

THE IMMIGRATION & NATIONAL SECURITY NEXUS: BALANCING SECURITY, OPENNESS, AND HUMANITY

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ABSTRACT

Immigration to the United States stretches back hundreds of years, and a review of its arc shows that at different points in history, the flow of people to its shores has been managed—and manipulated—in different ways. Analyzing the National Security Strategies (NSS) of three successive modern administrations will show that contemporary American immigration policy has been used as a clandestine tool to support the country's needs: First, for the sake of economic progress, then to meet national security demands, and now, a mix of both. In conducting this review, noting the inflection point in policy caused by 9/11, and raising awareness of climate change's impact, the reader should understand that if America continues to wield immigration policy as a tool to manage national security, it must do so openly, intentionally, and humanely to be effective.

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I. INTRODUCTION

In 2016, amidst the two packed weeks of quadrennial political theater known as the Republican and Democratic National Conventions, a political outsider delivered a performance so raw, so authentic, and so rousing as to make any career politician salivate. The surprise? It did not come from Donald Trump. Against all odds, 2016's breakthrough performance came from a previously unknown American Muslim lawyer.

On the last day of a fortnight positively saturated with campaign content, Pakistani-born Khizr Khan, supported by his dignified wife, Ghazala, sought to connect with Americans across the political divide in a way that should inspire warmth in every patriot's heart, and strike fear into Donald Trump's. And as a Muslim American woman who grew up in Iowa and whose parents, like Mr. and Mrs. Khan, came from Pakistan, it was the first time in the torrid election cycle of 2016 that I thought the fever giving life to then-candidate Trump might be starting to break.

The Khans' emotional tribute to their courageous son, Captain Humayun Khan, and decisive rebuke of Donald Trump, was devastatingly effective. Evidently, Americans heard their cry. The pocket version of the Constitution Mr. Khan flashed during his speech—almost as a talisman against Trump's vitriol—has become a bestseller on Amazon. That's right, a Muslim immigrant is responsible for the U.S. Constitution becoming an Amazon bestseller.¹

After Khan's speech, Trump's first reaction was to retreat into bigotry, insinuating that Ghazala's silence at the side of her husband was a primetime example of the chauvinism many falsely believe is intrinsic to the Muslim faith.² Yet what Trump failed to understand was that while the bereaved Mrs. Khan did not talk, her silence spoke loudly and clearly that night—and Americans heard her.

Trump's indifference to his fellow man is not news. His first appearance in the *New York Times*, in 1973, was for his practice of racially discriminating against tenants.³ Forty-three years later, his entire campaign was fueled on disrespect, fear mongering, and blatant racism of a kind that decent Americans assumed had been thankfully lost to history. Yet despite Trump's divisive rhetoric and insulting behavior, no one had been able to effectively break through the noise—until, for a brief moment, Khizr Khan. What was the secret to Khan's success?

1. Tribune News Services, *Pocket Constitution Becomes Best-Seller after Khizr Khan's DNC Speech*, CHI. TRIB. (July 31, 2016), <https://perma.cc/KH4H-EZA>.

2. Maggie Haberman & Richard A. O'Connell Jr., *Donald Trump Criticizes Muslim Family of Slain U.S. Soldier, Drawing Ire*, N.Y. TIMES (July 30, 2016), <https://perma.cc/GE8M-Z49W>.

3. David Dunlap, *1973|Meeting Donald Trump*, N.Y. TIMES (July 30, 2015), <https://perma.cc/4BC6-QH46>.

Matthew MacWilliams, a scholar at the University of Massachusetts Amherst whose work focuses on authoritarianism, describes one plausible explanation for the Trump phenomenon. His explanation is embedded not in the logic of political science, but in psychology. MacWilliams was vexed to find that even in liberal democracies like the United States, surprisingly large numbers of people hold what might be called “latent authoritarian tendencies.”⁴ These tendencies—suppressed in good times—come roaring to the fore when individuals feel threatened, particularly by outsiders. In these circumstances, people may drop their liberal values alarmingly quickly in favor of powerful leaders who promise to take whatever action necessary—no matter how depraved.⁵

The data seems to show that this fear of change and outsiders is abundant in contemporary America and likely fueled Trump’s ascent to the White House. One article highlighting MacWilliams’s theory pointed out that in South Carolina, a CBS News poll found that 75 percent of Republican primary voters supported banning Muslims from the United States.⁶ The poll found that a third of Trump voters support banning gay and lesbian people from the country.⁷ Perhaps most shockingly, 20 percent said President Lincoln should not have freed the enslaved people.⁸ Perhaps Trump personified his supporters’ core beliefs by advocating for discriminatory policies but denying that the policies were racially motivated. As Adam Serwer writes, Trump supporters will likely not change their minds because Trump is:

a president who embodies the rage they feel toward those they hate and fear, while reassuring them that that rage is nothing to be ashamed of . . . it is the most recent manifestation of a contradiction as old as the United States, a society founded by slaveholders on the principle that all men are created equal.⁹

Yet amid this climate of fear and resentment, Khan’s speech succeeded because he played to something that has proved time and again to be one of the few forces capable of countering the fear on which leaders like Trump rely: patriotism. For it is American patriotism that calls forth the best that is in us and is the antidote to the poison of fear and resentment. Unlike the destructive nationalisms of other parts of the world, American patriotism is—like America itself—exceptional. It is exceptional in that, unlike other countries, it is predicated not on the basis of ethnicity, language, or religion, but rather on basic ideas such as liberty and the equal protection of law—two

4. Amanda Taub, *The Rise of American Authoritarianism*, VOX (Mar. 1, 2016), <https://perma.cc/DG34-U4BH>.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Adam Serwer, *The Nationalist’s Delusion*, ATLANTIC (Nov. 20, 2017), <https://perma.cc/QA8E-PWRG>.

principles which Mr. Khan called out word for word from his dog-eared Constitution. And while Trump and his supporters may have seen only signs that proved to them that Mr. Khan and his wife do not belong, the rest of America heard, through accented English, perfect American.

