

HARMONIZING IMMIGRATION POLICY WITH NATIONAL FOREIGN POLICY: THE CONTRADICTIONS OF THE MATERIAL SUPPORT BAR

*Mary Armistead**

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*J.D. Candidate 2014, Albany Law School; B.A. Psychology 2011, Queens University of Charlotte. I would like to thank Professor Dorothy Hill for her editorial contributions to my comment, as well as my husband, Michael Rice, and my sister, Christina Armistead, for their consistent and unyielding support throughout my law school career.

“Any people anywhere, being inclined and having the power, have the right to rise up and shake off the existing government and form a new one that suits them. This is a most valuable and sacred right—a right which, we hope and believe, is to liberate the world.”¹

– ABRAHAM LINCOLN, 1848

INTRODUCTION

On April 19, 1775, early in the morning, the “shot heard ‘round the world” rang out from Lexington, Massachusetts.² This shot symbolized the beginning of a war between Great Britain and the United States.³ At the end of the battle on this fateful morning, eight Americans were dead and ten were wounded.⁴ Only one British soldier was injured.⁵ However, when the end of the war arrived, thousands of British and Americans had died.⁶

This war, of course, was the American Revolutionary War, also commonly called the “War for American Independence.”⁷ As is common knowledge for most Americans, this war was brought on by deplorable conditions imposed by the British government in its rule of the Americas.⁸ “No taxation without representation”⁹ is a phrase that almost exclusively brings to mind this war. Americans used force to fight against what was essentially an authoritarian government.¹⁰ In response to the British monarchy taking colonists’ money without allowing them a chance to represent their interests otherwise, the colonists gathered

¹ *As quoted in* GREGORY A. FOSSEDAL, *THE DEMOCRATIC IMPERATIVE: EXPLORING THE AMERICAN REVOLUTION* 139 (1989).

² *School House Rock: The Shot Heard Round the World America Rock* (Broadcast 1976), available at <http://www.youtube.com/watch?v=iU7FTYuQD-0>.

³ JOHN A. GARRATY ET AL., *AMERICAN HISTORY* 128–29 (1982).

⁴ *Id.* at 128.

⁵ *Id.*

⁶ See Hannah Fischer, *American War and Military Operations Casualties: Lists and Statistics*, THE NAVY DEPARTMENT LIBRARY, <http://www.history.navy.mil/library/online/american%20war%20casualty.htm> (last updated July 13, 2005).

⁷ GARRATY, *supra* note 3, at 128–29.

⁸ *Id.* at 125 (explaining the series of harsh taxes and regulations imposed by the British Parliament on the colonists).

⁹ *No Taxation Without Representation*, TOTALLYHISTORY.COM, <http://totallyhistory.com/no-taxation-without-representation/> (last visited Feb. 5, 2014) (quoting Jonathan Mayhew, 1750).

¹⁰ GARRATY, *supra* note 3, at 112 (discussing Parliament’s dismissal of the colonists’ concerns by admitting that even citizens in England could not vote).

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weapons and formed militias to violently combat the British and gain their independence.¹¹

Less than a century later, in 1861, Southern states rebelled by seceding from the Union and forming the Confederacy when they felt their rights were being violated.¹² Americans again picked up weapons and used force, this time against one another, fighting for the rights they believed were important—the South to maintain slavery and the lifestyle that came with it, the North to preserve the Union.¹³

Taxation and slavery—though these wars were more complex, these were the essential issues at the heart of the wars. Americans brandished weapons and used violence to oppose a government that was oppressing them by taking away their rights to representation before taxation and the maintenance of property value in slaves.

In recent history, using violence to oppose our own government's oppression has become less prevalent.¹⁴ However, America has consistently used violence in recent history to oppose other governments oppressing American citizens, or to oppose other authoritarian governments oppressing its own citizens. Iraq provides one ready example where the United States has used violent means with the stated purpose being both to protect the safety of American citizens and to install a democratic government (there are many other examples, discussed *infra* Part III). Regardless of the success of this mission (or other unstated purposes in instigating this war), it is clear that the United States has not shied away from endorsing and using violent means as a tool for overthrowing authoritarian governments and implementing democratic ones.

Despite this history, United States immigration law presents an outright bar to any person who has “materially supported” groups who, in their own country, fight against authoritarian governments in the pursuit of replacing an oppressive

¹¹ *Id.* at 129.

¹² *Id.* at 450–51.

¹³ *Id.* at 454–55.

¹⁴ Violence has been used to oppose the government in recent history, but on lesser scales. One of many examples is the Black Panther Party, who used violent measures, particularly against police officers, during the civil rights movement, primarily in self-defense. Monica Langley et al., *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 19 (1988).

government with a democratic one¹⁵—commonly referred to as “freedom fighters.”¹⁶ In many of these cases, the United States itself may find the authoritarian government to be an illegitimate government; yet no exception exists to give relief to those wishing to immigrate to the United States when such immigrants provided material support to groups who fight against these illegitimate, oppressive governments.¹⁷

Since the Material Support Bar was added to the immigration scheme in 1990, neither the courts, nor any rulemaking body, has created any exceptions to the Bar for duress, *de minimus* support, or legitimate social movements, despite the frequently harsh consequences on refugees, and the many pleas from academics and advocates to do so.¹⁸ The lack of exceptions to the material support bar often results in an “overbroad application of anti-terrorism provisions to noncitizens who have not engaged in terrorist activity as the definition is commonly understood.”¹⁹ To avoid this contradictory and unjust result as it relates to “freedom fighters,” the United States should harmonize the application of the Immigration Material Support Bar with its national foreign policy by allowing an exception for those who are involved in legitimate social or revolutionary movements that oppose an authoritarian government and seek to install a democratic government, especially where the United States itself overtly and actively supports the overthrow of the authoritarian government. Such an exception would lead to more fair results in applying the immigration laws of our country, often to the benefit of those who face great persecution if they return to their home country.

¹⁵ See discussion *infra* Part III.

¹⁶ *Freedom Fighter Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/freedom%20fighter> (last visited Feb. 21, 2014).

¹⁷ See discussion *infra* Part III.

¹⁸ See, e.g., Peter Margulies, *Laws of Unintended Consequences: Terrorist Financing Restrictions and Transitions to Democracy*, 20 N.Y. INT'L L. REV. 65, 65–67 (2007); Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 544–45 (2011); Scott Aldworth, Comment, *Terror Firma: The Unyielding Terrorism Bar in the Immigration and Nationality Act*, 14 LEWIS & CLARK L. REV. 1159 (2010); Daniella Pozzo Darnell, Comment, *The Scarlett Letter “T”: The Tier III Terrorist Classification’s Inconsistent and Ineffectual Effects on Asylum Relief for Members and Supporters of Pro-Democratic Groups*, 41 U. BALT. L. REV. 557 (2012); Courtney Schusheim, Comment, *Cruel Distinctions of the I.N.A.’s Material Support Bar*, 11 N.Y. CITY L. REV. 469 (2008).

