The Terrorism Exception to Asylum: Managing the Uncertainty in Status Determination

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The Immigration and Nationality Act ("INA"), as it must, excludes a terrorist from receiving asylum. The substantive criteria, and the adjudicative procedures set forth under the INA for the identification of the undeserving terrorist inevitably exclude those who are neither terrorists nor otherwise undeserving. Such unintended consequences are perhaps unavoidable in any well-conceived statutory scheme. What is disconcerting is, however, the margin of the possible error in the application of this statutory scheme. Those who may be excluded by the application of these provisions are often not those who are supposed to be excluded as terrorists. Moreover, the existing scheme provides little help in screening out the real terrorists. The Article demonstrates these flaws and proposes some substantive and procedural modifications.

INTRODUCTION

This Article intends to demonstrate that the existing law pertaining to the terrorism exception to asylum is overbroad, and as such makes the adjudication of asylum unnecessarily complicated. It further contends that the management of terrorism-related asylum cases as apportioned among various federal agencies unduly assigns significant national security duties to immigration judges without providing them meaningful resources. It argues that the immigration judge’s national security responsibility vitiates the adjudication of asylum cases, particularly when claimants possess certain demographic characteristics that may be associated with a propensity to commit acts of terrorism. Accordingly, this Article proposes amendment of some provisions of the applicable substantive law to mitigate the over-breadth, as well as reassignment of adjudicative duties in terrorism cases to appropriate agencies in order to relieve the burden on immigration judges. This reassignment would not only serve a national security purpose, but would also disentangle the asylum system from terrorism issues, which cannot be properly addressed in the immigration courts.

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1. These characteristics may include: age, gender, nationality, place of origin and religion.
Part I of this Article provides a brief description of the historic nexus between immigration and national security concerns, outlines the evolution of the concept of refugee status in the United States, and describes the sources of the existing law. Part II describes the current state of the law pertaining to various exceptions to asylum, focusing in-depth commentary on the terrorism exception in particular, with a view toward demonstrating the serious challenges that immigration courts face in adjudicating cases involving terrorism issues. Finally, Part III proposes substantive amendments and institutional reallocation of responsibilities.

I. IMMIGRATION AND PROTECTION OF NATIONAL SECURITY

This Part discusses the historical background and rationale for the link between immigration regulation and national security concerns and provides a brief overview of the evolution of the law in this area with particular emphasis on post-9/11 changes.

Throughout much of the history of the United States, immigration regulation has been linked to matters of national security. As early as 1798, Congress enacted the Alien and Sedition Act, authorizing the President to detain and deport any alien whose real or perceived affiliation with a foreign enemy of the United States caused him or her to be considered a security threat. In 1882, Congress enacted the Chinese Exclusion Act, which prohibited Chinese laborers from entering the United States.


3. Alien and Sedition Act of June 25, ch. 57, 1 Stat. 570-72 (1798). This act is better known for its restriction of free speech than of immigration. It had a chilling effect on speeches protected by the First Amendment as it criminalized any “false, scandalous and malicious” statement against the president, the government or Congress. See 1 Stat. 596-97, § 2. When Thomas Jefferson took the presidency from John Adams, during whose term the law was passed, he pardoned those who had been convicted under the Act. See MICHAEL LINFIELD, FREEDOM UNDER FIRE, 21 (1990) cited in Nancy Murrey & Sarah Wusnsh, Civil Liberties in Times of Crisis: Lessons from History, 87 MASS. L. REV. 72, 74 (2002). Jefferson is reported to have said the following regarding the Act: “[T]he friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow, or rather, has already followed, for already has a sedition act marked him as its prey.” Original Draft of the Kentucky Resolution (Oct. 1798), available at http://www.yale.edu/lawweb/avalon/jeffken.htm cited in Nancy Murrey & Sarah Wusnsh, Civil Liberties in Times of Crisis: Lessons from History, 87 MASS. L. REV. 72, 74 (2002). Although the Supreme Court never specifically overturned the Act, in the 1964 decision of New York Times v. Sullivan it indicated that the provisions of the Act would have been held to be inconsistent with the First Amendment. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).
Congress enacted the Chinese Exclusion Act,⁴ which prohibited admission of persons of Chinese origin into the United States. Cases resulting from the enactment of this legislation brought immigration into the national security context via the Plenary Power doctrine.⁵

In *Chae Chen Ping v. United States*,⁶ the Supreme Court addressed the constitutionality of the Chinese Exclusion Act and introduced the plenary power doctrine into the immigration context for the first time.⁷ Chae Chen Ping, a Chinese laborer, came to the United States under a treaty between China and the United States that guaranteed admission of Chinese workers into the United States.⁸ In 1880, a supplemental treaty was signed between the two nations which allowed the United States to “regulate, limit or suspend” Chinese immigration into the United States if their admission or stay “affect[ed] or threaten[ed] to affect the interests of [the] country, or [to] endanger the good order” of the United States and its territories.⁹ In 1882, Congress authorized the suspension of Chinese immigration for a period of ten years. It did make an exception for those already in the United States to leave and reenter, provided that they obtained a certificate showing that they had been initially admitted prior to 1880.¹⁰ Chae Chang Ping obtained the required certificate in 1887 and traveled to China. While he was in China, however, Congress enacted a prohibition against the readmission of Chinese nationals, including those who had

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⁷. See id. at 604. For discussion of the plenary power doctrine, see generally Henkin, supra note 2; Motomura, supra note 4.

⁸. The Treaty known as the Burlington Treaty was initially signed in 1868. It allowed Chinese laborers access to the United States labor market. See Chae Chen Ping, 130 U.S. at 592–96.

⁹. See id. at 596.

¹⁰. Id. at 598–99.
obtained a certificate before their departure.\textsuperscript{11} Ping challenged the law on two grounds,\textsuperscript{12} the more important one pertaining to Congressional authority to enact the exclusion law.\textsuperscript{13} Since the authority to regulate immigration is not among Congress's enumerated powers under the Constitution,\textsuperscript{14} the legislature had to look for authority from another clause. The Supreme Court initially attempted to find authority in the Commerce Clause,\textsuperscript{15} although as leading scholar on human rights law Professor Luis Henkin points out, immigration did not really "fit comfortably within the commercial rubric."\textsuperscript{16} He reasoned that:

\begin{quote}
[i]n those days at least, immigration largely was a matter of individual choice rather than of commerce with foreign nations; moreover, although the Constitution doubtless included in commerce the "importation of persons"—a euphemism for the slave trade—it was demeaning to lump the "huddled masses yearning to breathe free" together with coal and hides.\textsuperscript{17}
\end{quote}

As justification under the Commerce Clause was so highly opposed, the Court had to seek another source of support for a plenary Congressional power over immigration. The Court settled on principles of sovereignty and national security\textsuperscript{18} for that support in an opinion that reads:

\begin{quote}
To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine
\end{quote}

\textsuperscript{11} Id.
\textsuperscript{12} The first challenge was based on the 1880 treaty between China and the United States which provided that Chinese laborers who were already in the United States could leave and reenter if they obtained a certificate. The Supreme Court rejected this argument on the ground that the 1888 Congressional Act, which prohibited the reentry, superseded the treaty because it was later in time. See id.
\textsuperscript{13} Id. at 603.
\textsuperscript{14} The only textual guidance contained in the Constitution is the power to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4.
\textsuperscript{15} Edye v. Robinson, 112 U.S. 580 (1884).
\textsuperscript{16} Henkin, supra note 2, at 856.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 857.
the occasion on which the powers shall be called forth; and its
determinations, so far as the subjects affected are concerned,
are necessarily conclusive upon all its departments and offi-
cers. If, therefore, the government of the United States,
through its legislative department, considers the presence of
foreigners of a different race in this country, who will not as-
similate with us, to be dangerous to its peace and security,
their exclusion is not to be stayed because at the time there
are no actual hostilities with the nation of which the foreign-
ers are subjects. The existence of war would render the
necessity of the proceeding only more obvious and pressing.
The same necessity, in a less pressing degree, may arise when
war does not exist, and the same authority which adjudges the
necessity in one case must also determine it in the other. In
both cases its determination is conclusive upon the judiciary.19

This expansive view of national security, which includes the im-
migration of persons as a form of encroachment or invasion by
foreign countries, appears to have laid the foundation for the en-
during conflict between immigration and national security.

National security concerns took center stage following President
McKinley’s assassination in 1903, and again in 1918 due to insecu-
rity created by World War I.20 This unease prompted enactment of
the Anarchists Act21 which authorized deportation of “alien anar-
chists” and criminalized their reentry.22 Acting by authority of this
legislation and the Executive War Power, the President banished
somewhere between twelve and sixty-three hundred aliens of Ger-
man origin to internment camps.23 Those who were not so
confined were required to register and carry official permission if
they planned to travel anywhere.24

The period between the two World Wars also saw a resurgence of
enforcement actions against aliens because they were regarded as
threats to national security for ideological reasons.25 Immediately

20. Act of March 3, ch. 1012, §§ 2, 38, 32 Stat. 1213–14, 1221 (1903) (providing for ex-
clusion of “anarchists” and “subversives”).
21. See E.F. Hutchinson, Legislative History of American Immigration Policy
22. Id.
23. Id.
24. Id.
25. See Alexander Wohl, Free Speech and the Right of Entry Into the United States: Legislation
to Remedy the Ideological Exclusion Provision of the Immigration and Naturalization Act, 4 Am. U.J.
Int’l L & Pol’y 443, 450 (1989). For example, in 1919, about 3000 aliens were detained for
depортation following the bombing of the home of Attorney General Palmer. See John
preceding World War II, Congress enacted the 1940 Alien Registration Act. Soon thereafter, a combination of executive military actions and legislative initiatives resulted in the internment of hundreds of thousands of persons of Japanese descent on the West Coast of the United States, regardless of their citizenship status. The constitutionality of this action was upheld by the Supreme Court on national security grounds in the case of Korematsu v. United States.

In 1952, Congress enacted comprehensive immigration legislation, again grounded in national security interests. The Immigration and Nationality Act ("INA") categorically excludes aliens who may be entering the country to engage in such activities as espionage, sabotage, or other subversive activities that are inherently "prejudicial to the public interest." Further, the INA denies admission to aliens who have ever advocated for or been affiliated with any organization that has supported certain anti-government, especially anti-United States government, political views, such as communism or anarchy. It also provided for summary exclusion of aliens posing "a menace to th[e] nation's security."

During the brief period of the 1980s, the United States enjoyed an increased focus on humanitarianism. This allowed Congress to pass the Refugee Act, which gave the 1967 United Nations Proto-

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26. See Alien Registration Act of 1940, 54 Stat. 670 (1940) ("To prohibit certain subversive activities; to amend certain provisions of law with respect to the admission and deportation of aliens; to require the fingerprinting and registration of aliens; and for other purposes.").


28. Korematsu v. United States, 323 U.S. 214, 219 (1944) (stating "[b]ut hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.").


30. Id. at § 212(a)(29).

31. Id. at § 212(a)(27).

32. Id. at § 212(a)(28)(B), (C), (G).


The Terrorism Exception to Asylum

The U.S. version also established elaborate procedures for the adjudication of asylum. In 1987, seemingly contrary to the previous exclusionary trend, the Supreme Court articulated standards of proof for discretionary grant of asylum in the landmark case of *INS v. Cardoza-Fonseca*.

