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Thwarting Terrorists While Protecting Innocents: The Material Support and Related Provisions of the Immigration and Nationality Act

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JAMES JAY CARAFANO: When we at The Heritage Foundation coined the term “the long war” several years ago, we did it for a very particular reason. We did it because it got to the essence of what the War on Terrorism is really about. Nobody in this town—Democrat, Republican, liberal, conservative—thinks that the threat of transnational terrorism can be dealt with in a month or a year or several years; it’s a long, protracted competition. Long wars are fought differently. In a long war you’re as concerned with protecting the power of the state to compete over time as you are with getting the enemy. It’s like running a marathon, and it’s over when the other guy quits. If you could come directly to grips with him you would, but you can’t, so the notion is to out-compete him.

To do that, there are some very essential characteristics of a good, solid strategy. Security, obviously, getting the terrorists—I don’t think anybody would dispute that—but you also have to have economic growth, not just to pay for the security, but to pay for all the other needs of the society. As Eisenhower famously said, “It’s guns and butter, stupid.” There is also the protection of civil liberties and privacies, because what enables the state to compete best over the long term is the will of the governed, and the civil society and individual privacies and liberties are what hold that together. Anybody who would say to you, “I can make you a little safer, but I’ll have to take away some of your individual liberties,” is offering you a bad choice, because they’re undermining one of the fundamental things that allows the state to compete well and win in the war of ideas.

Talking Points

- After 9/11, Congress took steps to make it harder for terrorists wishing to harm America to be lawfully admitted into the U.S.
- Restrictions enacted into law covered persons who provided any kind of support to a group of persons viewed as terrorists. The laws were also interpreted to cover those who under duress and the threat of harm to themselves or their families were forced to provide the terrorists with food, housing, or other material support.
- Even honorable individuals who had fought alongside or helped U.S. troops, such as in Vietnam, now found themselves on the wrong side of the inadmissibility bar.
- The Administration and Congress sought to refine the provision of law and to exercise administrative exemption authorities assigned to the Secretaries of State and Homeland Security to remedy this problem and allow more otherwise eligible and honorable applicants for admission, refugees, and asylees to settle in America.

This paper, in its entirety, can be found at:
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All wars are ideological struggles, and that's particularly true in a long war where victory doesn't come in a parade or a climactic battle. It's a struggle between ideas that represent a credible and legitimate way to address political, social, cultural, economic, religious problems, and ideas that are illegitimate. It's a battle between good and evil. We've made the argument that whatever your policy—from inspecting containers to invading countries—you have to address all four of those concerns equally well: security, economic growth, protection of civil liberties and privacies of your own citizens while respecting those of your allies and promoting human rights for all, and winning the war of ideas. If your policy doesn't do all four equally well, then you have the wrong answer. Go back and start over.

So the issue that we're dealing with today, which is involved in the larger issue of who can travel to America and who can stay here, is central because it touches on all four of these problems. I don't think there is an issue where you have to work harder to get it right, and where getting it right is more important.

I want to start with my colleague from the Center for Legal and Judicial Studies, Brian Walsh, to frame the issue for us and tell us why the issue of material support and how we interpret that requirement in the law is so important. Then I want to turn it over to Kelly Ryan from the State Department, then to Paul Rosenzweig from the Department of Homeland Security, to talk about what they've done to try to implement the law fairly in a way that meets all four of the essential tasks that we have laid out. Then I want to turn it back to Brian to see if we've gone far enough in serving all of our priorities equally well.

BRIAN W. WALSH: The United States in 2005 resettled approximately 54,000 refugees. My understanding is that this number is greater than the rest of the world combined. Similarly, 2.6 million refugees have been settled in the United States since 1975. This is a huge number and quite comparable to what the rest of the nations of the world combined have done. Resettlement is a big part of who we are as a nation, and it's an important record that we want to maintain and perpetuate. President

Reagan is the one to have most famously said that the United States should be like that biblical city on the hill that is a place for the persecuted and oppressed to come. And we want to make sure that tradition is maintained in the United States.

It takes our best thinking to understand what the issues are and how we deal with a greater challenge, a greater threat—a different kind of threat—than we've ever seen before. How do we ensure that people who are truly oppressed and persecuted continue to find refuge and safety in the United States, and that they have a reasonable expectation of knowing what processes we will apply when they're deciding to seek refuge here and when the federal government is making decisions on their status?

