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Acts, Acquiescence, and Asylum: The Material Support Bar Under *Barahona v. Holder**

INTRODUCTION

Ever since passing its first immigration laws, the United States has sought to provide a home for victims of the worst kinds of persecution.¹ The humanitarian atrocities of World War II spurred the introduction of deliberate, systematic programs for refugee resettlement,² and those programs continue today. In fact, the United States continues to admit tens of thousands of refugees each year.³ At the same time, there are limits to the ability and the willingness of the nation to open its arms to refugees. Resources and institutional constraints have always served as a check on the acceptance of refugees,⁴ but increasingly the government's refugee policy also reflects national security concerns.⁵ A delicate balance must be struck between sheltering victims of violence and persecution, while keeping out those who pose a threat to national security.⁶

The Fourth Circuit recently walked this fine line in deciding *Barahona v. Holder*.⁷ José Barahona arrived in the United States from El Salvador, a country in the midst of a long and bloody civil war, and specifically from a hometown ruled by the merciless violence

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1. See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 812 (7th ed. 2012) (discussing the United States' history of providing asylum for refugees, beginning with Congress's exemption for political offenders in 1875).

2. See GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT 1–2 (1986).

3. Daniel C. Martin & James E. Yankay, *Annual Flow Report: Refugees & Asylees: 2012*, DEP'T OF HOMELAND SEC., 1 fig.1 (2013), available at http://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2012.pdf.

4. See David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, in REFUGEE POLICY: CANADA AND THE UNITED STATES 30, 36–37 (Howard Adelman ed., 1991).

5. See *Comprehensive Immigration Reform: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) (written testimony of Janet Napolitano, Secretary of Homeland Security) (discussing the commitment of the United States to assisting those seeking asylum, but also emphasizing the need for the Department of Homeland Security to “keep [its] focus exactly where it should be: preventing the entry of . . . national security threats”).

6. See *id.*

7. 691 F.3d 349 (4th Cir. 2012).

of rebel forces.⁸ Those who resisted the rebels were banished or, like Barahona's father and cousin, killed.⁹ When rebels demanded to use Barahona's home, he acquiesced before eventually fleeing to the United States.¹⁰ Was Barahona a victim of terrorism, or was he a facilitator? The court held that he was the latter and thus did not qualify for asylum.

This Recent Development argues that *Barahona* was wrongly decided. The court did not provide the wrong answer; it simply answered the wrong question. Specifically, the majority focused exclusively on one question: Whether an alien is admissible to the United States when he has materially supported terrorists, but has done so under duress. This ignored a crucial preliminary question: Whether a person can "materially support" terrorists without taking any affirmative action. By finding the petitioner inadmissible based on his failure to resist a terrorist organization, the Fourth Circuit established a troubling precedent. The decision will pose particular problems for asylum seekers, a group that already suffers disproportionately as a result of the line-drawing inherent in national security legislation.¹¹ Taken to its logical conclusion, the *Barahona* decision risks treating victims of terrorism as though they were supporters.

Analysis proceeds in four parts. Part I explains the complex system of statutory inadmissibility for aliens who have provided material support for terrorism. Part II explains the background of *Barahona* and discusses in detail the decision of the Fourth Circuit.

8. *Id.* at 351.

9. *Id.* at 352.

10. *Id.* at 351–52.

11. It remains to be seen whether these lines will be drawn any differently as a result of potential Comprehensive Immigration Reform. While reform has ignited significant recent discussion, it has not generated any legislation, and the future of the reform efforts is far from clear. See Jonathan Easley, *Obama: 'Price to Pay' for Immigration Block*, THE HILL (Nov. 9, 2013, 10:18 AM), <http://thehill.com/blogs/briefingroom/news/189781-obama-%E2%80%98a-price-to-pay%E2%80%99-for-republicans-blocking-immigration-reform> (reporting that President Obama "remained hopeful that Congress would overhaul the immigration system before the end of the year," but lamented that reform was currently "being held up"). Whatever happens, the existence and interpretation of the Material Support Bar have not featured significantly in reform discussions. One bill, however, included a provision specifically intended to soften the impact of the Material Support Bar on terrorist victims. See Refugee Protection Act of 2013, S. 645, 113th Cong. § 4 (2013) (as introduced, Mar. 21, 2013). The bill was referred to the Senate Judiciary Committee, but no action has been taken on it since then. S. 645: *Refugee Protection Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s645> (last updated Mar. 21, 2013). Statutory reform of the Material Support Bar in the near future therefore seems unlikely, or at least unpredictable.

Part III evaluates that decision and argues that the majority missed the key preliminary question of whether the alien had performed an affirmative act at all. As the dissent contends, a closer analysis of the plain language of the inadmissibility provisions would have necessitated a different result. Finally, Part IV examines the future implications of *Barahona*, with a particular focus on the additional burdens that the decision will impose on those seeking asylum in the United States.

I. THE MATERIAL SUPPORT BAR

United States immigration law contains certain statutory grounds of inadmissibility.¹² If any of these grounds apply to a particular alien, that alien is “ineligible to receive visas and ineligible to be admitted to the United States,”¹³ even if he otherwise meets the requirements for admission.¹⁴ For example, the Immigration and Nationality Act makes an alien inadmissible if he has ever “engaged in a terrorist activity,”¹⁵ which includes the commission of “an act that the actor knows, or reasonably should know, affords material support . . . to a terrorist organization.”¹⁶ According to its statutory definition, “material support” includes “a safe house, transportations, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons . . . , explosives, or training.”¹⁷ This basis for inadmissibility is colloquially known as the “Material Support Bar.”¹⁸

12. Those grounds are set out at 8 U.S.C. § 1182 (2012).

13. *Id.* § 1182(a).

14. In other words, an alien may qualify for admission to the United States as an immigrant or nonimmigrant. Nonetheless, that alien may still be ineligible for admission to the United States because of the statutory ground of inadmissibility. *See id.* § 1182(a) (“[A]liens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States.”). Nonimmigrant qualifying categories include visitors for tourism or business, *id.* § 1101(a)(15)(B), and temporary workers, *id.* § 1101(a)(15)(H). Immigrant categories include spouses of UNITED STATES citizens, *id.* § 1151(b)(2)(A), and individuals possessing exceptional talents, *id.* § 1101(a)(15)(O).

15. *Id.* § 1182(a)(3)(B)(i)(I).

16. *Id.* § 1182(a)(3)(B)(iv)(VI)(cc). The Act delegates authority to the Secretary of State to designate groups that will be defined as “terrorist organizations.” *Id.* § 1189(a).

17. *Id.* § 1182(a)(3)(B)(iv)(VI).

18. *See, e.g.,* 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, 246–48 (2012) (referring to the specific ground of inadmissibility contained in § 1182(a)(3)(B)(iv) as the “material-support bar”). This Recent Development will refer to the Material Support Bar as “the Bar.”

The Material Support Bar applies to a broad range of prospective visitors and immigrants. Most obviously, it affects those applying for immigrant or nonimmigrant visas at overseas consulates and those seeking temporary or permanent admission at the border.¹⁹ It also applies to certain categories of aliens that are already physically present in the United States, including those seeking asylum; although asylum applicants may remain on American soil while their applications are processed, they have not usually been formally “admitted” to the United States, and are therefore subject to the Material Support Bar.²⁰ The same is true for those who have entered the United States surreptitiously; because they have not been admitted, the Material Support Bar may render them ineligible for any legal status that they may later claim.²¹

The Material Support Bar also serves to limit immigrants’ eligibility for a form of relief known as a “special rule” cancellation of removal.²² Under that rule, the Department of Homeland Security

19. See *supra* note 14.

20. The Bar applies because asylum seekers usually have not been “admitted” to the United States, as that term is defined in the statute. See § 1101(a)(13)(A) (“The terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.”). Asylum applicants are generally “paroled” into the United States, and are therefore explicitly excluded from the class of aliens that have been “admitted.” *Id.* § 1101(a)(13)(B) (“An alien who is paroled . . . or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.”).

