

TERRORISM, MATERIAL SUPPORT, THE INHERENT
RIGHT TO SELF-DEFENSE, AND THE U.S.
OBLIGATION TO PROTECT LEGITIMATE ASYLUM
SEEKERS IN A POST-9/11, POST-PATRIOT ACT,
POST-REAL ID ACT WORLD

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I. INTRODUCTION

In the aftermath of September 11, 2001, the United States acted swiftly to enforce existing laws and enact new ones designed to protect our country and our citizenry from further atrocities at the hands of dangerous terrorists. Chief among these was the USA PATRIOT Act (PATRIOT Act), which was signed into law on October 26, 2001. The Act's title is an acronym for its stated goal: "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism."¹ Unfortunately, some of these tools have been applied against innocent victims, rather than against perpetrators of terror.

In this article, we will explore the definition of "material support"² under U.S. immigration law and how it negatively affects countless legitimate refugees who have fled persecution in their homelands. This obstacle to refugees arose from changes to the Immigration and Na-

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¹ USA PATRIOT Act, Pub. L. No. 107-56, § 1(a), 115 Stat. 272, 272 (2001) (codified in scattered sections of the U.S.C.).

² See generally 18 U.S.C. § 2339A (2001) (defining material support as any "property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel [one] or more individuals who may be or include oneself], and transportation, except medicine or religious materials").

tionality Act (INA),³ as a result of provisions contained in the PATRIOT Act, and, more recently, in the REAL ID Act of 2005 (REAL ID Act).⁴

The INA bars from asylum anyone who has “engaged in terrorist activity,” as well as anyone who “affords material support” to one who “has committed or plans to commit a terrorist activity.”⁵ Most would agree that individuals truly engaged in terrorist activity and those materially supporting terrorists should not be granted asylum in the United States. Yet, because both “terrorist activity” and “material support” are defined so broadly under current law, innocent victims of torture, rape and other atrocities committed against them by brutal totalitarian regimes, could themselves be labeled “terrorists” or “material supporters,” barring them from the protection of asylum in the United States. This is particularly true of those who have taken up arms in resistance in self-defense against such violent forces, as well as for those who have provided financial support, food or clothing to others engaged in resistance.⁶

The barring of vulnerable refugees under the INA has had devastating implications for the most brutally oppressed and intensely vulnerable ethnic and religious minorities in the world. In conjunction with Section 805 of the PATRIOT Act and Section 103 of the REAL ID Act, the proliferation of this bar by the Department of Homeland Security (DHS) and other government agencies against legitimate refugees is both abhorrent and anathema to the foundations upon which the United States stands.⁷

³ Immigration and Nationality Act, *codified at* 8 U.S.C. § 1101 (2001).

⁴ REAL ID Act of 2005, Pub. L. No. 109-13, Div. B § 1 119 Stat. 231, 303-323 (2005).

⁵ Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B) (2001).

⁶ See *U.S. Conference of Catholic Bishops on Refugees from Burma: Hearing Before the H. Int'l Relations Subcomm. on Africa, Global Rights, and Int'l Operations of the H. Comm. on Int'l Relations*, 109th Cong. 4, 7 (2006) (testimony of Anastasia K. Brown, Director of Refugee Programs for Migration and Refugee Services, U.S. Conference of Catholic Bishops) (discussing the implications of the Act on people living in Burma who have acted in self-defense) *available at* http://www.house.gov/international_relations/109/bro020706.pdf.

⁷ See generally USA PATRIOT Act, Pub. L. No. 107-56, § 805, 115 Stat. 272, 377 (2001); REAL ID Act, Div. B § 103 (defining broadly terrorists or material supporters of terrorists).

II. HISTORY OF U.S. LAW CONCERNING MATERIAL SUPPORT

The INA prohibits “provid[ing] material support or resources” to “foreign terrorist organizations.”⁸ The material support bar was first passed as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).⁹

“Congress was concerned that terrorist organizations with charitable and humanitarian arms were raising funds within the United States that could then be used to further terrorist activities.”¹⁰ To deal with this concern, the AEDPA provision made unlawful any support to these groups, even where the support was intended for charitable or humanitarian purposes.¹¹

In Section 805 of the PATRIOT Act, the definition of material support was expanded to include “expert advice and assistance”¹²—a definition deemed constitutionally vague in federal court.¹³ In response, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004.¹⁴ This Act provided a more detailed definitions of the terms “personnel,” “training,” and “expert advice or assistance.”¹⁵ It also amended the material support provision by requiring a person to have “knowledge that the organization is a designated terrorist organization ... that the organization has engaged or engages in terrorist activity ... or that the organization has engaged or engages in terrorism.”¹⁶

After a noble effort by the U. S. House of Representatives to seemingly narrow the definition of “terrorist organizations” and “material supporters,” the refugee and human rights community was shocked by

⁸ 18 U.S.C. § 2339B (a)(1) (2001).

⁹ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 323, 110 Stat. 1214, 1255 (2004) [hereinafter *AEDPA*] (codified as amended at 18 U.S.C. § 2339A).

¹⁰ MARY DEROSA, MATERIAL SUPPORT: A SUMMARY, IN PATRIOT DEBATES: EXPERTS DEBATE THE USA PATRIOT ACT (Stewart A. Baker & John Kavanaugh eds., 2005), <http://www.patriotdebates.com/material-support>.

¹¹ AEDPA, § 323 (defining “material support or resources” to include tangible support such as money, goods and materials, as well as intangible support such as “personnel” and “training”).

¹² USA PATRIOT ACT, § 805.

¹³ See *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1200 (C.D. Cal. 2004).

¹⁴ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1, 118 Stat. 3638, 3638 (2004).

¹⁵ Intelligence Reform and Terrorism Prevention Act of 2004, § 6603(b).

