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Requiring a Nexus to National Security: Immigration, "Terrorist Activities," and Statutory Reform

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INTRODUCTION

Terik Ramadan, a renowned Muslim scholar and citizen of Switzerland, has been denied entry into the United States three times in the past decade despite his desire to pursue an academic career in America.[1] In January of 2004, Ramadan was offered a position at the University of Notre Dame as a professor of Islamic studies.[2] Prior to 2004, Ramadan had lectured throughout the United States at conferences sponsored by Harvard, Stanford, and Princeton.[3] In connection with his offer from Notre Dame, he was issued an H1-B work visa, shipped all of his belongings to Indiana, and enrolled his children in school. However, his visa was "prudentially" revoked last-minute on the grounds that he had violated terrorist provisions within the USA PATRIOT Act ("PATRIOT Act"), meaning that he was considered a threat to "public safety or national security interests."[4] Ramadan, though, felt that the government prevented his entry in order to "suppress dissenting voices and . . . manipulate the political debate in America" because he had "publicly criticized U.S. policy in the Middle East, the war in Iraq, the use of torture, secret CIA prisons and other government actions that undermine fundamental civil liberties."[5] Ramadan reapplied for a nonimmigrant[6] visa in October of 2004,

1. Terik Ramadan, *Why I'm Banned in the USA*, WASH. POST, Oct. 1, 2006, at B1.

2. *Id.*

3. *Id.*

4. Lihua Xu v. U.S. Dep't of State, No. 2:08–cv–1023, 2010 WL 3942723 (S.D. Ohio Oct. 6, 2010).

5. Ramadan, *supra* note 1.

6. A "nonimmigrant" is a "noncitizen who seeks entry to the United States for a specific purpose to be accomplished during a *temporary stay*." THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 396 (6th ed. 2008) (emphasis added). *See also* Immigration and Nationality Act (INA) § 101(a)(15); Randall Monger, *Nonimmigrant Admissions to the United States: 2011*, DHS ANNUAL FLOW REPORT, July 2012, at 1–2, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ni_fr_2011.pdf ("Examples of nonimmigrant classes of admission include foreign government officials; temporary visitors for business and pleasure; aliens in transit; treaty traders and investors; academic and vocational students; temporary workers;

which would have allowed him to attend various academic conferences, but he never received a response to his petition.[7] His final application, made in September 2005, was also met with silence.[8]

With the help of the American Civil Liberties Union, the American Academy of Religion, and the American Association of University Professors, Ramadan filed suit in federal court.[9] The court ordered the government to accept or reject Ramadan's September application within 90 days, stating, "[W]hile the Executive may exclude an alien for almost any reason, it cannot do so solely because the Executive disagrees with the content of the alien's speech and therefore wants to prevent the alien from sharing this speech with a willing American audience."[10] At the imposed deadline, the government denied Ramadan's final visa application, finding that he had "materially supported" terrorism by making donations to a French charity that supported humanitarian work in Palestine.[11] Interestingly, although the U.S. Embassy claimed that Ramadan "reasonably should have known"[12] that the charity issued money to Hamas, Ramadan only made donations from 1998 to 2002, and the State Department did not label the charity as a "terrorist organization"[13] until 2003.[14]

Ramadan's repeated exclusion is not surprising given the dramatic change in national security policies during the last decade, especially as these policies relate to immigration. For example, in response to the terrorist attacks of 9/11, seven hundred noncitizens who were "deemed to be 'of interest' on security grounds" were

exchange visitors; athletes and entertainers; victims of certain crimes; and family members of U.S. citizens, legal permanent residents, and special immigrants."); STEEL ON IMMIGRATION LAW § 3:37 (2d ed.) ("A grant of a nonimmigrant visa requires a showing of three things: that the applicant is a bona fide nonimmigrant (coming to the United States temporarily), that the applicant is entitled to the nonimmigrant status being sought, and that the applicant is not inadmissible to the United States, or if inadmissible, has obtained a waiver of the ground or grounds of inadmissibility.").

7. Ramadan, *supra* note 1.
8. *Id*.
9. *See* Am. Acad. of Religion v. Chertoff, 463 F. Supp. 2d 400 (S.D.N.Y. 2006).
10. *Id*. at 415.
11. Ramadan, *supra* note 1.
12. *See* Immigration and Nationality Act (INA) § 212(a)(3)(B)(iv)(VI).
13. *See id*. § 212(a)(3)(B)(vi).
14. Ramadan, *supra* note 1.

detained by the Department of Justice without bond "on the basis of immigration law violations."[15] The Department of Justice also "delayed the filing of charges or slowed hearings or final removal in such cases . . . , closed large numbers of removal hearings to the public, and sometimes . . . used classified evidence not shared with the individual in the course of the proceedings."[16]

On the legislative front, Congress passed the PATRIOT Act[17] only six weeks after 9/11, adopted the Homeland Security Act[18] in 2002, and implemented the REAL ID Act[19] in 2005. Pieces of the PATRIOT Act, Homeland Security Act, and REAL ID Act have been incorporated into various sections of the Immigration and Nationality Act ("INA")—the principal body of law that regulates federal immigration procedures (e.g., naturalization, deportation, and visa applications)—with the effect that the INA now defines "terrorism" more broadly than any other federal statute.[20] These three statutes represent only a sampling of several recently enacted anti-terrorism provisions within the INA that collectively exclude hundreds of noncitizens from entering the United States each year.[21] While this may ostensibly be seen as a victory for national security, in 2009 a spokesman for the Department of Homeland Security reported that over 10,500 people excluded under the INA's broad provisions had subsequently been granted visas upon receiving a waiver from the Secretary of State or the Secretary of Homeland

15. ALEINIKOFF ET AL., *supra* note 6, at 532.

16. *Id.*

17. USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272 (2001).

18. Homeland Security Act, Pub. L. No. 107–296, 116 Stat. 2135 (2002).

19. REAL ID Act, Pub. L. No. 109–13, Division B, § 103, 119 Stat. 231, 308–09 (2005).

20. Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 261 (2004) [hereinafter Perry, *Too Many Grails*] ("The definitions of terrorism that include the greatest amount of conduct are in immigration law."). However, it is important to note that in *McAllister v. Attorney General*, the Third Circuit found that the INA's definition of "terrorist activities" was *not* "overbroad" or "vague." 444 F.3d 178, 186 (3d Cir. 2006). The court stated, "While this definition is certainly broad, we conclude that it is neither vague nor overbroad in that it does not infringe on constitutionally protected behavior. The definition includes a great deal of conduct, but all of this conduct could reasonably constitute terrorist activities." *Id.*

21. *See, e.g.*, Enhanced Border Security and Visa Entry Reform Act, Pub. L. No. 107–173 (2002); Intelligence Reform and Terrorism Prevention Act, Pub. L. No. 108–458 (2004); Consolidated Appropriations Act, Pub. L. No. 110–161 (2008). For exclusion statistics pertaining to nonimmigrants in 2012, see *infra* note 104 and accompanying text.

Security.[22] Thus, the real victor has been inefficiency. As the spokesman conceded, "While the department views this achievement as significant, we also understand that a more efficient authorization process than the one that has been in place would reach even more people."[23]

By narrowing the definition of terrorism within the INA, those noncitizens who would otherwise receive a waiver—and therefore be considered nonthreatening to national security—could potentially receive authorization to enter the United States without having to appeal to the Secretary of State or the Secretary of Homeland Security. Acknowledging that "[t]errorism is notoriously difficult to define,"[24] this Comment seeks to carefully refine various structural and substantive aspects of the INA's definitions of terrorism by promoting a closer, more pronounced link to United States national security.

This "nexus" to national security can be implemented in two important ways. First, a nexus can be implemented within the operational aspects of the INA's anti-terrorism provisions by requiring immigration officers to make a separate and specific determination as to whether a noncitizen is likely to engage in terrorist activity after entry. This nexus would enhance the efficiency of the visa application process because much of the analysis typically conducted in the waiver decision would be accomplished at the outset rather than on appeal. Second, a substantive nexus can be established within the definition of "terrorist activity" by requiring such activity to be "unlawful" under the laws *of the United States* without respect to the laws of the place where the activity occurred, thereby providing immigration officials with a more concrete set of laws upon which to base their assessments. These suggestions are drawn from other sections of the INA, prior case law, and various federal laws, and are designed to more precisely preserve national security interests while also affording non-terrorists the opportunity to enter the United States.

Part I of this Comment overviews the intersection of national security and immigration law throughout American history as well as

22. Marisa Taylor, *Why Are U.S.-Allied Refugees Still Branded as "Terrorists?"*, MCCLATCHY NEWSPAPERS, July 26, 2009, http://www.mcclatchydc.com/2009/07/26/72362/why-are-us-allied-refugees-still.html.

