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Discriminatory and Illegal Practices Administered in the United States' Discretion When Employing the National Security Exception to Claim Inadmissibility of Syrian Refugees for Resettlement

Cynthia Gonzalez

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DISCRIMINATORY AND ILLEGAL PRACTICES ADMINISTERED IN THE UNITED STATES' DISCRETION WHEN EMPLOYING THE NATIONAL SECURITY EXCEPTION TO CLAIM INADMISSIBILITY OF SYRIAN REFUGEES FOR RESETTLEMENT.

Cynthia Gonzalez

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INTRODUCTION

While the situation in Syria is being referred to as “the worst humanitarian crisis in the world,” the United States continues a strong stance against the War on Terror.¹ The War on Terror has allowed the United States to shape new immigration policy around its national security, as permitted by the United Nations Protocol to the Convention Relating to the Status of Refugees (1951 Convention).² The 1951 Convention provides a national security exception, which has also been enshrined within the United States’ domestic refugee law.³ The United States has used this exception as a crutch to practice discrimination and exclude certain applicants from admission into the United States, despite the fact that many of these applicants satisfy the definition of a refugee. While these laws dictate the procedures for determining whether a refugee is admissible into the United States, with a strong adherence to the national security clause, this report asserts that the United States uses methods that not only violate several international conventions protecting human rights, but that also violate its very own legal precedent. In the war against terrorism, human rights must not be the first victim.⁴ Refugee and asylum applicants deserve fair access to a fair process, and there are some rights upon which the government must never infringe.⁵

Part I of this article will provide background on the circumstances surrounding the current situation in Syria and its effect on refugees as a whole. Part II will analyze the likelihood that Syrian and Iraqi refugees fall within the international and U.S. domestic definition of refugee. Part III will discuss the lengthy and stringent screening process that each refugee must endure to obtain refugee status or asylum for admission into the United States, as well as the requirement that the United States abide by international conventions that require non-discriminatory practices in determining refugee status. Part IV will discuss the United States’ interpretation of the national security exception in relation to immigration, as well as an abuse of discretion among immigration officers. Part V will demonstrate that despite satisfaction of the definition of a refugee, discriminatory practices are present in determining

¹ Robert Golan-Vilella, *America is Never (Ever, Ever) Ending the War on Terror*, NAT’L INTEREST (Apr. 27, 2015), <http://nationalinterest.org/feature/america-never-ever-ending-the-war-terror-12744>.

² Victoria Rapport, Note, *The Politicization Of United States Asylum And Refugee Policies*, 11 SCHOLAR 195 (2009).

³ See *Generally* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

⁴ Geoff Gilbert, *Soapbox: Human Rights Have to Remain Sacrosanct*, TIMES HIGHER ED. (Oct. 12, 2001), <https://www.timeshighereducation.com/news/soapbox-human-rights-have-to-remain-sacrosanct/165318.article>.

⁵ *Id.*

admission because the national security exception cannot plausibly apply in all cases referred to the United States. Finally, Part VI of the report will propose that the United States adopt a different approach. Rather than continue a discriminatory process in violation of U.S. and international law, the U.S. should instead open its borders to refugees without discrimination. Perhaps by returning to a foreign policy-based admission of refugees, the United States still stand firmly against the War on Terror with an alternative, effective, and non-aggressive strategy.

PART I: RISE OF THE SYRIAN EXODUS

Islam's two major branches, Shiism and Sunnism, have, more often than not, co-existed peacefully over the centuries.⁶ Syria is one of the only two countries in the Middle East with a Shiite minority ruling over a Sunni majority.⁷ In the political vacuum that ensued after the Iraq War and gained stamina from the Arab Spring, sectarian divisions intensified, which led the Sunni opposition to take up arms against a 42-year long dynasty of the Shiite-led government in Syria.⁸ Since then, the battle has disintegrated into an even more lethal sectarian conflict with a heavy civilian death toll.⁹ The Civil War among the Sunni rebels and Shiite government paved the way for the Islamic State terrorist organization.¹⁰ Capitalizing on the chaos in the region, the protégé of al-Qaeda took control of a large swath of territory across northern and eastern Syria, as well as parts of Iraq.¹¹ Many foreign fighters in Syria are now involved in this "war within a war," battling rebels and jihadists from the elite al-Qaeda inspired front.¹²

Since the beginning of the conflict, more than four million Syrians have registered as refugees. However, some estimate that there are more than 10.6 million Syrians who have been displaced since the inception of the conflict.¹³ In fact, this conflict has created one of the largest refugee exoduses in recent history.¹⁴ Neighboring countries have borne the brunt

⁶ Leda Hartman, *Islamic Sectarianism*, 6 CQ GLOBAL RESEARCHER 353, 355 (2012).

⁷ *Id.* at 355.

⁸ *Id.*

⁹ *Id.* at 368.

¹⁰ Lucy Rodgers et al., *Syria: The Story of the Conflict*, BBC NEWS (Oct. 9, 2015), <http://www.bbc.com/news/world-middle-east-26116868>.

¹¹ *Id.*

¹² *Id.*

¹³ Mark Bixler & Michael Martinez, *War Has Forced Half of Syrians From Their Homes. Here's Where They've Gone*, CNN (Sept. 11, 2015), <http://www.cnn.com/2015/09/11/world/syria-refugee-crisis-when-war-displaces-half-a-country/>.

¹⁴ Rodgers, *supra* note 10.

of this refugee crisis, with Lebanon, Jordan and Turkey struggling to accommodate the flood of new arrivals.¹⁵ As conditions in Syria continue to deteriorate, the refugee exodus only increases. These refugees originally abandoned their homes while fleeing persecution from the Shiite backed government led by President Bashar al-Assad, who implemented a violent crackdown of insurgents and alleged supporters of the rebellion.¹⁶ According to reporters in the region, every refugee recounted knowing of a fellow national who returned to Syria only to be arrested or shot.¹⁷ Once the refugees flee their homes, the al-Assad forces tag them as insurgents, and therefore most Syrians who remain in Turkey and Lebanon are sure “a terrible fate awaits anyone who returns.”¹⁸

In 2014, the Islamic State of Iraq and the Levant (IS) took control of a prominent Iraqi city and incited a new refugee crisis in the Middle East.¹⁹ That same year, IS fighters attacked Kurdish villages along the Syrian-Turkish border and sparked a massive refugee migration.²⁰ Many of the refugees who hoped for a dying battle fled to the countryside in fear of the new jihadist movement.²¹ More than 130,000 Syrian Kurds fled the jihadi in late September 2014, which prompted the greatest refugee flow since the start of the Syrian Civil War.²²

Before this civil war, the al-Assad regime protected other minorities, including Christians and a minority sect of the Muslim religion, Druze.²³ These minorities originally feared government persecution from the Sunni sect. Unfortunately, refugees of all religions, whether Muslim or Christian, now fear (in addition to government persecution) the IS “near enemy” strategy, albeit on a regional level.²⁴ IS has declared its mission—inspired by strict right-wing ideology—to create a pure Sunni Islamic state governed by a brutal interpretation of sharia law.²⁵ The Islamic State, unlike al-Qaeda, targets not the United States, but rather

¹⁵ *Id.*

¹⁶ Liam Stack, *For Refugees From Syria, a Visit With No Expiration Date*, N.Y. TIMES (Nov. 14, 2011), http://www.nytimes.com/2011/11/15/world/middleeast/refugees-from-syria-settle-in-for-long-wait-in-turkey.html?pagewanted=all&_r=1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Syrian Refugees: A Snapshot of the Crisis—in the Middle East and Europe*, MIGRATION POLICY CTR. (last visited Apr. 09, 2016), http://syrianrefugees.eu/?page_id=163.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Hartman, *supra* note 6, at 355.

²⁴ Daniel L. Byman, *Comparing al Qaeda and ISIS: Different Goals, Different Targets*, BROOKINGS INST. (Apr. 29, 2015), <http://www.brookings.edu/research/testimony/2015/04/29-terrorism-in-africa-byman>.

