NOTES AND COMMENTS

TERROR FIRMA: THE UNYIELDING TERRORISM BAR IN THE IMMIGRATION AND NATIONALITY ACT

by
Scott Aldworth[*]

The terrorism bar casts a long shadow in the Immigration and Nationality Act (INA). If it applies to a non-citizen, that person is ineligible for essentially any form of immigration relief. The bar casts an equally broad net, sweeping in any person who was a member of—or has provided support to—a group that engaged in any kind of armed resistance deemed unlawful by its government. The terrorism bar does not allow an adjudicator to take into account the goals of the group, any alliance it has with the United States, or the level of involvement of the individual. As a result, thousands of non-citizens have been denied immigration benefits and the protection of the United States asylum laws because they participated in or supported a group that resisted some of the most corrupt and repressive regimes in the world. As the terrorism bar is currently written, the United States troops in Iraq and Afghanistan are considered members of a terrorist organization. In spite of this, the immigration agencies and the judiciary have followed a literal application of the statute.

This Comment argues that the terrorism bar operates in violation of international law and the United States's obligation to provide a safe harbor for refugees. Because of this and other canons of statutory construction, courts should interpret the statute narrowly to require a showing that there are reasonable grounds for regarding the non-citizen as a danger to national security. However, because courts have refused to interpret the statute appropriately, this Comment argues that the most

[*] J.D. Candidate 2011, Lewis & Clark Law School; B.A., History, University of California, Los Angeles. I would like to thank Professor Juliet Stumpf, Immigration Judge Michael H. Bennett, and Sarah Koteen Barr for nurturing my interest in Immigration Law and providing such valuable feedback. Also, thanks to Steph and Lucie for their love, support, and patience. For my brother, Mark, who was always my greatest champion.

practical solution to the problem is for the Attorney General to issue a regulation requiring a narrow interpretation.

I. INTRODUCTION

According to the United States Citizenship and Immigration Service (USCIS), Saman Kareem Ahmad is a terrorist.[1] In 2002 and 2003, he served in the militia for an armed political group that "conducted full-scale armed attacks and helped incite rebellions against" his nation's ruling government.[2] The USCIS did not consider the fact that this group was called the Kurdish Democratic Party (KDP) and that the government it sought to topple was that of Saddam Hussein.[3] It also did not consider it relevant that these attacks occurred in the context of Operation Desert Storm and Operation Iraqi Freedom, in alliance with the United States.[4] The USCIS also did not find it significant that the KDP is now a part of the newly established Iraqi government and that the militia in which Ahmad served has been integrated into the Iraqi army.[5] Finally, the

[1] Karen DeYoung, *Stalwart Service for U.S. in Iraq Is Not Enough to Gain Green Card,* WASH. POST, Mar. 23, 2008, at A01.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

USCIS did not even consider the fact that Ahmad worked as a translator for U.S. forces for four years—service that earned him two medals, commendations from the Secretary of the Navy and then-Major General David H. Petraeus, and an invitation to the White House.[6] In the eyes of the USCIS, Saman Kareem Ahmad is a terrorist.

In 2006, Ahmad entered the United States as part of a special visa program that was aimed at admitting Iraqi and Afghani translators as refugees.[7] Soon after, he was granted political asylum on the basis of the persecution that he had suffered at the hands of Saddam Hussein's regime.[8] However, his application to adjust his status to that of a legal permanent resident was denied by the USCIS.[9] The denial was based on Ahmad's membership in the KDP, whose actions, according to the USCIS, comported with those of an "undesignated terrorist organization" under the Immigration and Nationality Act (INA).[10] As a result, Ahmad was classified as "inadmissible" under section 212(a)(3)(B) of the INA and was therefore ineligible to adjust his status.[11]

The classification of groups such as the KDP as terrorist organizations is a direct result of the INA's overly broad definition of "terrorist activity."[12] Under this definition,

> the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves . . . [t]he use of any . . . explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.[13]

Furthermore, a "terrorist organization" is "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" terrorist activity.[14] As one human rights group has argued, this means that a terrorist organization is "*any* group of two or more people engaged in *any* armed resistance deemed unlawful by their government (no matter how repressive or corrupt that

---

[6] *Id.*

[7] *Id.*; National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1059, 119 Stat. 3136, 3443–44.

[8] DeYoung, *supra* note 1.

[9] *Id.*

[10] *Id.*; Immigration and Nationality Act § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182 (2006).

[11] DeYoung, *supra* note 1; INA § 212(a)(3)(B).

[12] INA § 212(a)(3)(B)(iii).

[13] *Id.*

[14] INA § 212(a)(3)(B)(vi)(III).

government may be)."[15] Indeed, the courts have enforced just such an interpretation and have refused to take into account any mitigating circumstances, such as the goals of the group, any affiliation with the United States, or whether or not one's membership in a so-called "terrorist organization" was forced.[16] The most significant authority for this is the precedent decision of the Board of Immigration Appeals (BIA) in *In re S-K-*, which has led to a strictly literal reading of the statute by immigration courts and federal appellate courts.[17]

This exceedingly broad definition of "terrorist activity" casts a long shadow in immigration law. It renders a person inadmissible and, if they do somehow make it into the United States, ineligible for essentially any form of relief, including adjustment of status and asylum.[18] Additionally, it not only affects those who have participated in "terrorist activity," but also those who have provided material support to a terrorist organization.[19] Again, the INA does not take into account whether or not this support was given under duress.[20] This has resulted in a number of refugees being denied admission to the United States for providing support to the very group that had persecuted them. In one case, a group of rebels killed a Liberian woman's father, gang-raped her, abducted her, and held her hostage.[21] However, because she was forced to cook for the rebels and do their laundry while she was being held against her will, the Department of Homeland Security (DHS) found that she had provided material support to a terrorist organization and was inadmissible.[22]

The injustice of the lack of a duress exception to the material support bar has been written about extensively in other articles.[23] The focus of this Comment will be on the application of the terrorist bar to those who willingly supported and participated in groups that are

---

[15] Brief for Human Rights First et al. as Amici Curiae Supporting Petitioner, 3 (5th Cir. Jan. 11, 2007) at 4, http://www.humanrightsfirst.info/pdf/07125-asy-s-k-brief.pdf.

[16] *In re* S-K-, 23 I. & N. Dec. 936, 940–41 (B.I.A. 2006).

[17] *Id.*; *see* Hussain v. Mukasey, 518 F.3d 534 (7th Cir. 2008); Khan v. Holder, 584 F.3d 773 (9th Cir. 2009).

[18] *See* INA §§ 208(b)(2)(A)(v), 8 U.S.C. § 1158 (2006); 212(a)(3)(B); 237(a)(4)(B), 8 U.S.C. § 1227 (2006).

[19] INA § 212(a)(3)(B)(iv)(VI).

[20] Jennie Pasquarella, *Victims of Terror Stopped at the Gate to Safety: The Impact of the "Material Support to Terrorism" Bar on Refugees*, HUM. RTS. BRIEF, Spring 2006, at 28, 28.

[21] *Id.*

[22] *Id.*

[23] *See, e.g.*, *id.*; Gregory F. Laufer, Note, *Admission Denied: In Support of a Duress Exception to the Immigration and Nationality Act's "Material Support for Terrorism" Provision*, 20 GEO. IMMIGR. L.J. 437 (2006); Michele L. Lombardo, Annigje J. Buwalda & Patricia Bast Lyman, *Terrorism, Material Support, the Inherent Right to Self-Defense, and the U.S. Obligation to Protect Legitimate Asylum Seekers in a Post-9/11, Post-PATRIOT Act, Post-REAL ID Act World*, 4 REGENT J. INT'L L. 237 (2006); Human Rights First, *Abandoning the Persecuted: Victims of Terrorism and Oppression Barred From Asylum* (2006), http://www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf.

classified as "terrorist organizations" under the INA. Other scholars have addressed the subject tangentially, but none have focused exclusively on the issue.[24] Also, although the terrorism bar will cause a person to be ineligible for any kind of immigration benefit, this Comment will focus exclusively on those who seek refugee status in the United States.

