

2017

## Is Immigration Law National Security Law?

Shoba Sivaprasad Wadhia

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### Recommended Citation

Shoba S. Wadhia, *Is Immigration Law National Security Law?*, 66 Emory L. J. 669 (2017).

Available at: <https://scholarlycommons.law.emory.edu/elj/vol66/iss3/6>

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# IS IMMIGRATION LAW NATIONAL SECURITY LAW?

*Shoba Sivaprasad Wadhia\**

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## INTRODUCTION

The debate around how to keep America safe while welcoming newcomers is prominent. In the last year, cities and countries around the world, including Baghdad,<sup>1</sup> Dhaka,<sup>2</sup> Istanbul,<sup>3</sup> Paris,<sup>4</sup> Beirut,<sup>5</sup> Mali,<sup>6</sup> and inside the United States,<sup>7</sup> have been vulnerable to terrorist attacks and human tragedy. Meanwhile, the world faces the largest refugee crises since the Second World War.<sup>8</sup>

This Article is based on remarks delivered at the *Emory Law Journal's* annual Thrower Symposium on February 11, 2016.<sup>9</sup> The Article explores how national security concerns have shaped recent immigration policy in the Executive Branch, Congress, and the states and considers the moral, legal, and practical implications of these proposals. Finally, this Article examines the parallels between these proposals and immigration policies enacted after September 11, 2001.

In the Executive Branch, President Barack Obama committed to admitting 10,000 refugees from Syria.<sup>10</sup> In contrast, the Administration made a choice to detain Central American women and children in newly constructed correctional

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<sup>1</sup> Falih Hassan, Tim Arango & Omar Al-Jawshy, *Bombing Kills More Than 140 in Baghdad*, N.Y. TIMES (July 3, 2016), [http://www.nytimes.com/2016/07/04/world/middleeast/baghdad-bombings.html?\\_r=0](http://www.nytimes.com/2016/07/04/world/middleeast/baghdad-bombings.html?_r=0).

<sup>2</sup> *The Latest: At Least Militants Dead, 13 Hostages Rescued*, SEATTLE TIMES (July 1, 2016, 9:46 PM), <http://www.seattletimes.com/nation-world/police-say-2-officers-killed-in-bangladesh-attack/>.

<sup>3</sup> Tim Arango, Sabrina Tavernise & Ceylan Yeginsu, *Istanbul Airport Attack Leaves at Least 41 Dead*, N.Y. TIMES (June 28, 2016), <http://www.nytimes.com/2016/06/29/world/europe/turkey-istanbul-airport-explosions.html>.

<sup>4</sup> Liz Alderman & Jim Yardley, *Paris Terror Attacks Leave Awful Realization: Another Massacre*, N.Y. TIMES (Nov. 13, 2015), <http://www.nytimes.com/2015/11/14/world/europe/paris-terror-attack.html>.

<sup>5</sup> Anne Barnard & Hwaida Saad, *ISIS Claims Responsibility for Blasts That Killed Dozens in Beirut*, N.Y. TIMES (Nov. 12, 2015), <http://www.nytimes.com/2015/11/13/world/middleeast/lebanon-explosions-southern-beirut-hezbollah.html>.

<sup>6</sup> Loucoumane Coulibaly & Dionne Searcey, *16 Killed in Terrorist Attack on Resort Hotels in Ivory Coast*, N.Y. TIMES (Mar. 13, 2016), <http://www.nytimes.com/2016/03/14/world/africa/gunmen-carry-out-fatal-attacks-at-resorts-in-ivory-coast.html>.

<sup>7</sup> Lizette Alvarez, Richard Pérez-Peña & Christine Hauser, *Orlando Gunman Was 'Cool and Calm' After Massacre, Police Say*, N.Y. TIMES (June 13, 2016), <http://www.nytimes.com/2016/06/14/us/orlando-shooting.html>.

<sup>8</sup> Lydia DePillis, Kulwant Saluja & Denise Lu, *A Visual Guide to 75 Years of Major Refugee Crises Around the World*, WASH. POST (Dec. 21, 2015), <https://www.washingtonpost.com/graphics/world/historical-migrant-crisis/>; see also *Figures at a Glance*, THE U.N. REFUGEE AGENCY, <http://www.unhcr.org/en-us/figures-at-a-glance.html> (last visited Oct. 19, 2016).

<sup>9</sup> The 2016 Randolph W. Thrower Symposium, *Redefined National Security Threats: Tensions and Legal Implications*, EMORY L.J. (Feb. 11, 2016), <http://law.emory.edu/elj/symposia.html>.

<sup>10</sup> Amy Pope, *How We're Welcoming Syrian Refugees While Ensuring Our Safety*, THE WHITE HOUSE (Nov. 17, 2015, 3:16 PM), <https://www.whitehouse.gov/blog/2015/11/17/how-were-welcoming-syrian-refugees>.

facilities known as “family detention center[s].”<sup>11</sup> The Department of Homeland Security’s (DHS) published enforcement priorities for removal lists “threats to national security, border security, and public safety” as the highest priority.<sup>12</sup> Other enforcement priorities include recent border crossers and immigration violators.<sup>13</sup> DHS has relied on this framework to participate in unannounced enforcement actions (raids) to arrest and deport Central American moms and children.<sup>14</sup>

On the presidential campaign trail, President Donald Trump moved to halt immigration for Muslims and normalized the platforms of other candidates to label Syrian refugees as “rabid dogs” and limit refugee admissions for Muslims.<sup>15</sup>

On Capitol Hill, Congress has debated, amended, shredded but not passed a comprehensive immigration reform bill in twenty years. Though Congress cannot reach an agreement on immigration reform, it has proposed or passed various proposals to restrict refugee admissions and visa-free privileges based on nationality<sup>16</sup> with full support and implementation by DHS.<sup>17</sup>

In the states, dozens of leaders vowed to reject Syrian refugees though the legal ability to do so is questionable.<sup>18</sup> The majority of these states are also

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<sup>11</sup> Eleanor Acer, Letter to the Editor, *The Detention of Immigrant Families from Central America*, N.Y. TIMES (June 22, 2015), <http://www.nytimes.com/2015/06/22/opinion/the-detention-of-immigrant-families-from-central-america.html>; *Stop Detaining Families*, NAT’L IMMIGRANT JUST. CTR., <http://www.immigrantjustice.org/stop-detaining-families> (last visited Feb. 21, 2016).

<sup>12</sup> Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

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

<sup>14</sup> Press Release, Jeh C. Johnson, Sec’y, U.S. Dep’t of Homeland Sec., Statement by Secretary Jeh C. Johnson on Southwest Border Security (Jan. 4, 2016), <https://www.dhs.gov/news/2016/01/04/statement-secretary-jeh-c-johnson-southwest-border-security>.

<sup>15</sup> Tessa Berenson, *Donald Trump Pushes for Muslim Ban After Orlando Shooting*, TIME (June 13, 2016, 3:38 PM), <http://time.com/4366912/donald-trump-orlando-shooting-muslim-ban/>; Nolan D. McCaskill, *Ben Carson Compares Syrian Refugees to Dogs*, POLITICO (Nov. 19, 2015, 3:23 PM), <http://www.politico.com/story/2015/11/ben-carson-syria-refugee-dogs-216064>.

<sup>16</sup> *See, e.g.*, Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, H.R. 158, 114th Cong. (2015) (enacted). *See generally* ALISON SISKIN, CONG. RESEARCH SERV., RL32221, VISA WAIVER PROGRAM (2015), <http://trac.syr.edu/immigration/library/P11321.pdf>.

<sup>17</sup> *See, e.g.*, Press Release, U.S. Dep’t of Homeland Sec., DHS Announces Further Travel Restrictions for the Visa Waiver Program (Feb. 18, 2016), <https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program>.

<sup>18</sup> *See, e.g.*, Ashley Fantz & Ben Brumfield, *More Than Half the Nation’s Governors Say Syrian Refugees Not Welcome*, CNN (Nov. 19, 2015, 3:20 PM), <http://www.cnn.com/2015/11/16/world/paris-attacks-syrian-refugees-backlash/>.

plaintiffs in a lawsuit challenging the legal authority for the President to implement deferred action, a longstanding form of prosecutorial discretion in immigration law.<sup>19</sup>

These immigration proposals emerged on the heels of devastating events around the globe. They also produce a flashback to many policies enacted by the Executive Branch after September 11, 2001. The prominence of immigration in the national security debate has been controversial and has legitimized a selective enforcement policy drawn along lines of race, religion, nationality, and citizenship.<sup>20</sup> The vestiges of 9/11 also reveal how immigration laws borne out of national security concerns can result in everlasting damage for affected individuals and families.

## I. EXECUTIVE BRANCH

### A. *Refugees*

In the Executive Branch, President Obama committed to admitting 10,000 refugees from Syria (among the 4.5 million estimated refugees).<sup>21</sup> The Administration engaged in public education about the structure of the United States refugee resettlement program, which involved an elaborate interviewing process and security check.<sup>22</sup> Meeting the legal definition for refugee is no easy task and requires the individual to show past persecution or “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>23</sup> Individuals who have committed certain crimes do not qualify.<sup>24</sup> According to the Department of State, a refugee

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<sup>19</sup> Brief for the State Respondents, *United States v. Texas*, 136 S. Ct. 1539 (2016) (mem.).

<sup>20</sup> The author recognizes that the U.S. immigration statute has long included classifications based on nationality and citizenship. However, they are important to include in the analysis for this essay as facially neutral proposals aimed at particular citizens and nationals for reasons relating to national security can still result in the actual or perceived targeting based along racial and religious lines and questions about efficacy.

<sup>21</sup> Pope, *supra* note 10.

<sup>22</sup> Amy Pope, *Infographic: The Screening Process for Refugee Entry into the United States*, THE WHITE HOUSE (Nov. 20, 2015, 7:09 PM), <https://www.whitehouse.gov/blog/2015/11/20/infographic-screening-process-refugee-entry-united-states>.

