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**NATIONAL SECURITY AND DISCRIMINATORY REFUGEE ADMISSIONS:  
HOW PRESIDENT TRUMP'S IMMIGRATION POLICIES UNDERMINE U.S.  
INTERNATIONAL LEGAL OBLIGATIONS**

By: Hannah H. Iglesias  
Spring 2018

## Introduction

For nearly fifty years, the United States has welcomed refugees from every corner of the world. In that time, over three million refugees<sup>1</sup> have been resettled on American soil, sowing the seeds of new lives away from the fear of persecution and violence. However, despite the seemingly welcome nature of the United States' refugee resettlement policy, recent political developments threaten to dismantle this resettlement program in a time when it is needed most. In the last five years, the United States has seen a steady decline in the number of refugees admitted despite the growing number of impacted persons worldwide.<sup>2</sup> Now, with the impetus of the Trump presidency and a highly divisive, anti-immigrant rhetoric, the resettlement program has suffered even greater blows, beginning with the notorious first iteration of President Trump's executive order targeting the United States Refugee Admissions Program ("USRAP") in the name of national security interests.<sup>3</sup>

Stepping back in time to the late 1960s, one will find a vastly different American view toward the global issue of refugee resettlement. In 1968, the United States ratified the 1967 Optional Protocol Relating to the Status of Refugees ("Protocol")<sup>4</sup>, furthering the U.S. tradition of offering safe harbor to the most vulnerable populations around the world. Through the adoption of the Protocol, the United States also bound itself to the substantive portions of the 1951 Convention

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<sup>1</sup> "Refugee Admissions," U.S. Department of State, accessed March 24, 2018, <https://www.state.gov/j/prm/ra/index.htm>

<sup>2</sup> Phillip Connor, "U.S. Resettles Fewer Refugees, Even as Global Number of Displaced People Grows," last modified October 12, 2017. [http://assets.pewresearch.org/wp-content/uploads/sites/2/2017/10/11170810/Pew-Research-Center\\_U.S.-Refugees-Report\\_2017.10.12.pdf](http://assets.pewresearch.org/wp-content/uploads/sites/2/2017/10/11170810/Pew-Research-Center_U.S.-Refugees-Report_2017.10.12.pdf)

<sup>3</sup> President Trump's "Executive Order Protecting the Nation from Terrorist Entry into the United States" (Executive Order 13769) froze refugee admissions for 120-days and indefinitely barred the admission of all Syrian refugees.

<sup>4</sup> Protocol Relating to the Status of Refugees, January 31, 1967, 606 U.N.T.S. 267 (entered into effect October 4, 1967) (hereinafter the 1967 Protocol).

Relating to the Status of Refugees (“Convention”).<sup>5</sup> This article seeks to address the United States’ legal obligations under this Protocol balanced against domestic policies and interests. Specifically, how the various iterations of President Trump’s “travel ban” constitute a discriminatory policy toward refugee admissions, thus contravening the purpose of Protocol and the Convention and undermining the United States’ legal obligation under international human rights law.

This article will begin by providing a brief background on the source of international refugee law compared against the development of the United States’ domestic policy and legal framework. It will then discuss the three variations of President Trump’s “travel ban” and resumption of the refugee admissions program. Finally, this article concludes with an assessment of the President’s bans and the national security justification under which each ban has been promulgated. It will be shown that these national security arguments carry little weight when analyzed against statistics showing the near non-existence of terrorism related activity by refugees admitted to the United States and the opinion of national security experts.

## **I. A Brief History of Refugee Law and Policy**

Part I seeks to provide a brief background on the development of international human rights law, specifically as it pertains to refugee policies. This article focuses mainly on the 1951 Convention and the 1967 Optional Protocol, which have directly influenced American refugee policy. Next, it will extend a short history on the United States’ adoption of the 1967 Optional Protocol, and further emphasize the implementation of those tenants in the United States refugee admissions and resettlement programs.

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<sup>5</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force April 22, 1951) (hereinafter the 1951 Convention).

**a. *1951 Convention and 1967 Optional Protocol Relating to the Status of Refugees:  
The Source of International Refugee Law***

Following World War II, the international community developed the refugee protection system, which remains in effect in large part today. Arising out of international human rights law, the 1951 Convention sought to address the growing refugee crisis that existed shortly after the War. The language of the 1951 Convention was temporal and geographic in nature, limiting those who could qualify as refugees to persons who had become refugees due to events occurring before January 1, 1951.<sup>6</sup> States were further given the opportunity to elect whether this definition would apply only to events that had taken place in Europe or globally.<sup>7</sup>

With the passage of time, it became clear that this narrow definition would need revision to reflect the modern refugee crisis. In 1967, the United Nations High Commissioner for Refugees introduced the Protocol, intending to alleviate the temporal and geographical limitations established by the Convention. Member states who consented to the Protocol “agree to apply the core content of the 1951 Convention (Articles 2 to 34) to all persons covered by the Protocol’s refugee definition, without limitations of time or place.”<sup>8</sup> These instruments codified the two fundamental governing aspects of international refugee law: (1) the definition of a refugee,<sup>9</sup> and (2) the obligation of non-refoulement.<sup>10</sup> Under the Protocol, the modern and controlling definition of refugee refers to one who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to

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<sup>6</sup> *Id.*, at 14.

<sup>7</sup> *Id.*

<sup>8</sup> Frances Nicholson and Judith Kumin, “A Guide to International Refugee Protection and Building State Asylum Systems,” United Nations High Commissioner for Refugees, 27 Handbook for Parliamentarians, 16 (2017).

<sup>9</sup> 1967 Protocol, *supra* note 4 at Article 1(2)-(3).

<sup>10</sup> 1951 Convention, *supra* note 5 Article 33.

avail himself of the protection of that country, or who, not having nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.<sup>11</sup>

To further protect a designated refugee, the Convention established the principle of “non-refoulement,” which “provides that no one shall expel or return (“refouler”) a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom.”<sup>12</sup> Both the Convention and the Protocol fixed the international standard for the treatment of refugees, striving to guarantee the right of refugees to non-discriminatory, humanitarian action by member states receiving and resettling these vulnerable populations.

**b. *The Refugee Act of 1980: The United States Response to International Standards***

In the wake of World War II, the United States began promulgating numerous statutory remedies aimed at addressing the massive influx of displaced peoples across the globe. However, during this time, U.S. domestic refugee policies largely developed out of pure foreign policy considerations meant to undermine Communist ideologies. When the 1951 Convention Relating to the Status of Refugees was approved by a United Nations conference, the United States was not among the states ratifying the Convention. Following continual international pressures, and in consideration of its position as a world leader, the United States later ratified the 1967 Optional Protocol Relating to the Status of Refugees in 1968. As a result, the United States was now bound by the substantive provisions of the Convention, including the definition of a refugee and the principle of non-refoulement.<sup>13</sup>

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<sup>11</sup> *Id.* at Article 1(A)(2).

