

The Relationship between President Trump's Executive Order and the Geneva Convention on Refugees

In section 4(d) on Executive Order “*Protecting the Nation From Foreign Terrorist Entry Into the United States*,” President Trump “hereby proclaim[s] that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any such entry until such time as I determine that additional admissions would be in the national interest.” In the next section, however, he adds that notwithstanding the rest of the Order, “the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis [including...] when admitting the person would enable the United States to conform its conduct to a preexisting international agreement.” Presumably, §4(e) refers, or should refer, to the 1951 Geneva Convention on Refugees, to which the US is specifically party through its signing of the 1967 Protocol and through its being ensconced in US law through the 1980 refugee Act. The question arises as to whether this entails an internal contradiction within Trump’s Order, and I take the position here that it does, on at least two counts. First, the plain reading of these sections of the statute shows that the order violates key sections of the Convention. Second, I will argue that this violation veers into lawmaking and thereby represents an overextension of executive power.

Article 7 of the Convention requires that “[e]xcept where this Convention contains more favorable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.” The blanket prohibition on the entry of refugees in §4(d) clearly violates this provision. It creates a tiered distinction in admittance procedures between refugees and other foreign aliens. Section 4(e) likewise continues this distinction. The order states that any refugees to be allowed in, are only those considered on a case-by-case basis by the “Secretaries of State and Homeland Security.” This stipulation specifically sets out different “treatment” of refugees than other aliens that is far unfavorable when considered against the Convention’s language. One could potentially make an argument that one can read the prefatory clause “except where this Convention contains more favorable provisions” implying that where the Convention is more favorable to refugees than to other aliens. The language is perhaps ambiguous here, but in light of the rest of the Convention, such a reading is absurd. It would go against the entire purpose of the Convention. It would allow for any signatory state to abrogate its treaty obligations. If that were to be allowed, then the Convention would serve no purpose.

Turning to the second issue, the Convention is domestic law (see, e.g., *Noriega v. Pastrana*, 564 F.3d 1290, 1295–96 (C.A.11 2009)). Therefore, any alterations to the letter of the law would require Congressional approval, presumably through legislation. The Order, by requiring a break in following the Convention, thereby exceeds its authority by making new law (cf. *Medellin v. Texas*, 552 U.S. 491 (2008)). It is also worth noting that the Order itself is internally incoherent, since it requires following both the Order itself and the Convention. But the very act of trying to make this distinction within the language of the Order serves to mean that there is no obligation for any to follow its dictates unless the United States Congress instituted those changes. Consider, for example, how Australia – another country who has worked to modify its approach to the acceptance of refugees in ways that contradict the language of the Convention – have only so far attempted to do so through its legislature, not through executive order.

These are issues inherent to the language of the Order as it relates to the Convention as law. There are, of course, several other potential issues arise when considering the Order in light of the United States’ obligations under the Convention as it applies as domestic law. Most notable

is the impact the actual implementation of the Order vis-à-vis refugees in terms of refoulement and the obligation to not discriminate based on the country of origin for a refugee. Since the Executive Order singles out migrants from a particular set of countries, this is a violation of the language of the Convention itself.