Statement of

IGOR V. TIMOFEYEV

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United States Senate

Hearing on

Renewing America's Commitment to the Refugee Convention:
The Refugee Protection Act of 2010

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Chairman Leahy, Senator Sessions, Members of the Committee:

Thank you for the opportunity to appear before you today as you examine "The Refugee Protection Act of 2010," introduced by Chairman Leahy, and the United States' policy and procedures with respect to admission and protection of refugees and asylees.

From February 2006 to October 2008, I served as the Special Advisor for Refugee and Asylum Affairs at the Department of Homeland Security ("DHS"). I was the first holder of that position since its establishment as part of the reforms recommended by the United States Commission on International Religious Freedom. For most of that time, I also served concurrently as a Director of Immigration Policy at DHS. In these capacities, I advised the DHS leadership on refugee, asylum and immigration issues, and coordinated the Department's policy in the area of asylum and refugee protection.

Prior to my work at DHS, I served as an associate legal officer to the President of the United Nations International Criminal Tribunal for the Former Yugoslavia. In that capacity, I advised the president and judges of the Tribunal on appeals involving issues of international humanitarian and criminal law. I am currently an attorney in private practice, specializing in appellate and international litigation. I wish to add that I am appearing before the Committee in my personal capacity, and that my testimony should not be attributed to my law firm.

The United States, as a nation founded by immigrants, has a long and proud history of welcoming individuals who sought to escape political, religious, or ethnic persecution in their own countries. One of the origins of our nation is the search of the Pilgrims and Puritans for religious safe haven in the early-to mid-1600s. This legacy endured throughout our country's history, as refugees continued to arrive, and find welcome, in the United States in ever-increasing numbers.

Indeed, I am proud to count my own family as a part of this heritage. My great-grandfather and his family arrived in the United States around the turn of the Twentieth Century as Jewish immigrants from Russia, seeking to escape then-rampant anti-semitism. My immediate family and I made a similar journey about a century later, when two decades ago we left the then-Soviet Union and made the United States our new home.

The United States' commitment to the protection of individuals fleeing persecution is not only our enduring heritage, it is also our legal obligation. In 1967, the United States became a party to the United Nations Convention Relating to the Status of Refugees, which is the main multilateral agreement outlining the international refugee protection regime. The Refugee Convention established certain responsibilities and expectations from participating states with respect to the treatment of refugees and asylum-seekers. The Refugee Act of 1980 incorporated the essential requirements of the Refugee Convention into the U.S. domestic legislation, creating the domestic refugee and asylum resettlement systems. Historically, the United States has been the largest recipient of refugees in the world, accepting more refugees than all other countries combined.

We must remain a welcoming home to refugees and asylum seekers from around the world. But we must also be cognizant of the important role that the immigration law plays in our counter-terrorism and immigration enforcement efforts. In recognition of the unfortunate realities of today's dangerous world, it is essential that immigration law provides agencies in the executive branch with the flexibility necessary to deny admission to the United States, or to deny protection once inside the country, to dangerous individuals, such as individuals who support terrorist organizations.

Further, the Executive must be able to remove expeditiously from the United States individuals who are here illegally and who do not have a valid protection claim. While the removal process must have appropriate legal guarantees, the legal requirements must not be so onerous as to make that process unnecessarily extended or unmanageable. A removal process that severely constrains immigration enforcement or imposes additional burdens on already-overburdened immigration courts and judicial system is not a process that can operate with integrity.

Finally, we should ensure that our refugee program has the flexibility necessary to account for unexpected events, such as a sudden deterioration in refugee situation in a specific area of the world, volatile security situations, and restrictions imposed by other countries on the U.S. refugee program's processing abroad.

In my view, many provisions of the proposed legislation would deprive the Executive of the necessary flexibility and discretion in these areas. Some provisions would do so directly, by codifying measures that the Executive has already implemented or can implement within the existing legislation, thereby making it impossible for the agencies to amend these measures as circumstances warrant. Other provisions would do so indirectly, by imposing additional procedures and requirements on the already burdened immigration enforcement system. In my testimony, I will focus on the following examples: (a) the changes to the terrorism inadmissibility provisions; (b) the codification of existing regulations and imposition of new

requirements with respect to detention and removal procedures; and (c) the additional requirements pertaining to the U.S. refugee program.

