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BORDER MYTHS AGENDA

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[1] Appearing in her capacity as Grievance Chair for the National Association of Immigration Judges

The Nation's Immigration Court System:

Compromised by Recent Changes?

Mimi Tsankov[1]

Grievance Chair of the National Association of Immigration Judges (NAIJ)

In the name of addressing a backlog approaching one million pending cases, the existing Immigration Court system is facing an unprecedented intrusion by the Department of Justice into individual Immigration Judge decisional independence. On a practical level, the case backlog stems not from inaction on the part of Immigration Judges but from years of imbalanced funding of the Immigration Court system. Yet many argue that this encroachment is part of a broader effort to change the way in which Immigration Court adjudications are addressed as it is taking multiple forms including (a) the imposition of new case quotas and deadlines into the existing performance appraisal process, (b) the Attorney General's referral of high-profile matters to himself for decision; and (c) the abrupt removal of cases from an Immigration Judge's docket.

For those that rely on an independent Immigration Court, the stakes are enormous. Immigration Judges are charged with upholding democratic principles and ensuring

[1] Mimi Tsankov serves as a Grievance Chair with the National Association of Immigration Judges (NAIJ) and has been a full-time Immigration Judge since 2006. The views expressed here **do not** represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the author's personal opinions, which were formed after extensive consultation with the membership of NAIJ.

Constitutional due process. They decide matters of "life and death" for people facing deportation at the U.S border. One faulty decision and an Immigration Judge can inadvertently return a Respondent to the hands of their persecutor. Further heightening the stakes for these vulnerable Respondents is the well-documented policy in the recent press that thousands of children have been segregated from their families in these Immigration Court proceedings.

Recent Department of Justice actions have infringed on Immigration Judge decisional independence and will compromise the integrity of the entire judicial system. For example, the imposition of quotas and deadlines in a performance appraisal context places the onus on decision-makers to consider either denying due process in order to meet a satisfactory performance level or affording due process and risking not meeting the performance standards. It introduces an element of self-interest into the decision-making process. This is problematic on a host of levels in regards to expectations about procedural fairness of the process, the provision of Constitutional due process to the parties, and adherence to the rule of law.

Department of Justice efforts to expedite adjudications are impeding the ability of Immigration Judges to provide due process to the parties appearing before them. Stakeholders have criticized these efforts as symptomatic of a larger goal of advancing political objectives. Given that the Immigration Court and its appellate body, the Board of Immigration Appeals, are housed in a law enforcement agency, criticism that its

policies are imbalanced are of great concern. Groups such as the National Association of Immigration Judges, the American Bar Association, the Federal Bar Association, and the American Immigration Lawyers Association have all called on the U.S. Congress to create an independent Immigration Court to address these concerns.

In this article, I will describe:

1. The existing Immigration Court structure, for context;
2. The criticisms that currently exist about the court structure;
3. Recent concerns ranging from Immigration Judge performance quotas and deadlines, abrupt outcome-oriented docketing changes, referral of high-profile cases to the Attorney General; and cases that remove discretion from Immigration Judges as regards substantive matters.

The article will conclude that the Department's efforts to subject Immigration Judges to a set of performance quotas and deadlines impermissibly forces them to choose between denying due process and keeping their jobs. Judges are expected to be impartial decision-makers when they take their oath of office. Due process and fairness in courtrooms require judges to be independent and impervious to outside interference and influence. Since the Immigration Court suffers from a fundamental flaw of being housed in the Justice Department controlled by the nation's top federal prosecutor, its independence is forever tainted.

Furthermore, the recent actions by the Attorney General have exacerbated an already troubling situation. The Department's actions against a backdrop of daily logistical challenges of shortage of staff, limited courtroom space, and job threatening performance quotas impact the ability of Immigration Judges to do their jobs fairly and, at a minimum, raise the specter of an appearance of compromised impartiality.

The Department's recent unprecedented decision to remove multiple cases from a Philadelphia-based Immigration Judge's docket due to his concern over the adequacy of notice for a scheduled hearing, is a clear demonstration of such outcome-driven and impermissible intervention. Cases such as *Matter of Castro-Tum*[2] and *Matter of L-A-B-R-*[3] demonstrate that the Attorney General has significantly curtailed the types of circumstances that support a finding of "good cause" for an Immigration Judge to grant a continuance for a collateral matter to be adjudicated. These Attorney General's decisions in these and other cases suggest the Justice Department's imposition of the Executive Branch's law enforcement policies into a court process that is supposed to be devoid of political influence.

