

The Green Card

Welcome to the Newsletter of the FBA's Immigration Law Section

LARRY BURMAN, CHAIR

Quote of the Month

“My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law [that] impedes the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule—or even to change it—

so as to do justice in the instant case before him. He need not wait for the legislature to intervene, because it can never be of any help in the instant case. “

Lord Denning (Alfred Thompson Denning), The Family Story 174, (1981)

PUBLISH IN THE FEDERAL LAWYER!

The Federal Lawyer continues to accept submissions for feature articles of 3000 to 8000 words, as well as letters to the editor, book reviews and commentaries. Guidelines for submission can be found at the fedbar.org website under publications/federal lawyer. Deadlines fall on the first of each month from December 2016 through most of 2017. The Immigration Law issue will be May 2017 and submissions are due Jan. 1, 2017.

If authors wish to submit an article with the official endorsement of ILS, they can send their draft at least two weeks in advance of the FBA deadline to Dr. Alicia Triche at aliciatrichecl@gmail.com. She will consider whether ILS will endorse the submission and, if so, provide edits and submit on the author's behalf.

Dr. Alicia Triche is Chair of the Section's Publications Committee.

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DISCLAIMER: *The Green Card* is a journal of opinion by and for immigration professionals. All opinions expressed herein are those of the writers alone, and do not represent the official position of the Federal Bar Association, the Immigration Law Section, or any organization with which the writer is associated.

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BY JASON DZUBOW

An Open Letter to My Friends at DHS and DOJ

Former House Speaker, and Donald Trump adviser, Newt “The Brain” Gingrich recently made plain what Mr. Trump has been arguing for months: The new Administration is planning “straight-out war” against the federal bureaucracy. But in my time, there are two things that I’ve learned about ideological wars: (1) The casualties are flesh-and-blood human beings, and (2) Everyone involved thinks that G-d is on his side.

In this case, Mr. Gingrich was speaking specifically about the troubled Department of Veterans Affairs, which he accused of various sins amounting mostly to half-truths (or perhaps whole lies). But we’ve seen a pattern with Mr. Trump’s appointments. For example, the new head of the Department of Energy wanted to eliminate that agency in 2012. The leader of the Environmental Protection Agency doubts human-influenced climate change and will likely prevent that organization from issuing regulations to protect public health. And the new Secretary of the Department of Housing and Urban Development will be Dr. Ben Carson, whose main qualification seems to be that he lives in a house.

But the situation for the Departments of Justice and Homeland Security are a bit different, at least in terms of those agencies’ oversight of our nation’s immigration laws. In those cases, it’s more likely that Mr. Trump will be ramping-up enforcement at the possible expense of other immigration functions (like processing immigration benefits).

Senator Jeff Sessions will lead the DOJ as Attorney General. He is known for his opposition to immigration reform and his belief that legal immigration to the United States should be reduced. So how will Senator Sessions’s appointment affect DOJ in terms of immigration enforcement? DOJ administers the nations Immigration Courts and the Board of Immigration Appeals (“BIA”), and (within some limits) interprets our immigration laws. As Attorney General, Mr. Sessions has the power to narrow precedents favorable to non-citizens. He can do this directly, by issuing Attorney-General opinions, which supersede decisions made by the BIA. He can also do it indirectly, by appointing ideologically like-minded Judges and BIA Members. DOJ also administers the Office of Immigration Litigation (“OIL”), which defends BIA decisions in the federal courts. Mr. Sessions could order OIL to take more hard-line stances, and he could push litigation that reflects his restrictionist viewpoint.

How would this be different than what we have now? The atmosphere for aliens in immigration proceedings has never been easy. That’s particularly true for aliens convicted of crimes. But at least in most cases, I have found

that Judges, BIA Board Members, and OIL attorneys are reasonable, and do their best to follow the law. Sometimes that means deporting people who are very sympathetic; other times, it means allowing people to stay who they believe should be deported. The problem comes when we have DOJ attorneys who are more concerned with ideological ends than with due process. We saw this most clearly when Attorney General John Ashcroft purged liberal (or supposedly liberal) BIA Board Members at the beginning of the George W. Bush Administration. Perhaps we will see a similar reshuffling in the months ahead.

For fair-minded attorneys, Judges, and Board Members at DOJ, that’s a frightening prospect. Are their jobs in jeopardy? Will they be forced to take positions contrary to their conscious, or contrary to their interpretation of the law? Many immigration benefits—such as asylum—contain a discretionary element. Will the ability to exercise discretion be intolerably curtailed?

It’s still unclear whether attorneys and officers at the Department of Homeland Security will face the same potential dilemmas as their DOJ counterparts. The new Secretary for DHS will be retired Marine Corps General John Kelly, who is widely viewed as non-ideological. Under the DHS ambit are several agencies that impact immigration, including U.S. Immigration and Customs Enforcement (“ICE”), which is basically the immigration police and prosecutors, and U.S. Citizenship and Immigration Services (“USCIS”), which administers immigration benefits, including asylum. We have yet to learn who will lead these agencies, and probably the choices for those posts will have more effect on the officers and attorneys “in the trenches” than General Kelly, who is overseeing the entire agency.

Currently, DHS attorneys, Asylum Officers, and ICE officers have a fair bit of discretion in handling cases, especially cases where the alien has no criminal record. DHS attorneys often can decide whether to keep an alien detained, they can offer prosecutorial discretion, and they can decide how aggressively to pursue an individual’s deportation or whether to agree to relief. Asylum Officers also have a fair bit of discretion to determine credibility and decide on relief.

The attorneys, officers, and Judges I know at DHS and DOJ are generally intelligent, caring individuals who do their best to follow and enforce the law without inflicting undo harm on individuals and families. They are aware of their power and their responsibilities, and they take their jobs seriously. Sometimes, I disagree with them on their interpretation of the law. Sometimes, I think their approach is unnecessarily aggressive. In some cases, we evaluate the merits of a case differently. While we do not

always agree, I can see that they are performing an essential function by fairly enforcing our nation's immigration laws.

In speaking to some DOJ and DHS attorneys and officers since the recent election, I have seen a certain level of demoralization. Some people have expressed to me their desire to leave government service. While these individuals respect and follow the law—even when the results are harsh—they are not ideological. They do not hate immigrants (or non-white people, or Muslims) and they do not want to enable or contribute to a system that they fear will become overtly hostile to immigrants that President Trump considers undesirable. I suppose if I have one word of advice for such people, it is this: Stay.

If you are a government attorney or officer and you are thinking of leaving because you fear an overtly ideological Administration, you are exactly the type of person that we need to stay. As has often been the case in recent decades, an honest, competent bureaucracy is the bulwark against our sometimes extremist politics.

It's likely that if you are a government employee who is sympathetic to non-citizens, your job will get more difficult, the atmosphere may become more hostile. It will be harder to "do the right thing" as you see it. Opportunities for promotions may become more limited. Nevertheless, I urge you to stay. We need you to help uphold the law and ensure due process for non-citizens and their families. To a large extent, our immigration system is as good or as bad as the people who administer the law. We need the good ones to stay.

DHS Is Your Friend on Facebook, Whether You "Like" It or Not

Following the December 2, 2015 terrorist attack in San Bernardino, California, where the husband-and-wife perpetrators had purportedly become radicalized via the internet, Congress requested that the Department of Homeland Security ("DHS") take steps to better investigate the social media accounts of immigrant applicants (the husband was an American-born U.S. citizen of Pakistani descent; his wife was a lawful permanent resident from Pakistan). In response, DHS established a task force and several pilot programs to expand social media screening of people seeking immigration benefits and U.S. visas. DHS also approved creation of a Social Media Center of Excellence, which would conduct social media background checks for the various DHS departments. The Center of Excellence would "set standards for social media use in relevant DHS operations while ensuring privacy and civil rights and civil liberties protections."

Last month, the DHS Office of Inspector General released a (clumsily) redacted report detailing the efficacy of DHS's efforts and making suggestions. Due to the incomplete redaction job, it seems likely that the pilot program focused on refugees and perhaps asylum seekers, but the plan is to expand the program to cover all types of immigration benefits.

The goal of the pilot program was to help develop policies and processes for the standardized use of social media department-wide. "USCIS had previously used social media in a limited capacity, but had no experience using it as a large-scale screening tool." The pilot program relied on manual and automated searches of social media accounts to "determine whether useful information for adjudicating refugee applications could be obtained." It seems that the ability of DHS to investigate social media accounts was limited by technology: At the time the pilot program was launched in 2016, "neither the private sector nor the U.S. Government possessed the capabilities for large-scale social media screening."

In one portion of the pilot program, applicants were asked to "voluntarily" give their social media user names. USCIS then "assessed identified accounts to determine whether the refugees were linked to derogatory social media information that could impact their eligibility for immigration benefits or admissibility into the United States."

DHS has also been looking into social media, email, and other computer files of people entering or leaving the United States, including U.S. citizens, and this inquiry is far from voluntary. There have been numerous recent reports of DHS Customs and Border Protection ("CBP") agents demanding passwords for cell phones and computers. The number of people subject to such searches increased significantly at the end of the Obama Administration, and seems to be further increasing under President Trump. Anecdotal evidence suggests that the large majority of people targeted for these searches are Muslim.

All this means that DHS may be looking at your accounts on Facebook, Twitter, LinkedIn, Instagram, etc. to determine whether you pose a threat and (possibly) to assess your credibility. They might also gain access to your email and other information stored on your computer or your cell phone. This data could then be used to evaluate your eligibility for immigration benefits, including asylum.

On the one hand, it seems reasonable that DHS would want to look into social media and other on-line material. After all, it is well-known that terrorists rely on the internet to spread their messages, and as DHS notes, "As the threat landscape changes, so does CBP." Also, most immigration benefits are discretionary, meaning that even if you qualify for them, the U.S. government can deny them in the exercise of discretion. Therefore, if DHS "requests" certain information as part of the application process, and the applicant fails to provide it, DHS can deny the benefit as a matter of discretion.

On the other hand, the inter-connectivity of the on-line world could yield evidence of relationships that do not actually exist. For example, one study estimates that Facebook users (all 1.6 billion of them) are connected to each other by 3.57 degrees of separation. That means there are—on average—only 3.57 people between you and Osama bin Laden (assuming he still maintains his Facebook

page). But of course, it is worse than that, since there are many terrorist suspects on Facebook, not just one (Osama bin Laden). So if you are from a terrorist-producing country, it's likely that suspected terrorists are separated from you by less than 3.57 degrees of separation. Presumably, DHS would take these metrics into account when reviewing on-line data, but you can see the problem—your on-line profile may indicate you have a relationship with someone with whom you have no relationship at all.

So what can you do to protect yourself?

First, don't be paranoid. It's nothing new for DHS or other government agencies to search your on-line profile. Since everything posted on-line is, at least in a sense, public, you should be discrete about what you post, and you should be aware that anyone—including the U.S. government—could be reading it.

What's more problematic is when CBP seizes electronic devices at the border and then reviews emails and other confidential information. This is extremely intrusive and an invasion of privacy. There is also an argument that it violates the Fourth Amendment right to be free of unlawful searches, but generally, people coming and going from the U.S. have less protection than people in the interior (though I imagine that as CBP steps up the practice, we will see lawsuits that further define Fourth Amendment rights at the border). Knowing that you could be subject to such a search at least enables you to prepare yourself. Don't travel with devices if you don't want them searched. Be careful what you store on your devices and in the cloud.

Also, if you think you have problematic on-line relationships or derogatory on-line information, be prepared to explain yourself and present evidence if the issue comes up.

On-line information can affect an asylum or immigration case in more subtle ways. For example, if you state in your application that you attended a protest on a particular date, make sure you got the date correct—DHS may be able to find out the date of the protest, and if your account of events does not match the on-line information, it could affect your credibility. The same is true for more personal information. For instance, if your asylum application indicates you attended high school from 1984 to 1987, that should match any available information on the internet. Mostly, this simply requires that you take care to accurately complete your immigration forms, so that there are no inconsistencies with data available on-line.

Again, it's not really news that DHS is reviewing social media and other on-line information. It does appear that such practices will become more common, but as long as applicants are aware of what is happening, they can prepare for it.

Answering the Impossible Question

Possibly the most common question I hear at initial consultations with asylum seekers is, "What are the chances that I will win my case?" It's a reasonable ques-

tion. People want to know the likelihood of success before they start any endeavor. The problem is, it's impossible to answer this question. Why is that?

One reason is mathematical. Probabilities are tricky to calculate and even more tricky to understand. Also, it is very hard to apply probabilities in a meaningful way to a single event. What does it mean, for example, when the weather report shows a 30% chance of rain? If you run 100 computer simulations of the weather, it will rain 30 times. But in the real world, it will either rain or it won't. The problem is that we do not have complete information to start with, and that there are too many variables to predict precisely how the weather will evolve over time. Without sufficient information, we have to approximate, and we are left with a range of possible outcomes and probabilities. As Niels Bohr observed, "Prediction is very difficult, especially if it's about the future."

Another difficulty is that predicting case outcomes involves human beings, and we are a notoriously capricious species. At the outset of a case, the lawyer may not know whether the client can get needed evidence, or whether she can remember her testimony, or how a witness will behave. Also, the lawyer may not know who the fact finder will be (with Immigration Court cases, we usually know in advance; for Asylum Office cases, we never know until the day of the interview). Also, what if the fact finder is in a particularly good or bad mood on the day of the case? Or what if she is hungry during the case (one Israeli study famously correlated favorable parole decisions to whether the judge had recently eaten lunch!)? These "human factors" can greatly affect the decision, and few of them can be known in advance, which again makes predicting difficult.

That's not to say we know nothing about the likelihood of success. For Immigration Court cases, there is data available about the grant rates of individual Judges. Also, there is some data available about Asylum Office grant rates. Of course, all of this is very general and does not necessarily bear much relationship to the likely outcome in a given individual's case, but I suppose it's better than nothing.

As a lawyer, once you get a sense for asylum cases, you can at least give the client some idea about the outcome. I can tell a strong case from a weak case, for example. If the client has a lot of credible evidence, has suffered past persecution on account of a protected ground, and faces some likelihood of future harm, the client has a strong case. The most I will say to such a prospective client is that, "If the adjudicator believes that you are telling the truth, you should win your case." I might also say that since the corroborating evidence is strong, it is likely that the adjudicator will believe the claim.

I do think there is a basic human desire behind the question about the chances for success, and that is the desire for certainty. Asylum cases now take years, and it is very difficult to live your life for so long under the threat of deportation. When the clients ask about the likelihood

of success, I know part of what they want is reassurance. Even if the case is weak, they want to feel like they have a chance. They want to feel that what they are building in the U.S. while they wait for a decision will not all be lost. How, then, do we balance the need for certainty with providing an honest evaluation of the case?

For my clients, I try to give them both honesty and hope. In the beginning, I give the client my honest assessment of the case and the likelihood of success. Knowing my assessment (whether it is good or bad), if the client decides to go forward, my focus shifts to creating the strongest case possible with the facts and evidence available, and to helping reassure the clients so they feel some hope. I try to encourage the client to do what is within their power to make the case better: Gather evidence, talk to witnesses, find experts, etc. At least this helps empower the client a bit, and it gives them some agency over their case outcome.

