ARTICLE

FEAR & LOATHING IN THE PRESENT POLITICAL CONTEXT: THE INCUBUS OF SECURITIZING IMMIGRATION

MARVIN L. ASTRADA*

"In dreams begins responsibility."[1]

TABLE OF CONTENTS

* Marvin L. Astrada (M.A., Ph.D., Florida International University; J.D., Rutgers University Law School; M.A., C.A.S., Wesleyan University; B.A. University of Connecticut) teaches in the Politics & History Department at New York University – Washington D.C.

1. William B. Yeats, Responsibilities & Other Poems (1916), https://archive.org/details/responsibilities00yeatuoft.

I. INTRODUCTION

The relationship between security, law, and public policy, generally speaking, can be described as contentious in a political system wherein three coequal, independent branches operate in a systemic context defined by separation of powers and checks and balances. How each branch interprets security, in light of law and public policy, has a profound effect on the content and character of American national identity. During the campaign and since taking office, then-candidate and now President Trump clearly espoused an emphasis on expansive security measures to "Make America Great Again."

Securitization measures, from a political, economic, sociocultural, and foreign policy perspective, were key pillars of President Trump's campaign, and have informed Executive policy-making since he assumed office. In the realm of immigration law and policy, a contentious relationship has been developing between the Executive and the federal courts, as the courts have pushed back against the Executive's policy priorities.[2] In the wake of the Court's recent per curiam opinion sustaining, in part, Executive policy in the realm of immigration, and the Court's allowing the travel ban to take effect while legal challenges go forward,[3] it is timely to critically examine the nexus

2. The Trump Administration has tried to push national security-based travel bans and border wall policies explicitly premised on politicized identity as well as socioeconomic policies premised on particular politicized identity groups. *See, e.g.*, Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 18, 2017) (Exec. Order on Buy American and Hire American); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (Exec. Order on Protecting the Nation From Foreign Terrorist Entry Into The United States); Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (Apr. 28, 2017) (Exec. Order on Implementing an America-First Offshore Energy Strategy); Traci Tong, *Will the Travel Ban and Building a Wall Fix America's Immigration Problems?*, PRI'S THE WORLD (Mar. 7, 2017), https://www.pri.org/stories/2017-03-07/will-travel-ban-and-building-wall-fix-americas-immigration-problems; Anna Brand, *Donald Trump: I Would Force Mexico to Build Border Wall*, MSNBC (June 28, 2015), http://www.msnbc.com/msnbc/donald-trump-i-would-force-mexico-build-border-wall.

3. *See* Trump v. Immigration Refugee Assistance Program, 582 U.S. ____ (2017) (per curiam); Greg Stohr & Benjamin D. Katz, *U.S. Supreme Court Lets Trump's Travel Ban Take Full Effect for Now*, BLOOMBERG (Dec. 4, 2017), https://www.bloomberg.com/news/articles/2017-12-04/u-s-high-court-lets-trump-travel-ban-take-full-effect-for-now.

between security, law, and public policy. This is especially pertinent given the fact that "the modern structure of immigration law actually has enabled the President to exert considerable control over immigration law's core question: which types of noncitizens, and how many, should be permitted to enter and reside in the United States."[4] The Executive has vigorously articulated and pursued an agenda that explicitly securitizes immigration law and policy. The foregoing development merits critical examination because it has substantial political, sociocultural, and legal implications for public policy.

The Executive's aggressive push to securitize immigration—to characterize immigration as a continuing and grave existential threat to the security of the Nation–State—has profound implications for Executive power and American national identity, viz., who exactly are We the People, and what values do the People subscribe to, as expressed in public policy? This is especially the case given that public authority in the US, and its pronouncements, in theory, present the will of the People. The case of immigration in the present political environment is one that highlights the gravitas of the nexus between Security, Law, and Public Policy (hereinafter, the SLPP nexus). In the case of immigration, especially after the 9/11 terrorist attacks, the "prominence of immigration in the national security debate has been controversial and has legitimized a selective enforcement policy drawn along lines of race, religion, nationality, and citizenship. The vestiges of 9/11 also reveal how immigration laws [have been] borne out of national security concerns."[5] Emplacing immigration in the present SLPP nexus enables one to analyze and better ascertain the interrelationship between each component, the consequences of securitization, and why it is important to explain and understand the magnitude of securitizing immigration on American politics and identity.

The Security component of the SLPP is potentially hyper-expansive in nature, and can lead to a politics and practice of securitization that galvanizes an economy of power that gives rise to a domain of securitization that Michel Foucault has termed a "Society of Security."[6] In such a society, Security becomes the preeminent value that informs public policy, and can be

---

4. Adam B. Cox & Cristina M. Rodriguez, *The President & Immigration Law*, 119 YALE L. J. 458 (2009).

5. Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law*, 66 EMORY L.J. 672 (2017).

6. MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLEGE OF FRANCE, 1977-1978 10-11 (2007) [hereinafter FOUCAULT SECURITY] ("Security" in the uppercase, throughout this work, refers to an analytic meta-signifier. "Security" as opposed to "security" is indicative of a discursive formation, a set of processes that constitute (and is constituted of) variegated interpretations of the meaning, purpose, and content of power and order. "Focusing on linguistic signs (such as words), Saussure defined a sign as being composed of a 'signifier' (signifiant) and a 'signified' (signifié). Contemporary commentators tend to describe the signifier as the form that the sign takes and the signified as the concept to which it refers . . . If we take a linguistic example, the word 'open' (when it is invested with meaning by someone who encounters it on a shop doorway) is a sign consisting of: a signifier: the word 'open'; a signified concept: that the shop is open for business." DANIEL CHANDLER, SEMIOTICS: THE BASICS, (2d ed. 2007). Despite multifarious interpretations, indicated by the lower-case "security," Security is a notion that applies to all forms of order, society, sociopolitical and economic organization embodied in formal and informal political units.).

rationally expanded to the point where securitized policy may result in "no tiny corner of the realm escap[ing] this general network of the sovereign's orders and laws."[7] This development can directly affect and significantly magnify the jurisdiction, so to speak, of what falls within the space of securitization. In light of this potential, it is incumbent to ascertain, define, and cabin Security, in thought and practice, within a democratic society due, in part, to its capacious, polymorphous character because "sovereignty is exercised within the borders of a territory, discipline is exercised on the bodies of individuals, and security is exercised over a whole population."[8] In the case of immigration, there are different types of criminal offenses that could be considered national security crimes in that such offenses do negatively impact, to some degree, security. Rationally, immigration-based crimes such as illegal entry, counterfeiting, passport and/or immigration fraud, or fraudulent use of other government documents[9] do impact national security in theory. Such immigration-based crimes "may form a periphery of what we consider to be national security crime [because they] undermine the proper functioning of the U.S. Government and its instrumentalities."[10] It is also the case, however, that such immigration-based crimes may also be classified as being a nuisance not explicitly related to national security.[11]

In light of the foregoing, it is important to critically examine the effects of subscribing to a securitized immigration agenda in the present political and legal contexts. This article critically examines the consequences of securitizing immigration within the context of the SLPP nexus. More specifically, by analyzing immigration through the lens of the SLPP, one can better appreciate the complex nature of Security, ascertain how it directly and indelibly affects public policy, and identify and expound upon the consequences that securitization has on the polity's identity, to include sociocultural and political values, principles, ethics, and purpose. The SLPP nexus sheds light on the intricate relationship between Security and Law, and how each impacts public policy. Law functions primarily as a means by which interpretations of Security are conceptualized and implemented. How the Law interprets and addresses the competing values and principles, such as civil liberties, that are impacted and affected by interpretations of Security directly inform public Order, authority, and policy. Security, when invoked by public authority, has the potential to present serious challenges to societies premised on representational political systems wherein civil rights, liberties, and political freedoms are deemed bedrock concepts, ordering principles that inform the

7. FOUCAULT SECURITY, *supra* note 6, at 14.
8. *Id.* at 11.
9. Erin Creegan, *National Security Crime*, 3 HARV. NAT'L SEC. J. 373, 402 (2012).
10. *Id.*
11. *Id.*

character and content of a society.[12]

This article will proceed as follows. First, this article contextualizes and develops Security and Law as components of the SLPP. Second, the article contextualizes the SLPP nexus and examines the relationship between Security, Law and public policy. Third, it discusses the complex and sectorial nature of Security in relation to the SLPP. Fourth, it examines the relationship between Security, Law, politicized identity, and public policy in the SLPP. Fifth, this article will critically analyze logic and consequences of securitization are. In particular, the role of rules is examined vis-à-vis politicized identity and public policy. Sixth, the article discusses immigration and the SLPP. Lastly, I present reflections pertaining to the SLPP and immigration, and the consequentialness of securitizing immigration.

II. ORDER, SECURITY & LAW: EFFECTUATING PUBLIC SAFETY

Security can be broadly conceived as reflecting a state of affairs wherein individual subjects and groups are emplaced within an overarching societal Order that equivocates itself with the general and specific wellbeing of the polity, wherein public safety is a cardinal value and end goal, that legitimizes public authority. Security creates secure spaces, which enable places to emerge that are free from the precariousness that permeate societies that reside in what Thomas Hobbes has characterized as a state of nature.[13] Security is a state of affairs that permeates the global and domestic contexts. A secure state of affairs, since the establishment of the modern system of States in 1648,[14] is one in which the sovereign governs to regulate societal affairs in order to establish and fix limits, frontiers, borders, locations, and above all, make possible and ensure the ordered circulation and protection of the People that reside within the geopolitical and physical borders of the State.[15] Security, conceptually, from a system of States lens, can be viewed as constituting an "organic bond uniting hierarchized individuals."[16] This is the case, in part, because the final objective of public authority is emplacing a population securely within the confines of sovereign-controlled space, creating a sense of place that provides the basis for a nationalist identity and allegiance, upon which to erect beacons of good Order, such as the proverbial

12. *See, e.g.*, MARVIN L. ASTRADA, AMERICAN POWER AFTER 9/11 (2010) (analyzing the USA PATRIOT Act of 2001 as an exemplar of how law is a means of producing and reflecting security priorities at the expense of competing priorities, such as civil liberties and civil rights, within a democratic society).

13. *See* THOMAS HOBBES, LEVIATHAN (1651), https://www.gutenberg.org/files/3207/3207-h/3207-h.htm.

14. *See* Treaty of Westphalia: Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, Oct. 24, 1648, 1 Parry 271. This treaty is the basis of conceptualizing modern international affairs as being comprised of a system of sovereign states.

15. FOUCAULT SECURITY, *supra* note 6, at 29.

16. GILLES DELEUZE & FELIX GUATTARI, WHAT IS PHILOSOPHY? xiv (1994).

American "City Upon a Hill."[17]

The State, therefore, provides a space where it is the ultimate provider of public safety so as to preserve the well-being of the population (as defined, in large part, by public authority) through the basic provision, preservation, and fortification of geopolitical and physical borders to emplace a population. To be secure in the world, therefore, involves public authority generating sundry mechanisms of identifying and addressing internal and external "threats."[18] Threats are addressed, in part, by having the State proactively structure and control space in the form of sovereign territory. An effect of procuring Security, very broadly conceived, is that it has "the constant tendency to expand."[19]

Variegated notions and configurations of Security have emerged throughout history.[20] That is, since the inception of organized political units, Security as a *category of practice* and as a *category of analysis*[21] has been a perpetual state of affairs impacting sociopolitical and economic thought, behavior, identity, and Order. Throughout history, among a vast array of arrangements of sociopolitical and economic organization—whether primitive, dictatorship, city-state, republic, feudal, monarchical, industrial, mercantilist, capitalist, socialist, or communist—Security has played an incalculable role in structuring a polity's affairs.[22] Security, expansively conceived, as a meta-signifier, has grounded existential notions of interests, value, meaning, purpose, identity, and survival.

Security is comprised of interactive material and intangible components that inform, complement, and produce securitization, such as a correct or desirable public ideology or legality. A systematic set of concepts and practices,

---

17. In 2006, then-Senator Barack Obama made reference to the proverbial City Upon a Hill in his commencement address on June 2, 2006 at the University of Massachusetts, Boston: "It was right here, in the waters around us, where the American experiment began. As the earliest settlers arrived on the shores of Boston and Salem and Plymouth, they dreamed of building a City upon a Hill. And the world watched, waiting to see if this improbable idea called America would succeed." Barack Obama, Commencement Speech at the University of Massachusetts-Boston (June 2, 2006), http://obamaspeeches.com/074-University-of-Massachusetts-at-Boston-Commencement-Address-Obama-Speech.htm.

18. *See, e.g.*, The Sedition Act of 1918, Pub. L. No. 65–150, 40 Stat. 553, (enacted May 16, 1918) ("Whoever, when the United States is at war . . . shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States . . . or shall willfully display the flag of any foreign enemy, or shall willfully . . . urge, incite, or advocate any curtailment of production . . . or advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than $10,000 or imprisonment for not more than 20 years, or both.").

19. FOUCAULT, SECURITY, *supra* note 6, at 45.

20. *See* ANNA YEATMAN & MAGDALENA ZOLKOS, STATE, SECURITY, AND SUBJECT FORMATION (2009); *see also* WALTER C. OPELLO JR., WAR, ARMED FORCE, AND THE PEOPLE: STATE FORMATION AND TRANSFORMATION IN HISTORICAL PERSPECTIVE (2016).

21. A category of practice encompasses categories of "everyday social experience, developed and deployed by ordinary social actors, as distinguished from the experience-distant [(or distorting)] analytic categories," which constitute categories of analysis, and are employed by elites for pursuing politicized interpretations of security (rendering it Security). Rogers Brubaker & Frederick Cooper, *Beyond Identity*, 29 THEORY & SOC'Y, 1-4 (2000).

22. ASTRADA, *supra* note 12, at 5-6.

empirical and intangible, thus function in tandem within an interdependent set of organizational relationships to articulate and implement Security.[23] Threats to public safety, in myriad form, are the fulcrum that legitimate and actualize securitization, which profoundly affects the character and content of public policy. Criminal offenses that undermine national security, for instance, are fodder for expansive securitization measures.[24] Order through public safety is at the apex of a State's *raison d'état*. "Order is what remains when everything that is prohibited has in fact been prevented."[25]

In tandem with Security, Law[26] assumes an indispensable role in attempts to both procure and restrict securitization. Law is a primary medium, mechanism, by which Security is translated into the applied realm.[27] In a system of Law "what is undetermined is what is permitted . . . the law prohibits . . . and the essential function of security . . . is to respond to a reality in such a way that this response cancels out the reality to which it responds—nullifies it, or limits, checks, or regulates it . . . this regulation within the element of reality is fundamental in . . . security."[28] In representative political units, Law has played a particularly important role in not only procuring Security but also in restricting it, buttressing competing political values, such as liberty, against the hyper-expansive nature of Security. The courts, as expositors of Law, have played a cardinal role in checking and balancing Executive and Congressional interpretations of Security. This is evident in the struggle by the Executive to securitize immigration. Recently, for instance, President Trump's Executive Order[29] aimed at stripping "sanctuary cities" of federal funding was blocked by the United States District Court for the Northern

---

23. *Id*. at 6-7.

