

May 15, 2019

Sweet Home Alabama (and Syria):
A terrorist bride returns from war

Department of Defense
OFFICE OF PREPUBLICATION AND SECURITY REVIEW

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“Americans wake up! Men and women altogether. You have much to do while you live under our greatest enemy, enough of your sleeping! Go on drivebys, and spill all of their blood, or rent a big truck and drive all over them. Veterans, Patriots, Memorial, etc. day ... Kill them.”

–Tweet from Alabama ISIS bride, Hoda Muthana (March 19, 2015)

EXECUTIVE SUMMARY

Citizenship matters, and the case of Hoda Muthana demonstrates the great lengths parents are willing to go to ensure a better future for their children. U.S. citizenship is valuable for many reasons such as ease of travel into and out of most countries. Once citizenship is granted, it cannot and should not be easily stripped away. National security threats are real and should be addressed, but passport and citizenship revocation should require additional scrutiny involving a thoughtful, nuanced, and holistic approach on the part of the United States government. A comprehensive solution requires willing cooperation among all three branches of government, but this has been elusive. This article details the case of a “terrorist bride” and analyzes some of the issues involved including potential terrorism charges, dual nationality, birthright citizenship, and denaturalization. Big issues like immigration affect everyone and require a robust public debate and buy-in from the electorate. We as a nation must

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decide which people to let in or keep out. It is not up to one person—neither president nor federal immigration judge—to decide.

I. A TERRORISM IMMIGRATION CASE STUDY

Hoda Muthana was a 20-year-old business student at the University of Alabama at Birmingham when she left to join the Islamic State of Iraq and Syria (ISIS) by tricking her family and flying to Syria through Turkey in November 2014.² Muthana was born in Hackensack, New Jersey in October 1994, months after her father stopped working as a Yemeni diplomat.³ Until recently, she possessed a valid U.S. passport. Shortly after her arrival in Syria, she married an ISIS fighter and began a recruitment Twitter account to lure other foreign fighters and supporters. Now 24, she has been married and widowed three times and has an 18-month-old son.⁴ In January 2019, Muthana fled the Islamic State's diminishing territory with her son, was captured by Kurdish forces, and now resides with her son in the sprawling al-Hawl refugee camp in northern Syria.⁵ In a

² Leada Gore, WHO IS HODA MUTHANA? ALABAMA WOMAN WHO SUPPORTED ISIS WON'T BE ALLOWED IN US; TRUMP RESPONDS ALABAMA.COM (2019), <https://www.al.com/news/2019/02/who-is-hoda-muthana-alabama-woman-who-joined-isis-wants-to-come-home-with-young-son.html> (last visited Apr 3, 2019).

³ Muthana's father, Ahmed Ali Muthana, stepped down from a post at Yemen's mission to the United Nations in New York and relinquished his diplomatic immunity but maintained a diplomatic visa, enabling him to legally stay in the country with this family.

⁴ Vanessa Romo, WOMAN WHO LEFT U.S. TO JOIN ISIS DENIED REQUEST TO EXPEDITE HER CASE TO RETURN NPR (2019), <https://www.npr.org/2019/03/05/700585612/woman-who-left-u-s-to-join-isis-denied-request-to-expedite-her-case-to-return> (last visited Apr 4, 2019).

⁵ Jonathan Shaub, HODA MUTHANA AND SHAMIMA BEGUM: CITIZENSHIP AND EXPATRIATION IN THE U.S. AND U.K. LAWFARE (2019), <https://www.lawfareblog.com/hoda-muthana-and-shamima-begum-citizenship-and-expatriation-us-and-uk> (last visited Mar 17, 2019).

series of interviews in February, she expressed deep remorse for her actions⁶ as well as a desire to return to the U.S. with her child—even if she faces prosecution.⁷

There has been much confusion and debate regarding Muthana’s citizenship status. Writing for *Lawfareblog*, Jonathan Shaub notes that a person born in the United States is entitled to citizenship by virtue of the Fourteenth Amendment (birthright citizenship), but a child born to a diplomat (like Muthana) is still under the protections of the home country and would be considered a citizen of that home country. However, Muthana's father has acknowledged his diplomatic employment ended in September 1994—over a month before Muthana’s birth⁸ —which means his daughter would be subject to the jurisdiction of the U.S. (and would have birthright citizenship).

In order to determine whether individuals like Muthana’s father are entitled to diplomatic immunity, Article 39 of the Vienna Convention on Diplomatic Relations recognizes immunity for a “reasonable period”⁹ of time between the end of an assignment and the diplomat’s departure from the country.¹⁰ Muthana's father was a

⁶ David Shortell & Jennifer Hansler, JUDGE DENIES MOTION TO FAST-TRACK CASE OF AMERICAN-BORN ISIS BRIDE CNN (2019), <https://www.cnn.com/2019/03/04/politics/hoda-muthana-us-citizen-justice-department/index.html> (last visited Mar 18, 2019).

⁷ Young American mom who married ISIS fighters begs to return to US, ABC NEWS (2019), <https://abcnews.go.com/Nightline/video/young-american-mom-married-isis-fighters-begs-return-61182265> (last visited Mar 1, 2019).

⁸ Jonathan Shaub, HODA MUTHANA AND SHAMIMA BEGUM: CITIZENSHIP AND EXPATRIATION IN THE U.S. AND U.K. LAWFARE (2019), <https://www.lawfareblog.com/hoda-muthana-and-shamima-begum-citizenship-and-expatriation-us-and-uk> (last visited Apr 26, 2019).

⁹ The full text of Article 39, Section 2 reads “When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.” The entire text of the Vienna Convention is available at http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf

¹⁰ Steve Vladeck, UNPACKING (SOME OF) THE LEGAL ISSUES SURROUNDING HODA MUTHANA JUST SECURITY (2019), <https://www.justsecurity.org/62659/unpacking-some-of-issues-surrounding-hoda-muthana/> (last visited Apr 7, 2019).

diplomat for Yemen at the United Nations in New York, but he turned in his diplomatic card in June 1994. The family has produced court documents showing Hoda Muthana was born on Oct. 28, 1994, in New Jersey and, at that time, Ahmed Ali Muthana and his wife had applied for and been granted permanent resident status in the U.S.¹¹ and did not immediately depart the U.S. after his diplomatic status expired, at least in part due to an ongoing civil war in Yemen.

Attorneys for Muthana's father argue that questions around the daughter's citizenship were already answered in 2005 when she was issued a U.S. passport. Prosecutors argue that while Muthana's father may have left his diplomatic post, the UN did not officially notify the American mission until February 1995. Prosecutors contend that the State Department issued Muthana's passport in error.¹²

The Obama administration was the first to determine Muthana was not a citizen and notified her family they would revoke her passport in 2016.¹³ The Trump administration recently asked a federal judge to dismiss a related lawsuit filed by Muthana's father seeking to overturn his administration's follow-on determination that Muthana is not an American citizen.¹⁴ In a February statement, Secretary of State Mike Pompeo said "Ms. Hoda Muthana is not a U.S. citizen and will not be admitted into the

¹¹ Brent D. Griffiths, ISIS BRIDE'S FATHER SUES TRUMP OVER BLOCKED RETURN TO U.S. POLITICO (2019), <https://www.politico.com/story/2019/02/21/isis-bride-trump-lawsuit-1179752> (last visited Mar 4, 2019).

¹² David Shortell & Jennifer Hansler, JUDGE DENIES MOTION TO FAST-TRACK CASE OF AMERICAN-BORN ISIS BRIDE CNN (2019), <https://www.cnn.com/2019/03/04/politics/hoda-muthana-us-citizen-justice-department/index.html> (last visited Feb 22, 2019).

¹³ Richard Engel, U.S.-BORN ISIS BRIDE: I'LL HAVE 'NO PROBLEM' RETURNING DESPITE TRUMP DECREE NBCNEWS.COM (2019), <https://www.nbcnews.com/news/world/isis-bride-hoda-muthana-says-she-ll-have-no-problem-n974391> (last visited Feb 25, 2019).

