

EXECUTIVE ORDER 13769 AND AMERICA'S LONGSTANDING PRACTICE OF INSTITUTIONALIZED RACIAL DISCRIMINATION TOWARDS REFUGEES AND ASYLUM SEEKERS

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I. INTRODUCTION

For over three years, Hameed Khalid Darweesh, a married national of Iraq with three children, dreamed of the day he would enter the United States. Prior to the Iraq war, Mr. Darweesh was employed as an electrical engineer.¹ He later was contracted by the U.S. government to serve as an interpreter for the U.S. Army beginning in 2003 until 2013.² Like many Iraqi nationals who were contracted by U.S. Armed Forces, anti-America militias and insurgents repeatedly threatened Mr. Darweesh and his family.³ Iraqi government officials and Baghdad Police searched his home, targeting Mr. Darweesh and his family.⁴ As a result, Mr. Darweesh and his family relocated within Iraq numerous times before he finally applied for an Iraqi Special Immigrant Visa (“SIV”) on October 1, 2014.⁵

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1. Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief ¶¶ 18, 6, *Darweesh v. Trump*, <https://www.aclu.org/legal-document/darweesh-v-trump-petition-writ-habeas-corpus-and-complaint-declaratory-and-injunctive> (E.D.N.Y Jan. 28, 2017) (No. 117CV00480) [hereinafter *Petition for Writ and Complaint*].

2. *Id.* ¶¶ 4, 3.

3. *Id.* ¶¶ 18, 6.

4. *Id.* ¶¶ 20, 6.

5. *Id.* ¶¶ 20–22, 6–7.

According to the State Department, the SIV program was specifically developed to award visas to “Iraqi nationals who were employed by or on behalf of the U.S. government” during the Iraq war and was authorized by the National Defense Authorization Act of 2008.⁶ Thus, the SIV program for Iraqi nationals was intended to be used as a protective mechanism for individuals who worked with the U.S. government and who were specifically targeted as a result of their affiliation. The SIV program allows for a small proportion of Iraqis to circumvent the traditional U.S. Refugee Admissions Program (“RAP”) or asylum procedure due to their professional assistance to the U.S. Department of Defense during the Iraq War.⁷ After acquiring preliminary approvals from the Chief of Mission and U.S. Citizenship and Immigration Services (“USCIS”), Mr. Darweesh then filed a DS-260 visa application with the National Visa Center and awaited his interview with the U.S. embassy.⁸ In April 2016, Mr. Darweesh and his family appeared for their visa interview and on January 20, 2017, the family of five all received their special immigrant visas.⁹ Due to their fear of further persecution, Mr. Darweesh and his family fled Iraq and traveled to the United States on January 27, 2017.¹⁰ Unexpectedly, Mr. Darweesh and his family were immediately detained by U.S. Customs and Border Patrol (“CBP”); denied access to their attorney; prohibited from requesting asylum or withholding of removal; and placed into expedited removal proceedings without a hearing before an immigration judge.¹¹

Mr. Darweesh and his family were some of the first victims of President Donald J. Trump’s Executive Order entitled, “Protecting the Nation from Foreign Terrorist Entry into the United States.” The Executive Order, inately signed on Holocaust Remembrance Day, suspended the admission and issuance of immigration benefits, including refugee status, to foreign nationals of countries

6. U.S. Dep’t of State, *Special Immigrant Visas for Iraqis*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/visas/en/immigrate/iraqis-work-for-us.html> (last visited Oct. 21, 2017).

7. See *id.* (limiting applications to Iraqis who were employed by the U.S. government); U.S. Dep’t of State, *U.S. Refugee Admissions Program (USRAP) Direct Access Program for U.S. Affiliated Iraqis*, STATE.GOV (Mar. 11, 2016), <https://www.state.gov/j/prm/releases/factsheets/2016/254650.htm> (creating a separate path for Iraqis who were merely affiliated (including employment) with the U.S. Government)).

8. Petition for Writ and Complaint, *supra* note 1, ¶¶ 25, 7–8.

9. *Id.* ¶¶ 29–30, 8.

10. *Id.* ¶¶ 30, 8.

11. *Id.* ¶¶ 34, 9.

of particular concern.¹² Specifically, the Executive Order prohibits the admission of refugees from Syria indefinitely and suspends all refugee admission for 120 days.¹³ The intent of this Article is to assess whether Executive Order 13,769 invites institutionalized racial discrimination against Syrian refugees on the basis of national origin and enforces differential treatment towards refugees in general, thereby violating federal law and international norms and customs.

Institutional racism “is developed or is legitimised [sic] through the workings of institutions” (e.g., government, media, education, housing, police, etc.) and “refers to the manner in which [such] institutions generate or sustain racism . . . through the daily handling of people (everyday level) or through the mechanics of the society (structural level).”¹⁴ Similarly, direct institutionalized racism is defined as “organizationally-prescribed or community-prescribed actions, which have an intentionally differential and negative impact on members of [minority or] subordinate groups.”¹⁵ This form of discrimination is primarily performed continuously as a routine “by a large number of individuals guided by the rules [and regulations] of [their] organization.”¹⁶ Authors Clairece Booher Feagin and Joe R. Feagin explain, “Today this direct institutionalized discrimination can be shaped by informal unwritten rules as well as by more formal laws; both types of rules have often been [e]mbedded in a bureaucratic system.”¹⁷ Hence, institutionalized racial discrimination is the implementation of practices or regulations that are: [1] restrictive, distinctive, or preferential based on race, color, nationality, ethnicity, or descent; [2] have a negative effect on members of a minority group; and [3] are legitimized by a working institution. The federal government’s

12. *Id.* ¶¶ 15, 5.

13. Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8979 § 5(c) (2017) [hereinafter Exec. Order]; see Helene Cooper & Michael D. Shear, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html> (noting the admission of Syrian refugees was “indefinitely blocked” by the Executive Order).

14. MARC VERLOT, *Understanding Institutional Racism, in EUROPE’S NEW RACISM: CAUSES, MANIFESTATIONS, AND SOLUTIONS* 27, 31 (Evens Foundation ed., Evens Found. 2002) (internal quotation marks omitted).

15. CLAIRECE BOOHER FEAGIN & JOE R. FEAGIN, *DISCRIMINATION AMERICAN STYLE: INSTITUTIONAL RACISM AND SEXISM* 30 (1978).

16. *Id.*

17. *Id.* at 31.

Executive Order—under the pretext of national security from “radical Islamic extremism”—is an example of institutionalized racial discrimination against foreign nationals based on their nationality.

In Part I, this Article provides a brief explanation regarding the development of international refugee law, state responsibilities towards refugees under international and U.S. federal law, and the prohibition of discrimination towards such persons. Part II introduces the history of racial exclusion in U.S. immigration laws, particularly towards persons that meet the modern definition of a refugee. Part III examines the legislative purpose of Executive Order 13,769, the Ninth Circuit Court of Appeals’ judicial examination, and the order’s legitimacy under federal and international human rights law. Part IV concludes that a reversal of the Circuit Court’s injunction and similar discriminatory legislation would produce only negative effects on refugee populations and U.S. counterterrorism efforts.

A. Refugees and the Principle of Non-discrimination Under International Human Rights Law

After World War II and the Nuremberg Trials, the United States was instrumental in developing international human rights law with the Universal Declaration of Human Rights (“UDHR”)¹⁸: the first document proclaimed by the United Nations to establish fundamental human rights and universal protection.¹⁹ The UDHR emphasized that international human rights are inalienable rights on the very basis of being a human being and that State actors without legal consequence would not infringe upon inherent liberties, such as the right to equality.²⁰ The purpose of the UDHR was to ensure that the mass genocide of six million Jews during the Holocaust would not reoccur.²¹

18. Jimmy Carter, *A Cruel and Unusual Record*, N.Y. TIMES (Jun. 24, 2012), <http://www.nytimes.com/2012/06/25/opinion/americas-shameful-human-rights-record.html>.

19. Universal Declaration of Human Rights pmbl., Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 [hereinafter UDHR].

20. *Id.*

21. See U.S. Holocaust Mem’l Museum, *Documenting Numbers of Victims of the Holocaust and Nazi Persecution*, UHMM.ORG, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10008193> (last visited Oct. 21, 2017) (explaining that up to six million Jewish people died in the Holocaust).

Under Article 2, all persons are entitled to the rights and liberties found in the declaration “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²² Article 7 further states that all persons possess the individual human right to equality before the law “without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”²³ Finally, Article 14 asserts that *all* persons have the right to seek asylum from persecution.²⁴ Thus, pursuant to international human rights law, every individual—regardless of citizenship or immigration status—maintains the human right to equality without discrimination based on any classified distinction, such as race or national origin. Equally important, every individual maintains the human right to seek refuge in another country, free from discrimination.

The enactment of the UDHR did not extend far enough to protect individuals fleeing persecution. Although the UDHR held that all persons have a human right to seek political asylum, international law lacked a clear definition of a refugee, eligibility terms, and State responsibilities towards such persons escaping persecution. The United Nations constructed the office of the United Nations High Commissioner for Refugees (“UNHCR”), authorizing the committee to institute an international legal instrument that defines and outlines the rights of displaced persons and State obligations to them.²⁵ As a result, UNHCR developed the 1951 Convention Relating to the Status of Refugees²⁶

22. UDHR, *supra* note 19, Art 2.

23. *Id.* Art 7.

24. “(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purpose and principles of the United Nations.” *Id.* Art 14.

25. See UN Refugee Agency, *Advocacy*, UNHCR.ORG, <http://www.unhcr.org/en-us/advocacy.html> (last visited Oct. 21, 2017) (noting the organization’s responsibility for making the law aligns with international standards).

26. See UN Refugee Agency, *International Status of Refugees: Convention Relating to the Status of Refugees – Implementation*, UNHCR.ORG, <http://adlib-ras.unhcr.org/ais5/Details/archive/110002044> (last visited Oct. 21, 2017) (indicating the UNHCR’s involvement in the implementation of the Convention and its existence in the organization’s archives).

and the 1967 Protocol.²⁷ The legal term “refugee,” originally limited to events prior to January 1, 1951, was defined as an individual who,

owing to 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 avail himself of the protection of that country; or who, not having a 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.²⁸

The 1967 Protocol amended the Convention by removing the limitation to events prior to 1951, thereby giving universal coverage.²⁹ The United States did not sign the Convention; however, the United States became a signatory party to the 1967 Protocol on November 1, 1968, binding it to the Convention.³⁰

The Refugee Convention prohibits discrimination towards a refugee based on race, religion, or country of origin under Article 3.³¹ Article 7 holds that States shall provide refugees with the same treatment as other foreign nationals.³² Finally, Article 32 asserts that a refugee may not be expelled from a State on the grounds of national security or public order without the due process of law—a principle derived from the U.S. Constitution—allowing the

27. See UN Refugee Agency, *International Status of Refugees: Protocol Relating to the Status of Refugees – Implementation*, UNHCR.ORG, <http://adlib-ras.unhcr.org/ais5/Details/archive/110002048> (last visited Oct. 21, 2017) (indicating the UNHCR’s involvement in the implementation of the Protocol and its existence in the organization’s archives).

28. Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 303, entered into force 22 Apr. 1954, Art 1 § (A)(2), available at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-2.en.pdf> [hereinafter Refugee Convention].

