

## RUSSIAN ELECTION INTERFERENCE AND RACE-BAITING

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*Russian interference in the 2016 United States presidential election exposed the nation's vulnerability to targeted campaign disruption by foreign intelligence actors through social media. The Russian cyber disinformation campaign exploited racial divisions in the United States to undermine public confidence in American electoral processes and institutions, revealing how those divisions can be weaponized. The campaign fed on racial divisions arising from institutionalized state practices that have a disparate discriminatory effect on racial minorities. Successful in their online interference in 2016, Russian operatives continued to stoke these divisions in the 2018 midterm election and have begun to do so in the 2020 presidential election campaign. Russia will continue to stir racial division in future elections, and other states may follow suit. To combat this threat, reframing the manner in which national security institutions address matters of race is necessary.*

*This Article advocates that national security institutions adopt an explicit "racism as national security threat" framework in place of the implicit "minority race as threat" framework that has previously shaped national security institutions' behavior. It traces how a minority race as threat framework has historically guided national security institutional action in significant ways. Further, it elucidates how a racism as national security threat framework promotes American antidiscrimination law and international human rights law, and how the strategic*

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*retrenchment of policies, programs, and practices that engender racial discrimination will reduce American vulnerability to foreign exploitation. Ultimately, this Article seeks to popularize the understanding that racism subverts American national security, and frame the curtailment of institutionalized racism as a national security priority of the United States.*

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## I. INTRODUCTION

Widespread Russian interference in the 2016 United States presidential election through social media exposed the extent to which the United States is vulnerable, technologically and socially, to targeted foreign election disruption. The Russian security state studied and exploited pandemic racial divisions to depress American voters' confidence in electoral processes and faith in their democratic institutions.<sup>1</sup> This exploitation was possible chiefly because institutionalized racism—perpetuated in the form of police shootings of unarmed African Americans,<sup>2</sup> racial profiling, and mass incarceration—had already contributed to racial polarization in the United States.<sup>3</sup>

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<sup>1</sup> Ken Dilanian & Ben Popken, *Russia Favored Trump, Targeted African-Americans with Election Meddling, Reports Say*, NBC NEWS (Dec. 17, 2018), <https://www.nbcnews.com/politics/politics-news/russia-favored-trump-targeted-african-americans-election-meddling-reports-say-n948731> [<https://perma.cc/A7LV-RTKA>].

<sup>2</sup> This Article uses the terms “Black” and “African American,” at times interchangeably, to refer to the community of people of African descent present in the United States. Neither term is intended to exclude anyone not born in the United States nor possessing citizenship or residency status in the United States. The terms are intended to be inclusive of anyone of the African diaspora, present in the United States, who has been or could be impacted by policies and practices targeted at people based upon their African descent. The author acknowledges that race is a social construct.

<sup>3</sup> See, e.g., *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, PEW RES. CTR. (June 27, 2016), <http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/> [<https://perma.cc/HBV5-KLAV>] (finding “profound differences

Russia's actions in 2016 were not unprecedented. During the Cold War, Russia exploited the United States' mistreatment of minority populations to further its geopolitical agenda; the United States was susceptible to such exploitation due to ongoing institutionalized racism.<sup>4</sup> As this Article will establish, the policies of American security institutions have reflected the racial biases present in the United States, often resulting in the treatment of minority communities as a security problem that must be contained through over-policing, racial profiling, mass incarceration, race-based internment, and suppressive investigation. Consequently, minority racial identity itself has historically been seen as a security threat, as illustrated by examples such as the internment of Japanese Americans during World War II<sup>5</sup> and the infiltration and disruption of civil rights organizations in the 1960's and 1970's.<sup>6</sup>

Racialized state security practices continue to exist today—"broken windows" policing, stop-and-frisk policies, and racial profiling practices have effectively branded African American communities as criminal.<sup>7</sup> Similarly, post-9/11 domestic surveillance programs, targeted religion-based investigations, and racial profiling have categorized Muslim community members as terrorists,<sup>8</sup> just as aggressive immigration enforcement actions have deemed Latinx community

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between [B]lack and [W]hite adults in their views on racial discrimination, barriers to [B]lack progress and the prospects for change").

<sup>4</sup> See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (William Chafe et al. eds., 2d prtg. 2002).

<sup>5</sup> See *Korematsu v. United States*, 323 U.S. 214, 214–15 (1944).

<sup>6</sup> S. REP. NO. 94-755, at 6–7 (1976); see also *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972) (concerning government electronic surveillance of a civil rights activist's communications).

<sup>7</sup> See Justin Peters, *Loose Cigarettes Today, Civil Unrest Tomorrow: The Racist, Classist Origins of Broken Windows Policing*, SLATE (Dec. 5, 2014), <https://slate.com/news-and-politics/2014/12/edward-banfield-the-racist-classist-origins-of-broken-windows-policing.html> [<https://perma.cc/L6NY-EARJ>]; see also N.Y. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, *THE CIVIL RIGHTS IMPLICATIONS OF "BROKEN WINDOWS" POLICING IN NYC AND GENERAL NYPD ACCOUNTABILITY TO THE PUBLIC* (2018), <https://www.usccr.gov/pubs/2018/03-22-NYSAC.pdf> [<https://perma.cc/9RHL-5PTF>].

<sup>8</sup> Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1577–82 (2002); see also Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 COLUM. L. REV. ONLINE 108, 108–11 (2016).

members suspicious “illegals” who are dehumanized in political rhetoric.<sup>9</sup>

This racial legacy is unsurprising because the nation itself was founded through processes rooted in racial oppression: the enslavement of Africans and the decimation of indigenous Americans. These original sins created racial conflict that has continuously threatened the broader security of the United States. Internal violence in the form of slave revolts, the Civil War, and the Indian Wars were inevitable given the state’s oppression and subjugation of Africans and indigenous people.<sup>10</sup> Over time, racial oppression in the United States benefitted foreign state enemies because it delegitimized the American democratic project on the world stage, thereby undermining the United States’ ability to achieve its geopolitical objectives.<sup>11</sup>

Today, a new external threat, in the shape of weaponized racial division on social media, has arisen. Social media provided the perfect platform for the Russian interference operation—it enabled Russian agents to construct false identities, target online communities with “fake news” and advertisements, and organize rallies and other activities furthering racial division.<sup>12</sup> The Russians ran a focused and specific campaign intended to divide and disrupt American communities.<sup>13</sup> This campaign mirrored historical Russian election interference efforts throughout Europe that likewise sought to sway electoral outcomes by inflaming racial, ethnic, and other societal divisions.<sup>14</sup>

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<sup>9</sup> Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants “Animals” in Rant*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html> [<https://perma.cc/EZS6-UNXM>].

<sup>10</sup> The violent, internal racial conflict that the United States has experienced over the centuries—slave revolts, the so-called “Indian Wars,” the Civil War, race riots—is a result of state policies that enslaved and oppressed people of African descent and seized land from Native populations. Since before the nation’s founding, national security and domestic stability have been undermined by policies of racial oppression.

<sup>11</sup> See generally Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992); Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

<sup>12</sup> Indictment, *United States v. Internet Research Agency LLC*, No. 1:18-cr-00032-DFL, 2018 WL 914777 (D.D.C. Feb. 16, 2018) [hereinafter *Indictment*].

<sup>13</sup> *Id.*

<sup>14</sup> See discussion *infra* Section II.C.

This Article's goal is to widen the public conception that racism is an exploitable phenomenon that undermines American national security, and to frame the retrenchment of institutionalized racism as a national security priority of the United States.<sup>15</sup> Part II of the Article provides background on Russian interference in the 2016 presidential election campaign, the 2018 midterm election, and ongoing interference leading up to the 2020 election. It outlines how Russia's security services capitalized on racism in a widespread and systematic manner that affected the majority of Americans. It also discusses how Russia's efforts were a continuation of its use of propaganda regarding American race relations during the Cold War and how Russia has similarly engaged in ethnic division campaigns in other countries.

Part III introduces the idea of national security interest convergence, which posits that anti-discriminatory goals are best achieved when they align with the priority interests of the majority community and elite policymakers. It argues that the current Russian interference campaign demonstrates the danger that inflamed racial division poses to national security. Specifically, it calls for an understanding of national security as encompassing the protection of a full, rich, and inclusive democratic project in which Americans and foreign nations maintain faith. It advocates for the promotion of antidiscrimination measures as a national security priority that protects our democratic institutions from foreign intervention.

Part IV elaborates on the theory that national security institutions have historically approached issues of race through the use of a minority *race as threat* framework. This framework reflects how American policymakers and institutions, including those in the national security community, have regarded minority communities as threats to a racialized hierarchy and status quo. Through time, this minority *race as threat* framework obscured the harm to national security caused by institutionalized racism that impacts minority communities. These practices forged fertile ground for Russia's racial exploitation

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<sup>15</sup> This Article focuses on the retrenchment of institutionalized racism. The retrenchment of personal racial biases and general societal discrimination are beyond the scope of this piece. The national security justification for the retrenchment of institutionalized racial discrimination that this Article offers could also serve as justification for programs and initiatives that seek to alleviate personal racial bias and societal discrimination.

campaign. Part V then discusses the domestic and international legal schemes that apply to foreign election interference. It concludes that these legal structures were not designed to address the novel issue of Russia's online weaponization of race and suggests that new approaches are necessary to respond to such interference.

Part VI presents the solution to the minority *race as threat* approach to national security and to Russian exploitation of racial division, which is the adoption of a *racism as threat* framework that explicitly identifies institutionalized racism and discrimination as national security threats. Part VII of this Article operationalizes the *racism as threat* approach and calls for the ratification of antidiscrimination measures that prioritize the retrenchment of institutionalized discrimination. These measures include, among others, the express recognition of racism as a national security threat in executive orders, national security planning documents, and federal, state, and local legislation and policy planning.

Part VIII concludes with an analysis of how a *racism as national security threat* framework furthers the equal protection and anti-subordination objectives of American and international antidiscrimination law. The framework accomplishes this by creating a powerful policy rationale for state actors to proactively eliminate practices at the federal and local level that have discriminatory effects on racial minorities, further internal racial division, and foster opportunities for foreign manipulation. The new framework converges an anti-discrimination agenda with a national security agenda, promising greater protection for the civil rights of minority communities and for American democratic processes.

## II. RUSSIAN EXPLOITATION OF RACIAL DIVISION

Beginning with the 2016 presidential campaign, Russia used social media to strategically exploit internal racial divisions in the United States in order to affect electoral outcomes.<sup>16</sup>

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<sup>16</sup> Special Counsel Robert Mueller's report on his investigation into Russian interference during the 2016 presidential election reveals that Russian operatives first began creating social media accounts in the United States in mid-2014, sending operatives to the United States to gather photographs and other information to create fictitious American personas for social media accounts and group pages. These false accounts and group pages addressed divisive political issues and were designed to attract large

Russia's racially divisive social media campaign parallels recent Russian campaigns to agitate ethnic division in European countries with the purpose of impacting political elections. Russia's disinformation campaign in the United States is part of a modern-day global strategy of racial division that has a historical antecedent in the United States—Russia's utilization of American racial division for geopolitical ends during the Cold War.

