S. HRG. 109–749

OVERSIGHT HEARING: U.S. REFUGEE ADMISSIONS AND POLICY

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

SEPTEMBER 27, 2006

Serial No. J–109–118

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

32–151 PDF WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

ARLEN SPECTER, Pennsylvania, *Chairman*

ORRIN G. HATCH, Utah
CHARLES E. GRASSLEY, Iowa
JON KYL, Arizona
MIKE DEWINE, Ohio
JEFF SESSIONS, Alabama
LINDSEY O. GRAHAM, South Carolina
JOHN CORNYN, Texas
SAM BROWNBACK, Kansas
TOM COBURN, Oklahoma

PATRICK J. LEAHY, Vermont
EDWARD M. KENNEDY, Massachusetts
JOSEPH R. BIDEN, JR., Delaware
HERBERT KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois

MICHAEL O'NEILL, *Chief Counsel and Staff Director*
BRUCE A. COHEN, *Democratic Chief Counsel and Staff Director*

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP

JOHN CORNYN, Texas, *Chairman*

CHARLES E. GRASSLEY, Iowa
JON KYL, Arizona
MIKE DEWINE, Ohio
JEFF SESSIONS, Alabama
SAM BROWNBACK, Kansas
TOM COBURN, Oklahoma

EDWARD M. KENNEDY, Massachusetts
JOSEPH R. BIDEN, JR., Delaware
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois

REED O'CONNOR, *Majority Chief Counsel*
JIM FLUG, *Democratic Chief Counsel*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

Page

Brownback, Hon. Sam, a U.S. Senator from the State of Kansas 15
Cornyn, Hon. John, a U.S. Senator from the State of Texas 1
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin, prepared statement 69
Kennedy, Hon. Edward M., a U.S. Senator from the State of Massachusetts ... 2
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, parepared statement 99

WITNESSES

Gavin, Rev. Kenneth, S.J., Vice Chair, Refugee Council USA, and National Director, Jesuit Refugee Service/USA, Washington, D.C. 21
Horowitz, Michael J., Director, Project for Civil Justice Reform and Project for International Religious Liberty, Hudson Institute, Washington, D.C. 18
Sauerbrey, Ellen R., Assistant Secretary, Bureau of Population, Refugees and Migration, Department of State, Washington, D.C. 4
Scharfen, Jonathan R., Deputy Director, U.S. Citizenship and Immigration Services, Department of Homeland Security, Washington, D.C. 6

QUESTIONS AND ANSWERS

Responses of Rev. Kenneth Gavin, S.J. to questions submitted by Senator Kennedy 27
Responses of Michael J. Horowitz to questions submitted by Senator Kennedy 30
Responses of Ellen R. Sauerbrey to questions submitted by Senator Kennedy . 34

SUBMISSIONS FOR THE RECORD

Administrative proposal to resolve outstanding areas of disagreement, memorandum 55
American Jewish community organization leaders, letter 60
Brand, Rachel L., Assistant Attorney General, Office of Legal Policy, Department of Justice, Washington, D.C., statement 63
Faith-based community leaders and individuals, letter 66
Gabaudan, Michel, Regional Representative for the United States of America and the Caribbean, Office of the United Nations High Commissioner for Refugees, Geneva, Switzerland, statement 71
Gavin, Rev. Kenneth, S.J., Vice Chair, Refugee Council USA, and National Director, Jesuit Refugee Service/USA, Washington, D.C. 78
Horowitz, Michael J., Director, Project for Civil Justice Reform and Project for International Religious Liberty, Hudson Institute, Washington, D.C. 89
Sauerbrey, Ellen R., Assistant Secretary, Bureau of Population, Refugees and Migration, Department of State, Washington, D.C. 101
Scharfen, Jonathan R., Deputy Director, U.S. Citizenship and Immigration Services, Department of Homeland Security, Washington, D.C. 106

OVERSIGHT HEARING: U.S. REFUGEE ADMISSIONS AND POLICY

WEDNESDAY, SEPTEMBER 27, 2006

UNITED STATES SENATE,
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP, COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:59 p.m., in room SD–226, Dirksen Senate Office Building, Hon. John Cornyn, Chairman of the Subcommittee, presiding.

Present: Senators Cornyn, Brownback, and Kennedy.

OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Chairman CORNYN. This hearing before the Senate Subcommittee on Immigration, Border Security and Citizenship will come to order. I want to thank Chairman Specter for scheduling today's hearing, and, of course, I appreciate my Ranking Member, Senator Kennedy, for his enormous contributions to this hearing and on this subject.

There is a great American tradition of providing safe haven for refugees, a tradition that dates back to the founding of our Nation. The United States accepts more refugees than any other country in the world. The refugee resettlement program advances our National interests and our democratic values. And let us not forget it saves lives.

However, while the refugee ceiling remains at 70,000 the Government has not consistently been able to meet this threshold established by the President. One explanation often cited for the inability to meet this threshold is that legitimate refugees are barred because the definition of "terrorist activity" is too broad. Under provisions of the Immigration and Nationality Act, refugees may be denied entry into the United States on terrorism grounds because they provided "material support" to terrorist organizations. Yet there are more than 10 million refugees around the world. I question whether the material support issue alone can account for the United States not achieving the capped goals. And so I look forward to hearing from our panelists about other obstacles to reaching the refugee admission, too.

Finally, I believe it is important to examine how refugee assistance funds are spent by the Department of State. Many critics have asserted that in the past, the State Department has spent most of its refugee assistance funding on short-term needs, like food, medicine, and housing. Obviously, while these needs are crit-

ical, we must not lose sight of the long-term needs of the refugees, including education, skills development, and integration into the host country.

With that, let me turn the floor over to Senator Kennedy for any opening statement he would like to make.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Senator Cornyn, for holding these hearings, and thank you for also your leadership on this Committee and on this issue. We welcome the opportunity to join with you in meeting with the Secretary of State recently and also with our panelists on that particular occasion. So we thank you very much for giving us a chance to have out in the open the refugee policy and the administration's position.

The Committee has the important responsibility to analyze the conditions around the world affecting refugee protection and resettlement to help the U.S. refugee admissions program to respond more effectively to the challenges facing it. As the Chairman pointed out, each year countless refugees are forced to leave their countries, fleeing persecution. America has always been the haven for those desperate for such protections. At the very beginning of our history, the refugee Pilgrims, seeking religious freedom, landed on Plymouth Rock. Ever since, we have welcomed refugees. It has made us a better Nation, and refugees represent the best of American values. They have stood alone at great personal cost against hostile governments for fundamental principles like freedom of speech and religion. They have fled bombings, gunfire, torture, rape, genocide. And they have endured unspeakable misery and suffering.

But they also bring with them the personal stories of hope and courage and triumph, and America offers them an opportunity for a new life, to live without fear, to go as far as their talent and energy allow, and we in turn are enriched by their presence.

The estimated decline in the refugee population worldwide from 16.4 million in 2000 to 13.1 million is welcome news, but it is disturbing that more than 7 million refugees have been restricted to camps or isolated settlements for a decade or more—the warehousing issue. They are trapped in various places around the world—Burmese refugees in Thailand, Bhutanese in Nepal, Angolans in Zambia, Congo-Kinshasans in Namibia, 280,000 Eritreans in the Sudan. Yet in this legislative year, which ends in a few days, the U.S. is expected to admit fewer than 42,000 refugees in this fiscal year, even though the admissions target was set at 70,000. As a result, nearly 28,000 refugee slots have been wasted this year alone, and over the past decade the refugee admissions program has fallen behind in its admission goals by an average of 19,000 per year.

The trend should not continue. It is contrary to America's heritage and history. It allows needless suffering of innocent refugees to persist. It gives an excuse to other countries to not do their part. Deserving refugees were available to fill most of these 28,000 slots. More than half slated to be filled by refugees who were otherwise eligible were excluded by their association with groups that are no

threat to the United States. They have not been identified by the National Intelligence Director Negroponte or Secretary Rice or Counterterrorism Coordinator Crumpton as groups of concern. Many of the groups have common goals with the United States in opposing oppressive regimes, such as those in Burma and Cuba. Nevertheless, the administration applies the broad definition of "terrorism" to keep them out, and we are to hear today how the State Department and DHS intends to address this problem so we can admit more deserving refugees.

There have been some positive changes in the refugee program, such as extending refugee admission to North Koreans and greater attention to stateless warehoused populations. We had a chance to review those at our meeting, and I commend the United Nations High Commissioner for Refugees and many refugee and humanitarian organizations for their extraordinary commitment to resolving these problems. I look forward to the testimony of the distinguished witnesses, particularly in the areas of funding refugee assistance and protecting Iraqi refugees for solutions for long-term refugees and the Darfur crisis. That is of special interest. And we understand—we had talked, I think, at the time of our meeting about some of the resources that were necessary to try and process some of the—both immigration and refugees, and we understand that there might be some positive news about that, which hopefully we will hear about.

Thank you, Mr. Chairman.

Chairman CORNYN. Thank you, Senator Kennedy.

At this time we will make part of the record the opening statements of Senator Leahy and Senator Feingold, without objection.

Our first witness is Hon. Ellen Sauerbrey, Assistant Secretary of the Department of State for Population, Refugees, and Migration. She was appointed to that position by President Bush on January 12, 2006. Before her appointment of Assistant Secretary, Ms. Sauerbrey served as U.S. Representative to the United Nations Commission on the Status of Women. In that capacity, she led the U.S. delegation to the Baltic Sea Conference on Women and Democracy in Estonia and has spoken at numerous international women's conferences.

We also have with us Mr. Jonathan Scharfen, Deputy Director of U.S. Citizenship and Immigration Services at the Department of Homeland Security. He was appointed by Director Emilio Gonzalez on June 22, 2006. Before his appointment to that responsibility, to that job, Mr. Scharfen served in the United States Marine Corps and retired in August 2003 at the rank of Colonel following 25 years of active-duty service. Mr. Scharfen also previously served as Chief Counsel and Deputy Staff Director of the House International Relations Committee.

I would like to ask you please to stand so I can administer the oath. Do both of you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Ms. SAUERBREY. I do.

Mr. SCHARFEN. I do.

Chairman CORNYN. Thank you very much. Please be seated.

Let me start with Ms. Sauerbrey. We will be glad to hear your opening statement, please.

STATEMENT OF ELLEN R. SAUERBREY, ASSISTANT SECRETARY, BUREAU OF POPULATION, REFUGEES AND MIGRATION, DEPARTMENT OF STATE, WASHINGTON, D.C.

Ms. SAUERBREY. Thank you, Senators. I am very pleased to have the opportunity to participate in this afternoon's public hearing on the President's refugee admissions program for 2007. I want to tell you, I am very passionate about this program, and I share the passion that I heard from you. The administration is committed to maintaining a robust admissions program as an integral component of our effort to promote the President's freedom agenda and to champion human dignity globally. Though fiscal year 2006 has been a challenging year, there is a lot of good news to report about this very important humanitarian program.

Among the best news is the fact that the worldwide population of refugees is indeed at its lowest level in 26 years. By the end of 2005, the estimated refugee population worldwide had declined to 13 million; 8.7 million of those are under the care of the United Nations High Commissioner for Refugees, and most of the remainder is under the care of UNRA. Millions of Liberians, Afghans, Sudanese, Burundians, and others have been able to return to their homelands or have found permanent refuge in asylum locations.

The President has proposed that the United States this year admit up to 70,000 refugees. We would allocate 50,000 of the refugee numbers among regions based on existing or identified caseloads. The unallocated reserve of 20,000 would be used as we identify and are in the process of identifying additional refugee populations for processing. I recently had the opportunity to visit three refugee hosting countries in Southeast Asia—Bangladesh, Malaysia, and Thailand—and saw very clear evidence of the need to extend the reach of our program to thousands of Burmese refugees who require resettlement if they are going to be able to end the limbo of living in these protracted situations.

We come into this year with a healthy number of refugees, nearly 20,000, in advanced stages of resettlement processing. We are already working with our overseas partners to process several large new populations for the program such as Burundians in Tanzania, Eritrean Kunama in Ethiopia, as well as vulnerable Congolese in Burundi. The Humanitarian Resettlement program in Vietnam for those who were unable to apply to the Orderly Departure Program is now underway, and the first people accorded status under this program arrived in the United States in September, this month. While the international community is making some, although slow, progress in achieving agreement on durable solutions for the 106,000 Bhutanese in Nepal, having had several meetings on this, I am very hopeful that the coming year will end what has been a decade-long stalemate and produce concrete results with this population.

The program continues to target diverse populations of refugees throughout the world. We are on track to admit about 41,200 refugees this year representing over 60 nationalities. Interagency cooperation has never been more important to the sustaining of the

successful implementation of this program. The Refugee Corps at the Department of Homeland Security's Citizenship and Immigration Services is working closely with the Department of State to adjudicate applications of those that are provided access to our program in more than 50 locations around the globe.

We continue to lead the world in refugee resettlement, accepting over 60 percent of the individuals referred by UNHCR in 2005 and admitting more refugees each year than all the rest of the world combined. Through multilateral and bilateral efforts and bilateral representations, we have been able to support UNHCR in promoting the expansion of countries that are engaged in resettlement. Brazil, Chile, Argentina, Spain, Ireland, and the United Kingdom are some of the nations that have joined in this important humanitarian work in recent years. We also continue to enhance UNHCR's ability to identify and refer refugees for resettlement by working with them to ensure that field offices have the resources that are necessary for them to carry out this important work.

Our collaboration with NGOs is a critical part of our program. We have solicited and received ideas and benefited from the research of NGO colleagues regarding resettlement needs and priorities. We have also implemented a mechanism to allow NGOs engaged in refugee assistance overseas to refer compelling cases directly to us.

I am also pleased to report that, having overcome some significant obstacles this year, we admitted the first nine North Korean refugees since the passage of the Human Rights Act. While we expect that most North Koreans seeking refuge will continue to resettle in the Republic of Korea, we are very happy to be contributing to this humanitarian effort and are working diligently to ensure that more will be admitted here in the coming year.

It is clear that the program has felt the impact of post-September 11th expansions in the scope of terrorism- related inadmissibility provisions of the Immigration and Nationality Act.

As a result, the Departments of State, Homeland Security, and Justice have been engaged in efforts to exercise the inapplicability provision contained in the INA. This means that these amendments do not apply to refugee applications of individuals who pose no security threat to the United States and that we would otherwise want to admit.

In consultation with the Secretary of Homeland Security and the Attorney General, the Secretary of State has twice invoked what has been referred to as the "inapplicability authority," that is, the authority not to apply to particular groups or individuals the INA provision that bars those who provide material support to groups that are deemed "terrorist organizations" under the vast expansion of the definition in the law. The exercise of the inapplicability authority benefited Burmese Karen refugees in Thailand who supported groups that share U.S. goals and pose no security threat to the U.S. We continue to review other populations for similar consideration and expect that additional refugees will benefit from the use of this authority in the near future.

Unfortunately, the inapplicability provision does not address other meritorious cases, such as Cuban anti-Castro freedom fighters, Vietnamese Montagnards who fought alongside of U.S. forces,

and Karen who participated in resistance against brutal attacks on their families and friends by the Burmese regime. The administration is working on developing a solution to address these groups.

The President's fiscal year 2007 budget request would support 70,000 admissions, and we urge Congress to fund the President's full request. Without a healthy appropriation, we will be unable to offer resettlement to thousands of refugees who are in desperate need of our help.

The refugee resettlement program is an enormously important foreign policy tool. Its use can also promote acceptance of other durable solutions, such as repatriation and local integration. We are doing our best to ensure that the program is flexible and that we provide access to refugees for whom resettlement is the appropriate solution. It is the administration's view that important national security concerns and counterterrorism efforts are compatible with our historic role as the world's leader in refugee resettlement. We will continue to seek opportunities to strengthen these two important policy interests. We look forward to working with you and other concerned members of the Senate and House to restore the necessary balance between national security concerns and our Nation's legacy as a refuge for the persecuted.

The United States' refugee admissions program has always been and remains a wonderful reflection of who we are as Americans: generous, compassionate, and immensely proud of our cultural diversity. As President Bush said, and I quote, "All who live in tyranny and hopelessness can know: the United States will not ignore your oppression, or excuse your oppressors. When you stand for your liberty, we will stand with you."

Thank you for your continued support of this very important program. I look forward to answering your questions.

[The prepared statement of Ms. Sauerbrey appears as a submission for the record.]

Chairman CORNYN. Thank you, Madam Secretary. Thank you for that testimony and for your service.

Mr. Scharfen, we would be glad to hear any opening statement you may care to make.

STATEMENT OF JONATHAN R. SCHARFEN, DEPUTY DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DEPARTMENT OF HOMELAND SECURITY, WASHINGTON, D.C.

Mr. SCHARFEN. Thank you, Mr. Chairman and Senator Kennedy. I am honored to have this opportunity to discuss the President's proposal for refugee admissions in fiscal year 2007. U.S. Citizenship and Immigration Services enthusiastically supports the proposed ceiling of 70,000 refugee admissions for the upcoming fiscal year. We are committed to providing the staff and resources to meet the goals outlined in the Annual Report to Congress on Refugee Admissions.

As part of the Department of Homeland Security, USCIS has responsibility for interviewing applicants for refugee resettlement, adjudicating their applications, and ensuring that necessary security checks are fully performed. For the first time this fiscal year, members of the newly formed Refugee Corps fulfilled this role for the USCIS. The establishment of the Refugee Corps is a major suc-

cess for the U.S. Refugee Admissions Program as a whole, and USCIS in particular. Today, we have nearly 30 refugee officers on board, with others in the hiring pipeline. We are very grateful to members of this Committee and this Subcommittee for your steadfast support for this initiative from its conception to reality.

USCIS is dedicated to preserving and promoting our National security. At the same time, we are deeply committed to continuing to provide protection to deserving refugees around the world and to upholding our tradition as a Nation of immigrants. Due to national security imperatives, legislation passed in recent years greatly expanded the definition of "terrorist activity" and "terrorist organizations" for purposes of determining which foreign nationals may be admitted to this country. The legislative initiatives included a provision making aliens who provide "material support" to individuals or organizations that engage in terrorist activity inadmissible to the United States.

The broad language of the terrorist activity provision in the Immigration and Nationality Act has had an impact on refugee admissions this year. However, the two recent exercises of the discretionary exemption authority contained in the INA by Secretary Rice for Burmese Karen refugees living in certain camps in Thailand show that the interagency process is capable of successfully addressing these challenges issues.

For USCIS' part, we consider the first exercise of Secretary Rice's material support exempt authority for ethnic Karen Burmese refugees in Tham Hin Camp in Thailand to have been very successful. Our refugee officers who worked in the Than Hin Camp were able to explore all relevant facts and recommend sound decisions on the eligibility of refugee applicants on a case-by-case basis. We continue to work on an intra-agency basis to consider other groups that may be good candidates for future exercises of exemption authority.

USCIS is committed to a strong partnership with its Federal, international, and nongovernmental partners to support a robust U.S. refugee resettlement program. We are equally committed to ensuring the integrity of our adjudications process. As such, we collaborate with our partners, including law enforcement and national security colleagues, and international and nongovernmental organizations to achieve our common objective: offering refuge to some of the most threatened populations around the world, while continuing to ensure the security of those who offer this refuge, the American people.

I would be happy to respond to any questions you may have. One note I would like to add is that just recently we got word regarding our term employees, and if you are interested in asking questions about that, gentlemen, I will be ready to talk about USCIS the term employees issue that I think now both of you have been very interested in.

Thank you very much. I look forward to your questions.

[The prepared statement of Mr. Scharfen appears as a submission for the record.]

Chairman CORNYN. Well, thank you, Mr. Scharfen. Rather than hold us in suspense, why don't you tell us about it?

[Laughter.]

Mr. SCHARFEN. Yes, sir.

Chairman CORNYN. I know this is a subject of some concern to Senator Kennedy and myself in meeting with you and Secretary Sauerbrey and Secretary Rice. Could you fill us in?

Mr. SCHARFEN. Yes, sir. Just last evening, we received word from the Office of Personnel Management that USCIS would have the authority to extend the employment of the term employees that we had working for USCIS. As you know, this is a matter of both authority and resources. What we have now is the authority to extend these terms. It is our intention to extend term employees until at least January 31st of 2007. This would affect 350 term employees, additional employees, and that is a rough calculation that we just did today. So that is an approximation. But that is our intent.

We will have to then take a look at our internal funding. As you know, we are a fee-funded organization, and we will have to be making some shifts in our funds to be able to pay for those employees. But that is our intention, and we will do that.

Chairman CORNYN. What would have been the consequences of failure to extend this term—

Mr. SCHARFEN. I think we were concerned that we would lose some valuable experience and very good employees who are important for us to the USCIS in being able to maintain our current workload. And all projections are that our workload will either remain steady or increase.

Senator KENNEDY. Would the Senator just yield? What was the reduction of backlog to reduce that backlog of cases—I have not got the figures here, but I think it was something like 2.5 million down to—

Mr. SCHARFEN. Yes, sir. It—

Senator KENNEDY. It was still significant, but at least it was dramatic.

Mr. SCHARFEN. It was dramatic, yes, sir. At one point in the year 2004 we had a backlog of 3.8 million, and we have reduced that backlog now to—

Senator KENNEDY. In terms of people waiting, I mean, that meant that the individuals and families were going to be waiting for a very considerable period of time, 18 months, even longer.

Mr. SCHARFEN. Yes, sir. That is correct, sir, and the term employees were key to reducing that backlog and, as you point out, reducing that long wait list. We have not achieved that 6-month goal in all categories, but we have in many.

Chairman CORNYN. I know the President's goal and your goal is to bring that down to no longer than 6 months. And I think if there had not been the extension of the term allowing you to maintain these employees, it might have proven the maximum. I have heard in some quarters that no good deed goes unpunished. But in this instance, a good deed has been rewarded by providing the additional means to keep these term employees on there, continue to work down the backlog. As Senator Kennedy and I have worked, as have all our colleagues, on immigration-related issues, we all know that your workload is going to do nothing but increase.

Mr. SCHARFEN. Yes, sir.

Chairman CORNYN. And we do not know exactly how or in what respects, but I think it is a virtual certainty that we are going to

have to provide adequate resources through Citizenship and Immigration Services to process the large number of people that are going to need your services.

Mr. SCHARFEN. Yes, sir, and I would be remiss not to point out that it took a lot of interest both within the executive branch and the legislative branch. Over 5 years we received appropriations, we received the authority to hire the term employees, and without that we would not have reduced the backlog. And so that is always appreciated.

Chairman CORNYN. Secretary Sauerbrey, we have talked a little bit about really the challenges that the State Department and the Department of Homeland Security have in meeting the 70,000 cap that has been authorized. And, of course, what has been mentioned is the definition of "terrorist activity" that bars the relocation, the resettlement of those who have either been combatants, who have been members of terrorist organizations as defined, or those who have provided material support.

But it strikes me, looking at the numbers, that this definition and these bars cannot alone account for inability to meet that 70,000 cap. Could you expand just a little bit on what you believe the other factors are that are impeding resettlement up to that cap?

Ms. SAUERBREY. Certainly, Senator. I appreciate the opportunity to do so.

First of all, last year we were funded not for 70,000 but for 54,000, and our plan was based on the expectation of bringing in 54,000. We are actually bringing in, as I said, 41,200. Most of the difference really has been because of the implications of material support. However, there are other factors, and I think perhaps Senator Kennedy referenced the large number of refugees around the world. And so we sometimes are asked, well, why don't you just go find some other refugees? And, indeed, we are looking for other caseloads that are not problematic. But we do make decisions based on vulnerability, and decisions are made well in advance of the time that a refugee actually arrives in the United States, the time that it takes from the identification of the caseload, working with the government, getting agreement that they will allow UNHCR do camp registration.

