

Plenary Panel

**Protecting the Homeland and Honoring Civil Liberties:
How Can the Constitution Guide Us?**

**Federal Bar Association
2017 Mid-Year Meeting**

**Saturday, March 18, 2017
10:30 AM – Noon**

Capital Hilton Hotel, Washington, D.C.

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Patrick J. Charles, <i>The Plenary Power Doctrine and the Constitutionality of Ideological Exclusions: An Historical Perspective</i> , 15 Texas Review of Law & Policy 61 (Fall 2010)	129

Congressional Research Service, <i>Executive Authority to Exclude Aliens: In Brief</i> , January 23, 2017	171
<i>Symposium on Confronting Realities: The Legal, Moral and Constitutional Issues Involving Diversity. Panel II: Immigration Policy: Diversity, Mass Immigration and National Security After 9/11, An Immigration Reform Movement Perspective</i> , 66 Albany Law Review 387 (2003)	186

**FEDERAL BAR ASSOCIATION
2017 MID-YEAR MEETING
CAPITAL HILTON HOTEL, WASHINGTON, D.C.**

**SATURDAY, MARCH 18, 2017
10:30 AM - NOON**

Program Overview

**Protecting the Homeland and Honoring Civil Liberties:
How Can the Constitution Guide Us?**

This plenary panel of legal and academic experts will explore the balance between national security and Constitutional rights amid the war against radical Islamic terrorism.

The balance between protecting America's shores and honoring its Constitution is at the center of the first major legal disputes involving the new Administration and its travel ban executive orders. Fears over religious differences have also spawned a rise in hate crimes here and abroad. In addition, government policies to counter violent extremism are raising new questions over their harmony with fundamental American values and their impact upon American security.

How can the Constitution and the protection of religious freedom point the way toward religious tolerance, yet preserve national security? Is the recent Presidential executive order to control the entry of certain immigrants and refugees into the United States constitutional? In an era of self-radicalization, when ideas and conflicts can cross borders at ease, how can the homeland be protected while honoring the civil liberties of all faiths and races?

Panelists:

Sahar Aziz

Professor of Law, Texas A&M University School of Law

Gwendolyn Keyes Fleming

Former Principal Legal Advisor, U.S. Immigration and Customs Enforcement

Michael M. Hethmon

Senior Counsel, Immigration Reform Law Institute

Bruce Moyer, Moderator

Counsel for Government Relations, Federal Bar Association

SAHAR F. AZIZ

Texas A&M University School of Law
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My scholarship engages in comparative and critical examinations of 1) counterterrorism law and policy in the U.S and the Middle East; 2) civil rights of Muslims, Arabs, and South Asians in the U.S; and 3) rule of law and authoritarianism in Egypt

ACADEMIC APPOINTMENTS

Texas A&M University School of Law

Professor of Law

Associate Professor

September 2016 - present

August 2013 – August 2016

Affiliated Faculty, Islamophobia Research and Documentation Project (IRDP), University of California - Berkeley

Courses: Torts; National Security Law; Anti-Terrorism Criminal Law Enforcement; Public International Law; Constitutional Torts Litigation; Islamic and Middle East Law; Race and the Law; Religion and the Law

Brookings Doha Center

Non-Resident Fellow

Expertise: Egypt, Rule of Law, Judicial Independence, Comparative Law, and Government Accountability

January 2016 – December 2016

Texas Wesleyan School of Law

Associate Professor of Law

Courses: Torts, National Security, Civil Rights Litigation, Race and the Law

August 2011 – August 2013

Georgetown University Law Center

Adjunct Associate Professor

Courses: Seminar on National Security and Race in a Post-9/11 America

August 2010 – May 2011

ACADEMIC ARTICLES AND BOOK CHAPTERS

Losing the “War of Ideas:” A Critique of Countering Violent Extremism Programs, TEXAS INT’L L. J. (solicited) (forthcoming 2017)

Military Electoral Authoritarianism in Egypt, ELECTION LAW JOURNAL (forthcoming 2017) (solicited) (peer reviewed)

Global Conflict and Populism in a Post-9/11 World, TULSA L. REV. (forthcoming 2017)

Rethinking Counterterrorism in the Age of ISIS: Lessons from Sinai, 95 NEB. L. REV. 307 (2016) (lead article)

Independence without Accountability: The Judicial Paradox of Egypt’s Failed Transition to Democracy, 120 PENN ST. L. REV. 1 (2016) (lead article)

Theater or Transitional Justice: Reforming the Judiciary in Egypt, TRANSITIONAL JUSTICE IN THE MIDDLE EAST (ed. Chandra Sriram, Oxford University Press 2016) (solicited)

- Cited in 10 LAW & ETHICS HUM. RTS. 185 (2016)

Egypt’s Revolution Turned Uprising, in EGYPT BEYOND TAHRIR (ed. Bessma Momain & Eid Mohamed, Indiana

University Press 2016) (*solicited*)

(De)liberalization of Judicial Independence in Post-January 25th Egypt, in *EGYPT AND THE CONTRADICTIONS OF LIBERALISM: ILLIBERALISM, INTELLIGENTSIA AND THE FUTURE OF EGYPTIAN DEMOCRACY* (eds. Dalia Fahmy & Daanish Faruqi, Oneworld Publications 2017) (*solicited*)

Terror(izing) the Muslim "Veil," THE RULE OF LAW AND THE RULE OF GOD, edited by Simeon Ilesanmi (Palsgraf Press 2014) (*solicited*)

- Cited in 8 *PHILOLOGIA* (2016)

Coercive Assimilationism: The Perils of Muslim Women's Identity Performance in the Workplace, 20 *MICH. J. RACE & L.* 1 (2014) (lead article)

- Cited in 39 *FORDHAM INT'L L.J.* 533 (2016); *INT'L J. HUMAN RES. MGMT* (2016); *MEDIA, CULTURE & SOCIETY* (2016)
- Cited in *BRIEF IN AMICI CURIAE IN SUPPORT OF PETITIONER, EEOC v. Abercrombie & Fitch Stores, Inc.* (U.S. Supreme Court Dec. 10, 2014); Featured in *ImmigrationProf Law Blog*, March 6, 2014, *WorkplaceProf Law Blog*, March 9, 2014, and *CivilRightsProf Law Blog*, Jan. 5, 2015

Bringing Down an Uprising: Egypt's Stillborn Revolution, 30 *CONN. J. INT'L L.* 1 (2014) (lead article)

- 41 *N.C. J. INT'L LAW* 326 (2016)

The Blinding Color of Race: Elections and Democracy in a Post-Shelby Era, 17 *BERKELEY J. AFR.-AM. L. & POL'Y* 182 (2015) (*solicited*)

- Cited in 18 *HARV. LATINO L. REV.* 99 (2015); Masters Dissertation, Cardiff University, *Persuasion and Trust Techniques in Campaigner's Political Speeches: A Multimodal Political Discourse Analysis of El-Sisi's Nomination Speech 2014* (2016).

Policing Terrorists in the Community, 5 *HARV. NAT'L SEC. J.* 147 (2014)

- Cited in *J. LAW & RELIGION* (2017); *AMERICAN U. L. REV.* (2016); 47 *LOY. U. CHIC. L. J.* 693 (2016); 39 *FORDHAM INT'L L.J.* 533 (2016); 50 *HARV. C.R.-C.L. L. REV.* 290 (2015); 31 *HARV. J. RACIAL & ETHNIC JUST.* 1 (2015); 29 *GEO. IMMIGR. L.J.* 45 (2015); 40 *LAW & SOC. INQUIRY* 1001 (2015); 31 *HARV. J. RACIAL & ETHNIC JUST.* 1 (2015); 62 *UCLA L. REV.* 834 (2015), 18 *CHAP. L. REV.* 577 (2015); *COMPARATIVE COUNTER-TERRORISM LAW* (2015); *Countering Violent Extremism and American Muslims*, GEORGE WASHINGTON PROGRAM ON EXTREMISM (2015); *COUNTERING VIOLENT EXTREMISM: DEVELOPING AN EVIDENCE-BASE FOR POLICY AND PRACTICE* (2015); 62 *AM. J. COMP. L.* 643 (2014); 50 *TULSA L. REV.* 43 (2014)
- Cited in Doctoral Dissertation, Northcentral University, *Exploring Community-Oriented Policing as an Anti-Terrorism Approach Post 9/11: A Case Study* (2015); Brennan Center Letter to the Honorable Lisa O. Monaco, Assistant to the President for Homeland Security and Counterterrorism (2015).

Revolution without Reform? A Critique of Egypt's Election Laws, 15 *GEO. WASH. INT'L L. REV.* 101 (2012)

- Cited in 2 *CONTEMP. REV. OF MIDDLE EAST* 289 (2015); 21 *U. MIAMI INT'L & COMP. L. REV.* 349 (2014); 2 *U. BALT. J. INT'L L.* 23 (2014); *ISLAM, IDEOLOGY AND TRANSITION: EGYPT AFTER MUBARAK*, (eds. Lust, Soltan and Wichmann, Yale University) (2013); Shash, Farah, *An assessment of the use of gender mainstreaming to promote equality in pre and post 2011 revolutionary Egypt* (2012)

From the Oppressed to the Terrorist: Muslim American Women in the Crosshairs of Intersectionality, 9 *HASTINGS RACE & POV. L. J.* 191 (2012)

- Cited in *Supreme Court and Public Administration*, *GLOBAL ENCYCLOPEDIA OF PUBLIC ADMINISTRATION, PUBLIC POLICY, AND GOVERNANCE* 1-6 (2016); *INT'L J. HUMAN RES. MGMT* (2016); *BMC Public Health*

(2016); “*Rejected and Dejected*”: *The Impacts and Contexts of Islamophobic Violence*, in RELIGION, FAITH AND CRIME (2016); 39 FORDHAM INT’L L.J. 533 (2016); 94 NEB. L. REV. 963 (2015); 30 BERKELEY J. GENDER L. & JUST. 226 (2015); MANAGING RELIGIOUS DIVERSITY IN THE WORKPLACE (2015); MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY (2015); GENDERED ISLAMOPHOBIA: HATE CRIME AGAINST MUSLIM WOMEN (2014); 20 SOCIAL IDENTITIES: J. STUDY OF RACE, NATION, & CULTURE 1 (2014); 47 U. MICH. J.L. REFORM 87 (2013); 28 AUSTRALIAN FEMINIST STUDIES 76 (2013); 8 FIU L. REV. 333 (2013)

- Cited in Selected Bibliography for PENN STATE WOMEN’S SUMMIT 2016; BRIEF IN AMICI CURIAE IN SUPPORT OF PETITIONER, *EEOC v. Abercrombie & Fitch Stores, Inc.* (Dec. 10, 2014); Respondent’s Brief to the U.S. Supreme Court in EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Petitioner, v. ABERCROMBIE & FITCH STORES, INC., 2014 U.S. Briefs 86, 2014 U.S. S. Ct. Briefs LEXIS 4352; Doctoral Dissertation, Walden University, *The Self-Perception and Campus Experiences of Traditional Age Female Muslim American Students* (2015)

Caught in a Preventive Dragnet: Selective Counterterrorism in a Post 9-11 America, 47 GONZ. L. REV. 1 (2012)

- Cited in REFLECTING 9/11: NEW NARRATIVES IN LITERATURE, TELEVISION, FILM AND THEATRE (2016); 54 HARV. J. LEG. (2016); 19.2 NEW CRIM. L. REV. 236 (2016); 7 LOY. U. CHIC. L. J. 693 (2016); 5 U.C. IRVINE L. REV. 945 (2015); 84 MISS. L.J. 1257 (2015); 19 LEWIS & CLARK L. REV. 1 (2015); NEW CRIM. L. REVIEW (2015); 2014 MICH. ST. L. REV. 1035 (2014); 89 A.L.R. FED. 2D 215 (2014); 75 LA. L. REV. 1 (2014); 25 STAN. L. & POL’Y REV. 341 (2014); 5 WM. & MARY BUS. L. REV. 105 (2014); 88 TUL. L. REV. 483 (2014); 3 U.C. IRVINE L. REV. 809 (2013); 103 J. CRIM. L. & CRIMINOLOGY 111 (2013); CONTEMPORARY ISLAMIC FINANCE (2013); 44 COLUM. HUM. RTS. L. REV. 47 (2012)
- Cited in Doctoral Dissertation, City University of New York, *Policy Advocacy and the Performance of Muslim American Identity* (2015)

Egypt’s Protracted Revolution, 19 No. 3 HUM. RTS. BRIEF 1 (2012) (*solicited*)

- Cited in 4 U. BALT. J. INT’L L. 1 (2016); 7 MIDDLE EAST L. & GOV. 236 (2015); 5 BERKELEY J. OF MIDDLE EASTERN & ISLAMIC LAW 1 (2013)

Sticks and Stones, the Words that Hurt: Entrenched Stereotypes 8 Years After 9/11, 13 N.Y. CITY L. REV. 33 (2009)

- Cited in CAL. L. REV. (2016); 8 PHILOLOGIA (2016); 21 BARRY L. REV. 123 (2015); 23 TUL. J. INT’L & COMP. L. 607 (2015); 84 MISS. L.J. 1257 (2015); MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY (2015); 2 SAVANNAH L. REV. 391 (2015); 30 TOURO L. REV. 9 (2014); 1 WARWICK RESEARCH JOURNAL 2 (2014); 122 YALE L.J. 1484 (2013) 47 U. MICH. J.L. REFORM 87 (2013); 46 LOY. L.A. L. REV. 31 (2013); 100 CALIF. L. REV. 1027 (2012); 10 SANTA CLARA J. INT’L L. 179 (2012); 22 S. CAL. INTERDIS. LJ 65 (2012); 11 MARYLAND J. RACE, RELIGION, GENDER & CLASS 271 (2011); PSYCHOLOGY OF PREJUDICE: INTERDISCIPLINARY PERSPECTIVES ON CONTEMPORARY ISSUES (2012); 122 YALE L.J. 1484 (2013);
- Cited in Amici Curai Brief to the U.S. Supreme Court of the United States in *University of Texas Southwestern Medical Center v. Naail Nassar*, Case No. 12-484 (2013); Amici Curiae Brief to the U.S. Court of Appeals for the Third Circuit, *Hassan v. The City of New York*, Case No. 14-1688 (2014)

The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Combating Terrorism?, 9 TEX. J. C.L. & C.R. 45 (2003)

- Cited in THE FINANCIAL WAR ON TERRORISM: A REVIEW OF COUNTER-TERRORISM FINANCING (2015); *Economic and Procedural Constraints of Compulsory Licenses for Medicines* in COMPULSORY LICENSING (2015); 63 EMORY L.J. 581 (2014); 2014 BYU L. REV. 697 (2014); 38 CAN.-U.S. L.J. 61, 92 (2013); 49 AM. CRIM. L. REV. 269 (2012); 10 SANTA CLARA J. INT’L L. 10 (2012); 49 AM. CRIM. L. REV. 269 (2012); 86 IND. L.J. 543 (2011); 54 HOW. L.J. 437 (2010-2011); 4 INT. J. LIABILITY AND SCIENTIFIC ENQUIRY 1 (2011); 34 N.C.J. INT’L L. & COM. REG. 601 (2008-2009); LEGAL RESPONSES TO TERRORISM (2008); 28 REV. LITIG. 263 (2008); 43 WAKE FOREST L. REV. 643 (2008); MORE SECURE, LESS FREE? ANTITERRORISM POLICY AND CIVIL

LIBERTIES AFTER 9/11 (2007); 12 TEX. HISP. J.L. & POL'Y 9 (2006); 29 HAMLINE L. REV. 65 (2006); THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW (2006); 50 VILL. L. REV. 1073 (2005); 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447 (2005); 24 REV. LITIG. 637 (2005); 15 KAN. J.L. & PUB. POL'Y 461 (2005); 7 SCHOLAR 205 (2004-2005); Dycus, Stephen, et al. NATIONAL SECURITY LAW, 2004-2005 Case Supplement. Aspen Publishers (2004)

- Cited in Doctoral Dissertation, Walden University, *The Use of Minors in Material Support of Terrorist Organizations* (2016).

Linking Intellectual Property Rights with Research and Development, Technology Transfer, and Foreign Investment: A Case Study of Egypt's Pharmaceutical Industry, 10 ILSA J. INT'L & COMP. L. 1 (2003)

- Cited in 52 AM. BUS. L.J. 435 (2015); INTERNATIONAL INTELLECTUAL PROPERTY: HANDBOOK OF CONTEMPORARY RESEARCH (2015); ECONOMIC AND PROCEDURAL CONSTRAINTS OF COMPULSORY LICENSES FOR MEDICINES (2015); 32 U. PA. J. INT'L L. 1165 (2010-2011); 32 MICH. J. INT'L L. 347 (2010-2011); 10 WAKE FOREST INTELL. PROP. L. J. 69 (2010); THE GLOBAL CHALLENGE OF INTELLECTUAL PROPERTY RIGHTS (2009); 10 WAKE FOREST INTELL. PROP. L. J. 69 (2009); 37 J. LAW, MEDICINE & ETHICS 209 (2009); 45 AM. BUS. L.J. 283 (2008); 8 WAKE FOREST INTELL. PROP. L.J. 161 (2007-2008); REPRESENTATIONAL FAIRNESS IN WTO RULE-MAKING (2006); 4 J. MARSHALL REV. INTELL. PROP. L. 1 (2004-2005); 4 JOHN MARSHALL REV. INTELL. PROP. L. 608 (2005).

PUBLIC POLICY REPORTS AND ESSAYS

De-Securitizing Counterterrorism in the Sinai Peninsula, BROOKINGS DOHA CENTER (forthcoming 2017)

Religious Freedom as an Antidote to Violent Religious Extremism, Religious Freedom and the Common Good Conference Report, BERKLEY CENTER FOR RELIGION, PEACE, AND WORLD AFFAIRS, GEORGETOWN UNIVERSITY (forthcoming 2017)

The Expanding Jurisdiction of Egypt's Military Court, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (SADA) (Oct. 12, 2016)

Concluding Remarks, *Security and Technology: Rethinking National Security Symposium*, TEXAS A&M LAW REVIEW (2016)

Coercing Assimilation: The Case of Muslim Women of Color, 24 TRANSNATIONAL L. & CONTEMP. PROB. 1 (Univ. of Iowa) (Fall 2015) (*solicited*)

- Featured as Article of Interest in [Religion Clause Blog](#)

Book Review of *The Headscarf Debates: Conflicts of National Belonging* by Anna C. Korteweg and Gokce Yurdakul (Stanford University Press 2014), CONTEMPORARY SOCIOLOGY (Fall 2015) (*solicited*)

Egypt's Judiciary, Coopted, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (SADA) (Aug.20, 2014)

Protest is Egypt's Last Resort, THE NEW YORK TIMES (Dec. 3, 2013) (co-authored with Shahira Abouelleil)

Terror and the Muslim "Veil," OXFORD ISLAMIC STUDIES ONLINE (Nov. 20 2013) (*solicited*)

Egypt's Impeachment Alternative, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (SADA) (Nov. 1, 2013)

- Cited in 4 U. BALT. J. INT'L L. 1 (2015); 24 IND. INT'L & COMP. L. REV. 859 (2014)

A Court Decides Who is White Under Law, AMERICAN BAR ASSOCIATION JOURNAL (Nov. 1, 2013) (*solicited*)

Sinai: Tipping Point or Pretext in Ouster?, THE MIDDLE EAST INSTITUTE (September 30, 2013) (*solicited*)

Sinai's Role in Morsi's Ouster, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (SADA), (Aug. 20, 2013)

- Cited in NORTH AFRICAN POLITICS: CHANGE AND CONTINUITY (2015); *The Future of the Sinai Peninsula*, PARTNERSHIP FOR PEACE CONSORTIUM QUARTERLY JOURNAL (Spring 2014)

U.S. Foreign Policy and Morsi's Ouster, THE MIDDLE EAST INSTITUTE (July 31, 2013)

- Cited in 127 HARV. L. REV. 2499 (2014); 21 U. MIAMI INT'L & COMP. L. REV. 349 (2014) Cited as a Must Read by the *Council on Foreign Affairs*, http://www.cfr.org/publication/by_type/must_read.html?groupby=0&filter=356.

Democracy, Like Revolution, is Unsustainable Without Women, UNITED STATES INSTITUTE FOR PEACE (June 2013)

- Cited in 33 INT'L AFFAIRS & GLOBAL STRATEGY (2015)

The Muslim "Veil" Post-9/11: Rethinking Women's Rights and Leadership, INSTITUTE FOR SOCIAL POLICY AND UNDERSTANDING (November 2012) (*solicited*)

- Cited in E-INTERNATIONAL RELATIONS (2016); RELIGION AND MEN'S VIOLENCE AGAINST WOMEN (2015); 20 SOCIAL IDENTITIES: J. FOR STUDY OF RACE, NATION, AND CULTURE 4 (2014)
- Cited in Doctoral Dissertation, Utah State University, *It is not in the Stars to Hold our Destiny but in Ourselves": Tales of Saudi Muslim Women Maintaining their Identities in U.S. Higher Education* (2015)

Protecting Rights as a Counterterrorism Tool: The Case of American Muslims, INSTITUTE FOR NEAR EAST & GULF MILITARY ANALYSIS (INEGMA) (October 2012) (*solicited*)

- Cited in *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions*, COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE & HUMAN RIGHTS WATCH (2014).

Countering Religion or Terrorism? Selective Enforcement of Material Support Laws Against Muslim Charities, INSTITUTE FOR SOCIAL POLICY AND UNDERSTANDING (August 2011) (*solicited*)

- Cited in FREE SPEECH AFTER 9/11 (2016); THE MUSLIMS ARE COMING! ISLAMOPHOBIA, EXTREMISM, AND THE DOMESTIC WAR ON TERROR (2014); 12 FIRST AMEND. L. REV. 139 (2013); *The American Mosque: Behind the Controversy* (2012); COUNTER-TERRORISM AND HUMANITARIAN ACTION (2011).
- Cited in Doctoral Dissertation, City University of New York, *Policy Advocacy and the Performance of Muslim American Identity* (2015); Doctoral Dissertation, American University, *"Too Damn Muslim to be Trusted:" The War on Terror and the Muslim American Response* (2014)

Citizens, Not Subjects: Debunking the Sectarian Narrative of Bahrain's Pro-Democracy Movement, INSTITUTE FOR SOCIAL POLICY AND UNDERSTANDING (July 2011) (*solicited*)

- Cited in 2 CONFLICT AND SOCIETY 125 (2016), PUBLIC ADMINISTRATION IN TANZANIA: CURRENT ISSUES AND CHALLENGES (2015); THE LAND AND ITS PEOPLE: CIVIL SOCIETY VOICES ADDRESS THE CRISIS OVER NATURAL RESOURCES IN THE MIDDLE EAST/NORTH AFRICA (2015); BEYOND THE ARAB SPRING: THE EVOLVING RULING BARGAIN IN THE MIDDLE EAST (2014); *Land Grabs and the Arab Spring: A Chronicle of Corruption as Statecraft* (2012); REPORT OF THE BAHRAIN INDEPENDENT COMMISSION OF INQUIRY (2011).

GRANTS

Diversity Matters Seed Grant, *Discrimination Experiences of Muslim American Students at Texas A&M University*, TEXAS A&M UNIVERSITY OFFICE OF THE VICE PRESIDENT AND ASSOCIATE PROVOST FOR DIVERSITY, \$4000 (awarded December 2015) (co-PI with Dr. Shaida Kalbasi)

Interdisciplinary Research Seed Grant, *The Foundations of Judicial Legitimacy: Public Support for Courts in the United States, Benin, Egypt, and Qatar*, TEXAS A&M UNIVERSITY SCHOOL OF LAW, BUSH SCHOOL OF GOVERNMENT AND PUBLIC POLICY, AND COLLEGE OF LIBERAL ARTS, \$30,000 (awarded September 2015) (co-PI Professors Jessica Gottlieb, Joseph Ura, and James Rogers)

EDUCATION

The University of Texas School of Law, Austin, Texas

J.D., *cum laude*

TEXAS LAW REVIEW - Associate Editor

Bar Admissions: Texas, District of Columbia

The University of Texas, Austin, Texas

M.A., Middle Eastern Studies

The University of Texas at Arlington, Arlington, Texas

B.Sc. Management Information Systems, *magna cum laude*

AWARDS AND RECOGNITIONS

1. *17th Annual Buck Colbert Franklin Memorial Civil Rights Lecture*, UNIVERSITY OF TULSA (Sept. 15, 2016)
2. *The Derrick A. Bell Award*, AMERICAN ASSOCIATION OF LAW SCHOOLS (2015)
3. *The Rose Nader Award*, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE (2015)
4. *Emerging Scholar Class of 2015*, DIVERSE MAGAZINE
5. *Texas A&M Law Review Service Award* (2014-2015)
6. Member (invited), THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Task Force to Combat Harassment in the Workplace* (2015 – present)
7. *Scholar in Residence* (invited), *The Role of Law in Revolutionary Egypt*, Institute for Immigration and International Law, THURGOOD MARSHALL SCHOOL OF LAW, Houston, Texas, October 2-4, 2013
8. *Dean's Scholarship Award for Tenure Track Faculty* (2012-2013)
9. *Pro Bono Attorney of the Year Award*, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE (2011)
10. *Patriot Award*, BILL OF RIGHTS DEFENSE COMMITTEE (2010)

U.S. ACADEMIC CONFERENCES

1. Presenter (invited), *Racialized Surveillance in the Post-9/11 Era*, Privacy, Security & Power: The State of Digital Surveillance, UNIVERSITY OF CONNECTICUT SCHOOL OF LAW, Jan. 27, 2017
2. Presenter (invited), *Women in the Syrian Refugee Crisis*, Women, Peace, and Security, TEXAS A&M UNIVERSITY BUSH SCHOOL OF GOVERNMENT, College Station, TX, Nov. 18, 2016
3. Presenter (invited), *Religious Freedom and Countering Terrorism*, Religious Freedom and the Common Good: A Capstone Symposium of the Religious Freedom Project, GEORGETOWN UNIVERSITY, Washington, D.C. Nov. 14, 2016
4. Presenter (invited), *Rethinking Counterterrorism in Age of ISIS: Lessons from Sinai*, Faculty Colloquium, UNIVERSITY OF CALIFORNIA - DAVIS, August 25, 2016
5. Presenter (invited), *ISIS: Navigating Conflict with Non-State Actors*, UNIVERSITY OF TEXAS SCHOOL OF LAW, April 15, 2016
6. Presenter (invited), *The Color of Surveillance*, GEORGETOWN LAW CENTER, April 8, 2016
7. Presenter (invited), *The Paradox of Preventive Counterterrorism*, US Counterterrorism Policy, HARVARD LAW SCHOOL, March 28-29, 2016

8. Presenter, *Rethinking Counterterrorism in the Age of ISIS*, Young Comparativists Conference, TULANE UNIVERSITY LAW SCHOOL, March 18-19, 2016
9. Presenter (invited), *(De)Essentializing Terrorism: A Typology of Terrorists*, The Transnational Executive Symposium, INDIANA UNIVERSITY MAURER SCHOOL OF LAW, March 3-4, 2016
10. Presenter (invited), *War on Terror(izing) Muslims: Hate Speech and Hate Crimes Post-9/11*, Free Speech Under Fire: The Future of Free Speech Symposium, BROOKLYN LAW SCHOOL, Feb. 26, 2016
11. Presenter (invited), *(De)Essentializing Terrorism: A Typology of Terrorists*, Symposium: Redefined National Security Threats: Tensions and Legal Implications, EMORY LAW SCHOOL, Feb. 10, 2016
12. Presenter and Conference Organizer, *Resisting From the Margins: Muslim Women at the Intersection of Racism, Sexism, and Empire*, Institutionalizing Islamophobia: Critiquing the Countering Violent Extremism (CVE) Framework and Emerging Programs, UNIVERSITY OF CALIFORNIA-BERKELEY, Feb. 6, 2016
13. Speaker (invited), *Failing States, Failed Paradigms: Security and Development in Sinai*, Faculty Workshop Colloquium, CASE WESTERN RESERVE SCHOOL OF LAW, Feb. 4, 2016
14. Presenter (invited), *Failing States, Failed Paradigms: Security and Development in Sinai*, International Law Association – West, BRIGHAM YOUNG UNIVERSITY SCHOOL OF LAW, January 29, 2016
15. Presenter, *Challenging Sovereignty: Exploring the Rise of ISIS and Boko Haram*, ASSOCIATION OF AMERICAN LAW SCHOOLS ANNUAL CONFERENCE, January 9, 2016
16. Presenter (invited), *Coercive Assimilationism: Muslim Women's Identity Performance in the Workplace*, ASSOCIATION OF AMERICAN LAW SCHOOLS ANNUAL CONFERENCE, January 9, 2016
17. Panelist (invited), *(De)Liberalizing Judicial Independence in Post-January 25th Egypt*, Egypt and the Contradictions of Liberalism: Illiberalism Within the Egyptian Intelligentsia, THE MIDDLE EAST STUDIES ASSOCIATION ANNUAL CONFERENCE, Denver, CO, Nov. 23-24, 2015
18. Presenter (invited), *Coercive Assimilationism: The Perils of Muslim Women's Identity Performance in the Workplace*, COLUMBIA LAW SCHOOL, Center for Gender and Sexuality Law, Nov. 10, 2015
19. Presenter (invited), *The Racial Muslim*, Symposium: Religion and the Law, FLORIDA INTERNATIONAL UNIVERSITY SCHOOL OF LAW, October 23, 2015
20. Presenter (invited), *Conference Plenary: Critical Constitutionalism: Deconstructing the Legitimacy of State Institutions*, LATCRIT XX ANNUAL CONFERENCE, Anaheim, CA, Oct. 1-3, 2015
21. Presenter (selected from a call for papers), *Identity Performance and Second Generation Discrimination Against Muslim Women of Color*, AALS WORKSHOP ON NEXT GENERATION ISSUES ON SEX, GENDER AND THE LAW, Orlando, FL, June 24-25, 2015
22. Participant (invited), *Convening on Religious Exemptions and Racial Justice*, COLUMBIA LAW SCHOOL, May 11, 2015
23. Presenter (invited), *Coercive Assimilationism: The Perils of Muslim Women's Identity Performance in the Workplace*, Sixth Annual Islamophobia Conference, UNIVERSITY OF CALIFORNIA AT BERKELEY, April 23-25, 2015
24. Presenter, *Independence without Accountability: The Judicial Paradox of Egypt's Failed Transition*, Young Comparativists Conference, FLORIDA STATE UNIVERSITY SCHOOL OF LAW, April 17, 2015; Moderator, *Constitutional Design*
25. Faculty Colloquium, *Independence without Accountability: The Judicial Paradox of Egypt's Failed Transition*, MCGEORGE SCHOOL OF LAW, April 2, 2015
26. Panelist (invited), *Law and Policy Implications of Countering Violent Extremism Programs*, Conference on the Muslim-American Legal Struggle: A Diversity of Experiences, UNIVERSITY OF CALIFORNIA-BERKELEY BOALT SCHOOL OF LAW, March 20, 2015
27. Panelist (invited), *Fourth Amendment: Rights, Race, Religion*, Conference on Policing, Conflict, and Change, CARDOZO SCHOOL OF LAW, March 12, 2015
28. Presenter, *Formal Models of Political Institutions*, PUBLIC CHOICE SOCIETY ANNUAL CONFERENCE, San Antonio, Texas, March. 12-15, 2015 (presenting with Dr. James Rogers, Texas A&M University at Qatar)
29. Presenter, *Theater or Transitional Justice: Reforming Egypt's Judiciary*, ASSOCIATION OF AMERICAN LAW SCHOOLS ANNUAL CONFERENCE, International Human Rights Section, Washington, D.C., Jan. 3, 2015 (selected from a call for papers)

30. Presenter, *Emerging Topics: The Rise of ISIS and its Effect on Domestic Counterterrorism*, NEW TECHNOLOGY, OLD LAW: RETHINKING NATIONAL SECURITY, Texas A&M University School of Law, Oct. 17, 2014
31. Presenter (invited), *Networking and Professional Development Strategies for Junior Faculty*, SOCIETY OF AMERICAN LAW TEACHERS ANNUAL CONFERENCE, University of Las Vegas Boyd School of Law, Las Vegas, NV, Oct. 9-11, 2014
32. Discussant (invited), *The Legal and Regulatory Challenges Facing Egypt's Press*, Egypt Media Forum, GEORGE WASHINGTON UNIVERSITY, Washington, D.C., Oct. 1-3, 2014
33. Presenter (invited), *Cross-National Civil Rights Challenges Facing Muslim Women the US*, Women in the Revolution: Gender and Social Justice after the Arab Spring, UNIVERSITY OF IOWA SCHOOL OF LAW, Sept. 26, 2014
34. Presenter (invited), *The Role of Law in Egypt's Uprising*, UNIVERSITY OF TEXAS SAN ANTONIO, April 24, 2014
35. Presenter (invited), *Veiled Discrimination*, UCLA SCHOOL OF LAW CRITICAL RACE THEORY WORKSHOP, April 15, 2014, Los Angeles, CA
36. Panelist (invited), *Coercive Assimilationism in the Workplace: Muslim Women of Color*, TITLE VII AT 50, ST. JOHN'S UNIVERSITY AND NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY, April 4-5, 2014
37. Keynote Speaker (invited), *Learning from the Past: Civil Rights in the Post-9/11 Era*, Enhancing Diversity Speaker Series, TEXAS A&M UNIVERSITY, March 21, 2014, College Station, Texas
38. Speaker (invited), *Law at the Crossroads of Revolution in Egypt*, YALE LAW SCHOOL, Feb. 24, 2014
39. Presenter, *Assimilationist Pressures to Perform Identity in a Multicultural Workplace: The Case of Muslim Women* (Work in Progress) NORTHEAST PROFESSORS OF COLOR CONFERENCE, San Juan, Puerto Rico, Dec. 6, 2013
40. Speaker (invited), *What's Next for Human and Civil Rights in Egypt*, THE UNIVERSITY OF SOUTH CAROLINA SCHOOL OF LAW, Columbia, SC, Nov. 14, 2013
41. Panelist (invited), *Law and Politics in Post-Revolutionary Egypt*, THE UNIVERSITY OF TEXAS CENTER FOR MIDDLE EASTERN STUDIES, Nov. 7, 2013
42. Panelist, *What's Next for Egypt: Notes From the Ground*, SOUTHERN METHODIST UNIVERSITY EMBREY HUMAN RIGHTS CENTER, October 8, 2013
43. Presenter, *Policing Terrorists in the Community; Performance Identity and Muslim Women*, LATCRIT ANNUAL CONFERENCE, Chicago, Illinois, Oct. 4-6, 2013
44. Participant (invited), *Community Surveillance: Strategizing for Solutions*, COLUMBIA LAW SCHOOL, New York City, NY, August 15-16, 2013
45. Presenter (invited), *Gender and Elections After Egypt's Jan 25 Revolution*, AMERICAN SOCIETY OF COMPARATIVE LAW YOUNGER COMPARATIVISTS SECOND ANNUAL CONFERENCE, "New Voices in Comparative Law," April 18-19, 2013, University of Indiana McKinney School of Law
46. Presenter (invited), *A Typology of Muslim Women Feminists*, Section on Africa, ASSOCIATION OF AMERICAN LAW SCHOOLS ANNUAL CONFERENCE, New Orleans, LA, Jan. 6, 2013
47. Presenter (invited), *The Arab Spring and Constitutionalism in the Middle East*, FORDHAM LAW SCHOOL, New York City, N.Y., Nov. 18, 2012
48. Presenter (invited), *Consolidating the Change: Challenges of Writing New Constitutions at the Harvard Arab Weekend Conference*, HARVARD LAW SCHOOL, Nov. 10, 2012
49. Presenter (invited), *The Current Status of Women's Rights in the Muslim World: Giving Voice to Muslim Women*, SOUTHERN METHODIST UNIVERSITY EMBREY HUMAN RIGHTS PROGRAM, October 18, 2012
50. Presenter, *Rule of Law: Rhetoric or Reality in Egypt's Transition to Democracy*, GEORGETOWN UNIVERSITY LAW CENTER, October 10, 2012
51. Presenter, *Who's Policing Whom? Community Policing in Counterterrorism*, A Multiplicity of Perspectives on the War on Terror: Teaching Social Justice in the Aftermath of 9/11 Panel, SOCIETY OF AMERICAN LAW TEACHERS Annual Conference: Teaching Social Justices, Expanding Access to Justice, October 4-6, 2012
52. Presenter (invited), *Hate Crimes and the Law*, SOUTHERN METHODIST UNIVERSITY DEDMAN SCHOOL OF LAW, October 1, 2012
53. Presenter, *Counterterrorism Scope Creep: From the War on Terror to the Occupy Movement*, The "Occupy Wall Street" Protests Panel, SOUTHEASTERN ASSOCIATION OF LAW SCHOOLS 2012 ANNUAL CONFERENCE, August 2, 2012

54. Presenter (invited), *Critical Discourses on Islamophobia: Symbols, Images and Representations*, UNIVERSITY OF CALIFORNIA BERKELEY BOALT LAW SCHOOL, April 20, 2012
55. Presenter (invited), *After Afghanistan: Where To From Here?* Center on Law, Ethics and National Security, DUKE UNIVERSITY SCHOOL OF LAW, Durham, North Carolina, April 13&14, 2012
56. Presenter, *Intersection and Divergence of Interests: Coalition Building Among People of Color Communities*, The 2012 Southeast/Southwest People of Color Scholarship Conference: Transformative Advocacy, Scholarship, and Praxis: Taking Our Pulse, at CUMBERLAND SCHOOL OF LAW, Birmingham, Alabama, March 29, 2012
57. Presenter, *Preparing for Egypt's Presidential Elections and the Transition to Civilian Rule*, The Center for Christian Muslim Understanding, GEORGETOWN UNIVERSITY, March 26, 2012
58. Presenter (invited), *Modern Global Revolution*, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW, Lansing, Michigan, February 16 & 17, 2012
59. Presenter (invited), *Muslim Women's Rights Under Secular and Religious Laws*, SOUTHERN METHODIST UNIVERSITY DEDMAN SCHOOL OF LAW, February 14, 2011
60. Faculty Colloquium, *From the Oppressed to the Terrorist: American Muslim Women Caught in the Crosshairs of Intersectionality?* CUMBERLAND SCHOOL OF LAW, November 11, 2011
61. Presenter (invited), *Spotlight on Civil Rights*, SOUTHERN METHODIST UNIVERSITY DEDMAN SCHOOL OF LAW, November 4, 2011
62. Presenter (invited), *Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later, The Civil Rights Division Department of Justice*, GEORGE WASHINGTON UNIVERSITY, Washington, D.C., October 19, 2011
63. Presenter (invited), *Muslim-American Citizenship: A Decade Since 9/11*, COLUMBIA UNIVERSITY, New York, NY October 7, 2011
64. Presenter, *Caught in a Preventive Dragnet: Selective Counterterrorism Against Muslims*, Race and Criminal Justice in the West, GONZAGA SCHOOL OF LAW, September 24, 2011
65. Presenter (invited), *The People's Movement in Egypt and Ripple Effects*, FORDHAM UNIVERSITY SCHOOL OF LAW, March 31, 2011
66. Presenter (invited), *New Racism: The State of Hate in the United States*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, March 28, 2011
67. Presenter (invited), *The Continuing Impact of 9/11 on National Security and Civil Liberties*, FLORIDA COASTAL SCHOOL OF LAW, March 4, 2011
68. Presenter (invited), *Responding to Anti-Muslim Bigotry*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, January 26, 2011
69. Presenter (invited), *Somali Youth Radicalization*, CENTER FOR CHRISTIAN MUSLIM UNDERSTANDING, GEORGETOWN UNIVERSITY, November 15, 2010
70. Presenter (invited), *Confronting Islam: Shariah, the Constitution, and American Muslims*, THE UNIVERSITY OF MARYLAND SCHOOL OF LAW, October 5, 2010
71. Presenter (invited), *Navigating a Post 9/11 World: Challenges to Civil Liberties and Religious Freedom*, WASHINGTON UNIVERSITY, St. Louis, MO September 15, 2011
72. Keynote Speaker, *Then and Now: Civil Liberties and Interfaith Relations Ten Years After 9/11* (invited), CENTER FOR FAITH STUDIES, Lincoln, Nebraska, September 11, 2011
73. Presenter (invited), *Issues in Law and Religion: Gender, Rights of Religious Minorities, and Multiculturalism*, The Rule of Law, The Rule of God: Their Difference and the Difference It Makes, WAKE FOREST UNIVERSITY Symposium on Ethics, Religion & Law, Winston-Salem, NC, March 2010
74. Presenter (invited), *Current Developments in Civil Rights Issues Post-9/11*, THE UNIVERSITY OF DELAWARE, April 2009
75. Presenter (invited), *Terror on Trial: Civil Liability and the War on Terrorism*, THE UNIVERSITY OF TEXAS SCHOOL OF LAW, Austin, Texas, March 2008

INTERNATIONAL CONFERENCES AND PRESENTATIONS

1. Speaker (invited), *Surveillance, Privacy, and Internet Freedom*, MOZILLA FOUNDATION FESTIVAL, London, United

- Kingdom, October 28-30, 2016
2. Participant (invited), *Workable Solutions for Radicalization*, HOLLINGS CENTER, Amman, Jordan, Oct. 23-26 2016
 3. Plenary Speaker (invited), *American Muslims at the Intersection of Religious Freedom and Racial Justice*, Twenty-Third Annual International Law and Religion Symposium, BRIGHAM YOUNG UNIVERSITY SCHOOL OF LAW, Provo, UT, Oct. 2-4, 2016
 4. Participant in invitation-only *Democracy and Security Dialogue* (chaired by Secretary Madeleine Albright), Washington, D.C., June 30, 2016
 5. Panel Chair (invited), *Ways Forward: How to Empower Formal Institutions to Counter Violent Extremism*, Exploring the Relationship Between Rule of Law and Countering Violent Extremism in the Middle East, UNIVERSITY OF SOUTH CAROLINA SCHOOL OF LAW AND U.S. DEPARTMENT OF JUSTICE, Dubai, UAE, June 1-3, 2016
 6. Panel Chair (invited), National Security, Religion, and Freedom of Expression, *Freedom of Expression Global Jurisprudence International Conference*, COLUMBIA LAW SCHOOL, April 4-5, 2016
 7. Plenary Panel (invited), *Future Generations in Economic Development in Egypt and the Arab World*, THE AMERICAN UNIVERSITY IN CAIRO, May 20-21, 2015
 8. Presenter (invited), *Borders in Transition: Rethinking Sovereignty, Domestic Politics and International Relations in the MENA Region*, EUROPEAN UNIVERSITY INSTITUTE, Florence, Italy, December 11-12, 2014
 9. Presenter (invited), *Theater or Transitional Justice: Reforming the Judiciary in Egypt*, TEXAS A&M UNIVERSITY IN QATAR, Doha, Qatar, September 11, 2014
 10. Participant (invited), *Transitional Justice in the Middle East Workshop*, GEORGETOWN UNIVERSITY CENTER FOR INTERNATIONAL RELATIONS, Doha, Qatar, August 11-13, 2014
 11. Presenter (invited), *Freedom of Information: A Cornerstone of Egypt's Democratic Transition*, THE ASSOCIATION FOR THE LEGAL WAY, Alexandria, Egypt, June 27, 2014
 12. Presenter (invited), *Latest Developments in U.S Civil Rights Law*, ALEXANDRIA UNIVERSITY COLLEGE OF LAW, June 28, 2014
 13. Participant, *Through Egyptian Eyes Academic Workshop*, UNIVERSITY OF WATERLOO BALSILLIE SCHOOL OF INTERNATIONAL AFFAIRS, Waterloo, Canada, May 4-5, 2014
 14. Participant (invited), THE GLOBAL STRATEGY GROUP MIDDLE EAST, Feb. 11-12, 2014, Kuwait City, Kuwait.
 15. Presenter (invited), *The Role of Access to Information in Freedom of the Press*, FUTURE GENERATIONS IN ECONOMIC DEVELOPMENT IN EGYPT AND THE REGION, American University in Cairo, Cairo, Egypt, Feb. 9, 2014
 16. Presenter (invited), *The Role of Law in Post-Revolutionary Egypt*, UNIVERSITY OF GUELPH, Middle East Scholars Society, Guelph, Canada, October 17, 2013
 17. Participant (invited), *Developing New Mechanisms to Promote the Muslim Charitable Sector Working Group*, BROOKINGS INSTITUTIONS' U.S. ISLAMIC WORLD FORUM, Doha, Qatar, May 29-31, 2012

TESTIMONY BEFORE U.S. GOVERNMENT AGENCIES AND CONGRESS

Witness (invited), U.S. House of Representatives Homeland Security Committee, Subcommittee on Oversight and Management Efficiency, Hearing Identifying the Enemy: Radical Islamist Terror, Sept. 22, 2016. Testimony available at <https://homeland.house.gov/hearing/identifying-enemy-radical-islamist-terror/>

Panelist (invited), Congressional Briefing Hosted by Members of Congress Judy Chu, Bill Pascrell, Jr., Andre Carson, and Keith Ellison, *Countering Violent Extremism*, U.S. HOUSE OF REPRESENTATIVES, Washington, D.C., March 22, 2016

Witness (invited), Testified before the U.S. Commission on Civil Rights, *Federal Civil Rights Engagement with Muslims and Arabs*, Washington, D.C., November 9, 2012. Testimony available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2184973

- Cited in *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions*, COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE & HUMAN RIGHTS WATCH (2014); 21 ASIAN AM. L.J. 43 (2014).

Witness (invited), Testified before the U.S. Equal Employment Opportunity Commission, *Strategic Enforcement Plan, Private, State and Local Government Sectors Roundtable*, Washington, D.C., July 18 2012. Testimony available at <http://www.eeoc.gov/eeoc/meetings/7-18-12/aziz.cfm>

LEGAL EXPERIENCE

Office for Civil Rights and Civil Liberties, U.S. Department of Homeland Security, Washington, D.C., Senior Policy Advisor, 2008-2009

Cohen Milstein Sellers & Toll PLLC, Washington, D.C., Civil Rights Associate, February 2007-2008

Wilmer, Cutler, Pickering, Hale & Dorr, Washington, D.C., Litigation Associate, 2003 & 2005-2007

The Honorable Andre M. Davis, U.S. District Court for the District of Maryland, Judicial Law Clerk, 2004-2005

PROFESSIONAL AFFILIATIONS

- U.S. Equal Employment Opportunity Commission Task Force for the Study of Harassment - Member (2015-2016)
- Association of American Law Schools (AALS)
 - Islamic Law Section – Co-Chair (2015); Executive Committee (2016)
 - National Security Section – Executive Committee (2016)
 - International Human Rights Section - Executive Committee (2015, 2016)
 - Civil Rights Section – Executive Committee (2013)
- State Bar of Texas, International Human Rights Committee (2016-present)
- ACLU of Texas – Board Member (2011-present)
- Egyptian American Rule of Law Association, President (2011-present)
- American Bar Association (Member)
- Tarrant County Bar Association (Member)
- Dallas County Bar Association (Member)

EXTERNAL SERVICE

- Co-Editor, Race and the Law Profs Blog, Law Profs Blog (2015-present) – Selected in ABA’s Top 100 Blawgs in 2016 (<http://lawprofessors.typepad.com/racelawprof/>)
- Invited by *Cambridge University Press* to review a book manuscript on the role of women in Egypt’s 2011 uprisings, September 2016
- Invited by *Global Policy Forum Journal* to referee an article submission examining the feasibility of transitional justice in Libya and Yemen
- Mentor, Bush Institute Women’s Leadership Initiative, Egypt Project (2013-2014)
- Invited by the *International Journal of Law in Context*, published by the Cambridge University Press, to referee a submission examining the impact of workers’ movement on the Egyptian revolution, August 2013
- Invited to review Casebook and Hornbook Reviewer, *National Security Law: The Intersection of Law and Policy* (Wolters Kluwer Law & Business Publishing) July 2012
- Present regularly at Career Day in Title I middle schools in Fort Worth, Texas
- Provide Know Your Rights presentations regularly to diverse communities in Dallas/Ft. Worth area

INTERNAL TEXAS A&M UNIVERSITY SERVICE

Committees and Student Recruitment

- Initiated 1L Student Advising Program (2016)
- Member, International Programs Committee, Texas A&M School of Law (2015-present)
- Member, Texas A&M School of Law Honor Council (2014-present)
- Member, Faculty Development Committee, Texas A&M School of Law (2015-2016)
- Member (nominated), Dean of Faculties Search Committee, Texas A&M University (2015)
- Chair, Diversity Committee Texas A&M School of Law (2013-2015)
- Faculty Advisor, American Constitution Society Student Chapter (2012-present)
 - Awarded Rising Chapter of the Year 2013-2014 by ACS National
 - Selected as Chapter of the Week, 2014 & 2015
- Host Committee, Public Interest Law Fellowship Program, Texas A&M School of Law (2014-2016)
- Regularly Participate in Recruitment of Prospective and Admitted Students

Panels and Conferences

1. Presenter (invited), *Middle East – U.S. Affairs: Fact v. Fiction, Diversity Lunch and Learn Series*, TEXAS A&M UNIVERSITY COLLEGE OF SCIENCE, September 30, 2016
2. Moderator and Organizer, *EEOC General Counsel David Lopez: My Year in the U.S. Supreme Court*, TEXAS A&M SCHOOL OF LAW DISTINGUISHED SPEAKERS SERIES, January 15, 2016
3. Moderator, *Women in the Law*, LAW STUDENT DIVERSITY CONFERENCE, Mexican Bar Association, Texas A&M School of Law, February 19, 2015
4. Moderator, *What Happened to the Arab Spring? Examining the Social, Economic, and Political Developments*, Texas A&M School of Law, October 9, 2014
5. Presenter, *The Stumbling Democracy in the Middle East: Challenges and Opportunities*, Texas A&M School of Law, April 10, 2014
6. Moderator, *Voting Rights in Texas*, Texas A&M School of Law, Feb. 3, 2014
7. Moderator, *Government Spying & the Threat to Democracy*, Texas A&M School of Law, March 26, 2014
8. Presenter and Organizer, *Law and Politics in Post-Revolutionary Egypt*, Texas A&M School of Law, October 8, 2013
9. Moderator and Organizer, *Immigration Story of Boxer Jesus Chavez*, Texas A&M School of Law, September 2013
10. Presenter, *Arrests at Home, Killings Abroad: Counterterrorism Today*, Texas A&M School of Law, September 27, 2012
11. Moderator, *Energy Conference*, Texas A&M School of Law, March 29, 2012
12. Moderator, *Terror/Torture*, Law and Humanities Conference, Texas A&M School of Law, March 17, 2012
13. Moderator and Organizer, *Indefinite Detention of US Citizens – A Bipartisan Assault on the Bill of Rights*, Texas A&M University School of Law, February 23, 2012
14. Moderator and Organizer, *Reflections on Litigating National Security Cases After 9/11*, Texas A&M University School of Law, February 2, 2012
15. Moderator and Organizer, *Pity Parties or Bad Business: Employment Discrimination Lawsuits from the Plaintiffs and Defendants perspectives*, Texas A&M University School of Law, Nov. 1, 2011

PRACTITIONER AND PUBLIC POLICY SPEAKING ENGAGEMENTS

1. Presenter (invited), *Economic and Political Stability in Egypt*, CANADIAN SECURITY INTELLIGENCE SERVICES, Dec. 6, 2016
2. Participant (invited), *Debate on the Net Harms and Net Gains of Countering Violent Extremism*, ISLAMIC SOCIETY OF NORTH AMERICA ANNUAL CONFERENCE, Chicago, IL, Sept. 3, 2016

3. Participants (invitation only), *Democracy and Security Dialogue*, UNITED STATES INSTITUTE FOR PEACE, Washington, D.C., June 30, 2016 (moderated by former Secretary Madeleine Albright)
4. Panelist (invited), *Democratization, Authoritarianism, and Radicalism*, THE CENTER FOR THE STUDY OF ISLAM AND DEMOCRACY, Washington, D.C., April 21, 2016
5. Panelist (invited), *Texas and the Syrian Refugee Crisis*, SOUTHERN METHODIST UNIVERSITY, Dallas, Texas, March 23, 2016
6. Panelist (invited), *Tips for Success in the Second Semester of the 1L Year*, DALLAS YOUNG LAWYERS ASSOCIATION, Haynes and Boone, Dallas, Texas, Feb. 27, 2016
7. Panelist (invited), *Status of Civil Rights Facing Arab and Muslim Americans*, ARAB AMERICAN NATIONAL SUMMIT, Detroit, MI, Nov. 7, 2015
8. Panelist (invited), *Understanding Cultural Differences in Mediation*, TEXAS MEDIATORS CREDENTIALING ASSOCIATION ANNUAL CONFERENCE, Austin, Texas, Oct. 17, 2015
9. Keynote Speaker (invited), *Strategies for Identifying and Minimizing Harassment Risks in a 21st Century Workforce*, EQUAL EMPLOYMENT ADVISORY COUNCIL FALL COMPLIANCE CONFERENCE, San Antonio, Oct. 13-15, 2015
10. Panelist (invited), *Islam in the Workplace: A Postscript to the Supreme Court Ruling EEOC v. Abercrombie & Fitch Stores, Inc.*, TEXAS A&M UNIVERSITY SAN ANTONIO, Oct. 7, 2015
11. Panelist (invited), *Race and Policing: Legal and Policy Considerations*, INTERNATIONAL ASSOCIATION OF LAW ENFORCEMENT PLANNERS, Arlington, Texas, Sept. 22, 2015
12. Panelist (invited), *To Vote or Not to Vote: Egypt's Diverse Electorate*, ATLANTIC COUNCIL, Washington, D.C., March 31, 2015
13. Presenter, *Egypt's Election: Justice, Gender and Human Rights*, THE ROBERT F. KENNEDY CENTER FOR JUSTICE & HUMAN RIGHTS, Washington, DC, May 21, 2014
14. Panelist (invited), *Cultural Considerations When Working with Arabs, Muslims, and South Asians*, ALTERNATIVE DISPUTE RESOLUTION CONTINUE LEGAL EDUCATION COURSE, STATE BAR OF TEXAS, Dallas, Texas, January 17, 2014
15. Presenter, STATE BAR OF TEXAS, Alternative Dispute Resolution Continue Legal Education Conference, *Serving Muslim, and Arab, and South Asian Clients*, Dallas, Texas, January 17, 2014
16. Panelist (with Professor Nathan Brown), *Egypt's New Constitution: Fulfilling the Revolution's Goals*, THE ATLANTIC COUNCIL, Washington, D.C., Dec. 11, 2013 (invited)
17. Presenter (invited), *Workshop on Democratic Governance and the Post-2015 Framework*, THE UNITED NATIONS, New York, NY, Dec. 3, 2013
18. Panelist (invited), *The Future of Democracy in Egypt: Notes From the Ground*, MIDDLE EAST INSTITUTE, Washington, DC, July 25, 2013
19. Presenter (invited), *The Status of Women After Egypt's January 25 Revolution*, NATIONAL WOMEN'S DEMOCRATIC ASSOCIATION, January 26, 2013
20. Presenter (invited), *Criminal Prosecution for Charitable Acts*, NATIONAL BAR ASSOCIATION, Law and Religion Program, Chicago, Illinois, April 27-28, 2012
21. Keynote Speaker (invited), *Connecticut Coalition to Stop Indefinite Detention Conference*, Dec. 8, 2012
22. Presenter (invited), *Intelligence Goes Local – Mapping the Domestic Security Matrix at the Local Level*, Securing Our Rights Conference, RIGHTS WORKING GROUP, San Francisco, CA, December 1-2, 2011
23. Presenter, *Religious Accommodation & Discrimination In The Workplace: Common Trends In Cases Involving Religious Minorities*, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION ANNUAL CONFERENCE, New Orleans, LA, June 29-July 2, 2011
24. Presenter (invited), *Democratic Transition in Egypt*, U.S. Congressional Briefing, NATIONAL ENDOWMENT FOR DEMOCRACY, June 22, 2011
25. Presenter (invited), *SAIC Thought Leadership Conference*, SAIC, May 24, 2011
26. Presenter (invited), *The Egyptian Revolution and Its Implications for an Awakened Middle East*, NEW YORK CITY BAR ASSOCIATION, April 25, 2011
27. Presenter, *The Tahrir Promise: The Challenges for Democracy*, THE ASPEN INSTITUTE, April 14, 2011

28. Presenter (invited), *Transition to Meaningful Democracy in Egypt*, U.S. CONGRESSIONAL BRIEFING hosted by the American Arab Anti-Discrimination Committee, March 2, 2011
29. Presenter (invited), *Relationships Between Arab-Americans and Law Enforcement*, U.S. CONGRESSIONAL BRIEFING hosted by the American Arab Anti-Discrimination Committee, February 8, 2011'
30. Presenter (invited), *Cutting the Fuse: Beyond the War on Terrorism*, NEW AMERICA FOUNDATION, October 12, 2010
31. Presenter (invited), *Religious Freedom Rights Training Session*, U.S. DEPARTMENT OF JUSTICE, Civil Rights Division, October 4, 2010
32. Presenter (invited), *Racial and Religious Profiling in a Post-9/11 America*, NATIONAL NETWORK OF ARAB AMERICAN COMMUNITIES ANNUAL CONFERENCE, September 24, 2010
33. Presenter (invited), *U.S. Domestic Integration Policies, A Model System versus a Mediocre System? A Comparison of Muslim Immigration and Integration in the U.S. and Germany*, AMERICAN INSTITUTE FOR GERMAN STUDIES, Washington, D.C. October 8, 2009
34. Presenter (invited), *Beyond Cairo: Muslim Civic Engagement under the Obama Administration*, KARAMAH: MUSLIM WOMEN LAWYERS FOR HUMAN RIGHTS, United States Capitol, Washington, D.C. July 25, 2009
35. Presenter (invited), *Current events and civil rights issues impacting Somalis in America*, Boston Massachusetts, April 2009
36. *Racial Harassment of Arabs, Muslims, and South Asians After September 11*, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION NATIONAL CONFERENCE, Atlanta, Georgia, June 2008
37. Presenter (invited), *Civil Rights Issues Affecting Arabs, South Asians, and Muslims Post 9/11*, TEXAS BAR ASSOCIATION ANNUAL CLE ON CIVIL RIGHTS, Austin, Texas, May 2008

EDITORIALS

1. *Trump's Immigrant Ban Part of a Long, Sad Tradition*, FOX NEWS, Jan. 28, 2017
2. *Postcard from Egypt During Christmas*, HUFFINGTON POST, Dec. 29, 2016
3. *Trump has created a toxic environment for Muslims – Americans who oppose bigotry must act*, INTERNATIONAL BUSINESS TIMES, Nov. 9, 2016
4. *The Expanding Jurisdiction of Egypt's Military Courts*, CARNEGIE ENDOWMENT FOR INT'L PEACE SADA JOURNAL, Oct. 12, 2016
5. *Testifying Before Homeland Security: Identify the Enemy*, THE NEW ARAB, Sept. 27, 2016
6. *Burkini Ban: Latest in Transnational Gender Debates*, THE NEW ARAB, August 31, 2016
7. *Countering Violent Extremism Programs Are Not Solution to Orlando Mass Shooting*, HUFFINGTON POST & BROOKINGS INSTITUTION, June 29, 2016 (highlighted LAWFARE.COM)
8. *Don't Let Terror Divide LGBTQ, Muslim Communities*, CNN.COM, June 14, 2016
9. *Breaking the Ultimate Glass Ceiling*, CNN.COM, June 9, 2016 (invited to contribute comments along with Gloria Steinem, Barbara Ehrenreich, Donna Brazile, Terry O'Neill, and Anne-Marie Slaughter)
10. *Egypt's Unsustainable Military Regime*, THE NEW ARAB, May 19, 2016
11. *Countering Violent Extremism Coming to a Church Near You*, HUFFINGTON POST, March 23, 2016
12. *In calling on Muslims to oppose terrorism, Obama ignores its root causes*, BROOKINGS INSTITUTION, Feb. 16, 2016
13. *Sanders, Trump Stun America*, CNN.COM, Feb. 10, 2016
14. *Scholars: Trumps' Call to Ban Muslims is UnAmerican*, THE CONVERSATION, Dec. 11, 2015
15. *Don't Collectively Punish Muslims*, CNN.COM, Dec. 4, 2015
16. *Online Debate, How to Defeat ISIS*, CNN.COM, Nov. 30, 2015
17. *Identifying the Wrong Culprit for Terrorism*, DALLAS MORNING NEWS, Nov. 24, 2015
18. *Sisi Signals Shift Toward Muslim Brotherhood*, THE CONVERSATION, Nov. 13, 2015
19. *Fourteen Years After 9/11 – Are We Safer?*, HUFFINGTON POST, Sept. 14, 2015
20. *Online Debate on Countering Violent Extremism*, THE ISLAMIC MONTHLY, June 27, 2015
 - Cited in *Countering Violent Extremism and American Muslims*, GEORGE WASHINGTON PROGRAM ON EXTREMISM (2015)

21. *Religious Liberty, Free Speech Necessary Pre-Conditions for Great American Experiment*, HUFFINGTON POST, May 20, 2015 (co-authored with Annette Lamoreaux)
22. *Morsi Sentence Latest Sign of Politicized Justice in Egypt*, WORLD POLITICS REVIEW, May 12, 2015 (solicited)
23. *From Cairo to Baltimore – of Revolutions and Riots*, AUSTIN AMERICAN STATESMAN, May 6, 2015
24. *Lone Wolf Terrorism and Anti-Minority Legislation*, THE ISLAMIC MONTHLY, Feb. 26, 2015
25. *Women Facing Anti-Muslim Backlash*, CNN.com, Jan 25, 2015
26. *How to prevent another Paris? Experts debate issues that divide, unite*, CNN.COM, Jan. 15, 2015
27. *Corruption Hobbles El-Sissi’s Economic Recovery Plans for Egypt*, WORLD POLITICS REVIEW, Dec. 24, 2014 (solicited)
28. *White House Announces Countering Violent Extremism Program: Is it Pretext for Spying on Muslims?*, HUFFINGTON POST, Oct. 1, 2014
29. *Don’t Blame Religion for Rise of ISIS*, FOXNEWS.COM, September 4, 2014
30. *The New Muslim American Leaders*, AL JAZEERA ENGLISH, July 24, 2014
31. *In Egypt-US Relations, Counterterrorism Trumps Human Rights*, THE BRICS POST, May 1, 2014
32. *Mass Death Sentences in Egypt Highlight Need for Judicial Reform*, CAIRO REVIEW OF GLOBAL AFFAIRS, March 31, 2014
33. *Political Stability Remains Elusive for Egypt*, AHARAM ONLINE, Feb. 23, 2014
34. *The War on Terror’s Authoritarian Template*, CNN.com, Jan. 13, 2014
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46. *Egypt’s Corruption Woes*, CNN.COM, February 8, 2013
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2. BBC WORLD NEWS, *Impact of Trump's Executive Orders*, Feb. 7, 2017
3. USA TODAY, *Changing CVE to Focus on Islam Is Counterproductive, Critics Say*, Feb. 2, 2017
4. AL JAZEERA ENGLISH, *Challenges to Trump's Muslim Ban Executive Order*, Jan. 30, 2017
5. DALLAS MORNING NEWS, *Muslims & Supporters Call for Understanding in 'Friendship, Not Suspicion'* Jan. 24, 2017
6. BBC WORLD NEWS, *Analysis of Trump's Inaugural Speech*, Jan. 20, 2017
7. BBC WORLD NEWS, *Impact of Trump's Victory on Civil Rights*, Nov. 11, 2016
8. FOX NEWS CHANNEL 4, *Muslim Law Professor Reacts to Latest Presidential Debate*, Oct. 10, 2016
9. BBC WORLD NEWS, *ISIS Second in Command Killed in Syria*, August 31, 2016 (aired live on PBS America)
10. THE CONVERSATION, *Immigration: Five Essential Reads*, August 31, 2016
11. AL JAZEERA ENGLISH, *U.S. Silent as Egyptian Journalists Sentenced to Death*, June 18, 2016
12. KERA PUBLIC RADIO NEWSHOUR, *Why Extra Security Might Not Be Enough at 'Soft Targets'*, June 13, 2016
13. KPFA PUBLIC RADIO, *After Orlando*, June 23, 2016
14. LOS ANGELES PUBLIC RADIO, *The Human Rights Situation in Egypt*, May 22, 2016
15. AL JAZEERA ENGLISH, *Egyptian Journalists Sentenced to Death*, May 5, 2016
16. CHRISTIAN SCIENCE MONITOR, *American woman jailed for 'insulting' United Arab Emirates*, April 12, 2016
17. TORONTO STAR, *Egypt faces a reckoning over its strongman ways*, April 10, 2016

18. KERA PUBLIC RADIO NEWSHOUR, *North Texas Muslims Aren't Happy With Ted Cruz*, March 25, 2016
19. CNN Money, *Unstereotyped: Muslim Feminists Fight for Change*, March 18, 2016, available [here](#)
20. AL JAZEERA ENGLISH, *Egypt shuts down NGO that helps torture victims*, Feb. 17, 2016
21. CBS-DFW, MITCH CARR RADIO SHOW, *Congressional Debate over Replacing Justice Scalia*, Feb. 17, 2016
22. WALL STREET JOURNAL, *Obama Makes First Visit to U.S. Mosque*, Feb. 3, 2016
23. AL JAZEERA ENGLISH, *NYPD Settles Lawsuit Alleging Mass Surveillance on Muslims*, Jan. 7, 2016
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27. AL JAZEERA ENGLISH, *Egyptian Court Releases Gamal and Alaa Mubarak*, Oct. 12, 2015
28. AL JAZEERA AMERICA, *Egyptian President Pardon's Al Jazeera Journalists*, Sept. 23, 2015
29. THE TORONTO STAR, *Fahmy's Pardon a Bright Spot in Egypt's Murky System*, Sept. 23, 2015
30. CBS-DFW, MITCH CARR RADIO SHOW, *Fourteenth Anniversary of 9/11*, Sept. 11, 2015
31. ABC AUSTRALIA RADIO, *Egypt Passes New Counterterrorism Law*, August 17, 2015
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35. NEW YORK TIMES, *Egyptian Court Sentences Ousted President Morsi to Death*, May 16, 2015
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39. AL JAZEERA AMERICA, *Morsi Convicted to 20 years in prison*, April 21, 2015
40. RUSSIA TODAY, *Death Toll Rises in Yemen as Saudis Ramp Up Operation Decisive Storm*, March 31, 2015
41. AL JAZEERA ENGLISH, *UK Proposes Reforming Asylum Detention Practices*, March 16, 2015
42. ARAB VOICES PACIFICA RADIO, *Rise in Violence in the Middle East and Hate Crimes against American Muslims*, February 24, 2015
43. KERA NATIONAL PUBLIC RADIO, *'We Are All One': North Texan Muslims Remember Chapel Hill Victims*, Feb. 16, 2015
44. AL JAZEERA ENGLISH, *INSIDE EGYPT, Fourth Anniversary of Egypt's Revolution*, Jan. 25, 2015
45. YAHALLAH VOICE ARAB AMERICAN RADIO, *Muslim and Arab Civil Rights in the US*, Jan. 20, 2015
46. CBS-DFW, MITCH CARR RADIO SHOW, *Terrorist Attack in Paris*, Jan. 19, 2015
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48. AL JAZEERA ENGLISH, *Youth Protests in Egypt*, Nov. 28, 2014
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53. NILE TV, *The Role of the Diaspora in Egypt's Transition to Democracy*, July 6, 2014 (with Shahira Amin)
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 65. AL JAZEERA AMERICA, Evening News, *Egyptians Vote on New Constitution*, Jan. 13, 2014
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 81. RADIO SAWA, *The Impact of Boston Bombings on Arabs in America*, May 2, 2013
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 88. YAHOO NEWS, *Was the Sikh Temple Shooting Domestic Terrorism?*, August 6, 2012
 89. TAHRIR TELEVISION, KALAM NADER TALK SHOW, *Discussions with Egypt's Former Ambassador to Spain and Pakistan About Recent Developments in Egypt*, June 29, 2012
 90. NILE INTERNATIONAL TELEVISION, THE BREAKFAST SHOW, *Discussions on The Revolution, Elections, and The Importance of Rule of Law in Egypt*, June 23, 2012
 91. RUSSIA TODAY, *FBI Framing Members of Occupy?*, May 8, 2012
 92. RUSSIA TODAY, *Police Brutality Too Common in the U.S.*, April 27, 2012
 93. RUSSIA TODAY, *Stereotypes Discriminate Against Minorities in America*, March 28, 2012
 94. AL JAZEERA ENGLISH, *Is Spying on Muslims Legal in the US?*, February 24, 2012
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 96. C-SPAN, *Civil Liberties 10 Years After 9/11*, September 8, 2011
 97. C-SPAN, *Civil Rights and National Security*, May 17, 2011
 98. *Egyptian Americans Rally in Support of Countrymen*, NPR MORNING EDITION, February 2, 2011
 99. PBS NEWSHOUR, *Supporters in U.S. Worry About Demonstrators Back Home in Egypt*, January 31, 2011
 100. AL-ARABIYA, *Civil Rights and the Peter King Hearings*, January 7, 2011
 101. C-SPAN, *Terrorism & Future of U.S. Foreign Policy*, October 12, 2010

GWENDOLYN KEYES FLEMING, ESQ.

EXPERIENCE

**PRINCIPAL LEGAL ADVISOR (GENERAL COUNSEL),
US DEPARTMENT OF HOMELAND SECURITY (DHS)
IMMIGRATION & CUSTOMS ENFORCEMENT (ICE)**

**5/2015 – 1/2017
Washington, DC**

- Led the largest legal program within DHS comprised of approximately 1500 attorneys and staff in 60 locations across the country who provide legal advice to ICE client senior officials as they lead a global team of nearly 20,000 employees committed to protecting national security and public safety.
- Served as ICE General Counsel handling matters concerning contract negotiations, ethics, administrative law, employment law and tort claims.
- Supervised attorneys representing the U.S. government in all aspects of exclusion and removal proceedings in immigration courts.
- Partner with other members of Executive Leadership team to prepare senior leaders for congressional hearings. Collaborate on responses to congressional and stakeholder inquiries.
- Maintained TS/SCI Clearance.
- Supervised a national legal strategy to defend U.S. Government, including coordinating aspects of discovery and witness preparation, in federal class action and single party suits challenging duration of pre- and post-order detention authority and the appropriateness of family detention and handling of unaccompanied minors under the *Flores* settlement agreement. Successfully drafted and implemented policy guidance as necessary for client in response to court rulings. Managed the defense of an active litigation docket alleging violations of the Federal Torts Claim Act and constitutional torts under *Bivens*. Supervised worksite enforcement investigations and settlement negotiations.
- Provided legal memoranda and participated in oral argument preparation with the Solicitor General in support of client's position on matters argued before the U.S. Supreme Court including *Lynch v. Morales-Santana* (an equal protection challenge to citizenship requirements and the appropriateness of instituting a non-statutory remedy), *Jennings v. Rodriguez* (addressing the legality of mandatory detention under the INA) and *Lynch v. Dimaya* (addressing the constitutionality of 18 U.S.C. 16(b) [crime of violence]) as incorporated into the INA).
- Supervised the research and review of sanctuary cities' refusal to share immigration status information under 8 U.S.C. §1373.
- Extensive experience researching and providing legal analysis on matters focused on border search authority of electronic devices, anti-dumping and customs violations as well as investigations involving cyber crimes, homeland and national security, financial crimes, child exploitation and human rights violations.
- Advised federal agents on application on the Arms Export Control Act, the Export Administration Act and their respective implementing regulations the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR) in select cases involving counter proliferation. Supported proactive government/private partnership initiatives such as Project Shield America.
- **Efficiently administered \$230M+ budget and ensured sufficient resources for key initiatives including increasing attorney staff by 20% while streamlining and standardizing on-boarding procedures.**

- Drafted and implemented a national engagement strategy that increased employee global satisfaction by 12% in less than 12 months (per FEVS). Drafted a five year strategic plan for office. Successfully modernized office IT support by piloting an e-service module, overseeing the distribution of software and hardware upgrades for 1300+ users and securing sufficient resources to streamline and organize information management.
- First African American and first female appointed to this position.

**CHIEF OF STAFF TO ADMINISTRATOR GINA MCCARTHY,
US ENVIRONMENTAL PROTECTION AGENCY**

**06/2013 – 05/2015
Washington, DC**

- Managed day-to-day operations of Agency's nearly \$8B budget and 15,000 employees in concert with other senior agency officials as the Agency finalized or proposed significant environmental regulations including the Clean Water Rule, the Clean Power Plan, the Definition of Solid Waste (DSW) Rule, Coal Combustion Residuals (CCR) Rule, Ozone NAAQS and the Worker Protection Standard. Maintained TS/SCI Clearance.
- Extensive contact with both political and career government staff as a result of serving as Administrator's representative at all levels of government including interactions with White House and Cabinet member senior staff, state and local leadership, private industry, citizen groups and other stakeholders. Coordinated extensively with political and career teams at the Council for Environmental Equality (CEQ), Department of Energy (DOE), Department of Interior (DOI) and the Department of Justice Environmental and Natural Resource Division (ENRD). Also collaborated extensively with the Environmental Council of the States (ECOS) participants and staff to address environmental concerns in region.
- Accompanied Administrator McCarthy to China in an effort to build supportive relationships with international leaders as a precursor for Presidential visit that ultimately culminated in the historic Climate Agreement between these two countries. Represented the EPA at the UN Universal Periodic Review (UPR) of the US human rights obligations in Geneva, Switzerland, May 2015.
- Served as primary point of contact for all internal and external coordination for Agency during October 2013 Shutdown. Coordinated Vice President Biden's surprise visit to EPA on the morning the government re-opened.
- Co-managed successful transition of the newly confirmed Administrator including identification, socialization and implementation of a new strategic vision, the allocation of resources and implementation of accountability measures.
- Responsible for recruiting, hiring and training all political appointees. Directed career Senior Executive staff in the areas of civil rights, small business programs and children's health. Successfully trained 88% of all managers across the country on unconscious bias – a first for EPA in its 40+ year history – as part of a larger Diversity and Inclusion Strategy. Instituted procedures to allow Schedule A employees to transfer into competitive service thereby assuring their fair treatment and consideration for future promotions.
- Completed key projects including finalizing the Agency's Role of Title VI Complainants Policy Paper, publishing the inaugural Title VI Progress Report and ushered the Anti-Harassment Policy to Unions for review after four years of stagnation. Directed the production of the Agency's first comprehensive Children's Health Strategy.
- First African American and first female appointed to this position.

**REGIONAL ADMINISTRATOR REGION 4,
US ENVIRONMENTAL PROTECTION AGENCY**

**09/2010 – 05/2013
Atlanta, Georgia**

- Presidential Appointee primarily responsible for establishing and implementing environmental policy affecting all aspects of air, water and soil concerns for 20% of the U.S. Population in eight southeastern states and six federally recognized tribes consistent with national directives. Maintained TS/SCI Clearance.
- Operated as the lead enforcement official responsible for coordinating all civil and criminal aspects of environmental protection in conjunction with state partners and headquarters in accordance with the statutory provisions of the Clean Water Act (CWA), Clean Air Act (CAA), Comprehensive Environmental Response, Compensation, and Liability Act (CERLA), National Environmental Policy Act (NEPA) and other environmental laws.
- Served as the chief negotiator on highly sensitive and complex environmental matters including a comprehensive and enforceable historic agreement with the State of Florida establishing for the first time a science-based protective limit (WQBEL) on phosphorus pollution discharges into the Everglades thereby ending nearly twenty years of litigation.
- Coordinated extensively with then Assistant Administrator for the Office of Air and Radiation, Gina McCarthy as the Lead Region representative while Agency prepared to rollout new National Ambient Air Quality Standards (NAAQs). Oversaw the regional rollout and implementation of the Mercury and Air Toxics Rule (MATS).
- Spearheaded negotiations with state counterparts and community leaders to clean up RCRA and superfund sites within region including Capital City Plume in Alabama.
- Broke internal log jam to cement the Region's commitment to providing environmental equity to formerly marginalized communities by finalizing the Region's Environmental Justice Policy after nearly 10 years, collaborating with state partners and communities to institute regular environmental justice information sessions, and empowering a cross-divisional EPA Environmental Justice Steering Committee to strategically and comprehensively address community concerns including coordinating contaminant assessment and clean ups in communities such as North Birmingham, AL and Hattiesburg, MS.
- After the Deepwater Horizon Oil Spill, served as the Agency's co-representative to the RESTORE Act Council, a federal and state partnership tasked with addressing ecosystem restoration and community resiliency in the Gulf of Mexico coastal region. Collaborated with ECOS member states and hosted quarterly regional meetings to address cross-disciplinary environmental issues affecting Region 4 states.
- Skillfully lead a seasoned team of ten direct reports supervising over 1000 employees in Air, Water, Land, Laboratory, Budget & Personnel, Communications and Regional Counsel's divisions who consistently met or surpassed national targets in all divisions by instituting cross-cutting strategies and utilizing fiscally sound practices to administer a \$587M annual budget without jeopardizing the Agency's core mission to protect human health and the environment.
- Served as the 2012 Annual Combined Federal Campaign (CFC) Chair leading a team of volunteers representing 100+ agencies who successfully raised over \$4.5M in the third largest Federal giving campaign by strengthening online giving/pledging and social media outreach.
- First African American and first female appointed to this position.