24. *See, e.g*., The USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272, (enacted Oct. 26, 2001); U.S. FEDERAL BUREAU OF INVESTIGATION, COINTELPRO PROGRAM (1956), https://vault.fbi.gov/cointel-pro ("The FBI began COINTELPRO—short for Counterintelligence Program—in 1956 to disrupt the activities of the Communist Party of the United States. In the 1960s, it was expanded to include a number of other domestic groups, such as the Ku Klux Klan, the Socialist Workers Party, and the Black Panther Party. All COINTELPRO operations were ended in 1971. Although limited in scope (about two-tenths of one percent of the FBI's workload over a 15-year period), COINTELPRO was later rightfully criticized by Congress and the American people for abridging first amendment rights and for other reasons.").

25. FOUCAULT, SECURITY, *supra* note 6, at 46.

26. "Law" throughout this work refers to a meta-signifier. Despite multifarious interpretations, indicated by the lower-case "law," Law is a notion that rules are a basis of societies, and Law in the form of rules applies to all forms of order, society, sociopolitical and economic organization embodied in formal and informal political units.

27. *See* ASTRADA, *supra* note 12, at 57-72.

28. FOUCAULT, SECURITY, *supra* note 6, at 47.

29. *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017) ("Interior enforcement of our Nation's immigration laws is critically important to the national security and public safety of the United States. Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for aliens who engage in criminal conduct in the United States. Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic. Tens of thousands of removable aliens have been released into communities across the country, solely because their home countries refuse to accept their repatriation. Many of these aliens are criminals who have served time in our Federal, State, and local jails. The presence of such individuals in

District of California. The court issued a permanent injunction prohibiting the Executive from unilaterally imposing its interpolation of Security regarding immigration.[30] Law has thus been instrumental in promoting and balancing Security interests with other societal values and interests.

The intersection of Security and democratic notions of liberty, broadly construed, has produced a contentious nexus within which the two states of affairs are at odds with one another. The challenge for a democratic society has been to balance the two in such a way as to create public policy that is supportive of and reflects the values of liberty while also maintaining public safety. In the present SLPP nexus, the Executive is promoting Security as *the* goal of public policy regarding immigration. Militarization of local police,[31] erecting a massive wall along the US Mexico border,[32] mass deportation of immigrants within the US,[33] and the restriction of certain groups of people from immigrating to the US[34] can be interpreted as the Executive explicitly favoring Security over other interests such as liberty. The US Attorney General, for instance, in a public speech given to the Fraternal Order of Police in Nashville, TN, declared that President Obama had put into place restrictions on police conduct that "'went too far . . . We will not put superficial concerns above public safety.'"[35] To imply that competing American values and norms are "superficial" in nature is to articulate a clear binary paradigm of Security/Insecurity. In positing such a paradigm, American identity, values, norms and identity are reduced to one-dimensional signifiers—Security and securitization measures become the fateful albatross that grounds public policy. The *ignus fatuus* of public safety, within a binary Security/Insecurity public policy framework, prioritizes Security over polity, simplifies actuality into a secure vs. insecure state of affairs, and has

---

the United States, and the practices of foreign nations that refuse the repatriation of their nationals, are contrary to the national interest.").

30. "The ruling represents a major setback to the administration's attempts to clamp down on cities, counties and states that seek to protect undocumented immigrants who come in contact with local law enforcement from deportation by federal authorities. The ruling was also the latest instance in which a federal judge has stood in the way of Trump's effort to implement his hardline policies immigration, joining rulings that have blocked different portions of Trump's travel ban and preliminary injunctions on the sanctuary cities order." Jeremy Diamond & Euan McKirdy, *Judge Issues Blow Against Trump's Sanctuary City Order*, CNN (Nov. 21, 2017), http://www.cnn.com/2017/11/21/politics/trump-sanctuary-cities-executive-order-blocked/index.html.

31. *See, e.g.*, Adam Goldman, *Trump Reverses Restrictions on Military Hardware for Police*, NEW YORK TIMES (Aug. 28, 2017), https://www.nytimes.com/2017/08/28/us/politics/trump-police-military-surplus-equipment.html?mcubz=0.

32. *See, e.g.*, Jennifer Jacobs, *Trump Demands Wall Funds From Congress, Claiming Mexico Will Pay*, BLOOMBERG NEWS (Aug. 28, 2017), https://www.bloomberg.com/news/articles/2017-08-28/trump-demands-wall-funds-from-congress-claiming-mexico-will-pay.

33. *See, e.g.*, Mizue Aizeki, *Families Fearing Deportation Because of Trump's Immigration Policies Prepare for I.C.E. Raid*, NEWSWEEK (June 28, 2017), http://www.newsweek.com/immigration-immigration-and-customs-enforcement-ice-donald-trump-628896.

34. *See, e.g.*, *Trump Travel Ban: Targeted Nations Condemn New US Order*, BBC NEWS (March 7, 2017), http://www.bbc.com/news/world-us-canada-39194875.

35. Goldman, *supra* note 31.

profound consequences for the polity's identity, its primary values, and the foundational bases of the People's will as expressed in public policy.

By examining some of the operative assumptions of the Executive's myopic focus on the Security component of the SLPP, and how the courts have interpreted Security in light of the SLPP, insight can be gained into the substance, dynamics, and consequentialness of how Security is conceptualized and implemented in our representative system. Furthermore, such an analysis sheds light on the effects that competing interpretations of the SLPP have for public policy, which, in turn, reflects broader notions of American identity. In sum, securitized immigration relies upon a reductionist Security/Insecurity national security framework which has explicit racial, ethnic, ideological, and religious overtones that, in turn, deeply impact the character and content of public policy.

III. FRAMING & CRITICALLY EXAMINING THE SLPP NEXUS

In any configuration of Security, control under-girds a secure state of affairs, and therefore, control is key. Control of borders, and of peoples that reside within and without borders, is a basic police function of States premised on maintaining public safety. This basic function, however, is readily susceptible to securitization measures based on xenophobia, ideological and religious purity, and zealotry. In the case of immigration, the debate over the desirability and constitutionality of the Executive's interpretation of the SLPP nexus is reminiscent of arguments premised on the politics of fear and loathing stemming from a securitized interpretation of immigration earlier in US history. Fear and loathing of an Other seem to have been at the forefront of securitized immigration in the late 19th and early 20th century. In the 1920s, the following statement, issued on behalf of the People of California (1879) to Congress regarding Japanese immigrants, is reflective of how a securitized interpretation of immigration—one premised on stringent and comprehensive control of the racial, ethnic, and ideological makeup of the populace—becomes knottily enmeshed in a politics of fear and loathing:

> As became a people devoted to the National Union, and filled with profound reverence for law, we have repeatedly, by petition and memorial, through the action of our Legislature, and by our Senators and Representatives in Congress, sought the appropriate remedies against this great wrong, and patiently awaited with confidence the action of the General Government. Meanwhile this giant evil has grown, and strengthened, and expanded; its baneful effects upon the material interests of the people, upon public morals, and our civilization, becoming more and more apparent, until patience is almost exhausted, and the spirit of discontent pervades the state. It would be disingenuous in us to attempt to conceal our amazement at the long delay of appropriate action by the National Government towards the prohibition of an immigration which

> is rapidly approaching the character of an Oriental invasion, and which threatens to supplant the Anglo-Saxon civilization on this Coast.[36]

The prior statement, which characterizes Japanese immigration as an "invasion," resonates with the present attempt by the Executive to securitize immigration based on the "invasiveness" of immigrants from the Global South and Middle East. This includes constructing a Great Wall on the US-Mexico border, enhancing procedures to deter entry into the US, streamlining deportation procedures, and funding law enforcement and prosecutorial resources to facilitate the rapid removal of illegal immigrants.[37] A consequence that ensues from excessively emphasizing Security within the SLPP is that Law and policy grounded in Security reflects a myopic focus on public safety. This disregards the negative effects of securitized immigration, to include prejudicial and discriminatory racial, ethnic, religious, and ideological effects that such a policy has on the character and content of what constitutes an American, the American polity, what is great (or not so great) about America, and categorical demonization of an Other. Furthermore, an emphasis on Security and unmitigated securitization in the SLPP severely minimizes or ablates competing notions of what constitutes the Good in the ordering of a society.

Security in an immigration context becomes tinged with race and ethnicity, and any liberty interests that attach to those enmeshed in suspect racial or ethnic classifications deemed a threat to public safety become attenuated. The sentiment expressed by Senator Sterling in the 1920s toward Japanese immigrants is reminiscent of the ethos that informs the Executive's present immigration law and policy toward the Global South and Middle East: "If we are going to exclude Japanese immigrants, let us exclude them because it is a wholesome thing, the right thing, the just thing to do for the United States

---

36. ROY LAWRENCE GARIS, IMMIGRATION RESTRICTION: A STUDY OF THE OPPOSITION TO AND REGULATION OF IMMIGRATION INTO THE UNITED STATES 316-17 (1927).

37. *See* THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY, TRUMP ADMINISTRATION IMMIGRATION POLICY PRIORITIES (Oct. 08, 2017), https://www.whitehouse.gov/briefings-statements/trump-administration-immigration-policy-priorities/ ("The Trump Administration is ready to work with Congress to achieve three immigration policy objectives to ensure safe and lawful admissions; defend the safety and security of our country; and protect American workers and taxpayers. Border Security: Build a southern border wall and close legal loopholes that enable illegal immigration and swell the court backlog.

- Fund and complete construction of the southern border wall.
- Authorize the Department of Homeland Security to raise and collect fees from visa services and border-crossings to fund border security and enforcement activities.
- Ensure the safe and expeditious return of Unaccompanied Alien Children (UAC) and family units . . .
- Remove illegal border crossers quickly by hiring an additional 370 Immigration Judges and 1,000 ICE attorneys.
- Discourage illegal re-entry by enhancing penalties and expanding categories of inadmissibility.
- Improve expedited removal.
- Increase northern border security . . .
- Protect innocent people in sanctuary cities.").

and for the American people."[38] Deportation, restriction of or privileging immigration based on a particular religious persuasion, erecting a massive great wall along the US-Mexico border—all of these policies reflect, and are in line with, a desire to control the racial, ethnic, religious, and ideological character and content of the nation's population as expressed in Senator Sterling's statement concerning the Japanese. Presently, the Executive and the courts (with the US Supreme Court to weigh in on the issue in the coming months) have provided somewhat different interpretations of the SLPP vis-à-vis immigration and Security.[39]

Public authority, and the interpretation and application of securitization measures based on said authority, permeate Security. With control as the baseline motive for securitization, the State propagates modalities of Security. To be secure therefore involves the generation of mechanisms of control over internal and external "threats" to Order, society, whereby the concepts of individuated and collective selfhood (I and We) are maintained. Securitization that is overtly and explicitly politicized to target enemies of the polity based on un-assimilable Otherness, such as physical and cultural difference, religious and ideological difference, specific types of alienage and foreignness, stokes fear and loathing, which, in turn, foments hate, anger, hostility, and violence.[40]

The SLPP thus has a profound effect on public policy. Three Executive orders proffered by President Trump pertaining to immigration at the onset of his tenure in office reflect the power-dynamics that inform expansive securitization regarding public safety, threat, and the prejudicial and discriminatory politicizing of racial, ethnic, religious and ideological identity.[41] On January

---

38. GARIS, *supra* note 36, at 328.

39. For instance, when the Trump Administration put forth the initial travel ban, the "states of Washington and Minnesota, along with a series of large corporations, then brought actions stating that these orders violated the Equal Protection Clause of the 14th Amendment and that, as aggrieved parties, they had standing to litigate. The complaints listed a multitude of potential harms to the states and their corporations if the United States government refused to admit individuals from these countries. The potential harms ranged from the economic harm of losing established employees to the disruption to families and communities because of the sudden loss of people who could not enter the United States." Mark Shmueli & Hassan Ahmad, *A Complete and Total Ban: Placing the Muslim Ban in Historical Context*, 64 FED. LAW. 29 (May 2017).

40. *See, e.g.*, Sasha Polakow-Suransky, *White Nationalism Is Destroying the West*, N.Y. TIMES (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/opinion/sunday/white-nationalism-threat-islam-america.html ("In recent years, anti-immigration rhetoric and nativist policies have become the new normal in liberal democracies from Europe to the United States. Legitimate debates about immigration policy and preventing extremism have been eclipsed by an obsessive focus on Muslims that paints them as an immutable civilizational enemy that is fundamentally incompatible with Western democratic values.").

41. *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017) ("Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic."); *see also* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Muslim-majority states are the focus of this Order, which implicitly equates a religious-ideological posture with viable threat to security); Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017) (The Federal Government will "take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border, using appropriate materials and technology to most effectively achieve complete operational control of the southern border [and] . . . To the extent permitted by law . . . to

27, 2017, the President issued Executive Order 13769, *Protecting the Nation From Foreign Terrorist Entry Into the United States*.[42] Citing the terrorist attacks of September 11, 2001, and contending that "numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes" since then, the Executive Order forcefully declared that, the US "must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles."[43] The Order was further justified because of "[d]eteriorating conditions in certain countries due to war, strife, disaster, and civil unrest [which] increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism."[44] In the act of invoking a grave existential threat to the United States, the Executive has put forth a hyper-expansive interpretation of Security that effectively emplaces immigration firmly in a national security framework.

A. *Shaping Immigration via Securitization*

Executive power to legally shape and impact the character and content of immigration in a Security context was put forth, in part, by the Court in *US ex rel. Knauff v. Shaughnessy*,[45] wherein the Court found that, "exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."[46] The courts, before and after *Shaughnessy*, have been deferential to the Executive in the realms of national security and immigration based, in part, on Congressional delegation of its immigration power over to the Executive.[47] In *Kleindienst v. Mandel*,[48] the Court stated

authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.").

42. Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017).

43. *Id.*

44. *Id.*

45. 338 U.S. 537, 542 (1950).

46. *Id.*

47. *See* Hawaii v. Trump, 859 F.3d 741, 769-70 (9th Cir. 2017) (Under Article I of the Constitution, the power to make immigration laws "is entrusted exclusively to Congress."); Galvan v. Press, 347 U.S. 522, 531 (1954); *see also* U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . ."); Fiallo v. Bell, 430 U.S. 787, 792, 796 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens . . . The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification ... have been recognized as matters solely for the responsibility of the Congress . . ."") (internal quotation marks omitted); Furthermore, in the Immigration and Nationalization Act of 1952, Congress delegated power to the President through Section 212(f), which provides, in part that, "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f).

