NOTE

Two Hooligans Forever Barred: When the Immaterial Becomes Material

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ABSTRACT

As victims of persecution, war, and forcible displacement, refugees and asylees are unprotected by their own governments and depend on the compassionate response of others. The United States asylum system, in support of international human rights efforts and humanitarian ideals, offers protection to those fleeing persecution. However, asylum seekers often face a convoluted web of immigration statutes, procedures, and grounds of exclusion that may deem them inadmissible. One ground of inadmissibility, the "material support bar," statutorily bars applicants from asylum if they have provided "material support" to a terrorist organization or for terrorist activity. This provision has been interpreted expansively by immigration and Article III courts and has created dangerous precedent that effectively treats immaterial support as material and victims of terrorism as terrorists.

Part I of this Note details the history of refugee law and the historical purposes for excluding criminals and persecutors from refugee status. Part II analyzes the legislative development of the material support bar and demonstrates how broadly it was drafted. Part III evaluates how federal agencies, immigration courts, and Article III courts have interpreted the statutory text

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even more broadly to exclude not only the criminally dangerous but also their victims. Part IV proposes a two-fold legislative solution and an executive solution. First, Congress should amend the Immigration and Nationality Act to (1) define the word "material" so that insignificant and unrelated actions are exempt under the material support bar and (2) add an explicit duress waiver for asylum seekers during the asylum adjudication process. Second, the Attorney General should certify the Board of Immigration Appeals decision in A-C-M- *, reverse it, and release a decision defining what "material" means consistent with this Note's first legislative proposal.*

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INTRODUCTION

Under the threat of death, Ana was forced to cook, clean, and wash clothes for Salvadoran militant guerillas.[1] She had committed no serious crimes and presented no danger to the United States.[2] Her actions, however, constituted "material support"[3] to a terrorist organization.[4] The Immigration and Nationality Act[5] barred Ana from asylum because she engaged in terrorist activity even though her menial tasks were insignificant or irrelevant for the purposes of terrorism.[6] That she was kidnapped, forced to watch her husband dig his grave before he was shot to death, and under the threat of death herself was immaterial to the United States.[7]

The tradition of providing a safe haven for refugees has existed since ancient times.[8] United States refugee[9] law draws its legal systems

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1 *See* A-C-M-, 27 I. & N. Dec. 303, 304 (B.I.A. 2018); *see also* Jenna Krajeski, *A Victim of Terrorism Faces Deportation for Helping Terrorists*, NEW YORKER (June 12, 2019), https://www.newyorker.com/news/news-desk/a-victim-of-terrorism-faces-deportation-for-helping-terrorists [https://perma.cc/26WR-MKHS].

2 In a prior hearing, the Board of Immigration Appeals also found Ana inadmissible because the guerillas' single attempt to forcibly train her with a gun while she was kidnapped constituted receiving "military-type weapons training." *See A-C-M-*, 27 I. & N. Dec. at 304; Krajeski, *supra* note 1. This Note argues that coercive conditions negate culpability, do not strongly suggest that the asylum seeker is dangerous, and should, therefore, not be a primary basis for denying relief to an otherwise bona fide asylum seeker.

3 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

4 *See A-C-M-*, 27 I. & N. Dec. at 311.

5 Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

6 *See A-C-M-*, 27 I. & N. Dec. at 311 ("Because the material support bar applies, we will dismiss the respondent's cross-appeal. As noted, the Immigration Judge determined that, but for the 'material support' bar, the respondent would have been eligible for asylum on humanitarian grounds . . . . The DHS does not dispute this finding. For the reasons enumerated by the Immigration Judge, we agree.").

7 *See id.* at 307–09.

8 KAREN MUSALO, JENNIFER MOORE, RICHARD A. BOSWELL & ANNIE DAHER, REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 3 (5th ed. 2018).

9 The Immigration and Nationality Act treats "refugees" and "asylees" differently. *Compare* 8 U.S.C. § 1101(a)(42), *with* 8 U.S.C. § 1158(a)(1). A refugee is a person fleeing persecution from their home country and seeking protection *outside* the United States. *See Refugees and Asylees*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/refugees-

and traditions from international law, which has evolved in response to global concerns for human displacement and flight caused by human rights violations.[10] The United States also regulates and restricts access to asylum protection[11] and has enacted a flood of complicated provisions that may deem asylum seekers inadmissible.[12] One of these provisions is the material support bar.[13]

Under the current interpretation of the material support bar, providing a glass of water,[14] paying war taxes under threat of death,[15] repairing a refrigerator,[16] or failing to prevent terrorists from using one's home kitchen[17] constitutes material support. Each of these actions bars an otherwise bona fide individual from asylum.[18] The United States undeniably has a legitimate interest in preventing dangerous criminals, persecutors, and national security risks from entering its borders.[19] However, the material support bar often revictimizes victims of terrorism by likening them to terrorists and denying humanitarian relief.[20] Anyone who has given insignificant or even de minimis support under duress is unworthy of asylum relief under the material support bar.[21] As a result, asylum seekers experience cumbersome years-long delays during appeal—sometimes in mandatory detention

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asylees [https://perma.cc/KV23-J5HL]. An asylee instead applies for protection while they are physically present in the United States or are seeking admission at a port of entry. *See id.*

10 MUSALO, ET AL., *supra* note 8, at 3–4.

11 *Id.*

12 *See generally* 8 U.S.C. § 1182.

13 The Immigration and Nationality Act deems any person engaged in terrorist-related activity inadmissible. *See id.* § 1182(a)(3)(B)(i). Providing material support for terrorist activity or to a terrorist organization constitutes "engag[ing] in terrorist activity" and makes a foreign national ineligible for asylum. *Id.* § 1182(a)(3)(B)(iv).

14 A-C-M-, 27 I. & N. Dec. 303, 314 (B.I.A. 2018) (Wendtland, Board Member, concurring and dissenting).

15 Jennie Pasquarella, *Victims of Terror Stopped at the Gate to Safety: The Impact of the "Material Support to Terrorism" Bar on Refugees*, 13 HUM. RTS. BRIEF 28, 30 (2006).

16 *Id.*

17 Barahona v. Holder, 691 F.3d 349, 354–56 (4th Cir. 2012).

18 Pasquarella, *supra* note 15, at 32.

19 Congress has plenary power to determine what groups of foreign nationals may be admitted to the United States. *See, e.g.*, Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."). The political branches' interests in national security often supersede the interests of an asylum applicant seeking admission. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2419–20 (2018).

20 *See* Steven H. Schulman, *Victimized Twice: Asylum Seekers and the Material-Support Bar*, 59 CATH. U. L. REV. 949, 954–55 (2010).

21 A-C-M-, 27 I. & N. Dec. 303, 308 (B.I.A. 2018).

until their order of removal is administratively final.[22] Only after this uncertain, byzantine process may an applicant seek a discretionary waiver—which is unreliable and unreviewable by any court.[23]

The current interpretation is flawed from a statutory interpretation perspective and impermissible given the United States's obligations under international asylum law.[24] Congress and the Attorney General should enact reforms to give the word "material" its plain meaning by only categorizing acts that are both relevant and significant to terrorism as material.

Part I of this Note details the history of international refugee law and the historical purposes behind excluding certain groups. Part II analyzes the legislative development of the material support bar and offers a common-sense statutory interpretation. Part III evaluates the current interpretation through the Board of Immigration Appeals and Article III court decisions. Part IV proposes a two-fold legislative solution and an executive solution. The legislative solution proposes two amendments to the Immigration and Nationality Act to limit the bar's overinclusive reach. The first amendment would define "material" so that insignificant and unrelated actions are exempt under this provision. The second would add an explicit duress waiver available to asylum seekers during the adjudication process because victims acting under duress are neither culpable nor significant risks to national security. Last, the executive solution calls upon the United States Attorney General to certify *A-C-M-*,[25] overrule it, and release a new decision defining what "material" means consistent with the first legislative amendment.

I. U.S. Asylum Law

Any asylum applicant seeking admission to the United States is subject to grounds of inadmissibility at the time of admission.[26] The

22 *See* Schulman, *supra* note 20, at 954, 962.

23 *See id.* at 954; U.S. Citizenship & Immigr. Servs., Fact Sheet: Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal (2008), https://www.uscis.gov/sites/default/files/document/fact-sheets/USCIS_Process_Fact_Sheet_-_Cases_in_Removal_Proceedings.pdf [https://perma.cc/5ZSY-ZJRP].

24 *See infra* Part I (discussing the history of U.S. asylum law).

25 27 I. & N. Dec. 303 (B.I.A. 2018).

26 *See* 8 U.S.C. § 1182.

Immigration and Nationality Act delineates a slew of inadmissibility grounds, including health, crime, and security-related considerations.[27]

The criteria for selection reflect the competing goals of refugee policy grounded in humanitarian, human rights, and national self-interest.[28] Welcoming countries have limited resources and are often concerned with foreign policy considerations,[29] unfounded asylum claims, and national security.[30]

The United States regulates access to asylum by defining who is eligible and ineligible.[31] Under the Immigration and Nationality Act, foreign nationals are eligible for asylum or withholding of removal if they have faced or fear persecution based on race, nationality, political opinion, membership in a particular social group, or religion.[32] Asylum status grants a host of benefits, including protection from deportation to one's home country,[33] work authorization,[34] permission to travel overseas,[35] federal welfare benefits,[36] a path to citizenship,[37] and the ability to petition to bring family members to the United States.[38]

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27 *See id.* § 1182(a)(1) (health-related grounds); § 1182(a)(2) (criminal-related grounds); § 1182(a)(3) (security-related grounds); § 1182(a)(4) (public charge).

28 *See* STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 1135 (7th ed. 2019); Daniel J. Steinbock, *The Qualities of Mercy: Maximizing the Impact of U.S. Refugee Resettlement*, 36 U. MICH. J.L. REFORM 951, 994–95 (2003) (proposing that U.S. selection priorities should combine national interest and the interests of refugees and their home countries). Some scholars argue that humanitarian ideals and human rights considerations are merely a facade. *See* James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L. L.J. 129, 130 (1990) (arguing that "[i]n practice, however, international refugee law seems to be of marginal value in meeting the needs of the forcibly displaced and, in fact, increasingly affords a basis for rationalizing the decisions of states to refuse protection").

29 The United States has historically turned away refugee and asylum applicants fleeing countries friendly with the United States. *See* LEGOMSKY & THRONSON, *supra* note 28, at 1135. Asylum seekers from these countries tend to be economic migrants fleeing poverty instead of persecution based on race, religion, nationality, membership in a particular social group, or political opinion. *See id.*

30 *Id.* at 1153–54.