<sup>12</sup> Convention and Protocol Relating to the Status of Refugees, Introductory Note pg. 2

<sup>13</sup> Kathryn M. Bockley, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. Int'l L. & Com. Reg. 253, 279 (1995).

In ratifying the Protocol, the United States took a major step in aligning its domestic policy with that of the international community. Despite this, the nation still struggled to apply the principles of the Protocol consistently. It was not until the adoption of the Refugee Act of 1980 (“Act”)<sup>14</sup> that the United States conformed to the standards of the Convention. The Act became the first comprehensive piece of U.S. refugee legislation, adopting the Convention and Protocol in near entirety.<sup>15</sup> By incorporating the Convention and Protocol’s definition of refugee in the Immigration and Nationality Act (INA),<sup>16</sup> Congress intended to “give statutory meaning to our [U.S.] national commitment to human rights and humanitarian concerns.”<sup>17</sup> In addition to creating a statutory definition for refugees, the Act created the process by which refugees are to be admitted to the United States, including establishing the Federal Refugee Resettlement Program.<sup>18</sup> The purpose of the Act was to reform the previous admissions policies of ideologically discriminatory admissions schemes, and implement a more standardized admissions process, thus “promot[ing] a more structured, equitable, and neutral decision-making process” in refugee admissions.<sup>19</sup>

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<sup>14</sup> Act of March 17, 1980 (Refugee Act of 1980), P.L. 96-212, 94 Stat. 102 (1980).

<sup>15</sup> Waibsnider, Meital, *How National Self Interest and Foreign Policy Continue to Influence the U.S. Refugee Admissions Program*, 75 Fordham L. Rev. 391, 398 (2006).

<sup>16</sup> Immigration and Nationality Act, § 101(a), 8 U.S.C. § 1101(a)(42)

The term ‘refugee’ means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .

<sup>17</sup> *In re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1996) (quoting S. Rep. No. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144)

<sup>18</sup> *Id.* § 411, 8 U.S.C. § 1521

<sup>19</sup> *Fulfilling U.S. Commitment to Refugee Resettlement: Protecting Refugees, Preserving National Security, & Building the U.S. Economy Through Refugee Admissions*, 5 Tex. A&M L. Rev. 155, 169 (Fall, 2017).

Under the provisions of the Act, the President has the authority to, in consultation with Congress, the State Department's Bureau of Population, Refugees and Migration (PRM), and the Department of Homeland Security (DHS), decide the number of refugees to be admitted annually in the upcoming fiscal year.<sup>20</sup> These numerical considerations are also regional in nature, allowing the President to determine how many refugees from five regions may be admitted.<sup>21</sup> In addition to establishing the framework for determining an annual ceiling for refugee admissions, the Act implemented the "permanent procedures for vetting, admitting and resettling refugees."<sup>22</sup>

#### **i. *United States Refugee Resettlement Program***

From the Act came the establishment of the United States Refugee Admissions Program (USRAP). USRAP is the amalgamation of numerous federal agencies involved in the refugee admission and resettlement process, including the PRM, DHS, U.S. Citizenship and Immigration Services (USCIS), and the Department of Health and Human Services (HHS). Through USRAP, candidates for resettlement are typically broken down into three categories, with the highest priority group consisting of "individuals with compelling persecution needs or those for whom no other durable solution exists."<sup>23</sup>

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<sup>20</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended at INA § 207(a), (d), (e), 8 U.S.C. § 1521 (2000)).

<sup>21</sup> Andorra Bruno, *Refugee Admissions and Resettlement Policy*, U.S. Congressional Research Service RL31269 (2017), Table 1 cites the following regions: (1) Africa, (2) East Africa, (3) Europe and Central Asia, (4) Latin America/Caribbean, (5) Near East/South Asia. There is also a region "Unallocated."

<sup>22</sup> Claire Felter and James McBride, "How Does the U.S. Refugee System Work?," Council on Foreign Relations, last modified October 10, 2017, accessed March 24, 2018 <https://www.cfr.org/background/how-does-us-refugee-system-work>

<sup>23</sup> "An Overview of U.S. Refugee Law and Policy" American Immigration Council, last modified November 18, 2015, accessed March 24, 2018

<https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy>

In addition to the priority one group of individuals with compelling persecution needs, the two remaining categories include groups of "special concern" (Priority



Refugees undergo an extremely rigorous security screening, more so than any other traveler to the U.S., before being admitted.<sup>24</sup> Resettlement begins with a mandatory registration with the United Nations High Commissioner for Refugees (UNHCR). Once registered, UNHCR (or U.S. embassies abroad and nongovernmental organizations) undertakes an analysis to determine whether the refugee would be an ideal candidate for third country resettlement and may refer the refugee to U.S. officials.<sup>25</sup> Only about one-percent of all registered refugees are referred for resettlement in a third country.<sup>26</sup> Once referred, a USCIS officer conducts an initial in-person interview with the applicant, in the applicant's country of asylum.<sup>27</sup> Further, the applicant's personal information is compared against the State Department's Refugee Admission Processing System.<sup>28</sup>

Numerous security checks are conducted by a variety of U.S. intelligence agencies, and biometric data of the applicant is collected and run against terrorist watch-lists, the FBI's Next Generation Identification System, and the Department of Defense's Automated Biometric

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Two) and relatives of refugees, including parents, spouses and unmarried children under 21, who are already settled in the United States (Priority Three).

<sup>24</sup> "Bureau of Population, Refugees and Migration Fact Sheet," Department of State, last modified February 1, 2018, accessed March 25, 2018

<https://www.state.gov/j/prm/releases/factsheets/2018/277838.htm>

Only after the U.S. Government's rigorous and lengthy security screening process has been completed and an applicant is not found to pose a threat does the U.S. Government grant that individual refugee admission to the U.S.

<sup>25</sup> Connor, *supra* at 6.

<sup>26</sup> "How Do Refugees Come to America?" U.S. Committee for Refugees and Immigrants, accessed March 27, 2018 <http://refugees.org/explore-the-issues/our-work-with-refugees/refugeeresettlementprocess/>

<sup>27</sup> *Id.*

<sup>28</sup> Larisa Epatko, "You Asked: How are Refugees Vetted Today?" PBS News Hour, last updated February 20, 2017, accessed March 27, 2018 <https://www.pbs.org/newshour/world/asked-refugees-vetted-today>

Identification System.<sup>29</sup> Processing of a candidate for resettlement can take anywhere from 18 to 24 months, during which time a candidates information and security checks may expire, thus extending the vetting process.<sup>30</sup> Upon a refugees' successfully clearing security, the refugee must undergo health screenings and cultural orientations throughout the waiting period before admission to the United States.<sup>31</sup> Once admitted, refugees are often connected with nonprofit groups to assist with resettlement.<sup>32</sup>

## **II. The “Protecting the Nation from Foreign Terrorist Entry into the United States” Saga**

Part II follows the development of President Trump's refugee admissions policy, beginning with the complete suspension of the program at the commencement of his first term in office and concluding with the resumption of admissions nearly a full year later. This section will provide a succinct run down of the litigation surrounding each iteration of the President's executive order.

