

Rethinking the Employment Status of Refugees in the United States

The United States has long been a global leader in refugee resettlement. Still, many refugees face extraordinary difficulties with poverty and unemployment after arriving in the country. Currently, refugees are barred from applying to jobs in the Federal Civil Service, the largest employer in the United States. A change in this policy could mitigate these challenges for the refugee population. Not only is the current policy misguided from a humanitarian and economic perspective, it is also potentially unconstitutional as it may be in conflict with U.S. obligations under the 1967 Protocol on the Status of Refugees.

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INTRODUCTION

Despite recent criticism, the United States has historically been a model country for refugee resettlement.¹ The refugee population in the United States, however, still faces many obstacles to integration—particularly in the area of employment. The exclusion of refugees from eligibility to work for the nation's largest single employer, the federal civil service,² almost assuredly plays a role.³ The exclusion of refugees from such a large sector of the economy may also conflict with the 1951 Convention on the Status of Refugees (“Convention”).⁴

In this note, I will first examine the potential contradictions between United States policy and its specific obligations under that treaty. I will start by providing background information on the Refugee Convention, U.S. federal employment policy, and the refugee resettlement program currently in place in the United States. I will then examine whether the Refugee Convention is a self-executing treaty and, therefore, binding under the Supremacy Clause. Finally, I will analyze the meaning of the labor provisions in the Refugee Convention and argue that there is, at minimum, a possibility of conflict with Executive Order 11935, which bars non-citizens from federal civil service employment.

I conclude by arguing that even if the exclusion of refugees from the federal civil service does not clearly violate the treaty, this executive branch policy unnecessarily conflicts with the treaty's object and purpose, and therefore runs contrary to the intent of Congress—which has made clear its commitment to respecting the treaty in full. While the executive branch's political justification for the citizenship requirement for federal civil service employment is persuasive when applied to non-citizens generally, it is much less legitimate when applied specifically to refugees. In the absence of a more legitimate and specific reason for excluding the refugee population from the vast job opportunities available in the federal civil service, the executive branch should refrain from restricting refugee employment rights recognized by the Refugee Convention and reaffirmed by

1. See *infra* p. 1024.

2. See U.S. DEP'T OF LABOR, *Federal Employment*, <http://www.dol.gov/odep/topics/federaemployment.htm> (last visited Oct. 27, 2016) [hereinafter *Federal Employment*].

3. Executive Order 11935 requires a person to be a citizen of the United States in order to be eligible for Civil Service Examination. See Exec. Order No. 11935, 41 Fed. Reg. 37,301 (Sept. 2, 1976).

4. See generally Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

Congress.

I. BACKGROUND

A. *The History of the Refugee Convention*

The Refugee Convention was drafted in 1950 and opened for signature in the summer of 1951.⁵ It was intended to apply only to persons who became refugees due to events occurring before 1951, mainly World War II.⁶ Although the United States took in a vast number of refugees from World War II for resettlement⁷, it did not ratify the 1951 Convention.⁸ In 1967 the Protocol relating to the Status of Refugees (“Protocol”) amended the Convention and extended its application to situations occurring post-1951.⁹ Article I (1) of the Protocol states that, “[t]he States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to [all] refugees”¹⁰ The United States ratified and became party to the 1967 Protocol on November 1, 1968.¹¹ Therefore, although not a state party to the 1951 Convention,¹² the United States became derivatively responsible for all obligations contained in Articles 2 through 34 of the original treaty.

Article 17 of the Refugee Convention requires states to give refugees specific rights to seek wage-earning employment. Section 2 of Article 17 specifically states:

5. Guy S. Goodwin-Gill, *Convention Relating to the Status of Refugees*, U.N. AUDIOVISUAL LIBRARY OF INT’L LAW 2, http://legal.un.org/avl/pdf/ha/prsr/prsr_e.pdf (last visited Oct. 27, 2016).

6. U.N. High Comm’r for Refugees, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol 1* (2011), <http://www.unhcr.org/4ec262df9.html> [hereinafter *Convention History*].

7. See generally *United States Policy Toward Jewish Refugees, 1941–1952, Holocaust Encyclopedia*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM (July 2, 2016), <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007094>.

8. Convention relating to the Status of Refugees, *supra* note 4.

9. See *Convention History*, *supra* note 6, at 1.

10. Protocol relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267.

11. Protocol relating to the Status of Refugees, Declarations and Reservations, Jan. 31, 1967, 606 U.N.T.S. 2, <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d9abe177&query=1951%20Refugee%20Convention> [hereinafter *Declarations and Reservations*].

12. See U.N. High Comm’r for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol 4*, <http://www.unhcr.org/3b73b0d63.html> [hereinafter *States Parties*].

In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfills one of the following conditions: (a) He has completed three years' residence in the country; (b) He has a spouse possessing the nationality of the country of residence . . . (c) He has one or more children possessing the nationality of the country of residence.¹³

Additionally, Article 17 (3) states:

The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.¹⁴

While the United States made reservations to the application of Articles 24 and 29 of the 1951 Convention when it ratified the 1967 Protocol, there was no indication of any objection to the obligations of Article 17.¹⁵ The Senate ratified the treaty after assurances from the executive branch that U.S. law would not need to be amended to be in compliance.¹⁶ It does not, however, appear that at the time of ratification there was any law limiting employment of refugees, even if citizenship may have sometimes been a *de facto* requirement for certain forms of employment in the United States.¹⁷ Therefore, at the time of ratification, it appears that the United States was, at least in a *de jure* sense, in compliance with Article 17.

B. Executive Order 11935

In 1970, the Civil Service Commission passed a rule limiting the persons who could take the civil service exam. The regulation provided in part:

13. Convention relating to the Status of Refugees, *supra* note 4, at art. 17(2).

14. *Id.* at art. 17(3).

15. Declarations and Reservations, *supra* note 11, at 5.

16. Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 4 (1997).

17. There was previously a regulation by the Civil Service Commission, which limited employment to citizens, but the regulation was struck down by the Supreme Court. *See infra* text accompanying notes 18–19.

(a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States. (b) A person may be given an appointment in the competitive service only if he or she is a citizen of or owes permanent allegiance to the United States. However, a noncitizen may be given (1) a limited executive assignment . . . in the absence of qualified citizens or (2) an appointment in rare cases . . . unless the appointment is prohibited by statute.¹⁸

The Supreme Court in *Hampton v. Mow Sun Wong* struck down this regulation.¹⁹ The court ruled narrowly that it was a violation of due process for the Civil Service Commission to impose this kind of limitation on federal employment, but left open the possibility that the regulation would have been constitutional had it been enacted into legislation by Congress or put in an executive order by the President.²⁰

In response to the Supreme Court's decision in *Hampton*, President Ford passed Executive Order 11935, using his presidential authority to alter the Federal Code to impose citizenship requirements for federal employees. The order reads:

By virtue of the authority vested in me by the Constitution and statutes of the United States of America . . . and as President of the United States of America, Civil Service Rule VII (5 CFR Part 7) is hereby amended by adding thereto the following new section:

Section 7.4 *Citizenship*.

(a) No person shall be admitted to competitive examination unless such person is a citizen or national of the United States.

(b) No person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States.

(c) The Commission may, as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appoint-

18. 33 Fed. Reg. 12429 (Sept. 4, 1968).

19. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 88 (1976).

