THE LEADERSHIP LIMITATION ON PERSECUTORS AND TERRORIST ORGANIZATIONS

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The asylum system in the United States is a melting pot of political discourse, international relations, and novel questions of law. Among other legal requirements, an asylee bears the burden of showing (1) they were persecuted or have a well-founded fear of future persecution and (2) that the persecution was committed by the government or that the government is unwilling or unable to protect the victim. One of these questions of law, that has led to a disagreement in federal appellate courts, is whether the second prong above is satisfied when party members of the controlling government party, rather than party officials, are the persecutors.

The political infrastructure of India is substantially different to that of the United States. Unlike the part-time city council members in various rural areas here, local authorities such as village leaders and political representatives have significant power and influence over the local populace in India. Like the United States, however, politics can be very polarizing and potentially violent. Often, asylees from India claim persecution on behalf of their political opinion, an assertion that is substantiated by decades of empirical evidence.

This Article discusses the evolution of asylum law as applied to Sikh refugees and proposes a resolution to an existing circuit split on a core issue. Part I summarizes the law of establishing eligibility for asylum and the relevant

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counter arguments. Part II discusses the jurisprudence of the "leadership limitation," a principal of law derived from three circuits' caselaw about terrorist organizations. Part III analyzes the disagreement between the Second and Ninth Circuits and the respective cases. Part IV proposes a resolution by applying the principal of law from Part II to the circuit split in Part III.

INTRODUCTION

India is home to breathtaking advancements in mathematics, science, and engineering. From the concept of zero and the decimal,[1] to the catapult,[2] to the first synthetic gene,[3] India is a treasure trove of development. Beneath these accomplishments is a society with centuries of divisive religious polarization, specifically between Hindus and Sikhs. Since England colonized India in the mid-1850's, these tensions grew and led to the Anti-Sikh Riot, also called the Sikh Massacre, in 1984. The government reported around 3,000 Sikh deaths,[4] but independent sources estimate between 8,000 and 17,000 Indian Sikhs were killed.[5] Afterward, the Khalistan Movement – a Sikh-led movement to create a sovereign state – was born. This "Sikh versus Government" feud has persisted into the 21st century and in 2021, the Indian government served a Mutual Legal Assistance Request to the United States to investigate a U.S.-based secessionist group called Sikhs for Justice, to extradite pro-Khalistan Sikhs.[6]

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1 Jessie Szalay, *Who Invented Zero?,* LIVESCIENCE (Sept. 18, 2017), https://www.livescience.com/27853-who-invented-zero.html [https://perma.cc/3Z4T-PBVK] (last visited Feb. 13, 2023).

2 UPINDER SINGH, A HISTORY OF ANCIENT AND EARLY MEDIEVAL INDIA: FROM THE STONE AGE TO THE 12TH CENTURY (2008).

3 Jennifer Calfas, *Google Celebrates Nobel-Prize Winning Biochemist Har Gobind Khorana*, TIME MAGAZINE (Jan. 9, 2018, 5:27 PM), https://time.com/5094695/google-doodle-har-gobind-khorana/ [https://perma.cc/3BS4-64VM] (last visited Feb. 13, 2023).

4 Deepshikha Ghosh, *Why Gujarat 2002 Finds Mention In 1984 Riots Court Order On Sajjan Kumar*, NEW DELHI TELEVISION, (Dec. 17, 2018, 3:04 PM), https://www.ndtv.com/india-news/why-gujarat-2002-finds-mention-in-1984-riots-court-order-on-sajjan-kumar-1963730 [https://perma.cc/JRY3-YGBG] (last visited Jan. 13, 2023).

5 *See* 1 PAUL JOSEPH, THE SAGE ENCYCLOPEDIA OF WAR: SOCIAL SCIENCE PERSPECTIVES, SAGE 433 (2016) ("around 17,000 Sikhs were burned alive or killed"); Akhilesh Pillalamarri, *India's Anti-Sikh Riots, 30 Years On*, THE DIPLOMAT (Oct. 31, 2014), https://thediplomat.com/2014/10/indias-anti-sikh-riots-30-years-on/ [https://perma.cc/A2AJ-JDLM] ("Between October 31 and November 3, 1984, over 8,000 Sikhs were murdered in riots organized and supported by numerous members of India's then-ruling Congress Party after Prime Minister Indira Gandhi's Sikh bodyguards assassinated her.").

6 Ananya Varma, *India Approaches US, Seeks Assistance In Investigating*

In the 2021 decision *Singh v. Garland*, the Second Circuit rejected the Ninth Circuit's determination of an issue prevalent in Sikh asylum cases: whether persecution committed by local authorities or members of the ruling political party constituted a government nexus sufficient to satisfy the legal standard for asylum.[7]

Many Sikhs fear for their well-being in India and have sought refuge in a country founded by defectors seeking religious freedom: The United States of America. For many years, Sikhs were granted asylee status, with only twenty-two percent of applicants from India being denied in fiscal year 2022.[8] Depending on other circuits' adoption of either the Second or Ninth circuit's interpretation of the issue, this number has great potential to change. This Article isolates a principle of law derived from jurisprudence about terrorist organizations and applies it to the disputed issue described above. This Article ultimately concludes that the Second Circuit properly decided *Singh*.