29. See Protocol Relating to the Status of Refugees, 31 Jan. 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, entered into force 4 Oct. 1967, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20606/v606.pdf> [hereinafter Protocol] (defining a refugee as a person who would meet the definition established in the Convention if the 1951 limitation was removed). By ratifying the Protocol, the United States bound itself to respect Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees. *Id.*

30. UN Refugee Agency, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, UNCHR.ORG, <http://www.unhcr.org/en-us/protection/basic/3b73bd63/states-parties-1951-convention-its-1967-protocol.html> (last visited Oct. 21, 2017).

31. Refugee Convention, *supra* note 28, Art 3.

32. *Id.* Art 7.

refugee to receive adequate and proper notice of the expulsion and an opportunity to be heard.³³ Equally important, a State party may not repatriate a refugee to his or her country of origin where he or she may have a well-founded fear of future persecution on account of his or her race, religion, nationality, political opinion, or membership in a particular social group. This is also known as the principle of *non-refoulement*.³⁴ Thus, the Refugee Convention obligates the United States to prohibit state actors from discriminating against refugees on the basis of the previously mentioned protected classifications and excludes repatriation to his or her country of origin where he or she maintains a well-founded fear of persecution.

In 1992, the United States also ratified the International Covenant on Civil and Political Rights (“ICCPR”), a human rights treaty guaranteeing that State parties protect basic human rights, including all enumerated rights, without distinction on the basis of race, color, religion, or nationality (Article 2) and that all persons have equal protection before the law without discrimination based on race, color, religion, or nationality (Article 26).³⁵ Subsequently, the United States also signed and ratified the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), an international treaty specifically recognizing that all persons maintain the protection of fundamental liberties free from distinction based on race, color, or national origin.³⁶

Article 1, Section 1 defines *racial discrimination* as

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the

33. *Id.* Art 32 §§ 1–2; *see also* U.S. CONST. amend. V (establishing the need for due process).

34. Refugee Convention, *supra* note 28, Art 33. Although not discussed in this Article, Article 3, Section 1 of the Convention Against Torture also prohibits *refoulement* stating, “No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 U.N.T.S. 85, *entered into force* 26 June 1987, Art 3 § 1.

35. International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), *entered into force* 23 Mar. 1976, *available at* <http://www.refworld.org/docid/3ae6b3aa0.html>, Art 2, 26 [hereinafter ICCPR].

36. International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966), *entered into force* 4 Jan. 1969, *available at* <http://www.refworld.org/docid/3ae6b3940.html> [hereinafter ICERD] (noting the participation of the United States, as well as the purpose of the treaty).

purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.³⁷

Under Article 2, contracting States are obligated to condemn racism and discrimination by instituting laws and policies in compliance with the ICERD.³⁸ Furthermore, the ICERD requires State parties to nullify any existing racially discriminatory laws and prohibits the enactment of legislation that “strengthen[s] racial division.”³⁹ Article 5 reasserts human rights previously outlined in the ICCPR, such as the right to nationality, and maintains that such international human rights are free from racial discrimination based on race, color, nationality, or ethnicity.⁴⁰

Both the ICCPR and ICERD are exceedingly important to the United States’ obligations under international law. Both conventions require that the United States protect the human rights of its citizens and foreign nationals within its borders. Moreover, in compliance with the ICERD, the United States must protect individuals from racial discrimination and prohibit the enactment of racially discriminatory legislation and policies. These fundamental rights extend to refugees, who are also protected by the Refugee Convention and the Universal Declaration of Human Rights.

B. Refugees and the Principle of Non-Discrimination Under U.S. Federal Law

The United States government prides itself on the development of this nation after European Protestants sought refuge from religious persecution in Great Britain. In a letter to Tench Tilghman dated March 24, 1784, George Washington exhibited the country’s acceptance of immigrant workers and his desire to employ them, stating, “If they are good workmen, they may be of [Asia], Africa, or Europe. They may be Mahometans [Muslim], Jews, or Christian of any Sect—or they may be

37. *Id.* Art 1 § 1.

38. *Id.* Art 2 § 1(a).

39. *Id.* Art 2 § 1(c-e).

40. *Id.* Art 5.

Atheists.”⁴¹ Three years later, the Founding Fathers incorporated the principal of freedom from persecution without distinction with the ratification of the Federal Constitution and the Bill of Rights. Within the Bill of Rights, federalists passed the Fifth Amendment, which guarantees due process:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.⁴²

The U.S. Supreme Court has interpreted the Fifth Amendment to guarantee individuals the right to procedural due process—where persons are guaranteed notice and a fair hearing to address the infringement or taking of liberty, life, or property.⁴³ The Supreme Court has also inferred that the Fifth Amendment guarantees equal protection—applicable to the federal government—under the Due Process Clause.⁴⁴ The rights enumerated in the Federal Constitution are not restricted to U.S. citizens or lawful permanent residents, but extend to all persons within the United States, including refugees seeking asylum.⁴⁵

41. Nat'l Historical Publ'ns & Records Comm'n, *From George Washington to Tench Tilghman, 24 March 1784*, FOUNDERS.ARCHIVES.GOV, <https://founders.archives.gov/documents/Washington/04-01-02-0174> (last visited Nov. 6, 2017).

42. U.S. CONST. amend. V.

43. Gary Lawson et al., *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 423 (2014); see *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that racial discrimination in the public schools of Washington, D.C. violated Black Americans' due process of law under the Fifth Amendment, whereas the guarantee of "liberty" establishes one's right to equal protection and is thereby applicable to the federal government).

44. Lawson, *supra* note 43, at 419 n.17; see *Bolling*, 347 U.S. at 498–500 (holding that racial discrimination in the public schools of Washington, D.C. violated Black Americans' due process of law under the Fifth Amendment, whereas the guarantee of "liberty" establishes one's right to equal protection and is thereby applicable to the federal government).

45. Fundamental rights guaranteed by the Constitution are extended to all persons within the bounds of the United States and its territories, regardless of citizenship status. See *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001) (stating that noncitizens in U.S. territories are protected under the Fifth Amendment's Due Process Clause).

Under Article I, Congress maintains the constitutional authority to legislate immigration law.⁴⁶ With that authority, Congress passed the Immigration and Nationality Act of 1952 (“INA”), which governs immigration law and delegates its implementation to the Attorney General and subsequently the Secretary of the Department of Homeland Security after the terrorist attacks on September 11th.⁴⁷ Congress first amended the INA with the Immigration Act of 1965, which prohibits discrimination against immigrants and non-immigrants (persons visiting the United States on a temporary basis) based on national origin.⁴⁸ The non-discrimination clause asserts, “[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”⁴⁹ The purpose of the non-discrimination clause was to eliminate previous immigration policy through which the government exhibited preferential treatment in issuing immigration benefits based on nationality.⁵⁰

Congress later enacted the Refugee Act of 1980 (“Refugee Act”), which established the federal legislative definition of a refugee.⁵¹ In addition, the Refugee Act authorizes the Department of State to determine the number of refugees for admission each year; allows the Department of Homeland Security to develop the adjudicative process permitting refugees to adjust their immigration status to lawful permanent residency; and warrants

46. “The Congress shall have Power . . . To establish a uniform Rule of Naturalization.” U.S. CONST. art. I, § 8, cl. 1, 4.

47. Implementation of immigration law was subsequently delegated to the Secretary of the Department of Homeland Security after the establishment of the agency following the terrorist attacks on September 11, 2001. Immigration and Nationality Act, Pub. L. No. 82-414, § 103, 66 Stat. 163, 173–74 (1952); see Homeland Security Act, Pub. L. No. 107-296, § 101, 116 Stat. 2135, 2142 (2002) (noting that one purpose of establishing a Commission is to examine and relay facts pertaining to the terrorist attacks that occurred on September 11, 2001 and that one function is to conduct investigations possibly into immigration).

48. Immigration and Nationality Act, Pub. L. No. 89-236, § 202(a), 79 Stat. 911, 911 (1965).

49. *Id.*

50. See *id.* (omitting an explicit mention of the purpose behind the clause’s inclusion but the clause produces an obvious result); see also David Bier, *Trump’s Exclusion of Immigrants from Specific Countries Is Not Legal*, CATO.ORG (Jan. 31, 2017, 2:24 PM), <https://www.cato.org/blog/trumps-exclusion-immigrants-specific-countries-not-legal> (discussing the supposed purpose of the Amendment on which President Donald Trump relied to act in contrast to the plain meaning of the law).

51. Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102, 102–03 (1980) (codified as 8 U.S.C. § 1101(a)(42) (2014)).

the Department of Health and Human Services to implement the Refugee Resettlement Program, which provides integration services (e.g., health, employment assistance, child care services, etc.).⁵² The enactment of the Refugee Act was actualized to satisfy state obligations under the 1951 Refugee Convention and 1967 Protocol.⁵³

II. BACKGROUND AND HISTORY

As previously mentioned, racial discrimination under the ICERD includes laws or policies that *exclude, restrict, give preference, or create distinction* on account of an individual's "race, [color], descent, or national or ethnic origin."⁵⁴ The ICERD makes government policies that infringe upon human rights due to a racially discriminatory legislative purpose or effect a violation of international law.⁵⁵ Notwithstanding, the United States did not become a signatory party to the ICERD until its ratification in 1994.⁵⁶ Prior to the establishment of the United Nations and the implementation of legal frameworks protecting human rights, the primary safeguard from institutionalized racial discrimination was the U.S. Constitution. Nonetheless, historically the United States has not been immune to administering racially discriminatory policies towards foreign nationals, as exemplified by the forced migration of Africans for indentured servitude.⁵⁷

The United States first excluded immigration based on national or ethnic origin with the Chinese Exclusion Act of 1882.⁵⁸ Congress continued to exercise its constitutional authority to

52. *Id.* § 207–08 (codified as 8 U.S.C. 1158 (1982) (granting various departments with the authority to conduct certain actions)).

53. Sarah R. Goodman, Note, *Asking for Too Much? The Role of Corroborating Evidence in Asylum Proceedings in the United States and United Kingdom*, 36 FORDHAM INT'L L.J. 1733, 1747 (2013) (noting that the U.S. incorporated the 1951 Convention and Handbook provisions into the Refugee Act to meet international requirements).

54. ICERD, *supra* note 36, Art 1 § 1.

55. *Id.* Art 2 § 1; see Stephen Menendian et al., *Structural Racism*, KIRWAN INST. 1, available at http://www.kirwaninstitute.osu.edu/reports/2009/12_2009_CERDReport_SRintheUS.pdf (last visited Nov. 6, 2017) (defining racial discrimination broadly to include laws that have the purpose or effect of generating unequal human rights and freedoms).

56. Menendian et al., *supra* note 55, at 1 n.1.

57. See KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 13 (2004) (noting that the United States has a lengthy history of harsh treatment towards minorities, specifically those of African descent).

58. See *id.* at 19 (discussing the timing of discriminatory immigration laws and the public sentiment towards Chinese persons).

racially exclude immigrants based on national origin through World War I.⁵⁹ During World War II, based on national security concerns, the U.S. government initially refused the entry of European Jews fleeing Nazi persecution.⁶⁰ Finally, modern U.S. immigration policies continue to exclude refugees based on ethnicity or national origin, particularly Haitians and Central Americans.⁶¹

A. Chinese Exclusion Acts

After the Gold Rush of 1849, Chinese nationals immigrated to the west coast in search of economic opportunities in the mining, garment, factory, and agricultural industries.⁶² By the late 1800s, unemployment reached the west coast, and citizens attributed the economic recession to Chinese immigrants who conducted work for less pay.⁶³ At the same time, white Americans became increasingly xenophobic towards Chinese nationals, as a result of racial tension and cultural attitudes of superiority over people of color lingering after the Civil War.⁶⁴ In response to the public's fears that Chinese immigrants were taking jobs away from U.S. citizens, Congress passed legislation "limit[ing] the number of Chinese [immigrants] . . . to fifteen per ship or vessel"; however, President Rutherford B. Hayes vetoed the bill because it violated an international treaty with China, the Burlingame-Seward Treaty.⁶⁵ In an effort to compromise with Democrats, President Hayes "appointed U.S. diplomat James B. Angell to negotiate" the revision of the treaty and limit Chinese immigration.⁶⁶ The Angell Treaty of 1880 authorized the U.S. government to suspend,

59. See *id.* at 21 (implying, through talk of ending exclusion during World War II, that exclusion existed earlier than that during and before World War I).