### **a. *Executive Order 13769: If at First You Don't Succeed . . .***

Less than a month into his presidency, President Trump signed Executive Order 13769 “Protecting the Nation from Foreign Terrorist Entry into the United States” (“first Order”). Within hours, international points of entry into the United States erupted in chaos, and legal challenges to the first Order were swiftly filed.<sup>33</sup> Under the guise of making the nation safer, President Trump's first Order “upended immigration processes at our borders and beyond.”<sup>34</sup> Encapsulating the

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Connors, *supra* at 6.

<sup>32</sup> “How Do Refugees Come to America?” *supra* note 26.

<sup>33</sup> Krishnadev Calamur, *What Trump's Executive Order on Immigrant Does—and Doesn't Do*, The Atlantic (January 30, 2017) available at:

<https://www.theatlantic.com/news/archive/2017/01/trump-immigration-order-muslims/514844/#correction>

<sup>34</sup> Eunice Lee, *Non-Discrimination in Refugee and Asylum Law (Against Travel Ban 1.0 and 2.0)*, 31 Geo. Immigr. L.J. 459, 462 (Spring 2017).

President's argument of increasing border security and eliminating potential national security threats, Section 1 of the first Order highlighted national security concerns stemming from admissions of those who he deemed diametrically opposed to American values.<sup>35</sup> Laying out the "policy" of the United States, Section 2 briefly addresses President Trump's concerns regarding the use of immigration channels for "malevolent purposes."<sup>36</sup> Triumphant language about vigilance and preventing opponents of the Constitution from entering the United States seeks to distract, albeit poorly, from the President's underlying intolerance of specific sects of immigrants and refugees and his outward promises to keep them out.

Scholars and human rights advocates criticized the first Order for its clearly discriminatory intent, effectuating President Trump's campaign promises and statements promoting his goal to ban Muslim migration to the United States.<sup>37</sup> Section 5 of the first Order addressed refugee admissions policies, ordering an immediate freeze in USRAP operations for 120-days, while

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<sup>35</sup> Executive Order No. 13769, "Protecting the Nation From Foreign Terrorist Entry to the United States," 82 Fed. Reg. 8977 § 1 (January 27, 2017) ("Executive Order 1")

In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.

<sup>36</sup> *Id.* at § 2.

<sup>37</sup> Shayna Freisleben, *Ahead of Speech in Saudi Arabia, Revisiting Trump's Past Statements about Muslims*, CBS News (May 21, 2017) available at: <https://www.cbsnews.com/news/ahead-of-saudi-speech-trump-past-statements-about-muslims/>. President Trump's various tweets throughout the campaign cite weak borders for the influx of Muslim immigrations to the United States.

Syrian refugees would be indefinitely banned from entering the United States.<sup>38</sup> In addition, Section 5 of the first Order drastically reduced the number of refugee admissions by over half to 50,000,<sup>39</sup> citing that admissions over 50,000 would be “detrimental to the interests of the United States.”<sup>40</sup>

Further, Section 5(e) granted the Secretaries of State and Homeland Security the ability to admit certain refugees on a case-by-case basis, so long as these admissions aligned with the national interests of the United States.<sup>41</sup> Providing examples of refugee groups that meet this exception, the Order specifically highlighted religious minorities facing religious persecution in their country of nationality.<sup>42</sup> President Trump quickly pledged to assist with the resettlement of Christian refugees, arguing that Muslim refugees were given priority over Christian refugees in countries like Syria.<sup>43</sup> Despite the first Order’s indefinite ban on the refugee admissions of all Syrian nationals<sup>44</sup>, President Trump proclaimed publically his view that Syrian Christians had been treated unfairly in the U.S. refugee admissions process, vowing to “help” Christians from Syria.<sup>45</sup> Preferential admissions of Christian refugees from Syria exposes the thinly veiled discriminatory motive of the President’s first Order. Where national security was the basis of the full ban on all nationals of Syria, admitting one portion of the population over the other in a nation where both

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<sup>38</sup> Greg Chen and Royce Murray, *Summary and Analysis of Executive Order “Protecting the Nation from Foreign Terrorist Entry into the United States,”* American Immigration Council, (January 27, 2017)

<sup>39</sup> Bruno, *supra* note 21 at 2 (noting FY2017 refugee admission ceiling of 110,000 as set by President Obama).

<sup>40</sup> Executive Order 1, §5(d).

<sup>41</sup> *Id.* at §5(e).

<sup>42</sup> *Id.*

<sup>43</sup> Daniel Burke, *Trump Says U.S. will Prioritize Christian Refugees*, CNN (January 30, 2017), available at <https://www.cnn.com/2017/01/27/politics/trump-christian-refugees/index.html>

<sup>44</sup> Executive Order 1, §5(c).

<sup>45</sup> Burke, *supra* note 43.

Muslims and Christians are persecuted epitomizes how little merit the President's national security arguments truly hold.

**i. *Federal Courts Take on the First Order***

Within hours of the President putting pen to paper, the Order faced legal challenges across the country. Premised on Constitutional violations of the Fifth Amendment guarantees of equal protection and due process and First Amendment establishment clause claims, challenges to the ban prompted federal courts to quickly enjoin its implementation. Less than twenty-four hours after the first Order came into effect, a federal court in New York issued a temporary restraining order, staying the removal of individuals impacted by the Order.<sup>46</sup>

Days later, the State of Washington filed suit, requesting a temporary restraining order (TRO) to block the government's ability to implement Sections 3 and 5 of the Order.<sup>47</sup> Arguing against the Order on Constitutional grounds, the State claimed the discriminatory nature of the Executive Order violated equal protection guaranteed under the Fifth Amendment, thus "harm[ing] Washington State residents on the basis of their religion or national origin."<sup>48</sup> Further, the State argued that the Order violated the Establishment Clause of the First Amendment, as there was evidence of religious discrimination in the preferential treatment given to Christian minorities.<sup>49</sup> Judge Robart granted the nationwide TRO, giving the TRO immediate effect nationwide.<sup>50</sup>

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<sup>46</sup> Decision and Order, *Darweesh v. Trump*, 1:17-cv-00480, (E.D.N.Y. Jan. 28, 2017).

<sup>47</sup> Complaint for Declaratory and Injunctive Relief, *Washington v. Trump*, C2:17-0141JLR, (W.D. Wash. Jan. 30, 2017).