¹⁴ Deidre Shesgreen & Kim Hjelmgaardkim, ISIS BRIDE CASE: MUTHANA LAWSUIT SHOULD BE DISMISSED, TRUMP ADMINISTRATION LAWYERS ARGUE USA TODAY (2019), <https://www.usatoday.com/story/news/world/2019/04/26/trump-administration-seeks-dismiss-lawsuit-hoda-muthana-father-isis-bride/3579664002/> (last visited Feb 22, 2019).

United States. She does not have any legal basis, no valid U.S. passport, no right to a passport, nor any visa to travel to the United States.” In the same statement he “strongly advise[d] all U.S. citizens not to travel to Syria.”¹⁵

II. TERRORISM DEFINED

Muthana burned her U.S. passport upon joining ISIS¹⁶ and is blocked from receiving another one due to her association with terrorism. Although she is alive and living in a refugee camp, we have seen other cases where the U.S. has intentionally targeted U.S. citizens for while they were abroad, including the recent famous case of Anwar al-Awlaki,¹⁷ the radical Muslim cleric. In the al-Awlaki case, The UN placed him on its Al-Qaida and Taliban Sanctions Committee¹⁸ list as an operative of al-Qaida in the Arabian Peninsula due to his increasingly greater role with the group as a recruiter, trainer and planner. The Obama administration placed him on its list of Specially Designated Global Terrorists, imposing restrictions that included freezing any U.S.

¹⁵ Michael R. Pompeo, STATEMENT ON HODA MUTHANA U.S. DEPARTMENT OF STATE (2019), <https://www.state.gov/secretary/remarks/2019/02/289558.htm> (last visited Apr 9, 2019).

¹⁶ A December 1, 2014 Twitter post shows female hands holding four international passports and reads “Bonfire soon, no need for these anymore, alhamdulliah [thanks be to God].”

¹⁷ A July 16, 2010 Department of Justice memorandum intended for Awlaki's case stated “We believe that the AUMF's authority to use lethal force abroad also may apply in appropriate circumstances to a United States citizen who is part of the forces of an enemy authorization within the scope of the force authorization.”

¹⁸ The Committee split in 2011 to deal with the two organizations separately.

assets and banning him from traveling to the U.S.¹⁹ Al-Awlaki was subsequently killed in a 2011 CIA unmanned aerial system²⁰ attack.²¹

There will likely be attempts to prosecute Muthana...but for what? It is easy to say that she and others like her are terrorists and should be locked up or even targeted for killing. In this section, we will discuss what terrorism is and whether Muthana could be prosecuted or legally targeted as a terrorist or terrorist sympathizer using existing legal authority.

The U.N. Security Council Counter-Terrorism Committee noted in its *Madrid Guiding Principles*²² that terrorist groups increasingly exploit information and communications technology (ICT) for “incitement, recruitment, and facilitation of terrorist activities.” Perhaps targeted recruitment is what ISIS had in mind with Muthana, as the organization sought to expand recruitment efforts in the West. The *Madrid Guiding Principles* say that terrorist groups use ICT to recruit not only traditional combatants but also businessmen, engineers and other “professionals,” and that this growing ICT expertise is a significant element of the foreign terrorist fighter threat.²³ Although the U.S. has its own domestic terrorism laws, many countries look to the UN as a model

¹⁹ UN Adds US-born Radical Cleric to Terror Watch List, VOA (2010), <https://www.voanews.com/a/radical-cleric-warns-against-us-involvement-in-yemen-98830404/172163.html> (last visited Apr 10, 2019).

²⁰ Often referred to as “drones,” such systems (i.e. Predator, Reaper, Global Hawk etc.) are not autonomous, although they are often controlled remotely.

²¹ Jarret Brachman, ANWAR AL-AWLAKI ENCYCLOPÆDIA BRITANNICA (2019), <https://www.britannica.com/biography/Anwar-al-Awlaki> (last visited Feb 24, 2019).

²² The *Guiding Principles* are intended as a practical tool for use by Member States in their efforts to combat terrorism and to stem the flow of foreign terrorist fighters (FTF) in accordance with resolution 2178 (2014).

²³ Madrid Guiding Principles, UNITED NATIONS (2015), https://www.un.org/sc/ctc/wp-content/uploads/2016/10/Madrid-Guiding-Principles_EN.pdf (last visited Feb 24, 2019).

when developing domestic law. UN Security Council Resolution (UNSCR) 2396 (2017)²⁴ updates UNSCR 2178 (2014) and provides greater focus on measures to address returning and relocating foreign terrorist fighters (FTF) and transnational terrorist groups. The UN has not yet decided upon a definition for “terrorism,”²⁵ but one can look to domestic law in many cases.

“Terrorism” is defined in 22 U.S. Code § 2656f as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”²⁶ and is not specific regarding geographic location. Sending out anti-Western Tweets from Syria likely does not meet the required “violence” threshold. It is unclear whether Muthana conducted any additional acts of violence but, up to this point, she has not been accused of such.

Regarding material support to terrorism, the Antiterrorism and Effective Death Penalty Act of 1996²⁷ amended 18 U.S.C. § 2339A to expand its list of terrorist type offenses.²⁸ Section 2339A, unlike the aiding and abetting statute (18 U.S.C. § 2), does

²⁴ United Nations Security Council Resolution 2396, UNITED NATIONS DIGITAL LIBRARY (2017), <https://digitallibrary.un.org/record/1327675?ln=en> (last visited Apr 23, 2019).

²⁵ Frequently asked questions about UN efforts to combat terrorism, UNITED NATIONS COUNTER-TERRORISM EXECUTIVE DIRECTORATE (2005), https://www.un.org/News/dh/infocus/terrorism/CTED_FAQs.pdf (last visited Feb 10, 2019). According to CTED, “[a]n unequivocal definition of terrorism would remove the political distinction that some make between the actions of so-called freedom fighters and terrorists and the need to do this was emphasized most recently by a panel of 16 eminent persons assembled by UN Secretary-General, Kofi Annan to study threats to global security.”

²⁶ 22 U.S.C § 2656f(d)(2)- Foreign Relations and Intercourse Definitions are available at <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title22/html/USCODE-2010-title22.htm>

²⁷ Although controversial for its changes to habeas corpus (Title I), it was upheld in *Felker v. Turpin*, 518 U.S. 651 (1997). The law also contained several provisions to deter terrorism, provide justice for victims, and provide for an effective death penalty. Full text is available at <https://www.congress.gov/104/plaws/publ132/PLAW-104publ132.pdf>

²⁸ See Pub. L. 104-132, § 323, 110 Stat. 1214, 1255. Section 2339A, originally enacted on September 13, 1994, is primarily a statute aimed at reaching those persons who provide material support to terrorists knowing that such support will be used to commit one of the offenses specified in the statute. (The offenses specified in the statute are: 18 U.S.C. §§ 32, 37, 81, 175, 351, 831, 842(m) or (n), 844(f) or (i), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 2155, 2156, 2280, 2281, 2332,

not require that the supplier also have whatever specific intent the perpetrator of the actual terrorist act must have to commit one of the specified offenses.²⁹ The term “material support or resources” in 18 U.S. Code § 2339A means, among other things, providing “expert advice or assistance,” which is defined as “advice or assistance derived from scientific, technical or other specialized knowledge.”³⁰ It is doubtful Muthana meets this threshold either.

“International terrorism” is defined in 50 USC § 1801 as activities that involve violent acts or acts dangerous to human life that are a violation of U.S. criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the U.S. or any State; appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by assassination or kidnapping; and occur totally outside the U.S., or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.³¹ Again, Tweeting could not be considered a violent or dangerous act, so Muthana is likely not an international terrorist under the terms of these provisions.

Perhaps her association with foreign terrorists could spell trouble. Foreign Terrorist Organizations (FTOs) are foreign organizations designated by the Secretary of

2332a, 2332b, or 2340A and 49 U.S.C. § 46502.) The section requires only that the supplier of the material support have knowledge of its intended use.