23. *Id.*

24. ALEINIKOFF ET AL., *supra* note 6, at 564.

more recent developments within the INA relating to anti-terrorism measures. Part II describes the current operation and structure of the INA's national security grounds for inadmissibility, with particular focus on the terms of INA section 212(a)(3)(B), which define "engage in terrorist activity," "terrorist organization," and "terrorist activity." Part III outlines two proposals that would refine the broad nature of the INA's terrorism bar to entry by requiring a closer nexus to United States national security. Part IV concludes.

I. OVERVIEW OF THE INTERSECTION OF NATIONAL SECURITY INTERESTS AND IMMIGRATION LAW

The United States has an extensive history of excluding and deporting persons considered to be "political subversives."[25] This section provides a brief history of the confluence of national security interests and immigration law and then describes various iterations of the INA's anti-terrorism provisions, which were first enacted in 1990.

A. History of National Security Measures in the Immigration Field

Congress's first major enactments affecting both national security and immigration were the Alien and Sedition Acts of 1798, which were "primarily directed against the foreign-born and [were] propelled in part by the Federalists' resentment and distrust of the many foreigners who sided with Jefferson."[26] The Alien Act afforded the President the capacity

> at any time during the continuance of this act, to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States, within such time as shall be expressed in such order.[27]

25. *See* Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 842 (1997); Mitchell C. Tilner, *Ideological Exclusion of Aliens: The Evolution of a Policy*, 2 GEO. IMMIGR. L.J. 1, 53–57 (1987).

26. BRIAN N. FRY, AMERICAN NATIVISM IN HISTORICAL PERSPECTIVE 65 (2001).

27. Alien Act, ch. 58, 1 Stat. 570, 570–71 (1798).

The Alien Act was never directly applied to any alien,[28] although a number of foreign nationals left the United States to avoid the law's effects.[29] The Alien Act was harshly criticized by the Jefferson administration, and, as a result, was allowed to expire in 1800. The Alien Enemies Act, however, remains in effect today with little alteration and allows for the detention and removal of "all natives, denizens, or subjects" of nations or governments with which the United States is at war, following a public proclamation of the President.[30] The Alien Enemies Act was used during World War II,[31] but it has always been applied selectively and "[p]residents have stopped short of rounding up all citizens of the foreign state present in the United States."[32]

Nearly a century after the Alien and Sedition Acts were passed, the Supreme Court upheld laws designed to hinder the immigration of Chinese persons.[33] In these cases, the Court adopted the notion that a sovereign nation's power to exclude was absolute: "[t]he right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare."[34] It has been observed

28. For the purposes of this Comment, the term "alien" refers to "any person not a citizen or national of the United States." INA § 101(a)(3).

29. One author has posited that the Alien and Sedition Acts led to "the mass exodus of frightened foreigners." JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 175 (1956).

30. Alien Enemy Act of July 14, 1798, ch. 66, § 1, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21–23 (2006)). The current law reads:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.

50 U.S.C. § 21 (2006).

31. The detention of Japanese-Americans during World War II, however, was based upon general military powers and not the Alien Enemies Act. ALEINIKOFF ET AL., *supra* note 6, at 539.

32. *Id.*

33. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

34. *Fong Yue Ting*, 149 U.S. at 711. *See also Chae Chan Ping*, 130 U.S. at 609 ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government

that the Court's embrace of a plenary power of exclusion "may well have encouraged, and surely did not discourage, Congress from passing later laws permitting the exclusion and deportation of noncitizens of certain political persuasions, including anarchists, organized labor leaders, and Communist Party members."[35] For example, Congress passed the Immigration Act of 1903, which stipulated that "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law, or the assassination of public officials," could be excluded from entry.[36] The Immigration Act of 1917 then expanded the grounds for deportation to cover actions subsequent to an alien's entry.[37] This Act stated that "any alien who at any time after entry shall be found advocating or teaching [subversion]" was deportable.[38] In 1920, Congress expanded further in declaring that any alien who "wrote, published, circulated, or possessed subversive literature" could be deported.[39] In the hunt against anarchist organizations, particularly those who supported the Bolshevik regime in Russia, Attorney General A. Mitchell Palmer led the infamous "Palmer Raids" in 1919 and 1920, which led to the imprisonment of thousands and the deportation of over five hundred people.[40] Overall,

of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties.").

35. Johnson, *supra* note 25, at 843.

36. Immigration Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214, repealed by Immigration Act of February 5, 1917, ch. 29, § 38, 39 Stat. 874, 897. *See also* Johnson, *supra* note 25, at 835 ("The assassination of President McKinley by an anarchist with a foreign-sounding name, who was in fact a U.S. citizen, along with labor strife, culminated in congressional passage of a law in 1903 providing for the exclusion of anarchists.").

37. *See* Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889.

38. *Id*.

39. ALEINIKOFF ET AL., *supra* note 6, at 539 (citing Act of June 5, 1930, ch. 251, § 1, 41 Stat. 1008).

40. *Id*. Contemporary legal professors poignantly remarked that "[p]unishments of the utmost cruelty, and heretofore unthinkable in America, have become usual. Great numbers of persons arrested, both aliens and citizens, have been threatened, beaten with blackjacks, struck with fists, jailed under abominable conditions, or actually tortured." R.G. BROWN ET AL., REPORT UPON THE ILLEGAL PRACTICES OF THE UNITED STATES DEPARTMENT OF JUSTICE 4 (1920).

approximately 1250 aliens were deported between 1911 and 1940 for having engaged in subversive activities.[41]

During the Cold War and the McCarthy Era, Congress continued to enlarge statutory deportation grounds in the name of national security, this time taking aim at the Communist Party. In the Alien Registration Act of 1940, Congress determined that former members of the Communist Party were deportable as well as any person who advocated for or organized a group encouraging the "overthrow or destruction" of the United States government.[42] Ten years later, when passing the Internal Security Act of 1950, Congress again expressed its disdain for the Communist Party:

> The Communist network in the United States is inspired and controlled in large part by foreign agents . . . . There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom . . . are free to roam the country at will . . . . One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.[43]

Throughout much of the 1950s, the Supreme Court broadly upheld anti-communist statutes,[44] but later in the decade the Court eventually backtracked by requiring proof of a "meaningful association" with the Communist Party before finding grounds for deportation.[45] Numerically speaking, only 230 noncitizens were deported on ideological grounds during the 1950s despite the breadth of Congress's anti-communist enactments.[46] However, it has been argued that "raw numbers . . . cannot reveal how many citizens and noncitizens might have been chilled from engaging in political activity" during the anti-communism era "because of the possibility that they would be penalized under the law."[47]

41. U.S. Dep't of Justice, Immigration and Naturalization Serv., 1994 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERV. 166 (1996) (Table 66: Aliens Deported by Cause Fiscal Years 1908-80).

42. Alien Registration Act of 1940, ch. 439, §§ 1–4, 54 Stat. 670, 670–76 (1940) (current version at 18 U.S.C. §§ 2385–87 (1994)).

43. Internal Security Act of 1950, Pub. L. No. 81-831, § 2(12)–(14), 64 Stat. 987, 988–89 (1950).

44. *See, e.g.*, Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaugnessy, 342 U.S. 580 (1952).

45. *See* Rowoldt v. Perfetto, 355 U.S. 115, 120 (1957).

46. U.S. Dep't of Justice, *supra* note 41.

47. Johnson, *supra* note 25, at 849–50.

B. More Recent Developments in the INA: Expanding the Executive's Power to Combat Terrorism

After the Berlin Wall fell, Congress significantly curtailed the ideological grounds upon which an immigrant could be excluded. Under the Immigration Act of 1990, the sections excluding anarchists, communists, and totalitarians were largely replaced with anti-terrorism and foreign policy provisions, which permitted consular officials to bar entry to persons who had "engaged in terrorist activity" or who the officials had "reasonable grounds to believe" were likely to engage in terrorist activity after entry.[48] The 1990 Act defined terrorism without respect to the alien's intent or motivation, focusing solely on acts committed, "that is, the statutory definition allowed virtually no possibility for an individual to show that his act was done in a good cause—even to support efforts meant to bring down a tyrant the United States had denounced."[49] In order to discontinue Cold War ideological exclusion against nonimmigrants, the Act allowed previously precluded persons to request review of their excludability in an effort to remove their names from the "automated visa lookout system."[50] The Attorney General and Secretary of State were also required to regularly update their lookout books.[51]

Following the World Trade Center bombing in 1993 and the Oklahoma City bombing in 1995, Congress passed the

48. Immigration Act of 1990, Pub. L. No. 101–649, § 601(a)(3), 104 Stat. 4978 (1990). These security-related grounds of exclusion are currently included in INA § 212(a)(3). It should be clarified that *immigrants* could still be excluded for their affiliations with totalitarian parties (and this exclusion remains in effect as of March 2013), but this exclusion was no longer applicable to *nonimmigrants* after 1990. *See* INA § 212(a)(3)(D). As defined in the INA, immigrants refer to "every alien except an alien who is within one of the . . . classes of nonimmigrant aliens." *Id.* § 101(a)(15). *See also* ALEINIKOFF ET AL., *supra* note 6.