The improper interference with the already faulty Immigration Court system has generated harsh criticisms and proposals for structural reform by prominent scholars and

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[2] *Matter of Castro-Tum*, 27 I. & N. Dec. 187 (A.G. 2018), *available at* https://www.justice.gov/eoir/page/file/1022366/download.

[3] *Matter of L-A-B-R*, 27 I. & N. Dec. 245 (A.G. 2018), *available at* https://www.justice.gov/eoir/page/file/1045661/download.

legal organizations throughout the nation. In order for the Immigration Court system to overcome these concerns, the Court needs to be removed from the Justice Department, so that it can be divorced from all political influences. Legal community leaders have called for an independent Article I court system comprised of a trial-level court and an appellate-level tribunal as a solution. Moreover, providing Immigration Judges absolute authority over their cases and fostering judicial transparency at both trial and appellate levels would ensure "quality over quantity" at the Immigration Court.

Immigrants as a Suspect Class
Dehumanization & Equal Protection

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The Article will discuss equal protection suspect class doctrine and explain why immigrants are properly designated a suspect class deserving of heightened judicial scrutiny. The Supreme Court has not provided any rationale for its designation, however. This Article will supply the missing reasoning and contend that immigrants, including undocumented immigrants, should be treated as suspect because of their history of and susceptibility to dehumanization.

Under equal protection suspect class doctrine, racial and ethnic minorities, women, illegitimate children, and immigrants have been deemed suspect. As a suspect class, laws that discriminate against the class are subject to rigorous judicial review. The Court will apply either strict scrutiny or intermediate scrutiny and require the government to have a strong justification for the discrimination.

The Court has laid out factors used to determine whether a group should be deemed suspect. These factors are: 1) History of discrimination; 2) political powerlessness; 3) immutability; 4) visibility; 5) relevance. These factors are derived from Carolene Products Footnote 4, which argued that discrete and insular minorities who are powerless in the political process should be afforded special judicial protection in the political process.

The Supreme Court's failure to adequately explain why immigrants are suspect has led to doctrinal confusion as to what kinds of immigrants should be deemed suspect. Thus, legal permanent resident aliens are suspect, while undocumented adult immigrants are not. However, undocumented immigrant children have implicitly been treated as suspect. The Court has yet to decide whether nonimmigrant aliens should be suspect but lower courts are split on this question.

The concept of dehumanization can help sort out some of the doctrinal confusion regarding suspect classes.

Dehumanization is the process by which a class of people are treated as less than human or subhuman. Dehumanizing treatment has been understood to be a key step in governmental infliction of abuse, atrocities, and harm against the dehumanized group. Dehumanization is qualitatively different from discrimination. Discrimination is unequal treatment between similarly situated groups. A law can discriminate between classes without dehumanizing either class. Discriminatory laws do not necessarily treat a class of people as subhuman. Thus, for example, affirmative action programs that discriminate against whites in the college admissions process do not dehumanize whites. Such programs do not treat whites as subhuman or less than human.

It is discrimination coupled with dehumanization that fundamentally implicates the core values of equal protection. A suspect class doctrine that fails to consider the central role of dehumanization in the subordination of vulnerable groups is fundamentally flawed.

Thus, whether the group has a history of being dehumanized or is susceptible to dehumanization should be added as a suspect class factor. In doing so, the dehumanization principle

helps to explain why immigrants should be deemed suspect. Immigrants have a long history of being subject to dehumanization. Undocumented immigrants, moreover, are also very susceptible to dehumanization because of the way in which they are labeled as "illegals."

The seminal equal protection case, Brown v. Board of Education, supports the inclusion of dehumanization in suspect class analysis. That was a case centrally about dehumanization, not just discrimination and segregation. *Brown's* concern that segregation instilled a sense of inferiority in black schoolchildren can be best understood as a concern with dehumanizing treatment and its effects. Segregation was institutionalized dehumanization of African Americans, and in striking down segregation, *Brown* implicitly recognized the harms of dehumanization.

