



How Robust Refugee Protection Policies Can Strengthen Human and National Security

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Executive Summary

This paper makes the case that refugee protection and national security should be viewed as complementary, not conflicting state goals. It argues that refugee protection can further the security of refugees, affected states, and the international community. Refugees and international migrants can also advance national security by contributing to a state's economic vitality, military strength, diplomatic standing, and civic values. The paper identifies several strategies that would, if implemented, promote both security and refugee protection. It also outlines additional steps that the US Congress should take to enhance US refugee protection policies and security. Finally, it argues for the efficacy of political engagement in support of pro-protection, pro-security policies, and against the assumption that political populism will invariably impede support for refugee protection.

I. Introduction

From its genesis in the debates of medieval canon lawyers, the concept of subjective human rights, including the right to self-preservation, has been premised on the idea of the moral equality of persons buttressed by a zone of human autonomy that permits the free exercise of rights (Siedentrop 2014, 245-46; Tierney 1997, 83-89). These intuitions ultimately gave rise, following the great upheaval of World War II, to a series of seminal human rights instruments that vested in states, individually and collectively, the core responsibility to defend human dignity, rights, and security.

Refugees and other forcibly displaced persons have fled violence, persecution and other untenable situations.¹ The overwhelming majority seeks a level of protection and security

¹ A refugee is a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.” Convention relating to the Status of Refugees (Geneva, 28 July 1951) 189 U.N.T.S. 137, *entered into force* 22 April 1954 [the Refugee Convention]; Protocol relating to the Status of Refugees (New York, 31 Jan. 1967) 606 U.N.T.S. 267, *entered into force* 4 Oct. 1967 [the Refugee Protocol]. The term “forcibly displaced” refers to refugees, asylum seekers (seeking refugee status in host states), and internally displaced persons (IDPs) (UNHCR 2015a). As used in this paper, the term “refugee protection” denotes more than the rights afforded refugees under the Refugee Convention and Protocol: it refers to the range of policies and programs to prevent and respond to forcible displacement.

to which they are legally entitled. At the same time, large-scale refugee and migrant streams include persons with a mix of motives (some dangerous) and aspirations (some illiberal).

States have a responsibility to prevent terrorist incursions and attacks: they exist, in part, to protect the lives and rights of their residents. However, they also have a responsibility to protect members of other states who are fleeing persecution and violence. In public and political discourse, refugees are often treated as a threat to national security and, in particular, as a source and conduit for terrorism. However, robust refugee protection policies do not cause and need not exacerbate the threat of terrorism. In fact, they can diminish it.

This paper addresses the intersection of refugee protection and national security, which should be conceived of as complementary, not competing, imperatives. It makes the case that: (1) refugee protection can advance both human and state security; (2) refugees and forcibly displaced persons can contribute to a state's vitality, economic well-being, diversity, core values, and military strength; and (3) refugee protection and national security strategies largely align.

Refugee protection and national security respond to the aspiration for human security, albeit from different perspectives and with different emphases. National security underscores the responsibility of states to protect the lives and safeguard the rights of their residents, while refugee protection speaks to the responsibility of states — individually and collectively — to defend the rights of persons who are at risk of persecution, either by their own states or by groups that their states cannot or will not control. National security also encompasses the protection of a state's economic vitality and fundamental values, including those values reflected in its commitments under domestic and international law.

A substantial body of literature has examined the nexus between international migration and terrorism (Adamson 2006; Leiken and Brooks 2006; Kerwin and Stock 2007; Martin 2009; Ginsburg 2006; and 2010), but there has been less scholarship on the relationships between refugee protection and national security (Koser and Cunningham 2015; Schmid 2016). That said, these two bodies of literature overlap, as do the lines between refugees and international migrants,² and between national security and counterterrorism.³

This paper builds on the paradigm described by Susan Ginsburg as “securing human mobility” (Ginsburg 2010), which speaks to the need for refugee- and migration-related security measures that go beyond default border control and immigration enforcement strategies. This framework recognizes the need to replace large-scale irregular flight with orderly, legal migration; to secure migration channels and infrastructure; to safeguard migrants in transit; to maximize the benefits of migration to all stakeholders in this process; and to foil terrorists, traffickers, and members of organized criminal groups.

After this introduction, the paper begins by describing, in Section II, the causes and

2 “International migration” refers to the movement of persons across national borders. The United Nations (UN) defines an “international migrant” as a person living outside his or her country of birth (UN DESA 2016, 4). In 2015, there were roughly 244 million international migrants (*ibid.*).

3 The US national security agenda identifies a range of priorities under the categories of security, prosperity, values and international order (White House 2015b). Combating the threat of terrorism constitutes one of eight priorities under the security rubric.

catastrophic dimensions of the global refugee crisis.⁴ Its third section outlines two of the paper's main themes; i.e., that refugee protection can further the security of refugees, affected states, and the international community, and that refugees and international migrants can advance national security by contributing to a state's economic vitality, military strength, diplomatic standing, and civic values.

Section IV examines the scope of the global terrorist threat, and the potential nexus between refugees, migrants, and terrorists. It concludes that terrorist violence leads to refugee flows and that robust screening can substantially diminish the risk of entry by terrorists posing as refugees.

Section V evaluates US migration-related security strategies following the September 11, 2001 attacks. This section describes the need for effective intelligence collection, information sharing, identity assurance, and strategies that promote national unity. It compares the US response to Muslim Americans and immigrants following the 9/11 attacks, with proposals to suspend the admission of Muslims and kill the families of terrorists. It also describes failed and misguided US security strategies and its overemphasis on US-Mexico border security.

Section VI describes the rigorous vetting and screening built into the US refugee resettlement system, and contrasts the US system with Europe's patchwork of migration-related security measures, which has exacerbated the vulnerability of European states to terrorist attacks.

Section VII offers three sets of policy recommendations. The first set starts from the premise that security and refugee protection reflect a common aspiration for human safety and well-being and that the primary refugee protection strategies promote national security, including strategies:

- to address refugee producing conditions through conflict prevention, mediation, and resolution;
- to strengthen the rule of law in refugee sending communities;
- to provide development and humanitarian assistance to the communities that host the vast majority of the world's refugees and forcibly displaced persons;
- to create conditions that permit the safe and voluntary return of refugees; and
- to screen refugees and migrants seeking entry to potential host countries.

The second set of recommendations outlines steps that the US Congress should take to enhance national security and refugee protection. These speak to improved congressional oversight and governance of the US Department of Homeland Security (DHS), the establishment of a US coordinator for refugee affairs, measures to prevent bona fide terrorists from purchasing firearms and explosives, and the need to depoliticize the US refugee resettlement program. The third argues for the efficacy of political engagement in support of pro-protection, pro-security policies.

⁴ The paper uses the term "refugee crisis" to describe the international community's failure to anticipate and respond effectively to refugee-producing conditions, the failure of responsibility sharing in meeting the needs and fostering the talents of refugees, and the massive human crisis that has resulted from these twin failures.

II. The Global Refugee Crisis: Causes, Consequences, and Response

At 65.3 million, the world's forcibly displaced population roughly equals in size the number of persons uprooted by World War II and its aftermath (UNHCR 2016; Proudfoot 1956). Moreover, the tenacity of the world's refugee-producing situations, the lack of progress in developing viable and permanent solutions for protracted refugees,⁵ and the regular emergence of new refugee-producing situations mean that this crisis will continue to intensify, absent a coordinated and generous global response (Nordland 2015).

As these situations reveal, if states do not successfully address the causes of refugee flows, they will invariably face the herculean task of responding to their human consequences

The world's "spiraling" refugee-producing crises reflect the failure of states to forego, prevent, and stem armed conflict, civil war, terrorism, and breakdowns in the rule of law (UNHCR 2015a, 5). Refugee-producing conflicts have regularly "erupted or reignited" and long-term crises "drag on with no solutions in sight."⁶ In October 2015, former United Nations High Commissioner for Refugees António Guterres spoke of the world's "shrinking humanitarian space," resulting from the "interlinked mega-crises in Syria and Iraq" and the displacement within the preceding year of 1.1 million Yemenis, 500,000 South Sudanese, 190,000 Burundians, and tens of thousands of Bangladeshis, stateless ethnic Rohingya, Central America children, and refugees from the Central African Republic (CAR), Nigeria, Ukraine, and the Democratic Republic of Congo (DRC) (UNHCR 2015d). In August 2016, the Office of the United Nations High Commissioner for Refugees (UNHCR) reported that 1.6 million South Sudanese were internally displaced and 930,000 had fled to the surrounding nations of Uganda, Sudan, DRC, CAR, Ethiopia, and Kenya, with more arriving daily (*UN News Centre* 2016). UN officials lament a vast "arc of crisis" which extends from "southwest Asia through the Middle East to the Horn of Africa and the Lake Chad Basin."⁷ As these situations reveal, if states do not successfully address the causes of refugee flows, they will invariably face the herculean task of responding to their human consequences.

The global refugee crisis can also be attributed, in part, to the finely honed strategies of developed states to deny access to protection through border externalization,⁸ immigration

5 UNHCR defines protracted refugees as those who have been displaced for five years or more and have no immediate prospects for durable solutions.

6 *The Causes and Consequences of Violent Extremism and the Role of Foreign Assistance: Hearing before the Senate Appropriations Subcommittee on State, Foreign Operations, and Related Programs*, 114th Cong. (2015) (written testimony of Kelly T. Clements, Deputy High Commissioner, United Nations High Commissioner for Refugees), <http://www.appropriations.senate.gov/imo/media/doc/041216%20-%20Clements%20-%20UNHCR%20-%20Testimony.pdf>.

7 *The Causes and Consequences of Violent Extremism and the Role of Foreign Assistance: Hearing before the Senate Appropriations Subcommittee on State, Foreign Operations, and Related Programs*, 114th Cong. (2015) (written testimony of Kelly T. Clements, Deputy High Commissioner, United Nations High Commissioner for Refugees), <http://www.appropriations.senate.gov/imo/media/doc/041216%20-%20Clements%20-%20UNHCR%20-%20Testimony.pdf>.

8 "Border externalization" refers to a range of developed state policies and practices that prevent refugees

enforcement, onerous procedures, and pinched interpretations that violate the spirit, intent and, often, the letter of international law (Schoenholtz 2015, 86-90; Hathaway and Gammeltoft-Hansen 2014).⁹ Border externalization strategies place the onus of refugee protection on less developed states in proximity to crises (UNGA 2016 § 112). They also force refugees to take perilous journeys, contribute to a public conception of refugees as a threat and burden, and bolster human trafficking syndicates (UNHCR 2015c).

One-half of the world's refugees are children (UNHCR 2016, 8), and their treatment can be particularly callous. Since 2014, for example, Mexico's immigration agency, Instituto Nacional de Migración, has intercepted tens of thousands of Central American unaccompanied children and families with young children who are fleeing some of the world's most violent communities.¹⁰ However, it has failed to inform most of those children of their right to seek recognition as refugees, to screen or question them for potential refugee claims, or to offer them legal assistance (HRW 39-56, 71-73). It has also detained, deterred and effectively prevented many children from pursuing refugee claims in violation of Mexican and international law (*ibid.*, 57-64).

The United States has underwritten Mexico's interception and detention program, while doing little to ensure screening and protection for those fleeing from violence and persecution in Central America and elsewhere. The United States has also built and populated its own vast "family detention" centers (USCCB/MRS and CMS 2015, 164).

The global refugee crisis can also be blamed on public indifference and insufficient state responsibility sharing in the form of traditional durable solutions and legal migration opportunities for refugees (UNHCR 2015d).¹¹ Like other human rights conventions, the Refugee Convention does not set forth a "precise balance of responsibility" between states or offer a blueprint for every contingency, but it recognizes refugee protection as a shared responsibility that should be addressed in a spirit of generosity and cooperation (Goodwin-Gill 2003, 25).

The preamble to the 1951 Refugee Convention acknowledges that because "asylum may place unduly heavy burdens on certain countries," a "satisfactory solution" to refugees cannot "be achieved without international co-operation."¹² Former United Nations High Commissioner for Refugees Antonio Guterres argued that nations "that host large numbers of refugees — thus producing a global public good — deserve particular focus" for humanitarian, equitable, and security reasons:

Many of these States are crucial pillars of peace and stability in their regions, and with conflicts and terrorism threatening to spill across borders, they de facto form the first line of defense for our collective security.

(UNHCR 2015d)

and other forcibly displaced persons from reaching territory where they might secure protection.

9 The 1951 Refugee Convention and 1967 Protocol.

10 Between FY 2013 and FY 2015, Mexico detained 67,600 children, including 35,000 in FY 2015 (HRW 2016, 86).

11 The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), established USRAP as part of a broader response that would include "humanitarian assistance ... in asylum areas" and "opportunities for resettlement or voluntary repatriation."

12 The 1951 Refugee Convention.

Yet the world's response to the communities that host large-scale refugee populations and that bear the burden for multiple humanitarian crises has been dismal. Only 35 percent of the needs of UN programs in Africa, for example, have been met,¹³ and UNHCR has received only 20 percent of the funding needed for the South Sudanese refugee crisis (*UN News Centre* 2016).

The Refugee Act of 1980, which established the US Refugee Admissions Program (USRAP), locates resettlement within a broader protection response that includes “humanitarian assistance” and “voluntary repatriation.”¹⁴ In fact, most refugees want to return home and there is a “growing consensus among states that repatriation constitutes the only feasible solution for the vast majority of refugees” (Long 2013 §§ 21, 197). However, the international community has failed to devote the level of resources or systematic engagement necessary to prevent refugee-producing conflicts, to mediate disputes, to engage difficult peace processes, or to create the conditions that would permit the safe return of refugees and other forcibly displaced persons. As a result, only 126,800 refugees were voluntarily repatriated in 2014, the smallest number in 30 years (UNHCR 2015a, 8)¹⁵ and 201,400 in 2015 (UNHCR 2016), the third lowest number in 20 years (*ibid.*, 25).¹⁶ These figures call into question safe, voluntary repatriation as a continued pillar of the global refugee protection system.

Moreover, repatriation and other durable solutions are less likely for the growing numbers of persons that have been displaced for extended periods (UNGA 2016 § 17; WEF 2016, 15). By the end of 2015, 6.7 million refugees lived in protracted situations; that is, they had been displaced for at least five years and had no immediate prospects of repatriation, incorporation into host communities, or third-country resettlement (UNHCR 2016, 8).¹⁷ The average protracted refugee situation has lasted 26 years (*ibid.*, 20). Some refugee camps and urban settings are now home to a third generation of displaced persons (UNGA 2016 § 2), including the 1.6 million Afghani refugees in Pakistan.¹⁸

Although less than 1 percent of refugees are ultimately resettled in third-countries (DOS 2015a), this option complements other durable solutions like safe repatriation and integration into host communities. UNHCR conservatively projected that 960,000 refugees would need to be resettled in 2015 (UNHCR 2014a, 9), but it referred only 134,000 cases for resettlement and only 107,100 refugees “departed” to a third-country, with 90 percent resettled in the United States, Canada, and Australia (UNHCR 2016, 26).