²⁵ *See id.*

what they consider defector regimes in the Arab world.²⁶ These apostate regimes are believed to have defected from the ultra-conservative form of Sunnism because they are known to practice a modernist interpretation of the Qu'ran.²⁷ The leaders of IS have declared their conquered territory to be part of a Sunni Muslim caliphate, and they seek to purify the land by attacking all Shiite and other religious minorities.²⁸ This attempt at "purification" has resulted in hundreds of thousands of refugees fleeing the area every day, many attempting the dangerous trip across the Mediterranean. These refugees are looking for a better future, far away from discriminatory persecution.²⁹

PART II: SATISFYING THE DEFINITION OF A REFUGEE

It is particularly important to understand the criteria international law expects member states to follow when determining the status of refugees. The United Nations created the 1951 Convention to ensure member states preserve the status of refugees. The 1951 Convention endorses a single definition of "refugee" as "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."³⁰ The 1951 Convention also includes an important non-discrimination clause, which requires member states to "apply the provisions of [the] Convention to refugees without discrimination as to race, religion or country of origin."³¹ The *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* further identifies the suggested standards in establishing refugee status.³² In interpreting the definition, the *Handbook* defines "agents of persecution" to mean an action by the authorities of a country.³³ It also

²⁶ *Id.*

²⁷ Hartman, *supra* note 6, at 360.

²⁸ See Byman, *supra* note 24.

²⁹ *Quick Facts: What You Need to Know About the Syria Crisis*, MERCYCORPS (Sept. 2, 2015), <https://www.mercycorps.org/articles/iraq-jordan-lebanon-syria-turkey/quick-facts-what-you-need-know-about-syria-crisis>.

³⁰ Convention and Protocol Relating to the Status of Refugees, G.A. Res. 429(V) (hereinafter G.A. Res. 429(v)), U.N. Doc. A/1775/48 (last visited Dec. 14, 2015), available at <http://www.unhcr.org/3b66c2aa10.html>.

³¹ G.A. Res. 429(V), *supra* note 30, at art. 3.

³² See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES [Hereinafter UNHCR] (last visited Apr. 24, 2016), <http://www.unhcr.org/3d58e13b4.html>.

³³ *Id.* at 15.

accepts that persecution may stem from sections of the population that do not respect the laws of the country concerned.³⁴ Persecution for reasons of religion may assume various forms, and broadly includes serious measures of discrimination imposed on individuals because they practice their religion or simply belong to or identify with a particular religious community.³⁵ Mere membership in a particular religious community will normally not be enough to substantiate a claim to refugee status.³⁶ However, there are circumstances where membership in a group does suffice to satisfy the requirement.³⁷ In these circumstances, satisfaction of the definition of refugee will primarily require an evaluation of the applicant's statements, rather than judgment on the situation prevailing in his or her country of origin.³⁸ The burden of proof is upon the individual submitting a claim to substantiate membership and future fear, though due to abnormal circumstances many times facing the individual's country of origin, there may be statements that are not susceptible to proof.³⁹ In these cases, the *Handbook* recommends that, unless there are good reasons to the contrary, the individual should be given the benefit of the doubt.⁴⁰

The United States has its own legislation and policies regarding the definition of refugee.⁴¹ The United States adopted the language of the 1951 Convention in its 1980 Refugee Act.⁴² This legislation and policy is regulated through the Immigration and Nationality Act.⁴³ The United States, as a party to the Convention and its Protocol, must adopt policies in compliance with these international obligations.⁴⁴ Accordingly, the *Handbook* accedes to the Contracting State an ability to establish a procedure that it considers most appropriate, taking into account its particular constitutional and administrative structure.⁴⁵ Therefore, the United States has interpreted "refugee" to mean that an applicant must qualify under one of the protected groups enumerated in the statute, and

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 16.

³⁷ *Id.* at 25.

³⁸ *Id.* at 11.

³⁹ *Id.* at 38.

⁴⁰ *Id.* at 39.

⁴¹ *See generally* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (amending Immigration and Nationality Act, 8 U.S.C. § 1182 to allow for refugee admission and resettlement in United States).

⁴² *See Id.*

⁴³ *Id.*

⁴⁴ Convention, *supra* note 30, at 46.

⁴⁵ *Id.* at 37.

connect that membership to a well-founded fear of persecution.⁴⁶ Mirrored after the 1951 Convention,⁴⁷ to satisfy this test under Section 1101(a)(42) an individual must show that he or she has a well-founded fear of persecution, which requires either (1) a showing of past persecution or (2) independent proof of a well-founded fear of future persecution.⁴⁸ Either route requires that the applicant forge a link between the harm asserted and some governmental act or omission.⁴⁹ In the form of terrorist activities, the necessary governmental connection may manifest itself in the execution of the persecuting acts themselves, in the condemnation of those acts, or in the failure to prevent them.⁵⁰

Persecution under U.S. interpretation conforms to the 1951 Convention interpretation and is defined as “an infliction or threat of death, torture, or injury to one’s person or freedom on account of a protected factor such as religion or membership in an ethnic group.”⁵¹ To satisfy the definition of “fear of well-founded persecution,” an individual must prove that he or she has a subjective and objective fear. The objective component requires credible, direct, and specific evidence of facts that would support an individual having a reasonable fear of persecution.⁵² In fact, “under certain conditions, they can be dispositive.”⁵³ An applicant may satisfy the subjective component by producing credible testimony that he or she genuinely fears persecution.⁵⁴ In regard to those abnormal circumstances anticipated by the 1951 Convention, where statements may not be susceptible to proof, the Supreme Court has further held that “so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution; it is enough that persecution is a reasonable possibility.”⁵⁵ Further, 8 C.F.R. Section 1208.13 provides that an applicant demonstrates a subjective, well-founded fear of persecution by establishing that there is a “pattern or practice in his or her country of nationality of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion, and the applicant establishes his or her own inclusion in, and identification with such group of persons

⁴⁶ 8 C.F.R. § 208.13 (2013).

⁴⁷ 8 U.S.C. § 1101(a)(42); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 429 (1987).

⁴⁸ Harutyunyan v. Gonzales, 421 F.3d 64, 67 (1st Cir. 2005).

⁴⁹ *Id.* at 67.

⁵⁰ *Id.* at 68. .

⁵¹ Yang v. Gonzales, 413 F.3d 757, 759 (8th Cir. 2005); *See also* HANDBOOK, *supra* note 32, at 13.

⁵² Rodriguez-Rivera v. INS, 848 F.2d 998 (9th Cir. 1988).

⁵³ Hartooni v. INS, 21 F.3d 336, 341 (9th Cir. 1994).

⁵⁴ *Id.*

⁵⁵ *See generally* Cardoza-Fonseca, 480 U.S. at 440.

such that his or her fear of persecution upon return is reasonable.”⁵⁶ Recent cases emphasize “the idea behind the ‘pattern or practice’ exception to the individualized proof requirement is that where the persecution of a group on the basis of a protected ground is sufficiently widespread, a ‘reasonable possibility’ of persecution is evident and evidence of individualized targeting becomes unnecessary.”⁵⁷ In these cases, it is likely that mere membership in a particular group will satisfy the requirement if reasonable possibility of persecution is proven. Finally, the individual must demonstrate that he or she is unable to avail him or herself to the protection of his or her government within the native country.⁵⁸

Accordingly, the Syrian refugees, while required to present facts relevant to their particular situations regarding persecution, potentially fall within the necessary categories to be considered for admission into the United States and avail themselves of its protection. Syria is in the midst of a civil war, and there is no government to which these refugees can count on for protection. In addition, the Islamic State has created a *de facto* government within the territory.⁵⁹ These individuals suffer persecution by both government forces and terrorist groups, on the basis of a religious belief, while being unable to receive the protection of any government in their country of origin.⁶⁰ Under these circumstances, these individuals appear to satisfy the definition of refugee both internationally and within the United States.⁶¹

PART III: FROM THEN TO NOW: SCREENING, VETTING, AND STOPPING THE ADMISSION OF REFUGEES INTO THE UNITED STATES WITH AN ADVISABLE ADHERENCE TO INTERNATIONAL OBLIGATIONS

According to the 1951 Convention, “A person is a refugee as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time that his refugee status is formally determined.

