

The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's comments

BY LEWIS F. MATUSZEWICH

Professor Mark E. Wojcik of The John Marshall Law School in Chicago is a past chair of the International and Immigration Law Section Council of the Illinois State Bar Association. His article, "Developments in development aid" joins 50 other articles that Mark has contributed to the International and Immigration Law, Local Government Law, Human Rights, Bench and Bar, Alternative Dispute Resolution, Child Law, Government Lawyers, and the Diversity Leadership

Section newsletters. Mark has served in many capacities for the Illinois State Bar Association, including the ISBA's Special Committee on the General Agreement on Trade and Services, which completed a recommendation to the Illinois State Bar Association for consideration of the Illinois Supreme Court to bring the Ethical and Procedural Rules mandated by the Illinois Supreme Court in line with the International Treaty known as GATS or

Continued on next page

Editor's comments

1

Developments in development aid

1

Case note: *Muthana v. Pompeo*

6

Developments in development aid

BY MARK E. WOJCIK

Introduction

Foreign development aid helps individuals in some of the world's poorest countries. Foreign aid promotes economic prosperity and progress toward global development goals. Foreign aid can also help serve political goals of the donor countries. U.S. policymakers and political leaders have long viewed foreign aid as an "essential instrument of U.S. foreign policy" that has also "increasingly been associated with national security policy." But although U.S. foreign aid "has never been totally divorced from political considerations, ... tying it directly to loyalty remains controversial even among

conservative scholars."

The Trump administration does not necessarily see providing foreign aid as an "essential instrument of U.S. foreign policy" but rather as a possible target to cut or even eliminate from the federal budget. Under a policy of "America First," money was seen as being better spent on a border wall than on promoting economic development in other countries. The Overseas Private Investment Corporation was also a foreign aid target until the Trump administration observed the benefits that the People's Republic of China was reaping from its Bridge and Road Initiative (BRI) foreign aid

program. Seeing those benefits, the Trump administration reverse course and quietly create an international development agency with twice the budget of its predecessor agency. Foreign aid remains a continuing target for budget cuts, however, because administration officials and political leaders either see little benefit in spending on foreign development or see the threat of cutting off foreign aid as the only foreign policy tool.

Development Aid

"Academic researchers have studied foreign aid since the establishment of

Continued on next page

Editor's comments

CONTINUED FROM PAGE 1

General Agreement on Trade and Services.

David W. Aubrey is currently vice chair of the International and Immigration Law Section Council and his case note, "*Muthana v. Pompeo*" joins ten other articles he has written for *The Globe*.

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As always, thank you to our authors. ■

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Developments in development aid

CONTINUED FROM PAGE 1

aid giving," but these researchers "are perplexed as to why and under what circumstances the leaders of one state would provide valuable resources to another state." Some countries may give development aid to less-developed countries for humanitarian reasons. It's seen as the right thing to do for responsible global citizens, particularly in response to humanitarian crises. Countries may give aid for strategic and political reasons, or to reduce the threat of terrorism. Foreign aid may also be given to avert public health and environmental catastrophes that might later affect the donor country if the problems are left unchecked. Foreign aid can also be used to promote the economic interests of the donor state.

Recipient countries, for their part, accept financial support from these donor countries, recognizing that development aid may be "earmarked" for particular purposes. The donor countries may expect that the recipient countries will enact certain laws or follow certain laws and policies favored by the donor countries. Some aid may also be "tied" to requirements that the aid recipients "purchase the equipment, arms, materials, supplies, parts and services, or other commodities made in the donor country or from the donor's corporations; use

contractors or consultants from the donor country; or that the equipment be shipped via ships or airplanes flagged in the donor country."

In addition to the categories of donor and recipient countries, a country may also find itself on both sides of the foreign aid equation: both receiving financial support from donor countries while giving some financial support to even less-developed countries.

Although foreign aid can be provided for purely humanitarian reasons, foreign aid is an undisputed foreign policy tool that provides recipient countries with either a reward for some behavior or an inducement to change its behavior. Foreign aid may also follow military action to help ensure that a country's foreign policy goals are met and secured.

In various speeches at his campaign rallies, President Trump promised to end or at least sharply curtail foreign aid. His administration and some members of Congress apparently saw the expenditures for development as wasteful and not supportive of the United States or of American values. Some argued that money spent on foreign aid should instead be diverted to help pay the construction costs of a wall along the southern border of the United States, fulfilling one of Mr. Trump's

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main campaign promises.

