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What If They're All Terrorists?: The Securitization of Muslims in Post-9/11 Immigration Policy

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THE SECURITIZATION OF MUSLIMS IN POST-9/11 IMMIGRATION POLICY

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I. Introduction: Islam and Immigration in a State of Exception

"Do you agree that the Supreme Court decision in *Korematsu* does not provide a legitimate precedent for internment or special registration of individuals who are Muslim or with ancestry from Muslim majority countries?" This question came during the confirmation hearing for John F. Kelly, nominated to serve as Secretary of Homeland Security under President Donald Trump. It is extraordinary but at once strangely normal, a question speaking to a fear brought forth by a promise repeated by Trump many times on the campaign trail. The questioner, Senator Gary Peters, asked on behalf of his immigrant and Muslim constituents whether Kelly found precedent in the World War II internment of Japanese Americans for the mass arrests or registration of Muslims or immigrants from Muslim-majority countries. If taken at face value, Kelly's answer—"I do. I don't agree with registering people based on ethnic or religion or anything like that. So I think, I would agree with the Supreme Court."—is at once benign, comforting, and demonstrative of a concerning lack of awareness of the situation, given that the Supreme Court in *Korematsu* had in fact found Japanese internment to be completely legal.[1]

This thesis deals with the normalization of the extraordinary in the years after the 9/11 attacks. I examine U.S. immigrant and refugee policy and policy discourse, focusing on the formation of Muslims as particular sites of risk as immigrants in the War on Terror. The most common figure of the terrorist that emerges after the attacks is of a man who is turbaned and bearded, pious and irrational, perversely masculine, inevitably penetrative, and, of course, Muslim.[2] In the years that follow, figures of the potential terrorist proliferate for policymakers in Congress. International students from Muslim-majorities countries studying certain disciplines are potential terrorists; Muslim refugees from high-conflict areas are potential terrorists; so are undocumented Pakistani laborers, Sikh men and hijab-wearing women in airports,[3] and so on. These figures of the 'potential terrorist' are assessed as risks within a process known as securitization, by which policymakers deploy a logic of emergency in order to discuss them as governable only through extraordinary measures.

Securitization, broadly, is a process in which state actors begin to use the language of security in considering the regulation and governance of a certain policy issue area. Risk management is a component of securitization that offers tools to assess, quantify, and address sites of risk, here through biometric and surveillance technologies. A risk assessment of the figure of the terrorist that emerges after 9/11 discussed above would center on the set of characteristics identified in that figure that might be used to identify other terrorists. But, as the securitization of immigrants and refugees effects a proliferation of potential terrorists, the risk management approach conceives of the terrorist as an incoherent mess of characteristics from which the only identifier to emerge repeatedly is religion. That is, since each of these figures securitized as potential terrorist is Muslim or appears to be Muslim, Islam becomes the only trustworthy indicator of the potential terrorist.

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[1] U.S. Congress, Senate, Committee on Homeland Security and Governmental Affairs, "Nomination Hearing: General John F. Kelly, Secretary of the Department of Homeland Security" (2017).

[2] See Puar, Jasbir K., and Amit S. Rai, "Monster, Terrorist, Fag: The War on Terrorism and the Production of Docile Patriots," *Social Text* 72, v. 20, no. 3 (Fall 2002): 117, 118-125.

[3] For work on the securitization of the Pakistani labor diaspora after 9/11, see Junaid Rana, *Terrifying Muslims: Race and Labor in the South Asian Diaspora* (Durham: Duke University Press, 2011); for work that locates profiling in airports within U.S. empire, see Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times*, Next Wave (Durham: Duke University Press, 2007); the securitization of international students and of Muslim refugees are covered in Chapters II and III, respectively, of this thesis.

I argue that the securitization of various figures who are Muslim or are linked to Muslim-majority countries in post-9/11 immigrant and refugee policy and political discourse contributes to political conditions under which Islam is understood as the only trusted identifier that marks the potential terrorist. My interest lies in drawing out the mechanics of that narrative: How does the post-9/11 policy regime form Muslims as subjects? How do policymakers understand the role of Islam in forming terrorist subjects? How do they configure immigrant and refugee policy as a means of enabling or preventing terrorist acts? I do not seek to assess the lived experiences of Muslim migrants who engage in acts of terror, but rather to understand how such experiences become a sort of text for those who write, debate, and implement policy. Chapters II and III of this thesis explore two instances of the securitization of figures who are Muslim or presumed to be Muslim. In the final chapter, I turn to that which I suggest is a realization of the logic that treats all Muslims as risk, the Trump executive orders heavily restricting immigration from Muslim-majority countries, and document the judicial contestations that followed.

My argument draws from two broad theoretical conversations, neither particularly demarcated nor well-defined. One is the meeting point of the various subsets of political science known as critical security studies, international political sociology, and surveillance studies. Scholarship in these fields deals with the rise of the logics of exception and emergency in policy-making, specifically dealing with the processes by which different policy sectors become governed in the language of security. A component part of these shifts is the rise of mass surveillance and biometric technologies as tools to 'solve' security threats. The second body of scholarship from which I draw deals with religion and race after 9/11. Reaching across and between disciplines, these scholars seek to understand how 9/11 altered and did not alter political, cultural, and social treatments of race and religion. I am most interested in commentaries on the formation of Islam and Muslims in the post-9/11 moment, a subject that has prompted much debate in regards to the racialization of religion, the treatment of religious behaviors in policy, and the discourses of colorblindness or race-neutrality and of freedom of religion. In conjunction with these two theoretical conversations, I reference a number of works on the history of immigration and refugee policy in the United States, along with critical studies in immigration more generally.

1. Securing the border, securitizing immigration

Conversations about border security and homeland security must begin with the conversation of what, exactly, entails securing borders and securing the homeland. The logics of insecurity and security were not always used to describe such abstractions as the border, much less the homeland. Scholars of security studies and international political sociology argue that the gradual extension of the language and policy structures that constitute security to borders and the homeland can be described as 'securitization.'

Loosely defined, securitization is the process by which things that are not implicitly related to national security become addressed through the language and logics of national security. Ole Wæver, the scholar of international relations who first formulated the idea of securitization, suggests that security be understood as a "self-referential practice." Wæver and those in the Copenhagen school of international relations tend to disagree with the normative conception of security as a matter of ontology. Normative theorists of international relations prefer to understand security as a constrained and unchanging field, such that security constitutes only the field of political relations between states that are organized around violence. For Wæver, security is better defined as the result of "political choice[s] on how to tackle an issue"

by which actors frame a given political topic in the language of urgency in order to accomplish certain outcomes. Security becomes the field of politics that stands apart from 'normal' politics.[4]

The mechanics of defining that which is security politics from that which is normal politics rests on securitization acts. An act of securitization, for Wæver, includes four components: the securitizing actor, the object labeled as threat, the object referred to as under threat, and the audience who is meant to perceive threat. The securitizing actor labels something an existential threat in order to "clai[m] a right to handle it with extraordinary means." Wæver frames securitization as almost entirely elite-driven, with political authorities generally taking the role of securitizing actor that seeks to convince the body of citizens of the need for security politics. To render a political issue as security politics requires a series of speech-acts: per Wæver's gloss of J.L. Austin, "by speaking something is done." Thus securitization theory draws attention to verbal and written texts produced by political elites aimed at broad audiences.[5]

Securitization theory functions here as a means of rendering legible the work of the politics of exception and, to a lesser degree, the biopolitical functions of immigration policy. In this sense I aim to uncover the architecture behind that which Didier Bigo names the "ban-opticon." This term, which plays on Foucault's reading of Jeremy Bentham's panopticon and Agamben's theory of the sovereign ban, offers a neat encapsulation of Bigo's approach: he bring together political theorists from separate but related disciplinary conversations to analyze complex relations of power in contemporary society. Bigo and his contemporaries draw especially from Foucault's work on biopolitics and population management, the Schmittian and Agambenian theories of exception, and Agamben's formulation of the *homo sacer*. Bigo's ban-opticon does so in describing the post-9/11 surveillance of certain minority groups:

> The Ban-opticon is then characterized by the exceptionalism of power (rules of emergency and their tendency to become permanent), by the way it excludes certain groups in the name of their future potential behavior (profiling) and by the way it normalizes the non-excluded through its production of normative imperatives, the most important of which is free movement... This Ban-opticon is deployed at a level that supersedes the nation-state and forces governments to strengthen their collaboration in more or less globalized spaces, both physical and virtual, sometimes global or Westernized, and still more frequently Europeanized.[6]

My interest lies primarily with the ways in which the exceptionalism of power is deployed to exclude minority groups through profiling. As I show below, the definition of immigration policy as security politics produces immigrants as security concerns, particularly affecting Muslims in the aftermath of the 9/11 attacks. In this sense, I aim to sketch out the discursive and policy mechanisms by which U.S. immigration policy constitutes the ban-opticon.

I quote at length from Bigo's work on the ban-opticon here in part because this summary acts as an excellent theoretical overview of the rest of this chapter and in part to stake out my relation to Bigo's approach. Bigo and many of the scholars writing in the field of international political sociology approach post-9/11 security studies from the European perspective, given Wæver's location in Copenhagen and Bigo's own Paris School of security studies. As the language from the quote above might suggest, international political sociology draws from continental philosophy in making sociological and anthropological arguments about the international system. In adopting the securitization paradigm to deal with Congressional

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[4] Ole Wæver, "What Is Security?," in *European Security 2000*, ed. Birthe Hansen (Copenhagen: Copenhagen Political Studies Press, 1995), 226.

[5] Wæver, "What Is Security?," 226-227.

[6] Didier Bigo, "Globalized (In)Security: The Field and the Ban-Opticon," in *Terror, Insecurity and Liberty: Illiberal Practices of Liberal Regimes after 9/11*, ed. Dider Bigo and Anastassia Tsoukala (Abingdon: Routledge, 2008), 35-6

discourse about immigrant and refugee policy, however, my approach takes a slightly less sweeping scope in that I deal with the mechanics of the policy process within the United States.[7]

Andrew W. Neal, writing in the tradition of Bigo, argues that political realizations of the state of exception such as the ban-opticon function within historical structures of power. Neal argues that Foucault points to a need for theorists of exception to go beyond "describ[ing] a special category" of political action. Rather, Neal calls for scholars "to stress that successful and mobilizing declarations of exceptions are only possible because of an already existing discursive formation of objects, subject positions, enunciative modalities, concepts and strategies."[8] I read Neal as a reminder to historicize the state of exception, which I will attempt to do in sketching out two moments in the pre-9/11 history of U.S. immigration policy that deal with the construction of the border and the homeland as issues of security.

2. Historicizing homeland security

In June 2002, Attorney General John Ashcroft announced the National Security Exit-Entry System (NSEERS) by describing a "new war" in which "our enemy's platoons infiltrate our borders, ...mov[ing] unnoticed through our cities, neighborhoods, and public spaces."[9] NSEERS functioned as a tracking program for all noncitizen men over the age of 16 from twenty-five countries, all but one of which were Muslim-majority. NSEERS resulted in over 13,000 deportations; none of those deported were charged with terrorism-related crimes.[10] Ashcroft deploys the language of emergency to justify the incredibly invasive system of profiling that NSEERS represents, a system that would prove to be ineffective in accomplishing the goals of policymakers. In declaring such an ambitious and technologically advanced program, Ashcroft brought immigration restrictionism into a new age, but he drew on well-tried scripts in describing it to the world: as Neal observes, declaring a need for exceptional politics in order to secure the homeland demands certain pre-existing configurations of power.

Stated otherwise, to historicize homeland security is to engage in "an analysis of how [the racist state] is able to do what it does" after 9/11, as Dylan Rodriguez puts it. This demands "a focal attention to the historical conditions of possibility for the current institutional formations of migrant criminalization and immigrant detention." [11] The history that follows is not necessarily a history of the securitization of immigration,[12] but rather an attempt to call attention to the 'conditions of possibility' for that which I study in this thesis.

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[7] See Didier Bigo, "International Political Sociology," in *Security Studies: An Introduction*, ed. Paul Williams, 2nd ed (London ; New York: Routledge, 2013), 120–33; for an example of an approach closer to that which I attempt here, see also Philippe Bourbeau, *The Securitization of Migration: A Study of Movement and Order*, Security and Governance Series (Milton Park, Abingdon, Oxon, [England] ; New York: Routledge, 2011), 7 ff.

[8] Andrew W. Neal, "Foucault in Guantánamo: Towards an Archaeology of the Exception," *Security Dialogue* 37, no. 1 (March 2006): 44.

[9] United States Department of Justice, "Announcing the National Security Entrance and Exit Registration System" June 6, 2002, http://web.archive.org/web/20031209053648/http://www.usdoj.gov/ag/speeches/2002/060502 agpreparedremarks.htm.

[10] Penn State University's Dickinson School of Law Center for Immigrants' Rights, "NSEERS: The Consequences of America's Efforts to Secure Its Borders" (Penn State University, March 31, 2009), 11.

[11] Dylan Rodríguez, "'I Would Wish Death on You...': Race, Gender, and Immigration in the Globality of the U.S. Prison Regime," *The Scholar and Feminist Online*, Borders on Belonging: Gender and Immigration, 6, no. 3 (Summer 2008), http://sfonline.barnard.edu/immigration/print_drodriguez.htm.

[12] Though this is primarily a question of method: since I attempt a structural overview not focused on speech acts and security politics, I cannot claim to investigate securitization in the sense of Wæver.

The Immigration Act of 1924 instituted the first federal regime of race-based immigration restriction. The infamous 'national origins quota,' designed to preserve the ethnic makeup of the early twentieth century United States, limited all immigration to 150,000 people annually, divided according to predetermined ratios based on nationality. Entry from each country was limited to 2% of the foreign-born population from that country residing in the United States according to past Census data. The Immigration Act of 1924 also incorporated the Asian Exclusion Act, which banned all immigration from Asia. The 1924 Act expanded on a short-term quota measure passed in 1921 and several state-based immigration restrictions that used nation of origin bans.[13]

Mae Ngai argues that the Immigration Act of 1924 created "a new sort of state territoriality" in instituting such a race-based immigration regime. In effect, this was the first time that immigrants in the United States could be sorted by authorized or unauthorized entry, with unauthorized entrants becoming a "social reality and legal impossibility." The Act of 1924 rendered certain populations *within* the United States illicit by their very presence. Such populations were defined in terms of race, in and of itself not particularly new were it not for the linkage of race to the specific geography of the border.[14] Ngai's analysis offers an important touchpoint in the use of racial panic to configure the border as exclusionary. While the racial origins quota system of the Immigration Act of 1924 was removed by the Immigration and Naturalization Act of 1965, which favored family reunification and the entry of those with educations, the systemization of territoriality and il/legality remained.

The end of the twentieth century saw a similar emphasis of the border in policy conversations about immigration. The free-market border politics of the Reagan era prompted pushback from anti-immigrant constituencies in states on the southern border in the late 1980s and 1990s, especially California and Texas. State legislatures began to implement harsher policing policies in cities near the border. In some states, ballot measures implemented increasingly harsh restrictions on access to public services for undocumented immigrations, such as California's Proposition 187 in 1994. By 1990, policymakers with explicitly restrictionist agendas took leadership roles in the immigration committees of national House and Senate. The policy shifts that followed in that decade, most notably the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), increased funding to the policing of the southern border, instituted a strict deportation regime, and reduced the rights of unauthorized immigrants. For the most part, the rights and access of so-called 'high-skilled' immigrants were left untouched.[15] Often, policymakers explained the difference of regulation by relating unauthorized entry to criminal activity or drug trafficking, thus justifying the militarization of the southern border through the mobilization of moral panic.[16]

The expansion of immigration restrictionist policies in the 1990s drew from and radically expanded the idea of the border as permeable and in need of intervention. IIRIRA and its state-level equivalents engaged in the "symbolic act of claiming the border inside [the state's] territorial boundary" such that any people observed representing the border as permeable are

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[13] Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America*, Princeton Studies in American Politics (Princeton, N.J: Princeton University Press, 2002), 139-149.

[14] Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, New Jersey: Princeton University Press, 2014), 105, 115.

[15] Tichenor, *Dividing Lines*, 274-285.

[16] Mehnaaz Momen, "Are You a Citizen?: Insights from Borderlands," *Citizenship Studies* 9, no. 3 (July 1, 2005): 325-326.

interpreted as threat.[17] Indeed, Lisa Marie Cacho observes a metonymy of immigrant and criminal articulated specifically against Latinx people at the height of the panic over unauthorized immigration at the southern border. Cacho notes the emergence of rhetoric that produces "illegal alien... as de facto status crime," under which 'de facto status crime' is the presumption of future or past criminality based on (often racialized) markers of status.[18] In this regard, the policies enacted on the southern border helped produce that which Nathalie Peutz and Nicholas de Genova name the deportation regime, under which the relatively ineffective, costly, and limited act of deportation exerts less violence than deportability, "the protracted possibility of being deported [and]... the multiple vulnerabilities that this susceptibility for deportation engenders."[19]

Most studies of the securitization of immigration agree that the attacks of 9/11 acted as a focusing event, to use Waever's language, for the expansion of security logics. In his extensive study of political and theoretical responses to the 9/11 attacks, Talal Asad names homeland security as "the new epistemic community being called for [as] necessary to name and deal with what is claimed to be a new object in the world of liberal democracy—terror."[20] For Asad, the post-9/11 apparatus is only new in that it reorients the mechanisms of state control against a new object, terror, and toward regulating those populations associated with terror. The homeland security regime is the product of this reorientation: it actualizes the idea of 'threat to the homeland' as a new political terrain in which to chart action, though such actions might not be particularly unique. Indeed, Chebel d'Appollonia suggests that the idea of homeland security relies on the "convergence of... comparable objectives" with the border security regime. Namely, policy actors are able argue for the goal of "strengthen[ing] border controls and expulsion policies" through the interlocking claims of securing the border, screening for terrorists, and "polic[ing] minorities at national and local levels."[21]

The act of securing the homeland relied upon and reproduced many of the tropes used in securing the southern border. Many politicians and commentators who described the threat presented by certain Muslims made clear that they were only concerned with the "bad" Muslims, not the "good" ones. The writing of "bad Muslim" as terrorist and illegal entrant and "good Muslim" as patriot drew upon the scripts of the previous decades that separated "bad immigrant," a figure who is undocumented and criminal, from "good immigrant," who assimilates and pays taxes.[22] Indeed, the language of immigrants threatening national security was mobilized not only against Muslims and people who looked like Muslims but against Latinx immigrants as well. The reinvigorated trope of "invaders from abroad," which had fallen out of use with the rise of the discourse of colorblindness, found greatest strength when leveraged in

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[17] Momen, "Are You a Citizen?," 332.

[18] Lisa Marie Cacho, *Social Death: Racialized Rightlessness and the Criminalization of the Unprotected* (New York: New York University Press, 2012), 43-44.

[19] Nathalie Mae Peutz and Nicholas de Genova, "Introduction," in *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*, ed. Nicholas de Genova and Nathalie Mae Peutz (Durham, NC: Duke University Press, 2010), 14; see also Victor Talavera, Guillerma Gina Nunez-Mchiri, and Joisah Heyman, "Deportation in the U.S.-Mexico Borderlands: Anticipation, Experience, and Memory" in *The Deportation Regime*.