31 A host country realistically cannot accept all persons seeking refuge. *See id* at 1135. Selection criteria further weeds out those a country believes are undeserving of protection. *See id.*

32 8 U.S.C. § 1101(a)(42) (defining "refugee"); *id.* §§ 1158(b)(1)(A), 1231(b)(3).

33 *Id.* § 1158(c)(1)(A).

34 *Id.* § 1158(c)(1)(B); 8 C.F.R. §§ 274a.12(a) (3), (5), (10) (2022).

35 8 U.S.C. § 1158(c)(1)(C).

36 *Id.* § 1612(a)(2)(A)(i)–(iii), (b)(2)(A)(i)(I)–(III).

37 *Id.* § 1159(b).

38 *See I-730, Refugee/Asylee Relative Petition*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 4, 2023), https://www.uscis.gov/i-730 [https://perma.cc/DP8B-4W9N].

In contrast to asylum, withholding of removal (or "nonrefoulement"[39]) is a less stable form of protection. Although it protects a person from being returned to her home country of persecution,[40] it does not allow one to bring family members, provides no path to citizenship, and can cause family separation.[41] Under international treaty obligations, the United States is only required to grant withholding of removal to qualified applicants; granting asylum and its various benefits is purely discretionary.[42]

The Immigration and Nationality Act details a host of conditions that deem applicants inadmissible and, therefore, ineligible for asylum and withholding of removal. The material support bar has broadened the scope of those considered inadmissible in a manner inconsistent with international treaty obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

A. Roots in International Asylum Law

From its inception, international refugee law sought to provide protection for refugees fleeing war and exclude national security threats from that protection.[43] Conceptualized over 70 years ago, the United Nations 1951 Refugee Convention ("Refugee Convention") was "the most comprehensive codification of the rights of refugees"[44] and still stands as the "centrepiece of international refugee protection today."[45] The Refugee Convention is rooted in Article 14 of the Uni-

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39 LEGOMSKY & THRONSON, *supra* note 28, at 1137.

40 *See id.*

41 *See* U.S. DEP'T JUST., EXEC. OFF. FOR IMMIGR. REV., DOC. NO. 09012635, FACT SHEET: ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS 6 (2009). In addition, the United States may deport the individual to a different country as long as they will not be persecuted there. *See* 8 U.S.C. § 1231(b). If the conditions in the applicant's home country improve, the government may seek the person's deportation. *See id.*

42 *See* Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention] ("No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.").

43 *See* LEGOMSKY & THRONSON, *supra* note 28, at 1140–42.

44 U.N. High Comm'r for Refugees, Convention and Protocol Relating to the Status of Refugees 3 (2010), [hereinafter Refugee Convention Reprint], https://www.unhcr.org/en-us/3b66c2aa10 [https://perma.cc/MHG9-S3ML].

45 *Id.* at 2; *see also* U.N. High Comm'r for Refugee for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, U.N. Doc. HCR/1P/4/ENG/Rev.4 (2019).

versal Declaration of Human Rights, which recognizes the right of every person to seek and enjoy relief from persecution.[46]

Originally enacted as a post-World War II instrument, the Refugee Convention limited protection to refugees who had fled Europe before January 1, 1951.[47] Its subsequent amendment, the 1967 Protocol Relating to the Status of Refugees,[48] broadened the refugee definition to all eligible persons beyond those affected by World War II.[49] This amendment signaled a progressive development toward international human rights law by removing the geographic and temporal limitations to refugee status and providing universal coverage to those forcibly displaced.[50]

The fundamental principles underpinning the Refugee Convention include nondiscrimination, nonpenalization, and nonrefoulement, which protects a refugee from being expelled to a country where she fears a threat to life or freedom.[51] The Refugee Convention's "principle of *non-refoulement* is so fundamental that no reservations or derogations may be made to it."[52] It reflects the international community's commitment to protecting fundamental human rights, such as the right to life, freedom from torture or cruel punishment, liberty, and security of person.[53] The Refugee Convention recognizes the right of any person to seek asylum from persecution[54] but is also concerned with excluding criminals, persecutors, and other dangers to national security.[55] For example, certain portions of the Refugee Convention

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46 Refugee Convention Reprint, *supra* note 44, at 2; *see also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948).

47 *See* Refugee Convention Reprint, *supra* note 44, at 2.

48 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

49 *Id.*; *see also* Refugee Convention Reprint, *supra* note 44, at 3 (defining refugee as "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion").

50 *See* Protocol Relating to the Status of Refugees, *supra* note 48, 19 U.S.T at 268, 606 U.N.T.S at 1967.

51 *See* Refugee Convention Reprint, *supra* note 44, at 3; *see also* Refugee Convention, *supra* note 42, art. 3 (stating Convention's provisions must be applied without discrimination); *id.* art. 31 (recognizing circumstances surrounding forcible displacement and that asylees may sometimes *have* to break immigration rules through illegal entry or stay); *id.* art. 32 (noting general prohibition on expulsion of refugees); *id.* art. 33 (detailing prohibition on refoulement).

52 *See* Refugee Convention Reprint, *supra* note 44, at 3.

53 *See Note on Non-Refoulement*, Exec. Comm. of the High Comm'r's Programme, Rep. of the Subcomm. of the Whole on Int'l Prot. on Its Twenty-Eighth Session, U.N. Doc. EC/SCP/2 (Aug. 23, 1977).

54 Refugee Convention Reprint, *supra* note 44, at 2.

55 *Note on the Exclusion Clauses*, U.N. High Comm'r for Refugees Standing Comm., U.N.

(i.e., "Exclusion Clauses") deny refugee status to certain persons even if they possess a well-founded fear of persecution.[56]

B. Traditional Bars to Asylum: Exclusion and Refoulment Clauses

The Refugee Convention's Exclusion Clauses bar the following groups from receiving refugee status: those who have (1) "committed a crime against peace, a war crime, or a crime against humanity," (2) "committed a serious non-political crime," or are (3) "guilty of acts contrary to the purposes and principles of the United Nations."[57]

First, a "crime against peace" includes any crimes relating to "the planning or waging of a war of aggression, or a war in violation of international treaties."[58] A "war crime" refers "to violations of international humanitarian law or the laws of armed conflict."[59] A "crime against humanity" is an "inhumane act[] such as murder, extermination, enslavement, . . . torture, rape, and persecution, committed as part of a widespread or systematic attack against any civilian population . . . ."[60]

Second, the Refugee Convention excludes anyone who has committed "serious non-political crimes."[61] The "seriousness" of a crime depends on the extent of harm caused and the type of penal sentence it attracts—usually long periods of custodial punishment.[62] These crimes generally refer to crimes that are especially egregious, including rape, homicide, armed robbery, and arson.[63] A nonpolitical crime is one in which other motives, such as personal gain, are the driving force.[64] This subpart applies to terrorism—though terrorist acts may also fall under the first exclusion clause as a "crime against humanity," or under the third exclusion clause as an act that threatens the "purposes and principles of the United Nations."[65] To justify exclusion, the

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Doc. EC/47/SC/CRP.29 (May 30, 1997), [hereinafter *Exclusion Clauses Note*] https://www.unhcr.org/en-us/excom/standcom/3ae68cf68/note-exclusion-clauses.html [https://perma.cc/PC5M-5ZV4].

56 *See id.*

57 Refugee Convention, *supra* note 42, art. 1F.

58 *Exclusion Clauses Note*, *supra* note 55, ¶ 9.

59 *Id.* ¶ 10.

60 *Id.* ¶ 11.

61 *Id.* ¶ 16.

62 U.N. High Comm'r for Refugees, UNHCR Statement on Article 1F of the 1951 Convention 12 (2009).

63 *Exclusion Clauses Note*, *supra* note 55, at ¶¶ 16–19.

64 *Id.* ¶ 17.

65 *See* U.N. High Comm'r for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, ¶ 82 (Sept. 4, 2003), http://www.unhcr.org/refworld/docid/3f5857d24.html [https://perma.cc/NA89-DA6X].

individual must have knowingly committed the act of terrorism or knowingly made a *substantial* contribution to it.[66] Crimes that do not directly cause violence but support it, such as donating money to terrorist groups, must still meet the requirement of seriousness.[67] One who significantly contributes money to a terrorist organization may be guilty of a serious nonpolitical crime.[68] In contrast, small and sporadic donations may not be serious enough.[69]

Third, any person "guilty of acts contrary to the purposes and principles of the United Nations" is excludable under the Refugee Convention.[70] Given the United Nations's goals "to maintain international peace and security" and to respect human rights, acts of terrorism threatening global security likely fall within this provision.[71]

The Refugee Convention also authorizes the recission of refugee status for any person who later becomes a national security threat in the country of asylum.[72] Under the clause permitting refoulement ("Refoulement Clause"), a refugee who subsequently becomes a severe threat may be denied the right of nonrefoulement.[73] The threat must be so exceptional that the *only* way to counter it is to remove the offender from the country.[74]

C. *The Exclusion and Refoulement Clauses Preserve the Integrity of Asylum and Keep Host Countries' National Security Interests Safe*

The Exclusion Clause and the Refoulement Clause have two essential purposes. First, it preserves the integrity of asylum by denying protection to morally and criminally culpable wrongdoers who should be held legally accountable for their serious transgressions.[75] The Clauses deem these individuals undeserving of protection to promote

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66 *See id.* ¶ 59.

67 *See id.* ¶ 82.

68 *See id.*

69 *See id.*

70 Refugee Convention, *supra* note 42, art. 1F(c).

71 U.N. High Comm'r for Refugees, *supra* note 65, ¶¶ 46 n.39, 83.

72 Refugee Convention, *supra* note 42, art. 33(2) ("The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.").

73 *See id.*

74 *See* U.N. High Comm'r for Refugees, *supra* note 65, ¶ 10.

75 *See Exclusion Clauses Note*, *supra* note 55, ¶ 3.

"ideas of humanity, equity, and the concept of refuge."[76] A perpetrator guilty of heinous war crimes and torture of civilians should not be able to seek refuge in another country in fear that he will now be persecuted because the war did not end up in his favor.[77] Second, the Clauses safeguard the host country from dangerous criminals. Those who indiscriminately attack innocent civilians, systematically commit genocide, or perform other egregious acts demonstrate a predisposition toward unlawful violence and are likely community and security risks.[78]

The principle of nonrefoulement is so imperative that former persecutors barred under the Exclusion Clause may nonetheless be granted refugee status to avoid torture or death upon return to their home country.[79] The United Nations High Commissioner for Refugees has emphasized that the Exclusion Clauses must be "applied in a manner proportionate to their objective" and in light of the Refugee Convention's goal in serving humanitarian interests.[80] States must use a balancing test and weigh the seriousness of the crime against the level of persecution the offender will face in their home country. However, to protect the integrity of asylum, this is a narrow exception only for exceptional cases and only after a thorough assessment of the applicant's circumstances.[81]

The Convention and Protocol also emphasize a knowledge requirement. To be excluded, a person must be personally responsible for a crime or must make a "substantial contribution" to it.[82] For example, one would face individual responsibility if they made a significant contribution to terrorist activity and knew that it would accomplish such aim.[83] The United Nations, however, recognizes that the Exclusion Clauses may not be justifiable where the person did not

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76 *Id.* (If protection were granted to persecutors and criminals of grave offenses, "the practice of international protection would be in direct conflict with national and international law[] and would contradict the humanitarian and peaceful nature of the concept of asylum").