¹⁹ MELANIE NEZER & ANWEN HUGHES, *Understanding the Terrorism-Related Inadmissibility Grounds: A Practitioner’s Guide*, in IMMIGR. & NATIONALITY LAW HANDBOOK 577–78 (2009–10).

I. OVERVIEW OF THE MATERIAL SUPPORT BAR

In determining whether an alien is barred from immigrating to the United States as a result of the material support bar, an immigration judge must examine two primary factors in light of the facts of the case: 1) was the organization which the alien provided support to engaged in terrorist activities, and 2) was the support provided to the organization “material support?”

A. *The Statutory Language*

The statutory language defining the material support bar can be found in the Immigration and Nationality Act. Providing material support is defined as engaging in a terrorist activity where, “in an individual capacity or as a member of an organization,” a person:

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

(aa) for the commission of a terrorist activity;

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

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

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.²⁰

Terrorist organization is defined by 8 U.S.C. § 1182, and includes any organization or group of people who “the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security” has determined is a terrorist organization, or any organization that engages in terrorist activity.²¹ The Ninth Circuit has declared:

The INA defines “engage in terrorist activity,” “terrorist activity,” and “terrorist organization” broadly. The definition of “terrorist organization” includes “a group of two or more individuals,

²⁰ 8 U.S.C. § 1182 (a)(3)(B)(iv)(2013) (emphasis added).

²¹ *Id.*

whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).²²

To engage in a terrorist activity means to commit, plan, gather information for, or solicit funds for a terrorist activity or organization.²³ “Terrorist activity” means any activity which is illegal where it was committed or would have been illegal if committed in the U.S. and which involves any of the following: “highjacking or sabotage of a conveyance”; seizing and threatening someone to compel another to do something as a condition for the release of the individual; a violent attack of an internationally protected person or his liberty; an assassination; using agents or weapons with the intent to place a person or peoples in danger or to cause substantial damage to property; or a threat, attempt, or conspiracy to do any of the above.²⁴ Terrorist activity has been construed to include *any* violent act committed toward a government by its citizens, regardless of the illegitimacy of that government.²⁵

B. *The Legislative History*

There is minimal legislative history regarding the implementation of the material support bar.²⁶ The terms “terrorist” and “terrorist activity” were enacted in 1990 in the Immigration and Nationality Act.²⁷ The material support bar was

²² Haile v. Holder, 658 F.3d 1122, 1126 (9th Cir. 2011) (quoting 8 U.S.C. § 1182(a)(3)(B)(vi)(III)).

²³ 8 U.S.C. § 1182(a)(3)(B)(iv)(I-VI).

²⁴ *Id.* § 1182(a)(3)(B)(iii)(I-VI).

²⁵ See *In re S-K-*, 23 I. & N. Dec. 936, 941 (B.I.A. 2006) (noting that Congress made no exception for “freedom fighters” or for “members of organizations to which our Government might be sympathetic” in its definition of terrorist activity).

²⁶ James Feroli, *The Material Support Bar to Asylum*, 08-02 Immigr. Briefings 1, 3 (2008). See also Bryan Clark & William Holahan, *Material Support: Immigration and National Security*, 59 CATH. U. L. REV. 935, 939–41 (2010) (discussing the history of the material support bar); Theodore Roethke, *American Law and the Problem of Coerced Provision of Support to a Terrorist Organization as Grounds for Removal*, 17 TEMP. POL. & CIV. RTS. L. REV. 173, 199–200 (2007) (asserting that the original statutory definition of the material support bar “remains the most expositive source for determining the current meaning”); Steven H. Schulman, *Victimized Twice: Asylum Seekers and the Material-Support Bar*, 59 CATH. U. L. REV. 949, 952 (2010) (lamenting which the lack of legislative history has led to uncertainty in the application of the material support bar).

²⁷ Feroli, *supra* note 26, at 1; Clark & Holahan, *supra* note 26, at 939–40.

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also created in this Act. In its original form, those who had provided material support to individuals “who had committed or planned to commit a terrorist activity” were barred from immigrating to the United States.²⁸ Shortly after the 9/11 attacks on the World Trade Center, the definitions of “terrorist” and “terrorist activity” were expanded upon in the 2001 PATRIOT ACT, where the scope of what constitutes terrorist activity was broadened, therefore expanding the definition of “terrorist organization.”²⁹ This act also redefined the term “engaged in terrorism” in such a way as “to include providing material support to a terrorist organization.”³⁰

Most recently, the Material Support Bar was amended in the REAL ID Act of 2005.³¹ This act expanded the material support bar in significant ways, especially in regards to asylum seekers.³² The legislative history indicates that Congress intended the application of the material support bar to cast a wide net and encompass an even greater number of immigrants than it previously had, including those applying for refugee status.³³ The debate over the expansion of the material support bar shows that Congress feared that terrorists or those supporting terrorist organizations would be able to seek refuge in the United States based on persecution, and the expansion of the material support bar sought to prevent such individuals from being able to obtain refugee status.³⁴ There was some pushback regarding the effect this expansion would have on refugees who were not guilty of engaging in terrorist activity as it is commonly perceived.³⁵ However, the debates include no discussion regarding the effect on refugees involved in legitimate social or revolutionary movements.

²⁸ Roethke, *supra* note 26, at 200.

²⁹ *Id.* at 199–200.

³⁰ *Id.* at 200.

³¹ Craig R. Novak, *Material Support to Terrorists or Terrorist Organizations: Asylum Seekers Walking the Relief Tightrope*, 4 MOD. AM. 19, 20 (2008).

³² *Id.*

³³ 151 Cong. Rec. H453, 456 (daily ed. Feb. 9, 2005) (statement of Rep. Hostettler).

³⁴ *Id.*

³⁵ *Id.* at H457 (statement of Rep. Wasserman-Schultz).

C. The Case Law

Because the term “material support” is defined in the statute with a non-exhaustive list of activities that would constitute material support, its definition has been broadly construed and expanded by case law. It has been expanded to such an extent that one commenter notes that “‘mere support’ or even ‘tangential support’ can replace ‘material support.’”³⁶ An examination of the case law will elucidate the truth of this statement.