<sup>23</sup> Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012); *see also Refugees*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/refugees> (last updated May 25, 2016).

<sup>24</sup> *Supra* note 23.

undergoes eighteen to twenty-four months of processing before arriving in the United States.<sup>25</sup>

Most refugees are initially referred to the United States government by the United Nations High Commissioner for Refugees (UNHCR).<sup>26</sup> Later in the process, refugees interface with the United States Citizenship Immigration Services, a unit within the DHS, whose officers are employed to conduct in-person interviews to determine if the individual qualifies as a refugee.<sup>27</sup> To qualify as a refugee through our overseas refugee program, a noncitizen must show that he or she has suffered or will suffer “persecution.”<sup>28</sup> Persecution is not defined in the immigration statute or regulations but rather is propelled by a body of case law and interpretations by the Department of Justice (DOJ) and DHS.<sup>29</sup> In addition to meeting the affirmative elements of the refugee definition, applicants must also show they have not engaged in persecutory activities or engaged in activity that would threaten the national security of the United States among other requirements.<sup>30</sup>

The lengthy security process coupled with the high legal standard makes it unlikely that a terrorist would use the overseas refugee program as a tool to enter and cause danger to the United States. In his written testimony to the Senate Judiciary Committee, DHS Secretary Jeh Johnson indicated that 5000 Syrians have been resettled in the United States as of June 30, 2016.<sup>31</sup> Prospects remained for the United States to reach its goal. According to one Department of State official, and as reported by the Washington Post, “[t]he pace of refugee resettlement has quickened in part because processing facilities in Istanbul and in Amman, Jordan, have been upgraded and more DHS teams have been

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<sup>25</sup> *Background Briefing on the Mechanics of the United States Refugee Admissions Program*, U.S. DEP’T OF STATE (Sept. 11, 2015), <http://www.state.gov/r/pa/prs/ps/2015/09/246843.htm>.

<sup>26</sup> *Id.*

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

<sup>28</sup> *Id.*

<sup>29</sup> *See, e.g., Immigration & Naturalization Serv. v. Stevic*, 467 U.S. 407 (1984); *Fatin v. Immigration & Naturalization Serv.*, 12 F.3d 1233 (3d Cir. 1993).

<sup>30</sup> *See* 8 U.S.C. § 1101(a)(42)(A) (“The term ‘refugee’ does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”).

<sup>31</sup> *Written Testimony of DHS Secretary Jeh Johnson for a Senate Committee on the Judiciary Hearing Titled “Oversight of the Department of Homeland Security”*, U.S. DEP’T OF HOMELAND SEC. (June 30, 2016), <https://www.dhs.gov/news/2016/06/30/written-testimony-dhs-secretary-jeh-johnson-senate-committee-judiciary-hearing>.

deployed to interview refugees.”<sup>32</sup> By the end of the fiscal year, the Administration admitted a total of 12,587 Syrian refugees and plans to admit a significantly higher number in the next fiscal year.<sup>33</sup> Notably, leaders around the country, including our very own keynote speaker at this symposium, by Harold Koh urged the President to commit to higher refugee admissions from Syria.<sup>34</sup>

Individuals living in the United States with a fear of return must also qualify as a refugee as defined in the immigration code but can apply for asylum within the United States if eligible.<sup>35</sup> Noncitizens are ineligible to apply for asylum in certain circumstances.<sup>36</sup> Likewise, they are ineligible for protection if they have been convicted of particularly serious crimes, committed serious criminal acts outside of the United States, engaged in persecutory or terrorist-related activity, and for other reasons.<sup>37</sup> Spouses or minor children of a principal asylum or refugee applicant may qualify for derivative status.<sup>38</sup> The concept of derivative status has been the subject of great confusion in the recent debate.<sup>39</sup>

### *B. Central American Families*

In contrast to the Administration’s welcome message to Syrian refugees is a narrative that seeks to deter unlawful migration by detaining mothers and children from the Northern Triangle countries: El Salvador, Honduras and Guatemala.<sup>40</sup> Beginning in the fall of 2014, the Administration began detaining

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<sup>32</sup> Fehit Nirappil, *More and More Syrians are Settling in the U.S.—Despite Governors’ Angst*, WASH. POST (July 9, 2016), [https://www.washingtonpost.com/local/md-politics/more-and-more-syrians-are-settling-in-the-us—despite-governors-angst/2016/07/09/1938e382-3d6e-11e6-80bc-d06711fd2125\\_story.html](https://www.washingtonpost.com/local/md-politics/more-and-more-syrians-are-settling-in-the-us—despite-governors-angst/2016/07/09/1938e382-3d6e-11e6-80bc-d06711fd2125_story.html).

<sup>33</sup> *US Accepts More Refugees from DRC than Syria Amid Warnings Over Militants*, GUARDIAN (Oct. 3, 2016, 5:11 PM), <https://www.theguardian.com/world/2016/oct/03/refugees-drc-congo-us-syria>.

<sup>34</sup> Harold Koh, Professor, Yale Law School, Keynote Address at the Emory Law Journal Randolph W. Throver Symposium: Redefined National Security Threats (Feb. 11, 2016); *see also* Michael R. Gordon, *Ex-Officials Urge White House to Accept More Syrian Refugees*, N.Y. TIMES (Sept. 17, 2015), <http://www.nytimes.com/2015/09/18/world/middleeast/ex-officials-urge-white-house-to-accept-more-syrian-refugees.html>.

<sup>35</sup> *See generally* Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2012) (defining refugee); 8 U.S.C. § 1158(d)(1) (2012) (asylum provision).

<sup>36</sup> 8 U.S.C. §§ 1158(d)(1), 1158(c)(2).

<sup>37</sup> 8 U.S.C. § 1158(b)(2).

<sup>38</sup> 8 U.S.C. § 1158(b)(3); *Application Procedures: Getting Derivative Refugee or Asylum Status for Your Child*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/family/family-refugees-asylees/refugee-asylee-children/application-procedures-getting-derivative-refugee-or-asylum-status-your-child> (last updated May 5, 2016).

<sup>39</sup> *See, e.g.*, David Bier, *The Boston Bombers Were Not Refugees—Neither Was the Paris Attacker*, HUFFINGTON POST (Nov. 18, 2015), [http://www.huffingtonpost.com/david-bier/the-boston-bombers-were-n\\_b\\_8584016.html](http://www.huffingtonpost.com/david-bier/the-boston-bombers-were-n_b_8584016.html).

<sup>40</sup> *Stop Detaining Families*, *supra* note 11.

in large numbers those arriving at the border or apprehended after arrival in “family detention center[s].”<sup>41</sup> DHS initially justified these detentions on national security grounds—namely, to send a message to future or forthcoming travelers to stay in their home countries and not seek admission into the United States.<sup>42</sup> Thereafter, the American Civil Liberties Union (ACLU), along with other co-counsel, filed a class-action lawsuit on behalf of detained mothers and children challenging this policy.<sup>43</sup> During the briefing and oral arguments, DHS relied on a controversial decision made by the Attorney General in the wake of 9/11 to argue that it was required to consider the deterrence of mass migrants when making custody decisions under the immigration statute.<sup>44</sup> On February 20, 2015, a federal judge certified the class of mothers and children and issued a preliminary injunction blocking DHS’s policy.<sup>45</sup> Said the court, “[i]ncantation of the magic words ‘national security’ without further substantiation is simply not enough to justify significant deprivations of liberty.”<sup>46</sup>

In January 2016, DHS began arresting mothers and children in an effort to detain and deport them.<sup>47</sup> The government justified these enforcement actions by arguing that recent border crossers and those ordered removed on or after January 1, 2014, were priorities for removal.<sup>48</sup> Said Secretary Jeh Johnson in a controversial statement following the January raids:

The focus of this weekend’s operations were adults and their children who (i) were apprehended after May 1, 2014 crossing the southern border illegally, (ii) have been issued final orders of removal by an immigration court, and (iii) have exhausted appropriate legal remedies,

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<sup>41</sup> *Id.*; *Family Detention*, CONGRESSWOMAN ZOE LOFGREN, <https://lofgren.house.gov/immigration-issues/family-detention.htm> (last visited Feb. 21, 2016); Wil S. Hylton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES MAGAZINE (Feb. 4, 2015), <http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html>.

<sup>42</sup> COMM’N ON IMMIGRATION, AM. BAR ASS’N. FAMILY IMMIGRATION DETENTION: WHY THE PAST CANNOT BE PROLOGUE (2015), [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf).

<sup>43</sup> *RILR v. Johnson*, ACLU (July 31, 2015, 12:45 PM), <https://www.aclu.org/cases/rilr-v-johnson>.

<sup>44</sup> *R.I.L-R v. Johnson*, No. 15-11 (JEB) (D.D.C. Feb. 20, 2015) (order granting preliminary injunction and provisional class certification); *see also In re D-J-*, 23 I.&N. Dec. 572 (Dep’t of Justice Apr. 17, 2003), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3488.pdf>.

<sup>45</sup> *R.I.L-R*, No. 15-11 (JEB).

<sup>46</sup> *Id.*

<sup>47</sup> Press Release, *supra* note 14; Hansi Lo Wang, *Raids on Unauthorized Immigrants Won’t Let Up, Homeland Security Says*, NPR (Jan. 6, 2016, 5:18 AM) <http://www.npr.org/2016/01/06/462114310/raids-on-unauthorized-immigrants-won-t-let-up-homeland-security-says>; *see also* Editorial, *The Dark Side of Immigration Discretion*, N.Y. TIMES (Apr. 20, 2016), [http://www.nytimes.com/2016/04/20/opinion/the-dark-side-of-immigration-discretion.html?\\_r=0](http://www.nytimes.com/2016/04/20/opinion/the-dark-side-of-immigration-discretion.html?_r=0).