For some refugees, third-country resettlement constitutes their only viable option. US

13 *The Causes and Consequences of Violent Extremism and the Role of Foreign Assistance: Hearing before the Senate Appropriations Subcommittee on State, Foreign Operations, and Related Programs*, 114th Cong. (2015) (written testimony of Kelly T. Clements, Deputy High Commissioner, United Nations High Commissioner for Refugees), <http://www.appropriations.senate.gov/imo/media/doc/041216%20-%20Clements%20-%20UNHCR%20-%20Testimony.pdf>.

14 Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), § 101 (a).

15 The DRC and Mali received most of the repatriated refugees in 2014.

16 In 2015, 83 percent of voluntarily repatriated refugees returned to Afghanistan, Sudan, Somali, CAR, and Côte d'Ivoire (UNHCR 2016, 8).

17 Eighty percent of IDPs have been displaced for more than five years (UNHCR 2015c).

18 According to UN officials, an additional 380,000 Afghans “were newly displaced in 2015” (Pitterman 2016).

refugee resettlement “priority” cases fit within this category. Former DHS Secretaries Janet Napolitano and Michael Chertoff describe the refugees eligible for resettlement in the United States as “the most vulnerable — particularly survivors of violence and torture, those with severe medical conditions, and women and children.”¹⁹ This population also includes persons at risk because they worked with Americans and US institutions in Iraq and Afghanistan.²⁰

The failure of states to protect can be seen starkly in the Syrian civil war and the humanitarian disaster that has emanated from it. Now in its sixth year, the war has claimed an estimated 400,000 lives, and includes a dizzying array of participants, including global and regional powers, the Assad regime, the Islamic State of Iraq and the Levant (ISIL), the al-Nusra Front (which primarily seeks an Islamic state in Syria), and a large number of brigades and “gangs” that vie for control over small areas.

An estimated 13.5 million persons in Syria need humanitarian aid, 6.5 million are internally displaced, and 4.5 million live in besieged or hard-to-reach regions (European Commission 2016). The Syrian crisis has convulsed the Middle East, exhausted the resources of Syria’s neighbors, shaken the foundations of the European Union (EU), led to thousands of migrant deaths,²¹ and become a global catastrophe. By August 2016, 4.81 million Syrians had been registered as refugees or were awaiting registration in Turkey (2.72 million), Lebanon (1.03 million), Jordan (656,198), Iraq (249,395), and Egypt (114,911), with smaller numbers in North Africa (3RP 2016).²² These five nations have a combined GDP of \$1.4 trillion, or \$1.1 trillion (if Egypt is excluded).²³ Their combined population is roughly 220 million or 128.5 million, excluding Egypt (UN DESA 2015, 14-17).²⁴ In comparison, the US GDP is \$17.4 trillion (World Bank 2015), and its population is 321.8 million (UN DESA 2015, 17).

The international community has a strong interest in an effective, coordinated response to the Syrian refugee crisis, but state contributions to international institutions and direct support have been decidedly unequal to the need. By the end of January 2016, the United Nations had received only 61 percent of its \$4.3 billion humanitarian appeal for Syrian

19 Letter from Janet Napolitano and Michael Chertoff, former DHS secretaries, to President Barack Obama (Nov. 19, 2015), <https://www.whitehouse.gov/blog/2015/11/19/two-former-homeland-security-secretaries-wrote-president-obama-safely-welcoming>.

20 *Admitting Syrian Refugees: The Intelligence Void and the Escalating Homeland Security Threat: Before the House Committee on Homeland Security, Subcommittee on Counterterrorism and Intelligences*, 114th Cong. (2014) (testimony of Daveed Gartenstein-Ross, Senior Fellow, Foundation for Defense of Democracies Chief Executive Officer, Valens Global), http://www.defenddemocracy.org/content/uploads/documents/Gartenstein_Ross_Admitting_Syrian_Refugees.pdf.

21 The International Organization for Migration (IOM) reports that 5,600 migrants perished in 2015, including 3,765 in the Mediterranean (IOM 2016). IOM records only deaths reported by the United Nations, state, media and non-government organizations (NGOs). These figures significantly understate actual migrant deaths. During the first eight months of 2016, the pace of migrant deaths increased compared to the same period in 2015, with a higher concentration of deaths in the Mediterranean.

22 Since the beginning of the October 2015 military offensive by the Syrian Arab Army, 137,802 have been displaced from Aleppo, Idleb, Hama, and Homs (ECHO 2016).

23 The GDPs of the states hosting the overwhelming majority of Syrian refugees are, respectively, Turkey (\$800 billion), Egypt (\$287 billion), Iraq (\$221 billion), Lebanon (\$46 billion), and Jordan (\$36 billion) (World Bank 2015).

24 The populations of the states hosting the most Syrian refugees are Turkey (78.7 million), Lebanon (5.8 million), Jordan (7.6 million), Iraq (36.4 million) and Egypt (91.5 million) (UN DESA 2015, 14-17).

refugees for 2015.²⁵ Funding shortfalls, in turn, have contributed to crises in refugee housing, health care, food, water, sanitation, education, and reception. The high rate of Syrian refugee girls forced into marriages starkly reflects the level of desperation among refugees (Save the Children 2014, 3-5; UNICEF 2014, 27). The girls' parents often view marriage as the only way available to support their families, protect their daughters, or otherwise escape their predicament (*ibid.*).

Condemned to marginal, insecure, and provisional lives in host states, hundreds of thousands of Syrians and other refugees have embarked on perilous journeys to Europe (Mahecic 2016; Grant 2015), overwhelming the screening capacity of Greece and Italy. The resulting crisis has undermined support for the Schengen Agreement's passport-free movement of residents within participating EU states, and eroded confidence in the ability of EU states to work in solidarity to address common challenges. Drastic cuts in food aid to refugees by the underfunded UN World Food Programme, the prospect of asylum in Europe, and diminishing hopes that the Assad regime will be replaced have also contributed to the onward migration of Syrians from neighboring states (Schmid 2016, 47).

As a result of these and other developments, the number of first-time asylum applicants in the EU-28 reached 1.26 million in 2015, with 29 percent from Syria (Eurostat 2016).²⁶ Germany alone registered 1.1 million first-time asylum-seekers in 2015 (Pandy 2016), more than one-third from Syria. Overall, between April 2011 and March 2016, more than one million Syrian asylum applications were filed in European nations (3RP 2016).

In a slightly shorter time period between 2012 and 2015, the United States granted asylum to 242 Syrians in immigration court and to an unreported (but modest) number of Syrians who made "affirmative" asylum claims to US Citizenship and Immigration Services (USCIS) (DOJ 2016). The United States has also extended temporary protected status (TPS) to roughly 5,800 Syrians and an additional 2,500 may be able to apply under the most recent TPS redesignation (Dinan 2016). TPS confers a reprieve from removal and work authorization for designated nationals who arrived before a designated date (Bergeron 2014, 25), in this case March 29, 2012.²⁷ Subsequently, DHS has redesignated Syria for TPS three times, most recently on August 1, 2016 (USCIS 2016). Unlike an extension of TPS, a redesignation covers nationals of designated states who arrive after the earlier designation and redesignation dates (Kerwin 2014, 57).

25 Between FY 2012 and FY 2015, the United States contributed \$4.53 billion in humanitarian funding for Syrians, including \$2.1 billion from the US Department of State's (DOS's) Bureau of Population, Refugees and Migration (PRM), \$1.6 billion from US Agency for International Development (USAID), Office of Food for Peace, and \$866 million through the USAID Office of Foreign Disaster Assistance (USAID 2015). It committed to contribute an additional \$600 million in aid at the February 4, 2016 London donors' conference (ECHO 2016). The EU and its member states have contributed €5 billion for relief and humanitarian aid in Syria, Lebanon, Jordan, Iraq, Turkey and Egypt, and pledged an additional €3 billion at the donors' conference in London (*ibid.*).

26 In stark contrast, the Gulf Cooperation Council states — Qatar, United Arab Emirates, Saudi Arabia, Kuwait, Bahrain, and Oman — failed to resettle any Syrian refugees between the war's onset and late 2015 (Amnesty 2015).

27 Because it does not lead to lawful permanent resident status and typically extends well beyond the initial designation period, TPS has been criticized for locking beneficiaries into a "legal limbo" that does not lead to permanent protection or integration (Bergeron 2014, 29).

While the United States has accepted roughly 70 percent of all UNHCR-submitted refugees for resettlement in recent years (UNHCR 2014a, 61; UNHCR 2015b, 53), from the beginning of FY 2012 through September 6, 2016, the United States admitted 12,910 Syrians for resettlement,²⁸ which is roughly one-fourth of 1 percent of Syrian refugees. Its admission of 11,056 Syrian refugees in slightly more than eleven months of FY 2016,²⁹ exceeds its FY 2016 goal of 10,000 Syrian admissions (DOS, DHS, and HHS 2015, iv).

III. Refugee Protection: A Potential Source of Security

Security-related fears do not constitute the only barrier to generous refugee policies. Concerns over social cohesion, social order, native employment and economic prospects also underlie anti-refugee sentiment. Large-scale refugee admissions have never enjoyed high levels of public support in the United States (DeSilver 2015). Yet in recent years refugee-related terrorism concerns have been particularly tenacious in the United States, Europe, Kenya, and elsewhere, contributing to the backlash against refugees and the uneven and parsimonious response to the global refugee crisis.

Refugee protection and legal migration policies can also further the rule-of-law by minimizing irregular migration, curbing the use of human smugglers, limiting the risk of trafficking, and making life more difficult for terrorists who depend upon and often profit from smuggling networks

Refugee protection and national security are inextricably linked needs. Both reflect a desire for safety and security. However, they approach this aspiration from different perspectives and have different emphases. Refugee protection arises from an ethic of solidarity rooted in a belief in human dignity and equality. It reflects the enlightened self-interest of states in a “stable and moral world, one in which peace and respect for human rights are pervasive and firmly rooted” (Helton 2002, 120).

In its thick sense, national security refers to more than national defense and homeland security. It speaks to the protection of “a people, territory and way of life” (Jordan et al. 2009, 3-4). It “is not an end in itself,” but a means to preserve a nation’s “values, principles, and way of life” (DHS 2010, v). It underscores a state’s responsibility to defend its members from foreign domination and to safeguard their rights at home and abroad, and also to uphold the rights of imperiled noncitizens at its borders, in transit through its territory, and (in extreme circumstances like genocide) in their states of origin.

States often use the language of security, crisis, and risk to justify harsh policy responses to refugees and other forcibly displaced persons. Yet this language also points to the potential complementarity between security and refugee protection. Conflict and terrorism create insecurity for their victims, for targeted and neighboring states, and for the international community. As a result, they require both security and protection responses.

28 US Department of State Bureau of Population, Refugees, and Migration (DOS/PRM), “Office of Admissions – Refugee Processing Center, Summary of Refugee Admissions from 1-Oct-2011 to 6-September-2016” (on file with author).

29 Ibid.

A survey of 750 “experts and decision-makers” from the World Economic Forum’s (WEF’s) “multistakeholder communities” identified “large-scale involuntary migration” as the most likely “global risk” and one “strongly interconnected with other risks that are considered highly worrisome in the longer term,” including state collapse, interstate conflict, climate change, and water crises (WEF 2016, 6, 15).³⁰ The survey identified the international refugee crisis as one of three risks that could “give rise to cascading risks” (ibid., 7). To address this crisis, the WEF’s report argued for a comprehensive response to interstate conflict and terrorist violence, as well as to the human insecurity caused by protracted refugee situations, ineffective integration, and inadequate “global humanitarian architecture.” (ibid., 15-16). In other words, its diagnosis (crisis and risk) led it to identify security and protection as complementary needs.

Michael Chertoff holds a similar position on the need for integrated refugee protection and security strategies. In a June 2016 interview, he said:

[T]he sheer number of people moving not only puts those people themselves at risk in terms of their own security, but can cause a real dislocation in society ... You also don’t want to have a situation where people are just stagnating in camps year in and year out because you’re creating essentially a hospitable environment for people to recruit extremists and criminals. So I think you’ve got to look at the system end-to-end. Part of that means dealing with countries that are failed states ... Where you do have war and you do have flight, you need to have a robust system for housing people, continuing to educate them, and processing them in a secure but reasonable timeframe. And frankly it’s enough of a global issue that it warrants the whole global community kicking in money to make sure that could be operated in an efficient way. And finally when people do qualify for asylum and are moved into host countries, there has to be a process in place to integrate them, get them educated, make sure they can find work so they become productive members of society and not simply embittered clusters of people who are marginalized.³¹

Rather than a threat, robust refugee protection and migration policies can positively influence three “core areas of state power: economic, military and diplomatic” (Adamson 2006, 185). They can advance a state’s economic interests because in a globalized, interconnected world “no nation can prosper, or even achieve modest economic success, without ready contact with the rest of the world” (Martin 2009, 4). In addition, they can help to meet labor needs (Chamie 2013), improve the productivity and prospects of millions (Clemens, Montenegro, and Pritchett 2008), and contribute to the development of source and destination nations (UNGA 2013). Refugee protection and legal migration policies can also further the rule-of-law by minimizing irregular migration, curbing the use of human smugglers, limiting the risk of trafficking, and making life more difficult for terrorists who depend upon and often profit from smuggling networks (Ginsburg 2010, 58-65; Schmid 2016, 27-29).

Refugees have historically made important economic, scientific, diplomatic, cultural, and ethical contributions to their new states. Prominent US refugees have included Albert

30 It defined global risk as “an uncertain event or condition that, if it occurs, can cause significant negative impact for several countries or industries within the next 10 years” (WEF 2016, 6).

31 CMS interview with Michael Chertoff, former DHS Secretary and Assistant Attorney General, DOJ Criminal Division (June 9, 2016), <http://cmsny.org/podcast-secretary-michael-chertoff/>.

Einstein, Enrico Fermi, Elie Weisel, Madeleine Albright, Andrew Grove, and Sergey Brin. The Council on Foreign Relations' Independent Task Force on US Immigration Policy cautioned that to "keep out talented immigrants or significantly disrupt legitimate cross-border traffic or commerce" would weaken "the long-term foundations of America's economy and military strength, and consequently its security" (CFR 2009, 21). Noncitizens also serve in substantial and growing numbers in the US armed forces to which they bring lower attrition rates than citizens, "a track record of superior performance" and linguistic and cultural diversity that supports US counterterrorism objectives (Hattiangadi et al. 2005, 24, 55-67, 83, 87).

The UN 2030 Sustainable Development Goals (SDG), adopted in September 2015, recognized the importance of migration as a potential instrument of human and economic development by setting development targets related to the protection of labor rights, orderly and safe migration, and reduced remittance fees (UNGA 2015). The SDG migration-related targets speak to the need to channel what often begin as poorly managed, irregular refugee and migrant flows into legal migration and refugee protection systems that maximize the development potential of refugees, migrants, and source and destination communities.