¹⁶ Intelligence Reform and Terrorism Prevention Act of 2004, § 6603(c)(2).

the introduction of the patently anti-refugee provisions of the REAL ID Act, which was initially passed by the House.¹⁷ These Acts have so impinged on existing immigration laws that persecuted refugees face harsher treatment in the United States than ever before.¹⁸ For example, members of many ethnic and religious minority groups, who have fled terror and persecution in their homeland, now face being mislabeled as terrorists by the United States and turned away from our shores. Among the most vulnerable groups is the Chin of Burma. As the authors have become personally and professionally involved in the cases of two Chin refugees in recent months, it is with their cases in mind that we write this article. The asylum applicants will be referred to in this article only as Mrs. MSK and Mr. ZC. The applicants are unrelated, and their lives took different turns. What they have in common is that both are of the Chin ethnic minority in Burma, and both now face being barred from asylum for having resisted the brutal forces that sought their demise, along with the annihilation of their people.

III. THE CHIN ETHNIC MINORITY BURMA: MATERIAL SUPPORTERS OF TERRORISM, OR PERSECUTED REFUGEES ENGAGED IN THEIR GOD-GIVEN NATURAL RIGHT TO SELF-DEFENSE?

Widespread human rights abuses are committed systematically against ethnic and religious minorities in Burma¹⁹ (renamed “Myanmar” by the illegitimate military junta ruling the government).²⁰

¹⁷ See generally Bob Egelko, *New Limit on Review of Asylum Cases; Immigration Judges' Decisions Would be Harder to Overturn*, S.F. CHRON., May 16, 2005, at A1 (reporting on how organizations such as Human Rights First believe the new asylum provisions of the REAL ID Act will have a harmful effect on people who have suffered human rights abuses); David D. Kirkpatrick, *Congress Approves Financing for Military and Immigration*, N.Y. TIMES, May 11, 2005, at A16 (“the amnesty provision [of the REAL ID Act] drew heavy criticism from religious and human rights groups who argued that it could harm genuine victims”).

¹⁸ United States Commission on International Religious Freedom (USCIRF), *Asylum Seekers in Expedited Removal*, <http://www.uscirf.gov/countries/global/asylum%5Frefugees/2005/february/execsum.pdf> (last visited Jan. 29, 2006) (providing details concerning recent treatment of asylum seekers in the United States).

¹⁹ U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Situation of Human Rights in Myanmar*, ¶¶ 43-46, U.N. Doc. E/CN.4/2004/33 (Jan. 5, 2004) (prepared by Paulo Sérgio Pinheiro).

²⁰ See James R. Carroll, *McConnell Leads Fight to End Oppression in Myanmar; Senator Pushes for Sanctions Against Asian Country*, COURIER-JOURNAL (Louisville, Ky.), June 30, 2003, at A1 (describing how Myanmar means “the first inhabi-

Burma has been savagely ruled for decades by this military junta that is not recognized by the United States.²¹ Burma's abysmal human rights record has been well documented by the U.S. Department of State and countless non-governmental human rights organizations.²² Ethnic minorities—particularly the Chin, Karin, and Karinni—are routinely and systematically subjected to torture, rape, forced servitude, and execution. Minority homes, lands, and crops necessary for survival are destroyed systematically by the military junta, which acts with impunity.²³

Human rights activists argue that the gross and systematic attacks by the Burmese military on its own civilian population amount to acts of state-sponsored terrorism and certainly constitute crimes against humanity, if not genocide.²⁴ The brutal terror directed against the ethnic Chin minority has given rise to a necessary resistance movement. Groups of ethnic minorities in Burma, including the National Democratic Front, the Chin National Front (CNF), and earlier the Chin National Army, have naturally joined together to defend themselves, their people and their homeland from tyranny and destruction.²⁵ All of these organizations have admittedly taken up arms to resist the brutal regime and to fight for the survival of their people in an ongoing struggle to protect the Chin from torture, rape, murder, and other atrocities.²⁶

Both Mr. ZC and Mrs. MSK are members of the Chin ethnic minority. Mr. ZC was widely known in Burma as a pro-democracy advocate and political dissident. He was an active member of the organiza-

tants of the world" in reference to the country's native Mramma people who made the country a major power in the 9th century).

²¹ Barbara Crossette, *The World; Dead Men Don't Wear Bleeding Chennai*, N.Y. TIMES, May 25, 1997, § 4, at 4.

²² See BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2003, BURMA (2004) (reporting on the various human rights abuses Burma inflicts upon its religious and ethnic minorities) available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27765.htm>. See also *Situation of Human Rights in Myanmar*, *supra* note 19, at 43-46.

²³ BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, *supra* note 22.

²⁴ John Bercow, *Civilised World Has Turned a Blind Eye to Burma For Too Long*, DAILY TELEGRAPH (London), Oct. 26, 2005, § Features, at 22.

²⁵ See Meera Sundar, *Central Pressure on Mizos, Chins*, STATESMAN (India), June 11, 2005 (discussing the Chin National Front's fight against the military junta in Myanmar); see *Burmese Opposition*, INDEPENDENT (London), Apr. 30, 1996, § Int'l, at 13 (describing the National Democratic Front as an "alliance of armed ethnic groups"); see *Myanmar Rebels Cop It In Mizoram*, STATESMAN (India), June 26, 2005 (describing the Chin National Army's operations on the Indo-Myanmarese border).

²⁶ Sundar, *supra* note 25.

tions listed above. As such, he could be barred from asylum under the INA.²⁷

Mrs. MSK was never a member of any organized resistance group. She did, however, provide a portion of her meager finances to support those engaged in resisting the savage military junta government. Due to her small contribution to the CNF, and because she provided a few household items to the group, she was denied asylum on account of having provided material support to a terrorist organization.

It should be noted that none of the Chin groups have been designated as terrorist organizations by the Attorney General.²⁸ Rather, Mrs. MSK was labeled as such because of the overly broad and easily abused provisions of the INA. This cannot be the result intended by Congress.²⁹ Representative Christopher H. Smith and Representative Ileana Ros-Lehtinen along with twenty-six members of the House Refugee Caucus, shared their distress with the U.S. Department of Homeland Security Secretary, Michael Chertoff:

In addition to duress and extortion situations, we are concerned that support to groups that are engaged in resistance against brutal, repressive regimes— even when the support is minimal—may bar a refugee from protection in the United States. This application of material support now threatens the resettlement of Burmese religious and ethnic minorities who in *any way* aided groups, whose members may have engaged in armed resistance to the repressive and illegitimate military junta that rules Burma, an entity that President Bush has repeatedly denounced.³⁰

U.S. Senators Edward M. Kennedy and Joseph I. Lieberman wrote similarly to Secretary Chertoff on February 28, 2006:

²⁷ Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B) (2001).