Different lawyers do things differently, and there are probably many “right” ways to balance realism and hope. There are also wrong ways. Any lawyer who “guarantees” you will win an asylum case is a lawyer you should avoid. No lawyer can guarantee a win because we do not make the decisions—the government does. Also, lawyers who make dubious promises (“I am good friends with your Judge, so I can get you a quicker hearing date”) are probably lying to get your business. Be careful, and remember

that offers that seem too good to be true probably are. For all its flaws, the American immigration system is largely free from corruption. Lawyers don’t have special relationships with adjudicators that can change outcomes or speed adjudication. When a lawyer oversells hope at the expense of realism, you are safer to seek a different attorney; one who is more interested in telling the truth than in selling you his services.

So when a prospective client asks me the chances for success, I’ll try to give the best evaluation I can, so that the person can make an informed choice about whether to file an asylum case. Once the case is started, I will try to address weakness and gather evidence to maximize the chances for a win. I will also try to encourage the client, so that she has some hope during the long wait. ■



Jason Dzubow is one of the founders of Dzubow & Pilcher, PLLC. His practice focuses on immigration law, asylum, and appellate litigation. In 2011 and 2013, Washingtonian magazine recognized him as one of the best immigration lawyers in Washington, DC. He is an adjunct professor at George Washington University Law School in Washington, DC. His blog, the

Asylumist, is the only blog in the U.S devoted exclusively to asylum law.



**Federal Bar
Association**

2017

IMMIGRATION LAW CONFERENCE

May 12–13, 2017

Embassy Suites by Hilton Downtown Denver, Colo.

As today’s changing political climate impacts the incredibly complex maze of immigration law and policy, the FBA Immigration Law Conference provides a venue for in-depth discussion on of-the-moment topics that are critical to immigration law practice. 60 sessions over two days will again feature speakers from the federal judiciary and immigration courts as well as panelists from the Department of Homeland Security, the Department of State, cutting edge law school clinical programs, the NGO community, and the private immigration bar.

Register today at www.fedbar.org/ImmLaw17.

WASHINGTON, D.C.: Jan. 26—The DOJ’s Office of Immigration Litigation celebrated the retirement of Elizabeth (Betty) Stevens, Assistant Director for OIL’s District Court Section. Betty, the Secretary and long-time Board Member of the Immigration law Section, retired after 28 years of Federal service. Judge Lawrence Burman spoke on behalf of the FBA, in light of Betty’s incredible support of the Section over the years.

SAN ANTONIO, TEXAS: March 9—David Ware, Elizabeth (Betty) Stevens, and Irene Steffas, spoke for the Section at the Labor & Employment Law Conference. Their presentation was entitled “Hot Topics in the Intersection of Immigration and Employment Law.” Kudos for these Section members in spreading the immigration word to another FBA section. ■

Opinion Immigration Muse

BY HON. PAUL WICKHAM SCHMIDT (RET.)

from his blog www.immigrationcourtside.com

Impending Disaster

Lorelei Laird reports in the *ABA Journal*:

“In the fall of 2016, the Executive Office for Immigration Review was busy addressing these problems by hiring aggressively, spokeswoman Kathryn Mattingly said.

As of March, she said the agency had 301 seated judges and had requested authorization for a total of 399 judgeships. Those new judges are welcomed by legal and immigration groups—including the ABA, which called for more immigration judges with 2010’s Resolution 114B.

But that effort may be overwhelmed by changes under the Trump administration. Trump’s actions since taking office emphasize enforcement; his executive orders call for 10,000 more ICE agents and 5,000 more CBP officers, and they substantially reduce use of prosecutorial discretion. In his first months in office, there were several high-profile deportations of immigrants who had previously benefited from prosecutorial discretion and had little or no criminal record.

Although the DOJ eventually said immigration judges weren’t subject to the hiring freeze, it’s unclear whether immigration courts will be funded enough to handle all the additional cases. If not, Schmidt says, wait times will only worsen.

“If they really put a lot more people in proceedings, then it seems to me the backlog’s going to continue to grow,” he says. “How are they going to take on more work with the number of cases that are already there?”

This is just a small sample. Read Lorelei’s much lengthier and complete analysis of all of the problems, including interviews with a number of other experts and a cross-

reference to the ABA’s previous work predicting just such a docket disaster at the above link.

In my view, the Trump Administration is aggravating the problem, rather than seeking to improve the delivery of due process. Given the nature of the system, they might get away with it for awhile. But, eventually, one way or another, these chickens are coming home to roost. And, when they do, it won’t be pretty for the Administration, for anyone involved with the U.S. Immigration Court system, and for the American system of justice.

“ADR” In Full Swing Again At EOIR—Detailed U.S. Immigration Judges Twiddle Thumbs As Home Dockets Suffer!

ADR = “Aimless Docket Reshuffling,” a phenomenon that occurs when political officials at the DOJ direct EOIR to “reprioritize” existing U.S. Immigration Court dockets to meet politically-driven enforcement goals. Results in U.S. Immigration Judges being reassigned from regularly scheduled largely “ready for trial” pending cases to “priority cases” that often are NQRFPPT. Therefore almost nothing gets completed, but the court staff is overburdened and the private bar and individual respondents as well as the DHS Assistant Chief Counsel see already prepared cases reassigned to new judges who don’t have time to hear them or “orbited” to spots at the end of the docket several years from now. Results in growing backlogs even with more judges employed in the system.

As reported in LexisNexis Immigration <https://www.lexisnexis.com/legalnewsroom/immigration/b/inside-news/archive/2017/03/27/eoir-posts-new-hearing-location-details.aspx?Redirected=true> EOIR has announced several rounds of details of U.S. Immigration Judges to “detained locations” as part of its “implementation of President Trump’s January 25th Executive Orders.” Julia Edwards Ainsley previously reported on this development

in Reuters <http://wp.me/p8eeJm-vF>.

However, according to several sources, once at the “detail court” these judges often have precious little to do.

To paraphrase some familiar with the system, “The only ‘surge’ happening here is a surge of judges. There’s no surge of cases.” But, you can bet that there was a “surge in frustration” from those whose previously scheduled cases were rescheduled to accommodate these unneeded details.

Just another “keystone cops” episode at DOJ? Tempting analysis, but not so funny when you consider that human lives and futures are being affected. Also, transferring busy judges from already jam-packed dockets to do little or nothing at the border to keep the “political bosses” satisfied wastes the taxpayers’ money and undermines the credibility of the Immigration Court. That’s bad for everyone.

Most Immigration Judges I know are 1) busy all the time (unlike many other judges, Immigration Judges are expected to schedule cases eight hours/day, every work day of the week except for four hours/week of “administrative time” for case preparation, decision writing, and continuing education); 2) fanatic about wanting to complete the cases on their daily dockets.

Consequently, I doubt that any sitting Immigration Judge would have thought it was a good idea to cancel or reassign their regular dockets to do a minute number of cases as a detailed judge. Moreover, because the Immigration Court is not “automated,” detailed Immigration Judges who have extra time have no access to pending motions that are piling up in their chambers during details. So, unlike the “home court” where a judge often can find “chambers work” to do during unanticipated “down time,” on detail “down time” is just that—wasted time.

Finally, there is the obvious question. What is a supposedly impartial, due process oriented court system doing mindlessly carrying out the President’s Executive Order on immigration enforcement to the derogation of its own already-pending cases? We need an independent Article I United States Immigration Court!

Immigration Judge Samuel Cole Grants Asylum To Singapore Dissident

<https://www.nytimes.com/aponline/2017/03/25/us/ap-us-singapore-us-teen-asylum-seeker-.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region@ion=top-news&WT.nav=top-news>

The AP reports in the NY Times:

“A blogger from Singapore who was jailed for his online posts blasting his government was granted asylum to remain in the United States, an immigration judge ruled.

Amos Yee, 18, has been detained by federal immigration authorities since December when he was taken into custody at Chicago’s O’Hare International Airport. Attorneys said he could be released from a Wisconsin detention center as early as Monday.

Judge Samuel Cole issued a 13-page decision Friday, more than two weeks after Yee’s closed-door hearing on the asylum application.

“Yee has met his burden of showing that he suffered past persecution on account of his political opinion and has a well-founded fear of future persecution in Singapore,” Cole wrote.

Yee left Singapore with the intention of seeking asylum in the U.S. after being jailed for several weeks in 2015 and 2016. He was accused of hurting the religious feelings of Muslims and Christians in the multiethnic city-state. Yee is an atheist.

Many of his blog and social media posts criticized Singapore’s leaders. He created controversy in 2015 as the city-state was mourning the death of its first prime minister and he posted an expletive-laden video about Prime Minister Lee Kuan Yew just after his death.

Such open criticism of political leaders is discouraged in Singapore. The case raised questions about free speech and censorship and has been closely watched abroad.

Cole said testimony during Yee’s hearing showed that while the Singapore government’s stated reason for punishing him involved religion, “its real purpose was to stifle Yee’s political speech.” He said Yee’s prison sentence was “unusually long and harsh” especially for his age.

Singapore’s government criticized the decision.”

Mr. Yee was successfully represented by Maryland immigration attorney Sandra Grossman of Grossman Law LLC.

As I have mentioned before in this blog, most fully litigated U.S. Immigration Court cases today, particularly those involving asylum or criminal law, involve exceptionally complex, and often sensitive, issues of law and fact which can’t be fairly resolved in a one to two hour time block. Yet, most of the Administration’s recent enforcement initiatives seem to assume that Immigration Court is an “assembly line” and that U.S. Immigration Judges are more or less “assembly line workers” who can be detailed to obscure locations on demand and perhaps required to work “night shifts” to keep the “deportation railroad running at full throttle.”

But, due process is not an assembly line operation. It usually takes time, expertise, careful scholarship, and detailed fact-finding for U.S. Immigration Judges to produce fair decisions that will pass muster upon judicial review in the Circuit Courts of Appeals. (I note that the Administration’s first, high-profile attempt to “ram” an immigration case—“Travel Ban 1.0”—through a Court of Appeals was spectacularly unsuccessful.)

These days, most individuals who are represented by competent counsel and reach the “Individual (Merits) Hearing” stage have at least some plausible defenses

to removal. Indeed, a 2016 study by TRAC Immigration showed that more than half (57%) of the total dispositions in U.S. Immigration Court favored the individual. <http://trac.syr.edu/immigration/reports/435/>

And, this was during the Obama Administration which already was prioritizing so-called “serious criminals.”

By expanding the “criminal alien” definition to include minor criminals and non-criminals, the Trump Administration will probably be taking on even more cases where it ultimately will fail to get a “final order of removal” unless concerted attempts are made to “game the system” to insure that individuals lose (for example, by denying individuals fair access to counsel or using prolonged detention in poor conditions as a device to persuade individuals to abandon their claims to remain in the US).

Nolan Rappaport Says DHS Does Inadequate Job Of Tracking Unaccompanied Children!

<http://thehill.com/blogs/pundits-blog/immigration/325942-maryland-immigrant-rape-case-shows-failure-of-us-policy-on>

Nolan writes:

“CBP is required by the William Wilberforce Trafficking Victims Protection Reauthorization Act to transfer the custody of unaccompanied alien children from Central America to ORR within 72 hours of determining that they are unaccompanied alien children. ORR promptly places them in the least restrictive setting that is in their best interests while they wait for an immigration hearing to be scheduled.

They normally are not held at a secure facility unless they are charged with criminal actions, pose a threat of violence, or are flight risks.

Unaccompanied alien children are not eligible for many forms of relief. Asylum is the most common. The only other possibilities I am aware of are “special immigrant juvenile status,” which requires a finding by a state juvenile court that they have been abused, neglected, or abandoned; and “T nonimmigrant status” for victims of trafficking.

Many of the children who are released from custody abscond instead of returning for their hearings. Between July 18, 2014, and June 28, 2016, removal proceedings were initiated in 69,540 cases. Only 31,091 of them were completed. Of the total completed cases, 12,977 resulted in removal orders, and 11,528 (89 percent) of the removal orders were issued in absentia because the children had absconded.

The post-Trump immigration court handles fewer unaccompanied alien children cases. This will increase the amount of time unaccompanied alien children have to wait for hearings, which is likely to increase the number of children who abscond.

Also, they will have less incentive to return for their hearings. In the more liberal Obama era, immigration

judges granted asylum in up to 71 percent of their asylum cases. This is not likely to continue in the post-Trump era.

The fact that many unaccompanied alien children abscond is disturbing. We know very little about them.”

Please read Nolan’s complete article over on The Hill at the link.

I have a few thoughts. First, although at the end of my career I was not assigned to the juvenile docket, I handled many juvenile cases over my 13-year career at the Arlington Immigration Court.

Even when I was not responsible for the juvenile docket, “mis-assigned” juvenile cases appeared on my docket on a regular basis, probably a consequence of the “haste makes waste” prioritization of juveniles by the Obama Administration. I never had a significant problem with juveniles “absconding.”

Not surprisingly, this is borne out by the facts. Studies show that represented juveniles appear for their hearings about 95% of the time. That suggests that the real effort should be on working with the pro bono bar to ensure that juvenile cases are scheduled in a manner that promotes maximum representation at the first hearing. Presto, the largely imaginary problem with “absconding” juveniles disappears.

See this link to an American Immigration Council analysis:

[Taking Attendance: New Data Finds Majority of Children Appear in Immigration Court | American Immigr](#)

Second, in the small number of cases where juveniles did not appear, the problem was almost always with the Government system, not the juveniles. Indeed, the suggestion that children, some infants, other toddlers, “abscond” is prima facie absurd.

There are a number of reasons why juveniles might not appear: 1) in their haste to move these cases through the system, DHS often incorrectly transmits the U.S. address to the Immigration Court; 2) under pressure to fill “priority” dockets required by the Obama Administration, the Immigration Court, which still operates with a manual data entry system, sometimes sent the notice to a wrong address; and 3) almost all juveniles have to rely on adult “sponsors” to get them to court. Depending on the degree of understanding and responsibility on the part of the sponsor, this might or might not happen.

When the court appearance requirements are properly communicated and understood by the sponsor, and where the juvenile has realistic access to legal representation, there simply are not many “no show” issues. In Immigration Courts that put due process first, most no-shows are eventually reopened when the juvenile and the sponsor discover the problem and explain the failure to appear. Therefore,

large numbers of “in absentia” juvenile cases suggests to me a problem with the system, and, perhaps, with particular Immigration Judges, rather than the juveniles.

Here’s a link to a L.A. Times article on in absentia orders for unaccompanied children.

<http://www.latimes.com/local/california/la-me-children-deported-20150306-story.html>

Third, Nolan’s reference to the “liberal” Obama administration seems gratuitous. The Obama Administration did little of substance to help juveniles and, to my knowledge, most of the precedents issued by the BIA made it more difficult, rather than easier, for juveniles from the Northern Triangle to get relief.