⁵⁶ 8 C.F.R. 1208.13(b)(2)(C)(iii)(A); *see also* 8 CFR 1208.13(b)(2)(C)(iii)(B).

⁵⁷ Michael D. Yanovsky Sukenik, *Marginal Refugee: The Ramifications of Terrorism for an Unsustainable United States Asylum Policy*, 65 U. MIAMI L. REV. 79 (2010); *see also* *Vakeesan v. Holder*, 343 F. App’x 126 (6th Cir. 2009) (An alien may prevail on his asylum claim even without credible evidence that he is likely to be singled out for persecution if he can establish a pattern or practice of persecution).

⁵⁸ *Harutyunyan*, 421 F.3d at 67.

⁵⁹ Zachary Laub, *The Islamic State*, COUNCIL ON FOREIGN RELATIONS (Nov. 16, 2015), <http://www.cfr.org/iraq/islamic-state/p14811>.

⁶⁰ *Id.*

⁶¹ *See* Convention, *supra* note 30.

Recognition of his refugee status does not therefore make him a refugee but declares him to be one.”⁶² As established within the 1980 Refugee Act, “merely because an individual or group of refugees comes within the definition [of a refugee] will not guarantee resettlement in the United States.”⁶³ After an individual satisfies the definition of a refugee, he or she must then be assessed within a new established set of procedures for admission into the United States.

The War on Terror permits the United States to modify its immigration policies around its national security concerns.⁶⁴ These modifications are subject to the 1951 Convention and other obligations under International Law. The principles of equality and non-discrimination are both integral to international human rights law and crucial for effectively countering terrorism.⁶⁵ By the International Covenant on Civil and Political Rights (ICCPR), Article IV, “limitations imposed for the protection of national security must be necessary to avert a real and imminent—not just hypothetical—danger to the existence of the nation, its territorial integrity or political independence.”⁶⁶ It follows that in times of public emergency, where the life of the nation is threatened, a national security exception is permitted. However, the parties to the ICCPR, including the United States, must not derogate rights that would involve discrimination to race, religion, or social origin.⁶⁷ Additionally, the United States is a party to the Committee on the Elimination of Racial Discrimination, which stipulates that member states must ensure that any measures taken against terrorism do not discriminate on the grounds of race, descent, national, or ethnic origins.⁶⁸

The U.S. approach to refugee admissions has been an issue for decades, dating back to the Cold War era.⁶⁹ The United States derogated the rights of non-citizens based on race and national origin in order to

⁶² UNHCR, *supra* note 32, at 9.

⁶³ *Cardoza-Fonseca*, 480 U.S. at 444.

⁶⁴ Rapport, *supra* note 2, at 211.

⁶⁵ UNITED NATIONS COUNTER-TERRORISM IMPLEMENTATION TASK FORCE, BASIC HUMAN RIGHTS REFERENCE GUIDE: SECURITY INFRASTRUCTURE (Mar. 2014) [Hereinafter UNCTITF], available at <http://www.un.org/en/terrorism/ctitf/pdfs/Basic%20Human%20Rights%20Reference%20-%20Security%20Infrastructure2014>.

⁶⁶ *Id.* at 6.

⁶⁷ International Covenant on Economic, Social and Cultural Rights, art. 2 *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

⁶⁸ UNCTITF, *supra* note 65, at 8.

⁶⁹ See Samia A. Malik, Student Article, *Protecting the Persecuted and Fulfilling the True Goals of a War on Terror Through Immigration*, 2 LOY. U. CHI. INT'L REV. 333, 344 (2005).

protect the nation from communism.⁷⁰ The government focused its efforts on admitting refugees from communist-dominated nations as part of a campaign of “psychological warfare” against the Soviet Union and its leadership.⁷¹ The purpose was to advance U.S. foreign policy objectives in a manner that would validate communist based countries’ government failures.⁷² Thereby, in granting asylum to refugees fleeing communist states, the U.S. would demonstrate that such states were oppressive persecutors and further the appeal of democracy and capitalism as superior systems of government,⁷³ while admonishing communist ideology.⁷⁴

The policy used during the Cold War to advance the position of the United States was abolished with the implementation of the 1980 Refugee Act.⁷⁵ The Refugee Act mirrored the 1951 Convention and considered a policy-neutral, humanitarian-based refugee policy.⁷⁶ That is, of course, until the attack on September 11, 2001, which began the War on Terror. Lack of interagency sharing led the government to enhance its screening by implementing strict policies targeted specifically at applicants from al-Qaeda based Middle Eastern nations.⁷⁷ This strategy was a result of many vulnerabilities of the screening, one of which permitted the admittance of two Iraqi nationals who pled guilty in 2011 to providing material support to al-Qaeda.⁷⁸ The interagency checks used at the time returned no red flags on the two individuals, while information regarding one of the individuals’ fingerprints on a roadside bomb sat in a Department of Defense database.⁷⁹

Since then, the process for vetting Iraqi nationals has become even more stringent; it has also been expanded to members of other nationalities. The process begins with the United Nations High

⁷⁰ *Id.*

⁷¹ Sukenik, *supra* note 57, at 103.

⁷² *Id.* at 102-03.

⁷³ *Id.*

⁷⁴ Andrew Brower, Note, *Asylum and The American Spirit: The Shift From Foreign Policy-Based Bias In Favor Of Applicants From Enemy Countries To A Domestic Policy-Based Bias Against Applicants From “High Risk” Countries*, 7 ELON L. REV. 571, 575 (2015).

⁷⁵ *See generally Id.*

⁷⁶ *Id.*

⁷⁷ *See generally Terrorist Exploitation of Refugee Programs: Hearing Before the H. Subcommittee on Counterterrorism and Intelligence Committee of Homeland Security*, 112th Cong., (2012) (statement of Lawrence Barlett, Director of Office of Refugee Admissions, Barbara Strack, Chief Refugee Affairs Division, United States Citizenship and Immigration Services, and Dawn Scalici, accompanying from U.S. Department of Homeland Security).

⁷⁸ *Id.*

⁷⁹ Hearing, *supra* note 77, at 17.

Commissioner for Refugees (UNHCR) office identifying and referring individuals who fit the definition of refugee to the U.S. Refugee Admissions Program (USRAP) for screening.⁸⁰ In coordination with the UNHCR, U.S. Citizenship and Immigration Service (USCIS) specially trained officers travel around the world to conduct detailed in-person interviews with refugee applicants.⁸¹ These officers have been trained for the specific populations that they will be interviewing, with detailed country of origin information and fraud trends or security issues that may have been identified in that region.⁸² The USCIS officers, when conducting interviews of Syrian refugees in particular, undergo a one-week training to focus on “Syria-specific topics.”⁸³ The line of questioning involves whether the applicant has been involved in terrorist activity, criminal activity, or the persecution/torture of others; the officer also conducts a credibility assessment.⁸⁴

The screening of refugee applicants involves numerous biographical checks initiated by the U.S. led Resettlement Support Centers (RSC).⁸⁵ These include name checks for all refugee applicants, (both primary names and variations of the name), which are conducted by the State Department.⁸⁶ The system contains records from numerous agencies and includes information on individuals who have been denied visas, who have immigration violations, who possess criminal histories, and who generate terrorism concerns. The system also contains intelligence information and child support enforcement data.⁸⁷ The USCIS continues such biographical checks with fingerprint equipment screened against the Federal Bureau of Investigation (FBI), Department of Defense (DOD), and Department of Homeland Security (DHS) databases.⁸⁸ Certain biographical and fingerprint tests were developed for certain cases, particularly in relation to individuals originating from the Middle East.⁸⁹ The purpose of establishing a relationship with the DOD was to obtain records from those individuals captured in Iraq and elsewhere.⁹⁰ In 2008, a special biographic check for Iraqi applicants was developed to expand the screening process to include data from individuals who had been

