2020

Paper Terrorists: Independence Movements and the Terrorism Bar

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This Article explores the application of the terrorism bar in immigration law to noncitizens who have participated in an independence movement. It proposes a uniform standard that immigration adjudicators can use to determine whether a foreign entity is a state in order to promote accurate applications of the terrorism bar. The terrorism bar in the Immigration and Nationality Act is broad—it can bar most forms of immigration relief, including asylum, and reaches far beyond ordinary definitions of terrorism. For example, the terrorism bar can block immigration relief for noncitizens who nonviolently supported a militia fighting for independence against a repressive state or who received military-type training from such an organization. The terrorism bar applies even if that militia is supported by the United States. The bar can also ensnare a noncitizen's spouse and children who have not themselves participated in those activities.

DOI: https://doi.org/10.15779/Z38MC8RH1B

* Associate Professor of Law, California Western School of Law. The author is grateful for invaluable feedback from William Aceves, Jillian Casey, Susan Bibler Coutin, Vivek Narayanadas, Carrie Rosenbaum, Andrew Schoenholtz, Philip Schrag, and Shoba Sivaprasad Wadhia, as well as workshop participants at the New Voices in Immigration Law Session at the Association of American Law Schools 2019 Annual Meeting, Immigration Law Scholars and Teachers Workshop at Drexel University Thomas R. Kline School of Law, Western Law Professors of Color and Conference of Asian Pacific American Law Faculty Joint Conference at the University of Nevada, Las Vegas William S. Boyd School of Law, and California Western School of Law Faculty Workshop. The author thanks Robert O'Leary for excellent library assistance.

Especially in light of its far reach and harsh consequences, it is of the utmost importance to accurately apply the bar, which can be challenging for cases on the margins. One such area is the application of the bar to noncitizens who have supported independence movements leading to the creation of new states, which are situations that often produce large numbers of asylum seekers and refugees. The complexity arises because the terrorism bar requires unlawful conduct, but participation in and support of a state's armed forces are not unlawful. During an independence movement, a new state can emerge, and support of its armed forces is not unlawful even though hostilities may continue with the state from which it seceded. Adjudicators need to be able to determine when an entity achieved statehood because it could mean the difference between a noncitizen participating in unlawful rebellion, which could trigger the terrorism bar, and supporting the armed forces of a state, which would not. However, there is currently no uniform framework for analyzing questions of statehood in the context of the terrorism bar.

Drawing from international law and domestic law, this Article proposes a standard that immigration adjudicators can use to assess questions of statehood to avoid the creation of "paper terrorists"—noncitizens who have participated in independence movements and are mistakenly labeled as terrorists under the Immigration and Nationality Act. This proposal stems from, and is consistent with, the statutory language of the Immigration and Nationality Act, and therefore does not require any legislative action. The proposed standard encourages immigration adjudicators to give full effect to the statutory language to promote more accurate applications of the terrorism bar.

INTRODUCTION

Created by the 1990 Immigration Act and expanded in the wake of the September 11, 2001 attacks, the terrorism bar in the Immigration and Nationality Act (INA) precludes any noncitizen[1] who has engaged in "terrorist activity" from most immigration relief, including asylum.[2] The breadth of the term "terrorist activity" in the INA is staggering, capturing conduct that may not be commonly considered terrorism.[3] The terrorism bar can block relief for asylum seekers and refugees who have participated in or supported armed combat, or have received military-type training during an independence movement, even if the movement is successful. Even the conduct of American Revolutionary War soldiers and the colonists who supported them could be considered terrorist activity under the INA.

This Article analyzes the application of the terrorism bar to noncitizens who have participated in an independence movement. An independence movement is one that strives to achieve political independence for a territory or a group of people with the goal of creating a new state.[4] An opposition movement, on the other hand, is one that seeks to overthrow and replace a government or regime within an existing state. The creation of a state and a change in government are distinct types of regime change within international law, and this Article focuses on the former.[5]

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1. This Article generally uses the term "noncitizen" to refer to an individual who is not a citizen of the United States and is seeking immigration benefits or relief in the United States.

2. Immigration and Nationality Act (INA) § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i)(I) (2018) (codifying Immigration Act of 1990, Pub. L. No. 101-649, § 601(a)(3)(B)(i)(I), 104 Stat. 4978, 5069); *see also id.* § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v) (providing that a noncitizen who has engaged in a "terrorist activity" is ineligible for asylum). This Article uses the terms "terrorist activity" and "terrorist organization" consistent with the definitions in the INA unless otherwise noted.

3. *See generally* Hussain v. Mukasey, 518 F.3d 534, 537 (7th Cir. 2008) (explaining that the INA "stretch[es] the term 'terrorist'" because "[t]errorism as used in common speech refers to the use of violence for political ends"); *In re* S-K-, 23 I. & N. Dec. 936, 948 (B.I.A. 2006) (Osuna, Acting Vice Chairman, concurring) (describing the statutory language of the terrorism bar as "breathtaking in its scope"); *infra* note 18 (describing the breadth of the terrorism bar).

4. Consistent with international law, this Article uses the term "state" to refer to countries, as opposed to U.S. states. *See* BARRY E. CARTER ET AL., INTERNATIONAL LAW 444 (5th ed. 2007) ("A 'state' in international law is what we often refer to as a nation or country (such as the United States of America or Japan) and is not one of the 50 U.S. states (such as California).").

5. *See, e.g.*, JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 34 (2d. ed. 2006) ("[I]nternational law does distinguish between change of State personality and change of the government of the State."); JULIUS GOEBEL, JR., THE RECOGNITION POLICY OF THE UNITED STATES 65–66 (1915) ("The question of the recognition of governments is a matter quite different from the recognition of states. . . . Changes in governmental forces are merely changes in the internal order, and although governments are the direct bearers of international rights and obligations, they are not a part of the international system in the sense that states themselves are."); *see also* JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 6 (1987) ("[B]oth writers and courts have failed to distinguish adequately between the recognition of States and of governments — a confusion that has contributed substantially to the prevailing uncertainty in the law of recognition."). Even through changes in government, "[t]here is a strong presumption that the State continues to exist, with its rights and

Independence movements pose a unique challenge to the application of the terrorism bar because the governing state of a territory is in flux. One of the terrorism bar's requirements is that the noncitizen's actions, or the actions of the group the noncitizen supports, are unlawful.[6] During times of peace and stability, the question of which laws to apply to evaluate the legality of conduct is generally straightforward. For example, if a noncitizen in Germany engaged in one of the specified activities listed in the terrorism bar, adjudicators would determine whether that activity is unlawful under German law. If it is, the terrorism bar could block immigration benefits and relief for the noncitizen as long as the other requirements of the bar are satisfied. If the noncitizen can show their actions were not unlawful, then they would not be subject to the bar per the express language of the INA.

During times of armed conflict resulting in the creation of a new state, assessing the lawfulness of a noncitizen's actions becomes more challenging. To assess whether a noncitizen's actions during an independence movement are unlawful, adjudicators must first determine which entity controls the territory where the noncitizen undertook the activity in question. This determination can be far from straightforward since it may not be clear when a new state has been created. If an entity involved in an independence movement has not yet become a state, the noncitizen's actions may constitute terrorist activity. However, if the entity becomes a state, the noncitizen would be fighting on behalf of their government and their conduct would not constitute terrorist activity provided it complies with the laws of war.

In recent history, armed independence movements leading to the creation of new states include the independence of Eritrea from Ethiopia, the independence of South Sudan from Sudan, and the independence of East Timor from Indonesia. Such situations often produce asylum seekers and refugees seeking protection in the United States. Thus, the application of the terrorism bar to noncitizens who have participated in independence movements is not merely theoretical. For example, between October 2000 and March 2020, over 5,000 Eritreans sought asylum in the United States.[7] In fiscal year 2017, Eritrea was one of the top ten countries to send refugees to the United States, with 1,917 individuals admitted as refugees.[8] Many of the Eritreans seeking refugee status

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obligations, despite revolutionary changes in government, or despite a period in which there is no, or no effective, government." CRAWFORD, *supra*, at 34.

6. *See* INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii). For a detailed description of the requirements of the terrorism bar, see *infra* notes 22–51 and accompanying text.

7. *See* Asylum Decisions, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), https://trac.syr.edu/phptools/immigration/asylum/ [https://perma.cc/CM34-WRUL] (set leftmost dropdown menu to "Nationality") (showing 5,015 asylum decisions involving Eritreans between October 2000 and March 2020).

8. NADWA MOSSAAD, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., REFUGEES AND ASYLEES: 2017, at 5 (2019), https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf [https://perma.cc/AM52-D3GM]. This number does not include asylum seekers. *See infra* notes 62–69

or asylum participated in or supported the nearly thirty-year long Eritrean independence movement, which culminated in the early 1990s.[9]

In one such case, an Eritrean man sought asylum in the United States to escape indefinite military conscription and torture.[10] In opposing asylum, the Department of Homeland Security raised the terrorism bar because the man had received some basic training, involving physical fitness exercises and one rifle-shooting lesson, from the forces fighting against Ethiopia during the Eritrean war for independence. The Department contended that the asylum seeker had engaged in "terrorist activity" because he received military-type training from a group of people who had unlawfully taken up arms against the Ethiopian government.[11]

The central question in deciding whether the terrorism bar blocked asylum in this case was whether the Eritrean forces were engaged in unlawful activities. When the asylum seeker received the training, it was not clear whether Eritrea had become a state or if Ethiopia still governed. If Eritrea had become a state, then the forces from which the asylum seeker received the training would have been engaging in lawful conduct, constituting the armed forces of a state fighting to repel a foreign aggressor. These activities would not be unlawful and, therefore, the terrorism bar would not apply. However, if Eritrea had not yet achieved independence, then the forces may have been engaging in treasonous and thus unlawful activity against the ruling state. In such a situation, the asylum seeker could be barred from asylum under the terrorism bar. Despite the complexity of this issue, there was no uniform standard to which the immigration judge could turn to analyze whether Eritrea had become a state at the time of the asylum seeker's actions.

Neither the Immigration and Nationality Act nor case law provides guidance on how to assess statehood.[12] Especially given the continued politicization of terrorism and asylum, this lack of a uniform standard can result in inaccurate, inconsistent, and sloppy application of the terrorism bar in cases

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and accompanying text (discussing the differences between refugees and asylum seekers). Even though hostilities between Eritrea and Ethiopia have ceased, refugees and asylum seekers who may have participated in Eritrea's independence movement have been fleeing the repressive one-party state in Eritrea for forced military conscription, torture, and reprisal for political opposition, among other reasons. *See* U.N. High Comm'r for Refugees (UNHCR), UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea 5, 12–29 (Apr. 2009), https://www.refworld.org/docid/49de06122.html [https://perma.cc/NC6D-7SCB] (describing common asylum claims by Eritreans).

9. *See* Terrence Lyons, *Eritrea: The Independence Struggle and the Struggles of Independence*, *in* INDEPENDENCE MOVEMENTS AND THEIR AFTERMATH 36, 36–37 (Jon B. Alterman & Will Todman eds., 2019).

10. Facts have been modified to protect client confidentiality.

11. *See* Matter of [Redacted], A [Redacted], at 5 ([Redacted] Immigration Ct. 2017) (on file with the author); *see also* INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v).

12. *See infra* notes 104–113 and accompanying text.

involving times of political transition.[13] These problems in application of the bar can easily result in falsely labeling noncitizens who were lawfully participating in the armed forces of a new state as "terrorists." These "paper terrorists" can be denied protection to which they are entitled under U.S. immigration law and U.S. treaty obligations.[14] Inaccurate application of an already expansive terrorism bar can also create potential conflicts with U.S. foreign policy by denying relief to noncitizens who participate in independence movements the United States supports.[15]

In an effort to ensure more accurate application of the terrorism bar, this Article draws upon international and domestic law to propose a uniform standard to assess statehood in the context of independence movements for the purpose of evaluating whether a noncitizen's actions were unlawful. This Article builds on the wealth of scholarship devoted to the expansiveness of the terrorism bar by tackling this issue from within the constraints of the existing statutory language.[16] Unlike most scholarship on the terrorism bar, this Article seeks to prevent legal error in the application of the terrorism bar as written, rather than advocating for legislative or regulatory reform.[17]

Part I provides a statutory overview of the terrorism bar and discusses the bar's immigration consequences. Part II proposes two standards rooted in international law that immigration adjudicators could use to evaluate statehood

13. *See generally* Stephanie J. Nawyn, *Refugees in the United States and the Politics of Crisis*, *in* THE OXFORD HANDBOOK OF MIGRATION CRISES (Cecilia Menjivar et al., eds. 2019) (describing the politicization of asylum seekers).

14. *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.); Protocol Relating to the Status of Refugees art. 1, ¶ 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (incorporating Convention Relating to the Status of Refugees, arts. 2–34, July 28, 1951, 19 U.N.T.S. 6268).

15. The terrorism bar has been used against asylum seekers who have "acted in a manner consistent with United States foreign policy." *See In re* S-K-, 23 I. & N. Dec. 936, 950 (B.I.A. 2006) (Osuna, Acting Vice Chairman, concurring). For example, the terrorism bar has been asserted against Hmong individuals who fought against communism in Laos, despite their support by the United States. *See* James Feroli, *The Material Support Bar to Asylum*, IMMIGRATION BRIEFINGS, Feb. 2008, at 1, 2008 WL 4092905.

16. Much scholarship has been devoted to the issue of the overbreadth of the statutory language of the terrorism bar. *See, e.g.*, Mary Armistead, *Harmonizing Immigration Policy with National Foreign Policy: The Contradictions of the Material Support Bar*, 7 ALB. GOV'T L. REV. 611 (2014); Marissa Hill, *No Due Process, No Asylum, and No Accountability: The Dissonance Between Refugee Due Process and International Obligations in the United States*, 31 AM. U. INT'L L. REV. 445 (2016); Geoffrey A. Hoffman & Susham M. Modi, *The War on Terror as a Metaphor for Immigration Regulation: A Critical View of a Distorted Debate*, 15 J. GENDER RACE & JUST. 449 (2012); *see also infra* note 31 (collecting scholarship on the material support bar).

17. In the past, adjudicators have rejected attempts to cabin the reach of the terrorism bar on the ground that the proposals are inconsistent with the statutory language of the bar. *See* Khan v. Holder, 584 F.3d 773, 784 (9th Cir. 2009) (holding the statutory language of the terrorism bar does not contain an exception "for armed resistance against military targets that is permitted under the international law of armed conflict"); *In re S-K-*, 23 I. & N. Dec. at 940–41 (rejecting a "totality of the circumstances" inquiry to determine whether conduct constitutes terrorist activity because the statutory language forecloses it).

in the context of the terrorism bar. The first is based on U.S. recognition of a foreign entity as a state. The second uses the four requirements for statehood from the Restatement (Third) of the Foreign Relations Law of the United States (Restatement) and the Montevideo Convention. Part III analyzes how federal courts have used these two standards to assess statehood in other domestic law contexts. Drawing from the rationales underlying the choice of standards in other domestic law contexts, Part IV recommends that adjudicators adopt a Restatement-based standard when analyzing statehood in the context of independence movements for the terrorism bar. This standard will best mitigate against the creation of "paper terrorists" by promoting more accurate applications of the terrorism bar.

I.
THE TERRORISM BAR IN THE IMMIGRATION AND NATIONALITY ACT

Part I discusses the statutory language of the terrorism bar in the INA. The bar casts a wide net, defining terrorist activity more broadly than common usage of the term "terrorism" does.[18] In addition to examining the expansive statutory language, Part I also analyzes the far-reaching effects of the bar, focusing on asylum, withholding of removal, and relief under the Convention Against Torture.

18. *Compare* INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii) (defining "terrorist activity" in the context of immigration), *with* 18 U.S.C. §§ 2331, 2332b (2018) (defining "international terrorism," "domestic terrorism," and "acts of terrorism transcending national boundaries" in the context of criminal law), *and* 22 U.S.C. § 2656f(d) (2018) (defining "terrorism" in the context of State Department annual country reports on terrorism), *and* 50 U.S.C. § 1801(c) (2018) (defining "international terrorism" in the context of national defense and foreign intelligence). *See also* Natalie Nanasi, *Are Domestic Abusers Terrorists? Rhetoric, Reality, and Asylum Law*, 91 Temple L. Rev. 215, 219–224 (2019) (analyzing various definitions of "terrorism"); *Terrorism-Related Inadmissibility Grounds (TRIG)*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., https://www.uscis.gov/legal-resources/terrorism-related-inadmissability-grounds/terrorism-related-inadmissibility-grounds-trig [https://perma.cc/Z9CK-LPG8] ("The INA defines terrorist activity quite expansively such that the term can apply to persons and actions not commonly thought of as terrorists and to actions not commonly thought of as terrorism.").