### A. Russian Cyber Interference in the 2016 Election and Beyond

On January 17, 2017, two months after the 2016 United States presidential election, the Central Intelligence Agency (CIA), Federal Bureau of Investigation (FBI), and National Security Agency (NSA) released a report stating that the Russian government had conducted an extensive social media campaign to influence the election.<sup>17</sup> The intelligence agencies concluded that Russian President Vladimir Putin ordered the campaign and that “Russia’s goals were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency.”<sup>18</sup> They further deduced that the Russian disinformation campaign was widespread and multifaceted, encompassing both covert cyber activity and overt activity by Russian agencies, state-owned media, third party intermediaries, and paid social media users.<sup>19</sup> The agencies assessed that the operation was a continuation of long-established Russian efforts to influence American elections but marked a significant escalation in the level of directness, activity, and scope of effort.<sup>20</sup> Moreover, they

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audiences—eventually, they became the foundation for Russia’s “active measures” campaign in the 2016 presidential election. “Active measures” is a term Russian intelligence operatives use to refer to campaigns intended to influence international affairs. 1 ROBERT S. MUELLER, III, U.S. DEP’T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 14–15 (2019) [hereinafter MUELLER REPORT VOL. 1], <https://www.justice.gov/storage/report.pdf> [<https://perma.cc/B4TF-HAMF>].

<sup>17</sup> OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT U.S. ELECTIONS (2017) [hereinafter ODNI].

<sup>18</sup> *Id.* at ii.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*



characterized the campaign as an extension of Russia's enduring objective to undermine the United States-led liberal democratic order, which Russia perceives as a direct threat to Putin's regime.<sup>21</sup> An analyst with the Alliance for Securing Democracy<sup>22</sup> determined that the Russian effort to foment racial division intended to weaken the United States' democratic institutions, thereby elevating Russia's standing in the world.<sup>23</sup>

In addition to covertly acquiring and leaking e-mails from the Democratic National Committee and Clinton campaign chairman John Podesta to Wikileaks at strategic moments during the campaign cycle, the Russian influence campaign relied heavily on social media channels.<sup>24</sup> The Internet Research Agency (IRA), a Russian entity with ties to the Kremlin,<sup>25</sup> hired hundreds of "trolls"<sup>26</sup> to post fake news and socially divisive content on Facebook, Twitter, YouTube, and other platforms.<sup>27</sup> Facebook reported that the IRA posted content that reached over 140 million of its users.<sup>28</sup>

The Department of Justice (DOJ) appointed Special Counsel Robert Mueller in May 2017 to investigate, among other things, Russian interference in the 2016 presidential election and any links or coordination between the Russian

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<sup>21</sup> *Id.* at 1.

<sup>22</sup> The Alliance for Securing Democracy is a bipartisan, transatlantic initiative, housed at the German Marshall Fund of the United States, that "develops comprehensive strategies to defend against, deter, and raise the costs on Russian and other state actors' efforts to undermine democracy and democratic institutions." *About Us*, ALLIANCE FOR SECURING DEMOCRACY, <https://securingdemocracy.gmfus.org/about-us/> [<https://perma.cc/K4GX-3DYU>]. The Alliance works to publicly document and expose Vladimir Putin's ongoing efforts to subvert democracy in the United States and Europe. *Id.*

<sup>23</sup> Nina Jankowicz, *The Top Three Trends We Miss When Discussing Russian Ads*, ALLIANCE FOR SECURING DEMOCRACY (May 15, 2018), <http://securingdemocracy.gmfus.org/blog/2018/05/15/top-three-trends-we-miss-when-discussing-russian-ads> [<https://perma.cc/6UST-AXTL>].

<sup>24</sup> Jarred Prier, *Commanding the Trend: Social Media as Information Warfare*, 11 STRATEGIC STUD. Q. 50, 72 (2017).

<sup>25</sup> Adrian Chen, *The Agency*, N.Y. TIMES MAG. (June 2, 2015), <https://www.nytimes.com/2015/06/07/magazine/the-agency.html> [<https://perma.cc/8DRS-BJML>].

<sup>26</sup> "Trolls" refers to people who disrupt online interactions with antagonistic and offensive rhetoric and posts. *Id.*

<sup>27</sup> Jonathan Masters, *Russia, Trump and the 2016 U.S. Election*, COUNCIL ON FOREIGN REL. (Feb. 26, 2018), <https://www.cfr.org/background/russia-trump-and-2016-us-election> [<https://perma.cc/R8TM-GQ82>].

<sup>28</sup> *Id.*

government and the Trump campaign.<sup>29</sup> Mueller's February 2018 indictment of three Russian agencies, including the IRA, and thirteen Russian individuals spells out the scope of the operation.<sup>30</sup> The indicted Russian defendants allegedly covertly operated social media accounts, bought political advertisements, and staged political rallies in the United States.<sup>31</sup> The indictment states that the defendants allegedly created false American personas and operated social media pages and groups designed to attract American audiences.<sup>32</sup> They also allegedly stole identities of real Americans to post on IRA-controlled social media accounts, buy political advertisements, and promote political rallies on social media.<sup>33</sup> By 2016, these fake social groups had gained hundreds of thousands of followers.<sup>34</sup> For example, the IRA-created Twitter handle @Ten\_GOP, which stood for "Tennessee GOP," obtained over 100,000 online followers.<sup>35</sup>

According to the indictment's allegations, the IRA employed hundreds of staff in support of its online operation<sup>36</sup>—by 2015, Russia had hired hundreds of staff at the IRA "troll farm" in St. Petersburg, Russia, to disseminate false information over the Internet using false identities.<sup>37</sup> IRA employees, known as "specialists," were "directed to create 'political intensity through supporting radical groups, users dissatisfied with [the] social and economic situation and oppositional social movements.'"<sup>38</sup> The specialists created thematic groups on social media sites such as Facebook and Instagram, covering a cross-

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<sup>29</sup> ROD J. ROSENSTEIN, OFFICE OF THE DEPUTY ATTORNEY GEN., ORDER NO. 3915-2017, APPOINTMENT OF SPECIAL COUNSEL TO INVESTIGATE RUSSIAN INTERFERENCE WITH THE 2016 PRESIDENTIAL ELECTION AND RELATED MATTERS (2017).

<sup>30</sup> Indictment, *supra* note 12.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* ¶ 4.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* ¶ 34.

<sup>35</sup> Andrew Prokop, *23 Tweets from @TEN\_GOP, One Russian-Run Twitter Account Mentioned in Mueller's New Indictment*, VOX (Feb. 16, 2018), <https://www.vox.com/policy-and-politics/2017/10/19/16504510/ten-gop-twitter-russia> [<https://perma.cc/DYA7-CB3Z>].

<sup>36</sup> Indictment, *supra* note 12, ¶ 10a.

<sup>37</sup> Chen, *supra* note 25. One Russian newspaper estimated that the IRA had 400 employees and a budget of \$400,000 per month. *Id.*

<sup>38</sup> Indictment, *supra* note 12, ¶ 33.

section of hot-button social issues, including immigration, with group names like “Secured Borders”; the Black Lives Matter (BLM) movement, with group names including “Blacktivist”; and religion, with group names such as “United Muslims of America” and “Army of Jesus.”<sup>39</sup> IRA managers guided employees on posts to increase their social media influence<sup>40</sup> and trained staff on the nuances of American social issues like LGBTQ rights and gun rights.<sup>41</sup> By 2016, IRA specialists were further directed to make posts supporting Donald Trump and Bernie Sanders while criticizing Hillary Clinton.<sup>42</sup>

The intelligence agents had a thorough understanding of the important role that minority turnout would play in the election. By mid-2016, the IRA began an active campaign through social media to suppress minority voter turnout. For example, in the Instagram group “Woke Blacks,” the IRA posted: “[A] particular hype and hatred for Trump is misleading the people and forcing Blacks to vote Killary. We cannot resort to the lesser of two devils. Then we’d surely be better off without voting AT ALL.”<sup>43</sup> The specialists also posted the following through their Blacktivist group on Instagram: “Choose peace and vote for Jill Stein. Trust me, it’s not a wasted vote.”<sup>44</sup> On Election Day, in the IRA-controlled United Muslims of America social media account, specialists posted: “American Muslims [are] boycotting elections today, most of the American Muslim voters refuse to vote for Hillary Clinton because she wants to continue the war on Muslims in the middle east and voted yes for invading Iraq.”<sup>45</sup>

Mueller agreed with the prior conclusion of the intelligence community—the aim of the Russian cyber disinformation campaign was to sow discord in the American electoral process.<sup>46</sup> The IRA had specifically referred to itself as engaging in “in-

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<sup>39</sup> *Id.* ¶ 34.

<sup>40</sup> *Id.* ¶ 38.

<sup>41</sup> STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 115TH CONG., PUTIN’S ASYMMETRIC ASSAULT ON DEMOCRACY IN RUSSIA AND EUROPE: IMPLICATIONS FOR U.S. NATIONAL SECURITY 45 (Comm. Print 2018) [hereinafter SFRC REPORT].

<sup>42</sup> Indictment, *supra* note 12, ¶ 43.

<sup>43</sup> *Id.* ¶ 46a.

<sup>44</sup> *Id.* ¶ 46b.

<sup>45</sup> *Id.* ¶ 46c.

<sup>46</sup> *Id.* ¶ 6.

formation warfare” against the United States, and the IRA’s stated goal was to spread “distrust towards the candidates and the political system in general.”<sup>47</sup> An IRA staffer reported, “Our goal wasn’t to turn the Americans toward Russia . . . [o]ur task was to set Americans against their own government: to provoke unrest and discontent . . . .”<sup>48</sup>

Americans unwittingly assisted the Russian specialists in carrying out their program.<sup>49</sup> Specialists targeted BLM activists because of the racially divided response to the BLM anti-police-brutality movement in the United States. Russian news outlet RBC’s investigations revealed that Russian specialists recruited Black activists on Facebook to organize BLM rallies and self-defense classes and to produce content for Russian-owned sites denouncing police brutality.<sup>50</sup> When contacted, activists disclosed that they had no idea they were supporting a Russian scheme.<sup>51</sup> Two IRA-affiliated sites, Black Matters US and Black Fist, contacted Black activists such as Conrad James, a rally organizer, and Omowale Adewale, a mixed martial artist and trainer.<sup>52</sup> The Russians paid James to coordinate two political rallies in North Carolina and Adewale to arrange self-defense classes for the Black community on behalf of the IRA-created Black Fist group. Unbeknownst to these activists, Russia hoped to stoke societal fear of perceived Black militancy through coverage of BLM events.<sup>53</sup>

Russian operatives also collaborated with White nationalist groups and used other unwitting White nationalists to stir their racially divisive messages online. Andrew Anglin, the American publisher of the Daily Stormer, which is the world’s largest neo-Nazi website, spent 2015 in Russia promoting his

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<sup>47</sup> *Id.* ¶¶ 10c–10e.

<sup>48</sup> *An Ex St. Petersburg “Troll” Speaks Out: Russian Independent TV Network Interviews Former Troll at the Internet Research Agency*, MEDUZA (Oct. 15, 2017), <https://meduza.io/en/feature/2017/10/15/an-ex-st-petersburg-troll-speaks-out> [<https://perma.cc/QXV7-BT4Z>].

<sup>49</sup> Indictment, *supra* note 12, ¶¶ 51–57.

<sup>50</sup> Sidney Fussell, *Russia Deceived Black Activists into Aiding Their Election Interference Scheme*, GIZMODO (Oct. 18, 2017), <https://gizmodo.com/russia-deceived-black-activists-into-aiding-their-elect-1819657993> [<https://perma.cc/528N-RZ4J>].

