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S. HRG. 110–753

# THE "MATERIAL SUPPORT" BAR: DENYING REFUGE TO THE PERSECUTED?

## HEARING

BEFORE THE

SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

SEPTEMBER 19, 2007

**Serial No. J–110–56**

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

47–451 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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# THE "MATERIAL SUPPORT" BAR: DENYING REFUGE TO THE PERSECUTED?

**WEDNESDAY, SEPTEMBER 19, 2007**

UNITED STATES SENATE,
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 2:30 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chairman of the Subcommittee, presiding.

Present: Senators Durbin, Kennedy, Feingold, Leahy, and Coburn.

## OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chairman DURBIN. This hearing of the Subcommittee on Human Rights and the Law will come to order. Good afternoon and welcome.

The hearing is entitled "The 'Material Support' Bar: Denying Refuge to the Persecuted?" After opening remarks, I will recognize my colleague and Ranking Member, Senator Coburn, for an opening statement, then turn to witnesses.

First, a word about the origin of this hearing. Earlier this year, the Subcommittee held a hearing on child soldiers. At the hearing, Senator Coburn and I were surprised to learn that under our immigration laws, the Department of Homeland Security has branded some former child soldiers as terrorists and prevented them from obtaining asylum in the United States. Senator Coburn immediately suggested that we hold a hearing to explore this issue. I want to thank him for requesting this hearing and commend him for recognizing the importance of this issue.

At the outset, let me also commend Judiciary Committee Chairman Pat Leahy for his leadership on this issue. Senator Leahy recognized this problem long before the rest of us, and he continues to fight to fix the problem with the material support bar.

As is our practice in the Human Rights and the Law Subcommittee, I would like to begin this hearing with a very brief video providing some background on this issue. This video tells the story of one refugee who has been affected by the "material support". I want to thank UNHCR for providing this video footage and for allowing us to use it at the hearing. And now please run the video.

[Videotape played, material appears as a submission for the record.]



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Chairman DURBIN. I want to thank UNHCR for providing that video.

At the base of the Statute of Liberty, Emma Lazarus' famous verse says, "I lift my lamp beside the golden door." For decades, the golden door to the United States has been open to refugees seeking safe haven from ethnic, religious, and political persecution. Our Nation receives more refugees than any other nation. The American people's generosity has made the United States a symbol of freedom and liberty around the world and has given hundreds of thousands of refugees the chance for a new life.

In the aftermath of the 9/11 terrorist attacks, security is an imperative. We must carefully scrutinize everyone seeking to enter our country, including refugees, to make sure that a wolf in sheep's clothing does not slip through. But at the same time, we must ensure that the golden door remains open to those who are fleeing oppression.

Unfortunately, the so-called material support bar has prevented many victims of human rights violations and terrorism from obtaining refugee and asylum status. Under current law, the Government denies asylum and refugee claims to anyone who has provided what the law terms "material support" to "terrorist organizations." These terms are defined very broadly, and the Department of Homeland Security has applied them in a manner that sweeps in conduct that no reasonable person would consider material support or terrorism. As a result, the golden door has been slammed shut for thousands.

Po Wah, whose story we heard in the video, is a good example. Her application for resettlement in the United States was denied. In 2006, the Secretary of State granted a waiver for the residents of Tham Hin Camp. Po Wah has now lived in the camp for 13 years. She now has a 5-month-old baby. She is being permitted to reapply for resettlement in the United States, but her parents will not be able to join her. Her father is ineligible for a waiver because he fought against the Burmese dictatorship.

Others have not been so fortunate. Here are some examples. The material support bar blocks refugees who have provided support to terrorist organizations or armed rebel groups under duress, including R.K., a captured Sri Lankan fisherman, forced to pay ransom to his terrorist kidnappers. Helene, a Sierra Leonean woman who was gang raped and burned by Revolutionary United Front members and forced to wash clothes and cook meals for them. Jennifer, a 13-year-old Ugandan girl who was abducted by the Lord's Resistance Army and forced to serve as the wife of an LRA leader. And Mariana, a nurse from Colombia, who will testify at today's hearing. Mariana's asylum claim was denied because she was kidnapped by the Revolutionary Armed Forces of Colombia, also known as FARC, and forced at gunpoint to provide nursing care to FARC guerrillas. In addition, Laotian Hmong, Vietnamese Montagnard, and Afghan members of the Northern Alliance, who fought alongside U.S. soldiers and against their own governments, have been affected by the material support bar because of the assistance they gave U.S. forces and their own armies.

It is not the role of this Subcommittee to assign blame. The fates of thousands of innocent refugees are too important. Instead of

pointing fingers, it is my hope we can join hands to assure that fundamental human rights are protected. There is no question that efforts are underway to address the problem created by this material support bar. The administration has taken some positive steps, exercising its waiver authority in some cases. Congress has also taken some steps. Language negotiated by Senators Kyl and Leahy that would exclude some from the material support bar was included in the foreign operations appropriations bill the Senate recently passed. We will have an opportunity to discuss those measures today.

But there is also no question that many legitimate refugees are still unjustly labeled "terrorist supporters" by the material support bar. As I have said before, this Subcommittee focuses on legislation, not lamentation, and today we will discuss what more the administration and Congress can do to ensure victims of persecution and terrorism are not denied safe haven in our country.

Now I would like to recognize Senator Coburn of Oklahoma, the Ranking Member of this Subcommittee.

**STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA**

Senator COBURN. Well, thank you, Senator Durbin, for having this hearing. It is a complicated, but nevertheless, very important issue.

Concern over the way U.S. anti-terror laws affect certain refugees and asylees who may otherwise be welcome in our country was first raised before this Subcommittee during our last hearing. At that hearing, we heard heart breaking stories about how children forced into servitude by rebel armies had been barred from refugee status in the United States by laws that were intended to exclude terrorists. Such stories prompted the Chairman and myself to seek further information on the subject, and I look forward to learning more about the subject today.

The United States has a rich and proud tradition of opening its doors to those who are persecuted around the world. In fact, the United States leads the world in refugee resettlement, accepting more than 60 percent of those referred by the UN High Commissioner for Refugees, and serving as that organization's single largest donor. Moreover, this country admits more refugees each year than the rest of the world combined. Since 1975, the United States has resettled more than 2.6 million refugees. Our compassion has saved millions of lives, and as a result, our country has been greatly enriched and strengthened by the diversity that we have received.

It is true, however, that the number of refugees admitted annually by the United States fell precipitously after September 11th. That tragic event presented security challenges never before seen in this country, and the vulnerabilities in our immigration system that were exploited and exposed on that day demand a response.

Unfortunately, the unintended result of that response has meant delayed and sometimes denied access for innocent victims of persecution around the world. Hence, we are faced with dual, though not inconsistent, interests and the obligation to maintain an aggressive anti-terrorism policy that protects the lives of U.S. citizens and a

desire to honor the commitment we have made to refugees around the world.

I am encouraged that the number of refugees admitted annually has risen since the initial post-9/11 decline. I understand that the material support bar, which is the focus of today's hearing, continues to act as an unintended barrier to admission for some individuals. But I am also encouraged that the administration has issued a number of waivers to provide for relief for many.

I am especially encouraged by the duress waivers issued this year, which should provide relief to many who were forced to give material support to terrorist organizations against their will. These acts, though slow in issuance and implementation, demonstrate progress in our attempt to resolve these problems. I remain concerned, however, that the progress we may have made has been insufficient. Former allies, such as the Laotian Hmong and the Vietnamese Montagnards, who fought alongside U.S. soldiers in past conflicts, remain excluded from entering the United States as refugees by the material support bar.

Additionally, it seems that the relief has been slow to reach bona fide refugees who should be covered by waivers that have not already been issued. I would like to hear more about whether and how these waivers have provided relief to deserving refugees who have been affected by the material support bar. I am also interested in learning more about how we can expedite the waiver process and alleviate some of these issues more efficiently.

I look forward to our witnesses' testimony, and again, I thank you and the other members of this Subcommittee for being in attendance at this hearing.

Chairman DURBIN. Thank you very much, Senator Coburn.

Senator Kennedy, do you have an opening statement?

## STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Mr. Chairman, I want to thank you and thank Senator Coburn for having this enormously important hearing. Yesterday, Senator Cornyn and I met with the Secretary of State in compliance with the statute to talk about refugees and about the progress or the challenges, which are out there on refugees and also about the Department's attitude toward material support. And we also talked about the issue of unaccompanied children.

I just want to thank you for having this hearing, and thank you for both your attitude and Senator Coburn's attitude. There is an expectation that there will be a ruling by the Department on the Hmongs and the Montagnards very, very soon, but it is long overdue.

And thank you for your reaction about the slowness in terms of the consideration of these individuals who, according to the best estimate by refugee organizations, number about 12,000. And as we are looking at those individuals, particularly the Iraqis—4 million now are homeless—many of the Iraqi interpreters, who served next to American servicemen and -women, risking their lives and did so bravely and courageously, and now, if found, are going to be shot and killed, deserve to have more expedited consideration of their

application. I think when you have, as we had yesterday, an American serviceman, a sergeant who had been in the military, in the Army, and who explains that his particular interpreter saved his life on countless occasions, now is hidden in Syria, unable to go outside because of fear of assassination and killing. There needs to be an expedited process.

There is a desperate situation out there with regard to material support and with regard to refugees in particular. We are very conscious that there has to be a process in clearing security-wise, but I find it very, very difficult, the delay of the administration, when you have interpreters who have, effectively, crosshairs on their back if they are found in Iraq, their names published and printed on the doors of the mosques, their brothers and sisters who have been interpreters killed and unable to get any kind of sanctuary in the United States. We are not talking about tens of thousands. We are talking about several thousand. We, I think, have a strong moral responsibility to deal with those issues.

I appreciate the fact that the Chair and Senator Coburn mentioned unaccompanied children. There was legislation passed in 2004 dealing with this issue, and there has been virtually no movement. There is a conference that is going to take place next wintertime, an interagency conference about this. But when you find out about the exploitation of children and women in these refugee camps, it is horrific. And I know the Chair has been interested in child soldiers and others, but we have not led the world in terms of trying to recognize this particular group as being a particularly vulnerable group. And I think we have some important responsibilities in those areas.

I thank the Chair.

Chairman DURBIN. Thank you, Senator Kennedy.

Like Senator Kennedy, Senator Leahy has been in the forefront, a leader on so many human rights issues, including this issue of material support, and I want to publicly thank him, as I have in previous Subcommittee hearings, for allowing us to form this Subcommittee, the first Human Rights Subcommittee in the history of the Senate. It has been a Subcommittee that we have tried to use effectively for important issues, and we would not have had that opportunity without his leadership. Senator Leahy.

## STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Well, thank you, Mr. Chairman. I, of course, wanted to form the Human Rights Subcommittee after you had agreed that you would chair it if we did. I think in our Nation, if we actually believe in our moral core as a Nation, then we have to stand up for these things.

I will put my full statement in the record, but I have said in that regard that we need to bring our laws back into alignment with our values. The revisions to the material support provisions that were included in the PATRIOT Act and the REAL ID Act undermine our Nation's commitment to human rights. They are a reactionary, blunt-instrument approach to a complex issue, and fear overcame common sense and our collective conscience.

Surely, a young Colombian refugee forced to dig graves for the victims of Colombian paramilitary soldiers and told he would be killed if he did not do it cannot rationally be said to have provided material support to his persecutors. But he was denied asylum by our Government. To think how we would point the finger of moral outrage at other countries doing this, and yet we do it.

How about the Liberian woman who was raped and abducted by rebels before being forced to cook and do laundry for them? Is that providing material support? Mr. Rosenzweig, your administration thinks it does. She was denied asylum.

We can give all kinds of other stories: Senators Coburn, Durbin, Brownback, Kennedy, and Feingold have talked about child soldiers. They are an obvious example. It is time to bring our laws back in line with our moral values.

Thank you. I will put my whole statement in the record.

Chairman DURBIN. Without objection, and thank you for being here, Chairman Leahy.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Chairman DURBIN. Our first witness is Paul Rosenzweig. He is Deputy Assistant Secretary for Policy at the Department of Homeland Security, and he has previously served as Acting Assistant Secretary for Policy Development, Acting Assistant Secretary for International Affairs, and Counselor to the Assistant Secretary for Policy. Mr. Rosenzweig is also an adjunct professor of law at George Mason University School of Law. Among other positions, he was previously senior legal research fellow at the Center for Legal and Judicial Studies of the Heritage Foundation. Mr. Rosenzweig has a J.D. from the prestigious University of Chicago Law School, has an M.S. in chemical oceanography from the University of California at San Diego, and a B.A. from Haverford College.

Thank you for joining us today, and if you would please stand and raise your right hand. Do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Rosenzweig. I do.

Chairman DURBIN. Let the record indicate that the witness has answered in the affirmative. Please make your opening statement. Your written statement will be made part of the official record.

## STATEMENT OF PAUL ROSENZWEIG, DEPUTY ASSISTANT SECRETARY FOR POLICY, U.S. DEPARTMENT OF HOMELAND SECURITY, WASHINGTON, D.C.

Mr. ROSENZWEIG. Thank you very much, Senator, and thank you very much for holding this hearing on such an important issue. I want to begin by assuring you that the Department of Homeland Security is committed to providing protection to refugees while also safeguarding our national security.

Let me begin, if I may, by reiterating precisely why the material support provisions are so vital to our national security. One can define terrorism in two ways: either by listing an organization as a terrorist organization, or by defining the conduct that makes an organization a terrorist one.

With respect to listing, we must recall that this Congress as well as the courts have said that such organizations are foreign organizations that engage in terrorist activity and are so tainted by their criminal conduct that any contribution to the organization is itself tainted.

With regard to a definition of terrorism by conduct, you must also remember that the listing process is cumbersome and slow, not nearly fast enough to keep up with the mutating terrorist groupings. Thus, while al Qaeda is a listed terrorist organization, its many subsidiary groups such as al Qaeda in the Magreb are not. And, thus, support for those organizations is only captured within the prohibition about broader conduct definitions.

Thus, while I know this Committee is focused on the barriers that the material support law presents to deserving refugees, it is, in our judgment, equally important to begin with the acknowledgment that this law provides absolutely vital protections to American national security. It has allowed the Department, for example, to remove a Saudi national who had paid for and helped run the webside for an al Qaeda front group, the so-called Committee for the Defense of Legitimate Rights, an unlisted Tier III terrorist organization. And it allowed us to deport a supporter and fundraiser for the Benevolence International Foundation, whose associates in the United States conspired to support the Taliban, which, interestingly enough, remains today an unlisted organization.

Now, all that having been said, we are well aware at the Department that the material support bar has the potential to sweep too broadly and to prevent us from providing immigration benefits to those who are deserving of them and to whom the United States is and ought to be willing to provide refuge.

Since my last testimony before the House in May of 2006, the administration has made substantial progress in assessing the material support problem and providing exemptions where appropriate. Since then, Secretary Rice has issued 11 separate determinations for 8 different organizations regarding refugee settlement applications. And as you noted, Mr. Chairman, the Tham Hin camp, because of its atrocious conditions, was the very first venue to which one of our exemptions applied. Thus, the woman whose story is so affecting will indeed be able to reapply now that the exemptions are in place.

In addition to Secretary Rice's actions, Secretary Chertoff has issued parallel exemptions for the same eight groups with regard to applications for immigration benefits or for asylum.

Just this past week, as Senator Kennedy noted, the administration determined to issue two further material support exemptions for Hmong and Montagnards who were valuable allies in Vietnam. That exemption is now in preparation for the Secretary's signature and should be issued in a matter of days.

Earlier this year, Secretary Chertoff also issued an exemption for cases of duress support provided to so-called Tier III groups, that is, groups that are unlisted. He later also issued another duress support exemption for Tier I and Tier II terrorist groups on the listing.

Armed with these exemptions, we have turned our attention to implementation. Here, too, the record is one of success, albeit slow-

ly. DHS has issued more than 3,000 exemptions since the first of the exemption authorities was signed. This has enabled us not only to admit those who are exempt, but to process tens of thousands in the camps in Burma, for example, not all of whom needed exemptions to be allowed to resettle. The exemptions have also allowed us to issue 200 exemptions to the Alzado Cubans who are refugees.

Additionally, 124 duress-based exemptions have been issued. That is up from the number cited in my testimony because each day that goes by sees more additional grants. Those exemptions have been issued to nationals of Iraq, Liberia, Somalia, and the Democratic Republic of Congo.

And in the last days following an extensive national security review, DHS has authorized the beginning of the process for the first set of Tier I duress cases involving the FARC.

But despite our success, one piece of work remains. We cannot under current legislative authority exempt from the application of the bar aliens who were actual combatants under arms, and this accounts for our failure to provide relief to many of the Hmong and Montagnards who fought beside our troops in Vietnam, as well as to some of the child soldiers who are the subject of your earlier hearing, as well as to the refugee's father whom we saw in the video today. We lack that authority.

The administration sent forward a legislative proposal to fix this gap in January, and I invite and welcome your support for that proposal. That limitation aside, however, the story of the material support bar's application is one of steady improvement. We are now poised with all the tools we need to achieve our dual goals of both protecting refugees and protecting the homeland. With your support, we can continue our efforts to achieve those goals.

Thank you for your attention to this timely and important issue, and I look forward to what I anticipate will be many questions.

Chairman DURBIN. Thank you, Mr. Rosenzweig, and before your testimony, you came up and we had a brief conversation about child soldiers. I believe Senator Feingold is on the Foreign Relations Committee, and I think this matter may have been sent to a staff attorney there, and I would like to see if you could help us find out what progress has been made on that legislative suggestion, which I think is valuable.

It seems like when you look at the specific cases here, you find elements that obviously would be taken into consideration by any judge who is trying to be dispassionate and objective: age, duress, circumstances, in some cases narcotics, other substances are being used. All of these things would seem to me to be reasonable things to bring into the material support conversation.

Are you allowed to take those things into consideration?

Mr. ROSENZWEIG. Absolutely, sir. And, indeed, that is part of what we do. Let me give you an example. This is from the guidance that we have issued to the field for adjudication of duress exemptions as opposed to some of the other factors, but each one is different.

We ask our adjudicators, when we provide them a non-exhaustive list, their direction is to assess each case under the totality of the circumstances. But we ask them to first assess whether there

is a reasonably perceived threat of a serious harm. And then we tell them this means things like whether the applicant reasonably could have avoided or taken steps to avoid providing the material support; the severity and type of harm inflicted or threatened; to whom the harm or threat of harm was directed; the imminence of the harm threatened; the likelihood that the threatened harm would be inflicted as opposed to just being an un-imminent threat.

In addition, we asked them to then also inquire on the other side within the totality of the circumstances: the amount and type of material support provided; the frequency of the material support provided; the nature of the terrorist activities committed by the terrorist organization engaged; the applicant's awareness of those terrorist activities, since lack of awareness would clearly be relevant; the length of time that has passed since the applicant provided the material support; the applicant's conduct since that time. All of those are a congery that go into a totality-of-the-circumstances analysis that actually gives us a great deal of flexibility to ask these questions on a fact-specific basis and address each case on a case-by-case instance.

Chairman DURBIN. I am glad to hear that. The problem we have, of course, is that we are given a capsule summary of the circumstances, and when we read of a 13-year-old Ugandan girl who was abducted, sexually assaulted at the age of 13 by the Lord's Resistance Army, and forced to serve as the so-called wife of one of their leaders at the age of 13, it would seem that on its face this is a case that would not argue that she was providing "material support" to a terrorist organization but was, in fact, enslaved by this organization. She was denied refugee status.

Do you know anything more about that case?

Mr. ROSENZWEIG. I don't know about that particular case, but what I do know is that the Lord's Resistance Army is a Tier II listed organization as opposed to one of the unlisted Tier III organizations. And that is because of the many horrific things that the have done, including, it would seem, this.

We have proceeded cautiously in using our authority to exempt material support provided under duress to Tier I and Tier II organizations precisely because we do not want to create unintended consequences that prevent us from continuing to use the same provisions to exclude people of the sort that I alluded to in my statement. The Lord's Resistance Army is one of the groups that is scheduled for an intensive national security analysis within the interagency and within the administration, with the expectation that if that analysis proves to warrant it, we will begin processing such cases as well.

Chairman DURBIN. Let me just close by asking this question: Aside from the substance of the law and its application, I would like to ask you about the timing of the reviews.

Two years ago, under the REAL ID Act, we created waiver authority at your agency. You said that the Department of Homeland Security has issued over 3,000 exemptions to individuals who provided material support, and most of these were for refugees outside the country. You did not mention those who were already in the U.S. and seeking asylum.

It is my understanding that at this point the Government has granted waivers to only nine asylum seekers; over 440 are pending. Is that correct? And if so, what is the justification for delay in processing the waivers for these asylum seekers?

Mr. ROSENZWEIG. I believe your numbers are correct. There have only been nine grants within the asylum division, and there are approximately 440 that are on hold. There are a couple of reasons that lie behind that time frame and sequencing. First, of course, is that we started the process in which we were exploring how to exercise this waiver authority outside the United States rather than inside. We did that for the reasons that are so radically demonstrated by the video that you showed us. The conditions there are so horrific that we wanted to address those first, and we wanted to address those in a context where we could assess whether or not we had the capability to adequately and accurately make determinations and adjudications about people. Having grown comfortable with that, we extended that authority back into the United States.

Then there comes a second order of delay, which is the first extension within the United States applied to asylum seekers and immigration benefit seekers other than those who sought support under duress. That, too, is a complicated issue that posed a series of intricate legal problems. We particularly did not want to move domestically on duress cases in a way that would affect pending Department of Justice prosecutions, issues that they are more capable of addressing for you than I am.

It turns out that almost all of the asylum cases that are pending on hold pose duress questions. Thus, since the issuance of the duress exemption for Tier III, we have processed eight Tier II duress cases in the asylum, and there are approximately 70 more left. There now are about 120 FARC duress exemption cases that have been on hold that are in train to be processed expeditiously now that the administration has determined to move forward with processing of those cases following the national security analysis I alluded to. We will then in train add the Lord's Resistance Army, the other opposition groups in Colombia, the AUC and the ELN.

Chairman DURBIN. What is the timeline on that?

Mr. ROSENZWEIG. Well, those determinations are out for review within the national security community. I do not know the time frame for them coming back. My experience in the group determinations that we began in Thailand is that the very first one of them took a great deal of time because that was asking the national security and intelligence communities to do analysis that they had never done before. They are very used to asking questions like how many Russian tanks there are and things like that, but not these sorts of questions. The first one for the FARC took a commensurately long time, but I am confident that the newer ones will go more quickly, and you will see additional extensions of Tier I duress waivers I would say for sure this calendar year.

Chairman DURBIN. Senator Coburn.

Senator COBURN. Thank you.

So, really, we have two problems. One is there are statutory changes that need to be made, that you all feel need to be made, and I would like for you to outline specifically what those are. And

then the second problem is actually working through the process, and I guess our question is: How do you speed up that process? So two questions. One, what are the exact statutory changes that need to be made, specifically? And number two, how do we help you speed up the process or how do we hold your feet to the fire to get the process speeded up?

Mr. ROSENZWEIG. Well, on the first of those, Senator, the administration has submitted a legislative proposal, the details of which get into the intricacies of sub-sections and sub-sub-sections of the INA. But, broadly speaking, today the exemption authority that the Secretary of State and the Secretary of Homeland Security have is limited to just a few subsets of terrorist-based exemptions.

We may exempt, for example, material support provisions. We may also exempt from that people who are representatives of other groups who espouse—who engage in political speech. We lack the authority to waive the application with respect to INA 212(a)(3)(B)—I think that is right—which is the provision that prohibits us from admitting anybody who has carried arms.

The structure of the administration's proposal is essentially to take off all those limitations and to say, as broad as is the exclusion authority for people who engage in support or otherwise are related to terrorist activity, make our exemption authority identically commensurate. If you do that, we will be able to exercise that authority with respect to the people who have yet to have the relief that they have sought.

With respect to how to speed up the process and hold our feet to the fire, well, this hearing certainly helps. But beyond that, I think that what has happened is that we were faced with a new and challenging set of issues, one that involve a very intricate interplay between provision of criminal and immigration law that is literally of the vital centerpiece of much of the counterterrorism activity that my colleagues in the Department of Justice undertake. And we had to proceed cautiously to ensure that we were not creating precedents that could be adversely used by criminal defendants, for example, in material support cases or things like that. That is why we did proceed on a very step-by-step basis, first in a single camp, then with respect to a single community, then with respect to camps only overseas, then domestically, then to the duress.

We are now actually at a position where there are, in my judgment, only two pieces that are left to be done administratively. The first is the continuing expansion and processing of Tier I and Tier II duress exemptions, and the second is, with your assistance, the extension to combatants so that we can take care of that piece. The first of those I have undertaken and will undertake to continue to move along as quickly as possible. The second of those I cannot do without your help.

Senator COBURN. When will that happen, the first one?

Mr. ROSENZWEIG. The first one? Well, as I said to Senator Durbin, we have put in train each of the groups. We are trying to prioritize them based upon the size of the affected communities. And this is one of the situations where, frankly, we can use the assistance both of the members of this Committee, your staff, and people in the NGO community for helping us to identify additional

groups that require this sort of scrutiny. We were very successful in that cooperative relationship, in my judgment—you will have to ask them—with the NGOs in the Tier III.

Senator COBURN. I think the thing this Committee would like to get a feeling, kind of like what Senator Kennedy said, is these are lives that are at risk, and I think what we want to make sure is that when lives are at risk, we go full speed forward and we do not use the idea of doing what is safe when we can do what is right. And, you know, what we would like to see is to make sure that this is prioritized, that it is a priority, that there is a fire running all the time, because time is the enemy of a lot of these people. And our inability to be responsive and timely could cost them their lives.

We are going to work, Senator Durbin and I have committed to work to get the legislative changes that you need. But I think we need to hear from you a commitment that this is a priority, we are going to do it, because every life that is hanging out there that we do not make a positive impact on is a life that is going to be lost or wasted.

Mr. ROSENZWEIG. You have my unreserved commitment. If I had to say, in my position I have responsibility for literally every policy matter that comes across the Department's plate, ranging from immigration and refugees to border screening to preparedness. And I personally have spent more time on this issue than on any other by far in volume, and that will continue to be the case, I think, until this issue is finally resolved.

Senator COBURN. Thank you for your assurance.

Chairman DURBIN. Senator Leahy.

Chairman LEAHY. Well, I am not going to ask questions. I will leave that to Senator Kennedy. But I agree with both you, Mr. Chairman, and I agree with Senator Coburn that this should be more of a priority. I think of the tens of thousands of Iraqis that we promised assistance to and a tiny handful receive help. And, frankly, Mr. Rosenzweig, I am sure you work very hard, and I am sure you are very dedicated. But I have heard nothing but the same kind of bureaucratic boilerplate I have heard from your Department when in the Appropriations Committee we asked them how are you doing in the cleanup after Katrina. And I heard all these things about policy meetings and this panel and that group and this policy and so on. But, of course, we have hundreds of millions of dollars squandered, and trailers never used. It is like the comments we heard that everything was okay in the Superdome, and yet people were dying.

I would like to hear a lot less boilerplate and see a lot more action.

Chairman DURBIN. Senator Kennedy.

Senator KENNEDY. Thank you. Thanks very much for being here. Let me go through these numbers of waivers. We know that there has been some legislative change, and we thank Chairman Leahy and Senator Durbin and Senator Coburn and Senator Kyl. But we have not seen a lot of transparency in this process. And I would like to just sort of run through this quickly with you.

The ongoing process between the Department of State, Homeland Security, and Department of Justice in identifying the groups that

merit a waiver and how we decide whether these waivers are granted, could you describe that for us?

Mr. ROSENZWEIG. Yes, Senator.

Senator KENNEDY. Maybe you could tell us how they have shifted and how they have changed, because I think Senator Coburn raises a very legitimate question about the timeliness of this. Tell us about your—you can start with maybe your Department and the Department of State since you have indicated that you deal with all of these issues—immigration, refugees, border security.

Mr. ROSENZWEIG. I am not sure I understand the question precisely. Let me—

Senator KENNEDY. The question, let me get—describe the ongoing process in the Department of Homeland Security, State Department, and Department of Justice in identifying groups that merit the waiver and deciding whether the waiver should be granted.

Mr. ROSENZWEIG. Thank you. That clarifies it.

There is an interagency group chaired by the NSC that comprises Justice, State, and the Department of Homeland Security. Typically, I am the representative of the Department of Homeland Security at that interagency group. My counterparts are the head of the Office of Legal Policy in the Department of Justice, the Assistant Attorney General—formerly Rachel Brand; her successor is a man named Brett Gerry—and Assistant Secretary for Population, Refugees, and Migration Ellen Sauerbrey. We meet regularly and routinely to discuss the development of policy with respect to these groups.

With respect to nominations of particular groups, initially much of the impetus for those came from our colleagues in the Refugee Affairs Division of the USCIS and the Department of State's PRM Bureau, who were familiar with the conditions in the Tham Hin camp, for example. More foundationally, they are often motivated by the information they receive from nongovernmental organizations and the UN High Commissioner on Refugees.

The UN High Commissioner on Refugees had, for example, been advancing the cause of the Karen and the Chin in the camps in Thailand for several months in an effort to assure that we took them to our attention.

Senator KENNEDY. Well, let me get to this because of the time—and I do not want to—you get recommendations of the High Commissioner. They go through nongovernmental agencies, then through the Refugee Affairs. Then they come into the Department. I am asking what is the process. What is the process for considering them? How do you work this through? What is the motif?

Mr. ROSENZWEIG. Well, I mean—

Senator KENNEDY. We have a motif allegedly about how we legislate around here. Sometimes it is followed and sometimes it is not, but at least we have got a motif—most people could describe generally what it is. What is the motif now? How do you proceed? And how do each of these agencies proceed? You have to know it.

Mr. ROSENZWEIG. Yes.

Senator KENNEDY. Because you are in charge. So I want to know how you proceed. You have three major agencies that make the judgment that you have just identified, and I would like to know, because we have had difficulty in finding out—you have sat

through those meetings—exactly how that process sort of works its way through.

Mr. ROSENZWEIG. A good example would be how we have processed or are processing the next extension of the Tier I and Tier II. Having done the FARC—

Senator KENNEDY. Let's take the Montagnards, for example. Who started that? What did your Department say about it? What did Homeland Security say about it? What did the Justice Department say? How did that process—you say it is about to get the Secretary's signature. She indicated that as well. But let us just take those two high profile and tell us exactly how that went through. Did you have to have more than one meeting? Has it gone on—did the Justice Department say, look, we ought to be able to go ahead and then did Homeland Security say, no, it is going to take longer—we are going to have to review this? How does it all work?

Mr. ROSENZWEIG. No, on the contrary, Senator, I mean, the first nomination that I know of for the Montagnards and the Hmong came in a collaborative process that was a joint interagency agreement among State, Justice, and DHS. And they have been on our minds because of their quite high profile and their truly affecting circumstances for quite some time.

It has been severely complicated by a bunch of questions that have only recently been resolved. Let me highlight for you two of them.

The first is that, unlike—

Senator KENNEDY. Just—because my time is up—I am trying to get the material support process. How does this role fit into Homeland Security and the Department of Justice? What was the nature of the discussion when you came to the Montagnards? You must have sat in there.

Mr. ROSENZWEIG. Yes.

Senator KENNEDY. Okay. Well, there is a discussion that Justice Department, Homeland Security conducts. You have got the Montagnards, you have got the Hmong. You must have sat through it. Now, how does that go?

Mr. ROSENZWEIG. Well, I—

Senator KENNEDY. I can tell you how discussions go in genetic discrimination with—well, the Senator has left—Senator Coburn over here. I can tell you how those conversations go, and we can all talk about it. How does it go when you are trying to make these judgments on material support?

Mr. ROSENZWEIG. Well—

Senator KENNEDY. You want to try to explain so that the public understands the process. We do not believe that it has been transparent. We do not believe that it has been open. You are the person, as you have just admitted, that knows about it, and there should not be any reason that you cannot really tell the Committee exactly how it works.

Mr. ROSENZWEIG. Well, as I was saying, Senator, there was no dispute on the face of it that the Hmong and Montagnards were a group that ought to have relief. So we agreed interagency that they were for consideration, and then they were sent out to the national security community to ensure that the latest information that we had from the intelligence community did not indicate any contrary

reason why they should not be granted relief. Upon completion of that—

Senator KENNEDY. Could I just—because my time is up. If I could just ask one other question. On the Iraqis, the refugees that are coming in here, as you know, in 2005 we took 198; in 2006, 202. I am not going to get into the numbers, but they are illustrative. Iraqis admitted as refugees so far in 2007, 990. We expect hopefully you will get to 1,700.

Let me ask you, what role will material support play in terms of these Iraqi refugees?

Mr. ROSENZWEIG. It is unlikely to present a large issue. We have already adjudicated at least one Tier II duress material support case for an Iraqi refugee. I anticipate that there will be other cases on an individual basis, but it is unlikely that anybody presenting themselves as a refugee will also have been somebody who provided material support to al Qaeda in Iraq. In that unlikely circumstance we will obviously have to face the question. But, by and large, given the large number of refugees, many of whom are, as you said in your opening statement, people who are known to have embedded by U.S. Government personnel, the material support bar obviously has no—

Senator KENNEDY. What if they did it to Saddam Hussein's henchmen, if they had a kidnapping, paid money to them?

Mr. ROSENZWEIG. I think we would have to probably face that when we come to it. I am corrected that we have actually issued a blanket waiver for any Tier III material support that is in the blanket exemption for any Tier III material support that involves non-designated groups in Iraq. So that actually helps me out quite a bit.

Chairman DURBIN. Senator Kennedy, thank you for raising that last point, and let me follow up on it.

When I recently visited Iraq, I learned that there were some 4 million displaced persons—2 million internally and 2 million outside of Iraq, refugees; rough estimates of 600,000 or 700,000 in Jordan, over a million in Syria, some in Egypt, and undoubtedly in other countries. And I was also told at the time that the United States had accepted some 700 Iraqi refugees. And so you have said that material support, as I understand it, is not generally an issue, with these Iraqi refugees?

Mr. ROSENZWEIG. It has not presented itself thus far, no.

Chairman DURBIN. I am trying to figure out why it is taking so long, why they have to leave Iraq to apply for refugee status. This displaced population is causing great hardship in Jordan. I did not visit Syria so I do not know, but it is causing great hardship in a country that is not wealthy. Though we assume most of the Middle East is wealthy, Jordan does not have oil or gas. And they are struggling to find water and the basics. Just allowing the children of these refugees into the Jordanian school system means that 10 percent of their school population will now be Iraqi.

So it seems to me, going back to earlier statements by Senator Kennedy and others, that we have a certain moral obligation here. Many of these people who are asking for refugee status literally risked their lives for us, for our soldiers, for our people, and for our cause. And I do not know what role you play in these Iraqi refugees

being processed, but can you give me some kind of assurance that this is going to change soon and that we are going to bring more into protection here in the United States who deserve it?

Mr. ROSENZWEIG. Yes, I can. Let me first, though, address the timeline question and then the numbers, because though I know it seems a long time to you, the processing time for Iraqi refugees is now down to between 4 and 6 months, which is shorter than for any other refugee population anywhere else in the world. You saw the Tham Hin camp where they have been waiting 10 years, and that is precisely because the Department of State, the International Organization for Migration, and DHS have been investing substantial and significant resources in speeding up the process.

To that end, the President's report on refugees will set a target, one that I am confident we will meet, of accepting 12,000 refugees from Iraq next year, which will be roughly 12/70th of the total goal for the entire world. So that is quite a substantial commitment.

That having been said, you know, if there are 600,000 in Jordan—and there are—the United States cannot possibly accept all of those. We have accepted more for referral from UNHCR than the rest of the world combined at this juncture, and we are going to continue to move forward on that.

Chairman DURBIN. How many have we accepted?

Mr. ROSENZWEIG. We have accepted for referral to the USA RAP program 11,019 as of Monday. Of those, 10,484 were referred to us by the UNHCR, 229 were referred by U.S. embassies, and 306 were what we call "direct access" referrals.

Chairman DURBIN. And how many have been accepted by the United States so far?

Mr. ROSENZWEIG. To date, there are 942, I believe—it may be higher because this is Monday's number—who have actually been admitted. We have completed interviews on 4,309 of them, conditionally approved—or fully approved some 2.987. I have asked—I have often likened this a bit to like water in a hose. You turn on the tap at one end, and it does not come out the other end until a bunch of things have happened.

We turned on this hose in February. It is now essentially at full flow, and for the next fiscal year, we are going to be processing essentially 1,000 a month, which is more than any other single individual refugee population.

I should add that there are two other reasons why things are slow. You did not go to Syria. My staff cannot go to Syria either. The Syrians have denied us visas for them to come and process refugees. If we do not go, we cannot process.

Chairman DURBIN. So how many DHS staff or employees are currently sent to Jordan, where you can go, to process the 600,000 or 700,000 Iraqi refugees?

Mr. ROSENZWEIG. We send teams of four to six whenever there are individuals who are ready for an interview. That is a middle point in the process.

Chairman DURBIN. So how many total have been sent to Jordan?

Mr. ROSENZWEIG. We have been to Amman four times that I know of, and we go on essentially a week's notice when people are ready for our portion of it. There is a prefatory phase that is conducted by IOM, and I am pleased and, quite frankly, very proud

to say that so far we have addressed and interviewed every single interview-ready individual within a matter of weeks from their being ready for interview.

Chairman DURBIN. Since I was there a few weeks ago—and I can tell you that the problem has overwhelmed Jordan—sending six teams of six, I am sure they would react by saying you have to do a lot more than that. And I hope we will. I understand that there is a security issue here that we have to be sensitive to and mindful of. I also understand that currently we have 65,000 Iraqi civilians who were supporting our effort in Iraq, risking their lives for our cause, and for theirs—a joint cause, I should say. So I hope that we will be more sensitive to the impact and the need for quick action.

If you say that this started last February, that was 4 years into this war before we started dealing with this issue. And clearly we are long overdue in meeting an obligation here.

Mr. ROSENZWEIG. Your latter point is well taken, but with respect to your former point about not putting sufficient resources to it, there are space limitations, people limitations, and I have to repeat, we are simply not going to be in a position to accept 600,000 Iraqi refugees. We will accept and process everybody who is qualified within the context of—DHS has thrown resources at this. We have pulled, frankly, adjudicators from other populations around the world to make sure that we answer the mail every time.

Chairman DURBIN. I am going send it to Senator Coburn with one last comment. We cannot accept 600,000 or 700,000, and I would not suggest it. We certainly can accept some moral responsibility for helping Jordan and those other countries who are trying to provide humanitarian assistance to them.

Mr. ROSENZWEIG. That I would certainly agree with. That, of course, is in my colleague from the Department of State's purview for providing humanitarian assistance.

Chairman DURBIN. Senator Coburn.

Senator COBURN. I just think the record needs—I served as a medical missionary in Iraq after the first Gulf War, and a lot of these refugees do not want to come here. They want to go home. And so we cannot use the number of 600,000 or 700,000 because their real choice is to go home. And so that is a whole other set of issues, but we need to be very clear. Those that have helped us, those that want to seek our help, we ought to be ready and able and willing to help. And I thank you for your testimony and the hard work that you do.

Chairman DURBIN. Thank you, Mr. Rosenzweig, for your testimony.

Mr. ROSENZWEIG. Thank you.

[The prepared statement of Mr. Rosenzweig appears as a submission for the record.]

Chairman DURBIN. It now is my pleasure to call before the Subcommittee the second panel of witnesses. Please note that the Subcommittee is taking special security measures to protect the anonymity of one of our witnesses. This witness will testify under a pseudonym, and she will be surrounded by screens to protect her identity. No video or photographs of this witness will be permitted.

The U.S. Capitol Police are present. They will escort from the hearing room anyone who does not abide by these rules.

We are honored to welcome a distinguished panel of witnesses to share their views. Each witness will have 5 minutes for their opening statement, if they would please take their seats at the table. Their complete written statements will be included in the record.

I would like to ask all of the witnesses if—do we need a minute? Okay. Just a minute here while we set things up.

[Pause.]

Chairman DURBIN. I would like to ask the witnesses, if they would not mind, to stand and be sworn in. Do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Ms. Hughes. I do.

Bishop Wenski. I do.

Mariana. I do.

Chairman DURBIN. Our first witness is Anwen Hughes, an attorney with the Human Rights First organization. She is senior counsel of Human Rights First's Refugee Protection Program. She helps oversee Human Rights First's pro bono representation for indigent asylum. Ms. Hughes received her J.D. from Yale Law and B.A. from Yale College. Ms. Hughes has been before this Subcommittee before, having testified at our child soldiers hearing about the impact of material support bar on these child soldiers.

Thank you for bringing this issue to our attention and for being with us today, and please proceed with your testimony. And as I mentioned, your written statement will be made a part of the record.

**STATEMENT OF ANWEN HUGHES, SENIOR COUNSEL, REFUGEE PROTECTION PROGRAM, HUMAN RIGHTS FIRST, NEW YORK, NEW YORK**

Ms. HUGHES. Chairman Durbin, Ranking Member Coburn, and members of the Subcommittee, thank you for holding this hearing and for inviting me here today to offer the views of Human Rights First on this important topic.

For nearly 30 years, Human Rights First has worked to protect and promote fundamental human rights and to ensure that the rights guaranteed to refugees under the Refugee Convention and its Protocol remain available to them under U.S. law. At the same time, we have a longstanding commitment to the proper application of the "exclusion" clauses of the Refugee Convention, which allow the denial of international protection to refugees who have committed serious violations of the human rights of others or other serious crimes, including acts of terrorism.

I am here today to talk about the way the terrorism bars in our immigration law enacted to bar terrorists and their supporters from the United States are undermining our ability to protect refugees and are barring as "terrorists" the victims of the people and groups these immigration law provisions had intended to target, as others have been explaining earlier.

Several asylum seekers are here with us today whose experiences illustrate the real human costs of this situation. One is a nurse from Colombia, Mariana, who will be testifying in a moment. She

was kidnapped by FARC guerrillas and forced to treat their wounded. She will be testifying in person today.