Case law interpreting the terrorism bar has confirmed the broad reach of these provisions. *See, e.g.*, McAllister v. Attorney Gen. of the United States, 444 F.3d 178, 187 (3d Cir. 2006) (concluding the INA "encompasses more conduct than our society, and perhaps even Congress, has come to associate with traditional acts of terrorism"); *In re S-K-*, 23 I. & N. Dec. at 941 (explaining that "Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as 'freedom fighters,' and it did not intend to give [the Board of Immigration Appeals and immigration judges] discretion to create exceptions for members of organizations to which our Government might be sympathetic"); *supra* note 3 and accompanying text (discussing the expansiveness of the terrorism bar).

A. Statutory Language and Background

The terrorism bar in the INA is a tangled morass, filled with seemingly unending internal cross-references and circular definitions.[19] To trigger the bar, the Department of Homeland Security bears the initial burden of producing evidence that it applies.[20] The burden then shifts to the noncitizen to show by a preponderance of the evidence that the bar is inapplicable.[21]

The general structure of the terrorism bar, also commonly called the terrorism-related inadmissibility grounds (TRIG), is as follows. The relevant section of the INA first enumerates nine broad categories that form the basic contours of the bar.[22] These categories include noncitizens who have "engaged in a terrorist activity,"[23] are "member[s] of a terrorist organization,"[24] "endorse[] . . . terrorist activity,"[25] and have "received military-type training" from a terrorist organization.[26] The bar even encompasses the spouse and

19. *See, e.g.*, INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v) (citing *id.* § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B), which cites *id.* § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B)); *id.* § 212(a)(3)(B)(i)(VIII), 8 U.S.C. § 1182(a)(3)(B)(i)(VIII) (citing *id.* § 212(a)(3)(B)(vi), 8 U.S.C. § 1182(a)(3)(B)(vi), which cites *id.* § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv), which cites *id.* § 212(a)(3)(B)(vi), 8 U.S.C. § 1182(a)(3)(B)(vi)).

20. 8 C.F.R. § 1240.8(d) (2020); *see also In re S-K-*, 23 I. & N. Dec. at 939.

21. 8 C.F.R. § 1240.8(d); *see also In re S-K-*, 23 I. & N. Dec. at 939.

22. INA § 212(a)(3)(B)(i), 8 U.S.C. § 1182(a)(3)(B)(i).

23. *Id.* § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i)(I).

24. *Id.* § 212(a)(3)(B)(i)(V), 8 U.S.C. § 1182(a)(3)(B)(i)(V).

25. *Id.* § 212(a)(3)(B)(i)(VII), 8 U.S.C. § 1182(a)(3)(B)(i)(VII).

26. *Id.* § 212(a)(3)(B)(i)(VIII), 8 U.S.C. § 1182(a)(3)(B)(i)(VIII). The complete list of the nine categories that constitute the terrorism bar is as follows:

> Any alien who—
>
> (I) has engaged in a terrorist activity;
>
> (II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));
>
> (III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;
>
> (IV) is a representative (as defined in clause (v)) of—
>
> (aa) a terrorist organization (as defined in clause (vi)); or
>
> (bb) a political, social, or other group that endorses or espouses terrorist activity;
>
> (V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);
>
> (VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;
>
> (VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;
>
> (VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or
>
> (IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,
>
> is inadmissible.

Id. § 212(a)(3)(B)(i), 8 U.S.C. § 1182(a)(3)(B)(i).

children of a noncitizen who falls into one of the aforementioned categories if the relevant activity triggering the bar occurred within the last five years.[27]

Each of these nine categories references at least one of the following terms of art: "engage in terrorist activity," "terrorist activity," or "terrorist organization."[28] The terrorism-related inadmissibility grounds section of the INA defines each of these terms after enumerating the nine broad categories that trigger the bar. The definitions of these terms of art are broader than those of their common usage, creating the expansive outer bounds of the bar.[29]

The definition of "engage in terrorist activity" lists several different activities that can be undertaken by a noncitizen either in an individual capacity or as a member of an organization.[30] They include committing a terrorist activity,

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27. *Id.* § 212(a)(3)(B)(i)(IX), 8 U.S.C. § 1182(a)(3)(B)(i)(IX). There are two exceptions when the bar does not apply to a spouse or children—(1) they did not know or should not reasonably have known of the noncitizen's activity or (2) they have renounced the activity. *Id.* § 212(a)(3)(B)(ii), 8 U.S.C. § 1182(a)(3)(B)(ii).

28. *See id.* § 212(a)(3)(B)(i), 8 U.S.C. § 1182(a)(3)(B)(i).

29. *See supra* note 18 (discussing the usage of the term "terrorism" outside of the immigration context).

30. INA § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv). The full list of activities is as follows:

> As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—
>
> (I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
>
> (II) to prepare or plan a terrorist activity;
>
> (III) to gather information on potential targets for terrorist activity;
>
> (IV) to solicit funds or other things of value for—
>
> (aa) a terrorist activity;
>
> (bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or
>
> (cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;
>
> (V) to solicit any individual—
>
> (aa) to engage in conduct otherwise described in this subsection;
>
> (bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or
>
> (cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or
>
> (VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—
>
> (aa) for the commission of a terrorist activity;
>
> (bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;
>
> (cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or
>
> (dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

"prepar[ing] or plan[ning] a terrorist activity," "gather[ing] information on potential targets for terrorist activity," "solicit[ing] funds" for a terrorist activity, and "afford[ing] material support" to a terrorist organization.[31]

The statute enumerates three types of groups that constitute "terrorist organization[s]," which are commonly referred to as Tier I, Tier II, and Tier III terrorist organizations.[32] A Tier I organization is designated by the Secretary of State in consultation with the Secretary of the Treasury and the Attorney General, and must engage in terrorist activity and threaten the security of U.S. nationals or the national security of the United States.[33] The names of Tier I groups are published in the Federal Register.[34] A Tier II terrorist organization is designated by the Secretary of State in consultation with or upon the request of the Attorney General or Secretary of Homeland Security after finding that the group engages in terrorist activity.[35] Names of Tier II organizations are published in the Federal Register.[36] Tier III organizations are undesignated, unlike Tier I and Tier II organizations. Adjudicators determine whether a group constitutes a Tier III organization on a case-by-case basis.[37] A Tier III organization is defined expansively as "a group of two or more individuals, whether organized or not, which engages in [terrorist activity]."[38]

Id.

31. *Id.* Much scholarship has been devoted to the issue of asylum seekers and the material support bar. *See, e.g.*, Edward F. Roche, *Acts, Acquiescence, and Asylum: The Material Support Bar Under* Barahona v. Holder, 92 N.C. L. REV. 316 (2013); Steven H. Schulman, *Victimized Twice: Asylum Seekers and the Material-Support Bar*, 59 CATH. U. L. REV. 949 (2010); Jennie Pasquarella, *Victims of Terror Stopped at the Gate to Safety: The Impact of Material Support to Terrorism Bar on Refugees*, HUM. RTS. BRIEF, Mar. 2006, at 28; Jordan Fischer, Note, *The United States and the Material-Support Bar for Refugees: A Tenuous Balance Between National Security and Basic Human Rights*, 5 DREXEL L. REV. 237 (2012). The material support bar is one piece of the terrorism bar, which bars immigration benefits and relief to noncitizens who have provided material support to a terrorist organization. *See* INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

32. The USA PATRIOT Act, a 342-page statutory behemoth passed only weeks after the 9/11 attacks, created the tiers of terrorist organizations. *See* Pub. L. No. 107-56, § 411, 115 Stat. 272, 345–50 (2001) (codified as amended in scattered sections of the U.S. Code). *See generally* Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145, 1147 (2004) (outlining "the short, but intense legislative process that produced the USA PATRIOT Act").

33. INA § 212(a)(3)(B)(vi)(I), 8 U.S.C. § 1182(a)(3)(B)(vi)(I); *id.* § 219(a)(1), (d)(4), 8 U.S.C. § 1189(a)(1), (d)(4).

34. *Id.* § 219(a)(2)(A)(ii); 8 U.S.C. § 1189(a)(2)(A)(ii).

35. *Id.* § 212(a)(3)(B)(vi)(II), 8 U.S.C. § 1182(a)(3)(B)(vi)(II).

36. *Id.*

37. *See id.* § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III); 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL §§ 301.1-2, 302.6 (2018). The USA PATRIOT Act authorized the retroactive application of the Tier III provision. § 411(c), 115 Stat. at 347–48 (codified at 8 U.S.C. § 1182 note); *see* Bojnoordi v. Holder, 757 F.3d 1075, 1077 (9th Cir. 2014) (discussing the retroactive application of the Tier III provision).

38. INA § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III). There is no requirement in the INA that Tier III organizations must threaten U.S. national security or U.S. nationals. *See id.* § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III). A 2006 bill attempted to add such a requirement, but it failed to move out of the House Judiciary Committee. *See* H.R. 5918, 109th Cong.

The term "terrorist activity" is the linchpin of the terrorism bar, as evidenced by its usage in the definitions of "engage in terrorist activity" and "terrorist organization," as well as its presence elsewhere in the statutory text. This term is cross-referenced by most operative parts of the bar—each of the nine categories that makes up the bar references "terrorist activity" either directly or indirectly.[39]

The definition of "terrorist activity" in the INA includes two parts. The first is that the activity must be "unlawful under the laws of the place where it is committed (*or* which, if it had been committed in the United States, would be unlawful under the laws of the United States or any [U.S.] State)."[40] This Article focuses on this part of the statutory language.

The second part of the definition of "terrorist activity" requires the activity to involve one of the following acts: (1) hijacking or sabotage of any conveyance; (2) seizing or detaining, and threatening to kill, injure, or continue to detain an individual to compel a third person to do or abstain from doing any act; (3) a violent attack upon an internationally protected person; (4) an assassination; (5) the use of any, inter alia, explosive, firearm, or other weapon other than for personal monetary gain, or use of a chemical agent or nuclear weapon, with the intent to endanger others or cause substantial damage to property; or (6) a threat, attempt, or conspiracy to do any of the foregoing.[41] For ease of reference, this Article will refer to these categories of activities in the definition of terrorist activity as "enumerated activities."

To constitute terrorist activity then, there must be an enumerated activity that is unlawful. Because terrorist activity is referenced in each of the nine

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(2006); *Summary: H.R. 5918 — 109th Congress (2005-2006)*, CONGRESS.GOV, https://www.congress.gov/bill/109th-congress/house-bill/5918 [https://perma.cc/QD3J-5LUE].

39. *See* INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii); *supra* notes 26, 30–38 and accompanying text (referencing "terrorist activity").

40. INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii) (emphasis added).

41. INA § 212(a)(3)(B)(iii)(I)–(VI); 8 U.S.C. § 1182(a)(3)(B)(iii)(I)–(VI). The complete list of conduct is as follows:

> (I) The highjacking [*sic*] or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
>
> (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
>
> (III) A violent attack upon an internationally protected person . . . or upon the liberty of such a person.
>
> (IV) An assassination.
>
> (V) The use of any—
>
> > (a) biological agent, chemical agent, or nuclear weapon or device, or
> >
> > (b) the use of any explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
>
> (VI) A threat, attempt, or conspiracy to commit any of the foregoing.

Id.

categories that constitute the terrorism bar, these two requirements—an enumerated activity and unlawfulness—must be satisfied at some point in the application of the bar. The following are examples to illustrate the requirements of terrorist activity. First: a noncitizen threatened to injure a person to force a third person to do something. Threatening to injure someone to compel a third person to do any act is an enumerated activity that constitutes "terrorist activity" if it is unlawful.[42] Assuming this activity is a violation of the law, this example falls under the first category of the bar—a noncitizen who has engaged in terrorist activity.[43]

Second: a noncitizen used a firearm with the intent to cause substantial property damage in violation of the law, but not for personal monetary gain. The unlawful use of a firearm, other than for personal monetary gain, to cause substantial damage to property is an enumerated activity that constitutes terrorist activity.[44] Therefore, this example also falls under the first category of the bar as a noncitizen who has engaged in terrorist activity.[45]

Third: a noncitizen received military-type training from a group of three people who are not formally organized and who have used knives to threaten government workers in violation of the law to obtain food for their families. This group of three people constitutes a Tier III terrorist organization because it is a group of individuals, whether organized or not, who have engaged in terrorist activity.[46] They committed a terrorist activity when they used weapons in violation of the law with the intent to endanger, directly or indirectly, the safety of others.[47] The noncitizen in this situation would trigger the bar under the eighth category—any noncitizen who has received military-type training from a terrorist organization.[48]

However, if the noncitizen received military-type training from the national guard of their country, even if the national guard used knives to subdue community members who were peacefully protesting, such use of weapons would likely not be unlawful because it is undertaken by the armed forces of the country.[49] Because the action is not unlawful, and thus not terrorist activity, the national guard would not constitute a Tier III terrorist organization.[50] Therefore,

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42. *See id.* § 212(a)(3)(B)(iii)(II), 8 U.S.C. § 1182(a)(3)(B)(iii)(II).
43. *See id.* § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i)(I).
44. *See id.* § 212(a)(3)(B)(iii)(V)(b), 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b).
45. *See id.* § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i)(I).
46. *See id.* § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III).
47. *See id.* § 212(a)(3)(B)(iii)(V)(b), 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b); *id.* § 212(a)(3)(B)(iv)(I), 8 U.S.C. § 1182(a)(3)(B)(iv)(I).
48. *See id.* § 212(a)(3)(B)(i)(VIII), 8 U.S.C. § 1182(a)(3)(B)(i)(VIII).
49. *See id.* § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii).
50. *See id.* § 212(a)(3)(B)(iii)(V)(b), 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b); *id.* § 212(a)(3)(B)(iv)(I), 8 U.S.C. § 1182(a)(3)(B)(iv)(I); *id.* § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

the noncitizen's actions would not trigger the bar because they did not receive military-type training from a terrorist organization.[51]

The consequences of the terrorism bar are harsh. It renders a noncitizen inadmissible and thus barred from entering the United States.[52] A finding of inadmissibility also bars a noncitizen from most immigration benefits and forms of relief including adjustment of status,[53] naturalization,[54] and cancellation of removal.[55] If a noncitizen triggers the bar after lawful entry into the United States, the noncitizen is deportable.[56] The bar can also block a noncitizen who fears persecution or torture in their home country from most types of relief, including refugee status,[57] asylum,[58] withholding of removal,[59] and withholding of removal under the Convention Against Torture.[60] A refugee or asylum seeker could thus be removed to a place where they could be persecuted, tortured, and killed. Although the bar applies to almost all forms of immigration benefits and relief, this Article focuses on asylum and refugee status because of the possibly deadly consequences of an erroneous application as well as the potential for adjudicators to misapply the bar due to recent vitriolic rhetoric associating asylum seekers and refugees with terrorism.[61]

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51. *See id.* § 212(a)(3)(B)(i)(VIII), 8 U.S.C. § 1182(a)(3)(B)(i)(VIII).

52. *Id.* § 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i)(I).

53. *Id.* § 245(a), 8 U.S.C. § 1255(a) (requiring an applicant to be admissible to the United States to be eligible for adjustment of status).

54. *Id.* § 316(a), 8 U.S.C. § 1427(a) (requiring good moral character for naturalization); *see also id.* § 101(f)(3), 8 U.S.C. § 1101(f)(3) (defining good moral character as excluding a person who is inadmissible under INA § 212(a), 8 U.S.C. § 1182(a)).

55. *Id.* § 240A(c)(4), 8 U.S.C. § 1229b(c)(4).

56. *Id.* § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B) ("Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.").

57. *Id.* § 207(c)(1), 8 U.S.C. § 1157(c)(1) (requiring that a noncitizen be admissible to be eligible for refugee status).

58. *Id.* § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v) (citing INA § 212(a)(3)(B)(i)(I)–(VI), 8 U.S.C. § 1182(a)(3)(B)(i)(I)–(VI)) (providing that a noncitizen who "has engaged in a terrorist activity" is ineligible for asylum).