60. *Id.* at 39–40.

61. *Id.* at 40.

62. *Chinese Exclusion Act (1882)*, HARV. U. LIBR. OPEN COLLECTIONS PROGRAM, <http://ocp.hul.harvard.edu/immigration/exclusion.html> (last visited Oct. 23, 2017) [hereinafter *Chinese Exclusion*]; see *Chinese Immigration and the Chinese Exclusion Acts*, U.S. DEP'T OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1866-1898/chinese-immigration> (last visited Nov. 6, 2017) [hereinafter *Chinese Immigration*] (noting that Chinese laborers immigrated to America to work in mines, factories, and the field of agriculture).

63. *Chinese Exclusion*, *supra* note 62.

64. *Chinese Immigration*, *supra* note 62.

65. *Id.*

66. *Id.*

regulate, or limit the immigration of Chinese laborers specifically immigrating for economic advancement.⁶⁷

In 1882, Congress passed the Chinese Exclusion Act, which paralleled the Angell Treaty and suspended Chinese immigration for ten years.⁶⁸ Chinese immigrants already in the United States were provided documents identifying their classifications (e.g., laborer, merchant, diplomat, etc.) and permitting temporary travel between the two countries.⁶⁹ Under the Scott Act of 1888, Congress reversed the clause permitting freedom of travel to China for Chinese immigrants with lawful residence in the United States.⁷⁰ Given that the Chinese Exclusion Act of 1882 only restricted Chinese immigration for ten years, Congress then passed the Geary Act of 1892 and extended the restrictions for an additional ten years.⁷¹ In 1902, the Geary Act was made permanent and expanded to the restriction of immigrants from the Philippines and Hawaii.⁷²

The Chinese Exclusion Act and subsequent extensions were finally challenged in *Chae Chan Ping v. United States*.⁷³ Appellant, a Chinese laborer with a lawful resident certificate permitting his re-entry, departed for China in June 1887.⁷⁴ On October 8, 1888, appellant returned to the United States and was inspected at the San Francisco port of entry.⁷⁵ The immigration official refused appellant's entry, citing the immigration certificate's invalidity given the passage of the Scott Act, which prohibited Chinese residents' re-admission into the United States.⁷⁶ Congress

67. Lucy Salzer, *Chew Heong v. United States: Chinese Exclusion and the Federal Courts*, FED. JUD. CENTER 3, 38–39 (2006), <https://www.fjc.gov/history/famous-federal-trials/chew-heong-v.-u.s.-chinese-exclusion-and-federal-courts> (last visited Nov. 6, 2017).

68. Chinese Exclusion Act of 1882, Pub. L. No. 47-126, § 1, 22 Stat. 58, 58 (1882) (repealed 1943).

69. *Chinese Immigration*, *supra* note 62.

70. Pub. L. No. 50-1064, § 1, 22 Stat. 504, 504 (1888) (repealed 1943); *see Chinese Immigration*, *supra* note 62 (explaining that Congress furthered Chinese exclusion with the implementation of the Scott Act, which made it impossible for Chinese residents to reenter the United States).

71. The Act also reaffirmed that Chinese immigrants lawfully present within the United States must retain immigration certificates attesting to their status. If a Chinese national did not obtain a residence certificate, he or she would be arrested, forced into hard labor, and subsequently deported. Geary Act of 1892, Pub. L. No. 52-60, § 6, 27 Stat. 25, 25–26 (1892) (repealed 1943).

72. *Chinese Immigration*, *supra* note 62.

73. 130 U.S. 581 (1889).

74. *Id.* at 582.

75. *Id.*

76. *Id.*

approved the Scott Act just seven days prior to appellant's arrival.⁷⁷

Appellant raised the question of whether the federal government retained the right to exclude Chinese immigrants pursuant to its sovereign power under the U.S. Constitution.⁷⁸ Writing for the Court, Justice Stephen Johnson Field held:

The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other.⁷⁹

Hence, Justice Field contended that Congress and the executive branch have *plenary* or sole power to govern immigration legislation with limited judicial review, pursuant to Congress' authorization to legislate "naturalization" under Article I and the federal government's sovereignty. Consequently, because

[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the [C]onstitution, the right to its exercise at any time when, in the judgment of the government; the interests of the country require it, cannot be granted away or restrained on behalf of any one.⁸⁰

77. See *id.* (calculating the spread in time based on the relevant dates); see also Scott Act, Pub. L. No. 50-1064, 22 Stat. 504, 504 (1888) (repealed 1943) (listing October 1, 1888 as the date the fiftieth Congress approved the supplement to the Act).

78. *Chae Chan Ping*, 130 U.S. at 589.

79. *Id.* at 606.

80. *Id.* at 609.

Professor Kevin Johnson expressed that modern federal courts continue to invoke the *plenary power doctrine* allowing the federal government to discriminate against foreign nationals who maintain a lawful right to permanently reside in the United States.⁸¹ Exercising plenary power, Congress continued to extend the exclusionary immigration regulations, expanding to the limitation of immigrants from Japan in 1907 and to such persons in the “Asiatic Barred Zone” in 1917.⁸² For over sixty years, Asians—particularly Chinese nationals—endured both individual racism from Americans and institutionalized racial discrimination as a result of immigration policies and judicial decisions. The Chinese Exclusion Acts were not repealed until 1943, during the height of World War II when China allied with the United States against Japan.⁸³

B. Immigration Act of 1917 and 1924

When Congress extended the Chinese Exclusion Acts with the Immigration Act of 1917, the federal legislation developed a literacy test administered to all immigrants seeking admission, who were over the age of sixteen.⁸⁴ At a time when the nation legitimized segregation with *Plessy v. Ferguson*,⁸⁵ segregationists also supported the new legislation because it restricted non-English speaking immigrants from entering the United States.⁸⁶ As a result, the law not only excluded the entry of immigrants from the “Asiatic Barred Zone” but also disproportionately refused entry to Greeks, Italians, Hungarians, and Poles.⁸⁷ President Woodrow

81. JOHNSON, *supra* note 57, at 86.

82. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1112, 1121 (1998) (showing that Congress implemented laws to exclude immigration from Asian nations in 1917); Ray Sanchez, *Immigration Ban? We Were There Exactly 100 Years Ago Today*, CNN, <http://www.cnn.com/2017/02/05/politics/trump-ban-1917-immigration-act-trnd/index.html> (last updated Feb. 5, 2017, 12:01 AM EST) (explaining that the modern day “Asiatic Barred Zone” includes Russia, Afghanistan, India, Iran, Saudi Arabia, Southeast Asia, and the Asian-Pacific islands).

83. Sanchez, *supra* note 82.

84. *The Immigration Act of 1924 (The Johnson-Reed Act)*, U.S. DEPT OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/immigration-act> (last visited Nov. 6, 2017) [hereinafter *Johnson-Reed Act*].

85. 163 U.S. 537, 550–51 (1896) (establishing the separate-but-equal doctrine, which allowed states to create separate facilities for blacks and whites so long as they were equal pursuant to the Equal Protection Clause of the Fourteenth Amendment).

86. Johnson, *supra* note 82, at 1128.

87. JOHNSON, *supra* note 57, at 23.

Wilson vetoed the law, which was subsequently overridden by Congress.⁸⁸ In vetoing the bill, President Wilson asserted that the legislation “all but close[d] entirely the gates of asylum which have always been open to those who could find nowhere else the right and opportunity of constitutional agitation for what they conceived to be the natural and inalienable rights of men.”⁸⁹

The literacy tests proved insufficient for restricting the number of immigrants entering the United States.⁹⁰ Thus, Congress revised the naturalization laws again in the 1920s.⁹¹ In an effort to continue formulating the ethnic composition of the United States, Senator William P. Dillingham (R-Vermont) introduced a bill to establish a national origin quota system, limiting the entry of foreign nationals to three percent of their total population within the United States, as set forth in the 1910 U.S. census.⁹² Senator Dillingham’s quota system was renewed in 1922, and by 1924, the program was well established.⁹³ Congress passed the Immigration Act of 1924, also known as the Johnson-Reed Act, which amended the quota system by lowering the existing program numbers to two percent of the foreign national population and revised the calculations based on the 1890 U.S. census rather than the 1910 census.⁹⁴ The quota system, originally based on the number of foreign nationals born outside of the United States but living within the U.S. territorial bounds, was now based on the entire U.S. population, including natural-born citizens.⁹⁵ Consequently, the percentage of available visas increased for Western Europe but decreased for other regions such as Southern and Eastern Europe.⁹⁶

According to Kevin Johnson, the legislative purpose of the revised quota system was to create a visa program that favored

88. Sanchez, *supra* note 82.

89. *Id.* (linking to another page presenting the entirety of President Wilson’s veto message).

90. *Johnson-Reed Act*, *supra* note 84.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*; see Immigration Act of 1924, Pub. L. No. 68-139, § 11(a), 43 Stat. 153, 159 (repealed 1952) (stating that “[t]he annual quota of any nationality shall be 2 per centum of the number of foreign-born individuals of such nationality resident in continental United States as determined by the United States census of 1890, but the minimum quota of any nationality shall be 100”).

95. *Johnson-Reed Act*, *supra* note 84.

96. *Id.*

Northern Europeans, whose culture Americans viewed as superior to Southern and Eastern Europeans'.⁹⁷ At the time of its passage, Southern and Eastern Europeans were considered non-white and perceived as unable to assimilate naturally into American society.⁹⁸

The Immigration Act of 1924 also excluded other races and ethnic persons. The Act included a provision that refused entry to any foreign national who, by virtue of his or her race or nationality, was ineligible for citizenship.⁹⁹ The law now extended to the exclusion of Asian descendants who were not previously prevented from immigrating, such as Japanese nationals.¹⁰⁰ The provision also excluded persons of African descent as a result of *Dred Scott v. Sandford*, which held that persons of African descent were not considered citizens under Article III of the U.S. Constitution.¹⁰¹ Even with immigration reform in 1952 and the passage of the INA, Congress retained the racially discriminatory nationality quota system.¹⁰² The quota system was not changed until the Immigration and Nationality Act of 1965.¹⁰³

C. Anti-Semitism and the Refusal of Jewish Refugees during World War II

After the national origin quota system was established, the allocation program also negatively affected Jewish refugees fleeing persecution in Nazi Germany. As previously mentioned, Europeans from South and Eastern Europe were considered non-white and inferior; thus, there were limitations to their available visas.¹⁰⁴ Furthermore, in the 1930s, Americans were still recovering from the Great Depression and sustained xenophobic fears that immigrants would obtain remaining available employment.¹⁰⁵ At the onset of World War II in 1939, the quota

97. JOHNSON, *supra* note 57, at 23.

98. *Id.*

99. *Johnson-Reed Act*, *supra* note 84.

100. *Id.*

101. *Dred Scott v. Sandford*, 60 U.S. 393, 421 (1857).

102. JOHNSON, *supra* note 57, at 24.

103. *See id.* (describing the timeline of the quota system's evolution).

