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## A No-Contest Discharge for Uncollectible Student Loans

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# THE DISCRIMINATORY EXECUTIVE AND THE RULE OF LAW

BY MARYAM JAMSHIDI\*

*Today, the executive enjoys unprecedented power, particularly in the area of national security. By and large, this authority is not meaningfully restrained by Congress or the courts. However, some scholars argue that the presidency is still kept in check by the rule of law and politics. According to this view, substantive and procedural laws and internal executive branch rules combine with political efforts by the public, like voting, to hold the President accountable. This Article challenges this view. It argues that the rule of law and politics do not always work together to restrain the executive. Instead, law can sometimes undermine political efforts to check the presidency, particularly where minority rights or interests are concerned.*

*Focusing on the national security domain, this Article demonstrates how some laws and programs that are consistent with the rule of law frustrate executive accountability. These initiatives give the President far-reaching powers, threaten civil liberties, and disproportionately impact communities of color. While this is precisely where political accountability is most needed, it often fails to materialize. As this Article explains, the rule of law's influence over social norms and behaviors helps explain this result. Facially neutral national security programs that disproportionately affect a small, disfavored*

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*group of Americans—in this case, Arabs and Muslims—legitimize and further their marginalization. This legalized discrimination undermines the solidarity—or “social cohesion”—between groups necessary for political accountability. This contrasts with other legalistic national security initiatives that also involve broad executive powers and threaten civil liberties but have generated efforts at political accountability.*

*This Article compares various national security programs to understand how the rule of law and politics can better combine to check presidential actions that negatively affects minorities. In adopting this comparative approach, this Article unpacks the complex relationship between the rule of law, politics, and executive power in the national security arena. Based on the resulting insights, it presents preliminary solutions to the rule of law’s failure to further political accountability for communities of color in some cases.*

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INTRODUCTION

In a world where Congress and the courts have become less effective at checking presidential power, it is critical to find other ways of restraining the executive.<sup>1</sup> For some scholars, politics and the rule of law provide this alternative route.<sup>2</sup> According to this view, substantive and procedural law,<sup>3</sup> as well as internal executive branch rules, combine with popular political mechanisms, such as elections, to check the presidency.<sup>4</sup> This theory holds appeal for the national security sector where Congress and the courts have notoriously failed to check executive power<sup>5</sup> that often undermines individual rights.<sup>6</sup> Unfortunately, the theory rests on a false premise—namely, that the rule of law necessarily works hand in hand with politics. This Article argues that the relationship is more complex. Depending on a variety of factors, law can either lead to or undermine accountability for executive action. Executive programs that discriminate against or

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1. While this Article focuses on the executive branch, it sometimes uses the terms “President,” “presidential,” or “presidency” to refer to that branch.

2. See *infra* Section I.A.

3. Throughout this Article, the “rule of law” and “law” are used interchangeably to denote the same idea—government limited and bound by law. In some instances, “law” is also used to refer to specific laws.

4. Richard Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1406–10 (2012). This argument is discussed in more detail in Section I.A.

5. See USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272 (2001) (codified as amended in scattered sections of the U.S. Code) (expanding surveillance authorities for the executive); DAVID RUDENSTINE, *THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER* 71, 84 (2016) (describing how the common law state secrets privilege has insulated the executive from meaningful judicial review in national security cases).

6. See DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION* (2006) (examining the civil liberty issues raised by the U.S. government’s counter-terrorism activities).

have other negative effects on communities of color highlight this complexity. Focusing on the national security sector, this Article explains how the rule of law can either promote or undermine political accountability for executive action that impacts minority communities. Based on these insights, it suggests several solutions to help ensure law and politics better restrain executive programs that disproportionately discriminate against these communities.

To explore these issues, this Article compares several domestic national security programs<sup>7</sup> that affect minority communities either exclusively or alongside other groups. These programs, which are mostly facially neutral,<sup>8</sup> comply with the rule of law. They are also ideal candidates for executive accountability since they bolster presidential authority and threaten individual rights no matter who is impacted.<sup>9</sup> These rights-eroding, executive-emboldening programs are precisely where law *should* work with politics to restrain executive power. However, these restraints do not always materialize.

The first group of initiatives—and the primary focus of this Article—consists of national security programs that are facially neutral<sup>10</sup> but disproportionately impact Arab and Muslim

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7. This Article focuses exclusively on domestic national security programs. These are programs that have a substantial impact on U.S. citizens whether implemented inside or outside the United States. Because citizens have greater political rights than noncitizens, they are better positioned to hold the government accountable, making their inability to do so particularly noteworthy.

8. Generally, as far as U.S. citizens are concerned, facially neutral national security laws—i.e., laws that do not expressly distinguish in the text between categories of people based on protected characteristics—are the norm. *See, e.g.*, National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (codified at 28 C.F.R. §§ 500–01) (facially neutral law providing “specific authority for the monitoring of communications” between any inmate and his or her attorneys or their agents “where there has been a specific determination that such actions are reasonably necessary in order to deter future acts of violence or terrorism . . .”). This trend also aligns with U.S. law more generally. *See* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 530 (2018) (noting that “official policies of explicit [discrimination] . . . are all but gone”). The only program addressed in this Article that is not facially neutral is President Donald Trump’s travel ban against countries with large Muslim populations or Muslim majorities.

9. *See infra* Sections II.A–B. Even though these laws and programs often threaten civil liberties, they still comply with the rule of law since they are consistent with applicable constitutional jurisprudence. Consistency with other laws is amongst the rule of law’s important elements. *See infra* Section I.B.

10. Notably, under the Supreme Court’s current jurisprudence, laws that are facially neutral but have a disparate impact on a class of persons do not violate

Americans,<sup>11</sup> a disfavored minority community that makes up a small subset of the U.S. population.<sup>12</sup> These programs are represented by the FBI's domestic surveillance initiative<sup>13</sup> and criminal laws prohibiting "material support" for terrorism,<sup>14</sup> as well as their private analogues.<sup>15</sup> Though these programs are

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equal protection unless there is proof of discriminatory purpose. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987).

11. The disparate impact that FBI surveillance, citizen-on-citizen monitoring, and material support cases have on Arabs and Muslims does not undermine their rule of law credentials. Indeed, the rule of law does not require that law act impersonally or only apply to "general classes" of persons. LON L. FULLER, *THE MORALITY OF LAW* 47 (1969). To the contrary, it can be explicitly directed at a "singular named individual," never mind being used against particular groups. *Id.*

12. There are an estimated 3.35 million Muslims in the United States and anywhere between 2.04 and 3.66 million individuals of Arab descent. See PEW RESEARCH CTR., *U.S. MUSLIMS CONCERNED ABOUT THEIR PLACE IN SOCIETY, BUT CONTINUE TO BELIEVE IN THE AMERICAN DREAM* 30 (2017), <https://www.pewresearch.org/wp-content/uploads/sites/7/2017/07/U.S.-MUSLIMS-FULL-REPORT.pdf> [<https://perma.cc/7XFH-92NP>] (estimating number of Muslim Americans); DEMOGRAPHICS, ARAB AM. INST. FOUND. (2018), [https://censuscounts.org/wp-content/uploads/2019/03/National\\_Demographics\\_SubAncestries-2018.pdf](https://censuscounts.org/wp-content/uploads/2019/03/National_Demographics_SubAncestries-2018.pdf) [<https://perma.cc/49HH-UEGL>] (estimating number of Arab Americans). While this Article focuses on Arab and Muslim Americans, the U.S. government's post-9/11 national security policies have also impacted those who are not in fact, but appear to be, Arab or Muslim. See Muneer I. Ahmed, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1278–79 (2004) [hereinafter *A Rage Shared by Law*].

13. See *infra* Section II.A.1. As described below, some of these surveillance programs are run in conjunction with the Department of Homeland Security (DHS). See *infra* Section II.A.1.

14. These programs are a sampling of the vast array of domestic national security tools that have a disproportionate impact on Arab and Muslim Americans. Representative examples, not discussed here, include use of the International Emergency Economic Powers Act, 50 U.S.C §§ 1701–1708, to freeze the assets of U.S. individuals and entities allegedly affiliated with "specially designated global terrorists," without due process; and the Terrorist Screening Database ("TSDB") and associated Selectee and No Fly lists, which place draconian travel restrictions on designees, including U.S. citizens, without notice to those designated and based on a loose "reasonable suspicion" standard and secret evidence. DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 76–78, 81 (2005); Matthew Howell, *Alleviating the Power of Secret Evidence: An Analysis of No Fly and Selectee List Determinations and Redress Proceedings*, 90 TEMP. L. REV. ONLINE 1, 6–8, 14 (2018).

15. As described below and in Sections II.A–B, various laws and programs encourage private parties to participate in the government's surveillance and material support efforts. An underlying premise of this Article, which distinguishes it from other scholarship, is that the FBI's domestic surveillance program and material support prosecutions are closely connected to, and should be examined in conjunction with, the private versions of these programs. Because this Article treats these public and private programs as one, it applies its rule of law analysis to both, even though the rule of law is typically directed to government conduct only.

consistent with the rule of law, they have generated little to no political accountability for the executive. The second group of programs is composed of initiatives that also disparately impact Arab and Muslim Americans but are broadly viewed as explicitly discriminatory.<sup>16</sup> They are represented by the Trump Administration's travel ban against various countries with Muslim majorities or substantial Muslim populations<sup>17</sup> ("Muslim Ban").<sup>18</sup> These programs, which are also consistent with the rule of law, *have* inspired political efforts to restrain the President.<sup>19</sup> The third group of programs consists of initiatives negatively affecting the rights of many Americans, including Arabs and Muslims. They are represented by secret mass surveillance under Section 215 of the USA PATRIOT Act<sup>20</sup> and Section 702 of the 2008 Amendments to the Foreign Intelligence Surveillance Act (FISA)<sup>21</sup> (collectively "Section 215 and 702 surveillance"),<sup>22</sup> both of which amended FISA.<sup>23</sup> Like the Muslim Ban, these legalistic programs have generated political checks on the President. The fourth and final group of programs consists of initiatives that negatively impact a diverse but small group of individuals

16. See *infra* Section III.C.

17. See *infra* Section III.C. The ban was ultimately issued three times and grounded in the President's broad authority under Section 212 of the Immigration and Nationality Act ("INA"). See *infra* Section III.C. While questions were raised about the rule of law credentials of all three bans, the Supreme Court's decision upholding the ban's final version settled those disputes. See *infra* Section III.C.

18. See *infra* Section III.C.

19. See *infra* Section III.C.

20. 50 U.S.C. § 1861 (2012). Section 215 expired on March 15, 2020 but is widely expected to be reauthorized by Congress. See India McKinney & Andrew Crocker, *Yes, Section 215 Expired. Now What?*, ELECT. FRONTIER FOUND. (Apr. 16, 2020), <https://www.eff.org/deeplinks/2020/04/yes-section-215-expired-now-what> [<https://perma.cc/M99J-RXCY>].

21. See *infra* Section III.D.1. The secret surveillance programs—a telephony metadata collection program and an Internet and telephone content collection program known as PRISM—were initially developed without clear legal authority. Sections 215 and 702 were later used to provide ex post justification for these initiatives. See *infra* Section III.D.1.

22. As discussed in Section III.D.1, while the telephony metadata and PRISM programs arguably had rule of law problems, Sections 215 and 702 are consistent with the rule of law.

23. 50 U.S.C. §§ 1801–1885. Though this Article focuses on surveillance under Sections 215 and 702, there are other domestic national security programs that have also broadly impacted the U.S. population and generated popular pushback. See COLE, *supra* note 14, at 72–73 (explaining how public opposition curbed efforts to create a national identity card days after 9/11 and placed limits on airport screening protocols).

including various communities of color as well as non-identitarian groups focused on social justice issues. They are represented by the Trump Administration's efforts to commandeer private land to build a wall along the Mexican border ("Border Wall" or "Wall").<sup>24</sup> As with the Muslim Ban and Section 215 and 702 surveillance, these efforts are consistent with the rule of law<sup>25</sup> and have inspired political backlash against executive power.<sup>26</sup>

Law plays a crucial role in determining whether rights-eroding, executive-emboldening programs like these generate political accountability on behalf of communities of color. To appreciate this dynamic, it is necessary to understand how the "rule of law" and "political accountability" are commonly understood and how they relate to a concept this Article terms "social cohesion." Political accountability refers to the extra-congressional ways in which members of society ensure government is responsive to their interests. It includes public opinion, civic organizing, and elections.<sup>27</sup> The success of these accountability efforts depends, in turn, upon social cohesion. Social cohesion is the process by which different individuals and communities join together politically to support or advocate for a particular objective.<sup>28</sup> This cohesion can involve intergroup convergence on material and/or moral interests.<sup>29</sup> It can also involve minorities working with the white majority, other minority groups, or social justice groups to realize their goals.

Achieving social cohesion depends, in part, on the rule of law. The rule of law, which is generally defined as the principle

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24. See *infra* Section III.D.2. The Border Wall, which is framed as a national security program, affects the property rights of indigenous tribes, as well as members of the Latinx community. The Wall has also generated opposition from other groups, like environmental organizations, whose interests are adversely affected. See *infra* Section III.D.2.

25. See *infra* Section III.D.2. While the Administration's authority to build the Wall and take private property is consistent with the rule of law, the Trump Administration's financing of the Wall may not be, as reflected in ongoing legal challenges to that financing. See *infra* Section III.D.2.

26. These different types of programs may overlap. As demonstrated by the Border Wall case, for example, a legalistic program may be explicitly discriminatory while also impacting the rights of small but diverse groups. See *infra* Section III.D.2. Nevertheless, for the sake of clarity, this Article treats these ideal types separately.

27. See *infra* Section III.A.

28. See *infra* Section III.A.

29. See *infra* Section III.A.



that government is limited and bound by law,<sup>30</sup> influences social norms, attitudes, and behaviors.<sup>31</sup> The rule of law undermines social cohesion and political accountability when it negatively impacts disfavored minorities in socially acceptable ways but does not hurt other groups. By contrast, the rule of law generates social cohesion and political accountability when it leads to pervasively negative consequences for society.

The domestic national security programs discussed in this Article reflect these dynamics. The rule of law undermines social cohesion and political accountability for FBI surveillance, the material support statutes, and their private analogues, which align with social perceptions about Arabs and Muslims without negatively impacting other groups. In the United States, Arabs and Muslims are politically marginalized and socially disfavored,<sup>32</sup> in part, because they are stereotyped as terrorists and viewed as threats to U.S. national security.<sup>33</sup> FBI surveillance, the material support statutes, and their private analogues reinforce these perceptions in a facially neutral way that is generally accepted within society.<sup>34</sup> This undermines social cohesion between Arabs and Muslims and other members of society who are unaffected by these initiatives and unlikely to politically mobilize with this marginalized group.<sup>35</sup> As a result, political accountability for these programs becomes unlikely.

By contrast, law facilitates social cohesion and political accountability for the Muslim Ban because it is viewed by many members of society as explicitly discriminatory.<sup>36</sup> Explicit discrimination—discrimination overtly embodying negative views or treatment of a particular group or individual due to their membership in that group<sup>37</sup>—is generally seen as socially

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30. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 137–38 (2004).

31. See *infra* Section III.A.

32. See *infra* Section III.B.3; Ramzi Kassem & Diala Shamas, *Rebellious Lawyering in the Security State*, 23 CLINICAL L. REV. 671, 695–96 (2017).

33. See *infra* Section III.B.3.

34. See *infra* Sections III.B.1–2.

35. Though exceeding this Article's scope, the rule of law may further a group's marginalization and undermine social cohesion by making members of the group less willing, for psychological and other reasons, to seek accountability. See Kassem & Shamas, *supra* note 32, at 684, 688, 694.

36. See *infra* Section III.C. The Muslim Ban's explicitly discriminatory nature is reflected in various statements by Trump and, to a lesser extent, through the text and promulgation of the Muslim Ban's first version. See *infra* Section III.C.

37. See *infra* Section III.B.1 and accompanying text.

unacceptable and offensive even when a disfavored minority community is disproportionately affected.<sup>38</sup> This discrimination generates social cohesion between Arabs and Muslims and other members of society who are unaffected but also offended by this discrimination.<sup>39</sup> Law also facilitates social cohesion and political accountability for Sections 215 and 702 surveillance and the Border Wall, which negatively impact diverse groups. While minorities are also affected, the broad adverse consequences of these programs create a common interest in checking executive action.<sup>40</sup>

In addition to illuminating the rule of law's effects on executive accountability, this Article's comparative approach adds nuance to the standard account in legal scholarship that majoritarian politics necessarily undermine minority rights and interests.<sup>41</sup> As it demonstrates, laws that are explicitly discriminatory or that negatively affect the rights and interests of a small but diverse array of actors can lead to executive accountability,<sup>42</sup> whether or not the white majority or its material objectives are substantially implicated.<sup>43</sup>

38. Nicholas A. Valentino et al., *The Changing Norms of Racial Political Rhetoric and the End of Racial Priming*, 80 J. POL. 757, 758–59 (2017).

39. See *infra* Section III.C.

40. See *infra* Section III.D.

41. As discussed in Section III.A, the idea that majoritarian democratic politics often fails to further the interests of minority groups is well-established in the legal literature, particularly in the works of Derrick Bell and John Hart Ely. Though they took different routes, both Bell and Ely reached roughly the same conclusion, namely, that majority support is typically required to achieve minority rights. Derrick A. Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523–33 (1980); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73–104, 135–79 (1980). For Ely, this dynamic is especially true for minority groups that are socially disfavored. *Id.* at 151.

42. See *infra* Sections III.A, D.2. Legal scholarship has increasingly documented the existence and/or importance of building coalitions amongst communities of color to achieve civil liberty and rights gains. See, e.g., Adrien Wing, *Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 745 (2003) (“Despite the frictions and problems between various traditional and nontraditional groups, coalition building can be a useful tool of critical race praxis [amongst minority groups in the United States].”); Kevin R. Johnson, *The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 LA. L. REV. 759, 766 (2003) (arguing that “coalitions between communities of color will be necessary to displace white domination of the electoral process in this country”). This Article adds to this scholarship while also emphasizing the importance of non-identitarian social justice groups to these coalitions.

43. See *infra* Section III.B. Bell and Ely's theories assume that the white majority's material interests—whether political, economic, or social—must be

This Article proceeds as follows. Part I examines the scholarship on executive power, the rule of law, and politics. It challenges the assumption that law necessarily supports political efforts to check the President. Instead, it argues that law often undermines political accountability where it is most needed. In presenting these arguments, this Part briefly explores two other strands of scholarship: first, on the rule of law and what it requires, and second, on the disproportionate impact national security programs have on Arab and Muslim Americans. As this discussion demonstrates, legalistic programs that bolster executive power, threaten individual rights, and discriminate against minority groups do not necessarily lead to political restraints on the executive, especially in the national security sector.<sup>44</sup>

Part II analyzes several national security programs that disproportionately affect Arab and Muslim Americans—FBI surveillance, material support cases, and their private analogues—and establishes their rule of law credentials.<sup>45</sup> Since 9/11, the FBI has developed extensive domestic intelligence gathering practices for counterterrorism purposes.<sup>46</sup> These practices, which give the FBI broad powers to surveil Americans, raise constitutional concerns but are still compliant with the rule of law.<sup>47</sup> Supporting these efforts are various initiatives, primarily developed by the Department of Homeland Security (DHS), urging citizens to surveil one another.<sup>48</sup> These citizen-on-citizen monitoring efforts are similarly compliant with the rule of law but further bolster executive surveillance powers and their rights-threatening effects.<sup>49</sup> These initiatives include the *See Something, Say Something* program, which urges members of the public to report “suspicious” activity to law enforcement, and the Countering Violent Extremism Program (CVE), which calls

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implicated in order for democratic politics to address minority concerns. See *infra* Section III.B.

44. See COLE, *supra* note 14, at xxvi–xxvii (emphasizing importance of accountability in national security since the executive “cannot be trusted to balance security and liberty fairly” and will “always overemphasize security needs and undercount liberty interests”).

45. See *infra* Sections II.A–B.

46. See *infra* Section II.A.

47. Emily Berman, *Regulating Domestic Intelligence Collection*, 71 WASH. & LEE L. REV. 3, 6 (2014).

48. See *infra* Section II.A.

49. See *infra* Section II.A.

on communities to monitor their members for signs of “radicalization.”<sup>50</sup>

As for material support, these laws, which prohibit a broad range of support for terrorist groups or activities, give the executive substantial authority to prosecute terrorism-related crimes.<sup>51</sup> As defined by statute, material support includes a host of nonviolent activities ranging from monetary assistance to educational training.<sup>52</sup> Pursuant to two criminal statutes, 18 U.S.C. § 2339A and 18 U.S.C. § 2339B, the government prosecutes individuals providing this prohibited support. While these cases often threaten civil liberties,<sup>53</sup> they are rule of law compliant. These prosecutions are complemented by two civil laws encouraging private individuals to also bring suit against those materially supporting terrorist groups or activities. These are the private right of action under the Antiterrorism Act of 1992 (“ATA”), 18 U.S.C. § 2333, and the terrorism exception to the Foreign Sovereign Immunities Act of 1976 (“FSIA”), 28 U.S.C. § 1605A.<sup>54</sup> As with citizen-on-citizen monitoring programs, these tort suits indirectly aggrandize executive power in ways that raise civil liberty concerns without violating the rule of law.<sup>55</sup>

Part III examines why political accountability for these discriminatory programs has been elusive, and compares these programs to legalistic national security initiatives that also bolster executive power and erode individual rights<sup>56</sup> but have generated political checks on the executive: the Muslim Ban, Section 215 and 702 surveillance, and the Border Wall.<sup>57</sup> It

50. See *infra* Section II.A.

51. See *infra* Section II.B.

52. 18 U.S.C. § 2339A(b)(1). See *infra* Section II.B for the complete definition of material support.

53. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 10–15 (2003) [hereinafter *The New McCarthyism*]. In *Holder v. Humanitarian Law Project*, the Supreme Court cleared the way for the government to use the material support laws to prohibit First Amendment-protected speech. 561 U.S. 1 (2010); see also *infra* Sections II.A–B.

54. See *infra* Section II.B. Relying on material support’s sweeping definition, citizens have used these civil laws to bring claims against private entities, as well as foreign governments designated as state sponsors of terrorism. See *infra* Section II.B.

55. See *infra* Section II.B.

56. See *infra* Section III.D.2. While most of the other programs discussed in this Article erode civil liberties, the Border Wall’s main threat is to property rights. See *infra* Section III.D.2.

57. See *infra* Sections III.B–D. Some of these efforts remain ongoing and incomplete (the Muslim Ban and the Border Wall), while other efforts, such as

demonstrates how some of these accountability efforts have occurred even though the white majority and/or its material interests have not been substantially involved.<sup>58</sup>

Applying insights from this comparative approach, Part IV presents three possible solutions to the accountability problems facing FBI surveillance, the material support statutes, and their private analogues.<sup>59</sup> The first strategy calls for an end to the discriminatory national security programs discussed in this Article. The second allows these programs to continue but calls for their civil liberty problems to be addressed. The third strategy calls for both fixing their civil liberty shortcomings and applying these programs more broadly across American society.<sup>60</sup> A brief conclusion follows.

Recent events are a reminder of the executive's expansive authority.<sup>61</sup> At a time when judicial and congressional checks on that power are less than robust, this Article aims to prompt additional scholarly work on the ways law can effectively support political restraints on the executive's national security authorities—especially for communities of color. Its insights may also apply outside the national security sphere. The rule of law's discriminatory impact reaches deeply into American society, as underscored by police brutality against Black and Brown communities.<sup>62</sup> Here, too, judicial and legislative checks have been

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surveillance under Sections 215 and 702, have achieved concrete accountability gains. *See infra* Sections III.C–D.

58. *See infra* Sections III.C, D.2. For example, while reactions to the Muslim Ban may be partly motivated by “majority” concerns—including handwringing about the ban’s impact on national security—opposition to the ban is mostly driven by widespread perceptions about its explicitly discriminatory intentions. *See infra* Section III.C. In addition, efforts to secure private land for the Border Wall have been restrained by a small but diverse coalition of groups that represent not only the interests of white ranchers but also various communities of color as well as social justice organizations. *See infra* Section III.D.2.

59. *See infra* Section IV.

60. *See infra* Section IV. This Article’s proposal that discriminatory laws and policies be applied across American society draws inspiration from a similar suggestion made in early post-9/11 scholarship on national security and civil liberties. COLE, *supra* note 14, at 23.

61. Trump’s impeachment is the most recent example of the executive’s extensive powers vis-a-vis the other branches.

62. *See* Ryan W. Miller, *Shake-up at Atlanta Police Department Latest in Law Enforcement Firings Following Protests*, USA TODAY (updated June 15, 2020), <https://www.usatoday.com/story/news/nation/2020/06/08/george-floyd-protests-have-sparked-some-police-firings-charges/5318019002/> [<https://perma.cc/V7UL-YRRH>]

elusive or ineffective.<sup>63</sup> Understanding law's effects on politically restraining executive power—whether at the federal, state, or local level—may prove useful in addressing this systemic crisis.

## I. RISING EXECUTIVE POWER AND THE RULE OF LAW

Most scholars agree that the modern executive has accrued substantial power.<sup>64</sup> According to prevailing accounts, Congress and the courts have increasingly been subordinate to and ruled by executive prerogatives, especially in the areas of national security and foreign affairs.<sup>65</sup> One proposed solution to this problem looks at how the rule of law and politics combine to restrain the executive, independently of Congress and the courts. By and large, the consensus view is that, however imperfectly, the rule of law and politics keep the President in check.

As Part I demonstrates, this view rests on a mistaken premise—namely, that the rule of law always furthers political accountability. To the contrary, law often undermines accountability where it is most needed. To demonstrate this, Part I starts by canvassing the scholarly literature on the role of law and politics in constraining executive power. It then examines two other areas of scholarship: first, on the rule of law and what it requires, and second, on the disparate impact national security

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] (reporting on nation-wide protests demanding accountability and change in law enforcement activity against communities of color).

63. See, e.g., Kate Levine, *We Cannot Prosecute Our Way to Making Black Lives Matter*, L. & POL. ECON. BLOG (June 10, 2020), <https://lpeblog.org/2020/06/10/prosecuting-police-wont-make-black-lives-matter/> [<https://perma.cc/H75D-FC6N>] (arguing that “there is ‘no equality under law’ in our criminal legal system, which imprisons black Americans at a rate far outstripping white Americans”); Jocelyn Simonson, *Power Over Policing*, BOS. REV. (June 8, 2020), <https://bostonreview.net/law-justice/jocelyn-simonson-power-over-policing> [<https://perma.cc/YTR8-WF25>] (arguing that technocratic reforms to policing are insufficient for realizing accountability).

64. See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 181–82 (2010) (arguing that executive power has become dangerously expansive and that existing institutional arrangements no longer constrain the President); Neal Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319–22 (2006) (arguing that Congress and the courts have abdicated their duties, which has allowed the executive to become increasingly powerful).

65. Curtis Bradley & Trevor W. Morrison, *Presidential Power, Historical Power, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1098–1101 (2013); ACKERMAN, *supra* note 64, at 184–85; Katyal, *supra* note 64.

laws have on Arab and Muslim Americans. Together, these areas of scholarship show how some legalistic programs bolster executive power, threaten individual rights, and discriminate against minority groups without generating political restraints on the executive. This is particularly evident in the national security sector, where there has been little accountability for legalistic programs that give the presidency broad powers that disproportionately affect the rights of Arabs and Muslims,<sup>66</sup> including U.S. citizens.<sup>67</sup>

### A. *The Executive Unbound*

A number of scholars have discussed how the rule of law and politics interact to constrain the President. Much of this scholarship is either implicitly or explicitly in conversation with arguments presented by Professors Eric Posner and Adrian Vermeule.<sup>68</sup> As Posner and Vermeule argue, our constitutional system of checks and balances is both inadequate for realizing executive accountability and ill-suited to the modern administrative state.<sup>69</sup> Because the executive stands at the center of that state, the courts and Congress are marginal actors, reacting to—rather than setting—policies created and enforced by the executive.<sup>70</sup> In emergency situations, Congress and the courts are even more ineffective.<sup>71</sup> This means the executive “governs, subject to legal constraints that are shaky in normal times and weak or nonexistent in times of crises.”<sup>72</sup> For Posner and Vermeule, this is not only a factual reality but also normatively preferable. In their view, an executive unbound by the rule of law produces better outcomes, particularly when it comes to making “rapid ongoing adjustments in complex policy matters.”<sup>73</sup>

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66. See Engy Abdelkader et al., *Mass Violence Motivated by Hate: Are New Domestic Terrorism Laws the Answer?*, 44 HARBINGER 116, 132 (2020) (noting “long history of misuse of terrorism related or national security related authorities to target minority communities . . .”).

67. See *infra* Section I.C.

68. See generally ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010).

69. *Id.* at 4–5, 14–15.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 19.

However, all is not lost when it comes to checking executive power. For Posner and Vermeule, democratic politics serve as the primary check on presidential authority.<sup>74</sup> While acknowledging that law and politics “lie on a continuum,” they argue that the political end of the spectrum—specifically elections and public opinion—effectively restrains the executive on its own.<sup>75</sup>

Many scholars have challenged Posner and Vermeule’s skepticism about the rule of law and argued that it works alongside politics to constrain presidential authority.<sup>76</sup> Critiquing what they see as the pair’s binary approach, various scholars underscore the dialectical relationship between law and political practice.<sup>77</sup> While not engaging directly with Posner and Vermeule’s position, Professor Jack Goldsmith argues that legal actors inside and outside the executive branch, including government lawyers, departmental inspectors general, and private civil rights attorneys, combine with investigative journalists to bring the force of law and politics to bear on the President’s actions.<sup>78</sup> Still, others describe the separation between the rule of law and politics as largely semantic, insisting that constraints on the executive arise “from some inextricable mix of law and public responses tied to the law . . . .”<sup>79</sup> Others argue that “while standing alone, legal and political mechanisms each yield only fragile constraints on government, when they work together they can prove effective.”<sup>80</sup>

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74. *Id.* at 4–5.

75. *Id.*

76. Some have also challenged the notion that the other branches do not check presidential power in any way. *See, e.g.,* Aziz Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 781–82 (2012) [hereinafter *Binding the Executive*] (arguing that Congress restrains the executive to some degree).

77. *Id.* at 782–83.

78. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* passim (2012); *but see* ACKERMAN, *supra* note 64, at 26–29, 68 (arguing that the media has stopped playing its checking role and executive branch lawyers often rubberstamp broad exercises of presidential power). While Goldsmith also argues that the courts—and to a lesser extent Congress—have restricted the President post-9/11, he concedes that this checking is substantially strengthened by the executive branch’s legal bureaucracy, as well as outside political forces. GOLDSMITH, *supra*, at xi–xvi.

79. Pildes, *supra* note 4, at 1410.

80. *Binding the Executive*, *supra* note 76, at 826. *See also* Julian David Mortenson, *Law Matters, Even to the Executive*, 112 MICH. L. REV. 1015, 1037 (2014) (“[S]ometimes law . . . creat[es] a set of electoral facts on the ground to which a politically aware executive must respond . . .”).