<sup>48</sup> Memorandum, *supra* note 12.



and have no outstanding appeal or claim for asylum or other humanitarian relief under our laws.<sup>49</sup>

To date, these actions have taken place in Georgia, Texas, and North Carolina, and in some cases the adults and children were transferred to family detention centers in Texas and Pennsylvania.<sup>50</sup> The criticism around these raids has been compelling and included documentation of extreme violations of due process, such as the officers entering homes without warrants, and officers requiring immigrants to sign papers in a language they cannot understand and without access to counsel.<sup>51</sup>

As of this writing, family detention centers continue to operate in Karnes, Texas; Dilley, Texas; and Berks, Pennsylvania.<sup>52</sup> Meanwhile, the very operation of Berks Family Shelter faces problems of its own as the Pennsylvania Department of Human Services has confirmed that it will not renew the facility's license because the Department has failed to use the shelter in the manner intended.<sup>53</sup>

### C. *Restrictions Based on Race, Religion, Nationality, and Citizenship*

President Donald J. Trump first announced his proposal to shut down Muslim immigration to the United States in December 2015 following the deadly attack in San Bernardino, California.<sup>54</sup> Lacking much detail, his plan was

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<sup>49</sup> Press Release, *supra* note 14.

<sup>50</sup> Wendy Feliz, *Eight Families Swept Up in Immigration Raids Released, While 30 Other Mothers Issue Plea for Freedom*, IMMIGRATION IMPACT (Feb. 10, 2016), <http://immigrationimpact.com/2016/02/10/immigration-raids-families/>; Lisa Rein, *U.S. Authorities Begin Raids, Taking 121 Illegal Immigrants into Custody over the Weekend*, WASH. POST (Jan. 4, 2016), <https://www.washingtonpost.com/news/federal-eye/wp/2016/01/04/u-s-authorities-begin-raids-taking-121-illegal-immigrants-into-custody-over-the-weekend/>.

<sup>51</sup> *Families in Fear: The Atlanta Immigration Raids*, S. POVERTY L. CTR. (Jan. 28, 2016), <https://www.splcenter.org/20160128/families-fear-atlanta-immigration-raids>; see also Julianne Hing, *What's the Difference Between a Refugee and a Deportee? A Lawyer.*, THE NATION (Feb. 13, 2016), <http://www.thenation.com/article/whats-the-difference-between-and-a-refugee-and-a-deportee-a-lawyer/>.

<sup>52</sup> DEP'T OF HOMELAND SEC., REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS 1 (2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>; Beth Werlin, *Government Losing Its License to Operate Family Detention Center in Pennsylvania*, IMMIGR. IMPACT (Feb. 1, 2016), <http://immigrationimpact.com/2016/02/01/family-detention-pennsylvania-license/>.

<sup>53</sup> Press Release, Human Rights First, *Ahead of Immigration Detention License Expiration, Human Rights First Releases Letters from Detained Mothers* (Feb. 19, 2016), <http://www.humanrightsfirst.org/press-release/ahead-immigration-detention-license-expiration-human-rights-first-releases-letters>.

<sup>54</sup> *Donald J. Trump Statement on Preventing Muslim Immigration*, TRUMP PENCE (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>; see also *Immigration Reform That Will Make America Great Again*, TRUMP PENCE, <https://www.donaldjtrump.com/positions/immigration-reform> (last visited Feb. 21, 2016).

the subject of great debate by scholars, lawyers, and communities.<sup>55</sup> On the heels of a massacre in June 2016 at a nightclub in Orlando, Florida, Trump said he would “suspend immigration from areas of the world when there is a proven history of terrorism.”<sup>56</sup> The connection Donald Trump made between the Orlando attack and immigration was tied to the gunman Omar Mateen, a 29-year old who was raised in the United States, but whose parents were originally Afghani.<sup>57</sup> Said Trump, “[t]he bottom line is that the only reason the killer was in America in the first place was because we allowed his family to come here.”<sup>58</sup> His speech received a controversial reaction, but one change was the choice by Trump to focus his proposal on regions of the world as opposed to persons of the Muslim religion. Donald Trump’s proposal later shifted in a different direction—in response to a question during the second presidential debate, Trump said, “[t]he Muslim ban. . . has morphed into [an] extreme vetting from certain areas of the world.”<sup>59</sup> Following the election, Trump appeared to stand by his proposal for a Muslim ban or a registry for those Muslims living in the United States.<sup>60</sup>

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<sup>55</sup> See Penn State University, *Probing Question: Is it Legal, or Practical, to Bar Immigrants Based on Religion?*, YOUTUBE (Feb. 9, 2016), <https://www.youtube.com/watch?v=qyHyrgqaWs4>. Compare Jerry Markon, *Experts: Trump’s Muslim Entry Ban Idea ‘Ridiculous,’ ‘Unconstitutional’*, WASH. POST (Dec. 7, 2015), [https://www.washingtonpost.com/politics/experts-trumps-muslim-entry-ban-idea-ridiculous-unconstitutional/2015/12/07/d44a970a-9d47-11e5-bce4-708fe33e3288\\_story.html](https://www.washingtonpost.com/politics/experts-trumps-muslim-entry-ban-idea-ridiculous-unconstitutional/2015/12/07/d44a970a-9d47-11e5-bce4-708fe33e3288_story.html) (citing legal scholars who say the ban would be unconstitutional), with Steven Nelson, *Top Scholars Say Trump Muslim Immigrant Ban May Be Constitutional*, U.S. NEWS (Dec. 8, 2015, 1:48 PM), <http://www.usnews.com/news/articles/2015/12/08/top-scholars-say-trumps-muslim-immigrant-ban-could-be-constitutional> (explaining that the ban may be constitutional), and Peter J. Spiro, *Trump’s Anti-Muslim Plan Is Awful. And Constitutional.*, N.Y. TIMES (Dec. 8, 2015), [http://www.nytimes.com/2015/12/10/opinion/trumps-anti-muslim-plan-is-awful-and-constitutional.html?\\_r=0](http://www.nytimes.com/2015/12/10/opinion/trumps-anti-muslim-plan-is-awful-and-constitutional.html?_r=0) (arguing that the ban may technically be constitutional, but that it should not be).

<sup>56</sup> Press Release, Donald J. Trump Addresses Terrorism, Immigration, and National Security, TRUMP PENCE (June 13, 2016), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-addresses-terrorism-immigration-and-national-security>.

<sup>57</sup> Alan Blinder, Jack Healy & Richard A. Oppel Jr., *Omar Mateen: From Early Promise to F.B.I. Surveillance*, N.Y. TIMES (June 12, 2016), <http://www.nytimes.com/2016/06/13/us/omar-mateen-early-signs-of-promise-then-abuse-and-suspected-terrorist-ties.html>.

<sup>58</sup> Press Release, *supra* note 56.

<sup>59</sup> Elise Foley, *Donald Trump Says His Muslim Ban Has ‘Morphed’ into ‘Extreme Vetting’*, HUFFINGTON POST (Oct. 11, 2016), [http://www.huffingtonpost.com/entry/presidential-debate-syrian-refugees\\_us\\_57e9820fe4b08d73b832e76a](http://www.huffingtonpost.com/entry/presidential-debate-syrian-refugees_us_57e9820fe4b08d73b832e76a).

<sup>60</sup> See, e.g., Abby Phillip & Abigail Hauslohner, *Trump on the Future of Proposed Muslim Ban, Registry: ‘You Know My Plans’*, WASH. POST (Dec. 22, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/?utm\\_term=.7029018aab26](https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/?utm_term=.7029018aab26); Katie Reilly, *Donald Trump on Proposed Muslim Ban: ‘You Know My Plans’*, TIME (Dec. 21, 2016), <http://time.com/4611229/donald-trump-berlin-attack/>.

### 1. *Legality*

Whether Trump's immigration proposals are legal is unsettled among legal scholars and also depends on how the proposal itself would be drawn.<sup>61</sup> Supreme Court jurisprudence has long recognized the authority of our "political" branches to regulate immigration with only minimal constitutional constraints.<sup>62</sup> This power is sometimes called the "plenary power doctrine" and the foundation for many of the scholars who believe Trump's proposal would be constitutional.<sup>63</sup> Temple Law Professor Peter Spiro explains the doctrine in the following way: "The court has given the political branches the judicial equivalent of a blank check to regulate immigration as they see fit. This posture of extreme deference is known as the 'plenary power' doctrine."<sup>64</sup> Some scholars, including Professor Spiro, argue that implementing a Muslim ban will not require congressional approval as Congress has already created this authority in the Immigration and Nationality Act (INA).<sup>65</sup> Section 212(f) of the INA states:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.<sup>66</sup>

Trump referred to § 212(f) in his June 2016 speech on national security when he remarked:

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<sup>61</sup> See, e.g., Lyle Denniston, *Constitution Check: Would a Ban on All Muslims Entering the U.S. Be Valid?*, CONSTITUTION DAILY (Dec. 17, 2015), <http://blog.constitutioncenter.org/2015/12/constitution-check-would-a-ban-on-all-muslims-entering-the-u-s-be-valid/>; Scott Greer, *Law Professors: Trump's Muslim Moratorium Is Constitutional*, DAILY CALLER (Dec. 12, 2015, 6:10 PM), <http://dailycaller.com/2015/12/12/law-professors-trumps-muslim-moratorium-is-constitutional/>; Ari Melber, *Legal Scholar: Trump's Muslim Ban Is Probably Legal*, MSNBC (Dec. 22, 2015, 7:34 PM), <http://www.msnbc.com/msnbc/trump-muslim-ban-probably-legal>; Spiro, *supra* note 55.

<sup>62</sup> See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889); Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485, 1524–26 (2010). For additional scholarship on the plenary power doctrine, see Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (coining the term "plenary power doctrine," identifying and criticizing its various supporting rationales, and suggesting ways around it); Rose Cuison Villazor, *Chae Chan Ping v. United States: Immigration as Property*, 68 OKLA. L. REV. 137 (2015). Beyond the scope of this article is a survey of the scholarship criticizing the "plenary power doctrine" or an analysis about the degree to which it has been eroded.

<sup>63</sup> See, e.g., Spiro, *supra* note 55.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Immigration and Nationality Act § 212(f), 8 U.S.C. § 1182(f) (2012).