I
LEGAL FRAMEWORK

A. Establishing Eligibility for Asylum

To establish eligibility for asylum in the United States, a Sikh applicant must demonstrate that he or she is a refugee within the meaning of the Immigration and Nationality Act ("INA") in that he or she suffered past persecution or has a

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Khalistani Outfit Sikhs For Justice, REPUBLIC WORLD (Feb. 4, 2021), https://www.republicworld.com/india-news/general-news/india-approaches-us-seeks-assistance-in-investigating-khalistani-outfit-sikhs-for-justice.html [https://perma.cc/99CL-89P5] (last visited Jan. 13, 2023). The anti-Khalistan movement is not quiet about its determination to combat "Khalistan Extremism." It established the Khalistan Extremism Monitor (KEM), which exists as "a non-partisan" database for research on the separatist movement by Sikh's in Punjab. *See generally* Khalistan Extremism Monitor, INSTITUTE FOR CONFLICT MANAGEMENT, https://www.khalistanextremismmonitor.org/about-us [https://perma.cc/N5A7-6K8T] (last visited Feb. 13, 2023).

7 Singh v. Garland, 11 F.4th 106, 111 (2d Cir. 2021) (using the 2018 Library of Congress Report to demonstrate Sikhs, like Singh, could relocate internally within India to avoid persecution). *See id.; see also* Tariq Ahmad, *India: Feasibility of Relocation of Sikhs and Members of the Shiromani Akali Dal (Mann) Party*, THE LIBR. CONG., [https://perma.cc/DVH6-M5QY] (last visited Feb. 14, 2023) [hereinafter "Library of Congress Report"].

8 EXEC. OFF. FOR IMMIGR. REV., *Adjudication Statistics – Asylum Decision Rates by Nationality Fiscal Year 2022* (Oct. 13, 2022), [https://perma.cc/KJ5Q-EKFA] (last visited Feb. 16, 2023). Note that 46% of asylum applications were granted, 22% were denied, and 32% were listed as "other" implying abandonment, a grant of withholding of removal, no adjudication, or a withdrawal. *Id.*

well-founded fear of future persecution on account of a protected ground (e.g., race, religion, national origin, political opinion, or membership in a particular social group), and that the government was the agent of the persecution or was unable or unwilling to control the persecutor(s).[9] The potential asylee must also demonstrate that the protected ground was or will be "one central reason" for the persecution.[10] Paramount to an asylee's application for removal relief is their creditability. Under the REAL ID Act,[11] an immigration judge may base an adverse credibility determination on any inconsistencies, inaccuracies, or falsehoods even if the inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.[12] Assuming the applicant is credible, they must still establish persecution and a nexus to the government.

The level of harm for persecution is subjective and must be determined by the immigration judge, but substantial case law can give us a good idea. Persecution implies harm or threats of harm that jeopardize the victim's life, liberty, freedom, or autonomy.[13] An act does not constitute persecution simply because our society considers the act unfair, unjust, unlawful, or even unconstitutional.[14] Nor does an act constitute persecution just because it annoys, distresses, or harasses someone.[15] Moreover, any harm or fear of future harm stemming from the general crime conditions of the respondent's country is not enough to constitute persecution.[16]

Often, asylum applicants rely on government reports concerning human rights abroad in corroborating their testimony. This is by design, as the text of the INA and precedential decisions of the BIA basically instruct applicants

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9 8 C.F.R. § 1208.13(a).

10 *See* Matter of L-E-A-, 27 I&N Dec. 40, 43-44 (B.I.A. 2017).

11 *See* Pub. L. No. 109–13, 119 Stat. 231, 302 (2005).

12 Xiu Xia Lin v. Mukasey, 534 F.3d 162, 163, 165 (2d Cir. 2008) (citing 8 U.S.C. § 1158(b)(1)(B)(iii)) (emphasis added).

13 For examples of qualifying harm, *see* Matter of Acosta, 19 I&N Dec. 211, 222 (B.I.A. 1985) (physical harm such as confinement or torture); Matter of T-Z-, 24 I&N Dec. 163 (B.I.A. 2007) (nonphysical forms of harm such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life).

14 Matter of V-T-S-, 21 I&N Dec. 792, 798 (B.I.A. 1997) (citing Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993)).

15 Ivanishvili v. U.S. Dep't of Just., 433 F.3d 332, 342 (2d Cir. 2006); *see also* Hoxha v. Ashcroft, 319 F.3d 1179, 1182 (9th Cir. 2003) (finding that harassment, threats, and one physical beating did not constitute persecution).

16 *See* Matter of Acosta, 19 I&N Dec. 211, 233 (B.I.A. 1985).

to do so.[17] The U.S. State Department publishes these reports annually and often serve as the backbone for asylum claims. Consequently, it can often serve as the source for the Department of Homeland Security's counterargument. Religious persecution is so pervasive abroad that the State Department authors a separate report for international religious freedom, referenced in the country conditions reports.[18] In the most recent edition, the State Department acknowledges how Sikhs and other non-Hindus are still subjected by the government to Hindu-based laws.[19] Often proffered as evidence alongside State Department reports are human rights reports by U.S. Commission on International Religious Freedom (USCIRF). In a recent edition of USCIRF's report, it documents that Sikhs represent merely 1.7% of the Indian population, towered by the Hindu majority at 79.8%.[20] The report chronicles the strife of Sikh Indians including political marginalization, targeted attacks, and limited access to housing, education, and employment.[21]

But these reports do not establish that any one Sikh was persecuted on account of their religion. That must still be established either through credible testimony or corroborative evidence.[22] The reports do, though, serve as a foundation for an asylum claim by showing that persecution of Sikhs by the controlling Hindu government is *possible.* For these reasons, it is reasonable that a Sikh could be persecuted on account of his or her faith or political opinion since Sikhs are often

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17 *See* INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (listing consistency with "the reports of the Department of State on country conditions" as a factor an immigration judge may consider in making an adverse credibility determination); Matter of H-L-H- & Z-Y-Z-, 25 I&N Dec. 209, 213 (B.I.A. 2010) (holding that "State Department reports on country conditions . . . are highly probative evidence and are usually the best source of information on conditions in foreign nations.").

