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National Security Gone Too Far: Flaws in the Designation of Tier III Terrorist Organizations  
Newton Portorreal\*

**I. Introduction**

The United States has long sought to bar immigrants for their political views. After the assassination of President McKinley in 1901 by Leon Czoglos,<sup>1</sup> Congress provided for the exclusion of “anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all governments or of all forms of law, or the assassination of public officials.”<sup>2</sup> After World War I, Congress broadened the exclusionary grounds to include the advocacy (or, membership in a group that advocates) of prohibited acts.<sup>3</sup> In 1950, Congress expressly made membership or affiliation with the Communist Party grounds for exclusion.<sup>4</sup> At the same time, Congress included the broad exclusion ground for immigrants seeking entry in order to engage in activities “prejudicial to the public interest.”<sup>5</sup> In 1990, Congress enacted section 601 of the Immigration Act of 1990, creating exclusion grounds for individuals whose entries or activities might adversely affect U.S. foreign policy.<sup>6</sup> Today, the terrorism exclusion grounds extend to those who are affiliated with terrorist organizations in specific ways, and most controversially, to those who provide “material support” to terrorist organizations or activity.<sup>7</sup>

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<sup>1</sup> John Higham, an American historian, referred to Czoglos as “an anarchist of American birth but obviously of foreign extraction.” JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 111 (2002).

<sup>2</sup> Act of March 3, 1903, ch. 1012, sec. 2, 38, 32 Stat. 1213, 1214, 1221.

<sup>3</sup> Act of June 5, 1920, ch. 251, 41 Stat. 1008, 1009.

<sup>4</sup> Internal Security Act of 1950, ch. 1024, Title I, § 22, 64 Stat. 987, 1006.

<sup>5</sup> *Id.*

<sup>6</sup> Immigration Act of 1990, § 601. Today, the provision is codified at 8 U.S.C. § 1182 (a)(3)(C).

<sup>7</sup> § 1882 (a)(2)(B)(iv)(VI).

Viewed in this light, Congress' current anti-terrorist restrictions on immigration are a natural extension in the history of exclusion grounds. In response to the new threat of foreign terrorism, Congress enacted the Antiterrorist and Effective Death Penalty Act (AEDPA) in 1996, a comprehensive antiterrorism statute.<sup>8</sup> After the terrorist attacks on September 11, 2001, Congress enacted a variety of additional restrictions in the USA PATRIOT Act (Patriot Act), expanding the range of terrorism-related exclusion grounds.<sup>9</sup> Specifically, the Patriot Act was enacted to “deter and punish terrorist acts in the United States and around the world [and] to enhance law enforcement investigatory tools.”<sup>10</sup> Title IV of the Patriot Act, titled “Protect the Border,” created enhanced immigration restrictions.<sup>11</sup>

Congress lengthened that list of exclusion grounds again through the REAL ID Act of 2005.<sup>12</sup> The REAL ID Act of 2005 in fact modified the material support bar to require a petitioner, who did in fact provide material support to a terrorist organization, to show by clear and convincing evidence they did not know they were supporting terrorism.<sup>13</sup> There is a vast literature regarding the material support bar and its broad applicability.<sup>14</sup> But material support is only one factor in the exclusion equation—a would-be immigrant must give that material support to a terrorist organization to fall within the exclusion ground. Given how broadly material support is defined, loosely defining terrorist organizations can have unintended consequences.

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<sup>8</sup> Pub. L. No. 104-132.

<sup>9</sup> Pub. L. No. 107-56.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Pub. L. No. 109-13.

<sup>13</sup> *Id.* at § 103(a)(VI).

<sup>14</sup> See, e.g., Teresa Pham Messer, *Barred From Justice: The Duress Waiver to the Material Support Bar*, 6 HLR OFF THE RECORD 63 (2015) (recommending solutions to the existing unjust applications of the material support bar); Steven H. Schulman, *Victimized Twice: Asylum Seekers and the Material-Support Bar*, 59 Cath. U. L. Rev. 949 (2010) (criticizing the broad application of the material support bar and advising practitioners on how to navigate it); Kara Beth Stein, *Female Refugees: Re-Victimized by the Material Support to Terrorism Bar*, 38 McGeorge L. Rev. 815 (2007) (criticizing DHS's overly inclusive interpretation of the material support bar for its outsize impact on women refugees).

The existing statutory definition of a terrorist organization is separated into three tiers.<sup>15</sup> Tier I terrorist organizations are “foreign organizations that pose a threat to the United States by ‘engaging or retaining the capability and intent to engage in terrorist activity or terrorism.’”<sup>16</sup> They are designated by the State Department, subject to bank account freezes, criminal penalties, and immigration sanctions, have their names published in the Federal Register and may seek judicial review of their designation.<sup>17</sup> Tier II terrorist organizations are “foreign organizations that engage in terrorist activity or provide material support to further terrorist activity.”<sup>18</sup> They are subject to immigration sanctions and have their names published in the State Department’s Terrorist Exclusion List (TEL).<sup>19</sup> Their designation may either be revoked through an order of Congress or based upon a finding that there was a change in circumstances.<sup>20</sup> Tier III terrorist organizations, the focus of this comment, were also redefined by the REAL ID Act of 2005.<sup>21</sup> They are “any group ‘whether organized or not, [that has] a subgroup which engages in, terrorist activities.’”<sup>22</sup> They are designated on a case-by-case basis without appearing on any central register.<sup>23</sup> Individuals who are members or supporters of tier III terrorist organizations are subject to immigration sanctions only.<sup>24</sup>

This Comment will argue that the existing statutory definition of tier III terrorist organizations should either be amended by Congress or given a narrow construction by the courts.

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<sup>15</sup> 8 U.S.C. § 1882 (a)(3)(B)(vi)(I)-(III) define “terrorist organization” in three ways. *See infra* notes 16 to 28 and the accompanying text.

<sup>16</sup> § 1182(a)(3)(B)(vi)(I)

<sup>17</sup> 8 U.S.C. § 1189.

<sup>18</sup> Mary Orsini, *Quantity vs. Quality: The Misdirected War on Immigration and the Sweeping Effects of the Tier III Terrorist Organization*, 41 RUTGERS L. REC. 167, 169-170.

<sup>19</sup> *Id.* at 170.

<sup>20</sup> § 1189(a)(5) and (6).

<sup>21</sup> Pub. L. No. 109-13, § 103(a)(vi)(III).