The immigration laws of the United States give the President the power to suspend entry into the country of any class of persons that the President deems detrimental to the interests or security of the United States, as he deems appropriate. I will use this power to protect the American people.<sup>67</sup>

Some scholars are uncertain about whether a prohibition on Muslim immigration would be lawful. Immigration scholar and author Stephen H. Legomsky remarked: “[w]hether modern courts would uphold a racial or religious immigration restriction is difficult to predict.”<sup>68</sup> Wall Street Journal journalist, Jacob Gershman, continued, “[t]he high court has reaffirmed the [plenary power] doctrine in a 1972 ruling denying entry to a self-described ‘revolutionary Marxist’ from Belgium who sought a temporary visa.”<sup>69</sup> Other scholars believe a Muslim ban would violate U.S. and international law.<sup>70</sup> Even conservative constitutional law scholar Jonathan Turley said, “[t]his would not only violate international law, but do so by embracing open discrimination against one religion. It would make the United States a virtual pariah among nations.”<sup>71</sup>

Constitutional challenges to a ban on Muslim immigration might rest on the Establishment Clause of the First Amendment<sup>72</sup> or the Due Process Clause of the Fifth Amendment, which states “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law” and implicitly recognizes that each person must be afforded equal protection under the law.<sup>73</sup> When analyzing equal protection claims, important factors include whether a petitioner is a long-term resident or citizen of the United States, and what level of scrutiny to apply. For noncitizens who might bring a selective prosecution claim under the Equal Protection Clause, the Supreme Court has left open the possibility for claims “of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome.”<sup>74</sup>

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<sup>67</sup> Press Release, *supra* note 56.

<sup>68</sup> Jacob Gershman, *Is Trump's Proposed Ban on Muslim Entry Unconstitutional?*, WALL ST. J. (Dec. 8, 2015, 3:41 PM), <http://blogs.wsj.com/law/2015/12/08/is-trumps-proposed-ban-on-muslim-entry-constitutional/>.

<sup>69</sup> *Id.*; *see also* *Kleindienst v. Mandel*, 408 U.S. 753, 756 (1972).

<sup>70</sup> *See, e.g.*, Gershman, *supra* note 68; *see generally* U.S. CONST. amends. I, V.

<sup>71</sup> Markon, *supra* note 55.

<sup>72</sup> *See, e.g.*, Memorandum from the ACLU, *The Trump Memos: The ACLU's Constitutional Analysis of the Public Statements and Policy Proposals of Donald Trump* 3 n.6 (July 14, 2016), <https://action.aclu.org/sites/default/files/pages/trumpmemos.pdf>; *see also* U.S. CONST. amend. I.

<sup>73</sup> U.S. CONST. amend. V.

<sup>74</sup> *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

Importantly, immigration restrictions based on religion could undermine domestic and international treaties on asylum, non-return, and protection from torture. The United States is required to protect refugees fleeing persecution and torture in their home countries.<sup>75</sup> In some cases, civilians are fleeing the very same individuals and groups responsible for the terrorist attacks on which immigration restrictionists' proposals are based.<sup>76</sup>

## 2. Feasibility

One practical problem with a proposal to restrict Muslim immigration is to ensure that the government has the resources necessary to handle screening. Even if a future President has the authority to enact an immigration policy, Congress would have to appropriate the funds to carry out such a proposal. A second significant challenge is finding a common definition for "Muslim." As Hussein Ibish asks in his op-ed "Who Is a Muslim?":

How would consular or immigration officials determine who is, and is not, a Muslim? This is the most obvious question, but almost no one is asking it. Instead, the debate churns on as if this problem does not exist. Would the definition of a Muslim be based on family heritage, personal beliefs or both? How would that be codified in practice? On what basis could the government categorize people as Muslims?<sup>77</sup>

Ibish eloquently moves from a discussion of "*who* is Muslim" to "*what* is a Muslim," describing the variety of what a person might identify as Muslim and confirming that "the range of peoples and societies that practice some form of Islam is so broad that it includes virtually any aspect of the human experience one can identify."<sup>78</sup>

Another consideration is the costs associated with a proposal to ban Muslim immigration. Former DHS officials and foreign policy experts have priced such

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<sup>75</sup> See generally United Nations Convention Relating to the Status of Refugees, art. 1(A)(2), July 22, 1954, 189 U.N.T.S. 150; United Nations Protocol Relating to the Status of Refugees, art. 1, Oct. 4, 1967, 606 U.N.T.S. 267.

<sup>76</sup> Ariane de Vogue, *States Cannot Refuse Refugees, but They Can Make It Difficult*, CNN (Nov. 16, 2015, 7:29 PM), <http://www.cnn.com/2015/11/16/politics/refugee-states-governors-syria/>. See generally Shoba Sivaprasad Wadhia, *Syrian Refugees and Moral Courage*, CENTRE DAILY TIMES (Nov. 21, 2015, 11:33 PM), <http://www.centredaily.com/opinion/article45858775.html>.

<sup>77</sup> Hussein Ibish, Opinion, *Who Is a Muslim?*, N.Y. TIMES (Dec. 15, 2015), [http://www.nytimes.com/2015/12/15/opinion/who-is-a-muslim.html?\\_r=0](http://www.nytimes.com/2015/12/15/opinion/who-is-a-muslim.html?_r=0).

<sup>78</sup> *Id.*

a ban in the billions.<sup>79</sup> Said Edward Alden from the Council on Foreign Relations:

In our note, we estimate that the direct loss of spending due to a Muslim travel ban could range from \$14 billion to \$30 billion per annum. Adding in indirect (multiplier) effects that take into account the broader spillover effects on the economy increases this range to \$31 billion to \$66 billion.<sup>80</sup>

### 3. *Moral Considerations: American Identity and Reputation*

Immigration restriction proposals based on race, religion, nationality, and citizenship also raise moral questions about American identity. When the then-Presidential candidate for the Republican Party conflates Muslims with terrorists, what message does this send to those living in the United States and to leaders around the world? Trump's anti-Muslim sentiment is well documented and contained even in his speeches: "Each year, the United States permanently admits more than 100,000 immigrants from the Middle East, and many more from Muslim countries outside the Middle East. Our government has been admitting ever-growing numbers, year after year, without any effective plan for our security."<sup>81</sup> While many conservatives have moved to disassociate themselves from Donald Trump, he was not the only candidate using national security as a proxy for controlling Muslim immigration. For example, former Presidential hopeful and current Senator Marco Rubio told Fox News:

It's not about closing down mosques. It's about closing down anyplace—whether it's a cafe, a diner, an internet site—anyplace where radicals are being inspired. The bigger problem we have is our inability to find out where these places are, because we've crippled our intelligence programs, both through unauthorized disclosures by a traitor, in Edward Snowden, or by some of the things this president has put in place with the support even of some from my own party to diminish our intelligence capabilities. So whatever facility is being used—it's not just a mosque—any facility that's being used to

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<sup>79</sup> Edward Alden, Opinion, *Counting the Cost of Banning Muslims from Visiting the U.S.*, NEWSWEEK (Oct. 13, 2016, 7:40 AM), <http://www.newsweek.com/counting-cost-banning-muslims-visiting-us-507983>; Ari Melber, *Experts Say Trump's Muslim Ban Would Cripple Immigration System*, NBC (Aug. 3, 2016, 7:44 AM), <http://www.nbcnews.com/politics/2016-election/experts-trump-s-muslim-ban-would-cripple-immigration-system-nearly-n621921>.

<sup>80</sup> Alden, *supra* note 79.

<sup>81</sup> Press Release, *supra* note 56.

radicalize and inspire attacks against the United States, should be a place that we look at.<sup>82</sup>

The consequences of building walls based on race, religion, nationality, or citizenship are not limited to the rhetoric and proposals by policy leaders and presidential candidates. They also block opportunities for segments of the world to collaborate, work, study, or visit the United States. Such restrictions furthermore tarnish America's reputation as a world leader<sup>83</sup> and safe haven for refugees around the world.<sup>84</sup>

## II. LEGISLATIVE BRANCH

### A. *Comprehensive Immigration Reform*

Congress has failed to move on an immigration reform bill in twenty years. In 2014, 11.3 million people lived in the United States without authorization, and yet in 2010 the DHS had the resources to deport only 400,000 or less than 4% of this population.<sup>85</sup>

For this reason and others, DHS exercises prosecutorial discretion by prioritizing targets for removal and placing low priority cases on the backburner. This kind of discretion provides neither the government nor the individual with a permanent solution; only Congress has this authority. By contrast, "comprehensive immigration reform" is a phrase used to describe an act by Congress to update the immigration statute.<sup>86</sup> Legislative reforms under this phrase include: creating mechanisms for future immigration; upgrading outdated

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<sup>82</sup> Matthew Yglesias, *Why I'm More Worried About Marco Rubio Than Donald Trump*, VOX (Feb. 20, 2016, 9:00 AM), <http://www.vox.com/2016/2/20/11067932/rubio-worse-than-trump>.

<sup>83</sup> See, e.g., Dan Bilefsky, *Trump's Plan to Bar Muslims Is Widely Condemned Abroad*, N.Y. TIMES (Dec. 8, 2015), <http://www.nytimes.com/2015/12/09/world/europe/donald-trumps-call-to-bar-muslims-reverberates-abroad.html>.

<sup>84</sup> HUMAN RIGHTS FIRST, THE SYRIAN REFUGEE CRISIS AND THE NEED FOR U.S. LEADERSHIP (2016), <http://www.humanrightsfirst.org/sites/default/files/HRFSyrianRefCrisis.pdf>.

<sup>85</sup> Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population Stable for Half a Decade*, PEW RES. CTR. (July 22, 2015), <http://www.pewresearch.org/fact-tank/2015/07/22/unauthorized-immigrant-population-stable-for-half-a-decade/>; Shoba Sivaprasad Wadhia, *Reading the Morton Memo*, IMMIGR. POL'Y CTR. (Dec. 2010), [http://works.bepress.com/shoba\\_wadhia/12/](http://works.bepress.com/shoba_wadhia/12/).