1. Financial Benefit

The statutory definition designates that providing *material* financial benefit is seen as material support. However, courts have defined material financial benefit as including relatively low sums of money donated over an extended period of time. *Arias v. Gonzales* is one example of this.³⁷ In *Arias*, Arias was denied asylum in the United States because, for about three years, he paid a war tax to the Revolutionary Armed Forces of Colombia (“FARC”) in the amount of 500,000 pesos a month (the equivalent of approximately 250 U.S. dollars³⁸) on behalf of his employer.³⁹ Arias claimed he paid the tax because he feared the FARC due to their reputation for violence.⁴⁰ However, an immigration judge (IJ) determined, and the Board of Immigration Appeals (BIA) upheld, that Arias was inadmissible due to his material support of the FARC, a terrorist organization, regardless of whether or not the payments were voluntary.⁴¹

In *In re S-K*,⁴² the respondent, who was attempting to flee Burma, her country of nationality, was found to have materially

³⁶ Schusheim, *supra* note 18, at 477.

³⁷ *Arias v. Gonzales*, 143 F. App’x 464 (3d Cir. 2005).

³⁸ *Colombian Pesos (COP) and United States Dollar (USD) Currency Exchange Rate Conversion Calculator*, COINMILL.COM, http://coinmill.com/COP_USD.html (last updated Feb. 5, 2014).

³⁹ *Arias*, 143 F. App’x at 466.

⁴⁰ *Id.*

⁴¹ *Id.* at 466, 468.

⁴² See *In re S-K*, 23 I. & N. Dec. 936 (B.I.A. 2006). The CNF supports and advocates for the election of Aung San Suu Kyi, a member of the National League for Democracy party and political leader. She spent much of her political career under house arrest due to her opposition of the authoritarian government regime before finally being released and elected to parliament in 2012. See *A Biography of Aung San Suu Kyi*, BURMA CAMPAIGN UK, <http://www.burmacampaign.org.uk/index.php/Burma/about-burma/about-burma/a-biography-of-aung-san-suu-kyi/> (last visited Feb. 6, 2014).

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supported the Chin National Front (CNF), whose mission was to “secur[e] freedom for ethnic Chin people”⁴³ Over the course of eleven months, she donated a total sum of S\$1100 (Singapore dollars—approximately 685 U.S. dollars).⁴⁴ She also donated other small goods; however, these goods were confiscated before the CNF were able to utilize them.⁴⁵ The court asserted that the sum of the money provided by S-K- “was sufficiently substantial by itself to have some effect on the ability of the CNF to accomplish its goals”⁴⁶ Therefore, the court determined that S-K- had provided material support to the CNF, and she was barred from obtaining status as a refugee in the United States.⁴⁷

2. Food, Water, and Shelter

Courts have also expanded the definition to include the provision of food, water, and shelter as a form of material support. In *Flores v. Attorney Gen. of United States*,⁴⁸ Flores or his family provided food and water to “Salvadoran guerillas . . . [who were] members of Farabundo Marti Liberación Nacional (‘FMLN’)” in order to obtain Flores’ release after being captured by the FMLN for a night.⁴⁹ Flores or his family⁵⁰ agreed to provide these supplies anytime the FMLN came to their house.⁵¹ Based on this information, the court found that Flores was inadmissible because he had “provided material support to a terrorist organization, even if unwillingly.”⁵²

Similarly, in *Singh v. Holder*,⁵³ the court determined that Singh had “provided Sikh militants . . . with material support in the form of food, shelter, and funds[,]” and found Singh inadmissible despite his claim that he acted under duress.⁵⁴ In *Singh-Kaur v. Ashcroft*,⁵⁵ the court found that “offering food and helping to

⁴³ *In re S-K-*, 23 I. & N. Dec. at 937, 945.

⁴⁴ *Id.*

⁴⁵ *Id.* at 937.

⁴⁶ *Id.* at 945.

⁴⁷ *Id.* at 946.

⁴⁸ *Flores v. Att’y Gen. of the U.S.*, 453 F. App’x 216 (3d Cir. 2011).

⁴⁹ *Id.* at 217–18.

⁵⁰ The record was unclear about who actually provided the food and water, Flores or his family members. *Id.*

⁵¹ *Id.* at 218.

⁵² *Id.*

⁵³ *Singh v. Holder*, 346 F. App’x 222, 222–24 (9th Cir. 2009) (mem.).

⁵⁴ *Id.* at 223–24.

⁵⁵ *Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Cir. 2004).

arrange shelter for persons[] constitute ‘material support[.]’⁵⁶ Singh-Kaur provided these provisions in the late 1980s at “organized meetings in different villages to propagate religion[.]”⁵⁷ which were attended by members of Babbar Khalsa, a group who committed violent acts against the Indian government due to persecution of those of the Sikh faith.⁵⁸

3. Information

Provision of information to terrorist organizations has also been classified as material support. The court in *Choub v. Gonzales*⁵⁹ found that “Choub’s activities—supplying information to the Cambodian Freedom Fighters (CFF) about the Cambodian government’s plans to arrest CFF members and about the strength of the Cambodian military in certain areas—constitute material support.”⁶⁰ The Cambodian Freedom Fighters are a political organization founded by a Cambodian-American in California.⁶¹ “The CFF’s goal is to overthrow the [authoritarian] Cambodian government, and it receives funding from the Cambodian-American community, which includes over 500 individuals residing in the United States.”⁶²

4. Medical Support

The Department of Homeland Security (DHS) has even found that medical care given by a health care worker under duress constitutes material support, and, therefore, should bar the applicant from being granted asylum.⁶³ As these examples make

⁵⁶ *Id.* at 296.

⁵⁷ *Id.* at 299–300.

⁵⁸ *Id.* at 294–95.

⁵⁹ *Choub v. Gonzales*, 245 F. App’x 618 (9th Cir. 2007) (mem.).

⁶⁰ *Id.* at 619.

⁶¹ Daniel C. LaPenta, Comment, *Fighting Terrorism Through the Immigration and Nationality Act: Dangers of Limiting the INA’s Breadth Under Cheema v. Ashcroft*, 40 NEW ENG. L. REV. 165, 203 (2005).

⁶² *Id.*

⁶³ Brief for Appellate at 17–18, *Abdille v. Baker*, 2010 WL 5779684 (2010) (No. 09-56941) (discussing DHS’s appeal of an immigration judge’s decision in *In re: BT* to grant the applicant asylum based on his provision of medical care twice in Nepal after being awoken in the middle of the night by Maosit guerillas who held a gun to his head and demanded he help fighters who had suffered gunshot wounds and burns). See also Charlotte Simon, Comment, *Change is Coming: Rethinking the Material Support Bar Following the Supreme Court’s Holding in Negusie v. Holder*, 47 HOUS. L. REV. 707, 708–09 (2010) (describing the same

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clear, the definition of material support has indeed been expanded to an extent that appears to go beyond “*material support*” and instead has become a standard that essentially means “*any support*.”

