Why Trump's 'Muslim Ban' Lost in Court

By overtly targeting Muslims with a travel ban, President Trump put himself at odds with U.S. treaties and other legal agreements, ensuring his latest legal setback in federal court, writes legal scholar Marjorie Cohn for JURIST.

By Marjorie Cohn

After a federal district court judge and a unanimous three-judge panel of the Ninth Circuit Court of Appeals ruled that Donald Trump's Executive Order (EO) instituting a travel ban was likely illegal, the president suspended it and issued a new EO on March 6.

On March 15, a federal judge granted a temporary restraining order in Hawaii v. Trump et al., halting the operation of the new EO nationwide. U.S. District Judge Derrick K. Watson found that plaintiffs met their burden of establishing a strong likelihood of success on the merits of their Establishment Clause claim, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of granting the requested relief.

When the case is heard on the merits, the legality of the new EO, which categorically suspends immigration from six Muslim majority countries to the United States, should be assessed in light of U.S. treaty and customary international law, according to an amicus brief filed in the case.

Eighty-one international law scholars, including this writer, and a dozen non-governmental organizations with expertise in civil rights law, immigration law or international human rights law (amici) argue in their amicus brief that the new EO threatens discrimination that would run afoul of two treaties. They are the International Covenant on Civil and Political Rights (CCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

When the United States ratifies a treaty, it not only makes the U.S. a party to that treaty; it also becomes U.S. domestic law under the Supremacy Clause of the Constitution, which says treaties "shall be the supreme law of the land." Courts have a duty to restrain federal executive action that conflicts with a ratified treaty.

Customary international law develops from the general and consistent practice of states. It is part of federal common law and must be enforced in U.S. courts, whether or not its provisions are contained in a ratified treaty.

Under the Constitution's Take Care Clause, the President must "take care that the laws be faithfully executed." This means Trump has a constitutional duty to comply with our legal obligations under both treaty and customary international law.

"[T]he Immigration and Nationality Act and other statutes must be read in harmony with these international legal obligations pursuant to the Supremacy Clause of the Constitution and long established principles of statutory construction requiring acts of Congress to be interpreted in a manner consistent with international law, whenever such a construction is reasonably possible," amici argue. "In this case, the international law obligations . . . reinforce interpretations of those statutes forbidding discrimination of the type threatened by Sections 2 and 11 of the EO."

International Covenant on Civil and Political Rights

The United States ratified the CCPR in 1992. Article 2 prohibits "any distinction, exclusion, restriction or preference" based on religion or national origin, which has "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing," according to the United Nation Human Rights Committee (HRC), the body charged with monitoring implementation of the CCPR.

Article 2 prohibits discrimination against the family as well as individuals. "The family is the natural and fundamental group of society and is entitled to protection by society and the State," Article 23 says. The HRC has opined that states have an obligation to adopt appropriate measures "to ensure the unity or reunification of families, particularly when their members are separated for political, economic and similar reasons."

Many immigrants and refugees flee their countries of origin and come to the United States to reunify with their families. The CCPR protects them against discrimination based on religion or national origin.

Amici state in their brief, "Restrictions on travel and entry caused by the EO that impose disparate and unreasonable burdens on the exercise of this right violate CCPR article 2." According to the HRC, although the CCPR does not generally "recognize a right of aliens to enter or reside in the territory of a State party . . . , in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and

respect for family life arise."

Thus the non-discrimination mandates and protection of family life in the CCPR "should be considered by courts in interpreting government measures affecting family unification," the brief says.

Article 26 prohibits religious and national origin discrimination and guarantees equal protection in any government measure. These provisions are not limited to individuals within the territory of the state party and subject to its jurisdiction. So immigrants need not be physically present in the United States to enjoy the protection of Article 26.

Moreover, the non-discrimination requirements enshrined in the CCPR also constitute customary international law. In 1948, the United States approved the Universal Declaration of Human Rights (UDHR), which is part of customary international law. The UDHR forbids discrimination based on religion or national origin, guarantees equal protection of the law, and protects family life against arbitrary interference.

International Convention on the Elimination of All Forms of Racial Discrimination

The United States ratified CERD in 1994. That treaty also prohibits discrimination based on religion or national origin. "Racial discrimination" includes any distinctions and restrictions based on national origin. Article 1 specifies that states can only adopt "nationality, citizenship or naturalization" policies that "do not discriminate against any particular nationality."

