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ESSAYS

SYMPOSIUM: MATERIAL SUPPORT AND THE WAR ON TERROR

MATERIAL SUPPORT: IMMIGRATION AND NATIONAL SECURITY

Bryan Clark⁺ & William Holahan^{}*

On January 29, 2010, the *Catholic University Law Review* held its annual symposium. This year, the Symposium, titled “Immigration and National Security: Material Support and the War on Terror,” focused on the so-called “material-support bar” found in section 212(a)(3)(B) of the Immigration and Nationality Act (I.N.A), which prohibits the admission of any alien who has provided “material support” to a “terrorist organization” or for “the commission of a terrorist activity” to the United States.¹ The material-support bar is the product of four statutory enactments,² the three most recent of which were responses to specific acts of terrorism passed to prevent future terrorist attacks on the United States. Congress’s aim to enhance U.S. national security was noble, but the gradual expansion of the material-support bar has dramatically reduced the number of meritorious refugees and asylum seekers who can resettle in the United States. In some cases, the refugees and asylum seekers denied entry into the United States under the material-support bar are themselves victims of terrorism and are barred because they gave “material support” to a “terrorist organization” after being threatened with torture and death. Others have been barred for their roles in challenging oppressive regimes in their home countries, even though many acted with the support of the U.S. government. The material-support bar also extends to hundreds of

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1. Immigration and Nationality Act (I.N.A.) § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2006); I.N.A. § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i) (providing that “[a]ny alien who . . . has engaged in a terrorist activity . . . is inadmissible to the United States”); *see also infra* note 11.

2. *See* Immigration Act of 1990, 8 U.S.C. § 1182(a); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, 8 U.S.C. § 1182(a)(3); REAL ID Act of 2005, 8 U.S.C. § 1182(a)(3)(B) (2006 & Supp. II 2008); *see also* Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, 8 U.S.C. § 1182(a)(3)(B).

refugees who have resettled in the United States, each of whom is waiting for his status to be adjusted to Lawful Permanent Resident, as well as hundreds of affirmative asylum seekers who petition for asylum after arriving in the United States.

The *Catholic University Law Review's* Symposium addressed the tension between national security and the government's "deep and abiding" "commitment . . . to protecting and assisting refugees" that "is a part of our nation's history and . . . goes to our very core values."³ The Symposium included a panel discussion among material-support experts Anwen Hughes, Jedidah Hussey, and Stephen Schulman, and it was moderated by Professor Carlos Ortiz-Miranda. The following is a summary of the complex issues related to the material-support bar. This summary discusses the issue's legislative history; dissects the material-support bar provisions; applies the material-support bar to refugees and asylum seekers; and examines executive action, case law, and proposals for reform.

I. MATERIAL SUPPORT STATUTORY PROVISIONS

The material-support bar arises from the confluence of four related statutory provisions. First, 8 U.S.C. §§ 1182(a)(3)(B)(i) and 1227(a)(4)(B)(i) provide for the exclusion and deportation of aliens who have engaged, or are likely to engage, in "terrorist activity."⁴ Second, 8 U.S.C. § 1182(a)(3)(B)(iii) defines

3. U.S. DEP'T OF STATE ET AL., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2009: REPORT TO THE CONGRESS, at ii (2008) (quoting then-Secretary of State, Condoleezza Rice) (internal quotation marks omitted).

4. I.N.A. § 212 (a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i), *id.* § 1227(a)(4)(B). Section 1182(a)(3)(B)(i) provides the general grounds for inadmissibility resulting from an alien's involvement in terrorist activities:

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

“terrorist activity.”⁵ Third, 8 U.S.C. § 1182(a)(3)(B)(iv) defines “engag[ing] in terrorist activity,” in part, as “afford[ing] material support . . . for the commission of a terrorist activity[] . . . to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity; [or] . . . to a terrorist organization.”⁶ Fourth, 8 U.S.C. §

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years, is inadmissible.

An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

I.N.A. § 212 (a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i).

Section 1227(a)(4)(B) simply adopts the inadmissibility provisions in § 1182: “Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.” *Id.* § 1227(a)(4)(B).

5. I.N.A. § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii). “Terrorist activity” is any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

I.N.A. § 212(a)(3)(B)(iii), 8 U.S.C. § 1182 (a)(3)(B)(iii).