20. *Id.* at 106. In a 5–4 decision the court ruled that an agency regulation barring noncitizens from the Federal Civil Service was a violation of the Fifth Amendment.

ments.²¹

The President's order was nearly an exact replica of the rule that had been struck down in *Hampton*, but because of the case's narrow ruling, which focused on agency discretion, the President passed the order under a presumption of constitutionality. Although the order has been challenged multiple times in Federal Court,²² it is still in effect today and bars legal immigrants of all kinds from applying for jobs in the Federal Civil Service.²³

C. The Importance of Appropriate Employment for Successful Refugee Resettlement and the Impact of the Syrian Refugee Crisis

Although the United States has recently been criticized for its hesitancy to accept an influx of refugees from the Syrian crisis,²⁴ it has historically been a leader in its commitments to refugee resettlement. In 1980, the United States passed the Refugee Act to standardize the system for refugee resettlement, regardless of national origin.²⁵ This act incorporated the United Nations High Commissioner for Refugees' ("UNHCR") definition of a refugee²⁶ and demonstrated intent to bring United States law in line with the 1967 Protocol relating to the Status of Refugees.²⁷ Since 1975, the United States has resettled more than three million refugees from over seventy countries of origin.²⁸ The United States has demonstrated an

21. Exec. Order No. 11935, *supra* note 3, at 301.

22. See, e.g., *Mow Sun Wong v. Campbell*, 626 F.2d 739, 742 (9th Cir. 1980); *Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th Cir. 1978); *Santin Ramos v. U.S. Civil Service Com'n*, 430 F.Supp. 422, 424 (D.P.R. 1977).

23. U.S. OFFICE OF PERS. MGMT. FEDERAL INVESTIGATIONS NOTICE NO. 03-01 (2002), <https://www.opm.gov/investigations/background-investigations/federal-investigations-notices/2003/fin03-01>.

24. Reuters, *Why Is the U.S. Not Doing More to Help Syrian Refugees?*, NEWSWEEK (Sept. 7, 2015, 4:49 PM), <http://www.newsweek.com/why-us-not-doing-more-help-syrian-refugees-369539>.

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

26. UNHCR's definition of a refugee comes from the Refugee Convention. It defines a refugee as someone 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 nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country." See Convention relating to the Status of Refugees, *supra* note 4, art.1.

27. See generally Refugee Act of 1980.

28. U.S. Dep't of State, Bureau of Population, Refugees, and Migration, *History of U.S. Refugee Resettlement* (2015), <http://www.state.gov/documents/>

outstanding commitment to refugee rights and is the world's leader in refugee resettlement by a large margin.²⁹

Although the United States is often seen as a model for refugee resettlement, much of the U.S. refugee population still lives in poverty. In the period between 2009–2011, twenty-four percent of refugees lived in households receiving food stamps, more than twice the percentage of native-born families.³⁰ Refugees were also almost twice as likely as U.S. born persons to live in a family receiving Temporary Assistance for Needy Families (“TANF”) benefits.³¹ Refugees often have difficulty finding employment in the United States, and those who do find employment are often forced to take jobs for which they are overqualified based on their educational background and pertinent experience.³² Not only does this deny refugees the opportunity to have a meaningful career, but it also creates a major burden on the budgets of the federal government, states, and localities.³³ Given the fact that the United States has made a commitment to refugee resettlement, it is in the national interest, both from a humanitarian and a budgetary perspective to ensure as many decent job opportunities as possible are available to refugees so that they can build meaningful and self-sufficient lives.³⁴

Unemployment and underemployment among refugee populations will become an even more pressing issue given the recently proposed increases in refugee admissions spurred by the Syrian refugee crisis. In 2015, the United States placed a cap on refugee admissions at 70,000 for the year.³⁵ Given the gravity of the Syrian refu-

organization/244270.pdf.

29. *Resettlement in the United States*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/en-us/resettlement-in-the-united-states.html> (last visited July 22, 2016).

30. RANDY CAPPS ET. AL., MIGRATION POL’Y INST., *THE INTEGRATION OUTCOMES OF U.S. REFUGEES: SUCCESSES AND CHALLENGES* 24 (2015).

31. *Id.*, at 25.

32. Anastasia Brown & Todd Scribner, *Unfulfilled Promises, Future Possibilities: The Refugee Resettlement System in the United States*, 2 J. ON MIGRATION & HUM. SEC. 101, 107 (2014).

33. Amber Phillips, *Here’s How Much the United States Spends on Refugees*, WASH. POST (Nov. 30, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/11/30/heres-how-much-the-united-states-spends-on-refugees>.

34. This conclusion requires the assumption that if the poverty rate is high and there are many educated people in that group, that some of the educated people are poor, and therefore likely underemployed. Although other situations could explain the statistics, it is likely that the extremely high rates of poverty among refugees with relatively high rates of education is partly attributable to underemployment.

35. Justin Worland, *U.S. to Increase Number of Refugees Admitted to 100,000 in 2017*, TIME, (Sept. 20, 2015), <http://time.com/4041699/us-refugees-kerry>.

gee crisis, President Obama has agreed that the cap would increase to 85,000 in 2016 and then to 110,000 in 2017.³⁶ The President also stated that at least 10,000 of the refugees admitted each of the two fiscal years should be from Syria.³⁷ Although targets for refugee admissions are not always met, in recent years the State Department has typically met or come close to meeting the numbers set out by the President.³⁸ Therefore, there will likely be a major increase in the number of refugees entering the country looking for employment in the coming years.³⁹

Arriving Syrian refugees will be among the most educated groups of refugees accepted into the United States since the initiation of the program. Although average educational attainment in Syria is lower than in the United States, it is significantly higher than that of the majority of other countries from which the United States accepts a large number of refugees.⁴⁰ This influx of educated refugees will likely mean that there will be many refugees desperate to find adequate work, who are qualified to fill the abundance of posts in the Federal Civil Service, yet are denied access due to their status.⁴¹ There is no doubt that access to the largest employer in the United States would serve to elevate the employment status of at least some incoming refugees, and those already here. Lack of access is not only a detriment to the lives of the refugees and their families, but also to American taxpayers who fund the social welfare programs that so many refugees depend on due to their inability to find well-paying jobs appropriate to their qualifications.⁴²

36. *Id.*; Merrit Kennedy, *White House Wants to Resettle 110,000 Refugees In the U.S. Next Year*, NPR (Sept. 14, 2016, 12:23 PM), <http://www.npr.org/sections/thetwo-way/2016/09/14/493922399/white-house-wants-to-resettle-110-000-refugees-in-u-s-next-year>.

37. Worland, *supra* note 35. With a few weeks remaining in Fiscal Year 2016 the U.S. has well exceeded its goal, having settled over 11,500 Syrian refugees. Kennedy, *supra* note 36.

38. Media Note, U.S. Dep't of State, U.S. Reaches its Refugee Admissions Target for the First Time Since 1980 (Oct. 21, 2013), <http://www.state.gov/r/pa/prs/ps/2013/10/215709.htm>.

39. This note assumes that future presidential administrations respect refugee targets and obligations as set by previous administrations.

40. *See* Annex.

41. *See Federal Employment, supra* note 2 (demonstrating that the Federal Civil Service is the largest single employer in the entire U.S.).

42. Alexia Fernández Campbell, *America's Real Refugee Problem*, ATLANTIC (Oct. 24, 2016), <http://www.theatlantic.com/business/archive/2016/10/the-challenge-of-integrating-americas-refugees/505031> ("There are jobs out there for plumbers, electricians—but they are not the jobs our parents used to do back home.").

II. EXECUTIVE ORDER 11935 RAISES QUESTIONS OF CONSTITUTIONALITY IN ITS APPLICATION TO REFUGEES

In order to prove that Executive Order 11935 is impermissible based on the obligations of the Refugee Convention, two steps are required. First, a potential challenger to the law would have to argue that the Refugee Convention is a law of the land as defined by the Supremacy Clause. Second, a challenger would have the more difficult task of demonstrating that the executive action is clearly in conflict with the obligations of the treaty. I will begin my analysis with the first step.

A. The Refugee Convention Should be Treated as Binding Law Under the Supremacy Clause

The Supremacy Clause ensures that treaties entered into through the constitutional process act as more than just international obligations, but are also domestically binding on courts, as any other congressional legislation would be.⁴³ Therefore, an executive act that clearly runs contrary to a treaty violates the President's duty to execute the laws of the United States.⁴⁴ In *Foster v. Neilson*,⁴⁵ the Supreme Court elaborated on the inclusion of treaties in the supremacy clause. Chief Justice Marshall explained:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.⁴⁶

43. The Supremacy clause states, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

44. *Id.* art. II, § 3.