⁸⁰ *Refugee Processing and Security Screening*, DEP'T OF HOMELAND SEC. (last visited Apr. 09, 2016), <http://www.uscis.gov/refugeescreening>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

detained or employed by U.S. forces.⁹¹ The process is applied to all refugees seeking admission into the United States; however, the DHS has recognized that the discriminating factor lies within the types of checks that are applied to refugees of particular nationalities.⁹²

For example, the USCIS provides an enhanced review of certain Syrian cases believed to present a national security threat.⁹³ Additionally, the Security Advisory Opinion (SAO) checks certain applicants in a more rigorous examination.⁹⁴ The State Department initiates the SAO for certain refugee applicants whom they identify as members of a group or nationality designated to require a higher security check.⁹⁵ In light of possible motivations of terrorist organizations to identify vulnerabilities in the screening procedure, the government has led a strictly intelligence driven process.⁹⁶ The DHS in particular, in conjunction with interagency partners, actively seeks to identify means by which terrorist organizations may try to “penetrate [U.S.] defenses” and identify groups of concern that really require increased screening and detention.⁹⁷

Following this stringent screening developed to combat terrorist infiltration of the refugee program, Congress has put forward the American Security Against Foreign Enemies Act of 2015 (American SAFE Act).⁹⁸ The act proposes a shut down of the resettlement program, which would halt admission to the U.S. from Syrian and Iraqi applicants altogether.⁹⁹ This pause on admission would continue until further investigation and review can be conducted to ensure that there is no security risk.¹⁰⁰ These additional screenings would be placed specifically upon individuals who are nationals or residents of Iraq or Syria and those who have been present in Iraq or Syria after March of 2011.¹⁰¹ In its proposal to the House, Representative Goodlatte emphasized that “the current vetting process cannot prevent [an IS operative] from receiving refugee status.”¹⁰² He promoted the bill by presenting FBI Director

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Hearing, *supra* note 77, at 30.

⁹⁷ *Id.*

⁹⁸ American Security Against Foreign Enemies Act of 2015, H.R. 4038, 114th Cong. (2015).

⁹⁹ Deirdre Walsh & Ted Barrett, *House Passes Bill That Could Limit Syrian Refugees*, CNN (Nov. 19, 2015), <http://www.cnn.com/2015/11/19/politics/house-democrats-refugee-hearings-obama/>.

¹⁰⁰ *Id.*

¹⁰¹ Hearing, *supra* note 77.

¹⁰² *Id.* (Statement of Rep. Goodlatte).

James Comey's comments: "with a conflict zone like Syria, where there is 'dramatically' less information available to use during the vetting process, he could not 'offer anybody an absolute assurance that there is no risk associated with' admitting Syrian nationals as refugees."¹⁰³ The bill would require the DHS Secretary, FBI Director, and Director of National Intelligence certify Congress that each refugee is not a security threat prior to his or her admission to the United States.¹⁰⁴ Countering, Representative Conyers asserts, "[t]his measure sets unreasonable clearance standards that the DHS simply cannot meet."¹⁰⁵ He continues, "[it] is an extreme over-reaction to these latest security concerns."¹⁰⁶ "Instead of slamming our doors to the world's most vulnerable, we should be considering legislation to strengthen and expand refugee programs."¹⁰⁷

Refugee resettlement into the United States has been relatively secure. The preemptive and reactionary measures by interagency cooperation have ensured that U.S. citizens and national security remain a top priority. However, perhaps it is these stringent security measures that lead to the U.S. government's inability to resettle thousands of refugees who qualify under the domestic definition.¹⁰⁸ Representative McCaul provided that in the homeland the FBI has investigated nearly 1,000 IS-related individuals in all 50 States,¹⁰⁹ yet provided no evidence of "plots" regarding the infiltration of refugees by IS into the United States specifically using the resettlement program. However, it is evidenced by the substantial decrease in refugee admittance to the United States that the U.S. government's resettlement officials adhere to these same fears. From January 2013 through December 2015, the United States has processed and resettled 2,365 Syrian refugees.¹¹⁰ Yet from 2007 to 2013, over 88,000 Iraqi nationals had been resettled in the

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (Statement by Rep. Conyers).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Kevin Walsh, Note, *Victims Of A Growing Crisis: A Call For Reform Of The United States Immigration Law And Policy Pertaining To Refugees Of The Iraq*, 53 VILL. L. REV. 421, 455 (2008).

¹⁰⁹ 161 CONG. REC. 171, H8381 (daily ed. Nov. 19, 2015).

¹¹⁰ *Admissions and Arrivals*, REFUGEE PROCESSING CTR. (last visited Apr. 10, 2016), http://www.wrapsnet.org/Reports/InteractiveReporting/tabid/393/E.numType/Report/Default.aspx?ItemPath=/rpt_WebArrivalsReports/Map%20%20Arrivals%20by%20State%20and%20Nationality (statistics of Syrian refugees accepted from 2013 to 2015).

United States.¹¹¹ Perhaps it was the United States' moral obligation to implement a refugee admissions program that included the refugees it created in Iraq and Afghanistan as a result of the post-September 11 U.S. led wars. In contrast, the United States took no military part in creating the Syrian refugees, and thereby arguably lacks a moral obligation to the refugees and instead feels justified in continuing a discriminatory screening process hidden behind national security concerns.

PART IV: INELIGIBILITY ON THE BASIS OF NATIONAL SECURITY

A. Defining the National Security Exception Used to Disqualify Refugees

Under the definition in the 1980 Refugee Act, every asylum-seeker is also a refugee.¹¹² Overseas refugees differ from asylum-seekers because they have not yet reached the United States but can nevertheless qualify for refugee status.¹¹³ While there is a factual distinction between the two definitions, both seek admission into the United States based on a well-founded fear of persecution.¹¹⁴ There is no appeal for a denial of an application for refugee status for those applying overseas, therefore it is difficult to determine the precise standard used by United States officers when qualifying admissibility.¹¹⁵ However, because under the 1980 Refugee Act every asylum-seeker is also a refugee and must satisfy the requirements of a refugee, the precedent under U.S. law for denying admission of a refugee on the basis of national security applied to asylum-seekers similarly applies to refugees seeking admission from outside of the United States.

¹¹¹ *Proposed Refugee Admissions for Fiscal Year 2014: Report to Congress: Submitted on Behalf of the President of the United States to the Committees on the Judiciary United States Senate and House of Representatives*, U.S. DEP'T OF STATE (last visited Apr. 20, 2016), <http://www.state.gov/documents/organization/219137.pdf>.

¹¹² Meital Waibsnider, Note, *How National Self-Interest And Foreign Policy Continue To Influence The U.S. Refugee Admissions Program*, 75 *FORDHAM L. REV.* 391, 392 (2006) (an asylum-seeker is eligible for asylum if the INS "determines that such alien is a refugee within the meaning of section 101(a)(42)(A)").

¹¹³ *Id.*

¹¹⁴ *Refugees and Asylum*, DEP'T OF HOMELAND SEC. (last visited Jun. 16, 2015), <http://www.uscis.gov/humanitarian/refugees-asylum> (defining asylum-seeker and refugee).

¹¹⁵ *Request for Review Tip Sheet*, DEP'T OF HOMELAND SEC. (last rev. Apr. 9, 2014), <http://www.uscis.gov/humanitarian/refugees-asylum/refugees/request-review-tip-sheet> (There is no appeal for a denial of an application for refugee status).