6. I.N.A. § 212(a)(3)(B)(ii), 8 U.S.C. § 1182(a)(3)(B)(ii). In full, “engage in terrorist activity” means the power of an “individual” or a “member of an organization”

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

1182(a)(3)(B)(vi) broadly defines “terrorist organization” to include, among other specific categories, any “group of two or more individuals, whether organized or not,” that engages in terrorist activity or provides material support for terrorist activities.⁷

The interaction of these four provisions raises two primary issues for refugees and asylum seekers. First, the broad, exceptionless definition of “material support” excludes otherwise meritorious refugees and asylum seekers who give de minimis support to a “terrorist organization” after being threatened with torture or execution. Second, the expansive definition of “terrorist organization” captures refugees and asylum seekers who have fought to challenge dictatorial regimes in their home countries, sometimes with the support of the U.S. government.

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II);

or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

I.N.A. § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(vi).

7. I.N.A. § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(vi). A “terrorist organization” is an organization

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

Id.

II. OVERVIEW OF THE MATERIAL-SUPPORT BAR

A. Legislative History

The material-support bar, as it stands today, was not enacted overnight or even all at once. Its first iteration appeared in the Immigration Act of 1990 when Congress added the words “terrorist activities” to the list of reasons for which aliens may be denied admission⁸ to or

8. Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978, 5067–75 (codified as amended at 8 U.S.C. § 1182(a)) (including “[t]errorist activities” in the list of grounds justifying the exclusion of a person from the United States). Section 6(a) of the Immigration Act of 1990 added § 1182(a)(3)(B)(i), which provided:

(B) TERRORIST ACTIVITIES.—

(i) IN GENERAL.—Any alien who—

(I) has engaged in a terrorist activity, or

(II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is likely to engage after entry in any terrorist activity (as defined in clause (iii)), is excludable. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act, to be engaged in a terrorist activity.

Id. § 106(a), 104 Stat. at 5069.

Section 6(a) of the Immigration Act of 1990 also added 8 U.S.C. § 1182(a)(3)(B)(ii), which read

(ii) TERRORIST ACTIVITY DEFINED.—As used in this Act, the term “terrorist activity” means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive or firearm (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

Id. § 106(a), 104 Stat. at 5069–70.

Finally, section 6(a) of the Immigration Act of 1990 added 8 U.S.C. § 1182(a)(3)(B)(iii), which provided:

(iii) ENGAGE IN TERRORIST ACTIVITY DEFINED.—As used in this Act, the term “engage in terrorist activity” means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

(I) The preparation or planning of a terrorist activity.

deported⁹ from the United States.¹⁰ This 1990 amendment to the INA provides the foundation upon which the present material-support bar provisions stand. In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which was intended “to prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in terrorist activities.”¹¹ Specifically, the AEDPA created a process by which the Secretary of State could designate particular groups as foreign terrorist organizations.¹² Under the Immigration Act of 1990 and the AEDPA, the material-support bar was much narrower than it is today because the definition of “terrorist organization” was limited to those organizations designated by the Secretary of State under 8 U.S.C. § 1189.¹³

In 2001, Congress dramatically enhanced the sweep of the material-support bar by adopting a broader definition of “terrorist organization” in the USA PATRIOT Act.¹⁴ Specifically, the USA PATRIOT Act expanded the definition of “terrorist organization” beyond the foreign terrorist organizations designated by the Secretary of State under 8 U.S.C. § 1189, to include any “group of two or more individuals, whether organized or not, which engages

(II) The gathering of information on potential targets for terrorist activity.

(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit an act of terrorist activity.

(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

Id. § 601(a), 104 Stat. at 5070.

9. *Id.* § 602(a), 104 Stat. at 5077–81 (codified as amended at 8 U.S.C. § 1227(a)(4)(B) (2006)) (including “[t]errorist activities” in the list of grounds justifying deportation from the United States). Section 602(a) adopted the definition of “terrorist activities” provided in section 601(a). *Id.*

10. The I.N.A. has always provided for the exclusion of aliens on security-related grounds. See I.N.A. § 212(a), 8 U.S.C. § 1182(a) (excluding from admission to the United States “[a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States”).