This Article will conclude with a discussion of some of the larger implications of this analysis for equal protection analysis.

Deconstructing the Myth of the Illegitimacy of the Plenary Powers Doctrine: Employing a New Originalism Approach to Understand the Federal Government's Constitutional Immigration Power

Professor Carlo E. Zayas-Morales
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From 1875 to 1882, Congress ventured into the regulation of immigration through the enactment of the Chinese Exclusion Laws.[1] Despite lacking explicit constitutional powers to regulate migration, Congress responded to the discriminatory and biased demands for limits on the entry and settlement of Chinese noncitizens. After the Chinese Exclusion Laws, the U.S. Supreme Court proceeded to offer its stamp of approval to this legislative enterprise by deciding a series of cases legitimizing the Federal Government's authority under the Constitution to regulate immigration.[2] Through the amalgamation of the Constitution's express mention of Congress' power to: regulate commerce with foreign nations;[3] establish rules of naturalization;[4] declare war;[5] and its inherent power as a sovereign state to regulate foreign affairs,[6] our highest Court instituted the plenary powers doctrine. Accordingly, the Federal Government unfastened a new era, one that displaced a centennial tradition of state immigration legislation[7] and embraced a cycle of Congressional and Executive actions aimed at appeasing discriminatory public interests and movements by enacting policies in response to economic, criminality, and labor trends and forces; balancing federal interests, state powers, and individual rights; and addressing political and international events, all with the acquiescence of our Supreme Court.

Almost a century after the plenary powers doctrine was adopted, scholars continue to scuffle with the legitimacy of its postulates. Some have challenged its legitimacy under the constitution and have called for its abandonment arguing for greater levels of judicial review for immigration statutes or the return of state immigration laws.[8] Few have attempted to explain why a doctrine that has endured for more than a century still offers a judicial basis for why Congress

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[1] T. ALEXANDER ALEINIKOFF, ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY, 154 (WEST ACADEMIC PUBLISHING, 8TH ED., 2016).
[2] *See*, *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889); *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893); *Wong Wing v. U.S.*, 163 U.S. 228 (1896).
[3] Art. I, Sec. 8, Cl. 8, U.S. Constitution.
[4] *Id.*, at Art. I, Sec. 8, Cl. 4.
[5] *Id.*, at Art. I, Sec. 8, Cl. 11.
[6] *Nishimura Ekiu v. U.S.*, 142 U.S. 651 (1892); *U.S. v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936).
[7] *See*, Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).
[8] *See, e.g.,* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965; Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995); T.L. Pilard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1; Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA REV. 1 (1998); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, and the Nineteenth Century Origins of the Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002).

and the Executive enjoy supreme judicial deference in matters addressing migration.[9]

Cognizant of this academic debate, this paper will strive to debunk the myth that the Federal Government does not have plenary constitutional powers over immigration by employing a new originalism perspective resting on two central tenets: (1) the reliance on an originalist framework; and (2) the expansion of that framework using the interpretation-construction distinction.[10] This paper will argue, through primary sources, that the original meaning of the constitutional powers delegated to Congress were always aimed at providing the Federal Government with plenary powers to regulate migration, despite Congress relinquishing that authority to the states for almost a century. Forthcoming generations, in turn, have elaborated this original framework through a two-step pattern employed by the political branches and the federal judiciary since the Declaration of Independence and up to the enactment of the Illegal Immigration and Immigrant Responsibility Act of 1996, and other recent amendments. Namely, the two-step interpretation-construction pattern consists of: (1) the enactment of federal statutes or Executive actions that respond to external and internal political and non-political forces that affect our national interests; and (2) a final judicial ratification of the political branches' effectuation of the Constitution, as expanded beyond, yet within, its original meaning.

