

ROTTEN TO THE CORE: RACISM, XENOPHOBIA, AND THE BORDER AND IMMIGRATION AGENCIES

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ABSTRACT

This Note traces modern xenophobia and racism in U.S. border and immigration policy to colonial times and argues that this legacy is the foundation on which border and immigration agencies, including the Department of Homeland Security (DHS), were built. Subjugation of the racial “other” is evident throughout American history, often taking the form of surveillance and control under the law to address a perceived threat from this group’s presence. This Note reveals how the modern national security system stems from American imperialism and racial subjugation, and the U.S. national security apparatus—which enveloped border and immigration policy and enforcement—was turbocharged after the 9/11 terrorist attacks. DHS was formed in the wake of the 9/11 attacks and the ensuing War on Terror. Against this backdrop, Immigration and Customs Enforcement (ICE) and Customs and Border Patrol (CBP), the border and immigration agencies under the DHS umbrella, have perpetrated atrocities against vulnerable populations. For example, subjecting women and children to sub-human living conditions in detention facilities at the border, rampant excessive force incidents, and well-documented corruption, racism, and bigotry infecting the highest echelons of the border and immigration agencies. This Note argues that the existing institution is so intertwined with racism and xenophobia, and the accompanying human rights abuses, that the only way to achieve meaningful change is to dismantle DHS and reimagine border and immigration policy as we know it.

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INTRODUCTION

U.S. border and immigration policy and enforcement are at an inflection point. The Trump administration's shocking and brutal deployment of the Department of Homeland Security ("DHS") machinery at the border and in U.S. cities has subjected DHS to a much needed, and long overdue, level of scrutiny. Specifically, DHS and the border and immigration agencies, provide a stark example of the contemporary manifestation of white supremacy. Border and immigration policy have been motivated by racism and xenophobia since colonial times, obscured by national security rationales. These national security justifications facilitate civil and human rights abuses, which have predominantly impacted vulnerable minority populations. To illustrate this, this Note will trace the history of racism and xenophobia in the nation's founding documents, founders' philosophies, and early border and immigration policies. This Note will further buttress this conclusion by investigating the history and early practices of DHS's two lead agencies, Customs and Border Protection ("CBP") and Immigration and Customs Enforcement ("ICE").¹ After finding that DHS was built on a foundation of bigotry and injustice, this Note argues that the agency must be dismantled, and border and immigration policy and enforcement must be fundamentally reimagined to ensure the protection of civil and human rights of all people, not just white people.

This Note proceeds in three parts. Part I will give a historical overview of "othering" persons of minority race, ethnicity, and national origin in this country, then trace how this differentiation was molded into longstanding practices of surveillance and control. In particular, the Note describes the experience of Indigenous, Chinese, Mexican-American and Japanese-American people, who were subject to a variety of immigration restrictions, counting and surveillance practices, and abrupt, politically motivated expulsion and resettlement orders. These case studies also expose the inextricable relationship between racism, xenophobia, and national security, as the latter was often cited as a rationale for restrictive immigration and border control laws. Part II dives deeply into the history of CBP and ICE, revealing a history intertwined with racism and white supremacy, escalated by the 9/11 attacks and the accompanying abusive conduct. Specifically, DHS's immigration

1. This Note focuses on these two DHS entities specifically because 1) they comprised a significant portion of the DHS agents deployed to Portland, and their conduct directly implicated questions of constitutional rights violations; Marissa J. Lang, Josh Dawsey, Devlin Barrett & Nick Miroff, *Operation Diligent Valor: Trump Showcased Federal Power in Portland, Making a Culture War Campaign Pitch*, WASH. POST (July 24, 2020), <https://perma.cc/4TCA-29N8>; and 2) out of DHS's twenty-two agencies, CBP and ICE—along with the Office of Biometric Identity Management (OBIM), which serves a support function for the other two agencies—receive 40 percent of total DHS funding. Jonathan Blitzer, *Is it Time to Defund the Department of Homeland Security?*, NEW YORKER (July 24, 2020), <https://perma.cc/VZ8V-5LX3>. "For the past decade and a half, the annual budget for these three has dwarfed the appropriations given to all other federal criminal-law enforcement agencies combined." *Id.* Significantly, congressional funding to these agencies has "steadily increased despite evidence, which has been amassing for years, of alarming [ICE and CBP] misconduct." *Id.*

law enforcement agencies have consistently operated inhumanely and extra-legally, but historically, the agencies predominantly terrorized communities of color. Part III examines some of the agencies' recent atrocities under the Trump administration, which were the foreseeable result of their white supremacist roots, and the potent national security veneer provided by the War on Terror. Moreover, DHS's brutal and unconstitutional conduct in Portland reveals that an erosion of rights for some inevitably leads to an erosion of rights for all.² Part IV argues for the dismantlement of DHS and the abolishment of border and immigration agencies in their current form. The rise of any new agencies in their place must be accompanied by a reckoning with the white supremacist motivations that have undergirded border and immigration policies since colonial times, as well as the de-securitization, de-militarization, and de-criminalization of immigration policy and enforcement.

I. RACISM, XENOPHOBIA AND NATIONAL SECURITY IN THE UNITED STATES:
EARLY LEGAL HISTORY AND MODERN NATIONAL SECURITY REGIME

This Part argues that the historical link between racism, xenophobia, and national security in the United States dates to the country's origin. In particular, the country's founding documents legalized inequality and many of the country's founders and early intellectuals espoused the goal of white racial homogeneity. These ideas were molded into early laws and policies to surveil and restrict the movements of minority persons, in order to address a perceived "threat" to the majority from their bare existence. Next, this Part summarizes the experience of enslaved Black, Chinese, Indigenous, Mexican-American, and Japanese-American people in this country, who have been prejudiced by racially-motivated immigration policies and restrictions, often justified by national security interest. Finally, this Part traces these same white supremacist ideologies through to the establishment of the modern national security state, which has served to turbocharge the border and immigration apparatus, while further obfuscating the link between border security, immigration policy, race, and national origin.

This history provides important context for understanding DHS's own conduct toward communities of color, taken up in Part II. Notably, agencies' abuses towards these communities reflect broader, systemic traditions of racism and xenophobia that are often cloaked in a desire to advance national security.

2. See Karen J. Greenberg, *Citizenship in America: A Country's "Priceless Treasure" Under Siege*, CENTURY FOUND. (Oct. 24, 2019), <https://perma.cc/XM3N-ELEV>.

A. *Conceptualizing the “Other” in Early America*

Subjugation of the racial “other” is evident throughout American history. “Othering” is a method of classifying individuals who are perceived as different from the “majority culture.”³ This practice is concomitant with creating or exacerbating a system of dominance and subordination⁴—it is both an explanation for differential treatment and a justification for gross human rights offenses. In the United States, this practice of “othering” persons of non-white, male, able and cis-bodied classifications dates back to the Constitution and early U.S. legal traditions.

The Constitution itself laid out a white supremacist vision for the country. Despite lofty language of equality, the recipients of full citizenship, fundamental rights, and liberties were, on closer inspection, property-owning white men. Scholar Mary Anne Franks asserts, “[t]he Constitution may have begun with the words ‘We the People,’ but it was a document that both reflected and perpetuated white male supremacy.”⁵ Franks’ contention is buttressed by the Supreme Court’s opinion in *Dred Scott v. Sandford*.⁶ Chief Justice Taney, discussing the scope of “all men are created equal,” maintained, “it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted [the Declaration of Independence].”⁷ In the Constitution, enslaved Black persons constituted three-fifths of a person for the purposes of determining congressional representation and apportionment of direct taxes.⁸ Taney, noting this deliberate constitutional design in *Dred Scott*, concluded, “[i]t cannot be supposed that they intended to secure to [the African race] rights, and privileges, and rank, in the new political body throughout the Union.”⁹ Crucially, Taney noted that granting Black people equal rights “endanger[ed] the peace and safety of the State.”¹⁰ Further, women, regardless of race, were legally equated to property, with no ability to vote, sue in court, or inherit.¹¹ The framers were cognizant of the incongruence between the egalitarian ideals that they espoused and the reality of the racial and gender inequality enshrined in the U.S. Constitution.¹² Their exclusion of certain groups from the protections of fundamental rights and guarantees in the charter of America’s existence set the stage to preserve and perpetuate white supremacy. The Founders created

3. Douglas Epps & Rich Furman, *The “Alien Other”: A Culture of Dehumanizing Immigrants in the United States*, 14 SOC. WORK & SOC’Y INT’L ONLINE J. 1, 2 (2016).

4. *Id.*

5. MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 8–9 (1st ed. 2020).

6. *Dred Scott v. Sanford*, 60 U.S. 393, 410 (1857).

7. *Id.*

8. See U.S. CONST. art. I, § 2.

9. *Dred Scott*, 60 U.S. at 416.

10. *Id.* at 416–17.

11. Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L. J. 2127, 2127 (1994); *Dred Scott*, 60 U.S. at 422 (“Women . . . who form a part of the political family, cannot vote . . .”); FRANKS, *supra* note 5, at 10.

12. FRANKS, *supra* note 5, at 26.

a government that legalized white dominion in the very structure of representation and powers.¹³

At the time of the U.S. Constitution's ratification, many Founders and other intellectual elites espoused the idea that America should be a homogeneous nation, predominantly populated by ethnically white Anglo-Saxons and closely related "races."¹⁴ Benjamin Franklin, in his 1751 objection to the importation of enslaved African people, articulated a desire for a white utopia in America: "the Number of purely white People in the World is proportionably very small. . . . I could wish their Numbers were increased. . . . Why should we in the Sight of Superior Beings, darken [America's] People?"¹⁵ In 1811, John Quincy Adams reiterated a similar white supremacist vision, writing: "[t]he whole continent of North America appears to be destined by Divine Providence to be peopled by one nation, speaking one language, professing one general system of religious and political principles, and accustomed to one general tenor of social usages and customs."¹⁶ These sentiments were carried forward in the country's early laws and policies.

B. *Treatment of the "Other" under Color of Law*

In addition to prejudice and limitations to legal rights, early American subjugation of the racial "other" took the form of surveillance and control under the law, often to address a perceived threat from this group's presence. Initially, the racial "other" was informally surveilled through trade and religious missionary work.¹⁷ Later, these practices were formalized and incorporated into government bureaucracy at the local and national levels. For example, eighteenth century New York City adopted lantern laws that required Black, mixed-race, and Indigenous enslaved persons to carry candle-lit lanterns if they walked around the city unaccompanied by a white person after sunset.¹⁸ The law's intent was to ensure that persons covered by the

13. Juan F. Perea, *Immigration Policy as a Defense of White Nationhood*, 12 GEO. J. L. & MOD. CRITICAL RACE PERSP. 1, 3 (2020) (quoting GEORGE M. FREDERICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* 145 (1981)).

14. Perea, *supra* note 13, at 4; *see also* THE FEDERALIST NO. 2, at 6 (John Jay) (George W. Carey & James McClellan eds., 2001) ("With equal pleasure I have as often taken notice, that Providence has been pleased to give this one connected country, to one united people; a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence.").

15. Benjamin Franklin, *Observations Concerning the Increase of Mankind, Peopling of Countries* (1751), *reprinted in* THE WORKS OF BENJAMIN FRANKLIN, VOL. II LETTERS AND MISC. WRITINGS 1735-1753, 338, 350 (1751) (John Bigelow ed., 1904); *see also* Perea, *supra* note 13, at 3.

16. SIDNEY LENS, *THE FORGING OF THE AMERICAN EMPIRE* 3 (2013).

17. Arun Kundnani & Deepa Kumar, *Race, Surveillance, and Empire*, INT'L SOCIALIST REV. (Mar. 21, 2015), <https://perma.cc/4H3V-UWBK>.

18. Claudia Garcia-Rojas, *The Surveillance of Blackness: From the Trans-Atlantic Slave Trade to Contemporary Surveillance Technologies*, TRUTHOUT (Mar. 3, 2016), <https://perma.cc/5HRW-DXV6>.

law could be “seen, located, and controlled at all times.”¹⁹ At the national level, Secretary of War John C. Calhoun established the Office of Indian Affairs in 1824 and tasked it with mapping and counting Native Americans.²⁰ Through entities like the Office of Indian Affairs (“OIA,” later the Bureau of Indian Affairs (“BIA”)), the United States developed methods of identification, categorization, and enumeration for the country’s Indigenous population, which made them “visible to [the government’s] surveillance gaze.”²¹ Specifically, the U.S. government had two concerns: 1) security, which was addressed in part by counting the proportion of warriors in Indian tribes, and 2) the removal of Indigenous peoples to lands not then occupied by the United States.²² Ostensibly, the OIA’s purpose for managing and counting Indigenous peoples was to “civilize” and “save” them.²³ In reality, by the 1830s, OIA was quantifying the Indigenous population not to monitor efforts to assimilate, but to assess the military threat the Indigenous population posed to U.S. territorial expansion and white settlers.²⁴ By 1848, the Commissioner of Indian Affairs put forward a “civilizing” plan, which included colonizing the Indigenous population, restricting their ability to gather food, restricting their land use, and selling the land they were no longer allowed to use to colonists.²⁵ Thus, the national government’s surveillance, restriction, and control of the Indigenous population, largely justified by national security concerns and realizing the United States’ “manifest destiny,” facilitated the ethnic cleansing of the Indigenous population.²⁶

Surveillance and control practices for racial or ethnic minorities were perpetuated and accelerated in twentieth century official government policies, laws, and executive actions. Notably, laws requiring surveillance often quickly spiraled into control and expulsion or internment for persons of disfavored ethnic or racial groups. Most often, the reason cited for this treatment was national security grounds; the reasoning was that surveillance and restriction of the “other” protect “the worthy society” from the “danger” posed by immigrants.²⁷ The experience of Mexican-American and Japanese-American people during the twentieth century provide compelling case studies demonstrating this trend.

19. Barton Gellman & Sam Adler-Bell, *THE DISPARATE IMPACT OF SURVEILLANCE*, CENTURY FOUND. 6 (2017), <https://perma.cc/8KB4-8PQV>.

20. Kundnani & Kumar, *supra* note 17.

21. *Id.*

22. Tim Rowse, *Population and Knowledge and the Practice of Guardianship*, 15 AM. 19TH CENTURY HIST. 15, 17 (2014).

23. *Id.*

24. *Id.* at 22–23.

25. *Id.* at 23.

26. The 1993 United Nations Commission of Experts report to the UN Security Council defined ethnic cleansing as “the planned deliberate removal from a specific territory, persons of a particular ethnic group, by force or intimidation, in order to render that area ethnically homogenous.” Carrie Booth Walling, *The History and Politics of Ethnic Cleansing*, 4 INT’L J. HUM. RTS. 47, 48–49 (2000).

27. Epps & Furman, *supra* note 3, at 6.

Throughout the twentieth century, Mexican-American communities have been the target of surveillance and control, often for purported security reasons. Surveillance and othering of Mexican-American people during the Great Depression eventually resulted in the expulsion of 400,000 persons with Mexican heritage, half of whom were estimated to be U.S. citizens.²⁸ At the turn of the twentieth century, there was an influx of Mexican people who immigrated to the United States for work.²⁹ Amid the scarcity of work during the Great Depression, the Mexican population was targeted because they were a new and visible group in the country, and the county welfare agencies did not want to be responsible for them.³⁰ The federal government assisted local governments by conducting large-scale deportations of Mexican people—determining whether or not they were legal residents or natural-born citizens was evidently irrelevant, since most of the people deported were legal immigrants or U.S. citizens.³¹ In the 1950s, in response to the American public’s increased alarm at the “invasion of illegal labor” in the United States, Immigration and Naturalization Services (“INS”) carried out “Operation Wetback,” which yet again targeted Mexican immigrants for mass deportation.³² Initially, the influx of Mexican labor in the 1940s was encouraged by the federal government, and these manual laborers were “regarded as heroes for helping the American war effort.”³³ However, the friendly attitude of the U.S. government quickly faded after the end of the war.³⁴ Consequently, INS, the predecessor to ICE and CBP, carried out a mass deportation of Mexican migrant laborers after an annual harvest, “presumably to prevent their integration into American society while reaping the benefits of their inexpensive labor efforts.”³⁵ Crucially, according to Immigration History Professor Mae Ngai, INS Commissioner Joseph Swing treated “Operation Wetback” as a military campaign.³⁶ The INS task force comprising 800 federal agents apprehended over a million unauthorized immigrants using raids and roadblocks.³⁷ According to Ngai, the government was more concerned with the appearance of rounding up unauthorized immigrants than the actual logistics. The government deported people en masse using trains, cargo ships, planes, and trucks.³⁸ Conditions of the transports were so horrific that a

28. Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 *FORDHAM L. REV.* 2521, 2522 (2007).