<sup>86</sup> *Comprehensive Immigration Reform: A Primer*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/research/comprehensive-immigration-reform-primer> (last visited Oct. 30, 2016); *Comprehensive Immigration Reform: Congress Must Act Comprehensively on Immigration Reform*, BARACK OBAMA, <https://www.barackobama.com/immigration-reform/> (last visited Feb. 21, 2016); *Immigration Reform*, HILLARY CLINTON, <https://www.hillaryclinton.com/issues/immigration-reform/> (last visited Oct. 30, 2016).

quotas in the family- and employment-based categories; and enabling people living in the United States without a lawful status to apply for a secure immigration status after proving they meet the qualifying criteria and undergo the necessary background and security checks.<sup>87</sup> Possibly, comprehensive immigration reform may do more to advance the national security than the current approach of searching for a needle in a haystack or in a specific race, religion, nationality, or citizenship.<sup>88</sup>

### B. Legislative Proposals to Restrict Immigration

Though Congress has been unable to reach an agreement on comprehensive immigration reform in twenty years, it did in less than one year proposed or passed various proposals to restrict refugee admissions or visa-free privileges based on nationality. In November 2015, House members introduced the American Security Against Foreign Enemies Act of 2015, which included restrictions on refugee resettlement for nationals and residents of Iraq and Syria.<sup>89</sup> The bill was introduced by Representative Michael McCaul (R-TX), in reaction to the news that one of the individuals who participated in the terrorist attack in Paris used a Syrian passport.<sup>90</sup>

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<sup>87</sup> A *21st-Century Immigration System*, NAT'L IMMIGR. F., <http://immigrationforum.org/21st-century-immigration-system/> (last visited Feb. 21, 2016); *Comprehensive Immigration Reform: Congress Must Act Comprehensively on Immigration Reform*, *supra* note 86; RUTH ELLEN WASEM, CONG. RESEARCH SERV., R42980, BRIEF HISTORY OF COMPREHENSIVE IMMIGRATION REFORM EFFORTS IN THE 109TH AND 110TH CONGRESSES TO INFORM POLICY DISCUSSIONS IN THE 113TH CONGRESS (Feb. 27, 2013); Shoba Sivaprasad Wadhia, *Immigration: Mind Over Matter*, 5 U. MD. L.J. RACE RELIGION GENDER & CLASS 201 (2005).

<sup>88</sup> See Kevin R. Johnson, *Possible Reforms of the U.S. Immigration Laws*, 18 CHAP. L. REV. 315, 318–20 (2015) (“The fact that so many undocumented immigrants live in the United States confirms what most Americans know—that the immigration laws are routinely violated and, as currently configured, are effectively unenforceable” and “[i]t makes little sense from an immigration or security standpoint to simply continue to throw resources at fortifying the borders, increasing border enforcement, and engaging in a futile attempt to keep all undocumented immigrants out of the country”); Donald Kerwin & Margaret D. Stock, *The Role of Immigration in a Coordinated National Security Policy*, 21 GEO. IMMIGR. L.J. 383 (2007); *The Need for Comprehensive Immigration Reform: Strengthening Our National Security: Hearing Before the Subcomm. on Immigration, Border Security, and Citizenship and the Subcomm. on Terrorism, Technology, and Homeland Security of the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Margaret D. Stock, Associate Professor of Law, U.S. Military Academy). *But see* Samira Afzali, *How ‘Comprehensive’ Is the Comprehensive Immigration Reform Bill? S.744 and Its Implications for Muslims, Arabs, South Asians, Somalis and Iranian Immigrants*, 35 HAMLIN J. PUB. L. & POL’Y 296, 328 (2014) (“National policies steeped in racial and ethnic profiling undermine the strong principles behind rule of law and political transparency.”).

<sup>89</sup> H.R. 4038, 114th Cong. (2015).

<sup>90</sup> *Id.*; H.R. 4038: *American SAFE Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/votes/114-2015/h643> (last visited Dec. 23, 2016).



Pushing back on the legislation was Democratic Whip Steny Hoyer (D-MD), who remarked, “[t]he bill rests on a faulty assumption that the European refugee screening process is similar to the United States screening process. This is entirely inaccurate.”<sup>91</sup> While the bill (H.R. 4038) passed in the House by a vote of 289–137, it failed to receive sufficient votes in the Senate to move forward.<sup>92</sup> On July 14, 2016, Representative Brian Babin (R-TX) introduced a bill (H.R. 5816) “[t]o suspend, and subsequently terminate, the admission of certain refugees, to examine the impact on the national security of the United States of admitting refugees, to examine the costs of providing benefits to such individuals, and for other purposes.”<sup>93</sup> While most of the refugee-related legislation during the 114th Congress has been restrictive, one positive bill known as the Refugee Protection Act of 2016, was introduced in both the House and Senate on July 14, 2016 and includes several reforms to the U.S. asylum and refugee system.<sup>94</sup>

Congress also made controversial proposals to the visa waiver program (VWP). The VWP allows citizens from some thirty-eight countries to visit the United States for ninety days or less without a visa.<sup>95</sup> Individuals traveling under the VWP must have a “machine readable passport” which contains specific biographical data that is later scanned at the port of entry.<sup>96</sup> In December 2015, Congress passed the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 (H.R. 158),<sup>97</sup> which was included in the end of year Omnibus spending bill.<sup>98</sup> This bill creates restrictions and prohibitions on the

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

<sup>92</sup> *Id.*

<sup>93</sup> H.R. 5816, 114th Cong. (2016). For additional bills introduced during the 114th Congress to restrict refugees, see CONGRESS.GOV, <https://www.congress.gov/search?q=%7B%22congress%22%3A%22114%22%2C%22source%22%3A%22legislation%22%2C%22search%22%3A%22refugee%22%7D> (last visited Oct. 4 2016).

<sup>94</sup> H.R. 5851, 114th Cong. (2016); *see also* CGRS *Strongly Supports the Refugee Protection Act of 2016*, CTR. FOR GENDER & REFUGEE STUD. (July 14, 2016), <http://cgrs.uchastings.edu/news/cgrs-strongly-supports-refugee-protection-act-2016>.

<sup>95</sup> *Visa Waiver Program*, U.S. DEP’T OF STATE: U.S. VISAS, <https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html> (last visited Feb. 21, 2016).

<sup>96</sup> *Visa Waiver Program Requirements*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/visa-waiver-program-requirements> (last visited Oct. 30, 2016); *see also* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 498–99 (Foundation Press, 6th ed. 2015).

<sup>97</sup> *Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015*, H.R. 158, 114th Cong. (2015); *H.R.158—Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/158> (last visited Dec. 23, 2016).

<sup>98</sup> Clark Mindock, *What’s in the Omnibus Spending Bill? Visa Waiver Access, Cybersecurity Information Sharing Act Measures Slammed by ACLU*, INT’L BUS. REV. (Dec. 12, 2016, 11:54 AM), <http://www.ibtimes.com/whats-omnibus-spending-bill-visa-waiver-access-cybersecurity-information-sharing-act-2228299>.

visa waiver program for dual nationals of Iran, Iraq, Syria, and Sudan and those who set foot into one of those countries since March 1, 2011.<sup>99</sup> The legislation grants DHS discretionary authority to waive these prohibitions if it “is in the law enforcement or national security interests of the United States.”<sup>100</sup>

Among the critiques of this legislation is the breadth of individuals labeled as dual nationals. For example, several European citizens are affected by this legislation because heritage automatically deems them as a dual national. As explained by the American Civil Liberties Union:

The new law enshrines discrimination against dual nationals of Iran, Iraq, Sudan, or Syria, who live in VWP countries. That means, for example, that a German citizen, who has lived in Berlin her entire life, will lose her visa-free privileges if her father is an Iranian citizen—even if she herself has never been to Iran.<sup>101</sup>

Thirty-four CEOs also highlighted how the legislation affects business interests:

These restrictions also harm U.S. business interests. Millions of European, Japanese, and Korean citizens travel as employees, customers, and suppliers of American firms. Requiring many of them to get visas imposes bureaucratic delays on U.S. firms. This reduces the agility and liberty of U.S. firms, makes us less competitive in the global economy, and will ultimately cost jobs.<sup>102</sup>

Politically, some saw the congressional shift away from legislation focused on refugee restrictions and toward restrictions on the visa waiver program as a concession. As described by Politico: “The Obama administration supported the changes to the Visa Waiver Program, in part because it saw it as an acceptable compromise that could defuse moves to tighten restrictions on the U.S. refugee resettlement program.”<sup>103</sup>

In January 2016 and on the heels of the passed Omnibus bill, DHS announced changes for dual citizens from Iran, Iraq, Sudan, or Syria entering

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<sup>99</sup> Visa Waiver Program, *supra* note 97.

<sup>100</sup> *Id.*

<sup>101</sup> See *Changes to the Visa Waiver Program*, ACLU, <https://www.aclu.org/changes-visa-waiver-program> (last visited July 10, 2016); see also *ACLU Backgrounder on the “Equal Protection in Travel Act” (H.R. 4380/S. 2449)*, ACLU, <https://www.aclu.org/other/aclu-backgrounder-equal-protection-travel-act-hr-4380-s-2449> (last visited Oct. 5, 2016).

<sup>102</sup> *Petitioning U.S. House of Representatives to Repeal Discriminatory Travel Restrictions*, CHANGE.ORG, <https://www.change.org/p/u-s-congress-repeal-discriminatory-travel-restrictions-equaltravel> (last visited July 12, 2016).