<sup>48</sup> *Id.* at 8-9.

<sup>49</sup> Emily C. Callan, *A Funny Thing Happened on My Way to the Border: How the Recent Immigration Executive Orders and Subsequent Lawsuits Demonstrate the Immediate Need for Comprehensive Immigration Reform*, 47 U. Balt. L. Rev. 1, 7 (Fall 2017).

<sup>50</sup> *Washington v. Trump*, 2017 WL 462040, at 2.

Promptly challenging the TRO, the Department of Justice maintained the State had not only lacked standing, but that the “President’s decisions about immigration policy, particularly when motivated by national security concerns, are *unreviewable*, even if those actions potentially contravene constitutional rights and protections.”<sup>51</sup> While the Ninth Circuit acknowledged the weight typically given to the Government’s national security concerns when balanced against the public interest, the Court disagreed that the Government’s national security determinations could be considered unreviewable, as “the Supreme Court has made clear that the Government’s ‘authority and expertise in [such] matters do not automatically trump the Court’s own obligation to secure the protection that the Constitution grants to individuals, even in times of war.’”<sup>52</sup> Reviewing the Government’s national security claims, the Ninth Circuit found the Government could produce “no evidence that any alien from any of the countries named in the Order has perpetrated a terrorist attack in the United States,”<sup>53</sup> thus concluding the Government had not adequately shown that staying the TRO would avoid irreparable injury.<sup>54</sup>

Through its inability to produce evidence supporting the Government’s national security reasoning for these immigration policies, the President’s justification for the ban as a protective measure quickly loses force. In its decision, the Ninth Circuit emphasized President Trump’s anti-Muslim statements on the campaign trail, highlighting how such statements impacted the Court’s

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<sup>51</sup> *Washington v. Trump*, 847 F.3d 1151, 1161 (9<sup>th</sup> Cir. 2017).

<sup>52</sup> *Id.* at 1163.

<sup>53</sup> *Id.* at 1168. In a footnote, the Court further explained that while the Government provided a list showing the seven nations as “countries of concern,” the Government’s lack of evidence “or even an explanation of how the national security concerns that justified those designations . . . can be extrapolated to justify an urgent need for the Executive Order to be immediately reinstated.” Footnote 7.

<sup>54</sup> *Id.*

reasoning.<sup>55</sup> Following the continued challenges to the first Order coupled with the Ninth Circuit's rejection of the Government's appeal, the President stated that he would issue a new executive order designed to comply with the Ninth Circuit's order.<sup>56</sup>

**b. *Executive Order 13780: Try, Try Again . . .***

After much speculation as to the expected announcement of the second iteration of the travel ban, President Trump signed Executive Order 13780 ("second Order" or the "Order"), also titled "Protecting the Nation from Foreign Terrorist Entry to the United States," on March 6, 2017.<sup>57</sup> As with Executive Order 13769, the second Order opened with a sweeping policy and purpose section, pushing the role of national security in improving the current vetting and screening protocols,<sup>58</sup> and reiterating concerns that "terrorist groups have sought to infiltrate several nations through refugee programs."<sup>59</sup> Within this Section, the Order cited reports issued by the Department of State concerning terrorism-related activities in the Sudan, Syria, Iran, Libya, Somalia, and Yemen,<sup>60</sup> the six countries designated in the first Order as posing "heightened risks

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<sup>55</sup> *Id.* 1167. The Ninth Circuit addressed the statements offered by the States to show "intent to implement a 'Muslim ban' as well as evidence they claim suggest the Executive Order was intended to be that ban." The Court acknowledged that "evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims."

<sup>56</sup> Laura Jarrett, Allie Malloy and Dan Merica, *Trump Promises New Immigration Order as DOJ holds off Appeals Court*, CNN (February 16, 2017) available at: <https://www.cnn.com/2017/02/16/politics/donald-trump-travel-ban-executive-order/index.html> (quoting President Trump "The new order is going to be very much tailored to what I consider to be a very bad decision.")

<sup>57</sup> Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 13209 (March 6, 2017), available at <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/> (hereinafter Executive Order 2).

<sup>58</sup> *Id.* at § 1(a)

<sup>59</sup> *Id.* at § 1(b)(iii)

<sup>60</sup> Lee, *supra* note 34 at 468.

to the security of the United States.”<sup>61</sup> These reports attempted to justify the need for revised screening and vetting protocols in the refugee admissions process, pointing to two specific cases in which admitted refugees were later convicted for terrorist activity.<sup>62</sup>

Citing these State Department reports and briefly alluding to cases of domestic terrorism committed by refugees, the second Order sought to justify the continued suspension of refugee admissions under USRAP for 120-days.<sup>63</sup> In the same vein, the Order upheld the ceiling of 50,000 refugee admissions for fiscal year 2017.<sup>64</sup> Unlike its predecessor, the second Order removed any reference to an indefinite ban on Syrian refugee admissions or preferential admission to religious minorities.<sup>65</sup> Case by case admissions at the discretion of the Secretaries of State and Homeland Security remained in effect.<sup>66</sup> Despite these slight changes, at the heart of the second Order lies the same animus as the first Order—a blatant attempt to prohibit refugees and immigrants from Muslim-majority countries from entering the United States through legitimate immigration channels and admissions processes on the basis of national security concerns.

As was the case with the first travel ban, advocates across the nation jumped on the second Order, bringing suit in federal courts across the country. Shortly after the signing of the second

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<sup>61</sup> Executive Order 2 § 1(d), (e). The Order highlights these nations as “state sponsor(s) of terrorism,” which inhibits “foreign government’s willingness . . . to share or validate important information about individuals seeking to travel to the United States,” furthering the fear that valid immigration channels “will be exploited to enable terrorist operatives or sympathizers to travel to the United States.”

<sup>62</sup> *Id.* at § 1(h). The Order cites (1) “two Iraqi nationals admitted to the United States as refugees in 2009 [were] sentenced to 40 years to life in prison . . . for multiple terrorism-related offenses,” and (2) “a native of Somalia . . . brought to the United States as a child refugee . . . sentenced to 30 years in prison for attempting to use weapon of mass destruction.”

<sup>63</sup> Lee, *supra* note 34 at 468.

<sup>64</sup> *Id.* at § 6(a)-(b).

<sup>65</sup> *Id.* at § 6(a), (c).

<sup>66</sup> *Id.* § 6(c).