Threats to Cut Off Development Aid

Donald Trump has viewed foreign aid as “entirely transactional,” something given for something in return. And while not extolling the benefits of foreign aid, his administration has used threats to cut off foreign aid as a somewhat clumsy tool of foreign policy. Three situations illustrate various threats to cut off foreign aid.

First, at the end of 2017, Mr. Trump threatened to cut off foreign aid to countries that were going to vote in support of a U.N. General Assembly Resolution opposing the recognition of Jerusalem as the capital of Israel. Mr. Trump told a press conference that those countries “take hundreds of millions of dollars and even billions of dollars, and then they vote against us. Let them vote against us. We’ll save a lot. We don’t care.” The General Assembly Resolution was in response to Mr. Trump’s decision to recognize Jerusalem as the capital of Israel. The United States had vetoed a similar resolution before the U.N. Security Council, where the vote was 14-1. The General Assembly Resolution, drafted by Turkey and Yemen, passed by 128 votes to 9 against with 21 absentees and 35 abstentions. The General Assembly Resolution on Jerusalem was nonbinding.

The Trump administration was condemned for trying to bully countries to support the United States in that vote of the U.N. General Assembly. One analyst suggested that the United States did so because it wanted to appear “isolated” in the United Nations. And although the United States “has a long and at least partially successful history of buying U.N. votes with foreign aid,” the United States has typically done so privately rather than with public threats. “Buying votes is frowned upon,” and “[i]ssuing public threats may make it harder for some governments to vote with the United States.”

Second, in September 2018, during his second speech addressing the annual opening of a new session of the U.N. General Assembly, President Trump announced that he would stop giving foreign aid to countries that “disrespected” or “were disloyal to” the United States. Expressing a transactional view of foreign aid, President Trump told the

U.N. General Assembly that:

The United States is the world’s largest giver in the world by far of foreign aid, but few give anything to us. That is why we are taking a hard look at U.S. foreign assistance . . . We will examine what is working, what is not working, and whether the countries that receive our dollars and our protection also have our interests at heart. Moving forward, we are only going to give foreign aid to those who respect us and, frankly, are our friends.

And as a third example of threatening to cut off foreign aid, in October 2018, Mr. Trump announced that he would cut off or substantially reduce aid to El Salvador, Guatemala, and Honduras because those countries were unable to stop migrants from leaving their countries and “coming illegally” to the United States. The timing of this threat may have had something to do with U.S. midterm elections, giving Mr. Trump another opportunity to rally his base by condemning “caravans” of asylum seekers who were fleeing violence and persecution in Central America. Individuals and families coming to the United States to claim asylum are not “coming illegally” to the United States, however, but are coming to exercise a lawful right to claim asylum.

These three examples illustrate how the Trump administration has used threats of cutting off foreign aid as a tool for foreign policy. It may be fairly questioned as to whether using public threats is a productive strategy or one that inadvertently backfires.

Recognizing a Competitive “Threat” from China: The Belt and Road Initiative

In addition to using public threats against countries that received U.S. aid, the Trump administration saw that China was succeeding in its global strategy of infrastructure investment. Where the United States was trying to threaten the cancellation of foreign aid, China seemed to be increasing its foreign influence by using investment and trade strategies.

The Belt and Road Initiative (BRI) of the People’s Republic of China is also variously known as “One Belt One Road” (OBOR), the “Silk Road Economic Belt,” and the “21st-century Maritime Silk Road.” Chinese President Xi Jinping originally announced

the BRI strategy during official visits to Indonesia and Kazakhstan in 2013. As of February 2019, China had signed “Belt and Road” agreements with 152 countries and international organizations in Europe, Asia, Middle East, Latin America, and Africa, spending billions of dollars in developing countries around the world.

Of course, the BRI did not appear just suddenly. It had been Chinese policy for more than five years. But when China and the United States entered into a trade skirmish if not a trade war, greater attention fell on the benefits that China was seeing from its investment strategy.

The of losing out to China assistance forced the Trump administration to reconsider its plan to reduce foreign aid payments under an “America First” strategy. As one newspaper noted, “President Trump, seeking to counter China’s growing geopolitical influence, is embracing a major expansion of foreign aid that will bankroll infrastructure projects in Africa, Asia and the Americas — throwing his support behind an initiative he once sought to scuttle.”