[20] Talal Asad, *On Suicide Bombing*, Wellek Library Lectures (New York: Columbia University Press, 2007), 29.

[21] Ariane Chebel d'Appollonia, *Migrant Mobilization and Securitization in the US and Europe: How Does It Feel to Be a Threat?*, Europe in Transition (New York, NY: Palgrave Macmillan, 2015).

[22] Cacho, *Social Death*, 99-107; Sunaina Maira, "Deporting Radicals, Deporting La Migra: The Hayat Case in Lodi," *Cultural Dynamics* 19, no. 1 (March 1, 2007): 42, 56-58; Mahmood Mamdani, *Good Muslim, Bad Muslim: America, the Cold War, and the Roots of Terror*, 1st ed (New York: Pantheon Books, 2004), 15-16.

through the "purportedly race-neutral language of cultural conflict" represented by multiple immigrant communities.[23]

Several distinguishing characteristics separate the securitization of immigration under the homeland security from the previous shifts in territoriality and border security noted above. First, the use of air transportation in the 9/11 attacks in a sense extended the perceived threat of border violations across the entirety of the United States. Second, the immigrant population defined as threatening was described in terms of religion, Islam, rather than by nation of origin or broad racial designation (more on this later). Finally, technology was simply more advanced than ever before. Security technologies were certainly of interest to the U.S. government before 9/11, both at the border and elsewhere, but the moments after the 9/11 attack represent the most significant adoption by government agencies of certain emerging technologies. The use of such technologies to identify terrorists and those who might be terrorists is a key component of the securitization of immigration after 9/11.

3. Risk management and risk technologies

The post-9/11 securitization of immigration manifested immediately in the use of the risk management approach in policymaking, a key component of which is a heavy reliance on the use of advanced security technologies. Risk management has its roots in the corporate world, where it serves to maximize the completion of business goals and return on capital investment. The use of risk management in policymaking maps onto the political moment that security scholars label the transformation of risk: intensifying globalization and increasing securitization of traditionally normal political issues shifted the role of risk in security analysis from external and calculable to uncertain, incalculable, and manufactured in part by a greater systemization of knowledge. That is, technological advances not only enable increased levels of knowledge about the world but also prompt a similar increase in variables to consider in making decisions, and therefore in a greater awareness of that which is unknown or uncertain.[24]

Benjamin Muller argues that the threat of terrorism after 9/11 leads to the "pre-assessment of risk" as a policy tool under the "regime of risk management." Risk management rests on the understanding that all failures are catastrophes and unmanageable, and as such for this approach failure must therefore be avoided at all costs by removing any risk. (One might say that this is a less a question of risk management as it is one of managing to avoid risk.) When applied to borders and border security, it follows, risk management assumes "that *all* individuals are potential risks," leading to a focus on "avoiding risk rather than effective mitigation and resilience." To assess an individual's potential for risk requires certainty over that person's identity. [25] In this sense, risk management requires a fascination with identity, in that it demands that an individual be able to verify their identity in order to be cognizable by the risk management apparatus.

Technology proves to be the most effective tool of securing identity. Risk technologies include biometric and surveillance technologies. Technically, 'biometrics' refers to any measurements of unique human characteristics. The most common usage of the term refers to

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[23] Ian Haney-López, *Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class* (Oxford ; New York: Oxford University Press, 2014), 121.

[24] Ayse Ceyhan, "Technologization of Security: Management of Uncertainty and Risk in the Age of Biometrics," *Surveillance & Society*, Smart Borders and Mobilities, 5, no. 2 (2008): 105-107.

[25] Benjamin Muller, *Security, Risk and the Biometric State: Governing Borders and Bodies*, PRIO New Security Studies (London ; New York: Routledge, 2010), 58, 60-61.

physical characteristics: in this case, biometric technologies can measure facial features, fingerprints, the irises and retinae of the eyes, and so on. Biometric technologies differ from other forms of identification, such as a visa, because the identifiers that they track are unique to each individual.[26] Surveillance technologies encompass a far broader range of tools, from those that record an individual's movement through their mobile devices to the practice of compiling data about a person's body from multiple different sources to create a comprehensive profile.[27]

Risk technologies are not value-neutral and, in the hands of a state that has constructed a security apparatus against a particular group of people, are potentially quite harmful. Take, for example, a hypothetical contract between a security agency and a software firm. The security agency requests that the firm develop a program to take in large sets of profiles, for which each profile consists of a number of attributes, and filter out profiles that have certain characteristics. The purpose of the program will be to sort through data submitted on visa applications to sort out 'risky' applicants for further, more rigorous screening. However, the agency does not inform the contractor about the specific use of the program, citing national security as a reason to keep details vague. The agency asks that the program use a machine learning algorithm: that is, the program will determine which characteristics should decide filtering based on a base set of profiles; the program will update the characteristics that decide filtering every time a new profile is filtered.

In this hypothetical, when the agency compiles the base set of 'risky' profiles (those that the program uses to determine which characteristics should decide filtering), agency members select a disproportionate number of profiles with the characteristics 'Iraqi,' 'bearded,' and so on. The initial program will initially be biased toward identifying as 'risky' the profiles of bearded Iraqis. As it learns from identifying 'risky' profiles, however, the program will update its list of characteristics that indicate risk from an even larger skewed set of profiles, making the bias more pronounced. The agency members handling the use of the program might not be trained to identify the algorithmic bias at work and the contractors might not be hired to maintain the program, allowing the skewed identification process to continue unquestioned.[28]

Risk management technologies track physical characteristics and biometric identifiers, but they are unable to evaluate those characteristics that are not physiological in nature. Despite this, intangible characteristics are not isolated from logic of risk management, which seeks to quantify and make certain all potential vectors of risk. Talal Asad notes that liberal political subjects who deal with the idea of terror exert a fascination with motive. According to Asad, motive describes not the reasons why someone does something, but rather to the intangible epistemological conditions that give meaning to a person's action. Motive is intensely personal, but becomes an issue of concern when linked to behaviors that are considered deviant or incognizable (Asad deals with suicide bombing). In the language of risk, Asad's note that "we ask for an explanation in terms of motive only when we are suspicious of what [an] action means"[29] indicates the frustrations of the risk management apparatus in assessing actions that cannot be explained through analysis of physical characteristics.

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[26] Ceyhan, "Technologization of Security," 104.

[27] For an excellent overview of contemporary surveillance technologies and their role within U.S. law, see Rachel Levinson-Waldman, "Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public," *Emory Law Journal* 66, no. 3 (January 2017): 534-549.

[28] My thanks to Eric Zeng, currently a doctoral candidate at the University of Washington's Security and Privacy Lab, for walking me through some of the technical details of surveillance technology and providing this example, and to Eamon Gaffney for his valuable comments.

[29] Talal Asad, *On Suicide Bombing*, Wellek Library Lectures (New York: Columbia University Press, 2007), 42, 63.

While risk management technologies can determine identity through physical markers, motive cannot be analyzed. Risk management renders the biometric body "a readable text composed of signs and codes," as Ayse Ceyhan puts it, but in doing so "de-links [the body] from consciousness and subjectivity."[30] The state that seeks to prevent terror through the preemptive assessment of risk, then, mistrusts motive and affairs of the consciousness, those intangible things that resist quantification. In the case of post-9/11 policymakers legislating on terror, the divide between measurable physical characteristics and the intangible realm of motive tends to be articulated in terms of race and religion. The risk management apparatus can conceive of race, given the inextricability of race and body, as well as the epistemic link of race and nationality. Religion, however, is less easily cognizable, belonging squarely within the realm of intangible motive. The confusion of a risk management apparatus that must treat religion as an identifier but struggles to do so produces continually innovative formations of race and religion.

4. Religion, race, terror

The securitization that I deal with here enacts through risk management an imbrication of religion, race, and terror in the immigrant subject. I must reiterate that I am not interested in the role that religion plays in forming the terrorist subject. Rather, I am interested in the ways that policymakers conceive of the role the religion plays in forming the terrorist subject and conceive of using immigration and refugee policy to block terrorist entry. My argument treats Islam as the primary identifier of the terrorist in policy discourse, though this is often mediated through the lenses of national origin or race. The anti-Muslim policies of the Trump administration, as I suggest in my final chapter, represent a realization of these logics, by which a risk management approach defines all Muslims as potential terrorists and therefore necessary targets of exclusionary policy-making.

A number of contemporary scholars of religion and race, such as Jasbir Puar, Junaid Rana, and Leerom Medovoi, argue that the homeland security regime effects a racialization of religion. They argue, generally speaking, that racial characteristics become associated with and indicative of religious identity, especially for federal, state, and local agents tasked with policing through profiling. For Puar, religious identity is rendered racial when filtered through the regulatory apparatuses of risk management, profiling, and population control. Medovoi and Rana point instead to the long histories by which European countries and the United States have deployed racial configurations of religious bodies in the maintenance of state power.

The meeting point of risk management technologies, as discussed above, and the body-centered practice of racial profiling after 9/11 draws out the ways in which Islam becomes an identity of skin color and bodily marking. Puar argues that "the manufacture of Muslim as race" follows the confusion of "the statistical informational ontologies deemed 'Muslims' and those that begin to bleed into 'terrorist'" in the post-9/11 moment. The collection of data at a mass scale through biometric and surveillance technologies enables security analysts to abstract and render similar data collected on those who are algorithmically Muslim—that is, assumed to be Muslim due to ethnicity or nation of origin—and those who have committed acts of terrorism. For Puar, this is an inevitable result of the state's "dance between the profile that is racialized and the racial profile" in which "data collection enables a mapping of race... [by] establish[ing] the individual as imbricated in manifold populations."[31] The bodily practices of racial profiling

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[30] Ceyhan, "Technologization of Security," 118.
[31] Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times*, Next Wave (Durham: Duke University Press, 2007), 160-162. See also Sangay Mishra and Jinee Lokaneeta, "Subjects of 'Suspicion': Racial Profiling of

link these technologized abstractions of human bodies to physical characteristics once again, rendering 'Muslim' a race in the sense of the data body and the detained body.

The 9/11 attacks do not represent the first moment that Muslims in the United States enter the public eye and therefore cannot represent a sort of initial point of racialization. Rana and Medovoi take similar approaches in discussing pre-9/11 forms of Islamophobia to shed light on its contemporary forms. Medovoi reads together the long history of the European politicization of Islam and Judaism to argue that the confluence of the two is a "generalized anti-Semitism" that he labels "dogma-line racism." Compared with racism based on physical characteristics, Medovoi's dogma-line racism understands threat as the "ideologically motivated enemy" who "actively seek[s] to infiltrate and destroy" those in power.[32] In Rana's treatment, Islam functions as the specter of the times, whether it be "Saracens, Moors, Turks, Orientals, Arabs, Africans, Asians, Jews, Indians, Muselmann," revived by white Europeans and U.S. Americans whenever white supremacy comes under attack. Rana argues that the 'racing' of Islam takes places within the context of specific formations of racism such as anti-Blackness, anti-Semitism, and, in the present context, racism against people of Arab or Middle Eastern descent.[33]

Fewer scholars have centered on state articulations of Islam as a religion within the realm of security policy. Rosemary Corbett calls for a re-accounting of the racialization framework through a reading of history similar to that provided by Medovoi and Rana. Corbett suggests that policy-makers do not treat religion exclusively as a race but rather center on "the irrational religious fanatic of whatever race or nation resists modernity and is given to passionate irrational attachments," effecting a "religionization of race."[34] A generous reading of Corbett might place her argument as following Asad's notes on motive, discussed above. Certainly irrationality and resistance to modernity might act as factors of which the risk management apparatus is unable to conceive. A less generous reading might question Corbett's assertion of policies that center on 'religious fanatics of whatever race or nation' given the thoroughly Christian or at least post-Christian language deployed in writing Islamophobia into law. Mahmood Mamdani's excellent formulation of "good Muslims" and "bad Muslims" may offer assistance here: if Islam is described in the language of 'culture talk,' as Mamdani asserts, the state divides Muslims according to the rubrics of secularity, rationality, and modern ethics.[35]

I aim to sketch out a claim in the following pages that both acknowledges the reality of racialization and points to the consistent discursive animus towards Islam as a religion. Many of the policies that I discuss here deploys nation of origin as a differentiating factor in the implementation process, an act of discrimination to which certain agencies have right in cases that relate to national security. In some cases, profiling on the basis of race or nation of origin is tacit, undertaken by federal agents following internal and confidential communications. As I will

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Muslims, South Asians, and Arabs in the Post-9/11 U.S," *Conference Papers -- American Political Science Association*, no. Journal Article (2012): 1–39.

[32] Leerom Medovoi, "Dogma-Line Racism: Islamophobia and the Second Axis of Race," *Social Text* 30, no. 2 111 (June 1, 2012): 67-68.

[33] Rana, "The Story of Islamophobia," 159.

[34] Rosemary R. Corbett, "Meta-Data, Same-Sex Marriage and the Making of 'Terrorists,'" *Culture and Religion* 15, no. 2 (April 3, 2014): 195-196. Puar's measured response to Corbett is deeply interesting; I suspect the conversation between the two will inform further theoretical work in this thesis. See: Jasbir K. Puar, "Reading Religion Back into Terrorist Assemblages: Author's Response," *Culture and Religion* 15, no. 2 (April 3, 2014): 203.

[35] Mamdani, *Good Muslim, Bad Muslim*, 15-16.

show, the language that motivates these racialized and racializing policy moves is that of religion. Members of Congress routinely invoke Muslims when speaking about security threats, most often through references to jihad, radical Muslims, and al-Qaeda. It is fear of the bad Muslims that effects a suspicion of all Muslims. Indeed, I turn to the realization of these logics in Chapter IV, which considers the actions taken by the Trump administration to ban the entry of Muslims into the United States. I suggest in this chapter that the overt anti-Muslim language of the Trump campaign and administration may offer a point of intervention through the religion clauses of the U.S. Constitution. If it is anti-Muslim discourse that has brought about the racialization of Muslims, perhaps the contestation of anti-Muslim discourse will contribute to the slow untangling of racial stereotypes from Muslim lives.

5. Notes on methods

I focus my primary source analysis less on immigration and refugee policy than on the conversation that surrounds policy. I use policy broadly to refer to legislative documents, executive orders, agency programs, and judicial decisions. My main area of interest lies with the Congressional debates, hearings, and other deliberative processes that inform U.S. political decision-making. My approach here is rooted in the understanding that language, spoken and written, constitutes a means for political institutions to conceptualize action. The United States Congress acts to produce policy but it must first seek political meaning, a deeply complicated process in which Congressional hearings and debates play a role. The archive of Congressional discussion and debate shows the processes of institutional meaning-making.

As such, I analyze transcripts of Congressional debates, Congressional reports, written submissions to Congressional hearings, transcripts of verbal submissions to Congressional hearings, and recordings of Congressional hearings. In a Congressional hearing, expert witnesses are invited to speak and then questioned by committee members. They allow "committee members and the public [to] hear about the strengths and weaknesses of a proposal." The committee chair determines which bills will receive a hearing, though hearings are sometimes convened independent of a specific policy proposals.[36] Committee hearings function within the authority of Congressional agenda-setting: the party that has a majority in the House decides the legislative landscape of the House; the majority party of the Senate does so for the Senate. In this sense, hearings shape the political discourse of Congress by determining what outside voices are centered in legislative discussions and the manner with which expert witness are engaged.

I do not mean to suggest that everything a person says in Congress affects policymaking or acts as a reference point for national conversations about policy. Nor do I mean to extract a coherent narrative from discussions that are anything but. Rather, I see the ideas introduced in the Congressional archive as a sort of exploration. Some ways of thinking might find a hold beyond the scope of a debate and some might not. In doing so, I follow Neal's call to frame securitization in ways that decenter elite- and state-based analysis. Neal argues that securitization is best conceptualized within the field of security politics, such that scholars acknowledge that "security does not simply involve the decisions of sovereigns or expansive techniques of government, but mobilizes and engages politicians in diverse ways." I aim to understand securitization as dynamic, iterative, and produced in the conflicts and agreements between

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[36] Congress.gov, "The Legislative Process: Committee Consideration," accessed November 14, 2016, https://www.congress.gov/legislative-process/committee-consideration.

politicians.[37] In this sense, every voice in the policy process matters for this sort of discourse analysis: tracking the growth of an idea from the periphery to the mainstream often requires paying attention to those policy actors who would be otherwise ignored.

6. Structure of the thesis

In Chapter II, I explore the expansion of the biometric state in 2002 and 2003, as effected through a fear of terrorists entering the United States on student visas and the imposition of risk management technologies on the system of entry for international students. One of the nineteen 9/11 hijackers entered on a student visa, though he did not list a sponsoring school and never attended a university in the United States (often, the number of attackers entering on student visas is inflated).[38] In response, the U.S. government imposed a series of changes to the student visa regime. The most notable of these is the Enhanced Border Security and Visa Entry Reform Act of 2002, which facilitated the funding of biometric technologies for student visa tracking and accelerated the Student and Exchange Visa Information System (SEVIS). In the fiscal year immediately following these changes, student visas issued to all countries declined, on average, by 20%; student visas issued to Muslim-majority countries declined, on average, by 58% and by over 80% in some cases.[39]

I argue that the greatest fear described by policymakers discussing student visas is not terrorists entering the United States on a student visas but students who might leave the United States with knowledge that can be used in terrorism. This specter of dangerous knowledge rests on an understanding of knowledge as capital that international students can leverage against the United States. Regulation of such knowledge aims to determine who has mobility across borders, what knowledge can be transferred across borders, and who is dangerous when they try to transfer knowledge across borders. As Rep. Rohrabacher (R-CA) put it in 2003: "[O]ur system, as it is working right now, a student can come in from a country that has many potential terrorists ... [a]nd they could come in on a student visa, and we wouldn't even know if they left, as it stands right now, isn't that correct?"[40] Through this anxiety of the foreign student, the university becomes a site of risk for the creation of the terrorist.

In Chapter III, I examine the national security concerns articulated by lawmakers facing the entry of Syrian refugees in 2015 and 2016. A number of lawmakers declared that Syrian refugees represented a terrorist threat to the United States, arguing that a lack of surveillance infrastructure in the Syrian crisis zones made it possible to confirm the identities of refugees. At issue here is not merely the entry of Syrian refugees, but the lack of capacity for surveillance in Syria. Democrats and Republicans both deploy the language of humanitarian concern but argue that the lack of information on who the refugees really are is too much of a risk. Identity is at issue here: what if a terrorist masquerades as a refugee in order to enter the United States and commit acts of violence? Legislators, concerned with the fact that Syrian refugees are unable to

[37] Andrew W. Neal, "'Events Dear Boy, Events': Terrorism and Security from the Perspective of Politics," *Critical Studies on Terrorism* 5, no. 1 (April 2012): 110.