However, the United States did not completely cast aside its cautionary stance. The Refugee Act delineates different categories of persons whose members are excluded from protection even if they meet the Protocol's definition of a refugee because they are either considered to be undeserving of protection or because they pose a national security threat. Specifically, an alien will be excluded if the Attorney General determines that:

(i) 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; (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States; (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

Following the Oklahoma City bombing in 1996, Congress again responded to heightened concerns about terrorism by enacting both the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). These two laws further narrowed the forms of discretionary relief available for certain categories of persons and significantly expanded grounds for the exclusion and deportation of aliens. The standards set by these enactments have remained subjects of great controversy.

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41. See generally supra notes 38–39. The AEDPA defined more crimes, prescribed penalties for crimes related to terrorism, enhanced law enforcement, and established a criminal alien identification system. See AEDPA § (440)(e) (amending 8 U.S.C. § 1101(a)(43)); see also AEDPA § 323 (modifying the definition of providing material support for terrorism);
The next wave of immigration reforms relating to national security came after the horrific events of September 11, 2001.

A. Post 9/11 Immigration Reform: Combating Terrorism Through Immigration Law

One of the first responses to the 9/11 terrorist attacks was the enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, now commonly known as the PATRIOT Act. Among other things, the Act provided for intelligence gathering and sharing and made significant modifications to the existing immigration law, particularly as it pertains to exclusion and deportation of aliens. Title IV of the PATRIOT Act is entirely dedicated to immigration and border protection matters. It authorized the increase of border patrol and customs and immigration personnel as well as funding for new technology to aid enforcement. It further granted the former Immigration and Naturalization Service ("INS") access to the Federal Bureau of Investigation ("FBI") files to crosscheck the criminal records of those applying for immigration benefits. Most importantly, it reformulated the immigration law pertaining to terrorism.

§ 435 (expanding the criteria for deportation for crimes of moral turpitude, which courts in the past had already interpreted liberally to include conduct such as provision of false information on a student loan application (see Kabongo v. INS, 837 F.2d. 753, 758 (6th Cir. 1988)) or heterosexual sodomy (see Veloz-Lonzano v. INS, 463 F.2d. 1305, 1307 (D.C. Cir. 1972)). See generally Stephen Legomsky, Immigration and Refugee Law and Policy, 433–53 (2d ed. 1997). The AEDPA also provided for swift criminal alien removal procedures. See §§ 431–43; see also § 705 (regarding increased penalties for certain terrorist crimes). The objective, inter alia, was to "deter terrorism [and] provide justice for victims." Id. at 110 Stat. at 1214. More importantly, the AEDPA also established unique procedures for the removal of suspected terrorists. See generally 8 U.S.C. § 1158. The IIRIRA added to the list of crimes previously considered to be aggravated felonies and also lowered the threshold penalty for the qualification of a crime to be considered deportable. See IIRIRA, § 321(a)(A); § 101(a)(43)(A); § 321(a)(3); § 101(a)(43)(F)–(G) (lowering the penalty from five years to one for crimes such as theft); § 440(e)(4), (6); 8 U.S.C. § 101(a)(43)(F) (lowering the prison sentence requirement of eighteen months for document fraud to twelve months).
In 2005, Congress enacted the REAL ID Act, as part of the Emergency Supplemental Appropriation Act for Defense, the Global War on Terror, and Tsunami Relief. Although the REAL ID Act was a part of the security-driven modifications of the immigration law, the changes it introduced are largely limited to evidentiary standards in asylum proceedings. The PATRIOT Act and the REAL ID Act provide the structure and substance of the INA provisions pertaining to the adjudication of immigration claims involving terrorism issues. These legislative enactments form the basis of the current asylum law as it pertains to national security and terrorism.

II. TERRORISM AS A STATUTORY BAR TO ASYLUM

This Part provides a detailed discussion of the complex statutory scheme pertaining to the statutory bar to asylum with a particular emphasis on the challenges of adjudication of cases involving the terrorism issue.

A. Asylum Status in General

A textual review of certain INA provisions discussing terrorism and asylum is necessary to demonstrate the difficulty of adjudicating cases involving terrorism issues. Section 208 of this statute is exclusively devoted to asylum. The general rule is as follows: "Any alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum in accordance with this [or certain other sections]." With respect to conditions of granting asylum, the INA states that, "The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for [it] in accordance with the requirements and procedures established by [either of them] if [either] determines that such alien is a refugee within the meaning of Section 101(a)(42)(A) of this title." This section defines a refugee as "any person who is outside any country of such

50. For example, the REAL ID Act makes the following clarification with respect to a very controversial issue of the standard of proof in asylum proceedings: "Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." INA § 208(a)(2)(B)(ii).
person’s nationality or . . . in which such person last habitually resided, and who is unable or unwilling to return to . . . [or] avail himself or herself of the protection of, that country 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.”

This Article is focused on the exceptions to this definition, particularly with respect to the terrorism exception to asylum.

B. Exceptions to Asylum

The INA excludes some category of persons from protection even if they otherwise meet the requirements of refugee status. The primary reason for these exceptions is that these categories of persons are deemed “undeserving” or “unworthy” of protection. Section 208(b)(2)(A) of the INA sets forth the various exceptions that prevent otherwise qualified applicants from being granted asylum in the United States, including, (1) persecution of others, (2) particularly serious crimes, (3) serious non-political crimes, and (4) danger to the security of the United States. The INA’s exclusion provisions somewhat parallel the exclusion provisions of the Refugee Convention, with the exception of the terrorism exception. The jurisprudence pertaining to almost all of the statutory bars is inextricably linked with the jurisprudence of the terrorism exception. As such, brief discussions of the various statutory bars

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53. 8 U.S.C. § 1101(a)(42)(A). Asylum is one of three interrelated forms of relief that an alien could seek under the INA. The second form of relief is called withholding of removal under 8 U.S.C. § 1231(b)(3) (“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”). Unlike asylum, which is purely discretionary, withholding of removal under this provision is mandatory. See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). The third form of relief that an alien could seek falls under the Convention against Torture; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987, 1465 U.N.T.S. 85. This was implemented through the Omnibus Consolidation and Emergency Supplemental Appropriation Act of 1999, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681–2682 and Regulations Concerning the Convention Against Torture, 9 C.F.R. § 208.16-208.18 (2005). For purposes of asylum, the INA further provides that: “The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.” 8 U.S.C. 1158(b)(1)(B)(i).

54. See supra Part II.A.


56. Id. at 442–43.
precede a detailed discussion of the terrorism bar in the following subsections.

1. Persecution of Others

An alien will be barred from receipt of asylum protection if he has "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." This determination is subject to the "clear and convincing evidence" standard of review. The court will consider the claimant's own testimony and other relevant facts to determine whether he or she had, at some time in the past, engaged in the persecution of others. Misconduct that might constitute persecution of others has been subject to complex and varying standards imposed by the BIA and various appellate courts. For example, the BIA at one point found that while torture and assassination constituted persecution of others, acts of violence incidental to armed conflict did not. On a different occasion, it held that involuntary or forced involvement in the persecution of others does not excuse the claimant, stating that what is important is not the state of mind of

57. 8 U.S.C. 1158(b)(2)(A)(i) (2000 & Supp. 2007). This exception seems to have been derived from the exclusion clauses of the Refugee Convention and has been modified to suit the needs of the United States government. Compare Convention Relating to the Status of Refugees of 1951, entered into force April 22, 1954, ch. 1, art. 1 (F), 189 U.N.T.S. 150 [hereinafter Refugee Convention] ("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.") with 8 U.S.C. 1101(a)(42) (2000 & Supp. 2007). The Refugee Convention was geographically limited to Europe and temporally limited to pre-1951 events. The Refugee Protocol in 1967 eliminated these limitations but incorporated all of the substantial provisions by reference, including the Convention's definition of a refugee. Although the United States was not an official party to the Refugee Convention, it became one by proxy when it ratified the Protocol in 1967.

58. McMullen v. INS, 788 F. 2d 591 (9th Cir. 1986).

59. Id. at 599.

60. See, e.g., Ofosu v. McElroy, 933 F. Supp. 237, 244-46 (9th Cir. 1995) (upholding BIA's decision relating to torture.).

61. See, e.g., McMullen v. INS, 19 I. & N. Dec. 90, 92-93 (BIA 1984), aff'd, 788 F.2d 591, 599 (9th Cir. 1986).


63. See Laipenieks v. INS, 18 I. & N. Dec. 433, 464-65 (BIA 1983); rev'd, 750 F. 2d 1427, 1435 (9th Cir. 1985).
the claimant when he committed the acts but the "objective effect" of the conduct.  

The difficulty of determining asylum claims under the existing system is evidenced in the Matter of A-H, wherein the BIA determined that once the government presents prima facie evidence showing that the claimant had engaged in persecution of others, the burden then shifts to the claimant to demonstrate by a preponderance of the evidence that he did not engage in the said conduct. In this case, the respondent was an Algerian national and citizen. Admittedly, he was a leader-in-exile of a political Islamic group best known by its French acronym "FIS," which came into conflict in 1992 with the Algerian government. A military branch of this group known as AIS was involved with terrorist activities. The respondent fled Algeria as the conflict erupted, entered the United States and applied for asylum in 1993. Three years later, the INS denied his claim on the ground that the respondent was complicit in persecution of others and acts of terrorism based on his affiliation with FIS. After an immigration judge affirmed the Service's decision and ordered him deported, the BIA reversed the decision on the ground that there was no sufficient evidence to conclude that the respondent was excludable because of the alleged acts and remanded the case to the immigration court for further proceedings.

The second immigration judge, upon consideration of additional evidence, decided that the respondent was excludable on the same ground as found by the previous judge. After a second appeal to the BIA, the deportation decision was reversed yet again on grounds of insufficient evidence and questionable credibility of the judge's determination and the respondent was granted asylum in the United States.

64. Id.
66. Id. at 786.
67. Id. at 775.
68. Id.
69. Id. 775–76.
70. Id. at 776.
71. Id.
72. Id.
73. Id. at 776–77.
74. Id. at 777 (citing In re A-H (BIA 1998)).
75. Id. at 777 (citing In re A-H (I.J. 1999)). The second judge granted the respondent deferral of removal under CAT and implementing legislation. See supra note 53.
76. Id. at 777–78.
77. Id. at 777 (citing In re A-H (BIA 2000)).
Dissatisfied with the BIA's repeated reversal of the immigration judges' decisions, the acting director of the INS referred the BIA's decision directly to the Attorney General, who considered the matter in detail and reversed the BIA's decision. Although the respondent denied personal involvement in terrorist activities, he did admit that he supported the military wing's actions before 1995. This evidence, combined with newspaper reports illustrating his sympathies, convinced the Attorney General that the respondent was sufficiently engaged in persecution of others to exclude him from asylum protection. Examples of evidence that could support a finding that a person who is a leader-in-exile of a political movement may be found to have "incited," "assisted," or "participated in" acts of persecution would include evidence indicating that the leader was instrumental in creating and sustaining the ties between the political movement and the armed group and was aware of the atrocities committed by the armed group, evidence that he used his profile and position of influence to make public statements that encouraged those atrocities, or evidence that he made statements that appear to have condoned the persecution without publicly and specifically disassociating himself and his movement from the acts of persecution, particularly if his statements appear to have resulted in an increase in the persecution. These examples are not intended to be exhaustive.