²⁹ Providing Material Support To Terrorists (18 U.S.C. § 2339A), THE UNITED STATES DEPARTMENT OF JUSTICE (2018), <https://www.justice.gov/jm/criminal-resource-manual-15-providing-material-support-terrorists-18-usc-2339a> (last visited Mar 1, 2019).

³⁰ 18 U.S. Code § 2339A - Providing material support to terrorists, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/uscode/text/18/2339A> (last visited Mar 2, 2019).

³¹ 50 USC § 1801 – Definitions. Available at <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title50/pdf/USCODE-2011-title50-chap36-subchapI-sec1801.pdf>

State in accordance with section 219 of the Immigration and Nationality Act (INA), as amended. Both ISIS and Islamic State of Iraq and the Levant's Branch in Libya (ISIL) are included on the list.³² It is clear that Muthana expressed moral support for an FTO in addition to marrying three FTO fighters and conceiving a child by the third husband. However, it remains to be litigated whether Muthana's "material support or resources," will matter for purposes of the INA, which makes representatives and members of a designated FTO inadmissible or removable³³ *if they are aliens*. The law would not apply if Muthana is deemed to be a citizen.

III. A HOLISTIC GOVERNMENT RESPONSE TO TERRORISM

The U.S. has a problem when it comes to terrorist recruitment both at home and abroad. An estimated 40,000 radicalized nationals have gone to fight in recent Middle East conflicts (mostly in Iraq and Syria), and an estimated one-quarter are women and minors. A majority have purportedly died in combat, but the UN Security Council estimated in February that as many as 3,000 foreign fighters and their dependents remained in Iraq and Syria.³⁴

The outcome of the Muthana case may ultimately hinge upon a technicality of immigration law (i.e., the status of her diplomat father), but the broader questions will eventually need to be addressed. What are the risks of repatriating foreign fighters and

³² Foreign Terrorist Organizations, U.S. DEPARTMENT OF STATE (2019), <https://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited April 17, 2019).

³³ See 8 U.S.C. §§ 1182 (a)(3)(B)(i)(IV)-(V), 1227 (a)(1)(A)).

³⁴ Meghan Benton & Natalia Banulescu-Bogdan, FOREIGN FIGHTERS: WILL REVOKING CITIZENSHIP MITIGATE THE THREAT? MIGRATIONPOLICY.ORG (2019), <https://www.migrationpolicy.org/article/foreign-fighters-will-revoking-citizenship-mitigate-threat> (last visited Apr 19, 2019).

their supporters? What options does the U.S. have with regard to stemming the overall flow of foreign fighters? The national response should be more nuanced with a special emphasis on the citizenship status of those involved. Several factors should be considered including citizenship status at the time of the terrorist activities, nature of the terrorist-related activity, and recidivism risk. In order to achieve the best outcome in terms of national security, there must be better coordination among federal agencies, especially Department of Defense (DoD), Department of State (DOS), and Department of Homeland Security (DHS).

There were many important lessons learned as a result of the terror attacks in 2001. The Bush administration reorganized the government in a way which was intended to increase information flow among agencies and allow analysts to “connect the dots.”³⁵ DHS was created, combining 22 federal agencies,³⁶ and new powers were granted to law enforcement and the intelligence apparatus. It was believed that stovepipes within the Intelligence Community (IC) led to a failure in identifying and actioning terrorists already residing in the U.S. It is unclear whether Muthana was on the IC’s radar prior to her travel to Syria, but probably not, as intelligence oversight rules are designed to prevent overreach. U.S. citizens are generally free to travel unless sanctions are in place. In her case she traveled first to Turkey, a NATO ally.

A holistic response to terrorism requires a lead and coordination. In August 2004, at the recommendation of the 9/11 Commission, the Terrorist Threat Integration Center

³⁵ Chapter 13 of the National Commission on the Terror Attacks Upon the United States report (aka “9/11 Commission Report”) refers to connecting the dots in the context of unity of effort across the foreign-domestic divide and is available at http://govinfo.library.unt.edu/911/report/911Report_Ch13.htm

³⁶ History, DEPARTMENT OF HOMELAND SECURITY (2018), <https://www.dhs.gov/history> (last visited Mar 11, 2019).

(TTIC) was incorporated into the National Counterterrorism Center (NCTC) by Executive Order (EO) 13354,³⁷ which became the foundation for codifying NCTC authorities in the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004. Through EO 13354 and subsequently IRTPA, NCTC gained responsibility for integrating analysis and coordinating information sharing and situational awareness at the national level.³⁸ In many terrorism related areas, DoD—if not the designated lead—becomes the de facto lead or execution arm of the other federal government due to budgeting and logistics. DoD has the largest budget and often the most human resources at its disposal necessary to accomplish a particular mission. The whole-of-DoD response is referred to as “Defense-in-Depth” and will be discussed later in the paper.

On February 26, then Secretary of Homeland Security Kirstjen Nielsen announced DHS was overhauling its approach to terrorism prevention and called for a shift from a “whole-of-government” to a “whole-of-society” approach involving nonprofit organizations, community leaders and groups, state and local officials, law enforcement, and digital innovators to forge new partnerships to fight back against terrorist radicalization.³⁹ While this might have been a positive development, the general public is becoming equally skeptical of both big tech and law enforcement. Any sign of collusion between the public and private sectors to spy on or deprive Americans of civil

³⁷ Executive Order 13354—National Counterterrorism Center, (2004), Executive Order 13354—National Counterterrorism Center (last visited Apr 17, 2019).

³⁸ Nicholas Rasmussen, TODAY'S NCTC NATIONAL COUNTERTERRORISM CENTER (2017), https://www.dni.gov/files/NCTC/documents/features_documents/NCTC-Primer_FINAL.pdf (last visited Apr 3, 2019).

³⁹ Preventing Terrorism, DEPARTMENT OF HOMELAND SECURITY (2019), <https://www.dhs.gov/topic/preventing-terrorism> (last visited Mar 25, 2019).

liberties is generally met with resistance, especially in the wake of the Snowden revelations and massive data breaches⁴⁰ in both the public and private sectors.

IV. EFFECTIVE COORDINATION REMAINS ELUSIVE

In the wake of 9/11, federal agencies were reorganized in a way which was intended to facilitate information sharing, especially information pertaining to terrorism cases. The situation has improved, but more needs to be done. It should be impossible for an individual to slip through the bureaucratic cracks as seems to be the case with Muthana, but it can happen for several reasons. Systems are often redundant⁴¹ and outdated even before they are even completed, due in part to lengthy contracting and acquisition cycles, and systems may not be integrated properly with those of another agency—or even the same agency. In addition, the federal space is crowded with a mix of political appointees, federal government workers, and contractors. They often have competing interests and incentives, and distrust abounds. There was plenty of room at the public trough as resources flowed freely in the years immediately following the 9/11 terrorist attacks. However, the resource environment is now becoming more constrained, and some agencies are once again focusing on their core missions and are less inclined to take on additional unfunded mandates. However, cost effective means to facilitate better coordination are occurring and include a proliferation of interagency

⁴⁰ Benedikt Kammel, Demetrios Pogkas & Mathieu Benhamou, THESE ARE THE WORST CORPORATE HACKS OF ALL TIME BLOOMBERG (2019), <https://www.bloomberg.com/graphics/corporate-hacks-cyber-attacks/> (last visited Mar 19, 2019).

⁴¹ Suzette Kent & Emily Murphy, SHARED SERVICES DELIVER FOR GOVERNMENT AND TAXPAYERS FEDERAL NEWS NETWORK (2019), <https://federalnewsnetwork.com/commentary/2019/04/shared-services-deliver-for-government-and-taxpayers/> (last visited Apr 27, 2019). According to the Federal News Network, the government operates more than 100 workforce systems and 40 financial management systems.

working groups and technical exchange meetings, liaisons, and joint duty assignments.⁴²

V. YEMEN

Most Americans do not have passports and never travel outside of the U.S.⁴³ But those who do travel with a U.S. passport are aware of the advantages, including fewer visa restrictions and fewer secondary screenings at international airports. It is no surprise, then, that Muthana's father wanted his daughter to enjoy the blessings of U.S. citizenship rather than the marginal benefits bestowed upon citizens of Yemen.