48. 408 U.S. 753, 770 (1972).

that, within the immigration context, the courts should not "look behind the exercise of [Executive] discretion" when exercised "on the basis of a facially legitimate and bona fide reason."[49] In interpreting the constitutionality of Executive power and immigration, the court in *Sarsour v. Trump*[50] cited *Mandel*, noting that:

> the Supreme Court concluded that where the government has provided a facially legitimate and bona fide reason, 'the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who [claim they are injured by the visa denial]' . . . a court must extend substantial deference to the government's facially legitimate and non-discriminatory stated purposes.[51]

The courts have found that "Congress has the exclusive constitutional authority to create immigration policies. In exercising that authority, Congress has enacted (and repealed) a wide variety of immigration statutes over the years, with a wide variety of restrictions and authorizations."[52]

Delegation of power to the Executive has, overall, had the sanction of the courts. In upholding the delegation of power, the courts have found that national security interests do in fact play a role in the exercise of Executive power, and that the courts will, generally speaking, not question the political and strategic calculus that undergirds a law or policy articulated under the aegis of national security—even if it negatively impacts a discrete group of peoples. The Court, for instance, has declared that, a "law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." Washington v. Davis, 426 U.S. 229, 242 (1976). This rationale "is particularly applicable in the area of immigration measures related to national security concerns. Relying on Supreme Court precedent, the Fourth Circuit has emphasized that where a particular immigration measure is facially neutral and has a rational national security basis that is 'facially legitimate and bona fide,' such a measure will survive an Equal Protection Clause challenge."[53]

---

49. *Id*.

50. Sarsour v. Trump, 245 F. Supp. 3d 719 (E.D. Va. 2017).

51. *Id*. at 736 (citations omitted); *see also* Fiallo v. Bell, 430 U.S. 787, 795 (1977) (confirming that a broad policy choice is to be reviewed under the same standard applied in *Kleindienst v. Mandel*, 408 U.S. 753 (1972)); Appiah v. INS, 202 F.3d 704, 710 (4th Cir. 2000) ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the president in the area of immigration and naturalization" (quoting Mathews v. Diaz, 426 U.S. 67, 81–82 (1976))).

52. *Appiah*, 202 F.3d at 730.

53. *Id*. at 738 (internal citations omitted); *see* Rajah v. Mukasey, 544 F.3d 427, 438 (2d Cir. 2008) ("Distinctions on the basis of nationality may be drawn in the immigration field by Congress or the Executive" and must be upheld as long as they "are not wholly irrational"); *see also* Romero v. INS, 399 F.3d 109, 111 (2d Cir. 2005); Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979).

While the courts are normally deferential to the Executive, the judiciary has not completely disengaged from shaping the SLPP in the realm of immigration. Although the "Executive has broad discretion over the admission and exclusion of aliens . . . that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie."[54] Furthermore, the courts have also stated that, "Whatever deference we accord to the President's immigration and national security policy judgments does not preclude us from reviewing the policy at all. We do not abdicate the judicial role, and we affirm our obligation 'to say what the law is.'"[55]

Presently, the lower federal courts and the Executive are, to some degree, at odds with one another regarding the constitutionality of the Executive's efforts to securitize immigration. The tension between the Executive and judiciary reflects fundamental disagreements as to how public authority articulates, justifies, and legitimates securitized immigration. In securitizing immigration, the Executive's interpretation of the SLPP is one rooted in managing the character and content of the population, which involves much more than merely exercising sovereign control over territory. Attempts to purge the US population of an influx of an Other deemed a threat to the nation's security—an Other portrayed as fundamentally incompatible with core American values and norms—reflects a politics of fear and loathing. Fear and loathing of a designated Other underpins and reflects a strategy of governance that, "is basically much more than reigning or ruling, much more than *imperium* . . . [and is] absolutely linked to population"[56] control, management, and the power to define what constitutes an American identity in the "true" and fullest sense of the term.

In the case of immigration, securitization can readily lend itself to Othering; i.e., securitization efforts posit an enemy that is antithetical to the essence of a polity. This especially the case when the Law applies a rational-basis test or standard of interpretation to securitized immigration. When the Law applies a rational basis test in evaluating law and policy grounded in national Security, the purview of Security is greatly enhanced and expanded. The State's interest in preserving national security is, according to the Court, "an urgent objective of the highest order."[57] Executive legal and policy pronouncements, when viewed as "rational attempt[s] to enhance national security,"[58] endow Security with the capacity to minimize competing values in

54. Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987).

55. Hawaii v. Trump, 859 F.3d 741, 768-69 (9th Cir. 2017) (internal citations omitted)*; see also* Rostker v. Goldberg, 453 U.S. 57, 70 (1981) (finding that judicial "deference does not mean abdication."); Mandel, 408 U.S. at 763–765 (permitting American plaintiffs to challenge the exclusion of a foreign national on the ground that the exclusion violated their own First Amendment rights).

56. FOUCAULT SECURITY, *supra* note 6, at 76.

57. Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010).

58. Rajah v. Mukasey, 544 F.3d 438-39 (2d Cir. 2008).

the SLPP that are part and parcel components of Order, and tincture the administration of justice with securitization. Control mechanisms embedded in measures that securitize immigration, such as exclusionary policies that overtly discriminate based on racial, ethnic, and other identity traits, serve to enhance Executive power to determine the form and substance of the populace.[59]

Security is thus enmeshed within a larger context of Control is equal to Security, and Security is equal to Control. Securitization, in word and deed, can be conceptualized as flowing from, amongst other things, the need and desire, for control of territory and the populace. Control over population, to include its movement, emplacement in the body politic, and the character and content of its racial, ethnic, ideological, cultural, and religious make up, informs securitization as the Executive interprets the SLPP regarding immigration. In the case of the present SLPP, immigration has been deemed of the utmost importance. Control over borders, culture, and identity, of enabling the US as a sociocultural, economic, and political unit to maintain what has made it historically "great" informs securitized immigration. The immigrant Other's threat to the essence of American identity and greatness qualifies immigration for strict securitization.

B. *Security & Law in the SLPP*

Security is generally perceived as an unambiguous state of affairs. Security can be unassumingly defined as consisting of a quality or state of being secure, free from danger, safety, and freedom from fear or anxiety.[60] Security functions logically and effectively when it confronts ominous threats that both abstractly and actually pose a significant (apperceived) threat to the well-being of a political unit. Why is immigration a prime target for securitization? The "threat" that emerges from the Other as a foreign agent contaminates the essence of an identity, adulterating a modality of thought and practice, rendering the immigrant Other a prime target in efforts to protect and neutralize threat. Within securitization schemes, Law is a primary means by which to combat threat. Being secure in one's place, person and effects,[61] is an overarching theme articulated in configurations of Security; such suppositions embody the authority to legitimately define what constitutes a secure state of affairs, and what is a threat.[62]

Security therefore, when critically examined within the SLPP, reveals the consequences that devolve from securitization: i.e., questions such as, what are the exact criteria that induce fear, peril, and provoke preservation, what is

---

59. *See* Max Weber, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77-128 (1946).

60. *See, e.g.*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999).

61. *See, e.g.*, THE DECLARATION OF INDEPENDENCE (U.S. 1776); U.S. CONST. amend. IV.

62. *See* MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE & THE DISCOURSE OF LANGUAGE 41 (1972) [hereinafter FOUCAULT ARCHAEOLOGY].

being preserved, and what measures are deemed necessary to effectuate Security all point to the highly contentious and politicized nature of Security. Threats to basic, physical integrity aside, such as physical acts resulting in grievous bodily harm/death, the notion of threat is entrenched in the relative, inter-subjective milieu of human sociality.[63] The sundry truths postulated, reified, and propagated by discourses of Security reflected in securitization measures assume pleonastic points of reference, tautologically reifying properties, effectively equivocating such securitization measures with a singular interpretation of objective, "common-sense" Security.

Law is key in this process. Security is not a singular value, ethos, or goal of public policy. There are competing values that exist and which Law has recognized and employed to temper securitization. In *United States v. Robel*, for instance, the Court declared that, the

> concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart . . . [O]ur country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.[64]

Securitization, when interpreted liberally and articulated in a legal framework, can become "an activity that is justified in itself . . . comes at once to be banalized (reduced to an object of routine police repression) and absolutized (as the Enemy, an absolute threat to the ethical order)."[65] Logically, one can postulate legal securitization measures that are ubiquitous and meta-comprehensive; this is perhaps Security's most potent and salient characteristic. Securitization can encompass a variety of fields that transcend a limited preoccupation with physical integrity/safety. The political, economic, cultural, literary, social, and media aspects of a polity, for instance, are all potential fodder for Security. The courts, however, have recognized the need to reign in the hyper-expansiveness of Security; "'national security' without further substantiation is simply not enough to justify significant deprivations

63. *Id*. at 21.
64. United States v. Robel, 389 U.S. 258, 264 (1967).
65. MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 13 (2000). Justice Thomas, writing separately in Trump v. International Refugee Assistance Project, 582 U. S. ____ (2017), noted that, the "[g]overnment has also established that failure to stay the injunctions will cause irreparable harm by interfering with its 'compelling need to provide for the Nation's security.' Finally, weighing the Government's interest in preserving national security against the hardships caused to respondents by temporary denials of entry into the country, the balance of the equities favors the Government. I would thus grant the Government's applications for a stay in their entirety."

of liberty."[66]

The potential for Security to subordinate competing interests, values, and principles, should raise critical questions: How is fear engendered, defined? What is to be feared and loathed? What functions does Security serve beyond basic public safety? Who/what benefits from securitization measures? In the case of the present Executive's securitization agenda apropos immigration, a question of particular importance to ask is, how is threat perceived vis-à-vis the character and composition of the national population?

Securitization of immigration encompasses the power to contour the character and content of the population. As David Campbell notes, a threat, danger, "is not an objective condition. It is not a thing that exists independently of those to whom it may"[67] be perceived as a threat. The Executive's attempts to posit new or dismantle existing legal precedents and regimes from a national security interpretation of immigration are potent reminders of the importance of continuously subjecting securitization measures to critical examination. Security, and its discursive manifestation in empirical reality, must be subject to critical interrogation because discourse is not merely the reflection of power relations and agendas. "Discourse—the mere fact of speaking, of employing words, of using the words of others (even if it means returning them), words that the others understand and accept (and, possibly, return from their side)—this fact is in itself a force. Discourse is, with respect to the relation of forces, not merely a surface of inscription, but something that brings about effects."[68]

IV. DISAGGREGATING SECURITY WITHIN THE SLPP

A critical examination of Security within the SLPP illuminates the complexity and power-effects that undergird defining and operationalizing securitization measures. Security discourse, which is informed by sociocultural and political factors, can be conceptualized as a discursive mechanism that manufactures, deploys, reproduces, and creates "a continuous call for authority."[69] The call for authority can be utilized to buttress the singular aim of preserving public safety. How securitization is implemented is left to the discretion of public authority that articulates and implements securitization measures under color of law. "Common-sense" measures designed to protect the polity from what are construed as evident and straightforward critical threats and dangers provide public authority a basis to put forth Security-based explanatory frameworks for defining, comprehending, and combatting existential

66. R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 190 (D.D.C. 2015) (order granting preliminary injunction and provisional class certification to detained mothers and children from the Northern Triangle countries).

67. DAVID CAMPBELL, WRITING SECURITY: US FOREIGN POLICY & THE POLITICS OF IDENTITY 1 (1992).

68. MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE, 1975-76 xx (1997) [hereinafter FOUCAULT SOCIETY].

69. HARDT & NEGRI, *supra* note 65, at 14.

threats.[70] Security measures can effectively be expanded in the interest of addressing continuously emerging threats. Concentrating analysis of securitization "at the point where it relates directly and immediately to what we might . . . call its object, its target, its field of application . . . the places where it implants itself and produces its real effects"[71] illuminates the impact of the SLPP nexus regarding immigration in the present context—especially when analyzing the interpretations of the SLPP by the Executive and the judiciary.

In securitizing immigration the Executive is, in essence, pursuing a war-response approach to immigration, effectively inverting the Clausewitzian aphorism pertaining to war and politics (equating war with the continuation of politics by other means), so that politics is the continuation of war, to include the protection of the character and content of the population, pursued through other (legal) means.[72] A war-response to immigration permits securitized measures to be implemented that are antithetical to other values, principles, and norms that provide the fundament for American political culture and identity, such a liberty, due process, and the rejection of discrimination by public authority based on race and ethnicity. Furthermore, and more insidiously, securitization enables public authority—under the color of law and in the interest of public safety—to put forth what it considers to be its interpretation of the character and content of the American populace.

President Trump's pardon of former Maricopa County, Arizona Sherriff Joe Arpaio charges of criminal contempt of the court for disregarding a court order in a racial-profiling case can be viewed as an explicitly politicized and racialized interpretation of Security, which reflects a desire to shape and contour the population so that it retains a particular racial and ethnic consistency. Within the SLPP, Sherriff Arpaio viewed racial profiling as a legitimate measure to enhance Security; the court, however, found that civil rights and liberties were controlling in its interpretation of the SLPP. A consequence of securitizing immigration is to mix policy with racial and ethnic overtones;

---

70. *See, e.g.*, *This San Francisco Slaying Became an Immigration Battle Cry*, L.A. TIMES (Nov. 21, 2017), http://www.latimes.com/local/lanow/la-me-ln-kate-steinle-murder-deliberations-20171121-story.html (describing the case of Garcia Zarate in San Francisco, CA, who was "charged with shooting to death Kate Steinle [which a jury subsequently found him not guilty of] . . . The case took on political overtones because Garcia Zarate is a Mexican citizen who had been deported five times and served federal prison time for illegally reentering the United States. Garcia Zarate had been released from the San Francisco jail about three months before the shooting, despite a request by federal immigration authorities to detain him for further deportation proceedings. San Francisco is a so-called 'sanctuary city' that bars city officials from cooperating with federal immigration deportation efforts. During the presidential race, then-candidate Donald Trump cited the killing as a reason to toughen U.S. immigration policies.").