104. *See id.* at 23 (describing the common attitude toward southern and eastern Europeans).

105. Constitutional Rights Found., *History Lesson 5: U.S. Immigration Policy and Hitler's Holocaust*, EDUCATING ABOUT IMMIGR., <http://crfimmigrationed.org/>

system only allocated for 27,370 German citizens; however, over 300,000 German refugees—most of them Jews fleeing the Nazis—were pending applicants for U.S. visas.¹⁰⁶ According to historians, only approximately 20,000 visa applications of Jewish refugees were approved that year.¹⁰⁷ Additionally, the federal government denied visas to any individual who was “likely to [be] a public charge.”¹⁰⁸ Since many Jewish refugees lost their jobs and abandoned their property during the war, Congress anticipated that such immigrants would seek government assistance upon entry.¹⁰⁹

Secretary of Labor, Frances Perkins, recommended to President Franklin D. Roosevelt that he initiate an Executive Order permitting an increase in the number of Jewish refugees from Germany.¹¹⁰ Secretary Perkins contended that the State Department should be authorized to give priority processing to refugees fleeing religious or racial persecution.¹¹¹ Nonetheless, State Department officials objected, and an Executive Order concerning refugees was never produced.¹¹² By 1938, public opinion regarding the intake of Jewish refugees was largely opposed to their admission, citing national security concerns.¹¹³

Encouraged by statements from President Roosevelt and officials from the Department of Justice, Americans believed Nazi and Communist spies were presenting themselves as Jewish refugees seeking admission into the United States.¹¹⁴ President Roosevelt even held a press conference, during which he alleged

index.php?option=com_content&view=article&id=144:hl5&catid=50:lessonsforteachers
(last visited Nov. 6, 2017) [hereinafter *Holocaust*].

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *See id.* (revealing that an opinion poll showed eighty-two percent of Americans still opposed admitting large numbers of Jewish refugees into the United States); *see also* Daniel A. Gross, *The U.S. Government Turned Away Thousands of Jewish Refugees Fearing That They Were Nazi Spies*, SMITHSONIAN.COM (Nov. 18, 2015), <http://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/> (describing how “[g]overnment officials from the State Department to the FBI to President Franklin Roosevelt himself argued that refugees posed a serious threat to national security”).

114. *See* Gross, *supra* note 113 (describing the story of Herbert Karl Friedrich Bahr, a refugee from Germany, who sought asylum in the United States, but was later revealed to be a Nazi spy).

unsubstantiated reports that Jewish refugees were engaging in espionage on behalf of the Nazi regime.¹¹⁵ As a result, the U.S. government heightened security vetting of any individual who had relatives in Nazi territories or concentration camps.¹¹⁶ This method prompted “spy trials” by the State Department, of persons whom the government believed were agents for either Nazis or Communists, and the State Department used the prosecutions as reasoning for refusing admission to Jewish refugees.¹¹⁷

The U.S. government’s racially discriminatory immigration policies undoubtedly contributed to World War II’s refugee crisis. Discrimination towards refugees further played out when almost a thousand German refugees—again, mostly Jewish—fled Europe on the St. Louis vessel, en route to Havana, Cuba.¹¹⁸ Upon reaching Cuba, the refugees were denied admission by immigration officials, who cited a revision in Cuba’s visa regulations.¹¹⁹ The vessel then departed for the United States and remained off the coast of Florida under watch by the U.S. Coast Guard.¹²⁰ While refugees waited, pro-immigration advocates called for State Department officials to admit the refugees; however, the agency refused to act without congressional legislation or an executive order.¹²¹ Both Congress and President Roosevelt refused to act on the refugees’ behalf, and all remaining passengers were returned to Europe.¹²² Many Jews were offered refugee status in neighboring European countries.¹²³ Notwithstanding, after the invasion of Europe by the Nazi regime, Nazi soldiers detained most of the St. Louis passengers and transported them to concentration camps.¹²⁴ Historians believe that at least 254 of the St. Louis passengers that returned to Europe were killed during the Holocaust.¹²⁵ The United States’ refusal to admit Jewish refugees and their subsequent persecution, based on unsupported claims of endangerment to

115. *Id.*

116. *Id.*

117. *Id.*

118. *Holocaust*, *supra* note 105.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Candice Norwood, *A Twitter Tribute to Holocaust Victims*, THE ATLANTIC (Jan. 27, 2017), <https://www.theatlantic.com/politics/archive/2017/01/jewish-refugees-in-the-us/514742/>.

national security, is an example of how racially discriminatory immigration policies can have a detrimental effect on refugees' human rights to life.

D. Modern Racial Exclusion of Asylum Seekers and Refugees
Based on National Origin

The refugee crisis during World War II was unprecedented. The Pew Research Center contends that in 1939 there were approximately 9.5 million Jews in Europe.¹²⁶ That number drastically dropped as a result of the Holocaust with an estimated 3.8 million in 1945.¹²⁷ The international shame regarding the rejection of Jewish refugees led the formation of the United Nations and subsequent international legal frameworks protecting human rights.¹²⁸ The Refugee Act of 1980 was constructed for the United States to uphold its State obligations to the 1951 Refugee Convention and 1967 Protocol.¹²⁹ Both the Department of State and Department of Justice worked together in the processing of immigrants seeking status as a refugee or asylum seeker.¹³⁰ Despite legislative success, the federal government continued to face challenges in protecting asylum seekers and refugees. Research indicates that the implementation of immigration policies towards asylum seekers and refugees are not consistently uniform in practice.¹³¹ To illustrate, in 1980, the same year the Refugee Act was passed, Central America faced wars and economic devastation causing a refugee crisis of its own; however, U.S. immigration officials disallowed these refugees to apply for

126. Michael Lipka, *The Continuing Decline of Europe's Jewish Population*, PEW RES. CENTER (Feb. 9, 2015), <http://www.pewresearch.org/fact-tank/2015/02/09/europes-jewish-population/>.

127. *Id.*

128. Michael Schaeffer Omer-Man, *The Origins and Politics of Israel's Refugee Debate*, +972 MAGAZINE (Jan. 28, 2014), <https://972mag.com/the-origins-and-politics-of-israels-refugee-debate/86180/>.

129. Eleanor E. Downes, *Fulfilling the Promise?: When Humanitarian Obligations and Foreign Policy Goals Conflict in the United States*, 27 B.C. THIRD WORLD L.J. 477, 486 (2007).

130. See U.S. Attorney's Office S. Dist. of Fla., *U.S. Department of Justice Encourages Reporting of Human Rights Violations*, U.S. DEPT OF JUST. (Nov. 23, 2016), <https://www.justice.gov/usao-sdfl/pr/us-department-justice-encourages-reporting-human-rights-violations> (mentioning the Department of Justice's involvement specifically but then referring to other agencies without naming the Department of State).

131. U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, USCIRF.GOV 17, <http://www.uscifr.gov/sites/default/files/Barriers%20To%20Protection.pdf> (last visited Nov. 6, 2017).

political asylum.¹³² Finally, beginning with the Bush Administration, thousands of Haitian nationals seeking refugee status have been unlawfully repatriated to Haiti and also have been prohibited from filing for asylum,¹³³ in heavy contrast from the large intake of their Caribbean neighbors, Cuban refugees.

1. *The De Facto “No Asylum” Policy for Central Americans*

After the passage of the Refugee Act, U.S. Immigration and Naturalization Service (“INS”) reorganized the agency, where immigration officers adjudicated applications for asylum claims.¹³⁴ On July 30, 1981, President Ronald Reagan addressed the nation regarding America’s commitment to supporting a country of immigrants and upholding international obligations relating to the intake of refugees:

Finally, we recognize that immigration and refugee problems require international solutions. We will seek greater international cooperation in the resettlement of refugees and, in the Caribbean Basin, international cooperation to assist accelerated economic development to reduce motivations for illegal immigration.¹³⁵

Although the Reagan Administration assured the international community that refugees would be resettled in the United States and that the country would cooperate with the United Nations and other stakeholders, the Administration struggled with maintaining its international commitments, particularly towards refugees from Central America.

During the early 1980s, civil war and economic despair caused thousands of Guatemalans, Nicaraguans, and Salvadorans to flee, causing a mass exodus to the United States and Canada.¹³⁶ Pro-

132. Rachael L. Godlove, *United States Asylum Policy: Safe Haven or Structured Exclusion?* 72 (Nov. 21, 2008) (unpublished M.A. thesis, Georgetown University), available at <https://repository.library.georgetown.edu/bitstream/handle/10822/558205/umi-georgetown-1068.pdf?sequence=1>.

133. *Id.* at 47.

134. See Edward M. Kennedy, *Refugee Act of 1980*, 15 INT’L MIGRATION REV. 141, 150 (1981) (explaining the impact of the new Refugee Act).

135. Presidential Library & Museum, *Statement on United States Immigration and Refugee Policy*, REAGANLIBRARY.GOV (July 30, 1981), <https://reaganlibrary.gov/archives/speeches/29-archives/speeches/1981/514-73081a>.

136. Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL’Y INST. (Apr. 1, 2006), <http://www.migrationpolicy.org/article/central-americans-and->

immigration and human rights activists called for the Reagan Administration to recognize the actions of these foreign governments as human rights violations; however, the Administration focused on national security and their political agenda to combat communism.¹³⁷ For instance, Amnesty International reported human rights violations by state actors, including military officials responsible for murdering community activists, priests, nuns, and union leaders in El Salvador, as well as Guatemalan soldiers for targeting indigenous persons causing internal displacement, kidnappings, and mass murders.¹³⁸ Nonetheless, the Reagan Administration intervened and supported both the Salvadoran and Guatemalan governments.¹³⁹

In 1995, over 140,000 Central American refugees applied for asylum, and “[f]ewer than [ten] percent of Salvadorans, Guatemalans, and Hondurans were granted asylum in 1999.”¹⁴⁰ The low percentage in asylum grants for Central Americans was the direct result of the Reagan Administration’s refusal to recognize the immigrants as refugees fleeing human rights violations. INS officials regarded the immigrants as “economic migrants” escaping financial hardships; thus, Central Americans did not qualify for asylum under the Refugee Act.¹⁴¹ The Reagan Administration allowed its foreign policy relations and support of the Central American governments to significantly influence INS decisions regarding asylum applications.¹⁴² Human rights activists also contend that U.S. immigration officials discouraged Central Americans from applying for asylum.¹⁴³ Guatemalans and Salvadorans were often apprehended at the U.S.-Mexico border, where they were “pressured . . . to ‘voluntarily return’ to their

asylum-policy-reagan-era; John Rosinbum, *A Crisis Transformed: Refugees, Activists and Government Officials in the United States and Canada During the Central American Refugee Crisis* 12 (Mar. 2014) (unpublished Ph.D. dissertation, Arizona State University), available at https://repository.asu.edu/attachments/135023/content/Rosinbum_asu_0010E_13984.pdf.

137. *Id.*

138. *Id.*

139. *Id.* “[O]ver 75,000 Salvadorans had been murdered or ‘disappeared,’” and researchers calculate that the Salvadoran war “had taken the life of 1 out of every 80 Salvadorans.” Rosinbum, *supra* note 136.

140. Advameg, Inc., *Refugee Policies—Refugees and the Cold War*, AMERICANFOREIGNRELATIONS.COM, <http://www.americanforeignrelations.com/O-W/Refugee-Policies-Refugees-and-the-cold-war.html> (last visited Nov. 6, 2017).