[38] Thomas R. Elridge, Susan Ginsburg, Walter T. Hempel II, Janice L. Kephart, and Kelly Moore, "9/11 and Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks Upon the United State," National Commission on Terrorist Attacks Upon the United States, August 21, 2004, 3.

[39] U.S. Department of State, "Nonimmigrant Visa Issuances by Visa Class and by Nationality, FY1997-2015 NIV Detail Table," Office of Visa Services, 2015, https://travel.state.gov/content/visas/en/law-and-policy/statistics/non-immigrant-visas.html.

[40] U.S. Congress, House, Committee on Science, *Dealing with Foreign Students and Scholars in an Age of Terrorism: Visa Backlogs and Tracking Systems*, 108th Cong., 1st sess., March 26, 2003, 51.

provide full accounting of their life histories and proper documentation, turn to conversations about systems of tracking and monitoring through biometric identifiers. Once again, policy-makers turn to the fear over the obfuscation of identity that Muller highlights as fundamental to the neoliberal biometric state.

I argue refugee policy is securitized specifically by the act of imagining a danger for the U.S. home and family in Congressional discourse around Syrian refugees, namely the debate around the American Security Against Foreign Enemies Act of 2015 and a series of hearings held by Congressional committees. As Rep. Jeff Duncan (R-SC) puts it, ultimately: "We lock our doors not because we hate the people on the outside. We lock our doors because we love the people on the inside."[41] The particular language of vulnerability that characterizes refugee policy marks women and children as those most deserving of humanitarian intervention. The entry of Muslim, brown, de-masculinized, and fundamentally traumatized families into the United States is articulated as a dangerously destabilizing force with regard to the image of the Christian, white, child-bearing nuclear family.

Finally, in Chapter IV, I turn to the judicial arguments around the rollout of two Trump executive orders, the so-called Muslim bans. The executive orders attempt to ban the entry of and sharply reduce refugee admissions for people from a set of Muslim-majority countries in the Middle East. Dealing primarily with the challenges to the orders from state governments, I examine the treatments of risk and religion in the language of those who support the orders and those who challenge them. The Trump orders generally frame Muslims as terrorists in a sort of culmination of the processes discussed in the thesis as a whole: since potential terrorists are Muslim, no matter whether students or refugees, the most effective method of managing risk is to ban all Muslims. Comparing contemporary court cases to those filed in the aftermath of post-9/11 policy that profiled on the basis of race and religion, I argue that such a framing has produced unique circumstances to challenge religious profiling as unconstitutional in the courts.

In this thesis I seek to chart a piece of the complex that is Islamophobia in the United States. Immigration policy discourse is but one site of many in discursive regime that attempts to describe Muslims in the language of not-belonging. I offer my analysis of the securitization of Muslims in these three particular moments of U.S. history in hopes that a greater understanding of Islamophobia in the United States might contribute to its undoing or, at the very least, to resisting those who continue to describe Muslims in the language of risk and terror.

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[41] American Security Against Foreign Enemies Act of 2015, HR 4038, 114th Cong., 1st sess., Congressional Record 161 (November 19, 2015): H8381, H8389.

II. Dangerous Knowledge:
Capital and Risk at the International University

The revelation that the student visa system played a role in the entry of the 9/11 attackers into the country represents a paradigm shift in policy language about international students in the United States. In the immediate aftermath of the attacks, reports varied significantly as to the number of attackers who entered as international students. A full investigation would eventually reveal that only one of the nineteen hijackers entered on a student visa, though he did not list a sponsoring school and never attended a university in the United States. Major press outlets reported this number as early as November 2001[42] and it saw confirmation in the official 9/11 Commission report of 2004.[43] Even then, misinformation persisted in the highest circles of policy decision-making. Representative Barbara Jackson Lee commented during the House's 2003 session that "it should be noted for the record that a high percentage of the hijackers came in on student visas"—this despite the correct reporting of the numbers on the House floor mere minutes earlier.[44]

In this chapter, I read debates, Congressional hearings, and policy documents addressing the national security threat that international students present. Primarily dating between late 2001 and 2003, these materials include a set of hearings in the House and Senate that consider student visas; two instruments of regulation, the Visa Condor system and the Student and Exchange Visa Information System (SEVIS); and policy language and debate around the Enhanced Border Security and Visa Entry Reform Act of 2002, an omnibus immigration restriction bill that includes several provisions to regulate international students. I begin by describing that which Michael C. Ewers and Joseph M. Lewis call the "securitization of student migration,"[45] comparing the growth of international student education to the rise of the language of risk in policy descriptions of student visas. I then examine the policies that follow this regime of securitization, drawing out the relation of surveillance and biometric technologies to anti-Muslim policy prescriptions.

I draw attention to the convergence (and confusion) of public and private interest by introducing an analysis of the Congressional Record through the lens of Benjamin Muller's theorization of an emergent 'ID card assemblage.' Private corporations and security-focused state actors alike are interested in the expansion of the surveillance regime, which represents an opportunity for profit and for control. The figure that emerges from the meeting point of securitization and biometric assemblage is of concern to both private industry and national security—the figure of the Muslim student of the sciences who will leverage dangerous knowledge for use in terrorist activities.

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[42] Chris Adams and Jess Bravin, "U.S. Revises Student-Visa Policies Amid Tightening of Immigration," *Wall Street Journal, Eastern Edition; New York, N.Y.*, November 1, 2001, sec. Politics & Policy; see also, half a year later, David Stout, "Inquiry Finds 'Widespread Failure' at I.N.S. in Handling of Hijackers' Student Visas," *New York Times* 151, no. 52125 (May 21, 2002): A16.

[43] Thomas R. Elridge, Susan Ginsburg, Walter T. Hempel II, Janice L. Kephart, and Kelly Moore, "9/11 and Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks Upon the United State," National Commission on Terrorist Attacks Upon the United States, August 21, 2004, 3.

[44] U.S. Congress, House, Committee on Science, "Dealing with Foreign Students and Scholars in an Age of Terrorism: Visa Backlogs and Tracking Systems," 63.

[45] Michael C. Ewers and Joseph M. Lewis, "Risk and the Securitisation of Student Migration to the United States," *Tijdschrift Voor Economische En Sociale Geografie* 99, no. 4 (September 2008): 471-2.

The securitization of the international student extends beyond the risk of terrorist entry to include the risk presented by certain forms of knowledge leaving the country. Members of Congress deal publicly with the concern that people masquerading as students will enter the United States in order to commit acts of terror. Lawmakers reveal in their conversations in the Congressional record that more concerning to them than terrorist entry is the knowledge that *leaves* the United States. Policymakers worry about the economic losses presented by U.S.-educated scholars leaving the country and the security concerns presented by students with certain forms of technical education leaving for states that are considered suspect. Immigration policy discourse about international students explores the necessity of enabling the circulation of capital and the ever-strengthening call for the greater managing of risk. Ultimately, I argue that the securitization of knowledge, particularly scientific and technical knowledge in the hands of Muslim students, functions within the maintenance of the U.S. economy and the homeland security complex.

The opening comments presented by Representative Ralph M. Hall at a House Committee on Science hearing called "Foreign Students and Scholars in an Age of Terrorism" offer an excellent example of the multiple layers of this conversation. As the title suggests, the hearing is a response to the attacks on 9/11, which stand according to the hearing briefing as "a stark reminder of the potential risks posed by foreign students." Hall considered the question of new systems to review international student visas in terms of capital and risk. On the one hand, Hall pointed to the danger that regulating student visas will endanger the "benefit [of] attracting talented international students to the universities... to keep the country in a place of scientific leadership." On the other, he worried, "we have to defend ourselves against terrorists."[46] Continued scientific leadership facilitated by foreign intellectual capital functions for Hall to indicate economic and military supremacy through technological advancement, as it has throughout modern U.S. history. Is such advancement, Hall might be paraphrased as asking, mutually reconcilable for the post-9/11 awareness of the need to secure the homeland?

1. International university, national security[47]

"These students," said Representative John Tierney in beginning an extended meditation on international students at a Congressional hearing, "are able to experience an environment of positive interchanges while they contribute to the intellectual achievements and cultural richness of our universities, promote understanding across cultures, and acquire an appreciation for the American values of freedom and democracy." Tierney described the acceptance of international students as wonderfully and mutually beneficial, a generous extension of U.S. culture and values to those most in need, in exchange for the potential for learning that these students bring. Tellingly, the argument Tierney leveraged against restrictionist policies regarding international students is an economic one. He cited the President of the Massachusetts Institute of Technology's anxiety over "aggravat[ing] our national shortage of highly skilled scientists and engineers," then turns to the possibility of "risk[ing] a brain drain" to other similarly developed states.[48] The university system, for Tierney, must be concerned with technological advancement

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[46] U.S. Congress, House, "Dealing with Foreign Students and Scholars in an Age of Terrorism," 4, 11.

[47] I am indebted to Wendy Ake and the Haas Institute for a Fair and Inclusive Society for guiding my research on the internationalization of higher education in the summer of 2016.

[48] U.S. Congress, House, Committee on the Education and the Workforce, Subcommittee on Select Education and Subcommittee on 21st Century Competitiveness, "Homeland Security: Tracking International Students in Higher Education-Progress and Issues since 9/11" (September 24, 2002), 4.

relevant to other states—that is, international student education is an issue of competition on the global scale.

The paradise of international exchange that Tierney describes finds itself in conflict with the regime of homeland security. As a part of the response to the 9/11 attacks, policymakers begin framing international students as sites of risk, engaging in a securitization process. To be clear, Tierney's analysis is not inaccurate: the system of international student exchange certainly functions within national and global economies. In 2002, almost 583,000 international students were enrolled in U.S. universities and postsecondary institutions. For the 2015-2016 school year, enrollment data sits at over a million.[49] International students in the United States mark a fraction of the global economy of student exchange: 3.7 million students studied under international education visas in 2009 worldwide.[50] International students have a not-insignificant economic impact in the United States, often through the influx of capital in tuition dollars and cost-of-living spending. In 2014, international students contributed $27 billion to the U.S. economy, with tuition fees generally representing the primary source.[51] Students entering on education visas represent a contributor to the U.S. economy, initialized in the internationalization of higher education that began in the 1990s.[52]

In other words, for Tierney and as demonstrated by the very fact that these data are collected, international higher education is an *industry*. In part, the student visa system in the pre-9/11 United States was not regulated because regulation would imply a restriction of capital. More complex bureaucracies of international student entry disincentivize border-crossing for the purpose of education. Given that international students contribute to the economy of the receiving state, the paradigm of neoliberal political economy demands that the state make border-crossing for the purpose of education less complex in order to facilitate economic growth.

The World Trade Organization (WTO) includes higher education under its list of commitments to removing barriers to international trade. Antoni Verger suggests that the rapid growth in the number of international students worldwide can be traced to the 1984 negotiations of the General Agreement on Tariffs and Trade (GATT), known as the Uruguay Round. The negotiators of the Uruguay Round put into place a classification system of all tradeable goods and services known as the Central Product Classification registry. "Education services" is included in this registry, though the negotiators of the Uruguay Round do not seem to have held education as an issue of particular importance—rather, they turned to the registry because it allowed states to harmonize regulation systems for key services trade with little room for confusion. When the Uruguay Round negotiators formally adopted this registry, education fell under the competence of services liberalization under the incipient World Trade Organization.[53]

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[49] Institute of International Education, "International Student Enrollment Trends, 1948/49-2015/16" (Open Doors Report on International Educational Exchange, 2016), http://www.iie.org/opendoors.

[50] Suemedha Sood, "The Statistics of Studying Abroad," *BBC*, September 26, 2012, http://www.bbc.com/travel/story/20120926-the-statistics-of-studying-abroad.

[51] Alejandro Ortiz, Li Chang, and Yuanyuan Fang, "International Student Mobility Trends 2015: An Economic Perspective," *World Education News and Reviews*, February 2, 2015, http://wenr.wes.org/2015/02/international-student-mobility-trends-2015-an-economic-perspective.

[52] This chapter deals primarily with the United States as a receiver state in the global economy of international exchange. It is also a major sender state, with U.S. students who study abroad participating in global exchanges of capital and culture often imbricated in geopolitical power structures.

[53] Antoni Verger, *WTO/GATS and the Global Politics of Higher Education*, Studies in Higher Education (New York: Routledge, 2010), 32-33.

Crucially, the registry excludes services which are seen as "neither tradeable nor commercially provided,"[54] generally accepted to indicate services that are public goods. In other words, the GATT negotiators set into motion the classification of higher education as a private, tradeable service. The deregulation of trade in services under the GATT and its various successors generally involves the de-emphasis of border restrictions in order to better enable the circulations of capital.[55] Higher education as a border-crossing source of profit, that which the members of Congress encounter in 2002 and 2003, is made possible only by the deregulation of international trade in education services under the neoliberal agenda of the WTO.

The intrusion of national security as an organizing principle on the unabashedly internationalized system of higher education represents the process of securitization. Take, for instance, a press release issued by Senator Dianne Feinstein in late September of 2001. Feinstein claimed the U.S.'s "national security depends on our [entry] system functioning to ensure that terrorists do not take advantage of the vulnerabilities in the student visa program." In order to accomplish such a momentous task, Feinstein proposed a moratorium on international student entry. [56] Thus unfolds the quintessential logic of risk management: if all individuals in a given category represent potential risk, then the demand of avoiding risks necessitates removing all such individuals. In drawing on such a framework, Feinstein recast Tierney's vision of 'positive interchanges' into a rather more nightmarish vision of international students seeking out vulnerabilities to exploit.

Terrorist entry is certainly a concern for U.S. policymakers dealing with international student education, as Feinstein's proposal shows, but in some ways such conversations mask the anxieties over students educated in the United States leaving with certain types of knowledge. Ewers and Lewis argue Feinstein's proposal stands as "the invocation of emergency measures [that] represents the crossing of a clear securitization threshold." In this specific securitization act, Feinstein presents the object labeled as threat as the entry of terrorists into the United States.[57]   I suggest that Ewers and Lewis deal only with the surface-level securitization of the student visa in this time period. Congressional discourse makes clear that terrorist entry is not the only source of risk when it comes to international students: knowledge is, as well.

2. Securitizing the student visa

While the United States implemented a number of measures to increase the rigor of the visa application process after 9/11, two are especially worth attention here. One, Visa Condor, deals with preventing terrorists from entering the United States and instituting more rigorous screenings of student visas; the other, the Student and Exchange Visa Information System (SEVIS), deals with the more ephemeral problem of who has access to what knowledge. Visa

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[54] "Note by the Secretariat: Reference List of Sectors," code: MTN.GNS/W/50 (Group of Negotiations on Services, April 13, 1989).

[55] See, for instance, the European Union commitment to the 'four freedoms'—the single-market guarantee of the free movement of goods, capital, services, and people—as neatly encapsulating the neoliberal logic of opening borders to maintain profit, not to mention the strategic blurring of 'people' with those workings of the markets.

[56] Ewers and Lewis, "Risk and the Securitisation of Student Migration to the United States," 474; for the full press release, see Dianne Feinstein, "Senator Feinstein Urges Major Changes in U.S. Student Visa Program," September 27, 2011, lobby.la.psu.edu/_107th/119_Student_Visas_Security/Congressional_Statements/Senate/S_Feinstein_09272001.htm

[57] As discussed in Chapter 1, the classic definition of securitization (as per the Copenhagen School of international relations) includes four components: the securitizing actor, the object labeled as threat, the object referred to as under threat, and the audience who is meant to perceive threat.

Condor was the first visa regulation system that can be truly described as 'post-9/11.' Starting in January 2002, the program subjected visa applicants from Muslim-majority countries to increased monitoring. Those studying sensitive technologies on student visas were especially marked as risks. SEVIS is a surveillance and tracking program implemented in the year after the attack, though it was proposed after the World Trade Center bombing in 1993. Visa Condor and SEVIS engage with different anxieties about international students: the former deals with an intensely Islamophobic concern about terrorist entry, the latter with the worry that certain forms of knowledge will leave the United States in the hands of those who would do harm to it. Both deploy biometric technology in the name of national security and private industry.

Visa Condor required mandatory security screenings for visa applicants from twenty-six countries, most of which are Muslim-majority countries.[58] Essentially, the program implemented extensive screening and biometric tracking for visa applicants who were likely to be Muslim. The program was significantly changed in 2004, both in scope of application and bureaucracy, but in the intervening two years approximately 130,000 checks were completed under Visa Condor. None yielded a visa denial on the grounds of terrorist activity.[59] House Committee on Science staff reports suggested that Condor targeted applications "particularly from those [students] in high tech, engineering and science" from "Arab and Muslim countries." Thus Visa Condor begins by enacting a slippage of ethnicity and religion in its definition of risk. The strategy of targeting suspect student populations is not new: Visa Condor is an extension of a program called Visa Mantis, a security check process implemented during the Cold War for work, study, or research regarding technologies that might have military use.[60] Half a year after Visa Condor began, the program's scope was replicated in the infamous National Security Exit-Entry Registration System, or 'Special Registration,' which similarly targeted visa and LPR holders from Muslim-majority countries.

Originally known as the Coordinated Interagency Partnerships Regulating International Students (CIPRIS) under the Immigration Reform and Immigrant Responsibility Act of 1996, SEVIS essentially monitors international students. CIPRIS was delayed mostly due to lack of political will. The attacks on 9/11 and the Patriot Act added significant momentum to implementation of the program.[61] The primary function of SEVIS is reporting. Universities are required to report to intelligence agencies any time a student on an F1, J, or M visa legally changes their name; reports a new residence address; changes their field of study, type of degree, or source of academic funding; requests authorization for off-campus employment; or violates any condition of visa status, including academic suspension, enrollment of credits under a certain

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[58] The so-called 'List of 26', though unpublished, likely includes Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates, and Yemen. Note that there is some confusion as to what countries Visa Condor applies: the National Research Council report cited elsewhere in this chapter, for instance, links Visa Condor to the list of U.S.-designated state sponsors of terrorism, a significantly shorter list more clearly linked to national security than the broad-ranging List of 26.

[59] Thomas R. Elridge, Susan Ginsburg, Walter T. Hempel II, Janice L. Kephart, and Kelly Moore, "9/11 and Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks Upon the United State," National Commission on Terrorist Attacks Upon the United States (August 21, 2004), 156-157.

[60] U.S. Congress, House, "Dealing with Foreign Students and Scholars in an Age of Terrorism," 5.

[61] National Research Council, *Policy Implications of International Graduate Students and Postdoctoral Scholars in the United States* (Washington, D.C.: National Academies Press, 2005), 68, 77-79.

required level, or criminal conviction.[62] Essentially, SEVIS is a system by which universities and intelligence agencies track all international students for any signs of risk behavior.

SEVIS does not impose more stringent conditions for the granting of a student visa. Implementation rests entirely on universities, which must apply for SEVIS authorization and then coordinate with immigration authorities. Janis Sposato, as of 2002 a high-ranking attorney in the Bush administration immigration bureaucracy, pointed to the limits of SEVIS: "In and of itself, SEVIS is not a system that is intended to prevent terrorism. It is intended to track people and their immigration status as a student. So if a terrorist is scrupulous about attending class and maintaining his status, there is nothing in this system that will help us."[63] Simply put, SEVIS does not necessarily indicate who is and who is not a terrorist. Instead, it identifies behaviors that act as markers of risk. SEVIS operates under the assumption that an international student who is about to commit an act of terrorism will stop attending classes, attempt to mask or somehow alter their identity, and so on.