Reversing Its Position – Foreign Aid is Good After All: The BUILD Act

In response to the BRI, the U.S. Congress passed the Better Utilization of Investment Leading to Development Act (the “BUILD” Act) of 2018. With “little fanfare” because it represented a dramatic shift in the policy of foreign aid, President Trump signed the Build Act into law in October 2018 as part of H.R. 302, a non-controversial five-year renewal of the legislation establishing the Federal Aviation Authority.

As part of the FAA Reauthorization Act of 2018, however, the BUILD Act was “a major policy reversal” for a U.S. administration previously set on drastically reducing expenditures on foreign development aid.

A New U.S. Government Aid Agency Doubles the Previous Budget for OPIC: The U.S. International Development Finance Corporation (USIDFC)

The BUILD Act, part of H.R. 302, the FAA Reauthorization Act of 2018, established a United States International Development Finance Corporation

(USIDFC).

The USIDFC consolidates the Overseas Private Investment Corporation (OPIC) and the Development Credit Authority (DCA) of the U.S. Agency for International Development (USAID), and its mandate to promote international development. The USIDFC will have an annual budget of US\$60 billion, more than double OPIC's annual budget of \$29 billion. And unlike OPIC, the USIDFC will have the ability to make equity investments and to make loans in local currency, reducing investor currency exchange risk.

The creation of the USIDFC was expected to accomplish three goals: (1) it would align the U.S. government's development-finance tools with broader foreign-policy and development goals, and thereby enhance their competitiveness; (2) it would minimize risk to American taxpayers by establishing appropriate risk-management protocols, including for co-investment with the private sector; and (3) it would increase efficiency by reducing duplicate efforts in the U.S. government's development-finance programs.

Although the USIDFC will be more competitive than OPIC and will operate with twice the budget, some observers note that the USIDFC is merely an "improvement and rebranding of OPIC" instead of a radically-different foreign aid agency. "In that sense, it is reminiscent of the rebranding with improvements of the North American Free Trade Agreement (NAFTA) that resulted in the United States–Mexico–Canada–Agreement (USMCA)." What is significant about USIDFC is that it represents a complete turnaround for an administration that was previously focused on reducing expenditures for foreign aid. The administration recognized that there are hard and soft benefits to foreign aid. It appears that "concern about China's growing influence in developing countries has been the driver of the administration's new embrace of development assistance and soft power."

Continued Challenges

The creation of a single new development agency does not completely solve foreign

development needs nor does it eliminate hostility to foreign aid programs. In the budget agreement reached in February 2019, the U.S. House of Representatives rejected Mr. Trump's proposals to eliminate the Asia Foundation, the United States–African Development Foundation, the Inter-American Foundation, and the United States Trade and Development Agency. The February budget agreement instead added hundreds of millions of dollars for international disaster assistance and foreign aid, including an additional \$1 billion toward peacekeeping activities, an additional \$96 million to support U.N. peacekeeping missions (including those in Afghanistan, Iraq, and Libya), and an additional \$1.4 billion to respond to refugee crises overseas. Global nutrition programs will also receive enough money to exceed the President's budget request by \$1.2 billion.

But that was in February 2019. The proposed Trump Budget submitted in March 2019 asked for even more money to construct a southern border wall and again sought cuts to foreign aid.

Conclusion

Foreign development aid will remain a target for U.S. politicians who claim that foreign aid is wasted on countries that vote against the United States at the United Nations, or who believe that money spent on foreign aid would be better spent building a southern border wall. Although the United States International Development Finance Corporation created a stronger version of OPIC funded at twice the level of its predecessor, the USIDFC came about only when the Trump administration feared that it would "lose out" to China. Until the positive aspects of U.S. foreign aid become better known to an administration that sees aid purely in a transactional setting ("do this for me and I'll do this for you"), foreign aid will remain a punching bag if not a target for elimination. ■