71. FOUCAULT SOCIETY, *supra* note 68, at 28.

72. *See* CARL MARIA VON CLAUSEWITZ, ON WAR (1874), http://www.gutenberg.org/files/1946/1946-h/1946-h.htm; *see also* FOUCAULT SOCIETY, *supra* note 68, at xviii, 15 ("Should one then turn around the formula and say that politics is war pursued by other means? Perhaps if one wishes always to maintain a difference between war and politics, one should suggest rather that this multiplicity of force-relations can be coded—in part and never totally—either in the form of 'war' or in the form of 'politics'; there would be here two different strategies (but ready to tip over into one another) for integrating these unbalanced, heterogeneous, unstable, tense force relations . . . politics is the continuation of war by other means.").

prejudice and discrimination thus become components of the SLPP in protecting the Homeland. The White House interpreted the pardon as expressing support for Security, protecting the US from the insidious presence of the Other: "Throughout his time as sheriff, Arpaio continued his life's work of protecting the public from the scourges of crime and illegal immigration . . . and after more than 50 years of admirable service to our nation, he is [a] worthy candidate for a Presidential pardon."[73] This was decreed despite the harsh, and at times brutal treatment of inmates under his control as well as the explicit use of racial profiling to hassle and arrest Latinos.[74]

A. *Security Sectors, Immigration & Public Policy*

Security is not monolithic; it is a state of affairs that ebbs and flows based on the criteria employed to define threat. Security can be viewed as being comprised of distinct yet overlapping sectors.[75] More specifically: the environmental sector, which involves the relationship between human activity and the biosphere; the economic sector, which encompasses trade, production, and finance; the societal sector, which pertains to collective identity; and the political sector, which involves the relationship of authority and governance.[76] When the societal and the political sectors are collapsed into a unified state of affairs, securitization measures can become far-reaching, such as immigration measures aimed at deporting specific groups from within the polity, and excluding specific groups from entering the country because they are viewed as un-American, a threat to American identity and the integrity of the State. Groups of people deemed a threat to national security by virtue of a legal status, e.g., illegal alien, undocumented immigrant, seem to share a common Otherness as far as being non-White and/or of a "questionable" religious-ideological persuasion. Security, when viewed in sectors, thus complicates yet also helps shed light on the SLPP and securitized immigration discourse.

A Security ethos/framework premised on a war-response to immigration can easily accommodate an expansive and repressive approach to immigration. The rule of Law, on the other hand, reflects a potentially more open, deliberative process with various substantive and procedural protections that reflect and accommodate American values and norms of fairness and justice. The rule of Law, however, when emplaced in a securitized immigration framework, effectively incorporates the politics of fear and loathing into

---

73. Kevin Liptak, Daniella Diaz & Sophie Tatum, *Trump Pardons Former Sheriff Joe Arpaio*, CNN (Aug. 27, 2017), http://www.cnn.com/2017/08/25/politics/sheriff-joe-arpaio-donald-trump-pardon/index.html.

74. *See* Marcela García, *Where is the Justice for Arpaio's Victims?*, BOSTON GLOBE (Aug. 26, 2017), https://www.bostonglobe.com/opinion/2017/08/26/where-justice-for-arpaio-victims/znlmzYyeBiWo5aZItnuJxI/story.html.

75. BARRY BUZAN, OLE WÆVER, & JAAP DE WILDE, SECURITY: A NEW FRAMEWORK FOR ANALYSIS 7-9 (1998).

76. *Id*. at 10-12.

public policy. Security thus directly contours American priorities, and the securitization of immigration reflects a myopic preoccupation with Security at the expense of other equally important constituent components of American political culture and identity. The rule of law, civil liberties and rights, political freedom, religious tolerance, an open society, and an immigrant-based history that deeply complicates American identity and culture all fall to wayside within a securitized immigration discourse.

The Executive's present immigration agenda can be placed in the intersection of the political and societal sectors of security. The political security sector consists of public decision-making processes and public policies. The organizing concept in societal and political sector security is identity. Threat is perceived as being antithetical or menacing to American identity as construed by the Executive. Preservation of identity and way of life is the basis for implementing securitization measures. Societal insecurity exists when a segment of the polity views an Other as a threat to its survival. President Trump, in suspending the DACA Program,[77] for instance, based his decision to do so on his interpretation of societal and political security issues:

> The temporary implementation of DACA by the Obama Administration, after Congress repeatedly rejected this amnesty-first approach, also helped spur a humanitarian crisis—the massive surge of unaccompanied minors from Central America including, in some cases, young people who would become members of violent gangs throughout our country, such as MS-13. Only by the reliable enforcement of immigration law can we produce safe communities, a robust middle class, and economic fairness for all Americans. Therefore, in the best interests of our country . . . Homeland Security will begin an orderly transition and wind-down of DACA . . . Our first and highest priority in advancing immigration reform must be to . . . improve jobs, wages and security for American workers and their families.[78]

A pressing issue that has been viewed as a threat to societal security under the current Administration is immigration in general, and specifically illegal immigration in all forms. This is especially the case for immigrants who are

---

77. President Obama created the Deferred Action for Childhood Arrivals (DACA) program through a 2012 executive order, which "has allowed hundreds of thousands of young people who were brought to the United States illegally as children to remain in the country. Applicants cannot have serious criminal histories, and must have arrived in the U.S. before 2007, when they were under the age of 16. DACA recipients can live and work legally in the U.S. for renewable two-year periods." Katie Heinrich & Daniel Arkin, *What Is DACA? Here's What You Need to Know About the Program Trump Is Ending*, NBC NEWS (Sept. 5, 2017), https://www.nbcnews.com/storyline/immigration-reform/what-daca-here-s-what-you-need-know-about-program-n798761; *see also* David Jackson, Kevin Johnson & Alan Gomez, *Trump Winds Down DACA Program For Undocumented Immigrants, Gives Congress 6 Months To Act*, USA TODAY (Sept. 5, 2017), https://www.usatoday.com/story/news/politics/2017/09/05/trump-congress-do-your-job-daca-immigration-replacement-plan/632191001/.

78. *President Trump's Statement on DACA*, FOX NEWS (Sept. 5, 2017), http://www.foxnews.com/politics/2017/09/05/president-trumps-statement-on-daca.html.

already in the US without proper documentation.[79] The introduction of alien cultures, foreign modalities of sociocultural, economic, and political organization, and racially and ethnically diverse people of color produce an angst that can be likened to a "clash of civilizations" that the Administration fears poses a mortal threat to US identity as a political unit.[80]

Immigration can thus be viewed as constituting a "legitimate" basis for securitization measures designed to effectively and explicitly control the influx as well as exclusion of an Other. Social and politically-based threats can be construed expansively.[81] in actuality, the political runs throughout all the various sectors of Security. The fact that political threats are aimed at the organizational stability of the State renders threat and securitization measures in response to said threat capacious in thought and application.[82] The political and societal sectors of Security, when viewed in the context of SLPP, ebb and flow based, in part, on how public authority perceives identity, its basis, structure, and what are threats to said identity.

There is no purely objective basis upon which to ground Security, and how it is to be conceptualized. Indeed, a complicating factor in any securitization calculus is the distinction between a threat and a problem. Problems are not concepts. A problem, such as efficient and effective regulation of immigration procedures, that has sociopolitical implications for public policy is not a productive basis for analytically organizing and informing attempts to articulate policy in a manner that addresses the structural aspects of a problem.[83] Concepts are the basis of attempts to explain and understand the factors that constitute problems and impact policy; problems are symptoms of deep structural fissures in how a society is ordered. Concepts are thus key to gaining insight into sectors of Security, and how each can alleviate or exacerbate a problem. Immigration, therefore, can be viewed as unsuitable for securitization because it is a problem that is socioeconomic in nature, and a product of US foreign policy on the world stage,[84] such as the destabilization of Central America during the Cold War,[85] and more recently in the Middle East region due to US military actions affecting Afghanistan, Iraq, Syria, and Libya.[86]

Casting identity and existential threats to what the Executive perceives to be authentic "Americanness" as the conceptual basis of securitizing immigration does not wholly address the problem of politically motivated violence.

---

79. Buzan, *supra* note 75, at 27-28.

80. *See* Samuel P. Huntington, *The Clash of Civilizations*, 72.3 FOREIGN AFFAIRS 22-49 (Summer 1993), http://online.sfsu.edu/mroozbeh/CLASS/h-607-pdfs/S.Huntington-Clash.pdf.

81. Buzan, *supra* note 75, at 36-38.

82. *Id*. at 22-23.

83. KEITH KRAUSE & MICHAEL C. WILLIAMS, CRITICAL SECURITY STUDIES: CONCEPTS AND CASES 35 (1997).

84. See Myron Weiner, *Security, Stability, and International Migration, International Security*, 17.3 INT'L SECURITY 91-126 (Winter, 1992-93).

85. *See* LARS SCHOULTZ, NATIONAL SECURITY AND UNITED STATES POLICY TOWARD LATIN AMERICA (2016).

86. *See* MELANI BARLAI, BIRTE FAEHNRICH & CHRISTINA GRIESSLER, THE MIGRANT CRISIS: EUROPEAN PERSPECTIVES AND NATIONAL DISCOURSES (2017).

The deep fissures that are exacerbated by public policy that reflects securitization of a problem that is perhaps better conceptualized, for instance, as a criminal justice issue as opposed to a comprehensive war-response to a problem. Identity as a conceptual basis for securitizing immigration may not be the most efficient or effective approach upon which to base public policy.[87] Targeting an identity group based on racial, ethnic, religious, and/or citizenship status for securitization does not address or resolve the underlying causes of legal and illegal immigration that are global in nature, e.g., severe economic disruption caused by military actions abroad or domestic economic policy that creates the conditions for immigrants seeking opportunities in the US.

When tying securitization measures to identity, and by default to communities and the culture they embody, the field of what is subject to being securitized is expanded. In the case of immigration, one must be careful because ideas, norms, values, and morals can become fodder for securitization. Concepts can indeed help illuminate problems, but are not effective when made a basis of securitization. Securitizing the conceptual bases of how individuals and groups define identity, very broadly speaking, can lead to a hyper expansive notion of Security. Humans require identity, and can acquire salient identity characteristics through the construction of an "enemy." Differences between identity groups are basic, differentiated by culture, e.g., history, geography, language, tradition, and religion.[88] A securitized immigration policy that securitizes identity in ethnic and religious terms is likely to produce an Us vs. Them framework between people of different races, ethnicities, and religions.[89]

Securitization thus fosters a war-response mentality that casts the problems associated with immigration as defense against external danger and defense against internal dangers that are existential in nature that are beyond the reach of the rule of Law to address. In such a paradigm, securitization does little to

---

87. For instance, consider that, "[i]n the case of Islam, the views-such as those championed most recently by former National Security Adviser Gen. Michael Flynn that Islam is not a religion, but rather an ideology that is at war with the United States have permeated the media and political life with misinformation that has led to policies so extreme that they do not pass the rational basis test of the Equal Protection Clause." Shmueli & Ahmad, *supra* note 39.

88. See Robert D. Putnam, *E pluribus Unum: Diversity and Community in the Twenty- First Century: The 2006 Johan Skytte Prize Lecture*, 30 SCANDINAVIAN POL. STUD. 137 (2007) (discussing the long and short-term effects on communities as a result of sharp increases in immigration); Jean S. Phinney & Anthony D. Ong, *Conceptualization and Measurement of Ethnic Identity: Current Status and Future Directions*, 54 J. OF COUNSELING PSYCHOLOGY 271 (2007) (exploring how individuals understand their ethnic identities); RODNEY E. HERO & CAROLINE J. TOLBERT, RACIAL/ETHNIC DIVERSITY INTERPRETATION OF POLITICS AND POLICY IN THE STATES OF THE U.S., 40 AM. J. OF POL. SCI. 851, 856–59 (1996); *see also* Chris Dolan, *Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence*, 849 INT'L REV. OF THE RED CROSS 485, 488 (2015); Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455, 1458 (2010).

89. *See* Benjamin R. Barber, *Jihad Vs. McWorld: The Two Axial Principles of Our Age—Tribalism and Globalism—Clash At Every Point Except One: They May Both Be Threatening to Democracy*, ATLANTIC (Mar. 1992), https://www.theatlantic.com/magazine/archive/1992/03/jihad-vs-mcworld/303882/.

quell the problems and issues that permeate the immigration context. Rather, hostility, threat, fear, and loathing become the basis for public policy. In the case of DACA's rescission, for instance, we are left with an identity group explicitly targeted for expulsion. This state of affairs gives rise to a combat modality between the Executive and those deemed Dreamers. For some, DACA is more than an "expansion of individual rights: it fortified a movement . . . it also contributed to the consolidation of a collective identity among formerly undocumented young immigrants, who became increasingly aware of their shared destiny and collective strength . . . collective identity, which denotes an emotional connection with a broader community of which one feels part, is a key prerequisite for social organization and collective action."[90] By securitizing immigration policy, then, the Executive has put forth restrictive policies that do little to address challenges and issues of immigration, and fuel further alienation and hostilities by entrenching immigration in a Security framework. Casting immigration as an existential identity threat has the effect of tincturing an anti-immigration stance with racially and ethnically informed nationalism and xenophobia.

V. CONSEQUENCES OF SECURITIZING IMMIGRATION

Law and Security are negatively impacted when securitizing immigration because Law is not only a set of rule-based prescriptions, but it also reflects national character and identity. Immigration "enforcement decisions constitute a 'vital part of law's identity as law.'"[91] As a political principle—which holds that the political and the national unit should be congruent—nationalism as a basis for a securitized immigration creates an unstable foundation for articulating effective public policy. Nationalist sentiment is very susceptible to being informed by feelings of fear, loathing, and anger aroused by the violation of the principle, or the feeling of satisfaction aroused by its fulfillment.[92] A nationalist-based securitized immigration discourse is actuated by hostile sentiment toward an Other.[93] Nationalism is a theory of political legitimacy, which requires that ethnic (as well as racial, religious, and ideological) boundaries not cut across political ones, and that such boundaries reflect a proper ordering of society as far as its identity is concerned.[94] Nationalism can thus function as a force of fragmentation.

In securitizing immigration, within an SLPP nexus, Law becomes less an instrument of effective policy and more of a means by which existential

---

90. Guillermo Cantor, *The DACA Affair: The Epitome of Injustice*, AM. IMMIGR. COUNCIL (Sept. 6, 2017), http://immigrationimpact.com/2017/09/06/the-daca-affair-the-epitome-of-injustice/.

91. Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 118 (2016).

92. *See* Brendan O'Leary, *On the Nature of Nationalism: An Appraisal of Ernest Gellner's Writings on Nationalism*, 27 BRIT. J. POL. SCI. 191–222 (1997).