DISTRICT ATTORNEY, STONE MOUNTAIN JUDICIAL CIRCUIT**05/2005 – 09/2010****Decatur, Georgia**

- Successfully unseated incumbent in closely contested democratic primary and general election in jurisdiction covering 270 square miles, population of 770,000 people representing 52 different cultures; Re-elected without opposition in 2008.
- Administered \$12M budget and managed office of over 165-employees (including lawyers, investigators, victim advocates and support staff) that prosecuted 13,000 felony charges annually in the ten divisions of Superior Court, 4,000 cases in Juvenile Court, conducted appellate work submitted to Appellate Courts and generated over \$15M dollars annually through interstate Child Support Enforcement. Procured additional \$3M in federal grant funds for office programs.
- Personally handled investigation, prosecution and negotiations in death penalty cases and other high profile matters. Coordinated media and messaging on all high profile complex cases, including year-long excessive use of force grand jury investigation of 15 officer involved shootings and an indictment of high ranking public officials for public corruption charges.
- Created Pre-Trial diversion program for first time, non-violent offenders. Instituted community outreach and crime prevention programs for middle schools girls and the elderly. Successfully lobbied for passage of HB 1015 which strengthened the Georgia Anti-Gang Act. Successfully amended Supreme Court Rules to allow out of state lawyers to volunteer in the public sector.
- First African American and first female elected to this position.

SOLICITOR GENERAL, DEKALB COUNTY SOLICITOR GENERAL'S OFFICE**01/1999 – 04/2004****Decatur, Georgia**

- Successfully campaigned in democratic primary and run-off election in county spanning 270 square miles with a population of approximately 670,000 people in one of the most diverse jurisdictions in the southeast; re-elected without opposition in 2002.
- Personally handled investigation and prosecution of high profile misdemeanors, including domestic violence and DUI charges involving public officials.
- Administered \$4M budget and managed office of over 75-employees (including 25+ lawyers, 15 investigators and 35 support staff) that prosecuted approximately 12,000 misdemeanor cases annually in the seven divisions of State Court and four divisions of Magistrate Court. Supervised all appellate work submitted to Appellate Courts on behalf of the office.
- Assisted in implementation of a new diversionary Mental Health Court for non-violent offenders. Procured over \$1M in federal grant funds to supplement office resources and community based programs. Instituted several community outreach programs focused on domestic violence, truancy and teen safe driving campaigns.
- Successfully lobbied to decrease the DUI legal limit from .10 to .08 and enact an Open Container law.
- First African American and first female elected to this position.
-

CHIEF ASSISTANT SOLICITOR GENERAL**11/1998 – 01/1999****SENIOR ASSISTANT SOLICITOR GENERAL****06/1993 – 11/1994**

CONTRACT ATTORNEY, JONES, DAY, REAVIS & POGUE (now Jones Day) 11/1997 – 05/1998
Atlanta, Georgia

- Conducted litigation preparation and document reviews while running for public office.

**SENIOR ASSISTANT DISTRICT ATTORNEY,
FULTON COUNTY DISTRICT ATTORNEY'S OFFICE** 11/1994 – 11/1997
Atlanta, Georgia

- Conducted all aspects of criminal prosecution in more than 7,500 felony cases in Superior Court; 75% jury trial success rate. Tried approximately 30 cases to verdict.

EDUCATION

PRESIDENTIAL LEADERSHIP WORKSHOP FOR SENIOR EXECUTIVE LEADERS,
Graduate, 12/2015 – 05/2016

EMORY UNIVERSITY SCHOOL OF LAW, Atlanta, Georgia J.D., 1993

*Past President, Emory University School of Law Alumni Association Executive Committee (LAAEC)
Former Adjunct Professor, Criminal Litigation Course and the National Institute of Trial Advocacy (NITA) Program
Master, Lamar Chapter of the American Inns of Court at Emory University School of Law (formerly a Barrister, and Student Member)*

Member, Executive Committee 2008 – Present (inactive during years of Presidential Appointment 2010-2016)

Former Barrister, Lumpkin Chapter of the American Inns of Court at University of Georgia Law School
Past Chair, Admissions Committee of the Emory Black Law Students Alumni Advisory Board
Former Member, Emory Public Interest Committee (EPIC) Advisory Board
Former Moot Court Society, Director of Competitions 1992-1993
Former Student Bar Assoc. 3rd Year Representative 1992-1993
Former Black Law Students' Assoc., Vice President 1991-1992
Frederick Douglass Moot Court Competition, Regional Quarter Finalist 1991-1992
Georgia Civil Justice Foundation Trial Advocacy Scholarship

Honors:

Order of the Coif 1993
Georgia Association for Women Lawyers (GAWL) Award for "High Academic Achievement, Dignity, Integrity, Service and Commitment to the Law in Georgia" 1993
Emory University School of Law Black Law Students Association Distinguished Alumni Award, 1996
Emory University School of Law Distinguished Alumni Award 2007

DOUGLASS COLLEGE at RUTGERS UNIVERSITY, New Brunswick, New Jersey B.S. Finance, 1990

Scholarships & Activities:

James D. Carr University Scholar
Douglass College Scholar
Jewel Plummer Cobb Minority Senior Achievement Award Recipient

Resident Advisor

Honors:

Inducted into the Douglass College Alumna Hall of Fame for Contributions to Law & Community, 2001

Commencement Keynote Address, May 2009

2014 Zagoren Lecture Speaker

BAR ADMISSION & LEGAL ASSOCIATIONS

State Bar of Georgia

Member, Board of Governors, 2010 (resigned to avoid conflict of interest upon appointment to Obama Administration)

Member, Law Related Education Committee

Georgia Mock Trial Competition, Former Coach for Award winning D.M. Therrell High School

Past Member, Supreme Court Commission on Equality (now Access & Fairness in the Courts)

Former Advisor, Unauthorized Practice of Law (UPL) Committee

Member, Prosecuting Attorney's Council Executive Committee, 2010

Past President, Georgia Association of Solicitors-General

Past Chair, DeKalb County Domestic Violence Task Force, Subcommittee on DV Fatality Reviews

Former Member, State Task Force on Truancy

Member, DeKalb Bar Association (DBA)

Member, Georgia Association of Black Women Attorneys (GABWA)

Member, DeKalb Lawyers Association (DLA)

Past President 1997-1998

Former Editor, DLA Newsletter, a monthly publication which won recognition at the 1998

Annual State Bar Conference

Have applied for admittance into the District of Columbia Bar

COMMUNITY & CIVIC ASSOCIATIONS

Leadership DeKalb, Class of 1999

Member, Youth Leadership DeKalb Advisory Board

Chair, Annual Justice Day Presentation

Member, Board of Directors, 2009 - Present

Leadership Georgia, Class of 2000

Trustee, Leadership Georgia Board of Trustees 2001-2004

Leadership Atlanta, Class of 2007

Co-Chair, Annual Criminal Justice & Public Safety Day

Trustee, Leadership Atlanta Board of Directors 2010

Atlanta OnBoard Graduate

Participant, Project Understanding 2001

Former Member, Black Jewish Coalition Advisory Board

Former Member, United Way DeKalb County Women's Legacy Advisory Board

Designee, Women's Initiative Next Generation (WINGs) Steering Committee

Former Member, Rotary International, South DeKalb Chapter

Former Editor, Weekly Newsletter/Bulletin 2001-2002

Georgia Center for Child Advocacy, Non-Profit Board Member 2007 – 2010 (resigned to avoid conflict of interest upon appointment to Obama Administration)

DeKalb Rape Crisis Center, Non-Profit Board Member 2007 – 2010 (resigned to avoid conflict of interest upon appointment to Obama Administration)

AWARDS

USEPA Environmental Justice Champion of Change Award 2015
 Atlanta Metropolitan Combined Federal Campaign Leadership Award, 2012
 Trail Blazer Leadership of Excellence Award presented by Congressman Hank Johnson, 2011
 Leadership Georgia E. Dale Threadgill Community Service Award, 2010
 Georgia Association of Black Women Attorneys (GABWA), Leah Ward Sears Award for Distinction in the Profession, 2010
 Atlanta Business Chronicle's Power Fifty in Law and Business, 2010
 Atlanta's Top 100 Black Women of Influence Award, 1999, 2007 – 2010
 Women in the NAACP Award, 2010
 South DeKalb Business Association, People to Watch Award, 2009
 Atlanta Business Chronicle's "Who's Who," 2009
 Mothers Against Drunk Driving Metro Atlanta Community Champion Award, 2008
 Salute to Black Mother's Powerful Women in Politics Award, 2008
 PDG Bob Grant "You are the Key" Award presented by the DeKalb Rotary Council for distinguished service and leadership, 2003
 Youth VIBE (Vision, Industry, Business and Empowerment) Honoree, 2003
 National Black Prosecutors Association, Pioneer Award, 2003
 American Business Women's Association, Rainbow International Chapter, Honoree for Political Empowerment, 2003
 Georgia Trend Magazine's 2003 "Top 40 Under 40"
 Member, Who's Who in American Law 2002-2003 Edition
 Member, Who's Who of International Professionals, 2002-2003 Edition
 Outstanding Atlanta 2002-2003 Honoree
 Georgia Supreme Court Chief Justice Robert Benham Community Service Award, 2001
 Women Looking Ahead News Magazines' List of Georgia's 100 Most Powerful and Influential Women, 2001, 2002
 Millennium Diva Award, 1999
 South DeKalb Business Association People to Watch Award, 1999
 Georgia Stonewall Democrats Partners in Equality Award, 1999
 Communities of America Trail Blazer Award, 1998
 GABWA "You Go Girl" Award, 1998

SPEAKING ENGAGEMENTS

Scheduled as Speaker at session entitled "Protecting the Homeland and Honoring Civil Liberties: How the Constitution Can Guide Us?" sponsored by the Federal Bar Association, March 2017
 Guest Presenter for session entitled "Ready to Govern, Managing the Political-Career Interface: Building a Strong Team" sponsored by the Partnership for Public Service, July 2015, August 2015, February 2017
 Panelist, American Immigration Lawyers' Association (AILA) Annual Conference on Immigration Law, June 2015
 Panelist for session entitled "DHS General Counsels' Office 2015 Update: Changes and New Direction" at the 10th Annual ABA Homeland Security Law Institute Annual CLE Conference August 2015
 Remarks at the Green 2.0 Media and Stakeholders Briefing, December 2014, "Breaking the Glass Ceiling" (See clip at <http://www.diversegreen.org/videos/>)
 Public Lecture entitled "Expanding the Conversation on Environmentalism: What Does it Look Like in Your Community" at Emory University School of Public Health, November 2014
 Speaker, "Key Environmental Issues in U.S. Environmental Protection Agency, Region 4" sponsored by that ABA Section of Environment, Energy and Resources, March 2015

- Panelist “Looking Upstream: Slime and Other Water Quality Threats to the Everglades” at the Everglades Coalition 28th Annual Conference, January 2013 (See http://www.evergladescoalition.org/pdf/evco_conferencebrochure_2013.pdf)
- Luncheon Speaking at the GreenLaw Georgia State Plummer Lecture Series, March 2013 (<http://www.southeastgreen.com/index.php/seg-features/tweet-diaries/8254-tweet-diary-gsu-and-greenlaw-host-dr-banjamin-santer>)
- Speaker at the Coretta Scott King Young Women’s Leadership Academy for Women’s History Month, March 2013 (See Announcement at https://archive.epa.gov/epapages/newsroom_archive/newsreleases/65c3edea0990178f85257b250050e3ec.html)
- Keynote speaker at the Seventh Annual Georgia Environmental Conference, August 2012
- Keynote Speaker, Georgia Interfaith Power & Light GIPPY Awards March 2012 (See pre speech interview at <https://www.youtube.com/watch?v=t5-kO27uLFs>)
- Keynote Speaker Atlanta University Center (AUC) 2012 RecycleMania Tournament, February 2012
- Keynote Speaker with Admiral Thad Allen, (retired) U.S. Coast Guard at the Air & Waste Management Association (A&WMA) 10th Annual Conference & Exhibition in 2011 speaking about the aftermath of the 2010 Deep Water Horizon Spill (See Comments on remarks <http://pubs.awma.org/gsearch/em/2011/8/presmessage.pdf>)
- Speaker, 35th Kentucky Governor’s Conference on Energy and the Environment, September 2011
- American Association of Blacks in Energy (AABE), Atlanta Chapter Event Speaker

OTHER

- Featured in article entitled “EPA Chief of Staff to Join ICE as Top Legal Adviser” May 2015 (See <https://www.law360.com/articles/650640/epa-chief-of-staff-to-join-ice-as-top-legal-adviser>)
- Featured in article entitled “ICE hires EPA Chief of Staff as Top Legal Adviser,” April 2015 (See <https://www.law360.com/articles/650640/epa-chief-of-staff-to-join-ice-as-top-legal-adviser>) NOTE: the article highlights ICE’s low morale, which showed a 12% increase during my tenure as the Principal Legal Advisor
- Featured in article entitled “McCarthy’s chief of staff – a former prosecutor – won’t back down” (See article: <http://www.eenews.net/greenwire/stories/1059991132>)
- Authored Blogs entitled
- “You Might Know the Next Rachel Carson” March 2015 (See <https://blog.epa.gov/blog/2015/03/you-might-know-the-next-rachel-carson/>)
- “EPA: Taking Action on Toxics and Chemical Safety” February 2015 (See <https://blog.epa.gov/blog/2015/02/28090/>)
- “Veterans Day Lessons from My Father, a Tuskegee Airman” (See <https://blog.epa.gov/blog/2015/02/28090/>)
- “National Award for Smart Growth Achievement Comes to Atlanta” February 2014 (See <https://blog.epa.gov/blog/2014/02/national-award-for-smart-growth-achievement-comes-to-atlanta/>)
- “Dr. King’s Dream and Environmental Justice” August 2013 (See <https://blog.epa.gov/blog/2013/08/marchonwashington/>)
- Quoted in <http://www.research.msstate.edu/rresources/news.php?id=2425> Designating Mississippi State Office of Research and Economic Development a “Center of Excellence”
- Quoted in article by Lexington Herald Leader entitled “EPA defends decision to block Kentucky coal mine permits.” <http://www.kentucky.com/news/state/kentucky/article44055690.html>

- Pictured and quoted in article entitled "FAMU and EPA Partner to Promote Sustainability Environmental Careers and Watershed Management", February 2011 (See article <http://www.famu.edu/index.cfm?a=headlines&p=display&news=2206>)
- Featured in announcement as the new Regional Administrator for USEPA Region 4, (See https://archive.epa.gov/epapages/newsroom_archive/newsreleases/ac4de052e6f50d3a852577910072c71a.html)
- Featured in Ebony Magazine, JET Magazine, The Atlanta Tribune, Rolling Out Magazine and the Atlanta Daily World Newspaper for being the first African-American and first female to be elected Solicitor-General and District Attorney of DeKalb County as well as the youngest person to obtain this post in the jurisdiction
- Guest Commentator on In Session, a national television show highlighting criminal trials that airs on TruTV, a CNN property

Michael M. Hethmon

mhethmon@irli.org

Experience

Senior Counsel at Immigration Reform Law Institute (IRLI), Washington DC

August 2012 - Present (4 years 6 months)

Senior litigator and subject matter expert in immigration and related fields of law for small but nationally active public interest legal education and defense organization representing individuals, small businesses, non-profit organizations, and local government agencies on matters related to the enforcement of immigration law before federal, state and local judicial and administrative tribunals. Extensive regulatory work with federal agencies. Legal analysis and media commentary for national print and electronic media. See www.irli.org.

General Counsel at Immigration Reform Law Institute (IRLI), Washington DC

January 2006 - July 2012 (6 years 7 months)

Managing director and senior legal officer for IRLI. Responsible for all management functions and legal activity of the Institute, including legislative drafting, litigation, and regulatory work before federal, state, and local governments and tribunals.

Staff Attorney at Federation for American Immigration Reform (FAIR), Washington, DC

May 1999 – September 2000, November 2001 - December 2005 (5 years 7 months)

In-house counsel for national non-profit organization advocating reduction in immigration to the United States. Responsible for immigration and nationality law, administrative law, legislative analysis, and advocacy litigation matters.

Finance and Administration Manager (Egypt) at Metcalf & Eddy Inc., Alexandria, Egypt

2000 - 2001 (1 year)

In-country manager for contract-related financial and administrative operations on a U.S. AID-funded construction management contract in support of the Egyptian General Organization for Sanitary Drainage (AGOSD) for the construction of wastewater collection and treatment facilities in Alexandria, Egypt.

Finance and Administration Specialist (Peace Sun Program) at BDM International Inc., Riyadh, Saudi Arabia

1993 - 1996 (3 years)

Supervised in-Kingdom accounting, treasury, and human resources administrative operations for major (400+ multinational personnel) systems integration and technical assistance contracts with the Royal Saudi Air Force.

Public Contracts Administrator at SPC International Inc., Arlington VA

1992-1993 (1 year)

Contracting and program support for the Embassy of Kuwait Emergency Recovery Program and the U.S. Department of State Embassy Task Group.

Program Analyst at U.S. Department of Energy (DOE), Washington DC

1990 - 1991 (1 year)

Energy emergency contingency planning analyst for U.S. DOE Office of International Affairs and Energy Emergencies.

Contracts Specialist at U.S. Department of Energy, Washington DC

1987 - 1990 (3 years)

Administered sales of petroleum products from U.S. Naval Petroleum and Shale Reserves. Administered DOE management and operating (M&O) and professional services contracts for Naval Petroleum Reserves and the Strategic Petroleum Reserve.

Oilfield Services Administrator at Craddock Engineering Inc., Tripoli, Libya

1985 - 1986 (1 year)

In-country administrative support for technical manpower contracts with Libyan national and joint venture petroleum companies. Support and government relations coordinator for ninety expatriate technicians.

Languages

Arabic, French and Spanish (Reading and conversational proficiency)

Education

University of Maryland School of Law at Baltimore, MD

J.D., 1998

Activities: Study at McGill University Faculty of Law, Montreal Canada (Summer 1998)

Thunderbird School of Global Management at Phoenix, AZ

Master of International Management (M.I.M.), December 1984

Activities: Circumnavigators Foundation Grantee: Conducted field interviews of athletes and coaches competing in the 1984 Olympic Games, in Taipei, Hong Kong, Bangkok, Kathmandu, Cairo, Lome, Cotonou, Bamako, Caracas, Santo Domingo, and Los Angeles (Summer 1984).

University of California at Los Angeles (UCLA) at Los Angeles, CA

Bachelor of Arts (B.A.), Near Eastern Studies, 1983

Activities: Study abroad at American University in Cairo, Egypt (1980-81), Institut Bourguiba, Tunis, Tunisia (1982).

Reported Cases

Texas v. United States, 787 F.3d 733 (5th Cir. May 26, 2015), 809 F.3d 134 (5th Cir. November 25, 2015) (amicus), affirmed by *United States v. Texas*, 195 L. Ed. 2d 638, 2016 U.S. LEXIS 4057 (U.S., 2016); *Wash. Alliance of Tech. Workers v. United States Dep't of Homeland Sec.*, 2016 U.S. App. LEXIS 8913 (DC Cir. May 13, 2016); *Santos v. Frederick County Bd. of Comm'rs*, 725 F.3d 451 (August 7, 2013) *certiorari denied* by *Frederick County Bd. of Comm'rs v. Santos*, 134 S. Ct. 1541 (2014), *on remand* at *Santos v. Frederick Cnty. Bd. of Comm'rs*, 2015 U.S. Dist. LEXIS 113776 (D. Md., Aug. 26, 2015), 2016 U.S. Dist. LEXIS 78347 (D. MD., June 16, 2016); *Lozano v. City of Hazleton*, 620 F.3d 170 (3rd Cir. September 9, 2010), *remanded* by *City of Hazleton v. Lozano*, 131 S.

Ct. 2958, (2011), *rehearing* at *Lozano v. City of Hazleton*, 724 F.3d 297 (3rd Cir. July 26, 2013), *certiorari denied* by *City of Hazleton v. Lozano*, 134 S. Ct. 1491 (2014); *DelRio-Mocci v. Connolly Props.*, 672 F.3d 241(3rd Cir. February 24, 2012), *certiorari denied* by *Bolmer v. Connolly Props.*, 2012 U.S. LEXIS 6979 (Oct. 1, 2012); *Estrada v. Rhode Island*, 594 F.3d 56; (1st Cir. February 23, 2010); *Programmers Guild, Inc. v. Chertoff*, 338 Fed. Appx. 239, (3rd Cir. July 17, 2009), *certiorari denied* by *Guild v. Napolitano*, 2010 U.S. LEXIS 3428 (Apr. 19, 2010); *Gray v. City of Valley Park*, 2008 U.S. Dist. LEXIS 7238 (E.D. MO Jan. 31, 2008), 567 F.3d 976, (8th Cir. June 5, 2009); *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D.KS July 5, 2005), Filed *affirmed* by *Day v. Bond*, 500 F.3d 1127, (10th Cir. August 30, 2007) *rehearing en banc, denied* by *Day v. Bond*, 511 F.3d 1030, (10th Cir. 2007), *certiorari denied* by *Day v. Bond*, 2008 U.S. LEXIS 5064 (June 23, 2008); *Save Jobs USA v. United States Dep't of Homeland Sec.*, 2016 U.S. Dist. LEXIS 132259 (D. DC September 27, 2016); *Puente Ariz. v. Arpaio*, 2016 U.S. Dist. LEXIS 22420 (D. AZ February 24, 2016), 2016 U.S. Dist. LEXIS 104883 (August 9, 2016); *Valle Del Sol v. Whiting*, 2012 U.S. Dist. LEXIS 172196, (Dist. Ct. AZ September 5, 2012), 2014 U.S. Dist. LEXIS 185311(September 9, 2014), 2015 U.S. Dist. LEXIS 181643, (April 6, 2015), *affirmed* 709 F.3d 808, 732 F.3d 1006 (9th Cir. Ariz., 2013) *reconsideration denied*, 2015 U.S. Dist. LEXIS 181643 (D. Ariz., Apr. 6, 2015); *United States v. Arizona*, 119 F. Supp. 3d 955 (D.AZ November 7, 2014); *Utah Coalition of La Raza v. Herbert*, 26 F. Supp. 3d 1125(D. UT June 18, 2014); *Friendly House v. Whiting*, 846 F. Supp. 2d 1053 (D.AZ February 29, 2012); *Fla. Immigrant Coalition v. Mendez*, 2010 U.S. Dist. LEXIS 114726 (SD. FL October 28, 2010); *Villas at Parkside Ptnrs v. City of Farmers Branch*, 577 F. Supp. 2d 851(ND.TX August 29, 2008), 2008 701 F. Supp. 2d 835 (March 24, 2010), 2010 U.S. Dist. LEXIS 68524 (July 9, 2010) *affirmed* 675 F.3d 802 (5th Cir. Tex., 2012); *Billings v. County Council*, 190 Md. App. 649 (February 26, 2010) *affirmed* by *County Council of Prince George's County v. Billings*, 420 Md. 84 (2011); *Matter of Jonet Dominguez-Rodriguez*, 26 I. & N. Dec. 408 (BIA September 18, 2014); *Matter of A--- R--- C--- G--- et al.*, 26 I. & N. Dec. 388 (BIA August 26, 2014); *Matter of Ezzat H. Abdelghany*, 26 I. & N. Dec. 254 (BIA February 28, 2014); *Matter of E-S-I-*, 26 I. & N. Dec. 136 (BIA June 21, 2013); *Matter of C---T---L---*, 25 I. & N. Dec. 341 (BIA September 14, 2010); *Matter of I--- S--- & C--- S---*, 24 I. & N. Dec. 432 (BIA January 10, 2008); *Jason's Enterprise, Inc. on Behalf of Nawar Salim El Murr*, 1993 BALCA LEXIS 414 (BALCA December 17, 1993).

Legal Writing

Diversity Mass Immigration and National Security After 9/11, 66 Albany Law Rev. 387 (2003), *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 U. DC Law Rev.83 (2004), *Tsunami Watch on the Coast of Bohemia: BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 Catholic U Law Rev. 999 (2006).

Presidential Documents

Title 3—

Executive Order 13780 of March 6, 2017

The President

Protecting the Nation From Foreign Terrorist Entry Into the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and section 301 of title 3, United States Code, and to protect the Nation from terrorist activities by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. Policy and Purpose. (a) It is the policy of the United States to protect its citizens from terrorist attacks, including those committed by foreign nationals. The screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program (USRAP) play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States. It is therefore the policy of the United States to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP.

(b) On January 27, 2017, to implement this policy, I issued Executive Order 13769 (Protecting the Nation from Foreign Terrorist Entry into the United States).

(i) Among other actions, Executive Order 13769 suspended for 90 days the entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. These are countries that had already been identified as presenting heightened concerns about terrorism and travel to the United States. Specifically, the suspension applied to countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), in which Congress restricted use of the Visa Waiver Program for nationals of, and aliens recently present in, (A) Iraq or Syria, (B) any country designated by the Secretary of State as a state sponsor of terrorism (currently Iran, Syria, and Sudan), and (C) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence. In 2016, the Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern for travel purposes, based on consideration of three statutory factors related to terrorism and national security: “(I) whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States; (II) whether a foreign terrorist organization has a significant presence in the country or area; and (III) whether the country or area is a safe haven for terrorists.” 8 U.S.C. 1187(a)(12)(D)(ii). Additionally, Members of Congress have expressed concerns about screening and vetting procedures following recent terrorist attacks in this country and in Europe.

(ii) In ordering the temporary suspension of entry described in subsection (b)(i) of this section, I exercised my authority under Article II of the Constitution and under section 212(f) of the INA, which provides in relevant part: “Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, 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 to be appropriate.”

8 U.S.C. 1182(f). Under these authorities, I determined that, for a brief period of 90 days, while existing screening and vetting procedures were under review, the entry into the United States of certain aliens from the seven identified countries—each afflicted by terrorism in a manner that compromised the ability of the United States to rely on normal decision-making procedures about travel to the United States—would be detrimental to the interests of the United States. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to grant case-by-case waivers when they determined that it was in the national interest to do so.

(iii) Executive Order 13769 also suspended the USRAP for 120 days. Terrorist groups have sought to infiltrate several nations through refugee programs. Accordingly, I temporarily suspended the USRAP pending a review of our procedures for screening and vetting refugees. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to jointly grant case-by-case waivers when they determined that it was in the national interest to do so.

(iv) Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities—whoever they are and wherever they reside—to avail themselves of the USRAP in light of their particular challenges and circumstances.

(c) The implementation of Executive Order 13769 has been delayed by litigation. Most significantly, enforcement of critical provisions of that order has been temporarily halted by court orders that apply nationwide and extend even to foreign nationals with no prior or substantial connection to the United States. On February 9, 2017, the United States Court of Appeals for the Ninth Circuit declined to stay or narrow one such order pending the outcome of further judicial proceedings, while noting that the “political branches are far better equipped to make appropriate distinctions” about who should be covered by a suspension of entry or of refugee admissions.

(d) Nationals from the countries previously identified under section 217(a)(12) of the INA warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government’s willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

(e) The following are brief descriptions, taken in part from the Department of State’s *Country Reports on Terrorism 2015* (June 2016), of some of the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States:

(i) *Iran*. Iran has been designated as a state sponsor of terrorism since 1984 and continues to support various terrorist groups, including Hizballah, Hamas, and terrorist groups in Iraq. Iran has also been linked to support

for al-Qa'ida and has permitted al-Qa'ida to transport funds and fighters through Iran to Syria and South Asia. Iran does not cooperate with the United States in counterterrorism efforts.

(ii) *Libya*. Libya is an active combat zone, with hostilities between the internationally recognized government and its rivals. In many parts of the country, security and law enforcement functions are provided by armed militias rather than state institutions. Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions to expand their presence in the country. The Libyan government provides some cooperation with the United States' counterterrorism efforts, but it is unable to secure thousands of miles of its land and maritime borders, enabling the illicit flow of weapons, migrants, and foreign terrorist fighters. The United States Embassy in Libya suspended its operations in 2014.

(iii) *Somalia*. Portions of Somalia have been terrorist safe havens. Al-Shabaab, an al-Qa'ida-affiliated terrorist group, has operated in the country for years and continues to plan and mount operations within Somalia and in neighboring countries. Somalia has porous borders, and most countries do not recognize Somali identity documents. The Somali government cooperates with the United States in some counterterrorism operations but does not have the capacity to sustain military pressure on or to investigate suspected terrorists.

(iv) *Sudan*. Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas. Historically, Sudan provided safe havens for al-Qa'ida and other terrorist groups to meet and train. Although Sudan's support to al-Qa'ida has ceased and it provides some cooperation with the United States' counterterrorism efforts, elements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.

(v) *Syria*. Syria has been designated as a state sponsor of terrorism since 1979. The Syrian government is engaged in an ongoing military conflict against ISIS and others for control of portions of the country. At the same time, Syria continues to support other terrorist groups. It has allowed or encouraged extremists to pass through its territory to enter Iraq. ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States. The United States Embassy in Syria suspended its operations in 2012. Syria does not cooperate with the United States' counterterrorism efforts.

(vi) *Yemen*. Yemen is the site of an ongoing conflict between the incumbent government and the Houthi-led opposition. Both ISIS and a second group, al-Qa'ida in the Arabian Peninsula (AQAP), have exploited this conflict to expand their presence in Yemen and to carry out hundreds of attacks. Weapons and other materials smuggled across Yemen's porous borders are used to finance AQAP and other terrorist activities. In 2015, the United States Embassy in Yemen suspended its operations, and embassy staff were relocated out of the country. Yemen has been supportive of, but has not been able to cooperate fully with, the United States in counterterrorism efforts.

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

(g) Iraq presents a special case. Portions of Iraq remain active combat zones. Since 2014, ISIS has had dominant influence over significant territory in northern and central Iraq. Although that influence has been significantly

reduced due to the efforts and sacrifices of the Iraqi government and armed forces, working along with a United States-led coalition, the ongoing conflict has impacted the Iraqi government's capacity to secure its borders and to identify fraudulent travel documents. Nevertheless, the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment for Iraq. In particular, those Iraqi government forces that have fought to regain more than half of the territory previously dominated by ISIS have shown steadfast determination and earned enduring respect as they battle an armed group that is the common enemy of Iraq and the United States. In addition, since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal. Decisions about issuance of visas or granting admission to Iraqi nationals should be subjected to additional scrutiny to determine if applicants have connections with ISIS or other terrorist organizations, or otherwise pose a risk to either national security or public safety.

(h) Recent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security. Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States. They have included not just persons who came here legally on visas but also individuals who first entered the country as refugees. For example, in January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon. The Attorney General has reported to me that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation.

(i) Given the foregoing, the entry into the United States of foreign nationals who may commit, aid, or support acts of terrorism remains a matter of grave concern. In light of the Ninth Circuit's observation that the political branches are better suited to determine the appropriate scope of any suspensions than are the courts, and in order to avoid spending additional time pursuing litigation, I am revoking Executive Order 13769 and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens.

Sec. 2. *Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security

shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

(d) Upon submission of the report described in subsection (b) of this section regarding the information needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.

(e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

(f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.

(g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.

Sec. 3. Scope and Implementation of Suspension.

(a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspension of entry pursuant to section 2 of this order shall apply only to foreign nationals of the designated countries who:

- (i) are outside the United States on the effective date of this order;
- (ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and
- (iii) do not have a valid visa on the effective date of this order.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this order shall not apply to:

- (i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the effective date of this order;

(iii) any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document;

(iv) any dual national of a country designated under section 2 of this order when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; or

(vi) any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspension of entry pursuant to section 2 of this order, a consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegatee, may, in the consular officer's or the CBP official's discretion, decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest. Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa issuance process will be effective both for the issuance of a visa and any subsequent entry on that visa, but will leave all other requirements for admission or entry unchanged. Case-by-case waivers could be appropriate in circumstances such as the following:

(i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;

(ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

(iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

(iv) the foreign national seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

(v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.*, traveling for purposes of conducting meetings or business with the United States Government, or traveling

to conduct business on behalf of an international organization not designated under the IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or

(ix) the foreign national is traveling as a United States Government-sponsored exchange visitor.

Sec. 4. *Additional Inquiries Related to Nationals of Iraq.* An application by any Iraqi national for a visa, admission, or other immigration benefit should be subjected to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership, since Executive Order 13769 was issued, concerning individuals suspected of ties to ISIS or other terrorist organizations and individuals coming from territories controlled or formerly controlled by ISIS. Such review shall include consideration of whether the applicant has connections with ISIS or other terrorist organizations or with territory that is or has been under the dominant influence of ISIS, as well as any other information bearing on whether the applicant may be a threat to commit acts of terrorism or otherwise threaten the national security or public safety of the United States.

Sec. 5. *Implementing Uniform Screening and Vetting Standards for All Immigration Programs.* (a) The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence shall implement a program, as part of the process for adjudications, to identify individuals who seek to enter the United States on a fraudulent basis, who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry. This program shall include the development of a uniform baseline for screening and vetting standards and procedures, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that applicants are who they claim to be; a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States; and any other appropriate means for ensuring the proper collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Director of National Intelligence, shall submit to the President an initial report on the progress of the program described in subsection (a) of this section within 60 days of the effective date of this order, a second report within 100 days of the effective date of this order, and a third report within 200 days of the effective date of this order.

Sec. 6. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.* (a) The Secretary of State shall suspend travel of refugees into the United States under the USRAP, and the Secretary of Homeland Security shall suspend decisions on applications for refugee status, for 120 days after the effective date of this order, subject to waivers pursuant to subsection (c) of this section. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. The suspension described in this subsection shall not apply to refugee applicants who, before the effective date of this order, have been formally scheduled for transit by the Department of State. The Secretary of State shall resume travel of refugees into the

United States under the USRAP 120 days after the effective date of this order, and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to this subsection are adequate to ensure the security and welfare of the United States.

(b) Pursuant to section 212(f) of the INA, I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any entries in excess of that number until such time as I determine that additional entries would be in the national interest.

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

(d) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of State shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 7. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretary of State and the Secretary of Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority permitted by section 212(d)(3)(B) of the INA, 8 U.S.C. 1182(d)(3)(B), relating to the terrorism grounds of inadmissibility, as well as any related implementing directives or guidance.

Sec. 8. *Expedited Completion of the Biometric Entry-Exit Tracking System.*

(a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for in-scope travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive set forth in subsection (a) of this section. The initial report shall be submitted within 100 days of the effective date of this order, a second report shall be submitted within 200 days of the effective date of this order, and a third report shall be submitted within 365 days of the effective date of this order. The Secretary of Homeland Security shall submit further reports every 180 days thereafter until the system is fully deployed and operational.

Sec. 9. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1202, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions. This suspension shall not apply to any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; traveling for purposes related to an international organization designated under the IOIA; or traveling for purposes of conducting meetings or business with the United States Government.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that nonimmigrant visa-interview wait times are not unduly affected.

Sec. 10. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements and arrangements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If another country does not treat United States nationals seeking nonimmigrant visas in a truly reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by that foreign country, to the extent practicable.

Sec. 11. *Transparency and Data Collection.* (a) To be more transparent with the American people and to implement more effectively policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available the following information:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation with or provision of material support to a terrorism-related organization, or any other national-security-related reasons;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and who have engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States;

(iii) information regarding the number and types of acts of gender-based violence against women, including so-called “honor killings,” in the United States by foreign nationals; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security or the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of Homeland Security shall release the initial report under subsection (a) of this section within 180 days of the effective date of this order and shall include information for the period from September 11, 2001, until the date of the initial report. Subsequent reports shall be issued every 180 days thereafter and reflect the period since the previous report.

Sec. 12. *Enforcement.* (a) The Secretary of State and the Secretary of Homeland Security shall consult with appropriate domestic and international partners, including countries and organizations, to ensure efficient, effective, and appropriate implementation of the actions directed in this order.

(b) In implementing this order, the Secretary of State and the Secretary of Homeland Security shall comply with all applicable laws and regulations, including, as appropriate, those providing an opportunity for individuals to claim a fear of persecution or torture, such as the credible fear determination for aliens covered by section 235(b)(1)(A) of the INA, 8 U.S.C. 1225(b)(1)(A).

(c) No immigrant or nonimmigrant visa issued before the effective date of this order shall be revoked pursuant to this order.

(d) Any individual whose visa was marked revoked or marked canceled as a result of Executive Order 13769 shall be entitled to a travel document confirming that the individual is permitted to travel to the United States and seek entry. Any prior cancellation or revocation of a visa that was solely pursuant to Executive Order 13769 shall not be the basis of inadmissibility for any future determination about entry or admissibility.

(e) This order shall not apply to an individual who has been granted asylum, to a refugee who has already been admitted to the United States, or to an individual granted withholding of removal or protection under the Convention Against Torture. Nothing in this order shall be construed to limit the ability of an individual to seek asylum, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.

Sec. 13. *Revocation.* Executive Order 13769 of January 27, 2017, is revoked as of the effective date of this order.

Sec. 14. *Effective Date.* This order is effective at 12:01 a.m., eastern daylight time on March 16, 2017.

Sec. 15. *Severability.* (a) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its other provisions to any other persons or circumstances shall not be affected thereby.

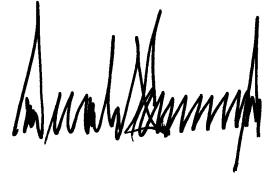
(b) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements.

Sec. 16. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

A handwritten signature in black ink, appearing to be the signature of Donald Trump, located in the upper right quadrant of the page.

THE WHITE HOUSE,
March 6, 2017.

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2016

Rethinking Counterterrorism in the Age of ISIS: Lessons from Sinai

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Sahar F. Aziz*

Rethinking Counterterrorism in the Age of ISIS: Lessons from Sinai

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I. INTRODUCTION

Failing states are havens for terrorism.¹ A toxic combination of social, economic, and political crises attract violent extremist groups to establish bases in these lawless areas.² As the groups grow in strength, the violence spreads from the immediate vicinity to the nation, region, and sometimes even other continents.³ One need only look to the terrorist attacks in New York, London, Madrid, and Paris as proof that terrorists operating out of failing states eventually set their sights on attacking Western capitals.⁴ Although the underlying causes of terrorism are often local, the violence is no longer contained within a particular country or region.⁵ Whether originating in Afghanistan, the Northwest Frontier of Pakistan, Somalia, Iraq, or

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1. See Stefan Mair, *A New Approach: The Need to Focus on Failing States*, HARV. INT'L REV., Winter 2008, at 52, 53 (arguing failing states encourage international terrorism and organized crime); William F. S. Miles, *Deploying Development to Counter Terrorism: Post-9/11 Transformation of U.S. Foreign Aid to Africa*, 55 AFR. STUD. REV., Dec. 2012, at 27, 31–32.
 2. Pinar Bilgin & Adam D. Morton, *From 'Rogue' to 'Failed' States? The Fallacy of Short-termism**, 24 POLITICS 169, 173 (2004); Jörg Raab & H. Brinton Milward, *Dark Networks as Problems*, 13 J. PUB. ADMIN. RES. & THEORY 413 (2003) (“There is increasing evidence of a close connection between Al Qaeda and the failed states of Liberia, Sierra Leone, and Burkino Faso in West Africa.”); PAUL J. SMITH, *THE TERRORISM AHEAD: CONFRONTING TRANSNATIONAL VIOLENCE IN THE TWENTY-FIRST CENTURY* 187 (2008).
 3. See Zaryab Iqbal & Harvey Starr, *Bad Neighbors: Failed States and Their Consequences*, 25 CONFLICT MGMT. & PEACE SCI. 315, 338 (2008) (arguing the instability and unrest in a failing state place neighboring states and the region at risk of similar problems).
 4. For a timely discussion of the shifting counterterror measures adopted by France after the November 12, 2015, Paris Attacks, see generally Khaled A. Beydoun, *Beyond the Paris Attacks: Unveiling the War Within French Counterterror Policy*, AM. U. L. REV. (forthcoming 2016).
 5. U.S. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY 2–3 (2008); Leonardo Helland & Stefan Borg, *The Lure of State Failure*, 16 INTERVENTIONS 877, 880 (2013); *About S/CRS*, U.S. DEPT. OF STATE (July 15, 2008), <http://2001-2009.state.gov/s/crs/c12936.htm> [<https://perma.unl.edu/23HM-Z93R>]; THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), <http://www.state.gov/documents/organization/63562.pdf> [<https://perma.unl.edu/5JJK-YC6C>] (“The events of September 11, 2001, taught us that weak states, like Afghanistan, can pose as great a danger to our national interests as strong states. Poverty does not make poor people into terrorists and murderers. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders.”); Mair, *supra* note 1, at 55; President Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014) (transcript available at <https://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony> [<https://perma.unl.edu/R739-YX85>]) (“[B]ut also beyond Europe’s borders where our NATO allies must pull their weight to counterterrorism and respond to failed states and train a network of partners.”). *But see* Edward Newman, *Failed States and International Order: Constructing a Post-Westphalian World*, 30 CONTEMP. SECURITY POL’Y, 421 (2009)

Syria, the rise of terrorist groups has become a worldwide problem that threatens the safety of citizens in both the Eastern and Western Hemispheres, albeit in differing degrees.⁶

Yet, global counterterrorism strategies focus more on symptoms rather than the underlying social, political, and economic conditions that produce politically motivated violence.⁷ In particular, counterterrorism policies are driven by military and security interests of authoritarian states whose state violence breeds more violence by nonstate actors. Moreover, Western nations often limit their counterterrorism practices to merely preventing violence on their soil. But with the advancement of technology, fluidity of borders, and ubiquity of international travel, countries can no longer afford to ignore the deteriorating conditions in failing states where terrorists set up bases.⁸ Nor can they limit their interest in failed states to bombing terrorist training camps or pushing terrorists underground.⁹ Only when the underlying political, social, and economic local hardships that produce fertile grounds for terrorists to operate are addressed can security improve for all people.¹⁰ Simply put, citizens in the West can no longer wall themselves off from violence inflicted on citizens in the East.

Accordingly, this Article argues for a paradigm shift in the preventive goals of global counterterrorism policies. Specifically, human development based on the local needs of failing states—not the interests of authoritarian regimes and their Western allies—should drive global counterterrorism strategy. Furthermore, human development should

(critiquing the focus on failed states post-9/11 as a political construction that produces threat inflation); Bilgin & Morton, *supra* note 2, at 170.

6. Seth Kaplan, *Identifying Truly Fragile States*, WASH. Q., Spring 2014, at 49, 50; Bob de Graaff, 'There's a Good Reason They are Called al-Qaeda in Iraq. They are al-Qaeda. . . in . . . Iraq.' *The Impossibility of a Global Counter-Terrorism Strategy, or the End of the Nation State*, in CRITICAL PERSPECTIVES ON COUNTER-TERRORISM 11, 12 (Lee Jarvis & Michael Lister eds., 2015).
7. Bilgin & Morton, *supra* note 2, at 170; Justin Logan & Christopher Preble, *Fixing Failed States: A Cure Worse than the Disease?*, HARV. INT'L REV., Winter 2008, at 62 (critiquing the "consensus view that the United States must reconstitute its national security bureaucracy in order to develop the capacity to fix failed states.").
8. THE WHITE HOUSE, *supra* note 5, at 1 ("America is now threatened less by conquering states than we are by failing ones.").
9. Morten Boås & Kathleen M. Jennings, 'Failed States' and 'State Failure': *Threats or Opportunities?*, 4 GLOBALIZATIONS 475, 479–80 (2007) (arguing that the U.S. did not take interest in Afghanistan or Somalia until after 2001 because the Taliban harbored Osama bin Laden, not because of humanitarian or governance-based definitions of state failure); DEP'T OF STATE & USAID, THE FIRST QUADRENNIAL DIPLOMACY AND DEVELOPMENT REVIEW 12 (2010), <http://www.state.gov/documents/organization/153108.pdf> [<https://perma.unl.edu/6LBW-M8SE>].
10. Kaplan, *supra* note 6, at 52 ("[A] locally driven, productive system of governance [is] a prerequisite for any attempt to develop or democratize.").

go beyond meeting fundamental needs such as food, shelter, and water to address political reforms demanded by the local population.

By failing to confront authoritarianism and its offspring, political repression, the international community misguidedly relies on counterproductive military and security-driven policies that produce, rather than prevent, violence. With the rise of violent transnational actors and fluid borders, the international community loses more than it gains by supporting dictators under the auspices of preserving stability. Dictatorships breed terrorism as they inculcate a culture of violence and instill fear, suspicion, and aggression among the citizens. In turn, violence becomes the only means to effectuate change in a zero-sum, winner-takes-all political system.

To demonstrate the flaws in security-driven, as opposed to development-driven, counterterrorism strategies that permeate the global “war on terror,” I examine Egypt’s Sinai Peninsula as a case study. The Sinai serves as an illustration of how a failing sub-state composed of a population long neglected by domestic and international development initiatives produces a growing militant insurgency that contributes toward destabilization of the state and the region.¹¹ Indeed, the violence in the Sinai has reached a tipping point wherein the violence perpetrated by nonstate militant groups has not only terrorized the local population and destabilized Egypt but has also buttressed the global threat posed by the self-described Islamic State in Iraq and Syria (ISIS). Thus, what happens in Sinai can offer valuable insights for policy makers and international organizations engaged in human development and counterterrorism in failing states or sub-states.

While Egypt is not currently a failed state according to international indexes,¹² the poor social, political, and economic conditions in the Sinai have attracted violent extremist groups whose lethal attacks on Egyptian soldiers and civilians is threatening the security of all Egyptians.¹³ With the establishment of Wilayat Sinai as a branch of

11. See, e.g., ZACK GOLD, INT’L CTR. FOR COUNTER-TERRORISM, SECURITY IN THE SINAI: PRESENT AND FUTURE 19 (2014), <http://www.icct.nl/download/file/ICCT-Gold-Security-In-The-Sinai-March-2014.pdf> [<https://perma.unl.edu/CP84-G6PH>] (noting that Sinai can be compared to the western tribal areas of Pakistan that has become a safe-haven for foreign terrorists).

12. See Charles T Call, *The Fallacy of the ‘Failed State’*, 29 THIRD WORLD Q. 1491, 1496 (2008) (arguing that authoritarian states as among the categories of states that warrant more empirical research as a cause of instability, conflict, and weak state institutions).

13. This has contributed toward Egypt’s fragility ranking of 38 out of 177 countries in the Failed State Index. With the most stable country (Finland) at a 17.8 index and the least stable countries (Somalia and South Sudan) with a 114.0 index, Egypt’s stands at 90. Among the various factors measured to determine a country’s failed state index, Egypt’s worst indicators are factionalized elites, group grievances, poverty and economic decline, lack of state legitimacy, poor human rights and rule of law, and an abusive security apparatus. Egypt’s Social Indica-

ISIS, the violence is likely to spread to and merge with violence in neighboring countries.

Couched in the critical security studies literature,¹⁴ this Article argues that counterterrorism strategies and policies are deficient in at least three ways: (1) they are shaped by Western counterterrorism agendas that focus on short term prevention of violent extremism on Western soil without meaningfully addressing the underlying political, social, and economic conditions that contribute to the rise of violent extremism over the long run;¹⁵ (2) they securitize human development problems that result in over-allocating resources to military and security personnel and an environment fertile for terrorist recruitment of the local population;¹⁶ and (3) they fail to localize and contextualize the causes of violent extremism that arise from underdevelopment.¹⁷ Rather than merely attempt to stop the next attack, the international community should have the long view of addressing the underlying social, political, and economic hardships that produce fertile grounds for politically motivated violence to thrive.¹⁸ That is, by shifting the focus from security to human development, resources will be allocated to building institutions and dem-

tors are as follow: Demographic Pressures 7.1; Refugees and Internally Displaced Persons 6.7; Group Grievance 8.7; Human Flight and Brain Drain 4.7. Egypt's Economic Indicators are as follow: Uneven Economic Development 6.5; Poverty and Economic Decline 8.1; Political Indicators; State Legitimacy 8.7; Public Services 5.4; Human Rights & Rule of Law 9.8; Security Apparatus 8.2; Factionalized Elites 9.0; External Intervention 7.1. *Fragile States Index 2015*, FUND FOR PEACE, <http://fsi.fundforpeace.org/rankings-2015> [<https://perma.unl.edu/FV2P-P3NAJ>].

14. COUNTER-TERRORISM AND STATE POLITICAL VIOLENCE: THE 'WAR ON TERROR' AS TERROR (Scott Poynting & David Whyte eds., 2012); MUSLIMS IN THE WEST AFTER 9/11 (Jocelyne Cesari ed., 2010); DAVID L. ALTHEIDE, TERRORISM AND THE POLITICS OF FEAR (2006); JENNIFER GANDHI, POLITICAL INSTITUTIONS UNDER DICTATORSHIP (2008).
15. See, e.g., Bilgin & Morton, *supra* note 2, at 169 (noting that public policy discourse on failed states focuses on symptoms of state failure, including international terrorism, rather than conditions that cause such failures to occur).
16. Newman, *supra* note 5, at 434 (defining securitization as "the process by which issues are accorded security status or seen as a threat through political labelling, rather than as a result of their real or objective significance."); DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, MAKING GOVERNANCE WORK FOR THE POOR, 2006, Cm. 6876 (UK) (converging security, peace-building, and development); Call, *supra* note 12, at 1496–97.
17. Bøås & Jennings, *supra* note 9, at 476 ("Every state is a culmination of unique historical processes."); de Graaff, *supra* note 6, at 18–19.
18. But see Organization for Economic Co-operation and Development [OECD], *Pilot-ing the Principles for Good International Engagement in Fragile States*, at 8–10, DCD(2005)11/REV2 (Aug. 17, 2005) (focusing on state building as a central focus of development); Rachel Stohl & Michael Stohl, *Failing the Failed: The Bush Administration and Failed States*, HARV. INT'L REV., Winter 2008, at 56, 60 (arguing that the failing states need development support from the international community).

cratic processes from the bottom up rather than strengthening military and security institutions with abysmal human rights records and a track record of political repression.¹⁹

While I acknowledge that scholars disagree on the criteria that should inform a state's failing status,²⁰ I adopt the Peace Fund Index criteria in evaluating the social, political, and economic conditions in the Sinai to argue for development-driven counterterrorism.²¹ This Article employs the various criteria in the Index as a means of illustrating the myriad ways Sinai informs analysis of other failing sub-states harmed by militarized and security-driven counterterrorism.²² Specifically, the following factors contribute towards the Sinai's fail-

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19. Call, *supra* note 12, at 1498; Declan Walsh, *Italian Student's Brutal Killing May Be Issue in Egypt-U.S. Meetings*, N.Y. TIMES (Feb. 7, 2016), http://www.nytimes.com/2016/02/08/world/middleeast/egypt-italy-giulio-regeni-cairo.html?_r=0.
20. The debates on the utility of the empirical approach to defining failed state status are beyond the scope of this article. See, e.g., Mair, *supra* note 1, at 52 (noting that most scholars agree that "a state must be able to exert a monopoly on the use of force within its borders, provide legitimate political and legal order, and offer essential services in health, education, and physical infrastructure," but beyond that there is little consensus as to what constitutes a failed state); Bilgin & Morton, *supra* note 2, at 173–74 (noting the binary discourse on "failed" versus "successful" states" reflects the continuation of Cold War discourses of binary oppositions); Bøås & Jennings, *supra* note 9, at 475; Call, *supra* note 12, at 1491 (arguing that the terms failed and failing states are used in such divergent ways that they have lost any utility); Helland & Borg, *supra* note 5, at 877; Kaplan, *supra* note 6, at 49; Newman, *supra* note 5, at 421; Logan & Preble, *supra* note 7, at 62 (critiquing the use of the term failed state without a consistent and accurate definition).
21. *Fragile States Index 2015*, *supra* note 13; see, e.g., Kaplan, *supra* note 6, at 50–51 (critiquing the Fund for Peace's Failed State Index).
22. The Fund for Peace index focuses on social, economic, and political and military indicators. Social indicators are demographic pressures, refugees and internally displaced persons, group grievance, and human flight and brain drain. The economic indicators are uneven economic development and poverty and economic decline. The political and military indicators are state legitimacy, public services, human rights and rule of law, security apparatus, factionalized elites, and external intervention. *The Indicators*, FUND FOR PEACE, <http://fsi.fundforpeace.org/indicators> [<https://perma.unl.edu/797Y-92QU>]; see *Fragile States Index 2015*, *supra* note 13. Other failed state indices use similar factors but different nomenclature. For example, the Harvard Failed States Project Index identifies the following attributes of a failing state: (1) loss of physical control of its territory; (2) loss of a monopoly on the legitimate use of force; (3) erosion of legitimate authority to make collective decisions; (4) inability to provide reasonable public services; (5) extensive corruption and criminal behavior; (6) inability to collect taxes; (7) inability to draw on citizen support; (8) large-scale involuntary dislocation; (9) sharp economic decline or depression; (10) group-based inequality; (11) institutionalized persecution or discrimination; (12) severe demographic pressures; (13) brain drain; and (14) environmental decay. Helland & Borg, *supra* note 5, at 887; see Call, *supra* note 12, at 1491–92 (noting the convergence of interest between progressives seeking to direct international humanitarian aid to residents in poor conflict zones and conservatives seeking to prevent terrorism in failed states that harbor terrorists).

ing sub-state status;²³ (1) political marginalization and displacement;²⁴ (2) poor infrastructure;²⁵ (3) religious and political violence;²⁶

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23. The Fragile States Index includes the following factors in its assessment of states, which I apply to the Sinai context throughout the paper: (1) water scarcity, (2) displacement, (3) discrimination, (4) powerlessness, (5) religious violence, (6) disproportionately lower incomes than mainland Egypt, (7) unemployment, (8) high youth unemployment, (9) an illicit economy, (10) drug trade, (11) corruption, (12) police abuses, (13) criminality, (14) insufficient education provision, (15) insufficient roads, (16) poor infrastructure, (17) poor sanitation, (18) lack of press freedom, (19) violation of civil liberties, (20) no political freedoms, (21) human trafficking, (22) political prisoners, (23) torture, (24) executions, (25) arms proliferation, (26) fatalities in conflict, (27) rebel activity, (28) bombings, and (29) internal conflict. *The Indicators*, *supra* note 22.
24. Dina Ezzat, *Sinai-The Challenges Ahead*, AL-AHRAM WKLY. (June 2, 2015, 4:08 A.M.), <http://weekly.ahram.org.eg/News/10379/17/Sinai—The-challenges-ahead.aspx> [<https://perma.unl.edu/NP47-FGG7>]; Hilary Gilbert, *Nature = Life: Environmental Identity as Resistance in South Sinai*, NOMADIC PEOPLES, Dec. 2013, at 40, 60 [hereinafter Gilbert, *Nature = Life*]; Ramzy Baroud, *Fighting for Survival in the Sinai*, ASIA TIMES ONLINE (Oct. 28, 2014), http://www.atimes.com/atimes/Middle_East/MID-01-281014.html [<https://perma.unl.edu/T7UB-QKCS>] [hereinafter Baroud, *Fighting*]; Ramzy Baroud, *Poverty Has Bred Resentment in Sinai*, GULF NEWS (Nov. 4, 2014, 8:00 PM), <http://gulfnews.com/opinion/thinkers/poverty-has-bred-resentment-in-sinai-1.1408128> [<https://perma.unl.edu/RPC5-SCGP>] [hereinafter Baroud, *Poverty*] (“Despite a media blackout in Sinai, the scene of devastation created by the military campaign is becoming clearer by the day. ‘Using bulldozers and dynamite’, the army has demolished as many as 800 houses and displaced up to 10,000 people, the New York Times reported. Al Sissi’s spokesman referred to the demolished neighbourhoods as terrorist ‘hotbeds.’”).
25. Press Release, Embassy of the U.S. in Cairo, Egypt, Egyptian and US Partners to Renovate Water Trucks to Increase Supply of Drinking Water to Central Sinai Families (Mar. 28, 2012), <http://egypt.usembassy.gov/pr032812.html> [<https://perma.unl.edu/DHF2-WSHM>]; *Sinai Ignored in Egypt Development Plans*, AL-MONITOR (May 1, 2014), <http://www.al-monitor.com/pulse/originals/2014/04/sinai-egypt-residents-anger-empty-government-promises.html> [<https://perma.unl.edu/SSC8-P3YG>]; U.S. AGENCY FOR INT’L DEV., LIVELIHOOD AND INCOME FROM THE ENVIRONMENT IN SINAI (LIFE SINAI) 5 (Apr. 2012), http://pdf.usaid.gov/pdf_docs/PA00HR6D.pdf [<https://perma.unl.edu/ZP49-8NQH>].
26. Mara Revkin, *Egypt’s Power Vacuum is Radicalizing the Sinai Peninsula*, WASH. POST (Aug. 29, 2013), http://www.washingtonpost.com/opinions/egypts-power-vacuum-is-radicalizing-the-sinai-peninsula/2013/08/29/77c427d2-10bb-11e3-bdf6-e4fc677d94a1_story.html [<https://perma.unl.edu/6VY5-FZEH>] (“In a widely circulated video in July, a pro-Morsi protester warned Gen. Abdel Fatah al-Sissi: ‘You have created a new Taliban and a new al-Qaeda in Egypt.’ In Sinai, this message resonates with both radical and more mainstream Islamists who increasingly resort to violence to avenge what they regard as criminal state action.”); *Sinai ‘Suicide Bombing’ Kills At Least 6 Egyptian Policemen, 10 Wounded*, RUSSIA TODAY (Nov. 4, 2015, 11:31 AM), <https://www.rt.com/news/320730-police-men-killed-sinai-bombing/> [<https://perma.unl.edu/3F9J-4SNY>]; Ashraf Sweilam, *Roadside Bomb Kills Egypt Officer in Restive Sinai*, U.S. NEWS (April 16, 2015, 6:53 A.M.), <http://www.usnews.com/news/world/articles/2015/04/16/roadside-bombing-kills-officer-in-egypts-restive-sinai> [<https://perma.unl.edu/8D2X-BYXJ>]

(4) poverty and unemployment;²⁷ (5) an illicit economy, arms proliferation and drug trade;²⁸ (6) absence of civil liberties;²⁹ and (7) internal conflict.³⁰ I will address these factors throughout the Article to demonstrate how such factors result in a rise of politically motivated, nonstate violence in the Sinai.

The Article is structured as follows. Part II provides a brief summary of Sinai's modern history, including the Egyptian state's systematic mistreatment of the Bedouin that has trapped them between state and nonstate violence.³¹ It goes into detail on the securitized

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27. Gilbert, *Nature = Life*, *supra* note 24, at 48 (“The poverty resulting from this exclusion is very real. Egyptian employers decline to employ Bedu. The limited education most now receive does not provide access to better employment and most of those working at all survive in low-paid, insecure jobs.”); Heba Aziz, *Employment in a Bedouin Community: The Case of the Town of Dahab in South Sinai*, NOMADIC PEOPLES, Nov. 2000, at 28; Hilary Gilbert, ‘This Is Not Our Life, It’s Just A Copy Of Other People’s’: Bedu And The Price Of ‘Development’ In South Sinai, NOMADIC PEOPLES, Dec. 2011, at 7, 9, 19 [hereinafter Gilbert, *This Is Not Our Life* . . .].
28. Gilbert, *This Is Not Our Life* . . . , *supra* note 27, at 18; Gold, *supra* note 11, at 7 (“Criminal smuggling, of course, did thrive in Sinai. As is often the case in border regions, members of Sinai tribes took advantage of relations in neighboring states and territories to smuggle people, drugs, goods and weapons into Israel and Gaza.”); Baroud, *Poverty*, *supra* note 24; OLIVER WALTON, GOVERNANCE AND SOC. DEV. RES. CTR., HELPDESK RESEARCH REPORT: CONFLICT, EXCLUSION AND LIVELIHOODS IN THE SINAI REGION OF EGYPT 6 (2012), <http://www.gsdr.org/docs/open/hdq834.pdf> [<https://perma.unl.edu/SX6X-UEL7>] (“The border with Israel is also an important site of trafficking, particularly for migrants and prostitutes. Some reports suggest that Bedouins have become increasingly involved in the trafficking of African migrants to Israel in recent years.”).
29. Shahira Amin, *Egypt: Law Will ‘Severely Erode Civil Liberties’*, INDEX ON CENSORSHIP (April 14, 2014), <https://www.indexoncensorship.org/2014/04/egypt-law-will-severely-erode-civil-liberties/> [<https://perma.unl.edu/726G-D5VC>]; Nour Youssef, *How Egyptian Media Has Become a Mouthpiece for the Military State*, GUARDIAN (June 25, 2015, 11:52 AM), <http://www.theguardian.com/world/2015/jun/25/egyptian-media-journalism-sisi-mubarak> [<https://perma.unl.edu/2QPU-SSEN>].
30. *Egypt Executes Six Men Convicted of Killing Soldiers After ‘Grossly Unfair’ Trial*, GUARDIAN (May 17, 2015, 11:25 AM), <http://www.theguardian.com/world/2015/may/17/egypt-executes-six-members-of-isis-aligned-militant-group-sinai-province> [<https://perma.unl.edu/Z3X6-EASD>] (reporting concerns with unfair trials for six men executed for allegedly carrying out terrorist attacks in Sinai); Toqa Ezzidin, *Geographically Hard To Secure: North Sinai Caught In Crossfire Between Army, Militants*, DAILY NEWS EGYPT (July 8, 2015), <http://www.dailynewsegypt.com/2015/07/08/geographically-hard-to-secure-north-sinai-caught-in-crossfire-between-army-militants/> [<https://perma.unl.edu/K2UX-LS4E>] (reporting on water shortage and skyrocketing inflation in Sinai); *Sinai ‘Suicide Bombing’ Kills At Least 6 Egyptian Policemen, 10 Wounded*, *supra* note 26; Sweilam, *supra* note 26.
31. The Bedu people (literally: “people of the desert”) are groups found throughout North Africa and the Middle East. In Sinai, the Bedouin make up eleven to thirteen semi-nomadic tribes with indistinct boundaries. The Bedu people had a “core” livelihood before countries such as Israel and Egypt attempted to “develop” the region. Especially in southern Sinai, this consisted of working in mountain-

governance of Sinai, in part due to the terms of the Egyptian–Israeli Peace Treaty, and the consequent social, economic, and political hardships of local residents. Frequent closure of the border between Gaza and Rafah, for example, makes illegal smuggling all but inevitable due to the consequent scarcity of consumer goods in Gaza and dearth of employment in Rafah. Moreover, Egypt’s harsh treatment of its North Sinai residents coupled with Israel’s mistreatment of Gazans gives the two beleaguered communities a common cause to fight both states.³² The absence of employment opportunities, inferior schools, and harsh over-policing fuels an environment of resentment toward the state that terrorist groups have leveraged to expand their operations after Egypt’s January 25, 2011, uprisings.³³ Thus, Egypt, Israel, the United States, and their allies should consider amending the Camp David Accords to transform the Sinai, particularly in the North, from barren military zones to a thriving part of Egypt where the Bedouin and other local residents can find gainful employment, receive government services commensurate with their Egyptian compatriots, and live in peace.³⁴

Part III proceeds to examine how local problems engendered politically motivated violence in Sinai. Various militant groups recruited Bedouin and Egyptians from the mainland to violently oppose the state. Terrorist attacks on resorts in South Sinai from 2004 to 2006 led to massive arbitrary arrests of Bedouin from nearly every village, hundreds of whom were detained for years without trial.³⁵ Thus, when the 2011 uprisings occurred, the Sinai was fertile grounds for

ous regions cultivating orchard fruits and dates and pastoralism. These are the labors that largely made up what Bedouin believed made people Bedouin. Gilbert, *This Is Not Our Life . . .*, *supra* note 27, at 9.

32. See MOHANNAD SABRY, SINAI: EGYPT’S LINCHPIN, GAZA’S LIFELINE, ISRAEL’S NIGHTMARE 131 (2015).
33. Adham Youssef, *Wounds and Medicines of Sinai*, DAILY NEWS EGYPT (May 12, 2015), <http://www.dailynewsegypt.com/2015/05/12/wounds-and-medicines-of-sinai/> [<https://perma.unl.edu/5SY5-BLQY>]; SABRY, *supra* note 32, at 35–36.
34. See Genevieve Belmaker, *Sinai ‘Basically a War Zone’ Says Expert, as Pentagon Plans Changes to Observer Deployments*, CNS NEWS (Apr. 28, 2016, 6:26 PM), <http://www.cnsnews.com/news/article/genevieve-belmaker/sinai-basically-war-zone-says-expert-pentagon-plans-changes-observer> [<https://perma.unl.edu/63LH-WT8Z>]; Heidi Breen, *Egypt: Freedom and Justice to the Bedouins in Sinai?* 59 (Autumn 2013) (unpublished M.A. thesis, University of Oslo) (on file with the Department of Cultural Studies and Oriental Languages, University of Oslo), https://www.duo.uio.no/bitstream/handle/10852/39058/Master_Heidi_Breen.pdf?sequence=1 [<https://perma.unl.edu/L2L2-YPJZ>] (finding that the absence of development and cities coupled with the rough terrain makes Sinai attractive to terrorist groups). *But see* AMR YOSSEF & JOSEPH R. CERAMI, *THE ARAB SPRING AND THE GEOPOLITICS OF THE MIDDLE EAST: EMERGING SECURITY THREATS AND REVOLUTIONARY CHANGE* 11–12 (2015) (arguing the failure of Arab states is due more to the weakness of its bureaucracy, i.e., its stateness).
35. SABRY, *supra* note 32, at 23–24.

the resurgence of violent extremist groups partially composed of Bedouin seeking revenge for decades of abuse and humiliation at the hands of state security.³⁶ Part III also looks at the current situation in Sinai wherein the self-described Islamic State of Iraq and Syria (ISIS) established a foothold when the Egyptian group Ansar Bayt al-Maqdis pledged its allegiance to ISIS. With an influx of weapons from Libya after the fall of Ghaddafi and arms smuggling at an all-time high, the Sinai appears to be on the path toward becoming a failing sub-state beyond the control of the Egyptian state.³⁷

The Egyptian military's scorched-earth response, including tearing down 1,000 meters of residential homes in Rafah, has only made matters worse.³⁸ As Egyptian military tanks storm schools, uproot olive trees, and destroy thousands of homes, the possibility of a working relationship between the citizenry and government plummets.³⁹ Exploiting the local population's economic deprivation and distrust of the state, violent extremist groups have burgeoned. Moreover, the security and political vacuum arising from the 2011 uprisings has allowed new militant groups to form as existing groups grow stronger.⁴⁰

While development initiatives have been undertaken in the Sinai, development has been the handmaiden of a securitized approach to governing Sinai. Part III argues that development by Egypt and the United States has proven to be half-hearted at best and futile at worst. Funds for human and economic development are both insufficient and inappropriately spent pursuant to Cairo-based Egyptian officials' political agendas. Rarely are Bedouin tribal leaders and other Sinai leaders included in the negotiations for developing the Sinai.⁴¹ Nor are they in elected offices representing the Sinai.⁴² When Bedouin are invited to discuss their grievances with Egyptian officials,

36. Gold, *supra* note 11, at 3 (noting the pace and lethality of attacks today is much worse than in the past).

37. Mair, *supra* note 1, at 53; SABRY, *supra* note 32, at 147 (noting state authorities had little control of Sinai after the 2011 uprisings); Ezzat, *supra* note 24.

38. Gold, *supra* note 11, at 14.

39. *Egypt Cabinet Approves New 'Terrorist Entities' Law*, AHAM ONLINE (Nov. 27, 2014), <http://english.ahram.org.eg/NewsContent/1/64/116565/Egypt/Politics-/Egypt-cabinet-approves-new-antiterrorism-law.aspx> [https://perma.unl.edu/767Q-E2XG]; *Egyptian Army Struggles to Address Terrorism in Sinai*, AL-MONITOR (Feb. 11, 2015), <http://www.al-monitor.com/pulse/originals/2015/02/sinai-egypt-army-failure-war-terrorism.html#> [https://perma.unl.edu/YUC4-ZJPP].

40. The active militant groups before Egypt's 2011 uprisings include Tawhid wal Jihad that is allegedly tied to Al Qaeda, Salafiya Jihadiya, Mujahideen Council, and Jaysh Al Islam. JEREMY M. SHARP, CONG. RESEARCH SERV., R43183, EGYPT IN CRISIS: ISSUES FOR CONGRESS 1 (2013).

41. SABRY, *supra* note 32, at 126, 193.

42. Dona Stewart, *The Sinai Bedouin: Political and Economic Discontent Turns Increasingly Violent*, MIDDLE E. POL'Y COUNCIL (Aug. 12, 2011), <http://mepc.org/articles-commentary/commentary/sinai-bedouin-political-and-economic-discontent-turns-increasingly-violent> [https://perma.unl.edu/92ZC-KEQF] ("Though Egypt-

their recommendations are often ignored.⁴³ These insincere meetings are then used by the authoritarian regime as proof that the Egyptian government is not oppressing the people of Sinai. But violence in Sinai has become so widespread that Egypt, its neighbors, and the international community can no longer afford to entertain such political posturing.⁴⁴

It is worth emphasizing that while much of the militant groups' ideological rhetoric in Sinai has been "Islamist,"⁴⁵ the militants have a political purpose—to overthrow an Egyptian government it views as illegitimate and oppressive. Indeed, the first order problem in Sinai is political, economic, and social in nature, wherein the issue of whether the militants are in fact "Islamic" is a second order issue. That is, the militant groups exploit religious rhetoric to appeal to the local population seeking relief from inequality, political repression, and human rights abuses. Militants (mis)interpret religion to gain support for political goals as a consequence of the fundamental role religion has played in daily life across the Middle East since the 1970s. In contrast, from the 1940s to the 1950s insurgent or opposition groups deployed nationalism and socialism to mobilize people in furtherance of the political goal of overthrowing a colonial government.⁴⁶ This was specific to the surge of anticolonial movements across the world and national revolutions. For these reasons, this Article does not engage in the second-order debates that frame counterterrorism around the religious legitimacy of violent extremist acts.⁴⁷

Before the Sinai transitions into a full-fledged failed sub-state, the international community and the Egyptian state should develop a long-term preventive strategy that incorporates and welcomes Sinai residents as stakeholders.⁴⁸ Rather than be marginalized as a fifth

tian citizens, they are not allowed to join the Army or police or hold significant government positions.").

43. SABRY, *supra* note 32, at 126, 193.

44. Stohl & Stohl, *supra* note 18, at 60 ("Without the assistance of the international community, weak and failing states will repeat their cycles of violence and instability.").

45. According to *Dictionary.com*, "Islamist" means supporting or advocating Islamic fundamentalism. *Islamist*, DICTIONARY.COM, <http://www.dictionary.com/browse/islamist> [<https://perma.unl.edu/6FA7-F9VR>].

46. See FED. RESEARCH DIV., LIBRARY OF CONGRESS, EGYPT: A COUNTRY STUDY 56–65 (Helen Chapin Metz ed., 1991).

47. See generally Jerome P. Bjelopera, *Countering Violent Extremism in the United States*, 9 INT'L J. TERRORISM & POL. HOT SPOTS 21 (2014); Jennifer S. Hendrickson, *Counter-Radicalization: Combating Terrorism at the Core*, (Aug. 2014) (unpublished M.A. thesis, Johns Hopkins University) (on file with the Sheridan Libraries, Johns Hopkins University), <https://jscholarship.library.jhu.edu/handle/1774.2/38096> [<https://perma.unl.edu/YWU6-NMFA>].

48. See SMITH, *supra* note 2, at 191 (explaining one way of "mitigating terrorism" is to change the environment by nurturing a "more equitable and fair international system").

column or de facto enemies of the state, the Bedouin and other Sinai residents should play a leading role in an intergenerational process for bringing stability back to Sinai through development.⁴⁹ The local populations' needs and active participation—not Western nations' or authoritarian regimes' security agendas—should shape human development in the Sinai.⁵⁰ Empowering Sinai residents through self-governance grants the local population a vested interest in working with security forces as partners to stop militant groups' violence against both civilians and soldiers.⁵¹ Their economic interests and political empowerment will also give Sinai residents a sense of belonging to the state, thereby making terrorist recruitment efforts less effective.

II. ECONOMIC DEPRIVATION AND POLITICAL MARGINALIZATION IN THE SINAI

Sinai did not reach its current state of lawlessness overnight.⁵² For decades, the Egyptian state (with the United States' military aid)⁵³ has securitized governance of the Sinai.⁵⁴ Rather than invest in human and economic development that could provide Bedouin with lawful employment, stability was achieved through fear.⁵⁵ The Ministry of Interior and Egyptian intelligence controlled Sinai governance

49. Ezzat, *supra* note 24.

50. See, e.g., Logan & Preble, *supra* note 7, at 62 (arguing the fetish with failed states is a modern iteration of Western imperialism to justify intervention in countries deemed strategic to Western political interests); Bilgin & Morton, *supra* note 2, at 169, 171 (noting that public policy discourse on failed states focuses on symptoms of state failure, including international terrorism, rather than conditions that cause such failures to occur); Bøås & Jennings, *supra* note 9, at 476 (arguing that “the use of the failed state label is inherently political” and the conditions of weak states does not necessarily explain the presence of terrorist groups); Call, *supra* note 12, at 1496.

51. *Egyptian Army Struggles to Address Terrorism in Sinai*, AL-MONITOR (Feb. 11, 2015), <http://www.al-monitor.com/pulse/originals/2015/02/sinai-egypt-army-failure-war-terrorism.html#> [<https://perma.unl.edu/73HW-8C24>]; SABRY, *supra* note 32, at 174.

52. SABRY, *supra* note 32, at 172 (noting how lawlessness strengthened sharia courts and independent tribal figures). *But see* Call, *supra* note 12, at 1499–1500 (noting that failed state analysis discounts alternative forms of authority in tribes or local strongmen that produce security for the population).

53. JEREMY M. SHARP, CONG. RESEARCH SERV., RL33003, EGYPT: BACKGROUND AND U.S. RELATIONS 13–15 (2015) (“Between 1948 and 2015, the United States provided Egypt with \$76 billion in bilateral foreign aid . . . including \$1.3 billion a year in military aid from 1987 to the present.”).

54. Louise Lief, *Egypt Puts Stamp on Sinai*, CHRISTIAN SCI. MONITOR (Apr. 22, 1982), <http://www.csmonitor.com/1982/0422/042255.html> [<https://perma.unl.edu/6V8D-S4UK>]; YOSSEF & CERAMI, *supra* note 34, at 51.

55. Gold, *supra* note 11, at 18.

with little regard for the needs of the local population.⁵⁶ This pushed the Bedouin into smuggling consumer goods, weapons, drugs, and humans as a means of economic survival.⁵⁷ Human rights abuses became a regular occurrence as residents were swept up and tortured in state anti-terrorism operations.⁵⁸ Tensions between the people and the state predictably reached a boiling point in January 2011 when Sinai residents joined the mass uprisings as they burned down police stations and chased security officers out of town.⁵⁹

The securitized approach to governance in Sinai is due, in large part, to an outdated mindset rooted in the 1979 Egyptian–Israeli Peace Treaty.⁶⁰ The Treaty is premised on preventing military engagement between two states. At the time of its signing, the Egyptian military was noncommittal to a permanent peace, and thus did not want to develop Sinai in the event that another conflict was necessary.⁶¹ The Treaty, thus, perpetuated treating North Sinai as demilitarized security zones, rather than civilian areas, where restrictions on Egyptian military activities are monitored by an international force.⁶² Four decades later, however, the more pressing security concerns now lie with violence by nonstate actors.⁶³ Transnational political Islamist groups and cross-border Bedouin clans are challenging the authority of both Egypt and Israel. While Israel recently granted Egypt military permission to expand its military presence to fight terrorists, the underlying militarized framework remains the same.⁶⁴ Residents of Rafah, Sheikh Zuweid, and Al Arish, where violence has

56. *Id.*; Emma Graham-Harrison, *How Sinai Became a Magnet for Terror*, *GUARDIAN* (Nov. 7, 2015, 7:20 PM), <http://www.theguardian.com/world/2015/nov/08/sinai-magnet-for-terror> [<https://perma.unl.edu/3UXF-MWD7>].