This issue can be far murkier than the clear unfairness of the lack of a duress exception. As one federal court has stated, "[o]ne country's terrorist can often be another country's freedom-fighter."[25] Because this distinction is only a matter of perception and because the allegiances of the U.S. government often shift, it would be difficult to establish any sort of bright-line rule. There are clearly some cases, though, such as that of Saman Kareem Ahmad, that are easy because the individual has worked as an ally to the United States and presents no danger to our national security. However, the only form of relief available to someone who has been classified as a terrorist under the INA's definition is the confusing, difficult, and rarely invoked process of obtaining a waiver from the Attorney General and the Secretaries of State and Homeland Security.[26]

Although the illogic of classifying those who have fought alongside American troops as terrorists has been recognized by members of Congress, judges, and even the USCIS, reform has been slow.[27] Rather than directly address the overly broad definition of "terrorist activity" in the INA and the overly difficult waiver process, the DHS has taken only piecemeal action in naming a handful of militant, pro-democracy groups that should not be considered terrorist organizations.[28] The latest step taken was the issuance of a memorandum by the deputy director of the USCIS putting a hold on all cases in which an applicant was found to be

[24] *See* Alice Farmer, *Non-Refoulement and* Jus Cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1 (2008) (arguing that the principle of non-refoulement is a *jus cogens* rule that the current terrorism bar violates); Won Kidane, *The Terrorism Exception to Asylum: Managing the Uncertainty in Status Determination*, 41 U. MICH. J.L. REFORM 669 (2008) (discussing the terrorism bar in detail and the inappropriate role of immigration judges in making important national security decisions); Courtney Schusheim, Comment, *Cruel Distinctions of the I.N.A.'s Material Support Bar*, 11 N.Y. CITY L. REV. 469 (2008) (discussing the material support bar and the ineffective waiver system); Victor P. White, Comment, *U.S. Asylum Law Out of Sync with International Obligations:* REAL ID *Act*, 8 SAN DIEGO INT'L L.J. 209, 247–51 (2006) (examining the REAL ID Act in depth and addressing the expanded terrorist-related bars to asylum).

[25] Cheema v. Ashcroft, 383 F.3d 848, 858 (9th Cir. 2004).

[26] INA § 212(d)(3)(B); Schusheim, *supra* note 24, at 483–85 (detailing the unclear waiver process).

[27] *See* Letter from Rep. John Conyers and Rep. Zoe Lofgren to Sec'y Michael Chertoff (Apr. 4, 2008), http://www.rcusa.org/uploads///pdfs/Congressional%20Letter%20to%20Chertoff,%204-4-08.pdf; Karen DeYoung, *U.S. to Stop Green Card Denials for Dissidents,* WASH. POST, Mar. 27, 2008, at A01.

[28] *See* Press Release, Michael Chertoff, Sec'y, U.S. Dep't of Homeland Sec., Statement on the Intention to Use Discretionary Authority for Material Support to Terrorism (Jan. 19, 2007), http://www.dhs.gov/xnews/releases/pr_1169465766808.shtm.

inadmissible because of involvement with an undesignated terrorist organization.[29] This was issued on March 26, 2008, and the deputy director told the Washington Post that the DHS and the State Department would "start making a list" of groups that should not be considered terrorist organizations.[30]

Since that time, however, the DHS has yet to release such a list and has continued to deny immigration benefits to applicants affiliated with pro-democracy groups that are considered terrorist organizations under the INA's broad definition. In one recent case, an Iraqi woman who worked for the U.S. State Department as an economic development adviser was barred refuge in the United States because of her work for the Patriotic Union of Kurdistan (PUK), a political party that also fought against Saddam Hussein and counts the current president of Iraq as a member.[31] Even if the DHS eventually releases a more complete list of groups that should not be classified as terrorists, such a solution is insufficient. A list of named groups will never be complete enough to provide relief to all of the people who will unjustly fall under the INA's broad definition so long as any "group of two or more individuals" is automatically considered a terrorist organization, and immigration officials are forbidden from considering any mitigating circumstances.[32]

The goals of this Comment are to thoroughly review the history of this problem, discuss the reasons why it needs to be addressed, and suggest a more rational way forward. Part II will detail the changes made to the INA after 9/11, the piecemeal approach taken by the DHS in addressing the problem, the judicial response, and the terrorist bar's ongoing impact. Part III will argue that the terrorism bar is in violation of international law and has had effects beyond what Congress had intended. Part III will also address and refute the arguments in favor of retaining the current terrorism bar. Finally, Part IV will look at the Supreme Court's recent decision in *Negusie v. Holder*[33] in addressing a similar exclusionary bar and will argue that it should represent the first step toward a more rational approach to determining whom this country wants to exclude. Additionally, Part IV will argue that the correct approach to the problem is for the Attorney General to issue a regulation instructing immigration judges (IJs) and USCIS adjudicators to read the terrorism bar as requiring that the individual pose an actual threat to the United States. While members of named terrorist groups would still be

[29] Memorandum from Jonathan Scharfen, Deputy Dir., USCIS on Withholding Adjudication and Review of Certain Cases (Mar. 26, 2008), http://www.uscis.gov/files/nativedocuments/Withholding_26Mar08.pdf.

[30] *Id.*; DeYoung, *supra* note 27.

[31] Marisa Taylor, *Why Are U.S.-Allied Refugees Still Branded as "Terrorists?,"* MCCLATCHY NEWSPAPERS, July 26, 2009, *available at* http://www.mcclatchydc.com/227/v-print/story/72362.html.

[32] INA § 212(a)(3)(B)(vi)(III).

[33] 129 S. Ct. 1159 (2009).

excluded under this regulation, it would allow IJs and USCIS adjudicators to make individualized determinations based on a totality-of-the-circumstances test rather than applying an overly broad bar to those who may have supported what would currently be considered an unnamed terrorist group.

II. THE EVOLUTION OF THE TERRORISM BAR

A. A Brief History of National Security Exclusionary Bars in U.S. Immigration Policy

The presence of national security concerns in U.S. immigration policy dates all the way back to the passage of the Alien Act of 1798.[34] After its expiration in 1800 however, the federal government did not enact any restrictive immigration legislation for three-quarters of a century.[35] Beginning in 1875, Congress passed a series of laws that barred the immigration of prostitutes, convicts, and Chinese nationals.[36] Exclusion based on national security concerns returned with the passage of the McCarran-Walter Bill (also known as the "INA"), which was passed over a presidential veto in June 1952 and served to codify and revise U.S. immigration law.[37]

Section 212 of the Immigration and Nationality Act of 1952 designated "general classes of aliens ineligible to receive visas and excluded from admission."[38] Among the long list of grounds for exclusion were a number that explicitly considered threats to the security of the United States. An alien was excluded if he sought "to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States . . . ."[39] Aliens were also excludable if they advocated (or belonged to an organization that advocated) the use of force to overthrow the U.S. government or the killing of governmental officers.[40] Finally, an alien was excludable if there

[34] Alien Enemy Act, 1 Stat. 570 (1798). The Act made it "lawful for the President of the United States . . . to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States." *Id.* at 571.

[35] James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L. L. 804, 835 n.165 (1983).

[36] *Id.* at n.168.

[37] Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in 8 U.S.C. §§ 1101–1503 (1952)); *Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643, 646 (1953); James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy,* 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 233 (1995).

[38] INA of 1952 § 212.

[39] *Id.* § 212(a)(27).

[40] *Id.* § 212(a)(28)(F).

were grounds to believe that, after entry, he would "engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security."[41] Based on the language of the statute, which specifically mentioned the security interests of the United States in each of the aforementioned exclusionary provisions, it seems that at the heart of each of these grounds for exclusion was a concern for the safety and security of the United States and her citizens.[42]

The Immigration Act of 1990 severely altered the national security grounds for exclusion. It contained the first reference to "terrorist activity" and created the broad foundation for the terrorism bar that still exists today.[43] The Act amended section 212 of the original INA to include those who engaged in terrorist activity as "aliens who are ineligible to receive visas and who shall be excluded from admission into the United States."[44] In defining "terrorist activity," the Act includes:

> any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves . . . [t]he 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.[45]

While some of the language is similar to that used in the original INA, the focus of the national security bar seems to have shifted from a concern for the safety of the United States to a condemnation of "terrorism" in general. Where the McCarran-Walter Bill had excluded those who were perceived to be a threat to the national security of the United States, the new terrorism bar sought to exclude those who had threatened the national security of any country.[46]

The terrorism bar was further expanded when the Anti-Terrorism and Effective Death Penalty Act (AEDPA) was passed in response to the

---

[41] *Id.* § 212(a)(29)(A).

[42] *Id.* §§ 212(a)(27), 212(a)(28)(F), 212(a)(29)(A).

[43] Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5069 (codified as amended in scattered sections of 8 U.S.C. (2006)).

[44] *Id.* § 601(a) (amending INA of 1952 § 212).