141. Gzesh, *supra* note 136.

142. *Id.*

143. *Id.*

countries of origin,” and never received legal counsel to seek asylum.¹⁴⁴ Pro-immigration lawyers and human rights organizations condemned the Reagan Administration, contending that the increase in deportations of Central American refugees and low approval of asylum claims were violations of the 1951 Refugee Convention and the Refugee Act of 1980.¹⁴⁵

The United States did not cease violating the principle of non-refoulement of Central American asylum seekers until a group of religious and human rights organizations brought forth a class action claim in *American Baptist Churches v. Thornburgh*.¹⁴⁶ According to the plaintiffs, the U.S. government discriminated against Central American immigrants and denied asylum claims based on the individuals’ national and ethnic origin.¹⁴⁷ In 1991, the federal court approved what is now known as the *ABC Settlement Agreement*, where the U.S. government ensures that “eligible class member[s] who register[] for . . . asylum by the agreed-upon dates . . . [are] entitled to an initial or de novo . . . adjudication [of their asylum claims] under the asylum regulations [of 1990].”¹⁴⁸ An eligible class member—even if he or she received a previous denial on his or her asylum claim—may re-file under the settlement guidelines.¹⁴⁹ The ABC settlement agreement was important to the overall processing of refugees and asylum seekers because it ensured that the adjudication of humanitarian applications would no longer be influenced by U.S. foreign policy agendas. Now, immigration officials adjudicate refugee and asylum claims on a case-by-case basis.¹⁵⁰

144. *Id.*

145. See Gzesh, *supra* note 136 (indicating claims of human rights violations generally).

146. See generally *id.* (describing the circumstances surrounding and the implications of the case); *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (detailing the noted case).

147. See *Am. Baptist Churches*, 760 F. Supp. at 799 (providing the plaintiffs’ claims).

148. U.S. Citizenship and Immigration Servs., *American Baptist Churches v. Thornburgh (ABC) Settlement Agreement*, USCIS.GOV, <https://www.uscis.gov/laws/legal-settlement-notice/american-baptist-churches-v-thornburgh-abc-settlement-agreement> (last updated Oct. 28, 2008).

149. *Id.*

150. U.S. Citizenship & Immigration Servs., *The Affirmative Asylum Process*, USCIS.GOV, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process> (last updated Jan. 17, 2017).

2. *Refugees from the Caribbean: The Differential Treatment Between Cuban and Haitian Nationals*

During the Cold War, Congress passed the Cuban Adjustment Act, which permitted Cuban refugees to be paroled into the United States.¹⁵¹ After one year, a Cuban refugee could apply for an adjustment of immigration status to that of a legal permanent resident.¹⁵² The Cuban Adjustment Act essentially provided Cubans—fleeing communism—a pathway to citizenship. The special privileges established for Cuban refugees were an example of the U.S. government’s foreign policy stance against the Cuban regime and communism. During the 1980s, Cubans suffered a second refugee crisis where a mass exodus of Cubans immigrated to South Florida.¹⁵³ On April 20, 1980, authoritarian Fidel Castro “announce[d] that all Cubans wishing to emigrate to the U.S. [were] free to board boats at the port of Mariel.”¹⁵⁴ Over the course of six months, approximately 125,000 Cuban refugees fled to the United States requesting political asylum.¹⁵⁵

The Cuban refugee crisis was prompted by economic constraints due to housing and employment shortages plummeting the Cuban economy.¹⁵⁶ At a time when Central American refugees fled politically driven civil wars but were refused asylum processing for being regarded as economic migrants, Cubans escaping financial hardships were automatically paroled into the United States as political refugees and guaranteed a pathway to U.S. citizenship.¹⁵⁷ As previously mentioned, the favoritism towards Cuban refugees was initially influenced by the Johnson Administration’s position on communism in Cuba. The special immigration privileges towards Cubans did not cease until President Obama ended the exemption for Cuban parolees in

151. Cuban Adjustment Act of 1966, Pub. L. No. 89-732, § 1, 80 Stat. 1161, 1161 (1966).

152. Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102, 106 (1980).

153. A&E Television Networks, LLC, *This Day in History: April 20, 1980 Castro Announces Mariel Boatlift*, HISTORY.COM, <http://www.history.com/this-day-in-history/castro-announces-mariel-boatlift> (last visited Nov. 6, 2017).

154. *Id.*

155. *Id.*

156. *Id.*

157. See generally Mary Turck, *US Embrace of Cuban Refugees Underscores Hypocrisy on Immigration*, AL JAZEERA AM. (Aug. 26, 2014, 6:00 AM EST), <http://america.aljazeera.com/opinions/2014/8/cuban-refugees-centralamericanmigrantsimmigrationdeportation.html> (discussing the United States’ seemingly hypocritical treatment of the different immigrants).

January 2017 following the restoration of U.S.-Cuba diplomatic relations.¹⁵⁸ Nonetheless, a Cuban national may still arrive in the United States and apply for asylum or avail him- or herself of the UNHCR's refugee processing.¹⁵⁹ The termination of the Cuban parole program eradicated fifty years of preferential treatment towards Cuban nationals and placed them on an equal ground against non-Cuban refugees seeking international protection.

Simultaneously, Haitian nationals fled Haiti to the same ports of entry in South Florida, seeking political asylum.¹⁶⁰ In the late 1980s, Haiti faced political turmoil during which the longstanding dictatorship of the Duvalier family was overthrown.¹⁶¹ In 1990, a presidential election was held; however, the new government, led by Jean Bertrand Aristide, was "overthrown by [a second] military revolt[,] leaving the Haitian government in pandemonium."¹⁶² Political supporters were "beaten, imprisoned, tortured, and murdered" by Haitian militants.¹⁶³ As a result, almost 40,000 Haitian nationals fled the island seeking political asylum in the United States between 1991 and 1992.¹⁶⁴ Of those near 40,000 Haitian refugees, only 10,747 were permitted to file asylum applications with INS.¹⁶⁵ The U.S. Coast Guard began intercepting boats fleeing Haiti "and took [remaining survivors] to the U.S. naval base at Guantanamo Bay in Cuba."¹⁶⁶ In Guantanamo, Haitians received in-country refugee processing during which their eligibility for asylum was determined.¹⁶⁷ Notwithstanding, once the naval base reached capacity at 12,000 refugees, President

158. Alan Gomez, *Obama Ends 'Wet Foot, Dry Foot' Policy for Cubans*, USA TODAY, <https://www.usatoday.com/story/news/world/2017/01/12/obama-ends-wet-foot-dry-foot-policy-cubans/96505172/> (last updated Jan. 12, 2017, 9:03 PM EST).

159. U.S. Dep't of State, *Refugee Admissions Program for Latin America and the Caribbean*, STATE.GOV (May 23, 2014), <https://www.state.gov/j/prm/releases/onepagereleases/228695.htm>.

160. Constitutional Rights Found., *History Lesson 9: Refugees from the Caribbean – Cuban and Haiti "Boat People,"* EDUCATING ABOUT IMMIGR. (2016), <http://www.crf-usa.org/images/pdf/Ed%20on%20Immigr%20Lesson%209.pdf> [hereinafter *Caribbean*].

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Patrick Gavigan, *Migration Emergencies and Human Rights in Haiti*, ORG. OF AM. STATES (Sept. 30–Oct. 1, 1997), <http://www.oas.org/juridico/english/gavigane.html>.

166. *Caribbean*, *supra* note 160.

167. *Id.*

George H.W. Bush signed Executive Order No. 12,807, authorizing the Coast Guard to repatriate all Haitians intercepted at sea.¹⁶⁸

Immigration advocates argued that the executive order racially discriminated against Haitian refugees based on their national origin.¹⁶⁹ Immigration lawyers noted that during the Cuban and Haitian refugee crises Cuban nationals were treated favorably and guaranteed resettlement, whereas Haitian nationals were forcefully repatriated to their country of origin, in violation of the non-refoulement principle under international law.¹⁷⁰ At the time, the United States government was working with the United Nations on restoring the Haitian government and building a democracy.¹⁷¹ Thus, the U.S. government had a vested foreign policy interest in the success of a new Haitian democracy, unlike the Cuban government's success because the federal government did not support its communist regime. As a consequence, a group of organizations, known as the Haitian Centers Council, Inc., representing Haitian refugees filed suit in the District Court for the Eastern District of New York, asserting the Executive Order violated the non-refoulement principle under Article 33 of the Refugee Convention of 1951 and of the 1967 Protocol and Section 243(h) of the INA prohibiting removal based on a protected classification.¹⁷²

The Supreme Court held that the Executive Order did not violate international or federal law, permitting the repatriation of immigrants intercepted in international waters.¹⁷³ Writing for the majority, Justice Stevens explained that Article 33 of the Convention was not intended to have an extraterritorial effect, meaning the international community intended to limit the

168. Gavigan, *supra* note 165; Interdiction of Illegal Aliens, Exec. Order No. 12,807, 57 Fed. Reg. 23, 133 (May 24, 1992).

169. Ron Harris, *Immigration: Fleeing Haitians Failing to Find a U.S. Advocacy: Few Voices Among Groups Who Once Escaped Oppression Are Raised in Refugees' Behalf*, L.A. TIMES (Dec. 3, 1991), http://articles.latimes.com/1991-12-03/news/mn-591_1_haitian-refugee.

170. *Id.*

171. See U.S. State Dep't, *U.S. Relations with Haiti: Bureau of Western Hemisphere Affairs Fact Sheet*, STATE.GOV (Mar. 23, 2017), <https://www.state.gov/r/pa/ei/bgn/1982.htm> [hereinafter *Fact Sheet*] (discussing the dynamics among the United States, Haiti, and the United Nations).

172. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 158 (1993). Note that Section 243(h)(1) of the INA prohibited the removal of an alien on account of race, religion, nationality, political opinion, or membership in a particular social group. INA, 8 U.S.C. § 243(h)(1) (repealed 1996).

173. *Sale*, 509 U.S. at 159.

Convention's coverage to refugees already within the State's territorial bounds.¹⁷⁴ Thus, individuals who may classify as refugees may be repatriated to their countries of origin without violating international norms, if such refugees are intercepted and returned outside of the State's territorial jurisdiction.¹⁷⁵ Furthermore, the text of Section 243(h) applies to the Attorney General in the context of his or her domestic procedures of excluding or removing immigrants from the United States; therefore, Congress did not intend for the section to be implemented by the U.S. Coast Guard or the President.¹⁷⁶ For these reasons, Congress did not intend for the Attorney General to guarantee deportation or exclusion hearings for persons excluded outside the United States.¹⁷⁷

During the 1992 U.S. presidential election, then-democratic candidate Governor Bill Clinton called the repatriation of Haitian refugees "cruel" and "immoral," advocating to end the blanket discriminatory practice.¹⁷⁸ After winning the election, President Clinton reversed his decision and upheld former President Bush's Executive Order, which led to the case of *Haitian Centers Council, Inc.*¹⁷⁹ Despite the United States' foreign policy agenda in Haiti, political violence and resulting poverty continued to impact the island.¹⁸⁰ By 2003, John Ashcroft, Attorney General for President George W. Bush, declared that all Haitian refugees who safely arrived on U.S. soil and requested asylum would automatically be detained on the grounds of national security until their asylum applications were adjudicated by an immigration officer.¹⁸¹ The United States did not reverse its Haitian immigration policy until the 2010 earthquake, which killed approximately 160,000 Haitians

174. *Id.* at 177.

175. *Id.* at 171–74.

176. *Id.* at 173.

177. *Id.* at 174.