Finding this standard problematic, however, the Ninth Circuit articulated a completely different standard in *Miranda Alvarado v. Gonzales*. In this case, the court said that to determine whether the person should be excluded from refugee status as a persecutor of others, two criteria must be met, (1) a particularized showing that

78. *Id.* at 781. The group was responsible for several terrorist acts and the death of civilians. The respondent was quoted by a French newsletter as saying, "The GIA exists in the media. They must stop using this terminology and talk instead of the Mujahidin...We are finally supporting the struggle of the Mujahidin." He was also quoted by another newspaper as saying, "the rumors about disagreement or conflict between the [AIS] and [GIS] are mere illusions for 'the Mujahidin have the same war and the same peace, and they are all from the womb of the FIS.'" *Id.*

79. *Id.* For example, an affiliate of The Economics reported the respondent's comment that FIS would pursue armed struggle in Algeria to depose the "junta in power" and his suggestion that intellectuals affiliated with the government would be targeted. *Id.* Interestingly, around the same time that the respondent made these statements, five Algerian intellectuals were killed. *Id.* Additionally, in an interview with Agence France-Presse following one such assassination, the respondent said that the assassination was a "sentence and not a crime." *Id.* at 785.

80. *Id.*

the claimant was personally involved, and (2) that the claimant’s involvement was material.\textsuperscript{2}

The A-H- case demonstrates the overlap between the “persecution of others” and the “terrorism” exceptions to asylum. While the bar against persecution of others applies to the conduct of the respondent in the past, the terrorism bar focuses not only on past conduct but also the future likelihood of involvement in terrorist activity. Moreover, as will be discussed below, the evidentiary issues involved with the terrorism exception are more complicated than those involved with the persecution of others cases. In fact, the involvement of the A-H- case with terrorism issues is precisely what complicates the case. The main issue in a case involving the bar against persecution of others is whether the respondent had engaged in persecution of others in the past. By contrast, the judge in a terrorism case only has to be concerned about the future likelihood of engagement in terrorist activity.

2. Particularly Serious Crimes

The second category of persons that the INA excludes from refugee status includes any alien who “[has] been convicted by a final judgment of a particularly serious crime, constitut[ing] a danger to the community of the United States.”\textsuperscript{3} As the text of this provision clearly indicates, this exclusionary ground is exclusively limited to criminal convictions in the United States. Originally designed to be a preemptive exclusionary provision, it is now more often used to terminate refugee status when the refugee commits “a particularly serious” crime after he has been granted asylum.\textsuperscript{4}

Under the INA, “aggravated felon[ies],” consisting of theft and perjury accompanied by a prison term of more than 1 year,\textsuperscript{5} are considered such particularly serious crimes within the meaning of

\textsuperscript{2} Id. This determination affirmed the ruling of twenty years prior in \textit{Laipenieks v. INS}, 750 F.2d 1427, 1431-32 (9th Cir. 1985) (demanding “proof of personal active assistance or participation in persecutorial acts.”) Other Circuits have taken a different view and the Supreme Court has denied certiorari. \textit{See}, e.g., Kulle v. INS, 825 F.2d 1188 (7th Cir. 1987), \textit{cert. denied}, 484 U.S. 1042 (1988); Schellog v. INS, 805 F.2d 655 (7th Cir. 1986), \textit{cert. denied}, 481 U.S. 1004 (1987) (holding that voluntary association with Nazi SS commando was a sufficient ground for exclusion even though a personal involvement in persecutory conduct could not be proven).


\textsuperscript{4} \textit{See} 8 U.S.C. § 1158(c)(2)(B) (“Asylum . . . may be terminated if . . . the alien meets a condition described in subsection (b)(2) of this section.”).

\textsuperscript{5} \textit{See}, e.g., 8 U.S.C. § 1101(a)(43)(G) (“A theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least 1 year.”).
the Refugee Act. The criteria for determining what constitutes a conviction of a particularly serious crime is as follows: (1) the nature of the conviction, (2) the underlying facts and the circumstances of the conviction, (3) the nature of the sentence given, and (4) evaluation of the circumstances of the commission of the crime to determine if the convict could be a danger to the community. The BIA's clear stance on this final requirement is disturbing. In the Matter of Q-T-M-T, it held that once it is determined that the respondent had, in fact, committed a particularly serious crime, an independent determination of whether he is also a danger to the community is unnecessary. Appellate Courts have overwhelmingly endorsed the BIA's position on this issue. This indicates that courts are far more interested in determining whether respondents are deserving of protection rather than whether there would be significant backlash if he or she were to remain in the United States. In fact, the BIA has simplified the standard of proof by limiting the inquiry to the actual records of the conviction without going "behind the record of conviction to redetermine the alien's innocence or guilt.

Therefore, the adjudication of cases involving this provision is restricted to just two inquiries: (1) the sufficiency of the conviction records to prove that the alleged conviction actually existed, and (2) whether the alleged crime constituted "a particularly serious crime" within the meaning of the statute. Since examination of court records often reveals telling details about the nature of the crime, the evidentiary issues involved in adjudication of the existence of a conviction are relatively slight as opposed to those involved with all other grounds of exclusion. The legal standards involved in the determination of the nature of the crime could, however, be problematic. Even though there is detailed statutory

86. A per se rule states that: "Conviction of aggravated felony—For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(i). For the definition of an aggravated felony, see generally 8 U.S.C. § 1101(a)(43).


88. Id. at 650–51; see also In re Frentescu, 18 I. & N. Dec. 244, 247 (BIA 1982).


91. See, e.g., Al-Salehi v. INS, 47 F.3d 390 (10th Cir. 1995); Kofa v. INS, 60 F.3d 1084 (4th Cir. 1995); Garcia v. INS, 7 F.3d 1320 (7th Cir. 1993); Martin v. INS, 972 F.2d 657 (5th Cir. 1992).

guidance in this respect and a per se rule\(^3\) provided by the INA, the application could be problematic.

One example of the difficulty an immigration judge could face in adjudicating this provision is whether a respondent who plead guilty to theft and received an indeterminate sentence qualifies as an aggravated felon. "[A] theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year\(^4\) is considered an aggravated felony. Therefore, whether a crime of theft is considered an aggravated felony turns on whether the sentence spans more than one year. However, this is not always a simple determination since the judge has to rely on the criminal court record, which may not be clear as to whether an indeterminate range of months was an actual sentence, a suspended sentence, probation or parole.\(^5\)

3. Serious Non-political Crimes

The INA also excludes an alien from protection if "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to [his] arrival... in the United States.\(^6\) The standard of proof for this exclusion is equivalent to the "probable cause" standard.\(^7\) Barapind \textit{v. Enomoto}\(^8\) illustrates what circumstances might constitute probable cause in this context. In this case, the Indian government requested extradition of an Indian national for allegedly driving a vehicle in India while a gunman riding with him committed mur-


\(^95\). See Anker, supra note 55, at 13-414, 441. When it is clear that the indeterminate sentence was a sentence that was actually imposed and later suspended in the form of parole, the maximum penalty is often considered to be the actual sentence rather than the minimum. See, e.g., Pichardo \textit{v. INS}, 104 F.3d 756, 759 (5th Cir. 1997); Rogers \textit{v. Pa. Bd. of Prob. \& Parole}, 724 A.2d. 319 (Pa. 1999).

\(^96\). 8 U.S.C. § 1158(b)(2)(A)(iii) (2000 & Supp. 2007). This provision was adopted almost verbatim from the Refugee Convention. See Refugee Convention, \textit{entered into force} 22 April, 1954, 189 U.N.T.S. 150, at art. 1(F)(b) (stating that a refugee is excluded from refugee status if there are serious reasons for considering that he "has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.").

\(^97\). McMullen \textit{v. INS}, 788 F.2d 591, 599 (9th Cir. 1998) (holding that clear and convincing evidence is not required); see also Barapind \textit{v. Enomoto}, 400 F.3d 744 (9th Cir. 2005) (partly overruling McMullen.).

\(^98\). Barapind, 400 F.3d at 744.
der and caused several injuries. For evidence to be sufficient to support probable cause, it must be "competent." As evidence, Indian officials relied on the translated statement of a man who was wounded in the shooting incident that identified the respondent as the driver. Respondent, on the other hand, submitted another affidavit made by the same individual, claiming that he had never seen the respondent driving the vehicle. Despite these blatant inconsistencies, the court held that the evidence supported the existence of probable cause and ordered that the credibility of the affidavit be tested at trial.

Secondly, there was a question of whether the alleged crime was political in nature. The circumstances suggested that the alleged crime occurred during a time of serious political violence during which tens of thousands of people were killed. Moreover, evidence suggested that the respondent was a prominent political leader. On this basis, the court remanded the case for further proceedings to determine if "[there was an] occurrence of an uprising or other violent political disturbance at the time of the charged offense, and [whether the] charged offense ... is 'incidental to' 'in the course of,' or 'in furtherance of' the uprising." Although consideration of the "political offense" exception has proven instructive in extradition cases, courts have added more perspective in the immigration context. For example, in *McMullen v. INS*, the Ninth Circuit stated that the most appropriate test in the immigration context looks at the subject's motivation, whether there is a direct link between the crime and an alleged political objective, and whether it is proportional to the objective sought and the level of its atrociousness.

*McMullen* also demonstrates the link between the "serious non-political crimes" bar and the terrorism bar. McMullen was a former

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99. *Id.* at 746–48. His asylum request was interrupted when India requested his extradition, alleging the crimes that he had committed were non-political. *Id.* at 747.
100. *Id.* at 749.
101. *Id.*
102. The affidavit that Barapind obtained from the same individual stated that the Indian police had him sign a blank piece of paper and turned it into an affidavit accusing Barapind of complicity in the crime. *Id.*
103. *Id.* at 750.
104. *Id.*
105. *Id.* at 747, 750.
106. *Id.* at 750 (citing Quinn v. Robinson, 783 F.2d 776, 797 (9th Cir. 1986)).
107. See, e.g., Ornelas v. Ruiz, 161 U.S. 502, 509-12 (1896); *McMullen v. INS*, 788 F.2d 591, 594 (9th Cir. 1986); Quinn v. Robinson, 783 F.2d 776, 782-83 (9th Cir. 1986).
109. *Id.* at 594.
member of the Provisional Irish Republican Army ("PIRA"). As a member, he was involved in militant activities that included bombing military installations, training operatives, and coordinating illegal arms shipments from the United States to Ireland to support PIRA's terrorist activities. From the outset, the court noted that the record left no room for doubt that the PIRA was a terrorist organization because it was involved in indiscriminate targeting of civilians no matter what the objectives might have been. The difficult question was whether there were serious reasons to believe that McMullen was involved in the indiscriminate attacks. McMullen admitted that he was involved in bombing military installations and in shipping arms, but denied any involvement in other types of terrorist activities in which the PIRA was implicated. The Court stated that, "[O]nce the conduct is determined to be a serious nonpolitical crime, the Convention requires only a finding of probable cause to believe the alien has committed the crime in order to find 'serious reasons.'" The court then concluded that the totality of the circumstances, including his admission of participation in serious military activities, shipment of arms, and training of PIRA members, supported the conclusion that there was probable cause or "serious reason" to believe that McMullen had committed serious non-political crimes associated with the PIRA.

