SPEAKER MEANING AND THE INTERPRETATION AND CONSTRUCTION OF EXECUTIVE ORDERS

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I. INTRODUCTION

This article explores the interpretation and construction[1] of executive orders using as examples President Trump's two executive orders captioned "Protecting the Nation From Foreign Terrorist Entry Into the United States" (the "Two Executive Orders").[2]

President Trump issued these orders in the context of (among other things) Candidate Trump's statements such as: "Islam hates us," and "[W]e can't allow people coming into this country who have this hatred."[3] President Trump provided further context with such tweets as: "People, the lawyers and the courts can call [the second of the Two Executive Orders] whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[4]

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1. *See infra* Section II.A. for the distinction between "interpretation" and "construction."

2. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

3. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 576 (4th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017), *and vacated as moot*, 138 S. Ct. 353 (2017); *see also* Transcript of Anderson Cooper 360 Degrees, *Transcripts*, CNN (Mar. 9, 2017), http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html; Theodore Schleifer, *Donald Trump: 'I Think Islam Hates Us'*, CNN (Mar. 10, 2016, 5:56 PM), http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html.

4. Donald Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:25 AM), https://twitter.com/realDonaldTrump/status/871674214356484096.

Litigation followed the first of the Two Executive Orders, and President Trump issued the second of the Two Executive Orders as a replacement for the first.[5] Litigation then followed the second of the Two Executive Orders.[6] Expressing "no view on the merits," the Supreme Court vacated and remanded the litigation with instructions to dismiss the litigation as moot because relevant provisions of that executive order had expired.[7] Despite their current status, however, the Two Executive Orders remain highly instructive for those exploring the interpretation and construction of executive orders in general. The Two Executive Orders also provide critical context for any subsequent executive orders issued by President Trump restricting travel.

Using insights from the semiotic subfield of pragmatics,[8] a semiotic subfield which explores how real-world people actually use, interpret, and construe language in various real-world contexts (including contexts where the individual issuing the order also claims "Islam hates us" and tweets "TRAVEL BAN!"[9]), this article therefore explores the Two Executive Orders in detail. In doing so, this article examines why reasonable judges thoroughly versed in legal theory, legal practice, and pragmatics should conclude that President Trump unlawfully targeted Muslims in the Two Executive Orders. By substituting such reasonable judges for impossible fictions such as Dworkin's

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5. *See* Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir. 2017); Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); *see also infra* Sections III.A.2. and III.A.3.

6. *Int'l Refugee Assistance Project*, 857 F.3d at 579; Hawaii v. Trump, 859 F.3d 741 (9th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017), *and vacated as moot*, 138 S. Ct. 377 (2017).

7. Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (2017) (4th Circuit case); Trump v. Hawaii, 138 S. Ct. 377 (2017) (9th Circuit case); *see infra* Section III.C.

8. *See, e.g., Pragmatics,* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016). The semiotic subfield of pragmatics involves "[t]he study of language as it is used in a social context, including its effect on the interlocutors" and "[t]he branch of semiotics that deals with the relationship between signs, especially words and other elements of language and their users." *Id.* By "semiotics" I mean "the study of signs" which "involves both the theory and analysis of signs, codes and signifying processes." DANIEL CHANDLER, SEMIOTICS: THE BASICS 259 (2d ed. 2007). A "sign" is defined as "a meaningful unit which is interpreted as 'standing for' something other than itself." *Id.* at 260. I have explored signs and how they work in more detail and will not repeat those details here. *See, e.g.,* Harold Anthony Lloyd, *Crushing Animals and Crashing Funerals: The Semiotics of Free Expression,* 12 FIRST AMENDMENT L. REV. 237, 253–56 (2013) [hereinafter *Crushing Animals and Crashing Funerals*]; Harold Anthony Lloyd, *Law's "Way of Words": Pragmatics and Textualist Error,* 49 CREIGHTON L. REV. 221, 225 (2016) [hereinafter *Law's "Way of Words"*].

9. *See* Schleifer, *supra* note 3; Trump, *supra* note 4.

"superhuman judge" Hercules,[10] this article instead offers real-world guidance. In its examinations of what the original speaker meant, this article also questions—among other things—the sensibility of such notions as "facial legitimacy" to the extent such notions suggest text has meaning apart from context.[11]

II. EXECUTIVE ORDERS AND THE PRAGMATICS OF SINGLE SPEAKER MEANING

A. *The Individual Private Boss*

i. Interpretation and Meaning

Before turning to the Two Executive Orders themselves, a brief look at simpler private executive orders provides a useful lead-in. Imagine, for example, a company supervisor who frequently uses the phrase "It's a full moon tonight" to mean she expects everyone to work late that night. Consistent with basic principles of pragmatics,[12] seasoned employees understand that company context drives meaning here. In this company context, they know that "It's a full moon tonight" is an order to work late that night. In such a company context, they know that "speaker meaning" differs from dictionary or facial meaning here to the extent the latter would speak of moons and not overtime. Furthermore, even new employees generally know that supervisors can make verbal errors or otherwise speak imprecisely from time to time. In those cases too, employees who want to keep their jobs would want to follow the supervisor's speaker meaning if lawful. For example, if the supervisor means "go right" by "go write," such employees would want to figure that out and go right instead of grabbing a pen. Thus, again, real-world language use would deviate from dictionary or other model usage. As these simple examples thus show, interpretation of "executive orders" requires an understanding of context, a topic further explored in Sections II.B and II.C below.

ii. Construction and Further Effects of

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10.   *See Dworkin*, THE PENGUIN DICTIONARY OF PHILOSOPHY (2d ed. 2005). See *infra* note 199 for a discussion of Justice Scalia's notion of a "reasonable reader" as judge.

11.   *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972); *see also infra* Section IV.B.

12.   *See Law's "Way of Words," supra* note 8; *see also infra* Section II.C.

Meaning

The simple examples above also help us parse a further useful distinction before exploring the Two Executive Orders further. Law-abiding employees will not willingly obey unlawful orders. Thus, law-abiding employees will not merely *interpret* their supervisor's words to determine the speaker meaning. They will also *construe* that speaker's meaning by considering its legal effect. As Professor Lawrence B. Solum analyzes the difference here: "[I]nterpretation recognizes or discovers the linguistic meaning of an authoritative legal text."[13] Construction, on the other hand, "gives legal effect to the semantic content of a legal text."[14]

For example, if the supervisor above emails the "full moon" language to instruct junior supervisors to require their hourly employees to work off the clock and avoid overtime pay, law-abiding junior supervisors will not only interpret the order but will also construe it as unlawful. In so doing, they will refuse to obey the unlawful order. They will, of course, understand that using the "full moon" language as cover in an email trail does not make the order lawful.[15]

B. *The Individual Public Boss*

With insight from these simple private law examples, one can now turn to presidential and other public officials' orders.

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13. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100 (2010) [hereinafter *The Interpretation-Construction Distinction*]. As Professor Solum also puts it, interpretation is "[t]he activity of discerning the linguistic meaning in context (or communicative content) of a legal text." Lawrence B. Solum, *Legal Theory Lexicon 063: Interpretation and Construction*, LEGAL THEORY LEXICON, http://lsolum.typepad.com/legal_theory_lexicon/2008/04/ (Feb. 5, 2017) [hereinafter *Legal Theory Lexicon*].

14. *The Interpretation-Construction Distinction, supra* note 13, at 103. Put another way, construction determines "the legal effect" of a text. *Legal Theory Lexicon, supra* note 13.

15. Parsing between interpretation and construction also applies where words are used more literally. For example, a private boss might make the following verbal statement needing little or no further interpretation in the context uttered: "I hereby give my employee Lettie Venable as her year-end bonus all my right, title, and interest in and to my home located at 1001 Franklin Street, Siddenville, North Carolina." Although the meaning here may be evident without need of lengthy or complex interpretation, one must *construe* the words as unenforceable where the statute of frauds, for example, requires any such conveyance to be in writing. Of course, to construe the purported conveyance as either enforceable or not enforceable, one must first understand what it purports to do. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 110(1)(d) (AM. LAW INST. 1981).

Here too, one must first interpret the speaker's meaning before one can construe it. If, for example, the President uses the word "fire" in an order, one must determine whether he means a flame, the discharge of someone from employment, or perhaps something else.[16] After interpreting the President's order in its relevant context, one can then construe the legal effect of the order.[17]

In the case of the Two Executive Orders, one must therefore first explore what President Trump meant to say in the applicable context. That is, one must first interpret the text. Once one has so interpreted the text, one can then construe it by exploring its legal effect.[18]

C. Context and the Meaning of Executive Orders

As these examples show, context is critical to the interpretation and construction of executive orders (and any other text). Before delving further into the Two Executive Orders, one must therefore have a basic understanding of context. In its broadest sense, context includes "all the circumstances that go

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16. *See Fire*, THE AMERICAN HERITAGE COLLEGE DICTIONARY (Houghton Mifflin Harcourt 4th ed. 2007).

17. *The Interpretation-Construction Distinction*, *supra* note 13, at 111–12; *see also infra* Section II.C.

18. *See infra* Sections III, IV, and V for a discussion of such interpretation and construction. As I hope to discuss in a future article, exploring the interpretation and construction of individual speaker meaning also provides insights into legislative speaker meaning. Confounded by the multiple minds and motives legislators bring to legislation, many have despaired of ever finding any speaker meaning or intent of a legislature with multiple legislators. *See, e.g.*, GERALD C. MACCALLUM, LEGISLATIVE INTENT AND OTHER ESSAYS ON LAW, POLITICS, AND MORALITY 13 (Marcus G. Singer et al. eds., 1993) (discussing Max Radin, Albert Kocourek, John Willis, and D. J. Payne on the issue). I, however, would focus on the legislature as a distinct speaker that speaks when adopting "legislative proposal[s] offered for debate." *See Bill*, BLACK'S LAW DICTIONARY (7th ed. 1999); RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 230–31(2012); WILLIAM J. KEEFE & MORRIS S. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES 33–35 (7th ed. 1989) (summarizing and diagramming how "a bill becomes a law"). Though legislators' thoughts, statements, and motives can be evidence of the meaning of such adopted proposals, legislators' thoughts, statements, and motives should not be confused with the adopted proposals themselves whose interpretation and construction become questions for the reasonable judge thoroughly versed in legal theory, legal practice, and semiotics (including pragmatics) explored in more detail in Section V below.

into defining the backgrounds and goals of [those interacting through the language involved]."[19]

These circumstances include cognitive contexts such as the "store of knowledge and remembered experiences which forms a background against which utterances are processed . . . and which can affect how meanings are construed."[20] For example, when an artist speaks of his "favorite brush," he may well mean a tool for applying paint, though a barber using the same phrase may mean a tool for working human hair. Less innocuously, for example, "East-side children" may mean Muslim children to a person who has perceived the eastern part of her town as primarily Muslim.