While these scholars rightly insist on law's critical role in realizing political accountability, they mistakenly assume that law necessarily furthers this accountability.<sup>81</sup> In fact, the rule of law does not always promote political checks on the executive. To understand why, it is necessary to appreciate what the rule of law does and does not require. As explored in the next section, the dominant approach to the rule of law is formalistic. According to formal legality, what matters is that government acts in accordance with relevant rules. These rules can support government action that bolsters executive power, undermines individual rights, and disproportionately impacts minority groups while still satisfying formal legality's requirements. These sorts of programs may, however, make it harder for the rule of law to promote political accountability and keep the executive in check.

### B. *Understanding the Rule of Law*

There are two main approaches to the rule of law: formalist and substantive.<sup>82</sup> In general, formal legality focuses on the proper form of law and government obedience to law, while substantive legality also requires that law have a particular content, usually aligned with justice and morals.<sup>83</sup> Within and between these schools of thought, the rule of law remains a highly contestable concept whose normative meaning and descriptive elements have long generated disagreement.<sup>84</sup>

Nevertheless, there are important areas of convergence. In particular, all conceptions of the rule of law embrace certain formal requirements.<sup>85</sup> Professor Lon Fuller's influential description of these requirements breaks them down into eight

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81. Some executive accountability scholars have gestured toward the idea that political accountability requires social cohesion. *See, e.g., Binding the Executive, supra* note 76, at 836 ("The political foundations of executive constraint . . . may be fraying as greater legislative polarization and political inequality create political dynamics in which political elites are increasingly unlikely to converge on opposition to a President . . .").

82. TAMANAHA, *supra* note 30, at 91.

83. *Id.* at 92.

84. Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7 (1997).

85. TAMANAHA, *supra* note 30, at 93. There are also various procedural requirements which govern how courts administer the rule of law but that are beyond the scope of this Article. STANFORD ENCYCLOPEDIA OF PHILOSOPHY, THE RULE OF LAW § 5.2 (2016), <https://plato.stanford.edu/entries/rule-of-law/#ProcAspe> [<https://perma.cc/VH2J-CWAR>].

features.<sup>86</sup> According to Fuller's formulation, law must be: (1) general, meaning that there are rules to guide government conduct;<sup>87</sup> (2) publicly promulgated, which means law must be published but not necessarily known by all its subjects;<sup>88</sup> (3) non-retroactive, except where necessary to correct the legal system;<sup>89</sup> (4) clear and understandable, meaning law is neither obscure nor incoherent;<sup>90</sup> (5) free of contradictions both internally and with respect to other laws;<sup>91</sup> (6) capable of obedience such that law does not demand the impossible from its subjects;<sup>92</sup> (7) constant, meaning law is not changed too frequently or suddenly;<sup>93</sup> and (8) congruent with official action, meaning that government officials act in accordance with law.<sup>94</sup> Law must also be the product of a "rational law-making process."<sup>95</sup>

According to formalist legality, law is presumptively valid as long as it satisfies these requirements. The eighth requirement—government compliance with relevant rules—is particularly important.<sup>96</sup> This requirement means state officials cannot change the law outside established procedures or break it without consequence.<sup>97</sup> This limits manifestations of "arbitrary

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86. TAMANAHA, *supra* note 30, at 93.

87. FULLER, *supra* note 11, at 4.

88. *Id.* at 51.

89. *Id.* at 54.

90. *Id.* at 63.

91. *Id.* at 65–66, 68. A law that is free of contradictions is not only internally consistent but also consistent with other laws. *See id.* at 69 (noting that laws that contradict one another, for example, by "fight[ing] each other, though without necessarily killing one another" can be "very hurtful to legality").

92. *Id.* at 70 n.29. A law that is impossible to comply with is different from a law that is extremely difficult to obey. The latter can be "harsh and unfair but it need not contradict the basic purpose of a legal order, as does a rule that demands what is patently impossible." *Id.* at 79.

93. *Id.* at 79–80.

94. *Id.* at 81.

95. Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 359 (1973). While there is general agreement on these basic elements of the rule of law, different scholars describe the rule of law's elements slightly differently, though these descriptions are usually coextensive with Fuller's list. *See, e.g.*, Fallon, *supra* note 84, at 8 n.27 (presenting a list of requirements for the rule of law that "differs in detail from, but is in spirit consistent with" Fuller's eight criteria).

96. *See generally* F.A. HAYEK, *THE ROAD TO SERFDOM* 112 (Bruce Caldwell ed. 2007).

97. Ignacio Sánchez-Cuenca, *Power, Rules, and Compliance*, in *DEMOCRACY AND THE RULE OF LAW* 62, 71 (José María Maravall & Adam Przeworski eds. 2003).

power”<sup>98</sup> and ensures the “rule of law, not men” prevails.<sup>99</sup> Notably, formalist legality does not require *all* government activities be rule-bound, but instead leaves that decision to social choice.<sup>100</sup> Where formalist legality does require formal rules—specifically for government deprivations of liberty or property<sup>101</sup>—it does not demand that law constrain the state in a particular way.<sup>102</sup> Law can give the government substantial discretion, create meaningful civil liberty restraints, or strike a middle ground.<sup>103</sup> Formalist legality is largely agnostic about which option is chosen, as long as the state continues to enforce and obey the law.<sup>104</sup>

The formalist rule of law also does not require that law have a particular normative content.<sup>105</sup> Law can serve “bad” ends, including by institutionalizing racial and religious discrimination.<sup>106</sup> Nor does formalism make demands regarding fundamental rights, equality, or justice.<sup>107</sup> For example, though some argue that the rule of law’s first formal requirement—the generality principle—demands “impartial” application of law,<sup>108</sup> it still allows for invidious discrimination<sup>109</sup> and does not require

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98. JOSEPH RAZ, *THE AUTHORITY OF LAW* 211, 219 (2009).

99. TAMANAHA, *supra* note 30, at 5.

100. *Id.* at 97.

101. *Id.* at 139.

102. Formal legality may, for example, be less necessary in areas where the state’s coercive power is minimal as in “the sphere of community activities.” *Id.* at 140.

103. As theorists note, “formal legality . . . [may be] counter-productive in situations that require discretion, judgment, compromise or context-specific adjustments.” *Id.*

104. See RAZ, *supra* note 98, at 218 (arguing that the “discretion of the crime-preventing agencies should not be allowed to pervert the law” including by “avoid[ing] all effort to prevent and detect certain crimes or prosecute certain classes of criminals”). The scholar F.A. Hayek had a particularly dim view of discretion and its corrosive effect on the rule of law. *Id.* at 120. As others have noted, however, Hayek’s view, which was primarily driven by opposition to socialism and the welfare state, failed to align with formal legality or appreciate how discretion can be restrained through legislative mandates and procedural requirements. TAMANAHA, *supra* note 30, at 98.

105. Ignacio Sánchez-Cuenca, *supra* note 97, at 62, 67; José María Maravall, *Rule of Law as a Political Weapon*, in *DEMOCRACY AND THE RULE OF LAW*, *supra* note 97, at 261, 274.

106. RAZ, *supra* note 98, at 211, 214.

107. TAMANAHA, *supra* note 30, at 94 (internal quotation marks omitted).

108. Fuller, himself, rejected this view. FULLER, *supra* note 11, at 47.

109. See STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 85 (noting that while the principle of generality means law should apply “impersonally and

individuals or groups receive equal treatment.<sup>110</sup> This is not to say that formalists do not care about the content of law, but rather that law's content is a matter of "substantive justice."<sup>111</sup>

In contrast to formal legality, the substantive rule of law both embraces law's formal aspects and has specific content requirements.<sup>112</sup> Most commonly, it incorporates individual rights and liberties into the rule of law regardless of what is required by statutory or constitutional provisions.<sup>113</sup> This approach to the rule of law does not distinguish "between the rule of law and substantive justice [and instead] requires . . . that the rules . . . capture and enforce moral rights."<sup>114</sup>

In short, while the formalist rule of law is fundamentally concerned with state adherence to law, regardless of its content, the substantive approach requires compliance not only with law but also with a set of higher-order individual rights that may or may not be reflected in law.<sup>115</sup>

The scholarship on executive accountability falls far more on the formalist, rather than substantive,<sup>116</sup> end of the rule of law spectrum.<sup>117</sup> Implicitly guided by formalism, the central rule

impartially" it also allows for "invidious discrimination so far as its substance is concerned").

110. Robin West, *Paul Gowder's Rule of Law*, 62 ST. LOUIS U. L.J. 303, 308 (2018). While there are some approaches to the formalist rule of law that center substantive principles of equality, they remain in the minority. See Paul Gowder, *The Rule of Law and Equality*, 322 L. & PHIL. 565, 567 (2013) (noting that the "equality rationale" for the rule of law is a "minority position").

111. Ronald Dworkin, *Political Judges and the Rule of Law*, 64 PROC. OF THE BRIT. ACAD. 259, 262 (1978).

112. TAMANAHA, *supra* note 30, at 102.

113. *Id.* at 102, 104.

114. Dworkin, *supra* note 111, at 262.

115. TAMANAHA, *supra* note 30, at 102.

116. Professor David Cole's work on executive accountability, law, and politics is a notable exception to the scholarship's formalist trend. Cole's theory of "civil society constitutionalism" focuses on the centrality of constitutional rights to politically checking the executive. David Cole, *Where Liberty Lies: Civil Society and Individual Rights After 9/11*, 57 WAYNE L. REV. 1203, 1254–61 (2011). For Cole, "in the first post-9/11 decade, constitutional and rule-of-law values were brought to bear on executive conduct by the interaction of the informal political, legal, and cultural work of civil society and the formal operation of law." *Id.* at 1209.

117. The focus, here, is on the scholarship about executive power, rule of law, and political accountability, rather than on the scholars themselves. Indeed, some of the scholars discussed here have explored the discriminatory impact of national security policies in their other work. See, e.g., Aziz Huq, *Article II and Antidiscrimination Norms*, 118 MICH. L. REV. 47 (2019) [hereinafter *Article II and Antidiscrimination Norms*] (examining the executive's "discretion-to-discriminate" under

of law issue for this literature is executive compliance with law, regardless of law's content. Professor Goldsmith argues that various intra and extra-governmental actors help curb the President's national security actions by ensuring legal compliance.<sup>118</sup> For Goldsmith, the success of these efforts is determined not by their embrace of individual rights, protection of vulnerable groups, or elimination of broad presidential discretion, but rather by the fact that executive power is subject to constraint of some kind.<sup>119</sup> Taking a slightly different approach, another scholar claims that law and politics restrain the executive because perceptions about presidential compliance with law (whatever that law may be) impact public opinion about executive action.<sup>120</sup>

These arguments fail to consider how executive compliance with certain substantive laws and programs may make it harder for the rule of law to support political checks on the presidency. As demonstrated in the next section, this issue is both urgent and pervasive in the national security sector.

### C. *A Discriminatory National Security Environment*

Since 9/11, scholars have demonstrated how Arabs and Muslims, citizen and noncitizen alike, have been the primary targets of national security laws and programs that bolster executive power and erode civil liberties. For nearly twenty years, there has been little accountability for these programs. This accountability is both necessary and important, despite some suggestions to the contrary.

While the literature on discriminatory national security programs is vast and defies efficient summary, it is worth noting a few streams that highlight the law's role in these ongoing practices. For example, scholars have shown how criminal counterterrorism laws give the executive broad prosecutorial powers that are used to target and undermine the rights of young Arab

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Article II using the Supreme Court's decisions on Japanese internment during World War II and Trump's Muslim Ban).

118. GOLDSMITH, *supra* note 78, at xi–xii.

119. *Id.* at xii, xv.

120. Pildes, *supra* note 4, at 1409–10.

and Muslim men.<sup>121</sup> They have also shown how legal approaches to international and domestic terrorism result in harsher treatment for Arabs and Muslims, who are primarily identified with *international* terrorism even if they are Americans.<sup>122</sup> Others have described the government's No Fly List—which bans certain people from all air travel with few due process protections—as involving “back-end discrimination”<sup>123</sup> that “disproportionately impact[s] those populations [stereotypically] associated with terrorism, such as military-age Muslim males . . . .”<sup>124</sup>

These and other discriminatory programs are generally grounded in the rule of law<sup>125</sup> yet have failed to generate meaningful political checks on presidential power. One possible explanation is that these programs simply should not be restrained. According to this view, these are valid national security initiatives designed to target “terrorists,” who just happen to be mostly Arab and/or Muslim. Indeed, in *Ashcroft v. Iqbal*, Supreme Court Justice Anthony Kennedy presented a variation of this perspective. Instead of allaying concerns about these programs, Kennedy's perspective demonstrates why accountability for the government's discriminatory national security practices is so necessary.

In his majority opinion, Kennedy dismissed allegations that the government had arrested and detained thousands of Arab and Muslim men in the weeks after 9/11 because of their race, religion, or national origin.<sup>126</sup> In justifying his conclusion, Kennedy argued that:

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good

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121. Sameer Ahmed, *Is History Repeating Itself?: Sentencing Young American Muslims in the War on Terror*, 126 YALE L.J. 1520, 1560 (2017) [hereinafter *Is History Repeating Itself?*].

122. Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333, 1395–97 (2019) [hereinafter *Separate and Unequal*].

123. Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633, 668 (2017). The No-Fly List's potential back-end discrimination is defined as “emerg[ing] from the supposedly neutral analytics of the digital watchlisting and database screening system itself.” *Id.*

124. *Id.*

125. See CHARLIE SAVAGE, *POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY* 50–55 (2017) (describing executive efforts to ensure national security policies comply with formalist legality).

126. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.<sup>127</sup>

For three reasons, this view underscores the importance of political accountability for these sorts of programs. First, the “*Iqbal* view” fundamentally ignores the devastating impact many national security programs have had on minority communities. Notwithstanding Kennedy’s description, the government’s post-9/11 detention policy was “[f]ar from a ‘legitimate’ effort to arrest those who had a ‘suspected link to the [9/11] attacks,’” and, instead, indiscriminately targeted “people who were simply brown and undocumented and who happened to fall under the gaze of law enforcement officers or fearful members of the public.”<sup>128</sup> While the Court should have been shocked by “mass detentions of any kind in the United States,” it behaved “as if it were entirely natural that horrific violence committed by nineteen men should generate suspicion of thousands of others who shared (or appeared to share) their broadly defined racial or religious identity.”<sup>129</sup>

Second, the *Iqbal* view is out of step with current realities about terrorist incidents in the United States. For nearly twenty years, domestic right-wing extremist groups have been responsible for the majority of U.S. terrorism incidents resulting in fatalities. According to a 2017 report from the Government Accountability Office (GAO), far right-wing violent extremists—which include white supremacists, neo-Nazis, and members of the Ku Klux Klan<sup>130</sup>—have been responsible for 73 percent of

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127. *Id.* at 682. As Professor Shirin Sinnar has pointed out, in *Iqbal* the Court conflated Muslims with Arabs while failing to grasp that many of those detained in the immediate aftermath of 9/11 were Muslim, but not Arab. Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L. J. 379, 416–17 (2017).

128. Sinnar, *supra* note 127, at 420.

129. *Id.* at 429.

130. U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-300, COUNTERING VIOLENT EXTREMISM: ACTIONS NEEDED TO DEFINE STRATEGY AND ADDRESS PROGRESS OF

terrorism-related incidents that resulted in deaths from September 12, 2001 to December 31, 2016.<sup>131</sup> According to reports from the Anti-Defamation League, which tracks extremist violence in the United States, right-wing groups were responsible for almost all “extremist-related” murders in 2018<sup>132</sup> and 2019.<sup>133</sup> These numbers suggest, at the very least, that terrorism is hardly a problem exclusive to Arab and Muslim groups.

Third, the *Iqbal* view depends on the normative assumption that to be a terrorist is to be a member of a certain racial, religious, or national community—specifically, to be Arab or Muslim or from an Arab or Muslim country.<sup>134</sup> It categorically excludes individuals who do not belong to one of these communities, even if they have engaged or have attempted to engage in criminal or violent activity. In these ways, the *Iqbal* view is notably reminiscent of other forms of racial profiling that have been exposed as illegitimate, including practices of equating “African American and Latino appearance . . . with criminality, Latino appearances with illegal border crossings, and Asian appearance with treason.”<sup>135</sup>

In short, political accountability for the executive’s discriminatory national security programs remains necessary and urgent. It cannot, however, be achieved without understanding how the rule of law influences accountability for rights-eroding, executive-emboldening programs that impact communities of color. The next section begins this exploration by establishing the legalistic nature of several of these programs—FBI surveillance, material support prosecutions, and their private analogues.

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FEDERAL EFFORTS 29 (2017), <https://www.gao.gov/assets/690/683984.pdf> [<https://perma.cc/C8WF-SBK9>].

131. *Id.* at 4. As the GAO report notes, the *number* of deaths caused by right-wing groups and groups identifying as Islamic were roughly equal during the reporting period. *Id.* at 4–5.

132. ANTI-DEFAMATION LEAGUE, *A Report from the Center on Extremism: Murder and Extremism in the United States in 2018* at 10 (Jan. 2019), <https://www.adl.org/media/12480/download> [<https://perma.cc/XQS4-CHD7>].

133. ANTI-DEFAMATION LEAGUE, *A Report from the Center on Extremism: Murder and Extremism in the United States in 2019* at 18 (Feb. 2020), <https://www.adl.org/media/14107/download> [hereinafter 2019 ADL REPORT] [<https://perma.cc/J4SL-SJ3B>].

134. Ahmed, *supra* note 12, at 1278.

135. *Id.*



## II. NATIONAL SECURITY PROGRAMS: FBI SURVEILLANCE, MATERIAL SUPPORT, AND THEIR PRIVATE ANALOGUES

As Professor Bernard Harcourt has observed, “our government does everything possible to legalize its [national security] measures and to place them solidly *within* the rule of law . . . .”<sup>136</sup> This section focuses on two of these domestic initiatives: FBI surveillance and material support cases. It also describes their relationship to various citizen-volunteer programs that encourage private individuals to further the executive’s national security prerogatives and bolster its power. The purpose of this section is to demonstrate how these laws and programs give broad authority—either directly or indirectly—to the executive, raise serious civil liberty concerns, and comply with the formalist rule of law. This frames the discussion for Part III, which explains how these legalistic initiatives have failed to generate meaningful efforts at political accountability because of their disproportionate impact on Arab and Muslim Americans.

### A. *FBI Surveillance and Citizen-on-Citizen Monitoring*

Since 9/11, the FBI’s domestic surveillance authority has grown significantly<sup>137</sup> in ways that threaten civil liberty protections.<sup>138</sup> This problem has been exacerbated by citizen-on-citizen monitoring programs that bolster the executive’s surveillance power while raising similar civil liberty concerns. Despite these constitutional threats, the FBI surveillance program and its private analogues comply with the rule of law’s formalistic requirements.

#### 1. Bolstering Executive Power

At the heart of the FBI’s domestic surveillance regime are two sets of rules: the Attorney General’s Guidelines for Domestic

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136. BERNARD E. HARCOURT, *THE COUNTERREVOLUTION: HOW OUR GOVERNMENT WENT TO WAR AGAINST ITS OWN CITIZENS* 213 (2018) (emphasis added).

137. Samuel Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 588–89 (2010) [hereinafter *Domesticating Intelligence*].

138. See Berman, *supra* note 47, at 6 (arguing that the FBI’s “broad investigative powers operate in tension with fundamental rights,” including privacy and freedoms of expression, association, and religious practice).

FBI Operations (“Guidelines”)<sup>139</sup> and the FBI’s Domestic Investigations and Operations Guide (“DIOG”).<sup>140</sup> The Guidelines, which are developed by the Attorney General, create a basic framework for FBI operations.<sup>141</sup> The DIOG, which is the FBI’s internal rulebook, implements the Guidelines’ directives.<sup>142</sup> After 9/11, then-Attorney General John Ashcroft made sweeping changes to the Guidelines that fundamentally expanded and transformed the FBI’s domestic surveillance work.<sup>143</sup> These amendments, as well as other changes to the Guidelines and DIOG, underscore the executive’s substantial surveillance powers over Americans.

In contrast to its previous version, which required suspicion that crime was afoot, Ashcroft’s amended Guidelines allowed the FBI to “visit any place and attend any event that [was] open to the public, on the same terms and conditions as the members of the public generally,” as long as the visit was for “the purpose of detecting terrorist activities.”<sup>144</sup> This applied to houses of worship and meetings of political organizations.<sup>145</sup> As originally

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139. MICHAEL MUKASEY, U.S. DEP’T OF JUST., ATTORNEY GENERAL’S GUIDELINES FOR DOMESTIC FBI OPERATIONS (2008), <https://www.justice.gov/archive/opa/docs/guidelines.pdf> [hereinafter 2008 GUIDELINES] [<https://perma.cc/JUH4-XSBD>]. The Guidelines were first created in 1976. They were developed in response to revelations about the FBI’s long-standing, abusive intelligence gathering practices made by the U.S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (“Church Committee”). Berman, *supra* note 47, at 12–13. To stave off calls for Congressional limits on the FBI’s practices, then-Attorney General Edward Levi issued internal rules to govern those practices, known as the “Levi Guidelines.” *Id.* at 13. The Guidelines limited domestic intelligence-gathering and investigatory practices and continue to serve as the primary restraint on the FBI’s work. *Id.* at 13–14.

140. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE (2011), <https://www.documentcloud.org/documents/3416775-DIOG-Redactions-Marked-Redacted.html> [<https://perma.cc/3Q52-KP2L>] [hereinafter DIOG].

141. Berman, *supra* note 47, at 8.

142. *See id.*

143. *See* JOHN ASHCROFT, U.S. DEP’T OF JUST., THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS, § VI (2002). The broadening of the FBI’s practices was accompanied by a new mission to “prevent[] the commission of terrorist acts against the United States and its people.” *Id.* at 1.

144. Marvin J. Johnson, *Interested Persons Memo: Analysis of Changes to Attorney General Guidelines*, AM. C.L. UNION (June 5, 2002), <https://www.aclu.org/other/interested-persons-memo-analysis-changes-attorney-general-guidelines?redirect=national-security/interested-persons-memo-analysis-changes-attorney-general-guidelines> [hereinafter INTERESTED PERSONS MEMO] [<https://perma.cc/WHA8-JSEN>].

145. *Id.*

promulgated, the rules did not restrict these practices or require oversight from the courts, FBI headquarters, or local supervisors.<sup>146</sup> The implications for executive power were startling. As critics argued, “the tendency will be to collect more information, rather than less, in the hopes some of this ‘innocuous’ information will be helpful when it comes time to ‘connect the dots.’”<sup>147</sup>

In 2008, the Guidelines were amended again.<sup>148</sup> Most notably, these amendments gave the FBI the authority to open “assessments” in order to prevent crime, protect national security, or collect foreign intelligence.<sup>149</sup> These assessments, which did not exist before the 2008 amendments, strengthen the FBI’s ability to initiate investigations without any concrete evidence of criminal or terrorist activity.<sup>150</sup> All the FBI needs to do in order to open an assessment is “determine that it is acting to protect against criminal or national-security threats, or to collect foreign intelligence.”<sup>151</sup>

Though the Guidelines have not been changed since 2008,<sup>152</sup> the DIOG was amended in 2011.<sup>153</sup> Some of these changes reined in previous guidance, including by placing limits on attending religious services, while still allowing surveillance of these spaces under certain circumstances.<sup>154</sup> Other changes loosened existing rules. These changes included removing limits on the use of surveillance squads.<sup>155</sup> The 2011 amendments also clarified and seemingly weakened existing rules relating to FBI agent or informant’s “undisclosed participation” in an

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146. *Id.*

147. *Id.*

148. 2008 GUIDELINES, *supra* note 139.

149. FACT SHEET—NEW ATTORNEY GENERAL GUIDELINES (2008), ACLU, <https://www.aclu.org/other/fact-sheet-new-attorney-general-guidelines?redirect=national-security/fact-sheet-new-attorney-general-guidelines> [<https://perma.cc/29AV-FBPX>] [hereinafter 2008 GUIDELINES FACT SHEET]. Depending upon the type, an FBI agent can open an assessment without seeking supervisory approval. DIOG, *supra* note 140, § 5.4.1.

150. Berman, *supra* note 47, at 18–19.

151. *Id.* at 18.

152. *Id.* at 15.

153. Charlie Savage, *FBI Gets Leeway to Push Privacy Bounds*, N.Y. TIMES (June 12, 2011), <https://www.nytimes.com/2011/06/13/us/13fbi.html> [<https://perma.cc/5G86-3T2J>].

154. DIOG, *supra* note 140, § 18.5.1.3.1.

155. Savage, *supra* note 153. As a result of these amendments, FBI surveillance squads, which surreptitiously follow individual targets, can be used repeatedly during an investigation’s assessment phase. *Id.*

organization or group.<sup>156</sup> As a result of these changes, an agent or informant can now surreptitiously attend up to five organizational or group meetings, including those organized for political purposes, before certain special rules<sup>157</sup> apply.<sup>158</sup>

Supplementing the FBI's robust surveillance powers, the Nationwide Suspicious Activity Reporting ("Nationwide SAR") initiative encourages information sharing and reporting across local and federal law enforcement and intelligence units.<sup>159</sup> Established in 2007 and primarily led by the FBI and DHS, the program focuses on gathering information about individuals engaged in "suspicious activities."<sup>160</sup> Because "suspicious activity" is broadly defined, Nationwide SAR effectively encourages law enforcement to gather data on individuals engaged in innocuous every day activities. For example, while "suspicious activity" includes various types of criminal behavior, like sabotaging "secure sites," it also includes noncriminal behavior that is less well-defined.<sup>161</sup> This includes "[q]uestioning individuals or otherwise soliciting information . . . about a public or private event" or "[d]emonstrating unusual or prolonged interest in facilities, buildings, or infrastructure" in a "manner that would arouse suspicion of terrorism or other criminality in a reasonable person."<sup>162</sup>

In addition to these government-run surveillance programs, the executive encourages members of the general public to serve

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156. *Id.*

157. *Id.* Under the amended DIOG rules, if the agent or informant is trying to join the group, then the DIOG's special rules apply immediately. *Id.*

158. *Id.* Before the 2011 amendments, the DIOG's special rules had broader applicability to the FBI's undisclosed participation in groups. *Id.*

159. *Nationwide SAR Initiative: About the NSI*, DHS, <https://www.dhs.gov/nationwide-sar-initiative-nsi/about-nsi> (last visited June 15, 2020) [<https://perma.cc/T5GN-QNTG>].

160. DEP'T HOMELAND SEC., ISE-FS-200, INFORMATION SHARING ENVIRONMENT FUNCTIONAL STANDARD SUSPICIOUS ACTIVITY REPORTING VERSION 1.5.5., [https://www.dhs.gov/sites/default/files/publications/15\\_0223\\_NSI\\_ISE-Functional-Standard-SAR.pdf](https://www.dhs.gov/sites/default/files/publications/15_0223_NSI_ISE-Functional-Standard-SAR.pdf) [hereinafter *Functional Standard*] [<https://perma.cc/DY7E-2PDD>]. As part of its work, the Nationwide SAR program aggregates reports about suspicious activities made by private parties to law enforcement. NATIONWIDE SAR INITIATIVE, SUSPICIOUS ACTIVITY REPORTING: INFORMATION FOR OFFICERS REPORTING SUSPICIOUS ACTIVITY, (2016), [https://www.national-publicsafetypartnership.org/Documents/Suspicious\\_Activity\\_Reporting\\_Information\\_for\\_Officers\\_Reporting\\_on\\_Suspicious\\_Activity.pdf](https://www.national-publicsafetypartnership.org/Documents/Suspicious_Activity_Reporting_Information_for_Officers_Reporting_on_Suspicious_Activity.pdf) [<https://perma.cc/SMR3-VALW>].

161. *Functional Standard*, *supra* note 160, at 44, 46, 49.

162. *Id.*

as volunteers and engage in domestic intelligence gathering themselves. These volunteer initiatives, which do not provide citizens with a meaningful opportunity to critique government policy,<sup>163</sup> aggrandize the executive's already substantial power in this area. Shortly after 9/11, these efforts began to take shape with Operation TIPS—the Terrorism Information and Prevention System. Operation TIPS was a “nationwide program giving millions of American truckers, letter carriers, train conductors, ship captains, utility employees, and others a formal way to report suspicious terrorist activity.”<sup>164</sup> Established by the Justice Department, the program was intended to focus specifically on workers who had access to private spaces, including homes.<sup>165</sup> Information provided by these workers would be transferred by the Justice Department to government databases at the FBI, CIA, and elsewhere.<sup>166</sup>

Because of public outcry,<sup>167</sup> Operation TIPS was dismantled in 2003.<sup>168</sup> However, its component parts have continued to operate through other federal citizen-on-citizen monitoring programs. They include “Airplane Watch,” a joint program between the Transportation Safety Administration (TSA) and the private sector that encourages airline pilots to detect and report perceived security threats.<sup>169</sup> Another joint program between TSA

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163. See, e.g., Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834 (2015) [hereinafter Akbar, *National Security's Broken Windows*] (describing CVE as a “top-down” rather than “grassroots” effort in which the government, and not targeted communities, sets the agenda).

164. See Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1444 (2010) (referencing material about Operation TIPS that no longer appears on the Justice Department's website).

165. *Id.* Volunteers were encouraged to sign up on a government website to participate in Operation TIPS. Nat Hentoff, *Death of Operation TIPS*, VILLAGE VOICE (Dec. 17, 2002), <https://www.villagevoice.com/2002/12/17/the-death-of-operation-tips/> [<https://perma.cc/6JMD-S5XG>].

166. Hentoff, *supra* note 165.

167. *Id.*

168. Homeland Security Act of 2002, Pub. L. No. 107-296, § 880, 116 Stat. 2135, 2245 (codified at 6 U.S.C. § 460 (2006)). As with Section 215 and 702 surveillance, Operation TIPS is an example of a domestic national security program that bolstered government authority, eroded individual liberties, and impacted American society writ large. Like sections 215 and 702, it received substantial political backlash as a result of its rights-eroding effects on a broad swath of the American public. COLE, *supra* note 14, at 73.

169. *Airport Watch*, AOPA, <http://aopa.org/advocacy/airports-and-airspace/security-and-borders/airport-watch-security> (last visited May 15, 2020) [<https://perma.cc/HBS7-6XFJ>] (providing a twenty-four-hour hotline where the country's approximately 560,000 pilots can report possible national security threats).

and the private sector, called “First Observer,” focuses on providing volunteer truck and bus drivers with training to detect, report, and even respond to situations that might threaten national security.<sup>170</sup> The “Maritime SAR Initiative” brings together various government stakeholders, including DHS, FBI, and the U.S. Coast Guard, to empower and improve the capability of private port and safety officials to report suspicious activity to federal, state, local, and territorial law enforcement.<sup>171</sup> The spirit behind Operation TIPS is also present in the *See Something, Say Something* program. Launched by DHS in July 2010, the program “engages the public in protecting the homeland” by encouraging individuals to report “suspicious activity” to local law enforcement.<sup>172</sup>

In tandem with these explicitly surveillance-oriented programs, the government has developed more subtle initiatives, like CVE, to encourage communities to monitor their members in the name of national security.<sup>173</sup> While CVE efforts have manifested in different ways<sup>174</sup> across various government branches, DHS has historically assumed a key role in coordinating and implementing the program.<sup>175</sup> First embraced by the

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170. See Oliver Patton, *Eyes on the Road: First Observer Takes Over for Highway Watch*, TRUCKING INFO (Aug. 10, 2009), <https://www.truckinginfo.com/149551/eyes-on-the-road-first-observer-takes-over-for-highway-watch> [<https://perma.cc/DM3D-S9DW>]; *First Observer Plus*, TSA, <https://www.tsa.gov/for-industry/firstobserver> (last visited May 15, 2020) [<https://perma.cc/5UPH-FDPE>].