²⁸ See Office of Counterterrorism, Foreign Terrorist Organizations (FTOs) (Oct. 11, 2005), available at <http://www.state.gov/s/ct/rls/fs/37191.htm> (providing a list of all organizations that have been designated as terrorist organizations).

²⁹ Rachel L. Swarns, *Provision of Antiterror Law Delays Entry of Refugees*, N.Y. TIMES, March 8, 2006, at A1.

³⁰ Letter from Christopher H. Smith, House of Representatives, 4th District, New Jersey, to Secretary Michael Chertoff, Department of Homeland Security, (March 3, 2006).

It is our belief that the Department should implement the material support bar in a manner that does not exclude deserving and vulnerable refugees and asylees....

....

...By revisiting its interpretation and application of the material support bar and by implementing procedures for exempting individuals and groups to whom the bar was not intended to apply, we believe that the Department will be able to ensure that the United States continues to protect Americans from terrorist threats without preventing innocent refugees from receiving protection in the United States.³¹

The following arguments address only the narrow issue described as it has broad implications for refugees of the Chin, Karin, Karinni, and other ethnic and religious minorities. These minorities have endured decades of gross and systematic human rights violations, arguably amounting to genocide at the hands of Burma's brutal and illegitimate ruling military junta. Acts of self-defense against such tyranny must be part of those inalienable rights America upholds as so dear.³²

To consider a human being either a terrorist or a material supporter of terrorism for taking up arms to protect his own life or the lives of others, or for joining those engaged in countering tyranny, would be reprehensible and in stark contradiction both to recognized inalienable rights and to the firm foundation and great humanitarian traditions of the United States. What follows is a discussion of how man's inherent and natural right to self-defense, and preservation of life and property, is firmly established in our Constitution and Bill of Rights and in volumes of writings by our nation's founding fathers. This inalienable right has been recognized for centuries in the common law traditions upon which our nation was founded. It is inconceivable that the United States Congress contemplated legislating away this inherent right without an explicit abrogation of such common law. Indeed neither natural law nor congressional intent supports the barring from asylum of those who have exercised their inherent and legal right to self-defense. The United States must not bar from asylum those like Mrs. SWK and Mr. ZC who have simply participated in the resistance movement necessary to protect the Chin ethnic minority from state-sponsored terror.

³¹ Letter from Senators Edward Kennedy and Joseph Lieberman to Secretary Michael Chertoff, Department of Homeland Security, (March 3, 2006).

³² U.S. CONST. amend. II.

IV. THE INHERENT NATURAL RIGHT TO SELF-DEFENSE, ALONG WITH THE COMMON LAW AND CONSTITUTIONAL RIGHT TO BEAR AND USE ARMS AGAINST AGGRESSORS AND TYRANTS, IS AN INHERENT RIGHT AND A CONSTITUTIONAL RIGHT ABROGATED BY THE INA'S BAR TO ASYLUM

More fundamental perhaps than any other natural and inherent right is the right to self-defense. The U.S. Constitution, the Bill of Rights, and the Constitutions of thirty-two States recognize the right to use arms in self-defense.³³ Before extending consideration to the myriad of writings recognizing this right, it is logical to look to our nation's founding documents and the clear and stated intent of our Founding Fathers, beginning with the Constitution.

As wisely stated by Thomas Jefferson in a letter to William Johnson:

On every question of construction [of the Constitution, let us] carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.³⁴

Samuel Adams, during debates and proceedings in the 1788 U.S. Constitution ratification convention in Massachusetts, said, "[t]hat the said Constitution [shall] be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to

³³ U.S. CONST. amend. II; ALA. CONST. art. I, § 26; ARK. CONST. art. 2, § 5; ARIZ. CONST. art. II, § 26; COLO. CONST. art. II, § 13; CONN. CONST. art. I, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. I, § 8; IND. CONST. art. 1, § 32; KAN. CONST. Bill of Rights § 4; KY. CONST. § 1; MICH. CONST. art. I, § 6; MISS. CONST. art. 3, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. 1, § 11; N.H. CONST. art. 2-a; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 4; OKLA. CONST. art. II, § 26; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; S.D. CONST. art. VI, § 24; TENN. CONST. art. I, § 26; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; VT. CONST. ch. 1, art. 16; WASH. CONST. art. I, § 24; W. VA. CONST. art. III, § 22; WIS. CONST. art. I, § 25; WYO. CONST. art. I, § 24.

³⁴ Letter from Thomas Jefferson to Judge William Johnson (June 12, 1823), in 15 THE WRITINGS OF THOMAS JEFFERSON, at 449 (Albert Ellery Bergh ed., 1907).

prevent the people of the United States, who are peaceable citizens, from keeping their own arms."³⁵

James Madison of Virginia wrote, "[The Constitution preserves] the advantage of being armed, which the Americans possess over the people of almost every other nation . . . [where] the governments are afraid to trust the people with arms."³⁶

Thus, to the Founding Fathers, the right to self-defense and the right to bear arms was not only constitutional, but pre-existed the Constitution. They believed it an inherent, natural right that no man may take away.

Fisher Ames, Delegate to the Massachusetts Constitutional Ratification Convention of 1788, who was later elected to the U.S. House of Representatives in 1789, wrote, "[t]he rights of conscience, of bearing arms, of changing the government, are declared to be inherent in the people."³⁷

The right of mankind to take up arms in self-defense pre-existed the laws of man, and neither law nor man can deny this inherent right. The early courts recognized and upheld these truths: "If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege."³⁸

The right to bear arms has roots in the common law heritage of our nation and was specifically recognized by our Founding Fathers. Alexander Hamilton and Thomas Jefferson, among others, clearly intended that the Second Amendment would provide an individual right to keep and bear arms. For example, Hamilton wrote that "[i]f the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self defense which is paramount to all positive forms of government."³⁹ Thomas Jefferson, in a letter to Major John Cartwright, wrote, "[t]he constitutions of most of our States assert, that all power is inherent in the people; that . . . it is their right and duty to be at all times armed."⁴⁰

³⁵ Samuel Adams, in *DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS 1788*, at 86-87 (Bradford K. Peirce & Charles Hale eds., William White, Printer to the Commonwealth 1856).

