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Keywords

Terrorists, Terrorist Organizations, Asylum, Revolutionary Armed Forces of Colombia, Immigration and Nationality Act, Mens rea

MATERIAL SUPPORT TO TERRORISTS OR TERRORIST ORGANIZATIONS: ASYLUM SEEKERS WALKING THE RELIEF TIGHTROPE

By
Craig R. Novak*

INTRODUCTION

In 2000, a thirty-year-old female dentist with an international relief organization prepares for surgery in a tent marked "Hospital." Her patient, a ten-year-old boy, has several infected molars. The hospital is located in the southernmost part of Putumayo, Colombia near the border of Ecuador. The boy squirms in his chair knowing that the needle in the dentist's hand will soon be injecting into his gums. "¡Tranquilo Niño! I have done this many times and you need to be a brave boy!"

Just as she places the needle in the child's mouth, she hears the sound of the tent flap opening. Entering are two easily identifiable members of the Revolutionary Armed Forces of Colombia ("F.A.R.C.") - one of Colombia's most notorious guerilla organizations. With eyes yellowed from jaundice and glazed with hate, they surround the dentist. "I am operating here!" she protests. "Shut-up bitch!" one states as he pulls her surgical cap off, yanks her hair back, and sticks his AK-47 hard into her neck. The other man moves his filthy hands along each surgical instrument. "You will operate on this man and his teeth." With that statement, the man who contaminated the instruments slaps the child out of the chair and sits in it himself. Knowing that any sudden move would be her death, the dentist looks inside the mouth of the guerilla member and begins to work.

Fortunately for the dentist, she was granted asylum before the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("Patriot Act") took effect in 2001, and before the passage of the REAL ID Act in 2005. Had she sought asylum any later, the U.S. government would have barred her from applying. Under the Patriot Act and REAL ID Act, she had committed a terrorist act by giving material support to individuals that she knew belonged to a terrorist organization.

The REAL ID Act provides arcane and widely unknown relief provisions that, in some limited cases, offset the harshness of the act. Relief under the REAL ID Act is tenuous as it can be revoked at any time, and the asylum seeker must navigate its narrow legal path. This is the tightrope. One misstep would bar an asylum application.

Part I of this article will give an overview and the legislative background of the Patriot Act and the REAL ID Act as they apply to asylum seekers. Part II will explore examples of the material support bar and its devastating effect on asylum applicants. Part III will describe the new forms of relief under the REAL ID Act, offer case law defining duress in a criminal and immigration context, and explain the totality of circumstances test. Lastly, part IV presents a practitioner's checklist for those who wish to assist clients with their exemption to the material support bar.

I. OVERVIEW AND LEGISLATIVE HISTORY

THE PATRIOT ACT OF 2001

When American Airlines Flight 11 hit the first tower on September 11, 2001, the legal landscape in the U.S. for asylum seekers, changed forever. Pushed by the Bush administration,¹ Congress, with very little debate,² passed the Patriot Act. The Patriot Act only expanded existing inadmissibility provisions and did not add any new provisions affecting asylum seekers.³ Asylum seekers had already been barred from both asylum and withholding of removal if they had participated in terrorist activities since the 1996 Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Acts ("IIRIRA").⁴ But the lack of new provisions did not mean the Patriot Act had no impact. Expanding the existing anti-terrorism provisions via the Patriot Act broadened the asylum bars not only to terrorists, but also in many cases, to their victims.⁵

Prior to the Patriot Act, the Secretary of State had designated twenty-seven Foreign Terrorist Organizations.⁶ After the passage of the Patriot Act, the Secretary of State Donald Rumsfeld used his authority granted under INA § 219 to designate an additional fifteen Foreign Terrorist Organizations, altogether referred to by the Department of Homeland Security ("DHS") as Tier I. The Patriot Act also authorized the Secretary of State to designate a new class of terrorist organizations under the "Terrorist Exclusion List," otherwise known as Tier II.⁷ Added together, 100 terrorist organizations have been officially identified.⁸