45. *Foster v. Neilson*, 27 U.S. 253 (1829) (overturned on other grounds).

46. *Id.* at 315.

The Chief Justice went on to explain that where the terms of the contract itself explicitly require a party to take action, that action must be accomplished through legislation. The treaty at issue in the case fell into this category, and was therefore non-self-executing. As such, the Court held that enforcement is considered the domain of the political branches and an inappropriate arena for judicial interference. Therefore, the Supremacy Clause only serves as adequate grounds to enforce the provisions of a treaty upon the government when a treaty is considered self-executing.⁴⁷

It is often difficult to distinguish between a self-executing and non-self-executing treaty. For example, in *Foster* the court found that the treaty at issue was not self-executing and therefore was not binding on the courts, based on a lack of evidence before it at the time.⁴⁸ However, later in *U.S. v. Percheman* the Supreme Court overturned the ruling in *Foster* based on additional evidence that had emerged about the meaning of the treaty and found that the same treaty at issue in the *Foster* case was self-executing.⁴⁹ Although these cases together demonstrate the difficulty in differentiating between self-executing and non-self-executing treaties, *Percheman* also serves to illuminate the process for the court's determination.⁵⁰ The Supreme Court changed its reading of the treaty based on new evidence of a translation of the treaty that was signed by the Spanish government.⁵¹ The translation of the Spanish document illuminated a different use of language, which led the Court to decide that the treaty was in fact intended to be self-executing,⁵² despite having previously decided based on the English version, which was not entirely clear on the issue, that the treaty was not self-executing.⁵³ This illuminates that despite difficulties in determining the exact criteria that make a treaty self-executing, key factors certainly include the specific language of the treaty and the degree to which that language suggests an immediate requirement.

Percheman demonstrates the great weight that the language of a treaty has on the determination of its binding nature in U.S. courts.

47. *Id.* at 316.

48. *Id.*

49. *U.S. v. Percheman*, 32 U.S. 51, 53 (1833) (Although the same treaty was at issue, the Court came to a different conclusion due to the fact that new evidence had come to light as to the meaning of Spanish translation of the treaty which demonstrated an intent to be bound that did not require additional domestic legislation.).

50. *Id.*

51. *Id.* at 89–90.

52. *Id.*

53. *Foster*, 27 U.S. at 316 (1829).

The most significant analysis performed by a court in the interpretation of a treaty, as with any other law, is the interpretation of the exact meaning of the text.⁵⁴ In *Medellin*, the Court found that the language in the United Nations Charter requiring that each state party “undertak[e] to comply”⁵⁵ with decisions of the International Court of Justice, demonstrated a commitment to take future action, rather than an immediate obligation. Therefore the treaty was not self-executing and required further action by the political branches to be binding on the courts.⁵⁶ The Court in *Medellin* stated that language indicating a concrete obligation on the United States such as “shall” or “must” would indicate that a treaty was intended to be self-executing; however, that type of language was not present in the treaty at issue.⁵⁷ Although the courts do take other evidence into account when deciding the meaning of a treaty, the specific language surrounding the nature of the obligations in the treaty is given great weight when deciding whether a treaty is self-executing.

The language of the Refugee Convention and Protocol relating to the Status of Refugees does not present a clear-cut answer as to whether the obligations on the United States are self-executing. The Protocol provides that, “The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.”⁵⁸ That language would seem to indicate that the treaty is non-self-executing based on *Medellin*.⁵⁹ Article 17(3) of the treaty is clearly aspirational and therefore cannot be analyzed in terms of conflict between the treaty and a presidential order, as it creates no binding legal obligations.⁶⁰ However, looking at the language of the specific obligations relating to employment rights of refugees in the Refugee Convention, Article 17(2), complicates the analysis. That provision states, “restrictive measures imposed on al-

54. *Medellin v. Texas*, 552 U.S. 491, 506 (2008) (“The interpretation of a treaty, like the interpretation of a statute, begins with its text.”).

55. *Id.* at 534.

56. *Id.* at 509.

57. *Id.*

58. Protocol relating to the Status of Refugees, *supra* note 10, art. I.

59. *Medellin*, 552 U.S. at 509. In *Medellin*, the Court found that the language “undertakes to comply,” indicated that the treaty at issue was not self-executing. The Protocol says “undertake to apply” which is seemingly similar and could potentially indicate that the derivative obligations of the Protocol are not self-executing.

60. Convention relating to the Status of Refugees, *supra* note 4, art. 17(3). The text of this article asks States to give “sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals.” This is clearly an aspirational article that does not legally bind States but gives meaning to the purpose of the article.

iens or the employment of aliens for the protection of the national labour market *shall* not be applied to a refugee . . . who fulfills . . . [the] conditions.”⁶¹ That specific language seems to be the kind of language that the Court in *Medellin* indicated would create a self-executing treaty obligation.⁶² Since the United States did not actually sign the 1951 Convention, and only derived the obligations of the Convention through the language in the 1967 Protocol, it is unclear to which language the Court would look. In *Medellin*, the Court looked at the language of the specific obligation at issue in the case, not at the preamble to the United Nations Charter or language about its general application.⁶³ However, the Court does not specifically say that a preamble, or a more general explanation of the nature of all obligations would not be appropriate to include in the analysis to illuminate the meaning of the treaty.⁶⁴ Further, the protocol’s language creates specific derivative obligations to uphold provisions of the Convention, so it is not exactly analogous to a preamble, which cannot create legally binding obligations. Given the lack of clarity as to the extent of the binding nature of the language in the protocol and treaty, further context would likely be necessary to complete a court’s analysis.

In prior cases, the Supreme Court—in addition to analyzing the text of a treaty or treaties—has looked to the drafting and legislative histories as well as post-ratification events to color its understanding of the document’s meaning.⁶⁵ The drafting history of the 1967 Protocol is perhaps the most telling indicator as to the meaning of the obligations contained therein. The main purpose of the Protocol was to apply the Refugee Convention to those who became refugees due to events occurring after 1951.⁶⁶ The majority of states that became party to the Protocol were states that had previously signed onto the 1951 Convention.⁶⁷ The United States is one of only three countries that ratified the 1967 Protocol without ratifying the 1951

61. *Id.* art. 17(2) (emphasis added).

62. *Medellin*, 552 U.S. at 509.

63. *Id.* at 506 (“The obligation on the part of signatory nations to comply with ICJ judgments derives not from the Optional Protocol, but rather from Article 94 of the United Nations Charter—the provision that specifically addresses the effect of ICJ decisions.”).

64. *Id.* at 508–11.

65. *Id.* at 507 (“Because a treaty ratified by the United States is ‘an agreement among sovereign powers,’ we have also considered as ‘aids to its interpretation’ the negotiation and drafting history of the treaty as well as ‘the postratification understanding’ of signatory nations.”).

66. Convention History, *supra* note 6, at 1.

67. States Parties, *supra* note 12, at 1.

Convention.⁶⁸ It is fairly clear that the purpose of the 1967 Protocol was not to lessen the obligations of the 1951 Convention but to increase its scope.⁶⁹ The Introductory Note to the Convention and Protocol specifically states, “The 1951 Convention, as a post-Second World War instrument, was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. The 1967 Protocol removed these limitations and thus gave the Convention universal coverage.”⁷⁰ In that context the language of the 1967 Protocol is no longer clearly indicative of a non-self-executing treaty. The phrase “undertake to apply”⁷¹ was therefore likely intended to give states parties some discretion as to the timing and process of incorporating a much broader group of people into their refugee regimes. It was not meant to modify the strength of the obligations of the original 1951 treaty, or to indicate that national legislation was needed to make those already existing obligations binding on parties to the Protocol.