From a foreign policy perspective, refugee protection can help states prevail "in the battle of ideas, in a contest for the support and even the affection of the world's population" (Martin 2009, 4). It can allow states to distinguish themselves from geopolitical rivals and to appeal to global public opinion.³² The US refugee program, for example, seeks to further "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."³³ It has also supported specific foreign policy objectives like protection of Soviet Jews and other religious minorities, while responding to domestic constituencies. Resettlement can also promote the stability of allied states that host large refugee populations and, as illustrated by the 1989 Comprehensive Plan of Action (CPA) concerning Indochinese refugees, can preserve the availability of protection in nations of first asylum.³⁴

In the United States, refugees serve as a continuous, living reminder of the nation's core values, including its commitment to religious liberty. And, as the Obama administration has recognized, US success in promoting its security and values abroad turns on its adherence to its values "at home" (White House 2015b, 19).

National security has traditionally been defined by state interests or collective identity which, in the post-Westphalian era, has been based on "nationalism" (Adamson 2006,

32 For an extended discussion of why national security concerns demand an appeal to global public opinion, see Pistone and Hoeffner (2011, 637-58, 674-76).

33 Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), § 101 (a).

34 After the Vietnam War, the United States "became the principal architect of the entire resettlement system" (Suhrke 1998, 406, 413). Its response offers a framework for a comprehensive, integrated response to large-scale refugee crises. Together, the 1979 Geneva conference which established the Orderly Departure Program (ODP) and the second Geneva conference of June 1989 which adopted the Comprehensive Plan of Action (CPA) provided for direct, legal departures from Vietnam, temporary protection in nations of first asylum, and large-scale, third-country refugee resettlement. The CPA also provided for the repatriation of those not deemed to be refugees. Not counting direct departures from Vietnam under the ODP, the United States took in 822,977 of the 1.3 million Indochinese refugees resettled worldwide between 1979 and 1995 (UNHCR 2010, 99).

181). In a globalized world, international migration “calls into question traditional models of national security, which assume a unitary national identity from which a set of national interests can be derived” (ibid., 175).

Refugees and migrants can also make crucial contributions to the struggle against terrorism. Indeed, following the 9/11 terrorist attacks, law enforcement and intelligence experts recognized the need to engage communities in which terrorists might attempt to hide, to draw on immigrants as a source of intelligence and support, and to enlist them in counterterror efforts (Kerwin and Stock 2007, 418-19). They insisted (correctly) that immigrant communities have a strong interest and incentive to cooperate in responding to a shared threat. Not only do the members of these communities overwhelmingly reject extremist ideologies and terrorism, but they bear the brunt of hate crimes and vilification by anti-immigrant extremists following attacks. In fact, tips from community or family members helped to expose one-quarter of the 330 cases of persons charged with jihadist terrorist offenses in the United States since 9/11 (Bergen 2016, 101-02).

Persons fleeing persecution and violence seek a degree of security denied them in their countries of origin, an aspiration that mirrors the desire for public safety by citizens in receiving communities

Finally, it should be emphasized that the Refugee Convention does not apply to persons who have “committed a crime against peace, a war crime, or a crime against humanity,” a “serious non-political crime outside the country of refuge” pre-admission, or have been “guilty of acts contrary to the purposes and principles of the United Nations.”³⁵ Nor does the right to *non-refoulement* extend to a refugee who can reasonably be regarded “as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”³⁶

A December 1, 2015 letter to the US Congress from a group of former US diplomatic, intelligence, military, and homeland security officials — including Madeleine Albright, Henry Kissinger, David Petraeus, and George Schultz — made this point plainly, stating that refugees “are victims, not perpetrators, of terrorism.”³⁷ One-half of the world’s refugees are children, large numbers have survived violence and torture, and many have severe or chronic medical conditions. Persons fleeing persecution and violence seek a degree of security denied them in their countries of origin, an aspiration that mirrors the desire for public safety by citizens in receiving communities.

35 The 1951 Refugee Convention, Art. 1(F).

36 The 1951 Refugee Convention, Art. 33(2).

37 Letter from 21 former US military, intelligence, and diplomatic officials to Congress (Dec. 1, 2015), <http://www.humanrightsfirst.org/sites/default/files/FormerNatSecOfficialsLetterRefugees.pdf>.

IV. National Security and the Terrorist Threat

The term terrorism arose in response to the French Revolution's Reign of Terror and was later used to describe state actors like the National Socialist Party and Stalinist Russia (Aly 2015, 85-86). In recent years, this phenomenon has become associated with violence against civilians or non-combatants by non-state actors. The Global Terrorism Index produced by the Institute for Economics and Peace defines terrorism as "the threatened or actual use of illegal force and violence by a non-state actor to attain a political, economic, religious, or social goal through fear, coercion, or intimidation" (IEP 2015, 6). Commentators regularly characterize terrorism as a tactic, not an enemy or an ideology, an observation that doubled as a criticism of the open-ended nature of the US war on terrorism. This "tactic" is often adopted by non-state actors in asymmetric conflicts with states.

The line between state and non-state terrorism can be blurred (WEF 2016, 31). On the one hand, terrorist groups like ISIL, the Revolutionary Armed Forces of Colombia (FARC), and al-Shabaab, have assumed some of the responsibilities of states (Glazzard 2015, 81). On the other hand, many states use terror as an instrument of repression, domination, and social control (Schmid 2016, 14). For instance, the Assad regime has terrorized Syrians in rebel-held areas and other perceived opponents through the widespread use of torture, extrajudicial killing, barrel bombs, and chemical weapons.

A. Scope and Dimensions of the Non-State Terrorist Threat

In recent years, terrorism-related killings have been overwhelmingly concentrated in a handful of nations. In 2014 terrorists carried out 13,463 attacks which resulted in 32,727 deaths, including of 6,200 perpetrators (START 2015, 3-6). Sixty percent of the attacks took place in Iraq, Pakistan, Afghanistan, India, and Nigeria, and 78 percent of fatalities occurred in Iraq, Nigeria, Afghanistan, Pakistan, and Syria (ibid.). ISIL or "Daesh" (an Arabic language acronym for ISIL) committed 17 percent of the attacks, followed by the Taliban in Afghanistan, al-Shabaab in Somalia, Boko Haram in Nigeria, and Maoists in India (ibid., 11).

Nine of the 20 deadliest attacks occurred in Nigeria (ibid., 9). Indeed, in 2014, the number of Boko Haram *killings* exceeded even those by ISIL (IEP 2015, 22, 41), to whom it declared allegiance in March 2015 (Almukhtar 2015). Boko Haram began 2015 with the January 3–7 massacre of an estimated 2,000 residents of the town of Baga in Nigeria's Borno state and ended the year with an offensive in Maiduguri, home to an estimated one million refugees and the capital of Borno state, and in the town of Madagali, southwest of Maiduguri (Sawab 2015).

Between 2000 and 2014, the 3,659 terrorist killings in Western states accounted for 2.6 percent of the world's total, with 91 percent of that number attributable to the September 11, 2001 attacks, the Madrid train bombings on March 11, 2004, the July 22, 2011 murders of 77 in Norway, and the three London bombings on July 7, 2005 which killed 56 (IEP 2015, 50-51).³⁸

38 Between 2006 and 2014, lone wolf attacks represented 70 percent of all terrorism-related killings in Western states (IEP 2015, 54-58).

Jihadist killings in the United States since 9/11 have invariably been committed by “lone wolves” acting without guidance, direction, or assistance from terrorist groups (ibid., 69), a phenomenon known as “leaderless jihad” (Bergen 2016, 52-53).³⁹ Forty-five persons were killed in the nine jihadist terrorist attacks in the United States between 2002 and 2015 (New America Foundation 2015).⁴⁰ Fifty more persons were killed in the June 12, 2016 terrorist attack at a gay nightclub in Orlando, Florida.⁴¹

The absence of large-scale coordinated attacks since 9/11 speaks, in part, to the degree of public support for the counterterror struggle (Brooks 2011, 27).⁴² An analysis of US terrorist plots in the decade after 9/11 concluded that those “most likely to succeed” involved “accessible weapons (e.g., firearms) and small numbers of individuals that require minimal skill and pre-operational steps” (ibid., 39). Intelligence and law enforcement officials believe that attacks against soft targets, modeled on the November 26–29, 2008 attacks in Mumbai by Lashkar-e-Taiba terrorists which killed 172 persons, have a greater probability of success than complex and ambitious 9/11-style attacks (Riedel 2015). Former New York City Police Department (NYPD) Commissioner Raymond Kelly characterized the November 13, 2015 Paris attacks as “shockingly simple” to plan and implement (Daly 2015).

The statistics on jihadist killings in the United States help to contextualize the risk of a catastrophic attack by a person admitted as a refugee, a very small category of well-screened and vetted residents. According to the US Department of State (DOS), “only about a dozen” of the nearly 785,000 refugees admitted since 9/11 have been “arrested or removed from the U.S. due to terrorism concerns” which preceded their admission (Ye He Lee 2015). There have been no domestic terrorist attacks by refugees during this period.

However, these figures hardly offer cause for complacency. Terrorists will continue to try to exploit all admission channels to targeted states (Adamson 2006, 195; Leiken and Brooke 2006, 510), including refugee programs (Hattem 2016). In addition, ISIL, al-Qaeda, and other groups are committed to inflicting catastrophic damage on their near and far enemies. Military and intelligence officials have repeatedly warned of the risk of terrorist attacks against Western states using improvised devices containing chemical, biological, radiological, or nuclear (CBRN) materials (Rudischhauser 2015). In 2004, the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) warned that al-Qaeda had been trying to secure “weapons of mass destruction” for at least a decade and viewed the United States as a “prime target” (9/11 Commission, 381), which it remains today.

B. The Refugee/Migrant and Terrorism Nexus

The need for refugee-related security measures assumes a connection between refugees and a security threat. To develop effective security strategies and robust refugee protection

39 These terrorists could also aptly be described as mass murderers.

40 These numbers reflect the success of US intelligence and law enforcement agencies in disrupting terrorist plots and preventing large-scale attacks since 9/11.

41 In that case, Omar Mateen, a US citizen of Afghani descent, claimed allegiance to ISIL, but had no connection to the group and seemed to act from mixed motives (Apuzzo and Lichtblau 2016).

42 The same conditions do not obtain in some European communities.

systems requires clarity on the relationship between the two. The nexus between terrorism and refugees can take a number of forms.

First, state (political) terror, internal conflict, and international conflict are correlated with high rates of terrorism (IEP 2015, 67-69; Schmid 2016, 17).⁴³ An analysis of terrorist attacks by non-state or sub-state actors resulting in at least one fatality between 1989 and 2014 found that 92 percent occurred where levels of political terror were very high, 55 percent in nations undergoing internal armed conflict, and 33 percent in nations embroiled in an “internationalized” conflict (IEP 2015, 70-72). Conversely, terrorist attacks occurred at very low rates (less than 1 percent) in states with no political terror or ongoing conflict (ibid., 72).⁴⁴

Second, terrorist violence results in refugee flows and displacement. The 11 nations that experienced more than 500 terrorism-related deaths in 2014 produced the highest average numbers of refugees and IDPs (IEP 2015, 59-60). Similarly, high fatality rates from terrorism in Syria, Iraq, Pakistan, and Afghanistan strongly correspond to numbers of first-time asylum seekers in Europe (Schmid 2016, 27). Given their flight from nations with high levels of terrorist violence, it stands to reason that refugees would not typically opt to migrate to those same states. In fact, of the 10 largest refugee-hosting nations, only Pakistan ranks among the top 10 countries affected by terrorist violence (IEP 2015, 59-60).

Forced displacement has been a goal of Lord’s Resistance Army, Boko Haram, and other terrorist groups (Koser and Cunningham 2015, 83).⁴⁵ ISIL has killed, subjugated and driven religious minorities and others from its territory, while appealing to Muslim refugees to return “home,” warning that they will be forced to convert in infidel lands (Zelin 2015). In a modern version of draining the sea (civilians) to catch the fish (insurgents), the Assad regime has targeted civilian populations and infrastructure, leading to massive displacement, in order to isolate and weaken rebel factions (Schmid 2016, 20).

While both state terror and non-state terrorism lead to refugee flows, it does not follow that refugees negatively impact security in host states. A recent analysis compared UN data on the location of refugees, IDPs, asylum seekers and returnees, with subnational data on conflict onset from 1989 to 2008. The study concluded that refugee host communities tend “to experience *more* stability over time,” possibly due to the influx of humanitarian and security actors that often accompany refugees. It found “no evidence” that refugee communities increase the likelihood of conflict or facilitate “regional conflict diffusion” (Shaver and Zhou 2015, 2, 24).

Most resettled refugees do not fit terrorist profiles. Former DHS Secretaries Napolitano and Chertoff described Syrian refugees as “the most vulnerable — particularly survivors of violence and torture, those with severe medical conditions, and women and children.”⁴⁶

43 The Global Terrorist Index defines political terror as “state sanctioned or state perpetrated violence against its citizens” (IEP 2015, 70).

44 In Organisation for Economic Co-operation and Development (OECD) nations, terrorism is associated with “social disenfranchisement,” as reflected in youth unemployment, low confidence in democracy and the press, and other factors (IEP 2015, 69).

45 Forced migration from has also been a strategic goal of the Assad regime and of many past regimes, like the Slobodan Milosevic’s regime in Serbia.

46 Letter from Janet Napolitano and Michael Chertoff, former DHS Secretaries, to President Barack Obama

The United States has also prioritized the resettlement of Iraqis and Afghans who worked at great peril with the US military and other US institutions.

Third, although refugee settlement does not increase the *overall* probability of conflict in a region (Shaver and Zhou 2015, 2, 24), international migration can “provide conduits for the diffusion of network-based forms of political violence and instability,” which particularly threaten less stable and weaker states (Adamson 2006, 191, 198).

In El Salvador, Guatemala and Honduras, for example, transnational criminal syndicates, fueled in part by US deportation policies and trafficked firearms, have subverted state institutions (CIDEHUM and UNHCR 2012, 11, 13). Gangs (*maras*) subjugate many communities in these states, extorting monies from businesses and individuals, conscripting youth, and effectively controlling access to public institutions like schools. Gang violence and recruitment has, in turn, led to the migration of tens of thousands of unaccompanied children from Mexico and Central America, often to join parents who previously migrated to the United States (Donato and Sisk 2015, 73). As a measure of their desperation, US-resident parents have chosen to hire smugglers, rather than expose their children to the risk of gang violence during the lengthy application processing period for refugee or humanitarian admission to the United States (Hennessy-Fiske 2016).

Likewise, failed states and the effective absence of states in particular regions have paved the way for terrorist groups to establish strongholds in Somalia (al-Shabaab), Uganda (Lord’s Resistance Army), and elsewhere. These groups, in turn, have displaced millions (Schmid 2016, 22-23).