49. ALEINIKOFF ET AL., *supra* note 6, at 565. "Terrorist activities" within § 601(a)(3)(B) of the 1990 Act included the following:

> (i) In general. Any alien who
>
> (I) has engaged in a terrorist activity, or
>
> (II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is likely to engage after entry in any terrorist activity (as defined in clause (iii)), is excludable. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act, to be engaged in a terrorist activity.

50. Immigration Act of 1990 § 601(c)(1)–(2).

51. *Id.* § 601(c).

Antiterrorism and Effective Death Penalty Act ("AEDPA").[52] The AEDPA instituted a process whereby the Secretary of State could designate "terrorist organizations," and under what is now section 219 of the INA, the Secretary of State could designate a group as a "foreign terrorist organization" if it was found that "the organization [was] a foreign organization" that "engage[d] in terrorist activity" that "threaten[ed] the security of United States nationals or the national security of the United States."[53] Persons who supported such organizations became subject to criminal penalties and the Secretary of the Treasury could freeze the organization's assets.[54]

In 2001, about six weeks after 9/11, the PATRIOT Act "broadened the definition of terrorist activity and created a three-tiered system for classifying terrorist organizations."[55] Under this refashioned designation system, organizations that qualified as "foreign terrorist organizations" under the AEDPA (or INA section 219) became known as Tier I organizations. Tier II organizations also included groups publicly designated by the Secretary of State; however, Tier II organizations were not subject to asset freezing.[56] Tier III organizations encompassed any "group of two or more individuals, whether organized or not, which engage[d] in, or has a subgroup which engage[d] in" committing, planning, or preparing a terrorist activity, or gathering information on prospective targets.[57]

52. 1996 Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132.

53. INA § 219(a)(1)(A)–(C). Prior to the passage of the AEDPA, Congress modified the phrase "engage in terrorist activity" in 1995 to appear as follows:

> The term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actors knows, or reasonably should know, affords material support to any individual, organization, or government in conducting terrorist activity at any time, including any of the following acts:
>
> . . .
>
> III. The providing of any type of material support, including . . . transportation, communications, funds, . . . or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.

54. *See id.* § 219(a)(2)(C).

55. Scott Aldworth, Comment, *Terror Firma: The Unyielding Terrorism Bar in the Immigration and Nationality Act*, 14 LEWIS & CLARK L. REV. 1159, 1167 (2010).

56. INA § 212(a)(3)(B)(vi)(II).

57. *Id.* § 212(a)(3)(B)(vi)(III).

The REAL ID Act of 2005 "represented a continuation in the trend to expand the terror-related grounds for exclusion and removal" in that it "expanded the terror-related grounds for inadmissibility and deportability, and amended the definitions of 'terrorist organization' and 'engage in terrorist activity' used by the INA."[58] In particular, the REAL ID Act modified the definition of "engage in terrorist activity" to include "material support" to "any member" of a Tier II or Tier III terrorist organization.[59]

Finally, the Consolidated Appropriations Act of 2008 ("CAA") expanded the waiver authority of executive officials, exempted ten organizations[60] from designation under the INA's "terrorist organization" provisions, and formally classified the Taliban as a Tier I organization.[61] The CAA also permits the Secretary of State, in consultation with the Secretary of Homeland Security and the Attorney General, to waive nearly all terrorism-related exclusions in INA section 212(a)(3)(B).[62] However, if removal proceedings have

58. Michael John Garcia & Ruth Allen Wasem, Congressional Research Service Report RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens* (Jan. 12, 2010), at 3, *available at* http://www.fas.org/sgp/crs/homesec/RL32564.pdf.

59. *See* INA §§ 212(a)(3)(B)(iv)(VI)(cc), (dd).

60. These organizations included the Karen National Union/Karen National Liberation Army (KNU/KNLA), the Chin National Front/Chin National Army (CNF/CNA), the Chin National League for Democracy (CNLD), the Kayan New Land Party (KNLP), the Arakan Liberation Party (ALP), the Tibetan Mustangs, the Cuban Alzados, the Karenni National Progressive Party (KNPP), groups affiliated with the Hmong, and groups affiliated with the Montagnards. Consolidated Appropriations Act of 2008 (CAA), Pub. L. No. 110-161, 121 Stat. 1844, Div. J, § 691(b).

61. *See id*. § 691(d).

62. Memorandum from Michael L. Aytes, Acting Deputy Dir. of U.S. Citizenship and Immigration Serv., *Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 2008, and Updated Processing Requirements for Discretionary Exemptions to Terrorist Activity Inadmissibility Grounds* (July 28, 2008), at 2, *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/caa_691_28_july_08.pdf. The expansion of the Executive's waiver authority was in direct response to policymakers' concerns that the scope of this authority was too limited. Garcia & Wasem, *supra* note 58, at 6. For example, at a congressional hearing in 2006, Ellen Sauerbrey, a State Department official, asserted,

> 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

already commenced for an alien residing within the country, only the Secretary of Homeland Security can grant an exemption.[63] Further, the Secretary of State and the Secretary of Homeland Security may exempt a group that qualifies as a Tier III terrorist organization from that categorization as long as the group has not "engaged in terrorist activity against the United States or another democratic country" and has not "purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians."[64]

As these modern developments indicate, the INA's substantive definitions relating to terrorism have increasingly expanded since they were first adopted in 1990. The waiver authority granted in the CAA, however, could portend a reduction in the INA's broad exclusionary effects. Practically speaking, this reduction may depend on whether the United States enjoys a protracted period of domestic peace, because if the nation experiences another terrorist attack, the waiver authority may be rarely invoked or even eliminated altogether.

II. THE CURRENT OPERATION AND STRUCTURE OF INA SECTION 212(A)(3)(B) AND THE DEFINITION OF "TERRORIST ACTIVITY"

The current "security related grounds" on which a foreign national may be deemed inadmissible are located in INA section 212(a)(3). This section of the INA outlines the procedure for making security-related inadmissibility determinations and defines the core considerations involved in these determinations.

A. General Structure

Under the current version of the INA, several categories or "classes" of aliens are deemed "ineligible to receive visas and ineligible to be admitted to the United States."[65] Some of these

harmonize national security concerns with the refugee admissions program.

S. Comm. on the Judiciary, Subcomm. on Immigration, Border Sec. and Citizenship, *Hearing on*

Oversight of U.S. Refugee Admissions and Policy, 109th Cong. (2006) (testimony of Ellen Sauerbrey, Asst. Sec. for the Bureau of Population, Refugees, and Migration).

63. Aytes, *supra* note 62.

64. CAA § 691(a).

65. INA § 212(a).

excludable classes include aliens who "have a communicable disease of public health significance,"[66] those who have committed "a crime of moral turpitude" or a crime "relating to a controlled substance,"[67] aliens who have committed "particularly severe violations of religious freedom,"[68] human traffickers,[69] money launderers,[70] those who are likely to become a "public charge,"[71] and importantly for this Comment, those who are excluded on national security grounds.[72]

The national security grounds of inadmissibility, which are contained in INA section 212(a)(3), include (1) a general section covering espionage, sabotage, and the overthrow of the government by force;[73] (2) terrorist activities;[74] (3) threats to foreign policy;[75] (4) membership in totalitarian parties;[76] (5) participation in Nazi persecution, genocide, or torture;[77] (6) association with terrorist organizations;[78] and (7) recruitment or use of child soldiers.[79] The second principal section explains the exclusion for "terrorist activities" and is the subject of this Comment. It contains three key subsections that provide extensive definitions of "engage in terrorist activity," "terrorist organization," and "terrorist activity."[80]

66. *Id.* § 212(a)(1)(A)(i).
67. *Id.* § 212(a)(2)(A)(i)(I)–(II).
68. *Id.* § 212(a)(2)(G).
69. *Id.* § 212(a)(2)(H).
70. *Id.* § 212(a)(2)(I).
71. *Id.* § 212(a)(4).
72. *Id.* § 212(a)(3).
73. *Id.* § 212(a)(3)(A).
74. *Id.* § 212(a)(3)(B).
75. *Id.* § 212(a)(3)(C).
76. *Id.* § 212(a)(3)(D).
77. *Id.* § 212(a)(3)(E).
78. *Id.* § 212(a)(3)(F).
79. *Id.* § 212(a)(3)(G).
80. *See id.* § 212(a)(3)(B)(iii)–(vi). For excellent summaries of the anti-terrorism provisions within INA § 212(a)(3)(B), see Nicholas J. Perry, *The Breadth and Impact of the Terrorism-Related Grounds of Inadmissibility of the INA*, 06-10 IMMIGR. BRIEFINGS 1 (2006) [hereinafter Perry, *Grounds of Inadmissibility*]; 3B Am. Jur. 2d Aliens and Citizens § 1575; 1 Immigration Law Service 2d § 3:47; STEEL ON IMMIGRATION LAW § 11:14 (2d ed.); 23 A.L.R. Fed. 2d 171 (originally published in 2007); Garcia & Wasem, *supra* note 58, at 4–8.