171. *Maritime Suspicious Activity Reporting Initiative (MSI)*, DHS, [https://www.dhs.gov/sites/default/files/publications/15\\_1216\\_NSI\\_Maritime-SAR-Handout.pdf](https://www.dhs.gov/sites/default/files/publications/15_1216_NSI_Maritime-SAR-Handout.pdf) [hereinafter *Maritime SAR Initiative*] [<https://perma.cc/9DSA-2QVV>].

172. *If You See Something, Say Something*, DHS, <https://www.dhs.gov/see-something-say-something> (last visited June 15, 2020) [<https://perma.cc/S676-RE9B>]. The *See Something, Say Something* program was initially developed and implemented by the New York Metropolitan Transportation Authority in 2002. *If You See Something, Say Something – About the Campaign*, DHS, <https://www.dhs.gov/see-something-say-something/about-campaign> (last visited June 15, 2020) [<https://perma.cc/4YDV-F9BD>].

173. Akbar, *National Security’s Broken Windows*, *supra* note 163, at 885. CVE is a public-private partnership between Muslim community and religious leaders and federal and local law enforcement officials to combat terrorism by countering “radicalization.” *Id.* at 834.

174. Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 147 (2012) [hereinafter Rascoff, *Establishing Official Islam?*].

175. U.S. NAT’L SEC. COUNCIL, STRATEGIC IMPLEMENTATION PLAN FOR EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES (2016), [https://www.dhs.gov/sites/default/files/publications/2016\\_strategic\\_implementation\\_plan\\_empowering\\_local\\_partners\\_prev.pdf](https://www.dhs.gov/sites/default/files/publications/2016_strategic_implementation_plan_empowering_local_partners_prev.pdf) [hereinafter 2016

Obama Administration, CVE is premised on the notion that certain worldviews encourage or “radicalize” individuals to tolerate and support terrorism, even if they never engage in terrorist violence themselves.<sup>176</sup> This theory, which has been criticized as empirically and scientifically weak,<sup>177</sup> posits a connection between “larger ideological, political, and social currents on the one hand, and personal crises that lead to ‘cognitive openings’ on the other.”<sup>178</sup> To prevent this supposedly radicalizing connection from forming, CVE targets individuals and groups that are “vulnerable” to such transformations.<sup>179</sup> Though it has been presented as a softer, more progressive approach to counterterrorism, CVE has been used to “mask efforts to gather intelligence, identify individuals who are not suspected of wrongdoing for surveillance, recruit informants, and co-opt community leaders to promote government messaging.”<sup>180</sup> While the Trump Administration has dismissed CVE as soft on terrorism<sup>181</sup> and

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STRATEGIC IMPLEMENTATION PLAN] [<https://perma.cc/67BS-NSZU>] (describing DHS’s key roles in implementing CVE). Although DHS shares primary responsibility for CVE with the Justice Department (DOJ), government-wide CVE efforts are coordinated through the CVE Taskforce, which includes DHS, DOJ, FBI, and the National Counterterrorism Center. *Id.*; *Countering Violent Extremism Taskforce: What is CVE*, DHS, <https://www.dhs.gov/cve/what-is-cve> (last visited June 15, 2020) [<https://perma.cc/4AXU-6JLG>].

176. Rascoff, *Establishing Official Islam?*, *supra* note 174, at 140–41. The turn to CVE reflects a concern with a rise in “homegrown” terrorism, which is believed to require more robust domestically-oriented, preventative approaches. *Id.* at 128–29.

177. See, e.g., *id.* at 140 (noting that radicalization theories “inevitably exhibit the shortcomings of predictive social science applied to limited data sets”).

178. *Id.* at 141. In order to counter radicalization, CVE programs may focus both on the behavioral transformation of individuals, as well as on particular ideologies viewed as encouraging terrorist violence. *Id.* at 144.

179. *Id.* at 142.

180. *Why Countering Violent Extremism Programs Are Bad Policy*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), <https://www.brennancenter.org/our-work/research-reports/why-countering-violent-extremism-programs-are-bad-policy> [<https://perma.cc/9YEM-HKCY>].

181. Peter Beinart, *Trump Shut Programs to Counter Violent Extremism*, ATLANTIC (Oct. 29, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/trump-shut-countering-violent-extremism-program/574237/> [<https://perma.cc/CG66-4GXC>].

privileged law enforcement-centered counterterrorism efforts,<sup>182</sup> CVE continues to be used at the state and local levels.<sup>183</sup>

The executive branch's extensive domestic surveillance powers are bolstered by these citizen-on-citizen monitoring programs. Through the Operation TIPS' spin-offs, as well as CVE, citizens participate in national security surveillance as arms of the state, enforcing its policies and objectives. These private volunteers act as "force multipliers" that can "reach more broadly than the government," including through superior access to private spaces.<sup>184</sup> While the extent of citizen monitoring under these programs is unclear, it is important enough to the U.S. national security agenda that individuals enjoy legal immunity for reporting suspicious activities under some of these initiatives.<sup>185</sup>

## 2. Civil Liberty Concerns

In addition to bolstering executive power, these public and private programs raise serious civil liberty concerns. For example, while the Attorney General Guidelines prohibit the FBI from surveilling Americans "solely for the purpose of monitoring . . . First Amendment [activities],"<sup>186</sup> "investigative activity prompted in part by these factors is not barred."<sup>187</sup> While this

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182. Faiza Patel & Andrew Lindsay, *Countering Violent Extremism Programs in the Trump Era*, BRENNAN CTR. FOR JUST. (June 15, 2018), <https://www.brennan-center.org/blog/countering-violent-extremism-programs-trump-era> [<https://perma.cc/6ELA-KXLR>].

183. See, e.g., Michael Duffin, *Local Governments Ramping Up Efforts to Counter Violent Extremism*, DIPNOTE, (July 17, 2018), <https://blogs.state.gov/stories/2018/07/17/en/local-governments-ramping-efforts-counter-violent-extremism> [<https://perma.cc/7R28-SNCV>] (describing community-based CVE efforts undertaken by various U.S. cities including San Diego and Los Angeles).

184. Michaels, *supra* note 164, at 1438.

185. 6 U.S.C. § 1104(a)(1) (statutory provision for SAR reporting relating to transportation which mandates that any person, including private individuals, who "in good faith and based on objectively reasonable suspicion, makes, or causes to be made, a voluntary report of covered activity to an authorized official shall be immune from civil liability under Federal, State, and local law for such report").

186. 2008 GUIDELINES, *supra* note 139, at Part I.C.3.

187. Berman, *supra* note 47, at 26. Even more so than the Guidelines, the DIOG contains multiple sections detailing the importance of various civil liberty protections, including First Amendments rights and equal protection under the law. DIOG, *supra* note 140, §§ 4.2–4.3. It also makes clear that civil liberty protections must be balanced against investigatory needs. *Id.*



sort of surveillance is unlikely to run afoul of First Amendment jurisprudence,<sup>188</sup> it nevertheless threatens First Amendment-protected activities. As one advocate describes, these practices effectively empower the FBI to “use unlimited physical surveillance, conduct pretextual interviews, and deploy confidential informants, absent any suspicion of wrongdoing, or ‘particular factual predication’” all of which can be mobilized “based mostly on First Amendment protected activity.”<sup>189</sup>

The FBI’s intelligence gathering practices are similarly consistent with Fourth Amendment jurisprudence, but still undermine privacy rights.<sup>190</sup> For example, assessments authorized under the Guidelines permit the FBI to use a “wide array of highly intrusive investigative tools,”<sup>191</sup> including allowing agents to “engage people in conversation while misrepresenting the agent’s status as a federal official” and to “station [themselves] . . . outside a target’s home or office—or even have [a target] followed—so that their movements are tracked day and night.”<sup>192</sup>

Despite including express language calling on government actors to protect civil liberties, the Nationwide SAR initiative also threatens those liberties by undermining individual privacy, stifling forms of expression, like photography and video

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188. See Berman, *supra* note 47, at 16–17 (arguing that the FBI’s intelligence collection efforts do not violate the First Amendment’s Free Exercise clause unless they are intended to suppress religiosity or are so expansive they outweigh competing interests in preventing terrorism); *Domesticating Intelligence*, *supra* note 137, at 591 (noting that the Supreme Court has explicitly exempted “human intelligence” gathering, including through undercover agents and confidential informants, from First and Fourth Amendment protections).

189. Akbar, *National Security’s Broken Windows*, *supra* note 163, at 856.

190. See *id.* at 856 (noting that the FBI’s post-9/11 surveillance techniques do not require a warrant under the Fourth Amendment). Even where a warrant is required for FBI intelligence gathering, the requirement can be waived where the FBI obtains the target’s consent. *Id.* Where a Fourth Amendment right otherwise exists, it may be defeated in court if it was not legally recognized at the time of surveillance. See *Fazaga v. Federal Bureau of Investigation*, 916 F.3d 1202, 1220–24 (9th Cir. 2019) (holding that plaintiffs had a Fourth Amendment expectation of privacy with respect to the FBI’s secret recordings at a mosque but concluding that the right was not cognizable because it was not legally recognized at the time of surveillance).

191. Berman, *supra* note 47, at 19.

192. *Id.* at 19–20.

recording,<sup>193</sup> and suppressing political speech.<sup>194</sup> The citizen-on-citizen monitoring programs raise similarly troubling civil liberty concerns.<sup>195</sup>

### 3. Rule of Law

Notwithstanding these rights-eroding, executive-emboldening tendencies, all these programs—FBI surveillance, the Nationwide SAR Initiative, *See Something, Say Something*, the Maritime SAR Initiative, Airplane Watch, First Observer, and CVE—are aligned with the rule of law. First, and most importantly, they are consistent with applicable executive branch rules, as well as statutory and constitutional authority. For example, the FBI’s surveillance authority is consistent with the Guidelines, the DIOG, and various federal statutes.<sup>196</sup> For its part, the Nationwide SAR Initiative derives its authority from and is consistent with various laws, including the Intelligence Reform and Terrorism Act of 2004.<sup>197</sup> *See Something, Say*

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193. Under Nationwide SAR’s Functional Standard, photography and video are included in the behavioral categories that have a “nexus to terrorism.” Nicolas Duque Franco, *Suspicious to Whom? Reforming the Suspicious Reporting Program to Better Protect Privacy and Prevent Discrimination*, 43 N.Y.U. REV. L. & SOC. CHANGE 611, 633, 637–38 (2019).

194. *Id.* at 637–42. There are reports, for example, of law enforcement monitoring the political activities of groups like Occupy Wall Street and Black Lives Matter as part of the Nationwide SAR initiative. *Id.* at 640–42. Despite these and other serious concerns mentioned above, it is unlikely the Nationwide SAR program violates the First and Fourth Amendment on its face. *See infra* note 201.

195. *See, e.g.*, Rascoff, *Establishing Official Islam?*, *supra* note 174, at 186–88 (suggesting that private parties implementing the government’s counter-radicalization programs may undermine First Amendment Establishment Clause values); Michaels, *supra* note 164, at 1463–66 (arguing that while private-party surveillance under Operation Tips spin-offs may not be prohibited under Fourth Amendment jurisprudence this surveillance raises privacy concerns because it is conducted on the government’s behalf).

196. The FBI’s legal authority to conduct national security investigation is based, in part, on Executive Order 12333 and 50 U.S.C. § 401 *et seq.* 2008 GUIDELINES, *supra* note 139, at 7. The Attorney General’s authority to promulgate and revise the Guidelines are grounded in and consistent with 28 U.S.C. §§ 509, 510, 533–34 and Executive Order 12333. 2008 GUIDELINES, *supra* note 139, at 2. Notably, there is no statute that specifically governs the FBI’s operations. Berman, *supra* note 47, at 14 n.34.

197. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, 118 Stat. 3638. The Nationwide SAR Initiative is also aligned with federal policy, as outlined in the 2007 National Strategy for Information Sharing. WHITE HOUSE, NATIONAL STRATEGY FOR INFORMATION SHARING (2007), <https://>

*Something* and Maritime SAR were launched in conjunction with the Nationwide SAR Initiative<sup>198</sup> and are consistent with the same legal authority. The Airplane Watch and First Observer programs grew out of and align with the Aviation and Transportation Security Act (ATSA).<sup>199</sup> As for CVE, executive authority to develop and promote the program across various departments draws on and is consistent with the Attorney General Guidelines, as well as DHS's legal mandate.<sup>200</sup> Generally, there is no contradiction between any of these policies and applicable constitutional jurisprudence.<sup>201</sup>

These programs satisfy formal legality's other requirements as well. As prospective initiatives, these programs are publicly accessible,<sup>202</sup> clear, and understandable. They are general in nature, meaning they consist of "rules of some kind . . ." <sup>203</sup> Indeed, even though law enforcement enjoys a fair amount of discretion

[www.dhs.gov/sites/default/files/publications/10\\_0924\\_NSI\\_National-Strategy-Information-Sharing.pdf](http://www.dhs.gov/sites/default/files/publications/10_0924_NSI_National-Strategy-Information-Sharing.pdf) [<https://perma.cc/J83H-RVRX>].

198. *If You See Something, Say Something – About the Campaign*, *supra* note 172; *Maritime SAR Initiative*, *supra* note 171.

199. Aviation and Transportation Security Act, Pub. L. No. 107–17, 115 Stat. 597 (2001).

200. Rascoff, *Establishing Official Islam?* *supra* note 174, at 155–57.

201. On the constitutionality of FBI surveillance see sources and cases cited *supra* note 188, 190. As for the Nationwide SAR program, Fourth Amendment protections do not apply, while First Amendment based claims would likely fail, at least on facial grounds. Duque Franco, *supra* note 193, at 634–37, 646–47. As mentioned earlier, it is unlikely that Fourth Amendment jurisprudence applies to citizen-on-citizen monitoring programs. See *supra* note 195. Nor would current First Amendment jurisprudence since that civil liberty applies to government action only. See, e.g., *Redden v. Women's Center of San Joaquin Cnty.*, No. C 05-03099, 2006 WL 132088, at \*1 (N.D. Cal. Jan. 17, 2006) ("[T]he First Amendment of the United States Constitution only applies to government actors . . ."). But see Rascoff, *Establishing Official Islam?*, *supra* note 174.

202. Beginning in 2010 and continuing throughout President Obama's Administration, the government's CVE program was articulated and explained in several publicly available White House documents. See, e.g., 2016 STRATEGIC IMPLEMENTATION PLAN; WHITE HOUSE, NATIONAL STRATEGY FOR COUNTERTERRORISM (2016), [https://obamawhitehouse.archives.gov/sites/default/files/docs/2015\\_national\\_security\\_strategy\\_2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf) [<https://perma.cc/89YD-7ETW>]. While the other citizen-on-citizen monitoring programs have also always been public, the 2011 edition of the FBI's DIOG is the first FBI guidance that is publicly available in unredacted form. *Domestic Investigations and Operations Guide*, INTERCEPT (Jan. 31, 2017), <https://theintercept.com/document/2017/01/31/domestic-investigations-and-operations-guide/#page-1>. A previous version, from 2008, was publicized, though with redactions. Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1608 (2016). The Attorney General Guidelines themselves have long been publicly available. *Id.*

203. FULLER, *supra* note 11, at 47.

under these programs, that discretion is created by and consistent with applicable rules. While the issue of congruence between law and official action is complex,<sup>204</sup> there is no evidence of systemic inconsistencies between what these programs require and official action. As surveillance initiatives, they do not demand the impossible from those subject to them. In fact, where FBI surveillance is concerned, no demands are made of anyone other than the FBI itself, which is bound by the Attorney General's Guidelines.<sup>205</sup> As for citizen-on-citizen monitoring, participation is voluntary.

On top of all this, evidence suggests that the development and implementation of these programs has followed formalistic, rules-based processes. For example, many of the policies discussed here have been created or implemented by DHS, which adheres to an internal policy-making system subject to internal guidelines.<sup>206</sup> This policy-making process includes review by DHS's general counsel's office, which ensures department programs are legally compliant.<sup>207</sup> The process also includes DHS's Office of Civil Rights and Civil Liberties ("CRCL") and the department's Privacy Officer, both of which are responsible for ensuring that civil rights and civil liberty concerns are addressed across all DHS policies and programs.<sup>208</sup>

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204. FULLER, *supra* note 11, at 81.

205. The Guidelines bind the executive up to and until a valid amendment or abrogation. See *United States v. Nixon*, 418 U.S. 683, 695–96 (1974) ("So long as this regulation [created by the executive branch] remains in force the executive Branch is bound by it . . ."); Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 895 (2007) ("[A] duly promulgated executive rule or order binds even the executive unless and until it is validly abrogated . . ."). While the FBI is authorized to amend the DIOG on its own, those amendments cannot violate the Guidelines. Berman, *supra* note 47, at 28 n.90.

206. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-300, RESULTS-ORIENTED GOVERNMENT: IMPROVEMENTS TO DHS'S PLANNING PROCESS WOULD ENHANCE USEFULNESS AND ACCOUNTABILITY (2005), <https://www.gao.gov/new.items/d05300.pdf> [<https://perma.cc/56WG-D5NP>] (report to Congress detailing recommended improvements to DHS's planning processes).

207. *Office of the General Counsel*, DHS, <https://www.dhs.gov/office-general-counsel> (last visited June 15, 2020) [<https://perma.cc/E7GR-WP8L>].

208. 6 U.S.C. § 345(a)(5). CRCL's effectiveness as a rights-protecting body is a matter of debate. See Susan Ferriss et al., *Homeland Security's Civil Rights Unit Lacks Power to Protect Migrant Kids*, NPR (Aug. 2, 2019), <https://www.npr.org/sections/health-shots/2019/08/02/746982152/homeland-securitys-civil-rights-unit-lack-s-power-to-protect-migrant-kids> [<https://perma.cc/7PZG-QMRW>] (reporting on CRCL's inability to prevent rights-abuses by DHS entities).

As for the Attorney General Guidelines and DIOG, they are formulated and promulgated by the Attorney General and the FBI, without any formal external oversight.<sup>209</sup> Despite the secrecy that shrouds their development,<sup>210</sup> evidence suggests both the Guidelines and DIOG are subject to an internal review process and, at least occasionally, include input from outside the Justice Department. For example, according to the latest version of the DIOG, it is “a direct result of more than 700 comments received from field and Headquarters employees . . . [and] reviewed by a working group comprised of experienced field agents and Chief Division Counsels, as well as representatives from the . . . Office of General Counsel . . . and the Office of Integrity and Compliance . . . .”<sup>211</sup> In advance of the Guidelines’ 2008 amendments, the Justice Department reportedly briefed relevant Congressional committees<sup>212</sup> and asked outside interest groups, including civil liberty organizations, to weigh-in on its proposed changes.<sup>213</sup>

As this section has shown, the FBI’s surveillance programs and citizen-on-citizen monitoring initiatives satisfy the rule of law, while also bolstering executive power and eroding civil liberties. As discussed in the next section, a similar dynamic can be seen with respect to material support litigation, which also aggrandizes executive authority and raises civil liberty concerns while remaining consistent with the rule of law.

### *B. Public and Private Material-Support Cases*

Since 9/11, the government has primarily relied on the concept of “material support” to prosecute terrorism cases in U.S. courts.<sup>214</sup> Under two federal statutes, 18 U.S.C. section 2339A

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209. See Berman, *supra* note 47, at 42–43 (suggesting various administrative law strategies to create more meaningful oversight for the Guidelines and DIOG, including public scrutiny and civil liberty reviews).

210. See Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 886 n.16 (2014) (noting that “secrecy still enshrouds processes” for various kinds of executive branch rulemaking relating to national security, including the FBI’s DIOG).

211. DIOG, *supra* note 140, at xxix.

212. Berman, *supra* note 47, at 62.

213. Rascoff, *supra* note 137, at 645–46.

214. Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT’L SECURITY L. & POL’Y 5, 5–6 (2005) [hereinafter *The Material Support Terrorism Offenses*]; Norman Abrams, A

("Section 2339A") and 18 U.S.C. section 2339B ("Section 2339B"), providing such "support" to terrorist groups or activities is a federal crime. As explored below, these laws have helped expand the executive's national security powers, often at the expense of individual constitutional rights.<sup>215</sup> These efforts have been complemented by two civil statutes: 18 U.S.C. § 2333 ("Section 2333") and 28 U.S.C. § 1605A ("Section 1605A"). Through these laws, private parties are encouraged to bring tort suits against individuals and entities that engage in terrorism, including by providing material support to terrorist groups or activities. As with citizen-on-citizen monitoring, these private initiatives aggrandize executive power while reinforcing the rights-threatening aspects of the government's public programs. Notwithstanding their constitutional threats, both the public and private material support suits accord with the rule of law.

### 1. Bolstering Executive Power

In different ways, Sections 2339A and 2339B give the executive broad powers to pursue individuals who have given support to terrorist groups or activities. Under Section 2339A, individuals are prohibited from knowingly providing material support in preparation for or to carry out specifically enumerated crimes of terrorism.<sup>216</sup> Under Section 2339B, individuals are prohibited from providing material support to designated foreign terrorist organizations (FTO), regardless of how individuals intend that support to be used or how the FTOs use that support.<sup>217</sup>

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*Constitutional Minimum Threshold for the Actus Reus of Crime? MPC Attempts and Material Support Offenses*, 37 QUINNIPIAC L. REV. 199, 213–14 (2019) [hereinafter *A Constitutional Minimum Threshold*].

215. This is particularly true of Section 2339B. WADIE E. SAID, *CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS* 65–68, 71 (2015) [hereinafter *CRIMES OF TERROR*].

216. 18 U.S.C. § 2339A(a) (2018) ("Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out [various crimes associated with terrorism] or attempts or conspires to do such an act" is guilty of violating the statute).

217. 18 U.S.C. § 2339B(a)(1) (2018) ("Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so" violates the statute).

The legal definition of material support is central to the executive's substantial power under this prosecutorial regime. Under federal law, material support includes:

[A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.<sup>218</sup>

In addition to criminalizing these wide-ranging activities, Sections 2339A and 2339B bolster the government's prosecutorial powers by converting what ought to be secondary liability crimes, specifically aiding and abetting, into primary liability offenses.<sup>219</sup> In doing so, these statutes transform minor offenses into crimes carrying serious penalties.<sup>220</sup> They also upend traditional features of criminal complicity law, including eschewing any need for the substantive offense (terrorist violence) to be completed.<sup>221</sup>

This broad prosecutorial regime is supplemented by the FTO designation process, which gives the executive substantial discretion to designate these groups.<sup>222</sup> Pursuant to federal statute, the Secretary of State can declare a group to be an FTO as long as it: (A) "is a foreign organization"; (B) "engages in terrorist activity . . . or terrorism . . . or retains the capability and intent to engage in terrorist activity or terrorism"; and (C) "threatens the security of [U.S.] nationals or the national security of the United States."<sup>223</sup> For purposes of Section 2339B, the FTO designation becomes effective once it is published in the Federal Register.<sup>224</sup> Typically, a designated organization has no

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218. 18 U.S.C. § 2339A(b)(1).

219. Abrams, *The Material Support Terrorism Offenses*, *supra* note 214, at 10–11.

220. *Id.*

221. *Id.* at 10–11, 11 n.24 (noting that an aiding and abetting charge typically requires completion of the principal offense).

222. 18 U.S.C. § 1189

223. *Id.* § 1189(a)(1)(A)–(C).

224. *Id.* § 1189(a)(2)(A)(ii); § 1189(a)(2)(B)(i).

opportunity to challenge its designation before publication occurs.<sup>225</sup> While it may challenge its designation in court post publication,<sup>226</sup> judicial review is limited in scope.<sup>227</sup>

Complementing the government's criminal material support prosecutions, Section 2333 of the ATA and Section 1605A of the FSIA allow private individuals to pursue individuals, entities, and foreign governments involved with terrorist groups or activities. Under Section 2333, "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors or heirs, may sue [responsible individuals or entities] therefor in any appropriate district court of the United States."<sup>228</sup> Under Section 1605A, private parties may sue countries designated as state sponsors of terrorism<sup>229</sup> for terrorism-related crimes. Under this provision:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which money damages are sought against a foreign state for

225. Indeed, Congress is the only entity entitled to notice about a designation decision prior to publication. *Id.* § 1189(a)(2)(A)(1). However, if the designated organization has sufficient contacts with the United States, then it may be entitled to notice before the State Department formally designates it. *See infra* Section II.B.2.

226. 18 U.S.C. § 1189. After designation, the organization has two years to file a petition for revocation with the Secretary. *Id.* § 1189(a)(4)(B)(ii)(I); *see id.* § 1189(a)(4) (detailing the revocation process). If the petition is denied, the organization has thirty days to appeal the Secretary's denial of a revocation to the D.C. Circuit Court of Appeals. *Id.* § 1189(c)(1). Alternatively, the designated organization may avoid petitioning the Secretary and seek direct judicial review of its FTO designation in the D.C. Circuit within thirty days from the date of notice in the Federal Register. *Id.*

227. *Id.* § 1189(c)(3) (stating that the court may set aside a FTO designation only where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity"; "in excess of statutory jurisdiction, authority, or limitation, or short of statutory rights"; "lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court"; or "not in accord with the procedures required by law"). In conducting its review, the court is confined to the administrative record compiled by the Secretary during the designation process, as well as any classified information used to make the designation, which the court must consider *ex parte* and *in camera*. *Id.* § 1189(c)(2).

228. 18 U.S.C. § 2333(a).

229. 28 U.S.C. § 1605A(h)(6) ("[T]he term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined . . . is a government that has repeatedly provided support for acts of international terrorism . . .").



personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.<sup>230</sup>

As with the FTO designation process, the Secretary of State has broad authority to designate foreign countries as state sponsors of terrorism.<sup>231</sup> Unlike the FTO designation process, however, there is no formal mechanism for a country to challenge its designation as a state sponsor.<sup>232</sup>

Far from run-of-the-mill tort suits, Sections 2333 and 1605A supplement executive power under Sections 2339A and 2339B by targeting similar types of cases, furthering the same legislative purpose and objectives, and facilitating collaboration between private parties and the federal government in the fight against terrorism.

Starting with the first category—similarity in case types—the civil and criminal terrorism laws focus mostly on material support and target a similar set of “terrorist” entities. On the material support point, the vast majority of Section 2333 litigation involves alleged, underlying violations of Sections 2339A and/or 2339B and is therefore subject to the same definition of material support.<sup>233</sup> While 1605A cases do not involve underlying violations of the criminal material support laws,<sup>234</sup> the

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230. *Id.* § 1605A(a)(1).

231. See Troy C. Homesley III, Comment, “Towards a Strategy of Peace”: Protecting the Iranian Nuclear Accord Despite \$46 Billion in State-Sponsored Terror Judgments, 95 N.C.L. REV. 795, 819 (2017).

232. See E. Perot Bissell V & Joseph R. Schottenfeld, *Exceptional Judgments: Revising the Terrorism Exception to the Foreign Sovereign Immunities Act*, 127 YALE L.J. 1890, 1911–12 (2018) (contrasting the FTO designation process with the absence of a similar process under Section 1605A).

233. See, e.g., Maryam Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, 96 WASH. U. L. REV. 559, 562 (2018). Defendants need not be convicted under Sections 2339A and 2339B in order to be sued under Section 2333. *Boim v. Quranic Literary Inst. & Holy Land Found.*, 291 F.3d 1000, 1015 (7th Cir. 2002).

234. While the statute does not refer to the criminal material support laws, certain direct forms of terrorist activity covered by Section 1605A, such as aircraft sabotage or hostage taking, are linked to other public laws found in international treaties. 28 U.S.C. § 1605A(h).

majority of 1605A cases are material support claims, which rely on the same definition of the term embraced by Sections 2339A and 2339B.<sup>235</sup> Because of this shared focus on material support, the criminal and civil cases encompass nearly any behavior connected in some way to terrorism or terrorist entities. For example, since they prohibit a wide range of conduct and do not require the actual commission of terrorist violence, the criminal material support laws allow the government to prosecute individuals and entities “regardless of their proximity to terrorism or terrorist groups . . . .”<sup>236</sup> Though the civil laws require that an act of violence occur, Sections 2333 and 1605A also empower plaintiffs to pursue expansive theories of liability against defendants with loose ties to terrorism. In the case of Section 2333, judicial interpretations of the statute have gradually eschewed any requirement that defendants generally intend their actions to facilitate terrorist violence.<sup>237</sup> This has allowed Section 2333 plaintiffs to pursue defendants that have engaged in activities often several degrees removed from terrorist groups or activities.<sup>238</sup> These defendants have frequently included financial organizations that allegedly facilitated bank transfers for charitable institutions purportedly affiliated with terrorist organizations.<sup>239</sup>

The civil and criminal material support cases also effectively implicate the same set of “terrorist” entities because they often require an FTO connection.<sup>240</sup> Like Section 2339B cases themselves, Section 2333 suits based on Section 2339B can only be brought against material support going to an FTO.<sup>241</sup> While

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235. See *id.* § 1605A(h)(3).

236. Jamshidi, *supra* note 233, at 579.

237. *Id.* at 591–94.

238. *Id.* at 619.

239. See, e.g., *Weiss v. Nat’l Westminster Bank PLC*, 278 F. Supp. 3d 636 (E.D.N.Y. 2017) (Section 2333 case brought against UK bank for allegedly transferring funds for thirteen charities purportedly affiliated with Hamas); *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414 (E.D.N.Y. 2013) (Section 2333 cases brought against French bank for maintaining accounts owned by a French non-profit that funded Palestinian charitable organizations allegedly affiliated with Hamas). Most cases brought under Section 2333 fail on the merits. See Jamshidi, *supra* note 233, at 620–21.

240. One notable difference between the criminal and civil cases is that the criminal material support laws are mostly directed at individuals, while the civil laws are usually directed at institutions. Jamshidi, *supra* note 233, at 601–02.

241. See, e.g., *Weiss v. Nat’l Westminster Bank PLC*, 768 F.3d 202, 204–05 (2d Cir. 2014) (Section 2333 case involving underlying Section 2339B claim alleging

Section 2333 cases based on Section 2339A can implicate terrorist activities by non-FTO groups, winning those cases is difficult absent a relationship between the group in question and a designated FTO.<sup>242</sup> Even though Section 1605A does not expressly condition suit on FTO support, most of these cases involve aid to such groups.<sup>243</sup>

As for the second category—furthering the same legislative purpose and objectives—prevention and deterrence of terrorism are at the heart of both the civil and criminal material support laws. In considering passage of Section 2339B, Congress noted that “law enforcement at all levels must be given reasonable and legitimate investigative tools to enhance their capability of thwarting, frustrating, and preventing terrorist acts before they result in death and destruction.”<sup>244</sup> Similarly, Section 2333 and 1605A’s legislative histories make clear that their purpose is partly aimed at combatting terrorism.<sup>245</sup> In describing the need for Section 2333, one senator declared that “[n]ow more than ever, countries around the world must be vigilant and relentless in the fight against terrorism.”<sup>246</sup> In passing the original version of Section 1605A, the House Report struck a similar tone.<sup>247</sup> An exception to foreign sovereign immunity was necessary, in Congress’s view, because state sponsors had “become better at hiding their material support for their surrogates . . . .”<sup>248</sup>

This brings us to the third and final way in which the civil and criminal material support suits work in tandem—facilitating collaboration between private parties and the executive. In

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material support to a charity providing funds to Hamas, a designated FTO); *Strauss*, 925 F. Supp. 2d at 419, 442 (Section 2333 case involving underlying 2339B claim alleging material support to purported alter-egos of Hamas).