18 U.S. DEP'T OF STATE, 2021 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM (2022), [https://perma.cc/YR89-YAL9] (last visited Feb. 14, 2023).

19 *Id.* at 7 ("The constitution states that any legal reference to Hindus is to be construed to include followers of Sikhism, Jainism, and Buddhism, meaning they are subject to laws regarding Hindus, such as the Hindu Marriage Act. Subsequent legislation continues to use the word Hindu as a category that includes Sikhs, Buddhists, Baha'is, and Jains, but it identifies the groups as separate religions whose followers are included under the legislation.").

20 2019 U.S. COMMISSION ON INT'L REL. FREEDOM, ANN. REP. at 2, [https://perma.cc/3AYF-TN6U] (last visited Feb. 12, 2023).

21 *Id.*

22 *See* Matter of E-P-, 21 I&N Dec. 860, 862 (B.I.A. 1997) (holding that even if found credible, an immigration judge may require an asylum applicant whose claim relies primarily on personal experiences to provide reasonably available corroborative evidence).

connoted with the pro-Khalistan secessionist party.

B. Counterarguments

Sometimes, even if a noncitizen establishes statutory eligibility for asylum, the Department of Homeland Security can prevail in arguing that removal relief be denied. This argument comes in many forms; the relevant here are internal relocation and the terrorism bar.

1. *Internal Relocation*

Internal relocation is an available argument to counter any asylum claim, regardless of the noncitizen's national origin. That said, an in-depth discussion about the argument as it applies to Sikh asylees is warranted, as it led to the 2021 Second Circuit case that rejected the 2019 decision by the Ninth Circuit on the same issue.

Even if a Sikh asylee establishes a prima facie case for granting asylum, the Department of Homeland Security may counter by arguing that despite their past persecution or well-founded fear of future persecution, they need not remain in the United States. Rather, they may safely return to another region of their home country instead. The BIA's 2012 decision, *Matter of M-Z-M-R-* serves as a guide for immigration judges evaluating such counterarguments.[23] That case instructs the adjudicator to first decide whether the future harm to the applicant constitutes persecution and whether relocating internally within their home country was feasible and reasonable.[24] To satisfy this standard of feasibly relocating, the separate region must have substantially better circumstances than the region giving rise to the past persecution or well-founded fear.[25] Lastly, to decide whether internal relocation is reasonable for the noncitizen, immigration judges conduct a balancing test of these factors: (1) the totality of the relevant circumstances of an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, (2) the geographic locus of the alleged persecution, (3) the size, numerosity, and reach of the alleged persecutor, and (4) the applicant's demonstrated ability to relocate to the United States to apply for asylum.[26]

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23 *See* Matter of M-Z-M-R-, 26 I&N Dec. 28, 28 (B.I.A. 2012).

24 *Id.* at 32.

25 *Id.* at 33.

26 *Id.* at 35 (citing 8 C.F.R. § 1208.13(b)(3)).

2. *The Terrorism Bar*

Terrorism Related Inadmissibility Grounds ("TRIG") seldom apply to Sikh asylees, but TRIG caselaw is relevant to the resolution of the disagreement between the Second and Ninth Circuits. Like the argument of internal relocation, the Department of Homeland Security may argue against granting an otherwise eligible asylee removal relief if a TRIG provision applies. In other words, a noncitizen otherwise eligible for asylum is barred from applying for that relief under INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v) for being described under INA §§ 212(a)(3)(B) and 237(a)(4)(B), 8 U.S.C. §§ 1182(a)(3)(B) and 1227(a)(4)(B). This so-called "terrorism bar" is raised when the Department of Homeland Security believes the evidence indicates that the respondent is ineligible. Upon a successful showing that the terrorism bar applies, the noncitizen must overcome the presumption that they are inadmissible.

The INA specifies three categories of "terrorist organizations."[27] Relevant here is the third category, qualified as an "undesignated terrorist organization."[28] Known as tier III terrorist organizations, this category was added to the INA in 2001 by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("PATRIOT Act").[29] Tier III terrorist organizations are broadly defined as "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" terrorist activity as defined under the INA.[30] Immigration judges routinely qualify organizations as tier III terrorist organizations, and these decisions are routinely affirmed by the BIA and circuit courts.[31]

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27 INA § 212(a)(3)(B)(vi), 8 U.S.C. 1182(a)(3)(B)(vi). For a more in-depth discussion on the categories, *see* Josh A. Roth, *Rules for Thee but Not for Me: The Irony of Tier III Terrorist Organizations*, 28-1 BENDER'S IMMIG. BULL. (2023).

28 INA § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

29 Pub. L. No. 107–56, 115 Stat. 272, 347-48 (2001) (adding definition) [hereinafter "PATRIOT Act"]; INA § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (current definition).

30 INA § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

31 *See, e.g.*, Bojnoordi v. Holder, 757 F.3d 1075, 1076-77 (9th Cir. 2014) (affirming BIA decision that Mojahedin-e Khalq, or MEK, was a tier III terrorist organization); Islam v. Sec'y, Dep't of Homeland Sec., 997 F.3d 1333, 1346 (11th Cir. 2021) (affirming USCIS determination that the Bangladesh National Party, a political party, was a tier III terrorist organization); A.A. v. Att'y Gen., 973 F.3d 171, 181 (3d Cir. 2020) (affirming BIA decision that Jaysh al-Sha'bi, a government-controlled militia, was a tier III terrorist organization). Similar cases exist across the circuits, and all follow similar analyses.