B. Terrorism Grounds of Inadmissibility

Under INA section 212(a)(3)(B)(i),[81] there are nine "general" ways an alien may be found inadmissible: (1) the alien has "engaged in terrorist activity"; (2) an immigration officer has "reasonable grounds to believe" the alien engaged in or is likely to engage in terrorist activity; (3) the alien has incited terrorist activity under circumstances indicating an intent to cause death or serious bodily harm; (4) the alien is a representative of a Tier I terrorist organization; (5) the alien is a member of a Tier II terrorist organization; (6) the alien is a member of a Tier III terrorist organization; (7) the alien endorses or espouses terrorist activity or persuades others to do so; (8) the alien has received military training from a terrorist organization; (9) the alien is the spouse or child of any alien just described and the impermissible activity occurred within the last five years.[82] Several of these grounds of inadmissibility

81. INA § 212(a)(3)(B)(i) appears as follows:

(i) In General

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of —

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18, United States Code) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under the subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years, is inadmissible.

82. *See* INA § 212(a)(3)(B)(i)(I)–(IX). An exception is provided for spouses and

turn on the phrase "engage in terrorist activity," which, under section 212(a)(3)(B)(iv), includes committing, inciting to commit, preparing, planning, gathering information for, soliciting funds for, soliciting individuals to participate in, or materially supporting "terrorist activity."[83]

Inadmissibility may also result from association with a terrorist organization.[84] As described previously,[85] a "terrorist organization" can fall into one of three categories: Tier I organizations are those that are designated by the Secretary of State and can have their assets (which are either possessed or controlled by United States financial institutions) frozen by the Secretary of the Treasury;[86] Tier II organizations are also designated by the Secretary of State in consultation with the Attorney General and Secretary of Homeland Security upon finding that "the organization engages in [terrorist] activities," and this designation is published in the Federal Register;[87] and lastly, Tier III organizations represent groups "of two or more individuals, whether organized or not, which engage[] in, or ha[ve] a subgroup which engages in" terrorist activities as described in INA section 212(a)(3)(B)(iv).[88]

The definition of "engage in terrorist activity," which focuses on the way terrorism can be carried out, and the definition of "terrorist organization," which attempts to identify groups that facilitate terrorism,[89] both fail to identify what constitutes terrorism. That task

children "who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible." *Id.* § 212(a)(3)(B)(ii)(I). An exception is also provided for an alien whom the Attorney General or the consular officer has "reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible." *Id.* § 212(a)(3)(B)(ii)(II). Thus, exceptions are provided for lack of knowledge and renunciation.

83. *See id.* § 212(a)(3)(B)(iv)(I)–(VI).

84. *Id.* § 212(a)(3)(F). An alien may also be inadmissible for membership in a terrorist organization. *See id.* § 212(a)(3)(B)(i)(V), (VI).

85. *See supra* notes 52–64 and accompanying text for more discussion regarding the genesis and development of the INA's "terrorist organization" classification system.

86. INA §§ 212(a)(3)(B)(vi)(I), 219.

87. *Id.* § 212(a)(3)(B)(vi)(II). Tier II organizations, unlike Tier I organizations, cannot have their assets frozen by the Secretary of the Treasury. *See supra* note 54 and accompanying text.

88. INA § 212(a)(3)(B)(vi)(III).

89. *See also* 9/11 Commission Report, 382–83 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf ("Public designation of terrorist financiers and organizations is still part of the fight, but it is not the primary weapon. Designations are instead a form of diplomacy, as governments join together to identify named individuals and groups as terrorists. They also prevent open fundraising. Some charities that have been

is left to the definition of "terrorist activity." Under INA section 212(a)(3)(B)(iii), "terrorist activity" includes:

> any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) *and* which involves any of the following:
>
> (I) The highjacking [sic] or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
>
> (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
>
> (III) A violent attack upon an internationally protected person . . . or upon the liberty of such a person.
>
> (IV) An assassination.
>
> (V) The use of any—
>
> (aa) biological agent, chemical agent, or nuclear weapon or device, or
>
> (bb) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
>
> (VI) A threat, attempt, or conspiracy to do any of the foregoing.[90]

A connection to terrorist activity does not inevitably result in inadmissibility. As noted,[91] the Secretary of State or the Secretary of Homeland Security[92] may determine "in such Secretary's sole

identified as likely avenues for terrorist financing have seen their donations diminish and their activities come under more scrutiny, and others have been put out of business, although controlling overseas branches of Gulf-area charities remains a challenge.").

90. INA § 212(a)(3)(B)(iii) (emphasis added).

91. *See supra* notes 62–64 and accompanying text.

92. The Secretary of State is required to consult with the Attorney General and the Secretary of Homeland Security before granting a waiver. INA § 212(d)(3)(B)(i). The Secretary of Homeland Security is required to consult with the Attorney General and the Secretary of State. *Id.*

unreviewable discretion" that INA section 212(a)(3)(B), or the terrorist grounds of inadmissibility, "shall not apply with respect to an alien [or group] within the scope of that subsection."[93] Courts do not have jurisdiction to review such waivers "except in a proceeding for review of a final order of removal," a proceeding that only occurs for aliens who have already entered the United States and are now being deported.[94] Also, waivers cannot be extended to aliens who "a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity"[95] or to aliens who are members of a Tier I or Tier II terrorist organization.[96]

It should also be noted that all of the "terrorist activities" grounds of exclusion apply to "aliens,"[97] which encompasses both immigrants (including refugees applying for asylum and persons applying for permanent residency) and nonimmigrants (persons seeking to enter for a temporary stay).[98] Further, the inadmissibility sections describing "terrorist activities" can also serve as grounds for deportation.[99] Lastly, the inadmissibility grounds under INA section 212(a)(3)(B) are retroactive[100] and do not contain a statute of limitations; in other words, they "appl[y] regardless of when the activity took place."[101]

93. *Id*.

94. *Id*. A removal proceeding in this context might occur in two situations: first, the alien did something on United States soil constituting terrorist activity; second, there was after-the-fact discovery of prior terrorist activity. The broader point is that aliens generally have more judicial protection once they have been admitted into the United States. *See, e.g.*, McAllister v. Att'y Gen., 444 F.3d 178 (3d Cir. 2006); Khan v. Holder, 584 F.3d 773 (9th Cir. 2009).

95. *See* INA § 212(a)(3)(B)(i)(II).

96. *Id*. § 212(d)(3)(B)(i).

97. *Id*. § 212(a)(3)(B)(i) (denying admission for "any alien" who falls under the following sections).

98. *See supra* note 6.

99. *See* INA § 237(4)(B).

100. *See* USA PATRIOT Act, Pub. L. No. 107-56, § 411(c)(1), 115 Stat. 272, 348 (Oct. 26, 2001); REAL ID Act, Pub. L. No. 109-13, Division B, § 103(d), 119 Stat. 231, 308–09 (May 11, 2005) ("The amendments made by this section shall take effect on the date of the enactment of this division, and . . . shall apply to . . . (2) acts and conditions constituting a ground for inadmissibility, excludability, deportation, or removal occurring or existing before, on, or after such date.").

101. 9 Foreign Affairs Manual § 40.32 N1.2-1(a).

III. ANALYZING POTENTIAL MODIFICATIONS TO THE STRUCTURE AND SUBSTANCE OF "TERRORIST ACTIVITIES"

Numerous scholars have already commented on the INA's provisions relating to "terrorist organizations" and the "material support" of terrorism,[102] yet none has addressed how to procedurally determine whether a person is likely to participate in terrorist activity upon admission. Scholars have also generally failed to scrutinize the INA's expansive and highly deferential approach to the "unlawfulness" requirement in the definition of "terrorist activity."[103] This Comment attempts to fill at least part of this gap by proposing two primary ways the INA's provisions relating to "terrorist activities" can be modified to harmonize national security interests and individual rights. Moreover, these modifications could significantly benefit nonimmigrants. Very few scholars have addressed the definition and scope of "terrorist activities" with respect to nonimmigrant visa applicants, even though nonimmigrants are impacted more negatively by the terrorism bar than immigrants applying for asylum or permanent residency.[104]

102. *See, e.g.*, Noah Bialostozky, *Material Support of Peace? The On-the-Ground Consequences of U.S. and International Material Support of Terrorism Laws and the Need for Greater Legal Precision*, 36 YALE J. INTL. L. ONLINE 59 (2011); Bryan Clark & William Holahan, *Material Support: Immigration and National Security*, 59 CATH. U. L. REV. 935 (2010); Andrew Peterson, *Addressing Tomorrow's Terrorists*, 2 J. NAT'L SECURITY L. & POL'Y 297 (2008); Julie B. Shapiro, *The Politicization of the Designation of Foreign Terrorist Organizations: The Effect on the Separation of Powers*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 547 (2008); James J. Ward, *The Root of All Evil: Expanding Criminal Liability for Providing Material Support to Terror*, 84 NOTRE DAME L. REV. 471 (2008); Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with Fundamentalism*, 37 GEO. J. INT'L L. 1 (2005); Eric Broxmeyer, *The Problems of Security and Freedom: Procedural Due Process and the Designation of Foreign Terrorist Organizations Under the Anti-Terrorism and Effective Death Penalty Act*, 22 BERKELEY J. INT'L L. 439 (2004); Sahar Aziz, *The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or A Legitimate Tool for Preventing Terrorism?*, 9 TEX. J. C.L. & C.R. 45 (2003); Jordan Fischer, Note, *The United States and the Material-Support Bar for Refugees: A Tenuous Balance Between National Security and Basic Human Rights*, 5 DREXEL L. REV. 237 (2012).