The targeted reporting system function of SEVIS renders the surveillance program tied to the management of identities of a population rendered suspect after 9/11. Sposato described SEVIS as strangely passive, with the (implicitly male) terrorist only noticed if playing truant. But SEVIS resonates far beyond the lecture hall: consider, for instance, that under SEVIS immigration authorities must be notified if a trans student changes their name, or if a student stops attending classes for mental health reasons. SEVIS creates conditions under which international students are disciplined to be disciplinary: identities that are not static are presumed 'risky' and marked as suspect in the name of national security.

To return to the problem raised by Hall quoted at the start of this chapter, the institution of a surveillance regime in higher education seems to endanger the circulation of capital on which the international university relies. Regulation in the financial sense and in the disciplinary sense create conditions that seem to disincentivize international students from participating in exchange programs. Indeed, Benjamin Muller notes the tensions between "the alleged security imperatives of the post-9/11 world" and "the commitment to neoliberal ideas of free markets, mobile labor, and flowing capital." [64] The homeland security regime demands a certain mistrust of border-crossing, as Visa Condor shows, and of those who have already crossed borders, as with SEVIS. Neoliberal capitalism, in contrast, understands movement across borders linked to the demand for labor and ideas as crucial for functioning markets. Many scholars argue that these are contradictory urges for policymakers, as indicated in Hall's dilemma. Muller disagrees. He argues that post-9/11 immigration policy produces an 'ID card assemblage' such that government tracking and surveillance programs operate constitutively with private industry that relies on transnational capital and labor.

Muller's analysis centers on a case study of the use of biometrics in Canadian airports in the early 2000s. He observes that technologies that link information collected about bodies to security find use in a private industry deeply relevant to public concern. Canadian airports operate either as state-owned corporations or privatized state-owned corporations, but generally contract out technical labor to industry partners. Muller suggests that airports function as a site where technological expertise, private industry, and government interest meet, creating

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[62] U.S. Congress, House, Committee on the Judiciary, Subcommittee on Immigration and Border Security, "Immigration and Naturalization Service's (INS's) Implementation of the Foreign Student Tracking Program" (September 18, 2002), 7-9.
[63] U.S. Congress, House, "Homeland Security," 34.
[64] Muller, *Security, Risk, and the Biometric State*, 51.

conditions that "heighten the reliance within government on individuals and organizations... located within the biometrics industry."[65] The convergence of public and private interests in a particular biometric technology system represents the key characteristic of Muller's ID card assemblage.

Muller does not venture toward a full definition of the ID card assemblage. Generally speaking, he describes it in terms of "divergent rationales, logics of rule, actors, and networks" that interact to form a "convergent system of control." In the case of the debate about national ID cards in Canada, the convergence creates "an over-determined field of identity management that already assumes the use of biometric technology." Key here is that which Muller labels a discourse of "inevitability": policymakers not versed in technology begin to understand biometrics to represent the way of the future and deploy surveillance policy as a sort of panacea to all problems.[66] The ID card assemblage, to draw out a generalizable from Muller's specific study, is that system of control which emerges from a field of competing and convergent state and corporate interests, and produces identity management through the assumption or inevitability of biometric surveillance.

I introduce the ID card assemblage as a theoretical framework to bring together multiple discursive strands and strategies deployed by members of Congress in talking about higher education, economic competition, and risk. In the sections that follow, I track two conversations that I argue mark the boundaries of an ID card assemblage under the post-9/11 regime of student visa regulation. First, members of Congress conceive of international students who leave the United States as a loss of investment, in that people educated in U.S. universities cross borders with the capital they gained from the system of higher education. Second, policymakers conceive of certain technical knowledge in the hands of international students from Muslim-majority countries to represent a significant site of risk. Both conversations bring together the concerns of the state and industry about populations, capital, and risk.

3. "I would like to keep them here"

In the years immediately following the 9/11 attacks, members of Congress begin discussing visa restrictions and surveillance in the context of the U.S. economy, returning to the critical role that immigrant labor plays in key growth sectors. Take the testimony submitted to a hearing commenting on proposed restrictions to student visas in October 2001 by Marlene M. Johnson, the executive director of the largest professional association for international student educators. She struck an urgent tone, writing that "what is being decided now is nothing less than whether we will or not we will make the investment in educating the next generation of world leaders." Such leaders are sure to play a role in assisting the United States in "the next generation of international crises." For Johnson, members of Congress were debating "about America's continued capacity to lead."[67] Johnson, knowingly or unknowingly, anticipated a shift in the conversation about international students after 9/11. While policy discussions about Visa Condor, SEVIS, and other responses to the use of student visas in the 9/11 attack remain in the foreground, members of Congress from both parties begin to frame international students who leave the United States as a threat to U.S. technological and economic supremacy.

Much of such language enters in a 2003 hearing convened to address the issue of international students and the entry of terrorists. Almost immediately after the start of the

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[65] Muller, *Security, Risk, and the Biometric State*, 45.
[66] Muller, *Security, Risk, and the Biometric State*, 52.
[67] U.S. Congress, House, "Tracking International Students in Higher Education," 142.

hearing, the conversation shifted to concerns about the supply of education. Representative Ralph Hall described his frustration with "the percentage of foreign participation" in the U.S. university system. He noted that while international students represent "some benefit to this country," they also limit the number of U.S. students in U.S. universities. Representative Nick Smith understands this as an opportunity to remark that benefit only accrues when international students stay: "If these are exceptional individuals that can help us either in the university level or in research and in commerce, I would like to keep them here."[68] For Hall and Smith, the limited supply of education—universities cannot serve every person who applies—leads the United States to define its interests by assessing the economic potential of university students. In effect, these representatives set aside the framework of higher education as transnational industry, a move grounded in a neoliberal regime from which the United States benefits greatly, to make a narrow argument about national advantage.

While Johnson introduces the concept of an investment in leadership, the return in question here is very much an economic one. Representative Sherwood Boehlert pointed in alarm to the fact that while 70 percent of international students receiving Ph.D.'s from U.S. universities used to stay in the United States, 70 percent now leave—and then qualified the figure by stating that he "pulled this figure out of thin air." Boehlert invented this figure to indicate the "real alarming deficiency in the United States... [of] students in the science, math, and engineering disciplines" who are entering "Corporate America." Similarly, Representative Dana Rohrabacher argued that because "American people pay a lot of their tax dollars into [higher] education institutions" it is unacceptable for international students to not stay in the United States after receiving such subsidized education. [69] As U.S. taxpayers fund the university system, those who benefit from U.S. higher education are expected to give back. Boehlert's mention of 'Corporate America' makes explicit the expected support provided by U.S. public universities to the private sector.

SEVIS marks an area of interest for these members of Congress in that they hope it can be configured to track international students in more economically valuable disciplines to stay in the United States. David Ward, an expert witness and President of the American Council on Education, described SEVIS as an opportunity for the "scientific community and the security community [to] come together to talk to each other to solve these problems" of tension between homeland security and economy. In this same vein, Rohrabacher referenced a bill that he cosponsored to route international students likely to leave the country into working for NASA. He argued that "we need some government service" for National Science Foundation grants to non-citizens in order to facilitate a return on investment.[70] Routing international students in technical fields toward government service provides for the retention of U.S.-funded intellectual capital. Given that the post-Cold War NASA functions within the U.S. national security complex, Rohrabacher's proposal would link innovation in the scientific community to the defense of the homeland.

Smith, meanwhile, proposed using SEVIS to "help facilitate" marriages between U.S. citizens "exceptional individuals" he mentioned in order to facilitate the naturalization and assimilation of those international students. He raised the point almost as a spontaneous aside when responding to an expert witness who had mentioned naturalizing through marriage.

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[68] U.S. Congress, House, Committee on Science, "Dealing with Foreign Students and Scholars in an Age of Terrorism: Visa Backlogs and Tracking Systems" (March 26, 2003), 46-47.
[69] U.S. Congress, House, "Dealing with Foreign Students and Scholars in an Age of Terrorism," 48-50.
[70] U.S. Congress, House, "Dealing with Foreign Students and Scholars in an Age of Terrorism," 53, 50-51.

'Keeping them here' becomes for Smith a matter of leveraging any possible functions of the state.[71] These somewhat incoherent suggestions for SEVIS manage to articulate both economic and biopolitical expressions of the need to keep certain forms of knowledge in the country. Retaining scientists, whether through government-funded research or government-sponsored (?) marriages, is equivalent to ensuring profit.

In the words of Tierney, quoted near the start of this chapter, people in Congress worried that the United States "risk[s] a brain drain" to other similarly developed states.[72] Tierney's fear might be better rephrased as a concern that the United States risks being ineffective at enacting brain drain. Students who return to their home countries interrupt the project of U.S. empire to extract intellectual and economic capital. Even more concerning, perhaps, are those students who leave U.S. universities to work in the technology industries of similarly developed countries: Tierney lists Canada, Australia, and the United Kingdom as countries likely to benefit economically from restrictionist policies toward international students in the United States.[73]

The contours of Muller's ID card assemblage emerge from this blurring of public and private interests around the regulation of student visas. The competitiveness of U.S. science and technology industries rely on policies enacted by the U.S. government, those which regulate a group of im/migrants through surveillance and tracking. At work here is the presumed inevitability that Muller describes—despite SEVIS's somewhat limited scope, policymakers attempt to deploy it as a solution to a dispersed field of problems. Knowledge in these conversations is instrumentalized in economic competition, with university programs for international students described in the language of an investment that goes beyond the scope of the transaction of tuition dollars. The approach to international higher education as an investment in human capital described here marks a discursive starting point for thinking about knowledge as something that can cross borders for use against the United States.

4. Dangerous knowledge

Following the idea that knowledge can be instrumentalized by students who return to their home countries with a U.S. education is the understanding that, in certain conditions, the transmission of knowledge across borders represents a site of risk. "We have many students here, foreign students," announced Representative Dana Rohrabacher at a House Committee on Science hearing, "who come from non-Democratic countries, who are potential adversaries of the United States." He was speaking to Janice Jacobs, then a State Department official in Visa Services. The question to which Rohrabacher was building, and eventually answered himself, dealt with the dangers of educating international students on sensitive technologies: "...are we training, are we allowing students from Pakistan and India into the United States to get Ph.D.'s so they can be equipped to make nuclear weapons? I think the answer is yes, is it not?"[74] Rohrabacher writes U.S. universities as complicit in propping up authoritarian regimes and raising the stakes of the India-Pakistan conflict. The culprit in all this, that which is dangerous for Rohrabacher, is knowledge.

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[71] U.S. Congress, House, "Dealing with Foreign Students and Scholars in an Age of Terrorism," 53.
[72] U.S. Congress, House, Committee on the Education and the Workforce, Subcommittee on Select Education and Subcommittee on 21st Century Competitiveness, "Homeland Security: Tracking International Students in Higher Education-Progress and Issues since 9/11" (September 24, 2002), 4.
[73] U.S. Congress, House, "Homeland Security," 4.
[74] U.S. Congress, House, "Dealing with Foreign Students and Scholars in an Age of Terrorism," 50.

Of course, not all knowledge is dangerous. For Congress after 9/11, only certain knowledge in certain hands presented a problem. Rohrabacher encapsulates this well: he worried about students trained to make nuclear weapons going to 'non-democratic countries' such as Pakistan and India, an orientalist swoop that manages to paint two of the largest democracies in the world as despotic regimes. At work here is a particular sort of securitization that takes knowledge as the object that presents a threat. Such securitization deploys the human capital framework discussed above, whereby knowledge becomes a commodity that can be transported across borders, within a political field that renders Muslims as a population marked by risk.

The effort to identify certain knowledge in certain hands as a threat comes from both sides of the aisle. The notoriously anti-immigrant Rohrabacher joined centrist Senate Democrats in raising concerns about students leaving the United States with dangerous knowledge. Senator Robert Byrd, who is a Democrat, offered a three-part securitization move in the debate over the Enhanced Border Security and Visa Entry Reform Act. First, he pointed out that "there are more than 500,000 foreign students in the United States who are benefiting from the goodwill of this country and from our investment in education." Next, Byrd referenced the types of learning that these students are doing: "Many of these are nuclear engineering scholars. Many of them are biochemistry students. Many of them are pilot trainees who have access to dangerous technology, training, and information." Finally, he linked all international students to the 9/11 hijackers by suggesting that "it should be noted that one of the September 11 hijackers entered the United States on a student visa, dropped out of classes, and remained here illegally thereafter."[75] Byrd constructs all international students as risks through their association with one international student who committed an act of terror.

Byrd's formulation is especially effective because he linked the knowledge that enabled the 9/11 attacks (namely, flight school training for several of the attackers, only one of whom entered on a valid student visa) to knowledge unrelated to the attacks that might be suspect, such as nuclear engineering and biochemistry. Entry on a student visa is not so much a marker of risk as is that knowledge to which a student visa grants access. Indeed, much of the danger here lies with potentiality. Senator Dianne Feinstein commented in the same hearing as Byrd that she did not believe that "the people of my State or the people of America want us to give advanced nuclear training to those who would conduct a nuclear program and use that program against us."[76] The mere presence of a particular form of knowledge that has the potential to be operationalized against the United States indicates the potential for risk.

Islam emerges here as the category by which knowledge can be identified as dangerous. Rohrabacher's testimony above links dangerous knowledge to an assumed-to-be-violent conflict between Pakistan and India, both coded as the Orient and therefore regressive, violent, and Muslim. Later, Rohrabacher worried that "a student can come in from a country that has many potential terrorists," the typifying example of which is "Egypt where we know that they have got some radical Islamic people there."[77] Feinstein held up the fact that U.S. universities "have given a higher education to the head of the Islamic Jihad" as the sign of ultimate failure.[78] Republican Senator Orrin Hatch pushed hard for "religious activities" to be included among the guidelines

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[75] Enhanced Border Security and Visa Entry Reform Act of 2001, S2652.
[76] Enhanced Border Security and Visa Entry Reform Act of 2001, S2615.
[77] U.S. Congress, House, "Dealing with Foreign Students and Scholars in an Age of Terrorism," 51.
[78] Enhanced Border Security and Visa Entry Reform Act of 2001, S2615.

that determine when the FBI notifies DHS about a concerning visa applicant.[79] On the policy level, Visa Condor deals almost exclusively with Muslim-majority countries in imposing more stringent visa restrictions linked to people studying certain technologies.

An exemplar of the convergence of War on Terror foreign policy logic and anti-Muslim nation-of-origin immigration restrictionism comes with the Iran Threat Reduction and Syria Human Rights Act of 2012 (H.R. 1905), some years after the hearings discussed above. Passed with relatively little difficulty, H.R. 1905 aimed to clarify the sanctions regime leveraged against Iran and institute several measures to warn Syria's Assad government about human rights violations. H.R. 1905 includes a provision, Section 501, named "Exclusion of citizens of Iran seeking education relating to the nuclear and energy sections of Iran":

> The Secretary of State shall deny a visa to, and the Secretary of Homeland Security shall exclude from the United States, any alien who is a citizen of Iran that the Secretary of State determines seeks to enter the United States to participate in coursework at an institution of higher education... to prepare the alien for a career in the energy sector of Iran or in nuclear science or nuclear engineering or a related field in Iran.[80]

Section 501 authorizes restricted entry for Iranian nationals who can be 'determined' to seek a career in energy or nuclear science. Immigration officials must concern themselves with motive in the process of deciding if entry for an Iranian student is allowable. At work here is the fascination with motive that Talal Asad notes characterizes liberal discourse on terror. Section 501 does not attempt to discern how people "justify... violence in terms of a discursive religious tradition" that Asad observes,[81] but rather to determine the motive that underlies the pursuit of knowledge. This pursuit, by the neat metonymic move that characterizes this conversation about dangerous knowledge, is coded by the markers of Islam and risk. Interestingly, earlier versions of H.R. 1905 included two provisions that restricted entry from Iranian government officials and restricted entry for anyone related to corporate activity implicated in human rights violations, to Iranian nuclear proliferation, or to sponsors of international terrorism.[82] Both were removed after the Senate amended the bill. The language of restricted entry mentioned in these provisions seems[83] to have been replaced by Section 501 in the final bill. Reading the history of H.R. 1905's language suggests a direct link between Section 501 in the final bill and the intent of barring the entry of potential terrorists in earlier versions.

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[79] U.S. Congress, House, Committee on the Judiciary, "Oversight Hearing on Counterterrorism" (107th Cong., 2nd sess., June 6, 2002), 19.

[80] Ileana Ros-Lehtinen, "Iran Threat Reduction and Syria Human Rights Act of 2012," H.R. 1905, Public Law No: 112-158 (2012).

[81] Talal Asad, *On Suicide Bombing*, Wellek Library Lectures (New York: Columbia University Press, 2007), 29, 36-37, 41-45, 102n26.

[82] Iran Threat Reduction and Syria Human Rights Act of 2011, H.R. 1905, 112th Cong., 1nd sess., Congressional Record 157 (December 13, 2011), H8845-H8846.

[83] 'Seems' is the operative word here. I am unable to find any record of the Congressional conversation behind the writing of Section 501. The debate over the bill as represented in the Congressional Record concerns itself for the most part with the sanctions imposed by H.R. 1905 (see, for instance, the debates beginning on Cong. Rec. 157 H8834, Cong. Rec. 158 S3641, and Cong. Rec. 158 H5552) contain no mention of international students, broadly, or Section 501's prohibition of Iranian student entry, specifically. While there are indications that such edits might have taken place as a result of a Senate Committee on Foreign Relations hearing in 2002, that hearing is not available in any of the publicly accessible databases that publish hearing transcripts.

5. Toward a student visa card assemblage

  The surveillance and tracking components of SEVIS act as responses to the threat presented by knowledge leaving the country for the use of terrorists. At one point in the debate over expanding the reporting requirements for SEVIS, Senator Sam Brownback described the monitoring of international students in terms of the total number of border crossings in 2001: "If we are looking at 330 million people in a universe and are trying to hone this down to several hundred, we need a lot of information."[84] He justified data collection not only through rhetorically inflating the number of international students entering the country, and therefore the number of potential threats, but also by assuming that some proportion of those entrants are suspect. The use of SEVIS to identify who is at risk of leaving the country with dangerous knowledge deploys biometrics in part on the presumption that such an incident is inevitable.