Nevertheless, juveniles were able to succeed at a fairly high rate where they obtained competent representation, Immigration Judges fairly applied the generous standards for asylum, and also gave the children adequate time to pursue other forms of relief such as those mentioned by Nolan.

The nationwide asylum grant rate in the most recent year was approximately 47 percent, not 71 percent. The latter was just one of the courts with a higher rate. But, there were also courts like Atlanta, with a 2 percent rate who were not doing a fair job of asylum adjudication.

In any event, there is every reason to believe that most of the juveniles in the system had at least a “respectable” chance of success in remaining.

It’s possible that the Trump Administration will attempt to “game” to system to depress grant rates. Such conduct

appears on its face to be both illegal and contrary to the generous standard for asylum established by the U.S. Supreme Court in *INS v. Cardoza-Fonseca*.

To date, I am aware of no such overt attempt by the Administration to interfere with the fair adjudication of asylum claims. However, I do acknowledge that the general tone of the Executive Orders is xenophobic and disparaging to refugees and immigrants. At some point, the Article III Courts will decide whether or not the Administration is complying with the requirements of U.S. law and various international protection agreements.

Finally, I think that Nolan’s suggestion that unaccompanied children be sent to third countries for U.N. processing would be a violation of both the INA and the Wilberforce Act. While there is a provision in the INA for sending individuals who arrived in “safe third countries” back to those countries for asylum adjudication, to date it only applies to Canada and is limited in a way that would make it inapplicable to the Southern Border Central American cases.

The U.S. would do far better to acknowledge the legitimate fears that cause women and children to flee countries in the Northern Triangle. Dealing with the problems at their source, which is likely to be a long-term prospect, while providing at least some type of screening and temporary refuge short of asylum, would, in my view, be a much better and more humane solution to this chronic issue than the enforcement initiatives proposed by the Trump Administration. ■



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DMV FOIAs become better practices for Immigration cases where a beneficiary has or had a Florida Driver's License

BY RENATA CASTRO, ESQ. FLORIDA BAR

Individuals seeking to obtain immigration benefits who have, at any point, obtained a Florida Driver's License, are particularly vulnerable to heightened cross-checking of information between Immigration Authorities and the Florida Department of Homeland Security.

Narrow limitations are imposed to Non-US citizens who wish to obtain a Florida Driver's license. Aside from fulfilling Identification requirements such as providing proof of birth date, completing the required first time driver course, and going to the Drivers' License Office to complete the written and practice test, Florida's list of required status identification¹ excludes individuals who have overstayed their allowed period of stay, or who do not have immigration status.

Some individuals who are in removal proceedings, such as those who have a notice showing an upcoming hearing; or evidence of cancellation of removal proceedings, to name a few, are eligible to obtain proper identification to drive. Even individuals under an order of supervision are authorized to obtain a driver's license. However, hundreds of thousands, if not millions of Floridians drive without a license, and see their odds of a chance encounter with local police enforcement and possibly with the Immigration and Custom's Enforcement taskforce rise as a result of driving without a license. The state of Florida has a deficient mass transportation system, which further pushes undocumented clients to make poor choices that could hinder their future immigration legal options.

Florida allows individuals with a valid I-94 to obtain a driver's license. This possibility has driven several Florida residents to obtain fraudulent I-94s and passport stamps in order to fill the gap of driving without a license. In their mind, they are protecting themselves from being deported. The challenge arises, most likely, if and when this individual has an opportunity to adjust status, usually through marriage to a United States Citizen, or because their biological and in some cases stepchildren who are United States Citizens have turned 21 years old. With the recent improvement of cross-agency communication, it has not been as easy to obtain a license in Florida by such means, nonetheless, the problem brews from a client's old license which is likely expired and is not a topic of conversation during an initial consultation.

It is not advisable to rely on a client's recollection to thoroughly describe the chain of events that could imperil his goal of becoming a lawful permanent resident, and therefore, a few best practices questions and procedures are suggested for those in this susceptible group:

- At the initial consultation, ask the client if he has ever had a Florida Driver's License;
- Subsequently, check to see if the expiration date matches that of the I-94 provided, if not, question the client how else he obtained the driver's license;
- If your client has had a Florida Driver's license after his authorized period of stay, or if the expiration date of the driver's license far exceeds the expiration date of the client's I-94, request a DMV FOIA²

Making a determination early on of whether or not your client has used a fake I-94 to obtain a Florida License could be the difference between pursuing adjustment of status for your client, or seeking a waiver of inadmissibility³ prior to filing an adjustment of status application. Although using fake documents to obtain a driver's license is legally different from using a fake document to obtain an immigration benefit,⁴ it can nonetheless impose on a client the burden to obtain a waiver in order to seek adjustment of status. It is irrelevant whether the client merely purchased fake documents or used them, as long as there is not an attempt to fraudulently use the document for immigration purposes.⁵ If you determine that the client has indeed used a fraudulent document, a waiver will be required.⁶

Clients can grow impatient as a result of the delay of filing any application for immigration relief, however this precaution can, at uncertain times such as the ones we currently face in immigration law, preclude your client from unnecessary and costly detention, and even deportation.

Although this article was written focusing on cases where the immigration practitioner is faced with a client who has lived or currently resides in Florida, it is important to note several other states have similar documentation requirements for obtaining drivers' licenses and therefore, practitioners across the country can benefit from implementing this best practice strategy. ■

Endnotes

¹DMV Acceptable Document Table AILA Doc. No. 16021601

²A DMV FOIA which includes copies of all documents and declarations made in connection with obtaining a Florida Identification Card or Driver's License can only be obtained if the request is made in writing in the form of a Driver License Records Request. There is a 2-week

processing time from the date the request is received. The form is available online <https://www.flhsmv.gov/forms/90511.pdf>

³It is important to ponder whether the waiver could be granted as a matter of discretion prior to filing an I-130 Petition for Alien Relative petition, or a I-140 Immigration Petition for Alien Worker petition, as, in the current climate, removal enforcement is across the spectrum and your client could end in removal proceedings depending on the equities and the particular details of the fraud.

⁴In *Matter of Cervantes-Gonzalez*, it was clearly estab-

lished that “working in the United States is not a benefit provided under 8 C.F.R. 274 (C) (a)(3). *Matter of Cervantes-Gonzalez* 22 I&N Dec. 560 (BIA 1999).

⁵See *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975); *Matter of Sarkissian*, 10 I&N Dec. 109 (BIA 1962); *Matter of Box*, 10 I&N Dec. 87 (BIA 1962); *Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991).

⁶Although USCIS may not know at the point of the interview whether your client used a fraudulent document, ethical obligations on both the attorney’s and the client’s end impose the requirement of disclosure, and as a result, filing a waiver becomes a requirement.

Article

Disparate Definitions: Uncertainty Regarding What Constitutes “Sexual Abuse of a Minor”

BY VIRGINIA L. GORDON AND K. LAETICIA MUKALA

An aggravated felony conviction poses serious immigration consequences for both lawful permanent residents and other aliens seeking relief. For instance, an aggravated felony conviction provides a basis for removal from the United States of a lawful permanent resident and disqualifies an alien from discretionary relief from removal. See sections 237(a)(2)(A)(iii), 240A of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1229b; see also 8 C.F.R. § 1240.66(a) (listing aggravated felony as a bar to special rule cancellation of removal). The “sexual abuse of a minor” aggravated felony provision, found at section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A), is undefined. The Board of Immigration Appeals has examined the statutory language, context, and purpose behind its inclusion in the Act and provided guidance regarding how the phrase should be interpreted. See *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999). The majority of the circuit courts of appeals have considered the term “sexual abuse of a minor” following the *Rodriguez-Rodriguez* decision, without reaching consensus, or delineation, as to what constitutes “sexual abuse of a minor” for removal purposes. The circuit courts are split regarding whether to accord *Chevron* deference to the Board’s approach, resulting in disparate definitions of the term “sexual abuse of a minor.” See generally *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

This article discusses the term “sexual abuse of a minor” in the immigration removal context, reviewing the circuit courts’ definitions of the term in light of the Board’s *Rodriguez-Rodriguez* decision. The article first discusses the history of the term “sexual abuse of a minor”

and its addition to the Act. The article then surveys the circuit courts’ definitions of “sexual abuse of a minor” and the disparity in the types of offenses that constitute “sexual abuse of a minor.” This article categorizes the circuit courts by those that accord *Chevron* deference to the *Rodriguez-Rodriguez* decision, those that expressly decline to accord *Chevron* deference, and those that implicitly reject *Rodriguez-Rodriguez*.

The History of the Term “Sexual Abuse of a Minor”

Before the term “sexual abuse of a minor” was added to the Act, the ground of inadmissibility at section 101(a)(43)(A) was limited to murder. See section 321(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-627. Nonetheless, the idea of “sexual abuse of a minor” was not foreign to Federal statutes. When section 101(a)(43)(A) of the Act was enacted, at least four separate Federal statutory provisions were relevant to sexual abuse offenses against children. See *Rodriguez-Rodriguez*, 22 I&N Dec. at 995; see also 18 U.S.C. §§ 2242, 2243, 2246, 3509(a)(8). Sections 2242 and 2243 define the terms “sexual abuse” and “sexual abuse of a minor or ward,” respectively; section 2246 expounds on the definitions provided under sections 2242 and 2243. Section 3509(a)(8) sets forth the types of sexual acts encompassed under the offense of “sexual abuse of a minor” for purposes of criminal procedure rules concerning witnesses and evidence.

In 1996, Congress amended the aggravated felony definition to include “sexual abuse of a minor.” IIRIRA § 321(a)(1); see also *Rodriguez-Rodriguez*, 22 I&N Dec.

at 995. Congress did not, however, provide a definition of the term “sexual abuse of a minor,” or cross-reference other provisions of Federal law for clarification. As noted by the Board in *Rodriguez-Rodriguez*, “Congress did not use the phrase ‘an offense described in section’ and then designate a definition found in the federal statute, as it did elsewhere in section 101(a)(43) of the Act, or name an offense and then, in parentheses, state ‘as described in’ or ‘as defined in’ a federal statute.” 22 I&N Dec. at 994-95. By comparison, illicit trafficking, an aggravated felony under section 101(a)(43)(B) of the Act, cross-references 21 U.S.C. § 802, which defines controlled substances, and 18 U.S.C. § 924(c), which defines a drug-trafficking crime. See also section 101(a)(43)(F) of the Act (defining “a crime of violence” in reference to the same term in 18 U.S.C. § 16). Although Congress’s intent to “expand the definition of an aggravated felony and to provide a comprehensive statutory scheme to cover crimes against children” is notable, see *Rodriguez-Rodriguez*, 22 I&N Dec. at 994, the legislature did not provide a singular, accepted definition of the term “sexual abuse of a minor.” Consequently, some circuit courts have adopted the interpretation of the term as set forth in the *Rodriguez-Rodriguez* decision, and other circuit courts have rejected that interpretation in favor of their construction of the term.

Outside the removal context, several circuit courts of appeals have considered the term “sexual abuse of a minor” with respect to sentence enhancement in Federal criminal proceedings. Under the current U.S. Sentencing Guidelines, which are slated for amendment in November 2016, sentencing enhancements apply to the unlawful re-entry convictions of individuals who were previously deported or who remained unlawfully in the United States following a conviction for a “crime of violence” or for an “aggravated felony.” See U.S.S.G. §§ 2L1.2(b)(1)(A), (b)(1)(C). The term “crime of violence” has been defined differently under the Sentencing Guidelines than it is under the Act. In particular, a “crime of violence” under the Sentencing Guidelines explicitly includes the term “sexual abuse of a minor.” See *id.* at cmt. n.1(B)(iii);¹ see also *United States v. De La Cruz-Garcia*, 590 F.3d 1157, 1160 (10th Cir. 2010) (considering the “ordinary, contemporary, and common meanings” of the words in “sexual abuse of a minor” to conclude a conviction under section 18–3–405(1) of Colorado Revised Statutes constitutes a crime of violence subjecting the defendant to a sentencing enhancement). By contrast, an “aggravated felony” for sentencing enhancement purposes is defined wholly by section 101(a)(43) of the Act. See U.S.S.G. § 2L1.2 cmt. n.3(A); see also *United States v. Londono-Quintero*, 289 F.3d 147 (1st Cir. 2002) (relying on the “plain meaning” of the phrase “sexual abuse of a minor” in section 101(a)(43)(A) of the Act to conclude that a conviction under section 800.04 of the Florida Statutes subjected a defendant to an aggravated felony sentencing enhancement). Therefore, it is important to note that, in the sentencing enhancement context, the term “sexual abuse of a minor” may be analyzed by the circuit courts in two different ways: either as

a “crime of violence” under the sentencing guidelines or as an aggravated felony under section 101(a)(43)(A) of the Act. A complete discussion of sentencing enhancement determinations is beyond the scope of this article; nonetheless, these distinctions illustrate further complications related to defining “sexual abuse of a minor” for immigration purposes.

The Board’s Interpretation of “Sexual Abuse of a Minor”

In *Rodriguez-Rodriguez*, the Board considered whether a conviction for indecency with a child by exposure under section 21.11(a)(2) of the Texas Penal Code Annotated constituted “sexual abuse of a minor” under section 101(a)(43)(A) of the Act. 22 I&N Dec. at 991-92. The Board examined Federal statutes relating to “sexual abuse of a minor” and ultimately determined the definition of sexual abuse in 18 U.S.C. § 3509(a)(8) provided “a more complete interpretation of the term ‘sexual abuse of a minor’ as it is commonly used” and determined it was a “reasonable interpretation” of the term. *Id.* at 996. The Board clarified that it was “not adopting this statute as a definitive standard or definition” but was invoking it as a “guide in identifying the types of crimes we would consider to be sexual abuse of a minor.” *Id.* In making this determination, the Board stated it was “not obliged to adopt a federal or state statutory provision” because the Attorney General delegated to the Board her authority to administer and enforce the Act. *Id.* at 994. This left the Board to interpret the definition of an aggravated felony sexual abuse of a minor offense as it arises in removal proceedings. *Id.*

The Board sought a definition under Federal law because removal proceedings are a function of Federal law. *Id.* at 995. It considered 18 U.S.C. §§ 2242, 2243, 2246, and 3509(a). *Id.* Under sections 2242 and 2243, the crimes of “sexual abuse” and “sexual abuse of a minor or ward,” respectively, require a sexual act, a component of which, under section 2246, is contact. Section 3509(a) outlines the rights of child victims and child witnesses in the context of Federal proceedings. Under section 3509(a)(8), “sexual abuse” is the “employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.”