Also here today is a Nepalese medical worker, referred to in his immigration papers by his initials, B.T., who was abducted by Maoist rebels and forced to treat their injured members.

Another refugee with us here is a member of Burma's Chin ethnic minority. For similar security reasons, we are referring to her publicly by her initials, which are S.K., who was denied asylum based on the finding that she had contributed to a Chin organization, some of whose members had used force against the army of the Burmese military regime.

A former student activist from Bhutan is also present at this hearing. As a refugee in Nepal, he had taught at a school that took money from him, probably because the school was being subjected to extortion by Maoist rebels. Because of this, this man's case has been frozen for over a year, prolonging his separation from his wife and his little daughter.

How do we get to a point where people like this became targets of our counterterrorism efforts? The root of this problem really lies in our immigration law's definition of "terrorist activity," which is defined to include the use of any weapon or dangerous device, other than for mere personal monetary gain, to endanger persons or property. If read literally, this definition covers everything from simple assaults to ordinary warfare, to what most people actually would consider to be terrorist activity. The essential elements of this definition have been on the books since 1990, but the passage of the USA PATRIOT Act and the REAL ID Act compounded their effects.

These pieces of legislation defined as a terrorist organization any group of people that engages in or has a subset that engaged in terrorist activity, as I just defined it, and there is no centralized government control over a decision that a group falls under that definition. They also provided that anyone who provides material support to a terrorist organization is held to have engaged in terrorist activity himself.

Now, under the Refugee Convention, in order to be excluded from protection, a refugee must bear individual responsibility for serious wrongdoing, either because the refugee personally committed an excludable act, which would include acts of terrorism, as that term is commonly understood, or because he or she contributed to the commission of such acts in a significant way and did so knowingly and voluntarily.

What we now have under our immigration laws, unfortunately, is a situation where a person can be returned to persecution for giving support to a group without any showing that any member of the group even engaged in any wrongdoing that would justify exclusion of that person, much less of the refugee who gave to the group as a whole.

Miss K, the Burmese Chin woman who is here with us, is an example of this. She has been denied asylum for giving to the CNF, the Chin organization I was referring to, based only on a finding that the CNF used arms in self-defense against the army of the Burmese military regime, which has targeted the Chin and also other Burmese ethnic minorities, like the Karen, who were rep-

resented in the video that was shown earlier, for ethnic and religious persecution.

But DHS has also amplified the unintended consequences of these definitions by interpreting them in the most expansive possible way. DHS has effectively read the "material" out of the term "material support," excluding people from protection based on minimal contributions or based on forms of assistance that bear no logical connection to terrorist activity. For example, DHS has considered emergency medical care to constitute material support to terrorism. Mariana, the nurse from Colombia who be testifying shortly, was kidnapped by FARC guerrillas and is an example of this. But she is not the only one.

The medical worker from Nepal who is with us here also was kidnapped and forced to treat injured Maoist guerrillas. He was granted asylum by the immigration judge, but DHS has appealed that decision to the BIA, and the case has been pending there since 2005.

DHS has also refused to recognize any defenses to this bar, including duress, as Senator Durbin and others were referring to earlier. It is hard to see how these interpretations advance our national security. In the overwhelming majority of these cases, the reason the U.S. Government knows that these refugees gave anything to an armed group at all is because the refugees themselves have come forward and told the Government about this of their own free will and under oath. Also, posing a threat to the security of the U.S. is an independent bar to asylum. In almost all of these cases, we are talking about people DHS does not contend pose any threat whatsoever to the United States.

Now, the statute provides authority for DHS and the Secretary of State overseas not to apply certain of these bars, and new legislation would expand this authority to cover the rest of them, subject to certain exceptions. This waiver authority is important, and its expansion is a positive development. But as has been noted and confirmed earlier, while about 3,000 refugees overseas have been granted waivers, only nine asylum seekers have received waivers to date, and there is still no process in place to grant waivers to any asylum seeker whose case is pending before the immigration court.

This means that although Chin refugees in exactly the same situation as Miss K, for example, are now being resettled in the United States, she herself remains in removal proceedings, and she was detained for 2 years because of this.

The other refugees attending this hearing today are in the same situation and have also seen their lives placed on hold. They are unable to travel or plan for the future, and they cannot be reunited with their spouses and children, who often remain in very dangerous situations overseas.

And these are the cases we know about. One of the scary things is that DHS and the Justice Department, as far as we are aware, do not have mechanisms in place to keep track of the cases that are pending before the immigration courts or the Federal courts that DHS intends to eventually consider for waivers, so that there does not appear to be a reliable system in place to keep those people from being deported before that can happen.

I would also note that these are the results that we have seen at the end of a 2-year period in which this problem has been the intense focus of the Government and also of the NGO community. From a practical standpoint, we have had serious concerns that this level of reliance on waivers is just not a feasible solution in the long term, especially if DHS maintains its current interpretations of the core legal definitions that are sweeping so many of these cases into this terrorism bar framework.

This scheme also raises very fundamental due process concerns. Administrative agencies are not infallible, and many of the asylum seekers who come before them are unrepresented by counsel and struggle to communicate their stories through inadequate translation and across significant cultural and linguistic barriers. For the asylum seekers involved, what is at issue here can be the difference between life and death, and we believe that these cases deserve the same procedural protections and the same review that our legal system normally accords to interests of this magnitude.

In conclusion, progress on implementing the waiver authority that currently exists is a positive development, and it should be pursued and it should also be closely monitored, both in asylum and adjustment-of-status cases and also in refugee cases overseas. Expanding the waiver authority is also an important step to help many refugees currently barred from protection. But in order to bring our system of refugee protection back into line with our treaty obligations and our historical traditions of extending protection to the persecuted, Congress ultimately will need to address the overbroad definitions that lie at the heart of this problem. The people the U.S. Government actually needs to target, including the examples that Mr. Rosenzweig was citing earlier, would lie well within a more focused set of definitions that we should all be able to agree on.

Thank you, Mr. Chairman, and I look forward to answering any questions the Subcommittee may have.

[The prepared statement of Ms. Hughes appears as a submission for the record.]

Chairman DURBIN. Thank you very much, Ms. Hughes.

Our next witness is Bishop Thomas Wenski. He has had a long and distinguished career. He has headed the Roman Catholic Diocese of Orlando since November 2004. He was previously auxiliary bishop of Miami for 7 years. He is chair of the U.S. Conference of Catholic Bishops' International Policy Committee, and was previously chair of their Migration Committee. He also served as Chairman of the Board of the Catholic Legal Immigration Network. Governor Jeb Bush of Florida appointed Bishop Wenski to the Governor's Task Force on Haiti. U.S. Attorney Paul Perez appointed Bishop Wenski to the Human Trafficking Working Group. His biography will tell you that he has been involved in extensive humanitarian efforts in Cuba, Haiti, the Dominican Republic, Colombia, and many Central American countries.

Bishop Wenski, thank you for joining us today. The floor is yours.

**STATEMENT OF BISHOP THOMAS WENSKI, DIOCESE OF ORLANDO, AND CHAIRMAN, INTERNATIONAL POLICY COMMITTEE, U.S. CONFERENCE OF CATHOLIC BISHOPS, ORLANDO, FLORIDA**

Bishop WENSKI. Thank you. I would like to thank you, Senator Durbin and Senator Coburn, for inviting me to testify here today.

The United States bishops and their Catholic dioceses are the largest nonprofit provider of services to refugees in our country, and we are gravely concerned with the impact of the issue of material support on bona fide refugees, asylum seekers, and others who come to our shores fleeing terror and persecution.

Mr. Chairman, let me say up front that the bishops and I appreciate the efforts of Congress to protect the American public and ensure our national security. Since 9/11, national security has been an urgent priority for the American public, and rightly so.

It is the view of the bishops that national security interests and important principles undergirding our democracy are not incompatible. We need not undermine our honored traditions and democratic principles in order to achieve security. In fact, we can achieve both with the proper balance.

With the issue of material support, we are concerned that we have failed to strike that proper balance and that people who are victims in their own countries, forcing them to flee, to become refugees fleeing terror, are now victimized again by the unintended consequences of an ineffectual policy.

Mr. Chairman, in my testimony, my written testimony, I have included several examples of refugees who have been denied resettlement in the United States because of the material support bar. Their stories are horrific, but similar in at least one respect: they were forced to provide some sort of support to a terrorist organization, as currently defined in law, at the risk of their health or lives. In most cases, they were providing this support under duress to groups or resisting regimes our own country also opposes.

Tragically, current law does not adequately take into account the circumstances whereby an individual provides material support to a group, nor does it properly distinguish between groups that are actual threats to our Nation and those who are not. For example, Colombians fleeing the civil war in their country have been particularly vulnerable to the material support bar because of the common practice by rebel groups to force payments from them at gunpoint. Burmese aiding rebel groups against the Burma military junta often were forced to support the groups at the risk of death.

To its credit, the administration has taken some steps to mitigate these circumstances by issuing waivers for certain groups, including the Burmese, to enter our country. But the process is very slow and burdensome and does not adequately solve the problem at hand, which is the denial of life-saving protection to thousands of refugees. And this is evident in the numbers resettled in the U.S. Refugee Program. Last year, nearly 12,000 cases were not resettled because of material support provisions, and only about 41,000 refugees were resettled. We are expected to bring in about the same number this year, but that is far below the Presidential determination of some 70,000 refugees.

For asylum seekers, over 440 cases are currently on hold, and only 9 cases have been approved. And for eligible persons in removal proceedings, no waivers have yet been issued. In our view, the best solution to this problem is for Congress to reconsider the issue of material support and revise the definitions of "terrorist activities" and "terrorist organizations," and this can be done without allowing individuals that support groups that truly threaten us. Congress should also statutorily clarify its intent on duress and provide an exception for that circumstance.

Mr. Chairman, the United States has been a beacon of hope for millions who have fled to this country for the protection that our democracy and our freedom bring. If we abandon our tradition of providing safe haven to the persecuted, we sacrifice those principles which have made this country great and, thus, allow our enemies a victory.

We ask you to consider our recommendations and act accordingly, and I thank you again for your consideration.

[The prepared statement of Bishop Wenski appears as a submission for the record.]

Chairman DURBIN. Bishop, thank you for your testimony.

We are going to now call our third witness on this panel. It will be necessary for us to make a few changes here to protect the identity of this witness, who fears for the safety of her family if her identity is disclosed.

[Pause.]

Chairman DURBIN. If the witness would please stand and take the oath. Do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mariana. I do.

Chairman DURBIN. Thank you.

Our final witness today is Mariana, a pseudonym which is being used for the protection of her identity. She is a refugee from Colombia. Mariana was kidnapped by the FARC and forced at gunpoint to provide medical care to guerrillas. Her asylum claim was denied because the Department of Homeland Security claimed that by providing nursing care for members of the FARC, she had provided material support to terrorists.

Mariana, this Subcommittee is honored to receive your testimony, and I want to commend you for the courage to come today, understanding that your testimony, and particularly your identity, could create some danger for you or your family. We look forward to your testimony. Please proceed.

## STATEMENT OF MARIANA, COLOMBIAN REFUGEE

MARIANA. Thank you for allowing me to be here today. I was a nurse in Colombia, and my daughter and I are seeking asylum in the United States because of my fear of the Revolutionary Armed Forces of Colombia (FARC). Both my daughter and I are currently in removal proceedings before an immigration judge after our asylum application was not granted because DHS said that I had provided material support to a terrorist organization. I am making this statement under the name "Mariana" because I am terrified that if the FARC learns of my identity in the United States, and

that I am seeking asylum, they will harm my family, which still resides in Colombia.

My family members were active supporters of the Colombian Government who raised me to value serving the Colombian people, and I became a nurse in Colombia because of my desire to help others. After completing my nursing degree, I worked for the Ministry of Health, organized conferences on health promotion, and directly served Bogota's poor communities. During my spare time, I volunteered in the communities, giving health lectures and distributing donated medicines, medications.

In 1997, I was giving a presentation with a doctor for a health campaign. During the talk, an audience member collapsed, so the doctor and I attended to him while the other attendees left. But the fallen man suddenly began to laugh, and two other men came over and identified themselves as members of FARC. The guerrillas kidnapped and physically assaulted me and took me to a FARC member who had been shot, forcing me at gunpoint to treat him. Before returning home, the guerrillas threatened my life and the lives of my family if I notified the authorities. In the following months, FARC members continued abducting me, forcing me to provide treatment and medicine to injured guerrillas.

Eventually, I became certain that I was going to be killed by FARC because I was left with a condolence card at my doorstep, something which FARC did routinely before it killed someone. I was absolutely terrified for my safety and for my family's safety. I knew that FARC would kill me and my family if I did not cooperate with them. The communications that they made showed me that they were watching my every move, and it is well known that FARC has infiltrated the Colombian Government and that there is no one that can protect you. For instance, shortly after the medical clinic where I worked was closed, FARC killed my cousin by beating him to death and then setting his taxi on fire.

I fled to the United States with my daughter and immediately filed a request for asylum. On July 26, 2006, DHS rejected my claim for asylum, stating that, "There are reasonable grounds for regarding you as a danger to the security of the United States in that you have provided material support to those who engage in terrorist activity." DHS then initiated removal proceedings against my daughter and me. Our request for asylum is now pending before the U.S. immigration court, and our next hearing is scheduled in early 2008.

I cannot believe that I was denied asylum based on supporting a terrorist organization. I never acted voluntarily. I only provided medical support because I was threatened at gunpoint and told that if I did not help the FARC soldiers both me and my family would be killed. I sincerely felt that I had no other option because I would have been killed if I had not done what they wanted. The asylum application has been pending for almost 7 years, and I am still overwhelmed with the fear that I will be sent back home to Colombia or that FARC will take action against my family. I have no sense of security, and it has been very difficult to raise my young daughter here with such uncertainty. Deportation back to Colombia would literally be a death sentence for us.

Thank you very much.

[The prepared statement of Mariana appears as a submission for the record.]

Chairman DURBIN. Thank you for your testimony. I think that it was difficult for you to say these words, and it was courageous of you to come here today and speak not just for yourself but for thousands of others who are caught in this material support loophole. You have experienced firsthand what it is like to be branded as "engaged in terrorist activity," which is the reason for the denial of your request.

Do you think that your home country will welcome you back after you have been designated as involved in terrorist activities by the United States Government?

MARIANA. No. No, they will never, and like I said in my statement, the FARC has infiltrated all our government, and if they know that I came here, seek asylum, and I say what I said today here, they will kill me and my family.

Chairman DURBIN. You have a special situation here that Senator Coburn can address better than I can, being a medical doctor, in that you are a medical professional with a humanitarian duty to provide emergency care.

MARIANA. Yes.

Chairman DURBIN. You have explained how you were intimidated and kidnapped and forced into this situation. I wonder how you feel that when you used your skills as a nurse for medical purposes, that that has been branded as "terrorist activity" by our Government.

MARIANA. I only did that because I was at gunpoint. They forced me. They told me, "If you don't do this, I will kill your daughter." They said her name, my father's name. "If you don't do this, if you don't tell me what the next activity, what the campaign, what political activities you are going to do next, we will kill you." It is the only way I will do it. I will do it—I have—I never did it because I wanted to. Because I was forced to.

Chairman DURBIN. And as you testified here, it was your cousin who was beaten to death and killed by this same organization.

MARIANA. Yes. He was with my father and my family members—sisters and cousins, we were together working on this. He was an accountant, and he was part of the group, and he was with us, and—with the group.

Chairman DURBIN. So you are really in a position now without a country.

MARIANA. Exactly. I cannot come back because they killed him, and we are in the same group, so I say, "I have to leave. I have to."

Chairman DURBIN. They will not give you refugee status in the United States. It is too dangerous for you to go back to Colombia.

MARIANA. Yes, it is.

Chairman DURBIN. And you are caught in our court system now while they make this final determination.

MARIANA. Exactly. I have been caught for 7 years. I don't know what to do at this moment. That is why I am here. I decided to come, like you said, to speak for me and speak up for the other people that are in the same situation. We were forced. You never do that because you wanted, especially in my case. My father is still—

you serve your country and you are going to be the rights, the human rights be protected, and your life is going to be taken care of, but they don't care about anything. They don't respect any human life. They don't care. They just kill some people because they only want power. It doesn't matter why or how.

Chairman DURBIN. Thank you.

Bishop Wenski, you have heard this testimony, which is as convincing as anything I have heard about the terror that this young woman has faced with her daughter because of this abduction and the kind of support that she was forced to give to these guerrillas. Have you run into similar cases that you have dealt with?

Bishop WENSKI. Yes, Colombians and also other people. I lived most of my life in South Florida, and South Florida is a gateway for people that come from troubled countries. But a few years ago, as part of the Bishops Conference, I went to Ecuador and visited the frontier town of Lagos Agrios, where there are many Colombian refugees that have been forced because of paramilitary action or FARC action to cross the border. And many of these Colombians are also seeking a permanent solution to their situation in a third country, which could very well be the United States, and because of the material support bars, they are being also caught in that situation.

Chairman DURBIN. Ms. Hughes, as I hear Mariana's testimony, it appears she is going to have an appeals hearing sometime perhaps next year. And what happens if that fails? Where does she turn next?

Ms. HUGHES. Well, her case is currently before the immigration court, and so if it were denied at that level, it would go to the Board of Immigration Appeals. One of the difficult things for people in her situation, as Mr. Rosenzweig was stating earlier, is that DHS has, in fact, agreed in principle to consider now duress waivers of the material support bar for people who provided support involuntarily to the FARC, which is her situation. But there is still no process in place. There is the willingness in principle, but there is still no process in place to do that, for her or for anyone else whose case is in immigration court.

Chairman DURBIN. Senator Coburn.

Senator COBURN. Ms. Hughes, let me follow up. How does somebody know that they are eligible for a waiver right now? For example, in principle, our witness over here is eligible for a waiver.

Ms. HUGHES. In principle, she certainly is, Senator, although there is no way for her to get one right now.

Senator COBURN. But the point is she is. So let's take the people that are eligible for a waiver and can get one. How do they notify them? What is the process? How do they communicate that?

Ms. HUGHES. They do not communicate that.

Senator COBURN. That is why I asked the question.

Ms. HUGHES. Right. My understanding of the way that USCIS is implementing this process is that they are considering for waivers those cases that they know of that are within their jurisdiction currently that fall within the waiver exemptions that have currently been announced.

The problem with this, though, is that somebody in Mariana's situation has—or let us say somebody in Mariana's situation's case

is pending before the asylum office, to take an example that actually would be implementable currently. That person has no way of knowing that that process is happening, that their file actually is going through that process. And if it is rejected, they also do not know why. If it is granted, as far as I know, people are not actually getting a notice: Oh, by the way, we reviewed your case for a waiver, and we are making an exemption. They would simply get a grant of their case.

So the system is as opaque as it is sounding.

Senator COBURN. So that is one of the reasons why you think that DHS ought to have a system where they know who is in court, in terms of asylum adjudication, who is actually in immigration court, who is actually in Federal court. They ought to have a network to track those.

Ms. HUGHES. Exactly.

Senator COBURN. And that was your point. And we do not have the DHS here, but I think we need to submit that question to DHS: What is your process to know who is out there, who can benefit from this, who is undergoing adjudication now, because, in fact, they could issue a waiver which would stop all that process and solve the problem before we continue on the legal side. Correct?

Ms. HUGHES. They could, indeed. They could also do something even more efficient, which would be to alter their position that the kind of support that this woman and others provided constitutes material support in the first place. Medical care has historically enjoyed a special role, and this case and others like it are legally anomalous in that sense.

Senator COBURN. I can agree partially with that, but I can also see how someone could get into this country under that auspices as well. But I think the more important thing is that there is no question in this case, this is duress. I mean, it is slam-dunk, open-shut.

Ms. HUGHES. I would agree with that.

Senator COBURN. So if, in fact, it is duress, how do we execute that to where we have a resolution of the problem rather than continue to keep something in court? It certainly is not cheap for her, both in terms of emotional costs, financial costs. Even though she may have pro bono work being done for her, there is a significant cost to her in terms of continuing her life and that of her child.

I think we will submit that question for the record to DHS and find out, and we also will ask in an additional question in terms of offering medical support. You know, there is a good question. If you are a trained medical professional, and no matter what somebody has done or what their belief system is or where they are, we have an obligation to help them if they are, in fact, in need. And so that ought to be looked at, and we will ask that question of DHS as well.

Ms. HUGHES. Thank you.

Senator COBURN. I thank both of you for your testimony. I have another hearing I have to go to.

Chairman DURBIN. Thank you very much, Senator Coburn, for inspiring me to have this hearing and for being here today during the course of the testimony. It is unusual when you can see results before we even adjourn, but we were just sent by the miracle of

BlackBerry a notice from the Department of Homeland Security that, Mariana, they are going to personally review your case based on the testimony today, and we are hopeful that the outcome will be the best for you and your daughter.

MARIANA. Thank you very much.

Chairman DURBIN. So your courage in coming here is going to be rewarded by at least an additional day in court, which we hope will end well.

I want to thank you, Ms. Hughes, for joining us again, Bishop Wenski, for your personal sacrifice in coming here today to join us. The faith community has played a big, big role in dealing with refugees, and I am proud that the Catholic Conference of Bishops has been part of that faith community that has done so much.

Let me mention just a number of the other organizations that have asked to place written statements in the record about this issue: the Beckett Fund for Religious Liberty; the Center for Victims of Torture; Richard Cizik, Vice President of the National Association of Evangelicals; the Episcopal Migration Ministries; Hebrew Immigrant Aid Society; Human Rights Watch; Immigrant and Refugee Appellate Center; Dr. Richard Land, President of the Southern Baptist Convention's Ethics and Religious Liberty Commission; the Lutheran Immigration and Refugee Service; Heartland Alliance's; National Immigrant Justice Center, based in Chicago; Physicians for Human Rights; Southeast Asia Resource Action Center; United Nations High Commissioner for Refugees; and World Relief USA. And without objection, these statements will be placed in the record.

The hearing record will remain open for a week for additional materials. Written questions may be directed to the witnesses, which we hope they will respond to in a timely fashion.

I thank my colleagues for participating. I thank the witnesses for their testimony. Mariana, thank you again for the risk that you took to speak out.

MARIANA. Thank you very much.

Chairman DURBIN. I only hope that your good fortune is shared by thousands of others who are waiting with the same fear and the same concern that you have for your family.

This hearing stands adjourned.

MARIANA. Thank you very much. I appreciate it.

[Whereupon, at 4 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

# QUESTIONS AND ANSWERS

**Follow-up questions of Sen. Coburn:**

1) *The United States leads the world in refugee resettlement. We accept more than 60 percent of those referred by the U.N. High Commissioner for Refugees and admit more refugees each year than the rest of the world combined. Given the challenges we have faced since 9-11, and the implications for refugees and asylees discussed here today, what is being done to encourage other countries to help resettle refugees around the world? What more can be done to encourage more widespread participation in refugee resettlement?*

The United States played a leadership role in crafting international standards for refugee protection, and our historic role as a refuge for the persecuted is a core aspect of our identity as a nation. The U.S.'s major role in refugee resettlement over the years reflects that tradition, and U.S. practice in this area influences how other countries, treat refugees seeking asylum and to what extent they are willing to resettle refugees from abroad. It should be noted that many countries that have not historically resettled many refugees have received—and continue to receive—relatively large numbers of refugees seeking asylum within their borders. Encouraging more widespread participation in refugee resettlement is important and ongoing—a few Latin American countries, for example, have begun to emerge as countries of resettlement for some refugees from Colombia and elsewhere—but should be seen as a complement to rather than a substitute for the U.S. rebuilding its own leadership role in this field. While the U.S. continues to play a dominant role in refugee resettlement, the number of refugees we resettle has been recovering slowly from an historic low. In order to encourage other countries to take on a greater role in refugee resettlement, it is important that the U.S. resolve the issues that have contributed to a slowdown in our own programs, including the over-expansive application of the terrorism bars, so as to avoid labeling refugees as terrorists and security threats.

2) *In your opinion, what procedures should be used to notify refugees previously barred by the material support statute that they have qualified for an Executive waiver?*

This question raises two important problems: identifying cases that are newly eligible for waiver consideration, and notifying applicants of that fact and allowing them the opportunity to submit evidence relevant to their waiver eligibility before a final decision is made.

The problem of identification of cases is particularly serious with respect to cases currently pending before the immigration courts and cases that have already been adjudicated at that level. DHS, currently, is relying on Immigration & Customs Enforcement (ICE) trial attorneys to flag cases currently pending and does not appear to be currently engaged in a serious effort to identify older cases that may still be pending before the federal courts, for example, after being denied at the Board of Immigration Appeals (BIA) level. We would recommend that DHS and DOJ work in tandem to flag those cases currently pending and also to identify cases already closed at the EOIR level.



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With respect to pending cases, we would recommend that EOIR track the basis for denial of asylum and withholding of removal claims--something it does not currently do—so that cases found eligible for refugee protection but for the terrorism bar can be identified much more easily going forward. Better outreach to the public, the bar, and the NGO community would also be helpful—the waiver implementation process has been marked by repeated and frustrating gaps in communication, where exemption announcements have not been communicated for weeks even to the core group of NGO's that has been working closely with the government on these problems, and where DHS's long-awaited process to implement its waiver authority in removal cases was only announced publicly a month and a half after it apparently went into effect, and then only in a fact-sheet that even lawyers actually looking for it have been unable to locate on USCIS's website.

With respect to closed cases, we do not believe there is any single easy solution, given the state of government databases, the gaps in what they track, and the amount of time this problem has been allowed to grow. Identifying cases with administratively final orders of removal already in place will require a combination of strategies that could include a survey of immigration judges to identify cases they have themselves decided that fall into this category, a similar survey of DHS trial attorneys, asking the DOJ Office for Immigration Litigation to identify cases they are currently litigating, or have recently litigated, at the federal court level where terrorism bar issues were raised, and a serious effort at outreach to the immigrant public, NGO's serving those populations, and the bar.

Applicants whose cases are currently on hold with USCIS can be considered for waivers as soon as the DHS Secretary announces that they may; since these cases are on hold already for this very reason, identifying them does not pose a particular challenge and USCIS has been able to do so effectively. It is important, however, in cases where the applicant has never been made aware of this issue, that USCIS give the applicant an opportunity for input at the waiver consideration stage. The Asylum Office can and does conduct follow-up interviews when it feels it needs more information to reach a decision on a case that has been on hold; other branches of USCIS should adopt similar measures, which could take the form of requests for evidence where appropriate.

Applicants for asylum or refugee status who have been considered for, and granted, a waiver of the terrorism bars should be issued a notification of this fact, so that they know that the issue has been considered and resolved and should be resolved as well for future immigration applications they may make. This would be relatively straightforward to accomplish; such notification should be a separate document from the decision applicants receive granting their cases; USCIS currently completes a form with this information every time it adjudicates a waiver, and all that would be required here would be to serve a copy of that form, or another document stating the outcome of that consideration, on the applicant.



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**Follow up questions of Sen. Kennedy:**

1) *Could you discuss in greater detail those groups of refugees and asylees who do not yet have waivers? What happens to these individuals? Are their cases denied? If they are here, do they risk deportation? How do they survive while the government debates whether or not to issue a waiver?*

Groups of refugees, asylees, and asylum-seekers who do not yet have waivers available to them—in the sense that they do not fall within any of the announcements of exercise of waiver authority made by the Secretaries of State and Homeland Security to date—find themselves in different situations depending on where they currently stand in the asylum, refugee resettlement, or immigration process.

For those who were previously granted asylum or refugee status and whose files have been flagged as falling within one of the terrorism bars in connection with a later application for permanent residence or family reunification, those applications are currently on hold, and the applicants are stuck in whatever status they already have (as refugees or asylees). The government has given them no indication of when their applications for permanent residence or reunification with their families may be resolved, but has also reiterated that it has no plans to deport them.

For those who are applying for refugee resettlement from abroad, and are deemed to be inadmissible and not covered by existing exemption announcements, they are unable to be resettled and remain stuck in conditions that are often extremely difficult.

For people who are here in the U.S. and applying for asylum, if their cases are before the Asylum Office and they are not covered by existing exemption announcements and the Asylum Office determines that they are otherwise eligible for asylum, their cases are being placed on hold in the same way as those applying for adjustment of status. Some affirmative asylum applicants have now been in this situation for years; while they are eligible to apply for work authorization after five months in limbo, the lack of lasting security and prolonged separation from their spouses and children abroad takes a terrible toll on these applicants, many of whom are never told what is holding up their applications.

Applicants for asylum (or other relief from removal) who are in removal proceedings can now—as of the fall of 2008—be referred to USCIS for waiver consideration if they are found to be eligible for relief but for a terrorism-related inadmissibility ground, but DHS has announced that it will only make these referrals if (1) an administratively final order of removal against the person was issued on or after September 8, 2008, and (2) the person falls within one of the existing exemption announcements. A person in this situation who presents a compelling claim for an exemption but does not fall within one of the categories for whom exemptions have been announced to date by Secretary Chertoff will not be referred to USCIS for consideration under DHS's plan, and can be deported as soon as she no longer has a pending appeal with an accompanying stay of removal. This is a matter of grave concern to Human Rights First, because it allows



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refugees to be returned to persecution in violation of U.S. treaty obligations without ever having been considered for a waiver. This is all the more troubling since DHS and DOJ have maintained that this same waiver authority should be the means of reconciling their interpretations of the terrorism bars with this country's obligation of *non-refoulement* under the 1967 Refugee Protocol.

2) *You mention the overbreadth of many of the terms that are associated with national security, such as the definition of terrorist activity and material support. If there were no changes to the current law, what legal and policy steps could be taken to ameliorate the problems faced by so many refugees and asylum-seekers?*

Changes to some of the more extreme interpretations taken by the agencies charged with implementing the current statute would help limit the number of cases currently being swept into the terrorism-bar morass and allow a substantial number of cases to be resolved without recourse to a waiver. Such changes would include recognition that *de minimis* contributions, contributions made under duress or as a child, and provision of services like medical care, for example, should not trigger the terrorism bars.

Changes to the current process of waiver implementation are also urgently needed. What follows are two of our most urgent recommendations:

First, the administration's approach to the large number of cases involving applicants who had some connection to groups deemed to be "Tier III" organizations has been to focus on granting exemptions related to those individual Tier III groups. There are hundreds of groups already deemed to fall into this category, and the fact that DHS and DOS have not issued any such exemptions since the passage of the Consolidated Appropriations Act of 2008 shows how unworkable this approach has proved to be. Iraqi applicants who rose up against Saddam Hussein at the behest of the U.S. in 1991, for example, and did not act in conjunction with any particular group, have no relief in sight under this approach. DHS and DOS should move toward broader-based waivers that focus on what the applicant actually did and under what circumstances he or she acted. DHS should also consider an exemption announcement that would provide that anyone who was previously granted asylum or refugee status after full disclosure of the relevant facts, can be granted a waiver of terrorism-related inadmissibility in connection with any subsequent applications or petitions (for permanent residence, family reunification, etc.) as long as no other grounds of ineligibility apply and there are no new facts to support a contrary result. Such an announcement would allow immediate adjudication of over 5,000 cases currently on hold with USCIS service centers. These cases involve applicants who are currently living and working in the U.S.—for years, in many cases—and whose lives and histories were previously examined in detail through the refugee or asylum adjudication process. A good number also involve connections to Tier III groups that actually do not fall within the statute's present-tense Tier III definition, as they ceased to exist—or gave up violent activity—before that definition was even enacted. Giving adjudicators authority to approve these cases where appropriate would allow these



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refugees and asylees to move on with their lives and allow DHS to focus its resources on new cases.

Second, DHS's process for adjudication of waivers for people in removal proceedings should be revised to allow USCIS to consider an applicant for a waiver as soon as there is a determination that he or she is eligible for relief but for the terrorism bar and that determination is final, without requiring the person to wait out (or forego) an administrative appeal. DHS should also allow all cases in this situation to be referred to USCIS for waiver consideration, not only those that fall within the narrow and limited exemption announcements made at the Secretary level to date. DHS and DOJ should also work together to identify and consider for waivers those cases where orders of removal became final before DHS began to implement its waiver authority in removal cases.

3) *What changes to existing law does Human Rights First support?*

The statutory definition of "terrorist activity" should be amended so that it targets actual terrorism—a concept whose key elements we understand to be violence against civilians or non-combatants and the use of such violence to intimidate populations or coerce parties such as governments or international organizations into acting or refraining from action. We would also support a revision of the definition of a "Tier III terrorist organization" to make such a label a temporary classification to deal with newly identified or emerging groups and require that such groups be reviewed for listing or designation as Tier I or Tier II groups, so that groups that do not warrant such treatment and that the U.S. does not otherwise regard as "terrorist organizations" are not permanently described as "terrorist organizations" for immigration-law purposes. These two changes would go a long way to bringing the INA back into line with most people's understanding of what terrorism is, and with the U.S.'s obligations to protect legitimate refugees. We would also support the elimination of section 212(a)(3)(B)(i)(IX) of the INA (8 U.S.C. § 1182(a)(3)(B)(i)(IX), which, taken together with INA section 237(a)(4)(B) (8 U.S.C. § 1227(a)(4)(B)), makes a person deportable and ineligible for refugee protection and permanent residence simply for being the child or spouse of a person deemed to be inadmissible under any of the INA's terrorism bars.

**Follow up question of Sen. Feingold:**

1) *Mr. Rosenzweig's written testimony acknowledges that the statutory definitions of "terrorist activity," "terrorist organization," and "material support" are so broad as to sweep in "those who do not present a risk to U.S. national security." He similarly acknowledges that the material support bar has had "unintended consequences." According to his testimony, these problems are addressed through the statutory waiver authority, which allows the government to extend asylum and other immigration benefits to deserving applicants who are caught up in the statute's sweeping definitions. Is the*



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*waiver authority, in fact, an adequate tool to address the problem of overbreadth in the relevant statutory definitions?*

The waiver authority has proved not to be an adequate tool to compensate for the overbreadth of the current statute. Particularly with respect to applicants who are here in the United States, there has been very little progress in implementing DHS's statutory waiver authority since that authority was enacted in 2005. The situation is particularly alarming for people in removal proceedings, for the reasons indicated earlier. Such minimal gains after three years of attention and advocacy on all sides point to the fact that an executive waiver cannot be the sole means of resolving the injustices that all parties to this debate recognize are resulting from the prevailing interpretations of the current statute, and of ensuring that the U.S. lives up to its international refugee protection obligations.



47451.006

**Question:** Why has implementation of Executive waivers taken so long? You testified that in implementing the Tier I and II duress exemptions, the government must conduct an "all-source evaluation" of the groups in question. What does that entail, and why is it important?

**Answer:** In just over two years, from the first instance in May 2006 on behalf of Burmese Karen refugees in Tham Hin refugee camp, Thailand, to today, the Secretaries of the Departments of Homeland Security (DHS or "the Department") and State (DOS), in consultation with one another and the Attorney General, have signed over 20 notices exercising their Immigration and Nationality Act (INA) section 212(d)(3)(B)(i) discretionary authority not to apply exemptible INA section 212(a)(3)(B) terrorism-related provisions to deserving aliens who are found not to pose a threat to U.S. national security. Armed with these exercises of authority, U.S. Citizenship and Immigration Services (USCIS), a component agency of DHS, has issued thousands of exemptions, where appropriate, to aliens who would otherwise be barred from sought after immigration benefits or protection.

In 2006 and 2007, Secretary Rice and Secretary Chertoff, singly or jointly, signed notices exercising their exemption authority on behalf of aliens seeking benefits or protection under the INA who would otherwise be barred for the provision of material support, INA section 212(a)(3)(B)(iv)(VI), to 10 undesignated terrorist organizations under INA section 212(a)(3)(B)(vi)(III), or, "Tier III" groups. [1]

In February 2007, Secretary Chertoff exercised his authority not to apply the material support inadmissibility provision with respect to certain aliens applying for immigration benefits if the material support was provided under duress to a Tier III organization where the totality of the circumstances justify the favorable exercise of discretion. This was the first "duress exemption." In April 2007, Secretary Chertoff exercised his discretionary authority not to apply the material support bar to individuals who provided the support under duress to certain designated terrorist organizations described in INA section 212(a)(3)(B)(vi)(I) and (II), or, "Tier I and II," terrorist organizations if warranted by a totality of the circumstances. This was the second duress exemption, and authorization has been provided to USCIS to use it to issue exemptions, where appropriate, to aliens who have provided material support under duress to the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army of Colombia (ELN), and the United Self-Defense Forces of Colombia (AUC).

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[1] These groups are: Karen National Union/Karen National Liberation Army (KNU/KNLA); Chin National Front/Chin National Army (CNF/CNA); Chin National League for Democracy (CNLD); Kayan New Land Party (KNLP); Arakan Liberation Party (ALP); Karenni National Progressive Party (KNPP); Tibetan Mustangs; Cuban Alzados; Front Unifié pour la Libération des Races Opprimées (FULRO); and ethnic Hmong individuals and groups.



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It is correct that prior to granting authorization to USCIS to apply the Tier I/II duress exemption to cases involving the provision of material support to a particular Tier I/II group, an all-source evaluation is conducted. This evaluation examines the aims and methods of a proposed group, including its use of duress to obtain material support, and whether the group may seek to exploit U.S. immigration channels to realize a terrorist objective. The reviews require extensive research and inter-agency coordination. They provide the Executive Branch the opportunity to thoroughly and judiciously consider each instance where the Tier I/II duress exemption might be used before applying it to individual aliens' cases in order to ensure that doing so will not jeopardize U.S. national security objectives. Because Tier I/II groups are the terrorist organizations of greatest concern to the U.S. Government, an especially high degree of vigilance is warranted.

On June 3, 2008, Secretary Rice and Secretary Chertoff exercised their broadened discretionary authority per section 691(a) of Division J of the Consolidated Appropriations Act, 2008 (CAA),[2] not to apply INA section 212(a)(3)(B), excluding subclause 212(a)(3)(B)(i)(II) that refers to present and future terrorist activity, with respect to an alien not otherwise covered by the automatic relief provisions of section 691(b) of the CAA, for any activity or association relating to the ten groups named in section 691(b) of the CAA.[3] These exemptions are already being applied in the context of the Burmese refugee camps in Thailand for individuals who were former combatants of the Burmese resistance groups for which the discretionary authority had already been exercised with respect to material support, providing relief and protection to hundreds of additional Burmese Karen and Chin refugees who were previously ineligible for exemption consideration prior to the passage of the CAA, and thereby allowing families to be reunited.

In each instance where a decision has been made to issue exemptions, where appropriate, to individuals who would otherwise be barred from relief or protection, USCIS has issued timely guidance and training to its officers. These officers have, in turn, adjudicated exemptions for eligible aliens whose cases have come before the agency as expeditiously as possible. The vast majority of the material support exemptions that have been issued were adjudicated within 60 days of the time of interview. Furthermore, the fact that over 7300 exemptions have been issued to aliens in the two years since the first Burmese

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[2] On December 26, 2007, the President signed the Consolidated Appropriations Act, 2008 (CAA), Pub. L. 110-161, 121 Stat. 1844. In Section 691 of Title VI of Division J, Congress amended the discretionary authority of the Secretary of Homeland Security and the Secretary of State, under subsection 212(d)(3)(B)(i) of the INA, to exempt the effect of an alien's terrorist activities on his or her inadmissibility or removability from the United States. Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008, Title VI, § 691 (Dec. 26, 2007). The amended version of § 212(d)(3)(B)(i) provides authority for the Secretaries of Homeland Security and State, in consultation with one another and the Attorney General, to exempt most terrorism-related grounds of inadmissibility under § 212(a)(3)(B). The more limited pre-CAA authority was used only to exempt aliens from the material support provision of the INA, § 212(a)(3)(B)(iv)(VI).

[3] These are the same Tier III groups that were the subject of material support exemptions previously issued, except that of the prior exemptions for the Hmong and Montagnards were worded slightly differently. The recent legislation refers to "appropriate groups affiliated with the" Hmong and the Montagnards while the prior exemptions referred instead to "ethnic Hmong individuals and groups" and the Montagnard organization "Front Unifié pour la Libération des Races Opprimées (FULRO)."



47451.008

exemption was signed by Secretary Rice in May 2006 amply demonstrates the Department's commitment to issuing exemptions to deserving aliens, where appropriate, upon exercise of the discretionary authority by one or both of the Secretaries in whom that authority is vested. Finally, DHS and its inter-agency partners are working to fine tune the review and decision-making process such that future exemptions may be signed by the Secretaries and implemented in the field in an effective and efficient manner while still safeguarding U.S. national security.

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| **Question#:** | 2 |
| **Topic:** | discretion |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Tom A. Coburn |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** Do you believe that maintaining Executive discretion to exempt deserving refugees is the proper way to provide relief to those who have been unintentionally excluded by the material support bar? If so, why is Executive discretion better than leaving such decisions to the courts?

**Response:**

The national security bars to admission and relief or protection are incredibly important tools for the U.S. Government to prevent relief, protection, or admission from being granted to aliens with ties to terrorist activity. The Immigration and Nationality Act's expansive terrorism-related provisions equip the USG with maximum flexibility to quickly and effectively apply the bars to address aliens believed to pose a threat to U.S. national security and public safety. The Secretaries' exemption authority allows for a balance of 1) avoiding application of the national security bars in certain meritorious cases, with 2) the expertise of the Executive Branch in foreign policy and national security matters through the use of comprehensive intelligence, classified information, and criminal and diplomatic policy considerations to preserve national security (without having the courts delve into the purview of the Executive Branch).



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| **Question#:** | 3 |
| **Topic:** | expedite |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Tom A. Coburn |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** What would expedite the process for both issuing new Executive waivers and implementing those that have already been issued?

**Response:**
Many of the individuals whose applications have been, or would be, negatively affected by the INA section 212(a)(3)(B) terrorism-related provisions, have had the negative effects ameliorated by the group-based exemptions, as recently amended to accord with the CAA, and the duress exemptions described above for both designated and undesignated terrorist organizations. These exemptions are already being implemented in the field.