Additionally, context includes any relevant preceding discourse context.[21] "It is behind the middle door," for example, can have widely different meanings depending on what was said earlier. The logically-possible meanings are of course endless: a cat, an umbrella, a book, two books, a sofa, and so on. To determine the meaning, we need to consider what was said or asked before. For example, "Where is the cat?" would lead to a very different meaning for "it" than would a preceding question such as "Do you have an umbrella that I can borrow?" Less innocuously, "East-side children" could mean Muslims when used by a person who has previously told us that the eastern part of her town is primarily Muslim.

Social, cultural, and other human contexts can also exist at broader community levels. As Judge Easterbrook notes, "You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities."[22] If, for example, a speaker is addressing a group that she knows equates Iraqis with Muslims, that might be evidence that the term "Iraqi" means "Muslim" for that speaker.

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19. ANDRIES BEZUIDENHOUT, *Semantics-Pragmatics Boundary, in* CONCISE ENCYCLOPEDIA OF PRAGMATICS 913, 913–14 (J. L. Mey ed., 2d ed. 2009); JACOB L. MEY, *Pragmatics: Overview, in* CONCISE ENCYCLOPEDIA OF PRAGMATICS, *supra,* at 786, 788 .

20. ALAN CRUSE, MEANING IN LANGUAGE: AN INTRODUCTION TO SEMANTICS AND PRAGMATICS 121 (3d ed. 2011).

21. *See id.* at 8 ("The discourse context of an utterance consists of the utterance(s) which preceded it in the same discourse, whether a conversation or a text.").

22. WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 13 (2006) (citing Cont'l Can Co. v. Chi. Truck Drivers Helpers & Warehouse Workers Union Pension Fund, 916 F.2d 1154, 1157 (7th Cir. 1990)).

As well as providing specific terms which need interpretation, surrounding text also provides useful context.[23] As the *Restatement (Second) of Contracts* notes:

> A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing similarly affects the paragraph, other related writings affect the particular writing, and the circumstances affect the whole.[24]

Therefore, finding speaker meaning involves careful analysis of surrounding text. It also, of course, involves determining what counts as applicable text, an analysis which I have explored in detail elsewhere.[25] For example, the surrounding text can tell us that "read" is in the past tense in "He read the book," while it is in the future tense in "We will read the book." Furthermore, "East-side children" may well mean Muslims if the phrase is contained in an e-mail where prior sentences repeatedly equate "East-side children" with Muslims.

Finally, context also includes applicable purposes and policies. In evaluating purpose context, I use "purpose" to mean a speaker's "objective, goal, or end,"[26] or the "general rationale"[27] for her text. The importance of purpose in determining speaker meaning is self-evident. For example, how can we determine the meaning of a phrase such as "Take this book" without reference to the speaker's purpose? Is the speaker giving away the book or is he merely asking someone to hold the book? That question cannot be answered without reference to the speaker's purpose. In this and in all the examples noted above, understanding the real speaker meaning requires putting the speaker's words in context.[28]

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23.   *See* POPKIN, *supra* note 22, at 135.
24.   RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. d (AM. LAW INST. 1981).
25.   *See Law's "Way of Words," supra* note 8, at 242–49.
26.   *Purpose,* BLACK'S LAW DICTIONARY (7th ed. 1999).
27.   *See* POPKIN, *supra* note 22, at 188.
28.   Should the reader still doubt the necessary role of context in determining meaning, it might help to note that even so-called "axioms" or "necessary statements" are not immune to the effects and requirements of context to determine meaning. Take for example the following: "x + y" = "y + x." Although we might first think this formula is clear on its face without any need to go outside the four corners of the text, this initial thought quickly breaks down. We must assign meaning to "+" and "=" which can vary.

III. OVERVIEW OF PRESIDENT TRUMP'S FIRST & SECOND
EXECUTIVE ORDERS: "PROTECTING THE NATION FROM
FOREIGN TERRORIST ENTRY INTO THE UNITED STATES"

*A. Background, Orders, & Litigation in the Fourth
Circuit*[29]

Having now explored the difference between speaker meaning and dictionary meaning, the difference between interpretation and construction, and the importance of context for interpreting and construing text, we can now turn to the background, text, and pragmatics of the Two Executive Orders as well as litigation that followed in the wake of the Two Executive Orders.

i. Campaign Statements

a. Trump's Direct Statements

During his campaign, Donald Trump in his speeches and interviews and through his campaign website and twitter account,made a variety of statements on restricting entry of Muslims into the United States. For example, on December 7, 2015, he published a "Statement on Preventing Muslim Immigration" on his campaign website.[30] In this statement, Mr.

Does "+" mean we are combining x and y into a unity, into something else, or treating them as a collection? Are we using "+" in the sense of "1 + 1 gives us 2" or are we using the "+" in the sense of "a chair + a couch gives us a minimally furnished room"? How we use "+" in either such case drives the meaning of "=". The potential effect of context does not end here. Are we operating under the assumption, for example, that listing something first highlights the first-listed thing? If so, then neither "couch + chair" = "chair + couch" nor "x + y" = "y + x" would be true. *See* ANDREW HODGES, ALAN TURING: THE ENIGMA 104–10 (1983) (providing an excellent biographical discussion of the development of forms of "algebra").

29. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017); Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). Because of the Fourth Circuit's instructive focus on linguistic and other analyses addressed in this article and because of space concerns, I shall focus primarily upon the Fourth Circuit in this article and shall leave more detailed analysis of the Ninth Circuit litigation to others. *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir.), *cert. granted,* 137 S. Ct. 2080 (2017), *and vacated as moot,* 138 S. Ct. 353 (2017); Hawaii v. Trump, 859 F.3d 741 (9th Cir.), *cert. granted,* 137 S. Ct. 2080 (2017), *and vacated as moot,* 138 S. Ct. 377 (2017).

30. *Int'l Refugee Assistance Project,* 857 F.3d at 575; Donald J. Trump, *Donald J. Trump Statement on Preventing Muslim Immigration,* DONALDJTRUMP.COM (Dec. 7, 2015), https://w eb.archive.org/web/20161207195544/https://www.donaldjtrump.com/press-releases/do nald-j.-trump-statement-on-preventing-muslim-immigration.

Trump called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[31] After publishing this statement, Mr. Trump tweeted: "Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!"[32] Later that evening, Mr. Trump read from his statement at a campaign rally in South Carolina, declaring, "I have friends that are Muslims. They are great people—but they know we have a problem."[33] Such language—referencing a "total and complete shutdown of Muslims entering the United States"—leaves little doubt about candidate Trump's intentions as early as December 7, 2015.

Consistent with the above, on March 9, 2016, during an interview with CNN, Mr. Trump proclaimed, "I think Islam hates us," and "[W]e can't allow people coming into the country who have this hatred."[34] Later, his spokeswoman told CNN, "We've allowed this propaganda to spread all through the country that [Islam] is a religion of peace."[35] Mr. Trump's Muslim talk continued in a March 22, 2016 interview with Fox Business television. There, he claimed that his call for a ban on Muslim immigration had received "tremendous support" and stated, "we're having problems with the Muslims, and we're having problems with Muslims coming into the country."[36] Mr. Trump went on to declare a need for surveillance, opining, "[Y]ou have to deal with the mosques whether you like it or not."[37] Thus, Mr.

31. *Int'l Refugee Assistance Project*, 857 F.3d at 575; Trump, *supra* note 30.

32. *Int'l Refugee Assistance Project*, 857 F.3d at 575–76; *see also* Donald Trump (@realDonaldTrump),   TWITTER   (Dec.   7,   2017,   5:47   PM), https://twitter.com/realDonaldTrump/status/6739822281630720000.

33. *Int'l Refugee Assistance Project*, 857 F.3d at 576; *see also* Ali Vitali, *At South Carolina Rally, Donald Trump Defiant on Muslim Ban*, NBC NEWS (Dec. 7, 2015, 10:20 PM), http://www.nbcnews.com/politics/2016-election/south-carolina-rally-trump-defiant-steadfast-muslim-ban-n475951.

34. *Int'l Refugee Assistance Project*, 857 F.3d at 576; *see also* Transcript of Anderson Cooper 360 Degrees, *supra* note 3; Schleifer, *supra* note 3.

35. *Int'l Refugee Assistance Project*, 857 F.3d at 576; *see also* Transcript of The Situation Room, *Transcripts*, CNN (Mar. 10, 2016), http://www.cnn.com/TRANSCRIPTS/1603/10/sitroom.01.html.

36. *Int'l Refugee Assistance Project*, 857 F.3d at 576; *see also* Factbase Videos, *Interview: Donald Trump Interview with Maria Bartiromo on Fox Business - March 22, 2016*, YOUTUBE (Nov. 2, 2017), https://www.youtube.com/watch?v=tdvFuKD9GgQ&feature=youtu.be&t=3m35s&ab_channel=FactbaseVideos.

37. *Int'l Refugee Assistance Project*, 857 F.3d at 576.