After 9/11, Congress passed a couple of different laws that changed the Immigration and Nationality Act, particularly Section 212 of the Act. Section 212 has to do with those who are seeking refuge or asylum, and who can be excluded under those provisions.

I think it made a lot of sense for Congress to ramp up the protections we had at that time, because they rightly—and I think prudently—determined that the laxity in our immigration laws had been used against us in the 9/11 attacks. And they also rightly understood that the intelligence that we had on terrorist organizations involved in the attacks, as the 9/11 Commission confirmed, was not exemplary. So we needed to get a handle on the problem—what were the weaknesses in our immigration laws, what was the threat, and how were people likely to use the laxity in our laws against us?

Also, in some cases it was not just the laxity of the laws that was a problem. Sometimes the problem was that some judges interpreted clear statutory provisions in a very liberal way in order to allow people who maybe should have been excluded in the first place into our country.

There were two places where both the REAL ID Act and the Patriot Act ramped up protections. First, Congress tightened security by making definitions broader in two specific categories. One defined what it meant to be a terrorist organization or to be engaged in terrorist activity, and the other defined what it meant to provide material support

to a terrorist organization, which would be a bar to any type of legal status as an asylee or a refugee in the United States. Both of those definitions were made extremely broad. The terrorist activity and terrorist organization definitions are so broad that it's hard to say that all of the groups and individuals they encompass would classically be defined as terrorist. Yet I think it did make some sense for Congress to make a very broad definition after 9/11, because we weren't always sure when we might be dealing with real terrorists who were not obviously members of well-known terrorist organizations. So in addition to what are called Tier 1 or Tier 2 organizations such as al-Qaeda, Hezbollah, Hamas, and others, we had other organizations that fall into a Tier 3 definition, and that broader definition ended up being a problem.

Why did it become a problem? It was a problem because it was broad enough that organizations or peoples such as the Hmong or the Montagnards, who fought alongside the United States in Vietnam, were excluded and were considered to be members of a terrorist organization under the new definitions. Many saw the injustice of it and began to voice concerns not long after the definitions were changed.

Second is in the material support arena. There's no specific exception in the statutory language for material support provided under duress—if they or a loved one were threatened with loss of life or severe bodily injury if they did not provide that material support. There isn't a clear exception for duress under the statute, but there is a waiver provision.

The Department of Homeland Security, the Department of State, and the Department of Justice were charged with making these waiver decisions. The process probably—in my view, and as I've heard some in the Administration admit as well—has taken longer than they expected or would have wanted it to. That's raised a lot of political momentum on these issues and caused us to have to revisit why it is that these statutes have been made as broad as they are and what is the correct fix.

I'm going to leave it to the two other panelists to talk about the details of what's been proposed on

the Hill, but I will mention that there has been movement by the Administration. One example is the exercise of waiver authority. There were eight waivers exercised in February, signed by Secretary Chertoff, and those included the Hmong and Montagnards, among others. In addition, the duress waiver was granted and signed in February for Tier 3 groups as well, which allows those who have provided material support only under duress to a Tier 3 organization to have the material support bar against their obtaining legal status waived on a case-by-case basis. There is an Administration proposal right now amending the language of Section 212. There also is different language amending Section 212 that has been proposed both by the Administration and by some Senators who are interested in the issue.

So with that, I'll turn it over to my colleagues on this panel with just a couple of requests. I hope they will give us a little better assessment of:

- how we have gotten to where we are now,
- why it has taken the Administration this long to get to this point of exercising its waiver authority, and
- what the plans are for continuing to make a more rational system for dealing with those who have provided material support only under duress, or who have been our allies in various conflicts throughout the world.

J. KELLY RYAN: First, I'd like to thank Heritage for letting us come to present to you what the Administration has done to date, and what we hope to do with respect to this problem.¹ I think the first thing to recall about the expansion of the inadmissibility bar is that the reason for its enactment was to make sure that no person who would do harm to the United States would get in. But I think in the breadth of the provision, through the changes in the REAL ID Act and the Patriot Act, it has negatively affected a larger number of people whom we would otherwise admit to the United States, and that is really three categories of persons: those seeking admission to the United States, asylees, and also refugees.