59. *Id.* § 241(b)(3)(B)(iv), 8 U.S.C. § 1231(b)(3)(B)(iv) (providing that a noncitizen is ineligible for withholding of removal if "there are reasonable grounds to believe that the alien is a danger to the security of the United States" which exist under INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) if the noncitizen "has engaged," "is engaged in or is likely to engage after entry in any terrorist activity" (citing INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B), which cites INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B)).

60. 8 C.F.R. § 1208.16(d)(2) (2020). *Compare infra* note 73 and accompanying text (explaining the requirements for withholding of removal), *with infra* note 74 and accompanying text (explaining the requirements for withholding of removal under the Convention Against Torture).

61. *See, e.g.*, *Full Text: Donald Trump's Speech on Fighting Terrorism*, POLITICO (Aug. 15, 2016), https://www.politico.com/story/2016/08/donald-trump-terrorism-speech-227025 [https://perma.cc/99CG-YX27] ("ISIS is trying to infiltrate refugee flows into Europe[]and the United States."); Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 22, 2018, 5:37 AM), https://twitter.com/realDonaldTrump/status/1054351078328885248 [https://perma.cc/ZE25-AEYM] ("Criminals and unknown Middle Easterners are mixed in [with the "Caravan heading to the Southern Border of the United States"]. I have alerted Border Patrol and Military that this is a National Emergy [*sic*]. Must change laws!").

Noncitizens who are located outside of their country of nationality qualify as refugees in the United States if they have a well-founded fear of persecution on account of a protected ground: race, religion, nationality, membership in a particular social group, or political opinion.[62] Noncitizens apply for refugee status from outside the United States.[63] The process of screening and resettling refugees involves multiple federal agencies and includes security-related background checks by U.S. Citizenship and Immigration Services (USCIS) within the Department of Homeland Security.[64] USCIS determines whether to approve refugee applications and considers whether an applicant would be precluded from relief by the terrorism bar.[65]

Asylum is a form of protection available to noncitizens who are physically present within the United States or arrive in the United States.[66] Like refugees, asylum seekers must demonstrate a well-founded fear of persecution on account of one of the five protected grounds.[67] Noncitizens can apply for asylum affirmatively or defensively. Affirmative asylum applicants file an application with USCIS, which can grant the application or refer it to the immigration court, which is within the Department of Justice.[68] Defensive asylum applicants file for asylum in removal proceedings in immigration court after they are apprehended by the Department of Homeland Security at the border or in the interior of the United States.[69]

In immigration court, an immigration judge, who is an employee of the Department of Justice, decides whether a noncitizen qualifies for asylum, including determining whether the terrorism bar precludes relief if it is raised by

62. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

63. *See* 8 C.F.R. § 207.1(a) ("Any alien who believes he or she is a refugee as defined in section 101(a)(42) of the [INA] . . . may apply for admission to the United States . . . .").

64. *See* Stella Burch Elias, *The Perils and Possibilities of Refugee Federalism*, 66 AM. UNIV. L. REV. 353, 362, 368–72 (2016) (describing the process of refugee resettlement in the United States).

65. *See id.* at 369 (describing the application process for refugees).

66. INA § 208(a)(1), 8 U.S.C. § 1158(a)(1).

67. *Id.* § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i); *see* INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (holding that a noncitizen can establish a well-founded fear with only a ten percent chance of persecution).

68. 8 C.F.R. § 208.14(c) ("If the asylum officer does not grant asylum to an applicant after an interview . . . , the asylum officer shall deny, refer, or dismiss the application . . . ."); *see also* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 305–09 (2007) (describing the affirmative asylum process). If an asylum seeker has lawful immigration status but is not eligible for asylum, then USCIS will deny the asylum application. 8 C.F.R. § 208.14(c)(2) ("In the case of an applicant who is maintaining valid immigrant, nonimmigrant, or Temporary Protected Status at the time the application is decided, the asylum officer shall deny the application for asylum."). USCIS refers applicants to immigration court if they do not have lawful immigration status. *Id.* § 208.14(c)(1) ("[I]n the case of an applicant who appears to be inadmissible or deportable . . . , the asylum officer shall refer the application to an immigration judge, together with the appropriate charging document, for adjudication in removal proceedings . . . .").

69. 8 C.F.R. § 208.2(b) (vesting exclusive jurisdiction with the immigration courts over asylum applications filed by noncitizens whom the Department of Homeland Security has served with charging documents); *see also* Ramji-Nogales et al., *supra* note 68, at 305–09 (describing the defensive asylum process).

opposing counsel from the Department of Homeland Security.[70] A noncitizen can appeal from a denial of relief to the Board of Immigration Appeals, also housed within the Department of Justice, and then directly to the federal courts of appeals.[71] Various adjudicators make determinations concerning asylum and the application of the terrorism bar, from employees of the Departments of Homeland Security and Justice to federal judges.

Like for asylum, noncitizens who are subject to the terrorism bar are ineligible for withholding of removal and withholding of removal under the Convention Against Torture.[72] Withholding of removal, subject to fewer restrictions than asylum, is available to noncitizens who meet a higher burden of proof than asylum's requirement of a well-founded fear. Noncitizens must show that it is more likely than not they will be persecuted on account of one of the protected grounds in the country of removal.[73]

Another and entirely separate form of relief is withholding of removal under the Convention Against Torture, available to noncitizens who can demonstrate that it is more likely than not they will be tortured in their country of removal.[74] Both withholding of removal and withholding of removal under the Convention Against Torture are more limited forms of relief than asylum,

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70. 8 C.F.R. § 1001.1(*l*) ("The term immigration judge means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review . . . ."); 8 C.F.R. § 1240.1(a)(1). Scholars and advocates have criticized the housing of the immigration courts within the Department of Justice as failing to shield immigration judges from political influence and not providing them judicial independence, as well as allowing judicial bias to remain unchecked. *See, e.g.*, INNOVATION LAW LAB & S. POVERTY LAW CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 5, 10–11, 18–23 (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [https://perma.cc/4TFX-ZACM]; Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENGLAND L. REV. 417, 429 (2011).

71. INA § 242(b)(2), 8 U.S.C. § 1252(b)(2); 8 C.F.R. § 1003.1. *See generally* Ramji-Nogales et al., *supra* note 68, at 305–09, 349–53 (describing the structure of the Board of Immigration Appeals). Although a noncitizen may seek review of an unfavorable decision by a federal court of appeals in the U.S. Supreme Court, it is unlikely the Supreme Court will grant review. *See* 28 U.S.C. § 1254; Ramji-Nogales et al., *supra* note 68, at 310 ("[T]he Supreme Court has accepted review in only a handful of asylum cases since the Refugee Act authorized asylum in 1980.").

72. *See supra* notes 59–60.

73. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3); INS v. Stevic, 467 U.S. 407, 423–25 (1984) (holding that an applicant for withholding of removal must prove that persecution is more likely than not).

74. 8 C.F.R. § 208.16(c)(2). Torture is defined as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a)(1).

notably because they do not provide a path to permanent residency.[75] Additionally, unlike asylum, USCIS employees generally cannot grant withholding of removal or withholding of removal under the Convention Against Torture.[76] Therefore, immigration judges will usually determine the application of the terrorism bar in those cases.

The only form of relief available to noncitizens who fall under the terrorism bar is deferral of removal under the Convention Against Torture.[77] Deferral of removal has the same stringent legal standard as withholding of removal under the Convention Against Torture, but is a significantly limited form of relief that does not require a noncitizen's release from detention, does not provide work authorization, and does not provide a path to permanent residency.[78] It only prevents removal from the United States. Like withholding of removal and withholding of removal under the Convention Against Torture, USCIS employees generally cannot grant deferral of removal.[79]

Even though deferral of removal is available to noncitizens ensnared by the terrorism bar, its requirements and standard of proof differ significantly from those for asylum.[80] A noncitizen who meets the requirements for asylum may not qualify for deferral of removal under the Convention Against Torture, potentially leaving them with no protection if the terrorism bar blocks asylum, despite a valid fear of returning to their home country.

In cases that may trigger the terrorism bar, there are limited avenues to avoid its consequences. USCIS officers adjudicating applications and Department of Homeland Security attorneys in immigration proceedings can choose not to raise the bar in an exercise of discretion. If they do raise the bar, adjudicators are then bound by the text of the INA. Adjudicators cannot consider mitigating circumstances or the totality of the circumstances on a case-by-case basis, including the nature and goals of the purported terrorist organization and the context of the purported terrorist activity.[81]

However, the INA empowers the Secretaries of State and Homeland Security, in consultation with the Attorney General, to create limited categorical

75. *See* Ramji-Nogales et al., *supra* note 68, at 309 (describing the differences between asylum, withholding of removal, and relief under the Convention Against Torture).

76. *See* INA § 241(b)(3), 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(a).

77. 8 C.F.R. §§ 208.17(a), 1208.17(a).

78. 8 C.F.R. §§ 208.17(b)(1), 1208.17(b)(1).

79. *See* 8 C.F.R. § 208.17(a) (citing 8 C.F.R. § 208.16).

80. To obtain withholding of removal under the Convention Against Torture, a noncitizen must establish that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). Asylum, on the other hand, has a lower standard of proof—an applicant need only have a well-founded fear, a standard that may be satisfied even if they have only a 10 percent chance of persecution. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).

81. *See In re* S-K-, 23 I. & N. Dec. 936, 936 (B.I.A. 2006) (reasoning the statutory language forecloses a consideration of the totality of the circumstances, including "an organization's purposes or goals and the nature of the regime that the organization opposes").

waivers of the terrorism bar in their discretion.[82] The executive branch has created several situational exemptions, including for material support provided under duress, military-type training received under duress, and the voluntary provision of medical care to individuals associated with terrorist activities or organizations.[83] The executive branch has created limited group-based exemptions from the terrorism bar for activities and associations with certain groups, generally ones with which the executive branch sympathizes.[84]

Despite the availability of waivers, the process of obtaining one is extraordinarily cumbersome, lengthy, and difficult to invoke successfully, rendering them limited in their utility.[85] Waivers are limited to certain enumerated groups and situations.[86] The group-based and situational waivers also exclude categories of noncitizens as ineligible, including those who have voluntarily or knowingly engaged in or espoused terrorist activity on behalf of a Tier I or Tier II terrorist organization and those who have voluntarily and knowingly received military-type training from a Tier I or Tier II terrorist organization.[87] Additionally, the INA does not permit immigration judges to grant waivers in removal proceedings.[88] Rather, noncitizens must wait until the conclusion of removal proceedings, after they receive an administratively final order of removal, to apply for a waiver with the Department of Homeland Security.[89] Given the constrained exemptions to the terrorism bar, one of the only ways a noncitizen can avoid its consequences is to successfully argue that they do not fall within the purview of the statutory language.

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82. INA § 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i).

83. *See Terrorism-Related Inadmissibility Grounds (TRIG) - Situational Exemptions*, USCIS, https://www.uscis.gov/unassigned/terrorism-related-inadmissibility-grounds-trig-situational-exemptions [https://perma.cc/58UJ-FB3J] (describing the situational exemptions to the terrorism bar).

84. *See* INA § 212(d)(3)(B), 8 U.S.C. § 1182(d)(3)(B); *Terrorism-Related Inadmissibility Grounds (TRIG) - Group-Based Exemptions*, USCIS, https://www.uscis.gov/legal-resources/terrorism-related-inadmissability-grounds/terrorism-related-inadmissibility-grounds-trig-group-based-exemptions [https://perma.cc/TZ2T-HCNG] (describing the group-based exemptions to the terrorism bar).

85. *See* Anwen Hughes et al., *Combating the Terrorism Bars Before DHS and the Courts*, *in* IMMIGRATION PRACTICE POINTERS 450, 454–55 (Rizwan Hassan et al. eds., 2010–11 ed. 2010); Courtney Schusheim, Comment, *Cruel Distinctions of the I.N.A.'s Material Support Bar*, 11 N.Y.C. L. REV. 469, 483–85 (2008).

86. INA § 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i).

87. *Id.* § 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i).

88. *See id.* § 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i); *see also* USCIS, FACT SHEET: DEPARTMENT OF HOMELAND SECURITY IMPLEMENTS EXEMPTION AUTHORITY FOR CERTAIN TERRORIST-RELATED INADMISSIBILITY GROUNDS FOR CASES WITH ADMINISTRATIVELY FINAL ORDERS OF REMOVAL (2008), https://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/USCIS_Process_Fact_Sheet_-_Cases_in_Removal_Proceedings.pdf [https://perma.cc/8XKL-6JBQ].

89. *See* USCIS, supra note 88 (explaining the process for applying for a waiver after the completion of removal proceedings).

B. The Amorphous Unlawfulness Requirement in the Terrorism Bar

The common thread tying together the wide variety of conduct encompassed by the terrorism bar is the requirement of an unlawful enumerated activity in the definition of "terrorist activity."[90] Although this language has been present in the bar since 1990, there is little case law discussing how adjudicators should apply this requirement in situations where it is unclear which state governs the relevant territory.

The Immigration Act of 1990 created the first explicit exclusion ground for terrorism.[91] In defining "terrorist activity," it included the requirement that the conduct be "unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State)."[92] Each successive statute has retained this requirement, and this language wholesale is present in the current immigration statute.[93]

Legislative history on this provision is limited, with scant discussion of the requirement that the enumerated activity be unlawful. Before this requirement was added to the statute, at least one member of Congress expressed his view that the immigration laws should move away from prior Cold War and McCarthy-era restrictions on entry based on political views and speech.[94] The requirement that the enumerated activity be unlawful shifted the focus of the terrorism bar to an individual's actions rather than their ideology.[95]

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90. *See supra* note 39 and accompanying text (discussing the use of the term "terrorist activity" in other parts of the terrorism bar).

91. Pub. L. No. 101-649, § 601, 104 Stat. 4987, 5067, 5075 (codified as amended at 8 U.S.C. § 1182). Before 1990, there was no enumerated exclusion ground for terrorism. General security-related grounds were used against noncitizens allegedly involved in terrorist activities. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(a)(27)–(29), 66 Stat. 163, 184–86 (codified as amended at 8 U.S.C. §§ 1101–1503) (detailing the national security-related grounds for exclusion); *see also* Scott Aldworth, Comment, *Terror Firma: The Unyielding Terrorism Bar in the Immigration and Nationality Act*, 14 LEWIS & CLARK L. REV. 1159, 1166 (2010) ("Where the [1952 Act] had excluded those who were perceived to be a threat to the national security of the United States, the new terrorism bar sought to exclude those who had threatened the national security of any country.").

92. § 601(a)(3)(B)(iii), 104 Stat. at 5067.

93. *Compare id.*, *with* INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii) (showing that the requirement of unlawfulness from the Immigration Act of 1990 is also present in the current version of the INA).

94. H.R. REP. NO. 107-236, at 431–33 (2001) (statement of Rep. Barney Frank). Representative Frank criticized an earlier version of the bill that would have permitted the exclusion of individuals who had "endorsed or espoused terrorist activity" as "cast[ing] far too wide a net of exclusion . . . lead[ing] to a renewal of some restriction on people whom Americans should continue to have the right to hear if they so choose." *Id.* at 432. Representative Frank distinguished "people who would come [to the United States] to organize acts of violence, and . . . those who have engaged in such activity overseas" with people who hold "unpopular political views." *Id.* at 432.

95. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(a)(27)–(29), 66 Stat. 163, 184–87, (codified as amended at 8 U.S.C. §§ 1101–1503) (excluding noncitizens who sought "to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States" and

The current statutory language considers whether a noncitizen's actions are unlawful in the place where they are undertaken or under U.S. law.[96] To determine the legality of conduct in the place of commission is a question of foreign law—an adjudicator needs to ascertain whether the state has a law that criminalizes the enumerated activity.[97] Questions of foreign law are made more complicated during independence movements, when it may not be obvious which state controls the territory where the noncitizen engaged in the enumerated activity.

If an enumerated activity was undertaken with the armed forces or militia of a state during an independence movement, it would not be unlawful under the laws of that state or U.S. law if it complies with the laws of war.[98] The international law principle that participation in armed combat is not always unlawful is widely accepted—states can lawfully engage in self-defense.[99] The corollary is that during an international conflict, members of the armed forces of a state, members of a militia or volunteer corps that belong to a state, and inhabitants of an area who participate in a popular uprising to defend against foreign invaders, qualify as lawful combatants.[100] Lawful combatants are permitted to engage in armed combat and receive immunity for actions conducted during hostilities that comport with international humanitarian law and the laws of war.[101] On the other hand, fighters who are not lawful combatants

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who advocated or belonged to an organization that advocated the use of force to overthrow the U.S. government or the killing of government officers).

96. INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii).

97. *See id.* Questions of foreign law are factual issues that courts must resolve. *See In re* S-K-, 23 I. & N. Dec. 936, 939 (B.I.A. 2006) ("Whether the CNF's [Chin National Front] actions are lawful in Burma is a question of foreign law and is a factual issue . . . ."); *In re* Annang, 14 I. & N. Dec. 502, 503 (B.I.A. 1973) ("[T]he law of a foreign country is a question of fact . . . ."); *see also* Abdille v. Ashcroft, 242 F.3d 477, 490 (3d Cir. 2001) (citing approvingly *Annang*). Courts typically rely on expert testimony and foreign legal sources to decide questions of foreign law. *See, e.g.*, Access Telecom, Inc. v. MCI Telecomms. Corp., 197 F.3d 694, 713 (5th Cir. 1999); Universe Sales Co. v. Silver Castle, Ltd., 182 F.3d 1036, 1037–38 (9th Cir. 1999); Dee-K Enters. Inc. v. Heveafil Sdn. Bhd., 174 F.R.D. 376, 379 n.4 (E.D. Va. 1997).

98. *See* 18 U.S.C. § 2441 (criminalizing "war crimes" but exempting damage and injury "incident to a lawful attack").

99. *See* Stephen C. Neff, *Towards a Law of Unarmed Conflict: A Proposal for a New International Law of Hostility*, 28 CORNELL INT'L L.J. 1, 17–19 (1995). *See generally* OFFICE OF GEN. COUNSEL, DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 45–47 (2016) [hereinafter LAW OF WAR MANUAL] (describing the inherent right of states to use force in self-defense).

100. The "'combatant's privilege' from liability under domestic law has been associated with POW [prisoner of war] status." LAW OF WAR MANUAL, *supra* note 99, at 108; *see* Geneva Convention Relative to the Treatment of Prisoners of War art. 4A, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (delineating the classes of combatants entitled to prisoner of war status).

101. *See* 3 MARIAN NASH (LEICH), DEP'T OF STATE, CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981–1988, at 3436, 3451 ("It is well-accepted that individuals who enjoy the status of prisoner of war are generally immune from prosecution for legitimate acts of war in international armed conflicts."); Letter from Daniel Webster, Sec'y of State, to John G. Crittenden, Attorney Gen. (Mar. 15, 1841), *in* THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 134–35 (1848) ("That an individual, forming part of a public force, and acting under the authority of his government, is not to be held answerable, as a private trespasser or

are not afforded such immunity under international law and can be criminally prosecuted under the domestic laws of a country, including treason laws.[102]

The question then is when do members of an armed group cease to be rebels and become lawful combatants?[103] The answer to that question depends on which entity governs a territory and informs whether an asylum seeker's support of an independence movement was lawful.

Only a small number of cases have analyzed the terrorism bar's requirement of legality.[104] These cases have acknowledged that if the enumerated activity is not unlawful, then it cannot be terrorist activity.[105] A few published cases have addressed the issue of lawfulness in the context of regime change.

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malefactor, is a principle of public law sanctioned by the usages of all civilized nations . . . ."); Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants*," 85 INT'L REV. RED CROSS, 45, 45–46 (2003) ("[L]awful[] combatants cannot be prosecuted for lawful acts of war in the course of military operations even if their behavior would constitute a serious crime in peacetime."); Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CALIF. L. REV. 530, 549 (1943); *see also* Dow v. Johnson, 100 U.S. 158, 165 (1879) ("[F]rom the very nature of war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army."); United States v. Lindh, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) ("[A] belligerent in a war cannot prosecute the soldiers of its foes for the soldiers' lawful acts of war.").

102. States retain sovereignty to prosecute individuals who do not qualify as lawful combatants. *See* Amendment to Art. 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects, Dec. 21, 2001, S. TREATY DOC. NO. 109-10, 2260 U.N.T.S. 82 ("Nothing in this Convention or its annexed Protocols shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State."); The Prize Cases, 67 U.S. (2 Black) 635, 673 (1862) ("[I]t is a proposition never doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights[.]").

103. Generally, armed actors outside of a state's control are not considered lawful combatants, and their actions may be unlawful under the state's domestic laws. *See* Dörmann, *supra* note 101, at 45–46; Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 18 & n.118 (2003); Inter-Am. Comm'n on Human Rights, *Rep. on Terrorism and Human Rights*, ¶ 70, OEA/Ser.L/V/II.116, (Oct. 22, 2002). However, there are some exceptions to this general rule, which can afford non-state fighters privileged belligerent status. *See generally* Sam Foster Halabi, *Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context*, 27 AM. U. INT'L L. REV. 321 (2012) (describing the theory and practice of the recognition of rebelling parties).

104. *See* FH-T v. Holder, 723 F.3d 833, 842 (7th Cir. 2013) (describing an argument based on the lawfulness of the enumerated activity as a "novel argument" in the context of the terrorism bar). Only federal court immigration decisions and published decisions by the Board of Immigration Appeals and the Attorney General are readily available. Although Westlaw contains some unpublished Board of Immigration Appeals decisions, most are not publicly accessible. Immigration judges decide most immigration cases, and they typically issue nonpublic oral decisions that are not transcribed unless a case is appealed. The lack of written records compounds the difficulty of determining how adjudicators approach this analysis.

105. *Id.* at 841 ("Had Petitioner employed the lawful-versus-unlawful terminology [before the Board of Immigration Appeals] . . . or elucidated arguments that the types of force used by the [Eritrean People's Liberation Front] . . . are lawful under Eritrean or American law, our finding may well have been different."); Khan v. Holder, 584 F.3d 773, 781 (9th Cir. 2009) ("An action would be lawful within the meaning of § 1182(a)(3)(B)(iii) 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. . . .").

But, these cases pertain to situations of internal conflict where asylum seekers sought a change in government within an existing state, rather than the creation of a new state.[106] These cases have expressed a reluctance in making determinations on the legitimacy of a foreign government.[107] For example, when addressing whether a noncitizen provided material support to a terrorist organization, the Board of Immigration Appeals declined to find that the military government of Burma was "illegitimate," reasoning that "[s]uch a determination is beyond [the Board's] delegated authority and is a matter left to elected and other high-level officials in this country."[108] Similarly, the Ninth Circuit held that the Board of Immigration Appeals "lacked authority to consider the legitimacy of the Aquino Government" in the Philippines.[109]

In a case addressing the merits of the lawfulness argument, the Board of Immigration Appeals analyzed on an ad hoc basis whether the U.S. government recognized the legitimacy of a foreign government.[110] The asylum seeker argued that if the foreign government lacked legitimacy, then opposing it would not have been unlawful.[111] The Board declined to determine the legitimacy of the foreign government itself. Rather, the Board looked to whether the U.S. government recognized the foreign government as legitimate.[112] To answer this question, the Board considered whether the United States maintained diplomatic relations with the government and maintained an embassy in the state in question.[113]

At least one unpublished immigration court case has considered the requirement of lawfulness when applying the terrorism bar to conduct during an

106. *See supra* notes 4–5 and accompanying text (discussing the difference between an independence movement to create a new state and an opposition movement seeking a change in the government of an existing state).

107. *But see* Matter of Izatula, 20 I. & N. Dec. 149, 155 (B.I.A. 1990) (Vacca, Board Member, concurring) ("In effect, the majority finds that the Afghan Government is illegitimate and therefore incapable of imposing a lawful punishment."). Regime legitimacy differs from determining which regime controls a territory in the context of the terrorism bar. Adjudicators must answer the latter question to ascertain which domestic laws to apply when evaluating the lawfulness of a noncitizen's conduct. *See infra* note 133 and accompanying text (distinguishing between recognition and approval of a state).

108. *In re* S-K-, 23 I. & N. Dec. 936, 940 (B.I.A. 2006). The Board used the name "Burma" rather than "Myanmar" in the opinion likely because the U.S. government "has not officially adopted the name [Myanmar]." *See* CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: BURMA, https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html [https://perma.cc/B23V-X2TB].

109. Zumel v. Lynch, 803 F.3d 463, 474 (9th Cir. 2015).

110. *In re S-K-*, 23 I. & N. Dec. at 940.

111. *Id.* at 938–39 ("According to the respondent, the United States does not recognize the Burmese Government's legislative acts, and therefore the CNF's [Chin National Front] actions are not unlawful under Burmese law.").

112. *Id.* at 940.

113. *Id.* (concluding that the "United States recognizes as legitimate the Burmese Government" because it "maintain[s] a diplomatic relationship with the Burmese Government and maintains an embassy there").

independence movement.[114] The immigration judge analyzed whether Eritrea had achieved independence from Ethiopia, and thus statehood, at the time of the asylum seeker's conduct in support of the independence movement. The judge used the four criteria for statehood from the Restatement (Third) of the Foreign Relations Law of the United States.[115] More specifically, the immigration judge examined whether Eritrea had a defined territory and a permanent population, was under the control of its own government, and had the capacity to engage in international relations.[116] The judge concluded that Eritrea satisfied these criteria and thus had achieved statehood at the time of the asylum seeker's actions; therefore, the terrorism bar was inapplicable.[117]

Although only meager case law discusses statehood in the context of the terrorism bar, other arenas of U.S. domestic law have used two prevailing standards stemming from international law to analyze this question. These standards are potential candidates for evaluating statehood in the terrorism bar context.

II.
TWO INTERNATIONAL LAW STANDARDS FOR DETERMINING STATEHOOD

Part II introduces and analyzes two potential standards that immigration adjudicators can use when evaluating the lawfulness of conduct undertaken to support an independence movement. More specifically, each standard can be used to assess the existence of a state to determine which foreign entity's laws to apply when analyzing the lawfulness of the enumerated activity. Both standards derive from prominent theories of international law and have already been adopted in different areas of U.S. domestic law.[118]

Use of these standards does not create an *exception* to the terrorism bar for participants in independence movements, but rather provides a framework for analysis. The federal courts of appeals and the Board of Immigration Appeals have consistently declined to read exceptions into the terrorism bar. They reason that if Congress wanted to include an exception for certain participants in regime change, it would have done so in the statute.[119] Rather, the proposed standards

114. *See* Matter of [Redacted], A [Redacted] ([Redacted] Immigration Ct. 2017) (on file with the author); *see also infra* Part II.B (discussing a Restatement-based standard for analyzing statehood).

115. *Matter of* [Redacted], A [Redacted], at 4–6.

116. *Id.* at 4–5.

117. *Id.* at 5–6.

118. *See* Krystyna Marek, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 2 (1968) ("International law does not 'create' States, just as State law does not 'create' individuals. . . . [I]t is international law and international law alone which provides the legal evaluation of the process, determines whether the entity is in fact a State, delimits its competences and decides when it ceases to exist."); *infra* Part III (analyzing federal courts' use of the recognition-based and Restatement standards to analyze questions of statehood).

119. *See, e.g.*, Khan v. Holder, 584 F.3d 773, 785–86 (9th Cir. 2009); *In re* S-K-, 23 I. & N. Dec. 936, 941 (B.I.A. 2006).

derive directly from the lawfulness inquiry baked into the statutory language.[120] The statutory language requires adjudicators to determine the lawfulness of a noncitizen's actions in the place they were committed.[121]

Moreover, the standards do not require adjudicators to consider the legitimacy of a governing regime, an issue some have expressed reluctance to address.[122] The statehood question remains distinct from the normative question of state or government legitimacy.[123] The former asks whether an entity is independent and sovereign, whereas the latter asks whether the United States approves of and supports that entity.[124]

The first standard focuses exclusively on whether the United States, more specifically the executive branch, has recognized the foreign entity as a state in some manner. If adjudicators adopt the first standard, they would defer to when the executive branch recognized a foreign entity as a state as the operative date for statehood.

The second standard comes from the Restatement (Third) of the Foreign Relations Law of the United States and the Montevideo Convention, a U.S.-ratified treaty, which provides four criteria for statehood that are unconnected to recognition.[125] If adjudicators adopt this standard, they would apply the four criteria to determine when a foreign entity became a state.[126]

A. Recognition-Based Standard

The recognition-based standard requires adjudicators to determine whether the United States, acting via the executive branch, has recognized a foreign entity

120. *See Khan*, 584 F.3d at 786–87 (Nelson, J., concurring) (explaining that using international law in the lawfulness inquiry "is not premised on carving out an 'exception' to the terrorist activity definition for groups engaged in legitimate armed conflict" and that the inquiry "turns on whether the conduct in question is unlawful").

121. *See* INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii).

122. *See In re S-K-*, 23 I. & N. Dec. at 940; Zumel v. Lynch, 803 F.3d 463, 474 (9th Cir. 2015); *supra* notes 107–113 and accompanying text (describing cases where adjudicators declined to consider the legitimacy of foreign governments).

123. *See infra* note 133 and accompanying text (distinguishing between recognition and approval of a state).

124. The issue of statehood does not present a nonjusticiable political question that courts may not address. *See* Ungar v. Palestine Liberation Org., 402 F.3d 274, 280–81 (1st Cir. 2005) (analyzing the six factors from *Baker v. Carr*, 369 U.S. 186 (1962), and concluding that the issue of whether an entity is a state in the context of foreign sovereign immunity is not a nonjusticiable political question).

125. Convention on the Rights and Duties of States (Montevideo Convention) art. 3, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987). The most recent Restatement, *The Restatement of the Law (Fourth) of the Foreign Relations Law of the United States*, does not address the recognition of states. Therefore, the Restatement (Third) reflects the most recent position on this issue. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. II, note (2018).

126. *See infra* Part III (discussing the use of the Restatement criteria for statehood in U.S. domestic law).

as a state.[127] The recognition-based standard stems from the constitutive view of state recognition in international law, which explains that the act of recognizing an entity as a state confers such status.[128] The constitutive theory comes from the idea that the recognition and treatment of an entity as a state does not happen in the absence of action by other states.[129] Under this theory, entities derive their "legal existence and their rights and duties from the deliberate acts of recognition of already established members of the international community."[130] Proponents of this view contend that a recognition-based standard comports with the realities of international relations, namely that an entity cannot exercise the prerogatives of a state unless others view it and treat it as such.[131]

A recognition-based standard can rely on only formal recognition by the executive branch, but also can consider implicit or tacit recognition.[132] Neither

127. Another potential recognition-based standard uses the date of membership of the state in the United Nations as a proxy for international recognition. This standard is appealing because it may reflect a global consensus on state recognition. This standard relies on *membership* in, rather than *recognition* by, the United Nations, because the United Nations expressly disclaims any ability to recognize new states. *About UN Membership*, UNITED NATIONS, http://www.un.org/en/sections/member-states/about-un-membership/index.html [https://perma.cc/8SWT-SHPU] ("The recognition of a new State or Government is an act that only other States and Governments may grant or withhold. . . . The United Nations is neither a State nor a Government, and therefore does not possess any authority to recognize either a State or a Government."). However, relying on the date of United Nations membership may not necessarily accurately reflect statehood. Many states existed before the creation of the United Nations. *See* CRAWFORD, *supra* note 5, at 727–39. Additionally, the membership process for new states requires an application, the Security Council's recommendation for admission, and the General Assembly's approval of admission. *About UN Membership*, *supra*. This lengthy process likely results in delays between when a new state assumes power over a territory and membership in the United Nations.

128. *See* HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 38–41 (1947) ("The orthodox constitutive view . . . deduces the legal existence of new States from the will of those already established . . . .").

129. THOMAS D. GRANT, THE RECOGNITION OF STATES 2 (1999) ("The central implication [of the constitutive theory] is that whether or not an entity has become a state depends on the actions of existing states.").

130. Leonard C. Meeker, *Recognition and the Restatement*, 41 N.Y.U. L. REV. 83, 85 (1966).

131. *See* LAUTERPACHT, *supra* note 128, at 75 ("A State may exist as a physical fact. But it is a physical fact which is of no relevance for the commencement of particular international rights and duties until by recognition—and nothing else—it has been lifted into the sphere of law, until by recognition it has become a juridical fact."); Meeker, *supra* note 130, at 86 ("As the world community has been organized, what is more realistic than to say that the decisions [to recognize entities] are made by states and governments as they accord recognition?"); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 202 cmt. b ("As a practical matter, . . . an entity will fully enjoy the status and benefits of statehood only if a significant number of other states consider it to be a state and treat it as such . . . .").

132. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 202 cmt. a ("States may recognize an entity's statehood by formal declaration or by recognizing its government, but states often treat a qualified entity as a state without any formal act of recognition."). As evidence of recognition, some federal courts have relied upon the State Department's fact sheet entitled *Independent States in the World*, U.S. DEP'T OF STATE (Mar. 27, 2019), https://www.state.gov/independent-states-in-the-world/ [https://perma.cc/BP9X-4TZS]. *See, e.g.*, European Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189, 196 (E.D.N.Y. 2011) (collecting cases), *vacated*, 764 F.3d 129 (2d Cir. 2014), *rev'd*, 136 S. Ct. 2090 (2016). The State Department maintains a separate fact sheet *Dependencies and Areas of Special Sovereignty*, U.S. DEP'T OF STATE (Mar. 7,

formal nor implicit recognition implies approval of the state or its government by the U.S. government, a point that has been reiterated by both the executive and legislative branches.[133] Recognition of a foreign entity's government also constitutes recognition of statehood.[134]

The executive branch can effectuate formal recognition of a state or government through an official public declaration by the State Department,[135] or through a press statement by the President or State Department.[136] Formal recognition can also take the form of a diplomatic note to a state, often in response to a request for recognition from that state.[137]

Implicit recognition can take several different forms. It can include entering into a bilateral agreement with a state, since only states can enter into treaties.[138] Formal diplomatic relations through the "presentation of credentials by a United States representative t[o] the authorities of the new state, and [the receipt of] credentials" of a state's representative also demonstrate recognition of an entity's

2017), https://www.state.gov/dependencies-and-areas-of-special-sovereignty/ [https://perma.cc/WL6Z-RPDQ], ostensibly for entities that are not recognized as states because another entity maintains sovereignty over them. The exceptions are Antarctica, the Paracel Islands, the Spratly Islands, and Western Sahara, where the sovereign is to be determined. *See id.*

133. *See, e.g.*, *United States Recognition of Foreign Governments: Hearing on S. Res. 205 Before the S. Comm. on Foreign Relations*, 91st Cong. 8 (1969) (statement of George H. Aldrich, Acting Legal Advisor, Dep't of St.) (describing Resolution 205 passed by the Senate in that recognition of a foreign government does not imply the United States approves of it); L. THOMAS GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS 41 (1978) ("Generally, it is useful that there should be diplomatic intercourse between those who exercise *de facto* governmental authority, and it is well established that recognition does not imply moral approval." (quoting 30 Dep't of St. Bull. 539–40 (1959) (address by Secretary of State Dulles titled "The Threat of a Red Asia"))); *cf. Independent States in the World*, *supra* note 132 (recognizing as independent states those with which the United States does not maintain diplomatic relations).

134. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 202 cmt. a ("States may recognize an entity's statehood by formal declaration or by recognizing its government . . . .").

135. *See, e.g.*, 18 Dep't St. Bull. 673 (1948) (statement by President Truman) ("This Government has been informed that a Jewish state has been proclaimed in Palestine, and recognition has been requested by the provisional government thereof. The United States recognizes the provisional government as the *de facto* authority of the new State of Israel."); GALLOWAY, *supra* note 133, at 50 (describing the public announcement recognizing the Peruvian government after the military coup in 1962).

136. *See, e.g.*, GALLOWAY, *supra* note 133, at 46 (1978) (describing the press statement by President Kennedy recognizing the government of El Salvador in 1961 (citing Press Conference of Feb. 15, 1961, 1 PUB. PAPERS 92 (Feb. 15, 1961))); *id.* at 51–52 (describing the State Department press release recognizing the new government of Guatemala after a military takeover in 1963).

137. *See, e.g.*, *id.* at 38 n.79 (describing a diplomatic note to the new Albanian government in 1945 in response to a request for recognition indicating a willingness to recognize it if the new government satisfied certain conditions).

138. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 204, reporters' note 2 (noting that recognition can occur via "conclusion of a bilateral agreement with the state"); *see also* Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 (defining "treaty" as "an international agreement concluded between States").

statehood.[139] However, the United States may recognize an entity as a state even though it does not maintain direct diplomatic relations with its government.[140] Implicit recognition may also occur when the United States votes in favor of an entity's membership in the United Nations or in other international organizations open only to states.[141]

B. Restatement Standard

A second standard for statehood comes from the criteria in the Restatement (Third) of the Foreign Relations Law of the United States and the Montevideo Convention of 1933. This standard derives from the declaratory theory of statehood from international law—that an entity automatically becomes a state when it meets certain minimum criteria for statehood in international law regardless of recognition by other states.[142] Under the declaratory theory, recognition by other states is not a prerequisite for statehood, but rather is "simply declaratory of the new legal situation, and stands as a public signal that the recognizing authority intends to treat the new state . . . as a subject of international law with corresponding rights and obligations."[143]

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139. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 204, reporters' note 2; *id.* § 202 cmt. c ("The obligation not to treat an entity as a state . . . includes a duty not to exchange diplomatic representatives with its government or to vote for that entity's membership in international organizations . . . ."). However, not all communications between states constitute formal diplomatic relations and thus recognition. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS OF THE UNITED STATES § 98 cmt. a (1965) ("[T]here cannot be formal diplomatic relations without recognition, although there are many forms of communication falling short of formal diplomatic relations that do not involve recognition . . . .").

140. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. d ("[O]ne government may recognize another yet refrain from assuming diplomatic relations with it. . . . [B]reaking off [diplomatic] relations does not constitute derecognition of the government."). In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), *superseded by statute on other grounds*, Foreign Assistance Act of 1965, Pub. L. No. 89-171, 79 Stat. 653, the Supreme Court held that an instrumentality of the Cuban government was permitted to sue in U.S. courts. Even though the U.S. government had severed diplomatic relations with Cuba, the Court explained that only governments that are not recognized or at war with the United States are denied access to U.S. courts. *Id.* at 409–10 ("[W]e are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts."). In the situation of Cuba, "merely diplomatic relations [were] broken," rather than there being a question about recognition. *Id*. at 410–11; *see also* Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 805–06 (D. Del. 1990) ("[I]n its landmark *Sabbatino* decision, the Court interpreted this rule [regarding suit in U.S. courts on behalf of a sovereign state] to mean that an instrumentality of the unfriendly but recognized Castro government in Cuba was entitled to access to U.S. courts.").

141. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 reporters' note 2. However, the sole "fact that the United States is a member of an international organization of which a state it does not recognize is also a member does not imply recognition of that state by the United States." *Id.*

142. *See* Montevideo Convention, *supra* note 125, art. 3 ("The political existence of the state is independent of recognition by the other states."). The declaratory theory contends that an entity becomes a state when it satisfies the required criteria. This Article uses the term "Restatement standard" because most federal courts cite the Restatement, rather than the Montevideo Convention, for these criteria.

143. Meeker, *supra* note 130, at 85. The act of giving recognition to the state only confirms its status as such. Montevideo Convention, *supra* note 125, art. 6 ("The recognition of a state merely

The Montevideo Convention outlines the most well-established definition of statehood under the declaratory theory.[144] The United States ratified this treaty, which remains in force.[145] The criteria for statehood from the Montevideo Convention have been widely accepted, including by customary international law and the Restatement (Third) of Foreign Relations Law.[146]

The Montevideo Convention proposes four elements for statehood, all of which must be satisfied: "*a*) a permanent population; *b*) a defined territory; *c*) government; and *d*) capacity to enter into relations with other states."[147] The Montevideo Convention does not provide any elucidation of these requirements. The Restatement (Third) of Foreign Relations Law has almost wholesale adopted these criteria in its definition of a state.[148] The comments and reporters' notes to the Restatement offer explanations and updates to the Montevideo Convention to reflect international practice on statehood.[149] For example, the comments to the Restatement identify an additional implicit requirement of statehood—that an entity must seek statehood.[150]

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signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law.").

144. *See generally* Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403 (1999) (examining the Montevideo Convention "in light of evolving theories" of statehood).

145. U.S. DEP'T OF STATE, TREATIES IN FORCE 46 (2020).

146. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201; JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION 77 (2000). The Restatement explains that this definition of statehood "is well-established in international law." § 201 cmt. a; *see also, e.g.*, STARKE'S INTERNATIONAL LAW 85 (I.A. Shearer ed., 11th ed. 1994); James Crawford, *The Criteria for Statehood in International Law*, 48 BRIT. Y.B. INT'L L. 93, 111 (1976); J.D. van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 14 (1991).

147. Montevideo Convention, *supra* note 125, art. 1.

148. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."); *see id.* cmt. a ("The definition in this section is . . . nearly identical to that in Article 1 of the Montevideo Convention on the Rights and Duties of States." (citation omitted)). *But see* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 71 (5th ed. 1998) (explaining that not all criteria need to be satisfied, and that satisfaction of all criteria does not on its own establish statehood). International Court of Justice Judge James Crawford notes several other criteria that have also been considered to determine statehood, including independence, sovereignty, permanence, and willingness and ability to observe international law. *See* CRAWFORD, *supra* note 5, at 62–95. Several of these criteria may be addressed by the four Restatement requirements. *See, e.g.*, *id.* at 62 (explaining that "independence" may be a synonym for "statehood," and that the third Restatement factor is the most important to determine statehood (citing Ungar v. Palestine Liberation Org., 402 F.3d 274, 288 (1st Cir. 2005))).

149. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201.

150. *Id.* § 201 cmt. f ("While the traditional definition does not formally require it, an entity is not a state if it does not claim to be a state. For example, Taiwan might satisfy the elements of the definition in this section, but its authorities have not claimed it to be a state, but rather part of the state of China."); *see* CRAWFORD, *supra* note 5, at 156 ("The case of Taiwan raises the possibility that an entity which does not claim to be a State, even though it might otherwise qualify for statehood in accordance with the basic criteria, will not be regarded as a State.").

The first Restatement requirement, a defined territory, means that the entity must "consist of a certain coherent territory effectively governed" with no minimum requirement for the area of the territory.[151] The first requirement does not necessitate fixed and undisputed borders—an entity can satisfy it even though it has unsettled boundaries or territory disputes with another state.[152] Even if a foreign power occupies an entity's territory or the entity temporarily loses control over its territory, the entity does not necessarily lose its statehood.[153] Because this requirement considers the effective governing of the territory, it may overlap with the third Restatement requirement concerning government.[154]

The second requirement, a permanent population, necessitates that an entity "have a population that is significant and permanent."[155] Similar to the first requirement, there is no minimum threshold for population.[156]

The third requirement, that the territory and population be under the control of the entity's government, looks to whether there is "some authority exercising governmental functions and able to represent the entity in international relations."[157] The entity must operate an effective government over the territory and population in question.[158] International law does not delineate any specific conditions concerning the nature and extent of control by the government, "except that it include some degree of maintenance of law and order and the establishment of basic institutions."[159] The third requirement may be satisfied even if there is internal civil strife for some period of time.[160] The rigidity in the application of this requirement depends on the specific facts of the situation and

151. CRAWFORD, *supra* note 5, at 52.

152. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. b; *see also* North Sea Continental Shelf (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3, 32 (Feb. 20) ("There is . . . no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not . . . ."); CRAWFORD, *supra* note 5, at 50–51 ("The rule . . . is seen to apply in a range of situations, from boundaries still to . . . be resolved to violations of a boundary defined in principle in accordance with the *uti possidetis*.").

153. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. b.

154. *See id.* (explaining that the first criteria "suggests that the requirement of territory is rather a constituent of government and independence than a distinct criterion of its own").

155. *Id.* § 201 cmt. c.

156. CRAWFORD, *supra* note 5 at 52.

157. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. d.

158. *See* CRAWFORD, *supra* note 5, at 56 (considering "the extent of governmental power exercised, or capable of being exercised, with respect to some territory and population").

159. *Id.* at 59.

160. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 reporter's note 2 ("Some entities have been assumed to be states when they could satisfy only a very loose standard for having an effective government . . . . A state may continue to be regarded as such even though, due to insurrection or other difficulties, its internal affairs become anarchic for an extended period of time."); *see also* CRAWFORD, *supra* note 5, at 56–60 (describing the application of the third criterion to challenging cases of statehood).

whether any other entity disputes the claim for statehood. If disputed, an entity may need to demonstrate a higher threshold of governance.[161]

The final requirement considers an entity's capacity to engage in international relations, including satisfying treaty obligations.[162] An entity must have "competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so."[163] An entity must be sufficiently separate such that no other entity undertakes its international relations obligations.[164] However, an entity may voluntarily allow another state to control its international relations or may delegate some authority to a "supranational" organization without compromising its statehood.[165] Capacity to enter into international relations does not require the entity to actually enter into such relations and does not depend on other states recognizing the entity.[166] Capacity to engage in international relations overlaps with the third requirement of government—without an adequate government, an entity likely cannot engage in relations with other states because it does not have the power to carry out its international obligations.[167]

The Supreme Court and other federal courts have cited the definition of statehood from the Restatement in a variety of contexts.[168] At least one immigration court has adopted the Restatement criteria to determine statehood in the context of the terrorism bar.[169] The State Department has also acknowledged the validity of the Restatement criteria in assessing statehood.[170]

The two international law standards discussed here are not new to U.S. domestic law. Part III outlines the usage of these standards in three areas of

161. *See* CRAWFORD, *supra* note 5, at 56–61 ("[Statehood] is a legally circumscribed claim of right, specifically to the competence to govern a certain territory. Whether that claim of right is justified as such depends both on the facts and on whether it is disputed.").

162. *See* Grant, *supra* note 144, at 414; CRAWFORD, *supra* note 5, at 61 (explaining that the capacity to enter into international relations is not "an exclusive State prerogative").

163. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. e.

164. CRAWFORD, *supra* note 5, at 62.

165. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. e.

166. *See* Montevideo Convention, *supra* note 125, art. 4 ("The rights of each [state] do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law."); *see also* CRAWFORD, *supra* note 5, at 61.

167. *See* CRAWFORD, *supra* note 5, at 62.

168. *See infra* Part III (discussing the use of the Restatement criteria for statehood in U.S. domestic law).

169. *See supra* notes 114–117 and accompanying text (discussing an immigration court's use of the Restatement criteria to analyze statehood in the context of the terrorism bar).

170. GRANT, *supra* note 129, at 6 (noting the State Department has considered "effective control over a clearly defined territory and population; an organized governmental administration of that territory; and a capacity to act effectively to conduct foreign relations and to fulfill international obligations" when analyzing statehood (quoting State Dep't, Press Relations Office Notice (Nov. 1, 1976))).

domestic law outside of the immigration law context in which the question of statehood arises.

III.
STANDARDS FOR STATEHOOD FROM OTHER CIVIL LAW CONTEXTS

The question of which state governs a particular territory is not unique to immigration law. Federal courts routinely make determinations concerning statehood in other civil law contexts, including foreign sovereign immunity, diversity jurisdiction, and the act of state doctrine. In these arenas, courts have used both the recognition-based and Restatement standards. Courts generally have used the Restatement standard to depoliticize decisions concerning statehood. They reason that a direct decision by the executive branch may have greater foreign policy ramifications than one by the judiciary, whose decisions are more insulated from diplomatic consequences. Conversely, courts have gravitated towards the recognition-based standard, deferring to the executive branch when they believe their decisions on statehood may impact foreign relations.

A. Foreign Sovereign Immunities Act

Foreign sovereign immunity is a concept from international law that gives foreign states immunity from suit in the courts of other states.[171] Stemming from principles of comity between states, foreign sovereign immunity was initially a common law doctrine under which courts deferred wholly to the executive branch.[172]

A decision granting foreign sovereign immunity can signal a state's willingness to treat a foreign entity as a state and can promote friendly relations.[173] A decision denying immunity can have the opposite effect. As a result, diplomatic influences weighed heavily on early executive branch decisions on immunity.[174] To "reduc[e] the foreign policy implications of

171. *See* Schooner Exch. v. McFadden, 11 U.S. (7 Cranch) 116 (1812); Ungar v. Palestine Liberation Org., 402 F.3d 274, 283 (1st Cir. 2005) (discussing the international law origins of foreign sovereign immunity); *see also* HAZEL FOX, THE LAW OF STATE IMMUNITY 57 (2d ed. 2008) (explaining that foreign sovereign immunity stems from "the maxim *par in parem non habet imperium:* one sovereign State is not subject to the jurisdiction of another State").