The Board found the definition in section 3509(a)(8) useful in identifying the forms of sexual abuse, stating that it encompassed “those crimes that can reasonably be considered sexual abuse of a minor.” *Rodriguez-Rodriguez*, 22 I&N Dec. at 995-96. The Board further considered common definitions of “sexual abuse” and “abuse.” *Id.* at 996. Citing *Black’s Law Dictionary*, 1375 (6th ed. 1990), the Board stated that “sexual abuse” is commonly defined as “illegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance.” *Id.* The Board defined “abuse” as physical or mental maltreatment, which, the Board concluded, suggests that the common usage of the

term “sexual abuse” includes a “broad range of maltreatment of a sexual nature, and it does not indicate that contact is a limiting factor.” *Id.* Furthermore, child abuse also constitutes a removability ground and is defined in common usage as “any form of cruelty to a child’s physical, moral or mental well-being.” *Id.* In addition, the States categorize sex crimes against children in “many different ways.” *Id.* Consequently, the Board concluded section 3509(a) better captured the “broad spectrum of sexually abusive behavior.” *Id.* Moreover, the Board found the definition in sections 2242, 2243, and 2246 “too restrictive to encompass the numerous state crimes that can be viewed as sexual abuse and the diverse types of conduct that would fit within the term as it commonly is used.” *Id.* The Board also found the definitions in sections 2242, 2243, and 2246 inconsistent with congressional intent to remove aliens who sexually abuse children and to bar those aliens from relief. *Id.*

Based on this analysis, the Board concluded that the conviction for indecency with a child by exposure under section 21.11(a)(2) of the Texas Penal Code Annotated required a high degree of mental culpability to knowingly expose oneself to a child with the intent to arouse and, as such, was “clearly sexual abuse of a minor within the meaning of section 101(a)(43)(A).” *Id.*

The Board further defined a “minor,” with respect to the term “sexual abuse of a minor,” as a person under the age of 18. *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006). Referring to its rationale in *Rodriguez-Rodriguez*, the Board examined sections 2242, 2243, 2246, and 3509(a). *Id.* Under section 2243(a)(1), a minor is referred to as someone between the ages of 12 and 16, but under section 3509(a)(2), a child is defined as a person under the age of 18. *See id.* at 861-62. The Board also noted that a minor is commonly defined as “a person who is under the age of legal competence,” which is the age of 18 in most states. *Id.* at 862 (citing *Black’s Law Dictionary* 899 (5th ed. 1979)). The Board determined the broader age limitation provided in section 3509(a)(2) best reflects diverse state laws that punish sexually abusive behavior toward children, the common usage of the word “minor,” and Congress’s intent to expand the definition of aggravated felony to protect children. *Id.* As such, section 3509(a)(2) was the best guide to determine the meaning of “minor” in “sexual abuse of a minor.” *Id.*

The circuit courts of appeals have considered the Board’s interpretation of “sexual abuse of a minor” and reached divergent conclusions regarding its reasonableness and applicability to various criminal convictions. In turn, this has led to disparate results regarding the types of criminal activity that may lead to ineligibility for relief and removal from the United States. The next section discusses circuit court definitions of “sexual abuse of a minor” and identifies state statutes matching those definitions.

Chevron Deference to the Board’s Interpretation

Four circuits have accorded *Chevron* deference to the

Board’s interpretation using section 3509(a) as a guide to determine what crimes constitute “sexual abuse of a minor” under section 101(a)(43)(A) of the Act.

The Second Circuit

The Second Circuit agrees with the Board that section 3509(a)(8) is an appropriate guide to identify the types of crimes considered “sexual abuse of a minor” offenses. *See Mugalli v. Ashcroft*, 258 F.3d 52, 58 (2d Cir. 2001). The Second Circuit found the Board’s interpretation reasonable because not only does the definition in section 3509(a)(8) appear in the U.S. criminal code, but it “is consonant with the generally understood broad meaning of the term ‘sexual abuse’ as reflected in *Black’s [Law Dictionary]*.” *Id.* at 58-59. Moreover, the definition is “supported by the [Board’s] reading of Congressional intent to ‘provide . . . a comprehensive scheme to cover crimes against children.’” *Id.* at 59 (quoting *Rodriguez-Rodriguez*, 22 I&N Dec. at 996).

Upon deferring to the Board’s use of section 3509(a)(8) as an interpretive guide, the Second Circuit has found several state criminal offenses constitute “sexual abuse of a minor” aggravated felony convictions for immigration purposes. In *Mugalli*, the Second Circuit found that rape in the third degree, where an individual aged 21 or older engages in sexual intercourse with a person under the age of 17 (also known as “statutory rape” under New York law), constitutes “sexual abuse of a minor.” *Id.* at 60-61 (N.Y. Penal Law § 130.25-2). In *Santos v. Gonzales*, the Second Circuit concluded that a conviction for an offense involving illegal sexual contact with a victim under the age of 16 constitutes “sexual abuse of a minor” because it involves sexually explicit conduct, namely contact with the intimate parts of a child under the age of 16 in a sexual and indecent manner. 436 F.3d 323, 325 (2d Cir. 2005) (Conn. Gen. Stat. Ann. § 53-21(a)(2)).² In addition, the Second Circuit has held that an offense involving sexual misconduct, in which an individual engages in sexual intercourse with a person incapable of providing consent due to age, constitutes “sexual abuse of a minor.” *Ganzhi v. Holder*, 624 F.3d 23 (2d Cir. 2010) (N.Y. Penal Law § 130.20(1)). Finally, the Second Circuit has found that the use of a child in a sexual performance constitutes “sexual abuse of a minor” because, under section 3509(a)(8), “sexual abuse” includes the employment or use of a child in sexual conduct; thus, authorizing a child to engage in a sexual performance has “the same effect as ‘employing’ or ‘inducing’ the child to perform because the law does not view minors as autonomous actors.” *Oouch v. U.S. Dep’t of Homeland Sec.*, 633 F.3d 119, 124 (2d Cir. 2011) (N.Y. Penal Law § 263.05). The Second Circuit also found the act of consenting to a child’s sexual performance constituted “sexual abuse of a minor” because it involved knowledge of the nature of the performance. *Id.* at 125-26.

The Third Circuit

The Third Circuit agrees with the Second Circuit that the reasonableness of the Board's reliance on section 3509(a) (8) to define "sexual abuse of a minor" is "rooted in the consonance between that statutory provision and the commonly accepted definition of 'sexual abuse.'" *Restrepo v. Att'y Gen. of U.S.*, 617 F.3d 787, 796 (3d Cir. 2010). The Third Circuit has thus accorded *Chevron* deference to the Board's definition of "sexual abuse of a minor." *Id.*

The Third Circuit has found aggravated criminal sexual contact that involved intentional touching of a minor's breasts and vagina through her clothing to be "sexual abuse of a minor" because the offense under the pertinent state statute necessarily involves "sexually explicit conduct" as defined in section 3509(a)(9). *Id.* at 800 (N.J. Stat. Ann. § 2C:14-3(a)). The Third Circuit also found indecent assault under section 3126(a)(7) of the Pennsylvania Consolidated Statutes constitutes "sexual abuse of a minor" because the statute covers conduct that categorically constitutes "other forms of sexual exploitation" of a child. *See Cadapan v. Att'y Gen. of U.S.*, 749 F.3d 157, 161 (3d Cir. 2014); *see also* 18 U.S.C. § 3509(a) (8). Moreover, the Third Circuit stated that "molestation" as used in section 3509(a)(8) includes all conduct covered by "indecent contact" as used in the state statute, given the ordinary meaning of that term as provided in *Black's Law Dictionary*. *See Cadapan*, 749 F.3d at 161 (citing *Black's Law Dictionary* 1096 (9th ed. 2009)).

The Sixth Circuit

The Sixth Circuit has held that the Board "permissibly interpreted 'sexual abuse of a minor,'" observing that "[n]othing forbids the Board's interpretation" of the phrase. *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1021, 1025 (6th Cir. 2016). The Sixth Circuit noted that Congress could have included a cross-reference to 18 U.S.C. § 2243(a) had it wanted to incorporate that definition of statutory rape into the Act, but Congress's refusal to do so indicated its intent for "sexual abuse of a minor" to "sweep in a broad array of state-law convictions." *Id.* at 1026. In finding the Board's interpretation reasonable, the Sixth Circuit upheld the Board's finding that a conviction for unlawful sexual intercourse with a minor in violation of California Penal Code section 261.5(c) constituted an aggravated felony "sexual abuse of a minor" offense under the Act. *Id.* at 1026-27.³

The Seventh Circuit

The Seventh Circuit has accorded *Chevron* deference to the Board's interpretation of "sexual abuse of a minor" in *Rodriguez-Rodriguez*. *See Gattem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005); *see also Espinoza-Franco v. Ashcroft*, 394 F.3d 461, 464-65 (7th Cir. 2005) (per curiam). Generally, the Seventh Circuit approves of the Board's broad view of "sexual abuse of a minor" in the immigration context. *Gaiskov v. Holder*, 567 F.3d 832, 835-36 (7th Cir. 2009).

Examining a conviction for solicitation of a sexual act in violation of chapter 720 of the Illinois Compiled

Statutes, section 5/11-14.1(a), the Seventh Circuit noted that the statute reaches conduct aimed at adults as well as minors; however, the respondent never contested the fact that his offense involved a minor. *Gattem*, 412 F.3d at 761 n.4, 765. The Seventh Circuit agreed with the Board that the conviction was properly classified as "sexual abuse of a minor" because solicitation poses "an inherent risk of exploitation, if not coercion, when an adult solicits a minor to engage in sexual activity." *Id.* The Seventh Circuit found that "[b]ecause minors are . . . more susceptible to corrupt influences, it is reasonable to think of an adult's solicitation of a minor to be abusive in the sense of exploiting the minor's vulnerabilities." *Id.* at 766. The Seventh Circuit stated, "Construing sexual abuse of a minor broadly to include the crime of soliciting a minor is reasonable notwithstanding the absence of any physical contact with or threat against the minor, given the inherent risk of exploitation that soliciting a minor presents." *Id.* at 767. The Seventh Circuit also rejected the notion that the Board was "obliged to define sexual abuse [under section 101(a)(43)(A)] with reference to the more narrow standards found elsewhere in the Criminal Code, including in particular 18 U.S.C. § 2243(a), which establishes the federal offense of sexually abusing a minor." *Id.* at 764; *see also Sharashidze v. Gonzales*, 480 F.3d 566 (7th Cir. 2007) (720 Ill. Comp. Stat. Ann. 5/11-14.1).⁴

Having considered the Board's approach several times, the Seventh Circuit has continued to apply *Rodriguez-Rodriguez* and conclude that various state offenses constitute "sexual abuse of a minor." *See Velasco-Giron v. Holder*, 773 F.3d 774, 776 (7th Cir. 2014). For example, the Seventh Circuit has found that sexual misconduct with a minor, which requires that the adult perpetrator touch the child victim with the intent to arouse or satisfy sexual desire, is "sexual abuse of a minor." *Gaiskov*, 567 F.3d at 836 (Ind. Code Ann. § 35-42-4-9(b)). In addition, the Seventh Circuit concluded that its decision in *Gattem* compelled the conclusion that indecent solicitation of a child, where the alien engaged in internet communications with a person he believed to be a 15-year-old girl but was in fact an undercover investigator, qualified as "sexual abuse of a minor." *Hernandez-Alvarez v. Gonzales*, 432 F.3d 763, 764, 766 (7th Cir. 2005) (720 Ill. Comp. Stat. Ann. 5/11-6(a)). In *Hernandez-Alvarez*, the fact that the victim was not actually a minor did not preclude the "sexual abuse of a minor" analysis because the Seventh Circuit reasoned that "the impossibility of completing the offense attempted is not a defense." *Id.* at 766.

The Ninth and Seventh Circuits Split on Statutory Rape

Interestingly, unlawful intercourse with a person under 18, where the defendant is at least 3 years older than the victim, constitutes "sexual abuse of a minor" in the Seventh Circuit, but the Ninth Circuit has held otherwise. *Compare Velasco-Giron*, 773 F.3d at 775 (addressing Cal. Penal Code § 261.5(c)), *with Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc) (addressing the same statute and reaching the opposite conclusion). California's statutory rape law criminalizes

sexual intercourse with someone under 18, and 3 years younger than the defendant, who is not the defendant's spouse. *Estrada-Espinoza*, 546 F.3d at 1151. The Seventh Circuit rejected the argument that it should define "sexual abuse of a minor" more narrowly in reference to a Federal statute such as 18 U.S.C. § 2243(a), which states "sexual abuse of a minor" involves engaging in a sexual act with a person between the ages of 12 and 15, if the offender is at least 4 years older. *Velasco-Giron*, 773 F.3d at 775. The Seventh Circuit noted the illogical result of adopting section 2243(a) as an exclusive definition would mean that only those aliens convicted of sexual abuse offenses involving victims of a certain age range could be removable for "sexual abuse of a minor." *Id.* at 776.

By contrast, the Ninth Circuit explicitly rejected the Board's *Rodriguez-Rodriguez* approach and formulated two definitions of "sexual abuse of a minor." One definition applies to statutory rape offenses. *See Estrada-Espinoza*, 546 F.3d at 1147. In *Estrada-Espinoza*, the respondent was convicted of statutory rape, stemming from his relationship with his young girlfriend. *Id.* at 1150. Thus, the Ninth Circuit considered whether a conviction under California Penal Code sections 261.5(c), criminalizing intercourse with a minor more than 3 years younger than the perpetrator; 286(b)(1), criminalizing sodomy of a person under 18; 288a(b)(1), criminalizing oral copulation with a person under 18; or 289(h), criminalizing sexual penetration by a foreign object of a person under 18, constituted "sexual abuse of a minor" within the meaning of section 101(a)(43)(A) of the Act. *Id.* at 1151-52 (*overruled on other grounds by United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011)).

To define "sexual abuse of a minor" with regard to statutory rape, the Ninth Circuit relied on 18 U.S.C. § 2243. *Id.* at 1152. The Ninth Circuit offered four elements of the generic offense: "(1) a mens rea level of knowingly; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least 4 years between the defendant and the minor." *Id.* at 1158. The Ninth Circuit believed Congress intended the term "sexual abuse of a minor" to carry its standard criminal definition, "on par with 'murder' or 'rape,'" stating the definition of "sexual abuse of a minor" as provided in section 2243 accorded with the "contemporary meaning attached to the crime." *Id.* at 1156. Comparing the aforementioned elements against the elements of the statutes at issue, the Ninth Circuit concluded that convictions under sections 261.5(c), 286(b)(1), 288a(b)(1), or 289(h) did not categorically constitute "sexual abuse of a minor" because each statute defined conduct that was broader than the definition of the term "sexual abuse of a minor." *Id.* at 1158-60.

Rejecting the notion that Congress's failure to provide a cross-reference to a Federal statute meant it did not intend to define "sexual abuse of a minor" by Federal law, the Ninth Circuit said the statute did not need a cross-reference where terms "refer to a specific crime which is already clearly defined in criminal law." *Id.* at 1155. Consequently, the Ninth Circuit determined "sexual abuse

of a minor" needs no cross-reference to a Federal statute because it refers to a specific crime, and thus it found no need to "survey criminal law to ascertain a federal definition" because Congress enumerated the elements of the offense of "sexual abuse of a minor" in 18 U.S.C. § 2243. *Id.* at 1152, 1155.