<sup>103</sup> Nahal Toosi, *Lawmakers Move to Protect Iran, Arab Diaspora from New Visa Rules*, POLITICO (Jan. 13, 2016, 7:00 PM), <http://www.politico.com/story/2016/01/congress-visa-waiver-iran-iraq-syria-sudan-217714>.

the United States through Europe or any person who traveled to one of these countries in the last five years.<sup>104</sup> In February 2016, DHS announced another program change: prohibiting nationals from Libya, Somalia, and Yemen from entering the United States without a visa.<sup>105</sup> DHS suggested that other countries could be added to the list.<sup>106</sup>

Though reforms to the visa waiver program are a reasonable platform for discussion, building a policy on the assumption that Muslims pose a greater threat than others is alienating and counterproductive to many. As described in a letter by the American-Arab Anti-Discrimination Committee in opposition to related legislation: “The fact is that terrorism is not limited to one particular race, country of national origin, or religion, nor bound by country borders.”<sup>107</sup> Similarly, in a letter urging Congress to undo the Visa Waiver Program legislation, thirty-four leading CEOs, including Twitter CEO Jack Dorsey, Pixar President Ed Catmull, and PayPal co-founder Max Levchin, stated:

Discriminating based on national heritage is inconsistent with American values. In effect, certain provisions of the new law require visas for Europeans and other citizens with Iranian, Sudanese, Syrian, or Iraqi heritage. We protest this just as vigorously as if Congress had mandated special travel papers for citizens based on their faith or the color of their skin. In the balancing act between fighting terrorism and upholding American liberties, these provisions go too far.<sup>108</sup>

Importantly, bi-partisan legislation known as the Equal Protection in Travel Act of 2016 was introduced in both the U.S. House and Senate in January 2016 and aimed at repealing the visa waiver restrictions placed as part of the Omnibus.<sup>109</sup>

In addition to introducing legislative proposals, current and former members of Congress have made troubling connections between national security and

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<sup>104</sup> Ron Nixon, *U.S. Tightens Visa Rules for Some European Visitors*, N.Y. TIMES (Jan. 21, 2016), <http://www.nytimes.com/2016/01/22/us/politics/us-tightens-visa-rules-for-some-european-visitors.html?ref=topics>.

<sup>105</sup> *DHS Announces Further Travel Restrictions for the Visa Waiver Program*, DEP'T OF HOMELAND SEC. (Feb. 18, 2016), <https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program>.

<sup>106</sup> *Id.*; Ron Nixon, *U.S. Expands Restrictions on Visa-Waiver Program for Visitors*, N.Y. TIMES (Feb. 18, 2016), [http://www.nytimes.com/2016/02/19/us/politics/us-expands-restrictions-on-visa-waiver-program-for-visitors.html?\\_r=0](http://www.nytimes.com/2016/02/19/us/politics/us-expands-restrictions-on-visa-waiver-program-for-visitors.html?_r=0).

<sup>107</sup> 161 CONG. REC. H9047, H9053 (daily ed. Dec. 8, 2015) (letter from Samer Khalaf, Am.-Arab Anti-Discrimination Comm. Nat'l President, to the House of Representatives).

<sup>108</sup> *Supra* note 102.

<sup>109</sup> Equal Protection in Travel Act of 2016, S. 2449, 114th Cong. (2016).

immigration in commentary. To illustrate, Senator Rubio has agreed that the United States should block the entry of Syrian refugees proclaiming, “[w]e won’t be able to take more refugees. It’s not that we aren’t compassionate. But we can’t. There’s no way to background check them.”<sup>110</sup>

Following the massacre in Orlando, Florida, Former Representative Barney Frank blamed an “Islamic element” for the killing of gay people.<sup>111</sup> Alienating progressives, Frank stated,

[t]here is an Islamic element here. Yes, the overwhelming majority of Muslims don’t do this, but there is clearly, sadly, an element in the interpretation of Islam that has some currency, some interpretation in the Middle East that encourages killing people—and L.G.B.T. people are on that list. And I think it is fair to ask leaders of the Islamic community, religious and otherwise, to spend some time combatting this.<sup>112</sup>

Advocates and scholars were quick to dispel the “either or” narrative of LGBT rights and being Muslim. As told beautifully and painfully by scholar Muneer Ahmad:

But the imperative for the Muslim and LGBT communities to find mutual understanding should not derive merely from shared vulnerability. Rather, solidarity must be forged from recognition of common humanity and, importantly, shared membership. . . . For those of us who are gay and Muslim, we must often choose between entering the mosque and exiting the closet.<sup>113</sup>

The Orlando massacre also prompted Senator Ted Cruz to call a hearing in the Senate Judiciary Committee titled, *Willful Blindness: Consequences of Agency Efforts to Deemphasize Radical Islam in Combating Terrorism*.<sup>114</sup> Said Senator Cruz, “you cannot fight an enemy you do not acknowledge, that you

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<sup>110</sup> Marco Rubio, *We Cannot Take Syrian Refugees*, FACEBOOK (Nov. 16, 2015), <https://www.facebook.com/MarcoRubio/posts/10153714701572708>.

<sup>111</sup> Sheryl Gay Stolberg, *Barney Frank Speaks of Concern on ‘Islamic Element’ to Terrorism*, N.Y. TIMES (June 13, 2016, 11:23 AM), <http://www.nytimes.com/live/orlando-nightclub-shooting-live-updates/barney-frank/>.

<sup>112</sup> *Id.*

<sup>113</sup> See Muneer I. Ahmad, *Gay Pride, Ramadan, and Solidarity After Orlando*, THE NATION (June 14, 2016), <https://www.thenation.com/article/gay-pride-ramadan-and-solidarity-after-orlando/>; see also Fatima Khan, *65 LGBTQ and Muslim Groups Unite Against Hate & Bigotry*, MUSLIM ADVOCATES (June 21, 2016), <https://www.muslimadvocates.org/65-lgbtq-and-muslim-groups-unite-against-hate-bigotry/>.

<sup>114</sup> *Willful Blindness: Consequences of Agency Efforts to Deemphasize Radical Islam in Combating Terrorism: Hearing Before the Subcomm. on Oversight, Agency Action, Fed. Rights and Fed. Courts of the S. Comm. on the Judiciary*, 114th Cong. (2016).

pretend does not exist and that you refuse to confront.”<sup>115</sup> Several members of Congress and other advocates directly confronted the anti-Muslim rhetoric by legislators. As one illustration, Democratic Senator Chis Coons remarked at the hearing that “to compromise these principles and blame over a billion Muslims . . . only serves to divide Americans, to alienate the Muslim world and to legitimize the murderous groups.”<sup>116</sup> Similarly, Farhana Khera, Executive Director for Muslim Advocates, testified to the damage of anti-Muslim sentiments: “Far too many of our nation’s public officials and political leaders engage in hateful and blatantly bigoted anti-Muslim rhetoric. Public officials must understand that such rhetoric carries grave consequences for American Muslims and those who are perceived to be Muslim in the U.S.”<sup>117</sup>

### III. STATES

#### A. *Syrian Refugees*

Thirty-one states have vowed to reject Syrian refugees though the legal ability to do so is questionable.<sup>118</sup> The legal impossibility of allowing states to set refugee policy is striking—immigration law is a federal responsibility.<sup>119</sup> States cannot make laws that would conflict with federal immigration laws, nor can they enforce laws that have been reserved for the federal government.<sup>120</sup> When states refuse to admit refugees based on nationality, they are also in potential violation of other laws like the Equal Protection Clause.<sup>121</sup>

Many of these same states are plaintiffs in a lawsuit challenging the legal authority of the President to implement deferred action, a longstanding form of

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<sup>115</sup> *Id.* (statement of Sen. Ted Cruz, Chairman, S. Subcomm. on Oversight, Agency Action, Fed. Rights and Fed. Courts).

<sup>116</sup> *Id.* (2016) (statement of Sen. Chris Coons).

<sup>117</sup> *Id.* (testimony of Farhana Y. Khera, President & Executive Director, Muslim Advocates).

<sup>118</sup> Fantz & Brumfield, *supra* note 18.

<sup>119</sup> *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (“The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad.” (internal citations omitted)).

<sup>120</sup> *See, e.g., id.* at 2500-01.

<sup>121</sup> *See* U.S. CONST. amend. XIV, § 1.

prosecutorial discretion in immigration law.<sup>122</sup> As summarized by America's Voice:

Back in April, [Texas Governor Greg] Abbott let the cat out of the bag by admitting that the lawsuit to block DAPA wasn't about protecting the Constitution, but about . . . making life miserable for immigrant families by leaving them at risk of deportation. Now these same Republican Governors appear to want to make the lives of Syrians fleeing war even more miserable, too.<sup>123</sup>

Following the terrorist attacks in Paris, the state of Texas filed a federal lawsuit seeking to freeze the resettlement of Syrian refugees in the state of Texas.<sup>124</sup> The primary allegation by Texas was that the federal government had violated a congressional mandate contained in the Refugee Act of 1980 by failing to consult with the state in resettling refugees within Texas.<sup>125</sup> The lawsuit was ultimately unsuccessful.<sup>126</sup> Initially, the court refused to issue a preliminary injunction, stating:

Somewhat ironically, Texas, perhaps the reddest of red states, asks a federal court to stick its judicial nose into this political morass, where it does not belong absent statutory authorization. . . . In our country, however, it is the federal executive that is charged with assessing and mitigating that risk [of refugees], not the states and not the courts.<sup>127</sup>

In June 2016, a district court in Dallas, Texas dismissed the lawsuit finding that Texas lacked standing to sue the federal government.<sup>128</sup> The court found that the Commission lacked a cause of action under the Refugee Act, the Administrative Procedure Act, or the Declaratory Judgment Act to enforce the Act's advance consultation requirement, and, therefore, the Commission failed to state a plausible claim for relief.<sup>129</sup>

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<sup>122</sup> Gabe Ortiz, *GOP Governors Blocking Immigration Action Also Blocking Syrian Refugees*, AMERICA'S VOICE (Dec. 1, 2015), <http://americasvoice.org/blog/gop-governors-blocking-immigration-action-also-blocking-syrian-refugees/>.

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

<sup>124</sup> Molly Hennessy-Fiske, *Texas Sues to Block Syrian Refugees from Settling in State*, L.A. TIMES (Dec. 2, 2015, 7:39 PM), <http://www.latimes.com/nation/la-na-texas-syrians-lawsuit-20151202-story.html>.