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1. Daniele Selby and Jana Sepehr, *Trump Says Countries That Receive Foreign Aid Do 'Nothing for Us' — We Crunched the Numbers*, GLOBAL CITIZEN (Jan. 4, 2019), available at <https://www.globalcitizen.org/en/content/trump-cabinet-meeting-foreign-aid>.
2. Clair Apodaca, *Foreign Aid as Foreign Policy Tool* in OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (2017). The United States gives most of its aid for strategic reasons; the largest U.S. aid recipients are Israel, Egypt, Afghanistan, Pakistan, and Iraq. Erik Voeten, *Did Trump try to lose today's United Nations vote on Israel?*, WASH. POST (Dec. 21, 2017), available at https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/21/did-trump-try-to-lose-todays-united-nations-vote-on-israel/?utm_term=.68d302c0704c.
3. John Hudson and Josh Dawsey, *Trump Vowed to Slash Foreign Aid. Here's why it hasn't happened.*, MERCURY NEWS (Sept. 26, 2018), available at <https://www.mercurynews.com/2018/09/25/trump-vowed-to-slash-foreign-aid-heres-why-it-hasnt-happened>.
4. *Trump 2020 Budget Slashes Foreign Aid, Hikes Defense Spending*, HAARETZ (Mar. 12, 2019), available at <https://www.haaretz.com/us-news/trump-s-2020-budget-raises-defense-spending-by-4-percent-cuts-foreign-aid-1.7016363> ("President Donald Trump . . . told Congress to slash funding for foreign aid and the State Department and increase spending for the military and the wall he wants to build on the U.S.-Mexico border in his 2020 budget, the opening move in his next funding fight with Congress.").
5. As discussed in Part IV, the Belt and Road Initiative ("BRI") of the People's Republic of China is also known as "One Belt One Road" ("OBOR"), the "Silk Road Economic Belt," and the "21st-century Maritime Silk Road."
6. The United States International Development Finance Corporation ("USIDFC") is discussed in Part VI.
7. See, e.g., Peter Beaumont, *Trump Has Turned Foreign Aid into Shabby Political Theatre*, THE GUARDIAN (Feb. 20, 2019), available at <https://www.theguardian.com/global-development/2019/feb/20/trump-has-turned-foreign-aid-into-shabby-political-theatre> ("how the US does aid in the Trump era" is a period characterized "by a transactional world view and a foreign policy that seems often more in service of the US president's personal standing than America's position as a global player. While US aid policy has been politicised since the post-war Marshall Plan, no US president has been so obvious and crude as Trump in their approach to using assistance for global leverage.").
8. Apodaca, *supra* note 2.
9. But see Beaumont, *supra* note 7 ("If the Trump administration's method can actually be called doctrine — as opposed to a series of attention-seeking and ego-driven impulses — it has revealed itself in the past two years to be unconcerned with much pretence of generally accepted humanitarian principles, instead often favouring gesture politics even at the expense of wider US foreign policy interests.").
10. Apodaca, *supra* note 2 ("Foreign aid is used predominantly to promote geostrategic interests, for the right to build and maintain foreign bases, to strengthen alliances, or to keep allied regimes in power. Foreign aid is also used to maintain friendly relations with foreign governments. Foreign aid facilitates cooperation, and it builds strong alliances.").
11. *Id.* ("There is a general belief that foreign aid could reduce the likelihood of terrorist attacks by averting the causes of terrorism—namely, hopelessness and resentment as the result of extreme poverty, illiteracy, and hunger. Foreign aid would also be used to reduce poverty and inequality in the recipient state, thought to be a source of terrorist activity.").
12. *Id.* ("Foreign aid is given to a recipient country to facilitate economic development, alleviate poverty, and improve human welfare. Aid contributes to global security by tackling threats to human security, such as human rights violations, disease, population growth, environmental degradation, peacemaking, and the growing gap between the rich and the poor. Poverty and extreme inequalities are often causes of social instability and civil unrest, which, in turn, can produce flows of refugees and acts of terrorism. Thus, aid helps build a safer, more peaceful, and more secure world.").

13. *Id.* (“For instance, [foreign aid] can be used to open foreign markets to multinational corporations headquartered in donor countries, to subsidize the donor’s domestic firms, or to provide employment for the donor’s domestic workers.”).

14. *Id.* (“[H]istorically, the United States has tied approximately 75% of its aid.”).

15. *Id.*

16. See *id.* A famous example of U.S. foreign aid after military conflict would include the Marshall Plan to assist in the reconstruction of Europe.

17. See, e.g., Hudson and Dawsey, *supra* note 3 (“The populist ultimatum [of ending foreign development aid] has been a frequent applause line at Trump rallies and speeches since the early days of his presidential campaign.”).