93. *See* AMERICAN CIVIL LIBERTIES UNION, NATIONWIDE ANTI-MOSQUE ACTIVITY (Nov. 27, 2017), https://www.aclu.org/issues/national-security/discriminatory-profiling/nationwide-anti-mosque-activity

94. *See* O'Leary, *supra* note 92, at 191-93; *see also* FOUCAULT SOCIETY, *supra* note 68, at 16-18.

threat is made more concrete because an identity and its expression of a community become a legitimate basis for securitization measures. Even when there is not physical violence present, there is discord, disintegration, and volatility in the polity when employing a war-response approach to immigration. The politics of securitized immigration contributes to instability and insecurity because it "sanctions and reproduces the disequilibrium of forces manifested in war ... within ... these [types of] political struggles, these clashes over or with power, these modifications of relations of force—the shifting balance, the reversals—in a political system, all these things must be interpreted as a continuation of war."[95]

A critical examination of Security disturbs the one-dimensional basis that the Executive is utilizing when casting immigration as a national Security issue. Securitization is "the result of a construction of rules that must be known, and the justifications of which must be scrutinized."[96] Rules and the imagery that accompanies rules play a vital role in the articulation and implementation of Security. They form the firmament of exclusion, confinement, inclusion, and circumscription when it comes to classification of the Secure/Insecure. Indeed, rules of formation are a primary means by which Security seeks to make "true" the interests, values, priorities, etc., that give rise to a particular expression of public policy.

In the case of rules and immigration, "the relationship between the President and Congress has been defined by Congress's dramatic expansion of federal immigration law over the course of the twentieth century through the creation of a complex, rule-bound legal code, which has given rise to a comprehensive regulatory system."[97] Within a rule-based context, Security functions as a set of rules but also the product of rules of formation. Security thrives by "constantly drawing those attacking [or threatening] it into fighting on the ground of reality which is always its own."[98] The rules come to be the very basis upon which other rules and actions emanate from, and the basis for Order. This is important to note because the "order which men look for in social life is not any pattern or regularity in the relations of human individuals or groups, but a pattern that leads to a particular result, an arrangement of social life such that it promotes certain goals or values"[99] Questions of who/what Order is "good" for, serves, are what Security addresses through legal rules and procedures.

---

95. FOUCAULT SOCIETY, *supra* note 68, at 16.

96. FOUCAULT ARCHAEOLOGY, *supra* note 62, at 25.

97. "The immigration laws of the United States are principally organized in the Immigration and Nationality Act (INA). The basic organization of the Act was first adopted in the INA of 1952, also known as the McCarran-Walter Act. Major amendments followed in 1965, 1986, 1990, and 1996, but the basic organization of the statute has remained largely unchanged. Today the Act is codified at INA §§ 101-507, 8 U.S.C. 5§ 1101-1537 (2006)." Cox, *supra* note 4, at 461-62 (citations omitted).

98. JEAN BAUDRILLARD, THE SPIRIT OF TERRORISM 17 (2002).

99. HEDLEY BULL, THE ANARCHICAL: A STUDY OF ORDER 3-4 (1977).

By establishing the parameters and contours of what constitutes public safety and threats through rules, Security equates itself with Order. Security discourse tinctures various institutions, arrangements, economies, identities, classes, and the administration of justice itself, which, in turn, structure a polity's identity. Security, in thought and practice, "is a term which can ultimately be given only some kind of . . . subjective definition."[100] Within the SLPP, Security has the potential to be comprised of a "domain of free syntheses where everything [can be securitized]: endless connections, nonexclusive disjunctions, nonspecific conjunctions, partial objects and flows"[101] can emanate from securitization. Yet, despite the relative nature of Security, it possesses continuity in public policy; i.e., it proffers political and societal mechanisms that ground and regulate the character and content of the population.

Stability is procured by Security. This being the case, rules hold a cardinal place in Security discourse: knowing the rules, abiding by them, and facing the consequences of disobedience all serve to enhance control. "Order in any society is maintained not merely by a sense of common interests in creating order or avoiding disorder, but by rules which spell out the kinds of behavior that is orderly."[102] Security has the effect of casting rules in a binary-based Secure/Insecure paradigm, in which rules primarily function to enhance public safety. Rules transect the political and societal sectors of Security. Rules and instructions can "serve as the instruments, not of the common interests of members of a society, but rather of the special interests of its ruling or dominant members."[103] Furthermore, rules "are general imperative propositions . . . Reasoning . . . [occurs] on a normative plane and not on an empirical or factual one."[104] Law is part of the same rule-based milieu that effectuates securitization and public policy. "Law is an instrumentality of political purposes of all kinds"[105] that embodies the value of stability, as in the case of Security. Yet, Law possesses a more capacious potential. Insert transition is a more nuanced state of affairs that incorporates competing values and interests such as justice, fairness, tolerance, and diversity that are independent from Security. The function of rules, however, can potentially be absorbed by Security discourse, emplacing public safety at the apex of the polity's priorities as reflected in rules.

Rules are "directed towards the preservation of order, not by directly upholding or implementing the rules, but by shaping, molding or managing the social environment in which the rules operate in such a way that they

100. *Id*. at 75.
101. GILLES DELEUZE & FELIX GUATTARI, ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA 54 (2003).
102. *Id*. at 52.
103. *Id*. at 53.
104. BULL, *supra* note 99, at 123.
105. *Id*. at 139.

have the opportunity of continuing to do so."[106] Legal pronouncements, legal rule-based regimes that are securitized, have the effect of shaping and molding the social environment.

A vivid exemple of this can be observed in the Delegation of Immigration Authority, Section 287(g) of the Immigration and Nationality Act.[107] Immigration and Customs Enforcement (ICE), the agency tasked enforcing federal immigration law, works closely with other federal, State, and local law enforcement agencies to protect the US Homeland. "The 287(g) program, one of ICE's top partnership initiatives, allows a state or local law enforcement entity to enter into a partnership with ICE, under a joint Memorandum of Agreement (MOA), in order to receive delegated authority for immigration enforcement within their jurisdictions."[108] 287(g) reflects the shaping and securitization of immigration in that it expands the power of the federal government to include local authorities in the enforcement of national security-based immigration policy. 287(g) is a legal mechanism by which the federal government, in essence, deputizes local and State law enforcement agencies as de facto federal immigration enforcement officers, training police to identify undocumented immigrants in their communities and jails and turning them over to ICE for deportation.[109] Investigations and court proceedings challenging 287(g)'s application have "revealed an ugly side effect: In some jurisdictions, local officers were using their authority to racially profile Latinos. One of the most egregious cases was in Maricopa County, Arizona's most populous, during the tenure of Sheriff Joseph Arpaio, who a federal judge ruled had discriminated against Latinos in patrols and other enforcement efforts."[110]

A. *The Immigration-Law Nexus within the SLPP*

Immigration and the courts have had what one commentator classifies as "a kind of oil-and-water relationship. The most famous illustration of this uneasy mix has been the so-called plenary power doctrine, under which the Supreme Court has explicitly accorded Congress unusual deference in matters that affect the admission or expulsion of aliens. This doctrine . . . has effectively insulated federal immigration statutes from constitutional review."[111] Immigration, under the plenary power doctrine, is deemed a

---

106. *Id.* at 57.

107. *See* U.S. Immigration & Customs Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act* (Mar. 26, 2018), https://www.ice.gov/287g.

108. "287(g) Revisions: Updated Facts. In 2009, ICE revised the 287(g) delegated authority program, strengthening public safety and ensuring consistency in immigration enforcement across the country by prioritizing the arrest and detention of criminal aliens." *Id.*

109. Nicholas Kulish, et al., *Trump's Immigration Policies Explained*, N.Y. TIMES (Feb. 21, 2017), https://www.nytimes.com/2017/02/21/us/trump-immigration-policies-deportation.html?mcubz=0.

110. *Id.*

111. Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (1999-2000); *see* Henderson v. Mayor of New York, 92 U.S. 259, 274-75 (1875).

political state of affairs, and thus mandates judicial deference to the political branches' interpretation. The Court's foundational rulings in the realm of immigration may be interpreted to provide a passive rational basis standard for securitizing immigration. Whether this is a desirable or efficacious interpretation is debatable. In *Chy Lung v. Freeman*, the Court found that the "passage of laws which concern the admission of [foreign] citizens . . . to our shores belongs to Congress, and not to the States . . . [the] responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government."[112] In *Chae Chan Ping v. United States*, the Court, in upholding the constitutionality of the Chinese Exclusion Act, found that the "power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution . . . cannot be granted away or restrained."[113]

Subsequent decisions of the Supreme Court and lower federal courts have contributed to an ongoing evolution of immigration. As far as continuity regarding immigration, the Court has ruled that, as matter of law, Congress and the Executive exercise exclusive power over immigration policy.[114] Modern immigration policy, from a legal perspective, lies within the ambit of Executive power.[115] The Court generally defers to the political branches

112. Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).

113. Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

114. *See, e.g.*, Galvan v. Press, 347 U.S. 522 (1954) ("The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security. Nevertheless, considering what it means to deport an alien who legally became part of the American community . . . the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."); INS v. Aguirre-Aguirre, 526 U.S. 415, 416 (1999) ("The Attorney General is charged with the INA's administration and enforcement, and §1253(h) expressly makes an alien's entitlement to withholding turn on the Attorney General's determination whether the statutory conditions for withholding have been met. Judicial deference to the Executive Branch is especially appropriate in the immigration context.") (internal citations omitted).

115. The Executive can, for example:

> deem certain groups to have temporary protected status to shield from removal foreigners from certain countries with troubled conditions resulting from political strife or natural disasters. Additionally, Presidents throughout U.S. history have granted other varying forms of temporary relief to a variety of groups depending on the political, economic, or humanitarian exigencies of the period. These include, for example, Presidents Ronald Reagan and George H.W. Bush's 'Family Fairness' orders in 1987 and 1990, which allowed the family members (who were ineligible for statutory relief) of many recipients of legalization under Congress's 1986 immigration law to remain in the United States. Many of these are not unilateral executive exercises of authority. In this model of accreted executive power, three factors - 1) Congress's passing of harsher and more complex immigration regulations, which, along with increased labor mobility, creates (2) a growing and sizable undocumented population, and (3) the President's constitutional responsibility for and control over the immigration enforcement apparatus-inevitably produce a situation wherein Congress has effectively delegated significant back-end policy making power to the President. Using tools such as prosecutorial discretion and enforcement prioritization, the President exercises substantial control over those who have found their way into the country either through congressionally sanctioned channels or by clandestine entry. Such executive intervention has come to define federal immigration policy.

when interpreting immigration policies.[116] However, courts have also concomitantly recognized and protected competing values that constrain securitization.[117] For instance, the courts have found that upholding "constitutional rights surely serves the public interest,"[118] that it "is always in the public interest to prevent the violation of a party's constitutional rights,"[119] and that the "public as a whole has a significant interest in ensuring . . . protection of [civil] liberties."[120] These legal pronouncements, antithetical to deference, reside within a legal space in which the judiciary has classified immigration as being within the exclusive purview of the national government.[121] Leaving the courts with a limited role to play in immigration.[122]

The contradictions that reside in the apertures of Security and Law in the SLPP can be observed in the contrasting interpretations of the SLPP by President Harry S. Truman's veto and Senator Pat McCarran's support of the Immigration and Nationality Act of 1952 (hereinafter INA).[123] The contrasting views proffered by Truman and McCarran succinctly capture opposing interpretations of Security and Law in the SLPP regarding immigration. Truman's view of the INA is that it is "Un-American" and discriminatory in nature; the INA is contrary to American values, norms, and identity as far as the immigrant-based character and content of the American populace. McCarran, on the other hand, presents a racialized war-response interpretation of Security that resonates with the present Administration's view of how to conceive of and interpret immigration in the 21st century. The character

---

Gulasekaram & Ramakrishnan, *supra* note 91, at 117-18.

116. Peter J. Spiro, *Trump's Anti-Muslim Plan is Awful. And Constitutional*., N.Y. TIMES (Dec. 8, 2015), http://www.nytimes.com/2015/12/10/opinion/trumps-anti-muslim-plan-is-awful-and-constitutional.html?_r=0 ("The court has given the political branches the judicial equivalent of a blank check to regulate immigration as they see fit. This posture of extreme deference is known as the 'plenary power' doctrine.").

117. *See, e.g*., Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) (finding that administrative hearings in proceedings for the deportation of aliens must conform to the requirements of the Administrative Procedure Act); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (finding that courts have no power to interfere in a deportation proceeding unless there was not a fair hearing); Yamataya v. Fisher, 189 U.S. 86, 100 (1903) ("[T]his court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law'").

118. Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 521 (4th Cir. 2002).

119. Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting Sammartano v. First Jud. Dist. Ct., 303 F.3d 959, 974 (9th Cir. 2002)).

120. Dayton Area Visually Impaired Pers., Inc. v. Fisher, 70 F.3d 1474, 1490 (6th Cir. 1995).

121. *See* Zadvydas v. Davis, 533 U.S. 678 (2001) (acknowledging the national government's plenary power over immigration, but noting that the government must use constitutionally permissible means when articulating and enforcing immigration law).

122. Legomsky, *supra* note 111, at 1616-17 ("Consequently, when someone challenges the constitutionality of an immigration statute, the courts accord Congress unusually great deference, at or approaching non-reviewability. The [plenary power] doctrine can be visualized in either of two ways: (1) the statute is upheld on the merits because the substantive power of Congress is so great that the statute is assumed to be constitutional; or (2) the courts have unusually limited power to review the constitutionality of immigration statutes (or none at all). Under either theory, the practical result is that Congress has a virtual blank check to formulate the immigration policies it thinks best," to include delegation of power to the Executive Branch and the courts reifying said delegation through judicial opinions.").

123. Pub. L. No. 82–414, 66 Stat. 163, (enacted June 27, 1952) (Also known as the McCarran–Walter Act, codified under Title 8 of the United States Code (8 U.S.C. ch. 12)).

and content of the population as a pressing and legitimate basis upon which to securitize is evident in McCarran's position. McCarran declares that securitizing immigration is necessary because a:

> sound immigration and naturalization system is essential to the preservation of our way of life, because that system is the conduit through which a stream of humanity flows into the fabric of our society. *If that stream is healthy, the impact on our society is salutary; but, if that stream is polluted, our institutions and our way of life become infected.*[124]

The notion of polluting the polity and infecting the population is in line with Security discourse that views the Other as an existential threat to American identity and way of life—as defined by McCarran and others of similar ilk. McCarran's view of, and the present Executive's posture toward, immigration are very similar in that Executive policy seeks to maintain the integrity and wholesomeness of a distinctly racial, ethnic, ideological, and/or religious identity of the population as part of a Security calculus. President Trump's recent re-tweet of videos from the ideological far-right in the UK allegedly depicting violence by Muslims against Whites and Christians to stress the urgency of securitizing immigration is directly in line with McCarran's approach to immigration.[125] McCarran goes on to contend that the "best interests of . . . America must be served . . . It is eminently fair and sound for visas to be allocated in a ratio which will admit a preponderance of immigrants who will be more readily assimilable because of the similarity of their cultural background to that of the principal components of our population."[126] McCarran's reasoning, which echoes the present Administration's justifications for securitized immigration, is reflected in the logic underlying the travel bans proffered by the Trump Administration. McCarran's inclusion of immigration in a Security calculus is ultimately justified by his belief that immigration can pose a mortal threat to the American polity:

---

124. 99 Cong. Rec. 1517 (Mar. 2, 1953) (statement by Senator McCarran) (emphasis added). https://www.gpo.gov/fdsys/pkg/GPO-CRECB-1953-pt2/pdf/GPO-CRECB-1953-pt2-3-1.pdf [hereinafter McCarran].