To achieve this objective, Part II of this paper will offer a quick survey of the position held by most legal scholars concerning the alleged *illegitimacy* of the plenary powers doctrine. This part of the article will analyze how such positions fit -or not- within different theories of interpreting the Constitution. Part III of this article will offer a brief explanation of the various modalities of the new originalism theory and will provide a useful framework for the analysis of the plenary powers doctrine within the field of immigration. Part IV will then examine primary sources to define the first tenet of new originalism—the original meaning framework—within the context of immigration. After establishing said foundation, this Part of the paper will then show how generations beyond our founding generation, through the political branches and the judiciary, have employed the interpretation-construction distinction to build upon that original framework a federal scheme of immigration that addresses the internal and external forces that have affected our Nation since its founding. Finally, this paper will conclude that new

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[9] For examples of those who have tried to rationalize the Plenary Powers Doctrine from a constitutional theory perspective, see David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015) (Employing Structuralism, *a la* Charles Black to explain the Plenary Powers Doctrine).

[10] To understand the New Originalist theory of constitutional interpretation, this paper will recur to the following articles, among others: Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459 (2013); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013); Matthew D. Bunker, *Originalism 2.0 Meets the First Amendment: The "New Originalism," Interpretive Methodology, and Freedom of Expression*, 17 COMM. L. & POL'Y 329 (2012); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011); Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1507 (2012); Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361 (2009); Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609 (2008); Daniel Hornal, *Why the Demands of Formalism Will Prevent New Originalism from Furthering Conservative Political Goals*, CRIT: CRITICAL LEGAL STUD. J. (Summer 2012), http://thecritui.com/wp-content/uploads/2012/spring2/Hornal_Final2.pdf.; Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J. L. & PUB. POL'Y 65, 66 (2011); Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 612 (1999); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599 (1988-1989).

originalism, as a theory of constitutional interpretation, offers a valid explanation for the Supreme Court's embrace of the federal plenary power to regulate immigration.

“The CaliBaja Border, the gateway to a cross-border reality”

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When Chimanda Adichie studied and wrote about the Nigerian culture, she discussed the danger of understanding individuals, communities, societies and countries, as “single stories”. The concept and implications of “single stories” has stuck with me because, as a cross border consul, I deal with “single stories" about Mexico, Mexicans, and the border region on a daily basis. CaliBaja,is a large border region comprised of San Diego County, Imperial Valley and Baja California’s five municipalities, which are Tijuana, Ensenada, Mexicali, Tecate and Playas de Rosarito. “Single Stories” about CaliBaja developed into generalized conceptions and myths that isolate the public’s perception of the region, undermine the work and progress that improve the region, and create an almost permanent cultural division that is difficult to eradicate. BajaCali myths are illustrated through statements like “all Mexicans that cross that border are illegal”; “the border is an unsafe, dangerous and inefficient place”; “Mexican and USA authorities at the border do not get along and have no coordination between them”; “Mexicans that come to the USA take jobs from Americans and they do not contribute to the development of our region”; “Mexicans are not bilinguals”; and “Mexicans in the border do not welcome other nationalities”. All these statements remain pervasive and have almost become legitimized preconceptions of the border region.

Over the course of two years, I have learned to understand the CaliBaja region in a completely different way. When I was assigned to the CaliBaja region in June 2016, I was welcomed with a network of political, economic, and social actors, all of whom had established a strong foundation where progress flourished. . I was surprised by the strength of the CaliBaja region, but strength is not what makes this region special. Before my assignment to the region, I had already spent a considerable time determining the unique characteristics of CaliBaja, and how I could use the classic consular diplomacy model to better serve the region. This work resulted in my cross-border consular diplomacy model. I took this model as a personal motto and started creating a figure and identity for my current role as the Consul General of Mexico in San Diego. I also wanted to use this model to help future consuls who succeed me. Furthermore, my cross-border approach included a deep understanding of the bi-national community’s needs, which have intricate characteristics that one must effectively address. To provide for the bi-national community’s needs, I fought against the myths that create an illusion of Mexican-Americans, and how people refer to or consider them without recognizing what Mexican-Americans truly fought for to establish their identities. However, any integrative approach cannot address these issues without the work and support of allies.

From day one, the border region’s networks of actors demanded a new version of me as a consul. In the end, I became the voice of people living abroad. I serve my country as much as I

serve the needs of my people and this has defined my role as a cross-border consul. Every decision I have made as consul has considered the input of people who will be impacted by the decision. In conclusion, I would not be able to fulfill my role as consul if I had not separated myself from the myths that have slowly defined the public's perception of the US-Mexico border in the CaliBaja.