Although insufficient and often nonexistent evidence presents serious problems in cases involving serious non-political crimes, these cases are actually slightly easier to adjudicate than ordinary terrorism cases since a defined standard of proof for non-political crime cases provides at least some framework for the court. Such definitional clarity is entirely lacking in terrorism cases.

110. Id. at 592-93.
111. Id. at 593.
112. The court stated specifically that:

Terrorism does not fit easily into the complex rubric of international law, ... and it is difficult to distinguish meaningfully between one obviously terrorist act and another. However, there is one relevant distinction that has maintained legal force for many years, and which applied in this case. There is a meaningful distinction between terrorist acts directed at the military or official agencies of the state, and random acts of violence against ordinary citizens that are intended only "to promote social chaos." The distinction between acts against ordinary civilians and official instrumentalities has been extant in the common law since In re Meunier, 2 Q.B. 415 (1894).

113. Id. at 597.
114. Id. (citing Grant v. Sindona, 619 F.2d 167, 174 (2d Cir. 1980)).
4. Danger to the Security of the United States

A person seeking asylum is also excluded from receiving protection if, "there are reasonable grounds for regarding the alien as a danger to the security of the United States."\(^{116}\) Since this security bar is quite general, its application is often linked to another exclusionary ground, namely the terrorism exception. The case of Azzouka v. Sava\(^ {117} \) questions the grounds under which a person can be labeled as a danger to U.S. security.

Azzouka, a national of Yemen of Palestinian origin, was detained at a port of entry while attempting to enter the United States.\(^ {118} \) Although he possessed a valid passport and visa, port inspectors found two fraudulent passports in his possession and detained him.\(^ {119} \) He was charged with criminal offenses related to possession of the fraudulent documents,\(^ {120} \) which were later dismissed because he agreed to provide information about the Palestinian Liberation Organization ("PLO"),\(^ {121} \) where he claimed to have worked as a clerk and driver. He denied any involvement in terrorist activities. After the criminal charges were dropped, he asked to present an asylum claim, professing that he would face persecution if he returned to his place of origin.\(^ {122} \) Rather than being adjudicated by an immigration judge, an INS Regional commissioner summarily excluded Azzouka on national security grounds. Azzouka then sought a habeas corpus review of this decision, questioning whether the INS commissioner was the appropriate person to decide his case. He claimed he had been denied an opportunity to have his case adjudicated by the Immigration Judge.\(^ {123} \) Simply stated, the most important issue in this case was whether an asylum-seeker had a right to have his asylum claim adjudicated by an immigration judge when the INS Regional Commissioner summarily decided that he posed a national security threat.\(^ {124} \) The Second Circuit reviewed two provisions of the INA.\(^ {125} \) The court stated in an elaborate ruling that:

\(^{117}\) Azzouka v. Sava, 777 F.2d 68 (2d Cir. 1985).
\(^{118}\) Id. at 69–70.
\(^{119}\) Id. at 70.
\(^{120}\) The charge was brought in the Eastern District of New York. Id. The specific criminal charges were violations of 18 U.S.C. § 1543 (1982) ("willful use" of false passport). Id. The charges were later amended and brought under 18 U.S.C. § 545 (1982) ("prohibiting passing false papers through the customhouse"). See id.
\(^{121}\) Id.
\(^{122}\) Id.
\(^{123}\) Id. at 71.
\(^{124}\) Id. at 71–75.
\(^{125}\) Id.
All we need decide is that if the Regional Commissioner has reasonable grounds for regarding an alien as a danger to the security of the United States, [the alien] not only may be excluded as an undesirable alien but also is not entitled to an asylum hearing. We find that the Regional Commissioner is the appropriate official to make the national security determination and not the immigration judge.126

The court based this conclusion on the following reasons: (1) an asylum hearing should only determine if the claimant has a well-founded fear of persecution, (2) Congress did not intend to amend the statutes regarding the summary exclusion of those who threaten national security by offering a new asylum hearing in which the security issue could be aired, and finally, (3) under sections 243(b)(2) and 235(c) the authority to determine security threats is given to the Attorney General and the Regional Commissioner as the Attorney General's designee.127 If they determine that a security threat exists, no separate asylum hearing is necessary.128

If the INS determines that an alien is a danger to national security, he or she may seek habeas corpus review. If none of the exceptions apply, the asylum-seeker is entitled to a hearing on his asylum petition. The habeas corpus remedy remained in effect until the enactment of the REAL ID Act of 2005, which stripped district courts of habeas jurisdiction to review final deportation orders.129

Normally, qualification for asylum status is a two-part process involving qualification as a refugee by definition and then possible exclusion. Then, a determination must be made as to whether the applicant will be excluded from protection for some other reason, even though he meets the technical definition of a refugee. The

126. *Id.* at 75.
127. *Id.* at 75–76.
128. *Id.* at 76. The Court distinguished this ruling from its former ruling in *Yiu Sing Chun v. Sava*, 708 F.2d 869 (2d Cir. 1983). In *Chun*, the Court had held that asylum hearings cannot be denied simply because the statute does not provide for an exclusion or deportation hearing. *Id.* at 870–72. *Chun* involved two stowaways who requested political asylum, which was denied by an INS District Direct. *Id.* at 869. The aliens sought a habeas corpus review but their request was denied by the District Court. *Id.* at 872. The Second Circuit reversed the district court's ruling and held that even if the claimants were deemed excludable under the general provision of 8 U.S.C. § 1332(d), the Refugee Act provides that aliens may seek asylum “irrespective of . . . their status.” 8 U.S.C. § 1158(a) (2000). Therefore, a hearing before an immigration judge to determine whether they qualify for asylum cannot be denied. *Chun*, 708 F.2d at 877. The court distinguished *Azzouka* on the ground that while Congress did not specifically and expressly exclude stowaways from asylum, it did so with respect to persons considered security threats. *See Azzouka*, 777 F.2d at 75.
The Terrorism Exception to Asylum

court's determination suggests that if a person suspected of posing a threat to national security is going to be excluded from refugee status whether he qualifies or not, there is no meaningful reason to allow the adjudication of the asylum claim to proceed. The opposing argument to this is, of course, that exclusionary evaluation is part of the refugee status determination process. One might argue, then, that the national security concerns should just be part of the ordinary exclusion evaluation. In the Azzouka case, however, the court identified a group of people who would not be granted asylum regardless of the fact that they might technically qualify.\textsuperscript{130}

Although there are other notable cases that were adjudicated mainly on security grounds like Azzouka,\textsuperscript{131} most cases pertaining to national security also involve at least one of the other statutory bars, mainly the terrorism bar. This is particularly true after the elaboration of the terrorism bar under the IIRIRA and UPA. Detailed discussion of the terrorism bar follows.

5. Terrorism

Terrorism is likely the most significant and most controversial statutory bar to asylum currently. Although the Refugee Convention does not explicitly contain a terrorism bar, it does exclude persons from refugee status “[f]or whom there are reasonable grounds for regarding as a danger to the security of the country.”\textsuperscript{132}

The original INA provision pertaining to terrorism, modified by the PATRIOT Act\textsuperscript{133} and the REAL ID Act\textsuperscript{134} has only recently gained significant jurisprudential import. Since scholarly commentaries about the subject are surprisingly sparse,\textsuperscript{135} it is important to lay out the statutory scheme in some detail.

Section 208(b)(2)(A)(v) provides that an alien is excluded from receiving asylum if the alien is specifically described elsewhere in the statute, or if the Attorney General determines that there are

\begin{footnotes}
\item 130. Azzouka, 777 F.2d at 75-76.
\item 132. See Refugee Convention, supra note 57, at art. 33(2).
\item 133. See PATRIOT Act, supra note 43, at § 411(b)(2).
\item 134. REAL ID Act, supra note 49, at § 101(b).
\item 135. For example, the 2007 edition of one of the leading textbooks on refugee law dedicates only a few pages for this subject. See KAREN MUSALO, JENNIFER MOORE & RICHARD A. BOSWELL, REFUGEE LAW AND POLICY 886-95 (3d ed. 2007). The other leading textbook also devotes a few pages for this subject. See ANKER, LAW OF ASYLUM, supra note 55, at 442-46.
\end{footnotes}
reasonable grounds for regarding the alien as a danger to the security of the United States.\textsuperscript{136}

Section 212 (a) (3) (B) (i) of the INA provides a general exclusionary rule pertaining to terrorism.\textsuperscript{137} Adjudication of cases involving these provisions could be extraordinarily difficult for reasons described in the following subsections in some detail.

\textit{a. Material Support}

Because the definition of important terms are so broad, critics insist that some genuine refugees, particularly those who were engaged in fights against gross human rights abuses, could be inappropriately denied refugee status on the basis that their actions fall within the scope of "engaging in terrorist activities."\textsuperscript{138} For example, a broad application of the material support provision of the INA could arguably exclude Iraqis who aligned with U.S. soldiers in the fight against Saddam Hussein.\textsuperscript{139} U.S. sympathizers such as Mohammed Odeh Al Refaiei, who was granted U.S. asylum in 2003 after helping rescue Jessica Lynch from a hospital in Nassiriya, would be excluded on the basis of providing material support to U.S. soldiers. In fact, the Georgetown Law Center Human Rights Institute reported that the Department of Homeland Security disclosed during oral argument before the BIA that Al Refaiei would be excluded from asylum as having provided material support in furtherance of a terrorist activity as the term is defined under the INA.\textsuperscript{140}

Under the INA section 212(a) (3) (B) (iv), the term "[e]ngag[ing] in terrorist activity" is defined broadly to include not only directly committing "terrorist activity" and providing material support to others engaged in terrorism,\textsuperscript{141} but also preparation to commit such activity and soliciting funds and members\textsuperscript{142} for terrorist causes.

\textsuperscript{139} See generally id.
\textsuperscript{140} See Georgetown Law Center Human Rights Institute, supra note 138, at 893, n. 84 (citing Transcript of Oral Argument at 24-35, \textit{In re} Ma San Kywe, U.S. Department of Justice, Executive Office for Immigration Review, United States Immigration Court (Jan. 26, 2006)).
Because the definition encompasses so many activities, adjudicators face significant complexities in applying this definition in practice, such as in the Al Refaiel case.

Congress classified some ambiguities contained in the definition under the Intelligence Reform and Terrorism Prevention Act of 2004, but some ambiguities still remain. INA 212(a)(3)(B)(iii) provides in part that:

[the term 'terrorist activity' means any activity which is unlawful under the laws of the place where it is committed ... and which involves any of the following: ... [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.]

The statute makes no exceptions relating to the purpose of using dangerous weapons. A different subsection of the same statute provides that engaging in terrorist activity would mean, inter alia, gathering "information on potential targets for terrorist activity" as well as committing acts "that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communication ... ." Read together, these provisions inevitably produce the absurd result noted in the Al Refaiel example simply because the U.S. soldiers carried weapons and conducted operations against the law of the place where they conducted the operations, namely Saddam Hussein's laws. They also arguably endangered the safety of one or more people, at least Saddam's men, at least indirectly. Finally, Mr. Refaiel provided them material support at least in the form of gathering information or providing communication.