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

racist rhetoric utilizing Russian bots.<sup>54</sup> This collaboration aligned with Russia's strategy to support far-right nationalist groups in Western democracies.<sup>55</sup> Russia's expedition of racial division persisted after the 2016 election—Congressman Tom Garrett reported the FBI's conclusion that Russia continued to divide Americans along racial lines by inciting such divisions at the 2017 Unite the Right rally in Charlottesville, Virginia.<sup>56</sup> The same fake Russian social media networks that infiltrated the 2016 election amplified divisive right-wing extremist rhetoric after Charlottesville by posting right-wing extremist rhetoric and conspiracy theories on social media.<sup>57</sup>

Racial division was fundamental to Russia's interference campaign. More than half of the Russian advertisements on Facebook, for example, used race as a central theme to sow disunion.<sup>58</sup> Facebook supplied 3000 advertisements from the IRA and Russian troll farms to congressional investigators, many of which employed racist tropes intending to influence the American public.<sup>59</sup> Facebook was particularly vulnerable to a strategic advertisement operation because its self-service advertisement model permits users to create their own advertisements and target recipients based on geography, demographics, and specific interests.<sup>60</sup> This capacity allowed

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<sup>54</sup> Luke O'Brien, *The Making of an American Nazi*, ATLANTIC (Dec. 2017), <https://www.theatlantic.com/magazine/archive/2017/12/the-making-of-an-american-nazi/544119/> [<https://perma.cc/2DVZ-JTJ5>].

<sup>55</sup> Casey Michel, *Inside Russia's Alliance with White Nationalists Across the Globe*, THINKPROGRESS (Oct. 15, 2017), <https://thinkprogress.org/interview-russia-the-far-right-f3fd27ceb928/> [<https://perma.cc/5LL4-4MCV>].

<sup>56</sup> Deirdre Shesgreen, *GOP Lawmaker: Russian Meddling Stirred Racial Divisions at Fatal Charlottesville Rally*, USA TODAY (Aug. 11, 2018), <https://www.usatoday.com/story/news/politics/2018/08/11/russians-involved-unite-right-charlottesville-tom-garrett-jr/966669002/> [<http://perma.cc/VCA6-NXSM>].

<sup>57</sup> Isaac Arnsdorf, *Pro-Russian Bots Take Up the Right-Wing Cause After Charlottesville*, PROPUBLICA (Aug. 23, 2017), <https://www.propublica.org/article/pro-russian-bots-take-up-the-right-wing-cause-after-charlottesville> [<https://perma.cc/S5CS-WD6Q>].

<sup>58</sup> Chas Danner, *More Than Half of Russian Facebook Ads Focused on Race*, N.Y. MAG. (May 12, 2018), <http://nymag.com/intelligencer/2018/05/more-than-half-of-russian-facebook-ads-focused-on-race.html> [<https://perma.cc/AX8W-SD3S>].

<sup>59</sup> *Id.*

<sup>60</sup> Dylan Byers, *Exclusive: Russian-Bought Black Lives Matter Ad on Facebook Targeted Baltimore and Ferguson*, CNN (Sept. 28, 2017), <http://>

the Russian agents to sow political and racial discord in particular communities.<sup>61</sup> At least one BLM advertisement specifically targeted the communities in Baltimore and Ferguson, which had experienced widespread protests and violent clashes with the police following the police killings of two unarmed Black men—Freddie Gray and Michael Brown, respectively.<sup>62</sup> One Russian-created Facebook page, posing as a Muslim rights organization, attracted over 268,000 followers and posted an advertisement accusing Senator John McCain and Secretary Clinton of funding the terrorist groups ISIS and Al-Qaeda.<sup>63</sup> Another advertisement, displaying Black women with guns protesting police brutality, was designed to stoke fear of an armed BLM uprising.<sup>64</sup>

The Congressional Black Caucus held hearings with Facebook COO Sheryl Sandberg in October 2017 to impress on Facebook the need to counteract the thousands of Russian advertisements on Facebook, which were devised to negatively influence public sentiment regarding social justice movements like BLM.<sup>65</sup> Congressman Andre Carson also emphasized the effect that Russian advertisements can have on U.S. government action. He noted the August 2017 revelation by *Foreign Policy Magazine* of an FBI intelligence report predicting premeditated attacks against the police by “[B]lack identity extremists,” and expressed concern that the Russian advertisements were creating a narrative that the FBI would adopt.<sup>66</sup>

Democrats on the House Intelligence Committee released over 3500 political advertisements posted by the Russians

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money.cnn.com/2017/09/27/media/facebook-black-lives-matter-targeting/index.html [https://perma.cc/5DWL-8QYQ]. Facebook allows creators of advertisements to target their advertisements at core audiences, including groups defined by location or demographics such as age, race, gender, and political views. See *Find Your Audience: Your Next Customers Are Here*, FACEBOOK, <https://www.facebook.com/business/ads/ad-targeting> [https://perma.cc/4L5R-S5Y7].

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Fussell, *supra* note 50.

<sup>64</sup> *Id.*

<sup>65</sup> Elana Schor & Heather Caygle, *CBC Scolds Facebook over Black Lives Matter Ads*, POLITICO (Oct. 12, 2017), <https://www.politico.com/story/2017/10/12/facebook-black-lives-matter-ads-cbc-243715> [http://perma.cc/2N4T-RFV2].

<sup>66</sup> *Id.*

to demonstrate the scope of Russian intrusion on social media.<sup>67</sup> Russia's agenda to propagate social division in the 2018 election was evident by the fact that many of the more than 3500 political advertisements produced on Facebook and Instagram did not support individual candidates, but rather focused on hot-button social issues such as police brutality, immigration, LGBTQ rights, and gun rights.<sup>68</sup> Viewed in totality, it became clear that the Russians produced advertisements with diametrically opposed positions on the same social issues with the goal of inflaming divisions in American society.<sup>69</sup> Facebook estimates that the political advertisements were viewed by more than ten million Americans during the 2016 election campaign.<sup>70</sup>

In addition to the 3500 political advertisements already released, Democrats on the House Intelligence Committee have promised to publish some of the more than 80,000 organic posts on Facebook and 120,000 organic posts on Instagram that reached over 146 million Americans.<sup>71</sup> These posts also used racial controversies to exacerbate divisions. For example, Russian agents were responsible for generating the impression that mass violence was occurring on the University of Missouri campus in the midst of peaceful student protests about the treatment of African Americans.<sup>72</sup> The false allegations went viral and people on the campus feared that a violent uprising had occurred.<sup>73</sup>

The Senate Select Committee on Intelligence (SSCI) commissioned two reports on Russian interference in the election based on the materials submitted to them by social media companies. Draft copies of the reports were released publicly in December 2018.<sup>74</sup> Both relied on information sub-

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<sup>67</sup> Issie Lapowsky, *House Democrats Release 3,500 Russia-Linked Facebook Ads*, WIRED (May 10, 2018), <https://www.wired.com/story/house-democrats-release-3500-russia-linked-facebook-ads/> [<https://perma.cc/B5ZF-QDCE>].

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Nitasha Tiku, *How Russia "Pushed Our Buttons" with Fake Online Ads*, WIRED (Nov. 3, 2017), <https://www.wired.com/story/how-russia-pushed-our-buttons-with-fake-online-ads/> [<https://perma.cc/XAK6-WEGU>].

<sup>71</sup> Lapowsky, *supra* note 67.

<sup>72</sup> Prier, *supra* note 24, at 68–70.

<sup>73</sup> *Id.*

<sup>74</sup> Dilanian & Popken, *supra* note 1.

mitted to the SSCI by Facebook, Twitter, and Google as well as social media data delivered from additional sources.<sup>75</sup> Together, the two studies constitute the most comprehensive analysis to date of IRA activity on social media platforms during the 2016 presidential election and beyond. The first report, *The IRA, Social Media and Political Polarization in the United States, 2012-2018*, produced by the University of Oxford and Graphika, assessed that between 2015 and 2017, thirty million users shared Facebook and Instagram posts composed by the IRA.<sup>76</sup> The report also determined that the IRA campaign was designed to polarize the American public and to interfere in the election by: (1) encouraging African Americans to boycott the election or use incorrect voting procedures, (2) encouraging Latinx voters to distrust American institutions, (3) encouraging extreme right-wing voters to be more confrontational, and (4) spreading sensationalist, conspiratorial, and false information to voters across the political spectrum.<sup>77</sup>

The second report, *The Tactics and Tropes of the Internet Research Agency*, compiled by New Knowledge, revealed that the Russian cyber disinformation scheme was much more prominent on Instagram than had previously been reported and that the IRA began to shift its activity to Instagram in 2017 after the media began reporting on their Facebook and Twitter operations.<sup>78</sup> The New Knowledge report concluded that the most prolific element of the Russian cyber operation specifically targeted the African American community by recruiting Black audiences<sup>79</sup> through the promotion of authentic Black media.<sup>80</sup> The social media campaign also targeted Black audiences for voter suppression through malicious misdirection, candidate support redirection, and turnout depression. The report concluded that active and ongoing Russian cyber

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<sup>75</sup> RENEE DiRESTA ET AL., NEW KNOWLEDGE, THE TACTICS AND TROPES OF THE INTERNET RESEARCH AGENCY 8 (2018) [hereinafter NEW KNOWLEDGE REPORT]; PHILIP N. HOWARD ET AL., THE IRA, SOCIAL MEDIA AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012–2018, at 3 (2018).

<sup>76</sup> HOWARD ET AL., *supra* note 75, at 3.

<sup>77</sup> *Id.*

<sup>78</sup> NEW KNOWLEDGE REPORT, *supra* note 75, at 8.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*



operations continued after the 2016 election cycle to the present day.<sup>81</sup>

On March 22, 2019, Special Counsel Mueller submitted his final report on the investigation of Russian interference in the 2016 presidential election, collusion by President Donald Trump's campaign, and presidential obstruction of justice to the Attorney General.<sup>82</sup> Attorney General Barr released a four-page summary of the report, which stated that the report determined that Russia had engaged in an insidious effort to influence the 2016 election by (1) spreading disinformation and sowing social discord through social media and (2) hacking the e-mail accounts of the Clinton campaign and DNC officials and releasing them through Wikileaks and other intermediaries.<sup>83</sup> Although Mueller indicted several Russian individuals and entities for election interference, his investigation did not find sufficient evidence to charge Trump campaign officials with conspiracy to support the Russian effort.<sup>84</sup> Barr also stated that Mueller was unable to reach a determination on the question of obstruction of justice and that accordingly, Barr made his own conclusion that the record was insufficient to substantiate obstruction of justice charges.<sup>85</sup> In response to a request from Congress to release

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<sup>81</sup> *Id.* at 7.

<sup>82</sup> Sharon LaFraniere & Katie Benner, *Mueller Delivers Report on Trump-Russia Investigation to Attorney General*, N.Y. TIMES (Mar. 22, 2019), <https://www.nytimes.com/2019/03/22/us/politics/mueller-report.html> [<https://perma.cc/65YT-TWSE>].

<sup>83</sup> *Read Attorney General William Barr's Summary of the Mueller Report*, N.Y. TIMES (Mar. 24, 2019), <https://www.nytimes.com/interactive/2019/03/24/us/politics/barr-letter-mueller-report.html> [<https://perma.cc/94JQ-3TR2>].

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* Although Mueller did not make a prosecutorial decision on obstruction of justice, his report clearly states that he was also not clearing the president of wrongdoing. Instead, the report lays out several instances in which the president appeared to have obstructed justice and the legal rationale for how Congress could so find. See 2 U.S. DEPT OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 8 (2019) [hereinafter "Mueller Report Vol. 2"]. Mueller likely decided to leave this decision to Congress, as he was unable to indict a sitting president under longstanding Justice Department policy. See *id.* at 1 ("The Office of Legal Counsel (OLC) has issued an opinion finding that 'the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its Constitutionally assigned functions'. Given the role of the Special

the full report,<sup>86</sup> Barr issued a redacted version to Congress and the public on April 18, 2019.<sup>87</sup>

The Mueller report detailed the scope of the Russian interference campaign. It found that the IRA had hundreds of thousands of American participants in its Facebook groups and on its Instagram accounts.<sup>88</sup> The IRA's Facebook accounts alone reached over 126 million people.<sup>89</sup> Similarly, the IRA controlled over 3800 Twitter accounts that had thousands of American followers, including several United States political leaders, and may have reached over 1.4 million people.<sup>90</sup> Several high profile figures retweeted information from IRA accounts, and the media reported on tweets from IRA accounts as if they were posted by Americans.<sup>91</sup> Regarding the Russian online interference campaign, the Mueller report noted that although thirteen Russian individuals and three Russian entities, including the IRA, had been indicted by a Washington, D.C. federal grand jury, the defendants remained at large.<sup>92</sup>

Though Mueller was limited in his investigation to studying the scope of Russian election interference in the 2016 campaign, media and expert analysis reveal that Russia attempted to interfere in the 2018 midterm elections<sup>93</sup> and is most likely already interfering in the 2020 presidential election cycle, as of the time of this Article. Cyber analysts are not yet able to determine definitively that Russia is the source of the

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Counsel as an attorney in the Department of Justice . . . this Office accepted OLC's legal conclusion for the purpose of exercising prosecutorial discretion.”).