[45] *Id.* § 601(a)(3)(B)(ii) (amending INA of 1952 § 212).

[46] *Compare* section 212 of the INA of 1952 (an alien is excludable if he seeks "to enter the United States . . . to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States" or if, after entry, he would "engage in activities which would be prohibited by the laws of the United States . . . or in other activity subversive to the national security"), *with* section 212(a)(3)(B)(ii)–(iii) of the Immigration Act of 1990 (an alien is excludable if he has committed "any activity which is unlawful under the laws of the place where it is committed" or if he has committed "an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time").

Oklahoma City bombing in 1996.[47] The statutory definition of terrorism was expanded to include representatives and members of terrorist organizations in addition to those who had engaged in (or were likely to engage in) terrorist activity.[48] The AEDPA was also significant in that it mandated the denial of essentially every form of relief (including withholding of deportation, adjustment of status, and asylum) to aliens who were classified as terrorists.[49] The terrorism bar to asylum was qualified, however, in that it applied "unless the Attorney General determine[d], in the discretion of the Attorney General, that there [were] no[] reasonable grounds for regarding the alien as a danger to the security of the United States."[50]

This qualification did not last long, however, as the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) was passed later in 1996.[51] IIRIRA was a major overhaul of the entire INA, but left much of the language of the terrorism bar intact. However, it did limit the situations in which the Attorney General could waive the terrorism bar to those in which there were no reasons to believe that the alien posed a danger to the United States and the only reason that the alien was inadmissible was his membership in a group that the Secretary of State had classified as a terrorist organization.[52] The Attorney General no longer had discretion to waive the terrorism bar in the case of an asylum applicant who had engaged in terrorist activity under the statutory definition but posed no real threat to the security of the United States.

The next major change to immigration policy came with the passage of the USA PATRIOT Act little more than a month after the terrorist attacks of September 11, 2001.[53] The Act broadened the definition of terrorist activity and created a three-tiered system for classifying terrorist organizations.[54] The first tier includes groups that are classified as terrorist organizations under section 219 of the INA.[55] That section allows the Secretary of State to classify a group as a terrorist organization subject to the approval of Congress and publication of the decision in the Federal Register, and only if "the terrorist activity or terrorism of the

[47] Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C. (2006)); W. Michael Reisman & Monica Hakimi, *Illusion and Reality in the Compensation of Victims of International Terrorism*, 54 ALA. L. REV. 561, 566 (2003).

[48] AEDPA § 411; Immigration Act of 1990 § 212(a)(3)(B)(i).

[49] *Id.* §§ 413, 421.

[50] *Id.* § 421.

[51] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. (2006)).

[52] *Id.* § 604.

[53] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[54] *Id.* § 411(a)(1)(G).

[55] *Id.*

organization threatens the security of United States nationals or the national security of the United States."[56] As of April 5, 2010, the Secretary of State had designated 45 groups as Tier I terrorist organizations, including well-known groups such as al-Qa'ida, Hamas, and the Revolutionary Armed Forces of Columbia (FARC).[57]

The second tier includes groups that the Secretary of State has designated as terrorist organizations "in consultation with or upon the request of the Attorney General."[58] This designation applies to any group that engages in terrorist activity or provides material support to further terrorist activities.[59] There are 59 groups that are designated as Tier II terrorist organizations, but none have been added to the list since April 29, 2004.[60]

The third tier provides the broad definition of terrorist organizations that has led to the problems described in this Comment. It includes any "group of two or more individuals, whether organized or not, which engages in the activities described in subclause (I), (II), or (III) of clause (iv)" of section 212(a)(3)(B).[61] This includes the commission of any terrorist activity under the broad statutory definition that was first laid out in the Immigration Act of 1990. Essentially, a Tier III terrorist organization is any group of two or more people who have used force for any reason other than for personal monetary gain, without regard for any underlying circumstances. However, the clause describing the terrorism bar concludes with an equally broad waiver provision, which states that:

> This clause shall not apply to any material support the alien afforded to an organization or individual that has committed terrorist activity, if the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, concludes in his sole unreviewable discretion, that this clause should not apply.[62]

This changed four years later, however, with the passage of the REAL ID Act of 2005.[63] The Act contained a new provision that expanded the consultation process to include the Secretary of the newly-created DHS and provided that it could only be used to waive the terrorism bar in regards to a member of a Tier III terrorist organization if that group was

---

[56] INA § 219, 8 U.S.C. § 1189 (2006).

[57] Office of the Coordinator for Counterterrorism, U.S. Dep't of State, Foreign Terrorist Organizations (Apr. 5, 2010), http://www.state.gov/s/ct/rls/other/des/123085.htm.

[58] USA PATRIOT Act § 411(a)(1)(G).

[59] *Id.*

[60] Office of the Coordinator for Counterterrorism, U.S. Dep't of State, Terrorist Exclusion List (Dec. 29, 2004), http://www.state.gov/s/ct/rls/other/des/123086.htm.

[61] USA PATRIOT Act § 411(a)(1)(G).

[62] *Id.* § 411(a)(1)(F).

[63] REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302 (codified as amended in scattered sections of 8 U.S.C. (2006)).

classified as such "solely by virtue of having a subgroup within the scope of" the terrorist bar.[64] Under the REAL ID Act, an individual who belonged to a pro-democracy group that used force to fight against a totalitarian government (or supported such a group) was considered a terrorist and deemed ineligible for any kind of discretionary waiver.[65]

B. Actions that Have Since Been Taken in Addressing the Problem

The passage of the REAL ID Act "drew heavy criticism from religious and human rights groups who argued that it could harm genuine victims."[66] It was also not long before members of Congress themselves realized that the language of the Act would have unintended consequences. In 2006, a bipartisan bill that acknowledged the fact that "vulnerable refugees who would otherwise be admitted will be denied entry because of the unintended consequences of overbroad bars on admission" was introduced in the House.[67] Significantly, Representative Joseph Pitts, a Republican from Pennsylvania who had voted for the USA PATRIOT Act and the REAL ID Act, introduced the bill.[68] After describing the problem, the bill called for the amendment of the terrorism bar in the INA to state that groups would only be classified as Tier III terrorist organizations if they posed an actual threat to the security of the United States.[69] The proposed bill was referred to the Committee on the Judiciary on July 27, 2006, but, unfortunately, died there.[70] A similar amendment that focused on the material support bar was proposed and rejected in the Senate.[71]

Although these bills limiting the terrorism bar to those who posed an actual threat to the United States were unsuccessful, a small amount of progress was made with the passage of the Consolidated Appropriations Act (CAA) on December 26, 2007.[72] The Act amended the waiver provision so that the Secretary of State or the DHS could now waive the terrorism bar with respect to any alien who was not affiliated with a Tier I or Tier II terrorist organization.[73] It also allowed them to make a

---

[64] *Id.* § 104.

[65] *See* Choub v. Gonzales, 245 F. App'x 618, 619 (9th Cir. 2007).

[66] David D. Kirkpatrick, *Congress Approves Financing for Military and Immigration*, N.Y. TIMES, May 11, 2005, at A16.

[67] H.R. 5918, 109th Cong. (2006), *available at* http://www.rcusa.org/uploads/pdfs/ms-pittsbill-hr5918.pdf.

[68] *Id.*; 147 CONG. REC. H7219, H7224 (daily ed. Oct. 24, 2001); 151 CONG. REC. H525, H566 (daily ed. Feb. 10, 2005).

[69] H.R. 5918.

[70] 152 CONG. REC. H5957, H6017 (daily ed. July 27, 2006); H.R. 5918, 109th Cong. 2007, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR05918:@@@X (providing status of bill).

[71] 152 CONG. REC. S4923, S4936, S4952 (daily ed. May 23, 2006).

[72] Consolidated Appropriations Act, 2008 (CAA), Pub. L. No. 110-161, Div. J, 121 Stat. 2277 (2007) (codified as amended in 8 U.S.C. § 1182 (2006)).

[73] *Id.* § 691(a).

determination that certain groups should not be considered undesignated Tier III terrorist organizations.[74] The Act further included an "automatic relief" provision that listed ten groups that were not to be considered terrorist organizations because they did not pose an actual threat to the United States.[75]

The Secretaries of State and the DHS have exercised their authority to exclude certain groups from consideration as undesignated Tier III terrorist organizations only once, and such exclusion was only extended to members of the same ten groups that were listed in the CAA but were "not otherwise covered by the automatic relief provisions of section 691(b) of the CAA."[76] The USCIS (the immigration branch of the DHS) has recognized that there continues to be a problem but has been slow in taking steps to resolve it. On March 26, 2008, the deputy director of the USCIS issued a memorandum ordering certain categories of cases to be placed on hold.[77] Among these cases are those of "[a]pplicants who are inadmissible under the terrorist-related provisions of the INA based on any activity or association that was *not under duress* relating to any other Tier III organization . . . ."[78] Since then, however, there has been no real effort to address the problem, and large numbers of potential immigrants who would otherwise be eligible for relief are still being adversely affected by the overbroad terrorism bar.