11. AEDPA, Pub. L. No. 104-132, § 301(b), 110 Stat. 1214, 1247.

12. *Id.* § 302, 110 Stat. at 1248–50 (codified as amended at 8 U.S.C. § 1189).

13. See 8 U.S.C. § 1182(a)(3)(B)(i)(IV) (Supp. II 1996); see also REFUGEE COUNCIL USA, THE IMPACT OF THE MATERIAL SUPPORT BAR: U.S. REFUGEE ADMISSIONS PROGRAM FOR FISCAL YEAR 2006 AND 2007 5 (2006), <http://www.rcusa.org/uploads/pdfs/RCUSA2006finpostbl-w.pdf>.

14. USA PATRIOT Act, 8 U.S.C. § 1182(a)(3). Compare 8 U.S.C. § 1182(a)(3)(B) (2000) (lacking a definition of “terrorist organization”), with 8 U.S.C. § 1182(a)(3)(B) (Supp. II 2002) (including a definition of “terrorist organization”).

in” certain overt terrorist activity.¹⁵ These terrorist organizations are commonly known as “Tier III” organizations because the definition appears in 8 U.S.C. § 1182(a)(3)(B)(vi)(III). The USA PATRIOT Act also expanded the definition of “engag[ing] in terrorist activity” to include, among other things, providing material support to Tier III organizations.¹⁶

The REAL ID Act of 2005 further expanded the definition of Tier III organizations to include any “group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in” any terrorist activity, including providing material support.¹⁷ In turn, the REAL ID Act concomitantly broadened the material-support bar because any alien found to have given material support to any such organization is both inadmissible and deportable.

B. The Material-Support Bar Today

Together, these enactments have produced a statute that defines “material support” for terrorism as the provision of

a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training . . . for the commission of a terrorist activity; . . . to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity; [or] . . . to a terrorist organization.¹⁸

The statute defines “terrorist activity” as any activity that is illegal where it is committed or would be illegal if it were committed in the United States, and which involves (1) “hijacking or sabotage of any conveyance”; (2) “seizing or detaining, and threatening to kill, injure, or continue to detain, another individual” for ransom or to compel a third party to “do or abstain from doing any act”; (3) “[a] violent attack upon an internationally protected person”; (4) “[a]n assassination”; (5) the use of a weapon of mass destruction, including biological, chemical, and nuclear weapons, or the use of a firearm or other dangerous weapon with the intent to endanger others or damage property; or (6) conspiracy to carry out any of the aforementioned terrorist activities.¹⁹ A “terrorist organization” is any organization “designated under [8 U.S.C. §] 1189” (Tier I); otherwise designated in the Federal Register (Tier II); or any

15. USA PATRIOT Act, § 411(a)(1)(G), 115 Stat. at 347–48.

16. USA PATRIOT ACT § 411(a)(1)(F), 115 Stat. at 346–47. Compare 8 U.S.C. § 1182(a)(3)(B)(iii) (2000), with 8 U.S.C. § 1182(a)(3)(B)(iv) (Supp. II 2002).

17. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 103(c), 119 Stat. 231, 308 (codified at 8 U.S.C. § 1182(a)(3)(B)(vi) (2006)).

18. 8 U.S.C. § 1182(a)(3)(B)(iv).

19. *Id.* § 1182(a)(3)(B)(iii).

“group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in” the listed activities (Tier III).²⁰

The intricacies of the statutory scheme are important because the interaction of these complex provisions has dramatically affected the United States’ refugee-resettlement program and asylum seekers, because refugees and asylum seekers “can be excluded for admission to the United States for giving any kind of support, no matter how insignificant, to virtually any group of two or more people which has ever used armed force against anyone.”²¹ However, the statute does provide two limited statutory exceptions to the bar.