29. Neal Conan with Mae Ngai, *A Tale of Deportation in the 1930s*, *NAT’L PUB. RADIO* (Apr. 5, 2006, 2:16 PM), <https://perma.cc/W8X9-YXEW>.

30. *Id.*

31. *Id.*

32. Dara Lind, *Operation Wetback, the 1950s Immigration Policy Donald Trump Loves, Explained*, *VOX* (Nov. 11, 2015, 1:40 PM), <https://perma.cc/RJ6K-LTRQ>; Epps & Furman, *supra* note 3, at 5.

33. Epps & Furman, *supra* note 3, at 5.

34. *Id.*

35. *Id.*; see also Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 *TEX. A&M L. REV.* 253, 277 (2018).

36. Lind, *supra* note 32.

37. *Id.*

38. *Id.*

congressional investigation likened the conditions on one of the cargo ships to a “slave ship on the Middle Passage.”³⁹ Mexican immigrants were a vulnerable population because their presence was visible, and thus trackable, and met with hostility from the (white) American public.⁴⁰ As demonstrated by the Mexican immigrant experience during this time, the perceived threat motivating brutal government actions was immigrants of color integrating into American society and threatening white majority rule. Today, surveillance and restriction policies in the United States remain salient methods used by those in power to control the constructed threat of the “alien other.” Examples include the Trump administration’s attempt to add a citizenship status question to the 2020 census (ironically under the guise of better protecting minority voters’ rights under the Voting Rights Act),⁴¹ or exaggerating the number of “suspected terrorists” crossing the southern U.S. border to justify building a wall on the U.S.-Mexico border.⁴²

Throughout the same time period, Japanese American communities were also subjected to significant surveillance and subordination for security reasons. During World War II, the Japanese attack on Pearl Harbor thrust the United States not only into the war, but also into a frantic fear of foreign enemies living within the country’s borders.⁴³ In fact, the Federal Bureau of Investigation (“FBI”) was already surveilling people of German, Italian, and Japanese descent as suspected enemy aliens prior to the United States’ entry into World War II.⁴⁴ Following the attack, the government became suspicious not only of immigrants from enemy nations, but of all persons of Japanese heritage—immigrants and U.S.-born citizens alike.⁴⁵ In February 1942, two months after the Pearl Harbor attack, President Roosevelt issued Executive Order 9066 under his Article II Commander-in-Chief power.⁴⁶ The order tasked the military with protecting the nation against “espionage” or “sabotage” and empowered the Secretary of War and the Military Commanders to designate military zones where people could be excluded from or restricted to.⁴⁷ Under the Order’s authority, the entire West Coast of the United States was designated a military area, and Lieutenant General John L. DeWitt imposed a curfew only on Japanese-Americans.⁴⁸ On March 29, 1942, after

39. *Id.* The “Middle Passage” refers to the brutal conditions endured by forced African migrants crossing the Atlantic Ocean on ships that were specifically fitted for human cargo. Rhonda V. Magee, *Slavery as Immigration?*, 31 IMMIGR. & NAT’Y L. REV. 743, 750 (2010).

40. See Interview with Neal Conan with Mae Ngai, *supra* note 29.

41. Andrew Prokop, *Trump’s Census Citizenship Question Fiasco, Explained*, VOX (July 11, 2019, 6:05 PM), <https://perma.cc/2F2G-S4DJ>.

42. Alex Ward, *What to Make of the DHS Whistleblower’s Shocking Complaint*, VOX (Sept. 11, 2020, 2:30 PM), <https://perma.cc/T9SS-P373>.

43. NAT’L ARCHIVES, *Japanese-American Internment During World War II*, <https://perma.cc/B332-HZHB>.

44. See *id.*

45. *Id.*

46. *Id.*

47. Exec. Order No. 9066, 42 Fed. Reg. 1563 (Feb. 19, 1942).

48. NAT’L ARCHIVES, *supra* note 43.

an unsuccessful push for Japanese-Americans to voluntarily evacuate from the designated military zones, DeWitt initiated the forced evacuation and detention of persons of Japanese descent, citing his authority to do so under Executive Order 9066.⁴⁹ Congress ratified the Japanese internment policy when just days prior to the forced evacuation, it passed a law making violation of Executive Order 9066 a criminal offense.⁵⁰ As a result, 120,000 people, nearly two-thirds of whom were American citizens, were sent to “long-term relocation centers” in the U.S. interior.⁵¹ Those being forcibly evacuated had forty-eight hours to do so, and unless they were able to make arrangements for the sale or care of their homes, farms, businesses, or other private property in that time, their property was lost forever.⁵² In the internment camps, four or five families shared an army-style barrack with shared common areas and bathrooms.⁵³ Internees lived in these conditions for three years or more until the end of the war.⁵⁴ Ironically, hearkening back to the perverse justification that ethnic cleansing of the Indigenous population was to “save” them, internees were told that they were put in the camps for their own protection.⁵⁵ Japanese internment is one of the “most extreme case[s] of the construction and consequences of alien citizenship in American history . . . their citizenship [was nullified], exclusively on grounds of racial difference.”⁵⁶ By contrast, the government’s treatment of people of German or Italian descent was drastically different: people were investigated on an individual case-by-case basis.⁵⁷ Thus, all persons of Japanese descent were othered, presumed to be “racially inclined to disloyalty,” and perceived as a national security threat.⁵⁸ The differential treatment of Japanese-Americans during this time lays bare the racial animus undergirding the U.S. policies of restriction, surveillance, and control, disguised by national security justifications.

In sum, early legal documents, the Founders’ preferences, and official policies carried out under color of law demonstrate a strong desire for a homogeneous, white majority population. Concomitant with racism and xenophobia, there was a perceived threat posed by the “other,” reflected in the need to identify and surveil Black, Indigenous, and other people of color (BIPOC), as well as control their presence. These practices were incorporated into not just treatment of persons within the country but to new persons trying to immigrate to the country as well.

49. *Id.*

50. *Id.*

51. Mae Ngai, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 175 (2014); NAT’L ARCHIVES, *supra* note 43.

52. NAT’L ARCHIVES, *supra* note 43.

53. *Id.*

54. *Id.*

55. *Id.*

56. Ngai, *supra* note 51, at 175.

57. *Id.*

58. *Id.*

C. *Subjugation and Control Through U.S. Immigration Law*

In the late nineteenth century, the U.S. border became a frontline where “racial and imperial security was intertwined with practices of surveillance.”⁵⁹ Existing methods for surveillance and control of minority persons were now carried forward in new laws restricting access and limiting movements for people arriving from China, Japan, Mexico and other countries without majority Anglo-Saxon white populations. Remnants of these same racist immigration policies remain enshrined in law today, with preferential admission for immigrants from more prosperous, more homogeneously white countries, and easier routes to entry for immigrants with highly sophisticated skills.

Although immigration historians usually begin with nineteenth century laws and policies, scholars often overlook slavery and the laws and policies that protected the institution as the first system of U.S. “immigration law.”⁶⁰ This “artificial cleavage” obscures transatlantic slavery as a crucial “historical antecedent” of modern U.S. immigration law and policy.⁶¹ In reality, transatlantic chattel slavery was a major part of the nation’s first immigration system—it was state-sponsored, endorsed by the federal government’s actions or inactions, an important source of tax revenue, and essential to meeting the needs for a “controllable labor population . . . at an artificially low economic cost.”⁶² Although the brutal circumstances under which forced migrants from Africa entered the United States are different, “[t]he [B]lack American experience is an immigrant experience.”⁶³ Black people, like other immigrants of color, were also “othered,” ruthlessly subjugated and controlled, and their presence was viewed as a threat to white dominion. For example, Benjamin Franklin was opposed to the importation of enslaved people for the risk of “darken[ing]” the American population.⁶⁴ Thomas Jefferson, who was ostensibly opposed to the slave trade despite owning over 180 enslaved people, believed Black people were “inherently inferior to whites,” that a free Black population was a threat, that peaceful “racial coexistence” was not possible, and that colonization, or removal from areas populated by whites, was the only alternative to slavery.⁶⁵ The sentiments of Franklin and Jefferson during the period of the transatlantic slavery reveal how this system of immigration is a historical antecedent to the U.S. immigration laws and policies that followed. Subsequent immigrants of color were

59. Kundnani & Kumar, *supra* note 17.

60. Magee, *supra* note 39, at 746, 749 (citing Aaron S. Fogelman, *From Slaves, Convicts, and Servants to Free Passengers: The Transformation of Immigration in the Era of the American Revolution*, J. AM. HIST. 43, 50 (1998)).

61. *Id.* at 746, 748.

62. *Id.* at 747.

63. *Id.* at 745 n.5 (quoting Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85 (1999)).

64. Franklin, *supra* note 15, at 350.

65. William Cohen, *Thomas Jefferson and the Problem of Slavery*, 56 J. AM. HIST. 503, 507, 510, 525 (1969).

exploited as a source of cheap labor, viewed by the white population and the white-dominated government as a threat, and thus tracked, restricted, excluded, or expelled.

Despite the persistence of xenophobia since colonial times, the United States generally allowed immigration for most of its first century of existence due to a need for a labor force.⁶⁶ Chinese immigrants arrived in relatively large numbers in the mid-nineteenth century to work in California's gold-fields and later on to construct the transcontinental railroad.⁶⁷ Initially, they "were greeted with a mixture of enthusiasm and curiosity," but soon, their presence provoked deep hostility and resentment in the white population, which resulted in discriminatory local and national legislation.⁶⁸ Congress passed the first Chinese Exclusion Act in 1882, which outlawed all immigration by Chinese laborers.⁶⁹ The Supreme Court upheld the Act in *Chae Chan Ping v. United States*, in part on national security grounds.⁷⁰ Notably, the opinion compared Chinese immigrants arriving in the United States to a hostile army invading its shores: the Court reasoned that "[i]t matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us."⁷¹ The Court further described that Chinese "immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization"—their failure to assimilate in effect created "a Chinese settlement within the state," and the Court doubted their loyalty to the United States.⁷² In sum, the opinion wrapped up racist and xenophobic rhetoric with security concerns, and found that the federal government had the sovereign authority to "exclude aliens from its territory."⁷³ For the Chinese population already living in the United States, the Chinese Exclusion Act led to "decades of family separation, legal insults (like anti-miscegenation laws), and violence."⁷⁴ The Act's legal discrimination against Chinese immigrants was later extended to those seeking to immigrate to the United States from South Asia and Japan.⁷⁵

Further immigration laws tied entry to the United States to the preferred status of certain racial groups, facilitated a heightened awareness of

66. LUCY E. SALYER, *LAW AS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 2 (1995).

67. CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* 1-2 (1994); LIBR. OF CONG., *Immigration to the United States, 1850-1900*, LOC, <https://perma.cc/24RB-Q9QH>.

68. *Id.* at 2, 9–10, 147.

69. Chinese Exclusion Act of 1882, 47 Cong. Ch. 126, 22 Stat. 58.

70. *Chae Chan Ping v. United States*, 130 U.S. 581, 606, 609 (1889).

71. *Id.* at 606.

72. *Id.* at 595.

73. David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 35 (2015) (quoting *Chae Chan Ping*, 130 U.S. at 603).

74. Mae Ngai, *Opinion, Why Trump Is Making Muslims the New Chinese*, CNN (Jan. 30, 2017, 6:58 AM), <https://perma.cc/4MBY-TARF>.

75. *Id.*

territoriality requiring increased surveillance, and created the concept of “illegal immigration.” The Johnson-Reed Immigration Act of 1924 institutionalized the idea of an American nation “that embodied certain hierarchies of race and nationality” and catered to the “prejudices among white Protestant Americans from Northern European backgrounds and their desire to maintain social and political dominance.”⁷⁶ The Act imposed a quota system intended to restrict immigration based on national origin.⁷⁷ In order to implement the quota system, the Act required the Departments of Labor, Commerce, and State to form a committee, the Quota Board, to allocate quotas by national origin.⁷⁸ The law required that the quota allocations to countries were proportionate to Americans who could trace their origins to that geographic area.⁷⁹ In order to do this, the Board constructed categories, such as “national original,” “native stock,” and “nationality,” which were based on “certain social values and political judgments.”⁸⁰ For example, “native stock” referred to persons who were not born in the United States, but were “descended from the white population of the United States at the time of the nation’s founding.”⁸¹ The statute defined “inhabitants” of the United States, and stipulated that the term did *not* include: “(1) immigrants from the Western Hemisphere or their descendants;” “(2) aliens ineligible for citizenship or their descendants;” “(3) the descendants of slave immigrants;” and “(4) the descendants of the American aborigines.”⁸² Pursuant to this definition, the Board discounted all Black, mixed race, Chinese, Japanese, and South Asian people, as well as people from Alaska, Hawaii, and Puerto Rico when it calculated the proportions of the nationalities represented in the American population.⁸³ Thus, the law “excised all nonwhite, non-European peoples” from its “legal representation of the American nation,” effectively “erasing them from the American nationality.”⁸⁴ As a result, European countries were allocated relatively large quotas, while African countries received a disproportionately small fraction of the quota allocations, considering African Americans constituted nine percent of the total American population in 1920.⁸⁵ In this way, the Act and its implementation created a white, European-American national identity and reified a race-based hierarchical immigration policy.⁸⁶ Further, the Act required and normalized not only passports—which were initially introduced in the United States as an emergency

76. Ngai, *supra* note 51, at 23.

77. *Id.* at 25–27.

78. *Id.* at 25.

79. *Id.*

80. *Id.*

81. *Id.* at 25–26.

82. Johnson-Reed Immigration Act of 1924, 68 Cong. Ch. 190, § 11(d), 43 Stat. 153, 159; *see also* Ngai, *supra* note 51, at 26.

83. Ngai, *supra* note 51, at 26.

84. *Id.*

85. *Id.*

86. Kundnani and Kumar, *supra* note 17, at 5.

war-time measure to track and restrict people's movements—but also visas, as documentary proof of national identity and permission to enter respectively.⁸⁷ In sum, although the Johnson-Reed Immigration Act was not the first immigration system, or restriction policy, in the United States, this regime was a watershed moment for at least two reasons: first, the Act formally legitimized a hierarchical system of who was allowed into the country based on constructed racial preferences, and second, the Act “articulated a new sense of territoriality, which was marked by unprecedented awareness and state surveillance” of U.S. borders.⁸⁸ Thus, “securing our borders” and the concept of the “illegal immigrant” was borne of a racially motivated government law to preserve America's white majority rule. Although subsequent immigration law eliminated the explicitly racialized national origins quota system, it carried forward numerical restriction and cemented the concept of the “illegal alien,” which is intertwined with security.⁸⁹

The construction of immigration status was accompanied by the criminalization of unauthorized migration and crime-based exclusion or deportation.⁹⁰ Immigrant criminalization, like the restriction laws, has its origins in racism and xenophobia.⁹¹ For example, the Page Act of 1875 criminalized the importation of Chinese women for purposes of prostitution.⁹² Congressman Horace Page of California characterized Chinese women as prostitutes and asserted that “[t]hieving, trickery, cheating, and fraud are taught and encouraged as the essential elements of success” in Chinese institutions.⁹³ Notably, criminalizing migrants and migration helped justify a security-centered approach to regulating movement and enforcing who belongs in American society.⁹⁴ Criminalization facilitated the demonization of migrants and the constructed threat posed by them, which is concomitant with dehumanization (discussed in more detail below), and made migrants easy targets for public safety campaigns.⁹⁵ This process, inextricably intertwined with racial animus, primed immigration law enforcement to become a natural, central pillar in the War on Terror narrative following the 9/11 attacks. The following section will provide an overview of the modern U.S. national security apparatus to provide further context for DHS's border and immigration agencies and the post-9/11 security environment.

87. Ngai, *supra* note 51, at 19.

88. *Id.* at 2–3.

89. *Id.* at 237, 239, 241, 264.

90. Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 185 (2018).

91. *Id.* at 185, 190–191.

92. *Id.* at 184.

93. *Id.* (quoting CONG. GLOBE, 37th Cong., 2d Sess. 2939 (1862)) (statement of Sen. Aaron Sargent).

94. César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 214 (2018); *see also* Das, *supra* note 90, at 178.

95. García Hernández, *supra* note 94, at 214, 216.

D. *The Modern National Security System*

The modern national security system stems from American imperialism and racial subjugation. By the turn of the twentieth century, the United States had largely succeeded in its coast-to-coast colonizing project.⁹⁶ As such, its colonial aspirations turned outward.⁹⁷ The U.S. conquest of the Philippines proved to be a training ground for the domestic security apparatus.⁹⁸ There, methods of surveillance and repression—such as compiling dossiers on political opponents, spreading disinformation through the media, and “planting agent provocateurs among militants”—were developed and perfected to squash Filipino resistance to American colonization.⁹⁹ In the Philippines, “[c]ontrol over information proved as effective a tool of colonial power as physical force.”¹⁰⁰ The extreme, emergency environment created by the onset of World War I led to the establishment of a domestic security apparatus, unrestrained by the courts or Constitution.¹⁰¹ The methods that had been developed and tested in the Philippines were implemented domestically, “provid[ing] both precedents and personnel for the establishment of a U.S. internal security apparatus.”¹⁰² During World War I, the FBI and Military Intelligence grew into “all-powerful agencies charged with extirpating any flicker of disloyalty anywhere in America.”¹⁰³ Their domestic surveillance activities during this time focused on monitoring 10 million German-American immigrants, which included physically examining 30 million letters and spying on immigrants, unions, and socialists.¹⁰⁴ During the interwar period, the surveillance apparatus was scaled back amid privacy concerns, but the mass surveillance apparatus reemerged in full force during World War II.¹⁰⁵ In response to fears of enemy espionage, President Franklin Roosevelt authorized the FBI to engage in warrantless surveillance of American citizens.¹⁰⁶ After the end of World War II, the United States emerged as a global superpower, and the idea of American exceptionalism—the notion that America was unique, built on liberal principles, and destined to be a global leader—firmly took hold.¹⁰⁷ This liberal global-leader image served to obscure “the centrality of whiteness to the security narrative.”¹⁰⁸ In reality, national security surveillance carries with it a legacy of racism,

96. Kundnani and Kumar, *supra* note 17, at 6.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. ALFRED W. MCCOY, *POLICING AMERICA’S EMPIRE: THE UNITED STATES, THE PHILIPPINES, AND THE RISE OF THE SURVEILLANCE STATE* 294 (Alfred W. McCoy et al. eds., 1st ed. 2009).

102. *Id.*

103. Alfred W. McCoy, *Surveillance and Scandal: Time-Tested Weapons for US Global Power*, *NATION* (Jan. 21 2014), <https://perma.cc/QG22-GQR4>.

104. *Id.*

105. *Id.*

106. *See id.*

107. Kundnani and Kumar, *supra* note 17.

108. *Id.*

xenophobia, and imperialism, as well as extralegal practices borne of war-time emergency that were carried forward into peacetime domestic life.

After World War II, Congress passed the National Security Act of 1947, which normalized and reified the entrenchment of “security” into post-war everyday American life.¹⁰⁹ The Act created the Office of the Secretary of Defense, the Joint Chiefs of Staff, the National Security Council, and the Central Intelligence Agency.¹¹⁰ Consequently, every facet of American life became relevant to the national defense strategy, and systems of surveillance were essential to sustaining this new order.¹¹¹ For example, FBI surveillance focused on a wide range of sociopolitical movements, activists, and public figures, including Martin Luther King, Jr., Malcolm X, the National Lawyers Guild, the Black Panther Party, the Socialist Workers Party, and the Federation of American Scientists.¹¹² Between 1955 and 1978, the FBI conducted over 900,000 surveillance cases, unrestrained by the Constitution’s purported protections.¹¹³ This “no holds barred” approach was a core motivation for the U.S. Senate’s 1975 Church Committee investigation into U.S. intelligence agencies’ abuses.¹¹⁴ The Church Committee investigation resulted in Congress passing the Foreign Intelligence Surveillance Act (“FISA”) and forming the FISA courts, which were tasked with issuing warrants for all national security wiretaps.¹¹⁵

The modern national security regime was turbocharged after the 9/11 attacks. For a time, the FISA courts purportedly reined in the surveillance state for a time by creating a “wall” between surveillance for law enforcement purposes and surveillance for intelligence gathering.¹¹⁶ However, the 9/11 attacks, and the subsequent blame placed on intelligence failures, essentially eliminated the FISA “wall” as a meaningful backstop to government surveillance abuses.¹¹⁷ In response to the attacks, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT Act”). Significantly, the Act’s greatest impact concerned surveillance and immigration.¹¹⁸ For example, the Act amended the FISA Act, relaxing FISA’s restrictions on conducting surveillance and expanding the scope of

109. *Id.*

110. *Id.*

111. *Id.* (“Every aspect of life—the social, political, intellectual, and economic—was conceived as playing a role in national defense, and a massive security establishment was built up.”).

112. See ATHAN G. THEOHARIS, ABUSE OF POWER: HOW COLD WAR SURVEILLANCE AND SECRECY POLICY SHAPED THE RESPONSE TO 9/11 46 (2011).

113. MCCOY, *supra* note 101, at 341.

114. *Id.*; see also McCoy, *supra* note 103.

115. McCoy, *supra* note 103.

116. See Hina Shamsi and Alex Abdo, *Privacy and Surveillance Post-9/11*, AM. BAR ASS’N. (Jan. 1, 2011), <https://perma.cc/Z76H-T2GX>.

117. See *id.*; see also NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMM’N REPORT 78–79 (2004), <https://perma.cc/K5RT-WES3>.

118. See Kyle Welch, *The PATRIOT Act and Crisis Legislation: The Unintended Consequences of Disaster Lawmaking*, 43 Capital U. L. Rev. 481, 487 (2015).

surveillance to include cell phones, the internet, and email.¹¹⁹ Further, the PATRIOT Act amended the Immigration and Nationality Act (“INA”), instituting and normalizing mandatory indefinite detention of “suspected terrorists.”¹²⁰ The PATRIOT Act, “force-fed through the legislative process” during a time of crisis, was ostensibly designed to prevent future terrorist attacks, but it has been criticized for not being closely tailored to the evil it was meant to address.¹²¹ Instead, the Act—and the post-9/11 security environment—has enabled the government to routinely and extralegally derogate constitutional civil liberties, particularly for people of color.¹²²

The period after the 9/11 attacks marked a new era in American surveillance history where “Muslimness” was racialized and made visible to the surveillance gaze.¹²³ Within a few weeks after the attacks, public opinion polls showed that “mainstream America” believed “Arab and Muslim Americans should be profiled and targeted for surveillance and interrogation in the name of national security.”¹²⁴ Evidently, the American public was willing to group all people who are Muslim, Arab, and Middle-Eastern together as a whole and hold them responsible for 9/11.¹²⁵ Consequently, Muslim people in the United States were perceived as dangerous and suspicious and thus became vulnerable to government abuse and denial of civil rights.¹²⁶ For example, in a move reminiscent of Japanese Internment, 83,000 young Muslim men living in the United States were forced submit to fingerprinting, questioning, and registering with U.S. immigration officials.¹²⁷ Moreover, immigration law was the most effective weapon to restrict and control the Arab and Muslim communities, in large part because the immigration courts have fewer legal protections.¹²⁸ Thus, “thousands were detained in secret . . . refused trials or hearings for months; interrogated under highly coercive conditions . . . and detained indefinitely solely on Attorney General John Ashcroft’s ‘say-so.’”¹²⁹ The 9/11 attacks and the legal and policy response in the name of national security was a watershed in some sense, but the theme of indiscriminately demonizing a foreign racial other, denying them civil and human rights, and subjecting them to government-sponsored subjugation and control is a theme that has remained constant throughout American history. Further, it is important to note the knee-jerk reaction to conflate the threat of

119. *Id.* at 497–98.

120. *Id.* at 495.

121. *Id.* at 483–84.

122. See Hilal Elver, *Racializing Islam Before and After 9/11: From Melting Pot to Islamophobia*, 21 *TRANSNAT’L L. & CONTEMP. PROBS.* 119, 142 (2012).

123. Kundnani and Kumar, *supra* note 17.

124. Elver, *supra* note 122, at 138 (quoting Anthony Cook, *Encountering the Other: Evangelicalism and Terrorism in a Post-9/11 World*, 20 *J.L. & RELIGION* 1, 3 (2005)).

125. *Id.*

126. *Id.* at 139.

127. *Id.* at 140.

128. *Id.* at 139.

129. *Id.* at 141 (quoting JILL NORGREN & SERENA NANDA, *AMERICAN CULTURAL PLURALISM AND LAW* 248–49 (3d ed. 2006)).

terrorism and a national security threat with immigrants since the constructed security threat posed by immigrants of color is a theme that has remained constant since colonial times. In sum, the national security apparatus has three important aspects: first, it was borne out of emergency measures but then entrenched into everyday life; second, its methods were honed and then indiscriminately weaponized against racial others; and third, its abuses are often shielded from legal scrutiny or accountability, which is discussed in the next section.

E. *The Role of the Courts: Extreme Deference to the Political Branches to Determine Issues Affecting National Security*

The Federal Judiciary, often thought to protect individual rights against majority encroachment, has historically demonstrated extreme deference to Congressional and Executive action that touches on national security.¹³⁰ Consequently, minorities have found little protection in the courts when challenging laws that subject them to surveillance and repression for national security reasons.

The concept of denying equal rights on the basis of national security was developed and legitimized through cases involving people of color, or the “alien other,” in the United States. Specifically, the Supreme Court’s opinion in *Chae Chan Ping* established the plenary power doctrine, which is based on Congress and the executive branch’s primacy in matters of national security.¹³¹ This doctrine facilitates the abdication of the courts’ duty to hold the other branches accountable when the government claims national security is implicated, thus shielding the U.S. government from constitutional violation claims due to discriminatory targeting of immigrant groups.¹³² The plenary power doctrine, which stems from an immigration law (the Chinese Exclusion Act), and accompanying Court decision were openly motivated by racism and xenophobia and are used to this day “to deny civil rights to vulnerable groups because of their perceived threat to national security.”¹³³ The Supreme Court’s decision in *Trump v. Hawaii* is one recent example, discussed in greater detail below.¹³⁴

One of the most salient examples of this trend is *Korematsu v. United States* (1944), by which the Supreme Court legitimized the U.S. government’s restriction and subjugation of the “alien other”—Japanese Americans—for national security purposes.¹³⁵ Ironically, *Korematsu* and the preceding *Hirabayashi v. U.S.* (1943) laid the groundwork for heightened scrutiny

130. See, e.g., DAVID RUDENSTINE, *THE AGE OF DEFEERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER* 3 (2016).

131. Mary M. Seandal, *Special Registration: Discrimination in the Name of Security*, 8 J. GENDER, RACE & JUST. 735, 745–46 (2005).

132. *Id.* at 745; see also RUDENSTINE, *supra* note 130.

133. Seandal, *supra* note 131, at 746.

134. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

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

review in Equal Protection jurisprudence.¹³⁶ Nevertheless, the *Korematsu* Court found that the government's national security considerations could outweigh even fundamental due process and equal protection interests of any particular, and especially non-white,¹³⁷ group of people.¹³⁸ The Court's decision permitted hundreds of thousands of Japanese Americans to be summarily removed from their homes and relocated to hastily constructed, isolated barracks with no process for relocated persons to challenge whether they actually posed any security risk.¹³⁹ The Court also failed to seriously prod the government's security argument, giving great weight instead to the fact that "military authorities considered that the need for action was great, and time was short."¹⁴⁰ Later, many of the military's own threat assessments were shown to be based on false reports and exaggerations.¹⁴¹ *Korematsu* illustrates how the U.S. government has invoked "national security" to justify racial and xenophobic discrimination, and in so doing, has circumvented constitutional protections that are purportedly applicable to all people within the jurisdiction of the United States.¹⁴² To date, the *Korematsu* decision has not been formally overturned, although the Court has determined that relocation of U.S. citizens to internment camps was "objectively unlawful" and outside the scope of the president's authority.¹⁴³

Several recent cases at the intersection of racism, xenophobia and national security have adhered to the Court's pattern of deferring to the political branches' assessment of national security issues, most notably Trump's "Muslim Ban," challenged in *Trump v. Hawaii*. During his election campaign, then-presidential candidate Donald Trump vowed to ban Muslim people from entering the United States upon taking office.¹⁴⁴ Within days of

136. See *id.* at 216; *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943). Notwithstanding the perverse and seemingly contradictory outcome, the *Korematsu* Court asserted, "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." *Korematsu*, 323 U.S. at 216.

137. Although individuals of German and Italian national origin were also the target of discrimination after Pearl Harbor, "it was only the non-Caucasian Japanese who were the target of concentration camps." Epps and Furman, *supra* note 3, at 2.

138. See *Korematsu*, 323 U.S. at 223.

139. HISTORY, *Japanese Internment Camps* (Oct. 29, 2009), <https://perma.cc/WE54-Z4TZ>.

140. See *Korematsu*, 323 U.S. at 223.

141. HISTORY, *supra* note 139.

142. U.S. Const. Amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). While the Court has held that "[u]ndocumented aliens cannot be treated as a suspect class," *Plyler v. Doe*, 457 U.S. 202, 210 (1982), even under rational-basis review (which weighs heavily in favor of the government), a government action is not legitimate if it is "divorced from any factual context from which we could discern a relationship to legitimate state interests," and "its sheer breadth [was] so discontinuous with the reasons offered for it" that the initiative seemed "inexplicable by anything but animus." *Trump v. Hawaii*, 138 S.Ct. 2392, 2420 (quoting *Romer v. Evans*, 517 U.S. 620, 632, 635 (1996)). Simply put, "classifications predicated on discriminatory animus can never be legitimate because the Government has no legitimate interest in exploiting 'mere negative attitudes, or fear' toward a disfavored group." *Id.* at 2442 (Sotomayor, J., dissenting (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985))).

143. *Trump*, 138 S. Ct. at 2423 ("The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority.").

144. *Id.* at 2417.

entering office, Trump issued the first iteration of his “Muslim Ban,” which directed DHS to review the “adequacy of information provided by foreign governments,” and pending this review, indiscriminately barred citizens of seven majority Muslim countries from entering the United States.¹⁴⁵ Crucially, these countries were targeted based on their perceived “heightened terrorism risks.”¹⁴⁶ By the time the Supreme Court considered the case, the “Muslim Ban” was in its third iteration (EO-3).¹⁴⁷ The ban was now a proclamation and the result of an “extensive process of interagency consultation,” which played a role in the Court upholding its constitutionality.¹⁴⁸ Ultimately, the majority found that the President did not exceed his authority by issuing EO-3, and noted that the Court inserting itself into questions of national security presented separation of powers issues.¹⁴⁹ Consequently, the Court found the executive’s purported national security-based justifications sufficient and was thus, highly deferential to the executive, applying rational-basis scrutiny to the constitutionality of EO-3 and rejecting the petitioners’ claims of discrimination and civil rights violations.¹⁵⁰

Significantly, in a forceful dissent, Justice Sonia Sotomayor called out the majority for upholding the “Muslim Ban” despite well-documented evidence that the executive action was motivated by anti-Muslim animus “now masquerad[ing] behind a façade of national-security concerns.”¹⁵¹ Sotomayor analogized the majority opinion to the holding in *Korematsu*, where “[a]s here, the government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion.”¹⁵² Significantly, Chief Justice John Roberts rejected Sotomayor’s analogy, but took the opportunity to repudiate *Korematsu*.¹⁵³ According to Roberts, *Korematsu* was inapposite because it operated within U.S. borders and affected U.S. nationals, while the “Muslim Ban” concerned “the privilege of admission.”¹⁵⁴ However, Roberts’ reasoning fails to address the core issue: the United States has a long history of denying equal rights to people of color—subjugating, restricting, and excluding people of color based on race, and, as Sotomayor points out, cloaking this thinly-veiled racism and xenophobia in national security justifications. Thus, the *Trump v. Hawaii* majority perpetuated the institutional protection of racial-animus-motivated law and policies, deploying the plenary power doctrine articulated in *Chae Chan Ping* to effectively abdicate

145. *Id.* at 2403 (quoting Exec. Order No. 13769, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed Reg. 8977 § 3(a), (c) (2017)).