The Costs of United States Immigration Policies

Professor Emerita Lydia Zepeda
University of Wisconsin – Madison

Far from being overrun by undocumented immigrants, the United States is at a 45-year low in illegal border crossings. This paper traces the costs and economic impacts of the US immigration policy. For example, the average cost of a border apprehension is currently more than $11,000 per person. That is 50 times the cost per apprehension in FY1990. This paper will examine trends and costs of detention, immigration court, and deportation. These rising expenditures will be examined in the context of reality and myths of illegal immigration to understand the motivations for US immigration policies.

Illegal immigration is often blamed for taking jobs from United States citizens. However, the number of illegal border crossings is less than 10% of the flow of legal temporary workers in FY2016. Most legal temporary workers (those with visas) are hired to fill well-paying skilled jobs, jobs that Americans want, but companies claim they cannot find US workers. Yet while they claim there is a labor shortage, companies refuse to raise wages, preferring to hire temporary workers on visas. In other words, it is the companies asking for temporary work visas for skilled workers who are taking jobs away from Americans. These temporary workers cannot complain or organize, much less vote. Temporary workers affect the employment opportunities for American collective bargaining in the workplace, as well as swell the number of non-voting residents in the US. It is important to note that while these workers cannot vote, they are counted in the Census to determine representative districts.

The reality of undocumented immigrants is that they work mostly in low paying jobs and are crucial to many sectors of the economy. For example, it is estimated over half all of agricultural workers are undocumented. Talk to any farmer and they will tell you, they cannot find American workers to fill these jobs. Yet few farmers apply for temporary work visas because such visas would require them to pay their workers more on average.

The paper also examines who we are deporting. The vast majority are not criminals; of the nearly 500,000 undocumented immigrants deported during 2016, the US government identified fewer than 2% as dangerous criminals. By comparison, 8% of the US population has a felony conviction. In other words, undocumented immigrants are less dangerous on average than citizens. So who exactly are we deporting? In reality, 95% are Mexicans and Central Americans, even though they make up only 69% of the undocumented population in the US. Clearly, we are targeting Mexicans and Central Americans for deportation. This appears to be in direct response to concerns by some in the US about the rising Hispanic population; Hispanics have made up over 50% of the population growth in the US since 2000. Hispanics currently represent 18% of the US population; they are the largest minority group in the US, 35% larger than the number of African-Americans. Given how our immigration policies and practices target Hispanics, it reflects just how much the US government is willing to pay to get one more Mexican or Central American out of our country.

UNDOCUMENTED IMMIGRANTS AND TAXES

Presented by Lilia Velasquez

The myth is that undocumented immigrants do not pay taxes but rather drain social services in medical costs when they have children.

We have three federal agencies with competing interests:

1. IRS – all people are required to pay taxes, including undocumented immigrants. The IRS facilitates this process by issuing an ITIN number. According to the IRS, in 2015, 4.35 million people paid over 13.7 billion in net taxes using an ITIN. ITIN holders are not eligible for Social benefits or the Earned Income Tax Credit.

2. Social Security Administration (SSA)- the employer will withhold federal and payroll taxes and report that to the SSA and IRS. SSA notes that when a name and number on a submitted W-2 do not match SSA records, it may notify the employer through a "no match" letter. But it has no authority to enforce penalties.

   In addition, millions of people work using a fake social security numbers and do not file for tax refunds because they are afraid immigration may find them and deport them. It is estimated that there are about $12 billion in a suspense fund consisting of unclaimed benefits.

3. Department of Homeland Security (DHS) – the law penalizes employers who hire undocumented workers, and it is also against the law for a foreign national to work without proper work authorization. As a result, most undocumented migrants obtain work by using a fake social security name and fake green card. They cannot obtain employment by using the ITIN number.

It is stressful for anyone to deal with payment of taxes, but for the undocumented it is confusing having to navigate the three bureaucracies and their competing interests.

Another issue was the requirement in court remedies that the undocumented person demonstrate good moral character for the last 10 years. It is bad moral character not to file taxes, and having no documents is not an excuse. Second, the IRS will only allow individuals to pay back taxes for the last three years. So even if a person wanted to file back taxes (or get a refund) they can only go back for three years. This is a huge dilemma.