A third terrorist organization category added by the Patriot Act is called the "undesignated category" or Tier III. This is the catch-all of the Patriot Act codified under INA § 212(a)(3)(B)(vi)(III), as the definition of terrorist organizations was expanded to "a group of two or more individuals, whether organized or not, which engages in terrorist activities."⁹ Asylum proponents worry most about this category because the broadly worded provisions are open to a gamut of interpretations. For example, student protesters throwing bricks at government forces to intentionally cause bodily harm, could be considered to have (1) formed a terrorist organization and (2) have committed terrorist acts. These students would be barred from asylum regardless of their persecution claims.¹⁰

Prior to the Patriot Act, in order for an applicant to fall under the inadmissibility provisions for a terrorist activity, material support had to be given with the knowledge that the support was going to a group planning terrorist activity. Under the Patriot Act, the applicant, who gives material support is barred whether or not he had any knowledge that the group was about to commit a terrorist act.¹¹

Congress believed that the PATRIOT Act granted DHS the tools needed to filter terrorists out of the immigration process. In late 2004 however, the Commission on 9/11 released its initial public report and pointed out that asylum was an even bigger portal to terrorists than initially believed.¹² In light of the report, certain members of the House of Representatives Rep. Steve Chabot (R-OH), Rep. John Hostettler (R-IN), Rep. Daniel Lungren (R-CA), Rep. Randy Forbes (R-VA), Rep. Mary Bono (R-CA), Rep. Peter Hoecstra (R-MI), and Rep. Randy Neugenbauer (R-TX), felt that they had the moral authority to slam that portal shut,¹³ culminating in one of the most powerful assaults on asylum in Congress' fifty year history: the REAL ID Act of 2005.

THE REAL ID ACT OF 2005

The REAL ID Act comprised of twenty-nine amendments to the Immigration and Nationality Act ("INA").¹⁴ While most famous for the yet unimplemented requirement that states make driver's license applicants prove their lawful immigration status, the REAL ID Act also changed many asylum elements, such as requiring that race, religion, nationality, membership in a social group, or political opinion, be central to the applicant's persecution claim.¹⁵ In addition, the REAL ID Act established a "totality of the circumstances" test, which requires that the trier of fact base credibility on the applicant's demeanor, candor, responsiveness, and the internal consistency of the applicant's statements.¹⁶ Also of note is the REAL ID's elimination of the writ of habeas corpus from removal proceedings. Lastly, REAL ID added relief to the material support bar under the definitions of terrorist activities, allowing the Secretary of State to waive the asylum bar for particular inadmissibility provisions.

Congress holds the Secretary of DHS accountable for these waivers, and should he activate them, he must report to several House and Senate committees within one week of the waiver, and annually report the number of individuals waived.¹⁷ Considering its harsh nature toward asylum seekers, the idea that the REAL ID Act provides any relief at all seems quite incongruous. Understanding the nature of REAL ID and the tenor of its Congressional sponsors requires an examination of its legislative history. Only then will it be clear why asylum applicants seem to be under such an onerous burden of proof, and why its relief provisions seem almost an oversight.

LEGISLATIVE HISTORY OF THE MATERIAL SUPPORT PROVISIONS

The Chairman of the Judiciary Committee, Representative F. James Sensenbrenner, Jr. (R - WI), pushed for modifying the material support provisions to terrorists because he and other Representatives were concerned that a person who was involved with terrorism could become an asylum applicant. During the Congressional floor debates, Representative John Hostettler (R - IN) stated that the current law misunderstood the real workings

of a terrorist organization because actual terrorists often used humanitarian work projects to fund their "criminal" functions as money is fungible and can go to "bullets ...instead of babies."¹⁸ The legislative debate over REAL ID shows that few of its provisions have unintended consequences.¹⁹

The material support provisions were designed to be an unforgiving filter for asylum seekers.

ELEMENTS OF THE MATERIAL SUPPORT PROVISIONS

The material support bar of the REAL ID Act breaks down into three elements where (1) the applicant knows or should have known (*mens rea*) that (2) the material support the applicant provided (3) was to a terrorist organization. Due to the previous discussion defining terrorist organizations, only the first and second elements of the material support bar will be presented in detail.