  Policymakers quickly move past the utility and reality of applying biometrics in risk management, instead exploring what might be called technological fantasy. Biometric technologies allow immigration authorities to "eliminate people who steal passports and try to enter as, you know, false identities," as explained in 2001 by Mary Ryan, then Assistant Secretary of State for Consular Affairs. She was commenting on the expansion of SEVIS under the Enhanced Border Security and Visa Entry Reform Act, specifically the implementation of "a really great biometric" that read biometric data from a digitized photograph. This would allow immigration officials to compare these data with those presented on visa application forms. Ryan compared the reading of facial measurements favorably to the "talk about fingerprinting and all that," suggesting photo-based technology was far less expensive. She was responding to a question from Representative Michael Castle, who quite excitedly spoke about creating "secure visa cards with biometric information on them" and implementing a sort of biometrically informed watermark as an "identification methodology" on visas.[85] Ryan begins with a purely entry-focused piece of technology dealing with the possibility of a person falsely identifying as an international student. Castle turns to a national system of tracking, monitoring, and biometric surveillance, almost as if the latter is a natural extension of the former.

  This moment might act as an exemplar of the politics of inevitability that Muller argues marks political attitudes toward biometrics and surveillance technology after the 9/11 attacks. As Muller puts it, "the overall escalation of specifically biometric ID card strategies as the sole legitimate solution to a particular articulation of the contemporary problem that is 'insecure identity'" constitutes the logic of the ID card assemblage.[86] Indeed, Castle was describing technology that at the time did not exist, while the technology Ryan described is invasive and has proven prone to problems: Junaid Rana offers one instance in which mistaken identities based on the sharing of data mined from photos provoked an international manhunt for the wrong people: the entry of several unauthorized Pakistani migrants triggered an overeager FBI press release about "potential terrorist activities" that publicized photos linked to the documentation of a jeweler who lived in and had not left Lahore.[87] Castle's casual suggestion that a system-wide biometric card could act as the solution to a problem of very limited scope demonstrates the presumed inevitability of biometrics about which Muller writes.

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[84] Enhanced Border Security and Visa Entry Reform Act of 2001, S2654.

[85] U.S. Congress, House, "Tracking International Students in Higher Education," 50-51.

[86] Muller, *Security, Risk, and the Biometric State*, 51.

[87] Junaid Rana, Terrifying Muslims: Race and Labor in the South Asian Diaspora (Durham: Duke University Press, 2011), 54, 57-60.

The discourse of inevitability serves a very particular set of interests at the meeting point of the public national security sector and the private technology sector. Rana, drawing from a set of interviews given by Colin Powell, calls attention to what Powell names the 'terror-industrial complex.' The complex emerges when, in Powell's words, the U.S. homeland security apparatus "get[s] so caught up in trying to throw money at the terrorist and counter-terrorist problem that we essentially are creating an industry that will only exist as long as you keep the terrorist threat pumped up."[88] Under the terror-industrial complex, the language of terror coupled with the maintenance of the logic of exception produces incredible technological innovation oriented against risk populations. Deepa Fernandes has detailed the blurring of private industry and government in homeland security contracting, in which she observed contractors approaching government officials to request grant proposals for surveillance technology already in development.[89] Such relationships constitute the specific and contextual forms through which this particular ID card assemblage takes hold under the rubric of homeland security: convergent state and corporate interests produce investment in a particular set of biometric technologies driven by the logics of terror and risk.

I call attention to the terror-industrial complex to show that the Congressional conversation about surveilling international students not only represents the meeting point for the market interests of certain public and private actors but also the meeting point of market strategies. Rana and Fernandes demonstrate that rhetoric about terror informs the ways in which capital circulates. Under the homeland security regime, the government grants money to those companies that produce technologies to assess and manage risk. Those companies contribute to the U.S. economy through the job creation and tax dollars. The maintenance of the terror-industrial complex proves to be of interest to those private sector actors, in that they generate profit as long as homeland security grants continue, and to public sector actors, who can claim the benefits of economic growth and national security both.

It follows, then, that the Islamophobia written underneath this rhetoric about terror will find new form in the circulations of capital that I here mark using Muller's ID card assemblage. The relation between global capital and Islamophobia in U.S. policy-making has been documented elsewhere in the work of Rana, Jasbir Puar, and Dylan Rodriguez.[90] The production of anti-Muslim sentiment is itself an industry of sorts, bankrolled by a network of funders and foundations that link together grassroots organizers, media outlets, and politicians. Millions of dollars flow in the United States towards the maintenance of Islamophobia. Included in this network are trainings that Islamophobic scholars provide to law enforcement officers and foundations that offer funding to the campaigns of anti-Muslim hawkish politicians.[91] The

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[88] Junaid Rana, "The Racial Infrastructure of the Terror-Industrial Complex," *Social* Text 34, no. 4 (December 2016): 112-113. The terror-industrial complex is also called the immigrant-industrial complex, by Deepa Fernandes, and the homeland security-industrial complex, by journalist James Risen (quoted in Rana).

[89] Deepa Fernandes, *Targeted: Homeland Security and the Business of Immigration*, 1st ed (New York: Seven Stories Press, 2007), 169-183.

[90] Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times*, Next Wave (Durham: Duke University Press, 2007), especially "Introduction" and "The Sexuality of Terrorism"; Dylan Rodríguez, "'I Would Wish Death on You...': Race, Gender, and Immigration in the Globality of the U.S. Prison Regime," *The Scholar and Feminist Online, Borders on Belonging: Gender and Immigration*, 6, no. 3 (Summer 2008).

[91] Ali Wajahat et al., "Fear, Inc.: The Roots of the Islamophobia Network in America" (Center for American Progress, August 2011); and Matthew Duss et al., "Fear, Inc. 2.0: The Islamophobia Network's Efforts to Manufacture Hate in America" (Center for American Progress, February 2015). See especially Chapter 3, "Islamophobia masquerading as law-enforcement counterterrorism training," in "Fear, Inc. 2.0."

circulations of capital that make up the Islamophobia network are imbricated in the homeland security complex.

A number of scholars have written extensively on the turn to the disposability of the Muslim body after the 9/11 attacks.[92] Nadine Naber writes that violence against Muslims or those perceived-as-Muslim creates an "'internment of the psyche', [a] general sense that one is always being watched and could at any time be attacked, deported, or disappeared" for immigrant communities.[93] The violence directed against Muslims from the gas station to the immigration detention center to Abu Ghraib, Guantanamo, and the CIA black sites certainly create conditions of psychic and emotional stress, not only against those attacked but against those who feel likely to be attacked. Thus profiling, by which bodily markers are taken to indicate which bodies are Muslim, does work beyond the immediate act of racialized recognition. Bodily violence directed at these presumed-to-be-Muslims, by the state and by individuals tacitly enabled by the state, mark them in turn as disposable, detainable, and deportable.

The post-9/11 anxieties on which I comment here, in contrast, represent an obsession with the Muslim *brain*. The terrorist constructed in these Congressional conversations, and the policy that such conversations produce, deal with the potential for knowledge to become weaponized. The profiling of bodies through physical characteristics cannot function in the world of student visa applications and international higher education—that is, it is impossible to use bodily markers in the policing of entry for international students under the regime of higher education as industry. The ID card assemblage that emerges around international student visas seeks to prevent knowledge, whether coded in the language of economic supremacy or in that of national security, from exiting the country. I see this as distinct from the securitization of international students to which Ewers and Lewis refer: the entry of terrorists to the United States through student visas is a security matter in terms of what will happen after entry; this concern ends when those in question have left the United States. The securitization of dangerous knowledge, building off the knowledge-as-capital framework, marks the figure of the Muslim student of the sciences as a potential terrorist.

The securitization of the student visa is one piece of the broad-scale proliferation of potential terrorists in the years following 2001. While the language of risk first used to describe international students deals with the fear that student visas present an opportunity for terrorist entry, the anxiety that follows centers on knowledge that leaves the United States. Border-crossing represents a potential loss of capital and a potential national security threat for the United States when U.S.-educated international students leave with knowledge that is somehow suspect. The figure that emerges as one who represents a risk is the Muslim student of the sciences. The risk management approach to international students deploys a system of regulation and surveillance that blurs the lines between private interests and the needs of the state. The impulses to simultaneously maintain the deregulation of capital and ensure the regulation of risk finds realization in the student visa card apparatus that emerges in the aftermath of the 9/11 attacks.

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[92] See, for instance, Rana's chapter "The Muslim Body" in *Terrifying Muslims*; much of Puar's *Terrorist Assemblages*, but especially "'The Turban is Not a Hat': Queer Diaspora and the Practices of Profiling"; Erin Runions' work on Abu Ghraib; and the extensive work on post-9/11 racial/religious profiling from Sunaina Maira and Sangay Mishra.

[93] Nadine Naber, "The Rules of Forced Engagement: Race, Gender, and the Culture of Fear among Arab Immigrants in San Francisco Post-9/11," *Cultural Dynamics* 18, no. 3 (November 1, 2006): 255.

III. Would-be Terrorists:
Uncertain Configurations of the Syrian Refugee

"Can you name for me or identify for me a suicidal terrorist that was not a Muslim?" The question, directed by Representative Steve King (R-IA) to Leon Rodriguez, Director of U.S. Citizenship and Immigration Services, came at the tail end of a House Judiciary hearing on the security implications of the Syrian refugee crisis. Convened by the Subcommittee on Immigration and Border Security just days after the disastrous November 2015 attacks in Paris, the hearing was charged. Rep. King's question was followed by murmurs throughout the chamber and sputters of surprise from Rodriguez. His follow-up was even more startling: "You're telling me that you're doing a thorough vetting process, but you're unable to tell me that you specifically ask [Syrian refugees] what their religion is. And if you don't specifically ask them, then neither are you able to quantify the risk to the American society."[94]

King describes a fear that emerges at the height of the Syrian refugee crisis: what if Syrian refugees admitted to the United States come in order to commit attacks of violence? The picture of Syrian refugees that emerges from Congressional discourse in 2015 and 2016 is one in which identities and intentions are unknowable. This deep uncertainty demands the imposition of a risk management approach to refugee entry, one that specifically imagines Muslim Syrian refugees as a danger to the U.S. home and family and demands greater surveillance in the United States and abroad.

In this chapter, I read Congressional hearings and debates from 2015 and 2016 that deal with the so-called Syrian refugee crisis. The hearings consider the immigration policy, foreign policy, and security policy implications of the refugee crisis, while the bill on which I focus, the American Security Against Foreign Enemies Act of 2015, offers harsh reforms to the program of refugee entry. The term refugee crisis is something of a misnomer, given that it received the greatest publicity when people fleeing from Syria attempted the European Union as asylees. As I note below, the imaginary of the Syrian refugee crisis, and the securitization of Syrian refugees more specifically, relies on a writing of the United States and the European Union as the West endangered by a mass of refugees. When policymakers apply the language of risk to Syrian refugees, they do so imagining a simultaneous danger to the U.S. home and family and to Western civilization itself.

Here, it must be noted, such logic may cost Syrian people their lives. As I write, in April 2017, it seems that the Syrian government may have killed over 70 Syrians using chemical weapons. This is by no means a new state of affairs. In Syria it seems that Mbembe's "war machine," that which operates beyond or in blatant violation of the state's "claim to ultimate of final authority in a particular political space," has taken control. Those who live within the regime of the war machines are at once subject to the logics of the state of exception, the state of siege, and the biopolitical state.[95] In this sense, the border security apparatus of the United States extends its regime of necropolitics beyond territoriality. While I leave it to others to debate the nature of al-Assad's Syria, whether it is a failed state, a suicidal state, or otherwise, I would be

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[94] U.S. Congress, House, Committee on Homeland Security, *The Syrian Refugee Crisis and Its Impact on the Security of the U.S. Refugee Admissions Program*, (114th Cong., 1st sess., November 19, 2015), 82; see, for video and audio recordings, https://judiciary.house.gov/hearing/hearing-the-syrian-refugee-crisis-and-its-impact-on-the-security-of-the-u-s-refugee-admissions-program/, timestamp 1:41:28.

[95] Achille Mbembe, "Necropolitics," trans. Libby Meintjes, Public Culture 15, no. 1 (2003): 32-34, 39-40.

remiss to not point out that the discussion here over whether refugees are dangerous can (and often does) elide the fact that many Syrians live in conditions of near-constant danger.

1. Refugees or infiltrators?

King's response typifies an attitude of uncertainty as to the motives of Syrian refugees that emerges in the aftermath of the Paris attacks, one that sought to identify whether those fleeing the crisis truly needed assistance or whether they might seek to do harm to the United States. This line of questioning saw prominence after reports emerged that one of the attackers had entered France among a wave of refugees. In the days before the hearing at which King spoke, 31 state governors announced their dissent toward the entry of Syrian refugees into their states. Just a month earlier, President Barack Obama had announced that he would allow 10,000 Syrian refugees into the United States. [96]

The Syrian refugee crisis, as it came to be known in the United States, began many years before these conversations. The first mass movements out of Syria began as early as April of 2011, when 5,000 Syrian people fled fighting in the town of Talkalakh. [97] It was not until 2014 that the number of Syrians entering the United States as refugees spiked above the previous annual maximum of 36 people. By the end of 2014, the State Department had accepted 208 refugees from Syria; that number increased significantly to 2,089 Syrian refugees in the year of 2015. As of April 2017, the total number of Syrian refugees in the United States numbers 20,635, following over 15,000 entries in calendar year 2016. [98] A number of Syrian people enter through affirmative asylum, which requires an applicant to be physically present in the United States. 2012, 2013, and 2014 saw 327, 750, and 868 Syrians granted affirmative asylum status, respectively, up from between zero and 40 in previous years. [99] Asylees are generally considered distinct from refugees, who may not be physically present in the United States at time of application. [100]

The blurring of the line between asylees and refugees into a single Syrian refugee crisis enables a parallel blurring by which all receiving states are presumed to face the same set of problems. The same day as the hearing quoted above, during a debate over a proposed piece of legislation that would make the entry of Syrian refugees subject to a prohibitive degree of scrutiny, Representative Michael McCaul commented that "ISIS has vowed, in their own words, to exploit the refugee process... [and] infiltrate the West." [101] The bill in question, known as the American SAFE Act, will be discussed later in the chapter; more pressing for now is McCaul's anxiety-fueled revival of 'the West' as an object of terrorism. Under McCaul's logic, threats to Europe are threats to the United States. A report produced by House Homeland Security

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[96] Ashley Fantz and Ben Brumfield, "Syrian Refugees Not Welcome in 31 U.S. States," *CNN*, November 19, 2015, http://www.cnn.com/2015/11/16/world/paris-attacks-syrian-refugees-backlash/index.html.

[97] Migration Policy Centre, "Timeline," *Syrian Refugees: A Snapshot of the Crisis in the Middle East and Europe*, October 5, 2016, http://syrianrefugees.eu/timeline/.

[98] U.S. Department of State, "Refugee Processing Center, Refugee Arrivals, CY2002-2017, Nationality: Syria, Religion: All Religions" (Bureau of Population, Refugees, and Migration, April 2017), http://ireports.wrapsnet.org.

[99] U.S. Department of Homeland Security, "Individuals Granted Asylum Affirmatively by Region and Country of Nationality: Fiscal Years 2005 to 2014" (Office of Immigration Statistics, August 2016), https://www.dhs.gov/immigration-statistics/yearbook/2014.

[100] See, for an overview: "The Affirmative Asylum Process," *USCIS*, February 23, 2016, https://www.uscis.gov/ humanitarian/refugees-asylum/asylum/affirmative-asylum-process; and "Learn About the Refugee Application Process," *USCIS*, May 25, 2016, https://www.uscis.gov/humanitarian/refugees-asylum/refugees.

[101] American Security Against Foreign Enemies Act of 2015, H.R. 4038, 114th Cong., 1st sess., Congressional Record 161 (November 19, 2015), H8382.

Committee researchers around the time of the debate deploys the more austere language of policy analysis to effect the same revival. The report notes that "Mediterranean and Balkan countries risk becoming a new 'terrorist turnpike' into the West" such that "America's security is put at risk [because] partner countries fail to conduct adequate counterterrorism checks on refugees and are unable to cope with the radicalization challenges created by mass migration."[102] The language of the report produces a strange metonymic chain by which entry into the southern and eastern states of the European Union is understood as entry into the West as a whole and therefore more specifically as (potential) entry into the United States.

Legislators and analysts who take the Paris attacks as a case study in what might happen to the United States engage in an act of elision that groups together two entirely different migration contexts. The structure of asylum policy in the European Union was poorly situated for the mass entry of asylum seekers. Previous to the Syrian refugee crisis, the governing directive of the Common European Asylum System was the Dublin Regulation, which requires asylum seekers to remain in the first E.U. country in which they applied for asylum. The so-called 'first country of arrival' principle "lays a disproportional burden on the countries on Europe's southern border."[103] It is precisely those countries that were overwhelmed by Syrian asylum seekers in 2015, resulting in the suspension of the Dublin Regulation and the unregulated entry of Syrians into the European Union on a significant scale. Refugee entry into the United States, as is discussed later in this chapter, operates through a completely different process, most markedly in that Syrians entering the United States cannot do so through unauthorized border-crossings.

Despite this difference, the Huntingtonian 'clash of civilizations' thesis emerges in full force.[104] Samuel Huntington infamously proposed a world system in which "the conflicts of the future occur along the cultural fault lines" that separate vaguely ontological but certainly transhistorical "civilizations." The most significant and persistent of these clashes is the "centuries-old military interaction between the West and Islam," which Huntington argues has more or less defined contemporary 'Western' and 'Islamic' civilization.[105] The imagery of infiltration speaks to the language of warfare, though not a war between ISIS and the United States. When McCaul and the Homeland Security Committee analysts worry that the failure of the Dublin Regulation spells a sort of setback for Western states, they make clear that the enemy is Muslims, the only people who present a 'radicalization challenge.' The language of the 'terrorist turnpike' places the European Union in the role of containing the states that border it: at work here is an image of unrestricted access, coupled with the violent excess of the fleeing mob. In failing to regulate the periphery of the European Union, the E.U. has made vulnerable the entire West, creating room for a moral panic about the breakdown of global order.

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[102] U.S. Congress, House, Committee on Homeland Security, "Syrian Refugee Flows: Security Risks and Counterterrorism Challenges" (114th Cong., 1st sess., November, 2015), 7, 9.

[103] Jan-Paul Brekke and Grete Brochmann, "Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences, and the Dublin Regulation," *Journal of Refugee Studies* 28, no. 2 (June 1, 2015): 147.

[104] Edward Said, ever prescient, comments after the attacks of 9/11 that the revival of Huntington is spurred, not hindered, by the presence of immigrant Muslims in Europe and the United States. "Buried in the collective culture are memories of the first great Arab-Islamic conquests... that shattered once and for all the ancient unity of the Mediterranean," Said writes, though this version of historical conflict pushes a person to "wander off in search of vast abstractions that may give momentary satisfaction but little self-knowledge or informed analysis." See Edward W. Said, "The Clash of Ignorance," *The Nation*, October 22, 2001, 13.

[105] Samuel P. Huntington, "The Clash of Civilizations?," Foreign Affairs 72, no. 3 (Summer 1993): 25, 31-32. Note (though this is perhaps the least of the problems with this article) the careful avoidance of labeling Western civilization as Christian even as Huntington defines several other civilizations in the language of religion.