172. *See* Opati v. Republic of Sudan, 140 S. Ct. 1601, 1605 (2020) ("[F]oreign sovereign immunity is a matter of 'grace and comity' . . . ." (quoting Republic of Austria v. Altmann, 541 U.S. 677, 689 (2004))); *Ungar*, 402 F.3d at 283–84 (describing the judiciary's deference to the executive branch on questions of immunity prior to the enactment of the Foreign Sovereign Immunities Act).

173. *See* Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. PA. L. REV. 411, 418 (2015) ("The doctrine is important both formally, as an expression of the independence and legal equality of sovereign states, and practically, as a way of fostering friendly international relations.").

174. *See* H.R. REP. NO. 94-1487, at 7, (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 ("The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity [by transferring immunity decisions to the judiciary].").

immunity determinations," Congress passed the Foreign Sovereign Immunities Act (FSIA) to transfer decisions of immunity from the executive branch to the courts.[175] Shifting foreign sovereign immunity decisions to the judiciary was meant to "insure that sovereign immunity decisions are decided on legal grounds"[176] rather than based upon political and diplomatic influences.[177]

The FSIA provides immunity from suit to "foreign state[s]" in federal and state courts in the United States, subject to some exceptions.[178] Congress did not define "foreign state" in the FSIA.[179] However, the committee report explained that "decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law."[180] Although Congress specified that the standard for statehood should come from international law, it did not indicate a preference between the constitutive or declaratory theories, leaving that decision to the courts.[181]

The Supreme Court cited the Restatement in *Samantar v. Yousuf* when deciding whether an individual official of a foreign state is entitled to foreign sovereign immunity.[182] The Court stated that "[t]he term 'foreign state' on its face indicates a body politic that governs a particular territory."[183] However, the Supreme Court's language may be explanatory dicta since *Samantar* did not deal with whether a foreign entity constituted a state. It therefore does not mandate

175. *Id.*; *see also* Carolyn J. Brock, Note, *The Foreign Sovereign Immunities Act: Defining a Role for the Executive*, 30 VA. J. INT'L L. 795, 799–803, 808 (1990) (describing the history of the enactment of the FSIA).

176. *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. 15 (1973) (statement of Charles N. Brower, Acting Legal Adviser, Dep't of St.).

177. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 80 (1976) (testimony of Cecil J. Olmstead, Chairman, S. Rule of Law Comm., Vice President, Texaco Co.) (explaining that the transfer of sovereign immunity decisions to the judiciary would allow litigants "to rely upon the resolution of immunity questions in commercial cases by courts free from diplomatic or political influence"); *see also id.* at 72 (statement of the Comm. on Int'l Law of the Ass'n of the Bar of the City of New York) ("By removing the question of sovereign immunity from the political sphere and placing it with the courts, where it belongs, the State Department is relieved of a burden it is ill equipped to bear and provides the private litigant with assurance that his claim will be determined under comprehensive rules and before a tribunal not subject to the daily exigencies of foreign policy.").

178. 28 U.S.C. §§ 1603–05A.

179. *See* 28 U.S.C. § 1603(a); *see also* Kirschenbaum v. 650 Fifth Ave. & Related Props., 830 F.3d 107, 123 (2d Cir. 2016) ("The FSIA does not define 'foreign state' except to state that it 'includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . . ."), *abrogated on other grounds by* Rubin v. Islamic Republic of Iran, 138 S. Ct. 816 (2018).

180. H.R. REP. NO. 94-1487, at 14, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6613.

181. *See supra* notes 128–131, 142–143 and accompanying text (discussing the constitutive and declaratory theories of statehood).

182. 560 U.S. 305, 314 (2010).

183. *Id.* ("[A] 'state' [is] 'an entity that has a defined territory and population under the control of a government and that engages in foreign relations'" (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 (1964))).

that courts apply the Restatement standard in the FSIA context.[184] *Samantar* leaves open the possibility that the executive branch could determine whether the requirements for statehood are met, and that courts must defer to that assessment under a recognition-based standard.

In the absence of clear congressional and Supreme Court guidance, lower federal courts have had to determine whether to use the recognition-based standard or the Restatement standard to analyze questions of statehood. Although some courts have chosen a standard, others have not needed to weigh in on this question[185] or have not decided which standard to adopt.[186]

The courts that have adopted a recognition-based standard have concluded that the FSIA only applies to recognized states.[187] One court reasoned that only the executive branch is competent on questions of recognition and, so, it must defer to whether the executive branch has recognized a foreign entity as a state.[188]

Some courts use a Restatement standard to decide questions of statehood themselves.[189] The First Circuit reasoned that the legislative history of the FSIA

184. *See id*. ("The question we face in this case is whether an individual sued for conduct undertaken in his official capacity is a 'foreign state' within the meaning of the [FSIA]."). The case addressed the question of whether a foreign official qualifies as an "agency or instrumentality" of a foreign state under the FSIA. *Id.* at 314–15.

185. *See* Ungar v. Palestine Liberation Org., 402 F.3d 274, 284 (1st Cir. 2005) (noting that case law on statehood in the context of the FSIA is "scanty"); CHARLES ALLEN WRIGHT ET AL., 14A FEDERAL PRACTICE & PROCEDURE § 3662.1 (4th ed. 2019) ("[T]he question whether a particular political entity can be considered a foreign state per se occasionally has been addressed by courts . . . .").

186. *See, e.g.*, *Ungar*, 402 F.3d at 284 n.6 (adopting the Restatement standard in this case because the parties agreed to it but cautioning that "the Restatement standard . . . is not inevitably correct"). The Sixth Circuit, although primarily relying on the recognition-based standard, ultimately did not decide which standard to adopt. *See* O'Bryan v. Holy See, 556 F.3d 361, 372 (6th Cir. 2009) ("[W]hen both standards lead to the same conclusion, courts need not choose as 'all roads lead to Rome.'" (quoting *Ungar*, 402 F.3d at 284 n.6)).

187. *See* Owens v. Republic of the Sudan, 531 F.3d 884, 892 (D.D.C. 2008) ("The FSIA in its entirety depends upon the President's decision to recognize an entity as a foreign nation because [it] only applies to recognized nations." (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964))); *see also Ungar*, 402 F.3d at 284 n.6 (stating, without deciding, that recognition as a sovereign by the U.S. government could be the appropriate standard to determine whether an entity is a "foreign state" for purposes of the FSIA); Mark L. Movsesian, *The Persistent Nation State and the Foreign Sovereign Immunities Act*, 18 CARDOZO L. REV. 1083, 1100 (1996) (stating that because the FSIA "borrowed" the phrase "foreign state" from the diversity statute, case law from the diversity context construing a foreign state as an entity recognized by the executive branch should apply in the sovereign immunity context). Neither case specified whether formal recognition is needed or if implicit recognition is sufficient. *See Owens*, 531 F.3d at 892; *Ungar*, 402 F.3d at 284 n.6.

188. *See Owens*, 531 F.3d at 892.

189. *See* Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44, 47 (2d Cir. 1991) ("[T]his Court has limited the definition of 'state' to '"entit[ies] that ha[ve] a defined territory and a permanent population, [that are] under the control of [their] own government, and that engage[] in, or ha[ve] the capacity to engage in, formal relations with other such entities."' (alterations in original) (quoting Nat'l Petrochem. Co. v. M/T Stolt Sheaf, 860 F.2d 551, 553 (2d Cir. 1988), which quotes RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987))); Gilmore v. Palestinian Interim Self-Gov't Auth., 422 F. Supp. 2d 96, 100 (D.D.C. 2006) ("To determine whether a defendant is immune from suit because it is

"offers strong support" for the judiciary's use of the Restatement factors to determine statehood.[190] The Second Circuit has long utilized the Restatement standard, explaining that it is consistent with Supreme Court precedent on attributes of statehood.[191] Moreover, use of the Restatement comports with the FSIA's goal of decreasing politicization by allowing the judiciary to assess statehood without having to rely on executive branch recognition.[192]

B. Access to the Federal Courts and Diversity Jurisdiction

The Supreme Court has long recognized that foreign states may bring civil claims in the federal courts under common law principles of comity.[193] Congress has explicitly granted the federal courts such jurisdiction in the diversity jurisdiction statute, consistent with the Constitution.[194] Diversity jurisdiction allows the federal district courts to hear cases between certain types of parties if the amount of controversy is satisfied.[195] It permits the district courts to hear cases between parties who are citizens of U.S. states and citizens of foreign states as well as cases between a foreign state that is a plaintiff and citizens of U.S. states.[196] The standard for determining whether a foreign entity qualifies as a state depends slightly on whether the case involves a foreign state as a plaintiff or a citizen of a foreign state. Overall, courts seem to gravitate towards a recognition-based approach in both situations, but most cases have dealt with recognition of governments rather than states.

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a 'state,' within the meaning of United States and international law, courts have looked to Section 201 of the Restatement (3rd) of Foreign Relations Law of the United States . . . .").

190. *Ungar*, 402 F.3d at 284.

191. *See, e.g.*, Kirschenbaum v. 650 Fifth Ave. & Related Props., 830 F.3d 107, 123–24 (2d Cir. 2016), *abrogated on other grounds by* Rubin v. Islamic Republic of Iran, 138 S. Ct. 816 (2018) ("Our Court has long construed 'foreign state' as used in the FSIA to mean an entity bearing the 'attributes of statehood,' which include a defined territory and population, self-governance and foreign relations, and the capacity to wage war and to enter into international agreements."); Morgan Guar. Tr. Co. of N.Y. v. Republic of Palau, 924 F.2d 1237, 1243 (2d Cir. 1991) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936)). *Curtiss-Wright Export Corp.* presented the question of whether Congress had unlawfully delegated power to the executive branch. In resolving this issue, the Supreme Court looked to the "law of nations" for "powers of external sovereignty," including the authority to declare and wage war, to conclude peace, and to maintain diplomatic relations with other states. 299 U.S. at 318. The Second Circuit noted the overlap between the attributes listed in *Curtiss-Wright Export Corp.* and the Restatement criteria when adopting a Restatement standard to resolve statehood questions in the context of the FSIA. *Morgan Guar. Tr. Co. of N.Y.*, 924 F.2d at 1243 (citing *Curtiss-Wright Export Corp.*, 299 U.S. at 318–19; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201).

192. *See Ungar*, 402 F.3d at 283–84.

193. Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 318–19 (1978); Transportes Aereos de Angola v. Ronair, Inc., 544 F. Supp. 858, 862 (D. Del. 1982).

194. U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"); 28 U.S.C. § 1332(a)(2)–(4); *see also Pfizer*, 434 U.S. at 319 & n.19.

195. 28 U.S.C. § 1332(a).

196. *Id.* § 1332(a)(2), (4).

According to the Second Circuit, a person qualifies as a citizen of a foreign state for diversity jurisdiction purposes when the foreign entity has been recognized by the executive branch as a "free and independent sovereign."[197] The Second Circuit held that this standard is consistent with the Restatement's "accepted definition of a 'state' in international law,"[198] which requires an entity to "have a 'defined territory' and be 'under the control of its own government.'"[199] Under the Second Circuit's approach, however, the judiciary does not apply the Restatement criteria itself, instead deferring to the executive branch's recognition of an entity as a state.[200]

The Second Circuit's recognition-based standard considers both formal and implicit recognition of an entity as a state by the executive branch.[201] For example, the Second Circuit accepted implicit recognition when it allowed Indian citizens to sue in federal court, even though they were citizens of an entity that had not yet achieved official "de jure recognition."[202] It upheld their access to the federal courts because India had gained what the court termed "de facto recognition."[203] The Second Circuit reasoned that even though the executive branch did not officially recognize India as an independent state until later, it had, at the relevant time for analyzing diversity jurisdiction, implicitly recognized India as a state by recognizing the Interim Government of India after its formation through the exchange of ambassadors.[204]

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197. Matimak Trading Co. v. Khalily, 118 F.3d 76, 80 (2d Cir. 1997) (quoting Iran Handicraft & Carpet Exp. Ctr. v. Marjan Int'l Corp., 655 F. Supp. 1275, 1278 (S.D.N.Y. 1987)), *abrogated on other grounds by* JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88 (2002); *see also* Land Oberoesterreich v. Gude, 109 F.2d 635, 637 (2d Cir. 1940) ("The state must first achieve recognition by our government, but once recognized, the foreign sovereign, its subjects and its citizens, including its corporations, may be suitors in our courts." (citation omitted)).

198. *Matimak Trading Co.*, 118 F.3d at 80.

199. *Id.* (quoting Nat'l Petrochem. Co. of Iran v. M/T Stolt Sheaf, 860 F.2d 551, 553 (2d Cir. 1988), which quotes RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987)).

200. *See id.* The Second Circuit has noted that "international law purports to require recognition of 'states' that satisfy the elements of [the Restatement's] definition." *Nat'l Petrochem. Co. of Iran*, 860 F.2d at 553. However, at least one district court within the Second Circuit has used the Restatement standard to evaluate statehood. *See Iran Handicraft & Carpet Exp. Ctr.*, 655 F. Supp. at 1279 (applying the Restatement criteria to conclude that "it is beyond doubt that the United States continues to recognize Iran as an independent sovereign nation").

201. *Matimak Trading Co.*, 118 F.3d at 80 (considering "who is the sovereign, *de jure* or *de facto*, of a territory"). This Article uses the terms "formal" and "implicit" recognition, rather than "de facto" and "de jure" recognition because these latter terms have not been used consistently. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 202, reporters' note 1 (noting that "de facto" and "de jure" have been "used with varying and uncertain meaning" in the context of recognition).

202. Murarka v. Bachrack Bros., Inc., 215 F.2d 547, 552 (2d Cir. 1954) (holding the plaintiffs were citizens of a foreign state, India, for jurisdictional purposes even though India was not fully independent at that time).

203. *Id.* Similarly, one early diversity jurisdiction case concluded that Cuba was a "foreign state" and that its people were "free and independent" following the Spanish-American War and its liberation from Spain, even though U.S. forces still occupied Cuba. Betancourt v. Mutual Reserve Fund Life Ass'n, 101 F. 305, 305 (Cir. Ct. S.D.N.Y. 1900) (citation omitted).

204. *Murarka*, 215 F.2d at 552.

In the context of determining whether to allow a foreign state access to the federal courts as a plaintiff in a civil case, courts seem to focus exclusively on whether the executive branch has recognized the *government* of the foreign state, as opposed to recognition of the state. Recognition of a government necessarily means recognition of the state, but the converse does not hold.[205] Courts have noted that although international law "purports to require" the recognition of a state when it meets the Restatement criteria, each state has the discretion to recognize a government in control of a state.[206]

The Supreme Court has emphasized that there is an "established rule of complete judicial deference to the Executive Branch."[207] This rule exists to prevent interference by the judicial branch on the politically sensitive question of recognition of a government.[208] If the United States has recognized and is at peace with a government, then that government can generally access the federal courts under diversity jurisdiction.[209] One district court's rationale behind relying on executive branch determinations is that "[a]llowing an unrecognized government to bring such a suit would constitute an acknowledgment that that government could legitimately speak on behalf of the people of the territory in question, thereby encroaching on the executive's exclusive power to determine what entity constitutes the . . . government of a foreign nation."[210]

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205. *See supra* note 134 and accompanying text.

206. Nat'l Petrochem. Co. of Iran v. M/T Stolt Sheaf, 860 F.2d 551, 553 (2d Cir. 1988); *see also* Org. for Inv. Econ. and Tech. Assistance of Iran v. Shack & Kimball, P.C., No. 85-0437, 1988 WL 143323, at *1 (D.C. Cir. Dec. 28, 1988) ("International legal principles require the recognition of a state when it satisfies certain definitional requirements. Formal recognition of the government in power in a particular state is, however, within the discretion of each state." (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 201, 203 (1987))).

207. Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 320 (1978). The specific question presented in this case was whether a foreign sovereign could sue in the federal courts for treble damages under the antitrust laws. *Id.* at 319. However, the Supreme Court noted that this question "is . . . no more than a specific application of a long-settled general rule" allowing foreign states access to the federal courts. *Id.* at 318–19.