Alarmingly, these types of cases are adjudicated on a regular basis. Cheema v. Ashcroft is a case that involved twenty-six different appearances before an immigration judge and took more than

143. The ambiguity was noted in Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1200 (C.D. Cal. 2004).
149. Cheema v. Ashcroft, 383 F.3d 848 (9th Cir. 2004).
eleven years to resolve. Petitioners were initially denied refugee status because they had raised money for people engaged in terrorist activity. The Indian couple sought asylum in the United States because they had experienced persecution in their home country and felt the likelihood of future persecution was strong because of Mr. Cheema's involvement with a political movement. The central issue in this case related to the nature of the movement and the level of Cheema and his wife Kaur's involvement.

Mr. Cheema had helped the All India Sikh Student Federation organize a protest rally against the Indian government's decision to divert water from the Punjab province. He gave food and shelter to two leaders of the group after his arrival in the United States. The money was used for various purposes including for the provision of legal representation to Sikh Federation members detained in the United States. The movement eventually split into peaceful and militant factions, the latter led by Daljit Singh Bittu ("SSB"), whom Cheema had known in college. Although Cheema denied any involvement in or advocacy for the militant activities, he did keep in distant touch with SSB. He testified that he attempted to advise SSB against militant actions. SSB later became one of India's wanted persons for his involvement in a bank robbery and

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150. The case was first instituted in May 1993. The Court of Appeals for the Ninth Circuit handed down its decision in this case in August, 2004. Even then it affirmed in part, reversed in part and remanded it for further proceedings. Id. at 851. Although Cheema was decided under prior law, it offers an excellent demonstration of existing challenges. Under the current law, the Ninth Circuit arrived at a slightly different conclusion by distinguishing Cheema. See, e.g., Bellout v. Ashcroft, 363 F.3d 975 (9th Cir. 2004).

151. According to his testimony that the immigration judge found consistent and credible, Cheema suffered severe past persecution including several arrests, and tortures that resulted in hospitalization. Id. at 850–52. The Appeals Court's description of one instance reads: "When he was unable to say, he was taken into the jail yard, stripped, bound, stretched repeatedly on a pulley, and finally subjected to a solid steel roller being rolled over his thighs, breaking the muscles and causing him to lose consciousness." Id. at 851. A description of another incident reads:

In May or June of 1989, Cheema was again arrested and taken to Amritsar for interrogation. He was beaten and his right leg broken by his police interrogators. He was brought before a magistrate, who ordered him taken to a hospital where his broken leg was set, but on remand to police custody the police broke it again.

Id.

152. Id. at 850.
153. Id.
154. Id. at 852.
155. Id.
156. Id. at 850–51.
157. Id. at 851.
158. Id.
assassination. When Cheema found out about SSB's deplorable actions, he urged him to cease such activities. Cheema's urging eventually resulted in the release of a kidnapping victim. Cheema's wife, Kaur, on her part also admitted to having raised money for Sikh widows but denied sending money for any militant activities.

The immigration judge who first adjudicated the Cheemas' asylum claims found both Cheema and his wife, Kaur, to be credible witnesses. She then granted Cheema's wife asylum but wavered on Cheema's petition. First, she denied his claim based on his "lack of candor." Then, she granted him the relief of withholding of removal. Finally, she decided that he was barred from that relief because he was "engaged in terrorist activity." In an interesting twist, the judge found that the bar was subject to discretionary waiver under INA 243(h)(3) as amended by the AEDPA and granted the waiver.

Both the claimants and the government appealed the decision. The BIA began its inquiry by noting the complexity of the matter and upheld the immigration court's credibility determination. The immigration court specifically held that Cheema endured brutal torture in India and is "one of the few prominent pro-Khalistan leaders in the world who would be in danger if returned to India." The BIA, however, held that both Cheema and his wife were barred from asylum and withholding of removal because they "had engaged in terrorist activity" within the meaning of the INA by providing material support by soliciting money for individuals and groups including SSB and others, likely knowing that these people were engaged in terrorism. The respondents appealed to the Ninth Circuit. More than eleven years after they first sought asylum, the Ninth Circuit handed down a decision demonstrating the complex doctrinal dilemma surrounding the entire issue of terrorism and asylum in the contemporary world. The court's decision also offers perhaps one of the best articulations of the law

159. Id.
160. Id. at 851.
161. Id. at 852.
162. Id. Although a classified evidence was also introduced into the record in this case, the court found it less than helpful. The most important evidence remained to be the testimony of the asylum seekers. As such, the finding of credibility was an important aspect of the evidentiary inquiry.
163. Id.
164. Id. at 852-53.
165. Id. at 583.
166. Id.
167. Id.
168. Id.
pertaining to the terrorism exception to asylum. It is discussed in some detail below.

As the asylum claim in this case was filed before the enactment of the IIRIRA,\textsuperscript{169} it was adjudicated under the provisions of AEDPA pertaining to the terrorism exception.\textsuperscript{170} The IIRIRA and subsequent amendments did not substantially alter the basic premise of the terrorism exception.

The court analyzed former INA section 208, as amended by AEDPA section 241.\textsuperscript{171} This provision, dealing specifically with denial of asylum to terrorists, states that, "The Attorney General may not grant an alien asylum if the Attorney General determines that the alien is excludable under subclause (I), (II), or (III) of section 212(a)(3)(B)(i) or deportable under section 241(a)(4)(B), unless the Attorney General, in the discretion of the Attorney General, determines that there are not reasonable grounds for regarding the alien as a danger to the security of the United States."\textsuperscript{172}

From the outset, the Ninth Circuit endorsed the BIA's view that a determination of participation in terrorist activities does not automatically make the applicant a danger to the security of the United States.\textsuperscript{173} More importantly, it expressly affirmed the BIA's view that "a separate determination with respect to the alien's danger to national security" must be made.\textsuperscript{174} As will be discussed later, this determination is exceedingly important for the whole jurisprudence of terrorism and refugee statutes because the link between exclusion and national security lends credence and rationality to an exception that would otherwise seem dubious. It is important to note here that the BIA's approach in Cheema regarding the requirement of an independent determination of the threat to national security significantly departs from its determination with respect to the "particularly serious crime" bar discussed under Section II(B)(2) above.

The BIA's position on the issue of whether a person who has been proven to have committed "a particularly serious crime" must also be independently determined to pose a national security threat. This is articulated in the Matter of Q-T-M-T.\textsuperscript{175} In this case,

\begin{itemize}
  \item \textsuperscript{170} See Cheema, 383 F.3d at 855.
  \item \textsuperscript{171} Id.
  \item \textsuperscript{172} See Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, § 208, 66 Stat. 163, § 208 (1952).
  \item \textsuperscript{173} See Cheema, 383 F.3d at 855.
  \item \textsuperscript{174} Id.
  \item \textsuperscript{175} See In re Q-T-M-T, 21, I. & N. Dec. 639 (B.I.A. 1996).
\end{itemize}
the BIA clearly held that an independent determination of whether the claimant is also a danger to the community is unnecessary as long as he is proven to have committed a particularly serious crime.\(^\text{176}\) As indicated above, the Courts of Appeals have almost invariably affirmed this determination.\(^\text{177}\)

The distinction that the BIA makes between the two types of bars seems to be predicated on the underlying assumptions behind them. Persons who have committed "a particularly serious crime" are not only considered dangerous per se but also undeserving of protection. Moreover, as discussed in section II(B)(2) above, the clear and convincing evidentiary requirement is so high here that it leaves little room for doubt as to the guilt or innocence of the individual subjected to the bar. Since the standard of proof for the exclusion of an alien on terrorism grounds is complicated at best, the risk of error is significantly high.

In *Cheema*, the Ninth Circuit stated that automatically finding an alien who might be considered to have engaged in terrorism to be a definite security threat within the meaning of the statute "would render the exception to the asylum bar meaningless."\(^\text{178}\) The court further stated that, "The statutory scheme contemplates an alien who is potentially excludable under one of the designated provisions, yet remains eligible for withholding of deportation or asylum upon a determination that 'there are not reasonable grounds for regarding the alien to be a danger to the security of the United States.'"\(^\text{179}\)

The court continued, articulating a two-part test which must be met cumulatively: "(1) whether an alien engaged in a terrorist activity, and (2) whether there are not reasonable grounds to believe that the alien is a danger to the security of the United States."\(^\text{180}\) This test is loosely discerned from the following statutory scheme analyzed by the court: (1) sets forth the criteria for eligibility for asylum; (2) lists several grounds of exclusion despite the fulfillment of the eligibility criteria; (3) provides for discretionary waiver of some grounds of exclusion. In the context of the terrorism exception, the waiver provision applies to one prong of the two-pronged test.


\(^{177}\) See Garcia v. I.N.S., 7 F.3d 1320 (7th Cir. 1993); Kofa v. I.N.S., 60 F.3d 1084 (4th Cir. 1995); Al-Salehi v. I.N.S., 47 F.3d 390 (10th Cir. 1995); Marun v. I.N.S., 972 F.2d 657 (5th Cir. 1992).

\(^{178}\) See *Cheema*, 383 F.3d at 855.

\(^{179}\) *Id.* (citing Nevada v. Watkins, 939 F.2d 710, 715 (9th Cir. 1991)) ("[w]e should avoid an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress." (citations omitted)).

\(^{180}\) *Cheema*, 383 F.3d at 855–56.
discussed above. The twist, however, is that aliens who have engaged in terrorist activities are considered to be threats to national security per se unless the Attorney General grants a discretionary waiver of those security grounds. Once the issue of "engaging in terrorist activity" has been affirmatively determined, the issue of whether the alien is also deemed to be a national security threat is in reality part of the discretionary waiver inquiry rather than the determination of exclusionary grounds in general. Although it is very important to note this distinction, the practical consequences of the statutory twist are minimal because the exercise of discretion may not be "arbitrary, irrational, or contrary to law." In other words, it must be granted where the statutory requirements are met, barring extraordinary circumstances. Hence, the second part of the two-part test is in fact a part of the waiver inquiry. Former INA section 243(h)(2)(D) provided that an alien who is considered to have engaged in terrorist activity is considered a danger to the national security of the United States. But again, the same provision allows for a discretionary waiver. Therefore, the two-part test would be whether the alien was engaged in terrorist activity and, if he was, whether he deserves a discretionary waiver of this ground of exclusion because his activities had nothing to do with the security of the United States.

According to the BIA, an alien is deemed to represent a danger to the national security of the United States where the alien acts "in a way which 1) endangers

Under the INA, aliens are rendered ineligible for withholding of deportation if "there are reasonable grounds for regarding them as a danger to the security of the United States." Aliens who have engaged in terrorist activity are considered a danger to the security of the United States subject to a discretionary waiver. We review whether substantial evidence supports both the finding of terrorist activity and the determination that the alien is a danger to the security of the United States.

Cheema, 383 F.3d at 856 (citations omitted).

The discretionary waiver provision is extremely valuable. Given the broad definition of terrorist activities to include almost any kind of material support to any kind of movement, its application could result in some serious anomalies without the waiver provision. The statutory scheme pertaining to the relief of withholding of deportation under the Convention Against Torture demonstrates the importance of the discretionary waiver provision. As the Ninth Circuit noted in Cheema, under former INA § 241(B)(3)(B) of INA 8 C.F.R. § 208.16(s)(2), an alien is excluded from protection under CAT if the alien is considered a danger to national security. A mandatory rule provides that for purposes of this provision an alien who had engaged in terrorist activity is considered to be a national security threat per se. See id.
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.”