103. Despite the vast amount of scholarship regarding "material support" of terrorism and the definition of "terrorist organizations" (especially as it relates to humanitarian aid), it seems that only one author has attempted to tackle the definition of "unlawful" on a substantive level. *See* Perry, *Grounds of Inadmissibility*, *supra* note 80.

104. The Bureau of Consular Affairs reported that 814 nonimmigrants were determined ineligible for admission for having participated in "terrorist activities" in 2012 whereas only 76 immigrants were denied on these grounds. *See Immigrant and Nonimmigrant Visa*

This section first addresses the rationales for refining the INA's approach to "terrorism" and then proposes two general modifications to the INA's "terrorist activities" sections. Overall, this section advocates that an alien must presently be a danger to the security of the United States in order to be denied admission under INA section 212(a)(3)(B). This nexus to national security can be reinforced through restructuring the operation of the "terrorist activities" provisions and substantively narrowing the definition of "terrorist activity."

A. Rationales for Refining the INA's Broad Definitional Net

The INA's definitions of "terrorist activity," "engage in terrorism," and "terrorist organization"—especially the qualifications for Tier III groups—are "extraordinarily broad" as Congress intended to "cast a very broad net" in protecting against terrorism.[105] Casting a "very broad net" seems reasonable when read in conjunction with the 9/11 Commission's findings in 2004:

> We found that as many as 15 of the 19 hijackers were potentially vulnerable to interception by border authorities. Analyzing their characteristic travel documents and travel patterns could have allowed authorities to intercept 4 to 15 hijackers and more effective use of information available in U.S. government databases could have identified up to 3 hijackers. . . . We also found that had the immigration system set a higher bar for determining whether individuals are who or what they claim to be—and ensuring routine consequences for violations—it could potentially have excluded, removed, or come into further contact with several hijackers who did not appear to meet the terms for admitting short-term visitors.[106]

Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act), Fiscal Year 2012, U.S. STATE DEP'T, http://www.travel.state.gov/pdf/FY12AnnualReport-TableXX.pdf (last visited Aug. 13, 2014). Current scholarship tends to focus on immigrants rather than nonimmigrants because immigrants generally have more opportunities for judicial review of their cases. *See* McAllister v. Att'y Gen., 444 F.3d 178 (3d Cir. 2006); Khan v. Holder, 584 F.3d 773 (9th Cir. 2009).

105. Gerald Neuman, *Terrorism, Selective Deportation and the First Amendment after* Reno v. AADC, 14 GEO. IMMIG. L.J. 313, 321–22 (2000). *See also* McAllister, 444 F.3d at 187 ("[T]he INA's definition of 'terrorist activity' certainly encompasses more conduct than our society, and perhaps even Congress, has come to associate with traditional acts of terrorism, *e.g.*, car bombs and assassinations.").

106. 9/11 Commission Report, *supra* note 89, at 384.

The Commission's report also stated that "the challenge for national security in an age of terrorism is to prevent the very few people who may pose overwhelming risks from entering or remaining in the United States undetected"[107] and ultimately described travel documents as being "as important as weapons" for terrorists.[108] Based on recent anti-terrorism legislation,[109] it appears that Congress has attempted to prevent those "very few people" from obtaining admission documents by implementing tremendously broad definitions of terrorism. Though well-intentioned, this approach is unlikely to solve the problem of terrorist entry.

First, it is imperative to note that the Commission's report highlights failures in the visa *process*—for example, consular officers failed to "analyze [the hijackers'] travel documents and patterns" and the immigration system failed to "set a higher bar for determining whether individuals are who or what they claim to be"—rather than definitional inadequacies.[110] Thus, maintaining and evaluating the efficacy of the Terrorist Screening Center,[111] the Interagency Border Inspections System,[112] and the Consular Lookout and Support System[113] are more likely to protect national security than casting a broad definitional net. As the Commission asserted, "[b]etter technology and training to detect terrorist travel documents are the most important immediate steps to reduce America's vulnerability to clandestine entry."[114]

Second, a broad definition of "terrorist activity" is operationalized through an ineffective expansion of the nonimmigrant visa application. The nonimmigrant visa application

107. *Id.* at 383.

108. *Id.* at 384.

109. *See supra* Part I.B.

110. 9/11 Commission Report, *supra* note 89.

111. The Terrorist Screening Center (TSC) is administered by the FBI, consolidates all terrorist watch lists, and "responds around the clock to receive and provide information to federal, state, local, and foreign governments. About 270 million persons are screened each month by frontline enforcement agencies (not solely immigration agencies) that use the database." ALEINIKOFF ET AL., *supra* note 6, at 669.

112. The Interagency Border Inspection System (IBIS) consolidates records of "potentially dangerous or otherwise ineligible individuals . . . from more than 20 federal law enforcement and intelligence agencies." *Id.*

113. The Consular Lookout and Support System (CLASS) is run by the State Department and as of 2005, CLASS was reported to contain 19.6 million records on aliens ineligible to receive visas. *Id.*

114. 9/11 Commission Report, *supra* note 89, at 385.

asks applicants to voluntarily provide information that could lead to a finding of inadmissibility on terrorism grounds. For example, the DS-160 visa application asks applicants to list the organizations to which they belong or have donated money, their current employers, names of immediate family members, whether they have any specialized military, firearms, chemical, or nuclear training, and whether they have ever been members of a paramilitary, guerilla, or insurgent group.[115] The form also asks the following questions with respect to terrorism: "[d]o you seek to engage in terrorist activities while in the United States or have you ever engaged in terrorist activities?"; "[h]ave you ever or do you intend to provide financial assistance or other support to terrorists or terrorist organizations?"; and "[a]re you a member or representative of a terrorist organization?"[116] Asking applicants to voluntarily identify terrorist grounds that would disqualify them from entry is a hopelessly ineffective means of preventing terrorism. As the 9/11 Commission observed, "Terrorists must travel *clandestinely* to meet, train, plan, case targets, and gain access to attack. To them, international travel presents great danger, because they must surface to pass through regulated channels, present themselves to border security officials, or attempt to circumvent inspection points."[117] Thus, if terrorists travel through channels requiring a visa, they are unlikely to disclose their terrorist ties in the visa application. Increasing the number of questions asked on the DS-160 form in response to an expanded definition of "terrorist activity" will do little or nothing to achieve the goals of the broader definition.

Third, the expansive definition of "terrorist activity" has produced inefficiency. Visa statistics show that 8,927,090 nonimmigrants were granted visas in 2012.[118] Of the nonimmigrant visa applications that year, 814 of them were refused (i.e., found to be ineligible) for having engaged in terrorist activities as defined in INA section 212(a)(3)(B).[119] However, 470 "terrorist activity"

115. *Online Nonimmigrant Visa Applications (DS-160)*, U.S. DEP'T OF STATE, https://ceac.state.gov/GENNIV/Default.aspx (last visited Aug. 13, 2014).

116. *Id.*

117. 9/11 Commission Report, *supra* note 89 (emphasis added).

118. *Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts Fiscal Years 2008 –2012*, U.S. STATE DEP'T, http://www.travel.state.gov/pdf/FY12AnnualReport-TableI.pdf (last visited Aug. 13, 2014).

119. *Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the*

refusals were overcome in 2012, meaning that there was evidence the ineligibility did not apply, a waiver was approved, or relief was granted through law.[120] Why, then, does Congress cast such a broad net when a substantial portion of the persons "caught" by it are subsequently permitted to pass through? It is the object of this Comment to demonstrate that refinement of the INA's structure and definition of "terrorist activities" could potentially qualify those 470 persons for entry upon their *initial* application, and thereby create a more efficient process while still preventing admission for persons who pose a legitimate terrorist threat.

Finally, as was demonstrated by the Ramadan case, a broad definition can foster erroneous decisions that harm individuals.[121] The expansiveness of the definition creates more room for immigration officials to render improper, pretextual determinations—e.g., decisions that are based on ideological or political motives.[122]

B. Structural Nexus to National Security

On the one hand, the substantive definition of "terrorist activity" cannot be eradicated because it provides a legislative basis upon which to deny entry, and providing unfettered discretion or insufficient guidance to immigration officials would certainly be unwise given the potentially grave consequences of admitting a terrorist. On the other hand, too much activity is currently captured by the substantive definitions of "terrorist activities," as is evidenced

Immigration and Nationality Act) Fiscal Year 2012, U.S. STATE DEP'T, http://www.travel.state.gov/pdf/FY12AnnualReport-TableXX.pdf (last visited Aug. 13, 2014).

