

Statement Submitted by ACLU for the Record
Senate Judiciary Subcommittee on Human Rights and the Law
Hearing on "The 'Material Support' Bar: Denying Refuge to the Persecuted?"
September 19, 2007

Chairman Durbin, Ranking Member Coburn and Members of the Subcommittee:

We are pleased to submit this statement for the record on behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with hundreds of thousands of activists and members and 53 affiliates nationwide dedicated to preserving the principles of the Constitution and Bill of Rights. This statement provides the ACLU's views on the "material support"¹ bar, as enhanced and clarified by the USA PATRIOT Act of 2001, and the Intelligence Reform and Terrorism Prevention Act of 2004.

In its zeal to keep real terrorists out of the country, the "material support" bar has been used to deny refugee processing to individuals who may qualify as refugees under U.S. law but for their support, often minimal and/or under duress, to groups considered by the U.S. government as foreign terrorist organizations. Sadly, in the name of national security, the "material support" bar is often being misapplied to individuals who are not terrorists, but are the terrorists' victims.

The U.S. government regularly uses the circumstances that caused refugees to flee their countries as grounds for denying them safety in ours. For example, adult and children refugees have been deprived of U.S. protection because they paid levies to guerrilla groups that instill fear in their neighborhoods, or because they performed services for armed rebel groups under threat of death. Currently, over 550 asylum requests have been placed on indefinite hold as a result of these provisions. This injustice has lasted several years for many asylum seekers, resulting in delays that have divided families, have left high and dry refugee children in dangerous places, and have forced many others to be detained like criminals for long periods – a treatment sometimes not very dissimilar from that inflicted by their tormentors abroad.

Some of these hardships could have been prevented without further legislation had the Administration responsibly created an effective process for refugees to seek an exception. Although the Administration has recently begun to exercise discretionary authority for narrowly circumscribed groups who have provided support to organizations now labeled as "terrorists," the waiver was made burdensome by requiring agreement between the Departments of State, Justice and Homeland Security. Also, in the approximately four years since these bars were last expanded, and after months of bureaucratic wrangling because of a extremely cumbersome and

¹ Multiple courts have found parts of the "material support" definitions, 18 U.S.C. §2339 (harboring terrorists). 18 U.S.C. §2339C (financing of terrorism), to be unconstitutionally vague. Vague statutes raise concerns because they can punish people for behavior they did not know was illegal, lead to arbitrary and discriminatory enforcement by government officers, and chill protected activity. For example, the Ninth Circuit, found various terms unconstitutionally vague, Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000); "personnel" because the term might be thought to envelope the efforts of a simple advocate; "training" because the term might be thought to sweep in benign academic instruction; and "expert advice or assistance" because like "personnel" and "training" the phrase might be read to include First Amendment protected pure speech and advocacy.

also limited waiver process, the Administration has used its waiver authority only under pressure, and exceedingly sparingly.

At this point legislation is urgently needed to restore justice and fairness to the American refugee and asylum systems. Congress must act to correct the lack of an exception for “material support” provided under duress; and to correct the lack of a *de minimis* exception for the support provided. Ultimately, the executive and the judiciary branches must be given discretion to decide, on a case-by-case basis, whether or not to grant refuge to a persecuted individual.

Citing the “material support” bar, the Department of Homeland Security has denied asylum to the United States to victims of authoritarians made to cooperate under duress. The lack of an explicit duress defense and refusal by the Department of Homeland Security and some courts to read one into the “material support” bar is inconsistent with general principles of U.S. law. The principle of duress is recognized in U.S. criminal law and, according to United States v. Bailey 444 U.S. 394 (1980), may be raised as a common-law defense even when certain conduct violates criminal statutes with no express duress exception. A duress exception would safeguard the country’s longstanding commitment to providing safe-haven to victims in need.

Furthermore, the Administration has interpreted the word “material” out of the statute. Counsel for the Department of Homeland Security has argued before the courts that Congress intended “material support” to mean any support, no matter how insignificant. Unfortunately, in Singh-Kaur v. Ashcroft, 385 F.3d 293 (3d Cir. 2004), the United States Court of Appeals for the Third Circuit found that providing food and setting up tents for a religious congregation, which may have included members of the religion’s militant sect, constituted material support. By not applying a *de minimis* exception, the Department of Homeland Security and U.S. courts have extended the “material support” bar to innocent civilians.

Moreover, interpretations of the material support bar that do not apply a duress exception or an exception for *de minimis* support violate U.S. obligations under Article 33 of the 1951 Non-Refoulement Refugee Convention. Under Article 33 the United States cannot expel or return a refugee to a country where he or she will face persecution unless there are “reasonable grounds for regarding [the refugee] as a danger to the security of the [U.S.]” and the refugee “constitutes a danger to the community of [the United States].” Applying the material support bar to refugees who provided support to terrorists under duress or insignificant amounts of support is inconsistent with the U.S.’s binding obligations under Article 33.

Finally, Congress should act to make clear that its intention in passing the “material support” laws was not to turn the very harm that refugees have suffered into the grounds for refusing them the protection they need. The solution to this problem is for Congress to clarify that:

- The ‘material support to terrorist organizations’ bar only applies to persons who have provided meaningful and voluntary assistance to a terrorist organization;
- Individual responsibility must be ascertained before denying refugee protection; and
- Decision-makers should consider all relevant factors regarding the group’s objectives, conduct, and structure.

We thank you, Mr. Chairman, and this subcommittee for the opportunity to submit our testimony to the record today. We look forward to working with you to advance our common goal of a safe and secure America, while staying true to our honorable and just principles of fairness and freedom.