II
THE "LEADERSHIP LIMITATION" ON TIER III TERRORIST ORGANIZATIONS

Immigration judges and circuit courts disagree on what exactly a tier III terrorist organization is, but the common analyses establish a connection to political violence.[32] In 2014, the Seventh Circuit set forth the first "leadership limitation" on tier III terrorist organizations, that later made its way into the Third and Eleventh Circuits.[33] This section discusses the contemporary caselaw governing designations as tier III terrorist organizations for immigration courts within those circuits.

Since there is no official register of tier III terrorist organizations, an immigration judge must make an *ad hoc* determination of whether an organization meets the definition of a tier III terrorist organization on an individualized, case-by-case basis when the evidence indicates that the mandatory terrorism bar applies.[34] An assessment of whether a group is a tier III terrorist organization focuses on whether the group engaged in terrorist activities as defined under INA § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv), during the relevant period during which the individual applying for immigration benefits was involved.[35]

As mentioned, for purposes of the INA, the Department of Homeland Security must show that "the evidence indicates" that the individual is barred from immigration benefits.[36] While that sounds vague and ambiguous, the BIA recently held that "indicates" means "some evidence" from which a reasonable factfinder could conclude that one or more grounds for mandatory denial of relief may apply.[37] Once the

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32 Judge Posner once acknowledged that the qualifications for designation as a tier III terrorist organization were broad, but argued they were not vague. In coming to this conclusion, Judge Posner discussed how the socially accepted definition of "terrorism" referring to the use of violence for political ends, but that the statutory definition was "broad enough to encompass a pair of kidnappers." Hussain v. Mukasey, 518 F.3d 534, 537 (7th Cir. 2008).

33 *See infra* Part II(b)-(c).

34 Roth, *supra* note 27. This is true even if that immigration judge had previously designated that same organization as a tier III terrorist organization. The non-binding and non-precedential decisions of immigrations judges is another commonly analyzed issue in U.S. immigration law. *See generally* Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts,"* 33 GEO. IMMIGR. L.J. 261, 294 (2019).

35 These statutory requirements are discussed in depth in Roth, *supra* note 27.

36 8 C.F.R. § 1240.8(d).

37 Matter of M-B-C-, 27 I&N Dec. 31, 37 (B.I.A. 2017).

government meets its initial burden of proof, the noncitizen must show by a preponderance of the evidence that the terrorism bar does not apply.[38]

A. The Seventh Circuit: *Khan v. Holder*

Pakistan is no stranger to political violence, and the strife for Mohajirs fighting to equality against the controlling Pakistani government is no exception. The Mohajir Quami Movement ("MQM") purported to fight for the rights of Mojahirs and to improve the opportunities for education and employment.[39] In 1992, a teenager, Khan, joined the MQM because of the government's "Operation Clean-up," which was purported as an expungement of terrorists in Karachi, but was believed to be a front for ethnic cleansing of Mohajirs.[40] Khan witnessed the MQM's actions gradually evolve from community work to political violence.[41] Over time, the MQM split into factions, the MQM-H and MQM-A, and Khan joined the MQM-H.[42] Because of his desertion, the MQM-A targeted Khan and threatened to kill and torture him and his family; indeed, Khan's cousin was killed.[43] The threat of harm only grew and in 2000, Khan fled to London, where he stayed until ultimately fleeing to the United States.[44]

In the wake of the terrorist attacks of September 11, 2001, the United States started a program requiring men from mostly Islamic countries, including Pakistan, to register with USCIS, be fingerprinted, photographed, and interrogated, all in the effort of "counterterrorism."[45] So Khan fled to Canada to avoid deportation, ultimately returning in 2008 after marrying a U.S. citizen.[46]

After applying for residency based on the marriage, Khan

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38 *See, e.g.*, De Almeida Viegas v. Holder, 699 F.3d 798, 802 (4th Cir. 2012) (affirming that the Department of Homeland Security's evidence indicated that the terrorism bar applied before the noncitizen had the burden to show the bar did not apply); Matter of R-S-H-, 23 I&N Dec. 629, 640 (B.I.A. 2003) (stating that where the evidence indicates that a mandatory bar applies, the respondent must establish by a preponderance of the evidence that the bar does not apply).

39 Khan v. Holder, 766 F.3d 689, 693 (7th Cir. 2014).

40 *Id.* at 692-93.

41 *Id.* at 693.

42 *Id.* The MQM-H was purportedly the "good version" of the MQM split because the MQM-A had been overrun by "gangsters and criminals."

43 *Id.* at 694.

44 *Id.* Khan briefly returned to Pakistan in 2001 when his mother became sick, and he was attacked again; he then decided to flee directly to the United States on a temporary visa. *Id.*

45 *Id.*

46 *Id.* at 695.

was put into removal proceedings where he was considered removable and applied for asylum.[47] The Department of Homeland Security successfully argued before the immigration judge that the MQM-H was a tier III terrorist organization, and thus Khan was statutorily barred from asylum. The BIA agreed, and his case went before the Seventh Circuit.