77 *See id.*

78 *See id.*

79 *See Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, U.N. High Comm'r for Refugees, ¶ 9, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003), [hereinafter *UNHCR Guidelines on International Protection*] https://www.unhcr.org/en-us/publications/legal/3f7d48514/guidelines-international-protection-5-application-exclusion-clauses-article.html [https://perma.cc/M3W3-GJ8Z].

80 *See id.* ¶ 24.

81 Courtney Schusheim, *Cruel Distinctions of the I.N.A.'s Material Support Bar*, 11 N.Y.C. L. Rev. 469, 475 n.37 (2008).

82 *See UNHCR Guidelines on International Protection*, *supra* note 79, at ¶ 18.

83 *See id.*

have the requisite knowledge and intent, acted under duress, or had expressed expiation of the crime.[84] Thus, absolute bars to asylum appear inconsistent with the Refugee Convention.[85]

The United States has multiple provisions that bar certain national security risks and dangerous individuals from asylum.[86] These provisions also reflect the primary purpose of the Convention's Exclusion Clause.[87] Under the Immigration and Nationality Act, individuals explicitly barred from asylum protection include (1) persecutors, (2) those convicted of a particularly serious crime in the United States, (3) those who have committed a serious nonpolitical crime abroad, (4) those who engaged in terrorist activity, (5) representatives of foreign terrorist organizations, and (6) those that otherwise pose a threat to national security.[88]

The United States's categories for exclusion appear consistent with its obligations under international law by conditioning relief on the applicant's criminal culpability and risk to national security.[89] Terrorists and their supporters indicate a proclivity for violence, and the United States has legitimate interests in keeping its nation and people safe.[90] However, the United States's bars to asylum are more extensive in scope than the Refugee Convention's.[91] In particular, those who have engaged in terrorist activity under the material support bar, are barred from relief even if they pose no national security risk.[92] Consequently, victims of terrorism, such as Ana, are seen as dangerous as terrorists.

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84 *See id.* ¶¶ 21–23.

85 *See id.*

86 In 1968, the U.S. acceded to the Refugee Convention by adopting the Protocol. INS v. Cardoza-Fonseca, 480 U.S. 421, 429 (1987). The United States also passed the Refugee Act of 1980 to bring U.S. laws into conformance with international refugee law. *See id.* at 424. The Refugee Act amended the Immigration and Nationality Act, adopted the Convention's and Protocol's definition of "refugee," and created domestic asylum and resettlement programs. *See* LEGOMSKY & THRONSON, *supra* note 28, at 1148–50; ANWEN HUGHES, HUM. RTS. FIRST, DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW'S "TERRORISM BARS" ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES 15 (2009).

87 *See* HUGHES, *supra* note 86, at 15–16.

88 8 U.S.C. § 1158(b)(2)(A) (bars to asylum); § 1231(b)(3)(B) (bars to withholding of removal); *see also* HUGHES, *supra* note 86, at 15–16.

89 *See* LEGOMSKY & THRONSON, *supra* note 28, at 1133, 1153–54.

90 *See* HUGHES, *supra* note 86, at 28 (recognizing that bars related to terrorism were justified to protect the United States's security).

91 *See id.* at 16 (detailing how U.S. law has broadened the expansions in the Refugee Convention).

92 *See id.*

II. The Material Support Bar and its Overbroad Text

A. The Immigration Act of 1990, "Terrorist Activity," and "Material Support"

Before the 1990s, the United States had no explicit terrorism-related provision for denying asylum.[93] Several terrorist events, such as the World Trade Center bombing and the Oklahoma City bombing, brought terrorism into the public discourse.[94] The Immigration Act of 1990[95] revised the exclusion grounds and introduced the material support bar.[96] Congress added it "as part of a broader effort to streamline and modernize the security and foreign policy grounds for inadmissibility and removal."[97]

Under the Immigration Act of 1990, any individual who has provided "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" is deemed to have engaged in a terrorist activity and is barred from admission.[98]

Terrorist activity was also broadly defined as any unlawful activity involving any one of a variety of violent acts, including "the use of any . . . 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."[99]

At first glance, the United States's desire to exclude those who engage in "terrorist activity" appears consistent with its obligations under international law. The Refugee Convention's Exclusion and Refoulement Clauses encompass acts of terrorism and authorize excluding persons who commit serious crimes.[100] Terrorists should be held morally culpable for their heinous acts and deemed inadmissible because their propensity for unlawful violence threatens the safety of the United States.

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93 *See* Legomsky & Thronson, *supra* note 28, at 550.

94 *See id.*

95 *See* Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978.

96 *See id.* § 601, 104 Stat. at 5067*; see also* Michael John Garcia & Ruth Ellen Wasem, Cong. Rsch. Serv., RL32564, Immigration: Terrorist Grounds for Exclusion and Removal of Aliens 3 (2010).

97 Garcia & Wasem, *supra* note 96, at 3.

98 Immigration Act of 1990 § 601(a).

99 *Id.* In 1996, Congress expanded the material support bar to include support given to terrorist organizations. Hughes, *supra* note 86, at 22.

100 Hughes, *supra* note 86, at 1.

Though rooted in legitimate concerns about the integrity of asylum and the dangerous nature of criminals, the current definition is much too expansive. The definition includes individuals who commit "crimes" for noble purposes or may not be a genuine threat to the United States. "Terrorist activity" includes virtually *any* use of armed force by a nonstate actor, directed at *anyone or anything*, for *any* reason other than personal financial gain.[101] Committing a violent action, even with the support of the United States, against a dictatorial regime or oppressive government constitutes terrorist activity.[102] Examples of individuals who have committed "terrorist activity" include George Washington and armed revolutionaries against the British, the young Jewish fighters in the Warsaw Ghetto Uprising resisting Nazi Germany's efforts to deport them into death camps, and Iraqi groups who fought against the regime of Saddam Hussein with the support from President George H. W. Bush.[103] Under the Immigration and Nationality Act, these people have no legal defenses and are statutorily barred from asylum for committing terrorist activities.

The legislative history of the Immigration Act of 1990 indicates almost nothing about the intent of Congress concerning the material support bar.[104] The Board of Immigration Appeals even stated that it is "unaware of any legislative history which indicates a limitation on the definition of the term 'material support.'"[105] A 1988 draft bill by the House Committee on the Judiciary provides a limited analysis of the proposed material support bar.[106] The Judiciary Committee opined that it was part of a broader effort to combat international and domestic terrorism "by excluding . . . those who have engaged in terrorist activities or who are likely to engage in such activity after entry to the United States."[107] The draft noted that "?engaging in terrorist activity' . . . includes activities terrorists often find necessary for the accomplishment of their mission," such as "gathering information on targets, providing any type of material support, such as transportation, communications, funds, weapons, and explosives," or "soliciting funds for terrorist activity."[108] Actions that are unnecessary for terrorism or ex-

101 *Id.* at 3–4.

102 *See id.*

103 *See id.*

104 S-K-, 23 I. & N. Dec. 936, 943 (B.I.A. 2006).

105 *Id.*

106 *See* H.R. REP. NO. 100-882, at 29–30 (1988).

107 *Id.* at 29.

108 *Id.* at 29–30. Acting as a conduit to deliver messages or provide food or documents may also constitute engaging in terrorist activity. *See id.*

amples of immaterial support were not included.[109] The Committee also emphasized a mens rea requirement to find that material support was given.[110] This suggests that an asylum seeker who did not have the requisite knowledge or intent to provide material support to terrorism or provided support under duress should not be subject to the material support bar.[111]

Despite the broad definition of "terrorist activity" and the limited legislative history surrounding the material support bar, a proper statutory interpretation of the bar requires limiting its application to truly *material* actions.

1. Statutory Analysis of the Material Support Bar

The Immigration and Nationality Act defines the term "engage in terrorist activity" to encompass numerous activities, including:

> [T]o 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 . . . .[112]

The Immigration and Nationality Act's expansive text has devastating consequences for asylum seekers who can be barred for de minimis acts of support. Section II.A.1 delineates a clear, commonsense reading of how courts and agencies *should* interpret the statutory text of the material support bar and give the word "material" its meaning. With this foundation, Section III.B demonstrates how federal agencies and courts *actually* interpret the material support bar exceeding the provision's scope.

Beginning with the plain language of the statute, *Black's Law Dictionary* defines material as (1) "[h]aving some logical connection with the consequential facts" and (2) "of such a nature that knowledge of the item would affect a person's decision-making; significant; essential."[113] The word material should encompass both definitions by incorporating a relevance and significance requirement.[114]

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109 *See id.*

110 *See id.* (stating that engaging in terrorist activities "*necessitate[s]* a finding that the actor knew, or reasonably should have known, that such activities afforded support to the terrorist act") (emphasis added).

111 *See id.*; *see also supra* notes 82–85 and accompanying text.

112 8 U.S.C. § 1182(a)(3)(B)(iv) (emphasis added).

113 *Material*, BLACK'S LAW DICTIONARY (11th ed. 2019).

114 *See* Singh-Kaur v. Ashcroft, 385 F.3d 293, 298 (3d Cir. 2004) (assessing *Black's Law*

First, the context surrounding the provision suggests that the material support should have some logical connection or relevance to terrorism.[115] The subparts beneath the provision delineate the bar's purpose and who the recipient must be.[116] Asylum applicants are barred from admission if they have provided material support for terrorist activity,[117] to anyone who has committed or plans to commit terrorist activity,[118] or to any terrorist organization.[119] These three categories indicate that support must be relevant to terrorism.

Second, "material" should incorporate the significance definition as a threshold requirement so that the word has independent meaning from "support."[120] If Congress intended to include insignificant or de minimis support, it would have simply barred any "support" and not "material support."[121] The provision uses "material support" as the general term and provides a few specific examples of actions that constitute material support.[122] These include providing 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."[123] All these examples are clearly important to terrorist activity, terrorists, and their organizations.[124] Analyzing the enumerated examples under the canon of statutory construction, *ejusdem generis*,[125] other types of material support must be of a same kind and degree and directly relate to terrorist activity.[126] These acts imply a

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Dictionary definition); Sesay v. Att'y Gen. of U.S., 787 F.3d 215 (3d Cir. 2015) (holding that "'material' must be ascribed some meaning" but declining to "define the outer boundaries of materiality"); *In re* [Redacted], 2009 WL 9133770, at *2 (B.I.A. July 10, 2009) (stating that the standard dictionary definition of "material" indicated that support should be "substantial, noticeable, of importance, and relevant").