5. Knowledge

Beyond the expansion of the definition of material support, other interpretations of the bar have been criticized. The knowledge requirement of the material support bar has also been identified as problematic. As the statute states, a person provides material support to a terrorist organization when she knows or reasonably should know that her actions are providing material support. However, “[t]he only way for an asylum applicant to overcome a finding of inadmissibility under the material support provision is to demonstrate, by clear and convincing evidence, a lack of knowledge that the organization she supported was a terrorist organization.”⁶⁴ This burden becomes almost impossible for an applicant to overcome. For example, in *Singh-Kaur*, the dissent points out that the record contained nothing in it that indicated that Singh-Kaur, at the time he provided material support, knew or reasonably should have known that these individuals had engaged in or were planning to engage in terrorist activity.⁶⁵ Nonetheless, the court relies on Singh-Kaur’s answer to a leading question as evidence that he had knowledge of the group’s terrorist activities. Singh-Kaur was asked, “[s]o, in other words, you were helping the militants who were involved in the terrorist activities. Isn’t that true?”⁶⁶ His answer, “We never help in any other way than giving them food. Yes[,]” was taken to evince his knowledge at the time the support was given, which occurred about a decade prior to the questioning.⁶⁷ The court did not stop to think that Singh-Kaur’s answer only evinced that he only became aware of their terrorist activities at some time after he had provided food and tents for them.⁶⁸

case).

⁶⁴ Simon, *supra* note 63, at 726.

⁶⁵ *Singh-Kaur v. Ashcroft*, 385 F.3d 222, 311 (9th Cir. 2007).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See id.*

6. Lack of Exceptions

Another major problem with the material support bar is the fact that courts have refused to find exceptions to the harsh rule. As can be seen in several of the cases discussed above, courts have refused to include either a *de minimus* exception or duress exception.⁶⁹ Many scholarly articles have been written regarding the lack of a *de minimus* or duress exception to the material support bar, urging for such exceptions to be adopted.⁷⁰ However, the topic of this paper focuses on the lack of exception to the material support bar for individuals engaging in legitimate social or revolutionary movements—e.g., “freedom fighter” groups that are opposing authoritarian governments and working toward implementation of democratic governments.⁷¹

In response to these concerns, the Department of Homeland Security (DHS) has created waivers that are available where duress, *de minimus* support, and revolutionary movements are at issue.⁷² However, these waivers are insufficient to cure the problems that arise in administering the material support bar, as they provide only inadequate, ad-hoc relief.⁷³ There are no clear procedures for administering these waivers, and DHS has too much discretion in determining whether or not a waiver will be granted in a particular case.⁷⁴ One author explains that when waivers are used to address these issues, “[a]djudicatory inconsistencies are inevitable, and the inconsistencies, in turn, undermine the traditional judicial value of decisional predictability. Consequently, the uncertainties, confusion, and delays inflict immense hardship on the asylum seekers. Plainly, a clear, comprehensive legislative solution is the best possible remedy to all of these problems.”⁷⁵

⁶⁹ *Id.* at 298; *Chhun v. Holder*, 345 F. App'x 309, 310–11 (9th Cir. 2009); *Am. Acad. of Relig. v. Napolitano*, 573 F.3d 115, 118 (2d Cir. 2009).

⁷⁰ Roethke, *supra* note 26, at 174, 176; Schusheim, *supra* note 18, at 470; Simon, *supra* note 63, at 710–11; Frank M. Walsh, *Navigating the “Series of Rocks”: Applying the Lessons from the Material Support Bar to Include Duress, De Minimis, and Age of Consent Exceptions to the Persecutor Bar*, 22 FLA. J. INT'L L. 227, 228–29 (2010).

⁷¹ Schusheim, *supra* note 18, at 478. *See generally* *In re S-K*, 23 I. & N. Dec. 936, 937 (B.I.A. 2006); *Haile v. Holder*, 658 F.3d 1122, 1125–26 (9th Cir. 2011); *Choub v. Gonzales*, 245 F. App'x 618, 620 (9th Cir. 2007).

⁷² Simon, *supra* note 63, at 732.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 732–33.

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The material support bar is particularly troubling due to its devastating and disproportionate impact on refugees seeking asylum in the United States. As one commentator has put it, “[f]or many refugees and asylum seekers, it means that the very circumstances that form the basis for their claims of persecution are used against them to deny protection.”⁷⁶ For those participating in legitimate political movements, the denial of refugee status in the United States may force them to return to a country where the authoritarian, even terroristic, government they have opposed may now seek retaliation against them for their opposition. Those who are fighting governments which use terrorist methods are ironically deemed terrorist themselves,⁷⁷ and sent back to a country where their government can continue to rule over them with fear.

II. AN EXAMPLE OF AN IMMIGRATION CASE THAT CONTRADICTS FOREIGN POLICY

As discussed earlier, there is no exception to the material support bar where the applicant was participating in a legitimate social or revolutionary movement against an oppressive government. More alarmingly, often the very movement that the applicant supports is also supported by the United States government itself, yet the applicant is still barred from admission into the United States due to the material support he or she provided to the revolutionary movement. Several cases provide examples where the outcome seems to directly contradict foreign policy.

In re S-K-, described above, is a case where a refugee applicant, over the course of eleven months, provided a total of S\$1100 to the Chin National Front (CNF).⁷⁸ The CNF is an organization formed for the purpose of opposing the oppressive military regime that has been in place in Burma since 1962.⁷⁹ Until 2011,⁸⁰ the Burmese government was run by the majority ethnic group in Burma, and “regularly commit[ted] human rights abuses against

⁷⁶ Schusheim, *supra* note 18, at 476. See also Simon, *supra* note 63, at 721–22.

⁷⁷ Walsh, *supra* note 70, at 238.

⁷⁸ *In re S-K-*, 23 I. & N. Dec. 936, 945 (B.I.A. 2006).

⁷⁹ *Welcome to Chinland*, CHIN NATIONAL FRONT, <http://www.chinland.org/> (last visited Feb. 22, 2014).