125. *See* Elizabeth Landers & James Masters, *Trump Retweets Anti-Muslim Videos*, CNN (Nov. 29, 2017), http://www.cnn.com/2017/11/29/politics/donald-trump-retweet-jayda-fransen/index.html ("White House press secretary Sarah Sanders defended Trump's retweets, telling reporters that he shared them to start a conversation about border security and immigration. 'I think his goal is to promote strong borders and strong national security,' Sanders told a small group of reporters after appearing on Fox News. Sanders also downplayed questions about whether the videos were authentic, because 'the threat is real.' 'That is what the President is talking about, that is what the President is focused on, is dealing with those real threats, and those are real no matter how you look at it,' she said."); *see also* Matthew Weaver, Robert Booth & Ben Jacobs, *Theresa May condemns Trump's retweets of UK far-right leader's anti-Muslim videos*, THE GUARDIAN (Nov. 29, 2017), https://www.theguardian.com/us-news/2017/nov/29/trump-account-retweets-anti-muslim-videos-of-british-far-right-leader.

126. McCarran, *supra* note 124, at 1517.

> I believe that this Nation is the last hope of western civilization and if this oasis of the world shall be overrun, perverted, contaminated or destroyed, then the last flickering light of humanity will be extinguished. I take no issue with those who would praise the contributions which have been made to our society by people of many races, of varied creeds and colors. America is indeed a joining together of many streams which go to form a mighty river which we call the American way. However, we have in the US today hardcore indigestible blocs who have not become integrated into the American way of life but which, on the contrary, are its deadly enemies. Today as never before untold millions are storming our gates for admission and those gates are cracking under the strain. The solution of the problems of [other countries] will not come through a transplanting of those problems en masse to the US. A solution remains possible only if America is maintained strong and free; only if our institutions, our way of life, are preserved by those who are part and parcel of that way of life so that America may lead the world in a way dedicated to the worth and dignity of the human soul.[127]

Truman's view of the INA, on the other hand, can be viewed as an admonition as to why it is not in the interest of the US to securitize immigration. Truman's counseling against the INA legalizing prejudicial and discriminatory postures toward the immigrant Other in the 1950s readily applies to the racial, ethnic, ideological, and religious foci of the travel bans proffered by the Trump Administration. The groups of immigrants that are the focus of the present Administration's restrictive and explicitly discriminatory immigration policy are the modern equivalent of the Other of 1950s securitized immigration—an Other that could not or would not be readily assimilable. Truman observes that:

> Today, we are 'protecting' ourselves . . . against being flooded by immigrants . . . We do not need to be protected against immigrants . . . on the contrary we want to stretch out a helping hand, to save those who have managed to flee into Western Europe, to succor those who are brave enough to escape from barbarism, to welcome and restore them against the day when their countries will, as we hope, be free again . . . In no other realm of our national life are we so hampered and stultified by the dead hand of the past, as we are in this field of immigration . . . we welcome progress and change to meet changing conditions in every sphere of life, except in the field of immigration.[128]

---

127. *Id.* at 1518.

128. Harry S Truman, *Veto of Bill To Revise the Laws Relating to Immigration, Naturalization, and Nationality*, AMERICAN PRESIDENCY PROJECT (June 25, 1952), http://www.presidency.ucsb.edu/ws/?pid=14175.

Truman recognizes the war-response approach to immigration in characterizing the INA as protective, exclusionary, and contrary to American notions of progress and embracing change through innovative Law and policy. Embracing notions of American identity, such as America being a beacon of hope and a place for those struggling to escape politically oppressive states of affairs, based on the acceptance, in turn, of notions of progress and change, highlight a very different interpretation of the role of Security in the SLPP nexus.

Truman goes on to note that the "time to develop a decent policy of immigration—a fitting instrument for our foreign policy and a true reflection of the ideals we stand for, at home and abroad—is now . . . Through the combined efforts of the Government and private agencies, working together not to keep people out, but to bring qualified people in, we [have] summoned our resources of good will and human feeling to meet the task . . . we have found better techniques to meet . . . immigration problems."[129] Truman's interpretation of the SLPP regarding immigration in the 1950s can be readily applied to the present immigration context, and to the Security and Law components of the SLPP nexus.

B. *Immigration after 9/11*

Before the 9/11 terrorist attacks in 2001, immigration in the US was not, for the most part, viewed as a national security issue but rather as a socioeconomic and criminal justice issue; debates over the form and substance of immigration in the decades before 2001 had focused mainly on economic and/or law enforcement questions, such as discouraging illegal immigrants from jumping the queue in search of economic opportunity.[130] After 9/11, national security arguments were used to justify the rapid expansion of aggressive enforcement measures. Immigration law and policy was thus overtly securitized in the decades following 9/11. Indeed, the Bush Administration in 2001 "redefined the role of immigration agencies, including them in a strategy to combat terrorism. The newly created Department of Homeland Security took over jurisdiction of Immigration and Customs Enforcement (ICE), thus establishing immigrants as threats to internal security."[131] US immigration policy going forward from 2001 used immigration tools such as visas, background checks, identity verification, border searches, and internal enforcement of immigration law to keep out and remove immigrants deemed a threat to

129. *Id.*

130. Edward Alden, *National Security & U.S. Immigration Policy*, 1 ST. JOHN'S J. INT'L & COMP. L. 19 (2016); *see* MICHAEL C. LEMAY, GUARDING THE GATES: IMMIGRATION & NATIONAL SECURITY (2006); Fiona B. Adamson, *Crossing Borders: International Migration & National Security*, 31.1 INT'L SECURITY 165 (Summer 2006).

131. Albaro Tutasig, *Immigration: A National Security Threat?*, COMM. ON U.S. LATIN AM. RELATIONS (Sept. 8, 2014), https://cuslar.org/2014/09/08/immigration-a-national-secuirty-threat/.

US national security.[132]

A running theme throughout the present immigration context proffered by the Executive is that Muslim culture does in fact pose a grave threat to public safety. The domestic terrorist attack in San Bernardino, California in December 2015, for instance, was used by then-candidate and now President Trump to explicitly support a policy that views Muslim immigration as a national security threat. Executive immigration policy seeks to halt Muslim immigration due to the threat Muslims, as a discrete class of un-assimilable persons, pose to US national security.[133] The targeting of Muslims, as well as regions of the world inhabited by populations that are racially, ethnically, ideologically, and religiously distinct from the traditional US population as ideally defined by the Administration, mirrors the security calculus, securitization rubric, articulated by Senator McCarran. The travel ban, which targets regions of the world that have a history of terrorism (as defined by the Administration), in conjunction with an outright ban on Muslims under the guise of "extreme vetting" are proposals based explicitly on securitizing immigration to preserve American society from what Senator McCarran described above as "pollutants."[134] At present, Senator Rubio discussed taking Senator McCarran's securitization logic to the next level, securitizing law and policy beyond racial, ethnic, ideological, and/or religious classifications—which are already immanently problematic—fully utilizing the limitless application of Security measures to apply to all contexts within which individuals have the potential to be "radicalized."[135]

After the 9/11 attacks, immigration was unmistakably securitized. "One of the principal responses by law enforcement authorities after the September 11 attacks was to use the federal immigration laws to detain aliens suspected of having possible ties to terrorism. Within 2 months of the attacks, law enforcement authorities had detained, at least for questioning, more than 1,200 citizens and aliens nationwide."[136] Another example of how the State

---

132. Alden, *supra* note 130, at 19*; see also* Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11 & the Future of North American Integration*, 91 MINN. L. REV. 1369 (2007).

133. Wadhia, *supra* note 5, at 676.

134. *See, e.g.*, Abby Phillip & Abigail Hauslohner, *Trump on the Future of Proposed Muslim Ban, Registry: "You Know My Plans*", WASHINGTON POST (Dec. 22, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/?utm_term=.b2c49152b185; Elise Foley, *Donald Trump Says His Muslim Ban Has Morphed into Extreme Vetting*, HUFFINGTON POST (Oct. 11, 2016), http://www.huffingtonpost.com/entry/presidential-debate-syrian-refugeesus_57e9820fe4b08d73b832e76a.

135. "It's not about closing down mosques. It's about closing down anyplace—whether it's a cafe, a diner, an internet site—anyplace where radicals are being inspired. The bigger problem we have is our inability to find out where these places are, because we've crippled our intelligence programs, both through unauthorized disclosures by a traitor, in Edward Snowden, or by some of the things this president has put in place with the support even of some from my own party to diminish our intelligence capabilities. So whatever facility is being used—it's not just a mosque—any facility that's being used to radicalize and inspire attacks against the United States, should be a place that we look at." Matthew Yglesias, *Why I'm More Worried About Marco Rubio Than Donald Trump*, VOX (Feb. 20, 2016) (quoting Senator Marco Rubio), http://www.vox.com/2016/2/20/11067932/rubio-worse-than-trump.

136. Wadhia, *supra* note 5, at 691.

securitized immigration after 9/11 was the establishment of the National Security Entry-Exit Registration System (hereinafter, NSEERS), which "required certain visitors to undergo special registration [involving] interrogations, fingerprints, and photographs and remained operational through 2011."[137] In securitizing immigration, broader security "measures such as the detention of all immigration violators, or the scrutiny of huge groups of individuals under programs like NSEERS have made little demonstrable contribution to security . . . the 9/11 Commission investigators [found] that better routine enforcement of immigration laws may 'raise obstacles for and in some cases have a deterrent effect on individuals intending to commit terrorist attacks.'"[138]

Some courts, however, found NSEERS and other similar programs pass constitutional muster. The following is worth quoting at length because it is illustrative of a rational legal standard of review that has the effect of encouraging rather than palliating securitization that results in policy premised on racial, ethnic, ideological, and/or religious discrimination. In Rajah v. Mukasey the 2nd Circuit Court of Appeals found that:

> No circumstance calling for a remedy is present here. There was a rational national security basis for the Program. The terrorist attacks on September 11, 2001 were facilitated by the lax enforcement of immigration laws. The Program was designed to monitor more closely aliens from certain countries selected on the basis of national security criteria. The individuals subject to special registration under the Program were neither citizens nor even lawful permanent residents. They were asked to provide information regarding their immigration status and other matters relevant to national security. They were not held in custody for appreciable lengths of time. Those whose immigration status was not valid were subject to generally applicable legal proceedings to enforce pre-existing immigration laws. In sum, the Program was a plainly rational attempt to enhance national security. We therefore join every circuit that has considered the issue in concluding that the [NSEERS] Program does not violate Equal Protection guarantees.[139]

The Trump Administration's immigration policy reflects a securitized interpretation of the SLPP that is in line with court's reasoning. The unmitigated politicized linkage of terroristic violence with the immigration of peoples from certain regions of the world can be viewed as a rational attempt to enhance national security. "Every political judgment helps to modify the facts on which it is passed. Political thought is itself a form of political action," and the "initial stage of aspiration towards an end is an essential

137. *Id*. at 692.
138. Alden, *supra* note 130, at 25.
139. Rajah v. Mukasey, 544 F.3d 427, 438-39 (2d Cir. 2008) (citations omitted).

foundation of . . . thinking."[140] Under a passive, rational basis legal standard, immigration becomes entrenched in the political and societal sectors of a national Security calculus based, in part on racial, ethnic, religious, and/or ideological statuses, and become tinctured with a comprehensive effusiveness that legitimates a securitized policy posture toward immigration. In the case of immigration tinctured with a restrictive, exclusionary ethos that targets the Other, fear and loathing find voluble expression in public policy. Nativism, for example, provides fertile grounds for a xenophobic and paranoiac view of the Other.

> While thoughtful people of good will can oppose large-scale immigration for legitimate reasons, often nativism sprouts from the roots of irrational economic insecurity, outright racism, concerns about balkanization, fear of crime, fear of high numbers of immigrants, anger about illegal immigration and what is often perceived as the government's tepid responses, and ignorance about both the contributions of immigrants and the stringency of the legal criteria for lawful permanent residence.[141]

VI. POLITICS, LAW & IMMIGRATION IN THE SLPP NEXUS

In the present immigration context, the Law component of the SLPP reflects competing interpretations of Security by the Executive and the courts. The courts, as a repository of Law and the administration of justice, wield immense influence and power over the Law component of the SLPP. As discussed above, one must concede that, at the outset, the courts, and the Supreme Court in particular, have been quite accommodating of the political branches' power over immigration policy. Immigration is indeed a politicized state of affairs, which the courts have generally distanced themselves from.[142] As noted above, the Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments [as being] largely immune from judicial control."[143] The Court has mainly deferred to the political branches in the

---

140. E.H. CARR, THE TWENTY YEARS CRISES 6, 8 (1976).

141. Legomsky, *supra* note 111, at 1627.

142.

> Most immigration cases are decided during periods of high-level immigration, partly because this is when most immigration cases are likely to arise, and partly because high levels of immigration are more likely to trigger restrictive legislation that in turn creates higher absolute numbers of aggrieved immigrants. This is an unlucky circumstance for immigrants. Historically, there has been a positive, though concededly imperfect, correlation between periods of high-volume immigration and public hostility toward immigrants. Thus, the periods in which major immigration precedents are most likely to be set are those.

Id. at 1626.