According to the UN, Yemen is one of the poorest countries in the Arab region. At 2.9 percent the country has one of the highest population growth rates globally, which increases demand for educational and health services, drinking water, and employment opportunities. Yemen currently faces a severe water shortage, and the Yemeni economy is caught in a jobless slow growth cycle leading to stagnant per capita incomes and rising levels of unemployment, particularly among the youth and women.⁴⁴ In what has quickly become the world's largest humanitarian crisis, the war has resulted in some 22 million people requiring assistance in the food, water, shelter, and sanitation. Eighty-four thousand children have died from acute malnutrition, and 8.4 million civilians stand on the brink of famine.⁴⁵

⁴² Based upon personal experience.

⁴³ Owen Amos, IS IT TRUE ONLY 10% OF AMERICANS HAVE PASSPORTS? BBC NEWS (2018), <https://www.bbc.com/news/world-us-canada-42586638> (last visited Mar 4, 2019).

⁴⁴ About Yemen, UNDP IN YEMEN (2019), <http://www.ye.undp.org/content/yemen/en/home/countryinfo.html> (last visited Mar 1, 2019).

⁴⁵ Caitlin Foster, YEMEN CIVIL WAR: WHO'S FIGHTING THE BRUTAL CONFLICT THAT'S LEFT MILLIONS ON THE BRINK OF FAMINE BUSINESS INSIDER (2019), <https://www.businessinsider.com/yemen-conflict-explained-2019-2#amnesty-international-estimates-nearly-6000-civilians-have-been-killed-during-the-ongoing-war-8> (last visited Mar 8, 2019)

Millions of internally displaced Yemenis live in makeshift shelters in urban and rural areas. In addition, three million people have been forced to flee their homes because of increased violence in the country. Of the refugees who have left the country, many have fled to Oman, Saudi Arabia, Djibouti, Ethiopia, Somalia, and Sudan, with 50,000 refugees in Oman alone as of 2017.⁴⁶ Even if refugees were to have financial resources, travel options would be limited. As of April, Yemeni citizens have visa-free or visa on arrival access to only 36 countries and territories, ranking the Yemeni passport 101st in terms of travel freedom according to the Henley Passport Index. It is no wonder that Muthana's family members prefer their U.S. passports, which allow visa-free travel to 184 countries.⁴⁷

On July 5, 2018, DHS announced a decision to extend the Temporary Protected Status (TPS)⁴⁸ designation for Yemen for 18 months through March 3, 2020.⁴⁹ However, this will not help Muthana, who is being held in a refugee camp in northern Syria awaiting the outcome of a lawsuit against the Trump administration. In March 2019, a federal judge denied a request from Muthana's family to expedite consideration of her case, finding there was not sufficient evidence she would be irreparably harmed.

⁴⁶ Yemen Refugee Crisis: Aid, Statistics and News, USA for UNHCR, YEMEN REFUGEE CRISIS: AID, STATISTICS AND NEWS, USA FOR UNHCR (2019), <https://www.unrefugees.org/emergencies/yemen/> (last visited Mar 11, 2019).

⁴⁷ Henley Passport Index 2008 to 2019, HENLEY PASSPORT INDEX (2019), <https://www.henleypassportindex.com/passport-index> (last visited Apr 18, 2019).

⁴⁸ TPS is a temporary immigration status granted to eligible nationals of a country designated for TPS under the INA, or to eligible persons without nationality who last habitually resided in the designated country. During the TPS designation period, TPS beneficiaries are eligible to remain in the United States, may not be removed, and are authorized to obtain EADs so long as they continue to meet the requirements of TPS. See <https://www.federalregister.gov/documents/2018/08/14/2018-17556/extension-of-the-designation-of-yemen-for-temporary-protected-status>

⁴⁹ Temporary Protected Status Designated Country: Yemen, USCIS (2015), <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-yemen> (last visited Mar 13, 2019).

The lawyer for the family argued that the case was eligible for expedited consideration because Muthana faced immediate harm, that her safety and ability to leave the country were precarious and also noted she had to change camps at least once due to ISIS threats after interviews with the media. Her attorney also argued that the U.S. withdrawal of troops from Syria puts her status at risk, but the judge in the case suggested that risk was speculative.⁵⁰

VI. BIRTHRIGHT CITIZENSHIP

The Citizenship Clause of the Fourteenth Amendment states “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside.”⁵¹ Pursuant to the Fourteenth Amendment of the U.S. Constitution, all persons born in the United States are U.S. citizens from birth. This means if a child is born in the U.S., he or she is a citizen—regardless of the status of the parents—and it is not necessary to derive citizenship through the parents. This was meant to override the 1857 *Dred Scott v. Sandford*⁵² decision that denied citizenship to African Americans.

On October 30, 2018, President Trump announced he was considering issuing an Executive Order to end birthright citizenship. Critics of the President’s proposal say that birthright citizenship cannot be ended by executive action because changes to the

⁵⁰ David Shortell & Jennifer Hansler, JUDGE DENIES MOTION TO FAST-TRACK CASE OF AMERICAN-BORN ISIS BRIDE CNN (2019), <https://www.cnn.com/2019/03/04/politics/hoda-muthana-us-citizen-justice-department/index.html> (last visited Mar 14, 2019).

⁵¹ Birthright Citizenship 2018, CONGRESSIONAL DIGEST, vol. 97, no. 10, 31.

⁵² Delivered by Chief Justice Roger Taney, this opinion declared that slaves were not citizens of the United States and could not sue in Federal courts. In addition, this decision declared that the Missouri Compromise was unconstitutional and that Congress did not have the authority to prohibit slavery in the territories. The *Dred Scott* decision was overturned by the 13th and 14th Amendments to the Constitution.

Constitution can only be made by a two-thirds vote in both houses of Congress or through a constitutional convention called for by two-thirds of state legislatures.⁵³

Supporters of the President, however, contend he does have the ability through executive action to direct federal agencies to act in accordance with the original meaning and intent of the Citizenship Clause. This would include directing those agencies to issue passports, Social Security numbers, etc., only to those individuals whose status as citizens meet the requirements of the law. They argue that Section 301 of the INA and the Citizenship Clause of the Fourteenth Amendment have been incorrectly enforced in violation of their terms.⁵⁴

VII. UNITED STATES CITIZENSHIP AND DUAL NATIONALITY

In many Western countries, including the U.S., citizenship is considered a right that cannot be taken away except in very limited cases, such as serving in another hostile nation's military or having fraudulently obtained citizenship. Other countries strip citizenship from those who obtain an additional passport,⁵⁵ but the U.S. allows for dual nationality, as was the case with Muthana until recently.

One of the earliest principles of U.S. foreign and domestic policy was that aliens could be naturalized as citizens and thereafter be absolved from allegiance to the countries of which they had previously been citizens. This was one of the principles

⁵³ Congressional Digest, *supra* note 49, at 31.

⁵⁴ Hans von Spakovsky, WHY TRUMP CAN END BIRTHRIGHT CITIZENSHIP BY EXECUTIVE ORDER THE HERITAGE FOUNDATION (2018), <https://www.heritage.org/immigration/commentary/why-trump-can-end-birthright-citizenship-executive-order> (last visited Mar 17, 2019).

⁵⁵ Singapore, Austria, India, and Saudi Arabia, for example, do not recognize dual citizenship. Britain and Israel are among the few countries that can revoke the citizenship of dual nationals—even if they are native born—if they are suspected or convicted of terrorist offenses or acts of disloyalty.

involved in the dispute with Great Britain which led to the War of 1812. Under British common law, it was generally held that no person could discard his or her nationality and become an alien without the consent of his or her sovereign or government.⁵⁶ This concept received some acceptance in the U.S. but was questioned from an early date.