The logic of the clash of civilization relies on an Orientalist framing of Muslims, particularly Muslim men, as violent and uncontrollable. In the same hearing as the one quoted above, King reflected on the Paris attacks: "When I look at the map of Europe and the dots of the hot spots where they have been attacked in nearly every country in Western Europe, and it's proportional to the populations that they've brought in from the Middle East and North Africa."[106] In the imaginary built by King, there is a direct correlation between the number of people from the Middle East and North Africa in a given location and the number of terrorist attacks in that location. Completing the logic of Huntington's clash of civilizations, 'infiltration' is followed by outright violence. King implicates the state in these attacks—it is they who have 'brought in' these presumably Muslim immigrants. With this, King offers a warning to U.S. legislators about the potential dangers of Syrian refugees.

2. The uncertain state

In relating Muslim men to violent attacks across Europe, King describes the aftermath of what policymakers might call the failure of a vetting system, without which the state is unable to differentiate with certainty who presents a risk and who does not. A central feature of any immigration authorization process to the United States is the background check. The most basic checks imposed by the U.S. Citizenship and Immigration Services include running an applicant's fingerprints and names through FBI databases to check for past criminal records. Syrian refugees and asylum seekers face an in-depth interview process that includes reference checks and biometric checks, facilitated by the Office of the United Nations High Commissioner for Refugees (UNHCR). Those deemed most vulnerable by UNHCR are referred to U.S. immigration authorities, who run a set of investigations that one official has described as "the most rigorous screening of any traveler to the U.S."[107]

A central concern for legislators, however, is that this system might not be effective in determining with certainty whether a refugee is dangerous. The revival of the West as a civilization under threat allows the collapse of the Dublin Regulation to function as a warning about refugees. For Representative Goodlatte, commenting during a hearing on responses to the refugee crisis, "exactly who the individuals fleeing Syria are is also a question of immense concern." After all, "members of the Islamic State and foreign fighters... are now some of the very individuals leaving the country."[108] Senator Rob Portman, in comments off the written record at a November 19th hearing, argues that refugees must be treated with intense suspicion, because "we need to know who they are and what their intentions are." [109] Goodlatte enacts a slippage of the refugee and the militant. If both flee Syria, how can the state distinguish between the two? Portman provides the answer in pointing to identity and intentions. The problem that these legislators confront, then, is how to discern who someone is and what they intend.

The conversation that emerges in Congress about the refugee vetting process deals with the perceived failure of the system to fulfill its intended purpose, as demonstrated in Europe and

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[106] U.S. Congress, House, *The Syrian Refugee Crisis*, 83.
[107] Alex Altman, "This Is How the Syrian Refugee Screening Process Works," Time, November 17, 2015, http://time.com/4116619/syrian-refugees-screening-process/; see also "Background and Security Checks," *USCIS Policy Manual*, December 14, 2016, https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartB-Chapter2.html, though the relevant process for refugees and immigrants is not disclosed.
[108] U.S. Congress, House, *The Syrian Refugee Crisis*, 62.
[109] U.S. Congress, Senate, *The Impact of ISIS on the Homeland and Refugee Resettlement,* 114th Cong., 1st sess., November 19, 2015, http://www.hsgac.senate.gov/hearings/lessons-from-the-paris-terrorist-attacks-ramifications-for-the-homeland-and-refugee-resettlement, timestamp 1:10:00 and following.

therefore possible in the United States. Goodlatte follows his statement by asking Mark Krikorian,[110] who leads the anti-immigration Center for Immigration Studies, whether government officials "have any credible way of distinguishing between refugees from Syria and individuals who are posing as Syrian refugees." Krikorian responds: "They can try... [but] more than 90 percent of Syrian refugee applicants are being approved... [T]he average worldwide is 80 percent. So how stringent, really, can a vetting process be when more than 90 percent of the people are being approved?"[111] Krikorian moves fluidly from questioning bureaucratic efficacy to insinuating that Syrian refugees are being treated with leniency. It seem that he builds from an assumption that enough refugees present a risk of terrorism that a certain portion of them must be denied entry—managing risk requires an understanding that everyone presents risk. Krikorian's implication is not just the vetting system, as a tool of risk management, may fail in the future, but that is has already failed.

Such language is often couched in reminders that the United States is a benefactor in refugee admissions. Portman follows his question about refugee vetting with repeated assurances that "we're the most generous country in the world, and thank God we are."[112] For Portman, the United States' generosity as a receiving state in some cases allows for a certain hostility toward immigrants in other cases: humanitarianism provides a distraction from and justification for immigration restrictionism and the treatment of Syrian refugees as sites of risk. Representative Jeff Duncan offers a rather more rhetorical call to action: "We should do everything we can to make sure that elements of evil are not introduced, due to our compassionate hearts, into the neighborhoods, the towns, the cities, and the States that we represent in this great Nation."[113] The Manichean tones of Duncan's statement, almost certainly a reference to the idiom of the Bush doctrine, define action in the face of international crisis not as humanitarian aid but as a turn to self-preservation. Compassion, it seems, represents its own form of risk.

Congressional uncertainty discourse deals with the apparent impossibility to uncover the motives of Syrian refugees. As a House report puts it, "refugees and economic migrants have been able to provide false documents, names, nationalities, and other information to authorities who have limited means to cross-check and validate the information." [114] Even beyond the scope of the information that is potentially falsifiable, the report's separation of 'refugees' and 'economic migrants' points to a mistrust with the nature of the asylum claim itself. If someone can provide fake documents, and therefore a false history, how can one know whether they are truly fleeing persecution? Refugee policy is premised on a certain exceptionalism: refugees and asylees are vulnerable more than anyone else, a division effected by labeling people who are not able to prove persecution as 'economic migrants.'

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[110] It is worth noting here that Krikorian and the Center for Immigration Studies he leads are linked to white nationalist groups: Hatewatch Staff, "Anti-Immigrant Center for Immigration Studies Continues to Associate With White Nationalists," Southern Poverty Law Center, November 10, 2015, https://www.splcenter.org/hatewatch/ 2015/10/09/anti-immigrant-center-immigration-studies-continues-associate-white-nationalists; for the history of links between U.S. anti-immigration groups and U.S. white supremacist groups, see Deepa Fernandes, *Targeted: Homeland Security and the Business of Immigration*, 1st ed (New York: Seven Stories Press, 2007), 201-238.

[111] U.S. Congress, House, *The Syrian Refugee Crisis*, 68.

[112] U.S. Congress, Senate, *The Impact of ISIS,* timestamp 1:10:00 and following.

[113] American Security Against Foreign Enemies Act of 2015, H8389.

[114] U.S. Congress, House, "Syrian Refugee Flows," 7.

Talal Asad argues that scholars of terrorism[115] often rely on a "forensic reading of motive": they attempt to (re)construct the reason for a terrorist to act in a particular way. Liberal theorists of violence tend to rely on what Asad labels 'motive' as a characteristic with which to distinguish between legitimate and illegitimate acts of violence. For the modern subject, Asad writes, it makes little sense that an actor should "*choose* to justify their violence in terms of a discursive religious tradition." Religious motives must be treated with a good deal of suspicion, if not outright hostility. The religious language with which Asad deals is Islam; presumably, the story is rather different in dealing with justifications that draw on Judeo-Christian values, whether explicitly or implicitly.[116] In other words, the acts of religious subjects, particularly Muslim subjects, are rendered somewhat suspect for the liberal modern subject.

Thus Syrian refugees, if not otherwise clarified as Christian, face a certain degree of suspicion with regard to the very legitimacy of their claims for seeking refuge. McCaul points to the importance of "roadblocks to keep terrorists from entering the United States" through strict refugee policy that would "allo[w] legitimate refugees who are not a threat to be resettled appropriately."[117] McCaul's language carries significant weight: only 'legitimate' refugees, those people who do not present a threat to the United States, will be resettled. He implies a separation not only between refugee and immigrant but between terrorist and refugee. Here enters the great frustration of the uncertain state in this Congressional discourse: if the extensive refugee vetting process cannot uncover the true identities and intentions of the Syrian refugee, how can it prevent terrorists from pretending to be refugees in entering the United States?

3. "Quantify the risk to the American society"

The tension over the failure of the vetting system operates through the securitization of the refugee and the imposition of risk management. Taken together, these two moves allow the uncertain state to act as if it were certain. Loosely defined, securitization is the process by which things that are not implicitly related to national security becomes addressed through the language and logics of national security. The Congressional discourse considered here engages in a classic act of securitization, with the refugee cast as the threat. This act of securitization leveraged against the figure of the refugee does not occur in a void: it is effected alongside the intrusion of security discourse into other immigration policy conversations.[118] For instance, Krikorian's image of a barely effective vetting process and McCaul's reference to 'roadblocks' rely on the configuration of the border as porous.

The image of a failing homeland security is facilitated in part by the raising of concern about the border security of the United States (and a call for greater militarization thereof). Deepa Fernandes points to the move made by anti-immigration members of Congress after 9/11

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[115] Terrorist studies is in and of itself worth examining: such scholarship emerges especially after the 9/11 attacks as a "new epistemic community" that Asad points to as oriented almost exclusively in constituting its object through the War on Terror. That is, scholars from a number of disciplines turn to divining the nature of terror (ostensibly new) through the (familiar) apparatus of state violence.

[116] Talal Asad, *On Suicide Bombing*, Wellek Library Lectures (New York: Columbia University Press, 2007), 29, 36-37, 41-45, 102n26; emphasis original.

[117] American Security Against Foreign Enemies Act of 2015, H8382.

[118] Terrorism and unauthorized entry are increasingly conflated in the years after 9/11. Take as an example the very name of the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, which passed the House but died in the Senate. One section of the bill would have required the Department of Homeland Security to submit, in a single report to Congress, the number of people apprehended from and deported at unauthorized entry and the subset of those people from countries labeled as state sponsors of terror (H.R. 4437, 109th Congress, 2nd Sess., §409).

to "declar[e] that protecting the homeland against terrorism was primarily an immigration issue." One Representative, Tom Trancredo of Colorado, "spoke of Islamic prayer rugs and a diary written in Arabic that had been found in the scrublands of the U.S.-Mexico border," though without providing evidence.[119] Tancredo builds of the fear of 'cultural invasion' that some scholars, including Huntington, link to Latinx immigration into a panic over militarized Muslims. In this sense, the securitization of the refugee in the contemporary era does not begin with these policy conversations about Syrian refugees but with the emergence of border security discourse in the 1990s and the corresponding fear of the 'immigrant-terrorist.'

Risk management is perhaps best considered as an attempt to identify and mark factors that indicate risk. It is generously coupled with the expansion of biometric technology use, which "focus[es] on the physical or physiological characteristics of the human body" and "transform[s] [them] into measurable data." Theorists of risk management[120] tend to draw contours around what sorts of risk are calculable by state actors. That is, most theorists operate from the understanding that some risk factors are knowable and some unknowable. Benjamin Muller argues that the "preoccupation with verification/authentication requires [a person] to resemble this digital data" to "over-code identity" in the eyes of state.[121] In other words, the state's mechanisms for understanding those who cross the borders are increasingly biological, such that non-biological and non-observable identifiers are suspect. Risk management as a framework for analyzing migration effects a biopolitical engagement with immigrants and refugees: they are described by the calculations of the state, rendered into probabilities of danger.

When insufficient biometric data is available, the state cannot calculate risk. The reliance on risk management thus produces a demand for data, rendered urgent through the language of emergency brought by securitization. The words of Representative Trey Gowdy at a House hearing offer an apt case study: "Administration officials responsible for national security and public safety, Mr. Speaker, have repeatedly warned us they cannot vet failed nation-states. They cannot do background investigations where there is no database."[122] Gowdy opened with the language of urgency, referencing (anonymous) bureaucrats who have taken on the responsibility of the state and its people. These officials are worried, Gowdy warned, that their work is hindered by the collapse of the Syrian government. Because Syria is a 'failed nation-state,' there is no data available.

Gowdy points toward the foreign policy concerns that underlie Congressional discussions of the Syrian refugee crisis. Immigration and refugee policy is in the case of Syrian refugees, and perhaps always, steeped in the logics of foreign policy. The border is not written only in relation to the particular territory it contains, but in relation to those spaces that are constituted as outside, beyond, or excluded.[123] Take, for example, the near-constant presence of foreign policy experts on Congressional panels on immigration and refugee policy. Seth Jones, one such foreign policy

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[119] Deepa Fernandes, *Targeted: Homeland Security and the Business of Immigration*, 1st ed. (New York: Seven Stories Press, 2007), 224

[120] Muller relies heavily on the work of Claudia Aradau and Rens van Munster on "precautionary risk," as well as Ayse Cehan's theorization of manufactured risk and Marieke de Goede's ungovernability.

[121] Muller, *Security, Risk and the Biometric State*, 22-23.

[122] American Security Against Foreign Enemies Act of 2015, H8398.

[123] As Prem Kumar Rajarm and Carl Grundy-Warr write in their introduction to the volume *Borderscapes*, the state enacts the border as a discourse in part through the "identification of spaces and social practices that are alien or inappropriate." See Rajaram, Prem Kumar, and Carl Grundy-Warr, "Introduction," in *Borderscapes: Hidden Geographies and Politics at Territory's Edge*, edited by Prem Kumar Rajaram and Carl Grundy-Warr, Borderlines, v. 29, Minneapolis: University of Minnesota Press, 2007, xxix.

expert who has affiliated with the RAND Corporation, compared Syria to Iraq and Afghanistan, where "we had large databases with biometric information and names, based on people who were coming into prison systems and checkpoints," In Syria, however, "we just have gaps."[124] Jones provides a foundation through which to relate immigration restrictionism and foreign interventionism. In invoking the U.S. invasions of Iraq and Afghanistan, Jones seems to imply that conditions of explicit war create surveillance apparatuses that allow the state to reduce the risk of refugee entry. Imperialism is lent the veneer of humanitarianism.

The call for surveillance centering on refugees comes with regard to Syrians in the United States as well. In a long exchange with Anne C. Richards of the State Department's Bureau of Population, Refugees, and Migration, Representative Lamar Smith argues in favor of the extensive tracking of Syrian refugees who have entered the country. After confirming that the State Department monitors all refugees for the first three months, primarily to ease integration, Smith asks pointedly whether "they [are] treated any differently than other refugees." When Richards reports that they are not, Smith responds:

> You say Syrians are less of a threat, even though we've had testimony from the FBI Director that of all of the cohorts of refugees, including Iraqi refugees, we have less information about the Syrian refugees than others? ... They may not have a record of terrorism. They may be would-be terrorists; they may be terrorists in training.[125]

Smith draws on the language of uncertainty and risk in laying out his claim for the greater surveillance of refugees within the United States. Any Syrian refugee might be a 'would-be terrorist,' therefore all Syrian refugees must be monitored. The need to calculate risk demands greater data collection, again framed in references to security and emergency.

Given these gaps in information, the uncertain state does not have many identifiers with which to regulate entry. As discussed above, Congressional discourse writes identities as falsifiable and intentions as uncoverable. The lack of biometric data, meanwhile, prevents the state from managing the population through the infrastructure of the biopolitical state, which tracks bodies and behavior far beyond the scope of the border security interview. In considering Syrian refugees, then, the state's elaborate apparatuses of control serve no function. The refugee can only be considered by the basic categories of national origin, race, ethnicity, age, gender, religion, and so on. In performing risk calculations on a population that is unified in national origin and sorted according to age, gender, and marital status by the UNHCR bureaucracy, the only identifier that emerges on which to make judgements is religion.

4. Locked doors and those most vulnerable

The debate around H.R. 4038, the American Security Against Foreign Enemies Act of 2015 or "SAFE Act," offers a clear view of the turn to religion as the only clear identifier in Congressional discourse about Syrian refugees. A close reading of the Congressional Record that details the consideration of the bill shows an explicit and tacit use of religious coding in risk management. The Record details the introduction of the SAFE Act to the House floor, with introductions from its Republican cosponsors and a rather lively debate. The debate followed party lines, and this section of the Record includes the consideration of a Democratic counterproposal, the Secure Refugee Process Act of 2015. Representatives in the debate seemed to cite almost the exact same scripts depending on their party alignment: Republican supporters reference feelings of insecurity and terror, threats to US homes and families, and Obama

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[124] U.S. Congress, House, *The Syrian Refugee Crisis*, 65.
[125] U.S. Congress, House, *The Syrian Refugee Crisis*, 71-72.

administration foreign policy failures; the Democrat opposition reference the moral obligation to save women and children.

The SAFE Act proposes the imposition of significantly more stringent evaluation requirements on all refugees entering the United States from Syria and Iraq. The most significant change would have required that every Syrian and Iraqi refugee be certified by unanimous consent of the Secretary of Homeland Security, the Director of the FBI, and the Director of National Intelligence. One representative estimates that such a review would take 2 hours per refugee file. The counterproposal imposes slightly less severe evaluation requirements for all refugees, not just those from Syria and Iraq; restricts the involvement of the DHS Secretary to a cursory evaluation of each file; and removes intelligence directors from the conversation. The Record concludes with the rejection of the counterproposal (180 in favor, 244 against, 9 abstentions) and the passage of the SAFE Act out of the House (289 in favor, 137 against, 8 abstentions). The SAFE Act eventually died in committee in the Senate. [126]

The Republican testimony in favor of H.R. 4038 offer a host of images that evoke the home. Representative Hal Rogers calls for the United States "to eradicate the threats posed here and abroad... to ensure that Americans can tuck in their children at night with a feeling of security that they will be waking up tomorrow morning for school free from fear." His colleague Jeb Hensarling calls for the House of Representatives to acknowledge that "today is not the day to share our territory, not until and unless these people can be properly vetted to ensure they don't threaten our families." Following his invocation of neighborhoods and towns as quoted above, Duncan offers an attempt at a charming adage: "We lock our doors, not because we hate the people on the outside. We lock our doors because we love the people on the inside."[127]

Rogers and Hensarling justify the expansion of security by invoking an apparent threat to the home and family. Their rhetoric presents Syrian refugees as a physical danger to families, especially those with children in the United States. The families who must be protected are almost certainly white and Christian: as Junaid Rana notes, the various historical formations of Islam in European and U.S. popular thought are those that "threate[n] the maintenance of a racial-religious order based in the idea of white Christian supremacy."[128] Such a reading is made quite explicit by the demand of Representative Dana Rohrbacher that "Christians should get the priority" in refugee admissions because "today the Christians in the Middle East are targeted for genocide."[129] The threat lies with Muslim refugees from Syria, who may be complicit in the persecution of Christians that Rohrbacher centers, Of course, the imagery of the War on Drugs is at play here is well, a call to white America's paranoia of Black men forcing their way into the home. It is against the man of color that the door is locked.