Like the CCPR, CERD does not limit its non-discrimination provisions to citizens or resident noncitizens. "While CERD does not speak specifically to restrictions on entry of nonresident aliens," the brief says, "the general language of CERD expresses a clear intention to eliminate discrimination based on race or national origin from all areas of government activity."

In Article 4, CERD provides that states parties "[s]hall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination." This includes discrimination based on national origin.

The Committee on the Elimination of Racial Discrimination, the body of independent experts that monitor the implementation of CERD, interprets Article 4 as requiring states to forbid speech that stigmatizes or stereotypes noncitizens, immigrants, refugees and those seeking asylum.

International Law Should be Considered in Evaluating the EO

"Those international law principles require courts to reject any attempt by the President to define classes based on national origin or religion, and then to impose on those classes disparate treatment, except to the extent necessary to achieve a legitimate government purpose," amici wrote.

Their brief continues, "The EO … makes an explicit distinction based on national origin that, unless necessary and narrowly tailored to achieve a legitimate government aim, would violate US obligations under international law."

In effect, the EO makes a distinction based on religion. All six of the listed countries have majority Muslim populations. As the brief says, "the EO does not suspend immigration from any state with a non-Muslim majority."

Amici also argue that international law is relevant to Section 11 of the EO, which requires the Secretary of Homeland Security to "collect and make publicly available" information relating to convictions of terrorism-related crimes, government charges of terrorism, and "gender-based violence against women" by foreign nationals. But the EO does not require publication of this information on U.S. citizens.

"By mandating that the Secretary publish pejorative information about noncitizens without comparable information about US citizens," amici wrote, "Section 11 makes a suspect distinction based on national origin."

Section 11 "may bear on the intent to discriminate, because the decision to publish derogatory information about noncitizens alone is stigmatizing, and appears to be motivated by a desire to characterize noncitizens as more prone to terrorism or gender-based violence than US citizens." Moreover, "a measure designed to stigmatize noncitizens cannot be proportionate and thus violates article 26 of the CCPR and articles 2 and 4 of the CERD."

Thus, amici "request that the Court consider US obligations under international law, which forms part of US law, in evaluating the legality of the EO."

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Jeff Sessions's Dubious Refugee Math

A rational approach to life cannot eliminate all risk – and trying to creates its own dangers – a reality many Americans forgot post-9/11 and that runs counter to President Trump's Muslim-targeting entry ban, as Arnold R. Isaacs describes.

By Arnold R. Isaacs

How frightened should Americans be of refugees, and how much safer will they be under President Trump's more restrictive refugee policy? If Americans are concerned about actual attacks involving committed terrorists sneaking through the vetting process with the intent to kill or maim Americans, the answer – based on statistics developed by Trump's Attorney General Jeff Sessions – appears, for all practical purposes, to be virtually zero.

Of course, Sessions doesn't frame his statistics that way. He agrees with Trump that existing screening procedures are inadequate and don't do enough to keep terrorists from posing as refugees. But the evidence he has offered to support that position – and remember, this is from a vehement supporter of Trump's immigration views, not a critic or a neutral researcher – showed exactly the opposite.

Sessions's analysis of refugee-terrorism links was in a statement he issued last August, when he was still a senator from Alabama. In the statement, titled "Refugee Terrorism Increases While Obama Administration Increases Flow," Sessions alleged that "top officials" had admitted "their inability to properly vet refugees," and called for "analyzing the immigration histories of recent terrorists so that we can more effectively safeguard our immigration system from being infiltrated."

Offering just such an analysis, Sessions presented a list of 20 refugees who were "convicted for, or implicated in, terrorism or terrorism-related offenses" after being admitted to the United States.

Here are some of the facts about those 20 cases:

– No American was killed or injured by any of those subjects. Not one of the 20 was charged for a violent act of any kind in the United States, or had any concrete or credible plan for one. (In November 2016, after Sessions's list was released, a Somali refugee injured 11 people on the Ohio State University campus, but none of the victims died.)

– No one on Sessions's list came from Syria. Six came from Iraq and six from Somalia (one of those born in a Somali refugee family in Kenya). Seven are Bosnian Americans, all involved in the same case, and one was from Uzbekistan. No one on the list was from Iran, Sudan, Libya, or Yemen – meaning that Sessions identified no cases from five of the seven countries whose citizens in all visa categories, not just refugees, were banned from entry for 90 days under Trump's immigration order.