Order, the State of Hawaii filed suit, arguing the Order was “nothing more than Muslim Ban 2.0.”<sup>67</sup> In *Hawaii v. Trump*,<sup>68</sup> the State of Hawaii challenged the Sections 2 and 6 of the Order, seeking a nationwide temporary restraining order meant to block the Government’s ability to enforce or implement these Sections.<sup>69</sup> In its complaint, the State asserted eight causes of action, predominantly concerning violations of the Constitution, including the Establishment Clause of the First Amendment and Due Process Clause of the Fifth Amendment.<sup>70</sup> Additionally, the State raised claims that the Order violated numerous statutory provisions, including the INA and the Religious Freedom Restoration Act.<sup>71</sup> This case brought many of President Trump’s social media posts and anti-Muslim statements to the forefront, arguing the Order was inherently discriminatory on the basis of nationality, as well as on the basis of religion.<sup>72</sup>

While the District Court found that the Orders were not facially discriminatory against any religion,<sup>73</sup> it noted that:

[S]tatements made in the months leading up to and contemporaneous with the signing of the Executive Order, and, in many cases, made by the Executive himself, betray the Executive Order’s stated secular purpose. Any reasonable, objective observer would conclude, as does the Court for purposes of the instant Motion for TRO, that the stated secular purpose of the Executive Order is, at the very least, “secondary to a religious objective” of temporarily suspending the entry of Muslims.<sup>74</sup>

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<sup>67</sup> Statement of Attorney General Doug Chin in Response to the President’s New Executive Order, State of Hawaii Department of the Attorney General (March 6, 2017) <https://ag.hawaii.gov/wp-content/uploads/2017/01/News-Release-2017-26.pdf>; Laurel Wamsley, *Hawaii Mounts Legal Challenge to President’s Revised Travel Ban*, NPR, Inc. (March 8, 2017) available at <https://www.npr.org/sections/thetwo-way/2017/03/08/519263084/hawaii-will-mount-legal-challenge-to-presidents-revised-travel-ban>

<sup>68</sup> *Hawaii v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017).

<sup>69</sup> *Id.* at 1122-23.

<sup>70</sup> *Id.* at 1128.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1128.

<sup>73</sup> *Id.* at 1135.

<sup>74</sup> *Id.* at 1137.

In light of the foregoing, the District Court granted the TRO,<sup>75</sup> effectively blocking the Government from implementing Sections 2 and 6 of the Order, a decision the Government promptly appealed.<sup>76</sup> The Ninth Circuit upheld the District Court's injunction.<sup>77</sup>

Contemporaneously, the District Court of Maryland heard arguments to enjoin the implementation of the second Order in *International Refugee Assistance Project et al. v. Trump*.<sup>78</sup> Plaintiffs in the case requested the District Court enjoin the enforcement of the second Order, arguing enforcement and implementation of the ban would cause irreparable harm to the refugees seeking to enter the United States, and their families.<sup>79</sup> In response, the District Court enjoined Section 2(c) of the Order, and the Government quickly appealed to the Fourth Circuit Court of Appeals.<sup>80</sup>

Addressing whether a plaintiff had the right to challenge an Executive Order “that in its text speaks with vague words of national security, but in context drips with religious intolerance, animus and discrimination,”<sup>81</sup> the Fourth Circuit upheld the District Court's injunction of Section 2(c).<sup>82</sup> In its analysis, the Fourth Circuit scrutinized the Trump Administration's main national security-based justification for the Orders, citing a DHS report that was leaked shortly before the second Order was signed into law.<sup>83</sup> Evaluating the DHS report, the Fourth Circuit highlighted the report's key finding:

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<sup>75</sup> *Id.* at 1140.

<sup>76</sup> *Lee*, *supra* note 34 at 472.

<sup>77</sup> *Id.*

<sup>78</sup> *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017).

<sup>79</sup> *Id.* at 548.

<sup>80</sup> *Lee*, *supra* note 34 at 472.

<sup>81</sup> *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4<sup>th</sup> Cir. 2017).

<sup>82</sup> *Id.*

<sup>83</sup> Jordan Brunner and Amira Mikhail, *Fourth Circuit Upholds Injunction on Trump's Travel Ban in IRAP v. Trump: A Summary*, Lawfare (May 26, 2017) <https://www.lawfareblog.com/fourth-circuit-upholds-injunction-trumps-travel-ban-irap-v-trump-summary>

[M]ost foreign-born, U.S.-based violent extremists became radicalized many years after entering the United States, and concluded that increased screening and vetting was therefore unlikely to significantly reduce terrorism related activity in the United States.<sup>84</sup>

Drawing on the DHS report and the discriminatory remarks made by the President both on the campaign trail and shortly after his election and inauguration, the Fourth Circuit found that despite the Order's facial neutrality, the "practical operation [of the Order] is not severable from the myriad of statements explaining its operation as intended to bar Muslims from the United States."<sup>85</sup>

In a concurring opinion, Judge Keenan agreed with the majority's conclusion, "that the stated 'national security purpose' of the Second Executive Order likely fails *Mandel's* 'bona fide' test and violates the Establishment Clause."<sup>86</sup> Judge Thacker, in a concurring opinion, goes on to conclude the "principal motivation for the travel ban was a desire to keep Muslims from entering this country."<sup>87</sup> She notes the lack of evidence presented to support the Government's argument that the second Order will protect the nation from foreign terrorism, and in the alternative cites a number of reports and amicus briefs showing the opposite.<sup>88</sup>

Following the decisions in the Ninth and Fourth Circuits, the Government petitioned the Supreme Court for certiorari to stay the injunctions. In a per curiam decision, the Court addressed the Ninth and Fourth Circuits nationwide injunctions of Sections 2 and 6 of the Order, respectively. Reviewing the Government's petition to stay the injunction of Section 2, the Court granted the

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<sup>84</sup> *Int'l Refugee Assistance Project v. Trump*, 857 F.3d at 575.

<sup>85</sup> *Id.* at 597, 601 "EO-2 cannot be divorced from the cohesive narrative linked it to the animus that inspired it. In light of this, we find that the reasonable observer would likely conclude that EO-2's primary purpose is to exclude persons from the United States on the basis of their religious beliefs."

<sup>86</sup> *Int'l Refugee Assistance Project v. Trump*, 857 F.3d at 606 (Keenan, J. concurring).

<sup>87</sup> *Id.* at 635 (Thacker, J., concurring).

<sup>88</sup> *Id.* (quoting a Department of Homeland Security report which found "that country of citizenship is unlikely to be a reliable indicator of potential terrorist activity").

application. However, the Court limited the Government's enforcement of Section 2(c) to foreign nationals who could not claim a bona fide relationship to a person or entity already within the United States.<sup>89</sup> Turning to the Ninth Circuit's injunction of Section 6, the Court again looked to the bona fide relationship as a distinguishing factor in enforcement of the Section.<sup>90</sup> In balancing the Government's interest in national security as against a refugee with no connection to the United States, the "balance tips in favor of the Government's compelling need to provide for the Nation's security."<sup>91</sup> While in the lower courts the anti-Muslim rhetoric and statements of the President weighed heavily in decisions to block the Orders, the Court's opinion noticeably lacked substantive discussion of President Trump's campaign statements, basing its decisions solely on a balancing of the equities.