<sup>125</sup> *Tex. Health & Human Serv. Comm'n v. United States*, 166 F. Supp. 3d 706, 712–13 (N.D. Tex. 2016).

<sup>126</sup> *Id.* at 714.

<sup>127</sup> *Id.* at 710, 714.

<sup>128</sup> *Id.* at 714. Another allegation in the lawsuit was made against the nonprofit International Rescue Committee for a breach of contract. *Id.* at 710; *see also* Manny Fernandez, *Federal Judge Tosses Texas' Lawsuit to Bar Syrian Refugees*, N.Y. TIMES (June 16, 2016), <http://www.nytimes.com/2016/06/17/us/federal-judge-tosses-texas-lawsuit-to-bar-syrian-refugees.html>.

<sup>129</sup> *Tex. Health & Human Serv. Comm'n*, 166 F. Supp. 3d at 713–14.

In October 2016, the Seventh Circuit Court of Appeals<sup>130</sup> upheld a preliminary injunction to stop efforts by Indiana to block Syrian refugees into the state.<sup>131</sup> Said Judge Richard Posner, the state of Indiana “provides no evidence that Syrian terrorists are posing as refugees or that Syrian refugees have ever committed acts of terrorism in the United States.”<sup>132</sup>

Notwithstanding the declarations by select state governors to ban Syrian refugees, they continue to resettle and thrive throughout the United States.<sup>133</sup> Amidst the litigation in Texas rose a beautiful story of Kamal, who fled Damascus, Syria after facing severe persecution in the form of detention, arrests, and physical harm.<sup>134</sup> The refugee process took Kamal two and half years, after which he was resettled in Houston, Texas. The New York Times reported on Kamal’s life in Houston:

Kamal is comfortable at the Y.M.C.A. In the cramped cubicles, they talk of success stories—former refugees who opened restaurants, who work at Neiman Marcus, who started their own businesses. After arriving in Houston, Kamal worked as a data entry clerk, but he will soon start a new job as a cook at a Middle Eastern restaurant. His dream is to own a restaurant. He has a name but no location: Pearl of the Orient. He wants an eclectic menu of Damascus, French and Italian cuisine. . . . On this afternoon, before stopping at the Kroger, he went to a Middle Eastern market near the Y.M.C.A. office, pointing out his favorite spices and cuts of lamb. He looked for things to illustrate his belief that people from distant places, like the Syrian and the Texan, are more alike than apart. He touched the 10-pound bags of basmati rice near the cash register. “Same as Uncle Ben’s,” he said.<sup>135</sup>

#### IV. 9/11 FLASHBACK

Many of the immigration restrictions proposed by presidential candidates, Congress, and the states in the name of national security produce a flashback to immigration policies enacted by the Executive Branch after 9/11. These programs were dubbed as national security programs and were a direct reaction

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<sup>130</sup> *Exodus Refugee Immigration, Inc. v. Pence*, 838 F.3d 902 (7th Cir. 2016).

<sup>131</sup> *Id.* at 903, 905; *see also* Ariane de Vogue, *Federal Court Blasts Pence on Syrian Refugees*, CNN (Oct. 3, 2016, 5:45 PM), <http://www.cnn.com/2016/10/03/politics/mike-pence-syrian-refugees/>.

<sup>132</sup> *Exodus Refugee Immigration*, 838 F.3d at 904.

<sup>133</sup> Nirappil, *supra* note 32.

<sup>134</sup> Manny Fernandez, *Thriving in Texas Amid Appeals to Reject Syrian Refugees*, N.Y. TIMES (Dec. 25, 2015), <http://www.nytimes.com/2015/12/26/us/thriving-in-texas-amid-appeals-to-reject-syrian-refugees.html>.

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

to the 9/11 attacks.<sup>136</sup> Many of these programs were counterproductive, alienating, and discriminatory.<sup>137</sup>

#### A. 9/11 Detentions

Immediately after 9/11, some 1200 people were swept up and detained on suspected terrorism charges.<sup>138</sup> As summarized by the DOJ's Office of the Inspector General:

One of the principal responses by law enforcement authorities after the September 11 attacks was to use the federal immigration laws to detain aliens suspected of having possible ties to terrorism. Within 2 months of the attacks, law enforcement authorities had detained, at least for questioning, more than 1,200 citizens and aliens nationwide.<sup>139</sup>

The fallout of these detentions did not go unnoticed as the OIG documented major concerns with the detention program including, but not limited to, deplorable conditions of confinement, limited access to counsel, and lack of notice to noncitizens about the reasons they were being held, among others.<sup>140</sup> Of the 762 detainees reviewed by the OIG, the majority were from Muslim-majority countries, with the largest number coming from Pakistan and Egypt.<sup>141</sup>

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<sup>136</sup> NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004).

<sup>137</sup> See, e.g., PENN STATE LAW, THE 9/11 EFFECT AND ITS LEGACY ON U.S. IMMIGRATION LAWS (2011), [https://pennstatelaw.psu.edu/\\_file/Immigrants/9\\_11\\_Effect\\_Online\\_Publication.pdf](https://pennstatelaw.psu.edu/_file/Immigrants/9_11_Effect_Online_Publication.pdf); see also Wadhia, *supra* note 62. See generally Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Kevin R. Johnson, *Protecting National Security Through More Liberal Admission of Immigrants*, 2007 U. CHI. LEGAL F. 157.

<sup>138</sup> OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003), <https://www.oig.justice.gov/special/0306/chapter1.htm#I>.

<sup>139</sup> *Id.* In reviewing the treatment of 762 of these detainees, the Office of the Inspector General focused on:

Issues affecting the length of the detainees' confinement, including the process undertaken by the FBI and others to clear individual detainees of a connection to the September 11 attacks or terrorism in general; Bond determinations for detainees; The removal process and the timing of removal; and Conditions of confinement experienced by detainees, including their access to legal counsel.

*Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* For a detailed summary of these detentions, see Wadhia, *supra* note 62, at 1491–95.



## B. Registration Program

Another program, known as the National Security Entry-Exit Registration System (NSEERS),<sup>142</sup> required certain visitors to undergo special registration.<sup>143</sup> The registration process involved interrogations, fingerprints, and photographs and remained operational through 2011.<sup>144</sup>

One controversial portion of the NSEERS program was the call-in registration program that required certain males over the age of sixteen from twenty-five countries (twenty-four of which have Muslim-majority populations) to report to a local immigration office for an in-depth interview.<sup>145</sup> More than 13,000 men who registered were placed in removal proceedings, largely for immigration visa violations.<sup>146</sup> In other words, in exchange for voluntarily reporting to a local immigration office to support national security, scores of young men were served with charging documents (Notices to Appear) that led to their deportation. None of the men who came forward were convicted of crimes related to terrorism.<sup>147</sup> James W. Ziglar, who was commissioner of the Immigration and Naturalization Service at the time, questioned whether NSEERS would be effective. “The question was, ‘What were we going to get for all of this?’ . . . The people who could be identified as terrorists weren’t going

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<sup>142</sup> SHOBA SIVAPRASAD WADHIA & KAREEM SHORA, NSEERS: THE CONSEQUENCES OF AMERICA’S EFFORTS TO SECURE ITS BORDERS 9 (2009), <http://www.adc.org/fileadmin/ADC/Pdfs/nseerspaper.pdf>. For additional information regarding the NSEERS program, see Shoba Sivaprasad Wadhia, *Shutting Down Special Registration*, MEDIUM (Dec. 11, 2016), <https://medium.com/@shobawadhia/shutting-down-special-registration-e40d25e9177b#.i02rv28gk>.

<sup>143</sup> RIGHTS WORKING GRP. & CTR. FOR IMMIGRANTS’ RIGHTS, PA. STATE UNIV.’S DICKINSON SCH. OF LAW, THE NSEERS EFFECT: A DECADE OF RACIAL PROFILING, FEAR, AND SECRECY (2012) [hereinafter NSEERS EFFECT], [https://pennstatelaw.psu.edu/\\_file/clinics/NSEERS\\_report.pdf](https://pennstatelaw.psu.edu/_file/clinics/NSEERS_report.pdf); Removing Designated Countries from the National Security Entry-Exit Registration System (NSEERS), Notice, 76 Fed. Reg. 23,830 (Apr. 28, 2011), <https://www.federalregister.gov/documents/2011/04/28/2011-10305/removing-designated-countries-from-the-national-security-entry-exit-registration-system-nseers>.

<sup>144</sup> Removing Designated Countries, *supra* note 143.

<sup>145</sup> Denyse Sabagh, *DHS Releases Long-Awaited Memo on Controversial 9/11 Program*, AM. IMMIGR. LAWS. ASSOC. (May 3, 2012), <http://www.aileadershipblog.org/2012/05/03/dhs-releases-long-awaited-memo-on-controversial-911-program/>; Rachel L. Swarns, *Thousands of Arabs and Muslims Could Be Deported*, N.Y. TIMES (June 7, 2003), <http://www.nytimes.com/2003/06/07/us/thousands-of-arabs-and-muslims-could-be-deported-officials-say.html>.

<sup>146</sup> WADHIA & SHORA, *supra* note 142, at 6, 44.