The Seventh Circuit overruled the BIA, holding that "[a]n entire organization does not automatically become a terrorist organization just because some members of the group commit terrorist acts. The question is one of authorization."[48]

B. The Third Circuit: Uddin v. Att'y Gen. U.S.

In 2017, the Third Circuit imputed the leadership limitation in *Uddin v. Attorney General*, adding a prong that the Department of Homeland Security must establish when arguing that a group is a tier III terrorist organization.[49] The Third Circuit was seemingly uncomfortable with the broad application of the terrorism bar, so it required a showing that the leadership personnel of whatever organization the Department wanted to label as a terrorist group had authorized the terrorist acts committed by its members.[50] At issue in this particular case was the Bangladesh National Party ("BNP"). The following excerpt from *Uddin* speaks not only to the exasperation some federal court judges feel towards the state of the U.S. immigration system, but the basis for the decision:

> We recognize that the Board's decisions are unpublished, and thus lack precedential value. We also note the Government's argument that the BNP's status as an undesignated terrorist organization is a "case-specific" determination based on the facts presented. That said, something is amiss where, time and time again, the Board finds the BNP is a terrorist organization one day, and reaches the exact opposite conclusion the next. Even more concerning, the IJ in this case stated that he was "aware of no BIA or circuit court decision to date which has

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47 *Id.*

48 *Id.* at 699. The Seventh Circuit had made this point in 2008, but it was not the central issue of the case. *See* Hussain v. Mukasey, 518 F.3d 534, 538 (7th Cir. 2008) ("What if an organization contained people who resorted to violence without the organization's sanction; would the organization be 'engaged in' that violence? That is a question about authorization. If an activity is not authorized, ratified, or otherwise approved or condoned by the organization, then the organization is not the actor.").

49 Uddin v. Att'y Gen. U.S., 870 F.3d 282, 290 (3d Cir. 2017).

50 Roth, *supra* note 27 (citing Uddin, *supra* note 49).

> considered whether the BNP constitutes a terrorist organization." At the time the IJ ruled, there were several such decisions, and now there are dozens. When asked at oral argument whether the IJ could access unpublished Board decisions regarding BNP's terrorist status, the Government's attorney responded that he did not know. This is a troubling state of affairs.[51]

C. The Eleventh Circuit: *Islam v. Secretary, DHS*

In 2021, the Eleventh Circuit adopted *Uddin* in *Islam v. Sec'y, Dep't of Homeland Sec.*, a case that also analyzed the BNP.[52] It expressly held that an organization can qualify as a tier III terrorist organization when its members "perpetrate terrorist activity" *and* "its leadership authorizes such conduct expressly or tacitly."[53]

The arguments surrounding the BNP imputed a "leadership limitation" because the Department sought to qualify it as a tier III terrorist organization. These three circuits have yet to rule on whether violence committed by members of a political organization such as the BNP would constitute persecution committed on behalf of the government if that political organization were in power. Similarly, the Second and Ninth Circuits have yet to rule on the "leadership limitation" as applied to tier III terrorist organizations. The following section discusses the existing disagreement between the Second and Ninth Circuits and argues that the "leadership limitation" described above helps resolve the disagreement.

III
PERSECUTION BY POLITICAL PARTY MEMBERS AND THE CIRCUIT SPLIT

Often, federal appellate courts disagree on a question of law, developing a dispute that can only be settled by the Supreme Court. This particular "circuit split" is based on the question of whether an act of persecution committed by a member of an in-power political party (as opposed to one committed by a party official)is *per se* an act of persecution committed by the government. The key is understanding that the persecutor has no official role in government, they are merely a supporter or registered member of a government party. As we see below, the Second and Ninth circuits

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51 Uddin, *supra* note 49, at 291.

52 Islam v. Sec'y, Dep't of Homeland Sec., 997 F.3d 1333, 1346 (11th Cir. 2021).

53 *Id.* at 1344 (emphasis added).

conclude differently on the subject.

A. The Ninth Circuit: *Singh v. Whitaker*

In early 2013, Narinder Pal Singh entered the United States after fleeing India.[54] He claimed he was persecuted on account of his membership in the pro-Khalistan political party; importantly, Singh claimed he was persecuted by "Punjabi police and *member*s of the Congress Party."[55] He passed his credible fear interview, and subsequently applied for asylum, withholding of removal, and protection under Article III of the Convention Against Torture (CAT).[56]

At his merits hearing, Singh testified that he endured threats and physical assaults from 2008 – 2012, and following his refuge in the United States, his father was attacked.[57] Singh stated his attackers were Punjabi police officers and members of the Congress Party, the political party in power.[58] The immigration judge granted his testimony sufficient weight to find him credible, but still denied his asylum application.[59] As discussed, for Singh to qualify for asylum, he must have either demonstrated past persecution or a well-founded fear of future persecution. The immigration judge found that Singh was persecuted, entitling him to a presumption of a well-founded fear of future persecution.[60] Fatally, the immigration judge simultaneously found that the Department of Homeland Security had rebutted that presumption by

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54 Singh v. Whitaker, 914 F.3d 654, 657 (9th Cir. 2019).

55 *Id.* (emphasis added).

56 *See id. See also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) (implemented in the removal context in principal part at 8 C.F.R. § 1208.16(c)–18). The CAT is a non-self-executing treaty. *See, e.g.*, Pierre v. Gonzales, 502 F.3d 109, 119-20 (2d Cir. 2007); Matter of H-M-V-, 22 I&N Dec. 256, 259-60 (B.I.A. 1998). Adjudicators do not apply the CAT itself, but rather the implementing regulations. The latter, for example, contain important United States ratification "reservations, understandings, declarations, and provis[ions]" with respect to the definition of "torture" not contained in the text of the Convention Against Torture itself. *See* 8 C.F.R. § 1208.18(a); *see also id.* § 1208.16(c)(1) ("The definition of torture contained in § 1208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture."). For ease of reference, however, the Article uses "CAT" to refer to the implementing regulations.

57 Whitaker, 914 F.3d. at 657.

58 *Id.*

59 *Id.* at 658.