C. Statutory Exceptions

The first of two limited statutory exceptions that narrow the scope of the material-support bar was enacted by Congress in the USA PATRIOT Act.²² This provision limits the application of 8 U.S.C. § 1182(a)(3)(B)(i)(IX), which renders inadmissible a spouse or child of an alien excluded under the material-support bar for actions that occurred within the last five years.²³ Specifically, the exception permits the admission of a spouse or child “who did not know or should not reasonably have known” of the material support given by the spouse or parent, or who “renounced” the material support that caused the spouse or parent to be deemed inadmissible.²⁴ Although this exception certainly narrows the application of the material-support bar, it does not address the core issues raised by its application to refugees and asylum seekers.²⁵

The second exception, which is similarly limited, truncates the general definition of “terrorist activities” found in 8 U.S.C. § 1182(a)(3)(B)(i) by providing that a member of a Tier III terrorist organization, who would ordinarily be inadmissible, may be admitted to the United States if “the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization.”²⁶ The implications of this exception on the material-support bar are unclear because, on its face, the provision only applies to members of Tier III organizations, not aliens who have given material support to such organizations.²⁷ This provision—a narrow exception for members but not for material supporters—highlights the curious breadth of the material-support bar, particularly after the REAL ID Act’s expansion of the definition of Tier III

20. *Id.* § 1182(a)(3)(B)(vi).

21. REFUGEE COUNCIL USA, *supra* note 13.

22. USA PATRIOT Act, Pub. L. No. 107-56, § 411(a)(1)(D), 115 Stat. 272, 346 (codified as amended at 8 U.S.C. § 1182(a)(3)(B)(ii) (2006 & Supp. II 2008)).

23. 8 U.S.C. § 1182(a)(3)(B)(i)(IX).

24. *Id.* § 1182(a)(3)(B)(ii).

25. *See infra* Part III.

26. 8 U.S.C. § 1182(a)(3)(B)(i)(VI).

27. *See id.*

terrorist organizations. By enacting this exception, Congress implicitly admitted that it might be impossible for a layperson to know that the United States has labeled an organization as “terrorist.” Many Tier III organizations are not “terrorist organizations” in common parlance. Instead, some are opposition political parties that fight for democratic reform in their home countries; others are not “organizations” at all. Thus, the distinction begs the question whether there should be a similar exception to the material-support bar for material supporters, as well as whether the Tier III definition of “terrorist organization” should be revisited.

In addition to these statutory exceptions, Congress empowered the Secretaries of the Departments of State and Homeland Security the power to exempt certain persons and organizations from the material-support bar.²⁸ To a certain degree, both Secretaries have successfully mitigated the negative consequences of the material-support bar for deserving refugees and asylum seekers by heavily exercising this exemption power over the last three years.

D. The Role of the Executive Branch

The difficult substantive policy issues underlying the material-support bar and its application to refugees and asylum seekers have been made exponentially more difficult to resolve because of the numerous government actors involved. Until recently, the politically sensitive nature of the issue caused a stalemate between Congress and the executive branch. On the one hand, Congress lacked the political will to pass legislative amendments that could ameliorate the negative impact of the material-support bar on individual refugees and groups of refugees, as well as the United States’ refugee resettlement program as a whole. Instead, Congress insisted that the executive branch exercise its statutory-waiver authority. On the other hand, the executive branch—specifically, the Secretaries of State and Homeland Security and the Attorney General—was hesitant to exercise its authority to refrain from applying the terrorism-related grounds of inadmissibility to particular aliens who, but for the material-support bar, would have been admissible. Instead, the executive-branch actors emphasized the need for Congress to “fix” the problem it created by amending the material-support statutory scheme so that refugees or asylum seekers with otherwise meritorious claims—people whom neither Congress nor the Secretaries of State or Homeland Security would consider “terrorists” in the traditional sense of the word—would not be rendered inadmissible or deportable.

Various executive-branch actors have both exacerbated the effects of the material-support bar due to their rigid interpretation of the statutory provisions and softened its application by carefully exercising their statutory-waiver authority.

28. *Id.*

1. Statutory Interpretation

The executive branch's effort to enforce the anti-terrorism immigration laws strictly, which the Department of Homeland Security (DHS) has described as "an essential weapon in the Administration's counter-terrorism arsenal,"²⁹ has drawn the ire of refugee and asylum-seeker advocates who describe its interpretation as "extreme, inflexible, and inconsistent with this country's commitments under the Refugee Convention and Protocol," and state that it has "greatly exacerbated the impact of these terrorism-related provisions on legitimate refugees who were never their intended targets."³⁰