242. See *infra* note 255 for a discussion of one such Section 2333 case, *Ahmad v. Christian Friends of Israeli Communities*.

243. See, e.g., *Braun v. Islamic Republic of Iran*, 228 F. Supp. 3d 64 (D.D.C. 2017) (1605A case involving alleged material support to Hamas, a designated FTO); *Bluth v. Islamic Republic of Iran*, 203 F. Supp. 3d 1 (D.D.C. 2016) (same); *Roth v. Islamic Republic of Iran*, 78 F. Supp. 3d 379 (D.D.C. 2015) (same).

244. H.R. Rep. No. 104-383, at 42 (1995). Section 2339B was passed in order to address concerns that Section 2339A failed to effectively prevent terrorism. See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 13 (2005) (noting criticisms of Section 2339A as hamstringing anti-terrorism efforts by requiring proof defendants had the intent or knowledge their aid would support a particular terrorist crime).

245. See 137 Cong. Rec. 3303 (1991); H.R. REP. NO. 104-383.

246. 137 Cong. Rec. 3303.

247. H.R. REP. NO. 104-383.

248. *Id.* at 62.

pursuing the “supporters” of terrorism and terrorist groups, the civil terrorism statutes, like the criminal material support laws, do more than target individual illegal acts. As their legislative history suggests, the criminal and civil laws aim, more broadly, to dismantle the ecosystem that purportedly maintains terrorist activities and groups.<sup>249</sup> Indeed, some civil terrorism plaintiffs view their work as aimed precisely at these public ends.<sup>250</sup> Some have felt duty-bound to share relevant evidence with the U.S. government. For example, in several cases, plaintiffs have provided information to assist with ongoing criminal suits or investigations.<sup>251</sup> On certain occasions, the U.S. government has returned the favor and directly collaborated with Section 2333 and 1605A plaintiffs. In at least one case, the U.S. government reportedly sent a team of FBI agents to the Gaza Strip to collect evidence on a plaintiff’s behalf.<sup>252</sup> In another suit, the U.S. Treasury Department provided information to the plaintiffs’ lawyers so they could attach funds held in U.S. bank accounts in fulfillment of a 1605A judgment against Iran.<sup>253</sup>

In short, Section 2333 and 1605A cases are more than just private suits to remedy private injuries—they are tools for supplementing the executive’s criminal efforts against terrorist groups and activities. Because of how they are structured, the civil laws effectively prohibit plaintiffs from deviating from the criminal material support statutes’ objectives.<sup>254</sup> On the rare

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249. See *supra* notes 242–46 and accompanying text.

250. As the lead plaintiff in one 1605A case said about her family’s motivations for filing suit, “[w]e don’t want to be victims of terror anymore. We want to be soldiers in the war on terrorism; the courtroom is our battlefield.” Newsweek Staff, *We Want to Hurt Iran*, NEWSWEEK (Mar. 18, 2003, 7:00 PM), <http://www.newsweek.com/we-want-hurt-iran-132447> [<https://perma.cc/UXH2-LWEC>]. Plaintiffs in a leading Section 2333 case expressed a similar desire to “shut[] down the [terrorist] fundraising network” and set a broad precedent to deter future funding of terrorism, rather than to simply collect damages. ORDE KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* 59 (2016).

251. For example, plaintiffs in *Boim v. Quranic Literary Institute and Holy Land Foundation*, provided evidence they gathered to the U.S. government to help with a criminal case against several *Boim* defendants. KITTRIE, *supra* note 250, at 59–60. Plaintiffs in another ATA case, *Linde v. Arab Bank*, also reportedly provided materials to the U.S. government to assist with its investigation into Arab Bank. *Id.* at 64.

252. *Id.* at 71.

253. *Id.* at 79.

254. As discussed in Section III.B.2, this approach involves focusing primarily on Arab and/or Muslim groups and countries.

occasion plaintiffs have attempted to do so, they have been swiftly defeated.<sup>255</sup>

## 2. Civil Liberty Concerns

As with the FBI's surveillance programs and citizen-on-citizen monitoring, the civil and criminal material support statutes bolster presidential authority, often at the expense of civil liberties.<sup>256</sup> Topping the list of civil liberty issues is the definition of material support, as well as the FTO designation process.

In *Holder v. Humanitarian Law Project* ("HLP"), the Supreme Court upheld the material support definition against First Amendment challenges.<sup>257</sup> In the process, the Court also demonstrated how the material support concept inevitably undermines free speech rights, whether under the criminal or civil laws.<sup>258</sup> As the HLP Court held, the prohibition against material support includes activities such as training members of a terrorist organization on how to use humanitarian and international law to peacefully resolve disputes; teaching them how to petition intergovernmental bodies, like the United Nations, for relief;

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255. For example, in *Ahmad v. Christian Friends of Israeli Communities*, the court dismissed a Section 2333 claim—based in part on underlying violations of Section 2339A—brought against U.S. charities purportedly providing financial support to Israeli settlers. No. 13 Civ. 3376, 2014 WL 1796322, at \*5 (S.D.N.Y. May 5, 2014). Even though plaintiffs had presented allegations that arguably made out a claim against the settlers for engaging in terrorist activity, the court dismissed the complaint. *Id.* at \*3. In doing so, it suggested that a "knowing" donor to Israeli settler groups would not, inevitably, know their money would support terrorist activities; while, by contrast, a knowing donor to Hamas "would know that Hamas was gunning for Israelis . . . and that donations to Hamas . . . would enable Hamas to kill or wound, or try to kill, or conspire to kill more people in Israel." *Id.* (quoting *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 693–94 (7th Cir. 2008)). In this fashion, the court intimated that being affiliated with the sort of "established terrorist organization[s]" typically designated as an FTO—like Hamas—was highly persuasive, even in Section 2333 cases based on violations of Section 2339A—which does not require a FTO designation. *Id.* Though plaintiffs' complaint suffered from other shortcomings, the fact that the alleged terrorist activity involved a group that defied government-sanctioned views on terrorist organizations arguably weighed heavily on the court's dismissal decision. *See id.*

256. *See, e.g.*, SAID, *supra* note 215, at 65–68 (discussing judicial interpretations of Section 2339B and their implications for free speech and association rights); *The New McCarthyism*, *supra* note 53, at 10–15 (arguing that the government's use of the criminal material support laws, particularly Section 2339B, violates the First Amendment's right to association).

257. 561 U.S. 1, 39 (2010).

258. *Id.* at 26, 36–39.

and engaging in “political advocacy” on their behalf.<sup>259</sup> While the Court conceded that these activities constitute speech, it stripped them of their protected status because they were coordinated with or under the direction of foreign groups the speaker knew to be terrorist organizations.<sup>260</sup> Whatever one thinks of the Court’s rationale, the fact that it declared speech acts to be prohibited under the statute demonstrates that material support necessarily reaches “a fair amount of speech.”<sup>261</sup> Because of their reliance on the same broad definition of material support, the civil statutes also implicitly raise free speech concerns.<sup>262</sup>

While at least one court has declined to strike down the FTO designation statute as facially unconstitutional,<sup>263</sup> the designation process is fraught with civil liberty concerns for both designated groups and third parties. With respect to designated FTOs, the designation process fails to sufficiently protect these groups’ Fifth Amendment rights.<sup>264</sup> As applied to particular designated organizations, some courts have agreed.<sup>265</sup> FTO

259. *Id.*

260. *Id.* In reaching this conclusion, the Court relied heavily on the “judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization.” *Id.* at 36. The Court also suggested that applying the material support prohibition to independent, uncoordinated speech may be unconstitutional. *Id.* at 39.

261. Sinnar, *supra* note 122, at 1369; see Wadie E. Said, *Humanitarian Law Project and the Supreme Court’s Construction of Terrorism*, 2011 B.Y.U. L. REV. 1455, 1457–58 (2011) (arguing that the Supreme Court’s decision in *HLP* “indicates that the government’s prerogatives in designating a group that has not and does not seek to directly harm the United States outweigh the First Amendment rights of the individual citizen hoping to aid a foreign entity”).

262. Even though the First Amendment only protects against government suppression of speech, private restrictions can still threaten free speech values. Erica Goldberg, *Competing Free Speech Values in an Age of Protest*, 39 CARDOZO L. REV. 2163, 2164–66 (2018).

263. *E.g.*, *United States v. Afshari*, 426 F.3d 1150, 1153–55 (9th Cir. 2005).

264. Sahar Aziz, Note, *The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?*, 9 TEX. J. ON C.L. & C.R. 45, 73–76 (2003) [hereinafter *Laws on Providing Material Support*].

265. In general, the D.C. Circuit, which has exclusive jurisdiction to review FTO designations, 8 U.S.C. § 1189(c)(1), has held that “a foreign entity without property or presence in this country has no constitutional rights, under the Due Process Clause or otherwise.” *People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 22 (DC Cir. 1999). However, where the organization has “entered the territory of the United States and established substantial connections with this country . . . [it is] entitled to the protections of the Constitution.” *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 203 (D.C. Cir. 2001) [hereinafter *NCRI*]. In

designations are also driven by political concerns and lack any publicly available guidance on how the Secretary makes her determinations.<sup>266</sup>

As for third parties, their free speech rights can be affected by FTO designations as well. Though the courts have rejected collateral First Amendment challenges to FTO designations, these designations can effectively prevent third parties from donating money or giving other support to FTOs engaged in charitable work<sup>267</sup> or to charitable groups connected to FTOs, no matter how tenuously.<sup>268</sup> Furthermore, the designation process has been criticized for violating the freedom of association and due process rights of third parties,<sup>269</sup> though the courts have implicitly rejected these arguments as well.<sup>270</sup>

While the designation of state sponsors of terrorism under Section 1605A does not present civil liberty issues,<sup>271</sup> a number

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*NCRI*, the court held that a designated terrorist organization that had established substantial connections with the United States did not receive but was entitled to notice from the Secretary of its imminent designation before the designation was formally made, as well as a pre-designation opportunity “to be heard at a meaningful time and in a meaningful manner.” *Id.* at 208–09.

266. COLE & DEMPSEY, *supra* note 6, at 137–40.

267. Aziz, *supra* note 264, at 85–87.

268. For example, the executive has accused charitable groups in a given geographic location of being part of a “terrorist network” with a designated FTO, based merely on the charities’ presence in that location. Wadie Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 586–88 (2011). In these kinds of cases, third parties are effectively prohibited from supporting humanitarian aid efforts in entire regions. *See id.* at 588–89.

269. *See Aziz, supra* note 264, at 79 (arguing that “[t]he criminal and civil penalties that accompany . . . [FTO] designations may stifle freedom of expression and association by limiting a person’s ability to choose where her money will be donated”); *id.* at 82 (arguing that the FTO designation law should be interpreted so as to comport with Fifth Amendment due process rights).

270. Like freedom of speech claims, third-party freedom of association and due process challenges against FTO designations have typically been made against Section 2339B. In rejecting these claims, the courts have implicitly suggested that these constitutional protections are not violated by FTO designations. *See HLP*, 561 U.S. 1, 39 (2010) (holding that Section 2339B “does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group”) (quoting *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000)); *Afshari*, 426 F.3d at 1157 (holding that due process rights of a criminal defendant in Section 2339B case were not violated by the FTO designation process, even though defendant could not challenge the government’s designation of a particular group).

271. *See Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 96–97 (D.C. Cir. 2002) (holding that “foreign states are not ‘persons’ protected by the Fifth Amendment” and noting that “legal disputes between the United States and foreign governments are not mediated through the Constitution”).

of commentators have noted the “arbitrary” nature of that designation system, which is often driven by political and policy-based considerations.<sup>272</sup>

### 3. Rule of Law

Notwithstanding their civil liberty concerns, Sections 2339A, 2339B, 2333, and 1605A, as well as the process for designating FTOs and state sponsors of terrorism, are all consistent with formalist legality. They are part of publicly promulgated statutes and are general, clear, and constant through time.<sup>273</sup> Sections 2339A, 2339B, 2333 and FTO designations are non-retroactive. While state sponsor designations<sup>274</sup> and Section 1605A can have retroactive effect,<sup>275</sup> the bar on retroactivity is not absolute.<sup>276</sup> It is also unclear whether the rule of law applies to relationships between countries, including to laws one country creates that affect another.<sup>277</sup>

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272. See, e.g., Homesley, *supra* note 231, at 822 (arguing that the “arbitrariness of [the state sponsor] designation decisions is . . . a looming concern”); Keith Sealing, “*State Sponsors of Terrorism is a Question, Not an Answer: The Terrorism Amendment to the FSLA Makes Less Sense Now Than It Did Before 9/11*,” 38 TEX. INT’L L.J. 119, 136 (2003) (“Arguments can be made that some countries on the list no longer deserve that status, and arguments can likewise be made that, for political reasons, countries not on the list do belong there.”).

273. The Supreme Court has explicitly held that Section 2339B, the most controversial of these laws, is clear and “provide[s] a person of ordinary intelligence fair notice of what is prohibited.” *HLP*, 561 U.S. at 20–21 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)) (brackets in original).

274. For purposes of a Section 1605A suit, a defendant country must be designated as a state sponsor of terrorism “at the time the act [that is the subject of the 1605A suit] occurred, or [be] so designated as a result of such act, and . . . either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section.” 28 U.S.C. § 1605A(a)(2)(A)(i)(I).

275. See *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 68–69 (D.D.C. 1998) (finding that Congress expressly directed that Section 1605(a)(7), the precursor to Sec. 1605A, be given retroactive effect).

276. See *supra* note 89 and accompanying text.

277. See Ricardo Gosalbo-Bono, *The Significance of the Rule of Law and Its Implications for the European Union and the United States*, 72 U. PITT. L. REV. 229, 291 (2010) (noting that “there is no evidence of a general practice of states accepting the rule of law as international customary law” nor does “[t]he United Nations Charter, which is the expression of the constitutional international order . . . explicitly provide that its organs and members states are subordinated to the principle of the rule of law”) (quoting Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 351–54 (2008)).



Though Sections 2339A, 2339B, 2333, and 1605A arguably create liability for those who have no intention of supporting terrorist violence or activities, this does not violate the rule of law. Indeed, the formalist approach allows for rules that embrace expansive notions of fault. For example, civil strict liability laws, which require neither intent to harm nor negligence, are consistent with the formalist rule of law as long as they “define as clearly as possible the kind of activity that carries a special surcharge of legal responsibility.”<sup>278</sup> Where criminal strict liability laws are concerned, more serious rule of law problems emerge, particularly where serious penalties are involved.<sup>279</sup> These laws are typically ones where guilt attaches even when a person acts with due care and “innocent” intent.<sup>280</sup> While this appears to describe Section 2339B, Congress and the Supreme Court seem to agree that there is no “innocent” intent where one is knowingly supporting a terrorist organization, even if one does not intend to support its violent activities.<sup>281</sup>

Though many of these laws give the government substantial discretion to deprive individuals of life, liberty, or property, that discretion is still bound by rules, even if they ought to be made more robust.<sup>282</sup> These laws are not impossible to comply with or internally inconsistent and do not directly contradict other laws.<sup>283</sup> To the extent government actors are involved in

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278. FULLER, *supra* note 11, at 75.

279. *Id.* at 77–78.

280. *Id.* at 77.

281. See *HLP*, 561 U.S. 1, 29–30 (2010).

282. See, e.g., *Laws on Providing Material Support*, *supra* note 264, at 91 (suggesting various changes to the FTO designation process including allowing organizations under investigation for FTO designation to “have the opportunity to provide counter-evidence that will be included in the judicially reviewable administrative record”).

283. See, e.g., *HLP*, 561 U.S. at 8 (rejecting plaintiffs’ argument that Section 2339B is impermissibly vague under the Fifth Amendment and violates their right to free association under the First Amendment); see *Humanitarian Law Project v. Dep’t of Just.*, 352 F.3d 382, 392, 400 (9th Cir. 2003) (rejecting plaintiffs’ argument that Section 2339B violates the Fifth Amendment’s due process clause for failing to require proof of “personal guilt”), *vacated on other grounds*, 393 F.3d 902 (9th Cir. 2004). In terms of the FTO designation process, the State Department’s practices have seemingly shifted to align with the due process holding in *NCRI*. See *Chai v. Dep’t of State*, 466 F.3d 125, 127 (D.C. Cir. 2006) (stating that the State Department sent a letter to people it thought “might represent” several organizations slated for re-designation as FTOs, offered to provide “the unclassified portion of the administrative record before the Department,” and gave the representatives “15 days from receipt of the record to submit a response”).

enforcing these laws, official action is congruent with those statutes. Indeed, the government's prosecution of criminal material support cases is aligned with the statutes' stated objective to prevent and deter individuals from providing material support to terrorist groups and activities.<sup>284</sup>

As Part II has established, the FBI's domestic surveillance program and material support prosecutions, as well as their private analogues, comply with the rule of law, while giving vast powers to the executive branch and generally threatening civil liberties. This is precisely where political accountability is most necessary and important, even though it has largely failed to materialize.<sup>285</sup> Part III explores the reasons for this accountability deficit by examining the rule of law's relationship to political accountability and comparing these programs to other national security initiatives where political accountability has manifested.

### III. UNDERMINING POLITICAL ACCOUNTABILITY

Building on Parts I and II, this Part explores why FBI surveillance programs, citizen-on-citizen-monitoring, and the public and private material support statutes have failed to generate meaningful political checks on the executive. It begins by explaining the rule of law's impact on political accountability. It then applies that theory to the FBI surveillance programs, citizen-on-citizen monitoring, and the public and private material support statutes, showing how law has undermined political accountability for those activities. It ends by comparing those initiatives to the Muslim Ban, Section 215 and 702 surveillance, and the Border Wall, which have all generated political efforts to check executive power.

As this Part demonstrates, the rule of law sometimes leads to and other times undermines political accountability for executive programs that discriminate or have other negative effects on communities of color. Law's influence on this accountability depends upon "social cohesion"—namely, the process by which

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284. Private actions under Sections 2333 and 1605A are consistent with the same set of government objectives.

285. See, e.g., Diala Shamas, *Where's the Outrage When the FBI Targets Muslims?*, NATION (Oct. 31, 2013), <https://www.thenation.com/article/wheres-outrage-when-fbi-targets-muslims/> [<https://perma.cc/Y4QH-KATF>] (describing lack of public outrage against FBI surveillance of Arabs and Muslims).

different groups join together politically to support or advocate for a particular objective. Law's ability to generate social cohesion depends, in turn, on how the executive's legalistic programs align with social norms and otherwise impact society.

For instance, the rule of law undermines social cohesion and erodes political accountability for programs that use facially neutral laws to target socially disfavored minority communities. These legalistic programs align with and legitimize existing norms that marginalize these groups, while doing so in a facially neutral way that is socially acceptable. This makes it harder for impacted communities to generate social cohesion with other groups, which are unaffected by these programs and disinterested in aligning with these groups.

By contrast, the rule of law facilitates social cohesion and political accountability for executive programs that are explicitly discriminatory. Even if these programs primarily affect disfavored groups, they conflict with and undermine norms against overt discrimination. Many individuals are offended by and opposed to this brand of discrimination, regardless of whether they are directly targeted. Law also facilitates social cohesion and political accountability for executive action that has negative consequences for a large number of individuals or a small but diverse group of Americans. Because these programs directly impact the interests of a range of groups, they generate a common interest in opposing these initiatives, even if a disfavored minority group is also affected.

To substantiate this theory, the rest of Part III demonstrates how FBI surveillance, material support laws, and their private analogues have disproportionately impacted Arab and Muslim Americans; how the rule of law has legitimized that discrimination; and how this legitimization has made political accountability for these executive initiatives elusive. It contrasts these programs with other legalistic initiatives: specifically, the Muslim Ban, Section 215 and 702 surveillance, and the Border Wall—all of which bolster executive power, threaten individual rights, and negatively impact communities of color but have generated sustained efforts at political accountability. As this discussion shows, these efforts—which have either achieved concrete gains or are ongoing—have been precipitated by the explicitly discriminatory nature of these programs (the Muslim Ban), their negative impact on the rights of many individuals

(Section 215 and 702 surveillance), or their negative effect on the interests of a small but diverse group of Americans (the Border Wall).

The discussion throughout Part III also adds nuance to the standard account in legal scholarship that majoritarian politics necessarily disfavor minority rights. As reflected in the works of Professors Derrick Bell<sup>286</sup> and John Hart Ely,<sup>287</sup> this theory posits that the white majority has little incentive to protect a minority group unless its own material interests are implicated. Without that protection, communities of color, especially disfavored ones, are unlikely to realize their rights and liberties. However, as this Part establishes, laws that are viewed as explicitly discriminatory or that affect the interests of a small but diverse array of political actors can generate efforts at political accountability for executive action, even where the majority and/or its material interests are not substantially involved (Muslim Ban and Border Wall). This accountability may result from coalitions between communities of color or between minorities and non-identitarian groups dedicated to social justice (Border Wall).

#### A. *Political Accountability, Social Cohesion, and the Rule of Law*

The rule of law depends upon the “ruler’s” obedience to law.<sup>288</sup> In a democracy, a powerful incentive for that obedience comes from individuals uniting together to hold the ruler accountable for her transgressions.<sup>289</sup> In practice, “[o]nly when [the people’s] commitment to police the behavior of the state is powerfully credible . . . does a ruling party, president, or sovereign develop a *self-interest* in adhering to the rules of the game . . . .”<sup>290</sup> As this section demonstrates, social cohesion is central

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286. Bell, *supra* note 41.

287. ELY, *supra* note 41.

288. Catalina Smulovitz, *How Can the Rule of Law Rule? Cost Imposition Through Decentralized Mechanisms*, in DEMOCRACY AND THE RULE OF LAW, *supra* note 97, at 168.

289. Barry R. Weingast, *A Postscript to “Political Foundations of Democracy and the Rule of Law”*, in DEMOCRACY AND THE RULE OF LAW, *supra* note 97, at 109–10.

290. LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 70 (1999) (emphasis in original); see Stephen Holmes, *Lineages of the Rule of Law*, in DEMOCRACY AND THE RULE OF LAW, *supra* note 97, at 1, 59 (“In a democratic society . . . a certain degree of initiative from ordinary citizens, beyond a willingness to stand in line on election day, is a precondition for law to function as it should.”).

to this political accountability. That cohesion is, in turn, affected by the rule of law, which influences social norms, attitudes, and behaviors, in ways that can either undermine or support social cohesion.

Social cohesion is predicated on the notion that individuals have different interests, goals, and values, but that generating “a common political identity”<sup>291</sup> between them is necessary for these individuals to cohere together and ensure government is responsive to their interests and objectives.<sup>292</sup> One way to achieve this cohesion is to draw on a common “moral core” between groups.<sup>293</sup> This core, which goes beyond material interests, represents the “ability of individuals to respond to and identify with one another on the basis of mutuality and reciprocity, without exchanging equal quantities of support, without calculating individual advantages, and above all without compulsion.”<sup>294</sup>

The work of Professors Ely and Bell underscores the importance of this social cohesion for protecting minority rights and interests. Though both theories primarily focus on how courts should or do respond to cases of minority discrimination, they can inform accountability efforts in the political domain as well.

The inspiration for Ely’s theory comes from Justice Harlan Stone’s influential footnote four in *United States v. Carolene Products Co.*<sup>295</sup> That footnote calls for “more exacting judicial scrutiny” of statutes directed at particular “religious . . . or national . . . or racial minorities . . .”<sup>296</sup> because “prejudice against discrete and insular minorities may . . . tend[] seriously to

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291. CHANTAL MOUFFE, *THE RETURN OF THE POLITICAL* 67 (2005 ed. 1993).

292. See ÉTIENNE BALIBAR, *CITIZENSHIP* 19 (Thomas Scott-Railton trans., Polity Press 2015) (2012) (describing the body politic as a “system of *relationships* that citizens establish among *themselves*,” which emerge out of their conflicting interests and values).

293. See Jane Mansbridge, *Conflict and Self-Interest in Deliberation*, in *DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS* 107, 108–09 (Samantha Besson & Jose Luis Marti eds., 2006) (“The most efficient societies, as well as often the most just, solve many . . . collective action problems by appealing . . . to a ‘moral core’ within each individual that consists both of cognitive commitments to principles of duty, fulfillment of promises, and the like and of more emotionally-based reasons for making the good of others one’s own.”).

294. JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* 472 (1992).

295. See generally ELY, *supra* note 41.

296. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

curtail the operation of those political processes ordinarily [useful] to protect [minority groups] . . . .”<sup>297</sup> Building off this point, Ely argues that those communities of color that are the “object of widespread vilification” are particularly vulnerable in a democratic society and unlikely to generate the political alliances necessary to realize their rights.<sup>298</sup>

In his influential work on “interest convergence,” Professor Bell develops a different but related line of argument—namely, that communities of color are more likely to achieve civil rights and civil liberties victories where their interests converge with those of the white majority.<sup>299</sup> Focusing on the seminal school desegregation case *Brown v. Board of Education*, Bell argues that “the decision in *Brown* to break with the [Supreme] Court’s long-held position on [school segregation] cannot be understood without some consideration of the decision’s value to whites . . . .”<sup>300</sup> While Bell concedes that some whites may have been motivated by the immorality of racial inequality, he argues that it was primarily the prospect of “economic and political advances at home and abroad” that desegregation would produce, which appealed to the interests of most whites and led to the result in *Brown*.<sup>301</sup>

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297. *Id.*

298. ELY, *supra* note 41, at 153. Some scholars have disputed the Ely/*Carolene Products* theory of minority disadvantage and argued that “other things being equal, ‘discreteness and insularity’ will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics.” Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723–24 (1985). Others have disagreed with this take. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 874 (1995) (“The organizational benefits of being ‘discrete and insular’ are more than offset by the fact that, because of racial prejudice, other groups are less willing to enter into political bargains with discrete and insular minorities.”).

299. Bell, *supra* note 41, at 523.

300. *Id.* at 524. In *Brown*, the Court rejected the principle of “separate but equal” articulated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), concluding that it had “no place” in public education. 347 U.S. 483, 495 (1954). Under *Plessy*’s “separate but equal” doctrine, “equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate.” *Id.* at 488.

301. Bell, *supra* note 41, at 524. The interest convergence theory has been criticized on various grounds, including for taking a simplistic approach to the “interest” of Black and White people, undermining the agency of Black plaintiffs and White judges, failing to account for racially egalitarian judicial decisions, limiting the range of tactics for achieving racial justice, and promoting racial conspiracy theories. See generally Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149 (2011).

Despite their force and clarity, these theories do not explain how the law itself affects social cohesion. This relationship—between the rule of law and social cohesion—is captured by scholarship on law's expressive value, as well as by the rule of law literature. As this scholarly work demonstrates, law will sometimes further social cohesion and political accountability for communities of color, while other times it will not.

As the expressive theory of law implicitly suggests, law influences social cohesion by shaping and reinforcing social norms, attitudes,<sup>302</sup> and behaviors.<sup>303</sup> Even without enforcement, law can have “an important effect in signaling [sic] appropriate behavior and in inculcating the expectation of social opprobrium and, hence, shame in those who deviate from the announced norm.”<sup>304</sup> As part of its expressive work, law communicates to society who is, and is not, an appropriate target for its disciplining authority, and distinguishes “in” groups from “out” groups.<sup>305</sup> Law's targeting and designation of these groups is particularly potent where it reinforces prevailing social and political norms.<sup>306</sup> For example, in the Jim Crow South, law bolstered existing notions about who was and was not a valued member of society. In *Brown*, the Supreme Court recognized this expressive effect of law when it described Jim Crow segregation “as denoting the inferiority of the negro group.”<sup>307</sup>

302. Cass R. Sunstein, *Conflicting Values in Law*, 62 FORDHAM L. REV. 1661, 1668 (1994).

303. See Dan M. Kahan, *What Do Alternative Sanctions Mean*, 63 U. CHI. L. REV. 591, 602–04 (1996) (explaining how expressive theories of punishment support deterrence theories aimed at curbing criminal behavior). Law can also alter established norms and behaviors. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2026 (1996) [hereinafter *On the Expressive Function of Law*].

304. *On the Expressive Function of Law*, *supra* note 303, at 2032.

305. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) (exploring the various ways law enables racial discrimination and marginalization of African-Americans).

306. See Clarke, *supra* note 8, at 522–23 (“The legitimization of . . . biased attitudes [through law] may . . . increase the prevalence of discrimination and further entrench inequality.”); Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 439–40 (2011) (“[T]o the extent that law is generally viewed as a system of rules that shape politics, power, and society, it becomes the vehicle with which the status quo and existing power relationships are maintained.”).

307. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (internal quotations omitted). Of course, discriminatory laws can have material consequences for targeted minority groups. Clarke, *supra* note 8, at 516–18. While these material

Rule of law scholars have similarly noted law's broad social effects, including how it can strengthen or weaken respect for moral values and government authority and create or maintain social stratification."<sup>308</sup> At the same time, they have noted how laws that have negative consequences can and often do inspire broad social and political backlash. For example, civil disobedience is partly grounded in the idea, however contestable, that it is permissible to flout laws that have pervasively bad social or political effects.<sup>309</sup> Indeed, these tactics of civil disobedience were important to bringing an end to Jim Crow laws in the 1950s and 60s.

Taken together, this scholarship suggests that law's effect on social cohesion depends, in part, on whether law is used to reinforce social norms about communities of color and/or has negative consequences that are pervasively felt. This means the rule of law may undermine social cohesion and erode political accountability for legalistic programs that target disfavored minority groups in facially neutral ways. In these situations, law legitimizes the discriminatory norm and validates the marginalization of the targeted community. The validity of this legalized discrimination is further reinforced by its facially neutral, non-overt nature, which is a generally accepted form of discrimination in U.S. society.<sup>310</sup> These circumstances make it harder for impacted minorities to generate social cohesion with other groups that are unaffected by these programs and already disinterested in aligning with these communities.

By contrast, where executive action discriminates against minority groups but has other pervasively negative effects on society, the rule of law may generate social cohesion and facilitate political accountability for those programs. This includes executive programs that are explicitly discriminatory—that is, overtly communicating negative views or treatment of a particular group or particular individuals due to their membership in that

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consequences can impact social cohesion, this Article focuses exclusively on law's expressive impact on communities of color.

308. RAZ, *supra* note 98, at 177.

309. *Id.* at 262–75.

310. See Valentino et al., *supra* note 38, at 759 (describing research showing that “racial attitudes . . . most powerfully influence policy views when racial messages [are] subtle and cues implicit”).



group.<sup>311</sup> While recent studies suggest that at least some whites may view explicit discrimination as permissible,<sup>312</sup> other studies show that, since the Civil Rights Movement, explicit bias has remained socially unacceptable and offensive to many people.<sup>313</sup> Because of these negative consequences, the rule of law facilitates social cohesion against explicitly discriminatory programs even where a disfavored group is targeted. For similar reasons, the rule of law may lead to social cohesion and political accountability for executive actions that have other pervasively negative consequences, such as eroding the rights of many or small but diverse groups of people.