For example, right now we have finally achieved agreement from Nepal to allow UNHCR to begin registering those Bhutanese refugees, which is hopefully a first step towards addressing this protracted situation. But my point being that it takes a long time to work through the process, getting them registered, going through the various security issues, DHS interviews, health processing, and so forth.

So when material support hit us last year and affected—we had anticipated ninety-four—there are 9,400 refugees in the Tham Hin Camp. It was part of our resettlement program for this year. We had anticipated bringing the majority, if not all of those, to the United States. That population has largely disappeared.

In addition, there are situations where countries, such as Cuba, decide to make it difficult for refugees that are processed and do not issue exit permits. So it is a combination of these sorts of fac-

tors that interfere, but the two big ones are funding and material support.

Chairman CORNYN. Is it through that there is an unallocated reserve? Let's say over and above just the funding issue, which is a big issue, and we need to do better in Congress to meet those funding issues so that we can get closer to the cap. But is there an unallocated reserve kept in order to deal with unexpected emergencies, natural disasters and the like?

Ms. SAUERBREY. Well, in this year's plan, we have identified a 50,000 number, and we have an unallocated reserve of the additional 20,000, and that was, frankly, in anticipation of material support waivers that would allow us to increase significantly, we hope, the numbers of Burmese refugees. But, yes, we can modify the program during the year to meet unexpected situations.

Chairman CORNYN. And certainly I think Congress is capable of dealing with emergency situations that might result in an unexpected increase due to a natural disaster or the like, but obviously you have a challenging job.

Let me ask you, Madam Secretary, the United States, of course, accepts more refugees than any other country. In fact, the United States accepts more than 60 percent of the individuals referred by the United Nations High Commissioner. And that is something we are all justly proud of. But what are the Department of State and the United Nations High Commissioner doing to encourage other countries to make refugee resettlement a high priority?

Ms. SAUERBREY. I will be next week in Geneva trying to do exactly that, because the UNHCR Executive Committee will be meeting. We are currently funding a program in Latin America to try to build capacity on the part of three Latin American countries that have recently indicated willingness to accept refugees. And we are trying to help them to develop their ability to process and to have a resettlement program.

We are constantly working with other countries to encourage them to join in this effort or increase the number of refugees that they are accepting. There really are only- -the only two countries that accept any large numbers besides the U.S.—and they are very small by contrast—are Australia and Canada. Most of the other countries take numbers in the hundreds, and so there is a lot of work to do to try to get other countries to step up to the plate.

Chairman CORNYN. Mr. Scharfen, let me ask you, you talked a little bit about the Refugee Corps, the men and women who go out and help adjudicate these cases. And, of course, we know they are required to make difficult and complex decisions. For example, they have to determine whether refugee applicants have persecuted other individuals.

What role did these individuals play in administering the material support waiver to refugees in the camp in Thailand? And can you share with us what you learned from that experience?

Mr. SCHARFEN. Yes, sir. We did send our members—the USCIS members that did go to the Tham Hin Camp to process the Karen refugees were from our Refugee Corps. We sent five of the members there, and their experience was a good experience. They felt that they were able to apply the inapplicability provisions well in those circumstances, that the standards and criteria were clear to

them; the process that was set up there with both the NGOs and the State Department worked well; and that they were trained well before they went.

The USCIS provided training with the State Department and others here in Washington prior to going to the Tham Hin Camp. Once there, the Refugee Corps felt that the experience from start to finish was good. Approximately 80 percent of those interviewed qualified for refugee status. They were able to apply the inapplicability provisions to approximately 30 percent of that population, and overall they thought that the interagency process leading up to the trip to Tham Hin was good. It provided them clear guidance, and they were well prepared to exercise their responsibilities there in Tham Hin, and they are looking forward to going off to Thailand for this next set as well.

Chairman CORNYN. Let me ask one last question, and then I will turn it over to Senator Kennedy.

Secretary Sauerbrey, some have suggested that the State Department needs additional authority, but I wanted to know from you whether you and perhaps Secretary Rice—I know we talked about this some informally at our meeting that Senator Kennedy and I mentioned earlier, but whether you believe that the waiver authority given to the Secretary that has been used—effectively, it sounds—whether that provides sufficient flexibility to deal with the issue.

Ms. SAUERBREY. As I indicated in my testimony, Senator, the waiver authority has certainly helped a great deal. It does not cover all individuals; for example, in Tham Hin, about 1,000 are on hold because they are either members of a group or identified as combatants.

Chairman CORNYN. Okay. The waiver just deals with material support.

Ms. SAUERBREY. The waiver only addresses material support.

Chairman CORNYN. And not combatants or members. Are you suggesting that that waiver authority needs to be expanded?

Ms. SAUERBREY. This is a pretty difficult and complex issue because it involves a number of Federal agencies that have different responsibilities. We have been working at an interagency level within the administration to try to find a solution and we will continue to do so.

Chairman CORNYN. Thank you very much.

Senator Kennedy?

Senator KENNEDY. Thank you, Mr. Chairman.

Madam Secretary, just to go over these figures quickly, as I understand the administration request—first of all, let me acknowledge that there are some former refugees here in the audience, as I understand, from Somalia, Liberia, Sierra Leone, Romania, maybe other countries. They are now staff at the Lutheran Social Services for the National Capital Area. The Lutheran Refugee Program is recognized as being just one of the really very top over the years. So I thank them for coming and thank them for their continuing commitment to the refugee community. And if they at the end of the day have some ideas or suggestions, we would certainly welcome having whatever comments that they would like to make. I am sure I speak for our Chairman and Senator Brownback. But

we have staff here, and we would love to get them, and we will try to get to them personally.

Now, Madam Secretary, just quickly on the figures, the administration requested 893 and you have got 783, and 893 was for 70,000 and then you got 42,000 for the 783. So just looking at the numbers, it does not look quite the sort of fit in terms of the numbers, you know, if you are doing a proportionality.

Is there a comment you would like to make?

Ms. SAUERBREY. If I can comment on what we are looking at currently—

Senator KENNEDY. I was looking at this last year. You know, we had authorized 70,000. We got 42,000. And one of the comments that you made was that the reduction of the Congress funding it, and as I understand it, the administration has requested 893, 893 million for 70,000, and you got 783, but you only got 42,000, and it looks like percentage-wise there is more of a drop there. I am just interested in what your comment—if you want to submit it later on for the record on it, if there is a way of understanding it a little better.

Ms. SAUERBREY. Well, there are two parts to funding. We have the assistance and protection portion, which is the greater portion of our funds go for the kinds of things, Mr. Chairman, that you talked about—food, water, sanitation, health. The admissions program is the smaller piece of our funding, and it was the admission line that took the largest cut.

Senator KENNEDY. Okay. If you would just—I would be interested just for the record, because that is one we want to keep an eye on. We want to try and be helpful to you.

Mr. Scharfen, I was interested, how did you get from the Marines into this work? Quickly.

[Laughter.]

Senator KENNEDY. My time watcher over here, Senator Brownback—no, just kidding. But could you give us a minute or two on that.

Mr. SCHARFEN. Yes, sir.

Senator KENNEDY. I commend you for it. It is obviously a commitment to public service and the country.

Mr. SCHARFEN. Thank you. Both my Mom and Dad were career public servants. I was stationed—my last tour I was detailed as an active-duty Marine Colonel to the Clinton administration National Security Council. I then stayed on through the transition and stayed on with President Bush's administration, in both instances, as Deputy Legal Adviser to the National Security Council. From there I retired, and Mr. Hyde—we had been working on different pieces of legislation over the year in my capacity at the NSC, and he saw fit to offer me a position there.

Senator KENNEDY. Well, good for you.

Mr. SCHARFEN. Thank you, sir.

Senator KENNEDY. Let me ask you about what DHS can do to correct the problem to allow bona fide refugees to come to the U.S. And what I am interested in is if you can provide us with a list of the groups that Homeland Security has determined are undesignated terrorist organizations and explain the administrative review process that led to those determinations. And does DHS consult

closely with the intelligence community and other agencies to determine whether a group is an undesignated terrorist organization? If you want to provide that later on, or you can summarize it now.

Mr. SCHARFEN. Yes, sir. It is an interagency process that does involve the intelligence agencies, the State Department, but I would feel more confident providing that to you in writing after this hearing.

Senator KENNEDY. I think this is part of the nub. You know, we are talking about waivers and we are talking about legislation and talking about the kind of coordination, and I think you have got the drift from the Chairman and myself about, you know, the interest that we have. I think we have gotten some good answers today and helpful answers. But I think if we got some accountability in these areas—because this material support does not only apply to refugees, it also applies to the asylum applicants as well. And as I understand, there are 500 or so asylum applicants that this applies to.

Mr. SCHARFEN. That is correct, sir.

Senator KENNEDY. And these are people that may very well be in real considerable danger.

Mr. SCHARFEN. Yes, sir. And those applications have been put on hold pending resolution of those issues, sir.

Senator KENNEDY. So they are not required—they don't go back. I think one of the points we want to get to is we do not—we have got the designation for next year. We are going to struggle and fight for the resources, and then we do not want to come back next year and find the same kinds of, you know, sort of challenges and problems that we have lost the opportunity to reach those numbers. I mean, that is in the back of our heads, at least mine. So we want to try and avoid it, and I think any suggestions and recommendations that you have that can help us on that, I would very much appreciate it.

Mr. SCHARFEN. Yes, sir.

Senator KENNEDY. Let me mention the issue on what call the P–3s. These are the reunifications of the families, you know, the family reunification. I had that right here, the family reunifications. Here we go.

At the present time, the administration has a list of 17 nationalities to be eligible for the P–3 designation. That is the ability to bring in their children and their families. This is a big aspect of our immigration overall policy, the family. And we have dealt with this, trying to get the nuclear family, when we had the abuses on the immigration issues. But certainly bringing in children and immediate members of the family is a priority. And yet it does not apply. I do not know why we have to have a P–3 category. Why isn't it available to all the groups? Myself, I just do not understand that. Maybe there is a good reason for it.

The UN High Commission and U.S. refugee agencies have urged the State Department to create a universal application of P–3. Now, this year, you have the Department taking Ivory Coast, Togo, and Liberia off the P–3 designation list.

What is the story?

Mr. SCHARFEN. I think that issue I might defer to Madam Secretary to answer, taking that country off the list, sir.

Senator KENNEDY. All right.

Ms. SAUERBREY. We feel very strongly about family reunification, and it is indeed a major goal in our program. We ran into a situation in Liberia where, because of great changes in Liberia, there was great hope and most of the effort of all of the refugee program is to enable people to go home. We think most people really want to go home.

What we were encountering was because of the P–3 opportunity for resettlement for a small number, there were a lot of people that were waiting and not going home. So we were actually asked in that case by UNHCR, as well as the government, interested parts of the government—

Senator KENNEDY. Are you saying they had big, big families all of a sudden? Is that what you are—

Ms. SAUERBREY. No. What I am saying is that because of the P–3—and, believe me, there is not a whole lot of understanding when we are doing refugee—when DHS CIS is there doing refugee resettlement adjudication, there is not a whole lot of understanding about who qualifies. So there were a lot of people who were simply sitting in the camp missing the opportunity to go home because they were thinking that this P–3 adjudication process was going to allow them to be resettled to the United States.

So we set a time where we allowed the continuing of the filing of the forms that would make them eligible, and we will restart the P–3 resettlement process, I believe in January. But we wanted to create a window that would allow those that needed to be thinking about repatriating to Liberia to proceed to do so.

Senator KENNEDY. I am just interested generally why we have that designation. We are talking about spouses, and we are talking about unmarried children under 21, I guess the older parents in some circumstances. I never could quite understand why we permit that if we are having the refugees from some countries and we do not do it for others, and why we—I just do not—I really have a difficult time understanding it.

I would hope that maybe they would go back and take a look at it. The UN High Commissioner made the recommendations, the various voluntary agencies have made these recommendations, and I have never really heard at least a convincing argument to me why some countries should have that and other countries not. But if you could just take another look at that, I would very much appreciate it.

I know my time is just about up. Could I ask just a moment about Darfur? If we have, you know, an overwhelming humanitarian kind of problem, it is a little different from what we have looked at and our jurisdiction generally in terms of refugees. But if there is anything—if the Chairman would just permit, if you could give us any kind of hope on this situation and give us some idea about any ways that we obviously can be helpful.

Ms. SAUERBREY. This is a little bit out of my department, but let me just say I know that the State Department continues to work diligently to try to get acceptance for a UN force to come in. In the meantime, however, we have seen huge refugee flows into Chad as well as internally displaced persons in Darfur. We are committed—

my office along with others in the State Department have committed very large resources to protection and assistance.

One of our great concerns is the attacks that are happening with high frequency now on humanitarian workers, and one point I would like to make is if there is something I have learned very quickly in this position, it is to have tremendous respect for the people on the ground who are providing under very dangerous circumstances for the well- being of refugees and internally displaced persons.

We are not able at this point to even be thinking about a resettlement program because UNHCR simply—it is a very dangerous environment, and UNHCR does not have the capacity, nor do we, to go in and try to do processing. But it is certainly going to be an issue for the future.

Senator KENNEDY. I thank the Chair.

Chairman CORNYN. Thank you, Senator Kennedy. We have been joined by Senator Brownback, who is former Chairman of this Subcommittee, and who I know has a lot of interest and expertise in this subject, and recently traveled to refugee camps in Africa, I understand. Senator Brownback, we will turn the floor over to you.

STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator BROWNBACK. Thanks, Mr. Chairman. I do not know about the expertise, but I do have a lot of interest in it. And I appreciate you holding this hearing, and I appreciate Senator Kennedy's long-term interest in this topic for many, many years that he has worked on it. I appreciate that, and the people on his staff. Esther has, I know, worked on this a lot as well, and I appreciate all that effort and focus and intensity.

Thanks very much for being here. I want to start off thanking you and applauding you for twice exercising discretionary authority on the Karen refugee population, bringing some of those residing in that camp. I visited that refugee camp, I guess it was in 2001, and they certainly need every bit of help that we can give. I hope you can continue to do that. This is a group that is stateless, that has predators all around it, traffickers for younger girls in particular, and they really need our help, and they do not have another option of a place to go. So to the degree you can continue to help them out, I would appreciate that.

I also want to thank you for admitting the first refugees under the North Korean Human Rights Act, bringing some refugees into the country here.

Having said that, I think the first group was like nine from North Korea, and the numbers I have seen or heard about—and I do not know if anybody can verify any of these at all—is that you are looking at somewhere between 200,000 and 300,000 North Korean refugees in northern China—stateless, a number of the women—the reports I am getting, almost all of the women are trafficked, sold into some form of sexual bondage in China. There is a generation of children now coming up in that situation where they are having children, and these children are also stateless and subject to the vagaries and the difficulties of being in that situa-

tion. I am hopeful we can admit a lot more North Korean refugees into the United States.

I do now know if you have any thoughts that you can give about either of those population pools.

Ms. SAUERBREY. Thank you, Senator. I just came back from visiting the Tham Hin Camp in Thailand—tremendously overcrowded, huge, huge problems there. I visited one of the other more remote camps as well. It certainly brings a driving compassion to wanting to help these people through resettlement, which is really the only option. They cannot go back to Burma. They are stateless, as you said. And Thailand, while it has been a generous host for almost 20 years for this population, is not willing to allow them to assimilate.

So the only option is resettlement, and we are eagerly looking forward to expanding the resettlement program to other camps in Thailand, as well as to hopefully being able to close out the Tham Hin population in the next year to the degree that we can resolve some of the problems that we have encountered in trying to do so.

As far as the North Koreans, as you know this presents very unique challenges because the huge number of them are in the PRC. The PRC does not recognize them as refugees. They refer to them as "migrants," "economic migrants."

I have had meetings—I was in Beijing about 2 months ago and had meetings with the Chinese at that time to urge them, No. 1, not to send North Koreans back to North Korea where they may be persecuted and tortured; second, to try to get the PRC to work more cooperatively with us for those that are in the PRC and indicating an interest in resettlement in the U.S.

The other countries in the region that the North Koreans reach, as you know, this is a very sensitive issue. There is a great concern about creating a huge pull factor. So we do not talk publicly—

Senator BROWNBACK. I think Kim Jong Il has already created a great pull factor—or a push factor, I guess, on his part.

Ms. SAUERBREY. There is no question, but I would be very happy to talk in a more classified setting about the efforts that we are making with other countries in the region. But we do not talk about that publicly because of the sensitivity and the issues of trying to get cooperation. But we will continue to work to try to bring additional North Koreans here. It is a high priority for the President as well as for my Bureau in the State Department.

Senator BROWNBACK. Looking at that particularly, the PRC has been very difficult to deal with on this. I have met with them, the administration officials have meet with them, about the refoulement that they are doing of North Korean refugees. That has created then this trafficking situation, because women come across the line, they are actually—and I am even told this, that some of the houses along the border, the owners have dogs to bark for when people come by to see if it is a female North Korean that they can capture and sell. They are captured like wild animals and sold for value. But then the women, once they are caught, they are told, "You will do as I say, or I am turning you in to the Chinese authority. They are sending you back to North Korea, and you know what that means. That means you are going into the gulag, and you know what happens there."

And then they comply, and then the Chinese man that buys them tells them the same story: "You are going to do what I say, and if you do not, I am turning you into the Chinese authority. They are shipping you back to North Korea. You are going to the gulag, and you know what happens there."

And so this very situation of refoulement where China does not comply with its own international obligations creates this entire trafficking pool of hundreds of thousands. Hundreds of thousands that are in. And I think it is past time for us talking to the Chinese. I think it is time for us to start talking about economic sanctions on them for violating their own agreements with the UNHCR, that we should do a type of approach where, if you are going to continue to refoule, then we are going to put forward systems where we can tax you and hit you economically on this, if you are going to continue to violate this in such a way that these people are being persecuted and killed.

I hope the administration can join us on this. I know the President is deeply concerned about it.

I would note one final thing, because my time is way over. I appreciate the 70,000 number, but we just have been averaging bringing in 41,000 refugee admission the past 4 years. We are not coming close to those numbers. And from what I have seen and the people I have talked to, there is no shortage of refugees around the world that we would not be hitting these numbers. And I would really urge you to redouble your efforts. I know it is difficult. I know we have a lot of security concerns to watch for. But there are huge populations that are absolutely persecuted and have no other option. And it gives them hope, and it makes us a better place. These people are resettled in the United States. I have hosted the North Korean refugees. They tell incredible stories, but it is an incredible story of human courage. And their persecution is just a direct hit into our system of saying, well, we ought to stand up for people that are in troubling circumstances, and the more people they can talk to, the more people they motivate. It is a blessing to us, and I really hope we can do more to do that and get more individuals in the United States, if for no other reason than for our own benefit here.

Thanks for your work. Godspeed in it. I just think we need to do more, and particularly in some of these targeted populations that are in a horrific circumstance.

Ms. SAUERBREY. Thank you, Senator. I appreciate everything that you have said and share your passion about it and just hope that the Senate mark, which is the President's request, will be what we are working with next year. As I indicated before you came in, Senator, we were only funded for 54,000, despite the fact that the President had asked for 70,000. And this year the Senate has a mark that will allow us to reach the President's goal. In addition to the fact that we now have the inapplicability provision for the Karen, this gives us great optimism that with these two things in place, we can indeed increase our numbers significantly.

Senator BROWNBACK. I hope you hit the number, because as an appropriator, when I see money appropriated and then if it is appropriated for 70,000 or even 54,000 and you only hit 41,000, I am thinking, well, I have got some money I can put somewhere else

now. So you need to hit the number and use it, or it is going to be shifted somewhere, because people are always, you know, tracking for where can we move money around in this budget. That is the nature of what happens here.

Ms. SAUERBREY. Had we not encountered the problem of material support this year, I think we would have reached our number of 54,000 that we were funded for. So now we hope that next year, because we do have the waivers for the camps in Thailand, that this will expand the pool that we have already got in the pipeline. So we hope that we can count on the funding to be able to reach the numbers.

Senator BROWNBACK. All right. Thanks, Chairman.

Chairman CORNYN. Thank you, Senator Brownback. Let me extend my thanks to both of you again for being here today and for your service to the Nation and to people truly in need. Thank you very much.

We will now move to the next panel, please.

Father Gavin and Mr. Horowitz, thank you for being here today and for contributing to our knowledge on this important topic.

Let me first introduce Mr. Horowitz, who will be the first member of the second panel. He is a Senior Fellow and Director at the Hudson Institute for Civil Justice Reform and Project for International Religious Liberty. Mr. Horowitz served as General Counsel for the Office of Management and Budget from 1981 to 1985, and as an Associate Professor of Law at the University of Mississippi from 1965 to 1967. He served as Chairman of President Reagan's Domestic Policy Council on Federalism and was co-Chairman of the Cabinet's Council Working Group on Legal Tort Policy.

We also have with us today Father Kenneth Gavin. Father Gavin serves as the National Director of the Jesuit Refugee Service/USA, in addition to serving as Vice Chair of the Refugee Council USA. Father Gavin has also served on the boards of numerous Catholic educational and service organizations. He has a Ph.D. in speech pathology from Northwestern University, a master's of divinity from Weston School of Theology, a master's of art in linguistics from the State University of New York, and last, but not least, an A.B. from Fordham University.

Gentlemen, thank you for being with us today. Mr. Horowitz, let me turn to you first for any opening statement that you would care to give, and let me remind you to punch that little button at the bottom of your microphone, and if the light comes on, that means your microphone is working.

STATEMENT OF MICHAEL J. HOROWITZ, DIRECTOR, PROJECT FOR CIVIL JUSTICE REFORM AND PROJECT FOR INTERNATIONAL RELIGIOUS LIBERTY, HUDSON INSTITUTE, WASHINGTON, D.C.

Mr. HOROWITZ. Thank you, Senator Cornyn. I am sorry Senator Kennedy is not here because I wanted to start off by saying I am a Marine also, except that I only made it to Lance Corporal E–3. I never got to Colonel, as the prior witness. And I think that is relevant because there is a lot of mock macho that does go on here on some of these immigration issues that I hope to address today that I hope that this Committee and many Senators will correct.

I have been a frequent witness before Congress. I have never been more pleased to testify than I am today because of the symbolic and the real importance of the issue before this Committee.

We have heard Secretary Sauerbrey say that she has not met her target largely because of the construction of the so-called material assistance issue and problem. Let me describe what it is.

First, there is the determination made, to take a particular example, that members of the Hmong and Montagnard communities, no matter that they proved themselves eligible for refugee status on every ground, no matter that they are vetted individually on grounds of whether they will support terrorism—they have been involved in terrorism, have committed crimes. They pass ever test with flying colors, and they are deemed terrorists per se solely because their community fought on the side of the United States in the Vietnam War.

Now, I do not believe that that construction is remotely called for under the statutes that Congress passed. But the fact of the matter is that there is that waiver authority, and we have seen it exercised in the case of the Karens, a very narrow band of them. This has gone on for 2 years, Mr. Chairman, and it is inexcusable that members who fought and died on the side of United States troops are deemed terrorists and excluded from the United States simply because they took our side. That surely is no way to enhance the national security of the United States, and Secretary Sauerbrey indicated and we know that there is clear authority, at least in some cases, to waive that for people who have given material support.

I was troubled to hear Secretary Sauerbrey say that it is complex and difficult to get administration support for what I would regard as a technical amendment because, once again, the position that Ms. Sauerbrey says is complex is one that says that if you gave aid to the troops fighting on the side of the United States in Vietnam, why, then we can waive you in and not exclude you, no matter what else, no matter what other qualities you bring; but if you lifted a rifle and engaged in combat risking your life on the size of United States troops, why, we need a statutory amendment and it is a very complicated matter.

