

Testimony of  
**Mr. Michael Horowitz**

September 27, 2006

TESTIMONY OF MICHAEL J. HOROWITZ

Before the  
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP  
of the  
SENATE JUDICIARY COMMITTEE  
September 27, 2006

Senator Cornyn and Members of the Committee:

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

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

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

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

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

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

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

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

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

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

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

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

The key element of the administration's position is the view that no "duress" exception can be granted to otherwise fully qualified refugee or asylum applicants if they engage in such

"terrorist" acts as paying ransoms to avoid the rape of their spouses. This position has been adopted even where the applicants can:

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

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

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

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

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

As the Committee is aware, such conservative leaders as Congressmen Pitts and Pence have sought to achieve a statutory return to common sense and decency by introducing legislation to override the administration's construction of the "material support" and "terrorist organization" provisions of law. But as the Committee is equally aware, the legislative process is often a difficult and torturous one - never more so than now, as Congress approaches the end of the Session.

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

Approaching immigration organization leaders, I urged them to consider a "stroke of the pen" compromise approach that would satisfy all stated administration security concerns while at the

same time authorizing carefully considered duress claims to be made and authorizing an expedited waiver process to distinguish between terrorist and non-terrorist organizations that had militarily resisted existing governments.

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

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

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

1. were faced with what a reasonable person would deem a threat of death or serious bodily harm against himself or herself or someone else; and
2. acted necessarily and reasonably to avoid the threat.

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

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

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

With respect to group exemptions for organizations that engaged in military resistance to existing governments, I was unable to find any administration official who would justify continuance of the blanket, per se terrorist designations now given to such organizations as Burmese supporters of the Chin National Front (CNF)/Chin National Army (CAN), the Karen National Union (KNU), the Montagnard community, the Hmong community or Cubans who supported anti-Communist movements. This point was made even clearer because, on May 3 and August 30, 2006, the Secretary of State granted statutory exemptions to Burmese Karen refugees located in

Thailand who had provided material support to the Karen National Union and Karen National Liberation Army. "In principle" - albeit not yet, after more than two years, in reality -- officials at all levels of the administration have expressed support for timely fact-finding proceedings that would offer similar waivers to similarly non-terrorist groups.

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

? permit the use of scrupulously defined and reviewed duress claims; and

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

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

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

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

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

First, as noted, I believe that the administration's position caricatures the views of those of us who, in the current and intense debate over U.S. immigration policy, favor tough, security-oriented policies. If "our" view is associated with policies that seek to shut the door to all refugee and asylum applicants, it will be harder for us to prevail in debates over such legitimate issues as security fences, treatment of the rogue decisions of the 9th Circuit and terrorist interrogation procedures. If the "conservative" position on immigration matters can be characterized as one that regards all of "them" as terrorists, irrespective of the facts, we will sadly lose credibility as we engage in crucial debates over the full range of post 9/11 policy issues. It is this loss and not the availability of carefully vetted refugee and asylum duress claims or carefully analyzed group waiver cases that will adversely effect U.S. security interests.

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

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

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

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

He cited President Reagan who was

[f]ond of quoting from a letter he had received from a man who wrote, "You can go to live in Turkey, but you can't become a Turk. You can't go to live in Japan and become Japanese, [and so

on for Germany, France, etc.] But ... Anyone from any corner of the world can come to America and be an American.

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

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

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

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