<sup>22</sup> *Id.*

<sup>23</sup> Mary Orsini, *Quantity vs. Quality: The Misdirected War on Immigration and the Sweeping Effects of the Tier III Terrorist Organization*, 41 RUTGERS L. REC. 167, 170-71.

<sup>24</sup> *Id.*

It is both over and under inclusive, inequitably barring the unsuspecting from immigration relief while potentially allowing members and supporters of dangerous organizations repeated opportunities to litigate their way into immigration relief.

## **II. Defining the Tier III Terrorist Organization**

This section will interpret the statutory definition of tier III terrorist organizations, beginning with the plain text of the statute. As per the statute, an individual may be barred from admission to the United States for being a member of or providing material support to a terrorist organization.<sup>25</sup> Tier III terrorist organizations are defined as “a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, [terrorist activity].”<sup>26</sup> However, two parts of the statute require further elaboration: what “terrorist activity” is and what it means to “engage” in terrorist activity. This section surveys efforts by various courts of appeals to limit the literal statutory language by focusing on the definition of “terrorist activity” and the requirement that organizations authorize terrorist activity before it is imputed to them.

### **A. Terrorist Activity**

Section 1182’s definition of terrorist activity is expansive.<sup>27</sup> While a number of very specific acts qualify as terrorist activities, this section also includes a catch-all clause: “the 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.”<sup>28</sup> On its face, this statute makes: (1) a knife fight at a

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<sup>25</sup> § 1182 (a)(3)(B)(iv)(VI). This sanction is applicable no matter which tier of terrorist organization the individual is accused of joining or otherwise supporting.

<sup>26</sup> § 1182 (a)(3)(B)(vi)(III)

<sup>27</sup> § 1182 (a)(3)(B)(iii).

<sup>28</sup> *Id.*

bar; (2) an assault with a baseball bat over a perceived insult; and (3) soccer hooliganism where a rock is thrown at opposing fans, terrorist activity. It is no wonder, then, that the tier III terrorist organization designation has been decried as barring immigration relief for association with “two guys and a gun.”<sup>29</sup>

The Ninth Circuit had an opportunity to interpret this statute in *Budiono*.<sup>30</sup> In that case, Budiono, an Indonesian national, had his petition for withholding of removal rejected by the immigration judge (IJ) because: (1) his application was time-barred, (2) Budiono had failed to prove past persecution and was ineligible for withholding of removal; and, in the alternative, (3) he associated with “Jakarta-based Muslim community group Jemaah Muslim Attaqwa (‘JMA’).”<sup>31</sup> On appeal to the Board of Immigration Appeals (BIA), Budiono’s claim was again rejected.<sup>32</sup>

The Ninth Circuit, however, disapproved of the IJ’s disposition on the alternative grounds.<sup>33</sup> In the proceedings below, the government had introduced evidence that the JMA was a radical, militant Islamic group that participated in violent, anti-government riots and may have caused at least two deaths and substantial property damage.<sup>34</sup> JMA members assaulted Budiono and his wife after Budiono protested the group’s militancy and renounced his membership in the organization.<sup>35</sup> Nonetheless, the Court insisted that the government had failed to make the requisite evidentiary showing.<sup>36</sup> Specifically, the government failed to make a “threshold showing

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<sup>29</sup> Maryellen Fullerton, Terrorism, Torture, and Refugee Protection in the United States, Refugee Survey Quarterly, Vol. 29, No. 4, UNHCR (2011), p. 13.

<sup>30</sup> *Budiono v. Lynch*, 837 F.3d 1042 (9th Cir. 2016).

<sup>31</sup> *Id.* at 1044.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1045.

<sup>36</sup> *Budiono*, 837 F.3d at 1048.

of particularized evidence of the [terrorist] bar’s applicability before placing on the applicant the burden to rebut it.”<sup>37</sup>

The evidentiary showing required by the Ninth Circuit in *Budiono* is analogous to another immigration law concept: the persecution bar. The persecutor bar makes individuals ineligible for asylum protection when they have “ordered, indicted, assisted, or otherwise participated in” persecution of a person on account of a protected ground.<sup>38</sup> In those cases, the Government must make a sufficient evidentiary showing, as to both the “personal involvement and purposeful assistance”<sup>39</sup> of persecution by the individual seeking relief to raise the inference that the bar applies.<sup>40</sup> Only then does a rebuttable presumption in favor of applying the bar exist.<sup>41</sup>

Applying that standard to *Budiono*’s case, the Ninth Circuit found that the Government had failed to make the requisite showing.<sup>42</sup> Specifically, the Government did not introduce evidence that the JMA ever used weapons, as required statutorily.<sup>43</sup> Accordingly, the terrorist bar did not apply to *Budiono* and he was, in fact, eligible for immigration relief.<sup>44</sup>

The *Budiono* Court’s statutory construction is a model for other courts to follow in this area. The statute at issue made no explicit mention of a threshold evidentiary showing.<sup>45</sup> Nonetheless, the Ninth Circuit imposed a requirement that the Government present particularized evidence to raise the inference that the terrorist bar applies.<sup>46</sup> By denying that such a judicial

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<sup>37</sup> *Id.* at 1048.

<sup>38</sup> *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 925 (9th Cir. 2006).

<sup>39</sup> *Id.* at 927.

<sup>40</sup> *Id.* at 930.

<sup>41</sup> *See, e.g., id.*

<sup>42</sup> *Budiono*, 837 F.3d at 1050.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1051.

<sup>45</sup> *See* 8 U.S.C. § 1182(a)(3)(B). The statute merely defines terrorist activities but does not mention the standard of proof by which the government must support an allegation that an alien should be subject to the terrorist bar.