115 *See* Hosseini v. Nielsen, 911 F.3d 366, 375 (6th Cir. 2018).

116 8 U.S.C. § 1182(a)(3)(B)(iv).

117 *Id.* § 1182(a)(3)(B)(iv)(VI)(aa).

118 *Id.* § 1182 (a)(3)(B)(iv)(VI)(bb).

119 *Id.* § 1182 (a)(3)(B)(iv)(VI)(cc)–(dd).

120 A-C-M-, 27 I. & N. Dec. 303, 313 (B.I.A. 2018) (Wendtland, Board Member, concurring and dissenting).

121 *Id.*

122 *Id.* at 313 n.1.

123 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

124 *See* Singh-Kaur v. Ashcroft, 385 F.3d 293, 304 (3d Cir. 2004) (Fisher, J., dissenting).

125 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, at xiv (2012) ("Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned (*ejusdem generis*).").

126 *See A-C-M-*, 27 I. & N. Dec. at 313–14 (Wendtland, Board Member, concurring and dissenting).

level of severity and significance to advancing the goals of terrorism and should thus exclude incidental or de minimis levels of support.[127]

B. The USA PATRIOT Act, Terrorist Activity, and Material Support

Humanitarian principles behind international refugee law highlight the need for a common-sense statutory interpretation of the material support bar so that the provision is not overinclusive and does not deny relief to deserving asylum seekers. However, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act")[128] and REAL ID Act of 2005[129] expanded the scope and breadth of the material support bar with devastating consequences. In particular, the statutory changes created a three-tiered definition of terrorist organization and added that providing material support to any of these tiers constitutes "terrorist activity."[130]

Before the PATRIOT Act, the Secretary of State could designate a terrorist organization as a Tier I foreign terrorist organization.[131] The PATRIOT Act created two new classes of terrorist organizations: Tier II and Tier III.[132] The Secretary of State was similarly authorized to designate Tier II organizations after finding the organization engaged in terrorist activity.[133] Tier III is the "undesignated category" or catch-all class for groups that are not formally recognized by the U.S. government.[134] It includes "any group of two or more individuals,

127 *See* Nuure v. Garland, 857 F. App'x 394, 396–97 (9th Cir. 2021) (Friedland, J., concurring).

128 USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

129 REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

130 *See* Craig R. Novak, *Material Support to Terrorists or Terrorist Organizations: Asylum Seekers Walking the Relief Tightrope*, 4 MOD. AM. 19, 19–21 (2008); HUGHES, *supra* note 86, at 3.

131 A Tier I is defined as an organization "designated under section 1189 of this title." 8 U.S.C. § 1182(a)(3)(B)(vi)(I). Section 1189 authorizes the Secretary of State to designate a Tier I organization if it "is a foreign organization" that "engages in terrorist activity" or "retains the capability and intent to engage in terrorist activity or terrorism" and "threatens the security of United States nationals or the national security of the United States." *Id.* § 1189(a)(1).

132 *See* Novak, *supra* note 130 at 19.

133 *See* Bureau of Counterterrorism, *Terrorist Exclusion List*, U.S. DEP'T OF STATE, https://www.state.gov/terrorist-exclusion-list [https://perma.cc/6C4L-WFEC]. Tier I and II groups include terrorist organizations like Al-Qaeda, FARC, and Hamas. *See* Bureau of Counterterrorism, *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, https://www.state.gov/foreign-terrorist-organizations/ [https://web.archive.org/web/20230526081654/https://www.state.gov/foreign-terrorist-organizations/].

134 Unlike Tier I and II organizations, Tier III organizations do not need a formal designation from the Secretary of State or other central government authority. *See* HUGHES, *supra* note 86, at 21 ("There is no requirement that such groups be listed or designated by any central

whether organized or not, which engages in, or has a subgroup which engages in . . . terrorist activity."[135] Tier III organizations are determined on a case-by-case basis by an immigration adjudicator and include any group that has used violence for any reason, except for sole pecuniary purpose.[136] Under the broad definition of "terrorist activity," any resistance or rebel group engaged in armed conflict would be a Tier III terrorist organization.[137] The political purpose of the organization—e.g., prodemocracy—and its conduct during armed conflict—e.g., compliance with laws of war—are irrelevant to the determination.[138]

Another significant change in the PATRIOT ACT expanded the scope of engaging in terrorist activity by prohibiting the provision of "material support" to *any* tier "terrorist organization."[139] Given the issues with the already-broad definition of Tier III organization, any group that uses force for an unlawful purpose other than personal enrichment is barred from asylum. Hypothetically, two hooligans blowing up a mailbox with fireworks on the Fourth of July would constitute a Tier III terrorist organization.[140] These hooligans and anyone who supported them—even if that support is minimal or unrelated to the Fourth of July shenanigans—would be statutorily barred from asylum.[141]

Additional statutory changes through the REAL ID Act expanded the reach of the material support bar. Lacking actual knowledge that the support was material is no longer a defense.[142] Now, applicants need to prove "by clear and convincing evidence" that they "did not know, and should not reasonably have known, that the or-

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authority, in any historical or political context, or based on any assessment that the group poses a risk of a kind that should be of concern to the U.S. government.").

135 *Id.* at 3 (citation omitted); *see also* Novak, *supra* note 130 at 19.

136 *See* HUGHES, *supra* note 86, at 5 ("A group 'is a Tier III group' when some immigration adjudicator, somewhere, says that it is, in the context of an individual case. And when that happens, there is no public announcement."); Schulman, *supra* note 20, at 952.

137 *See* HUGHES, *supra* note 86, at 25; *see also supra* Section II.A.

138 *See* HUGHES, *supra* note 86, at 21.

139 *See* 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

140 This humorous example is credited to Professor Leon Fresco from his Fall 2021 Immigration Law I class at The George Washington University Law School.

141 Under *A-C-M-*, de minimis support that is arguably insignificant and does not directly contribute to terrorist activities constitutes "material support." A-C-M-, 27 I. & N. Dec. 303, 307–09 (B.I.A. 2018); *see also* Schulman, *supra* note 20, at 952 ("Providing material support to one of these unlisted Tier III organizations—interpreted to include any group that uses violence against persons or property for any purpose, no matter how justifiable, unless solely for monetary gain—or simply to one of its members or subgroups thus became a bar to asylum.").

142 *See* HUGHES, *supra* note 86, at 22.

ganization was a terrorist organization."[143] It does not matter whether the applicant gave material support with intent to aid or harm.[144] The Immigration and Nationality Act also does not differentiate support provided willingly or under duress.[145]

During floor debates for the REAL ID Act, Representative John Hostettler (R-IN) advocated for the legislation's passage to close the ability of terrorists to exploit loopholes in the United States's immigration system.[146] Rep. Hostettler argued that without the amendment, a foreign national could escape deportation if he did not *actually* know the support would further terrorist activity.[147] He reasoned that material support would benefit the organization's "criminal, terrorist functions, regardless of whether such support was ostensibly intended to support nonviolent, nonterrorist activities."[148] Rep. Hostettler explained that an organization's charitable or humanitarian activities cannot be separated from its violent, terrorist operations: "money will ultimately go to bombs and bullets rather than babies, or, because money is fungible, it will free up other funds to be used on terrorist activities."[149]

The legislative debate for the REAL ID Act demonstrates that at least some congressional members sought an expansive scope to the material support bar. To those members, it was better to be overinclusive than underinclusive because devious supporters could evade liability under the guise of "charitable giving."[150]

Since the Immigration Act of 1990 was passed, major statutory revisions have expanded the definitions of terrorist activity, terrorist organization, and material support, and have created a legal quagmire for asylum applicants.[151] Congress's legislation now bars tens of thousands of human rights victims from asylum—including victims of

143 8 U.S.C. § 1182 (a)(3)(B)(iv)(VI); *see also* HUGHES, *supra* note 86, at 22.

144 Novak, *supra* note 130, at 20.

145 *See generally* 8 U.S.C. § 1182(a)(3)(B).

146 151 CONG. REC. 1910–11 (2005) (statement of Rep. John Hostettler).

147 *Id.* at 1910.

148 *Id.* at 1911 (quoting Kenneth McKune, former associate counterterrorism coordinator at the State Department).

149 *Id.* (quoting Sen. Diane Feinstein).

150 *See id.* at 1913 (statement of Rep. Sheila Jackson-Lee). Although the REAL ID Act's critics did not specifically target the material support provisions, some legislators believed that a less severe bill could still safeguard national security. Representative Sheila Jackson-Lee (D-TX) argued that the bill would close the doors for asylum seekers fleeing persecution. *See id.* ("What about the Cubans? What about the Haitians, the Liberians, the Sudanese, the Bosnians? What about those fleeing, as my colleague has indicated, our Jewish individuals who were fleeing persecution? I simply say that we have a better way of doing this. I wish we could do it together.").

151 *See* Schulman, *supra* note 20, at 952.

totalitarian regimes, war, and terrorism—for "supporting" their persecutors.[152]

III. The Material Support Bar and its Overbroad Interpretation

Part II demonstrated how the material support bar was broadly drafted but also provided a clear, commonsense statutory interpretation to reign in that scope. Part III shows how the Department of Homeland Security ("Homeland Security"), the Board of Immigration Appeals, and Article III Courts have interpreted the statute beyond its text to bring victims of terrorism and persons who arguably pose no significant threat to national security within the material support bar's scope.[153]

A. Bureaucratic Immigration Proceedings

In a typical removal proceeding, the foreign national appears before an immigration judge.[154] A foreign national who loses at immigration court may appeal to the Board of Immigration Appeals, "the highest administrative body for interpreting and applying [U.S.] immigration laws."[155] A foreign national who loses again at the appellate level may appeal to the federal court of appeals.[156] The Board of Immigration Appeals's decision is binding on Homeland Security and immigration judges unless overruled by an Article III court or the Attorney General—a process known as "certification."[157]

B. Cases

Singh-Kaur v. Ashcroft[158] and *S-K-*[159] illustrate how courts have interpreted the material support bar to include acts substantially unrelated or insignificant to terrorism. *A-C-M-* has been the most conse-

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152 *See* Editorial, *Fix This Law: Congress Made a Mess of Refugee Law, and a Lot of Human Rights Victims Could Suffer*, Wash. Post (Apr. 17, 2006), https://www.washingtonpost.com/archive/opinions/2006/04/17/fix-this-law-span-classbankheadcongress-made-a-mess-of-refugee-law-and-a-lot-of-human-rights-victims-could-sufferspan/dfadc2b5-44a8-4d9e-88fb-56da71e47d11/ [https://perma.cc/ZC8T-WEWS].