C. The Ongoing Impact of the Terrorism Bar

In spite of the recent actions taken by Congress, the DHS, and the USCIS, a large number of refugees are still being prevented from receiving immigration benefits because of their affiliation with pro-democracy groups that have been determined to be terrorist organizations. Unfortunately, the aforementioned story of Saman Kareem Ahmad is not unique. As Senator Patrick Leahy stated in a recent floor speech:

> The third tier of the law's definition of terrorist organization continues to ensnare those deserving of our protection who pose no legitimate threat to the United States. Currently, over 7,000 individuals who were granted refugee status or asylum, and who have since petitioned the Government for lawful permanent

---

[74] *Id.*

[75] *Id.* § 691(b). The ten named groups were "the Karen National Union/Karen Liberation Army (KNU/KNLA), the Chin National Front/Chin National Army (CNF/CNA), the Chin National League for Democracy (CNLD), the Kayan New Land Party (KNLP), the Arakan Liberation Party (ALP), the Mustangs, the Alzados, the Karenni National Progressive Party, and appropriate groups affiliated with the Hmong and the Montagnards." *Id.*

[76] Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 73 Fed. Reg. 34,770, 34,770–34,777 (June 18, 2008).

[77] Memorandum from Jonathan Scharfen, *supra* note 29, at 2.

[78] *Id.*

> residence, are on hold and in legal limbo because the agency has not implemented the authority granted under law. These are individuals whom our Government has already screened and deemed eligible for protection under the same set of facts now being held against them to erroneously claim that they are threats to the United States.[79]

Although the DHS says that over 10,500 individuals have been granted waivers to the terrorism bar, the fact that over 7,000 people who are eligible for immigration benefits are stuck in legal limbo is unacceptable.[80] Also, despite the fact that both the Bush and Obama administrations have vowed to fix the problem, it is getting worse.[81] The number of people whose applications for refugee status, asylum, or green cards have not been processed because of the terrorism bar has risen from 5,304 in December 2008 to 7,286 in June 2009.[82] Even more troubling, the DHS has reportedly "recently [begun] sending some immigrants letters informing them that the agency intends to revoke their asylum."[83]

In Denver, an Iraqi immigrant who was first admitted into the United States as a refugee in 2001 has yet to be able to adjust his status because he is caught up in the terrorism bar.[84] Sami Al-Karim is an artist who was sent to Abu Ghraib prison in the 1980s because he produced artwork that was critical of Saddam Hussein's regime.[85] While in Iraq, he also worked as a messenger for the Islamic Dawa Party (IDP), a political group that was opposed to Hussein and operated in exile.[86] Al-Karim's membership in the IDP was the basis for the State Department granting him refugee status in 2001, but it is also the reason that his application to adjust his status to that of a lawful permanent resident has not been approved.[87] The USCIS has put his application on hold because it believes that the IDP is a Tier III terrorist organization and has yet to decide whether to grant a waiver.[88] This is despite the fact that Iraq's current prime minister, Nouri al-Maliki, is a member of the IDP and that the IDP is now a legitimate political party in the Iraqi government that the U.S. government and military is fighting so hard to protect.[89] Because of his uncertain legal status, Al-Karim, who is now a father of four U.S.

---

[79] 155 CONG. REC. S8785, S8854–S8855 (daily ed. Aug. 5, 2009).

[80] Felisa Cardona, *Saddam Hussein Foe in Immigration Limbo in Denver*, DENV. POST, Aug. 19, 2009, at B1, *available at* http://www.denverpost.com/technology/ci_13154773.

[81] Taylor, *supra* note 31.

[82] *Id.*

[83] *Id.*

[84] Cardona, *supra* note 80.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

citizen children, is not able to work or travel freely and has had to turn down invitations to exhibit his artwork in Switzerland, Dubai, France, and London.[90]

In addition to delaying the adjustment of status of people who have already been granted asylum in the United States, the terrorism bar has also prevented deserving refugees from leaving potentially dangerous situations and resettling in America.[91] This is on top of the 7,000 people that Senator Leahy mentioned in his floor speech. An Iraqi woman named Anna and her two teenage daughters were recently denied admission into the United States as refugees because Anna was deemed to be a terrorist.[92] This was because she was formerly a member of the Patriotic Union of Kurdistan (PUK), which, like the IDP, had worked in opposition to Saddam Hussein.[93] Also like the IDP, the PUK is now a mainstream political party in Iraq, and the current President of Iraq is a member.[94] Her classification as a terrorist also came despite the fact that she has worked alongside the U.S. State Department as an economic development adviser, a position that has led to her receiving phone calls threatening revenge for her cooperation with the United States.[95] As Army Lt. Col. Dennis Chapman, who worked alongside Anna in the Kurdish region of Iraq, stated, "It's an absurd finding. It deprives the word 'terrorism' of any meaning."[96]

D. The Judicial Response to the Terrorism Bar

Judge Posner adequately summed up the judicial approach to the terrorism bar by stating that "[t]he statute may go too far, but that is not the business of the courts."[97] Although the overly broad nature of the terrorism bar has been severely criticized in concurrences and, sometimes, majority opinions, the courts have consistently held that the problem is for Congress to address and have applied the plain language of the INA in denying immigration benefits to asylum applicants.[98]

The BIA issued its precedent setting decision on the subject in *In re S-K-*.[99] In that case, a Burmese woman who was a member of the country's

[90] *Id.*; Taylor, *supra* note 31.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] Hussain v. Mukasey, 518 F.3d 534, 538 (7th Cir. 2008).

[98] McAllistar v. Att'y Gen., 444 F.3d 178, 191 (3d Cir. 2006) (Barry, J., concurring) ("Congress's definition of 'terrorist activity' sweeps in not only the big guy, but also the little guy who poses no risk to anyone."); *In re* S-K-, 23 I. & N. Dec. 936, 947 (B.I.A. 2006) (Osuna, J., concurring) ("[W]hen the bar is applied to cases such as this, it is difficult to conclude that this is what Congress intended.").

[99] 23 I. & N. Dec. 936 (B.I.A. 2006).

ethnic Chin minority had applied for asylum.[100] She alleged that Burma's military dictatorship regularly committed human rights abuses against the country's minorities, had arrested her brother, and had detained and murdered her fiancé.[101] The IJ determined that she had a well-founded fear of future persecution but denied her asylum application because she had donated money to the Chin National Front (CNF).[102] The CNF has used force against the military dictatorship in hopes of securing freedom for the ethnic Chin people.[103] It is even allied with the National League of Democracy, which is recognized as the legitimate representative of the Burmese people by the United States and the United Nations.[104] However, because the CNF had acted in violation of the laws of Burma's military dictatorship, the IJ classified it as a Tier III terrorist organization and held that the terrorism bar to asylum applied.[105]

On appeal, the BIA upheld the decision, finding that "Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as 'freedom fighters,' and it did not intend to grant us discretion to create exceptions for members of organizations to which our Government might be sympathetic."[106] The harsh consequence of this, the BIA reasoned, was balanced by the waiver provision.[107] The respondent in this case did, in fact, eventually receive a waiver and was granted asylum.[108] After the BIA's initial decision, the Attorney General ordered the case to be referred to him.[109] This occurred around the same time that the CAA was enacted, and the CNF was included among the ten groups that were specifically not to be considered as Tier III terrorist organizations.[110] In light of this development, the Attorney General remanded the case to the BIA, where she was granted asylum.[111] However, in remanding the case, the Attorney General stated that "my action here does not affect the precedential nature of the Board's conclusions in [the BIA's original decision] regarding the applicability and interpretation" of the terrorism bar.[112] Thus, the harsh implications of the terrorism bar were to continue to

[100] *Id.* at 937.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 939.
[105] *Id.* at 937.
[106] *Id.* at 941.
[107] *Id.*
[108] *In re* S-K-, 24 I. & N. Dec. 475, 477 (B.I.A. 2008), http://www.justice.gov/eoir/vll/intdec/vol24/3605.pdf.
[109] *In re* S-K-, 24 I. & N. Dec. 289, 289 (Att'y Gen. 2007), http://www.justice.gov/eoir/vll/intdec/vol24/3581.pdf.
[110] CAA, § 691(b).
[111] *In re* S-K-, 24 I. & N. Dec. 475, 477 (B.I.A. 2008).
[112] *In re* S-K-, 24 I. & N. Dec. 289, 290–91 (Att'y Gen. 2007).

apply to any individual who is a member of a group other than the ten that were listed.