1. Editor's Note: Many of the reforms discussed during this event have been adopted by Congress in the omnibus foreign operations appropriations bill passed in December 2007.

But I'm here first to tell you a little bit about the history over the past three years, what has happened, what we have accomplished, and then Paul is going to talk about our legislation and where we're trying to move. Forgive me for getting in the weeds, but I think it's helpful for people to understand the particular groups that have been affected.

The Patriot Act gave us expanded language regarding the provision of material support. We identified early on in September 2004 groups of Colombians, who were, through absolute duress, contributing money and other forms of support to the FARC (Revolutionary Armed Forces of Colombia) and AUC (United Self-Defense Forces of Colombia). Their children were kidnapped, family members were threatened with harm—including murder. There is no debate about the violence that the FARC and the AUC perpetrate in Colombia. So quickly this became an issue for the Administration, and we were no longer able to admit many Colombian refugees. That began in September 2004.

With the passage of the REAL ID Act in May 2005, the numbers of Colombians admitted to the U.S. through the refugee program dropped 50 percent. This was the first group affected by the changes in the law, a group that we thought was legitimate and would otherwise deserve admission to the United States.

With the agreement of the Thai government, we moved in 2006 to process large numbers of Burmese refugees who had been living in camps in Thailand for more than a decade. These are people who have fought defensive battles against the SLORC, the Burmese junta—people who are freedom-loving and who have been persecuted severely. There has been rape, there has been systematic use of torture, there has been forced servitude—the stories are dramatic and terrible.

Our efforts to resettle the Burmese were stymied by the changes to the law on material support. At that point, we began to confer in earnest with our colleagues at DHS and the Department of Justice, and the Secretary of State signed a waiver for the camp itself. We started incrementally. The waiver permitted us to let any of the Burmese refugees living in Tham Hin into the United States if their only ground of inadmissibility was that they had provid-

ed material support to the Karen National Union. Those first waivers were granted in July 2006, and out of the ten thousand in the camp, many started coming. I must say, though, that some were reluctant to even apply for fear of being barred, and this stymied our efforts to really get this processing going. We were struck by the fact that there were actually people who had fought defensively against the Burmese junta who were not admissible to date—and they still are not. Paul will talk to you about our efforts to address that.

The next important waiver was for the Chin, they are primarily a Christian group of Burmese who again have faced terrible persecution from the Burmese government. The first Chin waivers were granted almost immediately on October 11, 2006, and that waiver was for support of the Chin National Front. Then, we began to pick up speed as we got comfortable with the process, and with the language that our three departments worked out, and the Secretary of State signed six group waivers or exemptions. Again, these were for Burmese groups: the Karenni National Progressive Party, the Arakan Liberation Party, the Chin National League for Democracy, the Kayan New Land Party. And then Secretary Rice signed exemptions for two groups that, while small in number, are important to us not just symbolically but practically. One was for the Alzados, the mountain people who fought against Castro in Cuba. I have met with some of the survivors of that group, and they have been tortured for decades by Castro. The second was for supporters of the Mustangs, whom the United States backed in attempts to overthrow the Chinese. Those waivers came into effect on January 29, 2007.

At that point, Department of Homeland Security Secretary Chertoff signed exemptions for the same groups. The ones that the Secretary of State Rice signed were for refugees; Secretary Chertoff signed waivers that cover asylees (those who are granted asylum after applying in the United States) and for any other applicants for admission. Under the exemption, applicants for admission are able to be admitted and to adjust their status (to become lawful permanent residents). Others can now get asylum if they are otherwise eligible and in the United States. And then I think the most critical piece also

was the Secretary of Homeland Security's exercise of his authority to grant duress waivers for Tier 3 organizations. Many of the cases that attract the attention in the media are the duress cases, where there is credible information that someone was raped, or forced to supply water or to cook for a rogue terrorist organization. These are some of the cases that we hope to otherwise be able to grant status whether it is refugee, asylee, or lawful permanent residence.

Our next steps ahead, though, are based on what we've learned to date from exercising these exemptions. There are people who we think are otherwise legitimate refugees and asylees who are barred because of the changes in the REAL ID Act and the Patriot Act, so we are seeking a legislative change. The Administration has sent to the Hill legislative proposals that would permit us, in an exercise of discretion, on a case-by-case basis, to permit applicants to otherwise be admissible. What it would do is in essence give back to the executive branch the discretion that it had in the past.