21. In the confusing terminology of the immigration laws, § 1182(a)(6) makes entry without lawful admission or parole a ground for “inadmissibility.” Grounds of inadmissibility, set forth in § 1182, apply not only to those seeking entry, but also to individuals who, though physically present in the United States, were not lawfully admitted. See ALENIKOFF ET AL., *supra* note 1, at 583 (“[A] noncitizen who entered without inspection is subject to the inadmissibility grounds, even if she has lived in the United States for many years.”). By contrast, grounds for “deportability,” which appear in § 1227, apply to aliens who were legally admitted to the United States. See *id.* (“A noncitizen who is in the United States unlawfully after overstaying a period of admission is deportable, not inadmissible.”).

22. See *Barahona v. Holder*, 691 F.3d 349, 351 (4th Cir. 2012). To be eligible for “special rule” cancellation of removal, the alien must show that four conditions are satisfied: (1) he has been physically present in the United States for at least ten years; (2) he has been a person of good moral character during that time (as defined in § 1101(f), which excludes, among other things, “habitual drunkards” and those whose income is principally derived from illegal gambling activities); (3) he has not been convicted of certain crimes; and (4) his removal “would result in exceptional and extremely unusual hardship” to a spouse, parent, or child who is a UNITED STATES citizen. § 1229b(b)(1)(D). The plain language of that section vests discretion in the Attorney General. *Id.* § 1229b(b)(1). However, since the reorganization of the immigration functions after September 11, 2001, the discretion is now exercised by the Secretary of Homeland Security and her department. See Homeland Security Act of 2002 (HSA), Pub.

has discretion to cancel the removal of an inadmissible or deportable alien if the alien meets certain conditions.²³ However, certain aliens are ineligible for “special rule” cancellation of removal, even if they meet the *prima facie* conditions that permit the Department to exercise its discretion.²⁴ In particular, aliens inadmissible under the Material Support Bar are ineligible for cancellation of removal relief.²⁵

II. *BARAHONA V. HOLDER*

A. *Factual Background and Immigration Court Proceedings*

José Barahona, a citizen of El Salvador, entered the United States without inspection in 1985.²⁶ He first applied for asylum in 1987, but the government denied his application the following year.²⁷ Despite being given thirty days to leave the country, he remained and again sought asylum in 1995.²⁸ He failed to take the necessary action to maintain his asylum application, and as a result, the government closed his application in 2007.²⁹ In 2009, he appeared before an Immigration Judge (“IJ”) as an alien present in the United States without lawful admission or parole.³⁰ He sought “special rule” cancellation of removal.³¹

L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended at 6 U.S.C. § 111); Exec. Order No. 13,286, 68 Fed. Reg. 10,619 (Mar. 5, 2003).

23. Again, the language is not intuitive. “Removal” is the act of expelling an alien from the United States. An alien may become removable in one of two ways: (1) by entering without inspection and being inadmissible, *see* 8 U.S.C. § 1182(a)(6)(A)(i); or (2) by entering legally but subsequently becoming deportable, *see id.* § 1227. Entry without inspection, often colloquially known as “illegal entry,” is the process of physically crossing into the United States without presenting one’s travel documents to an immigration officer.

24. *See id.* § 1182(a).

25. *Id.* § 1182(a)(3)(B)(iv)(VI).

26. *Barahona*, 691 F.3d at 350–51; *see also supra* note 23 (explaining entry without inspection).

27. *Barahona*, 691 F.3d at 351.

28. *Id.* It is not clear why Barahona was able to remain in the country after the rejection of his first asylum application. Because no facts suggest that the government granted him any type of relief, it appears that the government simply failed to enforce the removal order against him.

29. *Id.* The government administratively closed his application for “failure to prosecute.” *Id.*

30. *Id.* Being an alien present without lawful admission or parole violates § 1182(a)(6). The Fourth Circuit opinion also reveals that Barahona pled guilty to a state misdemeanor domestic assault in December 2007. *Barahona*, 691 F.3d at 351. However, this is irrelevant to his immigration proceedings. Most misdemeanors will not make an alien inadmissible or deportable because, under the statute, immigration consequences

The government contended that Barahona was ineligible for relief because he had provided material support to terrorists in El Salvador during the year before arriving in the United States.³² Barahona testified before the IJ about his involvement with terrorists in his homeland.³³ In the mid-1980s, El Salvador was in the throes of a twelve-year civil war between the incumbent government and the Frente Farabundo Marti para la Liberación Nacional ("FMLN").³⁴ In 1984, FMLN guerillas seized Barahona's hometown of Carolina.³⁵ The area erupted into violence.³⁶ Guerillas would periodically arrive at Barahona's home and demand to use his kitchen.³⁷ He testified that if he had refused, he would have been forced to leave town or killed;³⁸ his own father and cousin had already been executed by the FMLN, and his father had not even been given the option to leave.³⁹ Barahona acquiesced. During the year before he left El Salvador for the United States, he allowed around 200 guerillas to use his kitchen to prepare food.⁴⁰ During bad weather, they occasionally slept inside the house.⁴¹ The government did not dispute any of those facts.⁴² Prosecutors argued, however, that Barahona had afforded material support in the form of a "safe house" to a terrorist organization and

generally attach only to crimes with a maximum sentence of imprisonment for one year or more. See §§ 1182(a)(2)(A)(ii), 1227(a)(2)(A)(i).

31. *Barahona*, 691 F.3d at 351; see *supra* notes 22–23 and accompanying text.

32. See *Barahona*, 691 F.3d at 351–52. To reach the Material Support Bar, the government worked through three separate interpretive steps. First, the categories of those ineligible for relief include aliens who are inadmissible under § 1182(a)(3). *Id.* at 352. Second, an alien is inadmissible under § 1182(a)(3) if he has ever "engaged in a terrorist activity." § 1182(a)(3)(B)(i)(I). Third, "terrorist activity" includes the commission of "an act that the actor knows, or reasonably should know, affords material support . . . to a terrorist organization." *Id.* § 1182(a)(3)(B)(iv)(VI)(cc).

33. *Barahona*, 691 F.3d at 351.

34. *Id.* For further information about the FMLN and the civil war in El Salvador, see generally HUGH BYRNE, *EL SALVADOR'S CIVIL WAR: A STUDY OF REVOLUTION* (1996); JOAN DIDION, *SALVADOR* (1994).

35. *Barahona*, 691 F.3d at 351.

36. *Id.*

37. *Id.* It is not clear how frequently the guerillas used Barahona's home during the course of the year.

38. *Id.* at 351–52.

39. *Id.* at 352.

40. *Id.*

41. *Id.* at 351–52. Barahona also occasionally provided directions to some of the guerillas. *Id.* at 352. Neither the Board of Immigration Appeals ("BIA") nor the Fourth Circuit found this to be a factor in determining the applicability of the Material Support Bar, apparently because it did not rise to the level of "material assistance." See *id.*

42. *Id.*

that this constituted “material support” within the meaning of the statutory bar to admissibility.⁴³

The IJ recognized that Barahona had no choice but to accommodate the guerillas and that he had only done so under duress.⁴⁴ Nonetheless, the IJ ruled that these facts were not relevant under the statute.⁴⁵ Since the Material Support Bar contains no exception for duress or involuntariness, Barahona’s acquiescence to the guerillas rendered him inadmissible.⁴⁶ The IJ ordered him removed from the United States.⁴⁷ The Board of Immigration Appeals (“BIA”) affirmed the IJ’s decision, agreeing that there is not a duress exception to the Material Support Bar.⁴⁸

B. *The Fourth Circuit Decision*

In his appeal to the Fourth Circuit,⁴⁹ Barahona maintained that the use of his kitchen “occurred under duress,” and that acts committed under duress “do not rise to the level of providing

43. *Id.* The government based its argument on 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2006), which is the Material Support Bar. *See supra* notes 17–18 and accompanying text.