146. *Id.*

147. Mark Tushnet, *Trump v. Hawaii: “This President” and the National Security Constitution*, 2018 SUP. CT. REV. 1, 3 (2018).

148. *Id.* at 4.

149. *Trump v. Hawaii*, 138 S. Ct. at 2410, 2419.

150. *Id.* at 2420–21.

151. *Id.* at 2433 (Sotomayor, J., Dissenting).

152. *Id.* at 2447.

153. *Id.* at 2423.

154. Tushnet, *supra* note 147, at 2.

the Court's duty to uphold constitutional principles intended to protect vulnerable communities. Accordingly, the spirit of *Korematsu* lives on, camouflaged in *Chae Chan Ping*'s plenary power reasoning. Notably, Roberts' reference to "the privilege of admission" gets at the heart of the issue: for the majority of U.S. history, the privilege of admission has been restricted for nonwhites in an effort to preserve the white majority and white national identity. Supreme Court jurisprudence reveals how national security justifications have legitimized and obscured racist and xenophobic laws and policies throughout U.S. history, and the Court has been complicit in perpetuating this practice.

II. CBP AND ICE: CONDUITS FOR WHITE SUPREMACY

As described above, the nexus between border and immigration law and policy and white supremacy has often been obscured by the invocation of national security. Today, CBP and ICE are central to carrying forward the white supremacist ideology of the country's early legal documents, framers, and legal precedent. Part II starts an overview of two interrelated processes: securitization and militarization, which provide a useful analytical lens for examining the history and conduct of the border and immigration agencies that were folded into DHS. Part II then illuminates the critical role of racism and xenophobia in these agencies' structure, organization, and activities from their founding. Part II will describe specific atrocities perpetrated by ICE and CBP that have escaped scrutiny and accountability, primarily as a result of purported national security rationales. Finally, the Note will elucidate the culture of racism and rogue behavior that characterizes ICE and CBP conduct and address how this culture primed the agencies for perpetrating violence domestically against civilians who were exercising their constitutional rights during the Trump administration.

A. *Theorizing Violence and Control: Securitization of Migrants and Migration and the Militarization of the Border and Immigration Agencies*

An understanding of the relationship between securitization and militarization clarifies the links between racism, xenophobia, and the atrocities perpetrated by the border and immigration agencies. Throughout U.S. history, the government identified the "alien others," presented their presence in the country as a threat, criminalized their status, and legitimized extraordinary dehumanizing treatment of vulnerable groups shielded by national security justifications. Relatedly, the militarization of immigration law enforcement agencies was facilitated by the securitization of migrants and migration and further contributed to the inhumane treatment of vulnerable groups.

Securitization is the process of presenting something as an existential threat, thereby justifying extraordinary measures to address it.¹⁵⁵ In other words, a security threat is not a given, it is constructed through a speech act: “by saying ‘security,’ a state representative declares an emergency condition, thus claiming a right to use whatever means are necessary” to neutralize the threat.¹⁵⁶ This process plays a significant role in the suspension of legal norms with devastating consequences. For example, immediately following the 9/11 attacks, the U.S. government zeroed in on “terrorist aliens.”¹⁵⁷ As discussed above, this focus had racist and xenophobic undertones and precipitated sweeping discriminatory policies disparately impacting people of color, namely Muslim and Middle Eastern communities.¹⁵⁸ In his public remarks on September 12, 2001, President George W. Bush stated that the United States was facing a different kind of enemy: an enemy that “hides in the shadows, and has no regard for human life. . . [that] preys on innocent and unsuspecting people.”¹⁵⁹ Here, President Bush described an existential threat to the American way of life posed by a vague enemy using demonizing and dehumanizing language. Within five days of the attacks, Vice President Richard Cheney went on *Meet the Press* and said that “counterterrorism efforts would require the use of ‘any means at our disposal.’”¹⁶⁰ This resulted in a government-sanctioned torture program, the normalization of indefinite detention (including for U.S. citizens), an offshore prison (Guantanamo Bay) created to bypass U.S. law, and mass warrantless surveillance of the American public.¹⁶¹ The United States’ response to the 9/11 attacks exemplifies how securitization—buttressed by demonization and dehumanization of the “dangerous other,” in this case people of Muslim or Middle Eastern origin—facilitates cruel, inhumane, and extralegal conduct.¹⁶²

This phenomenon can also be observed in the rhetoric of the Trump administration, which facilitated increasingly brutal enforcement at the U.S.-Mexico border. Trump himself stated that undocumented immigrants “aren’t people. These are animals”;¹⁶³ and he publicly called Mexican people “drug

155. See BARRY BUZAN, OLE WAEVER, & JAPP DE WILDE, *SECURITY: A NEW FRAMEWORK FOR ANALYSIS* 21 (1998).

156. *Id.*

157. See, e.g., John Ashcroft, Att’y Gen., U.S. Dep’t of Justice, Address Outlining Foreign Terrorist Tracking Task Force (Oct. 31, 2001).

158. César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 206 (2018); Elver, *supra* note 122, at 138; Bill Ong Hing, *Misusing Immigration policies in the Name of National Security*, 6 THE NEW CENT. REV. 195, 199–201 (2006).

159. George W. Bush, Remarks by the President in Photo Opportunity with the National Security Team (Sept. 12, 2001).

160. KAREN J. GREENBERG, *ROGUE JUSTICE: THE MAKING OF THE SECURITY STATE* 3 (2016).

161. *Id.*

162. Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3.3 PERSONALITY AND SOC. PSYCHOL. REV. 193, 200 (1999); see also Sophia Porotsky, *Pax Americana: The Successful Securitization of the Triple Threat of Terrorism, ‘Outlaw’ Regimes, and Weapons of Mass Destruction* 38–56 (Apr. 26, 2013) (M.A. Thesis, University of St Andrews), <https://perma.cc/8CRQ-66F4>.

163. Linda Qiu, *The Context Behind Trump’s ‘Animals’ Comment*, N.Y. TIMES (May 18, 2018), <https://perma.cc/7HTQ-PJ28>,

smugglers,” “criminals,” and “rapists.”¹⁶⁴ Moreover, the Trump administration tied its justifications for building a wall along the U.S.-Mexico border to the unsubstantiated claim that thousands of “known and suspected terrorists” were crossing the southern border.¹⁶⁵ The resulting atrocities, discussed in greater detail below, included forced family separation and indefinite detention in subhuman conditions. Here too, “alien others”—in this case, Latinx people—were demonized, dehumanized, and constructed as a threat to national security, which was even easier post-9/11 given the evident fungibility of the “terrorist” label. Cruel, extralegal conduct followed.

In addition to securitization, militarization also plays a role in border and immigration agencies’ history of excessive force and civil and human rights violations, with racism and xenophobia animating the conduct throughout. Militarism is “a set of beliefs, values, and assumptions that stress the use of force and threat of violence as the most appropriate and efficacious means to solve problems.”¹⁶⁶ Militarization is “the process of arming, organizing, planning, training for, threatening, and sometimes implementing violent conflict.”¹⁶⁷ This process implements “the central elements of the military model to an organization or particular situation.”¹⁶⁸ Taking the Border Patrol as an example, the 9/11 attacks were used to justify reckless expansion and accelerated militarization of this immigration law enforcement agency.¹⁶⁹ The line between military and civilian law enforcement has been blurred in the Border Patrol, facilitated by the implementation of military technology, hardware, and strategy, and the militarization of the agency’s culture and organizational structure.¹⁷⁰ As a result, “agents think of themselves as part of the military.” This is validated and reinforced by the agency recruiting heavily from veterans who served in Afghanistan and Iraq, who constitute 30 percent of the workforce as of 2016.¹⁷¹

Conflating military and civilian law enforcement is harmful because these entities have different missions and priorities. The threat to American democracy posed by military enforcement of civilian laws was examined in the *Wounded Knee* cases in the 1970s, in which domestic law enforcement

164. Full Text: Donald Trump Announces a Presidential Bid, WASH. POST (June 16, 2015), <https://perma.cc/7TEM-7W6G>.

165. Julia Ainsley, *DHS Spokeswoman Pushed NBC News to Retract Accurate Story About Terrorists at the Border*, NBC NEWS (Sept. 10, 2020), <https://perma.cc/SLN7-RU6R>.

166. Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 4 POLICING 1, 3 (2007).

167. *Id.*

168. *Id.*

169. Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, POLITICO (Nov.–Dec. 2014), <https://perma.cc/5LE5-CLZK>; Reece Jones & Corey Johnson, *Border Militarisation and the Re-Articulation of Sovereignty*, 41 TRANSACTIONS OF INST. OF BRIT. GEOGRAPHERS 187 (2016).

170. Jones & Johnson, *supra* note 169, at 190.

171. *Id.* at 196.

agencies enlisted the help of the U.S. military to quell civilian unrest.¹⁷² Unlike civilian law enforcement, “military personnel must be trained to operate under circumstances where the protection of constitutional freedoms cannot receive the consideration needed in order to assure their preservation.”¹⁷³ The Eighth Circuit further articulated the need for a distinction between the military and domestic law enforcement in *Bissonette v. Haig* (1985), noting, “[c]ivilian rule is basic to our system of government,” and the use of military force makes civilian government vulnerable “to the threat of military rule and the suspension of constitutional liberties.”¹⁷⁴ In an ominous foreshadowing of the Portland protests, discussed in further detail below, the court stated, “military enforcement of the civil law leaves the protection of vital [constitutional] rights in the hands of persons who are not trained to uphold these rights.”¹⁷⁵ Further, “[i]t may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.”¹⁷⁶ Militarization facilitates excessive force and inhumane treatment because military training is intended for hostile, violent conflict, not effectuating border and immigration policy. A battlefield atmosphere of emergency and survival may necessarily entail the use of force, including deadly force, but domestic law enforcement does not inherently present the same life or death environment. The securitizing process of elevating border and immigration law enforcement to an existential threat operates as a justification for the militarization of border and immigration agencies, and the concomitant disregard for human rights and human life.

Thus, the securitization and militarization of border and immigration policy and enforcement work in tandem: the government constructs a threat of a dangerous “alien other.” This constructed national security threat justifies extraordinary means—including the unprecedented militarization of civilian law enforcement agencies—brutal conduct ensues, and its racist and xenophobic motivation is obscured under a veil of national security justifications.

The following sections will examine the history of the border and immigration agencies in order to elucidate their racist and xenophobic underpinnings. This history reveals that these agencies and their antecedents have been effectuating white supremacist policies throughout U.S. history, cloaked in national security rationales, with the predictable result of inhumane treatment of vulnerable populations.

172. See, e.g., *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985); *United States v. McArthur*, 419 F. Supp. 186 (D.N.D. 1975); *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975).

173. *McArthur*, 419 F. Supp. at 193–94.

174. *Bissonette*, 776 F.2d at 1387.

175. *Id.*

176. *Id.*

B. *Creating DHS: Conflating National Security with Immigration Enforcement by Design*

This section describes the formation of DHS and pre-DHS histories of CBP and ICE, to describe the means by which these agencies, acting to further “national security” goals, have increasingly used brutal force against persons seeking entry to the United States. Some former DHS officials and other government actors blame DHS’s haphazard formation and failed leadership for its many civil rights transgressions.¹⁷⁷ Yet, the extent and severity of DHS’s repeated abuses are better explained by the agency’s incorporation of ICE and CBP’s historical legacy of racism and xenophobia into its own structure and goals.

Prior to DHS’s formation, border and immigration-related functions were concentrated in INS, an agency within the Justice Department.¹⁷⁸ INS was formed in 1933 when President Franklin Roosevelt merged the Border Patrol and the Bureau of Citizenship.¹⁷⁹ In its nearly seventy years of existence, INS was perpetually understaffed and under-resourced.¹⁸⁰ INS’s death knell came after 9/11, when it was revealed that due to ineptitude, the agency had approved long-delayed visas for two of the 9/11 hijackers.¹⁸¹ INS was the only agency to be completely disbanded in response to the terrorist attacks.¹⁸²

By contrast, the formation of DHS was the most significant administrative response to the 9/11 attacks.¹⁸³ Established by the Homeland Security Act of 2002, DHS was a Frankenstein-style amalgamation of 22 disparate agencies ripped from five departments,¹⁸⁴ making it the most significant government reorganization since the creation of the Department of Defense in 1947.¹⁸⁵ DHS’s mission was gargantuan: “preventing terrorism, securing the border, regulating immigration, and setting immigration policy.”¹⁸⁶ Yet, the agency was not given the same investigative, intelligence, or military capabilities as the FBI, CIA, or the Pentagon.¹⁸⁷ This was odd since, according to Richard Clarke, who served on the National Security Council for Presidents George H.W. Bush, Bill Clinton, and George W. Bush, DHS was sold to Congress as

177. See Susan B. Glasser & Michael Grunwald, *Department’s Mission was Undermined from Start*, WASH. POST (Dec. 22, 2005), <https://perma.cc/K3UT-RU4E>; see also Richard A. Clarke, *Dismantle the Department of Homeland Security*, WASH. POST (July 30, 2020), <https://perma.cc/KRR8-NVWK>; *Vital Interests Podcast: Richard Clarke on DHS, Governance, and the 2020 Presidential Election*, CTR. ON NAT’L SEC. (Oct. 13, 2020), <https://perma.cc/FW6C-TSB5>.

178. Graff, *supra* note 169.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. AMY POPE, *MIGRATION POL’Y INST., IMMIGRATION AND U.S. NATIONAL SECURITY: THE STATE OF PLAY SINCE 9/11 11* (2020).

184. *Id.* at 11; see also *Vital Interests Podcast*, *supra* note 177.

185. Glasser & Grunwald, *supra* note 177.

186. Pope, *supra* note 183, at 11.

187. Glasser & Grunwald, *supra* note 177.

a counter-terrorism department. However, “[DHS] never [absorbed] the lead agency for domestic counter-terrorism: the FBI.”¹⁸⁸

Significantly, DHS was contradictory on two fronts: first, it was a *domestic* “counter-terrorism” agency created in response to the 9/11 terrorist attacks, which were explicitly motivated by America’s *foreign* policy;¹⁸⁹ and second, DHS did not have meaningful counter-terrorism capacity at its inception because it lacked investigative and intelligence capabilities. This contradiction and innate ineptitude naturally channeled DHS’s focus into the remainder of its stated mission: securing the border, regulating immigration, and carrying out immigration policy.¹⁹⁰ This contradiction cannot be overlooked: the formation of DHS, which entailed the unprecedented funding and militarization of the border and immigration agencies, was packaged as one thing—counter-terrorism—but was weaponized in service of another, far more sweeping capacity—border and immigration enforcement generally. In other words, a significant U.S. government response to foreign hostility was to turn its military might and surveillance gaze inward: to domestic immigration law enforcement. The immensely broad category of people impacted by this securitizing maneuver and DHS’s lack of investigative and intelligence capabilities belies a plausible, targeted counter-terrorism policy, and exposes an underlying motivation: racial and xenophobic animus.

The conflation of the threat of terrorism with border and immigration security inherent in DHS’s structure reflects longstanding patterns of racism and xenophobia in U.S. national security policy.¹⁹¹ The remnants of INS, previously organized under the Justice Department, and the United States Customs Service, previously part of the Treasury Department, were folded into DHS and re-divided into three components: CBP, ICE, and United States Citizenship and Immigration Services (USCIS).¹⁹² Significantly, situating these customs and immigration enforcement functions within DHS further entrenched and legitimized the conflation of national security policy and immigration law enforcement. Similar to *Korematsu* or *Trump v. Hawaii*, this national security frame facilitates the demonization and dehumanization of “alien others” and serves to justify the securitization and militarization of these civilian law enforcement agencies, thus obscuring the racism and xenophobia animating border and immigration policy.¹⁹³

188. *Vital Interests Podcast*, *supra* note 177.

189. See Dominic Tierney, *The Twenty Years’ War*, ATLANTIC (Aug. 23, 2016), <https://perma.cc/JH8B-L69T>; Bernard Lewis, *License to Kill: Usama Bin Ladin’s Declaration of Jihad*, 77 FOREIGN AFF. 14, 14–15 (1998).