Declining to Afford Chevron Deference

In contrast with circuits that have accorded *Chevron* deference to the Board's *Rodriguez-Rodriguez* approach, a number of circuits have rejected the *Rodriguez-Rodriguez* decision in different ways.

Explicit Rejection of Rodriguez-Rodriguez

The Ninth Circuit

As discussed in the prior section, the Ninth Circuit has explicitly rejected the Board's *Rodriguez-Rodriguez* approach and has formulated two definitions of "sexual abuse of a minor." One definition applies to statutory rape offenses, *see Estrada-Espinoza*, 546 F.3d at 1147,⁵ and another definition applies to all other sexual abuse offenses involving minors, *see United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999).

With a focus on the word "abuse" in the term "sexual abuse of a minor," the Ninth Circuit drew a distinction between sexual relations with younger children under the age of 16 and sexual relations with older children between the ages of 16 and 18. *United States v. Medina-Villa*, 567 F.3d 507, 514-15 (9th Cir. 2009). Accordingly, in the Ninth Circuit, *Baron-Medina* applies to non-statutory rape sexual abuse offenses involving minors. *Id.* at 515-16.

In *Baron-Medina*, the Ninth Circuit analyzed the term "sexual abuse of a minor" in the sentencing context. 187 F.3d at 1145.⁶ The respondent was convicted of committing a lewd or lascivious act on a child under the age of 14 years in violation of section 288(a) of the California Penal Code. *Id.* To formulate a definition for "sexual abuse of a minor," the Ninth Circuit considered the fact that "sexual abuse of a minor" was placed in the company of crimes such as murder and rape, crimes traditionally proscribed by state law; it therefore declined to restrict its definition to provisions in Federal statutes. *Id.* at 1146. Instead, the Ninth Circuit employed the "ordinary, contemporary, and common meaning of the words that Congress used" and defined the term using dictionary definitions. *Id.* 1146-47. The Ninth Circuit compared that contemporary meaning against the elements of the statutes governing the respondent's conviction: "(1) the touching of an underage child's body; (2) with a sexual intent." *Id.* at 1147 (citing *People v. Martinez*, 903 P.2d 1037, 1042-43 (Cal. 1995)). It concluded that the conduct described under section 288(a) "indisputably [fell] within the common, everyday meanings of the words 'sexual' and 'minor.'" *Baron-Medina*, 187 F.3d at 1147. It further concluded that "[t]he use of young children for the gratification of sexual desires" constitutes abuse. *Id.* Moreover, it stated this definition comports with the "ordinary, contemporary, and com-

mon meaning” of the word “abuse” as found in *Black’s Law Dictionary* and *Webster’s Third New International Dictionary*: “maltreatment, no matter its form.” *Id.* (quoting *Black’s Law Dictionary* 10).

The Ninth Circuit clarified the distinction between *Estrada-Espinoza* and *Baron-Medina* when examining whether a conviction under California Penal Code section 288(a) for lewd and lascivious acts on a child under 14 constituted “sexual abuse of a minor.” *See Medina-Villa*, 567 F.3d at 509-10, 512. Under *Medina-Villa*, a crime that is not statutory rape under *Estrada-Espinoza* may still constitute “sexual abuse of a minor” if the following elements are satisfied: (1) the conduct prohibited by the criminal statute is sexual, (2) the statute protects a minor, and (3) the statute requires abuse. *See id.* at 513. The element of abuse is satisfied if the criminal statute expressly prohibits conduct that causes “‘physical or psychological harm’ in light of the age of the victim in question.” *Id.* For conduct to be *per se* abusive, it must encompass sexual conduct targeting younger children. *See Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1014 (9th Cir. 2009) (internal citation omitted).

The Ninth Circuit revisited and affirmed the frameworks presented in *Estrada-Espinoza* and *Medina-Villa* in finding a conviction for performing oral sex on a 16-year-old boy, in violation of Arizona Revised Statutes section 13-1405, did not constitute “sexual abuse of a minor.” *See Rivera-Cuartas v. Holder*, 605 F.3d 699 (9th Cir. 2010). Because Arizona Revised Statutes section 13-1405 punishes a person who “commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age,” it lacked the age difference requirement under the *Estrada-Espinoza* definition of “sexual abuse of a minor.” *Id.* at 702. Thus, the Ninth Circuit found the Arizona statute was broader than the generic offense because the statute applies to persons under 18 years of age. *Id.* Moreover, the statute failed to meet the *Medina-Villa* definition because it lacked the “abuse” element. *Id.* Consequently, Arizona Revised Statutes section 13-1405 does not constitute “sexual abuse of a minor” in the Ninth Circuit because it “‘does not expressly include physical or psychological abuse of a minor as an element of the crime,’ nor does it ‘criminalize[] only conduct that is *per se* abusive, because it is not limited to conduct targeting younger children.’” *Id.* at 702 (quoting *Pelayo-Garcia*, 589 F.3d at 1015).

The Fifth Circuit

The Fifth Circuit has explicitly rejected the Board’s *Rodriguez-Rodriguez* approach in favor of a plain meaning approach to define “sexual abuse of a minor.” *See Contreras v. Holder*, 754 F.3d 286 (5th Cir. 2014). The Fifth Circuit considered a conviction for carnal knowledge of a child between 13 and 15 years of age, in violation of section 18.2-63 of the Code of Virginia. *Id.* at 288-89. Finding the *Rodriguez-Rodriguez* approach contrary to Fifth Circuit precedent, the Fifth Circuit adopted a plain-meaning

approach in accordance with the circuit’s definitional methodology. *Id.* at 293. The Fifth Circuit’s approach derives the “generic, contemporary meaning” of the term sexual abuse of a minor from its “common usage as stated in legal and other well-accepted dictionaries.” *Id.* at 294. The Fifth Circuit simplified the phrase “sexual abuse of a minor” into three elements: “(1) the conduct must involve a ‘child’; (2) the conduct must be ‘sexual’ in nature; and (3) the sexual conduct must be ‘abusive.’” *Id.* at 293. Next, the Fifth Circuit used legal and other well-accepted dictionaries to define the words “minor,” “abuse,” “sexual,” and “sexual abuse.” *Id.* at 294-96. It defined “minor” as the age below that of majority, 18 years old; it defined “sexual” as “[o]f pertaining to, affecting, or characteristic of sex, the sexes, or the sex organs and their functions;” it defined “abuse” as “[t]o use wrongly or improperly’ or [t]o hurt or injure by maltreatment;” and it defined “sexual abuse” as “[a]n illegal or wrongful sex act, esp[ecially] one performed against a minor by an adult.” *Id.* at 294-95 (citing *The American Heritage Dictionary* and *Black’s Law Dictionary*).

The Fifth Circuit compared the dictionary definitions of abuse and sexual abuse against the elements of the Virginia statute and concluded the conviction for carnal knowledge by an adult necessarily constituted “sexual abuse of a minor” within the meaning of section 101(a) (43)(A) of the Act because sexual abuse means “[a]n illegal or wrongful sex act, esp[ecially] one performed against a minor by an adult.” *Id.* (quoting *Black’s Law Dictionary*).

In using the plain-meaning approach to define “sexual abuse of a minor,” the Fifth Circuit concluded that although a physical act is implicit in *Black’s Law Dictionary*’s definition, a “sexual act does not require physical contact with a minor to be abusive, since psychological harm may occur even without such contact and can be equally abusive.” *Contreras*, 754 F.3d at 294. The Fifth Circuit further established “a *per se* rule that gratifying or arousing one’s sexual desires in the presence of a child is abusive because it involves taking undue or unfair advantage of the minor.” *Id.* at 294-95.

The Tenth Circuit

The Tenth Circuit has also declined to accord *Chevron* deference to the Board’s interpretation of “sexual abuse of a minor.” *See Rangel-Perez v. Lynch*, 816 F.3d 591 (10th Cir. 2016). In considering whether a Utah conviction for unlawful sexual activity with a minor, a violation of Utah Code section 76-5-401, constitutes “sexual abuse of a minor,” the Tenth Circuit discussed whether the Federal definition included a *mens rea* element. *Id.* at 596. In contrast to those circuit courts of appeals that accorded *Chevron* deference to *Rodriguez-Rodriguez*, the Tenth Circuit took a narrow approach, only according deference if the Board decision addressed the *same* question before the circuit court. *Id.*

In *Rodriguez-Rodriguez*, the Board did not address whether the Federal “sexual abuse of a minor” definition

included a mens rea element of at least knowingly. *Id.* at 598. Moreover, the Board “did not purport to set forth all of the elements of “sexual abuse of a minor” and did not establish section 3509(a)(8) as “the exclusive touchstone for defining the elements of the [Act’s] ‘sexual abuse of a minor’ category of ‘aggravated’ felonies.” *Id.* at 598-99. Consequently, the Tenth Circuit found no reason to defer to the Board’s decision in *Rodriguez-Rodriguez*.⁷ *Id.* at 601. Furthermore, the Tenth Circuit said it would not defer to the Board even if it had established section 3509(a)(8) as the exclusive touchstone for defining all the elements of “sexual abuse of a minor.” *Id.* The Tenth Circuit rejected the notion that Congress “intended that every sex offense involving a minor—even sex offenses not requiring mens rea—should qualify as an ‘aggravated felony’ under the [Act].” *Id.* at 602. Because “sexual abuse of a minor” is listed with murder and rape, which have mens rea requirements, the Tenth Circuit stated “sexual abuse of a minor” must have intended a mens rea requirement as well. *Id.*

The Tenth Circuit examined analogous Federal law and considered two statutes setting forth substantive sexual abuse crimes involving minors: 18 U.S.C. §§ 2241(c) and 2243. *Id.* at 603-04. The Tenth Circuit found both require proof that the defendant act either knowingly or with a specific intent. *Id.* at 604. The Tenth Circuit concluded that, because these two analogous crimes required the defendant to act at least knowingly, the Act’s generic “sexual abuse of a minor” offense “also has as an element proof that the defendant ‘knowingly’ committed the proscribed sex acts.” *Id.* at 604-05.

Applying this reasoning, the Tenth Circuit found a conviction under Utah Code section 76-5-401, where a 19-year-old male engaged in sexual intercourse with his 15-year-old long-time girlfriend, who later became the mother of his child, not to be sexual abuse of a minor. *Id.* at 606-07. The Utah statute is a strict liability statute that does not require a mens rea element. The Tenth Circuit therefore concluded that it punishes a broader range of conduct than the conduct falling within the Act’s “sexual abuse of a minor” offense and is not an aggravated felony for removal purposes. *Id.*

Before *Rangel-Perez*, the Tenth Circuit had relied on section 3509(a) to find a conviction for contributing to the delinquency of a minor, in violation of section 18-6-701 of the Colorado Revised Statutes, constituted “sexual abuse of a minor” where the petitioner did not challenge the Board’s definition. *Vargas v. Dep’t of Homeland Sec.*, 451 F.3d 1105, 1107 (10th Cir. 2006).⁸

Implicit Rejection of Rodriguez-Rodriguez

The First and Eleventh Circuits have not explicitly rejected the Board’s definition in *Rodriguez-Rodriguez*; instead, they have considered the plain meaning of the phrase and developed a definition by which to compare State convictions for particular crimes involving sexual misconduct and minors.

The First Circuit

The First Circuit Court of Appeals has applied both a plain meaning approach and deference to the Board when considering whether a conviction constitutes “sexual abuse of a minor.” The First Circuit accorded deference, not to *Rodriguez-Rodriguez*, but rather to an underlying Board decision that used 18 U.S.C. § 2244, which describes “abusive sexual contact,” to find a conviction for indecent assault and battery on a child under 14 constituted “sexual abuse of a minor.” *Emile v. INS*, 244 F.3d 183, 185-86 (1st Cir. 2001).⁹ Section 2244 defines sexual contact as “intentional touching, ‘either directly or through the clothing,’ of another person’s genitals or other specified body parts ‘with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.’” *Id.* at 186; 18 U.S.C. § 2246(3). The First Circuit found this definition was reasonable and was “well within the Board’s discretion” to regard the alien’s conduct, by an adult against a minor, as presumptively within the scope of the term “sexual abuse of a minor.” *Emile*, 244 F.3d at 186.

Relying on a plain meaning approach, the First Circuit has also found lewd and lascivious assault on a child, in violation of Florida Statutes section 800.04, to constitute “sexual abuse of a minor.” See *United States v. Londono-Quintero*, 289 F.3d 147 (1st Cir. 2002). This sentencing enhancement case illustrates the First Circuit’s approach to determining the meaning of “sexual abuse of a minor” as used in section 101(a)(43)(A) of the Act. The First Circuit used *Random House Webster’s Unabridged Dictionary*, 1755 (2d ed. 1987), to define “sexual” as “of, pertaining to, or for sex;” “abuse” as “to use wrongly or improperly,” or “misuse;” and “sexual abuse” as “rape, sexual assault, or sexual molestation.” *Id.* at 153-54. The First Circuit did not settle on any particular definition, but read the plain meaning of “sexual abuse of a minor” in 101(a)(43)(A) “to encompass easily the physical contact provisions of [section] 800.04 of the Florida statute.” *Id.* at 154. The First Circuit noted that the Florida statute “criminalizes, *inter alia*, sexual offenses that do not rise to the level of rape or sexual battery and which are committed against children under the age of sixteen.” *Id.* at 152.

The Eleventh Circuit

The Eleventh Circuit defines “sexual abuse of a minor” as used in section 101(a)(43)(A) of the Act as “a perpetrator’s physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification.” See *United States v. Padilla-Reyes*, 247 F.3d 1158, 1163 (11th Cir. 2001). The Eleventh Circuit derived this definition by considering the “plain meaning” of the phrase. *Id.* The Eleventh Circuit concluded the plain meaning of “sexual abuse of a minor” is unambiguous and Congress’s lack of an explicit statutory cross-reference in the subsection indicates its intent to rely on the plain meaning of the terms. *Id.* at 1164. To determine the “ordinary and everyday meaning” of the phrase, the Eleventh Circuit considered the relevant definitions of “abuse,” “sexual,” and “sexual

abuse” as provided in *Webster’s Third New International Dictionary* and *Black’s Law Dictionary*. *Id.* at 1163. The Eleventh Circuit stated “of a minor” had a “fairly self-evident” definition, and it did not explicitly define the term further. *Id.* The Eleventh Circuit also stated that by not limiting “sexual abuse of a minor” to physical abuse, it recognizes “an invidious aspect of the offense: that the act, which may or may not involve physical contact by the perpetrator, usually results in psychological injury for the victim, regardless of whether any physical injury was incurred.” *Id.* Based on its definition, the Eleventh Circuit concluded a conviction under Florida Statutes section 800.04 constitutes “sexual abuse of a minor” in the sentencing enhancement context. *Id.*

The Eleventh Circuit has also found a conviction under the General Statutes of North Carolina section 14-202.1 to constitute “sexual abuse of a minor.” *Bahar v. Ashcroft*, 264 F.3d 1309 (11th Cir. 2001); *see also United States v. Ramirez-Garcia*, 646 F.3d 778, 784 (11th Cir. 2011) (stating that the *Padilla-Reyes* definition of “sexual abuse of a minor” does not “limit ‘sexual abuse of a minor’ to instances where the perpetrator is present in front of the minor, where the minor is aware of the abuse, or where the perpetrator makes contact with the minor,” making that definition “no narrower” than the North Carolina statute). In *Bahar*, the Eleventh Circuit considered the North Carolina conviction under the Board’s interpretation as discussed in *Rodriguez-Rodriguez*. *Bahar*, 264 F.3d at 1312. The Eleventh Circuit did not accord *Chevron* deference to the Board, but stated, “We cannot say that the Board’s interpretation of section 1101(a)(43)(A) was unreasonable” where the Board determined the North Carolina offense of taking indecent liberties with children constituted “sexual abuse of a minor.” *Id.* Comparing its definition and the Board’s reasoning, the Eleventh Circuit said its findings in *Padilla-Reyes* support the Board’s view. *Id.* In addition, the Eleventh Circuit compared the Florida statute from *Padilla-Reyes* with the North Carolina statute and found they did not require “materially different elements.” *Id.*

In the removal context, the Eleventh Circuit again considered Florida Statutes section 800.04, restated its definition of “sexual abuse of a minor” from *Padilla-Reyes* and concluded that all conduct proscribed by the statute met that definition and involved “a purpose associated with sexual gratification.” *See Chuang v. U.S. Att’y Gen.*, 382 F.3d 1299, 1301-02 (11th Cir. 2004). The Eleventh Circuit did not address the Board’s interpretation of “sexual abuse of a minor.”