Changes to the Terrorism Inadmissibility Provisions

The Immigration and National Act ("INA") currently makes individuals who are members of, or provide material support to, individuals or organizations that engage in terrorist activities inadmissible into, or removable from, the United States, and makes these individuals ineligible for most immigration benefits. INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B). The INA defines both the terrorist activity and the provision of material support to terrorists or terrorist organizations broadly. For example, in addition to the organizations formally designated as "terrorist organizations" by the United States government – so-called "Tier I" and "Tier II" organizations, *see* INA § 212(a)(3)(B)(vi)(I)-(II) – the INA provides that any organization of two or more individuals that engages in specific activity prohibited by the INA constitutes an "undesignated" terrorist organization, *id.* § 212(a)(3)(B)(vi)(III). These organizations are commonly referred to as "Tier III" organizations.

The prohibited activities range from the planning of terrorist acts, to solicitation of funds for terrorist activity, to the provision of material support to terrorists. *Id.* § 212(a)(3)(B)(iv). The material support is defined similarly broadly, ranging from the provision of chemical and biological weapons, to the provision of funds or training, to the provision of a safe house. *Id.* § 212(a)(3)(B)(iv)(VI). The statute does not contain exceptions for material support provided under duress. The statute does, however, authorize either the Secretary of State or the Secretary of Homeland Security, in consultation with each other and with the Attorney General, to waive most of these inadmissibility bars. INA § 212(d)(3)(B)(i). Over the past five years, both Secretaries have exercised this waiver authority with respect to several groups of applicants for refugee and asylum status, as well as with respect to individual applicants.

The proposed legislation will alter this statutory scheme in two ways. First, Section 4(4) of the proposed bill will eliminate the Tier III concept altogether. As a result, only organizations formally designated by the Executive as Tier I or Tier II organizations will be considered as terrorist organizations under the immigration law, and only individuals belonging to, or providing support to, these organizations will be subject to the terrorism inadmissibility provisions. In my view, this alteration would unnecessarily restrict the Executive's ability to respond to the rapidly mutating nature of terrorist groups. Many terrorist organizations form, break down, and re-group without giving notice to the outside world, and their exact identity may not become known to the United States government until well after the fact. A formal designation process, therefore, would not be able to keep up the pace with the shifting identities of the terrorist world.

There are, of course, groups that have been encompassed within the Tier III designation whose activities do not prose a threat to the United States. Indeed, some of these groups have engaged in these activities in order to defend themselves against oppressive foreign regimes, and in some instances have done so with the encouragement of the United States. The existing waiver authority allows the Executive to exempt both members and supporters of these organizations from the terrorism inadmissibility bars, and the Executive has exercised this

authority with respect to at least a dozen organizations since 2006 to the present. This waiver authority was first exercised by Secretary of State Rice in May 2006 with respect to Burmese Karen refugees in the Tham Hin camp in Thailand. In October 2009, Secretary of State Clinton and Secretary of Homeland Security Napolitano jointly exercised this authority with respect to three Iraqi groups (the Iraqi National Congress, the Kurdistan Democratic Party, and the Patriotic Union of Kurdistan).

Second, Section 4(3) of the proposed bill will exempt from the definition of material support under the INA any activity committed under duress. No one disagrees that, when appropriate, individuals who are coerced – often by brutal and life-threatening means – into providing material support should not be subject to the statutory bar. Yet, such authority already exists under the current legislation. Indeed, the Executive has exercised it on numerous occasions. Currently, individuals who provided material support under duress to Tier I, II, or III groups, as well as their spouses and children, are eligible for a waiver. Importantly, unlike the proposed bill, the waiver authority permits the Executive to impose additional restrictions on these exemptions, such as the requirement that the applicant had not participated in, or provided material support to, activities that targeted noncombatant civilians. The existing waiver process also permits the Executive to obtain, where necessary, an all-source evaluation of the group to which the applicant provided support, and of its aims and methods, including its coercion techniques. In addition, the existing waivers provide adjudicators with discretion to evaluate the totality of the applicant's circumstances when deciding whether to grant an exemption.

In sum, the main changes that the current bill proposes with respect to the INA's terrorism inadmissibility provisions can already be accomplished under the existing legislation. In that way, the proposed bill is different from the last bi-partisan legislative reform of these provisions – the Consolidated Appropriations Act of 2008 ("CAA"). Prior to the CAA, the Executive's waiver authority was limited. The CAA extended that authority to nearly all terrorism-related bars under INA § 212(a)(3)(B), with only few exceptions.

The waiver authority is often criticized as being slow and cumbersome. That criticism is, in part, true. With respect to the initial exercises of the waiver authority, the Executive did proceed cautiously as it was establishing the waiver process, in order to take into account national security interests and counter-terrorism efforts. Today, that process operates more smoothly, but it can – and should be – improved, particularly with respect to individuals in immigration court proceedings. To the extent the speed of the waiver process remains a problem, however, it is a problem amenable to an administrative solution.