III. THE CURRENT SYSTEM VIOLATES INTERNATIONAL LAW AND GOES BEYOND WHAT CONGRESS INTENDED

A. The Terrorism Bar is a Violation of International Law and the U.N. Protocol Relating to the Status of Refugees

As it is now written, the terrorism bar contradicts international law and America's obligation to provide a safe harbor for refugees. The United States established the current asylum system with the passage of the Refugee Act of 1980.[113] As the Supreme Court has stated, in passing the act, "one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees to which the United States acceded in 1968."[114] In acceding to the U.N. Protocol, the United States committed itself in international law to the concept of non-return, or non-refoulement, of refugees, described in articles 32 and 33.[115] Article 32 states that "[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."[116] Article 33 goes on to state that:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[117]

Essentially, the United States is obligated not to return any person who qualifies for refugee status to his home country, unless that person has committed a particularly serious crime or poses a threat to national security. This is reflected in the Refugee Act of 1980, which, in creating the asylum guidelines in the INA, stated that asylum benefits shall not

[113] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

[114] INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987) (citing U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 [hereinafter U.N. Protocol]).

[115] U.N. Protocol, *supra* note 114, 19 U.S.T. art. 32–33.

[116] *Id.* art. 32(1).

[117] *Id.* art. 33.

apply if "there are reasonable grounds for regarding the alien as a danger to the security of the United States."[118]

In denying asylum benefits to the aforementioned refugees who have been labeled as terrorists, the USCIS has never asserted that they posed any particular threat to the security of the United States. In fact, in the decision in *In re S-K-*, one member of the BIA stated in his concurrence that "[i]t is clear that the respondent poses no danger whatsoever to the national security of the United States."[119] There are two possible explanations for such a result: either Congress did not intend for the bar to have such an impact, which will be discussed below, or Congress intentionally determined that the entire class of non-citizens described in section 212(a)(3)(B) of the INA posed enough of a threat to U.S. security that there was no need for the USCIS to make an individualized finding. If the latter is true, Congress's decision violates the principle of non-refoulement.

Although the BIA did not address the international law argument in *In re S-K-*, the Ninth Circuit did so in its recent decision in *Khan v. Holder*.[120] The court first pointed out that the U.N. Protocol is not self-executing and "'serves only as a useful guide in determining congressional intent in enacting the Refugee Act.'"[121] Even if the U.N. Protocol is not technically binding on the United States, "[t]he principle of non-refoulement . . . is a rule of customary international law and cannot be derogated from under any circumstances."[122] Therefore, any violation of the principle of non-refoulement would also be a violation of international law regardless of whether the U.N. Protocol is binding on the United States.

The court then acknowledged the general rule that was established in the early case of *Murray v. Charming Betsy* that a statute should not be construed so as to violate international law, so long as there is any other possible construction.[123] However, the court then rejected the petitioner's argument that the broad sweep of the terrorism bar was a violation of the U.N. Protocol's prohibition of non-refoulement of refugees.[124] Because the U.N. Protocol did not define "danger to the security" of his or her host country, the court reasoned that it was up to each individual country to determine what constitutes a danger, which

---

[118] Refugee Act of 1980 § 207(h)(2)(D).

[119] *In re* S-K-, 23 I. & N. Dec. 936, 950 (B.I.A. 2006) (Osuna, J., concurring).

[120] 584 F.3d 773, 782–84 (9th Cir. 2009).

[121] *Id.* at 783 (quoting Barapind v. Reno, 225 F.3d 1100, 1107 (9th Cir. 2000).

[122] The Secretary-General, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ F69, *delivered to the General Assembly*, U.N. Doc. A/62/263 (Aug. 15, 2007); *see also* Farmer, *supra* note 24 (arguing that the principle of non-refoulement rises to the level of a *jus cogens* norm).

[123] *Khan*, 584 F.3d at 783; Murray v. Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[124] *Khan*, 584 F.3d at 784.

the United States had done in the language of the INA.[125] Therefore, if the United States determines that the terrorism bar applies to an individual and denies him asylum benefits on that basis, the United States is squarely within the U.N. Protocol and its principle of non-refoulement because it has determined that individual to be a danger to the security of the United States. That individual is therefore ineligible for any of the benefits that go along with article 33(1) of the U.N. Protocol. As the court saw it, "the INA's definition of 'terrorist activity' not only does not violate the Protocol, but adheres to its specific non-refoulement exception."[126]

This reasoning, however, ignores the language that directly precedes "danger to the security" in the U.N. Protocol (and the Refugee Act of 1980). Not only does the potential host country have to determine that the individual is a "danger to the security" of the nation, but there must be "reasonable grounds for regarding" them as such.[127] Prior to the enactment of IIRIRA, which altered the conditions under which the Attorney General could grant a waiver to those who had been found to have engaged in terrorist activity, the BIA had used a three-part test for determining whether or not there were "reasonable grounds for regarding the alien to be a danger to the security of the United States."[128] Under the BIA's test,

> an alien poses a danger to the security of the United States where the alien acts "in a way which 1) endangers the lives, property, or welfare of United States citizens; 2) compromises the national defense of the United States; or 3) materially damages the foreign relations or economic interests of the United States."[129]

This test is a sensible one and would certainly bring the United States into accordance with the U.N. Protocol.

As it stands now, however, the terrorism bar is applied even when there are not "reasonable grounds" for finding an individual to be a danger to the security of the United States. While there may be some groups for which a generalized bar may be reasonable because all of its members would fall under at least one of the test's categories (e.g., active members of al-Qa'ida), the class of non-citizens who have supported unnamed terrorist organizations certainly is not one of them. It is difficult to see how Anna, Sami Al-Karim, Saman Kareem Ahmad, or the petitioner in *In re S-K-* could reasonably be found to pose a danger to the

[125] *Id.* at 783–84.

[126] *Id.* at 784.

[127] U.N. Protocol, *supra* note 114, 19 U.S.T. art. 33(2); Refugee Act of 1980, Pub. L. No. 96-212, § 207(h)(2)(D), 94 Stat. 102, 107 (1980).

[128] Cheema v. Ashcroft, 383 F.3d 848, 855–56 (9th Cir. 2004) (citing the BIA's earlier decision in the case) (access restricted). Although this case was decided in 2004, the asylum application was filed before the IIRIRA's changes went into effect on April 1, 1997. *Id.* at 855.

[129] *Id.* at 856 (quoting the BIA's earlier decision in the case) (access restricted).

security of the United States under this test. At the same time, there are certainly a large number of individuals who have supported unnamed terrorist organizations that would be found to pose a danger to the security of the United States under this test. Because of this, any kind of generalized, sweeping bar is not appropriate. In order to determine whether there is truly a reasonable basis to regard an individual as a security threat and, therefore, adhere to the principle of non-refoulement, an individualized determination is necessary in these situations.

One could argue that there is a reasonable basis for concluding that an individual who has used force against his government in the past is capable of doing so again. However, the individuals who have been swept up in the terrorism bar's overly broad language are not anarchists who fought against the idea of government in general. They fought against brutal, totalitarian regimes, often with the support of the United States, in furtherance of the democratic ideals that are this country's foundation. Also, many of the so-called terrorists have not shown any violent inclinations. Sami Al-Karim was a messenger.[130] Anna was merely a member of a political party.[131] In a system based on individualized determinations rather than broad statutory bars, these facts could be considered, and asylum would be granted to those who are truly deserving. This is not to say that the fact that these individuals fought for democratic ideals should be determinative. The question that needs to be answered is whether or not there is a reasonable basis for regarding the individual as a danger to the security of the United States. It is only when this question is answered in the affirmative that an individual can be denied asylum in accordance with article 33 and the principle of non-refoulement.