The Myth of Enforcing Border Security Versus the Reality of Enforcing Dominant Masculinities

Professor Jamie R. Abrams

This essay explores the masculinities underpinnings of modern immigration law, policy, and rhetoric. Existing scholarship and media coverage have captured the ways in which Trump-era immigration laws, policies, and rhetorical strategies are explicitly and implicitly packaged in alarming racism and xenophobia. These rhetorical strands continue a long and deeply worrisome legacy of "othering" immigrants of color and of marginalizing communities of color in the United States more broadly.

Outside of the immigration law lens, separate strands of scholarship and media coverage of the Trump administration have captured the toxic masculinities perpetuated in the Trump era. Discussion of masculinities in the Trump era has generally focused on the campaign trail revelations of his treatment of women, the campaign gender dynamic with other candidates and reporters, the modern #MeToo movement, and his overall leadership style.

This essay brings these two strands of scholarship together to examine the additional masculinities underpinnings of the immigration law, policy, and rhetoric in addition to its much more examined racist and xenophopic frames. This masculinities lens applied to immigration law, policy, and rhetoric continues a prior work in 2013 titled *Enforcing Masculinities at the Border.*[1] This work concluded that masculinities theory offered an additional – even unifying – dimension to understanding disparate and divergent immigration laws and policies. It concluded that the history of American immigration law revealed rich multi-dimensional narratives of class and race, but that it also revealed a lesser-studied masculinities dimension. It concluded that, "our immigration laws and policies reinforce dominant masculinities at the border by excluding marginalized masculinities and admitting those who comport with dominant masculinity norms."

This essay modernizes this prior 2013 thesis to address Trump-era law, policy, and rhetoric. It is well understood that President Trump leveraged anti-immigrant sentiment to catapult himself into the White House, but particularly he channeled this sentiment around dominant masculinities framings that uniquely mobilized his base and inflamed toxic masculinities. The implications of this political strategy extend far beyond immigration law.

[1] Jamie R. Abrams, *Enforcing Masculinities at the Border*, 13 NEVADA L. J. 564, 565 (2013).

The Myths of Central American Undocumented Immigration and MS-13 in the United States

by
Associate Professor Guadalupe Correa-Cabrera
George Mason University

During a White House discussion in May 2018 about so-called sanctuary cities and MS-13 (a Central American/transnational criminal gang), President Donald Trump said: "We have people coming into the country or trying to come in—and we're stopping a lot of them—but we're taking people out of the country. You wouldn't believe how bad these people are. These aren't people. These are animals. And we're taking them out of the country at a level and at a rate that's never happened before. And because of the weak laws, they come in fast, we get them, we release them, we get them again, we bring them out. It's crazy." Trump is not alone in spreading this message of fear; other members of the Republican party have referred to MS-13 as one of the prime national security threats presently in the United States. What is more, recent polls show that an overwhelming majority of Trump's supporters see MS-13 as an effective threat to the country.

Are these assessments based in reality? Is MS-13 a real threat against national security in the United States that justifies a specific direction or drastic change in U.S. immigration law and policies? This essay seeks to answer these questions by analyzing the structure, aims, and modus operandi of MS-13 cliques in the United States, particularly in those geographic areas reported as having some of the highest concentrations of MS-13 members. This gang has significant presence in Los Angeles County and the San Francisco Bay Area in California; the Washington, DC metropolitan area; Elizabeth, Jersey City, Newark, and Plainfield in New Jersey; Queens and Long Island in New York; Boston, Massachusetts; Atlanta, Georgia; Houston, Texas; and Charlotte in North Carolina.

The geographic presence and alleged rapid expansion of MS-13 in certain regions of the country is now associated to immigration patterns and the existence of networks that support undocumented newcomers—including the resettlement of unaccompanied alien children in gang-controlled zones. Overall, this piece will explore the myths and realities of MS-13 in the United States and the actual impact of the discourse against this gang with regards to immigration policy.