143. Shaughnessy v. United States, 345 U.S. 206, 210 (1953)*; see also* Kleindienst v. Mandel, 408 U.S. 753 (1972) (wherein the Court held that the US Attorney General has the right to refuse entry to the

realm of immigration. As discussed above, under the plenary power doctrine, "courts have frequently strayed from otherwise liberal generic doctrine to reach results in immigration cases that are at odds with more general legal principles."[144] The Court has held that deportation of aliens is an inherent State power,[145] immigration policy is so exclusively entrusted to the political branches as to be largely immune from judicial inquiry or interference,[146] and the fact that immigration law inflicts severe hardship on individuals does not render it violative of the Due Process Clause.[147]

It is the case that immigration constitutes a formidable challenge for the State, in that there are legitimate physical Security concerns that attach. The State must address, balance intangible concerns, such as which values, norms, and principles are/should be constitutive of American political culture and national identity in tandem with public safety. In light of the SLPP, it is very important to note that Security concerns are qualitatively different from an unmitigated war-response based on hyper-expansive securitization. Fully securitizing immigration has a very distinctive consequence on American national identity, America's relationship with the international community, and the national government's relationship with the populace as far as serving the public interest. Within the SLPP nexus, judicial review of immigration provides the potential for divergent interpretations of Security. Judicial review, in light of separation of powers and checks and balances—two cardinal political ordering principles that are constitutive of American identity—is legitimate and warranted. Judicial review of immigration does not necessarily pose a threat to nor severely disrupt the national security calculus of the US. Indeed,

> it is farfetched to assume that more than a tiny proportion of even the constitutional issues that various immigration laws have raised is [sic] so intimately enmeshed in foreign policy that judicial intervention is dangerous. Even less realistic is to regard judicial review of fact-finding in individual cases, or judicial interpretation of ambiguous technical language in statutes or regulations, as posing a danger so systematic that the only safe option is total abdication. Questions such as whether a given individual would suffer extreme hardship if deported or whether a statute should be interpreted to make a stricter crime-related deportation provision retroactive are inherently unlikely to disrupt U.S. foreign policy.[148]

United States); Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952) (wherein the Court found that a law that authorizes deportation of a legal resident alien because of membership in the Communist Party was within the power of Congress).

144. Legomsky, *supra* note 111, at 1625.
145. Harisiades v. Shaughnessy, 342 U.S. at 587-88.
146. *Id*. at 588-590.
147. *Id*. at 590-591.
148. Legomsky, *supra* note 111, at 1628.

The federal courts have found that there is a space in the SLPP regarding immigration for judicial input into how Security and Law should be configured. For instance, in the case of civil rights and liberties, the courts have noted that, in assessing the Security component of the SLPP, competing values and notions of American national identity are independent of and may serve to check securitization. Regarding the recent travel bans, the Fourth Circuit Court of Appeals found the bans to be overtly religiously discriminatory, triggering judicial intervention. "When the government chooses sides on religious issues, the 'inevitable result' is 'hatred, disrespect and even contempt' towards those who fall on the wrong side of the line. Improper government involvement with religion 'tends to destroy government and to degrade religion,' encourage persecution of religious minorities and nonbelievers, and foster hostility and division in our pluralistic society. The risk of these harms is particularly acute here, where . . . an Executive Order [is] steeped in animus and directed at a single religious group."[149] In *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 273 (1875), the Court stated that the "laws which govern the right to land passengers in the United States from other countries [should be] the subject of a uniform system or plan." Within the SLPP, a uniform system or plan can be informed by the courts' exercising review over immigration when policy appears to contravene competing constitutional values, norms, and interests, such as liberty.

The remainder of this section highlights select competing interpretations of the Security component in the SLPP, and how and the courts can substantively impact immigration despite long standing precedent that has disconnected the courts from actively engaging in immigration. This analysis sheds light on the complex nature of the SLPP, and the consequentialness that interpretation of its components has going forward for public policy.

A. *Aziz v. Trump (2017)*[150]

When government action, generally speaking, is alleged to conflict with the Constitution, "it is emphatically the duty of the Judicial Department to say what the law is . . . If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."[151] The Court has further stated that the judiciary's duty will at times involve the resolution "of litigation challenging the constitutional authority of one of the three branches," but the courts cannot avoid their responsibility merely "because the issues have political implications."[152] This logic readily applies to the present immigration context.

---

149. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017) (citations omitted), *vacated*, 153 S. Ct. 353.

150. Aziz v. Trump, 234 F. Supp. 3d 724 (E.D. Va. 2017).

151. Marbury v. Madison, 5 U.S. 137 (1803).

152. *Aziz*, 234 F. Supp. 3d at 724, 732 (quoting INS v. Chadha, 462 U.S. 919, 943 (1983)).

The *Aziz* court articulated the role of judicial review regarding Security, Law and immigration within the SLPP. The *Aziz* court observed that every Executive action must abide by "the constraints of the Constitution, including the Bill of Rights . . . 'the Constitution ought to be the standard of construction for the laws, and that wherever there is evident opposition, the laws ought to give place to the Constitution' . . . Congress [cannot] delegate to the president the power to violate the Constitution and its amendments and the Supreme Court has made it clear that even in the context of immigration law, congressional and executive power 'is subject to important constitutional limitations.'"[153] The *Aziz* court further noted that, the Court "has refused to hold that the president is exempt from compliance with the Due Process Clause even when he is exercising a pure Article II power, such as the detention of persons deemed 'enemy combatants.'"[154] The *Aziz* court cites the Court's opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) as a basis for exercising review of the Executive's immigration policy premised on national security grounds. The Aziz court notes that *Hamdi* counters the claim that Executive policy making in immigration is free from judicial oversight. In *Hamdi*, the *Aziz* court contends that the Court has

> recognized the government's 'critical . . . interest in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict,' but still held that the president must comply with the Fifth Amendment. If the president's actions can be subject to judicial review when he is exercising his core Article II powers, as in *Hamdi*, it follows that his actions are also subject to such review when he exercises Article I powers delegated to him by Congress. As the Ninth Circuit has explained, 'the Supreme Court has repeatedly and explicitly rejected the notion that the political branches . . . are not subject to the Constitution [in the] policymaking context.'[155]

The notion of an independent judiciary—one that is designed to check and balance Executive, Congressional, and State power—is a principle of interpretation that justifies and grounds the *Aziz* court's review and interpretation of Security and Law within the SLPP. The court is clear to maintain deference to the Executive's authority in the realm of foreign policy and national security while asserting the judicial role to balance competing interests. The court is deferential to the Executive and Congress in the realms of "immigration and national security . . . Establishment Clause concerns [, however,] do not involve an assessment of the merits of the president's national security

153. *Id.* at 732-733 (citations omitted)*; see* Zadvydas v. Davis, 533 U.S. 678, 695 (2001); Zivotofsky v. Clinton, 566 U.S. 189, 195 (2012).
154. *Aziz*, 234 F. Supp. 3d at 733 (citations omitted).
155. *Id.*

judgment. Instead, the question is whether [policy] is animated by national security concerns at all, as opposed to the impermissible motive of, in the context of entry, disfavoring one religious group and, in the area of refugees, favoring another religious group."[156] The court explicitly articulates competing values, norms, and ordering principles that challenge the myopic focus on privileging Security above all other considerations in the articulation of public policy and American national identity. Public safety, while indispensable, does not override civil liberties and judicial independence to assess the constitutionality of laws and policy in the form of review. Each is viewed as equally important in interpreting and restricting Security in the SLPP.

B. *Int'l Refugee Assistance Project v. Trump*[157]

The *Refugee Assistance* court also articulates the importance of judicial independence in the form of review for balancing competing interests that vie for prominence in the articulation of policy and American national identity. Judicial review incorporates checks and balances and reaffirms separation of powers by introducing an independent public authority to appraise immigration policy premised on national security. "True independence, in the sense of insulation from the political process and security of tenure, is the strongest guarantee possible that the judge will base the findings of fact on the evidence presented, and the conclusions of law on his or her honest interpretation of the applicable legal sources."[158] The judiciary's independent role in appraising securitized immigration policy is viewed as even more necessary by the *Refugee Assistance* court in times of war. The court asks

> whether the Constitution ... remains 'a law for rulers and people, equally in war and in peace.' And if so, whether it protects Plaintiffs' right to challenge an Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination. Surely the Establishment Clause of the First Amendment yet stands as an untiring sentinel for the protection of one of our most cherished founding principles—that government shall not establish any religious orthodoxy, or favor or disfavor one religion over another. Congress granted the President broad power to deny entry to aliens, but that power is not absolute. It cannot go unchecked when, as here, the President wields it through an executive edict that stands to cause irreparable harm to individuals across this nation.[159]

---

156. *Id.* at 735-36 (internal citations omitted).
157. Int'l Refugee Assistance Project v. Trump, 857 F.3d 557 (4th Cir. 2017) (citations omitted), *vacated*, 153 S. Ct. 353.
158. Legomsky, *supra* note 111, at 1630.
159. *Refugee Assistance*, 857 F.3d at 554, 572 (citations omitted).

Security, therefore, does not trump civil liberties and foundational ordering principles that are woven into the fabric of an American political, legal, and national identity as it was established in, and subsequently interpreted by the courts, in the US Constitution. The "political branches' power over immigration is not tantamount to a constitutional blank check, and that vigorous judicial review is required when an immigration action's constitutionality is in question."[160]

When interpreting the place of Security in the SLPP the *Refugee Assistance* court states that it is

> unmoved by the Government's rote invocation of harm to 'national security interests' as the silver bullet that defeats all other asserted injuries. National security may be the most compelling of government interests, but this does not mean it will always tip the balance of the equities in favor of the government. A claim of harm to national security must still outweigh the competing claim of injury . . . 'unconditional deference to a government agent's invocation of 'emergency' . . . has a lamentable place in our history . . . and is incompatible with our duty to evaluate the evidence before us.[161]

The Refugee Assistance court further notes, in evaluating the Security component of the SLPP as proffered in the Administration's initial travel bans that, for "the public interest counsels in favor of upholding the preliminary injunction. As this and other courts have recognized, upholding the Constitution undeniably promotes the public interest . . . when we protect the constitutional rights of the few, it inures [sic] to the benefit of all. And even more so here, where the constitutional violation injures Plaintiffs and in the process permeates and ripples across entire religious groups, communities, and society at large."[162] The court explicitly acknowledges the role of an independent judiciary in mitigating the potential limitlessness of securitization measures. Acknowledging and upholding alternative ordering principles, such as checks and balances, and equally important norms and values that define the polity, such as civil liberties, tempers Security in the SLPP.

C. *Political & Judicial Interpolations of the SLPP in the Immigration Context*

Different public authorities, viz., the political and the judicial, interpret immigration in light of the SLPP nexus. The lower courts, generally speaking,

---

160. *Id.* at 590.
161. *Id.* at 603.
162. *Id.* at 604*; see also Ex parte* Quirin, 317 U.S. 1, 19 (1942) (the courts have a duty, "in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty"); Ex parte Milligan, 71 U.S. 2, 120–21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace . . . under all circumstances").

have recently found that the travel bans issued by the Administration amounted to invidious discrimination.

> Invidious discrimination that is shrouded in layers of legality is no less an insult to our Constitution than naked invidious discrimination. We have matured from the lessons learned by past experiences documented, for example, in *Dred Scott* and *Korematsu*. But we again encounter the affront of invidious discrimination—this time layered under the guise of a President's claim of unfettered congressionally delegated authority to control immigration and his proclamation that national security requires his exercise of that authority to deny entry to a class of aliens defined solely by their nation of origin. Laid bare, this Executive Order is no more than what the President promised before and after his election: naked invidious discrimination against Muslims.[163]

The political and societal interpretations of Security by the Executive in the present elevates the Security component of the SLPP to preeminence; it builds on the 9/11 securitization impulse, and casts immigration as a subset of national security, in the tradition of the USA Patriot Act.[164]

There is a history of immigration being securitized to actively discriminate against the Other in terms of the character and content of the populace.[165] Reconsider, for example, the case discussed above of former Arizona Sheriff Joe Arpaio's blatantly ignoring a federal district court's order to cease and desist from racially profiling Latinos for aggressive immigration enforcement. The case highlights the persistence of McCarran's interpretation of securitized immigration: Arpaio views Latinos as posing a viable threat to the polity. The restrictive and discriminatory nature of securitized immigration embodied in McCarran's, the Administration's, and Arpaio's interpretation of Security reflects a political and societal commitment to maintaining

---

163. *Refugee Assistance*, 857 F.3d at 612 (Wynn, J., concurring).

164. "The events of [9/11] brought immigration reform to an abrupt halt. Instead of legalization of undocumented workers and reconsideration of the restrictive nature of the 1996 immigration laws, Congress responded six weeks [after the attacks] with the passage of the USA Patriot Act." Barbara Hines, *An Overview of U.S. Immigration Law and Policy Since 9/11*, 12 TEX. HISP. J. L. & POL'Y 9, 12 (2006)*; see* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1934 (2000).

165. *See* Chae Chan Ping v. United States, 130 U.S. 581, 606, 609 (1889) ("To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from the vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth . . . If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary"); Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L. J. 833, 850–60 (1997).

the integrity of an (idealized) homogenized racial, ethnic, religious, and ideological population. Securitized immigration thus effectuates "the punitive treatment of Arab and Muslim noncitizens [and Latinos], followed by the imposition of restrictive policies affecting all immigrants."[166] Arpaio's prejudicial and discriminatory posture is in line with the notion that the Other poses a security threat to the integrity of the population which constitutes the polity.[167]

Counter to this view, the court issuing the order privileged civil rights over the "threat" posed by immigrants, articulating a judicial countermeasure to securitization in the SLPP. In the case of former Arizona Sherriff Joe Arpaio, he was convicted in a court of law for willfully disobeying a court order to cease and desist from singling out drivers based on their ethnicity and detaining them without charges. He willfully and explicitly defied the orders of US District Court Judge G. Murray Snow "to stop the racial profiling that was the subject of civil rights litigation."[168] Subsequently, when US District Court Judge Susan Bolton found Arpaio guilty of criminal contempt for disobeying orders halt racial profiling dating to 2011," she declared that, "'Not only did (Arpaio) abdicate responsibility, he announced to the world and to his subordinates that he was going to continue business as usual no matter who said otherwise.'"[169]

Deference to the Executive does not in any way provide the Executive *carte blanche* to enforce security to the point where the President is permitted "to trench . . . heavily on [fundamental] rights."[170] In defending the travel ban, the Executive has argued that the courts lack the authority to counter it because the "President has 'unreviewable authority to suspend the admission of any class of aliens' . . . even if those actions potentially contravene constitutional rights and protections."[171] There is a profound difference, however, between the courts granting substantial deference to the Executive in the realms of national security and immigration,[172] and the contention that the

166. Johnson, *supra* note 132, at 1376.

167. *See, e.g.*, Samuel P. Huntington, *The Hispanic Challenge*, FOREIGN POLICY (Oct. 28, 2009), http://foreignpolicy.com/2009/10/28/the-hispanic-challenge/; Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1073–77 (2005).

168. Joan Biskupic, *Judges Remain Silent as Trump Pardons Arpaio*, CNN (Aug. 28, 2017), http://www.cnn.com/2017/08/28/politics/trump-arpaio-judges/index.html.