³⁶ *THE FEDERALIST* NO. 46 (James Madison).

³⁷ Letter from Fisher Ames to George Richards Minot (June 12, 1789), in *1 WORKS OF FISHER AMES*, at 54 (Seth Ames ed., 1854).

³⁸ *Wilson v. Arkansas*, 33 Ark. 557, 560 (1878).

³⁹ *THE FEDERALIST* NO. 28 (Alexander Hamilton).

⁴⁰ Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824), in *THOMAS JEFFERSON WRITINGS 1490, 1491* (Merrill D. Peterson ed., 1984).

Even our pre-colonial common law fathers recognized these unalienable rights. For example, the great English jurist, Sir William Blackstone, observed in his 1766 *Commentaries on the Laws of England*, that the English Bill of Rights recognized “the right of having and using arms for self-preservation and defence” as one of the auxiliary rights people possess “to protect and maintain inviolate the three great and primary rights,” the first of which is “personal security.”⁴¹ Blackstone termed the use of arms for self-preservation and self-defense an “auxiliary” right, because it was one of the subordinate rights which were to guarantee the existence and enjoyment of the primary rights of personal security, personal liberty and private property.⁴² Blackstone’s influence on our Founding Fathers cannot be stressed enough:

There exists a wealth of common law and colonial history that indicates that both Englishmen and pre-revolutionary colonists possessed that individual right to keep and bear arms. It is well known that the founding fathers of this nation recognized Sir William Blackstone as an authority of the common law. Therefore, it should be highly probative of the founding fathers’ understanding of an individual’s rights to review a portion of Blackstone’s authoritative treatise of the common law.⁴³

Blackstone was not alone. Sir Michael Foster, judge of the Court of King’s Bench, also wrote the following concerning the right of self-defense:

The right of self-defence in these cases is founded in the law of nature, and is not, nor can be, superseded by any law of society: for before civil societies were formed, (one may conceive of such a state of things though it is difficult to fix the period when civil societies were formed,) I say before societies were formed for mutual defence and preservation, the right of self-defence resided in individuals; it could not reside elsewhere: and since in cases of necessity, individuals incorporated into society cannot resort for protection to the law of the society,

⁴¹ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 141, 144 (1766).

⁴² *Id.* at 141.

⁴³ Charles L. Cantrell, *The Right to Bear Arms: A Reply*, 53 WIS. B. BULL., 21, 21-26 (Oct. 1980), available at <http://www.foac-pac.org/laws/Cantrell.html>.

that law with great propriety and strict justice considereth them, as *still, in that instance*, under the protection of the law of nature.⁴⁴

Perhaps, John Locke states it most concisely in *Two Treatises of Government*, 1689:

Must Men alone be debarred the common Priviledge of opposing force with force, which Nature allows so freely to all other Creatures for their preservation from Injury? I Answer: Self-defence is a part of the Law of Nature; nor can it be denied the Community, even against the King himself.⁴⁵

Self-defense and preservation from injury is indeed a part of the law of nature that can never be denied. This natural right is inherent, and extends to all mankind – even to the persecuted Chin of Burma.

In the same volume, John Locke boldly writes:

And hence it is, that he who attempts to get another Man into his Absolute Power, does thereby *put himself into a State of War* with him; It being to be understood as a Declaration of a Design upon his Life . . . This makes it Lawful for a Man to *kill a Thief*, who has not in the least hurt him, nor declared any design upon his Life, any farther then by the use of Force, so to get him in his Power, as to take away his Money, or what he pleases from him: because using force, where he has no Right, to get me into his Power, let his pretence be what it will, I have no reason to suppose that he, who would *take away my Liberty*, would not when he had me in his Power, take away everything else. And therefore it is lawful for me to treat him, as one who has put *himself into a State of War* with me, i.e. kill him if I

⁴⁴ SIR MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE COUNTY OF SURRY; AND OF OTHER CROWN CASES: TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW 273-74 (Michael Dodson ed., E. and R. Brooke 1792). Cases of justifiable self-defense include "[w]here a known felony is attempted upon the person, be it to rob or murder, . . . [a] woman in defence of her chastity, . . . [and] arson or burglary in the habitation." *Id.* at 274.

⁴⁵ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 420 (Peter Laslett ed., Cambridge University Press 1988) (1698).

can; for to that hazard does he justly expose himself, whoever introduces a State of War, and is *aggressor* in it.⁴⁶

Daniel Webster of Massachusetts famously proclaimed, "God grants liberty only to those who love it, and are always ready to guard and defend it."⁴⁷ And State constitutions written during the Revolutionary War period contained an explicit right to bear arms, indicating awareness that such a right was an integral feature in any list of freedoms.⁴⁸

No one knew better than America's founders the importance of an armed population that could defend itself from tyranny. The founders understood that the first step tyrannical governments take to control and enslave the people of a nation is to disarm them.

George Mason was a Virginia delegate to the Constitutional Convention of 1787, and a delegate to the Virginia Constitutional Ratification Convention of 1788.⁴⁹ He also helped Thomas Jefferson draft the Virginia Declaration of Rights, which served as the basis for the U.S. Bill of Rights. According to Mason:

[W]hen the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man, who was governor of Pennsylvania, to disarm the people; that it was the best and most effectual way to enslave them; but that they should not do it openly, but weaken them, and let them sink gradually. . . .

. . . .

⁴⁶ *Id.* at 279-80.

⁴⁷ DANIEL WEBSTER, REMARKS IN THE SENATE (June 3, 1834), reprinted in 7 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER, at 47 (National ed., Little, Brown & Co. 1903).