208. *See id.* at 319–20 ("[T]he result we reach does not require the Judiciary in any way to interfere in sensitive matters of foreign policy."); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 412 (1964); Transportes Aeros de Angola v. Ronair, Inc., 544 F. Supp. 858, 863 (D. Del. 1982).

209. *See* 28 U.S.C. § 1332(a)(4); *Pfizer, Inc.*, 434 U.S. at 319–20 ("It has long been established that only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue."); Land Oberoesterreich v. Gude, 109 F.2d 635, 637 (2d Cir. 1940) ("The state must first achieve recognition by our government, but once recognized, the foreign sovereign, its subjects and its citizens, including its corporations, may be suitors in our courts. A right of action belonging to one sovereign will pass to its successor, if the successor has come to power in a manner acceptable to what our own government considers the principles of international law." (citation omitted)). *See generally* Stanley Lubman, *The Unrecognized Government in American Courts:* Upright v. Mercury Business Machines, 62 COLUM. L. REV. 275 (1962) (analyzing the treatment of unrecognized governments in federal and state courts).

210. Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 340 (C.D. Cal. 1997); *see also Transportes Aereos de Angola*, 544 F. Supp. at 862 ("Any suit brought by a foreign government represents an effort to vindicate rights either of specific citizens or of its citizenry as a whole."); Federal Republic of Germany v. Elicofon, 358 F. Supp. 747, 752 (E.D.N.Y. 1972) ("A

In light of the explicit requirement of recognition and the perception of the need for deference to the executive branch, federal courts have adopted a recognition-based standard to evaluate whether a foreign government may access the federal courts as a plaintiff. The Supreme Court has not specified the contours of the standard. The Court has expressly declined to decide whether "a foreign state must be diplomatically recognized" by the executive branch to access the federal courts.[211] Despite the lack of a clear standard from the Supreme Court, courts may rely on guidance from the executive branch when making decisions concerning recognition and U.S. foreign policy interests for purposes of diversity jurisdiction.[212]

When deciding if a foreign state can access the federal courts as a plaintiff, courts generally have adopted a recognition-based approach, with most cases dealing with the recognition of governments. Courts have cited the Restatement's criteria for statehood to determine whether an individual is a citizen of a foreign state. However, courts appear to defer to the executive branch's application of the Restatement criteria. The reason for deference may be because denying and granting access to the federal courts are consequences that directly affect the foreign entity and its citizens, and thus U.S. relations with that entity.[213]

C. Act of State Doctrine

Another area of domestic law where the question of statehood arises is the act of state doctrine. Under this doctrine, courts in the United States will generally abstain from examining the validity of an action of a foreign state taken within its own territory.[214] The act of state doctrine is not a jurisdictional rule;[215] rather, courts created this doctrine of judicial restraint to allow the executive

government is in every sense of the word acting in international affairs when it seeks the aid of a foreign government in an attempt to vindicate the private rights of specific citizens or of its citizenry as a whole."), *aff'd sub nom.* Kunstsammlungen zu Weimar v. Elicofon, 478 F.2d 231 (2d Cir. 1973).

211. JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 92 (2002).

212. *See, e.g.*, Calderone v. Naviera Vacuba S/A, 325 F.2d 76, 77 (2d Cir. 1963) ("Considerations of both international relations and judicial administration lead us to conclude that the onus is on the Department of State, or some other department of the Executive Branch, to bring to the attention of the courts its decision that permitting nationalized Cuban corporations to sue is contrary to the national interest."), *modified*, 328 F.2d 578 (2d Cir. 1964).

213. *See supra* notes 208–210 and accompanying text.

214. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("[T]he Judicial Branch [subject to some limitations] will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . ."); Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1987). The doctrine of foreign sovereign immunity, on the other hand, concerns acts of foreign states in or related to the United States, the forum state. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443, reporters' note 11.

215. Ricaud v. Am. Metal Co., 246 U.S. 304, 309 (1918) ("[The act of state doctrine] does not deprive the courts of jurisdiction once acquired over a case.").

branch to resolve disputes with foreign states to avoid the perceived foreign relations consequences of courts doing so.[216] The act of state doctrine thus benefits foreign states by making certain actions undertaken by them unreviewable in U.S. courts. Akin to foreign sovereign immunity, the origins of the act of state doctrine reflect notions of comity between states in the international system.[217]

The Supreme Court has explained that the act of state doctrine applies to "recognized foreign sovereign power[s]."[218] Although the Supreme Court has not articulated how to determine whether an entity is a "recognized foreign sovereign power," case law implies a recognition-based standard. The Supreme Court noted in an early act of state doctrine case that the question of what entity is the sovereign of a territory is one not for the judiciary, but for the legislative and executive branches.[219] However, the cases before the Supreme Court have involved the recognition of governments, as opposed to states.[220] Supreme Court precedent thus signals deference to the executive branch and the use of a recognition-based standard when evaluating recognition of a government, similar to the diversity jurisdiction context.

In the context of analyzing statehood, on the other hand, some district courts have taken a divergent approach and have used the Restatement criteria. A district court in the Southern District of New York articulated a hybrid framework, incorporating aspects of both the recognition-based and Restatement standards by defining a foreign state as "an entity recognized by our Government, which has a defined territory and population under control of its government."[221] However, the court used only the Restatement criteria when concluding the foreign entity in question "possessed sufficient attributes of an

216. *See Sabbatino*, 376 U.S. at 427–28 ("[The act of state doctrine's] continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."); Oetjen v. Cent. Leather Co., 246 U.S. 297, 304 (1918) ("To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'"); *Underhill*, 168 U.S. at 252 ("Redress of grievances by reason of [acts by a foreign government within its own territory] must be obtained through the means open to be availed of by sovereign powers as between themselves.").

217. *See Oetjen*, 246 U.S. at 303–04 (noting that "the highest considerations of international comity and expediency" underlie the act of state doctrine); *Underhill*, 168 U.S. at 252 ("Every sovereign state is bound to respect the independence of every other sovereign state . . . ."); *supra* note 172 and accompanying text.

218. *Sabbatino*, 376 U.S. at 401.

219. *Oetjen*, 246 U.S. at 302. The Supreme Court has not considered the application of the act of state doctrine to unrecognized states since the mid-1960s. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 cmt. b ("No post-*Sabbatino* case has considered application of the doctrine to acts by an unrecognized state or government.").

220. *See Sabbatino*, 376 U.S. at 427–28; *Oetjen*, 246 U.S. at 302; *Underhill*, 168 U.S. at 252.

221. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892, 909–10 (S.D.N.Y. 1968) (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 (1964)), *aff'd*, 433 F.2d 686 (2d Cir. 1970).

independent sovereign" to qualify as a state.[222] The court never explicitly analyzed whether the executive branch recognized the foreign entity.[223] Similarly, another district court assessed some of the Restatement criteria when concluding that two sheikdoms qualified as states.[224] Although the court noted that Great Britain recognized the sheikdoms as independent sovereigns, it made no mention of recognition by the United States.[225]

The district courts' use of the Restatement for questions of statehood differs from the Supreme Court's language signaling use of the recognition-based standard and deference to the executive branch on recognition of governments. This distinction may be the result of a belief that recognition of a government may signal U.S. acceptance of a regime, whereas recognition of a state may not carry the same foreign policy consequences. Moreover, deference in the context of the act of state doctrine, which provides a direct benefit to states, is consistent with other areas of domestic law where the judiciary's decisions can have potential consequences on U.S. foreign relations.[226]

Federal courts have adopted both the recognition-based and Restatement standards in domestic law contexts. Courts have used the Restatement factors when deciding questions of statehood that have arisen in the context of the FSIA. Courts reason that Congress intended for them to apply international law standards to make statehood determinations in order to depoliticize questions of foreign sovereign immunity. In diversity jurisdiction and act of state doctrine cases, where decisions may directly impact foreign relations, courts tend to favor the recognition-based standard, affording deference to the executive branch, especially for recognition of governments. Understanding why courts have chosen the Restatement and recognition standards in other contexts provides a useful point of comparison when evaluating which standard is most effective in the context of the terrorism bar.

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222. *Id.* at 910. The issue before the court was whether the act of state doctrine applied to Wuerttemberg, a constituent state of West Germany. When assessing the Restatement factors, the court focused on the fact that Wuerttemberg had the power to engage in foreign relations with the consent of the West German government. *See id.*

223. *See id.* at 912. The district court did, however, observe U.S. recognition of West Germany. *See id.* (acknowledging that West Germany is "a friendly foreign power, diplomatically recognized by the United States").

224. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 113 (C.D. Cal. 1971) ("While the precise international status of these sheikdoms [of Sharjah and Umm al Qaywayn] is at present unique and difficult to characterize, their degree of international personality is obviously greater than that, say, of Wuerttemberg." (citation omitted)). The court discussed Great Britain's supervision of their foreign relations, but noted this arrangement was agreed upon by treaty. *Id.*

225. *See id.*

226. *See supra* notes 209–210 and accompanying text.

IV.
RESTATEMENT STANDARD FOR STATEHOOD FOR THE TERRORISM BAR

Part IV recommends that adjudicators adopt the Restatement standard in the context of the terrorism bar to evaluate the lawfulness of a noncitizen's conduct in furtherance of an independence movement. More specifically, adjudicators should use the Restatement standard to assess whether a new state had come into existence at the time of the noncitizen's actions when deciding which entity's laws to use to analyze lawfulness. This standard will best mitigate against the creation of "paper terrorists"—the erroneous labeling of noncitizens as terrorists.

There are several reasons why the Restatement standard is preferable to a recognition-based rule. First, a Restatement-based approach will lead to more accurate decisions than a recognition-based approach: the decisions will reflect whether conduct would actually be considered unlawful under the legal system in the place where it was committed. The Restatement standard will permit adjudicators to consider the realities of governance over a particular territory to determine statehood, rather than having to rely on a decision by the executive branch that can be driven by geopolitical considerations. Second, the possible benefits of a recognition-based standard are not substantial enough to outweigh the clear and significant accuracy benefits that the Restatement standard provides. In particular, the commonly understood advantages of a recognition-based approach—namely, increased adjudicative consistency, not detracting from executive competency in decisions around statehood, and minimizing interference in foreign policy—are overblown in the terrorism bar context.

Initially, by allowing factfinders to take into account the realities of governance in the place of the noncitizen's conduct at the time it was undertaken, the fact-based Restatement standard will lead to more accurate applications of the terrorism bar to noncitizens who have supported independence movements. Accuracy is paramount because the consequences of the terrorism bar are severe. An erroneous decision could send an asylum seeker back to a place where they may be physically harmed or killed.

The Restatement standard requires adjudicators to determine which entity maintains control over a territory at a given time, regardless of whether the United States has accorded recognition at that time. Even though a formal recognition-based standard may track U.S. foreign policy, it focuses on the highly politicized act of recognition and may not reflect the reality of which entity's laws are applied on the ground.[227]

227. The constitutive theory of recognition, *see supra* notes 128–131 and accompanying text, has been similarly criticized. "Such a view may serve the purpose of Machiavellian statesmen who put national interests above all others. It provides them with a justification for ignoring the existence of other entities and denying them rights under international law." TI-CHIANG CHEN, THE INTERNATIONAL LAW OF RECOGNITION 3 (L.C. Green & J.L. Brierly eds., 1951); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. a (1987) ("[I]ssues of statehood have

The following hypothetical illustrates how the recognition-based approach can diverge from the realities of which entity governs a territory. Territory B is attempting to secede from State A, resulting in a civil war. At some point during the hostilities, Territory B satisfies the Restatement criteria for statehood, including the third requirement that the territory and population be under the control of the entity's government.[228] After this point, a noncitizen who later seeks asylum in the United States, joins the armed forces of Territory B. The United States declines to recognize Territory B as a state because it has close ties with State A. If a court adopts a recognition-based standard to evaluate whether the noncitizen's actions constitute terrorist activity, then the noncitizen would be barred from asylum under the terrorism bar. Under a recognition-based standard, the United States' refusal to recognize Territory B as a state necessarily means that it views State A as controlling the relevant territory, and the noncitizen's actions likely would be unlawful under State A's laws as treason. However, Territory B governs the relevant territory and would not consider the noncitizen's actions to be unlawful. The Restatement standard takes into account the realities of governance over the territory, unlike the recognition-based standard.

One example of the United States' delayed recognition of a state is Eritrea. The United States recognized Eritrean independence from Ethiopia on April 27, 1993, the same date that Eritrean authorities officially declared independence following a referendum on independence.[229] However, Eritrean authorities expelled Ethiopian forces and established the Provisional Government of Eritrea in May 1991.[230] Even the Department of State recognized that Eritrean authorities "ha[ve] actually been in de facto control of the country since May 24, 1991."[231] As early as 1990, Eritrean authorities were operating a functioning government that provided essential services and engaged in relations with other states.[232] Under the Restatement criteria, Eritrea could have qualified as an independent state from as early as 1990.

Another real world example is the United States' refusal after the Korean War to recognize the state of North Korea due to its Communist government,

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been resolved by the practice of states reflecting political expediency as much as logical consistency."); GRANT, *supra* note 129, at 2–3 ("[F]reed from law, recognition, under the constitutive conception, becomes a tool of statecraft.").

228. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. d.

229. *Background Note: Eritrea*, U.S. DEP'T OF STATE, (Jan. 2009), https://2001-2009.state.gov/r/pa/ei/bgn/2854.htm [https://perma.cc/6Q44-5A5K].

230. *Id.*

231. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993, at 87 (1994).

232. *See* Matter of [Redacted], A [Redacted], at 3, 5 ([Redacted] Immigration Ct. 2017) (summarizing expert testimony on the Eritrean authorities' governance of Eritrea since 1990) (on file with the author).

even though it controlled half of the Korean peninsula.[233] A rigid rule based on formal recognition would not have considered North Korea a sovereign state and adjudicators would not have been able to use North Korean law to evaluate the legality of a noncitizen's conduct there. While the United States now recognizes North Korea as an independent state,[234] in a different geographical context, a formal recognition-based standard could lead to absurd outcomes. It could treat lands as a legal void or as governed by another state that in actuality maintains no control, ignoring the reality that another entity has imposed a functioning system of laws over the lands.

Even a more flexible standard that considers implicit as well as formal recognition does not avoid politicization problems. Recognition by the executive branch may come later than the date an entity begins to demonstrate effective control over its territory, population, and international relations. For example, recognition may be delayed as the U.S. government tries to extract concessions from the entity in exchange for recognition.[235] In the foreign sovereign immunity context, Congress explicitly wanted to depoliticize immunity decisions and thus conferred decision-making in this context upon the judiciary. Although the primary decision-makers in the terrorism bar are executive branch employees, their decisions will be still be more insulated from political influences since these employees focus on individual immigration cases rather than broader foreign policy issues.[236]

Immigration law has generally favored an approach that comports with the realities of governance over territories. For example, case law has acknowledged that asylum seekers come from North Korea, with which the U.S. government does not maintain diplomatic relations, and Palestine, which the U.S. government does not recognize as an independent state.[237] Immigration adjudicators have demonstrated a willingness to treat these entities as states for the narrow purpose of determining the nationality of asylum seekers.

233. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 202, reporters' note 3.

234. *See Independent States in the World*, *supra* note 132.

235. *See supra* note 227 (criticizing the constitutive doctrine as putting political motivations foremost); GALLOWAY, *supra* note 133, at 1 ("[T]he United States has used recognition [of governments] as a political tool to support antimonarchical governments . . . , to advance economic imperialism . . . , to promote constitutional government . . . , and to halt the spread of communism . . . ."); *id.* at 38–39 n.79 (providing an example of the United States withholding recognition from an entity (Albania) until it satisfied certain conditions).

236. *See infra* note 248 and accompanying text.

237. *See, e.g.*, Jang v. Lynch, 812 F.3d 1187 (9th Cir. 2015) (adjudicating the asylum claim of a North Korean citizen); Jabr v. Holder, 711 F.3d 835, 837, 839–40 (7th Cir. 2013) (adjudicating the asylum claim of a Palestinian individual who was a native of the West Bank); *see also Independent States in the World*, *supra* note 132 (listing North Korea as an "independent state" with which the United States does not maintain diplomatic relations, and omitting Palestine); *cf.* 22 U.S.C. § 7842(a) (clarifying that "North Koreans are not barred from eligibility for refugee status or asylum . . . on account of any legal right to citizenship they may enjoy under the Constitution of the Republic of Korea").