The concept of dual nationality means that a person is a national of two countries at the same time. Each country has its own nationality laws based on its own policy.⁵⁷ Although U.S. nationality laws do not explicitly address dual nationality, the U.S. Supreme Court has stated that dual nationality is a “status long recognized in the law” and that “a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both.”⁵⁸ The State Department has adopted an administrative presumption that U.S. nationals intend to retain their U.S. citizenship when they naturalize as nationals of a foreign state, declare their allegiance to a foreign state, or accept non-policy level employment with a foreign government.⁵⁹

Because U.S. law does not mention dual nationality or require a person to choose one nationality or another, U.S. citizens may naturalize in a foreign state without risk to U.S. citizenship, although they may choose to give it up⁶⁰ for other reasons. Citizenship

⁵⁶ *Shanks v. Dupont*, 28 U.S. 242 (1830)

⁵⁷ According to the State Department, persons may have dual nationality by automatic operation of different laws rather than by choice. For example, a child born in a foreign country to U.S. national parents may be both a U.S. national and a national of the country of birth. Or, an individual having one nationality at birth may naturalize at a later date in another country and become a dual national.

⁵⁸ *Kawakita v. United States*, 343 U.S. 717 (1952)

⁵⁹ See 22 CFR 50.40(a); see also 7 FAM 1200 (additionally applying the presumption to serving as an officer in the military forces of a foreign state not engaged in hostilities against the United States). For advice regarding loss of U.S. nationality and seeking office in a foreign state, see <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/Advice-about-Possible-Loss-of-US-Nationality-Dual-Nationality/Loss-US-Nationality-Foreign-State.html>

⁶⁰ Persons who acquire a foreign nationality after age 18 by applying for it may relinquish their U.S. nationality if they wish. In order to relinquish U.S. nationality by virtue of naturalization as a citizen of a foreign state, the law requires that the person must apply for the foreign nationality

and passport possession implies loyalty to the U.S., and dual citizens have been met with skepticism in the past. The *Afroyim* decision opened the door to wider acceptance of dual or multiple citizenship. In *Afroyim v. Rusk*,⁶¹ the Supreme Court held that U.S. citizens may not be involuntarily deprived of their citizenship. In that case, the U.S. government had attempted to revoke the citizenship of a man born in Poland because he had voted in an Israeli election after becoming a naturalized U.S. citizen.

The Supreme Court decided that Afroyim's right to retain his citizenship was guaranteed by the Citizenship Clause of the Fourteenth Amendment. In so deciding, the Court struck down a federal law mandating loss of U.S. citizenship for voting in a foreign election—thereby overruling one of its own precedents, *Perez v. Brownell*⁶², in which it had upheld loss of citizenship under similar circumstances less than a decade earlier. The Bancroft Treaties were a series of agreements between the U.S. and other nations which sought to limit dual citizenship following naturalization. These were eventually abandoned after the Carter administration concluded that *Afroyim* and other Supreme Court decisions had rendered them unenforceable.

Dual nationals owe allegiance to both the United States and the foreign country. They are required to obey the laws of both countries, and either country has the right to enforce its laws. It is important to note the problems attendant to dual nationality. Claims of other countries upon U.S. dual nationals often place them in situations where their

voluntarily and with the intention to relinquish U.S. nationality. Intent may be shown by a person's statements and conduct.

⁶¹ 387 U.S. 253 (1967)

⁶² *Perez v. Brownell*, 356 U.S. 44 (1958), was a United States Supreme Court case in which the Court affirmed Congress's right to revoke U.S. citizenship as a result of a citizen's voluntary performance of specified actions, even in the absence of any intent or desire on the person's part to lose citizenship.

obligations to one country are in conflict with the laws of the other. In addition, their dual nationality may hamper U.S. efforts to provide consular protection to them when they are abroad, especially when they are in the country of their second nationality. U.S. nationals, including dual nationals, must use a U.S. passport to enter and leave the U.S. and may also be required by the foreign country to use its passport to enter and leave that country.⁶³

It is still being litigated whether Muthana was ever lawfully a U.S. citizen. Even if the litigation is resolved in her favor, this would not necessarily mean the government lacks the power to revoke her citizenship, as Steve Vladeck at *Just Security* notes. However, expatriation is limited to a specific set of cases spelled out at 8 U.S.C. § 1481(a), and none of those categories seem to apply. For example, 8 U.S.C. § 1481(a)(7) allows expatriation of those who commit treason or other hostile acts against the U.S. government but requires they be “convicted thereof by a court martial or by a court of competent jurisdiction” before they can be expatriated, which is not (yet at least) the case with Muthana.⁶⁴

VIII. DENATURALIZATION

Comprehensive immigration reform is a popular topic in Washington.⁶⁵ While many reform bills have been offered, none have addressed the significant substantive and

⁶³ Dual Nationality, U.S. DEPARTMENT OF STATE (2019), <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/Advice-about-Possible-Loss-of-US-Nationality-Dual-Nationality/Dual-Nationality.html> (last visited Apr 9, 2019).

⁶⁴ Steve Vladeck, UNPACKING (SOME OF) THE LEGAL ISSUES SURROUNDING HODA MUTHANA JUST SECURITY (2019), <https://www.justsecurity.org/62659/unpacking-some-of-issues-surrounding-hoda-muthana/> (last visited Apr 11, 2019).

⁶⁵ Elaine Kamarck & Christine Stenglein, CAN IMMIGRATION REFORM HAPPEN? A LOOK BACK BROOKINGS (2019), <https://www.brookings.edu/blog/fixgov/2019/02/11/can-immigration-reform-happen-a-look-back/> (last visited Apr 12, 2019).

procedural issues surrounding denaturalization. The power to strip immigrants of their U.S. citizenship has, until recently, been held exclusively by the courts. Congress transferred the naturalization power from federal and state courts to the Attorney General in 1990 when it changed the wording of a provision that allowed courts to use their existing powers to reopen their own judgments to overturn grants of naturalization. The Attorney General used this provision to authorize the INS to create its own procedure for administrative denaturalization. As a result, hundreds of new citizens received Notices of Intent to Revoke Naturalization. This “denaturalization” campaign was the dark flipside of the earlier “Citizenship USA,”⁶⁶ or CUSA, which was designed to administratively streamline the immigration process and was a major INS initiative intended to reduce a backlog of pending naturalization applications.⁶⁷ However, the campaign ultimately raised serious doubts about the value of U.S. citizenship and what it meant to be a citizen if citizenship could be removed without procedural protections offered by the court system.⁶⁸

Though denaturalization serves public policy as a final check on naturalization fraud, existing law also permits the government to denaturalize an individual solely for speech and expressive association that occurs after one acquires citizenship. Critics argue this provision, 8 U.S.C. § 1451(c), violates naturalized citizens' First Amendment rights to

⁶⁶ Naturalization applicants swelled due to the Legalization or Amnesty program of the Immigration Reform and Control Act of 1986 (IRCA). IRCA contained an “amnesty” provisions that affected millions of undocumented aliens. The provision dealt primarily with undocumented aliens who had entered the U.S. before January 1, 1982 without inspection or those who entered on a visitor or student visa and worked without permission.

⁶⁷ The Implementation of CUSA: an Overview, SPECIAL REPORT: AN INVESTIGATION OF THE INS'S CITIZENSHIP USA INITIATIVE - CUSA OVERVIEW (2019), <https://oig.justice.gov/special/0007/cusaimp.pdf> (last visited Apr 9, 2019).

⁶⁸ ADMINISTRATIVE DENATURALIZATION : IS THERE "NOTHING YOU CAN DO THAT CAN'T BE UNDONE"?, 34 Loy. L.A. L. Rev. 895

free speech and association, interferes with Fifth Amendment right of equal protection, and has a tendency to overpenalize otherwise innocent conduct.⁶⁹

IX. A BRITISH COMPARISON

The U.S and the United Kingdom (UK) militaries are keenly aware of looming terrorist threats. Together they devote tremendous military resources to fighting their shared enemies. These threats include American and British nationals returning—or at least attempting to return—home after fighting ISIS. Despite this joint threat, citizenship revocation is a more viable option in the UK than in the U.S.