44. *Barahona*, 691 F.3d at 352.

45. *Id.*

46. *Id.* The IJ worked through the same steps in interpreting the statute as set out above, *supra* note 32:

The sole INA provision underlying the IJ’s rejection of the special rule cancellation specifies that an alien is inadmissible if he has engaged in *terrorist activity* by providing “material support” to a terrorist organization. “Terrorist activity” is defined by the INA, and includes committing “an act that [the person] knows, or reasonably should know, affords material support . . . to a terrorist organization.” “Material support” includes providing “a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons . . . , explosives, or training.”

Barahona, 691 F.3d at 352 (footnote and citations omitted).

47. *Id.*

48. *Id.* at 353. Before the BIA, Barahona also made two additional arguments, both of which were rejected, and both of which are beyond the scope of this Recent Development. First, he argued that the use of his kitchen was de minimis, and therefore immaterial. *Id.* at 352–53. Second, he contended that the IJ’s decision was inconsistent with international law. *Id.* at 353.

49. As the court noted in its opinion, the administrative decision on whether an alien may obtain cancellation of removal is generally not subject to judicial review. *Id.* Courts can review constitutional issues or questions of law that arise in the administrative decision making. *Id.* Here the court was reviewing a pure question of law: Whether or not acts committed under duress could trigger the Material Support Bar. *Id.* By contrast, the decision on whether or not to grant relief is entirely for the discretion of the government and is immune from judicial review. *Id.* (citing 8 U.S.C. § 1101 (2006); *Ixcot v. Holder*, 646 F.3d 1202, 1213–14 (9th Cir. 2011)).

‘material support’ ” within the meaning of the statute.⁵⁰ The court disagreed.⁵¹ In a split decision, it held that there is no duress or involuntariness exception to the Material Support Bar and that Barahona was therefore ineligible for relief.⁵²

Judge King, writing for the majority,⁵³ gave *Chevron* deference to the BIA decision.⁵⁴ If the statute was not clear on the application of the Material Support Bar in this context, then the court would defer to the interpretation of the BIA. The court agreed with Barahona on the preliminary question of the *Chevron* analysis: The statute is silent on the existence of a duress or involuntariness exception.⁵⁵ But the court upheld the BIA’s decision at the second step of the *Chevron* analysis, holding that the decision was a reasonable interpretation of the statute.⁵⁶ The court relied heavily on a textual comparison between the Material Support Bar and a related provision which allows aliens who are statutorily inadmissible to petition the government for a discretionary waiver of inadmissibility.⁵⁷ The government may not grant such a waiver to any alien that has *voluntarily* supported terrorist activities.⁵⁸ By contrast, Congress did not draw this distinction between voluntary and involuntary support

50. Brief for Petitioner at 14, *Barahona*, 691 F.3d 349 (No. 11-2046). Given the arguments raised in Judge Wynn’s dissent and in this Recent Development, *see infra* Part III, Barahona should have cast his argument differently. The most compelling argument is that he did not perform an act at all, but merely an omission, meaning that the Material Support Bar should not apply. The duress point, on which the majority focused, is far less compelling, and Barahona should have included it only as an alternative argument. Although the distinction between the two arguments is subtle, the distinction makes all the difference. It does not appear that Barahona intentionally conceded that he committed an affirmative act. It seems instead, for reasons that are not clear, that he simply overlooked this potential argument.

51. *Barahona*, 691 F.3d at 351.

52. *Id.* at 354, 356.

53. *Id.* at 350. Chief Judge Traxler joined in the majority opinion.

54. *Id.* at 354 (citing *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *Midi v. Holder*, 566 F.3d 132, 136 (4th Cir. 2009)). The Fourth Circuit succinctly explained the two-step *Chevron* inquiry: “[First,] we initially examine the statute’s plain language; if Congress has spoken clearly on the precise question at issue, the statutory language controls. If, however, the statute is silent or ambiguous, we defer to the agency’s interpretation if it is reasonable.” *Id.* at 354 (citing *Midi v. Holder*, 566 F.3d 132, 136–37 (4th Cir. 2009)).

55. *Id.* at 354.

56. *Id.* at 356 (“It was . . . reasonable for the BIA, in its decision here, to decline to create an involuntariness exception from the Material Support Bar.”).

57. *Id.* at 354–55 (citing 8 U.S.C. § 1182(d)(3)(A) (2006)). The court explained: “Barahona’s lawyer advised at oral argument that her client had already applied for relief under the waiver provision, and that such relief was denied by the Secretary of Homeland Security in March 2012.” *Id.* at 355 n.8.

58. *Id.* at 354–55 (citing § 1182(d)(3)(B)).

in crafting the Material Support Bar.⁵⁹ The majority thus “assume[d] that Congress did not intend to create an involuntariness exception to the Material Support Bar, otherwise the voluntary support exception to the waiver provision would be rendered superfluous.”⁶⁰ The existence of the alternative statutory waiver was also relevant for another reason: Because aliens who have involuntarily assisted terrorists can obtain discretionary relief even when the Material Support Bar applies, it is reasonable to interpret the Bar as rendering those aliens *prima facie* ineligible.⁶¹

Next, the majority looked at other circuits’ interpretations of other statutory bars to admissibility.⁶² It referred to *Gonzalez v. Holder*,⁶³ in which the First Circuit addressed the scope of the “Crewman Bar.” That provision makes an alien ineligible for relief if he entered the United States as a crewman.⁶⁴ The petitioner in *Gonzalez* argued that there should be an exception to the Crewman Bar when the alien satisfies the statutory criteria of “special rule” cancellation of removal prior to entering the United States.⁶⁵ The First Circuit, holding that the Crewman Bar does not contain any exceptions, declined to “rewrite the statute.”⁶⁶ Drawing a parallel between *Gonzalez* and *Barahona*, the Fourth Circuit held that the Material Support Bar “simply . . . fail[s] to provide for the exception under which Barahona seeks relief.”⁶⁷

The court also dismissed Barahona’s claim that the BIA should have interpreted his case in light of the recent Supreme Court precedent established in *Negusie v. Holder*.⁶⁸ In that case, the Court reviewed the BIA’s refusal to read a duress exception into the

59. *Id.* at 355. Compare § 1182(d)(3)(B)(i) (“[N]o such waiver may be extended to an alien who . . . has voluntarily and knowingly engaged in . . . terrorist activity on behalf of, or has voluntarily and knowingly received military-type training from a terrorist organization.”), with *id.* § 1182(a)(3)(B)(iv)(VI) (making inadmissible any alien who has committed “an act that the actor knows, or reasonably should know, affords material support,” without regard to the alien’s mental state when committing the act).

60. *Barahona*, 691 F.3d at 355 (citing *Bilski v. Kappos*, 130 S. Ct. 3218, 3228 (2010)).

61. *See id.* at 356.

62. *Id.* at 355–56.

63. 673 F.3d 35 (1st Cir. 2012).

64. *See* § 1229b(c)(1) (making an alien “who entered the United States as a crewman subsequent to June 30, 1964,” ineligible for cancellation of removal). A crewman is “a person serving in any capacity on board a vessel or aircraft.” *Id.* § 1101(a)(10).

65. *Gonzalez*, 673 F.3d at 38.

66. *Id.* at 40–41 (“[T]he statute simply does not contain any exceptions. It plainly precludes from relief any alien ‘who entered the United States as a crewman subsequent to June 30, 1964.’ . . . We cannot rewrite the statute.” (internal citations omitted)).

67. *Barahona*, 691 F.3d at 355.

68. 555 U.S. 511 (2009).