Fourth, counterterror and counter-insurgency initiatives, particularly in terrorist strongholds, can also cause large-scale displacement (*ibid.*, 46-47). Following 9/11, counterterror experts voiced concern over the ability of al-Qaeda and the Taliban to operate and plan attacks from ungoverned “safe havens” like the Waziristan tribal region on the Afghanistan and Pakistan borders (Rotberg 2002). A Pakistani military offensive in this region in 2014 led to the displacement of an estimated one million civilians (Schmid 2016, 46).⁴⁷

Fifth, nationals of Western states have increasingly travelled abroad to receive training and to fight with terrorist groups. As of December 2015, an estimated 27,000 to 31,000 persons from 86 nations had traveled to Syria and Iraq to join ISIL and other extremist groups, including more than 5,000 from Europe (primarily from France, the United Kingdom, Germany, and Belgium) and roughly 250 each from the United States and Australia (Soufan Group, 4, 7-9, 12). Some terrorists, particularly those who can no longer return home, move from one jihadist conflict to the next (Schmid 2016, 43).

Jihadists have also returned to European and other Western states in high numbers, posing a substantial threat of violence and accounting for a large percentage of terrorist plots in Western states (*ibid.*, 39, 42-43).⁴⁸ An examination of 330 persons charged with a jihadist

(Nov. 19, 2015), <https://www.whitehouse.gov/blog/2015/11/19/two-former-homeland-security-secretaries-wrote-president-obama-safely-welcoming>.

47 The Iraq War displaced an estimated 2.7 million persons.

48 Counterterror expert Bruce Hoffman argues that “while the threat of homegrown violent extremism ... is now accepted as fact, there is still surprisingly little consensus on the potentially far greater danger posed by radicalized foreign fighters trained by ISIS, returning to their native or adopted homelands in the West ...”

terrorist-related offence in the United States since 9/11 found that nearly one-half had traveled overseas to join a jihadist group or had attempted to do so (Bergen 2016, 168-69).⁴⁹

Sixth, the migration-related security threat most commonly articulated in media and policy circles involves the potential entry of foreign terrorist operatives into states, whether for reconnaissance, as “sleepers” for future mobilization, or as “muscle” for imminent attacks. Some threats originate in Western states. US citizen David Headley, for example, made seven reconnaissance trips in preparation for Lashkar-e-Taiba’s November 26–29, 2008 attacks in Mumbai (Bergen 2016, 193).

International migrants hardly constitute the only source of the terrorist threat. A study of 373 “charged, convicted, and/or killed” jihadi terrorists from “transnational Sunni Islamist terrorist groups” operating in Western Europe and North America from 1993 through December 14, 2004 concluded that 41 percent were nationals of EU or North American states (Leiken and Brooke 2016, 507-08). However it also found “some degree of overlap” between immigration and terrorist networks, particularly of North African immigrants in the European Union and Canada (ibid., 509, 513).

Terrorists will continue to probe the security of migration channels and try to enter targeted states in whatever ways might be available to them, as evidenced by the entry of Tashfeen Malik, one of the two San Bernardino killers, on an F-1 (fiancée) visa. Perhaps the most troubling breaches of the US refugee program have involved Iraqi nationals arrested prior to planned attacks.⁵⁰ The first case involved Waad Alwan and Mohanad Hammadi, who were admitted as refugees in 2009 (DOJ 2013), despite having participated in the insurgency against US troops in Iraq and Afghanistan. After settling in Bowling Green, Kentucky, they became the subject of an FBI sting operation (based on a tip) and sought to purchase weapons for al Qaeda in Iraq (AQI), a predecessor to ISIL.

The Federal Bureau of Investigation (FBI) subsequently found Alwan’s finger and palm prints on the base of a cordless phone which had been connected to unexploded IEDs in Iraq.⁵¹ As a result of this case, the federal government halted Iraqi refugee admissions for several months, intensified screening of Iraqis (Meek and Ross 2015; Madhani 2012), and eliminated delays in processing weapons for biometric and other evidence.

49 Beyond ISIL, the al Qaeda affiliated group Jabhat al-Nusra or the al-Nusra Front (in northwestern Syria), the core al Qaeda group (the Khorasan Group) in Syria, and al Qaeda in the Arabian Peninsula, present a “high threat” of terrorism in Europe, the United States and against US and Western interests and institutions. *The Syrian Refugee Crisis and US National Security: Hearing before the House Judiciary Committee, Subcommittee on Immigration and Border Security*, 114th Cong. (2015) (testimony of Seth G. Jones, RAND Office of External Affairs), http://judiciary.house.gov/_cache/files/7d555810-97fb-4632-bb44-a44579ff2f32/11.19.15-seth-jones-testimony.pdf.

50 For this reason, some view these arrests as a counterterrorism and law enforcement success, an example of the “system working.”

51 The phone was stored in an FBI repository for ordnance from conflict zones in Iraq, Afghanistan, and elsewhere. Alwan pled guilty to conspiring to kill and to the use of a weapon of mass destruction (explosives) against US nationals abroad; “distributing information on the manufacture and use of IEDs; attempting to provide material support to terrorists and AQI; and conspiring to transfer, possess and export Stinger missiles.” Hammadi pled guilty to “attempting to provide material support to terrorists and AQI; conspiring to transfer, possess and export Stinger missiles; and making a false statement in an immigration application” (DOJ 2013).

In January 2016, the US Department of Justice (DOJ) announced the arrests of two more Iraqi nationals, Aws Mohammed Younis Al-Jayab and Omar Faraj Saeed Al Hardan, who entered as refugees. Al-Jayab allegedly left the United States to fight in Syria with terrorist groups between November 2013 and January 2014. Unlike Al-Jayab, Al Hardan apparently became radicalized after his arrival. He allegedly conspired with Al Jayab to fight for ISIL and to commit terrorist acts in the United States (Lozano 2016).

Seventh, terrorist groups have sought to recruit and radicalize vulnerable, often long-term refugees (Koser and Cunningham 2015, 83-84; Schmid 2016, 32-37). Some scholars have argued that refugee camps serve as “breeding grounds” for terrorism and a “source of insecurity” for host states and entire regions (Loesher and Milner 2014, 7). Syrian refugees reportedly face ISIL recruitment in Lebanese, Jordanian, and Turkish camps (Schmid 2016, 33-35; Speckhard 2015). Beyond the threat of terrorist violence (Naylor 2016), refugees have suffered xenophobic attacks in host communities (Schmid 2016, 40).

Eighth, politicians and the media treat radicalization, which can be highly sophisticated and incessant,⁵² as a migration-related phenomenon. However, terrorist recruitment often occurs after the migration process takes place and does not involve immigrants. Of the 71 persons charged by the United States with ISIL-related activities between March 2014 and December 2015, 58 percent were US citizens and six were US lawful permanent residents (LPRs) (Vidino and Hughes 2015, ix, 7).

Yet ISIL, al-Shabaab, Jabhat al-Nusra and other terrorist groups have also had some success in targeting persons from select refugee communities for recruitment (Jordan and Kesling 2015). A group of nine Somali-Americans from the Minneapolis/St. Paul area, for example, have been convicted of terrorism-related offenses related to a plot to join ISIL in Syria and a 10th member of the group is thought to have fled to Syria (McDowell 2016). According to the FBI, since 2007, 22 men have left Minnesota to join al-Shabab and roughly 12 Minnesotans (men and women) have joined militant groups in Syria (ibid.). Another person of Somali descent, a naturalized US citizen living in Columbus, Ohio, allegedly received terrorist training in Syria and, upon his return, intended to carry out attacks in the United States (DOJ 2015a).

Persons of other nationalities have also supported terrorist groups. For example, Abdullah Ramo Pazara, a Bosnian native from St. Louis, left the United States to join ISIL in May 2013. Six other Bosnians, including refugee Mediha Salkicevic, allegedly sent equipment and funds to Pazara who was killed in fall of 2014, to ISIL and to other terrorist groups (Patrick 2015). In addition, Fazliddin Kurbanov, an Uzbek refugee living in Boise, Idaho, was convicted in August 2015 of conspiracy and attempting to provide material support to the Islamic Movement of Uzbekistan, and possession of an unregistered destructive device (DOJ 2015b).

52 ISIL, for example, seeks to create an echo chamber and virtual community in order to indoctrinate recruits and convince them to join ISIL fighters abroad or to commit attacks in the United States (Vidino and Hughes 2015, ix, 5, 21-26). Many thousand Americans access ISIL’s online propaganda each day.

V. Migration-Related Security Imperatives and Pitfalls: The US Experience in the Post-9/11 Era

September 11, 2016 represents the 15th anniversary of the 9/11 attacks when 19 al-Qaeda terrorists hijacked four airplanes, killing 2,977 persons and injuring many thousand more at the World Trade Center (2,753 killed, including 11 pregnant women), Pentagon (184 killed), and United Flight 93 (40 killed). Among the victims were persons from 93 nations, 71 New York City and Port Authority police officers, and 343 firefighters.

The attacks led to a period of national soul searching over how to safeguard the nation from extremist violence while preserving its diverse, rights-respecting and open character. The US immigration system has invariably been implicated in this debate because of immigration's defining significance in US history and because the 9/11 terrorists exploited legal immigration channels to enter and remain. Several counterterror strategies have been pursued during this era. Some have proven successful and others misguided and even counter-productive.

A. Risk Management

Risk management has emerged as an integrating, organizational principle in the post-9/11 era (DHS 2014, 32; DHS 2011a). This concept speaks to the need to allocate (necessarily) limited resources in proportion to the likelihood of a threat coming to pass and its potential severity.⁵³ It weighs the benefit of a security measure against its financial and other costs (Kerwin and Stock 2007, 394). Under this principle, a state "accepts certain risks, reduces others, and concentrates on the most consequential" (DHS 2010, 55). In its Strategic National Risk Assessment, DHS identifies natural disasters, technological hazards, and terrorist attacks as among the greatest threats to the US homeland, but does not include immigration and border violations which it characterizes as "chronic society concerns" (DHS 2011b).

The United States issued nearly 10 million non-immigrant (temporary) visas in 2014 (DOS 2015b). Although these numbers dwarf refugee admissions, non-immigrant tourists, business people, and students have not been subject to nearly the same level of scrutiny and suspicion as refugees have, which raises the question: why not?

Like the refugee program, many non-immigrant programs have an underlying non-economic rationale.⁵⁴ However, they also bring immediate economic benefits, which a lengthy and burdensome screening process would threaten. Visitors to the United States, for example, spent \$220.8 billion and created an estimated 7.9 million jobs in 2014 (ITA 2014). The nearly one million international students in US colleges and universities in 2014/15 contributed \$30.8 billion to the US economy (IIE 2015). The US immigration system delivers "an inordinate share of the world's best talent," providing "a windfall in a global economy where heavy advantages accrue to the most innovative companies and the countries where they are based" (CFR 2009, 14).

⁵³ As the 9/11 Commission put it, "America can be attacked in many ways and has many vulnerabilities. No defenses are perfect. But risks must be calculated; hard choices must be made about allocating resources" (9/11 Commission 2004, 364).

⁵⁴ For example, foreign students are exposed to the United States' culturally diverse, democratic society, often winning their life-long support and admiration (CFR 2009, 8).

DHS has been criticized for its inability to bring risk-analysis capabilities and cost-benefit analysis to its decision making and program evaluation (Steward, Ellingwood, and Mueller 2011, 369, 383). Yet the concept itself is widely embraced by US law enforcement, intelligence, and homeland security agencies,⁵⁵ albeit not by politicians who do not want to concede the possibility of terrorist attacks or the need for security trade-offs.

Terrorists will seek to enter targeted states through whatever migration routes might be open to them. Even the most exhaustive screening processes must be continuously adjusted based on evolving intelligence, field experience, and newly discovered vulnerabilities.⁵⁶ Because risk cannot be eliminated, to demand absolute security for refugee protection programs represents a transparent way to oppose and politicize protection.

The question of whether radicalized European nationals might enter the United States through the Visa Waiver Program (VWP) has been intensely debated since the November 2015 Paris attacks.⁵⁷ Terrorists exploited the VWP program both before and after the 9/11 attacks, and counterterror experts and commentators (including the author) identified the program as a source of vulnerability (Kerwin and Stock 2007, 402-04; Ginsburg 2010, 283-86). Since that time, the security of the VWP program has been significantly strengthened.

The VWP allows nationals from 38 states to enter the United States for business or pleasure for up to 90 days without a visa. Commentators point out that the program is more secure than US non-immigrant (temporary) and immigrant visa programs because participating states must agree to share terrorism-related intelligence and use machine-readable “E” passports which contain biographic data and biometric identifiers in an electronic chip (Alden 2015). At this writing, the United States has entered Preventing and Combating Serious Crime (PCSC) agreements with 35 VWP nations and with other nations that seek admission to the program (DHS 2015a). These agreements provide for access to other countries’ biographic and biometric data about potential terrorists and serious criminals. The EU, however, does not share biometric data (fingerprints) with the United States from its Eurodac system, which is used to detect multiple asylum applications from the same person and to screen for unauthorized entry.

The United States requires visitors from VWP states to register, prior to travel, through its Electronic System for Travel Authorization (ESTA) program, which collects biographic, criminal and other information. It screens ESTA information against multiple databases and watch lists. Participating states must also share information on lost or stolen passports and agree to airport security requirements.

In 2015 and 2016, DHS and Congress sought to strengthen the VWPs security and promote

55 The alternative to risk-management is to devote insufficient resources to substantial risks or excessive resources to less severe and likely threats.

56 In March 2016, DHS Secretary Jeh Johnson expressed concern over the potential for terrorists to enter through the US refugee program (Hattem 2016).

57 The March 18, 2016 agreement between Turkey and the European Union has intensified concerns related to the infiltration of criminals and terrorists into the European Union from Turkey, Serbia, and other candidates for visa liberalization (Coates 2016). Under this agreement, Turkey has agreed to readmit from Greece “new irregular migrants” in return for visa-free travel of Turkish nationals to the European Union, increased resettlement in Europe of Syrian refugees residing in Turkey, and greater EU financial support to Turkey.

full compliance with its requirements. On August 6, 2015, DHS announced that all VWP travelers would need e-passports, participating states would be required to use INTERPOL Lost and Stolen Passport Database to screen travelers crossing their borders, and the use of US federal air marshals on international flights from VWP nations would be expanded (DHS 2015b). On November 30, 2015, DHS announced that the ESTA process would collect information on travel to nations that constitute “a terrorist safe haven (White House 2015a).

The omnibus appropriations’ bill for 2016 incorporated H.R. 158, the Visa Waiver Improvement and Terrorist Travel Prevention Action of 2015.⁵⁸ This legislation:

- bars persons from Iraq, Syria, Iran, Sudan and “any other country or area of concern” on or after March 1, 2011 from participating in the program;
- sets deadlines for VWP nations to issue and use machine-readable, fraud-resistant passports with biometric information; to screen and validate such passports at ports-of-entry (POEs); and to screen non-citizens against INTERPOL databases on arrival and departure “for unlawful activity”; and
- provides for the termination of nations in the VWP for failure to share information or to screen properly.