<sup>46</sup> *Budiono*, 937 F.3d at 1049 (“to invoke the terrorist bar, it is not enough for the government simply to assert that an individual was involved with a radical political or religious group. Rather, the record evidence must raise the inference that each element of the bar applies.”).

inference was appropriate for the IJ, the Ninth Circuit imposed a judicial limit on an unwieldy statute. The Ninth Circuit did so by departing from the plain text to interpret terrorist activity for the purposes of determining a tier III terrorist organization. More courts should follow the lead of the Ninth Circuit and other Courts of Appeal in imposing judicial limits to prevent inequitable applications of the terrorist bar.<sup>47</sup>

### **B. “Engaging” in Terrorist Activity**

Section 1182<sup>48</sup> classifies as a tier III terrorist organization any “group [or subgroup] of two or more individuals” engaged in terrorist activity.<sup>49</sup> Although terrorist activity<sup>50</sup>, defined *supra* in subsection a, is relatively straightforward, courts have focused on the preceding verb: “engage.” Take, for example, the Seventh Circuit’s decision in *Hussain v Mukasey*.<sup>51</sup> In that case, Hussain, a green card holder and national of Pakistan, challenged his removal order from the IJ.<sup>52</sup> Below, the IJ found Hussain was removable for gaining entry into the United States by fraud and for engaging in terrorist activity.<sup>53</sup> Hussain had previously been convicted of immigration fraud.<sup>54</sup> On appeal, the Government agreed to vacate the judgment.<sup>55</sup> The IJ, however, found that Hussain gained entry by fraud by concealing his membership in Mohajir Quami Movement-Haqiqi (MQM-H).<sup>56</sup> It does not seem to be disputed that Hussain was a member of MQM-H and concealed his membership in order to gain entry and receive permanent resident status.

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<sup>47</sup> See *infra* Part V

<sup>48</sup> 8 U.S.C. § 1182

<sup>49</sup> § 1182 (a)(3)(B)(vi)(III)

<sup>50</sup> See *supra* Part II.A.

<sup>51</sup> 518 F.3d 534 (7th Cir. 2008).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 535.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*



The IJ also found that Hussain was eligible for relief under the Convention Against Torture (CAT) because Hussain would likely be tortured upon his return to Pakistan.<sup>57</sup> The IJ ultimately entered an order of removal but stayed its effect until Hussain could be removed without precipitating a violation of the CAT.<sup>58</sup> The BIA affirmed the IJ's determination.<sup>59</sup> On appeal to the Seventh Circuit, Hussain argued that the definition of a tier III terrorist organization was impermissibly vague and created a "serious constitutional issue of fair notice."<sup>60</sup>

Writing for the panel, Judge Posner observed the while the statute was broad, it was not vague.<sup>61</sup> According to Posner, whatever ambiguity exists in the statute, it exists in the provision that requires an organization "engage" in particular activity.<sup>62</sup> Judge Posner, however, resolved the ambiguity by holding that "engaging" in activity as an organization depends upon authorization of a member's activity by the organization: "if an activity is not authorized, ratified, or otherwise approved or condoned by the organization, then the organization is not the actor."<sup>63</sup> Contrasting this theory of organizational activity to the law of agency, Judge Posner reasoned that without authorization, an organization is not an actor.<sup>64</sup> It may be liable for the actions of an agent, but it cannot be said to have "engaged" in that agent's actions.<sup>65</sup> For Judge Posner, however, organizations can authorize violence through their silence. Because MQM-H, specifically, "did not criticize, or make efforts to curb . . . violence; an inference that it was authorized is

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<sup>57</sup> *Hussain*, 518 F.3d at 535.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 537.

<sup>61</sup> *Id.*

<sup>62</sup> *Hussain*, 518 F.3d at 538.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

inescapable.”<sup>66</sup> Authorization need not be formal, nor do the acts authorized need to be politically motivated.<sup>67</sup>

The Third Circuit followed the Seventh Circuit’s lead in *Uddin v. Sessions*.<sup>68</sup> In that case, the Third Circuit took an appeal challenging the IJ and BIA’s determination that Uddin, a national of Bangladesh, was ineligible for withholding of removal because he was a member of the Bangladesh National Party (BNP).<sup>69</sup> The BNP is one of Bangladesh’s two major political parties, along with the Awami League (AL).<sup>70</sup> Uddin alleged he was victim to various incidents of violence at the hands of members of the AL.<sup>71</sup>

The IJ, however, denied Uddin’s claim for relief because he was a member of the BNP, which, in the past, used violence for political purposes.<sup>72</sup> During the 2013-14 election cycle, party leadership announced a series of strikes and blockades.<sup>73</sup> During these strikes, however, members of the BNP engaged in various incidents of political violence.<sup>74</sup> Accordingly, the IJ, and the BIA, which affirmed, deemed that the BNP was a tier III terrorist organization.<sup>75</sup> Crucially, however, both the IJ and BIA failed to “discuss whether the specified terrorist acts were actually authorized.”<sup>76</sup> The Court subsequently held that “absent such a finding regarding authorization by a group’s leaders, Tier III status cannot be assigned to a group.”<sup>77</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 870 F.3d 282 (3d Cir. 2017).

<sup>69</sup> *Id.* at 284.

<sup>70</sup> *Id.* at 285.

<sup>71</sup> *Id.* at 286.

<sup>72</sup> *Id.* at 287.

<sup>73</sup> *Uddin*, 870 F.3d at 287.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 289.

<sup>76</sup> *Id.* at 290.

<sup>77</sup> *Id.*

To reach this holding, the Court relied on the statutory text, the BIA’s own rulings, and the reasoning of the Seventh Circuit.<sup>78</sup> Beginning with the statutory text, the Court noted that groups, not merely their members, engage in terrorist activity.<sup>79</sup> As in *Hussain*, the Court acknowledged that groups engage in activity by authorizing the actions of its members.<sup>80</sup> Further, the Court pointed out that the BIA itself had adopted the authorization requirement in cases involving the BNP.<sup>81</sup> Finally, the Court explicitly endorsed Judge Posner’s analogy to agency law in *Hussain*.<sup>82</sup>

In concurrence, Judge Greenaway made explicit that the authorization requirement likewise applies to subgroups.<sup>83</sup> Judge Greenaway’s concern was that rogue members of any group could, by clever litigators, be defined as a subgroup of the larger group and escape the authorization requirement imposed by the Seventh and Third circuits.<sup>84</sup> Judge Greenaway would clearly impose limitations on which collections of members of a group can be considered a subgroup for the purposes of determining tier III terrorist organization status.<sup>85</sup> The BIA imposes two limits in various cases: (1) subgroups must be significant and (2) subgroups must be “subordinate to, or affiliated with, [the larger group] *and* the subgroup is dependent on . . . [the larger group] . . . to support or maintain its operations.”<sup>86</sup> Without this limitation, the authorization requirement

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<sup>78</sup> *Id.*

<sup>79</sup> *Uddin*, 870 F.3d at 290.