The objectives of this essay are threefold. First, this analysis will make an empirical contribution by comparing and contrasting specific findings in the United States with the gang model of MS-13 as established and currently practiced in the Central American Northern Triangle. Second, the essay will connect these findings with debates on U.S. national security policy and immigration, as MS-13 has emerged as a prime emblem of Latin American violence menacing the United States due to the "broken" U.S. immigration system. Lastly, this piece will break the myths related to these subjects and will attempt to offer preliminary insights on what policing and community strategies might beneficially address those criminal effects that do exist in connection to the MS-13 presence in the United States.

From Humanitarian Crisis to Marauding Hordes: A Manufactured Outcome

Jesse Imbriano
Legal Director, Casa Cornelia Law Center

The modern procedures for processing and adjudicating the immigration status of unaccompanied alien children ("UACs") began in 1985 with the filing of the *Flores* lawsuit, federal litigation that remains ongoing. Much of the current law applying to these minors has its genesis in that litigation. Yet, we are currently in the midst of an era that began much more recently, an ongoing reality that the past administration called a humanitarian crisis and the current administration has deemed a threat to national security and our very identity as the United States. Through myriad administrative actions, various officials within the current administration have narrowed UACs' ability to remain lawfully in the United States. In doing so, this essay will suggest, a massive and ever-growing population of noncitizen children who will be without lawful status has come into existence. In doing so, a self-fulfilling prophecy has emerged: many UACs will remain without lawful immigration status and without employment authorization and thereby remain permanent outsiders to the community.

The arrival to the United States of UACs is not new, but in 2014 such children began arriving in unprecedented numbers. At the time, the sudden arrival of tens of thousands of children was seen as a "surge"—a temporary increase to be addressed and overcome. The children were processed according to existing law simply in increased numbers. New facilities were added to ensure the children were cared for consistent with the *Flores* settlement and the federal law that had been enacted to comply with that settlement. The children were generally unhindered in seeking the lawful immigration status for which they may have been eligible. Indeed, while the last administration (consistent with federal law) vehemently opposed legal challenges demanding that these children be appointed government-funded counsel, the administration nonetheless supported efforts to ensure that these children had access to free legal counsel.

The change in administrations saw a fundamental shift as to how the federal government views UACs. Congress has not made any changes to the federal laws relating to UACs. Federal executives have, instead, altered administrative processing as well as how the federal laws are interpreted. Each change has made it less likely that individual UACs will be granted immigration status and permitted to permanently and lawfully reside in the United States. Some of these changes have made immediate repatriation more likely, but others likely dis-incentivize compliance with the law. This essay will address how this has occurred in three areas: fewer UACs released from federal detention, narrowed opportunities for UACs to apply for asylum, and decreased eligibly for abandoned, abused, and neglected UACs to seek lawful permanent residents as special immigrant juveniles.

By federal law, UACs apprehended by immigration officers must be transferred to the custody of the Department of Health and Human Services ("HHS") within seventy-two hours of apprehension. HHS, in turn, must detain a UAC only until a suitable family member, family friend, or institution can be located to provide for the child—as long as the child presents a danger neither to themselves nor the community. These children are not automatically given lawful immigration status in the United States, but rather the opportunity to participate in the legal process without being unnecessarily detained. Previously, this meant that many UACs would be quickly released

to a family member—often a parent—already residing in the United States. New polices have required that potential sponsors provide information on all household members and have directed HHS to share this information with the Department of Homeland Security ("DHS"). Considering that DHS's official stance is now that every immigrant in the United States in irregular immigration status is a priority for deportation, these new policies have meant that potential sponsors are less likely to receive and provide safe homes for UACs while their cases are pending. The result is longer stays in detention, more UACs reporting that they have no sponsor in the United States, and more UACs requesting their own immediate repatriation.

Federal law also provides for preferential treatment for UACs when they choose to apply for asylum. Unlike other noncitizens subject to deportation (including accompanied children) who may only apply for asylum in adversarial judicial proceedings before an immigration judge, UACs are given an initial opportunity to make their case for asylum in a non-adversarial, non-judicial setting, a process intuitively preferable for traumatized, fleeing children. Federal law also exempts UACs from a strict requirement that an asylum application be filed within one year of arrival to the United States. UACs are also exempt from the requirement that they seek asylum in alternative safe countries. Since 2013, these benefits to flow to UACs unhindered, but recent administrative changes have restricted the applicability of these protections and opportunities. At the same time, substantive eligibility for asylum has been narrowed.