The legislative history of the Senate consent process also provides insight into whether the consenting body believed the treaty to be self-executing. When the Senate was considering the 1967 Protocol, representatives from the executive branch assured Congress that the Immigration and Nationality Act would not require modification if the Protocol were passed, because the Act could be applied in such a way that all action would be in compliance with international obligations.⁷² After the Senate vote consenting to the President ratifying the treaty, Senator Proxmire made a statement commending the Senate for its action saying, “I am particularly gratified since this vote demonstrates clearly that these various international conventions, designed to internationalize human rights and their protection, can be ratified without prejudice to national or state law.”⁷³ The Senators who consented to the ratification of the treaty did so because they be-

68. *Id.* (Cabo Verde, the United States and Venezuela are the only countries party only to the 1967 Protocol and not the 1951 Convention.).

69. See G.A. Res. 21/2198 (XXI), Protocol Relating to the Status of Refugees, ¶ 3–7 (Dec. 16, 1966) (“Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention, irrespective of the date-line of 1 January 1951 Requests the Secretary-General to transmit the text of the Protocol to the States mentioned in article V thereof, with a view to enabling them to accede to the Protocol.”).

70. U.N. High Comm’r for Refugees, Introductory Note to the Convention and Protocol Relating to the Status of Refugees, 2 (Dec. 2010), <http://www.unhcr.org/3b66c2aa10.html>.

71. Protocol relating to the Status of Refugees, *supra* note 10, art. I(1).

72. Fitzpatrick, *supra* note 16, at 4.

73. 114 CONG. REC. 29577 (daily ed. Oct. 4, 1968)(Statement of Sen. Proxmire).

lieved that the United States was already in compliance with the laws and therefore no changes would need to be made to immigration statutes, not because they believed that the treaty would not be binding law.⁷⁴

The details of the U.S. ratification of the Protocol can also serve as an indicator of the intent to be bound. The United States made several reservations in its ratification of the treaty.⁷⁵ The reservations appear to be written under the assumption that the United States would be bound by obligations unless they made a formal declaration otherwise.⁷⁶ The United States did not indicate that it took any issue with or expected any exception to Article 17 of the Refugee Convention. Additionally, the United States did not make a reservation declaring that it understood the treaty in general to be non-self-executing.⁷⁷ That option has been utilized by the political branches and upheld by the Supreme Court as a legitimate way to limit the application of a ratified treaty.⁷⁸ The fact that a similar declaration was not made in the ratification of a treaty that by its context was at least arguably expected to be binding, can be read to indicate that the United States intended the treaty to be self-executing.

The actions of the legislature after ratification are also telling. For twelve years post-ratification, Congress did not pass any major legislation on the refugee resettlement program in the United States. In 1980, Congress passed the Refugee Act, partially motivated by a desire to bring U.S. law into compliance with the 1967 Protocol.⁷⁹ The law revised the Immigration and Nationality Act to create a more uniform system for the process of refugee admission and resettlement.⁸⁰ The Refugee Act also changed the definition of a refugee to bring it in line with the Protocol.⁸¹ Additionally, the Act ensured that compliance with key principles of the Refugee Convention such as nonrefoulement were mandated by U.S. law and not up to the discre-

74. Fitzpatrick, *supra* note 16, at 4.

75. Declarations and Reservations, *supra* note 11, at 5.

76. *Id.* The reservations include the language, “[t]he United States of America accepts the obligation of paragraph 1(b) of Article 24 of the Convention except . . .” This seems to indicate the United States’ expectation that it would be bound by any obligations to which it did not take exception.

77. *Id.*

78. *Iguartua-De La Rosa v. U.S.*, 417 F.3d 145, 151 (1st Cir. 2005) (stating that the Senate can, through the ratification process, declare a treaty, or specific provisions to be not self-executing).

79. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). *See also* Fitzpatrick, *supra* note 16, at 6.

80. *See generally* Refugee Act of 1980.

81. *Id.* at 102-03.

tion of the executive branch.⁸² Although the Act in practice worked to remedy discrepancies between U.S. statutory law and obligations under the treaty, the law was not what one would imagine as an “executing statute.”⁸³ The Refugee Act instead served the purpose of creating a more practical and regimented system for refugee resettlement, beyond the requirements of the Protocol.⁸⁴ In fact there was no mention of the Protocol at all in the section describing the purpose of the law.⁸⁵ Congress enacted the Refugee Act partially out of a desire to comply with the Refugee Convention, but also to impose its will upon a system that was previously handled almost exclusively by the executive branch.⁸⁶ In doing so, Congress included language that was more in line with the Protocol than previous immigration law,⁸⁷ but the Refugee Act did not serve the purpose of executing the treaty, merely ensuring that U.S. law was in compliance with international obligations.⁸⁸ The preceding analysis of Congress’s actions post-ratification seems to indicate that the government likely interpreted the 1967 Protocol to be self-executing, though the indication is not definitive.

Although the courts will always do their own in-depth review of the meaning of the language in a treaty in order to determine its obligations upon the U.S. government and courts, the courts will also give deference to the government’s, and more specifically, the executive branch’s, interpretation of the treaty.⁸⁹ In *Medellin*, the court

82. *Id.* at 107.

83. The term “executing statute” refers to the type of legislation that would be necessary to enact a non-self-executing treaty. *See supra* text accompanying note 46.

84. Refugee Act of 1980, at 102.

85. *Id.*

86. Fitzpatrick, *supra* note 16, at 6; *See, e.g.*, Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

87. Refugee Act of 1980, *supra* note 79, at 102, 105–09.

88. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987) (“If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees. . . to which the United States acceded in 1968.” Note that the Court did not say that the purpose was to execute the terms of the treaty, but instead to ensure U.S. compliance with the treaty.).

89. *Patterson v. Wagner*, 785 F.3d 1277, 1282–83 (9th Cir. 2015) (“Because the purpose of treaty interpretation is to ‘give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties,’ . . . courts—including our Supreme Court—look to the executive branch’s interpretation of the issue, the views of other contracting states, and the treaty’s negotiation and drafting history in order to ensure that their interpretation of the text is not contradicted by other evidence of intent.”).

noted that it is “well settled that the United States’ interpretation of a treaty ‘is entitled to great weight.’”⁹⁰ Were Executive Order 11935 to be challenged, it is likely that the government would argue that the order itself, as well as its enforcement by multiple presidential administrations since the 1970s, demonstrates the executive branch’s opinion on the issue. However, neither the order nor its application specifically contemplates the application of the law to refugees or the fact that it could be in conflict with the 1967 Protocol.⁹¹ It is entirely possible that the executive branch’s action in enforcing Executive Order 11935 was carried out in ignorance of Article 17(2) of the Refugee Convention rather than with the intention of interpreting the binding nature of the treaty. Therefore, it is conceivable that the executive branch’s actions in interpreting its obligations under Article 17(2) of the Refugee Convention could be given considerably less weight than other evidence, such as the drafting history and other indicators of the meaning of the treaty’s text.

The Supreme Court has previously grappled with the issue of whether or not the Refugee Convention is self-executing, although it has not articulated a clear answer. In *I.N.S. v. Cardoza-Fonseca* the Supreme Court did not need to decide whether or not the Refugee Convention was self-executing, but the dicta provide insight into the issue. First, the Court stated that although one of the laws at issue in the case did not dictate that the Attorney General act within the bounds of the Refugee Convention, the court presumed that “he honored the dictates of the United Nations Convention.”⁹² It is unlikely the Court would have made that presumption if the 1967 Protocol were a non-self-executing treaty with no executing statute passed by Congress, as the Attorney General would have been under no legal obligation to honor the treaty in that case. The Court also stated that Article 33(1) of the Refugee Convention “imposed a mandatory duty on contracting states.”⁹³ Were the 1967 Protocol non-self-executing, there would have been aspirational obligations, not any derivative “mandatory” duties upon States Parties. The Court’s language in *Cardoza-Fonseca* indicates that the Court interprets the 1967 Protocol and its derivative obligations contained in the 1951 Convention as binding on the United States.