DHS subsequently announced that it would add Libya, Somalia, and Yemen as countries “of concern” (DHS 2016b).

B. Intelligence Collection, Information Sharing, and Identity Assurance

The 9/11 attacks constituted a failure of intelligence gathering and information sharing. Fifteen of the 19 hijackers were “vulnerable to interception” (9/11 Commission 2004, 752-53). Three had been identified by the intelligence community as potential terrorists and the Central Intelligence Agency (CIA) knew that two of the three had entered the United States. However, the CIA failed to provide this information to the FBI in a timely way and the terrorists’ names were only belatedly added to the DOS’s list of known or suspected terrorists (ibid., 181-82). In addition, neither the CIA or FBI shared information on terrorist travel and passport practices with immigration, consular, or customs’ officials (Kerwin 2005, 752), or “systematically captured and analyzed” the substantial knowledge of these agencies on terrorist travel methods (Ginsburg 2010, 130-31).⁵⁹

In addition, states and localities had long resented the paucity of information sharing by federal law enforcement agencies. The NYPD repeatedly voiced these concerns in the aftermath of the first World Trade Center bombing on February 26, 1993, which killed six and injured more than 1,000 persons, including 88 firefighters, 35 police officers, and an emergency medical services worker (Kelly 2015, 90-91, 95-96). Following the 9/11 attacks, the NYPD built its own immense intelligence and counterterrorism apparatus to complement the work of federal agencies (ibid., 165-78).

⁵⁸ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, §§ 203 and 204 (2015).

⁵⁹ Refugees can also be a source of information on the conditions in terrorist-producing countries and (on occasion) regarding potential terrorists in their communities (Kerwin and Stock 2007, 400-01).

After 9/11, the United States prioritized intelligence collection, combined pre-9-11 terrorist watch-lists into a single, federal Terrorist Screening Data Base (TSDB), made this information available to federal, state and local officials, and established a feed-back loop to the FBI on all encounters with known or suspected terrorists.⁶⁰ It also prioritized the need for secure identification documents and, in particular, biometrically-enhanced, machine-readable passports for those seeking admission to the United States (Ginsburg 2010, 194-97).

Aggravating the threat, ISIL has secured hundreds of thousands of false, stolen and blank Syrian and Iraqi passports, and German officials' have been able to obtain fingerprints on only a small percentage of arriving refugees and migrants

By contrast, information sharing in Europe on suspected terrorists and criminals remains far from systematic (De La Baume and Paravicini 2015; Mazzetti 2016). European states lack a comprehensive list of suspected extremists and do not consistently check arriving migrants against INTERPOL databases of stolen passports and terrorist alerts (Fidler and Pop 2015). Before the November 13, 2015 Paris attacks, only 20 percent of the migrants entering Greece from Turkey received full security screening and processing (Faiola and Mekhennet 2016). Moreover, a low percentage of arriving refugees in Germany (25 to 30 percent) possessed passports or travel documents. Aggravating the threat, ISIL has secured hundreds of thousands of false, stolen and blank Syrian and Iraqi passports, and German officials' have been able to obtain fingerprints on only a small percentage of arriving refugees and migrants (Schmid 2016, 8-9). The November 13, 2015 Paris attacks have been attributed to “[p]oor information-sharing among intelligence agencies, a threadbare system for tracking suspects across open borders, and an unmanageably long list of homegrown extremists” (Witte and Morris 2015).

Most migrants to Europe have fled violence and war, extreme poverty, and untenable conditions. However, this massive population has included persons with bad motives. An estimated three dozen terrorists who entered Europe posing as migrants have been arrested while planning attacks or have died during attacks (Faiola and Mekhennet 2016). The inability of EU and state officials to establish the identity and effectively screen refugees and migrants presents an immense source of vulnerability. Germany has endured several attacks by asylum seekers, as it works through its processing backlogs and slowly gains intelligence on recently arrived asylum seekers and migrants (Faiola and Kirchner 2016).

Two of the terrorists responsible for the coordinated attacks in Paris on November 13, 2015 entered as migrants through Greece, claiming to be asylum seekers, and they subsequently registered at a refugee camp in Serbia (Faiola and Mekhennet 2016). Others who entered in refugee and migrant streams have also been implicated in terrorist plots (Troianovski and Turner 2016).

⁶⁰ *Statement Before the House of Representatives Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure Protection, 110th Cong. (2008) (testimony of Rick Kopel, Principal Deputy Director, Terrorist Screening Center, FBI), <https://www.fbi.gov/news/testimony/the-terrorist-screening-database-and-watchlisting-process>.*

Although federal law enforcement agencies characterized irregular immigrants as a threat to national security in the immediate aftermath of 9/11, a consensus subsequently developed among intelligence and law enforcement professionals that terrorist groups preferred recruits without criminal records or immigration problems, so-called “clean skins” who were not likely to draw the attention of the police or security services (Kerwin and Stock 2007, 406-07).⁶¹ However, many jihadists and terrorist sympathizers operate relatively openly in European and other nations. The perpetrators of the January and November 2015 Paris attacks and the March 2016 Brussels attacks included extremists whose jihadist sympathies, ties, and even past conspiracies were well-known to European law enforcement and security services. The size of the threat posed by their own nationals has overwhelmed the surveillance and law enforcement capacity of several European states: an estimated 38,000 foreign fighters have travelled to Syria and Iraq since 2012, including 5,000 Europeans and 1,700 from France (Ignatius 2016; Erlanger and Yardley 2015).

The 9/11 attacks also underscored the importance of establishing the identity of persons seeking admission, leading to a renewed focus on the integrity of the “breeder” documents (particularly birth certificates) used to obtain other identity documents, the need for biometrically-enhanced passports and other travel documents, and the importance of information sharing on lost and stolen passports (Ginsburg 2010, 191-216). Returning jihadists and foreign terrorists have used falsified passports and identity documents to enter Western states (Schmid 2016, 43-44).

C. National Unity and Enlisting Community and International Support

Law enforcement and intelligence experts post-9/11 stressed the need for resilience in response to the terrorist threat; that is, to combat terrorism in ways that do not compromise national unity or civic values (Flynn 2004, 163-64). Rights-respecting enforcement is also a strong theme of DHS’s planning process and communications (DHS 2014, 32). By contrast, demagoguery and divisive counterterror strategies can compromise national unity and alienate groups that may have information on potential threats and have the most to lose from an attack by a perceived member of their national, ethnic, or religious community.

The vilification of Muslims represents one of the greatest threats to national unity and a boon to terrorists, who seek to polarize populations (Schmid 2016, 46). David Petraeus, the former CIA director and commander of coalition forces in Iraq and Afghanistan, warns that anti-Muslim rhetoric is “playing directly into the hands” of al Qaeda and ISIL, which hope “to provoke a clash of civilizations” (Petraeus 2016). To that end, al-Shabaab has featured the proposal to suspend Muslim immigration to the United States in one of its recruitment videos (Stack 2016).

Following the 9/11 attacks, President George W. Bush, New York City Mayor Rudolph Giuliani, Immigration and Naturalization Service (INS) Commissioner James Ziglar, DHS Secretary Tom Ridge and other leaders took pains to distinguish between law-abiding immigrants and refugees. In the immediate aftermath of the attacks, President Bush visited

⁶¹ As of yet, there is no documented case of a terrorist arriving in the United States through illegal migration channels, although many have entered fraudulently through legal immigration system.

the Islamic Center in Washington, DC, where he made a powerful appeal to national unity and tolerance:

The face of terror is not the true faith of Islam. That's not what Islam is all about. Islam is peace. These terrorists don't represent peace. They represent evil and war.

When we think of Islam we think of a faith that brings comfort to a billion people around the world. Billions of people find comfort and solace and peace. And that's made brothers and sisters out of every race — out of every race.

America counts millions of Muslims amongst our citizens, and Muslims make an incredibly valuable contribution to our country. Muslims are doctors, lawyers, law professors, members of the military, entrepreneurs, shopkeepers, moms and dads. And they need to be treated with respect. In our anger and emotion, our fellow Americans must treat each other with respect.

(White House 2001).

The 9/11 Commission report also made this point starkly:

Islam is not the enemy. It is not synonymous with terror. Nor does Islam teach terror. America and its friends oppose a perversion of Islam, not the great world faith itself.

(9/11 Commission 2004, 363)

In stark contrast, Donald Trump, the Republican presidential nominee, has flaunted international and domestic law by proposing that the United States suspend the admission of non-US citizen Muslims, deny entry to Syrian refugees, kill the families of terrorists, renew waterboarding of terrorist suspects, and track refugees in the United States (Bradner 2015). This anti-Muslim invective follows a 15-year period in which not a single attack was committed in the United States by a terrorist posing as a refugee, and every jihadist attack has been roundly condemned by Muslim leaders and groups.

Some politicians have proposed patrolling Muslim neighborhoods and admitting only or mostly Christian refugees (Davidson 2015). Christians and other religious minorities endure forced conversion, extortion, religious “cleansing” (what some have characterized as genocide), and extraordinary levels of persecution in large swaths of the Middle-East,⁶² where they have lived for centuries. Yet scores of Muslims, the great majority of the region's refugees, likewise have no viable option to resettlement. Although difficult to estimate, Muslims certainly constitute a large percentage of the victims of terrorist violence if only because terrorism-related fatalities in recent years have mostly occurred in nations with high Muslim populations (Schmid 2016, 12; Alexander and Moore 2015).

The December 1, 2015 letter from former, high-level US diplomatic, intelligence, military, and homeland security officials opposed a de facto moratorium on admissions of refugees

62 Throughout its history, the United States has offered protection to victims of religious intolerance and persecution. In addition, it has regularly renewed legislation that creates a presumption of refugee status for religious minorities and other historically persecuted groups (Nezer 2014, 128). In addition, resettlement priority cases of “special humanitarian concern” include members of persecuted religious groups.

from Syria and Iraq on the grounds that it “would be contrary to our nation’s traditions of openness and inclusivity, and would undermine our core objective of combatting terrorism.”⁶³ They argued that refugee resettlement helps to “advance US national security interests by supporting the stability of our allies and partners that are struggling to host large number of refugees.”⁶⁴

They also averred that “[c]ategorically refusing” to admit Muslims “feeds the narrative of ISIL that there is a war between Islam and the West, that Muslims are not welcome in the United States and Europe, and that the ISIL caliphate is their true home.”⁶⁵ This latter point merits particular attention. ISIL views the flight of refugees from territories that it controls as a “challenge to the legitimacy of its caliphate.”⁶⁶ As a result, it has appealed to Syrian refugees to return, arguing that they will be forced to convert in the lands of infidels and will be welcomed home in its territory (Zelin 2015).

Michael Hayden, the former director of the CIA and the National Security Agency (NSA), argues that anti-Muslim rhetoric and discriminatory proposals play into the extremist narrative that Muslims “are born into a world of unrelenting hostility towards Islam from the Judeo-Christian West” (CFR 2015). Hayden called it “doubly stupid when we say things that reinforce that incredibly false narrative” (ibid.).

Former DHS Secretary Chertoff argues that a religious litmus test would be “odious to the values of America and utterly impractical to enforce in the real world.”⁶⁷ DHS Secretary Jeh Johnson said that this approach “would burn bridges to American Muslims when we’re trying to go in the exact opposite direction” (Kim 2015).

James Ziglar argues that a moratorium on Muslim immigration “would not achieve any national security objective, and would likely create an even more hostile and dangerous environment for the United States in its relations with the Muslim world.”⁶⁸ David Petraeus points out that the proposal would undermine US armed forces, which have depended heavily on Muslim forces to fight al-Qaeda in Iraq, the Taliban in Afghanistan, and the ISIL in Iraq and Syria, and which need Muslim partners to root out terrorist networks and hold territory formerly occupied by terrorists.

To deny entry to desperate refugees, to treat refugees with hostility, or to create discriminatory immigration policies based on fear of radicalization could become a self-fulfilling prophecy. Anti-Muslim rhetoric and proposals also foment hostility against

63 Letter from 21 former US military, intelligence and diplomatic officials, to Congress (Dec.1, 2015), <http://www.humanrightsfirst.org/sites/default/files/FormerNatSecOfficialsLetterRefugees.pdf>.

64 Ibid.

65 Ibid.

66 *Admitting Syrian Refugees: The Intelligence Void and the Escalating Homeland Security Threat: Before the House Committee on Homeland Security, Subcommittee on Counterterrorism and Intelligence*, 114th Cong. (2014) (testimony of Daveed Gartenstein-Ross, Senior Fellow, Foundation for Defense of Democracies Chief Executive Officer, Valens Global), http://www.defenddemocracy.org/content/uploads/documents/Gartenstein_Ross_Admitting_Syrian_Refugees.pdf.

67 Chertoff argues that “it’s not clear ... how you would know what somebody’s religion was and how you would prove what their religion was.” CMS interview with Michael Chertoff, former DHS Secretary and Assistant Attorney General, DOJ Criminal Division (June 9, 2016), <http://cmsny.org/podcast-secretary-michael-chertoff/>.

68 Interview by author with James Ziglar, former INS Commissioner (Dec. 29, 2015).

Muslims, lead to increases in hate crimes, undermine the security and integration of Muslim immigrants, and embolden US extremist groups. Jihadist terrorists seek to drive a wedge between refugees and their host states. As one commentator put it, “equating refugees with terrorists is simple: It’s exactly what the Islamic State wants” (Taylor 2015).

D. Failed and Misguided Strategies

If intelligence collection, information sharing, identity assurance, and national unity emerged from the post-9/11 era as hallmarks of an effective and coordinated counterterror strategy, this era also produced several excesses and anomalies. Many post-9/11 refugee- and migration-related security strategies have since been discredited as counterterror tools.

In the weeks following 9/11, US law enforcement and immigration agencies desperately sought to disrupt and prevent what they believed to be imminent, additional attacks. The National Security Entry-Exit Registration System (NSEERS) registered (temporary) non-immigrants from certain countries upon their entry and required that they re-register after 30 days and annually thereafter. It also included a “call-in,” “domestic” registration program for those in the United States at the program’s inception. The latter program led to the registration of 83,519 non-immigrants from 25 nations and the arrest of roughly 13,000 persons of Middle Eastern and South Asian descent for immigration violations, but it yielded little useful intelligence (Martin 2009, 25-26; Kerwin 2005, 760-61). An analysis of this program concluded that the order in which national groups were required to register did not align with the stated criteria (an “al-Qaeda presence”) for inclusion of states in the program (Leiken and Brooke 2006, 515). Nor was it rational from a security perspective to limit the program to non-immigrants (*ibid.*).