The history of immigration to the United States is fraught with complexity. In the early nineteenth and twentieth centuries, certain migrants were welcomed to our shores because their skills were complementary to the local needs of the economy at the time. Well into the twentieth century, immigrants like Mr. Khan came to the United States, set down roots, and became productive members of society—lawyers, doctors, teachers, CEOs, and engineers. Indeed, one only has to Google the term “inspiring immigration stories” to read heart-warming tales of people who have come to this country and changed lives on micro and macro levels. However, over time, the view of immigration has changed, and while an anecdote here and there is powerful, a movement that was once seen as advantageous to the country is now viewed in a nuanced and, in some cases, damaging light.

Immigration to the United States stretches back hundreds of years, and a review of its arc shows that at different points in history, the flow of people to its shores has been managed—and manipulated—in different ways. Analyzing the National Security Strategies (NSS) of three successive modern administrations will show that contemporary American immigration policy has been used as a clandestine tool to support the country’s needs: First, for the sake of economic progress, then to meet national security demands, and now, a mix of both. In conducting this review, noting the inflection point in policy caused by 9/11, and raising awareness of climate change’s impact, the reader should understand that if America continues to wield immigration policy as a tool to manage national security, it must do so openly, intentionally, and humanely to be effective.

II. BRIEF HISTORY OF IMMIGRATION IN THE UNITED STATES

The United States is deeply rooted in its immigrant history. A trip to Ellis Island will highlight how from 1820 to 1926, the federally owned island was the most important gateway for European immigrants often searching for the Statue of Liberty as the physical manifestation of liberty, welcoming them with the words, “give me your tired, your poor, your huddled masses yearning to breathe free.” Between 1820 and 1930 alone, the United States attracted 61 percent of the world’s immigrants, more than all other nations of the world combined.¹⁰ Even the national motto, “E Pluribus Unum,” Latin for “out of many, one” expresses a sincere belief in the unity that can be derived from diversity.¹¹ However, as novelist Ayad Akhtar notes, “the

10. CHRISTOPHER RUDOLPH, NATIONAL SECURITY AND IMMIGRATION 41 (2006).

11. *Id.*

established majority takes its we-image from a minority of its best, and shapes a they-image of the despised outsiders from a minority of their worst.”¹²

Following the nation’s founding, for nearly a century, immigration and the legal authority to regulate immigration were directly shaped by what Matthew Lindsay calls, “Americans’ prevailing political-economic world-view.”¹³ In the late nineteenth century, an influx of Asian immigration played a crucial role in the construction of the Transcontinental Railroad—forming close to 90 percent of the Central Pacific Railroad workforce.¹⁴ Chinese migrants had been encouraged to migrate, though were never fully embraced once they arrived in the United States.¹⁵ Despite having done most of the heavy lifting in the construction of one of America’s key levers of economic expansion, a famous photograph, taken in 1869, documenting the meeting of the rails at Promontory Point does not include a single Chinese laborer—a “graphic metaphor” for the techniques in which the Chinese were excluded from the United States and their demonstrated contributions to Western expansion erased.¹⁶ Within a decade, an aggressive anti-Chinese movement led by the California Workingmen’s Party set in motion a host of repressive measures including the exclusion of Chinese workers from numerous types of labor.¹⁷

The Chinese Exclusion Act of 1882 prohibiting almost all Chinese immigration to the United States was the first law to discriminate against a group of immigrants on the basis of race and class, and ultimately shaped the “nuts and bolts” of future immigration policies.¹⁸ This new form of immigration encounters and exclusion laws marked off the world and defined personal identity in terms of not only race and nation but also prescribed an exempt class. Chinese laborers were barred entry while exempt classes were created for merchants, teachers, students, travelers, diplomats and their families.¹⁹ The Chinese Exclusion Laws, enforced from 1882 to 1943, may arguably be the first dramatic example of the immigration and national security nexus.

The 1889 decision in *Chae Chan Ping v. United States*, titled the *Chinese Exclusion Case*, justified exclusion by appealing to national security logic.²⁰ In the *Chinese Exclusion Case*, Justice Field shifted the source of congressional authority in regulating immigration matters from the Commerce

12. AYAD AKHTAR, *HOMELAND ELEGIES* 119 (2020) (ebook).

13. Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 33 (2010).

14. Anne Pegler-Gordon, *Chinese Exclusion, Photography, and the Development of U.S. Immigration Policy*, 58 AM. Q. 51, 51 (2003).

15. *Id.*

16. *Id.*

17. Lindsay, *supra* note 13, at 29.

18. See Adam McKeown, *Ritualization of Regulation: The Enforcement of Chinese Exclusion in the United States and China*, 108 AM. HISTORICAL REV. 377, 378 (2003).

19. *Id.*

20. See Lindsay, *supra* note 13, at 40.

Clause “to the ill-defined, though apparently extra-constitutional, concept of national sovereignty.”²¹ Field shaped immigration power into “an instrument of national self-defense, to be deployed against invading armies of politically unassimilable, economically degraded, and racially suspect foreigners.”²² In short, Congress’s authority to exclude Chinese laborers did not stem from its commerce power, but was “an incident of sovereignty belonging to the government of the United States.”²³

The rise of Asian migration and the framing of this migration as a security concern eventually led to the eugenics movement during the late nineteenth century and continued into the 1940s.²⁴ The movement aimed to define national identity by race, initiating a change in the ethnic composition of migrants and eventually leading to the first comprehensive restrictive immigration policy, the Immigration and Nationality Act of 1924.²⁵ Passing this Act meant that national origins quotas and a racialized preference system remained the foundation of the U.S. immigration policy until 1965.²⁶ Even after amendments to the Immigration and Nationality Act in 1965, American migration policy continued to be shaped by “acute sensitivities to domestic ethnic demographics as well as qualitative changes in migration flows.”²⁷

During the 1990s, the American immigrant population grew rapidly with over 13 million people entering—more than a million people per year.²⁸ The Immigration Act of 1990 represented the first major overhaul of the American legal system in a quarter century. The law created a selection system designed once again to meet the economic needs of the country by moving away from family-based immigration and toward skill-based immigration.²⁹ Although this period seemed to have a more open immigration stance, national policy still continued to maintain a delicate balance between the economic and social dimensions of migration.