MENS REA

The *mens rea* standard for knowing has gone through several iterations as it applies to the material support provisions. Prior to REAL ID, individuals had to have known or should have known that the material support that they gave furthered the goals of the terrorist organization.²⁰ Under REAL ID, the *mens rea* standard is much stricter. If an individual knows or should *reasonably* know that they are giving support to a terrorist organization, then the individual meets the *mens rea* requirement and is barred from applying for asylum.

Intent is not part of the current *mens rea* requirement.²¹ It does not matter whether or not the individual gives material support with the intent to aid the organization or to harm others. Additionally, the individual does not have to give material support willingly. Even if an individual merely acquiesces to a guerilla organization under threat of harm, the *mens rea* requirement has been met because the individual gave material support knowing that it was aiding a terrorist organization.

The *Matter of S-K* shows the resolve of the Board of Immigration Appeals ("BIA") to enforce the *mens rea* standard strictly and literally. In *S-K*, an ethnic Chin woman provided money and supplies to the Chin National Front, who was protecting an ethnic group from the malicious assaults of the Burmese military junta. She was found credible, but was denied asylum because she knowingly supported a group who engaged in armed resistance.²² *S-K* is continuing to impact the immigration community because the *mens rea* standard seems almost unassailable, even for "freedom fighters," or rebels against governments unrecognized by the United States.²³ Attacks on the *mens rea* standard have often differentiated those asylum applicants who have given material support knowingly but not willingly. Immigration judges and the BIA have struck down many such attacks post-Patriot Act, denying asylum to thousands of individuals who were forced to provide material support to terrorist organizations.²⁴

If an individual knows or should reasonably know that they are giving support to a terrorist organization, then the individual meets the mens rea requirement and is barred from applying for asylum.

DEFINITION OF MATERIAL SUPPORT

The INA defines material support as a “safe transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification [and] weapons.” The Third Circuit Court of Appeals believes these are suggestions and not the entire spectrum of possibilities.²⁵ The BIA uses a “de minimis contributions” standard for examining cases of material support:²⁶ offering of food, arranging shelter for militants,²⁷ facilitating phone calls,²⁸ even providing a glass of water, are all bars to asylum.²⁹ By the BIA’s own admission, the statute is breath-taking in its scope.³⁰ Consequently, in *Cheema v. Ashcroft*, the Ninth Circuit limited the BIA’s broad definition of material support activities holding that where “not a scrap of evidence” shows that the aid recipients had anything to do with terrorism, the United States cannot impose the material support bar.³¹

II. THE IMPACT OF THE MATERIAL SUPPORT PROVISION TO ASYLUM SEEKERS

Though there is no proof that the material support provisions had an overall impact on the asylum process, the total number of U.S. asylum cases dropped by 41.51% in the years 2001 to 2005.³² Additionally, the number of asylum grants dropped by 11.95% in the years 2003 to 2005.³³ As of 2006, the United States had only allowed 26,113 asylees to enter.³⁴

But the statistics showing the impact on specific nations, demonstrate that Congress had wielded an effective tool with the material provisions bar.³⁵ Colombia was hit particularly hard, seeing a 32.14% drop in asylum grants (from 4,368 to 2,964) since REAL ID.³⁶ Responding to the prolonged civil war, and the surge of refugees crossing into Ecuador, the United Nations High Commissioner for Refugees (“UNHCR”) began trying in 2001 to resettle Colombians in the United States.³⁷ Starting with an initial referral group of 288 refugees in 2003, the number dwindled to thirty-five and then to nothing, when the United States began indefinitely deferring any Colombians who raised material support issues.³⁸ UNHCR believes that 70 to 80% of these Colombian refugees would be barred under the material support provisions.³⁹

The material support provision has barred people of many other nationalities, including a Sri Lankan man kidnapped by guerrillas and forced to pay them ransom from his entire life savings; a Liberian woman, whose captors killed her father, gang-raped her multiple times, and forced her to wash their clothes;⁴⁰ and a Nepalese man beaten by a gang of Maoist rebels, who surrendered all of his money and fled to the United States when he was told that the gang would come again. His case has languished in review since his 2002 application was submitted.⁴¹

The negative impact of the material support bar to asylees is not without its critics. After interviewing dozens of Colombians barred from asylum and living under oppressive circumstances in Ecuador, the Georgetown Law Center for Human Rights Fact-Finding Investigation made recommendations to Congress that the material support bar should be amended to allow exceptions for involuntary provisions, mistaken compliance, and insignificant support to terrorist organizations.⁴² Lifting the bar for these exceptions would allow the U.S. to regain balance between protecting the safety of its citizens and being the humanitarian nation that it so claims to be.