153 For example, see *Board of Immigration Appeals*, U.S. Dep't of Just. (Sept. 14, 2021), https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/S2KS-3YL9].

154 *4.2—Commencement of Removal Proceedings*, U.S. Dep't of Just. (Aug. 16, 2022), https://www.justice.gov/eoir/reference-materials/ic/chapter-4/2 [https://perma.cc/RSH2-687B].

155 *See Board of Immigration Appeals*, *supra* note 153.

156 *See id.*

157 *See id.*

158 385 F.3d 293 (3d Cir. 2004).

159 23 I. & N. Dec. 936 (B.I.A. 2006).

quential decision in years, extending the material support bar to de minimis levels of support.

1. Singh-Kaur v. Ashcroft

In *Singh-Kaur v. Ashcroft*, Charangeet Singh, a native and citizen of India, sought asylum in the United States and appealed the Board of Immigration Appeals's deportation order.[160] The Board of Immigration Appeals held that Singh's provision of food and tents for Sikh militants in India constituted "material support" to terrorism and found Singh removable from the United States.[161]

Singh, however, denied participating in violence.[162] He argued that the support provided was religious, as he had participated in Amrit Chakna, a religious ceremony, and was expected to make charitable contributions to his community.[163] Though Singh's testimony was credible, the Board of Immigration Appeals found that Singh knew or should have known that the militant Sikhs he provided food and shelter to would commit or had committed terrorist activities.[164]

In its review of the Board of Immigration Appeals's order, the Third Circuit began with the plain language of the material support bar.[165] It cited *Black's Law Dictionary* to define "material" as "[h]aving some logical connection with the consequential facts," "significant," or "essential."[166] *Black's Law* further defined "support" as "[s]ustenance or maintenance; esp., articles such as food and clothing that allow one to live in the degree of comfort to which one is accustomed."[167]

Turning to the statute, the court noted the nonexhaustive list of enumerated examples of "material support" in the material support bar.[168] The word "including" before the listed examples "suggests that Congress intended to illustrate a broad concept rather than narrowly circumscribe a term with exclusive categories."[169]

Next, the court considered Singh's contention that the list of material support examples was exhaustive because an analogous federal

160 *See Singh-Kaur*, 385 F.3d at 294.
161 *See id.* at 296.
162 *See id.* at 301.
163 *See id.* at 295.
164 *See id.* at 301.
165 *See id.* at 298.
166 *Id.* (quoting BLACK'S LAW DICTIONARY, *supra* note 113).
167 *Id.* (quoting BLACK'S LAW DICTIONARY, *supra* note 113).
168 *Id.*
169 *Id.*

statute that criminalizes providing "material support or resources" to terrorists includes a longer list.[170] Singh's argument relied on the canon of statutory interpretation that presumes Congress acted intentionally and purposefully.[171] Singh reasoned that including the specific language in another federal statute and omitting it in the Immigration and Nationality Act was intentional and indicated that Congress sought to exclude actions such as his.[172] The court rejected Singh's approach.[173] It explained that the canon was inapplicable because the two statutes were not by the same Congress.[174] Furthermore, it said that "it would be incongruous to conclude that a person who provides food and sets up tents for terrorists could be jailed for up to life under [the federal statute], but the same conduct could not prohibit admission to the United States under [8 U.S.C. § 1182]."[175] The court, therefore, concluded that the Board of Immigration Appeals's interpretation of material support was not arbitrary or capricious.[176]

The majority's holding is unfaithful to established canons of statutory interpretation and "reads [the word] '*material*' out of 'material support.'"[177] Under each definition of the *Black's Law* entry of "material," the record does not support a finding that providing food and shelter was (1) logically connected to, (2) significant to, or (3) essential to terrorist activity. The first definition indicates relevance, and the second and third definitions indicate importance. Providing food and shelter may be both relevant and important as it briefly provides resources to the organization. However, as the dissent argues, the effect of the support must "move the ball down the field for terrorism" because material support must be "*for* the commission of a *terrorist activity*."[178] If courts interpret material support too broadly so that anything qualifies as material support, "material" loses its meaning and is rendered superfluous.

Under the canon *ejusdem generis*, the material support bar's list of examples of material support reinforces the conclusion that support must be relevant and important to terrorism in degree and kind.[179]

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170 *Id.* at 298–99.

171 *See id.* at 299.

172 *See id.*

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.* at 308 (Fisher, J., dissenting) (emphasis added).

178 *Id.* at 304 (second emphasis added).

179 *See id.* at 305.

The majority correctly concludes that the list is not exhaustive, as the word "including" before the examples suggests that other types of support may be material.[180] Even so, actions like providing a safe house, transportation, funds, weapons, explosives, or training "*for* the commission of a *terrorist* activity"[181] or to anyone who plans to or "has committed . . . a *terrorist* activity"[182] or to any "*terrorist* organization" demonstrate that there must be an inherent link between the support and a terrorist attack.[183]

For example, providing temporary food and tents for religious purposes is similar to providing a "safe house" but should not be considered to the same degree as providing a safe house.[184] Providing a safe house is more vital to advancing terrorism as it may allow terrorists to evade the law and continue their unlawful activities. Providing temporary food and tents for charitable purposes, though helpful, is much less relevant and significant to the commission of terrorist activity.

The material support bar's surrounding provisions in the Immigration and Nationality Act also bolsters the conclusion that limited or insignificant support is not material for the goals of terrorism. Providing "material support" is one of six activities that qualify as "[e]ngag[ing] in terrorist activity."[185] To "engage in terrorist activity" is defined as actually committing terrorist activity, planning a terrorist activity, gathering information on potential targets for terrorist activity, soliciting funds for terrorist activity, recruiting for membership in a terrorist organization, and finally, affording "material support."[186] The first five provisions are directly related to advancing the goals of terrorism. Accordingly, the sixth provision for providing material support should also be of a similar type and kind.

Under the current interpretation, providing a pen, a glass of water, or a band-aid or selling bread to an individual who happened to be in a terrorist organization would qualify as material support.[187] Although these seem like hypothetical scenarios outlining the outer

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180 *See id.* at 298 (majority opinion).

181 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (emphasis added).

182 *Id.* (emphasis added).

183 *Singh-Kaur*, 385 F.3d at 303–04 (Fisher, J., dissenting) (emphasis added).

184 *See id.* at 305–06.

185 8 U.S.C. § 1182(a)(3)(B)(iv).

186 *Id.*

187 *See* A-C-M-, 27 I. & N. Dec. 303, 314 (B.I.A. 2018) (Wendtland, Board Member, concurring and dissenting).

scope of the material support bar, actual cases are not far off.[188] Over the years, immigration and Article III courts have held the following constitutes material support: being forced to hand over a packed lunch and having four dollars taken from one's shirt pocket to buy beer,[189] providing food and setting up tents for religious purposes,[190] cutting potatoes and onions and filling sandbags for transport under force,[191] and "cooking and cleaning . . . under threat of death."[192]

2. S-K-

In *S-K-*, S-K-, a native and citizen of Burma, applied for asylum in the United States.[193] She faced persecution and torture as a Christian and ethnic Chin in Burma because the military dictatorship "regularly commit[ed] human rights abuses against ethnic and religious minorities."[194] S-K-'s conduct at issue was her donation to the Chin National Front, an organization she supported for its "goal of securing freedom for ethnic Chin people."[195]

S-K- argued that "the type and amount of support" she provided was immaterial and contended that no evidence indicated that the "contributions were relevant to a specific terrorist goal."[196] Additionally, she argued that the Chin National Front was not a terrorist

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188 *See* HUGHES, *supra* note 86, at 6; Pasquarella, *supra* note 15, at 30 (explaining that several Colombian refugees were barred from asylum for providing a glass of water, occasionally selling basic goods from a family's bodega, and selling bread to guerillas disguised in civilian clothes even though the "support" was insignificant or unavoidable because of the armed groups' terrorist control over certain areas).

189 In this case, terrorists grabbed respondent's packed lunch and the equivalent of four dollars to buy beer. *See In Re* [Redacted], 2009 WL 9133770, at *1 (B.I.A. July 10, 2009). Although the Board of Immigration Appeals held that the support was not material, this is an unpublished decision and not binding on the Department of Homeland Security or other Board of Immigration Appeals cases. *See id.* at *1.

190 *See* Singh v. Gonzales, 225 F. App'x 706, 708 (9th Cir. 2007) (providing food, shelter, and transporting funds to members of Khalistan Commando Force made respondent ineligible for withholding of removal).

191 *See* Viknesrajah v. Lynch, 620 F. App'x 28, 30 (2d Cir. 2015). Viknesrajah, a citizen and native of Sri Lanka, was forced to dig bunkers, carry wood for a terrorist group two to three hours a day for seventeen to eighteen months, and had been directed to cut potatoes and onions and fill sandbags for transport. *See id.* at 29–30. The Second Circuit held that the Board of Immigration Appeals correctly denied asylum and withholding of removal under the material support bar. *See id.* at 30.

192 *See A-C-M-*, 27 I. & N. Dec. at 304–09.

193 S-K-, 23 I. & N. Dec. 936, 937 (B.I.A. 2006). S-K- was eventually granted a discretionary waiver and asylum. *See* LEGOMSKY & THRONSON, *supra* note 28, at 558–59.

194 *S-K-*, 23 I. & N. Dec. at 937.

195 *Id.*

196 *Id.* at 942–43.

group.[197] Rather, S-K- opined that the illegitimate, unlawful group at issue was the Burmese government[198] and noted that the United States even described the Burmese military as a "group of thugs."[199] She reasoned that because the Chin National Front's cause was noble, it should not be labeled a terrorist organization.[200] The Board of Immigration Appeals, however, disagreed. It held that the Chin National Front was statutorily defined as a terrorist organization for acting against the Government of Burma, despite its goals for democratic reform and use of force only in self-defense.[201]

Furthermore, the Board of Immigration Appeals explained that Congress intentionally drafted the material support bar broadly to include "freedom fighters."[202] The Board of Immigration Appeals also said that it did not have the discretionary authority to create exceptions for organizations to which the United States may be sympathetic.[203] Indeed, deciding what the "good" government is may invite an inappropriate political question in the judicial branch.[204]

S-K- also argued that her nominal donation of 1,100 Singapore dollars (approximately $685 in U.S. currency) was not material to the organization.[205] The Board of Immigration Appeals rejected this argument and explained that even if the money did not go to terrorism specifically, the funds still supported the organization.[206] Because money is fungible, donations enable a terrorist organization to solicit money for "an ostensibly benign purpose, and then transfer other equivalent funds in its possession to promote its terrorist activities."[207] The Board of Immigration Appeals's reasoning was similar to Representative John Hostettler's during the REAL ID floor debates.[208] Both argued that it was irrelevant whether the donations were

197 *See id.* at 938–39.