III. THE BUSH ADMINISTRATION: A NEW CHAPTER IN POST-9/11 IMMIGRATION POLICY

In 1968, Hannah Arendt wrote, ‘for the first time in history, all peoples on earth have a common present.’ In the age of globalization, ‘every country has become the almost immediate neighbor of every other

21. *Id.*

22. *Id.*

23. *Id.* at 45.

24. RUDOLPH, *supra* note 10, at 42.

25. *Id.*

26. *Id.*

27. *Id.*

28. Randolph Capps, Michael E. Fix & Jeffery S. Passel, *The Dispersal of Immigrants in the 1990s*, Brief No. 2, URB. INST. (2002), <https://perma.cc/BV67-ASGH>.

29. Muzaffar Chishti & Stephen Yale-Loehr, *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later*, MIGRATION POL’Y INST. 1 (July 2016).

*country, and every man feels the shock of events which take place at the other end of the globe.*³⁰

The perception of migration as a threat to national security has intensified over the past twenty years, likely rooted in the immediate events of 9/11. President Bush's early months in power were bruised by a disputed election, having lost the popular vote, and a recount process that ultimately handed him the presidency after a "highly controversial 5-4 Supreme Court decision in his favor."³¹ The terrorist attacks on September 11 sent a thunderbolt through the world and provided President Bush the "opportunity to galvanize a divided nation . . . [giving] him a purpose, identity, legitimacy and in time legacy."³² 9/11 became a catalyst for change in the government's approach to immigration—yet, in the years to come, there was no mention of immigration in the 2002 NSS³³ and only one sentence in the 2006 NSS. Despite the absence of immigration in the Bush administration's NSS, the gap was later filled in sweeping policy decisions.

The 2002 NSS stated upfront that the defense of the nation against enemies was the top priority and that the enemy had evolved into "shadowy networks of individuals [who] can bring great chaos to our shores for less than it costs to purchase a tank."³⁴ Though there is no direct mention of immigration, the administration recognized that a "diverse, modern society has inherent, ambitious, entrepreneurial energy," a clear admission of the value of immigrants in American society.³⁵ But at the most basic level, 9/11 fundamentally shifted the way Americans thought about immigration for years to come. Before the attacks, there was a simmering undercurrent of racism and prejudice toward groups deemed the "other," but the post-9/11 world brought that sentiment to the forefront and gave permission to the nation to harbor a respectable distrust of this new target. Indeed, in a Fox News poll taken in November 2001, 65 percent of those who participated supported a complete halt to all immigration into the country.³⁶

The first significant policy developments of the post-9/11 world imposed restrictions starting with the USA Patriot Act in October 2001 and the Enhanced Border Security and Visa Entry Reform Act (EBSVERA) in May

30. PANKAJ MISHRA, *AGE OF ANGER: A HISTORY OF THE PRESENT* 8 (Picador, 2017) (emphasis added).

31. Gary Gregg II & Mark Rozell, *Symposium: The Bush Presidency*, 32 *PERSP. ON POL. SCI.* 133, 133–34 (2003).

32. Kam C. Wong, *The Making of the USA PATRIOT Act II: Public Sentiments, Legislative Climate, Political Gamesmanship, Media Patriotism*, 34 *INT'L J. SOC. L.* 105, 114 (2006).

33. The National Security Strategy (NSS) is a document prepared periodically by the executive branch to communicate the administration's national security vision.

34. GEORGE W. BUSH, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 3 (Sept. 2002), <https://perma.cc/3YY6-NHRL>.

35. *Id.* at 31.

36. Dana Blanton, *Fox News/Opinion Dynamics Poll: Americans Still Strongly Supporting Bush, War*, FOX NEWS (Nov. 23, 2015, 4:24 PM), <https://perma.cc/3C39-Q4XU>.

2002.³⁷ The Patriot Act's main purpose was to prevent further terrorist attacks on America by fortifying its border security, strengthening the collection and sharing of foreign intelligence information, and restricting terrorist financing.³⁸ The Act also called for an expanded legal definition of "terrorist activities" that denied entry to those involved with terrorist organizations.³⁹ The expanded definition included material support for terrorists or terrorist organizations.⁴⁰

EBSVERA continued to amplify the Bush administration's efforts to strengthen border security. The Act outlined an increase of sheer manpower, adding three thousand immigration inspectors and investigators.⁴¹ In addition, heavier scrutiny was imposed on visa applications originating from countries with a history of supporting terrorism.⁴² Visa applications originating from countries designated as "state sponsors of terrorism"—Cuba, Libya, Iran, Iraq, North Korea, Sudan and Syria—were subject to higher levels of security clearance.⁴³ Lastly, American universities were required to keep track of foreign students. To better equip universities with the tools to monitor their international students, in January 2003, the administration enacted the Student and Exchange Visitor Information System (SEVIS) requiring universities to submit electronic files on the status of their international students.⁴⁴

The Bush administration had its own version of what some might call the first Muslim database, the National Security Entry-Exit Registration System (NSEERS), also known as "special registration."⁴⁵ Enacted a year after the 9/11 attacks, the program mostly targeted Muslim and Arab nations with the sole exception of North Korea.⁴⁶ All males sixteen years and older from twenty-five countries would be required to register. Through a series of mechanisms, the program was designed to collect essential data, fingerprints, and photographs of noncitizens entering and living in the United States, as well as tracing their travel once they were within the United States.⁴⁷ At the time, officials advocated for the program and felt it was vital to identify and capture terrorists who might enter the country with nefarious intentions.⁴⁸ In

37. RUDOLPH, *supra* note 10, at 79.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 80

44. *Id.* at 80.