<sup>86</sup> Press Release, U.S. House Comm. on the Judiciary, House Committee Chairs Take Next Step for Release of Full Mueller Report and Underlying Evidence (Apr. 2, 2019), <https://judiciary.house.gov/news/press-releases/house-committee-chairs-take-next-step-release-full-mueller-report-underlying> [<https://perma.cc/5D2X-M4BU>].

<sup>87</sup> MUELLER REPORT VOL. 1, *supra* note 16.

<sup>88</sup> *Id.* at 15.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 27–28.

<sup>92</sup> *Id.* at 174. The only litigation following the indictment involved one of the indicted Russian entities, Concord Management and Consulting LLC, which moved to have its charges dismissed by the District Court for the District of Columbia. *Id.*

<sup>93</sup> Alex Ward, *The 2018 Midterm Election Hasn't Been Hacked—but Russia Is Still Trying to Influence It*, VOX (Nov. 6, 2018), <https://www.vox.com/policy-and-politics/2018/11/6/18067756/midterm-election-russia-hacking-interference-meddling-china-iran> [<https://perma.cc/F85N-74NU>].

foreign cyber campaign targeting 2020 Democratic presidential candidates, but they have noted that the attacks share similar characteristics with Russia's IRA troll farm.<sup>94</sup> A 2019 investigative study by *Politico*, assisted by Guardians.ai (a technology company that works to disrupt cyberattacks and protect pro-democracy groups), concluded that bot-like social media accounts had targeted Democratic primary candidates Senator Kamala Harris, Senator Elizabeth Warren, Senator Bernie Sanders, and former congressman Beto O'Rourke with viral attacks involving accusations intended to inflame racial division.<sup>95</sup> One attack falsely accused Senator Warren of having a blackface doll in her kitchen during a New Year's Eve livestream on social media.<sup>96</sup> Another cyberattack accused Beto O'Rourke of using a racial epithet in a voicemail in the 1990's.<sup>97</sup> The accounts also utilized racist and sexist stereotypes in sensationalizing Senator Harris's former relationship with San Francisco mayor Willie Brown.<sup>98</sup>

The goal of the attacks is to undermine candidacies and to instigate racial discord within the Democratic primary.<sup>99</sup> Guardians.ai found that a core group of 200 accounts was responsible for the attacks, and these same accounts were active in spreading disinformation during the 2018 midterm election.<sup>100</sup> Whether the current disinformation offensive against Democratic candidates are proven to originate from Russia or from another source, they show that Russia's strategic use of social media platforms to disseminate disinformation and drive a wedge among the American public with race-baiting techniques has become the norm in American election cycles. Current and former American intelligence analysts and operatives predict that Russia will extend their cyber disinformation campaign into the 2020 election cycle because of their successful attempt to stir social division and political

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<sup>94</sup> Natasha Korecki, "Sustained and Ongoing" Disinformation Assault Targets Dem Presidential Candidates, *POLITICO* (Feb. 20, 2019), <https://www.politico.com/story/2019/02/20/2020-candidates-social-media-attack-1176018> [<https://perma.cc/G67C-WJHB>].

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

chaos, as illustrated by the political divide within Congress over how to respond to the Mueller report's release.<sup>101</sup>

## B. Cold War Geopolitics and Race

Russia's exploitation of racial divisions in the United States did not begin with the 2016 presidential election. Retired brigadier general Bruce McClintock, the former senior defense official at the United States Embassy in Moscow, observed that the Russian IRA troll farm tactics are in keeping with Russia's past efforts to inflame racial division in the United States, including reports that the KGB drafted supposed letters from the Ku Klux Klan (KKK) and spread various conspiracy theories about government involvement in Martin Luther King Jr.'s assassination.<sup>102</sup>

During the decades-long Cold War that followed World War II, Russia regularly used American racial strife for its own geopolitical aspirations. Russia exploited the situation in both external and internal ways. Externally, Russia proffered arguments about the moral hypocrisy of a liberal democracy that discriminated against minorities. Internally, Russia sought to agitate divisions with disinformation campaigns that built on racial tensions—a precursor to its 2016 election interference.

In January 1948, in a *New York Times Magazine* article, Robert Cushman, a Cornell University professor and member of President Truman's Committee on Civil Rights, summarized the implications of racism in America to the post-World War II global order:

[T]he nation finds itself the most powerful spokesman for the democratic way of life, as opposed to the principles of a totalitarian state. It is unpleasant to have the Russians publicize our continuing lynchings, our Jim Crow statutes and customs, our anti-Semitic discriminations and our witch-hunts; but is it underserved? . . . [We] cannot deny the truth of the charges; we are becoming aware that we do not practice the

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<sup>101</sup> Amy MacKinnon, *What the Mueller Report Tells Us About Russia's Designs on 2020*, FOREIGN POL'Y (Apr. 19, 2019), <https://foreignpolicy.com/2019/04/19/what-the-mueller-report-tells-us-about-russias-designs-on-2020-kremlin-putin-intelligence/> [https://perma.cc/92GC-SNNP].

<sup>102</sup> Tiku, *supra* note 70.

civil liberty we preach; and this realization is a wholesome thing.<sup>103</sup>

Similarly, American embassies around the world were forced to respond to inquiries and consistent press coverage about the mistreatment of African Americans in the United States and how it undermined American moral leadership.<sup>104</sup> In a 1949 cable, the United States Embassy in Moscow reported that

the “Negro question,” [was] [o]ne of the principal Soviet propaganda themes regarding the United States. . . . [T]he Soviet press hammers away unceasingly on such things as “lynch law,” segregation, racial discrimination, deprivation of political rights, etc., seeking to build up a picture of an America in which the Negroes are brutally downtrodden with no hope of improving their status under the existing form of government.<sup>105</sup>

Senator William Benton warned his Senate colleagues that Soviet propaganda regarding American racism was greatest in those countries that were caught between the Cold War philosophies of American democracy and Soviet communism: “[T]he fate of mankind may be decided . . . in Latin America, in Germany, and the Slavic countries of Europe, among the dark-skinned nations of Africa and southeast Asia, and among the yellow skinned peoples on the Asiatic mainland and the nearby island areas.”<sup>106</sup> Russian Cold War propaganda sought to convince states emerging from colonialism that American liberal democracy was flawed and that aligning with the Soviet Union would better serve their interests. Today, Russian propaganda seeks to undermine Western governments and their

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<sup>103</sup> DUDZIAK, *supra* note 4, at 29 (quoting Robert E. Cushman, *Our Civil Rights Become a World Issue*, N.Y. TIMES MAG., Jan. 12, 1948, at 12); Dudziak, *supra* note 11; *see also* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

<sup>104</sup> DUDZIAK, *supra* note 4, at 29–37.

<sup>105</sup> *Id.* at 38.

<sup>106</sup> *Id.* at 39.

democratic institutions from within, and with the growth of social media, they have found the perfect platform to do so.

### C. Racial Polarization as a Global Strategy

Russia's race-baiting and online proliferation of societal division in the 2016 United States presidential election is not only part of a long-standing geopolitical strategy to undermine the authority of the United States, but is also a key element of Russia's intent to pursue its interests in states globally. Russia has been particularly active in foreign influence campaigns in Europe for over two decades.<sup>107</sup> The first wave involved Russian intervention in former Soviet states following the dissolution of the Soviet Union in 1991.<sup>108</sup> The second wave began in 2014, when Russia began to intervene in Western European democratic elections.<sup>109</sup> A 2018 Senate Foreign Relations Committee minority staff report on Russian attacks on democracy in the United States and Europe observed that

[i]n consolidated democracies within the EU and NATO, the Russian government seeks to undermine support for sanctions against Russia, interfere in elections through overt or covert support of sympathetic political parties and the spread of disinformation, and sow discord and confusion by exacerbating existing social and political divisions through disinformation and cultivated ideological groups.<sup>110</sup>

A key component of Russia's foreign election interference in Europe is the sowing of racial, ideological, and societal discord through cyber disinformation campaigns, just as it does in the United States.<sup>111</sup> The Kremlin views the fostering of internal division in democratic states as a low-cost, high-reward tool for

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<sup>107</sup> Lucan Ahmad Way & Adam Casey, *Russia Has Been Meddling in Foreign Elections for Decades. Has It Made a Difference?*, WASH. POST (Jan. 8, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/05/russia-has-been-meddling-in-foreign-elections-for-decades-has-it-made-a-difference> [<https://perma.cc/8JVE-SCTG>].

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> SFRC REPORT, *supra* note 41, at 2.

<sup>111</sup> *Id.* at 38.

splitting its adversaries and undermining faith in democratic institutions.<sup>112</sup> The expansion of the fairly unregulated social media space, where most individuals now consume their news, has created an ideal platform for Russia's division endeavor.<sup>113</sup> Immediately prior to, during, and after the 2016 presidential election, Russia's cyber disinformation campaigns in Europe focused on social issues specific to the countries that they targeted, such as extreme nationalism, anti-Semitism, Islamophobia, xenophobia, and neo-Nazism in Austria, France, Germany, Hungary, Italy, and Latvia.<sup>114</sup> Russia sought maximum division by supporting ideologically opposed groups and viewpoints on both the right and left of the political spectrum.<sup>115</sup> Though Russian intervention may be challenged by expanded regulation of social media, discussed in Part VII, this Article advocates for the proactive minimization of state practices in the United States that create fertile ground for Russia's tactics. Such an approach would achieve antidiscrimination and national security goals that are in the interest of the American public.

### III. NATIONAL SECURITY INTEREST CONVERGENCE

Legal scholar Derrick Bell famously argued that civil rights advances for African Americans in the courts did not occur merely because legal advocates were able to convince courts that those advances were just or required by the Constitution.<sup>116</sup> He advanced the argument that civil rights legal victories such as *Brown v. Board of Education* instead reflected an "interest convergence" of the civil rights aims of the African American community with the broader interests of the demographic majority in the mid-twentieth century.<sup>117</sup> Bell contended that African Americans had been challenging the insufficiency of inferior and segregated public schools for African American children for a century prior to *Brown*, yet those challenges had never resulted in a determination that the Constitution or the post-Civil War Equal Protection Clause

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<sup>112</sup> *Id.* at 1.

<sup>113</sup> *Id.* at 6.

<sup>114</sup> *Id.* at 50–51.

<sup>115</sup> *Id.* at 52–53.

<sup>116</sup> Bell, Jr., *supra* note 103, at 523.

<sup>117</sup> *Id.* ("The interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of [W]hites.").

required integrated schools.<sup>118</sup> In Bell's view, racial progress in the form of integrated schools occurred only when it was perceived to be in the interests of the racial majority.