178. Elaine Sciolino, *Clinton Says U.S. Will Continue Ban on Haitian Exodus*, N.Y. TIMES (Jan. 15, 1993), <http://www.nytimes.com/1993/01/15/world/clinton-says-us-will-continue-ban-on-haitian-exodus.html>; Marc A. Thiessen, *The Clinton Solution for Refugees: Guantanamo*, WASH. POST (Nov. 23, 2015), https://www.washingtonpost.com/opinions/the-clinton-solution-for-refugees-guantanamo/2015/11/23/7bf338a4-91f4-11e5-8aa0-5d0946560a97_story.html?utm_term=.4c146efea23b.

179. Sciolino, *supra* note 178.

180. *Caribbean*, *supra* note 160; *Fact Sheet*, *supra* note 171.

181. *Caribbean*, *supra* note 160.

and displaced almost 1.5 million.¹⁸² Under the direction of President Barack H. Obama, the “DHS [Department of Homeland Security] designated Haiti for TPS [Temporary Protected Status]” for persons “already living in the United States”.¹⁸³ In May 2011, “Homeland Security Secretary Janet Napolitano extended and expanded TPS for Haitians . . . allowing those who had arrived in the United States up to one year after the earthquake to [apply],” and temporarily suspended deportations of Haitians.¹⁸⁴ Although Haiti suffered from a devastating hurricane in 2016, the U.S. government only extended TPS by six months; it now ends on Jan. 22, 2018.¹⁸⁵

All in all, the U.S. government has a long-standing history of excluding immigrants from entry into the country based on race and national or ethnic origin. Much like racist attitudes towards Africans, Asians, German Jews, and Southern and Eastern Europeans during the early 1900s, Haitians were still regarded as inferior because they were of African descent and immigrated from a poverty-stricken country.¹⁸⁶ While Haitians were either being deported or intercepted at sea, racial tension in America was at an all-time high since the Civil Rights Movement in the 1960s. This was a result of the acquittal of four white Los Angeles police officers who beat a black motorist, Rodney King; the acquittal of O.J. Simpson, a black professional athlete accused of murdering his affluent Caucasian wife and her acquaintance; and a second beating by white New York police officers who tortured a Haitian immigrant, Abner Louima.¹⁸⁷ Such attitudes and actions promoting the exclusion of Haitian refugees was in stark contrast to the government’s treatment of Cuban nationals—who self-identify as white and were automatically paroled into the United

182. Muzaffar Chishti & Sarah Pierce, *United States Abandons Its Harder Line on Haitian Migrants in the Face of Latest Natural Disaster*, MIGRATION POL’Y INST. (Oct. 26, 2016), <http://www.migrationpolicy.org/article/united-states-abandons-its-harder-line-haitian-migrants-face-latest-natural-disaster>.

183. *Id.*

184. *Id.*

185. U.S. Citizenship and Immigration Services, *Temporary Protected Status Designated Country: Haiti*, USCIS.GOV, <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-haiti> (last updated Oct. 3, 2017).

186. Harris, *supra* note 169.

187. See LARRY K. GAINES & VICTOR E. KAPPELER, COMMUNITY POLICING: A CONTEMPORARY PERSPECTIVE 149, 466 (7th ed. 2015) (discussing these incidents’ effect on public perceptions and the incidents as “some of the most publicized incidents of racial tension”).

States on the basis of their national origin, providing them an opportunity to eventually seek U.S. citizenship.¹⁸⁸

III. EXECUTIVE ORDER 13769

Throughout his presidential campaign, Donald J. Trump committed to the refusal of Muslims entering the United States.¹⁸⁹ On December 7, 2015, then-candidate Trump released a statement on preventing Muslim immigration, asserting, “Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life.”¹⁹⁰ After one week as President, Trump signed Executive Order 13,769, which banned entry for 90 days by citizens of Iraq, Iran, Libya, Somalia, Sudan, and Yemen and ceased the processing of Syrian refugees indefinitely.¹⁹¹ The executive order also suspended RAP for 120 days.¹⁹²

Outcry against the executive order, which opponents called a “Muslim ban,” was swift, prompting protests across the nation.¹⁹³ On January 30, 2017, “Washington state Attorney General Bob

188. Amber R. Fox, *Patterns of Identification: The Children of Latino/Non-Latino White Families* 13 (Dec. 2010) (unpublished M.S. thesis, Texas A&M University), *available at* <http://oaktrust.library.tamu.edu/bitstream/handle/1969.1/ETD-TAMU-2010-12-8150/FOX-THESIS.pdf> (“The 2000 census reveals that Cubans are most likely to [identify as white].”); see Nate Cohn, *More Hispanics Declaring Themselves White*, N.Y. TIMES (May 21, 2014), https://www.nytimes.com/2014/05/22/upshot/more-hispanics-declaring-themselves-white.html?_r=0 (noting the change from a 2000 to 2010 census revealed that Cubans are most likely to identify as white as opposed to some other race).

189. *Trump’s Promises Before and After the Election*, BBC NEWS (Sept. 19, 2017), <http://www.bbc.com/news/world-us-canada-37982000>.

190. Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States,’* WASH. POST (Dec. 7, 2015, 7:43 PM), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.6cfa4b2d662c; see also Donald J. Trump, *Donald J. Trump Statement on Preventing Muslim Immigration*, DONALDJTRUMP.COM (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> (link intentionally to page not found because the press release seems to have been removed after Trump’s election as president as discussed in Fred Barbash, *Muslim Ban Language Suddenly Disappears from Trump Campaign Website After Spicer Questioned*, WASH. POST (May 9, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/05/09/trumps-preventing-muslim-immigration-vow-disappears-from-campaign-website-after-spicer-questioned/?utm_term=.36cd83bcbb9c).

191. Exec. Order, *supra* note 13, §§ 3, 5(c), at 8977–79.

192. *Id.* § 5(a), at 8979.

193. Steve Almasy & Darran Simon, *A Timeline of President Trump’s Travel Bans*, CNN, <http://www.cnn.com/2017/02/10/us/trump-travel-ban-timeline/> (last updated Mar. 30, 2017, 4:01 AM EST).

Ferguson filed a lawsuit in the [U.S.] District Court in Seattle,” alleging the executive order travel ban was causing irreparable harm to Washington residents.¹⁹⁴ On February 3, 2017, U.S. District Court Judge James Robart halted the travel ban nationwide, thereby permitting travel by all affected foreign nationals.¹⁹⁵ The U.S. Department of Justice immediately appealed to the Ninth Circuit Court of Appeals.¹⁹⁶

According to the Department of Justice, both Congress and the executive branch retain plenary power over immigration and the exclusion of foreign nationals.¹⁹⁷ Furthermore, Section 1182 of the INA authorizes the executive branch to suspend entry of any class of aliens that the President deems necessary.¹⁹⁸ Hence, the appellants asserted that immigration and national security policies are not subject to federal review, as Congress and the executive branch are given great deference.¹⁹⁹ Appellees acknowledged that Congress maintain constitutional authority to govern immigration and naturalization matters pursuant to Article I.²⁰⁰ Nonetheless, appellees argued that the executive branch may not act with impunity and remains subject to constitutional limitations that should be interpreted by the courts.²⁰¹

The Court held that, although the President and Congress maintain constitutional authority to exercise plenary power in legislating immigration policy matters, such concerns are not “unreviewable,” and the courts may examine and interpret

194. Meredith McGraw et al., *A Timeline of Trump's Immigration Executive Order and Legal Challenges*, ABC NEWS (Jun. 29 2017, 12:22 PM EST), <http://abcnews.go.com/Politics/timeline-president-trumps-immigration-executive-order-legal-challenges/story?id=45332741>.

195. *Id.*

196. *Id.*

197. Emergency Motion Under Circuit Rule 27-3 For Administrative Stay and Motion for Stay Pending Appeal at 3–4, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105) [hereinafter *Emergency Motion*]; see *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (holding “the exclusion of aliens is [also] a fundamental act of sovereignty. . . . inherent in the executive power to control the foreign affairs of the nation”).

198. 8 U.S.C. § 1182(f) (2012).

199. *Emergency Motion*, *supra* note 197, at 15–16.

200. States’ Response to Emergency Motion under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal at 22–23, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105) [hereinafter *Emergency Motion Response*].

201. *Id.* at 9, 22; see *I.N.S. v. Chadha*, 462 U.S. 919, 940–41 (1983) (finding that Congress must choose “a constitutionally permissible means of implementing” its power over immigration).

constitutional challenges.²⁰² Citing *Zadvydas v. Davis*, the Court explained that the U.S. Supreme Court has continuously rejected the argument that the legislative and executive branches have unreviewable authority over national security and immigration matters.²⁰³ In fact, the Ninth Circuit sustained that courts may review foreign policy arguments presented to justify an executive action when constitutional rights are hindered.²⁰⁴ Therefore, although Congress and the President may exercise sovereign or plenary power to legislate immigration and national security policies, legislation or executive actions that allegedly threaten constitutional rights are subject to judicial review.

A. National Security and the Need for “Extreme” Vetting

Deputy Solicitor General Edwin Kneedler explained that the purpose of the executive order was to temporarily suspend the entry of foreign nationals from the designated countries while the new President and his appointed cabinet members reviewed and revised the security vetting procedures of RAP.²⁰⁵ Similar to previous administrations invoking national security concerns against immigrants based on national origin, the Trump Administration relied on 8 U.S.C. § 1182(f), under which Congress granted the President broad discretion to suspend any class of aliens and also broad discretion over RAP under 8 U.S.C. § 1157.²⁰⁶ Congress selected the previously mentioned countries listed in the travel ban under 8 U.S.C. § 1187(a)(12) as potentially high risks for harboring terrorists.²⁰⁷ Congress determined that individuals could not participate in the visa waiver program if they visited any of the designated territories, although Congress did not suspend RAP.²⁰⁸ Equally important, the “[Islamic State of Iraq and Levant

202. *Washington v. Trump*, 847 F.3d 1151, 1161–62 (9th Cir. 2017).

203. *Id.* at 1162; *see Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (noting Congress’ “power is subject to important constitutional limitations”); *Chadha*, 462 U.S. at 940–41 (affirming that the courts have authority to review congressional action concerning aliens when it allegedly violates constitutional principles).

204. *Trump*, 847 F.3d at 1162.

205. Reply in Support of Emergency Motion for Stay Pending Appeal at 1, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105) [hereinafter Reply].

206. *Id.* at 3–5.

207. *Id.* at 1; *see* 8 U.S.C. § 1187(a)(12) (establishing unique considerations for aliens who have certain connections to Iraq, Syria, and other designated “countries of concern”).

208. Uri Friedman, *Where America’s Terrorists Actually Come From*, THE ATLANTIC (Jan. 30, 2017), <https://www.theatlantic.com/international/archive/2017/01/trump-immigration-ban-terrorism/514361/>.