57. Sara Lynch, *Sinai Becomes Prison for African Migrants*, *N.Y. TIMES* (Oct. 31, 2012), http://www.nytimes.com/2012/11/01/world/middleeast/01iht-m01-sinai-migrants.html?_r=0 (“An estimated 20 percent to 30 percent of the mostly sub-Saharan migrants who have passed through Sinai since 2009 have been tortured, according to Ms. Shoham. The Israeli doctors’ group estimates that half the women have been sexually abused.”); Walton, *supra* note 28, at 1; Newman, *supra* note 5, at 430 (noting that arms smuggling is an indicator of weak or failing states).

58. SABRY, *supra* note 32, at 11.

59. Ismail Alexandrani, *The War in Sinai: A Battle Against Terrorism or Cultivating Terrorism for the Future?*, *ARAB REFORM INITIATIVE* 19 (Mar. 2014), <https://perma.unl.edu/97B7-U5XV>; SABRY, *supra* note 32, at 12.

60. See Shahjahan H. Bhuiyan, *Can Democratic Governance Be Achieved in Egypt?*, 38 *INT’L J. PUB. ADMIN.* 496, 496–97 (2015).

61. *See id.*

62. Treaty of Peace (with Annexes and Maps), Israel–Egypt, art. II, §§ a–c, March 26, 1979, 1138 *U.N.T.S.* 59.

63. NICOLAS PELHAM, *CHATHAM HOUSE*, *SINAI: THE BUFFER ERODES* vi (Sept. 2012).

64. Yehudit Ronen, *The Effects of the ‘Arab Spring’ on Israel’s Geostrategic and Security Environment: The Escalating Jihadist Terror in the Sinai Peninsula*, 20 *ISR. AFF.* 302, 312–13 (2014); Hillel Frisch, *The Egyptian Army and Egypt’s ‘Spring’*, 36 *J. STRATEGIC STUD.* 180, 196 (2013).

hit unprecedented levels, attribute the Egyptian government's failure to develop North Sinai to systemic neglect of the Bedouin and Israel's desire to keep the border area clear.⁶⁵ Little regard is paid to the local conditions that create fertile grounds for violence by nonstate actors.⁶⁶

Meanwhile, the limited investments in the tourism industry in South Sinai enrich Cairene crony capitalists and employ Egyptian migrants from the Nile Delta.⁶⁷ The Bedouin and other local Sinai residents are discriminated against by employers who refuse to hire them.⁶⁸ This leaves illegal smuggling as the primary means of economic survival for the Bedouin.⁶⁹ Further exacerbating their plight, Egyptian security over-polices the Bedouin through harsh collective punishment tactics that treat them as a fifth column. This has pushed some Bedouin to join militant groups and others to assist terrorists in hiding from state security.⁷⁰ Meanwhile, local Sinai leaders have been largely excluded from state governance that would otherwise allow them to represent the needs of Sinai communities.⁷¹ As a result, deep distrust and resentment of the state persists among Sinai residents, most acutely among the Bedouin.

With rising conflicts in the Middle East after the 1948 war, when Arab nationalism was at its peak, the Sinai became increasingly militarized. As tensions between Israel and Egypt grew, so too did the Egyptian state's suspicion of the Bedouin. With distinct dialects and cultures, the Egyptian government suspected the Sinai tribes as potential Israeli collaborators with no loyalty to Egypt.⁷² Meanwhile, Bedouin viewed Egypt as a colonizing force similar to the Turks and

65. *What Is Left of 'October's Sinai'?*, DAILY NEWS EGYPT (Oct. 6, 2015), <http://www.dailynewsegypt.com/2015/10/06/what-is-left-of-octobers-sinai/> [<https://perma.unl.edu/TS6L-FQHN>].

66. *Id.*

67. Gilbert, *This Is Not Our Life . . .*, *supra* note 27, at 8–9 (“[S]ince 1982, when full Egyptian government resumed, South Sinai has experienced rapid commercial development through tourism and substantial donor investment. An analysis for the Egyptian Environmental Affairs Agency (SEAM 2005: 20) concluded that ‘the Bedouin can hardly fail to benefit from these investments’. Yet South Sinai Bedu remain among the poorest and most marginalized of Egyptian citizens; a position reinforced by the government policy of settling mainland Egyptians in large numbers in the peninsula backed by a massive security presence.”); Gilbert, *Nature = Life*, *supra* note 24, at 43 (“Development on this scale threatens the environment, and the government has responded by designating almost 40 per cent of South Sinai’s landmass and littoral as Protected Areas”); *Egypt to Establish \$92M Industrial Zone in South Sinai*, AL BAWABA (May 30, 2016, 9:00 AM), <http://www.albawaba.com/business/egypt-establish-92m-industrial-zone-south-sinai-846024> [<https://perma.unl.edu/LLS2-W8C4>] (making no mention of quotas for local residents in terms of jobs).

68. Gold, *supra* note 11, at 3.

69. SABRY, *supra* note 32, at 223–24.

70. *Id.* at 238–40.

71. Youssef, *supra* note 33.

72. Gold, *supra* note 11, at 6.

English before them.⁷³ This state of distrust continues to shape the relationship between Sinai residents and the Egyptian state, resulting in a rise of violence between state and nonstate actors in Egypt's poorest region.

The following briefly summarizes how Sinai's strategic significance for both Israel and Egypt after decades of conflict coupled with anti-Bedouin prejudice produced a social, economic, and political environment vulnerable to exploitation by militant groups.

A. The Sinai's Strategic Significance

The Sinai Peninsula extends over 23,000 square miles, three times the size of the Nile Valley and Delta.⁷⁴ Its sparse population is 550,000 out of Egypt's total population of 91 million.⁷⁵ Approximately 400,000 residents are sedentary and live along the coastal plains of the North Sinai province, including 145,000 in the Sinai capital of Al Arish.⁷⁶ The other 150,000 residents live in South Sinai, where the annual population growth has been four times the national average due in large part to internal migration from the mainland for tourism jobs.⁷⁷

The Bedouin comprise approximately seventy percent of the total Sinai population. The remaining thirty percent of Sinai residents are Palestinian (10%), Egyptian migrants from the mainland (10%), and a mix of Bosnians, Turks, and other ethnicities who settled in Al Arish during the Ottoman era (10%).⁷⁸ Fifteen to twenty Bedouin tribes with 500 to 25,000 men in each tribe live in Sinai, most of which are sedentary.⁷⁹ Each tribe's territory is well-known and based on a particular tribe's strength.⁸⁰ Many tribes have strong historical and linguistic ties to Gaza. For example, the traditional lands of the Tarabin

73. Mara R. Revkin, *Triadic Legal Pluralism in North Sinai: A Case Study of State, Shari'a, and 'Urf Courts in Conflict and Cooperation*, 13 UCLA J. ISLAMIC & NEAR E.L. 21, 47 (2014); Alexandrani, *supra* note 59, at 19.

74. *Sinai Peninsula*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/place/Sinai-Peninsula> [<https://perma.unl.edu/SM8D-LBZS>].

75. Hana Afifi, *Egypt's Population to Reach 91 Million in June, up from 90 in December*, AHRAH ONLINE (Apr. 4, 2016), <http://english.ahram.org.eg/NewsPrint/198714.aspx> [<https://perma.unl.edu/9UQ2-HU72>]; PELHAM, *supra* note 63, at 1.

76. PELHAM, *supra* note 63, at 1; HUMAN DEV. PROGRAM & UNITED NATIONS DEV. PROGRAMME (UNDP), EGYPT HUMAN DEVELOPMENT REPORT 2004 (2004), http://hdr.undp.org/sites/default/files/egypt_2004_en.pdf.

77. PELHAM, *supra* note 63, at 1; SABRY, *supra* note 3258, at 8.

78. Ronen, *supra* note 64, at 303; Walton, *supra* note 28, at 2; SABRY, *supra* note 32, at 8.

79. PELHAM, *supra* note 63, at 1; INT'L CRISIS GRP., MIDDLE EAST/NORTH AFRICA REPORT N°61: EGYPT'S SINAI QUESTION 28 app. C (2007), <https://d2071andvip0wj.cloudfront.net/61-egypt-s-sinai-question.pdf> [<https://perma.unl.edu/35RW-FHY8>] (a map of Sinai showing Bedouin tribes).

80. Ronen, *supra* note 64, at 303.

tribe extend across the Egyptian–Gazan border from Beersheva in the East to Sinai’s western coast.⁸¹ As a result, over 40,000 Palestinian members of the Tarabin tribe live in Rafah, Sheikh Zuweid, and El Arish.⁸² Militant groups have leveraged these family relationships to engage in cross border attacks. The militants attack or infiltrate Israel from Sinai in hopes of triggering an interstate war between Egypt and Israel.⁸³

The two countries went to war in 1967, resulting in Israel’s occupation of Sinai until 1982, three years after both countries signed the U.S.-brokered Camp David Accords.⁸⁴ During that time, Israel spent \$7 billion in infrastructure development and oil drilling and established twelve agricultural villages.⁸⁵ Under Israeli governance, Bedouin economic livelihood transitioned from semi-nomadic pastoral to sedentary and insecure paid work in charcoal manufacturing, shop-keeping, camel transport, hunting, fishing, and guiding pilgrims to Mount Sinai.⁸⁶ Resort towns were built as the Sinai became a premier vacation destination for Israeli tourists. Meanwhile, from 1967 to 1973, some Bedouin secretly assisted Egypt’s military in gathering intelligence and facilitating undercover operations that culminated in the October 1973 war.⁸⁷ Indeed, Bedouin point to their loyal assistance to Egypt when lamenting their current mistreatment as a suspect group.⁸⁸

After a twelve-year war of attrition, Egypt and Israel signed a peace deal in 1979 brokered by the United States. The Camp David Accords created three zones in the Sinai with defined limitations on the number of Egyptian military troops permitted in each zone.⁸⁹ North Sinai’s eastern border with Israel is Zone C with the strictest military force restrictions.⁹⁰ Only civilian police are permitted to se-

81. PELHAM, *supra* note 63, at 1–2.

82. *Id.* at 1–2.

83. Ronen, *supra* note 64, at 312.

84. INT’L CRISIS GRP., *supra* note 79, at 5–6.

85. Lief, *supra* note 54.

86. Gilbert, *Nature = Life*, *supra* note 24, at 43; Gilbert, *This Is Not Our Life . . .*, *supra* note 27, at 11 (“The bedouin economy has always included paid work, strategically combined with core occupations in order to minimize risk. Various occupations are recorded in South Sinai: charcoal manufacture, camel transport, guiding pilgrims to Mount Sinai and working for the Monastery, and hunting and fishing . . .”).

87. SABRY, *supra* note 3258, at 52.

88. *See, e.g., id.* at 52, 218 (“On October 7, one day after the annual celebration of the October 6, 1973 victory, Ansar Bayt al-Maqdis targeted the South Sinai Security Directorate with a car bomb that killed five and injured more than fifty people.”)

89. Treaty of Peace (with Annexes and Maps), Israel-Egypt, art. II, March 26, 1979, 1138 U.N.T.S. 59.

90. *Id.*; Lief, *supra* note 54.

cure this most populous area of the Sinai.⁹¹ However, Israel has regularly waived the military presence restrictions to allow for Egyptian troops to combat militant groups attacking Israel from the Sinai.⁹² For example, in 2005 after the Israeli army withdrew from Gaza, the Accords were modified to allow for 750 Egyptian “border guards” to police the thirteen kilometer Gaza–Sinai border.⁹³

To enforce the restrictions on Egyptian and Israeli military operations, the Accords created the Multinational Force of Observers (MFO).⁹⁴ The United States plays a leading role in overseeing over 1,600 soldiers, including approximately 700 Americans, from various countries that comprise the MFO.⁹⁵ Funding for the MFO was initially split equally between Egypt, Israel, and the United States.⁹⁶ Currently, more than nine countries donate funds or equipment to the MFO.⁹⁷ Notably, militant groups point to the Camp David Accords and the MFO as evidence of Egypt’s collusion with the West and Israel—a common narrative used to recruit disaffected residents.⁹⁸

While the Camp David Accords diffused tensions between Egypt and Israel, they aggravated political, social, and economic conditions for Sinai residents. Limited development of Sinai and increased securitization was due to the government’s distrust of the local population, and the Bedouin in particular.⁹⁹ According to former Prime Minister Kamal Ganzouri, the Israeli government pressured the Mubarak regime not to settle more people in or develop Sinai because it was easier to secure without large population centers.¹⁰⁰ Meanwhile, state policies neglect the local populations’ needs, criminalize

91. Zachary Laub, *Why Egypt’s Sinai Is a Security Mess*, DEF. ONE (Dec. 16, 2013), <http://www.defenseone.com/threats/2013/12/why-egypts-sinai-security-mess/75564/> [https://perma.unl.edu/7XWW-SFEY].

92. Gold, *supra* note 11, at 15.

93. Geoffrey Aronson, *Improved Egypt-Israel Relations Through Sinai Crisis: Will They Last?*, MIDDLE E. INST. (July 24, 2015), <http://www.mei.edu/content/article/improved-egypt-israel-relations-through-sinai-crisis-will-they-last> [https://perma.unl.edu/AF9K-5M8Z].

94. *Id.*

95. *MFO in Numbers*, MULTINATIONAL FORCE AND OBSERVERS, <http://mfo.org/en/mfo-in-numbers> [https://perma.unl.edu/487L-AVKU]; Laub, *supra* note 91; Andrew Tilghman, *New ISIS Threat Prompts U.S. to Send 75 More Troops to Egypt’s Sinai*, MIL. TIMES (Sept. 10, 2015, 5:14 PM), <http://www.militarytimes.com/story/military/pentagon/2015/09/10/new-troops—sinai/72018008/> [https://perma.unl.edu/D3XA-NMQZ] (noting the United States’ decision to send an additional 75 troops to the MFO in response to the rising threat of insurgents associated with ISIS).

96. Gold, *supra* note 11, at 17.

97. *Id.* (noting that Denmark, Germany, the Netherlands, and the UK contributed troops to the MFO and that Finland, Japan, Norway, Sweden, and Switzerland donated funds).

98. Ronen, *supra* note 64, at 312.

99. Gilbert, *Nature = Life*, *supra* note 24, at 46.

100. *Sinai Ignored in Egypt Development Plans*, *supra* note 25.

the Bedouin, and perpetuate the status quo of limited development that excludes Bedouin as beneficiaries.¹⁰¹

B. Neglect and Criminalization of the Bedouin

The past three decades have left the Bedouin and other local residents feeling betrayed. Their list of grievances include being prohibited from owning land; confiscation of their tribal lands for tourism development that has excluded them from the profits; exclusion from jobs with the police, army, or MFO; and pervasive prejudice against Bedouin culture.¹⁰² Despite rhetoric stating otherwise, the limited development funds spent on the Sinai by the European Union, United States Agency for International Development (USAID), or the Egyptian government are not improving the livelihoods of indigenous populations.¹⁰³ Thus, any attempts to transition Sinai from the brink of becoming a failed state should not only adopt effective development programs, but also de-securitize governance by treating the Bedouin as equal citizens who have an important role to play in the process.¹⁰⁴

Despite its rich history and strategic importance, the Sinai's local residents remain isolated and neglected. The state's strategy has been to coercively assimilate Bedouin culture while ignoring their social and economic needs.¹⁰⁵ For over three decades, investment in Sinai has been inadequate while its population has suffered under harsh security measures.¹⁰⁶ Although Sinai experienced a boost in investment after Egypt took back possession from Israel in 1982, it was

101. Max Strasser, *Sinai: A War Zone in Waiting*, NEW STATESMEN (Aug. 15, 2012), <http://www.newstatesman.com/world-affairs/world-affairs/2012/08/sinai-war-zone-waiting> [https://perma.unl.edu/XX7S-WBE8] (“The area has long been neglected in terms of economic development. It has one of Egypt’s highest unemployment rates. Locals estimate that less than 50 per cent of people are formally employed. Because of the area’s location on the border, land development in Sinai requires the approval of the intelligence agencies. The Bedouins’ list of grievances is long, from not being allowed to own land to a lack of fresh water to how the local radio station is in the dialect of mainland Egypt. After a series of bombings at tourist resorts in South Sinai in 2004, hundreds of Bedouin were arbitrarily arrested, according to Human Rights Watch. Many of them remain in prison to this day.”); Ashraf Khalil, *The Saga of Sinai: A Neglected Hotspot Egypt’s Morsi Must Not Let Explode*, TIME (June 21, 2013), <http://world.time.com/2013/06/21/the-saga-of-sinai-a-neglected-hotspot-egypts-morsi-must-not-let-explode>.

102. Laub, *supra* note 91; Strasser, *supra* note 101.

103. Gold, *supra* note 11, at 17.

104. Ahmed Mohamed Hassan & Yara Bayoumy, *Special Report: Bedouins Drawn into Egypt’s Islamist Fight*, REUTERS (July 15, 2015, 5:29 AM), <http://www.reuters.com/article/us-egypt-islam-sinai-specialreport-idUSKCN0PP0UD20150715> [https://perma.unl.edu/7M87-FVW2].

105. Gilbert, *Nature = Life*, *supra* note 24, at 41.

106. Mohamed El-Menshawey, *The Cairo Elite and the Tyranny of the State*, COPTS UNITED (Oct. 7, 2013), <http://www.copts-united.com/English/Details.php?I=958&A=11588> [https://perma.unl.edu/R3QV-ANS2].

short lived.¹⁰⁷ Moreover, the limited investment has not benefitted the local population, resulting in pronounced disparities in the distribution of wealth between the Bedouin and migrants from the Nile Valley.¹⁰⁸ The major tourism industry in South Sinai, in particular, is owned by Cairenes or foreigners whose profits are not reinvested in the Sinai.¹⁰⁹ As a result, food poverty among South Sinai Bedouin is double that of Egypt while North Sinai is Egypt's poorest governorate.¹¹⁰

Such disparities are a direct result of prejudice against the Bedouin. The dominant discourse in Egypt engages in reductionist portrayals of the Bedouin as primitive, uneducated, and criminal.¹¹¹ Up to 100,000 Bedouin are refused Egyptian citizenship, and thus are not counted in official statistics.¹¹² Exclusion from the national identity goes so far as blocking Bedouin from serving in the Egyptian military, MFO, or police.¹¹³ And until 2007, Bedouin did not have the right to vote.¹¹⁴ Egyptian political leaders of the Sinai—often delegates from the Nile Valley—look down on the Bedouin as inferior and

107. Lief, *supra* note 54.

108. PELHAM, *supra* note 63, at 1.

109. Khalil, *supra* note 101 (noting that in 2003, South Sinai welcomed 2.6 million foreign tourists, more than a third of Egypt's tourists).

110. Gilbert, *Nature = Life*, *supra* note 24, at 48. Note that the UN 2010 Human Development Report for Egypt reports a higher adult literacy rate in North and South Sinai (75.8% and 88.4% respectively) compared to the Egyptian average (70.4%). However, these numbers do not include the Bedouin because they are largely excluded from official statistics. Walton, *supra* note 28, at 4.

111. Gilbert, *Nature = Life*, *supra* note 24, at 41.

112. See Hilary Gilbert & Mohammed al Jebraali, 'Not Philanthropists but Revolutionaries.' Promoting Bedouin Participation In The 'New Egypt': A Case Study From South Sinai 18 (Oct. 2012) (unpublished working paper) (on file with John D. Gerhart Center for Philanthropy and Civic Engagement, The American University in Cairo), <http://schools.aucegypt.edu/research/gerhart/rprogram/Documents/Voices-Latest.pdf> [<https://perma.unl.edu/4X5Y-RVNV>]; Gilbert, *Nature = Life*, *supra* note 24, at 48; Gold, *supra* note 11, at 6 (noting prohibition of Bedouin from serving in Egyptian military or police); Amr Yossef, *Securing the Sinai: More Troops Won't Keep the Peace or Save the Egyptian-Israeli Relationship*, FOREIGN AFF. (Sept. 28, 2011), <https://www.foreignaffairs.com/articles/middle-east/2011-09-28/securing-sinai> [<https://perma.unl.edu/7YJV-YTML>].

113. Jared Malsin, *Egypt is Struggling to Cope with Its ISIS Insurgency*, TIME (July 23, 2015), <http://time.com/3969596/egypt-isis-sinai/> [<https://perma.unl.edu/K753-WWDG>]; Laub, *supra* note 91 (noting that Bedouin are blocked from jobs in the police, army, and the MFO); Ehud Yaari, *Sinai: A New Front*, POL'Y NOTES (Wash. Inst. for Near E. Policy, Washington, D.C.), Jan. 2012, at 8, <http://www.washingtoninstitute.org/uploads/Documents/pubs/PolicyNote09.pdf> [<https://perma.unl.edu/B3ZA-KHTT>]; Yossef, *supra* note 112.

114. Gilbert & al Jebraali, *supra* note 112, at 8.

criminal.¹¹⁵ As a result, they willingly cooperate with security services to repress the Bedouin.¹¹⁶

Only a handful of civil society organizations operate in Sinai, further aggravating the marginalization of Bedouin in development negotiations and project selection.¹¹⁷ Any attempts to form informal local committees to petition the government for local representation have been ignored, or worse, invited police surveillance and suspicion of illicit political activity.¹¹⁸ Such conditions have left physical resistance as the primary response to oppression.¹¹⁹ As discussed in Part III, these circumstances produced an environment ripe for the growth of militant groups.

Following Israel's full withdrawal from the Sinai in 1982, Egypt launched a campaign to develop the Sinai's natural resources and build on its strategic access to the Suez Canal. The Egyptian government sought to increase Sinai's population of 172,000 primarily Bedouin inhabitants to one million by incentivizing labor migration from the Nile Valley.¹²⁰ Slogans such as, "bring 3 million from the Delta to Sinai" as part of the National Development Plan for Sinai communicated to Egyptians that Sinai was a land without a people, or at least a people that did not count as citizens.¹²¹ With the help of U.S. Agency for International Development (USAID), the government planned to create twelve new towns and an intrusive system of roads that violated the traditional zones of tribal authority.¹²² The project displaced thousands of Bedouin from their lands with minimal, if any, compensation.¹²³

The Bedouin felt betrayed by the Egyptian state because they had helped the military from 1967 to 1973 by providing them with intelligence, serving as informants, and assisting Egyptians to infiltrate in Sinai. And yet, when Egypt took back Sinai it neither recognized their efforts nor treated them as equal citizens.

In 1995, the government announced the National Project for the Development of Sinai would infuse \$20.5 billion into Sinai between 1995 and 2017. Promises for improving infrastructure to deliver clean

115. Walton, *supra* note 28, at 7; Gilbert & al Jebaali, *supra* note 112, at 8–9.

116. As half of the Bedouin subsist at around or below \$1 a day per person, administrators of Sinai dole out jobs and other benefits to their extended families rather than serve the local population. Alexandrani, *supra* note 59, at 18; Walton, *supra* note 28, at 4.

117. Laub, *supra* note 91.

118. Gilbert, *Nature = Life*, *supra* note 24, at 50–51.

119. *Id.* at 41.

120. Revkin, *supra* note 73, at 46.

121. *Id.* at 47; Gilbert, *Nature = Life*, *supra* note 24, at 46 (noting the number was later revised to 4.5 million residents).

122. Revkin, *supra* note 73, at 47–48.

123. *Id.* at 46.

water, proper medical treatment, and good education to Sinai residents proved to be little more than lofty rhetoric.¹²⁴ Instead, development plans translated into the Mubarak regime selling large tracts of land in South Sinai to his crony capitalist friends, which resulted in pushing many Bedouin out of their coastal tribal lands toward the barren interior of Sinai.¹²⁵ Further alienating the Bedouin, few of the tens of thousands of jobs created by the resorts sprouting up on the South Sinai coast went to Bedouin.¹²⁶

In conjunction with internal migration plans, the Egyptian government sought to sedentarize Bedouin in order to implement large scale land reclamation projects. Specifically, the Egyptian government converted 214,000 acres of tribal desert land into agricultural land. Not only were the Bedouin forcibly pushed off their land, Egyptians from the Nile Valley were invited to migrate to farm the land.¹²⁷ Bedouin were left with lower quality land in the interior of Sinai and stripped of their core livelihoods that constitute their Bedouin identity.¹²⁸ As a result of their structural marginalization, Bedouin view their future through the lens of colonization by a nation that refuses to grant them equal citizenship rights and excludes them from macroeconomic growth.¹²⁹

With no steady source of income, many Bedouin turned to smuggling.¹³⁰ Members of Sinai tribes whose land covers the 143 mile Israel–Egypt border leveraged their cross-border relations to smuggle goods, people, weapons, and drugs into Israel and Gaza.¹³¹ Israel’s blockade of Gaza starting in 2006 made smuggling the only way for goods to enter Gaza, thereby increasing profits.¹³² A lucrative \$500 million annual enterprise, smuggling enriches multiple stakeholders. Egyptian police reportedly are actively involved in the drug trade while other government officials take a cut of profits along the production and distribution chain.¹³³ This explains why the Mubarak re-

124. Baroud, *supra* note 24; Youssef, *supra* note 33.

125. Walton, *supra* note 28, at 4; Revkin, *supra* note 73, at 47.

126. Hassan & Bayoumy, *supra* note 104; Gilbert, *This Is Not Our Life . . .*, *supra* note 27, at 14 (noting that the Sharm Al Sheikh resort added 110 hotels from the late 1990s to the early 2000s that created thirty thousand jobs, few of which were offered to the Bedouin).

127. Revkin, *supra* note 73, at 46; Gilbert, *Nature = Life*, *supra* note 24, at 46.

128. Gilbert, *Nature = Life*, *supra* note 24, at 47.

129. Alexandrani, *supra* note 59, at 19; Revkin, *supra* note 73, at 47.

130. Gilbert, *This Is Not Our Life . . .*, *supra* note 27, at 11; INT’L CRISIS GRP., *supra* note 79, at 8.

131. Gold, *supra* note 11, at 2.

132. *Id.* SABRY, *supra* note 32, at 12.

133. Mark Perry, *Looking for Hashish in Cairo? Talk to the Police*, FOREIGN POL’Y (Aug. 23, 2013), <http://foreignpolicy.com/2013/08/23/looking-for-hashish-in-cairo-talk-to-the-police/> [<https://perma.unl.edu/4V7B-LZW7>]; *Economic Life Slows to a Crawl Amid Crackdown in North Sinai*, IRIN (Dec. 12, 2013), <http://www.irin->

gime looked the other way as Sinai Bedouin and Gazans established smuggling routes.¹³⁴

As smuggling profits boomed, a new class of armed semi-criminal kingpins arose.¹³⁵ Their wealth, power, and weapons allowed them to challenge traditional tribal leaders and centuries of tribal structure.¹³⁶ As a result, smuggling has undermined tribal unity as tribal leaders lose influence over new generations of disgruntled youth. Moreover, the smuggling kingpins' material interests in selling weapons merged with militant groups' political interests in attaining weapons to attack the Israeli and Egyptian government.¹³⁷ As the two groups became targets of the state's counterterrorism and antismuggling efforts, respectively, some Bedouin joined violent extremist groups.¹³⁸ Sinai residents, thus, have fallen victim to a cycle of violence between harsh security practices and militant groups.¹³⁹

III. BRINGING THE SINAI INTO THE NATIONAL FOLD

For years, analysts have called for developing the Sinai as a means of stabilizing the peninsula and offering its residents a life of dignity.¹⁴⁰ While the Egyptian government has undertaken development projects in Sinai funded by USAID and the European Union (EU), the programs are often poorly implemented due to security restrictions, lack of technical capacity, or inadequate funding.

Two fatal flaws in the strategies that shape development projects are worth highlighting: (1) the securitization of development and (2) the Egyptian and foreign governments' failure to include local Bedouin and other Sinai leaders in the planning and implementa-

news.org/fr/report/99316/economic-life-slows-to-a-crawl-amid-crackdown-in-north-sinai [https://perma.unl.edu/5SKX-PL47] [hereinafter *Economic Life Slows*]; INT'L CRISIS GRP., *supra* note 79, at 16; SABRY, *supra* note 32, at 12; Gilbert, *This Is Not Our Life . . .*, *supra* note 27, at 18.

134. Gold, *supra* note 11, at 11.

135. Khalil, *supra* note 101. Bedouin culture is grounded in a patrilineal and patriarchal tribal social structure that supports strong kinship networks. A five-generation kinship structure known as "Khamisa" requires that the extended family preserve the family's honor under customary ("urfi") law. Gilbert, *Nature = Life*, *supra* note 24, at 44.

136. Gold, *supra* note 11, at 7; Graham-Harrison, *supra* note 56.

137. Mokhtar Awad & Mostafa Abdou, *A New Sinai Battle? Bedouin Tribes and Egypt's ISIS Affiliate*, ATLANTIC COUNCIL (May 14, 2015), <http://www.atlantic-council.org/blogs/egyptsource/a-new-sinai-battle-bedouin-tribes-and-egypt-s-isis-affiliate> [https://perma.unl.edu/7NLD-N6XR].

138. Maram Mazen, *Human Rights Watch Says Civilians Harmed as Egypt Military Creates Northern Sinai Buffer Zone*, U.S. NEWS (Sept. 22, 2015, 4:25 AM), <http://www.usnews.com/news/world/articles/2015/09/22/rights-group-says-civilians-harmed-in-egypts-sinai-campaign> [https://perma.unl.edu/6KNS-FVJ8].

139. *What Is Left of 'October's Sinai'?*, *supra* note 65.

140. Khalil, *supra* note 101.

tion.¹⁴¹ Elite government officials from Cairo and military officers, including Sinai's governors, negotiate the terms of the program and wrestle with Western donors over control of the funds.¹⁴² As a result, Sinai residents are objectified as recipients of aid who lack agency to shape the objectives and sustainability of development programs.

The same exclusionary practices apply to Egypt's security and military institutions wherein Bedouin are barred from serving.¹⁴³ This sends a clear message to all Egyptians that the Bedouin are not trustworthy, much less equal citizens. Furthermore, the dearth of Bedouin in elected or appointed political office makes it all the more difficult to use the political process to improve their circumstances. Thus, the crucial missing component in past development efforts is the absence of meaningful inclusion of local leaders in the crafting and implementation of development programs from start to finish, in addition to the de-securitization of governance in Sinai.

Although security is as much, if not more, of a concern for Sinai residents as it is for other Egyptians, this Article does not argue that counterterrorism should be the prism through which one views Sinai's problems.¹⁴⁴ The security situation is so complex—in large part due to securitization of development—that a holistic approach to bringing peace and dignity to Sinai residents is warranted.¹⁴⁵

141. See Newman, *supra* note 5, at 424–25.

142. *Challenges of Sinai Assistance*, TELEGRAPH (Feb. 15, 2011, 8:22 PM), <http://www.telegraph.co.uk/news/wikileaks-files/egypt-wikileaks-cables/8327191/CHALLENGES-OF-SINAI-ASSISTANCE.html>; Hicham Bou Nassif, *Wedded to Mubarak: The Second Careers and Financial Rewards of Egypt's Military Elite, 1981–2011*, 67 MIDDLE E.J. 509, 518 (2013) (documenting that all governors assigned to Sinai were former military generals); Holger Albrecht, *Does Coup-Proofing Work? Political–Military Relations in Authoritarian Regimes Amid the Arab Uprisings*, 20 MEDITERRANEAN POL. 36, 45–46 (2015) (noting the governor of South Sinai is always occupied by a retired commander of the Republican Guard).

143. Mara Revkin, *Islamic Justice in the Sinai*, FOREIGN POL'Y (Jan. 11, 2013), <http://foreignpolicy.com/2013/01/11/islamic-justice-in-the-sinai/> [<https://perma.unl.edu/AXJ4-QZZA>] (“Their many grievances—including legal obstacles to land ownership, lack of basic public services, job discrimination, and systematic exclusion from military and police academies—have reinforced a climate of mutual distrust between the central government and the Sinai.”); *Bedouins Begin to Demand Equal Citizenship Rights*, IRIN (June 16, 2011), <http://www.irinnews.org/report/92998/egypt-bedouins-begin-to-demand-equal-citizenship-rights> [<https://perma.unl.edu/TR44-6QUP>] (“[Bedouin] say they are not allowed to join the army, study in police or military colleges, hold key government positions or form their own political parties.”).

144. See, e.g., Chuck Hagel, *A Republican Foreign Policy*, FOREIGN AFF., July/Aug. 2004, at 64–65 (arguing for prevention of failed states as a component of counterterrorism).

145. *Egypt's Military Struggles with Sinai*, NATION (Mar. 18, 2012), <http://nation.com.pk/international/18-Mar-2012/egypt-s-military-struggles-with-sinai> [<https://perma.unl.edu/QPW8-5DDB>] (reporting local residents' frustration that development cannot come without security); *Human Rights Report Reveals Significant*

Accordingly, this Part proffers a three-pronged approach to bringing stability and prosperity to failing sub-states, both in Sinai and other weak states that offer fertile grounds for militant groups to operate.¹⁴⁶ First, the government should commit to a long-term, rights-based development plan that prioritizes human development over security.¹⁴⁷ Second, the local population should be included in local and national governance through quotas or other forms of affirmative action that guarantee their political representation. Third, local residents should be recruited into the security and military forces in sufficient numbers to inform strategy based on their knowledge of the area and ties to the local population. Quotas may be required in the beginning to prevent incumbent personnel from stonewalling such diversification efforts. The following sections explore these three recommendations in more detail.

A. Long-Term Investment in Development

Long before Egypt's 2011 uprisings, Sinai residents were in desperate need of jobs, infrastructure, schools, and freedom from police abuse.¹⁴⁸ Indeed, militant groups pointed to the poverty, lack of political agency, and state abuse to declare they were defending the population against state oppression buttressed by Western support.¹⁴⁹ Had gainful employment been more readily available, Sinai's residents would not have been as dependent on black market economic activity to survive—including weapons and drug smuggling.¹⁵⁰ With more schools that provided residents with quality education, militant groups would have found it much more difficult to persuade local residents that their twisted interpretations of Islam justifies violence.¹⁵¹ Had state resources been spent on human development rather than hyper-securitization, the local population would have viewed militant groups as a threat to their material interests rather than spokespersons for their grievances and defenders of their dignity against state oppression.¹⁵²

Junta Violations of Sinai Peninsula Civilians, IKHWAN WEB (Dec 16, 2014, 6:43 PM), <http://www.ikhwanweb.com/article.php?id=31936> [<https://perma.unl.edu/7YRL-J4AR>].

146. Yossef & Cerami, *supra* note 34, at 51.

147. This Article disagrees with the security-first, development-second approach recommended by some policy analysts. See Gold, *supra* note 11, at 14–15.

148. Ezzat, *supra* note 24.

149. See Laub, *supra* note 91.

150. *Id.*

151. Gilbert, *This Is Not Our Life . . .*, *supra* note 27, at 18.

152. Pelham, *supra* note 63, at 18 (“But the [security] plans were half-baked. Egypt cited logistical difficulties, including stony ground, which reportedly hindered the hammering of steel plates deeper than four metres into the ground. Tunnel operators used welding torches to cut hundreds of holes in those sections of the bar-

Thus, when thirteen Egyptian human rights groups called for a comprehensive approach to solving Sinai's problems in January 2014, they were on point when they stated:¹⁵³

[A]ddressing terrorism requires that a more comprehensive vision be adopted which confronts the religious discourse that praises terrorism. This vision must also take into consideration the economic, social, and political circumstances in which terrorism emerges and spreads. Counterterrorism efforts must not include arbitrary measures but rather be conducted within a framework that respects the law and individual rights throughout the process of identifying the real perpetrators.¹⁵⁴

To be sure, the Egyptian government has attempted multiple times to develop the Sinai. However, the current model for development programs in Sinai is counterproductive because it fails to address the myriad political and social factors discussed earlier in this paper and indirectly perpetuates the securitization of the Sinai. As a result, Egyptian or Western funded development initiatives become public relations ploys that are poorly funded and do not benefit local residents.¹⁵⁵

For example, the al-Salam Canal project provided a vital water supply to farms in Sinai that employed local residents.¹⁵⁶ After the government reportedly spent E£4.8 billion (U.S. \$685 million), it was abruptly ended in 2006 and transformed into an impervious dam in

rier that had been completed, or they dug deeper tunnels, nullifying the multi-million-dollar project at a cost of a few thousand dollars.”).

153. Statement, Cairo Inst. for Hum. Rts. Stud., Rights Groups Condemn Terrorist Explosions, Concerned by Increasing Violence and Excessive Force by Security Forces (Jan. 25, 2014), <http://www.cihrs.org/?p=7971&lang=en> [<https://perma.unl.edu/D24R-PMSY>].

154. *Id.*

155. *Sinai Ignored in Egypt Development Plans*, *supra* note 25 (“Sinai researcher Mustafa Sangar told Al-Monitor that despite such a plan, the Sinai is only remembered during national events surrounding its liberation. ‘Talk about mega-projects for the development of the Sinai is only banter aimed at the inhabitants during national ceremonies, when the situation deteriorates in Sinai or in the context of electoral programs during presidential and parliamentary elections. Otherwise, there is nothing worth mentioning except for marginalization and neglect’”); Gilbert, *Nature = Life*, *supra* note 24, at 47 (“A ‘security-fixated conception of development,’ the ICG (2007: 19) notes, ‘is accompanied by the authorities’ declared wish to ‘Egyptianize’ the region, not only in economic and demographic terms, but also symbolically, in cultural and identity terms.’ Aziz (2000: 30) comments—without apparent irony—that the national project to develop Sinai ‘never argued for the elimination of the Bedouin.’ However, development has brought poverty and widespread decline in the core livelihoods that long constituted Bedouin identity. One Tarabîn man complained to me: ‘*The government forces us to leave the mountains, settles us in houses like chickens and makes us pay taxes*.’”); SABRY, *supra* note 32, at 91 (noting failure of government’s job-creation projects).

156. Frisch, *supra* note 64, at 185 (noting the military’s control over this development project in the Sinai).

2010.¹⁵⁷ Farmers were let down by the government's broken promises. Similarly, the Ismailiya–Rafah railway project was supposed to lay tracks from al-Ferdan Bridge in Ismailiya to Bir al-Abed in North Sinai. Again, the government abruptly ended the project after a few months without explanation. The iron tracks were eventually stolen by thieves.¹⁵⁸

Under Morsi, the Egyptian government reportedly allocated \$270 million toward development and infrastructure projects in Sinai for the 2012–2013 fiscal year.¹⁵⁹ The project was part of Morsi's shift in approach to engage in dialogue with tribal leaders, develop the Sinai, and discuss the Bedouin's longstanding request to change the land ownership law to allow them to own and inherit land.¹⁶⁰ The work was to be completed through the Sinai Development Agency (SDA), formed in January 2012 via ministerial decree and led by General Shawky Rashwan.¹⁶¹

The SDA appears to be a contemporary iteration of the Sinai Development Authority established in 1974 to manage reconstruction and development of Sinai after the 1973 war.¹⁶² The SDA was tasked with working with USAID to manage the \$50 million donated for Sinai development funds in 2012–2013.¹⁶³ However, a former assistant

157. *Sinai Ignored in Egypt Development Plans*, *supra* note 25.

158. *Id.*

159. *2012-13 Budget Allocates EGP 1 Billion for Sinai Development*, EGYPT ST. INFO. SERV. (Aug. 17, 2012, 12:00 AM), <http://www.sis.gov.eg/Story/63396?lang=en-us> [https://perma.unl.edu/5TEC-56SX].

160. Breen, *supra* note 34, at 78.

161. Ezzat, *supra* note 24; *Government Earmarks LE1 bn for Sinai Development*, EGYPT INDEP. (Aug. 16, 2012, 9:43 PM), <http://www.egyptindependent.com/news/government-earmarks-le1-bn-sinai-development> [https://perma.unl.edu/5RNG-K4W9]; Waheed Abdel-Meguid, *Egypt's Sinai: Development Versus Security*, AHARAM ONLINE (Aug. 30, 2012), <http://english.ahram.org.eg/NewsPrint/51615.aspx> [https://perma.unl.edu/8S6J-RBBV]. According to a 1981 USAID Working Paper, the Sinai Development Authority at the time was branch of the Ministry of Development, and “responsible for implementation of many construction and development projects in Sinai. Its development activities cover projects in nine sectors—housing, utilities, transport and communications, electricity, services, trade and supply, land reclamation, new communities, and special studies.” Dames & Moore, *The Public Administration of Development in Sinai: Current Practice* iv (Advisory Comm. for Reconstruction of the Ministry of Dev., Working Paper No. 30, 1981), http://pdf.usaid.gov/pdf_docs/Pnaav226.pdf [https://perma.unl.edu/JFW2-2NRC].

162. Dames and Moore, *supra* note 161, at 33–34.

163. Ezzat, *supra* note 24 (“The Sinai Development Authority (SDA) was established by presidential decree in January 2012 and tasked with developing strategies to overcome decades of central government neglect of the peninsula. Its head, a major general seconded from the army, was assigned four assistants, three of them military and one, Ahmed Sakr, with a background in development. After a year and half of being based in north Sinai, Sakr resigned his post and resumed his job at the Ministry of Planning.”); *Government Earmarks LE1 bn for Sinai Development*, *supra* note 161; Abdel-Meguid, *supra* note 161.

to the leadership, Ahmed Sakr, stated that after a year and a half he resigned because “as far as I could see no serious work to promote development in Sinai was being done.”¹⁶⁴ The lack of political will to develop Sinai coupled with state imposed evictions and curfews has made the situation in Sinai untenable. Sakr and other critics noted the SDA’s militarized approach to development through its focus on “cleansing Sinai of terrorists” as opposed to dealing with the local populations’ legitimate economic and political grievances.¹⁶⁵ Moreover, the military’s delivery of medical supplies, construction materials, and food to North Sinai residents on the forty-second anniversary of the October 6 War in 2015 was aimed to merely diffuse the anger of Rafah residents expelled from their demolished homes rather than offer sustainable development solutions.¹⁶⁶

Western states have also sponsored development projects in Sinai, due in part to policies that viewed Sinai’s underdevelopment as a threat to America’s interests in preventing attacks against Israel.¹⁶⁷ The USAID-funded Livelihood and Income from the Environment in Sinai (LIFE Sinai) program, for example, financed the construction of three water-desalination plants in three villages as a means of increasing the supply of clean drinking water to dispersed Bedouin communities in Central Sinai.¹⁶⁸ A five-year project that ended in 2012, LIFE Sinai also sought to provide Bedouin in North Sinai access to roads and public transportation systems.¹⁶⁹ The program’s final report states the following objectives: “[n]atural resources will be managed more sustainably, especially water resources[;] [b]enefits to local communities will be demonstrated in the form of increased employment and income generation, improved physical infrastructure, diversification of income resources, and increased access to community services including health, education, and other relevant service[;] [i]ncreased number of women participating in rural enterprises, devel-

164. Ezzat, *supra* note 24.

165. Walton, *supra* note 28, at 7; Abdel-Meguid, *supra* note 161 (reporting that the police’s abusive practices in Sinai created an environment conducive to extremism); Ezzat, *supra* note 24.

166. See *Egypt’s Army Begins Second Stage of Operation ‘Martyr’s Right’ in North Sinai*, AHAM ONLINE (Oct. 8, 2015), <http://english.ahram.org.eg/NewsPrint/152407.aspx> [<https://perma.unl.edu/9U6X-9H5X>].

167. Newman, *supra* note 5, at 438 (noting that resources, aid, and capacity-building funding is directed at conflict zones that threaten Western interests).

168. Press Release, Embassy of the U.S. in Cairo, Egypt, Egyptian and US Partners to Renovate Water Trucks to Increase Supply of Drinking Water to Central Sinai Family (Mar. 28, 2012), <http://egypt.usembassy.gov/pr032812.html> [<https://perma.unl.edu/G9HR-WVMN>].

169. Press Release, Embassy of the U.S. in Cairo, Egypt, Inauguration of Water Desalination Plants to Bring Clean Water to Sinai (Dec. 27, 2011), <http://egypt.usembassy.gov/pr122611.html> [<https://perma.unl.edu/BT3G-CHX4>].

opment activities, and community development planning in their communities.”¹⁷⁰

However, the current conditions in Sinai demonstrate that these objectives were not met. Similarly, the EU donated €64 million for the South Sinai Regional Development Program from 2006 to 2011. The program aimed to improve the living standards of South Sinai residents through preservation of social, cultural, and natural resources.¹⁷¹ Toward that end, the EU provided 124 small direct grants totaling €1 million to local Bedouin leaders for small projects and funded large infrastructure projects in water, waste management, and environmental management.¹⁷² While new and ongoing development projects are in the works, they are unlikely to be effective so long as Bedouin and other Sinai residents are not involved to ensure local needs are met and local residents benefit from the development initiatives.¹⁷³

While Western-funded programs may be well intended, their impact has been limited and often counterproductive.¹⁷⁴ The Egyptian government’s security restrictions, refusal to provide technical assistance consultants with access to beneficiary Bedouin communities, and delays in permitting feasibility studies circumscribed the pro-

170. U.S. AGENCY FOR INT’L DEV., *supra* note 25.

171. *South Sinai Regional Development Programme*, DELEGATION OF THE EUR. UNION TO EGYPT, http://eeas.europa.eu/delegations/egypt/projects/list_of_projects/5717_en.htm [https://perma.unl.edu/XLG4-5SNE].

172. *South Sinai Regional Development Programme*, TAS EUROPROJECTS, <http://www.taseuro.com/en/ict/item/27-south-sinai-regional-development-programme> [https://perma.unl.edu/93TK-HDLA].

173. An example of a new development project is Schnieder Electric’s plans to build a solar energy power station project in South Sinai. Sara Aggour, *Schneider Electric to Submit Proposal for a South Sinai Solar Energy Project: Company Official*, DAILY NEWS EGYPT (Sept. 30, 2015), <http://www.dailynewsegypt.com/2015/09/30/schneider-electric-to-submit-proposal-for-a-south-sinai-solar-energy-project-company-official/> [https://perma.unl.edu/B3E8-HHRG].

174. de Graaff, *supra* note 6, at 22–23 (“[Western] military interventions or civil war situations allow Islamist extremist groups to fight alongside national resistance groups and to impose their politico-religious narrative on the national struggle.”); Gilbert, *Nature = Life*, *supra* note 24, at 47 (“[T]hat the national project to develop Sinai ‘never argued for the elimination of the Bedouin.’ However, development has brought poverty and widespread decline in the core livelihoods that long constituted Bedouin identity. One Tarabîn man complained to me: ‘The government forces us to leave the mountains, settles us in houses like chickens and makes us pay taxes[.]’ Donors collude in discouraging the remaining mobile Bedu: the World Food Programme’s project in central South Sinai supports local people on condition of settlement, a principle recently extended by the EU-funded South Sinai Regional Development Programme (SSRDP). ‘Bedouin culture’ excites no interest except as a tourist attraction (ICG 2007: 9). The preferred strategy has been to subsume Bedu into mainstream pharaonic heritage in the interests of nation-building.”).

gram's original goals.¹⁷⁵ Moreover, Western donors have to work within the confines of security-driven agendas set by government officials based in Cairo and military intelligence. The end result has been programs that do not address the underlying political and human rights grievances that tie directly into the economic development and security of Sinai.¹⁷⁶

Accordingly, this Article proffers four recommendations to foster sustainable development in Sinai: (1) integrate Sinai's population and economy into mainland Egypt and prioritize the benefits to Sinai's residence;¹⁷⁷ (2) include Sinai residents in the local economy and development projects; (3) de-securitize the development agenda in Sinai; and (4) normalize and legalize trade between Gaza and Egypt to disincentivize tunnel smuggling of otherwise lawful consumer goods.¹⁷⁸ Each of these recommendations aims to remedy the principle flaw with development in Sinai: the security-driven agenda is determined in Cairo in collaboration with Tel Aviv and Washington D.C., with little if any input from local Sinai residents.¹⁷⁹ Meanwhile, the few material benefits produced go more to mainland Egyptians than Sinai residents.

B. De-Securitizing Development in Sinai

While the military is a stakeholder in Sinai, it should not be crafting or managing development projects.¹⁸⁰ Not only is the military unqualified to do so, but the generals have tainted their reputation as the new security force that practices the same harsh tactics of Mubarak's Ministry of Interior and the police.¹⁸¹ The military is solely focused on countering terrorism first, as opposed to develop-

175. *Challenges of Sinai Assistance*, *supra* note 142.

176. YOSSEF & CERAMI, *supra* note 34, at 54.

177. Khalil, *supra* note 101 (reporting that the average Egyptian citizen does consider Sinai as a pressing national problem as compared to the inflationary prices of food and gas); *see also* Kaplan, *supra* note 6, at 58–59 (noting the importance of unifying disparate people for prevention of a failed state).

178. Awad & Abdou, *supra* note 137; PELHAM, *supra* note 63, at 10.

179. *See* Mohannad Sabry, *Sinai Tribal Leaders Give Morsi Ultimatum*, AL-MONITOR (Apr. 8, 2013), <http://www.al-monitor.com/pulse/fr/originals/2013/04/sinai-tribal-leaders-morsi-ultimatum.html#> [https://perma.unl.edu/S6T4-X3TX].

180. Nourhan Fahmy, *Al-Sisi Passes Amendments to Sinai Development Law*, DAILY NEWS EGYPT (Aug. 17, 2015), <http://www.dailynewsegypt.com/2015/08/17/al-sisi-passes-amendments-to-sinai-development-law/> [https://perma.unl.edu/B7KA-EJQ8] (showing military's control of development projects in Sinai); *Govt Allocates LE1.95 bn for Sinai Development*, EGYPT INDEP. (Mar. 9, 2012, 5:29 PM), <http://www.egyptindependent.com/news/govt-allocates-le195-bn-sinai-development> [https://perma.unl.edu/3ECE-8AJ3] (noting the Ministry of Defense is funding water projects and schools).

181. *See, e.g.*, JOSHUA STACHER, *ADAPTABLE AUTOCRATS: REGIME POWER IN EGYPT AND SYRIA* (2012) (discussing in detail the dominant role of the military in shaping and controlling Egypt's autocratic system of governance).

ment.¹⁸² For example, the military's Sinai development plans in 2015, ironically called "Operation Martyr's Rights," started with a sixteen-day joint police and military offensive to "destroy the main hide-outs and gathering points used by the terror and criminal elements in Rafah, Sheikh Zuwayyed, and Arish, North Sinai."¹⁸³ Such language is usually a euphemism for arbitrary raids of residential homes. Indeed, at the end of the operation on September 22, 2015, the army announced that over 500 militants had been killed and 320 arrested.¹⁸⁴ Whether these individuals were in fact militants or innocent civilians will remain unknown due to the military-imposed media blackout.¹⁸⁵

The government's recent plans to build six tunnels linking Sinai to Port Said and Ismailiya is a positive step toward physically connecting Sinai and the rest of Egypt.¹⁸⁶ Discussions of creating three free trade zones in Rafah, Nuweiba, and Al Arish are also promising.¹⁸⁷ If these projects are in fact implemented, it will facilitate integrating the Bedouin and Sinai into the national economy. However, past development projects in tourism, for example, have shown that without affirmative action or quotas to ensure Bedouin benefit from the increased trade, they will remain in poverty while Nile Valley Egyptians profit. Hence, the Minister of Irrigation's announcement that water will be available for cultivation of 80,000 acres of land in Sinai and Sisi's decree allowing Egyptians to buy plots of land in Sinai may only aggravate Bedouins' marginalization if no quotas for Bedouin are in place.¹⁸⁸ Similarly, the Egyptian government should legally mandate employment quotas for Sinai residents in the peninsula's tourism sector.

182. Youssef, *supra* note 33 (originally published on Daily News Egypt, available at <https://www.masress.com/en/dailynews/258376> [https://perma.unl.edu/KYT5-KJHS]).

183. *Egypt: Army—Main Stage of Operation Martyr's Right Ends, Second Phase to Begin*, ALL AFRICA (Sept. 23, 2015), <http://allafrica.com/stories/201509240390.html>; *Egypt's Army Begins Second Stage of Operation 'Martyr's Right' in North Sinai*, *supra* note 166.

184. Ahmed Aboulenein & Ali Abdelaty, *Egypt Says Killed 55 Militants in Sinai, Two Soldiers Killed*, REUTERS (Sept. 15, 2015, 5:26 PM), <http://www.reuters.com/article/2015/09/15/us-egypt-militants-casualties-idUSKCN0RF2OU20150915> [https://perma.unl.edu/9MD5-BDNH].

185. *Id.*

186. Hossam Mounir, *Egypt Needs Giant Projects to Move Economy, Push Growth Rates: Bankers*, DAILY NEWS EGYPT (Sept. 11, 2015), <http://www.dailynewsegyp.com/2015/09/11/egypt-needs-giant-projects-to-move-economy-push-growth-rates-bankers/> [https://perma.unl.edu/6D78-QM5B].

187. *Govt Allocates LE1.95 bn for Sinai Development*, *supra* note 180.

188. *Id.*; Fahmy, *supra* note 180 (limiting land ownership in Sinai to Egyptian citizens with Egyptian parents and requiring approval from the Ministry of Defense, Interior, and general intelligence).

The punitive border controls between Gaza and Rafah are also counterproductive. Despite Egyptian and Israeli government depictions of tunnel smuggling as solely a security problem, it is primarily an economic problem. Tunnel smuggling will decrease when consumer goods can be freely traded above ground between Egypt and Gaza. While weapons are certainly smuggled between Sinai and Gaza, most items that cross the border are consumer items denied Gazans' due to a harsh Israeli blockade.¹⁸⁹ The demand for goods by the 1.7 million Gazans trapped in what some have called an "open air prison"¹⁹⁰ is so high that Sinai residents, as well as Egyptian security personnel, have made millions of dollars from tunnel smuggling.¹⁹¹ The profits from the black market are multiple times higher than the state-sponsored projects by the Social Solidarity Ministry.¹⁹² The tunnel smuggling business, thus, decreased unemployment in Rafah from 50% to 20% in 2008.¹⁹³ Each time the Mubarak regime (half-heartedly) destroyed tunnels, they were quickly rebuilt.¹⁹⁴ Because the black market took the pressure off of Egypt's government to employ and feed North Sinai further, and lined the pockets of poorly paid government security personnel; Mubarak's tunnel destructions were mostly political theater.¹⁹⁵ Indeed, by 2011, the number of operating tunnels reached over 1,200.¹⁹⁶

In addition to strong economic incentives, building the tunnels is perceived as an act of resistance to the oppression of Gazans.¹⁹⁷ Many Egyptians in Rafah and other border cities belong to the same families, clans, or tribes as Palestinians in Gaza. They are well-informed of the severe economic hardships and human rights violations arising from Israeli policies and military actions in Gaza. Similarly, when Sisi's regime bulldozed over a thousand homes, making thousands of Rafah citizens homeless, the cross-border harms and grievances were aggravated. Coupled with the neglect and abuse of their own government, the border between North Sinai and Gaza becomes meaningless

189. SABRY, *supra* note 32, at 88.

190. *David Cameron Describes Blockaded Gaza as a 'Prison'*, BBC NEWS (July 27, 2010), <http://www.bbc.com/news/world-middle-east-10778110> [<https://perma.unl.edu/9RUV-WC2H>] ("Gaza cannot and must not be allowed to remain a prison camp," Mr Cameron said. "People in Gaza are living under constant attacks and pressure in an open-air prison," he said.)

191. SABRY, *supra* note 32, at 92–93; Yaari, *supra* note 113, at 14.

192. SABRY, *supra* note 32, at 92–94.

193. *Id.* at 97.

194. *Id.* at 89–90, 99 (noting that the punishment for illegally crossing the border was two years in prison while smuggling legal items imposed a fine not to exceed 2000 LE).

195. *Id.* at 99–100.

196. *Id.* at 106.

197. *Id.* at 94.

in forming group identities of residents of Rafah and Gaza.¹⁹⁸ All of which makes Sinai less, not more, safe.

The treatment of North Sinai as a military zone rather than the residence of over 200,000 people nearly guarantees minimal development. It is long overdue for Israel and Egypt, with the assistance of objective, Western state mediators, to renegotiate the Egyptian–Israeli Treaty and their border policies to make them more conducive to economic development. The more impoverished (and abused) the local population in North Sinai and Gaza, the less secure Egypt and Israel will be. To be sure, such an endeavor is fraught with complexity and cannot be undertaken without considering the serious threat from Wilayat Sinai and other militant groups. However, with the assistance of the local population as partners, not foes, there is cause for optimism. First, the Bedouin and other Sinai residents must be integrated into Egypt’s political community through elections and political appointments.

C. Political Inclusion and Integrating Bedouin into Security Services

Many Egyptians view Sinai as a separate state about which they know very little. Government-controlled media manipulates domestic coverage of Sinai to suit the regime’s political interests. Specifically, Sinai residents and the Bedouin in particular are portrayed as primitive, criminal, and culturally different than mainland Egyptians.¹⁹⁹ A few roads and expensive air travel are the only means to travel to and from Sinai, making it less likely for mainland Egyptians and Sinai residents to interact socially or conduct intrastate business. The Sinai’s geographic and cultural disconnectedness from the Egyptian mainland enhances its isolation from society.

Prior to 2007, Sinai’s Bedouin did not have the right to vote.²⁰⁰ Nor did they have the right to run for political office.²⁰¹ As a result, the representatives of the Sinai governorates were not from Sinai,²⁰² and the president appointed governors from among his political loyalists in mainland Egypt.²⁰³ These political representatives subject the

198. *Id.* at 130–31.

199. Ezzat, *supra* note 24.

200. Walton, *supra* note 28, at 7; Gilbert, *This Is Not Our Life . . .*, *supra* note 27, at 7–32.

201. Walton, *supra* note 28, at 7; Gilbert, *This Is Not Our Life . . .*, *supra* note 27, at 7–32.

202. Sinai is composed of two governorates: North Sinai and South Sinai. Each governorate is composed of markaz that are composed of municipalities and villages. North Sinai, for example, has four markaz, nine municipalities, and six villages. Dames & Moore, *supra* note 161, at 17–18.

203. Kareem Fahim, *Egyptian Officials Fired over Soldiers’ Killings in Sinai*, N.Y. TIMES (Aug. 8, 2002), <http://www.nytimes.com/2012/08/09/world/middleeast/>

Bedouin and other Sinai residents to policies created by a centralized government based in Cairo that treats them as second-class citizens.²⁰⁴ Hence, locally based political representation of Sinai is a prerequisite for development programs to be effective. I propose this can be accomplished in at least five ways: quotas, local councils, political appointment of Sinai residents, recruiting Bedouin into the military and police, and amending the public education curriculum to depict Bedouin culture as part of the Egyptian national identity.²⁰⁵

First, quotas in parliament should be reserved by law for Bedouin and other Sinai residents to represent their districts.²⁰⁶ Quotas are not foreign to Egypt's electoral system. Prior to the 2011 uprisings, sixty-four seats in the lower house of parliament were reserved for women due to structural gender biases that impeded women from being elected to office.²⁰⁷ In 2015, election laws were amended to mandate the following quota for each closed party list in districts with fifteen seats: three seats for Christians, two seats for individuals who are farmers or workers, two seats for youth aged twenty-five to thirty-five, one seat for a person with a disability, and one seat for an Egyptian living abroad.²⁰⁸ In districts with forty-five seats, the quota num-

egypt-sinai-attacks.html (reporting that North Sinai governor at the time, Sayyid Abdul Wahab Mabrouk, was despised by local residents for his brutality and neglect); Nassif, *supra* note 142, at 518 (documenting that all governors assigned to Sinai were former military generals).

204. NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 119 (2002); Gilbert & al Jebaali, *supra* note 112, at 3.
205. Gilbert & al Jebaali, *supra* note 112, at 8 (citations omitted) (“Distrust is heightened in South Sinai by perceptions of identity arising from the state’s intention to ‘Egyptianize’ Sinai South Sinai Bedu, of course, are all Egyptian citizens, despite a widespread sense among Egyptians that they are ‘Other’: ‘uncivilized and unskilled.’ . . . Egyptian officials, according to Gardner . . . , ‘can treat the Bedouins with mistrust at best, or contempt at worst.’”).
206. The new parliamentary election law allocates six seats to North Sinai and four seats to South Sinai. Pesha Magid, *Elections Explainer: A Map to the Madness*, MADA MASR (Oct. 16, 2015, 8:12 PM), <http://www.madamasr.com/sections/politics/elections-explainer-map-madness> [<https://perma.unl.edu/8RHT-WQJX>]. See generally Khaled A. Beydoun, *Fast-Tracking Women into Parliamentary Seats in the Arab World*, 17 SW. J. INT’L L. 63, 101 (2011) (for a comparative argument on gender, where the author recommends robust, fast-track quotas as a means to integrate more Arab woman into state parliaments).
207. Adam Morrow, *Egypt: Disputes Rise over Quotas for Women MPs*, INTER PRESS SERV. (July 27, 2009), <http://www.ipsnews.net/2009/07/egypt-disputes-rise-over-quotas-for-women-mps/> [<https://perma.unl.edu/8RNA-E5T9>].
208. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 2014, art. 180; INT’L FOUND. FOR ELECTORAL SYS., ELECTIONS IN EGYPT 2015 HOUSE OF REPRESENTATIVES ELECTIONS: FREQUENTLY ASKED QUESTIONS 3 (2015), http://www.ifes.org/sites/default/files/2015_ifes_egypt_hor_elections_faqs_final.pdf [<https://perma.unl.edu/K4BE-BNPX>]; Ahmed Morsy, *The Egyptian Parliamentary Elections 101*, MIDDLE E. INST. (Jan. 26, 2015), <http://www.mei.edu/content/article/egyptian-parliamentary-elections-101> [<https://perma.unl.edu/9GGP-KGB5>]; Sahar F. Aziz, *Revolu-*

bers are tripled for each category. Moreover, the President can appoint Bedouin within his authority to appoint 5% of parliamentary seats, which comprise twenty-eight seats of the parliament.²⁰⁹ I argue that only Sinai residents should be permitted to run for parliamentary seats representing North and South Sinai, and voters should have a process for challenging candidates who falsify their residency.

Notably, the most recent parliamentary elections in 2015 are a promising step toward political inclusiveness. For example, in the run-offs of the second phase of the elections for the Al-Arish seats, candidates from North Sinai Bedouin tribes competed with candidates from Upper Egyptian families living in Sinai.²¹⁰ South Sinai was also among the governorates with the highest voter turnout at 41% compared to 28% nationwide, due in large part to clan and tribal mobilization in favor of particular candidates.²¹¹

A second avenue for local political participation in governance is local councils. Article 180 of Egypt's 2014 Constitution establishes elected local councils of which 25% must be allocated to youth between the ages of twenty-one and thirty-five, 25% allocated to women, and at least 50% allocated to workers and farmers.²¹² Although the Constitution grants the local councils the authority to implement national development plans in their respective jurisdiction, Egypt's highly centralized government based in Cairo impedes local councils' ability to carry out that mandate. Thus, policy makers should amend applicable laws to grant local councils meaningful governance authority as well as ensuring Bedouin are adequately represented in Sinai's local councils.²¹³

Third, the president should appoint the governors of Sinai provinces from among the local population based on leadership experience

tion Without Reform? A Critique of Egypt's Elections Laws, 45 GEO. WASH. INT'L L. REV. 1 (2013).

209. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 2014, art. 102.

210. Salma Abdallah, *Election Run-off Proceeds in North Sinai Amid Fierce Competition*, DAILY NEWS EGYPT (Dec. 1, 2015), <http://www.dailynewsegypt.com/2015/12/01/election-run-off-proceeds-in-north-sinai-amid-fierce-competition/> [https://perma.unl.edu/M6LY-9YTH] (reporting that Ibrahim Mohamed Abu Sheirand Hegazy Saeed secured seats in Sinai in the first round of parliamentary elections).

211. Ayah Aman, *Sisi Supporters Secure Second-Round Elections Victory*, AL-MONITOR (Dec. 1, 2015), <http://www.al-monitor.com/pulse/originals/2015/12/egypt-parliamentary-elections-president-sisi-supporters.html> [https://perma.unl.edu/SBP7-XG59]; *Egypt's Elections Committee Announces Final Parliamentary Results*, AHAM ONLINE (Dec. 18, 2015), <http://english.ahram.org.eg/NewsPrint/173877.aspx> [https://perma.unl.edu/7SYT-96MJ]; Amira El-Fekki, *Election Results for Second Phase Announced*, DAILY NEWS EGYPT (Dec. 4, 2015), <http://www.dailynewsegypt.com/2015/12/04/election-results-for-second-phase-announced/> [https://perma.unl.edu/DY4M-86JS].

212. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 2014, art. 18.

213. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 2014, art. 180.

and credibility among the constituency.²¹⁴ In Egypt, governors are appointed by the president, and have historically been retired military generals and elite businessmen.²¹⁵ Military and security personnel should not serve as governors, but rather work with the civilian governor to transition Sinai out of its failing status into a stable, developed region.

Fourth, the Bedouins' inclusion in politics should extend to the police and military. Few Bedouin serve in the military or are accepted into the police.²¹⁶ Indeed, prior to September 2011 the military training college in Cairo did not accept Bedouin from the Sinai.²¹⁷ This exclusion reinforces the perceptions that the Bedouin are not part of the Egyptian national identity because their loyalties are suspect. Their absence also adversely affects the efficacy of security efforts. For instance, Egyptian police and military have admitted their unfamiliarity with Central Sinai's complex topography, and as a consequence, their inability to effectively secure the peninsula from militant groups.²¹⁸ Meanwhile, militant groups recruit Bedouin trackers to assist them in evading Egyptian security. Thus, the Bedouin are a valuable resource that could be used in pursuit of peace, if the state changed its approach from systemic mistreatment to respect and equal citizenship rights.²¹⁹

214. The North Sinai governor as of the time of the writing of this article in December 2015 was Abdel Fattah Harhour, who has a military background. Abdallah, *supra* note 210. Sarah El-Sheikh, *Government Reshuffle Features Al-Sisi Appointments with Military Backgrounds*, DAILY NEWS EGYPT (Dec. 26, 2015), <http://www.dailynewsegypt.com/2015/12/26/government-reshuffle-features-al-sisi-appointments-with-military-backgrounds/> [https://perma.unl.edu/ZFT5-SP7V] (“There have been no changes in the rest of the 16 governorates, including Cairo, which is presided over by Governor Galal Said, or the governors of North Sinai and South Sinai, Abdel Fattah Harhour and Khaled Fouda respectively, both of whom have military background.”); Josh Lyons & Nadim Houry, “*Look for Another Homeland: Forced Evictions in Egypt’s Rafah*,” HUMAN RTS. WATCH, <https://www.hrw.org/report/2015/09/22/look-another-homeland/forced-evictions-egypt-rafah> [https://perma.unl.edu/6L3G-CR27].

215. *See, e.g.*, Nassif, *supra* note 142, at 509 (documenting that most governors throughout Mubarak’s era were former military generals or police officers).

216. Revkin, *supra* note 143 (“Their many grievances—including legal obstacles to land ownership, lack of basic public services, job discrimination, and systematic exclusion from military and police academies—have reinforced a climate of mutual distrust between the central government and the Sinai.”); *Bedouins Begin to Demand Equal Citizenship Rights*, *supra* note 143 (“[Bedouins] say they are not allowed to join the army, study in police or military colleges, hold key government positions or form their own political parties.”).

217. Breen, *supra* note 34, at 40.

218. *See* Sally Khalifa Isaac, *Fighting Terrorism in Sinai: Effects on Regional Security* 4 (Dec. 7, 2014) (unpublished paper) (on file with author); *Sinai: The Challenges Ahead*, AL-AHRAM WKLY. (Feb. 5, 2015), <http://weekly.ahram.org.eg/News/10379/17/Sinai—The-challenges-ahead.aspx> [https://perma.unl.edu/H79E-HG7U].

219. Awad & Abdou, *supra* note 137.

To be sure, the mistrust between the security forces and Bedouin is mutual. The state, therefore, will need to create quotas reserved for Bedouin in the military and police to overcome internal resistance. Police and military school curriculum should also include courses directly aimed at humanizing Bedouin and Sinai residents and countering negative stereotypes that they are criminals and disloyal.²²⁰ To persuade Bedouin that joining the security forces will not result in being tasked with oppressing their fellow tribesmen, security policies and practices must be reformed to respect human rights and due process.

Finally, the national education curriculum should be amended to counter the stereotypes that Bedouin are primitive, violent, and criminal. Egyptian identity should clearly include the Bedouin of Sinai and North Egypt as equal citizens of the state, and educate students about their unique contributions to Egypt.²²¹ Without an affirmative effort by the state to counter the negative stereotypes and include the Bedouin in the national narrative of Egyptian citizenship, the Bedouin will continue to experience the adverse effects of prejudice by both private citizens and state institutions. And Sinai will continue to be an unstable region as a result.

IV. CONTEXTUALIZING SINAI'S TRANSITION INTO A FAILING SUB-STATE

Weak states exist when the central government lacks the capacity to “control public order within its territory, is unable to consistently control its borders, cannot reliably maintain viable public institutions or services, and is vulnerable to extraconstitutional domestic challenges.”²²² Failed states occur when the government “is completely unable to maintain public services, institutions, or authority, and that central control over territory does not exist.”²²³ With those definitions in mind, this Article proffers that Sinai is a failing sub-state²²⁴ whose hyper-securitization coupled with pervasive poverty and political disenfranchisement has bred a potent insurgency of militant groups.²²⁵

220. Yossef, *supra* note 112.

221. Mai Serhan, *The Politics of Image: The Bedouins of South Sinai*, JADALIYYA (June 26, 2012), http://www.jadaliyya.com/pages/index/6101/the-politics-of-image_the-bedouins-of-south-sina [https://perma.unl.edu/B5YP-JNE4].

222. Newman, *supra* note 5, at 422.

223. *Id.*

224. *See, e.g.*, Mair, *supra* note 1, at 52–55 (arguing for the need to focus on failing, rather than failed, states).

225. *But see*, Logan & Preble, *supra* note 7, at 62 (disagreeing with the position that terrorism at its root is a result of poverty that can be eradicated by development, and instead supporting the view that terrorism is a response of political grievances). This Article takes the position that political grievances and poverty cannot so easily be separated, and that the former is often a product of the latter.

In short, Sinai is a conflict zone where rule of law and security are in short supply.²²⁶

Sinai's current state of lawlessness did not occur overnight. Since Egypt regained control of the peninsula in 1982, underlying economic and political conditions have deteriorated, resulting in waves of violence in the mid-1990s and early 2000s.²²⁷ Each time violent extremism rose, the Egyptian state aggressively reacted through harsh security measures that collectively punished the local population. Hundreds of local informants worked with the security forces, often coercively under threat of torture, to spy on indigenous resistance movements.²²⁸ Negative stereotypes of Bedouin as criminals and traitors animated the state's crackdown as thousands of local residents were arrested, tortured, and prosecuted.²²⁹ Many of them entered jail as innocent bystanders only to be radicalized inside prison.²³⁰ The government was more concerned with preventing attacks on the mainland and South Sinai's tourist destinations than long-term solutions to underlying economic and social problems engendering the nonstate violence.²³¹

Repressive state practices combined with the Sinai's remote and rough terrain gave rise to a mix of ideological militants seeking to overthrow the Egyptian regime.²³² The militant groups' membership is composed primarily of Sinai residents and mainland Egyptians with a few foreign fighters. In addition, the militant groups have secured assistance from some Bedouin in creating hideouts in Sinai's rough terrain.²³³ As the indigenous people of Sinai, the Bedouin's mastery

226. Newman, *supra* note 5, at 431 (“[W]eak . . . states . . . provide an environment conducive to the emergences or operation of terrorist organizations which may target local or international interests”).

227. Khalil al-Anani, *ISIS Enters Egypt*, FOREIGN AFF. (Dec. 4, 2014), <https://www.foreignaffairs.com/articles/middle-east/2014-12-04/isis-enters-egypt> [https://perma.unl.edu/HZ85-2EAP].

228. SABBRY, *supra* note 32, at 14.

229. Breen, *supra* note 34, at 74–75.

230. Awad & Abdou, *supra* note 137 (arguing the deplorable conditions in prison coupled with human rights violations of prisoners facilitated militant groups' recruitment of prisoners); SABBRY, *supra* note 32, at 28; Borzou Daragahi, *This Is How ISIS Spread Beyond Syria and Iraq*, BUZZFEED NEWS (Dec. 12, 2015, 9:01 AM), <http://www.buzzfeed.com/borzoudaragahi/this-is-how-isis-has-spread-beyond-syria-and-iraq> [https://perma.unl.edu/RU5J-3VVA].

231. Gold, *supra* note 11, at 19.

232. *What Is Left of 'October's Sinai'?*, *supra* note 65.

233. Gold, *supra* note 11, at 6 (noting that tribal leaders do not encourage violent extremism because the Islamist insurgency is challenging the Bedouin tribal structure); *Al-Qaeda's Expansion in Egypt: Implications for U.S. Homeland Security: Hearing Before the Subcomm. on Counterterrorism and Intelligence of the Comm. on Homeland Security House of Representatives*, 113th Cong. 5–9 (2014) (Statement of Steven A. Cook, Hasib J. Sabbagh Senior Fellow for Middle Eastern Studies, Council on Foreign Relations) [hereinafter *Al-Qaeda's Expansion in*

of the region is unmatched. Without the Bedouin's assistance, neither can the militant groups hide nor can the security forces apprehend the militants.

Were the Bedouin treated with dignity as citizens with equal rights, they would have been more likely to view the militants as a threat to their nation's stability. Instead, many tribes see themselves as independent agents whose primary means of economic survival is through illicit smuggling and extracting protection money from militant groups.²³⁴

A. Festering Grievances and Militants in Sinai Before the 2011 Uprisings

The growing presence (and lethality) of militant insurgent groups in Sinai has created both peril and opportunity for the Bedouin. Bedouin's interactions with the militant groups tend to fall within one of four categories: (1) Bedouin who reject them altogether and are victimized by their violence; (2) Bedouin (predominantly youth) who join the groups out of despair or revenge for the police or military who killed their relatives; (3) Bedouin who have adopted the ideology of the militants that use religion to justify overthrowing an oppressive regime; and (4) Bedouin who earn an income by serving as guides to the militants in hiding from the police or military. I proffer that the majority of Bedouin fall into categories one, two, and four; thereby leaving a small minority who join militant groups out of ideological or religious commitment. As such, development-driven responses to Sinai's security crisis should take into account the Bedouin's disparate relationships with the militants by focusing on providing economic and political empowerment, which can be a potent means of weakening militant groups' ability to operate in Sinai.

Sinai's terrain is anything but friendly. Treacherous desert topography combined with steep and cavernous mountains offer ample opportunities for militant groups to hide.²³⁵ Without the assistance of the local Bedouin tribes, the Egyptian state cannot ferret out militant groups. However, militarized policies have alienated and impoverished the Bedouin to such an extent that they assist militant groups in evading the security services in exchange for fees.²³⁶ For instance,

Egypt] (noting that Egyptian fighters returning from Iraq and Syria are responsible for most of the violence).

234. Graham-Harrison, *supra* note 56.

235. Leena ElDeeb, *A Walk to Revive South Sinai's Tourism*, DAILY NEWS EGYPT (Nov. 18, 2014), <http://www.dailynewsegypt.com/2014/11/18/walk-revive-south-sinai-tourism/> [https://perma.unl.edu/355S-V9H7].

236. Breen, *supra* note 34, at 55 (interviewing FJP members in the Morsi regime who found that the Bedouin's feelings of alienation and political oppression motivated some of them to turn to the use of violence).

the large and influential Tarabin tribe inhabits the territory in the rocky area of Jabal Halal where militants hide in the rugged mountainous area.²³⁷ Other tribes such as the Sawarka and Remeilat play a major role in operating networks of human, drug, and arms trafficking trade crossing their land.²³⁸

Feeling little attachment to an Egyptian identity that has rejected them, some Bedouin tribes have no choice but to function as smugglers, protectors, and guides for economic survival.²³⁹ In contrast, some of the tribes near Nuweiba, Sharm Al Sheikh, and Dahab who profit from the tourist industry (albeit disproportionately less than the regime's Cairene crony capitalists) are more willing to cooperate with the Egyptian government to stop terrorism.²⁴⁰ Hence, giving the Bedouin a stake in the economic development of Sinai appears to contribute toward decreasing violence.

Ideologically driven violence intersects with economically driven illicit activity to produce multiple militant groups operating out of the Sinai. The current landscape of Islamist opposition includes four types of groups: (1) Sinai-based militant groups affiliated with the Islamic State of Iraq and Syria (ISIS); (2) mainland-based militant groups self-described as Salafi and affiliated with Al Qaeda; (3) Gaza-based militant groups affiliated with Hamas; and (4) mainland-based groups comprised largely of disaffected Muslim Brotherhood members.²⁴¹ Although not all of the groups engage in violence, they agree that the Egyptian regime is illegitimate. Notably, militant Salafi groups oppose the Muslim Brotherhood as a co-opted organization whose ideology of political participation and incremental change is antithetical to the violent groups' political aims to overthrow the regime.²⁴² The Egyptian government's conflation of the Muslim Brotherhood with Salafi militant groups in Sinai, thus, is based more

237. Ronen, *supra* note 64, at 304.

238. *Id.* at 306; SABRY, *supra* note 32, at 18.