Trump made his views about a Muslim ban quite clear: "Islam hates us" and "[W]e can't allow people coming into this country who have this hatred."[38]

b. Trump's Indirect Statements and Their Pragmatics

1. Cover and "Politeness"

As some of the above examples show, speakers sometimes "encode" or "disguise" their speech for various reasons including (without limitation) attempted covering of unlawful or questionable directives ("It's a full moon tonight" as a directive to work overtime without proper compensation) and attempted compliance with social demands for politeness (referring to Muslims as "East-side children" rather than singling them out by their religion).[39]

The latter example involves a principle of politeness that is central to pragmatics.[40] Since speech is a social activity, it makes little sense to unnecessarily offend or irritate others; therefore, most rational speakers prefer polite to impolite or offensive words where reasonably possible.[41] Thus, the parent who referred to Muslim children as "East-side children" may well have used this less-direct reference to Muslims because the parent considered that language more polite than a direct reference to Muslim children. When the principle of politeness comes into play in such a manner, we must consider whether it is used for social purposes rather than to change the meaning of references. If contextual and other evidence indicates the parent meant to refer to Muslim children, we should of course understand the effects of the principle of politeness and not be confused by the resulting indirect references to "East-side children" rather than to "Muslims." Similarly, if contextual or other evidence indicates that referencing Muslim nations is more "polite" than a reference to Muslims as a people, we should interpret the words accordingly.

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38. Transcript of Anderson Cooper 360 Degrees, *supra* note 3.

39. *See* CRUSE, *supra* note 20, at 362 ("The purpose of politeness is the maintenance of harmonious and smooth social relations . . . .").

40. *See, e.g.*, PAUL GRICE, STUDIES IN THE WAY OF WORDS 28 (1991); CRUSE, *supra* note 20, at 361–63.

41. *See, e.g.*, CRUSE, *supra* note 20, at 362–63.

2. Anaphora

As we consider such various forms of indirect reference, we should also recognize the concept of anaphora, which points backwards in time to some antecedent.[42] For example, if while drafting a contract we define the term "European Nations" to mean "all countries having any territory in Europe as of June 30, 2017," subsequent usage of "European Nations" in the contract will reach back to that definition. Anaphora can also exist in less express ways.[43] If, for example, a speaker's prior references contextually tie "East-side children" to Muslim children, that would be no less anaphora than the use of "European Nations" in the above contract example.[44] Similarly, if references to certain predominantly-Muslim countries can be contextually tied into prior references to Muslims, we might well have anaphora and thus references to Muslims, despite the literal failure to use such a term.

3. Trump's Use of Indirection and Anaphora

Mr. Trump eventually switched to indirect reference to Muslims when challenged over direct reference. In an interview on CBS's *60 Minutes*, Mr. Trump was asked about a tweet posted previously by his running mate, Mike Pence, that stated: "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional."[45] Mr. Trump responded, "So you call it territories. OK? We're gonna do territories."[46] In a separate interview on NBC's *Meet the Press*, candidate Trump also said, "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."[47]

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42. *See* F. Cornish, *Discourse Anaphora, in* CONCISE ENCYCLOPEDIA OF PRAGMATICS, *supra* note 19, at 184–85.

43. *See Law's "Way of Words," supra* note 8, at 272–74.

44. *See id.*

45. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 576 (4th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017), *and vacated as moot*, 138 S. Ct. 353 (2017); *see also* Lesley Stahl, *The Republican Ticket: Trump and Pence*, CBS NEWS (July 17, 2016), http://www.cbsne ws.com/news/60-minutes-trump-pence-republican-ticket.

46. *Int'l Refugee Assistance Project*, 857 F.3d at 576.

47. *Id.*; *see also Meet the Press – July 24, 2016*, NBC NEWS (July 24, 2016, 11:47 AM), http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706.

Not only did candidate Trump state his plan to ban Muslims in the language above, he stated outright his plan to use indirect encoding to cover that plan. He told us it is "okay" that "you can't use the word Muslim" because he's now "talking territory instead of Muslim."[48] He also told us: "Remember this."[49] That statement is also quite important because it turns territory references into anaphora for Muslims to the extent Trump is expressly telling us to remember future references to territory will refer back to his planned ban of Muslims.[50]

4. Relevance and Balance

Finally, as we consider various forms for direct and indirect reference, we must also recognize the principles of relevance and balance often at play in discourse. Where we believe a speaker wishes to be relevant, to act lawfully, and to act otherwise in good faith, we by definition assume that the speaker does not mean to speak erroneously, misleadingly, unlawfully, irrationally, or incoherently even if the speaker's words can on their face be taken as such.[51] Where we believe the speaker wishes to be relevant and to act in good faith, we therefore prefer interpretation and construction resulting in accuracy, lawfulness, rationality, and coherence, unless we have good reason to interpret and construe otherwise. Preferring such interpretations is what I shall call applying the "principle of balance"[52] when interpreting and construing words where we believe the speaker means to be relevant and is otherwise acting in good faith.[53] Kent Greenawalt nicely personalizes the point of this principle, expressing hope

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48. *Int'l Refugee Assistance Project,* 857 F.3d at 576; *see also Meet the Press – July 24, 2016, supra* note 47.

49. *Int'l Refugee Assistance Project,* 857 F.3d at 576; *see also Meet the Press – July 24, 2016, supra* note 47.

50. *See Law's "Way of Words," supra* note 8, at 272–74.

51. Consistent with this, for example, the *Restatement (Second) of Contracts* provides that "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (AM. LAW INST. 1981).

52. *See, e.g.,* GRICE, *supra* note 40, at 26 ("Our talk exchanges do not normally consist of a succession of disconnected remarks, and would not be rational if they did. They are characteristically, to some degree at least, cooperative efforts; and each participant recognizes in them, to some extent, a common purpose or set of purposes, or at least a mutually accepted direction.").

53. *See id.; Law's "Way of Words," supra* note 8, at 236.

that an interpreter who finds statements of his that seem at odds with the remainder of a piece: "[I would hope that an interpreter] could figure out which statement did fit my overall position best and which reflected a lapse in how I have expressed myself" and would therefore say "'Greenawalt probably means X (or would think X) though one of his sentences points in a different direction.'"[54] Of course, where context or other evidence indicates otherwise, the presumption of balance is rebutted. In Section IV.C.3 below, I explore the principle of balance in the context of President Trump's executive orders.

ii. The First Executive Order

Consistent with his promises of "talking territory instead of Muslim" and the other background and context discussed above, on January 27, 2017, President Trump issued his first executive order (the "First Executive Order").[55] That Order "immediately suspended for ninety days the immigrant and nonimmigrant entry of foreign aliens from seven predominantly Muslim countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen."[56] When President Trump signed the First Executive Order he stated, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means."[57]

In an interview with Fox News on January 29, 2017, former New York City Mayor Rudolph Giuliani was asked how President Trump decided to include the countries he did in the First Executive Order, and responded by recounting a conversation he had with President Trump:

> I'll tell you the whole history of it. So when [the President] first announced it, he said "Muslim ban." He called me up. He said, "Put a commission together. Show me the right way to do it legally." I put a commission together with . . . a whole group of expert lawyers on this and what we did was we

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54. KENT GREENAWALT, LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS 82 (2010).

55. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

56. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 572 (4th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017), *and vacated as moot*, 138 S. Ct. 353 (2017).

57. *Id.* at 576–77; *see also Secretary of Defense Ceremonial Swearing-In,* C-SPAN (Jan. 27, 2017), https://www.c-span.org/video/?422913-1/president-trump-signs-executive-action-calling-extreme-vetting-refugees.

focused on, instead of religion, danger—the areas of the world that create danger for us. . . . It's based on places where there [is] substantial evidence that people are sending terrorists into our country.[58]

Additionally, the First Executive Order included phrases such as "honor killings" and "persecution of those who practice religions different from their own."[59] Section 1 of the First Executive Order, in describing its purpose, stated: "the United States should not admit those who engage in acts of bigotry or hatred (*including "honor" killings,* other forms of violence against women, *or the persecution of those who practice religions different from their own*). . . ."[60] "Numerous amici" in the case claim that such language involves stereotypes that Muslims are intolerant of other religions, and that Muslims kill family members to preserve family honor.[61] To the extent such language does this, it can serve as direct (if, for example, "their own" is understood in context to mean "Muslims' own") or at least indirect references to Muslims.

The First Executive Order also included language that, as a logical matter, singled out Muslims. The First Executive Order provided that refugees may be admitted into the United States on a case-by-case basis in the discretion of the Secretaries of State and Homeland Defense, "but only so long as they determine that the admission of such individuals as refugees is in the national interest *including when the person is a religious minority in his country of nationality facing religious persecution.*"[62] Religious minorities subject to this exception are by definition non-Muslim because the territories referenced are all majority-Muslim nations.[63]

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58. *Int'l Refugee Assistance Project,* 857 F.3d at 577; *see also Giuliani: Immigration Ban Is Based on Danger, Not Religion, Show Clips,* FOX NEWS (Jan. 29, 2017), http://video.foxnews.com/v/5301869519001/?#sp=show-clips.

59. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

60. *Id.* (emphasis added).

61. *Int'l Refugee Assistance Project,* 857 F.3d at 596 n.17 ("Numerous amici explain that invoking the specter of 'honor killings' is a well-worn tactic for stigmatizing and demeaning Islam and painting the religion, and its men, as violent and barbaric.").

62. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8979 (Feb. 1, 2017) (emphasis added).

63. President Trump's subsequent executive order attempts to rebut this logical point by claiming that the First Executive Order:

> did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which

Consistent with the above, President Trump gave an interview on the Christian Broadcasting Network the same morning he signed the First Executive Order and explained that the Order would give Christian refugees preference. Trump explained, "They've been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? *If you were a Muslim you could come in, but if you were a Christian, it was almost impossible . . . .*"[64] President Trump then stated that he "thought [the situation] was very, very unfair."[65]

Shortly after the First Executive Order was issued, a federal district court judge in the Western District of Washington granted a nationwide temporary restraining order against portions of the First Executive Order.[66] The Ninth Circuit subsequently refused to stay the temporary restraining order pending appeal.[67] Instead of pursuing the litigation further, President Trump issued a second executive order discussed below.

iii. The Second Executive Order

Rather than defend the First Executive Order further, President Trump decided to revoke the First Executive Order and issue a second executive order. On February 16, 2017, he opined about the temporary restraining order saying, "constitutional

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Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities whoever they are and wherever they reside to avail themselves of the [United States Refugee Admissions Program] in light of their particular challenges and circumstances.

Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). As noted in Section III.B., President Trump, through counsel, effectively concedes problems with this exception by claiming that it was deleted from the Second Executive Order "to make clear that national security, not religion is the [Second Executive Order's] focus." *See* Brief for Petitioners at 69, *Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (Nos. 16-1436 and 16-1540); *see also infra* Section III.B.

64.   *Int'l Refugee Assistance Project*, 857 F.3d at 576; *see also* David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priorities as Refugees*, CBN NEWS (Jan. 27, 2017), http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees.

65.   *Int'l Refugee Assistance Project*, 857 F.3d at 576; *see also* Brody, *supra* note 64.

66.   Washington v. Trump, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012 at *8 (W.D. Wash. Feb. 3, 2017).

67.   *See* Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir. 2017).

actions were blocked by judges, in my opinion, incorrect, and unsafe ruling [*sic*]," and then announced that he would be issuing a new executive action the following week.[68] The President vowed, "I will not back down from defending our country. I got elected on defense of our country. I keep my campaign promises, and our citizens will be very happy when they see the result."[69]

Consistent with President's Trump's statement that he keeps his campaign promises, both he and his agents made it clear that they saw the second order as substantially the same as the first. Stephen Miller, the President's Senior Policy Advisor, claimed the second order would contain "mostly minor technical differences" producing the "same basic policy outcome for the country."[70] Sean Spicer, White House Press Secretary, also affirmed that "The principles of the executive order remain the same," and President Trump in a rally stated that the second order was "a watered-down version of the first order."[71]

Additionally, the Attorney General and the Secretary of Homeland Security provided a letter recommending a temporary cessation of entry of individuals from countries covered by President Trump's subsequent order,[72] and the Secretary of State announced that "This [subsequent] executive order is a vital measure for strengthening our national security."[73]

In contrast to the statements made by Trump's Administration, however, a March 2017 report from the Department of Homeland Security ("DHS") Office of Intelligence

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68. *Full Transcript and Video: Trump News Conference*, N.Y. TIMES (Feb. 16, 2017), https://www.nytimes.com/2017/02/16/us/politics/donald-trump-press-conference-transcript.html?_r=0.

69. *Int'l Refugee Assistance Project*, 857 F.3d at 577; *see also Full Transcript and Video: Trump News Conference*, *supra* note 68.

70. *Int'l Refugee Assistance Project*, 857 F.3d at 572; *see also* Transcript of The First 100 Days, FOX NEWS (Feb. 21, 2017), http://www.foxnews.com/transcript/2017/02/21/mille r-new-order-will-be-responsive-to-judicial-ruling-rep-ron-desantis.html.

71. *Int'l Refugee Assistance Project*, 857 F.3d at 577; *see also* Press Release, Office of the Press Sec'y, Press Gaggle by Press Secretary Sean Spicer (Mar. 6, 2017), https://www.white house.gov/the-press-office/2017/03/06/press-gaggle-press-secretary-sean-spicer.

72. *Int'l Refugee Assistance Project*, 857 F.3d at 577; *see also* Letter from Jeff B. Sessions, Att'y Gen., & John F. Kelly, Sec'y of Homeland Sec., to Donald Trump, President of the U.S. (Mar. 6, 2017), https://www.dhs.gov/sites/default/files/publications/17_0306_S1_D HS-DOJ-POTUS-letter_0.pdf.

73. *Int'l Refugee Assistance Project*, 857 F.3d at 577; *see also* Rex Tillerson, Sec'y of State, Remarks on the President's Executive Order Signed Today (Mar. 6, 2017), https://www.st ate.gov/secretary/remarks/2017/03/268230.htm.

and Analysis found that the majority of foreign-born, U.S. violent extremists are radicalized several years after entering the United States.[74] As such, the DHS report concluded that the ability of increased screening and vetting to reduce terrorism-related activity is limited.[75] Additionally, ten former national security, foreign policy, and intelligence officials filed a joint declaration to the Ninth Circuit that stated, "There is no national security purpose for a total bar on entry for aliens from the [designated countries]. Since September 11, 2001, not a single terrorist attack in the United States has been perpetrated by aliens from the countries named . . . ."[76]

On March 6, 2017, President Trump issued his second Executive Order (the "Second Executive Order") against the background of the above additional context.[77] The order states in Section 1(a):

> It is the policy of the United States to protect its citizens from terrorist attacks, including those committed by foreign nationals. The screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program (USRAP) play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States. It is therefore the policy of the United States to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP.[78]

> Section 1(f) further states:

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74. *Int'l Refugee Assistance Project,* 857 F.3d at 575; *see also TRMS Exclusive: DHS Documents Undermines Trump Case for Travel Ban,* MSNBC (Mar. 3, 2017 12:14 AM), http://www.msnbc.com/rachel-maddow-show/trms-exclusive-dhs-document-undermines-trump-case-travel-ban.

75. *Int'l Refugee Assistance Project,* 857 F.3d at 575; *see also TRMS Exclusive: DHS Documents Undermines Trump Case for Travel Ban, supra* note 74.

76. *Declaration of National Security Officials,* WASH. POST, http://apps.washingtonpost.com/g/documents/politics/declaration-of-national-security-officials/2324/ (last visited Feb. 13, 2018). Four of the officials were on active intelligence related to terrorist threats as of January 20, 2017. *Id.*

77. Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

78. *Id.*

> In light of the conditions in [Iran, Libya, Somalia, Sudan, Syria, and Yemen], until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high. Accordingly, while that assessment is ongoing, I am imposing a temporary pause on the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, subject to categorical exceptions and case-by-case waivers, as described in section 3 of this order.[79]

Unlike the First Executive Order, the Second Executive Order drops Iraq from the list of prohibited "territories" and in Section 2(c) further provides:

> . . . to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in . . . this order.[80]

Furthermore, the Second Executive Order includes waiver provisions. For example, Section 3(c) provides:

> . . . a consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegee, may, in the consular officer's or the CBP official's discretion, decide on a case-by-case basis to authorize the

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79. *Id.* The use of "I" here underscores the application of President Trump's speaker meaning to the order.

80. *Id.* Again, the use of "I" here underscores the application of President Trump's speaker meaning to the order.

issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest.[81]

Section 6 (c) also provides that:

. . . the Secretary of State and the Secretary of Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States, including in circumstances such as the following: the individual's entry would enable the United States to conform its conduct to a preexisting   international   agreement   or arrangement, or the denial of entry would cause undue hardship.[82]

Additionally, as the Fourth Circuit notes, the Second Executive Order eliminated "the indefinite ban on Syrian refugees" and also eliminated "mandated preferential treatment of religious minorities seeking refugee status."[83]

iv. The Civil Actions & the Fourth Circuit[84]

On February 7, in 2017, the Fourth Circuit plaintiffs brought an action challenging the First Executive Order, claiming the First Executive Order:

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81.   *Id.*

82.   *Id.*

83.   Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 574 (4th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017), *and vacated as moot*, 138 S. Ct. 353 (2017).

84.   Again, because of the Fourth Circuit's instructive focus on linguistic and other analyses addressed in this article and because of space concerns, I shall primarily focus here upon the Fourth Circuit and shall leave more detailed analysis of additional litigation in the Ninth Circuit to others. *See generally Int'l Refugee Assistance Project*, 857 F.3d at 554; Hawaii v. Trump, 859 F.3d 741 (9th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017), *and vacated as moot*, 138 S. Ct. 377 (2017).

[V]iolated the Establishment Clause of the First Amendment; the equal protection component of the Due Process Clause of the Fifth Amendment; the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101–1537 (2012); the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012); the Refugee Act, 8 U.S.C. §§ 1521–24 (2012); and the Administrative Procedure Act, 5 U.S.C. §§ 701–706 (2012).[85]

Four days after President Trump issued the Second Executive Order, the plaintiffs filed their complaint and motion for a temporary restraining order and/or preliminary injunction; the district court granted in part and denied in part the motion for a preliminary injunction, which included enjoining Section 2(c) of the Second Executive Order in its entirety.[86]

In its review, the Fourth Circuit Court of Appeals focused on the First Amendment Establishment Clause claim because the district court relied upon that claim in enjoining Section 2 (c) of the Second Executive Order.[87] In performing this review, the Fourth Circuit relied on *Kleindienst v. Mandel*[88] and held that "[t]he government need only show that the challenged action is 'facially legitimate and bona fide' to defeat a constitutional challenge."[89]

The Fourth Circuit read the facial legitimacy requirement here to mean "there must be a valid reason for the challenged action stated on the face of the action,"[90] and found that the "stated purpose" of the Second Executive Order, "to protect the Nation from terrorist activities by foreign nationals admitted to the United States," satisfied this requirement of facial legitimacy.[91]

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85. *Int'l Refugee Assistance Project*, 857 F.3d at 578–79.

86. *Id.* at 579.

87. *Id.* The interesting question of whether the Free Exercise Clause would provide more solid grounds than the Establishment Clause (or vice versa) for construing the First and Second Executive Orders as unlawful is beyond the scope of this article.

88. Kleindienst v. Mandel, 408 U.S. 753 (1972).

89. *Int'l Refugee Assistance Project*, 857 F.3d at 590 (citing *Mandel*, 408 U.S. at 770).

90. *Id.* One migh,t of course, wonder why stating a "valid reason" cannot be offset by other countervailing matters discussed, for example, in Section IV.B. below. Given Trump's remarks about Muslims discussed in this article, one might also wonder why "Muslims" is not a reasonable reading of "foreign nationals." *See infra* Section IV.B. (discussing problems with the notion of "facial" meaning).

91. *Int'l Refugee Assistance Project*, 857 F.3d at 591.