⁴⁸ 1 SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, 319, 324 (1971). For example, Vermont had the following language: "[T]he people have a right to bear arms for the defense of themselves and the State . . ." *Id.* Massachusetts' Constitution stated the following: "The people have a right to keep and bear arms for the common defense." *Id.* at 337, 342. New York's Constitution stated that "it is of the utmost importance to the safety of every State that it should always be in a condition of defense; and it is the duty of every man . . . to be prepared and willing to defend it. . ." *Id.* at 301, 312. Lastly, Pennsylvania's Constitution stated that "the people have a right to bear arms for the defense of themselves and the State . . ." *Id.* at 262, 266.

⁴⁹ Helen Hill Miller, *Foreword* to GEORGE MASON: GENTLEMAN REVOLUTIONARY at ix (1975).

. . . I ask, Who are the militia? They consist now of the whole people, except a few public officers.⁵⁰

Fellow Virginian, Patrick Henry, agreed:

Are we at last brought to such an humiliating and debasing degradation that we cannot be trusted with arms for our defence? Where is the difference between having our arms in our own possession and under our own direction, and having them under the management of Congress? If our defence be the *real* object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands?⁵¹

During Virginia's U.S. Constitution ratification convention, Henry continued: "Guard with jealous attention the public liberty. Suspect every one who approaches that jewel."⁵²

Foreseeing what might likely befall a nation that arms its government and military, but forbids arms for the people, Tench Coxe of Pennsylvania wrote:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must occasionally be raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.⁵³

⁵⁰ GEORGE MASON, DEBATES DURING THE CONSTITUTIONAL CONVENTION (1787), reprinted in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, at 380, 425 (Jonathan Elliot ed., J.B. Lippincott Co. 1888).

⁵¹ PATRICK HENRY, DEBATES DURING THE CONSTITUTIONAL CONVENTION (1787), reprinted in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, at 168-69 (Jonathan Elliot ed., J.B. Lippincott Co. 1888).

⁵² *Id.* at 45.

⁵³ A Pennsylvanian, *Remarks on the First Part of the Amendments to the Federal Constitution Moved on the 8th Instant in the House of Representatives*, FEDERAL GAZETTE, June 18, 1789. (Author was later determined to be Tench Coxe).

It is ludicrous to suppose that our great nation would now punish those who adhere to these very principles, by denying them refuge and returning them to the savage tyrants who seek their demise.

Even Mohandas Gandhi recognized forced disarming as “the blackest” of Great Britain’s strategies in enslaving the Indian people, “Among the many misdeeds of the British rule in India, history will look upon the Act of depriving a whole nation of arms as the blackest.”⁵⁴

Quotes from America’s founding fathers on the constitutional, natural, inherent, and inalienable right to bear and take up arms in self-defense and self-preservation are voluminous. Patrick Henry said:

Have we the means of resisting disciplined armies, when our only defence, the militia, is put into the hands of Congress? . . . [O]f what service would the militia be to you when, most probably, you will not have a single musket in the state? [F]or, as arms are to be provided by Congress, they may or may not furnish them.⁵⁵

The great object is that every man be armed . . . Everyone who is able may have a gun.⁵⁶

Thomas Jefferson put it succinctly in the Virginia Constitution, “[T]he right of the people to keep and bear arms shall not be infringed.”⁵⁷ In his *Commonplace Book*, Jefferson wrote:

[L]aws that forbid the carrying of arms . . . disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity . . . will respect the less important and arbitrary ones . . . Such laws make things worse for the assaulted and better for the assailants; they serve rather to

⁵⁴ MOHANDAS GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 446 (Mahadev Desai trans., Beacon Press 1957) (1948).

⁵⁵ Patrick Henry, Debate in the Constitutional Convention of Virginia, reprinted in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 48, 51-52 (Jonathan Elliot ed., 2d ed., New York 1968)

⁵⁶ *Id.* at 386.

⁵⁷ VA. CONST. art. I, § 13.

encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man.⁵⁸

Nothing could more clearly describe the situation for the ethnic and religious minority Chin people of Burma. Should the ravaged Chin lie down and accept the rape, torture, and murder of their people and the utter destruction of their lands and crops? It would be nothing short of madness to consider an attempt at self-defense and preservation by a people marked for genocide as terrorism.

Burma is governed by a repressive, racist military regime that perpetuates political and economic domination for the Burmese ethnic majority by violently persecuting ethnic minority groups. Just this year, the U.S. Department of State reported:

Wide-ranging governmental and societal discrimination against minorities persisted. Animosity between the country's many ethnic minorities and the Burman majority, which has dominated the Government and the armed forces since independence, continued to fuel active conflict that resulted in serious abuses during the year. These abuses included reported killings, beatings, torture, forced labor, forced relocations, and rapes of Chin, Karen, Karenni, Shan, Mon, and other ethnic groups by SPDC soldiers. Some armed ethnic groups also may have committed abuses, but on a much smaller scale than the Burmese Army (see Sections 1.a., 1.c., 1.f., and 1.g.).⁵⁹

Although the genocidal rampage of Burma's military junta has been directed against ethnic minorities, the religious element cannot be ignored. The U.S. Secretary of State has designated Burma a "country of particular concern" under the International Religious Freedom Act for particularly severe violations of religious freedom every year since the designation was introduced in 1999.⁶⁰ The U.S. Commission on International Religious Freedom reports:

⁵⁸ THOMAS JEFFERSON, THE COMMONPLACE BOOK OF THOMAS JEFFERSON 314 (Gilbert Chinard ed., John Hopkins Press 1926) (quoting from *On Crimes and Punishment* by Enlightenment philosopher Cesare Beccaria).

⁵⁹ U.S. Dep't of State, Country Reports on Human Rights Practices 2005 – Burma (Feb. 2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41637.htm>.