45. Nadeem Muaddi, *The Bush-Era Muslim Registry Failed. Yet the US Could Be Trying It Again*, CNN (Dec. 22, 2016), <https://perma.cc/TEF5-W46S>. The countries included: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen.

46. *Id.*

47. Muzaffer Chishti & Claire Bergeron, *DHS Announces End to Controversial Post-9/11 Immigrant Registration and Tracking Program*, MIGRATION POL'Y INST. (May 17, 2011), <https://perma.cc/PW8Y-5N3Z>.

48. Muaddi, *supra* note 45.

making the case for NSEERS, then-Attorney General John Ashcroft said the 9/11 attacks exposed “the vulnerabilities of our immigration system.”⁴⁹

The NSEERS program was a counter-terrorism tool—a conflation of national security and immigration objectives. The program was heavily criticized by civil rights groups, law enforcement experts, and the media who claimed that the communities subject to the NSEERS program did not comprehend the requirements of the program and would face serious immigration and criminal penalties.⁵⁰ The program’s effectiveness as a counter-terrorism tool is debatable since the targeted individuals were identified based on national origin or religion and not on any pledges to a terrorist group or actual criminal activity.⁵¹ In 2003, *The New York Times* reported that of the nearly 85,000 people registered in the program, eleven were found to have ties to terrorism.⁵² The program was suspended in 2011 but not without leaving a lasting impact on members of the Muslim and Arab American communities, many of whom have deep family ties to the countries identified in the program, indicating perhaps an underlying assumption on behalf of the administration that those countries have a monopoly on terrorism.

The 2006 NSS mentions an effort to reduce “illegal immigration” as an area the administration should work with in the Western Hemisphere.⁵³ In order to strengthen public diplomacy, the strategy goes on to recognize engaging foreign audiences and “foreign students and scholars to study in the United States.”⁵⁴ Although few references were made to immigration-related issues in both the 2002 and 2006 strategies, the message came through clearly in execution—meeting national security objectives was a top priority, and the most expedient way the Bush administration achieved that was through bold policy rooted in management of immigration to America.

Due to the 9/11 attacks, the Bush administration, unlike any other administration in modern history, faced a new security paradigm—it struggled to balance American national security interests with the threat posed by terrorism, and at the same time justify the methods that were used in the war against terror.⁵⁵ The creation of the Department of Homeland Security (DHS) squarely merged seemingly different policy objectives—immigration control and anti-terrorism—under one umbrella. The mandate of the organization was summarized succinctly by then-Attorney General John Ashcroft, “Let the

49. *Id.*

50. Chishti, *supra* note 47.

51. *Id.*

52. Rachel Swarns, *Special Registration for Arab Immigrants Will Reportedly Stop*, N.Y. TIMES (Nov. 22, 2003), <https://perma.cc/VR76-5JFF>.

53. GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 37 (Mar. 2006), <https://perma.cc/Z28T-6ANC>.

54. *Id.*

55. Desirée Colomé-Menéndez, Joachim A. Koops & Daan Weggemans, *A Country of Immigrants No More? The Securitization of Immigration in the National Security Strategies of the United States of America*, 7 GLOBAL AFF. 13 (2021).

terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you.”⁵⁶

IV. THE OBAMA ADMINISTRATION: BALANCING SECURITY AND OPENNESS

*What we currently talk about as immigration [is] really a story of demographic management of populations. Who counts as an internal member, what rights are accorded to those that are insiders, and then what kind of treatments [do those] face [who] are viewed as “unfit.”*⁵⁷

In an effort to recalibrate the wartime policies of the Bush administration, presidential candidate Barack Obama campaigned against the overextension of military power in Iraq and Afghanistan. The stagnation of the wars coupled with the 2008 economic recession bolstered his successful ascent to office at a time when the country was desperate for a new style of leadership.⁵⁸ In both chambers of Congress, Democrats also went on to secure significant majorities. The triple wins reinforced Obama’s broad vision of moving the country in a new direction and “[using] all elements of American power to keep us safe, prosperous and free. Instead of alienating ourselves from the world,” he instead wanted America to lead once again.⁵⁹

While the Obama administration largely viewed his 2010 NSS as a rejection of his predecessor’s, there was no hiding the continuity in terms of championing American values and interests. These interests include the security of the American people, a growing U.S. economy, support for our values, and an international order that can address twenty-first century challenges.⁶⁰ In fact, there was so little difference between the two strategies that some analysts even characterized the strategy as “Bush Lite,” with the biggest difference being a lengthy section devoted to economic and social domestic policy.⁶¹ One of the key differences from the previous administration was the explicit introduction of immigration as a security issue.⁶² The president “felt strongly that domestic homeland security and external national security policy and strategy must all be viewed as part of the nation’s national security efforts.”⁶³

56. *Id.* at 14.

57. Aziz Rana, *Rethinking Migration with Aziz Rana*, DIG (Jan. 9, 2019), <https://perma.cc/DU2S-HNFD> (emphasis added).

58. Colomé-Menéndez, Koops & Weggemans, *supra* note 55, at 10.

59. *Obama’s Remarks on Iraq and Afghanistan*, N.Y. TIMES (July 15, 2008), <https://perma.cc/Z22N-SPRP>.

60. BARACK OBAMA, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 17 (May 2010), <https://perma.cc/DP2V-KJ3N>.

61. Peter Feaver, *Obama’s National Security Strategy: Real Change or Just ‘Bush Lite?’* FOREIGN POL’Y (May 27, 2010), <https://perma.cc/X322-JC64>.