I'm going to stop there and let Paul talk, but I agree with Dr. Carafano very much. This is not just a practical problem, this is a battle of ideas. While we have certainly taken a long time correcting it, I think each step we have taken has built our confidence in the process and assured us that we are not unduly making ourselves open to frivolous lawsuits or false claims by persons who are trying to make their way to the United States for criminal or terrorist reasons. So I appreciate the point that it has been slow in coming, and certainly we share that view, but we are determined to continue to try to adjust the balance here so that legitimate asylees, refugees, and applicants for admission can come to and remain in the United States.

PAUL S. ROSENZWEIG: Thank you, and I echo Kelly in extending my thanks to The Heritage Foundation for inviting us to come here today and share with you our thoughts on this provision. I have to begin at a personal level by saying that this issue first came across my radar in February 2006. I had no idea that this issue existed, and actually was dragged into the meeting because the person who was supposed to meet wasn't in that day. I have personally found it to be the single most challenging issue that I deal with on a day-to-day basis at the

Department, and one that occupies a great deal more of my attention—and, candidly, the attention of senior leaders in the Administration—than you might think given the relative size of the population that is affected. That truly is because, as Jim alluded to, it's an issue that is hard to get exactly right, and that offers competing interests that point in opposite directions at times. You have to carefully manage your way through to achieve what everybody acknowledges is the just result.

I don't think there's anybody in the Administration—or in the world, for that matter—who doubts the fundamental justness of finding the way to admit as refugees or allow for adjustment of status people who have been subject to some of the horrific degradations that have occurred and formed so much of the basis of our discussion. At the same time, I don't think there's anyone who doubts the fundamental necessity of, in the first instance obviously, ensuring that America's immigration and asylum programs are not subject to fraud; but leaving that aside, that they also aren't administered in a way that enhances or increases the risk to the security of the nation. To be sure, that latter factor is statistically less likely; the volume of possibility for adverse terrorist activity through this mechanism is relatively small, but I have to tell you, it's not zero.

One of the components that took us a little bit to get running was engaging our intelligence community in an assessment of the risks in the refugee program, an area that they had never focused on before. Sometimes I'm asked what took so long, and that is one of my answers, that I'm asking people to assess risk in an area that they've never looked at before. They're used to asking, "How many tanks does the Soviet Union have?" or "Is Castro still alive?" Now we're asking them what they think about risk as an avenue of problem, and that they identify some risks. There are known fraud risks in these programs, there are known areas of concern, and so we have to not blithely respond, "We have to manage that problem." And we can't take too routinized a view such as, "Of course, yes" for everybody or "Of course, no" for everybody. Those would both be utterly irresponsible.

I certainly share Kelly's frustration and regret that perhaps this process has not moved along as quickly

as any of us might have liked, but at the same time I'm quite comfortable in defending the deliberateness with which we've approached this, given the magnitude of some of the problems that are out there. As Kelly said, we've done a great deal so far. The Secretary of State and the Secretary of Homeland Security have issued parallel waivers for eight named groups that cover both refugees overseas and asylees and adjustment-seekers here in the United States, and we've also addressed the duress question through a waiver that allows the Secretary to deem inapplicable the bar to those who provide support under duress to Tier 3 groups.

There are other things that are in the future. The first and obviously most salient is that we spent a great deal of time trying to figure out whether or not the authority we had extended to allow us to deem inapplicable the bar, not just to those who provided material support to organizations—i.e., those who had given rice or water or had washed clothes or things like that—but also whether it allowed us to waive the inapplicability bar for those who had actually become members and taken up arms in groups and had fought. The obvious reason for this interest and concern is because of groups like the Hmong and Montagnards, who had fought on the side of American troops in Vietnam and for whom the taking up of arms was not in any way contrary to American national security interests or foreign policy interests, but whose actions *de jure* fell within the text of the bar.

After going around with our lawyers for awhile, we concluded that we didn't have the discretion that we needed, and that we needed to go to Congress to get legislative authority to exercise this waiver authority that the secretaries hold—not just for supporters, but for actual combatants, with the obvious intent that when we get that authority, of exercising it for groups like the people in the Hmong villages who supported American troops in the Vietnam War. To that end, we formally put up a legislative proposal earlier this year.