As demonstrated below, this dynamic—social cohesion's critical role in politically checking government coupled with law's influence over that cohesion—helps explain why there has been little to no accountability for the FBI's domestic surveillance program, material support statutes, and their private analogues. It also explains why the Muslim Ban, Section 215 and 702 surveillance, and the Border Wall have generated efforts at political accountability for the executive. As described below, the FBI surveillance program, material support statutes, and their private analogues disproportionately target Arabs and Muslims and treat these groups as dangerous purveyors of terrorism in ways that are facially neutral and not overtly discriminatory. This reinforces prevailing views about this community and undermines the social cohesion necessary to check executive power. By contrast, even though Muslims and Arabs are primarily impacted, the Muslim Ban has generated social cohesion against executive power due to the ban's explicitly discriminatory nature. Section 215 and 702 surveillance and the Border Wall controversy have also facilitated social cohesion in favor of

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311. I borrow here from Professor Jessica Clarke's definition of "explicit bias." As she defines it, this bias is "what a reasonable listener could consider to be views about attributes of a particular group or the attributes of particular individuals due to group membership" that are "conveyed to some audience by words or symbols," which may be obvious but can also be expressed in "coded" language or "deduced through inference." Clarke, *supra* note 8, at 513.

312. See, e.g., Valentino et al., *supra* note 38, at 768 ("Many whites now view themselves as an embattled and even disadvantaged group, and this has led to both strong in-group identity and a greater tolerance for expressions of hostility toward out-groups.").

313. See *id.* at 758–59 (cataloguing political science scholarship and anecdotal evidence demonstrating that explicit forms of racist political discourse have become unacceptable since the Civil Rights Movement of the 1950s and 60s).

restraining the executive. This is due to their negative consequences either for a broad majority of Americans or a small but diverse coalition of groups.

*B. FBI Surveillance, Material Support Statutes, and Their Private Analogues*

The rest of Part III explores how the rule of law either undermines or supports social cohesion and political accountability for the various domestic national security programs examined in this Article. Part III.B explores the FBI's surveillance programs, citizen-on-citizen monitoring, and public and private material support cases. Parts III.C and D turn to the Muslim Ban, Section 215 and 702 surveillance, and the Border Wall.

As this discussion demonstrates, the presence or absence of political accountability in some of these cases (Section 215 and 702 surveillance, as well as FBI surveillance, material support statutes and their private analogues) aligns with the canonical account of majoritarian politics offered by Professors Ely and Bell. At the same time, other executive policies (the Muslim Ban and Border Wall) suggest that law may generate political accountability in circumstances left out of or discounted by Bell and Ely's accounts. For example, both professors either implicitly or explicitly overestimated the need to appeal to the white majority's material interests, whether political or economic.<sup>314</sup> They also underestimated the importance of developing political ties with groups that are either not part of the majority, including other communities of color,<sup>315</sup> or are defined by a general commitment to social justice rather than identity. Contrary to

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314. Bell, for example, insists that minority rights depend on convergence with the white majority's material goals, rather than its moral commitments. *See, e.g.*, Sudha Setty, *National Security Interest Convergence*, 4 HARV. NAT'L SEC. J. 185, 227 (2012). Similarly, for Ely, the reason prejudice distorts the democratic political process is because it prevents minorities and majorities from recognizing their overlapping material interests. *See* Ely, *supra* note 41, at 153. ("Race prejudice divides groups that have much in common (black and poor whites) and unites groups (white rich and poor) that have little else in common than their antagonism for the racial minority.") (citation omitted).

315. *See, e.g.*, Philip Lee, *A Wall of Hate: Eminent Domain and Interest-Convergence*, 84 BROOK. L. REV. 421, 429 (2019) (noting that interest convergence theory has been applied to a diverse set of issues where it has been used to show how "the interest of minority groups in achieving equality and fair treatment overlapped with the interests of the majority group").

these views, this Part shows that law can generate political accountability even where the majority or its material interests are not substantially implicated. This includes facilitating coalition building between minority groups<sup>316</sup> or between minorities and non-identitarian groups oriented around social justice.

The next section begins by demonstrating how FBI surveillance, citizen-on-citizen monitoring, and the public and private material support cases disproportionately impact Arab and Muslim Americans. It then explains how this disproportionate impact undermines the social cohesion necessary to check executive power under these programs.

### 1. FBI Surveillance and Citizen-on-Citizen Monitoring

Since 9/11, the FBI's domestic intelligence gathering has reflected an overemphasis on surveilling Arabs and Muslims.<sup>317</sup> With a few exceptions, these practices have been enabled by laws and program that are facially neutral but nevertheless reflect prejudice and stereotyping of Arab and Muslim communities as predisposed to terrorism.

The FBI's monitoring of Arab and Muslim groups has been facilitated, first and foremost, by the rules governing its surveillance protocols. While the DIOG prohibits using "[r]ace, ethnicity, religion, or national origin alone" as "the sole basis for initiating investigative activity," it also notes that these characteristics may be taken into account where there is "an independent authorized law enforcement or national security purpose for initiating investigative authority."<sup>318</sup> In such cases,

Ethnicity may be considered in evaluating whether a subject is—or is not—a possible associate of a criminal or terrorist group that is known to be comprised of members of the same

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316. While the Border Wall also features inter-minority alliances, *see infra* Section III.D.2, the clearest example of such solidarity can be found in popular pushback against the New York Police Department's (NYPD) surveillance of Arab and Muslim communities. *See infra* Part IV.

317. Kassem & Shamas, *supra* note 32, at 677.

318. DIOG, *supra* note 140, § 4.1.1.

ethnic grouping—as long as it is not the dominant factor for focusing on a particular person.<sup>319</sup>

The DIOG also authorizes the FBI to “identify locations of concentrated ethnic communities in the field office’s domain, if these locations will reasonably aid the analysis of potential threats and vulnerabilities, and, overall, assist domain awareness for the purpose of performing intelligence analysis.”<sup>320</sup> In explaining how this rule might be applied, the DIOG notes that where “intelligence reporting reveals that members of certain terrorist organizations live and operate primarily within a certain concentrated community of the same ethnicity, the location of that community is clearly valuable—and properly collectible—data.”<sup>321</sup> Similarly, “the locations of ethnic-oriented businesses and other facilities may be collected if their locations will reasonably contribute to an awareness of threats and vulnerabilities and intelligence collection opportunities.”<sup>322</sup>

In line with these rules, the FBI has reportedly surveilled various Arab and Muslim American communities across the country. While there is little publicly available data about the FBI’s intelligence gathering practices across different racial and religious groups,<sup>323</sup> anecdotal evidence suggests that Muslim and Arab communities have disproportionately borne the brunt of these aggressive practices.<sup>324</sup> As Professor Wadie Said has described, the residents of Dearborn, Michigan—which has the highest percentage of Arab and Muslim American residents in the country—have long complained of government surveillance, including by the FBI.<sup>325</sup> As Said argues, this claim is borne out by the high proportion of Dearborn residents included in the government’s watchlist of “known or suspected terrorists.”<sup>326</sup> Residents of this town are the second highest entrants on that list after residents of New York City even though they have “eighty

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319. *Id.* § 4.3.3.1(B).

320. *Id.* § 4.3.3.2.1.

321. *Id.* § 4.3.3.2.2.

322. *Id.*

323. Kassem & Shamas, *supra* note 32, at 679.

324. *Id.* at 680; Wadie E. Said, *Law Enforcement in the American Security State*, 2019 WIS. L. REV. 819, 829–30 (2019) [hereinafter *Law Enforcement in the American Security State*].

325. Said, *supra* note 324, at 829.

326. *Id.*

times less” the population.<sup>327</sup> Other Muslim communities have reported regular interactions with the FBI. For example, in Minneapolis-St. Paul, which has a large Somali population, “[y]oung male residents of Somali origin . . . report being approached with some regularity by FBI agents, asking if they are interested in joining an extremist group such as ISIS.”<sup>328</sup>

Other FBI practices targeting Arab and Muslim Americans include systematic policies of mapping mosques and Muslim communities around the country,<sup>329</sup> sending informants into mosques,<sup>330</sup> and coaxing young men into becoming terrorists and then arresting them when they do.<sup>331</sup> The FBI also reportedly conducts so-called “voluntary interviews” with Arab and Muslim Americans,<sup>332</sup> which are often coercive. For example, FBI agents have allegedly told individuals who have asked for their lawyers to be present that “they can do [the interview] the easy way or the hard way.”<sup>333</sup> During these interrogations, individuals have sometimes been asked questions that delve into their religious and political views, such as, “What Islamic lecturers do you follow” and, “Do you hate Israel?”<sup>334</sup>

327. *Id.*

328. *Id.* at 829–30.

329. Sabrina Alimahomed-Wilson, *When the FBI Knocks: Racialized State Surveillance of Muslims*, 45(6) CRITICAL SOC. 871, 875 (2018).

330. Jerry Markon, *Mosque Infiltration Feeds Muslims’ Distrust of FBI*, WASH. POST (Dec. 5, 2010), <https://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403720.html> [<https://perma.cc/FCQ4-FEZB>]. Reliance on informants and undercover agents is a substantial part of the FBI’s surveillance of Arabs and Muslims. JEROME P. BJELOPERA, CONG. RSCH. SERV., R41416, AMERICAN JIHADIST TERRORISM: COMBATTING A COMPLEX THREAT 1–5 (2013), <https://fas.org/sgp/crs/terror/R41416.pdf> [<https://perma.cc/ND4L-ETHJ>].

331. *FBI Terror Stings: Entrapment or Prevention?*, CBS (Nov. 30, 2010), <https://www.cbsnews.com/news/fbi-terror-stings-entrapment-or-prevention/> [<https://perma.cc/NAV5-M4S8>].

332. While in the past these interviews largely focused on immigrants, they have increasingly targeted Arabs and Muslims who are U.S. citizens. Alimahomed-Wilson, *supra* note 329, at 879.

333. Shamas, *supra* note 285.

334. *Id.* Though the FBI’s practices remain ongoing, the NYPD’s surveillance of Arab and Muslim communities has been successfully challenged in court. See *Hasan v. City of New York*, 804 F.3d 277 (3d. Cir. 2015) (holding that plaintiffs’ complaint raised nonconclusory allegations that were sufficient to state a valid claim that NYPD surveillance of Muslim groups, individuals, and spaces violated the First and Fourteenth Amendments); Abigail Hauslohner, *NYPD Settles Third Lawsuit over Surveillance of Muslims*, WASH. POST (Apr. 5, 2018), [https://www.washingtonpost.com/national/nypd-settles-third-lawsuit-over-muslim-surveillance/2018/04/05/710882b2-3852-11e8-9c0a-85d477d9a226\\_story.html](https://www.washingtonpost.com/national/nypd-settles-third-lawsuit-over-muslim-surveillance/2018/04/05/710882b2-3852-11e8-9c0a-85d477d9a226_story.html) [<https://perma.cc/3PQ>].

At times, the FBI's discriminatory approach to Arab and Muslim communities has been explicitly discriminatory. For example, in 2011, news of an FBI training manual on Islam leaked publicly.<sup>335</sup> As one journalist described it, the manual, which was presented to counterterrorism agents at the FBI Academy in Quantico, Virginia,<sup>336</sup> had "nothing to do with crime and everything to do with . . . [Muslim] religious practice and social behavior."<sup>337</sup> The manual included a number of troubling statements and generally made little to no distinction between pious Muslims and terrorists.<sup>338</sup> Though the FBI subsequently distanced itself from the manual and claimed it was no longer in use,<sup>339</sup> the incident reinforced broader concerns that FBI counterterrorism practices are focused substantially on Arab and Muslim communities for prejudicial reasons.<sup>340</sup>

The Nationwide SAR Initiative also encourages surveillance of Arab and Muslim communities based on stereotypical narratives about their propensity for terrorism.<sup>341</sup> SAR reports, which are comprised of official and private reporting to law enforcement, are littered with numerous unsubstantiated reports about "Middle Eastern men" engaged in "suspicious" activities.<sup>342</sup>

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K-27M8] (reporting on settlement agreement between NYPD and plaintiffs in *Hasan v. City of New York*); Adam Goldman, *NYPD Settles Lawsuit over Muslim Monitoring*, WASH. POST (Jan. 7, 2016), [https://www.washingtonpost.com/world/national-security/nypd-settles-lawsuits-over-muslim-monitoring/2016/01/07/bdc8eb98-b3dc-11e5-9388-466021d971de\\_story.html](https://www.washingtonpost.com/world/national-security/nypd-settles-lawsuits-over-muslim-monitoring/2016/01/07/bdc8eb98-b3dc-11e5-9388-466021d971de_story.html) [<https://perma.cc/T529-3YVH>] (reporting on NYPD settlement of two other cases against the same surveillance program). These legal victories were preceded by political organizing in which Muslims New Yorkers forged alliances with other groups experiencing similar forms of abuse at the hands of the NYPD. *See infra* Part IV.

335. Spencer Ackerman, *FBI "Islam 101" Guide Depicted Muslims as 7th-Century Simpletons*, WIRED (July 27, 2011), <https://www.wired.com/2011/07/fbi-islam-101-guide/> [<https://perma.cc/39WG-28HR>].

336. Alimahomed-Wilson, *supra* note 329, at 871.

337. Ackerman, *supra* note 335.

338. *Id.*

339. *Id.*

340. Other FBI materials have similarly equated Islamic piety with a predisposition for terrorist activity. *See, e.g.*, FBI, *THE RADICALIZATION PROCESS: FROM CONVERSION TO JIHAD 10* (May 2006), <http://cryptome.org/fbi-jihad.pdf> [<https://perma.cc/35YZ-84X8>] (listing pre-radicalization indicators as including "[w]earing traditional Muslim attire," "[g]rowing facial hair," and "[f]requent attendance at a mosque or prayer group").

341. Duque Franco, *supra* note 193, at 642–46.

342. *See, e.g.*, SUSPICIOUS ACTIVITY REPORTS, JOINT REGIONAL INTELLIGENCE CENTER (LOS ANGELES REGION) 24, [https://www.aclunc.org/sites/default/files/asset\\_upload\\_file262\\_12586.pdf](https://www.aclunc.org/sites/default/files/asset_upload_file262_12586.pdf) [<https://perma.cc/D39A-XGCZ>] (reporting "[u]nknown

Similarly, the Operation TIPS spinoffs, including the *See Something, Say Something* programs and CVE, encourage racial and religious profiling of Arabs and Muslims and reinforce unfounded biases about their so-called “inclination for terrorist activity.”<sup>343</sup> The *See Something, Say Something* program has, for example, attracted a “seemingly common, kind of untrained eye that sees an al Qaeda operative lurking under every prayer cap.”<sup>344</sup> While the government’s public-facing description of CVE is ideologically and religiously neutral, it too disproportionately focuses on the American Muslim community.<sup>345</sup> The CVE program strongly implies that American Muslims “shoulder a particularized responsibility for national security that is not shared by other groups. . . .”<sup>346</sup> and treats “radical” perspectives on Islam<sup>347</sup> and U.S. policies in the Muslim-majority world<sup>348</sup> as hallmarks of potential terrorist inclinations.<sup>349</sup>

## 2. Public and Private Material Support Cases

As with the FBI surveillance programs and citizen-on-citizen monitoring, cases under Sections 2339A, 2339B, 2333 and

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(male middle eastern) seen on board bus 6738, with high powered camera photographing city hall”); *id.* at 21 (reporting “while driving . . . I saw 4 Middle Eastern MA’s . . . taking pictures of downtown skylines”); *id.* at 20 (reporting that “[s]ubject was taking pictures of another person on a Metrolink train, who was dressed in a ‘Middle Eastern’ costume”).

343. David Smith, *Presumed Suspect: Post-9/11 Intelligence Gathering, Race, and the First Amendment*, 11 UCLA J. ISLAMIC & NEAR E. L. 85, 109 (2012); Irina D. Manta, *Choosing Privacy*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 649, 657–59 (2017).

344. Feisal G. Mohamed, “*See Something, Say Something*” and Impunity for Profiling, HUFF. POST (June 29, 2011), [https://www.huffpost.com/entry/see-something-say-somethi\\_b\\_886951?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ29vZ2xlLnNvbS8&guce\\_referrer\\_sig=AQAAADibk\\_BqaPj\\_aNi8ksf87WPYZWm\\_VVwMdLMYHHknojb-f1ur7HB\\_B2y\\_Crj3f6s\\_12wkeXpSdWolUYemGBdt-gyZwm9AVDGnN6CJp1zM8R\\_T838iQ45E5EpG5Tmy3IZSY0nhiBW05CywqJIp\\_Ll8Aen3T4altsFe2IdOEE2UmLw](https://www.huffpost.com/entry/see-something-say-somethi_b_886951?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ29vZ2xlLnNvbS8&guce_referrer_sig=AQAAADibk_BqaPj_aNi8ksf87WPYZWm_VVwMdLMYHHknojb-f1ur7HB_B2y_Crj3f6s_12wkeXpSdWolUYemGBdt-gyZwm9AVDGnN6CJp1zM8R_T838iQ45E5EpG5Tmy3IZSY0nhiBW05CywqJIp_Ll8Aen3T4altsFe2IdOEE2UmLw) [https://perma.cc/PQ77-TA5E].

345. *Why Countering Violent Extremism Programs Are Bad Policy*, *supra* note 180.

346. Aziz Z. Huq, *The Social Production of National Security*, 98 CORNELL L. REV. 637, 706 (2013).

347. Akbar, *National Security’s Broken Windows*, *supra* note 163, at 882.

348. Amna Akbar, *Policing “Radicalization”*, 3 UC IRVINE L. REV. 809, 878 (2013).

349. See Sahar F. Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT’L SEC. J. 147, 199 (2014) [hereinafter *Policing Terrorists in the Community*] (arguing that CVE encourages Muslims to keep a watchful eye on those espousing “radical” religious or political beliefs).

1605A primarily implicate, directly or indirectly, Muslim and/or Arab individuals, groups, or countries. Like the executive's surveillance-oriented programs, these cases are also facially neutral, rather than explicitly discriminatory, in their targeting.

A major reason why criminal and civil material support cases disproportionately impact Arabs and Muslims has to do with FTO and state sponsor designations, as well as the general international focus of the material support laws. As mentioned earlier, Section 2339B requires a connection to a designated FTO.<sup>350</sup> Since the State Department first began making those designations in 1997,<sup>351</sup> sixty-two of the eighty-two total FTOs have been Arab and/or Muslim.<sup>352</sup> As one scholar puts it, the executive has "effectively employ[ed] its designation authority to halt almost all domestic activities and organizations associated with the Middle East or Islam under the auspices of combating terrorism."<sup>353</sup> While Section 2339A does not have a FTO requirement and is not expressly limited to foreign terrorism, the predicate crimes that trigger its application often have an international nexus.<sup>354</sup> For example, Section 2339A prohibits material support in connection with "[a]cts of terrorism transcending national boundaries"<sup>355</sup> or conspiracy "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in . . . the United States."<sup>356</sup> This focus on international activity has effectively oriented Section 2339A around individuals allegedly aligned with Muslim and/or Arab entities, which are disproportionately associated with international rather than domestic terrorism.<sup>357</sup> Given its reliance on Sections 2339A and 2339B, Section 2333 is subject to similar tendencies. As for Section 1605A,

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350. See 18 U.S.C. § 2339B.

351. Sean D. Murphy, *U.S. Designation of Foreign Terrorist Organization*, 94 AM. J. INT'L L. 365, 365 (2000).

352. *Foreign Terrorist Organizations*, U.S. DEPT OF STATE, <https://www.state.gov/foreign-terrorist-organizations/> (last visited June 10, 2020) [<https://perma.cc/QM2J-9UXX>]. I have used my own expertise and research on this issue to distinguish between groups that are and are not Arab and/or Muslim.

353. Aziz, *supra* note 264, at 91.

354. Sinnar, *supra* note 122, at 1357.

355. 18 U.S.C. § 2332b; 18 U.S.C. § 2339A(a) (listing Section 2332b as a predicate crime).

356. 18 U.S.C. § 956; 18 U.S.C. § 2339A(a) (listing Section 956 as a predicate crime).

357. Sinnar, *supra* note 122, at 1337.



it applies only to those countries designated by the State Department as sponsors of terrorism.<sup>358</sup> Since that law was passed in 1996, there have been eight designated state sponsors of terrorism, with six being Arab and/or majority Muslim.<sup>359</sup>

This nexus between material support laws and Arab and Muslim groups is reflected in the data. Though scattered, available information suggests most terrorism prosecutions, including for material support, are brought against Arabs and/or Muslim individuals,<sup>360</sup> often for vague or non-violent crimes.<sup>361</sup> For example, a recent study found that between 2012 and 2017 nearly all forty-five indictments charging violations of Section 2339A involved individuals who “came under the scrutiny of law enforcement based on the perception they sympathized, or had declared allegiance to, self-proclaimed Islamist militants abroad.”<sup>362</sup> Section 2333 and 1605A cases exhibit the same disproportionate focus on Arab and Muslim groups. Of the over eighty cases brought under Section 2333, nearly seventy have involved underlying terrorist activity allegedly committed by

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358. 28 U.S.C. § 1605A(a)(2).

359. These countries are Iran, Libya, Sudan, Syria, South Yemen, and Iraq. Cuba and North Korea have also been designated as state sponsors of terrorism. Cuba, as well as Iraq, South Yemen (which no longer exists), and Libya, have been removed from the state sponsor list. See DIANNE E. RENNACK, CONG. RSCH. SERV., R43835, STATE SPONSORS OF ACTS OF INTERNATIONAL TERRORISM — LEGISLATIVE PARAMETERS: IN BRIEF 8–9 (2006), <https://fas.org/sgp/crs/terror/R43835.pdf> [<https://perma.cc/Y8CL-XBP4>]. Currently, Iran, Syria, Sudan, and North Korea are listed as state sponsors. State Sponsors of Terrorism: Bureau of Counterterrorism, U.S. DEP’T OF STATE, <https://www.state.gov/state-sponsors-of-terrorism/> (last visited June 10, 2020) [<https://perma.cc/X5G8-D4F9>].

360. See Peter Bergen et al., *Terrorism in America After 9/11, Part II: Who Are the Terrorists?*, NEW AM., <https://www.newamerica.org/in-depth/terrorism-in-america/who-are-terrorists/> (last visited June 10, 2020) [<https://perma.cc/4VP5-NQ9U>] (reporting that of the 491 individuals charged with terrorism-related crimes or who died engaging in such crimes since 9/11, 452 have been Muslim).

361. See LORENZO VIDINO & SEAMUS HUGHES, *ISIS IN AMERICA: FROM RETWEETS TO RAQQA*, 7–8 (2015) (noting that, between March 2014 and December 2015, the overwhelming majority of U.S.-based ISIS supporters (73%) were not involved in plotting terrorist attacks in the U.S., and instead were arrested for “intent to do harm” overseas or for providing material support, specifically “personnel and funds,” to fighters in Syria and Iraq); CRIMES OF TERROR, *supra* note 215, at 147 (noting that “only a very small percentage of terrorism prosecutions have reflected an actual security threat . . .”).

362. Scott Sullivan, *Prosecuting Domestic Terrorism as Terrorism*, JUST SECURITY (Aug. 18, 2017), <https://www.justsecurity.org/44274/prosecuting-domestic-terrorism-terrorism/> [<https://perma.cc/Y5P4-8HBM>].

Arab and/or Muslim entities.<sup>363</sup> The lion's share of Section 1605A litigation has also been raised against Arab and/or Muslim-majority countries.<sup>364</sup>

Like their surveillance counterparts, the public and private material support suits rely on discriminatory stereotypes about Arabs and Muslims as being dangerous, irrational terrorists. This is partly reflected in the sanctions associated with the statutes. This regime, which is extremely punitive, appears designed not only to deter and prevent terrorism but also to disable its "violent" Muslim adherents.<sup>365</sup> Commenting on the criminal material support statutes, one scholar notes how sentencing defendants to long prison terms in these cases effectively communicates the view that "those affiliated with terrorist activity—primarily young Muslim men—are uniquely dangerous. . . [and] must . . . be incapacitated to protect society from their ideologically violent goals."<sup>366</sup>

### 3. The Impact on Social Cohesion

Together, FBI surveillance, citizen-on-citizen monitoring, and the public and private material support cases reinforce prejudices against Arabs and Muslims within American society. While these prejudices may fluctuate depending upon political and social factors,<sup>367</sup> they have endured since 9/11. According to polls conducted between 1993 and 2014, one in five Americans

363. Maryam Jamshidi, Antiterrorism Act Table of Cases (Aug. 14, 2020) (unpublished research) (on file with author).

364. According to published decisions available on Westlaw, in comparison to the more than 100 cases brought under the FSIA's terrorism exception against Arab and/or Muslim states, there have been less than twenty cases against Cuba and six against North Korea, as of this writing.

365. See, e.g., *Is History Repeating Itself?*, *supra* note 121, (arguing that sentencing policies subject young Muslim men to prison terms that are disproportionately severe given the non-violent nature of their crimes and lack of meaningful criminal history); see generally Jamshidi, *supra* note 233 (describing Section 2333's automatic trebling of damages plus loose liability requirements as part of the "world-wide battle" against terrorism).

366. Ahmed, *supra* note 121, at 1523.

367. See Murtaza Hussain & Maryam Saleh, *Bigoted Election Campaigns, Not Terror Attacks, Drive Anti-Muslim Activity*, INTERCEPT (Mar. 11, 2018), <https://the-intercept.com/2018/03/11/anti-muslim-activities-politics-terrorism-islamophobia/> [<https://perma.cc/4MF8-VNPA>] (reporting that anti-Muslim sentiment is driven by elections in which politicians resort to discriminatory tropes and rhetoric about Muslims to win votes).

view Muslims as threats to the United States.<sup>368</sup> Another poll conducted in 2014 found that only 27 percent of Americans had favorable views of Muslims, while only 32 percent had favorable views of Arabs.<sup>369</sup> While another poll from December 2017 claimed that attitudes toward Arabs and Muslims have improved,<sup>370</sup> more recent reports suggest that acceptance of anti-Muslim tropes is increasing again. For example, in 2019, a poll titled the National Islamophobia Index asked Americans to agree or disagree with several negative stereotypes associated with Muslims, including that “[m]ost Muslims living in the United States are more prone to violence than others”; “[m]ost Muslims living in the United States are hostile to the United States”; “[m]ost Muslims living in the United States are less civilized than other people”; and “[m]ost Muslims living in the United States are partially responsible for acts of violence carried out by other Muslims.”<sup>371</sup> The poll found that between 2018 and 2019 there was a four point increase in overall agreement with these statements.<sup>372</sup> Another report, issued by the Council on American Islamic Relations (CAIR),<sup>373</sup> recorded 10,015 incidents of anti-Muslim bias from 2014 to June 2019.<sup>374</sup> During the

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368. THE PRINCE ALWALEED BIN TALAL CTR. FOR MUSLIM-CHRISTIAN UNDERSTANDING, GEORGETOWN UNIV., *THE SUPER SURVEY: TWO DECADES OF AMERICANS' VIEWS ON ISLAM & MUSLIMS* 32 (The Bridge Initiative, 2015), <https://bridge.georgetown.edu/wp-content/uploads/2018/11/The-Super-Survey-1.pdf> [<https://perma.cc/5AF9-WRLV>].

369. Mary Wisniewski, *American Opinion of Arabs, Muslims Is Getting Worse: poll*, REUTERS (July 29, 2014), <https://www.reuters.com/article/us-usa-muslims-poll/american-opinion-of-arabs-muslims-is-getting-worse-poll-idUSKBN0FY1ZR20140729> [<https://perma.cc/UB2D-DPNW>].

370. *Poll: American Attitudes Improving Towards Arabs and Muslims*, VOA NEWS (Dec. 5, 2017), <https://www.voanews.com/usa/poll-american-attitudes-improving-toward-arabs-muslims> [<https://perma.cc/E7ST-K4N9>].

371. DALIA MOGAHED & ASKA MAHMOOD, INST. FOR SOC. POL'Y & UNDERSTANDING, *AMERICAN MUSLIM POLL 2019: PREDICTING AND PREVENTING ISLAMOPHOBIA* 19 (2019), <https://www.ispu.org/american-muslim-poll-2019-predicting-and-preventing-islamophobia/> [hereinafter *AMERICAN MUSLIM POLL 2019*] [<https://perma.cc/EKR3-RDBW>].

372. *Id.*

373. *About Us*, CAIR, [https://www.cair.com/about\\_cair/about-us/](https://www.cair.com/about_cair/about-us/) (last visited Aug. 8, 2020) [<https://perma.cc/U3MS-SEJH>].

374. COUNCIL ON AM. ISLAMIC RELS., *THE BIAS BRIEF: TRUMP'S IMPACT ON ANTI-MUSLIM BIAS* 5 (Sept. 2019), [http://www.islamophobia.org/images/2019/Bias\\_Brief\\_BB\\_2\\_-\\_FINAL.pdf](http://www.islamophobia.org/images/2019/Bias_Brief_BB_2_-_FINAL.pdf) [<https://perma.cc/8U7W-JP68>]. The report does not explicitly define “anti-Muslim bias” and instead lists various types of abuse included under this category, including harassment, denial of religious accommodation, intimidation, and bullying. Despite this and other shortcomings noted below, the report

same period, the organization recorded a total of 1,164 anti-Muslim hate crimes<sup>375</sup> and 506 “anti-mosque” incidents.<sup>376</sup>

As some of these reports and other research show, government discrimination fuels and supplements this private discrimination against Muslims. Indeed, the CAIR report explicitly connects private, anti-Muslim incidents with state action.<sup>377</sup> For example, in explaining the increase in anti-Muslim bias in 2017, the report partly blames the Muslim Ban, which was promulgated at the start of that year.<sup>378</sup> This relationship between private and public discrimination has also been noted by legal scholars and policy analysts.<sup>379</sup> As Professor Sahar Aziz has written, “[a]s the public interprets the government’s actions as part of reasonable national security policies, private actors feel justified in discriminating against Muslims in employment, housing, education, and public accommodations.”<sup>380</sup>

These dynamics—that is, the existence of pervasive prejudice against Arabs and Muslims reinforced by government action—help explain why there have been little to no political efforts that have successfully rolled back FBI surveillance and material support prosecutions, as well as their private analogues. These legally sanctioned programs communicate the message that, while “theoretically entitled to formal rights, [Muslims and/or Arabs] do not stand in for or represent the [American] nation.”<sup>381</sup> This promotes a view of Arabs and Muslims, embedded in law, as enemies “who seek to destroy the ‘American way of life.’”<sup>382</sup> By labeling Arabs and Muslims as the

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represents one of the few attempts to aggregate data on the treatment of American Muslims in the United States. *Id.*

375. *Id.* at 7.

376. *Id.* at 10. The report does not define “anti-mosque” incidents except to note that “the highest single type of incidents [consisted] of damage . . . destruction, or vandalism to mosque property at 148” and that “[t]hirty-seven [incidents] were related to land zoning issues.” *Id.*

377. *Id.* at 6.

378. *Id.*

379. See AMERICAN MUSLIM POLL 2019, *supra* note 371, at 19 (noting that “Islamophobia is not simply a phenomenon of societal sentiment, but is a structural phenomenon, manifesting in legislation, budget decisions, and law enforcement practices at the local, state, and federal levels” and that “public toleration for many of these [Islamophobic] practices is linked to higher [incidence of private anti-Muslim sentiment]”).