Declining to Adopt a Definition

The Fourth Circuit

The Fourth Circuit interpreted the term “sexual abuse of a minor” in the immigration context when it considered a conviction for causing abuse to a child under former Maryland Code article 27, section 35A. *Amos v. Lynch*, 790 F.3d 512 (4th Cir. 2015). The Fourth Circuit found the

conviction was not an aggravated felony under section 101(a)(43)(A) of the Act. *Id.* at 522. The Fourth Circuit cited *Rodriguez-Rodriguez*, and similarly used section 3509(a)(8) as a guide. *Id.* Nonetheless, the Fourth Circuit disapproved of the Board’s failure to adopt a particular definition and “provide direction regarding the elements of the generic federal crime of ‘sexual abuse of a minor.’” *Id.* at 520. Ultimately, the Fourth Circuit determined the former Maryland statute was broader than section 3509(a)(8) in that the Maryland statute included an omission or failure to act whereas section 3509(a)(8) only involved affirmative acts. *Id.* at 521-22. Thus, the least culpable conduct contemplated by the Maryland statute was not encompassed by section 3509(a)(8). *Id.*

Before *Amos*, the Fourth Circuit interpreted a conviction under Maryland’s child abuse statute, Maryland Code article 27, section 35C, in the sentencing enhancement context. *See United States v. Cabrera-Umanzor*, 728 F.3d 347 (4th Cir. 2013). A conviction under section 35C required the following elements: “(1) that the defendant is a parent, family or household member, or had care, custody, or responsibility for the victim’s supervision; (2) that the victim was a minor at the time; and (3) that the defendant sexually molested or exploited the victim by means of a specific act.” *Id.* at 351 (internal citations omitted). Comparing these elements against the definition of “sexual abuse of a minor” derived from *United States v. Diaz-Ibarra*, 522 F.3d 343, 352 (4th Cir. 2008)¹⁰—“physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification”—the Fourth Circuit concluded sexual abuse under section 35C did not amount to generic “sexual abuse of a minor” because section 35C did not require intent to gratify sexual urges as an element. *Id.* at 351-52 (internal citations omitted); *see also Diaz-Ibarra*, 522 F.3d at 352. *Cabrera-Umanzor* does not address “sexual abuse of a minor” in the context of the Act and, presumably, for this reason the Fourth Circuit did not draw on its analysis in that decision when it decided *Amos*.

Conclusion

As revealed by this overview of the disparate treatment of the term “sexual abuse of a minor” in the circuit courts of appeals, this issue is ripe for further adjudication and clarification as the different definitions lead to inconsistent results. For example, an adult who performs a sexual act on a 15- or 16-year-old will not have committed “sexual abuse of a minor” in the Ninth Circuit or Tenth Circuit if no age differential or mens rea is specified in the statute of conviction, but the same adult will suffer immigration consequences in several other circuits, possibly even based on a violation of the same state statute, thus leading to disparate immigration consequences for the same conduct. Perhaps “a national definition of the elements of a crime is required so as to permit uniform application of federal law in determining the federal effect of prior convictions.” *Estrada-Espinoza*, 546 F.3d at 1157. ■

Virginia L. Gordon and L. Laetitia Mukala were attorney advisors at the Arlington and Houston immigration courts, respectively, at the time of writing this article.

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Endnotes

¹The current definition of a “crime of violence” under the Sentencing Guidelines includes the term “sexual abuse of a minor,” but it does not go on to further define that term. See U.S.S.G. §§ 2L1.2(b)(1)(A) cmt. n.1(B) (iii). However, effective November 1, 2016, an amendment to the definition of a “crime of violence” in the Sentencing Guidelines will clarify that a sexual abuse of a minor offense constitutes a “crime of violence” only if the offense qualifies as one described in 18 U.S.C. § 2241(c) or an equivalent offense under state law. This amendment is notable because it addresses the need to clarify which “sexual abuse of a minor” offenses will have sentence enhancement consequences under the Guidelines. NEED A CITE TO THE AMENDMENT

²Sexually explicit conduct is defined in section 3509(a)(9)(A) in relevant part as “the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person.”

³The Sixth Circuit first addressed the definition of “sexual abuse of a minor” in the sentencing enhancement context with respect to section 101(a)(43)(A) of the Act. See *United States v. Gonzales-Vela*, 276 F.3d 763 (6th Cir. 2001).

⁴In *Lara-Ruiz v. INS*, the Seventh Circuit analyzed “sexual abuse of a minor” for the first time and found the Board’s definition of the term reasonable, but in that case the Board had defined “sexual abuse of a minor” in reference to 18 U.S.C. §§ 2241(c) and 2246(2)(A). 241 F.3d 934, 940 (7th Cir. 2001). It appears that the underlying unpublished Board decision in *Lara-Ruiz* was issued prior to the Board’s precedential decision in *Rodriguez-Rodriguez*. See *id.* at 940 n.4.

⁵The “construction of the generic § 2243 definition of ‘sexual abuse of a minor’ [in *Estrada-Espinoza*] encompassed statutory rape crimes only—that is, sexual offenses involving older as well as younger adolescents, not crimes prohibiting conduct harmful to younger children specifically.” *United States v. Medina-Villa*, 567 F.3d 507, 514 (9th Cir. 2009).

⁶*Baron-Medina* bears mention because “decisional law defining the term ‘sexual abuse of a minor’ in the sentencing context . . . is informed by the definition of the same term in the immigration context . . . and vice versa.” *Medina-Villa*, 567 F.3d at 511-12.

⁷The Tenth Circuit also found the use of section 3509(a) unreasonable because it is a procedural statute that does not define a substantive crime and accordingly does not address a crime’s elements. *Id.* at 605-06. The Tenth Circuit found it unreasonable to contemplate a procedural statute to determine whether a mens rea element is included in “sexual abuse of a minor,” particularly where substantive Federal crimes address the mens rea element. *Id.* at 606.

⁸The Tenth Circuit previously addressed the meaning of “sexual abuse of a minor” in the sentencing enhancement context and used the “ordinary, contemporary, and common” meanings of the words in the phrase to formulate the term’s definition. See, e.g., *United States v. De La Cruz-Garcia*, 590 F.3d 1157, 1160 (10th Cir. 2010) (using definitions from *Black’s Law Dictionary* and *Webster’s Third International Dictionary Unabridged*) (internal citations omitted).

⁹This case was decided after *Rodriguez-Rodriguez*. The First Circuit suggested a rejection of *Rodriguez-Rodriguez*, citing to the dissent in that case and stating “it is debatable how relevant [section 3509(a)(8)] may be.” *Id.* at 186 n.2.

¹⁰In *United States v. Diaz-Ibarra*, the Fourth Circuit determined whether the respondent’s crime of child molestation constituted sexual abuse of a minor for sentencing enhancement purposes. 522 F.3d at 352-53.

From the Editor

Please send all news items to me at LBurman@aol.com. We really want to know what is happening in the Section, and in the professional lives of our members. We especially would appreciate photographs. Kindly send submissions in Word format.

Larry Burman, editor

One Person's Freedom Fighter, Duress, and the Terrorism Bar

BY CHAYA CITRIN

Individuals have raised a host of arguments—two of which this article explores—in defending against the Immigration and Nationality Act's "terrorism bar," which sweeps broadly in barring many aliens who have engaged in any form of insurgency from admission to or relief in this country. One defense asserts that legitimate or justifiable violence is not unlawful and thus does not qualify as "terrorist activity" within the meaning of section 212(a)(3)(B)(iii) of the Act, 8 U.S.C. § 1182(a)(3)(B)(iii). That section provides that an activity constitutes terrorist activity only if it is "unlawful under the laws of the place where it is committed" or "if it had been committed in the United States, would be unlawful under the laws of the United States or any State." *Id.* Another defense is that an exception for duress is implicit in the terrorism bar's material-support provision, contained at section 212(a)(3)(B)(iv)(VI) of the Act, and that involuntarily providing support to terrorists therefore does not trigger the "material-support bar."¹

The *Immigration Law Advisor* has previously explored several of the terrorism bar's facets.² In short, the bar renders individuals who have engaged in terrorist activity inadmissible, *see* section 212(a)(3)(B)(i) of the Act; removable, *see* section 237(a)(4)(B) of the Act, 8 U.S.C. § 1227(a)(4)(B); and ineligible for most forms of immigration relief.³ Individuals subject to the terrorism bar remain eligible for a discretionary waiver pursuant to section 212(d)(3)(B)(i) of the Act and deferral of removal under the Convention Against Torture. *See, e.g., Khan v. Holder*, 766 F.3d 689, 698 (7th Cir. 2014); *Haile v. Holder*, 658 F.3d 1122, 1125–26 (9th Cir. 2011); *accord Matter of S-K*, 23 I&N Dec. 936, 946 (BIA 2006).

This article provides a survey of case law from the Board of Immigration Appeals and the federal courts of appeals addressing defenses against the terrorism bar raised by individuals who have engaged in claimed "legitimate" violence as part of an independence movement or who have involuntarily provided material support to terrorists. In considering a defense for "freedom fighters," the Board and the courts of appeals for the Third and Ninth Circuits, the only circuits to address the issue, have consistently rejected attempts to find implied exceptions to the terrorism bar. Likewise, the Board recently agreed with the Third, Fourth, Ninth, and Eleventh Circuits in *Matter of M-H-Z*, 26 I&N Dec. 757 (BIA 2016), that the terrorism bar does not contain an implicit exception for material support provided under duress. This article discusses the scope of the holdings regarding these proposed defenses, specifically in light of international law permitting the use of force against an illegitimate regime and limiting refoulement, and also discusses the availability of a waiver of the terrorism bar under section 212(d)(3)(B)(i) of the Act.

"Freedom Fighting" and the Terrorism Bar

Failed Defenses

The following are arguments, generally variations on the same theme, that the Board and circuit courts have considered in the context of applying the terrorism bar to individuals involved with independence movements. Despite some adjudicators' concerns regarding the terrorism bar's broad scope, none of these defenses has prevailed.

1. Political-Offense Exception

In *McAllister v. Attorney General of the United States*, 444 F.3d 178 (3d Cir. 2006), the Third Circuit dismissed the alien's petition for review in which he argued for an exception to the terrorism bar for political violence. *McAllister* is the first published decision to analyze the bar's application to independence movements. The petitioner argued that his conduct in the Irish National Liberation Army did not constitute terrorist activity because he had not targeted non-combatants and "the situation in Northern Ireland had risen to the level of an Article 3 conflict under the Geneva Convention."⁴ *Id.* at 187. The court rejected that argument because the Act's "definition of engaging in terrorist activity does not address either the targeting of non-combatants or the levels of conflict under the Geneva Convention." *Id.* at 187–88. The petitioner alternatively maintained that even if he had engaged in terrorist activity, his conduct fell within the Act's exception for political offenses. *Id.* at 188. The court disagreed with that argument as well, explaining that none of the Act's provisions recognizing an exception for political offenses—section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F) (concerning crimes of violence); section 212(a)(2)(A)(i)(I) of the Act (concerning crimes involving moral turpitude); and section 212(a)(2)(B) of the Act (concerning multiple criminal convictions)—pertains to terrorist activities. *See McAllister*, 444 F.3d at 188. Thus, the court held, the Board did not err in declining to apply the Act's political-offense exception to the petitioner's conduct. *See id.*

Several years later, the Ninth Circuit considered nearly the same argument concerning the relevance of the political-offense exception that the Third Circuit had rejected in *McAllister*. In *Annachamy v. Holder*, the petitioner conceded that he had engaged in terrorist activity under section 212(a)(3)(B)(iv)(VI) of the Act by providing material support to the Liberation Tigers of Tamil Eelam (LTTE)—"a militant organization . . . at war with the Sri Lankan government." 733 F.3d 254, 257 (9th Cir. 2013), *overruled on other grounds by Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014). He urged the court, however, to read an exception

into the Act for individuals who provide material support only for “legitimate political violence.” See *Annachamy*, 733 F.3d at 259 (internal quotation marks omitted). The court rejected that invitation, explaining that the petitioner had not suggested any “textual hook for his argument that the material support bar does not apply to political offenses.” *Id.*; cf. *Hussain v. Mukasey*, 518 F.3d 534, 537 (7th Cir. 2008) (noting that “[t]errorism as used in common speech refers to the use of violence for political ends”).