While it is true that neither Al-Karim nor Anna's situation falls under article 33 of the U.N. Protocol because the United States has not attempted to remove either one (which would be impossible with Anna because she was never admitted in the first place), the exception in article 33(2) has been the justification used by the DHS in arguing that the terrorism bar does not violate the U.N. Protocol.[132] With Al-Karim, the refusal to grant him permanent resident status could allow for him to be deported in the future, as he may be included among those immigrants to whom the DHS has "recently [begun] sending . . . letters informing them that the agency intends to revoke their asylum."[133]

In the case of Anna and others who have been denied admission on the basis of the terrorism bar, the United States has failed to uphold its commitment to the basic premise of the U.N. Protocol, which is the extension of asylum benefits to individuals who have been persecuted on

[130] Cardona, *supra* note 80.
[131] Taylor, *supra* note 31.
[132] *Khan,* 584 F.3d at 782–84.
[133] Taylor, *supra* note 31.

account of their race, religion, nationality, membership in a particular social group, or political opinion.[134] It could be argued that those who fall under the terrorism bar are precluded from being eligible for asylum benefits because they fall under article 1(F) of the U.N. Protocol. Article 1(F) states that:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.[135]

Those who have been unjustly swept up in the terrorism bar have not been accused of committing any non-political crimes, and so article 1(F)(b) clearly does not apply. Article 1(F)(a) is also inapplicable because it only contemplates those crimes that are "extremely serious, to the extent that there is no room for any weighing of the severity of potential persecution against the gravity of the conduct which amounts to a war crime, a crime against peace or a crime against humanity."[136] This includes such crimes as waging a war of aggression or committing genocide.[137]

Therefore, the only provision that could possibly be applicable is article 1(F)(c). It could be argued that the support of a group that used force in fighting against a repressive government is counter to the U.N.'s peaceful principles.[138] When the provision was originally adopted, representatives from member states believed that it covered "'war crimes, genocide and the subversion or overthrow of democratic régimes.'"[139] The French representative stated that it "was not aimed at the ordinary individual, 'but at persons occupying government posts, such as heads of State, [m]inisters and high officials . . . .'"[140] The U.S. representative had

---

[134] U.N. Protocol, *supra* note 114, 19 U.S.T. art. 1(A)(2).

[135] *Id.* art. 1(F).

[136] GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 165 (3d ed. 2007).

[137] *Id.* at 165, 167.

[138] *See* U.N. Charter art. 1 (1945), http://www.un.org/en/documents/charter/chapter1.shtml.

[139] GOODWIN-GILL & MCADAM , *supra* note 136, at 184 (quoting Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, November 27, 1951, *Summary Record of the Twenty-Fourth Meeting*, 2(i), U.N. Doc. A/CONF.2/SR.24).

[140] *Id.* at 184–85 n.254 (quoting U.N. Econ. & Soc. Council, 11th Sess. 166th mtg. at 6, U.N. Doc. E/AC.7/SR.166 (August 22, 1950)).

earlier mentioned that the provision would apply to collaborators, and the representative of the U.N. Secretariat believed that it referred to those who had violated human rights but had not committed a crime.[141]

Regardless of the original intent, there has been a recent trend to include terrorism within the gambit of offenses covered by article 1(F)(c).[142] While this is perhaps justifiable, it is doubtful that it could be extended to include acts committed by those who have been mislabeled as terrorists by the U.S. government. It would be an extraordinary stretch to argue that a provision that was originally written to cover the most egregious violators of human rights and the laws of nations should now also cover a woman who was a member of a political party whose principles reflect those of the U.N. and that existed in direct opposition to one of the most egregious violators of human rights in the world. As a result, article 1(F)(c) should also be inapplicable in this scenario.

Because the current terrorism bar in the INA cannot find shelter in either article 33(2) or article 1(F), it is in violation of the United States's commitment to the U.N. Protocol and in breach of an international treaty. Additionally, it violates the customary international law principle of non-refoulement. Following the *Charming Betsy* line of cases, it is the obligation of the courts to narrow the scope of the terrorism bar so that it is in conformity with international law, namely that it is only legitimate insofar as it applies to those individuals for "whom there are reasonable grounds for regarding as a danger to the security of the country . . . ."[143]

B. The Terrorism Bar Leads to Absurd Results Beyond What Congress Intended

In addition to the *Charming Betsy* canon, there is another strong reason why courts should refuse to enforce a mechanical construction of the terrorist bar. It is possible that the terrorism bar was just poorly constructed and has had unintended results. Indeed, members of Congress who voted for the USA PATRIOT Act and the REAL ID Act, which amended the terrorism bar into its current state, have said as such.[144] In *Church of the Holy Trinity v. United States*, the Supreme Court was confronted with a similar situation and stated:

---

[141] *Id.* (citing U.N. Econ. & Soc. Council, 11th Sess. 160th mtg. at 16, U.N. Doc. E/AC.7/SR.160 (August 18, 1950); U.N. Doc. E/AC.7/SR.166,9).

[142] *Id.* at 190.

[143] U.N. Protocol, *supra* note 114, 19 U.S.T. art. 33(2).

[144] *See* H.R. 5918, 109th Cong. (2006), *available at* http://www.rcusa.org/uploads/pdfs/ms-pittsbill-hr5918.pdf (mentioning the "unintended consequences of overbroad bars on admission," sponsored by Congressmen Pitts, Lantos, Pence, Smith, Souder, McGovern, Honda, Wamp, McCotter, Boehlert, Payne, and Rohrabacher); 151 CONG. REC. H525, H566 (daily ed. Feb. 10, 2005) (2005 House Roll No. 31 shows votes in support of the REAL ID Act by Congressmen Pitts, Pence, Souder, Wamp, McCotter, Boehlert, and Rohrabacher); 147 CONG. REC. H7219, H7224 (daily ed. Oct. 24, 2001) (2001 House Roll No. 398 shows votes in support of the USA PATRIOT Act by Congressmen Pitts, Lantos, Pence, Smith, Souder, Wamp, Boehlert, and Rohrabacher).

> it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.[145]

It is clear that a mechanical enforcement of the terrorism bar can lead to results that Congress could not have intended.

Under the terrorism bar as it is currently enforced, not only are individuals such as Saman Kareem Ahmad, who are allies of the United States and have worked with the U.S. military, labeled as terrorists, but members of the U.S. military themselves would be considered terrorists. As the unsuccessful bill that was introduced by Congressman Pitts in 2006 acknowledged, "[c]urrent law defines terrorist organization so broadly that even the United States military is defined as a terrorist organization any time it enters another country uninvited."[146] Therefore, not only is Saman Kareem Ahmad a terrorist because he supported the KDP political party, but he is also a terrorist because he worked as a translator for U.S. forces in Iraq. In fact, any Iraqi who worked as a translator or provided any other assistance to U.S. forces falls under the terrorist bar because he provided material support to a group of two or more people who used force for a reason other than personal monetary gain. Indeed, the DHS has admitted that the Iraqi national who provided information leading to the rescue of Jessica Lynch was barred from entry due to the fact that he had provided material support to a terrorist organization, namely the U.S. Marines.[147] There is simply no way that Congress could have intended such a result.

In an amicus curiae brief in support of the refugee in *In re S-K-*, Human Rights Watch details other historical situations in which the terrorism bar would have effects that Congress could not have intended.[148] It points out that "a mechanical application of INA section 212(a)(3)(B) would prohibit some of the most deserving refugees from entering the United States, creating a perverse and wholly unintended outcome."[149] The brief then goes on to give examples, such as the 60,000 Jews who participated in the Warsaw Ghetto Uprising, any individual who provided a safe house or other material support to the Jewish resistance fighters during World War II, any Tutsi civilians who banded together in

---

[145] 143 U.S. 457, 472 (1892).

[146] H.R. 5918.

[147] Georgetown University Law Center Human Rights Institute, *Unintended Consequences: Refugee Victims of the War on Terror*, 37 GEO. J. INT'L L. 759, 781 n.86 (2006) (citing Transcript of Oral Argument at 24–35, *In re Ma San Kywe*, U.S. Dep't of Justice, Executive Office for Immigration Review, U.S. Immigration Court, Jan. 26, 2006 (access restricted)).

[148] Brief for Human Rights First et al., *supra* note 15, at 23–29.

[149] *Id.* at 24.

groups of two or more to resist the Hutu militias during the Rwandan Genocide, and any Sudanese villagers who defended themselves against the Janjaweed militia during the genocide in Darfur.[150] As the law is written, all of these individuals are considered terrorists and are statutorily barred from receiving any immigration benefits.