I do not think it is a complicated matter, Senator, and I hope that the Senators, and particular conservative Senators, will hold the administration's feet to the fire on that issue.

Now we get to the second issue, the so-called duress issue. We have case after case of people who paid ransoms because terrorists came in their community, stuck guns to the heads of their children, and threatened to rape them, and they paid modest ransoms. They are regarded as terrorists. And once again, they meet the test of refugees in every single particular. They pass every known test of whether or not they pose any security problems to the United States, whether they have associated with terrorists, whether they have committed crimes in their own countries. There is a whole host of tests, and there ought to be tests, particularly after 9/11, on an individual case. But what we have here is a per se determination that says the facts be damned. We do not care how qualified you are as a refugee. If you paid a ransom to stop your wife from getting shot, you are a terrorist.

Now, I do not believe that the Congress of the United States passed legislation that posed a test that every single Member of Congress would have failed. I think the Supreme Court has made clear in a number of cases, to cite the Bailey decision, where given the circumstances where reasonable men must concede that they, too, would not have been able to act otherwise, a duress exception defense is implicit in the law. And yet the administration has refused to allow this, so that victims of terrorism are regarded as terrorists.

Or to take the case of groups, as a letter from the Jewish community said, under the administration's definition people who fought in Warsaw against the Nazis would be regarded as terrorists, inadmissible to the United States whatever other virtues they had. As I say, I do not think we need to change the law, but even if one reads the law as Secretary Sauerbrey does, why have we waited for 2 years to give that same kind of exception to Montagnards, to Cubans, and to others that we have reluctantly given in a narrow band to the Karen?

But the matter is even worse than that, Mr. Chairman, because when I discovered that this was going on, to my utter astonishment, I could not believe, because I do support and love the President and know where he comes from on these issues, that this was a position taken by the administration. I sat down with the refugee groups. There is, as you know, legislation from conservatives, from Congressman Pitts, there is Senate legislation to deal with this anomaly, to deal with this issue. But we all know what getting legislation passed at the end of session is like, and so I look to see if there weren't administrative solutions that could resolve, for the most part, all of these problems. And it turned out there were.

And I work with the immigrant groups, and then I called up colleagues, former colleagues, friends of mine in the administration, and I said, "How do you justify not holding hearings for 2 years on Montagnards to give them the waiver?" And they said, "We really can't." So what we did was put in an administrative determination that there would be a timely procedure for holding these hearings and determinations for waivers of groups that are not terrorists, that are freedom fighters, that would never be listed as terrorists by the Government in any other context.

Then we got to the duress problem. I said, "How can you deem a person to be a terrorist who simply paid a ransom to avoid the death of a spouse?" Or we have the case of women who were repeatedly raped and who washed the clothes of the terrorists who raped them. They are denied refugee status.

We have the case—I said, "How can you possibly do it?" They said, "Well, the first problem is there is no definition of 'duress.' It is too loose." So I sat down with the refugee groups, and you will see it, Mr. Chairman, in one of the attachments here entitled "Administrative Proposal." And the refugee groups agreed to a definition that said that the applicant must show that he or she was faced with what a reasonable person would deem a threat of death or serious bodily harm.

And they went further. They said that the applicant, even if they had the threat of bodily harm, the applicant must show that he or she acted necessarily and reasonably to avoid the threat.

And they went further and said that there must be a finding that the person—that the fact finder must affirmatively determine that the refugee will not threaten the security of the United States. I said, "Is that a tight enough definition?" "Well," they said, "maybe it is."

But we have got another problem. "We don't trust," they told me confidentially, "some of these fact finders. They might just ignore the definition and give duress exceptions for these people.

We went back to the drawing board. I said—and the refugee, the immigration groups have proposed a stroke-of- the-pen administrative solution that says that if a finding of duress is made, it must be, before it takes effect, reviewed on a timely basis by the home office at DHS.

Every single security concern raised by the administration on the duress issue, which I think is built into the statute, I believe we have satisfied, and still there are some within the administration dragging their feet. And I will tell you, Senator, I have talked confidentially to members of the administration who are as upset as I am by the foot-dragging that is taking place. And one of the reasons I am so pleased to be at the hearing today is because I think United States Senators have the capacity to raise this issue at the level of the President. And I have no doubt whatever as to the decision the President would make on this administrative procedure or necessary changes in order to permit Montagnards and Hmong to come to the United States or to allow victims of terrorism not to be barred because they were victims of terrorism when they met every other test for a refugee.

In the case of the Hmong, I found that—

Chairman CORNYN. Mr. Horowitz, let me ask you to wind down your opening statement. We can get to some questions and answers.

Mr. HOROWITZ. You bet. The only other—there are many other things I think that can be said here, but I would simply say that, as a conservative, this approach caricatures the kind of tough approaches that you have taken on many other issues and related issues. And I think it is incumbent on those of us who really want a robust policy dealing with the aftermath of 9/11 to fight the hardest to take out policies of this kind, which are facts be damned, blanket use of—misuse of statute in order to deny refugee status to otherwise fully qualified people.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Horowitz appears as a submission for the record.]

Chairman CORNYN. Thank you very much, Mr. Horowitz. Father Gavin, we would be glad to hear from you.

STATEMENT OF REVEREND KENNETH GAVIN, S.J., VICE CHAIR, REFUGEE COUNCIL USA, AND NATIONAL DIRECTOR, JESUIT REFUGEE SERVICE/USA, WASHINGTON, D.C.

Rev. GAVIN. Thank you, Mr. Chairman, for this opportunity to testify as Vice Chair of Refugee Council USA and as National Director of Jesuit Refugee Service/USA.

Refugee Council USA, as you know, is a coalition of 23 nongovernmental organizations dedicated to refugee protection. I have

with me a copy of our annual report for this year, and I ask at this time that it be entered into the record, if possible.

Chairman CORNYN. Certainly. Without objection.

Rev. GAVIN. Thank you.

I am speaking today on behalf of my own organization as well as the agencies and Refugee Council USA who help resettle the majority of refugees that the United States admits each year. In this testimony, I will make logistical points about how he U.S. refugee program can be made more effective, but before I move on to statistics, I simply would like to reflect on the reality of the people affected by the program itself.

Fear, hopelessness, and death are the options that most refugees face. I saw it firsthand in Malaysia the year before last, where I met with Chin refugees who had fled from severe religious persecution at the hands of the Burmese Government. After fleeing to Malaysia, these refugees found themselves in an equally precarious situation. Many of the 15,000 Chin in Malaysia live in sordid, plywood hovels in the shadow of the splendid rising city of Putrajaya, a city that they have helped to build with their own blood and sweat.

As refugees, they now suffer abuse and threats at the hands of local police and unscrupulous employers. These refugees told me that their only hope for new lives lies in resettlement and a fresh start in a new country.

Those of us who work with refugees know that each unfilled admission slot represents one person who needlessly continues to suffer because of our failures to offer a new home and a new life through resettlement. In this fiscal year, only 42,000 refugees are likely to be admitted to the United States, leaving more than 28,000 admission slots unfilled. Refugee Council USA has consistently called for a target of 90,000 admissions in the refugee program.

There are many contributing factors to this devastating shortfall in the admissions numbers. The most ominous obstacle, as we have heard, for the refugee program is the material support inadmissibility bar, which has prevented thousands of deserving refugees from seeking protection in the United States.

As my written testimony reflects, the Refugee Council USA community calls for a legislative solution to refine the statute of the material support bar. Too many refugees have been unjustly labeled as willful collaborators with terrorists rather than being justly recognized as the victims of terrorism. Too many refugees have had their cases put on hold because they support groups who have incorrectly been categorized as terrorist organizations, and too little has been done to reach out to these twice- persecuted people as prolonged interagency negotiations over waivers prevent the administration from taking swift and effective action for the many populations affected by material support.

Rather than depend on this cumbersome waiver process, we call for an amendment to the material support statute itself. With this legislative change, the law will promote safety for the United States and safety for bona fide refugees who come here seeking safe haven.

Additional obstacles to a more successful U.S. refugee program can also be removed through procedural and policy reforms. The State Department can treat the annual Presidential determination as a target rather than a ceiling, and it can make an effort to utilize the admissions numbers by lowering the number of rarely filled unallocated reserve positions.

The State Department should also maintain at least a 3- month pipeline of refugees moving toward admission to allow for unseen delays in refugee movements during the year. Steps can be taken to protect especially vulnerable refugee children and to include more Priority 2 and Priority 3 groupings. And all processing may be expedited, thus allowing the refugee program to admit more vulnerable refugees every year.

In recent years, the President's budget request has failed to include sufficient funds to admit the number of refugees set by the Presidential determination, and Congress has appropriated even less for refugee accounts. We recommend that the MRA account and the Office of Refugee Resettlement be funded at $980 million and $798 million, respectively, so that the refugee accounts do not continue to depend upon supplemental appropriations.

All these changes should be made to increase the admissions numbers, which represent new lives for refugees by the thousands. The Chin in Malaysia deserve our help. They dared to hope for a better future, and it is in our power to offer them new life and new hope through an improved U.S. refugee program.

Thank you very much for your attention.

[The prepared statement of Reverend Gavin appears as a submission for the record.]

Chairman CORNYN. Thank you very much, Father Gavin, for your opening statement.

Everyone who has spoken so far agrees with the goals of our refugee policy, and we have identified some problems that Congress perhaps needs to revisit in order to achieve those goals. But let me just drill down a little bit more, first starting with you, Mr. Horowitz, about some of your concerns.

If the Government has authority to waive material support, wouldn't that also include authority to cover duress, for example, the example you mentioned?

Mr. HOROWITZ. I do not think anyone denies that the Government could create a duress defense on material support.

Chairman CORNYN. My question is: Couldn't it be included in terms of a more—I will not call it a more expansive interpretation, but couldn't the—it seems to me that if you provide material support, you could do it under duress or you could do it voluntarily, but the term "material support" is broad enough to allow the Secretary to use the waiver. Is that not correct?

Mr. HOROWITZ. Absolutely. I think when Congress passed it—it is inconceivable to me that when Congress passed the material support provision, I cannot imagine that anybody in Congress thought that material support involved paying a ransom when there was a gun to the head of your child or you had been raped and imprisoned yourself and were forced to wash someone's clothes. That is simply done administratively within the administration. It is quite controversial within the administration. And I believe that

if the Senate puts the wood to the administration and gets the issue directly to the President—and you have seen these letters. They come from Gary Bauer and David Saperstein, from the National Council of Churches and the Southern Baptist Convention. I have never seen such a grouping on an issue of this kind. I believe that the handful of people standing in the road saying no can be overridden. There are many in the administration hoping that you, Mr. Chairman, and your fellow Members of the Senate will simply insist that a duress defense can be used.

And I say again the defense of duress does not excuse you from having to prove that you are a legitimate refugee or that you are not a threat to the United States to engage in terrorist activities on any other ground.

Chairman CORNYN. Father Gavin, you mentioned a proposed change in the definitions that were first applied, I guess, in the REAL ID Act of what constitutes a terrorist organization or terrorist activity, particularly when we are at war and we have, I think we would all agree, valid national security interests in making sure we protect America at the same time we try to implement a reasonable and rational refugee policy.

Could you explain to me why you do not believe that your concerns could be addressed through perhaps an expanded waiver authority that maybe to Mr. Horowitz's point was more rationally applied in a way that would achieve the goals that we all share?E

Rev. GAVIN. Right. I think that it is important for us to say that the Refugee Council is not supporting support of terrorists in our country.

Chairman CORNYN. I did not understand you to say otherwise.

Rev. GAVIN. What we really wish to do is to create an interpretation and a legislation of material support that will allow terrorists to not enter our country, and yet allow all refugees who have a reasonable and valid right to the refugee resettlement program to enter. Our concern really with the current use of waivers for the material support issue is varied.

To begin with, as we have already heard, the complexity of the interagency negotiations is something that obviously takes a good deal of time and sometimes more than even a year or two to create. And although we applaud the use of waivers, we realize that these waivers are not going to be able to be used easily for large numbers of refugee populations in the coming years.

Second, there are going to be individual cases that the material support issue would apply to and smaller groups that will be very difficult to be able to extend the waiver to, just because of the complexity of time.

Of course, then there are the issues of 20 percent of the Karen, 1,000 Karen in Tham Hin are not able at this point to pass the material support bar precisely because they served as combatants.

There are 565 asylum cases here in the U.S. that are on hold precisely because of material support issues. The duress issue Mr. Horowitz has spoken to I think is clear.

For all those reasons, in addition to the complexity issue, we feel that simply fiddling with the waiver itself is not adequate, and that we have to move towards a legislative solution.

Chairman CORNYN. So far we have heard, just to summarize, that there is an issue of unallocated reserve that I know you addressed, Father Gavin, in your written testimony that the lack of funding as well as the challenges of applying the law that Congress passed barring those who provide material support to terrorist organizations. Let me ask you, Mr. Horowitz, are we doing enough to use our immigration laws and policies as instruments and tools to advance our foreign policy and national security goals? I am thinking in particular of the small number of North Korean refugees that, to use your words, "their presence has vividly informed millions of Americans about the nature of the Kim Jong Il regime."

Mr. HOROWITZ. Senator, I am here after taking the Red Eye back from meeting with the bravest people I have ever been in the same room with, in Los Angeles yesterday with leaders of the Korean-American community and leaders of the Underground Railroad movement. They have lots of ideas about what can be done and what to do. And I think there are many things that can be done. I will just raise one here.

I think the UNHCR has gotten off a lot more easily than it ought to, at least in the case of North Korea. The North Korea Human Rights Act points to the fact that the UNHCR has the right to take China to binding international arbitration for its unlawful deportation of refugees. The UNHCR has not done so for fear of alienating China.

I believe that we should be placing much greater pressure on the UNHCR to get at China, to take them to international arbitration, in order to increase the potential flow of North Korean refugees. One of the great keys is the UNHCR, and I think we ought to be taking tough tests with the new, with the incoming candidates for Secretary General of the United Nations to see that the UN takes a tougher position vis-a-vis China than it does. The North Korea Human Rights Acts calls the failure to take China to arbitration by the UNHCR an "abdication of its core responsibility."

A second area is an amendment that this Committee adopted, Mr. Chairman, the S visa exception, which says that if you can find—if people are prepared to defect with knowledge of weapons of mass destruction or terrorism from countries like North Korea and Iran, they and their families should get green cards. The administration has opposed such a provision, even though it was unanimously adopted by this Committee.

What Senator Brownback said about national interest here—and I would echo it—if we can get 1,000 North Korean refugees in, that is it, we educate the people of the United States about the nature of the regime and encourage them to take steps like the blacks did in bringing down the apartheid regime or like the Jewish community did under the leadership of Senator Jackson, they are precious assets for that reason. And while I think some in the administration have done well, I think we need to do a lot more in terms of the American national interest.

Chairman CORNYN. You mentioned Iran, and the treatment of religious minorities there has, by all accounts, worsened considerably under President Ahmadinejad, who has expressed his wish, of course, to wipe Israel off the map and who has repeatedly denied the Holocaust.

Do you anticipate an increase in the departure of religious minorities from Iran to participate in the U.S. refugee program? And if so, can you talk a little bit about what you think might be some of the ramifications of such a departure on U.S. foreign policy and national security interests?

Rev. GAVIN. Well, I think every time that safe harbor is created, every time we give out what, ounce for ounce, is the most precious resource in the world, a United States green card, to sufferers of persecution, we send out messages of hope. We tell those regimes that you cannot lock up your own people, that there are outlets and escapes. We bring to the world voices that tell the rest of the world about what is happened, and we thereby strengthen American national security interests.

That was exactly the notion behind Jackson-Vanik, which people said could not be done, you could not do anything to the Soviet Union. That refugee policy was the policy that placed the first big cracks in the walls of the Soviet Union. Refugee policy does it time after time after time, and I hope that we are more welcoming than, in my judgment, we have been to many religious refugees. And I hope we send out the signal that, yes, we will be a haven for victims of religious persecution from Iran.

Chairman CORNYN. Well, to both of you, I want to say thank you on behalf of the Subcommittee and to thank all of the witnesses for being here today and testifying at today's hearing.

We are going to leave the record open until 5 p.m. on Wednesday, October the 4th, for members who perhaps were not able to be here today to submit additional documents into the record and perhaps even to ask questions in writing of any of the panelists.

So, with that and our thanks, this hearing is adjourned.

[Whereupon, at 4:33 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Senator Edward M. Kennedy
Questions for the Record
Senate Subcommittee on Immigration Oversight Hearing on
"U.S. Refugee Admissions and Policy"
Wednesday, September 27, 2006

Responses from Fr. Kenneth Gavin, S.J., National Director,
Jesuit Refugee Service/USA and Vice Chair of Refugee Council USA
October 13, 2006

I. Material Support

Your testimony calls for the material support issue to be solved through legislation granting the Secretary of State increased waiver authority and amending the statute to exclude groups that are not a threat to the United States.

Question: Why is an expanded waiver necessary?

The current waiver is unworkable for several reasons. First, the waiver process is encumbered by unnecessary bureaucratic processes that have delayed the granting of waivers and limited their use to only two instances to date. This has unduly delayed the consideration of bona fide refugees for admission to the United States, undercutting the humanitarian purpose of the program. Second, the present legislation severely limits the discretionary authority to grant waivers in the following ways:

- *Waivers cannot be granted to members of groups that have been falsely identified as "terrorist organizations." Even though supporters of such groups can be exempted by waiver, members of such organizations cannot, even if it is clear that the group in question is one that poses no threat to the United States, or is a U.S. ally. People who gave support to the Karen National Union have been exempted by waiver from the material support bar, but those who are members of that organization – which has now been identified as a group that does not pose a threat to the U.S. – are excluded from the waiver and therefore cannot be admitted to the U.S. Hmong refugees who fought with US soldiers in Vietnam likewise cannot benefit from a waiver.*

- *The waiver cannot be extended to persons who were trained by groups that have been falsely identified as "terrorist organizations." This means that Cuban alzados or Iraqi Kurds who took up arms at the request of the United States are now prevented from seeking refuge in the country they previously assisted.*

- *No waiver authority is presently available for asylees, or others who are already in the United States, whose circumstances are the same as those of refugees who would be able to benefit from waivers abroad.*

- *The Secretary of State has been unwilling or unable to use her discretionary authority to allow individuals to enter the United States who gave material support only under duress or extreme coercion. The Administration appears to be opposed to using*

waivers to benefit such refugees. This may in part be due to a lack of clarity as to the intent of the law.

Why is it necessary to exclude groups that do not present a national security threat?

The extremely broad definitions that make up the material support statute as presently enacted make this law ultimately inconsistent with the foreign policy and humanitarian goals of the United States. Under the current definitions of the material support statute, legal aliens who are serving in the U.S. military could be barred from re-entering the U.S. after fighting with our troops in Iraq. Other groups who have fought side by side with US forces are now being punished for their alliance with our national interests. In order to correct these anomalies, the statute must be amended to make clear that individuals and groups who pose no threat to the United States should not be barred from entry when they meet all other qualifications for resettlement in the U.S.

While a more timely and generous interpretation of the waiver authority might partially address some of the problems that have been created by the present legislation, we believe that legislative action is absolutely necessary to address the material support issue at its core. The legislative remedy that we are advocating would not eradicate the material support bar; rather, it would refine the statute so that especially vulnerable and deserving refugees are not mistakenly barred from admission. All of the tools that are currently being used to screen refugees and asylum seekers in the rigorous admissions process would remain in place, thus ensuring that anyone who poses a real threat to the United States will continue to be barred from admission.

Can these changes be made without legislation? Are there any non-legislative fixes that are likely to work?

We strongly believe that legislative action is absolutely necessary to correct the unintended consequences of the material support bar.

The authority to grant waivers under present law does not extend to some of the most compelling refugee cases. Even if larger numbers of refugees could be reached through the expanded use of waivers, those excluded from the process would be among those for whom resettlement is most urgently needed. In short, the limitations of the waiver process undermine a key goal of the U.S. program: to rescue the most desperate.

Furthermore, the waiver process itself is so cumbersome, and refugee situations so varied, that we fear it will prove impossible to operate an admissions program at traditional levels on the basis of waivers. The existing waiver authority, therefore, does not provide a sufficient remedy to the numerous problems created by the material support statute.

Legislation is needed not only to make the waiver process more workable, however, but more fundamentally to correct the overly broadened definitions of terrorism and terrorist organizations contained in the statute, so as to make clear that Congress does not intend to exclude from resettlement refugees affiliated with organizations which pose no threat to the United States. Our law should help us to recognize allies, and to allow

us to welcome refugees who are not themselves terrorists, but terrorism's victims. A waiver cannot correct this discrepancy between our foreign policy and humanitarian goals, and it cannot adequately address the many people who are now unjustly barred from admission.

II. Unallocated Reserves

The Administration has proposed to increase the unallocated reserve to 20,000 for FY2007, with the expectation that it will be used for groups that are affected by the material support bar, but are under consideration for waivers, as well as for large groups that are still in the pipeline from Fiscal Year 2006.

<u>Questions:</u> Can you comment generally on the designation of unallocated reserves? Do you think this increase in the unallocated reserves is a problem?

The doubling of the unallocated reserve represents a serious problem in that it indicates a lack of sufficient commitment, planning and resource allocation by the Department of State to reach the full authorized admissions figure.

The general pool of admissions for fiscal 2007 will come from a combination of groups that are still in the pipeline from 2006, groups that have or will receive waivers, and certain other refugees who may not be affected by the material support bar. Fifty thousand admissions spaces have been allocated among geographic regions for these groups. Only after these 50,000 allocated slots are used would the 20,000 numbers set aside in the allocated reserve need to be used.

It is our position that the designation of an unallocated reserve almost guarantees that the full figure of 70,000 approved in the Presidential Determination will not be used. The complexity of the US refugee resettlement system is such that the achievement of the full admissions target set by the PD requires a concerted effort to put an operational and logistical plan in place early in the fiscal year that will be sufficiently robust to identify, process, interview, clear, and move the full number of refugees authorized by the PD. We believe that the State Department should not hold numbers in reserve, but should treat the full 70,000 numbers approved by the Presidential Determination as a target rather than as a ceiling, and actively commit their operations from the beginning to meet this full admissions figure.

While we commend the State Department for its stated intention to admit the large groups from the FY2006 pipeline and the populations affected by the material support bar, we maintain that this unallocated reserve is unnecessary. Unused slots can be transferred between regional allocations, and Congress has the capacity to provide emergency appropriations if more than 70,000 refugees need to be admitted. In the hearing, Congressman Cornyn stated that he would be willing to work with the State Department to accommodate additional deserving refugees. We urge the Administration to eliminate the unallocated reserve and to develop concrete plans to use the entire 70,000 admissions numbers for populations within the regional allocations.

Senator Edward M. Kennedy Questions for the Record
Senate Subcommittee on Immigration Oversight Hearing on
"U.S. Refugee Admissions and Policy"
Wednesday, September 27, 2006

QUESTIONS FOR MR. HOROWITZ

I. Material Support

Your testimony characterizes the Administration position as one that converts otherwise qualified refugee and asylum applicants into terrorists because they pay modest ransoms to save their children from rape or death, and places refugees -- including previously admitted refugees -- at risk because members of their community fought for and died alongside American troops in Vietnam. You mention that it took more than two years for the State Department to issue waivers to non-terrorist groups. Yet, you call for administrative solutions rather than legislative solutions to these issues.

Questions:

1. Do you think the Administration would be able to comply with the tight timelines and strict definitions necessary to solve these issues administratively, when it has not significantly addressed them in two years?