It has been difficult ascertaining the U.S. interpretation of national security.¹¹⁶ The 1951 Convention provides a national security exception for states to limit admission of refugees.¹¹⁷ The 1951 Convention permits member states “in time of war or other grave and exceptional circumstances [to take] certain actions that it believes are essential to the national security of its homeland.”¹¹⁸ The domestic exception grew out of this 1951 Convention clause, and conformed to Article 33 of the UN Protocol, the *nonrefoulement* obligation.¹¹⁹ It states that a Contracting State must not expel or return a refugee to a country where his “life or freedom would be threatened on account of his race, religion, nationality, membership [in] a particular social group or political opinion.”¹²⁰ Article 33(2) provides an exception to that rule when “there are reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he is.”¹²¹ While this section relates to the deportation of a refugee already within the United States, *Qureshi v. Holder* provides that demonstrating eligibility for withholding of deportation is similar to that of asylum, with the only difference being that withholding of removal is mandatory, whereas asylum is discretionary.¹²² In this regard, the national security exception derived from the 1951 Convention applies to both the withholding of deportation analysis for a refugee on the basis of a national security threat and the criteria used for denying refugee status using the same standard.

The United States resettlement policy arguably weighs too heavily on the side of national security, which is against the UN’s recommendation to limit measures restricting the “full enjoyment” of human rights to only those deemed “necessary and proportional.”¹²³ In fact, the United States tends to use its national security exception as a crutch to continue discriminating against those seeking true protection. Therefore, perhaps the appearance of the United States policy weighing too heavily on the side of national security is not “necessary and proportional.” According to United States legal precedent defining national security, the criteria being used to establish eligibility or ineligibility for admission of refugees appears biased, arbitrary, and discriminatory.

¹¹⁶ Rapport, *supra* note 2, at 211.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Yusupov v. Attorney Gen. of the United States*, 518 F.3d 185, 202 (3d Cir. 2008).

¹²⁰ *Id.* at 203.

¹²¹ *Id.*

¹²² *Qureshi v. Holder*, 422 F. App’x 35, 36 (2d Cir. 2011).

¹²³ UNCTITF, *supra* note 65, at 2.

In *INS v. Cardoza-Fonseca*, the Supreme Court identified a clear distinction made by Congress when an alien brought an action to demonstrate eligibility for withholding of deportation, and argued that the language used in the Refugee Act of 1980 that required an alien to show that “his life would be threatened on account of [persecution] if he was deported,”¹²⁴ interpreted to mean that “it was more likely than not that the alien would be subject to persecution,”¹²⁵ was the same standard the government used in applications for a grant of asylum in demonstrating “an alien is unable or unwilling to return to his home . . . because of a well-founded fear of persecution.”¹²⁶ The Supreme Court asserted “[w]here Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”¹²⁷ In this case, the Court established that there was a linguistic difference from the “would be threatened” language of the removal statute and was not identical to that of the statute regarding the admissibility of aliens section’s reference to “well-founded fear of persecution.”¹²⁸

Contrarily, in regard to the national security exception alluded to in the removal statute and asylum statute in the Immigration and Naturalization Service Act, an alien is statutorily ineligible for asylum and barred from withholding of removal if there are “reasonable grounds for regarding the alien as a danger to national security.”¹²⁹ Further, in § 1182—also the material support bar—Congress included language that deemed an alien ineligible for admission if an “officer knows, or has reasonable grounds to believe” he poses a security-related threat.¹³⁰ Following the Supreme Court’s interpretation in *INS v. Cardoza-Fonseca*, Congress purposely intended to include “reasonable grounds” in every section of refugee and asylum law with regard to the national security exception. Therefore, the interpretation of national security exceptions must be viewed to apply to all sections of refugee law, including the process for determining admission of a refugee located overseas.

In interpreting the definition of national security, in *In re A-H-*, the court addressed the phrase “reasonable grounds regarding the alien as a

¹²⁴ *Cardoza-Fonseca*, 480 U.S. at 423.

¹²⁵ *Id.*; see also 8 U.S.C. §1253(h) (statute has been amended to exclude this language).

¹²⁶ *Id.* at 424; see also 8 U.S.C. § 1158(a).

¹²⁷ *Cardoza-Fonseca*, 480 U.S. at 433.

¹²⁸ *Id.* at 431.

¹²⁹ *Malkandi v. Holder*, 576 F.3d 906, 913 (9th Cir. 2009); see also 8 U.S.C. § 1158(b)(2)(A)(iv); 8 U.S.C. § 1231(b)(3)(B)(iv).

¹³⁰ 8 U.S.C. § 1182(a)(3).

danger to [national security].”¹³¹ It considered “reasonable grounds for regarding” as implying a reasonable person standard,¹³² and concluded that the “reasonable grounds for regarding” standard is satisfied if there is information that would permit a reasonable person to believe that the alien *may* pose a danger to national security.¹³³ However, in *Yusupov v. AG of the United States*, the court rejected the *In re A-H-* “reasonable grounds” meaning.¹³⁴ The court analyzed the phrase “is a danger” of the clause to conclude that “is” does not mean “may,” as suggested by the formulation in *In re A-H-* that the national security exception is satisfied “if there is information that would permit a reasonable person to believe that the alien *may* pose a danger to the national security.”¹³⁵ The court in *Yusupov* added:

This interpretation accords with neither the plain wording nor the ordinary meaning of the statutory text, which does not refer to belief in a mere possibility. In other words, ‘is’—and its subjunctive form ‘would’—connote a more certain determination than that the alien ‘might’ or ‘could’ be a danger for the national security exception to apply.¹³⁶

Under this interpretation, the court found the statute to mean what it says: “is” indicates that Congress intended the application of this section to individuals who actually pose a danger to U.S. security.¹³⁷ It did not intend this exception to cover aliens who conceivably could be such a danger or have the ability to pose such a danger, adding that under this category, “nearly anyone could fit.”¹³⁸ Finally, *Yusupov* added that the government must meet the threshold for establishing that an alien poses a national security risk before concluding that a reasonable person would believe the individual *may* pose a danger to national security.¹³⁹ In *Malkandi v. Holder*, the court confirmed this analysis and adopted it in a review of a denial of asylum.¹⁴⁰ The court concluded that the proper standard was employed and the alien actually posed a danger to United

¹³¹ See *In re A---H---*, 2005 BIA LEXIS 11, 23 I. & N. Dec. 774 (Bd. Immigr. App. 2005).

¹³² *Id.* at 789; see also 8 U.S.C. § 1182(a)(3)(B)(i)(II).

¹³³ *In re A-H-*, 231 I. & N. Dec at 789.

¹³⁴ *Yusupov*, 518 F.3d at 199.

¹³⁵ *Id.* at 201.

¹³⁶ *Id.*

¹³⁷ *Yusupov*, 518 F.3d at 202.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Malkandi*, 576 F.3d at 914.

States, and thus the national security exception was applicable.¹⁴¹ In *Malkandi*, there was substantial evidence to support the finding that there were reasonable grounds for regarding Malkandi as a danger to the United States.¹⁴² Substantial evidence therefore supports the adverse credibility determination, and refutes any “benefit of the doubt” given to individuals who may lack such proof that they were not an actual threat.¹⁴³ By *Malkandi*, the government must provide “specific and cogent reasons in support of an adverse credibility determination, after which the court will accord the credibility determination special deference.”¹⁴⁴

B. The Material Support Bar Used as a Means to Employ the National Security Exception to Disqualify Refugees

Section 1182 provides a material support bar that allows the United States to deny refugee status and asylum to an applicant regardless of his or her knowledge that a group will or has committed a terrorist activity, on the basis that he or she is affiliated with a terrorist and may be a threat.¹⁴⁵ As Part II of this report alluded to, there are many Syrians who have applied to the United States resettlement program who in fact may meet the definition, as required by international and domestic law. However, these qualifying refugees are limited in admission due to the stringent requirements placed on members of particular groups. One of the limitations is the material support bar—a standard used for the national security exception, developed for the determination of admissibility for refugees.¹⁴⁶ The material support bar applies to aliens who provide material support to an organization, with or without knowledge of completion of threat or completion of an attack. The bar, if satisfied, allows the government to deny protected status to the applicant.¹⁴⁷ 8 U.S.C. § 1182(3)(A) contains a national security and related grounds conditions for denying aliens admission.¹⁴⁸ This section bars from admission any “any alien who [an] officer . . . knows, or has reasonable grounds to believe, seeks to enter the United States to engage

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See generally Id.*

¹⁴⁴ *Malkandi*, 576 F.3d at 917.