Bell argued that the *Brown* decision must be understood in light of its benefit not only to African Americans, but also to the White community—particularly policymakers who understood the political and economic benefits at home and abroad that would come with desegregation.<sup>119</sup> Foreign policy elites understood the damage that oppression of African Americans had inflicted on the United States' reputation abroad, especially as it battled the Communist Soviet Union for influence in newly independent countries emerging from colonialism and populated by people of color.<sup>120</sup> Federal government lawyers joined the NAACP in advancing this Cold War argument to the Supreme Court.<sup>121</sup> The United States' amicus brief in *Brown* stated:

It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. . . . [for] discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.<sup>122</sup>

Professor Sudha Setty adopts Bell's interest convergence framework in arguing that legislators are not likely to protect marginalized groups from national security abuse if such action might be perceived as soft on counterterrorism by mainstream constituencies—unless the legislators are provided with an interest that is more palatable to those communities.<sup>123</sup> This Article

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<sup>118</sup> *Id.* at 523–24 (citing *Roberts v. City of Boston*, 59 Mass. 198 (1850) (an early challenge to inferior public schools for African Americans)).

<sup>119</sup> *Id.* at 524.

<sup>120</sup> *Id.*; Dudziak, *supra* note 11, at 118.

<sup>121</sup> Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 12 (1976).

<sup>122</sup> Brief for the United States as Amicus Curiae at 6, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10).

<sup>123</sup> See Sudha Setty, *National Security Interest Convergence*, 4 HARV. NAT'L SECURITY J. 185, 206, 225 (2012).



posits that the inoculation of American democratic processes from foreign exploitation by reducing institutional discrimination is such a converged national security interest.

In order to demonstrate how the advancement of anti-discrimination and national security interests converge in the present moment, it is necessary to define with specificity the converging interests. National security, broadly defined, encompasses the protection of the American people, government, homeland, infrastructure, and economic system from domestic and foreign threats.<sup>124</sup> National security institutions comprise those state agencies charged with this task, including but not limited to: at the federal level, the Department of Defense (DOD), the DOJ, the FBI, the CIA, and the Department of Homeland Security (DHS); and, at the state and local level, prosecutor offices, police departments, and law enforcement agencies.<sup>125</sup> Historically, national security institutions and their leadership—at both the national and local level—reflected the values and beliefs of dominant American culture and helped protect racially oppressive practices (such as slavery and Jim Crow laws) for nearly 200 years following American independence.<sup>126</sup>

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<sup>124</sup> For the purpose of this Article, I adopt a definition of national security similar to “the protection of the state and its citizens [from internal and external threats] through a variety of means, including military might, economic power, diplomacy, and power projection.” *Functions of Bureaucracy*, LUMEN LEARNING, <https://courses.lumenlearning.com/boundless-political-science/chapter/functions-of-bureaucracy/> [<https://perma.cc/P6MW-9U9M>].

<sup>125</sup> The National Security Act of 1947 created many of the national security institutions that exist today, including the National Security Council, the Department of Defense, the Joint Chiefs of Staff, and the Central Intelligence Agency. National Security Act of 1947, Pub. L. No. 80-253, §§ 101–211, 61 Stat. 495, 496–505 (codified as amended at 50 U.S.C. § 3001 (2018)). Other national security institutions, such as the Department of Justice and the Federal Bureau of Investigation, preceded the National Security Act. The Federal Bureau of Investigation was created on July 26, 1908, by memorandum of Attorney General Charles Bonaparte. *See A Brief History: The Nation Calls, 1908-1923*, FED. BUREAU INVESTIGATIONS, <https://www.fbi.gov/history/brief-history> [<https://perma.cc/XD5L-CMYV>]. Other institutions, such as the Department of Homeland Security, were created much later. The Department of Homeland Security was created by the Homeland Security Act of 2002 in the aftermath of the 9/11 attacks. Pub. L. No. 107-296, 116 Stat. 2135 (2002).

<sup>126</sup> As discussed in Part IV, national and local political, judicial, military, and law enforcement forces sustained slavery and Jim Crow practices by passing and enforcing laws that made racial subordination a way of life for African Americans for nearly 200 years (475 years if slavery during the pre-Independence colonial era is included).

It was only in the latter half of the twentieth century that the African American community and allies successfully forced a conception of national security that encompassed the elimination of *de jure* segregation and race-based disenfranchisement.<sup>127</sup>

From its founding, the security and success of the American democratic project was inextricably linked to its treatment of African Americans. The national security of the United States has been enhanced each time racially oppressive practices have been eliminated because the social division, and resulting violence, arising from the enforcement of and opposition to those institutions have ceased. This Article argues that American national security interests encompass the protection of democratic institutions and electoral processes from foreign intervention. Russia's cyber disinformation campaign has sought to externally influence and destabilize American electoral processes by exploiting racial grievances and fostering racial polarization.<sup>128</sup> The advancement of an antidiscrimination agenda focused on the retrenchment of institutional discrimination would alleviate a significant source of racial grievances for minority community members and reduce the opportunities for foreign exploitation of those legitimate grievances. Modern-day forms of institutional discrimination in national security institutions include such practices as racial profiling, broken windows over-policing, law enforcement killings of unarmed African Americans, race and identity-based investigative programs, and discriminatory immigration enforcement practices.<sup>129</sup> These practices, controlled by federal and local security institutions, have negative racial impacts in minority communities that create fertile ground for foreign exploitation.<sup>130</sup> The convergence of these two agendas—

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<sup>127</sup> As seen in segregated national institutions such as the Armed Forces and the federal civil service, segregation was not merely a southern issue, but a national one. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 520–21 (1991).

<sup>128</sup> See discussion *supra* Part II.

<sup>129</sup> For a discussion on immigration policies, see *infra* Section VI.A. For a discussion on racial profiling after 9/11, see *infra* Section IV.B.

<sup>130</sup> See, e.g., Lenese C. Herbert, *Bête Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149, 156 (2003) (“Race-based policing guts the expectation of fair-dealing, legitimacy, and justice in the criminal justice system, creating marginalized populations, especially of African Americans. Lack of judicial redress in the face of such policing irrevocably stains already beleaguered African Americans (and others so policed) as inferior citizens. This, in turn, may actualize a

eliminating institutional discrimination and mitigating foreign intervention in electoral processes—calls for a national security project that places antidiscrimination at its core.<sup>131</sup>

#### IV. A RACE AS THREAT NATIONAL SECURITY APPROACH

America's unfortunate historical treatment of race has always affected its broader national security given that its formation relied upon both slavery and the brutal conquest of Native Americans, which created the seeds for deep internal and external rifts. Throughout the nineteenth and early twentieth century, wars (collectively called the "American Indian Wars") were fought against Native Americans for territory, and slave rebellions were violently suppressed by American soldiers and state militias.<sup>132</sup> The national security of the state became synonymous with the maintenance of a status quo that maintained minority oppression. Laws were instituted to maintain control of both slaves and Native Americans as well

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catalyst of cooperative opportunity and vulnerability for those who seek to injure the United States, its institutions, and its people."); *see also supra* Part II.

<sup>131</sup> Private racial discrimination, like institutional discrimination, has a negative impact on the experiences of minorities in the United States that creates the opportunity for foreign racial exploitation. Though anti-discrimination law, and robust enforcement of that law, can mitigate private discrimination, private viewpoint discrimination cannot be eliminated by the state. This Article, therefore, focuses on the prevention of institutional discrimination. Specifically, it focuses on discrimination by security institutions because institutional practices are those most within the capacity of the state to prevent, and institutional discrimination has a sweeping impact on minority communities. As discussed in Part VI, racism should be framed as a national security threat in order to advance American foreign policy goals and to safeguard electoral processes. Such a framing is also likely to garner the support of a broader community of citizens for new anti-discrimination measures.

<sup>132</sup> The post-independence American Indian Wars encompassed conflict from the Cherokee-American Wars of 1776 to 1794 through the wars on the Western frontier, including the Apache Wars of 1849 to 1924. Historian Herbert Aptheker identified more than 250 slave revolts and planned revolts in his pioneering study, *American Negro Slave Revolts*, including Gabriel Prosser's slave rebellion of 1800, Denmark Vesey's slave revolt of 1822, and Nat Turner's Rebellion of 1831. Herbert Aptheker, *American Negro Slave Revolts*, 1 SCI. & SOC'Y 512, 537 (1937); *see also Slave Rebellions: A Timeline*, PBS, [www.pbs.org/independentlens/natturner/slave\\_rebellions.html](http://www.pbs.org/independentlens/natturner/slave_rebellions.html) [<https://perma.cc/PR57-8M6N>]. Prosser, Vesey, and Turner's slave rebellions occurred during the timeframe Aptheker analyzed.

as new migrants from China. The Fugitive Slave Act of 1850,<sup>133</sup> the Indian Removal Act of 1830,<sup>134</sup> and the Chinese Exclusion Act of 1882<sup>135</sup> all sought to maintain the status quo—African Americans in bondage, Native Americans conquered and isolated, and immigrant Chinese laborers denied citizenship. However, these policies of racial oppression themselves threatened American national security and stability because they divided the nation. Ultimately, the stability and security of the United States was shattered by the Civil War between Northern and Southern states fought over the institution of slavery.<sup>136</sup> Following the Civil War, in which 750,000 lives were lost,<sup>137</sup> a new status quo was envisioned by the Union Congress, which approved post-war constitutional amendments guaranteeing African Americans freedom, citizenship, equal protection of the laws, and the right to vote.<sup>138</sup> Despite these constitutional changes, a century of Jim Crow segregation and racial terror against African Americans soon commenced.

### A. Race as Threat

During the pre-Civil War period, the political leadership of the nation considered the freedom and equality of African Americans and other minorities as antithetical to their vision of national security. National security meant stability of the status quo, which included protection of a system of racial superiority that oppressed minority groups. Racial equality was a threat to that status quo. Because racial minorities would continue to fight and advocate for their freedom and equality, they themselves became dangerous to this view of national security: *minority race* became a threat. This conception of

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<sup>133</sup> Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864).

<sup>134</sup> Indian Removal Act of 1830, ch. 148, 4 Stat. 411.

<sup>135</sup> Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58. (repealed 1943).

<sup>136</sup> Tony Horwitz, *150 Years of Misunderstanding the Civil War*, ATLANTIC (June 19, 2013), <https://www.theatlantic.com/national/archive/2013/06/150-years-of-misunderstanding-the-civil-war/277022/> [https://perma.cc/RX6W-5NXP] (“[T]he Civil War claimed more lives than all other American wars combined . . .”).

<sup>137</sup> Daniel Nasaw, *Who, What, Why: How Many Soldiers Died in the US Civil War?*, BBC (Apr. 4, 2012), <https://www.bbc.com/news/magazine-17604991> [https://perma.cc/6V4L-DUL2].

<sup>138</sup> U.S. CONST. amends. XIII–XIV, XV.

*race as threat* persists today. In the century that followed the Civil War, American national security institutions engaged in actions that reflected this *race as threat* typology.

### 1. Jim Crow

Following the Civil War,<sup>139</sup> there was no community in greater need of state protection than the African American community, which faced a racial terror campaign by the KKK and southern segregationists. From the end of the Civil War through the mid-twentieth century, white supremacist groups such as the KKK, the White League in Louisiana, the White Man's Party in Alabama, and the South Carolina Red Shirts formed and engaged in terror plots in Black communities throughout the country—lynchings, murders, and rapes occurred against Black citizens with impunity.<sup>140</sup> With the Compromise of 1877, President Hayes removed federal troops from the South, effectively ending Reconstruction and leaving newly freed Black people to the mercy of these terror groups, which were supported by state agents.<sup>141</sup> Sheriffs, judges, and mayors enforced the newly formed Black Codes, which extended

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<sup>139</sup> The Supreme Court infamously determined in the *Dred Scott* case that African Americans were not citizens, even if born in the country. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. This view certainly reflected the policy of the times. African Americans were not citizens and were therefore “others” not entitled to the national security protection of the state. In fact, as potential “spoilers” of the system of racial dominance and chattel slavery, they were threats to the state as it was conceived. The Thirteenth and Fourteenth Amendments sought to rectify the Supreme Court’s pronouncement: former slaves were now free and citizens and presumably deserving of the national security protection of the state.