***c. Third Time is Not the Charm: Proclamation 9645 and Executive Order 13815***

With the expiration of the second Order on September 24, 2017, the Trump administration issued a third version of the Executive Order in the form of a proclamation, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats" (Proclamation).<sup>92</sup> Replacing the second Order, the Proclamation still holds close to many of the original aims of the second Order. Travel to the United States by foreign nationals of the six predominantly Muslim countries remains suspended;

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<sup>89</sup> *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2086 (U.S. 2017) The Court described the bona fide relationship as one of a "close familial relationship," or one of "formal, documented, and formed in the ordinary course" nature for entities.

<sup>90</sup> *Id.* at 2089.

<sup>91</sup> *Id.*

<sup>92</sup> Proclamation 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats" (September 24, 2017) available at <https://www.gpo.gov/fdsys/pkg/DCPD-201700685/pdf/DCPD-201700685.pdf> (hereinafter the Proclamation).

however, the Proclamation now adds North Korea and Venezuela<sup>93</sup> to the list, presumably in an attempt to counter arguments the travel ban specifically targets Muslim immigrants.

A month after the Proclamation was issued, the 120-day suspension of USRAP operations expired, resulting in the issuance of a third Executive Order on October 24, 2017, entitled “Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities” (hereinafter the third Order).<sup>94</sup> Section 1 of the third Order attempts to distinguish the newly implemented travel limitations of the Proclamation, concluding that while refugees admitted through USRAP pose “unique security risks,” the admission restrictions for foreign nationals under the Proclamation would not be applicable to refugees seeking admission through USRAP.<sup>95</sup>

Following review of the USRAP admissions program by the Secretaries of State and Homeland Security and the Director of National Intelligence, it was determined that the screening and vetting protocols were “generally adequate,” and with that, the third Order reinstated refugee admissions.<sup>96</sup> However, as with each version of President Trump’s Executive Order, there was a caveat. While refugee admission processes were deemed adequate, refugees would continue to be subjected to additional security checks and more intensive background checks.<sup>97</sup>

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<sup>93</sup> *Id.* at § 2(f)(ii). As it pertains to Venezuela, the Proclamation narrowly tailors the suspension of travel into the United States to members of the Venezuelan government involved in screening and vetting procedures and their families.

<sup>94</sup> Executive Order 13815, *Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities*, 82 FR 50055 (October 24, 2017) available at <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-resuming-united-states-refugee-admissions-program-enhanced-vetting-capabilities/> (hereinafter Executive Order 3).

<sup>95</sup> *Id.* at § 1(g)-(h).

<sup>96</sup> *Id.* at § 2(a).

<sup>97</sup> Joel Rose, *White House Says Refugee Admissions Can Resume, with New Security Vetting*, NPR (October 24, 2017) available at <https://www.npr.org/sections/thetwo-way/2017/10/24/559939989/white-house-says-refugee-admissions-can-resume-with-new-security-vetting>. All refugees will be required to supply personal information going back ten

Further, refugees hailing from eleven unnamed nations would be subject to even greater heightened screening and vetting protocols for an additional 90-days.<sup>98</sup> While the third Order did not disclose the eleven countries, there has been speculation stemming from statements by senior officials that the countries include Egypt, Iran, Iraq, Libya, Mali, North Korea, Somalia, South Sudan, Sudan, Syria and Yemen.<sup>99</sup> According to a memorandum from Secretary of State Rex Tillerson, Acting Secretary of Homeland Security Elaine Duke and Director of National Intelligence Daniel Coats to President Trump (Memo), these eleven nations were “identified as posing a higher risk to the United States through their designation on the Security Advisory Opinion (SAO) list.”<sup>100</sup> The memo further states that during this 90-day review period, foreign nationals from nations other than these eleven SAO countries will be given priority review.<sup>101</sup> Keeping in theme with the President’s anti-Muslim rhetoric, this third Order would predominantly impact refugees from certain majority-Muslim countries included in the list of eleven SAO nations. Additionally, the new admissions policy would indefinitely suspend the “following to join” program for all refugees, regardless of nationality.<sup>102</sup>

Following the release of the Memo and the President’s Executive Order reinstating the admissions program, legal challenges were mounted on the continued suspension of the following-

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years rather than the current five years, in addition to providing contact information for family members worldwide.

<sup>98</sup> *Id.* at § 3(a)(ii).

<sup>99</sup> Ted Hesson, *Trump targets refugees from 11 nations*, POLITICO (October 25, 2017) available at <https://www.politico.com/story/2017/10/24/refugee-nations-trump-administration-muslim-244135>

<sup>100</sup> Secretary Rex Tillerson, Secretary Elaine Duke, Director Daniel Coats to President Donald Trump, Memorandum to the President, 2 (October 23, 2017) available at <https://www.state.gov/documents/organization/275306.pdf> (hereinafter the Agency Memo).

<sup>101</sup> *Id.* at 2.

<sup>102</sup> The “following-to-join” program admits refugees with close family ties to those already resettled in the United States. Agency Memo, *supra* note 93 at 2.

to-join program and the extended 90-day review period for foreign nationals of the eleven SAO countries.<sup>103</sup> A Washington District Court judge found that while claims of national security constitute a compelling government interest, the government had failed to identify any specific national security threat in suspending the following-to-join program and the additional 90-day review, “[a]t most, the Agency Memo expresses general ‘concerns’ with admitting FTJ [following-to-join] refugees and refugees from SAO countries.”<sup>104</sup> Further, the District Court pointed to statements of former national security officials, who were “unaware of any national security threat that would justify the Agency Memo,” and “detailed concretely how the Agency Memo will harm the United States’ national security and foreign policy interests.”<sup>105</sup> In light of the foregoing, the District Court enjoined the government from enforcing these provisions of the Memo only as applied to following-to-join refugees or refugees with a “bona fide relationship to another person or entity within the United States.”<sup>106</sup>

At the conclusion of the 90-day review period, the Trump Administration resumed refugee admissions from the eleven SAO countries; however, foreign nationals from these countries continue to be subject to heightened vetting despite continuing lack of transparency as to who from these nations would be subject to increased screening.<sup>107</sup> Secretary of Homeland Security, Kirstjen Nielsen, stated “these additional security measures will make it harder for bad actors to exploit our refugee program, and they will ensure we take a more risk-based approach to protect the

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<sup>103</sup> *Doe v. Trump*, 2017 WL 6551491 (W.D. Wash. 2017).

<sup>104</sup> *Id.* at 70.

<sup>105</sup> *Id.* at 70-71.

<sup>106</sup> *Id.* at 76.