62. Colomé-Menéndez, Koops & Weggemans, *supra* note 55, at 10.

63. ALAN G. STOLBERG, *HOW NATION-STATES CRAFT NATIONAL SECURITY STRATEGY DOCUMENTS* 94 (2012).

Similar to President Bush's 2002 NSS, the Obama administration's 2010 NSS recognized "diversity and diaspora populations" as a source of strength and "not a source of division or insecurity."⁶⁴ However, in contrast to Bush, Obama's strategy went on to frame immigration as a national security issue and the need to "strick[e] a balance between security and openness."⁶⁵ The strategy advocated for comprehensive immigration reform that "effectively secures our borders, while repairing a broken system that fails to serve the needs of our nation."⁶⁶ It was in the Obama administration that immigration reform was finally solidified as a national security matter, finally amplifying the early whispers of the securitization of migration that had started in 2001.

Although he called immigration reform a priority during his campaign, President Obama's legislative plate was too full to make any substantive moves in his first year in office. By early 2010, with intense pressure from immigration advocates, he decided to make a bipartisan push for comprehensive reform, roping in Senators Chuck Schumer (D-N.Y.) and Lindsey Graham (R-S.C.) to work on legislation.⁶⁷ The efforts fell short due to a competitive fight over health care and an impending midterm election cycle.⁶⁸ Eventually, President Obama acknowledged that "there may not be an appetite" for immigration reform that year and, like presidents before him, tabled the issue for another time.⁶⁹

The time would come three years later when in 2013, the Senate made another bipartisan attempt towards a comprehensive immigration system.⁷⁰ The Senate passed S.744, the Border Security, Economic Opportunity, and Immigration Modernization Act by an overwhelming margin of sixty-eight to thirty-two votes.⁷¹ The bill took a modern approach to immigration reform by proposing three significant policy developments: 1) providing a more difficult but ultimately fair pathway to citizenship for unauthorized immigrants living in the United States; 2) updating, streamlining, and simplifying the legal visa system for the twenty-first century; and 3) making historically expansive investments in border security.⁷² Ultimately, the bipartisan Senate legislation died in the House of Representatives, where the bill found little support amongst the Republican-led chamber.⁷³ Some analysts believed that the opposition from House Republicans was not motivated by conservative

64. OBAMA, *supra* note 60, at 12, 19.

65. *Id.* at 30.

66. *Id.*

67. Rachel Weiner, *How Immigration Reform Failed, Over and Over*, WASH. POST (Jan. 30, 2013), <https://perma.cc/BE6G-RNVN>.

68. *Id.*

69. Debbie Wilgoren, *Obama: 'There May Not Be Appetite' to Tackle Immigration This Year*, WASH. POST (Apr. 20, 2010), <https://perma.cc/JFN5-BBLP>.

70. Phillip E. Wolgin, *2 Years Later, Immigrants Are Still Waiting on Immigration Reform*, CTR. FOR AM. PROGRESS (June 24, 2015), <https://perma.cc/J7UJ-BUQ2>.

71. S.744, 113th Cong. (2013).

72. Wolgin, *supra* note 70.

73. *Id.*

values but rather a deep anxiety associated with “losing their country” to immigrants.⁷⁴

With a failed comprehensive immigration bill in the rearview mirror, in 2014, President Obama moved to expand the Deferred Action for Childhood Arrivals (DACA) program, a policy developed two years earlier that allowed young immigrants to remain in the United States and continue to live, work, and study in their communities. In addition, the administration also created the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.⁷⁵ Together, the programs would have provided a stable environment allowing families to stay together, while also providing an economic boost to the country.⁷⁶ However, since DACA’s inception in 2012, the program has been on a “policy roller coaster,” with court rulings and different administrations canceling and then restoring the policy every few months.⁷⁷ The uncertainty left Dreamers, those affected by the program, struggling with the threat of deportation coming from a presidential memo or single court order.⁷⁸

The immigration framework seen through a national security lens appears to lessen in the 2015 NSS, with the first mention emphasizing the importance of “attract[ing] immigrants from every corner of the world who renew our country with their energy and entrepreneurial talents.”⁷⁹ Perhaps the administration was bruised from the failed attempt at comprehensive immigration reform, as the only mention of immigration reform hoped to combine “smart and effective enforcement of the law with a pathway to citizenship for those who earn it.”⁸⁰ The only significant mention of the national security and immigration nexus alludes to the migration surges, especially involving unaccompanied children at the southern border, and the devastating consequences of weak governing institutions and unmitigated violence driving people to flee.⁸¹ This reference is an explicit security framing with the underlying assumption that a prosperous, secure, and democratic Western Hemisphere remains a key national security interest for the United States.⁸²

The Obama administration’s early, robust, but ultimately failed attempts on immigration likely contributed to the President’s curtailed efforts, as demonstrated by the quiet reference to immigration in the 2015 NSS compared to the 2010 NSS. Despite a keen interest on President Obama’s part—evidenced

74. Christopher Parker, *The (Real) Reason Why the House Won’t Pass Comprehensive Immigration Reform*, BROOKINGS INST. (Aug. 4, 2014), <https://perma.cc/P6EJ-5Q7U>.

75. Wolgin, *supra* note 70.

76. *Id.*

77. Giulia McDonnell, Nieto del Rio & Miriam Jordan, *What Is DACA? And Where Does It Stand Now?*, N.Y. TIMES (July 16, 2021), <https://perma.cc/2DUP-XTCU>.

78. *Id.*

79. BARACK OBAMA, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 3 (Feb. 2015), <https://perma.cc/5E65-V3WA>.

80. *Id.* at 15.

81. *Id.* at 28.