THE GUIDE TO THE RELIEF PROVISIONS: HOW TO WALK THE TIGHTROPE

Regardless of the reasons, relief has come to some asylum applicants. Michael Chertoff, Secretary of Homeland Security, used his authority granted under the relief provisions of the REAL ID Act, to create some exemption from the material support bar in five memorandums in 2007.⁴³ While some asylum seekers may benefit from these exemptions, the exemptions are still complicated and narrow.

BURDENS AND EXEMPTIONS UNDER THE MATERIAL SUPPORT BAR

No presumption that an applicant has provided material support to a terrorist organization exists.⁴⁴ Generally, the applicant is the one who will bring up the material support issue either within his asylum affidavit or when answering a question by the asylum officer. Additionally, the Asylum Officer may infer that an applicant encountered a terrorist group because of the location of the applicant’s home. Once the issue of material support is raised, the applicant carries the burden of proving that the organization was not a terrorist organization, that he or she did not know it was a terrorist organization, or that he or she is entitled to the material support relief.

Currently, there are only three categories of applicants eligible for material support relief:

- (1) Applicants who provided material support to *only* designated groups with no conditions;⁴⁵
- (2) Applicants who provided material support to Tier III (undesignated terrorist organizations)⁴⁶ on the condition that (1) the applicants supplied the material support under duress and (2) applications are validated by the “totality of the circumstances” test;
- (3) Applicants who provided material support to specified Tier I and Tier II Terrorist Organizations (currently only applicable to F.A.R.C.) on the condition that (1) the applicants supplied the material support under duress and (2) applications are validated by the “totality of the circumstances” test.⁴⁷

CONDITION 1: THE DURESS EXEMPTION⁴⁸

Asylum applicants prove duress when they show that they had no or very little choice in providing material support to a terrorist organization because they would face serious, life-threatening circumstances, if they did not comply.

DHS field officers observe the following factors to determine whether an applicant will receive a duress exemption:

- The extent to which the applicant reasonably could have avoided or took steps to avoid, providing material support
- The severity and type of harm inflicted or threatened
- The person to whom the harm or threat of harm was directed

- The perceived imminence of the harm threatened
- The perceived likelihood that the threatened harm would be inflicted
- Any other relevant factor regarding the circumstances under which the applicant felt compelled to provide the material support.⁴⁹

While not involving an immigration cause of action, the case of *United States v. Contento-Pachon*, provides guidance for the workings of a duress defense. Here, the Ninth Circuit, determined whether a Colombian citizen had a duress defense for narcotics trafficking. The court noted that proving duress requires, a) immediate threat of death or serious bodily injury; b) a well-grounded fear that the threat will be carried out; and, c) no reasonable opportunity to escape the threat.⁵⁰

In the Third Circuit case, *Arias v. Gonzales*, a fish farm manager who, with his family, was being threatened by the F.A.R.C., offered a duress defense to a material support charge.⁵¹ The manager stated that he made “war payments” to the F.A.R.C., but also that he was making good money at the farm, and “doing well there.”⁵² The court found that the nature of the manager’s payments disproved any duress factors as it seemed that the manager paid F.A.R.C. voluntarily because he enjoyed his lifestyle.⁵³