The Supreme Court also suggested that the Refugee Convention and Protocol were self-executing in *I.N.S. v. Stevic*.⁹⁴ In *Stevic*,

90. *Medellin v. Texas*, 552 U.S. 491, 514 (2008).

91. Exec. Order 11935, *supra* note 3.

92. *Cardoza-Fonseca*, 480 U.S. at 429.

93. *Id.*

94. *I.N.S. v. Stevic*, 467 U.S. 407 (1984).

the Court referred to the different provisions contained in the Refugee Convention as “obligations” on the United States. The Court did not even contemplate the notion that States Parties to the treaty had the discretion as to whether or not to implement the treaty, instead assuming that the treaty brought with it binding obligations on the United States.⁹⁵ Specifically regarding the derivative obligations set up by the 1967 Protocol, the court said that, “[t]he Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees . . . with respect to ‘refugees’ as defined in Article 1.2 of the Protocol.”⁹⁶ This language does not allow the interpretation that U.S. compliance with the Convention articles was somehow dependent on further legislation. It clearly states that the United States was “bound” to comply.⁹⁷ This indicates that the Supreme Court has presumed the Refugee Convention to be a self-executing treaty.⁹⁸

The Supreme Court spoke most clearly on the issue of whether the Refugee Convention was self-executing in the case of *Sale v. Haitian Centers Council, Inc.*⁹⁹ Although ultimately the Supreme Court decided the case on different grounds and did not reach a clear conclusion on the constitutional issue, it did analyze whether an executive order was in conflict with the Refugee Convention, presumably under the assumption that it would have been unconstitutional should it conflict. Justice Stevens, writing for the majority, stated that, “the Convention might have established an extraterritorial obligation which the statute does not; under the Supremacy Clause, that broader treaty obligation might then provide the controlling rule of law.”¹⁰⁰ Although the court ultimately did not need to decide whether the Refugee Convention would have invalidated a conflicting Executive Order,¹⁰¹ it invited the possibility that a similar challenge to an executive order that does conflict would at least have a possibility of success in U.S. courts.¹⁰²

95. *Id.* at 428.

96. *Id.* at 416.

97. *Id.*

98. The Ninth Circuit has held that the Protocol on the Status of Refugees is not self-executing, but has not elaborated on the reasons for why. The court merely cited *INS v. Stevic*, for that assertion, a case that never elaborated on the self-executing nature of the treaty. Although I note this for the sake of thoroughness, I do not think that it is binding as a matter of national law, since the Supreme Court has never ruled as such. *Stevic*, 467 U.S. at 427 (1984); *U.S. v. Aguilar*, 871 F.2d 1436, 1454 (9th Cir. 1989).

99. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 179 (1993).

100. *Id.* at 178.

101. *Id.* at 188.

102. *Id.* at 179.

If it is positively determined that the 1967 Protocol and its derivative obligations in the 1951 Convention are self-executing, it would be binding on the executive branch in the same manner as a legislative statute. In *Edye v. Robertson*, the court enunciated its position on the application of the Supremacy Clause to treaties:

A treaty, then, is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute. But even in this aspect of the case there is nothing in this law that makes it irrevocable or unchangeable. The constitution gives it no superiority over an act of congress in this respect, which may be repealed or modified by an act of a later date.¹⁰³

Whitney v. Robertson clarified that if treaties and congressional legislation conflict, they should be construed, if possible, in such a way that they can exist in harmony, but when they cannot, whichever is last in time is binding law.¹⁰⁴ Therefore, the executive branch is bound to execute the terms of a binding treaty unless there has been clearly contrary legislation passed by Congress post-ratification.¹⁰⁵

The President is required by the Constitution to “take care that the laws be faithfully executed.”¹⁰⁶ Even when the President is granted the authority to use broad discretion in the execution of a law, he is not permitted to do so in such a way that contravenes another binding law.¹⁰⁷ In exercising his executive power, the President must ensure that his actions do not conflict with any “Law of the Land.”¹⁰⁸ A grant of executive discretion should not be interpreted as permission to act outside of the bounds of established law. In *Chamber of Commerce of U.S. v. Reich*, the United States Court of Appeals for the District of Columbia took up the issue of whether a broad grant of statutory discretion could be interpreted to give the President the power to issue an Executive Order that contradicted the National Labor Relations Act.¹⁰⁹ In that case the court found that

103. *Edye v. Robertson*, 112 U.S. 580, 598–99 (1884).

104. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

105. *Edye*, 112 U.S. at 599.

106. U.S. CONST. art. II, § 3.

107. *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1332 (D.C. Cir., 1996).

108. U.S. CONST. art. VI, cl. 2.

109. *Reich*, 74 F.3d at 1332.

reading a statute granting broad statutory discretion to the President, which had the potential to be in tension with the National Labor Relations Act, should be interpreted in such a way that the two did not conflict. That interpretation, it said, “runs against the canon of statutory construction: ‘[t]he cardinal rule . . . that repeals by implication are not favored.’”¹¹⁰ According to *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, “[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one.”¹¹¹ The case law suggests that, the President—even if given the kind of broad statutory discretion to pass Executive Order 11935—would be bound to ensure that it complied with the Refugee Convention, absent a statute explicitly nullifying the portion of the employment requirements of the treaty.

There has not been any legislation specifically overturning or amending the obligations of the United States to uphold Article 17 of the Convention. In 1980, Congress specifically passed legislation to ensure U.S. compliance with the treaty.¹¹² As previously determined by the courts, Congress properly gave the President the power to determine the qualifications for admission into the Federal Civil Service in the Civil Service Act.¹¹³ However, there is no reasonable way to interpret that grant of authority as any kind of implicit or explicit undermining of the Refugee Convention by Congress, or a determination by Congress that federal civil servants must be citizens. In fact, Congress has set its own limits on persons whose salaries may be paid by federal expenditures, and has set a much broader range of persons who may qualify, including refugees.¹¹⁴ Therefore, to ensure constitutionality, the President would need to establish that Executive Order 11935 is not in contradiction with the Refugee Convention.

B. Executive Order 11935 May Conflict with U.S. Obligations Under the Refugee Convention

The second and more difficult burden presented in a challenge of Executive Order 11935 is demonstrating a conflict with a specific obligation of the Refugee Convention. The first step in this analysis is to determine the precise meaning of Article 17(2) of the

110. *Id.* at 1333.

111. *Rad Zanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), quoting *Morton v. Mancari*, 417 U.S. 535, 550–551 (1974) (emphasis added).

112. *Fitzpatrick*, *supra* note 16, at 6.

113. Civil Service Act, 5 U.S.C. § 3301 (1966).

114. H.R. 2434, 112th Cong. (1st Sess. 2011) at 99.

treaty by examining the exact text.¹¹⁵ As stated earlier, the text of Article 17(2) of the Convention reads:

In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfills one of the following conditions: (a) He has completed three years' residence in the country; (b) He has a spouse possessing the nationality of the country of residence. . . (c) He has one or more children possessing the nationality of the country of residence.¹¹⁶

Clauses (a) through (c) are not at issue here. No matter how they are construed, they are still inclusive of populations who are excluded from consideration for citizenship. The largest category would be those persons who have completed more than three but less than five years of residence in the United States¹¹⁷ and therefore qualify for advanced employment rights under the Refugee Convention but do not qualify to apply for citizenship. This is seemingly unambiguous.

The text preceding clauses (a) through (c) are more open for interpretation. Determining the meaning of the phrase, "restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market"¹¹⁸ is most important in analyzing whether or not Executive Order 11935 is in conflict with the treaty. It appears there would be no legitimate argument that a blanket ban on the employment of non-citizens in the civil service¹¹⁹ should be considered anything other than a restrictive measure. The words "for the protection of the national labour market," cause the most uncertainty regarding the meaning of the provision. The phrase is meant to indicate that not all restrictions on employment of refugees are forbidden, as it is a modifying clause on the ban on restrictive measures. It would not have been included if all measures restricting refugee employment were disallowed. Additionally, the more aspira-

115. *Medellin v. Texas*, 552 U.S. 491, 506 (2008). The majority in *Medellin* clarified the importance of interpreting the text of a treaty, noting, "The interpretation of a treaty, like the interpretation of a statute, begins with its text."