Requirements with Respect to Detention and Removal Procedures

Several of the proposed bill's provisions will impose specific standards or procedures with respect to immigration detention and removal operations. Many of these provisions are commendable goals, such as the provisions seeking to ensure quality medical care for individuals in immigration detention or the provision seeking to establish a functioning program of secure alternatives to detention. I question, however, whether it is advisable to codify many of these standards and procedures in legislation, as opposed to leaving them subject to administrative guidelines.

The immigration detention and removal process is both lengthy and expensive. The Executive agencies charged with overseeing this process – the Immigration and Customs Enforcement within DHS and the Executive Office for Immigration Review within the Department of Justice – must strive to make this process better managed and more efficient. They must do so while ensuring that individuals subject to that process are treated appropriately and receive necessary procedural protections. But the procedures accompanying the detention and removal process must take account of the limited resources available to immigration enforcement and immigration courts.

In that respect, Section 8's codification of DHS's current parole policy for detained individuals and the requirement that DHS and DOJ issue regulations establishing parole criteria would limit the Executive's flexibility to modify – and further improve – the parole policy in light of its experience. The current parole policy was promulgated only in December 2009, and did not go into effect until January 2010 – only five months ago. DHS should be given the opportunity to evaluate the effectiveness of that policy – specifically, whether individuals released on parole return for their immigration court hearings and, if their claim for relief is unsuccessful, comply with removal orders. Crystallizing this recent policy in binding legislation and regulations is premature.

I also recommend that the Committee give serious consideration to Section 8(3)'s requirement that the parole determinations be reviewable by immigration judges. As a recent report by the American Bar Association, *Reforming the Immigration System*, demonstrates in detail, the immigration court system is currently understaffed and is operating under a crushing case-load.[1] Overwhelming the immigration court system further would not promote the efficiency or enhance the reputation of the removal process.

For a similar reason, I would advise careful consideration of Section 7(2)'s introduction of a more permissive standard of review of removal orders under INA § 242(b)(4), 8 U.S.C. § 1252(b)(4). The current standard of review contained in INA § 242(b)(4) requires that a reviewing court of appeals treat the immigration court's findings of fact as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." The standard of review proposed in Section 7 would replace that requirement with a more lenient "abuse of discretion" standard. This change would likely increase the workload both of immigration courts and of federal courts of appeals.

Requirements Pertaining to the U.S. Refugee Program

Finally, I would like to comment briefly on two additional provisions of the bill, which seek to alter the existing system of refugee processing. The first provision is Section 18's requirement that the Executive treat the annual Presidential determination under INA § 207,

[1] American Bar Association, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Proceedings: Executive Summary* (2010), *available at* www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf.

8 U.S.C. § 1157, as to the number of refugees that the United States may admit as a fixed admissions goal rather than, as in existing practice, an admissions ceiling.

I share fully the legislation's objective to admit into the United States as many individuals deserving protection as possible. The high number of refugees that the U.S. admits annually is an important demonstration of our enduring commitment to refugee protection. I question, however, whether transforming this goal into an inflexible numerical quota is desirable. By treating the annual Presidential refugee determination as a rigid goal – and by mandating annual report as to how closely, percentage-wise, the Executive has come to meet this quota – the legislation would limit the Executive's ability to respond to unanticipated refugee crises around the globe. The Executive should be free to allocate a certain portion of the numerical amount set by the President as a "reserve," in order to react appropriately to unexpected humanitarian emergencies. Moreover, the ability of U.S. refugee officers to process refugee applicants depends, in some measure, on the security situation in places where refugee interviews are conducted and on the willingness of host countries to cooperate with the U.S. refugee program. A strict legislative quota fails to take account of these contingencies.

Secondly, I do not view as necessary Section 20's proposed authority for the Secretary of State to designate certain groups for expedited adjudication as refugees. Again, I applaud the aim of making sure that particularly vulnerable populations are processed as expeditiously as possible. The Executive, however, already possesses the ability to prioritize specific groups whose resettlement is made paramount by humanitarian or national interest considerations. There is no reason the Executive cannot accomplish what Section 20 is designed to do within the existing parameters of the U.S. refugee program.

Conclusion

The hearing the Committee holds today is yet another testament of the importance that the United States accords to its moral and legal obligations to serve as a safe haven to individuals fleeing persecution. I applaud Chairman Leahy's leadership in this area and his determination to ensure that our refugee and asylum programs best serve these important goals. As we strive to maintain and improve these programs, however, we should do so in a way that does not limit the Executive's ability to adjust these programs as required by circumstances. This is particularly important given the close interrelationship of these programs with the issues of national security and immigration enforcement.

I thank the Committee for the opportunity to share some of my thoughts on these important issues, and I would be pleased to answer any questions Members of the Committee may have.

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