Immigration adjudicators have not afforded absolute deference to the executive branch's foreign policy decisions on recognition in this context.

Additionally, when analyzing the legality of certain practices in the context of family-based immigration petitions, adjudicators are required under the Department of State Foreign Affairs Manual to consider the laws in place in a given location, without regard to U.S. recognition of the entity. For example, when evaluating the lawfulness of a foreign adoption, the Foreign Affairs Manual directs adjudicators to assess whether it was "final and legal in the jurisdiction where it occurred."[238] When analyzing the validity of a marriage, adjudicators must determine whether it was "properly and legally performed in the place of celebration."[239] When assessing legality, the Foreign Affairs Manual does not require adjudicators to consider whether the United States has recognized a state, but rather requires them to focus on the laws actually in place in that territory.[240] Directing adjudicators to use the Restatement standard in the context of the terrorism bar would be consistent with this general approach in immigration law and would ensure that adjudicators consistently feel empowered to make accurate, context-based determinations free from the politicization problems that come with a recognition-based approach.

Furthermore, the arguments in favor of a recognition-based standard are not convincing in the context of the terrorism bar. First, the notion that a recognition-based standard provides adjudicative consistency may be overstated. Second, potential concerns around the competency of immigration adjudicators to decide questions of statehood are misplaced because most decisions regarding the terrorism bar are made by the executive branch, which is very familiar with making sensitive and complex multi-element fact-based findings. Finally, immigration decisions are purely internal decisions that do not directly impact external U.S. foreign relations, and so adjudicators should not be forced to use a less accurate standard out of fear of interfering with foreign policy.

First, although deference to the executive branch under a recognition-based standard may provide more adjudicative consistency, accuracy in decision-making is a more important value given the potentially life-threatening ramifications of the terrorism bar. Initially, consistency may be less important in terrorism bar decisions as opposed to those in other arenas of domestic law because the former have mostly internal consequences. Other areas of domestic law, such as diversity jurisdiction and the act of state doctrine, where courts tend to defer to the executive branch on determinations concerning recognition of governments, have mostly external consequences. In this context, "external consequences" refers to effects on foreign entities, including other states, in the international system, whereas "internal consequences" refers to effects on

238. 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 502.3-2(B)(b)(1) (2018).
239. *Id.* § 102.8-1(B)(a).
240. *See id.*

private individuals.[241] For example, courts differentiate between internal and external consequences, and have given effect to the actions of unrecognized entities "dealing solely with private, local and domestic matters" while refusing to credit acts "with respect to matters extending beyond [their] borders."[242]

Where there are external consequences affecting relations between states, it becomes more important for the executive branch and adjudicators to speak with one voice. In cases that have internal consequences on the other hand, "courts are entitled to look at the state of affairs actually existing in a territory, to see what is the law which is in fact effective and enforced in that territory, and to give such effect to it—in its impact on individuals—as justice and common sense require."[243] Because the consequences of the terrorism bar are internal—they affect the ability of a noncitizen, in other words a private person, to enter or remain in the United States—deference to the executive branch via a recognition-based standard should not be required, especially when a Restatement standard has the value of increased accuracy.[244]

Moreover, a standard that allows for implicit recognition may not impart as much consistency as a standard that uses only formal recognition. A formal recognition-based standard, although flawed for the reasons discussed earlier, would result in consistent outcomes for similarly-situated asylum seekers.[245] Implicit recognition, on the other hand, would still require adjudicators to evaluate the executive branch's actions on a case-by-case basis.[246] Therefore, the benefits in terms of consistency of a recognition-based standard may be exaggerated.

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241. CRAWFORD, *supra* note 5, at 18 ("The executive is concerned with the *external* consequences of recognition, vis-à-vis other states. The courts are concerned with the *internal* consequences of it, vis-à-vis private individuals." (quoting Hesperides Hotels v. Aegean Turkish Holidays [1977] AC 205 [217])).

242. *See* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892, 900 (S.D.N.Y. 1968); *see also* Federal Republic of Germany v. Elicofon, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd sub nom.* Kunstsammlungen zu Weimar v. Elicofon, 478 F.2d 231 (2d Cir. 1973); Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. 16, ¶ 125 (June 21) (advising that the "invalidity" in respect of Namibia of official acts by the Government of South Africa "cannot be extended to those acts such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory").

243. CRAWFORD, *supra* note 5, at 18 (quoting *Hesperides Hotels*, [1977] A.C. [217]). *Hesperides Hotels* includes the caveat that courts may consider the "state of affairs actually existing in a territory . . . provided always that there are no considerations of public policy against it," without explaining what such considerations could be. [1977] A.C. [217].

244. *See In re* S-P-, 21 I. & N. Dec. 486, 492 (B.I.A. 1996) ("It is . . . important to remember that a grant of political asylum is a benefit to an individual under asylum law, not a judgment against the country in question."); G.A. Res. 2312 (XXII), pmbl., Declaration on Territorial Asylum (Dec. 14, 1967) ("[T]he grant of asylum by a State is a peaceful and humanitarian act and . . . as such, it cannot be regarded as unfriendly by any other state.").

245. *See supra* notes 227–235 and accompanying text (discussing the flaws of a standard based on formal recognition by the executive branch).

246. *See supra* notes 138–141 and accompanying text (outlining the different ways courts have evaluated implicit recognition).

Second, at a most basic level, the choice between a recognition-based standard and the Restatement standard seems to be one between the executive branch and the judicial branch deciding questions of statehood. In the area of foreign relations or issues that are directly adjacent to foreign relations, the common sensibility may be that the executive branch is more competent than the judiciary to make such decisions.[247] However, the inquiry is more nuanced in the context of immigration law.

Unlike most other domestic law contexts that involve questions of statehood—including foreign sovereign immunity, access to the federal courts, and the act of state doctrine—immigration decisions, including the application of the terrorism bar, are mostly made by the executive branch. The Departments of Homeland Security and Justice decide most immigration cases, with the federal courts of appeals stepping in only in the later stages of appeal.[248] Therefore, in the context of the application of the terrorism bar during independence movements, executive branch employees would be applying the Restatement criteria in the vast majority of cases. Accordingly, any potential concerns that arise in other domestic law contexts that the judiciary is encroaching into the province of the executive branch by assessing statehood is minimized since executive branch employees are the primary decision-makers in most immigration cases.

Moreover, immigration adjudicators are competent to undertake the factual inquiry that is required under the Restatement standard. Such fact-intensive inquiries are common in asylum law, with adjudicators routinely considering questions such as whether a government is willing or able to protect an asylum seeker from a private actor and whether a group constitutes a particular social group within a country.[249]

Finally, concerns around the impact the Restatement standard may have on the executive branch's ability to conduct foreign policy are misplaced. Initially, even if adjudicators decide questions of statehood under the Restatement for the

247. *See, e.g.*, Matimak Trading Co. v. Khalily, 118 F.3d 76, 79 (2d Cir. 1997) ("[I]t is outside the competence of the judiciary to pass judgment upon executive branch decisions regarding recognition." (citation omitted)), *abrogated by* JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88 (2002).

248. *See, e.g.*, *supra* notes 66–79 and accompanying text (describing the adjudication processes of asylum, withholding of removal, and Convention Against Torture cases). Additionally, the Department of State, also within the executive branch, adjudicates visa petitions for overseas applicants who seek to enter the United States as nonimmigrants and immigrants.

249. *See* Matter of M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014) (requiring asylum applicants to "establish that the [particular social] group is (1) composed of members who share a common, immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question"); Matter of W-G-R-, 26 I. & N. Dec. 208, 214–15, 217 (B.I.A. 2014) (discussing the varying social and cultural considerations that an asylum applicant must present to satisfy the elements of particular social group), *vacated on other grounds sub nom.* Reyes v. Lynch, 842 F.3d 1125 (9th Cir. 2016); Matter of Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (requiring an asylum seeker to prove that the government was unable or unwilling to control the persecutor where the persecutor is a private actor), *overruled on other grounds by* Matter of Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

terrorism bar, the executive branch still retains full ability to recognize foreign entities as states as a matter of foreign policy.[250]

The potential foreign policy consequences of terrorism bar decisions are no different than those of other asylum and refugee decisions. A grant of asylum or refugee status at a most basic level involves determinations by immigration adjudicators that a foreign government has harmed its citizens or cannot or will not protect its citizens. Therefore, adjudicators regularly must answer sensitive questions related to a foreign government's conduct.[251] Decisions regarding the terrorism bar, which require a determination of which foreign entity's laws govern a particular territory, have no greater potential for foreign policy consequences than other routine immigration decisions adjudicators are already making.

Moreover, issues of statehood arising in the context of the terrorism bar are ancillary to the ultimate question—whether a noncitizen's actions subject them to the terrorism bar—and are thus unlikely to have an impact on foreign policy. The secondary issue of statehood helps an adjudicator determine which entity's laws governed a noncitizen's actions when they were undertaken. An adjudicator's decision on which entity's laws to use to determine the legality of conduct does not signal an official policy position on behalf of the United States because it does not directly impact a foreign entity. Rather, it primarily affects the private party who is seeking immigration benefits or relief.

In contrast, decisions on foreign sovereign immunity, diversity jurisdiction, or the act of state doctrine could have external consequences because they affect not only private persons, but foreign entities as well since courts are either granting or denying rights based on statehood. Indeed, in many of these cases, the foreign entity itself, or one of its agencies or instrumentalities, is a litigant.[252] The grant or denial of these rights afforded to states could be viewed as a political statement and could thus affect diplomatic relations with a foreign entity. The foreign policy consequences of these decisions are not hypothetical. For example, Congress created diversity jurisdiction to allow foreign states access to the federal courts to mitigate against negative foreign policy consequences—namely interference with foreign relations and weakening of foreign investment—when state courts refused to honor treaty obligations.[253] Given the

250. *See* Ungar v. Palestine Liberation Org., 402 F.3d 274, 281 (1st Cir. 2005) ("Here, the political branches have enacted a law that leaves undiminished their ability either to recognize or withhold recognition from foreign states, while leaving to the courts the responsibility of determining the existence vel non of statehood for jurisdictional purposes.").

251. *See In re* S-K-, 23 I. & N. Dec. 936, 940 (B.I.A. 2006) ("[T]here may have been cases in which [the Board] determined that certain acts by foreign governments were unlawful in terms of harming individuals who sought asylum [in the United States] . . . ."); *Matter of Acosta*, 19 I. & N. Dec. at 222 (requiring an asylum seeker to prove that the government was unable or unwilling to control the persecutor where the persecutor is a private actor).

252. *See* 28 U.S.C. §§ 1332(a)(4), 1603(a) (2018); *see also supra* Parts III.B–C.

253. *See* JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 94–95 (2002) (describing the history leading up to the creation of diversity jurisdiction). *See generally* Wythe

potential for direct foreign policy consequences, the judiciary generally has deferred to whether the executive branch recognizes an entity for diversity jurisdiction and the act of state doctrine.[254]

Similar to foreign sovereign immunity, it is important to minimize politicization when applying the terrorism bar to increase the accuracy of decisions. Courts previously deferred completely to the executive branch on foreign sovereign immunity.[255] But the FSIA sought to depoliticize foreign sovereign immunity decisions by turning over authority to the courts to ensure that immunity decisions were driven by international law standards rather than politics.[256] Accordingly, some courts have assessed statehood themselves using the Restatement criteria.[257] Similarly, use of the Restatement standard will allow adjudicators to address the facts of each case, rather than having to rely on politicized recognition decisions that may ignore the actual situation on the ground.[258]

This increased accuracy makes the Restatement standard the preferable method to evaluate statehood during independence movements when applying the terrorism bar. The Restatement standard will mitigate against erroneous applications of the terrorism bar and the resulting creation of "paper terrorists." It will allow adjudicators to consider the realities of governance in a territory to determine if a new state had come into being when the noncitizen engaged in conduct supporting an independence movement, while at the same time reducing politicization of these decisions.

CONCLUSION

The terrorism bar in immigration law is expansive, both in terms of the immigration benefits and relief it affects as well as the broad range of conduct it

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Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421 (1989) (providing a political history of the U.S. federal courts, including the creation of diversity jurisdiction).

254. *See supra* notes 207–210, 216–219 and accompanying text (discussing deference to the executive branch on questions of statehood in the diversity jurisdiction and act of state doctrine contexts).

255. *See supra* note 172 and accompanying text (describing the early approach to foreign sovereign immunity).

256. *See* Ungar v. Palestine Liberation Org., 402 F.3d 274, 283 (1st Cir. 2005) (recounting the legislative history of the FSIA that explains that "the objective of the bill was to codify sovereign immunity doctrine as recognized by international law and to ensure that this international standard would be applied in federal litigation"); *supra* notes 175–77 and accompanying text.

257. *See supra* notes 189–191 and accompanying text (analyzing cases that have adopted the Restatement standard in the context of foreign sovereign immunity). Given the external consequences, however, the executive branch retains the ability to voice its positions on foreign sovereign immunity questions through "statements of interest" the Department of State can file with the courts. *See* Republic of Austria v. Altmann, 541 U.S. 677, 701 (2004) (explaining that the State Department has the authority to file "statements of interest" in foreign sovereign immunity cases).

258. *See supra* notes 227, 233–235 and accompanying text (discussing the politicization of recognition decisions).

encompasses. In light of its breadth and wide-ranging ramifications, it is especially important to apply the bar accurately to complex cases on the margins. Immigration laws are already being manipulated to deny asylum to noncitizens who would have otherwise qualified for it.[259] Not having a clear standard for the terrorism bar allows hostile adjudicators to continue to do so. In the context of independence movements, inaccurate application of the bar can create "paper terrorists" by erroneously labeling noncitizens' activities during independence movements in support of a new state as terrorist activity.

To address the challenge of determining which state governs a particular territory during independence movements, this Article proposes a standard based on the Restatement that adjudicators can use to determine statehood. Use of the Restatement criteria will require adjudicators to focus on the situation in the territory in question to determine whether a new state has emerged and will thus lead to more accurate applications of the terrorism bar.

This Article's proposal does not ask the courts and immigration officials to read an *exception* into the INA when applying the bar to noncitizens who supported an independence movement. [260] Instead, it asks that they give full meaning to the lawfulness inquiry mandated by the statute. It is incumbent on immigration adjudicators to develop a standard because it is not likely that Congress will quickly provide further elucidation given the political sensitivity surrounding discussions touching on terrorism.[261] And action by Congress is not needed—the current statutory language allows adjudicators to assess questions of statehood when deciding the lawfulness of enumerated conduct.

It is of the utmost importance to accurately apply the terrorism bar to noncitizens, especially asylum seekers. Accurate application will help ensure that the United States is adequately protecting noncitizens fleeing persecution and torture consistent with our domestic laws and treaty obligations.[262] The consequences of reaching an erroneous decision are grave—a bona fide asylum

259. *See, e.g.*, *Trump Administration Attempts to Eliminate Asylum Based on Family Group in Latest Attack*, CTR. FOR GENDER & REFUGEE STUDIES (July 30, 2019), https://cgrs.uchastings.edu/news/trump-administration-attempts-eliminate-asylum-based-family-group-latest-attack [https://perma.cc/9KVQ-F78Q] (discussing the Attorney General's recent precedential decisions disregarding or overruling precedent in order to limit the availability of asylum).

260. *See* Annachamy v. Holder, 733 F.3d 254, 256 (9th Cir. 2013), *overruled on other grounds by* Abdisalan v. Holder, 774 F.3d 517 (9th Cir. 2014) (declining to read an exception into the terrorism bar for noncitizens who provided material support for "legitimate political violence"); *see also* Hussain v. Mukasey, 518 F.3d 534, 538 (7th Cir. 2008) ("The [terrorism bar] statute may go too far, but that is not the business of the courts."); *see supra* note 81 and accompanying text (summarizing case law disallowing adjudicators to consider the totality of the circumstances and other background context when applying the terrorism bar).

261. *See, e.g.*, 152 CONG. REC. S4923, 4942 (daily ed. May 23, 2006) (statement of Sen. Jon Kyl) (arguing against an amendment to the terrorism bar because the amendment "literally would allow us to take somebody from the Taliban into the United States").

262. *See* United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.).

seeker could be labeled a "paper terrorist," turned away from the United States, and returned to their home country to face persecution, torture, and death for engaging in lawful conduct.