239. ElDeeb, *supra* note 235.

240. Ronen, *supra* note 64, at 304.

241. MOKHTAR AWAD & MASTAFA HASHEM, CARNEGIE MIDDLE E. CTR., EGYPT'S ESCALATING ISLAMIST INSURGENCY (2015), http://carnegieendowment.org/files/CMEC_58_Egypt_Awad_Hashem_final.pdf [<https://perma.unl.edu/RDF9-V8KC>]; NATHAN BROWN & MICHELE DUNNE, CARNEGIE MIDDLE E. CTR., UNPRECEDENTED PRESSURES, UNCHARTED COURSE FOR EGYPT'S MUSLIM BROTHERHOOD, (2015), http://carnegieendowment.org/files/CP248-EgyptMB_BrownDunne_final.pdf [<https://perma.unl.edu/XJ6M-2T3P>] (noting younger Muslim Brotherhood members are disaffected and some are joining Sinai-based militant groups).

242. Awad & Hashem, *supra* note 241; SABRY, *supra* note 32, at 132; Ezzat, *supra* note 24; FRANÇOIS BURGAT, ISLAMISM IN THE SHADOW OF AL-QAEDA 25 (Patrick Hutchinson trans., 2008).

in political agendas to discredit the Muslim Brotherhood as the political opposition than in efforts to decrease violence in Egypt.²⁴³

The militant Salafi movement that began in Afghanistan in the 1980s actively looked for areas where repressive regimes alienated local populations. The movement sent foreign fighters to join local fighters with the aim of portraying the political conflict in religious terms.²⁴⁴ In the 1980s and 1990s, Salafi groups gained strength in the Northern Sinai towns in the forty kilometer stretch from Al-Arish to the eastern Sinai border where security forces have multiple checkpoints.²⁴⁵ Interactions with security forces checkpoints are often humiliating, or worse, turn violent for local residents.²⁴⁶ Terrorist recruitment strategies, thus, target people who seek revenge for detained or killed family members by state security forces crackdowns.²⁴⁷ In South Sinai, militant groups leveraged the influx of Western tourists whose behavior was deemed offensive to conservative Egyptian cultural and moral values as justification for attacks on Western hotels.²⁴⁸ Sinai's border with Israel also attracted militants opposed to the Israeli–Egyptian peace treaty.²⁴⁹

Local residents and Egyptian fighters returning from Iraq and Syria coalesced into various groups, some of whom actively engaged in violence while others called for violent uprising against the state with-

243. Gold, *supra* note 11, at 8; Brown & Dunne, *supra* note 241 (“[T]he state campaign against the Brotherhood, including threatening to carry out death sentences against members that were passed before the attacks. This has happened despite the government’s failure to make public any evidence of a connection between the [Muslim Brotherhood] and the attacks.”); Ahmed Eleiba, *Security Imperatives in Sinai*, AL-AHRAM WKLY. (Feb. 5, 2015), <http://weekly.ahram.org.eg/News/10333/17/Security-imperatives-in-Sinai.aspx> [https://perma.unl.edu/7M3K-F4GC] (“In more recent speeches he has been more explicit about elements of the organization. He claimed that there are links between the Muslim Brotherhood and Sinai extremist groups. Al-Sisi has also said that foreign powers are helping the militants with intelligence, and the planning and funding of operations.”); *Egypt PM Labels Brotherhood ‘Terrorist’ Group After Bomb Kills 14*, DAWN (Dec. 24, 2013, 8:08 AM), <http://www.dawn.com/news/1076098/egypt-pm-labels-brotherhood-terrorist-group-after-bomb-kills-14> [https://perma.unl.edu/4LE9-3Y2N].

244. Steven Metz, *Strategic Horizons: Sinai Is the Next Big Jihadist Battle*, WORLD POL. REV. (Aug. 7, 2013), <http://www.worldpoliticsreview.com/articles/13146/strategic-horizons-sinai-is-the-next-big-jihadist-battle> [https://perma.unl.edu/63N9-3866]; Laub, *supra* note 91.

245. Ronen, *supra* note 64, at 305; Ezzidin, *supra* note 30.

246. Ezzidin, *supra* note 30.

247. Recruitment strategies focus on people who have lost family members to state security forces crackdowns seeking revenge. Revkin, *supra* note 26.

248. *Id.* at 48 (noting the Al Gamaa’a Al Islamiyaa’s message to its followers that tourism brings corruption and bad morals to Egypt).

249. Awad & Hashem, *supra* note 241.

out taking credit for any particular attacks.²⁵⁰ Tawhid wal Jihad was the most violent Sinai-based militant groups in the decade preceding the 2011 uprisings. Formed in 2002 by Khalid Al-Masa'id and Nasr Khamis Al-Mallahy, the group was nearly quashed after a harsh security crackdown in 2006. Tawhid wal Jihad rejected the Camp David Accords and MFO as illegitimate and sought to overthrow the Egyptian regime.²⁵¹ The group relied on a network of disaffected Bedouin and Sinai youth of Palestinian origin in North Sinai.²⁵² They reportedly recruited in mosques scattered across Al-Arish and other Northern Sinai towns where local discontent runs high.²⁵³

Tawhid wal Jihad claimed responsibility for the wave of terrorism in Sinai that occurred from 2004 to 2006. The group targeted tourist resorts in South Sinai and killed over 150 Egyptians and foreigners with the intent of harming Egypt's tourism, a major source of income in Egypt.²⁵⁴ In October 2004, three bombs were detonated in Taba, Nuweiba, and Ras al-Shitan on the Red Sea, killing 34 people and injuring nearly 150.²⁵⁵ A month later, two roadside bombs hit an MFO bus, injuring two Canadians.²⁵⁶ The following year in July 2005, simultaneous bomb attacks occurred in Sharm El-Sheikh killing more than 88 people. In April 2006, 23 people were killed in bomb attacks in Dahab.²⁵⁷ After each attack, more police were deployed to Sinai who escalated the violence through aggressive crackdowns.

Thousands of Sinai residents were arbitrarily arrested in dragnet counterterrorism operations.²⁵⁸ Police went as far as arresting women and children as a bargaining chip to secure the surrender of the male tribal member—an unforgivable and unforgettable violation of

250. *Al-Qaeda's Expansion in Egypt*, *supra* note 233, at 5–9 (Statement of Steven A. Cook, Hasib J. Sabbagh Senior Fellow for Middle Eastern Studies, Council on Foreign Relations).

251. INT'L CRISIS GRP., *supra* note 79; Matthew Teague, *The Sinai*, NAT'L GEOGRAPHIC (Mar. 2009), <http://ngm.nationalgeographic.com/2009/03/sinai/teague-text/1> [<https://perma.unl.edu/N3MV-9JA9>].

252. Ronen, *supra* note 64, at 302; Abdulrahman al-Masri, Michele Chabin, Mona Alami & Sarah Lynch, *Al-Qaeda Hasn't Gone Away, and Is Gaining*, USA TODAY (Jan. 8, 2014, 9:29 AM), <http://www.usatoday.com/story/news/world/2014/01/07/al-qaeda-spread/4358845> [<https://perma.unl.edu/SPU4-NTJK>].

253. Ronen, *supra* note 64, at 308; Abdullah Al-Arian, *Between Terror and Tyranny: Political Islam in the Shadow of the Arab Uprisings*, MIDDLE E. RES. AND INFO. PROJECT (Dec. 30, 2015), <http://www.merip.org/mero/mero123015> [<https://perma.unl.edu/76WZ-689A>] (“Islamist movements throughout the Arab world became increasingly likely to adapt their missions to local conditions.”).

254. *Egypt: Systematic Abuses in the Name of Security*, AMNESTY INT'L (Apr. 11, 2007), <https://www.amnesty.org/en/documents/MDE12/001/2007/en/> [<https://perma.unl.edu/4B2E-E44D>].

255. SABRY, *supra* note 32, at 23.

256. Ruben Tuitel, *The Future of the Sinai Peninsula*, Q.J., Spring 2014, at 79, 81.

257. *Egypt: Systematic Abuses in the Name of Security*, *supra* note 254.

258. Gold, *supra* note 11, at 8; Khalil, *supra* note 101.

tribal traditions.²⁵⁹ These shortsighted securitized approaches to counterterrorism ultimately pushed residents to join militant groups, thereby making Sinai less safe in the long run.

Although Tawhid wal Jihad was significantly weakened by the end of the Mubarak regime, some of its members escaped from jail during the 2011 uprisings and reportedly resumed attacking police stations and other state institutions.²⁶⁰ Others joined the new and heavily armed militant groups now affiliated with ISIS. Local grievances facilitate Bedouin recruitment or assistance for attacks against the military, security personnel, government officials, and most recently in November 2015 a Russian civilian aircraft flying out of Sharm El Sheikh.²⁶¹

Another Sinai-based militant group is Jaysh Al Islam (also known as the Army of Islam), which was allegedly affiliated with Al Qaeda and maintained strong ties with Tawhid wal Jihad.²⁶² Established in 2006 in Gaza by Mumtaz Dughmush who broke off from the Popular Resistance Committees, the group exploits grievances of Palestinians in Gaza and Bedouin in Sinai to conduct cross border attacks against Israeli and Egyptian targets.²⁶³ For example, the Egyptian government blamed the group for an attack on a Christian church in Alexandria on New Year's Eve in 2011 and an attack on Egyptian army soldiers breaking fast in Sinai in August 2012.²⁶⁴ Some scholars attribute the willingness of Bedouin youth to join the group to their dismal socioeconomic conditions, hatred for the Egyptian regime, and exposure to extremist Salafi ideology on the internet.²⁶⁵ In September 2015, the Jaysh Al Islam reportedly pledged allegiance to Wilayat Sinai.²⁶⁶

259. SABRY, *supra* note 32, at 24.

260. Gold, *supra* note 11, at 9.

261. Yossef, *supra* note 112; Fiona Keating, *Russian Plane Crash: Leader Of Sinai Province Group Abu Osama Al-Masri Named as Bombing Mastermind*, INT'L BUS. TIMES (Nov. 8, 2015, 2:06 PM), <http://www.ibtimes.co.uk/russian-plane-crash-leader-sinai-province-group-abu-osama-al-masri-named-bombing-mastermind-1527764> [<https://perma.unl.edu/TL4P-GAYA>]; SMITH, *supra* note 2, at 170–71 (quoting the former head of CIA counterterrorism center, Paul Pillar, stating that most terrorists are adult men who are “unemployed or underemployed (except by terrorist groups), with weak social and familial support, and with poor prospects for economic improvement or advancement through legitimate work.”).

262. Ronen, *supra* note 64, at 308–09.

263. Gold, *supra* note 11, at 19.

264. *Jaysh al-Islam*, TAHRIR INST. FOR MIDDLE E. POL'Y, <http://timep.org/esw/profiles/terror-groups/jaysh-al-islam/> [<https://perma.unl.edu/FQ2K-23RZ>].

265. Ronen, *supra* note 64, at 308–09. *But see* Breen, *supra* note 34, at 61–62 (interviewing members of the FJP who claimed secret documents were found in the state security offices proving that the bombing was ordered by the former Minister of Interior Habib Al Adly).

266. Dov Lieber, *Powerful Militant Group in Gaza Allegedly Pledges Allegiance to ISIS*, JERUSALEM POST (Sept 11, 2015, 6:52 AM), <http://www.jpost.com/Middle->

The Egyptian government responded to the wave of attacks by banning the Bedouin from economic activity in Sharm El Sheikh and rounded up thousands of detainees.²⁶⁷ Egypt's emergency law granted the government the authority to detain them for months without criminal charges. The hundreds who were not charged with a crime languished for years in administrative detention along with nearly 18,000 other Egyptian administrative detainees held in inhumane conditions across the country.²⁶⁸ Detainees were tortured and subjected to cruel and degrading treatment.²⁶⁹ Hundreds fell ill to tuberculosis and other diseases that spread due to a lack of hygiene and medical care, overcrowding, and poor food in prisons.²⁷⁰ Many of the detainees were innocent Sinai residents who became radicalized in prison and later joined militant groups.²⁷¹ The systematic human rights abuse triggered a vicious cycle of extremism and revenge-seeking violence.²⁷²

These mass roundups brought relations between the Bedouin and the state to the lowest point in decades. Indeed, the International Crisis Group described the North Sinai governorate as being "under a quasi-state of siege."²⁷³ It was not until 2010 that Egyptian officials half-heartedly attempted to salvage relations with Bedouin tribes by releasing 200 Bedouin activists arrested in the security sweeps.²⁷⁴ By then, however, the environment was fertile for new militant groups to leverage the deep seated resentment against security forces in the political vacuum that ensued after January 2011. The 2011 uprisings provided the opportunity both for Sinai residents to expel the loathed security forces and militant groups to amass weapons in furtherance of their insurgent objectives.

East/ISIS-Threat/Powerful-militant-group-in-Gaza-allegedly-pledges-allegiance-to-ISIS-415869 [https://perma.unl.edu/U3WP-KRHB].

267. Tuitel, *supra* note 256, at 83.

268. *Egypt: Systematic Abuses in the Name of Security*, *supra* note 254.

269. *Id.*; Lyons & Houry, *supra* note 214.

270. *Egypt: Systematic Abuses in the Name of Security*, *supra* note 254.

271. Strasser, *supra* note 101; Graham-Harrison, *supra* note 56; *Are Tribes in Sinai Really Unifying Against Terrorism?*, AL-MONITOR (May 15, 2015), <http://www.al-monitor.com/pulse/originals/2015/05/egypt-siani-tribes-war-terrorism-army.html> [https://perma.unl.edu/QN8Y-D8G7]; SABRY, *supra* note 32, at 149.

272. Graham-Harrison, *supra* note 56; Awad & Hashem, *supra* note 241; Revkin, *supra* note 26; *see* G.A. Res. 60/288, at 2 (Sept. 20, 2006) ("*Recognizing* that development, peace and security, and human rights are interlinked and mutually reinforcing[.]").

273. DALIA DASSA KAYE ET AL., MORE FREEDOM, LESS TERROR?: LIBERALIZATION AND POLITICAL VIOLENCE IN THE ARAB WORLD 42–43 (2008).

274. Walton, *supra* note 28, at 8.

B. 2011 Uprisings Create a Security and Political Vacuum

Notwithstanding the government's differential treatment of Sinai, the local population's response to the 2011 uprising mirrored Egyptians in other parts of the country. After decades of political oppression, security abuses, and economic deprivation, Sinai residents joined the nationwide protests against the corrupt Mubarak regime.²⁷⁵ Security personnel were the primary targets of the people's wrath.²⁷⁶ Police stations were burned down and police officers were run out of villages under threat of physical attack.²⁷⁷ The State Security Investigations compounds, often referred to as torture factories, were attacked with rocket-propelled grenades.²⁷⁸ Local tribes and leaders took control of state institutions as the Egyptian government's attention was focused on Cairo.²⁷⁹ Bedouin seeking the release of their jailed tribesmen, whom they believed were wrongfully detained in pre-2011 roundups, sieged an MFO camp for eight days and kidnapped tourists and foreign workers.²⁸⁰ These hardline tactics by residents, coupled with the military's attempts to improve relations with Sinai residents, resulted in the pardoning of eighteen Bedouin sentenced in absentia by military tribunals and new trials ordered for five Bedouin accused of bombing Sinai resorts in 2004.²⁸¹

Although the state's absence granted local residents de facto self-governance, it also strengthened militant groups.²⁸² Thousands of Egyptian fighters abroad, previously barred from entering Egypt under threat of prosecution, returned to the Sinai after the Supreme Council of the Armed Forces (SCAF) lifted their names from security watch lists at national entry ports.²⁸³ They were joined by some of the 22,000 prisoners who escaped from at least five Egyptian jails in the

275. SABRY, *supra* note 32, at 4–7.

276. Gold, *supra* note 11, at 6.

277. Ronen, *supra* note 64, at 306.

278. SABRY, *supra* note 32, at 11.

279. *Id.* at 13; Gold, *supra* note 11, at 6.

280. Breen, *supra* note 34, at 27; *Bedouins Briefly Abduct 10 Peacekeepers in Egypt*, AL ARABIYA NEWS (May 7, 2012, 11:22 PM), <https://english.alarabiya.net/articles/2012/05/07/212736.html> [<https://perma.unl.edu/XT8N-PDL5>]. The MFO would be subjected to further attacks in September 2012 reportedly in connection with a region-wide protests against an anti-Muslim video released by an American filmmaker. Ahmed Eleiba, Hatem Maher & Sherif Tarek, 'Operation Eagle' Will Not Stop Until Sinai Is Terror-Free: Egypt's Military, AHARAM ONLINE (Aug. 8, 2012), <http://english.ahram.org.eg/NewsPrint/49956.aspx> [<https://perma.unl.edu/N5WJ-QSJ9>].

281. *Bedouins Briefly Abduct 10 Peacekeepers in Egypt*, *supra* note 280.

282. SHARP, *supra* note 40, at 12; Breen, *supra* note 34, at 24.

283. al-Anani, *supra* note 227.; Awad & Hashem, *supra* note 241.; SABRY, *supra* note 32, at 20, 138.

mayhem of the eighteen-day uprisings in 2011.²⁸⁴ Making matters worse, the revolution next door in Libya exposed Egypt's western border to unprecedented levels of arms smuggling.²⁸⁵ Anticipating the eventual return of the security forces, the Bedouin in Sinai stockpiled weapons.²⁸⁶

Confronted with rising violence in Sinai, Mohamed Morsi's regime promised to make Sinai a pillar of his Nahda ("renaissance") program.²⁸⁷ In his first month in office in July 2012, Morsi paid a visit to Sinai during which he promised new relations and increased development.²⁸⁸ No sooner had he returned to Cairo, Morsi faced a political crisis when thirty-five armed militants attacked a Rafah border post in August 2012 killing sixteen Egyptian soldiers, seizing two Egyptian armored vehicles, and storming the border fence with Israel.²⁸⁹ The crisis provided Morsi with an opportunity to arrange the retirement of longstanding Minister of Defense General Hussein Al Tantawi and Army Chief of Staff Sami Anan, and promote General Abdel-Fatah Al Sisi as the new Minister of Defense—who would depose Morsi one year later.²⁹⁰

The newly elected Morsi regime, in coordination with Israel, sent more military forces to Sinai in Operation Eagle I to expel the militant groups out of North Sinai's cities.²⁹¹ While the operation was successful in pushing militant groups back into the mountains and other isolated areas in the peninsula, it did little to resolve the underlying grievances that fed the groups' recruits or tacit support among the local population.²⁹²

284. *Terrorism and the City*, MADA MASR (July 15, 2015, 10:22 PM), www.madamasr.com/opinion/politics/terrorism-and-city.

285. *What Is Left of 'October's Sinai'?*, *supra* note 65; Ronen, *supra* note 64, at 314; Ezzat, *supra* note 24.

286. SHARP, *supra* note 40, at 12.

287. Tuitel, *supra* note 256, at 84.

288. Sarah El-Rashidi, *Morsi's Failures in Sinai: A Cautionary Tale*, ATLANTIC COUNCIL (Sept. 4, 2013), <http://www.atlanticcouncil.org/blogs/egyptsource/morsi-s-failures-in-sinai-a-cautionary-tale> [<https://perma.unl.edu/7396-2WFFQ>] ("Morsi's campaign promised that Sinai would be one of the four pillars of his Nahda program, and thus would receive a quarter of its spending on development and investments[.]").

289. *The Root of Egypt's Coup: Morsi Giving Free Hand to Sinai Islamists*, HAARETZ (July 18, 2013, 7:09 PM) [hereinafter *The Root of Egypt's Coup*], <http://www.haaretz.com/news/middle-east/1.536623> [<https://perma.unl.edu/6YZF-KVH2>]; Ronen, *supra* note 64, at 312; SABRY, *supra* note 32, at xxii.

290. Gold, *supra* note 11, at 12; Osman El Sharnoubi, *Egypt's President Morsi in Power: A Timeline (Part I)*, JADALIYYA (June 28, 2013), http://www.jadaliyya.com/pages/index/13101/egypts-president-morsi-in-power_a-timeline [<https://perma.unl.edu/3E5W-5PN2>].

291. Breen, *supra* note 34, at 26; see Yossef, *supra* note 112.

292. Gold, *supra* note 11, at 12.

In contrast to his predecessor, Morsi did not limit his response to violence in Sinai through military operations. After decades of hyper-securitization under the Mubarak regime, Morsi attempted a different strategy: to engage and negotiate with Sinai residents.²⁹³ As a former political prisoner himself, he may have understood that state violence would only aggravate the underlying political grievances.²⁹⁴ Thus, Morsi's administration set out to engage with tribal leaders to hear their grievances and look for solutions moving forward.²⁹⁵ He invited tribal chiefs from North Sinai to meet him and the North Sinai Governor in the presidential palace in Cairo.²⁹⁶ The participants discussed a potential pardon of certain tribal detainees, developing a telecommunications network in Sinai, and increasing the budget for development plans in Sinai from 50 million Egyptian pounds to 100 Egyptian pounds.²⁹⁷

Morsi also promised to allow for Sinai residents to own and use land in the planned development projects, which would require reversing a 2012 resolution that banned their land ownership in the eastern border of Sinai.²⁹⁸ Denial of land ownership, and by extension barring inheritance of property, has been a long time grievance of the Bedouin of Sinai.²⁹⁹ The immediate outcome was the secession of the military campaign and a ceasefire with militants.³⁰⁰ The longer term outcome was the creation of a committee of tribal chiefs and other representatives to follow up with the Morsi administration.³⁰¹ Whether this committee was in fact empowered to effectuate changes in government policy is unlikely given the military and security forces' distrust of the local population.

293. SABRY, *supra* note 32, at xxii; Mair, *supra* note 1, at 55 (noting that co-opting the violent groups may be the only option for sustainable rebuilding starting at the bottom).

294. *See* Breen, *supra* note 34, at 28.

295. *Id.* at 62–63.

296. *Morsy Meets Sinai Tribal Chiefs*, EGYPT INDEP. (Jan. 3, 2013, 3:44 PM), <http://www.egyptindependent.com/news/morsy-meets-sinai-tribal-chiefs> [<https://perma.unl.edu/LB2U-JDQG>].

297. *Id.*

298. *Id.*; Nouran El-Behairy, *Sinai Bedouins Allowed to Own Land*, DAILY NEWS EGYPT (Oct. 30, 2012), <http://www.dailynewsegypt.com/2012/10/30/sinai-bedouins-allowed-to-own-land/> [<https://perma.unl.edu/SUV6-XAWD>]; *see* Gilad Wenig, Opinion, *Egypt Must Gamble in the Sinai*, NAT'L INT. (Aug. 14, 2013), <http://nationalinterest.org/commentary/egypt-must-gamble-the-sinai-8888> [<https://perma.unl.edu/VUQ8-8FDK>] (“Amending or replacing the controversial Sinai land ownership law, which was passed by Morsi’s government in late 2012, would also be constructive. Although the law reversed official policy by allowing Sinai residents to own land, it effectively discriminates against Bedouin by requiring them to prove their and their parents’ citizenship.”).

299. Breen, *supra* note 34, at 54.

300. SABRY, *supra* note 32, at xxii.

301. *Morsy Meets Sinai Tribal Chiefs*, *supra* note 296.

Morsi's administration also took the unprecedented step of engaging nonviolent extremist Salafi groups who opposed the government but were not taking responsibility for terrorist attacks. Morsi leveraged his regime's Salafi allies to mediate with militant groups to persuade them to stop the violence. Under state auspices, Al Azhar University, the global bastion of Sunni Islamic thought, conducted religious lessons to counter radicalization in Sinai.³⁰² Muslim Brotherhood leaders met with tribal elders in Sinai to debunk the jurisprudence of the jihadist and *takfir* movements.³⁰³ As political Islamists who worked through the political system to oppose government policies, the Muslim Brotherhood representatives hoped to persuade the Salafi militants to reject fatwas that call for killing innocent people, attacking gas pipelines, or committing other offenses against the state.³⁰⁴

Morsi's regime went as far as proposing that leaders of the largest Bedouin tribes be trained and employed to operate checkpoints against militant attacks.³⁰⁵ The reasoning was that the Bedouin would be vested in securing the Sinai against militant insurgents. Meanwhile, the insurgents would fear attacking the Bedouin because informal tribal law would require revenge on the group.³⁰⁶

To be sure, Morsi's strategy was highly suspect in Egyptian and Israeli security circles that deemed engaging with insurgent groups anathema to national security. That Morsi was a political Islamist made the military all the more wary of his intentions and allegiances.³⁰⁷ Opponents viewed Morsi's approach as placation at best or tacit support at worst.³⁰⁸ Instead, the Egyptian military wanted to pursue an aggressive military offensive in Sinai. In November of 2012, Morsi reportedly ordered Field Marshall El-Sisi (who was to become Egypt's president in 2014 following a military coup and purport-

302. Gold, *supra* note 11, at 13.

303. Richard Barrett, *Legitimacy, Credibility and Relevance: The Tools of Terrorists and 'Counter-Terrorists'*, in *AFTER THE WAR ON TERROR: REGIONAL AND MULTILATERAL PERSPECTIVES ON COUNTER-TERRORISM STRATEGY*, 26–27 (Alex P. Schmid & Gary F. Hindle eds., 2009) (“In Islam, only a properly qualified judge can declare someone an unbeliever (*kufir*), and then only in very specific circumstances. Takfirism, as the Al-Qa’ida practice has come to be known, is further condemned in the Islamic world as likely to lead to another very serious offence, which is to cause *fitna*, or splits in the Muslim community.”).

304. Mahmoud Chaaban Bayoumi, *Egypt's Muslim Brothers Preach Nonviolence to Sinai Jihadis*, *AL-MONITOR* (Aug. 17, 2012), <http://www.al-monitor.com/pulse/tr/security/01/08/brotherhood-hold-juristic-revisions-to-takfir-groups-in-the-sina.html> [<https://perma.unl.edu/8DE7-MS2E>].

305. Aya Batrawy, *Egypt Mulls Arming Sinai Bedouin Security Forces*, *YAHOO! NEWS* (Oct. 8, 2012), <http://news.yahoo.com/egypt-mulls-arming-sinai-bedouin-security-force-180514131.html> [<https://perma.unl.edu/RR7X-TVFN>].

306. Gilbert, *Nature = Life*, *supra* note 24, at 44.

307. SABRY, *supra* note 32, at 166.

308. Gold, *supra* note 11, at 13.

edly free elections)³⁰⁹ to hold off planned raids and offenses.³¹⁰ As part of a broader strategy to improve relations with Hamas, Morsi also reportedly asked intelligence officers to meet with Hamas leader Khaled Meshaal to address the killings of the soldiers and prevent further attacks. The security elite refused to work with a group they deemed terrorist.³¹¹ And the military leadership was increasingly suspicious of Morsi's soft tactics they deemed did not properly avenge the deaths of Egyptian soldiers.³¹²

Morsi's strategy ultimately failed. Not only was he unable to attain buy-in from the military on a non-militarized solution to Sinai's problems, but militant groups continued their attacks with Sinai residents held hostage in between.³¹³ Violent extremist Salafi groups condemned the Muslim Brotherhood as tyrants who failed to rule according to strict interpretations of Shari'a.³¹⁴ Sinai tribal leaders criticized Morsi's regime to be no different than Mubarak as they experienced the same neglect and economic deprivation.³¹⁵ However, some Bedouin noted the decrease in mistreatment and arbitrary arrests during Morsi's year in power.³¹⁶

As Morsi became weaker in the final months of his presidency, militants brazenly kidnapped seven Egyptian soldiers in May 2013.³¹⁷ While the military and Morsi administration were able to negotiate the soldiers' release in exchange for releasing Islamist prisoners, the aggressive clampdown on Sinai continued.³¹⁸ In the end, Morsi's brief one-year presidency and incomplete development strategy produced little change in Sinai's economic and political situation.³¹⁹ What came next pushed Sinai closer to the brink of a failed sub-state.

309. Sahar F. Aziz, *Bringing Down an Uprising: Egypt's Stillborn Revolution*, 30 CONN. J. INT'L L. 1, 6 (2014).

310. *The Root of Egypt's Coup*, *supra* note 289.

311. *Id.*; Breen, *supra* note 34, at 69–70.

312. Tuitel, *supra* note 256, at 84–85.

313. *Egyptian Troops in Sinai Mistakenly Fire on Bedouin Funeral: AP*, AHRAM ONLINE (May 21, 2013), <http://english.ahram.org.eg/NewsContentPrint/1/0/72026/Egypt/0/Egyptian-troops-in-Sinai-mistakenly-fire-on-Bedoui.aspx> [<https://perma.unl.edu/F93R-66VQ>]; Graham-Harrison, *supra* note 56; Ezzat, *supra* note 24.

314. Alexandrani, *supra* note 59, at 17; Al-Arian, *supra* note 253.

315. Sabry, *supra* note 179.

316. Abigail Hauslohner, *Insurgency Takes Root in Egypt's Sinai*, WASH. POST (July 28, 2013), https://www.washingtonpost.com/world/insurgency-takes-root-in-egypts-sinai/2013/07/28/2e3e01da-f7a4-11e2-a954-358d90d5d72d_story.html [<https://perma.unl.edu/JC9S-D98F>].

317. SABRY, *supra* note 32, at xxiii.

318. *Id.*; Khalil, *supra* note 101; Gold, *supra* note 11, at 13; Breen, *supra* note 34, at 53 (noting the abduction of tourists or government officials has been used by the Bedouin as a way of negotiating for the release of their members because it is the only tactic the government is responsive to).

319. Breen, *supra* note 34, at 77–79.

The combination of a disgruntled population, geographic and cultural isolation, poverty, a security vacuum, arms smuggling and militant groups with pre-existing political agendas to control the Sinai proved toxic.³²⁰ The Sinai soon became a launching pad for attacks against Israel and the Egyptian government. As attacks in Sinai and the mainland increased, the same group claimed responsibility—Ansar Beit Al Maqdis (ABM). A Sinai-based group founded by Egyptians trained in Afghanistan and Syria, ABM claimed credit for bombings in North and South Sinai, an assassination attempt on the Egyptian interior minister in 2013, and attacks on security buildings in the Cairo, Dakahliya, Ismailiya, and Sharqiya governorates.³²¹ ABM also targeted the natural gas pipeline that crosses the Sinai Peninsula to provide gas to Egypt's industrial zones, Jordan, and Israel.³²² In the eighteen months following the 2011 uprising, the pipeline was attacked at least fifteen times.³²³ The attacks were both symbolic and pragmatic. For some Bedouin, the gas was a stolen resource by the Egyptian state and for the militant groups it was considered a Muslim resource sold to the "Zionist occupier."³²⁴

What started out as a small urban terrorist group, the ABM morphed into a formidable insurgency with a couple of thousand Egyptian fighters.³²⁵ The ABM appealed to disenfranchised youth from North Sinai to join it in the fight against tyranny.³²⁶ Bedouin and Palestinian grievances soon morphed into a more ambitious agenda to create a province of ISIS in Sinai.³²⁷ After the military-led deposal of Morsi in July 2013, ABM shifted its focus from attacks on the Egypt–Israeli gas pipeline and cross border attacks to an exclusive focus on fighting the Egyptian army.³²⁸ Suicide bombings at army

320. Ronen, *supra* note 64, at 307; SABRY, *supra* note 32, at 16; Khalil, *supra* note 101. (noting one checkpoint near the Gaza border was attacked 39 times in the first six months of 2013).

321. Gold, *supra* note 11, at 8; *Al-Qaeda's Expansion in Egypt*, *supra* note 233, at 9–21 (Statement of Thomas Joscelyn, Senior Fellow, Foundation for Defense of Democracies); SMITH, *supra* note 2, at 78 (discussing how the "Afghan alumni" returned to their home countries to join militant Islamist groups); YOSSEF & CERAMI, *supra* note 34, at 51.

322. Breen, *supra* note 34, at 26.

323. Gold, *supra* note 11, at 3–4; Laub, *supra* note 91.

324. Gold, *supra* note 11, at 3–4; *After Joining IS, Ansar Bayt al-Maqdis Expands into Egypt*, AL-MONITOR (Dec 1, 2014), <http://www.al-monitor.com/pulse/originals/2014/12/egypt-ansar-maqdis-sinai-spread.html>; SABRY, *supra* note 32, at 36–37 [<https://perma.unl.edu/W32B-9RSW>].

325. Natasha Ezrow, *How Islamic State Is Moving Its Egyptian Battle from Sinai to Cairo*, CONVERSATION (August 21, 2015, 1:34 AM), <http://theconversation.com/how-islamic-state-is-moving-its-egyptian-battle-from-sinai-to-cairo-46439> [<https://perma.unl.edu/HY7G-8RFD>].

326. Ronen, *supra* note 64, at 303; Awad & Hashem, *supra* note 241.

327. SABRY, *supra* note 32, at 145; al-Anani, *supra* note 227.

328. Gold, *supra* note 11, at 8.

checkpoints starting in 2014 until the present have killed dozens of soldiers.³²⁹

After a year of protracted violence after Morsi's ouster, ABM pledged its allegiance to ISIS in November 2014 and formally changed its name to Wilayat Sinai (the Sinai Province of ISIS).³³⁰ In addition to targeting the state's security apparatus, Wilayat Sinai increasingly targeted civilians accused of collaborating with Israeli or Egyptian intelligence.³³¹ It also escalated its attacks to densely populated areas in the Nile Delta and Cairo, including the Mansoura Security Headquarters in December 2013.³³² Their attacks became more sophisticated as shoulder-fired missiles that require training were used to down a military helicopter in Sinai in January 2014.³³³ As it grew in strength and sophistication, Wilayat Sinai became the umbrella group that connected militant jihadist groups in Sinai and from across Egypt. Although the militant group does not control significant areas of land, Wilayat Sinai is the second strongest branch of ISIS outside of Syria and Iraq after ISIS in Libya.³³⁴

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329. Graham-Harrison, *supra* note 56; Hassan & Bayoumy, *supra* note 104; Yusri Mohamed & Ahmed Hassan, *More than 100 Dead as Militants, Egyptian Army Clash in North Sinai*, REUTERS (July 1, 2015, 6:19 PM), <http://www.reuters.com/article/2015/07/01/us-egypt-security-sinai-idUSKCN0PB3VJ20150701> [https://perma.unl.edu/F7SX-RFN8]; *Ansar Beit Al-Maqdis Claims Thursday Sinai Attacks*, AHAM ONLINE (April 3, 2015), <http://english.ahram.org.eg/NewsPrint/126816.aspx> [https://perma.unl.edu/3RB6-MN3E]; *Roadside Bombs Kill 6 Soldiers in Egypt's Sinai Peninsula*, AL ARABIYA ENGLISH (May 31, 2016), <http://english.alarabiya.net/en/News/middle-east/2016/05/31/Roadside-bombs-kills-6-soldiers-in-Egypt-s-Sinai-Peninsula.html> [https://perma.unl.edu/6JY6-75LU].
330. Menna Zaki, Amira El-Fekki & Mahmoud Mostafa, *'State of Sinai' Claim Hundreds of Killings in Sinai Attacks*, DAILY NEWS EGYPT (Jan. 31, 2015), <http://www.dailynewsegypt.com/2015/01/31/state-sinai-claim-hundreds-killings-sinai-attacks/> [https://perma.unl.edu/746D-TFE7]; David D. Kirkpatrick, *Militant Group in Egypt Vows Loyalty to ISIS*, N.Y. TIMES (Nov. 10, 2014), http://www.nytimes.com/2014/11/11/world/middleeast/egyptian-militant-group-pledges-loyalty-to-isis.html?_r=0; JESSICA STERN & J. M. BERGER, *ISIS: THE STATE OF TERROR* 184–85 (2015).
331. Zack Gold, *North Sinai Population Continues to Sacrifice for Egypt*, TAHRIR INST. FOR MIDDLE E. POL'Y (May 18, 2015), <http://timep.org/commentary/north-sinai-population-continues-to-sacrifice-for-egypt/> [https://perma.unl.edu/6S4N-DLMM].
332. *Al-Qaeda's Expansion in Egypt*, *supra* note 233, at 25 (Statement of Mohamed Elmenshawy, Resident Scholar at the Middle Eastern Institute).
333. *Id.*
334. Graham-Harrison, *supra* note 56; Betsy Hiel, *Egypt Open to Jihadist Violence, Experts Warn*, TRIB LIVE (Jan. 30, 2016, 10:40 PM), <http://triblive.com/usworld/middleeast/9890114-74/egypt-isis-sinai> [https://perma.unl.edu/CTJ4-73WD] (“The expanding control of an ISIS affiliate in Libya has grown so worrisome that the United States is considering ‘military options’ there, a Pentagon spokesman said last week.”); Jim Sciutto, Barbara Starr & Kevin Liptak, *ISIS Fighters in Libya Surge as Group Suffers Setbacks in Syria, Iraq*, CNN (Feb. 4, 2016, 4:39

C. Violence in Sinai Reaches New Heights after Morsi is Deposed

The military coup that removed President Mohamed Morsi on July 3, 2013, was a major setback for democracy in Egypt. That Morsi was democratically elected and a member of an Islamist political party strengthened the violent Salafi militant groups' strategic ideological claim: only through violence could the abusive security apparatus be stopped.³³⁵ Morsi's ouster also united the disparate militant groups under Ansar Beit Al Maqdis, which soon thereafter created an Egyptian franchise of ISIS.³³⁶ Militant groups used Morsi's ouster as justification for hundreds of violent attacks across Egypt, thereby creating a serious security crisis in mainland Egypt. They targeted disaffected Muslim Brotherhood members and Bedouin for recruitment. The sharp rise in violence transitioned Sinai from a dangerous haven for terrorism to a conflict zone.³³⁷

When thousands of Muslim Brotherhood leaders and members were arrested as their assets were frozen, businesses closed, and social services shut down, terrorist attacks in mainland Egypt increased.³³⁸ Militant groups attacked churches, police stations, police checkpoints, and other state targets.³³⁹ In July 2013, Sinai-based militants bombed the Mansoura police station, killing fifteen policemen and injuring over 130 people.³⁴⁰ Militants paraded gruesome images of the hundreds of Egyptians killed by Egyptian security forces in Cairo's Raba'a and Nahda Squares in August 2013 to portray the attacks as self-defense against a tyrannical state.³⁴¹ In December 2013, Ansar Beit Al Maqdis conducted a suicide bomb of the Daqah-

PM), <http://www.cnn.com/2016/02/04/politics/isis-fighters-libya-syria-iraq> [https://perma.unl.edu/P2XG-56NC]; Malsin, *supra* note 113.

335. Revkin, *supra* note 26; see also Daniel Byman, *Fighting Terrorism with Democracy?*, in *RADICAL ISLAM AND INTERNATIONAL SECURITY: CHALLENGES AND RESPONSES* 188, 201 (Hillel Frisch & Efraim Inbar eds., 2008) (cautioning against the perils of Western support of military coups after Islamists win elections, as was the case in Algeria in 1991 and 1992, resulting in extremist Islamist groups recruiting tens of thousands of people).

336. Graham-Harrison, *supra* note 56; SABRY, *supra* note 32, at 159.

337. Graham-Harrison, *supra* note 56; Awad & Hashem, *supra* note 241.

338. Gold, *supra* note 11, at 19; Maria Gloria Polimeno, *Chief Prosecutor Killed by Car Bomb as Egypt Marks Two Years of al-Sisi*, *CONVERSATION* (June 30, 2015, 8:38 AM), <http://theconversation.com/chief-prosecutor-killed-by-car-bomb-as-egypt-marks-two-years-of-al-sisi-43570> [https://perma.unl.edu/99AL-6RN5].

339. Gold, *supra* note 11, at 19; U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, *COUNTRY REPORTS ON TERRORISM 2014 157-223* (June 2015), <http://www.state.gov/documents/organization/239631.pdf> [https://perma.unl.edu/M4JG-XC2N].

340. Gold, *supra* note 11, at 5; *15 Dead, 134 Injured in Egypt's Mansoura Explosion*, *AHRAM ONLINE* (Dec. 24, 2013), <http://english.ahram.org.eg/NewsPrint/89902.aspx> [https://perma.unl.edu/BC3H-AV7W].

341. SABRY, *supra* note 32, at xxiii, 211.

liya Security Directorate in the Nile Delta.³⁴² The violence continued throughout 2014 and 2015, as multiple security targets were bombed in Cairo, Damietta, and other cities in the mainland.³⁴³

Bombings in Sinai also became more frequent and more lethal.³⁴⁴ Prior to Morsi's removal, ABM focused its attacks on Israel in collaboration with Gaza based militant groups. After July 2013, however, ABM shifted its focus to Egypt's security services and military.³⁴⁵ In July and August 2013, security personnel were under attack on a near daily basis.³⁴⁶ As a result, in the last half of 2013, approximately 200 soldiers and over 70 security personnel were killed in Sinai.³⁴⁷ The attacks became more sophisticated, as evinced by the downing of an Egyptian helicopter in January 2014.³⁴⁸ After thirty-one soldiers were killed in a suicide bombing in October 2014, Sisi declared a state of emergency in Northeast Sinai that encompassed Rafah, Sheikh Zuwayd, Al-Arish, and dozens of other villages.³⁴⁹ As of the writing of this Article, emergency law is still in effect.³⁵⁰

As terrorists killed more soldiers—interpreted by some Egyptians as an indicia of military ineptness—the Egyptian military imposed a media blackout.³⁵¹ Designating North Sinai as a military zone, the military prohibited journalists from entering.³⁵² Western journalists

342. Ronen, *supra* note 64, at 302.

343. U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, *supra* note 339; *Egypt: Ten Extremists Killed, 11 Arrested in North Sinai*, ALL AFRICA (Mar. 1, 2014), <http://allafrica.com/stories/201403031320.html>; *Egyptian Soldier Killed in Sinai Bus Attack*, AL ARABIYA (Mar. 30, 2014), <http://english.alarabiya.net/en/News/middle-east/2014/03/30/Egyptian-soldier-killed-in-Sinai-bus-attack-.html> [<https://perma.unl.edu/KC4E-Z8XP>]; Eleiba, *supra* note 243.

344. U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, *supra* note 339.

345. Ezrow, *supra* note 325.

346. Gold, *supra* note 11, at 3.

347. Revkin, *supra* note 26; *15 Dead, 134 Injured in Egypt's Mansoura Explosion*, *supra* note 340.

348. *Militants Claim Downing of Egyptian Helicopter in Sinai*, TIMES ISR. (Jan. 26, 2014, 12:13 PM), <http://www.timesofisrael.com/militants-claim-downing-of-egyptian-helicopter/> [<https://perma.unl.edu/RRS8-AYP5>].

349. Ismail Alexandrani, *The Politics of the Egypt-Gaza Buffer Zone*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Nov. 25, 2014), <http://carnegieendowment.org/sada/?fa=57316>. As of the writing of this article, that state of emergency is still in effect. Mostafa Hashen & Eric Knecht, *Egypt Extends State of Emergency in North Sinai by Three Months*, REUTERS (Oct. 28, 2015, 6:10 AM), <http://www.reuters.com/article/us-egypt-sinai-idUSKCN0SM12T20151028> [<https://perma.unl.edu/7PN3-NPNB>]; Mohamed Hassan Shaban, *Egypt Declares "New" State of Emergency in North Sinai*, ASHARQ AL-AWSAT (April 26, 2015, 4:47 PM), <http://www.aawsat.net/2015/04/article55343110/egypt-declares-new-state-of-emergency-in-north-sinai> [<https://perma.unl.edu/XM3S-6LCB>].

350. Hashen & Knecht, *supra* note 349.

351. Alexandrani, *supra* note 349.

352. Agence France-Presse, *Egypt Imposes Anti-Terror Law that Punishes 'False' Reporting of Attacks*, GUARDIAN (Aug. 17, 2015, 1:00 AM), <http://www.theguardian.com>

were not permitted to pass military checkpoints on the road to Al Arish.³⁵³ Journalists able to reach Sinai or living in Sinai were harassed, intimidated, and had their equipment smashed.³⁵⁴ The less fortunate Egyptian reporters have been subjected to military trials for allegedly spreading false information and threatening national security—with the most recent case being Ismail Alexandrani in November 2015.³⁵⁵

Since October 2013, communication networks, mobile and land telephone lines, and the internet have been cut off six to twelve hours per day.³⁵⁶ In August 2015, the military's clamp down extended to a new counterterrorism law that imposed fines of 200,000 to 500,000 Egyptian pounds on anyone who published information on militant attacks or military operations that the military deemed false.³⁵⁷ Journalists could have their license stripped for up to one year.³⁵⁸ As a result, events in Sinai go unreported or are limited to government propaganda that omits material information that would disclose the military's struggle to retain control, including casualty rates of soldiers.³⁵⁹ For example, the military reported in July 2015 that more than 240 militants were killed, four wanted terrorists were arrested, and twenty-nine terrorist suspects were arrested after simultaneous attacks on military checkpoints.³⁶⁰ Two months later in September 2015, the military reported killing 415 militants and arresting 320 people.³⁶¹ Meanwhile, Wilayat Sinai claimed responsibility for at-

.com/world/2015/aug/17/egyptian-president-ratifies-law-to-punish-false-reporting-of-terror-attacks [https://perma.unl.edu/HPZ6-PSPE].

353. Gold, *supra* note 331.

354. *Id.*

355. Lucy Westcott, *Egypt Detains Freelance Journalist Ismail Alexandrani*, NEWSWEEK (Dec. 2, 2015, 11:35 AM), <http://www.newsweek.com/egypt-detains-freelance-journalist-ismail-alexandrani-400276> [https://perma.unl.edu/5PVK-FQWU]; *Egypt Arrests Prominent Journalist over 'False Information'*, YAHOO! NEWS (Dec. 1, 2015), <http://news.yahoo.com/egypt-arrests-prominent-journalist-return-berlin-164443343.html> [https://perma.unl.edu/C25Z-HP46].

356. Alexandrani, *supra* note 349; Adham Youssef, *North Sinai's Telecommunications Remain Poor: Residents*, DAILY NEWS EGYPT (July 21, 2015), <http://www.dailynewsegypt.com/2015/07/21/north-sinai-telecommunications-remain-poor-residents/> [https://perma.unl.edu/9ZBK-K6K6]; *Fighting in Sinai Kills 2 Egyptian Soldiers*, AL ARABIYA ENGLISH (Dec. 20, 2013), <http://english.alarabiya.net/en/News/middle-east/2013/12/20/Fighting-in-Sinai-kills-2-Egyptian-soldiers.html> [https://perma.unl.edu/8VM4-US4L].

357. Agence France-Presse, *supra* note 352; Malsin, *supra* note 113.

358. Agence France-Presse, *supra* note 352.

359. Baroud, *Poverty*, *supra* note 24; Gold, *North Sinai*, *supra* note 331; Malsin, *supra* note 113.

360. Mohamed & Hassan, *supra* note 104; *241 'Terrorists' Killed in North Sinai in 5 Days: Military*, AHARAM ONLINE (July 6, 2015), <http://english.ahram.org.eg/NewsContent/1/64/134680/Egypt/Politics/-terrorists-killed-in-North-Sinai-in—days-Militar.aspx> [https://perma.unl.edu/9J6T-5YZ3].

361. Aboulenein & Abdelaty, *supra* note 184.

tacking fifteen security sites and carrying out three suicide bombings that killed more than twenty-one soldiers.³⁶² Without independent journalists, it is difficult to know whether the military's reports are accurate and to what extent innocent civilians are being rounded up in the security sweep, similar to what occurred in 2004 to 2006.

What has unfolded in Sinai over the past five years is a return to the cycle of state and nonstate violence that adds fresh wounds to the local populations' longstanding grievances, making stability more elusive.³⁶³ The military has taken the place of the loathed Ministry of Interior's security services in collectively punishing residents. Intense and sustained military operations have killed hundreds of militants, but they have also led to human rights violations. Main roads are closed and checkpoints litter the road between Al Arish and Rafah, making the thirty-five minute ride a three to four hour trek of humiliation at the hands of state security.³⁶⁴ The military clampdown has also created a shortage in drinking water, food, and skyrocketing inflation.³⁶⁵ The heavily armed militant groups brutally kill any civilian they suspect of sympathizing with or assisting the military while the military suspects those not assisting the army of being terrorists.³⁶⁶ Residents are caught in the crossfire between the militants and the military.³⁶⁷

The military's scorched-earth strategy has destroyed hundreds of homes and farms through raids and airstrikes.³⁶⁸ With no warnings to evacuate, air bombings have killed civilians and burned homes of impoverished Bedouin.³⁶⁹ The indiscriminate tactics that kill civilians while militants hide in safety evince a lack of good intelligence by

362. Mohamed & Hassan, *supra* note 104; *Egyptian Army Counters Major Attack by IS Militants in North Sinai; Dozens Killed*, AHRAH ONLINE (July 1, 2015), <http://english.ahram.org.eg/NewsContent/1/64/134218/Egypt/Politics-/LIVE-UPDATES-Largest-attack-on-restive-Sinai-leave.aspx> [https://perma.unl.edu/3T4F-EPA5].

363. Gill Cohen, *Egypt Cabinet Passes Anti-Terrorism Law Amid Deadliest Sinai Battle in 40 Years*, HAARETZ (July 1, 2015, 9:25 PM), <http://www.haaretz.com/news/middle-east/1.663992> [https://perma.unl.edu/4KV5-ASAS]; *Fighting in Sinai Kills 2 Egyptian Soldiers*, *supra* note 356.

364. *Terrorism and the City*, *supra* note 284.

365. Ezzidin, *supra* note 30; Youssef, *supra* note 356.

366. *Terrorism and the City*, *supra* note 284; *What Is Left of 'October's Sinai'?*, *supra* note 65.

367. Ezzidin, *supra* note 30.

368. Gold, *supra* note 11, at 4.

369. *Egypt Says Fighters Killed in Sinai Clashes*, AL JAZEERA (July 27, 2014), <http://www.aljazeera.com/news/middleeast/2014/07/egypt-says-fighters-killed-sinai-clashes-201472775643852646.html> [https://perma.unl.edu/7W83-W8JF]; *Sinai Peninsula Rocket Kills 9-Year Old Child*, MIDDLE EAST EYE (Jul. 29, 2014, 10:27 AM), <http://www.middleeasteye.net/news/sinai-peninsula-rocket-kills-9-year-old-child-313973812> [https://perma.unl.edu/VK4P-8TYC]; *Egypt: Non-Commissioned Officer, 8 Takfiris Killed in North Sinai Campaign*, ALL AFRICA (Jul. 30, 2014), <http://allafrica.com/stories/201407310371.html>.

government officials.³⁷⁰ Sinai residents have also complained of security personnel stealing their money, jewelry, clothes, and furniture before burning down their homes under the auspices that they belong to terrorist suspects.³⁷¹ Militant groups, in turn, leverage populist anger to recruit Bedouin and other Sinai residents to attack the army as self-defense and retribution for rights abuses.³⁷² State violence only begets more nonstate violence.

One tactic, in particular, has angered tens of thousands of Rafah residents and effectively depopulated the city of Rafah.³⁷³ In October 2014, Sisi announced the military would create a buffer zone within 1,000 meters (originally 500 meters) of the Gaza-Rafah border. Rather than use sophisticated tunnel detecting technology, the military razed all homes and buildings to eliminate all smuggling tunnels to Gaza.³⁷⁴ Residents—most of whom are not Bedouin—were given only forty-eight-hours notice to pack their belongings and leave their homes.³⁷⁵ Between 1,200 and 2,000 homes have been destroyed, hundreds of hectares of farmland razed, and 3,200 families forcibly evicted over the past two years.³⁷⁶ Residents did not receive sufficient compensation for their homes and none at all for their farmland.³⁷⁷ Nor did residents have any effective means to challenge their eviction, demolition, or amount of compensation.³⁷⁸ Thus, the expelled re-

370. Lyons & Houry, *supra* note 214; Ezzat, *supra* note 24 (noting concerns with extremists' infiltration of Egypt's military intelligence).

371. Alexandrani, *supra* note 59, at 8; *Sisi Creates Unified Military Command to Combat Terrorism in Egypt's Sinai*, AHARAM ONLINE (Jan. 31, 2015), <http://english.ahram.org.eg/NewsPrint/121835.aspx> [<https://perma.unl.edu/93SA-HY42>].

372. Alexandrani, *supra* note 59, at 20 (“The security state has experienced the repercussions of building anger in the hearts of the Bedouins of the border region.”); Awad & Hashem, *supra* note 241.

373. *See Egypt Begins Work on 2nd Stage of Sinai-Gaza Security Buffer Zone*, JEWISH NEWS SERV. (Jan. 6, 2015), [http://www.jns.org/news-briefs/2015/1/6/egypt-begins-work-on-2nd-stage-of-sinai-gaza-security-buffer-zone#.VSndC_nF9IE=](http://www.jns.org/news-briefs/2015/1/6/egypt-begins-work-on-2nd-stage-of-sinai-gaza-security-buffer-zone#.VSndC_nF9IE) [<https://perma.unl.edu/37AW-EHWC>].

374. David D. Kirkpatrick, *Egypt Destroying Far More Homes than Buffer-Zone Plan Called For, Report Says*, N.Y. TIMES (Sept. 22, 2015), <http://www.nytimes.com/2015/09/22/world/egypt-destroying-far-more-homes-than-buffer-zone-plan-called-for-report-says.html?nytmobile=0>; Lyons & Houry, *supra* note 214; SHARP, *supra* note 40.

375. Alexandrani, *supra* note 349; al-Anani, *supra* note 227.

376. Mazen, *supra* note 138; Lyons & Houry, *supra* note 214; *see also* SABRY, *supra* note 32, at 236 (“[T]he military forces destroyed some two thousand houses in the one-kilometer area lining the border with Gaza.”).

377. Sonia Farid, *Razing Rafah: The Toll of the Buffer Zone*, AL ARABIYA ENGLISH (Jan. 27, 2015), <http://english.alarabiya.net/en/perspective/analysis/2015/01/27/Razing-Rafah-The-toll-of-the-buffer-zone.html> [<https://perma.unl.edu/P5HQ-HZ4S>] (reporting compensation will be provided to those forced to evacuate).

378. Lyons & Houry, *supra* note 214; Kirkpatrick, *supra* note 374 (“[R]esidents . . . were pressured into accepting inadequate payments for their homes”).

sidents have all the more reason to join their Bedouin neighbors in decrying government abuses.³⁷⁹

As the military's rhetoric focused on the weapons smuggling occurring in the tunnels, they failed to discuss the economic conditions that produced the underground tunnels in the first place.³⁸⁰ Few employment opportunities in Sinai coupled with Israel's harsh restrictions on trade to Gaza produced a lucrative black market.³⁸¹ Bedouin, other Sinai residents, and Egyptian security all benefited financially from the tunnel smuggling. Indeed, without Egyptian security cooperation (for bribes) the tunnels could not have operated for so many years.³⁸² Thus, when Sisi violently created the buffer zone, he not only made thousands of Rafah residents homeless but he also stripped them of their main source of income without providing alternative lawful employment.³⁸³ The Sisi regime's tactics transformed a security problem into a full-fledged insurgency.³⁸⁴

As Sinai's residents bore the brunt of militarized governance, they also fell victim to militant groups' barbaric violence.³⁸⁵ For example, militants killed eight Bedouin within two days in December 2013 for allegedly collaborating with the army.³⁸⁶ In August 2014, ABM decapitated four men in North Sinai for allegedly being informants for Israel.³⁸⁷ In the spring of 2015, a member of the Tarabin tribe refused to distribute a Wilayat Sinai flyer. That same day, the militants went to his house and killed him.³⁸⁸ Other Bedouin have been targets of violence for speaking out against the militants.³⁸⁹ In another case in April 2015, Wilayat Sinai kidnapped, raped, and beheaded a Bedouin woman for allegedly collaborating with the army.³⁹⁰ Targeting women, a serious offense under Bedouin traditions, triggered a conflict

379. Alexandrani, *supra* note 349.

380. Lucia Ardovini, *General Sisi Fights on All Fronts to Secure Egypt's Borders*, CONVERSATION (Feb. 18, 2015, 11:20 AM), <http://theconversation.com/general-sisi-fights-on-all-fronts-to-secure-egypts-borders-37718> [<https://perma.unl.edu/6EPA-SQ8X>].

381. Aswat Masriya, *Egypt Closes Rafah Border Crossing, Thousands Still Waiting to Cross*, AHRAM ONLINE (Dec. 6, 2015), <http://english.ahram.org.eg/NewsPrint/172706.aspx> [<https://perma.unl.edu/5BJU-JNH7>].

382. SABRY, *supra* note 32, at 131, 224.

383. *See* Alexandrani, *supra* note 349.

384. Ezrow, *supra* note 325.

385. SABRY, *supra* note 32, at 176.

386. Gold, *supra* note 11, at 4.

387. al-Anani, *supra* note 227.

388. Awad & Abdou, *supra* note 137.

389. Ahmed Mamdouh, *Wilayat Sinai Executes a Bedouin in Sheikh Zuweid*, AL-BAWABA EGYPT (April 27, 2015, 12:33 PM), <http://www.albawabaeg.com/53809> [<https://perma.unl.edu/8SHY-VK9K>].

390. Hassan & Bayoumy, *supra* note 104; *see also* *Are Tribes in Sinai Really Unifying Against Terrorism?*, *supra* note 271.

between the militants and some tribes.³⁹¹ The Egyptian media reported that more than a dozen tribes issued a joint statement condemning the militants and allying themselves with the government to fight against terrorism.³⁹² The tribes reportedly went so far as putting a \$130,000 bounty on a militant leader.³⁹³ Although some analysts question the veracity of the statement, that the Bedouin were willing to put aside the decades of state neglect and violence to ally with the state speaks volumes about the level of violence employed by the militants.³⁹⁴ Moreover, the militants' activities are threatening the tribes' business interests and encroaching on their land.³⁹⁵

V. CONCLUSION

This Article looks to the Sinai as a case study to demonstrate that authoritarian state violence is a counterproductive response to terrorism. Securitized counterterrorism policies escalate the violence, increase the civilian death toll and legitimize the terrorists groups' narratives as the peoples' defenders against state injustice. Thus, human development should replace the predominant "security first" approaches in developing long term, sustainable policies for decreasing politically motivated, nonstate violence. In doing so, international organizations must candidly address the role of authoritarianism and its externalities in producing nonstate violence in the form of terrorism. That is, state violence perpetrated by dictatorships creates a culture of fear and violence where the only means of resisting oppression is through more violence.³⁹⁶ Terrorist groups leverage the anger of local residents collectively punished for acts of resistance to recruit,³⁹⁷ causing the cycle of deprivation and instability to continue unabated. Meanwhile, nonviolent opponents to political repression are marginalized as naïve and ineffective. In the end, the militarized approach to governance pushes failing states further on the path toward becoming

391. *Are Tribes in Sinai Really Unifying Against Terrorism?*, *supra* note 271. Paradoxically, militant groups exploit the sexual assault of female detainees by security officials to recruit Egyptians and attack the military. Awad & Hashem, *supra* note 241; *Sinai 'Suicide Bombing' Kills At Least 6 Egyptian Policemen, 10 Wounded*, *supra* note 26.

392. Hassan & Bayoumy, *supra* note 104; Hossam Mostafa, *Internet and Communication Services are Back in Sinai*, *CAIRO POST* (Oct. 18, 2013, 2:16 AM), <http://thecairopost.com/news/19646/news/internet-and-communication-services-are-back-in-sinai> [<https://perma.unl.edu/QT3B-9U89>].

393. Awad & Abdou, *supra* note 137.

394. *Are Tribes in Sinai Really Unifying Against Terrorism?*, *supra* note 271; Hassan & Bayoumy, *supra* note 104.

395. Hassan & Bayoumy, *supra* note 104; Awad & Abdou, *supra* note 137.

396. See generally RICHARD JACKSON ET AL., *TERRORISM: A CRITICAL INTRODUCTION* (2011) (arguing that terrorism is socially constructed such that nonstate violence is deemed terrorism while the state violence is sanctioned as national security).

397. Gold, *supra* note 11, at 6.

a conflict zone.³⁹⁸ As a result, scholars have found that terrorism is correlated with political repression, and aggravated when coupled with poverty.³⁹⁹

As this Article's in-depth examination of the underlying causes of insurgency and terrorism in Sinai demonstrates, counterterrorism policies are deficient for at least three reasons. First, Western counterterrorism agendas that focus on short term prevention of violent extremism without meaningfully addressing the underlying political, social, and economic conditions contribute to the rise of violent extremism over the long run.⁴⁰⁰ Second, securitization of human development results in over-allocating resources to military and security personnel while neglecting the development needs of the local population who are the first targets of recruitment by militant groups.⁴⁰¹ Although nations pay lip service to development as integral to stability,⁴⁰² development remains an afterthought to national security. So long as the ongoing development projects do not address the social, political, and economic problems head on, efforts spent on development will merely exacerbate Sinai's downward spiral into a failing sub-state. Finally, the failure to localize and contextualize the causes of violent extremism that arise from underdevelopment lends itself to one-size-fits-all counterterrorism strategies that aggravate rather than reduce violence.⁴⁰³ And when development is undertaken, it

398. MICHELE DUNNE, CARNEGIE ENDOWMENT FOR INT'L PEACE, A U.S. STRATEGY TOWARD EGYPT UNDER SISI (2014), http://carnegieendowment.org/files/us_strategy_under_sisi.pdf [<https://perma.unl.edu/66US-FMY3>].

399. Richard J. Hughbank & Joseph Ferrandino, *Members Wanted: Terrorism and its Growth Industry*, 6 HOMELAND SECURITY REV. 245, 249 (2012) (“[S]ubstantial Muslim populations, widespread poverty, poor policing, inadequate border control, and systemic political and economic corruption’ serve as breeding grounds in the recruitment effort.”); Noémie Bouhana & Per-Olof H. Wikström, *Theorizing Terrorism: Terrorism as Moral Action*, 2 CONTEMP. READINGS IN L. & SOC. JUST., no. 2, 2010, at 9, 32–33 (citations omitted) (“A similar logic extends to the search for ‘the causes of the causes,’ the systemic factors thought to play a part in the emergence of terrorism . . . , such as inequality, development, social strain, conflict and poverty, or the ever-popular ‘globalization’, which are not a cause of action, but are part of the background of action, through their indirect influence on (1) the characteristics and experiences individuals come to have, and (2) the contexts in which they come to operate.”).

400. See, e.g., Bilgin & Morton, *supra* note 2, at 169 (noting that public policy discourse on failed states focuses on symptoms of state failure, including international terrorism, rather than conditions that cause such failures to occur).

401. Newman, *supra* note 5, at 34 (defining securitization as “the process by which issues are accorded security status or seen as a threat through political labelling, rather than as a result of their real or objective significance”); DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, *supra* note 16 (converging security, peace-building, and development); Call, *supra* note 12, at 1496–97.

402. ELIAS H. TUMA, ECONOMIC AND POLITICAL CHANGE IN THE MIDDLE EAST 50 (2015).

403. Bøås & Jenning, *supra* note 9, at 476–77 (“Every state is a culmination of unique historical processes.”); de Graaff, *supra* note 6, at 18–19.

often suffers from the domestic and foreign governments' failure to include local Bedouin and other Sinai leaders in the planning and implementation.⁴⁰⁴ Thus, international responses should be grounded in localized political, social, and economic needs—not merely international security or Western interests.⁴⁰⁵

To be sure, the development and security challenges in Sinai are grave. No easy solutions exist to the complex, localized causes of instability, political repression, and poverty. As witnessed in Iraq and Syria, Wilayat Sinai's local insurgency may spread beyond its borders and merge with other burgeoning ISIS branches in Tunisia, Libya, and other North African nations. Sinai offers the international community an opportunity to be an exemplar in creating a more effective and sustainable model to prevent terrorism.

Most notably, Sinai teaches that nonstate violence arises from local social, political, and economic grievances associated with state violence—not religious ideology. The latter is a second order problem consequent to the first order economic, social, and political problems. Policy responses, therefore, must be contextualized within the local environment where violence is occurring—whether it is Sinai, Iraq, Syria, Yemen, Libya, or other conflict zones in the Middle East. In contrast, a homogenous regional approach is sure to fail due to the vast differences in demographics, history and context across the region. Local residents are entitled to plan and lead development efforts with assistance from their government and the international community, rather than the other way around.

What happens in Sinai can offer valuable insights for policy makers and international organizations engaged in development and counterterrorism in failing states. The lessons learned from the Sinai can be applied to other contexts where nonstate violence is high to develop effective counterterrorism strategies that address the underlying causes rather than the symptoms of terrorism. With the decreasing relevance of borders, fluidity of migration, and ubiquity of technology, the nature of conflict has fundamentally changed over the past century. Nonstate actors have grown both in number and strength as they challenge nation states' monopoly over the use of force and make nation-state borders all the less relevant.

It is long overdue to revisit how the international community seeks to reduce violence both in strong and fragile states, and ultimately minimize the threat of terrorism. Shifting our paradigm to recognize that nonstate action is an offspring of state violence, particularly in authoritarian states, is an important step toward that end.

404. Newman, *supra* note 5, at 24.

405. de Graaff, *supra* note 6, at 16.

Losing the “War of Ideas”: A Critique of Countering Violent Extremism Programs

Sahar F. Aziz¹

American national security is a priority that crosses partisan lines. Americans of all races, ethnicities and religions are equally concerned with ensuring our country is safe from violence – whether politically motivated terrorism, state violence, or violent crime.² Furthermore, we all share an interest in preventing violence before it occurs. Toward that end, citizens and elected officials have a responsibility to carefully examine whether the methods we are using to prevent terrorism are effective.

In 2011, the Obama administration initiated a “Countering Violent Extremism” program purportedly aimed at tackling the underlying causes of terrorism domestically and abroad.³ According to the White House, “CVE efforts address the root causes of extremism through community engagement” and “the underlying premise of the approach to countering violent extremism in the United States is that (1) communities provide the solution to violent extremism; and (2) CVE efforts are best pursued at the local level, tailored to local dynamics, where local officials continue to build relationships within their communities through established community policing and community outreach mechanisms.”⁴

In January 2017, the Trump administration announced it would change the name of the program to “Countering Islamic Extremism” to reflect his administration’s intentions to focus exclusively on terrorism committed by individuals claiming to be Muslim, while excluding terrorism committed by others including White Supremacists.⁵ Notwithstanding the outcry by civil rights advocate on Trump’s renaming of the program, CVE has always been focused on Muslim

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² Although there is no single definition of terrorism in U.S. or international law, I define terrorism here as an attack on civilians for larger political objectives, whether couched in religious or secular narratives. See 22 U.S.C. § 2656f(d)(2) (2004); 28 C.F.R. § 0.85 (2012); U.S. Dep’t of Defense, Directive 2000.12 (Mar. 1, 2012), available at <http://www.dtic.mil/whs/directives/corres/pdf/200012p.pdf>; Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEX. L. REV. 1715, 1718 n.10 (2010); Joshua Sinai, *How to Define Terrorism*, 2 PERSP. ON TERRORISM 9, 10 (2008).

³ Press Release, Office of the Press Secretary, The White House, FACT SHEET: The White House Summit on Countering Violent Extremism (Feb. 18, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/18/fact-sheet-white-house-summit-countering-violent-extremism>.

⁴ *Id.*

⁵ Julia Edwards Ainsley, Dustin Volz & Kristina Cooke, Exclusive: Trump to focus counter-extremism program solely on Islam, Reuters (Feb. 2, 2017) <http://www.reuters.com/article/us-usa-trump-extremists-program-exclusiv-idUSKBN15G5VO>.

communities in the United States. Trump's actions merely validate what critics of the CVE program claimed all along.

Despite the Obama administration's lofty rhetoric, this article argues that CVE programs are fundamentally flawed for three reasons: they are counterproductive, unnecessary, and a waste of government resources. Government programs seeking to build community resilience are most effective when administered by social service agencies with the requisite expertise, not law enforcement agencies. As such, this article addresses four fundamental flaws with CVE: 1) CVE programs securitize Muslim communities and validate terrorists' narratives that America is at war with Islam; 2) CVE programs are unnecessary to prevent domestic terrorism; 3) CVE programs are a waste of government resources; and 4) government funds for community development and resilience should be funded and administered by social service agencies without law enforcement control.

First, CVE programs managed and funded by the U.S. Department of Homeland Security and the U.S. Department of Justice securitize government-community relations such that Muslims are perceived and engaged primarily through a security lens.⁶ Muslim Americans are treated as potential terrorists first, and citizens second. Such securitized treatment of an entire religious community is counterproductive. Not only does it risk innocent Americans' civil liberties and signal to the public that Muslims warrant collective suspicion, but CVE focused on Muslims confirms international terrorists' narratives that America is at war with Islam.⁷ In turn, terrorists point to such religious profiling and selective targeting of Muslims in their international recruiting efforts to gain followers and sympathy for their perverse political agenda.⁸

Second, CVE programs are unnecessary to preserve American national security. Muslims – like other Americans – do not need a special program for them to be good Samaritans that report suspicious criminal activity of which they have knowledge. Indeed, a Duke University report found that Muslim communities across the country have a positive relationship with their local police or express a willingness to engage with police departments based on principles of fairness and equal treatment.⁹ And according to the New America Foundation, approximately 60% of terrorism plots have been prevented due to traditional investigative methods, including about

⁶ See, e.g. Carl W. Enst (ed.), *ISLAMOPHOBIA IN AMERICA: THE ANATOMY OF INTOLERANCE* (2013); Jeffrey L. Thomas, *SCAPEGOATING ISLAM: INTOLERANCE, SECURITY, AND THE AMERICAN MUSLIM* (2015).

⁷ See Sahar F. Aziz, *Policing Terrorists in the Community*, 5 Harv. Nat'l Sec. L.J. 147 (2014); Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429 (2011/2012).

⁸ E.g., Tiffany Ap, *Al-Shabaab recruit video with Trump excerpt: U.S. is racist, anti-Muslim*, CNN (Jan. 3, 2016, 9:20 AM), <http://www.cnn.com/2016/01/02/middleeast/al-shabaab-video-trump/>. See also Sahar Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 Gonz. L. Rev. 429 (2011/2012).

⁹ David Schanzer, et al., *Triangle Center on Terrorism and Homeland Security, Sanford School of Public Policy, Duke University, The Challenge and Promise of Using Community Policing Strategies to Prevent Violent Extremism* (2016), <https://sites.duke.edu/tcths/files/2016/05/The-Challenge-and-Promise-of-Using-Community-Policing-Strategies-to-Prevent-Violent-Extremism.pdf>.

18% by initial tips from Muslim communities without the need for costly and counterproductive CVE programs.¹⁰

Third, the tens of millions of dollars spent on CVE programs are better spent on programs administered through social services agencies with the expertise to assist the multitude of American communities in need of job training, mental health services, domestic violence prevention, English language training, refugee resettlement, youth afterschool programs, tutoring, and other services that promote safe and healthy communities.¹¹ To the extent the U.S. government seeks to engage in good faith efforts to support the diverse Muslim American communities, resources should be managed by institutions whose missions are to develop communities, not prosecute and incarcerate individuals based on racial and ethnic stereotypes.

I. The Dueling Definitions of Countering Violent Extremism

Countering violent extremism is a term often invoked but rarely defined. Proponents and opponents of CVE disagree on its strengths and weaknesses while implicitly assuming there is agreement on the definition of CVE.¹² As such, a brief summary of the dueling definitions is warranted.

In general, there are two definitions of CVE that influence stakeholders' positions on CVE programs. The first definition considers CVE as the soft arm of counterterrorism that supplements anti-terrorism surveillance, sting operations, prosecution, and convictions. The second definition treats CVE as separate, though complementary, to counterterrorism insofar as it is focused more on providing long term social services to individuals and communities believed to be at risk of engaging in terrorism. Hence, both definitions presume that stopping "radicalization" of individuals to engage in terrorism is the ultimate goal of CVE.¹³ And, both definitions accept that certain communities are targeted by CVE based on those communities' common identities with perpetrators of terrorism. In the post-9/11 era under both Obama and

¹⁰ Peter Bergen, David Sterman, Emily Schneider, & Bailey Cahall, New America Foundation, Do NSA's Bulk Surveillance Programs Stop Terrorists? 4-5 (2014), <https://na-production.s3.amazonaws.com/documents/do-nsas-bulk-surveillance-programs-stop-terrorists>; Michael Hirsh, *Inside the FBI's Secret Muslim Network: While candidates stoke fears of Islam, a little-known counterterror program has been going exactly the other way*, Politico (Mar. 24, 2016), <http://www.politico.com/magazine/story/2016/03/fbi-muslim-outreach-terrorism-213765>.

¹¹ See Jana Kasperkevic, *Welfare programs shown to reduce poverty in America*, Guardian (Nov. 12, 2014 1:39 PM), <https://www.theguardian.com/money/us-money-blog/2014/nov/12/social-welfare-programs-food-stamps-reduce-poverty-america>.

¹² The Council on American-Islamic Relations, Brief on Countering Violent Extremism, (July 2015) <https://www.cair.com/government-affairs/13063-brief-on-countering-violent-extremism-cve.html>.

¹³ Samuel J. Rascoff, Establishing Official Islam? The Law and Strategy of Counter-Radicalization, 64 Stan. L. Rev. 125, 137.

Trump, those targeted communities have been exclusively Muslim, Arab, and South Asian notwithstanding the documented rise of White Supremacist groups in the United States.¹⁴

Implicitly adopting the soft counterterrorism definition, the White House Initiative on Countering Violent Extremism under Obama concluded “family members, friends, or close acquaintances are the most likely to observe activities or behaviors suggesting an individual is being radicalized or has violent intent.”¹⁵ And accordingly, the government’s newly created CVE Interagency Task Force “will coordinate the development and dissemination of resources describing possible warning signs as well as steps families and friends can take if they believe someone close to them is becoming recruited or radicalized to violence. The resources will include information for trusted members of local communities who those families and friends may call upon for guidance or assistance.”¹⁶

According to John Cohen, former Undersecretary for Intelligence and Analysis and the Counter-Terrorism Coordinator in the United States Department of Homeland Security: “In most cases, those radicalized to violence exhibit behaviors of concern that are observed by those who associate with that individual. This is why United States law enforcement and homeland security officials have sought to develop and employ locally based prevention strategies designed to aid authorities in detecting those on the verge of ideologically motivated violence. These programmatic efforts have become known as “countering violent extremism.”¹⁷ Cohen tellingly stated that CVE “is an operational model informed by long-standing behavioral risk assessment and threat management techniques employed by organizations such as the United States Secret Service and involves incorporating CVE into community-based, multidisciplinary activities intended to prevent targeted violent activity and mass casualty attacks more broadly.”¹⁸

The second definition of CVE proffers that social services should be deployed to address long term challenges facing communities whose members are believed to be more prone to joining terrorist groups or engaging in terrorism as lone wolves.¹⁹ Accordingly, terrorism should not be countered exclusively with intelligence, police, and military means;²⁰ but also through a focus on

¹⁴ Muslim Advocates, Countering Violent Extremism (CVE), <https://www.muslimadvocates.org/cve-countering-violent-extremism/>; Mark Potok, *The Year in Hate and Extremism*, Southern Poverty Law Center (Feb. 17, 2016) <https://www.splcenter.org/fighting-hate/intelligence-report/2016/year-hate-and-extremism>.

¹⁵ Executive Office of the President of the United States, STRATEGIC IMPLEMENTATION PLAN FOR EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES (2016), *available at* https://www.brennancenter.org/sites/default/files/2016_strategic_implementation_plan_empowering_local_partners_prev%20%282%29.pdf.

¹⁶ *Id.*

¹⁷ John D. Cohen, The Next Generation of Government CVE Strategies at Home: Expanding Opportunities for Intervention, 668 *Annals* 118, 119.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ What is CVE (Countering Violent Extremism)?, <http://www.patheos.com/blogs/altmuslim/2016/11/what-is-cve-countering-violent-extremism/>

the “structural causes of violent extremism . . . including intolerance, government failure, and political, economic, and social marginalization.”²¹ As such, proponents of this definition CVE in the domestic context believe they are the counterparts of those working on human rights, development, and peacebuilding in the international conflict resolution context.²² This definition assumes that CVE programs provide opportunities for marginalized communities to bring their concerns to police and federal law enforcement officials. And the reasoning goes that engagement between local communities, civil society, and government agencies make communities more resilient and governments more responsive to those communities’ concerns. Such efforts are operationalized through town hall meetings and roundtable discussions. Furthermore, implementing this CVE model provides safe spaces for discussions on sensitive civic and religious topics without fear of stigma or shame. Despite the stated community capacity building goal of this second definition of CVE, the objectives are similar to the first soft counterterrorism definition- to stop terrorism in the short term. In doing so, social service agencies and community members in CVE should engage in 1) intervention to dissuade at-risk youth from engaging in violence; 2) interdiction to stop individuals taking tangible steps toward violent action; and 3) rehabilitate individuals released into the public after incarceration for a terrorism related crime.²³

Former Deputy National Security Advisor Denis McDonough appears to adopt the second definition; although his rhetoric sends mixed messages. On the one hand, McDonough states that as CVE devotes more resources to research and analytics, the government would also expand “our engagement with local communities that are being targeted by terrorist recruiters,” as well as have other departments “like Health and Human Services and Education” join with communities “to better understand and address the social, emotional and economic challenges faced by young people,” in addition to U.S. Attorneys “leading a new coordinated federal effort to deepen our partnerships with communities on a host of issues.” On the other hand, McDonough highlighted that community partnerships are a crucial component of effective counterterrorism that in turn allows the government to “discover and thwart many of their plots before they could kill.”²⁴ As such, the government should “work[] to empower local communities with the information and tools they need to build their own capacity to disrupt, challenge and counter propaganda, in both the real world and the virtual world.”²⁵ McDonough further stated that, “we’re expanding our coordination with state and local governments,

²¹ Owen Frazer & Christian Nünlist, *The Concept of Countering Violent Extremism*, 183 *CSS Analyses in Security Policy* 1.