There will continue to be new kinds of cases involving different organizations that arise which merit exemption consideration. As alluded to above, DHS and its inter-agency partners are working to fine tune the review and decision-making process such that future exemptions may be signed by the Secretaries and implemented in the field in an effective and efficient manner while still safeguarding U.S. national security. Through an internal review of our own records, collaboration with our inter-agency partners, and augmented by suggestions from the advocacy community; the Administration is compiling and prioritizing a list of new groups that should be considered for an exemption. All-source reviews for several of these groups are already underway, and new exemptions or authorizations to process cases involving the provision of material support to additional Tier I/II groups will be forthcoming in the weeks and months ahead.



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| **Question#:** | 4 |
| **Topic:** | exemptions |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Tom A. Coburn |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** You stated that 2,909 exemptions have been issued for individuals who provided material support to one of eight groups. What percentage of individuals who qualified for the exemption does that number represent? What is holding up the rest of those who are qualified?

**Response:**
As of July 15, 2008, USCIS has issued 4,078 group-based exemptions to individuals who have provided material support to one of the 10 groups for which group-based exemptions are available. An applicant is not eligible for consideration for a group-based exemption until he or she has otherwise established eligibility for the benefit sought. To date, USCIS has not denied a group-based exemption as a matter of discretion to an alien who has established all other requirements for the exemption to be granted. Therefore, all those eligible for group-based exemptions whose exemptions have been decided, have been approved.

For those applicants encountered in the refugee processing context, almost all group-based exemptions are completed within 60 days of interview. Current Department of State records indicate no cases on hold for group-based exemption review that are more than 120 days old. The 30- to 60-day turnaround that generally occurs between date of interview and date of exemption approval is the result of exemption approval procedures that require review of the decision to exempt at the level of field office director or above.

The enactment of the CAA on December 26, 2007, has eliminated the necessity for exemptions for individuals who have provided material support to these groups, as those groups are no longer considered to be terrorist organizations based on activities prior to the date of enactment. In addition, on June 3, 2008, Secretaries Chertoff and Rice exercised their authority as expanded by Section 691(a) of the CAA to allow exemptions for almost all terrorist activity that relates to the groups named in that statute that is not excused by the statute.



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| **Question#:** | 5 |
| **Topic:** | process |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Tom A. Coburn |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** What is the process for notifying refugee populations that they qualify for Executive waivers? Similarly, how are individuals seeking asylum notified? Is there a mechanism for intervening in ongoing asylee litigation when applicable Executive waivers are issued?

**Response:**
Applicants for immigration benefits need not file any form to be considered for an exemption. Exemptions are considered by USCIS during the course of adjudication for an immigration benefit. USCIS adjudicators are trained to carefully examine the record and identify those cases where a terrorist-related ground of inadmissibility or bar may be present and whether the applicant is eligible for an exemption.

DHS and USCIS have taken several steps to keep the public informed of the availability of exemptions for these grounds of inadmissibility. For example, in many instances, USCIS posts relevant information about the exemptions on its public website, including fact sheets regarding our procedures for adjudicating exemptions. Additionally, USCIS meets with the NGO/advocacy community on a regular basis to keep them informed of the latest developments in adjudicating these exemptions. USCIS routinely provides the NGO community with the latest statistics and procedures regarding exemptions. As many NGOs involved who participate in these liaison meetings provide both refugee resettlement services and legal representation to asylum applicants, their participation has been crucial in keeping the affected immigrant communities informed of the latest developments in these cases.

With regard to cases in removal proceedings, the Secretary's exemption authority will be considered for cases once an administratively final order of removal has been issued in order to clarify any and all outstanding issues, including credibility, additional bars to relief or protection, and general eligibility for the relief or protection requested. Once these issues have been addressed and resolved, eligible cases are forwarded to USCIS for exemption consideration.



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| **Question#:** | 6 |
| **Topic:** | current law |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Tom A. Coburn |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** Under current law, it appears that the only way a medical professional who has rendered assistance to a member of a terrorist organization can qualify for an Executive material support waiver is if that professional provided assistance under duress. Medical professionals, however, have an obligation to provide assistance to the sick or injured, regardless of their affiliation. Does the Executive currently have authority to waive the material support bar to a medical professional who voluntarily provided medical assistance to a member of a terrorist organization? If not, what can be done to provide greater flexibility in these circumstances?

**Response:**

As this is a matter of ongoing litigation, DHS cannot provide a response at this time.



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| **Question#:** | 7 |
| **Topic:** | flexibility |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Russell D. Feingold |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** You testified that the statutory waiver authority for the material support bar "gives us a great deal of flexibility" to "address each case on a case-by-case instance." In fact, it appears that you do not address waivers on a case-by-case basis, but rather on an organization-by-organization basis. For duress cases, the Secretaries of State and Homeland Security review particular groups, and decide whether to extend waivers to individuals who gave material support to those groups. Individuals who gave material support under duress to Tier I or Tier II groups that have not been so "cleared" are not even considered for a waiver, regardless of their individual circumstances and despite their statutory eligibility.

What is the rationale for exercising the statutory waiver authority on a group-by-group basis rather than an individual basis?

What criteria are used in determining whether a particular group's coercive conduct should operate to waive the material support bar for the individuals it coerced?

What will be the fate of asylum seekers and refugees who were persecuted by, and coerced into giving "material support" to, an organization that the Secretaries decide not to designate?

**Question:**
What is the rationale for exercising the statutory waiver authority on a group-by-group basis rather than an individual basis?

**Response:**
You are correct that, with the exception of the application of the Tier III duress exemption,[4] the Department of Homeland Security (DHS) and its inter-agency partners have required an all-source evaluation of each proposed terrorist organization prior to Secretarial signature of an exemption (the group-based exemptions) or DHS

[4] In February 2007, Secretary Chertoff exercised his authority not to apply the material support inadmissibility provision with respect to certain aliens applying for immigration benefits if the material support was provided under duress to an undesignated terrorist organization under INA section 212(a)(3)(B)(vi)(III), or, "Tier III," terrorist organization where the totality of the circumstances justify the favorable exercise of discretion. This was the first "duress exemption."



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| **Question#:** | 7 |
| **Topic:** | flexibility |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Russell D. Feingold |
| **Committee:** | JUDICIARY (SENATE) |

Headquarters authorization (the Tier I/II duress exemption[5]) to process cases involving activities or association relating to a particular terrorist organization.

With respect to Tier III groups on behalf of which aliens have engaged in activities or maintained associations *voluntarily*, the Department of Homeland Security believes it is crucial to carefully examine the nature of a proposed group's activities, methods, and aims in light of U.S. national security and foreign policy interests before exercising the Secretaries' discretionary authority, under Immigration and Nationality Act (INA) section 212(d)(3)(B)(i), not to apply exemptible INA section 212(a)(3)(B) terrorism-related provisions to affected aliens. Likewise, because Tier I and II groups are the terrorist organizations that have been identified by the U.S. Government as posing the greatest risk to U.S. national security, the Department of Homeland Security believes it is crucial to carefully examine the nature of a proposed group's activities, methods, and aims – including its use of duress to obtain material support, and whether the group may seek to exploit U.S. immigration channels to realize a terrorist objective – before authorizing the processing of cases involving the provision of material support under duress to the group.

After Secretarial signature of a group-based exemption, or DHS Headquarters authorization to process cases involving the provision of material support to a particular Tier I/II group, USCIS officers, in consultation with U.S. Immigration and Customs Enforcement (ICE), or U.S. consular officers, as applicable, ascertain whether a particular applicant meets the criteria set forth in the exemptions. Thus, case-by-case adjudications are performed on an individual basis, even while the general determination to consider cases involving a particular organization, with the exception of that for cases falling under the scope of the Tier III duress exemption, is made on a group-by-group basis.

Because Tier I/II groups are the terrorist organizations of greatest concern to the U.S. Government, an especially high degree of vigilance is warranted.

**Question:**

[5] In April 2007, Secretary Chertoff exercised his discretionary authority not to apply the material support bar to individuals who provided the support under duress to certain designated terrorist organizations under INA section 212(a)(3)(B)(vi)(I) and (II), or, "Tier I and II," terrorist organizations if warranted by a totality of the circumstances. This was the second duress exemption, and authorization has been provided to USCIS to use it to issue exemptions, where appropriate, to aliens who have provided material support under duress to the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army of Colombia (ELN), and the United Self-Defense Forces of Colombia (AUC).



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| **Question#:** | 7 |
| **Topic:** | flexibility |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Russell D. Feingold |
| **Committee:** | JUDICIARY (SENATE) |

What criteria are used in determining whether a particular group's coercive conduct should operate to waive the material support bar for the individuals it coerced?

**Response:**
See above regarding the determination to authorize processing for cases involving the provision of material support under duress to a Tier I/II organization.

With regard to making the case-by-case determination for applicants whose cases are eligible for exemption consideration for having provided material support under duress to a Tier I, II, or III organization, USCIS officers may consider the following factors: whether the applicant reasonably could have avoided (or taken steps to avoid) providing material support, the severity and type of harm inflicted or threatened, to whom the harm was directed, and, in cases of threats alone, the perceived imminence of the harm threatened and the perceived likelihood that the harm would be inflicted.

When considering the totality of the circumstances, factors to be considered, in addition to the duress-related factors stated above, may include, among others, the amount, type and frequency of material support provided, the nature of the activities committed by the terrorist organization, the alien's awareness of those activities, the length of time since material support was provided, the alien's conduct since that time, and any other relevant factor.[6]

**Question:**
What will be the fate of asylum seekers and refugees who were persecuted by, and coerced into giving "material support" to, an organization that the Secretaries decide not to designate?

**Response:**
Through an internal review of our own records, and augmented by suggestions from the advocacy community, the Administration is compiling and prioritizing a list of new Tier I/II groups that could be considered under the Tier I/II exemption authority. All-source reviews for some of these groups are already underway.

For cases involving the provision of material support under duress to Tier I/II groups where processing authorization has either not yet been granted or has been actively decided against, affected aliens will generally be processed per standard procedures,

[6] These factors are delineated in the notices of determination from the Office of the Secretary, DHS, "Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act," **Federal Register**, Vol.72, No. 43, Tuesday, March 6, 2007/Notices; and Vol.72, No. 88, Tuesday, May 8, 2007/Notices



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| **Question#:** | 7 |
| **Topic:** | flexibility |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Russell D. Feingold |
| **Committee:** | JUDICIARY (SENATE) |

without duress exemption consideration. However, recognizing that some deserving aliens may not be captured by the Tier I/II groups authorized for processing at any one time, DHS has implemented a number of safeguards to ensure worthy cases are not overlooked: (1) ICE issued interim guidance to its Office of Detention and Removal Operations instructing all field offices to review their case loads and refer any cases with final orders of removal involving the INA section 212(a)(3)(B) terrorism-related provisions to the ICE National Security Law Division for tracking and review; (2) USCIS issued interim guidance to its field offices instructing them to withhold adjudication of several categories of cases that could, per the amended discretionary authority provided in section 691(a) of the CAA, potentially benefit from a Secretarial exemption; and (3) DHS is devising a formalized process for considering individualized exemptions for particularly compelling cases on an exceptional basis. Although no formalized process is yet in place, both DHS and DOS, in consultation with the other and with DOJ, have granted individualized exemptions to two aliens whose cases were not covered by existing exemptions, but were determined by the inter-agency to warrant a favorable exercise of Secretarial discretion not to apply the relevant INA section 212(a)(3)(B) terrorism-related grounds on an exceptional basis.



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| **Question#:** | 8 |
| **Topic:** | waivers |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Russell D. Feingold |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** The Secretaries of State and Homeland Security have announced waivers of the material support bar for people who gave support, whether voluntarily or involuntarily, to a limited number of groups that might otherwise be deemed Tier III terrorist organizations. Do you intend to consider waivers for any additional such groups, and if so, is there a process in place to do so?

**Answer:** The Tier III duress exemption covers, and is being applied to, aliens who have provided material support under duress to *any* Tier III terrorist organization, when the totality of the circumstances justifies the favorable exercise of discretion.

With regard to group-based exemptions, where an alien's activity or association relating to a Tier III group was voluntary, many of the individuals whose applications have been, or would be, negatively affected by the INA section 212(a)(3)(B) terrorism-related provisions have been ameliorated by the group-based exemptions, as recently amended to accord with the CAA,[7] signed and implemented to date. Nevertheless, there will continue to be new kinds of cases involving different organizations that arise which merit exemption consideration. DHS and its inter-agency partners are working to fine tune the review and decision-making process such that future exemptions may be signed by the Secretaries and implemented in the field in an effective and efficient manner while still safeguarding U.S. national security. Through an internal review of our own records, collaboration with our inter-agency partners, and augmented by suggestions from the advocacy community; the Administration is compiling and prioritizing a list of new groups that should be considered for an exemption. All-source reviews for several of these groups are already underway, and news of new exemptions will be forthcoming in the weeks and months ahead.

[7] On June 3, 2008, Secretary Rice and Secretary Chertoff exercised their broadened discretionary authority per section 691(a) of Division J of the Consolidated Appropriation Act, 2008 (CAA), not to apply INA section 212(a)(3)(B), excluding subclause (i)(II), with respect to an alien not otherwise covered by the automatic relief provisions of section 691(b) of the CAA, for any activity or association relating to the ten groups named in section 691(b) of the CAA. These groups are: Karen National Union/Karen National Liberation Army (KNU/KNLA); Chin National Front/Chin National Army (CNF/CNA); Chin National League for Democracy (CNLD); Kayan New Land Party (KNLP); Arakan Liberation Party (ALP); Karenni National Progressive Party (KNPP); Tibetan Mustangs; Cuban Alzados; appropriate groups affiliated with the Hmong; and appropriate groups affiliated with the Montagnard.



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| **Question#:** | 9 |
| **Topic:** | eligibility |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Russell D. Feingold |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** It goes without saying that asylum seekers and refugees are more likely to provide information relevant to a waiver determination if they are aware that they are eligible for a waiver. Does the Department of Homeland Security, the Department of State, or the Department of Justice notify asylum seekers and refugees of their eligibility for a waiver from the material support bar? If not, why not?

**Response:**
Applicants for immigration benefits need not file any form to be considered for an exemption. Exemptions are considered by USCIS during the course of adjudication for an immigration benefit. USCIS adjudicators are trained to carefully examine the record and identify those cases where a terrorist-related ground of inadmissibility or bar may be present and whether the applicant is eligible for an exemption.

DHS and USCIS have taken several steps to keep the public informed of the availability of exemptions for these grounds of inadmissibility. First, USCIS posts all relevant information about the exemptions on its public website. In the past, we have posted fact sheets and copies of our procedures for adjudicating exemptions. Second, we have issued press releases regarding availability of certain new exemptions. Third, and most importantly, USCIS meets with the NGO/advocacy community on a regular basis to keep them informed of the latest developments in adjudicating these exemptions. USCIS routinely provides the NGO community with the latest statistics and procedures regarding exemptions. As many NGOs involved who participate in these liaison meetings provide both refugee resettlement services and legal representation to asylum applicants, their participation has been crucial in keeping the affected immigrant communities informed of the latest developments in these cases.



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| **Question#:** | 10 |
| **Topic:** | cases |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Russell D. Feingold |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** As you know, there are numerous cases pending in immigration courts, federal courts, or before the Attorney General, where a "material support" bar exists and the alien could be eligible for a waiver.

What process is in place to keep track of those cases and ensure that a waiver determination is made in each case?

What process is in place to ensure that no alien who is eligible for a waiver is deported before a waiver determination is made?

If no such processes are in place, is there any intent to establish them? If so, when? If not, why not?

**Question:**
What process is in place to keep track of those cases and ensure that a waiver determination is made in each case?

**Response:**

Guidance was recently distributed to all ICE Chief Counsel's offices, detailing procedures for tracking and referring cases eligible for the exemption of national security bars to relief or protection. Final order cases which are eligible will be referred to USCIS for evaluation.

**Question:**
What process is in place to ensure that no alien who is eligible for a waiver is deported before a waiver determination is made?

**Response:**

See above. The guidance also details working with the ICE Office of Detention and Removal Operations field offices in cases where an eligible alien is detained and facing removal.

**Question:**

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| **Question#:** | 10 |
| **Topic:** | cases |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Russell D. Feingold |
| **Committee:** | JUDICIARY (SENATE) |

If no such processes are in place, is there any intent to establish them? If so, when? If not, why not?

**Response:**

See above.

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| **Question#:** | 11 |
| **Topic:** | waiver process |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Edward M. Kennedy |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** While we commend efforts which have produced a number of waivers this year for vulnerable groups, the process that is being used for those waivers is not clear. There is little transparency and little, if any, possibility of public comment.

Please describe the ongoing process between the Department of State, Department of Homeland Security, and Department of Justice in identifying a group, considering the merits of a waiver, and deciding on whether waivers should be granted?

What role does each of the departments play in determining material support waivers?

**Question:**
Please describe the ongoing process between the Department of State, Department of Homeland Security, and Department of Justice in identifying a group, considering the merits of a waiver, and deciding on whether waivers should be granted?

**Response:**
There will continue to be new kinds of cases involving different organizations that arise, which merit exemption consideration. DHS and its inter-agency partners are working to fine tune the review and decision-making process such that future exemptions may be signed by the Secretaries and implemented in the field in an effective and efficient manner while still safeguarding U.S. national security. This process includes compiling and prioritizing lists of new groups that should be considered for an exemption based on internal reviews of our own DHS records, an assessment of need based on planned or current processing of refugee populations abroad (DOS), exigencies associated with any ongoing investigations or prosecutions conducted by the U.S. Government (DOJ), and augmented by suggestions from the advocacy community. Other foreign policy and national security interests also are taken into account. As appropriate, all-source evaluations are done for the groups. The purpose of the evaluations is to provide DHS and its inter-agency partners a means to carefully examine the nature of a proposed group's activities, methods, and aims, in light of U.S. national security and foreign policy interests, before exercising the Secretaries' discretionary authority, under Immigration and Nationality Act (INA) section 212(d)(3)(B)(i), not to apply exemptible INA section 212(a)(3)(B) terrorism-related provisions to affected aliens.



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| **Question#:** | 11 |
| **Topic:** | waiver process |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Edward M. Kennedy |
| **Committee:** | JUDICIARY (SENATE) |

All-source evaluations are reviewed by DHS and its inter-agency partners to determine whether, based upon the evaluation's findings, an exemption is merited. Once staff-level concurrence is reached among the Executive Branch agencies involved, an exemption notice is presented to the pre-designated Secretary (or, in the case of a jointly signed exemption, both Secretaries) for his or her review and signature. Upon signature, operational components are notified, guidance and training is written or amended and disseminated, and officers adjudicate and issue the exemption, where appropriate, on a case-by-case basis to deserving aliens seeking benefits or protection under the INA who are now eligible for exemption consideration.

**Question:**
What role does each of the departments play in determining material support waivers?

**Response:**
See above.



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| **Question#:** | 12 |
| **Topic:** | hmong |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Edward M. Kennedy |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** You have indicated that waivers for the Hmong and the Montagnards are forthcoming. I met Secretary Rice yesterday for the refugee consultation process and she told me that the State Department has signed off on this waiver, but it is now pending with DHS. In the meantime, waivers have been issued for eight other refugee groups.

Why has it taken so much longer to issue waivers for the Hmong and Montagnards? In many respects, given that these are ethnic communities who fought with U.S. forces, it seems that this should have been a straightforward determination. Can you give us an idea when these waivers will be issued?

How many cases are currently affected by the failure to complete these waivers?

**Question:**
Why has it taken so much longer to issue waivers for the Hmong and Montagnards? In many respects, given that these are ethnic communities who fought with U.S. forces, it seems that this should have been a straightforward determination. Can you give us an idea when these waivers will be issued?

**Response:**
In October 2007, Secretary Rice and Secretary Chertoff jointly signed notices exercising their exemption authority on behalf of aliens seeking benefits or protection under the INA who would otherwise be barred for the provision of material support, INA section 212(a)(3)(B)(iv)(VI), to the Front Unifié pour la Libération des Races Opprimées (FULRO) and to ethnic Hmong individuals and groups.

With the passage last December of the Consolidated Appropriations Act, 2008 (CAA),[8] the Secretaries signed new notices exercising their amended INA section 212(d)(3)(B)(i)

[8] On December 26, 2007, the President signed the Consolidated Appropriations Act, 2008 (CAA), Pub. L. 110-161, 121 Stat. 1844. In Section 691 of Title VI of Division J, Congress amended the discretionary authority of the Secretary of Homeland Security and the Secretary of State, under subsection 212(d)(3)(B)(i) of the INA, to exempt the effect of an alien's terrorist activities on his or her inadmissibility or removability from the United States. Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008, Title VI, § 691 (Dec. 26, 2007). The amended version of § 212(d)(3)(B)(i) provides authority for the Secretaries of State and Homeland Security, in consultation with one another and the Attorney General, to exempt most terrorism-related grounds of inadmissibility under § 212(a)(3)(B). The more limited pre-CAA authority was used only to exempt aliens from the material support provision of the INA, § 212(a)(3)(B)(iv)(VI).



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| **Question#:** | 12 |
| **Topic:** | hmong |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Edward M. Kennedy |
| **Committee:** | JUDICIARY (SENATE) |

authority, per CAA section 691(a), for the 10 groups for which the Secretaries had previously signed exemptions. Among these revised exemptions are ones covering the activities and associations of aliens relating to "appropriate groups affiliated with the Hmong" and "appropriate groups affiliated with the Montagnards."

**Question:**
How many cases are currently affected by the failure to complete these waivers?

**Response:**
See above. There have now been two sets of exemptions covering aliens whose activities or associations relating to the Hmong and Montagnards rendered them inadmissible under the INA section 212(a)(3)(B) terrorism-related provisions.



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| **Question#:** | 13 |
| **Topic:** | iraqi refugees |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Edward M. Kennedy |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** The Department of State is proposing to increase to 12,000 the number of Iraqi refugees admitted to the U.S. under our resettlement program. For many different reasons, the admissions process has been very slow, so much so that even Ambassador Crocker has expressed frustrations. This year, we will only admit about 1000 Iraqis, even though 2 millions have fled their country since the start of the war, and another 2 million are refugees in their own country. As you know, DHS plays a significant role in this process by interviewing potential refugees.

Can you tell us whether the material support bar has presented a problem in the admission of Iraqi refugees?

**Response:**
The U.S. Refugee Admissions Program met and exceeded its target to admit 12,000 Iraqi refugees in fiscal year 2008, admitting a total of 13,824. The Administration has set a fiscal year 2009 goal of admitting a minimum of 17,000 additional Iraqi refugees.

The material support inadmissibility provision is not holding up the resettlement of Iraqi refugees. To date, 946 Iraqis have been exempted from inadmissibility because they had provided material support to terrorist organizations under duress. USCIS is current on Iraqi cases that are within its authority to approve for an exemption. The Iraqi cases currently being reviewed were interviewed in the last 2 months.



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| **Question#:** | 14 |
| **Topic:** | duress |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Edward M. Kennedy |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** The administration announced in April that it will waive the material support bar for persons who gave material support under duress or coercion with respect to particular groups. You indicate that the first group cleared for possible waivers is the FARC. During the second panel, we will hear from a woman denied asylum because she provided medical care to the FARC under duress. I understand that hundreds of similar asylum cases on hold.

What is the status of a waiver for Colombians victimized by the FARC?

How many cases are currently on hold that might be eligible to receive such a waiver?

Will this waiver be applied to both refugee cases and asylum cases?

**Question:**
What is the status of a waiver for Colombians victimized by the FARC?

**Response:**
In April 2007, Secretary Chertoff, after consulting with the Secretary of State and the Attorney General, exercised his discretionary authority not to apply the material support bar to individuals who provided the support under duress to certain designated terrorist organizations under INA section 212(a)(3)(B)(vi)(I) and (II), or, "Tier I and II," terrorist organizations if warranted by a totality of the circumstances. On September 6, 2007, following an inter-agency review of an all-source evaluation of the Revolutionary Armed Forces of Colombia (FARC), based upon which the Administration determined it was in keeping with our national security and foreign policy interests to process cases involving the provision of material support to the FARC, DHS Headquarters authorized USCIS to begin adjudicating exemptions for these cases.

Because cases of Colombian nationals often involve the provision of material support under duress not only to the FARC, but also to the National Liberation Army of Colombia (ELN) or the United Self-Defense Forces of Colombia (AUC), two other Tier I terrorist organizations operating in Colombia, an all-source evaluation was conducted for these groups as well. Following inter-agency review of these assessments, the Administration determined it was in keeping with our national security and foreign policy interests to process cases involving the provision of material support to the ELN and



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| **Question#:** | 14 |
| **Topic:** | duress |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Edward M. Kennedy |
| **Committee:** | JUDICIARY (SENATE) |

AUC. DHS Headquarters authorized USCIS to begin adjudicating exemptions for these cases on December 18, 2007, and March 10, 2008, respectively.

**Question:**
How many cases are currently on hold that might be eligible to receive such a waiver?

**Response:**
To date, USCIS has granted 41 exemptions to individuals who provided material support to the ELN under duress, 3 exemptions to individuals who provided material support to the AUC under duress, and 158 exemptions to individuals who provided material support to the FARC under duress. USCIS currently has 37 pending cases in which the applicant indicated that s/he provided material support under duress to the ELN, 28 pending cases in which the applicant indicated that s/he provided material support to the AUC, and 150 cases in which the applicant indicated that s/he provided material support to the FARC. The agency is currently working through this caseload to determine whether these individuals are in fact eligible for the exemption.

**Question:**
Will this waiver be applied to both refugee cases and asylum cases?

**Response:**
Yes. The Tier I/II duress exemption signed by Secretary Chertoff applies to all individuals, including refugees and asylum applicants, applying for an immigration benefit or protection who would otherwise be inadmissible as a consequence of the bar. As the Tier I/II duress exemption is the relevant exemption in the case of the Colombian Tier I groups, it is being applied, *inter alia*, to refugee and asylum cases.



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| **Question#:** | 15 |
| **Topic:** | immigration court |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Edward M. Kennedy |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** Duress waivers are applicable to individuals applying for asylum, whether through the asylum division of USCIS or through the immigration courts. Some immigration court cases that were previously denied asylum because of material support may now be eligible due to the recent waivers. I understand that these cases must be transferred from the immigration court system at DOJ to the asylum division of USCIS for a review before a waiver can be granted.

Why hasn't an inter-agency process been implemented to transfer eligible cases for duress waivers to USCIS for individual review determinations?

How quickly can we expect such a process to be put in place?

**Question:**
Why hasn't an inter-agency process been implemented to transfer eligible cases for duress waivers to USCIS for individual review determinations?

**Response:**

A process has been developed, and guidance was recently distributed to all ICE Chief Counsel's offices. The guidance covers identification of eligible cases in immigration courts, and the procedure for referring these to USCIS once all outstanding issues have been resolved.

**Question:**
How quickly can we expect such a process to be put in place?

**Response:**

As noted in the preceding answer, the process is already in place.



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| **Question#:** | 16 |
| **Topic:** | Guantanamo |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Edward M. Kennedy |
| **Committee:** | JUDICIARY (SENATE) |

**Question:** Seventeen Uighur men are confined at the detention center at Guantanamo Bay Naval Station, Cuba. They are from an area of far western China commonly referred to as "Turkistan." Each of these men was cleared by the United States military for release from Guantanamo as long ago as 2003. Despite their exoneration, they remain in Guantanamo because they cannot be repatriated to China; the State Department has recognized that they would be subject to persecution if repatriated.

These Uighurs were not captured on the battlefield and have never engaged in hostile acts against the United States or against anyone else. Each of them had fled persecution in China and resettled in the neighboring country of Afghanistan. After the United States began military activities in Afghanistan in October 2001, these men fled to escape the fighting. They were captured, most in Pakistan, and sold by local tribesmen to the United States military for substantial bounties. They were transferred to Guantanamo beginning in early 2002.

Almost since the time of their arrival in Guantanamo, the State Department has attempted to persuade numerous foreign countries to resettle the Uighurs. However, the U.S. government has been unable to find another country willing to take them. Because the United States has no interest in detaining these men further for investigation or prosecution, and because there is apparently nowhere else for them to go, I would like to ask DHS several questions concerning the possibility of resettling these men in the United States:

**Question:**
Will DHS allow these 17 men to be resettled in the United States, given that they were cleared as long ago as 2003 and no other country will accept them? If not, why not?

**Answer:** No. This determination is based on facts concerning specific detainees, some of which are classified, and thus cannot be discussed in this document. Suffice it to say, however, the Uighurs were not hapless victims of circumstance. They were in Afghanistan to receive military and terrorist training from a camp affiliated with enemies of the United States. Regardless of who they originally intended to target with these newly acquired skills, they are dangerous individuals who would constitute an unreasonable threat to the American people.

**Question:** If the State Department and the Defense Department agree to resettle the



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| **Question#:** | 16 |
| **Topic:** | Guantanamo |
| **Hearing:** | The 'Material Support' Bar: Denying Refuge to the Persecuted? |
| **Primary:** | The Honorable Edward M. Kennedy |
| **Committee:** | JUDICIARY (SENATE) |

Uighurs in this country would DHS concur? If not, why not?

**Answer:** There is no agreement within the executive branch to permit the detainees to resettle in the United States. Even were there such an agreement, as explained above, DHS would not concur with such a decision.

**Question:** Under what circumstances, would DHS agree to allow resettlement of the Uighurs in this country?

**Answer:** None.

**Question:** Is there a particular provision of law, such as a material support bar, that prohibits accepting the Uighurs as refugees?

**Answer:** A full response to this question is detainee specific and thus would require disclosure of classified information.

**Question:** If such a bar exists, would the Uighurs qualify for a waiver?

**Answer:** A full response to this question is detainee specific and thus would require disclosure of classified information.



47451.031

**"The 'Material Support' Bar: Denying Refuge to the Persecuted?"**
**Senate Judiciary Subcommittee on Human Rights and the Law**
**September 19, 2007**

**Question Submitted by U.S. Senator Russell D. Feingold**
**to Bishop Thomas Wenski**

1. As you are aware, the government conducts an extensive review of Tier I and Tier II organizations before deciding whether to extend material support waivers to people who gave material support under duress to those organizations. The inevitable result of this process is a period of delay for the asylum-seekers or refugees in question. In your observation, what is the practical effect of that delay on the lives of these individuals and their families?

**Answer:**
The delays that result from the extensive review of these cases regularly cause refugees in dire need of resettlement to languish for long periods of time in camps where their lives may be at risk due to nationality or political affiliation. These delays also have the effect of keeping families separated for long periods of time, as asylum applicants and refugees alike are often detained indefinitely in appalling conditions while the groups to which they provided material support under duress are evaluated. In some cases, the stress of this uncertainty has led to suicide.

We are talking here about individuals who may have been forced to pay kidnappers for the ransom of loved ones or who were violently coerced by members of an armed group to provide food or shelter. Some of these people fought alongside U.S forces to help protect and defend our freedoms. These people are not terrorists, they are victims of terrorism. It is unacceptable that they be stuck in a legal limbo and separated from family members who are already in the U.S.

In order to solve this problem, we ask that Congress direct the Administration to establish a procedure for expeditiously granting waivers to individuals in removal proceedings or whose cases are on appeal. In addition, it is essential that duress is recognized as a defense to these immigration provisions, and that the overly broad immigration law definitions contained in the USA PATRIOT Act and the Real ID Act are clarified to ensure that refugees who have fled terror – and who pose no threat to the security of the U.S. – can receive this country's protection.



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# SUBMISSIONS FOR THE RECORD

**Statement Submitted by ACLU for the Record**
**Senate Judiciary Subcommittee on Human Rights and the Law**
**Hearing on "The 'Material Support' Bar: Denying Refuge to the Persecuted?"**
**September 19, 2007**

Chairman Durbin, Ranking Member Coburn and Members of the Subcommittee:

We are pleased to submit this statement for the record on behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with hundreds of thousands of activists and members and 53 affiliates nationwide dedicated to preserving the principles of the Constitution and Bill of Rights. This statement provides the ACLU's views on the "material support"[1] bar, as enhanced and clarified by the USA PATRIOT Act of 2001, and the Intelligence Reform and Terrorism Prevention Act of 2004.

In its zeal to keep real terrorists out of the country, the "material support" bar has been used to deny refugee processing to individuals who may qualify as refugees under U.S. law but for their support, often minimal and/or under duress, to groups considered by the U.S. government as foreign terrorist organizations. Sadly, in the name of national security, the "material support" bar is often being misapplied to individuals who are not terrorists, but are the terrorists' victims.

The U.S. government regularly uses the circumstances that caused refugees to flee their countries as grounds for denying them safety in ours. For example, adult and children refugees have been deprived of U.S. protection because they paid levies to guerrilla groups that instill fear in their neighborhoods, or because they performed services for armed rebel groups under threat of death. Currently, over 550 asylum requests have been placed on indefinite hold as a result of these provisions. This injustice has lasted several years for many asylum seekers, resulting in delays that have divided families, have left high and dry refugee children in dangerous places, and have forced many others to be detained like criminals for long periods – a treatment sometimes not very dissimilar from that inflicted by their tormentors abroad.

Some of these hardships could have been prevented without further legislation had the Administration responsibly created an effective process for refugees to seek an exception. Although the Administration has recently begun to exercise discretionary authority for narrowly circumscribed groups who have provided support to organizations now labeled as "terrorists," the waiver was made burdensome by requiring agreement between the Departments of State, Justice and Homeland Security. Also, in the approximately four years since these bars were last expanded, and after months of bureaucratic wrangling because of a extremely cumbersome and

[1] Multiple courts have found parts of the "material support" definitions, 18 U.S.C. §2339 (harboring terrorists). 18 U.S.C. §2339C (financing of terrorism), to be unconstitutionally vague. Vague statutes raise concerns because they can punish people for behavior they did not know was illegal, lead to arbitrary and discriminatory enforcement by government officers, and chill protected activity. For example, the Ninth Circuit, found various terms unconstitutionally vague, Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000); "personnel" because the term might be thought to envelope the efforts of a simple advocate; "training" because the term might be thought to sweep in benign academic instruction; and "expert advice or assistance" because like "personnel" and "training" the phrase might be read to include First Amendment protected pure speech and advocacy.



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also limited waiver process, the Administration has used its waiver authority only under pressure, and exceedingly sparingly.

At this point legislation is urgently needed to restore justice and fairness to the American refugee and asylum systems. Congress must act to correct the lack of an exception for "material support" provided under duress; and to correct the lack of a *de minimis* exception for the support provided. Ultimately, the executive and the judiciary branches must be given discretion to decide, on a case-by-case basis, whether or not to grant refuge to a persecuted individual.

Citing the "material support" bar, the Department of Homeland Security has denied asylum to the United States to victims of authoritarians made to cooperate under duress. The lack of an explicit duress defense and refusal by the Department of Homeland Security and some courts to read one into the "material support" bar is inconsistent with general principles of U.S. law. The principle of duress is recognized in U.S. criminal law and, according to United States v. Bailey 444 U.S. 394 (1980), may be raised as a common-law defense even when certain conduct violates criminal statutes with no express duress exception. A duress exception would safeguard the country's longstanding commitment to providing safe-haven to victims in need.

Furthermore, the Administration has interpreted the word "material" out of the statute. Counsel for the Department of Homeland Security has argued before the courts that Congress intended "material support" to mean any support, no matter how insignificant. Unfortunately, in Singh-Kaur v. Ashcroft, 385 F.3d 293 (3d Cir. 2004), the United States Court of Appeals for the Third Circuit found that providing food and setting up tents for a religious congregation, which may have included members of the religion's militant sect, constituted material support. By not applying a *de minimis* exception, the Department of Homeland Security and U.S. courts have extended the "material support" bar to innocent civilians.

Moreover, interpretations of the material support bar that do not apply a duress exception or an exception for *de minimis* support violate U.S. obligations under Article 33 of the 1951 Non-Refoulement Refugee Convention. Under Article 33 the United States cannot expel or return a refugee to a country where he or she will face persecution unless there are "reasonable grounds for regarding [the refugee] as a danger to the security of the [U.S.]" and the refugee "constitutes a danger to the community of [the United States]." Applying the material support bar to refugees who provided support to terrorists under duress or insignificant amounts of support is inconsistent with the U.S.'s binding obligations under Article 33.

Finally, Congress should act to make clear that its intention in passing the "material support" laws was not to turn the very harm that refugees have suffered into the grounds for refusing them the protection they need. The solution to this problem is for Congress to clarify that:

- The 'material support to terrorist organizations' bar only applies to persons who have provided meaningful and voluntary assistance to a terrorist organization;
- Individual responsibility must be ascertained before denying refugee protection; and
- Decision-makers should consider all relevant factors regarding the group's objectives, conduct, and structure.



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We thank you, Mr. Chairman, and this subcommittee for the opportunity to submit our testimony to the record today. We look forward to working with you to advance our common goal of a safe and secure America, while staying true to our honorable and just principles of fairness and freedom.



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**Written Comments Submitted to the**

**Judiciary Committee, Subcommittee on Human Rights and the Law**

# "The 'Material Support Bar': Denying Refuge to the Persecuted?

# September 19, 2007

**On behalf of:**

**Gideon Aronoff, President and CEO**
**Hebrew Immigrant Aid Society (HIAS)**

For more information, please contact:

Melanie Nezer
Migration Policy Counsel
HIAS
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Washington, DC 20006
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Melanie.nezer@hias.org



47451.036

Through its mission of rescue, reunion, and resettlement, HIAS has provided lifesaving services to world Jewry for more than 125 years. As an expression of Jewish tradition and values, HIAS also responds to the needs of other migrants who are threatened and oppressed.

Since its founding in 1881 by Jewish immigrants who found sanctuary in the United States after fleeing persecution in Europe, HIAS has assisted more than four and a half million people in their quest for freedom, helping them start new lives in the United States, Israel, Canada, Latin America, Australia, New Zealand and other countries around the world. As the oldest international migration and refugee resettlement agency in the United States, HIAS has played a key role in the rescue and relocation of Jewish survivors of the Holocaust, Jews from Arab and communist countries, more than 380,000 Jewish refugees from Iran and the former Soviet Union, and refugees of all faiths fleeing persecution in Vietnam, Bosnia, Kosovo, Sudan, and other dangerous places.

HIAS is equally committed to our country's national security and to our proud history as a safe haven for refugees. Out of concern that both have been undermined by the "material support" bar, HIAS has for the past three years urged Congress and the Administration to remedy what has become a major injustice to the U.S. Refugee and Asylum Program.

For three years, America's anti-terrorism laws have had the unintended effect of denying protection to refugees and asylum seekers fleeing some of the most brutal regimes and violent conflicts on earth. Thousands of refugees have been denied access to the U.S. refugee program because of implementation of the "material support" provisions of the USA Patriot Act and the Real ID Act.

Under these provisions, any individual who has provided what the law terms "material support" to terrorists is barred from entering the United States. Leading organizations in the Jewish community were in the forefront of efforts to enact a tough ban on material support for terrorist organizations as well as sanctions against the states that sponsor them. However, the material support provisions, as amended, are ironically being invoked to exclude victims of terrorism, some whose very struggle to be free now makes them inadmissible to the United States.

Shockingly, under today's laws, Jews who bravely resisted and survived Nazi terror would be excluded from refuge in the United States. Under current policy, the Warsaw ghetto uprising would have been considered "terrorist activity" because it involved the use of weapons against persons or property for reasons other than for "mere personal monetary gain."

We strongly believe that Congress should immediately act to amend the law to ensure that innocent victims are not branded as "terrorists" and refused safe haven. Although the Administration has in recent months made great strides in using the discretion it has



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under current law to admit refugees, asylum seekers, and others who would otherwise be barred for "material support," the law does not allow the U.S. to admit those who actually fought against their oppressors. Until the law is changed, thousands of deserving refugees will continue to be barred from admission to the U.S.

The U.S. refugee program is reflective of the core Jewish value of "redeeming the captive" (*Pidyon shvuyim*). To honor this tradition, we urge Congress to exempt all legitimate refugees and asylees from the "material support" bar to admission where refugees seeking U.S. protection are not supporters of terrorism and are in fact victims of tyranny and oppression.

Specifically, we urge Congress to retain the "material support" language that was passed by the Senate in the Foreign Operations Appropriations bill. We are hopeful that this provision will give the Administration the tools it needs to admit refugees, asylum-seekers, and others who have been unjustly barred from admission to the U.S. The Senate-passed language also allows the Administration, in its discretion, to admit to the U.S. those who were forcibly conscripted, including child soldiers.

Through this legislation, the Administration will have the authority to admit individuals who were former members and combatants of groups that the U.S. considers to pose no threat to our national security, including Burmese ethnic and religious minority groups currently languishing in refugee camps in Thailand and elsewhere, as well as Hmong and Montagnard refugees who fought alongside U.S. troops during the Vietnam War. We hope that the Administration will use this authority quickly so that refugee families are no longer separated and so those who bravely resisted brutal military dictatorships and those who fought alongside our own forces are finally admitted to the U.S.

While Congress will need to continue to monitor closely the Administration's issuance of waivers and ensure that all refugees, asylum-seekers, green-card applicants, and others who are eligible to be admitted to the U.S. are quickly and fairly processed for "waivers," this legislation is an important step toward solving the material support problem.



47451.038

18 September 2007

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U.S. Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Members of the Senate Judiciary Subcommittee on Human Rights and the Law,

As a public interest law firm dedicated to the cause of religious freedom for people of all religious traditions, we at the Becket Fund for Religious Liberty express our support for the current language in the Foreign Operations Appropriations bill with regard to the "material support" issue. This bill corrects policies that have confused victims of terrorism with terrorists, and will instead allow deserving innocents to seek refuge in the United States.

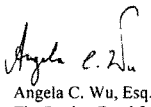
We support necessary security measures to fight terrorism and to keep terrorists out of the United States, but we cannot ignore that terrorist organizations have demanded the support of vulnerable minorities by forcing them to pay ransoms, provide services, and conscript to their militias. Because they have been extorted by terrorists, many of these victims have been denied access to refugee programs in the United States. Thus, it is a great relief that the current language allows for more of these innocent men, women, and children – who pose no danger to the United States – to seek refuge in this country of freedom.