⁸⁰ *Myanmar Profile*, BBC NEWS, <http://www.bbc.co.uk/news/world-asia-pacific-12990563> (last updated July 16, 2013).

ethnic and religious minorities,”⁸¹ such as those of the Christian religion or Chin national identity.⁸² The CNF works toward restoring democracy in Burma, and opposing the militaristic government they find to be illegitimate.⁸³ S-K- began providing support to the CNF after her fiancé was murdered by the Burmese government; as a result of this tragedy, she became sympathetic to the CNF’s cause.⁸⁴ S-K- was of the Christian religion as well as ethnically Chin, and therefore was subject to persecution by the Burmese government, who persecutes such minorities.⁸⁵ In her case, the IJ found that she “had established a well-founded fear of persecution in order to qualify for asylum” based on her status as a minority; however, he denied her application for asylum due to the monetary contributions made to the CNF, “an organization which uses land mines and engages in armed conflict with the Burmese Government,” finding that these contributions (totaling about 685 U.S. dollars over the course of eleven months) made her ineligible under the material support bar.⁸⁶

The court, in reviewing the decision, determined that because Congress did not include any exclusionary language in the statute, they “did not intend to give . . . discretion to create exceptions for members of organizations to which our Government might be sympathetic.”⁸⁷ The court broadly asserted that “there is no exception in the [material support bar which allows] relief [to be granted] in cases involving the use of justifiable force to repel attacks by forces of an illegitimate regime.”⁸⁸ The Acting Vice Chairman of the BIA, in his

⁸¹ *In re S-K-*, 23 I. & N. Dec. at 937.

⁸² *United States Policy in Burma: Time for Reassessment*, THE BAMBOO CURTAIN (Sept. 22, 2013), <http://thebamboocurtain.com/2013/09/22/united-states-policy-in-burma-time-for-reassessment/>; *End Discrimination Against Ethnic and Religious Minorities: UN Rights Chief to Burma*, CHINLANDGUARDIAN.COM (June 20, 2013, 2:38 PM), <http://www.chinlandguardian.com/index.php/news/item/1844-end-discrimination-against-ethnic-and-religious-minorities-un-rights-chief-to-burma>; *CHRO Submitted Human Rights Situation in Chinland to UN Special Rapporteur on the Human Rights Situation*, CHIN HUM. RTS. ORGANIZATION (July 15, 2009), <http://www.chro.ca/index.php/action-alerts/advocacy-campaign/229-chro-submitted-human-rights-situation-in-chinland-to-un-special-rapporteur-on-the-human-rights-situa>.

⁸³ *In re S-K-*, 23 I. & N. Dec. at 937, 939.

⁸⁴ *Id.* at 937.

⁸⁵ *Id.*

⁸⁶ *Id.* at 937, 945.

⁸⁷ *Id.* at 941.

⁸⁸ *In re S-K-*, 23 I. & N. Dec. 936, 941 (B.I.A. 2006).

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concurrence, stated “[a]ny group that has used a weapon for any purpose other than for personal monetary gain can, under this statute, be labeled a terrorist organization.”⁸⁹

Therefore, despite the fact that the CNF were using weapons largely in self-defense, and despite the fact that “the type of struggle the CNF was waging [was] against one of the world’s most repressive and ostracized regimes,” the CNF was still designated as a terrorist organization, and, therefore, S-K’s support of the CNF caused her to be denied asylum under the material support bar.⁹⁰ To add insult to injury, the court did not even consider the fact that the CNF is an organization that is “allied with the National League of Democracy, which both the United Nations and United States have recognized as the legitimate representative of the Burmese people.”⁹¹

Recognizing the inconsistency between their decision and foreign policy, an exception was created by the executive branch in the year following the decision in *In re S-K*. The then Secretary of Homeland Security, Michael Chertoff, declared: “[C]onsidering the national security and foreign policy interests deemed relevant in these consultations, that [the material support bar] shall not apply with respect to material support provided to the Chin National [League for Democracy (CNLD)]” where certain requirements are met.⁹² As a result, *In re S-K* was remanded, and S-K was granted asylum. However, this waiver did not alter the precedential effect of the case—those who support legitimate revolutionary movements will still be barred from immigrating to the United States under the material support bar.⁹³ Moreover, as explained earlier, such waivers do not provide the type of relief needed for refugees of this kind under the material support bar due to inevitable inconsistencies, delays, confusion, and other issues.⁹⁴ Clearly, a “comprehensive legislative solution”⁹⁵ is needed to deal with the inconsistencies that can arise in the application of the material support bar.

⁸⁹ *Id.* at 948.

⁹⁰ Said, *supra* note 18, at 571.

⁹¹ Schusheim, *supra* note 18, at 487.

⁹² Exercise of Auth. Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9957 (Mar. 6, 2007) (The CNLD and the CNF are one in the same.).

⁹³ Feroli, *supra* note 26, at 5.

⁹⁴ Simon, *supra* note 63, at 732–33.

⁹⁵ *Id.* at 733.

III. THE USE OF VIOLENCE IN ACHIEVING DEMOCRACY

In his decision in *In re S-K*, the IJ stated: “[o]ur own history is based on an armed response to a government that we could not change democratically.”⁹⁶ Yet, under the material support bar, he felt constrained to find that the applicant could not be granted asylum in the United States due to her material support of a group who was working to overthrow an authoritarian, oppressive government that was known for regularly committing human rights abuses against certain groups of its citizens, including killing those who opposed them.⁹⁷

It is undisputed that a primary goal of democracy is nonviolence. One author explores the ideal of eradicating all violence in a democracy:

Ideally conceived, democracies understand themselves as nonviolent. “Violence is anathema to its spirit and substance;” democracies are strongly committed to non-violence, and almost by definition they represent an institutionalized framework and a way of life that ensures nonviolent means to share power between communities of people with widely differing values and beliefs. In democracies, institutions ensure that the use of violence is controlled and those who use it are held accountable. Both democratic values and institutions were developed and conceived of as remedies against violent conflicts in the bloody religious wars and revolutions from the seventeenth to the nineteenth centuries, and they are based on the premise of the *containment* of violence.⁹⁸

Indeed, as a democracy, the United States abhors the use of violence by citizens to go unchecked, especially when that violence is against the government of those violent citizens.⁹⁹ In a society that has achieved and maintained a democracy for over two-hundred years, it is reasonable for the United States to take such a strong stance against unchecked violence by the citizens of a nation. The material support bar can be seen as a manifestation of the United States’ opposition to such violence.

However, it is also important that, as a nation with a bloody past, we realize that before democracy is achieved, violence may be a necessary evil in implementing a democratic government

⁹⁶ Darnell, *supra* note 18, at 567.

⁹⁷ *In re S-K*, 23 I. & N. Dec. 936, 937 (B.I.A. 2006).

⁹⁸ Susanne Karstedt, *Democracy, Values, and Violence: Paradoxes, Tensions, and Comparative Advantages of Liberal Inclusion*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 50–51 (2006) (citations omitted).

⁹⁹ *Id.* at 51.