<sup>107</sup> Yeganeh Torbati, *U.S. to Resume Refugee Admissions from 11 “High-Risk” Countries*, Reuters (January 29, 2018) available at <https://www.reuters.com/article/us-usa-immigration-refugees/u-s-to-resume-refugee-admissions-from-11-high-risk-countries-idUSKBN1FI27F>;

homeland.”<sup>108</sup> While the resumption of refugee admissions program has been welcomed by resettlement agencies, concerns remain that the Trump Administration continues its aim to dramatically reduce and effectively bar the admission of Muslims.<sup>109</sup>

### **III. Thinly Veiled Religious Discrimination in Trump’s Refugee Policies and International Norms of Non-Discrimination**

In promulgating the Refugee Act of 1980 and adopting the United Nations definition of refugee, it was arguably the intent of Congress to bring domestic refugee law into compliance with international norms and standards. Following this logic, federal courts have “generally held that international law guidance, and in particular that of the United Nations High Commissioner on Refugees, informs U.S. courts construing our [U.S.] refugee law.”<sup>110</sup> Article 3 of the Convention guides the non-discrimination policy afforded to refugees, “The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.”<sup>111</sup> Furthering the focus on non-discrimination, the Introductory Note of the Convention discusses the Convention’s right-based and status-based purpose, naming non-discrimination as the first fundamental principle of the instrument.<sup>112</sup> While these international standards of non-discrimination should guide domestic refugee policies, this has long not been the case in the United States, a concept that remains true with President Trump’s various Executive Orders.<sup>113</sup>

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<sup>108</sup> Miriam Jordan, *New Scrutiny Coming for Refugees from 11 “High-Risk” Nations*, The New York Times, (January 29, 2018) available at <https://www.nytimes.com/2018/01/29/us/muslim-refugees-trump.html>

<sup>109</sup> *Id.*

<sup>110</sup> Lee, *supra* note 34 at 486.

<sup>111</sup> 1951 Convention, *supra* note 5 at Article 3.

<sup>112</sup> *Id.* at page 3. (“Convention provisions . . . are to be applied without discrimination as to race, religion or country of origin. Developments in international human rights law also reinforce the principle that the Convention be applied without discrimination as to sex, age, disability, sexuality or other prohibited grounds of discrimination.”)

<sup>113</sup> Lee, *supra* note 34 at 508 (“Executive action targeting refugees for exclusion and adverse treatment on the basis of protected ground contravenes these embedded norms, denigrating



Despite the central status of the principle of non-discrimination in the Convention and subsequent Protocol (of which the United States is a party state), President Trump has continually strayed from these principles in his various iterations of the travel ban. In justifying his Executive Orders, President Trump has invoked executive authority to act under Section 1182(f) of the INA<sup>114</sup>, which provides:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions as he may deem to be appropriate.<sup>115</sup>

In relying on this statutory provision, the Executive is required to provide “a finding that a class of aliens would be detrimental to the interests of the United States.”<sup>116</sup> The first Order makes no such formal findings, and although the second Order makes brief mention of terrorist groups utilizing refugee admissions programs to gain lawful access to the United States, this does not constitute a formal finding “regarding the harmful nature of refugees as a class.”<sup>117</sup> With an increased focus on the President’s campaign statements and tweets on his Presidential twitter feed, federal courts have found the various bans stem largely from an anti-Muslim, discriminatory intent.

President Trump cites national security concerns as the major reasoning behind his attempts to curtail refugee admissions into the United States. Within days of taking office, his first

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precisely those dimensions of human dignity that the Convention and our domestic refugee laws strive to protect.”)

<sup>114</sup> Executive Order(s) 1-2

Pursuant to section 212(f) of the INA, I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any entries in excess of that number until such time as I determine that additional entries would be in the national interest.

<sup>115</sup> 8 U.S.C. § 1182(f) (2013).

<sup>116</sup> *Hawaii v. Trump*, 859 F.3d 741, 770 (9<sup>th</sup> Cir. 2017).

<sup>117</sup> Lee, *supra* note 34 at 517.

travel ban claimed terrorist groups were manipulating the United States' refugee resettlement program as a means of entering the country with the intent to do harm.<sup>118</sup> Despite his first ban being struck down by federal courts, President Trump furthered this anti-refugee position in his second Executive Order, claiming again that “[t]errorist groups have sought to infiltrate several nations through refugee programs.”<sup>119</sup> Going on to cite two cases in which persons admitted to the U.S. as refugees were later convicted for terrorism-related offenses,<sup>120</sup> President Trump ignores the majority of cases in which foreign nationals admitted as refugees go on to lead productive lives in the United States.

A report by the CATO Institute published in September of 2016 found the likelihood of “an American being murdered in a terrorist attack caused by a refugee is 1 in 3.64 billion per year; whereas, the chance of an American “being murdered by somebody other than a foreign-born terrorist was 252.9 times greater than the chance of dying in a terrorist attack committed by a foreign-born terrorist.”<sup>121</sup> During the period between 1975 and the end of 2015, over three million refugees were admitted to the United States.<sup>122</sup> The report notes that “[o]f the 3,252,493 refugees admitted from 1975 to the end of 2015, 20 were terrorists . . . one terrorist entered as a refugee for every 162,625 refugees who were not terrorists.” Further, of those twenty refugees, only three refugees carried out successful attacks, causing three fatalities.<sup>123</sup>

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<sup>118</sup> Executive Order 1, *supra* note \_\_ at § 1. (“Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program.”).

<sup>119</sup> Executive Order 2, *supra* note \_\_ at § 1(b)(iii).

<sup>120</sup> *Id.* at § 1(h).

<sup>121</sup> Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, 798 CATO Instit. Policy Analysis 13 (2016).

<sup>122</sup> *Id.* at 13.

<sup>123</sup> *Id.*

In addition to the foregoing, these fatalities occurred before the implementation of the Refugee Act of 1980, which codified the modern screening and vetting protocols for the United States refugee admissions programs.<sup>124</sup> Upon the implementation of the Refugee Act of 1980, “no person accepted to the United States as a refugee, Syrian or otherwise, has been implicated in a major fatal terrorist act.”<sup>125</sup> Even of the two cases cited by the second Order, a DHS memorandum notes that “most foreign-born US-based violent extremists likely radicalized several years after their entry to the United States.”<sup>126</sup>

In terms of refugee admissions, the United States already has some of the most stringent admissions policies in the world.<sup>127</sup> In a letter to Congress in 2015, top national security experts, including Madeleine Albright and Henry Kissinger, noted the importance of national security considerations in refugee admissions; however, the overarching theme of the letter highlighted the already intensive vetting process which should adequately satisfy any national security concerns.<sup>128</sup> The letter addressed the already “robust and thorough” vetting processes for resettlement, finding that “[refugees] are vetted more intensively than any other category of

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<sup>124</sup> *Id.*

<sup>125</sup> Eric Levenson, *How Many Fatal Terror Attacks Have Refugees Carried Out in the US? None.*, CNN, (January 29, 2017) available at <https://www.cnn.com/2017/01/29/us/refugee-terrorism-trnd/index.html>

<sup>126</sup> Greg Sargent, *Opinion: In Leaked Document, the Case for Trump's "Muslim Ban" Takes Another Huge Hit*, The Washington Post, (March 3, 2017), available at <https://www.washingtonpost.com/blogs/plum-line/wp/2017/03/03/in-leaked-document-the-case-for-trumps-muslim-ban-takes-another-hugehit/>

<sup>127</sup> Lori Nessel, *Instilling Fear and Regulating Behavior: Immigration Law as Social Control*, 31 Geo. Immigr. L.J. 525, 548 (Spring 2017).