For example, Hilal al-Jedda was an Iraqi citizen who went to the UK as an asylum-seeker in 1992 and acquired British citizenship in 2000. He travelled to Iraq in 2004, where he was arrested by U.S. forces and transferred to British custody. Shortly before his release in 2007, he was notified that the Home Secretary was considering depriving him of his British citizenship on the basis this would be conducive to the public good.⁷⁰ Under the British Nationality Act 1981, a Home Secretary could remove someone’s citizenship without warning and with no judicial approval under the belief it would be “conducive to the public good”.⁷¹ Al-Jedda won a six-year court battle to regain his British citizenship when the highest court unanimously ruled its loss would illegally

⁶⁹ ARTICLE: SNAP: HOW THE MORAL ELASTICITY OF THE DENATURALIZATION STATUTE GOES TOO FAR, 23 Wm. & Mary Bill of Rts. J. 638

⁷⁰ David Anderson, CITIZENSHIP REMOVE RESULTING IN STATELESSNESS UNITED KINGDOM PUBLISHING SERVICE (2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/518390/David_Anderson_QC_-_CITIZENSHIP_REMOVAL__print_.pdf (last visited Mar 15, 2019).

⁷¹ Alice Ross, HOME SECRETARY THERESA MAY STRIPS MAN OF UK CITIZENSHIP - FOR THE THE INDEPENDENT (2013), <https://www.independent.co.uk/news/uk/home-news/home-secretary-theresa-may-strips-man-of-uk-citizenship-for-the-second-time-8976216.html> (last visited Mar 10, 2019).

make him stateless.⁷² A change to the British Nationality Act in 2014 enabled the government to cancel the citizenship of those born in the UK if the Home Secretary deemed they had acted against the “vital interests” of the UK without having been charged or convicted of a crime in the UK or abroad. In 2016, 14 people had their British citizenship withdrawn, and the number increased to 104 in 2017.⁷³

In general, antiterrorism legislation in the UK provides for a large number of criminal offenses connected with terrorism. For example, it is a criminal offense for any British national to travel abroad to commit or prepare a terrorist offense, or to obtain terrorist training. Suspects may be prosecuted in the UK for other acts of terrorism, even if the acts are committed overseas.⁷⁴ Any acts to prepare for acts of terrorism or assist others to prepare are also criminal offenses punishable by up to life imprisonment.⁷⁵ In addition, the Terrorism Acts provide the police with many powers, including the power to take terrorism prevention and investigation measures (TPIM), which are restrictive measures imposed on a person, such as the requirement to reside at a specific property and limitations on travel.⁷⁶

⁷² Two principal international Conventions seek to avoid incidents of statelessness: 1) the 1961 UN Convention on the Reduction of Statelessness [the 1961 Convention]; and 2) the Council of Europe’s 1997 European Convention on Nationality [the 1997 Convention].

⁷³ Taylor Heyman, CAN THE UK CANCEL A PERSON'S CITIZENSHIP? THE NATIONAL (2019), <https://www.thenational.ae/world/europe/can-the-uk-cancel-a-person-s-citizenship-1.828164> (last visited Apr 13, 2019).

⁷⁴ Terrorism Act 2000, c. 11, § 63A-B, <http://www.legislation.gov.uk/ukpga/2000/11/contents> (last visited Apr 14, 2019).

⁷⁵ Terrorism Act 2006, c. 11, s. 5, <http://www.legislation.gov.uk/ukpga/2006/11/contents> (last visited Apr 14, 2019).

⁷⁶ Terrorism Prevention and Investigation Measures Act 2011, c. 23, <http://www.legislation.gov.uk/ukpga/2011/23/contents>; House of Commons Home Affairs Committee, Counter-Terrorism Seventeenth Report of Session 2013–14, HC 231, 2013-14, ¶ 119, www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/231/231.pdf (last visited Apr 13, 2019); Treatment of Foreign Fighters in Selected Jurisdictions: Country Surveys, TREATMENT OF FOREIGN FIGHTERS IN SELECTED JURISDICTIONS (2014), https://www.loc.gov/law/help/foreign-fighters/country-surveys.php#_ftn300 (last visited Apr 7, 2019).

X. CONSEQUENCES OF FOREIGN TERRORIST DESIGNATION

The Designation of Foreign Terrorist Organization (FTO) allows the U.S. to impose certain legal consequences on the FTO as well as on individuals that associate with or knowingly provide support to the designated organization. It is unlawful for a person in the U.S., or subject to its jurisdiction, to knowingly provide “material support or resources” to a designated FTO, and offenders can be fined or imprisoned for violating this law.⁷⁷

Under section 219 of the Immigration and Nationality Act, the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, is authorized to designate an organization as an FTO.⁷⁸ For DOS to designate an organization as an FTO, the Secretary of State must find that the organization meets three criteria: 1) it is a foreign organization; 2) the organization engages in terrorist activity or terrorism, or retains the capability and intent to engage in terrorist activity or terrorism;⁷⁹ or 3) the organization’s terrorist activity or terrorism threatens the security of U.S. nationals or U.S. national security.⁸⁰ DOS has developed a six-step process for designating FTOs that involves other DOS bureaus and agency partners. The DOS Bureau of Counterterrorism (CT) leads the designation process, monitors terrorist

⁷⁷ 18 U.S.C. § 2339B.

⁷⁸ 8 U.S.C. § 1189.

⁷⁹ Terrorist activity is defined at 8 U.S.C. § 1182(a)(3)(B). Terrorism is defined at 22 U.S.C. § 2656f(d)(2).

⁸⁰ Combating Terrorism: Foreign Terrorist Organization Designation Process and U.S. Agency Enforcement Actions, GOVERNMENT ACCOUNTABILITY OFFICE (2015), <https://www.gao.gov/assets/680/671028.pdf> (last visited Mar 15, 2019).

activity to identify potential targets for designation, and considers recommendations for potential targets from the interagency and foreign partners.⁸¹

It is unlawful for a person in the U.S. or subject to its jurisdiction to knowingly provide "material support or resources" to a designated FTO.⁸² 18 U.S.C. § 2339A(b)(3) further provides that for these purposes the term "expert advice or assistance" means advice or assistance derived from scientific, technical, or other specialized knowledge. Muthana's case involves several encouraging social media posts but would likely not be considered technical advice or specialized knowledge.

Visa applicants to the U.S. can be inadmissible for a variety of reasons to include terrorist activity. According to 8 USC § 1182, terrorist activity is any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the U.S., would be unlawful under the laws of the U.S. or any State) and which involves hijacking or sabotage of aircraft, vessels, or vehicles.⁸³ Representatives and members of a designated FTO, if they are aliens, are inadmissible to and, in certain circumstances, removable from the U.S.⁸⁴ Inadmissibility may apply if Muthana is determined to be an alien and she seeks admission, but removal would not apply since she is physically located in Syria and not the U.S.

⁸¹ The number of FTO designations has varied annually since 1997, when 20 FTOs were designated. As of March 2019, 67 organizations were designated as FTOs.

⁸² The term "material support or resources" is defined in 18 U.S.C. § 2339A(b)(1) as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who maybe or include oneself), and transportation, except medicine or religious materials."

⁸³ The full text of 8 USC § 1182 is available at: <https://www.govinfo.gov/content/pkg/USCODE-2016-title8/pdf/USCODE-2016-title8-chap12-subchapII-partII-sec1182.pdf>

⁸⁴ See 8 U.S.C. §§ 1182 (a)(3)(B)(i)(IV)-(V), 1227 (a)(1)(A)).

XI. FOREIGN TERRORIST FIGHTER: AN IMPRECISE TERM

How should Muthana and others be classified for purposes of prosecution (or targeting)? The term often used in association with individuals in her situation is Foreign Terrorist Fighter (FTF). There is no evidence to suggest she actively fought in battle against U.S. troops operating in Syria, so the “fighter” part of the term is not convincing. What about “foreign”? This term is also problematic, especially for dual nationals. Terrorism has multiple definitions under various national laws. Criminal prosecutions would surely benefit from a reexamination of the term.