Answer of Mr. Horowitz:

I do not believe that the administration has failed to make waiver determinations for such groups as the Montagnards and Hmong because it lacks the capacity to comply with meaningful, achievable time schedules to consider and make statutory waiver determinations. The time periods in the administrative reform proposal attached to my written testimony were based on extensive consultations with experts in the immigration law community, and they offer the administration more than ample time to conduct necessary investigations of groups for whom waiver determinations should be considered. The truth is that the administration has lacked the will to make any waiver determinations, and has converted what Congress clearly

intended to be a strong *presumption* against granting refugee status to persons and groups engaged in military action against existing governments into a *flat bar* against all such persons and groups. In other words, the administration has wrongly construed statutes designed to enhance U.S. anti-terrorist *security* into statutes seeking to block *refugee admissions*.

The same is true of the administration's inexcusable insistence on applying *per se* bars against otherwise fully qualified refugee and asylum applicants -- in clear violation of Congressional intent not to convert persons raped by terrorists into terrorists because they were forced to wash the clothes of their rapists. It should be noted that the administration's treatment of the "duress" issue ignores Supreme Court precedent to the effect that duress defenses may be implied where "given the circumstances, other reasonable men must concede that they too would not have been able to act otherwise." *See*, U.S. v. Bailey, 444 U.S. 394, 411 n. 8 (1980); and *see also,* Fedorenko v. U.S, 449 U.S. 490 at 512-13 (1981).

I urge Senator Kennedy, working with other Judiciary Committee members from both parties, to forcefully call on the administration to immediately begin to process waiver applications for groups such as the Hmong and Montagnards – action that can now be immediately undertaken. Likewise, I urge Senator Kennedy and his Committee colleagues to press the administration with equal forcefulness to permit duress defenses to be raised.

I reiterate what I said when I testified: It is disgraceful that, during a two year period when tens of thousands of otherwise fully eligible persons festered in refugee camps (and were in some cases denied the right to join family members living in the United States), the administration has made but a single, limited statutory waiver determination for a small band of Karem refugees. The administration is fully capable of conducting rapid, orderly and thorough waiver determinations for many other groups and should do so on its own or because it is forcefully pressed by bi-partisan Congressional coalitions to do so.

The administration position on the "terrorist organization" and "duress" issues is so at odds with Congressional intent, historic practice in the treatment of refugee and asylum applications, *and* genuine American national security interests as to be politically unsustainable once Congress applies sunlight to it. As noted in my testimony, I believe that Congressional action that elevates the issue to the attention of the President

– something Congress knows well how to do -- will cause rapid reversal of the positions taken by some mid-level administration officials during the past two years.

2. Doesn't issuing waivers to these groups stigmatize them as terrorist organizations and strengthen the repressive regimes they oppose?

Answer of Mr. Horowitz:

I do not believe that any "stigma" would attach to groups receiving statutory waivers, in part because, as noted, I read the design of current law as follows: Broadly ban all groups involved in any form of anti-government military activity – in effect, create a strong presumption that all such groups are engaged in terrorist activities inimical to U.S. security interests -- but then give the administration both the discretion ***and the responsibility*** to quickly determine which groups were engaged in terrorist activities and which were not. This is not an entirely inappropriate legislative design, and it can and should have been implemented to protect American security interests without banning *all* groups engaged in anti-government military activities. By effectively failing to consider waiver applications through administrative inaction, the administration has thwarted Congressional intent and ignored the design and purpose of the statutory waiver provisions. The broad definition of terrorist groups set out in the relevant statutes was not intended to serve as a *de facto* means of reducing refugee admissions to the United States, nor do I think it was meant to – nor will it -- stigmatize groups receiving the statutory waiver.

A final point: Both questions posed by Senator Kennedy suggest that a legislative rather than an administrative solution would be most appropriate to deal with the "duress" and "terrorist organization" problems created by the administration's conduct over the past two years. While one might theoretically agree with this view, the hard reality is that the legislative process is often a torturous and lengthy one, while the "stroke of the pen" administrative reform can be implemented immediately. Moreover, the proposed administrative reform may be of even greater value now than it was when the Committee conducted its oversight hearing. This is so because, as I have recently been advised by administration officials, the administration will now support legislation to allow the *per se* bars to be lifted from *all* persons associated with groups that receive statutory waivers.

(In other words, the legislation that the administration is now prepared to support will extend the effect of waivers to all persons associated with groups that received the waivers, and not merely those who offered mere "material support.") With such legislation – which, with administration support, should be passed during the November lame duck session – the "stroke of the pen" administrative reform would become fully operational.

This is not to say that Congress should not consider and, where appropriate, enact further legislation to deal with the "material support" and "terrorist organization" issues: It is only to say that no legislation is needed to remove alleged stigmas from groups receiving waivers, and that fixing the problem through an administrative "stroke of the pen" reform will offer immediate relief to tens of thousands of eligible and legitimate refugee and asylum applicants who should not be forced to remain in refugee camps and/or in limbo status pending lengthy legislative battles that might in the end result in no statutory changes.

Having said the above, I believe that the administration should be given a short timeframe to adopt reasonable administrative reforms that: (a) expedite group waiver investigations and determinations; and (b) permit reasonable duress claims to be made by persons who otherwise satisfy all security and refugee status tests.

I hope that the Committee will communicate directly to the President, making it clear to him that failure to rapidly implement such administrative reforms will oblige it to consider legislative reforms of a sort likely to offer less decision-making discretion to the administration than the proposed administrative reforms now do.

Questions for the Record Submitted to
Assistant Secretary Ellen R. Sauerbrey by
Senator Edward M. Kennedy (#1)
Senate Committee on the Judiciary
Subcommittee on Immigration
September 27, 2006

1. Foreign Assistance Reform

I understand that foreign assistance reforms are currently being considered that could change the way the Administration and Congress budget for foreign aid. Reports indicate that among the changes under consideration is the elimination of Migration and Refugee Assistance and Emergency Refugee and Migration Assistance as distinct accounts, and the merging of refugee assistance into the foreign assistance accounts of each country. I'm concerned that that these reforms could have an adverse impact on refugee funding.

Question:

Please explain the status of foreign assistance reform and how this effort will affect funding for the U.S. refugee resettlement program and overseas refugee assistance. Does the State Department plan to merge or consolidate the relevant USAID and State Department offices that manage these programs, such as USAID's Office of Foreign Disaster Assistance and the State Department's Bureau of Population, Refugees and Migration?

Answer:

Refugee Admissions to the U.S. and overseas refugee protection and assistance feature prominently in the Humanitarian Assistance objective of the new Foreign Assistance Framework, and they will continue to be significant parts of the President's budget request. There is no plan to merge or consolidate USAID and State Department offices that manage

humanitarian programs, or to eliminate foreign assistance accounts such as Migration and Refugee Assistance or the President's Emergency Refugee and Migration Assistance fund. The Department will remain in close consultation with Congress on this important reform process.

Questions for the Record Submitted to
Assistant Secretary Ellen R. Sauerbrey by
Senator Edward M. Kennedy (#2)
Senate Committee on the Judiciary
Subcommittee on Immigration
September 27, 2006

2. Material Support

In our letter to Secretary Chertoff, Senator Lieberman and I urged the Department of Homeland Security not to bar refugee admission to innocent people who are forced to provide support to terrorists or suffer severe retaliation. I recently reiterated this concern, as well others about material support, to Secretary Rice. In the hearing, I noted my concern that persons are being excluded from the United States because of their association with groups that are no threat to the United States and have been identified by neither National Intelligence Director Negroponte, nor Secretary Rice, nor Counterterrorism Coordinator Crumpton as "groups of concern."

Question:

How many refugees and asylees are excluded from the United States because of their association with non-designated groups? With which groups are they associated? How many are excluded because under duress they provided material support to "terrorist organizations"? What has been done to address these critical issues and when can we expect results? Do you agree that waivers are the best approach? How long do they take and when can we expect more? Can you give an update on the interagency consultation process?

Answer:

The Department of State estimates that some 12,000 refugees who were part of the original planning for FY 2006 arrivals were not resettled in the United States as a result of the terrorism-related inadmissibility provisions in Section 212(a)(3)(B) of the INA. Of these, the vast majority

are associated with groups that do not appear on either the Foreign Terrorist Organization (FTO) or the Terrorist Exclusion Lists (TEL). The largest number from among this 12,000 (approximately 10,000) are ethnic minority refugees from Burma who are associated with either the Karen National Union or the Chin National Front. In addition, over 300 refugee applicants from Cuba are on hold because of ties to the U.S.-supported Alzados resistance movement. Colombian cases on hold or not processed as a result of these provisions (approximately 1,400 individuals) involve material support provided – reportedly under duress -- to either the FARC or the ELN, both organizations on the FTO list.

The Secretary of State has now exercised the existing authority to render the material support bar inapplicable three times, twice on behalf of ethnic Karen refugees from Burma and once on behalf of ethnic Chin refugees from Burma. These "waivers" have allowed processing for many of these vulnerable refugees to begin in significant numbers, and we anticipate processing thousands more in FY 2007. In addition, the Administration is working to develop a proposal on how to broaden the inapplicability provision in the INA to cover other bases for inadmissibility, such as the provisions on membership in a terrorist organization and the

provision that bars those who defend themselves and their families against oppressive regimes.

The Administration believes that the problem can be largely addressed through expansion of the waiver. The first three waivers required significant inter-agency deliberation, but experience gained through exercising this option has allowed each successive waiver to be concluded more quickly. There are currently six additional groups under consideration for waivers.

In his testimony, Michael Horowitz characterized the Administration's position as maintaining that no "duress" exception can be granted to otherwise fully qualified refugee or asylum applicants if they engage in such "terrorist" acts as paying ransoms to avoid the rape of their spouses. Mr. Horowitz believes that the Administration's construction of applicable law ignores the Supreme Court's recognition that a duress defense should be implied where "given the circumstances, other reasonable men must concede that they would not have been able to act otherwise.

Question:

Does the Administration believe that it has the authority under current law to grant waivers to persons who provided material support under duress or coercion? If so, why hasn't the Administration granted any waivers for refugees who provided material support under duress or extreme coercion? If not, will the Administration seek legislation to make clear that providing material support under duress or coercion is not a bar to admissibility?

Answer:

It is correct that the Administration has not to date granted any waivers to individuals specifically for providing material support under

duress. However, the existing waiver provision could be used to do so. At present, the Department of Homeland Security is developing a proposal for how to proceed on implementing the waiver for duress cases. The Administration does not believe that any legislative change is necessary for resolution of duress cases involving provision of material support.

In Mr. Horowitz's testimony, he stated that he believed that a bill introduced by Representatives Pitts and Pence (HR 5918) addressing the material support problem merits the active consideration of Congress.

Question:

Does the Administration have a position on this legislation?

Answer:

The Administration has not taken a position on the Pitts bill. However, as noted above, the Administration is currently working to develop its own proposal for how to amend the INA to address this problem.

Mr. Scharfen was asked to provide the Subcommittee with a list of groups that have been determined to be undesignated terrorist organizations by the Department of Homeland Security. He was also asked to explain the administrative review process – including the interagency consultation process -- that led to the determination. Provisions that allow the exclusion of members and material supporters of undesignated terrorist organizations apply to visa adjudications as well.

Question:

When consular officers evaluate visa applicants do they refer to a master list of "undesignated terrorist organizations" coordinated between State, Justice, and Homeland Security? Please provide us with a copy of the list.

Answer:

There is no such list. Instead, Consular Officers worldwide vet every visa applicant through the Consular Lookout and Support System ("CLASS") database. CLASS identifies individuals who may be inadmissible for, among other things, terrorist activities. The database itself is organized based on identities; however the supporting information on an individual may be based on membership or affiliation with a group that meets the statutory definition of an "undesignated terrorist organization:" "… a group of two or more individuals, whether organized or not, which engages in, or has a subgroup that engages in, (terrorist activities)."

Questions for the Record Submitted to
Assistant Secretary Ellen R. Sauerbrey by
Senator Edward M. Kennedy (#3)
Senate Committee on the Judiciary
Subcommittee on Immigration
September 27, 2006

3. Unaccompanied Children

In fiscal year 2004, Congress enacted legislation stating that unaccompanied refugee children should be given priority for admission to the United States refugee program. In order to move forward with processing children, I understand that the United States needs to make a determination about the best interest of each child.

Question:

Will the State Department partner with nongovernmental organizations to carry out these best interest determinations?

Answer:

The State Department works very closely with the United Nations High Commissioner for Refugees (UNHCR) in seeking to ensure that unaccompanied refugee children are cared for properly, including through Best Interest Determinations (BIDs). BIDs are designed not as a tool for placing a child in the resettlement stream, but as a tool for ensuring that all aspects of a child's well-being and situation are considered before any decision is reached about the best course of action. For most children, the optimal outcome is reunification with parents or relatives. When UNHCR's

BIDs result in resettlement referrals to the USRAP, we act as expeditiously as possible to process these vulnerable cases. The USRAP also encounters cases involving minors that do not come to our attention through UNHCR. When this occurs, we partner with other competent child welfare organizations to ensure that a proper BID is carried out on behalf of the child before proceeding with resettlement processing.

Questions for the Record Submitted to
Assistant Secretary Ellen R. Sauerbrey by
Senator Edward M. Kennedy (#4)
Senate Committee on the Judiciary
Subcommittee on Immigration
September 27, 2006

4. Iraqi Refugees

The war in Iraq has created hundreds of thousands of refugees who, virtually unknown to the rest of the world, are seeking sanctuary in Syria, Iran, Lebanon, Jordan, and other neighboring countries. Many Iraqis are escaping violence and threats made against them for cooperating with the United States. It was reported recently that two bodies and a human head were discovered in Baghdad neighborhoods. The head had a note attached, saying "This is the destiny of those who work with the Americans." Others have fled because of the attacks, kidnappings, and threats to their lives by insurgent groups. I understand that no specific accommodations are made for this refugee population in the upcoming admissions program.

Question:

I believe we have a duty to assist Iraqi refugees, who can't return home, particularly the ones who are facing persecution because of their affiliation with the U.S. What is the State Department doing to protect these Iraqis? Has the UNHCR, your embassy officials or a designated (non?)governmental organization identified any Iraqis for priority refugee status under the P-1 classification? Have you considered designating Iraqi religious minorities as a special interest group under a Priority-2 classification?

Answer:

Inside Iraq, the State Department's Bureau of Population, Refugees, and Migration (PRM) has funded UNHCR's Iraq Operations to provide

traditional support activities (reintegration, protection and humanitarian assistance activities) to refugees returning to Iraq as well as third-country refugees seeking asylum inside Iraq. PRM is also funding IOM (the International Organization for Migration) to support the technical and institutional capacity building of the Iraqi Ministry of Displacement and Migration (MoDM), which is responsible for managing refugee affairs in Iraq. PRM funded nine international NGOs in FY 2006 to provide basic shelter, income generation, water/sanitation, education and health services to returning Iraqi refugees and the larger host communities supporting their integration. Outside Iraq, PRM's main partner protecting Iraqi refugees in the region is UNHCR. We support their protection programs in Syria, Jordan and Lebanon. PRM has also funded the NGO ICMC (International Catholic Migration Commission) in Syria ($1,114,828), Lebanon ($772,399) and Jordan ($1,393,167) to provide targeted health, education, social (income generation, childcare, etc) and legal services to Extremely Vulnerable Individual (EVI) Iraqi refugees in those countries.

During FY 2006, the United States resettled over 200 Iraqi refugees from various locations around the world. During FY 2006, UNHCR referred only 133 individuals, principally because of resource constraints limiting its ability to screen refugees for possible resettlement referral. We are committed to working with UNHCR to help improve its capacity to conduct refugee status determinations and refer refugees for resettlement without detracting from its vital protection role in the region. We plan to dedicate funding specifically for this purpose during FY 2007. In addition, we are working with UNHCR to identify and resolve other barriers to referrals of greater numbers of Iraqi refugees. These include discussions on how best to coordinate efforts in the region to increase refugee referrals in one location in the region without creating "magnet effect" or causing secondary movements from another.

We a;sp continue to urge UNHCR to refer extremely vulnerable Iraqi cases to the USRAP, including cases involving religious minorities. We do not view a Priority 2 designation of any particular group as the appropriate way to address the needs of extremely vulnerable Iraqis at tis time, because we believe that singling out any one group for special attention could serve

to make current inter-ethnic and –religious group tensions worse. Rather, we are working with UNHCR to enhance their capacity to screen and refer vulnerable cases in the region based on individual need.

Questions for the Record Submitted to
Assistant Secretary Ellen R. Sauerbrey by
Senator Edward M. Kennedy (#5)
Senate Committee on the Judiciary
Subcommittee on Immigration
September 27, 2006

5. P-3 Classification – Reuniting Families

Reuniting families has long been a cornerstone of the U.S. refugee and immigration policy. It is important to consider family members for refugee status and they should be a priority. The Administration proposes a list of 17 nationalities that would be eligible for P-3 designation. I believe that family reunification through the P-3 category should be available to all refugees worldwide, regardless of their nationality. The UNHCR and U.S. refugee agencies have urged the State Department to create a universally applicable P-3 designation.

Question:

Can you comment on this recommendation, listing your reasons for and against a universal designation? Also, can you clarify why last year the State Department designated 20 nationalities, but this year left the Ivory Coast, Togo, and Liberia off the list?

Answer:

The USRAP includes a universal family reunification access track through the Visas 93 program. Under this program, refugees in the United States can file for immediate family members (spouse and unmarried minor children) of any nationality in any location – including the country of origin. Beneficiaries of Visas 93 petitions need not establish a refugee claim of their own. They need only verify their relationship to the petitioner and be otherwise admissible to be approved for admission.

The USRAP includes a universal family reunification access track through the Visas 93 program. Under this program, refugees in the United States can file for immediate family members (spouse and unmarried minor children) of any nationality in any location – including the country of origin. Beneficiaries of Visas 93 petitions need not establish a refugee claim of their own. They need only verify their relationship to the petitioner and be otherwise admissible to be approved for admission. The USRAP also includes the Priority 3 (P-3) family reunification access track for family members which includes spouses, unmarried children under 21, and parents of certain nationalities. Applicants under P-3 must have a refugee claim of their own to be approved and can only be processed outside their country of

origin. We seek to include nationalities on the P-3 list in keeping with UNHCR's assessment of resettlement needs among refugee populations. We also consider changing country conditions, ongoing repatriation efforts and other factors in deciding which nationalities to include. For example, given the rapidly improving situation in Liberia and the international community's and USG's focus on supporting large scale repatriation to Liberia, the USRAP has taken Liberians off the list of nationalities eligible to file new applications under P-3 in FY 2007. Ivory Coast and Togo are no longer on the list in FY 2007 because the identified need for resettlement for refugees from these nationalities is minimal.

Questions for the Record Submitted to
Assistant Secretary Ellen R. Sauerbrey by
Senator Edward M. Kennedy (#6)
Senate Committee on the Judiciary
Subcommittee on Immigration
September 27, 2006

Question 6: Refugees in Tanzania

The Administration has noted African refugees' increasing confinement to refugee camps or settlements. This seems to be a particular problem in Tanzania. Last year's report indicated that 15,000 Burundi Hutus have resided in camps in Tanzania since 1972, with no prospects for either repatriation or local integration.

Question:

Has the State Department raised these refugees' confinement to camps with the Tanzanian government? Did the Millennium Challenge Corporation (MCC) take its treatment of refugees into account when it decided to make Tanzania eligible for MCC funding? Shouldn't the State Department and MCC consider the treatment of refugees in a particular country before it awards any compacts?

Answer:

Tanzania has long been one of the largest and most hospitable hosts for refugees. Beginning in the 1960s it has hosted two waves of Mozambican refugees, two of Rwandan refugees, and multiple waves of Burundi, along with Congolese, Ugandans, South Africans, Somalis and others. The State Department has raised the issue of refugees' confinement to camps with the Tanzanian government, and has worked closely with partners such an UNHCR to ensure that refugees' rights are protected.

Tanzania is currently host to some 500,000 refugees including 170,000 Burundi in camps, 200,000 Burundi in settlements (integrated into villages and primarily self-sufficient), and 131,000 DRCongolese in camps. The successful democratic elections in Burundi in late August 2005 and progress towards peace in the DRC have led to significant refugee returns from Tanzania. So far in 2006, over 23,000 Burundi refugees have repatriated from Tanzania and 14,000 DRCongolese have returned home. Nearly 300,000 Burundi refugees have returned home from Tanzania since 2002. For those who remain, the Department continues to support UNHCR protection and assistance programs, including technical support to the Government of Tanzania (GoT) in areas such as harmonizing the roles of the different ministries involved in refugee matters, reviewing the draft Refugee Act, and preparing a GoT guidebook on refugee administration.

The report to which your question refers was highlighting a discrete group of Burundi refugees who the United States is considering for resettlement in the United States. They had fled Burundi in 1972 and taken asylum in Rwanda and the Democratic Republic of Congo and were subsequently uprooted by conflict in those two countries, fleeing again to Tanzania where they were put into camps with the newer Burundi. This

discrete group has been registered by UNHCR and will be processed over this year and next.

The Department and MCC consider the treatment of refugees in a country before MCC compacts are awarded. The Bureau of Population, Refugees, and Migration contributes information about countries' treatment of refugees to Department recommendations to the MCC Board during the country selection process. Treatment of refugees is considered, among other factors, in MCC indicators on Civil Liberties and Immunization Rates. In addition to these indicators, the MCC Board considers supplementary information, which may include the Department's Human Rights Reports among other resources, during the country selection process.

Questions for the Record Submitted to
Assistant Secretary Ellen R. Sauerbrey by
Senator Edward M. Kennedy (#7)
Senate Committee on the Judiciary
Subcommittee on Immigration
September 27, 2006

7. – Refugee Women and Girls at Risk

On October 2, you commended the UNHCR Executive Session for its upcoming conclusion on women and girls at risk and characterized it as an important advance in the protection of these individuals.

Question:

What is the status of this conclusion and what are its major elements? Were there any elements of the conclusion that fell short of your delegation's goals?

Answer:

The Conclusion on *Women and Girls at Risk* was approved by UNHCR's Executive Committee on October 6, 2006. The U.S. Delegation was very pleased with the outcome of the conclusion, which, as implemented will enhance the protection of refugee women and girls at all levels, including when promoting durable solutions. The Conclusion discusses ways in which forced displacement can expose women and girls to further violation of their rights, preventative strategies to reduce these risks, and recommended actions by States, UNHCR, and other relevant agencies and partners to actively respond to their individual situations. We will

continue to work with UNHCR in enhancing their organizational accountability in the protection of refugee women and girls and will continue to support programs such as prevention and response to GBV, education, and livelihoods in order to empower women and girls to become agents of their own protection.

Questions for the Record Submitted to
Assistant Secretary Ellen R. Sauerbrey by
Senator Edward M. Kennedy (#8)
Senate Committee on the Judiciary
Subcommittee on Immigration
September 27, 2006

8. Vietnamese Refugees in the Philippines

Because the Philippines does not confer citizenship on the spouses of its female citizens, many male Vietnamese refugees in the Philippines are essentially stateless and without basic rights. I understand, however, that Homeland Security is not interviewing Vietnamese men who married Philippine women.

Question:

Does the State Department agree that these refugees should be considered for the admissions program? Are you working with Homeland Security to ensure processing can take place?

Answer:

When we established the resettlement program for the group of some 2,000 Vietnamese remaining in the Philippines, we clearly stated that spouses and children of Philippine citizens would not be considered, as they legally have a firm resettlement option in the Philippines. As a part of our agreement with the Government of the Philippines to offer durable solutions to Vietnamese nationals, the Republic of the Philippines agreed to make best efforts to offer residency consistent with its law to the small number of spouses and children of Philippine citizens. We continue to work with the Government of the Philippines to make this a reality.