²² *Id.* at 3.

²³ What is CVE (Countering Violent Extremism)?, <http://www.patheos.com/blogs/altmuslim/2016/11/what-is-cve-countering-violent-extremism/>

²⁴ Denis McDonough, Deputy Nat'l Sec. Advisor, *Remarks on Partnering with Communities to Prevent Violent Extremism in America* (Mar. 6, 2011) (transcript available at <http://www.cfr.org/terrorism/remarks-denis-mcdonough-deputy-national-security-advisor-partnering-communities-prevent-violent-extremism-america-march-2011/p24313>).

²⁵ *Id.* See also Hedieh Mirahmadi, *Building Resilience against Violent Extremism: A Community-Based Approach*, 668 *Annals* 129, 131.

including law enforcement, which work directly with communities every day” by developing and expanding “training for law enforcement, counter-terrorism fusion centers, and state officials.” Hence, CVE programs engage Muslim communities for the purpose of coopting communities to support the government’s counterterrorism efforts.

This article proffers that notwithstanding any rhetorical commitments to the second definition of CVE as community engagement; in practice, the soft counterterrorism definition of CVE controls government policy and practices. That is, CVE is a soft tool in law enforcement’s arsenal of counterterrorism methods ultimately aimed at maximizing the number of individuals investigated, prosecuted, and convicted for terrorism related crimes. And as a result, it poses serious civil liberties threats for targeted communities.

II. CVE Programs Securitize Muslim Communities and Validate Terrorists’ Warped Narratives that America is at War with Islam

Terrorists thrive on narratives of oppression and injustice as a means of recruiting vulnerable individuals.²⁶ The particular narrative selected is context-specific to the political, social, and economic circumstances that give rise to a terrorist group. For Al Qaeda and Da’esh (also known as ISIS or ISIL) based in the Middle East, a crucial component of their recruitment narrative is that the West, and America in particular, is at war with Islam.²⁷ Terrorists claim that Muslims are victims of Western hegemony in the Middle East through American military intervention and financial support of dictators that violently repress their Muslim citizens.²⁸ Da’esh portrays its violence as part of a defensive rather than offensive war where its leaders are the heroic defenders of the Muslim world against Western colonization.²⁹ In turn, Da’esh makes a call to arms for Muslims to kill civilians and governments that it unilaterally declares as enemies. Among Da’esh’s declared enemies are mainstream American Muslim leaders who have openly and repeatedly condemned Da’esh and rebuked its misinterpretation of Islamic principles.³⁰

²⁶ See Edward Newman, *Exploring the “Root Causes” of Terrorism*, *STUDIES IN CONFLICT & TERRORISM*, 29:749–772, 2006; Clint Watts, *Radicalization in the U.S. Beyond al Qaeda Treating the disease of the disconnection*, PROGRAM ON NATIONAL SECURITY FOREIGN POLICY RESEARCH INSTITUTE (2012).

²⁷ Madiha Afzal, *How we all reinforce a narrative of Islam versus the West*, Brookings (Aug. 4, 2016), <https://www.brookings.edu/blog/order-from-chaos/2016/08/04/how-we-all-reinforce-a-narrative-of-islam-versus-the-west/>.

²⁸ Matt Olson, *Why ISIS Supports Donald Trump*, Time (Sept. 8, 2016 9:31 AM), <http://time.com/4480945/isis-donald-trump/>; Tierney Sneed & Lauren Fox, *Why Some Jihadists Consider Donald Trump To Be The Perfect Enemy*, Talking Points Memo (June 30, 2016, 6:00 AM), <http://talkingpointsmemo.com/dc/trump-extremist-web-forums>.

²⁹ Alex P. Schmid, *Challenging the Narrative of the “Islamic State”*, in *Countering Violent Extremism: Developing an Evidence-base for Policy and Practice* 67 (Sara Zeiger & Anne Aly eds. 2015), https://www.nla.gov.au/sites/default/files/webform/draft_cve_developing_an_evidence-based_for_policy_and_practice.pdf.

³⁰ Patrick Goodenough, *ISIS Urges Supporters to Kill Muslim ‘Infidels’ in West, Including Congressman and Top Clinton Aide*, *cnsnews.com* (Apr. 13, 2016), <http://www.cnsnews.com/news/article/patrick-goodenough/isis-urges-supporters-kill-named-muslim-infidels-west-rep-ellison>; See also Ian Reifowitz, *Anti-ISIS Muslims face death*

Notwithstanding Da'esh and other terrorist groups' attempts to use religion as a justification for their politically-motivated violence, their claims are rejected by nearly all of the 1.5 billion Muslims across the world.³¹ An often overlooked fact that contributes to Da'esh's fringe status among the world's Muslims is that the majority of victims of terrorism are Muslim. According to the National Counter-terrorism Center's 2011 Report on Terrorism, in cases where the religious affiliation of terrorism casualties could be determined, Muslims suffered between 82% and 97% of terrorism-related fatalities during the prior five years and Muslim countries bore the brunt of the attacks involving 10 or more deaths.³²

Debunking Da'esh's specious claims on the theological merits is beyond the scope of this article; however it is worth noting that hundreds of credible, mainstream Muslim scholars from across the world issued the Open Letter to Baghdadi, among other documents, debunking Da'esh's specious theological claims.³³ Moreover, Muslim communities and leaders across the United States have rejected Da'esh's warped misappropriation of Islamic doctrine for violent political ends.³⁴ Thus, the issue before us today is not whether Da'esh represents the 1.5 billion Muslims across the world or the 3 to 6 million Muslims in America—the evidence is clear that it does not.

Rather, the issue that should be of concern to the government and the public is ensuring that the American government does not adopt counterproductive policies or practices that validate terrorists' claims of a “clash of civilization” between the West and Islam.³⁵ Religious profiling, racialized counterterrorism enforcement, and discrimination against Muslims not only infringes

threats. Is that 'enough' for Hannity and Trump lackey Ben Carson?, Daily Kos (May 15, 2016), <http://www.dailykos.com/story/2016/5/15/1525349/-Anti-ISIS-Muslims-face-death-threats-Is-that-enough-for-Hannity-and-Trump-lackey-Ben-Carson>.

³¹ Willa Frej, *How 70,000 Muslim Clerics Are Standing Up To Terrorism*, HUFFINGTON POST (Dec. 11, 2015), http://www.huffingtonpost.com/entry/muslim-clerics-condemn-terrorism_us_566adfa1e4b009377b249dea

³² The Nat'l Counterterrorism Ctr., Report on Terrorism 14 (2011), <https://fas.org/irp/threat/nctc2011.pdf>.

³³ Open Letter to Al-Baghdadi (2014), <http://www.lettertobaghdadi.com/>. See also *Muslim Leaders Refute ISIS*, THE FIQH COUNCIL OF NORTH AMERICA, <http://www.fiqhcouncil.org/node/69>; Emily Feldman, *How Muslim Groups, Scholars Have Been Fighting ISIS*, NBC CHICAGO (Dec. 9, 2015), <http://www.nbcchicago.com/news/national-international/Muslim-Scholars-Groups-Against-ISIS-Speal-Out-361309791.html>.

³⁴ *E.g.*, Stoyan Zaimov, *Muslim-Americans Condemn ISIS in Phoenix Billboard, Say Islam Is Religion of Peace, Not Terror*, Christian Post (Aug. 24, 2016, 11:17 AM), <http://www.christianpost.com/news/muslim-americans-condemn-isis-phoenix-billboard-islam-religion-peace-not-terror-168487/> (Muslim-Americans post billboard reading “HEY ISIS, YOU SUCK!!!”); Omar Jimenez, *Baltimore Muslims: Islam condemns ISIS, terror attacks*, WBAL-TV (Mar. 23, 2016, 6:16 PM), <http://www.wbaltv.com/news/baltimore-muslims-islam-condemns-isis-terror-attacks/38661300>; Alexandra Limon, *Muslims rally outside White House condemning ISIS, terrorism*, (Nov. 20, 2015 11:30 PM), <http://www.fox5dc.com/news/local-news/52446799-story>; Tatiana Sanchez, *San Diego Muslims condemn Paris attacks*, San Diego Union Tribune (Nov. 14, 2015, 8:38 PM), <http://www.sandiegouniontribune.com/news/sdut-cair-anniversary-banquet-islamic-2015nov14-story.html>; Shanika Gunaratna, *Muslim Americans rush to condemn Orlando massacre*, CBS News (June 13, 2016 12:52 PM), <http://www.cbsnews.com/news/orlando-shooting-pulse-nightclub-muslims-condemn-attack/>.

³⁵ See Schmid, *supra* note 13; Terrence McCoy, *The apocalyptic magazine the Islamic State uses to recruit and radicalize foreigners*, Wash. Post (Sept. 16, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/09/16/the-apocalyptic-magazine-the-islamic-state-uses-to-recruit-and-radicalize-foreigners/>.

on civil rights and liberties of Muslims, but is also exploited by terrorist groups to claim that Muslims are under attack to generate sympathy for their cause.³⁶

This is where America's CVE programs are highly problematic. The government portrays CVE as a means to build community resilience and development, separate from the dominant prosecution-driven counterterrorism model. However, the record clearly shows that CVE is an integral part of counterterrorism.³⁷ Law enforcement agencies, not social services agencies, are leading and funding CVE nationwide. The Department of Homeland Security (DHS), U.S. Attorneys, and the Federal Bureau of Investigations (FBI) lead government meetings with Muslim communities across the country.³⁸ The institutional agendas of FBI agents, federal prosecutors, and DHS officials – not social service agencies – shape CVE programs. For these reasons, the leading agencies of the federal interagency task force on CVE rotate between DHS and DOJ – whose missions are to investigate, prosecute, and convict criminal suspects.

That U.S. Attorneys are leading federal outreach at the local level raises further questions as to the relationship between counterterrorism enforcement and community engagement given that U.S. Attorneys are also the lead prosecutors of anti-terrorism laws.³⁹ Their participation as lead conveners of CVE meetings aggravates the inherent divergence between Muslim communities' interests in protecting their civil liberties and prosecutors' mandate to prosecute and show tangible results in the form of convictions. That is, law enforcement led programs signal to Muslim communities that their community development and resilience is not the government's priority. Rather the objective appears to be to deputize Muslim leaders to spy on each other, thereby breeding distrust and divisiveness within Muslim communities.⁴⁰

While prosecution-driven counterterrorism is an integral part of criminal enforcement, it should be conducted in accordance with civil and constitutional rights. Specifically, law enforcement should conduct investigations based on individualized suspicion arising from predicate acts of

³⁶ See Abbas Barzegar, Shawn Powers, & Nagham El Karhili, *Civic Approaches to Confronting Violent Extremism: Sector Recommendations and Best Practices* (Sept. 2016), http://www.britishcouncil.us/sites/default/files/civic_approaches_to_confronting_violent_extremism_-_digital_release.pdf.

³⁷ See Sahar F. Aziz, *Policing Terrorists in the Community*, 5 Harv. Nat'l Sec. L.J. 147 (2014) ; Amna Akbar *National Security's Broken Windows*, 62 UCLA L. Rev. 834 (2015).

³⁸ *Community Outreach*, FBI, <https://www.fbi.gov/contact-us/field-offices/losangeles/community-outreach-1> (last visited Sept. 20, 2016); Michael Hirsh, *Inside the FBI's Secret Muslim Network: While candidates stoke fears of Islam, a little-known counterterror program has been going exactly the other way*, Politico (Mar. 24, 2016), <http://www.politico.com/magazine/story/2016/03/fbi-muslim-outreach-terrorism-213765>.

³⁹ Laura Yuen, *Muslims fear anti-terror program could spy on their communities*, MPR News (Jan. 30, 2015), <http://www.mprnews.org/story/2015/01/30/anti-terror-program>; Mike German, *Is the FBI's Community Outreach Program a Trojan Horse?*, ACLU (Feb. 15, 2013, 3:33 PM), <https://www.aclu.org/blog/fbis-community-outreach-program-trojan-horse>; Paul McEnroe, *Twin Cities Muslim leaders challenge federal outreach effort as cloak for spying*, Star Tribune (Feb. 17, 2015, 11:32 PM), <http://www.startribune.com/area-muslim-leaders-call-federal-outreach-cloak-for-spying/292307031/>.

⁴⁰ Sahar F. Aziz, *Policing Terrorists in the Community*, 5 Harv. Nat'l Sec. L.J. 147 (2014).

criminal activity, not a broad (and false) assumption that Muslim communities en masse are “at risk” or “vulnerable” to terrorist recruitment and susceptible to engaging in terrorism.

III. CVE Signals to the Public that Muslims are a Suspect Community Leading to More Discrimination and Hate Crimes

Like the United Kingdom’s (UK) Prevent Program, which is the blueprint on which the US program is based, CVE target Muslim communities based on the false premise that Muslims are a suspect community and fifth column in the United States.⁴¹ The UK House of Commons found that Prevent’s exclusive focus on Muslims was stigmatizing, alienating, and counterproductive. The European Parliament also found that soft counter terrorism programs through counter-radicalization initiatives (which is effectively what CVE is) are detrimental to fostering community cohesion and do not succeed in their stated objectives to prevent terrorism.⁴² Professor Arun Kundnani, an expert on U.K. counterterrorism policy, warns that the U.S. program would “suffer from the same problems, such as drawing non-policing professionals into becoming the eyes and ears of counterterrorism surveillance, and thereby undermining professional norms and relationships of trust among educators, health workers, and others.”⁴³

CVE also legitimizes discrimination against Muslims. In the United States, numerous polls show a rise in anti-Muslim bias that is manifesting into tangible hate crimes, mosque vandalizations, employment discrimination, and bullying of Muslim kids in schools.⁴⁴ A 2015 poll in North

⁴¹ See Arun Kundnani, *THE MUSLIMS ARE COMING: ISLAMOPHOBIA, EXTREMISM, AND THE DOMESTIC WAR ON TERROR* (2015).

⁴² BRENNAN CENTER FOR JUSTICE, *Countering Violent Extremism: Myths and Fact*, <https://www.brennancenter.org/sites/default/files/analysis/102915%20Final%20CVE%20Fact%20Sheet.pdf>.

⁴³ Murtaza Hussein and Jenna McLaughlin, *FBI’s “Shared Responsibility Committees” to Identify “Radicalized” Muslims Raise Alarms*, *THE INTERCEPT* (April 9, 2016).

⁴⁴ *E.g.*, *Islamophobia: Understanding Anti-Muslim Sentiment in the West*, Gallup, <http://www.gallup.com/poll/157082/islamophobia-understanding-anti-muslim-sentiment-west.aspx> (last visited Sept. 2, 2016) (“In the U.S., about one-half of nationally representative samples of Mormons, Protestants, Catholics, Muslims, and Jews agree that in general, most Americans are prejudiced toward Muslim Americans. Specifically, 66% of Jewish Americans and 60% of Muslim Americans say that Americans in general are prejudiced toward Muslim Americans.”); Jonathan Easley, *SC exit poll: 75 percent agree with Trump’s Muslim ban*, Hill (February 20, 2016, 6:17 PM), <http://thehill.com/blogs/ballot-box/presidential-races/270156-sc-exit-poll-75-percent-agree-with-trumps-muslim-ban>. Rebecca Shabad, *CBS News projects Donald Trump win in South Carolina primary*, CBS (Feb. 20, 2016, 5:20 PM), <http://www.cbsnews.com/news/results-from-south-carolinas-gop-primary-to-soon-trickle-in/> (“Three-fourths of Republicans participating in Saturday’s South Carolina GOP primary say they support presidential hopeful Donald Trump’s proposal to ban all Muslims from entering the U.S., according to an exit poll.”); Tom Benning, *Most Texas voters support Donald Trump’s border wall and Muslim ban, poll says*, *Dall. Morning News* (June 28, 2016, 11:53 AM), <http://www.dallasnews.com/news/politics/headlines/20160628-most-texas-voters-support-donald-trumps-border-wall-and-muslim-ban-poll-says.ece> (last updated June 28, 2016, 4:18 PM) (“Nearly 52 percent of respondents said they strongly or somewhat support a wall along the Mexican border, compared with about 40 percent who oppose it. The numbers were similar in response to the idea of banning noncitizen Muslims from entering the U.S.”); Jesse Hellmann, *Poll: Americans split on Trump’s proposed Muslim ban*, Hill (June 16, 2016, 5:00 PM), <http://thehill.com/blogs/ballot-box/presidential-races/283789-poll-americans-split-on-trumps-muslim-ban-proposal> (“The NBC News/SurveyMonkey poll shows 50 percent of those surveyed support Trump’s proposed Muslim immigration ban, while 46 percent are opposed.”); Kristina Wong, *Poll: Half of*

Carolina, for example, reported 72% of respondents said that a Muslim should not be allowed to be president of the United States and 40% said that Islam should be illegal.⁴⁵ A 2015 study by LifeWay Research found that 27% of Americans believe ISIS represents what the Islamic religion really is—along with 45% of 1,000 “senior Protestant pastors.”⁴⁶ Another survey by the Economist/YouGov poll, found that 52% of Americans think Islam is more likely than other religions to encourage violence.⁴⁷

Such pervasive prejudice has produced tangible civil rights violations against innocent Muslims across the country.⁴⁸ A recent report by the Center for the Study of Hate and Extremism at California State University in San Bernardino found that anti-Muslim hate crimes increased 78% in 2015 at 196 as compared to 110 hate crimes in 2014.⁴⁹ Anti-Arab hate crimes rose by 219% from 21 in 2014 to 67 in 2015. Similarly, the civil rights organizations Muslim Advocates, reported that since the November 2015 Paris attacks, at least 100 hate crimes against Muslims in American have been reported.⁵⁰ However, these stark numbers likely do not reflect the entirety of anti-Muslim discrimination. The U.S. Department of Justice Bureau of Statistics reported that only 44% of hate crimes are reported to the police, and in 2013, the Bureau found that nearly two-thirds of all hate crimes are unreported.⁵¹

In 2015-2016 alone, the following cases provide a sampling of the types of violence Muslims and those perceived as Muslim are experiencing: 1) two Muslim women pushing their children in strollers were attacked in Brooklyn by an assailant who spewed anti-Muslim slurs (Sept. 10,

American voters back Trump's Muslim ban, Hill (Mar. 29, 2016, 5:30 AM), <http://thehill.com/policy/defense/274521-poll-half-of-american-voters-back-trumps-muslim-ban> (“A ‘virtual majority’ of American voters — 49 percent — also agrees with Cruz's call for additional law enforcement patrols of Muslim neighborhoods in the U.S., the poll showed.”);

⁴⁵ *September 24-27, 2015 Survey of 576 Republican primary voters*, Pub. Policy Polling (Sept. 29, 2015), http://www.publicpolicypolling.com/pdf/2015/PPP_Release_NC_92915.pdf.

⁴⁶ *One in Three Americans Worry About Sharia Law Being Applied in America*, LifeWay (Feb. 11, 2015), <http://lifewayresearch.com/2015/02/11/1-in-3-americans-worry-about-sharia-law-being-applied-in-america/>.

⁴⁷ Kathy Frankovic, *Muslim Americans widely seen as victims of discrimination*, YouGov (Feb. 20, 2015), <https://today.yougov.com/news/2015/02/20/muslim-americans-widely-seen-victims-discriminatio/>. That same poll also found that three-fourths of Americans — 73% — think American Muslims face a great deal or a fair amount of discrimination. *Id.*

⁴⁸ Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era*, N.Y. Times (Sept. 17, 2016), <http://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html>.

⁴⁹ Ctr. for the Study of Hate & Extremism, Cal. State Univ., *Special Status Report: Hate Crime in the United States 6* (2016), <https://www.documentcloud.org/documents/3110202-SPECIAL-STATUS-REPORT-v5-9-16-16.html>.

⁵⁰ *Recent Incidents of Anti-Muslim Hate Crimes*, MUSLIM ADVOCATES (2016), <https://www.muslimadvocates.org/map-anti-muslim-hate-crimes/>.

⁵¹ *Nearly Two-Thirds of Hate Crimes Went Unreported to Police in Recent Years*, U.S. DEP'T OF JUSTICE (Mar. 21, 2013), <http://ojp.gov/newsroom/pressreleases/2013/ojppr032113.pdf>. For a theoretical analysis of the myriad ways Muslim women are disproportionately harmed by post-9/11 discrimination, see Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim American Women Caught in the Crosshairs of Intersectionality*, 9 HASTINGS R. & POV. L. J. 1 (2012).

2016);⁵² 2) a man set fire to the Islamic Center of Fort Pierce, Florida (Sept. 12, 2016);⁵³ 3) a Muslim man was assaulted and beaten after leaving a mosque resulting in five broken bones, a concussion, and fractured ribs (June 1, 2016);⁵⁴ 4) a delivery driver was brutally beaten by a passenger who called him a “Muslim a—hole” and punched multiple times before trying to escape the vehicle, then later pulled to the ground and punched and stomped on (May 21, 2016);⁵⁵ 5) a Sikh temple was vandalized by a man who said he thought it was a mosque and affiliated with terrorists (Mar. 3, 2016);⁵⁶ 6) a Muslim woman wearing a headscarf had hot liquid poured on her by another woman shouting “Muslim piece of trash” (April 21, 2016);⁵⁷ 7) while a Muslim family was shopping for a home, a man in the neighborhood pointed a gun at them saying they “should all die” because they are Muslim (Feb. 21, 2016);⁵⁸ 8) an elderly Sikh man was stabbed to death while working at a convenience store;⁵⁹ 9) in two separate incidents, one American Muslim female was shot as she was leaving an Islamic center and another woman was nearly run off the road by someone throwing rocks at her car as she left the mosque (Dec. 11, 2015);⁶⁰ 10) a taxi driver - a 38-year-old Moroccan immigrant – was shot and injured by one of his passengers after being asked about his background (Nov. 26, 2015).⁶¹

Among the most troubling forms of anti-Muslim discrimination is the bullying of Muslim children taking place in our schools. In 2010, a study in Northern Virginia found that 80% of Muslim youth were subjected to taunts and harassment at school. In 2014, a survey of Muslim children in third

⁵² Lauren del Valle, *2 Muslim women, babies attacked in alleged hate crime in New York*, CNN (Sept. 10, 2016, 12:49 AM), <http://www.cnn.com/2016/09/10/us/brooklyn-muslim-women-attacked/>.

⁵³ Lindsey Bever, *Arrest made in arson at Orlando gunman’s mosque, authorities say*, Wash. Post (Sept. 14, 2016), <https://www.washingtonpost.com/news/acts-of-faith/wp/2016/09/12/arson-suspected-in-fire-at-florida-mosque-attended-by-pulse-shooter-omar-mateen/>.

⁵⁴ Laurel Raymond, *Assault of Muslim Man in NYC Comes Amid Rising Islamophobia Nationwide*, THINKPROGRESS (June 6, 2016), <http://thinkprogress.org/justice/2016/06/06/3785049/muslim-man-attackedqueens/>.

⁵⁵ Rocco Parascandola, *Bronx Livery Driver Repeatedly Punched In the Face By Passenger Who Called Him ‘Muslim Driver A--hole,’* N.Y. DAILY NEWS (May 25, 2016), <http://www.nydailynews.com/newyork/bronx-livery-driver-punched-called-muslim-driver-a-hole-article-1.2648669>.

⁵⁶ Ajay Ghosh, *Hate Crime Charged Against Pittman for Spokane Gurdwara Vandalism*, UNIVERSAL NEWS NETWORK, (Mar. 15, 2016), <http://theunn.com/2016/03/hate-crime-charged-against-pittman-forspokane-gurdwara-vandalism/>.

⁵⁷ Steve Birr, *Police Release Video of Assault on Muslim Woman Outside DC Starbucks*, THE DAILY CALLER (May 3, 2016), <http://dailycaller.com/2016/05/03/police-release-video-of-assault-on-muslimwoman-outside-dc-starbucks/>.

⁵⁸ Kevin Killeen, *Affton Man Charged With Anti-Muslim Hate Crime*, CBS ST. LOUIS (Feb. 29, 2016), <http://stlouis.cbslocal.com/2016/02/29/muslims-wait-for-bob-mcculloch-to-file-charges/>.

⁵⁹ Charles Lam, *Sikh Man Stabbed to Death in Robbery of Central California Convenience Store*, NBC NEWS (Jan. 5, 2016), <http://www.nbcnews.com/news/asian-america/sikh-man-stabbed-death-robberycentral-california-convenience-store-n490786>.

⁶⁰ Travis Gettys, *Muslim Woman Shot At and Another Nearly Run Off the Road in Tampa After Leaving Mosques*, RAW STORY (Dec. 11, 2015), <https://www.rawstory.com/2015/12/muslim-woman-shot-at-andanother-nearly-run-off-the-road-in-tampa-after-leaving-mosques/>.

⁶¹ Dan Majors, *Muslim Taxi Driver Shot on Thanksgiving in Hazelwood Calls Attack a Hate Crime*, PITT. POST GAZETTE (Nov. 29, 2015), <http://www.post-gazette.com/local/city/2015/11/29/Muslim-taxi-drivershot-on-Thanksgiving-in-Pittsburgh-calls-attack-a-hate-crime/stories/201511290154>.

through twelfth grade in Maryland found that nearly one-third “said they had experienced insults or abuse at least once because of their faith.”⁶² That same year, a statewide survey of more than 600 Muslim American students ages 11-18 in California found that 55% of respondents reported being bullied or discriminated against, twice the number of students nationally who reported being bullied.⁶³ Additionally, 29% of Muslim female students who wear a headscarf experienced offensive touching or pulling off their hijab.⁶⁴

These findings are consistent with a 2016 report published by Georgetown University finding 180 reported incidents of anti-Muslim violence between March 2015 and March 2016. Among the incidents reported are 12 murders, 34 physical assaults, 56 acts of vandalism or destruction of property, 9 arsons, and 8 shootings and bombings.⁶⁵

Despite the troubling rise in anti-Muslim discrimination and hate crimes, Muslims believe their public safety concerns are not adequately addressed. At law enforcement led community outreach meetings, law enforcement agents are primarily interested in knowing if Muslims have any knowledge of potential terrorist plots.⁶⁶ A comprehensive empirical study published in 2016 by Duke’s Center for Terrorism also found that interviewees believed law enforcement agencies have broken communities’ trust in the past by violating civil liberties of Muslims who worked with them.⁶⁷

These broken promises have produced a deep distrust that in turn has stifled coordination between civil society and law enforcement. For example, an American Civil Liberties Union (ACLU) Freedom of Information Act (FOIA) request uncovered documents showing that the FBI was keeping records of conversations and activities within mosques and other Muslim organizations from 2004 through 2008 and information provided by federal employees engaged in the outreach programs.⁶⁸ This discovery contradicted multiple statements by law

⁶² Donna St. George, *During a school year of terrorist attacks, Muslim students report bullying*, Wash. Post (June 14, 2016), https://www.washingtonpost.com/local/education/during-a-school-year-of-terrorist-attacks-muslim-students-report-bullying/2016/06/14/1b066a44-3220-11e6-8758-d58e76e11b12_story.html.

⁶³ Id.

⁶⁴ Tatiana Sanchez, *Muslim students report bullying at twice the rate of non-Muslim peers, survey shows*, L.A. Times (Oct. 31, 2015, 4:00 AM), <http://www.latimes.com/local/california/la-me-1031-bullying-20151031-story.html>.

⁶⁵ Engy Abdelkader, Bridge Initiative, Special Report, *When Islamophobia Turns Violent: The 206 U.S. Presidential Elections 1-2 (2016)*, <http://bridge.georgetown.edu/wp-content/uploads/2016/05/When-Islamophobia-Turns-Violent.pdf>.

⁶⁶ David Schanzer, Charles Kursman, Jessica Toliver & Elizabeth Miller, *The Challenge and Promise of Using Community Policing Strategies to Prevent Violent Extremism: A Call for Community Partnerships with Law Enforcement to Enhance Public Safety*, Triangle Center on Terrorism and Homeland Security, Sanford School of Public Policy, Duke University (2016), <https://sanford.duke.edu/sites/sanford.duke.edu/files/documents/2015-full-report-FINAL1.pdf>.

⁶⁷ Id.

⁶⁸ Mike German, *Is the FBI’s Community Outreach Program a Trojan Horse?*, ACLU (Feb. 15, 2013, 3:33 PM), <https://www.aclu.org/blog/fbis-community-outreach-program-trojan-horse>; Michael Price, Brennan Ctr. for Justice, *Community Outreach or Intelligence Gathering? A Closer Look at “Countering Violent Extremism” Programs*,

enforcement assuring concerned citizens that intelligence was not being collected at community outreach meetings.⁶⁹ In 2009, an FBI initiative exploited community outreach to collect information on Muslim communities and build a “baseline profile of Somali individuals that are vulnerable to being radicalized.”⁷⁰ And in 2012, another ACLU FOIA request uncovered FBI and NYPD systemic surveillance of Middle Eastern and Muslim communities in Michigan, San Francisco, and New York City.⁷¹

Similarly, Muslim community leaders who engaged with law enforcement later discovered they were targets of investigations and surveillance. For example, the emails of Faisal Gill were subject to surveillance from 2006 to 2008 despite his service in the U.S. Navy and as a senior policy advisor in the U.S. Department of Homeland Security under George W. Bush.⁷² Such cases are further evidence that CVE programs are a ruse for counterterrorism practices that impose collective suspicion of millions of Muslims in America for the criminal acts of individuals with whom they have nothing in common.⁷³

In sum, purported community engagement and CVE programs by law enforcement agencies have proven to be a failure in their stated objectives. They have alienated and stigmatized Muslim communities and legitimized anti-Muslim prejudice infecting our society. Consequently, racialized and rights violating government practices are then exploited by terrorists to corroborate their apocalyptic recruitment narrative that America wants to destroy Islam.

https://www.brennancenter.org/sites/default/files/analysis/Community_Outreach_or_Intelligence_Gathering.pdf (last visited Sept. 20, 2016).

⁶⁹ E.g., H.G. Reza, *FBI Tries to Reassure Muslims in Irvine*, (June 7, 2006), <http://articles.latimes.com/2006/jun/07/local/me-muslim7>. See also Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 *Harvard C.R.-C.L. L. Rev.* 289 (2015)

⁷⁰ Cora Currier & Murtaza Hussain, *Letter Details FBI Plan for Secretive Anti-Radicalization Committees*, *Intercept* (Apr. 28, 2016, 12:02 PM), <https://theintercept.com/2016/04/28/letter-details-fbi-plan-for-secretive-anti-radicalization-committees/>.

⁷¹ See *Eye on the FBI*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/national-security/eye-fbi-exposing-misconduct-and-abuse-authority> (last visited Sept. 20, 2016); *ACLU Eye on the FBI: The FBI is Engaged in Unconstitutional Racial Profiling and Racial “Mapping”*, Am. Civil Liberties Union, <https://www.aclu.org/aclu-eye-fbi-fbi-engaged-unconstitutional-racial-profiling-and-racial-mapping> (last visited Sept. 20, 2016); *ACLU Eye on the FBI Alert – Mosque Outreach for Intelligence Gathering*, Am. Civil Liberties Union, <https://www.aclu.org/other/aclu-eye-fbi-alert-mosque-outreach-intelligence-gathering?redirect=aclu-eye-fbi-alert-mosque-outreach-intelligence-gathering> (last visited Sept. 20, 2016).

⁷² James Gordon Meek, Brian Ross, & Rhonda Schwartz, *Feds Spied on Prominent Muslim-Americans, Report Claims*, ABC News (July 9, 2014), <http://abcnews.go.com/Blotter/feds-spied-prominent-muslim-americans-report-claims/story?id=24370482>; Faisal Gill, *I was targeted because of my faith*, CNN (July 10, 2014, 4:48 PM), <http://www.cnn.com/2014/07/10/opinion/gill-unwarranted-surveillance-muslim/>. Other Muslim leaders subject to surveillance are Asim Ghafoor, a well-known lawyer; Hooshang Amirahmadi, a professor at Rutgers University; and Agha Saeed, a political science professor at California State University. *Id.*

⁷³ Waleed S. Ahmed, *Spying on American Muslim Leaders Betrays Advocates of Civic Engagement*, *Muslim Matters* (July 16, 2014), <http://muslimmatters.org/2014/07/16/spying-on-american-muslim-leaders-betrays-advocates-of-civic-engagement/>.

IV. CVE Programs are Unnecessary to Prevent Domestic Terrorism

Not only are CVE programs counterproductive, they are unnecessary. Like their fellow Americans, Muslim communities report suspicious criminal activity about which they have knowledge without the need for a multi-million dollar government program.⁷⁴ According to Peter Bergen at the New America Foundation, nearly 20% of terrorism plots have been prevented due to initial tips from Muslim communities and family members.⁷⁵ Studies by the Duke Triangle Center on Terrorism and Homeland Security also found that American Muslim communities provided a large source of information about terrorist plots since 9/11.⁷⁶

Hence, CVE programs, which overtly aim to recruit Muslims to report potential terrorist plots,⁷⁷ are a waste of government resources. Muslim Americans know less about potential plots than law enforcement agencies with a sophisticated array of investigative tools at their disposal.⁷⁸ Most cases charging Muslims of violating anti-terrorism laws are driven by undercover agents and informants outside the knowledge of community leaders or the individual's family.

A 2016 George Washington Report on Extremism reported that over half (39) of the individuals they researched were arrested after an investigation involving an informant or undercover law enforcement officer.⁷⁹ Out of the 500 anti-terrorism cases studies, nearly 250 involved an informant or undercover agent.⁸⁰ For these reasons, some Muslims worry that their engagement

⁷⁴ Jessica Stern & J.M. Berger, *ISIS: THE STATE OF TERROR* 248-49 (2015) (noting that there is “a near-total lack of evidence that [CVE programs] actually prevent violent extremism in any meaningful way”).

⁷⁵ Peter Bergen, David Sterman, Emily Schneider, & Bailey Cahall, New America Foundation, *Do NSA's Bulk Surveillance Programs Stop Terrorists?* 4-5 (2014), <https://na-production.s3.amazonaws.com/documents/do-nsas-bulk-surveillance-programs-stop-terrorists>; see also Mohammed A. Malik, *I reported Omar Mateen to the FBI. Trump is wrong that Muslims don't do our part.*, Wash. Post (June 20, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/20/i-reported-omar-mateen-to-the-fbi-trump-is-wrong-that-muslims-dont-do-our-part/?utm_term=.0dfd4ce3b782 (authored by a Muslim American who reported the Orlando shooter Omar Mateen to the FBI in 2014 after observing suspicious activity).

⁷⁶ Charles Kurzman, Triangle Center on Terrorism and Homeland Security, Sanford School of Public Policy, Duke University, *Muslim-American Terrorism in 2013* 4 (2014), https://sites.duke.edu/tcths/files/2013/06/Kurzman_Muslim-American_Terrorism_in_20131.pdf.

⁷⁷ See, e.g., Press Release, Office of the Press Secretary, The White House, *FACT SHEET: The White House Summit on Countering Violent Extremism* (Feb. 18, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/18/fact-sheet-white-house-summit-countering-violent-extremism> (discussing community engagement with religious leaders and communities).

⁷⁸ See Pew Research Center, *Mainstream and Moderate Attitudes Muslim Americans: No Signs of Growth in Alienation or Support for Extremism* 1 (2011), <http://www.people-press.org/files/legacy-pdf/Muslim%20American%20Report%2010-02-12%20fix.pdf> (noting that only about 20% of Muslims even perceive much support for extremism among the American Muslim community).

⁷⁹ Lorenzo Vidino & Seamus Hughes, George Washington Univ., Program on Extremism, *ISIS in America: From Retweets to Raqqa* ix (2015), <https://cchs.gwu.edu/sites/cchs.gwu.edu/files/downloads/ISIS%20in%20America%20-%20Full%20Report.pdf>.

⁸⁰ *Id.*

with law enforcement may lead to their youth being targeted for sting operations that put them on the path to prosecution.⁸¹

Such concerns are not farfetched. A report by Human Rights Watch and Columbia Law School's Human Rights Institute in 2014 found that "in some cases, the Federal Bureau of Investigation may have created terrorists out of law-abiding individuals by conducting sting operations that facilitated or invented the target's willingness to act."⁸² According to the Center on National Security at Fordham University School of Law, approximately 60% of cases against Americans in Da'esh-related charges have involved informants as compared to 30% of all terrorism indictments since 9/11.⁸³ These results are unsurprising in light of the FBI's widespread use of informants, estimated at 15,000 domestically as of 2008, which is reportedly 10 times the number of informants active during the era of J. Edgar Hoover and COINTELPRO.⁸⁴

In the cases where a Muslim (often a young male) is targeted by bona fide Da'esh recruiters, the process occurs online, in secret, and without the knowledge of the community leaders and family members.⁸⁵ A New America Foundation report found that of the sixty-two cases examined, there was no evidence of physical recruitment by a militant operative, cleric, returning foreign fighter, or radicalization in prison.⁸⁶ Moreover, studies of terrorism suspects show Da'esh recruits' knowledge of Islam is negligible. A 2008 study of hundreds of individuals involved in terrorism and terrorism finance by the British intelligence agency MI-5 found that most of them were "religious novices," and that a "well-established religious identity actually protects against violent radicalization."⁸⁷ A recent leak of Da'esh documents showed that 70% of recruits had a remedial

⁸¹ Glenn Greenwald, *Why Does the FBI Have to Manufacture its Own Plots if Terrorism and ISIS Are Such Grave Threats?*, THE INTERCEPT (Feb. 26, 2015), <https://theintercept.com/2015/02/26/fbi-manufacture-plots-terrorism-isis-grave-threats/>

⁸² Human Rights Institute, *Illusion of Justice Human Rights Abuses in US Terrorism Prosecutions 2* (2014), http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/final_report_-_illusion_of_justice_0.pdf.

⁸³ Nicole Hong, *In U.S. ISIS Cases, Informants Play a Big Role*, WALL ST. J. (Apr. 21, 2015, 7:08 PM), <http://www.wsj.com/articles/in-u-s-isis-cases-informants-play-a-big-role-1429636206>.

⁸⁴ Cora Currier & Murtaza Hussain, *Letter Details FBI Plan for Secretive Anti-Radicalization Committees*, THE INTERCEPT (Apr. 28, 2016), <https://theintercept.com/2016/04/28/letter-details-fbi-plan-for-secretive-anti-radicalization-committees/>.

⁸⁵ See David Talbot, *Fighting ISIS Online*, MIT TECH. REV. (Sept. 30, 2015), <https://www.technologyreview.com/s/541801/fighting-isis-online/>; Rukmini Callimachi, *ISIS and the Lonely Young American*, N.Y. TIMES (June 27, 2015), http://www.nytimes.com/2015/06/28/world/americas/isis-online-recruiting-american.html?_r=0. See also *ISIS Online: Countering Terrorist Radicalization & Recruitment on the Internet & Social Media: Hearing Before the Permanent Subcomm. on Investigations*, 114th Cong. 10 (2015) (testimony by Peter Bergen), http://www.hsgac.senate.gov/download/bergen-testimony_psi-2016-07-05 ("Around nine out of 10 American militants are active in online jihadist circles.")

⁸⁶ *ISIS Online: Countering Terrorist Radicalization & Recruitment on the Internet & Social Media: Hearing Before the Permanent Subcomm. on Investigations*, 114th Cong. 4 (2016) (testimony by Peter Bergen), file:///C:/Users/Staff/Downloads/Bergen%20Testimony_PSI%202016-07-06.pdf.

⁸⁷ Alan Travis, *MI5 Report Challenges Views on Terrorism in Britain*, THE GUARDIAN (Aug. 20, 2008), <https://www.theguardian.com/uk/2008/aug/20/uksecurity.terrorism1>.

understanding of Islam, and often were alienated from mainstream Muslim communities.⁸⁸ Indeed, Director of Community Partnerships at DHS George Selim's statement in a Reuters article that "[g]iven the current scope of the threat, we believe family members, friends, coaches, teachers are best placed to potentially prevent and intervene in the process of radicalization" is unsupported by evidence.⁸⁹ Unless the government wants Muslims to actively spy on each other's online activities in contravention of fundamental American values, CVE programs will only waste government resources and alienate otherwise well integrated American communities.⁹⁰

In the end, irrational prejudices animate the false assumption that each Muslim has knowledge of and is responsible for all other Muslims' actions. Like all other Americans, Muslims deserve to be presumed innocent and treated as individuals, not collectively guilty based on the criminal acts of a few individuals who misappropriate religious doctrine to engage in politically-motivated violence.⁹¹

V. CVE Programs are a Waste Government Resources

Senior government officials have gone on the record stating that the threat of Americans joining Da'esh is diminishing. According to Francis Taylor, Undersecretary of the Office of Intelligence and Analysis for DHS, in 2015 there was no specific, credible, imminent threat to the homeland from Da'esh.⁹² In October 2015, FBI Director James Comey testified before Congress that fewer Americans are attempting to travel to Syria to join Da'esh.⁹³

Moreover, the data does not corroborate a sufficient security threat to warrant a nationwide CVE program. The FBI estimates that approximately 200 Muslim Americans (out of 3 to 6 million)⁹⁴

⁸⁸ *Leaked ISIS Docs Show 70% of Recruits Don't Even Know What Islam Is*, OffGuardian (Aug. 22, 2016), <https://off-guardian.org/2016/08/22/leaked-isis-docs-show-70-of-recruits-dont-even-know-what-islam-is/>.

⁸⁹ Yasmeen Abutaleb & Kristina Cooke, *A teen's turn to radicalism and the U.S. safety net that failed to stop it*, Reuters (June 6, 2016, 2:20 PM), <http://www.reuters.com/investigates/special-report/usa-extremists-teen/>.

⁹⁰ Michael Hirsh, *Inside the FBI's Secret Muslim Network*, Politico Magazine (March 24, 2016), <http://www.politico.com/magazine/story/2016/03/fbi-muslim-outreach-terrorism-213765> (noting Harvard terrorism expert Jessica Stern conclusion that the relative prosperity and assimilation of American Muslims starkly contrasts with Muslims in Europe where the latter experience disparities in employment and wages as well as overpolicing).

⁹¹ See The Clarion Project, Special Report: The Islamic State 6 (2015), <http://www.clarionproject.org/sites/default/files/islamic-state-isis-isil-factsheet-1.pdf> (explaining that Da'esh is a political organization that uses religion to justify its goals).

⁹² See *The Impact of ISIS on the Homeland and Refugee Resettlement: Hearing Before the U.S. Senate Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 10 (2015) (testimony of Peter Bergen), <http://www.hsgac.senate.gov/hearings/lessons-from-the-paris-terrorist-attacks-ramifications-for-the-homeland-and-refugee-resettlement>.

⁹³ Del Quentin Wilber, *FBI says fewer Americans now try to join Islamic State*, L.A. Times (May 11, 2016, 2:49 PM), <http://www.latimes.com/nation/la-na-comey-fbi-20160511-snap-story.html>.

⁹⁴ Besheer Mohamed, *A new estimate of the U.S. Muslim population*, Pew Research Ctr. (Jan. 6, 2016), <http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/> (stating that Pew Research Center estimates that 3.3 million Muslims lived in the United States in 2015).

have attempted to join Da'esh in Syria and Iraq.⁹⁵ In 2015, a George Washington University report by the Project on Extremism estimated the total number of Americans who have traveled to Syria and Iraq since 2011 was 250 out of 30,000 foreign fighters worldwide and over 5000 from Europe.⁹⁶

In the United States, there has only been one reported case of a fighter returning and allegedly plotting an attack.⁹⁷ Speaking to the Council on Foreign Relations in March 2015, Director of National Intelligence James Clapper stated that approximately 40 individuals have returned from Syria, and: "We have since found they went for humanitarian purposes or some other reason that don't relate to plotting."⁹⁸ Similarly, the New America Foundation found that no American fighter who fought in the conflict in Somalia returned to plot an attack in the United States. Most either died there or were taken into custody upon their return to the United States.⁹⁹

To be sure, domestic terrorism is a security issue that must be taken seriously. And our law enforcement agencies have myriad legal and investigative tools at their disposal to counter terrorism based on individualized suspicious activity indicative of criminal wrongdoing. Casting a wide net of suspicion, surveillance, and investigation on Muslim communities writ large is a waste of resources that distracts agents from real security threats—not to mention a violation of constitutional and civil rights.

Furthermore, CVE programs are likely to be as wasteful as fusion centers. In 2012, a bi-partisan investigation by the U.S. Senate Permanent Subcommittee on Investigations found that "state and local intelligence fusion centers had not yielded significant useful information to support federal counterterrorism intelligence efforts."¹⁰⁰ Specifically, the Permanent Committee found

⁹⁵ Julian Hattem, *FBI: More than 200 Americans have tried to fight for ISIS*, The Hill, (July 8, 2015), <http://thehill.com/policy/national-security/247256-more-than-200-americans-tried-to-fight-for-isis-fbi-says>; *How many Americans have joined ISIS*, CBS News (August 22, 2014), <http://www.cbsnews.com/news/how-many-americans-have-joined-isis/> (reporting that as of August 2014, fewer than 12 Americans have been confirmed to have joined ISIS in Syria and Iraq).

⁹⁶ Lorenzo Vidino & Seamus Hughes, George Washington Univ., Program on Extremism, *ISIS in America: From Retweets to Raqqa ix* (2015), <https://cchs.gwu.edu/sites/cchs.gwu.edu/files/downloads/ISIS%20in%20America%20-%20Full%20Report.pdf>.

⁹⁷ *ISIS Online: Countering Terrorist Radicalization & Recruitment on the Internet & Social Media: Hearing Before the Permanent Subcomm. on Investigations*, 114th Cong. 14 (2016) (testimony by Peter Bergen), <file:///C:/Users/Staff/Downloads/Testimony-Bergen-2015-11-19-REVISED.pdf>.

⁹⁸ Karl Vick, *New Study Says U.S. Threat from Returning Jihadis Is Low*, Time (Mar. 25, 2016), <http://time.com/4272307/isis-foreign-jihadis-threat/>; Julian Hattem, *Spy chief: No threat from Americans who aided militants in Syria*, The Hill (Mar. 2, 2015 1:52 PM), <http://thehill.com/policy/defense/234322-spy-chief-no-threat-from-returning-americans-who-fought-in-syria>.

⁹⁹ *The Impact of ISIS on the Homeland and Refugee Resettlement: Hearing Before the U.S. Senate Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 13 (2015) (testimony of Peter Bergen), <http://www.hsgac.senate.gov/hearings/lessons-from-the-paris-terrorist-attacks-ramifications-for-the-homeland-and-refugee-resettlement>.

¹⁰⁰ Permanent Subcomm. on Investigations, *Federal Support for and Involvement in State and Local Fusion Centers, Majority and Minority Staff Report*,

that intelligence produced by fusion centers was of “uneven quality – oftentimes shoddy, rarely timely, sometimes endangering citizens’ civil liberties and Privacy Act protections, occasionally taken from already-published public sources, and more often than not unrelated to terrorism.”¹⁰¹ Ultimately, there was no evidence that fusion centers assisted in disrupting or preventing terrorism. The same government waste and civil liberties violations are likely to occur with CVE programs.

Government resources and policies, therefore, should be guided by the degree of the threat based on credible data. Fatalities from terrorism were 69 since 9/11,¹⁰² compared with 220,000 deaths from murders over the same period.¹⁰³ In 2015 alone, 475 people were killed in mass shootings.¹⁰⁴ According to the Combating Terrorism Center at West Point, the risk of death at the hands of terrorists in the United States approaches lottery-winning odds.¹⁰⁵ And yet we are not seeing government CVE programs targeting single white males in their thirties and forties who are the most common demographic committing mass murder.¹⁰⁶ Nor are we seeing CVE programs for Christians due to right wing groups’ misappropriation of Christian doctrine in furtherance of their violent political ends. Government hearings are not being held to debate whether violence perpetrated by the Klu Klux Klan, the Army of God, or the Lord’s Resistance Army” should be called “radical Christian terrorism.”¹⁰⁷ This is despite the Southern Poverty Law Center findings that at least 100 plots, conspiracies and racist rampages since 1995 aimed at waging violence against the United States government.¹⁰⁸ The National Consortium for the Study of Terrorism and Responses to Terrorism found that between 1990 and 2014, far-right domestic

<https://www.hsgac.senate.gov/subcommittees/investigations/media/investigative-report-criticizes-counterterrorism-reporting-waste-at-state-and-local-intelligence-fusion-centers>.

¹⁰¹ *Id.*

¹⁰² Charles Kurzman & David Schanzer, Triangle Center on Terrorism and Homeland Security, Sanford School of Public Policy, Duke University, Law Enforcement Assessment of Violent Extremism Threat 7-9 (2015), https://sites.duke.edu/tcths/files/2013/06/Kurzman_Schanzer_Law_Enforcement_Assessment_of_the_Violent_Extremist_Threat_final.pdf.

¹⁰³ Linda Qiu, *Fact-checking a comparison of gun deaths and terrorism deaths*, Politifact (Oct. 5, 2015, 11:55 AM), <http://www.politifact.com/truth-o-meter/statements/2015/oct/05/viral-image/fact-checking-comparison-gun-deaths-and-terrorism-/>.

¹⁰⁴ *Mass Shootings – 2015*, Gun Violence Archive (2015), <http://www.pbsgunviolencearchive.org/newshour/rundown/2015-the-year-of-reports/mass-shootings/2015?page=13>.

Brian Michael Jenkins, *Fifteen Years On, Where Are We In the “War on Terror”?*, CTC SENTINEL, September 2016, at 7. Text from: https://www.ctc.usma.edu/v2/wp-content/uploads/2016/09/CTC-SENTINEL_Vol9Iss92.pdf.

¹⁰⁶ R. Kleinfield, Russ Buettner, David W. Chen, & Nikita Stewart, *Mass Murders Fit Profile, as Do Many Others Who Don’t Kill*, N.Y. Times (Oct. 3, 2015), http://www.nytimes.com/2015/10/04/us/mass-murderers-fit-profile-as-do-many-others-who-dont-kill.html?_r=0 (discussing the difficulty with the profile of a mass shooter that fits a majority class).

¹⁰⁷ *Racial Equality*, White Camelia Knights of the Ku Klux Klan (2011), <http://www.wckkkk.org/eql.html>; Army of God, <http://www.armyofgod.com/>; Harry J. Bentham, *ISIS isn’t Islamic as the Lord’s Resistance Army isn’t Christian*, BELIEF NET, <http://www.beliefnet.com/columnists/lordre/2014/11/isis-islam-lords-resistance-army-christianity-extremism.html>.

¹⁰⁸ Southern Poverty Law Center, *Terror From the Right: Plots, Conspiracies, and Racist Rampages Since Oklahoma City* (2015), <https://www.splcenter.org/20100126/terror-right>

extremists perpetrated four times as many ideologically based homicidal incidents than extremists associated with Al Qaeda and associated groups.¹⁰⁹

From 2000 to 2015, the number of hate groups has increased by 56%, which include a large number of anti-immigrant, anti-LGBT, anti-Muslim, and anti-government “Patriot” groups. And from 2014 to 2015 the number of radical right-wing groups increased by 14 percent.¹¹⁰ For example, Klu Klux Klan chapters increased from 72 in 2014 to 190 in 2015. Self-described “Patriot” groups with an anti-government agenda grew from 874 in 2014 to 998 in 2015. Stormfront, a White Nationalist online hate forum, had more than 300,000 registered members in 2015 with an average annual increase of 25,000 new users.¹¹¹ White supremacist online forums also radicalized Dylaan Roof, the alleged shooter in the massacre of nine African Americans at Charleston’s Emanuel African Methodist Episcopal Church on June 17, 2015.¹¹²

The rise in right-wing violent extremism has resulted in 337 attacks per year in the decade after 9/11, causing a total of 254 fatalities, according to a study by Arie Perliger, a professor at the United States Military Academy’s Combating Terrorism Center.¹¹³ One chilling case in January 2011 involved a neo-Nazi who hid a bomb packed with fishing weights coated with rat poison in a backpack in the route of the Martin Luther King Day parade in Spokane, Washington.¹¹⁴ In June 2014, a violent extremist associated with the right wing Sovereign Citizens movement shot police officers with an assault rifle during his attack on a courthouse in Forsyth County, Georgia.¹¹⁵ That same year in Nevada, anti-government militants associated with Sovereign Citizens shot two police officers in a restaurant and placed over their bodies a “Don’t Tread on Me” flag, a swastika-

¹⁰⁹ Parkin, William S., Steven M. Chermak, Joshua D. Freilich, & Jeff Gruenewald, Office of University Programs, Science and Technology Directorate, U.S. Department of Homeland Security, *Twenty-Five Years of Ideological Homicide Victimization in the United States of America* (2016), https://www.start.umd.edu/pubs/START_CSTAB_ECDB_25YearsofIdeologicalHomicideVictimizationUS_March2016.pdf.

¹¹⁰ Mark Potok, *The Year in Hate and Extremism*, S. Poverty L. Ctr. (Feb. 17, 2016), <https://www.splcenter.org/fighting-hate/intelligence-report/2016/year-hate-and-extremism>.

¹¹¹ *Id.*

¹¹² Morris Dees & J. Richard Cohen, *White Supremacists Without Borders*, N.Y. Times (June 22, 2015), <http://www.nytimes.com/2015/06/22/opinion/white-supremacists-without-borders.html>.

¹¹³ Arie Perliger, Combating Terrorism Center at West Point, *Challengers From the Sidelines: Understanding America’s Violent Far-Right* (2012), <https://www.ctc.usma.edu/v2/wp-content/uploads/2013/01/ChallengersFromtheSidelines.pdf>; Charles Kurzman & David Schanzer, *The Growing Right Wing Terror Threat*, N.Y. Times (June 16, 2015), <http://www.nytimes.com/2015/06/16/opinion/the-other-terror-threat.html>.

¹¹⁴ Arie Perliger, Combating Terrorism Center at West Point, *Challengers From the Sidelines: Understanding America’s Violent Far-Right* (2012), <https://www.ctc.usma.edu/v2/wp-content/uploads/2013/01/ChallengersFromtheSidelines.pdf>.

¹¹⁵ *Forsyth deputy shot, suspect dead, courthouse evacuated*, ajc.com (June 6, 2014), <http://www.ajc.com/news/news/police-activity-around-forsyth-courthouse/ngFsZ/>.

stamped manifesto, and note that read “This is the start of the revolution.”¹¹⁶ In early 2016, 150-armed white Christian “militia” members occupied a federal building and took over several acres of federal land.¹¹⁷

In comparison, an average of nine Muslims per year—out of 3 to 6 million—have been involved in an annual average of six terrorism-related plots against targets in the United States. While most were disrupted, the 20 plots that were carried out accounted for 50 fatalities between 2001 and 2014, excluding the 9/11 terrorist attacks.¹¹⁸ Thus, it comes as no surprise that a 2015 Duke University research study found that over 74% of 382 local and state agencies rated anti-government extremism as one of the top three terrorist threats in their jurisdiction.¹¹⁹ This is compared to 39% rating Al Qaeda or like-minded terrorists as a top threat.¹²⁰ When asked to rank 1 to 5 the terrorist threat in their jurisdiction, 149 departments out of 170 ranked “other” forms of terrorism as a higher threat than Al Qaeda and associated terrorism. Similarly, only 3% identified the threat of Muslim violent extremists as severe, as compared to 7% for anti-government and other forms of violent extremists.¹²¹

When Duke University researchers asked law enforcement agencies why they did not have a CVE program tailored for right wing extremist groups, agents noted it would be a waste of time because the right wing extremists live in the shadows and do not communicate their criminal activity to white communities.¹²² The same reality applies to terrorism plotters who claim to be Muslims. They do not tell Muslim community leaders or family members about their criminal plans. Nor do they become recruited by international terrorists in open forums where interventions by civilians are a possibility. Indeed, Muslims interviewed in the Duke University study were asked about the efficacy of CVE programs, respondents expressed frustration that the government and fellow Americans expected them to have knowledge of every fringe element that claims to share their faith whereas other faith traditions are not imposed with the same

¹¹⁶ JJ MacNab, *What Las Vegas Police Killings Show About Evolving Sovereign Movement*, Forbes (June 13, 2014), <http://www.forbes.com/sites/jjmacnab/2014/06/13/what-las-vegas-police-killings-show-about-evolving-sovereign-movement/#2e27c38d57be>.

¹¹⁷ Carissa Wolf, Peter Holley, & Wesley Lowery, *Armed men, led by Bundy brothers, take over federal building in rural Oregon*, Wash. Post (Jan. 3, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/01/03/armed-militia-bundy-brothers-take-over-federal-building-in-rural-oregon/?utm_term=.72d2b63a4e19.

¹¹⁸ Charles Kurzman & David Schanzer, *The Growing Right-Wing Terror Threat*, N.Y. Times (June 16, 2015), http://www.nytimes.com/2015/06/16/opinion/the-other-terror-threat.html?_r=0.

¹¹⁹ Charles Kurzman & David Schanzer, Triangle Center on Terrorism and Homeland Security, Sanford School of Public Policy, Duke University, Law Enforcement Assessment of Violent Extremism Threat 4 (2015), https://sites.duke.edu/tcths/files/2013/06/Kurzman_Schanzer_Law_Enforcement_Assessment_of_the_Violent_Extremist_Threat_final.pdf.

¹²⁰ *Id.*

¹²¹ Charles Kurzman & David Schanzer, *The Growing Right-Wing Terror Threat*, N.Y. Times (June 16, 2015), http://www.nytimes.com/2015/06/16/opinion/the-other-terror-threat.html?_r=0.

¹²² David Schanzer, et al., Triangle Center on Terrorism and Homeland Security, Sanford School of Public Policy, Duke University, *The Challenge and Promise of Using Community Policing Strategies to Prevent Violent Extremism 21-22* (2016), <https://sites.duke.edu/tcths/files/2013/06/2015-full-report-FINAL1.pdf>.

burden.¹²³ Not only are such expectations impractical, they are un-American. We are a country founded on rule of law where each individual is responsible for her individual acts, not for the acts of others who happen to share the same race, ethnicity, gender, religion, or other characteristics. CVE programs contravene this fundamental American principle.

To be sure, we should not be creating CVE programs based on religious identities – whether Christian, Muslim, Jewish or otherwise. But the unabashed focus on Muslims in government efforts to counter politically motivated violence in America demonstrates the government's disparate treatment of faith communities.

VI. Funds for Community Development and Resilience Should be Managed by Social Service Agencies without Law Enforcement Control

Muslims communities are among the most diverse in America. Comprised of races and ethnic backgrounds, the diversity of Muslim American communities is a testament to America's rich cultural heritage. Nearly 70% of Muslims are foreign born and 20% are African American.¹²⁴ For decades, Muslim engineers, doctors, lawyers, professors, and other professionals have contributed their skills and strong work ethic toward America's economic prosperity. Similarly, Muslims are entrepreneurs who operate businesses that create jobs and grow our economy.

As a result, 14% of Muslims earn a household income over \$100,000 compared to 16% of the general population and 13% of Muslim households earn \$50,000 to \$74,999 compared to 15% of the general population.¹²⁵ Accordingly, a Pew Research Center study in 2011 found that Muslims are mostly mainstream and well integrated into American society.¹²⁶

However, like many other American communities, Muslim American communities include a significant number of low income families. The Pew Research Forum found that in 2011 45% of Muslim households earned less than \$30,000 compared to 36% of the general public and only 33% of Muslims were homeowners compared to 58% of the general public.¹²⁷ With the poverty line at approximately \$28,000 for a family of five and \$32,000 for a family of six,¹²⁸ a third of Muslims in America are on the verge of poverty. Moreover, 17% of Muslims were unemployed

¹²³ *Id.* at 19.

¹²⁴ According the Pew Forum on Religious and Public Life, 65% of Muslims are foreign born, 35% are U.S. born, and approximately 20% all Muslims are African Americans. *Section 1: A Demographic Portrait of Muslim Americans*, Pew Research Ctr. (Aug. 30, 2011), <http://www.people-press.org/2011/08/30/section-1-a-demographic-portrait-of-muslim-americans/>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Muslim Americans: No Signs of Growth in Alienation or Support for Extremism*, Pew Research Ctr. (Aug. 30, 2011), <http://www.people-press.org/2011/08/30/muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism/>.

¹²⁸ *Poverty Guidelines*, U.S. Department of Health & Human Services (Jan. 25, 2016), <https://aspe.hhs.gov/poverty-guidelines>.

compared to 12% of the general public and 29% were under-employed compared to 20% of the general public.¹²⁹

Low income Muslims in America at a time when Islamophobia has reached unprecedented levels demonstrates the need for social services in many Muslim American communities.¹³⁰ Indeed, as a standalone faith-group – Muslims are comparatively poorer than the broader American polity.¹³¹ In some Muslim communities, the poverty rate is alarmingly high. For example, 82% of the estimated 80,000 Somali Americans living in Minnesota are near or below the poverty line. In Brooklyn, nearly 54% of Bangladeshi Americans are low income or below the poverty line and many Yemeni American families who live in high cost cities such as New York, Detroit and the Bay Area are low income.¹³²

The consequent social and economic challenges faced by some Muslims in America—not inflated terrorism threats based on fear and prejudice—should determine how we spend government resources. For example, some Muslim leaders such as Los Angeles-based cleric Jihad Saafir, believe local gangs pose the most immediate threat to community safety, not homegrown violent extremists.¹³³ As such, government resources are more wisely spent on investing in education, employment, health, and other social services that empower diverse Muslim communities to thrive and prosper. Funds currently allocated to CVE should be redirected to social service agencies with the expertise and institutional mission to assist new immigrant and low income communities. Law enforcement should only get involved if there is individualized suspicion of predicate criminal acts in accordance with the U.S constitution and civil rights.¹³⁴ Decoupling law enforcement from community development is consistent with Pentagon officials’ determination that civilian programs abroad led by the U.S Agency for International Development were more effective in mitigating the circumstances that may lead some vulnerable youth to being recruited by terrorist groups.¹³⁵

Government programs funded and controlled by state and federal social service agencies, such as the departments of education and health and human services, will also facilitate community involvement in setting the agenda based on the diverse communities’ needs. This will bolster

¹²⁹ *Muslim Americans: No Signs of Growth in Alienation or Support for Extremism*, Pew Research Ctr. (Aug. 30, 2011), <http://www.people-press.org/2011/08/30/muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism/>.

¹³⁰ See Khaled A. Beydoun, *Between Indigence, Islamophobia, and Erasure: Poor and Muslim in “War on Terror” America*, CALIFORNIA LAW REVIEW (forthcoming 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685840.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Alejandro Beutel, *Using Local Public-Private Partnerships to Reduce Risk of Violent Extremism*, BRINK NEWS (Aug. 6, 2015), <http://www.brinknews.com/using-local-public-private-partnerships-to-reduce-risk-of-violent-extremism/>.

¹³⁴ Michael German, *Permanent Provisions of the Patriot Act*, Congressional Testimony, House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security (March 30, 2011), https://www.aclu.org/files/assets/ACLU_Testimony_Before_the_HJC_Regarding_the_Patriot_Act.pdf

¹³⁵ James Stavridis & John R. Allen, *Expanding the U.S. Military’s Smart-Power Toolbox*, Wall St. J. (June 9, 2016, 12:03 PM), <http://www.wsj.com/articles/expanding-the-u-s-militarys-smart-power-toolbox-1465425489>.

community-government partnerships. Communities can focus on working with qualified social services experts in addressing community development challenges rather than worry that their involvement will be exploited by law enforcement to surveil their communities, violate their civil liberties, and legitimize discrimination by private actors.

VII. Conclusion

We live in a world where opportunities and conflicts cross borders with ease. New technologies and advances in international travel have created unprecedented possibilities for citizens across the world to interact and exchange ideas for the common good.

However, violent non-state actors with political agendas are exploiting new technologies and seamless borders to manipulate vulnerable individuals.¹³⁶ They use myriad ideological doctrines to lend credence to their perverse political motivations. In confronting these violent actors, we cannot afford to adopt an “us versus them” approach. We must unite as Americans to ensure we are all safe and secure from both state and nonstate violence. Doing so entails staying true to our fundamental American values. The most pertinent of which is our commitment to individual responsibility for individual wrongdoing, regardless of one’s religion, race, or creed.

Unfortunately, CVE programs undermine rather than promote these values as well as American security. The securitization of Muslim communities as potential terrorists legitimizes the pervasive anti-Muslim prejudice and bigotry infecting our society today. Consequently, private actors are emboldened to harass, assault, and even kill fellow citizens who are or perceived to be Muslim.¹³⁷ Meanwhile, CVE programs ignore the rise of right wing extremists—who often target Muslims in hate crimes.¹³⁸ All of which is exploited by Da’esh to validate its twisted narrative that America is at war with Islam.

In addition, the data does not support the need for a law enforcement-led CVE program targeting Muslim communities. Long before the White House CVE initiative in 2010, Muslims in America have informed law enforcement when they have knowledge of criminal activity. Indeed, Muslims have also actively stopped attempted terrorism by other Muslims. For example, a Muslim vendor in New York City was the first to spot smoke coming out of an SUV in the Times Square attempted bombing. His immediate communication with law enforcement was instrumental in preventing the loss of life.¹³⁹ Thus, spending tens of millions of dollars on CVE programs especially for Muslim communities is not only stigmatizing, it is unnecessary and wasteful.

¹³⁶ See, e.g., Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VANDERBILT L. REV. (forthcoming 2017).

¹³⁷ See Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim American Women Caught in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POV. L. J. (2012).

¹³⁸ Peter Romaniuk, Global Center on Cooperative Security, *Does CVE Work? Lessons Learned from the Global Effort to Counter Violent Extremism*, Global Center on Cooperative Security (September 2015), http://www.globalcenter.org/wp-content/uploads/2015/09/Does-CVE-Work_2015.pdf.

¹³⁹ *Muslim Vendor Gets No Credit in Helping to Foil Times Square Bomb Plot*, Democracy Now! (May 6, 2010), http://www.democracynow.org/2010/5/6/muslim_vendor_gets_no_credit_in.

Independent of flawed CVE programs and specious radicalization theories, our government resources are well spent investing in new immigrant and low income communities who face unique social and economic challenges. As a country that prides itself in offering the opportunity for social mobility to citizens willing and able to work hard, investing in community development is a worthy endeavor.

Funds that would otherwise be wasted on ill-fated CVE programs instead should be given to social services agencies with the expertise to support the diverse Muslim American communities in need of job training, physical and mental health services, youth programs, educational opportunities, and other services that build community resilience. And rather than make such programs available only to a particular religion or race, they should be available to communities based on need.

Fifteen years after the tragic 9/11 attacks, most Muslims in America are actively and constructively engaged in American society.¹⁴⁰ They welcome working with their government and fellow citizens to ensure all Americans have equal opportunity to thrive and be safe. But they are thwarted from doing so by racialized government programs that treat them as outsiders and fifth columns rather than partners and equal citizens.

It is long overdue to rethinking our counterterrorism policies and practices to make them less discriminatory and more compliant with our constitution. Failing to do so could impede America's relative success in integrating communities of all faiths, races, and immigrant status.

¹⁴⁰ Amaney Jamal, *Political Participation and Engagement of Muslim Americans: Mosque Involvement and Group Consciousness*, 33 AMERICAN POLITICS RESEARCH 521-544 (2005).

[ARTICLE: The Plenary Power Doctrine and the Constitutionality of Ideological Exclusions: An Historical Perspective](#)

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Text

[*63]

I. Introduction

For over a century, it has been repeatedly but unsuccessfully argued that the First Amendment of the Constitution limits the federal government's plenary power to exclude or expel aliens from the United States. ¹ Such arguments have persisted despite the Supreme Court having repeatedly determined that the First Amendment does not restrict such power. ² Instead, the Court has upheld the federal government's plenary power to "forbid aliens or classes of aliens from coming within their borders, and

¹ See [Negusie v. Holder](#), 129 S. Ct. 1159 (2009); [Zadvydas v. Davis](#), 533 U.S. 678, 679 (2001); [Reno v. Am.-Arab Anti-Discrimination Comm.](#), 525 U.S. 471, 498 (1999); [Kleindienst v. Mandel](#), 408 U.S. 753, 769-70 (1972); [Harisiades v. Shaughnessy](#), 342 U.S. 580, 592 (1952); [Bridges v. Wixon](#), 326 U.S. 135, 160 (1945); [U.S. ex rel. Turner v. Williams](#), 194 U.S. 279, 291 (1904); [Am. Acad. of Religion v. Napolitano](#), 573 F.3d 115, 117 (2d Cir. 2009); [Hernandez-Caballero v. U.S. Att'y Gen.](#), 250 F. App'x. 275 (11th Cir. 2007); [Bruno v. Albright](#), 197 F.3d 1153 (D.C. Cir. 1999); [Am.-Arab Anti-Discrimination Comm. v. Thornburgh](#), 940 F.2d 445-46 opinion amended and superseded on denial of reh'g, 970 F.2d 501 (9th Cir. 1991); [Rafeedie v. INS](#), 880 F.2d 506, 517 (D.C. Cir. 1989); [Randall v. Meese](#), 854 F.2d 472 (D.C. Cir. 1988); [Abourezk v. Reagan](#), 785 F.2d 1043, 1074-75 (D.C. Cir. 1986); [Rafeedie v. INS](#), 795 F. Supp. 13 (D.D.C. 1992).

² [Harisiades](#), 342 U.S. at 592; [Turner](#), 194 U.S. at 291.

expel aliens or classes of aliens from their territory" regardless of whether its justification is based upon ideological or association grounds.³

Numerous commentators, scholars, and attorneys have attacked this rationale by arguing that the Bill of Rights limits the federal government's power to exclude or expel aliens.⁴ For instance, Karen Engle criticizes ideological and [*64] association exclusion on the ground that it is impossible to separate bad aliens from good aliens on such grounds. She believes that the United States' power to "determine immigration policy does not mean that all state actions regarding immigration [should] necessarily go unchallenged."⁵ Berta Esperanza Hernandez-Truyol believes ideological exclusion not only violates the First Amendment but also constitutes a "myriad [of] human rights violations ... [including] racial, religious, ethnic, and national discrimination, as well as discrimination in the applications and enjoyment of the rights to free speech and association."⁶ Meanwhile, academics such as Steven R. Shapiro have argued that ideological and association exclusions "abridge" the "constitutional rights of American citizens."⁷ He writes that "in a nation premised on the notion that sovereignty flows from the popular will and that the popular will is determined by political debate, ideological exclusions cannot be justified."⁸

Commentators, such as these, often place the blame of ideological and association exclusions on the Supreme Court's dicta in the Chinese Exclusion Case.⁹ It is frequently argued that the Court "formulated the plenary power doctrine" without any supporting constitutional authority.¹⁰ Most recently, Matthew J. Lindsay wrote an extensive piece asserting that the plenary power doctrine was "borne" in the late nineteenth century of "an urgent sense of national peril."¹¹ Academic scholar Peter J. Spiro describes

³ [Turner, 194 U.S. at 291.](#)

⁴ See Susan M. Akram, Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion, [14 Geo. Immigr. L.J. 51 \(1999\)](#); T. Alexander Aleinikoff, Federal Regulation of Aliens and the Constitution, [83 Am. J. Int'l. L. 862 \(1989\)](#); Steven J. Burr, Immigration and the First Amendment, [73 Calif. L. Rev. 1889 \(1985\)](#); Karen Engle, Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism), [75 U. Colo. L. Rev. 59 \(2004\)](#); Richard F. Hahn, Constitutional Limits on the Power to Exclude Aliens, 82 Colum. L. Rev. 957 (1982); Berta Esperanza Hernandez-Truyol, Nativism, Terrorism, and Human Rights - The Global Wrongs of Reno v. American-Arab Anti-Discrimination Committee, [31 Colum. Hum. Rts. L. Rev. 521 \(2000\)](#); Kevin R. Johnson, The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens, [28 St. Mary's L.J. 833 \(1997\)](#); Philip Monrad, Ideological Exclusion, Plenary Power, and the PLO, [77 Calif. L. Rev. 831 \(1989\)](#); David Moyce, Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws, [74 Calif. L. Rev. 1747, 1773-76 \(1986\)](#); Stephen R. Shapiro, Ideological Exclusions: Closing the Border to Political Dissidents, [100 Harv. L. Rev. 930 \(1987\)](#); Peter J. Spiro, Explaining the End of Plenary Power, [16 Geo. Immigr. L.J. 339 \(2002\)](#); W. Aaron Vandiver, Checking Ideas at the Border: Evaluating the Possible Renewal of Ideological Exclusion, [55 Emory L.J. 751 \(2006\)](#); Note, Constitutional Limitations on the Naturalization Power, 80 Yale L.J. 769, 787-91 (1971).

⁵ Engle, *supra* note 4, at 65.

⁶ [Hernandez-Truyol, supra](#) note 4, at 559.

⁷ Shapiro, *supra* note 4, at 942.

⁸ *Id.* at 944-45.

⁹ [Chae Chan Ping v. United States, 130 U.S. 581 \(1889\)](#). For criticism, see Akram, *supra* note 4, at 59, and James A. R. Nafziger, The General Admission of Aliens Under International Law, [77 Am. J. Int'l L. 804, 823-29 \(1983\)](#) (citing the Chinese Exclusion Case as when the Court first established that congressional authority to exclude aliens was plenary).

¹⁰ Vandiver, *supra* note 4, at 773-75.

¹¹ Matthew J. Lindsay, Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power, [45 Harv. C.R.-C.L. L. Rev. 1, 6 \(2010\)](#). Professor Lindsay correctly identifies that the principle of national "self-preservation" is what grants the federal government plenary authority over immigration. *Id.* at 31-46. However, Professor Lindsay incorrectly assumes this legal principle was created in the late nineteenth century. It existed well before then.

the [*65] plenary power doctrine as "a rights-subverting constitutional anomaly" which has "long been relegated to a sort of constitutional hall of shame."¹² Meanwhile, Stephen Legomsky argues that the courts have based too much reliance upon early case precedent such as the Chinese Exclusion Case¹³ and its nineteenth-century predecessors.¹⁴ Legomsky asserts that the holdings and rationales for these cases provide no support for the plenary power doctrine.¹⁵

What all these commentators fail to address, however, is the legal and historical precedent supporting the plenary power doctrine. Not one of these commentators attempts to delve into the Anglo-American tradition or the early treatises on international law by which the plenary power doctrine was derived.¹⁶ Instead, they attack the plenary power doctrine by asserting that the First Amendment prevents the federal government from conditioning entry or settlement on ideological grounds - all the while without having a firm historical or contextual grasp on the subject. Granted, one may argue that ideological exclusions are morally repugnant to the people that view this nation as being founded on liberty for all. However, the plenary power doctrine is firmly rooted in the Anglo-American legal tradition. It should be emphasized that the determination to expel or exclude foreigners, whether they have already [*66] lawfully settled or even begun the process of naturalization, is a political question and not a vested right absent congressional statutory acquiescence.¹⁷ The argument of moral repugnancy does not make exclusions based on association or ideological grounds unconstitutional. It is an issue that can only be placed into this nation's political discourse, where it has always and rightfully been.

Similar to other constitutional political questions, one must separate personal political beliefs from the law and history. Just as it may be argued that it is unconstitutional to exclude based upon ideological association, the same argument can be made for aliens that do not have sufficient property, are not

¹² Spiro, *supra* note 4, at 340-41; see also Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 118-38 (1996); Aleinikoff, *supra* note 4, at 862-71; Peter H. Schuck, *The Transformation of Immigration Law*, [84 Colum. L. Rev. 1 \(1984\)](#).

¹³ [Chae Chan Ping, 130 U.S. at 581](#).

¹⁴ **[Fong Yue Ting v. United States, 149 U.S. 698 \(1893\)](#)**; [Nishimurra Ekiu v. United States, 142 U.S. 651 \(1892\)](#).

¹⁵ S. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* 199-218 (1987); see also Hahn, *supra* note 4, at 960-83; L. Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, [100 Harv. L. Rev. 853, 858 \(1987\)](#) (stating that the plenary power doctrine is subject to constitutional restraints); Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, [100 Yale. L.J. 545 \(1990\)](#) (explaining the ultimate "failure" of the plenary power doctrine).