169. *Id.*

170. Kent v. Dulles, 357 U.S. 116, 129–30 (1958).

171. Washington v. Trump, 847 F.3d 1161 (9th Cir. 2017). Precedent that supports such contentions is based on the plenary power doctrine. *See, e.g.*, INS v. Abudu, 485 U.S. 94, 110 (1988) (Immigration and Naturalization Service "officials must exercise especially sensitive political functions that implicate questions of foreign relations"); Mathews v. Diaz, 426 U.S. 67, 81 (1976) (contending that deference to the legislative and executive branches on immigration matters is justified because "decisions in these matters may implicate our relations with foreign powers").

172. *See, e.g.*, Fiallo v. Bell, 430 U.S. 792 (1977) (noting that the Court's cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.") (quoting Shaughnessy v. United States, 345 U.S. 206, 210 (1953)); Hampton v. Mow Sun Wong, 426 U.S. 88, 101 (1976) (policy concerning aliens is of a political character, and thus subject to narrow judicial review).

courts have no power to check the Executive's articulation of security in the SLPP.[173] "[A]lthough courts owe considerable deference to the President's policy determinations with respect to immigration and national security, it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action."[174]

When exercising review, courts are charged with weighing and balancing competing values, norms, and interests. When contemplating the security calculus, the courts have found that national security

> is a complex business with potentially grave consequences for our country ... the Supreme Court has observed that, 'it is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.' This observation is especially true in today's world, where we face threats from radical terrorists who seek to cross our borders for the purpose of harming us and destroying our way of life. Although we often are quick to forget the fact, 'the real risks, the real threats, of terrorist attacks are constant and not likely soon to abate'; therefore, 'the Government's interest in combating terrorism is an urgent objective of the highest order.' Given the multitude of critical factors involved in protecting national security ... 'questions of national security ... do not admit of easy answers, especially not as products of the necessarily limited analysis undertaken in a single case,' and 'they are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.'[175]

Yet, it is important to note that for some judges, Security should outweigh competing values in the case of immigration. For instance, a judge contends, in the case of the Executive's proposed travel ban that

> Undoubtedly, protection of constitutional rights is important, but there are often times in the federal system when constitutional rights must yield for the public interest ... for example, in applying the state secrets doctrine, a plaintiff with a plausibly viable constitutional claim can be barred from pursuing it 'not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national security' ... the very serious national security interest served by the temporary travel pause (as

---

173. *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (emphasizing that the power of the political branches over immigration "is subject to important constitutional limitations"); American–Arab Anti–Discrimination Comm. v. Reno, 70 F.3d 1045, 1056 (9th Cir. 1995) (noting that courts "can and do review foreign policy arguments that are offered to justify legislative or executive action when constitutional rights are at stake").

174. Washington v. Trump, 847 F.3d at 1164.

175. *Refugee Assistance*, 857 F.3d at 654-655 (citations omitted) (Shedd, J., dissenting); *see also* Haig v. Agee, 453 U.S. 280, 307 (1981); Boumediene v. Bush, 553 U.S. 723, 793 (2008); Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010); Lebron v. Rumsfeld, 670 F.3d 540, 549 (4th Cir. 2012); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

> determined by those who are duly empowered to make the decision and who have access to current intelligence information) greatly outweighs the alleged temporary and relatively minor harm that will befall these few plaintiffs.[176]

VII. FINAL REFLECTIONS ON IMMIGRATION AND THE SLPP

Security, within the context of the SLPP it is a way of knowing the world because it directly impacts American identity in the form of public policy. Political and societal Security are not necessarily a function of ethics, but rather reflect an ethics of securitization—such as violating civil rights in the name of Security—as a function of politics. This state of affairs has been played out before in an immigration context. In Korematsu v. United States,[177] for instance, the Executive put forth, and the Court allowed, securitization of race as acceptable public policy and, as in the case of Sherriff Arpaio, privileged Security over civil rights.[178] Security, through the manufacture of existential threat and in the name of public safety, provides a "unifying principle that [can seemingly] produce order out of chaos."[179]

Ordering principles based on securitized immigration has a very dark history when it comes to racialization and vilification of the Other. The politics of fear and loathing came into play regarding the Japanese in 1920s America (and which can be transposed to Muslims and Latinos in the present).[180]

---

176. *Refugee Assistance*, 857 F.3d at 659.

177. Korematsu v. United States, 323 U.S. 214 (1944).

178. In *Korematsu v. United States*, the Court upheld the constitutionality of Executive Order 9066, which ordered Japanese Americans into internment camps during World War II regardless of citizenship. The Court found that the need to protect against espionage outweighed Fred Korematsu's individual rights, and the rights of Americans of Japanese descent. Justice Murphy's dissent points to the profound harm and problem that securitization of race (ethnicity) poses for society:

> I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting, but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution.

Korematsu, 323 U.S. at 242 (Murphy, J., dissenting).

179. ROBERT JERVIS, PERCEPTIONS & MISPERCEPTIONS IN INTERNATIONAL RELATIONS 160 (1976).

180.

> [T]o infer that examples of individual [misconduct] prove group [misconduct] and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference ... has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference . . . is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

Korematsu, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting).

> Senator James D. Phelan of California would seem to have summed up the situation [(1921):] The solution of the Japanese problem . . . requires prompt action by Congress. It is charged with danger . . . The state, therefore, is obliged as a simple matter of self-preservation to prevent the Japanese from absorbing the soil, because the future of the white race, American institutions, and western civilization are put in peril. The Japanese do not assimilate with our people and make a homogeneous population, and hence they cannot be naturalized and admitted to citizenship. Therefore, the question is principally economic and partly racial. Immigration and naturalization are domestic questions, and no people can come to the United States except upon our own terms.[181]

Indeed, echoes of the very same sentiments can be heard in the rhetoric and policy enactments of the present Executive's policies pertaining to Latino and Muslim immigrants in the present.[182]

Within the SLPP nexus, securitization gives rise to the "exclusive right of concept creation"[183] as to what constitutes threat and public safety. Threat, a necessary component of any Security discourse, is not an objective condition; i.e., "it is not a thing that exists independently of those to whom it may become a threat."[184] Danger, risk, and other Security concerns find expression, meaning, content, and substance, within subjectively defined categories that have no objective correspondence to the external world. Identifying and interpreting danger is a process that relies upon "certain modes of representation [to] crystallize around referents marked as dangers . . . the ability to represent things as alien, subversive, dirty, or sick has been pivotal to the articulation of danger in the American experience."[185] Under a securitized immigration rubric, efforts to obtain a secure state of affairs are in actuality undermined, as securitization with no counterbalance foments societal danger, threat, fear, anger, and hate, effectively contributing to insecurity and a volatile state of affairs. "The constitution of identity is achieved through the inscription of boundaries that serve to demarcate an 'inside' from an 'outside,' a 'self' from an 'other,' a 'domestic' from a foreign.'"[186] Security thrives on Otherness cast in terms of threat and danger. "Given all the possible locations of threats in an unfinished and endangered world, locating them in the external realm has to be understood as serving a particular interpretive

---

181. GARIS, *supra* note 36, at 319-21.
182. *See* Steven W. Bender, *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os*, 81 OR. L. REV. 1153, 1161–65 (2002).
183. DELEUZE & GUATTARI, *supra* note 16, at 8.
184. CAMPBELL, *supra* note 67, at 1.
185. *Id*. at 2-3.
186. *Id*. at 9.

and political function."[187] Security is therefore a contingent concept and process that is infused with high degrees of politicization and sociality.

Power in the US democratic-republican form of government is premised upon the idea that members of the polity are subject to and are represented in the rule of law. Law plays a fundamental role in the ordering of the polity. Law, legality, therefore is a means by which Security can be invested with truth-value. Law creates an essential linkage between Security and policy. Law provides a means whereby the State can "legitimately" articulate Security. Law's power "is exercised through networks, and individuals do not simply circulate in those networks; they are in a position to both submit and exercise this power. They are never the inert or consenting targets of power . . . power passes through individuals."[188] Within the SLPP, Law, as a conduit for knowledge and truth, is produced and produces as well as reifies securitization measures. Law codifies, and has the potential to securitize policy. Legality can thus be employed as a means of producing and reflecting Security priorities.[189]

"We are in the position of Aristotle's prudent individual, who makes judgments about the just and unjust without the least criterion."[190] Judgment, while devoid of objective criteria per say, is a form of political and legal thought that is itself a form of political and legal action. The political dimension of legal judgment in the SLPP is about the shifting, layered and relative bases upon which Security and securitization measures are premised. Judgment is therefore an act of imagination; imagination enables the power to invent criteria for "objective" judgment.[191] The "truth of certain . . . propositions belongs to our frame of reference."[192] Within the SLPP, Security can manifest itself as a meta-language because of its expression through Law into public policy. Morality, for example, finds legal expression in the SLPP. Consider, for example, the notion of "immigration pluralism":

> While the [immigration] monist sees the nation as a sovereign to be defined and defended, the immigration pluralist sees the nation as a composite of overlapping societies. The role of the nation-state, according to the pluralist view, is to balance the competing claims of

187. *Id*. at 63.

188. FOUCAULT SOCIETY, *supra* note 68, at 29.

189. Consider, e.g., the notion of "immigration monism" in law and policy:

> Immigration monism postulates that all possible objectives of immigration law ultimately collapse into the sole goal of national security, broadly defined. Immigration monism has a long, if inglorious, history. It marred the birth of federal immigration law: Congress's regulation of Chinese migration in the 1880's and the U.S. Supreme Court's subsequent announcement of the 'plenary power doctrine' as necessary to protect the United States from 'foreign aggression' and corruption of the national identity, which the Court characterized as a national security concern. In that foundational instance, the United States deployed immigration law as a weapon of national self-definition and self-defense.

Johnson, *supra* note 132, at 1399.

190. JEAN FRANCOIS LYOTARD & JEAN LOUP THEBAUD, JUST GAMING 14 (1999).

191. *See id*. at 17-18.

192. LUDWIG WITTGENSTEIN, ON CERTAINTY 12 (1969).

> these various societies. . . . Immigration pluralism, which recognizes the many goals of immigration law and policy, strives to balance many competing goals and objectives rather than to focus myopically on national security. In an era of much-heralded globalization and the increasing integration of the world economy, pluralistic approaches to immigration regulation are especially important. To this end, in the pursuit of economic development in the United States and Mexico, the movement of labor between the United States and Mexico should be normalized, not militarized.[193]

Morality, generally construed, thus assumes a role in the discourse of Security within the SLPP; morality, however, is a product of power.[194] While variations of morality are the product of imagination, a "correct" or superior morality is effectuated via power. A moral prerogative enables one to declare that a particular circumstance must be the case, because morality decrees it so.[195]

The Executive's posture on immigration lends itself to what many feel was not what made or has made America great, such as the insidious racialization of immigration policy. Securitized immigration is restrictive in nature; it has the effect of protecting and preserving a population's racial, ethnic, religious, and ideological content and character, which is beyond objective security concerns, such as physical border integrity and preserving public safety. The national security argument vis-à-vis immigration has "been exploited effectively by those whose primary agenda is not advancing national security, but rather restricting immigration."[196] Again, US policy from the 1920s seem to accurately capture the ethos of the present Executive's policy immigration policy to make American great:

> Yet it must be recognized by all thoughtful persons that restriction, even absolute exclusion, does not signify racial hatred. Restriction does not mark a nation as the inferior of any or all others. Many individuals of any race may be superior by every just standard of measurement to many individuals of the white race. Yet true assimilation requires racial compatibility, and any irreconcilable resistance to amalgamation and social equality cannot be ignored. Kipling recognized this when he wrote "East is East, and West is West, And never the twain shall meet—" For America, the Japanese are a non-assimilable

193. Johnson, *supra* note 132, at 1401-02.

194. National security concerns "should not bar the United States from considering economic, political, and social aims in the formulation of immigration law and policy. Well crafted, manageable, and effective policies must carefully weigh all facets of immigration and its impacts on the United States." *Id.* at 1406.

195. "The insidious thing about the [moral] point of view is that it leads us to say: 'Of course it [has to be] like that.' Whereas we ought to think: it may [be like] that – and also in many other ways." LUDWIG WITTGENSTEIN, CULTURE & VALUE 37 (1980).

196. Alden, *supra* note 130, at 22.

> people, as are all Asiatics, and little could be gained by the continuance of a policy contrary to American interests and which removed from our control a universally recognized domestic problem.[197]

Security, within the SLPP, has the capability and potential to become an overtly measureless, sovereign strategy of control, uniting "juridical categories and universal ethical values, making them work together as an organic whole."[198] Securitization of immigration is an expression of control that explicitly argues for the privileging, prioritizing, of Security over competing values. Politically, ideologically, morally, Security reflects being "bounded in sovereign space, a politics . . . obsessed by the dangers of time and contingency, of a dissolution or an absence threatening the secure frontiers of an unproblematic [political and legal] identity."[199] Political, social and economic reality are, in part, engendered by and generated from Security measures. Truth in Security discourse is actually repressive in that it delimits the space of thought and possibility. Order appropriates truth so as to accord itself the privilege of inclusion and exclusion, of what is or is not (can or cannot be) the case. Immigration monism is a vivid case in point. Immigration monism views Security and protection of the State as the ultimate and singular purpose of immigration.

> All other goals, whether economic, social, or political, are secondary to the defense of the nation-state. The monistic project involves defining and enforcing strong borders, creating categories of 'insider' and 'other,' subsidizing the insider by penalizing the other, and creating mechanisms strictly limiting the ability of others to become insiders. Immigration monism is entirely consistent with [a paradigm] in which the power of the executive and legislative branches reigns supreme, with the judiciary possessing a limited role in reviewing the immigration laws.[200]

Justice comes into being within the SLPP. It is "truth that makes the laws, that produces the ["true"] discourse which, at least partially, decides, transmits itself, extends upon the effects of power. In the end, we are judged, condemned, classified, determined in our undertakings, destined to a certain mode of living or dying, as a function of the true discourses which are the bearer of the specific effects of power."[201] Truth produces correctness: knowledge and power are "integrated with one another . . . It is not possible for power to be exercised without knowledge, and it is impossible

197. GARIS, *supra* note 36, at 352-53.
198. HARDT & NEGRI, *supra* note 65, at 10.
199. R.B.J. WALKER, INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY x (1993).
200. Johnson, *supra* note 132, at 1399.
201. MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977 94 (1980).

for knowledge not to engender power."[202] In the case of the SLPP and immigration, the consequentialness of securitizing immigration has deep implications for American national identity. Thus, it is imperative that we remain vigilant, as a myopic focus on the Security component of the SLPP has the potential to ablate competing values, norms, and ordering principles while concomitantly undermining rather than bolstering the *raison d'état* of policy premised on Security—i.e., the preservation and protection of the polity.

202. *Id*. at 51-52.