– Of the 20 names on the list, 11 have been found guilty, six are still awaiting trial, and one case had already been dismissed when Sessions released his list. (That defendant agreed to leave the United States when the charge was dropped, so it may not quite count as an entirely clear-cut exoneration. On the other hand, the prosecutors' agreement to that deal is a pretty strong sign that they did not consider him a real threat.) Of the remaining two, one was killed in Syria and never charged with a criminal offense, and one, named in an arrest warrant issued by federal prosecutors in Virginia, is apparently in Somalia.

– Of six Iraqis on the list, four have been convicted, one is still awaiting trial, and charges against the sixth were dropped. Two of those found guilty were involved in what Trump aide Kellyanne Conway incorrectly called a "massacre" in Bowling Green, Kentucky; in fact there was no attack there, and charges against the two had nothing to do with any act in the United States but were related to support for "terrorists" in Iraq. (The conspiracy they were convicted for, by the way, was one of a fairly long list of plots that were not initiated by defendants but invented as sting operations by undercover FBI agents.)

– At least two of the Somali refugees came to the United States as young children, so obviously could not have been identified as threats by any security vetting procedure, however strong or weak. A number of others on the list came as teenagers or had been in the United States for a substantial number of years before their offenses took place. (Altogether Sessions' list identifies eight of his 20 subjects as U.S. citizens, meaning they would have spent a minimum of five years as permanent residents plus additional time – often one or even several years – to complete the naturalization process.) In those cases the strong probability is that their terrorist leanings developed after they were screened for refugee status and admitted, not before.

An Overestimate

From all available information, it is highly unlikely that most of these cases match the model Sessions and Trump have promoted, in which a violent radical pretends to be a refugee, manages to sneak through the security vetting, and enters the United States with the intent of committing terrorist acts. If we assume that half of Sessions's 20 examples fit that script — almost certainly an overestimate — and if we assume that the list represents the best case a strong advocate could make for that scenario, the following arithmetic applies:

Ten terrorists are approximately one of every 80,000 refugees who have come to this country since 2001. If refugee admissions are capped at 50,000 instead of the 110,000 President Obama announced for 2017 — a provision of Trump's executive order that has gotten less attention than its impact on refugees and other immigrants already approved for admission — and if the percentage of potential terrorists eluding detection remains the same as Sessions's list indicates, letting in 60,000 fewer refugees a year will keep out at most one might-be terrorist.

Here are a couple of other calculations:

By Sessions's count, one Iraqi has been convicted of a terror offense for every 30,000-plus Iraqi refugees in this country, or nearly twice the number of Iraqis admitted annually in recent years. If that statistic remains valid, we would have to ban all Iraqi refugees for two years to keep out one possible terrorist.

Blocking Syrian refugees, for whatever period, will keep out *no* terrorists, based on past experience, since none of the 18,000 Syrians admitted as refugees have been involved in terror. That's right. Syrian refugees, despite being singled out in Trump's immigration order for even more restrictive procedures than other refugees, have not been implicated in any terrorist case at all.

So, if you extrapolate from Sessions's analysis, the restrictions Trump advocates might keep *one* potentially dangerous person out of this country every year. That's right, one less possible terrorist in a year (to be precise, a year and four months). Moreover, again extrapolating from Sessions's data, that one person will be statistically unlikely to commit a violent act in the United States.

To be clear, this analysis is specifically about people admitted as refugees, not other immigrants. Terror crimes by foreign-born persons in all categories have been rare, but the incidence among refugees is even lower.

Regarding Sessions's statement of last August, his list included only half of the "at least 40 individuals" who the statement said were involved in terrorism

after coming to this country as refugees since September 11, 2001. That is two or three times more than most studies have reported, though still a tiny fraction of the more than three-quarters of a million refugees, more than one-third of them Muslims, who have been resettled in this country during that period.

Sessions did not say why only 20 of those 40 subjects were identified, or how he chose which cases to include. Since he presumably wanted to make the most persuasive possible argument for restrictions, it does not seem logical that he would have omitted any examples that clearly support his criticism of the refugee screening process. One can't be certain of that, without knowing which cases were left off the list.

So, did Sessions' examples illustrate that present rules for admitting refugees are too loose and pose too great a risk that terrorists will come here and harm Americans? To put it mildly, the evidence is less than convincing.

The conclusion is inescapable: Sessions's evidence did not demonstrate that refugee screening has been ineffective. It did not even come close. It does not support any argument that more restrictive refugee procedures will make Americans safer. It makes exactly the opposite case, and shows that he and the President he now serves are stoking public fear with falsehoods, not facts.

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