Since its inception, the material support bar to admissions has particularly affected religious minorities who are targeted by terrorist organizations because of their vulnerability in society. Groups like the Assyrian Christians, the Chaldeans, the Chin, the Hmong, the Mandaeans, the Montagnards, and the Yezidis have been barred from admission despite the fact that they face religious persecution at home and are targeted by terrorist groups because of their religious identities.

Finally, U.S. security policies in the war on terror have helped to protect Americans from terrorist threats, but we must remember what is threatened – the very concept of freedom. The civil liberties for which we are fighting should thus be central to our foreign policy. Through this legislation's establishment of a more accurate and efficient system for determining refugee status, the United States government declares that in fighting terrorism, America has remembered one of the cornerstones of any free society – the right to religious expression without fear of terror.

Thank you for your leadership and your compassionate response to innocent victims of terrorism.

Sincerely,



Angela C. Wu, Esq.
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# Department of Justice

STATEMENT

OF

RACHEL L. BRAND
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON INTERNATIONAL RELATIONS
SUBCOMMITTEE ON AFRICA, GLOBAL HUMAN RIGHTS
AND INTERNATIONAL OPERATIONS
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

"CURRENT ISSUES IN U.S. REFUGEE PROTECTION AND RESETTLEMENT"

PRESENTED ON

MAY 10, 2006

**Hearing before the House International Relations Committee, Subcommittee on Africa, Global Human Rights and International Operations**
**May 10, 2006**

Dear Chairman Smith, Ranking Member Payne, and members of the Subcommittee:

Thank you for inviting me to testify on the subject of the admission of refugees who have provided material support to terrorist organizations as defined in the Immigration and Nationality Act ("INA") and on the implementation of the training provisions of the International Religious Freedom Act of 1998. In major part, my testimony will address the material support issue, although I will briefly discuss the training implementation at the end of my remarks.

As an initial matter, let me put the question of admission of refugees who have provided material support under the INA in context. Attorney General Gonzales has stated on many occasions that the fight against terrorism is the number one priority of the Department of Justice. Congress has contributed greatly to our successes, first with the enactment of, and then with the recent reauthorization of, the USA PATRIOT Act.

The Department's counter-terrorism efforts are proactive. Thus, in addition to prosecuting those who commit acts of terrorism or plan terrorist attacks, the Department prosecutes those who provide material support to terrorists. We know from experience that terrorists need an infrastructure to operate. They need to raise funds, maintain bank accounts and transfer money, communicate with each other, obtain travel documents, train personnel, and procure equipment. The people who perform these functions may not commit terrorist acts themselves, but the front-line terrorists could not operate without them. The material support statutes in the criminal and immigration contexts are designed to reach these individuals and shut down the terrorist infrastructure. Our fight against material support for terrorism is thus part and parcel of our overall counter-terrorism strategy.

With this in mind, we can more fully appreciate the interests at stake in considering the admission of refugees who have provided material support to a terrorist organization or an individual that has engaged in terrorist activity as defined in the INA..

The United States is, of course, a compassionate nation. We are a nation of immigrants and a nation of refugees. In fact, I understand that the United States currently admits far more refugees each year than any other country. Having said that, we are also engaged in a long war against terrorism. Any actions we take with regard to the admission of refugees must not conflict with or undermine our counter-terrorism strategy---by admitting persons who pose a security threat to this country, by complicating positions the government takes in litigation, or by sending inconsistent messages to the world about our policy toward acts of terror. I do not mean to diminish the importance of admitting bone fide refugees into the United States. Rather, my goal is to explain the full scope of considerations at stake.



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Just as we have a proactive counter-terrorism strategy, the existing legislative scheme for admissions is, and historically has been, preventive—that is, designed to prevent undesirable aliens from entering the United States. Congress strengthened that scheme in the USA PATRIOT and REAL ID Acts, with objective standards and a presumption against the admission of aliens involved with terrorist organizations or individuals engaged in terrorist activities. As you are aware, the INA now contains broad definitions of some relevant terms, particularly "terrorist activity," "engaged in terrorist activity" (which includes provision of material support) and "organization [that has engaged in terrorist activity]". The definitions are broad, however, for good reasons. They can be used for homeland security and immigration litigation purposes to prevent aliens who present risks to the United States or its citizens from entering or staying in the United States—even if their activities are not criminal under the narrower definitions in the criminal code and not prosecutable under the harder-to-meet criminal burden of proof. They provide alternative courses of action positions for government authorities to protect U.S. citizens' safety in cases where the after-the-fact remedy of criminal prosecution is not sufficient.

We recognize that the breadth of these provisions may in some instances bar admission of individuals and groups who do not present such risks and to whom the United States is sympathetic. Congress addressed these concerns to some extent by providing the Secretaries of State and Homeland Security the authority to exercise their sole and unreviewable discretion, on a case-by-case basis, that the provision barring persons who have provided material support to terrorist organizations, as defined in the INA, does not apply to a particular alien. Exercising this authority would permit that alien to enter the United States so long as he met all other requirements for admission. The law also requires that the relevant Secretary must consult with the other Secretary and the Attorney General. This scheme allows for the broadest consideration of all factors relevant to the case—the foreign policy considerations, the counter-terrorist strategy considerations, the immigration considerations, and the litigation risks. It properly includes the Department of State, the Department of Homeland Security, and the Department of Justice, each of which has an important, and different role, in protecting national security, promoting foreign policy, and implementing immigration law and refugee policy.

As you are aware, last week the Secretary of State did exercise her authority under the statute, after consultation with the Attorney General and Secretary of Homeland Security, to allow for admission of certain Karen refugees from the Tham Hin camp in Thailand, so long as they meet all other requirements for admission. Through the interagency process, the Attorney General was satisfied that the Karen National Union did not pose a threat to the United States and that exercising the statutory authority on the behalf of certain refugee applicants who provided material support to the KNU would not unduly compromise other U.S. government interests.

In sum, it is the Administration's view that important national security interests and counter-terrorism efforts are not incompatible with our nation's historic role as the



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world's leader in refugee resettlement. While we must keep out terrorists, we can continue to provide safe haven to legitimate refugees. Due to national security imperatives, there have been recent changes to the law as well as to the process and we continue to work on ways to harmonize these two important policy interests. It was an important step to have moved forward on the ethnic Karen Burmese refugees in Thailand, and we are continuing to look at further steps necessary to ensuring the harmonization of national security interests with the refugee program.

With regard to the training required by International Religious Freedom Act of 1998 (IRFA), the Department is pleased to report that they have been fully implemented. Since enactment of IRFA, the Executive Office for Immigration Review has completed the required training on religious persecution in accordance with the Act. For example, at this year's upcoming Immigration Judge training conference, the panel on religious freedom will include the Director for International Refugee Issues and the Deputy Director for Policy from the United States Commission on International Religious Freedom and a representative from the Office of International Religious Freedom from the State Department. A similar training was held in October 2005 for the Board of Immigration Appeals. Additionally, all staff is kept up to date on current asylum and refugee law by various means including coursework for incoming Immigration Judges, internet library updates, and relevant case law summaries.

In addition to the statutorily required training of Immigration Judges, the Civil Division's Office of Immigration Litigation (OIL) provides training of government personnel through conferences and seminars on immigration law that routinely address the statutory and regulatory provisions that govern asylum and refugee status. Last month, for example, at OIL's Tenth Annual Immigration Litigation Conference, the program including presentations by the staff of the United States Commission on International Religious Freedom. Such training is available to all government personnel, including the staff and adjudicators of the Executive Office for Immigration Review and the Department of Homeland Security. OIL also provides training through websites, monthly bulletins, and case-specific counseling.

Mr. Chairman, that concludes my prepared statement. I would be pleased to take the Subcommittee members' questions at this time.



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**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

October 3, 2006

The Honorable Christopher H. Smith
Chairman
Subcommittee on Africa, Global Human Rights,
and International Operations
Committee on International Relations
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Please find enclosed the Department of Justice's responses to questions directed to Rachel Brand, Assistant Attorney General for the Office of Legal Policy, Department of Justice, in connection with the May 10, 2006, hearing concerning "Current Issues in U.S. Refugee Protection and Resettlement."

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of this proposal. Please do not hesitate to call upon us if we may be of additional assistance.

Sincerely,

James H. Clinger

James H. Clinger
Acting Assistant Attorney General

Enclosure

cc: The Honorable Donald M. Payne
Ranking Minority Member



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**Questions for the Record**
**Posed to Assistant Attorney General Rachel Brand**
**in connection with the**
**Hearing before the House International Relations Committee, Subcommittee on Africa, Global Human Rights and International Operations**
**May 10, 2006**
**On**
**"Current Issues in U.S. Refugee Protection and Resettlement"**

**1. Material Support Bar and the Refugee Program:**

***Can you explain the process by which the Administration plans to grant waivers of "material support" ground for inadmissibility?***

As I stated in my testimony, the Administration believes that it is possible to balance our nation's historic commitment to accepting refugees and our post-September 11th national security concerns. To that end, the Departments of State, Justice, and Homeland Security — as well as the Intelligence Community — will examine the actions and situation of refugees or groups of refugees identified by the Administration for possible exercise of authority to render the material support bar inapplicable for particular refugees, including consideration of the activities and situation of each organization to which those refugees have provided material support. Once reliable and complete information is gathered regarding the activities and situation of an organization and the refugees who supported it, a decision will be made with input from all relevant agencies as to whether exercise of the inapplicability authority is appropriate in that case. Use of this interagency process ensures that all relevant concerns, including national security, humanitarian concerns, and diplomatic relations, are considered.

***Is there a policy on the application of the material support bar to aliens whose support to "terrorist organizations" was done involuntarily or under duress?***

Under Section 212(a)(3)(B)(iv)(VI) of the INA, aliens who provide material support to individuals or organizations that engage in terrorist activity are inadmissible to the United States. The INA does not specifically address material support provided involuntarily or under duress. However, Section 212(d)(3)(B)(i) of the INA, which grants discretion not to apply the material support exclusion to any provision of material support by an alien, could be invoked in any appropriate situation, including cases of involuntary action or duress.

***Is there a process or policy, to identify armed resistance groups as not being terrorist groups in appropriate cases?***

Members of armed resistance groups that meet the definition of "terrorist organization" are not admissible. With regard to material supporters of armed resistance groups, as noted above, the Administration is conducting case-by-case analyses of groups of



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refugees and each organization to determine whether exercise of the inapplicability authority is appropriate.

***How many asylum cases have been denied by the EOIR in the past year based on the "material support" bar?***

Because of the numerous issues involved in each case, the Department does not track cases based on areas of substantive law raised during litigation. Therefore, we do not have the information that would enable us to respond to this question.

***How many asylum cases raising this issue are currently pending before the BIA?***

As noted above, the Department does not track cases based on areas of substantive law raised during litigation. Therefore, we do not have the information that would enable us to respond to this question.

***How many asylum seekers whose cases were denied based on the material support bar have received final orders of removal?***

Again, the Department does not track cases based on areas of substantive law raised during litigation. Therefore, we do not have the information that would enable us to respond to this question.

***What is the status of implementation of the statutory authority to waive application of the material support bar with respect to aliens in removal proceedings?***

The Secretary of Homeland Security retains the statutory authority to exercise the inapplicability provision, in consultation with the Attorney General and the Secretary of State, once removal proceedings are instituted against an alien. We therefore defer to the Department of Homeland Security regarding the answer to this question. (The statute specifically prohibits the Secretary of State from exercising her authority once removal proceedings against an alien are instituted.)

**2. Other Questions Asked During the Hearing:**

***Representative Smith asked for an explanation of the Li v. Gonzales Case.***

As I noted at the hearing, the Departments of Justice and Homeland Security worked together to seek vacatur of a court of appeals decision ordering Xiaodong Li's removal, based on new information provided by the U.S. Commission on International Religious Freedom. According to his applications for asylum and withholding of removal under sections 208 and 241(b)(3), respectively, of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), Li led a church in China that was not registered with the authorities, as required by a Chinese law that allows religious practice only within government-sanctioned religious organizations. Li's religious meetings were discovered, and he was arrested and beaten by the authorities. The Board of Immigration Appeals



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agreed with the Immigration Judge that Li had failed to timely file his asylum application but reversed the Immigration Judge's determination that Li was eligible for withholding of removal. The U.S. Court of Appeals for the Fifth Circuit affirmed in *Li v. Gonzales*, 420 F.3d 500 (5th Cir. 2005). The court upheld the Board's determination that Chinese persecution of *unregistered* religious practice was not persecution "on account of" religion so as to qualify for asylum or withholding of removal. The court based its holding on a State Department report in the record in that case, which, in the court's view, "establishe[d] that the Chinese government * * * * tolerates the Christian faith and seeks to punish only the unregistered aspects of Li's activities." 420 F.3d at 510.

After the court's decision, however, the Departments of Justice and Homeland Security obtained new evidence on country conditions in China from the U.S. Commission on International Religious Freedom. The evidence was material to the nature of restrictions on religious practice in such churches and the extent to which such restrictions prevented members from fully practicing their faith and placed them at risk. Based on this new evidence, the Board of Immigration Appeals reopened its decision and vacated its prior decision, reinstating the Immigration Judge's grant of withholding of removal. In turn, the Fifth Circuit vacated as moot the *Li* decision, which no longer stands as precedent. 429 F.3d 1153 (5th Cir. 2005). The Departments recognize that punishment for violation of oppressive religious registration requirements precluding the practice of an asylum-seeker's faith could constitute persecution on account of religion for purposes of asylum and withholding of removal.

***Representative Smith asked about the T-visa program for victims of trafficking in persons.***

Victims of a severe form of trafficking who have complied with reasonable requests for assistance in the investigation and prosecution of acts of trafficking may petition the U.S. Citizenship and Immigration Service ("USCIS") for a T visa. A victim who receives a T visa may remain in the United States for up to four years and may apply for lawful permanent residency in the third year. In Fiscal Year 2005, USCIS granted 229 applications for T visas. The Department of Justice closely coordinates with the Department of Homeland Security in the granting of T visas to ensure that they are granted to victims who have met the legal requirement to assist in the investigation and prosecution of those who have trafficked them. It is imperative that victims assist in order to convict the criminals, disrupt trafficking networks, and thereby prevent victimization of others in the future.

***Representative Watson asked why the United States has not signed the 1954 convention relating to the status of stateless persons and the 1961 convention on the reduction of statelessness and whether any changes to those conventions would change the U.S. position.***

I have referred your question to the Department of State.



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**Written Statement of Rachel L. Brand**
**Assistant Attorney General for Legal Policy, U.S. Department of Justice**

**"Oversight Hearing on U.S. Refugee Admissions and Policy"**
**before the Senate Committee on the Judiciary, Subcommittee on Immigration, Border Security and Citizenship**

**September 27, 2006**

Dear Chairman Cornyn and Ranking Member Kennedy,

Thank you for inviting me to provide this written statement on the role of the Department of Justice in the admission of refugees to the United States

President Bush has rightly said that America is and has always been "the great hope on the horizon, an open door to the future, a blessed and promised land " In fact, the Attorney General himself is the grandchild of immigrants and has said that his family achieved the American dream He has made improving both the immigration laws and the immigration adjudication process high priorities. The Department of Justice is thus committed to playing its part in ensuring a fair and manageable immigration system. And the refugee and asylum programs are crucial parts of this system, since they offer the promise of freedom and safety to some of the world's most downtrodden

Having said that, we are also engaged in a long war against terrorism. Any actions we take with regard to the admission of refugees must not conflict with or undermine our counter-terrorism strategy — by admitting persons who pose a security threat to this country, by undermining positions the government takes in litigation, or by sending inconsistent messages to the world about our policy toward acts of terror I do not mean to diminish the importance of admitting bona fide refugees into the United States. Rather, my goal is to explain the full scope of considerations at stake.

It is important to understand that the Administration's counter-terrorism efforts are proactive We investigate threats before they materialize, rather than just tracking down culprits after an attack has happened Thus, in addition to prosecuting those who commit acts of terrorism, we prosecute those who plan attacks and those who provide material support to attackers and potential attackers

Just as we have a proactive counter-terrorism strategy, the existing legislative scheme for refugee admissions is, and historically has been, preventive — that is, designed to prevent undesirable aliens from entering the United States Congress strengthened that scheme in the USA PATRIOT and REAL ID Acts, with objective standards and a presumption against the admission of aliens involved with terrorist organizations or individuals engaged in terrorist activities. As you are aware, the Immigration and Nationality Act ("INA") now contains broad definitions of some relevant terms, particularly "terrorist activity," "engaged in terrorist activity" (which includes provision of material support) and "organization [that has engaged in terrorist activity]"



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The definitions are broad, however, for good reasons They can be used for homeland security and immigration litigation purposes to prevent aliens who present risks to the United States or its citizens from entering or staying in the United States — even if their activities are not criminal under the narrower definitions in the criminal code and not prosecutable under the harder-to-meet criminal burden of proof They provide alternative courses of action for government authorities to protect U S. citizens' safety in cases where the after-the-fact remedy of criminal prosecution is not sufficient

I recognize that the breadth of these provisions may in some instances bar admission of individuals and groups who do not present such risks and to whom the United States is sympathetic. Congress addressed these concerns to some extent by providing the Secretaries of State and Homeland Security the authority to exercise their sole and unreviewable discretion, on a case-by-case basis, that the provision barring persons who have provided material support to organizations or individuals engaged in terrorist activity, as defined in the INA, does not apply to a particular alien Exercising this authority would permit that alien who has provided such support to enter the United States so long as he met all other requirements for admission

The law also requires that the relevant Secretary must consult with the other Secretary and the Attorney General. This scheme allows for the broadest consideration of all factors relevant to the case—the foreign policy considerations, the counter-terrorist strategy considerations, the immigration considerations, and the litigation risks. It properly includes the Department of State, the Department of Homeland Security, and the Department of Justice, each of which has an important role in protecting national security, advancing foreign policy, and implementing immigration law and refugee policy

The Department's expertise in investigating, disrupting, and prosecuting terrorist plots is a crucial element in this process For example, we know from experience that terrorists need an infrastructure to operate. They need to raise funds, maintain bank accounts and transfer money, communicate with each other, obtain travel documents, train personnel, and procure equipment. The people who perform these functions may not commit terrorist acts themselves, but the front-line terrorists could not operate without them

Careful scrutiny of applicants for refugee status who have provided material support to a terrorist organization, as defined in the INA, is therefore warranted Such scrutiny requires high-level decision-making that accounts not just for individual circumstances, but also for the large-scale impact of a decision on the U S government's counter-terrorism policies

I believe that important national security interests and counter-terrorism efforts are not incompatible with our nation's role as the world's leader in refugee resettlement While we must keep out terrorists, we can continue to provide safe haven to legitimate refugees

Thank you for this opportunity to provide a written statement on this important issue



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November 27, 2006

The following is a true copy of a Resolution adopted by the Executive Council at its meeting on November 12 – 15, 2006 in Chicago, Illinois, at which a quorum was present and voting.

*Resolved,* That the Executive Council, meeting in Chicago, Illinois, November 12-15, 2006

1. strongly opposes the overly broad interpretation of the "material support" provisions of the Patriot Act, now incorporated into the US Immigration and Nationality act, which provides the basis for denying bona fide refugees admission to the United States and otherwise excludes other categories of immigrants such as asylum seekers and those adjusting status and pursuing naturalization from the benefits to which they aspire;
2. recommends an interpretation of "material support" which pertains only to members of formally designated foreign terrorist organizations and not be applied to those who are not a threat to the security of the United States such as refugees, asylum seekers, asylees, or those adjusting to permanent residence or pursuing naturalization;
3. advocates for policies and practices that exempt those from the "material s support bar" who under duress or the threat of violence unwittingly or involuntarily associate with a terrorist organization;
4. advocates for policies and practices that exempt those from the "material support bar" who have been members of groups who have resisted regimes which victimized or persecuted them or denied them their basic human rights.
*5. urges The Episcopal Church to join with the Refugee Council USA and other refugee programs to address the issues of the "material support bar" with the United States Government.*

**EXPLANATION**

An overly broad interpretation of the "material support" provisions of the Patriot Act, reiterated in the REAL ID Act, has effectively denied any refugee admission to the United States if he/she had any association with a so-called terrorist group. As applied by the Department of Homeland Security, any organized resistance to oppressive governments, even those traditionally opposed by the US, is now classified for purposes of admissibility to the US as a terrorist group. An equally broad interpretation of material support has led to the exclusion from US resettlement those persons who even under duress may have been associated with a so-called terrorist organization; e.g., Liberian women forced into sexual slavery or Colombians trapped between opposing forces in that nation's conflict. Ironically, without the material support bar, these persons would be classic examples of those ideally suited for settlement. The indiscriminate application of material support also extends to those seeking asylum, persons

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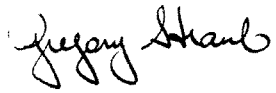
adjusting to permanent residence or those pursuing naturalization. The consequence has been denial of nearly 11,000 Burmese Karen refugees to the US because of their identification with an exile community which has escaped from and resisted the persecution of the Myanmar government. Likewise, 750 Colombians are now unable to be resettled in the US because of the material support bar; and 500 persons hoping for grants of asylum are now in jeopardy because of the prospect of being trapped by an overreaching application of the material support bar. While a limited waiver has been granted to a modest group of Burmese refugees, a comprehensive solution which reopens the doors of the US to bona fide refugees, asylees and candidates for citizenship is needed. Otherwise, thousands with impeccable credentials will be deterred from receiving the protection and privileges which they seek and deserve.



The Rev. Dr. Gregory S. Straub
Secretary of the Executive Council and
The Domestic and Foreign Missionary Society
of the Protestant Episcopal Church in the United States of America

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CHURCH WORLD SERVICE

## STATEMENT ON THE MATERIAL SUPPORT BAR

Since 2004, thousands of persecuted men, women, and children have been denied access to asylum and resettlement in the United States due to the unintended consequences of the "material support" bar to admission under the 2001 USA PATRIOT Act and the 2005 REAL ID Act. As a humanitarian aid and refugee resettlement organization, Church World Service has advocated for a solution to this dilemma so that these refugees and asylum seekers will not be abandoned as a result of their persecution and victimization.

The bar denies entry to anyone who has provided "material support" to a terrorist organization. However, it does not exempt individuals who have provided such support under coercion – often involving threats of death or injury to themselves or loved ones. Many refugees and asylum seekers need protection precisely because they fear terrorist groups that have forced them to provide such "support" as food, shelter, services, and monetary bribes for the release of their kidnapped children. The very circumstances that form the basis for their claim of persecution have been misinterpreted under the bar to deny them entry into the United States.

The U.S. Senate recently passed an amendment to the Foreign Operations Bill that would expand the Administration's authority to waive refugees and asylum seekers who have only provided "material support" involuntarily or unknowingly. Should this amendment pass during the conference process, the Administration would be able to provide protection to child soldiers, parents who have paid bribes for their kidnapped children, and women who have been abducted and forced to cook and clean for their rapists and captors. Vulnerable groups that have been unfairly barred, such as the Hmong and Montagnards who fought alongside U.S. troops during the Vietnam War, will also receive relief under this legislation.

While we welcome this improvement, we still hold that a discretionary "waiver" system (which currently lacks independent judicial review and a process by which individuals can apply for asylum or appeal a denied application) is an inappropriate way to determine whether an individual should be protected or continue to face persecution and perhaps death. So far the Administration has only exercised its authority for 92 duress waivers, while thousands of vulnerable refugees and asylum seekers continue to seek justice.

As this issue is still a concern for us, we will continue to advocate for a legislative solution that will provide a duress exemption for the material support bar, since duress should be an implicit defense, as it is throughout both civil and criminal law. Church World Service will continue to monitor how waivers are implemented, particularly in regard to asylum cases, working with the Departments of State, Justice, and Homeland Security to ensure vulnerable persons are protected.

For more information, contact Jen Smyers, Associate for Immigration and Refugee Policy, at jsmyers@churchworldservice.org or via phone at (202) 481-6935.



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**Statement of Senator Tom Coburn, M.D.**
Hearing: "*The 'Material Support' Bar: Denying Refuge to the Persecuted?*"
Subcommittee on Human Rights and the law
United States Senate Committee on the Judiciary
September 18, 2007

I would like to thank Chairman Durbin for holding this hearing on such an important and complicated issue. Concern over the way U.S. anti-terror laws affect certain refugees and asylees who may otherwise be welcome in our country was first raised before this subcommittee during our last hearing. At that hearing, we heard heartbreaking stories about how children forced into servitude by rebel armies had been barred from refuge in the United States by laws intended to exclude terrorists. Such stories prompted the Chairman and me to seek further information on the subject, and I look forward to learning more today.

The United States has a rich and proud tradition of opening its doors to those who are persecuted around the world. In fact, the United States leads the world in refugee resettlement, accepting more than 60 percent of those referred by the UN High Commissioner for Refugees and serving as that organization's single largest donor. Moreover, this country admits more refugees each year than the rest of the world combined. Since 1975, the United States has resettled more than 2.6 million refugees.[1] Our compassion has saved millions of lives, and as a result, our country has been greatly enriched.

It is true, however, that the number of refugees admitted annually by the United States fell in the aftermath of September 11th. That tragic event presented security challenges never before seen in this country, and the vulnerabilities in our immigration system that were exploited and exposed on that day demanded a response. Unfortunately, the unintended result of that response has meant delayed — and sometimes denied — relief for innocent victims of persecution around the world.

[1] Testimony of Kenneth Gavin, Refugee Council USA, before the Senate Judiciary Subcommittee on Immigration, Border Security and Citizenship, Sept. 27, 2006.



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Hence we are faced with dual, though not inconsistent, interests — an obligation to maintain aggressive anti-terrorism policies that protect the lives of U.S. citizens, and a desire to honor the commitment we have made to refugees around the world.

I am encouraged that the number of refugees admitted annually has risen since the initial post-9/11 decline. I understand that the material support bar, which is the focus of today's hearing, continues to act as an unintended barrier to admission for some individuals, but I am encouraged that the Administration has issued a number of waivers to provide relief for many. I am especially encouraged by the duress waivers, issued this year, which should provide relief to many who were forced to give material support to terrorist organizations against their will. These acts, though slow in issuance and implementation, demonstrate progress in our attempt to resolve these problems.

I remain concerned, however, that the progress we have made may be insufficient. Former allies, such as the Laotian Hmong and Vietnamese Montagnards — who fought alongside U.S. soldiers in past conflicts — remain excluded from entering the United States as refugees by the material support bar. Additionally, it seems that relief has been slow to reach bona fide refugees who should be covered by waivers that have already been issued. I would like to hear more about whether and how these waivers have provided relief to deserving refugees who have been affected by the material support bar. I am also interested in learning more about how we can expedite the waiver process and alleviate some of these issues more efficiently.

I look forward to the witness testimony.



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**Senate Judiciary Committee**
**Subcommittee on Human Rights and the Law**
**"The Material Support Bar: Denying Refuge to the Persecuted?"**
**September 19, 2007**

**Written Statement for the Record**

**Jennifer Daskal**
**Senior Counterterrorism Counsel**
**Human Rights Watch**

Thank you for the invitation to submit a statement for the record on this important subject.

Thousands of vulnerable refugees and asylum seekers have been denied entry to the United States or face return to their countries of origin by the U.S. because of overbroad terrorism-related bars in the U.S. Immigration and Nationality Act. These bars define anyone who associated with or provided any "material support" to any armed group as terrorists – even if the group has been actively supported by the United States, and even if the individual was forced at gunpoint to provide the support.

Shockingly, Hmong and Montagnards have been defined as terrorists and barred entry into the United States because they fought against the Lao and Vietnam governments – alongside the US – during the Vietnam War; rape victims forced into domestic servitude have been labeled supporters of terrorism because of the cooking and cleaning they did while enslaved; and Burmese refugees have been labeled terrorists because they once fought against one of the world's most repressive regimes.

Last fiscal year, the United States admitted over 12,000 fewer refugees than expected – largely due to the unintended consequences of these bars.[1] At its peak, over 500 asylum

1 Assistant Secretary of State Ellen Sauerbrey to Senator Edward Kennedy; Written Response to Questions for the Record, Subcommittee on Immigration, September 27, 2006. ("The Department of State estimates that some 12,000 refugee who were part? of the original planning for FY 2006 arrivals were not resettled in the United States as a result of the terrorism-related inadmissibility provisions in Section 212)(a)(3)(B) of the INA. Of these, the vast majority are associated with groups that do not appear on either the Foreign Terrorist Organization (FTO) or the Terrorist Exclusion Lists (TEL).The largest number from among this 12,000 (approximately 10,000) are ethnic minority refugees from Burma who are associated with either the Karen National Union or the Chin National Front. In addition, over 300 refugee applicants from Cuba are on hold because of ties to the U.S.-supported Alzados resistance movement. Colombian cases on hold or



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cases were on indefinite hold, as the administration sorted out what to do with individuals who had cleared every other security hurdle but were being described as "material supporters of terrorism" because they had been forced against their will to provide food, water, or services to armed rebels. Tens of thousand of others who have already been granted asylum – including thousands of Hmong and Montagnards who fought alongside or supported US troops during the Vietnam War – have been told that they cannot naturalize because of these bars.

Over the last two years, a left-right coalition of groups representing a wide array of religious, human rights, civil liberties, refugee and immigration groups have joined forces to push for changes in the law and its application. We have called upon the administration to read an implicit duress exception into the law, so as to protect rape and kidnapping victims from being defined as terrorists because of what they were compelled to do by their captors. We have urged Congress to write an explicit duress exception into the law; to change the overbroad definition of "terrorist activity" and "terrorist organization" in the law, so that armed groups that do not target civilians but are engaged in legitimate resistance movements are not inadvertently labeled terrorists; and to broaden the administration's discretion to avoid the unintended consequences of the law. And we have urged the administration to begin using the authority already provided under the current law to waive some of these bars in compelling cases.

A year ago, these efforts began to bear fruit, when Secretary of State Condoleezza Rice issued an order protecting supporters of the Chin National Front and Karen National Union, two ethnic Burmese resistance movements, from the application of these bars. Over the last year, Secretary of State Rice and Secretary of Homeland Security Michael Chertoff have issued waivers to protect supporters of eight groups – including several Burmese resistance groups and the US-supported Cuban Alzados – that would never have been considered terrorist organizations but for the overbroad definition in the law. As of the end of April, the administration also issued guidance to begin implementing so-called "duress" waivers, designed to protect victims of terrorism forced against their will to provide support to armed rebels from being barred as terrorists themselves.

The implementation of these waivers has been slow and painstaking, but we are now starting to see real results. To date, over 3,000 refugees – mostly Burmese refugees who had supported ethnic resistance movements – have been admitted into the United States pursuant to these waivers. Asylum cases are moving along a bit more slowly, with 9 granted and another 440 on hold as likely candidates for a waiver. And approximately 30 adjustment of status waivers have been granted to date.

While a huge step forward, the administration of this waiver authority remains problematic. In that regard, I would like to raise three main concerns – two dealing with the process or lack thereof for administering the waivers, and one with the limits in the law itself. As explained in what follows, I am very hopeful that the latter problem will be solved with legislation that has passed the Senate as part of the Foreign Operations

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not processed as a result of material support provided – reportedly under duress – to either the FARC or the ELN, both organizations on the FTO list.")



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Appropriations Bill and urge all members of this committee to help ensure this bill quickly becomes law.

First, the administration still has not yet issued, or set out procedures, for dealing with the many cases that are before immigration judges in some stage of removal proceedings, yet waiver-eligible. Consider the case of S.K. Over a year ago, on June 8, 2006, the Board of Immigration Appeals issued its opinion in her case, denying her asylum solely because she had provided money to the Chin National Front, a Burmese ethnic resistance movement that falls within the law's overbroad catch-all definition of "terrorist organization." In several footnotes, the court suggested that the administration should consider exercising its waiver authority in her case. The concurring opinion made the point even more bluntly, noting the absurd result:

> We are finding that a Christian member of the ethnic Chin minority in Burma, who clearly has a well-founded fear of being persecuted by one of the more repressive governments in the world, one that the United States Government views as illegitimate, is ineligible to avail herself for asylum despite posing no threat to the security of this country... I suggest that DHS may consider this respondent as someone to whom the grant of such a waiver is appropriate.[2]

On February 20, 2007, Homeland Security Secretary Chertoff issued waiver authority to protect those, like S.K., who provided support to the Chin National Front from the bar on admission. Yet six months later, S.K. has not been granted a waiver. Nor have any of the other asylum seekers whose cases are in removal proceedings been granted waivers even though they, like S.K., meet the criteria that the Secretary of Homeland Security outlined half a year ago.

Officials from the Department of Homeland Security claim that they plan to issue S.K. and others like her a waiver, but first need to sort out the internal procedures for transferring her case file into the division of DHS authorized to issue the waiver. But six months seems to be more than ample time to work out the process of case transfers, particularly given that some of those affected remain in detention while DHS decides whether to grant their asylum claim.

Second, the implementation of the duress waivers of so-called "Tier I" and "Tier II" designated groups has been unjustifiably slow. To date, only one person – a victim of the Revolutionary Armed Forces of Colombia (FARC) – has been granted such a waiver, while hundreds of other cases remain on indefinite hold.

Those on hold include a woman and daughter raped and abducted by the Revolutionary United Front (RUF) in Sierra Leone and forced to perform household chores for their captors; a Sri Lankan fisherman forced to pay a ransom to secure his release from the Liberation Tigers of Tamil Eelam (LTTE), a rebel group that the United States has long condemned for its brutality; and a Nepalese healthcare worker captured by the Nepalese

2 In re S.K., 23 I and N Dec. 936 (BIA 2006), 946-950.



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Maoist guerillas, the People's Liberation Army of Nepal, and forced at gunpoint to provide medical treatment to injured fighters.

Once again, the problem appears to be one of administrative process. In issuing duress waivers, the administration has set up two different processes depending on whether or not the group has been officially listed on either the Foreign Terrorist Organization (FTO) or the Terrorist Exclusion Lists (TEL). These are the so-called "Tier I" and "Tier II" groups – a label that derives from how they are defined in the Immigration and Nationality Act. The administration will not issue any Tier I and Tier II waivers until it has completed an intelligence assessment of the group. The administration asserts that this assessment is needed to help the adjudicators understand the group's general practices and better assess the refugee or asylum seeker's claim of duress.

While this seems to be a reasonable process, the implementation has undergone unreasonable delay. While the authority to issue these waivers was granted in April, five months later the administration has issued just one assessment – of the FARC. Both the Department of State and Department of Defense have issued numerous reports and statements about the FARC, an organization that is no doubt the subject of much intelligence analysis given its importance to the effort to combat drug trafficking in Colombia. Why did it take months for the administration to produce an intelligence analysis of a group that it could presumably have completed in a few days, if not hours? Over 350 asylum cases remain on hold because the asylum seeker has made what appear to be credible claims of duress by a Tier I or Tier II group. When are we going to see assessments completed of the other groups at issue – including groups like the National Liberation Army of Colombia (ELN), the United Self-Defense Forces of Colombia (AUC), and the LTTE in Sri Lanka – that the United States has long monitored and condemned?

Finally, even if exercised to its fullest extent possible, the administration's waiver authority is limited. Under current law, the administration can exempt material supporters of groups like the Chin National Front or Karen National Union, but it cannot waive in members or combatants who actually fought alongside those groups. In some cases, the Department of State has been forced to split up family units. The father, for example, might be barred because he once fought to protect his village alongside the Chin National Front, while the mother and children are defined as mere "supporters" and eligible for a waiver.

Legislation that recently passed the Senate as part of the Foreign Operations Appropriations Act would solve this problem. The legislation provides immediate relief to members and combatants of the eight groups for whom the administration has already issued waivers, plus those associated with the Hmong and Montagnards. This provision alone will provide immediate relief to thousands who are being inadvertently defined as terrorists because of the overbroad definitions in the law.

Even more significantly, the law expands the current waiver authority, giving the administration the discretion it wants and needs to protect against the unintended



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consequences of these bars in the future. Notably, the legislation gives the administration the discretion to exempt members and combatants of groups that inadvertently fall into the catch-all definition of terrorist organization in the future. It also provides waiver authority to protect those – such as child soldiers – forced against their will to join or act on behalf of one of the designated (Tier I or Tier II) terrorists groups. And it ensures continued authority to issue duress waivers to supporters of any of these groups.

The administration has long stated that the lack of waiver authority has made it impossible to effectively mitigate the unintended consequences of the law. This legislation will give the administration the discretion that it wants and needs to effectively protect against the law's unintended consequences.

We hope that Congress and the president will act quickly to pass this legislation into law. And once that happens, we look forward to working with the administration to ensure the prompt and responsible exercise of its new-found discretion.



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**Statement of Arthur E. Dewey**
**Assistant Secretary of State for Population, Refugees and Migration**

**SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP**
**SENATE COMMITTEE ON THE JUDICIARY**
**September 21, 2004**
**2:00 PM**

Thank you for this opportunity to give you my assessment of the achievements and prospects for the U S. Refugee Admissions Program. Through this program, the United States provides an extraordinary opportunity for resettlement to tens of thousands of refugees fleeing persecution. As President Bush said last June, it is important that America be a welcoming society We lead the world in offering resettlement to those in need, and we encourage other countries to develop resettlement programs

First, I want to thank you for your continued support, which reflects the strong humanitarian impulse in the American people that I witness whenever I travel around the country Your support has helped us implement many new initiatives. These initiatives, which I will discuss, helped us attain our ambitious goals for the fiscal year 2004 program After two years of adjusting to the changes brought about by 9-11, and continuing to respond to the end of Cold War, we have made a robust program When September 30 arrives, based on anticipated developments, we project that refugee admissions will have increased nearly 80 percent over fiscal 2003, despite logistical and security challenges that kept per capita costs high—$3,500 per refugee admitted compared to $2,200 in FY 2001. So long as we receive adequate funding, I am confident that we have a system in place that is capable of sustaining or increasing admissions numbers in coming years

But before I talk about the future, let me reflect for a few moments on the past. I have been in humanitarian operations for some time, serving under three Administrations and for the United Nations. Major geopolitical earth shifts during that time have profoundly affected the U.S. refugee admissions program.



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From the mid-1970s until the mid-1990s at least three-quarters of refugees coming to the United States were from two principal locations -- the former Soviet Union or Southeast Asia. Processing sites were few and they were safe. The Soviet Union, the Philippines, Thailand, Hong Kong and Indonesia readily allowed us to process refugees.

Now, we process refugees—a few hundred or a few thousand at a time in about 46 locations and representing 60 different nationalities Some of these widely scattered places are remote; some are dangerous Based on an assessment of terrorism threats, the impact of the war in Iraq and other factors, some traditional processing sites have been eliminated My Bureau and Homeland Security's Bureau of U S Citizenship and Immigration Services have collaborated to redirect resources to locations providing adequate safety for U S. personnel We have spent millions of dollars on physically moving thousands of refugees and on "hardening" processing facilities around the world Much of this effort has been in Africa. Additionally, after the tragic events of 9/11, we have implemented more stringent namecheck and other security requirements. So compared to the old days, costs are much higher and the process much more labor-intensive

In last year's report to Congress we acknowledged the program was at a crossroads. We had two choices limit the size and scope of our program, allowing the program to wane, or mount the most extensive and expensive rescue operation in the history of the U S refugee admissions program. Of course we chose the latter.

In doing so, we expanded the concept of "rescue" to include refugees who have been living in protracted unresolved situations, like the Meskhetian Turks in Russia, who had been rootless for decades, or 15,000 Lao Hmong living in a closed camp in Thailand for about a decade We are resettling these groups. We are also identifying other populations in Southeast Asia in need of resettlement, and resettling long-suffering Somali Bantu in Kenya, and Liberians oppressed by the Taylor regime who continue to be at risk. As I said in an op-ed published earlier this month in the Washington Times,



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"long-staying" refugees are not commodities, they are vibrant human beings. We are resolved not to let them languish in further in dependency and even despair We will continue to seek out vulnerable people— especially women and children---who have waited years or even decades for rescue.

The refugee outlook is brighter now than it has been for years. The overall number of refugees in the world continues to decline – the global refugee population has dropped by approximately 20% over the last two years, from 12.1 million at the end of 2001 to 9 7 million at the end of 2003 The predominant reason cited by the United Nations for this progress is the option to voluntarily repatriate. The dramatic changes in Sierra Leone, Afghanistan, Angola and Iraq have made it possible for refugees to return to those countries Large-scale repatriations are or will soon be underway for hundreds of thousands of refugees in Africa. The more than 3 million who have returned to Afghanistan since the fall of the Taliban make up one of the largest repatriations in history. As Afghanistan continues to protect the rights of its citizens, particularly women, the environment becomes fertile with hope and opportunity. The U.S government remains the major contributor both to making repatriation solutions happen, and to making them last through employment opportunities such as the Afghan Conservation Corps In Iraq, over the next 2-3 years, we anticipate that U S.-Iraqi-international cooperation will lead to the return of about 1.5 million Iraqi refugees and internally displaced persons, some of whom have been in exile for decades. As freedom and liberty continue to be embraced around the world, there is good reason to expect fewer situations resulting in refugees

When resettlement is the appropriate durable solution for refugees, the United States steps up to the plate. Despite the shrinking pool of refugees, the disqualification of many previously approved family reunification cases because of fraud, and the logistical and security challenges I mentioned, I am happy to report that as of today we have admitted over 48,000 refugees this fiscal year, we expect that number will rise to more than 52,000 by September 30. More than half are from Africa. Furthermore, we will enter FY 2005 with a healthy pipeline of approved cases in the final stages of processing



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The extraordinary effort that produced this result has had the full support of the President and is testimony to his steadfast commitment to a vibrant, diverse, and secure refugee resettlement program. The success of this year's program owes a debt as well to the outstanding cooperation among partners both inside and outside government over the past three years The Departments of State, Homeland Security, and Health and Human Services have worked closely to overcome significant obstacles We have worked with the Office of the UN High Commissioner for Refugees to mainstream resettlement within its overall program of activities Refugee advocates in the NGO community—especially Refugee Council USA and InterAction—played key roles in the identification and sponsorship components of the resettlement process. Our NGO partners in the U S. have helped streamline sponsorship processes to expedite departures this year and prepared receiving communities for the increased number of arrivals

Let me specifically mention our efforts to promote greater identification and referral capacities within the government and by the UNHCR and NGOs. The time-consuming and often politically sensitive task of caseload identification is critical to maintaining a healthy admissions pipeline Over the past two years, our contribution of over 14 million dollars has supported 46 full-time resettlement related positions in UNHCR and resulted in a much larger number of referrals This year, we expect UNHCR to refer at least 21,500 individual refugee cases to the United States through this initiative

UNHCR's improved ability to identify resettlement cases also helps further our mutual goal of increasing the number of countries involved in resettling refugees. The rest of the world combined takes less than half as many refugees as the U S does, this year, some 20-25,000 vice 53,000 for the United States. Canada and Australia took more than 10,000 each in calendar year 2003, but after that the numbers drop significantly. Many European nations claim that they are contending with large numbers of asylum seekers and are unable to voluntarily accept refugees from overseas as well The U S receives asylum seekers, too, but that in our view in no way diminishes our commitment to



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resettle refugees. We will continue to work with UNHCR and other countries to encourage the expansion of resettlement as a durable solution for refugees in need.