Notwithstanding its recognition that "[b]ecause the material support bar casts a broad net, its scope may include those who do not present a risk to U.S. national security and to whom the United States is sympathetic and willing to provide refuge, to the extent allowed by law," DHS has maintained its expansive reading of the statute.³¹ Instead, it has focused its efforts on exercising, and successfully urging Congress to expand, its authority to exempt certain categories of otherwise inadmissible or deportable aliens, aimed at refugees and asylum seekers, from the application of the material-support

29. *The "Material-Support" Bar: Denying Refuge to the Persecuted?: Hearing Before the S. Judiciary Subcomm. on Human Rights and the Law, 110th Cong. (2007)* (statement of Paul Rosenzweig, Deputy Assistant Secretary for Policy, U.S. Dep't of Homeland Sec.) [hereinafter Statement of Paul Rosenzweig]. DHS has successfully used the material-support bar to deport aliens, including:

an alien who was a former board member, fundraiser, and donor to the Benevolence International Foundation (BIF), whose associates in the United States included Aafia Siddiqui (placed on the Federal Bureau of Investigation's Most Wanted Terrorists list after 9/11 for assisting Al Qaeda), as well as members of the "Portland 7," a terrorist cell in Portland, Oregon, which conspired to provide material support to Al Qaeda and the Taliban during the war against the United States in Afghanistan.

Id.

30. HUMAN RIGHTS FIRST, DENIAL AND DELAY 6 (2009). Human Rights First highlighted the following statutory interpretations as particularly troublesome:

Treating victims of armed groups as supporters of the very groups that extorted goods or services from them under threat of violence;

Applying the "terrorism bars" to the acts of children in the same way as to adults, and as a result, barring a number of former child soldiers and child captives of armed groups;

Treating minimal contributions—a few dollars, a chicken, a bag of rice—as "material support;"

Interpreting "material support" to cover virtually anything, including non-violent speech and other purely political activity—e.g. writing for a student newspaper or distributing political flyers—that a person did in connection with his or her membership in a group the Department of Homeland Security deems to be a "terrorist organization" under the immigration laws, including a "Tier III" group;

Treating medical care as "material support;" and

Retroactive application of the USA PATRIOT Act's definition of a "Tier III" organization to groups that no longer exist or that have given up violence, stretching back as far as four decades.

Id.

31. Statement of Paul Rosenzweig, *supra* note 29.

bar.³² From DHS's perspective, this approach is the best of both worlds: DHS can maintain extremely broad authority to deny admission or deport any alien subject to the expansive material-support bar, but it can also curb the "unintended consequences of the material support bar through the secretarial exercises of discretionary authority to exempt deserving aliens."³³ Although the Secretaries of State and Homeland Security (the two cabinet officials who alone have the power to exempt certain aliens from the application of the material-support bar) were slow to issue the first exemptions—both because of the sluggish bureaucracy that defines administrative agencies and because of their prudent decision to proceed with caution—they have now issued nine categorical exemptions, which have allowed roughly 11,500 deserving refugees to enter the country.

2. Exemption/Waiver Authority

Congress first gave the executive branch, specifically the Secretary of State and the Attorney General, in consultation with each other, the power to exempt particular aliens from the material-support bar when they conclude in their "sole and unreviewable discretion" that the bar should not apply.³⁴ However, neither the Secretary of State nor the Attorney General exercised this exemption authority.³⁵

This authority was replaced by an exemption provision contained in the REAL ID Act of 2005.³⁶ The REAL ID Act exemption provision gave the Secretaries of State and Homeland Security, after consultation with each other and the Attorney General, the authority to exempt certain aliens from the application of four aspects of the material-support bar.³⁷ First, the Secretaries could exempt representatives of "a political, social, or other group that endorses or espouses terrorist activity."³⁸ Second, they could exempt members of Tier III organizations.³⁹ Third, the Secretaries could exempt aliens who gave material support to an organization or individual that has engaged in a "terrorist activity."⁴⁰ Fourth, they could exempt members of Tier III organizations labeled as such because they contain subgroups that engage in

32. See *id.*; HUMAN RIGHTS FIRST, *supra* note 30, at 43; see also Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. J, § 691, 121 Stat. 1844, 2364–66 (2007).

33. See Statement of Paul Rosenzweig, *supra* note 29.

34. See 8 U.S.C. § 1182(a)(3)(B)(iv) (Supp. II 2002).

35. See HUMAN RIGHTS FIRST, *supra* note 30, at 41.

36. *Id.*

37. REAL ID Act of 2005, 8 U.S.C. § 1182(d)(3)(B)(i) (2006) (granting "[t]he Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, . . . sole unreviewable discretion" to exempt aliens from application of the material-support bar).