60 *Id.*

successfully demonstrating that internal relocation was possible.[61] The Ninth Circuit reversed the decision, holding that the BIA failed to analyze whether internal relocation was feasible, given his circumstances.[62] The key circumstance here is that Singh was persecuted by "Congress Party members," which entitled him to the presumption.[63]

The Ninth Circuit considered the BIA's overreliance of a 2012 Law Library of Congress Report that suggested that only "high-profile militants" would be targeted.[64] Having found that Singh held "pro-Khalistani views," the BIA felt the report overcame the presumption of Singh's well-founded fear of future persecution. The Ninth Circuit qualified the BIA's error as "failing to address the potential harm Congress Party *members*, or other local authorities, might inflict upon Singh" if he were to internally relocate.[65] The Ninth Circuit ultimately concluded that by ignoring the nationwide potential for future persecution and Singh's intent to continue proselytizing for the Mann Party, the BIA inadequately analyzed the Department's internal relocation argument.

B. The Second Circuit: *Singh v. Garland*

This section discusses the Second Circuit decision *Singh v. Garland*, which addressed a similar issue as *Singh v.Whitaker*, however ultimately concluding differently.

Jagdeep Singh was a Sikh Indian who entered the United States without inspection in late 2014, claiming a fear of returning to India on account of his political affiliation with the pro-Khalistan party, the Shiromani Akali Dal Amristar.[66] A month later, Singh appeared before an immigration judge and requested a change of venue to New York, New York.[67] Three years later, Singh appeared before another immigration judge to present his asylum case on the merits.[68]

At his hearing, Singh testified that he was threatened by

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61 *Id.*

62 *Id.* at 661.

63 *Id.*

64 *Id.* at 660-61.

65 *Id.* at 661 (emphasis added).

66 Singh v. Garland, 11 F.4th 106, 109 (2d Cir. 2021).

67 *Id.* at 109-10.

68 *Id.* The three-year delay between hearings is not unheard of. Then, and today, there exists a monumental oversaturation of the U.S. immigration courts. *See* Hurubie Meko, *Migrants Encounter 'Chaos and Confusion' in New York Immigration Courts*, N.Y. TIMES (Nov. 3, 2022), https://www.nytimes.com/2022/11/03/nyregion/ny-immigration-courts-migrants.html [https://perma.cc/3FC2-QKK6] (last visited Feb. 8, 2023).

members of the opposing political party, who threatened his life if he did not sell drugs on their behalf.[69] Interestingly, Singh attempted to insulate himself from the internal relocation counterargument in his testimony:

> Singh said that he did not move to another part of India to avoid the rival party members because, when he rented a home or applied for a job, he would need to provide identification. If he showed his identification to anyone, he said, [i]t's a very strong possibility that . . . I would [be] tracked down and I would have been killed.[70]

To Singh's downfall, he never claimed to be a high-ranking member of the pro-Khalistan movement, which opened the window of denial for the immigration judge (like the BIA's analysis of the 2012 Law Library of Congress Report in *Singh v. Whitaker*). Despite ruling that Singh suffered past persecution, the immigration judge denied his application for asylum, relying largely on the 2018 Library of Congress Report[71] and the State Department's country conditions report and international religious freedom report.[72]

Singh unsuccessfully appealed the immigration judge's decision to the BIA. The BIA found no error in the immigration judge's ruling and affirmed that Singh could safely relocate within India.[73] Upon his appeal to the Second Circuit, Singh argued that the immigration judge's denial was incorrect for two discrete reasons: (1) the Department failed to show that internal relocation would be *reasonable* and (2) Singh had established eligibility for relief under the CAT.[74]

Despite this being Singh's third time presenting a case before an adjudicator, it was the first before an Article III court. In immigration proceedings, standards of review are crucial and often dispositive for potential asylees. Upon review by the circuit court, findings of fact by the BIA are considered

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69 Singh, 11 F.4th at 110.

70 *Id.* (internal quotations omitted).

71 *See* Library of Congress Report, *supra* note 7.

72 *See* Singh, 11 F.4th at 111 ("Noting that Singh did not allege to be a high-profile member of the Akali Dal Mann, the IJ also relied on a report of the Library of Congress indicating that "only hardcore militants are of interest to Central Indian authorities" and that one does not qualify as a high-profile militant merely by holding pro-Khalistan views. The IJ also observed that "neither the 2016 U.S. Department of State Human Rights Report for India nor the most recent International Religious Freedom Report mentions the persecution of Shiromani Akali Dal Amritsar members in Punjab or elsewhere in India") (internal citations omitted).

73 *Id.* at 111-12.

74 *Id.* at 115.

"conclusive unless any reasonable adjudicator would be compelled to conclude the contrary."[75] There is one exception to this – adverse credibility findings – that allows a more nuanced review of the prior decision.[76] Here, though, Singh was thought to be credible in his testimony that he suffered past persecution, so the bar to overcome the BIA decision was high from the start.[77]

The Second Circuit questioned the BIA's holding that Singh was persecuted but left that stone unturned and focused on the issues of internal relocation and CAT protection.[78] In doing so, the Court expressly disagreed with the Ninth Circuit's decision in *Singh v. Whitaker* to hold that persecution by party members was *per se* persecution committed by the government:

> Individuals who are merely members of a ruling political party are not part of the government, and the extent to which persecution by actual governmental authorities affects the feasibility of internal relocation depends on the circumstances of the particular case. Here, the agency reasonably concluded that—even assuming that Singh faced a threat of persecution in his locality—that threat does not exist nationwide.[79]

In evaluating Singh's argument against internal relocation, the Second Circuit emphasized how generic country condition reports did not dispose of any asylee's case, in that country condition reports cannot show that any particular person would be subject to persecution if removed.[80] Yet the Second Circuit allowed generic country condition reports to show that any particular person *would not* be subject to persecution if removed.

Consider future Sikh asylum applicants who now face a near-vertical uphill battle to overcome this decision in *Singh.* The Second Circuit practically fortified the argument that even

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75 INA § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B).