Applying this three-part test, the BIA held that Cheema and his wife posed a security threat because their joint solicitation of funds for the Sikh resistance organization was considered an engagement in terrorist activity. The BIA said, [i]t is clear that those who engage in terrorism within the United States, even when that terrorism is not directly aimed at the United States, necessarily endanger the lives, property, and welfare of United States citizens and compromises our national defense because such acts inherently involve the United States in foreign conflicts without its consent and “create the very real possibility that such conflicts will be brought home to use by their warring factions.”

Having duly noted the highly deferential standard of review for factual determinations, the Ninth Circuit categorically rejected the BIA's determination that Cheema's wife, Kaur, engaged in terrorism since her testimony that, on two occasions, she had sent money to widowed women and orphaned children was found by the court not to evidence any link between the money she sent and militant activities. The court stated that “the Board's conclusion that [Kaur's] donations to Indian widows and orphaned children 'obviously' and 'inherently' posed a danger to the security of the United States stretches speculation to its breaking point.” As a result, it was unnecessary to inquire whether Kaur was also a security threat. With respect to Cheema as well, although the court did not feel compelled to question the negative inference drawn from Cheema's fundraising activities, it was not convinced that there was substantial evidence to support the determination that he posed a security threat. According to the court, the BIA

184. Id. (accepting the Board's interpretation of “national security”).
185. Id. at 857.
186. Id.
187. Id. at 856.
188. Id.
189. Id.
190. Id. The court added: “The Board adopted the immigration judge’s findings of fact. The immigration judge made no finding that these widows or orphans were engaged in terrorism, had committed or were planning to commit terrorist acts, or were conduits to terrorist organizations. The Board is bound by this absence of factual foundation as it is bound by the IJ's and its own acceptance of the credibility of Rajwinder Kaur. Not a scrap of evidence shows her to have engaged in terrorist activity as defined in INA, Sec. 212(a)(3)(B)(iii).” Id. at 856-57.
191. Id. at 857.
192. Id.
inappropriately merged the two-part test into one when it held that, "[i]t is clear that those who engage in terrorism within the United States, even when that terrorism is not directly aimed at the United States, necessarily endanger the lives, property, and welfare of the United States citizens and compromises our national defense."193 Contrary to the government's assertion, however, it is by no means self-evident that a person engaged in extra-territorial or resistance activities—even militant activities—is necessarily a threat to the security of the United States. One country's terrorist can often be another country's freedom-fighter.194

193. Id.
194. Id. at 858. The court offered elaborate examples, one of which follows:

That terrorist activity affecting a country struggling with strife cannot be equated automatically with an impact on the security of the United States is dramatically illustrated by the case of Nelson Mandela. In 1961, Mandela organized a paramilitary branch of the African National Congress, Umkhonto we Sizwe (MK) or "Spear of the Nation," to conduct guerrilla warfare against the ruling white government. He then went into hiding to carry out the MK's mission: "to make government impossible," and began arranging for key leaders and their volunteers to go abroad for training in guerrilla warfare. Mandela was convicted by the South African government of treason in 1964 and sentenced to life in prison. In 1986, Congress passed the Comprehensive Anti-Apartheid Act, stating that its goal was to pressure the South African government to release Nelson Mandela from prison. It would not be sensible to conclude that Congress, in aiding a man convicted of treason by his own government, endangered the security of the United States or that the alien supporters of Mandela in this country were all deportable as terrorists endangering our national security.

383 F.3d at 858–59 (citations omitted); see also ANTHONY SAMPSON, MANDELA: THE AUTHORIZED BIOGRAPHY 150–51, 158, 177 (1999).

The court's opinion contained more examples, some of which are reproduced below:

The Contras in Nicaragua, for instance, used terrorist tactics in an attempt to overthrow the ruling Sandinista government. It would be difficult to conclude, however, without specific evidence, that supporters of the Contras within the United States compromised national defense. The United States itself opposed the Sandinista regime and sent money to assist the Contras. Similarly, the Solidarity Movement that was instrumental in ending Communism in Eastern Europe was labeled by the Soviet Union as subversive and dangerous, but it can hardly be said that contributors to the Solidarity Movement posed a threat to the lives and property in the United States. We cannot conclude automatically that those individuals who are activists for an independent Tibet are necessarily threats to the United States because they have been labeled by China as insurgents. Without further evidence, it does not follow that an organization that might be a danger to one nation is necessarily a danger to the security of the United States.

History, indeed, is to the contrary. At least since 1848, the year of democratic revolutions in Europe, the United States has been a hotbed of sympathy for revolution in other lands, often with emigres to this country organizing moral and material support for their countrymen oppressed by European empires such as those of Austria, Britain and Russia. In the twentieth century, active revolutionaries such as De Valera and Ben Gurion worked in the United States for the liberation of their homelands.
The doctrinal debate surrounding this issue is featured in Judge Johnnie C. Rawlinson's dissenting opinion to this case. He takes the position that a chain of events occurring anywhere in the world cannot be ignored.\textsuperscript{105} Noting that on June 28, 1914, the assassination in Sarajevo of Archduke Franz Ferdinand set off a chain of events that within a few months embroiled all Europe in World War I, Judge Rawlinson concludes that a determination that aliens engaged in terrorist activities anywhere necessarily supports the conclusion that they pose a security threat to the United States and that no separate proof of such threat is necessary after that determination is made.\textsuperscript{106} In conclusion, he remarked, “Contrary to the majority’s apparent view, our country should not become a haven for those who desire to foment international strife from our shores.”\textsuperscript{107}

To this day, the doctrinal debate continues to be whether aliens deemed to have engaged in acts of terrorism as statutorily defined may be exempted from exclusion if they do not pose a security threat specifically to the United States. This doctrinal dilemma seems to have essentially resulted in the complication of the technical details of the law governing the terrorism bar to asylum.

To add to the complexity further, on top of the category of aliens who are excluded because they had personally been engaged in terrorist activities or provided material support as in the Cheema case, the statute creates different layers of involvement and participation that would exclude asylum-seekers on terrorism grounds. Some examples are discussed below in the following subsection.

\textbf{b. Participation}

The terrorism bar also excludes: (a) persons who have prepared to commit a terrorist activity or incited others to commit a terrorist

\begin{footnotesize}
More recently, foreign anti-Communists living in the United States were active in encouraging and aiding movements against Communist tyranny in the Soviet Union and China. Much of this revolutionary activity would fall under the definition of terrorist activity as the Board interprets the statute. None of it had consequences for the lives and property of American citizens or the national defense, and the slight strains occasionally put on our foreign relations were more than offset by the reputation earned by the United States as a continuing cradle for liberty in other parts of the world.

Cheema, 383 F.3d at 858.
195. \textit{Id.} at 860.
196. \textit{Id.} at 860.
197. \textit{Id.} at 861.
\end{footnotesize}
activity;198 (b) representatives or members of terrorist organiza-
tions;199 (c) persons who have solicited funds or members for the
benefit of a terrorist organization; (d) persons who endorse or
espouse terrorist activity or persuade others to do so; (e) those who
have received military training from a terrorist organization or on
behalf of one; and (f) spouse and children of the above catego-
ries.200

The difficulty of adjudicating cases involving allegations of direct
involvement with terrorist activity as in the Cheema case has been
demonstrated under material support in subsection 1 above.

i. Preparation and Incitement

Preparation

Preparing or planning a terrorist activity is considered a ground
for exclusion.201 In criminal law, preparation to commit a crime is
not ordinarily punishable since no tangible harm typically results
from mere preparation. Preparation to commit a terrorist activity
is, in fact, punishable. Like driving while intoxicated, punishment
of this offense is a preventative measure, yet it is often difficult to
prove with limited and/or ambiguous evidence. Gathering evi-
dence for events that may have occurred a long time ago or in a
foreign country can be challenging. Further, the definitions of the
statuses or acts which can qualify a person for engagement in ter-
rorist activity are ambiguous. Albin Eser, a former judge for the
International Criminal Tribunal for Yugoslavia ("ICTY"), says that
the very essence of crime is harm202 and leading criminal law
scholar Professor Dressler claims that "the criminal law punishes
conduct and not mere thoughts."203 It punishes people for the

200. See § 1182(a)(3)(B)(i). It is important to note that a threat, attempt or conspiracy
to commit any one of these acts is also considered a terrorist activity. See
§ 1182(a)(3)(B)(iii)(VI). Obviously, the existence of such inchoate offenses would complic-
ate the adjudication of cases even more. In the interest of brevity, this article does not go
into the details of the adjudicatory challenges involved in cases charging the commission of
inchoate offense for purposes of exclusion.
the Criminally Protected Legal Interest, 4 DUQ. L. REV. 345, 345, 413 (1965).
2007).
harm that results from their voluntary acts or omissions. In the absence of a cognizable social harm, it is difficult to prove the actus reus and thus the crime. Still, Professor Dressler notes that driving while intoxicated is punishable even when it does not result in any harm as it is merely a preventive measure. The preparation exception to asylum seems to fall under this latter rubric.

**Incitement**

The INA's definition of engaging in terrorist activity includes incitement to commit a terrorist activity, which is even more problematic than preparation or planning because it involves free speech issues. For example, does selling a newspaper affiliated with a terrorist organization for personal gain amount to incitement to terrorism?

The Sixth Circuit raised this issue in *Daneshvar v. Ashcroft*, a case in which the immigration court and the BIA excluded the respondent on terrorism grounds because about fifteen years ago, when he was sixteen years old, he sold newspapers affiliated with an organization which was later designated as a terrorist organization. Although the incitement issue was not outcome determinative in this case, the Sixth Circuit made an interesting remark in a footnote relating to incitement stating in pertinent part that:

> We merely note a certain degree of ambiguity in the statute that the parties may wish to consider on remand. A "terrorist activity" is defined as an activity that would be unlawful, inter alia, in the United States if it had been committed in the United States and that involves, inter alia, taking hostages. The term "engaging in terrorist activity" is defined, inter alia, as incitement. It is therefore unclear whether or not an act that would qualify as "engage in terrorist activity" must at the same time be unlawful in the United States.

In particular, the court said that it is unclear whether an incitement conduct must be evaluated "in light of the more

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204. *Id.* at 126–127, 145.
205. *Id.* at 145.
208. *Id.* at 620–21.
209. *Id.* at 627–28 n.13.
speech-friendly First Amendment standard articulated by the Supreme Court in *Brandenburg v. Ohio*.”

The challenges of the substantive free speech standards aside, excluding an asylum-seeker on incitement grounds would inevitably involve serious interpretive and evidentiary issues. The statute requires immigration judges to resolve these issues just like any other issue involved in removal proceedings.

**ii. Representative of a Terrorist Organization**

INA Section 212(a)(3)(B)(i)(IV) expressly excludes an alien who is a representative of "a terrorist organization" or "a political, social, or other group that endorses or espouses terrorist activity." The first category is a simple per se rule. The State Department designates foreign terrorist organizations as terrorist organizations under section 219 of the INA and keeps a list of these organizations. Three general rules govern the designation process:

1. the organization must be a foreign organization;
2. it must engage in terrorist activity or "retain the capability and intent to engage in terrorist activity or terrorism"; and
3. such activity or intent must threaten the security of the United States and its nationals.

What is important for purposes of this Article is the use of this designation as conclusive evidence of any organization's status as a

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211. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (standing for the proposition that government may not punish inflammatory speech unless it is likely to incite imminent lawless action)).