As for the bona fide requirement, the Fourth Circuit relied upon language from Justice Kennedy in a separate opinion in *Kerry v. Din* [92] to hold that:

> [W]here a plaintiff makes 'an affirmative showing of bad faith' that is 'plausibly alleged with sufficient particularity,' courts may 'look behind' the challenged action to assess its 'facially legitimate' justification.[93]

Applying this understanding of the bona fide test, the Fourth Circuit had little trouble finding that Plaintiffs had met their burden of proof. The Fourth Circuit noted, among other things, the following evidence: Trump's many campaign statements "expressing animus towards the Islamic faith;" his proposal to ban Muslims from the United States; his subsequent words that he would do this by focusing on "territories" rather than Muslims directly; the First Executive Order targeting several predominately-Muslim nations with preferences for minority religions; a statement by an advisor that Trump requested him to find a means to ban Muslims in a lawful way; the Second Executive Order resembling the first and described by President Trump and his advisors as maintaining the same policy goals of the First Executive Order; and what the Fourth Circuit considered as "comparably weak evidence" that the purpose of the Second Executive Order is "to address national security interests."[94] The court also noted "the exclusion of national security agencies from the decision-making process, the post hoc nature of the national security rationale, and evidence from DHS that [the Second Executive Order] would not operate to diminish the threat of potential terrorist activity."[95]

Finding that the Plaintiffs "have more than plausibly alleged that [the Second Executive Order's] stated national security interest was provided in bad faith, as a pretext for its religious purpose," the Fourth Circuit held that it could therefore "look behind" the Second Executive Order to examine the

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92. Kerry v. Din, 135 S. Ct. 2128 (2015).
93. *Int'l Refugee Assistance Project*, 857 F.3d at 590–91 (citing *Kerry*, 135 S. Ct. at 2141).
94. *Int'l Refugee Assistance Project*, 857 F.3d at 591–92.
95. *Id.* at 592.

Plaintiffs' Establishment Clause claim.[96] In performing its analysis, the Fourth Circuit looked to *Lemon v. Kurtzman*[97] and determined that the government must "show that the challenged action (1) 'ha[s] a secular legislative purpose,' (2) that 'its principal or primary effect [is] one that neither advances nor inhibits religion,' and (3) that it does 'not foster [excessive governmental entanglements with religion].'"[98] The court further held that the "Government must satisfy all three prongs of *Lemon* to defeat an Establishment Clause challenge," and noted that "[t]he dispute here centers on *Lemon*'s first prong."[99]

In evaluating the first prong of *Lemon* here, the Fourth Circuit followed several of the basic principles of pragmatics noted above. For example, it recognized that it should act:

> as a reasonable, "objective observer," taking into account "the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act."[100]

The court also recognized that:

> [In such capacity, a court] also considers the action's "historical context" and "the specific sequence of events leading to [its] passage." And as a reasonable observer, a court has a "reasonable memor[y]," and it cannot "'turn a blind eye to the context in which [the action] arose.'"[101]

As a "reasonable observer" reviewing the evidence and context set out above, the Fourth Circuit unsurprisingly found a "compelling case" that the primary purpose of the Second Executive Order was religious.[102] In addition to, or further elaborating upon, the matters mentioned above, the court considered Mr. Trump's campaign website post on December 7,

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96. *Id.*

97. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

98. *Int'l Refugee Assistance Project,* 857 F.3d at 593 (quoting *Lemon,* 403 U.S. at 612–13).

99. *Id.* (internal citations omitted).

100. *Id.* (citing, *inter alia,* McCreary v. ACLU, 545 U.S. 844, 862, 866 (2005)) (other internal citations omitted).

101. *Id.* (internal citations omitted).

102. *Id.* at 594.

2015 titled "Statement on Preventing Muslim Immigration" and calling for "a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on," while also stating: "[I]t is obvious to anybody that the hatred is beyond comprehension . . . . [O]ur country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life."[103]

The court also considered Mr. Trump's March 9, 2016 interview where he remarked that "Islam hates us," and "We can't allow people coming into this country who have this hatred."[104] The court also noted that shortly thereafter on March 22, 2016, Trump "again called for excluding Muslims" on the grounds that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country."[105] The court further considered Mr. Trump's December 21, 2016 response to a question about "whether recent attacks in Europe affected his proposed Muslim ban" when he answered: "You know my plans. All along, I've proven to be right. 100% correct."[106]

Additionally, the court focused on Mr. Trump's suggestion that he would refer to territories instead of religion in an attempt to avoid scrutiny of a "Muslim ban," including Trump's response "So you call it territories. OK? We're gonna do territories" when faced with the claim that "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional."[107] The court further noted Mr. Trump's assertion that entry to the United States ought to be "immediately suspend[ed] . . . from any nation that has been compromised by terrorism," and that when he was asked "whether this meant he was 'roll[ing] back' his call for a Muslim ban, he said his plan was an 'expansion' and explained that '[p]eople were so upset when I used the word Muslim, so he was instead 'talking territory instead of Muslim.'"[108]

The court also considered the consistent narrative that followed after Mr. Trump became President. First, President Trump promulgated the First Executive Order, which "appeared

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103.   *Id.* (internal citations omitted).
104.   *Id.* (internal citations omitted).
105.   *Id.* (internal citations omitted).
106.   *Id.* (internal citations omitted).
107.   *Id.* (internal citations omitted).
108.   *Id.* (internal citations omitted).

to take this exact form [of using territories], barring citizens of seven predominantly Muslim countries from entering the United States."[109] The court also found President Trump's words just before signing the Order, and Mayor Giuliani's words on Fox News shortly thereafter (both discussed in the previous section), indicative of a religious motive.[110] The court noted how President Trump's narrative remained consistent, with only slight modifications, as the First Executive Order encountered difficulties in the courts; for example, President Trump and his team characterized the Second Executive Order "as being substantially similar to [the First]."[111] The Second Executive Order also had "the same name and basic structure as [the First]," but with some variations; namely, "[the lack of] preference for religious-minority refugees and [exclusion of] Iraq from its list of Designated Countries."[112] The court also noted that members of President Trump's team described the Second Executive Order as primarily the same, in principle, and "described the changes as 'mostly minor technical differences' [which would lead to] 'the same basic policy outcomes for the country.'"[113] President Trump himself "described [the Second Executive Order] as 'a watered-down version of the first order.'"[114]

Given this lengthy and consistent narrative, the Fourth Circuit found that "[t]hese statements suggest that like [the First Executive Order], [the Second Executive Order's] purpose is to effectuate the promised Muslim ban, and that its changes from the [the First Executive Order] reflect an effort to help it survive judicial scrutiny, rather than to avoid targeting Muslims for exclusion from the United States."[115] On May 25, 2017, as a "reasonable observer," the Fourth Circuit therefore construed the Second Executive Order as unlawful and upheld the nationwide preliminary injunction (though it excluded President Trump

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109. *Id.* (internal citations omitted).
110. *Id.* (internal citations omitted).
111. *Id.* (internal citations omitted).
112. *Id.* (internal citations omitted).
113. *Id.* (internal citations omitted).
114. *Id.* at 595 (internal citations omitted).
115. *Id.* Again, the interesting question of whether the Free Exercise Clause would provide more solid grounds than the Establishment Clause (or vice versa) for construing the First and Second Executive Orders as unlawful is beyond the scope of this article.

himself from coverage).[116] The Government filed a petition for writ of certiorari on June 1, 2017.[117]

v. The Post-Fourth Circuit Tweets

Interestingly, the consistent narrative that had troubled the Fourth Circuit continued from President Trump himself in a series of tweets on June 5, 2017 after the Fourth Circuit had ruled against him:

> People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN![118]
>
> The Justice Dept. should have stayed with the original Travel Ban, not the watered-down, politically correct version they submitted to S.C. [sic].[119]
>
> The Justice Dept. should ask for an expedited hearing of the watered-down Travel Ban before the Supreme Court – & seek much tougher version![120]

Such subsequent evidence from the speaker himself further underscored a consistent speaker meaning and purpose from the presidential campaign through both the First Executive Order and the Second Executive Order.

vi. Petitions for Certiorari Granted

On June 26, 2017, the United States Supreme Court granted petitions for writs of certiorari for actions in both the Fourth and Ninth Circuits.[121] The Court also partially stayed the injunction on Section 2(c) of the Second Executive Order such

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116.   *Id.* at 594, 601.
117.   Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2085, *vacated as moot*, 138 S. Ct. 353 (2017).
118.   Donald Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:25 AM), https://twitter.com/realDonaldTrump/status/871674214356484096.
119.   Donald Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:39 AM), https://twitter.com/realDonaldTrump/status/871675245043888128.
120.   Donald Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:37 AM), https://twitter.com/realDonaldTrump/status/871677472202477568.
121.   *Int'l Refugee Assistance Project*, 137 S. Ct. at 2083. Again, I am focusing in this Article on the Fourth Circuit's portion of this litigation. *See supra* notes 36 and 91.

that the ban can only apply to those who are not "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States."[122]

The Court gave several examples of what constitutes such a "bona fide relationship." For individuals, "a close familial relationship is required."[123] "As for relationships with entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Second Executive Order]."[124] Such bona fide relationships would exist, for example, for students "who have been admitted to the University of Hawaii," or for "a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience."[125]

B. Petitioners' August 10, 2017 Supreme Court Brief

On August 10, 2017, President Trump and other petitioners filed their petitioners' brief in the Supreme Court.[126] Arguments addressing matters explored by the Fourth Circuit include (among others)[127] the following:

First, petitioners argue that *Mandel* and *Din* did not allow the Fourth Circuit "to examine whether the President's stated reason [for the executive orders] was given 'in good faith'" and that the president "need only determine that, in his judgment, entry 'would be detrimental to the interests of the United States.'"[128] The Fourth Circuit's quite reasonable analysis to the contrary is set forth in Section III.A.4 above and my further challenges to *Mandel* are set forth in Section IV below.