¹⁶ James Nafziger provides the most detailed attempt to examine this history from a legal perspective. However, Nafziger only briefly touches upon the Anglo-American heritage of the plenary power. Nafziger, *supra* note 9, at 804-47.

¹⁷ A recent article by James E. Pfander and Theresa R. Wardon asserts that the congressional plenary authority over immigration is limited in that Congress cannot prescribe retroactive legislation concerning naturalization and settlement to aliens that have lawfully settled. See James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of The Early Republic: Prospectivity, Uniformity, and Transparency*, [96 Va. L. Rev. 359, 441 \(2010\)](#). Pfander and Wardon argue,

Congress was not given untrammelled power to regulate (immigration and) naturalization but was required to "establish a uniform rule." Embedded in this provision were norms of prospectivity, uniformity, and transparency: Congress was to act by public law, creating a framework within which executive and judicial officers would administer naturalization law. Congress was neither to change the rules that apply to resident aliens, lawfully present in the United States, nor to exercise case-by-case control of naturalization decisions.

Id. As will be shown below, this interpretation of congressional power over naturalization and its intimate relation to immigration and foreign affairs cannot survive. The Founders understood these powers as significant to national self-preservation.

properly educated, or have dangerous communicable diseases.¹⁸ Nevertheless, we exclude individuals based upon all these factors. Furthermore, it may be argued that those convicted of crimes should not be excluded, for it violates their right to due process.¹⁹ This [*67] begets the question, "Which factors are excludable and who is to determine them?" The answer is simple: the factors are to be determined by this nation's elected federal representatives, including the President.²⁰

The purpose of this study is to correct the century-old assertion that the plenary power to expel or exclude aliens is subject to any limitations, except the powers delegated between the Legislative and Executive Branches by the Constitution. In particular, this Article sets forth the well-established, and often forgotten, doctrine of allegiance, the Anglo-American legal precedent for ideological exclusion and expulsion, the inherent authority of nations as understood by early international law commentators, how the Founding Fathers understood these doctrines, and the reasons this power resides with the federal government. The evidence demonstrates that ideological exclusion and expulsion are constitutionally permissible and are political questions to be determined by the people through their federal representatives.

II. The Anglo Origins of Immigration Law, Plenary Power, and Exclusion Based Upon Ideological and Association Grounds

Legal commentators have asserted that the Chinese Exclusion Case plenary power doctrine is a judicial creation²¹ or that the late nineteenth century perception of immigration law is fundamentally distinguishable from modern doctrine.²² These commentators fail to adequately examine the Anglo and international origins of ideological and association exclusion. One of the most detailed legal commentaries concerning these Anglo origins comes from [*68] James A. R. Nafziger, who concludes, "Before the late 19th century, there was little, in principle, to support the absolute exclusion of aliens."²³ He believes the historical record supports the concept of free migration and even cites to the Magna Charta, which protected the freedom of merchants to travel "in accordance with ancient and lawful customs."²⁴ Nafziger's commentary, however, distorts the historical record and also interprets the

¹⁸ For a discussion against excluding aliens according to such factors, see Note, Constitutional Limitations on the Naturalization Power, *supra* note 4, at 791-809, and Hahn, *supra* note 4, at 985-92.

¹⁹ As it stands today, the only due process afforded to aliens applying for entry or seeking lawful admission into the United States can be prescribed by Congress. See *Landon v. Plasencia*, 459 U.S. 21, (1982); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). Due process also does not extend to aliens seeking admission at a port of entry with a valid immigrant visa or aliens that enter unlawfully because they do not have the "ties that go with permanent residence." *Landon*, 459 U.S. at 32. Alexander Aleinikoff, however, argues that such aliens should have due process rights. See Aleinikoff, *supra* note 4, at 867-68. For other commentary questioning due process rights afforded to excludable aliens, see Ethan A. Klingsberg, Penetrating the Entry Doctrine: Excludable Aliens' Constitutional Rights in Immigration Processes, 98 *Yale L.J.* 639, 658 (1989); Mocy, *supra* note 4, at 1747, 1771-72; Note, Constitutional Limitations on the Naturalization Power, *supra* note 4, at 796 ("[A] resident alien's interest in the deportation process ... should be considered fundamental.").

²⁰ According to the commentators mentioned in this Article, the factors for exclusion should be limited by the provisions of the Constitution. There is no arguing that the Constitution limits the authority of the federal government, especially in its relation to citizens. However, there is no provision that expressly restricts the federal government regarding immigration.

²¹ See, e.g., Akram, *supra* note 4, at 58-59; Vandiver, *supra* note 4, at 773-75.

²² See, e.g., Nafziger, *supra* note 9, at 825-28.

²³ *Id.* at 809.

²⁴ *Id.* at 810 (quoting the Magna Carta).

Magna Charta too liberally, for, as the history will show, it was subject to "lawful customs," or what was known as the Statutes of the Realm and the law of nations.

A. Early Origins of the Plenary Power and the Doctrine of Allegiance

The most prominent early international commentator on immigration law was Hugo Grotius (1583-1645).²⁵ Even today, his 1608 work, *The Rights of War and Peace*, gives great insight into the development of international law. Of particular interest to free migration advocates is Grotius's section on refugees, as he may have been the first to write on the subject in detail:

[A] permanent residence ought not to be denied to foreigners who, expelled from their homes, are seeking a refuge, provided that they submit themselves to the established government and observe any regulations which are necessary in order to avoid strifes "It is characteristic of barbarians to drive away strangers," says Strabo, following Eratosthenes; and in this respect the Spartans failed to gain approval. In the opinion of Ambrose, also, those who keep foreigners out of their city are by no means worthy of approval.²⁶

While much of the focus of this quote has been placed on Grotius stating that refugees should be granted asylum,²⁷ [*69] what is overlooked are the major preconditions Grotius identifies to such a grant: "provided that they submit themselves to the established government and observe any regulations which are necessary in order to avoid strifes."²⁸ This language is significant for two reasons. First, the language "submit themselves" is in reference to the ancient doctrine of allegiance which requires every entering alien to give temporary allegiance to the foreign jurisdiction. Second, this doctrine of allegiance is strengthened when Grotius states "observe any regulation." Emphasis should be placed on the word "any," for it illustrates that as early as the seventeenth century it was acknowledged that all aliens, refugees included, must comply with any laws respecting immigration in order to receive the legal and physical protections of the foreign jurisdiction in which they reside.

This interpretation of Grotius is affirmed when viewing his other sections discussing immigration. It illustrates that immigration was directly linked to a nation's right of self-preservation, foreign affairs, and intertwined with the doctrine of allegiance. For example, in discussing the receiving of foreigners, Grotius writes, "There ought to be no doubt that such a person tacitly binds himself to do nothing against that government under which he seeks protection."²⁹ In another section, Grotius confirms that immigration is a matter of plenary authority and foreign relations when he describes the receiving of exiles as a matter of "friendship" between nations.³⁰

Of course, Grotius did not invent the concept of plenary power over immigration or the doctrine of allegiance. They existed well prior to him. Regarding the Anglo origins, the strength of the historical

²⁵ Hersch Louterpacht, *The Grotian Tradition in International Law*, 23 *Brit. Y.B. Int'l. L.* 1 (1946).

²⁶ Hugo Grotius, *The Rights of War and Peace* 201-02 (Francis W. Kelsey ed., 1925).

²⁷ See Roman Boed, *The State of the Right of Asylum in International Law*, 5 *Duke J. Comp. & Int'l L.* 1, 8 (1994); Eric Engle, *Universal Human Rights: A Generational History*, 12 *Ann. Surv. Int'l & Comp. L.* 219, 234 n.106 (2006); Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 *Am. J. Int'l L.* 532, 536 (1986); Nafziger, *supra* note 9, at 810-11; Matthew E. Price, *Politics or Humanitarianism? Recovering the Political Roots of Asylum*, 19 *Geo. Immigr. L.J.* 277, 292-96 (2004).

²⁸ Grotius, *supra* note 26, at 201-02.

²⁹ *Id.* at 857.

³⁰ *Id.* at 819.

evidence rests in England's Statutes of the Realm. From the inception of the Magna Charta to the early sixteenth century, the law generally did not require much of aliens.³¹ However, in 1529, the doctrine [*70] of alien allegiance was statutorily codified. It required aliens residing in London to:

Take their othe [of allegiance] and be sworne upon in the Comon Halle or metyng place of the said craftes, and there to receyve and take their othe and be sworne upon the Holy Evangelyst before the Mayster and Wardeyns of their said craft, to be faythfull and trewe to the Kyng our Sovereigne Lorde and his heires Kynges of England and to be obedyent to hym and them and his and their Lawes³²

All aliens outside of London, while immune from taking the oath, were still bound by the doctrine of allegiance itself. Section 4 of the statute required every alien "to be faithfull and trew to us and our heyres Kynges of England, and to be obedyent to us and them and our and their Lawes and to all Actes Ordynaunces and Decrees made and confirmed by us and our Councill or by our Councill."³³

[*71] In 1540, Parliament passed another statute addressing the allegiance of aliens. It was passed because an

infinite number of Straungs and aliens of foren countries and nations whiche daily doo increase and multiplie within his Graces Realme and Dominions in excessive nombres, to the greate detriment hindaunce losse and empovishment of his Graces naturall true lieges and subjects of this his Realme and to the greate decay of the same³⁴

Obedience was required not only of aliens but of denizens as well. The statute stipulated that letters of denization would be granted as long as the denizen "shalbe bounde and obedyent by and unto all the forsaid act ... and estatutes of this Realme."³⁵ Regarding all other alien classes, the statute required

³¹ What these laws do reveal, however, is the legal distinctions between aliens and citizens. See 14 Ric. 2, c. 1 (1390) (Eng.) (requiring every alien "of what Degree or Condition that he be, that bringeth any Merchandize into England, shall find sufficient Sureties before the Customers ... to the Value of Half the said Merchandises so brought"); 14 Hen. 6, c. 7 (1435) (Eng.) (discussing the capture of the goods of alien friends); 31 Hen. 6, c. 4 (1452-53) (clarifying that the King's courts have jurisdiction and aliens have legal recourse for injuries done at sea); 14 & 15 Hen. 8, c. 2 (1523) (allowing the search of alien businesses in London for violations of the merchant laws); 22 Hen. 8, c. 8 (1530-31) (Eng.) (codifying the rule that aliens made denizens shall pay customs, tolls, and duties as before the change in their status); 32 Hen. 8, c. 14 (1540) (Eng.) (requiring aliens to ship all goods in English ships and imposing a duty if done by foreign ships); see also 2 William Holdsworth, *A History of English Law* 473-74 (2d ed. 1966). Holdsworth notes,

The growing commercial importance of England the need for putting some restraint upon the piratical propensity of Englishmen, and the inefficiency of the court of Admiralty, added to the Statute Book some laws directed to safeguarding the interests of alien friends An Act of 1435 was passed to regulate the thorny subject of the goods of alien friends upon enemies' ships. The statute recited that the immunity of such goods led to fraudulent practices, and therefore allowed the captors of such ships ... to retain such goods. An Act of 1436 was passed to regulate certain abuses of some forms of safe conduct. In 1439 alien friends were prohibited from loading their goods in an enemy's ship under penalty of forfeiture, unless the ship had a safe conduct. It is to these statutes that we must look for the germs of that part of the law of England which is directed to the enforcement of international obligations, and the regulation of the rights of foreigners. Up till the last century it was a very meager branch of English law; and this is due to the fact that it was a branch of law which fell outside the purview of the ordinary courts.

Holdsworth, *supra*, at 473-74.

³² 21 Hen. 8, c. 16, § 1 (1529) (Eng.).

³³ *Id.* § 4.

³⁴ 32 Hen. 8, c. 16, § 1 (1540) (Eng.). According to Francis Bacon, the statute was passed because Parliament found that aliens "did eate the Englishmen out of trade, and that they entertained no Apprentizes, but of their owne Nation." Francis Bacon, *Three Speeches of the Right Honorable, Sir Francis Bacon Knight* 19 (1641).

³⁵ 32 Hen. 8, c. 16, § 1 (1540) (Eng.).

"every alien and straungier borne out of the Kinges obedience, not being denizen ... [to be] bounden by and unto the lawes and statutis of this realme." ³⁶

Throughout this period, the sovereign possessed virtually unchecked plenary power over foreigners and foreign trade. ³⁷ William Holdsworth describes the development of the plenary power of that era as follows:

As the controller of foreign affairs [the crown] had by virtue of the prerogative and by statute powers to enforce any treaties which it pleased to make; and these treaties often dealt with the conditions under which foreign trade could be carried on... . Medieval statutes recognized that a large discretion must be left to the crown in these matters. It was an idea which came naturally to an age which accepted the root principle of the mercantile system that all trade should be organized with a view to the maintenance of national power; and the claims made by the crown naturally grew larger as, with the rise of the [*72] modern state, trade rivalry tended to become simply a phase of national rivalry. ³⁸

Also, at this time it was well-established that aliens were subject to rules of law which differed from the common law. Aliens could not claim the rights and liberties of the English subject, and the government was free to treat them as it pleased. ³⁹ This power was exhibited in a 1557 statute during the reign of Phillip and Mary - 4 & 5 P. & M., c. 6. It proclaimed that in order to ensure the sovereign had "suretie and preservation" of the realm:

That all Frenchemen, and all and every other pson and psons ... was under the Frenche Kinges Obeisance, not being Denizens, (other then suche as the King and Quenes Highnes...speciallye licence limit and appointe to remaine within this Realme,) shall departe out of this Realme and out and from the Dominions and Territories of the same, ther to remaine and continue without returne into this Realme, during the time and continuance of the Warres ⁴⁰

The statute is significant because it was the first to exclude aliens based upon their nationality. It did, however, provide an exception to "suche Aliens and Strangers" whom the sovereign "shall licence to remain and tarrie in this Realme." ⁴¹ Similar to past precedent, aliens were required to be bound by the doctrine of allegiance. ⁴²

Although the legal premise of 4 & 5 P. & M., c. 6 was exclusion based upon nationality, its underlying purpose was the exclusion of dangerous Catholics. ⁴³ Therefore, French nationals were being excluded on two grounds - as alien enemies and for their ideological religious beliefs. Of course, the exclusion of

³⁶ Id. § 3. The plenary power to grant all privileges to aliens was vested with Parliament and the King. The statute stated, "it shalbe the Kinges moste gratiouse pleasure to graunte to any suche alyen any special liberties or privileges more or otherwise than is conteyned in the said estatutis." Id. § 2.

³⁷ 4 Holdsworth, supra note 31, at 335.

³⁸ Id. at 336.

³⁹ Id. at 335.

⁴⁰ 4 & 5 P. & M., c. 6, § 1 (1557-58) (Eng.).

⁴¹ Id. § 2.

⁴² Id.; see also 32 Hen. 8, c. 16, § 1 (1540) (Eng.); 21 Hen. 8, c. 16, § 1 (1529) (Eng.) (stating that aliens should swear allegiance to the king).

⁴³ See Bacon, supra note 34, at 20-21 (discussing the long standing fear that Catholic France sought to subdue Protestant England).

alien enemies was common practice. [*73] The statutes of the realm distinguished between alien friends and alien enemies on a regular basis.⁴⁴

Expulsion based upon ideological grounds, however, had never been statutorily codified. Certainly, the government could expel or exclude individuals that it deemed dangerous. To expel an entire class of persons because their ideological beliefs were deemed dangerous to the nation, however, first came to legal prominence with 4 & 5 P. & M., c. 6. It would be the basis of future exclusions, expulsions, and rules of naturalization. For instance, in the early seventeenth century, when the fear of Catholic plots to overthrow the government was heightened, Parliament restricted naturalization to individuals who "have received the Sacrament of the Lordes Supper wthin one Moneth next before any Bill exhibited for that Purpose; and also shall take the Oath of Supremacy and the Oath of Allegiance in the Parliament Howse."⁴⁵ In other words, not only did naturalizing foreigners have to take an oath of allegiance but they also had to be of the Protestant faith.

The entire basis of England's early immigration and naturalization laws were intertwined with the doctrine of allegiance. When the King's Bench decided Calvin's Case it was determined that the "'bond of allegiance,'" said Lord Ellesmere, "'of which we dispute is vinculum fidei; it bindeth the soul and conscience of every subject severally and respectively, to be faithful and obedient to the king."⁴⁶ The effect that the doctrine of allegiance had on aliens was that it prescribed the legal structure by which they were naturalized and permitted to reside in the realm.⁴⁷ As Holdsworth observes, the entire development of immigration [*74] law was "centered round the doctrine of allegiance, and of the rules which defined the position of the alien friend."⁴⁸

Returning to Calvin's Case, the King's Bench addressed the doctrine of allegiance concerning the rights of aliens. The case presented the challenging of an alien juror because he was born out of the king's allegiance. It did not matter that the alien had lived his entire life in England and had sworn allegiance to the king, for it was determined, "an alien be sworn in the leet or elsewhere, that does not make him a liege subject of the king, for neither the steward of a lord nor any one else, save the king himself, is able to convert an alien into a subject."⁴⁹

The development of the doctrine of allegiance in immigration matters would reach its height during the seventeenth century. In 1641, Francis Bacon stated that the "priviledge of Naturalization, followeth Allegeance, and that allegeance followeth the Kingdome."⁵⁰ Citing Sir Thomas Littleton's 1481 treatise

⁴⁴ 2 Holdsworth, supra note 31, at 474; see also 14 Hen. 6, c. 7 (1435) (Eng.); 31 Hen. 6, c. 4 (1452-53) (Eng.); 22 Hen. 8, c. 8 (1530-31) (Eng.).

⁴⁵ 7 Jac. 1, c. 2 (1609-10) (Eng.).

⁴⁶ 9 Holdsworth, supra note 31, at 82. Edward Coke described Calvin's Case as follows:

And all Aliens that are within the Realm of England, and whose Sovereigns are in amity with the king of England, are within the protection of the king, and do owe a local obedience to the king, (are homes within this act) and if they commit High Treason against the king, they shall be punished as Traytors; but otherwise it is of an Enemy, whereof you may read at large

³ Edward Coke, Institutes of the Laws of England 4 (4th ed. 1669).

⁴⁷ 9 Holdsworth, supra note 31, at 83.

⁴⁸ Id. at 72.

⁴⁹ Id. at 92.

⁵⁰ Bacon, supra note 34, at 15. There was debate as to whether an alien's allegiance was due to the sovereign, to Parliament, or to the kingdom itself. Bacon describes this debate, writing:

On Tenures, ⁵¹ Bacon defined an alien as a person "which is born out of the allegiance of our Lord the King." ⁵² There were two degrees of aliens - alien friends and alien enemies. An alien friend was defined as a person "borne under the obeisance of such a King or State, as is confederate with the King of England, or at least not in war with him." ⁵³ However, even an alien friend "may be an Enemy," therefore to this "person the Law allotteth ... [a] benefit" that is "transitory." ⁵⁴

During the seventeenth century, differentiating between subjects and aliens, strangers, or denizens remained a [*75] prominent practice. The legality of this differentiation rested with allegiance. For instance, the Acts of the Interregnum reveal that "every Alien and Stranger born out of the Kings obeysance, as well as Denizens" had to pay "a proportion double" to subjects. ⁵⁵ Allegiance, however, was not limited to taxes. It also appeared in an ordinance restricting aliens from inhabiting the counties of Norfolk, Suffolk, Essex, Cambridge, Hertford, and Huntingdon. The ordinance stipulated "that no stranger shall come in, or inhabit within the town of Cambridge or the Isle of Ely, without approbation ... upon certificate of his or their good affections to the King and Parliament, and also that they bring [this] certificate under four[] Deputy-Lieutenants hands." ⁵⁶

The doctrine of allegiance also appeared in Interregnum ordinances concerning trade and commerce. In a 1644 ordinance, it was stated that in order for "Forreigners, and Strangers" to receive "incouragement for Trade, and commerce within the City of London and other Ports" they must "keep their fidelity to the King and Parliament" and pay the "customes and discharge such duties as are due and accustomed." ⁵⁷ Coupled with the doctrine of allegiance, England's entire immigration policy centered on the benefits that encouraging foreigners could afford trade, commerce, and wealth. The general philosophy was that foreigners would bring their commerce and individual wealth into England, thereby increasing the overall riches of the kingdom. Statutes that supported immigration were enacted in order to encourage trade. As Holdsworth has rightfully observed, aliens received statutory rights and privileges because "law which denies any rights to aliens will discourage trade." ⁵⁸

Individuals like Daniel Defoe supported immigration because of this very point. He thought the "Wealth and Trade of England would be greatly increased" by a general [*76] naturalization of foreigners. ⁵⁹ He

For some said that allegiance hath respect to the Law, some to the Crowne, some to the Kingdome, some to the body politique of the King, so there is confusion of tongues amongst them, as it commonly commeth to passe in opinions, that have their foundations in subtilty, and imagination of mans wit, and not in the ground of nature.

Id. at 16.

⁵¹ For a modern copy, see Littleton's Tenures in English (Eugene Wambaugh ed., 1908).

⁵² Bacon, supra note 34, at 37.

⁵³ Id. at 11.

⁵⁴ Id. at 11-12.

⁵⁵ For examples, see Acts and Ordinances of the Interregnum, 1642-1660, at 85-100, 531-53 (1911).

⁵⁶ Id. at 242-45.

⁵⁷ Id. at 498-501.

⁵⁸ 9 Holdsworth, supra note 31, at 94.

⁵⁹ Daniel Defoe, Some Seasonable Queries, on the Third Head, viz. A General Naturalization 1 (1697) [hereinafter Defoe, Some Seasonable Queries]. For a brief survey of Daniel Defoe's political and economic writings supporting immigration, see Daniel Statt, Daniel Defoe and Immigration, 24 Eighteenth-Century Studies 293, 293-313 (1991). See also Daniel Defoe, Giving Alms no Charity (1704); Daniel Defoe, Lex Talionis, or, An Enquiry into the Most Proper Ways to Prevent the Persecution of the Protestants in France (1698).

viewed an increase of foreigners as raising the landed gentries' rent profits, providing "a greater consumption of the Native Products," and bringing an increase of tax revenue.⁶⁰ Not to mention, Defoe saw an influx of foreigners as contributing to the security of the nation as well. The more foreigners that were naturalized increased the pool of men from which the government could impress into service.⁶¹ Meanwhile, in his 1693 tract entitled *A New Discourse of Trade*, Josiah Child also supported immigration because it would "tend to the advancement of Trade, and increase ... the value of the Lands of this Kingdom."⁶² Childs was cognizant of the criticism that foreigners came to England poor and destitute. He defended against such arguments, stating that "many [foreigners] have brought hither very good Estates, and hundreds more would do the like, and settle here for their Lives ... if they had the same Freedom and Security here as they have in Holland and Italy."⁶³

Of course, not everyone viewed the admission of aliens, foreigners, and strangers as beneficial to trade. This is evidenced by a dozen instances of refusal by Parliament to pass a general immigration or naturalization bill from the Restoration to the early eighteenth century.⁶⁴ A short 1662 tract entitled *Reasons Against the General Naturalization of Aliens* argued that the wealth and prosperity of England would be disadvantaged should Parliament pass a new naturalization act.⁶⁵ The anonymous author felt that [*77] "advancing aliens" would "impoverish[] the Native Subjects."⁶⁶ English merchants would sustain losses in their exports, and the England's markets would be flooded with merchandise thereby causing local merchants to lose valuable profits.⁶⁷

Other seventeenth-century political tracts made similar observations. The 1680 *The History of Naturalization* stated, "Aliens [are] ruinous to English Trade and [the] English Merchant" for "the English Merchants had many Foreign Commissions very advantageous to them, which these Aliens now enjoy."⁶⁸ A 1690 tract entitled *A Brief and Summary Narrative of the Mischiefs and Inconveniences ... Occassioned by Naturalizing of Aliens* argued that the aliens had caused the rise of imports to the point that "this Nation cannot consume all the Commodities Imported, which will occasion the price to fall."⁶⁹ A 1694 publication of Sir John Knight's speech against naturalization quoted him as stating that immigration hurts English manufactures because aliens drive down domestic wages, thus preventing poor Englishmen from "supporting their Families by their honest and painful Labour and Industry."⁷⁰

⁶⁰ Defoe, *Some Seasonable Queries*, supra note 59, at 1, 2.

⁶¹ Id.

⁶² Josiah Child, *A New Discourse of Trade, Wherein is Recommended Several Weighty Points Relating to the Companies of Merchants* 122 (1693).

⁶³ Id. at 125. For other support, see *An Humble Address With Some Proposals for the Future Preventing of the Decrease of the Inhabitants of this Realm* (1677); *The Grand Concern of England Explained* (1673).

⁶⁴ See Statt, supra note 59, at 295; Daniel Statt, *The City of London and the Controversy Over Immigration, 1660-1772*, 33 *Hist. J.* 45, 45-61 (1990).

⁶⁵ *Reasons Against the General Naturalization of Aliens* 1 (1662).

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ *The History of Naturalization With Some Remarques upon the Effects thereof, in respect to the Religion, Trade and Safety of his Majesties Dominions* 2 (1680).

⁶⁹ *A Brief and Summary Narrative of the Many Mischiefs and Inconveniences in former Times as well as of late Years, Occassioned by the Naturalizing of Aliens* 1 (1690).

⁷⁰ *The Speech of Sir John Knight of Bristol, Against the Bill for a General Naturalization in 1693*, at 8 (1694). For other seventeenth century tracts on aliens, see *Sundry Considerations Touching Naturalization of Aliens: Whereby the Alleged*

Knight was for "sending the Foreigners back" because "then the Money will be found circulating at Home, in such Englishmens Hands." ⁷¹

In addition to the argument that foreigners had a negative impact on commerce and trade, it was frequently asserted that foreigners should not be naturalized or permitted to settle due to allegiance conflicts between one's nation of **[*78]** origin and England. For example, in the 1695 tract *Sundry Considerations Touching Naturalization of Aliens*, it was argued that the "Safety of States and Kingdomes is of too great" importance "to practice experiments" of immigration and naturalization. ⁷² The tract queried, "What if Wars should arise between this Kingdom, and those Kingdoms from which the great resort of Aliens should come?" ⁷³ The answer was "can any man reasonably think that they would not have respect to their Native Countries ... or can we think they should wholly be distinct of their Allegiance If not, then we have so many Enemies Incorporated to us, who may quickly ... ruin our Peace and Kingdom." ⁷⁴

In the tract *The History of Naturalization*, it was argued that merchant aliens were "dangerous to the Government" because they "will not have their Affections changed, nor their Alliances extinguished by Naturalization." ⁷⁵ The tract elaborated on this point, stating foreigners, "like Summer Birds when they have filled their Pockets, or if trouble or War arise, they will not forget their Fathers Land" which will be to the "great inconvenience to His Majesty and His Natural-born Subjects." ⁷⁶

Even Daniel Defoe, who supported naturalization and immigration on commercial grounds, ⁷⁷ referenced the significance of the doctrine of allegiance in admitting foreigners that supported the ideological beliefs of that nation. Defoe was not for encouraging all foreigners, but only "Foreign Protestants," especially those who "hazarded their Lives to save our Liberties" during the 1688-1689 Glorious Revolution. ⁷⁸ He rationalized that the "strength of England augmented by such a considerable Accession of zealous Protestants" would "be obliged to defend our Rights and Liberties, as their own." ⁷⁹

[*79] To truly understand seventeenth-century England, it should be emphasized that the Protestant religion was the ideological identity of English society. It was intimately intertwined with the lives, liberties, and property of English subjects. In other words, it was the basis of government itself. Similar to how today's Americans view the identity of the United States as being intertwined with the ideologies of democracy, individual freedom, and federalism, English subjects in the seventeenth and eighteenth centuries intertwined their ideological identity with the Protestant religion. This is significant because the history of seventeenth-and eighteenth-century England shows that the political branches saw it as their duty to protect that identity from foreigners whose ideals may conflict with its own. In short, it was within

Advantages Thereby are Confuted, and the Contrary Mischiefs Thereof are Detected and Discovered (1695), and *A Supplement to Sundry Reasons against a General Naturalization of Aliens* (1696).

⁷¹ [The Speech of Sir John Knight](#), *supra* note 70, at 5.

⁷² *Sundry Considerations Touching Naturalization of Aliens*, *supra* note 70, at 14.

⁷³ *Id.* at 7.

⁷⁴ *Id.*

⁷⁵ *The History of Naturalization*, *supra* note 68, at 2.

⁷⁶ *Id.* at 3.

⁷⁷ *Statt*, *supra* note 59, at 297-304.

⁷⁸ Defoe, *Some Seasonable Queries*, *supra* note 59, at 3.

⁷⁹ *Id.*

the power of the political branches of government to exclude or expel noncitizens whose ideological beliefs conflicted with the basis of English society.

In the late-seventeenth century, exclusion based on the grounds of ideological conflict may have been at its peak. In one political tract, it was argued that the increase of non-Protestant foreigners caused "Divisions in Religion."⁸⁰ It was important that the identity of the nation, the "Protestant Religion," be "kept pure and undefiled."⁸¹ Meanwhile, in another political tract it was argued that mingling "Men of all Religions" in government, society, and employments would be a "hazard and destruction not only of the Protestants, but of the Christian Religion it self."⁸²

Certainly not everyone agreed with the premise of ideological exclusion or requiring foreigners to take the Protestant sacrament. In the 1697 tract entitled *An Essay Concerning the Powers of the Magistrates and the Rights of Mankind in Matters of Religion*, Matthew Tindal saw such restrictions as tending to "discourage the Loyalty and Affection" of foreigners and impacting commerce.⁸³ What is [*80] significant from Tindal's dissenting voice, however, is that ideological exclusions did exist and were in practice.

B. The Immigration Experiment of Queen Anne, 1709-1711

After the Restoration in 1660, only a few immigrants were naturalized, granted letters of denization, or were permitted to establish settlement in England.⁸⁴ However, in 1709, a Whig-dominated Parliament sought to promote immigration in the hopes of repopulating England and increasing commerce.⁸⁵ Following the advice of such economists as Josiah Child, Josiah Tucker, and John Houghton, it was believed that immigrants would be the answer to England's economic woes.⁸⁶ Thus, Parliament and Queen Anne put into force 7 Anne c. 5, which echoed this purpose and stated:

Whereas the Increase of People is a Means of advancing the Wealth and Strength of a Nation And whereas many Strangers of the Protestant or Reformed Religion out of a due Consideration of the happy Constitution of Government of this Realm would be induced to transport themselves and their Estates into this Kingdom if they might be made Partakers of the Advantages and Privileges which the natural born Subjects thereof do enjoy... .⁸⁷

Although the bill was welcomed to promote commerce,⁸⁸ it came with an ideological condition. In Parliament, Mr. Compton would only support the bill "should there be a clause interested in it for obliging

⁸⁰ A Brief and Summary Narrative of the Many Mischiefs, *supra* note 69, at 1.

⁸¹ *Id.*

⁸² *Sundry Considerations Touching Naturalization of Aliens*, *supra* note 70, at 11.

⁸³ Matthew Tindal, *An Essay Concerning the Power of the Magistrate, and the Rights of Mankind in the Matters of Religion* 169, 169-76 (1697).

⁸⁴ *Statt*, *supra* note 64, at 46.

⁸⁵ *Id.* at 47-48.

⁸⁶ *Id.* at 48.

⁸⁷ 7 Anne c. 5, § 1 (1708) (Eng.).

⁸⁸ The economic influences in passing the bill cannot be stressed enough. The City of London supported the bill because it was believed Protestant refugees would bring two million sterling and their estates which could be inherited and transferred to England. See 6 William Cobbett, *The Parliamentary History of England from the Earliest Period to the Year 1803*, at 782-83 (1810).

foreigners, as should be willing to enjoy the benefit of it, to receive the sacrament." ⁸⁹ Thus, the requirement that naturalized foreigners receive "the Sacrament of the Lords Supper in some Protestant or reformed Congregation within this Kingdom of Great Britain" was placed within the bill. ⁹⁰ In addition to the [*81] Protestant-ideological requirement, foreigners were required to take the oath of allegiance, given the concern that even foreign Protestants "owe allegiance to their respective princes, and retain a fondness for their native countries." ⁹¹

Despite these restrictions, 7 Anne c. 5 never achieved its objective of "advancing the Wealth and Strength of a Nation" and its provisions were short lived. ⁹² Instead of attracting wealthy foreign Protestants, it attracted an estimated 10,000 poor Palatines. These Palatines had to be supported by government grants and private charity, thereby financially burdening the nation. Furthermore, the influx of poor foreigners caused friction between poor English natives and their foreign counterparts. ⁹³ This explains why the 1711 repeal of the statute, 10 Anne, c. 9, stated: "Whereas divers Mischiefs and Inconveniencies have been found by Experience to follow from the same to the Discouragement of the natural born Subjects of this Kingdom and to the Detriment of the Trade and Wealth there of" ⁹⁴

The House of Commons displayed similar feelings when it considered passing 10 Anne, c. 9. It was stated:

That the inviting and bringing over into this kingdom the poor Palatines, of all religions, at the public expence, was an extravagant and unreasonable charge to the kingdom, and a scandalous misapplication of the public money, tending to increase and oppression of the poor of this kingdom, and of dangerous consequence to the constitution in church and state. ⁹⁵

C. The French Revolution, Ideological Exclusions, and the Precursor to the Alien and Sedition Acts

[*82] In 1793, Parliament passed an alien bill to protect England from the ideological beliefs of the French Revolution. ⁹⁶ What is particularly interesting about the alien bill is that it may have been a legislative model for the 1798 Alien and Sedition Acts, for the justifications were based upon the same principles - allegiance and the right of self-preservation. As noted above, commentator James A. R. Nafziger has argued that before the nineteenth century "there was little, in principle, to support the absolute exclusion of aliens." ⁹⁷ Meanwhile, other commentators place this same assertion in a First

⁸⁹ Id. at 780.

⁹⁰ 7 Anne c. 5, § 2 (1708) (Eng.).

⁹¹ 6 Cobbett, supra note 88, at 780.

⁹² 10 Anne, c. 9 (1711) (Eng.).

⁹³ H.T. Dickinson, The Poor Palatines and the Parties, 82 Eng. Hist. Rev. 464, 474 (1967). Much of friction probably rested with financial assistance the foreigners were receiving. For instance, Queen Anne had employed several hundred to build a canal and tend to the royal gardens. Id. at 476. In addition to this, the ministry offered any parish a bounty of £ 5 for every Palatine received. Most parishes responded that they already had to deal with their own poor inhabitants and could not take on others. Id.

⁹⁴ 10 Anne, c. 9 (1711) (Eng.).

⁹⁵ 6 Cobbett, supra note 88, at 1000.

⁹⁶ E.S. Roscoe, Aliens in Great Britain, 16 Transactions of the Grotius Soc'y 65, 66 (1930).

⁹⁷ Nafziger, supra note 9, at 809.

Amendment paradigm by arguing that expulsion or exclusion cannot be based on ideological grounds.⁹⁸ These assumptions, however, are based on a minute examination of Anglo-American history and law.

The legal sources of the period up to 1792 all attest to the legality of plenary power doctrine, ideological exclusions, and the doctrine of allegiance. William Holdsworth provides the best legal summary leading up to 1793, writing:

As we might expect, this wide prerogative of controlling the movements of aliens was exercised in the sixteenth century. Its existence was not questioned either then, or in the course of the constitutional controversies of the first half of the seventeenth century. In these circumstances there can be no doubt that Jeffreys, C.J., was warranted in saying in 1684, "I conceive the King had an absolute power to forbid foreigners whether merchants or others, from coming within his dominions, both in times of war and in times of peace, according to his royal will and pleasure; and therefore gave safe-conducts to merchants, strangers, to come in, at all ages, and at his pleasure commanded them out again." In 1705 Northey, the attorney-general, said that the Crown had power to exclude aliens; in 1771 the secretary of state directed that no Jews should be allowed to enter England except under certain conditions. Blackstone said that aliens "were liable to be sent home whenever the King sees occasion"; ... during the greater [*83] part of the eighteenth century, there appear to be very few instances in which the Crown used its prerogative either to exclude or to expel aliens; and, when, at the end of the century, it was thought desirable to exclude aliens, statutory powers were got. In the third place, these statutes were passed to exclude aliens who, it was thought, might spread in England the ideas of the French Revolution... . Since 1793, if the government wished to exclude aliens, it has had recourse to the Legislature. It is clear that, whether or not the Crown had power to exclude, this power is in effect superseded by the statutes which now regulate that power. In the second place, whether or not the King has the power to exclude, the alien excluded cannot, by taking legal proceedings, assert a right to enter the country. He is not a British subject, and he is not an alien resident in this country. Therefore any measures taken by the Crown to exclude him cannot give rise to any proceedings in an English Court because they are acts of state... . The better opinion would seem to be that the Crown has no general power to expel an alien; but that it may have a power to expel if an alien enters the country in contravention of a statute, or perhaps of a royal prohibition to enter, or if the Crown has this power by the law of a particular colony.⁹⁹

In summation, Holdsworth was stating that the authority of the English government over immigration matters was unquestionably plenary despite liberty charters such as the Magna Charta, 1689 Declaration of Rights, and the Act of Settlement. The only major debate over immigration matters concerned whether Parliament or the Crown had the absolute authority to exclude or expel aliens. What Holdsworth makes clear is that by 1793 the power over immigration had a concurrent structure. While this distribution of power is significant in determining the legality of an individual's exclusion or expulsion, what is of importance for this study is that the plenary power doctrine, ideological exclusion, and the doctrine of allegiance were all in full force and unquestioned.

English legal treatises of the eighteenth century illuminate this fact. For example, in John Comyns's *A Digest of the Laws of England*, the requirement that foreigners [*84] declare their allegiance by submitting to the laws is clarified when it states, "[By the st. 32 H. 8.](#) 16. s. 9. every alien shall be subject

⁹⁸ See supra note 4. These commentators and scholars have argued that the Bill of Rights limits the federal government's power to exclude or expel aliens.

⁹⁹ 10 Holdsworth, supra note 31, 395-98.

to the laws." ¹⁰⁰ Comyns also confirms the existence of the ideological aspects of immigration and naturalization, writing that "by the st. 7 Jac. 2. no person shall be naturalized, unless he hath received the sacrament within a month before the bill exhibited, and take the oaths of supremacy and allegiance in the parliament house." ¹⁰¹ Of course, Comyns was not the only commentator to do so.

Wyndham Beawes's *Lex Mercatoria Rediviva* also discusses the legal framework of immigration and naturalization law. Of interest is his analysis of the doctrine of allegiance as applying to Englishmen that settle in a foreign country. Beawes wrote, "If an Englishman shall go beyond Sea, and shall there swear Allegiance to any foreign Prince or State, he shall be esteemed an Alien, and shall pay the same position as they; but if he returns and lives in England, he shall be restored to his Liberties." ¹⁰² In Matthew Bacon's *A New Abridgement of the Law*, the doctrine of allegiance is discussed in further detail. Bacon wrote:

An Alien is one born in a strange Country and different Society, to which he is presumed to have a natural and necessary Allegiance; and therefore the Policy of our Constitution has established several Laws relating to such a one; the Reasons whereof are, that every Man is presumed to bear Faith and Love to that Prince and Country where first he received Protection during his Infancy; and that one Prince might not settle Spies in another's Country; but chiefly that the Rents and Revenues of one Country might not be drawn to the Subjects of another. ¹⁰³

Even William Blackstone discussed the importance of the doctrine of allegiance and the legal requirement that all foreigners must submit to a nation's laws as a requirement **[*85]** to enter or settle. He writes that allegiance "both express and implied, is the duty of all the king's subjects" as is the case with aliens. ¹⁰⁴ He defines an alien as "one who is born out of the king's dominions, or allegiance." ¹⁰⁵ Regarding the plenary power of government over foreign affairs and immigration, Blackstone writes,

By the law of nations no member of one society has a right to intrude into another. And therefore Puffendorf very justly resolves, that it is left in the power of all states to take such measures about the admission of strangers, as they think convenient... . Great tenderness is shown by our laws, not only to foreigners in distress ... but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king's protection; though liable to be sent home whenever the king sees occasion. ¹⁰⁶

What Blackstone's *Commentaries* makes abundantly clear is that immigration is a privilege, not a right. While he admits that the English statutes were generous to foreigners entering the realm, he conditions their entry and settling on "behaving peaceably." ¹⁰⁷ Furthermore, Blackstone confirms that the sovereign authority has discretion to send foreigners home at any time. ¹⁰⁸

¹⁰⁰ 1 John Comyns, *A Digest of the Laws of England* 561 (Anthony Hammond ed., 5th ed. 1824); Comyns distinguishes between alien friends, alien enemies, and allegiance. *Id.* at 552, 560.

¹⁰¹ 1 Comyns, *supra* note 100, at 555.

¹⁰² Wyndham Beawes, *Lex Mercatoria Rediviva: or, the Merchant's Directory* 277 (6th ed. 1773).

¹⁰³ 1 Matthew Bacon, *A New Abridgement of the Law* 76 (6th ed. 1793).

¹⁰⁴ 1 William Blackstone, *Commentaries on the Laws of England* 359 (1765).

¹⁰⁵ *Id.* at 361.

¹⁰⁶ *Id.* at 251-52.

¹⁰⁷ *Id.* at 252.

¹⁰⁸ *Id.*

Perhaps the most influential commentator on immigration law was Emer De Vattel. He was not of English origin, but Vattel's work provides historians and legal commentators with an international context of immigration law, especially with respect to Western civilization. While his works were not translated into English until 1787, Benjamin Franklin's correspondence proves that Vattel's Law of Nations significantly impacted the legal thought of immigration law in England and the American colonies as early as 1775. In a December 9, 1775 letter to Charles Dumas, Franklin wrote, **[*86]**

I am much obliged by the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations. Accordingly that copy which I kept (after depositing one in our own public library here, and sending the other to the college of Massachusetts Bay, as you directed) has been continually in the hands of the members of our congress, now sitting, who are much pleased with your notes and preface, and have entertained a high and just esteem for their author. ¹⁰⁹

Vattel undoubtedly influenced the late-eighteenth-century understanding of immigration and naturalization - such as who may obtain a country's rights, privileges, and immunities. ¹¹⁰ First and foremost, Vattel viewed the admission of aliens as a privilege, not a right. ¹¹¹ In exchange for permission to "settle and stay," aliens were "bound to the society by their residence ... subject to the laws of the state ... and ... obliged to defend it, because it grants them protection." ¹¹² These allegiances were required even though a permitted alien did "not participate in all the rights of citizens." ¹¹³ In other words, the law of nations made it clear that lawful aliens were viewed as "citizens of an inferior order, and ... united to the society, without participating in all its advantages." ¹¹⁴

If lawful aliens were "citizens of an inferior order," this begets the question: What rights, privileges, and immunities, if any, are granted to aliens who do not prescribe their allegiance to the laws? According to Vattel, the key to the answer rests as to whether an alien had settled. Aliens must first be permitted to settle before they may obtain the protection of the country and its laws. To accomplish this requirement, the alien must establish "a **[*87]** fixed residence in any place with an intention of always staying there." ¹¹⁵ While one may view Vattel's analysis as a broad allowance for any person to immigrate to any country in order to qualify, he makes it clear that a "man does not ... establish his settlement ... unless he makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration." ¹¹⁶

In other words, eighteenth-century international precedent required aliens to inform the government of their intent to settle. This is a legal premise that has survived throughout the world, even today. Most

¹⁰⁹ Benjamin Franklin, *Memoirs of Benjamin Franklin* 297 (1834).

¹¹⁰ See generally [Prentiss v. Barton, 19 F. Cas. 1276, 1277 \(C.C.D. Va. 1819\)](#) (No. 11,284). John Marshall would even cite to Vattel when he defined "domicil of origin." *Id.*

¹¹¹ The inhabitants, as distinguished from citizens, are foreigners, who are permitted to settle and stay in the country." Emer de Vattel, *The Law of Nations* § 213 (Bela Kapossy & Richard Whatmore eds., Liberty Fund 2008).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* § 218.

¹¹⁶ *Id.*

importantly, it was a legal premise that Parliament would include in their 1793 Alien Bill ¹¹⁷ and the American Founding Fathers would include in their first laws on naturalization. ¹¹⁸ In fact, in 1822, the Committee of the Judiciary would reiterate this premise, stating that to "dispense with [the declaration of the intent to settle] is to commit a breach in the established system, and to make residence, without declared intention to become a citizen, sufficient to entitle a person to admission" into the United States. ¹¹⁹

Aliens that did not comport to a nation's laws of settlement, according to Vattel, were vagrants - the eighteenth-century equivalent of what we refer today as "illegal" or "unlawful" aliens. They are individuals that "have no settlement." ¹²⁰ "For to settle for ever in a nation," wrote Vattel, "is to become a member of it, at least as a [*88] perpetual inhabitant, if not with all the privileges of a citizen." ¹²¹ Therefore, as Vattel makes clear, the law of nations required aliens to settle in order to obtain the "privileges of a citizen." This is not to say that vagrants did not have any rights, privileges, or immunities. ¹²² They were entitled to legal due process, ¹²³ protection over their person, ¹²⁴ and to maintain their personal property. ¹²⁵

However, vagrants were not necessarily entitled to any other protections unless the law of the nation expressly grants them. ¹²⁶ In reference to aliens, as a matter of law, they are only granted full protection upon legal entry or what Vattel describes as the "tacit condition, that [they] be subject to the laws." ¹²⁷ This includes laws "which have no relation to the title of citizen, or of the subject of the state" - the rules of naturalization and entry. ¹²⁸ Aliens may be subjected to these extra requirements as a condition to the

¹¹⁷ 33 Geo. 3, c. 4 (1793) (Eng.).

¹¹⁸ The first law to establish a uniform rule of naturalization required the alien to show proof he resided in the United States for two years, had settled in a state where the court was located for at least one year, and to make "proof to the satisfaction of such court, that he is a person of good character, and taking the oath ... to support the Constitution of the United States" to be "considered as a citizen of the United States." An Act to establish an Uniform Rule of Naturalization, ch. 3, [1 Stat. 103-04 \(1790\)](#). The 1802 Naturalization Act similarly required aliens announce their intent to settle at least three years before the time applying to be admitted to become a citizen of the United States. An Act to establish an Uniform Rule of Naturalization, and to repeal the acts heretofore passed on the subject, ch. 28, [2 Stat. 153-54 \(1802\)](#).

¹¹⁹ Report of the Committee on the Judiciary Upon the Subject of Admitting Aliens to the Rights of Citizenship Who Resided Within the United States One Year Preceding the Declaration of the Law War With Great Britain (March 18, 1822).

¹²⁰ Vattel, supra note 111, § 219.

¹²¹ Id.

¹²² Id. During the 1790 debates over the rules of naturalization, James Jackson hoped to see the "title of a citizen of America as highly venerated and respected as was that of a citizen of old Rome." Furthermore, Jackson was of the opinion, "that rather than have the common class of vagrants, paupers and other outcasts of Europe, that we had better be as we are, and trust to the natural increase of our population for inhabitants." 1 Annals of Cong. 1114 (1790).

¹²³ Vattel, supra note 111, § 103.

¹²⁴ The state ... cannot arrogate to herself any power over the person of a foreigner, who, though he has entered her territory, has not become her subject." Id. § 108.

¹²⁵ The property of an individual does not cease to belong to him on account of his being in a foreign country; it still constitutes a part of the aggregate wealth of his nation." Id. § 109.

¹²⁶ These protections can be found in our federal and state constitutions or by legislation passed by Congress, the states, and localities. However, not even through the treaty power may aliens or foreigners be granted new or greater rights, privileges, and immunities than citizens of the United States.

¹²⁷ Vattel, supra note 111, § 101.

¹²⁸ Id.

enjoyment of a nation's rights and privileges because, as Vattel states, "the public safety, the rights of the nation ... necessarily require" it.¹²⁹ In fact, aliens were not only required to submit to the laws of a nation but, Vattel writes, they "ought to assist [the nation] upon occasion, and contribute to its defence, as far as is consistent with [their] duty as [a] citizen" of the nation wherein they reside.¹³⁰ In [*89] short, Vattel's Law of Nations is significant because it shows how the immigration laws were viewed in the eighteenth century. They were powers that were only limited by statute and had been traditionally bestowed with the sovereign government.¹³¹

This brings us to the 1792 Parliament debates over the Alien Bill. Upon the Bill's second reading, Lord Grenville immediately affirmed the government's plenary power over immigration and addressed the doctrine of allegiance:

The law ... had always made a marked distinction between natural-born subjects and aliens The former owed a constant [allegiance], the latter only a local and transitory allegiance to the crown, and, on this account, the situation of both was, in the eye of the law, extremely different. It appeared to be part of the prerogative of the crown to forbid foreigners to enter or reside within the realm.¹³²

Like Grotius and Blackstone, Grenville agreed that asylum should be offered to Protestant refugees that have been expelled from their country.¹³³ However, he was sure to point out that asylum was a governmental allowance - not a right - for Grenville believed that the "safety of the state was not to be sacrificed to hospitality; and whatever was necessary to that safety, was not to be blamed."¹³⁴ Grenville hoped to protect England from the ideological principles of the French Revolution,¹³⁵ and he was not alone. Lord [*90] Stormont described the Alien Bill as a "measure of self-defence."¹³⁶ Secretary Dundas was concerned that an "influx of foreigners [that] had come from a country which had lately been the scene of very extraordinary transactions; where their constitution had been overthrown, and acts of the most dreadful enormity had been perpetrated"¹³⁷ were dangerous and considered the Bill "necessary to the safety of the state."¹³⁸ Meanwhile, Edmund Burke gave his "most cordial support" for

¹²⁹ Id.

¹³⁰ Id. § 105. Throughout nineteenth-century America, it was common practice that aliens were liable to do service in the militia, but this would end at the beginning of the twentieth century. See 2 James Kent, *Commentaries on American Law* 74 (1873). In the United States today, federal statute protects non-immigrant aliens from registering with the Selective Service. See [50 U.S.C. App. § 453](#) (2006).

¹³¹ 1 Blackstone, *supra* note 104, at 362.

¹³² 30 William Cobbett, *The Parliamentary History of England from the Earliest Period to the Year 1803*, at 156 (1817).

¹³³ The Earl of Lauderdale sympathized with emigrant refugees, stating:

"The first description of emigrants mentioned by the noble lord were entitled to our utmost compassion, and even delicacy. Driven from other countries, they had come to this in hopes of being able to live in inoffensive retirement, and keep their names, their rank, and their misfortunes unknown to the world, till their native country should deem it safe to receive them."

Id. at 159.

¹³⁴ Id. at 157.

¹³⁵ Id. at 158 (stating "that when anarchy was substituted in the room of government in France, some men of the most abominable principles, had, in different parts of that country, worked themselves into situations of power... . People of that kind had been sent to England in the hope that they might be able to raise insurrection, and overthrow government.").

¹³⁶ Id. at 160.

¹³⁷ Id. at 174.

¹³⁸ Id. at 176.

the Bill because it is "calculated to keep out of England those murderous atheists, who would pull down church and state; religion and God; morality and happiness." ¹³⁹

What is interesting about Burke's speech concerning the Alien Bill is his reference to immigration and naturalization being a matter foreign policy. He believed that the "reciprocity of good dispositions between the people of two nations ... was a serious factor which deserved to be attended to" in considering the Alien Bill. ¹⁴⁰ Burke, however, was not the first to make this argument. The 1695 tract entitled *Sundry Considerations Touching Upon the Naturalization of Aliens* had argued against inviting foreigners because of lack of reciprocity between nations. It stated, "We have never have the advantage to invite the English into the Foreign Parts of Europe or Asia, as they will have to invite them hither." ¹⁴¹

Of course, not everyone agreed with the Alien Bill. The Earl of Wycombe preferred extending the "benefits of our constitution" rather than restricting them. ¹⁴² He saw "no ground for any alarm from disaffection to the constitution." ¹⁴³ Meanwhile, Mr. Taylor was concerned whether the expulsion and exclusion of aliens in the Bill would be extended to British subjects, thereby repealing the [*91] Habeas Corpus Act. ¹⁴⁴ He was also concerned that the Bill "violated the rights of aliens" because it "entirely left them in the power of the king." ¹⁴⁵

The power of the Crown over the exclusion and expelling of aliens was always a matter of some debate, but the majority seemed to side with the Crown's prerogative. For instance, Mr. Jenkinson cited Blackstone, stating, "that the king had an undoubted right to order any alien to depart this realm out of his own will and pleasure." ¹⁴⁶ Mr. Fox agreed, stating the "prerogative of the crown to send foreigners out of the kingdom ... ought not to remain in doubt." ¹⁴⁷ Meanwhile, Mr. Hardinge was of the opinion that the Sovereign "had, by law, the right of sending aliens out of the kingdom for the public safety." ¹⁴⁸ And if the Sovereign did not have this power, Hardinge thought the Alien Bill even more necessary to protect the nation. ¹⁴⁹

In the end, the Alien Bill passed. Mr. Fox supported the bill because he feared the "propagation of French opinions in this country." ¹⁵⁰ Mr. Hardinge viewed the bill as a "necessary evil because, without an indefinite power over aliens of all descriptions, the mischievous could never be separated from the good." ¹⁵¹ Lastly, Mr. Pitt threw in his support because he could see a scenario where Jacobins would carry out

¹³⁹ Id. at 188.

¹⁴⁰ Id. at 185.

¹⁴¹ *Sundry Considerations Touching Naturalization of Aliens*, supra note 70, at 13.

¹⁴² 30 Cobbett, supra note 132, at 195.

¹⁴³ Id. at 195-96.

¹⁴⁴ Id. at 194.

¹⁴⁵ Id. at 195.

¹⁴⁶ Id. at 206.

¹⁴⁷ Id. at 226.

¹⁴⁸ Id. at 203.

¹⁴⁹ Id.

¹⁵⁰ Id. at 220.

¹⁵¹ Id. at 202.

a similar overthrow of government in England.¹⁵² He viewed the Jacobin philosophy as "setting in defiance all regular authority" that has been "sanctioned by the laws of other countries."¹⁵³ In other words, the Jacobin ideology of spreading anarchy was seen as a violation of the law of nations.¹⁵⁴

[*92]

III. Immigration Law, the Plenary Power, and Exclusion Based Upon Association and Ideological Grounds in the Early Republic

It is improperly assumed by contemporary legal commentators that the Founding Fathers viewed the international and Anglo tradition respecting the rights, privileges, and immunities of foreigners differently.¹⁵⁵ These commentators believe that the Bill of Rights, especially the First and Fifth Amendments respectively, restrict congressional authority to exclude or expel foreigners. Their argument rests on one important fact - that the Constitution does not expressly grant the federal government the power to regulate immigration.¹⁵⁶ While legal commentators generally do not argue that the power over immigration rests with the federal government, they believe the lack of an affirmative constitutional clause restricts immigration laws by the provisions in the Bill of Rights. A look into the historical record of the Early Republic reveals that these beliefs are unsupported, especially in regards to the First Amendment restricting ideological and association exclusions or expulsions.

The problem with these contemporary legal commentators' interpretation of the First Amendment restricting the exclusion and expulsion of foreigners is that they merely gloss over the history of the Early Republic as if it is insignificant. For instance, James A. R. Nafziger writes, "A laissez faire policy of unrestricted admissions prevailed for nearly a hundred years, with the exception of the notorious Alien and Sedition Acts of 1798."¹⁵⁷ From Nafziger's statement, one would assume that the Founding Fathers did not understand the law of nations respecting immigration, strangers, and foreigners. One may also assume that the 1798 Alien and Sedition Acts was nothing more than a **[*93]** fleeting partisan aberration in the development of the federal government's authority to regulate immigration.¹⁵⁸ To the average reader of these recent commentaries, one would assume the Alien and Sedition Acts were nothing more than a mistake and do not have any value in understanding the scope of the federal government's immigration powers. Assumptions like these, however, are unwarranted.

A. The United States Constitution, the Law of Nations, and the Plenary Power Doctrine

¹⁵² Id. at 230.

¹⁵³ Id. at 233.

¹⁵⁴ Id.

¹⁵⁵ See Brandon E. Davis, *America's Immigration Crisis: Examining the Necessity of Comprehensive Immigration Reform*, [54 Loy. L. Rev. 353, 354 \(2004\)](#); Aubrey Glover, *Terrorism: Aliens' Freedom of Speech and Association Under Attack in the United States*, [41 Duq. L. Rev. 363, 368-69 \(2003\)](#); Berta Esperanza Hernandez-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, [23 Fordham Urb. L.J. 1075, 1118 \(1996\)](#); Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, [22 B.U. Int'l L.J. 246, 306 \(2004\)](#).

¹⁵⁶ See supra notes 4, 19 and accompanying text.

¹⁵⁷ Nafziger, supra note 9, at 835.

¹⁵⁸ Most commentators supporting the First Amendment restriction on immigration law do not even mention the Alien and Sedition Acts in passing, but those that do merely gloss over the Alien and Sedition Acts as "notorious" without examining their constitutional, philosophical, and international underpinnings. See Akram, supra note 4, at 756; Vandiver, supra note 4, at 755.

It is frequently argued that the plenary power doctrine should be reexamined because the Constitution does not expressly grant the political branches plenary authority over immigration.¹⁵⁹ These arguments have little, if any, historical merit. In 1829, constitutional commentator William Rawle wrote, "Whoever visits or resides among us, comes under the knowledge that he is liable, by the law of nations, to be sent off"¹⁶⁰ should the binds of the doctrine of allegiance be violated.¹⁶¹ It was well-established by the Framers that the plenary power doctrine was derived from the law of nations and is essential to a nation's right of self- [*94] preservation.¹⁶² To the contrary of contemporary legal commentators, the consensus among Early American historians is that the Constitution was adopted to correct the problems that the Articles of Confederation posed in relation to foreign policy and immigration.¹⁶³ For instance, historian Andrew C. Lenner writes that the law of nations was "an inherent attribute of sovereignty" and "constituted a vital source of federal power."¹⁶⁴ The law of nations was significant because the Founders realized "Americans had to convince Europe that they were capable of effectively employing military force, enforcing their commercial sanctions, and keeping their promises (i.e., treaties)."¹⁶⁵

Indeed, well before the drafting of the Constitution, it is documented that the Founding Fathers were acutely aware of the tenets of international law.¹⁶⁶ In drafting the Declaration of Independence, the Founders were faced with prescribing to the law of nations in order to obtain an alliance with France.¹⁶⁷ Throughout the Revolutionary War, the Founders were forced to adopt articles of war that mirrored those of European nations.¹⁶⁸ Furthermore, the Founders were familiar with the law of nations when they

¹⁵⁹ See, e.g., Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories & the Nineteenth Century Origins of Plenary Power Over Foreign Affairs, [81 Tex. L. Rev. 1, 81-82, 158-163 \(2002\)](#) ("There is also little reason to believe that the Framers contemplated creating a federal immigration power."); Natsu Taylor Saito, Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law, [20 Yale L. & Pol'y Rev. 427, 430 \(2002\)](#) ("Nothing in the Constitution explicitly gives the government such [plenary] power.").

¹⁶⁰ William Rawle, A View of the Constitution of the United States of America 100 (1829).

¹⁶¹ The doctrine of allegiance was alive and well in early Republic thought, and a fact of which William Rawle took notice. See *id.* at 90-101. Moreover, in George Wythe's reported cases it makes mention of Calvin's Case, which was based upon the doctrine of allegiance as it respects foreigners. See George Wythe, Decisions of Cases in Virginia, by the High Court of Chancery, With Remarks Upon Decrees by the Court of Appeals, Reversing Some of Those Decisions 138-42 (1795).

¹⁶² [Kansas v. Colorado, 206 U.S. 46, 57 \(1907\)](#) ("Self-preservation is the highest right and duty of a Nation"); [United States ex rel. Turner v. Williams, 194 U.S. 279, 290 \(1904\)](#). In *Turner*, the Court stated,

Rested on the accepted principle of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe

[Turner, 194 U.S. at 290.](#)

¹⁶³ Daniel George Lang, Foreign Policy in the Early Republic: The Law of Nations and the Balance of Power 80-86 (1985); Peter Onuf & Nicholas Onuf, Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776-1814, at 113-44 (1993); Andrew Lenner, Separate Spheres: Republican Constitutionalism in the Federalist Era, 41 *Amer. J. Legal Hist.* 254, 253-56 (1997).

¹⁶⁴ Lenner, *supra* note 163, at 256.

¹⁶⁵ *Id.*

¹⁶⁶ Patrick J. Charles, Irreconcilable Grievances: The Events that Shaped the Declaration of Independence 229-335 (2008).

¹⁶⁷ *Id.*

¹⁶⁸ See Patrick J. Charles, The Second Amendment: The Intent and Its Interpretation by the States and the Supreme Court 114-30 (2009) (discussing how the Founders had to dispense with their dissatisfaction with European rules of martial law in order to

[*95] entered into the 1783 Treaty of Paris, which even addressed immigration matters when it distinguished between "real British subjects"¹⁶⁹ and American citizens based on the doctrine of allegiance.¹⁷⁰

By the summer of 1787, however, the members of the Constitutional Convention were aware of the failure of the existing system under the Articles of Confederation.¹⁷¹ Despite the 1783 Treaty of Paris and the Articles, England and other foreign nations were able to frustrate the United States' diplomatic relations.¹⁷² Equally, the disparity between the laws of the respective states respecting the rights of citizenship was an influential factor in dispensing with the Articles of Confederation.¹⁷³ As early as April 1787, James Madison had written to George Washington about the importance of the federal government "fixing the terms of and forms of naturalization."¹⁷⁴ Madison believed "it was a power that was 'absolutely necessary' to be placed with the federal government in order to avert the states from 'harassing each other with rival and spiteful measures' and to prevent 'the aggressions of interested majorities on the rights of minorities and of individuals.'"¹⁷⁵ The North Carolina Constitutional Convention supported such plenary power as important to avoid "disagreeable controversies with foreign nations" and as a "means of preserving the peace and tranquility of the Union."¹⁷⁶ It was well known by the founding generation that the "encroachments of some states on the rights of others, and of all on those of the Confederacy, [on the rules of immigration and citizenship] **[*96]** are incontestable proofs" of the weakness of the Articles of Confederation.¹⁷⁷

These issues were elaborated during the 1787 Constitutional Convention. Madison supported the Naturalization Clause because he viewed it as the power to "fix different periods of residence."¹⁷⁸ However, Madison's views were not shared by all. Many were concerned with the effect the granting of such power would have on foreigners who were already residing in the United States by the permission of the respective states.¹⁷⁹ These aliens had already established residency under the belief they would be permitted to remain and be admitted as citizens under state laws.¹⁸⁰ Roger Sherman addressed this

defeat the British); Baron De Stuben, *Regulations for the Order and Discipline of the Troops of the United States* (Joseph Riling ed. 1966).

¹⁶⁹ Treaty of Paris, U.S.-Gr. Brit., art. 5, Sept. 3, 1783.

¹⁷⁰ James H. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 *Amer. J. Legal Hist.* 208, 241 (1974).

¹⁷¹ Gordon S. Wood, *Empire of Liberty: A History of the Early Republic 1789-1815*, at 15 (2009).

¹⁷² Onuf & Onuf, *supra* note 163, at 94-95.

¹⁷³ Kettner, *supra* note 170, at 224.

¹⁷⁴ James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 593 (Gaillard Hunt & James Scott eds., 1920).

¹⁷⁵ Brief for Amicus Curiae Immigration Reform Law Institute in Support of Respondent at 22, *Flores-Villar v. United States*, No. 09-5801 (U.S. petition for certiorari filed Aug. 3, 2009) (quoting Madison, *supra* note 174, at 593-94).

¹⁷⁶ 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 19 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1907).

¹⁷⁷ *Id.* at 20; see also Rawle, *supra* note 160, at 85; St. George Tucker, *A View of the Constitution with Selected Writings* 197-98 (1999).

¹⁷⁸ 5 *The Debates in the [Several State Conventions on the Adoption of the Federal Constitution](#), *supra* note 176, at 398.*

¹⁷⁹ *Id.* at 412-13.

¹⁸⁰ For instance, James Wilson was concerned that Pennsylvania had pledged to grant citizenship on two years residence. Wilson never denied the federal government would have the power to supersede this naturalization law. However, he hoped that

concern, stating that "the United States have not invited foreigners, nor pledged their faith that they should enjoy equal privileges with native citizens." ¹⁸¹ It was up to Congress to "make any discriminations [it] may judge requisite." ¹⁸²

James Madison agreed with this understanding of the Constitution's Naturalization Clause. He proclaimed that the "states alone are bound" to the consequences of their former naturalization laws, not the United States. ¹⁸³ This did not mean that the states would not ultimately impact the nation's naturalization laws, for each state had stake in the Union. The states were parties to the Constitution, took part in passing legislation, and even had the power to offer amendments. More importantly, Madison felt if the states did not like the option of violating the "faith pledged to" foreigners, they could reject this provision of the [*97] Constitution altogether. ¹⁸⁴ However, this did not happen and the Naturalization Clause was one of the least debated provisions of the Constitution.

James E. Pfander and Theresa R. Wardon paint a much different picture of the history of the Constitution, the Naturalization Clause, and the Framers' views on congressional authority over immigration. They assert that the legislative history of the United States' first naturalization laws provides that the Framers did not intend to "conceive of congressional power" that was "unbridled." ¹⁸⁵ They argue that the "so-called plenary power doctrine" ¹⁸⁶ is limited in that immigrants have vested rights upon lawfully settling, writing:

The Framers of the Constitution and the members of Congress who applied its terms in the early years were strongly committed to norms of prospectivity, uniformity, and transparency. Congress can change the rules, on this account, but must respect the reliance interests of those who have established a residence in the United States and have complied with the rules in place at the time of their arrival. ¹⁸⁷

Pfander and Wardon's argument rests on two flawed historical assumptions. First, they assume because Congress did not pass retroactive legislation concerning naturalization in the Early Republic that this forecloses Congress from passing retroactive legislation to aliens who have "established lawful residence in the United States" today. ¹⁸⁸ Second, they qualify this restraint on their inaccurate reading of the word "establish" in the Naturalization Clause. ¹⁸⁹ Pfander and Wardon believe that the Framers' use of the word "establish" in defining congressional power over naturalization "conveys a distinctive message of relative permanence and prospectivity" that prevents retroactive legislation. ¹⁹⁰ To [*98] support this

the federal government would "maintain the faith thus pledged to her citizens of foreign birth" by appealing to the law of nations. Wilson thought to retract this promise would "deter" future foreigners from wanting to emigrate. *Id.* at 414.

¹⁸¹ *Id.* at 412-13.

¹⁸² *Id.* at 413.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Pfander & Wardon, *supra* note 17, at 370.

¹⁸⁶ *Id.* at 413.

¹⁸⁷ *Id.* at 370.

¹⁸⁸ *Id.* at 413.

¹⁸⁹ *Id.* at 385-93.

¹⁹⁰ *Id.* at 388.

claim they urge that the Constitution's use of "establish" in the preamble and congressional power to "ordain and establish" the federal Judiciary "suggests a degree of permanence."¹⁹¹

This interpretation of congressional power over naturalization, and the plenary power doctrine altogether, does not comport with the Framers' intent in adopting the Naturalization Clause or their understanding of the law of nations. As to the former, the word "establish" was used to signify unfettered authority over naturalization and the granting of rights included in United States citizenship. Alexander Hamilton's notes from the 1787 Constitutional Convention unequivocally confirm this. Hamilton viewed congressional power over naturalization and the rules of citizenship as necessary to protect American government. He scribbled in his notes on the Convention, "The right of determining the rule of naturalization will then leave a discretion to the [federal] Legislature on this subject which will answer every purpose."¹⁹² Hamilton later confirmed congressional plenary authority over naturalization at the 1788 New York Convention.¹⁹³ In the discussion over the federal government's power to tax, Hamilton argued that the federal government's power to tax should be similar to "that of Naturalization That by Construction would give an Exclusive Right."¹⁹⁴

Hamilton's most expansive treatment concerning immigration, naturalization, and citizenship would come in 1802 under a string of numbered editorials entitled *The Examination*. They show that immigration and naturalization were issues of federal policy that could be changed at the will of the "common consent," which did not concern constitutional restraints such as prospectivity or retroactivity.¹⁹⁵ For instance, in *The Examination* No. VII, Hamilton questioned Jefferson's policy of abolishing all [*99] restrictions on naturalization and immigration.¹⁹⁶ He felt such a policy contradicted the social contract established by the Constitution and would lead to the destruction of American principles of government. He wrote:

The impolicy of admitting foreigners to an immediate and unreserved participation in the right of suffrage, or in the sovereignty of a Republic, is as much a received axiom as any thing in the science of politics, and is verified by the experience of all ages. Among other instances, it is known, that hardly any thing contributed more to the downfall of Rome, than her precipitate communication of the privileges of citizenship to the inhabitants of Italy at large.¹⁹⁷

In *The Examination* No. VIII, Hamilton again qualified that the "admission of foreigners" was a national political issue dependent upon a multitude of public policy considerations, writing:

The safety of a republic depends essentially on the energy of a common National sentiment; on a uniformity of principles and habits; on the exemption of the citizens from foreign bias, and prejudice; and on that love of country which will almost invariably be found to be closely connected with birth, education, and family.¹⁹⁸

¹⁹¹ *Id.* at 388-89.

¹⁹² 4 *The Papers of Alexander Hamilton* 234 (Harold C. Syrett ed., 1962).

¹⁹³ 5 *id.* at 126.

¹⁹⁴ *Id.* at 127.

¹⁹⁵ *Washington Federalist* (Washington, DC), January 15, 1802, at 2, col. 3; see also 25 *The Papers of Alexander Hamilton* 491-95 (Harold C. Syrett ed., 1977).

¹⁹⁶ 25 *The Papers of Alexander Hamilton*, *supra* note 195, at 491-95.

¹⁹⁷ *Id.* at 494.

¹⁹⁸ *Newport Mercury* (Newport, RI), January 26, 1802, at 1, col. 3; see also 25 *The Papers of Alexander Hamilton*, *supra* note 195, at 495-97. For more on Hamilton's opinion on immigration, naturalization, and the right of self-preservation, see *The*

To Hamilton, the first naturalization laws were "merely a temporary measure adopted under peculiar circumstances."¹⁹⁹ He stressed that the "situation is now changed."²⁰⁰ The old policy of mass immigration was beginning to "change and corrupt the national spirit," to "divide the community and to distract our councils, by promoting in different classes, different predilections in favour of particular foreign nations," and "compromise the [*100] interests of our own country in favor of another."²⁰¹ Hamilton was not advocating for closing off immigration or citizenship.²⁰² He was merely stating that liberal immigration and naturalization policies were proper at America's infant stages. However, as of 1802, Hamilton knew that a revision of the naturalization laws needed to be adopted "between closing the door altogether and throwing it entirely open."²⁰³ The laws must "enable aliens to get rid of foreign and acquire American attachments; to learn the principles and imbibe the spirit of our government; and to admit of a probability at least of their feeling a real interest in our affairs."²⁰⁴

Just as Hamilton had expressed his opinion as to the "Exclusive Right" granted in the Naturalization Clause,²⁰⁵ James Madison similarly interpreted the clause as prescribing unfettered congressional authority over the privileges of citizenship and naturalization. According to Madison in *The Federalist No. 42*, the problem with the Articles of Confederation was not just with different rules of naturalization, which in turn granted "all the rights of citizenship."²⁰⁶ The "inconsistent" state laws were as equally "obnoxious" concerning the "privileges of residence."²⁰⁷ Clearly understanding the law of nations as it existed in the late-eighteenth century and how the differentiating state rules of immigration and naturalization impacted international affairs, Madison knew the United States had been fortunate in not causing an international incident.²⁰⁸ He wrote, "We owe it to mere casualty, that very serious embarrassments on this subject have been hitherto escaped."²⁰⁹

Madison's sentiments on congressional plenary authority in these areas of law can also be found in his personal [*101] papers where he defined the different "qualities of a citizen" and an alien.²¹⁰ He elaborated on some "general principles" of naturalization law, including the "established maxim that birth is a criterion of allegiance" and that place of birth "is the most certain criterion" and "is what applies in the United States."²¹¹ What is particularly significant about Madison's understanding of the Naturalization Clause is that he interpreted the power broadly so Congress may prescribe class distinctions concerning

Republican or Anti-Democrat (Baltimore, MD), February 17, 1802, pg. 2 cols. 1-3 (*The Examination No. IX*); *The Papers of Alexander Hamilton*, supra note 195, at 500-06.

¹⁹⁹ 25 *The Papers of Alexander Hamilton*, supra note 195, at 497.

²⁰⁰ *Id.* at 496.

²⁰¹ *Id.*

²⁰² See *id.* at 497.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ 5 *The Papers of Alexander Hamilton*, supra note 192, at 126.

²⁰⁶ *The Federalist No. 42* (James Madison).

²⁰⁷ *Id.*

²⁰⁸ *Id.*; see also *The Debates in the Several State Conventions*, supra note 176, at 19 (discussing the Naturalization Clause as necessary to prevent "disagreeable controversies with foreign nations.").

²⁰⁹ *The Federalist No. 42* (James Madison).

²¹⁰ 12 *The Papers of James Madison* 179 (Robert A. Rutland ed., 1979).

²¹¹ *Id.* at 179.

the rules of citizenship. For instance, during the 1794-1795 debates over a new naturalization bill, Madison supported a proposal making a "distinction" for "one class of emigrants over another, as to the length of time before they would be admitted citizens." ²¹² Madison made a similar distinction in 1819. Addressing the fact that some alien classes fostered firmer allegiance ties to the United States than other classes, he wrote: "I have been led to think it worthy of consideration whether our law of naturalization might not be so varied as to communicate the rights of Citizens by degrees, and in that way preclude the abuses committed by [different classes of aliens.]" ²¹³

While Madison knew that these "restrictions would be felt it is true by meritorious individuals, of whom [he] could name some ... this always happens in precautionary regulations for the general good." ²¹⁴ Thus, to Madison the words "establish" and "uniform" were to be interpreted broadly, not restrictively as Pfander and Wardon claim.

The early constitutional commentators were all in concurrence with this interpretation of the Naturalization Clause. St. George Tucker listed congressional power to prescribe the terms of citizenship as being "exclusively granted to the federal government." ²¹⁵ William Rawle understood the rules of naturalization under the paradigm of allegiance by conditioning residence on allegiances as **[*102]** defined by the federal government. ²¹⁶ As Rawle articulated it, since naturalization is the "mode of acquiring the right" of citizenship and "is the factitious substitution of legal form for actual birth," individuals born outside the United States owe due allegiance to rules of naturalization. ²¹⁷

Justice Joseph Story similarly stated that Congress has plenary power to regulate naturalization and citizenship. He wrote that the naturalization power "must be exclusive; for a concurrent power in the states would bring back all the evils and embarrassments, which the uniform rule of the constitution was designed to remedy." ²¹⁸ He went on to write that the use of the language establish, which exists in the Naturalization Clause, must be given "the liberal interpretation of the clause." ²¹⁹ Story used the Congressional power to establish post offices and post roads as an example. The power to establish these, wrote Story, has been interpreted by some as merely a power to define "where post-offices shall be kept" and "designate, or point out, what roads shall be mail-roads, and the right of passage." ²²⁰ Such an interpretation, however, "has never been understood to be limited." ²²¹ Instead, he wrote that it has "constantly had to the more expanded sense of the word." ²²²

²¹² 15 The Papers of James Madison 432 (Thomas A. Mason, Robert A. Rutland, & Jeanne K. Sisson, eds., 1985).

²¹³ 8 The Writings of James Madison 425 (Galliard Hunt ed., 1908).

²¹⁴ *Id.*

²¹⁵ Tucker, *supra* note 177, at 129, 131.

²¹⁶ For discussion see Rawle, *supra* note 160, at 90-98.

²¹⁷ *Id.* at 86. Allegiance must begin "with his residence among us" and will only be rendered "perpetual by his naturalization." *Id.* at 94.

²¹⁸ Joseph Story, *Commentaries on the Constitution of the United States* § 1099 (1833).

²¹⁹ *Id.* § 554.

²²⁰ *Id.* § 553.

²²¹ *Id.* § 554.

