but other precedent allows for a more active judicial role when the issue is characterized as one of straightforward statutory interpretation.
- In barring relief on "serious nonpolitical offense" grounds, should (or may) the severity of prospective persecution be taken into account? The United Nations High Commissioner on Refugee's Handbook calls for balancing the seriousness of the offenses against the severity of possible persecution, but the BIA and several courts have rejected such a balancing requirement.
- What factors bear on whether certain activities comprise a "serious nonpolitical offense"? Motivation, degree of harm, and effect on bystanders all appear to be relevant, but it is less clear whether any weight should be put on country conditions and the means available for expressing political grievances.