120. *Id.* It is important to note that "the total number of ineligibilities overcome may not necessarily represent the same visa applicants found ineligible and recorded in the total of ineligibility findings" because "[a] visa may be refused in one fiscal year and the refusal overcome in a subsequent fiscal year." *Id.* Also, the data for 2013 indicates that 591 nonimmigrant visa applicants were refused entry on terrorism grounds while 352 refusals were overcome. *Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act) Fiscal Year 2013*, U.S. STATE DEP'T, http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXX.pdf (last visited Aug. 13, 2014). However, the data for 2013 was still considered preliminary at the time this Comment was written.

121. *See supra* notes 1–14 and accompanying text.

122. *See* American Academy of Religion v. Chertoff, 463 F. Supp. 2d 400, 405 (S.D.N.Y. 2006).

by the number of nonimmigrant visa refusals that were overcome in 2012. A middle ground can be achieved by requiring a direct nexus to national security. This section focuses on how that link can be established in terms of statutory structure and standards of proof.

1. Proposal: Consular officers, the Attorney General, or the Secretary of Homeland Security should be required to determine whether an alien is likely to engage in terrorist activity after entry, with the standard of proof being "reasonable ground to believe."

Of the nine ways an alien may be excluded under the "terrorist activities" section providing for "general" grounds of inadmissibility, only one of them—section 212(a)(3)(B)(i)(II)—includes determining whether an alien is presently a threat to national security. In other words, this determination is not mandatory. Several other sections of the INA outside of the "terrorist activities" provisions do mandate this determination. For example, INA section 212(a)(3)(D)(i), which describes aliens who are inadmissible for being "a member of or affiliated with the Communist or any other totalitarian party,"[123] states that if the alien proves that his "membership or affiliation terminated at least . . . 2 years before the date of such application . . . *and the alien is not a threat to the security of the United States*," he is admissible.[124] This language is repeated in the exception provided for close family members, wherein the Attorney General may waive the disqualification if the applicant is an immediate relative of either a United States citizen or a lawful permanent resident and "if the immigrant is not a threat to the security of the United States."[125] The relevant language in the first exception requires the alien to demonstrate he is not presently a threat to United States national security, and in the second exception, the Attorney General must be convinced that this is the case.

This same determination is required in other portions of the INA. For example, INA section 212(a)(F), which precludes the admission of aliens "who have been associated with a terrorist organization,"[126] requires the Attorney General or the Secretary of

123. *Id.* § 212(a)(3)(D)(i).

124. *Id.* § 212(a)(3)(D)(iii)(I)–(II) (emphasis added).

125. *Id.* § 212(a)(3)(D)(iv).

126. It should be emphasized that this section is *not* within the "terrorist activities"

State to engage in a two-step process to determine (1) whether the alien has been or is associated with a terrorist organization, and (2) whether the alien also "intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States."[127]

As referenced above, INA section 212(a)(3)(B)(i)(II), which is one of the nine "general" ways an alien can be excluded under the "terrorist activities" sections, prevents the admission of aliens who a consular officer, the Attorney General, or the Secretary of Homeland Security has "reasonable ground to believe" is either currently engaged in or "is likely to engage after entry" in terrorist activity.[128] In order to promote greater consistency with these other provisions of the INA and generate a stronger nexus to United States national security considerations, INA section 212(a)(3)(B)(i)(II) should be transformed to operate as a required element.

Once this subsection is transformed into a necessary element,[129] the nine grounds of exclusion within the general "terrorist activities" section, 212(a)(B)(i), should operate like the two-step process provided in section 212(a)(F). First, one of the other eight subsections within section 212(a)(B)(i) must be satisfied—e.g., the alien "engaged in terrorist activity,"[130] "endorses or espouses terrorist activity,"[131] or is a "member of a terrorist organization."[132] And second, a consular officer, the Attorney General, or the Secretary of Homeland Security must also make a specific determination regarding whether the alien is "likely" to engage in terrorist activity after entering the United States, with the standard of proof being "reasonable ground to believe."[133] Once these

provisions of INA § 212(a)(3)(B).

127. *Id.* § 212(a)(3)(F).

128. *Id.* § 212(a)(3)(B)(i)(II).

129. Making this a required element may have helped the respondent in the case of *In re* S-K-, which is discussed *infra* Part III.C: "It is clear that the respondent poses no danger whatsoever to the national security of the United States. Indeed, by supporting the [Chin National Front] in its resistance to the Burmese junta, it is arguable that the respondent actually acted in a manner consistent with United States foreign policy. And yet we cannot ignore the clear language that Congress chose in the material support provisions . . . ." 23 I. & N. Dec. 936, 950 (BIA 2006) (Osuna, Juan, concurring).

130. INA § 212(a)(3)(B)(i)(I).

131. *Id.* § 212(a)(3)(B)(i)(VII).

132. *Id.* § 212(a)(3)(B)(i)(V).

133. Or, as was discussed in the first exception to totalitarian party membership, Congress could require the alien to affirmatively demonstrate to the satisfaction of immigration

modifications are made, INA section 212(a)(B)(i) would appear as follows:

> Any alien who a consular officer, the Attorney General, or the Secretary of Homeland Security knows or has reasonable ground to believe—
>
> (I) has engaged in a terrorist activity;
>
> (II) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;
>
> (III) is a representative (as defined in clause (v)) of —
>
> (aa) a terrorist organization (as defined in clause (vi)); or
>
> (bb) a political, social, or other group that endorses or espouses terrorist activity;
>
> (IV) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);
>
> (V) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;
>
> (VI) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;
>
> (VII) has received military-type training (as defined in section 2339D(c)(1) of title 18, United States Code) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); *or*
>
> (VIII) is the spouse or child of an alien who is inadmissible under the subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,
>
> is inadmissible; *and*
>
> (IX) who a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage in terrorist activity (as defined in

officials that he is not a threat to national security. *See supra* notes 123–25 and accompanying text.

clause (iv)) *against United States security interests*[134] after entry,

is inadmissible.

Modifying section 212(a)(B)(i) to operate like section 212(a)(F) would not eradicate the definitions of "engage in terrorism," "terrorist organization," or "terrorist activity," and, consequently, is not a drastic departure from the current structure of the INA. Further, while section 212(a)(B)(i)(II) currently provides for a "reasonable ground to believe" standard of proof, the INA's terrorism bar lacks a uniform standard, which could help provide consistency and clarity to a complex set of laws. The United States Supreme Court has asserted that a standard of proof serves to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[135] Therefore, uniformly implementing a "reasonable ground to believe" standard of proof would ensure that immigration officials are not casting the "net of exclusion" based on guesses and inferences, but are relying on reasonable evidence in support of their conclusions. While some might argue that instituting a uniform standard would allow easier entry for terrorists, consular officials are already statutorily required to provide the reasons for refusing an application.[136] Thus, the uniform standard would merely ensure that these grounds are reasonable. Moreover, "reasonable ground to believe" is a relatively low threshold that is significantly easier to satisfy than "preponderance of the evidence," which is the typical standard applied in civil and administrative proceedings.[137]

Finally, instituting this two-step process expedites the overall visa application procedure because these two steps are essentially the same analysis performed in the waiver determination, which is detailed in INA section 212(d)(3). As the Board of Immigration

134. For discussion of the requirement that terrorist activity be against United States security interests, see *infra* Part III.B.1.a.

135. Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

136. *See* 22 C.F.R. § 41.121(b)(1) (2013).

137. *See, e.g.*, *Addington*, 441 U.S. at 423; Hoffman v. Loud, 111 Mich. 156, 158 (1896) ("In civil cases, a preponderance of evidence is all that is required, and by a 'preponderance of evidence' is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.").

Appeals explained in *Matter of Hranka*,[138] the Attorney General must consider "the risk of harm to society if the applicant is admitted" when deciding whether to grant a waiver to a nonimmigrant visa applicant.[139] Under the proposed version, this risk assessment would have to be performed by the consular officer at the outset rather than on appeal. Furthermore, because aliens who are denied visas are likely to apply for waivers anyway, conducting this analysis in the initial determination expedites the process.

a. The separate determinations requirement and Cheema.

The application of this two-step process was effectively illustrated by the Ninth Circuit in *Cheema v. Ashcroft*.[140] Most importantly, *Cheema* demonstrates that each step of the process should be considered independently to ensure that "reasonable grounds" are provided to support each determination.