380. Aziz, *supra* note 349, at 186.

381. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1594 (2002).

382. *Id.* at 1595.

dangerous “terrorist other,”<sup>383</sup> these laws and programs frustrate the creation of a shared identity between this community and other members of U.S. society. While all Americans may not share the same concerns Arabs and Muslims have with U.S. counterterrorism policies, the possibility exists for different groups to come together in the service of curbing executive authority under these legalistic national security programs. This could be precipitated by a common commitment to civil liberties, similar experiences under those programs, or through a shared belief in other values and goals. The likelihood of this social cohesion is, however, frustrated by legalistic national security initiatives that buttress commonly held stereotypes about Arabs and Muslims, further marginalize those communities, and do not affect other groups.

This outcome stands in stark contrast to other national security programs that discriminate or otherwise negatively affect minorities. The following section begins this comparative study by looking at the Muslim Ban. The section that follows examines Section 215 and 702 surveillance and the controversy surrounding the Border Wall. Together, these three case studies emphasize law’s dynamic role in impacting social cohesion and generating political accountability for minority rights and interests. As these case studies demonstrate, where the rule of law is wielded in ways that appear explicitly discriminatory or have negative consequences for a large or small but diverse group of people, it generates political efforts at accountability for the executive, no matter who is impacted.

### C. *The Muslim Ban*

While the Muslim Ban primarily affects the rights of Arabs and Muslims, both citizen and noncitizen alike, its initial promulgation and subsequent revisions have triggered substantial public outcry. Though various factors have likely sparked this social cohesion, the ban’s explicitly discriminatory intent is a particularly significant influence. Anger and opposition to this discrimination has led to ongoing efforts to end the ban. This section examines these issues, beginning with background on the Muslim Ban and its rule of law credentials, continuing with

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383. Sahar F. Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y.C. L. REV. 33, 35 (2009).

its impact on Arab and Muslim Americans, and ending with the backlash it has received from across American society.

Only one week after his inauguration, President Trump signed executive Order 13,796 (“First Muslim Ban”), prohibiting nearly all non-U.S. citizen nationals from seven Muslim-majority states—Iraq, Iran, Libya, Syria, Yemen, Sudan, and Somalia—from entering the United States for ninety days.<sup>384</sup> Amongst other provisions, the order also placed an indefinite ban on the entry of all Syrian refugees.<sup>385</sup> Evoking Section 212 of the INA, the First Muslim Ban framed these restrictions as necessary to protect American citizens against terrorism.<sup>386</sup> Under Section 212, the President has broad authority to “suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem appropriate” upon making a finding that such entry “would be detrimental to the interests of the United States.”<sup>387</sup>

Since it was first issued, the Muslim Ban has had three main iterations.<sup>388</sup> After a nationwide preliminary injunction was issued against parts of the First Muslim Ban,<sup>389</sup> the Administration rescinded that order and issued a revised ban on March 6, 2017 (“Second Muslim Ban”).<sup>390</sup> Though it somewhat narrowed the original ban, including by removing Iraq and

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384. Exec. Order No. 13769 § 3(c), 3 C.F.R. 272 (2017) [hereinafter FIRST MUSLIM BAN]. The order did not apply to certain categories of travelers and allowed for exceptions “on a case-by-case basis.” *Id.* § 3(c), (g). While the ban did not explicitly list the countries it applied to, it incorporated, by reference to 8 U.S.C. § 1187(a)(12), those countries that were already subject to certain restrictions under the U.S. government’s visa waiver program. These countries included Iraq, Syria, Iran, Libya, Somalia, Sudan, and Yemen. *Fact Sheet: Protecting the Nation from Foreign Terrorist Entry to the United States*, DEP’T OF HOMELAND SEC. (Jan. 29, 2017), <https://www.dhs.gov/news/2017/01/29/protecting-nation-foreign-terrorist-entry-united-states> [<https://perma.cc/5WRJ-42HR>].

385. FIRST MUSLIM BAN § 5(c). The order also temporarily suspended the U.S. refugee resettlement program for 120 days. *Id.* § 5(a).

386. *Id.* §§ 1–2.

387. Immigration and Nationality Act of 1965 § 212(f), 8 U.S.C. § 1182(f).

388. There was also a “fourth” version of the Muslim Ban, which reactivated the U.S. refugee resettlement program albeit with “enhanced vetting” capabilities. Exec. Order No. 13815, 3 C.F.R. 390 (2017).

389. *Washington v. Trump*, 2017 WL 462040, No. C17-0141JLR, (W.D. Wash. Feb. 3, 2017), *denying stay pending appeal*, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), *reh’g en banc denied*, 858 F.3d 1168 (9th Cir. 2017).

390. Exec. Order No. 13,780, 3 C.F.R. 301 (2017), *amended by* Effective Date in Executive Order 13780, 3 C.F.R. 468 (2017) [hereinafter SECOND MUSLIM BAN].

eliminating the indefinite ban on Syrian refugees, the Second Muslim Ban continued to prohibit most travel from the six remaining countries.<sup>391</sup> This revised ban was immediately challenged in court, leading to more injunctions.<sup>392</sup>

In June 2017, the Supreme Court weighed in and granted the government's certiorari petition challenging the injunctions against the Second Muslim Ban.<sup>393</sup> Pending its merits review, the Court limited the scope of those outstanding injunctions and, subject to those restrictions, allowed the Second Muslim Ban to go into temporary effect.<sup>394</sup> Before the Supreme Court's merits review could take place, however, portions of the Second Muslim Ban expired on September 24, 2017.<sup>395</sup> In response, President Trump issued a proclamation permanently and indefinitely restricting travel by non-U.S. citizens from Chad, Iran, Libya, North Korea, Somalia, Syria, Yemen, and Venezuela ("Third Muslim Ban").<sup>396</sup> As with the First and Second Muslim Bans, the Third Muslim Ban was met with renewed litigation.<sup>397</sup>

391. SECOND MUSLIM BAN § 1(d)–(g).

392. *IRAP v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017), *aff'd in part and vacated in part*, 857 F.3d 554 (4th Cir. 2017), *cert. granted and injunction partially stayed* by *Trump v. IRAP*, 137 S. Ct. 2080 (2017), *vacated and remanded by*, 138 S. Ct. 353 (2017); *Hawai'i v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017), *aff'd in part and vacated in part*, 859 F.3d 741 (9th Cir. 2017), *cert. granted and injunction partially stayed* by *Trump v. IRAP*, 137 S. Ct. 2080 (2017), *vacated and remanded by Trump v. Hawaii*, 138 S. Ct. 377 (2017).

393. *Trump*, 137 S. Ct. at 2086.

394. *See id.* at 2088 (limiting preliminary injunctions against Second Muslim Ban only to those foreign nationals with a "credible claim of a bona fide relationship with a person or entity in the United States").

395. Chad Li, *President Trump Replaces Expired Travel Ban with New Restrictions on Eight Countries*, OGLETREE DEAKINS (Sept. 26, 2017), <https://ogletree.com/insights/president-trump-replaces-expired-travel-ban-with-new-restrictions-on-eight-countries/> [<https://perma.cc/HY5D-LRAQ>].

396. Proclamation No. 9645, 3 C.F.R. 135 (Sept. 24, 2017) [hereinafter *THIRD MUSLIM BAN*]. The new ban placed different immigration restrictions on each affected country. It also dropped Sudan from the list of banned countries, though it was later re-added in January 2020. *See infra* note 406. The ban on North Korea, which had little migration to the United States, and Venezuela, which applied only to a group of government officials and their families, was viewed as an attempt to undermine claims of anti-Muslim bias by adding two non-Muslim majority countries to the list. *Id.* § 2 (f)(ii); Oliver Laughland, *Trump Travel Ban Extended to Blocks on North Korea, Venezuela, and Chad*, *GUARDIAN* (Sept. 25, 2017), <https://www.theguardian.com/us-news/2017/sep/25/trump-travel-ban-extended-to-blocks-on-north-korea-and-venezuela> [<https://perma.cc/J2F7-9MLT>].

397. Once again, the Ninth and Fourth Circuits upheld nationwide injunctions against parts of the Third Muslim Ban. *Hawaii v. Trump*, 265 F. Supp. 3d 1140 (D. Haw.) [hereinafter *Hawaii I*], *aff'd in part and vacated in part*, 878 F.3d 662 (9th

While the rule of law issues with the first, short-lived version of the ban were particularly stark,<sup>398</sup> litigants challenged all three bans on rule of law grounds for exceeding the government's statutory authority and being inconsistent with the Constitution.<sup>399</sup> Whatever validity those arguments may have had, the Supreme Court issued a 5-4 decision in June 2018 upholding the Third Muslim Ban's rule of law credentials, concluding that it was consistent with the President's authority under the INA and the First Amendment's Establishment Clause.<sup>400</sup>

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Cir. 2017) (per curiam) [hereinafter *Hawaii II*], *rev'd* Trump v. Hawaii, 138 S. Ct. 2392 (2018); *IRAP* v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017) [hereinafter *IRAP I*], *aff'd*, 883 F.3d 233 (4th Cir. 2018) [hereinafter *IRAP II*], *rev'd* Trump v. Hawaii, 138 S. Ct. 2392 (2018). However, neither those decisions, nor the underlying district court injunctions, ultimately impacted the Third Muslim Ban. On December 4, 2017, the Supreme Court stayed the district court injunctions pending appellate review and allowed the Third Muslim Ban to go into immediate effect. Adam Lip-tak, *Supreme Court Allows Trump Travel Ban to Take Effect*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/politics/trump-travel-ban-supreme-court.html> [https://perma.cc/6HL9-MQ3Z]. Once the Ninth and Fourth Circuits weighed in, they also stayed their orders pending Supreme Court review of the Third Muslim Ban. *Hawaii II*, 878 F.3d at 702; *IRAP II*, 883 F.3d at 274.

398. While all three bans were publicly promulgated, general, constant through time, non-retroactive, and internally coherent, there are credible arguments that the First Muslim Ban violated the rule of law's requirement that law be clear and subject to rational lawmaking processes. As described below, the first ban was drafted quickly without proper internal review and was so poorly written that government officials did not clearly understand its scope. *See infra* notes 437–40 and accompanying text. The executive subsequently issued various forms of guidance during the first hours and days following the ban's implementation, clarifying the scope of the order in a piecemeal and often confusing fashion. *See, e.g.*, OFF. INSPECTOR GEN. OIG-18-37, DHS IMPLEMENTATION OF EXECUTIVE ORDER #13769 "PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES" 16–23, 26–31, 46–48, 56–58 (2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-01/OIG-18-37-Jan18.pdf> [hereinafter IG REPORT ON MUSLIM BAN] [https://perma.cc/D824-6AB8] (documenting various issues with creation, promulgation, and implementation of internal guidance for First Muslim Ban). There were also serious questions about whether DHS's Office of Customs and Border Protection initially complied with court orders enjoining application of parts of the First Muslim Ban. *Id.* at 6–7.

399. *See, e.g.*, *IRAP II*, 883 F.3d 233 (upholding district court injunction against certain parts of Third Muslim Ban as violating the First Amendment's Establishment Clause); *Hawaii II*, 878 F.3d 662 (upholding district court injunction against certain parts of the Third Muslim Ban as exceeding the President's statutory authority under the INA).

400. Trump v. Hawaii, 138 S. Ct. 2415, 2423 (2018) [hereinafter *SCOTUS Muslim Ban*]. Though relying on different rationale, the dissenting judges—Justices Stephen Breyer, Elena Kagan, Sonia Sotomayor, and Ruth Bader Ginsburg—concluded that the Muslim Ban violated the First Amendment's Establishment Clause. *Id.* at 2433 (Breyer, J., dissenting); *id.* at 2433–34 (Sotomayor, J., dissenting).



The majority decision also implicitly upheld the ban's compliance with other formalist rule of law requirements. In particular, the majority referenced the ban's purported adherence to a rational lawmaking process. In the First and Second Muslim Bans, the Administration had variously ordered a "review" to determine what information was needed from which countries to ensure foreign nationals desiring to travel to the United States did not pose a "security or public-safety threat."<sup>401</sup> As part of its rationale for upholding the Third Muslim Ban, the majority emphasized that review process and its attendant procedures,<sup>402</sup> which were detailed in the ban's text.<sup>403</sup>

While bolstering the Muslim Ban's formalist credentials, the Supreme Court's decision effectively "set no limit on the president's ability to exclude . . . groups on the basis of race or nationality, so long as he claims their entry would be detrimental to the United States for some foreign policy or national security reasons."<sup>404</sup> Indeed, since the Court's decision, Trump has banned more countries. Though Chad is no longer on the list,<sup>405</sup> the Administration has added six more nations, bringing the total number of banned countries to thirteen.<sup>406</sup> While these newly added countries are not all majority Muslim, they are mostly non-white and have substantial Muslim populations.<sup>407</sup>

401. FIRST MUSLIM BAN § 3(a); SECOND MUSLIM BAN § 2(a).

402. *SCOTUS Muslim Ban*, 138 S. Ct. at 2421.

403. THIRD MUSLIM BAN §§(1)(c)–(j). In her dissent, Justice Sotomayor questioned the legitimacy of this review process, which she described as supposedly examining hundreds of countries but yielding a report of a "mere 17 pages." *Id.* at 2443 (Sotomayor, J., dissenting).

404. Shirin Sinnar, *Trump v. Hawaii: A Roadmap for New Racial Origin Quotas*, STAN. L. SCH. BLOGS (June 26, 2018), <https://law.stanford.edu/2018/06/26/trump-v-hawaii-a-roadmap-for-new-racial-origin-quotas/> [<https://perma.cc/86S9-5CTG>].

405. Eric Beech, *U.S. Lifts Travel Ban on Chad Citizens: White House*, REUTERS (Apr. 10, 2018), <https://www.reuters.com/article/us-usa-chad-security/u-s-lifts-travel-ban-on-chad-citizens-white-house-idUSKBN1HH3FW> [<https://perma.cc/NJ3G-CKDL>].

406. The six new countries are Eritrea, Kyrgyzstan, Nigeria, Myanmar, Tanzania, and Sudan. Proclamation No. 9983, 85 Fed. Reg. 6699, 6701–02 (Jan. 31, 2020). While the restrictions vary for each country, the new ban generally applies only to citizens of these states who are seeking to enter the United States as immigrants, i.e., permanent residents or green card holders. *Id.* at 6703.

407. See Zolan Kanno-Youngs, Opinion, *Trump Administration Adds Six Countries to Travel Ban*, N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/us/politics/trump-travel-ban.html> [<https://perma.cc/3W4F-ZUPZ>] (noting that "[a]ll six countries have substantial Muslim populations"); Grace Meng, *New Travel Ban Reflects Trump Administration's Discriminatory Intent*, HILL (Feb. 4, 2020), <https://thehill.com/opinion/national-security/481363-new-travel-ban-reflects->

Indeed, according to reports, the new order has doubled the number of affected Muslims to 320 million worldwide.<sup>408</sup>

Though the Muslim Ban has had an obvious impact on foreign nationals, it has also had clear and dramatic effects on American citizens.<sup>409</sup> Given the ban's focus on countries with Muslim majorities or large Muslim populations,<sup>410</sup> most of these affected American citizens are likely of Muslim heritage.<sup>411</sup> Indeed, some of these Americans brought suit against all three versions of the Muslim Ban, arguing that it prevented them from reuniting with their relatives.<sup>412</sup> Since the Third Muslim Ban went into effect in December 2017, there has been mounting evidence of this family separation. According to one report examining 549 visa waiver applications filed under the Muslim Ban's waiver process,<sup>413</sup> 15.3 percent of these applications were "siblings who were separated from each other," 26 percent were "children who were separated from parents," and 37.7 percent

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trump-administrations-discriminatory-intent [<https://perma.cc/Y8S5-36PL>] (describing expansion of Third Muslim Ban as "designed to curtail legal immigration by nonwhite people, Muslims, and those with lower incomes").

408. Sam Levin, *Trump is Deciding Who is American: How the Travel Ban is Tearing Families Apart*, GUARDIAN (Feb. 16, 2020), <https://www.theguardian.com/us-news/2020/feb/16/trump-is-deciding-who-is-american-how-the-new-travel-ban-is-tearing-families-apart> [<https://perma.cc/ZPM4-HMHR>].

409. *Article II and Antidiscrimination Norms*, *supra* note 117, at 98.

410. Vahid Niayesh, *Statistics Show that Trump's "Travel Ban" Was Always a Muslim Ban*, QUARTZ (Oct. 28, 2019), <https://qz.com/1736809/statistics-show-that-trumps-travel-ban-was-always-a-muslim-ban/> [<https://perma.cc/7YEB-5L7U>] (reviewing data from December 2017, at the start of the Third Muslim Ban, through mid-2019 and demonstrating that banned Muslim countries experienced steep drops in the number of immigrant visas issued, while non-Muslim countries—Venezuela and North Korea—had virtually unchanged numbers compared to pre-ban levels).

411. Other U.S. citizens who are neither Muslim nor from affected countries have undoubtedly been impacted as well, including spouses and fiancées. One might argue, then, that the Muslim Ban is not just a case of explicit discrimination but also a situation where executive action impacted a small but diverse group of communities. Without discounting this overlap, the Muslim Ban's discriminatory cast has been especially prominent in shaping political accountability efforts. See *infra* notes 427–34 and accompanying text.

412. See, e.g., *IRAP I*, 265 F. Supp. 3d 570, 593–94 (D. Md. 2017) (noting claims by various U.S. citizens and legal permanent resident plaintiffs "assert[ing] that they will suffer harm from the implementation of the [ban] in the form of prolonged separation of family members located in the Designated Countries"); *Hawaii I*, 265 F. Supp. 3d 1140, 1150–51 (D. Haw.) (detailing claims by various U.S. citizens and legal permanent residents who are Muslim and/or from affected countries and alleging injury based, in part, on an inability to reunite with family members).

413. THIRD MUSLIM BAN § 3(c) (allowing eligible individuals from banned countries to enter the United States on a case-by-case basis).

were “partners who were separated from each other.”<sup>414</sup> At the time, the State Department had granted only 5.1 percent of all visa waivers filed under the ban.<sup>415</sup>

Despite the disproportionate impact on their communities, Muslim and Arab Americans have not been alone in opposing the order. To the contrary, both before and after the Supreme Court upheld the Muslim Ban, there has been substantial social cohesion in favor of rejecting the ban and curbing executive authority. When the First Muslim Ban was issued, it immediately led to significant public outcry across demographic groups.<sup>416</sup> Starting one day after its promulgation, large protests took place at various sites around the country and world.<sup>417</sup> In the United States, protesters gathered at various airports, including New York’s JFK, Chicago’s O’Hare, Los Angeles’s LAX, and Washington’s Dulles airport.<sup>418</sup> During many of these demonstrations, participants held signs of solidarity emblazoned with statements like “We Are All Immigrants” and “Let Refugees In.”<sup>419</sup>

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414. *The Muslim and African Bans*, BRIDGE INITIATIVE, <https://bridge.georgetown.edu/research-publications/reports/muslimban/> (last visited June 26, 2020) [<https://perma.cc/6YLA-QZLM>].

415. This figure is based on visa waivers filed between December 2017 and March 2019. *Id.* While recent evidence suggests the number of waiver approvals increased between March 2019 and April 2020, three in four waiver applications were still denied during this period. *Id.*

416. Chelsea Bailey & Katie Wong, *Global Demonstrations over Trump’s Policies Heat Up Amid Anger over Travel Ban*, NBC NEWS (Feb. 4, 2017, 10:37 AM), <https://www.nbcnews.com/politics/donald-trump/global-demonstrations-over-trump-s-policies-heat-amid-anger-over-n716831> [<https://perma.cc/SH5H-5QA6>].

417. See, e.g., *id.*; Chris Riotta, *Nationwide Protests Erupt after Supreme Court Upholds Trump’s Travel Ban*, INDEP. (June 26, 2018, 7:51 PM), <https://www.independent.co.uk/news/world/americas/us-politics/protests-demonstration-travel-ban-trump-muslim-groups-cair-supreme-court-rally-a8418051.html> [<https://perma.cc/N5DK-3XX4>].

418. *Protests Erupt at Airports Nationwide over Immigration Action*, CBS (Jan. 29, 2017, 12:50 AM), <https://www.cbsnews.com/news/protests-airports-immigration-action-president-trump/> [<https://perma.cc/3H52-NMP9>].

419. *Id.*

A host of discrete groups—from governors<sup>420</sup> to mayors<sup>421</sup> to universities<sup>422</sup>—have spoken out against the Muslim Ban. In particular, Japanese American individuals and groups have condemned the ban, drawing parallels to World War II-era internment of individuals of Japanese heritage in the United States.<sup>423</sup> Jewish American groups have also railed against the ban, invoking the legacy of Jews fleeing the Holocaust and other persecution in Europe.<sup>424</sup> Outrage over the ban has been expressed in other ways, as well. According to reports, the ACLU received \$24 million in donations the weekend after the First Muslim Ban went into effect, which was more than it had received in all of

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420. See, e.g., Press Release, Dannel P. Malloy, Governor Conn., Gov. Malloy Statement on Federal Court Order Blocking Travel Ban (Mar. 15, 2017), <https://portal.ct.gov/Malloy-Archive/Press-Room/Press-Releases/2017/03-2017/Gov-Malloy-Statement-on-Federal-Court-Order-Blocking-Travel-Ban> [<https://perma.cc/8CQT-DX29>] (statement from Connecticut governor commending court order blocking Muslim Ban); Ryan Quigley, *Governor McAuliffe Releases Statement on Trump Executive Order*, ABC 8 NEWS (Jan. 28, 2017, 9:33 PM), <https://www.wric.com/news/governor-mcauliffe-releases-statement-on-trump-executive-order/> [<https://perma.cc/XVQ2-PFCP>] (statement from Virginia governor opposing Muslim Ban).

421. See, e.g., Statement, Bill de Blasio, Mayor N.Y.C., Statement from Mayor Bill de Blasio on President Trump's Travel Ban (Mar. 6, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/133-17/statement-mayor-bill-de-blasio-president-trump-s-travel-ban> [<https://perma.cc/24C6-ZYPD>] (statement from New York City mayor opposing Muslim Ban); Statement, Eric Garcetti, Mayor L.A., Statement: Mayor Garcetti on Revised Travel Ban Executive Order (Mar. 6, 2017), <https://www.lamayor.org/statement-mayor-garcetti-revised-travel-ban-executive-order> [<https://perma.cc/47RV-432C>] [hereinafter *Garcetti Statement*] (statement from Los Angeles mayor opposing Muslim Ban).

422. Susan Svrluga, *Universities Respond to New Executive Order on Immigration with Concern*, WASH. POST (Mar. 6, 2017, 6:49 PM), <https://www.washingtonpost.com/news/grade-point/wp/2017/03/06/universities-respond-to-new-executive-order-on-immigration-with-concern/> [<https://perma.cc/U8T8-DN5L>].

423. Richard Wolf, *Children of Japanese American Legal Pioneers from World War II Fight Travel Ban*, USA TODAY (Oct. 10, 2017, 8:00 AM), <https://www.usatoday.com/story/news/politics/2017/10/10/children-japanese-american-legal-pioneers-world-war-ii-fight-travel-ban/740910001/> [<https://perma.cc/2MDY-UDGK>]; *JACL Continues Opposition to Newly Issued Immigration Ban*, Japanese American Citizens League (Sept. 25, 2017), <https://jacl.org/jacl-continues-opposition-to-newly-issued-immigration-ban/> [<https://perma.cc/W3H5-KKM2>].

424. *Revised Executive Order on Immigration Remains Dangerous and Wrong*, J STREET (Mar. 6, 2007), <https://jstreet.org/press-releases/revised-executive-order-immigration-remains-dangerous-wrong/#.XtbeMS85Q0o> [<https://perma.cc/SCG5-MJ7K>].

2016.<sup>425</sup> Starbucks pledged to hire 10,000 refugees worldwide in response to the order.<sup>426</sup>

While some opposition to the ban suggests “majority” interests may be at play,<sup>427</sup> most of the social cohesion has focused on the ban’s explicitly discriminatory cast. This opposition to the ban’s overt discrimination is the strongest and most consistent argument against the ban raised by Arab and Muslim Americans, various religious<sup>428</sup> and ethnic organizations,<sup>429</sup> as well as diverse professional groups<sup>430</sup> and politicians.<sup>431</sup> The Muslim Ban has, for example, been decried as “out of step with values of religious tolerance and equality,”<sup>432</sup> as embracing “xenophobia /Islamophobia that contradicts our American values,”<sup>433</sup> and as reflecting an “obsession with religious discrimination [that] is disgusting, un-American, and outright dangerous.”<sup>434</sup>

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425. Alia E. Dastagir, *Outrage over Trump’s Immigrant Ban Helps ACLU Raise More Money Online in One Weekend than in All of 2016*, USA TODAY (Jan. 29, 2017, 6:09 PM), <https://www.usatoday.com/story/news/nation/2017/01/29/aclu-fundraising-records-muslim-immigrant-ban/97218098/> [<https://perma.cc/3XH6-2TJ2>].

426. Tribune News Services, *Starbucks to Hire 10,000 Refugees in Response to Trump’s Executive Order*, CHIC. TRIB. (Jan. 29, 2017, 7:51 PM), <https://www.chicagotribune.com/business/ct-starbucks-refugees-trump-executive-order-20170129-story.html> [<https://perma.cc/ET6V-GGYJ>].

427. Svrluga, *supra* note 422 (opposing the ban because it does not “recognize the importance of international medical graduates, physicians, and medical researchers to the nation’s health security”); *Letter from Foreign Policy Experts on Travel Ban*, N.Y. TIMES (Mar. 11, 2017), <https://www.nytimes.com/interactive/2017/03/11/us/politics/document-letter-foreign-policy-trump.html> [<https://perma.cc/ZY8M-F54B>] (describing numerous national security officials who opposed the ban because it hurts U.S. national security and undermines the fight against terrorism).

428. Jack Jenkins, *A List of Faith Groups Opposing Trump’s New Muslim Ban*, THINK PROGRESS (Mar. 7, 2017, 2:18 PM), <https://archive.thinkprogress.org/faith-groups-opposing-new-muslim-ban-d88a75caea/> [<https://perma.cc/EDV9-F2RS>] (describing various faith groups as condemning the Muslim Ban for its “affront to religious freedom”).

429. See, e.g., *supra* notes 423–28 and accompanying text.

430. See, e.g., Paul Fain, *Forceful Response: The Trump Administration’s Entry Ban Triggered Wide Condemnation from Colleges, Associations, Faculty Groups and Others in Higher Education*, INSIDE HIGHER ED (Jan. 30, 2017), <https://www.insidehighered.com/news/2017/01/30/higher-education-leaders-denounce-trumps-travel-ban> [<https://perma.cc/MTE8-BLHR>] (compiling various responses from higher education professionals condemning the Muslim Ban’s discriminatory aims).

431. See sources cited *supra* notes 420–25 and accompanying text.

432. *Garcetti Statement*, *supra* note 421.

433. Mahita Gajanan, *‘Still a Muslim Ban’: Lawmakers React to President Trump’s Travel Ban*, TIME (Mar. 6, 2017, 1:36 PM), <https://time.com/4692116/donald-trump-travel-ban-internet-reaction/> [<https://perma.cc/P8HA-HSN4>].

434. *Id.*

There is ample evidence to support these claims, including Trump's many explicit anti-Muslim comments, the text of the First Muslim Ban, and the process by which the first ban was promulgated. Many of those anti-Muslim comments were made during the 2016 presidential election. These included Trump's "call[] for a total and complete shutdown of Muslims entering the United States"; his statement that "Islam hates us . . . . [W]e can't allow people coming into this country who have this hatred of the United States"; his claim that "[w]e're having problems with Muslims, and we're having problems with Muslims coming into the country"; and his statement that Muslims "do not respect us at all" and "don't respect a lot of the things that are happening throughout not only our country, but they don't respect other things."<sup>435</sup>

The text of the First Muslim Ban also provides evidence of its discriminatory nature. While it did not express an explicit intention to ban Muslims, the First Muslim Ban contained other indications that strongly suggest such intent.<sup>436</sup> In addition to exclusively impacting Muslim majority countries,<sup>437</sup> the First Muslim Ban contained various thinly veiled stereotypes about Muslims. As part of its purpose, the ban stated that "[t]he United States cannot, and should not, admit those . . . who would place violent ideologies over American law" or "those who engage in acts of bigotry or hatred (including 'honor' killings [or] other forms of violence against women . . . )"<sup>438</sup>—all of which are stereotypes associated with Muslims.<sup>439</sup>

Finally, the process through which the first order was issued points to motives that are illegitimate, at the very least. According to reporting at the time, the First Muslim Ban circumvented

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435. *SCOTUS Muslim Ban*, 138 S. Ct. 2415, at 2435–37 (2019) (Sotomayor, J., dissenting). Trump continued to allude to a "desire to keep Muslims out of the country" even as litigation against the Muslim Ban was ongoing. *Id.* at 2437.

436. Abed Ayoub & Khaled Beydoun, *Executive Disorder: The Muslim Ban, Emergency Advocacy, and the Fires Next Time*, 22 MICH. J. OF RACE & L. 215, 225 (2017).

437. Michael D. Shear & Helene Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html> [<https://perma.cc/TR66-BSLZ>].

438. FIRST MUSLIM BAN § 1.

439. Ayoub & Beydoun, *supra* note 436.

the executive branch's own review processes.<sup>440</sup> The Secretary of DHS, the agency responsible for the order's implementation at the U.S. border, had seen it only a few days before it was issued and was caught off guard when it suddenly went into effect.<sup>441</sup> Nor was the order subject to legal review and analysis by DHS attorneys.<sup>442</sup> As a result of this haphazard process, the order was so poorly drafted—it was unclear, for example, whether it covered legal permanent residents<sup>443</sup>—and abruptly implemented that it immediately caused chaos at airports in the United States and abroad.<sup>444</sup>

Resistance to the Muslim Ban remains ongoing. Street protests against the First Muslim Ban died down in early February 2017,<sup>445</sup> likely in response to judicial decisions enjoining that ban's key provisions. After the Supreme Court upheld the Muslim Ban, demonstrations erupted again, though not at previous levels.<sup>446</sup> Other forms of opposition, including through media<sup>447</sup> and legal advocacy,<sup>448</sup> as well as political lobbying,<sup>449</sup> have been even more important and consistent. A congressional hearing on the ban was held in September 2019, featuring testimony from

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440. Michael D. Shear & Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/politics/donald-trump-rush-immigration-order-chaos.html> [https://perma.cc/9Y8Y-KCY9].

441. *Id.*

442. *Id.* As detailed in a subsequent government report on the First Muslim Ban's implementation, the Office of Legal Counsel ("OLC") at the Department of Justice, as well as the White House Counsel's office, reviewed the original ban. IG REPORT ON MUSLIM BAN, *supra* note 398, at 8. According to the report, however, the OLC opinion had a "dearth of analysis" and simply stated that the "proposed Order is approved with respect to form and legality." *Id.* at 9.

443. *Id.* at 20–21.

444. Shear & Nixon, *supra* note 440.

445. Colin Moynihan, *About 20 Rabbis Arrested During Protest over Trump Travel Ban*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/nyregion/rabbis-arrested-protest-trump-muslim-ban.html> [https://perma.cc/TR7R-Q697].