Second, Petitioners further claim that the text of Section 2(c) of the Second Executive Order "does not refer to or draw any distinction based on religion," the order "is religion-neutral [applying] to six countries based on national-security risk," and the order "applies to certain nationals of those countries without

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122.   *Id.* at 2087.
123.   *Id.* at 2088.
124.   *Id.*
125.   *Id.*
126.   Brief for Petitioners, *supra* note 63.
127.   Space limits prohibit addressing every argument raised in the Petitioners' brief.
128.   Brief for Petitioners, *supra* note 63, at 62–69.

regard to their religion."[129] Petitioners would therefore have us focus on "the actual terms of the [Second Executive Order]" which they claim "do not relate to Islam in any way."[130] However, as discussed in Section IV.B below, such a claim is hardly clear, and, again, the President has made known how he reads the text of *his* order: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[131] This tweet followed in the wake of earlier communications such as Candidate Trump's publishing on his campaign website a "Statement on Preventing Muslim Immigration."[132]

Third, Petitioners argue that such campaign statements should not be considered here because taking the Presidential oath "marks a profound transition from private life to the Nation's highest public office, and manifests the singular responsibility and independent authority to protect security and welfare of the Nation that the Constitution reposes in the President."[133] Though such words may be lofty, they make little sense in light of the need as discussed in Section II.C above to consider all relevant context when interpreting text. Further, they make little sense in light of President Trump's view that his oath of office permits, again, such tweets as "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[134] Additionally, of course, it is hard to see how such a tweet does not reincorporate by reference prior campaign statements discussed above even if they would otherwise have been somehow magically erased from consideration by the oath of office. Finally, it is also hard to see how such a tweet does not belie any underlying argument here that a Prince Hal in his seventies

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129. *Id.* at 70–71.

130. *See id.* at 77.

131. Donald Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:25 AM), https://twitter.com/realDonaldTrump/status/871674214356484096.

132. The Trump Campaign has removed the press release from their site, but it can still be accessed via internet archive. *Donald J. Trump Statement on Preventing Muslim Immigration,* Internet Archive Wayback Machine (Dec. 7, 2015), https://web.archive.org/web/20161207195544/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration.

133. Brief for Petitioners, *supra* note 63, at 73.

134. Donald Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:25 AM), https://twitter.com/realDonaldTrump/status/871674214356484096.

has suddenly changed in ways that restart context and language anew once that septuagenarian Prince Hal has taken office.[135]

Fourth, Petitioners also argue that allowing campaign statements to be considered will result in "no rational limit" where even a "college essay" could be considered in interpretation.[136] This slippery slope argument is addressed further in Section IV.C.2 below.

Fifth, Petitioners, citing *Reno v. American-Arab Anti-Discrimination Commission*,[137] argue that "courts are generally 'ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy' of the Executive's 'reasons for deeming nationals of a particular country a special threat.'"[138] However, the work of the Fourth Circuit discussed in this article on its face goes far to challenge such claims. Additionally, I discuss in Section V below the critical role that a reasonable judge thoroughly versed in legal theory, legal practice, and semiotics (including pragmatics) must play in the determination of speaker meaning.

Sixth, petitioners note the Second Executive Order's removal of "provisions aimed at aiding victims of religious persecution,"[139] which, as discussed in Section III.A.2 above, effectively only benefitted non-Muslims.[140] Although petitioners claim that the purpose of this removal was "to make clear that national security, not religion is the [Second Executive Order's] focus,"[141] this seems at best a small effort in light of broad claims discussed in Section III.A.3 above that the Second Executive Order would contain "mostly minor technical differences" producing the "same basic policy outcome for the country."[142] Additionally, if removal of a provision designed to benefit only non-Muslims is considered a "minor technical difference" by President Trump's administration, does this not underscore claims

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135. *See generally* WILLIAM SHAKESPEARE, THE FIRST & SECOND PARTS OF KING HENRY THE FOURTH (1909).

136. Brief for Petitioners, *supra* note 63, at 75.

137. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999).

138. Brief for Petitioners, *supra* note 63, at 64.

139. *Id.* at 69

140. *See supra* Section III.A.2.

141. Brief for Petitioners, *supra* note 63, at 69.

142. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 577 (4th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017), *and vacated as moot*, 138 S. Ct. 353 (2017); *see also* Transcript of The First 100 Days, *supra* note 70.

of anti-Muslim bias? How can an administration devoted to religious tolerance and equality see as a "minor technical" matter a provision designed to exclude Muslims?

C. Dismissal on Grounds of Mootness

Expressing "no view on the merits," by orders dated October 10, 2017 and October 24, 2017, the Supreme Court vacated and remanded the litigation in both the Fourth Circuit and Ninth Circuit with instructions to dismiss the litigation as moot because the Court found the relevant executive order provisions had expired.[143] Justice Sotomayor dissented "from the order vacating the judgment below and would [have dismissed] the [writs] of certiorari as improvidently granted."[144]

IV. FURTHER INTERPRETATION & CONSTRUCTION OF PRESIDENT TRUMP'S SECOND EXECUTIVE ORDER "PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES"

A. *Pragmatics, the Fourth Circuit, and* McCreary County

Although the Court dismissed the Fourth Circuit and Ninth Circuit actions on mootness grounds,[145] much can still be learned from the Fourth Circuit's analysis in particular. After the Fourth Circuit had jumped through the hoops of *Mandel* as it understood them, the court no doubt found the true speaker meaning and purpose of the executive orders: "to effectuate the promised Muslim ban" which prompted changes in the Second Executive Order "to help it survive judicial scrutiny, rather than to avoid targeting Muslims for exclusion from the United States."[146] I say "no doubt" here because President Trump himself confirmed this in a later tweet: "People, the lawyers and the courts can call it

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143. Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (2017) (October 10 order); Trump v. Hawaii, 138 S. Ct. 377 (2017) (October 24 order).

144. Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (2017) (Sotomayor, J., dissenting) (dissenting from the October 10 order); Trump v. Hawaii, 138 S. Ct. 377 (2017) (Sotomayor, J., Sotomayor) (dissenting from the October 24 order).

145. Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (2017) (4th Circuit case); Trump v. Hawaii, 138 S. Ct. 377 (2017) (9th Circuit Case).

146. *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 595 (4th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017), *and vacated as moot*, 138 S. Ct. 353 (2017).

whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[147]

In finding such speaker meaning, the Fourth Circuit followed basic principles of pragmatics discussed above as it relied upon *McCreary County v. ACLU of Kentucky*.[148] It did this not only in examining "the traditional external signs that show up in the 'text, legislative history, and implementation of the [challenged action],'" but in also relying on "principles of 'common sense' and the 'reasonable observer['s . . . reasonable memor[y]' to cull the relevant context surrounding the challenged action."[149]

Also citing *McCreary*, the Fourth Circuit recognized in accordance with the pragmatic principles discussed above that:

> Just as the reasonable observer's "world is not made brand new every morning," nor are we able to awake without the vivid memory of these [campaign or other] statements. We cannot shut our eyes to such evidence when it stares us in the face, for "there's none so blind as they that won't see." If and when future courts are confronted with campaign or other statements proffered as evidence of governmental purpose, those courts must similarly determine, on a case-by-case basis, whether such statements are probative evidence of governmental purpose.[150]

In addition to the foregoing, one can also elaborate further pragmatics and other considerations that were involved (or should have been involved) in interpreting and then construing President Trump's executive orders. I do this in Sections IV.B. and C and Section V below.

B. The Second Executive Order and Facial Legitimacy

Bound by *Mandel*'s precedent, the Fourth Circuit was forced to use the notion of facial legitimacy[151] though it rightly

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147. Donald Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:25 AM), https://twitter.com/realDonaldTrump/status/871674214356484096.

148. McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 860 (2005).

149. *Int'l Refugee Assistance Project*, 857 F.3d at 598 (quoting *McCreary*, 545 U.S. at 862, 866).

150. *Id.* at 599 (internal citations omitted).

151. Again, in performing its review, the Fourth Circuit relied on *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and held that "[t]he government need only show that the

understood that words have meaning in context and not simply on their face. For example, the Second Executive Order directs collection of data on honor killings performed by foreign nationals in the United States.[152] The court took heed of the Plaintiffs' claim that the Second Executive Order's reference to "honor killings":

> [I]ncorporates "a stereotype about Muslims that the President had invoked in the months preceding the Order." [Their brief reproduces] Trump's remarks in a September 2016 speech in Arizona in which he stated that applicants from countries like Iraq and Afghanistan would be "asked their views about honor killings," because "a majority of residents [in those countries] say that the barbaric practice of honor killings against women are often or sometimes justified"). Numerous amici explain that invoking the specter of "honor killings" is a well-worn tactic for stigmatizing and demeaning Islam and painting the religion, and its men, as violent and barbaric. The Amici Constitutional Law Scholars go so far as to call the reference to honor killings "anti-Islamic dog-whistling."[153]

Undoubtedly understanding that words' meaning depends upon context,[154] the court correctly found this "honor killings" text to be "yet another marker that [the Second Executive Order's] national security purpose is secondary to its religious purpose."[155]

Of course, one could find other possible textual "markers" of such religious purpose. For example, the Second Executive

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challenged action is 'facially legitimate and bona fide' to defeat a constitutional challenge." *Int'l Refugee Assistance Project*, 857 F.3d at 590. The Fourth Circuit read the facial legitimacy requirement to mean that "there must be a valid reason for the challenged action stated on the face of the action," and it found that the stated purpose of the Second Executive Order, "to protect the Nation from terrorist activities by foreign nationals admitted to the United States," satisfied this requirement of facial legitimacy. *Id.* at 590–91. The court then engaged in the separate analysis "bona fide" purpose analysis discussed in Section III above. For the reasons discussed in Section II.C. above and the remainder of Section IV, *Mandel* is flawed to the extent it assumes text has meaning apart from context.

152.   Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

153.   *Int'l Refugee Assistance Project*, 857 F.3d at 596 n.17 (internal citations omitted).

154.   *See supra* Section II.C.

155.   *Int'l Refugee Assistance Project*, 857 F.3d at 596 n.17 (internal citations omitted).