⁶⁰ Alan Cooperman, *U.S. Cites Top Violators of Religious Liberties*, WASH. POST, Nov. 9, 2005, at A26. See generally International Religious Freedom Act, 22

Repression by the military regime in Burma is widespread and continues systematically to include severe violations of religious freedom and other abuses. The government exercises strict control over many religious activities, imposes restrictions on certain religious practices, and, in some areas of the country, forcefully promotes Buddhism over other religions.⁶¹ Members of minority religious groups, especially Muslims and Christians, face serious abuses of religious freedom and other human rights by the military. In some localities, military commanders forcibly conscripted members of religious minorities as porters, killing some who have refused. Christians and Muslims have been forced to engage in the destruction of churches and graveyards for the purpose of clearing sites for military camps.⁶²

And according to the U.S. State Department:

There continued to be evidence that Christian Chins were pressured to attend Buddhist seminaries and monasteries and were encouraged to convert to Buddhism. In April, an exile Chin human rights group reported that local authorities forced 15 Chin pastors to participate in Buddhist New Year events to demonstrate "unity" with Burman Buddhists. The same human rights group claimed that local government officials lodged the children of Chin Christians in Buddhist monasteries in which they were given religious instruction and converted to Buddhism without their parents' knowledge or consent. Reports suggested that the Government sought to induce members of the Naga ethnic group in Sagaing Division to convert to Buddhism by similar means.⁶³

U.S.C. § 6442 (2000) (defining what it means to be a "country of particular concern" with relation to religious freedom).

⁶¹ U.S. Comm'n on Int'l Religious Freedom, *Countries of Particular Concern: Burma* (2005) available at <http://www.uscirf.gov/countries/countriesconcerns/Countries/Burma.html>.

⁶² U.S. Comm'n on Int'l Religious Freedom, *Annual Report of the U.S. Commission on International Religious Freedom 27* (2004), available at www.uscirf.gov/reports/12May04/finalReport.php3.

⁶³ U.S. Dep't of State, *supra* note 59.

Should such atrocities threaten the people of the United States, our Founding Fathers had clear instructions. Thomas Jefferson wrote:

[W]hat country can preserve it's liberties, if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is it's natural manure.⁶⁴

This *spirit of resistance* is all the Chin people have to preserve their lives. However, a spirit of resistance without arms with which to defend themselves would be both an exercise in futility and an invitation to further enslavement and slaughter.

It is difficult to find a single founding father who did not agree. Noah Webster, of Pennsylvania wrote:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the *power*, and jealousy will instantly inspire the *inclination*, to resist the execution of a law which appears to the unjust and oppressive.⁶⁵

Alexander Hamilton, of New York wrote:

[I]f circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all inferior to them in discipline and the

⁶⁴ Letter from Thomas Jefferson to William Smith (Nov. 13, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 356 (Julian Boyd ed., Princeton University Press 1955).

⁶⁵ Noah Webster, An Examination of the Leading Principles of the Federal Constitution ,(1787) in THE AMERICAN REPUBLIC: PRIMARY SOURCES 292 (2002).

use of arms, who stand ready to defend their own rights and those of their fellow-citizens.⁶⁶

Thomas Paine, of Pennsylvania wrote:

The supposed quietude of a good man allures the ruffian; while on the other hand, arms, like law, discourage and keep the invader and the plunderer in awe, and preserve order in the world as well as property Horrid mischief would ensue were one-half the world deprived of the use of them . . . [and] the weak will become a prey to the strong.⁶⁷

John Adams, in his *A Defence of the Constitutions of Government of the United States of America*, addressed specifically the absurdity of not allowing citizens to keep arms for their own defense, "To suppose arms in the hands of citizens, to be used at individual discretion, except in private self-defence . . . is a dissolution of the government."⁶⁸

The founders recognized beyond a shadow of a doubt that governments can become tyrannical and that individual citizens must have the strength and the arms to protect themselves in such event. Thomas Jefferson took it a step further in recognizing the right of the people not only to stand their ground, but also to overthrow and institute a new government when necessary. A shocking, obscure writing you suggest? Hardly—these are Jefferson's words in the third sentence of the *Declaration of Independence*:

That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.⁶⁹

With regard to our own nation, the Second Amendment right to keep and bear arms has become both fundamental, and a right firmly

⁶⁶ THE FEDERALIST NO. 29 (Alexander Hamilton).

⁶⁷ Thomas Paine, *Thoughts on Defensive War*, PENNSYLVANIA MAGAZINE (July 1775).

⁶⁸ JOHN ADAMS, 3 HISTORY OF THE PRINCIPAL REPUBLICS OF THE WORLD: A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 475 (1794).

⁶⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

established in our great tradition. Moreover, there unquestionably exists a natural right of an individual in his personal security and a concomitant right to protect one's family and self.

Early U.S. Supreme Court Justices recognized the natural inherent right of individuals to self-defense and to bear arms. Justice Joseph Story, a U.S. Supreme Court Justice from 1812 to 1845 wrote:

The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable people to resist and triumph over them.⁷⁰

And also:

One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia. The friends of a free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice, for the sake of mere private convenience, this powerful check upon the designs of ambitious men.⁷¹

In *United States v. Cruikshank*,⁷² the U.S. Supreme Court recognized that the right to arms pre-existed the Constitution and is thus an individual right. Chief Justice Morrison R. Waite, issued the majority opinion, in which he wrote:

The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amend-

⁷⁰ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1890 (3d ed. 1858).

⁷¹ JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 319, § 450 (Regnery Gateway Bicentennial Edition 1986) (1840).

⁷² 92 U.S. 542 (1876).

ments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called . . . the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.⁷³

In *Beard v. United States*,⁷⁴ the Court approved the common law rule that a person "may repel force by force" in self-defense.⁷⁵ It concluded that when attacked a person "was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such a way and with such force" as needed to prevent "great bodily injury or death."⁷⁶

In addition to the clearly stated intentions of our Founding Fathers and early U.S. Supreme Court justices, the laws of all fifty states and the constitutions of forty-four states recognize the right to use armed force in self-defense.⁷⁷ In light of this, it seems absurd and wholly un-

⁷³ *Id.* at 553.

⁷⁴ 158 U.S. 550 (1895).

⁷⁵ *Id.* at 562.

⁷⁶ *Id.* at 564.