SUBMISSIONS FOR THE RECORD

"Material Support" and "Terrorist Organization" Issues: Proposed Administrative Solutions

The administration has been grappling with the "material support" and "terrorist organization" provisions of the INA for more than two years. Although the executive agencies involved with the matter have been conducting internal reviews and have been meeting with outside groups as well as Congress during this period, no comprehensive administrative proposal has been put on the table to resolve the outstanding areas of disagreement.

The time has come to do so, and in a manner that fully protects U.S. national and homeland security interests.

This memorandum sets out administrative proposals that, save for one exception requiring an essentially technical statutory amendment, will resolve all outstanding issues, and do so in a manner designed to satisfy the security concerns raised by administration officials.

We hope that the administration will find this memorandum a means of satisfying all stated concerns previously raised, and that the suffering and uncertainty of thousands of qualified refugee and asylum applicants capable of adding to America's well-being *and security* can thus be brought to an end.

UNDERLYING PURPOSE OF INA:

- A critical purpose of the INA is to give refuge to persons fleeing persecution but not to knowing, willful terrorist supporters or to persons who, if admitted to the United States, could pose homeland security/terrorism threats.
- A central focus of the refugee program is "to achieve a balance between humanitarian commitments and national security concerns."[1]
- The intent of Congress in passing the USA PATRIOT ACT and the REAL ID Act was to keep out persons who intended to cause harm to the U.S. while "protecting honest asylum seekers."[2]
- Terrorism as commonly understood[3] includes acts intended to intimidate or coerce a civilian population or to influence the policy of a government by intimidation or coercion. Terrorism is not understood to include paying a ransom to obtain the release of a kidnapped child. Terrorism is not understood to include the use of justifiable force to repel attacks by forces of an illegitimate regime.

THE DURESS ISSUE:

A duress exception is implicit in the statute:

- The U.S. Supreme Court has recognized that the duress defense may be implied where "given the circumstances, other reasonable men must concede that they too would not have been able to act otherwise."[4]
- Where there are difficult "line-drawing problems," there should be a "particularized evaluation in order to determine whether an individual's behavior was culpable."[5]

---

[1] DOS-DHS-HHS "Proposed Refugee Admissions for fiscal year 2006"
[2] Rep. Sensenbrenner, discussion on REAL ID Act
[3] And as defined in 50 U.S.C. § 1801(c)
[4] See, e.g., U.S. v. Bailey, 444 U.S. 394, 411 n. 8. (1980).

- DHS adjudicators should assess whether an applicant's support for a terrorist organization invokes any degree of personal liability or responsibility.

Duress definition proposal:

- First, an individual must show that he or she was faced with what a reasonable person would deem a threat of death or serious bodily harm against him or herself or someone else;

- Second, the individual must show that he or she acted necessarily and reasonably to avoid this threat;

- Finally, even where the applicant has established that he or she acted under duress, the adjudicator must affirmatively determine that the refugee or asylum seeker will not threaten the security of United States nationals or the national security of the United States (by definition in the INA, this includes threats to the national defense, foreign relations, or economic interests of the United States).

Duress adjudication and review proposal:[6]

- DHS adjudicators are required to make complex credibility and factual determinations every time they interview a refugee or asylum applicant.

- In each case, they must determine the plausibility of the applicant's testimony given the applicant's credibility, the details of their story, corroborating evidence, and what the adjudicator knows about the country from which the applicant fled.

- Requiring DHS adjudicators to make a determination as to whether an applicant acted under duress merely adds another element to the evaluation of whether an individual meets the refugee definition and is eligible for admission to the U.S.

- These decisions should be made concurrently with the refugee or asylum determination.

- Given the sensitivity of such determinations, duress adjudications should be subject to individual review by the Office of Refugee, Asylum, & International Operations of the Department of Homeland Security. Such review must be completed within a reasonable period of time (no longer than 30 days).

Existing additional protections to ensure protection of U.S. homeland and national security protection.

- An asylum seeker or refugee applicant who proves he or she provided material support under duress remains subject to the numerous other terrorism-related grounds of inadmissibility. These include engaging in terrorist activities, espousing terrorism, inciting terrorism, receiving military training from a designated terrorist organization, soliciting others to join a designated terrorist organization, or associated with, joined, or represented a terrorist organization. In addition, persecution of others, risk to national security, and "serious reasons for believing the alien has committed a serious non-political crime outside the U.S." are all grounds of inadmissibility.

---

[5] Fedorenko v. U.S, 449 U.S. 490 at 512-13 (1981).

[6] DHS is and should remain responsible for duress determinations in affirmative asylum cases and in overseas refugee adjudications. Immigration Judges, who are equally equipped to make duress determinations, should remain responsible for duress determinations in immigration court proceedings.

- Moreover, in asylum and refugee context, the issue of duress should only arise if the applicant *is found to meet the refugee definition*. People who are not refugees to start with—people who claim they were coerced into providing assistance to terrorist organizations but have not suffered and do not fear persecution based on their race, religion, nationality, political opinion, or membership in a particular social group--can and should be denied refugee protection on that basis.

THE FREEDOM FIGHTER ISSUE AND THE PROBLEM OF "TIER III" ORGANIZATIONS:

- The concern underlying the creation of the Tier III category of "non-designated" terrorist organizations was to give the government the ability to deal with newly emerged or newly discovered dangerous groups and their supporters without having to wait for a designation process. The point of Tier III was not to create a whole new species of terrorist organization or to target a new range of conduct that would not be eligible for designation under either Tier I or Tier II. The Administration should not exclude people for support to or membership in organizations that it would never think of designated as terrorist organizations under either section 219 of the INA or of placing on the terrorist exclusion list, because their activities fall within the scope of legitimate combat or self-defense and pose no danger to the security of the U.S.

- Once the State Department or DHS has made a request initiating consultation with the other agency for purposes of determining whether an exception to the material support bar should be made for a particular group, the two agencies must issue a decision within a reasonable period of time (no longer than 60 days).

- At a minimum, the following refugees and asylum seekers should be immediately exempted from the material support bar to admission:

    - Burmese ethnic and religious minorities, such as the Karen, Karenni, and Chin, who have been victimized by the brutal Burmese regime;
    - Montagnards and Hmong who supported U.S. troops during the Vietnam War;
    - Cubans who joined anti-Castro movements at the behest of the United States.

- Legislation will be needed to expand the Administration's discretionary waiver authority to include all categories of persons associated with groups for whom Tier III waivers are granted – this so that the Administration can, for example, in addition to waiving in persons who provided food or shelter to U.S. troops in Vietnam, issue similar waivers to Montagnards and others who fought alongside U.S. troops in the same conflict.

ADMINISTRATIVE PROPOSAL

A. Definition of duress.

1. **The applicant must show that he or she was faced with what a reasonable person would deem a threat of death or serious bodily harm against him or herself or someone else.**
2. **The applicant must show that he or she acted necessarily and reasonably to avoid this threat.**
3. **Even where the applicant has established that he or she acted under duress, the adjudicator must affirmatively determine that he or she will not threaten the security of United States nationals or the national security of the United States.**

B. Duress adjudication and review process.

1. **Adjudicators to make duress determinations only after concluding that applicants have fully satisfied the statutory "fear of persecution" refugee/asylum petition test.**
2. **Given the sensitivity of duress determinations, all adjudicator findings of duress to be subject to review by the Office of Refugee, Asylum & International Operations of the Department of Homeland Security, provided that such reviews will be concluded within 30 days from the date of the adjudicators' findings.**

C. Tier III waiver review process for "non-designated organizations."

1. **Organizations that would neither be designated as terrorist organizations under Section 219 of the INA or otherwise placed on the terrorist exclusion list should receive Section 212(d)(3)(B)(i) "non-designated" waivers given by the Secretary of State to the Karen National Union and Karen National Liberation Army located in the Tham Hin Camp in Thailand.**
2. **Within 90 days, formal State Department-DHS process to be initiated for the review and adjudication of "non-designated organization" petitions.**
3. **Adjudications of waiver applications to be made within 60 days of the date after completed petitions are filed pursuant to the issuance of the above, C(2) process guidelines.**
4. **Adjudications of the petitions of the following organizations to be made on an emergency basis immediately following the issuance of the above, C(2) process guidelines:**

a) **Burmese ethnic and religious minority organizations comprised of such groups as the Karen, Karenni, and Chin, who have been victimized by the Burmese regime;**

b) **Montagnard and Hmong organizations, who supported the United States during the Vietnam War; and**

c) **Cuban organizations, who engaged in anti-Castro activities with the support and encouragement of the United States.**

July 21, 2006

The Honorable George W. Bush
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President,

As leaders of organizations of the American Jewish community committed to our country's national security and our proud history as a safe haven for refugees, we are writing today to urge you to correct a major injustice to the U.S. Refugee and Asylum Programs.

This letter is to urge you to take immediate action to ensure that America's anti-terrorism laws do not have the unintended effect of denying protection to refugees and asylum seekers fleeing some of the most brutal regimes and violent conflicts on earth. This year, although 70,000 refugees have been authorized for admission to the United States, and although Congress has provided funding for 54,000 refugee admissions, fewer than 42,000 refugees will likely be offered protection. This shortfall is attributable in large part to the implementation of the "material support" provisions of the USA Patriot Act and the Real ID Act.

Under these provisions, any individual who has provided what the law terms "material support" to terrorists is barred from entering the United States. Leading organizations in our community were in the forefront of efforts to enact a tough ban on material support for terrorist organizations as well as sanctions against the states that sponsor them. However, the material support provisions, as amended, are ironically being invoked to exclude victims of terrorism, some whose very struggle to be free now makes them inadmissible to the United States. For example:

- Burmese ethnic and religious minority groups who are viciously repressed by the Myanmar regime - generally viewed as one of the most brutal in the world - are not being processed for admission to the United States.
- Hmong refugees from Laos, who were ardent supporters of the American government during the Vietnam War, are now in danger of being denied admission to the United States.
- Colombians who have paid ransom to obtain the release of a kidnapped loved one are considered by the American government to be supporters of terrorism.
- Women from West African countries in turmoil who have been raped, abducted, and forced into servitude by rebel groups have been "deferred" from the U.S. Refugee Program for providing material support to terrorists, including tasks such as doing laundry.

Under the broad definition of the term "terrorism," support for a group that is associated with armed resistance against *any* regime constitutes material support to terrorism. This is the case even if the group's actions are not terrorist acts by any customary understanding of the term, even if the government it opposes is a major human rights violator, and even if the American government openly supports the goals of the opposition group.

Even refugees and asylum applicants whose actions in support of terrorist groups were forced or coerced are subject to the bar. As implemented, even those under extreme duress do not have any reprieve: Any contribution to a terrorist group - even if it was made at gunpoint or under threat of death - constitutes material support to terrorism. U.S. refugee and asylum adjudicators are not considering the motives, circumstances and beliefs of the refugee.

Shockingly, under today's laws, Jews who bravely resisted and survived Nazi terror would be excluded from refuge in the United States. Under current policy, the Warsaw ghetto uprising would have been considered "terrorist activity" because it involved the use of weapons against persons or property for reasons other than for "mere personal monetary gain."

We strongly believe that the Administration and Congress should work together and immediately amend the law to ensure that innocent victims are not branded as "terrorists" and refused safe haven. Although Congress has granted the Administration the discretionary authority to exempt from the material support bar some individuals who are not terrorists, that authority has been used only once, for some Burmese Karen refugees in the Tham Hin refugee camp in Thailand. However, even if this authority were to be exercised more frequently, the law does not allow the U.S. to admit those who actually fought against their oppressors. Until the law is changed, thousands of deserving refugees in the Tham Hin camp - and those living elsewhere under equally precarious circumstances - will still be barred from admission to the United States.

In the meantime, we urge you to direct the Secretary of Homeland Security and the Secretary of State to delegate to refugee and asylum adjudicators the authority to make exceptions to the material support bar where appropriate. These well-trained, front-line decision makers should be instructed to exempt refugees and asylum seekers from the material support bar whenever there is no reasonable basis to believe that they pose a security threat to the United States. Once exempted, these refugees and asylum seekers would still be required to pass security and background checks. It has become clear that the current ad-hoc process in place for making these decisions is far too slow, given the fact that people's lives are at stake.

This problem has persisted for far too long, and thus far, discussions and negotiations have unfortunately yielded little in the way of results.

The current policy undermines America's leadership in the realm of refugee protection, and will ultimately undermine the international regime of refugee protection itself. In

addition, U.S. foreign policy interests are ill served when we suggest to oppressive governments and brutal terrorist groups that their victims are considered "terrorists" by the U.S. and are not suitable candidates for refugee status.

Mr. President, you have spoken eloquently about our refugee program and how it reflects our finest humanitarian tradition. The program is also reflective of the core Jewish value of "redeeming the captive" (*Pidyon shvuyim)*. To honor this tradition, we urge the Administration to exempt legitimate refugees and asylum applicants from the "material support" bar to admission where the support provided has been coerced under duress, or where it is otherwise clear that the refugees seeking U.S. protection are not supporters of terrorism and are in fact victims of tyranny and oppression.

Sincerely,

Batya Abramson-Goldstein
Executive Director
Jewish Community Relations Council,
St. Louis

Gideon Aronoff
President and CEO
Hebrew Immigrant Aid Society (HIAS)

Judith Bernstein-Baker, Esq.,
Executive Director
Irwin Lipton, President
HIAS and Council Migration Service of
Philadelphia

Richard T. Foltin
Legislative Director and Counsel
American Jewish Committee

Jess N. Hordes
Washington Director
Anti-Defamation League (ADL)

Rabbi Jill Jacobs
Director of Education
Jewish FundS for Justice

Robert Kestenbaum
Executive Director
The Workmen's Circle/Arbeter Ring

Avram B. Lyon
Executive Director
Jewish Labor Committee

Daniel S. Mariaschin
Executive Vice President
B'nai B'rith International

William E. Rapfogel
CEO/Executive Director
Metropolitan Council on Jewish Poverty

Vic Rosenthal
Executive Director
Jewish Community Action, St. Paul, MN

Phyllis Snyder
President
National Council of Jewish Women

Ronald Soloway
Managing Director, Government and
External Relations
UJA-Federation of New York

Hadar Susskind
Washington Director
Jewish Council for Public Affairs

Cc: Stephen Hadley
Assistant to the President for National Security Affairs

Department of Justice

WRITTEN STATEMENT

OF

RACHEL L. BRAND
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY,
AND CITIZENSHIP
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"OVERSIGHT HEARING: U.S. REFUGEE ADMISSIONS
AND POLICY"

PRESENTED ON

SEPTEMBER 27, 2006

Written Statement of Rachel L. Brand
Assistant Attorney General for Legal Policy, U.S. Department of Justice

"Oversight Hearing on U.S. Refugee Admissions and Policy"
before the Senate Committee on the Judiciary, Subcommittee on Immigration, Border Security and Citizenship

September 27, 2006

Dear Chairman Cornyn and Ranking Member Kennedy,

Thank you for inviting me to provide this written statement on the role of the Department of Justice in the admission of refugees to the United States.

President Bush has rightly said that America is and has always been "the great hope on the horizon, an open door to the future, a blessed and promised land." In fact, the Attorney General himself is the grandchild of immigrants and has said that his family achieved the American dream. He has made improving both the immigration laws and the immigration adjudication process high priorities. The Department of Justice is thus committed to playing its part in ensuring a fair and manageable immigration system. And the refugee and asylum programs are crucial parts of this system, since they offer the promise of freedom and safety to some of the world's most downtrodden.

Having said that, we are also engaged in a long war against terrorism. Any actions we take with regard to the admission of refugees must not conflict with or undermine our counter-terrorism strategy — by admitting persons who pose a security threat to this country, by undermining positions the government takes in litigation, or by sending inconsistent messages to the world about our policy toward acts of terror. I do not mean to diminish the importance of admitting bona fide refugees into the United States. Rather, my goal is to explain the full scope of considerations at stake.

It is important to understand that the Administration's counter-terrorism efforts are proactive. We investigate threats before they materialize, rather than just tracking down culprits after an attack has happened. Thus, in addition to prosecuting those who commit acts of terrorism, we prosecute those who plan attacks and those who provide material support to attackers and potential attackers.

Just as we have a proactive counter-terrorism strategy, the existing legislative scheme for refugee admissions is, and historically has been, preventive — that is, designed to prevent undesirable aliens from entering the United States. Congress strengthened that scheme in the USA PATRIOT and REAL ID Acts, with objective standards and a presumption against the admission of aliens involved with terrorist organizations or individuals engaged in terrorist activities. As you are aware, the Immigration and Nationality Act ("INA") now contains broad definitions of some relevant terms, particularly "terrorist activity," "engaged in terrorist activity" (which includes provision of material support) and "organization [that has engaged in terrorist activity]".

The definitions are broad, however, for good reasons. They can be used for homeland security and immigration litigation purposes to prevent aliens who present risks to the United States or its citizens from entering or staying in the United States — even if their activities are not criminal under the narrower definitions in the criminal code and not prosecutable under the harder-to-meet criminal burden of proof. They provide alternative courses of action for government authorities to protect U.S. citizens' safety in cases where the after-the-fact remedy of criminal prosecution is not sufficient.

I recognize that the breadth of these provisions may in some instances bar admission of individuals and groups who do not present such risks and to whom the United States is sympathetic. Congress addressed these concerns to some extent by providing the Secretaries of State and Homeland Security the authority to exercise their sole and unreviewable discretion, on a case-by-case basis, that the provision barring persons who have provided material support to organizations or individuals engaged in terrorist activity, as defined in the INA, does not apply to a particular alien. Exercising this authority would permit that alien who has provided such support to enter the United States so long as he met all other requirements for admission.

The law also requires that the relevant Secretary must consult with the other Secretary and the Attorney General. This scheme allows for the broadest consideration of all factors relevant to the case—the foreign policy considerations, the counter-terrorist strategy considerations, the immigration considerations, and the litigation risks. It properly includes the Department of State, the Department of Homeland Security, and the Department of Justice, each of which has an important role in protecting national security, advancing foreign policy, and implementing immigration law and refugee policy.

The Department's expertise in investigating, disrupting, and prosecuting terrorist plots is a crucial element in this process. For example, we know from experience that terrorists need an infrastructure to operate. They need to raise funds, maintain bank accounts and transfer money, communicate with each other, obtain travel documents, train personnel, and procure equipment. The people who perform these functions may not commit terrorist acts themselves, but the front-line terrorists could not operate without them.

Careful scrutiny of applicants for refugee status who have provided material support to a terrorist organization, as defined in the INA, is therefore warranted. Such scrutiny requires high-level decision-making that accounts not just for individual circumstances, but also for the large-scale impact of a decision on the U.S. government's counter-terrorism policies.

I believe that important national security interests and counter-terrorism efforts are not incompatible with our nation's role as the world's leader in refugee resettlement. While we must keep out terrorists, we can continue to provide safe haven to legitimate refugees.

Thank you for this opportunity to provide a written statement on this important issue.

August 24, 2006

The Honorable George W. Bush
President of the United States
Washington, DC

Dear Mr. President,

As leaders of faith-based communities and individuals concerned with protecting victims of persecution, we ask to meet with you and urge you to directly intervene in a situation that is barring thousands of refugees and asylum seekers, some of the world's most vulnerable and oppressed people, from gaining the protection offered by the U.S. refugee resettlement and asylum programs.

All refugees endure extreme hardship and suffering and for some, their only hope for rebuilding their lives is to resettle in the United States. However, the U.S. has mistakenly characterized many of these refugees as having aided terrorists when they in fact were often the victims of terrorism. For example, a Christian Burmese Chin refugee who was interrogated and beaten by the Burmese military, a Sierra Leonean woman refugee who was raped repeatedly by rebels and saw her daughter attacked in front of her, a Montagnard refugee who fought alongside our troops in Vietnam, and a Colombian father who paid a ransom to obtain the release of his son are all refugees who have been refused resettlement to the U.S. due to a grossly misconstrued interpretation by the Department of Homeland Security of what constitutes "material support to a terrorist organization."

There is a process by which a waiver can be applied to allow certain groups of refugees to come to the U .S. who would otherwise be denied under this overbroad definition of "material support." However, this waiver has only been exercised once, and for only one group of Burmese refugees in one of eight refugee camps in Thailand. Furthermore, it took nine months of interagency deliberations to reach this limited result which is so narrow that it excludes hundreds of refugees inside the camp who are deserving of resettlement and thousands more who face extremely precarious situations in some of the world's most troubled regions. Just recently, twenty five Burmese refugees including two women in advanced stages of pregnancy were detained and sent into the hands of human traffickers after the United Nations High Commissioner for Refugees suspended referrals from Malaysia to the U.S. resettlement program due to the material support bar.

The current situation in which refugees are being denied the protection offered by the U.S. resettlement program runs contrary to your long-standing agenda of freedom and democracy for oppressed people all over the world and undermines the efforts of the Department of State to provide resettlement as a durable solution to refugees in need of protection. The Department of State, the Department of Justice, and the Department of Homeland Security have not placed due urgency on resolving this issue, sending a message to the world that we no longer stand with those who have been oppressed by the very regimes we oppose. Thus we ask for your direct intervention so that current implementation of the law can correspond with the intent of the law and the foreign and domestic policy objectives of the White House.

The present interpretation of the material support bar has effectively altered U.S. policy so that refugees and asylum seekers who have suffered at the hands of terrorists and despotic regimes are now no longer welcome to the U.S. as our friends. Your leadership is needed at this critical juncture so our country can be a place of freedom for those who are persecuted all over the world. Refugees cannot become the unintended victims of the war against terrorism.

We ask to meet with you concerning this grave situation and look forward to your response.

Respectfully,

Gary Bauer
President
American Values

Most Reverend Gerald R. Barnes
Bishop of San Bernardino
Chairman, U.S. Conference of Catholic Bishops' Committee on Migration

Ann Buwalda
Director
Jubilee Campaign USA

Richard Cizik
Vice President for Governmental Affairs
National Association of Evangelicals

Michael Cromartie
Vice President
Ethics and Public Policy Center

Rev. Dr. Robert Edgar
General Secretary
National Council of Churches of Christ

Deborah Fikes
Human Rights Advocacy Advisor
Ministerial Alliance of Midland, Texas

Joseph Grieboski
President
Institute on Religion and Public Policy

The Most Rev. Frank T. Griswold
Presiding Bishop and Primate
The Episcopal Church

Michael Horowitz
Senior Fellow
Hudson Institute

Jim Jacobson
President
Christian Freedom International

Jeff King
President
International Christian Concern

Dr. Richard Land
President
Southern Baptist Ethics & Religious Liberty Commission

Rev. John L. McCullough
Executive Director
Church World Service

William Murray
Chairman
Peggy Birchfield
Executive Director
Religious Freedom Coalition

Kathryn Cameron Porter
President
Leadership Council for Human Rights

Pamela D. Pryor
Director of Government Relations & Public Policy
We Care America

Rabbi David Saperstein
Director
Religious Action Center of Reform Judaism

Nina Shea
Director
Center for Religious Freedom, Freedom House

Very Reverend Thomas H. Smolich, S.J.
President
Jesuit Conference, USA

James D. Standish, JD, MBA
Executive Director
North American Religious Liberty Association

James Tonkowich
President
Institute on Religion and Democracy

Geoff Tunnicliffe
International Director/CEO
World Evangelical Alliance

Jim Winkler
General Secretary
United Methodist Church, General Board of Church and Society

Wendy Wright
President
Concerned Women for America

Angela C. Wu
Director of International Advocacy
The Becket Fund for Religious Liberty

Statement of U.S. Senator Russell D. Feingold
Senate Committee on the Judiciary
Subcommittee on Immigration, Border Security and Citizenship
Hearing on "Oversight Hearing: U.S. Refugee Admissions and Policy "
September 27, 2006

Thank you, Mr. Chairman, for holding this hearing, and I want to thank the witnesses for testifying today. Let me take a moment to express my thoughts about the direction of U.S. refugee resettlement policy.