190. POPE, *supra* note 183, at 11; see also *Vital Interests Podcast*, *supra* note 177 (“Contrary to popular belief, Homeland Security has never been the government’s lead counterterrorism entity”).

191. See, e.g., Ashcroft, *supra* note 157 (as early as October 2001, the Bush administration identified the immigration law enforcement agencies as central to the War on Terror).

192. Katie McDonough, *A Short, Brutal History of ICE*, SPLINTER NEWS (Feb. 2, 2018), <https://perma.cc/HHA4-GSTK>.

193. Hernández, *supra* note 94.

Following the 9/11 attacks, the government response, largely aimed at noncitizens, was sweeping rather than narrowly tailored to target likely terrorism suspects.¹⁹⁴ As directed by then-Attorney General John Ashcroft, immigration law enforcement agencies were tasked with “serv[ing] one of the most important objectives in the war against terrorism . . . protecting our nation against terrorist aliens.”¹⁹⁵ While there is an argument that immigration and border agency failures played a role in the 9/11 attacks, as the 9/11 Commission report suggests,¹⁹⁶ the government’s response quickly revealed a discriminatory, “racialized edge.”¹⁹⁷ One illustrative example is the forced registration, fingerprinting, and interrogation of 83,000 young Muslim men by U.S. immigration officials.¹⁹⁸ Of the 83,000 men who came forward, 13,000 were deported, but none were charged with any terrorism-related crimes.¹⁹⁹ Thus, identifying the border and immigration agencies’ functions as a pillar of the U.S. national security strategy normalized viewing migrants and migration through an explicit security lens, which then legitimized discriminatory treatment of racial “others” residing in the country.²⁰⁰ Notably, because of the sweeping emphasis on border and immigration law enforcement as a pillar of the post-9/11 national security strategy, migrants crossing the U.S.-Mexico border in search of a better life also became viewed through a national security lens and conflated with the threat posed by terrorism.²⁰¹

Although 9/11 turbocharged modern immigration law enforcement, the border and immigration agencies that were incorporated into DHS and divided into CBP and ICE, have a legacy of enforcing racist and xenophobic policies and inhumane conduct. An examination of these agencies’ history reveals their central role in effectuating white supremacist policies under the guise of national security.

C. *Founding and History of Customs and Border Patrol*

The history of CBP’s Border Patrol arm reveals that DHS inherited a force with a legacy of interweaving white supremacy agenda with national security policy enforcement. Further, the breakneck rate of expansion of the Border Patrol after 9/11 exacerbated abuses and internal mismanagement. Each of these will be explored below.

Prior to the formation of the Border Patrol in the early 1900s, the government was already dictating who belonged in the United States under specific

194. Hing, *supra* note 158.

195. Ashcroft, *supra* note 157.

196. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 117, at 95.

197. Hernández, *supra* note 94, at 207.

198. *Id.*; Elver, *supra* note 122, at 140.

199. Hing, *supra* note 217, at 203.

200. Epps and Furman, *supra* note 3, at 6.

201. *Id.* at 3.

Acts, such as the 1790 Naturalization Act²⁰² and the 1882 Chinese Exclusion Act, which both restricted immigration and naturalization for non-whites.²⁰³ The Border Patrol was operational by 1924, the same year Congress passed the Johnson-Reed Immigration Act, which cemented the concept of “illegal immigration” and the United States’ white national identity.²⁰⁴ The Border Patrol’s first agents were transitioned from the Mounted Guard of Chinese Inspectors, who had previously enforced the Chinese Exclusion Acts in the Western states.²⁰⁵ In 1933, President Roosevelt merged the Border Patrol and the Bureau of Citizenship into the INS, a Justice Department agency.²⁰⁶ The Border Patrol engaged in its first large-scale deportation operation in 1954, as part of “Operation Wetback,” a mass deportation of Mexican migrant farm laborers.²⁰⁷

After the 9/11 attacks, immigration law enforcement was explicitly elevated to a key pillar of national security policy and the Border Patrol was folded into CBP and supercharged.²⁰⁸ In the years between “Operation Wetback” and 9/11, the Border Patrol had a relative lull—border and immigration-related crackdowns and raids were sporadic.²⁰⁹ During this time, the Border Patrol was viewed as “the poor stepchild” within the INS.²¹⁰ However, after 9/11, Congress was willing to appropriate “unlimited amounts of money” to expand the Border Patrol, increasing the agency’s annual budget by billions of dollars.²¹¹ By the end of the Bush administration, the agency “had gone from being a comparatively tiny, undermanned backwater of the Justice Department,” with about 9,000 personnel when Bush took office, to a force of 21,000 within DHS, now the largest federal law enforcement agency in the country.²¹² By 2014, CBP, including the Border Patrol, ballooned to 60,000 personnel.²¹³

The breakneck rate of the Border Patrol’s personnel expansion was accompanied by the agency’s unprecedented militarization, “fueled by a seemingly unlimited budget for security expenditures,” and the eagerness of the defense industry to capitalize on this expanding new market.²¹⁴ Specifically, of DHS’s twenty-two agencies, ICE and CBP—along with the Office of

202. Naturalization Act of 1790, Pub. L. No. 1-3, § 2, 1 Stat. 103, 103-104 (1790) (“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any alien, being a *free white person*, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof”) (emphasis added).

203. Perea, *supra* note 14, at 5.

204. Graff, *supra* note 169; Ngai, *supra* note 51, at 25–26.

205. Graff, *supra* note 169.

206. *Id.*

207. *See id.*; *see also* Epps and Furman, *supra* note 3, at 5.

208. Ashcroft, *supra* note 157; Graff, *supra* note 169.

209. Graff, *supra* note 169.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. Jones & Johnson, *supra* note 169, at 4.

Biometric Identity Management (OBIM), which serves a supporting function for the other two agencies—receive 40 percent of DHS’s funding: \$26 billion for fiscal year 2020, which is significant increase from the \$18 billion annual budget in 2016.²¹⁵ Given this massive injection of funding, military contractors began targeting the border and immigration enforcement market and “[w]eapons developed for the battlefields of Iraq and Afghanistan are now routinely deployed along the border.”²¹⁶ Thus, the Border Patrol—an agency that cut its teeth enforcing racist and xenophobic immigration policies, such as Chinese Exclusion, the Johnson-Reed Immigration Act, and “Operation Wetback”—was centered in the U.S. War on Terror, which was also undergirded by racial and xenophobic animus. As a result, the agency was recklessly expanded and armed with military-grade equipment, which exacerbated the agency’s racist, militaristic, and insular culture.

The government recklessly expanded the Border Patrol, with disastrous results. Misconduct was all but guaranteed due to poor vetting, training, and oversight for new hires.²¹⁷ James Wong, a former CBP senior internal affairs official who helped to supervise new hire background checks, confirmed that the speed of expansion led to foreseeable misconduct issues.²¹⁸ As Government Accountability Office (GAO) reports revealed, in some sectors, field agent experience plummeted and agent-to-supervisor ratios ballooned.²¹⁹ According to one DHS official, “Congress and the Bush administration prized speed and quantity over quality. ‘Their view was . . . [a]lmost any body in the field was better than no body.’”²²⁰ James Tomsheck, former head of internal affairs at CBP from 2006 to 2014, admits, “The agency had problems with misconduct, lack of sensitivity to immigrants, and violence along the border.”²²¹ One GAO report showed that more than 2,000 CBP agents were arrested on criminal charges between 2005 and 2012.²²² Another internal report from 2018 revealed that nine percent of CBP’s staff had faced some degree of disciplinary action.²²³

The Border Patrol’s insularity exacerbated misconduct within its ranks, with corruption and excessive-force complaints spiking.²²⁴ In the field, there was an ethos of “what happens in the field stays in the field.”²²⁵ Despite facing an onslaught of complaints of serious misconduct like excessive force

215. Blitzer, *supra* note 1; Todd Miller, *Border Patrol Capitalism: On the U.S.-Mexico Border, the Border Security Industry Grows Alongside the Expanding Militarization of the Drug Wars*, 48 NACLA REP. ON THE AMERICAS 150, 153 (2016).

216. Jones and Johnson, *supra* note 169, at 4.

217. Graff, *supra* note 169.

218. *Id.*

219. *Id.*

220. *Id.*

221. Blitzer, *supra* note 1 (internal quotations omitted).

222. *Id.*

223. *Id.*

224. Graff, *supra* note 169.

225. *Id.*

complaints, the Border Patrol reacted with inaction.²²⁶ Given its inaction despite a deluge of misconduct reports, Congress pressured the Border Patrol to commission the Washington-based law enforcement think tank Police Executive Research Forum (“PERF”) to compile a report on the Border Patrol’s policies.²²⁷ PERF’s report, which CBP fought the release of for a year, concluded that “[t]oo many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force.”²²⁸ The report concluded that agents were purposely “creating justification for the use of deadly force” and that the Border Patrol’s use-of-force policies were “far outside the mainstream of US law enforcement.”²²⁹ Crucially, the report revealed, “there don’t appear to be any consequences for agents who violate the use-of-force policy.”²³⁰

During the Obama administration, CBP’s corruption was so widespread, that CBP and DHS leadership revised its definition of “corruption” to minimize the number of incidents.²³¹ According to Wong, the agency began distinguishing between “mission-compromising corruption,” such as bribery, narcotics-smuggling or human smuggling allegations, and “non-mission-compromising corruption” such as “sexually assaulting detainees.”²³² The new definition and reporting requirements enabled CBP and DHS to forgo reporting “non-mission-compromising” offenses to Congress.²³³

Some have asserted that CBP’s, and particularly the Border Patrol’s, endemic misconduct and corruption is the result of a failure of DHS’s leadership and its flawed construction. However, this conclusion falls prey to the “few bad apples” trope deployed by the government to obscure the complicity of the entire system.²³⁴ For example, the U.S. government explained away the harrowing abuse and humiliation of Iraqi prisoners in the U.S.-run Abu Ghraib prison as the isolated conduct of a few bad apples: the American soldiers at the lowest ranks of the system. In reality, the abuse was the result of policies and decisions flowing down from the top echelons of the U.S. government. This is evident based on the Office of Legal Counsel’s (“OLC”) “torture memos,” which claimed that the Geneva Convention’s restrictions on the treatment and interrogation of detainees were obsolete,²³⁵ President George W. Bush signing off on the torture memos’ findings,²³⁶ and then-

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. See, e.g., Interview by Soledad O’Brien with Phil Zimbardo, Prof. of Psych., Stan. Univ., CNN (May 21, 2004), <https://perma.cc/KB69-DRUN>.

235. Andrew Cohen, *The Torture Memos, 10 Years Later*, ATLANTIC (Feb. 6, 2012), <https://perma.cc/56MD-HXAC>.

236. Memorandum on Humane Treatment of Taliban and Al Qaeda Detainees, George W. Bush, Pres. of U.S. (Feb. 7, 2002), <https://perma.cc/T8LA-2PZA>.

Secretary of Defense Donald Rumsfeld's explicit approval of various torture techniques.²³⁷

Crucially, Abu Ghraib was a manifestation of white supremacy. Specifically, the 2003 United States invasion of Iraq hearkens back to the U. S. colonial era of Western white dominion over nonwhite populations in the Philippines, Cuba, and Puerto Rico.²³⁸ Consequently, the torture at Abu Ghraib "is an enactment of a global script in which white nations view themselves as assisting the Third World into modernity."²³⁹ The torture methods, such as forcing naked male prisoners to simulate sodomy or forced sexual contact with female interrogators, specifically exploited the Iraqi prisoners' cultural and religious differences.²⁴⁰ Moreover, photo documentation of the torture, a trophy of sorts, resembles the practice of ordinary Americans proudly posing for photos next to lynched Black bodies.²⁴¹ Crucially, both instances were not the violent actions of a few, but a "collective expression of hatred and white supremacy."²⁴²

Thus, chalking up the Border Patrol's rampant misconduct to the isolated failures of DHS only looks at the symptoms of white supremacy, which has been deeply embedded in the entire system since the founding. Moreover, the government's emphasis on the *appearance* of a strong response to 9/11, consciously disregarding the danger this posed to the people who would come into contact with the untrained and unvetted Border Patrol agents, is reminiscent of the callous, inhumane mass deportation of Mexicans during INS's "Operation Wetback." There too, the government was more concerned with the appearance of addressing the perceived threat posed by unauthorized immigrants (coded nonwhite "alien others") than the actual logistics; the conditions on one of the cargo ships used to deport people was compared to a slave ship on the Middle Passage in a later congressional investigation.²⁴³ The government empowered the Border Patrol, which has historically carried out the United States' white supremacist policies, to use any means necessary for national security purposes. In other words, the securitization and militarization of the Border Patrol all but ensured the human rights abuses perpetrated against America's undesirables, namely, migrants of color. Throughout U.S. history, the rights and lives of vulnerable populations have been expendable in service of white dominion.

237. Memorandum on Counter-Resistance Techniques for Donald Rumsfeld, Sec. of Defense, William J. Haynes II, General Counsel, Dep't of Defense, (Nov. 27, 2002), <https://perma.cc/Q4BE-G7LX>.

238. Emmitt B. Evans, *Iraq and the New American Colonialism*, 1 MOEBIUS 47, 49 (2003).

239. Sherene H. Razack, *How is White Supremacy Embodied: Sexualized Racial Violence at Abu Ghraib*, 17 CAN. J. WOMEN & L. 341, 345 (2005).

240. *Id.* at 342; PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 425–26 (2008).

241. Razack, *supra* note 239, at 351.

242. *Id.*

243. Lind, *supra* note 32.

D. *Founding and Recent History of Immigration and Customs Enforcement*

Similar to CBP, the history and long-term practices of ICE demonstrate this agency is also an instrument to further white supremacist ideology. This section looks at how ICE policy reified the conflation of national security and immigration enforcement. ICE used this national security veneer to implement racist and xenophobic surveillance and removal policies that perpetuate longstanding practices of subjugation and control of nonwhite “alien others.”

Similar to the Border Patrol, 9/11 provided ICE with a national security façade and turbocharged the effectuation of racist and xenophobic immigration policies. The Bush administration created ICE in an “opportunistic and frenzied political reorganization” after the 9/11 attacks.²⁴⁴ Its component parts were derived from INS, which was located within the Justice Department, and the United States Customs Service, from the Treasury Department, and thrust into the new, national security-focused DHS.²⁴⁵ In 2003, ICE released Endgame, a ten-year “detention and removal strategy for a secure homeland.”²⁴⁶ Endgame cemented the constructed national security threat posed by undocumented immigrants—adhering to a longstanding American tradition of racist, xenophobic government conduct framed as national security policies.²⁴⁷ It did so in two critical ways: seeking to deport all “removable aliens” and criminalizing immigration offenses.

A core pillar of Endgame was a “100 [percent] rate of removal for all removable aliens.”²⁴⁸ In the words of ICE’s then-director of the Office of Detention and Removal (“DRO”), Anthony S. Tangeman, “[a]s the title implies, DRO provides the endgame to immigration enforcement and that is the removal of all removable aliens.”²⁴⁹ This goal was “critical to allow ICE to provide the level of immigration enforcement necessary to keep America secure.”²⁵⁰ Without this final step, it was asserted that DHS could not “truly contribute to national security.”²⁵¹ Again, the wide net cast belies a sincere counter-terrorism purpose and is better explained by racism and xenophobia with a national security veneer.

Operation Streamline, which launched in 2005 under the Endgame strategic plan, is an illustrative example of the racial animus undergirding ICE

244. McDonough, *supra* note 192.

245. *Id.*

246. U.S. DEP’T OF HOMELAND SEC., BUREAU OF IMMIGR. AND CUSTOMS ENFORCEMENT, ENDGAME OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003–2012 (2003), <https://perma.cc/D69Q-XTQQ> [hereinafter ENDGAME STRATEGIC PLAN].

247. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944); *Chae Chan Ping v. United States*, 130 U.S. 581, 606, 609 (1889).

248. ENDGAME STRATEGIC PLAN, *supra* note 246.

249. Memorandum from Anthony S. Tangeman, Dir., Off. of Detention and Removal, to Deputy Assistant Dir., Field Operations Division, Field Off. Dirs. (June 27, 2003), <https://perma.cc/W2DY-DDLT>.