(ISIL)] does control territor[ies] in Syria, Iraq, and Libya,” while al-Qaeda continues control in Yemen and al-Shabab (a sect of al-Qaeda) holds presence in Somalia.²⁰⁹

Proponents of the executive order note two attacks by asylum seekers across Europe: stabbings carried out by a Somali refugee at Ohio State University and the Boston marathon bombings executed by brothers Tamerlan and Dzhokhar Tsarnaev—both political asylum recipients born in Kyrgyzstan.²¹⁰ Supporters also contend that President Obama generated a similar executive order where he mandated a thorough review of the security-vetting procedures of Iraqi nationals for refugee and SIV applications in 2011.²¹¹

Section 4 of the Executive Order states:

The Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation shall implement a program, as part of the adjudication process for immigration benefits, to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission.²¹²

The Trump Administration intends to coordinate a uniform screening procedure; interviews; a computer database to compile identity documents to recognize duplication; additional fraud and security application questions; a mechanism to evaluate whether or not the applicant will make a positive contribution to the country; and an evaluation to examine the applicant’s potential intent to commit criminal or terroristic acts after admission.²¹³

209. *Id.*

210. See Adam Goldman & Mitch Smith, *From Somalia to U.S.: Ohio State Attacker’s Path to Violence*, N.Y. TIMES (Dec. 1, 2016), <https://www.nytimes.com/2016/12/01/us/from-somalia-to-us-ohio-state-attackers-path-to-violence.html> (describing the Ohio State attacker’s background and possible connections to terrorist organizations); Friedman, *supra* note 208 (noting that the Ohio State attacker was a Somali refugee); Eric Levenson, *How Many Fatal Terror Attacks Have Refugees Carried Out in the U.S.?*, CNN (Jan. 29, 2017, 6:54 PM), <http://www.cnn.com/2017/01/29/us/refugee-terrorism-trnd/> (describing the perpetrators of the Boston Marathon bombings, among other attacks).

211. Jon Finer, *Sorry, Mr. President: The Obama Administration Did Nothing Similar to Your Immigration Ban*, FOREIGN POL’Y (Jan. 30, 2017, 8:30 AM), <http://foreignpolicy.com/2017/01/30/sorry-mr-president-the-obama-administration-did-nothing-similar-to-your-immigration-ban/>.

212. Exec. Order, *supra* note 13, § 4(a), at 8978.

213. *Id.* at 8978–79.

Appellees argued that the federal government's invoking of national security concerns to broadly prohibit the entry of refugees, and Syrian refugees indefinitely, remains unsupported by any evidence.²¹⁴ First, the State of Washington contended that the new Administration did not confer with legal experts or agency leadership at the Department of Homeland Security or the State Department, prior to the issuance and publication of the travel ban.²¹⁵ Second, the executive order discriminates against Syrian refugees based on national origin by suspending their admission and goes further by provoking differential treatment towards Syrians.²¹⁶ Hence, the travel ban is in stark contrast to the executive order issued by President Obama because, although the Department of Homeland Security and the State Department revised security measures for vetting Iraqi refugees and SIV recipients, immigration officers were still permitted to grant eligible Iraqi nationals immigration benefits.²¹⁷ Equally important, President Obama's executive order was neither issued nor published until after national security advisers and cabinet officials had been consulted in the drafting of the policy document, and RAP had not been suspended.²¹⁸

Opponents of the travel ban assert that the Department of Homeland Security, in partnership with several other executive and law enforcement agencies, presently implement a strict security vetting process for refugees and asylum seekers.²¹⁹ After the UNHCR selects a refugee for resettlement in the United States, the Department of State initiates a name check in the Consular Lookout and Support System.²²⁰ The system reviews the applicant's primary name and any variations used by the applicant, providing information such as immigration violations, criminal history, previously denied visas, intelligence information, and terrorism concerns.²²¹ The FBI, Interpol, the Terrorist

214. Motion for Temporary Restraining Order at 9, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105) [hereinafter Motion for Temporary Restraining Order].

215. *Id.* at 6.

216. *Id.* at 6–7.

217. See *Finer*, *supra* note 211 (describing how refugees were continually—if more slowly than times past—admitted into the United States under the Obama administration).

218. *Id.*

219. *Friedman*, *supra* note 208.

220. U.S. Citizenship and Immigration Servs., *Refugee Processing and Security Screening*, USCIS.GOV, <https://www.uscis.gov/refugeescreening> (last updated Dec. 3, 2015) [hereinafter *Refugee Processing*].

221. *Id.*

Screening Center, and other law enforcement agencies compile such information for the State Department.²²² Applicants undergo an additional background check known as a Security Advisory Opinion when arriving from countries that Congress has designated as carrying a higher risk of terrorism.²²³ This added measure is conducted by the FBI and other intelligence organizations; thus, the information must be reviewed by a USCIS Refugee Officer prior to making a final decision on the applicant's case.²²⁴

At the time of the resettlement interview, USCIS staff members collect biometric fingerprints and record that data to review potential criminal history and previous immigration benefit applications or violations that were not recovered in the previous name background check.²²⁵ Then, government officials send the biometric record to the Department of Defense to ensure that the applicant is not a threat to national security.²²⁶ A trained USCIS immigration officer then interviews the refugee.²²⁷ Officers interviewing Syrian refugees, for example, receive specialized country information training on specific populations to identify fraud- or terrorism-related activity.²²⁸ Finally, refugee applicants presenting a national security concern undergo review by the Controlled Application Review and Resolution Process, and Syrian applicants receive additional vetting by the USCIS Fraud Detection and National Security Directorate, which “monitors terrorist watch lists and disseminates intelligence information.”²²⁹ CBP receives a manifest approximately one week before the approved refugees are scheduled to travel.²³⁰ When a refugee arrives at a U.S. port of entry, the CBP officer begins additional vetting, such as an inspection and further internal background checks.²³¹

Appellees asserted that appellants provided no evidence that refugees from any of the designated territories engaged in

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

terrorism after admission into the United States.²³² The lack of evidence, proponents contend, is a direct result of the already-in-place rigorous security vetting.²³³ Moreover, the executive order alleges that the purpose of the ban is to prevent a threat like September 11, 2001; however, the travel ban does not include States represented by terrorists during the attack, including Egypt, Saudi Arabia, the United Arab Emirates, and Lebanon.²³⁴ The Circuit Court reemphasized that the federal government did not provide any evidence to support its claim that foreign nationals from any of the designated countries have committed or engaged in terrorism while in the United States.²³⁵ The Court further noted in the footnotes that the Department of Justice not only lacked evidence supporting the claim that aliens from the designated countries pose a terroristic threat, but also failed to provide an explanation of how national security concerns justified the urgency of the travel ban.²³⁶

B. The Executive Order Discriminates Based on National Origin and Is Therefore Unconstitutional

Appellees argued that the Executive Order violated an asylum seeker's right to equal protection under the Fifth Amendment; thus, federal courts must determine whether the challenged classification burdens a suspect or quasi-suspect class.²³⁷ Appellees further argued that if the executive order addresses a suspect classification such as national origin, or hinders a protected constitutional right, then courts must utilize the strict scrutiny standard and determine whether the legislation is narrowly tailored to serve a compelling government interest.²³⁸ Federal courts have long held that classifications based on race,

232. Motion for Temporary Restraining Order, *supra* note 214, at 8–9.

233. Friedman, *supra* note 208.

234. Motion for Temporary Restraining Order, *supra* note 214, at 9.

235. *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017).

236. *Id.* at 1168, n.7.

237. Motion for Temporary Restraining Order, *supra* note 214, at 10; *see Harris v. McRae*, 448 U.S. 297, 322 (1980) (describing the constitutional analysis required for equal protection claims); *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001) (explaining the analysis applied when the classification at issue burdens a “suspect” or “quasi-suspect” class).

238. Motion for Temporary Restraining Order, *supra* note 214, at 5; *Ball*, 254 F.3d at 823 (stating the rule for strict scrutiny analysis).

nationality, or alienage are subject to strict scrutiny.²³⁹ Appellees asserted that the executive order discriminated against individuals from the seven countries referenced in Section 3, “Nationals of Countries of Particular Concern” on the basis of national origin.²⁴⁰ In regards to refugees, the document specifically targets Syrian refugees by permanently suspending their admission exclusively based on their status as Syrian nationals.²⁴¹ Syrian refugees who have already entered the United States and are seeking refugee status as asylum seekers maintain a constitutional right to equal protection under the Fifth Amendment’s Due Process Clause.

The Court did not address the merits of the claim, but only examined whether the federal government would likely succeed on appeal. The Court held that the government failed to illustrate that refugees seeking asylum in the United States lack constitutional protection under the Fifth Amendment’s Due Process Clause.²⁴² The Court concurred with Appellees that non-citizens within the United States sustain constitutionally protected rights, regardless of immigration status.²⁴³

Although the appellate court did not address the issues on the merits, the executive order clearly focuses on Syrian refugees based on their national origin. On appeal, the federal government would likely be unsuccessful in illustrating that the Executive Order was narrowly tailored to serve a compelling government interest. Despite the government’s plenary power over national security matters, the Department of Justice failed to present sufficient evidence that any Syrian refugee has engaged in terroristic acts causing national security concerns. The government also offered no evidence that refugees, in general, pose a heightened threat to the national security of the United States.

The Executive Order also violates the non-discrimination clause of the INA and its amendments under the Refugee Act of

239. Motion for Temporary Restraining Order, *supra* note 214, at 5; see *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (stating that “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny” (internal footnotes omitted)).

240. Motion for Temporary Restraining Order, *supra* note 214, at 1; Exec. Order, *supra* note 13, § 3, at 8977.

241. Motion for Temporary Restraining Order, *supra* note 214, at 7.

242. *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017).

243. *Id.* at 1165; see *Zadvydas v. Davis*, 533 U.S. 678, 693 (emphasizing that the Fifth Amendment applies to all “persons” within the United States, including lawful and unlawful aliens).

1980. The Department of Justice argued that the prohibition of discrimination based on nationality under the INA only applies to the issuance of immigrant visas and not to the President's authority to limit the right of entry.²⁴⁴ In response, appellees contended that strictly construing the non-discrimination clause to apply only to the issuance of immigrant visas would render the INA futile for its inability to prohibit discrimination in all realms of issuing immigration benefits.²⁴⁵ Appellees cited *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, in which the Fifth Circuit Court held, "Section 1152 is a part of the Immigration and Nationality Act. . . . Congress has unambiguously directed that no nationality-based discrimination shall occur."²⁴⁶ The Department of Justice failed to show that Congress intended for the non-discrimination clause to only apply to a minute portion of foreign aliens seeking immigration benefits—immigrant visas. Thus, the non-discrimination clause is also applicable to asylum seekers and refugees, prohibiting distinction based on nationality in determining eligibility for refugee status.

Finally, pursuant to the Refugee Act, foreign nationals may file a petition to seek refugee status in the United States as asylum seekers.²⁴⁷ U.S. Citizenship and Immigration Services, under the direction of the Department of Homeland Security, is statutorily obligated to review the applications for asylum and regulate eligibility for refugee status, and refugees are protected from *non-refoulement*.²⁴⁸ Accordingly, appellees asserted Congress created a constitutionally protected right, allowing refugees to petition the United States government for political asylum.²⁴⁹ Appellees further argued that the constitutionally protected right to seek

244. Reply, *supra* note 205, at 5; see 8 U.S.C. § 1152(a)(1)(A) (2012) (providing that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence").

245. Motion for Temporary Restraining Order, *supra* note 214, at 19–20.

246. *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995).

247. 8 U.S.C. § 1158(a)(1) (2012).

248. *Id.* § 1158(b)(1)(A); see Official Website for the Dep't of Homeland Security, *The Affirmative Asylum Process*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process> (last updated Jan. 17, 2017) (providing steps for affirmative asylum seekers).

249. Motion for Temporary Restraining Order, *supra* note 214, at 18; see *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1038 (5th Cir. 1982) (concluding that both Congress and the Executive established a constitutionally protected right for the right to petition the United States government for political asylum).

asylum guarantees refugees the rights to due process, notice, and hearing.²⁵⁰ The Executive Order suspends refugee processing for 120 days and Syrian refugee processing indefinitely.²⁵¹ The executive document does not clarify whether the suspension of refugee processing only applies to refugees processed overseas by the Refugee Affairs Division and International Operations, or if the executive order also suspends the processing of refugees already in the United States, adjudicated by the Asylum Division. The Executive Order also infringes on an asylum seeker's constitutional right to apply for refugee status under the Refugee Act and denies his or her fundamental right to notice and hearing under the Due Process Clause of the Fifth Amendment.