¹⁴⁵ 8 U.S.C. § 1182.

¹⁴⁶ *See* Courtney Schusheim, Comment, *Cruel Distinctions of the I.N.A.’s Material Support Bar*, 11 N.Y. CITY L. REV. 469, 470 (2008).

¹⁴⁷ Jordan Fischer, Student Article, *The United States and the Material Support Bar for Refugee: A Tenuous Balance Between National Security And Basic Human Rights*, 5 DREXEL L. REV. 237, 256 (2012).

¹⁴⁸ 8 U.S.C. § 1182(3)(A).

solely, principally, or incidentally . . . “¹⁴⁹ to terrorist activities which the alien may engage, advertently or inadvertently.¹⁵⁰ The bar is extremely broad and contains no exception, creating a heavy burden on the admissions seeker to disprove the alleged support of terrorist activity.¹⁵¹ For example, the material support bar applies to refugees who gave support, or are linked by mere affiliation or relation, to a known or unknown member of a terrorist group.¹⁵² This includes refugees who have lived in or traveled to areas controlled by non-governmental armed groups in order to cross into another state.¹⁵³ The language of the statute encompasses the provider’s past, present, and future contributions, as well as his past, present, and future terrorist activity.¹⁵⁴ Essentially, a refugee may have unwillingly given support, i.e. financial, emotional, religious, to a group in the past that has been implicated in terrorist activity in the future. As a result, those who have “cooperated” with terrorist organizations or members in order to flee a conflict area have been found inadmissible under this ground.¹⁵⁵ The statute also includes a bar against aliens who have cooperated with a “group of two or more individuals, whether organized or not,” that engages in terrorist activities.¹⁵⁶ This provision is synonymous to a catchall phrase intended to encompass any support given to any subgroup of potential terrorists.

In viewing the United States’ interpretation of national security against its more stringent standard, the material support bar, it appears that United States officers may be disqualifying refugees on an arbitrary basis. Disqualifying refugees on the basis of the material support bar when an alien may pose a threat is against the Court’s very own interpretation. The United States’ application of the material support bar to refugees therefore directly contributes to the UN’s fear of arbitrary denial of protection for valid asylum-seekers.¹⁵⁷ As stated above,¹⁵⁸ the UN has held that in responding to security threats, a nation must impose limitations for the protection of national security, necessary to avert a real and imminent—not just hypothetical—danger,¹⁵⁹ as it appears to be administered in the U.S. for refugees of particular nationalities.

¹⁴⁹ Schusheim, *supra* note 146.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 471.

¹⁵² *Id.* at 477.

¹⁵³ *Id.*

¹⁵⁴ 8 U.S.C. § 1182(3)(B).

¹⁵⁵ Schusheim, *supra* note 146, at 478.

¹⁵⁶ 8 U.S.C. § 1182(3)(B)(vi)(III) (1980).

¹⁵⁷ Fischer, *supra* note 147, at 258.

¹⁵⁸ *Id.*

¹⁵⁹ UNCTITF, *supra* note 65.

Further, it has been underlined in United Nations Security Council resolutions to the General Assembly that counter-terrorism efforts must be consistent with States' obligations under international refugee, human rights, and humanitarian law.¹⁶⁰ Additionally, while Article 1F of the 1951 Convention provides that the Convention shall not apply to persons with regard to whom there are serious reasons for which they are undeserving of international protection in view of the gravity of the acts committed,¹⁶¹ The UNHCR further encourages States to apply these limiting provisions regarding national security "scrupulously and restrictively."¹⁶² Despite these recommendations, in *In re S-K-*, the U.S. courts did not agree with the UNHCR, which urged that the material support bar be assessed by the 1951 Convention interpretation that requires a link between the provision of material support to a terrorist organization and the intended use by that recipient organization of the assistance to further a terrorist activity.¹⁶³ The Court instead noted, "Congress may enact statutes that conflict with international law,"¹⁶⁴ and cited *United States v. Yousef*, which stated "while courts are 'bound by the law of nations which is a part of the law of the land,' Congress may 'manifest [its] will' to apply a different rule 'by passing an act for that purpose.'"¹⁶⁵ Thus, the UN's suggestion to create necessary, proportionate, and least restrictive means for achievement was undermined by the reading in *In re S-K-*, which precluded consideration of international convention obligations to the U.S.¹⁶⁶ Contrarily, in *INS v. Cardoza-Fonseca*, the Supreme Court acknowledged that they are guided by the analysis set forth in the UNHCR *Handbook* regarding the status of refugees.¹⁶⁷ Yet the dissent in that case stated that the explanation set forth in the *Handbook* on procedures and criteria for determining refugee status has no "force of law and in no way binds the INS."¹⁶⁸ Further, the

¹⁶⁰ S.C. Res. 1269, U.N. Doc. S/RES/1269 (Oct. 19, 1999); S.C. Res. 1371, U.N. Doc. S/RES/1371 (Sept. 28, 2001).

¹⁶¹ See *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR (Sept. 4, 2003), <http://www.unhcr.org/3f7d48514.html>.

¹⁶² *Id.*

¹⁶³ *In re S---K---*, 2006 BIA LEXIS 11, 23 I. & N. Dec. 936, 944 (Bd. Immigr. App. 2006) ("We thus reject the respondent's [UNHCR] assertion that there must be a link between the provision of material support to a terrorist organization and the intended use by that recipient organization of the assistance to further a terrorist activity.").

¹⁶⁴ *Id.* at 942.

¹⁶⁵ *United States v. Yousef*, 327 F.3d 56, 93 (2d Cir. 2003) (quoting C.J. Marshall, *The Nereide*, 13 U.S. (9 Cranch) 388, 423, 3 L. Ed. 769 (1815)).

¹⁶⁶ Schusheim, *supra* note 146, at 476; see generally United Nations Counter Terrorism Task Force, *supra* note 65.

¹⁶⁷ *Cardoza-Fonseca*, 480 U.S. at 439.

¹⁶⁸ *Id.*

Court held that § 1158, in conjunction with Article 34 of the 1951 Convention, does not require the implanting authority to actually grant asylum to all those who are eligible, and therefore permits the United States to use discretion in classifying persons who qualify as “refugees.”¹⁶⁹

The UN has continuously pleaded with states to narrowly tailor national laws to allow for the protection of national security while still supporting the refugee programs.¹⁷⁰ Yet, the *Handbook*, as discussed previously, differs with the Contracting State’s ability to establish the procedure that it considers most appropriate, taking into account its particular constitutional and administrative structure.¹⁷¹ Therefore, the United States has continued its admissions process by using the material support bar as its primary method to secure the national integrity of its nation. While arguably the application to those individuals with knowledge of—or who should have knowledge of—terrorist activities is justified in the name of national security, application of the material support bar to asylum and refugee applicants who do not intend to support terrorist organizations goes too far.

PART V: DISCRETION IS DISCRIMINATION WHEN PROFILING THE ENEMY

It follows, USCIS specially trained officers determine whether or not a refugee is a national security threat by using the criteria established in the material support bar under U.S. law. In ascertaining whether an alien deserves a positive grant into the United States, the immigration authorities must not only consider whether the applicant showed a “well-founded fear of persecution,”¹⁷² but also whether the conditions in the country of origin provide a risk of future persecution.¹⁷³ This determination is particularly difficult for Syrian and Iraqi refugees who are encountering “forced displacement, violence, lack of infrastructure, illness and lack of stability, which are not ideal conditions for preserving formal identity documents such as passports, birth certificates, or marriage certificates.”¹⁷⁴ In this regard, refugees face the added challenge of preserving the documents that prove who they are, why they are

¹⁶⁹ *Id.* at 441; *see also* 8 U.S.C. § 1158 (2009).

¹⁷⁰ Fischer, *supra* note 147, at 244.