214. See generally § 1189.


"terrorist organization" within the meaning of INA, section 212(a)(3)(B)(vi). Section 219(a)(8) states that, "If a designation under this subsection has become effective under paragraph (2)(B) a defendant in a criminal action or an alien in a removal proceeding shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing."\(^{220}\) Thus, if a person is a representative of any organization designated as a terrorist organization through this process, he is automatically barred from asylum. Whenever an asylum-seeker is alleged to have affiliation with a designated terrorist organization, the answer to whether the said organization is a terrorist organization is as easy as flipping another page because the list is published in the Federal Registry.\(^{221}\) The challenge remains, however, whether the asylum-seeker is a representative of such organization as that term is defined in the statute.\(^{222}\) The term "representative" includes "an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity."\(^{223}\)

The determination of whether a person has directed, counseled, commanded or induced an organization to commit acts of terrorism could be very difficult because in most cases reliable evidence could not be presented. Typically, courts only have the asylum-seeker's testimony, the Department of State Country Condition Report and perhaps some other causal reports. This challenge is compounded when the organization is not even designated as such but is simply "a political, social, or other group that endorses or espouses terrorist activity."\(^{224}\) Evidently, this is a very broad category that would certainly invite serious controversy. Immigration judges routinely determine whether they think a certain foreign organization endorses and espouses terrorism based on evidence submitted to them which is usually limited to the claimant's testimony and a few general reports.

The term "representative" functions as a catch-all in the INA definitions. Although usually membership alone in a terrorist organization is enough to evidence a person's significant tie to the organization, if a member is lucky enough to be granted a waiver

\(^{220}\) 8 U.S.C. § 1189(a)(8).
\(^{221}\) The current list of designated organizations is available at http://www.state.gov/s/ct/rls/fs/37191.htm (last visited Nov. 7, 2007).
\(^{223}\) § 1182(a)(3)(B)(iv).
of exclusion, that person can still be qualified as a representative, a status for which no waiver is permissible.\textsuperscript{225}

### iii. Mere Membership in a Terrorist Organization

Even membership in an organization that is believed to have provided support to terrorists would be enough to exclude an asylum-seeker from protection. Although the INA itself does not define "membership," the Department of State has issued guidelines that incorporate the following factors: acknowledgement or recognition by the organization or other members, active participation in or leadership of the organization, receiving benefits from it, contributing money to it, taking part in the organization’s activities, and frequent association with other members of the organization.\textsuperscript{226} An asylum-seeker who could demonstrate by clear and convincing evidence that he "did not know, and should not reasonably have known, that the organization was a terrorist organization" may avoid exclusion.\textsuperscript{227} It is important to note that this exception does not apply to a terrorist organization designated under INA Section 219 because publication of these organizations’ names is considered sufficient public notice.

The following example demonstrates the breadth of this definition. Group A has four members, W, X, Y, and Z, all from Burma.\textsuperscript{228}

\textsuperscript{225} § 1182(d)(3)(B)(i) ("The Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, may conclude in such Secretary's sole unreviewable discretion that subsection (a)(3)(B)(i)(IV)(bb) or (a)(3)(B)(i)(VII) of this section shall not apply to an alien, that subsection (a)(3)(B)(iv)(VI) of this section shall not apply with respect to any material support an alien afforded to an organization or individual that has engaged in a terrorist activity, or that subsection (a)(3)(B)(vi)(III) of this section shall not apply to a group solely by virtue of having a subgroup within the scope of that subsection. The Secretary of State may not, however, exercise discretion under this clause with respect to an alien once removal proceedings against the alien are instituted under section 1229a of this title.").

\textsuperscript{226} See U.S. Dep't of State, Cable No. 97-State-191813 (Oct. 9, 1997), reprinted in 75 INTERPRETER RELEASES 295, 296–97 (Mar. 2, 1998) [hereinafter Cable].

\textsuperscript{227} See § 1182(a)(3)(B)(i)(VI).

\textsuperscript{228} The hypothetical discussed here is based on real asylum cases involving asylum-seekers from Burma with some modifications for purposes of demonstration. For a description of these cases, see Human Rights First, Abandoning the Persecuted: Victims of Terrorism and Oppression Barred from Asylum, 13 (2006), http://www.humanrightsfirst.org/pdf/06925-asy-abandon-persecuted.pdf (last visited Nov. 7, 2007). In one of the cases reported by Human Rights First, an immigration judge denied asylum to a Burmese asylum-seeker on terrorism grounds because the asylum-seeker, a teacher by profession, testified that he was visited by members of the Burmese Chin National Front ("CNF"), a group implicated for using terrorist tactics against the Burmese dictatorship. He also said that CNF members spoke with him about democracy and stayed in his village sharing shelter and food. He indicated that he did not provide hospitality willingly. The Burmese government
and currently residing in the United States. They raise funds to assist Group B, an affiliated humanitarian organization which provides humanitarian assistance to widows and orphans of members of Group C. Group C wages a military struggle against the Burmese military regime. W, X, Y, and Z admit that they knew the widows fed members of Group C whenever the members visited their villages. Members of Group A continue to send them money despite knowledge of this involvement.

Under the statutory scheme, all members of Group A could be independently excluded from protection because of this peripheral connection to terrorist activity. Due to the State Department’s guidelines, any of them could also be excluded because they frequently associated with those who contributed to the terrorist organization.

Members of Group A would have to prove by clear and convincing evidence that there was no way that they “should have known” about the terrorist activities of the organization. For example, a newspaper article reporting that members of Group C were sheltered and fed by a certain Burmese village could easily be used to prove that the members of Group A “should have known” that their money was being used occasionally to provide support to terrorist groups.

iv. Solicitation of Funds and Members

Actions falling under the solicitation of funds and members for a terrorist organization are one step beyond those illustrated in the Burma example. This classification falls under the same standard of proof as does membership in a terrorist organization.

A person does not have to be a member or be personally affiliated with an organization to be found to have engaged in solicitation of funds for a terrorist organization. If this is the case, that person may obtain protection by proving by clear and convincing evidence that he did not know or should not reasonably have known that the group was engaged in terrorist activity. It gets more complex when a group has legitimate subgroups that may be unknowingly or retaliated against the villagers for sheltering the CNF fighters by burning the village. The asylum-seeker was taken by the government and tortured. He finally managed to escape to the United States. See generally id.


231. Id.
knowingly assisting terrorists. Therefore, it often turns on the asylum-seeker's knowledge of the terrorist activity and proximity to it.

Solicitation, as an inchoate offense, is very controversial in the criminal law context, but is even more problematic in the terrorism context. In criminal law, ordinarily the crime of solicitation is said to have been committed as soon as "the solicitor asks, entices, or encourages another to commit the target offense." Professor Dressler says that solicitation is essentially a double inchoate offense because an attempt to conspire to commit a certain crime could be solicitation to commit the underlying crime. In simple terms, if A attempts to solicit B or conspire with B to kill C, A could theoretically be charged with attempted solicitation or conspiracy. Once the underlying offense is attempted or committed, however, the crime of solicitation may merge and the charge would just be the commission or attempt of the underlying offense. The difficulty involved in proving these kinds of dubious crimes is obvious.

Significantly greater difficulties are involved in adjudicating cases involving allegations of solicitation of funds and members for terrorist organization. What if in the hypothetical discussed above, H unsuccessfully attempted to solicit money for the benefit of Group A. Would he be treated differently because he did not manage to get the money? There seems to be a mens rea requirement because Congress provided for an exemption if the asylum-seeker proves that he did not know or should not reasonably have known that the money would reach terrorists. What if H is arrested before he had a chance to give the money to Group A? Would he still be excluded for soliciting funds?

In considering these questions, it is important to note that the underlying offense in this case is the solicitation itself. Therefore, one might argue that it is not an inchoate offense at all, although one may be guilty of solicitation of funds if he asks someone to raise funds. Regardless of the theoretical implications, proving state of mind becomes very important. In contrast to criminal cases where the government must prove beyond a reasonable doubt that the accused intended to commit the crime of solicitation whatever

232. See Dressler, supra note 203, at 804.
233. Id.
234. Id.
235. Professor Dressler gives the following example, "if Agnes solicits Ben to murder Camille, and Ben refuses, Agnes is guilty of solicitation; if Ben agrees and kills or attempts to murder Camille, Agnes is guilty of murder or attempted murder, respectively, under complicity principles . . . , rather than of the offense of solicitation. If Ben agrees, but is arrested before the attempt, Agnes and Ben may be prosecuted for conspiracy to commit murder . . . . Agnes's solicitation would merge into the conspiracy." Id.
The Terrorism Exception to Asylum

The underlying offense, under the INA, the burden is on the asylum-seeker to prove by clear and convincing evidence that he did not know or should not reasonably have known that the funds that he solicited would benefit a terrorist group or its affiliate.

The government still needs to present a prima facie case that solicitation of funds had actually occurred and that those funds had benefited a terrorist group. The government has to prove each of the following facts in the following order to establish a prima facie showing that a person solicited terrorist funds: (1) Group C exists and is a terrorist organization; (2) Group B exists and it provided humanitarian assistance to widows and orphans in a certain village in Burma; (3) The widows and orphans fed and sheltered members of Group C; (4) Group A is a terrorist organization because it provides material assistance to Group B which, in turn, assists the widows and orphans who provided the material assistance to Group C, a known terrorist organization; (5) Finally, it needs to prove that H intentionally solicited funds for Group A knowing that the money he passed along would eventually be given to people who incidentally provide benefit to the terrorist organization.

Daneshvar v. Ashcroft supports the proposition that the prima facie and state of mind requirements can be inferred from the language of the statute. In this case, the court considered the issue of whether the government needed to present a prima facie case or prove the state mind of an asylum applicant when the government sought to exclude him for soliciting members for a terrorist organization. The petitioner, a thirty-nine-year-old Iranian national, admitted to having sold newspapers when he was sixteen years old, the revenue from which supported an organization named Mujahedin-e Khalq ("MEK"). Since MEK was designated by the State Department as a terrorist organization, the petitioner was found to have engaged in the solicitation of members for MEK such that he should be excluded from asylum. The BIA affirmed the decision. The Court of Appeals disagreed and held that, "We would be hard-pressed to classify any minor who sold newspapers for an organization that supported an armed revolt against a tyrannical monarch as a terrorist. To impute such political sophistication to a teenager that apparently even the U.S. Congress failed to achieve,

237. Id. at 628.
238. Id. at 619.
239. In fact, because the MEK was not designated as a terrorist organization at the time the petitioner sold MEK newspapers, he was deemed excludable for soliciting members to an undesignated clause 212(a)(3)(B)(vi)(III) terrorist organization. Id. at 626.
240. Id. at 621.
in our minds, would amount to a manifest injustice." Moreover, the court held that to exclude an asylum-seeker from protection for soliciting members for a terrorist organization under the "knew or should have known" exception the asylum-seeker's state of mind when he committed the alleged solicitation must be considered.

Along these same lines falls endorsement or espousal of terrorist activity as well as persuasion of others to endorse such activity. One complication of determining what counts as a terrorist activity is the determination of whether it is sufficient that the activity would have been illegal in the United States had it been committed there or whether it is enough that it is illegal in the country in which it was carried out. Given its dependence upon political opinion, this could potentially have dangerous consequences in the realm of free speech. Unlike some other provisions, this one does not afford any discretion to government officials to intervene in the determination of whether a person has engaged in endorsing or espousing terrorism sufficient to exclude him from asylum protection. It seems deliberate that the weight of this decision falls on the judge alone.