38. I.N.A. § 212 (a)(3)(B)(IV)(bb), 8 U.S.C. § 1182 (a)(3)(B)(i)(IV)(bb).

39. I.N.A. § 212 (a)(3)(B)(i)(VII), 8 U.S.C. § 1182(a)(3)(B)(i)(VII).

40. I.N.A. § 212 (a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

“terrorist activity.”⁴¹ However, this exemption did not allow the Secretaries to waive the application of the material-support bar with respect to a Tier III organization that itself engaged in “terrorist activity.”⁴²

After the 2007 amendment, the Secretaries of State and Homeland Security gained authority to exempt aliens from all but six provisions of the material-support bar: (1) “aliens for whom there are reasonable grounds to believe are engaged in (present activities) or likely to engage in (future activities) terrorist activity”;⁴³ (2) “members of Tier I and Tier II terrorist organizations”;⁴⁴ (3) “representatives of Tier I and Tier II terrorist organizations”;⁴⁵ (4) “aliens who *voluntarily and knowingly* engaged in terrorist activity on behalf of a Tier I or Tier II organization”;⁴⁶ (5) “aliens who *voluntarily and knowingly* endorsed or espoused terrorist activity or persuaded others to do so on behalf of a Tier I or Tier II organization”;⁴⁷ and (6) “aliens who *voluntarily and knowingly* received military-type training from a Tier I or Tier II terrorist organization.”⁴⁸

III. REFUGEE AND ASYLUM-SEEKER PROBLEM

When Congress significantly broadened the material-support bar via the USA PATRIOT Act following the September 11th terrorist attacks, it immediately, though not single-handedly, decimated the United States’ refugee-resettlement program.⁴⁹ Although the United States admitted 73,147 refugees in 2000 and 69,304 refugees in 2001, it admitted only 27,110 in 2002,

41. I.N.A. § 212 (a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

42. See *Oversight of U.S. Refugee Admissions and Policy: Hearing Before the S. Judiciary Subcomm. on Immigration, Border Security and Citizenship*, 109th Cong. (2006) (statement of Ellen Sauerbrey, Assistant Secretary of State, Population, Refugees, and Migration) (noting that “Cuban anti-Castro freedom fighters and Vietnamese Montagnards who fought alongside U.S. forces have been found inadmissible on this basis, as have Karen who participated in resistance to brutal attacks on their families and friends by the Burmese regime”).

43. Memorandum from Michael L. Aytes, Acting Deputy Dir., U.S. Citizenship & Immigration Servs., to Assoc. Dirs., Chief Admin. Appeals, and Chief Counsel, U.S. Citizenship & Immigration Servs. 2 (July 28, 2008) [hereinafter Aytes Memo]; see also 8 U.S.C. § 1182(a)(3)(B)(i)(II).

44. Aytes Memo, *supra* note 43; see also 8 U.S.C. § 1182(a)(3)(B)(i)(V).

45. Aytes Memo, *supra* note 43; see also 8 U.S.C. § 1182(a)(3)(B)(i)(IV)(aa).

46. Aytes Memo, *supra* note 43; see also 8 U.S.C. §§ 1182(a)(3)(B)(i)(I), (a)(3)(B)(iv).

47. Aytes Memo, *supra* note 43; see also 8 U.S.C. § 1182(a)(3)(B)(i)(VII).

48. Aytes Memo, *supra* note 43; see also 8 U.S.C. § 1182(a)(3)(B)(i)(VIII).

49. See REFUGEE COUNCIL USA, *supra* note 13, app. 7; see also U.S. DEP’T OF STATE & BROAD. BD. OF GOVERNORS OFFICE OF INSPECTOR GEN., NO. ISP-I-06-40 REPORT OF INSPECTION: BUREAU OF POPULATION, REFUGEES, AND MIGRATION 3 (2006) (noting that the number of refugee admissions “plummeted” by roughly two-thirds in 2002 in part “because of more rigorous screening requirements for all categories of immigrants seeking entry to the United States”); Susan Benesch & Devon Chaffee, *The Ever-Expanding Material Support Bar: An Unjust Obstacle for Refugees and Asylum Seekers*, 83 INTERPRETER RELEASES 465, 466 (2006) (“The material support problem has nearly shut down the U.S. refugee admissions program for Colombia and Burma . . .”).