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that works for the people. In fact, even in established democracies around the world, violence is still present.¹⁰⁰ Violence within democracies is generally perpetuated by citizens against citizens, rather than by citizens against the government—e.g., assaults, murder, domestic violence, sexual abuse, etc.; however, it is important to note that even democracies struggle with the human tendency to commit violent acts in certain situations.

Further, as the IJ in *In re S-K* noted, our material support bar seems to ignore our own bloody history, in which violence was used to overthrow an oppressive government for the purposes of installing a democratic one. The American people resorted to the use of violence in order to resist a government that was taxing them without representation.¹⁰¹ This now undisputed act of unfairness by the British government prompted Americans to pick up arms and fight against this unfair treatment.¹⁰² Yet now, we create a barrier through the material support bar to others who pick up arms to fight governments who commit human rights violations against their citizens far worse than taxation without representation. Today, America stands on a high platform, demanding others not to use violence against their government in any situation, labeling individuals a terrorist if they do so.¹⁰³ America claims adherence to the Rule of Law, and demands this of all citizens, of all nations, no matter the context or situation.¹⁰⁴ But even beyond our own revolution, which admittedly took place many years ago, the United States has been involved in violence more recently for the sake of democracy. One author explains:

Multiple wars, political strife, riots, assassinations, uprisings, and international consternation are often ignored in the face of America's present day success. Even in this country of overlapping constitutional protections, the history of America is a bloody one. The economic success of this country along with the longevity of its Constitution has overshadowed the turbulence that remains a part of American history.¹⁰⁵

¹⁰⁰ *Id.* at 50–51.

¹⁰¹ See *British Repeal Hated Townsend Act*, HISTORY.COM, <http://www.history.com/this-day-in-history/british-repeal-hated-townshend-act> (last visited Feb. 10, 2014).

¹⁰² *Id.*

¹⁰³ See, e.g., *In re S-K*, 23 I. & N. Dec. 936, 937 (B.I.A. 2006).

¹⁰⁴ Gloria J. Browne-Marshall, *Early American Conflicts and Modern African Practices: A Comparative Commentary on Constitutionalism*, 10 ILSA J. INT'L & COMP. L. 305, 306 (2004).

¹⁰⁵ *Id.* at 306.

Going beyond violence in our country, we can look to America's violent involvement in other countries for the sake of democracy. One author describes four periods of American history regarding intervention versus nonintervention, and asserts that the most recent period of American intervention, which includes the period following the Cold War to the present, is characterized by "[h]umanitarian interventions in ethnic conflicts and interventions to aid countries in creating democratic governments."¹⁰⁶

Even prior to the end of the Cold War, America has a long history of violent intervention, engaging in multiple armed conflicts for the sake of democracy. In 1918, American forces went to Russia in order to combat the new Russian government, the Bolsheviks, which was communist; this mission was termed the Polar Bear Expedition.¹⁰⁷ In 1936, American troops were sent to Spain to aid the "Loyalists" in the Spanish Civil in which the "Nationalist" overtook the democratically elected Spanish government.¹⁰⁸ From 1950–1953, America was involved in the Korean War, again a fight against a communist regime in favor of a democratic one.¹⁰⁹ The United States retains a military force in South Korea today.¹¹⁰ In 1958, Operation Blue Bat deployed Marines to Lebanon to support the current pro-Western government.¹¹¹ In 1959, the United States began a long and grueling war in Vietnam to oppose the North Vietnam communist government.¹¹² Over a decade later, without admitting defeat, the United States withdrew from the war; two years later, North

¹⁰⁶ *Intervention and Non-intervention: The Practice of Intervention*, NEW AMERICAN NATION, <http://www.americanforeignrelations.com/E-N/Intervention-and-Nonintervention-The-practice-of-intervention.html#ixzz2JZzLMJJOX> (last visited Feb. 6, 2014).

¹⁰⁷ *Forgotten History: US and Allied Wars in Russia, 1918–22*, CRITICAL ENQUIRY, <http://www.criticalenquiry.org/history/polarbear.shtml> (last visited Feb. 18, 2014).

¹⁰⁸ FOSSEDAL, *supra* note 1, at 3.

¹⁰⁹ See KARL R. DEROUEN, JR., HISTORICAL ENCYCLOPEDIA OF U.S. PRESIDENTIAL USE OF FORCE, 1789–2000, 28 (2001). See also GARY R. HESS, PRESIDENTIAL DECISIONS FOR WAR: KOREA, VIETNAM, AND THE PERSIAN GULF 8–11 (2001).

¹¹⁰ Jayshree Bajoria, & Youkyung Lee, *The U.S.-South Korea Alliance*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/south-korea/us-south-korea-alliance/p11459> (last updated Oct. 13, 2011).

¹¹¹ *Operation Blue Bat-1958*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/ops/blue_bat.htm (last visited Feb. 18, 2014).

¹¹² *Vietnam War*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/628478/Vietnam-War> (last visited Feb. 18, 2014).

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Vietnam took over South Vietnam.¹¹³ In 1989, the United States invaded Panama in order to oust the dictator, who was also an international drug trafficker.¹¹⁴ In 1991, the United States led a coalition to drive Iraqi forces out of Kuwait after Iraq attempted to claim Kuwait as an Iraq territory.¹¹⁵ In 1994, the United States led Operation Uphold Democracy, which was an intervention in Haiti to remove the military regime that had ousted the recent democratically-elected President.¹¹⁶ Finally, in recent history, the United States has been involved in Operation Iraqi Freedom, motivated by the desire to implement a democratic government,¹¹⁷ and Operation Enduring Freedom, which involves the United States' opposition to the Taliban government in Afghanistan, as well as, a presence in over a dozen other countries worldwide, including the Philippines.¹¹⁸ This is only a sampling of America's violent intervention over the last century.

The United States appears to have no qualms about using violent force against governments who engage in governing tactics that the United States is opposed to, as evidenced by the multitude of occasions in the past century that United States has engaged in violent intervention outside our borders for the sake of promoting democracy in other nations. The United States government also has intervened on multiple occasions where governments are committing human rights violations against their citizens.¹¹⁹ Nonetheless, where a country's own citizens take

¹¹³ *Id.*

¹¹⁴ *Invasion of Panama: Operation JUST CAUSE*, MILITARY.COM, http://www.military.com/Resources/HistorySubmittedFileView?file=history_pana.htm (last visited Feb. 18, 2014).

¹¹⁵ *United Nations Iraq-Kuwait Observation Mission*, UN.ORG, <http://www.un.org/en/peacekeeping/missions/past/unikom/background.html> (last visited Feb. 18, 2014).

¹¹⁶ *Operation Uphold Democracy*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/ops/uphold_democracy.htm (last visited Feb. 18, 2014).