82. *Id.* at 27.

through later remarks on immigration reform and his State of the Union—he ultimately resigned to the political wrangling that shut down his comprehensive immigration reform bill and his later efforts with the DACA and DAPA programs.⁸³ These failures on immigration reform and the heightened immigration-security nexus must be put into the context in which President Obama was operating—a global economic crisis on the same level of the Great Depression, an influx of unaccompanied minors at the southern border during the summer of 2014 which impacted the national security nexus, and a Syrian refugee crisis.⁸⁴

V. THE TRUMP ADMINISTRATION: *E PLURIBUS UNUM* NO MORE?

*“Trumpism either represents a rupture, a wholly un-American movement that has captured the institutions of government; or he is the realization of a deep-rooted American form of extremism.”*⁸⁵

Donald Trump’s election win in 2016 came as a surprise even to the Republican party. As a candidate, Trump campaigned to “make America great again” and centered his platform as “anti-Obama, anti-immigrant, anti-Mexican, and anti-globalization.”⁸⁶ He launched his campaign specifically focused on the southern border, claiming that Mexican immigrants were bringing drugs and crimes to the United States and were rapists.⁸⁷ Unlike some politicians’ empty campaign rhetoric, upon taking office President Trump spent the next few months furiously using his executive powers to radically transform immigration policy unlike any other president in modern times.

In 2017, the Trump administration’s NSS was released, proclaiming a clear-eyed assessment of American interests and proposing a national security strategy that puts America first.⁸⁸ Staying true to his campaign promises, immigration figured prominently in the document, blaming porous borders and unenforced immigration laws as the culprit for American vulnerabilities to criminal cartels and crime.⁸⁹ The 2017 NSS was based on four pillars—the first of which included an extensive discussion on strengthening border control and immigration policy. The section does not mince words and quickly frames immigration as a national security issue: “Strengthening control over

83. Colomé-Menéndez, Koops & Weggemans, *supra* note 55, at 12.

84. *Id.* at 14.

85. GREG GRANDIN, *THE END OF THE MYTH: FROM THE FRONTIER TO THE BORDER WALL IN THE MIND OF AMERICA* 7 (2019) (emphasis added).

86. Gary Jacobson, *The Effects of the Early Trump Presidency on Public Attitudes Toward the Republican Party*, 48 *PRESIDENTIAL STUD. Q.* 404, 405 (2018).

87. *Here’s Donald Trump’s Presidential Announcement Speech*, TIME (June 16, 2015), <https://perma.cc/R95C-CTPS>.

88. DONALD J. TRUMP, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 1 (Dec. 2017), <https://perma.cc/BJ5L-J5BG>.

89. *Id.*

our borders and immigration system is central to national security, economic prosperity, and the rule of law. Terrorists, drug traffickers, and criminal cartels exploit porous borders and threaten U.S. security and public safety. These actors adapt quickly to outpace our defenses.”⁹⁰

Following the campaign’s anti-immigrant theme and in stark contrast to prior administrations that recognized the importance of immigration, the NSS goes on say that the country “understands the contributions immigrants have made to our Nation” but is forthright in its condemnation of “illegal” immigration and its burden to the economy, detrimental impact on American workers, and threat to public safety.⁹¹ This shift is significant—it is a complete break from the long-standing general bipartisan consensus that immigration is the essence of the American story and meaningfully helpful to the economy and society at large.⁹² As Mae Ngai writes, the idea that migrants “pose a potential threat of foreign invasion has become a familiar provocation in nationalist discourse,” one that President Trump successfully marshaled during his campaign and carried into his administration.⁹³ In reality, immigrants have always been a small percentage of the receiving country’s total population, which is a far cry from the doom and gloom scenarios of a foreign invasion frequently touted during modern-day election cycles.⁹⁴

President Trump’s anti-immigration views extended to legal immigration with the NSS, “recogniz[ing] that decisions about who to legally admit for residency, citizenship, or otherwise are among the most important a country has to make.”⁹⁵ Specifically, the NSS details an effort to review visa procedures to “reduce economic theft by non-traditional intelligence collectors . . . and consider restrictions on foreign STEM students . . . to ensure that intellectual property is not transferred to competitors.”⁹⁶ This notion is further elaborated on and directed pointedly at China’s efforts to spread authoritarian values including corruption and the use of surveillance.⁹⁷ Further, the NSS claims that, “part of China’s military modernization and economic expansion is due to the U.S. innovation economy, including America’s world-class universities.”⁹⁸ As Mae Ngai explores, the implication of foreign policy in the formulation of immigration policy “not only speaks to the nation’s vision of itself, it also signals its position in the world and its relationships with other nation-states.”⁹⁹

90. *Id.* at 9.

91. *Id.*

92. SARAH PIERCE & ANDREW SELEE, IMMIGRATION UNDER TRUMP: A REVIEW OF POLICY SHIFTS IN THE YEAR SINCE THE ELECTION, MIGRATION POL’Y INST. 2 (Dec. 2017), <https://perma.cc/J4GX-GRQ7>.

93. MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 12 (2004).

94. *Id.*

95. TRUMP, *supra* note 88, at 9.

96. *Id.* at 22.

97. *Id.* at 25.

98. *Id.*

99. NGAI, *supra* note 93, at 9.

On January 27, 2017, in one of his first decisions, President Trump signed Executive Order 13769, commonly referred to as the “Muslim Ban.” The executive order banned foreign nationals from seven predominantly Muslim countries from visiting the United States for ninety days, suspended the entry of all Syrian refugees indefinitely, and stopped any other refugees from coming into the United States for 120 days. Just a few days after this sweeping policy decision, a five-year-old Iranian child was handcuffed and held at Dulles Airport for five hours under President Trump’s Muslim-nation immigration ban. White House officials had described the boy, an American citizen from Maryland, as a “security threat” and went on to say that “to assume that just because of someone’s age and gender that they don’t pose a threat would be misguided and wrong.”¹⁰⁰ Many of the directives were slowed down due to resistance from political groups or the judicial system itself, where an increasing number of states declined to cooperate with federal immigration officials.¹⁰¹