Generally, spouses and children of an asylum applicant who falls under any of these exclusionary criteria are also automatically excluded from asylum protection. However, the exclusion does not apply to the asylum-seeker's family members if the alleged activity occurred more than five years prior to filing the asylum application. One exception applies if the family member did not know or could not have reasonably known that the accused was engaged in espousing terrorism. Again, immigration judges must grapple with factual analysis in making this determination. Leniency in this case stems from a hesitancy to adversely impact free speech.

241. Id. at 628.
243. Id.
244. See § 1182(a)(3)(i)(VII).
247. Id.
248. § 1182(a)(3)(B)(ii) ("Subclause (VII) of clause (i) does not apply to a spouse or child—(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or (II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.").
249. It is important to note, however, that most of the exclusionary grounds may be waived at the discretion of the Secretary of State in consultation with the Attorney General and the Department of Homeland Security. See generally § 1182(d)(3)(B).
250. Daneshvar, 355 F.3d at 628 n.13.
Thankfully for immigration judges, the provision that deals with military training presents perhaps the clearest statutory language, but also raises problems when there is no room for judicial discretion in individual cases as the forms that military service can take is often ambiguous.

III. GOING FORWARD

The preceding examples show that immigration judges are responsible for adjudicating all asylum claims as well as those involving terrorism questions. This Article proposes that cases having to do with terrorism be assigned to a more specific authoritative body or person that is specially trained to answer sensitive questions related to terrorism. Congress has already enacted a law providing for the establishment of a specialized court called the Alien Terrorist Removal Court ("ATRC"). The ATRC grew out of the expansion of the terrorism exception through the AEDPA and the IIRIRA. Although this court has not yet been instituted, its very statutory creation indicates a Congressional desire to deal with terrorism issues separately. At this point in its conception, the ATRC is not authorized to adjudicate asylum claims. This Article proposes extension of its mandate.

Under the existing statutory framework, the ATRC would function under the Supreme Court of the United States with five district court judges from different districts selected by the Chief Justice of the Supreme Court. The main function of the court would be to adjudicate removal cases where an alien is suspected of terrorism and the evidence thereof needs to be kept confidential for national security reasons. The application must inter alia include such details as the identity of the particular attorney within the Attorney General's office who submits the application, the identity and location of the alien being subjected to the process,

254. The Chief Justice may assign one or more of the judges who are already on the Foreign Intelligence Surveillance Court of 1978 established under 50 U.S.C. 1803(a). See 8 U.S.C. § 1532(a). The Chief Justice shall also designate one of the five as a chief judge. See § 1532(c)(1). The Chief Judge has the responsibility of promulgating the ATRC's rules and assign cases to the individual judges. See § 1532(c)(2).
255. See generally § 1533.
256. See § 1533(a)(1)(A).
257. See § 1533(a)(1)(C).
and a statement of facts establishing "probable cause" that "the alien is an alien terrorist" and that subjecting him to the ordinary Title II removal process would pose a national security threat. 258 Finally, the application must be filed with the ATRC under seal "ex parte and in camera." 259

After examining the application and any other evidence submitted by the government, an ARTC judge may grant or deny the application. 260 If the judge grants the application upon finding probable cause that the alien is properly identified as an alien terrorist and that the disclosure of the confidential evidence might pose a national security risk, a removal hearing would commence under section 504. 261 Alternatively, if the judge determines that there is no probable cause, the government may appeal to the Court of Appeals for the District of Columbia. 262

Unlike ordinary immigration proceedings, aliens in removal proceedings do have the right to a government appointed attorney 263 that is specifically designated by the ATRC and possesses a security clearance. 264 Also in these proceedings, the attorneys have access to confidential evidence and can challenge it in court. 265 The hearing is open to the public although confidential evidence may not be disclosed. 266 The ARTC procedures also provide the alien with reasonable opportunity to challenge adverse findings on appeal. 267 Presumably, the ARTC only determines if the alien must be removed because he is a terrorist. 268 If the court finds this to be the case, the alien is taken into custody and removed from the country. 269 While the ARTC does not have jurisdiction to grant relief from deportation under any of the forms under immigration law, such as asylum or withholding of removal, an alien may seek legal status through regular immigration procedures.

The ARTC is already infused with a sound structural foundation, including reasonable avenues of appeal and due process. At this point, the court requires only slight modification and jurisdictional expansion in order to effectively adjudicate terrorism-related

258. See § 1533(a)(1)(D).
259. See § 1533(2).
260. See § 1533(c)(2)−(3).
261. See § 1533(c)(2).
262. See § 1533(c)(3); see also § 1535(a)(1).
263. See § 1534(c)(1) ("for purposes of determining the maximum amount of compensation, the matter shall be treated as if a felony was charged.").
264. Id.
265. See § 1534(c)(3)(F).
266. See § 1534(a)(2).
267. See generally § 1535.
268. See, e.g., § 1534(g).
269. See § 1534(i).
claims. Title V of the INA can be easily amended in order to modify the scope of admissible evidence, add more judges, and grant immigration relief in the form of asylum or withholding of removal. This would ensure that immigration judges adjudicate all non-terrorism cases with proper care and without fear of responsibility for allowing a terrorist to remain in the United States.

In addition to installing the ATRC, the substantive law must be simplified and clarified in order to effectively address the challenges involved with adjudicating terrorism-related immigration cases. While it is in the country's best interests to be overly cautious in granting refugee status to people whose associations might endanger national security, there are currently too many gray areas. After 9/11, Congress chose to err on the side of over-inclusiveness to the point that some of the provisions do not serve any cognizable purpose. Therefore, the substantive law as it stands today is "so indefensible [that it] is causing heroes who fought for the United States to be afraid of being deported." According to a comprehensive report by the U.S. Congressional Commission on International Religious Freedom, denying refugee status "[b]ecause [a person] provided inconsequential support to organizations which oppose particularly repressive regimes is not only undermining the international leadership of the United States in the field of human rights, it is [also] endangering the lives of innocent refugees who have fled terror or repression." The only two considerations for whether a person should be excluded from asylum protection must be: (1) whether a person is undeserving of protection because of his or her past actions, and (2) whether a person is believed to pose a cognizable security threat to the United States. Therefore, the INA provisions dealing with the terrorism exception must be amended with these essential considerations in mind.

Additionally, the responsibility of adjudication should be re-assigned. Under the existing statutory allocation of responsibilities,

[the Office of the Coordinator for Counterterrorism in the State Department (S/CT) continually monitors the activities of known terrorist groups active around the world to identify potential targets for designation. When reviewing the potential targets, S/CT looks not only at the actual attacks that a

The designation is made after proper consultations with the Attorney General and the Department of the Treasury and Congress is given a seven-day veto check on designation. In the context of an asylum claim, however, immigration judges are given nearly free reign in singularly deciding whether an organization is engaged in terrorist activities using ambiguous standards. Leaving the responsibility of categorizing organizations to the State Department and its balancing counterparts assures that the assessment follows the proper channels. This solution can be made possible by a simple amendment to the existing law.

Currently, along with the State Department, the Attorney General holds power to certify an alien as a terrorist if he reasonably believes that the person falls under any of the exclusionary grounds contained in section 212(a)(3)(B) of the INA. Congress tried to be careful not to extend the power of certification to anyone other than the Attorney General and his Deputy, but succeeded in granting overbroad authority to immigration judges to perform almost the same duty through asylum adjudication. Just like when immigration judges take over the State Department’s duties of designation, they are also required to substitute for the Attorney General’s certification duty by identifying terrorists on an ad hoc adjudicatory basis. The failing here, however, is that immigration judges do not have the same cooperative network as the Attorney General from which to draw in making their determinations. While the Attorney General may draw upon his connection to the Department of Homeland Security, the State Department, the Central Intelligence Agency, and the Federal Bureau of Investigation, immigration judges are on their own. Accordingly, Congress should consider expanding the Attorney General’s authority to delegate his certification power to a highly specialized agency within his office that would certify all aliens who may meet

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274. Id.
the security criteria for certification as terrorists. Under this arrangement, while certified cases would be processed by the ATRC discussed above, uncertified cases would be processed through the regular immigration court system. This would ensure that immigration judges adjudicate asylum claims without feeling responsible for national security as that task would properly be performed by the state department and the Attorney General. It is with the view to alleviating the serious challenges outlined above that this Article proposes the reassignment of the various responsibilities to the appropriate agencies.

CONCLUSION

Since the breadth of asylum cases are so varied in terms and scope and often lack substantial evidence that a judge could use to determine if the asylum-seeker falls under any of the asylum exceptions, the safest course of conduct for an immigration judge is often to deny asylum because the apparent risk is just too great. There is a general fear even outside the scope of adjudicative responsibility that the asylum system will be vulnerable to abuse by potential terrorists. Former House Judiciary Committee Chairman James Sensenbrenner, who was responsible for the authorship of the asylum-related provisions of the REAL ID Act, made the following remark in support of the passage of the bill when it was still under consideration:

There is no one who is lying through their teeth that should be able to get relief from the courts, and I would just point out that this bill would give immigration judges the tool to get at the Blind Sheikh who wanted to blow up landmarks in New York, the man who plotted and executed the bombing of the World Trade Center in New York, the man who shot up the entrance to the CIA headquarters in north Virginia, and the man who shot up the El Al counter at Los Angeles International Airport. Every one of these non-9/11 terrorists who tried to kill or did kill honest, law-abiding Americans was an asylum applicant. We ought to give our judges the opportunity to tell these people no and to pass the bill.277

277. 151 CONG. REC. H460 (daily ed. Feb. 10, 2005) (statement of Chairman Sensenbrenner); see also Marisa Silenzi Cianciarulo, Terrorism and Asylum Seekers: Why the REAL ID Act is a False Promise, 43 HARV. J. ON LEGIS. 101, 102 (2006).
Whether this fear is real or imagined is a subject of great controversy and, as a result, responses to it have been varied. Congress has adopted legislation, without context, that excludes from asylum anyone who might remotely be considered to be a terrorist. Therefore, the most important problem, how to differentiate between real terrorists and genuine refugees, remains. This Article has proposed two interrelated ways of managing the uncertainty that immigration judges face: (1) amendment of the over-inclusive INA provisions that exclude genuine refugees from protection on terrorism grounds where they pose no danger to the security of the nation, and (2) the reassignment of adjudicative responsibility to the proper authorities thereby relieving immigration judges of the duty of adjudicating asylum cases involving terrorism cases. This would not only strengthen the integrity of the asylum system in general by assuring immigration judges that some other authority is responsible for the nation's security, but would also minimize the risk of error in two ways: (1) the certification of terrorists would be managed by a specialized agency within the Attorney General's office and would be assisted by all the appropriate departments and security agencies of the Federal Government, and (2) immigration judges would adjudicate all other cases and would not be subject to responsibility for the nation's security with respect to terrorism.

In all earnest, the existing system is not reassuring to genuine refugees who fit certain characteristics relating to age, gender, religion and country of origin. Without implementation of genuine legal and institutional reforms, the system designed to protect individuals from persecution and discrimination because of their race, religion, nationality, political opinion, or social group in the United States will continue to discriminate against many of them precisely on these same grounds.