¹¹⁷ *Operation Iraqi Freedom*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/ops/iraqi_freedom.htm (last visited Feb. 18, 2014).

¹¹⁸ Andrew W. Lehren, *Calculating the Human Cost of the War in Afghanistan*, N.Y. TIMES (Aug. 21, 2012, 3:38 PM), <http://atwar.blogs.nytimes.com/2012/08/21/calculating-the-human-cost-of-the-war-in-afghanistan/>; *Operation Enduring Freedom Fast Facts*, CNN.COM, <http://www.cnn.com/2013/10/28/world/operation-enduring-freedom-fast-facts/> (last updated Oct. 28, 2013, 4:58 PM).

¹¹⁹ Mark Lagon, *Promoting Human Rights: Is U.S. Consistency Desirable or Possible?*, COUNCIL ON FOREIGN RELATIONS (Oct. 2011), <http://www.cfr.org/human-rights/promoting-human-rights-us-consistency-desirable-possible/p26228>.

violent actions against their own government (a government which often is committing human rights violations against its citizens) for the sake of democracy, such activity is likely to bar these citizens from ever immigrating to the United States, even if seeking refuge to avoid retaliatory action from the oppressive government.¹²⁰

This immigration policy disregards not only the United States' own history, but also a crucial fact about attaining democracy. One author notes: "[democratic leaders] are fortunate to have at their disposal many foreign-policy tools that are not violent and indeed involve only minimal risk of prompting violence from others."¹²¹ However, in countries that lack a democracy, and which are ruled by oppressive governments, the road to democracy is not easy. One author suggests that

transitions to democracy [must be] a pragmatic undertaking that requires continual adaptations to changed circumstances. . . [T]ransition cannot rely on one tool, whether that tool is financial pressure, military force, or persuasion; rather, a repertoire of tools and institutions is necessary.¹²²

Another author, Michel Rosenfeld, explains that violence is "a necessary precondition to a successful implantation of constitutional democracy."¹²³ He explains that violence is required because oppressive leaders do not "relinquish their powers willingly."¹²⁴ He also asserts that oppressed people have certain natural reactions in response to an oppressive regime that include violent backlash.¹²⁵ He goes further to explain how the use of violence against an oppressive government assists the oppressed citizens in "undermining prevailing submissive mentalities and self-images," which were nurtured by the regime for their own ends.¹²⁶ Undermining this submissive mentality, Rosenfeld argues, is essential to creating a constitutional identity of a new people free from oppressive reign.¹²⁷

Immigration cases not implicating the material support bar recognize the truth that violence is often necessary in

¹²⁰ See, e.g., *In re S-K-*, 23 I. & N. Dec. 936, 941 (B.I.A. 2006).

¹²¹ FOSSEDAL, *supra* note 1, at 139.

¹²² Margulies, *supra* note 18, at 68.

¹²³ MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY* 129 (2010).

¹²⁴ *Id.* at 128.

¹²⁵ See *id.* at 128–32.

¹²⁶ *Id.* at 128.

¹²⁷ See *id.*

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overthrowing an oppressive government. In *Matter of Izatula*,¹²⁸ the court declared that “[t]he general rule that prosecution for an attempt to overthrow a lawfully constituted government does not constitute persecution is inapplicable in countries where a coup is the only means of effectuating political change.”¹²⁹ In this case, an alien applied for asylum as a refugee; in asylum proceedings, the applicant must establish that he or she is unwilling or unable to return to their country of nationality “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹³⁰ Izatula, a native of Afghanistan, had not only avoided conscription into the Afghan Army, but had provided assistance to the Mujahedin, a group opposing the Afghan government.¹³¹ He testified that because of these activities, he feared persecution by the Afghan government due to his political opinion.¹³²

The IJ found Izatula inadmissible, claiming that his “fear of harm from the Afghan Government relates to ‘an act of prosecution rather than act of persecution for aiding groups in opposition in an attempt to overthrow the defacto [sic] government of Afghanistan.’”¹³³ However, the reviewing court disagreed with this rationale.¹³⁴ The court examined evidence from the Department of State’s 1988 Country Reports on Human Rights Practices, finding that, in regards to citizens of Afghanistan, the reports stated that “[c]itizens have neither the right nor the ability peacefully to change their government. Afghanistan is a totalitarian state under the control of the [People’s Democratic Party of Afghanistan], which is kept in power by the Soviet Union.”¹³⁵ The court declared that as a result, “the existing political situation in Afghanistan [is] different from that of countries where citizens have an opportunity to seek change in the political structure of the government via peaceful processes.”¹³⁶ The court thus recognized

¹²⁸ *Matter of Izatula*, 20 I. & N. Dec. 149 (B.I.A. 1990).

¹²⁹ *Id.* at 149, *HN1 (citing *Dwonoh v. Sava*, 696 F. Supp. 970 (S.D.N.Y. 1988)).

¹³⁰ *Id.* at 150.

¹³¹ *Id.* at 151.

¹³² *Id.* at 152 (The applicant feared the government would punish him for supporting the Mujahedin.).

¹³³ *Id.*

¹³⁴ *Matter of Izatula*, 20 I. & N. Dec. 149, 153 (B.I.A. 1990).

¹³⁵ *Id.* at 153–54.

¹³⁶ *Id.* at 154.

that in order to create a democracy, the citizens of Afghanistan would have to take violent measures against the totalitarian government.

In a more recent asylum case, *Vumi v. Gonzales*, the applicant, Vumi, had been tortured by the Congolese government as officials attempted to force her to give information about her husband, who was suspected to have assassinated the president.¹³⁷ The IJ refused her application for asylum, declaring that “the government’s interrogation of [Vumi] would be quite reasonable in light of the fact that her husband was a bodyguard of Kabila, was a Rwandan, and a Tutsi, and had fled the area. Clearly, the government had a very rational reason to interview or interrogate [her].”¹³⁸ The Second Circuit reversed, finding that the IJ “failed to examine the political context or country conditions in DRC [Democratic Republic of the Congo],”¹³⁹ and emphasized that such things must be considered in determining whether or not the actions taken by a current government against a citizen is a legitimate exercise of power.¹⁴⁰ Here, again, we see the court emphasizing the importance at looking at the surrounding circumstances when looking at activity committed against the current government in the alien’s country of nationality.

Violence may be something that is undesirable within a democracy, but it is undeniable that in certain circumstances, the only way to achieve a democracy is by using some form of violent means against an authoritarian, militant government. As a government whose own actions, both past and present, realize such a reality, it is hypocritical for us to bar aliens from immigrating to the United States when they have taken a strong stance to stand up against an oppressive government in order to instill a democracy. In order to avoid this incongruity, the material support bar should include an exception for aliens who have participated in legitimate social or revolutionary movements.