446. Riotta, *supra* note 417.

447. See, e.g., Meng, *supra* note 407 (op-ed from immigration advocate criticizing Muslim Ban).

448. Sharon Samber, *Still Fighting the Muslim Ban After Two Years*, HIAS (Jan. 26, 2019), <https://www.hias.org/blog/still-fighting-muslim-ban-after-two-years> [https://perma.cc/7VFP-JPZ4].

449. See NO MUSLIM BAN EVER CAMPAIGN, <https://www.nomuslimbanever.com> (last visited June 2, 2020) [https://perma.cc/9QP4-EBRD] (political and legal advocacy campaign aimed at ending Muslim Ban).

American families impacted by the order.<sup>450</sup> Earlier that year, Democratic congressional members introduced the NO BAN Act to end the Muslim Ban and place limits on the President's ability to enact similar orders in the future, including by limiting executive authority under Section 212 of the INA.<sup>451</sup> As of this writing, both bills remain pending in Congress. Democratic Presidential nominee Joe Biden has also issued a statement committing to repeal the Muslim Ban.<sup>452</sup>

#### *D. Section 215 and 702 Surveillance and Border-Land Controversies*

As with laws that are explicitly discriminatory, laws that empower the executive and undermine civil liberties have often generated political accountability where either a sizable portion of the population or a small but diverse range of groups have been negatively affected. This section explores this phenomenon by examining Section 215 and 702 surveillance, as well as the Border Wall, the legal bases for these initiatives, political reactions to them, and resulting efforts to restrict executive power.

In 2013, revelations about secret surveillance programs created under Sections 215 and 702—a telephony metadata collection program as well as a program known as PRISM—helped trigger congressional legislation curbing those initiatives and reforming the statutes themselves. Even though Arab and Muslim Americans were likely targeted by these national security programs, the revelations made clear that the rights of millions of Americans were also impacted. These broad-based negative consequences helped trigger political accountability for these programs and privacy protections for all Americans, Arabs and Muslim included. In the case of the Border Wall, a small but diverse coalition of impacted individuals, including various communities of color and social justice groups, have come together

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450. *Oversight of the Trump Administration's Muslim Ban Before the H. Comm. on the Judiciary*, 116th Cong. (2019), <https://judiciary.house.gov/calendar/event-single.aspx?EventID=2268> [<https://perma.cc/MF87-G3TE>].

451. National Origin-Based Antidiscrimination for Nonimmigrants Act (NO BAN Act), S. 1123, 116th Cong. (2019); National Origin-Based Antidiscrimination for Nonimmigrants Act (NO BAN Act), H.R. 2214, 116th Cong. (2019).

452. *Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN PRESIDENT, <https://joebiden.com/immigration/> (last visited July 1, 2020) [<https://perma.cc/LPM5-MZHH>].



to push back against this initiative. This political backlash, which remains ongoing, has contributed to congressional refusals to fully fund the Wall and continuing public protests.

### 1. Section 215 and 702 Surveillance

Like FBI surveillance, the material support cases and their private analogues, Section 215 and 702 surveillance, are examples of formally legalistic national security programs that expand executive power and erode civil liberties. However, unlike those other programs, the rule of law has generated social cohesion that has led to restrictions on these surveillance initiatives. To demonstrate this, this section starts by laying out the general contours of the FISA statute, which is the background framework for Sections 215 and 702. It then examines the statutes themselves, their compliance with the rule of law, as well as the telephony metadata and PRISM programs created under them. It concludes by looking at the political accountability these initiatives have generated.

FISA generally gives the executive “extremely powerful investigative techniques, permitting access to private communications of all kinds.”<sup>453</sup> Originally enacted in 1978,<sup>454</sup> the statute allows the executive to engage in various types of intelligence work targeting foreign powers and their agents.<sup>455</sup> Generally, FISA applies where that intelligence gathering is connected to any U.S. person or territory, where there is a reasonable expectation of privacy, and where a search warrant would normally be required.<sup>456</sup> The statute also creates two judicial bodies: the

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453. DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS § 4:1 (2010).

454. FISA was passed in response to revelations about the executive’s long-standing mass surveillance of U.S. citizens, including political activists and dissidents. Walter F. Mondale et al., *No Longer a Neutral Magistrate: The Foreign Intelligence Surveillance Court in the Wake of the War on Terror*, 100 MINN. L. REV. 2251, 2259–62 (2016) These revelations were exposed by the Church Committee, the same Congressional body whose work led to the creation of the FBI’s Levi Guidelines, noted earlier. Berman, *supra* note 47, at 12.

455. KRIS & WILSON, *supra* note 453, § 4:2. Amongst its authorizations, FISA allows for physical searches targeting foreign powers or agents of foreign powers; the use of pen registers and trap-and-trace devices; and court orders compelling the production of tangible things in connection with certain national security investigations. *Id.*

456. JENNIFER GRANICK, AMERICAN SPIES: MODERN SURVEILLANCE, WHY YOU SHOULD CARE, AND WHAT TO DO ABOUT IT 184 (2017).

Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISCR)—that are responsible for overseeing the government's foreign surveillance work.<sup>457</sup> This judicial review, which the executive typically participates in *ex parte*,<sup>458</sup> provides few meaningful restrictions and has historically had little impact on the presidency's broad FISA powers.<sup>459</sup>

In 2008, Congress amended FISA to add Section 702.<sup>460</sup> While leaving much of FISA intact, Section 702 has created a “new and independent source of intelligence collection authority, beyond that granted in traditional FISA.”<sup>461</sup> Under this provision, the Attorney General and the Director of National Intelligence may jointly authorize the targeting of “persons reasonably believed to be located outside the United States to acquire foreign intelligence information,” for up to one year.<sup>462</sup> The executive may not, however, use this authority to “intentionally target[] ... any person known to be in the United States or any U.S. person reasonably believed to be located abroad.”<sup>463</sup> Before implementing any authorized targeting, “the Attorney General and the Director of National Intelligence shall provide to the [FISC] written certification and any supporting affidavit, under oath and under seal . . . .”<sup>464</sup>

In a departure from regular FISA, Section 702 does not require the government establish probable cause that its target is a foreign power or an agent of a foreign power.<sup>465</sup> Nor does the government need to establish that the target is engaging in

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457. KRIS & WILSON, *supra* note 453, at § 4:2. The FISC considers applications for electronic surveillance, while FISCR considers FISC denials of electronic surveillance applications. *Id.* § 5:1.

458. Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161, 1162 (2015). As discussed below, pursuant to 2015 amendments to the statute, FISA now allows for *amicus curiae* to participate in some cases. *See infra* note 526 and accompanying text.

459. Scott Boykin, *The Foreign Intelligence Surveillance Act and the Separation of Powers*, 38 U. ARK. LITTLE ROCK L. REV. 33, 34–35 (2015).

460. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. 110-261, 122 Stat. 2436 (2008) (codified as amended in scattered sections of 50 U.S.C.).

461. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 404 (2013) (internal quotation marks and citation omitted).

462. 50 U.S.C. § 1881a(a).

463. *Clapper*, 568 U.S. at 405 (citing 50 U.S.C. § 1881a(b)(1)–(3)).

464. 50 U.S.C. § 1881a(h)(1)(A). This requirement is subject to an exception detailed in the statute, but not relevant here. *Id.* at § 1881a(h)(1)(B).

465. *Clapper*, 568 U.S. at 404.

illegal activity.<sup>466</sup> Also unlike regular FISA, the government is not required to specify the nature and location of each facility or place where the electronic surveillance will be conducted.<sup>467</sup> Though the FISC reviews the executive's targeting certification for a number of elements,<sup>468</sup> the court "is limited in the role it can play with regard to reviewing the certification . . . . As long as the certification [and other] elements are present . . . the Court *shall* enter an [*ex parte*] order approving the certification . . . ." <sup>469</sup>

While 702 surveillance is subject to "statutory [limitations], judicial authorization, congressional supervision, and compliance with the Fourth Amendment,"<sup>470</sup> the statute effectively allows the executive to "listen to Americans when we talk to foreigners overseas about matters of foreign intelligence interest."<sup>471</sup> Indeed, both before and since its passage, many civil libertarians and members of Congress have criticized Section 702 because of its threats to the Fourth Amendment rights of all Americans.<sup>472</sup>

A few years before Section 702 became law, Congress passed Section 215, which also expanded the government's surveillance powers under FISA.<sup>473</sup> Amending FISA Section 502, Section 215 of the USA PATRIOT Act gives the FBI authority to obtain court orders from the FISC "requiring the production of any tangible things (including books, records, papers, documents, and other items) . . . ." <sup>474</sup> Under the original language of Section 502, which was passed in 1998, the FBI could only request business records from common carriers, public accommodation facilities, storage facilities, and vehicle rental facilities.<sup>475</sup> While this

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466. GRANICK, *supra* note 456, at 213.

467. *Clapper*, 568 U.S. at 404.

468. *See id.* at 405 (detailing various elements of FISC review).

469. Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL'Y 117, 140 (2015) [hereinafter *Section 702 and the Collection of International Telephone and Internet Content*] (internal quotations and citation omitted) (emphasis in original).

470. *Clapper*, 568 U.S. at 404.

471. GRANICK, *supra* note 456, at 214.

472. *Id.* at 119; LAURA DONOHUE, *THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE* 36, 64–65 (2016) [hereinafter *FUTURE OF FOREIGN INTELLIGENCE*].

473. USA PATRIOT Act, Pub. L. No. 107–140, § 215, 115 Stat. 272, 287 (2001).

474. *Id.*

475. *FUTURE OF FOREIGN INTELLIGENCE*, *supra* note 472, at 14, 25.

authority was already quite broad,<sup>476</sup> Section 215 removes even these restrictions and makes it possible for the government to seek any kind of business or personal record from “just about any institution or company.”<sup>477</sup>

Section 215 initially removed other limitations placed on Section 502,<sup>478</sup> including its exclusive application to records that pertained to a “foreign power or an agent of a foreign power.”<sup>479</sup> The statute was amended in 2005 to change this and require that the executive establish “reasonable grounds to believe that the tangible things” are “relevant to an authorized investigation . . . to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities” and show that the records “pertain to (i) a foreign power or an agent of a foreign power; (ii) the activities of a suspected agent of a foreign power . . . ; or (iii) an individual in contact with, or known to, a suspected agent of a foreign power . . . ,” amongst other things.<sup>480</sup>

Under Section 215, an investigation shall not be conducted “of a United States person” solely on the basis of First Amendment protected activities.<sup>481</sup> Like Section 702, as long as the executive’s application meets all the statutory requirements, the FISC “shall enter an ex parte order as requested, or as modified, approving the release of tangible things.”<sup>482</sup>

As with Section 702, scholars, civil libertarians, and members of Congress have long decried the rights-eroding effects and substantial power Section 215 gives to the executive.<sup>483</sup> As one scholar describes it, by removing various limitations on records

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476. *Id.* at 14.

477. *Id.* at 25.

478. *Id.* at 14–15.

479. Compare USA PATRIOT Act, Pub. L. No. 107-140, § 215, 115 Stat. at 287 (2008), with Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 602, 112 Stat. 2396, 2410 (1998).

480. USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005, PL 109-177, March 9, 2006, 120 Stat 192; *Section 702 and the Collection of International Telephone and Internet Content*, *supra* note 469, at 797–802.

481. 50 U.S.C. § 1861(a)(2)(B).

482. *Id.* § 1861(c)(1).

483. See, e.g., Ryan Lizza, *The Metadata Program in Eleven Documents*, NEW YORKER (Dec. 31, 2013), <https://www.newyorker.com/news/daily-comment/the-metadata-program-in-eleven-documents> [<https://perma.cc/LDZ3-88BT>] (reporting on 2005 letter sent by then-Senators Barack Obama, John Kerry, Richard Durbin, as well as Senator Chuck Hagel, deriding Section 215 for facilitating “fishing expeditions” against innocent Americans).

requests, Section 215 effectively allows the government to “collect information on people not suspected of wrongdoing, as long as it *relate[s]* to an authorized investigation.”<sup>484</sup>

Though these concerns with the laws’ constitutional implications and bolstering of executive power are important and legitimate, neither these nor other aspects of Sections 215 and 702 run afoul of the rule of law. Indeed, Congress passed the FISA statute to ensure that “the statutory rule of law . . . prevail[s] in the area of foreign intelligence surveillance.”<sup>485</sup> Consistent with this, both statutes are general, clear, constant through time, non-retroactive, and internally coherent.<sup>486</sup> To the extent executive action has been judicially determined as incongruent with these statutes, publicly available information suggests it has typically been brought into alignment or otherwise sanctioned.<sup>487</sup> It is also far from clear that either Section 215 or 702 facially contradict applicable constitutional jurisprudence.<sup>488</sup>

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484. FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472, at 26 (emphasis in original).

485. S. REP. NO. 95-604, pt. 1, at 7 (1977). Notwithstanding Congress’s aim, many scholars have debated whether FISA places meaningful restrictions on executive action, especially when it comes to civil liberties. *See, e.g.*, FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472 at 2-3 (arguing that FISA is no longer sufficient to protect the civil liberties of Americans); Margo Schlanger, *Intelligence Legalism and the National Security Agency’s Civil Liberties Gap*, 6 HARV. NAT’L SEC. J. 112, 113-20 (2015) (arguing that FISA created “intelligence legalism” that subjects the executive’s foreign surveillance to meaningful legal limits but fails to fully protect civil liberties).

486. One might argue that Section 215 and 702 are inconsistent with the rule of law since the programs promulgated under those statutes are often secret. As discussed below, however, it is far from clear that secrecy is always prohibited by the rule of law. *See infra* note 510. Even if it is, the statutes themselves are public and give people notice about what the government is authorized to do, even if it is done secretly.

487. *See, e.g.*, Memorandum Opinion and Order 45-121, [Redacted], (FISA Ct. Oct. 18, 2018) (holding that the FBI’s queries of Section 702 information and related procedures violated the statute and the Fourth Amendment and imposing certain documentation requirements on FBI), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018\\_Cert\\_FISC\\_Opin\\_18Oct18.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf) [<https://perma.cc/5RRH-6BLN>]. With respect to the telephony metadata and PRISM programs discussed below, executive action was conducted with FISC oversight, though that oversight was arguably weak. *See* FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472, at 48-49, 68-72 (detailing FISC oversight of the telephony metadata and PRISM programs).

488. The Fourth Amendment is most salient to Section 702 surveillance, while Section 215 implicates both the First and Fourth Amendments. Starting with Section 702, it expressly requires compliance with the Fourth Amendment. 50 U.S.C. § 1881a(b)(6). The Fourth Amendment, however, generally does not apply to non-U.S. persons who are outside of and do not have a “substantial connection” to the

Notwithstanding their rights-eroding, executive-emboldening effects, there was little public outcry against Section 215 and 702 surveillance for many years. While there may be various reasons for this, one possible explanation is that these programs were perceived to focus only on those associated with terrorism, namely Arabs and Muslims.<sup>489</sup> Indeed, to the extent government officials publicly discussed these initiatives, they claimed they were only used to spy on “terrorists.”<sup>490</sup>

In June 2013, everything changed. Edward Snowden, a government contractor working for the National Security Agency (NSA), disclosed the existence of secret surveillance programs conducted pursuant to both statutes.<sup>491</sup> Confirming the fears of critics, the revelations made clear that millions of Americans’ communications were being monitored.<sup>492</sup> The programs revealed by Snowden included a telephony metadata collection program, which was authorized under Section 215, as well as Internet and telephone content collection programs<sup>493</sup>—called PRISM—which were authorized under Section 702.<sup>494</sup>

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United States. *Section 702 and the Collection of International Telephone and Internet Content*, *supra* note 469, at 222. Nor does the Fourth Amendment require a traditional warrant for collection of incidental communications between those persons and U.S. persons or persons inside the United States. *United States v. Hasbajrami*, 945 F.3d 641, 667 (2d Cir. 2019). As for Section 215, it expressly prohibits investigations against U.S. persons based on First Amendment protected activity. *See supra* note 481 and accompanying text. Additionally, “[u]nder the third-party doctrine, the Fourth Amendment is not implicated when the government acquires information that people provide to corporations [as occurs under Section 215], because they voluntarily provide their information to another entity and assume the risk that the entity will disclose the information to the government.” Avidan Y. Cover, *Corporate Avatars and the Erosion of the Populist Fourth Amendment*, 100 IOWA L. REV. 1441, 1444 (2015).

489. Polling done after the Snowden revelations suggests most Americans remain comfortable with surveillance of “terrorists.” *See infra* note 526 and accompanying text.

490. GRANICK, *supra* note 460, at 206–07.

491. *Edward Snowden: Leaks that Exposed U.S. Spy Programme*, BBC (Jan. 17, 2014), <https://www.bbc.com/news/world-us-canada-23123964> [<https://perma.cc/KED6-WYNK>].

492. FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472, at 38.

493. Metadata “consists of information that describes who is communicating; potentially where they are located; the origin, path, and destination of each communication; and the length of the exchange.” FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472, at 18. Content consists of “actual words spoken – or written – in the course of a communication.” *Id.*

494. *See, e.g.*, Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013), <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> [<https://perma.cc/ZZ5Y->

The telephony metadata program, which was run by the NSA, required major phone companies to collect and turn over “comprehensive communications routing information” held about their customers.<sup>495</sup> This included “session identifying information (e.g. originating and terminating telephone number . . . )’ . . . the truck identifier for each call (indicating which local cell phone tower was used in the connection), telephone calling card numbers, and the time and duration of each call.”<sup>496</sup> Under PRISM, which involved both the NSA and FBI, the government collected electronic communications from providers like Microsoft, Facebook, Google, and Apple.<sup>497</sup> Through PRISM, the FBI, with FISC approval, ordered these Internet companies to use specified search terms, known as “selectors,” to retrieve and turn over information to the government.<sup>498</sup> Section 702 placed few restrictions on how or what selectors were chosen, while FISC also did not review selectors to ensure their appropriateness.<sup>499</sup>

Public reactions to news of these surveillance programs were largely negative.<sup>500</sup> In an attempt to mitigate this

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XGQK] (detailing Section 215 program); Glenn Greenwald, *NSA Prism Program Taps into User Data of Apple, Google and Others*, GUARDIAN (June 7, 2013), <https://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data> [<https://perma.cc/c/4Q84-L7TX>] (detailing PRISM). Both the telephony metadata and PRISM programs were originally developed by the Bush Administration without clear legal authority. Specifically, the programs were part of STELLARWIND, a mass secret surveillance initiative created shortly after 9/11. FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472, at 18–19; GRANICK, *supra* note 456, at 200–05. STELLARWIND collected telephony and Internet metadata, as well as telephone and Internet content. FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472, at 18. The telephony metadata portion of STELLARWIND was eventually justified under Section 215, while Section 702 was passed to provide legal cover for Internet and telephone content collection. FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472, at 47; GRANICK, *supra* note 456, at 205–13. The Internet metadata portion of STELLARWIND, which was retrospectively authorized under FISA’s pen register and trap-and-trace provision, was abandoned in December 2011, though some have argued it continued in different form. FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472, at 45–48.

495. FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472, at 48.

496. *Id.*

497. GRANICK, *supra* note 456, at 214.

498. *Id.* at 117.

499. *Id.* at 118.

500. See Bart Jansen & Carolyn Pesce, *Anti-NSA Rally Attracts Thousands to March in Washington*, USA TODAY (Oct. 26, 2013), <https://www.usatoday.com/story/news/nation/2013/10/26/nsa-dc-rally/3241417/> [<https://perma.cc/G2B6-R2PN>] (reporting on nationwide protests against NSA surveillance programs leaked by Edward Snowden); Heather Kelly, *Protests Against the NSA Spring Up Across U.S.*,

backlash, the executive branch made several disclosures aimed at bolstering the programs' rule-of-law credentials. With respect to Section 215 surveillance, the Obama Administration released various statements, fact sheets, redacted FISC opinions, and a White Paper, arguing that the program was compliant with statutory law and the Constitution.<sup>501</sup> The Administration made similar disclosures about PRISM through press releases, public Congressional hearings, and the declassification of various documents.<sup>502</sup> In addition to this, within a week of the first Snowden-related news article, a bipartisan group of thirteen senators asked an independent agency within the executive, the Privacy and Civil Liberties Oversight Board, to investigate the surveillance programs.<sup>503</sup> A week later, the board held a meeting with President Obama and senior staff about its investigations.<sup>504</sup>

The board eventually released unclassified reports about both programs.<sup>505</sup> With respect to telephony metadata collection, the board recommended termination because the program "lack[ed] a viable legal foundation under Section 215, implicat[ed] constitutional concerns under the First and Fourth Amendments, rais[ed] serious threats to privacy and civil liberties as a policy matter, and has shown only limited value."<sup>506</sup> As for PRISM, while scholars lambasted it for violating Section

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CNN (July 5, 2013), <https://edition.cnn.com/2013/07/04/tech/web/restore-nsa-protests> [<https://perma.cc/9RRC-HVHQ>] (same).

501. Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL'Y 757, 760 (2014).

502. *Section 702 and the Collection of International Telephone and Internet Content*, *supra* note 469, at 121–22.

503. FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472, at 49.

504. *Id.*

505. PRIVACY AND CIV. LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT, (2014) [hereinafter PRIVACY BOARD REPORT ON 215 PROGRAM]; PRIVACY AND CIV. LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT, (2014) [hereinafter PRIVACY BOARD REPORT ON 702 PROGRAM].

506. PRIVACY BOARD REPORT ON 215 PROGRAM, *supra* note 505, § VII. At least one court considering legal challenges to the telephony metadata program also concluded it did not comport with Section 215. *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015) (holding that telephony metadata program exceeded authority under Section 215).



702,<sup>507</sup> the board concluded that it provided “considerable value . . . in the government’s efforts to combat terrorism and gather foreign intelligence” and that “at its core, the program is sound.”<sup>508</sup> Nevertheless, the board also noted that “some features outside of the program’s core, particularly those impact[ing] U.S. persons, raise questions regarding the reasonableness of the program” and made a “series of policy recommendations to ensure [PRISM] includes adequate and appropriate safeguards for privacy and civil liberties.”<sup>509</sup>

While both PRISM and the telephony metadata program arguably had rule-of-law problems,<sup>510</sup> they were supported by an extensive legal architecture meant to ground those initiatives in formal legality—including FISC review of surveillance applications and legal opinions from the Department of Justice.<sup>511</sup> Nevertheless, the public controversy they generated ended one of the secret surveillance programs, placed limitations on the other,<sup>512</sup> led to restrictions on Sections 702 and 215, and reformed judicial review under FISC and FISCR.

Many of these changes came in the form of federal legislation known as the USA Freedom Act, which was passed in

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507. See, e.g., *Section 702 and the Collection of International Telephone and Internet Content*, *supra* note 469, at 194–95 (arguing that PRISM contradicted Section 702’s clear language).

508. PRIVACY BOARD REPORT ON 712 PROGRAM, *supra* note 505, at 134.

509. *Id.*

510. Because it exceeded the statutory bounds of Section 215, the telephony metadata program violated the rule of law. As programs that were kept secret from the public, one might argue that both PRISM and the telephony metadata programs violated the rule of law on that ground as well. While it is beyond the scope of this Article to delve into this issue, government secrecy, though varied in kind and sometimes justified for national security reasons, can undermine formal legality. See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 286 (2010) (“By giving officials greater leeway to pursue unpopular and unethical policies, secrecy . . . threatens the rule of law.”). At the same time, “if the public expressly grants someone the authority to keep certain secrets, and if the grantee faithfully applies that authority subject to post hoc review, it is fair to see this exchange as a victory for democracy, not simply as a concession to practical necessity.” *Id.* at 287.

511. Sudha Setty, *Surveillance, Secrecy, and the Search for Meaningful Accountability*, 51 STAN. J. INT’L L. 69, 74–75 (2015).

512. See *id.* at 76 (noting that “Snowden’s revelations with regard to a variety of surveillance activities . . . provoked anger from a wide and bipartisan swath of the U.S. public . . . [which] in turn forced the Obama administration, Congress, and the courts to respond”).

2015.<sup>513</sup> Most notably, the Act, which amends FISA, prohibits bulk collection under Section 215's telephony metadata program.<sup>514</sup> Under this amendment to FISA, phone companies are no longer required to turn over all relevant information and only have to deliver a subset specifically requested by the NSA.<sup>515</sup> In order to obtain a FISC order for telephony metadata, the government must include a specific selector term—such as one identifying a person, entity, account, or device—and demonstrate a “reasonable, articulable suspicion” that the term is associated with a foreign power or an agent of a foreign power engaged in or preparing for an act of international terrorism.<sup>516</sup> Applications to the FISC also must include a statement of facts establishing reasons to believe the records sought are relevant to an authorized investigation to protect against terrorism.<sup>517</sup> Once obtained, the records are subject to minimization procedures that require the executive destroy all records it determines are unrelated to foreign intelligence.<sup>518</sup>

While recent reports suggest Section 215's telephony metadata program was shuttered in early 2019,<sup>519</sup> the executive branch has continued to defend the statute's utility and push for its renewal.<sup>520</sup> Despite these efforts, Section 215 was allowed to expire on March 15, 2020, though Congress is expected to renew it with reforms.<sup>521</sup>

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513. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015) [hereinafter USA Freedom Act].

514. FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472, at 52.

515. *Id.*

516. USA Freedom Act § 101. The telephone companies will then use the FISC-approved selector to collect the government-requested data. FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472, at 52.

517. USA Freedom Act § 101.

518. *Id.*

519. Ellen Nakashima, *Repeated Mistakes in Phone Record Collection Led NSA to Shutter Controversial Program*, WASH. POST (June 26, 2019), [https://www.washingtonpost.com/world/national-security/repeated-mistakes-in-phone-record-collection-led-nsa-to-shutter-controversial-program/2019/06/25/f256ba6c-93ca-11e9-b570-6416efdc0803\\_story.html](https://www.washingtonpost.com/world/national-security/repeated-mistakes-in-phone-record-collection-led-nsa-to-shutter-controversial-program/2019/06/25/f256ba6c-93ca-11e9-b570-6416efdc0803_story.html) [https://perma.cc/PVC5-Z3VL].

520. Jordain Carney, *Congress Set for Clash Over Surveillance Reforms*, HILL (Feb. 24, 2020), <https://thehill.com/homenews/senate/484150-congress-set-for-clash-over-surveillance-reforms> [https://perma.cc/8LFE-6YYG].

521. *Id.*; McKinney & Crocker, *supra* note 20. Section 215's savings clause allows the statute to still be used for ongoing investigations that began before its expiration or for new investigations into events that started or occurred before that date. USA PATRIOT Act, Pub. L. No. 107-140, § 224, 115 Stat. 272 (2001); Charlie

With respect to PRISM, the NSA eventually stopped using specific collection protocols that had vastly expanded Section 702's reach.<sup>522</sup> This included abandoning "about" collection, which had facilitated retrieval of digital communications that were "about" a target but did not actually involve the target.<sup>523</sup> If the NSA had not made this decision, and continued to use "about" collection, it would have been subject to recent federal legislation that subjects such intelligence gathering to congressional oversight.<sup>524</sup>

More broadly, the USA Freedom Act led to important changes to FISC and FISCR aimed at making judicial review of executive action more meaningful.<sup>525</sup> These reforms included appointing *amicus curiae* to assist judges in "consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law" and declassifying decisions, orders, and opinions issued by the FISC and FISCR "that include[] a significant construction or interpretation of any provision of law . . . ."<sup>526</sup>

While these changes have fallen short of fixing all the executive abuse and civil liberty problems raised by Section 215 and 702 surveillance,<sup>527</sup> they represent a rare bright spot in the national security arena. Sections 215 and 702 give the executive broad authority with troubling implications for civil liberties. The post-Snowden reforms made to these laws have limited that power. Those limits would not have been possible without social cohesion among countless Americans who had an interest in curbing the executive's surveillance programs. Prior to the Snowden revelations, when many believed FISA surveillance

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Savage, *House Departs Without Vote to Extend Expired FBI Tools*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/2020/03/27/us/politics/house-fisa-bill.html> [<https://perma.cc/3YSC-AVZQ>].

522. Louise Matsakis, *Congress Is Debating Warrantless Surveillance in the Dark*, WIRED (Dec. 23, 2017), <https://www.wired.com/story/section-702-warrantless-surveillance-debate/> [<https://perma.cc/9VJD-FDCR>].

523. *Id.* "About collection" means that "multiple people, none of whom is a target, may nevertheless be monitored because of the topic of their conversation, so long as one of the parties to the conversation is a foreigner located overseas." GRANICK, *supra* note 456, at 121.

524. FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, § 103, 132 Stat. 3 (2017).

525. FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472, at 142–43.

526. USA Freedom Act §§ 401, 402.

527. See FUTURE OF FOREIGN INTELLIGENCE, *supra* note 472, at 136–69 (detailing additional necessary reforms to FISA surveillance).

was limited to “terrorists,” there was little to no public outcry about Sections 215 and 702. Indeed, polling on surveillance post-Snowden suggests Americans still support government surveillance targeted at terrorism and, therefore, primarily impacting Muslim and Arabs.<sup>528</sup> It is because the negative consequences of Sections 215 and 702 surveillance were understood to impact millions of people that these sentiments were overcome and the rule of law and political accountability aligned, however imperfectly, to curb executive authority under those programs.

## 2. The Border Wall

While not impacting as many Americans as Section 215 and 702 surveillance, the Trump Administration’s plan to seize private land along the U.S.-Mexico border has targeted a small but diverse group of individuals and received substantial ongoing pushback. Though this opposition may be partly triggered by the Administration’s explicitly racist motives for building the Wall,<sup>529</sup> it has primarily revolved around the rights and interests of a small group of individuals who are directly impacted by the government’s seizure of land and the Wall construction. As discussed below, while white ranchers are also actively involved, this anti-Wall coalition includes indigenous tribes, members of the Latinx community, and religious and environmental groups. As this mix of groups demonstrates, social cohesion in the service of minority rights and interests can be achieved not only between the white majority and minority groups, but also among communities of color and non-identitarian groups dedicated to social justice.

This section begins with background on the legal authority for the Border Wall, its compliance with the rule of law, and executive efforts to secure private land for its construction. It then describes the small but diverse coalition of groups that has

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528. See Lee Raine & Mary Madden, *Americans’ Privacy Strategies Post-Snowden*, PEW RESEARCH (Mar. 16, 2015), <https://www.pewresearch.org/internet/2015/03/16/americans-privacy-strategies-post-snowden/> [<https://perma.cc/C736-JERB>] (polling from 2014–2015 showing that 82% support surveillance of “suspected terrorists” and that 68% believe it is “okay to monitor someone who exchanged emails with an imam who preached against infidels”).

529. Lee, *supra* note 315, at 459–61; Meghan K. Tierney, *President Trump’s Big, Beautiful Wall: Discrimination, Eminent Domain, and the Public Use Requirement*, 94 CHI. KENT L. REV. 179, 179 (2019).

formed to oppose the Wall's construction and its efforts to politically restrain the executive's extensive, rights-eroding powers.