Finally, federal law allows young people under twenty-one years old who have been abandoned, abused, or neglected by their parents to seek special immigrant status in the United States and, eventually, lawful permanent residence. Increased demand from the surge of newly-arrived UACs has created a backlog while immigration judges have simultaneously been instructed not to await adjudication of such collateral matters. At the same time, administrative interpretations have limited who can access this protection notwithstanding precedent to the contrary.

Certain facts are beyond dispute, but perception can be influential. It is an indisputable fact that hundreds of thousands of UACs arrived to the United States in the last several years. If they are denied access to the legal protections the law provides for them, they will either be deported or remain an underclass permanently excluded from full participation in the society. They need not be such, but they will be as long as the law is applied to enact the narrative.

MUSLIMS AND THE MYTHS IN THE IMMIGRATION POLICIES OF THE UNITED STATES

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Recently, the U.S. Supreme Court upheld in *Trump v. Hawaii* the fiercely criticized "travel ban" that targets particularly Muslims traveling to the United States. The travel ban has caused a broad wave of public indignation and worldwide condemnation after social media and other media reported footages of dozens of stuck passengers. In the political discourse, the ban was justified as a necessary national security measure. However, and as Justice Sotomayor has critically pointed out in her dissenting opinion, the broader debate concerning the travel ban unveils what is really behind the façade of security: in general, fear of the "stranger" and in particular, fear of the Muslim migrant. The history of migration to the United States, as it relates to singling out some migrant groups for special prohibitions and restrictions, reveals the travel ban is not unique. Centuries ago some migrants were expelled from the colonies by powerful settlers because of their "heretic" views. More generally, some colonies were "not open" to Baptists, Jews and Quakers. And until very recently, Catholics in the United States suffered from widespread feelings of animosity and prejudices that dated back to the Irish migration wave to the United States during the nineteenth century.

The Muslim travel ban is based on the same narrative of anxiety towards the stranger, and it is symptomatic for what has been called "policies of fear." Historically, such policies have affected migrant groups who did not share the majoritarian religious or political perspective. In the past, Baptists, Catholics, Jews, Mormons and Quakers were targeted. Today, policies of fear affect especially Muslim migrants.

Over the past few years, particularly in the aftermath of Muslim terrorist attacks, the outward appearance of Muslims–such as wearing headscarves, keeping beards, non-Hispanic brown, and Middle-Eastern posture–has played a major role in the racial profiling of Muslim migrants in the United States. Furthermore, such physical characteristics and stereotypes have formed the basis to treat the stranger as suspicious. Racial and ethnic profiling of Muslims or travelers with a "Muslim name" or an "Islamic appearance" at airports has become a notorious phenomenon. While racial profiling of Muslims at airports and other security-sensitive places is considered necessary for pressing security needs, in other fields, the Islamic background of migrants is considered a serious threat to societal harmony and peaceful coexistence in diversity.

For example, headscarves and beards have caused conflicts in the field of labor and employment. Additionally, disputes are reported relating to building plans for mosques or Islamic centers. The most controversial example is the plan to build a multi-faith center close to Ground Zero in New York. This project has been called the "Ground Zero Mosque" by its opponents. What may include most of the stereotypes concerning the Muslim migrant population in the United States is the initiative in Oklahoma to prohibit reliance on Sharia law. Although, this "Save our State" amendment was halted in *Awad v. Ziriax*, it was presented as a necessary means in the battle against what was perceived as the barbaric culture.

What do these recent cases of Muslim racialization and discrimination tell us? Can we identify a particular migration myth behind the façades of security and social harmony?

The main aim of this paper is to identify and formulate the myths behind the racialization of Muslim migrants in the United States. In this respect, this paper elaborates on the travel ban case, headscarves and beard cases and the court ruling in the Save our State case. Furthermore, this paper analyzes the historical context of the current anti-immigration atmosphere. The main claim is that the process of racialization and mythologization of migrant groups will contribute to the creation of parallel societies affecting the equal access to fundamental liberties and most basic needs in society. Moreover, this paper will introduce strategies to overcome the era of intolerance towards newcomers. The conclusion of this paper is that we should defend the rule of law in order to overcome the era of anxiety.