“Persecutor Bar.”⁶⁹ The Persecutor Bar renders an alien inadmissible if he ever “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁷⁰ The Court held that the BIA mistakenly viewed a previous Supreme Court decision as controlling.⁷¹ The BIA’s reliance constituted legal error, as the purported precedent “addressed a different statute enacted for a different purpose.”⁷² The *Barahona* court distinguished *Negusie* by finding that the BIA did not rely on mistaken legal authority in this case.⁷³ Rather, the majority found that the BIA interpreted the Material Support Bar in a way that remained faithful to the statutory scheme.⁷⁴

Judge Wynn dissented.⁷⁵ In his view, the court should have reversed the BIA based on the first *Chevron* step because it is clear that “passive acquiescence to the crimes of terrorists does not constitute an ‘act’ that ‘affords material support . . . to a terrorist organization’ ” under the Material Support Bar.⁷⁶ Judge Wynn provided two arguments in support of his view. First, the Bar does not, by its plain statutory language, apply to Barahona’s interactions with the FMLN.⁷⁷ The statute renders an alien inadmissible if he has

69. *Id.* at 514.

70. 8 U.S.C. § 1158(b)(2)(A)(i) (2012); *see also infra* note 108.

71. *Negusie*, 555 U.S. at 520. In *Negusie*, the BIA had held that the so-called “Persecutor Bar” applied and prevented an individual from seeking asylum whether or not the individual’s acts were voluntary or coerced. *Id.* As a result, an individual who had served as a guard in a concentration camp was ineligible for relief even if the BIA accepted his argument that he acted under duress and was a victim rather than a true perpetrator. *Id.* The BIA relied on *Fedorenko v. United States*, 449 U.S. 490 (1981), which held that there was no involuntariness exception in the Displaced Persons Act (DPA) of 1948. *Fedorenko*, 449 U.S. at 512, 518. In *Negusie*, the Supreme Court reversed the BIA’s decision, holding that *Fedorenko* does not control the interpretation of the Persecutor Bar. *Negusie*, 555 U.S. at 520.

72. *Negusie*, 555 U.S. at 520 (citing Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102-03 (codified as amended at § 1101(a)(42))) (“Unlike the DPA, which was enacted to address not just the post war refugee problem but also the Holocaust and its horror, the Refugee Act was designed to provide a general rule for the ongoing treatment of all refugees and displaced persons.”).

73. *Id.*

74. *Id.* at 519–20.

75. *Barahona v. Holder*, 691 F.3d 349, 356 (4th Cir. 2012) (Wynn, J., dissenting).

76. *Id.* Under Judge Wynn’s interpretation, the BIA decision would fail at the first step of the *Chevron* test in which the court should “initially examine the statute’s plain language; if Congress has spoken clearly on the precise question at issue, the statutory language controls.” *Midi v. Holder*, 566 F.3d 132, 136–37 (4th Cir. 2009) (citing *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

77. *Barahona*, 691 F.3d at 356 (Wynn, J., dissenting).

committed "*an act* that [the person] knows, or reasonably should know, affords material support . . . to a terrorist organization."⁷⁸ But given the facts in the record, Barahona did not commit any act; he merely acquiesced to the guerillas' actions. According to Judge Wynn, the BIA and the majority therefore confused the issue.⁷⁹ The majority considered whether the statute permitted duress to be raised as an affirmative defense or, in other words, whether there was an available excuse for a person who had committed an act.⁸⁰ However, in doing so, the majority neglected to ask a preliminary question: Whether Barahona had committed an *act* at all.⁸¹ In Judge Wynn's view, the plain language of the statute requires an act. For the Material Support Bar to apply, the alien must have done something "beyond simply being the unfortunate victim of terrorists."⁸² But on the facts of this case, Judge Wynn observed, "Nowhere in the record before this Court is there any suggestion that Barahona took any affirmative step, or otherwise performed or did any deed, that he 'kn[ew], or reasonably should [have known], afford[ed] material support' to the guerillas."⁸³ Thus, because Barahona's conduct did not fall within the plain language of the Material Support Bar, Judge Wynn concluded he ought not be rendered inadmissible under it.⁸⁴

In addition to the plain language, Judge Wynn used another tool of statutory interpretation to support his position: "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."⁸⁵ Judge Wynn used two hypotheticals to illustrate how the majority's construction of the Material Support Bar could produce bizarre results. For example, it could also bar an alien from relief if he fled his home, reasonably believing that terrorists would occupy it after he left.⁸⁶ And it would still render an alien inadmissible "even if he had taken some sort of action to prevent the guerillas from being able to prepare meals, such as sabotaging his stove, if they instead used his fireplace."⁸⁷ Judge Wynn found these results to be

78. *Id.* (emphasis in original) (quoting 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2006)).

79. *Id.* at 356–57.

80. *See id.*

81. *Id.*

82. *Id.* at 358.

83. *Id.* at 357 (quoting § 1182(a)(3)(B)(iv)(VI)(cc)).

84. *Id.*

85. *Id.* at 358 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982)).

86. *Id.*

87. *Id.*

incongruous with the intent of Congress, which had specifically written the statute so as to require an act.⁸⁸

III. EVALUATING THE FOURTH CIRCUIT'S DECISION

The majority asked the wrong question. It focused exclusively on whether the Material Support Bar contains an exception for acts committed under duress. The court reasoned thoroughly and persuasively on this issue in reaching the conclusion that there is no such exception in the statute.⁸⁹ However, the majority's singular focus caused it to miss what should have been the central issue in the case—the requirement of an affirmative act. This produced a result that is inconsistent with the language of the statute and the policy objectives underpinning the Material Support Bar. This Part first demonstrates the distinction between the “act” issue and the “duress” issue. Next, it shows that the majority neglected this important distinction and that this was a fatal error. Finally, this Part responds to some of the principal objections to the viewpoint presented.

A. *Distinguishing the “Act” Issue and the “Duress” Issue*

In interpreting the Material Support Bar, like any statute, courts may look to accepted principles and “terms of art” that Congress has “borrowed” from other areas of the law.⁹⁰ Although an “act” is required to trigger the Material Support Bar,⁹¹ the statute does not define an act or provide for a duress exception. In order to determine how the Bar operates, it is instructive to consider the way in which the “act” requirement and the defense of duress function in other areas of the law.

The law traditionally takes two separate doctrinal steps in determining whether to impose liability for a person's conduct.⁹² The

88. *See id.*

89. *See id.* at 356 (majority opinion).

90. Justice Jackson clearly articulated this principle in *Morisette v. United States*, 342 U.S. 246 (1952):

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such a case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them.

Id. at 263.

91. *See* 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2012).

92. This distinction most frequently occurs in the context of criminal law and torts. In both areas, the law routinely imposes liability on the basis of actions, but offers certain

first step is whether the individual committed a voluntary act. This step itself has two components. An act must be distinguished from an omission, or a failure to act.⁹³ Liability only attaches to an omission, or a failure to act, in very limited circumstances.⁹⁴ Next, even if the individual committed an act, he will be liable only if his act was voluntary.⁹⁵ To be voluntary, an act must be the result of a willed contraction of the muscles.⁹⁶ An act that is involuntary, such as one that occurs during unconsciousness,⁹⁷ may not trigger liability.⁹⁸ There

excuses as defenses to liability. Of course, immigration and national security statutes need not necessarily adopt the exact same doctrines. Immigration law is a unique creature in the sense that it is not really about imposing liability. Courts have long recognized that even deportation, the most extreme form of immigration action, is not a penalty. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 729 (1893) (holding that deportation is a civil action and not a penalty, and that deportation adjudications are not subject to the Due Process Clause of the Fourteenth Amendment). However, there are no indications that Congress intended for an “act” to be defined differently in interpreting the Material Support Bar, or in immigration law in general, than it is interpreted in other areas of the law. An “act” is not defined in the statute, and there are no other apparent reasons for giving it a meaning that is different from the criminal or torts setting.

93. Black’s Law Dictionary defines an omission as “[a] failure to do something,” especially “a neglect of duty.” BLACK’S LAW DICTIONARY 1197 (9th ed. 2009).

94. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 6.2 (5th ed. 2010) (explaining how some criminal statutes impose liability for omissions: “The criminal statute itself imposes the duty to act, and breach of the duty is made a crime”). *See generally* Otto Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615 (1942) (explaining the general theories on which the law imposes duties to act). In tort law also, there is “an ancient distinction between ‘misfeasance’ and ‘non-feasance.’” 2 RESTATEMENT (SECOND) OF TORTS § 324A cmt. f (1965); *see also id.* §§ 314–314B (imposing liability to act only in certain defined circumstances, generally involving some special relationship between the plaintiff and the defendant); MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW ¶ 65.02 (2d ed. 2003) (“[U]nder common law a plaintiff who is not able to show a legally recognized relationship or an undertaking generally cannot succeed in a tort action for failure to act.”).

95. For example, a voluntary (or “volitional”) act is an element of the intentional torts of assault and battery which require some kind of willed physical movement. *See, e.g.,* 1 RESTATEMENT (SECOND) OF TORTS § 2 cmt. a (1965) (discussing these examples and concluding “[t]here cannot be an act without volition”); SHAPO, *supra* note 94, at ¶¶ 6.01B, 7.01D (discussing the same principle). Similarly, “[t]he concept of the voluntary act lies at the very foundation of the criminal law.” Kevin W. Saunders, *Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition*, 49 U. PITT. L. REV. 443, 443–44 (1988) (citing statements to this effect from statutes, the Model Penal Code, and many cases).

96. “An ‘act’ is a bodily movement An act is ‘voluntary’ when the bodily movement is the product of conscious effort or determination.” 1 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 25 (15th ed. 1993).

97. *See, e.g.,* MODEL PENAL CODE § 2.01(2) (1985) (excluding from the definition of a “voluntary act” only reflexes, movements during sleep, unconsciousness, and hypnosis, and “bodily movement[s] that otherwise [are] not a product of the effort or determination of the actor, either conscious or habitual”); LAFAVE, *supra* note 94, at § 6.1 (discussing the different potential definitions of an “act,” and endorsing the “modern view” put forth in the Model Penal Code).

is therefore a very low standard to clear this first doctrinal step. A willed movement of the muscles is a voluntary act *irrespective* of any external circumstances or pressures.⁹⁹

External pressures only become relevant at the second doctrinal step. This second step only applies to those that have committed voluntary acts; an individual who has failed to act, or whose act was involuntary, does not proceed beyond the first step. At the second step, the law asks whether some reason exists such that the individual should nevertheless be *excused* from liability for his voluntary act.¹⁰⁰ An excuse operates as a type of affirmative defense.¹⁰¹ Duress is one such excuse.¹⁰² The substantive law, usually a statute, determines which excuses, if any, are available for a particular offense.¹⁰³

Courts do not always properly distinguish these two analytical steps. Even the United States Supreme Court has made this error. In *Fedorenko v. United States*,¹⁰⁴ the Court considered whether a naturalized citizen could be denaturalized following the discovery

98. For example, reflexive movements and movements during sleep are not voluntary acts. See SHAPO, *supra* note 94, at ¶ 6.01.

99. See *Barahona v. Holder*, 691 F.3d 349, 357 (4th Cir. 2012) (Wynn, J., dissenting) (quoting TORCIA, *supra* note 96, at § 52) (“[I]f a person threatens another with harm unless he commits a crime, and thereby causes the crime to be committed, the coerced person has performed an act”); see also 1 RESTATEMENT (SECOND) OF TORTS § 2 cmt. b (1965) (“If the actor’s will is in fact manifested by some muscular contraction, including those which are necessary to the speaking of words, it is not necessary that his will operate freely and without pressure from outside circumstances.”).

100. See DAVID C. BRODY & JAMES R. ACKER, CRIMINAL LAW 160 (2d ed. 2010).

101. *Id.* Besides excuses, there is one other species of affirmative defense in criminal law—justification defenses. *Id.* Although not relevant to the present inquiry, justifications, such as necessity and self-defense, are also considered at this second step: Assuming the defendant committed a voluntary act, was the act nonetheless justified? *Id.*

102. See TORCIA, *supra* note 96, at § 52 (“[W]hen a defendant engages in conduct which would otherwise constitute a crime, it is a defense that he was coerced to do so by a threat of imminent death or serious bodily injury.”); see, e.g., *Edwards v. State*, 106 S.W.3d 833, 843 (Tex. App. 2003) (explaining that duress is an affirmative defense, to be proved based on a preponderance of the evidence); *State v. Riker*, 869 P.2d 43, 51–52 (Wash. 1994) (explaining that duress excuses conduct that is otherwise unlawful); LAFAVE, *supra* note 94, at § 9.7(a) (“One who, under the pressure of an unlawful threat from another human being to harm him (or to harm a third person), commits what would otherwise be a crime may, under some circumstances, be excused for doing what he did and thus not be guilty of the crime in question.”).

103. For example, duress is not usually a defense to murder. See generally *People v. Anderson*, 50 P.3d 368 (Cal. 2002) (stating the general rule that duress is unavailable as a defense to murder); *McMillian v. State*, 51 A.3d 623 (Md. 2012) (holding that duress was a permissible defense as to the underlying felony in a felony-murder prosecution, but not as a defense to a murder charge based on other theories).

104. 449 U.S. 490 (1981).

that he had worked as a guard at a Nazi concentration camp.¹⁰⁵ The petitioner had lied about his past on his visa and naturalization applications.¹⁰⁶ He argued that his misrepresentation was not material, and therefore not a basis for denaturalization, because he was only present at the camp as a Russian prisoner of war and was forced to act as a guard by his Nazi captors.¹⁰⁷ As a result, he claimed that the “Persecutor Bar” did not render him inadmissible to the United States.¹⁰⁸ The Court accepted that the petitioner’s actions were “involuntary,” but held that the Persecutor Bar applied regardless of whether he acted voluntarily or not because the statute contained no exception for duress or involuntariness.¹⁰⁹ But the Court muddled its terminology. In no sense could the guard’s actions have been involuntary. An act is voluntary if it is the result of the willed contraction of the muscles.¹¹⁰ The petitioner did not contend that he was acting unconsciously or reflexively when he served as a guard.¹¹¹ Rather, he argued that his captors’ threats forced him to act.¹¹² His argument was therefore premised on *external* circumstances and was properly classified as the affirmative defense of duress.¹¹³

The Supreme Court confused the two separate inquiries. Involuntariness goes to the first question: Was there a voluntary act?¹¹⁴ By contrast, duress goes to the second question: Assuming there was a voluntary act, do any external factors excuse that act?¹¹⁵ This is not the exact same mistake as the *Barahona* court made, but it illustrates that courts frequently confuse the “voluntary act” inquiry and the “duress” inquiry. Duress and involuntariness should never be considered together because, properly analyzed, duress is only

105. *Id.* at 493. Unlike the scenario in *Barahona*, the alien’s work as a guard in *Fedorenko* is clearly an act rather than an omission.

106. *Id.* at 496–97.

107. *Id.* at 500–02.

108. *Id.* The Persecutor Bar appears at 8 U.S.C. § 1101(a)(42) (2012). The Bar prevents those who have “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion” from obtaining asylum and certain other immigration benefits. *Id.* For a discussion of modern case law addressing the persecutor bar, see generally Martine Forneret, Note, *Pulling the Trigger: An Analysis of Circuit Court Review of the “Persecutor Bar,”* 113 COLUM. L. REV. 1007 (2013).