Trump's promise to build a Wall along the U.S.-Mexico border dates back to the 2016 presidential campaign.<sup>530</sup> Within days of assuming office, the newly elected President issued an executive order, directing the "immediate construction of a physical wall on the southern border" to, among other things, "prevent terrorism."<sup>531</sup> The order itself was authorized by various congressional laws.<sup>532</sup> While there have been numerous legal challenges to the Border Wall's construction, especially regarding its financing,<sup>533</sup> the original order, as well as the laws upon which it is based, remain consistent with the rule of law. Both the order and the laws authorizing it are general, clear, constant through time, non-retroactive, internally consistent, and coherent. Though construction of certain parts of the Border Wall may

530. Time Staff, *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015), [www.time.com/3923128/donald-trump-announcement-speech/](http://www.time.com/3923128/donald-trump-announcement-speech/) [<https://perma.cc/Q5UT-NE6E>].

531. Exec. Order No. 13,767, 82 Fed. Reg. 8,793, §2(a) (Jan. 25, 2017).

532. The Executive Order lists its legal authority as including the Immigration and Nationality Act, the Secure Fence Act of 2006, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017). In general, the executive branch is responsible for controlling the "borders and boundaries of the United States against the illegal entry of aliens" and can "contract for and buy an interest in land" where necessary to do so. 8 U.S.C. § 1103 (2006). This includes building "physical barriers" at the border. *See, e.g.*, The Secure Fence Act of 2006, Pub. L. 109-367, 120 Stat. 2638, § 3 (2006) (providing that the "Secretary of Homeland Security shall provide for at least two layers of reinforced fencing" at the southern border); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, tit. 1, § 102, 110 Stat. 3009 (providing "for the construction along the 14 miles of the international land border of the United States, starting at the Pacific Ocean and extending eastward, of second and third fences, in addition to the existing reinforced fence, and for roads between the fences"). Pursuant to this authority, the U.S. government first began building a physical barrier along the U.S.-Mexico border during the Clinton, Bush, and Obama Administrations. Susan Montoya Bryan, *Past Projects Show Border Wall Building Is Complex, Costly*, AP (Jan. 12, 2019), <https://apnews.com/ab1b07e15e6f4e9a9274b576ff3a1d45> [<https://perma.cc/B6L3-3P4A>]. Trump's wall extends those earlier efforts. *Id.*

533. Various groups and state governments have brought suit to enjoin the Trump Administration from using its February 2019 national emergency declaration to re-route funds to build the Wall. *See infra* note 552 for background on the declaration. Some of these efforts have resulted in injunctive relief though they remain subject to a Supreme Court stay, as of this writing. *See* *Sierra Club v. Trump*, 963 F.3d 874, at 897 (9th Cir. 2020) (affirming permanent injunction against parts of the Border Wall); Adam Liptak, *Supreme Court Lets Trump Keep Building His Border Wall*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/07/31/us/supreme-court-trump-border-wall.html> [<https://perma.cc/YUA2-5CCD>].

conflict with other laws and may, as a result, run afoul of the rule of law,<sup>534</sup> there is generally no clear facial contradiction between the Border Wall order—or the statutes upon which it is based—and those other laws.

Despite the executive's broad, legally sanctioned power to build the Wall, many private landowners along its route have refused to allow the government to acquire their land.<sup>535</sup> Indeed, the Border Wall's construction poses a direct threat to the private property rights of countless landowners. To build the Wall, which will be roughly 2,000 miles in length and stretch across four states, the government must secure substantial amounts of private property.<sup>536</sup> Together with land owned by individual states, privately held land makes up 67 percent of territory at the border.<sup>537</sup>

Where parties have been unwilling to sell, the Trump Administration has attempted to secure their property through eminent domain.<sup>538</sup> In accordance with the Takings Clause of the Fifth Amendment, eminent domain allows the government to "acquire . . . property [for public use] from unwilling owners in exchange for just compensation."<sup>539</sup> While the jurisprudence on eminent domain is complex, it is understood to give the executive

534. There are a number of other potential legal obstacles to building the Wall, including, but not limited to, environmental regulations, treaties with indigenous tribes, and international environmental agreements. Melissa W. Wright, *Border Thinking, Borderland Diversity, and Trump's Wall*, 109 ANNALS AM. ASS'N GEOGRAPHERS 511, 514 (2019).

535. Gerald S. Dickinson, *Cooperative Federalism and Federal Takings After the Trump Administration's Border Wall Executive Order*, 70 RUTGERS U. L. REV. 647, 651 (2018).

536. Sarah Almukhter & Josh Williams, *Trump Wants a Border Wall*. See *What's in Place Already*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/interactive/2018/02/05/us/border-wall.html> [<https://perma.cc/GP6Y-3APS>]. This includes land owned by indigenous tribes. Jane Coaston, *Eminent Domain, the Big-government Concept Tactic Trump Needs to Use to Build the Wall, Explained*, VOX (Jan. 18, 2019), <https://www.vox.com/policy-and-politics/2019/1/18/18176893/eminent-domain-trump-border-wall-gop> [<https://perma.cc/53X7-DQPU>].

537. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-399, SOUTHWEST BORDER: ISSUES RELATED TO PRIVATE PROPERTY DAMAGE 5 (2015), <http://www.gao.gov/assets/670/669936.pdf> [<https://perma.cc/E5ED-K3HB>].

538. See Bob Ortega, *The Trump Administration Is Dialing Up Efforts to Build that Wall, Records Show*, CNN (Nov. 22, 2019), <https://www.cnn.com/2019/11/22/us/trump-administration-seizing-border-wall-land/index.html> [<https://perma.cc/F9AJ-Y9KD>] (reporting on the Trump Administration's increased use of eminent domain suits in 2019 to seize private land needed to build Border Wall).

539. *Kelo v. City of New London*, 545 U.S. 469, 472 (2005); U.S. CONST. amend. V.

substantial authority to assume ownership over privately held property.<sup>540</sup> Since construction on the Border Wall began in 2017,<sup>541</sup> the executive has brought various eminent domain cases against entities as varied as ranchers, farmers, and even Catholic dioceses.<sup>542</sup>

In addition to opposing these legal efforts,<sup>543</sup> this diverse body of impacted individuals and groups has politically mobilized against the Wall's construction. Indeed, various groups, including environmentalists, human rights activists, immigrant advocates, as well as indigenous tribes and Latinx individuals, have united to protest the Wall's construction.<sup>544</sup> This coalition, which has been built around private property interests as well as environmental and social justice concerns, has been key to generating broad political opposition to the Wall.<sup>545</sup> While it is hard to definitively know the racial composition of this movement, it represents more than just convergence between the interests of whites and communities of color.<sup>546</sup> Indeed, a number

540. Lee, *supra* note 315, at 431; Simon J. Harrall, *The Federal Government's power of Eminent Domain Over State Lands Regarding the U.S.-Mexico Border Wall*, 56 HOUS. L. REV. 635, 655–56 (2019).

541. Stephen Dinan, *Trump Border Wall Construction Begins*, WASH. TIMES (Sept. 26, 2017), <http://www.washingtontimes.com/news/2017/sep/26/trump-border-wall-construction-begins/> [<https://perma.cc/SSS4-9CG3>].

542. Elizabeth Findell, *Construction of Texas Border Wall Stalls over Fights with Landowners*, WALL ST. J., (Dec. 12, 2019), <https://www.wsj.com/articles/construction-of-texas-border-wall-stalls-over-fights-with-landowners-11576154415> [<https://perma.cc/RE3F-KPAR>].

543. *Id.* Scholars have taken note of the wide swath of groups impacted by the Wall's construction and argued that this cohesion may lead to heightened judicial scrutiny of the government's eminent domain efforts. Lee, *supra* note 315, at 425.

544. Wright, *supra* note 534, at 512; Nina Lakhani, *'That's Genocide:' Ancient Tribal Graves Threatened by Trump Border Wall*, GUARDIAN (Dec. 16, 2019), <https://www.theguardian.com/environment/2019/dec/16/tribe-fights-to-save-ancestral-graves-in-the-path-of-trumps-border-wall> [<https://perma.cc/ZB4Q-BLGL>]; Ryan Devereaux, *"We Are Still Here": Native Activists in Arizona Resist Trump's Border Wall*, INTERCEPT (Nov. 24, 2019), <https://theintercept.com/2019/11/24/arizona-border-wall-native-activists/> [<https://perma.cc/PP5Z-EGMJ>]; Katie Zezemias & Mark Berman, *Trump's Wall Needs Private Property. But Some Texans Won't Give Up Their Land Without a Fight*, WASH. POST (Jan. 10, 2019), [https://www.washingtonpost.com/national/trumps-border-wall-would-need-private-property-but-texas-landowners-plan-to-dig-in-for-lengthy-legal-fight/2019/01/10/d7e4c6ba8-1443-11e9-803c-4ef28312c8b9\\_story.html](https://www.washingtonpost.com/national/trumps-border-wall-would-need-private-property-but-texas-landowners-plan-to-dig-in-for-lengthy-legal-fight/2019/01/10/d7e4c6ba8-1443-11e9-803c-4ef28312c8b9_story.html) [<https://perma.cc/KPW5-G5RB>].

545. Wright, *supra* note 534, at 512.

546. Even those scholars applying an interest convergence lens to the Border Wall controversy concede that "in addition to racial interests converging, other types of convergence are occurring," including between "property rights organizations, environmentalists, and immigrants' rights advocates." Lee, *supra* note 529,

of political efforts against the Wall have been led by social-justice groups or through alignments between those groups and communities of color.<sup>547</sup>

These efforts, which include relatively regular civic demonstrations against the Wall,<sup>548</sup> appear to have borne fruit.<sup>549</sup> According to recent polling, 60 percent of Americans oppose major new wall construction along the southern border.<sup>550</sup> At the Texas border, 54 percent of residents oppose the Wall.<sup>551</sup> This public opposition has also helped generate a number of legislative obstacles to the Border Wall. This includes various congressional efforts to block the Wall, such as Congress's general refusal to fully fund the barrier<sup>552</sup> as well as congressional bills to

at 455. See Wright, *supra* note 534, at 512 (arguing that “[t]hrough their alliances that merge advocacies for human rights, immigrant well-being, and environmental stewardship, antiwall coalitions have formed powerful campaigns that have eroded public support for the project”).

547. See, e.g., Devereau, *supra* note 544 (describing the Center for Biological Diversity, an environmental non-profit, as leading the fight against the Border Wall).

548. See, e.g., Jessica Kutz, *At a Protest in Arizona, Border Communities Are Fighting Trump's Wall*, MOTHER JONES (Nov. 24, 2019), <https://www.motherjones.com/environment/2019/11/at-a-protest-in-arizona-border-communities-are-fighting-trumps-wall/> [<https://perma.cc/TSA7-A3LU>]; Christal Hayes, *Protests Planned Against Trump's National Emergency Over the Border Wall*, USA TODAY (Feb. 16, 2019), <https://www.usatoday.com/story/news/politics/2019/02/16/trumps-national-emergency-order-nationwide-protests/2886436002/> [<https://perma.cc/XDY9-NVZH>].

549. See Wright, *supra* note 534, at 515 (noting that “[a]s antiwall activists publicize the connections linking the project to a cruel politics that reveals a startling disdain for human and environmental well-being, congressional and broader public support has stalled”).

550. Jim Norman, *Solid Majority Still Opposes New Construction on Border Wall*, GALLUP (Feb. 4, 2019), <https://news.gallup.com/poll/246455/solid-majority-opposes-new-construction-border-wall.aspx> [<https://perma.cc/6WNT-PWMA>].

551. Findell, *supra* note 542.

552. While Congress initially refused to fund the Border Wall's construction, it acquiesced after Trump forced a government shutdown over the issue. Jacob Pramuk & Christina Wilkie, *Trump Declares National Emergency to Build Border Wall, Setting Up Massive Legal Fight*, CNBC (Feb. 15, 2019), <https://www.cnn.com/2019/02/15/trump-national-emergency-declaration-border-wall-spending-bill.html> [<https://perma.cc/E2LN-8MAP>]. The resulting funding, however, fell short of the requested amount. Andrew Duehren, *Senate Again Passes Resolution to Block Funding for Border Wall*, WALL ST. J. (Sept. 25, 2019), <https://www.wsj.com/articles/senate-again-passes-resolution-to-block-funding-for-border-wall-11569430599> [<https://perma.cc/6MNN-4FN3>]. Trump reacted by declaring a “national emergency” at the southern border, which purportedly allowed him to repurpose funds previously allocated for military projects. *Id.* Twice, Congress responded by passing bipartisan bills to overturn the national emergency declaration and block funding for the wall. Duehren, *supra* note 552. Both times, Trump successfully vetoed those bills. Emily Cochrane, *Senate Fails to Override Trump's Veto, Keeping Border Emergency in*



protect private landowners from eminent domain litigation.<sup>553</sup> There have even been local legislative efforts to restrict the Wall's construction, including at least one bill in the Texas legislature.<sup>554</sup>

Despite the President's broad authority to construct the Border Wall under federal law, the Wall's impact on the rights of diverse groups has exerted some checks on presidential authority. While the Trump Administration has built portions of the Border Wall, it has mostly been on land already owned by the federal government<sup>555</sup> and in areas where barriers already exist.<sup>556</sup> Though many eminent domain cases remain pending<sup>557</sup> they will likely deaccelerate the overall building process, increase the cost of construction, and/or result in changes to the wall's route, even if the cases are ultimately successful.<sup>558</sup>

Place, N.Y. TIMES (Oct. 17, 2019), <https://www.nytimes.com/2019/10/17/us/politics/senate-veto-override-border.html> [<https://perma.cc/ZY7T-6KA3>]. In December 2019, Congress approved another spending bill that allocated more funding for the wall, though the amount still fell short of the Administration's request. Emily Cochrane, *Congress Approves Spending Package to Avoid Shutdown, Clearing It for Trump*, N.Y. TIMES (Dec. 19, 2019), <https://www.nytimes.com/2019/12/19/us/politics/government-shutdown-bill.html> [<https://perma.cc/C9F8-33NC>].

553. See, e.g., Protecting the Property Rights of Border Landowners Act of 2017, H.R. 3943, 115th Cong. (2017) (unsuccessful legislative effort to restrict federal eminent domain power for purposes of "constructing a wall, or other physical barrier, along the international border between the United States and Mexico").

554. Tex. S. Con. Res. 31, 85th Leg., R. S. (2017). This legislation failed to pass. Harrall, *supra* note 540, at 638.

555. Nick Miroff, *Trump Planning to Divert Additional \$7.2 billion in Pentagon Funds for Border Wall*, WASH. POST (Jan. 13, 2020), [https://www.washingtonpost.com/immigration/trump-planning-to-divert-additional-72-billion-in-pentagon-funds-for-border-wall/2020/01/13/59080a3a-363d-11ea-bb7b-265f4554af6d\\_story.html](https://www.washingtonpost.com/immigration/trump-planning-to-divert-additional-72-billion-in-pentagon-funds-for-border-wall/2020/01/13/59080a3a-363d-11ea-bb7b-265f4554af6d_story.html) [<https://perma.cc/W8KK-4JTP>].

556. Zolan Kanno-Youngs, *Border Wall Land Grabs Accelerate as Owners Shelter from Pandemic*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/politics/border-wall-coronavirus.html> [<https://perma.cc/V3RQ-KVCF>].

557. *Id.*

558. See DEPT OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-09-56, PROGRESS IN ADDRESSING SECURE BORDER INITIATIVE OPERATIONAL REQUIREMENTS AND CONSTRUCTING THE SOUTHWEST BORDER FENCE 16 (2009) (generally noting impact of eminent domain litigation on construction of fencing at the U.S.-Mexico border, including ensuing costs and delays). Adding to the cost of these eminent domain cases are the number of litigants. In Texas, where the majority of border land is privately owned, there are hundreds if not thousands of potential defendants. Courtney Kube & Julia Ainsley, *Trump Admin Preparing to Take Over Private Land in Texas for Border Wall*, NBC NEWS (Nov. 14, 2019), <https://www.nbcnews.com/politics/immigration/trump-admin-preparing-take-over-private-land-border-wall-n1082316> [<https://perma.cc/UMD8-AN6V>].

The Muslim Ban, Section 215 and 702 surveillance, and the Border Wall controversy demonstrate that legally sanctioned programs that bolster executive authority and undermine civil liberties can still generate political accountability for minority rights and interests. This social cohesion can occur even if the majority and/or their material interests are not substantially involved. Part IV explores the implications of some of these insights for fixing the political accountability problems facing the FBI's surveillance programs, citizen-on-citizen monitoring, and public and private material support cases.

#### IV. PRELIMINARY SOLUTIONS

Synthesizing the various observations from Parts I, II, and III, there are several potential solutions to the accountability problems facing the FBI's domestic surveillance programs, citizen-on-citizen monitoring, and public and private material support cases. These solutions are pitched as general demands made to ensure that the rule of law and politics more effectively check executive power. The purpose is to provide scholars and advocates with a preliminary framework for thinking about the types of strategies that may resolve these programs' political accountability deficit. Ultimately, their feasibility and effectiveness will turn both on the particularities of each program and the acquiescence of one or more branches of the federal government. Implementation may be fraught, both from a programmatic and institutional perspective, but the hope is that a basic road map can inform this important work.

The first solution is to call for an end to the FBI surveillance program, citizen-on-citizen monitoring, and public and private material support statutes. The second solution is to demand that these programs' civil liberty problems be addressed. The third is to both address their civil liberty shortcomings and call for these programs to be applied more broadly across American society. The remainder of this section will briefly explore the implications of each solution, without favoring any one in particular.

Before exploring these approaches, it is worth mentioning one solution that is not pursued here: adopting a substantive approach to the rule of law. While the spirit behind this approach—that the law's content aligns with morality and justice—is appealing, the implications have troubled many philosophers and

theorists for good reason.<sup>559</sup> The main stumbling block is in deciding what morality and justice mean or require in any given situation or society. As Professor Brian Tamanaha has noted, “[t]o suggest that society’s views on these subjects cohere at the highest level of political and moral principle . . . denies the ultimately contestable nature of the disputes.”<sup>560</sup> Even Professor Ronald Dworkin, substantive legality’s foremost adherent, conceded that the approach poses important and intractable philosophical questions that formal legality does not.<sup>561</sup> In short, a substantive approach to the rule of law is fraught with potential landmines that far from guarantee disfavored communities of color will be protected from the activities of a powerful executive.

As for the first proposed solution, ending the discriminatory programs discussed here is supported by their disproportionate impact on Arab and Muslim Americans, their dubious effectiveness (at least as currently implemented),<sup>562</sup> and the civil liberty concerns they raise—regardless of who is targeted. Of course, some might counter that these programs, particularly their public forms, promote valid national security objectives despite their many deep problems. Indeed, in the eyes of some, both FBI surveillance and the criminal material support statutes are important parts of the government’s preventative approach to terrorism.<sup>563</sup> For example, the criminal material support statutes allow the government to intervene before an act of terrorism has occurred and, in particular, prevent the flow of financing and materials, like weapons, that may be used in terrorist acts.<sup>564</sup> While there are also significant downsides associated with a preventative counterterrorism strategy,<sup>565</sup> including the civil liberty issues discussed here, a preventative approach may not be

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559. See, e.g., TAMANAHA, *supra* note 30, at 103.

560. *Id.*

561. Dworkin, *supra* note 111, at 263–64.

562. See Ahmed, *supra* note 121, at 1562–63 (arguing that the disproportionate impact of counterterrorism policies on Muslim Americans make them distrustful of cooperating with law enforcement and, as a result, have serious ramifications for U.S. national security policies).

563. Robert Chesney, *Beyond Conspiracy?: Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 429 (2007).

564. Abrams, *A Constitutional Minimum Threshold*, *supra* note 214, at 216–17.

565. See Chesney, *supra* note 563, at 433–46 (cataloguing costs and benefits of preventative approach to terrorism in the context of material support prosecutions).

a wholly unreasonable way of addressing terrorist violence, particularly if those costs can be adequately remedied.<sup>566</sup>

At the same time, abolition may be the only way of addressing the systemic discrimination and accountability issues plaguing these programs. Without evidence of explicit discrimination, there is little chance the rule of law and politics will combine to limit these programs in any meaningful way. Even if such evidence existed, it is hard to know whether and how such reforms would materialize, as demonstrated by ongoing but still incomplete efforts at political accountability for the Muslim Ban. Eliminating these programs also draws inspiration from historic efforts to dismantle police and prisons—institutions riven by racism and prejudice—that are picking up steam.<sup>567</sup>

This brings us to the second solution: strengthening these programs' civil liberty protections. This could be achieved by applying strict scrutiny to First Amendment protected activity covered by the material support statutes, creating stronger due process protections for groups designated or about to be designated as FTOs, and creating a specific intent requirement for cases under Section 2339B.<sup>568</sup> In addition, domestic intelligence gathering could be subjected to the Fourth Amendment protections it currently lacks.<sup>569</sup> Even if such changes could be achieved, the executive might still disproportionately apply these programs to Arabs and Muslims. A similar phenomenon can be seen in domestic policing. While constitutional protections are comparatively more robust than in the national security sphere,<sup>570</sup> there is ample evidence that these protections have done little to prevent policing practices from disproportionately impacting Black

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566. Aziz, *supra* note 264, at 47.

567. See, e.g., Garrett Felber, *The Struggle to Abolish the Police Is Not New*, BOS. REV. (June 9, 2020), <http://bostonreview.net/race/garrett-felber-struggle-abolish-police-not-new> [<https://perma.cc/N5Q6-TNM6>].

568. Aziz, *supra* note 264, at 90–92; see Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Materials Resources to a Foreign Terrorist Organization*, 56 BAYLOR L. REV. 861, 915 (2004) (arguing that “the First Amendment right of association [should require] that the government [have to] prove [in a Section 2339B case] that the donor in making the donation intended to further the terroristic activities of the organization”).

569. Rascoff, *supra* note 137, at 591.

570. See SAID, *supra* note 215, at 73–104 (demonstrating how various evidentiary and constitutional protections generally available in criminal trials are loosened or eroded in trials involving federal terrorism charges).

and Brown communities.<sup>571</sup> More broadly, where laws disproportionately impact communities of color, rights-based solutions may be insufficient to remedy subordination.<sup>572</sup>

This tees up the third and final solution: applying these programs across U.S. society. In a different context—namely strengthening civil rights and civil liberties for noncitizens in emergencies—Professor David Cole made a similar argument for expanding rights burdens across the population:

A political process that weighs everyone's security on one side of the balance, but weighs the rights and liberties of only a voiceless and often demonized "alien" minority on the other, is a recipe of overreaction . . . . A different approach with substantially more hope for taming the time-tested proclivity to overreact [in a time of crisis] would be to insist that, as much as possible, all persons share equally the costs and burdens that we have so often selectively imposed on foreign nationals.<sup>573</sup>

While this solution ought to be combined with the second proposed solution, it may still lead to troubling outcomes. For example, broad application of Section 2339A would mean targeting domestic terrorist groups and potentially even expanding the definition of terrorism to reach other types of groups or activities deemed criminal. Depending on how broad a definition is adopted, it could be twisted to cover the actions of protestors and activists.<sup>574</sup> This would be particularly concerning given the harsh prison sentences that apply to federal terrorism convictions.<sup>575</sup> If Section 2339B were applied to domestic groups without statutory amendment, this would clearly violate both the

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571. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2018).

572. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1866 (2019).

573. COLE, *supra* note 14, at 23.

574. See Harsha Panduranga & Faiza Patel, *Domestic Terrorism Bills Create More Problems Than They Solve*, JUST SECURITY (Aug. 28, 2019), <https://www.just-security.org/65998/domestic-terrorism-bills-create-more-problems-than-they-solve/> [<https://perma.cc/2W5N-JUHT>] (describing broad definition of terrorism in proposed federal domestic terrorism legislation as easily twisted "to cover protestors or activists").

575. Aziz, *supra* note 121, at 1526–27.

statute, which is limited to FTOs, and the rule of law. As many have argued, it would also raise First Amendment concerns.<sup>576</sup>

On the surveillance side, expanding the FBI's practices would mean having the FBI surveil members of all sorts of religious, political, and social groups, and encouraging private parties to do the same under the citizen-on-citizen monitoring programs. It would also mean encouraging various communities to surveil their fellow community members to ensure they do not become "radicalized" toward criminal violence—terrorism or otherwise.

Together, across-the-board application of the material support and surveillance programs would likely result in increased policing of communities of color—indeed, that already appears to be happening where executive branch surveillance is concerned.<sup>577</sup> On the flip side, part of the value of this approach is that broad application could lead to greater political accountability for these programs. This is demonstrated most powerfully by the campaign to end NYPD surveillance of Arabs and Muslims—one of the few examples of successful political organizing against national security programs targeting this group.<sup>578</sup> In order to end the program, Muslim and Arab New Yorkers joined with other minority groups, including Black and Latinx communities, who were subject to similar NYPD practices, like stop-and-frisk.<sup>579</sup> Together, these communities collaborated to pass

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576. Mary B. McCord & Jason M. Blazakis, *A Road Map for Congress to Address Domestic Terrorism*, LAWFARE (Feb. 27, 2019), <https://www.lawfareblog.com/road-map-congress-address-domestic-terrorism> [<https://perma.cc/WA2V-LP9T>].

577. George Joseph, *Exclusive: Feds Regularly Monitored Black Lives Matter Since Ferguson*, INTERCEPT (July 24, 2015), <https://theintercept.com/2015/07/24/documents-show-department-homeland-security-monitoring-black-lives-matter-since-ferguson/> [<https://perma.cc/JE6T-VBHE>] (reporting that the executive is increasingly using its national security surveillance powers against black activists). Notably, DHS recently expanded its counterterrorism work to include Neo-Nazi and white nationalist groups. DEPT OF HOMELAND SEC., STRATEGIC FRAMEWORK FOR COUNTERING TERRORISM AND TARGETED VIOLENCE (2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0920\\_plcy\\_strategic-framework-countering-terrorism-targeted-violence.pdf](https://www.dhs.gov/sites/default/files/publications/19_0920_plcy_strategic-framework-countering-terrorism-targeted-violence.pdf) [<https://perma.cc/YJ34-W3GR>]. It is unclear, however, whether or how this expansion might remedy the tendency for Black and Brown communities to bear the brunt of government surveillance and policing in the terrorism context and beyond.

578. See, e.g., Shamas, *supra* note 285 (noting that while there has been backlash against NYPD surveillance of Muslim communities, there has been little public outrage against the intelligence-gathering practice the FBI uses nationwide against Muslims).

579. *Id.*

City Council bills that prohibited racial profiling and created an inspector general to monitor the NYPD and prohibit racial profiling.<sup>580</sup> Support for these bills was so strong that then-Mayor Michael Bloomberg's attempted veto of both laws was overridden.<sup>581</sup>

The troubling outcomes of domestic application of these initiatives could also lead to broader conversations about the problems plaguing the government's counterterrorism programs. This much is suggested by reactions to Trump's threat in May 2020 to designate Antifa, a domestic anti-fascist movement composed of a loose coalition of individuals and groups, as a terrorist entity.<sup>582</sup> Many have rejected the move not only for exceeding the President's legal authority but also for its political and constitutional implications, particularly for freedom of speech.<sup>583</sup> As one expert notes, "[if] Trump succeeds in designating Antifa it potentially opens the door for American citizens to be charged for merely holding their beliefs—even if they are extreme and at times, militant."<sup>584</sup>

While the Administration has yet to formally designate the movement as a terrorist group, there have been other calls to expand and apply federal terrorism laws domestically. These include popular efforts to list the KKK as a terrorist organization and expand the definition of terrorism to include racism.<sup>585</sup> There are also bills pending in Congress to analyze, monitor, and

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580. *Id.*

581. *Id.* While advocates also won important courtroom victories against the NYPD program, these came after their political achievements. *See supra* note 334.

582. Sahar Aziz, *Trump's Call to Label Antifa 'Domestic Terrorists' Is Dangerous*, AL JAZEERA ENG. (June 12, 2020), <https://www.aljazeera.com/indepth/opinion/trump-call-label-antifa-domestic-terrorists-dangerous-200611134333479.html> [https://perma.cc/9W83-Z35P].

583. *See, e.g., id.* (discussing political and legal implications of designating Antifa or any other domestic group as a terrorist organization); Shirin Sinnar, *Invoking "Terrorism" Against Police Protestors*, JUST SEC. (June 3, 2020), <https://www.justsecurity.org/70549/invoking-terrorism-against-police-protestors/> [https://perma.cc/E4HE-HSQ3] (same).

584. Peter Bergen, *Trump's Crazy Designation of Antifa as Terrorist Organization*, CNN (June 1, 2020), <https://www.cnn.com/2020/05/31/opinions/trump-antifa-domestic-terrorist-bergen/index.html> [https://perma.cc/9W3L-UK3V].

585. Ewan Palmer, *Over a Million People Sign Petition Calling for KKK to Be Declared a Terrorist Group*, NEWSWEEK (June 12, 2020), <https://www.newsweek.com/kkk-petition-terrorist-group-million-1510419> [https://perma.cc/B9PA-Z9LD].

take steps to prevent domestic terrorism.<sup>586</sup> As efforts like these continue, conversations about the downsides of the executive's counterterrorism powers will likely accelerate. At the same time, even if these efforts spur reforms to FBI surveillance, the material support statutes, and their private analogues, those reforms may yield only limited fixes, much like the post-Snowden changes to Sections 215 and 702.

## CONCLUSION

While the rule of law is important, “one should not take [its] value . . . on trust nor assert it blindly.”<sup>587</sup> Indeed, “[s]acrificing too many social goals on the altar of the rule of law may make the law barren and empty.”<sup>588</sup> As this Article has demonstrated, the rule of law does not always facilitate political accountability for troubling exercises of executive power. Understanding this complexity can help make the rule of law and politics a more effective check on presidential authority, especially where the rights and interests of communities of color are concerned. It can also help build a deeper understanding of the rule of law's impact on executive accountability across other domains.<sup>589</sup>

As the FBI's surveillance programs, material support cases, and their private analogues demonstrate, facially neutral laws that expand executive power and undermine civil liberties while targeting marginalized communities undermine the social cohesion necessary to keeping a powerful executive in check. At the same time, laws that are explicitly discriminatory or that negatively impact the rights of large or small but diverse groups can generate political accountability for executive action—as evidenced by the Muslim Ban, Section 215 and 702 surveillance, and the Border Wall controversy. These political accountability

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586. Domestic Terrorism Prevention Act of 2020, S.3190, 116th Cong. (2020); Domestic Terrorism Prevention Act of 2020, H.R. 5602, 116th Cong. (2020).

587. RAZ, *supra* note 98, at 222.

588. *Id.* at 229.

589. The insights of this Article may, for example, be useful to debates about whether and how legal reforms, like ending qualified immunity and allowing for greater police prosecutions, are sufficient for law enforcement accountability. *Cf.* Levine, *supra* note 63, (arguing that increased police prosecutions will only mask problems of police brutality and racism and that divestment from police is needed instead); Simonson, *supra* note 63.



efforts can materialize even if the majority and/or its material interests are not substantially involved.

These insights add nuance to the canonical view of majoritarian politics, while also presenting potential solutions for fixing the accountability problems facing facially neutral national security laws that disproportionately impact Arab and Muslim Americans. These solutions will likely require drastic action that may mean either abolishing these programs altogether or accepting troubling consequences that may violate the rule of law itself. Reckoning with law's potentially corrosive impact on political accountability requires that we at least entertain these possibilities, in the hope that dramatic action taken now will lead to better outcomes for all Americans in the future.