¹⁷¹ UNHCR, *supra* note 32.

¹⁷² 8 U.S.C. § 101(a)(42).

¹⁷³ *Harutyunyan v. Gonzales*, 421 F.3d 64, 67 (1st Cir. 2005).

¹⁷⁴ Marisa Silenzi Cianciarulo, *The W Visa: A Legislative Proposal for Female and Child Refugees Trapped in A Post-September 11 World*, 17 *YALE J.L. & FEMINISM* 459, 481 (2005).

refugees, and that they are not involved in terrorism.¹⁷⁵ This is particularly important in trying to overcome the stringent standards applied to them through the material support bar's excuse for the protection of national security. As discussed, however, the 1951 Convention alluded to this issue, and the United States followed, understanding that in particular cases, as the *Handbook* recommends, unless there are good reasons to believe the contrary, the individual should be given the benefit of the doubt.¹⁷⁶ Thereby, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.¹⁷⁷ In some cases it is therefore necessary for the examiner to use all the means at his disposal, including credibility assessments, to produce the necessary evidence in support of the application.¹⁷⁸ The issue is whether or not specialized officers are in fact adhering to these practices.

FBI Director James Comey was quoted during the proposal of the American SAFE Act: "with a conflict zone like Syria, where there is 'dramatically' less information available to use during the vetting process, he could not 'offer anybody an absolute assurance that there is no risk associated with' admitting Syrian nationals as refugees."¹⁷⁹ Yet, in viewing the statistics provided in Part III, Director Comey's comments confirm the practice of immigration officers regarding these refugees. While the explanation for the decrease in admissions is arguably the rigorous process for screening, an approximate 85,000-drop from the Iraqi resettlement program (during the peak of the War on Terror) to the program intended to resettle the Syrian refugees cannot be explained solely on a lengthy and stringent process. Since 2013, the UNHCR has referred 32,369 Syrian refugees to the United States for resettlement consideration.¹⁸⁰ From those, the United States has processed and resettled only 2,486.¹⁸¹ While the screening process may last several years before a refugee gains protection within the United States, this report proposes that given the current administration's authorization to

¹⁷⁵ *Id.*

¹⁷⁶ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; *see also* UNHCR, *supra* note 32, at 39.

¹⁷⁷ UNHCR, *supra* note 32, at 38.

¹⁷⁸ *Id.*; *see also* *Malkandi*, 576 F.3d at 917.

¹⁷⁹ 161 CONG. REC. 171, H8381 (daily ed. Nov. 19, 2015) (statement by Rep. Goodlatte quoting FBI Director James Comey).

¹⁸⁰ *Resettlement and Other Forms of Legal Admission for Syrian Refugees*, UNHCR (Mar. 18, 2016), <http://www.unhcr.org/52b2febafc5.pdf>.

¹⁸¹ REFUGEE PROCESSING CTR., *supra* note 110.

accept 70,000 refugees—10,000 Syrian,¹⁸² where 22,427 of four million¹⁸³ have been referred the United States, with acceptance of 2,365,¹⁸⁴ these USCIS officers have not only abused their discretion by continuously engaging in discriminatory practices in determining the status of refugees, but they have also abandoned U.S. precedent.

Qureshi v. Holder provided that the only difference between withholding of removal and an application for asylum or refugee status is that removal is mandatory, while asylum is discretionary.¹⁸⁵ Immigration officers conduct detailed in-person interviews with refugee applicants for the determination of admission.¹⁸⁶ Given their discretion, not only have these officers engaged in arbitrary practices for admitting refugees into the United States, but they have also hidden these denials behind the national security exception. The decrease in admissions of refugees may have a number of explanations. However, this report proposes that given the many specialized screening processes targeted at Syrian and Iraqi nationals, the latest American SAFE Act, along with the American population's strong opposition to accepting Syrian refugees into the United States,¹⁸⁷ leads to an inherent discriminatory bias with the national security exception as its loophole.

The consistent practice of the USCIS officers resembles that of profiling. Profiling is generally defined as the systematic association of sets of physical, behavioral or psychological characteristics with particular offenses and their use as a basis for making law enforcement decisions.¹⁸⁸ The use of profiling constitutes disproportionate interferences with human rights and violates the principle of non-discrimination.¹⁸⁹ Both the ICCPR and the 1951 Convention are widely accepted either as binding treaty law or customary international law. The United States is a party to both conventions, and must therefore adhere to its obligations regarding derogation of rights, which shall be accomplished in a non-discriminatory manner.¹⁹⁰ In addition, the 1951

¹⁸² *Presidential Memorandum -- FY 2015 Refugee Admissions*, WHITE HOUSE (Sept. 30, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/30/presidential-memorandum-fy-2015-refugee-admissions>.

¹⁸³ Bixler & Martinez, *supra* note 13, at 15.

¹⁸⁴ Schusheim, *supra* note 146.

¹⁸⁵ See *Qureshi v. Holder*, 422 F. App'x 35, 36 (2d Cir. 2011).

¹⁸⁶ Hearing, *supra* note 77, at 9.

¹⁸⁷ Margaret Talev, *Most Americans Oppose Syrian Refugee Resettlement*, BLOOMBERG (Nov. 18, 2015), <http://www.bloomberg.com/politics/articles/2015-11-18/bloomberg-poll-most-americans-oppose-syrian-refugee-resettlement> (53% of Americans opposed to accepting Syrian refugees).

¹⁸⁸ UNCTITF, *supra* note 65, at 8.

¹⁸⁹ *Id.*

¹⁹⁰ ICCPR, *supra* note 70, ch. 4.

Convention clearly and unequivocally requires member states to “apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.”¹⁹¹ Profiling by immigration officers and the United States Congress, based on ethnic and national origin, country of origin, or religion is an immoral violation of international law.¹⁹² Clearly, the United States has abandoned its international obligations to humanitarian law, refugee law, and Treaties, and has violated the oldest known principle of *pacta sunt servanda* (agreements must be kept).¹⁹³ Such profiling and discrimination has broken ties with many of its allies. If the United States wishes to hold strong ties with its allies in the War on Terror, “it must stand by its values of freedom and make sure these values extend to those who are persecuted by the same individuals or groups who have created the necessity for a war against terrorism.”¹⁹⁴

PART VI: DISCRIMINATION PROMOTES THREATS TO NATIONAL SECURITY; OPENING BORDERS UNDERMINES IT

The United States has historically engaged in discriminatory practices to secure the nation’s integrity. During World War II, the United States implemented a policy for limiting Jewish refugees because of anti-Semitism influence and fear of Nazism.¹⁹⁵ Additionally, the U.S. historical detention of thousands of Japanese-Americans in internment camps demonstrates that the U.S. has long feared the enemy planting agents, spies and saboteurs among the refugees or pressuring refugees to act on their behalf.¹⁹⁶

After the attack in 2001, where the hijackers entered the United States through the immigration system,¹⁹⁷ the United States prepared its forces to defeat al-Qaeda by adapting its military, intelligence, and law enforcement agencies to the tasks of counterterrorism and counterinsurgency against al-Qaeda operatives.¹⁹⁸ However, IS is a

¹⁹¹ G.A. Res. 429(V), *supra* note 30, art. 3.

¹⁹² UNCTITF, *supra* note 65.

¹⁹³ Encyclopedia Britannica, *pacta sunt servanda* (last visited Apr. 10, 2016) <http://www.britannica.com/topic/pacta-sunt-servanda> (defining *pacta sunt servanda*).

¹⁹⁴ Malik, *supra* note 69, at 341.

¹⁹⁵ See generally Adam Geller, *Refugee Refusal Today Compared, Contrasted to That of WWII*, ASSOC. PRESS (Nov. 20, 2015), <http://bigstory.ap.org/article/fdb11e7c23744e1f869299be47fcb56d/refugee-refusal-today-compared-contrasted-wwii>.

¹⁹⁶ *Id.*

¹⁹⁷ Martha Raddatz, *State Dept. Lapses Aided 9/11 Hijackers*, ABC NEWS (last visited Apr. 10, 2016), <http://abcnews.go.com/WNT/story?id=130051>.