As an advocate for human rights, I am proud that the United States has a long history of protecting and resettling refugee populations. Our country has resettled more than 2.6 million refugees since 1975. It is therefore disturbing to see a drop in refugee resettlement figures this year – a result of the passage of the REAL ID Act, which has prevented legitimate refugees from being resettled in the United States.

It is time for Congress to fix the problems created by the REAL ID Act for our refugee admissions policy. This is not about whether we should resettle people engaged in terrorist activities. There is no question that we must protect our borders and ensure that we do not admit those who seek to harm us. The vast majority of refugees, however, do not pose a terrorist threat to our country. Most refugees are victims of political or humanitarian tragedies – they are victims of warfare and persecution and face uncertain futures in refugee camps. Refugees live without stable housing or employment, lack access to health care and education, and are dependent upon their temporary host countries for protection.

We should ensure that our national security concerns are addressed without creating unnecessary obstacles that delay the resettlement of legitimate refugees who could benefit from resettlement to our country. Since the enactment of the REAL ID Act, there have been noticeable delays and a subsequent reduction in refugee resettlements. In 2005, the United States admitted 53,813 refugees, compared to just over 41,000 this year. Waits are longer, too. Refugees are often forced to wait in squalid camps and without the proper medical care for themselves and their families. The longer wait means continued instability for those living in the camps, increased costs of housing the refugees for international refugee assistance organizations, and increased costs for the temporary host countries that provide protection.

I know that the Administration is aware of the impact that the REAL ID Act is having on our refugee admissions efforts. The Departments of Homeland Security, State, and Justice have made decisions to waive the restrictions placed on a number of innocent refugees seeking resettlement. But that approach is not a realistic long-term solution to the current and burdensome resettlement policy. I encourage DOS, DOJ, and DHS to immediately resolve the status of refugees whose cases are in limbo because of the

requirements of the REAL ID Act. I also believe Congress should act soon. Congress needs to fix those provisions that have made the resettlement process cumbersome and unwieldy. I hope that these departments will work with Congress to develop a viable solution that allows for an efficient resettlement process while protecting the United States from terrorist threats.

I want to again thank the witnesses for testifying today. I hope we can continue to work together to ensure that legitimate refugee populations are provided the opportunity for a new life and future through resettlement to the United States.

Written Statement Submitted by
Michel Gabaudan,
Regional Representative for the United States of America and the Caribbean,
Office of the United Nations High Commissioner for Refugees

Oversight Hearing on U.S. Refugee Admissions and Policy

before the
United States Senate
Committee on the Judiciary
Subcommittee on Immigration, Border Security and Citizenship

226 Dirksen Senate Office Building
September 27, 2006

I. Introduction

The Office of the United Nations High Commissioner for Refugees (UNHCR) appreciates the opportunity to submit this statement to the Committee on the Judiciary Subcommittee on Immigration, Border Security and Citizenship. UNHCR is the UN refugee agency mandated by the international community to ensure refugee protection and to identify durable solutions to refugee situations. Our mandate is grounded in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, which define a refugee as a person having a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion. The United States signed the 1967 Protocol in 1968, thus obligating itself to comply with both the terms of the Protocol as well as the substantive provisions of the 1951 Refugee Convention.

UNHCR relies on the support of its Member States to fulfill its mandate. Over the past decades, virtually no partner has been as critical to our work as the United States. We depend on the United States not only for its political and financial support of our programs, but also as a model to other countries in its generous resettlement and asylum programs.

Each year, the United States resettles more refugees than all other resettlement countries combined. Over the years, United States resettlement has provided the opportunity to millions of refugees from virtually all regions of the world to begin their lives anew in safety and with dignity.

UNHCR closely partners with the United States in its resettlement efforts. In 2005, we referred more than 27,000 refugees to the United States, equal to about half of the United States resettlement program in US FY 2005. We are gravely concerned, however, about the impact of the material support and related bars on the United States resettlement system, which not only jeopardizes the ability of the United States to sustain the levels of admissions it has historically maintained, but also poses a threat to the lives and safety of refugees who remain in their host countries.[1]

II. The Material Support and Related Bars

Under international law, individuals who are, or have been, engaged in terrorism are ineligible for refugee status and protection. UNHCR, as an agency that itself performs refugee status determinations all over the world, takes very seriously its obligation to exclude from refugee protection those individuals who commit heinous acts of violence, in particular against civilians. To do otherwise would seriously undermine the integrity of the international refugee protection regime.

Current immigration law in the United States, however, defines terrorist activity and related terms so broadly that it captures many individuals who clearly are not terrorists and who pose no threat to the United States or the international community. These individuals are then barred

[1] While not the focus of this hearing, we also wish to underscore that we are equally concerned about the impact that material support and related bars have on protections normally available in the context of the United States asylum system.

from refugee protection by the United States, either through its resettlement or asylum programs. For example, a "terrorist organization" under United States law includes any organization that uses a "weapon or dangerous device with the intent to endanger the safety of one or more persons or to cause substantial damage to property," regardless of whether the organization is engaged in armed struggle against a repressive regime. Any person who is a member of, or provided "material support" to, such an organization is barred from resettlement to the United States.

Both the Department of Homeland Security and the Department of Justice have taken the position that these bars make no exception for individuals who provide assistance under duress, even if minimal, to true terrorist organizations or for those who provided support to or were members of pro-democracy groups that under immigration law as it now stands are defined as terrorist organizations. Both the underlying legislation and the Administration's interpretation of it where the legislative language and intent are not clear, are inconsistent with international refugee standards.

The Immigration and Nationality Act provides a very narrow exception to the material support bar. The Secretary of State and the Secretary of Homeland Security, after consultation with each other and the Attorney General, may "waive" application of the bar to an individual who would otherwise fall under it. There is no waiver authority for the other related terrorism bars, *e.g.*, membership in a "terrorist organization." As discussed in more detail below, experience to date has shown that the waiver authority is insufficient to address the problems created by the material support bar and would likely be insufficient, were it to be expanded, for the related terrorism bars as well.

These bars are threatening the foundation of the US refugee protection regime. While ostensibly designed for a very real and legitimate purpose--to bar the admission of individuals who wish to harm the United States and its citizenry--in actuality they throw a net so wide that they deny refuge to individuals who have faced very real threats to their lives and safety. The bars fail to accurately distinguish refugees who do not pose a risk to the United States or the international community from those who do, nor do they take into account that these groups and individuals have been previously identified by the United States Government as priority caseloads for resettlement.

III. Affected Populations

The material support and related bars are already having a widespread impact on refugee populations the United States Government had previously indicated it would process for resettlement. UNHCR has already been forced to begin diverting refugee cases away from the United States to other resettlement countries because of the bars. UNHCR recently referred approximately 1,000 Lao H'mong to Australia and other countries, despite their traditionally strong ties to the United States, because their precarious situation in Thailand could no longer await a resolution of the material support and related bars that would otherwise apply to them. UNHCR has also been compelled to divert hundreds of Colombian refugees living in Ecuador and Costa Rica to other resettlement countries, despite the fact that the United States Government funded UNHCR to initiate a resettlement program in the region.

Other caseloads identified for resettlement to the United States have been placed on indefinite hold. For example, last year, UNHCR referred 13,000 refugees from Thailand; this year the number has plummeted to less than 200. Other caseloads for which resettlement is on hold include the Karen (who are not residing in designated refugee camps) and Chin ethnic minority groups from Myanmar ("Burma"), Eritreans, Somalis, Sudanese, Ethiopians, Liberians, Vietnamese Montagnards, and Cubans.

To date, the only refugees to benefit from a waiver are Karen refugees from Myanmar residing in refugee camps in Thailand. As outlined below, however, the waiver has proven to be an insufficient remedy. The cumulative effect of the material support and related bars will make it extremely difficult for annual resettlement targets to be achieved, or for UNHCR to sustain resettlement referrals to the United States at current levels, unless the law is revised to admit more effectively refugee populations in need of protection.

IV. The Experience with the Tham Hin Camp in Thailand

Approximately 9,300 Karen refugees have been living for more than a decade in Tham Hin, a camp located in Thailand that is known for its extremely poor living conditions. The prospects for return of the refugees to Myanmar has become increasingly dim due to the ongoing armed conflict and the prevalence of human rights violations against minority groups in their home country.

In the Administration's Refugee Consultation Document for Fiscal Year 2006, the Tham Him population was named as one meriting resettlement to the United States. The State Department subsequently accepted this group for United States resettlement processing in October 2005. As a large portion of the Karen population in the camp were known to potentially fall under the material support bar, however, interviews by the United States Department of Homeland Security could not begin until a material support waiver was in place. In May 2006, the Secretary of State issued a waiver for the Karen residing in Tham Hin, the first waiver issued for material support. In issuing the waiver, the Secretary of State noted that the population in question met all other requirements for United States resettlement and posed no danger to the safety and security of the United States.

In June 2006, processing of the refugees at the Tham Hin camp began. Of the 9,300 refugees previously identified for resettlement, about 3,600 came forward for the first round of resettlement processing. More than 99 percent of those interviewed were found by the Department of Homeland Security to meet the refugee definition as contained in the 1951 Refugee Convention and the 1967 Protocol as well as in United States immigration law.

However, approximately 20 percent of those Karen who were interviewed were subsequently deemed inadmissible to the United States because their active opposition to the military regime of Myanmar constituted terrorist activity under United States immigration law. The denial rate on the basis of overly broad terrorism-related bars therefore means that almost one fifth of the refugees who *the United States has found to be in need of refugee protection and would normally have been resettled to the United States* will be forced to languish in unacceptable living conditions, their futures uncertain and their protection in jeopardy.

The Tham Hin experience demonstrates a number of weaknesses with the waiver process as a true solution for the material support problem. These include:

The length of time required to issue a waiver: In the case of Tham Hin, which was a population that had already been identified by the Administration as a priority and which received significant public attention, the process took more than seven months from the time that the United States accepted the caseload for processing until the waiver was issued. The waiver process conceivably could take even longer for populations with more complex backgrounds or for populations that are not as prominent. In the interim, refugees may be forced to live in unsafe conditions and under threat of deportation to their home countries where they may face further persecution.

Since issuance of the Tham Hin waiver, only one other waiver has been announced. That waiver effectively expanded the initial waiver to other Karen refugees residing in certain other camps in Thailand. Despite the fact that this second waiver presumably was founded on the same rationale as the first, and therefore required little additional security vetting, it still took approximately four months to be issued. Moreover, the second waiver, like the first, fails to cover other deserving refugees from Myanmar, such as those from the Chin or Karenni minority groups or even Karen who are not living in refugee camps.

The lack of clarity and predictability in the waiver process: It is essential that resettlement be based on a consistent and rational framework. Even when a waiver is issued, some portion of the beneficiary caseload may not benefit. In the case of Tham Hin, for example, about a fifth of the refugees interviewed did not benefit because the United States considers them to be "members of a terrorist organization" or to have "participated in terrorist activity," as these terms are broadly defined under the immigration laws of the United States. In other cases, UNHCR may refer a refugee who appears to be eligible under the waiver but is ultimately rejected due to how the waiver is actually applied during the adjudication process, thus rendering the future protection of that refugee uncertain.

The unpredictability of the process is compounded by the issuance of waivers for some ethnic groups but not others, even when persons of other ethnicities may have provided support to the same organization. For example, support provide by Karen refugees to the Karen National Union is waived, whereas support provided by ethnic Burman refugees to the same organization is not. In other cases, even refugees of the same ethnicity may not be covered by the waiver if they happen to reside in a different host country or refugee camp.

The cumbersome bureaucracy created by the waiver process: By statute three federal agencies are required to determine caseloads for which waivers may be issued. Moreover, while some caseloads may be quite large, as was the case with the Tham Hin population, in other cases affected by the material support bar, significant administrative time may be consumed by having to issue waivers in individual cases.

V. The Implications of the Material Support and Related Bars for International Refugee Protection

Because of our international mandate to ensure refugee protection, UNHCR is concerned not only about the impact of the material support and related bars on United States resettlement, but also about the labeling of refugees as supporters of terrorism. Such mischaracterizations will inevitably influence the attitudes and actions of other governments.

UNHCR regularly refers groups of refugees to the United States for resettlement when conditions in their homeland are not conducive to return and integration in their host country is not feasible. If the United States were to reject on the basis of terrorism-related grounds refugees who UNHCR has referred, the host country will likely interpret that rejection to mean that the refugees might endanger the security of their own citizens. The host country may then use this as a justification for its own security measures, including confinement of refugees to camps or detention centers, or possibly even the forcible return of the refugees back to their homelands where they could face further persecution. Repressive regimes also can use the United States designation as a justification for their further persecution of political and ethnic groups in similar circumstances as the refugees. Finally, other resettlement countries are likely to be reluctant to accept refugees who the United States has deemed security risks, even though, in reality, they pose no risk at all.

If host countries become less willing to tolerate the presence of refugees, if the risk of persecution is heightened in home countries, and if other countries are then no longer willing to take the rejected refugees, UNHCR--and most importantly--the individual refugees are left in an untenable situation. In fact, the safety of the refugees would be more precarious than it was before the resettlement referral. This is why UNHCR remains extremely concerned about the nearly 700 refugees who were rejected by the United States during its initial processing at the Tham Hin refugee camp and who are now stamped with a "supporter of terrorism" label despite being found by the Department of Homeland Security to be in need of refugee protection. This situation is likely to repeat itself with other refugee groups that we refer in the future.

VI. UNHCR's Response to the Material Support and Related Bars

In the absence of legislation to address the material support and related bars to resettlement, UNHCR has been compelled to adjust its own resettlement program to work around these barriers. Because our core mandate is refugee protection, UNHCR cannot put refugees at risk of further harm by referring them to the United States when there is uncertainty as to whether the United States will reject them for material support or related grounds. The success of the resettlement system depends on predictability. The refugees themselves, host governments, and UNHCR offices around the world must be able to rely on the consistent application of the refugee definition and long established criteria for United States resettlement.

Therefore, UNHCR has decided to take the following steps on an interim basis. UNHCR will refrain from finalizing the submission of any refugee group to the United States for resettlement that may be subject to material support or related bars until the United States issues an effective waiver for the group. To facilitate this process, we are recommending that the United States Government evaluate proposed resettlement groups in advance and indicate which of those

groups might be subject to material support or related bars to admission. This will enable UNHCR to then determine if referral to the United States resettlement program is in the best interests of the refugees in question or places them at greater risk.

When a waiver is not available, issued, or sufficient in scope, UNHCR will need to consider other protection options, including referral to other resettlement countries when possible. This occurred with the 1,000 Lao H'mong whom we recently referred to Australia. This step was necessary due to UNHCR's concerns over the growing number of H'mong cases that had been on hold for several months due to the material support and related bars, despite that community's strong historic ties to the United States.

UNHCR recognizes this could have a significant impact on the United States resettlement program, because to date the only refugees to benefit from the waiver process are Karen from Myanmar residing in certain refugee camps in Thailand. These waivers, issued for a highly visible refugee population, took seven months to be issued by the Secretary of State for the first camp and an additional four months for the second group of camps. However, absent a more comprehensive solution to the material support problem by the United States Government, we will have to rely on these revised procedures for any new population to be considered for resettlement to the United States. If the status quo remains--that is that large numbers of refugees face being barred from resettlement for material support or related grounds, and waivers are either not in place or available--this will undoubtedly affect the number of UNHCR referrals that can be made to the United States.

UNHCR would also like to note that we are aware of approximately 700 cases of refugees and asylees residing in the United States whose adjustment to permanent residence is on hold because the statute allows retroactive application of the material support and related bars. Because the United States requires refugees and asylees to adjust their status, these individuals are at risk of being placed in removal proceedings long after the United States granted them refugee status. This could result in the forced return of refugees who the United States has already recognized and admitted. Adjustment is the single best way to ensure the full integration of refugees into United States society, but now refugees may be reluctant to comply, knowing it might result in their deportation.

VII. Conclusion

UNHCR welcomes the efforts of the Subcommittee to address the serious protection challenges presented by the material support and related bars to admission. UNHCR fully recognizes the need for combating terrorism; however, we equally believe that this can, and should, be accomplished without eroding refugee protection. We look forward to a speedy resolution to the obstacles presented to the refugee protection regime by material support and related provisions, and to a continued and robust partnership with the United States Government on resettlement.

Thank you for considering this testimony.

For further information, please contact Wendy Young, Coordinator for US Government and External Relations, at (202) 243-7620 or youngw@unhcr.org.

Testimony on

"Oversight Hearing: U.S. Refugee Admissions and Policy"

by

Fr. Kenneth Gavin, S.J.

on behalf of

Refugee Council USA

before the

Senate Committee on the

Judiciary Subcommittee on Immigration, Border Security

and Citizenship

September 27, 2006

Thank you, Chairman Cornyn, Ranking Member Kennedy, and Members of the Senate Judiciary Subcommittee on Immigration, Border Security and Citizenship for providing me the opportunity to testify on an issue of great importance to the people of the United States—our country's role as the preeminent provider of hope, assistance and protection for the world's refugees.

I testify today both in my capacity as Vice Chair of Refugee Council USA and as National Director of Jesuit Refugee Service/USA (JRS/USA).

Refugee Council USA is a coalition of 23 non-governmental organizations focused on refugee protection. Refugee Council USA provides focused advocacy on issues affecting the protection and rights of refugees, asylum seekers, displaced persons, victims of torture, and victims of trafficking in the United States and across the world. Our particular areas of concern are adherence to international standards of refugee rights, the promotion of the right to asylum, political and financial support for UNHCR, and the promotion of durable solutions, including resettlement to the United States.

The members of Refugee Council USA are: American Refugee Committee International, Amnesty International, Center for Victims of Torture, Chaldean Federation of America, Church World Service/Immigration & Refugee Program, Episcopal Migration Ministries, Ethiopian Community Development Council, Hebrew Immigrant Aid Society, Hmong National Development, Human Rights First, International Catholic Migration Commission, International Rescue Committee, Jesuit Refugee Service/USA, Jubilee Campaign, Kurdish Human Rights Watch, Lutheran Immigration and Refugee Service, Mapendo International, Migration & Refugee Services/U.S. Conference of Catholic Bishops, National Alliance of Vietnamese American Service Agencies, Southeast Asia Resource Action Center, U.S. Committee for Refugees and Immigrants, Women's Commission for Refugee Women & Children, and World Relief.

My personal involvement with refugee protection stems from my role as National Director of Jesuit Refugee Service/USA. Based on our commitment to Catholic social teaching and in the finest tradition of American humanitarian values, the mission of Jesuit Refugee Service/USA is to accompany, serve, and defend the rights of refugees throughout the world. JRS is not a resettlement agency; rather it focuses on programs to assist the world's most vulnerable refugees and asylum seekers. Among its many programs are schools for refugees in camp settings in Thailand, Uganda, and Kenya, and for repatriated refugees in southern Sudan and Liberia. Working in partnership with fellow members of Refugee Council USA, JRS advocates strongly for generous resettlement policies in the United States and worldwide, stemming from our conviction that this is frequently the most appropriate form of protection for thousands of refugees around the world.

On behalf of both Jesuit Refugee Service and Refugee Council USA, I would like to thank you and the Congress of the United States for your essential leadership in creating and maintaining the U.S. Refugee Resettlement Program. As we continue to seek to fulfill this noble calling, and to address the array of challenges facing refugees across the globe, your role as protectors of the world's most vulnerable individuals is as critical now as ever before.

The following testimony will address Refugee Council USA's perspective on four issues: first, the RCUSA perspective of the current state of the U.S. Refugee Resettlement Program; second, the refugee protection crisis created by present interpretation and application of the "material support for

terrorist activity" bar on refugees and asylum seekers; third, structural impediments that must be overcome to facilitate protection of the greatest possible number of refugees; and fourth, the funding essential for U.S. global leadership in refugee protection.

The Current State of the Refugee Admissions Program

Since 1975 the U.S. has resettled over 2.6 million refugees. The average number of refugees admitted annually since 1980 is 98,000. In recent years, however, this number has steadily declined.

In the aftermath of September 11th, refugee admissions fell to fewer than 30,000 for the following two years while new and more stringent security standards were created and implemented to strengthen those measures already in place. By 2003 the U.S. Refugee Resettlement Program was well on its way to recovery. Admissions increased from 28,422 to 52,868 in FY04 and to 53,813 in FY05. Unfortunately this positive trend has now been reversed due largely to the effects of the newly implemented "material support" bar. As a result of this bar, only 42,000 refugees are expected to be admitted in Fiscal Year 2006. The Administration has requested the admission of only 70,000 refugees for FY 2007 and of this number has allocated only 50,000 to specific geographic processing regions, with 20,000 to be held in reserve.

Despite the disappointing number for the coming year, widespread public commitment to the humanitarian principles enshrined in this program remains strong. Local citizens and private organizations throughout the country stand ready to welcome the persecuted and to provide them a safe haven and home.

Refugee Council USA has consistently called for the admission of at least 90,000 refugees per year since the beginning of the Bush Administration. This reflects a pledge that the Administration made early in its first term to increase the program incrementally to that level over the next four years. In the view of our members, the achievement of this level of admissions would represent a significant contribution of the United States toward its responsibility to relieve the burden placed on countries of first asylum who continue to provide refuge to millions of refugees year after year. It is vital, therefore, to remember that in each year the U.S. fails to use its full capacity for resettlement, thousands in need of this form of international protection continue to subsist in desperate situations throughout the world. When admissions ceilings are not achieved, thousands of opportunities to rescue refugees are lost.

The "Material Support" Bar on Admissions: Punishing the Victims of Terrorism

Mr. Chairman, the U.S. Refugee Resettlement Program, which was well on its way to a post-September 11th recovery, faces a new, devastating threat today—the "material support" bar. The "material support" bar, the common term ascribed to the broad terrorism-related grounds of inadmissibility applied to refugees and asylum seekers, is a tragedy for refugees as well as for the moral leadership of the United States, a nation traditionally known for welcoming the victims of persecution to its shores.

Components of the material support bar, when applied individually or in combination have the dire, although unintended, effect of barring the admission and asylum of legitimate refugees who are not by any reasonable definition terrorists and who thus pose no danger to the United States. The most troubling of these components are the overly broad definition of terrorism and terrorist activity, the lack of an exception for material support provided under duress, and the lack of a *de minimis* exception for the support given.

As the law is presently applied, refugees who have been members or supporters of organizations whose activities fall within the scope of self defense against brutal governments condemned by the United States, including refugees who were trained by the U.S. and who fought side by side with U.S. soldiers, are barred from U.S. admission under the expanded terrorism definition. Examples include Montagnards and Hmong who supported the U.S. military during the Vietnam War, and Cubans who supported anti-Communist movements. Many of these refugees whom the U.S. now labels as terrorists continue to suffer persecution because of their close association with the United States. We believe that Congress and the Bush Administration should immediately address this issue so that legitimate freedom fighters and allies who pose no security threat to the United States can receive the protection they so urgently need.

Although the Administration has recently begun to exercise discretionary authority for narrowly circumscribed groups who have provided support to organizations now mistakenly labeled as "terrorists", it does not have the authority to extend such discretion to members of these organizations nor to individuals who have been trained by them. Legislation is needed to allow a distinction between actual terrorists who are a security threat to our nation and refugees who have been forced to defend their families and their freedom from oppressors.