In summation, the Ninth Circuit Court denied appellant's emergency motion to reverse the District Court's injunction staying the Executive Order.²⁵² Although the Court did not address the unconstitutionality of the document, the Court strongly worded its opinion that appellant's failure to proffer evidence supporting discrimination based on alienage and nationality in the interest of national security was exceedingly unlikely to succeed on appeal.²⁵³ Based on the equal protection and due process requirements of the Federal Constitution, and the non-discrimination clause of the INA, the Trump Administration's Executive Order unconstitutionally excludes Syrians and persons of Middle Eastern and African descent. The executive order is a modern example of institutionalized racial discrimination towards refugees from the named countries of particular concern.

Although not discussed in this Article, the State of Washington also challenged the document's unconstitutionality for violating the Establishment Clause under the First Amendment for discrimination against Muslims.²⁵⁴ Immediately preceding the issuance of the executive order, President Trump stated that the Department of Homeland Security and State Department would

250. Motion for Temporary Restraining Order, *supra* note 214, at 14–15.

251. Dan Merica, *Trump Signs Executive Order to Keep Out 'Radical Islamic Terrorists,'* CNN (Jan. 30, 2017, 2:02 PM EST), <http://www.cnn.com/2017/01/27/politics/trump-plans-to-sign-executive-action-on-refugees-extreme-vetting/index.html>.

252. *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017).

253. *Id.* at 1164, 1167.

254. Motion for Temporary Restraining Order, *supra* note 214, at 11–14.

now prioritize Christian refugees fleeing religious persecution.²⁵⁵ The Administration again ignores the necessary prohibition of preferential treatment of any protected classification over another and the negative effect a discriminatory immigration policy may cause. The execution of such policies would once again establish an immigration admissions system where politicians determine the entry of foreign nationals based on national origin, in an effort to maintain homogenous ethnic composition of the nation.

C. The Executive Order Violates International Law and Perpetuates the Ongoing Worldly Trend of Excluding Syrian Refugees

As previously noted in Part I, the 1951 Convention Relating to the Status of Refugees and Protocol forbids discrimination based on country of origin, race, or religion in Article 3 and prohibits differential treatment between refugees and all other aliens.²⁵⁶ The executive order consequentially violates the Refugee Convention, as it does the Refugee Act originally implemented to become compliant with the international agreement. The executive action, by excluding the processing of refugees, impels the federal government to abnegate its State obligations to refugees under the Convention. Equally important, ostracizing Syrian refugees indefinitely prompts government officials to exhibit distinctive treatment between Syrian refugees and other foreign nationals, on account of nationality. The mere discriminating treatment between refugees and others within the territorial bounds of the United States is a violation of the Refugee Convention.

In addition, the immigration policy document violates the non-discrimination clause of Article 2 and the equal protection clause of Article 26 of the ICCPR.²⁵⁷ By guaranteeing lesser rights to refugees, the United States violates its treaty obligations. Finally, the executive order breaches international obligations under Article 1 of the ICERD by racially discriminating against ethnic Syrians, and failing to nullify racially discriminatory laws under

255. Katie Reilly, *President Trump Says He Will Prioritize Persecuted Christians in Refugee Policy*, TIME (Jan. 27, 2017), <http://time.com/4652367/donald-trump-refugee-policy-christians/>.

256. Refugee Convention, *supra* note 28, Art 3.

257. ICCPR, *supra* note 35, Art 2, 26.

Article 2.²⁵⁸ By excluding Syrian refugees based on national and ethnic origin and hindering their fundamental human rights, the executive action endorses institutionalized racial discrimination against Syrian nationals. The U.N. Committee on the Elimination of Racial Discrimination, a final tribunal utilized when complainants have exhausted State remedies, held that “the definition of racial discrimination in Article 1 expressly extends beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination.”²⁵⁹ Therefore, by directly discriminating against Syrian refugees on its face and failing to rescind Section 5(c) of the executive order, the federal government advocated and normalized racial discrimination against Syrian nationals.

The progression of institutionalized discrimination towards refugees extends beyond the United States’ borders and permeates throughout Europe as well. While then-candidate Donald Trump campaigned for the highest political office in the United States, the European Union contracted a bilateral agreement between Turkey and Greece.²⁶⁰ The agreement, reached in March 2016, authorizes Greece to return “all new irregular migrants” to Turkey, arriving after March 20, 2016.²⁶¹ In response, European Union member-states would increase the resettlement of Syrian refugees residing in Turkey, increase financial support for Turkey’s refugee population, and advance visas for Turkish nationals.²⁶² By June, three asylum seekers filed suit against the European Union, claiming repatriation of asylum seekers from the Greek islands to the Turkish mainland is a violation of European and international laws protecting refugees from refoulement.²⁶³ Opponents of the treaty allege it breaches their right to asylum and protection from expulsion to a State where they are at risk of inhumane or degrading treatment.²⁶⁴ Germany is also under considerable

258. ICERD, *supra* note 36, Art 1–2.

259. L. R. v. Slovakia, Communication No. 31/2003, Para. 10.4, U.N. Doc. CERD/C/66/D/31/2003 (2005).

260. Elizabeth Collett, *The Paradox of the EU-Turkey Refugee Deal*, MIGRATION POL’Y INST. (Mar. 2016), <http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal>.

261. *Id.*

262. *Id.*

263. Matthew Holehouse, *Refugees Sue EU over Turkey Deal*, THE TELEGRAPH (June 13, 2016, 7:29 PM), <http://www.telegraph.co.uk/news/2016/06/13/refugees-sue-eu-over-turkey-deal/>.

264. *Id.*

scrutiny after backtracking on its “open door” policy for refugees and instead offering “subsidiary protection.”²⁶⁵ The subsidiary protection withholds immigrants from deportation; however, the individual does not receive status as a refugee.²⁶⁶ The differential treatment towards refugees in Europe preceded Executive Order 13,769; yet, it coincides with the persisting theme that refugees are faced with deterrents infringing on their human right to international protection, as a result of xenophobic attitudes and national calls for exclusion.

IV. CONCLUSION

The Ninth Circuit Court of Appeals acknowledged the President and Congress’ plenary power over legislating immigration and national security policies. Notwithstanding, the two political branches’ constitutional authority is not absolute and free from judicial review when the legislation violates constitutional protections. The executive order distinctly beseeches differential treatment towards refugees by suspending the Refugee Admissions Program and prohibiting their due process right to apply for asylum. The executive action also violates the State’s international obligations under several international authorities upholding a refugees’ right to seek asylum and obtain equal protection under the law. Finally, the document promotes institutionalized racial discrimination towards Syrian refugees by barring their admission into the United States. The exclusionary measure violates a Syrian national’s human right to seek international protection under the Universal Declaration of Human Rights, the Refugee Convention and Protocol, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of Racial Discrimination.

The legislative purpose of the order is futile given the small probability that a refugee would effectuate a terrorist attack in the United States. According to a study by Alex Nowrasteh, an immigration expert for the CATO Institute, nationals of the seven

265. Caroline Mortimer, *Thousands of Refugees Successfully Sue German Government over Partial Asylum Status*, THE INDEP. (Oct. 18, 2016, 21:28 BST), <http://www.independent.co.uk/news/world/europe/refugee-crisis-germany-government-bamf-angela-merkel-anti-immigration-a7368551.html>.

266. *Id.*

countries of particular concern have killed zero people in terrorist attacks in the United States over the last forty years.²⁶⁷ Equally important, Nowrasteh reports only 20 out of the 3.25 million refugees, admitted into the United States during that time period, were convicted of attempting to engage in terroristic activities in the United States.²⁶⁸ Only three U.S. citizens have been killed in attacks committed by refugees—ironically by Cuban refugees in the 1970s.²⁶⁹ There have been zero terrorist attacks or deaths committed by Syrian refugees in the United States.²⁷⁰ Hence, Nowrasteh asserts the likelihood of an American being murdered by someone other than a terrorist is 252.9 times greater than dying in a terrorist attack.²⁷¹ Finally, terrorists who attacked on September 11, 2001 were foreign nationals from Saudi Arabia, the United Arab Emirates, Lebanon, and Egypt,²⁷² yet they are not designated in the Executive Order. Between 1975 to 2015, these four countries generated foreign nationals who committed terrorism on U.S. soil, killing a total of 3,004 U.S. citizens.²⁷³

Legislation establishing discriminatory immigration policies will only embolden actual terrorists to implement future attacks against the United States and consequentially recruit vulnerable individuals, such as refugees. The executive order isolates the United States from our Middle Eastern and African allies and undermines our intelligence agencies working with Muslim communities, when such relationships are vital to domestic counterterrorism.²⁷⁴ Terrorist groups are known to target lone American citizens suffering from mental illness, social isolation, discrimination, or other factors forging vulnerability.²⁷⁵ Discriminatory immigration policies will only galvanize ISIL and

267. Friedman, *supra* note 208.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. Daniel Benjamin, *The Disastrous Consequences of Trump's New Immigration Rules*, POLITICO MAGAZINE (Jan. 27, 2017), <http://www.politico.com/magazine/story/2017/01/trump-immigration-refugee-vetting-consequences-executive-order-214702>.

275. Anne Speckhard, *How Dragging Our Feet on Refugees Creates More Terrorists*, N.Y. TIMES (Sept. 29, 2015), <https://www.nytimes.com/2015/09/29/opinion/how-dragging-our-feet-on-refugees-creates-more-terrorists.html?module=ArrowsNav&contentCollection=Opinion&action=keypress®ion=FixedLeft&pgtype=article>.

other foreign terrorist organizations to exploit refugees and become radicalized.²⁷⁶

The United States government has both a national and international responsibility to denounce xenophobic attitudes and racially discriminatory policies towards refugees. This Article demonstrates the federal government's incessant pattern of blaming refugees and immigrants for social and economic distresses, resulting in prejudiced immigration laws. Institutionalized racial discrimination is not only bigoted and hypocritical of our country's adage of being founded by immigrants, but it also fosters white nationalism and can even lead to violence and hate crimes.²⁷⁷ During an interview with CNN, Representative Sean Duffy (R – Wisconsin) exclaimed, “[T]here is a difference between terror acts by white people and those committed by Muslims.”²⁷⁸ CNN host Alisyn Camerota noted the growing trend of white supremacy and domestic terrorism, such as the attack against black Americans in South Carolina by Dylan Roof and a recent attack on a Muslim mosque by a white nationalist in Quebec, Canada.²⁷⁹ Nonetheless, Duffy asserted that attacks by white Americans are executed independently, whereas foreign terrorist organizations such as ISIL and al-Qaeda are a “movement.”²⁸⁰ Congressman Duffy's inexcusable statement is an example of the federal government's misguided disposition towards domestic terrorism and its intersection with race and policy in this country. It will take the pressure of informed voters to avert history from repeating and to encourage the nation to be at the forefront of supporting refugees with the international protection they require.

276. *Id.*

277. Eric Lichtblau, *U.S. Hate Crimes Surge 6% Fueled by Attacks on Muslims*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/us/politics/fbi-hate-crimes-muslims.html>.

278. Eugene Scott, *Duffy: ‘There’s a Difference’ on White Terror and Muslim Terror*, CNN (Feb. 8, 2017, 1:51 AM EST), <http://www.cnn.com/2017/02/07/politics/sean-duffy-white-terrorism-cnntv/>.

279. *Id.*

280. *Id.*