The legislation would do two things. First and most important, would be to make the waiver authority that the secretaries would have coextensive with the bars. So very simply, right now the waiver authority is limited to a certain subset of the

things that might get you barred related to material support or terrorist activity. The simple fix is to make the waiver authority coextensive with the bars, and then we would anticipate exercising that authority on group-by-group bases for people where it is applicable, and on a case-by-case basis for people who didn't fit into any of the groups. The other piece of the legislation is a technical fix. I've often heard some of my colleagues in the Senate or in the NGO community wonder about a change in a sub-clause that in effect removed our authority to waive this inapplicability for the spouses and children of people who were combatants, and it involved a renumbering where Congress failed to fully renumber everything and conform all the amendments.

Portions of this legislative proposal, but not the whole thing, were advanced by Senator Patrick Leahy (D-VT) as part of the Iraq Supplemental. He also added some other things that I think the Administration would have had difficulty supporting. We never had that full discussion with the Senator because that piece of the bill was struck on a point of order and so we'll have to have that discussion in a different form and at a different time. And it's one that the Administration looks forward to engaging in, both with Senator Leahy and with Senator Jon Kyl (R-AZ), who raised the point of order. We're convinced that there is legislative language that can be supported by all parties, since everybody—including Senator Kyl—supports the fundamental goal of much of this legislation, i.e., to make it possible to provide relief to the Hmong who are here.

One of the things that makes this legislation all the more necessary is that our existing waiver authority for material support has not proved as effective as we want, because it leaves us in the uncomfortable position of being unable to address whole families, a family where the mother and the child, for example, might have been material supporters, but the father was an actual combatant. We actually encountered that in the Karen camps in Thailand. It's not that we would deny adjustment to the mother and child who are seeking refugee status—we would not—but it is the case that for familial reasons, there is reluctance on the part of some.

Others have gone forward and willingly been split up, but for some there is a natural and understandable reluctance for the mother and daughter to seek refugee status while the father is *de jure* inapplicable and must remain behind. So, besides addressing the public cases of the Hmong and Montagnards, we want to use this authority to also go back—without prejudging any ultimate executive branch decision—and look at whether or not this ought to apply as well to Karen fighters or Chin fighters who could not have otherwise come within the group.

I should add that there are two other things that are on our plate for consideration and in which we are also moving forward. First, we have not yet issued group waivers for Hmong and Montagnard material supporters, as opposed to the combatants. To a large degree that's because the number of combatants has so much overwhelmed the number of supporters, but we've taken a policy decision to issue waivers. These group waivers take a slightly different form, for a host of technical reasons, so we're working our way through what a text might look like, but it is the Administration's intention to give as much relief as we can, absent legislative change, to Hmong and Montagnards. There is a small number of them who are still in Laos, Burma, or Vietnam who might be refugees, and there's a far larger number who are here in the United States and who might take advantage of adjustments of status opportunities if we make them available, and we will do that.

The second piece is that, as Brian and Kelly mentioned, we have processed the first set of people under the Tier 3 duress waiver. There have been five refugee cases already processed and four asylum cases already processed and granted. Those were processed immediately, without having done the necessary steps of creating standard operating procedures for Citizenship and Immigration Services officials who adjudicate all the many other cases that are out there, because they were—to all appearances and to everybody who reviewed the files—obvious cases for relief. There are other, less obvious cases, so we are putting together a set of operational internal guidelines and procedures that will guide our adjudicators in the field in sorting out legitimate claims of duress from fraudulent claims.

Our experience with this process is growing, and so is our comfort level. Therefore, we are working our way towards putting together an options discussion for our department principals on extending this duress waiver to people who provided support under duress to Tier 1 and Tier 2 groups. There are obvious reasons why that is probably the singularly most problematic thing we will have to face. The Tier 1 and Tier 2 groups are some of the most problematic terrorist organizations that confront the West today: al-Qaeda and Hezbollah, to name just two. And so we want to be very careful to ensure that we put into place procedures that very clearly delineate between not only those who are justified in seeking relief and those who might seek it under fraudulent pretenses, but also those who might seek to take advantage of this process as a loophole for entry into the United States for terrorist purposes.