Two additional objectionable aspects of the material support bar are the lack of any exception for those refugees who have been coerced to provide support under duress and for support that was of a very minimal nature. The "material support" bar, as it is now interpreted, denies refugee protection to *bona fide* refugees who have been forced by circumstances beyond their control or coerced under extreme duress—even at gunpoint—to provide material support, even when such support was of the most minimal value.

In many refugee producing areas, large territories are occupied, controlled and administered by opposition groups considered to be terrorist organizations under U.S. law. Refugees who live in such areas are forced by the necessities of existence to interact with these opposition groups in the course of daily life. In well known cases, such as that of Colombia, residents are forced to pay coercive fees to paramilitary or guerilla groups, are subject to the confiscation of goods, to the holding of family members for ransom, and to other forms of coercion. Refugees who flee these circumstances are now barred from the U.S. refugee admission program as supporters of terrorism, when they should in fact be recognized for what they are—victims of terrorism. Even individuals who have given as little as a glass of water to armed men who demanded it of them, or who have been forced to stand by while brigands looted their homes for what little food they possessed are barred as supporters of terrorism. Surely no reasonable person or nation should interpret such minimal, inadvertent, or involuntary contributions as support to terrorism.

Although the problems that the material support bar poses for refugee admission were identified several years ago, the only possible solution allowed by current law involves interagency negotiations between the Secretary of State, the Department of Homeland Security, and the Attorney General. The process of these negotiations has been inexcusably slow, and no comprehensive solution has been found to date. While the agencies debate which populations may be exempt from the material support bar, the U.S. refugee admissions program has practically been shut down for Colombians. The material support bar has caused substantial processing delays and has resulted in a 20 percent rejection rate for Burmese Karen in Thailand, *bona fide* refugees identified in October 2005 by the United States as in need of resettlement. Of an initial 1,500 Burmese Chin in Malaysia slated for U.S. resettlement, 1,185 have been negatively affected by the material support bar. This problem is not limited to a few instances. Other populations suffering the impact of the bar include such long-time U.S. allies as Vietnamese Montagnards and Hmong, as well as Cubans, Liberians, and Sudanese.

Not only are refugees overseas at risk, but so too are many refugees who have fled to the United States and applied for asylum in this country. Over 560 asylum requests have been placed on indefinite hold as a result of these provisions and the failure of the Department of Homeland Security to set up an effective process for refugees to seek an exemption. Asylum seekers from Colombia, Burma, Nepal, Sri Lanka, and Bhutan are among those improperly prevented from receiving asylum because of the material support bar. This state of limbo has already lasted several years for some asylum seekers, causing delays that have left many families divided, stranding refugee children seeking to join their parents in the United States in difficult and dangerous circumstances abroad, and forcing many asylum seekers to endure long periods of detention. In some cases, asylum applicants have now remained incarcerated for a year or more, even though immigration judges have ruled that they are otherwise deserving of asylum.

In light of the scope and complexity of the issues surrounding the overly broad application of the material support bar, Refugee Council USA calls for a legislative solution to this problem. Although the Secretary of State has exercised her discretionary authority with some success in the past, the problems with the material support bar are too intricate and the cases too varied to be solved through time-consuming, interagency negotiations. A more effective and comprehensive solution requires a legislative fix, which will grant the Secretary of State the authority to issue waivers to groups that are currently ineligible for this exemption, such as members and combatants of groups that have been falsely identified as "terrorist organizations." The material support statute itself must also be amended so that groups or individuals that pose no threat to the United States cannot be misnamed as terrorists, and so that people who are victims of terrorism are not further punished for any alleged collaboration with their persecutors. These legislative remedies are urgently needed to restore the U.S. Refugee Resettlement Program to its traditional scope of operation and ensure its pre-eminence, strength, and example to the world as a leader in refugee resettlement and protection in the coming years and decades.

The fact that individuals are forced to provide "material support" under the threat of death or torture should not be grounds for inadmissibility for refugees or asylum seekers seeking protection from the United States government. Yet, as far as we know, not one case in which duress is a mitigating factor has been admitted to the U.S. Even refugees whose support was coerced by rape, torture, or other extreme acts of brutality remain categorically barred from admission. Immediate legislative action should set in place procedures for exempting appropriate duress cases from the "material support" bar.

Until a full legislative solution is in place, Refugee Council USA urges the Administration to move swiftly to bring to bear such tools as it already has available to admit deserving refugees who are currently excluded by the material support provisions. Nonetheless, without a comprehensive legislative fix to this humanitarian problem, the number of refugees who are in need of protection and fall victim to this bar will continue to grow.

Structural Reforms Needed to Fulfill the United States' Refugee Protection Mission

Mr. Chairman, notwithstanding the situation stemming from the "material support" bar, Refugee Council USA believes that the State Department could achieve a far higher admissions number if several policy and procedural reforms were instituted.

In managing the refugee admissions program, the Bureau for Population, Refugees, and Migration (PRM) of the State Department has historically treated the authorized admissions number as a ceiling, not as a target. Evidence of this is the persistent, significant difference each year between the ceiling and actual arrivals. In recent years, a significant number of admission slots in the Presidential Determination has been set aside as "unallocated". This means that there is no effort to develop an operational plan for the use of these numbers, which are reserved for use in unanticipated situations.

Although the total number of refugees in the world has decreased somewhat in recent years, there remain millions of refugees for whom no durable solution has been found. These include the Burmese in Thailand, Malaysia, and Bangladesh, the Bhutanese in Nepal, Iraqi minorities and several large refugee populations in Africa. Only one large population, the 100,000 Karen in Thailand, has been identified for resettlement in the next year. The Administration does indeed deserve credit for acting to designate an exception to the "material support" bar that will allow the majority of the Karen refugees who have languished in Thailand for over ten years to be processed for resettlement. We note with dismay, however, that the current plan envisions fewer than 10,000 admissions from this group in Fiscal Year 2007. In a world where needs are so great and admissions numbers are so limited, urgent action is needed to ensure that, once a group has been identified for resettlement, its processing and movement are treated with more urgency.

The process of identifying new groups of refugees for resettlement can also be improved. Although Refugee Council USA supports the work of the UNHCR, which plays an indispensable role in refugee protection throughout the world, we believe that there continues to be an over-reliance by the U.S. government on the United Nations High Commissioner for Refugees (UNHCR) for identification of refugees in need of resettlement. This over-reliance is especially problematic given the serious funding constraints facing UNHCR.

In recent years, the shift in the refugee resettlement program from reliance on the movement of large populations in a limited number of locations toward smaller groups with compelling needs in many, less accessible locations has put an enormous strain on the limited resources and infrastructure of UNHCR and the international humanitarian community. This has created lengthy backlogs in many locations for both refugee status determinations and resettlement referrals. These backlogs pose substantial obstacles for refugees attempting to access the United States resettlement program.

In view of these limitations, alternative routes of access to the United States resettlement program must urgently be employed. First of all, utilization of "Priority -2" group designations should be enhanced to increase access to the U.S. program in light of the above challenges. The P-2 designation has provided an important avenue of protection for many "groups of special concern to the United States" over the years. It has allowed groups with compelling and similar refugee claims to access the U.S. Refugee Resettlement Program directly, without the need for an individual referral from UNHCR. This has resulted in timely and effective refugee access to durable solutions and huge savings in staff time and other resources for UNHCR. The Chin in Malaysia would be an excellent example of a group of refugees which would lend itself to a P-2 designation.

A second access route that should be more widely used is "Priority 3"--family reunification eligibility. Family unity should be a key consideration in determining which refugees are considered for resettlement in the United States. Family unity is a fundamental and universally recognized human right that applies to all individuals, regardless of their status. The "P-3" category, dedicated to reunifying refugees with immediate family members already living in the United States, is presently limited to only a few nationalities. Since Fiscal Year 2004, the P-3 designation has been further limited to those refugee applicants whose family "anchor" entered the United States as a refugee or asylee. The Refugee Council USA recommends that P-3 designations be applied to refugees of all nationalities and that the restrictions placed on eligibility for P-3 in Fiscal 2004 be rescinded. The necessary systems are already in place to address concerns about misrepresentation in this caseload.

The most vulnerable refugees in any situation must be given special attention and proactively identified for urgent consideration. As an example, within the Burmese refugee population in Thailand are some 8,000 minors living without their parents. Not all of these children are candidates for resettlement, but all are in need of evaluation and assistance. The U.S. should take a leading role in ensuring Best Interest Determinations are performed for each of these children. If UNHCR does not have the capability of ensuring that this process takes place, the U.S. should promote the use of NGO child welfare experts to assist in implementation. More generally, the U.S. should show leadership in ensuring that vulnerable refugees, including separated children, the disabled and infirm, and women at risk are consistently identified and evaluated both for immediate assistance and also for durable solutions as early as possible in each refugee situation.

Another way to augment and to complement UNHCR's referral capacity is through the use of the Targeted Response Team (TRT) model. These teams, which may involve a combination of State Department, NGO, UNHCR and DHS staff, travel, travel to regions with the purpose of identifying particular refugee groups for resettlement and/or to assess a situation for the establishment of resettlement processing. Three TRTs were conducted in 2005: the first to Thailand and Malaysia; the second to Kenya and Tanzania; and the third to Krasnador Krai, Russia. The Refugee Council USA urges the State Department to continue to mobilize regular TRTs to assist in the identification of new refugee groups in need of resettlement to the U.S.

An additional innovative way to enhance access to resettlement would be the establishment and mobilization of Rapid Response Teams, formalized structures composed of designated NGO staff who could be rapidly deployed to identify and process refugee populations for U.S. resettlement. The mission of these teams would be to engage expert NGO staff on a regular basis to analyze the resettlement needs of refugee populations around the world. These resettlement experts would then help

establish the initial processing mechanisms for identifying and referring cases for United States consideration.

Refugee Council USA applauds and encourages PRM in its efforts to engage private organizations that provide assistance to refugees in specific regions around the world in making NGO referrals of refugees for U.S. resettlement. Greater use should be made of this alternative point of access, and NGOs everywhere should be encouraged and facilitated in their efforts to refer refugees for resettlement. The growth of this initiative should be encouraged through greater involvement of NGOs with refugee processing and resettlement experience in the coordination and training of the referring agencies.

As PRM has moved in recent years to the "Overseas Processing Entity" (OPE) model, it has sometimes relied on government personnel to conduct the processing work involved in refugee resettlement. Traditionally, the use of NGOs for this purpose brought flexibility, cost effectiveness, expertise, and connections to humanitarian services which are largely lost with the substitution of U.S. Government personnel. The involvement of NGOs, especially those with resettlement expertise, has also provided important perspectives, resources, and advocacy to the process. These resources are now underutilized.

The role of the Overseas Processing Entity should be enhanced and expanded to incorporate the full range of talents and resources of the NGO community, and to allow for a direct OPE role in the identification of groups of refugees and individuals not currently being considered by the U.S. Such a model should allow the OPE to engage in direct intake, registration, and processing of refugees within a designated P-2 group, and permit the OPE to identity and screen additional individual cases of compelling concern that may merit consideration by the U.S. Refugee Resettlement Program.

Lastly, the complexities of managing the refugee admissions "pipeline" require careful contingency planning to deal with the inevitable disruptions that occur due to medical problems, local security issues, transportation delays, and access issues that develop from time to time. A proposal repeatedly made by the voluntary agencies—one which we repeat here—is that PRM should strive to maintain at all times at least a three-month pipeline of travel-ready refugees so as to provide the flexibility needed to ensure that the full admissions number is utilized each year.

Funding Needs for Refugee Admissions and Resettlement

Mr. Chairman, in addition to significant modification of the U.S. government's approach to identifying and referring refugees for resettlement, Congress and the Administration must join together to provide sufficient funding for this program to ensure its success.

The two accounts that fund admissions and resettlement activities are the Migration and Refugee Assistance (MRA) account administered by the State Department's bureau of Population, Refugees, and Migration (PRM), and the Refugee and Entrant Assistance account administered by the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services. The refugee program also relies on the State Department's Emergency Refugee and Migration Assistance (ERMA) account, which funds unanticipated emergencies.

In recent years, we have seen several alarming trends in U.S. government funding for refugees.

- The President's budget request does not include the level of funding required to admit the full number of refugees set by the Presidential Determination (PD).
- Congress is appropriating less regular funding for refugee accounts than the amount requested in the President's budget.
- Congress is funding a significant portion of the State Department's refugee budget with supplemental appropriations.
- Supplemental appropriations which allow the State Department to bring in more refugees do not include funding for the Office of Refugee Resettlement (ORR) which is responsible for resettlement services at the local level.

These trends become evident in reviewing recent spending and appropriation figures. In Fiscal Year 2004, the State Department spent over $900 million to assist and protect refugees. Yet, the President's request for Fiscal 2005 was a mere $730 million for the MRA. Congress appropriated funds above this request, funding the MRA at $764 million. However, these funds were insufficient to cover the needs of the Presidential Determination on refugee admission, and an extra $121 million in supplemental funding was necessary to provide for the admission of additional refugees and to address ongoing refugee crisis in Africa. In Fiscal 2005, PRM spend a total of $996 million.

In Fiscal 2006 there was a substantial increase in the President's request, which was set at $893 million for the MRA. Due to fiscal constraints, however, Congress appropriated over $100 million less than the President's request, providing only $783 million. Congress later realized this was insufficient, and appropriated supplemental funding exceeding $150 million.

Refugee Council USA is concerned that the FY 2007 funding levels set by the House and Senate for the refugee accounts continue the alarming trend of leaving PRM dependent on supplemental appropriations later in the year. Although actual spending to meet the needs of refugees this fiscal year will exceed $1 billion dollars for the first time in the history of the Refugee Resettlement Program, the House mark for refugees funds PRM at only $730 million. The Senate mark funds PRM at the President's request of $833 million.

This year, for the first time in several years, the President's FY07 budget request includes sufficient funding to admit the anticipated level of the Presidential Determination for this year, about 70,000 refugees. But the President's request is insufficient to meet the needs of repatriated refugees in Africa, to provide emergency food aid for refugees, to protect the internally displaced, and to help refugees work so they can eventually become less dependent on assistance.

The following chart shows that if Congress does not step in over the lame duck session to rectify the difference between the House and Senate mark for refugee assistance, the State Department will have a significant funding crisis on its hands. With the current FY07 marks, PRM may have to choose whether to assist vulnerable refugees overseas or bring more refugees to the United States. Congress has an

opportunity now to provide sufficient funding for the refugee accounts so that the question of competing dollars for refugee assistance and resettlement do not become an either/or proposition.

Refugee Funding – Basic Needs for FY07

Foreign Operations Account	President's FY07 Budget	House Mark	Senate Mark	FY07 Basic Needs	Senate Shortfall
Migration & Refugee Assistance (MRA)	$833m	$750m	$833m	$900m	$67m
Emergency Refugee & Migration Assistance (ERMA)	$55m	$30m	$55m	$80m	$25m
TOTAL	**$888m**	**$780m**	**$888m**	**$980m**	**$92m**

Refugee Council USA's initial FY07 request to the President and the Congress was $1.2 billion for the MRA account. However, we acknowledge the challenge before Congress to negotiate for additional refugee funding beyond the President's request. That is why we recommend, at a bare minimum, the MRA account be funded at $980m for FY07. If this basic level of funding is not met, the State Department will have to depend on supplemental funding for emergency needs later in the fiscal year.

The Refugee Council USA has also recommended a FY07 appropriation of $798 million for the Office of Refugee Resettlement (ORR) to meet the needs of refugees during their initial eight-month settlement period after arriving in the United States. The President's FY07 request for ORR is for $615 million, which is a moderate increase of $40m over FY06 appropriated levels. The Refugee Council USA is pleased that both the House and Senate have been able to meet the President's funding request for ORR, but feels that additional funds are needed for the early employment Match Grant program, social service grants to help states manage local services for new arrivals, and to care for domestic victims of trafficking.

Conclusion

In summary, Congress, through its oversight responsibilities for the U.S. Refugee Resettlement Program, should insist that the annual target for refugee admissions be met by the various Administration departments provided with this responsibility. Achieving this objective will require the full engagement of the U.S. government with both international agencies and the NGO community.

Legislative and administrative solutions must be found for the crisis caused by the "material support" bar that will ensure that refugees are properly recognized and offered the protection of the United States as victims of tyrannical regimes and terrorist groups, rather than barred as supporters of terrorism.

Among the reforms that should be utilized to meet the target are: expanded use of P-2 "groups of special concern" designations, a universal P-3 family reunion category, greater access for refugee minors, additional Targeted Response Team missions, initiation of a Rapid Response Team process, greater emphasis on NGO refugee referrals, expanded roles for Overseas Processing Entities in the identification of individuals and groups for resettlement, and refugee pipeline management that provides at least three months worth of travel ready refugees for resettlement.

Finally and most importantly, without adequate funding for the Migration and Refugee Assistance, Emergency Refugee and Migration Assistance and Office of Refugee Resettlement accounts, structural and legislative reform will be stymied. Congress and the Administration must recommit to providing the appropriate resources necessary to maintain the United States' traditional leadership role in refugee protection.

Refugee Council USA looks forward to working closely with Congress and the Administration in addressing the many challenges facing the U.S. Refugee Resettlement Program, and assisting in reinvigorating our country's commitment to protecting the world's refugees.

Mr. Chairman and Members of the Committee, I would like to once again thank you for giving us an opportunity to raise our concerns about the current state of the United States Refugee Resettlement Program.

TESTIMONY OF MICHAEL J. HOROWITZ
Before the
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP
of the
SENATE JUDICIARY COMMITTEE
September 27, 2006

Senator Cornyn and Members of the Committee:

I have testified before Congress on many occasions, but I have never been more grateful for the opportunity to do so than I am today.

I come before the Committee as a committed conservative who believes that in a post-9/11 world no higher priority exists for U.S. immigration law than the robust protection of U.S. national security interests and the adoption of strong anti-terrorist policies. I come as a man who proudly served in the Reagan administration and as one who admires and supports President Bush. I come as one who on the morning of 9/11/05 was meeting in the Hart Building with Senator Brownback, a Member of this Committee, at the very moment when the second and third planes struck; as one privileged to have spent time with Lisa Beamer; and as one who gains inspiration every day when leaving home by looking at the funeral service photograph of Barbara Olson.

I yield to no one in my support of vigorous U.S. anti-terrorist policies.

But it is for that very reason that I come before this Committee to seek support for the reversal of administration constructions of law that caricature the views of those of us who seek immigration policies that reflect the imperatives of the war against terrorism.

For more than two years, the administration has construed the "material support to a terrorist organization" and "terrorist organization" provisions of the Patriot and Real I.D. Acts in a manner that has caused stunned consternation on the part of liberals and conservatives, religious and human rights leaders and Congressional leaders from both parties.

These positions were described as follows by the attached August 24 letter sent to the President by religious leaders ranging from the President of the Southern Baptist Convention Ethics and Religious Liberty Commission to the General Secretary of the National Council of Churches; from the President of Concerned Women for America to the Presiding Bishop of the Episcopal Church; from the Chairman of the U.S. Conference of Catholic Bishops Committee on Migration to the General Secretary of the Midland, Texas Ministerial Alliance, from Gary Bauer to David Saperstein:

> [T]he United States has mistakenly characterized many ... refugees as having aided terrorists when they in fact were often the victims of terrorism. For example, a Christian Burmese Chin refugee who was interrogated and beaten by the Burmese military, a Sierra Leonean woman refugee who was raped repeatedly by rebels and saw her daughter attacked in front of her, a Montagnard refugee who fought alongside our troops in Vietnam, and a Colombian father who paid a ransom to obtain the release of his son are all refugees who have been refused resettlement to the United States due to a grossly misconstrued interpretation by the Department of Homeland Security of what constitutes "material support to a terrorist organization."

Likewise, the attached July 21 letter to the President sent by leaders of Jewish organizations characterized the administration's construction of the Real I.D. and Patriot Acts in the following terms:

> Under the broad definition of the term "terrorism," support for a group that is associated with armed resistance against *any* regime constitutes material support to terrorism. This is the case even if the group's actions are not terrorist acts by any customary understanding of the term, even if the government it opposes is a major human rights violator, and even if the American government openly supports the goals of the opposition group.
>
> Even refugees and asylum applicants whose actions in support of terrorist groups were forced or coerced are subject to the bar. As implemented, even those under

> extreme duress do not have any reprieve: Any contribution to a terrorist group – even if it was made at gunpoint or under threat of death – constitutes material support to terrorism. U.S. refugee and asylum adjudicators are not considering the motives, circumstances and beliefs of the refugee.
>
> Shockingly, under today's laws, Jews who bravely resisted and survived Nazi terror would be excluded from refuge in the United States. Under current policy, the Warsaw ghetto uprising would have been considered "terrorist activity" because it involved the use of weapons against persons or property for reasons other than for "mere personal monetary gain."

I have noted my support and admiration for the President. This regard is based, in no small measure, on my belief that he would summarily, indeed angrily, reject the above-described positions taken by members of his administration were they presented to him for decision. It is for this reason that I am grateful for the opportunity to testify today, for I believe that the Members of this Committee have the power to place this issue on President's desk for his personal consideration and action. It is my hope that today's hearing will cause the Members of this Committee to ask the President to personally review an administration position that converts otherwise qualified refugee and asylum applicants into terrorists because they pay modest ransoms to save their children from rape or death, and that bars otherwise qualified Hmong and Montagnard refugee applicants from joining their families in the United States and otherwise places their asylum applicants <u>and previously admitted refugees</u> at risk of deportation <u>solely because</u> members of their community fought and died for and alongside American troops in Vietnam.

The key element of the administration's position is the view that no "duress" exception can be granted to otherwise fully qualified refugee or asylum applicants if they engage in such "terrorist" acts as paying ransoms to avoid the rape of their spouses. This position has been adopted even where the applicants can:

- fully prove themselves subject to the legitimate fear of persecution in their home countries; and

- fully prove that they have not violated all other terrorism-related grounds of inadmissibility under U.S. immigration laws, including: engaging in terrorist activities; espousing terrorism; inciting terrorism; receiving military training from a designated terrorist organization; soliciting others to joint a designated terrorist organization; associating with, joining, or representing a terrorist organization; or committing a serious non-political crime outside the United States.

I believe that the administration's construction of applicable law ignores the Supreme Court's recognition that a duress defense should be implied where "given the circumstances, other reasonable men must concede that they too would not have been able to act otherwise." See, e.g., U.S. v. Bailey, 444 U.S. 394, 411 n.8 (1980); and see Fedorenko v. U.S. 449 U.S. 490 at 512-13 (1981). Likewise, I believe it inconceivable that Congress intended to bar otherwise qualified refugee applicants from admission to the United States, and previously admitted refugees, or to deport otherwise qualified asylum applicants and previously admitted refugees for such acts as the payment of a ransom to avoid the murder of a spouse -- ***acts that every Member of Congress would themselves have taken.***

Also at the heart of the administration's position is the view that every organization that takes up arms against an established government for reasons other than financial gain is to be treated as a terrorist organization – and to be so treated even where the organizations would never have been placed on any terrorist exclusion list or designated as a terrorist organization under Section 219 of the Immigration and Naturalization Act.

Here too, I believe it inconceivable that Congress intended for the Hmong and Montagnard communities who fought alongside U.S. troops in Vietnam to be deemed terrorist organizations. Further and at a minimum, I believe it inexcusable that for more than two years the administration has dragged its feet by failing to exercise its clear waiver authority to ensure that those and similar communities are not deemed *per se* terrorist communities and their members not deemed *per se* terrorists.

As the Committee is aware, such conservative leaders as Congressmen Pitts and Pence have sought to achieve a statutory return to common sense and decency by introducing legislation to override the administration's construction of the "material support" and "terrorist

organization" provisions of law. But as the Committee is equally aware, the legislative process is often a difficult and torturous one – never more so than now, as Congress approaches the end of the Session.