CONDITION 2: THE TOTALITY OF THE CIRCUMSTANCES TEST

Once DHS determines that the applicant has met the initial duress burden, it then applies the “totality of the circumstances” test. Generally, a court applies this test by balancing all the inferences involved in the suspicious conduct. Similarly, DHS advises its field officers to weigh factors such as the amount and type of material support the applicant provided, the frequency of material support provided, and the nature of the terrorist activities committed by the terrorist organization.⁵⁴ For instance, a comprehensive analysis of how the totality of the circumstances operates in an immigration (denaturalization) context, occurs in *Breyer v. Ashcroft*. In this case, the Third Circuit determined that a former World War II German soldier, who was actually a U.S. citizen, did not forsake his citizenship when becoming a member of the SS Corps.⁵⁵ The key issue was whether the soldier acted voluntarily in joining the *Totenkopf Sturmabteilung* (Death’s Head Battalion) at Auschwitz.⁵⁶ The court weighed the positive factors of the soldier trying to get leave every weekend, and his refusing to be tattooed with the SS mark, against the negative factors such as his reporting for his initial SS training, even though a politician volunteered to secure his release from the service.⁵⁷

The “totality of the circumstances” test should be of concern to the immigration law practitioner because an adverse finding here will eliminate even a worthy applicant who can prove duress in giving material support.

III. PRACTITIONER’S GUIDE TO MATERIAL SUPPORT RELIEF

Little, if any, aid exists to help the practitioner navigate this brave new world of material support relief. The goal of this checklist is to assist the practitioner in walking the tightrope of

the REAL ID waivers and to point out some of the hazards that exist along the way. It will help the practitioner to frame the approaches to their asylum applicant’s material support exemptions that would constitute a material support exemption for an asylum applicant.

The basic elements of an asylum claim have not changed. An applicant still has the burden of proof that one of the five protected areas (race, religion, nationality, political opinion, membership in a social group) is central to the persecution claim, and that the applicant filed a claim within one year of arrival. Practitioners should remember that Congress is guarded against the asylum system. Practitioners should also heed Michael Chertoff’s warning on each of these exemptions, that he may revoke the waiver at his discretion. In order to encourage use of the relief exemptions, practitioners can start by presenting DHS officers with asylum cases that directly fall under the exemption, gradually letting DHS and Congress know that those seeking the relief are not a danger to the nation.

**CHECKLIST:
INITIAL STEPS IN FRAMING YOUR STRATEGY**

1. Does your client even need to consider the material support exemption?

a. Has the client given any aid to anyone who may be considered a terrorist or belongs to a terrorist group?

i. Consider whether the client has *ever* had any contact with any non-government groups that are on the State Department terrorist lists or could be considered terrorist organizations.

ii. The key point is “knowing or should have known” that (a) the client has given any aid and that (b) aid was given to a terrorist organization. If the client is not sure on these issues, the attorney should continue down the checklist.

1. Question the client about giving any aid to anyone that they remotely consider to be dangerous as a potential refresher of his or her memory.

a. Check both the Foreign Terrorist Organization List and the Terrorist Exclusion List available at the U.S. Department of State. See if the client is familiar with any of these names, and if so, the circumstance under which he or she is familiar.

2. Note that cases where the clients are not sure that they have given material support to a terrorist organization are fairly rare. Most clients are quite clear with whom they were dealing.

3. Remember that material support is de minimis:

- A cup of coffee, a glass of water, spare coins
 - Food, shelter, repairs
4. The mens rea requirement is *knowing or should have known*:
- Even if client believes that his or her help will not further the terrorists' criminal activities, this does not exempt him or her from the material support bar.

iii. Listen for the DHS "buzz words" in your client's story.

1. DHS advised its field officers to watch for these words in an asylum interview.⁵⁸

Ie. Ransom, War Tax, Slave, Force, Threat
Extortion, Fighter, Militant, Soldier, Rebel

2. If, during your client conversations, he or she uses any of these phrases, it should alert the attorney to a potential material support issue.

b. Research the location where the client claims persecution.

i. Many of the Tier I and Tier II terrorist organizations have information available online. Many of the terrorist organizations have specific uniforms, and areas of geographic operations. If your client lived outside of these areas, it will bolster his or her case, disproving any claims of material support if the attorney can provide the material support showing the distance between the client and the active terrorist groups in his or her geographic area.

ii. Removing doubt from the Asylum Officer's or Immigration Judge's mind requires proof contrary to the presumption that the client, if living in certain areas, encountered terrorist groups. Enlist the client's help in proving lack of encounters:

1. Factors such as:

a. Education:

i. Most educated people do not live in rural areas, where some terrorist groups are known to operate

b. Profession:

i. Some professions, such as economists, would rarely encounter terrorist organizations

c. Family:

i. Some cultures forbid women from talking to strangers.

c. Explore with the client any suspicion that you believe will raise security concerns about your client being a

danger to the United States.

i. DHS examines all asylum applicant cases to see whether they are a danger to the nation, regardless of whether the material support issue exists. Should DHS have any doubts regarding the client being a danger, the client will lose his or her opportunity to apply for either asylum or the material support relief. Some clients do not realize that their activities, which may be only directed towards some group not associated with the United States, will be considered participating in terrorist activities and a danger to the United States.

ii. The best approach is a comprehensive interview with the client asking about his or her associations, spouse's affiliations, and any activities that could possibly flag the client.

THE MATERIAL SUPPORT RELIEF PROCESS

2. Use this stage when it is fairly certain that the client provided material support to a terrorist organization.

a. Identify the organization:

i. No Duress Exemption Required:

- Karen National Union/Karen National Liberation Army ("KNU/KNLA")
- Chin National Front/Chin National Army ("CNF/CNA") Chi National League for Democracy ("CNLD")
- Kayan New Land Party ("KNLP")
- Arakan Liberation Party ("ALP")
- Tibetan Mustangs
- Cuban Alzados
- Karenni National Progressive Party ("KNPP").

1. If the client gave material support to any of these organizations, then the attorney may go directly to step 3.

ii. Duress Exemption Will be Required:

1. TIER I/II Terrorist Organizations:

a. F.A.R.C.

i. This is the only terrorist organization allowed an exemption.

2. TIER III Undesignated Organizations:

a. Organizations that could be considered terrorists under INA §212(a)(3)(B)(iv)(vi)(III).

iii. No Material Support Exemption Available:

1. Any organization not mentioned above:

- a. As of writing, the client is barred from applying for asylum
- b. This stage may end the client's asylum

journey if he or she has knowingly given material support to a non-exempted terrorist organization.

b. Full Disclosure Required:

- i. Should the attorney believe that the client qualifies for the material support exemption, DHS requires that any submission for this relief must be accompanied by a full and complete disclosure of “the nature and circumstances of each provision of material support.”⁵⁹
- ii. Attorney should assist the client in documenting the circumstances.

c. Begin Duress Analysis:

- i. Duress involves these three factors:
 - 1. Imminent threat of death or serious bodily injury
 - 2. A well-grounded fear that the threat will be carried out
 - 3. No reasonable opportunity to escape the threatened harm
- ii. The client must give a detailed explanation as to what occurred, involving all three factors:
 - 1. The client’s story must be consistent, plausible and believable.
 - 2. Details that bring the Asylum Officer or Immigration Judge into the picture are crucial to the duress analysis:
 - a. Ask the basic “who, what, when, where and why” questions.
 - b. Have the client give his story using the detailed facts:
 - i. For example: “In December 2006, my wife, children, and I were having our standard lunch of boiled chicken and peanuts when these armed men stormed into our house and held their rifle against my daughter’s head. They said that if we didn’t give them the chickens that we kept in our farm, they would kill my daughter and take my sons into their group.”
 - ii. Here, there is a threat to a life that seems imminent, by people who look as if they would carry it out if the client did not comply. Additionally, the client and his family were detained by threat of force, and there was no reasonable avenue of escape. This small story meets all of the duress elements.
- iii. In instances where the client gives material support over a longer period, such as a farmer in a guerilla infested area where he is paying “war taxes” monthly, the client will need to show why he or she did not try to escape or remove himself or herself from the danger.