In this case, Harpal Singh Cheema (Cheema) and his wife, Rajwinder Kaur (Kaur), petitioned the Ninth Circuit for review of an order from the Board of Immigration Appeals denying them withholding of deportation and asylum.[141] At the time of their petitions, an alien was ineligible for withholding of deportation when there were "reasonable grounds for regarding [the alien] as a danger to the security of the United States."[142] In interpreting this provision, the Ninth Circuit stated that "an alien excludable for participation in terrorist activity *is not automatically a danger to the United States*, and that the bar to relief requires a *separate determination* with respect to the alien's danger to national security."[143] The Ninth Circuit adopted the Board's three-pronged test for determining whether an alien poses a danger to national

138. 16 I. & N. Dec. 491 (BIA 1978).

139. *Id.* at 491. The Board of Immigration Appeals stated that "the seriousness of the applicant's immigration law, or criminal law violation, if any" and "the nature of the applicant's reasons for wishing to enter the United States" must also be weighed. *Id.*

140. 383 F.3d 848 (9th Cir. 2004).

141. *Id.* at 850.

142. *Id.* at 856 (quoting INA § 243(h)(2)(D)). Similarly, under a former version of the INA that was applied in this case, an alien could not be granted asylum if he had participated in terrorist activity unless the Attorney General determined "that there were not reasonable grounds for regarding the alien as a danger to the security of the United States." *Id.* at 855 (quoting INA § 208, as amended by AEDPA § 421).

143. *Id.* at 855 (emphasis added).

security.[144] This test stipulated that when "an alien acts in a way which (1) endangers the lives, property, or welfare of United States citizens; (2) compromises the national defense of the United States; or (3) materially damages the foreign relations or economic interests of the United States," the alien is considered a danger to national security.[145] Significantly, the court also interpreted "reasonable grounds" to mean "substantial evidence"—i.e., a prong of the test could only be satisfied if it was supported by substantial evidence.[146]

With respect to Kaur, the Ninth Circuit held that her petition for withholding deportation should be granted because "the Board's conclusion that her donations to Indian widows and orphaned children 'obviously' and 'inherently' posed a danger to the security of the United States stretches speculation to its breaking point."[147] Although the Board had determined that those donations were to Sikh militants rather than widows and orphans, there were no facts presented by the INS to support this claim.[148]

With respect to Cheema, the Board had concluded that he engaged in terrorist activity by soliciting funds for Sikh resistance organizations in India.[149] Consequently, in applying the first and second prongs of the national security test, the Board denied his request for withholding of removal because "'[i]t is clear that those who engage in terrorism within the United States, even when that terrorism is not directly aimed at the United States, necessarily endanger the lives, property, and welfare of United States citizens and compromises our national defense.'"[150] The Ninth Circuit adamantly rejected this "self-evident" conclusion, stating that the Board failed to articulate any substantial evidence that would "link the finding of terrorist activity affecting India with one of the criteria [or prongs] [of] . . . our national security [test]."[151] The court continued in asserting that activities posing a danger to one nation—even if those activities are militant—do not *necessarily* present a danger to United States national security, as "[o]ne country's

144. *Id.* at 856.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 853.
149. *Id.* at 857.
150. *Id.*
151. *Id.*

terrorist can often be another country's freedom-fighter."[152] Accordingly, Cheema's petition for withholding of deportation was remanded so that the Board could base its determination concerning whether Cheema posed a threat to United States security on evidence rather than inferences.[153] It is necessary to note, however, that the *Cheema* decision has subsequently been limited to cases in which a refugee filed for asylum before April 1, 1997, because *Cheema* was based on previous versions of the asylum and withholding statutes.[154]

In terms of establishing a nexus to national security, the applications of *Cheema* to the current version of the INA are significant. First, as has been previously advocated, if present endangerment to United States national security—which is essentially analogous to "likely to engage after entry in any terrorist activity"—was added as a required element of general "terrorist activities," separate determinations would be made regarding whether the alien engaged in terrorist activity and whether the alien is a danger to national security. Second, requiring separate determinations encourages immigration officials to use concrete evidence to support their decisions. As the Ninth Circuit noted, the INS (which is now part of the Department of Homeland Security), along with the Departments of Defense, State, Justice, and Treasury, possesses "extensive resources" and "is in a unique position to provide" substantiating evidence.[155]

Under the separate determinations approach, there is potential for overlap in the determinations, but this overlap should not lead to "automatic" conclusions.[156] This means that immigration officials would not be permitted to simply infer that a person would be a threat to national security based solely on the fact that the person participated in "terrorist activities." For example, a consular official may have reason to suspect that an alien is likely to engage in terrorist activity after entry if the alien is currently a member of a Tier I or Tier II terrorist organization, but membership alone would not necessarily demonstrate the requisite likeliness. If the alien "has

152. *Id*. at 858.

153. *Id*. at 859–60.

154. McAllister v. Att'y Gen., 444 F.3d 178, 189 (3d Cir. 2006).

155. *Cheema*, 383 F.3d at 857.

156. *See id*. at 855.

engaged in terrorist activity" in the past and is not currently a member of a terrorist organization, the official's determination of whether the alien is likely to participate in terrorist activity after entry is probably more difficult.

To further illustrate, imagine that a Chinese citizen stole a car by threat of force thirty years ago, served the requisite prison sentence, never committed another crime, has several family members in Seattle, and has been invited to attend a business conference there. Because there is no statute of limitations within the current version of the INA, this person would likely be inadmissible for having participated in "terrorist activity," or hijacking; however, by requiring separate determinations, the consular official could now permit this person to enter upon his initial application if it is found that he has no recent history or present proclivity to engage in terrorist activities—that is, he has been rehabilitated. Overall, the separate determinations approach effectively allows immigration officers to balance several factors—such as the recency of the activity, the extent of the harm caused, and, importantly, the activity's connection to the United States—in determining whether an alien is or will be a threat to national security.

Conceptually speaking, on one end of the "terrorist activity" spectrum is harmful activity that has no nexus to the United States, and on the other end is non-serious activity that is directed at the United States. As long as there is reasonable, concrete evidence to suggest that an alien would be a threat to the security of the United States, activity on either end of the spectrum could lead to a finding of inadmissibility. As explained in *Cheema*, the underlying point is that consular officials should be making conscious, evidence-based decisions as to whether a person will harm national security. Thus, allowing for this balancing accommodates both national security interests and individual rights.

C. Substantive Nexus to the Laws of the United States

While the proposal proffered in Part III.B focused on implementing a stronger nexus to United States security in terms of statutory structure, the following suggestions are aimed at substantively linking the definition of "terrorist activity" to the laws of the United States.

1. Proposal: Congress should redefine "unlawful" to only encompass United States laws.

Under the INA, "terrorist activity" must be "*unlawful* under the laws of the place where it is committed," the "laws of the United States," *or* the laws of "any State" within the United States.[157] The INA currently does not define the term "unlawful."

In the Board of Immigration Appeals' seminal decision, In re *S-K-*,[158] the Board stated that the question of whether activity is "unlawful under the laws of the place where it is committed" is one of "foreign law and is a factual issue on which the respondent bears the burden of proof . . . to show by a preponderance of the evidence that the [terrorism bar to asylum or admission] is inapplicable."[159] In this case, the respondent, a citizen of Burma applying for asylum, argued that because the United States did not recognize the Burmese government's legislative acts, the actions of the Chin National Front (or "CNF," the alleged terrorist organization) that she was found to have supported were not "unlawful" under Burmese law.[160] The Board, however, found that the presence of an embassy in Burma and the maintenance of diplomatic relations with the current Burmese regime was enough to conclude that "in some sense or degree, the United States recognizes as legitimate the Burmese Government."[161] As a result, the Board rejected this argument and was unwilling to rule that "a foreign sovereignty would not be recognized by the United States Government," leaving such a determination to "elected and other high-level officials."[162]

The respondent further argued that Congress deliberately used the term "unlawful" (which she defined as "unethical" or "morally repugnant" conduct) instead of "illegal" (which she defined as conduct inconsistent with technical rules), but the Board was not "convinced that Congress intended different meanings for the terms

157. INA § 212(a)(3)(B)(iii) (emphasis added) ("As used in this [Act], the term 'terrorist activity' means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) . . . .").

158. 23 I. & N. Dec. 936 (BIA 2006), 2006 WL 1976710.

159. *Id.* at 939.

160. *Id.* at 938.

161. *Id.* at 939–40.

162. *Id.* at 940.

'unlawful' and 'illegal.'"[163] Ultimately, the fact that the Burmese government "*appear[ed] to consider* the activities of the CNF unlawful" was enough for the Board to conclude that the "unlawful" requirement was satisfied, meaning that the respondent failed to meet her burden of proof.[164]

The holding in this case is unsatisfying for several reasons. Requiring the respondent to demonstrate that the Burmese government, "a military dictatorship ruled by the majority Burman ethnic group,"[165] did not consider her actions "unlawful" seems illogical at best, especially considering the United States only recognizes the dictatorship in only "some sense or degree." Further, in asserting that the Burmese government "appeared to consider" certain actions unlawful, the Board failed to point to any specific facts or arguments that led them to this conclusion. Perhaps the Board presumed unlawfulness because the record stated that the CNF was "an organization which uses land mines and engages in armed conflict with the Burmese Government,"[166] or because the "Burmese military [is] known to torture anyone affiliated with the CNF,"[167] or merely because the respondent was fearful for her life if she returned to Burma.[168] Although requiring an official position from a foreign government would be excessive, presuming unlawfulness seems insufficient—the Board could potentially find a specific conviction or a provision in Burmese law indicating not just disdain for the CNA but the unlawfulness of its actions. Even though the Board's holding likely rested on the respondent failing to meet her burden of proof rather than the Burmese government's presumed perspective,[169] the Board's opinion flounders in establishing a clear precedent for immigration officials to follow in determining whether specific conduct is unlawful in a foreign nation.