<sup>140</sup> William Y. Chin, *Domestic Counterinsurgency: How Counterinsurgency Tactics Combined with Laws Were Deployed Against Blacks Throughout U.S. History*, 3 U. MIAMI RACE & SOC. JUST. L. REV. 31, 47–48 (2013).

<sup>141</sup> See generally NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 184–85* (2006) (describing the state-led creation of the Jim Crow system in former Confederate states that replaced the previously “informal and violent nullification of Negro rights”); C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1966) (discussing how the Compromise of 1877 brought Reconstruction to an end and how African Americans feared the withdrawal of federal protection). See also Steve Hahn, *Homegrown Terror*, NEW REPUBLIC (Nov. 20, 2006), <https://newrepublic.com/article/63909/home-grown-terror> [<https://perma.cc/F24R-HVNC>].

slavery's prohibition of African Americans' right to own property, receive an education, and enter into contracts or enforce rights and later became institutionalized throughout the South as Jim Crow segregation.<sup>142</sup> Appeals to the state for national security protection for African Americans fell on deaf ears as federal troops withdrew from the South and defeated Confederate troops waged their terror campaign against African Americans as elected officials, state agents, and paramilitary hate groups.<sup>143</sup> Black Americans were treated as threats to the historic system of white supremacy that state and local institutions sought to protect through widespread racial oppression.<sup>144</sup>

From the end of the Civil War until the end of World War II, so-called "race riots" resulted in the destruction of numerous African American communities.<sup>145</sup> These riots were actually racial terror schemes visited on Black communities at the whim of racist agitators.<sup>146</sup> Race riots occurred throughout the country in New Orleans, Atlanta, Springfield, East St. Louis, Washington, Chicago, Mobile, Beaumont, Detroit, and Harlem.<sup>147</sup> Rather than treat African Americans as citizens

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<sup>142</sup> Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 573–74, 573 n.54, 581, 622 (2012) ("The 'Black Codes' were passed by each state of the former confederacy and sought to reimpose many of the legal restrictions that had applied to slaves prior to emancipation, particularly in relation to the exercise of contractual and civil rights. For example, the codes required the freedmen to make annual written contracts for their labor and provided that they would be subject to arrest and forfeiture of the entirety of their annual wages if they left before the contract's term. Vagrancy laws were strengthened in an effort to ensure that freedmen agreed to such contractual provisions; those who lacked a 'home and support' were subject to arrest and enforced service to pay their debts." (citation omitted)).

<sup>143</sup> Hahn, *supra* note 141; *see also* Bell, *supra* note 11, at 376 ("Those committed to racial equality also had to overlook the political motivations for the Civil War Amendments—self-interest motivations almost guaranteeing that when political needs changed, the protection provided the former slaves would not be enforced.").

<sup>144</sup> *See* Hahn, *supra* note 141.

<sup>145</sup> For more information about the race riots, *see* ENCYCLOPEDIA OF AMERICAN RACE RIOTS (Walter Rucker & Nathaniel Upton eds., 2007).

<sup>146</sup> Chauncey DeVega, *White America's Racial Amnesia: The Sobering Truth About Our Country's "Race Riots,"* SALON (May 1, 2015), [https://www.salon.com/2015/05/01/white\\_americas\\_racial\\_amnesia\\_the\\_sobering\\_truth\\_about\\_our\\_countrys\\_race\\_riots\\_partner/](https://www.salon.com/2015/05/01/white_americas_racial_amnesia_the_sobering_truth_about_our_countrys_race_riots_partner/) [<https://perma.cc/UHF6-4LFA>].

<sup>147</sup> Chin, *supra* note 140, at 46.

deserving of national security protection, state institutions and agents often failed to intervene or participated in the terror against Black communities.<sup>148</sup> One of the many tragic race riots was the Tulsa Race Riot of 1921, which resulted in the destruction of a thriving Black community—known as “Black Wall Street”—by a White mob numbering in the hundreds.<sup>149</sup> An African American lawyer in the community, Buck Colbert Franklin, father of famed historian John Hope Franklin, provided an eyewitness account:

I could see planes circling in mid-air. They grew in number and hummed, darted and dipped low. I could hear something like hail falling upon the top of my office building. Down East Archer, I saw the old Mid-Way hotel on fire, burning from its top, and then another and another and another building began to burn from their top.<sup>150</sup>

African American and Native American residents of the Greenwood neighborhood in Tulsa, Oklahoma had become wealthy due to oil reserves that they had discovered on their land.<sup>151</sup> The wealth of this Black community was conspicuous, leading to Greenwood’s nickname of Black Wall Street.<sup>152</sup> Their poorer White neighbors could not abet this success and, as recounted by Buck Franklin, nearly a dozen private planes air-bombed the community and Blacks were machine-gunned

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<sup>148</sup> See, e.g., CHARLES L. LUMPKINS, *AMERICAN POGROM: THE EAST ST. LOUIS RACE RIOT AND BLACK POLITICS 1* (2008) (“On July 2 and 3, 1917, rampaging white men and women looted and torched black homes and businesses and assaulted African Americans in the small industrial city of East St. Louis, Illinois. The mob, which included police officers and National Guardsmen, wounded or killed many black residents and terrorized others into fleeing the city.”).

<sup>149</sup> DeNeen L. Brown, *They Was Killing Black People*, WASH. POST (Sept. 28, 2018), [https://www.washingtonpost.com/news/local/wp/2018/09/28/feature/they-was-killing-black-people/?utm\\_term=.39c58cd4d78f](https://www.washingtonpost.com/news/local/wp/2018/09/28/feature/they-was-killing-black-people/?utm_term=.39c58cd4d78f) [https://perma.cc/54UM-QQRR].

<sup>150</sup> Allison Keyes, *A Long-Lost Manuscript Contains a Searing Eyewitness Account of the Tulsa Race Massacre of 1921*, SMITHSONIAN.COM (May 27, 2016), <https://www.smithsonianmag.com/smithsonian-institution/long-lost-manuscript-contains-searing-eyewitness-account-tulsa-race-massacre-1921-180959251/> [https://perma.cc/2HLJ-T6QL].

<sup>151</sup> *Id.*

<sup>152</sup> Brown, *supra* note 149.

down in the street.<sup>153</sup> More than thirty-five blocks and 1200 homes were destroyed, and 300 people, almost all Black, were killed.<sup>154</sup> When the Governor declared martial law and sent in the National Guard to restore calm, any Black person who had not already been imprisoned by White mobs and the local law enforcement supporting them were then placed in jail by the National Guard.<sup>155</sup> The National Guard's actions reinforced the position that national security institutions were protectors of *White* citizens—even those engaged in violent activity—and the victimized African American community was the enemy.

White mob violence of this era often led to “racial cleansings,” where White mobs drove all of the Black members out of entire cities.<sup>156</sup> Furthermore, state institutions such as local police, sheriffs, politicians, and judges colluded with white supremacist groups like the KKK to brutally enforce a century of Jim Crow segregation throughout the South (and *de facto* segregation in the North) where Black citizens were denied equal education, housing, jobs, and opportunities.<sup>157</sup> African Americans were effectively treated as security threats by the state rather than citizens whose rights deserved protection.

## 2. Japanese American Internment

African Americans were not the only racial minority treated as a threat by American national security institutions. Japanese Americans endured one of the most infamous race-based national security deprivations of the twentieth century at the direction of the highest levels of the United States government. During World War II, the United States military forced Japanese Americans, living in a region of California and the West Coast designated as a military zone, to abandon their homes and relocate to internment camps in the middle of the country.<sup>158</sup> The military justified relocation on the theory that Japanese Americans *as a group* were subversive

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<sup>153</sup> Keyes, *supra* note 150.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Chin, *supra* note 140, at 46–48.

<sup>157</sup> Tara McAndrew, *The History of the KKK in American Politics*, JSTOR DAILY (Jan. 25, 2017), <https://daily.jstor.org/history-kkk-american-politics/> [<https://perma.cc/EGV3-T6UH>].

<sup>158</sup> *Korematsu v. United States*, 323 U.S. 214, 216–17 (1944).



and would share information to assist Japanese enemy forces in an attack on the West Coast.<sup>159</sup> Congress passed a statute making a violation of the military order a criminal offense.<sup>160</sup> More than 110,000 people of Japanese descent (70,000 of whom were citizens) were confined to these camps.<sup>161</sup> The American military did not institute a similar policy for people of German descent nor people of Italian descent in the United States, notwithstanding the fact that Hitler's Germany and Mussolini's Italy were also America's enemies in the war. Only Japanese Americans, as a group, were identified as a security threat deserving of internment,<sup>162</sup> reaffirming the view that racial minorities were a security threat to the United States.

Fred Korematsu, a Japanese American citizen, refused the internment orders and was convicted of a criminal violation.<sup>163</sup> He challenged his conviction in court, which led to the infamous and heavily-criticized Supreme Court *Korematsu* decision. Writing for the Court, Justice Black stated that "Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because . . . the properly constituted military authorities . . . decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily . . ." <sup>164</sup>

In a strongly-worded dissent, Justice Murphy spelled out the racially discriminatory views underlying the military exclusion orders:

Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion." They are claimed to be given to "emperor worshipping ceremonies" and to "dual citizenship." . . . The main reasons

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<sup>159</sup> *Id.* at 217.

<sup>160</sup> Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (codified as amended at 18 U.S.C. § 97a (Supp. II 1946)); *see also Korematsu*, 323 U.S. at 228 (Roberts, J., dissenting).

<sup>161</sup> *Korematsu*, 323 U.S. at 241–42 (Jackson, J., dissenting).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 215–16 (majority opinion).

<sup>164</sup> *Id.* at 223.

relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of misinformation . . . that for years ha[s] been directed against Japanese Americans by people with racial and economic prejudices . . . . A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.<sup>165</sup>

Justice Murphy's dissent reveals the sweeping conclusions drawn about the Japanese American community based on racial innuendo and discriminatory views, eviscerating any sound military judgement involved in the racial exclusion. The dissent goes on to note that, in contrast to the treatment of Japanese Americans, Americans of German and Italian descent who were detained during the War were subject to specific individual determinations regarding their subversive activity rather than broad, group-based accusations.<sup>166</sup> In a time of national vulnerability and anxiety following Japan's attack on Pearl Harbor, racial biases and the fear of the minority Japanese American *race as threat* led the country's national security leadership to tarnish once more the Constitution's promise of equal protection. This pattern continued to manifest itself in the ensuing decades.

### 3. COINTELPRO

One of the most notorious twentieth century examples of a national security institution using its power against the African American community was the targeting of civil rights leadership by the FBI during the Civil Rights Era. This

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<sup>165</sup> *Id.* at 237, 239–40 (Murphy, J., dissenting) (footnotes omitted).

<sup>166</sup> *Id.* at 241.

activity fell under the rubric of COINTELPRO (shorthand for “Counter Intelligence Program”), which was under the direction of FBI Director J. Edgar Hoover.<sup>167</sup> In justifying his targeting of these leaders, J. Edgar Hoover famously described the goal of the program as “prevent[ing] the rise of a [Black] ‘messiah’ . . . .”<sup>168</sup> Fear of a Black “messiah” indicates a distorted view and fear of race held by the most senior leadership of the national security community.