<sup>80</sup> *Id.* (“Had the statute stated that a Tier III terrorist organization is “a group whose members engage in terrorist activity,” then a group’s Tier III designation could be based on the individual actions of its members, regardless of authorization. But the text speaks to concerted actions of a group, not uncoordinated activities by individual members: an organization receives Tier III status only if a group itself engages in terrorist activity.”)

<sup>81</sup> *Id.* The decision did not cite any BIA precedential opinion. Instead, the panel noted that “the rule we announce mirrors the Board’s own reasoning in the mine-run of its cases involving the BNP’s status as a Tier III organization” without any citation.

<sup>82</sup> *Id.* at 290–91.

<sup>83</sup> *Uddin*, 870 F.3d at 292 (Greenaway, Jr., J., concurring).

<sup>84</sup> *Id.* at 293.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (alterations and emphasis in original) (quoting BIA opinion, Dec. 16, 2016).

would be toothless.<sup>87</sup> The constitutional notice question that precipitated *Hussain*'s authorization exception could be raised anew "so long as 'subgroup' can mean 'members.'"<sup>88</sup>

The authorization requirement announced by *Hussain* and refined by *Uddin* are other examples of the courts limiting the application of an extraordinarily broad statute. More courts should adopt the particular rule announced in these cases, but more broadly, adopt a willingness to narrowly construe tier III terrorist organizations in the spirit of equitable application of our immigration law.<sup>89</sup>

### **III. Negative Effects of Tier III Designation's Broad Reach and Failure to Provide Standards**

The facially broad language of the tier III designation is likely to swallow up organizations that are neither a national security threat nor terrorist organizations in our ordinary language sense. As Judge Posner recognized, "[t]errorism as used in common speech refers to the use of violence for political ends. But the statutory definition of 'terrorist organization' is broad enough to encompass a pair of kidnappers."<sup>90</sup> This section will lay out examples of various inequitable applications of the tier III designation.

In *Khan v. Holder*, the Ninth Circuit considered the appeal of an Indian national whose application for asylum and withholding of removal was denied by the IJ and the BIA because he engaged in terrorist activity.<sup>91</sup> Khan had been involved in the Kashmiri independence movement since 1967 and, sometime in the early 1970s, began working with the Jammu Kashmir Liberation

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 293 n. 2.

<sup>89</sup> *See infra* Part V.

<sup>90</sup> *Hussain v. Mukasey*, 518 F.3d 534, 537 (7th Cir. 2008). Judge Posner continues, however, "[t]he statutory deformation of the ordinary meaning of the word 'terrorist' would be a problem if people were allowed to rely, in determining their legal obligations, on the name of a statute without bothering to read the body of the statute. They are not." *Id.* at 538.

<sup>91</sup> 584 F.3d 773 (9th Cir. 2009).

Front (JKLF).<sup>92</sup> The JKLF had both militant and political factions; the militant faction engaged in political violence, the political faction engaged in nonviolent advocacy for Kashmir independence.<sup>93</sup> Khan was involved only with the political wing of the JKLF.<sup>94</sup> Nonetheless, Khan admitted knowledge of the militant wing's activities.<sup>95</sup> The IJ decided, and the BIA affirmed, that Khan was ineligible for asylum or withholding of removal on the basis of his affiliation with the JKLF.<sup>96</sup>

Among other arguments, Khan contended that the JKLF was erroneously designated a terrorist organization.<sup>97</sup> In short, Khan argued that because the JKLF was engaged in legitimate political resistance against the government of India, its actions were only unlawful if they violated international law.<sup>98</sup> The Ninth Circuit panel rejected Khan's contention on the basis that it was unsupported by either domestic or international law.<sup>99</sup>

Turning to the statutory text, the panel noted that the "unlawful" acts that may be deemed terrorist activity refer unambiguously to acts deemed "unlawful in the place where they were committed."<sup>100</sup> The panel further noted that Khan's argument was belied by the discretionary waiver provision of the terrorism bar.<sup>101</sup> Because the executive is granted broad latitude with waiver authority, the panel decided that the broad reading of the terrorism bar, without an exception for resistance within the bounds of international law, was justified.<sup>102</sup>

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<sup>92</sup> *Id.* at 775.

<sup>93</sup> *Id.* at 775–76.

<sup>94</sup> *Id.* at 776.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* The IJ and BIA did hold, however, that Khan was eligible for relief under the CAT. *Id.*

<sup>97</sup> *Khan*, 584 F.3d at 778.

<sup>98</sup> *Id.* at 781.

<sup>99</sup> *See id.* at 780–84.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 784 (noting that "even if [the definition of terrorist activity and the determination of refugee status] did conflict, the administrative discretion in the INA . . . might resolve the conflict.").

<sup>102</sup> *Id.* at 782.

While the Ninth Circuit's application of the terrorism bar may well have been correct, there is little doubt that the failure to find an exception for legitimate resistance leads to inconsistent relief for asylum seekers who sought to defend themselves in their home countries.<sup>103</sup> The absurd application of the tier III designation is not lost on the courts themselves. The Third Circuit recently noted that a failure to implement the authorization requirement might require the courts to consider the Democratic and Republican Parties terrorist organizations.<sup>104</sup> It is such application that prevents members of pro-democratic groups abroad from seeking admission in the United States.<sup>105</sup>

Just as troubling, however, is that the tier III designation is determined on a case-by-case basis.<sup>106</sup> This means that the same organization can be a terrorist organization in one case and not in another. Consider the BNP, as the Third Circuit did in *Uddin*.<sup>107</sup> The panel's own research unearthed various opinions by the BIA regarding the BNP.<sup>108</sup> The results, to put it mildly, were all over the map.

In six of the opinions, the Board agreed with the IJ that the BNP qualified as a terrorist organization based on the record in that case. But in at least ten, the Board concluded that the BNP was not a terrorist organization. In at least five cases, the Government did not challenge the IJ's determination that the BNP is not a terrorist organization. And in one case, the Board reversed its own prior determination, finding that that "the Board's last decision incorrectly affirmed the Immigration Judge's finding that the BNP is a Tier III terrorist organization." Many of the cases discussed the BNP's terrorist status during the same time periods, reaching radically different results.<sup>109</sup>

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<sup>103</sup> See Daniella Pozzo Darnell, *Comment: The Scarlett Letter "T": The Tier III Terrorist Classification's Inconsistent and Ineffectual Effects on Asylum Relief for Members and Supporters of Pro-democratic Groups*, 41 U. BALT. L. REV. 557 (2012).