In the immediate aftermath of the 9/11 attacks, the United States also arrested and detained in often abusive conditions hundreds of non-citizen men who purportedly had some connection (however attenuated) to the 9/11 terrorists (Kerwin 2002, 23-26). Many detainees were held incommunicado and could not be located by family members or counsel for protracted periods. Federal officials held the detainees for immigration violations or as material witnesses for criminal proceedings, while pressuring them for information on terrorist plots which they mostly did not possess. A significant number were subject to closed court hearings. However, the initiative led to only one arrest of an al-Qaeda-affiliated terrorist (Bergen 2016, 32).⁶⁹

In 2008, adopting a similar “broad net” strategy, the FBI’s Controlled Application Review and Resolution Program (CARRP) began to pressure mostly Muslim, “known or suspected” or “non-known or suspected terrorists” to become government informants by delaying consideration of their applications for immigration status, naturalization, or protection (Ansari and Dato 2016). Critics contend that this program withholds immigration benefits from persons who present no threat and produces little, if any, actionable intelligence (*ibid.*).

The FBI has also been criticized for using its large network of informants to *propose* terrorist operations to often impressionable and hapless persons, and to help execute plots

⁶⁹ In addition, these practices can potentially alienate populations in which terrorists might try to hide and could diminish cooperation with intelligence and law enforcement agencies (Kerwin et al. 2003).

that would not otherwise be pursued (Bergen 2016, 97-98). The strategy has been defended on the grounds that it increases suspicion among terrorists and makes it difficult to organize, large-scale attacks (ibid., 100). However, it can also lead to long-term prison sentences for persons who would never have conceived of or carried out plots on their own.

A common denominator of these tactics has been their reliance on broad profiling and preventive or “pre-textual” use of immigration enforcement tools. As many counterterrorism experts cautioned after 9/11, strategies that target persons based on race, religion, ethnicity, or national origin cast far too wide and indiscriminate a net to be useful law enforcement tools (Kerwin 2005, 755). In addition, discriminatory policies cannot attract the kind of broad, sustained support necessary to address what will likely be a long-term threat (Heymann 2003, 88-92, 162).

On the other hand, profiling based on terrorist behavior, tactics, and real-time intelligence constitutes a crucial counterterrorism and law enforcement tool. An analysis of 475 ISIL recruits from Western states found that one in seven were women (Bergen 2016, 267-68), a substantial increase that demonstrates how terrorists adapt to established profiles. In recent years, the FBI has sought to identify serious threats through “universal indicators” of violence. The typical progression to a terrorist attack, for example, moves from a grievance, to a sense of the necessity of violence, to concrete planning, and to “leakage” of information about an imminent attack (ibid., 233-38). Law enforcement intervention would be indicated at the latter stages of this process.

The post-9/11 era also witnessed several dubious and exaggerated security claims for measures as diverse as the interdiction and detention of Haitian boat people, the indefinite detention of immigrants who had been ordered removed, and the US-Canada safe-third country asylum agreement which requires that asylum claims, with some exceptions, be lodged in the first of the two states that an asylum-seeker enters.

E. Border Security

In the post-9/11 era, borders have become a potent political symbol of migration-related security concerns. Borders also represent a potential point of vulnerability and exposure for terrorists. The ease with which the perpetrators of the November 13, 2015 Paris and the March 22, 2016 Brussels attacks moved within EU states and returned to the EU following jihadist activity abroad underscores the potential security function of borders and ports-of-entry (Mazzetti 2016).⁷⁰ Porous borders have also been blamed for al-Shabab attacks in Kenya, Boko Haram’s infiltration of Niger, Chad and Cameroon, and ISIL attacks in Libya, Tunisia, and Egypt (Sieff 2016).

The massive growth in border infrastructure since 9/11 in the United States may deter some terrorists from seeking to enter. However, the greater security need is to identify and foil committed terrorists, preferably before they reach national boundaries, to promote orderly, regulated migration flows so that states can concentrate their resources on the small number of border crossers that may present a public safety or security risk, and to combat the radicalization of residents.

⁷⁰ Belgian national Abdelhamid Abaaoud, the mastermind of the November 13, 2015 attacks, repeatedly left and returned to the European Union without being detected.

Moreover, the US investment in hardening the southern border does not correspond to the size of the security threat posed by the border. An analysis of 373 jihadi terrorists between 1993 and 2004 found that not a single terrorist crossed the US-Mexico border where 87 percent of Border Patrol agents are stationed (US Border Patrol 2015), but it identified 26 confirmed terrorists in Canada, three of whom had entered or tried to enter the United States (Leiken and Brooke 2006, 513). DHS's main metrics for "border security" — apprehensions, repeat crossings ("recidivism") and "effectiveness" in arresting or turning back unauthorized migrants (CRS 2016, 22-23) — speak almost entirely to irregular migration, not to terrorism. In addition, most newly "unauthorized" US residents enter the nation legally and violate the terms of their temporary visas, rather than cross in irregular migration streams (Warren and Kerwin 2015, 93-94). Thus, even if unauthorized persons posed a heightened security risk (which they do not), greater investment in border control would not significantly mitigate that risk.

Border enforcement growth has also led to diminished refugee protection. Over the last 20 years, security and enforcement agencies have been vested with broad refugee protection responsibilities. Under US law, migrants without sufficient travel documents or who are stopped at a port-of-entry or apprehended at or near a border face expedited removal unless they request political asylum or express a fear of return to a border official. If they do, they must be referred for a "credible fear" interview by a member of USCIS's specially trained asylum corps. If determined to possess a credible fear of persecution, they can seek political asylum.

US Customs and Border Protection (CBP) and, in particular, the US Border Patrol, draw heavily from US military veterans and enjoy a strong paramilitary and law enforcement culture. Yet these officials also bear responsibility for deciding whether to refer migrants for credible fear determinations (which can lead to political asylum hearings) or to remove them without judicial recourse. Border officials often seek to dissuade asylum seekers from pursuing their claims by threatening them with detention and separation from their families (Cabot 2014, 366-67). The US Commission on International Religious Freedom has twice investigated the US expedited removal process and found that border officials often fail to ask migrants if they fear returning home and fail to note when migrants express fear, which can lead to their detention and summary removal (USCIRF 2005, 20-23; USCIRF 2016, 21-23). CBP's screening of unaccompanied children to determine if they fear return or have been trafficked has been similarly problematic (GAOb 2015). In addition, dozens of complaints have been filed regarding the poor and abusive treatment of children in Border Patrol holding cells (Burnett 2014).

In 2015, DHS's Office of Inspector General (OIG) reported that certain Border Patrol sectors refer asylum seekers for criminal prosecution (OIG 2015, 16) in violation of the Refugee Convention. Criminal prosecution makes it far more difficult to sustain an asylum claim, punishes bona fide asylum seekers for reaching protection in the only way available to many of them, and causes asylees to begin life in their new communities with a criminal record (Kerwin 2015, 218-19). In response to this practice, OIG accepted the Border Patrol's claim that criminal prosecutions for illegal entry and the asylum process should proceed on parallel tracks (OIG 2015, 17-18) — which manifestly they should not — while recommending only that the Border Patrol develop guidance on this issue.

VI. The US Refugee Resettlement Program: A Case Study in Securing Refugee Flows

The current era of record displacement demands US leadership. Yet not since USRAP's creation in 1980 has there been greater opposition in the United States to refugee resettlement. This section examines security-related concerns regarding the program in light of its strong vetting and screening process.

A. Recent Opposition to US Refugee Resettlement

In late 2015, the US House of Representatives passed the American Security Against Foreign Enemies Act of 2015 (the SAFE Act), which would have precluded the admission of refugees from Iraq or Syria, or refugees who last lived in or recently visited these two nations, until the director of the FBI, the secretary of DHS, and the director of national intelligence (DNI) certified to 12 congressional committees that the refugee did not represent a threat. In addition, the Act would have required the DHS inspector general to review and report annually to the same committees on each certification. Requiring high-level sign-off on individual admissions from these nations would have brought resettlement to a standstill for some of the world's most desperate refugees and would have risked "diverting limited homeland security and law enforcement resources from more pressing needs."⁷¹ President Obama vowed to veto this legislation (EOP 2015), and in January 2016 the bill failed to win sufficient support to proceed to passage in the Senate.

In recent years, many states and localities have voiced concerns that refugees pose a terrorist threat, strain local resources, and cannot be absorbed into their communities (Brown and Scribner 2014, 109-10). In 2015, 31 US governors vowed to prevent Syrian refugees from resettling in their states (Fantz and Brumfield 2015), despite the well-established authority of the federal government to set immigration and refugee policies. The state of Texas brought an ultimately unsuccessful lawsuit to enjoin the resettlement of Syrian refugees, based on the claim that the federal government and federally funded resettlement agencies had failed in their statutory responsibility to consult with the state prior to placement of refugees (Walters and Ura 2016).

State hostility toward resettlement of Syrian and Iraqi refugees may be less a legal than a practical threat to the refugee program, which depends heavily on partnerships between participating federal agencies, non-governmental resettlement agencies, and states and localities. The Refugee Act of 1980 provides for advance consultation with states and local governments and consideration of their placement concerns, suitability, and capacity. As a result, resettlement agencies meet on a regular basis with state and local officials regarding the services available to refugees in their communities and their ability to accommodate new arrivals. State resettlement offices receive federal funding to provide cash assistance, medical assistance, language programs, and social services. In the past, DOS has occasionally urged the modification of refugee placement plans based on feedback from states. In addition, under federal law, if states do not want to distribute benefits to refugees,

71 Interview by author with James Ziglar, former Immigration and Naturalization Service (INS) Commissioner (Dec. 29, 2015).

the Office of Refugee Resettlement can enter into arrangements with NGOs to provide benefits in those states.⁷²

Opposition to the admission of Syrians and Iraqis would be more understandable if the United States had agreed to resettle far larger numbers of refugees. Yet its commitment to resettle 10,000 Syrians in FY 2016 pales in comparison to the nearly five million refugees hosted by Syria's neighboring states and to the generosity of Germany and Sweden in entertaining hundreds of thousands of Syrian political asylum claims. It also represents a substantial retreat from the nation's historic leadership in responding to large-scale refugee crises.

Terrorist groups seek to terrorize their targets — whether through ruthlessness, technical sophistication, or an aura of invincibility — in order to achieve their political, ideological, and strategic objectives (Brooks 2011, 39-40). Communities may be at demonstrably greater risk from workplace homicides (*ibid.*, 39), or alcohol-related car crashes,⁷³ but terrorism succeeds when it provokes overreaction. While the resilience of targeted communities can help to diminish terrorism's efficacy, exaggeration of a program's risks can undermine security. In fact, as discussed below, the US resettlement program is the most secure US admissions program.

B. The US Refugee Resettlement Program

DHS has championed a multi-layered, risk-based approach to security in which “each layer must be effective in its own right,” but there is a high degree of coordination and redundancy since no “single security measure is foolproof.” (9/11 Commission 2004, 392). Former DHS Secretaries Napolitano and Chertoff have characterized the refugee screening process as “thorough and robust,” but not without risk.⁷⁴ Vincent Cannistraro, former Chief of Operations and Analysis for the CIA's Counterterrorism Center, describes refugee resettlement “a program in the nation's interest” and a relatively secure program:

The United States makes it far more difficult than other countries for a person with bad intentions to enter. In addition, the refugee screening and admissions process is a more lengthy, difficult and secure process than we have for any other group seeking to enter. This program is certainly less of a risk than the normal immigration systems for tourists, business people and others.⁷⁵

In 2002 and 2003, following the 9/11 attacks, refugee admissions fell sharply as the United States undertook a comprehensive review and analysis of the program based on concerns that it could be used by terrorists to gain entry into the United States (Kerwin and Stock 2007, 389). Current refugee screening and admissions policies reflect the hardening and

72 Most refugees receive cash and medical assistance for a period of eight months (Brown and Scribner 2014, 108).

73 Drunk driving killed 13,365 in 2010 (Chambers, Liu, and Moore 2011).

74 Letter from Janet Napolitano and Michael Chertoff, former DHS Secretaries, to President Barack Obama (Nov. 19, 2015), <https://www.whitehouse.gov/blog/2015/11/19/two-former-homeland-security-secretaries-wrote-president-obama-safely-welcoming>.

75 Interview by author with Vincent Cannistraro, former Chief of Operations and Analysis in the CIA's Counterterrorism Center (Nov. 20, 2015).

securitizing of this program. After the review, refugee admissions rebounded. At the time, national security and law enforcement experts believed that program vulnerabilities could be sufficiently mitigated (ibid., 405, n.122). More recently, Napolitano and Chertoff have argued that homeland security and refugee protection are not “mutually exclusive” goals, provided that vetting and screening processes remain robust and undiluted.⁷⁶

Obama administration officials have characterized the refugee program as the most secure process for non-citizens seeking admission to the United States.⁷⁷ Indeed, until recent years, refugee screening was often criticized for a level of redundancy that put refugees and their families at risk for extended periods (HRF 2010, 21-26; Kerwin 2012, 6-8).

The multiplicity of institutional stakeholders in the refugee screening and admissions process operate as a check against fraud and terrorist infiltration. Moreover, the eligibility standard for refugee status is narrow, and refugees can be found inadmissible on security, criminal, and other grounds. The US processing priorities and commitment to resettle the most vulnerable further limit the refugees considered for admission.⁷⁸ The cases referred by UNHCR for US resettlement are highly vulnerable, low-risk persons, including single women with children, torture survivors, and persons with special medical needs (Sengupta 2015). Roughly 2 percent are single men without US families to receive them.

The US refugee resettlement program enjoys the comparative advantage of being able to vet and screen refugees prior to their admission.⁷⁹ This process is deliberate and thorough (Brown and Scribner, 115-16). Because the schedules and periods of validity of security and health screenings do not perfectly overlap, some screenings must be completed a second time (Nezer 2014, 129). Applicants also undergo continuous review and recurrent vetting, meaning that they can be denied admission based on new information at any point in the process.

UNHCR assesses refugee claims and refers persons for resettlement. It interviews potential refugees and collects biographic information and biometric data on them: it has collected

76 Letter from Janet Napolitano and Michael Chertoff, former DHS Secretaries, to President Barack Obama (Nov. 19, 2015), <https://www.whitehouse.gov/blog/2015/11/19/two-former-homeland-security-secretaries-wrote-president-obama-safely-welcoming>.

77 *Oversight of the Administration's FY 2016 Refugee Resettlement Program: Fiscal and Security Implications: Hearing Before the Senate Committee on the Judiciary, Subcommittee on Immigration and the National Interest*, 114th Cong. (2015) (written testimony of Barbara Strack, USCIS Refugee Affairs Division Chief, and Matt Emrich, USCIS Fraud Detention & National Security Associate Director), <http://www.uscis.gov/tools/resources/hearing-refugee-admissions-fiscal-year-2016-senate-committee-judiciary-october-1-2015-chief-refugee-affairs-division-barbara-l-strack-and-acting-associate-director-matthew-d-emrich>; *The Impact of ISIS on the Homeland and Refugee Resettlement: Hearing Before the Senate Committee on Homeland Security and Governmental Affairs*, 114th Cong. (2015) (written testimony of Leon Rodriguez, USCIS Director), <https://www.dhs.gov/news/2015/11/19/written-testimony-uscis-director-senate-committee-homeland-security-and-governmental>.