109. See *Fedorenko*, 449 U.S. at 512.

110. See *supra* notes 95–96.

111. See *Fedorenko*, 449 U.S. at 500.

112. *Id.*

113. See *supra* notes 100–02102 and accompanying text.

114. See *supra* notes 92–99 and accompanying text.

115. See *supra* notes 100–02 and accompanying text.

relevant once the court determines that the defendant committed a voluntary act.¹¹⁶

Granted, the Justices' misuse of terminology had no impact on the result in *Fedorenko*. Analyzed properly, the Court would have addressed the issues as follows. At the first step, there was clearly a voluntary act. There was an affirmative action rather than an omission, and that action was the result of a willed muscular contraction.¹¹⁷ The petitioner was therefore a "persecutor" unless, moving to the second step, the statute afforded him any applicable excuses for his conduct.¹¹⁸ The statute did not contain any exception for duress.¹¹⁹ The "correct" approach would therefore have yielded the same result as the Court in fact reached: The petitioner was barred as a persecutor and was thus inadmissible and subject to denaturalization.¹²⁰ Nonetheless, in some cases, there may be serious consequences to a court's failure to conduct the proper two-step inquiry. *Barahona* is one such case.

B. The Barahona Court Answered the Wrong Question

Both the majority and the dissent in *Barahona* provided correct answers to the questions they posed in their respective opinions. But only Judge Wynn reached the right result in the case. The majority, by neglecting to conduct the proper two-step inquiry,¹²¹ answered the wrong question.

The majority asked whether *Barahona's* conduct fell within a duress or involuntariness exception to the Material Support Bar.¹²² The resolution of that question—that the statute does not contain a duress exception¹²³—was the correct one.¹²⁴ However, the court

116. See *supra* notes 92–103 and accompanying text.

117. See *Fedorenko*, 449 U.S. at 500.

118. *Id.* at 513.

119. *Id.*

120. *Id.* at 518.

121. See *supra* notes 92–103 and accompanying text.

122. *Barahona v. Holder*, 691 F.3d 349, 353–54 (4th Cir. 2012).

123. *Id.* at 355–56.

124. The court provided substantial support for the view that duress is irrelevant. See *supra* notes 103, 119 and accompanying text. There are also some strong arguments weighing against the court's reading of the statute. For example, the principal policy behind the Material Support Bar—national security—is arguably not implicated when the alien's support for terrorism occurred under duress. Although there is very little legislative history accompanying the Material Support Bar, congressional discussions over amendments to the Material Support Bar make clear that national security is the principal rationale for the provision. See 150 CONG. REC. H8885 (2004) (statement of Rep. Green) ("[W]e cannot allow our welcoming arms to be a tool for terrorists who seek our downfall."). In addition, national security is a constant theme even in the plain language of

skipped the first step of the essential two-step inquiry¹²⁵: It failed to ask whether the defendant had committed a voluntary act at all.¹²⁶ Had the court begun with this question, it would have concluded, like Judge Wynn,¹²⁷ that Barahona did not commit an act at all, but rather a mere omission. The court would never have reached the second step of the *Chevron* inquiry and would not have been required even to consider the duress issue. The presence or absence of affirmative defenses would be moot because Barahona's mere acquiescence was insufficient to trigger the statute's prima facie requirement of an act.

Barahona did not commit any act sufficient to trigger the Material Support Bar. Rather, his failure to prevent the FMLN guerillas from using his home was a classic omission.¹²⁸ In Judge Wynn's words, Barahona "*did not prevent* the guerillas from occupying his home."¹²⁹ There is no indication in the statute that a mere omission, or failure to act, triggers the Material Support Bar. To the contrary, the statute explicitly requires "an act."¹³⁰ When Congress intends to legislate for omissions, it explicitly says so.¹³¹

Moreover, it is unsurprising that the Material Support Bar applies only to aliens who have committed *acts* that have materially assisted terrorists. This is also the case in the context of criminal law. It is a federal crime to "provide[] material support or resources to a foreign terrorist organization."¹³² There is no suggestion in the statute or case law that a person who merely failed to prevent terrorist activities would be guilty of a crime. This fits the general principle in the law, whereby liability attaches to acts, but rarely to omissions.¹³³

the statute. For example, the Secretary of State only has authority to list a group as a "terrorist organization" if it "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1) (2012). Even with these counterarguments, the BIA's interpretation of the duress issue would have been satisfactory under the deferential *Chevron* standard.

125. See *supra* notes 92–103 and accompanying text.

126. The IJ and the BIA failed to even consider whether Barahona committed an act. See *Barahona*, 691 F.3d at 357 (Wynn, J., dissenting). They did not, therefore, consider whether, on the facts, there was or was not an act. *Id.* The BIA's interpretation was therefore legally erroneous.

127. *Id.* at 358.

128. See *supra* notes 93–94 and accompanying text.

129. *Barahona*, 691 F.3d at 357 (Wynn, J., dissenting).

130. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(cc) (2012).

131. See, e.g., 10 U.S.C. § 1054(a) (addressing the civil liability of the United States when a plaintiff's legal malpractice claim is based on the "act or omission" of a member of the legal staff in the Department of Defense); 18 U.S.C. § 1166 (criminalizing "any act or omission" involving gambling on Indian lands).

132. 18 U.S.C. § 2339B(a)(1).

133. See *supra* notes 93–94 and accompanying text.

Altogether, there is no persuasive argument that the Material Support Bar applies to aliens based on mere omissions. The *Barahona* majority did not even consider the distinction between acts and omissions in interpreting the statute; it instead jumped ahead to the involuntariness and duress issues.¹³⁴

While the Supreme Court's erroneous analysis did not affect the final outcome in *Fedorenko*,¹³⁵ the Fourth Circuit's mistake in *Barahona* was central to the outcome. If the majority in *Barahona* had asked the correct question, it should have concluded that, based on the plain meaning of the statute, the Material Support Bar does not apply to an alien who has not committed any affirmative act. This conclusion would have required a reversal of the BIA decision¹³⁶ and a remand to reconsider whether to grant Barahona the relief he sought.¹³⁷

C. *The Principal Objections to this View of the Case are Unpersuasive*

There are two principal objections to the view of the case that this Recent Development has so far advanced. First, one could argue that Barahona committed an affirmative act. Second, there is a potential argument that the Fourth Circuit adopted an interpretation that, whether theoretically correct or not, conforms to the analyses of other courts. Neither objection is persuasive.

1. If Barahona Committed Some Affirmative Act on the Facts of the Case, the Court Should Have Said So

The strongest potential objection to the analysis in this Recent Development is based on the facts of the case. Critics may argue that, in allowing the guerillas to use his home, Barahona must have performed some affirmative act rather than merely failing to act. As a result, the Fourth Circuit would have reached the same outcome even

134. *Barahona*, 691 F.3d at 353–54.

135. See *supra* notes 117–20 and accompanying text.

136. The correct analysis would result in a reversal under the first prong of *Chevron*. “[I]f Congress has spoken clearly on the precise question at issue, the statutory language controls.” *Barahona*, 691 F.3d at 354 (quoting *Midi v. Holder*, 566 F.3d 132, 136–37 (4th Cir. 2009)).

137. For an explanation of why Barahona would have been eligible for “special rule” cancellation of removal, see *supra* notes 22–25 and accompanying text. Cancellation of removal is a discretionary form of relief. See *supra* notes 22–23 and accompanying text. There is therefore no guarantee that the BIA would have granted Barahona cancellation of removal. However, having satisfied all of the other criteria for cancellation of removal, he would at least have been eligible for relief.

if it had properly interpreted the statute. Such an act would subject Barahona to the Material Support Bar¹³⁸ and therefore render him inadmissible.¹³⁹

This objection may come in one of two forms. First, critics may assume that Barahona must have taken some additional affirmative steps to assist the FMLN guerillas beyond the facts mentioned in the opinion. Barahona conceded that he did sometimes provide affirmative assistance: He occasionally gave the guerillas directions.¹⁴⁰ It is not clear why the opinion did not focus on these affirmative acts, but the most likely explanation seems to be that the court did not find that these acts satisfied the statute's materiality requirement.¹⁴¹ Whatever the explanation, the Fourth Circuit was deciding on the facts before it. It is therefore unhelpful to speculate as to the existence of additional facts; whether they existed or not, they were not central to the court's decision.