Despite these efforts, the Supreme Court upheld President Trump’s ban on travel from predominately Muslim countries, reinforcing his power to control immigration justified by national security concerns.¹⁰² In a 5-4 vote, the Court’s conservatives said that the president placing entry restrictions on foreign nationals from particular countries was not undermined by President Trump’s history of derogatory comments about Muslims.¹⁰³ In the majority opinion, Chief Justice John G. Roberts ruled that President Trump did have sufficient statutory authority to make national security judgments when it came to immigration.¹⁰⁴

In a scathing dissent, Justice Sonia Sotomayor said the decision was no better than *Korematsu v. United States*, the 1944 decision that supported the detention of Japanese Americans during World War II. Justice Sotomayor goes on to state that the policy is a “total and complete shutdown of Muslims entering the United States” and the policy now “masquerades behind a facade of national-security concerns.”¹⁰⁵ She details President Trump’s numerous justifications for the travel ban, some of which include noting that President Franklin D. Roosevelt “did the same thing” with respect to the internment of Japanese Americans during World War II and describing a fabricated story about U.S. General John J. Pershing killing Muslim insurgents in the Philippines with bullets dipped in pigs’ blood in the early 1900s.¹⁰⁶ In continuing to reiterate his deep-rooted belief that Muslims could not assimilate into Western culture, Sotomayor describes how at an April 2017 rally,

100. CATHY PARK HONG, *MINOR FEELINGS* 89 (2020).

101. PIERCE & SELEE, *supra* note 92, at 1.

102. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

103. Adam Liptak & Michael Shear, *Trump’s Travel Ban Is Upheld by Supreme Court*, N.Y. TIMES (June 26, 2018), <https://perma.cc/7ZF5-R8NF>.

104. *Hawaii*, 138 S. Ct. at 2423.

105. *Id.* at 2447.

106. *Id.* at 2435–36.

President Trump recited the lyrics to a song called “The Snake,” a song about a woman who nurses a sick snake back to health but then is attacked by the snake, as a warning about Syrian refugees entering the country.¹⁰⁷

As Justice Sotomayor details, in *Korematsu*, the Court gave “a pass [to] an odious, gravely injurious racial classification” that was authorized through an executive order.¹⁰⁸ In *Korematsu*, the government also invoked national security to justify its exclusionary policy rooted in dangerous stereotypes about a specific group’s inability to assimilate and desire to harm the United States.¹⁰⁹ Justice Sotomayor’s dissent praises the Court for overruling *Korematsu*, a long overdue “shameful precedent.”¹¹⁰ However, she goes on to rebuke the majority’s decision in upholding the travel ban, noting the parallel reasoning in *Korematsu* and the current case, “by blindly accepting the Government’s misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one ‘gravely wrong’ decision with another.”¹¹¹

While the Muslim Ban was just one example of the Trump administration’s extensive use of executive power, other significant policy developments include the cuts to the number of refugees allowed per fiscal year and the rescission of DACA. During the Obama administration, the refugee admission ceiling was increased to 85,000 in FY 2016 and 110,000 to FY 2017.¹¹² The move was largely in recognition of the worldwide refugee crisis, largely stemming from the Syrian civil war, and was an increase from the 70,000 level in FY 2013–15.¹¹³ Using national security concerns as a justification, the Trump administration immediately suspended the program for 120 days and reduced the FY 2017 ceiling by 60,000 places.¹¹⁴ For FY 2018, the Trump administration continued citing its security concerns and lowered the ceiling to 45,000 refugees—the lowest level since 1980.¹¹⁵

During his campaign, candidate Trump also promised to terminate the DACA program, which he considered an unconstitutional overreach of executive power. After the election, President Trump appeared to waver on the position, even seeming to demonstrate sympathy during interviews.¹¹⁶ Ultimately, then-Attorney General Jeff Sessions announced the end of the

107. *Id.* at 2437.

108. *Id.* at 2447.

109. *Id.*

110. *Id.* at 2448.

111. *Id.*

112. Juliet Eilperin, *White House Raises Refugee Target to 110,000*, WASH. POST (Sept. 14, 2016), <https://perma.cc/V2LP-ZBUE>.

113. PIERCE & SELEE, *supra* note 92, at 4.

114. *Id.*

115. *Id.*

116. Priscilla Alvarez, *Trump Ditches His Promise to ‘Terminate’ DACA*, ATLANTIC (June 16, 2017), <https://perma.cc/LV6L-NJLR>.

DACA program: “we cannot admit everyone who would like to come here . . . that would be an open-border policy and the American people have rightly rejected that.”¹¹⁷

Unlike its predecessors, the Trump administration shaped its national security and immigration nexus agenda based on campaign promises rather than external events. At the time, evidence suggested that the number of people unlawfully present in the United States and new arrivals was at its lowest level in a decade.¹¹⁸ A Pew Research Center report found that undocumented immigrants arriving from Mexico decreased by almost half from 52 percent of total arrivals in 2007 to 24 percent in 2016.¹¹⁹ In October 2018, prior to midterm elections, the threat of a migrant caravan from the Northern Triangle in Central America (Guatemala, Honduras, and El Salvador) “provided an irresistible visual for Republican closing arguments about immigration.”¹²⁰ Ultimately, the Trump administration’s approach to immigration dramatically shifted the conversation to an insistence that immigrants pose a national security threat and only a heavy-handed and permanent security lens would suffice.

VI. CONCLUSION

*“In the coming decades, climate change will motivate or force millions of people to leave their homes in search of viable livelihoods and safety. It will be “staggering” and “surpass any historic precedent.” Despite predictions of such startling magnitude, there is no legal framework for climate refugees.”*¹²¹

When you consider the story of American immigration policy, a pattern of open and closed borders emerges and can be used to forecast the future direction of migration. The patterns ebb and flow in the wake of major national and international events. Prior to 9/11, we framed immigration policy as an advantage to the American economy and in our national interest—a period marked by expansion, growth, and a looser hold on the doors to the nation. After 9/11, twenty years of immigration policy was still shaped with the national interest at heart, but tightly written within the guardrails of an anti-terrorism framework—a period marked by a sense of isolationism and scrutiny of outsiders.