²²² *Id.*

Not even the works of James Wilson, whom Pfander and Wardon cite as supporting their interpretation of the word "establish," ²²³ supports a limited interpretation of the Naturalization Clause. In one of his many lectures on the law delivered at the University of Pennsylvania, Wilson distinguished the rules concerning citizens and aliens. ²²⁴ Citing to the works of Blackstone, Bacon, and Coke throughout his analysis, Wilson acknowledged that late-eighteenth-century public policy "liberally" granted aliens **[*103]** the "private rights and privileges, of our country." ²²⁵ However, Wilson qualifies that only foreigners "of good character" could be admitted, "for numbers without virtue are not our object." ²²⁶

The "good character" of an individual or class of individuals is a determination that can only be made by the federal government through the uniform rules of naturalization and a determination that may retroactively change according to national interests. Pfander and Wardon's argument that Congress cannot retroactively change such rules conflicts with the entire purpose of the naturalization process - the acquiring of allegiance on the conditions prescribed by "We the people" through our representatives. As will be shown in the next section, such an attempt to limit this enumerated constitutional power would strip the federal government of its right of self-preservation and ultimately make the Necessary and Proper Clause nugatory. However, for the purposes of this section, it is worth noting that there is no substantiating evidence that the Framers sought to make each naturalization law prospective. The text, language, and conditions prescribed in the early naturalization laws were based on public policy and international considerations, not an interpretation of the Constitution.

In fact, the jurisprudence of three members of the first United States Supreme Court confirms that the founding generation was well informed of the "law of nations" concerning the rights of aliens and rules of citizenship. In 1790, Chief Justice John Jay delivered a charge to the grand jury on the importance of the "law of nations" in our constitutional jurisprudence: "We had become a nation - as such we were responsible to others for the observance of the law of nations; and as our national concerns were to be regulated by national laws, national tribunals became necessary for the interpretation and execution of them both." ²²⁷

[*104] On November 23, 1798, Associate Justice William Cushing delivered a charge to a grand jury defending the Alien Act of 1798. ²²⁸ The Act gave the Executive authority to expel any alien deemed dangerous to the public safety. ²²⁹ Cushing began his charge by reminding the people that matters effecting international relations are left "to our representatives in Congress assembled" where "the constitution has lodged" such "power and discretion." ²³⁰ He further stated that the Bill of Rights was never intended to take away these powers inherent to national sovereignty, such as the removal of

²²³ Pfander & Wardon, *supra* note 17, at 389 n. 129, 391.

²²⁴ 2 *Collected Works of James Wilson* 1038-52 (Kermit L. Hall & Mark David Hall eds., 2007).

²²⁵ *Id.* at 1051.

²²⁶ *Id.*

²²⁷ John Jay, *The Charge of Chief Justice Jay to the Grand Juries of the Eastern Circuit* 7 (1790) (emphasis added).

²²⁸ *The Honorable Judge Cushing, A Charge Delivered to the Federal Grand Jury for the District of Virginia, on the 23d Nov. 1798: By the Honorable Judge Cushing, published by request of the Grand Jury, The Eastern Herald and Gazette of Maine, January 21, 1799, Vol. XV.*

²²⁹ Act of June 25, 1798, ch. 58, [1 Stat. 570, 571 \(1798\)](#).

²³⁰ Cushing, *supra* note 230, at 1, cols. 2-3.

aliens, and that Congress had the authority "to make all necessary and proper laws for that purpose." ²³¹ Cushing elaborated on the "due process" afforded aliens until they obtain the rights of citizenship:

Can it be imagined, that the supreme authority of government ... has no power to ... remove aliens who belong to, and owe allegiance to a foreign state But it is suggested, that aliens cannot be touched in such case without the intervention of a jury, because it is provided in the 7th article of the amendments to the constitution ...and in the 8th article of amendments There is no doubt but that any alien permitted to reside among us, committing any crime against the municipal laws of the country, is to be tried in the common way, by jury. But that no way touches the present case [of a nation's power to remove aliens].
²³²

Fellow Associate Justice James Iredell similarly defended the Alien Act of 1798 in a charge to a grand jury delivered in Philadelphia. Touching upon every alien's right to residence or settlement in the United States, Iredell stated that the "law of nations undoubtedly is, when an alien goes into a foreign country, he goes under either an express or implied safe conduct." ²³³ A nation's "liberality" concerning **[*105]** immigration was moot, for "it is always understood that the government may order away any alien whose stay is deemed incompatible with the safety of the country." ²³⁴ The same rule applied to those aliens who put their "faith in government" that they would be granted the privilege of citizenship. ²³⁵ Iredell elaborated:

There are certain conditions, without which no alien can ever be admitted, if he stay ever so long; and one is ... he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. If his conduct be different, he is no object of the naturalization law at all, and consequently no implied compact was made with him Besides, any alien coming to this country must or ought to know, that this being an independent nation, it has all the rights concerning the removal of aliens which belong by the law of nations to any other; that while he remains in the country in the character of an alien, he can claim no other privilege than such as an alien is entitled to, and consequently, whatever risque he may incur in that capacity is incurred voluntarily, with the hope that in due time by his unexceptionable conduct, he may become a citizen of the United States. ²³⁶

Thus, looking at the historical evidence in its entirety, it is difficult to ascertain where Pfander and Wardon gain support for their argument that the Founders adhered to "norms of prospectivity ... on constitutional grounds" in drafting the early naturalization laws. ²³⁷ If the 1790 naturalization debates reveal anything, it is the political and international nature of the issue. The politics of naturalization primarily concerned wealth and the advancement of commerce. Madison addressed this point when he described the naturalization laws as the means to "increase the wealth and strength of the community."
²³⁸

²³¹ Id. at 2, col. 2.

²³² Id.

²³³ Claypoole's Daily Advertiser (Philadelphia, PA), May 16, 1799, at 2, col. 2.

²³⁴ Id.

²³⁵ See Daniel G. Iles, With a Little Help from my Friends: The Federal Government's Reliance on Cooperation from the States in Enforcing Immigration Policy, 31 Wash. Univ. J.L. & Pol'y 193, 201-02 (2009).

²³⁶ Claypoole's Daily Advertiser (Philadelphia, PA), May 16, 1799, at 2, cols. 3-4.

²³⁷ Pfander & Wardon, supra note 17, at 393.

²³⁸ 1 Annals of Cong. 1150 (1790).

[*106] What the debates also reveal is that the drafters were well aware that immigration and naturalization were matters of national sovereignty and international law. Congressman Thomas Hartley addressed the international nature of the issue stating the current policy of "the old nations of Europe has drawn a line between citizens and aliens" that has existed "since the foundation of the Roman Empire."²³⁹ Congressman John Page acknowledged the international nature of the issue, but hoped the United States would deviate by allowing a "more liberal system ought to prevail."²⁴⁰ Theodore Sedgwick was concerned with admitting too many foreigners because they might deteriorate American republicanism.²⁴¹ Meanwhile, James Jackson viewed congressional authority over immigration and naturalization as akin to that of Parliament. Using Blackstone's Commentaries, Jackson determined that the Constitution supports "progressive and probational naturalization."²⁴²

The 1794-1795 debates do not deviate from the understanding that immigration and naturalization law were a political consideration. Naturalization, citizenship, and the privileges of residence were all legal and political issues that were based on the doctrine of allegiance.²⁴³ Such laws could always be changed and modified upon the consent of a congressional majority. For instance, a 1798 congressional committee saw no problems in recommending that the naturalization laws be amended to require a "longer residence" to obtain citizenship and establish further "precautions against the promiscuous reception and residence of aliens."²⁴⁴ Nothing in the Committee Report can be construed as limiting the establishment of such laws on the premise of prospectivity.

A March 14, 1800 committee report illustrates this perfectly. It shows that principles of prospectivity were never intended to apply to the plenary power doctrine. **[*107]** According to the report, a group of aliens sought to obtain relief by securing the "rights they would have received had they made the declaration required by" the Naturalization Act of 1795.²⁴⁵ The committee refused to interpret the naturalization laws as having a prospective affect, writing that "nothing ... can warrant a deviation from the general rule."²⁴⁶ The Committee thought the amendments to the naturalization laws "to be founded on fair and just principles" because the federal government has the power to make laws that are "safe or prudent ... to repose that confidence in [aliens] which it must place in its own citizens."²⁴⁷

Therefore, Pfander and Wardon's interpretation of the Naturalization Clause simply cannot survive. As shown above, the Naturalization Clause was drafted to ensure that the rules of immigration and naturalization would apply uniformly in the broad and liberal sense - to prevent the states from "harassing each other with rival and spiteful measures."²⁴⁸ More importantly, it was intimately tied into the foreign affairs power and meant to prevent international incidents. As James Madison wrote to George Washington, federal "terms and forms of naturalization" were necessary to prevent the States from

²³⁹ Id. at 1148.

²⁴⁰ Id.

²⁴¹ Id. at 1117.

²⁴² Id. at 1119.

²⁴³ 4 Annals of Cong. 1005, 1053 (1793-95).

²⁴⁴ 1 American State Papers: Miscellaneous 180 (1834).

²⁴⁵ Id. at 208.

²⁴⁶ Id.

²⁴⁷ Id.

²⁴⁸ Madison, *supra* note 174, at 593.

"violating treaties and the law of nations." ²⁴⁹ "Without this defensive power" being vested to the federal government, Madison feared that "every positive power" granted to it would be "evaded & defeated." ²⁵⁰ To be precise, parts of the Constitution were drafted to incorporate the law of nations as was understood by Congress. As historians Peter and Nicholas Onuf write, the federal Constitution was drafted so that the "American states ... would be governed by a perfected law of nations" ²⁵¹ - a law of nations that was to be controlled by the plenary power of the political branches.

[*108]

B. The Alien Act of 1798 and an Originalist Understanding of the Plenary Power Doctrine

Despite frequent characterization as "notorious," ²⁵² the debates, political discourse, and print culture respecting the Alien and Sedition Acts provide great insight to the founding generation's view of immigration law in the constructs of the Constitution and the law of nations. ²⁵³ The historical evidence reveals that both Federalists and Republicans supported the Constitution as essential to America's progression in the international sphere. ²⁵⁴ Not to mention, the international legal thought of commentators such as S.F. von Puffendorf, Hugo Grotius, Emmerich de Vattel, William Blackstone, and others were prominent among the founding generation. ²⁵⁵

In 1792, Edmund Randolph wrote how the Constitution did not change the "doctrine of alienage" for it "sprang" from the law of nations and is a "disability that must be born with man." ²⁵⁶ For evidence that the law of nations and the Constitution were seen as intertwined, one needs to look no further than the text of the Constitution itself. Article I, Section 8 prescribes that Congress has the power to "define" the "Offences against the Law of Nations." ²⁵⁷ However, the first Chief Justice of the Supreme Court, John Jay, would argue the law of nations applied absent this textual affirmation. In a 1793 charge to a grand jury delivered in Richmond, Virginia, Jay classified the "laws of the United States ... under three heads or descriptions":

[*109]

"1st. All treaties made under the authority of the United States.

2d. The laws of nations.

²⁴⁹ Id.

²⁵⁰ Id.

²⁵¹ Onuf & Onuf, *supra* note 163, at 136-37.

²⁵² Nafziger, *supra* note 9, at 835. See generally Wood, *supra* note 171 (describing Alien and Sedition Acts as a justified mistake); Cleveland, *supra* note 159, at 84-98.

²⁵³ See generally Lang, *supra* note 163 (discussing the significance of the law of nations as impacting the framework and intent of the Constitution).

²⁵⁴ See Lenner, *supra* note 163, at 255-56.

²⁵⁵ Id. at 254, 259; see James H. Kettner, *The Development of American Citizenship, 1608-1870*, at 188 (1978); Onuf & Onuf, *supra* note 163, at 138; Kettner, *supra* note 170, at 219; Andrew C. Lenner, *John Taylor and the Origins of American Federalism*, 17 *J. Early Republic* 406, 408 (1997). See generally Thomas Evans, *An Address to the People of Virginia, Respecting the Alien & Sedition Laws* (Richmond, Davis, 1798); *Observations on the Alien & Sedition Laws of the United States* (Washington, PA, Colerick, 1799); St. George Tucker, *A Letter to a Member of Congress Respecting the Alien and Sedition Laws* (Richmond, 1799).

²⁵⁶ 27 *The Papers of Thomas Jefferson* 826 (John Catanzariti ed., 1997).

²⁵⁷ U.S. Const. art I, § 8.

3d. The constitution and statutes of the United States." ²⁵⁸

Relying on Vattel, the "celebrated writer on the law of nations," ²⁵⁹ Jay stated the law of nations consists of "those laws by which nations are bound to regulate their conduct towards each other" and "those duties, as well as rights, which spring from the relation of nation to nation." ²⁶⁰ These laws undoubtedly included every nation's right over aliens. Jay elaborated on this point, writing:

The respect which every nation owes to itself imposes a duty on its government to cause all its laws to be respected and obeyed; and that not only by its proper citizens, but also by those strangers who may visit and occasionally reside within its territories. There is no principle better established, than that all strangers admitted into a country are, during their residence, subject to the laws of it; and if they violate the laws, they are to be punished according to the laws ... to maintain order and safety. ²⁶¹

Although Chief Justice Jay viewed the power over aliens as an inherent right of national sovereignty through the law of nations, many eighteenth-century commentators relied on Article I, Section 8 of the Constitution. In fact, it would be this provision that was most often cited to support congressional authority to prescribe the rules of immigration in the Alien Act of 1798. ²⁶² Other constitutional provisions that were used to support the constitutionality of the Alien and Sedition Acts include the Necessary and Proper Clause, ²⁶³ Commerce Clause, ²⁶⁴ Naturalization Clause, ²⁶⁵ [*110] and congressional power to provide for the common defense and general welfare. ²⁶⁶ However, the most powerful argument was the right of federal government to invoke and protect its right of self-preservation. ²⁶⁷ The preamble of the Constitution conveys the right of self-preservation, stating:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the

²⁵⁸ City Gazette and Daily Advertiser (Charleston, SC), August 14, 1793, at 2, col. 1.

²⁵⁹ Id. at 2, col. 2.

²⁶⁰ Id. at 2, col. 1.

²⁶¹ Id. at 2, col. 3.

²⁶² See 1 American State Papers Miscellaneous 180 (1834); An Address of the Minority of the Virginia Legislature to the People of that State 8 (Richmond, 1799); Evans, supra note 256, at 18.

²⁶³ 8 Annals of Cong. 1974 (1798); 1 American State Papers: Miscellaneous 180 (1834); Communications From Several States, on the Resolutions of the Legislature of Virginia 11 (Richmond, 1800); Evans, supra note 256, at 17-19.

²⁶⁴ 8 Annals of Cong. 1974 (1798); Observations on the Alien & Sedition Laws of the United States, supra note 256, at 20-25.

²⁶⁵ 8 Annals of Cong. 2020 (1798); Evans, supra note 256, at 24-25; The Debates in the Several State Conventions, supra note 176, at 441.

²⁶⁶ 8 Annals of Cong. 1790, 1974, 1981, 1986 (1798); 1 American State Papers Miscellaneous 180, 182 (1834); Reports of the Committee in Congress to Whom were Referred Certain Memorials and Petitions Complaining of the Acts of Congress, Concerning the Alien and Sedition Laws 3 (Richmond, Va., Nicolson, 1799); An Address of the Minority of the Virginia Legislature, supra note 263 at 6-10; Charles Lee, Defence of the Alien and Sedition Laws 5-7 (Philadelphia, Fenno, 1798); The Debates in the Several State Conventions, supra note 176, at 441; Evans, supra note 256, at 28; Observations on the Alien & Sedition Laws of the United States, supra note 256, at 21-25.

²⁶⁷ This right can be traced back to Hugo Grotius and gained prominence during the 1642 English Civil War, the 1688-89 Glorious Revolution, and was used as a justification for the American Revolution. Patrick J. Charles, The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms, 2010 Cardozo L. Rev. de novo 18, 26-27 (2010); see also 8 Annals of Cong. 1984, 1986-87 (1798); Evans, supra note 256, at 15; An Address of the Minority of the Virginia Legislature, supra note 263, at 11; Observations on the Alien & Sedition Laws of the United States, supra note 256, at 6, 9, 13.

Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.²⁶⁸

This sovereign right of self-preservation was universally recognized by the international legal treatises of the eighteenth century, to which the political pamphlets concerning the Alien and Sedition Acts all attest. In the pamphlet entitled *An Address to the People of Virginia, Respecting the Alien and Sedition Laws*, Thomas Evans believed in the constitutionality of the Alien Act on the grounds that it "attained the most important of all political ends, the preservation of our national existence."²⁶⁹ He believed this power was properly vested with the President by the "laws of nations, which were pre-existent, and were therefore recognized as of existing obligation by the [*111] constitution."²⁷⁰ Evans did not see anything "more dangerous to our self-preservation as a nation ... than to have in the bosom of our country the materials of an hostile army."²⁷¹

Of course, sovereignty and self-preservation were intertwined, for one could not exercise the latter without the former, and the former could not remain without the latter. This is why Charles Lee wrote, "There can be no complete sovereignty without the power of removing aliens; and the exercise of such a power is inseparably incident to the nation."²⁷² Similarly, in the pamphlet entitled *Observations on the Alien & Sedition Laws of the United States*, an anonymous author defended a nation's exercise of the right to self-preservation in reference to "Law concerning Aliens."²⁷³ Paraphrasing Vattel, the pamphlet reads:

The sovereign may forbid the entrance of his territory, either in general to every stranger, or, in a particular case, to certain persons, or on account of certain affairs, according as he may find it most for the advantage of the state But even in countries where every stranger may enter freely, the sovereign is supposed to allow them access, only upon the tacit condition that they will be subject to the laws - to the general laws made to maintain good order, and which have no relation to the title of citizen or subject of the state. The public safety and the rights of the nation necessarily suppose this condition, and the stranger tacitly submits to it, as soon as he enters the country, and he cannot presume upon having access upon any other footing.²⁷⁴

Similar self-preservation arguments in favor of the Alien and Sedition Acts can be found in documents such as *An Address of the Minority of the Virginia Legislature*, which stated, "Government is instituted and preserved for the general happiness and safety; the people therefore are interested in its preservation, and have a right to adopt measures for its security, as well against secret plots as open [*112] hostility."²⁷⁵ The Massachusetts Legislature argued that Congress has "not only the right [of self-preservation], but [is] bound to protect [the nation] against internal as well as external foes."²⁷⁶

²⁶⁸ U.S. Const. pmbi.

²⁶⁹ Evans, *supra* note 256, at 15.

²⁷⁰ *Id.* at 16.

²⁷¹ *Id.* at 19.

²⁷² Lee, *supra* note 267, at 8-9.

²⁷³ *Observations on the Alien & Sedition Laws of the United States*, *supra* note 256, at 9.

²⁷⁴ *Id.* at 10.

²⁷⁵ *An Address of the Minority of the Virginia Legislature*, *supra* note 263, at 11.

²⁷⁶ *Reports of the Committee in Congress*, *supra* note 267, at 12.

The House debates of the Alien Act itself reveal more of the same. Harrison Gray Otis argued that the Constitution "might as well have never been made" if the federal government cannot exercise authority which is "necessary to its existence."²⁷⁷ John Wilkes Kittera could not see how there was opposition to the exercise of the power to expel and exclude aliens on ideological or association grounds because the "power proposed ... is exercised by every Government upon earth, whether despotic or democratic."²⁷⁸ Kittera argued that if every man has the right to turn away individuals "dangerous to the peace and welfare of his family" that is was absurd to believe the federal government could not exercise similar discretion.²⁷⁹ Samuel Dana also made a self-preservation argument, stating, "There is one power ... inherent and common in every form of Government ... which is the power of preserving itself."²⁸⁰ Meanwhile, William Gordon stated the power to expel and exclude foreigners for self-preservation was the "very existence of Government" itself. He knew the "sovereign power of every nation possesses it; it is a power possessed by Government to protect itself; and, in his opinion, ought now to be exercised."²⁸¹

Perhaps the most telling analysis of the right of "self-preservation" and the constitutionality of congressional plenary authority over aliens was from a Pennsylvania judge named Alexander Addison. In his analysis on the Alien Act of 1798, he wrote that Congress may "receive [aliens], and admit them to become citizens; or may reject them, or [*113] remove them, before they become citizens."²⁸² Addison argued that the "power over aliens is to be measured, not by internal and municipal law, but by external and national law."²⁸³ He emphasized that congressional power over aliens is not judged by how it "affects ... the people of the United States, parties and subjects to the constitution; but foreign governments, whose subjects the aliens are."²⁸⁴ Citing Vattel's Law of Nations, Addison knew that "every government must be [the] sole judge of what is necessary to be done, for its own safety or advantage, within its own territory."²⁸⁵ To be precise, only the law of nations bound Congress in determining whether laws respecting aliens were permissible.²⁸⁶ Addison elaborated on this point:

Nothing appears from the constitution, that can shew [sic], that the people of the United States meant to deny their own government any right, which, by the law of nations, any other sovereignty enjoys with respect to foreign nations: and the alien law affects only foreign nations. The limits of power of any government, towards its own subjects, were never meant to be applied as limits of power of that

²⁷⁷ 8 Annals of Cong. 1987 (1798).

²⁷⁸ *Id.* at 2016.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 1969-70.

²⁸¹ *Id.* at 1983-84.

²⁸² Alexander Addison, On the Alien Act: A Charge to the Grand Juries of the Country Courts of the Fifth Circuit of the State of Pennsylvania 11 (John Colerick ed., 1799).

²⁸³ Alexander Addison, Analysis of the Report of the Committee of the Virginia Assembly 21 (Philadelphia, 1800).

²⁸⁴ *Id.*

²⁸⁵ Addison, *supra* note 282, at 2.

²⁸⁶ See *id.* at 3 ("The Constitution leaves aliens, as in other countries, to the protection of the general principles of the law of nations, or of the particular provisions of treaties made between the United States, and the government whose subjects or citizens the aliens severally are."); see also *id.* at 11 ("The people of the United States therein limit the power of their government over themselves; but lay no restraint on the power of their government over aliens."). For more on Alexander Addison and the Sedition Act, see Norman L. Rosenberg, Alexander Addison and the Pennsylvania Origins of Federalist First-Amendment Thought, 108 Pa. Mag. Hist. & Biography 399 (1984).

government towards the subjects of other governments. And the question, whether a government conducts itself well towards a subject of another government, is not a question of municipal, but of national law: it cannot arise between the subject of another government and the government of which he complains, but between this and his own government.²⁸⁷

[*114] Addison's arguments in support of the Alien and Sedition Acts were so compelling that George Washington wrote to John Marshall that its contents were "flashed conviction as clear as the Sun in its Meridian brightness."²⁸⁸ Washington similarly wrote to his nephew, Bushrod Washington, that Addison's writings would "produce conviction on the minds" of the opposition.²⁸⁹ Lastly, Washington wrote to Addison himself of the "good example" he had set by acquainting the people with the "proper understanding" of the "Laws & principles of their Government."²⁹⁰

John Marshall agreed with Washington's sentiments and described Addison's work as "well written" and wished that "other publications on the same subject could be more generally read ... to make some impression on the mass of the people."²⁹¹ Whether Marshall viewed the Alien Act as constitutional has been the subject of some debate.²⁹² When he was running for Congress, he was asked the questions, "Are you an advocate for the alien and sedition bills? or [sic], in the event of your election, will you use your influence to obtain a repeal of those laws?"²⁹³ Marshall replied:

I am not an advocate for the alien and sedition bills: had I been in congress when they passed, I should, unless my judgment could have been changed, certainly have opposed them. Yet, I do not think them fraught with all those mischiefs which many gentlemen ascribe to them. I should have opposed them, because I think them useless; and because they are calculated to create, unnecessarily, discontents and jealousies at a time when our very existence, as a nation, may depend on our union - I believe that these laws, had they been opposed on these principles by a man, not suspected of intending to destroy the government, or of being hostile to it, would never been [*115] enacted. With respect to their repeal, the effort will be made before I can become a member of congress. If it succeeds, there will be an end of the business - if it failes, I shall, on the question of renewing the effort, should I be chosen to represent the district, obey the voice of my constituents.²⁹⁴

Here, Marshall makes no reference to the Alien and Sedition Acts being unconstitutional. He simply stresses the historic fact that party politics have superseded the best interests of the Republic.²⁹⁵

²⁸⁷ Addison, *supra* note 283, at 26.

²⁸⁸ 3 *The Papers of John Marshall* 531 (William C. Stinchcombe et al. eds., 1979).

²⁸⁹ 3 *The Papers of George Washington: Retirement Series* 303 (W.W. Abbot & Edward G. Lengel eds., 1999).

²⁹⁰ *Id.* at 407. For more on George Washington and the Alien and Sedition Acts, see Marshall Smelter, *George Washington and the Alien and Sedition Acts*, 59 *Am. Hist. Rev.* 322 (1954).

²⁹¹ 4 *The Papers of John Marshall* 3 (Charles T. Cullen & Leslie Tobias eds., 1984).

²⁹² See Kurt. T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, [68 *Ohio St. L.J.* 435, 500-03 \(2007\)](#).

²⁹³ 3 [The Papers of John Marshall](#), *supra* note 288, at 503.

²⁹⁴ *Id.* at 505-06.

²⁹⁵ *Id.*; see also 4 [The Papers of John Marshall](#), *supra* note 291, at 3-4 (discussing that no matter the bill at issue, the Republicans "would have been attacked with equal virulence" and that the issue was "men who will hold power by any means rather than not hold it; & who would prefer a dissolution of the union to the continuance of an administration not of their own party.").

However, it can be assumed that he supported the Alien Act as a proper exercise of the Constitution's Necessary and Proper Clause. The best evidence of this is Marshall's incorporation of Addison's analysis of the clause in two of his opinions - *United States v. Fisher*²⁹⁶ and *McCulloch v. Maryland*.²⁹⁷ This legal influence has been seemingly ignored by historians and legal scholars,²⁹⁸ but it is clear and convincing, for Addison was the only pre-Marshall commentator to use the phrase "choice of means" in describing the Necessary and Proper Clause.

Addison wrote that the Alien Act was constitutional, because Congress has "discretion of the choice of means, necessary or proper, for executing their powers."²⁹⁹ He asserted that the "power over the end implies a power over the means; and a power to make laws, for carrying any power into execution."³⁰⁰ Not only was Marshall familiar with Addison's work,³⁰¹ but in his 1805 opinion in *United States v. Fisher*, Marshall paraphrased Addison writing, "Congress must possess the choice of means, and must be [*116] empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution."³⁰²

It should be emphasized that during the Alien Act debates, neither Federalists nor Republicans had qualms with whether the expulsion and exclusion of foreigners was constitutional. The disagreement was over where the power to expel and exclude "alien friends" rested.³⁰³ Generally, Republicans did not deny that government had a right to expel and exclude foreigners as it sees fit. The thrust of their argument rested with the belief, as Albert Gallatin stated it, that Congress "has not the power to remove alien friends, [and] it cannot be inferred" because "no facts had appeared ... which require these arbitrary means to be employed against them."³⁰⁴

Not even James Madison, who disfavored the Alien Act, argued that the removal of aliens - friend or enemy - was unconstitutional but rather that "alien friends" were under concurrent federal and state

²⁹⁶ [6 U.S. 358 \(1805\)](#).

²⁹⁷ [17 U.S. 316 \(1819\)](#).

²⁹⁸ Most scholars attribute the influence to Alexander Hamilton's Arguments for the Creation of a National Bank. See e.g., Samuel R. Olken, Chief Justice John Marshall and the Course of American Constitutional History, [33 J. Marshall L. Rev. 743, 769-70 \(2000\)](#). There is little doubting this argument influenced Marshall in *McCulloch*, but Hamilton never used the language "choice of means." Only Addison used this language.

²⁹⁹ Addison, *supra* note 284, at 39.

³⁰⁰ *Id.*

³⁰¹ 3 [The Papers of John Marshall, supra](#) note 288, at 505-06.

³⁰² [United States v. Fisher, 6 U.S. 358, 298 \(1805\)](#).

³⁰³ See Tucker, *supra* note 256, at 10; Lenner, *supra* note 256, at 413.

³⁰⁴ 8 Annals of Cong. 1980 (1798). Republican John Taylor viewed the right of self-preservation as being with the respective states. Lenner, *supra* note 256, at 406. Certainly, the Founding Fathers believed that the states retained the right of self-preservation within their respective borders or should the federal government usurp the sanctions of society. Charles, *supra* note 268, at 57-59. However, immigration is an issue that affected the entire Union, and the law of nations had always placed the power of admitting foreigners in the hands of the national government. The Founding Fathers understood this when they drafted the Constitution. Lenner, *supra* note 256, at 407-09.

jurisdiction.³⁰⁵ In fact, Madison was one of the strongest proponents for applying federal power over the law of nations and the doctrine of allegiance. In 1789, he wrote that "it is an established maxim that birth is a criterion of allegiance."³⁰⁶ Madison even adhered to the international principle that in order to be protected by a foreign government, "it is established that allegiance shall first be due to the whole nation."³⁰⁷

Where Madison disagreed with the Federalists was that he thought it improper to subject alien friends to **[*117]** "banishment by an arbitrary and unusual process, either under the one government or the other."³⁰⁸ In other words, Madison felt that the power to expel an "alien friend" rested with the state and municipal governments respectively. It was within each state or municipal government's due process protections to determine whether an "alien friend" was dangerous. This was essentially the entire basis of the state sovereignty argument.³⁰⁹ Throughout the debates and tracts, Republicans argued that "alien friends" suspected of being dangerous to government were entitled to a trial by jury as prescribed in the state or municipality in which the "alien friend" resided.³¹⁰

The problem with Madison and the Republicans' argument was that a state or municipal government only had the power to expel an alien from its own jurisdiction, not from the United States. Harrison Gray Otis addressed the fallacy of the Republicans' argument by stating that he could not see how state and municipal governments could have such power when they do not possess the authority over "peace and war, negotiations with foreign countries, the general peace and welfare of the United States ... [and making] measures preparatory to the national defence."³¹¹ Most importantly, for the Constitution to place such a power within the states would only displace dangerous aliens from one sub-national territory to another. Otis stated that dangerous aliens "stamped with infamy in their own country, and plotting treasons against ours, may [still] remain in some part of the ... United States, while Congress has not the power to get rid of them until all the states concur in the same object."³¹² Robert Goodloe Harper agreed with Otis because he did not see how the states can make such a determination, when they do not have "any **[*118]** knowledge of what relates to our foreign relations, or the common defence of the Union."³¹³

Not even the staunchest opponents of the Alien Act argued that the expulsion or exclusion of foreigners, who subscribed to the radical Jacobin ideology, violated the Constitution or the First Amendment.³¹⁴

³⁰⁵ The Debates in the Several State Conventions, supra note 176, at 546-60; see also Lenner, supra note 163, at 267 ("Republican opposition to Federalist measures, it should again be stressed, was neither doctrinaire nor opportunistic, but rooted in principled disagreements over federalism and state sovereignty.").

³⁰⁶ 12 The Papers of James Madison, supra note 210, at 179.

³⁰⁷ Id. at 180.

³⁰⁸ The Debates in the Several State Conventions, supra note 176, at 559.

³⁰⁹ Harrison Gray Otis correctly summed up the entire basis of the Republicans' argument, stating, "All these objections ... [are] founded on the right of a trial by jury." 8 Annals of Cong. 2018 (1798).

³¹⁰ 8 Annals of Cong. 1789-92 (1798); Tucker, supra note 256, at 15, 18, 20. It is interesting that none of the Republicans argued that "alien enemies" should be afforded due process protection. In fact, St. George Tucker expressly stated that "alien enemies" do not enjoy it. Tucker, supra note 256, at 18.

³¹¹ 8 Annals of Cong. 1986 (1798).

³¹² Id. at 1987.

³¹³ Id. at 1990.

³¹⁴ James Ogilvie, one such opponent, made arguments similar to those in early eighteenth-century England pamphlets. He viewed the Alien and Sedition Acts as laws that would prevent "many unhappy & virtuous foreigners from emigrating to America

This is especially telling, because the Alien Act and Sedition Act were often opposed together in the political tracts of the period. Repeatedly, opponents of the Sedition Act argued that it violated the protections afforded in the First Amendment,³¹⁵ and rightfully so. However, the Alien Act, which expelled and excluded foreigners on the basis of association and political ideology, was never viewed as a violation of the First Amendment. Thus, under an originalist approach, there exists a substantially stronger argument that the founding generation viewed the politics of expulsion and exclusion as unique and distinct from the First Amendment freedoms.

IV. *Kleindienst v. Mandel*, the First Amendment, Ideological Exclusions, and the Plenary Power Doctrine - Setting the Record Straight

Despite the well-established positions of the plenary power doctrine, in both law³¹⁶ and history, legal commentators have continued to argue that congressional [*119] authority over immigration should be limited by the First Amendment and other constitutional provisions.³¹⁷ In making this argument, commentators often look to the Supreme Court holding in *Kleindienst v. Mandel*.³¹⁸ For instance, Susan M. Akram reads *Mandel* as inferring that the First Amendment can limit the plenary power doctrine.³¹⁹ Akram writes that "the Supreme Court would review and independently judge the validity of the Executive's decisions concerning rights of aliens where freedom of speech and association are implicated even in cases of excludable aliens."³²⁰ Akram asserts that the Supreme Court would do this because the *Mandel* Court rejected the government's argument that the Attorney General's decisions on admission should be subject to complete defeasance. Meanwhile, Hiroshi Motomura reads *Mandel* in a more limited context, stating the decision only "suggests some outer limits to executive discretion that might not apply to direct congressional decisions."³²¹

Commentators such as Vandiver and Monrad, however, read the *Mandel* decision liberally and assume too much.³²² A careful reading of *Mandel* does not even dent the chains that bind the plenary power doctrine. If anything, the decision affirms it, for the Court held the "plenary congressional power to make policies and rules for the exclusion of aliens has long been firmly established."³²³ Furthermore, the

and adding to our strength, and respectability, and resources." James Ogilvie, *A Speech Delivered in Essex County 4* (Richmond, Va., Jones & Dixon, 1798). He also viewed the laws as impeding commerce, agriculture, and the arts. *Id.* at 4.

³¹⁵ See generally Reports of the Committee in Congress, *supra* note 267; Tucker, *supra* note 256.

³¹⁶ See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) ("It is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of government to exclude a given alien."); *United States ex rel. John Turner*, 194 U.S. 279, 291 (1904) ("[It is] essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe); see also *Denmore v. Kim*, 538 U.S. 510, 521-22 (2003); *Reno v. Flores*, 507 U.S. 292, 305-06 (1993); *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972); *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Galvan v. Press*, 347 U.S. 522, 530 (1954); *Harisiades v. Shaughnessy*, 342, U.S. 580, 588-89 (1952); *Chuoco Tiaco v. Forbes*, 228 U.S. 549, 556-57 (1913); ***Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893)**; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

³¹⁷ See *supra* notes 4, 15, 19.

³¹⁸ *Mandel*, 408 U.S. at 753.

³¹⁹ Akram, *supra* note 4, at 59.

³²⁰ *Id.*

³²¹ Motomura, *supra* note 15, at 581.

³²² See Monrad, *supra* note 4, at 867-73; Vandiver, *supra* note 4, at 765-66;

³²³ *Mandel*, 408 U.S. at 769-70.

Court's analysis of the First Amendment was not the ground upon which the case was decided. This is supported in two portions of the majority opinion. First, the Court opened its analysis, stating, "Recognition that First Amendment rights are implicated ... is not dispositive of our inquiry here."³²⁴ Second, in summarizing the holding, the Court stated, "What First Amendment or other grounds may be available for attacking the exercise of discretion for **[*120]** which no justification whatsoever is advanced is a question we neither address nor decide in this case."³²⁵

Despite the fact that Mandel affirmed the plenary power doctrine, some appellate courts have improperly applied the decision to analyze the sufficiency of immigration statutes under either the First Amendment or a modified rational basis test. It needs to be stressed that the Mandel Court was only reviewing whether the Executive Branch properly carried out the statutory powers granted by Congress. In particular, the question presented was whether a waiver procedure, provided in the statute, permitted the temporary admittance of a foreigner that was excluded on ideological grounds.³²⁶ In its analysis, the Court never questioned congressional authority to exclude or expel foreigners from the United States, including removal on associational or ideological grounds. In fact, the Court refused to address the issue because it was conceded by the parties that "Congress could enact a blanket prohibition against entry of all aliens falling into" a class prescribed by statute, and that "First Amendment rights could not override that decision."³²⁷

The only manner in which the First Amendment was implicated in the Mandel decision was as the means by which a group of American citizens were given standing to challenge the statute in question.³²⁸ The primary plaintiff in the case was Ernest E. Mandel, a professional journalist from Belgium who described himself as a "revolutionary Marxist."³²⁹ Mandel had been admitted to the United States twice before. However, unbeknown to Mandel, both times he was admitted in the United States it was at the Attorney General's discretion. This admission was discretionary because the Immigration and Nationality Act of 1952 contained an ideological exclusion provision excluding aliens "who write or publish ... [the] governmental doctrines of world communism."³³⁰

[*121] Given the fact that Mandel was not present within the territorial United States at the time he was refused entry, he did not have standing to bring a claim. It is here that the First Amendment was implicated in the case, for a group of university professors joined the complaint alleging violations of their freedom of speech.³³¹ To be precise, the professors alleged that by refusing Mandel's entry into the United States, the federal government had denied them the First Amendment freedom to hear Mandel's "views and engage him in a free and open academic exchange."³³² Thus, the First Amendment was not

³²⁴ [Id. at 765.](#)

³²⁵ [Id. at 770.](#)

³²⁶ [Id. at 755, 767.](#)

³²⁷ [Id. at 767.](#)

³²⁸ [Id. at 759-65.](#)

³²⁹ [Id. at 756](#) (citing E. Mandel, *Revolutionary Strategy in the Imperialist Countries* (1969)).

³³⁰ [Id. at 755-56](#) (citing **8 U.S.C. § 1182**(G)(v) (2006)).

³³¹ [Id. at 759-60.](#)

³³² *Id.*

implicated as to whether an alien may be refused entry on ideological grounds but whether this exclusion violated the rights of United States citizens.

In *Mandel*, the Supreme Court, however, refused to "balance First Amendment rights against governmental regulatory interests."³³³ Many subsequent appellate courts have limited their interpretation of *Mandel* to U.S. citizens' standing to file sue. In *Abourezk v. Reagan*, the appellants had standing because they were United States citizens claiming that the exclusion of James Abourezk violated their First Amendment rights.³³⁴ The District of Columbia Court of Appeals affirmed the validity of association or ideological exclusions, stating that "nothing in our analysis inhibits the State Department from using a group affiliation to deny visas to members of terrorist groups, or organized crime syndicates" so long as the "organizations [are] specifically proscribed by the Act."³³⁵ The court, despite having no issue with Congress' ability to impose restraints, did have concerns regarding the Executive Branch's use of that power. The court elaborated on this point, stating:

The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in [*122] cases properly before them, to say where those statutory and constitutional boundaries lie.³³⁶

One may interpret the court's reference to "constitutional limitations" to include the Bill of Rights; however, an interpretation takes the court's decision out of context. The "constitutional limitations" on the power to admit, expel, and exclude foreigners clearly refers to the distribution of powers between the Legislative and Executive branches of government.³³⁷ In *Bustamante v. Mukasev*,³³⁸ the Court of Appeals for the Ninth Circuit conveyed a similar limited interpretation of *Mandel*, stating that the courts may only review the exclusion of an alien on First Amendment grounds when it "implicates the constitutional rights of American citizens."³³⁹ The Ninth Circuit went on to affirm that "Congress has plenary power to make policies and rules for the exclusion of aliens."³⁴⁰ However, when a "U.S. citizen raises a constitutional challenge" to a foreigner's exclusion by the Executive Branch, it is within the court's power to determine whether such exclusion is "facially legitimate" under the constraints of the Executive authority granted by Congress.³⁴¹

³³³ [Id. at 765.](#)

³³⁴ [785 F.2d 1043, 1047-49 \(D.C. Cir. 1986\).](#)

³³⁵ [Id. at 1058 n.18.](#)

³³⁶ [Id. at 1061.](#)

³³⁷ See [INS v. Chadha, 462 U.S. 919, 941-42 \(1983\)](#) (requiring Congress to choose "a constitutionally permissible means of implementing" its plenary power).

³³⁸ [531 F.3d 1059 \(9th Cir. 2008\).](#)

³³⁹ [Id. at 1061.](#)

³⁴⁰ *Id.*

³⁴¹ [Id. at 1062.](#) For other appellate courts that have interpreted *Mandel* properly, see [Detroit Free Press v. Ashcroft, 303 F.3d 681, 687 \(6th Cir. 2002\)](#); [Gonzalez v. Reno, 212 F.3d 1338, 1354 n.23 \(11th Cir. 2000\)](#); [Garcia v. INS, 7 F.3d 1320, 1327 \(7th Cir. 1993\)](#); [Joseph v. INS, 1993 U.S. App. LEXIS 11773 \(4th Cir. 1993\).](#)

However, not every appellate court has taken the proper limited interpretation of Mandel. For instance, while the First Circuit Court of Appeals accurately identified the standing requirement in Mandel, it improperly assumed the Supreme Court's holding was a form of First Amendment review.³⁴² The court held that, under Mandel, it can examine "the possibility of impairment of United States citizens' First Amendment rights through the exclusion of the alien."³⁴³ The court went on to hold that First Amendment review [*123] required a "facially legitimate and bona fide reason" standard.³⁴⁴ Where exactly the First Circuit obtained this standard of review in Mandel is uncertain.

Of course, the First Circuit Court of Appeals is not the only circuit to misconstrue Mandel in this fashion. In *American Academy of Religion v. Napolitano*, the Second Circuit similarly held that Mandel permits a "limited judicial review of First Amendment claims" because the "First Amendment requires at least some judicial review of the discretionary decision of the Attorney General to waive admissibility."³⁴⁵ These cases take Mandel out of context. The Supreme Court only held that the First Amendment provides citizens with the requisite Article III standing for their case to be reviewed. At no point did the Mandel Court state that its opinion was to be construed as a First Amendment analysis or a standard of review for immigration statutes. Instead, the Court in Mandel held that whatever "First Amendment or other grounds may be available for attacking [the] exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case."³⁴⁶

Another common mistake made by appellate courts in interpreting Mandel is the assertion that congressional immigration legislation is subject to a modified rational basis review. As shown above, in *Bustamante* the Ninth Circuit accurately applied Mandel in determining whether the Executive Branch properly exercised its statutory authority.³⁴⁷ However, just three years earlier in *Padilla-Padilla v. Gonzales*, the Ninth Circuit inaccurately applied Mandel's "facially legitimate and bona fide reason" standard to Congress.³⁴⁸ The *Padilla-Padilla* court held that "so long as Congress legislates with 'a facially legitimate and bona fide reason' the courts will neither look beyond the exercise [*124] of that discretion, nor test it by balancing its justification."³⁴⁹

Such language attempts to subvert the Supreme Court's repeated affirmation of the plenary power doctrine and seemingly places immigration statutes under a modified rational basis test. The District of Columbia Court of Appeals took this approach in *Miller v. Christopher*, when it used the "facially legitimate and bona fide reason" test to determine whether immigration statute [8 U.S.C. § 1409](#) was

³⁴² [Adams v. Baker, 909 F.2d 643 \(1st Cir. 1990\).](#)

³⁴³ [Id. at 647.](#)

³⁴⁴ [Id. at 649.](#) It is of note that the First Circuit had properly applied the Mandel standard just two years prior. See [Allende v. Schultz, 845 F.2d 1111, 1114-16 \(1st Cir. 1998\).](#)

³⁴⁵ [Am. Acad. Of Religion v. Napolitano, 573 F.3d 115, 124-25 \(2d Cir. 2009\).](#) It is important to note that neither American Academy of Religion nor Adams was petitioned for certiorari to the Supreme Court.

³⁴⁶ [Kleindienst v. Mandel, 408 U.S. 753, 770 \(1972\).](#)

³⁴⁷ [Bustamante v. Mukasey, 531 F.3d 1059, 1062 \(9th Cir. 2008\).](#)

³⁴⁸ [463 F.3d 972, 979 \(9th Cir. 2006\).](#)

³⁴⁹ *Id.* (quoting [Fiallo v. Bell, 430 U.S. 787, 794-95 \(1977\).](#))

constitutional.³⁵⁰ Acting upon its immigration power to prescribe who is a United States citizen when born outside the territorial United States, Congress drafted § 1409 to provide different standards of citizenship for children born overseas if only one of the parents was a citizen.³⁵¹ In writing its opinion, the Court of Appeals for the District of Columbia made sure to acknowledge "Congress's plenary authority to prescribe rules for the admission and exclusion of aliens."³⁵² However, the court improperly examined whether Congress had a "facially legitimate and bona fide reason" for adopting § 1409.³⁵³

In *Kamara v. Attorney General of the United States*, the Court of Appeals for the Third Circuit similarly applied the fictional "facially legitimate and bona fide reason" standard to determine the constitutionality of immigration statutes.³⁵⁴ [*125] Like the Miller court, the Third Circuit identified the significance of the plenary power doctrine,³⁵⁵ yet misapplied Mandel when it asserted that the Supreme Court "has applied a very lenient 'facially legitimate and bona fide reason standard' to constitutional challenges of immigration statutes."³⁵⁶ Other appellate decisions have also misconstrued Mandel in this light,³⁵⁷ but these decisions should be ignored by future courts. As shown above, the Mandel decision stood for nothing more than determining whether the Executive Branch properly exercised its authority granted by Congress. Thus, to extend Mandel's language to challenge the plenary power doctrine is to turn the decision on its head, for neither the Founding Fathers, the law of nations, or the Supreme Court has ever prescribed to the rule that congressional plenary authority over the admittance and settling of foreigners is restricted by the individual freedoms in the Constitution.

V. Conclusion

The history shows that the authority to admit, expel, and exclude foreigners is a political matter that is solely subject to the determination of the political branches as a means of self-preservation - an

³⁵⁰ [96 F.3d 1467, 1470-71 \(D.C. Cir. 1996\)](#). The Supreme Court granted certiorari in this case; however, it did not apply the "facially legitimate and bona fide reason" standard. See [Miller v. Albright, 523 U.S. 420 \(1998\)](#).

³⁵¹ The Supreme Court has never answered this constitutional question, see [Tuan Anh Nguyen v. INS, 533 U.S. 53 \(2001\)](#), but there is no evidence that the drafters of the Fourteenth Amendment intended to apply to the Equal Protection Clause to congressional plenary authority over the rules of naturalization. See 36 Cong. Globe 498 (1866) ("We have a right to exclude ... people ... from becoming citizens, if we so choose."); id. at 1266 ("I am inclined to think ... that the word 'naturalization' may very properly, so far as legislative purposes are concerned, be construed in a larger and more liberal sense"); id. at 1832.

It is an exercise of authority which belongs to every sovereign Power, and is essentially a subject of national jurisdiction. The whole power over citizenship is intrusted to the national Government, which can make citizens of any foreign people as an exercise of sovereignty, or under the power, "to establish a uniform rule of naturalization."

Id. at 1832.

³⁵² [Miller, 96 F.3d at 1470](#) (quoting [Kleindienst v. Mandel, 408 U.S. 753, 770 \(1972\)](#)).

³⁵³ Id. at 1471.

³⁵⁴ [420 F.3d 202, 217 \(3d Cir. 2005\)](#).

³⁵⁵ Id.

³⁵⁶ Id.

³⁵⁷ See [Leal Rodriguez v. INS, 990 F.2d 939, 951 \(7th Cir. 1993\)](#); [Azizi v. Thornburgh, 908 F.2d 1130, 1133 n.2 \(2d Cir. 1990\)](#); [Anetekhai v. INS, 876 F.2d 1218, 1222 n.7 \(5th Cir. 1989\)](#).

interpretation of the Constitution that the Supreme Court has always understood.³⁵⁸ The fact that citizens, advocacy groups, or attorneys may personally believe that certain foreigners are being denied First Amendment freedoms by being excluded on association or ideological grounds is irrelevant. It is a well-established [*126] tenet of the law of nations that the danger or threat foreigners pose is a determination to be made by the political branches of government based upon such factors as the doctrine of allegiance, and not by a court absent express authority through statute or treaty.³⁵⁹ As Sir Francis Bacon states, even an alien friend "may be an enemy," therefore to this "person the law allotteth ... [a] benefit" that is "transitory" at the discretion of the sovereign government.³⁶⁰

Under Mandel, there is no denying that the courts may review the statutory authority that Congress grants the Executive Branch in excluding foreigners on association or ideological grounds. Such review, however, has not changed the plenary power doctrine one iota, for the Supreme Court has consistently held that Congress has plenary authority to exclude or expel foreigners on any grounds.³⁶¹ Exclusion is not limited by the First Amendment's right to freedom of religion, association, or political beliefs. Congress has the power to exclude foreigners regarding a broad range of associational and ideological grounds, including anarchism, totalitarianism, communism, and terrorism. Generally, exclusions have not been based solely on a religious faith. This may change, however, for the twenty-first century has seen an expansion of politically active religious sects whose ideological purposes include the overthrow of democracy. Whether such religious exclusions will occur is unknown, but what is certain is that the plenary power doctrine has no bounds in order to achieve the congressional authority of self-preservation.

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³⁵⁸ See [United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 \(1950\)](#) ("[It] is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of government to exclude a given alien."); [United States ex rel. Turner, 194 U.S. 279, 291 \(1904\)](#) ("[It is] essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); see also [Demore v. Kim, 538 U.S. 510, 521-22 \(2003\)](#); [Reno v. Flores, 507 U.S. 292, 305-06 \(1993\)](#); [Kleindienst v. Mandel, 408 U.S. 753, 765-66 \(1972\)](#); [Graham v. Richardson, 403 U.S. 365, 377 \(1971\)](#); [Galvan v. Press, 347 U.S. 522, 530 \(1954\)](#); [Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 \(1952\)](#); [Tiano v. Forbes, 228 U.S. 549, 556-77 \(1913\)](#); [Fong Yue Ting v. United States, 149 U.S. 698, 705 \(1893\)](#); [Nishimura Ekiu v. United States, 142 U.S. 651, 659 \(1892\)](#).

³⁵⁹ See [Tuan Anh Nguyen v. INS, 533 U.S. 53, 67 \(2001\)](#) (requiring that when determining an individual's "ties and allegiances, it is for Congress, not this Court, to make that determination").

³⁶⁰ Bacon, *supra* note 34, at 11-12.

³⁶¹ See *supra* note 358.



Executive Authority to Exclude Aliens: In Brief

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Summary

The Immigration and Nationality Act (INA) provides that individual aliens outside the United States are “inadmissible”—or barred from admission to the country—on health, criminal, security, and other grounds set forth in the INA. However, the INA also grants the Executive several broader authorities that could be used to exclude certain individual aliens or classes of aliens for reasons that are not specifically prescribed in the INA.

Section 212(f) of the INA is arguably the broadest and best known of these authorities. It provides, in relevant part, that

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, 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 to be appropriate.

Over the years, Presidents have relied upon Section 212(f) to suspend or otherwise restrict the entry of individual aliens and classes of aliens, often (although not always) in conjunction with the imposition of financial sanctions upon these aliens. Among those so excluded have been aliens whose actions “threaten the peace, security, or stability of Libya”; officials of the North Korean government; and aliens responsible for “serious human rights violations.”

Neither the text of Section 212(f) nor the case law to date suggests any firm legal limits upon the President’s exercise of his authority to exclude aliens under this provision. The central statutory constraint imposed on Section 212(f)’s exclusionary power is that the President must have found that the entry of any alien or class of aliens would be “detrimental to the interests of the United States.” The statute does not address (1) what factors should be considered in determining whether aliens’ entry is “detrimental” to U.S. interests; (2) when and how proclamations suspending or restricting entry should be issued; (3) what factors are to be considered in determining whether particular restrictions are “appropriate”; or (4) how long any restrictions should last. The limited case law addressing exercises of presidential authority under Section 212(f) also supports the view that this provision confers broad authority to bar or impose conditions upon the entry of aliens. Key among these cases is the Supreme Court’s 1993 decision in *Sale v. Haitian Centers Council, Inc.*, which held that the U.S. practice of interdicting persons fleeing Haiti outside U.S. territorial waters and returning them to their home country without allowing them to raise claims for asylum or withholding of removal did not violate the INA or the United Nations Convention Relating to the Status of Refugees. The U.S. practice had been established by Executive Order 12807, which was issued, in part, under the authority of Section 212(f) and “suspend[ed] the entry of aliens coming by sea to the United States without necessary documentation.” However, depending on their scope, future executive actions under Section 212(f) could potentially be seen to raise legal issues that have not been prompted by the Executive’s prior exercises of this authority.

Beyond Section 212(f), other provisions of the INA can also be seen to authorize the Executive to restrict aliens’ entry to the United States. Most notably, Section 214(a)(1) prescribes that the “admission of any alien to the United States as a nonimmigrant shall be for such time and under such conditions as [the Executive] may by regulations prescribe.” Section 215(a)(1) similarly provides that “it shall be unlawful for any alien” to enter or depart the United States “except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.” For example, President Carter cited Section 215(a)—rather than Section 212(f)—when authorizing the revocation of immigrant and nonimmigrant visas issued to Iranian citizens during the Iran Hostage Crisis.

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The Immigration and Nationality Act (INA) provides that individual aliens outside the United States are “inadmissible”—or generally barred from admission to the country¹—on health, criminal, security, and other grounds set forth in the INA.² However, the INA also grants the Executive several broad authorities that could be used to exclude certain individual aliens or classes of aliens for reasons that are not specifically set forth in the INA. Section 212(f) of the INA is arguably the broadest and best known of these provisions,³ but Sections 214(a)(1) and 215(a)(1) can also be seen to authorize the Executive to restrict aliens’ entry or admission to the United States.⁴

This report provides a brief overview of the Executive’s authority under these provisions of the INA. It begins with and focuses primarily on Section 212(f). It also briefly notes other provisions.

Section 212(f) of the INA

The provisions currently in Section 212(f)—which have been part of the INA since its enactment in 1952⁵—state, in relevant part, that

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation and for such period as he shall deem necessary, 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 to be appropriate.⁶

Legislative history materials from the time of the INA’s enactment suggest that these provisions were seen to grant the President broad authority to bar or impose conditions upon the entry of aliens,⁷ and Presidents over the years have relied upon Section 212(f) to suspend or restrict the entry of various groups of aliens, often (although not always) in conjunction with the imposition of financial sanctions upon them. Among those so excluded have been aliens whose actions

¹ The INA defines “admission” to mean “the lawful entry of an alien into the United States after inspection and authorization by an immigration officer.” INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A). The INA is codified in Title 8 of the United States Code, and references to the INA in this report also include references to the corresponding sections of Title 8.

² See INA § 212(a), 8 U.S.C. § 1182(a) (prescribing the inadmissibility of, among others, aliens who have a communicable disease of public health significance; have been convicted of two or more criminal offenses; have engaged in a terrorist activity; are permanently ineligible for citizenship; or have previously voted in violation of any federal, state, or local law). Certain of these grounds of inadmissibility may be waived. See, e.g., INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v) (authorizing the Executive to waive the 3- and 10-year bars upon the admission of aliens who have been unlawfully present in the United States for more than 180 days if the refusal of admission to the alien would result in “extreme hardship” to a parent or spouse who is a U.S. citizen or lawful permanent resident (LPR)).

³ 8 U.S.C. § 1182(f).

⁴ 8 U.S.C. §§ 1184(a)(1), 1185(a)(1). As is discussed later in this report, the term “entry” is no longer defined for purposes of the INA. See Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), P.L. 104-208, § 301(a), 110 Stat. 3009-575 (Sept. 30, 1996) (amending INA § 101(a)(13) so that it defines “admission,” instead of “entry”). However, at one time, the INA defined the term “entry” to mean “any coming of an alien into the United States, from any foreign port or place or from an outlying possession, whether voluntarily or otherwise.” INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994). See *infra* notes 26-27 and accompanying text.

⁵ 8 U.S.C. § 1182(f).

⁶ See P.L. 82-414, § 212(e), 66 Stat. 188 (June 27, 1952).

⁷ See, e.g., H.R. RPT. 1365, 82d Cong., 2d Sess., at 53 (Feb. 14, 1952) (“The bill vests in the President the authority to suspend the entry of all aliens if he finds that their entry would be detrimental to the interests of the United States, for such period as he shall deem necessary.”).

“threaten the peace, security, or stability of Libya”;⁸ officials of the North Korean government or the Workers’ Party of North Korea;⁹ aliens who have participated in “serious human rights violations”;¹⁰ and others noted in **Table 1** below.

Neither the text of Section 212(f) nor the case law to date suggests any firm legal constraints upon the President’s exercise of his authority under Section 212(f), as is explained below. However, future executive actions under INA § 212(f) could potentially be seen to raise legal issues that have not been prompted by the Executive’s prior exercise of this authority.¹¹

Statutory Language and Executive Branch Interpretations

On its face, Section 212(f) would appear to give the President broad authority to preclude or otherwise restrict the entry into the United States of individual aliens or classes of aliens who are outside the United States and lack recognized ties to the country.¹² The central statutory constraint imposed on Section 212(f)’s exclusionary power is that the President must have found that the entry of any aliens or class of aliens would be “detrimental to the interests of the United States” in order to exclude the alien or class of aliens.¹³ The statute does not address (1) what factors should be considered in determining whether aliens’ entry is “detrimental” to U.S. interests; (2) when and how proclamations suspending or restricting entry should be issued; (3) what factors are to be considered in determining whether particular restrictions are “appropriate”; or (4) how long any restrictions should last. There also do not appear to be any regulations addressing the exercise of presidential authority under Section 212(f).

The Department of State’s *Foreign Affairs Manual* (FAM) seemingly provides the only publicly available executive branch guidance on the President’s Section 212(f) authority. In relevant part, the FAM notes that Section 212(f) proclamations “typically” grant the Secretary of State authority to identify individuals covered by the proclamation and to waive its application for foreign policy

⁸ See Executive Order 13726, Blocking Property and Suspending Entry Into the United States of Persons Contributing to the Situation in Libya, 81 Fed. Reg. 23559 (Apr. 21, 2016).

⁹ See Executive Order 13687, Imposing Additional Sanctions With Respect To North Korea, 80 Fed. Reg. 819 (Jan. 6, 2015).

¹⁰ See Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses, 76 Fed. Reg. 49277 (Aug. 9, 2011).

¹¹ Not knowing the form that future restrictions might take, or the grounds upon which such restrictions might be subject to legal challenges, it would be premature to assess whether specific restrictions might be within the Executive’s authority. However, it is important to note that aliens outside the United States who have no ties to the country generally have limited ability to challenge the denial of visas or admission to them. See, e.g., *Shaughnessy v. Mezei*, 345 U.S. 206, 216 (1953) (“Whatever our individual estimate of that policy and the fears on which it rests, respondent’s right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate.”); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (“[A]n alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe.”). But see *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (recognizing that U.S. persons adversely affected by the denial of a visa waiver to an alien outside the United States may have a right to challenge the denial under certain circumstances).

¹² LPRs who leave the United States for a brief period of time are distinguishable from, for example, refugees seeking to be admitted to the United States. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (discussing due process concerns raised by the application to an LPR of a statute which provided for the exclusion of any alien who “at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law”).

¹³ INA § 212(f), 8 U.S.C. § 1182(f).

or other national interests.¹⁴ The FAM also notes that such proclamations may bar entry based on either affiliation or “objectionable” conduct. In addition, it provides that Section 212(f) may reach persons who are inadmissible under other provisions of law, in which case, the “statutory inadmissibilities are to be considered prior to determining whether a Presidential Proclamation applies.”¹⁵ However, the FAM is generally not seen as having the force of law to bind the executive branch.¹⁶ Thus, the Executive would not need to engage in notice-and-comment rulemaking in order to alter particular practices contained in the FAM that have historically been associated with exercises of Section 212(f) authority (e.g., not relying on a 212(f) proclamation to bar the admission of aliens who are inadmissible on other grounds).¹⁷

Judicial Constructions of Section 212(f)

The limited case law addressing exercises of presidential authority under Section 212(f) also supports the view that this provision of the INA confers broad authority to suspend or restrict the entry of aliens. Key among these cases is the Supreme Court’s 1993 decision in *Sale v. Haitian Centers Council, Inc.*, which held that the U.S. practice of interdicting persons fleeing Haiti outside U.S. territorial waters and returning them to their home country without allowing them to raise claims for asylum and withholding of removal did not violate either the INA or the United Nations Convention Relating to the Status of Refugees.¹⁸ The U.S. practice had been established by Executive Order 12807, which was issued, in part, under the authority of Section 212(f) of the INA¹⁹ and “suspend[ed] the entry of aliens coming by sea to the United States without necessary documentation.”²⁰ Although the *Sale* Court was primarily concerned with whether the INA and UN Convention provisions regarding withholding of removal applied extraterritorially,²¹ it is arguably important for understanding the scope of the President’s Section 212(f) authority. In particular, the *Sale* decision arguably helped clarify the relationship between exercises of the authority granted by Section 212(f) and those granted by other provisions of the INA, as well as the meaning of *entry* for purposes of Section 212(f).

¹⁴ 9 FAM § 302.11-3(B)(1), available at <https://fam.state.gov/Fam/FAM.aspx> (last accessed: Jan. 3, 2017).

¹⁵ *Id.*

¹⁶ See, e.g., *Patel v. U.S. Dep’t of State*, No. 11-cv-6-wmc, 2013 U.S. Dist. LEXIS 108592, at *13 (W.D. Wis. Aug. 2, 2013) (“[T]he Foreign Affairs Manual is an internal guideline that sets forth agency practice and procedures. Because internal guidelines and agency manuals like the Foreign Affairs Manual are not subject to [Administrative Procedure Act] APA rulemaking procedures, they lack the force of law and do not bind agency discretion.”).

¹⁷ For more on the constraints of the rulemaking process, see generally CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey and Daniel T. Shedd; CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

¹⁸ 509 U.S. 155, 158-59 (1993). Specifically at issue in *Sale* were the provisions currently in INA § 241(b)(3)(B) and Article 33 of the Convention, which both bar the return of aliens to countries where their life or freedom would be threatened because of their race, religion, nationality, political opinion, or membership in a particular social group. The United States is technically a party to the 1967 UN Protocol Relating to the Status of Refugees, not the 1951 Convention Relating to the Status of Refugees. However, the Protocol incorporated articles 2 to 34 of the Convention, and it is customary for commentators to refer to the Convention, not the Protocol, when discussing these articles.

¹⁹ Executive Order 12,807 also cited INA § 215(a)(1), which provides that “[u]nless otherwise ordered by the President, it shall be unlawful for any alien to depart from or enter ... the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.” 8 U.S.C. § 1185(a)(1). For further discussion of this provision, see *infra* “Other Provisions of the INA”.

²⁰ See *Interdiction of Illegal Aliens*, 57 Fed. Reg. 23133 (June 1, 1992). President George H.W. Bush initially issued this order, but President Clinton left the order in place without modifications when he took office. It remained in effect at the time of the Court’s decision in *Sale*. See generally 509 U.S. at 165.

²¹ *Sale*, 509 U.S. at 173-88.

In particular, the Court rejected the view of the U.S. Court of Appeals for the Second Circuit (“Second Circuit”) that interdiction was prohibited because of the INA’s prohibition upon the then-Attorney General returning an alien to a country where he or she would be persecuted.²² The Second Circuit had reached this conclusion by noting that the Attorney General was the President’s “agent” in matters of immigration.²³ Therefore, it found that INA’s prohibition on the Attorney General returning aliens to countries where the alien’s life or freedom would be threatened because of the alien’s race, religion, nationality, political opinion, or membership in a particular social group should be imputed to the rest of the executive branch.²⁴ The Supreme Court disagreed, however, holding that the interdiction program created by the President did not “usurp[] authority that Congress has delegated to, or implicate[] responsibilities that it has imposed on, the Attorney General alone.”²⁵ The Court reached this conclusion, in part, because it viewed the INA as restricting only the then-Attorney General’s immigration-related responsibilities under the act. It did not view the INA as restricting the President’s actions in geographic areas outside of where Congress had authorized the Attorney General to act in the immigration context (i.e., outside the United States).²⁶ The upshot of this reasoning was that the Court declined to find that the interdiction program implemented under the authority of Section 212(f) ran afoul of statutory or treaty-based restrictions.

The *Sale* decision also helped define what is meant by the term *entry* as that term is used in Section 212(f). At the time when *Sale* was decided, the INA explicitly defined *entry* to encompass “any coming of an alien into the United States, from any foreign port or place or from an outlying possession, whether voluntarily or otherwise.”²⁷ Therefore, consistent with this definition, the Court distinguished between (1) aliens who are “on our shores seeking admission” or “on the threshold of initial entry,” and (2) aliens who are within the United States after entry, regardless of the legality of that entry.²⁸ While the statutory definition of *entry* that the Court relied upon was deleted from the INA as part of the amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (P.L. 104-208),²⁹ the *Sale* Court’s construction of *entry* has persisted in discussions of Section 212(f) and in other contexts.³⁰

²² *Id.* at 171-72. For several decades, the authority to interpret, implement, and enforce the provisions of the INA was primarily vested in the Attorney General. The Attorney General, in turn, delegated this authority to the Immigration and Naturalization Service (INS) within the Department of Justice. Following the establishment of the Department of Homeland Security (DHS) pursuant to the Homeland Security Act of 2002 (P.L. 107-296), the INS was abolished and its functions were generally transferred to DHS. *See* 6 U.S.C. § 251. Although the INA still refers to the Attorney General in multiple places, such references are generally (although not universally) taken to mean the Secretary of Homeland Security. *See generally* CRS Legal Sidebar WSLG553, *Does It Matter Whether the INA Says DOJ or DHS?: An Example Involving Revocation of Asylum*, by Kate M. Manuel.

²³ *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1360 (2d Cir. 1992).

²⁴ *Id.* (“[W]e reject the government’s suggestion that since [the relevant provision of the INA] restricts actions of only the attorney general, the President might in any event assign the same “return” function to some other government official. Congress understood that the President’s agent for dealing with immigration matters is the attorney general, and we would find it difficult to believe that the proscription of [the INA]—returning an alien to his persecutors—was forbidden if done by the attorney general but permitted if done by some other arm of the executive branch.”).

²⁵ *Sale*, 509 U.S. at 172.

²⁶ *Id.* at 173. *See also* INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (“The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President....”).

²⁷ INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994).

²⁸ *Sale*, 509 U.S. at 174.

²⁹ P.L. 104-208, § 301(a), 110 Stat. 3009-575 (amending Section 101(a)(13) of the INA to define *admission*, instead of (continued...))

Lower court decisions provide some further discussion of exercises of 212(f) authority that would seem to be consistent with *Sale*. The most recent of these, an unpublished 2003 decision by the Second Circuit in *Sesay v. Immigration and Naturalization Service [INS]*, granted deference to the Board of Immigration Appeals' (BIA's) determination that the alien petitioner was ineligible for asylum because a grant of asylum necessarily requires entry, and the petitioner's entry was barred by Presidential Proclamation 7062.³¹ Previously, in its 1992 decision in *Haitian Refugee Center, Inc. v. Baker*, the U.S. Court of Appeals for the Eleventh Circuit had noted various precedents characterizing the power to exclude aliens from the country as an "inherent executive power" when opining that Section 212(f) "clearly grants the President broad discretionary authority to control the entry of aliens into the United States."³² A lower court, the U.S. District Court for the Northern District of California, similarly emphasized the breadth of the executive's power over entry in conjunction with its discussion of Section 212(f) in its 1996 decision in *Encuentro del Canto Popular v. Christopher*, stating,

The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.³³

Collectively, *Sale* and these other decisions suggest that Section 212(f) gives the Executive significant power to bar or impose conditions upon the entry of aliens "on our shores seeking admission" or "on the threshold of initial entry."³⁴ None of these decisions note any limitations upon the President's power under Section 212(f). This silence could, however, be seen, in part, to reflect the arguably limited nature of the Executive's use of its Section 212(f) authority to date. As **Table 1** below illustrates, prior exercises of presidential authority under Section 212(f) have

(...continued)

entry). See *supra* note 5.

³⁰ See, e.g., *Sesay v. INS*, 74 Fed. App'x 84, 86 (2d Cir. 2003) (considering the meaning of "entry" in the course of addressing whether a grant of asylum requires entry into the United States); *Matter of Rosas-Ramirez*, 22 I. & N. Dec. 616, 617 (BIA 1999) (discussing whether adjustment of status while within the United States constitutes an "admission" for purposes of INA § 237(a)(2)(A)(iii), and noting that admission is defined, in part, in terms of "entry").

³¹ 74 Fed. App'x at 86. The BIA is the highest administrative tribunal for interpreting and applying immigration law. The Second Circuit noted, but did not address, arguments as to the relationship between Sections 212(d) and 212(f) in its decision. The Secretary of Homeland Security's authority to parole aliens into the United States under Section 212(d), however, could be seen as a counterpart to the President's authority under Section 212(f) in that the President may "parole"—or permit the entry into the United States—almost any alien, regardless of whether the alien is subject to one or more of the grounds of inadmissibility set forth in Section 212(a). See INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) ("The Attorney General [later, Secretary of Homeland Security] may [subject to certain restrictions involving refugees and alien laborers] in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States....").

³² 953 F.2d 1498, 1506-08 (11th Cir. 1992).

³³ 930 F. Supp. 1360, 1365 (N.D. Cal. 1996) (quoting *Knauff v. Shaughnessy*, 338 U.S. 537 (1949) (upholding the executive branch's determination to exclude the alien wife of a former U.S. servicemember, who was eligible for admission under the War Brides Act of 1945, because of concerns that her admission would endanger public safety)). The *Christopher* case arose from a challenge to the denial or revocation of visas to certain Cubans pursuant to Presidential Proclamation 5377, which suspended the entry of individuals whom the Secretary of State (or a designee) considered to be officers or employees of the Cuban government or Cuban Communist Party. As the district court noted, although the plaintiffs at times seem to have suggested that Section 212(f) itself is invalid, their argument was best construed as being that Presidential Proclamation 5377 was invalid because it conflicted with Section 901 of the Foreign Relations Authorization Act for FY1988-1989. *Id.* at 1363.

³⁴ *Sale*, 509 U.S. at 174.

differed in terms of which and how many aliens are subject to exclusion. In no case to date, though, has the Executive purported to take certain types of action, such as barring all aliens from entering the United States for an extended period of time or explicitly distinguishing between categories of aliens based on their religion. Any such restrictions could potentially be seen to raise legal issues that were not raised by prior exclusions. For example, if the Executive were to seek to bar the entry of all aliens, as immigrants or nonimmigrants, for an extended time, questions could be raised about whether the President’s action was consistent with Congress’s intent in enacting statutes which prescribe criteria for the issuance of family- and employment-based immigrant and nonimmigrant visas and authorize the issuance of certain numbers of such visas each year.³⁵ Similarly, if the President were to purport to exclude aliens based on their religion, an argument could potentially be made that this action is in tension with U.S. treaty obligations³⁶ or the First Amendment.³⁷ (Distinctions between aliens based on nationality, in contrast, have historically been viewed as a routine feature of immigration legislation and subjected to deferential “rational basis” review by the courts.³⁸)

Table I. Categories of Aliens Excluded under INA § 212(f)

Arranged Chronologically, from the Most to the Least Recent,
by the Date of Their Publication in the *Federal Register*

Date & President	Nature of the Exclusion
2016, Apr. 21 – Obama <i>Executive Order 13726, 81 Fed. Reg. 23559</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have “contributed to the situation in Libya” in specified ways (e.g., engaging in “actions or policies that threaten the peace, security, or stability” of that country or may lead to or result in the

³⁵ For example, Section 203(a)(1) provides that “[q]ualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400” (with some additions possible) each year. See 8 U.S.C. § 1153(a)(1). “Shall” has been construed to indicate mandatory agency action when used in other contexts. See, e.g., *Kirtsang v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1983 (2016); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016).

³⁶ For example, Article 2 of the International Covenant on Civil and Political Rights provides that “[e]ach State Party ... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind” based on religion, among other things. United Nations, Human Rights, Office of the High Commissioner, International Covenant on Civil and Political Rights, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last accessed: Jan. 14, 2017). The United States ratified this Convention in 1992, with certain reservations, understandings, and declarations. See, e.g., Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 *NW. J. INT’L HUM. RTS.* 1, 2 (2005). However, “Congress has not made the treaty enforceable in U.S. courts,” and commentators have disagreed as to whether it or other provisions of law (e.g., the First Amendment) could serve as basis for invalidating the exclusion of certain aliens because of their religion. See, e.g., Debra Cassens Weiss, *Would SCOTUS Uphold Trump’s Plan to Bar Muslim Immigrants*, ABA J., Dec. 9, 2015, http://www.abajournal.com/news/article/would_scotus_uphold_trumps_plan_to_bar_muslim_immigrants.

³⁷ Aliens outside the United States without recognized ties to the country might have difficulty in maintaining such a challenge. See *id.* However, in certain cases, a ban on the entry of persons based on religion could potentially be seen to impinge upon the First Amendment rights of U.S. citizens by, for example, excluding officers and teachers of that religion. Cf. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (recognizing that U.S. persons whose constitutional rights are adversely affected by the denial of a visa way to an alien outside the United States may have the right to challenge the denial in certain circumstances).

³⁸ See, e.g., *Rajah v. Mukasey*, 544 F.3d 427, 435-36 (2d Cir. 2008) (quoting an earlier decision to the effect that the “most exacting level of scrutiny that we will impose on immigration legislation is rational basis review”); *Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1980) (“[C]lassifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis....”).