We also recognize that NGOs may be aware of individuals for whom U.S. resettlement would be appropriate. Accordingly, we have held two training programs on case identification and referral in Africa over the past eighteen months. We will offer this training to NGOs in Asia later this year and wherever it might be warranted in the future.

In addition to the development of individual case referral mechanisms, we initiated field visits in collaboration with UNHCR, host governments, and NGOs to explore potential groups for resettlement consideration In the past year, we fielded the first of these Targeted Response Teams to Mozambique, Uganda, Guinea, and Ghana We found this to be an effective approach to group caseload identification, particularly for populations that have long been in protracted situations. In part through the work of a U.S. government official detailed to UNHCR, we have been firmly committed to the complementary work UNHCR has undertaken in the area of group referrals. Through a systematic, analytical methodology under development, UNHCR can designate entire groups for resettlement consideration. This permits UNHCR to better promote the strategic use of resettlement to resolve refugee situations

These are just some of the initiatives we have undertaken. In addition,

- We added new staff to augment both overseas processing and identification of new needy populations. The creation of the Department of Homeland Security's corps of refugee officers also will be a critical part of this effort

- We have expanded Family Reunification: Having instituted additional fraud prevention measures in the program, we were able to increase from four to nine the number of nationalities eligible for P-3 processing in FY 2004 and propose a further expansion of the family reunification component of the program to 14 nationalities in FY 2005.



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- We have commissioned a comprehensive study of refugee admissions Professor David Martin, a renowned expert in the refugee field, has recently completed an independent study of our program. Drawing on the experience and ideas of United States government agencies, NGOs, international organizations, and refugees, his report includes a number of important recommendations that we are now reviewing. The report will be made available to the public and will inform the process of determining the shape of further reforms.

We believe we have accomplished all of the initiatives set forth in last year's report to Congress with the lone exception of developing targeted strategies to improve the protection of unaccompanied minors This will be a focus in FY 2005 The FY-2005 Presidential proposal includes several program modifications worth noting here They include revised definitions of processing priorities, and expansion of Priority 3 family reunification eligibility, and limited universal in-country processing authority. During FY-05, we also intend to examine possible statutory and regulatory changes that could better improve and streamline the admissions process without compromising national security We also will explore additional measures to counter fraud and corruption, and to enhance the physical security of all refugees overseas.

The Administration's FY 2005 proposed ceiling of 70,000 refugees, with 50,000 regionally allocated at present, reflects the President's commitment to a continued sustained recovery in our program to resettle refugees in the United States Given the level of effort and resources expended in FY 2004, and continuing security challenges, the per capita cost of resettling each refugee is likely to remain high. In order to be able to admit refugees through the 20,000 unallocated numbers included in the FY 2005 proposal, in the coming months, we will work to identify additional refugees in need of resettlement and the funding to support them while continuing to support critical humanitarian assistance requirements



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The United States refugee admissions program represents an important component of our rich tradition as an immigration country: offering refuge to the oppressed. The Administration has demonstrated that, with sufficient resolve, resources, and commitment, we can continue to demonstrate robust U.S. leadership in refugee resettlement. It has been tremendously satisfying to see our efforts of the past three years pay off in significantly increased admissions in Fiscal Year 2004. Working together with our resettlement partners, and with availability of adequate resources, we have shown that we can realize the President's commitment to grow the program – even in the challenging environment after 9-11. The US will not be deterred in our role as a beacon of freedom to those that have known only war and oppression.

Thank you. I would be happy to take your questions.



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United States Senator
Illinois
September 19, 2007

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Statement of Senator Dick Durbin
Chairman, Subcommittee on Human Rights and the Law
"The 'Material Support' Bar: Denying Refuge to the Persecuted?"
September 19, 2007

This hearing of the Subcommittee on Human Rights and the Law will come to order.

Good afternoon and welcome to this hearing, which is entitled, "The 'Material Support' Bar: Denying Refuge to the Persecuted."

After opening remarks, I will recognize Senator Coburn, the Subcommittee's Ranking Member, for an opening statement. Then we will turn to our witnesses.

First, a word about the origins of this hearing. Earlier this year, the Human Rights Subcommittee held a hearing on child soldiers. At that hearing, Senator Coburn and I were surprised to learn that, under our immigration laws, the Department of Homeland Security has branded some former child soldiers as terrorists and prevented them from obtaining asylum in the United States.

Senator Coburn immediately suggested that we hold a hearing to explore this issue further. I want to thank him for requesting this hearing and commend him for recognizing the importance of this issue.

At the outset, I also want to commend Judiciary Committee Chairman Pat Leahy for his leadership on this issue. Senator Leahy recognized this problem long before the rest of us and he continues the fight to fix the problems with the material support bar.

As is our practice in the Human Rights Subcommittee, I would like to begin this hearing with a brief video that provides some background on the "material support" bar. This video tells the story of one refugee who has been affected by the bar. I want to thank UNHCR for providing this video footage and for allowing us to use it at today's hearing.

[SHOW VIDEO]

At the base of the Statue of Liberty, Emma Lazarus' famous verse says, "I lift my lamp beside the golden door." For decades, the golden door to the United States has been open to refugees seeking safe haven from ethnic, religious, and political persecution. Our nation receives more refugees than any other. The American people's generosity has made the United States a symbol of freedom and liberty around the world and has given hundreds of thousands of refugees the chance form a new life.



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In the aftermath of the 9/11 terrorist attacks, security is an imperative. We must carefully scrutinize everyone seeking to enter our country, including refugees, to make sure that a wolf in sheep's clothing does not slip through. But, at the same time, we must ensure that the golden door remains open to those who are fleeing oppression in their homelands to make a better life in America.

Unfortunately, the so-called "material support" bar has prevented many victims of human rights violations and terrorism from obtaining refugee or asylum status. Under current law, the government denies asylum and refugee claims from anyone who has provided what the law terms quote "material support" to quote "terrorist organizations."

These terms are defined very broadly and the Department of Homeland Security has applied them in a manner that sweeps in conduct that no reasonable person would consider material support or terrorism. As a result, the golden door has slammed shut for thousands of refugees and asylum seekers.

Paw Wah, whose story we heard in the video, is a good example. Paw Wah's application for resettlement into the United States was denied. In 2006, Secretary of State Rice granted a waiver for the residents of Tham Hin camp. Paw Wah has now lived in the camp for 13 years and she has a 5-month old baby. She is being permitted to reapply for resettlement in the United States, but her parents will not be able to join her. Her father is ineligible for a waiver because he fought against the Burmese dictatorship.

The material support bar also blocks refugees who have provided support to terrorist organizations or armed rebel groups under duress, including:

• R.K., a captured Sri Lankan fisherman forced to pay ransom to his terrorist kidnappers.

• Helene, a Sierra Leonean woman who was gang raped and burned by Revolutionary United Front members and forced to wash clothes and cook meals for the RUF.

• Jennifer, a 13-year-old Ugandan girl who was abducted by the Lord's Resistance Army and forced to serve as the "wife" of an LRA leader.

• And Mariana, a nurse from Colombia who will testify at today's hearing. Mariana's asylum claim was denied by DHS because she was kidnapped by the Revolutionary Armed Forces of Colombia, also known as FARC, and forced at gunpoint to provide care to FARC guerillas.

In addition, Laotian Hmong, Vietnamese Montagnard, and Afghan members of the Northern Alliance who fought alongside U.S. soldiers and against their own governments have been affected by the material support bar because of the assistance they gave U.S. forces and their own armies.

It is not the role of this Subcommittee to assign blame. The fates of thousands of innocent refugees are too important. Instead of pointing fingers it is my hope we can join hands to



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ensure that fundamental human rights are protected and the rule of law is upheld.

There is no question that efforts are underway to address the problems created by the material support bar. The Administration has taken some positive steps by exercising its waiver authority in some cases. Congress has also taken some positive steps. Language negotiated by Senator Kyl and Senator Leahy that would exclude some from the material support bar was included in the Foreign Operations Appropriations bill that the Senate recently passed. We will have an opportunity to discuss these measures today.

But there is also no question that many legitimate refugees are still unjustly labeled terrorist supporters by the material support bar. As I have said before, this Subcommittee focuses on legislation, not lamentation, and today we will discuss what more the Administration and Congress should do to ensure that victims of persecution and terrorism are not denied safe haven in our country.



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Statement of U.S. Senator Russ Feingold
Senate Judiciary Committee Hearing
"The 'Material Support' Bar: Denying Refuge to the Persecuted?"
September 19, 2007

I thank the Chairman for his hard work and exemplary leadership on this issue. I also thank the witnesses for taking the time to come before this subcommittee today to talk about the difficulties refugees and asylum seekers face because of the "material support" bar. As a result of changes in the law brought about by the USA PATRIOT Act and the REAL ID Act, many refugees and asylum seekers have found themselves unfairly labeled as terrorists and terrorist supporters, when it is clear they are nothing of the kind. It has been disappointing to hear stories of people with otherwise legitimate claims who have been unable to seek refuge from persecution in the United States because of this law.

I was therefore pleased that the Senate took an important step forward by adding language to the fiscal year 2008 foreign operations appropriations bill that would offer some relief to those unfairly affected by the "material support" bar. In particular, the language provides immediate relief for the Hmong, who fought alongside the United States in the Vietnam War and then found themselves barred from resettlement because of that assistance. I think we can all agree that statutory relief for the Hmong is necessary and appropriate.

However, including this provision in the appropriations bill does not end the debate. While the provision gives the Department of Homeland Security and the State Department broader waiver authority, it still does not get to the heart of the issue – that the USA PATRIOT Act and the REAL ID Act have unfairly labeled some legitimate refugees and asylum seekers as "terrorists" and "terrorist supporters." I understand there is a need to protect U.S. national security interests, but an innocent civilian who is held hostage and forced at gunpoint to pay a ransom to terrorist kidnappers is not a threat to our national security and should not labeled as such. Nor is it sufficient to rely entirely on the hope that the Department of Homeland Security and the State Department will exercise their discretion to waive the "material support" bar for such a person.

It is important that Congress acknowledge that we have more work to do before we fully resolve this issue. I am proud that the United States has been a leader throughout the world on protecting and assisting refugees, and we need a fair and balanced policy to ensure that we retain that leadership role.



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**TESTIMONY OF**
**ANWEN HUGHES**

**SENIOR COUNSEL**
**REFUGEE PROTECTION PROGRAM**
**HUMAN RIGHTS FIRST**

**HEARING ON THE "MATERIAL SUPPORT" BAR**

**BEFORE THE**

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**
**SUBCOMMITEE ON HUMAN RIGHTS AND THE LAW**

**SEPTEMBER 19, 2007**



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**Introduction**

Chairman Durbin, Ranking Member Coburn and Members of the Subcommittee, thank you for inviting me here today to offer the views of Human Rights First on the effects of our immigration law's terrorism bars on people who seek refuge in the United States from persecution in their home countries.

My name is Anwen Hughes, and I am an attorney with the Refugee Protection Program of Human Rights First. For nearly 30 years, Human Rights First has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees. Our organization also operates one of the largest pro bono representation programs for asylum seekers in this country, providing free legal services to refugees who cannot afford counsel. Our views on the U.S. asylum system are informed by many years of working directly with the refugees that system was set up to protect.

Human Rights First is committed to ensuring that the protections guaranteed to refugees and asylum seekers under the 1951 Refugee Convention and its 1967 Protocol remain available to those who seek safety in the United States. At the same time, we have a longstanding commitment to the proper application of the "exclusion" clauses of the Refugee Convention, which place refugees who have committed serious violations of the human rights of others or other serious crimes, outside the protection of the international refugee regime.

I am here today to discuss the ways provisions of our immigration laws intended to bar terrorists and their supporters from the United States are wreaking havoc with our system of refugee protection and barring as "terrorists" the victims of the people and groups these immigration law provisions had intended to target.

**Exclusion from Refugee Protection: The Way the Refugee Convention and the Immigration and Nationality Act are Supposed to Work**

In the wake of World War II, the United States played a leading role in building an international refugee protection regime to ensure that the nations of the world would never again refuse to offer shelter to people fleeing persecution. The United States has committed to the central guarantees of the 1951 Refugee Convention and its 1967 Protocol. The United States passed the Refugee Act of 1980 in order to bring our nation's laws into compliance with the Refugee Convention and Protocol. That legislation incorporated into the Immigration and Nationality Act ("INA") provisions establishing the domestic asylum and refugee resettlement systems that in the years since then have helped over two million refugees escape persecution and begin new lives in this country.

We incorporated into our law the Refugee Convention's promise to provide protection to refugees, but also the Convention's principle that some individuals who meet this definition should nonetheless be excluded from protection. Under the Refugee Convention, these "exclusion clauses" apply to people who have committed heinous acts



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and crimes so grave as to make them undeserving of international protection as refugees, despite a well-founded fear of persecution. A separate provision of the Convention allows the return of refugees who pose a danger to the security of the host country. The Immigration and Nationality Act incorporated bars to asylum that track the broad categories of the Convention's exclusion clauses and reflect the same underlying principles. People who engaged or assisted in or incited the persecution of others, people who have been convicted of a particularly serious crime in the United States or have committed a serious non-political crime abroad, people who have engaged in terrorist activity, who are representatives of foreign terrorist organizations, or who otherwise pose a danger to the security of the United States, have long been barred from asylum. Refugees seeking resettlement from abroad are subject to an overlapping set of requirements that they be admissible to the United States.

The purpose of these provisions—which is an important purpose, and one that we support—was to ensure that perpetrators of heinous acts and serious crimes are identified and cannot use the refugee protection system to avoid being held accountable for their actions, and that refugees who threaten the safety of the community in their host countries can be removed. Under the Refugee Convention, exclusion from protection of a person who meets the refugee definition must be predicated on the individual refugee's individual responsibility for serious wrongdoing. Either the refugee must have individually committed an excludable offense (which would include acts of terrorism as that term is commonly understood), or he or she must have contributed to its commission in a significant way, and have done so knowingly and voluntarily.

**Definitional disasters**

Unfortunately, the passage of the USA PATRIOT Act in 2001 and the REAL ID Act in 2005, combined with the longstanding but until then little noticed over-breadth of the INA's definition of "terrorist activity," has turned these principles upside down. Under these new and old laws, as they are being expansively interpreted by the federal agencies charged with enforcing them, refugees who were victimized by groups the U.S. has designated as terrorist organizations are being treated as terrorists themselves. Thus "Mariana," a nurse from Colombia, saw her asylum claim rejected because she had been kidnapped by FARC guerrillas in her country who had forced her, often at gunpoint, to provide medical care to their wounded. DHS concluded that the medical care Mariana had provided constituted material support to terrorists.

Refugees who voluntarily helped any group that included an armed wing have suffered the same fate—regardless of the circumstances in which that group used force, regardless of who or what its targets were, and regardless of whether the assistance the refugee provided had any logical connection to the use of force. A schoolteacher from Burma, for example, was denied asylum because he had allowed representatives of an ethnic Chin political movement, the Chin National Front (CNF), to stay at his school and speak to villagers about democracy. Because the CNF includes an armed wing that has fought the army of the Burmese military junta, the help the schoolteacher gave to the



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visiting CNF members was deemed to be "material support to a terrorist organization." How did we get to this point?

The roots of this situation lie in the Immigration Act of 1990, which first incorporated a definition of "terrorist activity" into the INA. This was, even then, an extremely broad definition. Since 1990, the INA has defined terrorist activity to include "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." The unintended consequences we are currently experiencing stem from the interaction of this definition of terrorist activity with the subsequent changes introduced by the USA PATRIOT and REAL ID Acts. The USA PATRIOT Act broadened the 1990 definition of "terrorist activity" even further to include the use of any "weapon or dangerous device" for the virtually undefined range of purposes described in the 1990 text. More significantly, however, the USA PATRIOT Act expanded the INA's definition of "terrorist activity" to include "material support" to any organization that has engaged in "terrorist activity." It also defined a "terrorist organization," for immigration-law purposes, to mean not only any organization designated as such by the U.S. government, but also any group of two or more people, "whether organized or not," that has used armed force.

The first two categories of "terrorist organizations" are those whose names appear on lists that are publicly available on the State Department's website. These include organizations designated as terrorist organizations under section 219 of the INA (what many people working on this issue have been referring to as "Tier I" organizations), and organizations placed on the "Terrorism Exclusion List" by publication in the Federal Register (commonly referred to as "Tier II" organizations). The third category of "terrorist organizations" created by the USA PATRIOT Act is not listed anywhere. Groups are deemed to be "Tier III" terrorist organizations in an ad hoc fashion, in connection with a particular refugee applicant's case. There is no central control over the application of this definition, which is triggered simply by an adjudicator's assessment that the group or some of its members at some point used armed force.

It is the breadth of the "terrorist activity" definition that accounts for the sweeping and indiscriminate impact of the USA PATRIOT and REAL ID Act amendments. We do not believe this was the result Congress intended. The USA PATRIOT Act changes passed with hardly any debate, and supporters of the REAL ID Act publicly stated their intent that the U.S. should continue to give "hope and shelter to people who can legitimately claim and receive asylum."

But once these changes were enacted, the relevant federal agencies—the Department of Homeland Security, the Department of Justice, and the Department of State—began to apply all of these provisions very literally, including the 1990 "terrorist activity" definition. This provision is being read to define as terrorism any use of any weapon or dangerous device against persons or property outside of a context of state authority, carried out for any purpose other than "mere personal monetary gain." Taken together with the amendments made by the USA PATRIOT and REAL ID Acts, this



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means that any group that has used armed force, or has a subset that has used armed force, is now considered a "terrorist organization," and that anyone who provides material support to any such group is now considered a "terrorist."

DHS's current interpretations of the statute are being applied not only to asylum seekers with pending cases, and to refugees abroad seeking resettlement in the U.S., but also to the later applications and petitions of asylum seekers and refugees who had previously been granted protection here without any question. When these refugees and asylees have applied for permanent residence or petitioned for their spouses and children to join them, those applications have been placed on hold if the applicant or petitioner's case is now deemed to trigger one of the "terrorism bars." The number of cases on hold in this last category has been growing exponentially over the past year.

One of the first asylum seekers thus redefined was a refugee from Burma publicly known by her initials S.K. I am not giving her full name here to protect the safety of her family. In Burma, Ms. K had peacefully protested against the military regime. She wanted a democratically elected government and equal treatment for the country's ethnic and religious minorities—of which she, as an ethnic Chin and a Baptist Christian, was a member. After the Burmese military junta violently suppressed the pro-democracy protests, Ms. K gave support to the Chin National Front (CNF), an ethnic Chin political movement that includes an armed wing. The U.S. government has repeatedly condemned the Burmese military regime and its treatment of ethnic and religious minorities, and the CNF has never been designated as a terrorist group by the Department of State. Nonetheless, Ms. K was denied asylum in the United States on the grounds that her contributions to the CNF constituted material support to a terrorist organization. The Immigration Judge who denied her case reacted to this outcome with discomfort, noting that "our own history is based on an armed response to a government that we could not change democratically." The Immigration Judge, however, ultimately adopted the Department of Homeland Security's interpretation of the law, and this decision was then affirmed by the Board of Immigration Appeals, which held that the material support bar made no exception for "cases involving the use of justifiable force to repel attacks by the forces of an illegitimate regime."

Read this way, the Immigration and Nationality Act labels as terrorists a spectrum of people ranging from Osama Bin Laden to surviving participants of the Warsaw ghetto uprising to modern-day refugees who took up arms against the military forces of Saddam Hussein or the Burmese military junta. There is something absurd about this lack of differentiation, which we believe is ultimately counterproductive even as an enforcement measure. If everything is terrorism, then the term loses all moral force, as well as the deterrent impact these INA provisions were intended to have. It also becomes impossible for refugees and all other non-citizens to know what they may and may not do. If we are going to make "terrorist activity" grounds for mandatory deportation with no eligibility for relief, we must be able to define the conduct that term actually intends to target.



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**Denying defenses**

Even as the terrorism bars have expanded over the past six years, the Department of Homeland Security has also adopted a uniformly expansive reading of all of their component terms. DHS has essentially read the "material" out of "material support," interpreting this term to include forms of assistance that bear no logical relation to "terrorist activity," and refusing to recognize any exception for *de minimis* contributions. Our volunteer attorneys are providing legal representation to the elementary schoolteacher from Burma mentioned earlier, for example, who had allowed three members of the Chin National Front to stay for two nights at the school where he taught in order to speak to the villagers about democracy. While they were there, the schoolteacher and other villagers gave the three men food and refreshments. Because he provided this limited and entirely peaceful assistance to members of the CNF, the Burmese military regime burned down the teacher's home, berated him for his belief in democracy, beat him severely, and held him prisoner for two years, first in a local jail and later in a forced labor camp. Because he provided this limited and entirely peaceful assistance to members of the CNF, the U.S. government has now denied the schoolteacher asylum.

DHS has also taken the position that emergency medical care to an injured person constitutes "material support to terrorism" if the injured person has engaged in terrorist activity. "Mariana," a nurse from Colombia who is also a witness at this hearing, was kidnapped and physically assaulted by guerrillas from the Revolutionary Armed Forces of Colombia (FARC). They threatened her life and the lives of her family members and forced her, often at gunpoint, to give medical treatment to their members. When "Mariana" fled to the U.S. and applied for asylum, her claim was rejected on the grounds that the medical care she had provided constituted "material support" to a terrorist organization. A Nepalese healthcare worker who was placed in the same situation by the Maoist guerrillas in his country was granted asylum by an immigration judge, but DHS has appealed that decision to the BIA where the his case has been pending since 2005. Leaving aside the fact that both these people provided medical care to their captors under duress, DHS's position that emergency medical care constitutes "material support" to terrorism is deeply disturbing and in fundamental conflict with principles of medical ethics.

DHS and the Department of Justice's Office for Immigration Litigation (OIL) have also taken the position that the material support bar applies to refugees who were coerced into providing support to armed groups. A fisherman from Sri Lanka who was kidnapped by the Liberation Tigers of Tamil Eelam (LTTE) and made to pay ransom for his own release, has been denied asylum on this basis. A student activist from Bhutan living as a refugee in Nepal taught at a school that took money from him, some of which the school may have paid as protection money to Maoist rebels. As a result of this, his asylum application has been on hold for over a year, prolonging his separation from his wife and little daughter. Hundreds of other asylum seekers are in the same situation, as are thousands of refugees who have been deemed ineligible for resettlement on this basis.



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There is nothing natural or inevitable about this interpretation of the law. Similar criminal statutes are read to include an implied defense of duress, as are analogous civil statutes, and before 2005, a good number of trial attorneys representing DHS in immigration court took the position that the INA should be read the same way. DHS's current uniform position to the contrary treats victims of groups like the FARC, the Maoists, and the LTTE as terrorists themselves and helps swell the numbers of refugees whose lives are being endangered or placed on indefinite hold by the "material support" bars.

**Waiting for waivers**

The statute provides authority for the Secretaries of State (in overseas cases) and Homeland Security (in cases arising in the United States), in consultation with the Attorney General and each other, to waive application of some, though not all, of the terrorism-related bars in particular cases. New legislation would expand this authority to cover most of the terrorism-related bars, including the membership and "terrorist activity" bars, subject to certain exceptions. Statutory authority for the Executive, in its sole unreviewable discretion, to decline to apply these bars has been the Executive's preferred solution to the current crisis, and there has finally been some progress in recent months in implementing portions of this statutory waiver authority, particularly in overseas refugee cases. Only nine asylum seekers have been granted waivers to date, however, and over two years after this authority was enacted, there is still no process in place to grant waivers to asylum seekers in immigration court. Without wishing to diminish the efforts of those at DHS who have worked to make this possible, or the practical impact on those refugees who have been granted waivers, we remain deeply concerned that using unreviewable discretionary waivers as the sole means of resolving a significant portion of refugee and asylum cases is neither legally appropriate nor workable in the long term.

From a practical standpoint, implementation of the waiver process has been extremely slow and unevenly distributed. In the overseas resettlement context, about 3,000 refugees have been granted waivers, almost all of whom provided varying forms of assistance to particular groups (including Burmese ethnic minority movements like the Karen National Union, the Chin National Front, and others) whose donors were exempted from application of the material support bar by the Secretary of State in 2006. The remainder of the refugees granted waivers to date have been people subjected to duress by "Tier III" groups, i.e. groups that have never been designated or listed as terrorist organizations by the U.S. government. This represents progress, but that progress has come only at the end of protracted delays, and refugees who were subjected to coercion by "Tier I" or "Tier II" organizations such as the FARC and other armed groups in Colombia, the Maoists in Nepal, the LTTE in Sri Lanka, and others, have yet to be granted waivers. In cases involving coercion by "Tier I" and "Tier II" groups, DHS has set up a process that requires an initial decision whether victims of a particular organization should be allowed to be considered for duress waivers, before waiver determinations may be made in an individual refugee case. No Tier I or Tier II



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organizations have so far cleared this first phase of the administrative decision-making process.

For asylum seekers, waiver implementation has proceeded at a glacial pace. Over two years after statutory authority for such waivers was enacted in its present form as part of the REAL ID Act, only nine asylum seekers have actually been approved for waivers, while over 440 asylum seekers who applied for asylum affirmatively (i.e. without being in removal proceedings) remain on hold at the Asylum Office. A high proportion of asylum seekers whose cases have been deemed to trigger terrorism-bar concerns are people who were subjected to coercion by Tier I or Tier II organizations, whose victims DHS has not yet begun to consider for waivers.

Moreover, there is still no process in place to implement waiver authority for asylum seekers whose cases are before the immigration courts, the Board of Immigration Appeals, or the federal courts. This means that asylum seekers who are otherwise eligible for waivers in the various categories DHS has already announced—people who provided support against their will to "Tier III" organizations, as well as contributors to groups already deemed not to pose terrorism-bar concerns—are not able to be granted this relief. Ms. K, for example, is identically situated to refugees overseas who, like her, gave money to the Chin National Front, and are now being resettled in the U.S. after being granted waivers of inadmissibility. But because her case originated in immigration court, there is still no process in place to grant Ms. K a waiver. The same is true of the Chin Burmese schoolteacher described earlier, as well as two other Burmese Chin refugees whose asylum claims were denied around the same time. Attorney General Alberto Gonzales certified the BIA's decisions in all of these Chin cases to himself in March of this year, which prevented them from pursuing federal appeals of the BIA's decisions but provided them with no relief.

Yesterday, the Attorney General remanded Ms. K's case to the BIA "so that it may consider what, if any, further proceedings are appropriate in light of [Secretary Chertoff's] February 20, 2007" decision not to apply the material support bar to people like Ms. K who gave to the CNF. But there is still no process in place for waivers to be granted to Ms. K, to the Burmese schoolteacher, to "Mariana" the nurse from Colombia, to the Sri Lankan fisherman, or to any other asylum seeker whose case is before the immigration courts, the BIA, or the federal courts of appeals. None of these people have any idea when they may see their cases resolved.

These delays come with real human costs. The schoolteacher's family, for example, remains in a dangerous situation abroad, and he has no ability to extricate them from that danger and be reunited with them here until he is finally granted asylum. The same is true of the Sri Lankan fisherman, who will not be considered for a waiver until DHS agrees to authorize implementation of duress waivers for individual victims of coercion by the LTTE. He was detained for over two years while these administrative discussions dragged on. Ms. K was likewise detained for over two years in an immigration jail in Texas, even after being granted protection under the Convention Against Torture.



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And these are the cases we know about. One of the most alarming things about the state of adjudication of these cases, from a refugee advocate's perspective, is that the Departments of Justice and Homeland Security, to the best of our knowledge, do not have mechanisms in place to track cases pending before the DOJ or the federal courts that are triggering the terrorism bars but that DHS has indicated it intends eventually to consider for waivers. As a result, there does not appear to be any reliable system in place to prevent such asylum seekers from actually being deported before this can happen. DHS has indicated that it is moving towards approving implementation of waivers for people subjected to coercion by the FARC—too late for one asylum seeker whose case we were involved in, who was deported back to Colombia on this basis in 2005 after a lengthy stay in immigration detention.

These are the results we have seen at the end of a two-year period in which refugee advocates have been intensely focused on waiver implementation and government officials at the highest levels of the relevant federal agencies have indicated that resolving this problem is a priority. Based on this experience, we have serious concerns about the long-term feasibility of this level of reliance on waivers as the sole means of resolving these kinds of cases, especially if DHS maintains its current interpretations of the core legal definitions in the INA ("material support," "terrorist activity," and "terrorist organization") that are sweeping such a large number of cases into the terrorism-bar framework.

This scheme also raises fundamental due process concerns. Administrative agencies are not infallible, and our legal system normally does not expect them to be. This is not a perfect system, and many asylum seekers who enter into it are unrepresented by counsel, do not speak English, and struggle to communicate their stories through inadequate translation and across significant cultural and informational barriers. Whether or not a person should be subject to exclusion for "material support" to a group that is deemed to be a terrorist organization (or subject to any other terrorism-related bar) involves legal and factual determinations of the same kind as the other core aspects of decision-making in an asylum case and should be subject to the same process of administrative and judicial review. For the asylum seekers involved, what is at issue can be the difference between life and death. The stakes in our legal system do not get much higher than this, and these cases deserve the same procedural protections and review normally accorded to interests of this magnitude.

**Conclusion**

Progress on implementing administrative waiver authority is a positive development, and should be pursued and closely monitored in asylum and adjustment of status as well as refugee cases, with urgent attention to the implementation of a process to grant waivers to asylum seekers in removal proceedings and to ensuring that no refugees are not deported back to persecution before such a process is in place. Expanding statutory waiver authority is an important step to help many refugees currently barred from protection. In order to bring U.S. laws and administrative procedures back into line



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with the Refugee Convention and the U.S. tradition of extending protection to those who flee from persecution; and to ensure that no refugee is returned to persecution, Congress should also address the overbroad definitions that lie at the heart of the "material support" problem, and make explicit its intention to target people who make a moral choice to engage in terrorist activity.



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Statement to the Human Rights and Law Subcommittee
of the U.S. Senate Committee on the Judiciary
by the Immigrant and Refugee Appellate Center

Mr. Chairman:

The material support bar is Congress' attempt to deny terrorists or terrorist supporters all access to the United States. In the context of asylum, the bar is a fix which complicates a pre-existing solution that works well to keep terrorists and their supporters out.

The pre-existing solution is found in section 208(b)(2)(A)(iii) of the Immigration and Nationality Act ("Act"). There, Congress mandates that aliens who commit "serious nonpolitical crimes" cannot apply for asylum. Congress markedly reduced asylum eligibility. Only aliens who demonstrate that their crimes were political remain eligible.

There are long-established legal standards for determining the political nature of a crime. The Board of Immigration Appeals set out these standards in 1984, in a decision titled Matter of McMullen, 19 I&N Dec. 90 (BIA 1984) and applied them restrictively. McMullen was a member and supporter of the Provisional Irish Republican Army. His organization had engaged in assassinations and bombings to force Great Britain out of Northern Ireland. He applied for asylum in the United States.

Examining McMullen's case, the Board ruled that first, whether a crime is political is a question of fact established by examining the circumstances in which the crime occurred. Second, a crime is political if its political aspects outweigh its common-law character. Third, a crime is political if it is proportional to the actor's political objectives. The Board noted that under these standards, terrorist use of explosives and terrorist activities randomly directed at civilian populations do not qualify as political crimes. Applying the standards to McMullen, the Board determined that his crimes were not political, and barred him from asylum.

When Congress passed the Patriot Act and implemented the material support bar, Congress left section 208(b)(2)(A)(iii) untouched. Under this section, as applied according to Matter of McMullen, the alien in Matter of S-K, 23 I&N Dec. 936 (BIA 2006) is not a terrorist, nor has she engaged in, or supported terrorist activities. She contributed relatively small amounts of money and materials to a group which uses force in self defense against an illegitimate totalitarian regime. She remains eligible for asylum. On the other hand, under the Patriot Act and the material support bar, these same actions may serve to make her into a supporter of terror and, bar her from asylum.

We urge Congress to revisit the Patriot Act and affirm the standard established in Matter of McMullen, which has worked well to make terrorists ineligible for asylum.

Thomas Hutchins, Esq.
James Feroli, Esq.



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**Statement of Senator Edward M. Kennedy**
**"The 'Material Support' Bar: Denying Refuge to the Persecuted?"**
**Senate Judiciary Subcommittee on Human Rights and the Law**
**September 19, 2007**

Thank you, Senator Durbin and Senator Coburn, for calling this timely hearing. For generations, refugees have sought the protection of the United States. They have come here seeking haven and hope and the American dream, and they have transformed their own lives and our entire country in the process.

Too often in recent years, however, the Administration has thrown up needless barriers to refugees and asylum seekers, as the slow response to the Iraqi refugee crisis in the Middle East now so vividly demonstrates. Despite the existence of over 2 million refugees who have fled Iraq and two million more who have become refugees in their own countries, only 942 Iraqis have been admitted to the United States this year.

I have introduced "The Refugee Crisis in Iraq Act" to address the numerous barriers generated by bureaucratic delays and red tape, and particularly to help the courageous Iraqi refugees who have a



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target on their backs because of their association with the United States.

Today's hearing on "material support," however, highlights another barrier, one that is caused primarily by narrow legal interpretations governed by a "guilt by association" mentality. Under these interpretations, anyone who uses a weapon against a brutal regime, anyone who assists such a person, directly or indirectly, and anyone forced to serve such a regime or organization, becomes a terrorist or becomes guilty of providing material support to a terrorist organization.

As American Jewish leaders wrote to the President last year, "under today's laws, Jews who bravely resisted and survived Nazi terror would be excluded from refuge in the United States."

Montagnard and Hmong communities who fought alongside our troops in Vietnam are considered members of terrorist organizations. The very Iraqis who have supported the U.S. government could be



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considered terrorists for past activity against Sadaam Hussein's regime or for paying ransom today to bring home a kidnapped child.

Waivers are available, but until recently, the Department of State and the Department of Homeland Security have delayed issuing them, relying on overly burdensome and bureaucratic procedures that have left many eligible and deserving refugees trapped in unstable and deteriorating conditions in other countries and many asylum applicants suffering in detention in the United States. The material support bar has harmed people all over the world, including Colombians, ethnic Burmese refugees, Laotian Hmong, Vietnamese Montagnards, and Cubans. Although some progress has been made this year, the process is still too long and the path too difficult for anyone seeking a waiver.

The Senate has recognized the ironic nature of these policies, taking action recently to specifically exclude groups such as the Montagnards and Hmong from the category of terrorist groups.



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But much more must be done. I urge the Department of Homeland Security and the Department of State to re-assess their current policies. The basic question is whether or not an individual actually poses a threat to our nation. Waiver procedures should be simplified, and greater discretion should be given to adjudicators who understand the dimensions of the problem and who can assess an individual's circumstances.

Procedures must be put into place to resolve the many cases currently foundering in immigration court. Immigration advocates insist there is no efficient way to resolve the material support issue. Some of these problems ultimately may require legislation, but it is clear that much more can be accomplished through reasonable and balanced interpretations of the law that are not driven by false presumptions of guilt.

Professor David Cole, an expert on the prosecution of terror suspects, has characterized much of the immigration litigation since 9/11 as based on the principles of secrecy and guilt by association. He notes "Guilt by association...allows the government to rely on



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inferences and assumptions that are unsupported by fact. Where it seeks to show danger or liability based on association, the government need not show that the individual did anything wrong, or is planning to do anything wrong. It is enough to show that he is associated with the wrong group. But that kind of group-based culpability is exactly what lies at the root of stereotyping and prejudice--it treats people not as individuals in their own right, but as suspect for their group association and identity."

This failure to distinguish between the individual and the group has tragic consequences. Consider Helene, a woman from Sierra Leone persecuted by the Revolutionary United Front. The rebels attacked her home, murdered one family member with machetes, and set another on fire, leaving him covered with severe burns. For four days, Helene and her family were held captive in their own home, and she and her daughter were raped repeatedly. Helene was forced to wash the rebels' clothes and cook their meals. Yet her enslavement was held to constitute material support for terrorism, and she has been barred from seeking protection in the United States. Surely, a woman like Helene poses no threat to our national security.



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The Department of Homeland Security must shed its fear of Helene and many other innocent victims of war and persecution. In today's hearing, we hope to explore a reasoned approach that respects our national security, without further harming those who deserve protection.



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**Statement on the Impact of the Material Support Bar on Refugees and Asylum-seekers**

September 19, 2007

By Dr. Richard Land
President
Ethics & Religious Liberty Commission
Southern Baptist Convention

The Ethics & Religious Liberty Commission is the entity charged by the Southern Baptist Convention to address public policy. The SBC is the largest non-Catholic denomination in the country with over 16 million members in more than 43,000 churches throughout the nation. We are dedicated to addressing social, moral, and ethical concerns, with particular attention to their impact on American families and their faith. Our mission is to awaken, inform, energize, equip, and mobilize Christians to be the catalysts for the Biblically-based transformation of their families, churches, communities, and the nation.

The Ethics & Religious Liberty Commission believes that religious freedom should be practiced the world over and is a key to world peace. George Washington, one of the pivotal founding fathers of the country, once wrote that he wished to "establish effective barriers against the horrors of spiritual tyranny and every species of religious persecution." Over 200 years later, President George W. Bush further stated that, "Religious freedom is the first freedom of the human soul. The right to speak the words that God places in our mouths. We must stand for that freedom in our country. We must speak for that freedom to the world."

Religious liberty has played an integral part in American history. Its importance is reflected in our nation's leadership in providing protection through the U.S. resettlement and asylum programs of refugees who have fled religious persecution and have been recognized in need of protection by the Department of State. Since 1975, over 2.6 million refugees have resettled in the U.S. The Department of State has used these programs historically to allow those refugees whom the U.S. has had a strategic foreign policy interest in resettling to come to the U.S. in high numbers. For example, the U.S. resettled 131,000 Vietnamese refugees between May 1 and December 20, 1975. These included former political prisoners, those escaping the fall of the Saigon government, religious leaders, and ex-military and government officials who worked for the U.S. and feared reprisals because of that association. The United States also stood for democracy and freedom during the Cold War and recognized we had a particular responsibility to help those fleeing communism. After the collapse of the former Soviet Union, the U.S. sought to resettle those who had been persecuted and resettled approximately 154,000 Soviet refugees to the U.S.

In recent years, the Department of State has used the resettlement program to provide protection to refugees fleeing Burma, Iran, and Cuba—countries that are long known for their repressive regimes and brutal human rights records, particularly when it comes to



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repression of religious freedom. These countries have produced significant flows of refugees and the U.S. has been a leader in providing protection to those who have fled these regimes. The Ethics & Religious Liberty Commission is particularly concerned, however, about the impact of the material support bar on refugee admissions and asylum in the U.S. Currently, refugees that enter the U.S. need to prove that they have fled their country in response to a well founded fear of persecution and are not barred on the many security and terrorism related bars. Refugees are often fleeing brutal regimes and often find themselves unable to return home or locally integrate in the country of asylum. Resettlement thus offers hope for a small percentage of the world's refugees currently in great jeopardy. Ironically, the interpretation of the material support bar has led to unintended consequences that have kept out the very people who were the victims of the terrorists these laws were meant to keep out. In an ironic twist, the very basis for the persecution claim of refugees now forms the grounds for inadmissibility to the U.S.

Religious freedom and freedom of conscience is an integral part, a foundational part, of why this nation exists. Just about everywhere we look in the world today there is a religious dimension to conflict. The old concepts of security based on sovereign nations competing for armaments and strategic superiority are being replaced by high-tech weaponry and ethnic and religious strife—which often are synonymous with one another. Since the terrorist attacks of September 11, 2001, we have seen the need to more carefully screen those who enter our country and ensure that those who pose a national security threat do not land on our soil. Congress laudably passed legislation shortly after the attacks that allowed our country to be safer and increased the tools the Administration needs to combat terrorism at home and abroad. Refugees, however, cannot become the unintended victims of the war against terrorism. Fixing the unintended consequences of the material support bar to provide relief to thousands of refugees and asylum-seekers does not come at the expense of national security but rather furthers our national security interests by protecting those refugees who have bravely stood with us in war and continue to be our allies in resisting the regimes that repress their right to religious freedom and expression.

Of particular note is the impact that the material support bar has had on Montagnards who have fought bravely with our soldiers during the Vietnam War and are now barred because of this activity. Vietnam has been consistently designated as a Country of Particular Concern by the Department of State and yet the Montagnards who bravely stood with us and were victims of this regime are now barred for "engaging in terrorist activity." Montagnards are known for resisting attacks by the Vietnamese communist forces, and many U.S. soldiers can attest to their bravery and courage in standing with us during the Vietnam War. More recently, Vietnam has cracked down on religious minority groups in the highlands and restricted freedom of speech, association, and assembly. Montagnards in particular have been imprisoned due to their peaceful religious activities. They are often regarded as subversives by Vietnamese officials and have fled to neighboring countries to escape harassment and persecution. Congress and the Administration must immediately address the effect of terrorism-related bars on Montagnards and other refugee groups to ensure those who have bravely fought with our soldiers overseas are not barred due to their resistance to brutal regimes. Our leaders in



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government must ensure that we know how to distinguish between our enemies and our friends and to properly ensure those who were our allies in war are not shut out unjustly from the refugee program.