18. See, e.g., John Campbell, *President Trump Embraces Foreign Aid After Trying to Gut It*, COUNCIL ON FOREIGN RELATIONS (Oct. 26, 2018), available at <https://www.cfr.org/blog/president-trump-embraces-foreign-aid-after-trying-gut-it> (“In its early days, the Trump administration’s rhetoric was hostile to the United States funding overseas economic development and skeptical of the benefits of soft power.”).

19. Josh Rogin, *Will Trump go after foreign aid to pay for his border wall?*, WASH. POST (Jan. 10, 2019), available at https://www.washingtonpost.com/opinions/global-opinions/will-trump-go-after-foreign-aid-to-pay-for-his-border-wall/2019/01/10/22b2673a-14fd-11e9-803c-4ef28312c8b9_story.html?noredirect=on&utm_term=.1d8818367797; Trump 2020 Budget Slashes Foreign Aid, Hikes Defense Spending, HAARETZ (Mar. 12, 2019), available at <https://www.haaretz.com/us-news/trump-s-2020-budget-raises-defense-spending-by-4-percent-cuts-foreign-aid-1.7016363> (“Trump’s budget asked for \$8.6 billion to build a wall on the southern border with Mexico, more than six times what Congress gave him for border projects in each of the past two fiscal years, and 6 percent more than he has corralled by invoking emergency powers this year after he failed to get the money he wanted.”).

20. Beaumont, *supra* note 7.

21. See *Jerusalem UN vote: Trump threatens US aid recipients*, BBC (Dec. 20, 2017), available at <https://www.bbc.com/news/world-middle-east-42431095>.

22. *Id.*

23. See *Jerusalem: US vetoes UN resolution rejecting Trump’s declaration*, BBC (Dec. 16, 2017), available at <https://www.bbc.com/news/world-middle-east-42394264> (“The text put forward by Egypt affirmed that any decisions on the status of Jerusalem had ‘no legal effect, are null and void[,] and must be rescinded.’”).

24. U.N. GENERAL ASSEMBLY RES. ES-10/L.22 (Dec. 19, 2017), available at <https://undocs.org/A/ES-10/L.22>. The nine states voting against the resolution were Guatemala, Honduras, Israel, Marshall Islands, Micronesia, Nauru, Palau, Togo, and the United States. The thirty-five states abstaining from the vote were Antigua and Barbuda, Argentina, Australia, Bahamas, Benin, Bhutan, Bosnia and Herzegovina, Cameroon, Canada, Colombia, Croatia, Czech Republic, Dominican Republic, Equatorial Guinea, Fiji, Haiti, Hungary, Jamaica, Kiribati, Latvia, Lesotho, Malawi, Mexico, Panama, Paraguay, Philippines, Poland, Romania, Rwanda, Solomon Islands, South Sudan, Trinidad and Tobago, Tuvalu, Uganda, and Vanuatu. And the twenty-one states not present for the voting were the Central African Republic, the Democratic Republic of the Congo, East Timor (Timor Leste), El Salvador, Georgia, Guinea-Bissau, Kenya, Mongolia, Myanmar, Moldova, Saint Kitts and Nevis, Saint Lucia, Samoa, San Marino, São Tomé and Príncipe, Sierra Leone, Swaziland, Tonga, Turkmenistan, Ukraine, and Zambia.

25. See, e.g., Voeten, *supra* note 2.

26. Voeten, *supra* note 2.

27. *Id.*

28. *Id.*

29. See, e.g., Hudson and Dawsey, *supra* note 3.

30. See, e.g., Steve Herman, *Trump: US to Cut Aid to Guatemala, Honduras, El Salvador*, VOICE OF AMERICA (Oct. 22, 2018), available at <https://www.voanews.com/a/trump-us-begin-cutting-aid-guatemala-honduras-el-salvador/4624760.html>.

31. See, e.g., Usman W. Chohan, *What Is One Belt One Road? A Surplus Recycling Mechanism Approach*, *Approach*, at 1 (June 13, 2017), available at SSRN: <https://ssrn.com/abstract=2997650> or <http://dx.doi.org/10.2139/ssrn.2997650>.

32. *152 Countries, [International] Organisations Sign Belt and Road Deals with China*, FINANCIAL EXPRESS (Mar. 4, 2019), available at <http://thefinancialexpress.com.bd/economy/global/152-countries-intl-organisations-sign-belt-and-road-deals-with-china-1551686061>.