For that reason, I sought to explore the possibility of an *administrative* reform track when, less than two months ago, I first learned, to my astonishment, of the "material support"/"terrorist organization" impasse.

Approaching immigration organization leaders, I urged them to consider a "stroke of the pen" compromise approach that would satisfy all stated administration security concerns while at the same time authorizing carefully considered duress claims to be made and authorizing an expedited waiver process to distinguish between terrorist and non-terrorist organizations that had militarily resisted existing governments.

After they agreed to do so, I spoke with administration officials involved with the issue, and found that two security-related concerns underpinned resistance to permitting duress claims to be considered.

First, there was concern that no tightly drawn definition of duress was in place such as would require field adjudicators of refugee and asylum claims to distinguish between conduct such as the voluntary or excessive offer of support to terrorist groups and the payment of ransoms to avert legitimate death threats.

In response, and following intense internal debate, immigration group leaders agreed to support an administrative reform proposal that would require persons making claims of duress to prove that they:

1. were faced with what a reasonable person would deem a threat of death or serious bodily harm against himself or herself or someone else; and

2. acted necessarily and reasonably to avoid the threat.

Next, administration officials expressed concern that some field officers responsible for evaluating duress claims might ignore even the most tightly drawn definitions of duress and unilaterally allow illegitimate duress claims to be made.

In response, and with understandable reluctance but commendable readiness, the groups supported a second administrative reform mechanism: Requiring all field officer findings of duress be subject to timely review by the USCIS Office of Refugee, Asylum & International Operations of the Department of Homeland Security. The above review process agreed to by the immigration groups represents an extraordinary concession designed to satisfy the stated concerns of administration officials regarding the potential security implications of duress claims. It should be noted that reviews of duress decisions made by field officers can only take place under this proposal when the claims have been granted, and are not authorized when field officers deny such duress claims.

With the above reform proposal offers, I believe that no legitimate security-based ground exists for further blanket refusals to consider duress claims offered by otherwise fully qualified refugee and asylum applicants.

With respect to group exemptions for organizations that engaged in military resistance to existing governments, I was unable to find any administration official who would justify continuance of the blanket, *per se* terrorist designations now given to such organizations as Burmese supporters of the Chin National Front (CNF)/Chin National Army (CAN), the Karen National Union (KNU), the Montagnard community, the Hmong community or Cubans who supported anti-Communist movements. This point was made even clearer because, on May 3 and August 30, 2006, the Secretary of State granted statutory exemptions to Burmese Karen refugees located in Thailand who had provided material support to the Karen National Union and Karen National Liberation Army. "In principle" – albeit not yet, after more than two years, in reality -- officials at all levels of the administration have expressed support for timely fact-finding proceedings that would offer similar waivers to similarly non-terrorist groups.

I attach to this testimony the memorandum entitled "'Material Support' and 'Terrorist Organization' Issues: Memorandum on Proposed Administrative Solutions," and the critical two-page memo entitled "ADMINISTRATIVE PROPOSAL." These memos, and the latter in particular, memorialize the reforms that, save for a single, arguably required technical legislative amendment, will satisfy all stated security concerns voiced by administration officials but at the same time:

- ***permit the use of scrupulously defined and reviewed duress claims; and***

- ***expedite waiver proceedings and determinations that distinguish between terrorist and non-terrorist organizations that have engaged in military action against existing regimes.***

Adoption of the administrative reforms set forth in the attached memoranda will leave room for further consideration of such legislation as the Pitts-Pence and Coleman-Leahy bills that many refugee groups and others believe necessary to further and fairly protect the rights of legitimate refugee and asylum applicants. In particular, I believe that the Pitts-Pence bill, HR 5918, merits the active consideration of the Congress. At the same time, the administrative reforms set forth in the attached memoranda will greatly help end the impasse that, for the past two years, has excluded thousands of fully qualified refugee and asylum applicants.

I believe that administration rejection of the administrative compromise here described will cause its position on the "material support" and "terrorist organization" issues to be seen as based, not on genuine security concerns, but on a facts-be-damned anti-immigration hostility.

For this reason alone, I ask Members of this Committee to call upon the President to consider and support the administrative compromise which the immigration and other groups have offered.

I believe that reversal of the administration's positions on the "material support" and "terrorist organization" issues is called for as a matter of justice and reasonable statutory construction. But I believe that there are other reasons to do so.

First, as noted, I believe that the administration's position caricatures the views of those of us who, in the current and intense debate over U.S. immigration policy, favor tough, security-oriented policies. If "our" view is associated with policies that seek to shut the door to all refugee and asylum applicants, it will be harder for us to prevail in debates over such legitimate issues as security fences, treatment of the rogue decisions of the 9th Circuit and terrorist interrogation procedures. If the "conservative" position on immigration matters can be characterized as one that regards all of "them" as terrorists, *irrespective of the facts*, we will sadly lose credibility as we

engage in crucial debates over the full range of post 9/11 policy issues. It is this loss and not the availability of carefully vetted refugee and asylum duress claims or carefully analyzed group waiver cases that will adversely effect U.S. security interests.

Likewise, this loss of credibility will apply to the President – yet another reason why I hope that Members of this Committee will bring the administrative compromise set out in the attached memos to the direct attention of the President. As noted, I have no doubt of the decision the President will make once the "material support" and "terrorist organization" issues are set before him for decision – both because of his innate decency and because he will understand the political cost that some members of his administration have needlessly and wrongfully imposed on him by a "keep them all out" approach to the matter.

Next: While it is an absolute given that we must ensure that no one who comes to America poses a meaningful risk of engaging in terrorist activities, it is also important to recognize that blanket closure of our shores to refugee and asylum claimants will also harm U.S. national security interests. To give but two examples: The President has commendably, and against the advice of some in his administration, called for full enforcement of the refugee provisions of the North Korea Human Rights Act. Thanks to that act of Presidential leadership, a small, initial number of North Korean refugees have recently been admitted to the United States, and their presence has vividly informed millions of Americans about the nature of the Kim Jung Il regime. I believe that the concentrated presence of as few as 500 North Korean refugees will galvanize America to call for policies similar to those that allowed Soviet Jews to migrate and allowed South African blacks to vote – historic developments that profoundly enhanced American national security without a shot being fired. Likewise, an amendment to the Immigration Bill adopted by this Committee that provides S-visas to persons offering significant evidence of unlawful WMD or terrorist activities by such rogue regimes as North Korea and Iran is another example of how the world's most precious commodity – American green cards -- can be used to peacefully enhance American security. It is as a security-oriented policy *conservative* that I most object to the assertion by some fellow conservatives that post-9/11 vigilance is best exercised by using every available means, fair or otherwise, to exclude as many immigrants as possible from the United States.

Finally, the position which so many of us who agree on so little else so much here share is one that I believe to be consistent with bedrock principles of American character and history. I close by citing from Ted Olson's remarks, delivered to the Federalist Society on November 16, 2001 at the first memorial Barbara K. Olson Memorial Lecture. No one lost more than Ted Olson on 9/11, and no one had greater excuse than he to descend into bitterness and xenophobia. Yet his remarks at the Barbara Olson lecture taught that America's post-9/11 battle must be fought to preserve the best of our traditions, and that this effort obliges us to reject the counsel of persons who would systematically condemn and exclude refugee and asylum applicants seeking freedom in America. Olson spoke of an America with:

> [m]ore Jews in New York City than in Israel. More Poles in Chicago than any city in the world except Warsaw. America is home to 39 million Irish-Americans, 58 million German-Americans, 39 million Hispanic-Americans and nearly a million Japanese-Americans. And seven million Muslims [are] in America, nearly the population of New York City.

He cited President Reagan who was

> [f]ond of quoting from a letter he had received from a man who wrote, "You can go to live in Turkey, but you can't become a Turk. You can't go to live in Japan and become Japanese, [and so on for Germany, France, etc.] But ... Anyone from any corner of the world can come to America and be an American.

Olson's summarizing views, deeply relevant at the subject of today's hearing, were these:

> We welcome immigrants because nearly all of us are immigrants or descendants of immigrants who came here to enjoy America's freedoms, rights, liberties, and the opportunity, denied elsewhere, to pursue happiness and prosperity. People from all places on the globe give our country its identity, its diversity and its strength....

> We cannot and will not, dishonor or wash away the memories of those who somehow clawed their way out of poverty, tyranny and persecution to come to this country because it was America, and because they were willing to risk death to become Americans, and to give their children and grandchildren the opportunity and freedom and inspiration that makes this place America. Americans could no longer call themselves American if they could walk away from that legacy.

With the leadership of this Committee and the continued commitment of the remarkable coalition that seeks to end the blanket designation of Hmong refugees and brutalized, security-vetted victims of terrorism as terrorists, I am confident that America's great legacy – and, with it, our ability to win the war against terrorism -- will remain intact.

Senator Patrick Leahy
Opening Statement
Hearing on Refugee Admissions
Subcommittee on Immigration, Border Security and Citizenship
September 27, 2006

Mr. Chairman, thank you for holding this hearing and I thank the witnesses for being here.

I know you have several topics to cover but I want to take a minute to explain why I believe legislation is necessary to prevent further injustice resulting from the "material support" bar to refugee admissions.

After 9/11, our laws were modified in the interest of protecting national security. No one wants terrorists or their supporters to come here as refugees. But the Congress cast the net so widely that we are now denying asylum to legitimate refugees.

There are two serious problems with the law:

First, it does not make an exception for persons forced to provide "material support" under severe coercion or duress. As a result, the very facts that make up an individual refugee's claim – that he or she was terrorized by armed groups – become the same facts that are used to deny asylum.

Let me give an example: During the war in Liberia rebels came to a woman's home, shot and killed her father, raped and abducted her, and forced her to perform household tasks like laundry and cooking. She eventually escaped and made her way to a refugee camp, where she sought admission to the U.S. But the tasks she performed for the rebels – like doing laundry – were considered to be "material support" and her case was placed on indefinite hold.

Hundreds of other victims of persecution – who pose no threat to the United States – have been turned away for similar reasons. This is perverse. It is an embarrassment for a country that has been known throughout our history as a safe haven for refugees.

The second problem is the catch-all definition of "terrorist organization". It is defined as a group of two or more persons, whether organized or not, who bear arms against the ruling government. That is so broad as to include those who fought alongside the U.S. like the Montagnards in Vietnam and members of the Northern Alliance in Afghanistan.

This harsh, illogical and unintended consequence is now widely recognized – the question is how best to fix it.

Some have argued that there is no need to amend the law because the Administration has the authority to waive the law in extreme cases. But in the four years since these bars

were expanded, and after eight months of bureaucratic wrangling, the Administration has used its waiver authority only once – to protect a subset of Burmese refugees living in Thailand.

The waiver process is cumbersome – requiring the agreement of three different agencies that rarely agree: the Department of State, Department of Justice, and Department of Defense. It is also limited. While these agencies can waive in the supporters of groups that fall in the overbroad definition of "terrorist organization," the waiver does not apply to members of those groups.

And the waiver authority, although available, has never been used in cases of coercion, like the case of the Liberian woman, that cry out for relief.

Despite this, the Justice Department, according to their written testimony, apparently believes the status quo is fine. It isn't. It is unworkable, it is unfair, and it is not making us safer. The fact that they feel that way is why we need to fix the law.

It is time for Congress to act. Congressman Joseph Pitts has introduced legislation in the House that should guide our work in the Senate. His legislation includes two simple fixes: (1) an exemption for those, like the Liberian woman, who are coerced into providing support for terrorists; and (2) assurance that groups who support U.S. troops or are engaged in legitimate resistance movements are not inadvertently defined as "terrorist organizations."

Any supporter or member of one of the more than 100 designated terrorist groups will still be barred from entry into this country. The changes proposed by Congressman Pitts – changes we should all support – only amend the additional, catch-all definition of terrorist organization, leaving intact the bars for anyone associated with a designated terrorist group.

The legislation also leaves untouched the many other security and terrorism-related bars on entry. Anyone who has ever engaged in terrorist activities; espoused terrorism; incited terrorism; received military training from a designated terrorist organization; solicited others to join a designated terrorist organization; associated with, joined or represented a designated terrorist organization; or provided any sort of material support – no matter how limited – to a terrorist organization, will continue to be barred entry to the United States.

The legislation will make us safer by ensuring that supporters of the United States, and those we support, are not inadvertently labeled terrorists. We cannot effectively combat terrorism if we cannot distinguish between our friends and enemies.

It is time to bring our laws back in line with our values.

Thank you Mr. Chairman, and I hope we can work together to pass legislation like that proposed by Congressman Pitts.

STATEMENT OF

ASSISTANT SECRETARY ELLEN SAUERBREY
BUREAU OF POPULATION, REFUGEES AND MIGRATION
DEPARTMENT OF STATE

REGARDING A HEARING ON

"OVERSIGHT OF U.S. REFUGEE ADMISSIONS AND POLICY"

BEFORE THE

SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY AND CITIZENSHIP

SEPTEMBER 27, 2006

Embargoed Until 3 PM

I am pleased to participate in this afternoon's public hearing on the President's refugee admissions program for FY 2007. The Administration is committed to maintaining a robust admissions program as an integral component of our effort to promote the President's freedom agenda and to champion human dignity globally. Though FY 2006 has been a challenging year, there is much good news to report about this important humanitarian program.

Among the best news is the fact that the worldwide population of refugees is at its lowest level in 26 years – with just under 9 million in the care of UNHCR. Millions of Liberians, Afghans, Sudanese, Burundians and others have been able to return to their homelands or have found permanent refuge in asylum locations.

FY 2007 Proposed Refugee Admissions Number

The President has proposed that the United States admit up to 70,000 refugees in FY07. We would allocate 50,000 of the refugee numbers among regions based on existing or identified caseloads. The unallocated reserve of 20,000 numbers would be used as we identify additional refugee populations for processing. I have recently visited three refugee hosting countries in South and Southeast Asia – Bangladesh, Malaysia and Thailand - and saw clear evidence of the need to extend the reach of our program to thousands of refugees who require resettlement to end the limbo of unsatisfactory and unresolved protracted situations.

We enter the year with a healthy number of refugees in advanced stages of resettlement processing. We are already working with our overseas partners to process several large new populations for the program such as Burundians in Tanzania, Eritrean Kunama in Ethiopia, and vulnerable Congolese in Burundi. The Humanitarian Resettlement program in Vietnam for those who were unable to apply to the Orderly Departure Program is now underway, and the first people accorded status under this program arrived in the United States in September. While the international community is

making some, albeit slow, progress in achieving agreement on durable solutions for the 100,000 Bhutanese in Nepal, we hope that the coming year will end this decade-long stalemate and produce concrete results.

Highlights and Challenges

The program continues to target diverse populations of refugees throughout the world. We are on track to admit some 41,500 refugees representing over 60 nationalities this year. Interagency cooperation has never been more vital to the successful implementation of this program. The Refugee Corps at the Department of Homeland Security's Citizenship and Immigration Services is working closely with Department of State personnel to adjudicate the applications of those provided access to our program in more than 50 locations.

We continue to lead the world in refugee resettlement, accepting over 60% of the individuals referred by UNHCR in 2005 and admitting more refugees each year than all other resettlement countries combined. Through multilateral and bilateral efforts and bilateral representations, we have supported UNHCR in promoting the expansion of countries engaged in resettlement. Brazil, Chile, Argentina, Spain, Ireland and the United Kingdom are some of the nations that have joined in this important humanitarian work in recent years. We also continue to promote UNHCR's enhanced ability to identify and refer refugees for resettlement by working with them to ensure that field offices have the resources necessary to carry out this important task.

Our collaboration with NGOs is a critical part of our program. We have solicited and received ideas and benefited from the research of NGO colleagues regarding resettlement needs and priorities. We have also implemented a mechanism to allow NGOs engaged in refugee assistance overseas to refer compelling cases.

I am also pleased to report that, having overcome some significant obstacles, this year, we admitted the first nine North Korean refugees since the passage of the North Korean Human Rights Act. While we expect that most North

Koreans seeking refuge will continue to resettle in the Republic of Korea, we are pleased to contribute to this humanitarian effort and are working to ensure that more will be admitted here in the coming year.

It is clear that the program has felt the impact of post September 11 expansions in the scope of terrorism-related inadmissibility provisions of the Immigration and Nationality Act (INA).

As a result, the Departments of State, Homeland Security and Justice have been engaged in efforts to exercise the inapplicability provision contained in the INA. This means that these amendments do not apply to refugee applications of individuals who pose no security threat to the United States and who we would otherwise wish to approve. In consultation with the Secretary of Homeland Security and the Attorney General, the Secretary of State has twice invoked what has been referred to as the "inapplicability authority," that is, the authority not to apply to particular groups or individuals the INA provision barring those who provide material support to groups that are deemed "terrorist organizations" under the expanded definition in the law. The exercise of the inapplicability authority benefited Burmese Karen refugees in Thailand who supported groups that share US goals and pose no security threat to the US. We continue to review other populations for similar consideration and expect additional refugees will benefit from similar use of this authority in the near future.

Although Secretarial exercise of the inapplicability authority allows us to make significant progress in reaching some populations in need of resettlement, it does not provide the flexibility required in all refugee cases. For example, Cuban anti-Castro freedom fighters and Vietnamese Montagnards who fought alongside U.S. forces have been found inadmissible on this basis, as have Karen who participated in resistance to brutal attacks on their families and friends by the Burmese regime. The Administration will continue to seek solutions for these groups and to further harmonize national security concerns with the refugee admissions program.

The President's FY07 budget request would support 70,000 admissions and we urge Congress to fund the President's full request. Without a healthy

appropriation, we will be unable to offer resettlement to thousands of refugees who are in desperate need of our help.

Conclusion

The Refugee resettlement program is an enormously important foreign policy tool. Its use can also promote acceptance of other durable solutions: repatriation and local integration. We are doing our best to ensure the program is flexible and that we provide access to refugees for whom resettlement is the appropriate durable solution. It is the Administration's view that important national security concerns and counter-terrorism efforts are compatible with our historic role as the world's leader in refugee resettlement. We will continue to seek opportunities to strengthen these two important policy interests. We look forward to working with you and other concerned members of the Senate and House of Representatives to restore the necessary balance between national security concerns and our nation's legacy as a refuge for the persecuted. The United States' Refugee Admissions program has always been and remains a wonderful reflection of who we are as a people; generous, compassionate and immensely proud of our cultural diversity. As President Bush has said
"All who live in tyranny and hopelessness can know: the United States will not ignore your oppression, or excuse your oppressors. When you stand for your liberty, we will stand with you."

Thank you for your continued support of this important program. I look forward to your questions.

STATEMENT

OF

JONATHAN R. SCHARFEN
DEPUTY DIRECTOR
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
U.S. DEPARTMENT OF HOMELAND SECURITY

REGARDING A HEARING ON

"OVERSIGHT OF U.S. REFUGEE ADMISSIONS AND POLICY"

BEFORE THE

SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP

September 27, 2006
3:00 PM

Mr. Chairman and Members of the Subcommittee:

I am honored to have this opportunity to discuss the President's proposal for refugee admissions in Fiscal Year (FY) 2007. U.S. Citizenship and Immigration Services (USCIS) enthusiastically supports the proposed ceiling of 70,000 refugee admissions for the upcoming fiscal year. As an organization, we are committed to providing the staff and resources to meet the goals outlined in the Annual Report to Congress on Refugee Admissions.

The U.S. Refugee Admissions Program has adapted to the shifting and complex nature of the world refugee situation in recent years by identifying and processing smaller groups of refugees who are often located in remote areas. This is illustrated by the fact that during FY 2006, USCIS officers traveled to more than 50 countries to interview refugee applicants from nearly 60 nations.

As you know, the Department of State has overall management responsibility for the refugee program and has the lead in proposing admissions ceilings and populations to be processed. As part of the Department of Homeland Security, USCIS has responsibility for interviewing applicants for refugee resettlement, adjudicating their applications, and ensuring that necessary security checks are fully performed. For the first time this fiscal year, members of the newly formed Refugee Corps fulfilled this role for USCIS. The establishment of the Refugee Corps is a major success for the U.S. Refugee Admissions Program as a whole, and USCIS in particular. We are very grateful to the Members of this Committee and this Subcommittee for your steadfast support for this initiative from its conception to reality. The creation of a corps of Refugee Officers dedicated solely to refugee adjudications will not only provide greater consistency in adjudications, but will also increase flexibility in fielding adjudication teams, which is essential to meet the needs of a more diverse refugee program.

The first Refugee Corps Officer was hired just over a year ago, and today we have nearly 30 officers on board with others in the hiring pipeline. We plan to hire a total of 40 officers and seven supervisors. Our Refugee Officers are a talented group. They couple expertise in immigration law and adjudications with a wide range of academic and professional backgrounds and substantial international experience. The development of the Refugee Corps has coincided with an expansion of the Refugee Affairs Division at USCIS headquarters, as well, in order to support our overseas operations in areas such as training, fraud detection and deterrence, and quality assurance.

As part of the Department of Homeland Security, USCIS is dedicated to preserving and promoting our national security. At the same time, as the Secretary underscored on World Refugee Day this year, we are deeply committed to continuing to provide protection to deserving refugees around the world and to upholding our tradition as a nation of immigrants. It is the Administration's view that important national security interests and counter-terrorism efforts are not incompatible with our nation's historic role as a world leader in welcoming legal immigrants and refugees. Due to national security imperatives, legislation passed in recent years greatly expanded the definition of terrorist

activity and terrorist organizations for purposes of determining which foreign nationals may be allowed to be admitted to this country. The legislative initiatives included a provision making aliens who provide "material support" to individuals or organizations that engage in terrorist activity inadmissible to the United States. The Immigration and Nationality Act (INA) does contain a discretionary exemption to the material support inadmissibility provision, which allows the Secretary of Homeland Security or the Secretary of State, in consultation with each other and with the Attorney General, to make an unreviewable discretionary determination that the terrorist inadmissibility provision does not apply with respect to material support afforded by a foreign national.

The broad language of the terrorist activity provision in the INA has had an impact on refugee admissions this year. However, the two recent exercises of the discretionary exemption authority by Secretary of State Rice for Burmese Karen refugees living in certain camps in Thailand show that the interagency process is capable of successfully addressing these challenging issues in a way that balances our need for security with our commitment to refugee protection. It was an important step to move forward on the ethnic Karen Burmese refugees in Thailand, and we are continuing to work on an interagency basis to consider other groups that may be good candidates for future exercises of exemption authority.

For USCIS' part, we consider the first exercise of Secretary Rice's material support exemption authority to have been very successful. Our Refugee Officers who worked in the Tham Hin camp in Thailand were able to explore all relevant facts and recommend sound decisions on the eligibility of refugee applicants on a case-by-case basis. The overall approval rate for applicants in the Tham Hin Camp was approximately 80 percent, with roughly 30 percent of the total cases requiring the material support discretionary exemption. At present, the first refugees to benefit from these decisions have begun to arrive in the United States for refugee resettlement.

USCIS is committed to a strong partnership with its federal, international, and nongovernmental partners to support a robust U.S. refugee resettlement program. We are equally committed to ensuring the integrity of our adjudications process. We have taken a number of steps to enhance our ability to protect our nation's security and to deter and detect fraud. These measures include:

- Completion of interagency security checks prior to final adjudication of any refugee application.
- Development of the Training and Program Integrity section within the Refugee Affairs Division that is responsible for researching existing fraud trends, developing counter-strategies, and referring suspected cases of fraud for investigation and possible prosecution.
- Expansion of our fingerprinting capacity through the acquisition and deployment of portable fingerprinting equipment, employing appropriate standards to safeguard the information collected.

○