1. For example:

- a. Guerillas surrounded the area and thus, the family could not exit
- b. Natural barriers such as high water rivers during the monsoon season existed
- c. Lack of transportation

d. Begin Totality of the Circumstances Analysis:

- i. .DHS has the discretion to deny the material support relief simply because it does not find that the client’s duress justifies the exemption.
- ii. At this writing, two factors will quickly eliminate the client as a potential asylee:
 - 1. DHS believes that the client gave material support voluntarily:
 - For example: the terrorists only collected their fees by mail and the client never encountered the group directly.
 - 2. DHS believes that the client, because of the duration of support given, was receiving benefits from the relationship with the terrorist organization instead of simply cooperating to protect his or her life, limb, and property. In *Arias v. Gonzales*, the client continued to pay the F.A.R.C. because “the money was good” where he was working.
- iii. When the practitioner is confident that the elements in the checklist are well documented, he or she must then submit an I-589 Form, and specifically claim the material support exemption, if it is warranted.

CONCLUSION

Denied by the thousands, individuals who applied for asylum after the passage of the PATRIOT Act and REAL ID Act up to early 2007, faced a Congressional majority convinced that this group of worthy beneficiaries was a dangerous threat to the United States. As a nation, the United States had “strained out the gnat, yet swallowed the camel.”⁶⁰ Providentially, in the very legislation that denies asylum to so many, a paragraph that presents some hope exists. Obtaining this relief is a precarious balancing act, and any misstep will destroy the applicant’s chance of entry. Representation is crucial to help those who are not terrorists but are indeed terrorized, gain access to this narrow exemption. Only then, can asylum seekers walk the tightrope.

ENDNOTES

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¹ Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505, 505 (2002).

² *Id.* at 505-06.

³ *Id.* at 506.

⁴ *Id.*

⁵ *Id.*

⁶ Germain, *supra* note 1, at 515.

⁷ See generally Real ID Act, 8 U.S.C. § 1182 (2005) (stating that Tier I terrorists are the groups most likely to disrupt the United States, while Tier II terrorists are less threatening to the country).

⁸ U.S. Dep't of Homeland Security, U.S. Citizenship & Immigr. Servs., Office of Communications, Fact Sheet (May 10, 2007), <http://www.uscis.gov/files/pressrelease/Sec212Authority051007.pdf> (illustrating the Terrorist Organization Tier designations).

⁹ Real ID Act, 8 U.S.C. § 1182 (2005) (describing the terrorist organizations identified as a threat to the United States government).

¹⁰ R. Brent Wisner, *Shifting Borders: Immigration, Refugee and Asylum Matters and Public Policy: Asylum Denied: Seeking Asylum in the Age of Terrorism Interview with Bill Frelick, Human Rights Watch*, 12 GEO. PUB. POL'Y REV. 21, 23 (2007); See also Barbara Hines, *An Overview of U.S. Immigration Law and Policy Since 9/11*, 12 TEX. HISP. J. L. & POL'Y 9, 12 (2006) (discussing where an African National Congress anti-apartheid activities would ban members under the PATRIOT Act).

¹¹ Germain, *supra* note 1, at 518-19.

¹² 151 Cong. Rec. H453, 1-2, 21 (daily ed. Feb. 9, 2005) (statements of Rep. Sensenbrenner, Rep. Norton).

¹³ *Id.* at 2, 11 (statements of Rep. Sensenbrenner, Rep. Pence).

¹⁴ Ira J. Kurzban, *Immigration Law Sourcebook: A Comprehensive Outline and Reference Tool*, 13 Am. Immigr. Law Found., 20-23 (10th Ed. 2006).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 151 Cong. Rec. H453, *supra* at note 12 (statement of Rep. Hostettler).

¹⁹ Representatives opposed to the REAL-ID asylum provisions believed that a less draconian immigration law could be passed without diminishing National Security. See *Cheema v. Ashcroft*, 383 F.3d 848, 458-60 (9th Cir. 2004) (pointing out the comments by Rep. Shiela Jackson-Lee, "[w]hat about the Cubans? What about the Haitians, the Liberians, the Sudanese, the Bosnians? What about those fleeing, as my colleague has indicated our Jewish individuals who were fleeing persecution? I simply say that we have a better way of doing this").

²⁰ *Id.* at 854-57.

²¹ See *In Re S-K*, 23 I. & N. Dec. 936 Interim Decision 3534, 943-44 (BIA 2006) (discussing an alien's making of a donation to a terrorist organization, and not elaborating the mens rea for that intent).