The Ethics & Religious Liberty Commission is also particularly concerned about families that have been separated where former members/combatants of pro-democracy groups have been barred from the U.S. while the rest of their family members were waived for giving material support to the same groups and have arrived already to the U.S. There are more than 80 Burmese Karen families in the Tham Hin refugee camp in Thailand that have been separated. These families should be reunited as quickly as possible so they can begin the process of rebuilding their lives together in the U.S. The family is the foundational institution of human society and its importance should be reflected in U.S. refugee policy as well.

The Administration should be commended for the progress made thus far in issuing waivers to groups of refugees that were not found to be a national security threat and otherwise admissible to the U.S. The Administration has used the authority given to them in the law to allow refugees who provided material support to be waived and processed after passing other security requirements to come to the U.S. The Administration has consistently shown strong leadership in our war on terror and also demonstrated through its humanitarian assistance and protection programs that it is within our strategic interest to have a generous and compassionate program, whether through humanitarian assistance overseas to refugee communities or through resettlement of refugees and asylum-seekers to the U.S.

The situation of "unintended consequences" must immediately be rectified through changes in the law that reflect the intent of the members of Congress. The Ethics & Religious Liberty Commission supports legislation that would provide the opportunity for refugees who were members of pro-democracy groups to be admissible to the U.S. and create measures to address the problem of those who were forced under duress to provide material support to a terrorist organization. Congress must also continue to provide oversight to ensure the Administration issues waivers to all those seeking the protection of the U.S. refugee and asylum programs who qualify and are otherwise admissible to the U.S.

When we prioritize trade and security concerns over human rights and religious freedom, we travel a dangerous road. The better way is to seek to link these concerns in a way consistent with our own interests and the long-term betterment of the lives of those in countries where violations of freedom of thought, conscience, and religion are common. This country's historical commitment to freedom requires a responsible, generous, and compassionate policy toward refugees. Congress must not allow unintended consequences of terrorism-related laws to diminish U.S. leadership in offering protection to some of the world's most vulnerable populations fleeing persecution, whether through refugee resettlement or through the U.S. asylum program.



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Statement of Senator Patrick Leahy
"The 'Material Support' Bar: Denying Refuge to the Persecuted?"
Senate Judiciary Committee
Subcommittee on Human Rights and the Law
September 19, 2007

I am very pleased that the Judiciary Committee's Subcommittee on Human Rights and the Law is holding today's hearing. I thank Senator Durbin for chairing it and our witnesses for appearing.

The injustices caused by the expansion of the "material support bar" to the admission to the United States deserve our continuing attention. The material support bar is an issue that involves the conscience of our Nation, and the role and reputation of the United States as a leader in respecting human rights.

Fortunately, the unintended yet tragic results of this law and its implementation to date have not gone unnoticed. Human rights advocates, scholars, and many nongovernmental organizations – liberal and conservative – have spoken out forcefully against this law and have been working diligently to change it. No fewer than 10 editorials decrying the law have appeared in our country's major newspapers.

I have said on many occasions that we need to bring our laws back into alignment with our values. The revisions to the material support provisions that were included in the Patriot Act and the Real ID Act undermine our Nation's commitment to human rights. They represent a reactionary, blunt-instrument approach to a complex issue. I am afraid that, as with so many other actions taken by this Administration, fear has overcome common sense and our collective conscience.

We all recognize that today we face new threats around the world. No government official wants to be responsible for allowing someone into the United States who would do us harm. But the current material support bar and its implementation lack the refinement necessary to respect both our national security needs and our role as a sanctuary for the oppressed and persecuted.

This law and the strident opposition by some against its sensible reform reflect a profound lack of confidence in the ability of our government officials to distinguish those who would harm us from those who need our help.

Surely the young Colombian refugee forced to dig graves for the victims of Colombian paramilitary soldiers cannot be rationally said to have provided material support to his persecutors. Yet he was denied asylum.

Nor can the Liberian woman who was raped and abducted by rebels before being forced to cook and do laundry for them be said to have provided material support in the manner the law intended. But she was denied asylum, as well.



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There are numerous stories of such injustices, and others involving former child soldiers and members of groups who fought alongside the United States in Southeast Asia and elsewhere. I know Senators Durbin, Coburn and Brownback have a particular concern about child soldiers, as I do. We need to be sure that our law fully addresses that concern. We will never succeed in stopping terrorists by punishing our friends or the victims of terrorists.

The perverse results of the material support bar are but one example of several humanitarian crises that have been left unattended by this Administration.

The internal displacement of millions of Iraqi citizens, and the flight of millions more to neighboring countries has gone largely unaddressed. The Judiciary Committee held a hearing on this matter as one of our first this year because the Administration had ignored it. Still the Administration refuses to treat it like the humanitarian catastrophe it has become.

The Administration has also been painfully slow to provide assistance to the many Iraqis who have risked their lives to support the United States. In so many facets of the Iraq war effort, Iraqi citizens have bravely stepped forward to assist as translators and in other ways. Instead of reciprocating by assisting these Iraqis to relocate to the United States when their lives are threatened, the Administration has made excuses. President Bush pledged to admit 7,000 Iraqis into the United States by the end of September. Like so many of the Administration's promises, this too has gone largely unfulfilled.

Still, I am hopeful that we can make progress. I am encouraged that the Senate recently took an important first step in the 2008 State, Foreign Operations Appropriations bill to restore some sensibility to the issue of material support. This is a good start, and I appreciate Senator Kyl's staff working with mine to reach this compromise.

I look forward to seeing how the Administration implements these changes once enacted. In the same bill I also included a provision directing the State Department to establish a processing center within Iraq to handle immigration applications. This should spur the Administration to take action and accomplish what it has promised to the many Iraqis who seek to escape the violence and persecution in their country.

I, once again, thank Senator Durbin for focusing the attention of the Committee and the Senate on these matters. If we work together, we can fix the law in a manner that protects the security of the American people consistent with our values.

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Statement of Lutheran Immigration and Refugee Service
Submitted to the Senate Subcommittee on Human Rights and The Law
September 19, 2007

Lutheran Immigration and Refugee Service (LIRS) submits this statement to the Human Rights and the Law Subcommittee of the U.S. Senate Committee on the Judiciary for the September 19, 2007 hearing, "The 'Material Support' Bar: Denying Refuge to the Persecuted?"

LIRS is the national agency established by Lutheran churches in the United States to carry out the churches' ministry with uprooted people. LIRS is a cooperative agency of the Evangelical Lutheran Church in America, the Lutheran Church-Missouri Synod, and the Latvian Evangelical Lutheran Church in America, three Lutheran denominations whose members comprise about 7.5 million congregants nationwide. Since 1939, LIRS has assisted and advocated on behalf of refugees, asylum seekers, and other vulnerable migrant populations in the United States and worldwide. LIRS programs include: refugee resettlement and integration; foster care for refugee and immigrant minors; assistance for asylum seekers, including those in immigration detention; immigration training and consulting; legislative and administrative advocacy; and public education. LIRS works through a nationwide network of grassroots partner agencies, including Lutheran social service agencies and other social and legal service groups. LIRS joins the other national resettlement agencies and leading refugee human rights groups as an active member of Refugee Council, USA (RCUSA).

Ever since the material support provisions were enacted pursuant to the PATRIOT Act and REAL ID Act, LIRS has been deeply concerned that *bona fide* refugees, asylum seekers, and their families are being denied critical protection as an unintended consequence of the goal of protecting our country from terrorism. As the second largest U.S. refugee resettlement agency aiding thousands of individuals each year in settling in new homes and communities, LIRS works closely with populations in Asia, the Middle East, Africa, and Latin America who are in need of immediate humanitarian protection but have been excluded by the material support bars. In addition, through LIRS's national service provider network, LIRS has received reports of asylum seekers and their family members whose petitions for asylum, adjustment, and family unity—whether before an immigration judge or the U.S. Citizenship and Immigration Service (USCIS)—have been placed on indefinite hold as a result of the material support bar. These are individuals who pose no danger to national security. In fact, many of these individuals are either victims of terrorism themselves or have been labeled "terrorists" while



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supporting efforts to overthrow oppressive regimes that the U.S. government does not support, such as the government of Myanmar.

To protect the lives of literally thousands of innocent people, immediate and comprehensive resolution of this problem is needed. LIRS supports passage of the legislation on material support included in the current Senate Foreign Operations Appropriations bill. This legislation marks an important first step by providing expanded authority to the Administration to grant waivers to the material support bars. RCUSA and LIRS have continued to advocate with several agencies of the U.S. government which have now begun implementation of the waiver process. LIRS has been pleased to work with both Democratic and Republican leaders in Congress and with the Administration to address this important humanitarian issue.

While the pending legislation and progress of the Administration constitute steps forward, LIRS recommends that the following additional actions be taken for there to be a comprehensive resolution to the unintended consequences of the material support bars:

1. Congress should amend the definition of material support to include a duress exception.

2. Congress should amend the definition of terrorist group so that legitimate ethnic and political resistance groups that pose no threat to the United States are not defined and treated as terrorist groups.

3. The Administration should immediately establish a procedure for expeditiously granting waivers to individuals in removal proceedings or whose cases are on appeal.

4. The Administration should report quarterly to Congress on its progress implementing waivers for material support and appoint high level officials to oversee the process.

**1. Congress should amend the definition of material support to include a duress exception.**

Even if the legislation included in the pending Senate Foreign Operations Appropriations bill becomes law, LIRS urges Congress to amend to the definition of material support to expressly include a duress exception (see Immigration and Nationality Act INA § 212(a)(3)(B)(iv)(VI)). By clarifying that the material support bar does *not* include individuals who acted under duress, Congress would accomplish two important goals:

First, Congress would reduce the need for a separate waiver process that has proven burdensome and resource intensive to implement and has resulted in lengthy delays for refugees, asylum seekers, and their families whose safety is at serious risk. Even with the waiver authority that current law confers upon the U.S. government, it took several federal agencies more than two years to initiate a waiver system and begin screening and



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granting waivers to refugees abroad and affirmative asylum applicants. As yet, the U.S. government has not implemented a waiver process for individuals in removal proceedings, leaving hundreds of cases languishing on indefinite hold. These delays underscore the bureaucratic obstacles that make the waiver process an inadequate long-term solution to the material support bar.

If, however, Congress were to amend the definition of material support to include a duress exception, Congress would clarify that immigration judges and asylum officers can determine whether to apply the material support bar without referring the case for a separate waiver. Already, these adjudicators must identify the material support issue when they review the asylum case. But once they identify the presence of material support in a person's case, they must refer the case for a separate waiver, adding an extra step that duplicates the case review process that the judge or asylum officer has already performed. By amending the definition of material support to include duress, Congress would streamline the adjudication process while ensuring that cases are thoroughly screened to bar persons who pose a treat to national security.

Second, by expressly redefining material support to include a duress exception, Congress would enable individuals in domestic application processes to seek review of decisions to bar them from asylum or adjustment as part of the regular appeal process. Under the current legal framework, access to asylum or adjustment for these coerced individuals is available only through the waiver authority under INA § 212(d) that "grants sole and unreviewable discretion" to the Secretary of Homeland Security or the Secretary of State. The proposed legislation pending in the Senate would not alter the "unreviewable" nature of relief for coerced individuals.

The denial of asylum protection or adjustment of status are a life-changing decisions that will likely result in repatriation of individuals to countries where their lives or freedom may be threatened. Such a critical decision should not be insulated from the standard process of judicial review. By amending the definition of material support to include a duress exception, Congress would place the question of duress squarely within a well-established adjudication process for asylum and adjustment cases and allow for review of decisions by federal courts and administrative bodies.

**2. Congress should amend the definition of terrorist group so that legitimate ethnic and political resistance groups that pose no threat to the United States are not defined and treated as terrorist groups**

Under current law, the definition of terrorist group encompasses many groups that are of no threat to our national security, including many who should receive protection as refugees and asylum seekers. As a result thousands of refugees have been kept waiting for the last two years until the Administration can grant waivers to their groups. The National Security Council and Assistant Secretaries of the Department of State, Department of Justice, and Department of Homeland Security and their staff spent hundreds of hours over the last two years to grant waivers to eight groups of refugees that posed no threat to the United States and many of whom are or were allied with and



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supported by the United States. To avoid the need for continual processing of group waivers for groups that pose no danger, Congress should pass legislation that corrects the overly broad definition of terrorist group. This could be accomplished by redefining a terrorist group to include only those groups whose activities threaten our national security or our nationals. LIRS supports language introduced last year by Congressman Pitts (R-NJ) in H.R. 5918 that would make such a change.

3. **The Administration should immediately establish a procedure for expeditiously granting waivers to individuals in removal proceedings or whose cases are on appeal.**

Six years have passed since the PATRIOT Act was enacted and more than two years have passed since the Real ID Act was enacted. Even after all this time, the Administration has not yet established a waiver process for individuals in removal proceedings before the Executive Office for Immigration Review or on appeal with the Board of Immigration Appeals or U.S. Circuit Courts of Appeal. LIRS is not aware of a single such removal or removal appeal case that has been referred to USCIS for a waiver. Moreover, numerous Burmese asylum seekers--from groups already granted waivers in the refugee context--are now languishing with their cases on hold in the U.S. Fifth Circuit Court of Appeals. To ensure that asylum seekers and asylees seeking adjustment obtain prompt review of their cases, the Administration should immediately implement a waiver process for individuals in removal proceedings or whose cases are on appeal.

4. **The Administration should report quarterly to Congress on its progress implementing waivers for material support and appoint high level officials to oversee the process.**

For more than two years, LIRS and the RCUSA coalition have worked with the Administration to fix the problem with the material support provisions. Despite these joint efforts, progress has been extremely slow and time-consuming. Only by late 2006 did the Administration issue its first group waiver, more than 18 months after passage of the REAL ID Act. The Administration did not begin actively processing duress waivers until this summer. Furthermore, the Administration has not yet implemented any waiver process for cases in removal proceedings or on appeal. Whether these delays result from inadequate resources or leadership, they have kept thousands of refugees and asylum seekers waiting unnecessarily to have their cases decided. To ensure that adequate attention is paid to this problem, LIRS recommends that Congress require the Administration to report quarterly on its progress. Part of the report should be to describe how the Administration has refined the waiver process so that it protects us from real dangers while allowing us to protect refugees and asylum seekers. In addition, LIRS recommends that the Administration appoint high level staff from the necessary agencies to coordinate the process.

END



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**STATEMENT OF MARIANA***
**To the Senate Judiciary Subcommittee on Human Rights and the Law**
***The "Material Support" Bar: Denying Refuge to the Persecuted?***
**Wednesday, September 19, 2007**

I was a nurse in Colombia, and my daughter and I are seeking asylum in the United States because of my fear of the Revolutionary Armed Forces of Colombia (FARC). Both my daughter and I are currently in removal proceedings before an immigration judge after our asylum application was not granted because DHS said that I had provided material support to a terrorist organization. I am making this statement under the name "Mariana" because I am terrified that if FARC learns of my identity in the United States, and that I am seeking asylum, they will harm my family, which still resides in Colombia.

My family members were active supporters of the Colombian government who raised me to value serving the Colombian people, and I became a nurse in Colombia because of my desire to help others. After completing my nursing degree, I worked for the Ministry of Health, organized conferences on health promotion, and directly served Bogota's poor communities. During my spare time, I volunteered in the communities, giving health lectures and distributing donated medicines.

In 1997, I was giving a presentation with a doctor for a health campaign. During the talk, an audience member collapsed, so the doctor and I attended to him while the other attendees left. But the fallen man suddenly began to laugh, and the two other men came over and identified themselves as members of FARC. The guerrillas kidnapped and physically assaulted me and took me to a FARC member who had been shot, forcing me at gunpoint to treat him. Before returning home, the guerrillas threatened my life and the lives of my family if I notified the authorities. In the following months, FARC members continued abducting me, forcing me to provide treatment and medicine to injured guerrillas.

Eventually, I became certain that I was going to be killed by FARC because I was left with a condolence card at my doorstep, something which FARC did routinely before it killed someone. I was absolutely terrified for my safety and for my family's safety. I knew that FARC would kill me and my family if I did not cooperate with them. The communications that they made showed me that they were watching my every move, and it is well known that FARC has infiltrated the Colombian government and that there is no one that can protect you. For instance, shortly after the medical clinic where I worked was closed, FARC killed my cousin by beating him to death and then setting his taxi on fire.

I fled to the US with my daughter and immediately filed a request for asylum. On July 26, 2006, DHS rejected my claim for asylum, stating that "There are reasonable grounds for regarding you as a danger to the security of the United States in that you have provided material support to those who engage in terrorist activity." DHS then initiated removal proceedings against my daughter and me. Our request for asylum is now



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pending before the U.S. immigration court, and our next hearing is scheduled in 2008.

I cannot believe that I was denied asylum based on supporting a terrorist organization. I never acted voluntarily- I only provided medical support because I threatened at gunpoint and told that if I did not help the FARC soldiers both me a family would be killed. I sincerely felt that I had no other option because I would been killed if I had not done what they wanted. The asylum application has been for almost seven years and I am still overwhelmed with the fear that I will be sent Colombia, or that FARC will take action against my family. I have no sense of se and it has been very difficult to raise my young daughter here with such uncertaint Deportation back to Colombia would literally be a death sentence for us.

* Name has been changed to protect witness identity.



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**National Association of Evangelicals**
**Statement on the Impact of the Material Support Bar on Refugees and Asylum-Seekers**
**By Rev. Richard Cizik**

**September 19, 2007**

The National Association of Evangelicals (NAE) is a network of 61 evangelical member denominations, representing 45,000 churches in the United States. The NAE seeks to apply biblical truth to current events and create a society in which justice and mercy are reflected in governmental practices and policies.

The NAE is particularly concerned about the impact that material support and terrorism related bars have on refugees and asylum-seekers- those who have fled persecution from the very tyrannical regimes that the U.S. opposes. Many countries that have long histories of repressing religious freedom and abusing religious minorities have been some of the world's greatest producers of refugees. Of particular note is Burma, a country that has been designated by the Department of State as a country of particular concern since 1999 and is well known for human rights abuses. According to the State Department's 2006 report, Burma's already poor human rights record worsened with increasing hostility directed at ethnic minorities, democracy activists, and international humanitarian agencies. Yet in 2006 thousands of refugees who were recognized by the Department of State as being in need of resettlement were ultimately shut out of the program because they provided material support or were former members/combatants of pro-democracy groups that oppose the Burmese military regime. Many of these refugees have undergone horrific persecution, fled their homes, and now seek the protection of the United States. Shutting these refugees out of the U.S. resettlement program would only add to their vulnerability and essentially victimize them twice.

The promotion of religious freedom should be an inherent goal of the U.S. Department of State, and the practices and programs of the Department of State should reflect this valued goal. The impact of the material support bar on refugees who have fled religious persecution undermines stated U.S. foreign policy objectives to protect those who have fled regimes that restrict religious freedom and diminishes the U.S. commitment to advancing religious freedom abroad. Since the atrocities of September 11, 2001, the spiritual and religious dimensions of global conflict have been sharpened. While extra security measures have indeed been needed and implemented since then, the broad interpretation of the PATRIOT Act and REAL ID Act to bar those who are fleeing terrorism themselves runs contrary to the United States' long standing tradition of welcoming the world's most vulnerable and oppressed. Refugees cannot become the unintended victims of the war against terrorism. Fixing the unintended consequences of the material support bar to provide relief to thousands of refugees and asylum-seekers does not come at the expense of national security but rather furthers our national security interests by protecting those refugees who have bravely stood with us in war and continue to be our allies in resisting the regimes that repress their right to religious freedom and expression.



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The material support bar in particular has impacted the Burmese Chin, a largely Christian ethnic minority population that suffered severe religious and ethnic-based persecution by the Burmese military junta and are now living in large numbers in Malaysia, India, and Thailand. While in Burma, the Chin were often forced to convert to Buddhism and were regularly conscripted for labor. The evangelical community has always had grave concerns about the repressive Burmese military regime and has heard often from Burmese Christian leaders about the brutal atrocities the Christian community in Burma endures in the name of the state. In other areas of the world, a Liberian woman who was gang-raped and forced to wash the dishes for her captors was barred from admission to the U.S. due to material support provided under duress to her captors. These are egregious cases of injustice that require an appropriate U.S. response.

The fact that material support and terrorism-related bars do not take into account the political and historical context of pro-democracy groups or the nature or circumstance of the material support given creates protection problems for the refugees on the ground and creates undue bureaucratic hurdles for refugees and asylum-seekers who would otherwise be admissible to the U.S. While the Department of State has stated recently that they have issued waivers for many of these cases, there are many more equally compelling cases that are still barred from admission or have been placed on hold.

The NAE is particularly concerned about the approximately 80 Burmese Karen families from the Tham Hin refugee camp in Thailand that have been split as some family members have arrived to the U.S. while others are barred for being a former member/combatant of pro-democracy ethnic group. These families should be reunited as quickly as possible so as not to compound the suffering they have already endured and so they can begin a new life together as one family in the U.S.

The Administration has made significant progress in the past year to ameliorate the unintended consequences of terrorism-related bars on refugees and asylum-seekers, but there is still much to be done. The NAE stands with World Relief, our humanitarian arm, and many other faith-based organizations in calling on Congress to pass legislation that would allow refugees who were members of pro-democracy groups to be admissible to the U.S. and create measures to address the problem of those who were forced under duress to provide material support to a terrorist organization.

We would also urge the Administration to immediately issue waivers for the over 400 asylum cases that are currently on hold due to the material support bar. In the long term, the Administration must continue to exercise its authority in a clear, consistent, and expeditious manner to waive in refugees who pose no national security threat to the U.S. and would otherwise be admissible to the U.S. if not for the material support bar.

The NAE in conjunction with World Relief has worked over the past 60 years to engage Evangelical churches in providing dignified relief through resettlement to thousands of refugees per year. We have seen the life-transforming work of resettlement on individual refugee lives and believe that refugee resettlement should be used as a strategic tool



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within the State Department to further ensure the United States' long-standing commitment to provide protection to those fleeing persecution abroad.

This country's historical commitment to freedom requires a responsible, generous, and compassionate policy toward refugees. Congress must not allow unintended consequences of terrorism-related laws to diminish U.S. leadership in offering protection to some of the world's most vulnerable populations fleeing persecution, whether through refugee resettlement or through the U.S. asylum program.



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**Statement of National Immigrant Justice Center**
**Hearing on "The 'Material Support' Bar: Denying Refuge to the Persecuted?"**
**U.S. Senate Committee on the Judiciary**
**Subcommittee on Human Rights and the Law**
**September 19, 2007**

*Introduction*

In recent years, Congress enacted several pieces of legislation that attempt to keep terrorists from obtaining immigration status in the United States as refugees or asylees. The USA PATRIOT Act of 2001 and the REAL ID Act of 2005 amended our nation's immigration laws to expand the definition of a "terrorist organization" and, in turn, dramatically broaden the class of people that are barred from admission to the United States for having provided material support to terrorists. In practice, however, these laws have prevented many genuine asylum seekers from gaining protection in the United States, even if they were themselves victims of terrorist activity.

The new and modified definitions are so broad as to achieve an absurd result. With asylum seekers, application of the law results in grave danger for individuals fleeing threats of persecution, harm, and death. The experience of the National Immigrant Justice Center as a provider of legal representation to asylum seekers, torture survivors and other extremely vulnerable individuals prompts it to submit this statement to the Subcommittee on Human Rights and the Law. The National Immigrant Justice Center urges the Congress to modify current law to ensure asylum seekers are not unintentionally barred from safety as a consequence of the law's broadly drafted provisions.

The National Immigrant Justice Center, a partner of Heartland Alliance for Human Needs and Human Rights, promotes the human rights of non-citizens through legal services, advocacy, and strategic impact litigation. Based in Chicago, Illinois, the National Immigrant Justice Center offers free or low-cost legal representation to approximately 8,000 immigrants, refugees, asylum seekers, unaccompanied immigrant children and victims of human trafficking each year, including approximately 500 asylum seekers per year. The National Immigrant Justice Center is a leading national voice for immigration reform, advocating for access to legal counsel and due process protections for all non-citizens. The organization is nationally recognized for its quality legal services and impact litigation, working with the largest *pro bono* network in the nation. This network includes 700 *pro bono* attorneys, who handle individual cases and strategic litigation in the federal courts.

Heartland Alliance for Human Needs & Human Rights
National Immigrant Justice Center
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The National Immigrant Justice Center is grateful to Chairman Richard Durbin for inviting the submission of this statement for the hearing record.

*The Material Support Bar in Current Law*

Under current immigration law, a collection of individuals may now be considered a terrorist organization if it is a "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" terrorist activities.[1] Terrorist activity includes any "threat, attempt, or conspiracy" to use "any...explosive, firearm, or other weapon or dangerous device (other than for mere personal or monetary gain), with intent to endanger...the safety of one or more individuals or to cause substantial damage to property."[2] A group's activity is terrorist activity if it is "unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State)."[3]

Under this framework, pro-democracy groups that struggle against dictatorships may be considered terrorist groups if the actions they take against their repressive regimes violate the laws of the country where the actions take place. For example, before the fall of the Taliban, members of the U.S.-supported Northern Alliance would have been barred from receiving asylum in the United States because they would have been considered terrorists. U.S. government attorneys have admitted that under this definition, even U.S. Marines operating in Iraq before the fall of Saddam Hussein would have qualified as a terrorist organization.[4]

These hypothetical examples mirror the experience of actual asylum seekers who have been blocked, thus far, from seeking protection in the United States. The Board of Immigration Appeals (BIA) recently found that a Burmese woman who provided financial support to pro-democracy freedom fighters was barred from receiving asylum because she provided material support to a terrorist organization.[5] Thus far, the courts have found no defenses to this bar. Duress, infancy, self-defense and mental incapacity do not excuse material support under the current statute. Moreover, there is no *de minimus* exception. Providing a meal for a rebel fighter could trigger the bar. Being held hostage in one's home while members of a guerilla group lodge for the night could trigger the bar. Paying a fee to keep terrorists from killing one's family could trigger the bar. The statutory language is, as one BIA Board member observed, "breathtaking in its scope."[6]

In an announcement published in the Federal Register on March 6, 2007,[7] the Department

[1] Immigration and Nationality Act (INA) §212(a)(3)(B)(vi)(III).
[2] INA §212(a)(3)(B)(iii)(V).
[3] INA §212(a)(3)(B)(iii).
[4] *In re S-K-*, 23 I&N Dec. 935 (BIA 2006), Oral Argument Transcript at 25.
[5] *In re S-K-*, 23 I&N Dec 936 (BIA 2006).
[6] *In re S-K* at 948. (Osuna, J., concurring).
[7] 72 Fed. Reg. 9954.



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of Homeland Security (DHS) stated that, effective February 20, 2007, discretionary waivers will be available in some cases. The waivers are available to certain asylum-seekers who provided material support under duress. Waivers are also available to asylum-seekers who provided material support to certain groups that are favored by the U.S. government, including particular opposition groups from Burma, Cuba, and Tibet.

These waivers are discretionary, based upon a "totality of the circumstances" test, and can be revoked at any time. Moreover, the waiver is so amorphous as to be nearly impossible to obtain. There is no clearly articulated procedure that one can follow to request a waiver or to seek review if one is denied or if circumstances change. While DHS issued a memo on May 24, 2007,[8] detailing how asylum officers should proceed in cases in which they suspect that otherwise eligible asylum seekers may have provided material support in violation of the law, there is no discussion in this memo of how an asylum seeker may affirmatively request a waiver. This situation is fraught with risk for asylum seekers that apply for status without the benefit of legal representation. These individuals may fail to comprehend the "totality of the circumstances" analysis and therefore fail to present the full set of facts that would provide the asylum officer with sufficient information to determine that a material support waiver is appropriate.

*The Material Support Bar and Asylum Seekers Inside the United States*

Most of the attention paid to the material support bar has thus far focused on the plight of individuals outside U.S. borders who seek recognition as refugees and resettlement in the United States. These include Burmese nationals who have lived for years in Thai refugee camps who may be barred for supporting organizations that oppose the military junta in their country of origin. Colombians in Ecuador face a similar plight if they were forced to provide food, medicine or lodging to the FARC rebels, even if this "material support" was provided only under threat of violence.

Less frequently discussed is the fact that there are asylum seekers presently in the United States who face the same legal obstacle to obtaining legal immigration status as their refugee counterparts overseas. The numbers are admittedly smaller, but each case involves an individual seeking protection who deserves a fair opportunity to demonstrate his or her eligibility for asylum under U.S. law.

In response to changes in the law, the National Immigrant Justice Center modified its training program for *pro bono* attorneys who wish to handle the cases of adult and children asylum seekers. Training presentations and manuals now explicitly address the need for attorneys representing asylum-seekers to keep the expanded definitions of terrorist organizations and material support in mind as they prepare their clients' asylum claims. In the past, certain facts, such as coercion or threats from non-state actors that the government

[8] Interoffice Memorandum from Jonathan Scharfen, Deputy Director, USCIS, to Associate Directors, Re: Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations, May 24, 2007.



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could not control, might have bolstered an applicants' claim for asylum. Now the client and attorney must assess whether those same facts will render the client barred because he or she provided what is defined under law as material support.

*A Case Example Illustrating the Need to Anticipate a Charge of Material Support*

The National Immigrant Justice Center carefully screens every potential case for validity, eligibility, and for potential challenges from the government. As noted above, a material support screen is now a critical component of that intake process and remains significant throughout the case preparation. Thus far, the government has not alleged that any of the National Immigrant Justice Center's clients are barred for having provided material support. In several cases, however, staff attorneys and *pro bono* partners prepared arguments in response to anticipated charges. One of these cases is described below. Because this case is not fully resolved, and the client's ability to remain in the United States is not guaranteed, the client's name and identity have been obscured.

The National Immigrant Justice Center and a *pro bono* attorney from a leading Chicago law firm represent a woman from a country in central Africa. Married with an infant son, Ms. Haroun[9] lived in the capital city of her country and worked as a consultant. The capital came under attack by a rebel army hostile to the government in power. Rebels burst into Ms. Haroun's home and held her family hostage at gunpoint for three days, using their home as a base of operations, using their telephone, and relying upon the radio and television as sources of news. The rebels slept in shifts so that the family members were under watch at all times and could not escape or contact outsiders for assistance. The family had no connection to the rebels, but had no choice but to wait out the situation. After three days, police burst in and captured the rebels. The police also arrested Ms. Haroun and her family, assuming they were sympathetic to the rebels. Ms. Haroun was beaten after she refused to admit that she supported the rebels. She and her child were released after she was interrogated. She subsequently escaped the country with her son. Her husband is believed to have been released but his whereabouts remain unknown to this day.

Despite the fact that Ms. Haroun and her family were victims of rebel violence, under the material support law, she could be barred from admission as an asylee in the United States. Her "support" was provided under duress and was limited to the lodging that the rebels demanded and took without invitation. She had no prior or subsequent contact with the rebels and took no steps to aid them. Nonetheless, the current administration views all support as fungible, such that lodging is considered material support just as if it were a cash contribution or a weapon. The law contains no duress defense such that Ms. Haroun's involuntary contribution of lodging would be excused.[10] DHS issued regulations in 2007 stating that it would consider duress exceptions based on the "totality of the

[9] A pseudonym.
[10] Senator Patrick Leahy of Vermont, Chairman of the U.S. Senate Committee on the Judiciary, has fought to include a duress defense in law, but thus far his attempts to enact such language have been blocked.



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circumstances," but as with the exceptions noted above, DHS has total discretion to grant or deny duress waivers and the asylum seeker has no opportunity to appeal or seek judicial review of a denial of discretion.

*Recommendations:*

*I. Enact a duress defense for those who provide material support under threat, coercion or duress*

The following language should be enacted to ensure that those who provide material support under duress are not barred from protection:

> DURESS EXCEPTION- Section 212(a)(3)(B)(iv)(VI) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iv)(VI)) is amended by adding at the end: "It shall be an affirmative defense to inadmissibility under this subsection that the actor provided material support under duress."[11]

*II. Conduct vigorous oversight of administrative waivers*

The National Immigrant Justice Center urges Congressional committees and subcommittees, including the Subcommittee on Human Rights and the Law, to conduct vigorous oversight of the implementation of the material support bar and the granting of waivers to eligible asylum seekers and refugees who provided material support against their will.

*III. Consider the particular needs of child soldiers in any material support legislative fix*

The National Immigrant Justice Center commends the work of Chairman Durbin and Ranking Member Coburn to protect child soldiers both in their countries of origin and in their quest for safety in the United States as refugees or asylees. Many of the children who are abducted from their families and forcibly conscripted are made to commit horrifying acts of violence against members of their own families and communities, as well as civilians targeted by the armies or rebels they are coerced into joining.

The asylum claims of these children require special attention because the child victim may be forced to commit crimes that would otherwise trigger a bar to protection. For example, a person who commits certain non-political crimes is ineligible for asylum in the United States. Those who persecute others are also ineligible. Child soldiers fall into a complex area of law because they may commit such crimes but not of their own volition. Just as these acts have potential to trigger criminal or persecutor bars, they may also meet the

[11] This language was included as section 694(c) of the FY08 Foreign Operations Appropriations bill, H.R.2764 RS (110th Congress), but was struck during Senate floor debate.



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technical definition of material support to a terrorist organization.

The National Immigrant Justice Center has been forced to confront such questions in a small number of cases involving child soldiers who escaped their captors and sought protection in the United States. The Center's staff would be pleased to work with the Subcommittee to draft legislative proposals to address this problem.

* * *

The National Immigrant Justice Center expresses its appreciation to Chairman Durbin and Ranking Member Coburn, for holding this hearing and seeking solutions to the challenges posed by the material support bar. The National Immigrant Justice Center also thanks those members of Congress, especially Senator Leahy, Senator Coleman, and Representative Pitts, who have worked tirelessly to ensure that the material support bar is amended so that its application serves the stated intent of barring those who actually support terrorist organizations. America's longstanding commitment to welcome and protect refugees and asylum seekers has been dishonored by application of this law. It is time for Congress to act to restore America's place as a beacon of light for these vulnerable populations.

For further information, please contact Mary Meg McCarthy, Executive Director, at (312) 660-1351, or mmccarthy@heartlandalliance.org, or Tara Magner, Director of Policy, at (312) 660-1363, or tmagner@heartlandalliance.org.



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STATEMENT OF EPISCOPAL MIGRATION MINISTRIES ON THE MATERIAL SUPPORT BAR

Submitted by: C. Richard Parkins, Director
September 15, 2007

Episcopal Migration Ministries (EMM) has joined other resettlement agencies and particularly faith based communities in lamenting the barrier presented by the material support bar in providing access to the U.S. resettlement program for some of the world's most vulnerable persons – persons deserving the protection that resettlement in the United States offers.

Of particular concern has been the plight of Burmese Christians of all ethnicities who have languished in Thailand, Malaysia and India as well as desperate Colombians victimized by the protracted conflict in that war ravaged country. Our church is acutely aware of the suffering of the Burmese, given our presence in that country, and our first hand encounter with the oppression inflicted upon religious minorities in a country well known for its ruthless dictatorship. To compound the suffering of those who escaped persecution by denying them access to resettlement is considered a serious miscarriage of justice.

The pretext for such denials has been the association of individuals and groups with a terrorist organization or their active, organized opposition to groups and regimes that inflicted terror upon them. For much of the past two years, we struggled with colleague agencies to have waivers granted to allow those whose association with terrorist groups was tangential and unintended so that these persons could avail themselves of resettlement. Even modest relief for thousands of deserving refugees was slow in coming. We also address instances of persons who under duress may have contributed to the support of a questionable group. We note with some relief that recently there has has been the prospect of Congressional action that would provide for an exception for this group. Since the very nature of civil conflict and as well as the establishment of resistance groups to oppose authoritarian systems create many occasions for persons to be co-opted into assisting unfavorable groups, waiving duress as condition of inadmissibility is extremely important. . Moreover, failure by the administration to initially view the material support mandate flexibly and broadly led to bizarre and tragic consequences for otherwise deserving refugees. In these cases, there was a presumption of guilt even when evidence was lacking or where contrary evidence existed.

The Episcopal Church has a presence in Colombia. I have personally toured Colombia with the Episcopal bishop of Colombia and was able to see something of the consequences of this ongoing conflict when I visited the Nelson Mandela Camp in Cartagena where thousands of internally displaced persons reside. Large numbers of the camp residents had been caught between the leftist guerrillas – the FARC – and the



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paramilitary on the right and had paid tribute to one or the other to save family members from horrible consequences. Their material support contributions were obviously given under duress. Their victimization was serious; their need for protection urgent; yet their misfortune to have been caught up in a civil struggle not of their making left them outside the reach of the U.S. resettlement program. It is only now that Congress is hopefully prepared to address the need for a duress exception for these especially at-risk persons.

An overriding concern of The Episcopal Church in addressing the material support issue is the seeming capitulation to fear which underlies the legislation which gave rise to the material support bar. This has resulted in excluding persons whose protection needs could not have been more urgent. A corollary of fear is often irrational behavior or at least behavior that is not critically examined. To illustrate, presuming that persons are guilty without fairly examining the circumstances surrounding their actions is irrational as well as a flat denial of justice. Judging persons based on a presumption of guilt is anathema to our sense of justice. We have historically objected to any profiling of persons where a failure to understand their individual circumstances or to accord them the dignity to which we believe all persons are entitled has existed. . Yet fear and hasty Congressional action in the form of the sweeping provisions of the Patriot have resulted in the wholesale indictment of groups. The application of the material support bar to groups without acknowledging their claims for protection or by overlooking their vulnerability represents a classic example of fear replacing reason as a basis for official action. Such behavior violates the tenets of our faith.

There is finally the expectation that the United States will exercise moral leadership in responding to the world's refugee crisis. The imposition of the material support bar, even in its more modified form, sends the unfortunate message that refugees are prospective terrorists and should be treated as questionable newcomers. The vulnerable stranger becomes a prospective conveyer of harm and destruction. Whether intentional or not, the application of the material support bar by the United States – the most prominent player in the international refugee resettlement field - has given cover to those who would willingly close their doors to the defenseless stranger.

Ideally, we believe that the material support bar should be eliminated for refugees. A legislative remedy is needed which restores the U.S. refugee program to its former place as a program of predictable refuge and safety for the world's refugees. Security mechanisms already in place for the US refugee program are adequate safeguards to ensure that refugees who seek resettlement are not potential threats to our personal or national security. We can be safe while granting safety to others.



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**STATEMENT FOR THE RECORD FROM PHYSICIANS FOR HUMAN RIGHTS**

U.S. Senate Committee on the Judiciary, Human Rights and the Law Subcommittee

Senator Richard J. Durbin, Illinois, Chairman of the Subcommittee, Presiding

*"The 'Material Support' Bar: Denying Refuge to the Persecuted?"*

September 19, 2007

Physicians for Human Rights (PHR) commends Chairman Durbin and the Human Rights and Law Subcommittee for holding a hearing on this important issue. We strongly support the efforts of our colleagues in other non-governmental organizations who are working to correct the unintended consequences of the material support bar and its unjust impact on many individuals who have themselves been victims of oppression and terrorism in places such as Colombia, Sri Lanka, and Burma.

While it is vital that the Bush Administration address the consequences of the material support bar for these broad groups, PHR would like to bring to the subcommittee's attention another important but less visible problem raised by the bar: The denial of asylum to health workers for complying with their ethical duty to treat anyone in need, regardless of the person's political affiliation. The Department of Homeland Security has sought to deny asylum to health workers who have provided medical care to wounded terrorists, even though those health workers have no affiliation with a terrorist organization. In our view, current interpretation of the Immigration and Nationality Act, which considers the provision of medical care to injured members of groups designated as terrorist organizations to be "material support" to terrorism under Section 211(a)(3)(B)(iv)(VI), conflicts with medical ethics, with well-established principles of customary law, and with applicable international conventions. Denial of asylum to these health workers also contradicts long-standing U.S. policy which has supported the protection of health workers in war and has condemned any violations of medical neutrality by other governments.

As an organization that mobilizes health professionals to advance human rights, dignity, and justice, PHR has a particular interest in how the material support bar has affected the asylum claims of healthcare workers and how it may affect them in the future. Based on its expertise in medical ethics and international humanitarian law, PHR believes that it is vital to defend medical neutrality and the right of civilians and combatants to receive medical care during time of war.

***Ethical Obligations***

Healthcare workers worldwide are obligated, according to principles of medical ethics, to treat the sick and wounded without regard to politics, nationality, religion, race, sex or



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other such factors. The common tenets of medical ethics find expression in a variety of codes and forms. The most familiar is the Hippocratic Oath, which has as its central premise "above all, do no harm." The most widely accepted modern codification is the *International Code of Medical Ethics* of the World Medical Association, an international organization representing physicians, which provides ethical guidance to physicians worldwide. The *International Code of Medical Ethics* affirms a physician's duties by providing that:

> A physician shall always bear in mind the obligation to respect human life.
>
> A physician shall always act in the patient's best interest when providing medical care.
>
> A physician shall owe his/her patients complete loyalty...
>
> A physician shall give emergency care as a humanitarian duty unless he/she is assured that others are willing and able to give such care.

Similarly, the "Geneva Oath" requires members of the medical profession to treat patient's health as their "first consideration" and to "maintain the utmost respect for human life..., even under threat."

***Medical Assistance Is Not "Material Support" Under The Law***

Anti-terrorism legislation adopted under the USA PATRIOT Act of 2001 and the REAL ID Act of 2005 amended section 212 of the INA and widely expanded the class of individuals considered inadmissible to the U.S. for having "engaged in terrorist activity," by inter alia, providing "material support" to "terrorists" or "terrorist organizations." Instead of defining the term, the statute lists a number of practices that constitute "material support." The types of conduct that constitutes "material support" are actions that Congress placed on the same footing as actually "engaging in terrorist activity." Thus, one engages in terrorist activity when he commits:

> 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 chemcial, biological, or radiological weapons), explosives or training...