78 US processing and admission priorities include: (1) Priority 1 (P-1) cases referred by UNHCR, a US embassy, or a designated NGO; (2) P-2 cases which include groups of special humanitarian concern identified by the US refugee program (this category has traditionally included religious minorities); and (3) P-3 family reunification cases (USCIS 2015a).

79 “Pushing the border out” became a centerpiece of post-9/11 immigration enforcement and security strategies, and rigorous screening outside US borders became one layer in the defense against terrorist infiltration.

1.5 million iris scans of registered refugees (O'Toole 2015). It also seeks to determine if refugees fall within 45 “categories of concern,” whether based on their family ties, service in “particular government ministries or military units,” or even “being in specific locations at specific times” (ibid.). According to UNHCR officials, “almost any flag will scuttle the refugee’s case indefinitely” and UNHCR screens out at least half of the cases it reviews (ibid.). Fraud prevention represents one its top priorities (UNHCR 2014b §§ 19-20).

The interview process itself — the probing and recording of a refugee’s story — permits credibility assessments. The process also connects a name to biometric data, which helps to establish an “identity” and to promote security moving ahead. Screening allows UNHCR and states to identify the humanitarian and integration needs of refugees for placement purposes.

The State Department’s Bureau of Population, Refugees and Migration (DOS/PRM) contracts with Resettlement Support Centers (RSC) to pre-screen persons for admission and to prepare cases for review by USCIS. RSCs collect information for case adjudication and security screening, including biographic information that includes name, aliases, date of birth, family tree, education, the basis of the persecution claim, and the date and place from which the refugee departed. RSCs also initiate biographic checks of names (using linguistic logarithms), aliases, places of birth, nationalities, and other data against DOS’s Consular Lookout and Support System (CLASS). CLASS includes multi-agency records with information on intelligence, criminal histories, immigration violations, and potential terrorists.⁸⁰

Prior to the USCIS interview, the Refugee Affairs Division reviews and refers cases that meet certain criteria to USCIS’s Fraud Detection and National Security Directorate (FDNS), which liaises with US intelligence agencies. FDNS conducts open-source and classified research on referred cases, and produces an assessment for the USCIS interviewing officer. If the interview raises any red flags, the case is referred again to FDNS.

It may seem counterintuitive, but social media, in particular, can be a very rich source of information on terrorists. An estimated 40 percent of persons charged with a jihadist terrorist-related offence since 9/11 either posted jihadist content online or “used the Internet in an operational manner” (Bergen 2016, 135-36). Terrorists use social media to organize, recruit, and even declare their terrorist affiliations.⁸¹ As a result, DHS has been working aggressively to enhance its review of the social media footprint of refugees, asylum seekers, and visa applicants (Nixon 2016).

RSCs also initiate Security Advisory Opinions (SAOs) by law enforcement and intelligence agencies. These reviews consist of running the applicant’s name and other data through multiple intelligence and law enforcement databases. Thus, they build a level of redundancy into the vetting process. The profile of recipients of SAO reviews remained the same for

80 CLASS contains information from DOS, the National Counterterrorism Center (NCTC), the FBI’s Terrorist Screening Center, CBP’s TECS system, the Drug Enforcement Administration, and Health and Human Services (USCIS 2015b).

81 San Bernardino terrorist Tashfeen Malik, for example, posted comments expressing her desire to participate in violent jihad prior to her arrival to the United States on an F-1 (fiancée) visa (Apuzzo, Schmidt, and Preston 2015).

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several years after 9/11 (Kerwin 2012, 6), but has been expanded in recent years. The reviews are based on criteria that include nationality (roughly 30 nations), gender, and age. Persons in unclassified categories selected by DOS based on US foreign policy interests and security concerns also receive SAO screening. Most reviews are completed within 45 to 60 days, not an inconsequential period for refugees in desperate, often dangerous circumstances. However, in some cases, it can take months for the participating agencies to respond. Significant delays can result when the name of an intending refugee resembles or matches a name in a government database.

US family ties help to establish a refugee's identity and connections. RSCs also secure "sponsorship assurance" from domestic resettlement agencies. The more information that intelligence and law enforcement agencies gather on an applicant, the more confident they can be regarding his or her background and intentions. Family and sponsoring agencies also facilitate integration by helping refugees find a place to live, secure work, and register for school.

USCIS reviews refugee applications for eligibility and admissibility. On the day of the refugee interview, USCIS conducts biometric checks (fingerprints and photographs) against: (1) the FBI's Next Generation Identification system (NGI), the world's largest repository of criminal records; (2) DHS's Automated Biometric Identification System (IDENT) which contains immigration and travel history and records; and (3) the Department of Defense's (DOD's) Automated Biometric Identification System (ABIS), which includes biometric records from Iraq, Afghanistan, and other areas of conflict (USCIS 2015b).

In 2011, DHS initiated an additional screening process, Inter-Agency Checks (IACs), which refugees receive prior to the refugee interview and pre-departure to the United States. The National Counterterrorism Center (NCTC) helps to coordinate the review.⁸² NCTC was established in response to a 9/11 Commission recommendation for "a center for joint operational planning and joint intelligence" (9/11 Commission 2004, 403).

The USCIS Refugee Corps plays an underappreciated role in the vetting process. Officers receive extensive, specialized training on "refugee law, grounds of inadmissibility, fraud detection and prevention, security protocols, interviewing techniques, credibility analysis and country conditions research."⁸³ Prior to deployment, they undergo additional training

82 NCTC connects multiple departments and agencies within the US intelligence community. It falls within the Office of the Director of National Intelligence (ODNI). Its mission is to lead US efforts "to combat terrorism at home and abroad by analyzing the threat, sharing that information with our partners, and integrating all instruments of national power to ensure unity of effort" (ODNI 2015). The director of national intelligence (DNI) heads the US Intelligence Community, which comprises 16 agencies and includes Air Force Intelligence, Army Intelligence, the CIA, Coast Guard Intelligence, the Defense Intelligence Agency, the Department of Energy, DHS, DOS, the Department of the Treasury, the Drug Enforcement Administration, the FBI, Marine Corps Intelligence, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, the NSA, and Navy Intelligence.

83 *Oversight of the Administration's FY 2016 Refugee Resettlement Program: Fiscal and Security Implications: Hearing Before the Senate Committee on the Judiciary, Subcommittee on Immigration and the National Interest*, 114th Cong. (2015) (written testimony of Barbara Strack, USCIS Refugee Affairs Division Chief, and Matt Emrich, USCIS Fraud Detection and National Security Associate Director), <http://www.uscis.gov/tools/resources/hearing-refugee-admissions-fiscal-year-2016-senate-committee-judiciary-october-1-2015-chief-refugee-affairs-division-barbara-l-strack-and-acting-associate-director-matthew-d-emrich>.

on “the types of refugee claims they are likely to encounter, detailed country of origin information, and updates on any fraud trends and security issues.”⁸⁴ They also receive expert training on country-specific intelligence issues.

Refugee officers conduct in-depth interviews in which they assess the merits of claims, probe and test credibility, and explore potential fraud and security concerns. Since 9/11, security has been a pervasive DHS priority, including for its USCIS Refugee Corps.

Prior to their departure to the United States, refugees pass through a second inter-agency review which seeks to identify new derogatory information. Prior to admission, CBP screens refugees against its National Targeting Center-Passenger and the Transportation Security Administration (TSA) Secure Flight program. CBP also screens newly arrived refugees for admission at ports-of-entry, reviewing their documents and conducting additional security checks.

Terrorist information obtained during refugee screening is entered into the Terrorist Identities Datamart Environment (TIDES), which includes biographic data, fingerprints, and other classified holdings. Thus, the refugee program not only benefits from intelligence, but contributes to it as well.

High-ranking FBI, DHS, and NCTC officials have lamented deficiencies in intelligence collection related to Syrian refugees, arguing that effective screening requires datasets that contain accurate and thorough information on potential terrorists and criminals (HHSC 2015, 4). Republican presidential candidates and members of Congress have interpreted these concerns as evidence that the United States cannot vet or run “background checks” against Syrian refugees and, thus, should not admit any of them (Saddiqui 2015). This is not the case.

The United States can collect intelligence more easily from Iraq or Afghanistan, where it has had a large military presence, than from Syria. At the same time, its military engagements have engendered terrorist blowback. The large numbers of watch-listed Iraqis should not be viewed as a counterterror triumph. In addition, the lack of US access to information from Syrian state intelligence and police agencies,⁸⁵ is not an insurmountable barrier to identifying Syrian terrorists.

Since 9/11, the United States has created a vast intelligence, counterterror and homeland security infrastructure that by 2010 reportedly encompassed 1,271 government organizations and 1,931 private corporations, and 854,000 persons with top-secret clearances in the Washington, DC area alone (Priest and Arkin 2010). One study found that annual US expenditure on homeland security increased by \$75 billion between 2001 and 2009 (in 2010 dollars), including by \$50 billion for federal agencies (other than intelligence agencies), \$15 billion for federal intelligence agencies, and \$10 billion for states and localities (Stewart, Ellingwood and Mueller 2011, 373). Moreover, this “very conservative” estimate did not account for private sector expenses (ibid., 373). In FY 2015, US intelligence agency

84 Id.

85 *The Syrian Refugee Crisis and US National Security: Hearing before the House Judiciary Committee, Subcommittee on Immigration and Border Security*, 114th Cong. (2015) (testimony of Seth G. Jones, RAND Office of External Affairs), http://judiciary.house.gov/_cache/files/7d555810-97fb-4632-bb44-a44579ff2f32/11.19.15-seth-jones-testimony.pdf.

budgets totaled nearly \$67 billion, \$50.3 billion for the National Intelligence Program, and \$16.5 billion for the Military Intelligence Program (FAS 2016).

The combined, enacted budgets of the two principal federal homeland security and immigration enforcement agencies, CBP and Immigration and Customs Enforcement (ICE), exceeded \$19 billion in 2015 (DHS 2016a, 10). Given these immense investments and the widely recognized need for better intelligence exposed by the 9/11 attacks, it is no surprise that US intelligence agencies have, in fact, generated derogatory information on individual Syrians seeking admission to the United States.

The “known unknown” presents a real but manageable challenge for the US screening system. Previously unknown terrorists can be identified through their associations, travel methods, tradecraft, evasiveness, inconsistencies, use of social media, and other means. In other words, they can be detected through a rigorous vetting, screening, and admissions process. As Robert Bonner, former CBP Commissioner, has said: “We are capable of vetting There’s certainly the opportunity to make sure that the refugees that we do admit do not pose a security threat to our country.”⁸⁶

Finally, Syrian refugees in Europe come from upper middle-class backgrounds at higher rates than refugee populations from other nations (McHugh 2015). They include doctors, bankers, business people, and other professionals whose “identity” can be documented and well-established (ibid.). They come from a society that prior to civil war served as a haven for large numbers of Middle Eastern refugees, including two million Iraqis (Polk 2013), and that ranked among the “medium human development” states in the 2010 Human Development Index (UNDP 2010, 145). As UNHCR and DHS have found, the identity of many Syrian refugees can be determined with a high degree of confidence.

In a November 19, 2015 letter to President Obama, former DHS Secretaries Napolitano and Chertoff wrote that the “highest priority of our government is to keep American’s safe” and “we can achieve this mission in a manner that is consistent with American values of openness and inclusiveness.”⁸⁷ In particular, the United States can “admit the most vulnerable of these refugees . . . as long as we do not compromise the already established protections.”⁸⁸

VII. Policy Recommendations

This paper makes the case that refugee protection and national security should be viewed as complementary, not conflicting, state goals. To that end, this section identifies several strategies that promote both security and refugee protection. It also outlines steps that the US Congress should take to enhance US refugee protection policies and security. Finally, it argues for the efficacy of political engagement in support of pro-protection, pro-security policies, and against the assumption that political populism will invariably impede support for refugee protection.

86 Id.

87 Letter from Janet Napolitano and Michael Chertoff, former DHS Secretaries, to President Barack Obama (Nov. 19, 2015), <https://www.whitehouse.gov/blog/2015/11/19/two-former-homeland-security-secretaries-wrote-president-obama-safely-welcoming>.

88 Ibid.

A. Strategies to Further National Security and Refugee Protection

As a conceptual matter, national security and refugee protection express the aspiration for human safety and well-being, but from different perspectives and with different emphases. From a practical perspective, strategies to advance these dual priorities — conflict prevention, peacebuilding, reconstruction, reconciliation, safe return, humanitarian and development assistance, and integration — largely align and can re-enforce each other.

“Conflict prevention” represents a national security priority (White House 2015b, 10), and a refugee protection imperative.⁸⁹ The “early and durable resolution of armed conflicts” (UNGA 2016 § 100[e]), and reductions in conflict, political terror, and human rights violations can reduce forced migration (Shaver and Zhou 2015), and avoid the “escalating series of negative, and often perverse, consequences and growing costs for host countries, the international community, and refugees themselves” (Papademetriou 2015, 8).

States should commit far greater political and diplomatic capital to resolve the world’s multiple refugee-producing crises, which include the Syrian and Iraqi “mega-crisis,” the ravages of “Africa’s first world war” centered in the DRC, the quarter century of chaos and turmoil in Somalia, the civil war in South Sudan, the sectarian violence in the CAR, the flight of Eritreans from poverty and conscription, the breakdown of the rule-of-law in El Salvador, Honduras, and Guatemala, the protracted and newly displaced Afghani refugees, and the stateless Rohingya, among others. A “national security framework” cannot be sustained without addressing the other conditions that “create human insecurity” and displacement (Vietti and Scribner 2014, 27). Nor can safe, voluntary return, the preferred option for most refugees, be brought to scale as a durable solution without systematically addressing refugee-producing conditions.

In the UN summit report *Addressing the Large Movements of Refugees and Migrants*, the UN secretary-general urged states to take concrete steps to uphold “the safety and dignity” of refugees and migrants; to adopt a “global compact” that would entail greater, more integrated and differentiated commitments to refugee protection; and to develop a “global compact for safe, regular and orderly migration” (UN Secretary-General 2016 § 24-29). The United States has expressed its commitment to expanded and diversified state commitments to address this immense human crisis.⁹⁰ While the language in the UN report has been watered down in the summit outcome document, many of the report’s key ideas have survived. In particular, the idea of a global compact on refugee protection, buttressed by concrete state commitments, deserves support from both a refugee protection and national security perspective.

Developed states should offer orderly and expanded access to their own territories. They should also increase opportunities for protection through greater use of humanitarian, medical, family, student, labor, and private resettlement channels (UN Secretary-General

⁸⁹ Moreover, many conflicts and other refugee-producing conditions can be anticipated (Rupp 2016, 81).

⁹⁰ The United States has announced that it will seek to identify an additional 10 states to contribute regularly to UN humanitarian appeals and agencies, to secure a 30 percent increase in state commitments for this work (from \$10 billion in 2015 to \$13 billion in 2016), to double the number of refugee resettlement or other legal avenues of admission worldwide, and to expand refugee education and employment opportunities by one million persons in each of 10 refugee host states (Campbell 2016).