76 Singh, 11 F.4th at 113.

77 The Second Circuit cited a 2021 U.S. Supreme Court case that fortified the difficulty of overcoming a BIA finding of fact, holding that "[t]he only question for judges reviewing the BIA's factual determinations is whether *any* reasonable adjudicator could have found as the agency did." *Id.* (citing Garland v. Ming Dai, 141 S. Ct. 1669, 1678 (2021)).

78 *Id.* at 116 ("We doubt that the finding of past persecution was correct, but we need not disturb that unchallenged finding in order to reject Singh's argument that there are [no] safe places for him within India because he was persecuted by the government.") (internal quotations omitted).

79 *Id.* at 116 n.4.

80 *Id.* at 116.

pro-Khalistan Sikhs can relocate internally within India, based almost entirely on a 2018 report incorporating data from 2003 – 2015 from the U.S., U.K., and Canadian immigration agencies. In fact, one need not consider hypothetical applicant, for *Singh* has already been heralded by the Second Circuit in denying similar claims.[81] The Third Circuit even did so in denying a Sikh asylum.[82] Before *Singh*, these government reports were highly relevant, but not dispositive. Now, it appears easy to reject an asylum claim if the circumstances are close enough to that in *Singh* and congruent with the Library of Congress Report.[83]

Notwithstanding the fortification of the Library of Congress Report, the Second Circuit's decision rejected the Ninth Circuit's analysis of persecution committed by political party members. The following section proposes a resolution to the circuit split by applying the "leadership limitation" principle to the issue, and ultimately concludes that the Second Circuit was correct.

IV
APPLYING THE LEADERSHIP LIMITATION TO THE CIRCUIT SPLIT

The disagreement between the Second and Ninth Circuits on persecution at the hands of low-level political party members could reasonably be resolved by applying the "leadership limitation" formulated by the Third, Seventh, and Eleventh Circuits on tier III terrorist organizations. As discussed, these circuits seemingly felt uncomfortable with the broad application of a bar to immigration benefits without some kind of organizational tie. The Second Circuit appears to agree, although in a different context: the actions of a political party member are not *per se* an act of the political party without some kind of tie to the party's leadership.

This section shows how similar these issues are, and

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81 *See, e.g.*, Lalit Sambahamphe v. Garland, No. 20-3666 NAC, 2022 U.S. App. LEXIS 25053, at *3 (2d Cir. Sep. 7, 2022) (disposing of all forms of removal relief because the respondent could relocate internally); Singh v. Garland, No. 19-3030 NAC, 2022 U.S. App. LEXIS 5469, at *3 (2d Cir. Mar. 2, 2022) (same). This second *Singh v. Garland* is interesting as well because again, the Court cites to the Library of Congress Report by recounting the 2015 report issued by the U.K. *See id.* ("[A] 2015 report issued by the United Kingdom concluded that although Sikhs were attacked in the 1980s and may suffer lingering distrust in some areas, 'there is little discrimination' or 'no discrimination' against Indian Sikhs in the modern day.").

82 Singh v. AG United States, No. 21-2083, 2022 U.S. App. LEXIS 8909, at *6 (3d Cir. Apr. 4, 2022).

83 *See* Library of Congress Report, *supra* note 7.

argues that because of these overlapping elements, the issues should be resolved on the same basis.

A. Acts of Persecution and Acts of Terrorism

As discussed, an act of persecution is a one that leads to a subjective level of harm that transcends harassment but does not necessarily rise to the level of torture.[84] In *Singh v. Whitaker*, the acts of persecution were committed over several years. From 2008 to 2012, Singh received several in-person and telephonic threats of harm, multiple instances of physical harm, and a six-day stint of physical beatings with a leather strap for distributing Mann Party flyers, leading to an extended hospitalization.[85] In *Singh v. Garland*, the acts of persecution were telephonic threats, demands to sell drugs for an opposing party, and a five-on-one beating rendering him unconscious and hospitalized.[86] The rest of the persecution analyses (e.g., nexus to a protected ground and ties to the government) were also satisfied, but need not be discussed now. The point here is demonstrating that physical violence with the intent to coerce can sufficiently constitute an act of persecution.

Part II of this Article discussed terrorist organizations and the subjective standard that must be met before applying the terrorism bar to a potential asylee.[87] Acts of terrorism receive similar scrutiny but are a bit more objective. The INA defines "terrorist activity" as, among other things, "any activity which is 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 State)" and which involves:

> (I) the hijacking or sabotage of any conveyance;
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> (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;
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> (III) a violent attack upon an internationally protected person;
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> (IV) an assassination;
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> (V) the use of a biological or chemical agent, or nuclear

84 *See supra* Part I.

85 Singh v. Whitaker, 914 F.3d 654, 657 (9th Cir. 2019).

86 Singh v. Garland, 11 F.4th 106, 110 (2d Cir. 2021).

87 *See supra* Part II.

> device, or the use of an explosive, firearm, or other weapon or dangerous devices with the intent to endanger the safety of one or more individuals or to cause substantial damage to property; or
>
> (VI) a threat, attempt, or conspiracy to do any of the foregoing.[88]

Sections (II) and (III) above would fall in the center of the Venn Diagram of acts of terrorism and acts of persecution. In fact, there is a "persecutor bar" that, like the terrorism bar, would bar any potential asylee from all immigration benefits under U.S. law if the asylee persecuted others.[89] Also like the terrorism bar, the persecutor bar has no exception for acts of persecution committed under coercion or duress.[90]

For these reasons, one can reasonably conclude that U.S. immigration law views acts of persecution and acts of terrorism similarly, and that often proof of one can satisfy proof of the other (assuming other contextual details are met).