The comments from Democrats against the bill call for the protection of refugee women and children by a humane patriarchal state. Representative Zoe Lofgren calls for leniency toward Syrian refugees because "the overwhelming majority are children and widows who have been victims of torture, who have seen their husbands beheaded." In a letter submitted to the Congressional Record, former Directors of Homeland Security Janet Napolitano and Michael Chertoff comments that officials "consider only the most vulnerable—particularly survivors of violence and torture, those with severe medical conditions, and women and children—for

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[126] "Actions - H.R.4038 - 114th Congress (2015-2016): American Security Against Foreign Enemies Act of 2015," *Congress.gov*, January 20, 2016, https://www.congress.gov/bill/114th-congress/house-bill/4038/actions.
[127] American Security Against Foreign Enemies Act of 2015, 161 Cong. Rec. H8381, 2015, H8384, H8386, H8389.
[128] Junaid Rana, "The Story of Islamophobia," *Souls* 9, no. 2 (June 6, 2007): 157.
[129] American Security Against Foreign Enemies Act of 2015, H8388.

potential admittance to the U.S."[130] Lofgren, Napolitano, and Chertoff located Syrian and Iraqi women in spaces that are perpetually violent. Women see their husbands beheaded, rendering their trauma one described in the language of what happens to the men around them. The language here also raises the question of who exactly is performing these acts of violence—here looms the specter of the violent Muslim man.

The language of the Democrats engages in a fundamental denial of agency of the women imagined under incredible threat. Pardis Mahdavi argues that the repetition of the phrase 'women and children' effects a sort of confusion of language by which women are infantilized: 'women and children' becomes 'women-as-children.'[131] Women are in need of saving by the state, especially those women who no longer have husbands. Take Representative Barbara Jackson Lee's characterization of Republicans as saying "turn your back on children, women, and old people broken and bent," as compared to her own assertion that "America's values can parallel the love, respect, and commitment to the national security of this Nation."[132] Jackson Lee (somewhat confusedly) seems to argue that security concerns and the savior complex go hand in hand, ignoring the reality that commitment to U.S. national security is one of the main justifications that the state provides for the very military engagements that produce refugees.

The debate over the American SAFE Act neatly draws together refugee policy, foreign policy, and national security. Refugees from Syria and Iraq become a sort of receptacle for the anxiety over the external threats of terrorism. The family emerges as a central site of concern for both proponents and opponents of the bill. The Republican testimony in favor of H.R. 4038 offers a host of images that evoke the home, calling upon sleeping children and locked front doors. The families who must be protected are almost certainly Christian, heterosexual, and white. The comments from Democrats against the bill, meanwhile, call for the protection of refugee women and children by a humane patriarchal state. The concern here lies with people who are 'vulnerable' in the current setting of refugee camps.

Both scripts pass no reference to young Muslim men. This elision is telling—I suggest that it indicates precisely who the threat is. Of course, the violent young brown man is a standard figure of threat in narratives about Islam, not to mention a familiar specter raised throughout U.S. history in representing the danger presented by Black masculinity. The tacit inclusion of this figure in Congressional discourse about Syrian refugees suggests that the uncertain state can only act with certainty in refugee admissions when religion is deployed as an identifying characteristic. Circling back to the question raised by King at the start of this chapter, the logics of this Congressional turn to Islamophobia as risk management become clear: to quantify the risk to American society requires a focus on young Muslim men.

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[130] American Security Against Foreign Enemies Act of 2015, H8383, H8385.
[131] Mahdavi, Pardis, "From Trafficking to Terror: Connecting Two Global Wars," presented at *The "War on Terror", 15 Years Later*, Claremont, CA, October 14, 2016.
[132] American Security Against Foreign Enemies Act of 2015, H8384.

IV. Plainly-Worded Statements:
Judicial Contestations of Islamophobia under Trump

Donald J. Trump ran his campaign on the promise to leverage the power of the Presidential office against Muslims. Take, for instance, his oft-quoted call "for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on," made only sixth months after the announcement of his campaign and at the very beginning of his meteoric rise to power. The very title of the press release— "Statement on Preventing Muslim Immigration" [133]—speaks to an essentialized and restrictive immigration policy, one that can separate and identify people according to religious beliefs. The immigration policy agenda of the Trump administration's first months includes two executive orders that do not mention Islam or Muslims once and yet are clearly intended to actualize Trump's commitment to 'preventing Muslim immigration.' These orders, both of which were almost immediately branded as a 'Muslim ban,' forbid entry and restrict refugee admission from a set of Muslim-majority countries in the Middle East.

In this chapter, I examine the legal contestations of the Trump executive orders, dealing primarily with two major cases filed by states attorneys general in the past two months, *State of Washington and State of Minnesota v. Donald J. Trump* and *State of Hawaii and Ismail Elshikh v. Donald J. Trump*. The district court ruling in *Washington* blocked the first iteration of the Trump executive order, while that of *Hawaii* blocked the original ban's replacement. In turning from Congressional ideations of the Muslim-as-terrorist to executive and judicial contestations of whether exactly it is legal to regulate all Muslims as terrorists in immigration policy, I follow the progression of a set of ideas from discussion to actualization.

With this in mind, I focus on the language of risk and religion in the legal briefs, oral arguments, and court documents of the two contemporary cases. I chart out two separate but related arguments in this chapter. First, I overview the progression of *Washington* and *Hawaii* through the courts up until April 1, 2017 and explore the ways in which Islam is produced in the discussion over the two cases. I suggest that a close reading of the federal government's arguments show that the Trump administration operates under an extreme logic of risk management that renders all Muslims as potential terrorists. In this sense, the Trump executive orders represent a sort of culmination of the logics discussed in previous chapters: if the only unifying characteristic of all potential terrorists is that each potential terrorist is Muslim, then the most effective means of managing risk is to ban all Muslims.

The second argument of the chapter deals with the religion clauses of the Constitution. These begin the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."[134] The Establishment Clause and the Free Exercise Clause both played a role in *Washington* and *Hawaii*, though the Establishment Clause is more central. I compare these two contemporary cases to two relatively recent rulings on religious discrimination against Muslims in post-9/11 immigration policing. *Ashcroft v. Iqbal* and the cases consolidated under *Turkmen v. Ashcroft* alleged religious discrimination on the parts of senior Bush administration officials, arguing that federal agents violated the Free Exercise rights of Muslim detainees. Drawing from the substantial secondary literature on the

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[133] Donald J. Trump, "Donald J. Trump Statement on Preventing Muslim Immigration," *Donald J. Trump for President*, December 7, 2015, https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration.
[134] U.S. Constitution, amend. I.

two cases, I show that First Amendment claims in *Iqbal* and *Turkmen* found little success in the courts, in part because a lack of evidence at the highest levels of policy decision-making that indicated clear intent to discriminate on the basis of religion. I suggest that the relative (albeit preliminary) successes of the Establishment Clause arguments in *Washington* and *Hawaii* in relation to the religion clauses in *Iqbal* and *Turkmen* follow the overt securitization of all Muslim immigrants. The courts in *Washington* and *Hawaii* suggest that if the U.S. government indeed conceives of Islam as a marker of risk for any person crossing the border and writes policy on that understanding then the government is not respecting its constitutional duty toward the establishment of religion.

1. The Muslim ban in the courts

On January 27, 2017, seven days after his inauguration, Trump signed Executive Order 13769, titled "Protecting the Nation from Foreign Terrorist Entry Into the United States." In doing so, he instituted sweeping changes to immigrant and refugee policy, most notably a ban on entry of all immigrants and nonimmigrant visitors from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[135] The executive order restructured the refugee system considerably, by suspending all refugee admissions into the United States for 120 days, limiting refugee entry to 50,000 people a year, and banning the entry of Syrian refugees. E.O. 13769 further declared the Secretaries of State and Homeland Security would "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality."[136]

The release of E.O. 13769 saw hundreds of people detained in airports across the United States, among them legal permanent residents, Iraqi interpreters issued visas for service in combat, young children, and elders. Implementation proved to be rushed and confused, with some border agents expressing that communication from the Trump administration lacked clarity or guidance, especially with regard to legal permanent residents (LPR) and family separation. Almost immediately after the order was released and as soon as detentions were reported, protestors filled airports across the country.[137] Meanwhile, attorneys filed dozens of cases against E.O. 13769 in the days that followed its issuance.[138]

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[135] E.O. 13769 bans the entry of those from "countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12)," a section of Title 8 that deals with eligibility for the Visa Waiver Program. The citation refers to a section of the eligibility requirements that notes that applicants for the Visa Waiver Program must not have been present in a number of countries. The rules restricted applicants who lived in or recently visited: Iraq and Syria; state sponsors of terrorism according to the Department of State, as of 2017 Iran, Sudan, and Syria; and states blocked by the Secretary of Homeland Security (see 8 U.S.C. 1187(a)(12), https://www.law.cornell.edu/uscode/text/8/1187).

[136] "Executive Order 13769 of January 27, 2017, Protecting the Nation From Foreign Terrorist Entry Into the United States," *Federal Register* 82, no. 20 (February 1, 2017): 8979.

[137] See, for instance, Ron Nixon, "More People Were Affected by Travel Ban Than Trump Initially Said," *The New York Times*, January 31, 2017, https://www.nytimes.com/2017/01/31/us/politics/trump-ban-immigrants-refugees.html; Michael D. Kulish, Alan Feuer, and Nicholas Shear, "Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide," *The New York Times*, January 28, 2017, https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html.

[138] For an excellent overview of the cases challenging E.O. 13769 and E.O. 13780, see: Quinta Jurecic, Emma Kohse, and Shannon Togawa Mercer, "Litigation Documents & Resources Related to Trump Executive Order on Immigration," *Lawfare*, January 31, 2017, https://lawfareblog.com/litigation-documents-resources-related-trump-executive-order-immigration.

Among those cases was *State of Washington and State of Minnesota v. Donald J. Trump*, filed by Washington Attorney General Bob Ferguson on January 30, 2017 and joined a day later by the state of Minnesota. The case brought to the U.S. District Court of Western Washington a number of charges on behalf of state residents: a Fifth Amendment Equal Protection Clause claim on discriminatory intent and a Due Process Clause claim; a First Amendment Establishment Clause claim on unlawful preference for certain religions; claims drawing from various immigration policy statutes on discriminatory visa procedures, denial of asylum, and protecting entrants under threat of torture; an exercise of religion claim under the Religious Freedoms Restoration Act; and two claims of procedural violations.[139] After hearing oral arguments on February 3, Judge James Robart issued a Temporary Restraining Order (TRO) that delayed the enforcement of the order nationwide. The Trump administration immediately appealed to the U.S. Court of Appeals for the Ninth Circuit for a stay on the TRO. A panel of Ninth Circuit Judges William Canby, Richard Clifton, and Michelle Friedland heard arguments on February 7 and issued a unanimous decision in favor of the states on February 9.[140] Rather than continue to an *en banc* proceeding with the full panel of the Ninth Circuit, the Trump administration requested a delay pending their issue of a replacement executive order.

Executive Order 13780 revoked and replaced E.O. 13769 after being signed by Trump on March 6, 2017. E.O. 13780 has the same name as its predecessor and indeed spends a number of paragraphs marking a spirited defense of E.O. 13769, including a country-by-country overview of "some of the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States."[141] The new executive order maintains a ban on entry for individuals from Iraq, Libya, Somalia, Sudan, Syria, and Yemen,[142] though Iraq is removed from this list. E.O. 13780 includes a number of exceptions to this ban, namely for LPRs and people granted asylee or refugee status, as well as a detailed explanation of case-by-case waivers. The temporary suspension and downsizing of the refugee program as implemented by E.O. 13769 remain, while the steps taken to ban Syrian refugees and prioritize religious-based persecution do not.

Hawaii's attorney general filed *State of Hawaii and Ismail Elshikh v. Donald J. Trump* a day after the Trump administration released E.O. 13780, likely due to the weeks of warning that a new executive order was forthcoming. Brought to the U.S. District Court of Hawaii, the state filed a number of claims along with Ismail Elshikh, a plaintiff who is an LPR from Egypt and an imam, along with his family. They alleged: First Amendment Establishment Clause violations with harms to Elshikh, his family, and mosque community; Fifth Amendment claims citing the Equal Protection and Due Process Clauses; violations of the Immigration and Nationality Act; infringements of the free exercise of religion as protected by the Religious Freedoms Restoration Act; and several procedural violations.[143] Judge Derrick Watson issued a Temporary Restraining Order, a finding in favor of the claims of the state and Elshikh, on March 15, which he converted

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[139] State of Washington, "Washington v. Trump, Complaint for Declaratory and Injunctive Relief," January 30, 2017, 8-13.

[140] United States Court of Appeals for the Ninth Circuit, "Washington v. Trump, Per Curiam Order," February 9, 2017, 3-9.

[141] "Executive Order 13780 of March 6, 2017, Protecting the Nation From Foreign Terrorist Entry Into the United States," *Federal Register* 82, no. 45 (March 9, 2017): 12310-12311.

[142] Note that E.O. 13780 names the six countries directly, rather than through the indirect citation used in E.O. 13769.

[143] State of Hawaii and Ismail Elshikh, "Hawaii v. Trump, Second Amended Complaint for Declaratory and Injunctive Relief," March 7, 2017, 31-37.

to a more permanent injunction on March 29. As of March 30, the Trump administration filed documents to appeal the injunction to the Ninth Circuit.[144]

2. Risk assessments and (un)reviewability

As mentioned above, the Trump administration's approach represents something of a culmination of the use of risk management logics in immigration and refugee policy. In arguing against the *Washington v. Trump* TRO, counsel for the administration Michelle Bennett argued that the "rationale for the order was not only [the 9/11 attacks]," but "was to protect the United States from the potential for terrorism." Bennet's claim came directly after Justice Robart asked if there had been terrorist attacks in the United States by refugees or other immigrants from the seven countries listed. [145] In other words, the counsel provided as evidence of attacks that immigrants from these Muslim-majority countries represent the *risk* of terrorist attack.

The oral arguments brought by the Trump administration in the *Washington* appeal deploy the logic of national security in arguing that such risk assessment is essentially beyond question. August Flentje, arguing for the federal government, described the appeal as motivated by "the district court's decision [to] override the president's national security judgement about the level of risk that is acceptable." In this same conversation, Flentje cites evidence that he reports the government cannot include in the record. In other words, the government assesses risk through access to knowledge that must be *presumed* to be decisive simply because the knowledge cannot be shared and therefore cannot be evaluated by outside parties. The administration's risk assessment cannot be questioned: responding to Judge Friedland's question on whether "the president's decision in that regard is unreviewable," Flentje responds with a simple affirmative.[146]

Bennett and Flentje deploy the logic of emergency and exception as a claim that the courts cannot review the Trump administration's assessment of risk. The mechanics of that assessment are obfuscated because they are matters of 'national security,' a phrase that further invokes governance through exception. Legally speaking, Flentje has little ground on which to stand. The Ninth Circuit roundly dismisses any idea that the courts cannot question national security decisions through the citation of a significant body of case law.[147] The counsel's invocation of national security, however, indicates a discursive willingness to discard one of the most basic premises of U.S. government, that of judicial review, in the name of a politics of exception. Flentje's argument seems to embody the extreme of Ole Wæver's assertion that security politics are that which is separate from 'normal' politics,[148] deploying risk as the grounds on which to establish a state of exception almost beyond the reach of the juridical.

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[144] United States Department of Justice, "Hawaii v. Trump, Notice of Appeal," March 30, 2017.

[145] United States Department of Justice, "Washington v. Trump, Emergency Motion under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal" (No. 17-35105, February 4, 2017), 104.

[146] United States Court of Appeals for the Ninth Circuit, *17-35105 State of Washington, et Al. v. Donald J. Trump et Al., 2017*, https://www.youtube.com/watch?v=RPOFowWqFGU, 00:12:33 onward.

[147] "...while counseling deference to the national security determinations of the political branches, the Supreme Court has made clear that the Government's "authority and expertise in [such] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals," even in times of war." See "Washington v. Trump, Per Curiam Order," February 9, 2017, 16-17.

[148] Ole Wæver, "What Is Security?," in *European Security 2000*, ed. Birthe Hansen (Copenhagen: Copenhagen Political Studies Press, 1995), 226-227.

3. "I'm talking territory instead of Muslim"

   The legal challenges against E.O. 13769 and E.O. 13780 rely in part on the argument that the treatment of all Muslims as sites of risk in executive action violate the religion clauses of the Constitution. *Washington v. Trump* and *Hawaii v. Trump* make two specific claims with regard to religion. First, counsels for the states argued that the ban on entry from certain countries and the changes to refugee admissions represents a violation of the Establishment Clause. They frame Sections 3 and 5 of E.O. 13769 and Section 2 of E.O. 13780 as "intended to disfavor Islam and favor Christianity." Second, the counsels argued that the travel restrictions violate the free exercise protections of the Religious Freedoms Restoration Act (RFRA). RFRA protects religion in the public sphere, which the states suggest would be extended to planned travel for religious purposes.[149] The Establishment Clause arguments prove to hold the greatest interest to the courts.

   The plaintiffs' arguments in both cases extended beyond purely constitutional grounds, however. Counsels included reference to "statements made by [the Trump administration] concerning [the] intent and application" of the Executive Order with regard to Muslims.[150] The state's case in *Hawaii*, in particular, tracks Trump's language in describing a potential travel ban in overtly discriminatory language to language that is "facially neutral."[151] The state's central claim is that the past language describing a policy move should clarify the intent of the eventual result. For instance, the complaint in *Hawaii* quotes in full a comment from Trump describing the difference between E.O. 13769 and E.O. 13780: "I don't think it's a rollback [of the original executive order]. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim."[152] The complaint in *Hawaii* argues that evidence like this proves any nation-of-origin language in E.O. 13780 serves to mask anti-Muslim intent. As Noah Purcell, arguing for the states, puts it in *Washington*, the burden of the plaintiffs is "to prove that a desire to discriminate based on religion was one motivating factor in the adoption of the order."[153] In other words, the states sought to establish that the bans were grounded in exclusionary intent.

   The Trump administration's responses to these arguments emphasized the neutrality of the Executive Orders. Neither E.O. 13769 nor E.O. 1370 mentions Islam or religion more generally. Bennett argued for the Trump administration in *Washington* that "distinctions based on nationality, which is what the Executive Order does, in the immigration context are completely valid and legitimate and do not violate the Constitution."[154] The nation-of-origin entry restrictions, according to the administration, are simply that, regardless of any disproportionate impact on certain religious groups. Similarly, one of the administration's primary responses to an Establishment Clause challenge to E.O. 13769 stressed that the "accommodation for minority religions within each country participating in the refugee program" applies to every country in the world, not only the seven Muslim-majority countries

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[149] State of Washington, "Washington v. Trump, Complaint for Declaratory and Injunctive Relief," 9, 11-12; State of Hawaii and Elshikh, "Hawaii v. Trump, Second Amended Complaint for Declaratory and Injunctive Relief," 31, 35.

[150] State of Washington, "Washington v. Trump, Complaint for Declaratory and Injunctive Relief," 9.

[151] Hawaii and Elshikh, "Hawaii v. Trump, Second Amended Complaint for Declaratory and Injunctive Relief," 9.

[152] Hawaii and Elshikh, "Hawaii v. Trump, Second Amended Complaint for Declaratory and Injunctive Relief," 11.

[153] U.S. Department of Justice, "Washington v. Trump, Emergency Motion," 83-84.

[154] U.S. Department of Justice, "Washington v. Trump, Emergency Motion," 104.

singled out in the ban.[155] Because the travel restrictions and changes to refugee program were facially neutral with regard to religion, the counsels for administration argued, no Establishment Clause violation could take place.