⁷⁷ ALA. CONST. art. I, § 26; ALASKA CONST. art. I, § 19; ARIZ. CONST. art. II, § 26; ARK. CONST. art. II, § 5; COLO. CONST. art. II, § 13; CONN. CONST. art. I, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. I, § 8; GA. CONST. art. I, § 1, para. 8; HAW. CONST. art. I, § 15; IDAHO CONST. art. I, § 11; ILL. CONST. art. I, § 22; IND. CONST. art. I, § 32; KAN. CONST. Bill of Rights § 4; KY. CONST. Bill of Rights § 1, para. 7; LA. CONST. art. I, § 11; ME. CONST. art. I, § 16; MASS. CONST. part I, art. XVII; MICH. CONST. art. I, § 6; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 11; N.H. CONST. part I, art. 2(a); N.M. CONST. art. II, § 6; N.C. CONST. art. I, § 30; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 4; OKLA. CONST. art. I, § 27; PA. CONST. art. I, § 21; R.I. CONST. art. I, § 22; S.C. CONST. art. I, § 20; S.D. CONST. art. VI, § 24; TENN. CONST. art. I, § 26; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; VT. CONST. ch. I, art. 16; VA. CONST. art. I, § 24. California, Iowa, Maryland, Minnesota, New Jersey, and New York do not have "right to keep and bear arms" amendments in their state constitutions. Iowa's constitution states: "All men are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." IOWA CONST. art. I, § 1. New Jersey's constitution states: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety, and happiness." N.J. CONST. art. I, § 1. These summaries have been taken from NRA-ILA fact sheet available at

American for our lawmakers and the jurists charged with interpreting our laws to deny refuge and asylum to victims of widespread, systematic, and violent persecution on the basis that these refugees joined or supported organizations formed to resist the brutal and tyrannical regime seeking their annihilation. The potential application of the label *terrorist* to a group of victims simply because they engage in self-defense will remove them from consideration to obtain refugee status. For some, this will certainly mean torture and death.

It could not have been the intention of our founding fathers to define as terrorists, those who rightly bear arms are acting in self-defense. This must never be accepted as legal or moral by those now writing, enforcing, and interpreting laws in our great nation. Among the most compelling beliefs of our founders is that human beings are endowed by their Creator with a natural and inherent right to protect themselves from tyranny and to do so with the use of arms. This right pre-existed our Constitution, and in fact all man-made laws, and will exist until the end of time. Thus, any provision in modern law that seeks to, or inadvertently results in denying this right, is inherently flawed and wholly unenforceable. To suggest that a human being is in any way a terrorist or supporter of terrorism for either taking up arms to protect his own life, or for providing financial or other support to those engaged in countering tyranny on his behalf, would be reprehensible and in stark contradiction both to the laws of nature and to the firm foundation and great humanitarian traditions of the United States.

V. IT IS ANATHEMA TO U.S. JURISPRUDENCE AND TRADITION, AS WELL AS TO OUR TREATY OBLIGATIONS WITH REGARD TO THE PROTECTION OF REFUGEES, THAT GROUPS OF PERSECUTED RELIGIOUS AND/OR ETHNIC MINORITIES WHO HAVE BANDED TOGETHER TO DEFEND THEMSELVES AGAINST GROSS AND SYSTEMATIC TORTURE, RAPE, AND EXECUTION BE LABELED *TERRORIST ORGANIZATIONS*, AND THOSE WHO RESIST THEIR OPPRESSORS BE BARRED FROM ASYLUM

In response to the above analysis, some may say the United States' obligation to respect and protect the above-described right to self-defense is or should be limited only to those residing within its territory, the underlying philosophy being *self-defense for me, but not for thee*. However, in the present hour, it is clear that United States *interests*, and even our national and economic security, could be pro-

foundly affected by the extent to which our policies encourage or punish legitimate resistance, self-help and self-defense by oppressed persons throughout the world. The United States must decide whether here in the United States, it will protect those who dare to fight back on their own, or whether our refugee policy will label such persons *terrorists*, thereby ironically leaving the United States to expend its own blood and treasure around the world removing by force the real terrorists and tyrants who might have been more thoroughly and swiftly vanquished by armed, organized and well-funded groups of their own people.

Congress intended to limit terrorist entry in the United States with the enactment of the INA. Acts of self-defense are inherently lawful and especially in the United States, self-defense is a defense to otherwise criminal acts in all fifty states.⁷⁸ Congress did not intend to punish the oppressed and reward the tyrant. To suggest so is to discard more than two centuries of benevolent humanitarian legislation designed to protect and uphold the rights of the vulnerable.

Were immigration judges and the DHS to broadly apply portions of the INA dealing with the definition of terrorist activity,⁷⁹ devoid of an understanding of both Congressional intent and the intentions of our nation's founders, countless persecuted refugees would be denied asylum. Indeed any group engaged in what our Founding Fathers cherished as the inherent right to resist, would be labeled terrorists.

On April 23, 2003, the DHS granted asylum to Mohammed Odeh Al Rehaief. Mr. Al Rehaief is the Iraqi citizen who risked his life to provide information to U.S. Marines that led to the rescue of Private Jessica Lynch from a hospital in Nassiriyah, Iraq. The United States was so proud of this asylum grant that press releases were issued on April 29, 2003, by both the White House,⁸⁰ and DHS.⁸¹

However, an overly broad application of the INA to Mr. Al Rehaief's case would have had a far darker outcome. As the U.S. Marines were engaged in the use of firearms "with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause

⁷⁸ Paul Marcus, Interview, *The Entrapment Defense*, 30 OHIO N.U. L. REV. 211, 217 (2004).

⁷⁹ Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B) (2001).

⁸⁰ Press Release, White House, DHS Grants Asylum to Iraqi Who Aided Jessica Lynch Rescue (April 29, 2003), available at <http://www.whitehouse.gov/news/releases/2003/04/20030429-12.html>.