198 *Id.*

199 *Id.* at 939 (referencing a speech by the Assistant Secretary of State).

200 *See id.* at 938–39.

201 *Id.* at 938–39, 941–42.

202 *Id.* at 941.

203 *See id.*

204 One country's terrorist can very well be another's freedom fighter. Because this is a complicated political question, proponents of an overbroad material support bar would likely argue that focusing on violent behavior through extreme vetting may be more efficient and beneficial.

205 *See id.* at 945 n.13.

206 *Id.* at 945–46.

207 *Id.* at 944.

208 *See supra* notes 146–49 and accompanying text.

earmarked for charitable purposes as any amount of financial support could support the organization's ultimate goals.[209]

Shortly after the Board of Immigration Appeals issued its decision, the Secretary of Homeland Security exercised his discretionary power to waive the material support exclusion for Burmese Chins who met certain conditions.[210] Congress also enacted the Consolidated Appropriations Act and declared that certain groups, including Chin National Front, were not terrorist organizations.[211] Afterward, Homeland Security filed a written acknowledgment that S-K- was no longer inadmissible, and the Board of Immigration Appeals granted asylum.[212]

3. A-C-M-

In *A-C-M-*, Ana, a Salvadorian citizen, came to the United States in 1991 and was granted Temporary Protected Status.[213] She left the United States on advance parole, and upon return, Homeland Security initiated removal proceedings against her.[214] Ana subsequently applied for asylum on humanitarian grounds.[215] Homeland Security argued that Ana was per se ineligible for asylum because she provided material support to a terrorist organization.[216] Under the Immigration and Nationality Act, Ana could not assert a duress defense, even though she provided the "support" after being kidnapped and was coerced into cooking and cleaning for guerrillas under threat of death.[217]

The question before the Board of Immigration Appeals was whether cooking, cleaning, and washing dishes for a guerilla organization constituted "material support."[218] The Board of Immigration Appeals answered in the affirmative. It held that even de minimis support constituted "material support" because there was "no such quantitative limitation" in the material support bar.[219] Accordingly, it

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209 *See supra* notes 146–49; *S-K-*, 23 I. & N. Dec. at 944.

210 *See* Press Release, U.S. Dep't of State, The Department of State Decides Material Support Inapplicable to Chin Refugees from Burma (Oct. 19, 2006), https://2001-2009.state.gov/r/pa/prs/ps/2006/74761.htm [https://perma.cc/SMQ9-DDYN].

211 *See* Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 691(b), 121 Stat. 1844, 2365 (2007).

212 *See* LEGOMSKY & THRONSON, *supra* note 28, at 558–59.

213 A-C-M-, 27 I. & N. Dec. 303, 304 (B.I.A. 2018).

214 *Id.*

215 *Id.* at 304–05.

216 *See id.*

217 *See id.* at 306.

218 *Id.* at 306–11.

219 *Id.* at 306.

reasoned that Ana provided material support.[220] After all, her cooking and cleaning helped the guerillas "promote, sustain, and maintain" their terrorist organization.[221] The Board of Immigration Appeals recognized that Ana's assistance was "relatively minimal."[222] Nevertheless, it concluded that she was not a victim but functionally a member of their group because she had worked for the guerillas.[223]

Once again, Homeland Security and the Board of Immigration Appeals read out the word *material* and broadened the material support bar's scope by rejecting a threshold limitation.[224] It strains credulity to hold that de minimis or insignificant support is material. Rejecting a threshold limitation is indefensible under every possible definition of "material" in *Black's Law Dictionary*. Cooking and cleaning is not (1) logically connected to, (2) significant to, or (3) essential to terrorist activity. Thus, Ana's insignificant tasks should not be equated to other types of material support that actually finance or directly aid terrorist activities.

Although cleaning services may free up the terrorist organization for other activities, the provision of services is too general, and its logical connection and significance to terrorism is too attenuated.[225] The dissent aptly expounded the majority's incongruous result: "under the majority's strained interpretation, providing a glass of water to a thirsty individual who happened to belong to a terrorist organization would constitute material support of that organization, because the individual otherwise would have needed to obtain water from another source."[226] Because the Board of Immigration Appeals rejected a threshold limitation, any action with even the slightest connection to promoting, sustaining, or maintaining a terrorist organization constitutes material support and serves as an absolute bar to asylum.

Suppose materiality should be determined not by the quantity of support but rather by the type of support. In that case, it should also matter whether the assistance was intended to support terrorism or was provided under duress. For example, if Ana had not provided the cooking and cleaning services, it may be equally true that the guerillas would have forced another person to provide the menial services. In that case, the power to render victims ineligible for asylum belongs to

220 *Id.* at 309.

221 *See id.* at 308.

222 *Id.* at 310.

223 *See* Krajeski, *supra* note 1 (summarizing the decision in *A-C-M-*).

224 *See* Singh-Kaur v. Ashcroft, 385 F.3d 294, 301 (3d Cir. 2004) (Fisher, J., dissenting).

225 *Id.* at 304.

226 *A-C-M-*, 27 I. & N. Dec. at 314 (Wendtland, Board Member, concurring and dissenting).

the terrorist organization because it ultimately chooses which victims to coerce.[227]

A-C-M- is untenable from a common-sense statutory interpretation perspective and incompatible with the United States's legal obligations under the Refugee Convention and 1967 Protocol.[228] The United States has no legitimate justification for rejecting Ana, who was not morally culpable for her actions, was nonviolent, and posed no genuine risk to national security. The Refugee Convention and 1967 Protocol bars criminals, persecutors, and other wrongdoers from asylum relief to (1) preserve the integrity of asylum by holding wrongdoers accountable for their transgressions and (2) safeguard the national security interests of the host country by excluding dangerous individuals.[229] However, Ana's wrongdoing resulted from coercion; she was not a willing, voluntary participant and should not be legally accountable for actions performed under the threat of death. Furthermore, Ana is not a dangerous criminal for providing menial services. She starkly contrasts with the types of persecutors and wrongdoers that the Refugee Convention's Exclusions Clause seeks to bar.[230] Even if the single instance she was forcibly taught how to shoot a gun constituted military-type training for a terrorist organization,[231] it was still involuntary. Accordingly, the Refugee Convention and 1967 Protocol would not deem Ana morally or legally culpable.

C. Inadequate Waivers

Throughout their removal proceedings, asylum applicants are not entitled to a duress defense and cannot successfully argue that their support was minor.[232] An asylum applicant may have a chance of relief by seeking a waiver after exhausting all administrative proceedings.

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227 *See* Legomsky & Thronson, *supra* note 28, at 568.

228 *See supra* Section I.C.

229 *See supra* Section I.C.

230 *See supra* Section I.C.

231 *See A-C-M-*, 27 I. & N. Dec. at 304.

232 The Immigration and Nationality Act does not provide an affirmative defense for duress for the material support bar, however, 8 U.S.C. § 1182 offers an exception for involuntary membership in a totalitarian party. *See* 8 U.S.C. § 1182(a)(3)(D)(ii). In the absence of an express statutory exception for duress, the courts have also declined to recognize an implied exception. *See A-C-M-*, 27 I. & N. Dec. at 306; *see also* Alturo v. U.S. Att'y. Gen. 716 F.3d 1310, 1314 (11th Cir. 2013). In *A-C-M-*, Ana argued that even if she was subject to the material support bar, she was "entitled to a duress exception." 27 I. & N. Dec. at 306. The BIA rejected Ana's argument and reaffirmed its prior holding in *M-H-Z-*, 26 I. &N. Dec. 757 (B.I.A. 2016), to hold that the Immigration and Nationality Act "does not include an implied exception for an alien whose material support to a terrorist organization was provided under duress." *A-C-M-*, 27 I. & N. Dec. at 306. The BIA further emphasized that "the Board [of Immigration Appeals] and the Federal

Even then, the granting of a waiver is purely discretionary and unreviewable, and the waiver process is an inadequate, uncertain solution for asylum applicants seeking humanitarian assistance.[233]

The Immigration and Nationality Act authorizes the Secretary of State or Secretary of Homeland Security (after consultation with each other and with the Attorney General), in their "sole unreviewable discretion," to grant a waiver for asylum seekers if it finds that the material support bar should not apply.[234] This authority was delegated to the U.S. Citizenship and Immigration Services, which may grant a discretionary waiver for (1) material support provided under duress, (2) "certain limited material support," or (3) "insignificant material support."[235]

The duress exemption can apply to both designated (Tier I and II) and undesignated (Tier III) terrorist organizations, and the criteria for determining whether the exemption applies is the same.[236] A U.S. Citizenship and Immigration Services adjudicator may consider "duress-related factors" such as whether the applicant could have reasonably avoided the provision of support and the severity of the harm or threats inflicted onto the applicant.[237] The adjudicator may also consider factors under the totality of the circumstances, such as (1) the "amount, type and frequency of material support provided," (2) "the

courts ha[d] uniformly rejected a duress exception to the material support bar" and declined to "address that issue further." *Id.*

The Board of Immigration Appeals and Article III courts recognize that the unavailability of a duress defense leads to "harsh" results. *See Alturo*, 716 F.3d at 1314. However, they also opine that such "harsh" results are balanced by Homeland Security's waiver process, which allows the review of cases in a "more holistic manner." 27 I. & N. Dec. at 307–08; *see also* S-K-, 23 I. & N. Dec. 936, 941 (B.I.A. 2006).

233 *See* Schulman, *supra* note 20, at 953–54.

234 8 U.S.C. § 1182(d)(3)(B)(i).

235 *Terrorism-Related Inadmissibility Grounds (TRIG)—Situational Exemptions*, U.S. Citizenship & Immigr. Servs. (Aug. 29, 2022), https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-trig-situational-exemptions [https://perma.cc/L8YH-42C8].

236 For information on duress exemptions for material support to an undesignated (Tier III) terrorist organization, see U.S. Dep't of Homeland Sec., Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act (Feb. 26, 2007); *see also* U.S. Citizenship & Immigr. Servs., Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations (May 24, 2007) [hereinafter 2007 Discretionary Exemption Memo]. For information on duress exemptions for material support to a designated (Tier I or II) organization, see U.S. Dep't of Homeland Sec., Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act (April 27, 2007); *see also* 2007 Discretionary Exemption Memo, *supra*.