116. Convention relating to the Status of Refugees, *supra* note 4, art. 17(2).

117. 8 U.S.C.A. §1427 (a) (2006) (U.S. law requires that a person lawfully admitted to the United States reside in the country for at least five years in order to be eligible to apply for naturalization.).

118. Convention relating to the Status of Refugees, *supra* note 4, art. 17(2).

119. Exec. Order 11935, *supra* note 3.

tional goal, as articulated in Article 17(3), asks States to make efforts to give refugees the same treatment as nationals in the area of employment.¹²⁰ The inclusion of that provision implies that there can still legally be some restrictions on refugee employment under the Convention.

The question then is how limiting is Article 17(2) on state action restricting refugee employment rights? It defies logic to interpret this to mean that only restrictions passed by States explicitly for the protection of the national labor market would be included, as a State could then fairly easily get around this requirement by articulating a false premise for a restriction, or alternatively, no reasoning at all. However, it is unclear what kind of restrictions on refugee labor the treaty would permit. Presumably any law that was legitimately passed for a reason other than the protection of the national workforce would be permitted under Article 17, as it only specifies the types of laws that are forbidden, rather than the ones that are permitted. The question still remains though, what law would be legitimately passed for a reason other than protection of the labor market? This question is colored by the fact that political pressure on the government to protect the national workforce is extremely high,¹²¹ and therefore certain types of provisions claimed to be for alternative purposes might in reality be in conflict with the treaty. Although these questions are not clarified by the text of the treaty alone, it is clear that any law passed for the purpose of protecting the national workforce would be in violation of the treaty.

In order to better illuminate ambiguities in the treaty that are not clarified by an analysis of the text, there are several outlets to which domestic federal courts turn. The Supreme Court in *Zicherman v. Korean Air Lines Co., Ltd.* articulated, “[b]ecause a treaty ratified by the United States is not only the law of this land . . . but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the post-ratification understanding of the contracting parties.”¹²² The negotiating history of the treaty helps somewhat to clarify the meaning of the phrase “for the protection of the national labour market.” During the drafting process, the International Labour Organization (“ILO”) suggested that Article 17 should be changed to read: “In countries in which employment of migrants

120. Convention relating to the Status of Refugees, *supra* note 4, art. 17(3).

121. Examples of this can be seen in the hostility to free trade agreements like NAFTA that are perceived to relocate jobs from the United States to neighboring countries. See Jeff Faux, *NAFTA's Impact on U.S. Workers*, ECON. POL'Y INST. WORKING ECON. BLOG (Dec. 9, 2013), <http://www.epi.org/blog/naftas-impact-workers>.

122. *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 226 (1996).

is subject to restrictions, those restrictions shall not apply to refugees.”¹²³ Although that language was ultimately not included, the United States supported the language, with the exception that it wished to substitute the word “alien” for “migrant.”¹²⁴ Ultimately, the United Kingdom explained that the phrase “protection of national workers” was substitutable, a concession that it felt should satisfy the ILO.¹²⁵ This history is quite illuminating. It appears that if States were willing to interpret the limiting clause as “substitutable,” that the parties did not imagine that it would make much of a difference to the impact of the treaty, and certainly that they did not imagine that the clause would allow parties to have broad freedoms to enact laws limiting refugee employment. Furthermore, the United States in particular was pushing for a very protective treaty to which States could express reservations, rather than a watered down treaty with which States would generally comply but which would deny important labor rights to refugees.¹²⁶ Therefore, it is doubtful that at the time of drafting, the clause “for the protection of national workers” was interpreted by signatories to be a major limitation on the impact of the provision; rather, it was included only to leave open the option for States to limit the employment of refugees under very specialized circumstances. Analysis of the *travaux préparatoires* tends to support a narrow understanding of the limits of the term “for the protection of national workers” in Article 17(2) of the Refugee Convention.

Even under a narrow interpretation of the words “for the protection of national workers,” however, it is not clear that the U.S. government’s prohibition on the hiring of non-citizens would necessarily be in compliance with Article 17(2). In prior litigation,¹²⁷ the

123. THE REFUGEE CONVENTION, 1951: THE *TRAVAUX PRÉPARATOIRES* ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS 101 (U.N. High Comm’r for Refugees ed. 1990) [hereinafter *TRAVAUX PRÉPARATOIRES*].

124. *Id.*

125. *Id.*

126. *Id.* at 100.

127. The federal courts have ruled on the constitutionality of Executive Order 11935 on several occasions, but none of the challenges have been based on the Refugee Convention. In fact none of the challengers to the executive actions have had refugee status. In *Mow Sun Wong v. Campbell*, a challenge to Executive Order 11935 raised two questions. The first was whether the President had the statutory or constitutional authority to issue the order. The second was whether the President had a governmental interest in requiring citizenship for employment in the federal civil service, sufficient to permit discrimination against noncitizens under the constitution. See *Mow Sun Wong v. Campbell*, 626 F.2d 739, 742 (9th Cir. 1980). The court answered both questions in the affirmative. *Id.* at 744–46. The Seventh Circuit came to very similar conclusions on a challenge to Executive Order 11935 in *Vergara v. Hampton*. In that case, the court found that the President had an overriding national interest in limiting employment in the federal civil service to U.S. citizens and that

executive branch has advanced several policy reasons for the decision to limit employment in the federal civil service to United States citizens:

(1) [To] maintain the status quo in regards to the exclusion of aliens from employment in the federal civil service, (2) [to] encourage naturalization by aliens in this country, or (3) [to] create an expendable token which would help facilitate possible treaties with foreign countries which call for reciprocal employment concessions.¹²⁸

The federal courts have recognized that the stated purpose of encouraging naturalization by aliens is a legitimate governmental goal advanced by Executive Order 11935.¹²⁹ It is not clear, however, that the other interests advanced by the executive branch in litigation would be accepted as legitimate by the courts.

Although the Seventh and Ninth Circuits have explicitly stated that encouragement of naturalization is a legitimate purpose for Executive Order 11935, they have not analyzed that justification as it applies to the specific class of refugees protected by the Refugee Convention. It is quite possible that the justification of encouraging naturalization is not nearly as persuasive when applied to refugees. Statistics have shown that refugees are much more likely to naturalize than other immigrant groups. Although refugees make up only seven percent of immigrants to the United States, and fourteen percent of immigrants who are eligible to naturalize, twenty-four percent of those who were recently naturalized were refugees.¹³⁰ Additionally, refugees often have more of a psychological reason for wanting to naturalize, as they are typically people who cannot return to the territory where they have citizenship rights. Their status as stateless persons adds a mental element to the impetus to naturalize that is not always present for persons who chose to immigrate to the United States under their own free will.¹³¹ Given the high rate of naturalization among refugees and their special circumstances as a stateless people, it is possible that the purpose of Executive Order 11935 as

therefore the executive action was not a violation of the Due Process Clause. *Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th Cir. 1978).

128. *Mow Sun Wong*, 626 F.2d at 745.

129. *Id.*; *See also Vergara*, 581 F.2d at 1276–87.

130. MICHAEL FIX ET AL., URBAN INST. IMMIGRATION STUDIES PROGRAM, TRENDS IN NATURALIZATION: IMMIGRANT FAMILIES AND WORKERS: FACTS AND PERSPECTIVES BRIEF No. 3, at 6 (2003).

131. *Id.* (“... naturalization rates are higher partly because few refugees in the United States can return to their home countries.”).

applied legitimately to other classes of immigrants, is not persuasive in the refugee context. Although it is entirely plausible that the U.S. government has another legitimate purpose other than the protection of the national workforce for excluding refugees from employment in the civil service, the formerly advanced justification for the law would be a potential ground on which to challenge the legitimacy of Executive Order 11935.