<sup>104</sup> See *Uddin v. Attorney General*, 870 F.3d 282, 290 (3d. Cir. 2017).

<sup>105</sup> See Darnell, *supra*, note 103 at 557 (relaying the story of Sara, a peaceful political activist in Cameroon whose organization, seeking the independence of English-speaking Cameroon, was determined to be a tier III terrorist organization, delaying resolution of her petition to bring her children to the United States.).

<sup>106</sup> *Uddin*, 870 F.3d at 285.

<sup>107</sup> *Uddin*, 870 F.3d 282.

<sup>108</sup> *Id.* at 291.

<sup>109</sup> *Id.*

The BIA's decisions in other cases need not be released to the public, compounding the confusion for advocates, asylum seekers, and even IJs.<sup>110</sup>

Imagine, however, that the BNP is, in fact, an organization that poses a national security risk to the United States. Surely, there are organizations, dangerous to the United States, whose existence escapes the eyes of our State Department. In fact, this is exactly the scenario the tier III designation contemplates: an organization—not designated by the State Department or Secretary of State—that nonetheless poses a risk to national security. If Congress seeks to address the problem of dangerous organizations not yet known to our security apparatus, the benefits of case-by-case designation of such organizations are not apparent. This flaw cries out for reform as much as an inequitable result in any individual case. A BIA designation that a group is a terrorist organization deserves some deference. Given the government's very low burden of proof, such deference is arguably inappropriate at the moment. But should the Courts of Appeal or Congress implement some of the limits argued for *infra*, the BIA's substantive conclusion that a group is a terrorist organization may warrant creating precedential authority.

#### **IV. The Material Support Bar and its Interplay with the Tier III Designation**

Though the material support bar does not only apply to supporters of tier III terrorist organizations, its broad applicability, combined with the facially broad definition of tier III terrorist organizations, can result in facially inequitable results. Accordingly, understanding the material support bar is key to understanding the concrete impact of flaws with the tier III designation. This

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<sup>110</sup> See *Heartland Alliance Nat'l Immigrant Justice Ctr. v. DHS*, 840 F.3d 419 (7th Cir. 2016) (holding that the Freedom of Information Act does not compel the government to turn over the names of tier III terrorist organizations).

section will elaborate on the content of the material support bar and summarize existing criticism of the bar, especially in relation to its application to tier III terrorist organizations.

### **A. Defining the Material Support Bar**

*In re S-K-* provides an informative application of the material support bar after its revision by the REAL ID Act of 2005.<sup>111</sup> In that case, respondent, a Burmese national, Christian and ethnic Chin, faced persecution if returned to Burma, then under the control of an autocratic, military regime.<sup>112</sup> During her time in Burma, respondent donated money to the Chin National Front (CNF), an organization dedicated to the freedom of ethnic Chin people.<sup>113</sup> There was some question as to whether, given the Burmese government's relationship to the United States, the CNF was in fact a terrorist organization.<sup>114</sup> Nonetheless, the BIA affirmed the IJ's conclusion that the CNF was a terrorist organization because it used force against and was outlawed by the Burmese government.<sup>115</sup>

Among other things, respondent argued her support of the CNF failed to qualify as material.<sup>116</sup> Specifically, she argued the IJ needed to find that the funds and goods she provided were "relevant to the planning or implementation of a terrorist act[.]"<sup>117</sup> The BIA, however, rejected respondent's contention relying on the statutory text: "[the statute] requires only that the provider afford material support to a terrorist organization."<sup>118</sup> It regarded such a limitation as unworkable "where assistance as fungible as money is concerned" because even funding for an ostensibly benign purpose allows the terrorist organization to use other funds in support of its

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<sup>111</sup> *In re S-K-*, 23 I. & N. 936 (BIA 2006).

<sup>112</sup> *Id.* at 937-939.

<sup>113</sup> *Id.* at 936.

<sup>114</sup> *Id.* at 940.

<sup>115</sup> *Id.* at 941.

<sup>116</sup> *In re S-K-*, 23 I. & N. 936, 942 (BIA 2006).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 943.



terrorist activities.<sup>119</sup> Ultimately, the BIA affirmed the IJ's decision that respondent was ineligible for asylum or withholding of removal owing to her material support of a terrorist organization.<sup>120</sup>

While the wisdom of the BIA's decision may be in dispute,<sup>121</sup> its precedential value is not. In *Hussain*, Judge Posner rejected Hussain's arguments that his fundraising did not contribute to MQM-H's terrorist activities, explicitly relying on *In re S-K*'s reasoning.<sup>122</sup>

In *Annachamy v. Holder*, the Ninth Circuit rejected various arguments for exceptions to the statutory language of the material support bar.<sup>123</sup> Annachamy, a Sri Lankan national, appealed the BIA's decision to bar him from immigration relief for his material support of a terrorist organization, the Liberation Tigers of Tamil Eelam (LTTE).<sup>124</sup> LTTE was, during Annachamy's residence in Sri Lanka, a militant organization at war with Sri Lanka's government.<sup>125</sup> At various times, Annachamy was detained, interrogated, and tortured by the Sri Lankan military.<sup>126</sup> Nevertheless, Annachamy testified that he in fact opposed LTTE as they too attempted to coerce him.<sup>127</sup> Against his will, LTE forced Annachamy to give money to the organization and cook, dig trenches, and build fences at a camp.<sup>128</sup> Annachamy fled Sri Lanka and came to the United States.<sup>129</sup>

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<sup>119</sup> *Id.* at 944.

<sup>120</sup> *Id.* at 946. The BIA also ordered, however, that the IJ reconsider whether respondent was eligible for deferral of removal under the CAT. Subsequently, respondent was granted immigration relief, first by the Secretary of the Department of Homeland Security, *in re S-K*-, 14 I. & N. Dec. 289 (AG 2007) and then by Congress, Pub. L. 110-161.

<sup>121</sup> See *infra* Part III.

<sup>122</sup> *Hussain*, 518 F.3d at 538–39 (quoting *In re S-K*-, 23 I. & N. at 944).

<sup>123</sup> 733 F.3d 254 (9th Cir. 2013).

<sup>124</sup> *Id.* at 256.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 257.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Annachamy*, 733 F.3d at 257.