33. See, e.g., See, e.g., Carol Guensburg and Patsy Widakuswara, *Trump Administration Rethinks Foreign Aid With Eye Toward China*, VOICE OF AMERICA (Oct. 19, 2019), available at <https://www.voanews.com/a/trump-administration-rethinks-foreign-aid-with-eye-toward-china/4620187.html>; Hudson and Dawsey, *supra* note 3 (Trump’s “America First” mantra and adjusting foreign aid priorities in the budget “has faced stiff resistance from officials at the Pentagon, State Department[,] and U.S. Agency for International Development who said [the] proposals were counterproductive, contradictory[,] and could cede influence to China . . .”).

34. Glenn Thrush, *China’s Weight Fuels Reversal By Trump On Foreign Aid*, N.Y. TIMES, Oct. 15, 2018, at B1, available at https://www.nytimes.com/2018/10/14/world/asia/donald-trump-foreign-aid-bill.html?emc=edit_nn_20181015&nl=morning-briefing&nlid=1418504420181015&te=1.

35. *Id.*

36. See *id.* (“President Trump, seeking to counter China’s growing geopolitical influence, is embracing a major expansion of foreign aid that will bankroll infrastructure projects in Africa, Asia and the Americas — throwing his support behind an initiative he once sought to scuttle.”). See also Guensburg and Widakuswara, *supra* note 33. The non-partisan Center for Strategic and International Studies (CSIS) in Washington D.C. described the BUILD Act as “the most important piece of U.S. soft power legislation in more than a decade.” *Id.*

37. In legislation creating the USIDFC was quietly included in the “FAA Reauthorization Act of 2018” also reauthorizes the Federal Aviation Administration and related revenue authorities through September 30, 2023; modified the Federal Emergency Management Agency’s disaster assistance authorities; provided \$1.68 billion in emergency supplemental appropriations for the Department of Housing and Urban Development’s Community Development Fund for long-term disaster recovery; and further integrates unmanned aircraft systems into the Nation’s airspace systems. See <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signs-h-r-302-law/>.

38. Guensburg and Widakuswara, *supra* note 33.

39. Campbell, *supra* note 18.

40. Statement of U.S. Agency for International Development Administrator Mark Green on the Creation of the U.S. International Development Finance Corporation (USIDFC) (Oct. 3, 2018), available at <https://www.usaid.gov/news-information/press-releases/oct-3-2018-administrator-green-statement-creation-usidfc>. Mr. Green also stated that the creation of the USIDFC “creates a unique opportunity for USAID to scale up its use of financing tools for development significantly” and that USAID Missions would “be able to take advantage of an expanded toolbox of financing options beyond guarantees (including loans, political-risk insurance and equity) and a broader range of private-sector expertise to support and reorient ongoing programs towards enterprise-led development.” *Id.* He also added that “[t]he USIDFC will catalyze market-based, private-sector development, spur economic growth in less-developed countries, and advance the foreign-policy interests of the United States.” *Id.* Not included in his statement was any evidence that USAID lacked appropriate risk-management protocols for its lending programs that required new protocols to be put into place for the USIDFC. His statement also did not elaborate on how the co-investments would be sought from the private sector or whether that private sector would be from the United States, the target country, or a third country. One might imagine a

system where only those who are well-connected with the agency would receive timely notice of investment opportunities rather than information being provided at the same time to all interested persons.

41. See, e.g., Campbell, *supra* note 18.

42. Campbell, *supra* note 18.

43. *Id.*

44. Emily Cochrane and Catie Edmondson, *Raises and Rebukes: What’s in Those 7 Spending Bills*, N.Y. TIMES, Feb. 15, 2019, at A17, available at <https://www.nytimes.com/2019/02/14/us/politics/congress-trump-border-deal-wall.html?login=email&auth=login-email>.

45. *Id.*

46. *Id.*

47. Trump 2020 Budget Slashes Foreign Aid, Hikes Defense Spending, Haaretz (Mar. 12, 2019), available at <https://www.haaretz.com/us-news/trump-s-2020-budget-raises-defense-spending-by-4-percent-cuts-foreign-aid-1.7016363> (“Trump’s budget asked for \$8.6 billion to build a wall on the southern border with Mexico . . .”). Observers note that Mr. Trump is unlikely to receive that amount because the Democrats oppose that expenditure and because they are in control of the U.S. House of Representatives.