Medical care is not on the list of instances of "material support" contained in the INA. Each of the types of activity on the list describes conduct that actively furthers the ability of terrorists to carry out defined terrorist acts. The activities specifically enumerated as constituting "material support" share a common characteristic: the contribution of money, infrastructure, and means for accomplishing a terrorist organization's agenda. Providing medical assistance to sick and wounded human beings who also happen to be members of terrorist organizations does not share this characteristic; indeed it is of an entirely different order. The ethical imperative to give medical care to the sick and



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wounded aims only to heal individuals, without regard to any political beliefs or agenda. None of the enumerated examples of "material support" involves anything similar to medical care. Clearly, Congress could have easily included medical care on this list but did not do so. Congress had good reasons for not listing medical care, given that healthcare workers are obligated under customary international law and medical ethics to care for the sick and wounded regardless of their politics.

***The Geneva Conventions and Customary International Humanitarian Law***

The Geneva Conventions, and their two Additional Protocols, not only require parties to the conventions to care for the wounded and sick, but prohibit parties from punishing those who carry out medical activities compatible with medical ethics. Including medical care under the definition of "material support" thus violates the principles of medical ethics. Denying asylum to a healthcare worker for providing medical assistance pursuant to his professional and ethical obligations, in circumstances protected by the Geneva Conventions, would undermine the ability of healthcare workers to provide aid in war-torn areas.

As the Supreme Court has ruled, courts are bound to follow customary international law, the universally acknowledged body of norms reflecting the practice of nations as developed over time and accepted by States as binding legal rules. In particular, the Geneva Conventions and consistent State practice acknowledging and following the Conventions form the basis of customary international law rules pertinent to this issue. Reflecting widespread agreement on the norms of medical ethics, these principles have been adopted as part of the body of customary international humanitarian law. Article 10 of Additional Protocol II to the Geneva Conventions provides that "persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol." Although the U.S. has not ratified the Additional Protocols, U. S. authorities must apply these rules since the relevant standards relating to the protection of medical personnel form part of customary international law

Civilians and combatants alike are entitled to medical treatment in times of conflict. As codified in the Geneva Conventions and their two Additional Protocols, "the duty to care for the wounded and sick combatants without distinction is a long-standing rule of customary international law." Likewise, compliance with the standards of medical ethics requires healthcare workers to assist all those in need, on all sides of an armed conflict." In approaching a wounded person, a healthcare worker "must see only a patient, and not a friend or enemy. " As framed by the International Committee of the Red Cross:

> Medical assistance should always be neutral; it should not be considered as taking a stand on the conflict because of those benefiting from this assistance. The criterion of when to undertake medical activities is based on purely humanitarian considerations, regardless of any other factors. To perform medical activities for



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> the benefit of any person, including persons belonging to the adverse party, is not only lawful, but even a duty for those who are professionally bound.

If the provision of medical care were to be considered "material support" under the INA, the result would be that healthcare workers would be required to deny medical care to certain wounded persons. Under such a reading of the INA healthcare workers would be in the untenable position of deciding whether a life is worth saving, whether a person has committed a crime or terrorist act, and whether a group should be denied medical treatment – a form of political decision-making incompatible with medical ethics and international law.

***Current Interpretation Undermines U.S. Policies***

Adopting the view that providing medical assistance constitutes material support would undermine U.S. efforts against terrorism by implicitly sanctioning terrorists who deny essential medical care on political, religious, or other invidious grounds in violation of the same international norms the U.S. should be following. Encouraging disrespect of these rules potentially puts at risk sick and wounded U.S. citizens who find themselves in war zones throughout the world.

Such a view is also contrary to U.S. policy regarding care of the sick and wounded in combat zones, as articulated by the State and Defense Departments. United States policy and practice is to provide medical treatment to detained terrorist suspects; soldiers are instructed to abide by customary international humanitarian law by respecting the rights of the wounded and sick. In addition, the State Department repeatedly has condemned foreign governments for not protecting medical personnel who provide medical assistance to enemy combatants, classifying such persecution as "human rights violations" in State Department country reports. The U.S. Army Field Manual, the U.S. Air Force Pamphlet, and the U.S. Naval Handbook all require U.S. military personnel to treat the wounded and sick humanely. U.S. military manuals also codify the customary international law prohibition against denying medical care based on the politics or similar attributes of a wounded or ill person. The U.S. military takes great and understandable pride in providing good medical care to any wounded persons, including terrorists, who come into their custody. The same standards should apply to asylum seekers who have provided medical assistance to members of terrorist organizations.

***Conclusion***

The anti-terrorist legislation which amended the INA was aimed at thwarting further terrorist acts. Nowhere in the statutes or legislative history is there any indication that Congress intended to bar from the U.S. persons who conform their conduct to international law and ethical norms by treating the sick and wounded. Including medical activities under the definition of "material support" would lead to absurd and unconscionable results. For example, an emergency room doctor who treats a patient considered to be a terrorist suspect could be classified as "affording material support" to a terrorist. Likewise, non-citizen U.S. military personnel in medical units, who provide



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medical assistance to detained terrorist suspects could be deemed to be providing "material support" to someone engaged in terrorist activity. Given that more than 40,000 non-citizens serve in the military (active and reserve) and about 8,000 permanent resident aliens enlist for active duty every year, many of whom enlist to qualify for citizenship, Congress could not have intended to penalize its own military personnel for fulfilling their duty to provide indiscriminate medical care in accordance with humanitarian law.

Medical care does not come within the statutory definition of "material support" as a matter of law. To maintain otherwise would violate the United State's obligations under customary international humanitarian law, undermine medical ethics, and contradict U.S. policy as espoused by the Departments of Defense and State. Physicians for Human Rights urges Congress to ensure that the Department of Homeland Security does not deny asylum or refugee status to any healthcare worker under the material support provision of the INA for the provision of medical care in line with ethical duties.



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STATEMENT OF
PAUL ROSENZWEIG
DEPUTY ASSISTANT SECRETARY FOR POLICY
U.S. DEPARTMENT OF HOMELAND SECURITY

BEFORE THE UNITED STATES SENATE
JUDICIARY SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW

THE "MATERIAL SUPPORT" BAR: DENYING REFUGE TO THE PERSECUTED?

WEDNESDAY, SEPTEMBER 19, 2007
WASHINGTON, D.C.

Chairman Durbin, Senator Coburn, and Members of the Subcommittee on Human Rights and the Law: I would like to thank you for the opportunity to appear before you today as you examine issues related to the United States' protection and resettlement of refugees who may be subject to the material support provisions of the Immigration and Nationality Act (INA). I appreciate the Subcommittee's attention to this important issue, and I would like to assure the Members of the Subcommittee that the U.S. Department of Homeland Security (DHS) is steadfastly committed to fulfilling its mission of providing protection to deserving refugees while safeguarding our nation's security.

Under Section 212(a)(3)(B) of the INA, the aliens who provide material support to individuals or organizations that engage in terrorist activity are inadmissible or removable for having engaged in terrorist activity and are ineligible for most immigration benefits. The INA's broad definitions of terrorist activity and the provision of material support to terrorists or terrorist organizations are at the heart of the U.S. government's ability to be proactive in its counter-terrorism efforts. Terrorists need more than ill will to commit terrorist acts; they need funds, equipment, and a variety of other resources to successfully lodge an attack. The Courts and Congress have recognized that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct," *See* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1136 (9th Cir. 2000) and ("Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), § 301(a)(7), P.L. 104-132, 110 Stat. 1214. Equipping the U.S. government with the means to take the offensive against those who fuel the maintenance of the terrorist infrastructure, thus, is an essential weapon in the Administration's counter-terrorism arsenal.

For DHS, with regard to immigration, one of our strongest weapons is the ability to deny benefits or protection to those who have provided material support to terrorists. For example, we successfully used this tool in the case of an alien from Saudi Arabia, who entered the United States as a student. A Joint Terrorism Task Force investigation revealed his connection to the Committee for Defense of Legitimate Rights (CDLR), an Al Qaeda front group. In 2004, U.S. Immigration and Customs Enforcement (ICE)—a component agency of DHS—initiated removal proceedings where an immigration judge



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found the alien had engaged in terrorist activity through his material support of and his membership to the CDLR. Among other things, he paid for and helped run the CDLR's website and solicited money for its operation. The alien was ordered removed and denied any immigration benefits. The alien was successfully removed from the United States in January 2007.

Another example is the case of an alien who was a former board member, fundraiser, and donor to the Benevolence International Foundation (BIF), whose associates in the United States included Aafia Siddiqui (placed on the Federal Bureau of Investigation's Most Wanted Terrorists list after 9/11 for assisting Al Qaeda), as well as members of the "Portland 7," a terrorist cell in Portland, Oregon, which conspired to provide material support to Al Qaeda and the Taliban during the war against the United States in Afghanistan. The alien applied for adjustment of status to that of a lawful permanent resident, which U.S. Citizenship and Immigration Services (USCIS)—a component agency of DHS—denied; finding the alien had engaged in terrorist activity in the United States by providing material support, including solicitation of funds for BIF, an organization specially designated as a terrorist organization by the U.S. Department of Treasury. The alien was subsequently detained by ICE and placed in removal proceedings. He was removed from the United States in June of 2007.

These cases illustrate this crucial and readily used tool to bar immigration benefits to aliens who provide material support to terrorist organizations.

While it is vital that DHS is able to use the broad definitions of the INA to prevent aliens who present a genuine threat to the United States or its citizens from entering or staying in the country, it is also our duty to consider providing immigration benefits and protection to deserving aliens who provided material support in sympathetic circumstances, but otherwise are eligible under existing law and who do not pose such a threat. This is especially true in the case of refugees, who may face persecution—sometimes at the hands of the terrorists themselves—if they are not granted the benefits or protection they seek. Because the material support bar casts a broad net, its scope may include those who do not present a risk to U.S. national security and to whom the United States is sympathetic and willing to provide refuge, to the extent allowed by law. It is for this reason that Congress provided in section 212(d)(3)(B)(i) of the INA that the Secretaries of State and Homeland Security, in consultation with one another and the Attorney General, shall have the discretionary authority not to apply the material support provision in a particular case.

Since the last time I testified, in May of last year, the Administration has worked tirelessly, on an interagency basis, to exercise and implement this authority where doing so is in keeping with the foreign policy and national security interests of the United States. Secretary of State Rice exercised this authority three times in 2006 in the refugee program context for Burmese Karen individuals living in various camps in Thailand who provided material support to the Karen National Union (KNU) or Karen National Liberation Army (KNLA) and for Chin refugees from Burma living in Malaysia, India, or Thailand who provided material support to the Chin National Front (CNF) or Chin



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National Army (CNA). In January 2007, Secretary Rice exercised her authority eight additional times in the refugee program context for refugee resettlement applicants who had provided material support to the following eight organizations: Karen National Union/Karen National Liberation Army (KNU/KNLA), Chin National Front/Chin National Army (CNF/CNA), Chin National League for Democracy (CNLD), Kayan New Land Party (KNLP), Arakan Liberation Party (ALP), Tibetan Mustangs, Cuban Alzados, or Karenni National Progressive Party (KNPP).

In February of this year, Secretary Chertoff exercised his authority not to apply the material support inadmissibility provision with respect to certain aliens applying for immigration benefits or protection who had provided material support to these same eight undesignated terrorist organizations for whom Secretary Rice signed exemptions in January. These exercises of authority expanded the scope of the previous exemptions to include asylum seekers and other aliens applying for benefits or protection domestically, as well as refugees applying for protection overseas.

In addition to these eight groups, I am pleased to announce that the Administration has finalized two new exemptions to benefit aliens who have provided material support to certain individuals or groups associated with the Hmong and Montagnard. These exemptions will be issued jointly by the Departments of State and Homeland Security, and are now being prepared for signature by both Secretaries. As both the Hmong and the Montagnards acted as valuable allies to the United States during the Vietnam War, the Administration has long recognized the need to implement exemptions on their behalf.

Also in February of this year, Secretary Chertoff exercised his authority not to apply the material support inadmissibility provision with respect to certain aliens applying for immigration benefits if the material support was provided under duress to an undesignated terrorist organization under INA 212(a)(3)(B)(vi)(III), or, "Tier III," terrorist organization where the totality of the circumstances justify the favorable exercise of discretion. This was the first "duress exemption" either Secretary had exercised. This April, the Secretary of Homeland Security exercised his discretionary authority not to apply the material support bar to individuals who provided the support under duress to certain designated terrorist organizations under INA 219 or 212(a)(3)(B)(vi)(I) and (II), or, "Tier I and II," terrorist organizations if warranted by a totality of the circumstances.

Armed with the above described exemptions, the Administration has turned its attention to implementation of these exercises of authority. DHS has made a great deal of progress in this regard. USCIS has recently completed a tour of all of the asylum offices and two of the service centers handling adjustment of status applications, providing training on material support adjudication procedures.

So far, USCIS has issued over 3,000 exemptions to applicants for immigration benefits who provided material support either to one of the eight named groups or under duress to a terrorist organization. Most of these exemptions have been issued by the Refugee Affairs Division of USCIS. Thus, 2,909 of the exemptions were issued for refugee



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applicants who provided material support to one of the eight named groups. Most of these exemptions were issued for individuals who provided food and shelter or have assisted in transporting goods for one of the identified groups that opposes the Burmese government. This number includes 295 exemptions issued last fiscal year under the authority granted by Secretary Rice for refugee cases in certain locations. There have also been over 200 exemptions issued to individuals who provided material support to the Cuban Alzados. USCIS has also issued 101 duress-based exemptions. Individuals for whom USCIS issued duress-based exemptions include nationals of Iraq, Liberia, Somalia, and the Democratic Republic of Congo. In addition, Service Center Operations has issued 28 exemptions in instances where an applicant sought immigration benefits other than refugee or asylee status, 16 of which were group-based exemptions.

In the case of implementing the Tier I/II duress exemption, the Administration has agreed to a very careful, judicious process to assure that our national security is fully protected even as we fulfill our humanitarian objectives. Prior to beginning processing of cases involving claims of duress by a particular terrorist group, we are obtaining an all-source evaluation concerning that group, its aims and methods, including its use of duress. For instance, one of the goals of the evaluation is to assess whether the Tier I/II terrorist organization may be disposed to use the U.S. Refugee Admissions Program as a conduit to realizing a terrorism-related objective.

A great many of the cases involving the provision of material support under duress to a Tier I terrorist organization that have been adversely affected by the material support bar have involved the provision of material support to the Revolutionary Armed Forces of Colombia (FARC). For that reason, DHS proposed the FARC as the first Tier I group for which an evaluation would be conducted. Based on our review of this evaluation, USCIS has recently begun adjudicating exemptions for the first of these cases.

In addition to the FARC, the Administration has requested evaluations regarding other Tier I/II groups to which a significant number of individuals seeking immigration benefits have stated that they provided material support under duress. As those evaluations are completed and reviewed, we will proceed to process additional cases.

While the Administration has made tremendous strides in addressing the unintended consequences of the material support bar through the secretarial exercises of discretionary authority to exempt deserving aliens that have been signed and implemented to date, we remain cognizant of the fact that the authority provided for under INA 212(d)(3)(B) does not provide the U.S. government with the flexibility to exempt deserving aliens from all of the 212(a)(3)(B) terrorist provisions for which exemptions would be consistent with U.S. foreign policy and national security objectives. To this end, the Administration submitted proposed legislation to Congress early this year that would amend the INA to allow the U.S. government that needed flexibility. Perhaps most importantly, this legislation would provide the Administration with the authority to exempt certain individuals, such as certain Hmong and Montagnard combatants, who fought valiantly on behalf of the U.S. during the Vietnam War, but who are currently barred and beyond the reach of the Secretaries' discretionary authority to exempt. In



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addition, though in some cases the persecutor bar may still apply, the Administration's proposal could allow for the exemption of certain children abducted and forced to undergo military training by armed factions.

It is the Administration's view that important national security interests and counter-terrorism efforts are not incompatible with our nation's historic role as the world's leader in refugee resettlement. While we must keep out terrorists, we can continue to provide safe haven to deserving refugees. Due to national security imperatives, there have been recent changes to the law as well as to the process, and we continue to work on ways to harmonize these two important policy interests. In the last year, we have taken a number of important steps demonstrative of real progress on this front. We have implemented exemptions for aliens who have provided material support to eight Tier III groups and for aliens who have provided material support under duress to Tier I, II, and III groups, and applied these exemptions in both the overseas and domestic contexts. The implementation of these exemptions has yielded impressive results: To date, we have exercised the Secretaries' discretionary authority to exempt over 3,000 deserving aliens from the material support bar, where doing so has been consistent with U.S. national security. As the Department and its interagency partners continue to improve this process, Congress can be assured that the number of deserving aliens who benefit from these exemptions will continue to increase, even as we remain vigilant in executing the mission that Congress has given us to safeguard the security of the American people.

I thank the Members of the Subcommittee for the opportunity to address these important issues today, and I stand ready to answer any questions you may have.



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# STATEMENT

# OF

## JONATHAN R. SCHARFEN
## DEPUTY DIRECTOR
## U.S. CITIZENSHIP AND IMMIGRATION SERVICES
## U.S. DEPARTMENT OF HOMELAND SECURITY

REGARDING A HEARING ON

## "OVERSIGHT OF U.S. REFUGEE ADMISSIONS AND POLICY"

BEFORE THE

## SENATE JUDICIARY COMMITTEE
## SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP

**September 27, 2006**
**3:00 PM**

Mr. Chairman and Members of the Subcommittee:

I am honored to have this opportunity to discuss the President's proposal for refugee admissions in Fiscal Year (FY) 2007 U S. Citizenship and Immigration Services (USCIS) enthusiastically supports the proposed ceiling of 70,000 refugee admissions for the upcoming fiscal year. As an organization, we are committed to providing the staff and resources to meet the goals outlined in the Annual Report to Congress on Refugee Admissions

The U.S. Refugee Admissions Program has adapted to the shifting and complex nature of the world refugee situation in recent years by identifying and processing smaller groups of refugees who are often located in remote areas. This is illustrated by the fact that during FY 2006, USCIS officers traveled to more than 50 countries to interview refugee applicants from nearly 60 nations.

As you know, the Department of State has overall management responsibility for the refugee program and has the lead in proposing admissions ceilings and populations to be processed. As part of the Department of Homeland Security, USCIS has responsibility for interviewing applicants for refugee resettlement, adjudicating their applications, and ensuring that necessary security checks are fully performed. For the first time this fiscal year, members of the newly formed Refugee Corps fulfilled this role for USCIS The establishment of the Refugee Corps is a major success for the U S Refugee Admissions Program as a whole, and USCIS in particular We are very grateful to the Members of this Committee and this Subcommittee for your steadfast support for this initiative from its conception to reality The creation of a corps of Refugee Officers dedicated solely to refugee adjudications will not only provide greater consistency in adjudications, but will also increase flexibility in fielding adjudication teams which is essential to meet the needs of a more diverse refugee program

The first Refugee Corps Officer was hired just over a year ago, and today we have nearly 30 officers on board with others in the hiring pipeline. We plan to hire a total of 40 officers and seven supervisors. Our Refugee Officers are a talented group They couple expertise in immigration law and adjudications with a wide range of academic and professional backgrounds and substantial international experience. The development of the Refugee Corps has coincided with an expansion of the Refugee Affairs Division at USCIS headquarters, as well, in order to support our overseas operations in areas such as training, fraud detection and deterrence, and quality assurance

As part of the Department of Homeland Security, USCIS is dedicated to preserving and promoting our national security At the same time, as the Secretary underscored on World Refugee Day this year, we are deeply committed to continuing to provide protection to deserving refugees around the world and to upholding our tradition as a nation of immigrants It is the Administration's view that important national security interests and counter-terrorism efforts are not incompatible with our nation's historic role as a world leader in welcoming legal immigrants and refugees Due to national security imperatives, legislation passed in recent years greatly expanded the definition of terrorist



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activity and terrorist organizations for purposes of determining which foreign nationals may be allowed to be admitted to this country The legislative initiatives included a provision making aliens who provide "material support" to individuals or organizations that engage in terrorist activity inadmissible to the United States. The Immigration and Nationality Act (INA) does contain a discretionary exemption to the material support inadmissibility provision, which allows the Secretary of Homeland Security or the Secretary of State, in consultation with each other and with the Attorney General, to make an unreviewable discretionary determination that the terrorist inadmissibility provision does not apply with respect to material support afforded by a foreign national.

The broad language of the terrorist activity provision in the INA has had an impact on refugee admissions this year However, the two recent exercises of the discretionary exemption authority by Secretary of State Rice for Burmese Karen refugees living in certain camps in Thailand show that the interagency process is capable of successfully addressing these challenging issues in a way that balances our need for security with our commitment to refugee protection It was an important step to move forward on the ethnic Karen Burmese refugees in Thailand, and we are continuing to work on an interagency basis to consider other groups that may be good candidates for future exercises of exemption authority

For USCIS' part, we consider the first exercise of Secretary Rice's material support exemption authority to have been very successful. Our Refugee Officers who worked in the Tham Hin camp in Thailand were able to explore all relevant facts and recommend sound decisions on the eligibility of refugee applicants on a case-by-case basis The overall approval rate for applicants in the Tham Hin Camp was approximately 80 percent, with roughly 30 percent of the total cases requiring the material support discretionary exemption At present, the first refugees to benefit from these decisions have begun to arrive in the United States for refugee resettlement

USCIS is committed to a strong partnership with its federal, international, and nongovernmental partners to support a robust U S refugee resettlement program. We are equally committed to ensuring the integrity of our adjudications process We have taken a number of steps to enhance our ability to protect our nation's security and to deter and detect fraud These measures include

- Completion of interagency security checks prior to final adjudication of any refugee application.
- Development of the Training and Program Integrity section within the Refugee Affairs Division that is responsible for researching existing fraud trends, developing counter-strategies, and referring suspected cases of fraud for investigation and possible prosecution.
- Expansion of our fingerprinting capacity through the acquisition and deployment of portable fingerprinting equipment, employing appropriate standards to safeguard the information collected



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children of Hmong admitted for resettlement who were not included in the original Thai list may have these cases considered by the U.S.

A significant number of Hmong wish to flee Laos, where some Hmong are reliably reported to be in wretched circumstances owing to continued repression by the government at certain sites and where some are denied food and health care. The U S and the Office of the UN High Commissioner for Refugees (UNHCR) should seek to institute an orderly departure program for Hmong with close ties to the U S. who are endangered by such policies.

Similarly, in Vietnam, the U.S should seek to admit Montagnard people who also suffered very heavily as some of our closest allies in the Vietnam war Currently they face repression in Vietnam and many have been ~~are often~~ forced back when they try to flee to Cambodia owing, in part, to pressure by the government of Vietnam on Cambodia to deny even temporary asylum t the Montgnards. RI also supports ~~recommends~~ resettlement of the remaining Vietnamese in the Philippines.

In FY2005, Refugees International also urges the U.S. to consider Burmese refugees in Thailand. Many have been there for more than a decade and should be given a chance to move on with their lives. Some argue that many of these refugees would like to return eventually to Burma. The current regime in Burma, however, has actually revoked the citizenship of those who have fled the country. Thousands of Burmese children born in exile are now effectively stateless. Further, the Thai government has restricted the activities of Burmese dissidents now in Thailand and has put increasing pressure on Burmese to end their political opposition to the government in Rangoon.

While some Burmese would hope to return once conditions in their homeland make it possible for them to resume their lives in safety and dignity in their home communities, many Burmese told recent RI missions that they have no desire to live under a regime that continues to repress its citizens and denies full political rights to Aung Sung Suchi and her supporters. The U.S. should continue its proud tradition of granting resettlement and a chance to live in freedom for Burmese refugees unable to return to their homeland

RI supports U.S. efforts to find durable solutions, including well-supported local integration and resettlement opportunities, for some of the 70,000 Bhutanese in Nepal and the 19,000 Muslim Burmese (Rohingya) refugees in Bangladesh These populations should not be abandoned nor have assistance terminated in ill-conceived local integration schemes where refugees have little likelihood of being able to gain employment or acceptance.

In Africa, as returns to Burundi continue, RI urges the Administration to continue to support improved protection and integration assistance, while not forgetting those Burundians so traumatized or at risk that resettlement remains the only reasonable solution. RI notes the large number of Zimbabwean refugees forced to flee to South Africa and neighboring countries because of the ruthless political and economic pressures and use of imprisonment and torture against political opponents of the current Mugabe

government. A recent RI mission found large numbers barely able to survive in the absence of official recognition of their status or any international assistance. RI urges the U.S to consider Zimbabwean refugees as a population of humanitarian concern.

In West Africa, RI notes that some Liberians and Sierra Leoneans have been forced so many times from their homeland during over a decade of war that repatriation is not feasible from their places of asylum in the region This group would reasonably include a number of female-headed households,—Victims of sexual abuse or torture, unaccompanied minors, as well as some minority ethnic leaders, could still be at risk RI urges that such groups be considered for resettlement.

In East Africa, RI recommends continued consideration of groups like the Somali Bantu and the Bandir, who have spent more than a decade in camps, as well as ed some of the minority Sudanese groups still in Ethiopia

In all these cases, RI urges the US to make strong efforts to ensure that when offering resettlement to part of a group that this humanitarian action not adversely effect the ability of the remaining population to receive refuge and assistance in that country of asylum

**Funding**

RI strongly supports providing funding at lease at the level recommended by the Senate Appropriations Committee of $775 million for the Migration and Refugee Assistance Account and $50 million for the Emergency Migration and Refugee Account The continuing crisis in Darfur with one million displaced and over 200,000 refugees now seeking aid in Chad suggests a need for an even higher level of funding, particularly given the inability of the UN World Food Program to guarantee basic food assistance to these populations, as well as others in West Africa, without substantial new donor support. RI urges the Administration to increase its efforts to seek additional food aid for refugees and for internally displaced as well as populations emerging from years of war and dislocation.

**Answers to Written Questions of Senator Richard Durbin**
**Chairman, Subcommittee on Human Rights and the Law**
**Hearing on "No Safe Haven: Accountability for**
**Human Rights Violators in the United States"**
**November 14, 2007**

David Scheffer, Mayer Brown/Robert A. Helman Professor of Law, Northwestern University School of Law

1. *Please explain why you believe most or all of the statutes of limitations for atrocity crimes under U.S. law should be eliminated.*

**Answer:** First, Article 29 of the Rome Statute of the International Criminal Court requires that, "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations." Because the United States, even as a non-party State to the Rome Statute, realizes the full protection (and benefit) of the complementarity principle under that treaty, then U.S. law should not extinguish the power of the courts to adjudicate atrocity crimes because of a legal obligation to apply a statute of limitations to offenses which qualify as atrocity crimes. Imagine the difficulty U.S. authorities would face if a 5-year federal statute of limitations runs its term pertaining to a particular atrocity crime allegedly committed by a U.S. national who remains exposed to the jurisdiction of the International Criminal Court (because the atrocity crime was committed on the territory of a State Party to the Rome Statute) and, in responding to requests and diplomatic pressures from the ICC and other governments, the State Department must confirm that U.S. courts no longer have the power to investigate and, if merited, prosecute the alleged perpetrator. That admission would render the United States "unable" to prosecute (even if it were willing to do so but for the statute of limitations) and thus open up the possibility of controversial efforts by the ICC to gain custody of the alleged perpetrator, particularly if he or she travels abroad. I see no reason to invite that disarming of American options.

Second, as a matter of sound policy the U.S. Government should retain throughout the lifetime of any alleged perpetrator of atrocity crimes the power to investigate and, if merited, prosecute such individual for the heinous acts that constitute atrocity crimes. Anything less would likely lead to extreme embarrassment for the United States and a perception that we are mocking the rule of law. Such a situation (of statutes of limitations applying to, and ultimately blocking prosecution of, atrocity crimes) would sustain the United States as a safe haven for war criminals and atrocity lords—precisely what the Subcommittee has been seeking to shut down with the Genocide Accountability Act of 2007 and the pending legislation of the Child Soldiers Accountability Act and the Trafficking in Persons Accountability Act. How does one explain to the victims' families that if the alien perpetrator can reach American territory and avoid indictment for the duration of the relevant U.S. statute of limitations, he or she may succeed in achieving permanent sanctuary in the United States? Even if an international criminal tribunal still would pursue such an individual for commission of an atrocity crime in the past, the United States would



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thwart any such prosecution by having closed the door to federal prosecution even though U.S. law might also recognize the criminality of the heinous act (but only within the time frame afforded by the relevant statute of limitations). Atrocity lords and war criminals often have support networks, the capacity and will to intimidate potential witnesses into silence, and political advantages (such as holding onto office for years following commission of atrocity crimes) that can stymie investigations and the indictments of national prosecutors and thus realize the maximum benefit of statutes of limitations.

Third, there remains considerable variance among national criminal codes on the applicability of statutes of limitations for common offenses that may rise to the gravity of atrocity crimes, so it may be premature to conclude that there is a customary international rule prohibiting statutes of limitations for atrocity crimes. [*See* Antonio Cassese, *International Criminal Law* 316-319 (2003).] It is noteworthy that Article 29 of the Rome Statute of the ICC confirms the view of at least the 105 States Parties as of November 2007 that there should be no such statute of limitations for international prosecution of atrocity crimes. Further, many States Parties have eliminated statutes of limitations for atrocity crimes in their implementing legislation for the Rome Statute. There are 45 States Parties (not including the United States) to the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (26 November 1968), which entered into force on 11 November 1970, and which was favorably noted during the negotiations leading to Article 29 of the Rome Statute of the ICC. [*See* M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text,* v. 2, 221 (2005).] The European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (25 January 1974), though negotiated and finalized by European Governments, has not entered into force.

Fourth, while the case can be made for statutes of limitation for lesser common crimes under federal criminal law, the magnitude and international significance of atrocity crimes, combined with the growing trend in international law towards rejection of statutes of limitation for atrocity crimes, points to the value of their denial in federal criminal law.



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2. *You testified that certain countries have incorporated atrocity crimes into their national criminal codes as a way to preempt International Criminal Court (ICC) jurisdiction over their nationals. Please explain how reforming our human rights laws would allow the United States to preempt ICC jurisdiction over U.S. nationals.*

**Answer:** Either as a current non-party State or as a potential future State Party to the Rome Statute of the International Criminal Court (ICC), the United States is able to ensure that U.S. nationals who may be or become the targets of investigation by the ICC for atrocity crimes in a "situation" of atrocities in fact would be subject to U.S. rather than ICC jurisdiction. That is the "complementarity" regime set forth in Articles 17, 18, and 19 of the Rome Statute and its intent is to maximize domestic investigations and prosecutions of atrocity crimes, looking to the ICC as a last resort court if the State "is unwilling or unable genuinely to carry out the investigation or prosecution" or a national decision not to prosecute results "from the unwillingness or inability of the State genuinely to prosecute." [Rome Statute, Art. 17(1)(a)&(b)] The United States delegation to the United Nations talks on the Rome Statute was deeply influential in the drafting and negotiation of the complementarity regime because it was a methodology and reasonable restraint on the ICC that we strongly believed should be incorporated into the Rome Statute.

It is essential, however, that the United States be able to demonstrate that it is able genuinely to carry out investigations and, if merited, prosecutions of U.S. national suspects of atrocity crimes falling within the subject matter jurisdiction of the Rome Statute. [Rome Statute, Arts. 5, 6, 7, and 8] Only when the federal criminal code provides for federal jurisdiction over all atrocity crimes will the U.S. Government be able to demonstrate such ability in all relevant cases and thus inform the ICC, if it were to pursue a U.S. national, to stand down and let U.S. authorities address the matter on a comparable basis under U.S. law. Certain States Parties, as identified in my written testimony, have undertaken or are undertaking such a modernizing exercise of their criminal codes so as to strengthen their own domestic abilities to investigate and prosecute atrocity crimes and thus prevent ICC jurisdiction over their own nationals. We should not want even to contemplate the possibility of any ICC judge pondering whether the federal criminal code covers any particular atrocity crime set forth in the Rome Statute so that he or she may conclude that the United States is not "able" to investigate or prosecute a particular crime falling within the subject matter jurisdiction of the Rome Statute, even if it were to demonstrate a willingness to do so.

Thus, for both pragmatic and legalistic reasons, the United States would protect its interests by amending the federal criminal code so that U.S. courts rather than the ICC seize jurisdiction over U.S. nationals who may be responsible for the commission of atrocity crimes anywhere in the world. If it were to take such a modernizing step, then the United States would join some of its major allies which already have modernized their criminal codes with the result of minimizing their exposure to ICC jurisdiction.



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3. *Based on your experience as U.S. Ambassador at Large for War Crimes Issues, can you think of situations where the U.S. government would have liked to assert jurisdiction over non-U.S. nationals who committed atrocity crimes but was not able to do so under current laws?*

**Answer:** There are two clear examples from my own experience. The first concerns senior Khmer Rouge leaders Pol Pot and Ta Mok. Until Pol Pot died in March 1998 and Ta Mok was captured by the Cambodian military in early 1999, I undertook intensive diplomatic and operational efforts to apprehend and bring both individuals to justice outside of Cambodia pursuant to strategies that ideally would avoid their presence on U.S. territory but, if either was detained on U.S. territory, would minimize that period of detention prior to transfer to a foreign jurisdiction that would prosecute either of them. The elaborate strategies were required because the Justice Department determined that it would be strongly preferable not to risk trying to prosecute non-U.S. nationals in U.S. courts, or afford them the opportunity for *habeus corpus* petitions before U.S. courts and potentially enable them to achieve safe haven in the United States, because U.S. statutory law did not permit the prosecution of non-U.S. nationals for genocide that was not committed on U.S. territory or for crimes against humanity. The Genocide Accountability Act of 2007 now corrects part of that old deficiency in U.S. law, but in the late 1990's the option of prosecution of a non-U.S. national for genocide committed outside the United States did not exist. Pol Pot and Ta Mok more likely would have been charged primarily with crimes against humanity, for which there was not then and there still is not jurisdiction in U.S. courts to prosecute the likes of those two individuals.

The second example concerns former Iraqi leader Saddam Hussein and other leaders in his regime. During the Clinton Administration I waged an often lonely campaign to obtain U.N. Security Council authorization for the establishment of a commission of experts on the atrocity crimes of the Saddam Hussein regime and, as a final step, the creation of an international criminal tribunal to investigate and, if merited, indict Saddam Hussein and his regime colleagues for atrocity crimes. Gaining custody for prosecution, we knew, might be a long time coming but the strategy was to create the legal net within which to snare them, and degrade their domestic legitimacy. I could not consider the option of indicting and, one hoped, ultimately prosecuting Saddam Hussein and his colleagues in U.S. courts for a wide range of atrocity crimes, including war crimes against U.S. soldiers and diplomats during the First Gulf War in 1990-91. (The war crimes charges had been key priorities of the Pentagon until they were eclipsed by other issues in the mid-1990's.) I was advised by the Justice Department that U.S. statutes of limitations prevented any such prosecution for the war crimes charges relating to U.S. personnel and that there was no law to apply towards genocide and crimes against humanity charges pertaining to the Iraqi leadership. To a large extent, these realities continue to cripple U.S. law.



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**Answer to Question from Senator Jon Kyl to David Scheffer:**

1. *In your statement and testimony, you said that the United States, as a non-party to the Rome Statute of the International Criminal Court, is more exposed to the International Criminal Court's jurisdiction than are other countries who have modernized their criminal codes to deal with atrocities and human rights violations. Give specific examples of how the United States has greater exposure to the International Criminal Court's jurisdiction and the ramifications of such exposure.*

**Answer:** When one considers the relatively antiquated character of the federal criminal code as it concerns atrocity crimes and combine that with the non-party status of the United States under the Rome Statute of the International Criminal Court, the United States could find itself subject to greater exposure to the ICC's jurisdiction than would a number of countries which are States Parties to the ICC and have modernized their criminal codes to more effectively address atrocities and human rights violations.

First, it is important to recognize that regardless of how U.S. authorities or judicial officers or any American observers might interpret the Rome Statute or understand international law, the predominant foreign perspective is that a U.S. national can be subject to the jurisdiction of the ICC—even though the United States is a non-party to the Rome Statute—if he or she perpetrated an atrocity crime on the territory of a State Party to the Rome Statute. [*See* Rome Statute, Art. 12(2)(a).]

Second, for example, if a U.S. national allegedly commits the crime against humanity of persecution [*See* Rome Statute, Art. 7(1)(h)], which is a legal charge that often arises when ethnic cleansing has been committed, no U.S. court has statutory authority to prosecute such a crime *per se*. If the United States were to claim its "complementarity" right under Articles 17, 18, and 19 of the Rome Statute in order to prevent ICC jurisdiction, the ICC judges likely would conclude that given the inability of U.S. courts to prosecute the crime against humanity of persecution, the ICC would have jurisdiction to indict and seek custody of the U.S. national for trial in The Hague. Gaining custody might become a realistic option for the ICC if the U.S. national travels outside the United States. Further ramifications would be the diplomatic uproar that might result as Washington sought to restrain the ICC and any nation in which the individual travels from acting against him or her. In contrast, the ICC could not reach such a conclusion based solely on the inability to prosecute the crime against humanity of persecution if the State in question had modernized its criminal code to include such crime, which, for example, the United Kingdom, Australia, Canada, and Germany have accomplished.

Third, the War Crimes Act of 1996, as amended, creates only a partial set of war crimes for which U.S. nationals can be prosecuted. There is a wide gap between U.S. statutory law and the full listing of war crimes set forth in Article 8 of the Rome Statute. Again, key countries have now incorporated the Article 8 war crimes into their domestic criminal codes and thus empowered their national courts to prosecute the full range of such crimes and thus avoid ICC jurisdiction. If, for example, U.S. nationals employed by American contractors providing security services to U.S. diplomats in Iraq or



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Afghanistan allegedly commit war crimes that are not covered by the War Crimes Act of 1996, as amended, and yet are war crimes covered by the much broader listing in Article 8 of the Rome Statute, then the ICC might find a basis for exercising jurisdiction over such U.S. nationals provided other jurisdictional pre-conditions under the Rome Statute are satisfied (which is a real possibility). It would be far safer for U.S. interests if one were to amend U.S. law so that U.S. courts have the unquestioned authority, by statute, to prosecute the full range of war crimes which, as expressed in Article 8 of the Rome Statute, are well understood to constitute customary international law. With such authority, the United States would be able to use the complementarity principle in the Rome Statute to deflect ICC jurisdiction, in a manner identical to that of other countries which have modernized their criminal codes accordingly.

Those who might argue that in some cases the so-called "Article 98 bilateral non-surrender agreements" that have been negotiated during the Bush Administration would protect all U.S. nationals from surrender to the ICC, are, in my view, mistaken. See my article entitled, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM. JUSTICE No. 2, 333 (2005).



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**Human Rights and the Law Subcommittee of the U.S. Senate Committee on the Judiciary**
**Hearing: The 'Material Support' Bar: Denying Refuge to the Persecuted?**
**September 19, 2007**

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Senator Durbin and distinguished Subcommittee members, it is an honor for myself, on behalf of the organization for which I work, the Southeast Asia Resource Action Center (SEARAC), to submit this statement about the different ways the "material support" bars of inadmissibility have impacted the communities with whom SEARAC works. SEARAC is a national organization, based in Washington, DC, that advances the interests of Southeast Asian Americans though leadership development, capacity building, public policy advocacy, and community empowerment. We were founded in 1979 as the Indochina Refugee Action Center in order to facilitate the relocation and integration of Southeast Asian refugees into American society.

This hearing comes at a momentous point in the long struggle to address the drastic, unintended consequences material support has wrought upon vulnerable refugee communities around the world. The recent passage of the amendment, SA 2784, as part of the Foreign Operations Appropriations Bill marks a great leap forward in this process. On behalf of the untold thousands of asylum seekers and refugees who cannot be here today to speak for themselves, for those who have remained in various states of uncertainty since the introduction of the material support bars in the Real ID and Patriot Acts, we applaud all of the hard work that has gotten us to where we are today. We look forward to the time when we can report that a comprehensive legislative fix has been achieved, and among other things, relief will be provided for the Hmong and Montagnard and "other groups that do not pose a threat to the United States."

When advocates talk about the tremendous numbers of individuals and families who have innocently gotten caught in the wide net that has been cast by material support, occasionally the direct impact this issue has had on individuals gets lost in the larger, tragic material support story. However, the story of material support cannot be separated from the story of Xiong Yang of Wausau, Wisconsin. Like hundreds of thousands of people from the Southeast Asian countries of Cambodia, Laos, and Vietnam, she and her family entered the United States as refugees after the Vietnam War. The Hmong and Montagnards have a unique connection to the United States and began to relocate to this country after fighting alongside Americans, rescuing downed American pilots, and gathering intelligence during the war. The Hmong were forced to flee their homes in Laos, much as the Montagnards were forced to flee their homes in the Central



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Highlands of Vietnam, after their support of Americans during the war. Xiong Yang and her family built new lives in this country and have continued to sacrifice for America. One of her sons recently returned from military duty in Iraq, and another one of her sons is in the U.S. Navy. Yet, in spite of the Yangs' history with this country, because of the current language in the Real ID and Patriot Acts, her 77-year old mother, and her brother, living in squalor in a settlement in Northeast Thailand, cannot resettle in this country because they are now defined as terrorists.

The story of Vager Vang from Fresno, California is also the story of material support. When fighting in Laos in support of American forces during the Vietnam War, Mr. Vang rescued an American pilot who had been shot down. Now, his support of America, the very reason he was granted resettlement in this country to begin with, is the very reason it is believed that he has been unable to obtain his green card and gain permanent resident status. One of the consequences of material support has been that approximately 4,000 individuals like Mr. Vang who already arrived in this country as refugees have been unable to adjust their statuses in order to become permanent residents. Although the United States Citizenship and Immigration Services (USCIS) does not release information about the nationalities of these applicants, advocates believe that a significant number of them are Hmong. The indefinite hold that has been placed on their applications has precluded them from continuing on the important path to citizenship and achieving full integration into American society.