²² Wisner, *supra* note 10, at 24.

²³ *Id.* at 938-39.

²⁴ *Id.*

²⁵ *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298 (3d Cir. 2004) (explaining that no language in the statute limits 'material support' to the enumerated examples in the statute).

²⁶ Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law*, 10769 Practising Law Inst. 217, 235 (2007).

²⁷ *Singh-Kaur*, 385 F.3d at 296.

²⁸ *Cheema*, 383 F.3d at 854.

²⁹ Wisner, *supra* note 10, at 24.

³⁰ *Id.*

³¹ *Cheema*, 383 F.3d at 856.

³² DAVID A. MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY 91 (West 2007).

³³ U.S. Dep't of Homeland Security, Office of Immigr. Statistics, Policy Directorate, Annual Flow Report May 2007: Refugees and Asylees: 2006, May 2007, http://www.dhs.gov/xlibrary/assets/statistics/publications/Refugee_AsyleeSec508Compliant.pdf. (showing that both the number of immigrants applying for asylum and the government's granting of those asylum cases actually presented, have dropped).

³⁴ *Id.* at 1.

³⁵ *Id.* at 4.

³⁶ *Id.*

³⁷ Mark Fleming ed. et AL., *Unintended Consequences: Refugee Victims of the War on Terror*, 37 GEO. J. INT'L 759, 763-78 (2006).

³⁸ *Id.* at 774.

³⁹ *Id.* at 767.

⁴⁰ *Id.* at 780.

⁴¹ *Id.* at 784.

⁴² *Id.* at 765.

⁴³ U.S. Dep't of Homeland Security, U.S. Citizenship & Immigr. Servs., Office of Commc'ns, Factsheet, USCIS Implements Authority to Exempt Certain Persons Who Provided Material Support Under Duress to the Revolutionary Armed Forces of Colombia (F.A.R.C.) (Sept. 26, 2007), http://www.uscis.gov/files/pressrelease/MaterialSupportFS_26Sep07.pdf.

⁴⁴ U.S. Dep't of Homeland Security, Office of Director, U.S. Citizenship & Immigr. Svs. Interoffice Memorandum, Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations (May 24, 2007), http://www.uscis.gov/files/pressrelease/MaterialSupport_24May07.pdf.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 F.R. 26,138, 26,138-02 (May 8, 2007) (Stating that applicants must prove that the material support that they gave to the terrorist organizations be made under duress).

⁴⁹ U.S. Dep't of Homeland Security, U.S. Citizenship & Immigr. Servs., Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations (May 24, 2007), http://www.uscis.gov/files/pressrelease/MaterialSupport_24May07.pdf.

⁵⁰ *United States v. Contento-Pachon*, 723 F.2d 691, 693 (9th Cir. 1984) (stating that there was sufficient evidence of duress to present a triable issue of fact when the defendant's life and family's lives were threatened if defendant did not transport narcotics).

⁵¹ *Arias v. Gonzales*, 143 F. App'x 464, 467 (3d Cir. 2005) (stating that Arias was not threatened to make payments to FARC, therefore the duress defense was unsupported).

⁵² *Id.*

⁵³ *Id.* at 468.

⁵⁴ WAS Interoffice Memorandum, *supra* note 44, at 5

⁵⁵ *Breyer v. Ashcroft*, 350 F.3d 327, 328-31 (3d Cir. 2003) (the court discussing, after looking at the totality of the circumstances, that Breyer did not want to be a Nazi soldier, although he refused, and was obligated to stay for the duration of the war, whether he voluntarily enlisted or not).

⁵⁶ *Id.* at 335-35.

⁵⁷ *Id.* at 336-38.

⁵⁸ Interoffice Memorandum, *supra* note 44, at 6.

⁵⁹ Exercise of Authority, *supra* note 48, at 26138-01.

⁶⁰ *Matthew 23:24* (New American Standard Bible) (statement by Jesus Christ to the Pharisees criticizing their hypocrisy and their willful disregard of the Law's (Torah) provisions of justice and mercy).