Given the fact that Congress could not have intended these consequences, the courts should limit its application to avoid these absurd results. In *In re S-K-*, the BIA noted that the DHS conceded at oral argument that an individual who had assisted the Northern Alliance in its fight against the Taliban would be considered a terrorist.[151] It also acknowledged that "in certain instances, [INA section 212(a)(3)(B)] could potentially bar from relief those who provide assistance to United States or allied armed forces."[152] However, this did not prevent the BIA from going ahead and mechanically applying the language of the terrorism bar. Apparently, the facts of the case were not so absurd and so far from what Congress could have intended that it would have been appropriate to apply the rule of *Church of the Holy Trinity*. However, given the fact that the group that the refugee in *In re S-K-* supported was later explicitly declared not to be a terrorist organization, it is clear that Congress did not intend to exclude people like her.

It could be argued that the CAA, which explicitly stated that ten named groups were not to be considered terrorist organizations, was Congress's attempt to remedy the overbreadth of the statute and that, by limiting the list to ten, Congress only intended to create a very narrow exception to the statute.[153] However, this list was coupled with a broader grant of authority to the Attorney General, the Secretary of State, and the Secretary of the DHS to grant waivers to other such groups.[154] Congress presumably meant for these officials to apply this waiver to other similarly situated groups, but it has yet to do so. At present, groups that Congress could not have meant to include in the terrorism bar, including U.S. troops, would still fall under the statute. Because a strictly literal reading of the statute leads to absurd results beyond what Congress intended, the courts have erred in their current mechanical application. However, because it is clear that the courts are not willing to address the problem on their own, a different approach must be taken.

C. Arguments in Favor of a Broad Terrorism Bar

Despite the potential for absurd results and the actuality of unjust results, there are people who believe that the terrorism bar should remain in its current, broadly written form. One argument is that it is

---

[150] *Id.* at 23–29.

[151] *In re* S-K-, 23 I. & N. Dec. 936, 948 (B.I.A. 2006) (Osuna, J., concurring).

[152] *Id.* at 949 n.15.

[153] CAA § 691(b).

[154] *Id.* § 691(a).

essential in a post-9/11 world to have the broadest tools available in order to combat terrorism.[155] Under this view, the changes to the terrorism bar "are common sense responses to the nation's ongoing War on Terror. The strict requirements for admission are proper during times of danger since the political branches have the authority to prohibit those who threaten and choose to harm Americans from entering the country."[156]

However, the foundation of this argument is that the government must have broad powers in order to keep Americans safe. The terrorism bar as it is written though, excludes large numbers of deserving refugees who pose no threat to the safety of Americans whatsoever. The generalized determination that is written into the statute and has been enforced by the courts does not allow a finding to be made as to whether an applicant actually does pose a threat to the safety of Americans. Many of these refugees have fought with democratic ideals in mind and sometimes, with American troops at their side. There is no logical basis for considering them to be terrorists or a danger to the security of American citizens. As a result, while the terrorism bar does exclude those who wish to harm U.S. citizens, it does so at the expense of the exclusion of a large number of deserving refugees who pose no harm whatsoever to this country. A narrower interpretation of the statute could keep Americans safe while still allowing victims of persecution to take refuge in the United States, complying with the U.N. Protocol, and adhering to the principle of non-refoulement.

Other people argue that, although the terrorism bar may be overly broad and exclude individuals who pose no threat to the country, this is cured by the existence of the waiver provision. Indeed, this was very significant to the BIA in its decision in *In re S-K-*.[157] This was also the argument of those who opposed the amendment that was introduced in the Senate in 2006.[158] However, it is clear that the waiver system is not working. If it were, the number of refugees unjustly affected by the terrorism bar would not be rising, and the DHS would not be sending out letters to refugees informing them that it intends to revoke their

[155] Farrah G. de Leon, Note, *Girding the Nation's Armor: The Appropriate Use Of Immigration Law to Combat Terrorism*, 3 REGENT J. INT'L L. 115, 127 (2005).

[156] *Id.*

[157] *In re S-K-*, 23 I. & N. Dec. 936, 941 (B.I.A. 2006) ("Congress attempted to balance the harsh provisions set forth in the Act with a waiver, but it only granted the power to make exemptions to the Attorney General and the Secretaries of State and Homeland Security, who have not delegated such power to the Immigration Judges or the Board of Immigration Appeals.").

[158] 152 CONG. REC. S4923, S4942 (daily ed. May 23, 2006) (Sen. Kyl: "There is already a law that provides full waiver authority to the Secretary of State to allow entry into this country for someone who happened to be caught up in terrorist activity, albeit innocently—the villager who is forced to give rice and water to a Taliban member. There is nothing that prevents the Secretary of State from allowing that person to come into this country. This is literally a solution looking for a problem.").

asylum.[159] While it is understandable that, in the environment immediately following 9/11, Congress felt that it was necessary to establish a presumption of guilt that could later be overcome, the United States must return to a more rational policy of confronting terrorism within its immigration laws. While members of Tier I and Tier II terrorist organizations clearly need to be excluded, the government should have to show that there are reasonable grounds for believing that anybody else would pose a danger to the security of the United States. In presuming guilt and mandating that the immigrant go through the lengthy waiver process, large numbers of deserving refugees have fallen through the cracks and will continue to do so as long as the current system is in place.

A final argument is that U.S. foreign policy is constantly changing and, as a result, an individual who is our ally today may be our enemy tomorrow. It is important to remember that the United States once supported the Taliban in its fight against Russia, and likewise, Saddam Hussein in Iraq's war with Iran.[160] Certainly, an equally broad exception to the terrorist bar that applies to anyone who has been an ally to the United States would lead to the possibility of admitting potential threats to the country's security. However, this only shows that IJ and USCIS adjudicators should not be limited by sweeping bars but should be allowed to take a totality-of-the-circumstances approach to determine whether an applicant poses any real threat to the security of the United States. Because terrorism is such a serious issue, the DHS must only meet the low standard of there being a "reasonable basis" for determining an individual to be a security threat. Under this standard, if there is a reason to believe that an individual belonged to an organization that had espoused an anti-Western or anti-democratic ideology, there would be a reasonable basis for determining that that person posed a threat to our national security. As a result, members of the Taliban and Saddam Hussein's collaborators would always be inadmissible, even when they were allies of the United States. In focusing on actual threats to our national security, the immigration laws can strike a balance between keeping America safe and extending benefits to those applicants who deserve them.

IV. A MORE LOGICAL WAY FORWARD

A. Looking to Negusie v. Holder *as the First Step Toward a More Rational Approach to Immigration Policy*

Although it is clear that people who engage in acts of terrorism must not be allowed to immigrate into the United States, a more rational

[159] Taylor, *supra* note 31.

[160] Joseph Fitchett, *What About the Taliban's Stingers?*, INT'L HERALD TRIBUNE, Sep. 26, 2001, at 1; Newsmax Wires, *Saddam Key in Early CIA Plot*, NEWSMAX, Apr. 11, 2003, http://archive.newsmax.com/archives/articles/2003/4/10/205859.shtml.

approach must be taken to determining who falls into this category. The Supreme Court's recent decision in *Negusie v. Holder* dealt with a similar issue and established the first steps toward a more rational approach to whom this country wishes to exclude.[161] At issue in that case was the persecutor bar in the INA, which, like the terrorism bar, is written broadly and does not take into account any outside circumstances.[162] The broad language of the bar led to the denial of asylum in many cases where an individual had only persecuted others as a result of duress, such as in the case of child soldiers.[163] In *Negusie*, the petitioner had been arrested by the Eritrean government for refusing to fight in its war with Ethiopia.[164] While in prison, he was beaten with sticks and was sometimes forced to work as a prison guard, looking over his fellow inmates.[165] Although he had never directly punished anybody and had helped some prisoners on occasion, the BIA determined that the persecutor bar applied, and he was denied asylum.[166] As it had done in a long line of cases in which the persecutor bar was relevant, the BIA held that the Supreme Court's decision in *Fedorenko v. United States*, which found that a former Nazi prison guard could not assert a duress defense, was controlling.[167]

On appeal, the Supreme Court held that the BIA had been improperly relying on *Fedorenko* for years.[168] While *Fedorenko* held that there was no voluntariness requirement to a persecutor bar, the statute in question in that case was the post-World War II Displaced Persons Act, which had different language and a different purpose than the INA.[169] Finding that the BIA's reliance on *Fedorenko* had been in error, the Court held that it was not entitled to *Chevron*[170] deference and found it proper to remand to the agency in order for it to determine whether or not a duress exception could be read into the persecutor bar.[171] Justice Stevens, joined by Justice Breyer, concurred in the reversal of the BIA but

[161] 129 S. Ct. 1159 (2009).

[162] *Id.* at 1162. The persecutor bar states that an alien is ineligible for asylum if "the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 208(b)(2)(A)(i).