One crucial detail in comparing the two is that, when considering terrorist organizations, adjudicators are averse to qualifying political parties as terrorist organizations, so conflating an act of persecution by the hands of a government agent as an act of terrorism seems questionable. The following section seeks to dissolve this misconception by showing that, historically speaking, the U.S. has had no problems qualifying governments and political parties as terroristic actors.

B. Sometimes the Government is the Terrorist Organization

There are two discrete reasons to believe that being a government actor and being a terrorist are not mutually exclusive: (1) State Sponsors of Terrorism and (2) designation of a political party as a tier III terrorist organization.

State Sponsors of Terrorism are countries determined by the Secretary of State to have repeatedly supported acts of international terrorism are designated pursuant to three laws: Section 1754(c) of the National Defense Authorization Act for

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88 *See* INA § 212(a)(3)(B)(iii)(I)-(V), 8 U.S.C. § 1182(a)(3)(B)(iii)(I)-(V).

89 Matter of Negusie, 28 I&N Dec. 120 (A.G. 2020).

90 *Id. See also* Matter of A-C-M-, 27 I&N Dec. 303, 303 (B.I.A. 2018) (holding that the respondent afforded material support to the guerillas in El Salvador because the forced labor she provided in the form of cooking, cleaning, and washing their clothes aided the group in continuing their violent opposition to the Salvadoran government). This "no exception for duress" reading was adopted by the Second Circuit in Hernandez v. Sessions, 884 F.3d 107, 109 (2d Cir. 2018), later cited by the BIA in its decision in Matter of A-C-M.

Fiscal Year 2019, Section 40 of the Arms Export Control Act, and Section 620A of the Foreign Assistance Act of 1961.[91] Currently four countries are designated under these authorities: Cuba, the Democratic People's Republic of Korea (North Korea), Iran, and Syria.[92] So the State Department is explicitly willing to qualify countries and by implication, its political leadership, as sponsors of terrorism. As discussed below, the Justice Department is just as willing, although not as transparently. These qualifications are made through an immigration judge's decision (and BIA affirmation) that a political party is a tier III terrorist organization.

Tier III determinations may seem contrary to an immigration court's jurisdiction because the decisions can have foreign policy implications. Even so, the circuit courts and the Board of Immigration Appeals have consistently affirmed tier III designations, even while acknowledging that the statutory language has a "breathtaking" scope.[93] Earlier, this Article discussed the Bangladesh National Party (BNP) and how even circuit courts affirmed its designation as a tier III terrorist organization. The BNP is not in power, so one might argue that calling the BNP a terrorist organization is not tantamount to calling the government of Bangladesh a terrorist organization. Consider then, the Jaysh al-Sha'bi, a government-controlled militia in Syria. In 2011, a Syrian national was drafted into the military and attempted to flee because he believed the military was committing human rights violations in Syria's civil war.[94] Despite his efforts, he was captured and forced through basic training, where he received weapons training.[95] While serving in Jaysh al-Sha'bi as a tower guard, his superiors repeatedly abused him, resulting in a hospitalization and temporary medical discharge.[96] He feared escaping even more now because he learned about reports of government actors raping and murdering the family of prior deserters.[97] Even so, he fled to the United States and sought refuge, only to be barred from asylum for having materially contributed to the Jaysh al-Sha'bi, which the immigration

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91 U.S. DEP'T OF STATE BUREAU OF COUNTERTERRORISM, *State Sponsors of Terrorism*, [https://perma.cc/WF9F-2GZE] (last visited Jan. 26, 2023).

92 *Id.*

93 *See* Matter of S-K-, 23 I&N Dec. 936, 948 (B.I.A. 2006).

94 A.A. v. Att'y Gen. of the United States, 973 F.3d 171, 174 (3d Cir. 2020).

95 *Id.*

96 *Id.*

97 *Id.*

judge qualified as a tier III terrorist organization.[98]

In short, acts of terrorism are sometimes committed by government actors and entities. And sometimes, acts of terrorism satisfy the legal burden of an act of persecution. This is not an ambiguity in the law; the similarities and overlap simply demonstrate that the law views the concepts as similar. Because of this overlap, the circuit split derived from *Singh v. Whitaker* and *Singh v. Garland* can be settled based on existing jurisprudence about tier III terrorist organizations.

If the leadership limitation imposed on the Department of Homeland Security by the Third, Seventh, and Eleventh Circuits on tier III terrorist organizations is correct (and I believe it is), it reasonably follows that the same principle applies to asylum claims in which the persecutors are members of the controlling government party. Thus, this Article contends that the Second Circuit correctly determined that an overbroad application of governmental ties to the persecutor was fallacious. Therefore, without some showing that the leadership, or higher authority, of that political party authorized or acquiesced to the persecution, applicants such as that in *Singh v. Whitaker* have an additional burden to meet.

CONCLUSION

Asylum and refugee law is no stranger to novel questions of law and disagreements between federal courts. The Third, Seventh, and Eleventh Circuits have agreed that an inherent element of "leadership authorization" exists in the statute qualifying tier III terrorist organizations, in that acts of terrorism committed by members of a group cannot dispositively qualify the group as a terrorist organization unless the acts were authorized by its leaders. The Second and Ninth disagree on whether private citizens who are members of the controlling government party who persecute another dispositively qualify the act as one committed by the government. By applying the "leadership authorization" of the former to the latter, this Article concludes that the Second Circuit correctly determined that such acts are not *per se* acts of persecution committed by the government.

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98 *Id.* at 175. It is irrelevant that he was forced into service because duress and coercion are unavailable defenses. *See* Matter of A-C-M-, *supra* note 90 and accompanying text.