which was the first full year for which data about refugee admissions under the expanded material-support bar was available.⁵⁰ Since 2002, the number of refugee admissions has risen steadily each year but has yet to return to pre-September 11th and pre-USA PATRIOT Act levels.⁵¹ In 2007, the United States admitted 48,281 refugees,⁵² and in 2008, the number rose to 60,192, a marked increase compared to recent years.⁵³

But the numbers do not do justice to the human cost of the material-support bar: the bar prevents refugees and asylum seekers with meritorious claims from entering, or remaining, in the United States. Moreover, it prevents members of both groups from obtaining green cards by barring them from changing their status to Lawful Permanent Resident. Accordingly, refugee advocates, the executive branch, and Congress have worked to mitigate the negative consequences of the bar. Thus far, they have made progress in reconciling the United States' legitimate national-security interests with its commitment to providing a refuge for the persecuted.

IV. NATIONAL-SECURITY CONCERNS

Despite the problems that have arisen under the bar, the material-support statute has proven to be an extraordinarily effective tool for federal prosecutors to eliminate support networks used to fund terrorist organizations. Any alien who provides material support to an individual or organization that engages in or supports terrorist activity is inadmissible or ineligible to receive almost all immigration benefits.⁵⁴ Although this principle has proven controversial, many have argued that it is vital to implementing the U.S. government's overall counterterrorism strategy⁵⁵ and is essential to providing the United States with the means to employ counterterrorism measures.⁵⁶ It is clear that terrorists and terrorist organizations require funds and support to operate and levy successful attacks both within and outside the United States.⁵⁷ Congress and the United States courts have reaffirmed this notion: "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that

50. See REFUGEE COUNCIL USA, *supra* note 13, app. 7. Not only was the total number of refugees admitted in 2002 one-third the number admitted in 2000 and 2001, but it fell nearly 43,000 admissions short of the President's goal of 70,000 admissions. See James W. Ziglar, Immigration & Naturalization Servs. Comm'r, Address at the National Immigration Forum Conference (Feb. 1, 2002), available at <http://www.aila.org/content/default.aspx?bc=1016%7c6715%7c12053%7c26279%7c12228%7c2059>.

51. See REFUGEE COUNCIL USA, *supra* note 13, app. 7.

52. U.S. DEP'T OF STATE ET AL., *supra* note 3, at 5.

53. BUREAU OF POPULATION, REFUGEES & MIGRATION OFFICE OF ADMISSIONS, U.S. DEP'T OF STATE, SUMMARY OF REFUGEE ADMISSIONS FISCAL YEAR 2008.

54. I.N.A. § 212 (a)(3)(B)(i), 8 U.S.C. § 1182(a)(3)(B)(i) (2006).

55. See, e.g., Humanitarian Law Project v. Reno, 205 F.3d 1130, 1136 (9th Cir. 2000).

56. *Id.*; see AEDPA, Pub. L. No. 104-132, § 301(a), 110 Stat. 1214, 1247.

57. *Reno*, 205 F.3d at 1136; see AEDPA § 301(a), 110 Stat. at 1247.

conduct.”⁵⁸ Although refugee concerns are important, they must be weighed against the risk of terrorist attacks against U.S. citizens and the effectiveness of the material-support bar in thwarting such attacks.

V. CONCLUSION

Over the years, the material-support bar has proven to be a controversial body of law. The broad, exceptionless definition of “material support” bars otherwise meritorious refugees and asylum seekers who provide de minimis support to a “terrorist organization” after being threatened with torture or execution. Moreover, the broad definition of “terrorist organization” captures refugees and asylum seekers who have challenged dictatorial regimes in their home countries, sometimes even with the support of the U.S. government. Despite its shortfalls, the bar still serves as a necessary counterterrorism tool for the United States to protect its citizens, even if that protection comes at the expense of prohibiting refugees from seeking asylum in the United States.

58. *Reno*, 205 F.3d at 1136 (quoting AEDPA § 301(a)(7), 110 Stat. at 1247).