African Americans, many of whom had just returned to America from fighting against Nazism and racial oppression abroad during World War II, were continuing their advocacy for civil rights and equal protection at home under the leadership of the National Association for the Advancement of Colored People (NAACP), the Southern Christian Leadership Conference (SCLC), the Student Nonviolent Coordinating Committee (SNCC), and the Congress of Racial Equality (CORE). Clergy, student activists, and labor leaders led these racial justice organizations.<sup>169</sup> These civil rights organizations wished to make the promise of the post-Civil War Amendments a reality for the African American community.

However, many civil rights leaders were treated as a national security threat to the country.<sup>170</sup> The FBI disrupted civil rights organizations and aimed to discredit leaders such

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<sup>167</sup> Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1062, 1094 (2002). COINTELPRO originally began in the early twentieth century as an anti-Communist program. Over the years, the program evolved and applied its tactics to Black, Latinx, Native American, and anti-Vietnam War organizers in civil rights and liberation organizations. *Id.* at 1088, 1090, 1098.

<sup>168</sup> *Id.* at 1094 (emphasis omitted).

<sup>169</sup> Aldon D. Morris, *A Retrospective on the Civil Rights Movement: Political and Intellectual Landmarks*, 25 ANN. REV. SOC. 517, 525 (1999).

<sup>170</sup> The COINTELPRO program targeted Black civil rights organizations and leaders, many of whom were swept up in a broader categorization as being Black militant groups or capable of militancy. Jonathan David Farley, *Preventing the Rise of a “Messiah,”* GUARDIAN (Apr. 4, 2008), <https://www.theguardian.com/commentisfree/2008/apr/04/preventingtheriseofamessi> [<https://perma.cc/P2SX-RAJN>] (“Hoover issued another directive: ‘Prevent the rise of a “messiah” who could unify and electrify the militant black nationalist movement. Malcolm X might have been such a “messiah” . . . . Martin Luther King, Stokely Carmichael, and [Nation of Islam leader] Elijah Muhammed [sic] all aspire to this position . . . . King could be a very real contender for this position should he abandon his supposed “obedience” to “white, liberal doctrines” (nonviolence).”).

as Martin Luther King Jr., the exemplar of nonviolent protest.<sup>171</sup> FBI records reveal that the FBI sent an anonymous letter to King alleging knowledge of his extramarital affairs and encouraging him to commit suicide.<sup>172</sup> With Attorney General Robert Kennedy's approval, the FBI wiretapped King for several years.<sup>173</sup> This action was initially prompted by the theory that one of King's advisers was a prominent member of the Communist Party of the United States and later continued as part of a broader campaign led by J. Edgar Hoover to discredit King.<sup>174</sup>

The COINTELPRO program was extensive<sup>175</sup> and sought to make certain civil rights organizations ineffective through "disruption" tactics, which included FBI agents infiltrating domestic organizations, creating misinformation schemes within those organizations, and disturbing their activities.<sup>176</sup> The FBI even worked with local law enforcement to disrupt organizations and to target individuals that they saw as potentially influential.<sup>177</sup> In one tragic instance, Fred Hampton, a young Black leader from Chicago, was killed by local police in Chicago as the result of a COINTELPRO plot that involved local law enforcement.<sup>178</sup> The civil rights movement challenged a racially discriminatory status quo in America—this meant that for J. Edgar Hoover's FBI, protecting the national security of the United States was synonymous with maintenance of a legal-political system that protected white supremacy. This again demonstrates that national security

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<sup>171</sup> *Id.*

<sup>172</sup> Beverly Gage, *What an Uncensored Letter to M.L.K. Reveals*, N.Y. TIMES MAG. (Nov. 11, 2014), <https://www.nytimes.com/2014/11/16/magazine/what-an-uncensored-letter-to-mlk-reveals.html> [<https://perma.cc/8ZX6-3ZWN>].

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> S. REP. NO. 94-755, at 22 (1976).

<sup>176</sup> Saito, *supra* note 167, at 1080.

<sup>177</sup> S. REP. NO. 94-755, at 20–23.

<sup>178</sup> Ted Gregory, *The Black Panther Raid and the Death of Fred Hampton*, CHI. TRIB. (Dec. 19, 2007), <http://www.chicagotribune.com/news/nationworld/politics/chi-chicagodays-pantherraid-story-story.html> [<https://perma.cc/EGC9-9VVG>]. Even if one were to argue that the FBI was only surveilling groups that espoused violence, the FBI's record of infiltration of civil rights organizations and leaders drew no such distinctions and included groups and leaders that advocated nonviolent protest, such as Martin Luther King, Jr. See S. REP. NO. 94-755, at 172–83.

officials viewed the African American community through the *race as threat* lens.

In 1975, the Senate created the Select Committee to Study Governmental Operations with Respect to Intelligence Activities (also known as the “Church Committee” after its chair, Senator Frank Church of Idaho) to investigate “the extent, if any, to which illegal, improper, or unethical activities were engaged in” by the intelligence agencies, including the FBI and CIA’s infiltration of domestic organizations.<sup>179</sup> The Church Committee found that procedures for executive branch review of intelligence agency activities were inadequate and had been circumvented, allowing intelligence agencies to engage in abuses domestically and abroad.<sup>180</sup> It revealed that with respect to domestic organizations involved in the civil rights and anti-Vietnam War protests:

FBI headquarters alone ha[d] developed over 500,000 domestic intelligence files, and these have been augmented by additional files at FBI Field Offices. The FBI opened 65,000 of these domestic intelligence files in 1972 alone. In fact, substantially more individuals and groups are subject to intelligence scrutiny than the number of files would appear to indicate, since typically, each domestic intelligence file contains information on more than one individual or group . . . .<sup>181</sup>

The report found that “certain domestic intelligence activities were clearly wrong . . . . [W]e would ban tactics such as those used in the FBI’s COINTELPRO.”<sup>182</sup> As a result of its findings, the Church Committee made several recommendations to prevent intelligence agency abuse of Americans’ constitutional rights.<sup>183</sup> It suggested legislation that would require all covert actions by intelligence and investigative agencies to be approved

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<sup>179</sup> S. Res. 21, 94th Cong. (1975).

<sup>180</sup> S. REP. NO. 94-755, at 159. The House created a similar commission—the House Select Committee on Intelligence (also known as the Pike Committee)—that came to similar conclusions. H.R. REP. NO. 94-833 (1976).

<sup>181</sup> S. REP. NO. 94-755, at 6–7 (footnotes omitted).

<sup>182</sup> *Id.* at 292–93.

<sup>183</sup> *Id.* at 296–341.

by a committee consisting of the Secretaries of State and Defense, the National Security Adviser, the CIA Director, the Attorney General, and the Chairman of the Joint Chiefs of Staff.<sup>184</sup> The Committee also drafted legislation intended to prevent abuses in the domestic collection of intelligence that “threaten the very values that form the foundation of our society.”<sup>185</sup> The report pointedly called for:

prohibiting Bureau interference in lawful speech, publication, assembly, organization, or association of Americans[.] [T]he Committee intends to prohibit a Bureau agent from mailing fake letters to factionalize a group as well as to prohibit an informant from manipulating or influencing the peaceful activities of a group on behalf of the FBI.

Subsequent recommendations limit the kinds of investigations which can be opened and provide controls for those investigations. Specifically, the Committee limits FBI authority to collect information on Americans to enumerated circumstances; limits authority to maintain information on political beliefs, political associations, or private lives of Americans; requires judicial warrants for the most intrusive covert collection techniques (electronic surveillance, mail opening, and surreptitious entry); and proposes new restrictions upon the use of other covert techniques, particularly informants.<sup>186</sup>

To preempt the passage of legislation, President Ford passed Executive Order 11,905, which encompassed the recommendations made in the Church Committee Report, including the formation of an Operations Advisory Group similar to the covert activity oversight committee called for by the Committee.<sup>187</sup> The Executive Order also restricted agencies, other than the FBI, from engaging in domestic surveillance and restricted the FBI's domestic activities relative to American persons in the manner called for by the Church Committee.<sup>188</sup>

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<sup>184</sup> *Id.* at 159–61.

<sup>185</sup> *Id.* at vii.

<sup>186</sup> *Id.* at 317.

<sup>187</sup> Exec. Order No. 11,905, 41 Fed. Reg. 7703 (Feb. 18, 1976).

<sup>188</sup> *Id.*

It further prohibited intelligence agencies from engaging in human experimentation or assassinations (both abuses committed by the CIA).<sup>189</sup> The intelligence oversight framework adopted by President Ford essentially remains intact—President Carter added congressional oversight responsibilities in Executive Order 12,036, and President Reagan provided additional structure to intelligence collection and oversight in Executive Order 12,333, an amended version of which remains in effect today.<sup>190</sup> Due to litigation challenging the FBI’s use of wiretapping during COINTELPRO investigations, the United States Supreme Court ruled that federal investigative agency wiretapping was subject to the Fourth Amendment and required prior judicial approval.<sup>191</sup>

In 1976, several Washington, D.C. area residents who had been involved in civil rights and anti-Vietnam War organizations and were targeted by COINTELPRO sued FBI and D.C. officials for violations of their constitutional rights related to the COINTELPRO program.<sup>192</sup> The plaintiffs won most of their claims.<sup>193</sup> In its appellate opinion, the D.C. Circuit Court of Appeals noted that “[g]overnment action, taken with the intent to disrupt or destroy lawful organizations, or to deter membership in those groups, is absolutely unconstitutional.”<sup>194</sup>

With new limitations placed on their conduct by the courts, an executive order, and greater congressional oversight, national security institutions had the opportunity to shift away

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<sup>189</sup> *Id.*

<sup>190</sup> See Exec. Order No. 12,036, 43 Fed. Reg. 3674 (Jan. 24, 1978); Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 8, 1981). For executive orders amending Executive Order 12,333, see also Exec. Order No. 13,284, 68 Fed. Reg. 4075 (Jan. 23, 2003); Exec. Order No. 13,355, 69 Fed. Reg. 53,593 (Aug. 27, 2004); and Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (July 30, 2008).

<sup>191</sup> *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 321 (1972). Congress also took action in 1978 when it passed the Foreign Intelligence Surveillance Act (FISA), which created a FISA court to legally authorize foreign intelligence surveillance and provided standards for the approval of such surveillance within the United States. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1885c (2012)).

<sup>192</sup> *Hobson v. Wilson*, 737 F.2d 1, 10–11, 13 (D.C. Cir. 1984).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 29.

from a minority *race as threat* approach.<sup>195</sup> After an existential threat to the nation occurred on September 11, 2001, however, the national security response reverted to a minority *race as threat* framework directed at those perceived to be Muslim.

### B. *Race as Threat* Profiling After 9/11

The same vulnerability experienced by Americans following the Japanese attack on Pearl Harbor in 1942 revisited the nation following the terrorist attacks of September 11, 2001. The country was fearful and knew little about the enemy that had attacked it. Although President George W. Bush publicly stated that Islam was a religion of peace and that the country was not at war with Islam,<sup>196</sup> national and local authorities treated members of Muslim communities in the United States with suspicion.<sup>197</sup> Legal scholars such as Khaled Beydoun, Sahar Aziz, and Amna Akbar have detailed how Islamophobia manifested itself in national security policies following 9/11 that disproportionately targeted Muslim American communities.<sup>198</sup>

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<sup>195</sup> Though it is impossible to argue that institutional discrimination by the FBI ended with COINTELPRO, the Church Committee findings and recommendations did provide for greater oversight and critique of agency excesses and constitutional violations.

<sup>196</sup> Anthony Zurcher, *What Trump Team Has Said About Islam*, BBC (Feb. 7, 2017), <https://www.bbc.com/news/world-us-canada-38886496> [<https://perma.cc/5ZVJ-766T>].