250. ENDGAME STRATEGIC PLAN, *supra* note 246, at 2-2.

251. *Id.*

policy because of its focus on criminalizing immigration offenses for immigrants of specific national origin. Operation Streamline, similar to “Operation Wetback” in the 1950s, targeted the Mexican and Central American migrant populations.²⁵² Unauthorized entry was previously a civil violation, but became a serious crime under Operation Streamline, “but only for the select immigrants crossing the U.S.-Mexico border in specifically designated areas.”²⁵³ Operation Streamline created a self-serving feedback loop whereby undocumented immigrants, whose only crime consists of entering the United States without proper credentials, are criminalized, playing into the “criminal aliens” trope deployed to demonize, detain, mistreat, and deport them.²⁵⁴ Criminalization or constructing the danger posed by the “alien other” was necessary to tether Operation Streamline to ICE’s purported national security mission, and obfuscated the racist and xenophobic motivations behind the policy.

When President Obama entered office, rather than walking back ICE’s Endgame Strategic Plan, he “turbocharged it.”²⁵⁵ By 2016, the budget for immigration enforcement was \$18 billion, or 40 percent of DHS’s budget for its twenty-two agencies, a 300 percent increase since DHS’s formation under Bush.²⁵⁶ Moreover, the Obama administration exponentially grew Secure Communities, a program implemented to turn local police into “force multipliers,” from operating in fourteen counties during the Bush administration to every U.S. jurisdiction—3,181 counties—by 2013.²⁵⁷ Secure Communities is in essence a deputization of other law enforcement agencies’ resources to carry out ICE’s 100 percent removal mission when undocumented immigrants are detained by another law enforcement agency.²⁵⁸ Additionally, under the program, the FBI automatically sends fingerprints to DHS to check immigration status.²⁵⁹ While ICE’s surveillance and removal capacity was amplified by post-9/11 laws and policies, the practice of surveillance and removal of vulnerable populations can be traced back to the OIA in the early nineteenth century. There, the Indigenous population was perceived as posing a threat to white colonist’s “manifest destiny” of settling the entire continent. Thus, the OIA (and later BIA) was tasked with surveilling and forcibly removing indigenous communities.²⁶⁰ In sum, ICE’s inherited legacy and conduct since its formation exposes the agency as an instrument of white

252. See Epps & Furman, *supra* note 3, at 7.

253. *Id.*

254. *Id.*; César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 214 (2018).

255. Marisa Franco & Carlos Garcia, *The Deportation Machine Obama Built for President Trump*, NATION (June 27, 2016), <https://perma.cc/64QA-NQLH>.

256. Blitzer, *supra* note 1; Franco & Garcia, *supra* note 255.

257. Franco & Garcia, *supra* note 255; see also U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, *Secure Communities* (Feb. 9, 2021), <https://perma.cc/XE6R-XNT6>.

258. See U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 257.

259. *Id.*

260. Rowse, *supra* note 22, at 17–23.

supremacy. The innate racism and xenophobia and concomitant human rights abuses in immigration policy have endured throughout U.S. history, and the national security rationale camouflages and preserves the system.

III. SPIRALING OUT OF CONTROL: MOUNTING ABUSES

Part III examines some of the recent atrocities perpetrated by ICE and CBP. The securitization and militarization of these agencies, bolstered by an enabling Congress and the Supreme Court's excessive deference on national security issues, facilitates rampant human rights abuses against vulnerable populations. The national security justification for using any means necessary shields the white supremacist ideology animating U.S. immigration policy and facilitates the conscious and callous disregard for civil and human rights, as demonstrated by the accounts below.

A. *Recent Atrocities at CBP and ICE During the Trump Administration*

The Bush and Obama administrations created a monster: militarized, lawless border and immigration agencies. These agencies justified, ratified, and normalized their conduct by national security pretexts, ever-increasing government funding, and limited oversight. While many view the Trump administration's border and immigration policies as an aberrant departure from previous administrations, these policies are merely more explicit articulations of a white supremacist ideology that has endured since the nation's founding. The racially motivated securitization of "alien others" enabled the demonization and dehumanization of vulnerable populations, precipitating foreseeable abuses such as those detailed in this section.

The Border Patrol's culture of racism, xenophobia, misconduct, and unaccountability only grew more toxic and appalling under the Trump administration. Tellingly, the Border Patrol union was the first union to endorse President Trump's candidacy in 2015, in the face of his inciteful, racist anti-Mexico rhetoric on the campaign trail.²⁶¹ Further confirming that racism and xenophobia are thriving in the ranks of the Border Patrol, news broke in July 2019 of a secret Border Patrol Facebook group.²⁶² This group consisted of nearly 10,000 current and former Border Patrol agents and its members shared "wildly misogynistic and racist content, often directed at the populations Border Patrol agents interact with on a daily basis."²⁶³ Former chiefs of the Border Patrol, Carla Provost and Rodney Scott, as well as numerous other senior officials were all members of the group.²⁶⁴

261. Garrett M. Graff, *The Border Patrol Hits a Breaking Point*, POLITICO (July 15, 2019), <https://perma.cc/J89G-7454>.

262. A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, PROPUBLICA (July 1, 2019), <https://perma.cc/AR5Z-RV3L>.

263. Ryan Devereaux, *Trump Administration Shields Racist Border Patrol Facebook Members*, INTERCEPT (October 30, 2020), <https://perma.cc/4ADX-L76T>.

264. *Id.*

In a stark refusal to repudiate and address such brazen racial animus, senior CBP officials negotiated deals for leniency in disciplining employees who participated in the Facebook group.²⁶⁵ Moreover, the agency has resisted congressional oversight, forcing the House Oversight and Reform Committee to subpoena CBP after the agency withheld documents from the Committee for over a year and refused to disclose the names of four individuals who were fired in connection with the Facebook group.²⁶⁶ CBP's inability to implement basic, threshold level investigative and disciplinary actions in response to gross misconduct violations, coupled with its recalcitrance to abide by lawful congressional oversight of its practices, reflected a new low in the agency's long history of entrenched racism and xenophobia. However, this result is foreseeable: preserving white supremacy is the *raison d'être* of the Border Patrol.

The racist, dehumanizing secret Facebook group was far from an isolated incident. 2019 proved to be one of the worst years in "modern memory" for CBP and the Border Patrol: at least twelve people had died in CBP custody the year before and its agents had been accused of crimes ranging from trafficking firearms to sexually abusing migrant children under their care.²⁶⁷ One Border Patrol agent was even arrested and charged with being a serial killer.²⁶⁸ In the summer of 2019, Clara Long—a Flores Settlement²⁶⁹ detention monitor and consultant—testified on behalf of Human Rights Watch to the House Committee on Oversight and Reform.²⁷⁰ Long testified that based on her in-depth interviews with over fifty detained children, "Border Patrol is holding many children, including some who are much too young to take care of themselves, in jail-like border facilities for weeks at a time without contact with family members, or regular access to showers, clean clothes,

265. *Id.*

266. *Id.*; Eric Katz, *Democrats Ask Trump Administration to Name Names of Feds Participating in Racist, Sexist Group*, GOV'T EXEC. (Jan. 11, 2021), <https://perma.cc/TY39-NQNP>.

267. Graff, *supra* note 261.

268. *Id.*

269. The 1997 *Flores* Settlement Agreement is a court-supervised settlement resulting from the Supreme Court case *Reno v. Flores*. See Nicholas Wu, *What Is the Flores Agreement, and What Happens If the Trump Administration Withdraws from It?*, JUST SECURITY (Oct. 18, 2018), <https://perma.cc/3C8A-HLCQ>; see generally *Reno v. Flores*, 507 U.S. 292 (1993). The *Flores* Settlement "establishes a 'nationwide policy for the detention, release, and treatment of minors' in immigration custody. The settlement agreement announces a 'general policy favoring release' and requires the government to place apprehended alien minors in the 'least restrictive setting appropriate with the minor's age and special needs.'" CONG. RSCH. SERV., THE "FLORES SETTLEMENT" AND ALIEN FAMILIES APPREHENDED AT THE U.S. BORDER: FREQUENTLY ASKED QUESTIONS, R45297, at 7 (2018). As such, "[a]mong other protections, the *Flores* Settlement Agreement requires the government to release migrant children expeditiously to sponsors and hold them in the least restrictive environment. It requires the government to house the children it does detain in facilities that are 'safe and sanitary' and provide 'access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, [and] adequate temperature control and ventilation.'" Clara Long, *Written Testimony: "Kids in Cages: Inhumane Treatment at the Border"*, HUM. RTS. WATCH (July 11, 2019), <https://perma.cc/RAC7-QF5J>. The time that CBP can keep children unaccompanied by their parents in custody is limited to 72 hours. *Id.*

270. *Kids in Cages: Inhumane Treatment at the Border: Hearing Before the Subcomm. on C.R. and C.L. of the H. Comm. on Oversight and Reform*, 116th Cong. 18-20 (2019) (statement of Clara Long, Acting Deputy Director and Senior Researcher on Immigration, Human Rights Watch).

toothbrushes, or proper beds.”²⁷¹ Long noted that the conditions she observed in the summer of 2019 were consistent with conditions documented by Human Rights Watch in February 2018—people, including children and infants, were routinely detained in “frigid holding cells” for days—except now the children were being detained for weeks, not days.²⁷² Many of the children interviewed by Long reported being separated from family members and primary caregivers at the border, which is a regular practice of CBP.²⁷³ In response to the horrific humanitarian crisis at the border detailed in Long’s congressional testimony, DHS was granted \$4.6 billion “for use on humanitarian services, such as providing medical care and food in borderland detention centers.” However, a June 2020 GAO report revealed that instead, CBP used the money to buy dirt bikes, dog food, and boats.²⁷⁴ Evidently, CBP prioritized feeding their dogs over addressing the subhuman conditions suffered by the men, women, and children in their custody.

Further human rights abuses continued despite the national attention to DHS’s conduct at the U.S.-Mexico border over the summer of 2019. According to a harrowing Business Insider investigation, which included a visit to the United States Border Patrol Academy in Artesia, New Mexico, there appeared to be no “training specific to working in detention centers, or caring for migrant children.”²⁷⁵ A CBP spokesperson confirmed that the Academy does not train new agents for detention officer duties.²⁷⁶ In other words, CBP’s minimum training requirements do not include preparing thousands of Border Patrol officers to deal with a situation they will deal with on a daily basis. Yet again, the appearance of implementing immigration policy

271. Long, *supra* note 269. Crucially, the “*Flores* Settlement binds [the government] until the federal government promulgates final regulations implementing the agreement.” CONG. RSCH. SERV., THE “*FLORES SETTLEMENT*” AND ALIEN FAMILIES APPREHENDED AT THE U.S. BORDER: FREQUENTLY ASKED QUESTIONS, R45297, at 7 (2018). Before the Trump administration, “no implementing regulations ha[d] been promulgated.” *Id.* In 2019, DHS and the Department of Health and Human Services (HHS) promulgated new regulations; key elements of the new regulatory scheme included: “(1) the elimination of the *Flores* Agreement’s requirement that a class member (even one in removal proceedings) be released if a custodian is available and detention is not required to secure timely appearance or to ensure any person’s safety; (2) the adoption of a new definition of ‘licensed facility’ that allows U.S. Immigration and Customs Enforcement (“ICE”) to detain families in facilities not licensed by a state; and (3) ensuring that “[m]inors who are in expedited removal proceedings are not entitled to bond hearings.” *Flores v. Barr*, 407 F. Supp. 3d 909, 915 (C.D. Cal. 2019). However, a federal district court held, the “*Flores* Agreement is a binding contract and consent decree. . . . [the government] cannot simply impose their will by promulgating regulations that abrogate the consent decree’s most basic tenets.” *Id.* at 931. The Court declared that the government did not terminate the *Flores* Agreement and issued a Permanent Injunction against the government implementing the new regulations. *Id.* The government appealed the district court’s decision, and the Ninth Circuit affirmed in part and reversed in part, allowing some of the proposed regulations to move forward. *See Flores v. Rosen*, 984 F.3d 720, 744 (9th Cir. 2020).

272. Long, *supra* note 269.

273. *Id.*

274. Blitzer, *supra* note 1.

275. Graham Flanagan, *We Went inside the Border Patrol Boot Camp and Found the Academy Isn’t Training Agents for the Job the White House Is Asking Them to Do*, BUSINESS INSIDER (July 29, 2019), <https://perma.cc/K6BH-A9CA>.

276. *Id.*

is prioritized over the actual logistics, which has historically led to human rights abuses.

With respect to ICE, the agency remains one of the primary vehicles for the mass surveillance and the mass deportation machine. The ICE machinery built by consecutive administrations is ever-present, and ICE's laundry list of transgressions range from racially motivated warrantless mass surveillance to horrific detainee abuse.

The Trump administration reinvigorated racist and xenophobic immigration policies under the Secure Communities program. In 2008, then-President Obama launched Secure Communities, an information-sharing program designed to enable ICE to target immigrants for deportation in U.S. jails.²⁷⁷ Obama replaced Secure Communities with the Priority Enforcement Program ("PEP") in 2014,²⁷⁸ which reoriented deportation actions to focus on "individuals convicted of significant criminal offenses or who otherwise pose a threat to public safety."²⁷⁹ However, six days into his presidency, President Trump issued Executive Order 13768, eliminating PEP and reinstating Secure Communities.²⁸⁰ The order, reminiscent of the post-9/11 Endgame rhetoric, asserted, "[w]e cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement."²⁸¹ Further, ICE's website noted that "the biometric interoperability [of Secure Communities] has remained constant" despite its "temporar[y] suspen[sion]" under the Obama administration.²⁸² As a result of President Trump's order, the number of people without criminal convictions arrested by ICE skyrocketed.²⁸³ Moreover, concomitant with this trend is a significant increase in immigration cases involving long-term U.S. residents.²⁸⁴ Taken together, Secure Communities seems less about keeping communities secure and more about removing people who the government deemed to be undesirable U.S. residents. Crucially, the trajectory of the Secure Communities program under the Trump administration demonstrates how unbridling ICE's capacity "is a question of opening or closing a faucet on what has become a well-oiled [] pipeline. Whether it is flowing rapidly or cut to a trickle is a choice of the person in charge."²⁸⁵ While ICE's most invasive and forceful machinery may be channeled differently depending on who is in power, President Trump's actions demonstrate how nonwhite "alien

277. AM. IMMIGR. COUNCIL, *Secure Communities: A Fact Sheet* (Nov. 29, 2011), <https://perma.cc/N6LA-VRXV>.

278. Franco & Garcia, *supra* note 255.

279. *Priority Enforcement Program*, U.S. IMMIGR. AND CUSTOMS ENF'T, <https://perma.cc/BZ8T-9KGX>.

280. *See* Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

281. *Id.*

282. *See* U.S. IMMIGR. AND CUSTOMS ENF'T, *supra* note 257.

283. McKenzie Funk, *How ICE Picks Its Targets in the Surveillance Age*, N.Y. TIMES MAG. (Oct. 2, 2019), <https://perma.cc/ZN9J-54P3>.

284. *Id.*

285. Franco & Garcia, *supra* note 255.

others” are always ready targets for public safety campaigns²⁸⁶ due to the historical legacy of racist and xenophobic immigration policy shrouded in national security rationales. Thus, ICE’s capacity for gross human rights violations is ever-present.