A more convincing version of this objection would focus on Barahona's allowing the guerillas into his home. One could argue that this was not a simple one-off transaction; he did not simply fail to deny access on one isolated occasion. The guerillas used his kitchen for almost a year.¹⁴² During this time, it is hard to imagine that he avoided performing *any* kind of affirmative act of material assistance, such as opening the door to allow them in. This is not only a voluntary, affirmative act; it is also a material one. This is because the statute, as an example of "material support," includes the provision of "a safe house."¹⁴³ To provide a person with a safe house does not seem to require substantial physical action. While there is no case law on the precise meaning of "safe house," the plain language of the statute seems to suggest that Congress contemplated that any act that gives terrorists a place to hide or shelter—even if that just involves opening a door and letting terrorists in—would be material.

If this were true, then the Fourth Circuit reached the correct outcome. If Barahona in fact performed affirmative actions that

138. This would fall squarely within the statute because it would be "an act that the actor knows, or reasonably should know, affords material support . . . to a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(cc) (2012).

139. See *id.* § 1182(a)(3)(B)(i)(I).

140. *Barahona*, 691 F.3d at 352.

141. See § 1182(a)(3)(B)(iv)(VI) (requiring material support and defining it to include providing "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons, . . . explosives, or training" (emphasis added)).

142. *Barahona*, 691 F.3d at 351.

143. § 1182(a)(3)(B)(iv)(VI).

materially assisted the FMLN by providing a safe house, this would be a voluntary act that is sufficient to trigger the Material Support Bar.¹⁴⁴ Barahona could only then prevail by demonstrating that he was acting under duress, and that the Material Support Bar contains an exception for those whose assistance occurred under duress. But this leads to the question that the majority in fact answered: The Bar does not contain a duress exception.¹⁴⁵ On this interpretation, the court would have been correct to uphold the BIA's decision.

While this argument is a strong one, it does not cure the deficiencies in the Fourth Circuit's reasoning. As fact-finder, the IJ did not conclude that Barahona performed any affirmative acts. And in recounting Barahona's testimony before the IJ, the court took care to point out that he did not give any affirmative assistance.¹⁴⁶ For example, the Fourth Circuit noted that the guerillas "always brought their own food."¹⁴⁷ Again, it is unhelpful to speculate on whether the facts before the IJ were complete. And if the majority really wanted to decide that Barahona committed an affirmative act, this should have been noted in the opinion. Aside from the reference to Barahona giving the guerillas directions, there is no mention—in either the facts section or the court's analysis—of Barahona performing any affirmative acts.

As written, the opinion breeds confusion. By skipping over the "voluntary act" requirement entirely, it leaves the reader unclear on the way in which the majority really conceptualized the case¹⁴⁸: Did they ignore the statute's explicit "act" requirement altogether, or did they believe that the commission of an affirmative act was so obvious—despite the dissent—that the question did not require discussion? The majority should have engaged directly with Judge Wynn's dissent, which would have forced them to confront all of the issues. If they disagreed with the dissent's view that Barahona's conduct did not involve any affirmative acts,¹⁴⁹ they could have provided a principled basis for that disagreement before moving on to the duress issue.

144. See *supra* notes 93–99 and accompanying text.

145. See *supra* notes 122–24 and accompanying text.

146. *Barahona*, 691 F.3d at 356.

147. *Id.* at 352.

148. See *supra* notes 122–26 and accompanying text.

149. See *Barahona*, 691 F.3d at 358 (Wynn, J., dissenting).

2. National Security Concerns Do Not Justify Applying the Material Support Bar to Omissions

The second major point of contention with the view of *Barahona* articulated in this Recent Development may be that it potentially undermines the level of national security protection that the Material Support Bar provides. Critics may argue that, in order to provide an appropriate level of protection, Congress had to draw some lines in enacting the statute. Of course, in drawing lines, a statute may catch some aliens who are “undeserving” of being found inadmissible. Critics may argue that Congress should err on the side of caution, drawing broad lines to catch all of the aliens that *may* threaten national security, even at the expense of barring some aliens who would not pose a true threat to the United States.¹⁵⁰ In addition, the legislative history behind the Material Support Bar shows that a strong concern for national security is what motivated Congress to pass the law in the first place.¹⁵¹ As a result, one may argue that it is correct to interpret the statute as barring everyone who has materially assisted terrorists, even where that assistance resulted from a mere failure to prevent terrorism; those who have assisted through omissions may still be more dangerous than those who have never assisted in any way. Furthermore, aliens who have only supported terrorism by way of omission are still able to seek a discretionary waiver.¹⁵² The Attorney General can therefore make exceptions as warranted,¹⁵³ but as a practical matter it is arguably more appropriate for the law to exclude all of these supporters as a *prima facie* rule.

While these national security concerns are legitimate and were central to Congress’s decision to enact the Material Support Bar, they do not justify interpreting the Material Support Bar as covering aliens who have provided assistance through omissions. There are two main reasons for this. First, the view advanced in this Recent Development, and in Judge Wynn’s dissent,¹⁵⁴ is not a normative argument. It does not suggest that aliens whose assistance has involved mere omissions should be excluded from the Material Support Bar because it is unfair

150. See generally John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565 (2007) (emphasizing national security concerns in interpreting the Constitution).

151. See *supra* note 124.

152. 8 U.S.C. § 1182(d)(3)(A) (2012). *Barahona*’s attempt to obtain such a waiver was unsuccessful. See *supra* note 57.

153. In practice, this discretion is normally exercised by the Secretary of the Department of Homeland Security. See *supra* note 22.

154. *Barahona*, 691 F.3d at 356–58 (Wynn, J., dissenting).

to render them inadmissible. Rather, the argument is a purely positive one: Congress, by the plain language of the statute, only intended the Material Support Bar to apply to those who have provided material support via an affirmative act.¹⁵⁵ This argument is sufficient alone because the reviewing court approaches the agency interpretation with a high level of deference. It can reverse the BIA's decision only on an error of law¹⁵⁶ and, based on *Chevron*, cannot reverse if the agency's interpretation is a reasonable construction of the statute.¹⁵⁷ In *Barahona*, the BIA interpretation should have failed because it was contrary to a clear expression of congressional intent.¹⁵⁸

Moreover, even as a normative argument, excluding omissions from the Material Support Bar would still have merit. Applying the Material Support Bar to all those whose omissions may have assisted terrorists would be an extremely broad, and arguably unwarranted, step. Would the Bar then apply to all those who failed to report terrorism, or to physically prevent it? Would reporting terrorism even be enough if the reporter had already opened his door when threatened by terrorists? Would it even be enough for Barahona to abandon his home once terrorists began to use it? Would he be forced to burn down his home? In other words, how could a person in Barahona's shoes possibly comply with his duty? The duty imposed on him is a far broader duty than the law usually imposes on anyone¹⁵⁹ and would be incredibly difficult to adjudicate. As the next Part will demonstrate, this construction would also apply disproportionately to asylum seekers.

In addition, the Fourth Circuit in *Barahona* did not intend or purport to interpret the Material Support Bar broadly enough to encapsulate omission-based assistance. Rather, the court limited its review to the question of whether the Bar contained a duress or involuntariness exception.¹⁶⁰ The majority's misapplication of the Bar to an alien who had merely acquiesced in terrorist conduct appeared to be an unintended consequence of its mistaken analysis rather than a deliberate goal. Thus, it would be wrong to read *Barahona* as correctly determining, on national security grounds, the scope of the conduct that the Material Support Bar covers. The Fourth Circuit did

155. See *supra* notes 130–31 and accompanying text.

156. *Barahona*, 691 F.3d at 353 (majority opinion).

157. *Id.* at 354 (citing *Midi v. Holder*, 566 F.3d 132, 137 (4th Cir. 2009) (“If . . . the statute is silent or ambiguous, we defer to the agency’s interpretation if it is reasonable.”)).