Case note: *Muthana v. Pompeo*

BY DAVID W. AUBREY

A new lawsuit in the District of Columbia presents federal courts with the occasion to further expand or narrow the absolute right of United States Citizens to reenter its borders. Denial of reentry to a citizen is effectively banishment, which is barred by the Eighth Amendment.

In the present case, Hoda Muthana was born in New Jersey in October 1994. Her father previously worked as a diplomat for Yemen, but lost his job because of a civil war in Yemen in June, 1994. Ms. Muthana was raised in the United States, applied for and received a U.S. Passport twice, and eventually resided in Alabama for college. Further, Muthana's mother was a lawful permanent resident at the time of her daughter's birth in New Jersey.

At some point, Ms. Muthana became indoctrinated to believe in the cause of the Islamic State of Iraq and Syria (hereinafter, "ISIS"). According to pleadings in the case, in November 2014, Ms. Muthana was a student at University of Alabama at Birmingham. She misled her parents and said that she was going to Atlanta, Georgia as part of a field trip. But, instead she withdrew from school and used her tuition reimbursement to purchase a plane ticket to Turkey. From Turkey, she traveled to Syria.

There she joined ISIS, and married a number of ISIS fighters. She also had a son with her second husband. Her first husband was an Australian citizen and was killed eighty-six days after they married. Her second husband was Tunisian. Ms. Muthana posted calls to incite violence against the United States via social media and burned her passport.

In January 2016, President Obama's administration revoked that passport. Then in January 2019, Kurdish forces captured Muthana, along with her children. She expresses remorse for her actions against the United States. Her attorneys have stipulated that she is willing to face the retribution of

the laws of the United States for her actions.

According to the pleadings, on February 20, 2019, President Donald J. Trump tweeted that, *"I have instructed Secretary of State Mike Pompeo, and he fully agrees, not to allow Hoda Muthana back into the Country!"* Before this social media post, the United States had not initiated any action in federal court to revoke Ms. Muthana's citizenship.

On February 21, 2019, Mr. Ahmed, Muthana's father, filed a complaint against Attorney General William Barr, secretary of the Department of State Michael Pompeo, and President Donald Trump in the U.S. District Court in the District of Columbia. Mr. Ahmed is a naturalized citizen of the United States.

According to his complaint, Mr. Ahmed did so on behalf of his daughter and his grandchildren who currently reside at a refugee camp in Northern Syria. Mr. Ahmed seeks declaratory relief recognizing that his daughter is a United States Citizen, unless her citizenship is validly revoked by the Constitution of the United States.

Mr. Ahmed also prayed for expedited relief due to his family's circumstance in Syria. On March 4, however, Judge Reggie Walton denied that request, agreeing with Secretary Pompeo that the conditions of the refugee camp in Syria were a matter of speculation.

In memorandum in response, Secretary Pompeo argued that Hoda Muthana never was a U.S. Citizen because her father enjoyed diplomatic immunity as a former-diplomat for Yemen when she was born in New Jersey. It was not disputed that Mr. Ahmed had resigned as a diplomat a month prior to her birth in New Jersey.

Pompeo alleged that because the United Nations had not received notice of his resignation at the time of her birth, Mr. Ahmed still enjoyed diplomatic immunity. Children of diplomats do not automatically receive birthright citizenship even if they are

born in the United States. Thus, Secretary Pompeo argued that Muthana could not reenter the United States because she was not a citizen. The response by Secretary Pompeo does not explain why Muthana did not receive birthright citizenship via her mother.

This case comes at the same time when the Department of State of the United States is encouraging European allies to prosecute former ISIS fighters within their own borders. It also comes just after the successful prosecution of "El Chapo" Guzman in federal court in Brooklyn. Yet, nevertheless in spite of this context, for the last decade the United States government has strongly rejected the notion that federal courts are capable of prosecuting Islamic terrorists. These issues may come to a head, along with the prohibition of banishment under the Eighth Amendment in the *Muthana v. Pompeo* case. Banishment via Twitter seems like a perilous precedent. ■

David W. Aubrey primarily represents clients diagnosed with mesothelioma and their families. In addition, David represents those injured in commercial trucking accidents, whistle blowers in qui-tam actions, and prisoners in civil rights cases. His contact information follows.

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1. See, e.g., *Trop v. Dulles*, 356 U.S. 86 (U.S. 1958).
2. See *Muthana v. Pompeo*, 1:19-cv-00445 (D.C. Dist. Ct. 2019).