The Organization for Security and Co-operation in Europe (OSCE) suggest the “fundamental principle of legality and certainty in the law” is strained by terms that are “vague” and “uncertain in scope,” as restrictions on rights in criminal law (e.g., freedom of expression, association, etc.) must be clearly provided for in the law.⁸⁵

UNSCR 2178 (2014) associates the term “foreigner” with individuals who “travel to a State other than their States of residence or nationality.” This leaves significant room for ambiguity. In line with basic principles of international law, dual nationals or persons with important personal, social, cultural and family links to states beyond formal residence or nationality should not be considered “foreigners” for this purpose when they travel to the state with which they have the relevant links.⁸⁶ The OSCE reiterates that there is no internationally agreed definition of the term “terrorist” or “terrorism,” leaving room for diversity of opinion by national authorities and increasing the potential

⁸⁵ Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (2018), <https://www.osce.org/odihr/393503?download=true> (last visited Feb 3, 2019).

⁸⁶ UNSCR 2178 (2014), para 6, refers to prosecuting travel to states other than states of residence or nationality.

for abuse. FTF provisions commonly cover travel to support “terrorist organizations” and entities, but it is unclear how that qualification is made and by whom.⁸⁷

XII. THE FATE OF TERRORISTS AND SUPPORTERS

ISIS fighters and their supporters have several options. They can continue the fight and risk being killed by Western forces (or Russian forces in Syria), give up the fight and go to a refugee camp like Muthana did, or travel to a country willing to accept them as asylum seekers or repatriated citizens. On February 16, President Trump encouraged, Britain, France, Germany and other European allies to “take back” over 800 ISIS fighters in Syria and “put them on trial.”⁸⁸ However, as it now stands, few governments are willing to take them back, in part because such actions are not politically popular.⁸⁹

It is estimated that tens of thousands of ISIS fighters and supporters have died in the fighting in Syria, and the number grows larger depending upon the geographic boundary of what one considers to be the caliphate. The *Financial Times* recently reported that U.S.-backed Syrian Democratic Forces (SDF) was holding around 57,000 people from 48 different countries. While the U.S. has urged its allies to repatriate their nationals, Europe has resisted, with the UK instead stripping citizenship of Shamima Begum, a British woman who joined Isis at the age of 15.⁹⁰ While it is good that ISIS

⁸⁷ OSCE, *supra* note 84.

⁸⁸ Donald J. Trump, TWITTER (2019), <https://twitter.com/realDonaldTrump/status/1096980408401625088> (last visited Mar 15, 2019).

⁸⁹ Courtney Vinopal, SHOULD THOUSANDS OF ISIS FIGHTERS AND THEIR FAMILIES BE ALLOWED TO RETURN HOME? PBS (2019), <https://www.pbs.org/newshour/world/should-thousands-of-isis-fighters-and-their-families-be-allowed-to-return-home> (last visited Mar 15, 2019).

⁹⁰ Chloe Cornish, ISIS FIGHTERS SURRENDER THEIR LAST TERRITORY IN SYRIA FINANCIAL TIMES (2019), <https://www.ft.com/content/e96535ce-4d51-11e9-9c76-bf4a0ce37d49> (last visited Mar 16, 2019).

militants are currently in custody, it is also troubling, because SDF lacks the resources to police its network of makeshift prisons and has warned that it may eventually need to release hundreds if not thousands of ISIS fighters and relatives. In March alone, hundreds of ISIS fighters were released by the SDF into eastern Syria, and many more are smuggling themselves into other lawless parts of the country, according to *Politico*.⁹¹

Daniel Bymans at *Brookings* argues that, if Muthana voluntarily joined the Islamic State (as seems likely), she should be allowed home, given a trial, and serve the appropriate penalty for providing support to a terrorist organization and other crimes. He further suggests that if the U.S. and Europe do not take back their citizens, some will be killed while others will hide or flee to safer areas. This would create a threat for their new host countries and a potential long-term terrorism risk.⁹² Muthana, meanwhile, describes herself as a former Islamic “radical” who has changed her beliefs and deeply regrets traveling to ISIS territory after being “brainwashed” online. When asked in a recent interview what she expects will happen if she is allowed to return to the U.S. admitted, “Of course I’ll be given jail time.”⁹³

To complicate matters, FTO members and sympathizers often choose to blend in with internally displaced persons (IDP)⁹⁴ and refugee flows waiting for an opportunity to

⁹¹ Charles Lister et al., TRUMP SAYS ISIS IS DEFEATED. REALITY SAYS OTHERWISE. POLITICO MAGAZINE (2019), <https://www.politico.com/magazine/story/2019/03/18/trump-isis-terrorists-defeated-foreign-policy-225816> (last visited Mar 17, 2019).

⁹² Daniel L. Byman, THE WRONG DECISION ON HODA MUTHANA BROOKINGS (2019), <https://www.brookings.edu/blog/order-from-chaos/2019/02/21/the-wrong-decision-on-hoda-muthana/> (last visited Apr 12, 2019).

⁹³ Richard Engel, U.S.-BORN ISIS BRIDE: I'LL HAVE 'NO PROBLEM' RETURNING DESPITE TRUMP DECREE NBC NEWS (2019), <https://www.nbcnews.com/news/world/isis-bride-hoda-muthana-says-she-ll-have-no-problem-n974391> (last visited Apr 13, 2019).

⁹⁴ Internally displaced persons (IDPs), according to the United Nations Guiding Principles on Internal Displacement, are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the

claim asylum in the West, which is generally the target of their violent intentions. According to United Nations High Commissioner for Refugees (UNHCR), there are 6.2 million people, including 2.5 million children, displaced within Syria.⁹⁵ While this is clearly a tragedy and a humanitarian crisis, it is important to properly vet asylum applicants to the West to ensure they are not attempting to hide in plain view. While Muthana has self-identified as a U.S. citizen and even given interviews, there may be other terrorists and sympathizers in her camp or other camps.

XIII. DEFENSE-IN-DEPTH

A coherent and coordinated response to terrorism generally—and FTFs in particular—is needed and cannot be effective without the involvement of the DoD, who is often the first to encounter foreign fighters directly or through proxies. DoD operates in more than 160 countries⁹⁶ and is able to collect—through human intelligence (HUMINT) or other means—important terrorism related information which other federal agencies are not able to collect themselves. DoD employs a strategy of pushing out the barriers and attempting to collect as much information as possible about potential terrorists before they arrive on our shores.

Defense-in-Depth (DiD) is a strategy adapted from the maritime and information technology (IT) domains which has been embraced by USG in a whole-of-government approach and has evolved into a driver for the use of biometric data, which is useful for

effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border."

⁹⁵ <https://www.unhcr.org/sy/internally-displaced-people>

⁹⁶ Our Story, UNITED STATES DEPARTMENT OF DEFENSE (2019), <https://www.defense.gov/Our-Story/> (last visited Mar 19, 2019).

identifying and tracking terrorists. National Security Presidential Directive (NSPD) 41 prescribes a global cross-discipline approach in the maritime domain centered on a layered, DiD framework that can be adjusted based upon threat level.⁹⁷ National Institute of Standards and Technology (NIST) security and privacy guidance describes an information security strategy integrating people, technology,⁹⁸ and operations capabilities to establish variable barriers across multiple layers and missions of the organization. In the IT context, requiring adversaries to defeat multiple mechanisms makes it more difficult to successfully attack critical information resources (i.e., increases adversary work factor) and also increases the likelihood of detection.⁹⁹

In the overall national security context generally, DiD is understood to mean pushing the borders outward so as to detect and mitigate threats earlier, thereby giving the government more time to either craft a response or execute existing response procedures. At the local or installation level, the concept of a layered approach translates to “security in depth,” often through use of physical access control systems (PACS). For DoD, access control is designed to restrict or control entrance to properties and installations to “only those authorized persons¹⁰⁰ and their conveyances.”¹⁰¹

⁹⁷ George W. Bush, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE NSPD-41, HOMELAND SECURITY PRESIDENTIAL DIRECTIVE HSPD-13: MARITIME SECURITY POLICY HOMELAND SECURITY DIGITAL LIBRARY (2004), <https://www.hsdl.org/?abstract&did=776173> (last visited Mar 12, 2019).