Even if a party could prove that there was no legitimate justification for Executive Order 11935 in the specific context of its application to refugees, it would still be an uphill battle to prove that the restriction is in conflict with the Refugee Convention. There is an argument that despite no language to this effect within the treaty, states parties understood Article 17(2) to carve out an exception for citizenship requirements for national civil service jobs. During the drafting of the statute, Australia commented:

[C]oncerning paragraph 2, in the Commonwealth and State Government service, the employment of other than natural-born or naturalized Australian subjects is prohibited or severely circumscribed. These restrictions would apply to all refugees, including those who fulfill any one of the conditions specified. Australia maintains these conditions on security grounds and not for the protection of the 'national labour market.' It is presumed that this case has been envisaged and is not affected.¹³²

It should be noted that Australia has been often criticized as a major violator of the Convention in its treatment of refugees seeking a home in the country.¹³³ However, this comment by Australia should not be discounted based on their recent record. Within the *travaux préparatoires* there is no indication that any other states took issue or disagreed with the statement made by Australia.¹³⁴ Therefore, it is

132. *TRAVAUX PRÉPARATOIRES*, *supra* note 123, at 103.

133. The United Nations found that Australia's treatment of asylum seekers was so harsh that it was in violation of international bans on torture and cruel, degrading, and inhuman treatment. See Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Observations on Communications Transmitted to Governments and Replies Received*, U.N. Doc. A/HRC/28/68/Add.1 (Mar. 6, 2015). The deal signed between Cambodia and Australia to resettle refugees seeking asylum in Australia within the territory of Cambodia has also been criticized as a violation of the Refugee Convention. See Gabriel Domínguez, *AI: Australia-Cambodia Refugee Deal 'in Violation of International Law'*, DEUTSCHE WELLE (Sept. 26, 2014), <http://www.dw.com/en/ai-australia-cambodia-refugee-deal-in-violation-of-international-law/a-17958007>.

134. *TRAVAUX PRÉPARATOIRES*, *supra* note 123, at 103.

likely there was an understanding that requiring citizenship for government jobs due to national security concerns would be permitted under the treaty, even if that had a discriminatory impact on refugees who met the standards laid out in Article 17(2).

Commentaries on the treaty, although less legally persuasive than the text of the treaty or its drafting history,¹³⁵ also provide insight into the scope of employment limitations permitted by Article 17(2). Paul Weis's commentary seems to offer the broadest interpretation of the kind of employment restrictions permitted by the treaty. He states that:

Only restrictions for the protection of the national labour market are excluded, not measures taken in the interest of national security such as the prohibition of employment of aliens in defence industries. The prohibition of the employment of aliens in the civil service or in certain categories of the civil service which exists in many countries, is also not excluded.¹³⁶

Weis's commentary would suggest that Executive Order 11935 is almost certainly permissible under the treaty, as his reading of the treaty exempts civil service jobs generally from the requirements of Article 17(2).

Other commentaries, however, do not grant such a broad exception. Professor Atle Grahl-Madsen's commentary provides a more nuanced analysis of the types of restrictions that may be imposed under the framework of Article 17(2). He says that measures which have a purpose other than the protection of the national labor market such as, "prohibition of employment of aliens in industries working for the national defence, based on considerations of national security, are not affected by the present provision."¹³⁷ The use of the example of national security policy is illuminating, as it has been raised several times and seems to indicate the type of consideration that would be wholly removed from protection of the national labor market.

135. This is not to say that scholarly commentary is not utilized by the courts in interpreting treaties. However, because there are typically numerous commentaries interpreting the terms of the treaty, a single commentary remark is typically less persuasive than the comments from drafters officially recorded in the *travaux préparatoires*. For example, the court has specified that it finds treaty commentary persuasive when it is "virtually unanimous," however such specifications and universality are not required when looking at the official *travaux* or the practice of state parties in order for the evidence to be persuasive. *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 228 (1996).

136. *TRAVAUX PRÉPARATOIRES*, *supra* note 123, at 107.

137. ATLE GRAHL-MADSEN, COMMENTARY ON THE REFUGEE CONVENTION 1951: ARTICLES 2-11, 13-37, 71 (1997).

Grahl-Madsen's interpretation is not limited to national security. He goes on to say, "Furthermore, the political considerations which may lead to certain posts in the Civil Service being reserved for nationals are unaffected; and the same applies to the rules which aim at ensuring that persons exercising certain occupations possess the necessary qualifications."¹³⁸ Grahl-Madsen does not elaborate on the meaning of political considerations, but the use of the phrase "certain posts" seems to indicate that a blanket ban on refugee employment in the civil service would be impermissible notwithstanding some kind of highly persuasive political explanation.¹³⁹ One would imagine that the kind of political consideration that would exempt certain civil service jobs and not others would be, for example, a requirement that applicants for employment at the policymaking level be citizens. It is unclear that the government's justification of "encouraging naturalization," as applied to the entire civil service, including jobs with no policymaking purpose and no national security implications, would be permitted under the Grahl-Madsen reading of Article 17(2).

It is important to note the inherent difference between a restriction for national security purposes, for example, and a restriction for the purpose announced by the U.S. government: "encouraging naturalization." The national security rationale is one that is inherently removed from the sphere of immigration and nationality. It is based on concerns about flows of information and the interests of everyone present in the United States. The requirement of citizenship is based upon allegiance to country, and the fact that a person who is a natural born citizen or who has spent long periods of time in a country is more likely to have a history of conduct that is accessible to the federal government. "Encouraging naturalization" as a rationale for limiting employment is quite different. Its purpose is a more broadly based policy goal that is irrelevant to the standards necessary for the job itself. Additionally, inherent in the policy goal is the implication that the national workforce is being favored over the non-citizen population, as the restriction would not encourage naturalization if it did not offer advantages to citizens. Therefore, restricting the civil service based on the purpose of "encouraging naturalization" is actually much more akin to "protection of the national work force," than a policy goal such as protecting national security, or even reserving participation in the political and policymaking process to citizens.

Under a reading of the statute similar to Grahl-Madsen's, it is possible that Executive Order 11935 would be in conflict with the

138. *Id.*

139. *Id.*

Refugee Convention. Additionally, it seems that this reading of the Convention better illuminates the specific meaning of the text of the Convention than that of Paul Weis. Under Weis's interpretation, a restriction on employment in the civil service, even if explicitly for the protection of the national workforce, would be exempted from Article 17(2), in plain violation of the text. The Grahl-Madsen reading seems to work within the framework of the specific text, giving examples of the purposes for restriction that would be permitted, such as restrictions for national security.¹⁴⁰ Combining the plain text with the commentaries seems to offer up the possibility that Executive Order 11935 is exactly the type of "protection of the national work force" that is banned by the treaty.

Although the plain text of the treaty does not seem to support a blanket carve out for restriction of civil service jobs, state practice is varied. Many states do not have a blanket ban on refugees, or on non-citizens in general, working in their civil service. For example, New Zealand¹⁴¹ does not require citizenship for the vast majority of jobs in the federal government with the exception of "the positions of Member of Parliament or employee of the New Zealand Security Intelligence Service (because of issues of national interest, loyalty and national security)."¹⁴² In Sweden and the Netherlands,¹⁴³ most government jobs are open to residents "if their functions are not directly subordinated to government and relate to national security."¹⁴⁴ In Germany and France, conversely, positions in the civil service are restricted to citizens of the European Union.¹⁴⁵ In Japan, also a party to the treaty,¹⁴⁶ "high and low national civil servants are closed to aliens."¹⁴⁷ It does not appear, however, that any of the states which restrict employment in the civil service have indicated that this practice is in compliance with the Refugee Convention. Deviance from a principle of international law by a few actors does not change the fact that it is law. However, since there is not an entirely consistent state practice regarding citizenship requirements for civil service employment, this inquiry should not be determinative in an analysis of the

140. See *supra* note 136 and accompanying text.

141. States Parties, *supra* note 12, at 3.

142. Atsushi Kondo, *Comparative Citizenship and Aliens' Rights*, in *CITIZENSHIP IN A GLOBAL WORLD: COMPARING CITIZENSHIP RIGHTS FOR ALIENS* 238 (Atsushi Kondo ed., 2001) [hereinafter *CITIZENSHIP IN A GLOBAL WORLD*].