158. *Id.* at 357 (Wynn, J., dissenting).

159. See *supra* note 94 and accompanying text.

160. *Barahona*, 691 F.3d at 353 (majority opinion).

not even purport to address that issue. Neither a strict construction of the statute nor a policy-oriented approach justifies the application of the Material Support Bar to aliens who have assisted terrorists by way of mere omissions.

IV. ALLOWING ACQUIESCENCE TO TRIGGER THE MATERIAL SUPPORT BAR WOULD HAVE TROUBLING IMPLICATIONS FOR ASYLUM SEEKERS

The Material Support Bar is a ground of inadmissibility and therefore applies to all categories of prospective immigrants.¹⁶¹ At the same time, the Fourth Circuit's interpretation of the statute, implicitly extending the Bar to cover those who have acquiesced in terrorist conduct in addition to those who have affirmatively assisted in it,¹⁶² is likely to have a disproportionate impact on asylum seekers. This effect is likely because of the large potential overlap between those who have legitimate claims to asylum and those who have been forced to acquiesce with terrorists' conduct, without committing any affirmative acts of assistance. The goal in this Section is not to argue that the statutory requirements of the Material Support Bar should be amended. Others have already examined in detail the ways in which the Bar, even according to its usual interpretation, causes problems for those seeking asylum.¹⁶³ The more modest goal of this Recent Development is to demonstrate the particular way in which *Barahona's* application of the Bar to omissions threatens additional negative impacts on asylum seekers. This group, more than any other, is likely to suffer from the Fourth Circuit's doctrinal errors.

Congress has vested in the Attorney General discretion to grant asylum in the United States to an individual who has a well-founded fear of persecution on account of his race, religion, nationality,

161. See *supra* notes 19–21 and accompanying text.

162. See *supra* notes 125–27 and accompanying text.

163. See, e.g., Steven H. Schulman, *Victimized Twice: Asylum Seekers and the Material-Support Bar*, 59 CATH. U. L. REV. 949 (2010) (explaining that the BIA's interpretation of the Bar leads to its finding many terrorism victims inadmissible, including those who have been forced to pay ransoms for release from capture); *Report, Unintended Consequences: Refugee Victims of the War on Terror*, 37 GEO. J. INT'L L. 759 (2006) (documenting in detail a wide range of agency determinations on issues surrounding the Material Support Bar, and concluding that "the terms 'material support' and 'terrorist organization' have few limiting principles"); Kathryn White, Note, *A Chance for Redemption: Revising the "Persecutor Bar" and "Material Support Bar" in the Case of Child Soldiers*, 43 VAND. J. TRANSNAT'L L. 191 (2010) (observing that the Material Support Bar fails to distinguish between adult members of terrorist organizations and those who have been forced to serve as child soldiers for the organizations).

political opinion, or membership in a particular social group.¹⁶⁴ As a result, by definition, asylum seekers are coming to the United States from places where they faced harm or the threat of harm.¹⁶⁵ In many cases, this threat may have come from groups that the Department of State has designated as “foreign terrorist organizations,” many of which are anti-government or separatist groups.¹⁶⁶ Asylum seekers may have lived among these groups for long periods of time and, as in *Barahona* itself, day-to-day existence may depend on some degree of cooperation with occupying terrorist organizations.¹⁶⁷ In fact, it may very well have been this forced cooperation that prompted these refugees to seek asylum in the United States in the first place.

Followed to its logical conclusion, treating omissions as sufficient to trigger the Material Support Bar would be problematic. It would make virtually all asylum seekers inadmissible if they come from areas that are occupied by terrorist organizations. On this reasoning, the Bar would even apply in the “absurd” situations that Judge Wynn described.¹⁶⁸ An alien would be inadmissible if, for example, he has been forced to flee his home and knows that the terrorists will likely occupy it.¹⁶⁹ He would also be inadmissible, even more absurdly, if he fails to report the actions of a terrorist organization, even when the government is in the midst of a civil war and is powerless to stop the group. In some circumstances, he will have nobody to whom he can report the terrorists. He may, as in *Barahona*’s situation, have a legitimate fear of retaliation if he reports the terrorist actions.

164. See 8 U.S.C. § 1158(b)(1)(b) (2012); *id.* § 1101(a)(42) (defining a “refugee” based on the well-founded fear of persecution on the basis of any of those five associations); *id.* § 1231(b)(3)(A) (preventing the Attorney General from returning an individual to a country in which his life or freedom would be threatened based on any of those associations).

165. See *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (noting that “persecution” is not statutorily defined, but explaining it as “the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive” (quoting *Prasad v. INS*, 47 F.3d 336, 339 (9th Cir. 1995))); *Osaghae v. INS*, 942 F.2d 1160, 1163 (7th Cir. 1991) (“‘Persecution’ means, in immigration law, punishment for political, religious, or other reasons that our country does not recognize as legitimate.” (quoting *Zalega v. INS*, 916 F.2d 1257, 1260 (7th Cir. 1990))).

166. See § 1189(a) (delegating authority to the Secretary of State to determine those groups that should be listed as “foreign terrorist organizations”). See generally *In re S-K-*, 23 I. & N. Dec. 936 (B.I.A. 2006); Dep’t of State, Bureau of Counterterrorism, *Foreign Terrorist Organizations* (Sept. 28, 2012), <http://www.state.gov/j/ct/rls/other/des/123085.htm>. A good example is *Barahona* itself, in which the anti-government rebels took over *Barahona*’s village and threatened inhabitants with violence. See *supra* notes 34–41 and accompanying text.

167. See *supra* notes 37–41 and accompanying text.

168. *Barahona v. Holder*, 691 F.3d 349, 358 (4th Cir. 2012) (Wynn, J., dissenting).

169. See *id.*

Following the interpretation of the Material Support Bar in *Barahona*, how would a court treat an asylum applicant from Colombia who had been stopped at gunpoint while driving and forced to surrender his vehicle to members of the United Self-Defense Forces of Colombia who were engaged in drug trafficking? What about a shop owner in Somalia who, under threat of execution, failed to prevent Al-Shabaab insurgents from raiding his inventory for supplies? There is a danger in these situations that an unduly broad application of the Material Support Bar would prevent these persecuted and non-threatening individuals from gaining asylum in the United States. *Barahona* brings about an unwarranted magnification of the impact of the Material Support Bar on asylum seekers: Mere acquiescence, without any affirmative action, is sufficient to turn a terrorist victim into a terrorist supporter. This mislabeling is significant in itself, but its consequences are even more troubling. If the United States denies victims the opportunity to escape, their only choice is to continue living with the daily threat of violence and persecution and to continue acquiescing to their terrorist oppressors.

CONCLUSION

Barahona was wrongly decided because it was wrongly analyzed. Rather than focusing on the preliminary question of whether *Barahona* committed an act that would trigger the Material Support Bar, the majority jumped ahead to determine whether there is a duress exception to the Material Support Bar. Although it was right to conclude that there is no such exception, the court should not have reached the duress issue at all. The threshold question, raised in Judge Wynn's dissent, is whether *Barahona* committed an affirmative act. Had the majority addressed this question, it would have likely concluded that no affirmative act occurred that was sufficient to trigger the Material Support Bar. On this basis, the BIA's interpretation should have failed at the first step of the *Chevron* test, and the BIA's decision should therefore have been reversed.

As a result of the *Barahona* court's holding, the Material Support Bar will render inadmissible aliens who have done nothing more than merely acquiesce with occupying terrorist forces in order to ensure their own survival. This could have especially severe ramifications for asylum seekers. Future courts should apply the Bar by interpreting the statute according to its plain meaning and follow the two-step process advanced in this Recent Development. On this reasoning, acquiescence would not be enough to bar aliens from the United

States. The rule would operate as it should, keeping out supporters of terrorism while protecting victims.

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