237 *See* sources cited *supra* note 236.

nature of the activities committed by the terrorist organization," (3) the applicant's "awareness of those activities," (4) how long material support was provided, and (5) the applicant's conduct since material support ceased.[238]

The "certain limited material support" exemption authorizes a discretionary waiver for "certain routine commercial transactions, certain routine social transactions, certain humanitarian assistance," and "[m]aterial [s]upport provided under substantial pressure that does not rise to the level of duress ('sub-duress pressure')."[239] This exemption originally only applied to undesignated (Tier III) organizations, but on June 8, 2022, the Secretaries of State and Homeland Security extended the discretionary relief to include support to designated (Tier I and II) organizations.[240]

The "insignificant material support" exemption applies only if the support was "minimal in amount" and if the applicant "reasonably believed that it would be inconsequential."[241] Under this exemption, the adjudicator determines whether the support was minimal "by considering its relative value, fungibility, quantity and volume, and duration and frequency."[242] Similar to the exemption for "certain limited material support," the exemption was initially available for undesignated terrorist organizations but was extended to designated terrorist organizations on June 8, 2022.[243]

This discretionary waiver system is inadequate because a denied asylum applicant must wait until their case is administratively final, and the denial of a waiver is unreviewable by federal courts.[244] A typical applicant undergoes a credible fear determination by an asylum

238 *See* sources cited *supra* note 236.

239 U.S. Citizenship & Immigr. Servs., PM-602-0112, Implementation of the Discretionary Exemption Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Certain Limited Material Support 1 (2015) [hereinafter Implementation Memo]; *see also* U.S. Citizenship & Immigr. Servs., PM-602-0191, Implementation of the Discretionary Exemption Authority Under Immigration and Nationality Act (INA) § 212(d)(3)(B)(i) for the Provision of Certain Limited or Insignificant Material Support to Designated Organizations 2 (2022).

240 *See* Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 79 Fed. Reg. 6914, 6914 (Feb. 5, 2014); U.S. Dep't of State & U.S. Dep't of Homeland Sec., Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act 1–2 (June 8, 2022).

241 U.S. Citizenship & Immigr. Servs., PM-602-0113, Implementation of the Discretionary Exemption Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Insignificant Material Support 4 (May 8, 2015).

242 *Id.*

243 U.S. Dep't of State & U.S. Dep't of Homeland Sec., *supra* note 240, at 1.

244 Schulman, *supra* note 20, at 954.

officer, a hearing by an immigration judge, an appeal to the Board of Immigration Appeals, and an appeal to the federal court of appeals.[245] These applicants can face years-long delays and prolonged separation from their families, sometimes in mandatory detention.[246]

Furthermore, the waivers for "certain limited" and "insignificant" material support demonstrate how the word *material* is stripped of its meaning through agency and court statutory interpretation.[247] If support is limited or insignificant, it is not material. Instead of providing a discretionary waiver after a final removal order, these waivers should be accessible to asylum seekers during their removal proceedings. Providing an affirmative exception would lessen the number of appeals in an already backlogged court system and grant asylum to those deserving of humanitarian relief.

IV. Overcoming Legal Impediments to The Material Support Bar Statutory Text and its Interpretation

To remedy the material support bar's overbroad text and current statutory interpretation, Congress should make two legislative amendments to the Immigration and Nationality Act. The Attorney General should also certify and overrule *A-C-M-*. For years, courts have acknowledged the harsh consequences of the material support bar and passed the buck to the political branches to correct the perceived inequities.[248] Though Homeland Security created the waiver system, it is severely inadequate. The legislative and executive branches should therefore act to (1) redefine the material support bar through legislative amendments and (2) clarify its interpretation and guidance through executive action.

A. Two-Fold Legislative Amendment Defining Materiality

First, Congress should amend the Immigration and Nationality Act's material support bar by explicitly defining "material" so that the material support bar excludes actual terrorists and not their victims. With this clarification, de minimis support unrelated to terrorism

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245 The federal court of appeals reviews Board of Immigration Appeals conclusions of law on de novo review. The court of appeals gives deference to the Board of Immigration Appeals's interpretation of the Immigration & Nationality Act and reviews under an arbitrary and capricious standard. *See* Singh-Kaur v. Ashcroft, 385 F.3d 293, 296 (3d Cir. 2004).

246 *See id.*

247 Tyler Anne Lee, *When "Material" Loses Meaning:* Matter of A-C-M- *and the Material Support Bar to Asylum*, 51 Colum. Hum. Rts L. Rev. 376, 388 (2019).

248 *See* Alturo v. U.S. Att'y Gen., 716 F.3d 1310, 1314 (11th Cir. 2013).

would not be a complete bar to admission. Second, Congress should also add an explicit duress defense available to asylum applicants from the start of their administrative proceedings. These amendments aim to provide a narrower solution while still excluding persecutors and threats to national security—two goals consistent with the traditional bars to asylum under the Refugee Convention and the 1967 Protocol. The existing waivers for certain limited and insignificant support and duress provide the backbone for these amendments.

1. Defining Material

The first amendment would add a definition of "material" and establish that de minimis support is not "material."

> (1) *Proposed amendment:* Under 8 U.S.C. § 1182(a)(3)(B)(iv)(VI), "Material" is defined as having a significant or essential connection to terrorist activity or a terrorist organization to advance terrorism. Material support directly enables a terrorist or terrorist organization to carry out terrorist activities.
>
> Limited, insignificant, or de minimis support is not material. Limited support may include but is not limited to (1) certain routine commercial transactions, (2) certain routine social transactions, (3) certain humanitarian assistance, and (4) material support provided under substantial pressure that does not rise to the level of duress. Insignificant and de minimis support are minimal in amount and inconsequential.

This amendment still gives immigration judges and adjudicators discretion in determining what is "material" while narrowing the scope to exclude limited and inconsequential levels of support. This definition does not alter the existing enumerated examples of material support in the material support bar. The enumerated examples—providing a safe house, material financial benefit, false documentation, or weapons—involve actions that can be directly used to plan or carry out terrorist activities.[249] Limited and insignificant support are categorically unlike the enumerated examples and would fall outside of the bar's reach. Thus, this new definition would no longer read the word "material" out of "material support."

This legislative proposal may elicit concerns about increased administrative costs and threats to national security. Critics may argue that adjudicators would incur more administrative costs to determine whether an action meets the quantitative limitation. It is easier and

249 A-C-M-, 27 I. & N. Dec. 303, 313–14 (B.I.A. 2018).

more effective for adjudicators to be overinclusive and find material support when there is *any* level of support. However, costs will likely decrease because once an adjudicator determines that an asylum seeker did not provide material support because it was limited or insignificant, the applicant is granted relief.[250] Under the current system, a waiver is only considered after all court proceedings and administrative appeals "have been exhausted, even if there is no dispute about the grounds for waiver eligibility."[251] Providing a waiver at the start of immigration court proceedings eliminates the need for a lengthy appeals process. Moreover, a deserving asylum applicant would no longer incur the unquantifiable personal, financial, and emotional costs from years of uncertainty, delays, and even mandatory detainment.[252]

Additionally, the legislative proposal may raise concerns that wholescale exemptions for certain limited or insignificant material support is contrary to national security interests because both direct and indirect support help a terrorist organization achieve its goals. The material support bar focuses on the *behavior* of a foreign national, and the United States should exclude individuals that engage in or contribute to violent behavior.[253] Although limited and insignificant support may indirectly support a terrorist organization by freeing their resources, it is against international refugee law and policy to deny asylum based on these actions.[254] Since its inception, refugee law has long barred certain dangerous criminals and persecutors from asylum relief to protect the host country's community and national security interests.[255] Indeed, terrorism constitutes one of those crimes that should bar someone from admission to the United States.[256] The material support bar, however, victimizes those who provide limited or insignificant support when they themselves are often victims of terrorism or oppressive governments.[257] The United States, under the Refugee Convention and its 1967 Protocol, should not penalize such applicants. Additionally, Homeland Security only provides waivers for

250 *See* Schulman, *supra* note 20, at 953–54.

251 *Id* at 954.

252 *See id.* (providing an example of an asylum applicant who applied for a waiver in May 2007 but had not received a decision until July 2010 because his case was not "administratively final" until February 2010).

253 *See supra* Part III.

254 *See supra* Section I.C.

255 *See supra* Section I.C.

256 *See supra* Section I.C.

257 Schulman, *supra* note 20, at 950.

limited and insignificant support to those who do not pose a risk to national security.[258] If incorporated into the material support bar, these waivers, in conjunction with the numerous background checks, will only provide humanitarian relief to those who are not dangerous to national security.[259]

Further critics of this Note's proposed solution may also argue that the United States is interested in extreme vetting at the front end to keep national security interests safe. However, the current process denies a worthy waiver applicant relief until their proceedings are administratively final, even if Homeland Security anticipates that a waiver is applicable. Thus, many asylum applicants are denied through the vetting process even though they pose no risk to national security. An extreme vetting process does not justify the revictimization of thousands of deserving asylees or those that "have had only incidental contact with members of armed groups."[260] The utility of continuing this process should be balanced with the increasing worldwide need for humanitarian aid. Although the economic costs of resettlement may influence this policy preference, the scale of the global refugee crisis continues to grow. According to the U.N. High Commissioner for Refugees, at the end of 2021, 89.3 million people worldwide have been forcibly displaced because of persecution, war, or other human rights violations.[261] One in every eighty-eight people is displaced, and the projections grow every year.[262]

a. Applying the New Definition of "Material Support" to Singh-Kaur *and* S-K-

This legislative amendment would change the outcome of cases like *Singh-Kaur* and *S-K-* so that they are more faithful to the United States's international law obligations. The new definition of "material" will not automatically bar an asylum applicant for providing any degree of support.

Applying the new definition of material to *Singh-Kaur*, Singh would not be barred from asylum because setting up tents and providing food for religious purposes is not significant or essential to terror-

258 *See* IMPLEMENTATION MEMO, *supra* note 239.

259 *See id.*

260 Schulman, *supra* note 20, at 950–51 (recognizing that the current statutory interpretation impacts "thousands of terrorism victims" or those with negligible contact with armed organizations).

261 *Figures at a Glance*, U.N. HIGH COMM'R FOR REFUGEES, https://www.unhcr.org/en-us/figures-at-a-glance.html [https://perma.cc/9NQ6-NKV7].

262 *See id.*

ism and does not directly aid in the planning or execution of terrorist activities. Although the closest enumerated statutory example of providing material support is providing a safe house, the record does not suggest that Singh provided the tents to hide terrorists from the law or engage in secret activities.[263] Supplying shelter is necessary for life and may technically support a terrorist organization by providing a place for refuge.[264] However, providing necessities for life is not the same as providing necessities for terrorism. Under the proposed amendment, Singh's actions are best categorized as "limited" support. He provided minimal shelter and a basic meal.[265]

Singh could also argue that his acts qualified as a "routine social transaction" because of his religious and cultural obligations.[266] Singh participated in an induction ceremony, Amrit Chakna, to commit to his Sikh faith.[267] Thus, his charitable contributions to the community such as providing food and assistance to the poor are arguably a routine social transaction.