⁸¹ Press Release, Department of Homeland Security, Asylum Granted to Iraqi Who Aided Jessica Lynch Rescue (April 29, 2003), available at <http://www.dhs.gov/dhspublic/display?content=580>.

substantial damage to property,” they would be labeled a “terrorist organization” engaged in “terrorist activities” under this provision.⁸²

An overly broad application would not take into consideration the nature of the armed conflict in which the Marines were engaged, or their noble intentions to liberate a people oppressed for decades under a brutal dictatorial regime. It would look only to the fact that the *terrorists* (i.e., our brave Marines) used guns in violation of the laws of Saddam Hussein’s Iraq with the intent to endanger those loyal to Saddam Hussein. And, of course, Mr. Al Rehaief had provided material support to this *terrorist organization*, as he had provided *communications* to them.

One would immediately argue that when the U.S. military engages in armed defense, or in this case armed aggression, it would be preposterous to suggest they were engaged in terrorist activities. This widely publicized example illustrates the fact that not all armed actors are terrorists, and not all individuals who assist them are guilty of material support of terrorism.

Immigration judges and the DHS must not apply an overly broad interpretation of the law such as to discard the common law and constitutional rights of self-defense which the INA does not explicitly intend to abrogate. Our nation was born out of resistance to and liberation from tyrants. We have cherished and embraced for more than two hundred years our inherent right to protect and preserve our lives and liberty.

It is essential that the United States uphold both its own fundamental values, and its international treaty obligations to protect persecuted asylum seekers – not to forcibly *refoul* them to countries where they would likely suffer torture and death. It is anathema to U.S. jurisprudence and tradition, as well as to our treaty obligations with regard to the protection of refugees, that groups of persecuted religious and/or ethnic minorities who have banded together to defend themselves against gross and systematic torture, rape, and execution be labeled *terrorist organizations*, and those who resist their oppressors be barred from seeking asylum. Congress removed the right of terrorists to receive asylum. It certainly did not and would not, however, bar from these protections refugees who have exercised the right of self-defense against tyranny and state-sponsored terrorism. It would be the height of hypocrisy to consider turning our backs on those who have embraced the values we hold dear.

⁸² Immigration and Nationality Act, § 1182(a)(3)(B)(iii)(V)(b).

Indeed, the U. S. Congress provided within the PATRIOT Act and maintained within the REAL ID Act a waiver provision whereby the Secretary of the DHS and the Secretary of the Department of State, after consultation with one another and the Attorney General, may determine that the material support to a terrorist organization ground of inadmissibility does not apply to an individual or a specific organized group.⁸³ Although government lawyers from these departments have met regularly to establish guidelines and a procedure to implement this waiver authority, to date no action has been taken. Consequently, immigration judges have been left without guidance in how to apply the material support provision.

In the case of Mrs. MSK whose *material support* consisted of giving a flashlight and raincoats to members of one of the Chin resistance organizations, she remains in a US immigration detention facility pending the outcome of her appeal to the Board of Immigration Appeals. Should this decision prevail, Mrs. MSK will have been stripped of refugee protection on account of supporting her inherent right of self-defense and will be returned into the hands of the military junta whose atrocities our government otherwise condemns.

Self-defense is a natural inherent right that exists to protect against repression by false and tyrannical governments. In light of the overly broad interpretation of the material support bar by the DHS's District Counsels and Department of Justice Immigration Judges, Congress' effort to narrow the relevant provision in the Intelligence Reform and Terrorism Prevention Act of 2004 has failed the Constitutional test. Since Congress in the PATRIOT Act did not abrogate the natural and inherent right to self-defense, asylum seekers who engage in that right against tyranny should not be barred in the event that they may have provided *material support* to a group engaged in defending the defenseless. Either the Executive Branch must implement its authority to grant waivers to the bar, or this overbroad provision must again be found un-constitutional in the courts.

It would be deeply at odds with our history and our values as a nation to shun a minority group organized for the sole purpose of defending its people against gross and systematic raping and torture of villagers, pillaging, forced portering, mass destruction of villages, infanticide, and summary executions. These atrocities are routinely commit-

⁸³ REAL ID Act of 2005, Pub. L. No. 109-13, Div. B § 104, 119 Stat. 231, 309 (2005); USA PATRIOT Act, Pub. L. No. 107-56, § 411, 115 Stat. 272, 348 (2001).

ted in Burma, carried out with impunity by an armed military junta at the behest of one of the most brutal and repressive illegitimate regimes on Earth propped up by drug trafficking, specifically on account of the ethnic and religious identity of the displaced and brutalized Chin, Karin, and Karinni people.

VI. CONCLUSION

It is essential that the United States protect our country from terrorists, terrorist organizations, and those who provide unquestionable material support to terrorists – such as knowingly providing flight training to suicide hijackers or knowingly providing bomb-making instructions to al-Qaeda operatives. The PATRIOT Act, therefore, has an important role in our nation's ability to prevent and punish those who seek to harm us. But just as essential, and just as fundamental, is the responsibility and obligation of the United States to protect persecuted refugees and legitimate asylum seekers who have fled terror in their homelands for the safety of our shores.

The barring of asylum to refugees under the INA has devastating implications for the most brutally oppressed and intensely vulnerable ethnic and religious minorities in the world. In conjunction with Section 805 of the PATRIOT Act and Section 103 of the REAL ID Act, the proliferation of this bar by the DHS and other government agencies against legitimate refugees and asylum seekers is both abhorrent and anathema to traditional U.S. jurisprudence. Persecuted ethnic and/or religious minorities who stand together against brutal tyranny, systematic torture, rape, and other atrocities must not be labeled terrorists, and those who resist their oppressors must not be barred from seeking asylum.

The United States was founded by individuals who held dear the natural rights of self-defense to resist and to rise out of tyranny. This nation has backed up these ideals by offering not only significant financial support but also even the lives of its finest young men and women in the military in defense of oppressed persons throughout the world. The material support provisions of the PATRIOT Act discussed above turn legitimate refugees who have proven, often with their own blood. They embrace our values and share in our struggle for freedom, into *terrorists* ineligible for the very protection and freedom they sought in their own countries. The ultimate yet tragic irony is that these provisions of the PATRIOT Act could doom to deportation and even death some of the most “patriotic” people to enter our shores.