<sup>147</sup> See NSEERS EFFECT, *supra* note 143, at 6; Bill Ong Hing, *Misusing Immigration Policies in the Name of Homeland Security*, 6 NEW CENTENNIAL REV. 195, 203 (2006).

to show up. This project was a huge exercise and caused us to use resources in the field that could have been much better deployed.”<sup>148</sup>

The legality of the NSEERS program was unsuccessfully challenged on constitutional grounds in several circuit courts.<sup>149</sup> In many circuits, the courts held that NSEERS was a rational national security tool and one that did not violate the Equal Protection Clause of the Fifth Amendment.<sup>150</sup> As illustrated by the Second Circuit case of *Rajah v. Mukasey*:

No circumstance calling for a remedy is present here. There was a rational national security basis for the Program. The terrorist attacks on September 11, 2001 were facilitated by the lax enforcement of immigration laws. The Program was designed to monitor more closely aliens from certain countries selected on the basis of national security criteria. The individuals subject to special registration under the Program were neither citizens nor even lawful permanent residents. They were asked to provide information regarding their immigration status and other matters relevant to national security. They were not held in custody for appreciable lengths of time. Those whose immigration status was not valid were subject to generally applicable legal proceedings to enforce pre-existing immigration laws. In sum, the Program was a plainly rational attempt to enhance national security. We therefore join every circuit that has considered the issue in concluding that the [NSEERS] Program does not violate Equal Protection guarantees.<sup>151</sup>

Many did not register because they did not know about the NSEERS program, which was publicized largely through a 75,000-page government publication called the Federal Register, or because they were fearful about what might happen if they did comply. The saga of NSEERS continued for more than a decade and affected many people, including men seeking green cards based on

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<sup>148</sup> See Rachel L. Swarns, *Program's Value in Dispute as a Tool to Fight Terrorism*, N.Y. TIMES (Dec. 21, 2004), <http://www.nytimes.com/2004/12/21/us/programs-value-in-dispute-as-a-tool-to-fight-terrorism.html>; see also Shoba Sivaprasad Wadhia, *9/11 Flashback and Future Immigration Policy*, THE HILL (Dec. 9, 2015), <http://thehill.com/blogs/congress-blog/homeland-security/262478-9-11-flashback-and-future-immigration-policy>; see also NSEERS EFFECT, *supra* note 143, at 6; WADHIA & SHORA, *supra* note 142, at 11.

<sup>149</sup> See *Kandamar v. Gonzales*, 464 F.3d 65, 73–75 (1st Cir. 2006); *Shaybob v. Attorney Gen.*, 189 Fed. App'x 127, 130 (3d Cir. 2006); *Malik v. Gonzales*, 213 Fed. App'x 173, 174 (4th Cir. 2007) (per curiam); *Ali v. Gonzales*, 440 F.3d 678, 681 n.4 (5th Cir. 2006) (per curiam); *Hadayat v. Gonzales*, 458 F.3d 659, 664–65 (7th Cir. 2006) (finding that the court had no jurisdiction to review the claim); *Zafar v. U.S. Attorney Gen.*, 461 F.3d 1357, 1367 (11th Cir. 2006).

<sup>150</sup> *Kandamar*, 464 F.3d at 73–75; *Shaybob*, 189 Fed. App'x at 130; *Malik*, 213 Fed. App'x at 174; *Ali*, 440 F.3d at 681; *Zafar*, 461 F.3d at 1367.

<sup>151</sup> *Rajah v. Mukasey*, 544 F.3d 427, 438–39 (2d Cir. 2008) (citations omitted).

a qualifying relationship, such as to an employer or family member, who were years later questioned or denied because of NSEERS.<sup>152</sup>

On April 29, 2011, DHS published a Notice in the Federal Register de-listing the countries required to undergo special registration and effectively discontinued the program.<sup>153</sup> Though the NSEERS program was discontinued in 2011, the penalties associated with the NSEERS program remained intact as did the regulatory structure on which it was based.<sup>154</sup> For example, under the regulations, a person who failed without good cause to comply with the departure component of NSEERS was presumed inadmissible under the Immigration and Nationality Act (INA) “as an alien who[] . . . seeks to enter the United States to engage in unlawful activity.”<sup>155</sup> Notably, the regulatory structure giving rise to NSEERS remained on the books until December 23, 2016, when DHS published a final rule ending the program for good.<sup>156</sup> As I described on the morning the final rule was released:

Though NSEERS was discontinued in 2011, the regulatory structure remained on the books until today. Today’s decision comes on the heels of diverse voices who advocated for rescission for years, including former DHS officials; members of Congress; civil and human rights organizations; and the immigration lawyers and Muslim, Arab and South Asian organizations who work(ed) with families and individuals impacted by NSEERS. By ending NSEERS, DHS has closed the curtain on one of the darkest chapters of American history.<sup>157</sup>

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<sup>152</sup> NSEERS EFFECT, *supra* note 143.

<sup>153</sup> Removing Designated Countries, *supra* note 143.

<sup>154</sup> *Id.* at 18; see also Muzaffar Chishti & Claire Bergeron, *DHS Announces End to Controversial Post-9/11 Immigrant Registration and Tracking Program*, MIGRATION POL’Y INST. (May 17, 2011), <http://www.migrationpolicy.org/article/dhs-announces-end-controversial-post-911-immigrant-registration-and-tracking-program>.

<sup>155</sup> 8 C.F.R. § 264.1 (2016).

<sup>156</sup> The author has written extensively about the remaining components of NSEERS after 2011 and the efforts and exercises that led to the final rule eliminating the regulatory framework on December 23, 2016. See, e.g., Shoba Sivaprasad Wadhia, *NSEERS or “Muslim” Registration Was a Failed Post 9-11 Program and Must Come to an End*, MEDIUM (Nov. 22, 2016), <https://medium.com/@shobawadhia/nseers-or-muslim-registration-was-a-failed-post-9-11-program-and-must-come-to-an-end-1200469bf64b#4ddfyrq90>; Shoba Sivaprasad Wadhia, *Understanding the Final Rule Endings NSEERS*, YALE J. ON REG.: NOTICE AND COMMENT (Dec. 23, 2016), <http://yalejreg.com/nc/understanding-the-final-rule-ending-nseers-by-shoba-sivaprasad-wadhia/>; Shoba Sivaprasad Wadhia, *On this Day: The End of NSEERS*, MEDIUM (Dec. 22, 2016), <https://medium.com/@shobawadhia/on-this-day-the-end-of-nseers-2959935e6c66#ggk8ngaas>; Wadhia, *Shutting Down Special Registration*, *supra* note 142.

<sup>157</sup> Wadhia, *On this Day: The End of NSEERS*, *supra* note 156.

While the end of NSEERS does not prevent the Trump Administration from assembling a registry program similar to or even more controversial than NSEERS, it does slow the process down. With the NSEERS framework dismantled, a new Administration would be required to start from a blank page and with legal and policy eyes watching.<sup>158</sup>

### C. Notices to Appear

On the heels of 9/11, the DOJ issued a new regulation that enabled the agency to hold a person in custody without charges for forty-eight hours or longer in the event of an emergency or extraordinary circumstance.<sup>159</sup> The regulation does not define “emergency” or “extraordinary circumstance,” and as analyzed by the OIG, enabled several 9/11 detainees to sit in custody without charging papers.<sup>160</sup> While the regulation itself was crafted by the DOJ, the jurisdiction transferred to DHS pursuant to the Homeland Security Act of 2002.<sup>161</sup> The regulation was inherited by DHS and remains intact.<sup>162</sup>

Efforts to roll back 9/11 immigration programs through legislation known as the “Civil Liberties Restoration Act”<sup>163</sup> were unsuccessful.<sup>164</sup> Similarly, many lawsuits filed to challenge the constitutionality of these programs were upheld under the Supreme Court’s plenary power doctrine.<sup>165</sup> The 9/11 flashback described in this section is by no means exhaustive and is well described elsewhere.<sup>166</sup>

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<sup>158</sup> See, e.g., J. David Goodman and Ron Nixon, *Obama to Dismantle Visitor Registry Before Trump Can Revive It*, N.Y. TIMES (Dec. 22, 2016), [http://www.nytimes.com/2016/12/22/nyregion/obama-to-dismantle-visitor-registry-before-trump-can-revive-it.html?\\_r=0](http://www.nytimes.com/2016/12/22/nyregion/obama-to-dismantle-visitor-registry-before-trump-can-revive-it.html?_r=0); Ed Pilkington, *Registry Used to Track Arabs and Muslims Dismantled by Obama Administration*, THE GUARDIAN (Dec. 22, 2016), <https://www.theguardian.com/us-news/2016/dec/22/nseers-arab-muslim-tracking-system-dismantled-obama>.

<sup>159</sup> 8 C.F.R. § 287.3 (2016).

<sup>160</sup> OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003), <https://oig.justice.gov/special/0306/chapter3.htm#1A>; see also Wadhia, *supra* note 62, at 1497–99.

<sup>161</sup> Homeland Security Act (HSA) of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

<sup>162</sup> For a detailed discussion about the Notice to Appear regulation, see Wadhia, *supra* note 62, at 1497–99.

<sup>163</sup> Civil Liberties Restoration Act, H.R. 1502, 109th Cong. (2005).

<sup>164</sup> For a summary of the Civil Liberties Restoration Act, see *Civil Liberties Restoration Act of 2004*, CTR. FOR AM. PROGRESS (May 26, 2004), <https://www.americanprogress.org/wp-content/uploads/kf/CLRASUMMARY.pdf> (last visited July 12, 2016). For a meditation on the efforts to advance the CLRA, see Wadhia, *supra* note 87, at 234–36, and Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & C.R. L. REV. 387, 412 (2007).

<sup>165</sup> See, e.g., Wadhia, *supra* note 62, at 1524–29; WADHIA & SHORA, *supra* note 142, at 22–27.

<sup>166</sup> See, e.g., Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259 (2004); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and*

## CONCLUSION

The goal of this Article is to describe the recent pronouncements and proposals against refugees, Muslims, and families from Central America and to examine how they relate to post-9/11 programs that targeted marginalized groups.<sup>167</sup>

Then, the politics were as emotional as they are now. Policymakers, the public, and President Trump should question and critically examine programs that use national security as a proxy for immigration proposals drawn by race, religion, nationality, or citizenship. Whether or not new programs are labeled “immigration” or “national security,” any policy moving forward should focus on real solutions and be consistent with American values and the rule of the law.

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*Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Kerwin & Stock, *supra* note 88; Wadhia, *supra* note 62; Wadhia, *supra* note 164, at 234–37.

<sup>167</sup> See Immigration Policy Center, *Targets of Suspicion: The Impact of Post-9/11 Policies on Muslims, Arabs and South Asians in the United States*, 3 IMMIGR. POL'Y IN FOCUS, May 2004, 1, 2; Wadhia, *supra* note 62.