In the past two years alone, ICE has exhibited a pattern of flouting constitutional and human-rights standards with impunity. For example, in July 2019, news broke that ICE officials were running facial recognition technology on state driver’s license databases, mining millions of unknowing motorists’ photos.²⁸⁷ The news reports revealed that ICE trawls terabytes of information from hundreds of disparate state and local government computer systems, private data brokers, and social networks to compile dossiers on their targets.²⁸⁸ ICE scanning DMV databases is particularly concerning because more than a dozen states allow undocumented immigrants to obtain full driver’s licenses or driver privilege cards, provided that they show proof of in-state residency.²⁸⁹

The constitutional dubiousness of ICE’s mass surveillance practices is compounded with its abysmal human rights record on detention practices. In 2019, over 500,000 people were detained in an expansive network of over 200 jails managed by ICE with an “appalling record of abuse.”²⁹⁰ Since 2017, ICE has concentrated the development of the immigration and detention system in areas where “immigrants are most likely to be isolated from legal counsel, remain in detention without real opportunity for release, and are more likely to lose their cases.”²⁹¹ ICE’s new detention centers reflect historical patterns of inhumane treatment, including medical neglect, which can be traced to ICE’s inception, and have only worsened.²⁹² In these facilities are asylum seekers, as well as long-time U.S. residents facing removal, regardless of whether they have a criminal record.²⁹³ Crucially, according to an April 2020 ACLU Research Report, the ICE detention system “was never prepared to safely handle the crisis situation” presented by the COVID-19 pandemic.²⁹⁴ The report also noted that in 2019, ICE detained over 50,000 people on any given day, and when including CBP facilities, the federal government detained over 80,000 people at a time, far exceeding the detention

286. García Hernández, *supra* note 94, at 214, 216.

287. Catie Edmonson, *ICE Used Facial Recognition to Mine State Driver’s License Databases*, N.Y. TIMES (July 7, 2019), <https://perma.cc/NT3B-SGTF>.

288. Funk, *supra* note 283.

289. Drew Harwell, *FBI, ICE Find State Driver’s License Photos Are a Gold Mine for Facial-Recognition Searches*, WASH. POST (July 7, 2019), <https://perma.cc/NTZ2-HMP4>.

290. DETENTION WATCH NETWORK, *Immigration Detention 101*, <https://perma.cc/3AFT-KKK3>.

291. EUNICE HYUNHYE CHO, TARA TIDWELL CULLEN, & CLARA LONG, AM. C.L. UNION, JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 4 (2020), <https://perma.cc/RQT3-DSG4>.

292. *Id.*

293. *Id.*

294. *Id.* (highlighting particularly concerning findings such as “understaffing and cost-cutting measures in medical units which appeared dangerously unprepared for emergencies” and “immigrants’ lack of access to proper hygiene and . . . unsanitary conditions in living units”).

numbers of previous administrations.²⁹⁵ Additionally, the Trump administration has increasingly used private prison contractors, including companies with previously terminated federal contracts “due in part to poor conditions of confinement.”²⁹⁶ The report revealed that “[o]fficers have used physical force, tear gas, and pepper spray, and they have threatened immigrants in detention facilities.”²⁹⁷ The report recounts in harrowing detail how detainees are kept in solitary confinement for long periods of time, suffer sordid, unhygienic conditions, and are deprived of their wages, “even at the rate of a dollar a day.”²⁹⁸ The people in detention “raised concerns about the safety, quality, and amount of food served[,]” and often did not receive accommodations for dietary needs, such as diabetes or religious restrictions.²⁹⁹ Similar to Long’s congressional testimony concerning CBP’s cruel treatment of vulnerable populations in their custody, ICE’s detention practices, which also predominantly impact vulnerable people of color, demonstrate a pattern of inhumane treatment.

Further, recent revelations provide additional evidence of shocking ICE abuses. In October 2020, several members of Congress sent a letter to the United Nations High Commissioner for Human Rights in response to a complaint filed with the DHS Office of the Inspector General on September 14, 2020.³⁰⁰ The referenced complaint described “extremely disturbing allegations of medical neglect, malpractice, and abuse” at an ICE facility.³⁰¹ The complaint was based on the accounts of detainees and whistleblower Dawn Wooten, a nurse employed at the ICE facility in question.³⁰² The complaint detailed “unnecessary surgeries—including partial or full hysterectomies and other gynecological procedures—[that] were performed . . . potentially without the full informed consent of the women.”³⁰³ Since the whistleblower complaint, over twenty women have come forward, saying they received “gynecological exams, procedures, and medication that . . . they did [not] want or fully understand.”³⁰⁴ Testifying to Congress, two prominent gynecologists found “a disturbing pattern of aggressive treatment, including ‘over-calling’ the need for invasive surgeries, unwarranted pressure to undergo surgery, and failure to obtain informed consent.”³⁰⁵ These harrowing accounts are but a few examples of the long list of ICE brutalities perpetrated against the vulnerable communities that come into contact with the agency.

295. *Id.* at 5.

296. *Id.*

297. *Id.* at 7.

298. *Id.*

299. *Id.* at 7–8.

300. Letter from Rashida Tlaib et al., Members of Congress, to H.E. Michelle Bachelet, United Nations High Commissioner for Human Rights (Oct. 23, 2020), <https://perma.cc/S3L7-PWEC>.

301. *Id.* at 1.

302. *Id.*

303. *Id.* at 1–2.

304. Emily Green & Neda Toloui-Semnani, *22 Women Just Went Public with Graphic Descriptions of Medical Abuse in ICE Detention*, VICE NEWS (Nov. 19, 2020), <https://perma.cc/NX3D-JMKA>.

305. *Id.*

B. *Turning Inward: Summer 2020 DHS Violence Against Citizens in Portland*

Two related themes are important to bear in mind in the context of the 2020 Portland protests: first, the legacy of protecting racist institutions from the Constitution's drafting to present day; and second, the unequal protection of minorities' constitutional rights, particularly when national security is invoked. These two themes, which undergird all subjects discussed in this Note, contradict the values ostensibly enshrined in the Constitution. History reveals that constitutional protections have been applied selectively—and have often been deviated from—in service of white dominion. This “normalization of deviance”³⁰⁶ meant it was only a matter of time before extralegal, abusive conduct was directed at the wider American population, and the border and immigration agencies were the logical weapon of choice.³⁰⁷

In June 2020, President Donald J. Trump signed the Executive Order on Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence in response to the outbreak of mostly peaceful racial justice protests across the country.³⁰⁸ According to the “purpose” section of the order, “there has been a sustained assault on the life and property of civilians, law enforcement officers, government property, and revered American monuments.”³⁰⁹ The order asserted that the individuals carrying out this purported assault “identified themselves with ideologies—such as Marxism—that call for the destruction of the United States system of government.”³¹⁰ Crucially, the Order enlisted DHS agents to carry out the purpose of the Order, ostensibly the protection of American monuments, memorials, and statues, which was evidently motivated by the toppling of monuments commemorating enslavers and confederate generals.³¹¹

The Trump administration's response to the summer 2020 racial justice protests demonstrated a familiar, white supremacist reaction common not just in the Trump presidency, but previous administrations as well.³¹²

306. The normalization of deviance is a phenomenon first described by sociologist Diane Vaughan when examining the conduct of NASA scientists in the lead up to the Challenger Space Shuttle Disaster. He noted that “people within [an] organization become so much accustomed to a deviation that they don't consider it as deviant, despite the fact that they far exceed their own rules.” Terry Wilcutt & Hal Bell, *The Cost of Silence: Normalization of Deviance and Groupthink*, NASA (Nov. 3, 2014), <https://perma.cc/2KFE-WHQ7>. Although Vaughan described the normalization of deviance in a different context, it is applicable to many organizations and how deviant behavior becomes normalized over time when there is no repudiation of the deviant behavior.

307. See Greenberg, *supra* note 2 (examining how an erosion of rights for some inevitably leads to an erosion of rights for all).

308. Marissa J. Lang, Josh Dawsey, Delvin Barrett, & Nick Miroff, *Operation Diligent Valor: Trump Showcased Federal Power in Portland, Making a Culture War Campaign Pitch*, WASH. POST (July 24, 2020), <https://perma.cc/4TCA-29N8>; Exec. Order No. 13,933, 85 Fed. Reg. 40,081 (June 26, 2019), <https://perma.cc/HJB6-395L> [hereinafter Exec. Order on Protecting MMS].

309. Exec. Order on Protecting MMS, *supra* note 308.

310. *Id.*

311. Lang et al., *supra* note 308.

312. See Sean Collins, *Trump Once Flirted With White Nationalism. Now It's a Centerpiece of His White House*, VOX (July 21, 2020), <https://perma.cc/CQB3-6EZH>.

Notably, President Trump's executive order framed the nation's most significant racial justice movement in a generation as an existential national security threat, calling for a militarized, federal reaction to what were largely peaceful, localized protests. DHS predictably deployed extreme force that was unnecessary in the circumstances

As the events unfolded in Portland, much of the American public was outraged and surprised by ICE and CBP's seemingly brazen constitutional violations. Headlines exposed warrantless surveillance of journalists and protesters,³¹³ federal agents teargassing and pepper-spraying mostly peaceful protesters,³¹⁴ as well as allegations of federal encroachment of states' rights.³¹⁵ However, ICE and CBP's history and past conduct—even in the past two years—reveals that the violent suppression of protesters in Portland is merely an extension of a legacy of extralegal, inhumane conduct, which has historically been directed at communities of color. For example, ICE was conducting mass warrantless surveillance and assembling dossiers of undocumented immigrant targets; scanning states' DMV databases, even though such conduct could directly contradict states' rights with respect to public safety initiatives; and teargassing and pepper-spraying detainees. CBP has a documented track record of using excessive force, deploying agents who lack specific training for their role, and exhibiting racism throughout its ranks to the top echelons of the agency.

President Trump framed the racial justice protests as a national security threat. Thus, the deployment of militarized ICE and CBP units to enforce his thinly veiled white supremacist agenda is unsurprising. Moreover, the "scenes of confrontation and chaos" in Portland primarily served as fodder for Trump's campaign materials,³¹⁶ using the "Law and Order" trope as a white supremacist dog whistle.³¹⁷ Throughout their history, ICE and CBP have been enforcing policies rooted in a legacy of racism and xenophobia that can be traced to colonial times, using (white) national security as cover. Evidence of the racial animus undergirding their historical antecedents and conduct is ubiquitous: the Border Patrol has roots in Chinese Exclusion Act and the Johnson-Reed Immigration Act; ICE criminalized migrants based on national origin; ICE targets communities of color with their surveillance; ICE and CBP abuse and neglect is predominantly perpetrated against people

313. See Shane Harris, *DHS Compiled 'Intelligence Reports' on Journalists Who Published Leaked Documents*, WASH. POST (July 30, 2020), <https://perma.cc/E9XL-Y88D>; Vladeck & Wittes, *DHS Authorizes Domestic Surveillance to Protect Statues and Monuments*, LAWFARE (July 20, 2020), <https://perma.cc/36BJ-GN65>.

314. See Mike Baker, Thomas Fuller & Sergio Olmos, *Federal Agents Push Into Portland Streets, Stretching Limits of Their Authority*, N.Y. TIMES (July 25, 2020), <https://perma.cc/QH3B-CZFS>; Lang et al., *supra* note 307.

315. See Isaac Chotiner, *The Constitutional Case Against Trump's Use of the Department of Homeland Security*, NEW YORKER (July 30, 2020), <https://perma.cc/KC8W-H8AG>.

316. Maggie Haberman, Nick Corasaniti & Annie Karni, *As Trump Pushes Into Portland, His Campaign Ads Turn Darker*, N.Y. TIMES (Aug. 28, 2020), <https://perma.cc/KJ54-GBGS>.

317. See Beth Schwartzapfel, *What Trump Really Means When He Tweets "LAW & ORDER!!!"*, MARSHALL PROJECT (Oct. 7, 2020), <https://perma.cc/67YY-UXFG>.

of color; and thousands of CBP agents participated in a racist and dehumanizing Facebook group. In Portland, we bore witness to ICE and CBP's abusive conduct and legacy of flouting constitutional and human rights values. While initially reserved for minorities, Portland demonstrates how these agencies' abuses left unchecked threaten the rights and freedoms of all Americans and democratic ideals generally.

IV. DISMANTLE DHS

Given the deep, insidious roots of racism and xenophobia in immigration policy, the ease with which national security rationales camouflage white supremacist motivations, and the resulting human rights abuses, DHS is beyond reform and must be dismantled. Looking no further than domestic policing and the prison industrial complex, there is ample evidence that reforms do not bring about meaningful change. Meaningful change and justice require the dismantlement of DHS, accompanied by a reckoning with the white supremacist roots of border and immigration policy and enforcement, de-securitization, de-militarization, and de-criminalization of the border and immigration agencies and the vulnerable populations they interact with.

A. *Reform Does Not Go Far Enough in Addressing Systemic Problems at DHS*

Some scholars and industry experts have suggested that DHS does not need to be fully dismantled, but rather its component agencies merely need to be better managed and perhaps divided into separate units where agency objectives might be misaligned with each other. One adherent of this view is Richard Clarke, former National Security Advisor during the George H. W. Bush, Clinton, and George W. Bush administrations. However, as explained below, simply breaking up the department while leaving the existing agencies intact, specifically the border and immigration agencies, does not go far enough in addressing the historical and still-present racism and xenophobia that galvanized the creation of DHS—the white supremacy animating the border and immigration agencies has endured despite numerous previous reorganizations.

Clarke argues that DHS's problems can be addressed by paying closer attention to organization and management—it is merely lacking good leadership, the ability to attract good talent, and inter-department synergy, and as a result, “every once in a while, you’re going to have a dysfunction.”³¹⁸ He proposes breaking up DHS into at least two separate agencies: 1) a Department of Public Safety, which would contain “protective” entities, such as the Coast Guard, the cybersecurity-focused agencies, the Secret Service, and some

318. *Vital Interests Podcast*, *supra* note 177.

others; and 2) the border and immigration agencies, which he proposes should be returned to the Justice Department.³¹⁹

However, Clarke's proposal does not go nearly far enough. This Note has revealed problems that run far deeper than bureaucratic mismanagement. Creating smaller, more manageable departments and hiring good leadership is not an adequate solution. Clarke sanitizes the human rights and legal violations that DHS agencies have perpetrated by chalking it up to an occasional "dysfunction." It is possible that some of the twenty-two agencies within DHS may not need to be completely purged. However, merely transferring the immigration and border agencies to the Justice Department will not address white supremacy within these agencies, which has influenced U.S. immigration policy since the transatlantic slave trade. Moreover, the Justice Department is no better home for the border and immigration agencies. On the contrary, the Justice Department also participated in conduct with explicit and implicit racial undertones, such as: "Operation Wetback;" COINTELPRO (a covert FBI program directed against domestic groups and individuals such as the Black Panther Party and Martin Luther King, Jr. using methods "intolerable in a democratic society");³²⁰ and more recently, its involvement in the violent ambush of peaceful protesters, using rubber bullets and chemical gas, to clear Washington D.C.'s Lafayette Square so that President Trump could pose for photos in front of St. John's Episcopal Church.³²¹

Others offer apologist explanations for the border and immigration agencies' rampant misconduct. They contend that the Border Patrol, for example, is "plagued today by a huge and unresolved mismatch between the agency's founding identity and its current mission."³²² Border Patrol agents serving today, the argument goes, signed up to "protect the country against terrorists" and instead find themselves on the frontlines of a humanitarian crisis.³²³ However, the mission drift explanation for the Border Patrol and CBP's egregious civil and human rights violations not only ignores crucial historical context but also fails to explain CBP's racist and dehumanizing conduct. With respect to the Border Patrol, its founding identity was keeping undesirables, people who did not fit into America's white national identity, out of the country. 9/11 merely provided a convenient counter-terrorism veneer, an opportunity to securitize immigrants as "alien terrorists," but the underlying racial and xenophobic animus has remained constant. That is the foundation that CBP is built on. Ratification of CBP's inherent racial animus is

319. *Id.*

320. S. REP. NO. 94-755, Book III, at 3-5 (1976).

321. Rebecca Tan, Samantha Schmidt, Derek Hawkins, Fredrick Kunkle & Jessica Contrera, *Before Trump Vows to End "Lawlessness," Federal Officers Confront Protesters Outside White House*, WASH. POST (June 2, 2020), <https://perma.cc/HXQ8-5JXE>.

322. Garrett M. Graff, *The Border Patrol Hits a Breaking Point*, POLITICO MAG. (July 15, 2019), <https://perma.cc/H65L-W5AQ>.

323. *Id.*

evidenced by a 10,000-member-strong Facebook group that included former heads of the Border Patrol. Further, mission drift does not sufficiently explain human rights violations. While a lack of proper training to handle a humanitarian crisis plays a role in certain failures, CBP training facilities consciously do not prepare agents for working in detention centers, despite agents coming into contact with detained populations on a daily basis. The safety of people in detention is clearly not valued, and their abuse is foreseeable. Finally, mission drift does not explain the misuse of congressional funds intended to address the humanitarian crisis at the border; such conduct suggests a subhuman conception of the vulnerable populations in their custody.