These are just two of the countless stories that could be told about the way material support has left refugees, many of whom have given up an unfathomable amount in support of this country and its ideals of freedom, in dangerous limbo. The time has at last arrived when all concerned parties can move forward together and finally secure the legislative solution to a problem that has caused so much pain and uncertainty, and in doing so, put to rest an ugly chapter in this country's long standing history of serving as a refuge for the world's most persecuted.

**Therefore, SEARAC supports the "material support" language that is found in SA 2784, and it is our hope that this language will remain in tact as it moves through the upcoming conference process.**



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The Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law
"The 'Material Support' Bar: Denying Refuge to the Persecuted?"

Tham Hin "Temporary Shelter" – 10,000 Karen refugees in less than 1 square kilometer. They cannot leave the compound. They have lived here for ten years with no hope of going home.

"My name is Paw Wah. I'm 15 years old."

"The Burmese soldiers came and burned our village. We fled to Thailand and ended up in the Tham Hin camp. I was five years old then. It's very crowded so a lot of people get sick. I love with my mother and father and four siblings.

My father fought against the Burmese army. He stepped on a mine and lost his eyesight."

Pah Wah's Mother: "I encourage my daughters to listen to my advice but she's always got her activities, always busy."

Pah Way: "I'd rather be doing something. I get very bored sitting at home. I get up at 5am, cook, wash and rest. I go to school, weave.

When I grow up, I don't want to live like this. We have applied to resettle in America.

If we resettle, we can get more education – maybe have better conditions to live in."

Paw Wah's Mother: "She's doing well in school. She says she wants to be a doctor… or a female boxer."

Text:

Paw Wah applied for resettlement in the United States. Her application was denied because her father had been a member of the Karen National Union (KNU), a pro-democracy group that fought against the military dictatorship in Burma.

Thousands of refugees and asylum seekers have been denied refuge in the United States for providing "material support" to armed groups, even though many provided minimal support and did so under duress.



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## Washington Post

# Doctors Without Refuge

By Leonard S. Rubenstein
Monday, March 5, 2007; A15

In war, health workers are often heroes and often victims. Though the Geneva Conventions are supposed to protect them as they fulfill their ethical duty to provide care to wounded combatants without regard to affiliation -- what is known as medical neutrality -- they frequently become targets by attending to the enemies of one side or another.

The United States has always stood up for the protection of health workers in war, condemning violations of medical neutrality. And until now, it has offered asylum to doctors, nurses and other health workers forced to flee their home countries after they complied with their obligations to treat any and all wounded. But in another instance of the corrosion of human rights that has been the hallmark of this administration since Sept. 11, 2001 -- including torture, secret detention and denial of due process -- the Department of Homeland Security is contesting asylum requests by health workers whose lives are at risk for having provided assistance to wounded members of rebel groups.

The government claims that providing such medical care amounts to prohibited "material support" to terrorists and thus is a basis for denying asylum. Its position is as radical a departure from past practice -- where it protested interference with a physician's duty to treat without political distinction -- as it is chilling. For example, the State Department's human rights report for 1999 condemned the Serbian government of Slobodan Milosevic for having "threatened and intimidated doctors working in the province to prevent them from treating [Kosovo Liberation Army] members."

The reversal is even more dramatically illustrated by the position the U.S. government took regarding a physician caught up in the brutal war in Chechnya. Performing surgery in late 1999 and early 2000 under conditions resembling those of the American Civil War, this doctor adhered to the highest traditions of medicine and medical ethics and saved the lives of civilians, Russian soldiers and Chechen rebels. Because he treated fighters from both sides, though, the physician became a target of Russian forces as well as the rebel groups. The rebels distrusted and threatened him while Russian forces labeled him the "bandit doctor." He was detained overnight and later warned by both Russian and Chechen fighters that he could be arrested and executed.



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The doctor escaped and, with the help of the U.S. Embassy, made his way to the United States. When he applied for asylum, his request, as someone persecuted for upholding medical ethics in wartime, was granted in a mere two weeks.

But now the U.S. government is appealing an immigration judge's decision granting asylum to a Nepalese health worker who was twice kidnapped by a Maoist group that wanted him to attend to a wounded rebel. It rejected the asylum claim of a Colombian nurse who was kidnapped by the Revolutionary Armed Forces of Colombia, assaulted and forced at gunpoint to provide medical care to its members.

These actions are part of a larger and disturbing pattern of denying asylum even for victims of the most horrific human rights violations. A report by Human Rights First last year showed how the Department of Homeland Security's interpretation of the ban on providing "material support" to terrorists has extended to victims of abuse, such as a journalist who gave money to a rebel group after being beaten and a fisherman who was abducted and forced to pay ransom for his release.

The administration's interpretation goes far beyond what the law requires. Indeed, medical care is not even included among the practices Congress listed as amounting to "material support." In response to an outcry about its policy, the administration said it would offer selected waivers from the "material support" exclusion. While providing justice for some, that stance doesn't begin to restore the commitment to refugee protection that has been central to our values and our policies.

Congress must revise the law to protect medical ethics and restore America's commitment to being a place of refuge for those fleeing persecution. This step is also essential to revive principles of medical neutrality. Just as the government diminished itself and U.S. standing by adopting perverse interpretations of law and medical ethics to justify torture and to enlist doctors' help in breaking down detainees, it is undermining America's long and critical support for medical services for the wounded in war.

*The writer is executive director of Physicians for Human Rights.*



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**Written Statement Submitted by**
**the Regional Representation for the United States of America and the Caribbean**
**Office of the United Nations High Commissioner for Refugees**

**Hearing on "The 'Material Support' Bar: Denying Refuge to the Persecuted?"**

**before the**
**United States Senate**
**Committee on the Judiciary**
**Subcommittee on Human Rights and the Law**

**226 Dirksen Senate Office Building**
**September 19, 2007**



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## I. Introduction

The Office of the United Nations High Commissioner for Refugees (UNHCR) appreciates the opportunity to submit this statement to the Senate Committee on the Judiciary Subcommittee on Human Rights and the Law. UNHCR is the UN refugee agency mandated by the international community to ensure refugee protection and to identify durable solutions to refugee situations. Our mandate is grounded in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, which define a refugee as a person having a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion. The United States signed the 1967 Protocol in 1968, thus obligating itself to comply with both the terms of the Protocol as well as the substantive provisions of the 1951 Refugee Convention.

UNHCR relies on the support of its Member States to fulfill its mandate. Over the past decades, virtually no partner has been as critical to our work as the United States. We depend on the United States not only for its political and financial support of our programs, but also as a model to other countries in its generous resettlement and asylum programs.

We remain concerned, however, about the impact of the terrorism-related bars on the United States resettlement and asylum systems. It will also have to be evaluated whether a process that automatically bars from refugee protection individuals who have not committed a crime or heinous act that renders them undeserving of protection, and then relies upon an exercise of a discretionary waiver, is in compliance with the 1951 Convention or its 1967 Protocol. The bars continue to jeopardize the ability of the United States to sustain the levels of admissions it has historically maintained and to ensure that those refugees who reach its shores are protected. Moreover, application of the bars may threaten the safety of refugees who remain in their host countries.

## II. Terrorism-related Bars, including Material Support

Under international law, individuals who are, or have been, engaged in terrorism are ineligible for refugee status and protection. UNHCR, as an agency that itself performs refugee status determinations all over the world, takes very seriously its obligation to exclude from refugee protection those individuals who commit heinous acts of violence, in particular against civilians.

Current immigration law in the United States, however, defines terrorist activity and related terms so broadly that it captures many individuals who clearly are not terrorists and some who should not be considered to pose a threat to the United States or the international community. These individuals are then barred from refugee protection by the United States, either through its resettlement or asylum programs. For example, a "terrorist organization" under United States law includes any organization that uses a "weapon or dangerous device with the intent to endanger the safety of one or more persons or to cause substantial damage to property," regardless of whether the organization is engaged in armed struggle against a repressive regime. Any person who is a member of, or provided "material support" to, such an organization is barred from resettlement to or asylum in the United States.



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Both the Department of Homeland Security and the Department of Justice have taken the position that these bars make no exception for individuals who provide assistance under duress, even if minimal, to true terrorist organizations or for those who provided support to or were members of pro-democracy groups that under current immigration law are defined as terrorist organizations. Both the underlying legislation and the Administration's interpretation of it are inconsistent with international refugee standards. Many of the individuals impacted by these bars not only should not be excluded from refugee protection under international refugee law but the very facts rendering them barred under United States law are the facts which make them refugees.

The Immigration and Nationality Act provides very narrow waiver authority with respect to the many terrorism-related bars. To date, the Administration has exercised this limited authority in the context of the material support bars in the form of a waiver for duress cases and for certain specified groups. Waivers can only be issued by the Secretary of State or the Secretary of Homeland Security, after consultation with each other and the Attorney General. As discussed in more detail below, experience to date has shown that the waiver authority is insufficient to address the problems created by the material support bar and would likely remain insufficient, were it to be expanded, for the related terrorism bars as well.

These bars are threatening the foundation of the United States refugee protection regime. While ostensibly designed for a very real and legitimate purpose – to bar the admission of individuals who wish to harm the United States and its citizenry – in actuality they throw a net so wide that they deny refuge to individuals who have faced very real threats to their lives and safety and who in fact are often victims of terrorism. The bars fail to accurately distinguish refugees who do not pose a risk to the United States or the international community from those who do, nor do they take into account those groups and individuals previously identified by the United States Government as priority caseloads for resettlement.

**III. Affected Populations in the Resettlement Context**

Terrorism-related bars to admission became a major obstacle for resettlement to the United States starting in 2004 in the context of Colombian refugees. It was not until 2006, however, that the Administration issued the first waiver for material support, for Karen from Myanmar in the Tham Hin refugee camp. The issuance of subsequent waivers for eight specific groups affected by the terrorism-related bars has enabled admission of a number of refugees. Of the eight groups benefiting from waivers, six are from Myanmar. About 80 percent of the Myanmar cases who were on hold for terrorism-related bars have been resolved; however, many refugees still cannot be admitted to the United States because they are barred under terrorism-related grounds for which there is no waiver.

Globally, the resettlement of several thousand refugees referred to the United States continues to be on hold due to terrorism-related bars. Mainly this is due to a refugee (a) being found to have provided material support to a terrorist organization (other than the aforementioned eight groups) for which no material support waiver has been issued, e.g. Eritrean People's Liberation Front, Lao H'mong, or (b) being barred for terrorism-related grounds other than material support, e.g. membership in the Karen National Union, or soliciting funds for the Chin National Front.



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The number of refugees denied resettlement or on hold for terrorism-related bars, however, does not fully reflect the total population affected. UNHCR has had to avoid referring certain refugees to the United States when it is clear they would be barred. For example, UNHCR had expected to refer 1,000 Colombians annually to the United States resettlement program; now the number is virtually nil. Furthermore, some refugees have chosen not to pursue resettlement as they believe either they or their close relatives could be subject to a terrorism-related bar. Additionally, families have been split in cases in which some family members benefit from the material support waiver and resettle, while others are barred on membership or other grounds and are forced to remain behind or seek resettlement in another country.

**IV. The Experience with the Tham Hin Camp in Thailand**

We focus here on the Tham Hin camp because it was the first major refugee population affected by the terrorism-related bars for which the Administration issued waivers, and it provides the most complete picture to date of their implementation in the resettlement context. Over 10,000 Karen refugees have been living for more than a decade in Tham Hin, a camp located in Thailand that is known for its extremely poor living conditions. The prospects for return of the refugees to Myanmar have become increasingly dim due to the ongoing armed conflict and the prevalence of human rights violations against minority groups in their home country.

In the Administration's Refugee Consultation Document for Fiscal Year 2006, the Tham Him population was named as one meriting resettlement to the United States. The State Department subsequently accepted this group for United States resettlement processing in October 2005. As a large portion of the Karen population in the camp were known to potentially fall under the material support bar, however, interviews by the United States Department of Homeland Security could not begin until a material support waiver was in place. In May 2006, the Secretary of State issued a waiver for the Karen residing in Tham Hin, the first waiver issued for material support. In issuing the waiver, the Secretary of State noted that the population in question met all other requirements for United States resettlement and posed no danger to the safety and security of the United States.

In June 2006, processing of refugees at the Tham Hin camp began. More than 95 percent of those interviewed were found by the Department of Homeland Security to meet the refugee definition as contained in the 1951 Refugee Convention and the 1967 Protocol as well as in United States immigration law.

However, despite the material support waiver for Karen, of the 5,821 Karen interviewed by the Department of Homeland Security more than 837 were subsequently deemed inadmissible to the United States because their active opposition to the military regime of Myanmar constituted terrorist activity under United States immigration law. UNHCR believes that hundreds of others did not apply for resettlement out of fear that they or one or more of their close family members would be barred. Out of the over 10,000 Karen refugees in Tham Hin, only 4,788 have been approved for resettlement to the United States so far.



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The Tham Hin experience demonstrates a number of weaknesses with the waiver process as a true solution for the material support problem. These include:

***The length of time required to issue a waiver***: In the case of the refugees in Tham Hin, a population that had already been identified by the Administration as a priority and received significant public attention, the process took more than seven months from the time that the United States accepted the caseload for processing until the waiver was issued.

The waiver process has taken even longer for populations with more complex backgrounds and for populations that are not as prominent. As a result, refugees are forced to remain in unsafe conditions and under threat of deportation to their home countries where they may face further persecution while awaiting the issuance of a waiver.

***The lack of clarity and predictability in the waiver process***: It is essential that resettlement be based on a consistent and rational framework. Even when a waiver is issued, some portion of the potential beneficiaries may not benefit. In the case of Tham Hin, for example, a significant number of the of the refugees interviewed did not benefit because the United States considers them to be "members of a terrorist organization" or "former combatants" as these terms are broadly defined under the immigration laws of the United States. As the experience of refugees in Tham Hin has shown, these anomalies can lead to spouses, parents, or children being separated from close family members or refugees placed on indefinite hold for resettlement.

## V. The Implications of the Terrorism-Related Bars for International Refugee Protection

Because of our international mandate to ensure refugee protection, UNHCR is concerned not only about the impact of the terrorism-related bars on United States resettlement, but also about the labeling of refugees as supporters of terrorism. Such mischaracterizations will inevitably influence the attitudes and actions of other governments.

UNHCR regularly refers groups of refugees to the United States for resettlement when conditions in their homeland are not conducive to return and integration in their host country is not feasible. If the United States were to reject on the basis of terrorism-related grounds refugees who UNHCR has referred, the host country will likely interpret that rejection to mean that the refugees might endanger the security of their own citizens. The host country may then use this as a justification for its own security measures, including confinement of refugees to camps or detention centers, or possibly even the forcible return of the refugees back to their homelands where they could face further persecution. Repressive regimes also can use the United States designation as a justification for their further persecution of political and ethnic groups in similar circumstances as the refugees. Finally, other resettlement countries may be reluctant to accept refugees who the United States has deemed security risks, even though, in reality, they pose no risk at all.

If host countries become less willing to tolerate the presence of refugees, if the risk of persecution is heightened in home countries, and if other countries are then no longer willing to take the rejected refugees, UNHCR – and most importantly – the individual refugees are left in



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an untenable situation. In fact, the safety of the refugees would be more precarious than it was before the resettlement referral. This is why UNHCR remains extremely concerned about the over 800 refugees who were rejected by the United States during its processing at the Tham Hin refugee camp and who are now stamped with a "supporter of terrorism" label despite being found by the Department of Homeland Security to be in need of refugee protection. This situation is likely to repeat itself with other refugee groups that we refer in the future.

## VI. Impact of the Terrorism-related Bars within the United States Asylum System

***Asylum Cases in Immigration Court:*** There is no way to know how many individuals seeking asylum in the Immigration Court process are impacted by the terrorism-related bars. There is no system for tracking cases and it is feared that refugees in need of protection may have already been ordered removed or actually removed. The process for consideration of waivers in immigration court cases has not yet been established and promises to be inherently inefficient. The Attorney General does not have authority to issue waivers. Thus, rather than immigration judges who receive all of the facts and hear testimony in the asylum cases before them, the United States Citizenship and Immigration Services within the Department of Homeland Security will consider waivers in these cases. The interplay of more than one adjudicator is likely to perpetuate the lengthy delays, inefficiencies, limited predictability, and significant expenditure of resources that have already been witnessed under the current waiver system over the past two years. Furthermore, there is currently no process for individuals to apply for a waiver and there is a concern that certain refugees might fall through the cracks because they lack political visibility, legal representation or both.

***Individuals Seeking Asylum with the Asylum Division:*** According to the Asylum Division, there are currently 442 asylum applications before the Asylum Division which are on hold because the material support bar may be implicated. Of these cases, 109 of those cases involve material support under duress to the FARC, which is the first Tier I group under consideration for potential exercise of the waiver authority. Two hundred and sixty cases involve material support to a Tier I or Tier II terrorist organization. The remaining 73 may involve material support under duress to a Tier III group.

***Adjustment of Status of Refugees and Asylees:*** Refugees are obligated to apply to adjust their status in the United States to that of lawful permanent resident within one year of arrival in the United States. According to the Department of Homeland Security as of June 2007, 2,400 applicants for refugee adjustment of status were on hold due to terrorism-related bars. As of June 2007, 3,800 applications for adjustment of status for asylees (those granted asylum in the United States) were on hold. It is not known how many of these individuals are subject to terrorism-related bars for which there is a waiver available.

Because the United States requires refugees and asylees to adjust their status, those individuals whose adjustment is on hold for terrorism-related bars for which there is no waiver are at risk of being placed in removal proceedings long after the United States granted them refugee status. This could result in the forced return of refugees who the United States has already recognized and admitted. Adjustment is the single best way to ensure the full integration of refugees into



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United States society, but now refugees may be reluctant to comply, knowing it might result in their removal.

**VII. UNHCR's Response to the Terrorism-Related Bars**

In the absence of legislation to address the terrorism-related bars, UNHCR has been compelled to adjust its own resettlement program to work around these barriers. Because our core mandate is refugee protection, UNHCR cannot put refugees at risk of further harm by referring them to the United States when there is uncertainty as to whether the United States will reject them for material support or related grounds. The success of the resettlement system depends on predictability. The refugees themselves, host governments, and UNHCR offices around the world must be able to rely on the consistent application of the refugee definition and long established criteria for United States resettlement.

Therefore, UNHCR has decided to take the following steps on an interim basis. UNHCR will refrain from finalizing the submission of any refugee group to the United States for resettlement that may be subject to terrorism-related bars until the United States issues an effective waiver for the group. To facilitate this process, we are recommending that the United States Government evaluate proposed resettlement groups in advance and indicate which of those groups might be subject to terrorism-related bars to admission. This will enable UNHCR to then determine if referral to the United States resettlement program is in the best interests of the refugees in question or places them at greater risk.

When a waiver is not available, issued, or sufficient in scope, UNHCR will need to consider other protection options, including referral to other resettlement countries when possible. This occurred with the hundreds of Lao H'mong whom we referred to Australia. This step was necessary due to UNHCR's concerns over the growing number of H'mong cases that had been on hold for several months due to the terrorism-related bars, despite that community's strong historic ties to the United States.

Absent a more comprehensive solution to the overly broad terrorism-related bars, we will have to rely on these revised procedures for any new population to be considered for resettlement to the United States. If the status quo remains – that is that large numbers of refugees face being barred from resettlement for terrorism-related or material support grounds, and waivers are either not in place or unavailable – this will undoubtedly affect the number of UNHCR referrals that can be made to the United States.

With regard to asylum cases before United States immigration courts, UNHCR continues to be concerned that the law excludes from refugee protection individuals who should be determined to meet the refugee definition in the first instance and that the Administration does not have authority to waive application of other overly broad terrorism-related bars besides material support. In addition, we fear that any system which is established to adjudicate waivers will be inefficient, suffer from long delays in decision-making and fail to result in waivers for individual cases not benefiting from a group waiver.



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**VIII. Conclusion**

UNHCR welcomes the efforts of the Subcommittee to address the serious protection challenges presented by the terrorism-related bars to admission. UNHCR fully recognizes the need for combating terrorism; however, we equally believe that this can, and should, be accomplished without eroding refugee protection. We look forward to a speedy resolution to the obstacles presented to the refugee protection regime by terrorism-related provisions, and to a continued and robust partnership with the United States Government with respect to its resettlement and asylum systems.

Thank you for considering this testimony.

***For further information, please contact Wendy Young, Coordinator for US Government and External Relations, at (202) 243-7620 or youngw@unhcr.org.***



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# STATEMENT OF MOST REVEREND THOMAS WENSKI

## BISHOP OF ORLANDO, FLORIDA

## CONSULTANT, U.S. CONFERENCE OF CATHOLIC BISHOPS' COMMITTEE ON MIGRATION

## BEFORE

## THE SUBCOMMITTEE ON HUMAN RIGHTS AND LAW

## SENATE JUDICIARY COMMITTEE

## SEPTEMBER 19, 2007



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I am Thomas Wenski, bishop of Orlando and consultant to the U.S. Conference of Catholic Bishops' Committee on Migration. Through Migration and Refugee Services (MRS) of the U.S. Conference of Catholic Bishops (USCCB), the Catholic Church is the largest refugee service provider in the United States. Working with over 100 Catholic dioceses across the nation, we provide resettlement assistance to approximately 15,000 to 20,000 refugees each year, helping them with job placement, housing, and other forms of assistance to ensure their early self-sufficiency.

I would like to thank Subcommittee Chairman Richard Durbin (D-IL) and Ranking Member Tom Coburn (R-OK) for the invitation to speak to you today about refugee and asylum protection issues, particularly the issue of material support. I also would like to thank Chairman Patrick Leahy (D-VT) for his leadership on this issue, as well as Senator Edward M. Kennedy, chairman of the Subcommittee on Immigration. In assessing the issue of material support, the Catholic bishops believe that the United States can meet its national security protection goals without jeopardizing this honored tradition of welcoming refugees, asylum-seekers, and other vulnerable populations to our shores.

The Administration and Congress should move immediately to correct the damage caused by recent changes in law relating to material support. These changes have led to unintended consequences that do not contribute to security yet undermine the safety and rights of refugees and asylum-seekers. These provisions can be interpreted in an overly-broad manner, resulting in the possible denial of refugee protection to many deserving, bona fide refugees. Specifically, we ask for the following changes in the material support policy:

- Congress should review the definitions of "terrorist activity" and "terrorist organization" in current law to ensure that they are not so broad so as to limit the protection of bona fide refugees who might have provided support to a pro-democracy group that is no threat to the United States;

- Congress should amend the law to ensure that refugees, asylum-seekers, and other entrants who provide material support to a designated group under duress are not barred from entering the United States;

- The Administration should create a process for consideration of waivers of individuals in the removal process, adjustment of status, and family reunification cases;

- The Administration should speed the process of granting waivers to any refugee, asylum-seeker, or other entrant who provided material support under duress to a Tier I or Tier II group.

**The Issue of Material Support**

The Immigration and Nationality Act (INA) prohibits granting refugee status to anyone who is a terrorist or supports terrorist activity. This prohibition is needed to ensure national security and to prevent the extension of refugee protection to those who are undeserving of protection.



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However, the USA Patriot Act and the REAL ID Act expanded and broadened this law in ways that have had an unintended, negative impact on bona fide refugees. For example, the USA Patriot Act expanded the reach of the terrorism definition by broadening grounds of inadmissibility to anyone who provides "material support" to groups which engage in "terrorist activity," which includes any use of a weapon or "dangerous device" with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property, for any motive other than "mere personal monetary gain." Moreover, the REAL ID Act expanded the definition of "non-designated" terrorist organization to include a "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in "any form of terrorist activity."

These overly broad changes were ostensibly designed to protect the United States from genuine terrorist threats. However, they have had the effect of excluding from U.S. protection refugees and asylum-seekers who have been victims of terrorism or brutal regimes. This bar to admissibility is having a profound impact on several vulnerable refugee populations. They do not simply affect refugees and asylum-seekers, but also those seeking adjustment of status, NACARA applicants, and those seeking citizenship.

Mr. Chairman, I would like to include for the record several case examples of vulnerable refugees who have been unable to enter the United States because of the material support issue:[1]

**Somali woman's family attacked by United Somali Congress (USC) members,; paid ransom for son's release.** USC members beat a Somali's woman husband, and when her daughter ran to her father pleading with the men to stop beating him, the men shot and killed both the daughter and her husband. They blindfolded and handcuffed the woman's son, looted the house of valuables, and took her son away in a car. The woman's son was held for three months until she paid $2,000 for his release. One week after her son was released, the attackers returned to her house, beat her and her son, raped her, and told them to leave their house. The woman and her son fled the country, but were denied resettlement in the US because of their material support (the valuables and the ransom) to terrorists.

**Sierra Leonean man on hold for fixing rebels' cars to protect his family.** Sierra Leonean man was working as a mechanic when a group of heavily armed JUNTA men came to his house and demanded that he provide them with transportation support. He refused, but the men took over his garage and said they would kill his family if he did not help them. He worked for them for two weeks, fixing cars. After two weeks, the men took the man and some of his family to another location, but during the move, KAMAJOR men attacked and the refugee escaped with his family. The man's resettlement to the U.S. is on hold for material support (fixing cars under duress).

**Liberian woman attacked at home, forced to wash clothes.** A Liberian single female head of household was referred to U.S. resettlement program by UNHCR as a particularly vulnerable single parent. During the war in Liberia, LURD rebels came to her home and beat her and her father. They shot and killed her father and gang-raped her before abducting her and holding her

[1] Refugee Council USA, March, 2007.



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against her will. During the time she was held hostage, she was forced to perform tasks such as washing the rebels' clothing. The woman escaped from the rebels after several weeks of captivity and made her way to a refugee camp where she remains. DHS considered the tasks she had performed for the rebels (i.e. doing laundry) to be "material support" and her case was placed on hold.

**Colombian youth forced to dig graves.** A 22-year-old Colombian male arrived in Ecuador after fleeing from a paramilitary encampment after a death march. Earlier the man's mother refused to sell family land to paramilitaries who planned to build a road through the property the man's mother and three younger siblings were "disappeared." The man was away attending high school at the time of the disappearances. He believes his family was killed for their resistance to the paramilitary plan. At the age of 16, he continued to refuse to sell the land. One night, four members of the paramilitary arrived at his mother's house where the man was living with his uncle and forced him to march to where the paramilitaries had amassed some of the local indigenous population. The paramilitaries shot and killed many of those who marched with him. The man dug graves for the dead. Because the paramilitary forces would sometimes shoot someone in the back when he had finished digging the grave, the man said, "I never knew when I would be digging my own grave." He is awaiting resettlement. The material support issue in his case: providing services for the paramilitaries – i.e. digging graves, including what could have been his own grave.

Mr. Chairman, I would like to specifically point out the plight of the Colombian refugee population, which has been severely impacted by the material support bar. Simply put, the material support bar has virtually halted the resettlement of Colombians from Ecuador and other countries of first asylum to the United States. Because at least 70 percent of Colombian refugees have been forced under duress to make payments to Colombian rebel groups [The Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN) and the United Self-Defense Forces of Colombia (AUC)] on the State Department's list of foreign terrorist organizations, just over 100 Colombian refugees were resettled in the United States last year.

Colombian refugees are particularly a population in need. Safe return to Colombia is not possible at this point and integration in nearby countries is difficult to achieve. Colombian refugees have difficulty accessing basic services in countries of first asylum, such as Ecuador, Costa Rica, and Venezuela, and often face discrimination. Resettlement is the only option for many of these refugees. Disturbingly, the United Nations High Commissioner for Refugees (UNHCR) has stopped referring the large majority of Colombian cases to the U.S. State Department because of the material support bar.

**Impact of the Material Support Provision on the U.S. Refugee Program**

Mr. Chairman, this issue has had a profound impact on the U.S. refugee program and its ability to provide protection to vulnerable refugees. During 2006, as many as 12,000 refugees who were otherwise eligible were not admitted to the program because of the material support bar. Many other cases were delayed in entering the United States because of a lack of a waiver process, including the Burmese, Bhutanese, and Chin in Malaysia. It is expected that this bar could have a profound impact upon Iraqis fleeing violence in Iraq.



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Since September 11, 2001, the United States has resettled, on average, 25 percent less refugees per year. With the enactment of the material support bar, that average has dipped even further. In 2006, the U.S. refugee program resettled only 41,276 refugees and this year approximately the same number of refugees are expected to be resettled, despite a presidential ceiling of 70,000.

**Administration Interpretation and Implementation of Material Support Bar**
Mr. Chairman, these are a few examples of the injustice that has occurred because of the material support provisions of U.S. law. For the past several years, attempts have been made to correct these provisions so as to permit bona fide refugees entrance into the United States, but progress on this front has been slow, at best. The administration has made several announcements regarding waivers for certain refugee groups, but the results of these announcements in terms of increased resettlement of these groups have yet to be realized.

For example, in January 2007, the Administration announced its intention to grant a series of waivers to individuals who had provided material support to several groups, including the Chin National League for Democracy, the Karenni National Progressive Party, and the Cuban Alzados. While these waivers are encouraging, their implementation has been slow and has not served to expedite the processing of affected refugees. About 3,000 refugees have been admitted to the United States pursuant to these waivers. In addition, 442 asylum cases remain on hold, with only 9 waivers for asylees granted.

Part of the problem is the process whereby the Administration has "cleared" the groups being considered for a duress waiver. DHS granted the authority to grant these waivers in April for Tier I and Tier II groups, but to date only those who supported the FARC have been cleared. This is because of intelligence assessments of groups which have taken months, not days, to complete.

It is clear that, despite having a waiver authority, the Administration is not using this authority expeditiously and in time to meet our resettlement goals. Moreover, the Administration has not yet issued or set out procedures for individuals who are in removal proceedings but eligible for a waiver.

**A Solution to the Material Support Issue**
Mr. Chairman, we understand and appreciate the role of Congress in protecting the American public from outside threats, including terrorist attacks. The purposes of the material support provisions are to protect Americans from those who might enter the United States with the intent of harming innocent Americans. In our view, the provisions are overbroad in their meaning and application and have had the unintended effect of harming refugees, asylum-seekers, and others who are themselves fleeing terror and persecution. Surely, this was not the intent of Congress in enacting these provisions. With some changes to the material support provisions, we can rescue bona fide refugees from persecution without inhibiting our ability to prevent terrorist attacks.

Congress must first look at the definitions of "terrorist activity," and "terrorist organization" contained in the USA PATRIOT Act and the READ ID Act of 2005. The PATRIOT Act expanded the definition of terrorist activity to include almost any use of a "weapon" for the purposes of other than "monetary gain." While the U.S. Department of State maintains a list of



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designated terrorist organizations, this expanded definition could extend terrorist activity to any groups that use armed force. This could include groups that seek to overthrow totalitarian regimes and whom the United States has supported in the past. Moreover, the READ ID Act expands the definition to include groups with subgroups that use weapons.

Mr. Chairman, it is clear that the definitions described are overly broad and impact refugees and asylum-seekers which may have supported groups seeking to overthrow brutal regimes, such as the Cuban government and the Burmese military junta. Congress should revise these definitions to exclude groups that are no threat to the United States and do not meet the criteria for designation as foreign terrorist organizations.

Further, the Administration has interpreted the material support provisions as not including a duress exception. In other words, any support given to a terrorist organization does not have to be voluntary in order for an individual to be barred from entry. In many cases, refugees are forced at gun point or through threat of their lives to provide support to a rebel group or some other organized group. This has prohibited thousands of refugees who are victims of terror from receiving protection in our country.

To their credit, the Administration is beginning the process of issuing waivers for certain cases of duress, but, as mentioned, the process is slow. We urge Congress, at a minimum, to address this issue and enact a duress exception to the statute.

Mr. Chairman, the Senate's recent adoption of language in the Foreign Operations Appropriations bill would provide some relief from the material support bar to bona fide refugees. The legislation provides relief to combatants and members of the groups already waived by the Administration, plus those who supported the Hmong and Montagnards. It also expands the waiver authority of the Administration by providing exemptions to combatants and members of groups and ensures continued authority for the Administration to issue duress waivers.

This new language marks a step forward in addressing this critical issue, but is insufficient to solve the problem at hand. It fails to examine the definition of terrorist activity or terrorist organization nor does it provide a statutory duress exception, leaving these judgments to the Executive branch. We will continue to monitor the actions of the Administration in admitting bona fide refugees and work to improve this language in the future, if necessary.

**Conclusion**

Mr. Chairman, the issue of material support has seriously undermined the effectiveness of the U.S. refugee protection regime in offering safe haven to persons who flee terror and persecution in our world. We need not shrink from our responsibilities to the world's refugees in order to obtain security for the American public. Indeed, refugees and asylum-seekers share a similar experience with our country as victims of terror.

We urge you to correct the unintended consequences of the material support bar and amend it so that bona fide refugees may have access to a new future in our country.



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WORLD RELIEF

**Statement on the Impact of Material Support and Terrorism-Related Bars on Refugees and Asylum-seekers**

**September 19, 2007**

World Relief is the humanitarian arm of the National Association of Evangelicals that works with, for and from the Church to relieve human suffering, poverty and hunger worldwide in the name of Jesus Christ. Every year, World Relief and our network of church-based volunteers in 24 affiliate offices throughout the United States help thousands of refugees fleeing persecution and war in their homelands to transition to American life.

The United States has been a leader in refugee resettlement for over 25 years, providing refuge to those who often cannot return to their homes or locally integrate in their country of asylum. Refugee resettlement has been used as a key durable solution to allow refugees who often find themselves in protracted situations or stuck in camps for long periods of time to start anew in the United States. The U.S. refugee resettlement experience is rich with a history of accepting large numbers of refugees to our shores at times of heightened political world conflict.

In recent years since September 11, 2001, the refugee admissions program has admitted far fewer numbers than the annual ceiling set by the President at the beginning of every fiscal year. The ceiling has consistently stayed at 70,000 even though there is a much greater need. Despite this ceiling, the annual admission since 2002 has averaged 40,698 refugees per year. One of the more recent challenges to the refugee program has been the impact of the material support and terrorism-related bars to admission for many refugees and asylum-seekers due to the expansion in the definitions of terrorist activity and terrorist organization in the USA PATRIOT Act of 2001 and the REAL ID Act of 2005.

The material support bar shut out large numbers of refugees from the U.S. resettlement program including Burmese and Colombian refugees in greatest number since 2005, despite that fact that these refugee groups were specifically identified as groups in need of resettlement by the Department of State in their Report to Congress for Fiscal Year 2006. The Administration used its discretionary waiver authority in May 2006 to allow Burmese refugees from the Tham Hin refugee camp in Thailand who gave material support to certain pro-democracy groups to be admissible to the United States. The Administration continued to issue waivers based on group designation and eventually expanded the waiver to cover not just refugees overseas applying for admission to the U.S. but also those refugees who had already arrived and were adjusting status for green cards or eventual citizenship.

**Problems with the Waiver Process**
The waiver process, however, has been overly burdensome and has added additional bureaucratic steps to processing refugees when security-related provisions to keep the country safe are already in place to exclude refugees who would be inadmissible to the United States. For example, anyone who has ever engaged in terrorist activities, espoused terrorism, incited terrorism, received military training from a designated terrorist organization, solicited others to join a designated terrorist organization, associated with, joined or represented a designated terrorist organization, or provided any sort of material support – no matter how minimum – to a terrorist organization are barred entry to the United States. The current definitions of terrorist organization and terrorist activity are so broad, however, that the nature of the conflict in which one engages in "terrorist activity" or even the circumstances under which material support is given to a terrorist organization are not taken into consideration. Thus, refugees who apply to come to the United States and do not pose a national security threat are swept up in a waiver process in order to be admissible to the United States.

The overly broad definitions of terrorist organization and terrorist activity have inherently functioned to designate a refugee who has engaged in terrorist activity as a terrorist because he/she was forced to provide material support under duress or was a member of group that within a common law understanding of terrorism is not a terrorist organization. This is a troubling predicament for refugees who already face grave protection concerns on the ground. Refugees are often harassed and detained because their government does not agree with their political opinion or face persecution based on their ethnic or religious background. The United States labeling these refugees as terrorists gives these repressive governments further substance to justify persecution against "terrorists" on their land. Resettlement to a third country may also prove to be unworkable as other countries are unwilling to accept refugees the United States has rejected on terrorism-related grounds.

The waivers that have been issued thus far have also taken extremely long to produce. The waiver for Burmese refugees in the Tham Hin refugee camp, which was the first group to be issued a waiver, was issued after 7 months of interagency negotiations that required consultation by the Secretaries of State, Homeland Security, and the Attorney General. The current waiver authority is also extremely narrow in scope as former members/combatants of pro-democracy groups are inadmissible to the U.S. and are ineligible for a waiver. This has caused the needless separation of families as certain individuals who bravely resisted tyrannical regimes are now statutorily unable to come to the United States while other members of their family have been waived in and are now in the United States.

**Protection problems on the ground**
The United States is the world's leader in refugee resettlement. The United States resettles the greatest numbers of refugees compared to all other resettlement countries combined. This historic commitment to be a leader in providing resettlement as a durable solution is key to the operations of the United Nations High Commissioner for Refugees (UNHCR) that refers large numbers of cases to the U.S. refugee resettlement program.



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The time-consuming nature of the waiver process, as well as its unpredictability in the past year, led to significant protection concerns on the ground. Many refugees that would have been referred to the U.S. resettlement program were often pulled from the program and referred to other resettlement countries. Many of these other resettlement countries, however, do not resettle refugees in the great numbers the United States has committed to every year. Given the time-consuming nature of issuing waivers, in January 2006, the UNHCR office in Malaysia suspended all referrals to the U.S. resettlement program. We received reports after this suspension that approximately 25 Burmese Chin refugees were detained and sent into the hands of human traffickers.

While the issuance of waivers by the Administration has ameliorated some of the protection concerns that initially arose from large numbers of refugees being barred from the U.S. resettlement program, the unpredictability of the process means future groups of refugees that have not been issued a waiver will have to undergo the same time-consuming, interagency process to be processed to the U.S., increasing their vulnerability on the ground. In addition, because the waiver authority is completely discretionary, there is no mechanism for reviewing the governments' decisions to not issue waivers in particular cases.

**Duress Claims**

Secretary Chertoff announced on April 27th 2007 that the Department of Homeland Security will consider duress claims of individuals who have provided material support to Tier I and Tier II terrorist groups. In doing so, the Administration recognized that it does not make sense to deny the victims of the groups which the U.S. has designated to be the worst terrorists in the world from the opportunity to prove that their "support" was provided under duress.

However, on May 10th 2007, the U.S. Citizenship and Immigration Services issued a Fact Sheet on the April 27 Memorandum, which stated: "The Department of Homeland Security will identify those designated terrorist organizations that may be included for consideration in this exercise of authority, and the exemption authority will be exercised only with respect to applicants who provided material support under duress to one of those organizations."

The Administration to this date has not issued a single waiver for material support provided under duress to a Tier I or Tier II organization. Some of the most egregious cases of persecution that are currently being denied admission to the U.S. include a Colombian man who was forced to the pay the ransom for his father who had been kidnapped by the Revolutionary Armed Forces of Colombia (FARC). After receiving death threats, this refugee family fled to Costa Rica and then to Spain where they were referred to the U.S. resettlement program. The material support they provided under duress to the FARC constituted material support and they are currently barred from admission to the United States.



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**Refugee Groups of concern**
Burma has been ruled by a military dictatorship since 1962 and the military regime has been widely known to target religious and ethnic minorities. Mass political oppression by the Burmese government in 1988 led to an exodus of Burmese refugees to Malaysia, Thailand, and India. There are now over 150,000 Burmese refugees living in 8 refugee camps along the Thai-Burma border. The Department of State declared in October 2005 that large groups of Burmese refugees would start to be processed to come to the United States. After the initial processing of this refugee population began, up to 60% of the refugees were barred for giving material support to pro-democracy groups that were protecting ethnic minority groups from attacks by the Burmese military junta. The Secretary of State in May 2006 was able to exercise the waiver authority available and deemed the material support bar as inapplicable to certain Burmese pro-democracy groups.

There still remains, however, dozens of former members/combatants of pro-democracy groups who are still barred from admission to the United States. Many of these former members and combatants who are still residing in the Tham Hin refugee camp in Thailand are the fathers and brothers of families that have already arrived to the United States. Families are the foundational units through which our society functions. Legislation must be immediately passed so the Secretary of State can have the full authority to waive in members of pro-democracy groups who bravely resisted the Burmese military regime and are not a threat to national security.

**The Domestic Aspect/Asylum**
Hundreds of refugees who have already passed security checks to arrive to the United States are now being placed on hold by the material support and terrorism-related bars in their applications for adjustment of status and citizenship in the United States. These refugees had already been cleared overseas by the Department of Homeland Security to come to the United States but are now being placed on hold and unable to fully move forward in the process to becoming integrated residents of the United States.

There are also over 400 asylum cases on hold that merit a material support waiver. The waiver process has had minimal benefit on asylum-seekers who are not traditionally from the countries for which refugee group waivers have been issued. For example, a large number of cases that have been resettled through the U.S. refugee program in the past few years have come from Vietnam, Somalia, or the former Soviet Union. Asylum-seekers however come from a myriad of countries like China, Guatemala, or Morocco. Thus, the process by which asylum-seekers can qualify and be issued a waiver in the first place is still unclear.

**Support for Legislation**
While the Administration has made some significant progress in issuing waivers to groups of refugees and individuals, legislation is urgently needed to address this on-going dilemma in a comprehensive manner that would allow for a quick, efficient, and transparent processing of refugee and asylum applications without further bureaucratic delays.



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Thus, World Relief supports legislation that would include the following:

1) expanded waiver authority of the Administration so former members/combatants of pro-democracy groups can be waived in
2) a duress exception in the law so those who were forced at threat of death or violence can be admissible to the United States
3) a more narrow definition of terrorist organization/activity so pro-democracy groups that resisted brutal regimes are not classified as terrorist organizations

Rectifying the unintended consequences of the material support and terrorism-related bars is recognizing that safeguarding national security need not come at the expense of the U.S.' long-standing humanitarian commitment to refugees. The United States must continue to maintain leadership in providing a fair and generous refugee program that is reflective of our great history of welcoming those who have fled persecution abroad.

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