Under either possibility, Singh's actions would not constitute material support to terrorism. Asylum determinations are currently made case-by-case, making outcomes difficult to predict. This amendment, at least, provides a higher likelihood that he is not statutorily barred from asylum at the onset of his asylum application.

As applied in *S-K-*, the new definition of "material" would not bar S-K- from asylum. The initial Board of Immigration Appeals's holding found S-K- unworthy of refugee status for providing limited support to a sympathetic organization even though it opposed an extremely repressive government that brutally targeted against ethnic minorities.[268] The concurring opinion in *S-K-* urged Homeland Security to consider the respondent for a limited support waiver as there was no indication in the record that S-K- was dangerous or otherwise unworthy of asylee status.[269] Under this legislative amendment, S-K- could affirmatively demonstrate that the limited support to the Chin National Front was immaterial by definition at the beginning of her removal proceedings. As a best-case scenario, Homeland Security

263 *See* Singh-Kaur v. Ashcroft, 385 F.3d 293, 29496 (3d Cir. 2004).

264 *See* Hadeer Soliman, *The "Material Support to Terrorism" Bar: Despite Recent Modifications, Bona Fide Refugees Still Find No Safe Haven*, 1 DIVERSITY & SOC. JUST. F. 40, 43–44 (2016).

265 *See Singh-Kaur*, 385 F.3d at 295–96.

266 Soliman, *supra* note 264, at 43.

267 *See Singh-Kaur*, 385 F.3d at 295.

268 *See* S-K-, 23 I. & N. Dec. 936, 939 (B.I.A. 2006).

269 *Id.* at 950 (Osuna, Acting Vice Chairman, concurring).

would not even initiate removal proceedings under the material support bar because this amendment would dissuade any finding that S-K-'s minimal amount of support was material.

2. An Explicit Statutory Waiver for Duress

The second amendment adds an explicit statutory duress waiver for asylum seekers who have provided material support.

> (2) *Proposed amendment:* 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) of the Act shall not apply with respect to material support provided under duress to a terrorist organization or for the commission of a terrorist activity if warranted under the totality of the circumstances. An alien[270] seeking asylum may invoke an affirmative defense of duress, which requires that the material support was provided in response to a reasonably perceived threat of serious harm.[271]

Once again, Homeland Security already has the authority to grant an exception for duress.[272] An asylum seeker who has provided material support under the threat of death or serious bodily harm should not be held legally accountable for involuntary actions and is not dangerous to national security.

a. Applying the Duress Waiver to A-C-M-

As seen in *A-C-M-*, Ana, who was kidnapped by militant guerillas and forced to cook and clean, would qualify for a duress exemption.[273] She experienced horrific harm and threats of violence from the guerrillas if she failed to comply with their commands.[274]

This duress exemption is consistent with the United States's obligations under the Refugee Convention. The Refugee Convention barred relief to those who were individually and criminally culpable and were reasonably foreseeable threats to a nation's people and national security.[275] However, coercive conditions negate the culpability of one's actions and do not strongly suggest that the individual is dan-

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270 The Immigration and Nationality Act uses the term "alien" to refer to a foreign national or noncitizen. 8 U.S.C. § 1101. The term was selected here for consistency although "foreign national" or "noncitizen" would be more appropriate.

271 The language of this duress waiver is derived from Homeland Security's existing exemption for material support under duress. *See* IMPLEMENTATION MEMO, *supra* note 239.

272 8 U.S.C. § 1182(d)(3)(B)(i).

273 *See* A-C-M-, 27 I. & N. Dec. 303, 305–06 (B.I.A. 2018).

274 *See id.* at 304–05.

275 *See supra* notes 87–89 and accompanying text.

gerous.[276] Because her assistance was involuntary, Ana is much less culpable and threatening to the United States than a genuine supporter of the guerillas who voluntarily rendered assistance.[277]

Ana's hardship with her removal proceedings demonstrates why it is more equitable to add a duress waiver. In 2011, Homeland Security rejected Ana's request for a Cancellation of Removal, finding that Ana had provided material support to a terrorist organization.[278] In immigration court, Ana's application for asylum was denied because of the material support bar, even though the judge believed Ana was otherwise qualified.[279] Although she did not qualify for asylum, her order of removal was deferred under the Convention Against Torture—as she had been brutalized under the guerillas' custody.[280] Homeland Security challenged Ana's deferral of removal to the Board of Immigration Appeals.[281] In June 2018, the Board of Immigration Appeals ruled against Ana for providing material support.[282] After the decision, Ana, effectively branded as a terrorist, lost two jobs and even believed that she was a terrorist because the U.S. justice system had said so.[283] Ana experienced years of trauma in El Salvador and was revictimized by the U.S. immigration system all because she was targeted, kidnapped, and forced into slave labor by guerillas under constant threat of death. With this legislative amendment, the affirmative duress waiver would allow genuine asylum applications like Ana to find refuge and stability at the outset and avoid years-long emotional distress, uncertainty, and revictimization.

B. Attorney General Certification Reversing A-C-M-

The second solution calls on the executive branch to take action. Congress has delegated power to the Attorney General to execute the United States's immigration laws and fill in the gaps that Congress may have intentionally or unintentionally left.[284] The Attorney General has primarily delegated this authority to the Board of Immigra-

276 *See* Dixon v. United States, 548 U.S. 1, 7 (2006).

277 *See A-C-M-*, 27 I. & N. Dec. at 306.

278 *See* Krajeski, *supra* note 1.

279 *See id.*

280 *See id.*

281 *See id.*

282 *See id.*

283 *See id.*

284 *See* 8 U.S.C. § 1103(a)(1) (stating that with respect to the administration and enforcement of the Immigration and Nationality Act, the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling").

tion Appeals.[285] The Attorney General has the power of "referral and review" or "certification."[286] Under this power, the United States Attorney General may intervene in Board of Immigration Appeals decisions, overrule them, and set binding precedent.

Critics of the certification process may raise concerns over an administration's far-reaching ability to significantly alter the immigration system by bypassing the legislation or regulation process. The judiciary already gives extreme deference to the Executive and Legislative branches under the plenary power doctrine.[287] Professor Emeritus at Washington University in St. Louis Stephen Legomsky has stated that the certification process is particularly troublesome because the Attorney General, as the nation's chief law enforcement official, may unilaterally reverse the decision of an adjudicatory tribunal—even for proceedings in which the government is one of the opposing parties.[288] The Attorney General may direct the Board of Immigration Appeals to refer a case to him anytime without restrictions.[289] On the other hand, certification is also a powerful tool to correct erroneous exercises of the Attorney General's delegates and quickly enact necessary changes.[290] The process allows the Attorney General to bypass a cum-

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285 *See* 8 C.F.R. § 1003.1 (creating the Board of Immigration Appeals made up of attorneys appointed by the Attorney General "to act as the Attorney General's delegates in the cases that come before them"); SARAH PIERCE, OBSCURE BUT POWERFUL: SHAPING U.S. IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW 3–4 (2021).

286 *See* 8 C.F.R. § 1003.1(h) (describing the categories of cases the Attorney General may review on certification).

Historically the certification power was used sparingly. During President Bill Clinton's two terms, the Attorney General used the certification power four times. See Jonathan P. Riedel, Chevron *and the Attorney General's Certification Power*, 95 N.Y.U. L. REV. 271, 312–25 (2020) for a list of Attorney General-certified opinions since the Roosevelt administration. Under George W. Bush, the certification power was used fifteen times during eight years. *See id.* Under President Barack Obama, it was used four times. *See id.* Under President Trump, the certification power was used sixteen times. *See* E-F-H-L-, 27 I. & N. Dec. 226 (A.G. 2018); L-A-B-R-, 27 I. & N. Dec. 405 (A.G. 2018); A-B-, 27 I. & N. Dec. 316 (A.G. 2018); Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018); M-G-G-, 27 I. & N. Dec. 475 (A.G. 2018); S-O-G-, 27 I. & N. Dec. 462 (A.G. 2018); L-E-A-, 27 I. & N. Dec. 581 (A.G. 2019); M-S-, 27 I. & N. Dec. 509 (A.G. 2019); Castillo-Perez, 27 I. & N. Dec. 664 (A.G. 2019); Thomas, 27 I. & N. Dec. 674 (A.G 2019); R-A-F-, 27 I. & N. Dec. 778 (A.G. 2020); A-M-R-C-, 28 I. & N. Dec. 7 (A.G. 2020); O-F-A-S-, 28 I. & N. Dec. 35 (A.G. 2020); Reyes, 28 I. & N. Dec. 52 (A.G. 2020); A-C-A-A-, 28 I. & N. Dec. 84 (A.G. 2020); Negusie, 28 I. & N. Dec. 120 (A.G. 2020).

287 *See supra* note 19 and accompanying text.

288 *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1671–72 (2010).

289 8 C.F.R. § 1003.1(h)(1)(i) (2021).

290 *See* Riedel, *supra* note 286, at 282–83.

bersome regulatory process of public notice, debate, revision, and public comment, which often extends for years or decades.[291]

In any case, the Attorney General has the power of certification and may use it to overrule the Board of Immigration Appeals's most consequential material support bar decision—*A-C-M-*. The Attorney General should vacate the Board of Immigration Appeals's decision and remand for review under new guidance directing that respondent's activities must be of the kind and magnitude to meet the threshold of "material." The Attorney General should define what "material" means in a definition similar to this Note's proposed legislative amendment.

Under this definition, Ana's menial and incidental slave labor for Salvadoran guerillas would not constitute material support to terrorism and would not bar her from asylum relief. This definition would still prohibit terrorists and their supporters from entering the United States on asylum—while granting relief to genuine asylees and victims of terrorism, persecution, and war. The material support bar and its case law desperately need reform, and certification by the Attorney General will provide swift relief and significant change to a provision that is currently interpreted far beyond its statutory text.

Conclusion

The United States asylum system penalizes countless applicants like Ana for being victims of terrorism. The current statutory framework is flawed in light of the principles behind international refugee law and the United States's legal obligations under the Refugee Convention. To prevent further harm to asylum seekers seeking humanitarian relief, Congress and the Attorney General should reform the material support bar so that immaterial support is no longer deemed material and asylum seekers are no longer punished simply for being victims of terrorism.

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291 Critics of the certification process have also argued that "it violates due process, gives rise to arbitrary and capricious actions, engenders conflicts of interest, and lacks sufficient independence." *Id.*