Any reform-based solution that does not entail a complete reimagining of border and immigration policy and enforcement, including its disentanglement from national security frames, will not address the root cause. Namely, racism and xenophobia are the foundation of U.S. border and immigration policy, and often “dictates domestic policy.”³²⁴ Simply put, immigrants of color threaten the ideal of the United States as a nation “controlled and dominated by whites and their culture.”³²⁵ Only dismantlement and the formulation of a new immigration policy and enforcement mechanism can stand a chance against subverting the white supremacist status quo.

B. *Dismantle DHS*

Based on DHS’s racist and xenophobic underpinnings, level of securitization and militarization, and track record of human rights abuses, there is a strong case for dismantling the agency and creating an entirely new, reimagined border and immigration enforcement apparatus. Reimagining border and immigration policy and enforcement have at least four necessary elements: reckoning with the white supremacist motivations that have undergirded border and immigration policies since colonial times; de-securitization; de-militarization; and de-criminalization.

DHS’s danger to all Americans was made abundantly clear when the agency was weaponized during the racial justice protests to effectuate Trump’s overtly white supremacist agenda. Marisa Franco, Director of Mijente, a Latinx and Chicax justice movement, and Carlos Garcia, Director of Puente Human Rights Movement, correctly predicted in June 2016 that the destructive potential of DHS “is a question of opening or closing a faucet.”³²⁶ It is unconscionable that the largest, most militarized law enforcement agency in the world can be deployed at the whim of a president—that is tyranny. That is reason enough to defang the department. DHS agencies have long operated in a manner seemingly unrestrained by constitutional

324. Erika Lee, *Trump’s Xenophobia is an American Tradition—but it Doesn’t Have to Be*, WASH. POST (Nov. 26, 2019), <https://perma.cc/YS5B-SBHX>.

325. Perea, *supra* note 13, at 2.

326. See Franco & Garcia, *supra* note 278.

obligations, and all that was required to unleash a militarized force on the American people was a vague, highly attenuated reference to national security.³²⁷

First, border and immigration agencies cannot aspire to meaningful transformation without reckoning with white supremacy, which has festered since colonial times. Upon closer examination, immigration policy, from the country's foundation until now, is tinged with racism and a desire for white dominion. Moreover, the white supremacy underlying immigration policy has been consistently obscured by national security rationales, which have legitimized and normalized inhumane conduct perpetrated against vulnerable communities of color. Some examples include the Chinese Exclusion Acts, ICE's Endgame strategic plan, and more recently, the U.S. policies at the southern border. The enduring, unbroken thread of racial animus, and the accompanying abuses, need to be acknowledged and repudiated. DHS, particularly through ICE and CBP, has taken up the mantle of preserving white supremacy in the United States, predominantly through immigration policy, but as we have seen, through domestic "law enforcement" as well. Based on their inextricable relationship to preserving white supremacy, DHS, ICE, and CBP should be dismantled and abolished.

Second, de-securitizing migrants and nonwhite "alien others," as well as immigration policy and enforcement is necessary. Securitization—the process of presenting something as an existential threat, thereby justifying any means necessary to address it—plays a critical role in the suspension of legal norms resulting in civil and human rights violations. Securitizing maneuvers can be observed throughout U.S. history: the surveillance and forcible expulsion of Indigenous populations in the 1800s, Chinese Exclusion, Japanese internment, the U.S. government-sanctioned torture program during the War on Terror, and more recently, the Trump administration's border policy and his DHS deployment to Portland. Securitization's resulting any-means-necessary approach not only justifies militarization and the concomitant aggressive use of force but also obscures the actual racist and xenophobic motivations behind government policies and conduct. For example, the acute securitization of terrorism justified the constitutionality of the "Muslim Ban" nearly twenty years after 9/11 despite clear evidence in the record that the policy was motivated by racial and religious animus; the Supreme Court deferred to the Executive, since national security was implicated. As another example, Brian Murphy, then-acting DHS Undersecretary for Intelligence and Analysis, alleged in a whistleblower retaliation complaint that he was pressured to fabricate instances of "known and suspected terrorists" crossing the southern border to fit the security narrative of the Trump administration.³²⁸ In

327. See Exec. Order on Protecting MMS, *supra* note 308.

328. See Brian Murphy (Dep't of Homeland Sec. Sept. 8, 2020) (Whistleblower Reprisal Complaint), <https://perma.cc/3NQ5-SJEL>.

reality, migrants with connections to “terrorists” crossing the border is simply not true,³²⁹ and this reveals just how far off-mission the DHS immigration and border agencies have drifted. De-securitizing immigration policy and enforcement is necessary for the protection of civil and human rights of all people. Although de-securitization is absolutely necessary for meaningful change, DHS’s entire premise is based on securitization—a core pillar of its mandate is viewing border and immigration through a securitized lens—leading to the conclusion that DHS must be dismantled.

Third, de-militarizing border and immigration agencies is a necessary part of DHS dismantlement. As discussed above, militarization plays a central role in the border and immigration agencies’ track record of excessive force and human and civil rights violations. The 9/11 attacks and the securitization of border and immigration enforcement facilitated the unprecedented militarization of the DHS agencies, particularly the Border Patrol.³³⁰ Crucially, conflating civilian law enforcement with the military is harmful because military tactics are intended for emergency life-or-death circumstances where the preservation of constitutional freedoms and human rights are not a priority. Thus, military training, tactics, and equipment are intended for hostile, violent conflict, not border and immigration enforcement. The “at war” atmosphere created by militarization obfuscates border and immigration policy’s civilian law enforcement function and primes agents to use excessive force.³³¹ Recall, the Police Executive Research Forum concluded that an all-too-common occurrence in the Border Patrol was the objectively unreasonable use of deadly force, the creation of justifications for the use of deadly force, such as agents purposely stepping in front of vehicles, and the use of policies “far outside the mainstream of U[.S][.] law enforcement.”³³²

Militarization’s harmful effects can also be observed in domestic policing, which buttresses the need to de-militarize. An ACLU report found that in the domestic policing context, too, excessive militarization “creates incentives for state and local police to use unnecessarily aggressive weapons and tactics designed for the battlefield.”³³³ Similar to DHS, “the use of paramilitary weapons and tactics primarily impacted people of color.”³³⁴ Crucially, DHS has actually been one of the primary enablers of domestic policing’s militarization—local law enforcement agencies, including remote departments in New Hampshire, use vague and unfounded counter-terrorism justifications to

329. *See id.* at 6.

330. Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-control Law Enforcement Agency*, POLITICO (Nov.-Dec. 2014), <https://perma.cc/QLR9-FQVT>; Reece Jones and Corey Johnson, *Border Militarization and the Re-Articulation of Sovereignty*, TRANSACTIONS OF INST. OF BRIT. GEOGRAPHERS 1, 4 (2016).

331. ACLU, *Police Militarization*, <https://perma.cc/M54V-UPZT>.

332. Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-control Law Enforcement Agency*, POLITICO (2014), <https://perma.cc/QLR9-FQVT>.

333. ACLU, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 5* (2014), <https://perma.cc/Q7FX-J4KY>.

334. *Id.*

receive DHS funding.³³⁵ These local law enforcement agencies then use the DHS-funded paramilitary equipment in the course of ordinary law enforcement activities.³³⁶ Thus, DHS's militarization and securitization has actually flowed into domestic law enforcement, incentivizing excessive force. Moreover, the use of excessive force was a central flashpoint for the summer 2020 racial justice protests, which DHS then violently suppressed with a heavily militarized response. Here too, meaningful change will only come from incorporating demilitarization into dismantling DHS.

Last, immigration status-related offenses should be decriminalized. Criminalization facilitates demonization, dehumanization, and consequently, moral disengagement and human-rights abuses.³³⁷ The concept of "illegal immigration" stems from white supremacist policies, namely, the Johnson-Reed Immigration Act. Additionally, criminalization reinforces the dangerous "alien other" narrative, which makes immigrants vulnerable and ever-present targets for public safety campaigns. Further, criminalizing unauthorized immigration has enabled the indefinite detention of vulnerable populations in inhumane conditions, their confinement justified for "safety" purposes. If border and immigration policy is de-criminalized and de-securitized, there is no credible justification for the level of militarization within ICE and CBP.

DHS perpetuates the racially motivated securitization and criminalization of border and immigration policy, and its abuses are facilitated and exacerbated by its excessive militarization. Given the influence of white supremacy on border and immigration and national security policy, a legacy that has endured centuries and multiple reorganizations, complete dismantlement is necessary and requires de-securitization, de-militarization, and de-criminalization of border and immigration policy to ensure the protection of civil and human rights and the safety of *all* people.

Others may contend that the complete dismantlement of DHS, and reimagining the border and immigration agencies in particular, is too radical. Some may argue that reform—such as implicit bias training, holding individual bad actors accountable, or more congressional oversight—is a sufficient solution. However, look no further than the abolitionist scholarship in the criminal justice reform context, which provides ample proof that reforming the existing, inherently racist institution is ineffective. Namely, efforts to reform prison and police, such as diverse hiring, implicit bias training, civilian review boards, and criminal indictments of police have all failed.³³⁸ Despite these efforts, "violence remain[s] a core feature of the[se] sprawling institution [s]."³³⁹

335. *Id.* at 25.

336. *Id.*

337. *See infra* Part II.B.

338. *See* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1782–83 (2020).

339. *Id.* at 1783.

Similar to this Note, abolitionist scholar Amna A. Akbar highlights the “scale, power, and violence of police and prisons—rooted in histories of enslavement and conquest—[as] defining pieces of architecture within our political economy.”³⁴⁰ Akbar argues that transformation of the state and society, rather than reform, is a more honest and viable solution.³⁴¹ With the border and immigration agencies too, vague reform efforts or a change in administration are insufficient: the state and society require a transformation. Although some dismiss the term “white supremacy” as a “radical left” dog whistle, transformation requires naming and acknowledging white supremacy for what it is and the immeasurable harm it causes.

In the same vein, the ACLU report on militarized policing concludes, “[r]eform must be systemic; the problems of overly aggressive policing are cultural and cannot be solved by merely identifying a few ‘bad apples’ . . . reform must happen at all levels of government.”³⁴² Donald Trump is not merely a “bad apple”—his conduct and policies were enabled by deeply ingrained white supremacy. With DHS, Trump merely utilized machinery that was already available. Although the Biden administration promises reform, anything short of dismantlement and the accompanying reckoning with white supremacy, de-securitization, de-militarization, and de-criminalization is unlikely to effectuate meaningful change. The early days of the Biden administration already provide some support for this.

On February 2, 2021, Alejandro Mayorkas assumed office as United States Secretary of DHS.³⁴³ Mayorkas is the first Latino and first immigrant to lead DHS, but he is also a DHS veteran.³⁴⁴ Mayorkas is credited with creating the Deferred Action for Childhood Arrivals (“DACA”) program, which defers deportation proceedings against people who were brought to the United States illegally as minors.³⁴⁵ Tellingly, DACA does not provide a pathway to citizenship, it merely relies on prosecutorial discretion to defer removal proceedings for a period of two years, subject to renewal.³⁴⁶ Mayorkas’s DACA policy exemplifies an insufficient incrementalist approach. Crucially, Mayorkas still comes from the very establishment that has perpetuated deeply entrenched, white supremacist notions of who belongs in this country, regardless of whether the United States is the only home an individual has ever known. While it remains to be seen what is done with the department, the symbolic appointment of Mayorkas runs the risk of creating an illusion of change. For example, despite the Biden administration’s purported rollback

340. *Id.* at 1785.

341. *Id.*

342. ACLU, *supra* note 332, at 6.

343. Alana Wise, *Senate Makes Alejandro Mayorkas First Latino Head of Homeland Security*, NAT. PUB. RADIO (Feb. 2, 2021), <https://perma.cc/4JS7-7STW>.

344. *Id.*

345. Ben Fox, *Ex-Homeland Security Official Mayorkas Returns Under Biden*, AP NEWS (Nov. 23, 2020), <https://perma.cc/9Z44-UPHW>.

346. U.S. CITIZENSHIP & IMMIGR. SERV., *Consideration of Deferred Action for Childhood Arrivals (DACA)*, <https://perma.cc/HS3Y-YZJV>.

of Trump immigration policies, the “administration has continued to detain families and expel them from the border under a public-health order,”³⁴⁷ and there is an ongoing mass deportation of Haitian asylum seekers, including children.³⁴⁸ Moreover, the Biden administration confirmed that immigration enforcement will prioritize individuals who pose “national-security and public-safety threats,” which perpetuates the criminalization and securitization of undocumented immigrants and asylum seekers.³⁴⁹ Thus, there are already early warning signs that promises of reform are insufficient to address harmful, firmly entrenched white supremacy in immigration policy and enforcement—underscoring the argument that dismantlement is necessary.

CONCLUSION

Racism and xenophobia animating border and immigration policy have deep roots in the United States, and DHS is merely the current enforcement mechanism taking up the white supremacist mantle. In reality, surveillance, subjugation, and control of Black, indigenous, and other people of color can be traced from the country’s founding to the present day.

The United States Constitution, written by white men who expounded a vision for a homogenous white nation, treats Black people as subhuman and presumes that many in this country will not enjoy the privileges and immunities of full citizenship. The first piece of legislation addressing pathways to citizenship, the 1790 Naturalization Act, specifically excluded any person who was not a “free white person.” The Chinese Exclusion Act, Japanese Internment via Executive Order, “Operation Wetback,” and the recent Muslim Ban are just some of the egregious examples of the white majority’s hostility towards non-white immigration and presence within U.S. borders. Many of these discriminatory policies were cloaked in national security justifications. Consequently, immigration policy has been conflated with national security, and its racist and xenophobic motivations have been obscured. When the U.S. government invokes national security or identifies specific groups as existential threats to the American people, facilitates the suspension of legal norms and concomitant civil and human rights abuses.

An examination of DHS, specifically the history of CBP and ICE and its antecedents, reveals how these law enforcement agencies effectuate policies steeped in racism and xenophobia behind the veil of national security rationales. These false justifications enable and legitimize civil and human rights violations, which have predominantly affected vulnerable communities of color.

347. Maria Sacchetti, Nick Miroff, & Silvia Foster-Frau, *Texas Family Detention Centers Expected to Transform in Rapid-Processing Hubs*, WASH. POST (Mar. 4, 2021), <https://perma.cc/6YGH-PMTY>.

348. DEMOCRACY NOW!, *Haitian Asylum Seekers, Including Children, Deported Despite Biden Administration’s Promises* (Feb. 9, 2021), <https://perma.cc/Z82M-375G>.

349. *Id.*

The conflation of immigration policy and homeland security requires conscious, intentional disentanglement. One important step forward is to dismantle DHS and start afresh. Halfway changes and modifications are insufficient. As abolitionist scholars in the criminal justice context have revealed, reform of an existing institution that is inextricably intertwined with racism and injustice is futile. Implicit bias trainings, diverse hires, and other reforms have ultimately failed to successfully reform the criminal justice system, and the border and immigration agencies would be no different. Thus, meaningful change requires dismantlement and the accompanying reckoning with white supremacy, de-securitization, de-militarization, and de-criminalization of the border and immigration agencies and the vulnerable populations these agencies interact with on a daily basis. The U.S. government must acknowledge that immigration policy, from the country's founding until now, is tinged with racism and efforts to preserve white dominion. Next, de-securitizing migrants and nonwhite "alien others," as well as immigration policy and enforcement is necessary. The U.S. government has used a veil of national security to justify the inhumane treatment of vulnerable populations, who are predominantly communities of color. De-securitization goes hand-in-hand with de-militarization. The War on Terror paradigm legitimized the use of excessive force and military-grade equipment at the border, justified by the threat of potential terrorists crossing the border. Twenty years after 9/11, we know that threat was unsubstantiated. Moreover, there is no valid justification for the permeation of military culture and weapons within a federal law enforcement agency, and it is necessary to deblur the line between military and civilian agencies. Finally, immigration status-related offenses should be decriminalized. The concept of illegal immigration stems from white supremacist policies and reinforces the dangerous "alien other" narrative, which makes immigrants vulnerable, ever-present targets for public safety campaigns. Justice Louis D. Brandeis said, "[s]unlight is said to be the best of disinfectants,"³⁵⁰ and the time to disinfect is long overdue.

350. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914).