2016 § 83).⁹¹ Legal migration contributes to security by denying traffickers access to vulnerable persons, preventing crossing deaths, and allowing states to identify persons seeking admission and to concentrate their resources on bad actors. By contrast, terrorists often profit from and occasionally control criminal smuggling rings (Adamson 2006, 178; Schmid 2016, 27-28). Smugglers and traffickers flourish “when the demand for opportunities to immigrate outstrips the supply provided by official channels” (Adamson 2006, 193). In order to minimize criminally organized flows, states should align their legal migration policies with their own socio-economic interests. They should also regularly legalize unauthorized populations.

The threat of terrorist recruitment, conscription and violence speaks to the need to safeguard refugees in camps and urban settings, the need to expand and expedite durable solutions, and the need to extend legal migration channels to refugees. In addition, greater educational and employment opportunities can immunize refugees from terrorist propaganda and diminish onward migration, while affording them portable skills (UN Secretary-General 2016 § 82).

Developed states should provide far greater support to refugee hosting states for both humanitarian and security reasons. The latter states can serve as a bulwark against extremism and dangerous, unregulated migration. With appropriate support, they can offer development opportunities to all of their residents (including refugees) and, thus, increase the prospects for refugee integration.

Terrorists seek to radicalize socially disenfranchised youth and young adults in Western states (IEP 2015, 69). In response, states and civil society should prioritize youth education, employment, socially inclusive policies, and holistic policing strategies (IEP 2015, 74). The literature on immigrant integration illustrates that the policies, values, and prejudices of receiving communities strongly influence integration outcomes (Portes and Zhou 1993, 83).⁹² Thus, host states should adopt strong and inclusive policies for their refugee and forcibly displaced populations.

Integration also demands a commitment by refugees and asylees to the core, rights-respecting values and laws of receiving states. Extremist groups, by contrast, seek to create homogeneous societies: they reject pluralism and minority rights, and view the “rule-of-law” as an impediment to their goals (Schmid 2016, 8-9).⁹³

An integrated response to refugee integration is also a hallmark of effective policies: integration between state agencies; between localities, states, supranational, and international

91 *The Causes and Consequences of Violent Extremism and the Role of Foreign Assistance: Hearing before the Senate Appropriations Subcommittee on State, Foreign Operations, and Related Programs, 114th Cong. (2015)* (written testimony of Kelly T. Clements, Deputy High Commissioner, United Nations High Commissioner for Refugees), <http://www.appropriations.senate.gov/imo/media/doc/041216%20-%20Clements%20-%20UNHCR%20-%20Testimony.pdf>.

92 The reception of refugees, asylees and their children may well have a greater influence on the receptivity of these populations to violent extremism than their nations of origin or ancestry (Bolifrass, Shaver, and Zhou 2015).

93 Alex Schmid has usefully characterized Europe’s core values as “democratic majority rule with respect for rights of minorities, rule of law, human rights, separation of state and religion, gender equality, freedom of thought and religion, social solidarity, pluralist acceptance of diversity and mutual tolerance” (Schmid 2016, 51).

bodies; and between government, the private sector, and NGOs (UN Secretary-General 2016 § 114[a]). Similarly, counterterrorism requires the integrated use of “all elements of national power,” including “diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense” (9/11 Commission 2004, 205).

States whose members are targeted for terrorist recruitment should also prioritize countering violent extremism (CVE).⁹⁴ As part of its “national security” strategy, for example, the United States has committed to addressing “the underlying conditions that can help foster violent extremism” and to support “alternatives to extremist messaging and greater economic opportunities for women and disaffected youth” (White House 2015b, 9). These important goals need to be operationalized.⁹⁵

The success of CVE programs depends, in part, on their responsiveness to the diverse contexts and motivations of terrorist recruits,⁹⁶ and on engagement of these programs with family, school, law enforcement, and other community institutions.⁹⁷ An analysis of “counter-radicalization” programs in the United Kingdom, the Netherlands, Denmark and Norway found that programs that targeted at risk persons or those already on a path to radicalization were more effective than broad, preventive initiatives (Vidino and Brandon 2012, 70). CVE initiatives can be difficult to assess given the difficulties in proving “prevention” or abandonment of an ideology or affiliation (Schmid 2016, 45-54). However, they should nonetheless be targeted, context-specific, and rigorously evaluated.

Liberal democracies have historically treated migration from totalitarian states as an expression of the aspiration for freedom by persons who would otherwise be consigned to lives of repression and poverty. These concerns are not implicated in cases of persons seeking to join a terrorist organization or to evade arrest for domestic or overseas terrorist activity. Returning jihadists, in particular, should receive exhaustive screening, with an eye toward determining which of a continuum of responses to impose, from release and surveillance to criminal prosecution and, in extreme circumstances, to revocation of citizenship through judicial proceedings.⁹⁸

Robust refugee and migrant vetting procedures can advance national security and pave the way for generous refugee protection policies. In the post-9/11 era, the United States has sought to “secure mobility” through:

94 The related term “counter-radicalization” has been described as a “catch all” that encompasses de-radicalization (to abandon one’s radical views), disengagement (to abandon a terrorist affiliation and activities, if not its ideology), and radicalization prevention (which targets a particular segment of society whose members may be vulnerable to radicalization) (Vidino and Brandon 2012, 9).

95 To that end, in 2015, the United States hosted national and regional summits on countering violent extremism (CVE). In May 2016, it released a strategy document describing its priorities in this area. CVE initiatives seek to eliminate or minimize the factors that cause members of targeted communities to join or support terrorist organizations (Schmid 2016, 53-54).

96 A study of 2,032 persons who fought for al Qaeda broke down their motivations into four categories, identity seeking (40 percent), revenge seeking (30 percent), status seeking (25 percent), and thrill seeking (5 percent) (IEP 2015, 73).

97 Under the US strategy, CVE encompasses not just prevention, but rehabilitation and reintegration programs (DOS and USAID 2016, 7).

98 Denaturalization might be fitting, for example, in cases of hardened terrorists, war criminals, and others who were granted citizenship based on willful misrepresentation.

- intelligence collection;
- expanded and accurate terrorist and criminal databases;
- information sharing within and between states;
- secure, biometrically enhanced identity documents;⁹⁹
- layered screening, including interviews to assess eligibility for admission and credibility;
- enhanced background checks on migrants who meet evidence-based profiles;
- strategies that enlist public support and advance national unity; and
- continuous assessment of terrorist threats, tactics, and methods.

Many states cannot afford such an extensive vetting and screening regime. However, the severe, sometimes existential threat posed by transnational terrorists and criminal organizations to fragile states argues for “increased levels of interstate cooperation” in the form of intelligence collection, information sharing, law enforcement support, and regulated migration (Adamson 2006, 198).

While potentially an important point of exposure and vulnerability for terrorists, borders should not be the sole or main locus for identifying terrorists or preventing their entry. In addition, the level of investment in border and immigration enforcement policies should be subjected to risk management principles. Enforcement agencies should not be charged with screening refugees and migrants for protection. However, if they are vested with these responsibilities, an independent, specially trained unit should be created for this purpose.

B. Proposals to Strengthen and Secure the US Refugee Protection System

The US Congress should take six steps to strengthen the US refugee protection system and national security. First, Congress should “create a single, principal point of oversight and review for homeland security” (9/11 Commission 2004, 421). On the 10th anniversary of the attacks, the National Security Preparedness Group (NSPG) composed of 9/11 Commission members reported that dysfunctional congressional oversight had created gross inefficiencies and security vulnerabilities. The NSPG found that DHS answered to “more than 100 committees and subcommittees” and, in 2009 and 2010, “provided more than 3,900 briefings” and “testified more than 285 times” (NSPG 2011, 16). As a result, DHS operates under “unclear security policies,” duplicates efforts, receives “conflicting guidance,” and has not successfully integrated its constituent parts (ibid.)

According to James Ziglar, “the failure of Congress to have a focused oversight strategy for DHS actually endangers our national security interests by forcing DHS to respond to the policy and political interests of hundreds of members of Congress (and committees), as well as the increased risk of disclosure of confidential and classified information in the hands of so many Members.”¹⁰⁰ Ziglar argues that DHS’s responsibilities “are as important as those of US intelligence agencies, yet the Congress refuses to manage the oversight of DHS with the same seriousness as it does with the intelligence agencies.”¹⁰¹ Congress

99 Identity assurance can also increase the efficiency of humanitarian and resettlement assistance.

100 Interview by author with James Ziglar, former INS Commissioner (Dec. 29, 2015).

101 Ibid.

should move with alacrity to streamline its oversight of the nation's homeland security agency.

Second, Congress should ensure that DHS creates a unified command structure to respond to terrorist attacks and other catastrophic events that implicate multiple jurisdictions and agencies (NSPG 2011, 12-13). Just as integration between diverse government agencies is central to preventing terrorism, so too can an integrated response to terrorist attacks minimize their impact and transform them into an occasion for national unity.

Third, as stipulated in the Refugee Act of 1980, Congress should also create a presidentially appointed US coordinator for refugee affairs to develop refugee policy, coordinate admission and resettlement programs, and serve as a liaison to foreign governments, Congress, relevant federal agencies, state and local governments, and NGOs.¹⁰² Given the high degree of interest in and misinformation related to the refugee program, the time is ripe to create such a position.

As it stands, the United States cannot credibly deny admission to desperate, well-vetted refugees on security-related grounds, but allow potential terrorists to purchase firearms and explosives

Fourth, Congress should pass legislation to prevent suspected terrorists from purchasing firearms and explosives, while permitting those who wish to purchase firearms and are incorrectly on the FBI's terrorist watch list to clear their names in an expedited way. ISIS has identified US firearm policies as a source of vulnerability to the United States (Taylor 2016). The FBI operates the National Instant Criminal Background Check System (NICS), which allows federal, state, and local law enforcement to conduct checks on persons seeking to purchase firearms or to secure a permit to obtain, sell, or transfer explosives. NICS searches the FBI's National Crime Information Center (NCIC) database, which contains information on persons "wanted" by federal, state, and local law enforcement, and the FBI's consolidated terrorist screening database. As the law stands, felons, fugitives, and persons without immigration status cannot purchase firearms or explosives in the United States, but suspected terrorists can.

In March 2015, the US Government Accountability Office (GAO) reported that from February 2004 through 2014, persons on the terrorist watch list "were involved in firearm or explosives background checks 2,233 times" and that "2,043 (about 91 percent) of the transactions were allowed to proceed ..." (GAOa 2015). The FBI can use information on an *attempted* purchase in its counterterrorism investigations. However, it does not always know if suspected terrorists have actually obtained firearms or a license or permit for explosives because gun and explosives dealers must keep this information, but need not report it (GAO 2010, 4).

Despite strong public support, bills to allow potential gun purchasers to challenge an incorrect terrorist watch list designation and to prevent terrorists from purchasing firearms and explosives have been reliably defeated (Ingraham 2015; Ingraham 2016), including

¹⁰² Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 § 301 (1980).

by the US Senate on December 3, 2015 (after the San Bernardino attack) and on June 20, 2016 (after the Orlando attack by a US citizen formerly on a terrorist watch list). Congress should pass bipartisan legislation to address these dual imperatives. As it stands, the United States cannot credibly deny admission to desperate, well-vetted refugees on security-related grounds, but allow potential terrorists to purchase firearms and explosives. Nor should it deny the right to purchase firearms to persons mistakenly or incorrectly placed on the terrorist watch list.

Fifth, Congress should depoliticize its oversight of the US refugee program. The need for generous refugee protection policies and for a rational assessment of their security vulnerabilities has never been so great. It represents an exercise in cynicism to conflate persons who have fled for their lives, with the terrorist groups who, in many cases, prompted their flights, or to portray the interests of those seeking protection as at odds with citizens who expect to be safe and secure in their own nations. Like national security, refugee protection should be a “valence issue,” supported across the political spectrum and debated on the level of strategy and tactics.

Effective responses to large-scale refugee crises have invariably resulted from political leadership, strong domestic constituencies, and a high level of public understanding and acceptance of those seeking protection

Sixth, while “100 percent security” cannot be guaranteed, the US refugee resettlement program is highly securitized.¹⁰³ The response to a security breach in this program should not be a bar on the admission of desperate people. Instead, it should be an exhaustive review of whether officials rigorously followed all the steps in the vetting and screening process. If they did not, quality control and oversight need to be improved. If they did, previously unrecognized vulnerabilities need to be immediately remedied. As a matter of course, refugee and international migration policies should be continuously assessed and, if necessary, strengthened based on evolving intelligence on terrorist intentions, methods and tactics.

C. Making Refugee Protection a Popular Cause

It is a central paradox in the debate over refugee protection and security that effective protection policies can further security, but security-driven fears often impede their adoption. Many policymakers, commentators, and advocates attribute hostility to refugees and other forcibly displaced persons to political populism, stoked by demagogues. Extremist political movements have been on the ascent in Europe and the United States (Troianovski 2016). These movements criticize what they perceive to be collusion between the press and the political elite. They maintain that Islam is incompatible with liberal democracy, challenge the legitimacy of state institutions, oppose the putative loss of sovereignty to supranational and international institutions, and support generous social welfare policies

103 Interview by author with Vincent Cannistraro, former Chief of Operations and Analysis in the CIA’s Counter-Terrorism Center (Nov. 20, 2015).

for natives. They seek an exclusive kind of order and security that diminishes the prospects for security for refugees and other forcibly displaced persons.

National defense and public safety represent core responsibilities of sovereign states. Yet as reflected in a succession of seminal human rights instruments since World War II, states also exist to safeguard the rights of their citizens at home and abroad, non-citizens in transit, persons fleeing persecution at their borders, refugees and immigrants who settle in their territories and (in limited circumstances) imperiled person beyond their borders (UN Secretary-General 2016 §§ 13, 54).

The debate over how to reconcile these broad responsibilities will remain messy and fraught, but it must be engaged politically and cannot remain a debate *between* refugee protection and national security. Refugee resettlement and admission policies arise from political commitments, not from international legal commitments. Effective responses to large-scale refugee crises have invariably resulted from political leadership, strong domestic constituencies, and a high level of public understanding and acceptance of those seeking protection. It seems trite to make the case that public opinion matters for refugee protection, but in fact it does. Moreover, public opinion surveys,¹⁰⁴ and the great generosity of many host communities offer abundant evidence of public support for refugees. The need is not to extinguish populist politics, but to educate the public on the interconnectedness of refugee protection and security, and to make protection a popular cause.

104 Eighty percent of respondents in a global survey of 27,000 persons in 27 nations said they would accept persons fleeing war or persecution into their countries, 10 percent said they would accept such persons into their homes, 73 percent believed that such persons should be able to take refuge in other countries, and 66 percent said that states should do more to help persons fleeing war or persecution (Amnesty 2016).

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