[163] *See* Jennifer C. Everett, *The Battle Continues: Fighting for a More Child-Sensitive Approach to Asylum for Child Soldiers*, 21 FLA. J. INT'L L. 285, 335–36 (2009).

[164] *Negusie*, 129 S. Ct. at 1162.

[165] *Id.* at 1162–63.

[166] *Id.* at 1163.

[167] *Id.* at 1162; Fedorenko v. United States, 449 U.S. 490 (1981).

[168] Negusie v. Holder, 129 S. Ct. 1159, 1164 (2009).

[169] *Id.* at 1165.

[170] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (following the doctrine articulated in *Chevron*, the BIA is entitled to deference in interpreting ambiguous provisions of the INA. *Negusie*, 129 S. Ct. at 1164).

[171] *Negusie*, 129 S. Ct. at 1167.

dissented from the Court's decision to remand to the agency.[172] Citing the language of the U.N. Protocol, Stevens found it "plain that the persecutor bar does not disqualify from asylum or withholding of removal an alien whose conduct was coerced or otherwise the product of duress."[173] Although the Court did not explicitly find a duress exception to the persecutor bar, given the ease with which Stevens read one into the statute, as well as the current personnel at the Justice Department, it appears likely that the Attorney General will also do so.[174]

Negusie is relevant to the terrorism bar problem because it shows that the Supreme Court has been unwilling to accept such a broad interpretation of an exclusionary bar in a similar situation. The *Negusie* decision reflects the idea that sweeping bars are incompatible with the basic goal of asylum law: admitting refugees who need protection while only excluding those that do not deserve it.[175] The achievement of this goal requires a more circumstance-specific inquiry into each case rather than the imposition of inflexibly broad categorizations that do not permit consideration of the true reality of the situation. Because of this, a different interpretation of the terrorism bar—one that allows for an individualized determination and consideration of mitigating circumstances—needs to be implemented.

B. The Attorney General Should Issue a Regulation Interpreting the Terrorism Bar so that It Only Applies to Those Who Pose an Actual Threat to National Security

As has been shown, there are only two possible conclusions when one considers the terrorism bar: Congress either intended the terrorism bar to be broadly construed and to exclude even those who do not pose an actual threat, or the terrorism bar was poorly drafted and has had an effect beyond what Congress intended. If it is the former, the bar violates the U.N. Protocol and courts should interpret it narrowly in order to comply with international law under the *Charming Betsy* doctrine. If it is the latter, courts should interpret it narrowly so that it only has the effect that Congress intended under *Church of the Holy Trinity*. However, given the fact that the courts have refused to acknowledge that the current terrorism bar is a violation of international law and have been, somewhat understandably, wary to determine what Congress did and did not intend, it is clear that the judiciary is not going to solve this problem.

Likewise, Congress has failed to take significant action to correct the problem in spite of support from the last two administrations. This is

---

[172] *Id.* at 1170 (Stevens, J., concurring).

[173] *Id.* at 1174.

[174] The current Justice Department has taken a more humanitarian approach to asylum applicants, as is evidenced by its decision to extend asylum benefits to victims of domestic violence. Julia Preston, *New Policy Permits Asylum for Battered Women*, N.Y. TIMES, July 16, 2009, at A1.

[175] *See generally* U.N. Protocol, *supra* note 114.

likely due to the reluctance of elected officials to take any measures that might be misconstrued as soft on terrorism.[176] As a result, the most practical solution is an agency interpretation that would be binding on the USCIS and immigration courts. Under the INA, the Attorney General has authority to issue regulations, and the "determination[s] and ruling[s] by the Attorney General with respect to all questions of law [are] controlling."[177] The Attorney General should use this power to address the problem and attempt to limit the terrorism bar to the exclusion of those who pose an actual threat to the country.

One possible interpretation is reflected in the bill that was proposed by Representative Pitts in 2006.[178] It would have amended INA section 212(a)(3)(B)(vi)(III) to qualify the definition of Tier III terrorist organizations so that it only applied to those "whose activities threaten the security of United States nationals or the national security of the United States . . . as determined by the Secretary of State, independently or upon the request of the Attorney General or the Secretary of Homeland Security."[179] The Attorney General could issue a regulation ordering the USCIS and immigration courts to implement the terrorism bar using a similar standard.

The problem with this solution is that it would effectively require the same process that is used for listing a group as a Tier I or Tier II terrorist organization. Requiring the Secretary of State to make an affirmative finding that an entire organization poses a threat to national security may be too lenient of an approach and could allow members of unrecognized groups who may actually pose a threat to slip through the cracks. In a situation like this, in which the immigration policy must balance the importance of the nation's national security with its commitment to providing a safe haven for refugees from around the world, bright-line rules are inapt. Clearly, those who have belonged to Tier I or Tier II named terrorist organizations should continue to be denied all immigration benefits. The designation of terrorist groups is a serious matter and, when an individual has belonged to such a group, it must be presumed that they pose a danger to the country.[180]

However, a different process is appropriate for those who have belonged to Tier III terrorist organizations. Because there is such a wide

---

[176] *See* 152 CONG. REC. S4923, S4942 (daily ed. May 23, 2006) (recounting Senators' arguments against an attempt to amend the terrorism bar, stating that it "literally would allow us to take somebody from the Taliban into the United States").

[177] Immigration and Nationality Act §§ 103(a)(1), 103(g)(2), 8 U.S.C. §§ 1103(a)(1), 1103(g)(2) (2006).

[178] H.R. 5918, 109th Cong. (2006), *available at* http://www.rcusa.org/uploads/pdfs/ms-pittsbill-hr5918.pdf.

[179] *Id.*

[180] Some have argued that mere membership should not be enough to trigger the bar and that its strict application also leads to overly broad results. *See* Kidane, *supra* note 24, at 704–05. This argument has its merits and a discussion of that issue deserves its own paper.

range of activities that could fall under the extremely broad definition, it should not be presumed that an individual who has been a member of such an organization would be a danger to the United States. The Attorney General should issue a regulation stating that those individuals are able to apply for immigration benefits and that the IJ or USCIS adjudicator has the discretion to make an individualized determination as to whether or not there is a reasonable basis for finding that the applicant poses an actual threat to the United States. The only way that they could do this is through a totality-of-the-circumstances approach in which consideration is given to the principles and aims of the organization, the extent of the individual's involvement in that organization, and the actions that the group is resisting.

The burden should rest with the DHS to establish that there is a reasonable basis for regarding the individual as a security threat. Because the DHS only has to meet a reasonable basis standard, anyone who has espoused an anti-Western ideology or has used force against any allies of the United States would necessarily be excluded. This system would do away with the presumption of guilt and overly burdensome waiver process that have rendered the current system ineffective. It would also keep Americans safe, while still extending asylum benefits to deserving refugees.

V. CONCLUSION

The overbroad terrorism bar in the INA has resulted in the exclusion of men and women who were born into unfortunate circumstances but had the courage and perseverance to rise above them. As one circuit court judge wrote when discussing a different exclusionary bar:

> The excludable aliens statute is but an exception, albeit necessary, to the traditional tolerance of a nation founded and built by immigrants. If, in our two hundred years of independence, we have in some measure realized our ideals, it is in large part because we have always found a place for those committed to the spirit of liberty and willing to help implement it.[181]

Those who have been adversely affected by the terrorism bar have overcome dire situations and are as committed to the spirit of liberty as any American citizen. They were willing to fight, often with the support and encouragement of the United States, against some of the most brutal regimes in the world. They are the very kinds of people that the asylum system was established to help. However, instead of being embraced by the United States, they have been labeled terrorists and excluded from eligibility for any kind of immigration benefit as a result of a terrorism bar that is a violation of international law and that has had effects far beyond what Congress could have intended when it was enacted.

[181] Lennon v. INS, 527 F.2d 187, 195 (2d Cir. 1975).

The Obama administration recently announced that it is planning to push for legislation to overhaul the immigration system in 2010.[182] Hopefully, in approaching the shortcomings of the current system, the administration will remember the plight of refugees like Saman Kareem Ahmed, Anna, and Sami Al-Karim, and the Attorney General will require the terrorism bar to be applied so that it only excludes those who would pose an actual threat to the United States. Only then will these refugees who have been mislabeled as terrorists be able to become American citizens and see their dream of living in a country that embraces democracy and liberty realized.

[182] Julia Preston, *White House Plan on Immigration Includes Legal Status*, N.Y. TIMES, Nov. 14, 2009, at A10.