2. Regimes’ Legitimacy and Resistance Groups’ Motivations

Shortly after the Third Circuit decided *McAllister*, the Board published *Matter of S-K*, a decision in which it declined to infer an exception to the terrorism bar for the “use of justifiable force to repel attacks by forces of an illegitimate regime.” 23 I&N Dec. 936, 941 (BIA 2006).⁵ The respondent—who had supported the Chin National Front (CNF)—argued that the Burmese government and its legislative acts were illegitimate. She contended that the CNF’s violent actions against such an illegitimate government were not “unlawful” under Burmese law and therefore did not constitute terrorist activity. See *id.* at 939. The Board rejected that argument, however, on the ground that it lacks authority to judge a regime’s legitimacy; “[s]uch a determination,” the Board explained, “is a matter left to elected and other high-level officials.” *Id.* at 940. The Board also disagreed with the respondent’s contention that, in determining whether a group has engaged in terrorist activity, the Board must consider the group’s motivations for “seeking to effect change in a country.” *Id.* at 940–41. In reaching that conclusion, the Board noted that other parts of the Act contain exceptions for “serious nonpolitical offenses and aliens who have persecuted others, even where persecuted themselves.” *Id.* at 941. That section 212(a)(3)(B) of the Act lacks a similar exception suggests, the Board explained, that “Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as ‘freedom fighters.’” *Id.*

Recently, the Ninth Circuit cited *Matter of S-K* approvingly for the proposition that, in determining the terrorism bar’s application, the Board does not assess a government’s “legitimacy” or a group’s “motives in attempting to overthrow” that regime. See *Zumel v. Lynch*, 803 F.3d 463, 474 (9th Cir. 2015). *Zumel* concerns the application of the terrorism bar to an individual who had helped plan a coup against the president of the Philippines. 803 F.3d at 466–67. In the petitioner’s view, the Board erred by ignoring that his conduct had been politically motivated given that the definition of terrorist activity under section 212(a)(3)(B)(iii)(V) of the Act requires as an element the “intent to endanger.” *Zumel*, 803 F.3d at 474 (internal quotation marks omitted). The appellate court disagreed with that argument, explaining that the Board’s refusal to consider his political intentions had not prevented it from assessing whether the coup attempt had involved the requisite “intent to endanger.”⁶ See *id.*; see also *Chhun v. Holder*, 345 F. App’x 297, 299 (9th Cir. 2009) (describing Cambodian Freedom Fighters’

“democratic goals” as “irrelevant” to whether the organization had engaged in terrorist activity); *Choub v. Gonzales*, 245 F. App’x 618, 619–20 (9th Cir. 2007) (same).

3. International Law Permitting “Legitimate” Violence

The argument in *Matter of S-K* regarding a regime’s lack of legitimacy reappeared in a slightly different form in *Khan v. Holder*, 584 F.3d 773 (9th Cir. 2009), a decision in which the Ninth Circuit, like the Board, declined to read an exception into the terrorism bar for “legitimate” violence. The petitioner—who had worked with the Jammu Kashmir Liberation Front (JKLF), “a group dedicated to the establishment of an independent Kashmir” and to “armed struggle against the Indian government”—argued that the group’s actions were in opposition to an illegitimate regime, were permissible under international law, and therefore did not constitute terrorist activity. *Id.* at 778. In the petitioner’s view, the Act’s definition of terrorist activity incorporates international law to the effect that “actions that are illegal under the laws of the regime in power in the alien’s country of origin are ‘unlawful’ within the meaning of [the Act] only if [they] violate the international law of armed conflict.” *Id.* at 781. The court rejected that position, however, reasoning that the Act’s definition of terrorist activity is “unambiguous” in that it “does not make an exception for actions that are lawful under international law.” *Id.* Thus, the court held, terrorist activity under the Act includes “armed resistance against military targets that is permitted under the international law of armed conflict.” *Id.* at 784.

Nevertheless, *Khan* acknowledges that international law may be relevant in determining whether conduct constitutes terrorist activity: “An action would be lawful within the meaning of [section 212(a)(3)(B)(iii) of the Act] if the law of the country in question incorporates international law such that the conduct in question is no longer ‘unlawful’ under the country’s domestic law.” 584 F.3d at 781. A concurring opinion in *Khan* explained further that this approach “is not premised on carving out an exception to the terrorist activity definition for groups engaged in legitimate armed conflict,” but instead “turns on whether the conduct in question is unlawful.” *Id.* at 787 (Nelson, J., concurring) (internal quotation marks omitted).

Courts have yet to publish a decision, however, ruling that armed resistance against a foreign regime was permitted under international law, as ratified by domestic law. Because the petitioner in *Khan* did not argue that India had adopted international law that would sanction the JKLF’s activities, the panel’s majority declined to consider whether the country had in fact adopted such law. See *id.* at 781. Likewise, in a case involving an individual who had supported the Eritrean People’s Liberation Front, the Seventh Circuit noted in dictum that the petitioner’s argument invoking international law fell short given that he did not assert that Eritrea had ratified such law. See *FH-T v. Holder*, 723 F.3d 833, 840 n.4 (7th Cir. 2013). Indeed, though the petitioner in *Annachamy* requested that the Board “consider whether Sri Lanka has incorporated international law, such that the LTTE’s activities were not unlawful under

Sri Lankan domestic law,” the Ninth Circuit declined to remand absent any evidence that the country had in fact “incorporated such international law.” 733 F.3d at 260 n.5. Finally, even considering the bearing of international law, the concurring opinion in *Khan* concluded that such law did not help the petitioner given the evidence “that the JKLF has exceeded the bounds of permissible conduct under the international law of armed conflict.” 584 F.3d at 787 (Nelson, J., concurring).

4. International Law Prohibiting Refoulement

Individuals have also relied on international nonrefoulement law as a basis for challenging the terrorism bar’s application to their conduct. Nonrefoulement refers to “[a] refugee’s right not to be expelled from one state to another, esp[ecially] to one where his or her life or liberty would be threatened.” *Nonrefoulement*, Black’s Law Dictionary (10th ed. 2014). In *Khan*, the petitioner argued that applying the terrorism bar based on his involvement with an armed resistance group would violate the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 [hereinafter Protocol], which, in his view, provides “the only permissible grounds on which a country can refo[ul] a refugee.” 584 F.3d at 782–84.

The Ninth Circuit, providing context for the petitioner’s argument explained that “[t]he Protocol binds parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees [(“Refugee Convention”).]” *Id.* at 782 (quoting *INS v. Stevic*, 467 U.S. 407, 416 (1984)) (internal quotation marks and brackets omitted). Article 33 of the Refugee Convention establishes the duty of nonrefoulement: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.” 584 F.3d at 782 (quoting the Refugee Convention, art. 33.1, July 28, 1951, 19 U.S.T. 6223). Yet, “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is” seeking refuge is not entitled to this protection. *Id.* at 782–83 (quoting the Refugee Convention, art. 33.2).

The petitioner argued that Article 33.2 of the Refugee Convention permits refoulement on the ground that an alien poses a danger to the security of the United States only if three conditions are satisfied: The alien “pose[s] a present danger to the United States,” “the danger [is] a serious threat to national security,” and “the danger [is] proved, not simply assumed.” *Khan*, 584 F.3d at 784. In light of those limitations, the petitioner contended, the Act’s definition of terrorist activity sweeps too broadly. *See id.* at 782–84.

As an initial matter, the Ninth Circuit assessed the extent to which the United States is bound by the Protocol, which this country acceded to in 1968. *See id.* at 783. Because the Protocol “is not self-executing,” the court explained, it “does not have the force of law in American courts.” *Id.*

Accordingly, it “serves only as a useful guide in determining congressional intent in enacting the Refugee Act of 1980, which sought to bring United States refugee law into conformity with the Protocol.” *See id.* (internal quotation marks and citation omitted). Acknowledging the open question “whether the Protocol is also a useful guide in interpreting provisions of the [Act] that were not enacted with the Protocol in mind, such as the terrorism bars to relief from removal,” the court applied the canon observed in *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804), “that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.” *Khan*, 584 F.3d at 783 (internal quotation marks omitted); *see generally United States v. Ali*, 718 F.3d 929 (D.C. Cir. 2013) (conducting an analysis under the *Charming Betsy* canon).

Applying the canon, the court explained that neither the Protocol nor the Refugee Convention defines the term “danger to . . . security” and that “the Contracting State in whose territory the refugee finds himself” has the duty to determine the individual’s “refugee status.” *Khan*, 584 F.3d at 783 (internal quotation marks, citation, and ellipses omitted). Therefore, the court reasoned, the determination reflected in section 241(b)(3)(B) of the Act—that an individual who has engaged in terrorist activity is someone “with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States”—accords with the Protocol’s exception to nonrefoulement for refugees who pose a danger to security. *Id.* at 784 (internal quotation marks and citation omitted); *see also Annachamy*, 733 F.3d at 266 (“Under the Protocol and Convention, Congress is free to decide that an alien who provided material support to a terrorist organization, even if under duress, is a danger to the security of the United States.”). With that in mind, the Ninth Circuit disagreed with the petitioner’s contention that the Act’s definition of terrorist activity conflicts with the duty of nonrefoulement under the Protocol. *See Khan*, 584 F.3d at 783–84.

Concerns Regarding the Terrorism Bar’s Application to “Legitimate” Violence

Despite consensus concerning the terrorism bar’s application to armed resistance against repressive regimes, each appellate body to consider the issue has criticized the bar’s expansive reach. One line of criticism has focused on Congress’s disregard for the circumstances leading to such resistance. For example, the concurrence in *McAllister* faulted Congress for requiring courts to ignore the reasons for a group’s resort to violence, such as “the eight hundred years of history that led [the petitioner] to fight with his people to remove British rule, and the persecution inflicted by that rule on Northern Ireland and on [the petitioner] and his family.” 444 F.3d at 192 (Barry, J., concurring). In a similar vein, the Ninth Circuit has noted that the Act’s definition of terrorist activity is so broad that it would encompass “armed resistance by Jews against the government of Nazi Germany.” *Zumel*, 803 F.3d at 474 (internal quotation marks); *see also Khan*, 584 F.3d at 781, 787 (Nelson, J.,

concurring). Likewise, a concurrence to the Board's decision in *Matter of S-K* noted that the CNF qualified as a terrorist organization under the Act, despite the fact that it "engage[d] in violence primarily as a means of self-defense against the Burmese Government, a known human rights abuser." See 23 I&N Dec. at 947-48 (Osuna, concurring).⁷

The terrorism bar has also suffered criticism for conflicting with this country's foreign-policy interests. According to the concurrence in *Matter of S-K*, because the terrorism bar may apply to "[a]ny group that has used a weapon for any purpose other than for personal monetary gain," the bar could apply to a group whose "activities coincide with our foreign policy objectives" or perhaps even one "who provide[d] assistance to United States or allied armed forces." 23 I&N Dec. at 948, 949 n.15 (Osuna, concurring).⁸ Lastly, the terrorism bar has suffered critique for its breadth. The concurrence in *Khan* opined that the terrorism bar would, in fact, apply to an individual who aided the United States military in its invasions of Afghanistan and Iraq because those operations "were indisputably 'unlawful' under the domestic laws of those countries." 584 F.3d at 787. The concurrence further cautioned that the terrorism bar's breadth "could discourage sympathetic groups from lending support to the U.S. military, knowing it would preclude them from seeking refuge in the U.S. in the future." *Id.*

Discretionary Exemptions for Freedom Fighters

Both the Ninth Circuit and the Board have commented, however, that the terrorism bar's expansive scope is mitigated by the availability of a discretionary waiver of the bar under section 212(d)(3)(B)(i) of the Act. See *Khan*, 584 F.3d at 782; *Matter of S-K*, 23 I&N Dec. at 941 (noting that Congress included the waiver provision in an "attempt[] to balance the harsh provisions set forth in the Act"). The Board recently discussed the contours of the discretionary-waiver framework in *Matter of M-H-Z*, 26 I&N Dec. at 762 n.5.⁹ In short, section 212(d)(3)(B)(i) of the Act permits the Secretaries of State or Homeland Security, after consultation with one another and with the Attorney General, to exempt individuals and groups from most applications of the terrorism bar. In the Ninth Circuit's view, "These officials are in a position to judge the characteristics of particular groups engaging in armed resistance in their home countries, as well as the implications for our foreign relations in determining whether the actions of these groups are terrorist activities." *Khan*, 584 F.3d at 782. Both the Ninth Circuit and the Board have observed that the discretionary waiver-framework likely obviates any potential conflict between the terrorism bar and international law limiting refoulement. See *Khan*, 584 F.3d at 784; *Matter of S-K*, 23 I&N Dec. at 943 n.7; see also *Annachamy*, 733 F.3d at 266 n.15.

The Secretary of Homeland Security has repeatedly exercised the discretion to waive the terrorism bar, more or less broadly, with respect to several resistance groups based on the United States' national-security and foreign-policy interests.¹⁰ Those groups include those listed in section 691(b) of the Consolidated Appropriations Act of 2008—"the Karen

National Union/Karen Liberation Army (KNU/KNLA), the Chin National Front/Chin National Army (CNF/CNA), the Chin National League for Democracy (CNLD), the Kayan New Land Party (KNLP), the Arakan Liberation Party (ALP), the Mustangs, the Alzados, the Karenni National Progressive Party, and appropriate groups affiliated with the Hmong and the Montagnards"¹¹—as well as the following groups:

- Aliens involved in uprisings against Saddam Hussein's government between March 1 and April 5, 1991
- All Burma Muslim Union
- All India Sikh Students Federation-Bittu Faction
- All Burma Students' Democratic Front
- Arakan Army
- Democratic Movement for the Liberation of Eritrean Kunama
- Eritrean Liberation Front
- Farabundo Marti National Liberation Front
- Hongsawatoi Restoration Army/Party
- Kachin Independence Army
- Kachin Independence Organization
- Karen National Defense Organization
- Karenni Nationalities People's Liberation Front
- Kawthoolei Muslim Liberation Front
- Kosovo Liberation Army
- Kuki National Army
- Mon National Liberation Army
- Mon National Warrior Army
- Myeik-Dawei United Front
- National Democratic Front
- National United Party of Arakan
- Nationalist Republican Alliance
- New Democratic Army Kachin
- New Mon State Party
- Parliamentary Democracy Party
- People's Democratic Front
- Ramanya Restoration Army
- Shan State Army
- Zomi Reunification Organization/Zomi Revolutionary Army.¹²

Duress and the Material-Support Bar

Efforts to identify an exception to the terrorism bar for material support provided under duress have proven as unsuccessful as those urging an exception to the bar for violence against repressive regimes. The absence of an express duress exception is undisputed. See *Sesay v. Att'y Gen. of U.S.*, 787 F.3d 215, 222 (3d Cir. 2015); *Ay v. Holder*, 743 F.3d 317, 320 (2d Cir. 2014); *Annachamy*, 733 F.3d at 260; *Alturo v. U.S. Att'y Gen.*, 716 F.3d 1310, 1314 (11th Cir. 2013); *Barahona v. Holder*, 691 F.3d 349, 354 (4th Cir. 2012); *Matter of M-H-Z*, 26 I&N Dec. at 760-61 n.3. The circuit courts have debated, however, the existence of an implicit duress exception. In considering the issue, the courts have acknowledged *Negusie v. Holder*, 555 U.S. 511, 518 (2009), a decision in which the United States Supreme Court held that the Act's silence regarding a duress exception to the persecutor bar in sections 208(b)(2)(A)(i) and 241(b)(3)(B)(i) of

the Act “is not conclusive” as to whether a duress exception is implied. *See Sesay*, 787 F.3d at 222; *Ay*, 743 F.3d at 320; *Annachamy*, 733 F.3d at 260; *Barahona*, 691 F.3d at 354; *see also Matter of M-H-Z-*, 26 I&N Dec. at 760–61. Despite *Negusie*, each court to decide the issue on the merits—the Third, Fourth, Ninth, and Eleventh Circuits—has held that the material-support bar lacks an implicit exception for duress. *See Sesay*, 787 F.3d at 222–24; *Annachamy*, 733 F.3d at 260–65; *Alturo*, 716 F.3d at 1314; *Barahona*, 691 F.3d at 354–56; *but see Barahona*, 691 F.3d at 356–58 (Wynn, J., dissenting) (“[P]assive acquiescence to the crimes of terrorists does not constitute an act that affords material support to a terrorist organization.”) (internal quotation marks and ellipses omitted); *see also Matter of M-H-Z-*, 26 I&N Dec. at 760 (noting the circuit courts’ unanimity regarding the absence of an implied duress defense).