So that's the current state of play. We've done a great deal since the last waiver in July 2006. We've processed thousands of people; we anticipate processing many more. We anticipate moving forward with other waivers and then, if we can succeed in convincing Congress to afford the legislative authority that we need, we anticipate having the pleasure of being able to consider the very deserving cases of people like the Hmong and Montagnard combatants who fought on America's behalf.

JAMES CARAFANO: I'll turn it back over to Brian in a second to ask him how satisfied he is with the progress, but I did want to mention that both Brian and Janice Smith, also at The Heritage Foundation, have been deeply involved in this issue—talking to the Administration, talking at the Hill, talking with non-governmental organizations—and have really done yeoman's service in moving the dialogue on this issue forward. I think it's just been remarkable what they've achieved.

But let me go back to Brian and ask: Having worked on this issue for almost a year, how satisfied are you with the progress that's been made?

BRIAN WALSH: When I first got involved with the issue, we were looking at a certain set of cases that involved several of the groups that we've already mentioned, and Tier 3 duress claims in particular. So when I first was presented with the issue, those cases seemed to raise the central concerns:

What is Tier 3 duress and how can we subject people to the material support bar even though the organization to which they provided material support may not even be like what would traditionally be considered a terrorist organization, even though they are engaged in terrorist-like activities?

So I'd like to know more about these cases. My questions are going to start with numbers. I'd like to know a little bit more about the process going forward, to get some specifics. It seems to me that the issues that I first got involved in—Jim, to answer your question—are being addressed, maybe not as quickly as we would have wanted, and certainly not as quickly as many of the other people who are involved in this issue would have wanted. And then I'd like to know more about the process and how it's going to flow forward. I have been hearing that the intelligence gap was one of the key problems that required more time and study—that is, making sure that we understood how to assess these individuals and groups from an intelligence standpoint. Have we reached a place now where we have those intelligence processes in place, or is there more that needs to be done in order to make sure that we can clear people relatively quickly?

My first question is, what kind of numbers are we looking at? A year ago, one of the numbers that was widely reported was on the order of 55,000 refugees and asylees who were authorized in 2006, and it looked like we were going to end up being about 10,000 short of that number because of the problems we've mentioned. So I would like to know how many of them, even after the waiver is exercised, actually apply to 2006. Or do those waivers affect only 2007 numbers? Please help us understand where we're at today.

KELLY RYAN: The refugee number is very interesting. It's one of the few areas in international protection that is numerically limited for the United States. So we did have the money and the authority from the President after consultation with Congress last year to admit up to 70,000, and we would have admitted probably 55,000 had we had the inapplicability authority in place for the Burmese. It is definitely true that it affected our numbers last year. It is the combatants issue that is still affecting our numbers, because so many of the Burmese have had

to take up arms defensively against the junta. So while it has had an effect, at least on our 2006 numbers, we're hoping that with legislation we can move forward to use the numbers that the President has authorized for admission. This is a yearly exercise that we go through after consultation within the Administration, with the Congress, and everyone here probably knows there is strong bipartisan support for a refugee program. Since 1975 we have admitted 2.6 million refugees, many of whom are now very able contributors to our society.

So it has had a numerical effect, there is no doubt about it, but we have tried. As I said before, it's been an incremental approach; it has not gotten us some of the cases that we would like to see. There is an editorial that perhaps some of you have seen about a man named Lincoln, an amazing fellow I met in Tham Hin who has served as a teacher to the students there. He has family members in the United States, but he is a former combatant and he's now not admissible to the United States. So it's the Lincolns of the world that we need to worry about.

But on the duress, I think this was a very complicated question. These are some of the most deserving cases we have seen. These people have had to endure really terrible things, and so we're very pleased that we've had the duress exception, at least for Tier 3.

BRIAN WALSH: So the way I understand it, we have a theoretical number each year that we're supposedly allocated, and then we have a different number for which funds are actually appropriated. For instance, in 2006, 70,000 was the theoretical number. What are those numbers for 2007?

KELLY RYAN: This year we have the authority to admit up to 70,000. We have funding for 60,000, and we hope to admit up to 60,000 refugees this year worldwide.