Clearly, the unlawfulness determination is riddled with difficulty for both the applicant and immigration officials. In order to provide clarity and promote a closer nexus to the United States' legal

163. *Id.* at 939 n.3.

164. *Id.* at 940 (emphasis added).

165. *Id.* at 937.

166. *Id.*

167. *Id.*

168. *Id.*

169. *See id.* at 941 ("[T]he respondent has not provided evidence that would rebut this conclusion or lead us to interpret the Act differently.").

conceptions of terrorism, Congress should omit the phrases "under the laws of the place where it is committed" and "any State" from INA section 212(a)(3)(B)(iii), which would mean that the "unlawful" determination would only be evaluated in light of United States law. United States courts can be trusted to make more competent determinations regarding United States law and the difficulties illustrated by In re *S-K-* could also be avoided, meaning that courts would no longer have to make "in some sense or degree" conclusions concerning whether foreign laws were violated.[170]

Congress should also explicitly define "unlawful" to more clearly guide immigration officials and courts. "Unlawful" could be confined to violations of the federal criminal code, or, in the alternative, violations of federal laws that refer specifically to terrorism. There are, however, twenty-two definitions of terrorism within federal law,[171] and if Congress wanted to adopt a narrower approach, "unlawful" should refer only to violations of one, or at most a handful, of those definitions.[172] For example, the terrorism chapter of the federal criminal code, rather than all of the sections of the code, could be used. The terrorism chapter includes definitions for "domestic terrorism," "international terrorism," the "federal crime of terrorism," "harboring or concealing terrorists," "providing material support to terrorists," violence against a national of the United States, as well as a definition of "terrorist organization" extracted from the INA.[173] Upon close examination and given the express overlap with the INA's definition of "terrorist organization,"[174] the specific contours of these definitions are congruent with the elements of "terrorist activity" within the INA.

170. Because the government is competent in United States law, perhaps the burden of proof could now lie with the government rather than the respondent. This shift in the burden of proof aligns with fundamental notions of fairness, as it is typically the task of the government to demonstrate that a person has violated the law. *See, e.g.*, Johnson v. Florida, 391 U.S. 596, 598 (1968) ("The burden . . . is on the State to prove that an accused has committed an act bringing him within a criminal statute.").

171. Perry, *Too Many Grails*, *supra* note 20, at 273.

172. *See also id.* ("A single definition would allow better communication between agencies in the fight against terrorism and provide at least some shielding to charges that the United States is inconsistent in whom it labels a terrorist.").

173. *See* 18 U.S.C.A. §§ 2331(5), 2331(1), 2332b(g)(5), 2339(a), 2339A(a), 2332(a)–(c), 2339B(g)(6).

174. For a thorough discussion of each of these definitions, see Perry, *Too Many Grails*, *supra* note 20, at 256–59.

Moreover, even though a conviction under the criminal code requires proof beyond a reasonable doubt,[175] the INA could still maintain the proposed "reasonable ground to believe" standard of proof[176] in determining whether conduct is "unlawful," which would help to preserve the civil nature of the INA.[177]

The Third Circuit has arguably adopted a more narrow conception of "unlawful" that would align with this proposal. Specifically, it could be inferred from the court's holding in *McAllister v. Attorney General of the United States*[178] that "unlawful" refers only to violations of criminal law, given the court's determination that common law criminal defenses could potentially refute or invalidate the "unlawful" requirement.[179] Although this inference is somewhat tenuous given that the Third Circuit did not expressly state that "unlawful" only referred to violations of criminal law, narrowing the INA's conception of "unlawful" would still be beneficial because having "numerous definitions" leads to "inconsistency in determining what terrorism is."[180]

Overall, the "unlawful" requirement may have little practical utility because *all* of the activities enumerated in the "terrorist activity" section are already unlawful under the laws of the United States. As evidenced by In re *S-K-*, a criminal conviction or evidence of a civil suit is currently not necessary to satisfy the unlawful element.[181] Instead, the appearance of unlawfulness is sufficient.[182] Given these considerations, perhaps Congress could remove the unlawful requirement altogether. But, if Congress were unwilling to

175. *See* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000).

176. *See* INA § 212(a)(3)(B)(i)(II).

177. *See* Perry, *Too Many Grails*, *supra* note 20, at 274.

178. 444 F.3d 178 (3d Cir. 2006).

179. *Id.* at 186–87. The precise holding of the Third Circuit was that the defenses of incapacity and self-defense could exclude an act from being labeled as "terrorist activity" under INA § 202(a)(3)(B)(iii)(V)(b), which requires "the actor to have the specific intent to endanger the safety of individuals or to cause substantial damage to property." *Id.* at 186. But, because this analysis was part of the larger discussion of unlawfulness and because the court specifically stated that self-defense, in the context of a given hypothetical, "negates the 'unlawful' element," it could be inferred that the action *must* violate criminal law in order to be considered "unlawful." *See id.* at 186–87. Although this inference is not clear-cut, it has been argued. *See* Perry, *Grounds of Inadmissibility*, *supra* note 80.

180. Perry, *Too Many Grails*, *supra* note 20, at 272.

181. *See generally In re* S-K-, 23 I. & N. Dec. 936 (BIA 2006).

182. *See id.* at 940.

do so, refining the requirement to only encompass the laws of the United States would be a significant step in the right direction.

IV. CONCLUSION

Because the doctrine of consular nonreviewability typically bars the judiciary from reviewing the issuance or denial of a visa application, modifications to the INA's anti-terrorism provisions for nonimmigrants seeking entry would likely have to be effectuated through legislative action.[183] Despite this limitation, which is likely a principal reason for the dearth of scholarship on the matter, the issue is still salient given that 814 nonimmigrant visa applications were refused in 2012 for having engaged in "terrorist activity," although 470 refusals were overcome.[184] The INA can more effectively grant admission to those nonimmigrants who have participated in "terrorist activity" but merit waivers by requiring aliens to pose a danger to United States security, implementing a standard of proof for this determination, and linking certain substantive aspects of the terrorism bar to United States laws.

The modifications proposed in this Comment could also benefit immigrants. As the INA's provisions become less broad and ambiguous, there is less room for lofty executive interpretations under the *Chevron* doctrine because the realm of "permissible construction" is narrowed.[185] The Ninth Circuit in *Khan v. Holder*[186]

183. "In view of the political nature of visa determinations and of the lack of any statute expressly authorizing judicial review of consular officers' actions, courts have applied what has become known as the doctrine of consular nonreviewability. The doctrine holds that a consular official's decision to issue or withhold a visa is not subject to judicial review, *at least unless Congress says otherwise*." Saavedra Bruno v. Albright, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (emphasis added). *See also* U.S. *ex rel.* London v. Phelps, 22 F.2d 288, 290 (2d Cir. 1927) (The "[u]njustifiable refusal to visé a passport may be ground for diplomatic complaint by the nation whose subject has been discriminated against . . . [but] [i]t is beyond the jurisdiction of the court.") (internal citation omitted).

184. *Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act) Fiscal Year 2012*, U.S. STATE DEP'T, http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2012AnnualReport/FY12AnnualReport-TableXX.pdf (last visited Aug. 13, 2014).

185. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however,

recently stated that federal courts "have jurisdiction to determine the scope and meaning of the statutory terrorism bar, including the definition of 'terrorist organization' and 'terrorist activity,' as these present purely legal questions. We also have jurisdiction to determine whether the [alien] meets this standard."[187] Therefore, if the proposals included in this Comment were adopted, the judiciary could more adequately enforce standards of proof for determinations affecting immigrants applying for asylum or permanent residency.[188] Although no waivers were approved for immigrant applicants refused on terrorism grounds in 2012,[189] increasing the potential for judicial review would at a minimum safeguard against arbitrary decisions of consular officials.

As has been demonstrated, the definitional net cast by the INA's anti-terrorism provisions is too broad. By refining the operation, structure, and substance of "terrorist activities," that net can be appropriately reduced.

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the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

186. 584 F.3d 773 (9th Cir. 2009).

187. *Id.* at 780.

188. These proposals would also allow the judiciary to enforce more adequate standards that are created not by the judiciary but by Congress.

189. *Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act) Fiscal Year 2012*, U.S. STATE DEP'T, http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2012AnnualReport/FY12AnnualReport-TableXX.pdf (last visited Aug. 13, 2014).

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