The Second Circuit, however, issued a series of remands in light of *Negusie*, instructing the Board “to address in a precedential decision” whether the material-support bar “should be construed to include a duress exception.” *Ay*, 743 F.3d at 319; *see also Khan*, 766 F.3d at 700–01 (acknowledging the “open question whether there is a duress exception to the material support bar”). The Board’s recent decision in *Matter of M-H-Z-* resulted from an unpublished remand order like the one in *Ay*, *see Hernandez v. Holder*, 579 F. App’x 12, 15 (2d Cir. 2014), and is the Board’s first published decision concerning an implied duress defense to the material-support bar. *See* 26 I&N Dec. at 757. *Matter of M-H-Z-* concerns an individual who had provided food and other goods to the Revolutionary Armed Forces of Colombia after receiving demands for goods and money, as well as threats, from the group. *See id.* at 757–58.

As with the courts of appeals that have decided the issue on the merits, the Board in *Matter of M-H-Z-* declined to read a duress exception into the material-support bar and reiterated several of the reasons that the appellate courts have recognized for holding that such an exception is not implied. As an initial matter, the Board noted that the inclusion of an express exception for involuntary membership in a totalitarian party in section 212(a)(3)(D)(ii) of the Act suggests that Congress intentionally omitted a similar exception for duress from the terrorism bar’s material-support provision. *See Matter of M-H-Z-*, 26 I&N Dec. at 761; *accord Sesay*, 787 F.3d at 222 (noting that the Act’s “totalitarian bar” includes “an exception precisely for involuntariness”) (internal quotation marks omitted); *Annachamy*, 733 F.3d at 261; *Alturo*, 716 F.3d at 1314; *Barahona*, 691 F.3d at 355 n.9. The Board also noted that the Third and Ninth Circuits have cited the exception to the material-support bar in section 212(a)(3)(B)(iv)(VI)(dd) of the Act—“for aliens who demonstrate a lack of knowledge that the organization [to which they provided material support] was a terrorist organization”—as additional evidence that Congress “would have likewise expressly excepted involuntary support if it intended to do so.” *See Matter of M-H-Z-*, 26 I&N Dec. at 761 n.3 (internal quotation marks omitted).

Additionally, the Board relied on the availability of a discretionary waiver under section 212(d)(3)(B) of the Act as further reason not to construe the material-support bar as containing

an implicit duress exception. *See id.* at 761–63. Citing *Matter of S-K-*, 23 I&N Dec. at 941, the Board explained that the later enactment of the discretionary-waiver provision demonstrates that Congress intended the waiver to “balanc[e] the harsh provisions of the material support bar” and that the “omission of ameliorative provisions in section 212(a)(3)(B) of the Act was intentional.” *Id.* at 762. That Congress “decid[ed] to provide a waiver, but to allow no exception for involuntariness or duress,” the Board reasoned, “should therefore be given deference.” *Id.* at 762–63; *accord Annachamy*, 733 F.3d at 261–62.

In the Board’s view, later developments concerning discretionary waivers of the terrorism bar further confirm that Congress did not intend an exception for material support provided under duress. *See Matter of M-H-Z-*, 26 I&N Dec. at 761 n.4. In 2007, the Secretary of Homeland Security exercised the discretion to waive the terrorism bar “with respect to material support provided under duress.” Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 26138-02 (May 8, 2007); Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9958-01 (Mar. 6, 2007). The next year, Congress acted through the Consolidated Appropriations Act, 2008, to bar individuals who voluntarily provided material support from receiving a waiver and to require the Secretary of Homeland Security to report to Congress annually regarding discretionary waivers for individuals who provided material support under duress. *See* § 691(a), (e), 121 Stat. 1844. This legislation, the Board reasoned, further reveals Congress’s “ability to distinguish between voluntary and involuntary conduct” and its intent that the terrorism bar apply to material support provided under duress. *See Matter of M-H-Z-*, 26 I&N Dec. at 761 n.4; *accord Sesay*, 787 F.3d at 223–24; *Annachamy*, 733 F.3d at 264; *Alturo*, 716 F.3d at 1314; *Barahona*, 691 F.3d at 354–55.

After rejecting an implied duress exception as a matter of statutory interpretation, the Board dispatched two policy arguments that the respondent had presented in support of inferring a duress exception. First, the Board disagreed with the view that declining to read a duress exception into the material-support bar “would necessarily lead to results that are inconsistent with our treaty obligations, including the duty of nonrefoulement.” *Matter of M-H-Z-*, 26 I&N Dec. at 763. Citing the Ninth Circuit’s reasoning in *Annachamy*, 733 F.3d at 266, the Board explained that “under international law, Congress is free to decide that an alien who provided material support to a terrorist organization, even if under duress, is a danger to the security of the United States.” 26 I&N Dec. at 763 (internal quotation marks omitted); *see also Khan*, 584 F.3d at 783–84. Second, the Board rejected the contention that duress must be a defense to the material-support bar given that it is a defense to criminal culpability, noting that immigration proceedings are “civil in nature”—not criminal—and “even in criminal cases, duress is not always a defense.” *Matter of M-H-Z-*, 26 I&N Dec. at 763–64; *accord Annachamy*, 733 F.3d at 260 n.6.

Conclusion

Although most courts of appeals have not yet weighed in on exceptions to the terrorism bar for opposition to repressive regimes and material support provided under duress, the unanimity thus far suggests that the remaining circuits might likewise reject these defenses. The upshot of the Board and appellate courts' decisions is that, aside from deferral of removal under the Convention Against Torture, a discretionary waiver is the singular recourse for individuals subject to the bar because of their opposition to repressive regimes or involuntary provision of material support for terrorists. See, e.g., *Matter of M-H-Z*, 26 I&N Dec. at 762; *Matter of S-K*, 23 I&N Dec. at 942. In light of the recent uptick in group-based waivers—the Secretary of Homeland Security exempted twenty-one Burmese groups earlier this year—perhaps further discretionary waivers for “freedom fighters” are forthcoming.¹³ Observers may also want to watch for changes to the process for obtaining a waiver given several courts' questions regarding the efficacy of the current system. See, e.g., *Ay*, 743 F.3d at 321; *FH-T v. Holder*, 743 F.3d 1077 (7th Cir. 2014) (Wood, J., dissenting from the denial of rehearing en banc); *Khan*, 584 F.3d at 786-88 (Nelson, J., concurring); see also *Sesay*, 787 F.3d at 223 n.7; *Annachamy*, 733 F.3d at 263 n.9. ■

Chaya Citrin is an Attorney Advisor at the Los Angeles Immigration Court.

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Endnotes

¹Other proposed defenses to the terrorism bar include the following: Material support does not include support that is “de minimis,” see *Sesay v. Att’y Gen. of U.S.*, 787 F.3d 215, 221–22 (3d Cir. 2015); *Haile v. Holder*, 658 F.3d 1122, 1128–29 (9th Cir. 2011); *Matter of S-K*, 23 I&N Dec. 936, 944–46 (BIA 2006), or that is in furtherance of nonviolent activities, see *Hussain v. Mukasey*, 518 F.3d 534, 538–39 (7th Cir. 2008); *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 301–13 (3d Cir. 2004) (Fisher, J., dissenting); *Matter of S-K*, 23 I&N Dec. at 942–44; see also *Hosseini v. Johnson*, 826 F.3d 354, 357 (6th Cir. 2016); *Humanitarian Law Project v. U.S. Treasury Dep’t*, 578 F.3d 1133, 1148 n.14 (9th Cir. 2009); group members’

unauthorized commission of terrorist activity does not make a group a terrorist organization, see *Khan v. Holder*, 766 F.3d 689, 699–701 (7th Cir. 2014); and whether conduct is “unlawful” and therefore constitutes terrorist activity depends on “the law of the newly independent nation,” as opposed to “the laws of the oppressor nation,” see *FH-T v. Holder*, 723 F.3d 833, 839–41 (7th Cir. 2013). In addition, a recent article in the *Immigration Law Advisor* examines whether an immigration judge’s decision not to apply the terrorism bar may have a collateral estoppel effect on proceedings before U.S. Citizenship and Immigration Services. See Denise Bell, “Tier III Terrorist Organizations: The Role of the Immigration Court in Making a Terrorist Determination,” *Immigration Law Advisor*, Vol. 10, No. 5 (July 2016), at 10.

²See Bell, *supra* note 1; Patricia Allen, “Let’s Talk ‘TRIG’: Litigation in the Federal Courts on the Terrorism-related Inadmissibility Grounds,” *Immigration Law Advisor*, Vol. 7, No. 9 (Nov.–Dec. 2013); Lisa Yu, “Differentiating the Material Support and Persecutor Bars in Asylum Claims,” *Immigration Law Advisor*, Vol. 3, No. 2 (Feb. 2009); Lisa Yu, “New Developments on the Terrorism-Related Inadmissibility Ground Exemptions,” *Immigration Law Advisor*, Vol. 2, No. 12 (Dec. 2008); Linda Alberty, “Affording Material Support to a Terrorist Organization—A Look at the Discretionary Exemption to Inadmissibility for Aliens Caught Between a Rock and a Hard Place,” *Immigration Law Advisor*, Vol. 2, No. 4 (Apr. 2008).

³The bar renders an applicant ineligible for asylum under section 208(b)(2)(A)(v) of the Act, 8 U.S.C. § 1158(b)(2)(A)(v); withholding of removal under both section 241(b)(3)(B) of the Act, 8 U.S.C. § 1231(b)(3)(B), and the United Nations Convention Against Torture, see 8 C.F.R. § 1208.16(d)(2); cancellation of removal under section 240A(c)(4) of the Act, 8 U.S.C. § 1229b(c)(4); and special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 203, 111 Stat. 2160 (1997), see 8 C.F.R. § 1240.66(b)(1).

⁴Article 3 of the Geneva Conventions concerns “armed conflict[s] not of an international character.” E.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516.

⁵See also Alberty, *supra* note 2, at 4 (discussing the decision’s continuing precedential effect after *Matter of S-K*, 24 I&N Dec. 289 (AG 2007) (*Matter of S-K II*) and *Matter of S-K*, 24 I&N Dec. 475 (BIA 2008) (*Matter of S-K III*)).

⁶Notably, the Ninth Circuit granted the petition for review in *Zumel* and remanded the matter to the Board for application of the appropriate standard of review as well as an explanation concerning how the Immigration Judge had clearly erred in finding that the coup participants lacked the requisite “intent to endanger.” 803 F.3d at 476.

⁷To a great extent, the CNF no longer qualifies as a terrorist organization in light of the Consolidated Appropriations Act of 2008, which exempted the group, among others, from “be[ing] considered to be a terrorist organization” based on prior acts or events. Pub. L. No. 110-161, § 691(b), 121 Stat. 1844; see also *Matter of S-K III*, 24 I&N Dec. at 476–78. In addition, the Secretary of Homeland Security has waived

almost every application of the terrorism bar with respect to the CNF. *See* Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 73 Fed. Reg. 34772-02 (June 18, 2008); Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9957-01 (Mar. 6, 2007); *see also* *Matter of S-K-III*, 24 I&N Dec. at 476; *Matter of S-K-II*, 24 I&N Dec. at 290.

⁸*See* Bell, *supra* note 1, at 4.

⁹*See* Alberty, *supra* note 2, at 3–5; *see also* Allen, *supra* note 2, at 2; Yu, “Differentiating the Material Support and Persecutor Bars in Asylum Claims,” *supra* note 2, at 5; Yu, “New Developments on the Terrorism-Related Inadmissibility Ground Exemptions,” *supra* note 2, at 2–3.

¹⁰*See, e.g.*, Terrorism-Related Inadmissibility Grounds (TRIG)–Group-Based Exemptions, U.S. Citizenship and Immigration Services, <https://www.uscis.gov/unassigned/terrorism-related-inadmissibility-grounds-trig-group-based-exemptions> (last updated June 16, 2016); *see also* Terrorism-Related Inadmissibility Grounds (TRIG), U.S. Citizenship and Immigration Services, <https://www.uscis.gov/laws/terrorism-related-inadmissibility-grounds/terrorism-related-inadmissibility-grounds-trig> (last updated Mar. 28, 2016).

¹¹*See* Exercises of Authority Under Section 212(d)(3)(B)

(i) of the Immigration and Nationality Act, 73 Fed. Reg. 34770-03, 34771-01, 34772-01, 34772-02, 34773-01, 34774-01, 34774-02, 34775-01, 34776-01, 34776-02 (June 18, 2008).

¹²*See* Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 81 Fed. Reg. 21891-01 (Apr. 13, 2016); Exercise of Authority Under the Immigration and Nationality Act, 78 Fed. Reg. 66036-02, 66037-01 (Nov. 4, 2013); Exercise of Authority Under the Immigration and Nationality Act, 78 Fed. Reg. 24225-01, 24225-02 (Apr. 24, 2013); Exercise of Authority Under the Immigration and Nationality Act, 77 Fed. Reg. 51545-02 (Aug. 24, 2012); Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 77 Fed. Reg. 41795-01 (July 16, 2012); Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 76 Fed. Reg. 2130-02, 2131-01 (Jan. 12, 2011).




¹³*See* Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 81 Fed. Reg. 21891-01 (Apr. 13, 2016); Policy Memorandum, U.S. Citizenship and Immigration Services, Implementation of the Discretionary Exemption Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for Certain Burmese Groups (June 2, 2016), https://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/APPROVED_2016-0602_Certain_Burmese_Groups_Implementation_PM.pdf.

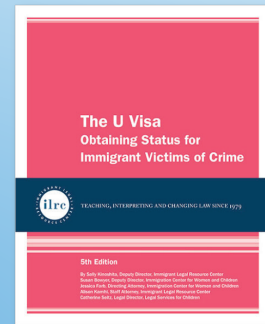
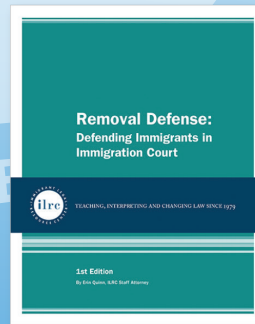
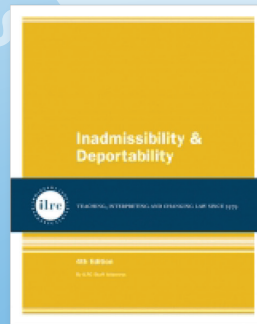
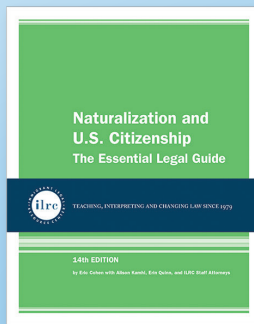


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