¹³⁷ *Vumi v. Gonzalez*, 502 F.3d 150, 151–52 (2d Cir. 2007).

¹³⁸ *Id.* at 152.

¹³⁹ *Id.* at 156.

¹⁴⁰ *Id.* at 157.

IV. A LEGISLATIVE SOLUTION TO THE PROBLEM

In *In re S-K*, S-K's lawyer urged during oral argument that the court adopt a "totality of the circumstances" test in making a determination as to "whether an organization is engaged in terrorist activity, [considering] factors such as an organization's purposes or goals and the nature of the regime that the organization opposes"¹⁴¹ In response to this proposal, the court declared:

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 give us discretion to create exceptions for members of organizations to which our Government might be sympathetic. Rather, 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.¹⁴²

These waiver powers have indeed been used to create exceptions to the material support bar, including where a legitimate social or revolutionary movement is at issue. However, this response to the problem hardly provides an adequate solution, due to the ad-hoc process of obtaining a waiver that can lead to inconsistent results and confusion for aliens. First, a waivers-only approach often causes the plight of individual aliens to go unrecognized and unresolved until years of advocacy push forward the plight of a group of immigrants, leading to the creation of a waiver. Individual aliens may keep their situations in the shadow for fear of deportation consequences if their requests for a waiver are denied.

This was exactly what happened for S-K- and supporters of the CNF. S-K- was denied admission because there was no exception to the material support bar for legitimate revolutionary movements against authoritarian governments, and therefore her support of an organization that had committed violent acts, primarily in defense, caused her to be found inadmissible in the courts. More than a year after her case, there had finally been enough advocacy to prompt the creation of a waiver for

¹⁴¹ *In re S-K*, 23 I. & N. Dec. 936 (B.I.A. 2006).

¹⁴² *Id.* at 941.

supporters of the CNF to give relief to those in her situation.¹⁴³ In the interim, aliens like S-K- must face the confusion of applying for immigration status, being denied status due to their activities supporting democracy, filing appeals, and fighting for a waiver to be created for their specific situation, as the waivers granted generally provide relief only to citizens of a specific country that has been brought to the attention of those with the power to grant waivers.¹⁴⁴ More importantly, those sifting through the waiver process may have to return to a volatile home country in the interim.

Rather than using the ad-hoc waiver process, a legislative amendment should be created to ameliorate this problem. Where an organization has been officially determined by the United States government to be a terrorist organization, an IJ should be obligated to find that material support given to such an organization bars the applicant's immigration to the United States pursuant to the material support bar of the INA. However, where an organization supported by an alien is not officially designated as a terrorist organization, a judge should be allowed discretion to determine whether or not the organization being funded is engaging in terrorist activities as that term is commonly understood. A list of factors would assist the judge in making a determination as to whether an organization's violent activities against a government were committed solely as part of a legitimate social or revolutionary movement carried out to oppose and overthrow an authoritarian government in the pursuit of implementing a government that represents the desires and best interests of its citizens.

These factors should allow a judge to examine the circumstances surrounding the situation where violence is being used against a government by its citizens. Such factors should include: 1) an examination of whether the United States supports, explicitly or implicitly, the organization at issue; 2) an examination of whether the government is recognized by the international community as a legitimate governing body of the people; 3) an examination of the United States Department of State Human Rights Reports to determine whether or not the

¹⁴³ See Secretary of State Condoleezza Rice, Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act (Jan. 22, 2007), <http://www.rcusa.org/uploads/pdfs/ms-refwaiv-cnfrdn1-22-07.pdf>.

¹⁴⁴ See *generally* Refuge Waivers and Exemptions, REFUGEE COUNCIL USA, <http://www.rcusa.org/?page=refugee-waivers> (last visited Feb. 19, 2014).

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government is committing human rights violations against all of its citizens or a group of them;¹⁴⁵ 4) the stated purposes of the group in committing violent acts against the government; and 5) the circumstances that provoke the group to use violence against its government. Such factors will create a “totality of the circumstances” test, such as the one proposed by S-K’s lawyer,¹⁴⁶ that will determine whether or not an alien is inadmissible for supporting an organization or group that has committed violent acts against its government. It will allow for judicial discretion on a case-by-case basis to determine when an alien’s activities should bar him due to support given to terrorist activities. This concept would replace reserving such discretion to the Attorney General and the Secretaries of State and Homeland Security, who are unable to involve themselves in every case decision, and can give relief only after immigration status has initially been denied to the alien.¹⁴⁷ Allowing judicial discretion on a case-by-case basis will allow for more consistent and fair results than the current waiver process can give to immigrants.

CONCLUSION

Given that violence is often necessary in ousting an authoritarian government and establishing a democratic one, as evidenced by America’s own history and its practices of intervention over the past century,¹⁴⁸ the material support bar should recognize this necessity to avoid hypocritical results in barring immigrants from attaining legal status in the United States. The current formulation of the material support bar, in its application, bars any alien who has provided support to an organization or group that has committed violent acts against its

¹⁴⁵ Such an approach was used in *Matter of Izatula*, in determining whether or not any punishment meted out by the Afghan government to the applicant due to his failure to join the Afghan army would be an act of persecution based on political opinion, rather than a legitimate prosecutorial act due to the surrounding circumstances. 20 I. & N. Dec. 149, 153–54 (B.I.A. 1990). See also *Human Rights Reports*, U.S. DEP’T OF STATE, <http://www.state.gov/j/drl/rls/hrrpt/> (last visited Feb. 25, 2014) (giving access to Human Rights Reports from 1999 to present).

¹⁴⁶ See *In re S-K*, 23 I. & N. Dec. at 940.

¹⁴⁷ See *Terrorism-related Inadmissibility Grounds Exemptions*, U.S. CITIZENSHIP & IMMIGRATION SERVICES (last updated Nov. 14, 2012), <http://www.uscis.gov/laws/terrorism-related-inadmissibility-grounds/terrorism-related-inadmissibility-grounds-exemptions>.

¹⁴⁸ See Browne-Marshall, *supra* note 104, at 306.

government, regardless of the surrounding circumstances, with only insufficient, ad-hoc relief available through waivers created by the Attorney General and the Secretaries of State and Homeland Security. To alleviate the inconsistency and unfairness that arises under such an application, a legislative amendment should be made allowing judicial discretion in examining the surrounding circumstances to determine if the organization or group supported by the alien was involved in a legitimate social or revolutionary movement, based on a set of factors the judge must examine as set out above.¹⁴⁹ Only then can the United States harmonize its foreign policy with its current immigration policy.

¹⁴⁹ See *supra* Part IV.