The Immigration and Naturalization Service, now the Department of Homeland Security, initiated removal proceedings upon Annachamy's arrival.<sup>130</sup> Annachamy made claims for asylum, withholding of removal, and protection under the CAT.<sup>131</sup> The IJ, finding Annachamy's testimony credible, granted Annachamy asylum and withholding of removal.<sup>132</sup> The BIA, however, reversed the IJ's opinion on the grounds that Annachamy had provided material support to a terrorist organization.<sup>133</sup> On appeal, Annachamy argued that: (1) LTTE was an organization engaged in legitimate political violence and (2) he provided support under duress.<sup>134</sup>

The Ninth Circuit, however, agreed with the BIA and rejected the contention that the material support bar contained an exception either for legitimate political violence or support provided under duress.<sup>135</sup> On the first argument, the Court relied on the plain text of the material support bar to undermine Annachamy's contention that an exception existed for support of a legitimate resistance group.<sup>136</sup> The fatal blow to Annachamy's argument was the concession that LTTE was a terrorist organization.<sup>137</sup> Because the Ninth Circuit did not find a political offense exception in the definition of terrorist activity, it similarly declined to locate a political offense exception in the definition of material support.<sup>138</sup>

Moving onto Annachamy's second argument, the Ninth Circuit panel relied on textual and structural factors in denying that a duress exception existed in the definition of material support.<sup>139</sup>

While the material support bar did not provide an explicit exception under duress, a neighboring

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 256.

<sup>135</sup> *Annachamy*, 733 F.3d at 256.

<sup>136</sup> *Id.* at 259.

<sup>137</sup> *See id.* The argument that there was a legitimate political violence exception to the definition of terrorist activity was foreclosed by the Ninth Circuit's decision in *Khan*, 584 F.3d 773. *See supra* Part III.

<sup>138</sup> *Annachamy*, 733 F.3d at 259.

<sup>139</sup> *Id.* at 260–66.

subsection does, indeed, contain such an exception.<sup>140</sup> The panel concluded that the failure to explicitly create an exception to the material support bar, however, is evidence Congress did not intend to create such an exception.<sup>141</sup> Further, the material support bar’s administrative waiver provision indicated that Congress left to the executive branch the discretion to consider whether certain individuals were forced to support terrorist organizations against their will, or that particular terrorist organizations had a practice of forced support.<sup>142</sup> In short, because the evidence weighed against finding that Congress intended a duress exception to the material support bar, the Ninth Circuit rejected the contention that such an exception exists.<sup>143</sup>

### **B. Application of the Material Support Bar**

Much of the criticism around the material support bar focuses on its application to individuals otherwise deserving of relief.<sup>144</sup> Its effects do not neatly map onto the presumptive goals of Congress in its enactment: keeping the United States safe from foreign terrorism. It differs in meaningful ways from similar immigration law provisions.<sup>145</sup> One commentator compares the language and development of the persecutor bar, established by the Refugee Act of 1980,<sup>146</sup> to the material support bar.<sup>147</sup> The material support bar and the persecutor bar both affect primarily the same provisions of asylum law—allowing the United States to turn away refugees. While the persecutor bar brings the United States into compliance with the United Nations Refugee

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<sup>140</sup> 8 U.S.C. § 1182(a)(3)(D)(ii) provides that the bar to immigration relief for members of affiliates of the Communist Party is inapplicable to those whose membership or affiliation was involuntary.

<sup>141</sup> *Annachamy*, 733 F.3d at 261.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 260-66.

<sup>144</sup> See, e.g., Charlotte Simon, *Comment: Change Is Coming: Rethinking the Material Support Bar Following the Supreme Court’s Holding in Negusie v. Holder*, 47 HOUS. L. REV. 707 (2010)

<sup>145</sup> See *id.*

<sup>146</sup> Pub. L. No. 96-212.

<sup>147</sup> Simon, *supra*, note 144.

Convention and Protocol<sup>148</sup>, the Refugee Act also allows the United States to deny entry to refugees who pose a risk to national security.<sup>149</sup> However, neither statutory provision contains an explicit duress exception in its statutory text.<sup>150</sup>

Quite apart from the facial similarities these provisions share, the courts have given each quite different treatment. For one, courts have held that the persecutor bar requires that the government establish much more conclusively a person's direct involvement in the alleged persecution.<sup>151</sup> The courts have held that the material support bar, on the other hand, is satisfied when the government shows even a tenuous connection to a terrorist organization and need not make any connection at all to terrorist activity.<sup>152</sup> The government's burden is also lower when it needs to establish the individual's state of mind in providing material support.<sup>153</sup>

The most important difference between the treatment of these two statutes, however, has been the application of a duress exception to the persecutor bar but no such exception to the material support bar. In *Negusie*, the Supreme Court overturned the Fifth Circuit's affirmance of a BIA decision to apply the persecutor bar to a dual national of Eritrea and Ethiopia who was jailed and forced to work as a prison guard by the Eritrean government.<sup>154</sup> Below, the BIA had denied Negusie's application for relief by applying a categorical rule it had developed in its own case law<sup>155</sup> and, in the Court's eyes, failed to "exercise[] its interpretative authority."<sup>156</sup> Although the

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<sup>148</sup> *Id.* at 715; United Nations Convention Relating to the Status of Refugees, adopted July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) ("Convention"), and the United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967; for the United States Nov. 1, 1968); *In re J.M. Alvarado*, 27 I&N Dec. 27, 30 n.3 (BIA 2017).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 715–16.

<sup>151</sup> *Id.* at 716–17.

<sup>152</sup> *Id.* at 717.

<sup>153</sup> *Id.* at 718.

<sup>154</sup> *Negusie v. Holder*, 555 U.S. 511 (2009).

<sup>155</sup> See *In re Fedorenko*, 19 I. & N. Dec. 57, 69 (BIA 1984) ("an alien's motivation and intent are irrelevant to the issue of whether he 'assisted' in persecution . . . it is the objective effect of an alien's actions which is controlling.")

<sup>156</sup> *Negusie*, 555 U.S. at 522.

Court did not answer the question,<sup>157</sup> in requiring the BIA to interpret the applicability of the persecutor bar in the first instance, the Supreme Court created some grounds for arguing that there was such an exception, not just for the persecutor bar but for the material support bar.<sup>158</sup> Alas, however, various courts of appeals have since upheld the BIA's determination that there is no duress exception to the material support bar.<sup>159</sup>

Interpreting the material support bar to not include a duress exception forces individuals who were forced to provide support to terrorist organization in their home countries to rely on an imperfect administrative waiver process.<sup>160</sup>

## **V. Proposals for Reform of the Tier III Designation**

This section will offer some possible reforms to the scheme of tier III designation. First, this section will detail legislative reform efforts either attempted by the legislature or recommended to the legislature by commentators or courts. Then, this section will offer some proposals for limited statutory interpretation and justifications of existing limits on this statute.