<sup>128</sup> Betsy Fisher, *Trump's New Refugee Vetting Rules Will All but Stop the Resettlement Process*, ACLU, (October 26, 2017) available at <https://www.aclu.org/blog/immigrants-rights/trumps-new-refugee-vetting-rules-will-all-stop-resettlement-process>

traveler, and this vetting is conducted while they are overseas . . . [refugees] are screened by national and international intelligence agencies.”<sup>129</sup>

While President Trump argues extreme vetting will further national security interests and prevent terrorists from infiltrating the United States through the refugee resettlement program, the majority of national security experts argue that continuing to put up walls on refugee admissions actually harms U.S. national security interests.<sup>130</sup> Continuing to resettle refugees from hostile regions helps to promote stability in these regions, and above all is consistent with American values and ideals.<sup>131</sup> Remaining open to refugee resettlement “has proven integral to preserving and building goodwill with U.S. allies in the Middle East.”<sup>132</sup>

In light of these statistics and arguments by national security experts, President Trump’s promotion of national security as the basis for tightening refugee vetting becomes less persuasive. As has been shown by numerous federal courts and refugee advocates, there is clear discriminatory intent in the promotion of President Trump’s many variations of the travel ban and adjustments to the refugee resettlement program. Continuing to distinguish between refugee groups only furthers this discriminatory intent. Majority Muslim nations remain subject to heightened vetting protocols for refugee admissions with little in the way of support for such changes in procedure. President

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<sup>129</sup> Letter to Congress,

<http://www.humanrightsfirst.org/sites/default/files/FormerNatSecOfficialsLetterRefugees.pdf>

<sup>130</sup> Eleanor Acer, *Will Trump DHS Nominee Adhere to International Law?*, Human Rights First, (November 8, 2017) available at <https://www.humanrightsfirst.org/blog/will-trump-dhs-nominee-adhere-international-law>

<sup>131</sup> *Id.*

<sup>132</sup> *Supra*, note 19 at 176 (quoting 2015 bipartisan letter to Congress: “Refusing to take [refugees] only feeds the narrative of ISIS that there is a war between Islam and the West . . . We must make clear that the United States rejects this worldview by continuing to offer refuge to the world’s most vulnerable people, regardless of their religion or nationality.”).

Trump's "Muslim ban" undoubtedly violates the non-discriminatory purpose and intent of the Convention and Protocol, bringing the United States out of compliance with international law.

Since its inception, the travel ban has worked heavily against the admission of Muslim refugees and immigrants, and despite the resumption of refugee admissions programs, there has been a drastic downtick in the number of Muslim refugees admitted to the United States. Whereas between 2015 and 2016 Muslim refugee admissions averaged around 3,076, from the impetus of President Trump's ban and into the beginning of 2018, those numbers have decreased by ninety-one percent.<sup>133</sup> In comparison, Christian refugee admissions have dramatically increased, with Christian refugees now representing fifty-eight percent of all incoming refugees.<sup>134</sup>

While this drop in admissions can in part be linked to the 120-day suspension of USRAP, President Trump's administration has done little to ramp up refugee admissions since the resumption of the program. In slashing the maximum ceiling for refugee admissions to 45,000 in fiscal year 2018, President Trump made it even more difficult for Muslim refugees to enter the United States. Even with such a drastic reduction, the United States is barely on track to meet that ceiling.<sup>135</sup> With an estimated 20,800 refugees on track for admissions in 2018, the United States is faced with its lowest admissions rate since 1980.<sup>136</sup> Continued bureaucratic obstacles in the interviewing process have furthered the snail-like pace of admissions, causing many refugees' medical and background checks to expire before admission can be granted. These actions belie an

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<sup>133</sup> David Bier, *U.S. Approves Far Fewer Muslim Refugees, Immigrants, & Travelers*, CATO Institute, (April 23, 2018), available at <https://www.cato.org/blog/us-approves-far-fewer-muslim-refugees-immigrants-travelers>

<sup>134</sup> *America is on track to admit the fewest refugees in four decades*, The Economist (April 21, 2018), available at <https://www.economist.com/news/united-states/21740774-muslim-refugees-are-set-decline-85-america-track-admit-fewest-refugees>

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

intent to slowly dismantle the refugee resettlement program, with a specific aim at reducing the number of Muslim refugees from being admitted into the United States through USRAP.

### **Conclusion**

President Trump's ever-changing immigration and refugee policy is squarely opposed to U.S. international treaty obligations. The President's policy to exclude certain groups of refugees from admission to the United States blatantly violates the anti-discrimination provision of the 1951 Convention and 1967 Optional Protocol. While refugee admissions may have resumed, the clearly preferential treatment given to certain religious groups and refugees from non-Muslim-majority countries effectuates the innate intolerance with which President Trump has shaped the refugee admissions program.

President Trump carries great power in fashioning immigration and refugee policy to suit his anti-Muslim agenda, as can be seen with massive declines in Muslim refugee admissions, and increased bureaucratic red tape slowing the admissions process to a near crawl. Betsy Fisher, policy director at the International Refugee Assistance Project has called the President's actions "an effort to systematically dismantle the refugee program writ large, with a particular target and focus on immediate and drastic reduction in resettlement from Muslim-majority countries."<sup>137</sup> National security may be given the greatest deference in judicial review; however, where there is a glaring lack of evidence for the President's stated national security concerns, it is clear he has acted with discriminatory intent and purpose in enacting his immigration policies. Without a greater showing of true national security risk, the President's actions in suspending refugee

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<sup>137</sup> Keegan Hamilton, *Trump Has Banned Muslim Refugees. These Numbers Prove It*, VICE News, (April 25, 2018) available at [https://news.vice.com/en\\_us/article/j5a3g7/trump-has-banned-muslim-refugees-these-numbers-prove-it](https://news.vice.com/en_us/article/j5a3g7/trump-has-banned-muslim-refugees-these-numbers-prove-it)

admissions and critically slowing the admissions processes evidence an intent to discriminate against refugees in contravention of U.S. international legal obligations.