Date & President	Nature of the Exclusion
2016, Mar. 18 – Obama <i>Executive Order 13722, 81 Fed. Reg. 14943</i>	misappropriation of Libyan state assets) Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain transactions involving North Korea (e.g., selling or purchasing metal, graphite, coal, or software directly or indirectly to or from North Korea, or to persons acting for or on behalf of the North Korean government or the Workers' Party of Korea)
2015, Nov. 25 – Obama <i>Executive Order 13712, 80 Fed. Reg. 73633</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have “contributed to the situation in Burundi” in specified ways (e.g., engaging in “actions or policies that threaten the peace, security, or stability of Burundi,” or “undermine democratic processes or institutions” in that country)
2015, Apr. 2 – Obama <i>Executive Order 13694, 80 Fed. Reg. 18077 (later amended by Executive Order 13757, 82 Fed. Reg. 1 (Jan. 3, 2017))</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in “significant malicious cyber-enabled activities” (e.g., harming or significantly compromising the provision of services by a computer or computer network that supports an entity in a critical infrastructure sector)
2015, Mar. 11 – Obama <i>Executive Order 13692, 80 Fed. Reg. 12747</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have “contributed to the situation in Venezuela” in specified ways (e.g., engaging in actions or policies that undermine democratic processes or institutions, significant acts of violence or conduct that constitutes a serious abuse or violation of human rights)
2015, Jan. 6 – Obama <i>Executive Order 13687, 80 Fed. Reg. 819</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens with specified connections to North Korea (e.g., officials of the North Korean government or the Workers' Party of Korea)
2014, Dec. 24 – Obama <i>Executive Order 13685, 79 Fed. Reg. 77357</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain transactions involving the Crimea region of Ukraine (e.g., materially assisting, sponsoring, or providing financial, material, or technological support for, or goods or services to or in support of, persons whose property or interests are blocked pursuant to the order)
2014, May 15 – Obama <i>Executive Order 13667, 79 Fed. Reg. 28387</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have contributed to the conflict in the Central African Republic in specified ways (e.g., engaging in actions or policies that threaten the peace, security, or stability of that country, or that threaten transitional agreements or the political transition process)
2014, Apr. 7 – Obama <i>Executive Order 13664, 79 Fed. Reg. 19283</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain conduct as to South Sudan (e.g., actions or policies that “have the purpose or effect of expanding or extending the conflict” in that country, or obstructing reconciliation or peace talks or processes)
2014, Mar. 24 – Obama <i>Executive Order 13662, 79 Fed. Reg. 16169</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have contributed to the situation in Ukraine in specified ways (e.g., operating in the financial services, energy, metals and mining, engineering, or defense and related materiel sectors of the Russian Federation economy)
2014, Mar. 19 – Obama <i>Executive Order 13661, 79 Fed. Reg. 15535</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens determined to have contributed to the situation in Ukraine in specified ways (e.g., officials of the government of the Russian Federation, or persons who operate in the arms or related materiel sector)
2014, Mar. 10 – Obama <i>Executive Order 13660, 79 Fed.</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens determined to have contributed to the situation in Ukraine in specified ways (e.g., engagement in or responsibility for misappropriation of state assets of

Date & President	Nature of the Exclusion
Reg. 13493	Ukraine or of economically significant entities in that country)
2013, June 5 – Obama <i>Executive Order 13645, 78 Fed. Reg. 33945</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who have engaged in certain conduct related to Iran (e.g., materially assisting, sponsoring, or providing support for, or goods or services to or in support of, any Iranian person included on the list of Specially Designated Nationals and Blocked Persons)
2012, Oct. 12 – Obama <i>Executive Order 13628, 77 Fed. Reg. 62139</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain actions involving Iran (e.g., knowingly transferring or facilitating the transfer of goods or technologies to Iran, to entities organized under Iranian law or subject to Iranian jurisdiction, or to Iranian nationals, that are likely to be used by the Iranian government to commit serious human rights abuses against the Iranian people)
2012, July 13 – Obama <i>Executive Order 13619, 77 Fed. Reg. 41243</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to threaten the peace, security, or stability of Burma in specified ways (e.g., participation in the commission of human rights abuses, or importing or exporting arms or related materiel to or from North Korea)
2012, May 3 – Obama <i>Executive Order 13608, 77 Fed. Reg. 26409</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain conduct as to Iran and Syria (e.g., facilitating deceptive transactions for or on behalf of any person subject to U.S. sanctions concerning Iran and Syria)
2012, Apr. 24 – Obama <i>Executive Order 13606, 77 Fed. Reg. 24571</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens determined to have engaged in specified conduct involving “grave human rights abuses by the governments of Iran and Syria via information technology” (e.g., operating or directing the operation of communications technology that facilitates computer or network disruption, monitoring, or tracking that could assist or enable serious human rights abuses by or on behalf of these governments)
2011, Aug. 9 – Obama <i>Proclamation 8697, 76 Fed. Reg. 49277</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who participate in serious human rights and humanitarian law violations and other abuses (e.g., planning, ordering, assisting, aiding and abetting, committing, or otherwise participating in “widespread or systemic violence against any civilian population” based, in whole or in part, on race, color, descent, sex, disability, language, religion, ethnicity, birth, political opinion, national origin, membership in a particular social group, membership in an indigenous group, or sexual orientation or gender identity)
2011, July 27 – Obama <i>Proclamation 8693, 76 Fed. Reg. 44751</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens subject to U.N. Security Council travel bans and International Emergency Economic Powers Act sanctions
2009, Jan. 22 – Bush <i>Proclamation 8342, 74 Fed. Reg. 4093</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of foreign government officials responsible for failing to combat trafficking in persons
2007, July 3 – Bush <i>Proclamation 8158, 72 Fed. Reg. 36587</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons responsible for policies or actions that threaten Lebanon’s sovereignty and democracy (e.g., current or former Lebanese government officials and private persons who “deliberately undermine or harm Lebanon’s sovereignty”)
2006, May 16 – Bush <i>Proclamation 8015, 71 Fed. Reg. 28541</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons responsible for policies or actions that threaten the transition to democracy in Belarus (e.g., Members of the government of Alyaksandr Lukashenka and other persons involved in policies or actions that “undermine or injure democratic institutions or impede the transition to democracy in Belarus”)
2004, Jan. 14 – Bush <i>Proclamation 7750, 69 Fed. Reg.</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons who have engaged in or benefitted from corruption in specified ways (e.g., current or former public officials whose solicitation or acceptance of articles of

Date & President	Nature of the Exclusion
2287	monetary value or other benefits has or had “serious adverse effects on the national interests of the United States”)
2002, Feb. 26 – Bush <i>Proclamation 7524, 67 Fed. Reg. 8857</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons responsible for actions that threaten Zimbabwe’s democratic institutions and transition to a multi-party democracy (e.g., Senior members of the government of Robert Mugabe, persons who through their business dealings with Zimbabwe government officials derive significant financial benefit from policies that undermine or injure Zimbabwe’s democratic institutions)
2001, June 29 – Bush <i>Proclamation 7452, 66 Fed. Reg. 34775</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons responsible for actions that threaten international stabilization efforts in the Western Balkans, or are responsible for wartime atrocities in that region
2000, Oct. 13 – Clinton <i>Proclamation 7359, 65 Fed. Reg. 60831</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who plan, engage in, or benefit from activities that support the Revolutionary United Front or otherwise impede the peace process in Sierra Leone
1999, Nov. 17 – Clinton <i>Proclamation 7249, 64 Fed. Reg. 62561</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens responsible for repression of the civilian population in Kosovo or policies that obstruct democracy in the Federal Republic of Yugoslavia (FRY) or otherwise lend support to the government of the FRY and the Republic of Serbia
1998, Jan. 16 – Clinton <i>Proclamation 7062, 63 Fed. Reg. 2871</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of members of the military junta in Sierra Leone and their family
1997, Dec. 16 – Clinton <i>Proclamation 7060, 62 Fed. Reg. 65987</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of senior officials of the National Union for the Total Independence of Angola (UNITA) and adult members of their immediate families
1996, Nov. 26 – Clinton <i>Proclamation 6958, 61 Fed. Reg. 60007</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of members of the government of Sudan, officials of that country, and members of the Sudanese armed forces
1996, Oct. 7 – Clinton <i>Proclamation 6925, 61 Fed. Reg. 52233</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons who “formulate, implement, or benefit from policies that impede Burma’s transition to democracy” and their immediate family members
1994, Oct. 27 – Clinton <i>Proclamation 6749, 59 Fed. Reg. 54117</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of certain aliens described in U.N. Security Council Resolution 942 (e.g., officers of the Bosnian Serb military and paramilitary forces and those acting on their behalf, or persons found to have provided financial, material, logistical, military, or other tangible support to Bosnian Serb forces in violation of relevant U.S. Security Council resolutions)
1994, Oct. 5 – Clinton <i>Proclamation 6730, 59 Fed. Reg. 50683</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who formulate, implement, or benefit from policies that impede Liberia’s transition to democracy and their immediate family
1994, May 10 – Clinton <i>Proclamation 6685, 59 Fed. Reg. 24337</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens described in U.N. Security Council Resolution 917 (e.g., officers of the Haitian military, including the police, and their immediate families; major participants in the 1991 Haitian coup d’etat)
1993, Dec. 14 – Clinton <i>Proclamation 6636, 58 Fed. Reg. 65525</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of aliens who formulate, implement, or benefit from policies that impede Nigeria’s transition to democracy and their immediate family
1993, June 23 – Clinton <i>Proclamation 6574, 58 Fed. Reg.</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons who formulate or benefit from policies that impede Zaire’s transition to democracy and their immediate family

Date & President	Nature of the Exclusion
34209	
1993, June 7 – Clinton <i>Proclamation 6569, 58 Fed. Reg. 31897</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of persons who formulate, implement, or benefit from policies that impede the progress of negotiations to restore a constitutional government to Haiti and their immediate family
1992, June 1 – Bush <i>Executive Order 12807, 57 Fed. Reg. 23133</i>	Making provisions to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any covered vessel carrying such aliens
1988, Oct. 26 – Reagan <i>Proclamation 5887, 53 Fed. Reg. 43184</i>	Suspending the entry of specified Nicaraguan nationals into the United States as nonimmigrants (e.g., officers of the Nicaraguan government or the Sandinista National Liberation Front holding diplomatic or official passports)
1988, June 14 – Reagan <i>Proclamation 5829, 53 Fed. Reg. 22289</i>	Suspending the entry into the United States, as immigrants or nonimmigrants, of certain Panamanian nationals who formulate or implement the policies Manuel Antonio Noriega and Manuel Solis Palma, and their immediate families
1986, Aug. 26 – Reagan <i>Proclamation 5517, 51 Fed. Reg. 30470</i>	Suspending the entry of Cuban nationals as immigrants with certain specified exceptions (e.g., Cuban nationals applying for admission as immediate relatives under INA § 201(b))
1985, Oct. 10 – Reagan <i>Proclamation 5377, 50 Fed. Reg. 41329</i>	Suspending the entry of specified classes of Cuban nationals as nonimmigrants (e.g., officers or employees of the Cuban government or the Communist Party of Cuba holding diplomatic or official passports)
1981, Oct. 1 – Reagan <i>Proclamation 4865, 46 Fed. Reg. 48107</i>	Suspending the entry of undocumented aliens from the high seas, and directing the interdiction of certain vessels carrying such aliens

Source: Congressional Research Service, based on various sources cited in **Table I**.

Note: In a number of cases, the exclusions listed in **Table I** were expressly said to be waivable, in the Executive's discretion, when the entry of a particular alien otherwise subject to exclusion "would not be contrary to the interests of the United States." See, e.g., 50 Fed. Reg. 41329, at § 2 (Oct. 10, 1985).

Other Provisions of the INA

Beyond Section 212(f), other provisions of the INA can also be seen to authorize the Executive to restrict aliens' entry to the United States.³⁹ Most notably, Section 214(a)(1) prescribes that the "admission of any alien to the United States as a nonimmigrant shall be for such time and under such conditions as [the Executive] may by regulations prescribe."⁴⁰ (Nonimmigrants are aliens admitted to the United States for a specific period of time and purpose pursuant to one of the

³⁹ In addition, yet other provisions of the INA could be seen to give the Executive discretion as to whether certain categories of aliens are admitted. For example, Section 207(a)(2) of the INA could be seen to give the Executive broad discretion in determining how many aliens are admitted to the United States as refugees each year. See 8 U.S.C. § 1157(a)(2). Other provisions outside immigration law could also apply. See National Defense Authorization Act for FY2017, P.L. 114-328, §§ 1261-1265, —Stat.—(Dec. 23, 2016) (sanctions for human rights abusers); Consolidated Appropriations Act, P.L. 114-113, § 7031(c), 129 Stat. 2755 (Dec. 18, 2015) (providing that certain foreign officials involved in "significant corruption" and their immediate family are ineligible for entry to the United States); Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, P.L. 112-208, §§ 404-406, 126 Stat. 1505-1509 (Dec. 14, 2012) (excluding certain aliens involved in human rights abuses).

⁴⁰ 8 U.S.C. § 1184(a)(1).

“lettered” visas set forth in Section 101(a)(15) of the INA.⁴¹ Section 215(a)(1) similarly provides that “it shall be unlawful for any alien” to enter or depart the United States “except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.”⁴² In the past, the Executive has relied upon Section 215(a)(1), in particular, to exclude certain aliens. For example, President Carter cited to Section 215(a) when authorizing the revocation of immigrant and nonimmigrant visas issued to Iranians during the Iran Hostage Crisis.⁴³

The current Section 215(a) was enacted as part of the INA in 1952.⁴⁴ However, similar language appeared in earlier immigration-related statutes.⁴⁵ Both the earlier language and the initial version of Section 215(a) granted the President the power to impose additional restrictions upon aliens’ entry into and departure from the United States during times of war and, in some cases, “national emergency.”⁴⁶ The President’s exclusion of certain aliens under this authority⁴⁷ was upheld in several court cases, the most notable of which was arguably the Supreme Court’s 1950 decision in *United States ex rel. Knauff v. Shaughnessy*.⁴⁸ There, the Court rejected a challenge to the exclusion of a German “war bride” under regulations promulgated pursuant to Presidential Proclamation 2523, which was itself issued under the authority of a predecessor of Section 215(a).⁴⁹ In so doing, the Court rejected the excluded bride’s argument that both the regulations and the underlying statute constituted an impermissible delegation of legislative power, reasoning that “[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not

⁴¹ *Id.* § 1101(a)(15) (defining an “immigrant” to mean “every alien *except* an alien who is within one of the following classes of nonimmigrant aliens....”) (emphasis added).

⁴² *Id.* § 1184(a)(1).

⁴³ See Executive Order 12172, Delegation of Authority With Respect to Entry of Certain Aliens Into the United States, 44 Fed. Reg. 67947, 67947 (Nov. 28, 1979) (authorizing the Secretary of State and the Attorney General to exercise “in respect of Iranians holding *nonimmigrant visas*, the authority conferred upon the President by section 215(a)(1) of the Act of June 27, 1952 (8 USC 1185)...”) (emphasis added); Executive Order 12206, Amendment of Delegation of Authority with Respect to Entry of Certain Aliens Into the United States,” 45 Fed. Reg. 24101, 24201 (Apr. 7, 1980) (amending Executive Order 12172 to cover *immigrant*, as well as nonimmigrant visas). The exclusion addressed in *Sale* was also effectuated, in part, under the authority of Section 215(a). See *supra* note 19.

⁴⁴ See P.L. 82-414, § 212(e), 66 Stat. 190 (June 27, 1952).

⁴⁵ See P.L. 65-164, 40 Stat. 559 (May 22, 1918) (“[W]hen the United States is at war, if the President shall find that public safety requires that restrictions and prohibitions ... be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful [f]or any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe.”); P.L. 77-113, 55 Stat. 252 (June 20, 1941) (similar).

⁴⁶ See 66 Stat. 190 (war and national emergency); 55 Stat. 252 (war); 40 Stat. 559 (war).

⁴⁷ See, e.g., Proclamation 3,004, Control of Persons Leaving or Entering the United States, 18 Fed. Reg. 489 (Jan. 17, 1953) (President Truman relying, in part, on a predecessor to Section 215(a) to impose restrictions on the entry of aliens into the Panama Canal Zone and American Samoa); Proclamation 2,850, 14 Fed. Reg. 5173 (Aug. 19, 1949) (President Truman relying, in part, on a predecessor to Section 215(a) in excluding aliens whose entry executive officials deem “would be prejudicial to the interests of the United States”); Proclamation 2,523, Control of Persons Entering and Leaving the United States, 6 Fed. Reg. 2617 (Nov. 18, 1941) (similar, President Roosevelt).

⁴⁸ 338 U.S. 537 (1950). See also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (noting the President’s power to exclude aliens in the course of finding that an alien who was so excluded, but whom no other country would accept, was not entitled to release into the United States). The *Mezei* Court, in particular, cited a number of precedents for the proposition that “the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” 345 U.S. at 210 (citing *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *The Chinese Exclusion Case*, 130 U.S. 581 (1889); and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

⁴⁹ *Knauff*, 338 U.S. at 540-42.

from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”⁵⁰ Therefore, in the Court’s view, Congress could not have run afoul of the non-delegation doctrine by authorizing the President to exercise this power “for the best interests of the country” during wartime because the President already possessed such authority.⁵¹ The *Knauff* Court similarly rejected the argument that the regulations in question were not “reasonable,” as required by the statutory authority under which they were issued—which in relevant part, made it unlawful for an alien to enter the United States “except under such reasonable rules ... as the President may prescribe.”⁵² The Court did so because it viewed the regulations excluding aliens whose entry was “deemed prejudicial to the public interest” as “reasonable in the circumstances of the period for which they were authorized, namely, the national emergency of World War II.”⁵³

The statutory language regarding war and national emergency—which arguably factored into the Court’s decision in *Knauff*—was deleted from Section 215(a) in 1978.⁵⁴ However, it seems unlikely that this deletion would serve as a basis for overruling the *Knauff* Court’s conclusions about whether the power in question was impermissibly delegated to the Executive,⁵⁵ or about what constitutes a “reasonable” regulation for purposes of Section 215(a).⁵⁶ *Knauff*’s statements about the inherent power of nations to exclude aliens outside the United States with no recognized ties to the country would also generally seem to remain good law.⁵⁷

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⁵⁰ *Id.* at 542.

⁵¹ *Id.* at 542-43 (“[T]here is no question of inappropriate delegation of legislative power involved here.”). The non-delegation doctrine precludes Congress from handing over its legislative powers to other branches of the federal government. However, Congress may “confer[] decisionmaking authority upon agencies, so long as it “lays down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.” See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (internal quotations omitted).

⁵² 338 U.S. at 544.

⁵³ *Id.*

⁵⁴ P.L. 95-426, § 707(a), 92 Stat. 992-93 (Oct. 7, 1978).

⁵⁵ *Cf.* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000) (“Since 1935, the Supreme Court has not struck down an act of Congress on nondelegation grounds....”).

⁵⁶ There does not appear to be any court cases establishing what is meant by the term “reasonable regulations” for purposes of Section 215(a) and its predecessors. However, courts may grant considerable deference to the Executive’s determinations in this area, given the “plenary power” that the political branches are generally seen to have over immigration. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (“For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”).

⁵⁷ *See, e.g., Jean v. Nelson*, 472 U.S. 847, 875 (1985) (“It is in the area of entry] that the Government’s interest in protecting our sovereignty is at its strongest and that individual claims to constitutional entitlement are the least compelling.”); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citing cases finding that the power to exclude is a “fundamental sovereign attribute”); *Kleindeinst v. Mandel*, 408 U.S. 753, 765 (similar) (1972). Certain limits to this power have, however, been recognized, particularly as to aliens with recognized ties to the United States or who would need to be detained in the United States to effectuate their exclusion. *See, e.g., CRS Legal Sidebar WSLG1695, Supreme Court to Hear Challenge to Aliens’ Detention Pending Removal Proceedings*, by Kate M. Manuel.

SYMPOSIUM ON CONFRONTING REALITIES: THE LEGAL, MORAL, AND CONSTITUTIONAL ISSUES INVOLVING DIVERSITY: PANEL II: IMMIGRATION POLICY: DIVERSITY, MASS IMMIGRATION, AND NATIONAL SECURITY AFTER 9/11 - AN IMMIGRATION REFORM MOVEMENT PERSPECTIVE

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Text

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Fiat justitia et pereat mundus? ¹ Diversity as a legal doctrine in immigration law has become a contradiction, not because of what occurs under the law, but because of what occurs outside the law. In legal scholarship, diversity is a project of liberal constitutionalism, with its concepts of radical egalitarianism, anti-subjugation protections, and historicism. ² Adherence to variants of liberal constitutionalism among immigration lawyers is widespread. These shared ideologies and professional interests have encouraged a rhetorical segregation of opponents of mass immigration at the "nativist" right extreme of the political spectrum. ³

In actuality, the core leadership of the immigration reform movement comes from the environmental movement and has tended to use ecological rather than legal concepts in public discourse. ⁴ In an attempt to renew dialogue between rights-oriented lawyers and limits-oriented environmentalists, I offer a working paper that **[*388]** highlights ecologic ⁵ concepts behind immigration reform advocacy. The

¹ Let justice be done, though the world perish." Holy Roman Emperor Ferdinand I (1503-1564), cited in Garrett Hardin, *An Ecologic View of the Human Predicament*, in *Global Resources: Perspectives and Alternatives* (C.N. McRostie ed., 1980).

² See Peter Singer & Renata Singer, *The Ethics of Refugee Policy*, in *Open Borders? Closed Societies?* (Mark Gibney, ed., 1988); see also Stephen H. Legomsky, *Why Citizenship?*, *35 Va. J. Int'l. L.* 279 (1994); Owen Fiss, *a Community of Equals* (1999); Mark Tushnet, *Immigration Policy in Liberal Political Theory*, in *Justice in Immigration* (Warren A. Schwartz ed., 1995).

³ See, e.g., Robert Crawford & Terre Rybovich, *Lady Liberty No More: The Anti-Immigrant Movement in the USA*, *Searchlight*, May 2000, available at www.searchlightmagazine.com/usa/liberty.htm (last visited Feb. 6, 2003).

⁴ See, e.g., Garrett Hardin, *The Immigration Dilemma: Avoiding the Tragedy of the Commons* (1995); David Reimers, *Unwelcome Strangers* 43-64 (1999); John Tanton, *Rethinking Immigration Policy* (1979); Roy Howard Beck & Leon J. Kolankiewicz, *The Environmental Movement's Retreat from Advocating U.S. Population Stabilization (1970-1998)*, *12 J. of Pol'y Hist.* (2000), available at <http://www.numbersusa.com/interests/env/modernmove.html> (last visited Feb. 6, 2003).

⁵ Hardin defines "ecology" as a working understanding of the complexity of the world and of the way each quasi-stable state

paradigm of diversity provides a useful organizing point. Diversity has taken on a set of concentric meanings in contemporary immigration law and policy. I would suggest that most advocates mix and mingle these meanings in legal writing.

I. Diversity Visas

At its most discrete, diversity describes a statutory program for awarding immigrant visas to winners of a lottery from countries that have sent relatively few immigrants to the U.S. in recent years.⁶ Congressional sponsors of this legislation described the policy underlying the statute as an equitable provision of current visa preferences to natives of countries that have been disadvantaged by past numerical limits and priority laws.⁷

The "diversity visa" originated in a pilot program authorized under the Immigration Reform and Control Act of 1986.⁸ The NP-5 program provided for 5,000 visas per year to be made available during 1987 and 1988 to natives of foreign states that had been "adversely affected"⁹ by the enactment of the Immigration and Nationality Act of 1965.¹⁰ Certain European countries experienced significant drops in the numbers of nationals eligible for immigrant visas after the 1965 repeal of the nation origins quota system. Thirty-seven countries subsequently were determined to be "adversely affected."¹¹ Applicants for NP-5 non-preference visas could apply by mail to the U.S. State Department, with priority based on the date the application was received.¹²

An unexpectedly high demand for NP-5 visas prompted Congress to extend the program for two more years in 1988 and to increase [*389] the availability of visa numbers to 15,000 per fiscal year.¹³ However, Rep. Howard Berman (D-CA) criticized the European orientation of the NP-5 program as a "slap in the face" to the 1965 reforms.¹⁴ Berman was able to include a new OP-1 program to add 10,000 more visa numbers in fiscal years 1990 and 1991 for natives of "underrepresented countries."¹⁵ "Underrepresented countries" were defined as those that had used less than twenty-five percent of the immigrant visa numbers normally available during fiscal year 1988.¹⁶ Unlike NP-5, successful applicants

gives way to other quasi-stable states over time. Ecolacy requires both literacy and numeracy. The basic insight of the ecolate citizen is that the world is a complex of systems so intricately interconnected that an advocate, in particular a non-numerate advocate, can seldom be confident that a proposed intervention in this system of systems will produce the desired consequences. See Hardin, *supra* note 1.

⁶ [8 U.S.C. 1153\(c\)](#) (2000).

⁷ See H.R. Rep. No. 101-723, at 48 (1990), reprinted in 1990 U.S.C.A.A.N. 6710, 6728.

⁸ Pub. L. No. 99-603, 1986 U.S.C.A.A.N. (100 Stat.) 3359.

⁹ *Id.* at 314(b)(1).

¹⁰ Pub. L. No. 89-236, 1965 U.S.C.A.A.N. ([79 Stat. 911](#)) 883.

¹¹ See H.R. Rep. No. 100-1038, at 4, reprinted in 1988 U.S.C.A.A.N. 5558, 5560. The visas were most often issued to citizens of Ireland, Canada, and Great Britain. *Id.*

¹² NP-5 was popularly known as the "Donnelly visa," after sponsor Rep. Brian Donnelly (D-MA).

¹³ Immigration Amendments of 1988, Pub. L. No. 100-658, 2(a), 1988 U.S.C.A.A.N. (102 Stat.) 3908, 3908.

¹⁴ 65 Interpreter Releases 1008 (Oct. 3, 1988).

¹⁵ Immigration Amendments of 1988 3(a). OP-1 was known popularly as the "Berman visa" program.

¹⁶ *Id.* at 3(e).

under the OP-1 program would be selected randomly by computer in a visa lottery.¹⁷ One hundred and sixty-two countries were found to qualify, and an unprecedented estimated three million applications were received.

The diversity visa program was greatly expanded under the Immigration Act of 1990.¹⁸ Further technical corrections were enacted in 1991.¹⁹ As part of the largest statutory increase in legal immigration levels, Congress stated that one of its goals was to "promote diversity," although the term was never defined.²⁰ First, a transitional provision, called the AA-1 program, provided 40,000 visas for use between fiscal year 1992 and 1994 for thirty-four "adversely affected" countries.²¹ The program was structured by Sen. Edward M. Kennedy and Rep. Edward J. Markey of Massachusetts to favor natives of Ireland, and in particular, Irish citizens illegally employed in the United States.²² The AA-1 program also included a family preference provision that granted [*390] derivative status to spouses and children of approved beneficiaries.²³ A second transitional provision added loopholes designed to extend NP-5 eligibility for an additional year to various special interest groups and also lacked any diversity-based policy rationale.²⁴

The permanent diversity visa provisions enacted in 1990 created the diversity lottery in its present form.²⁵ Allocation of visas by national origin is based on an extraordinarily complicated formula.²⁶ The Attorney General must first identify, for each "foreign state,"²⁷ the total number of aliens granted permanent legal residence during the most recent five-fiscal-year period.²⁸ States for which the total number of aliens granted permanent residency status exceeded 50,000 during the relevant period are

¹⁷ 22 C.F.R. 44.1-44.6 (1990).

¹⁸ See Immigration Act of 1990, Pub. L. No. 101-649, 1990 U.S.C.A.A.N. (104 Stat.) 4978.

¹⁹ See Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 1991 U.S.C.A.A.N. (105 Stat.) 1733.

²⁰ H.R. Rep. No. 101-723, at 48 (1990), reprinted in 1990 U.S.C.A.A.N. 6710, 6728.

²¹ Immigration Act of 1990, Pub. L. No. 101-649, 132, 1990 U.S.C.A.A.N. (104 Stat.) 4978, 5000. Canada and Mexico were explicitly excluded. The former East and West Germany were reunified by 1990. *Id.* at 132(b)(1).

²² Forty percent of AA-1 visas were made available to natives of the country that received the greatest number of visas under 134 of the Immigration Reform and Control Act, *id.* at 132(c), and visas had most often been issued to citizens of Ireland. See H.R. Rep. No. 100-1038, at 4, reprinted in 1988 U.S.C.A.A.N. 5558, 5560. The Immigration Act of 1990 required a firm commitment of employment, Pub. L. No. 101-649, 132, 1990 U.S.C.A.A.N. (104 Stat.) 4978, 5000, and allowed applicants to use a U.S. address. These provisions were intended to assist a claimed population of 200,000 Irish illegal aliens. H.R. Rep. No. 101-955, at 122 (1990), reprinted in 1990 U.S.C.A.A.N. 6784, 6787.

²³ Immigration Act of 1990, Pub. L. No. 101-649, 132(d), 1990 U.S.C.A.A.N. (104 Stat.) 4978, 5000.

²⁴ *Id.* at 133. Beneficiary classifications were (1) NP-5 beneficiaries for whom annual limits on issuance had expired; (2) NP-5 beneficiaries who were inadmissible due to violations of the Immigration and Nationality Act 212(e) (2-year home country residence requirement for exchange visitors) or Immigration and Nationalization Act 212(a)(19) (false statements in visa applications); and (3) otherwise eligible beneficiaries who were nationals but not natives of an adversely affected country, such as Poles born in the Soviet Union or British citizens who were Asian immigrants. See *id.* Ninety-four percent of the beneficiaries of a final extension of AA-1 1994 benefits through fiscal year 1995 were Irish. See 72 Interpreter Releases 631 (May 8, 1995).

²⁵ Immigration Act of 1990, Pub. L. No. 101-649, 131, **104 Stat. 4978.**

²⁶ *Id.* The origin of the formula is unclear.

²⁷ Northern Ireland is treated as a separate state, but every other colony or other component or dependent area of a foreign state is treated as part of the foreign state. [8 U.S.C. 1153\(c\)\(1\)\(F\)](#) (2000).

²⁸ [8 U.S.C. 1153\(c\)\(1\)\(A\).](#)

designated as high-admission states.²⁹ Natives of high-admission states are ineligible for diversity visas.³⁰ Six world regions, which roughly correlate to the primary racial classifications used by the federal government, are identified either as "high-admission" or "low-admission."³¹ Quotas for visa numbers for low-admission states are then created using a weighted formula to favor states in low-admissions regions.³² Unused visa numbers can be redistributed by region [*391] using the same quota ratios.³³ An absolute ceiling of seven percent of total diversity visas is imposed on each eligible state.³⁴

Diversity visa applicants are chosen randomly each fiscal year in a lottery and selection process. Winning applicants and their derivative spouses must meet education and work experience qualifications higher than those for a "skilled worker" under a third-preference employment-based visa.³⁵ Separate extensions of eligibility for various special interest groups were enacted in 1994 and 1996.³⁶ In 1996, the Nicaraguan Adjustment and Central American Relief Act (NACARA) reallocated 5,000 diversity visa numbers to certain illegal aliens from Central America who became eligible to adjust their status to permanent legal resident.³⁷

The legislative history of the diversity visa programs is one of targeted relief for domestic special interests.³⁸ It does not identify a legal principle of diversity with general applicability to immigration law.

³⁹ Designation of diversity beneficiaries by nationality and national origin has been arbitrary, and in policy

²⁹ See 8 U.S.C. 1153(c)(1)(B)(ii)(I)(A).

³⁰ [8 U.S.C. 1153\(c\)\(1\)\(E\)](#).

³¹ Specified regions are (i) Africa, (ii) Asia, (iii) Europe, (iv) North America other than Mexico, (v) Oceania, and (vi) South America, Mexico, Central America, and the Caribbean. [8 U.S.C. 1153\(c\)\(1\)\(F\)](#). A high-admission region is defined as having a total number of aliens granted permanent resident status during the applicable five-year period that exceeded one-sixth of all such immigration to the United States. Other regions are "low-admission." [8 U.S.C. 1153\(c\)\(1\)\(B\)\(i\)\(II\)](#).

³² The quota formula for low-admission states in low-admission regions is at [8 U.S.C. 1153\(c\)\(1\)\(E\)\(ii\)](#). The formula for low-admission states in high-admission regions is at [8 U.S.C. 1153\(c\)\(1\)\(E\)\(iii\)](#).

³³ [8 U.S.C. 1153\(c\)\(1\)\(E\)\(iv\)](#).

³⁴ [8 U.S.C. 1153\(c\)\(1\)\(E\)\(v\)](#).

³⁵ [8 U.S.C. 1153\(c\)\(2\)](#) (requiring a high school education or at least two years of work experience in an occupation that requires two years of training or experience). An immigrant will qualify as a "skilled worker" if he or she is capable of performing trained labor for which qualified workers are not available in the United States. [8 U.S.C. 1153\(b\)\(3\)\(A\)\(i\)](#).

³⁶ Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 217, 1994 U.S.C.A.A.N. (108 Stat.) 4305, 4315; Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, Title VI, subtitle C, 637, 1996 U.S.C.A.A.N. (110 Stat.) 3009, 3009-704.

³⁷ NACARA, Pub. L. No. 105-100, Title II, 203(e), 1997 U.S.C.A.A.N. (111 Stat.) 2160, 2199, amended by Pub. L. No. 105-139, 1997 U.S.C.A.A.N. (111 Stat.) 2644.

³⁸ One explanation is that diversity visas were a political carrot accepted in 1986 by the sponsors of IRCA to offset the stick of employer sanctions legislation.

³⁹ Distribution of NP-5 Donnelly visas: Ireland (3,112); Canada (2,078); Gt. Britain & N. Ireland (1,181); Indonesia (810); Poland (592); Japan (518); Italy (315), and W. Germany (311). Distribution of OP-1 Berman visas: Bangladesh (4,974); Pakistan (1,837); Poland (953); Turkey (819); Egypt (790); Trinidad & Tobago (597); Peru (585), and Iran (525). Distribution of AA-1 visas: Ireland & N. Ireland (21,538); Poland (12,077); Japan (6,381); Gt. Britain (3,048); Indonesia (2,950); Argentina (1,449); Germany (656), and France (635). 10 CIS Immigration Review (Spring 1992).

terms, represents little more than a back-handed acknowledgement of the continuing vitality of the plenary power doctrine in immigration jurisprudence.

In immigration policy debate, diversity has also taken on a more normative meaning that evokes domestic civil rights law, as classically but vaguely defined in the Bakke decision.⁴⁰ Civil rights rhetoric has been a determinative factor in shaping policy alternatives available to the United States government for the regulation of immigration.⁴¹ In the United States, this formulation [*392] of diversity has been shaped by the Supreme Court's unwillingness to enforce ethnic quotas or other more stark forms of proportionalism among ascriptive groups. For example, in American legal education, diversity is said to enhance interaction among individuals of different races by expanding the subject matter of discourse and improving communications and insight among people from different backgrounds.⁴²

II. Transnational Diversity Theory

In immigration policy, diversity is said to provide the same benefits on a transnational scale. In particular, diversity is expressed as an ideology for combating xenophobia. This paradigm has been developed most elaborately in transnational institutions.⁴³ Traditional U.S. civil rights analysis had two prongs - a constitutional prong, based on equal-protection analysis, and a sociological prong - the harm and benefit thesis, based on social science studies, which found that racial and ethnic isolation damaged the individual performance of members of isolated groups.⁴⁴ In immigration law, the constitutional prong has been exercised through sanctions on national-origin discrimination.⁴⁵ [*393] The influence of the sociological argument has waned along with the failure of federal integration programs in public education and housing, but it has remained influential in foreign jurisprudence, notably in European antidiscrimination law.

⁴⁰ [See *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-19 \(1978\).](#)

⁴¹ See Debra L. DeLaet, U.S. Immigration Policy in an Age of Rights 1 (2000).

⁴² Jonathan R. Alger, The Educational Value Of Diversity, 83 *Academe* Jan.-Feb. 1997, at 20, 21 (1997).

⁴³ Transnational institutions that have been closely associated with these developments include the activities of the International Labor Office, Geneva, the European Monitoring Centre on Racism and Xenophobia, Vienna, and the preparatory conferences for the 2001 World Conference Against Racism, Racial Intolerance, Xenophobia and Related Intolerance, and the Working Group of Intergovernmental Experts on the Human Rights of Migrants of the United Nations Human Rights Commission.

⁴⁴ See, e.g., [Brown v. Board of Education](#), 347 U.S. 483, 494 (1954).

⁴⁵ As a complement to the employer sanctions provisions in the Immigration Reform and Control Act of 1986 101, codified at [8 U.S.C. 1324\(a\)](#) (2000), the Immigration Reform and Control Act of 1986 102, [8 U.S.C. 1324\(b\)](#), prohibits discrimination by employers on the basis of national origin or citizenship status. Prior to the enactment of this statute, the primary source of protection provided to aliens against unlawful discrimination was found in case law interpreting and applying Title VII of the Civil Rights Act of 1964. See [Espinoza v. Farah Mfg. Co.](#), 414 U.S. 86, 95 (1973). Diversity was not recognized as an element of the problem or the legislation. The policy rationale in the legislative history of the Immigration Reform and Control Act of 1986 stated that "it makes no sense to admit immigrants and refugees to this country, require them to work and then to allow employers to refuse to hire them because of their immigration (non-citizenship) status." H.R. Rep. No. 99-682, at 70, reprinted in 1986 U.S.C.A.A.N. 5649, 5674. Rather, the frame of reference was the elimination of legal disabilities among citizens. See, e.g., Valdivia-Sanchez [1 O.C.A.H.O. 106](#), available at 1989 WL 433897, at 18 n.3 (1989) (stating that "the idea of equal citizenship focuses on those inequalities that are particularly likely to stigmatize, to demoralize, to impair effective participation in society, or to put the matter more positively, on "the needs that must be met if we are to stand to one another as fellow citizens." See Carlos A. Gonzalez, Standards of Proof in Section 274B of the Immigration Reform and Control Act of 1986, [41 Vand. L. Rev. 1323 \(1988\)](#)).

Advocates at the transnational level believe that the definition of xenophobia and the differences between it and racism are "still evolving concepts."⁴⁶ There is an implication that xenophobia, as "'an attitudinal orientation of hostility against non-natives in a given population'" encompasses a wider range of politically unacceptable thought than does racism, with its emphasis on measurable differences in behaviors.⁴⁷ Although xenophobia is a thought crime, its manifestations are said to derive from "severe economic inequalities and the marginalization of persons from access to basic economic and social conditions."⁴⁸ However, a direct causal connection between the demographic representation of migrants in a given population and the level of xenophobia is generally denied.⁴⁹

Human rights law, with its postulates of a universal right of migration, is the legal mechanism used to measure unlawful xenophobia.⁵⁰ Human rights discourse is given a central role in this analysis of xenophobia, whose target is defined broadly as "outsiders." Human rights-based diversity analysis also minimizes legal distinctions between migrant workers and refugees.⁵¹ Diversity, defined as respect for the values and identities of others, is seen as the social and political tool for reducing and ameliorating xenophobic attitudes.⁵² The essential legal tools in this process are national and transnational anti-discrimination legislation to prohibit both direct and indirect xenophobia and to mandate "respect for diversity."⁵³

Diversity is also used in its most radical sense to describe an ideological alternative to an unrealistic goal of a single, united [*394] community of Americans. For example, legal scholar Stephen Legomsky argues that the United States, with a 1996 population of 260 million and growing, was already too large to maintain a traditional national cultural identity and social structure.⁵⁴ Legomsky wrote that, except during fleeting moments of national crisis, Americans "cannot reasonably expect to feel any sort of enduring kinship with 260,000,000 people spread out over millions of square miles and separated by ethnicity, religion, economic class, education level, age, ideology, and other divides."⁵⁵ He does not dispute that today the U.S. is experiencing historic sustained high levels of immigration, unlike the past fluxuations, but sees mass immigration both as a net benefit and as a "crucial component of tolerating and celebrating diversity."⁵⁶

⁴⁶ International Migration, Racism, Discrimination, and Xenophobia, at <http://www.unesco.org/most/migration/imdrx.pdf> 2 (last visited Feb. 6, 2003).

⁴⁷ *Id.*

⁴⁸ *Id.* at 10.

⁴⁹ See *id.*

⁵⁰ Heikki Mattila, Migrants' Human Rights: Principles and Practices, 38.6 *Int'l Migration* 53-67 (2000).

⁵¹ See *id.* at 57.

⁵² See International Migration, Racism, Discrimination, and Xenophobia, *supra* note 46, at 12.

⁵³ See *id.* at 22, 23. The core goals are found in the wide ratification of the 1990 United Nations Convention on the Rights of Migrant Workers and the Members of Their Families, and International Labor Organization Conventions No. 97 and 143 on migrant workers. *Id.*

⁵⁴ Stephen H. Legomsky, *E Pluribus Unum: Immigration, Race, and Other Deep Divides*, 21 *S. Ill U. L.J.* 101, 101-02 (1996).

⁵⁵ *Id.* at 101-02.

⁵⁶ *Id.* at 109, 111.

A variation of this post-national meaning in European discourse expresses the idea dialectically. Personal social identities are held to be mutable and allow for identification with more than one community. Official neglect or hostility to differences can undermine the social and political fabric at a national level. Diversity in this view becomes a prerequisite for societal and individual development. Social cohesion is to be maintained by equalizing the quality of life between evolving communities and by eliminating the marginalization of existing social groups.⁵⁷ Multicultural legal theorist Dr. Warwick Tie sought to illustrate the tensions inherent in this dialectic with an anecdote of a Maori man who was indicted for assault on actors who were reenacting the nineteenth century landing of British colonists in New Zealand (a.k.a. Aotearoa).⁵⁸ The defendant rejected the court's authority as a Eurocentric legal institution, yet he could not request that the case be transferred to his culturally preferred institution - the marae - unless he first acknowledged the court's authority. He refused to do so. As a result, the trial proceeded, and the judge found that his resistance was a plea of not guilty.

III. Diversity and Mass Immigration

The immigration reform movement looks with skepticism on [*395] diversity as a legal basis for a national immigration policy. That skepticism has been expressed on both conservative and progressive political grounds.⁵⁹ However, the central concern of organized immigration control advocacy since the 1970s has been sustained massive levels of worldwide migration.

Under conditions of mass immigration, the benefits diversity is said to provide mutate into problems. To understand this dilemma, it is helpful to make a conceptual contrast between quantity and quality of diversity in immigration. An immigration flow that emphasized quantitative diversity would allocate visa preferences exclusively to natives of countries whose members would constitute a visible minority in the receiving state. It would essentially be a policy of population replacement. A theoretical policy that promoted qualitative diversity would evenly distribute immigrants across all appropriate sending countries.⁶⁰

The diversity visa program has had no significant effect on the increasing concentration of sources of U.S. immigration by national origin. The existence of the diversity lottery is an acknowledgement by lawmakers that an imbalance exists - but no more than that. In 2001, nearly twenty percent of legal immigrants admitted to the United States came from a single sending country.⁶¹ That year, more than forty percent of legal immigrants came from just five⁶² of more than 250 sovereign states and dependent territories worldwide.⁶³ In effect, the concentration of immigrant flows makes the "visa-rich" richer and the "visa-poor" poorer.

⁵⁷ Jan Niessen, *Diversity and Cohesion* 12 (2000).

⁵⁸ Warwick Tie, *Legal Pluralism: Toward A Multicultural Conception Of Law* 1 (1999).

⁵⁹ See, e.g., Lawrence Auster, *The Path to National Suicide: An Essay on Immigration and Multiculturalism* (1990) (illustrating a social conservative critique); Hugh Davis Graham, *Collision Course: The Strange Convergence of Affirmative Action and Immigration Policy* 123-24, 152-160 (2002) (providing a progressive critique).

⁶⁰ Inappropriate countries would be those excluded for national security or national interest reasons.

⁶¹ See Office of Policy and Planning, *Immigr. and Naturalization Svc., U.S. Dep't. of Justice, Annual Report 7, Legal Immigration, Fiscal Year 2001, 2* (2002) (noting that almost twenty percent of the people who legally immigrated to the United States came from Mexico), available at <http://www.ins.gov/graphics/aboutins/statistics/IMM2001.pdf> (last visited Feb. 6, 2003).

⁶² See *id.* at 2 (reporting that forty percent of these immigrants were from Mexico, India, China, the Philippines, and Vietnam).

⁶³ See Bureau of Intelligence and Research, *U.S. Dep't of State, Independent States in the World* (Nov. 13, 2002) (listing 192 independent states), available at <http://www.state.gov/s/inr/rls/4250pf.htm> (last visited Feb. 6, 2003); see DMOZ Open Directory

The mechanism driving this imbalance is chain migration, which [*396] was built into U.S. immigration law in 1965. ⁶⁴ Chain migration occurs because immigration in the United States is dominated by the policy of family reunification, which enables members of an extended family to follow a single migrant into the United States and gain permanent resident status, regardless of whether they possess skills, a diverse background, or any other qualities that would make them a net benefit to current citizens. ⁶⁵ In that sense, U.S. immigration policy is essentially nepotistic. Nepotism and diversity are contradictory. ⁶⁶

As a legal preference for undistinguished immigrants, nepotism represents an opportunity cost to any immigration reform project that purports to favor qualitative diversity - it crowds out talented immigrants. ⁶⁷ In critic Steve Sailer's sardonic example, the brother-in-law of an Indian computer chip designer is admitted on a derivative visa and drives a taxi until he saves enough money to put a down payment on a motel. There, he fires the black maids and hires his newly arrived sisters to clean the rooms. ⁶⁸ In a liberal-democratic system facing conditions of mass immigration, a doctrine of family reunification, by favoring the blood claims of the most recent arrivals over those of more indigenous stock, functions as an extraordinary mutation of jus sanguinis. The practice of transnational nepotism facilitates a preference for immigrants who out compete poor American citizens for taxi and motel jobs, rather than those admitted on the basis of any unique and economically valuable talent. ⁶⁹ Even where immigrants are initially selected solely on the basis of high achievement, those socially valuable qualities do not persist. "While talent does run in families, it also [*397] fairly rapidly regresses to the mean" ⁷⁰

An immigration policy that favors qualitative diversity requires the enforcement of a system of national-origin quotas. In fact, the Immigration and Nationality Act provides for such a quota system. ⁷¹ Per country ceilings are set at seven percent of total family, employment, and diversity visas granted each year. ⁷² In practice, however, the body of U.S. immigration law is a labyrinth of loopholes and waivers of

Project, Independent Nations and Their Dependencies and Areas of Special Sovereignty (listing 65 dependent territories), available at <http://dmoz.org/dependents.html> (last visited Feb. 6, 2003).

⁶⁴ See Immigration and Nationality Act Amendments, Pub. L. No. 89-236, 201(b), 1965 U.S.C.A.N. (79 Stat. 911) 883, 883; S. Rep. No. 89-748 (1965), reprinted in 1965 U.S.C.A.A.N. 3328; Federation for American Immigration Reform, Shackled by Chain Migration: How "Family Reunification" Drives Up the Annual Number of Immigrants (describing chain migration as the process where one immigrant sponsors many other immigrants for admission, who then sponsor many others themselves, resulting in a chain reaction), available at <http://www.fairus.org/html/04140708.htm> (last visited January 24, 2002).

⁶⁵ See 8 U.S.C. 1151(b)(2)(A)(i) (2000); see also Office of Policy and Planning, Immigr. and Naturalization Svc., U.S. Dep't. of Justice, Annual Report 7, Legal Immigration, Fiscal Year 2001, 2 (2002) (finding that sixty-four percent of people who immigrated to the United States in 2001 were family sponsored), available at www.ins.gov/graphics/aboutins/statistics/IMM2001.pdf (last visited Feb. 6, 2003).

⁶⁶ Except where diversity is used, in the racist sense, to define a policy of facilitating the demographic reduction of an existing majority to a plurality or minority.

⁶⁷ See Steve Sailer, Brookings Does Diversity, Sort Of, at <http://www.vdare.com/sailer/brookings.htm> (last visited Feb. 6, 2003).

⁶⁸ Id.

⁶⁹ See id.

⁷⁰ Id.

⁷¹ See 8 U.S.C. 1152(a)(2) (2000).

⁷² See id.

those per-country ceilings.⁷³ This arbitrary framework for adjustment of status, when combined with the exceptionally liberal naturalization regime of the United States, makes the theoretical qualitative diversity of United States immigration law illusory in practice.

The relationship between mass immigration and diversity is also contradictory over time. Absorption is a useful term to describe what might be called "immigrant" policy and law, as opposed to "immigration policy," because it connotes neutrality on whether the impact of immigrants on the receiving society should be viewed as a process of newcomer assimilation or of indigenous adaptation. Total numbers of arriving aliens and diversity of immigration flow are inverse factors for the absorptive capacity of the receiving country. It is in principle more efficient to absorb a million immigrants from a single country than a million immigrants from a hundred countries. The first option, however, does not contribute to diversity in terms of the benefits ascribed to such a policy.⁷⁴ In contrast, absorbing a hundred-thousand immigrants from a hundred countries would be relatively easier. Disregarding absorptive capacity in order to promote both mass immigration and increased [*398] diversity is not a sustainable option because it increases conflict.⁷⁵

A final conceptual problem inherent in a diversity-driven immigration system is its sustainability. What would a non-discriminatory diversity quotient in immigration law look like? The legal regime that would frame such a construct would require a judicial bureaucracy to define, to monitor, and to redistribute political and social resources among competing ascriptive groups. Such a system would face great difficulties under existing constitutional anti-discrimination and separation-of-powers doctrines. The constitutional dilemma would remain whether the goal of such a diversity-driven immigration statute was a national population whose demographic composition reflected their worldwide distribution, or instead, one in which no ascriptive group constituted a demographic majority.

III. Limits to Globalization

The emerging solution to this dilemma among legal scholars is the advocacy of globalization, which - in the immigration context - means the deregulation of migration across national borders, perhaps under a

⁷³ See, e.g., [8 U.S.C. 1152\(e\)](#) (2000) (creating special rules for countries that easily reach their ceiling limitations); [8 U.S.C. 1154\(a\)\(1\)\(A\)\(iii\)-\(vi\)](#) (2000) (granting special immigrant status for battered spouses of United States citizens); [8 U.S.C. 1154\(f\)](#) (2000) (giving preferential treatment for children fathered by U.S. citizens and born in Korea, Vietnam, Laos, Kampuchea or Thailand); [8 U.S.C. 1229b](#) (2000) (providing for the right of the Attorney General to cancel the removal of an inadmissible or deportable alien); 1255(i) (adjustment of status for aliens physically present in the United States); see also Hungarian Refugee Act, Pub. L. No. 85-559, [72 Stat. 419](#); Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, [80 Stat. 1161](#); Indochinese Refugee Resettlement Act, Pub. L. No. 95-145, [91 Stat. 1223](#); Cuban-Haitian Adjustment Act, Pub. L. No. 99-603, [100 Stat. 3359](#).

⁷⁴ For example, the level of interracial marriage in California has diverged sharply between immigrants and natives. Under massive levels of immigration, the tendency for migrants to marry within ethnic communities more than negated a trend of increasing exogenous marriage among U.S. citizens. See Sonya M. Tafoya, *Mixed Race and Ethnicity in California* (Jan. 2000), available at www.ppic.org/publications/CalCounts2/calcounts2.html (last visited Feb. 6, 2003).

⁷⁵ See, e.g., Bill Ong Hing, *Answering Challenges of the New Immigrant-Driven Diversity: Considering Immigration Strategies*, [40 Brandeis L.J. 861, 882 \(2002\)](#) (noting that communities might have challenges in dealing with typical concerns related to migration, such as bilingual education and social services for non-citizens); James H. Johnson, Jr. & Melvin L. Oliver, *Interethnic Minority Conflict in Urban America: The Effects of Economic and Social Dislocations*, 10 *Urban Geography* 449-63 (1989) (stating that the emergence of conflict among ethnic minority groups is a direct consequence of increasing immigration and major demographic changes which place these groups in competition for scarce resources).

transnational legal regime. ⁷⁶ Pope John Paul II summarized the benefits of the deregulation of migration in 1991: "When a nation has the courage to open itself to immigration it is rewarded with increased prosperity, a solid social renewal, and a vigorous impetus toward new economic and human goals." ⁷⁷ A secular variant of this argument equates diversity with multiculturalism. The United Nations Economic and Social Council (UNESCO) and the United Nations High Commission for Refugees (UNHCR) are examples of international organizations that endorse what they term an "ideological-normative" approach to cultural diversity. ⁷⁸ Essentially stated, transnational advocates for this [*399] approach to cultural diversity argue that increased ethnic diversity within nation-states "benefits both individuals and the larger society by reducing pressures for social conflict based on disadvantage and inequality," and is an "an enrichment for the society as a whole." ⁷⁹

These claims of conflict resolution and net societal enrichment symbolize an enormously complex and currently unsolved dilemma in American law. However, the legal theorists who make these claims, like the Pontiff, generally do not quantify them. Ecologist Garrett Hardin has noted that it is impossible to approach an unsolved problem except through the door of metaphor. ⁸⁰ Well over two-thirds of the world is desperately poor, and one-third is comparatively rich. Metaphorically, each rich nation amounts to a lifeboat full of rich people. The wretched of the earth are in other, more crowded lifeboats. Poor people continuously fall out of their lifeboats and swim around in the water, hoping to be taken on board. As a question of justice, what should the occupants of the rich lifeboats do?

Lifeboats have a limited capacity, analogous to the ecological concept that the territory of every nation has a finite carrying capacity. ⁸¹ When we, as Americans, in our relatively un-crowded rich lifeboat with only twenty-five occupants and a capacity of fifty, see 100 others swimming in the water, what are our choices?

If we act on a theory of egalitarian justice and acknowledge that all persons have the same needs, we would take all needy persons who reach our boat. The boat, with a capacity of fifty and occupancy of 150, would then capsize. Alternatively, we could admit twenty-five, up to the capacity of the lifeboat. But this raises two problems: First, the safety factor is eliminated, so unless our maximum lifeboat population of fifty is restrained from helping anyone else, [*400] the result would also be catastrophic. ⁸² Second, what theory of justice do we select to discriminate among those whom we do let on board?

⁷⁶ See Myron Weiner, *The Global Migration Crisis: Challenge to States and To Human Rights* (1995) (summarizing the writings of John Rawls, Joseph H. Carens, and Peter Singer, among others).

⁷⁷ Hardin, *supra* note 4, at 10.

⁷⁸ See Christine Inglis, *Multiculturalism: New Policy Responses to Diversity, Management of Social Transformations (MOST)-UNESCO Policy Paper No. 4*, at <http://www.unesco.org/most/pp4.htm> (last visited January 24, 2003).

⁷⁹ *Id.* Increased ethnic diversity within a modern state necessarily implies demographically significant levels of immigration.

⁸⁰ See Garrett Hardin, *Living on a Lifeboat*, 24 *BioScience* 561, 561 (1974).

⁸¹ Important legal implications of carrying capacity analysis include: (1) carrying capacity, like the environment is variable over time; (2) legislation based on a unique estimate of carrying capacity should thus prefer the minimum of an identified range of policy options, not the maximum, nor even the average; (3) transgressing carrying capacity for one period lowers capacity thereafter, risking a spiral towards collapse; (4) error and unintended negative feedback are highly probable when governmental policy in complex systems is driven by non-numerate ideology - including rights-based legal theory, and (5) the consequences of error in estimating capacity are grave. Once carrying capacity is reached, nondiscriminatory protection of many individual, political or social rights can be quantifiably counterproductive for both the individual and society. See Hardin, *supra* note 1.

⁸² See *id.* at 562. The "safety factor" emphasizes the key role of un-utilized environmental carrying capacity. For the estimated 1.2 billion human beings surviving on less than one dollar per day, the range of environmental risks that could provoke a fatal

Rights-based theories of jurisprudence have great difficulties accommodating models of societal collapse due to environmental factors, which imply a corollary quantitative threshold of acceptable migration. Lawyers and political scientists tend to ignore or deny the probability of such an event, despite many contemporary examples.⁸³

However, the reality of environmental collapse is implicitly recognized in United States immigration law under the doctrine of "temporary protected status."⁸⁴ The Attorney General, exercising Presidential plenary power, may grant "TPS" to nationals of designated foreign states where, inter alia, an "environmental disaster" has resulted in a substantial but temporary disruption of living conditions that the foreign state is unable to handle adequately.⁸⁵ The legal status of these environmental refugees is intended to be transient and non-assimilatory, not unlike that imposed on guest workers in other nations. Beneficiaries are granted work authorization but are denied many social and most political rights.⁸⁶ In practice, however, this power has been exercised arbitrarily, and few if any alien beneficiaries have returned home.

The numerate analysis by immigration reformers can be applied to culture as well as to demography. In contrast to the dominant view of cultural diversity in legal discourse as the perception that differences among ethnically or racially diverse population segments have social and legal significance, some immigration [*401] reform groups look at culture as quality of life - the idea that "man does not live by bread alone."⁸⁷ While there is and can be no universal metric for cultural comparison, Hardin points out that per capita consumption of energy may be used as a crude approximation of the ensemble of luxury, leisure, aesthetic, and interpersonal goods, which, when added to food, shelter, and clothing, comprise our standard of living.⁸⁸ The trend of high and increasing energy consumption patterns in the United States and other Western societies provides a crude but valid explanation of why, in a popular sense, so many view Western culture as superior or dominant. The overwhelming attractiveness of the American lifestyle to immigrants also supports this quality-of-life view of culture.

In this framework, cultural diversity is best viewed as a measurement of the accessibility of cultural goods and, as a corollary, a function of the standard of living. No literate person would suggest that an animal existence is acceptable to homo sapiens. The goal of population control is not to reduce population per se, but to reduce misery among the living. All people want to maximize the cultural amenities our society can furnish, in the sense of all the artifacts of human existence: institutions, structures, customs,

decline in income is lengthy and complex. See generally Joel Cohen, *How Many People Can the Earth Support?* (1996); Walter Youngquist, *GeoDestinies* (1997). Examples of states with no safety factors include the environmentally blighted regions of the former Communist bloc, as well as densely populated least-developed nations.

⁸³ The small Pacific island nation of Tuvalu is an example of more extensive population-driven collapses. The national territory is expected to soon become uninhabitable due to human-induced climate change. The Tuvaluans are reported to be negotiating with New Zealand to resettle the entire national population as refugees. See John Cairns, Jr., *Environmental Refugees*, 13 *Social Contract*, Fall 2002, at 36-37, available at <http://www.thesocialcontract.com/pdf/thirteen-one/xiii-1-34.pdf> (last visited February 6, 2003).

⁸⁴ See 8 U.S.C. 1254a (2000).

⁸⁵ [8 U.S.C. 1254a\(b\)\(1\)\(B\)](#).

⁸⁶ [8 U.S.C. 1254a\(f\)](#).

⁸⁷ Garrett Hardin, *Cultural Carrying Capacity: A Biological Approach to Human Problems*, 36 *BioScience* 599, 602 (1986) (noting that there is a difference between "mere existence and the good life").

⁸⁸ See *id.* at 602-03.

knowledge, and inventions. ⁸⁹ For the ecologist, measurement of cultural carrying capacity cannot be made on a global level, except in a relative sense illustrative of limits. For example, carrying capacity at an urban American quality of life is a fraction of that of a rural Latin American or African. This inverse relationship between the availability of cultural diversity within a society and between societies creates a problem for proponents of a human rights-based theory of globalization (and in particular, the role of migration within that theory) because it implies quantitative limits to the exercise of theoretically unlimited human rights, such as the right to migrate, the right to reproduce, the rights to nondiscriminatory access to social benefits, and the rights to participation in the political process. ⁹⁰

An anti-globalist counterargument to the ecologist perspective is an environmental justice critique. From this perspective, the interjection of population statistics into a rights-based analysis of [*402] immigration is merely a subterfuge to make the politically disenfranchised a scapegoat. ⁹¹ "Blaming population growth is a convenient way to ignore the varying impacts of different groups of people and institutions." ⁹² It is asserted that corporate and military interests control both production and individual consumption decisions, and have more effect on the environment than population. ⁹³ As a result, powerless immigrant communities are said to suffer disproportionately from environmental degradation. ⁹⁴ Anti-globalists argue that population-based immigration controls are "mean-spirited[]" because they use immigrants as a surrogate for the continued exploitation of domestic poor, elderly, and people of color. ⁹⁵

Despite their differences, both globalizers and anti-globalists share a belief that diverse immigrant cultures and practices in American society are positive factors, in both legal and social terms. Anti-globalists distinguish current migrant flows as coming from places where "sustainable lifestyles and a closer connection to the land" are more prevalent than they are in the United States. ⁹⁶ This shared misunderstanding of diversity in immigration, based on a flawed conception of sustainable development, is essentially a variant of the globalizing argument.

An ecologist model - Dr. Hardin's metaphor of the "tragedy of the commons" - demonstrates why deregulated migration or open borders would have catastrophic effects, in both the demographic and cultural context, under both globalizing and sustainable development paradigms. ⁹⁷ Under a system of private property, owners recognize their responsibility and act accordingly. An intelligent farmer would allow no more cattle to graze in his pasture than its carrying capacity allows.

⁸⁹ See *id.*

⁹⁰ See Garrett Hardin, *Living Within Limits* 204-14 (2000).

⁹¹ See, e.g., Cathi Tactaquin, *The Greening of the Anti-Immigrant Agenda*, available at www.nnirr.org/news/archived_netnews/thegreening.htm (last visited Feb. 6, 2003).

⁹² Political Ecology Group, *Immigration and Environment Campaign Position Statement*, at <http://www.cwpe.org/issues/dangerous.html/greening/political.html> (last visited Feb. 6, 2003).

⁹³ See *id.* (asserting that corporate and governmental decision-making is based on private short-term gain, rather than for the long-term public good).

⁹⁴ See *id.* (arguing that immigrant communities are exposed to environmental problems, such as pesticides and chemicals, at a higher rate than other groups in the United States).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243, 1243-48 (1968).

Now picture a deregulated pasture open as a commons to all. ⁹⁸ To [*403] maximize his gain, each herdsman calculates the utility of adding one additional animal to his herd. Proceeds from the sale of the incremental animal are profit, while the damage to the pasture from overgrazing by an extra animal is a loss. In a commons, the herdsman would retain all the profit from incremental exploitation, but share the environmental losses with all other herdsmen. Every rational herdsman would continue to add to his herd. Under the constraints of a finite commons, a rational exercise of this freedom to exploit leads inevitably (and tragically) to conflict and mutual ruin.

Desertification, deforestation, tuberculosis, and the collapse of world fisheries are literal examples of scarcity caused by misuse of the commons. But global inequality is not. Scarcity of human wealth and human rights may be ubiquitous, but labeling the problem as a global one makes sense only if the plausible solution is also global. Hardin's foundational thesis that rejects the possibility of a limitless global solution can be reiterated as stating that under conditions of overpopulation, the free exercise of human rights in an unmanaged commons brings ruin to all. ⁹⁹

A third response to the lifeboat problem is to admit on board only a small number of swimmers, ensuring the survival of the people already in the boat. Many (if not most) legal thinkers would find the third option abhorrent because it is unjust. If that is so, the ethical response would be an appeal to conscience, a charity-based approach - let the rich advocate get out of the boat and sacrifice his place to a poor swimmer. ¹⁰⁰

From an ecologist perspective, sustainable development requires an altruistic legal system. Altruism requires discrimination by benefactors among potential beneficiaries. Without discrimination, the benefits of an altruistic "sustainable" system would be communized - so diluted that they would be less than the benefits available from selfish exclusionary practices. In the lifeboat example, this insight explains why sacrificing one's seat to a migrant in distress as a humanitarian act provides no systemic benefit. Applied to immigration policy, it suggests that the [*404] "promiscuous sharing" premise underlying the social cohesion theory of diversity is also defective. ¹⁰¹ These defects, which are in actuality quantitative limits, restrict the availability of global legal solutions.

A rich democratic nation, like the rich advocate, then faces a dilemma of hubris. Our commonplace Western solutions have been first, a belief that technical progress has always increased carrying capacity faster than population growth, and second, a belief that diversity, as a global extension of distributional justice, can make human impacts benign. The ecologist response is that such solutions are incredible because they do not accurately balance economies of scale, (e.g., from traditional manufacturing economics) with dysfunctions of scale (e.g., from the increasing inefficiency of democratic government as population increases). ¹⁰² Wealth subject to regulation under any juridical system can exist in just three modalities - resources, energy, and information. Technology cannot increase all factors of carrying

⁹⁸ See *id.* at 1244. Whether the commons are open under a socialistic or capitalistic system of property is not significant to the analysis.

⁹⁹ See *id.*

¹⁰⁰ See Hardin, *supra* note 80, at 562. One of the most malicious attacks on ecologist-based immigration reform advocacy has been the canard that Hardin, Tanton, and other theorists would contemplate human liquidation or extermination as a policy option. See, e.g., Tucker Carlson, *The Intellectual Roots of Nativism*, *Wall St. J.*, Oct. 2, 1997, at A22. The ecologist view is fully in accord with traditional common law rejecting the morality of human jettison. See, e.g., [United States v. Holmes](#), 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383); *The Queen v. Dudley & Stephens*, 14 Eng. Rep. 273 (Q.B. 1884).

¹⁰¹ Hardin, *supra* note 90, at 23-36.

¹⁰² See *id.* at 98-100, 123-24.

capacity equally. In conditions of overpopulation, the tragedy of the commons is still inevitable even with an unlimited energy supply. The paradigm of replacement immigration, wherein the resource gap between poor and rich is eliminated through declines in reproduction in rich societies coupled with labor migration from poor ones, is nothing but a euphemism for an expansion of the commons, and also leads to universal poverty.¹⁰³ To the immigration reform movement, the harsh consequences of a disregard for limits are only heightened by reproductive differences among populations. This is particularly noticeable as between immigrants and the native-born in the United States.¹⁰⁴

Global information-sharing, in theory, does not share the zero-sum constraints of traditional resource transfers. However, the failures of international development work over the last sixty years suggest that sharing wrong information, in the form of mistaken [*405] theory and incomplete data, has arguably caused more harm than good when applied in a transnational context.¹⁰⁵ More mundanely, temporary nonimmigrant guest-worker programs implicitly recognize the limits of knowledge-based globalism. A policy argument in favor of the nonimmigrant specialty occupation worker ("H-1B") program¹⁰⁶ has been that importing of foreign computer programmers prevents the off-shore transfer of United States technology to India or other low-cost jurisdictions. In fact, only small and nonstrategic portions of software development work have moved overseas, as the industry discovered that the interaction of skilled workers in a live community creates more economic value than the savings realized from a global network of job sites.¹⁰⁷

Most variations of diversity theory anticipate the eventual decoupling of the concept of citizenship from the nation-state, where the claims to material and cultural goods embodied in concepts of citizenship in a nation-state are largely replaced by normative-ideological concepts of community. In an immigration reform paradigm, the national unit retains primacy precisely due to its perceived ecolate diversity. Only the scale of a nation-state, as contrasted with those of communities, provides the highest potential quality of life, while the multiplicity of political units provides a prudential safety factor against social collapse.¹⁰⁸ This, in a metaphorical nutshell, is why borders, and the sovereign states they define, have utility and will not disappear, regardless of the expanding exchanges of information that undergird globalization and harmonization.¹⁰⁹

¹⁰³ Hardin makes the rhetorical point that the very concept of "world resources" is an echo of Proudhon's maxim, "property is theft." Hardin, *supra* note 1.

¹⁰⁴ Under competition, low living standards will drive out high ones. Although the poor outnumber the rich two to one globally, assume an equal ratio of rich natives to poor immigrants. Further assume a purely egalitarian legal system requiring the equal sharing of available resources. If, as has been the case, the immigrant birth rate is higher than that of natives, inexorably the disparity in resource allocation between the two groups will increase. That shift in the share of resources in favor of the immigrant group accelerates where, as is the case in this country, the rate of population increase falls faster among the indigenous group. See Hardin, *supra* note 90, at 263-64.

¹⁰⁵ See *id.*

¹⁰⁶ See 8 U.S.C. 1101(a)(15)(H)(i)(b) (2000); **8 U.S.C. 1182**(n) (2000).

¹⁰⁷ See *Debunking the Myth of a Desperate Software Labor Shortage: Testimony to the U.S. House Judiciary Committee on Immigration* (Apr. 21, 1998) (statement of Dr. Norman Matloff), at <http://heather.cs.ucdavis.edu/itaa.real.html> (last updated December 9, 2002).

¹⁰⁸ The village in McLuhan's oxymoronic "global village" brought small-group ethics into legal theory, while the compressive term global permitted advocates to ignore the demands that large numbers make on anyone living in a totally interdependent world. As ideology, it freed ethical debate from the embarrassing burden of scale effects. See Garrett Hardin, *The Ostrich Factor* 91-93 (1999).

¹⁰⁹ Barring the appearance of galactic aliens as a common enemy.

V. Implications For a Post 9/11 World

Almost instinctively, the ferocity of the Al Qaeda attacks on the United States has provoked questioning of the claimed benefits of diversity in immigration policy. Nonetheless, in the post-9/11 environment, transnational immigration theorists have found a new [*406] defense of globalization, and by extension diversity - the ultimate solution to terrorism.¹¹⁰

In his recent law review article *Globalization, Terror, and the Movements of People*,¹¹¹ Arthur Helton, the immigration and refugee law scholar at the Council on Foreign Relations, provides a representative statement of this view. An illustrative set of core propositions can be abstracted from Helton's article - first, massive levels of migration will continue worldwide, upon which national legal regimes will have only a limited effect.¹¹² Existing levels of diversity and cultural and economic wealth give the United States a clear competitive advantage as globalization continues.¹¹³ Globalization does entail risks - mass communications and travel provoke resentment among the poor and facilitate international crime in which breakdowns in the rule of law occur.¹¹⁴ Global diasporas of social groups ("population diversity") increase the likelihood of conflict once any group is perceived as a threat.¹¹⁵ The root cause of terrorism, however, is global inequality.¹¹⁶

The migration of terrorists can and will be controlled by international legal institutions.¹¹⁷ Transnational norms set limits on the ability of national governments to rely on the securitization¹¹⁸ and militarization of immigration law as anti-terrorism tools.¹¹⁹ The international harmonization of immigration and nationality law between states is a necessary step. In the absence, however, of a compelling political imperative such as the European Union, American public opinion, which is highly susceptible to domestic political manipulation, will remain an obstacle to the harmonization of United States immigration and refugee law with international [*407] norms.¹²⁰ In balance, Helton concludes that "astutely targeted law

¹¹⁰ See, e.g., David Cole, *Enemy Aliens*, [54 Stan. L. Rev. 953, 958 \(2002\)](#) (asserting that as terrorism is not confined to certain countries or continents, it requires transnational consideration).

¹¹¹ Arthur C. Helton & Dessie P. Zagorcheva, *Globalization, Terror, and the Movements of People*, [36 Int'l Law 91 \(2002\)](#).

¹¹² See [id. at 91](#). (stating that "more people are moving across borders, both pushed or pulled, with or without permission" every year).

¹¹³ See [id. at 92](#).

¹¹⁴ See *id.*

¹¹⁵ See [id. at 93](#).

¹¹⁶ See [id. at 92](#) (noting that the widening gap between the rich and the poor can create resentment and violence).

¹¹⁷ See [id. at 94-97](#).

¹¹⁸ See, e.g., *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (U.S.A. PATRIOT Act), Pub. L. No. 107-56, 2001 U.S.C.A.A.N. (115 Stat.) 272 (delineating methods to prevent terrorism, and similar legislation overseas).

¹¹⁹ See Helton, *supra* note 111, at 99-100.

¹²⁰ See Anthony Romero, *In Defense of Liberty in a Time of National Emergency*, ABA Individual Rights & Responsibilities Section (Winter 2002) (noting a connection between post 9/11 security measures and national leaders' fears of sabotage by foreigners during crisis periods), available at www.abanet.org/irr/hr/winter02/romero.html (last visited Feb. 6, 2003).

enforcement," coordinated through multilateral institutions, is the only "decisive" antiterrorist policy for the United States and its allies. ¹²¹

Responding to Helton's argument for globalization, it is reasonable to first question the premise that the causes of mass immigration (and terrorism) arise from conditions of global inequality over which nation-states have only limited control. Outside of OECD states, national security concerns have dominated immigration policy development. Interstate conflict and civil conflict are responsible for more migratory flows than economic push-pull factors. Modern Middle East history provides vivid examples of how conflicting immigration and emigration policies of state actors, not economic disparities, are the primary causes of both terrorism and migration. In the Israeli-Palestinian, Saharan, Iranian, and Afghan conflicts, as well as the 1990 Gulf War, immigration policy has been treated by all parties as a national security issue, rather than as a global economic phenomenon. ¹²² For cases in which modern states have collapsed under stress, there is no indication that diversity has played anything other than a retrogressive role. ¹²³

There is also little evidence to date that transnational institutions have successfully managed or controlled migrant flows so as to reduce ethnic conflict and terrorism. ¹²⁴ Beyond emergency and humanitarian relief efforts, international institutions and transnational organizations have not succeeded in extending political or social benefits to refugees in their countries of refuge, nor in their countries of origin. The contemporary backlash against perceived threats from asylum seekers and the concomitant rollback of liberal asylum policies in OECD states, notably the European Union and Australia, underline the scope of this failure. The argument that international norms will limit the securitization of [*408] immigration policy also draws little support from the historical record.

From an immigration control perspective, the problems of a diversity-based analysis of immigration policy are particularly evident in a national security context. In 1980, Garrett Hardin disagreed with advocates for egalitarian globalization that the threats of war, terrorism, and aggressive non-violent illegal immigration, conducted by poor populations against rich Western societies, could be resolved through international programs of distributional justice. He pointed out that technology had already shifted the balance of military power further away from poor societies, making war on the rich unlikely. For Hardin, police action was the only rational response to terrorism, despite its imperfections. Meeting the distributive demands of terrorists, which typically include some form of compensation for the past, would only create new inequity. Hardin saw illegal migration as the greatest security threat because it would, under ecologic population theory, expand poverty. ¹²⁵

Important changes in state responses to international terrorism suggest that Hardin's 1980 thesis that terrorism can be managed by local police action - a position echoed with different motives by Helton in 2002 - has become dated. First, as national populations have become more diverse, the need for government to monitor individuals has increased. The informal arrangements for social control found in homogeneous societies have weakened. A tenet of multiculturalism is that one man's terrorist can be

¹²¹ Helton, *supra* note 111, at 99.

¹²² See Weiner, *supra* note 76, at 131-132 (providing a recitation of recent mass migrant flows).

¹²³ See, e.g., Robert D. Kaplan, *The Coming Anarchy*, *Atlantic Monthly*, Feb. 1994, at 44 (asserting that criminal anarchy, rather than egalitarian diversity, is the consequence of the decline of the nation-state in conditions of environmental breakdown and overpopulation).

¹²⁴ See Weiner, *supra* note 76, at 155-64.

¹²⁵ See Hardin, *supra* note 1.

another's freedom fighter or victim of persecution.¹²⁶ Our world is full of examples of individuals and population sectors that would fit both profiles. September 11 has simply injected this dilemma into popular discourse. Mass immigration greatly expanded the range of individuals for whom a state can demonstrate a rational basis to "astutely target[]," to use Helton's phrase.¹²⁷ Second, increasing population growth and urbanization have increased the risk that individuals can function as implements of mass destruction, without the need for advanced military technology. The ecolate analysis of the immigration reform movement - in particular the concept of cultural carrying capacity - explains these phenomena far better than does diversity based analysis, with its focus on marshalling the [*409] legal resources of the state to combat irrational mass outbreaks of latent xenophobia.

The inability to locate individuals among migrant populations has become the primary security liability for governments in the post 9/11 environment. To the extent that aliens cannot be accurately identified and located, the harmonization of conflicting national laws governing migrant classification and protection has lost legal and political urgency. This identity crisis has renewed interest in government control of illegal immigration. Helton and immigrant advocates would like to break down any nexus between alien terrorist suspects and the far larger population of millions of illegal immigrants, subjecting the relatively minuscule former group to police scrutiny, while providing the later population some form of national preference treatment, such as eligibility for social benefits and political rights.

Instead, in the United States, exactly the opposite is occurring. The federal government appears to have tacitly recognized several longstanding policy insights of immigration reform organizations. First, alien terrorists are now seen as a particularly dangerous subset of illegal immigrants. Reducing or eliminating the ability of the larger illegal population to avoid detection and control has become the key variable in restricting the alien terrorist's ability to function. Second, without any overt change in domestic anti-discrimination policy, the liabilities of maintaining multicultural identities have increased. As a consequence of changes in the foreign policy of the United States, often in reaction to hostile acts overseas, immigration preferences and other legal benefits accepted by aliens based on their group membership status under diversity-based law become grounds for increased personal scrutiny. The reactivation of the moribund system of alien registration is at the center of these changes.¹²⁸ It is important to note that the immigration reform movement does not disagree with advocates such as David Cole, who argues that a risk exists that "measures initially targeted at noncitizens may well come back to haunt us all."¹²⁹ The ecolate analysis views the risk of erosion of citizen liberties as serious as long as conditions of aggressive mass immigration persist.

While Helton notes that an increase in transnational crime is a risk for the globalizing agenda, it can be suggested that he [*410] understates the security threat that immigrant crime presents. One of the most negative manifestations of xenophobia is said to be the association of criminality with alien communities.¹³⁰ Advocates for immigrants dislike even the term "illegal alien" for this reason. Helton's recommendation of "astutely targeted law enforcement activities" describes a policy that would increase

¹²⁶ Note in this regard the continuing international backlash against attempts to force the international asylum and refugee regime to accommodate economic and sexual refugees.

¹²⁷ See Helton, *supra* note 111, at 99.

¹²⁸ See [67 Fed. Reg. 52,584](#) (Aug. 12, 2002) (to be codified at 8 C.F.R. pt. 214, 264).

¹²⁹ Cole, *supra* note 110, at 959.

¹³⁰ See International Migration, Racism, Discrimination, and Xenophobia, *supra* note 46, at 11 ("The deliberate association of migration and migrants with criminality is an especially dangerous trend, one which tacitly encourages and condones xenophobic hostility and violence.").

the legal separation between domestic and immigration law enforcement.¹³¹ A more radical version of this view advocates a criminalization of detention and removal procedures,¹³² linked to a decriminalization of substantive U.S. immigration law through amnesty and liberalized migration.¹³³ This rights-driven approach ignores the numerate insights of criminology, in particular the parallel between the treatment of immigration violations and identity fraud as insignificant or victimless, and "broken windows" models of policing, which hold that failure to control quality of life violations causes increased lawlessness, such as narcotics, sex trafficking, corruption, and ultimately organized political violence.¹³⁴

The dilemma of unrestricted immigration is that it threatens environmental sustainability, national security, and, ironically, diversity - in the sense of reduced social conflict. Existing legal theories of diversity do not provide a consistent ethical or predictive basis for the regulation of human migration because they cannot account for environmental limitations that can shift the balance between liberty and security or - under conditions of aggressive mass immigration - under both.¹³⁵ Deregulation of borders will not [*411] reduce social conflict or manage terrorism, because the predicate condition - global equality - cannot be achieved. On both theoretical and empirical levels, only a system of nation-states protecting differentiated communities of cultured citizens offers a real prospect of justice in human migration. The enduring insight of the immigration reform movement is its commitment to count the reasons why.

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¹³¹ See Helton, *supra* note 111, at 99 (arguing that law enforcement is a more effective weapon for fighting terrorism than immigration law).

¹³² For example, the application of constitutional standards for criminal procedure in such areas as habeas corpus, due process, evidentiary rules, and judicial review to immigration violations.

¹³³ See, e.g., Rep. Luis Gutierrez (D-IL), *Democratic Immigration Principles: An Access to Earned Legalization*, available at <http://luisgutierrez.house.gov/pdf/ImmigrationPrinciples-Final1.pdf>. (Aug. 2001).

¹³⁴ James Q. Wilson & George L. Kelling, *Broken Windows*, *Atlantic Monthly*, March 1982, at 29 (arguing that failure to police small transgressions of social norms undermines willingness of population to enforce social order and asserting that this failure to police leads to higher levels of crime and violence).

¹³⁵ See, e.g., Kaplan, *supra* note 123.

Mention the environment or "diminishing natural resources" in foreign-policy circles and you meet a brick wall of skepticism or boredom. To conservatives especially, the very terms seem flaky. Public-policy foundations have contributed to the lack of interest, by funding narrowly focused environmental studies replete with technical jargon which foreign-affairs experts just let pile up on their desks.

Id. (emphasis omitted).