117. JUSTICE DEP’T, *Attorney General Sessions Delivers Remarks on DACA* (Sept. 5, 2017), <https://perma.cc/TGR4-TFEC>.

118. Colomé-Menéndez, Koops & Weggemans, *supra* note 55, at 15.

119. JEFFREY PASSEL & D’VERA COHN, U.S. UNAUTHORIZED IMMIGRANT TOTAL DIPS TO LOWEST LEVEL IN A DECADE, PEW RES. CTR. 10 (Nov. 27, 2018), <https://perma.cc/P3VM-K7DK>.

120. Dara Lind, *The Migrant Caravan, Explained*, VOX (Oct. 25, 2018), <https://perma.cc/JC9D-Z6YB>.

121. TODD MILLER, *STORMING THE WALL: CLIMATE CHANGE, MIGRATION, AND HOMELAND SECURITY* 23 (2017) (emphasis added).

It appears we may now be at another inflection point that changes the future of migration streams yet again and thus, how we shape immigration policy. Extensive research has shown that climate change is not a red herring, but directly correlates with carbon and greenhouse gas emissions from the world's largest economies like the United States, Australia, the United Kingdom, and Canada.¹²² It is possible that because of the environmental impacts not yet fully realized due to carbon and greenhouse gas emissions, more people will likely be fleeing an environmental disaster rather than war, terrorist activity, or chronic political unrest. The vast majority of climate migrants will relocate without crossing national borders. "Hurricane Katrina gave the country a traumatic preview of large-scale climate displacement."¹²³

For example, Tuvalu, in the South Pacific, is an independent island nation within the British Commonwealth that has been threatened with total submersion as climate change and global warming contribute to ocean levels rising.¹²⁴ Since 2007—well before any substantive government recognition of climate migration—the government of Tuvalu has been advocating through diplomatic channels like the United Nations (UN) Framework Convention on Climate Change in Kyoto and the UN General Assembly for global recognition of its grievances. Over one-fifth of Tuvaluans have already migrated to neighboring islands and New Zealand.¹²⁵ Australia, with the world's highest greenhouse gas emissions from coal power, refuses to accept Tuvaluans as climate refugees.¹²⁶

As Todd Miller writes in *Storming the Wall: Climate Change, Migration, and the Homeland Security*, the American homeland security apparatus that oversees immigration, border control, and anti-terrorism now predates the idea of climate refugees.¹²⁷ Yet, the same apparatus is now being deployed to manage climate refugees—"just like super-typhoons, rising seas, and heat waves, border build-up and militarization are by-products of climate change."¹²⁸ If you look at national security strategies and military planning reports about climate change, key government agency assessments analyze climate change as a dynamic of people moving towards the United States, with the result being that the United States will continue to bolster its border security.¹²⁹ Instead of allocating resources to mitigate climate change, the homeland security industry will continue to increase its resources to build borders and keep out climate refugees.

122. HARSHA WALIA, UNDOING BORDER IMPERIALISM 24 (2013).

123. AYANA ELIZABETH JOHNSON, ALL WE CAN SAVE: TRUTH, COURAGE, AND SOLUTIONS FOR THE CLIMATE CRISIS 353 (2020).

124. *Id.* at 51.

125. *Id.* at 52.

126. *Id.*

127. MILLER, *supra* note 121, at 30.

128. *Id.* at 27.

129. Noel King, *Climate Change Is a Risk to National Security, the Pentagon Says*, NPR (Oct. 26, 2021), <https://perma.cc/L67J-8HL2>.

Absent a major terrorist attack on American soil, the post-9/11 homeland security scaffolding will likely return to the era of 90s immigration standards.¹³⁰ But “the theater for future climate battles will be the world’s ever thickening border zones . . . vast numbers of people will be on the move, and vast numbers of people will be trained, armed and paid to stop them.”¹³¹ Governments, the military establishment, and the international community need to reassess the homeland security apparatus of the last twenty years so that the same immigration national security nexus is not applied to climate migrants—especially when the proper legal protections and framework have not been established.

In an effort to understand climate change and perhaps send a symbolic message of policy importance, President Biden signed Executive Order 14013, “Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration,” in which he called for the first-ever U.S. government report analyzing climate change and its impacts on migration.¹³² The Biden-Harris administration recently released the *Report on the Impact of Climate Change on Migration* outlining the links between climate change and migration.¹³³ The report details how an average of 21.5 million people were forcibly displaced each year by a sudden onset of weather-related hazards between 2008 and 2016, and thousands more from slower hazards linked to climate change impacts.¹³⁴ The report’s call for “humane migration management, regional stability, and sustainable economic growth and development” is a decent start in recognizing climate migration as a key national interest but falls short as it frames climate migration as an interest rooted in American foreign policy.¹³⁵

It would be flat-footed to say that climate change is coming and we have time to react; the truth is that climate change is already here and with outsized impact on various populations throughout the world, such as the Tuvalu. What matters most is what the United States does now in response. The Biden-Harris administration report is a step in the right direction; however, in addition to understanding the impact of climate change on migration, we must also act. As in the past where policy was written in response to certain events, we have the opportunity to write policy as climate change unfolds around us. Starting this journey sooner, rather than later, allows us to remain nimble, safe, and lead with a humanitarian tone.

130. RUDOLPH, *supra* note 10, at 85.

131. MILLER, *supra* note 121, at 29.

132. THE WHITE HOUSE, REPORT ON THE IMPACT OF CLIMATE CHANGE ON MIGRATION 4 (Oct. 2021), <https://perma.cc/56Y2-QRU4>.

133. *Id.*

134. *Id.*

135. *Id.* at 17.