While the TRO issued by Robart in *Washington* offers little significant consideration of the religion clause claims, [156] the approach taken by Watson in the *Hawaii* TRO suggests that a policy's lack of reference to religion does not offer any sort of exemption from Establishment Clause review. Watson applied what is known as the Lemon test for legislation that deals with religion, developed in the 1971 case *Lemon v. Kurtzman* and clarified in further cases. The Lemon test has three so-called prongs: the purpose prong, which states that a statute must have a secular legislative purpose; the effects prong, which states that a statute's primary effect must neither advance nor inhibit religion; and the excessive entanglement prong, which declares that a statute not foster "an excessive government entanglement with religion." If a statute fails any part of the Lemon test, it violates the Establishment Clause.[157] Watson argued that E.O. 13780 violated the secular purpose prong. Citing the disproportionate impact of the travel ban on Muslims, Watson concluded "it would therefore be no paradigmatic leap to conclude that targeting these countries likewise targets Islam."[158] He further argued the "plainly-worded statements" of Trump and his advisors referencing the religious intent of the travel ban "betray the Executive Order's stated purpose."[159]

In the debate before the appellate panel in *Washington*, the counsel for the states frames secular purpose as a parallel to active religious discrimination. Judges Clifton, Friedland, and Canby pushed Purcell, arguing again for the states, and Flentje, arguing for the federal government, to clarify their argumentation over the Establishment Clause. When prompted by the panel to identify the best tool to evaluate the Establishment Clause claim, Purcell cites *Larson v. Valente*, a 1982 ruling that dealt with a Minnesota law that required charitable organizations soliciting funds to register written with the state government unless they were religious organizations that drew more than half their solicitations from members. A religious organization that did not fit the fifty-percent rule successfully sued on Establishment Clause grounds.[160] For Purcell, the similarity between the law in *Larson* and E.O. 13769 is that both represent "a facially neutral law" that ultimately "distinguish[ed] between [religious denominations] in a way that favored some and not others."[161] Though Purcell mentioned in an

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[155] United States Department of Justice, "Washington v. Trump, Defendants' Opposition to Plaintiff State of Washington's Motion for Temporary Restraining Order," 27.

[156] The Temporary Restraining Order issued by Robart in *Washington* deals primarily with the procedural issues of the states of Washington and Minnesota suing the federal government. Robart seeks first to establish that the states have standing to request a TRO, a technical issue with which I will not deal here, and then to determine whether the states' claim that E.O. 13769 would deal harm to the states themselves held merit. Robart ruled that the executive order adversely affected state residents and further harmed Washington and Minnesota "by virtue of the damage that implementation of the Executive Order has inflicted upon the operations and missions of their public universities and institutions of higher learning." See James Robart, Washington v. Trump (United States District Court for the Western District of Washington February 3, 2017), 5.

[157] Ronald B. Flowers, *That Godless Court?: Supreme Court Decisions on Church-State Relationships*, 2nd ed (Louisville, Ky: Westminster John Knox Press, 2005), 75, 167-169.

[158] Derrick Watson, Hawaii v. Trump (United States District Court for the District of Hawaii March 15, 2017), 31.

[159] Watson, Hawaii v. Trump, 36.

[160] Kenneth L. Karst, "Larson v. Valente 456 U.S. 228 (1982)," in *Encyclopedia of the American Constitution*, ed. Leonard W. Levy and Kenneth L. Karst, 2nd ed., vol. 4 (Detroit: Macmillan Reference USA, 2000), 1562–63.

[161] United States Court of Appeals for the Ninth Circuit, *17-35105 State of Washington, et Al. v. Donald J. Trump et Al*, 00:43:25 onward.

aside that he expected the state's case in *Washington* to succeed in the Lemon test as well as through *Larson*, his shift to the latter case emphasizes that the E.O. 13769 not only fails a secular purpose test but also actively disfavors certain religious practice despite policy language that does not reference religion.

4. Religious discrimination and the post-9/11 Constitution

   The citation of the Establishment Clause in *Washington* and *Hawaii* mark the two cases as unique among the body of legal challenges to profiling on the basis of race and religion in post-9/11 immigration and immigrant detention policy. That Robart, Watson, and the appellate panel of the Ninth Circuit found such claims compelling represents a significant departure from previous rulings on religious Constitutional claims after 9/11. Previous allegations of religious discrimination related to the mass profiling of immigrants by federal authorities have found little ground in the courts. The religious discrimination claims in *Washington* and *Hawaii* differ from previous post-9/11 cases not only in terms of their (albeit limited) successes but in that their presentation of Constitutional violations of religious liberty draw from a dramatically different set of claims and evidence.

   The majority of cases brought against the government on the grounds of religious profiling after 9/11 have invoked the Free Exercise Clause, if the First Amendment is referenced at all. The most significant of these are likely the 2009 Supreme Court decision *Ashcroft v. Iqbal* and the cases consolidated under *Turkmen v. Ashcroft*, now more properly known as *Ziglar v. Abbasi*, argued in front of the Supreme Court in January and pending decision.[162] *Iqbal* and *Turkmen* were both responses to the wave of immigrant detention in the aftermaths of the attack. The plaintiffs in the cases were arrested in the first year after the attacks and detained for unauthorized presence, an immigrant crime. During the detention process, government agents physically and verbally abused the plaintiffs, denied them due process, and refused to let them pray, eat halal meat, or access a copy of the Quran. Plaintiffs in both cases reported clear anti-Muslim animus in the detention process, though the evidence in *Turkmen* would prove to be more clearly recorded and accessible to the courts than in *Iqbal*.[163]

   Facially, the circumstances of *Iqbal* and *Turkmen* bear some similarity to those of *Washington* and *Hawaii*: executive action orders large-scale profiling that targets immigrants and refugees on the basis of race and religion. While First Amendment challenges to executive authority deploying the religion clauses are certainly not common, *Iqbal* and *Turkmen* has no lack of legal precedent.[164] Both cases assert that the federal government enabled Islamophobia through the political logics of counter-terrorism and homeland security. The 2001 and 2002 cases deal with detention and sometimes deportation of those already in the country, however, while the 2017 cases challenge restrictions of entry and detentions in the airport. The plaintiffs in *Iqbal* and *Turkmen* held that actions taken by federal agents under executive authority prevented them

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[162] I use *Turkmen* rather than *Ziglar v. Abbasi* due to the name change taking place in November 2016 at the granting of *certiori*. The plaintiff named Turkmen settled out of court, as did a number of plaintiffs in *Iqbal* and *Turkmen*.

[163] Shirin Sinnar, "The Lost Story of Iqbal," *Georgetown Law Journal 105*, no. 2 (January 17, 2017), 396 ff; Center for Constitutional Rights, "A Detailed Legal History of Ziglar v. Abbasi (Formerly Turkmen v. Ashcroft)," Center for Constitutional Rights, October 7, 2016, https://ccrjustice.org/node/6034.

[164] For an excellent survey of the legal conversation on challenges to the executive using the First Amendment (the opening word of which is 'Congress,' apparently precluding such legal action for some textualists), see Daniel Hemel, "Executive Action and the First Amendment's First Word," *Pepperdine Law Review* 40, no. 3 (April 12, 2013), http://digitalcommons.pepperdine.edu/plr/vol40/iss3/2.

from the free exercise of their religion though they did not seek Establishment Clause interventions.

Ultimately, the courts were not receptive to the religious discrimination arguments in *Iqbal* and *Turkmen*. The Supreme Court ruling in *Iqbal* declined to consider the damages implied by a First Amendment violation enacted by federal authorities, in part out of a refusal to hold government authorities responsible for the individual discriminatory intent of federal employees.[165] The Court's response to allegations that policing under the Bush administration discriminated on the basis of religion, race, and national origin, meanwhile, strikes a strongly conciliatory tone:

> The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. ...the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as "of high interest" because of their race, religion, or national origin. This the complaint fails to do.[166]

The majority opinion elides disparate religious and racial impact with a veneer of common sense. The rhetorical question here seems to be: if all the attackers were Arab Muslims, why is it a 'surprise' that those who are detained are Arab Muslims as well, even given a neutral policy? (It is worth noting that none of the plaintiffs in *Iqbal* were of Arab descent and that many of those detained in the aftermaths of the attack were not Arab or Muslim.) Indeed, the Court operated under the presumption, given the lack of admissible evidence otherwise, that the Bush administration's actions were neutral with regard to race and religion.[167]

Shirin Sinnar argues that the tone of this passage establishes a several discursive link that excuse racial-religious profiling in government immigration policy. First, the Court seems to imply that the composition of al-Qaeda and of those detained after 9/11 are causally linked. That is, the opinion offers Arab Muslim criminality as an explanation for the disparate impact of the detentions and deportations. Second, Sinnar suggests that the majority opinion implies "that even if law enforcement officials *did* take into account ethnicity and religion in their investigation, such considerations were legitimate because of the ethnic and religious composition of the hijackers and al Qaeda," providing normative grounds for profiling.[168] In the context of

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[165] Leila McNeill, "The Role of Individuals Discrimination in Free Exercise Claims: Putting Iqbal in Its Place," *Missouri Law Review* 75, no. 3 (June 1, 2010), 1017-19. The problem in *Iqbal* lay with the application of what is known as a *Bivens* course of action. The Supreme Court set precedent in a 1971 ruling that "implied cause of action may be maintained against federal officials for violations of federal constitutional rights," originally relating to Fourth Amendment protections. That is, a *Bivens* course of action allows a plaintiff to contest constitutional violations by specific officers. While the Court in *Iqbal* assumed that a *Bivens* claim could be extended to First Amendment violations, it ruled that *Bevins* did not extend supervisory liability. In other words, the Court held that senior Bush administration officials such as John Ashcroft could not be held liable for constitutional violations committed by federal agents unless the plaintiffs proved that the senior officials demonstrated clear discriminatory intent on the basis of religion. See also Dawinder S. Sidhu, "First Korematsu and Now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims of Discrimination," *Buffalo Law Review* 58, no. 2 (April 17, 2010): 432, 468-9.

[166] Ashcroft v. Iqbal, 556 U.S. 662 (Supreme Court of the United States 2009), 682.

[167] Vivek Mittal, "Using Iqbal in Iqbal: Exploiting Arabs, Muslims, and South Asians after September 11," *UCLA Asian Pacific American Law Journal* 15, no. 1 (2009): 130-131.

[168] Shirin Sinnar, "The Lost Story of Iqbal," 389-390, emphasis original.

violations of constitutional religious freedoms, Sinnar's argument that about Court's causal claim and normative claim points to a juridical framework that demands explicit and legally plausible evidence of profiling on the basis of religion.

The Second Circuit ruled in 2015 that the plaintiffs in *Turkmen* could proceed with their due process, equal protection, and Fourth Amendment search claims, denying qualified immunity to many of the Bush administration officials. The free exercise claim was, however, discarded for all plaintiffs.[169] The reason given was literally straight out of *Iqbal*: "the Supreme Court has 'not found an implied damages remedy under the Free Exercise Clause' and 'has declined to extend *Bivens* to a claim sounding the First Amendment.'"[170] The appellate court cited and quoted from *Iqbal* to discard the plaintiffs' religious discrimination claims. This despite what Vivek Mittal refers to as a concentrated effort by the petitioners in *Turkmen* "to distinguish *Iqbal* for nearly every cause of action" in the arguments about religious discrimination. Mittal argues that the court in *Turkmen* yielded to the "symbolic power of the Supreme Court" despite significant factual evidence of discrimination present in *Turkmen* that were not accessible in the *Iqbal* complaint.[171]

The First Amendment claims in *Washington* and *Hawaii* are significant, then, in that they are unusually successful. To be clear, *Washington* only preceded through appellate review before E.O. 13769 was revoked and *Hawaii* has only been heard by a district court. *Hawaii* has recently been appealed to the Ninth Circuit and will likely be taken to the Supreme Court.[172] In other words, my use of 'success' here must be taken with a grain of salt in that review has been primarily restricted to the lower courts. That being said, how might we account for the difference between the judicial lifespans of *Washington* and *Hawaii* and *Iqbal* and *Turkmen*?

The targets of religious discrimination, and therefore the grounds on which to make claims of Constitutional violations, are different in the post-9/11 cases and the 2017 cases. The plaintiffs in *Iqbal* and *Turkmen* were all men on nonimmigrant visas swept up in the wave of policing after 9/11. The arrests targeted men of South Asian or Middle Eastern origin and presumed to be Muslim, using tactics that deployed the juridical logics of profiling and detention perfected through legal defenses of the policies of the War on Drugs.[173] *Iqbal* and *Turkmen* named as unconstitutional the *actions* of federal authorities—specifically, the interactions between immigration authorities and detained individuals. The legal groundwork for such a challenge proved unsteady. The 2017 cases, in contrast, cast a highly visible and much-discussed dragnet that detained hundreds of people in a single day as religious discrimination that followed overtly anti-Muslim discourse. The Trump administration promised to deploy E.O. 13769 and E.O. 13780 as the starting point for the mass profiling of Muslims.

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[169] Pooler, Raggi, and Wesley, Turkmen v. Hasty (United State Court of Appeals for the Second Circuit June 17, 2015), 108.

[170] Pooler, Raggi, and Wesley, Turkmen v. Hasty, 35-36. See note 29 on *Bivens*.

[171] Mittal, "Using Iqbal in Iqbal," 132-133. Mittal's argument is fantastically prescient here given that he analyzed a Second Circuit decision in *Turkmen* from 2009: the Second Circuit remanded the case down to the district court upon the Supreme Court's decision in *Iqbal* but did not did not cite *Iqbal* directly, prompting Mittal's analysis about "symbolic power." When *Turkmen* made its way back to the Second Circuit as *Turkmen v. Hasty*, the Second Circuit's decision quoted the Supreme Court in *Iqbal*, as referenced above.

[172] Nikita Vladimirov, "Trump Admin to Appeal Hawaii Judge's Order Halting Travel Ban," *The Hill*, (March 30, 2017), http://thehill.com/homenews/administration/326642-trump-admin-to-appeal-hawaii-judges-order-halting-travel-ban.

[173] Geoffrey Skoll, *Social Theory of Fear: Terror, Torture, and Death in a Post-Capitalist World* (Palgrave Macmillan US, 2010), 70-72.

I suggest the expansion of the figure of the terrorist Muslim that I track elsewhere in this thesis, and the resulting shift in policy action, may account for the change in religious discrimination claim. The rise in blatant Islamophobia that accompanied these changes created political conditions in which a presidential candidate could blame 'all Muslims' for a blame, rather than the more moderated (though no less harmful) claims against 'bad Muslims' or 'fascist Islam' that characterized post-9/11 discourse.[174] The plaintiffs in the 2017 cases leveraged Trump's statements to fill the gap of 'facts plausibly showing' religious discrimination in *Iqbal* and *Turkmen.* Indeed, though the complaints in *Washington* and *Hawaii* referenced free exercise infringements, these played a minimal role during oral arguments and were referenced only lightly in the decisions of the courts. The expansion of religious discrimination from those targeted for and during detention as 'bad Muslims' to all Muslims entering the United States shifted the Constitutional stakes of legal challenges.

5. Reading religion in Trump's United States

The courts responded to the administration "talking territory instead of Muslim" by issuing orders that suggested an understanding of the power of the 'talk' that drives policymaking. The arguments in and decisions that followed *Washington* and *Hawaii* cast in sharp relief the material covered in the previous two chapters of this thesis. I mean this not only in regards to my main argument about speech that securitize various figures of the Muslim immigrant and contribute to the metonymy of Muslim-as-terrorist. The courts call attention here to the very specific work that anti-Muslim political speech does in writing policy that abstracts Islam through nation-of-origin restrictions: to paraphrase the arguments of the defendants in *Washington* and *Hawaii*, how could the Executive Orders be anti-Muslim when so much of the body of post-9/11 immigrant and refugee policy have used similar methods of exclusion?

The courts' response might be summarized as *talk matters*. This presents an opportunity to rethink the role that religion plays in assessing post-9/11 Islamophobia. As I have discussed in previous chapters, many scholars examining Islamophobia after the 9/11 attacks focus on the racialization of Muslims and the violence enacted on Muslim bodies. The decisions in *Washington* and *Hawaii*, however, rely on First Amendment claims, along with Equal Protection Clause and RFRA claims with regard to religious practice. Counsels alleging Constitutional violations made little reference to racial profiling in the court cases. To be clear, the mechanics by which the orders were implemented likely involved no small degree of profiling or physical characteristics, given the well-documented history of profiling in airports. In focusing on 'plainly-worded statements,' the district courts and Ninth Circuit panel rule less on those implementation realities of racial profiling and more on the language of religious discrimination that produced such implementation.

Junaid Rana describes discrimination against Muslims in the language of anti-Muslim racism, rather than Islamophobia, in order to situate the politics of the post-9/11 moment in the broader history of U.S. racism.[175] The attention that Rana pays to structural racism, the process by which the interactions between political institutions across time restrict and racialize being, [176]

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[174] See Mahmood Mamdani, "Good Muslim, Bad Muslim: A Political Perspective on Culture and Terrorism," *American Anthropologist* 104, no. 3 (September 1, 2002): 766–75.

[175] Junaid Akram Rana*, Terrifying Muslims: Race and Labor in the South Asian Diaspora* (Durham: Duke University Press, 2011), 29-31.

[176] Andrew Grant-Thomas and john a. powell, "Structural Racism and Color Lines in the United States," in *Twenty-First Century Color Lines: Multiracial Change in Contemporary America*, ed. Andrew Grant-Thomas and Gary Orfield (Philadelphia: Temple University Press, 2009), 137.

is important work in that it situates anti-Muslim immigrant policy discourse, to use one example, with past histories and present realities of racism against African American Muslims. The link between the post-9/11 immigrant detention regime and the broader history of the racist prison-industrial complex in the United States offers not only analytic clarity but a greater understanding of that which intervention requires. Contesting structural racism requires intervening at the meeting points of proximate political institutions, such as immigration policy and the regime of mass incarceration, with the goal of unraveling deep historical inequities through legal and political challenges to inequality.

In 2017, the religion clauses of the Constitution offer potential for contestation of the juridical regime of the anti-Muslim Trump administration. The securitization of all Muslims, of which I have explored pieces here, writes Muslim immigrants as sites of risk in the language of counter-terrorism. While I do not mean to suggest that *Washington* and *Hawaii* represent a rubric for some sort of de-securitization or an undoing of Islamophobic rhetoric, these court cases might indeed provide an example for opportunity to halt further securitization. In invoking the Establishment Clause, *Washington* and *Hawaii* assert the Constitutional rights of all Muslims, not just U.S. citizens, as agents under a rule of law that cannot enact broad religious mandates. Religious discourse brings about policies that rely on racialization and racial profiling: operationalizing religious discourse in the courts may also offer the opportunity for intervention by leveraging the Constitutional privileging of religion in the service of those marginalized and oppressed by the state. Ultimately, these judicial contestations to the Trump executive orders might present a crucial point of intervention in the language that binds Islam and immigration in the state of exception.

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