BRIAN WALSH: What about the procedures going forward now? How does a person who perhaps is deemed to have provided material support and barred from entry or barred from legal status, find out that there is a waiver out there? Does somebody let them know?

KELLY RYAN: We don't tell them individually. We have announced through press releases, both at

the Department of State and Department of Homeland Security, any time that we have exercised this authority, but the adjudicators on the ground are aware and have been given guidance on this. They elicit responses to all the questions on eligibility for refugee status as well as admissibility to the United States. If material support is implicated, they understand very clearly how to use the inapplicability authority by bringing it to the supervisor's attention.

I think it's fair to say that we have our ducks in order, exercising authority when it's appropriate. But it's also fair to say that we don't have the full discretion that we'd like to have.

PAUL ROSENZWEIG: I should add, not only did we do the press releases; these were actual proclamations, declarations that are published in the *Federal Register*. So the federal government takes as many steps as it can to publicize this. The other piece of it that we should mention, of course, is that we work very closely with the U.N. High Commissioner for Refugees, who brings forward groups and proposes them for our consideration. That office has basically the worldwide remit of trying to manage the refugee process and match up applicants who are deserving with countries who will accept them and also help us find them. We also work closely with the whole host of non-U.N. non-governmental organizations that are all deeply engaged in the refugee and asylum processes and are more than willing to bring to our attention any places we haven't looked. At least that's been my experience.

BRIAN WALSH: In the Tier 3 category, how many people are covered by the duress exception right now? Do we have a sense of that?

PAUL ROSENZWEIG: It's hard to know, because that's an individual-by-individual determination. We have, in the refugee and asylum divisions of Citizenship and Immigration Services, a little more than 1,000 cases on hold that we think might implicate duress-based claims, based upon a review of the files. But we haven't processed them because we haven't had a process for doing so. So we haven't assessed the validity of those claims, whether or not our rough assessment from the outside looks like it's right or wrong when we talk to somebody. So that's a number that can't be confidently stated, but as a rough order of magnitude,

about 1,100 cases more or less that we've identified. And as we go through others, we may well find more that we don't know, and we may find several in that group whose preliminary review was wrong.

BRIAN WALSH: Another question involves an express duress exception for which a lot of people have advocated. A number of experts that I've talked to think it might be a good idea. But I've also talked to experts who are concerned—and I'm concerned, too—about the litigation possibilities from having express statutory language. So what is the balance on that? If we were to have express statutory language that says that the bar can be waived for persons who have provided material support only under duress, some of the cases that I've read coming out of some of the federal circuits make me concerned that judges may or may not interpret that in a very precise manner. Some judges seem to be less concerned about precise statutory language than others. So where does the Administration generally stand on that?

PAUL ROSENZWEIG: That certainly was one of the areas of the Leahy Amendment in the Iraq Supplemental that we would have wanted to have some discussions about. Our sense is that there are two problems with putting the duress area in the statute. The first is obviously definitional: what constitutes duress. I've seen proposals for specifying it, I've seen proposals limiting it to common law duress, and as with any definition, in both cases there are problems with both under- and over-inclusiveness, as well as the litigation risks of working off a hard definition that would pose some difficulties in implementation that simply force us to be more cautious.

The other piece of this, which was also implicated in the Leahy Amendment, was basically the burden of proof. That is, whether or not it is the obligation of the United States to disprove a claim of duress that is made, or the obligation of a refugee or asylum-seeker to demonstrate duress. We have standards of proof for all determinations about any claim of refugee or asylum that we would import. But if it's written as if that is part of a definition, the absence of duress, then that's one thing, but if it's written as an affirmative to the inapplicability con-

nection, that's another way of looking at it. So we would want to be very careful.

The Administration's view, generically (and obviously, this is all subject to our ongoing discussions) is that the current waiver authority encompasses our ability to make a broad duress waiver and then define who will get the benefit of a waiver within the context of internal procedures and guidances. This preferred means of implementation will (1) protect our decisions from litigation risk, (2) can be flexibly applied to each individual case rather than the alternative of trying to apply a rigid standard that has been written into a statute that could be both over- and under-inclusive, and (3) allow us to address each case and also consider the nature of the duress without having

to particularize the factors we are considering and arbitrarily exclude or include any of the various factors.

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