### **A. Legislative Changes**

There are a number of policy reasons to change the way we define terrorist organizations: we ensnare immigrants we do not want to bar from relief, we strengthen anti-American resentment

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<sup>157</sup> *Id.* at 524 (stating that answering the question before the BIA had exercised its interpretative authority is in tension with the “ordinary remand rule.”)

<sup>158</sup> See Simon, *supra*, note 144 at 735 (“[Negusie] preserves the possibility of asylum for victims of terrorism who have been denied relief under the material support bar.”)

<sup>159</sup> See *Annachamy v. Holder*, 686 F.3d 729, 734 (9th Cir. 2012) (holding that a duress exception to the material support bar is “not a permissible reading of the statute”); *Barahona v. Holder*, 691 F.3d 349, 355-56 (4th Cir. 2012) (holding that the material support bar contains “no express exception for material support provided . . . either involuntarily or under duress” and that the administrative waiver provision provides “an alternate avenue of relief from admissibility.”); *Sesay v. Attorney General*, 787 F.3d 215, 224 (3d Cir. 2015) (holding that absent an administrative waiver, the material support bar applies to bar relief regardless of whether support was provided voluntarily). *But see Ay v. Holder*, 743 F.3d 317, 322 (2d Cir. 2014) (remanding to the BIA for consideration whether there is a duress exception to the material support bar and suggesting that the BIA may address the level of support necessary to be “material.”)

<sup>160</sup> See Messer, *supra*, note 14 at 71–72 (proposing Congress enact a duress exception to the material support bar rather than allowing DHS to create and apply the waiver “it sees fit” and criticizing the “current application procedure for the duress waiver” as “inefficient” and “unjust”).

abroad, and we fail in our international treaty obligations. These, however, are not reasons for the courts to interpret the statute a particular way (or at least, not the only reasons). These are the reasons Congress should do something about the law.

One such proposal is “the eradication of the Tier III terrorist organization given its imprecision in targeting threats to the United States.”<sup>161</sup> The tier III designation has done little except “waste[] copious amounts of time and resources by investigating individuals that pose *no threat* to the United States. Time and resources better spent enforcing laws denying relief to individuals that actually pose a threat to the United States.”<sup>162</sup>

Congress has, in fact, considered such a solution. Senators Patrick Leahy<sup>163</sup> and Carl Levin<sup>164</sup> introduced the Refugee Protection Act of 2010 to no avail.<sup>165</sup> That bill proposed eliminating the tier III designation entirely, in a section entitled “Protecting Victims of Terrorism from Being Defined as Terrorists.”<sup>166</sup> In proposing the bill, Senator Leahy cited the need to recommit to and re-comply with America’s obligations under 1951 Convention Relating to the Status of Refugees and its 1967 protocol.<sup>167</sup> Unfortunately, Senators Leahy and Levin’s bill did not become law. Today, Congress seems to have rejected the vision of limiting the exclusion grounds and instead expanding them. Take, for instance, a bill introduced by Senator Chuck Grassley in the 115th Congress.<sup>168</sup> The bill’s purpose is to make “aliens associated with a criminal gang inadmissible, deportable, and ineligible for various forms of relief.”<sup>169</sup> While Senator

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<sup>161</sup> Mary Orsini, *Quantity vs. Quality: The Misdirected War on Immigration and the Sweeping Effects of the Tier III Terrorist Organization*, 41 Rutgers L. Rec. 167, 175 (2013).

<sup>162</sup> *Id.* at 167.

<sup>163</sup> D-VT

<sup>164</sup> D-MI

<sup>165</sup> S.3113, 111th Cong. (2010).

<sup>166</sup> S.3113, 111th Cong., § 4 (2010).

<sup>167</sup> Statement of Senator Patrick Leahy, March 15, 2010, < <https://www.leahy.senate.gov/press/leahy-introduces-landmark-refugee-protection-act>>.

<sup>168</sup> S.52, 115th Cong. (2017).

<sup>169</sup> *Id.*

Grassley's bill has not seen any movement since its introduction, it does indicate two things. First, Congress is looking to expand, not contract, the exclusion grounds. Second, it may signal that the next perceived threat to national security Congress will seek to address is the threat of street gangs composed primarily of immigrant members.<sup>170</sup>

Another suggestion, less radical than the outright repeal of the tier III designation proposed by Senators Leahy and Levin is for Congress to increase the government's burden of proof, ever so slightly, in the removal proceedings. If Congress' goal is to preclude real dangers to national security from immigration relief, it should take those goals seriously. It should require the government show that an individual has some likelihood of engaging in terrorist activity.<sup>171</sup> Outside of the terrorism bar, such a showing is required by the government. In the Communism bar, for instance, a former member or affiliate of the Communist Party may avoid application of the bar if she can prove that her "membership or affiliation terminated . . . at least 2 years before the date of such application . . . and the alien is not a threat to the security of the United States."<sup>172</sup>

As one commentator points out, the framework for such a requirement already exists in the terrorist activities section providing for security grounds of admissibility.<sup>173</sup> One of the nine enumerated grounds is that "[a]ny alien who . . . the Attorney General, the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or likely to engage after entry in any terrorist activity."<sup>174</sup> If, instead, the government were required to show an individual was

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<sup>170</sup> The Trump administration, and the President himself, seem to be fascinated with MS-13, a street gang founded in the United States by Central American immigrants which has spread into Central America. President Trump, in an endorsement of Virginia gubernatorial candidate Ed Gillespie, claimed then-Lieutenant Governor of Virginia, Ralph Northam "is fighting for the violent MS-13 killer gangs & sanctuary cities." Donald Trump (@realDonaldTrump), TWITTER (OCT. 5, 2017, 9:58 PM), <https://twitter.com/realDonaldTrump/status/916120435762266114>.

<sup>171</sup> See Jared Hatch, *Requiring a Nexus to National Security: Immigration, "Terrorist Activities," and Statutory Reform*, 2014 B.Y.U. L. Rev. 697, 719.