Order refers to "nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen."[156] Since all of the countries in this text are predominantly-Muslim nations,[157] why could a reasonably-educated person not read "nationals" in such text as a reference to Muslims or at least as a reference mostly to Muslims? Interestingly, perhaps in an attempt to mask this common Muslim thread, the Second Executive Order used the name "Iran" instead of the country's actual name: the "Islamic Republic of Iran."[158] This did not change the real-world reference here to an "Islamic Republic" inhabited mostly by Muslims.[159]

These questions all demonstrate that there is no such thing as facial meaning or facial legitimacy outside of the applicable context that indicates such meaning (legitimate or otherwise). As we saw in Section II.C above, meaning of text depends upon applicable context, and the strings of words in the Second Executive Order are no different. The President, for example, of course expects us to put the words into the cognitive context of current world geography. How else would we know what the phrase "nationals of Iran" means? Dictionary definitions of "Iran" (such as "A country of SW Asia; first inhabited c. 4000 B.C. and officially called Iran since 1935. Cap. Tehran. Pop. 59, 778,000")[160] hardly give us sufficient details from which to implement travel restrictions of any complexity. In fact, this definition does not even give us the official name of the country.[161] Instead, when determining the meaning of a three-word phrase such as "nationals of Iran," we must look at all the applicable legal and social contexts that together define what is meant by "nationals of Iran." When we do this, we look at more than the face of the Second Executive Order. We look off the page and back out into

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156. Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

157. Country-based Religion Statistics, *World Factbook*, CIA, https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html#xx (last visited Feb. 14, 2018). The CIA's *World Factbook* lists the percentage of Muslims in the populations of Iran as 99.4%, Libya as 96.6%, and Syria as 87%. *Id.* There are no percentages indicated for Somalia or Sudan, but Muslims are listed as the majority for both countries. *Id.*

158. Iran, *World Factbook*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html (last visited Feb. 14, 2018) (listing the conventional country name as "Islamic Republic of Iran").

159. *Id.*

160. *Iran*, THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2007).

161. *Id.*; Iran, *World Factbook, supra* note 158.

the world as well, a world which includes the well-known fact that Iran is a predominately-Muslim nation.[162]

Looking back out into the world for context also raises at least three further issues for *Mandel*[163] or any other test that might require finding facial legitimacy where no such meaning (legitimate or otherwise) exists out in the world of actual context. First, when looking back out into that world of context, we encounter Mr. Trump's remarks about Muslims and his talk of substituting territory discourse for discourse about Muslims.[164] Given his express substitution of territory talk here for religious talk, how can there not be a strong argument that a list of predominantly-Muslim nations is directed at Muslims? Even worse, given Mr. Trump's remarks about Muslims discussed in this article, how can there not be a strong argument that "Muslims" is what Mr. Trump meant by the phrase "foreign nationals"?

Second, and more generally, given the importance of context in determining meaning, how can we ever sensibly speak of facial legitimacy in any reasonable sense that does not look beyond text to context?[165] Even a simple statement such as "X = X" cannot have plain meaning apart from context. For example, are we saying the letter "X" is the same as the letter "X"? Or are we making the algebraic statement that any number equals itself? Or are we making the broader logical point that anything equals itself? Only context can give us the answer. I have written elsewhere about the problems plaguing "plain meaning" of texts[166] and will not address those questions further here.

Third, as a matter of respect for the rule of law and the office of the Presidency itself, we should be wary of tests that lead us away from the President's actual speaker meaning. To the extent we deviate in the process of interpretation from the President's speaker meaning, we are of course no longer listening to the President. This cannot be lawful since only the President has the lawful authority to issue such presidential executive

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162. Iran, *World Factbook, supra* note 158.

163. Kleindienst v. Mandel, 408 U.S. 753 (1972).

164. *See supra* Section III.A.1.b.ii.

165. Even "pure" textualists (to the extent anyone could or would be such a thing) will look to some form of context. *See* POPKIN, *supra* note 22, at 44 ("Textualists (and everyone else) emphasize [linguistic context], because all language depends on some common understanding of language between author and audience.").

166. *See generally Law's "Way of Words," supra* note 8.

orders.[167] Again, however, this is not to say that we must *construe* such orders as lawful. As noted above, interpretation and construction are different exercises.[168] Instead, we give proper respect to the office of the Presidency when we interpret the President's words accurately, a proper respect which also requires us to construe any unlawful meaning or purpose accordingly. To the extent cases like *Mandel* create hurdles to addressing speaker meaning (such as requiring proof of bad faith before we can dig deeper and "look behind"[169] into actual speaker meaning) we should therefore reconsider such cases.

C. Pragmatics and Four Potential Red Herrings

i. Drafters' Meaning and the Second
Executive Order

Assuming that lawyers drafted the text of the Second Executive Order, one might also become confused about whose speaker meaning should control. Should the lawyers' speaker meaning control? Or do we have a mixed situation where both President Trump's and the lawyers' speaker meanings somehow combine to provide the speaker meaning of the Second Executive Order?

Even if we assume that President Trump did not draft the text of the Second Executive Order, his speaker meaning alone

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167. As Michael Sinclair puts it when speaking of legislatures, "Legislators are elected; the legislature's view, the speaker's meaning, thus has a certain democratic legitimacy. To allow [a] 'hearer's' meaning to triumph over a different meaning founded in the legislative intent would be anti-democratic and would allow the triumph of non-elective law making over the normal, elective law-making." M. B. W. Sinclair, *Legislative Intent: Fact or Fabrication?*, 41 N.Y.L. SCH. L. REV. 1329, 1388 (1997). By analogy, the same principle would apply to executive orders of the President. Unless the principle of balance directs otherwise, respect for the office of the Presidency requires that we take evidence suggesting unlawful speaker meaning to suggest such unlawful meaning. In such case, we would run counter to the rule of law in the manner Prof. Sinclair describes should we substitute other more palatable meaning for that of the President. Instead, rule of law requires us to address the unlawfulness of any such speaker meaning through the process of construction. See *supra* notes 13 and 14 on the distinction between interpretation and construction; see also *supra* Section III.A.1.b.iii and *infra* Section IV.C.3. discussing the applicability or inapplicability of the principle of balance.

168. *See supra* notes 13–14 and accompanying text.

169. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 590 (4th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017), *and vacated as moot*, 138 S. Ct. 353 (2017) (citing Kerry v. Din, 135 S. Ct. 2128, 2141 (2015)).

must govern its interpretation and construction.[170] Again, the Second Executive Order is President Trump's action; President Trump's lawyers do not have the constitutional authority to issue Presidential orders on their own.[171]

To avoid confusion here, we can consider how this lawyer and Presidential client interplay works in practice. To do this, we can use Alan Cruse's speech model to consider the various potential stages of an executive order up to the stage of transmission of the text:

> (i) The speaker normally has a *purpose* in communicating.
> (ii) The speaker constructs a *message* to be communicated.
> (iii) The speaker constructs an *utterance* with which to convey the message.
> (iv) The speaker transforms the utterance into a [*text*].
> (v) The speaker *transmits* the [text].[172]

As we can see, text is created in step (iv) and that text captures what the speaker means to say in accordance with the purpose or purposes referenced in the three preceding steps. Text is thus a tool for transmitting pre-existing speaker meaning, and delegating creation of the text should no more change speaker meaning than should delegating transmission of the text, which comes next in stage (v). Where text deviates from the President's message or speaker meaning, rule of law again requires that we focus on the President's speaker meaning.[173]

Of course, one could drag this red herring still further. What if President Trump not only did not draft the Second Executive Order, but also did not read it before signing it? As an

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170. *See supra* note 167 and accompanying text.

171. *See also* CONG. RESEARCH SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 2 (2014), https://www.everycrsreport.com/files/201404 16_RS20846_5061281a4a4b0e15da9d33695a6a93403b91bca0.pdf ("[A]uthority for the execution and implementation of [written executive orders] stems from implied constitutional and statutory authority.").

172. *See* CRUSE, *supra* note 20, at 5 (emphasis added). I explore each of these steps in more detail in *Law's "Way of Words," supra* note 8, at 227–29.

173. *See supra* note 167 and accompanying text.

interpretive matter, the answer remains the same since the text serves to convey President Trump's speaker meaning as noted above. If any words deviate from President Trump's meaning, these words would be drafting errors or anomalies undetected by the President who did not read the order. As a practical matter, this would further underscore the need to look at all available evidence to assure that the text does not lead us away from President Trump's speaker meaning as we interpret the order.[174]

ii. Context and Inescapable Taint?

One might object that considering extra-textual statements makes it impossible for President Trump to ever regulate travel or immigration from Muslim countries. The dissent, for example, notes that, "Presumably, the majority does not intend entirely to stop the President from creating policies that address these nations [covered by the Second Executive Order], but it gives the President no guidelines for 'cleansing' himself of the 'taint' they have purportedly identified."[175]

There is no doubt that President Trump has created a burden of suspicion for himself going forward when he deals with travel from Muslim nations. However, the Fourth Circuit made it clear that his hands are far from tied under their reasoning. In its

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174. Dragging red herrings even further, one might imagine the crazy case of a vindictive lawyer who presents President Trump with a page from *Middlemarch* or some other entirely-unrelated text purporting to be the order and President Trump signs such a text without reading it. *See* GEORGE ELIOT, MIDDLEMARCH (David Carroll ed., Oxford: Clarendon Press 1986). As a matter of *interpretation*, President Trump's speaker meaning would still control just at it did in the error example above. Having not read the text, he could not be said to have meant it to supersede his speaker meaning. As a matter of *construction*, however, we would have little choice but to construe the "order" as unenforceable gibberish for the lack of reasonable legal notice it would provide to those it purports to direct. Speakers are free to choose unconventional signifiers of their speaker meaning but communication will of course fail if addressees cannot discern the link. I can call rabbits "tibbars" if I like but no one will understand me if I do not provide sufficient notices of my unconventional meaning. Such notice could perhaps come from people asking me what I meant by this one word but an executive order askew in every word would no doubt be beyond any such redemption at least as a matter of construction. *See, e.g., Crushing Animals and Crashing Funerals, supra* note 8, at 253–56 (2013) (discussing how conventional signifiers function).