143. Both states are party to the 1951 Convention of the Status of Refugees. States Parties, *supra* note 12, at 3–4.

144. *CITIZENSHIP IN A GLOBAL WORLD*, *supra* note 142, at 237.

145. *CITIZENSHIP IN A GLOBAL WORLD*, *supra* note 142, at 237.

146. States Parties, *supra* note 12, at 3.

147. *CITIZENSHIP IN A GLOBAL WORLD*, *supra* note 142, at 238.

legality of the restriction on refugee employment in the U.S. federal government. Even if practice were more consistent, without positive commentary from states as to their policies' conformity with the treaty, it is difficult to know whether state practice is based on a specific interpretation of the meaning of the treaty, or whether it is simply an example of states shirking their obligations. The Supreme Court has pointed out in litigation over treaty interpretation that state practice is not always entirely persuasive as to the actual meaning of the treaty because of the distinct possibility that other states are not in full conformity.¹⁴⁸ Therefore, the non-uniform state practice regarding citizenship requirements for civil service jobs among our treaty partners should not be treated as a persuasive source when interpreting the meaning of the Refugee Convention.

CONCLUSION

It appears that there is at least a reasonable possibility that Executive Order 11935, prohibiting employment of non-citizens in the Federal Civil Service, is in conflict with the Refugee Convention, and is therefore unconstitutional under U.S. law. The plain language of the treaty, although not entirely clear on the issue, unquestionably indicates that a restriction on the employment of refugees for the protection of the national workforce is not permitted. Although the U.S. government's claimed purpose is phrased differently—"encouraging naturalization"—the premise is arguably the same. The premise behind the justification of "encouraging naturalization," is that citizens are favored in a sector of the economy, and therefore more people will want to naturalize. It seems difficult to advance that argument, while also claiming that the measure does not act to "protect the national work force." Although some commentators have argued that there is an implicit exception to Article 17(2) of the treaty for employment in a state party's civil service, this opinion is not uniform, and is also not represented by any uniform state practice. Therefore, the most persuasive interpretation is one that rests upon the text of the treaty in the context of its object and purpose. In this case that interpretation leads to a strong argument that the Executive Order is in conflict with Article 17(2) of the Refugee Convention and is therefore unconstitutional based on the Supremacy Clause.

Given the influx of educated and likely qualified refugees

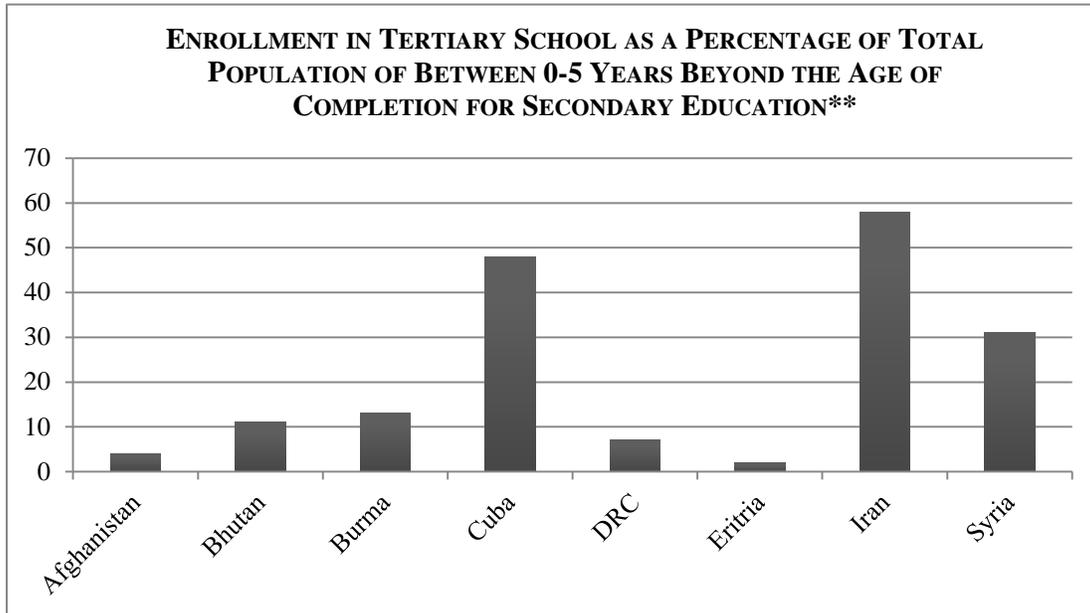
148. Transcript of Oral Argument at 34, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (No. 04-1084) (During Oral Argument, Justice Scalia took issue with the argument that the practice of states parties gave a definitive meaning to the treaty saying, "Maybe our Treaty partners are just violating the Treaty.").

from the Syrian refugee crisis who are expected to be admitted to the United States in the coming years, and the difficulties faced by refugees in finding adequate and stable employment after arrival, advocates for refugee rights would be wise to consider a challenge to the application of Executive Order 11935 to refugee populations who are not yet eligible for citizenship. Although the government may be able to advance a more legitimate argument for its employment policies than the one that has previously been accepted by the Supreme Court, as it stands, there is a strong argument that Executive Order 11935's application to refugees is unconstitutional and should be struck down by the courts.

*Kendall Collins**

* Executive Online Editor, *Columbia Journal of Transnational Law*; J.D. Candidate, Columbia Law School, 2017; B.A. Vassar College, 2014. I am grateful to Professor David Pozen for his invaluable assistance and feedback. I also wish to thank Jeremy Kessler for his helpful comments, as well as Suparna Reddy and the rest of the *Journal* staff for their tireless efforts on this piece. Finally, I wish to thank Zachary Cobb for his commentary, advice, and encouragement and my family for their constant support.

ANNEX



**This chart was compiled using data from the World Bank. See World Bank, *World Development Indicators: Participation in Education Table 2.11* (2015), <http://wdi.worldbank.org/table/2.11>. Countries included were those that made up the top ten highest percentages of countries of origin for refugees accepted into the United States in 2013, 2014, and 2015 respectively. The data for 2013 was used when available because no later statistic was available for Syria due to the conflict. For Afghanistan, the 2011 statistic was used, as it was the most recent. For Burma, the 2012 statistic was used for the same reason. For Eritrea, the 2014 statistic was used, as no other data was available. Note that several countries were excluded because of lack of data; their inclusion would have likely brought the average down significantly. Iraq had no data but the higher education system in Iraq has been decimated by war and was declining prior to the U.S. invasion. See *Costs of War: Education*, WATSON INST. INT'L & PUB. AFF. (Apr. 2015), <http://watson.brown.edu/costsofwar/costs/social/education>. Somalia also had no data. However, less than half of those in Somalia enrolled in grade one advance to grade four and their educational system is fraught with problems. It is unlikely that any significant portion of their population is involved in higher education. See *Education in Somalia*, UNICEF (last visited Feb. 7, 2016), <http://www.unicef.org/somalia/education.html>. Ethiopia was

excluded for lack of information. It is not clear that any significant portion of the population could possibly attend tertiary school as only 5% of the population aged 15–24 has completed or is enrolled in secondary school. *See* Educ. Pol. And Data Cent., Ethiopia: National Education Profile 2014 Update (2014), http://www.epdc.org/sites/default/files/documents/EPDC%20NEP_Ethiopia.pdf. Also, note that although the statistic for Cuba is high, their statistics had huge differentials from year to year, indicating that the statistic may not be reliable.