¹⁹⁸ Audrey Kurth Cronin, *ISIS: Is Not a Terrorist Group*, FOREIGN AFFAIRS, (Mar./Apr. 2015), <https://www.foreignaffairs.com/articles/middle-east/isis-not-terrorist-group>.

different group; IS is not al-Qaeda.¹⁹⁹ Al-Qaeda's primary enemy is the United States.²⁰⁰ The primary target of IS has not been the United States, but the apostate regimes in the Arab world.²⁰¹ IS maintains its focus on Iraq and Syria, and to a lesser degree on other states in the Muslim world.²⁰² While the actions of IS may inspire homegrown terror in the United States, IS has not directed its resources to attack it.²⁰³ Regarding the recent Paris attack by IS, while proposals of IS infiltration among the European refugees have been introduced, such a position is contrary to IS' strategic goals.²⁰⁴

A backlash against the refugee population serves the interests of IS because fleeing refugees weaken the idealistic image IS intends to introduce.²⁰⁵ Leaving IS territory does not promote a "refuge" as IS claims, but rather, a land to seek refuge from.²⁰⁶ IS warns that these fleeing refugees will only find happiness in the IS caliphate. Therefore, when refugees are denied and mistreated, this furthers IS legitimacy,²⁰⁷ and the U.S. instead lays ground for recruiting among the refugees.²⁰⁸ Therefore, "[w]elcoming immigrants, isn't just a moral act—it's smart counterterrorism."²⁰⁹

A return to the Cold War foreign-based policy has been considered as a mechanism for advancement of the U.S. position.²¹⁰ However, it has been countered that such a policy would not function as well as it once did because the War on Terror is not a war against theocratic governments, but instead one against terrorist organizations that consist of individuals not affiliated with any particular form of government.²¹¹ This may have been true in the war against al-Qaeda, which gained support from varying operatives by using mechanisms of attack to

¹⁹⁹ *Id.*

²⁰⁰ Cole Bunzel, *From Paper State to Caliphate: The Ideology of the Islamic State*, BROOKINGS PROJECT ON U.S. RELATIONS WITH THE ISLAMIC WORLD, (Mar. 19, 2015), <http://www.brookings.edu/~media/research/files/papers/2015/03/ideology-of-islamic-state-bunzel/the-ideology-of-the-islamic-state.pdf>.

²⁰¹ *Id.* at Part I.

²⁰² Byman, *supra* note 24.

²⁰³ *Id.*

²⁰⁴ Zack Beauchamp, *Turning Back Syrian Refugees Isn't Just Wrong—It Helps ISIS*, VOXWORLD, (Nov. 17, 2015), <http://www.vox.com/world/2015/11/17/9747042/paris-attacks-isis-refugees>.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Brower, *supra* note 74, at 580.

²¹¹ *Id.*

eliminate U.S. support from the region.²¹² Here, IS has already declared a caliphate within the territory under its control.²¹³ This particular government includes institutions in the territory that are affiliated with an ultra-conservative Sunni Muslim rule.²¹⁴

If the United States government must continue a self-serving policy, they must use it to their advantage, and just as in the foreign policy directed at refugees during the Cold War, they must accept Syrian refugees as they do all other nationalities. In accepting refugees, the U.S. turns IS's mission against them by undermining their legitimacy, and also follows correct precedent and its international obligations. This policy will lend support to the belief that the IS caliphate is not in accordance with true Islam²¹⁵ and follow a campaign of "psychological warfare" against IS and its leadership. If IS is truly the cause of the United States' greatest fear of accepting refugees, it is necessary for the U.S. to consider options not only beneficial to their national security, but also to consider those that are consistent with universal human rights. As during the Cold War, the purpose was to advance U.S. foreign policy objectives in a manner that would validate communist-based countries' failure.²¹⁶ Here, in granting admission to refugees fleeing IS controlled territory, the U.S. will demonstrate that IS is an oppressive persecutor and instead further its appeal against IS claims,²¹⁷ while at the same time admonishing IS recruiting grounds among the refugees.

CONCLUSION

The purpose of asylum and refugee law is to continue the tradition of providing the oppressed with opportunities to settle in the United States. Yet, the current system is arguably ill-equipped to accomplish this task. The laws created by the legislature have displaced humanitarian concerns in favor of self-serving practices. In reality, such practices provide the United States government with another tool for making cruel distinctions that keep genuine refugees from being granted status or sanctuary.

²¹² Byman, *supra* note 24.

²¹³ *ISIS Jihadists Declare 'Islamic Caliphate'*, AL ARABIYA NEWS (Jun. 29, 2014), <http://english.alarabiya.net/en/News/2014/06/29/ISIS-jihadists-declare-caliphate-.html>.

²¹⁴ *Id.*

²¹⁵ Jacob Poushter, *In Nations With Significant Muslim Populations, Much Disdain For ISIS*, PEW RESEARCH CTR. (Nov. 17, 2015), <http://www.pewresearch.org/fact-tank/2015/11/17/in-nations-with-significant-muslim-populations-much-disdain-for-isis/>.

²¹⁶ *Id.*

²¹⁷ *Id.* (quoting Daniel L. Swanwick, Note, Foreign Policy and Humanitarianism in U.S. Asylum Adjudication: Revisiting the Debate in the Wake of the War on Terror, 21 GEO. IMMIGR. L.J. 129 (2006)).

Regardless of the establishment of a foreign-based policy that may advance counter-terrorism efforts against IS, the United States is failing in its obligations to international law and to its own domestic law. By the definitions established in the 1951 Convention and domestic law, terrorists fleeing Syria and Iraq attempt to escape a “pattern and practice” of unavoidable persecution premised on discriminatory and protected grounds.²¹⁸ Government forces on one end and terrorists on the other end continue to implement such violence.²¹⁹ Each applicant arguably satisfies the definition required by the UNHCR and the United States to become a refugee. The United States has an obligation to follow the treaties that it has ratified, which demand non-discriminatory practices in determining eligibility for refugee status. The United States cannot send its immigration officers to conduct interviews with these applicants and use “loopholes” to argue inadmissibility on the basis of national security when the exceptions are being applied arbitrarily. It is uncanny that the disparate numbers in admissions into the United States, compared to those that have been referred, are a result of long processing times. Instead, the problem falls upon immigration officers’ discretion in admitting or denying applicants on the basis of these possible national security concerns. Under the definition the United States has provided, immigration officers must conclude that there is sufficient evidence to establish that such applicants may pose a threat to the security of the United States, and then determine through further investigation whether they are actually a threat to national security.

The twenty-first century has seen some staggering changes; once standing as the leader in humanitarian efforts for the rights of man, the United States now stands aside, shaking the weight of the worst humanitarian crisis in the world off their shoulders. Instead, the home of the historical genocide that once shocked the conscience of humanity has become the model for human rights and frontrunner in the Syrian exodus. Germany has consistently maintained a resettlement success rate for Syrian refugees at 93.2 percent.²²⁰ Representative Conyers made it very clear in his rejection of the unreasonable proposal of halting the resettlement program for Syrian and Iraqi nationals: “Rather than shutting our doors to these desperate men and women and children who are risking their lives to escape death and torture in their own homelands, we should work to utilize our immense resources and good intentions of

²¹⁸ Poushter, *supra* note 215, at 93.

²¹⁹ *Id.* at Part I.

²²⁰ Leonid Bershidsky, *German Response to Refugees Puts U.S. to Shame*, BLOOMBERG VIEW (Nov. 17, 2015), available at <http://www.bloombergview.com/articles/2015-11-17/german-response-to-refugees-puts-u-s-to-shame>

our citizens to welcome them.”²²¹ Perhaps fear is a stronger emotion than compassion, yet when fear is multiplied by four million Syrian refugees, human rights must remain sacrosanct.²²²

²²¹ Cong. Rec. H 8381, *supra* note 109.

²²² Gilbert, *supra* note 4.