⁹⁸ For example, Executive Order 13800 mandates a NIST framework for managing agency cybersecurity risk. See Executive Order 13800, Presidential Executive Order on Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure (Mar 15, 2017). Available at <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-strengthening-cybersecurity-federal-networks-critical-infrastructure/>

⁹⁹ Security and Privacy Controls for Federal Information Systems and Organizations, COMPUTER SECURITY RESOURCE CENTER (2015), <https://csrc.nist.gov/publications/detail/sp/800-53/rev-4/final> (last visited Mar 16, 2019).

¹⁰⁰ Such persons may live or work on the installation, be visiting or attending a ceremony, and may or may not require an escort.

¹⁰¹ James R. Clapper, DIRECTIVE -TYPE MEMORANDUM (DTM) 09-012, “INTERIM POLICY GUIDANCE FOR DOD PHYSICAL ACCESS CONTROL” EXECUTIVE SERVICES DIRECTORATE (2018),

Installation commanders have broad discretion to employ personnel access control measures at installation perimeter to enhance security and protection of personnel, resources, and installations.¹⁰² DoD and USG often encounter the same individuals in multiple theaters attempting to engage in nefarious activities. Therefore, it is reasonable to expect that terrorists hiding in plain view in a refugee camp, for example, would attempt to immigrate to the U.S. or other to be closer to the enemy.¹⁰³

The U.S. plans to integrate capabilities from across USG and coordinate with partners abroad to prevent terrorists from entering the U.S. This effort begins overseas, ensuring that partners “share and use information, such as watchlists, biometric information, and travel data, to prevent terrorists and fleeing foreign fighters from traveling to the United States.” The U.S. is also modernizing screening and identity intelligence (I2) capabilities to track terrorist travelers and prevent the entry of those who support violence and terrorist ideologies.¹⁰⁴

Sometimes terrorists or other malign actor are actively monitored or tracked, but an encounter-based approach is the norm for several reasons including resourcing, communication issues, and gaps in jurisdictional authority as a person of interest travels, perhaps entering an austere environment or a failed nation state willing to harbor him or unaware of his presence. The DiD model assumes that, eventually, the individual terrorist or malign actor will present an identity (real or assumed) to derive

<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dtm/DTM-09-012.pdf?ver=2018-08-23-074619-957> (last visited Apr 28, 2019).

¹⁰² *Id.* at 9.

¹⁰³ Based upon personal experience.

¹⁰⁴ Donald J. Trump, NATIONAL STRATEGY FOR COUNTERTERRORISM OF THE UNITED STATES OF AMERICA WHITE HOUSE (2018), <https://www.whitehouse.gov/wp-content/uploads/2018/10/NSCT.pdf> (last visited Mar 27, 2019).

some benefit, such as a social service or access at a border crossing. The individual may present a false identity or persona to avoid discovery, but nation states are becoming more astute with regard to fraud detection through implementation of biometrics and other technologies. There is no foreseeable expedient replacement for the DiD framework, although the “borders” will likely continue to expand, and the frequency of encounters will increase as more biometric systems come online and are fully integrated.

XIV. TERRORISTS IN REFUGEE CAMPS

As previously discussed, at least one (former?) ISIS supporter, Hoda Muthana, is currently in a refugee camp in Syria. It is unclear what will happen to her and her young child, but it is clear she is in a better position than most of her peers. For example, she has access to U.S. courts, speaks English well, and has the support of international aid agencies. She also has a supportive family back in the U.S. Such is not the case with most refugees and IDPs living in Syria or the broader Middle East—terrorist or not.

Terrorists generally do not identify themselves early on in the vetting process when applying for asylum in the West, for example. As such, they benefit for anonymity and often do not possess (through loss or destruction) primary identity documents.¹⁰⁵ They also benefit from improper vetting as “refugees.” Sometimes those in camps do not even speak the local language, which should raise a red flag that perhaps the individual is attempting to infiltrate or game the system. Asylum seekers often are or

¹⁰⁵ Primary identity documents such as passports and birth certificates may be lost or destroyed en route, sometimes intentionally in order to mask the country of origin. Also, such documents are relatively easily forged or can be obtained through bribes to issuing officials.

pretend to be from other countries, especially if they have heard that a country in the West is accepting applicants from one country versus another. In other words, an asylum seeker may present as being Syrian versus Iraqi if Western Country “X” is accepting Syrian asylum claims.

The High Commissioner for Refugees is mandated by the UN to lead and coordinate international action for the worldwide protection of refugees.¹⁰⁶ In its efforts to achieve the objective of ensuring the well-being of refugees, UNHCR strives to ensure that everyone can exercise the right to seek asylum, find refuge in another state, and return home voluntarily. As such, UNHCR assists refugees to return to their own country or to settle permanently in another country.¹⁰⁷ However, it is becoming more difficult to place refugees, and for good reasons. For its part, the U.S. is doing a better job than most when it comes to screening asylees. United States Citizenship and Immigration Service (USCIS) has implemented new security measures and procedures based on an interagency joint review of the U.S. Refugee Admissions Program (USRAP), as required by Executive Order 13780.¹⁰⁸

The only way to truly discover and bind someone’s identity is through the use of biometrics. International organizations often look to the U.S. for leadership in CT matters. UNHCR employs biometrics for case management¹⁰⁹ and benefits rationing but

¹⁰⁶ Mission Statement UNHCR - The United Nations Refugee Agency, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEE (2019), <https://www.unhcr.org/afr/4847b7832.pdf>.

¹⁰⁷ Provision of Life-Saving Assistance and Supporting Communities End of Year Report 2018, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (2019), <https://www.unhcr.org/sy/wp-content/uploads/sites/3/2019/02/End-of-Year-2018-S.pdf> (last visited Mar 12, 2019).

¹⁰⁸ Donald J. Trump, EXECUTIVE ORDER PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES THE WHITE HOUSE (2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/> (last visited Mar 13, 2019).

¹⁰⁹ Population Registration and Identity Management EcoSystem (PRIMES) is a suite of interoperable tools and applications to provide better access to opportunities and services for

has historically been reluctant to share biometric data with military and intelligence organizations. European nations especially have been reluctant to share biometrics among themselves or even internally, but this is changing. A key finding in a recent EU report on fundamental rights¹¹⁰ noted that IT systems set up for asylum and migration management are increasingly also serving internal security purposes like prevention of serious crime and terrorism. The report noted that these systems increasingly rely on biometric data like fingerprints and facial images to connect the individual to the stored information. Sharing information within the EU is an improvement but sharing with the U.S. is necessary in order to maximize overall CT efforts.

XV. CONCLUSION AND SUMMARY

The U.S. government has dedicated significant manpower and resources to restructure the federal government and increase information flow. It has also partnered with other nations to provide intelligence and law enforcement tips and assist with the monitoring of cross-border flows. It has attempted to integrate government systems and establish and share terrorist watchlists, both biometric and biographic. Despite these efforts, terrorists and their supporters continue to travel to conflict areas and later attempt to return “home” when—to put it mildly—things do not work out. The U.S. is on the right track and is also assisting other nations in bolstering their security processes and procedures, but we should get our own house in order and lead by example

refugees and other forcibly displaced persons. It is replacing the Biometric Enrolment System (BIMS).

¹¹⁰ Under watchful eyes – biometrics, EU IT-systems and fundamental rights, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (2018), <http://fra.europa.eu/en/publication/2018/biometrics-rights-protection> (last visited Mar 15, 2019).

through better interagency coordination and resource allocation. We live in a free society, and there will always be an element of risk. Ultimately, voters speak every four years and determine the level of risk they are willing to accept regarding border security and immigration policies. In the meantime, systems are becoming more integrated, more interagency collaboration is gradually occurring, and terrorists and their supporters are being identified globally.