<sup>172</sup> 8 U.S.C. 1182(a)(3)(D)(i).

<sup>173</sup> Hatch, *supra*, note 171 at 719.

<sup>174</sup> § 1182(a)(3)(B)(i)(II).

engaged in or likely to engage in terrorist activity, then required to show one of the remaining eight enumerated grounds, much of the tier III designation's inequitable application could be resolved.<sup>175</sup> Such a requirement would operate like the two-step process barring those associated with terrorist organizations from immigration relief.<sup>176</sup> Such a change would also bring some necessary consistency to the terrorism bar.

Another proposal for reform offered is to redefine terrorist activity so that it must be unlawful under the laws of the United States and not the laws of the place the activity is committed.<sup>177</sup> Such a requirement would also alleviate inequitable application of the terrorism bar in cases like *In re S-K*.<sup>178</sup> While *S-K* is the touchstone in material support analysis, its holding relied on finding that the CNF was a terrorist organization.<sup>179</sup> That determination rested solely upon the fact that its activities were considered unlawful by the Burmese government.<sup>180</sup> While the result in *S-K* prompted both executive and congressional redress,<sup>181</sup> it might have been avoided by simply requiring the government to show that CNF's activities would have been illegal in the United States. If an organization's actions would not have violated domestic law had they taken place in the United States, then there is no basis for determining they are a national security risk. More importantly, limiting the bar to would-be violations of domestic law allows the immigration of members and supporters of pro-democratic groups under repressive, undemocratic regimes.

A third proposal for reform, from another commentator, is redrafting the tier III designation to reflect a multi-factored approach geared towards excluding militant groups that are more

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<sup>175</sup> See Hatch, *supra*, note 171 at 720.

<sup>176</sup> *Id.* at 719-20; § 1182 (a)(3)(F).

<sup>177</sup> See Hatch, *supra* note 171, at 727.

<sup>178</sup> See *supra* part IV.

<sup>179</sup> See *In re S-K*, 23 I. & N. Dec. 936 (BIA 2006).

<sup>180</sup> *Id.* at 940.

<sup>181</sup> See *supra* note 120.



squarely at odds with both domestic law and international norms.<sup>182</sup> The first factor is whether the organization’s purpose is political and if so, how central are its political goals to its purpose.<sup>183</sup> Of note is the relation between the group’s objectionable activities and its political purpose.<sup>184</sup> A second factor is the willingness of the group to strategically exploit the fear of noncombatants.<sup>185</sup> This would allow for the immigration of members of groups who engage in self-defense while targeting those objectionable few who target the innocent.<sup>186</sup> Finally, the courts should be required to consider whether the group engages in internationally proscribed acts of violence.<sup>187</sup> The third factor, again, would allow the self-defensive use of arms and non-violent political dissent.<sup>188</sup> On the whole, the benefit of the multifactor approach would be to alleviate the inconsistent classification of terrorist organizations.<sup>189</sup>

In the likely event that Congress fails to implement any statutory reform, there are nonetheless avenues for the court to implement the narrow, limiting applications of the tier III designation discussed in part II, *supra*, through the tools of statutory interpretation.

First, more courts should consider implementing the threshold evidentiary showing of *Budiono*.<sup>190</sup> For one, it is “unreasonable to expect applicants for withholding of removal and other forms of relief to anticipate what bars might apply to their case, and then to affirmatively rebut all of those bars.”<sup>191</sup> When the terrorism bar is so broad, it might prove near impossible to anticipate that the glass of water given to a stranger was material support for a terrorist organization.

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<sup>182</sup> See Darnell, *supra* note 103, at 571.

<sup>183</sup> *Id.* at 575–76.

<sup>184</sup> *Id.* at 576.

<sup>185</sup> *Id.* at 577.

<sup>186</sup> See *Id.* at 577–78.

<sup>187</sup> Darnell, *supra* note 103, at 578.

<sup>188</sup> *Id.* at 579–81.

<sup>189</sup> *Id.* at 582.

<sup>190</sup> *Budiono*, 837 F.3d at 1042.

<sup>191</sup> *Id.* at 1049.

Underneath this concern, however, is the fear that meritorious claims for immigration relief are being denied “on the basis of a vague association with religious or political fundamentalism.”<sup>192</sup>

The authorization requirement announced by *Hussain*<sup>193</sup> and *Uddin*<sup>194</sup> should also be adopted by the courts. The Third Circuit argues that such a requirement “simply formalizes common sense notions as to what a terrorist organization is.”<sup>195</sup> Of course, violence at a rally for President Trump would not make the Republican Party a terrorist organization. It would defy common sense to impute to the larger organization, the Party, actions of rogue members that it did not authorize, endorse, or even condone. In fact, because we would expect such action to draw the Party’s condemnation, it seems especially inappropriate to hold the Party responsible in any way. Likewise, the courts should deny that the government can merely raise evidence that members of a group were engaged in terrorist activity and must instead show authorization for terrorist activities by group leadership.

A necessary corollary of that rule must be a concurrent limitation of the definition of subgroup.<sup>196</sup> As wise as the adoption of the authorization requirement may be, if it may be escaped by clever litigators, then it is toothless. Requiring that “subgroups” be more than “whichever individuals committed terrorist acts”<sup>197</sup> does not have much force on its own, but it does close the inevitable loophole created by a focus on group authorization of member activities.

## **VI. Conclusion**

Congress’ immigration scheme has long barred individuals from relief for their political affiliations. From “anarchists” in the post-war period, to Communists in the cold-war period, to

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<sup>192</sup> *Id.*

<sup>193</sup> *Hussain*, 518 F.3d at 534.

<sup>194</sup> *Uddin*, 870 F.3d at 282.

<sup>195</sup> *Id.* at 290.

<sup>196</sup> *See id.* at 292 (Greenaway, Jr., J., concurring).

<sup>197</sup> *Id.* at 293.

terrorists as the War on Terror reaches every corner of the globe. Now, as then, Congress is primarily concerned with national security. Nonetheless, both Congress and the courts can effectively address the gaping flaws of the existing terrorism bar by reigning in the application of the tier III designation. Congress may impose a higher burden of proof upon the government, take a multifaceted approach to the designation of a tier III terrorist organization, or eliminate the tier III designation altogether. Courts, on the other hand, may adopt the threshold evidentiary showing of *Budiono* and the authorization requirement of *Hussain* and *Uddin*. The status quo is the worst of the available options.