175. *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 651 (4th Cir.) (Niemeyer, J., dissenting), *cert. granted*, 137 S. Ct. 2080 (2017), *and vacated as moot*, 138 S. Ct. 353 (2017); *see also* Brief for Petitioners, *supra* note 63, at 75.

view, there "must be a substantial, specific connection between [a past statement] and the challenged action."[176]

Here, in this "highly unique set of circumstances," it noted the

> . . . direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and [the Second Executive Order], the "watered down" version of that plan that "get[s] just about everything," and "in some ways, more."[177]

In other words, here there was a clear plan that was quickly implemented in the First Executive Order and then in the Second Executive Order. Additionally, this case was "unique" because government actors "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate."[178] And here, of course, "the private speaker and the government actor are one and the same,"[179] a one-and-the-same person who, again, tweeted: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[180]

Should new events or new information arise arguably requiring further executive orders, the "substantial, specific connection" may no longer exist between such further orders and the previous statements. This will be a matter for further factual analysis. As the court notes: "Whether a specific statement continues to taint a government action is a fact-specific inquiry for the court evaluating the statement."[181] From a national security standpoint, it is unfortunate that President Trump has created a suspicious cloud around himself, but it would be disingenuous, be irresponsible, run counter to the rule of law,[182] and disrespect the

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176. *Int'l Refugee Assistance Project*, 857 F.3d at 599.

177. *Id.* at 599–600.

178. *Id.* at 600 (citing Smith v. Town of Clarkton, 682 F.2d 1055, 1064 (4th Cir. 1982)).

179. *Id.* at 598 n.20.

180. Donald Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:25 AM), https://twitter.com/realDonaldTrump/status/871674214356484096.

181. *Int'l Refugee Assistance Project*, 857 F.3d at 599 n.21.

182. *See supra* note 167 and accompanying text.

Presidency itself[183] to ignore what a President has said and actually meant.

iii. The Principle of Balance?

As discussed above, where we believe a speaker wishes to be relevant, to act lawfully, and to otherwise act in good faith, we by definition will assume that the speaker does not mean to speak erroneously, unlawfully, irrationally, or incoherently even if the speaker's words can be taken as such.[184] Instead, in such a case, we try to interpret the speaker's words in a lawful, correct, rational, and coherent way in order to recover the *real* speaker meaning. A similar rationale can be used to justify such canons of construction as the constitutionality canon, which would, in appropriate cases, attempt to read language in a constitutional rather than unconstitutional manner.[185]

However, the principle of balance by definition does not apply to unlawful speech where the evidence contradicts the general presumption that speakers do not mean to speak unlawfully.[186] Here, we have the President, as the Fourth Circuit noted, expressly stating that he is using territorial references as a substitute for references to Muslims: "On July 17, 2016, when asked about a tweet that said, 'Calls to ban Muslims from entering the U.S. are offensive and unconstitutional,' then-candidate Trump responded, 'So you call it territories. OK? We're gonna do territories.'"[187] Under any reasonable analysis, Mr. Trump expressly refers to a Muslim ban. Doing so, he rebuts the necessary presumption of lawfulness for the principle of balance to apply. Were we to apply the principle anyway and somehow find neutral territorial references, we would be changing—rather than finding—President Trump's consistent speaker meaning here.[188]

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183. *See id.*

184. Consistent with this, for example, the *Restatement (Second) of Contracts* provides that "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (AM. LAW INST. 1981).

185. POPKIN, *supra* note 22, at 14–15.

186. *See supra* Section III.A.1.b.iii.

187. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 576 (4th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017), *and vacated as moot*, 138 S. Ct. 353 (2017) (internal citations omitted).

188. Candidate and then President Trump's consistent narrative is set out in Section III.A above.

In doing so, we would also be ignoring the anaphoric use of "territories" for "Muslims" discussed above: "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."[189] Again, anaphora points backwards in time to some antecedent.[190] Like defined terms in a contract, we see territories expressly used to replace prior references to Muslims with further instruction to "remember this."[191] Thus, the principle of balance simply would not apply here.

iv. "Politeness" and Speaker Meaning

Finally, as the politeness principle discussed above recognizes, speakers will often choose less offensive words for their speaker meaning, but this does not change their speaker meaning.[192] Talk of restricting "territories" may be less offensive than talk of restricting "Muslims," but the actual speaker meaning remains the same. So, again, we recall: "Oh, you can't use the word Muslim . . . . I'm okay with that, because I'm talking territory instead of Muslim."[193] And, when the principle of politeness comes into play, we must remember it is used for social purposes rather than for changing the meaning of references. If contextual and other evidence indicates the speaker meant to refer to Muslims, the politeness principle does not change this fact.

V. JUDGING PRESIDENTIAL SPEAKER MEANING

Since interpretation and construction of executive orders involve matters of law,[194] when seeking Presidential and speaker meaning, we should ask ourselves what a reasonable *judge*

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189.   *Int'l Refugee Assistance Project,* 857 F.3d at 576 (internal citations omitted) (emphasis added); *see also Law's "Way of Words," supra* note, 8 at 272–74.

190.   Cornish, *supra* note 42, at 184, 185; *Law's "Way of Words," supra* note 8, at 272–74.

191.   *Int'l Refugee Assistance Project,* 857 F.3d at 576.

192.   *See* CRUSE, *supra* note 22, at 426–27; *see also supra* Section III.A.1.b.i.

193.   *Int'l Refugee Assistance Project,* 857 F.3d at 576.

194.   Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); United States v. Customhouse Brokerage, Inc., 464 F. Supp. 2d 1364, 1371 (Ct. Intl. Trade 2006) (quoting Ahrenholz v. Bd. of Tr. of Univ. of Ill., 219 F.3d 674, 675 (7th Cir. 2000)) ("A 'question of law' is one involving 'the meaning of a statutory or constitutional provision, regulation, or common law doctrine.'"); *Question of Law,* BLACK'S LAW DICTIONARY (7th ed. 1999) ("An issue to be decided by the judge, concerning the application or interpretation of the law.").

thoroughly versed[195] in legal theory, legal practice,[196] and semiotics (including pragmatics) reviewing *all* the relevant evidence would conclude about such speaker meaning. Since judges review matters of law,[197] such an approach makes logical sense. Additionally, because judges must comply with the rules of judicial and professional conduct,[198] these hypothetical judges thoroughly versed in legal theory, practice, and semiotics (including pragmatics) would be bound by impartiality and other standards not upon binding non-lawyer readers.[199]

    All that said, however, we should remember that we are not ultimately substituting a hypothetical judge's meaning for the President's or the legislature's. First, if we substitute a judge's meaning for speaker meaning in the case of executive orders, we subvert the rule of law in the manner noted above because we replace the President's meaning with another's meaning.[200] Second, judging may improve with time and this may lead to improved and potentially-different understandings of Presidential meaning. Third, despite best efforts, our reasonable judge's meaning at any point in time may just be wrong due to lack of sufficient evidence or other matters. Fourth, our reasonable judges' conclusions at any point in time may be incomplete because, as one example, general terms permit development over time. For example, a judge deciding the meaning of "concealed dangerous weapons" before the invention of a pen-sized death ray

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195. I have carefully chosen this adjective because it turns on study, experience, knowledge, and skill. *See Versed*, THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2007); *see also infra* note 208.

196. Understanding the art and craft of law is inseparable from understanding the theory of law despite any claims of Christopher Columbus Langdell to the contrary. *See generally* Harold Anthony Lloyd, *Raising the Bar, Razing Langdell*, 51 WAKE FOREST L. REV. 231 (2016).

197. *See supra* note 194 and accompanying text.

198. *See generally, e.g.*, MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 1983); MODEL CODE OF JUD'L CONDUCT (AM. BAR ASS'N 1990).

199. Justice Scalia, for example, would invoke the aid of a "reasonable reader" defined as one "who is aware of all the elements (such as the canons) bearing on the meaning of the text, and whose judgment regarding their effects is invariably sound. Never mind that no such person exists." ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 393 (2012). Of course, one must ask at least two questions: What counts as "aware"? And could anyone less than the type of judge I propose have such awareness? I contend that proper answers to these questions lead us back to the hypothetical judges I have proposed.

200. *See supra* note 167 and accompanying text.

would likely not imagine the latter covered by the former.[201] A future judge interpreting the phrase after invention of such a new device might well reach a different conclusion.

VI. CONCLUSION

Although correct understandings of the President's First and Second Executive Orders demonstrate the unfortunate fact that Presidents can and do at times act unlawfully, we have seen that we must nonetheless put only the President's speaker meaning behind the President's words. As we have seen, rule of law (including respect for the office of the Presidency itself) requires such respect for the original Presidential speaker.[202] We should therefore ask ourselves how a reasonable judge thoroughly versed in legal theory, practice, and semiotics (including pragmatics) would weigh all the relevant evidence of such meaning in all the relevant contexts.[203] Where such a judge would interpret and construe[204] the speaker meaning of Presidential directives as unlawful, we must do the same.

In light of the discussion in Section II.C, such a reasonable judge must recognize that context is essential for accurate interpretation. Even where words are used in their dictionary senses, most words have multiple such senses which context must parse.[205] Additionally, words are often used in ways that deviate from prescribed or model usage (such as the phrase "It's a full moon tonight" used to direct workers to work late or when various "territories" are substituted for "Muslims"[206]). These usage deviations further require context to discern accurate speaker meaning.[207] Furthermore, words can be used in ways that only make sense in light of prior discourse context (as in, for example, the phrase "Bring me what I mentioned yesterday" or "Islam hates us").[208] Thus, as we have seen, pragmatics recognizes that contexts

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201. *See* Sinclair, *supra* note 167, at 1363 (citing Lon Fuller's famous example of "dangerous weapons" and small death rays).

202. *See id.*

203. *See supra* Section V.

204. *See supra* notes 13–14.

205. *See supra* Section II.C.

206. *See supra* note 47 and accompanying text.

207. *See supra* Sections II.A and II.C. *See generally Law's "Way of Words," supra* note 8.

208. *See supra* Section II.C and note 3.

include "all the circumstances that go into defining the backgrounds and goals of [those interacting through language]"[209] and reasonable judges must therefore consider all such circumstances.

For the reasons discussed above, a careful analysis of relevant words, contexts, and applicable principles of pragmatics leaves reasonable judges thoroughly versed in legal theory, legal practice, and semiotics (including pragmatics) little if any room to doubt that President Trump's First and Second Executive Orders unlawfully targeted Muslims.[210] Reaching this conclusion not only teaches us the sad truth of what was done here. It also teaches us much about the interpretation and construction of executive orders in general and provides critical context for interpreting and construing future executive orders by President Trump restricting travel from primarily Muslim regions.

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209.   *See supra* note 19.
210.   *See supra* Sections III, IV, and V.