<sup>197</sup> See Volpp, *supra* note 8, at 1578 (“[W]e know that the vast majority of those detained appear to be Middle Eastern, Muslim, or South Asian. We know, too, that the majority were identified to the government through suspicions and tips based solely upon perceptions of their racial, religious, or ethnic identity.” (footnote omitted)); see also Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1278 (2004) (discussing the “logic” of post-September 11 governmental profiling, which concluded that all Arabs and all Muslims are likely to be terrorists).

<sup>198</sup> See KHALED A. BEYDOUN, *AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR* (2018) [hereinafter BEYDOUN, *AMERICAN ISLAMOPHOBIA*]; Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834 (2015) [hereinafter Akbar, *National Security's Broken Windows*]; Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809 (2013) [hereinafter Akbar, *Policing “Radicalization”*]; Sahar F. Aziz, *Losing the “War of Ideas:” A Critique of Countering Violent Extremism Programs*, 52 TEX. INT’L L.J. 255 (2017) [hereinafter Aziz, *Losing the War of Ideas*]; Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429 (2011) [hereinafter Aziz, *Caught in a Preventive Dragnet*]; Khaled A. Beydoun,



Akbar argues that the FBI's post-9/11 Muslim American community engagement programs were essentially counter-radicalization or countering violent extremism (CVE) initiatives based on the presumption that particular political and religious views of the Muslim American community corresponded with a propensity for terrorist activity, despite a lack of sound methodological support for that conclusion.<sup>199</sup> Akbar notes that the widespread use of CVE programs in Muslim American communities is not justified, because research indicates that there is no single profile of a terrorist, no markers for how someone becomes a terrorist, and no data to show that the Muslim community in general is becoming more radicalized or more violent.<sup>200</sup> These "community engagement" programs become surveillance initiatives in which views shared by Muslim American participants in "engagement" meetings unwittingly become part of national security files maintained about Muslim American community members.<sup>201</sup> Other community members are utilized as informants, reporting on the political and religious views of others within Muslim American mosques and organizations—techniques reminiscent of COINTELPRO.<sup>202</sup>

Furthermore, the FBI programs place a penalty on group members' religious expression and belief. Beydoun notes that the impact of these CVE practices falls most directly on the most religiously observant, as CVE programs link propensity for radicalization with religious piety.<sup>203</sup> In addition, the monitoring of Muslim Americans' religious observance, political views, speech, and associations through informants and review of online expression negatively impacts their First Amendment and Fourth Amendment rights.<sup>204</sup> Sahar Aziz observes that the American government's primary focus on counterterrorism

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*Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1 (2018) [hereinafter Beydoun, *Acting Muslim*]; Khaled A. Beydoun, *Between Indigence, Islamophobia, and Erasure: Poor and Muslim in "War on Terror" America*, 104 CALIF. L. REV. 1463 (2016) [hereinafter Beydoun, *Between Indigence, Islamophobia, and Erasure*].

<sup>199</sup> Akbar, *National Security's Broken Windows*, *supra* note 198, at 848–50.

<sup>200</sup> *Id.* at 878–79.

<sup>201</sup> *Id.* at 852–54.

<sup>202</sup> *Id.*

<sup>203</sup> Beydoun, *Between Indigence, Islamophobia, and Erasure*, *supra* note 198, at 1487–90.

<sup>204</sup> *Id.* at 1488.

initiatives targeting the Muslim American community has had the effect of creating a racialized subtext of Muslims as terror suspects that has manifested itself in the “suspicion[] of mosques as bastions of extremists, Muslim charities as supporters of terrorism, and imams as unpatriotic for refusing to spy on their congregations.”<sup>205</sup>

The Supreme Court case, *Ashcroft v. Iqbal*, details the Bush Administration’s use of national security justifications for the targeting of Muslim communities immediately following 9/11.<sup>206</sup> Two months after 9/11, Javaid Iqbal, a Muslim Pakistani national who was an undocumented immigrant in the United States, was questioned and then detained by FBI and Immigration and Naturalization Service (INS) officials on suspicion that he had been involved in the 9/11 bombings in New York.<sup>207</sup> Iqbal was arrested and detained in the administrative special housing unit of the Metropolitan Detention Center, a special unit for post-9/11 detainees.<sup>208</sup> This unit housed approximately eighty-four detainees arrested in relation to 9/11 investigations.<sup>209</sup> According to Iqbal, he was repeatedly beaten during his detention, was subjected to frequent strip and body cavity searches, and was confined in a cell with bright lights all night causing sleep deprivation, depression, and anxiety.<sup>210</sup> After an investigation, the Department of Justice Inspector General concluded that these abuses had occurred and disciplined several officers, though none were charged with crimes.<sup>211</sup>

Iqbal sued then attorney general Ashcroft and then FBI director Mueller for violating his First and Fifth Amendment rights through the creation and execution of a program that targeted thousands of Muslim men for arrest and detention under harsh conditions because of their race, religion, and national origin.<sup>212</sup> Writing for the majority, Justice Kennedy reasoned that Iqbal’s complaint did not plead sufficient facts

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<sup>205</sup> Aziz, *Caught in a Preventive Dragnet*, *supra* note 198, at 477.

<sup>206</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 667–69 (2009).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379, 399 (2017).

<sup>210</sup> *Id.* at 401–02.

<sup>211</sup> *Id.* at 402.

<sup>212</sup> *Iqbal*, 556 U.S. at 669.

to indicate purposeful or unlawful discrimination on the part of the federal government.<sup>213</sup> In the majority's view,

a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.<sup>214</sup>

The Court dismissed the charges on procedural grounds, finding that *Iqbal* had failed to meet the Court's recently-adopted heightened pleading standard.<sup>215</sup>

Although the Court found that *Iqbal* had not plead sufficient facts to support his legal claim of discrimination, an analysis of the *Iqbal* case and post-9/11 arrest patterns by Professor Shirin Sinnar reveals that arrest patterns during that period reflected discriminatory targeting on the basis of race, color, national origin, or religion.<sup>216</sup> As Sinnar observes, the Court conflated the "Arab" and "Muslim" identities into the racial-religious category of "Arab Muslim," which related the detainees to the airplane hijackers.<sup>217</sup> In the Court's view, arrests among this group were an incidental and justified

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<sup>213</sup> *Id.* at 682.

<sup>214</sup> *Id.* (citation omitted).

<sup>215</sup> *Id.* at 680 (noting that, under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), complaints must allege sufficient facts that move legal claims "across the line from conceivable to plausible").

<sup>216</sup> Sinnar, *supra* note 209, at 416–21.

<sup>217</sup> *Id.* at 416–18; see also Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29, 30 (2013) (discussing the legal roots of this conflation).

result of the investigation rather than the result of invidious discrimination.<sup>218</sup>

However, as Sinnar notes, there are problems with the broad descriptor “Arab Muslim”—one is a religion and the other is an ethnic and linguistic identity. The majority of Arab Americans in the United States are not Muslim (three-fourths are Christian), and Arabs constitute only fifteen to eighteen percent of the Muslim population worldwide.<sup>219</sup> Among the 762 immigrants detained in the United States following 9/11, 254 were from Pakistan, 111 were from Egypt, and the remaining top ten nationalities were Turkish, Jordanian, Yemeni, Indian, Saudi Arabian, Moroccan, Tunisian, and Syrian.<sup>220</sup> These statistics were available to the Court in the DOJ Inspector General report that it cited.<sup>221</sup> The demographic statistics reveal that the arrested detainees were not all Arab; in fact, the largest country represented, Pakistan, is South Asian, and two of the other top ten nationalities detained—Turkish and Indian—are also not “Arab.” Nor is India a majority-Muslim country.<sup>222</sup> Instead of race or color being incidental to the arrests as posited by the Court, a perception that individuals were Muslim, Arab, or Middle Eastern was a central factor in post-9/11 arrests by government agencies.<sup>223</sup>

Muneer Ahmad describes this post-9/11 terrorist suspect category as encompassing “not only Arab Muslims, but Arab Christians, Muslim non-Arabs (such as Pakistanis or Indonesians), non-Muslim South Asians (Sikhs, Hindus), and even Latin[x] and African Americans, depending on how closely they approach[ed] the phenotypic stereotype of the terrorist.”<sup>224</sup> For this reason, many Pakistanis such as Iqbal, who did not share the same nationality nor an Arab linguistic or cultural identity with the 9/11 hijackers, became targets of the post-9/11 investigation.<sup>225</sup> It was their appearance and relative visibility, rather than a factual linkage to terrorists, that made them suspects. As Sinnar accurately observes,

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<sup>218</sup> *Iqbal*, 556 U.S. at 680–81.

<sup>219</sup> Sinnar, *supra* note 209, at 417–18.

<sup>220</sup> *Id.* at 417.

<sup>221</sup> *Id.* at 415–16.

<sup>222</sup> *Id.* at 417.

<sup>223</sup> Volpp, *supra* note 8, at 1576–78, 1584, 1590.

<sup>224</sup> Ahmad, *supra* note 197, at 1278–79.

<sup>225</sup> *Id.*

even if the Court had meant that those arrested were either Arab or Muslim—rather than both—such a view would undermine the Court’s basic contention that any disparate impact in the racial and religious composition of those arrested was due to their “potential connection” (in Justice Kennedy’s words) to the terrorist hijackers.<sup>226</sup> Under that rationale, the more attenuated the potential connections—which in Iqbal’s case meant no Arabic or nationality-based connections to the terrorist hijackers—the less likely that race or religion were merely incidental to the arrests.

Subsequent review of post-9/11 arrests reveals that race and religious-based assumptions were central, instead of incidental, to many of the arrests. Although some of those initially arrested did have a link to the hijackers (such as being roommates and attending flight school together), many more were arrested because they appeared to be Muslim and had an immigration or criminal record.<sup>227</sup> The DOJ Inspector General report reveals that many agents followed up on calls from the general public expressing suspicion solely on the basis of someone’s identity and generally acceptable conduct, including several Middle Eastern men arrested after law enforcement found pictures of famous buildings like the World Trade Center in their car during traffic stops and an immigrant arrested after someone reported that more Middle Eastern men than necessary were running a grocery store.<sup>228</sup> A Human Rights Watch report further reveals that two Somali men were deemed suspicious because they kneeled to pray in a parking lot, an Egyptian man was detained by a Newark officer for asking for directions, and an Iranian citizen was apparently asked for his immigration documentation during a traffic stop because an officer noticed his “Muslim-sounding” name.<sup>229</sup> An author who spoke with forty ex-detainees observed that “[o]ne story after another reveal[ed] that racial profiling triggered suspicion against individuals and that spe-

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<sup>226</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009); Sinnar, *supra* note 209, at 390, 419.

<sup>227</sup> Sinnar, *supra* note 209, at 420.

<sup>228</sup> OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 16–17 (2003).

<sup>229</sup> See HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES 12–15 (2002).

cific questions about their religion led to their arrests.”<sup>230</sup> The post-9/11 treatment of Americans perceived to be Muslim or Arab was another permutation of the historic treatment of minority *race as threat*. Racial grievance and division caused by such practices, and the attitudes undergirding them, facilitated the insertion of Russia’s racial exploitation campaign.

## V. CURRENT LEGAL FRAMEWORKS DO NOT FULLY ADDRESS RUSSIA’S CYBER CAMPAIGN

Russia’s exploitation of the racial division fostered by racially-biased state practices led to a foreign influence campaign that violated American law. An examination of the legal prohibitions against such foreign interference is instructive to understanding both the options and challenges involved in an American response. This Part discusses the domestic and international legal prohibitions against foreign election intervention on social media.

### A. United States Legal Prohibitions Against Foreign Election Interference

Although the Constitution’s drafters expressed significant concern about foreign influence in domestic elections, no explicit prohibition addressing such foreign influence appears in the Constitution.<sup>231</sup> In 1972, Congress expressly prohibited political campaign contributions from all foreign sources due to the revelation that the Nixon campaign had fundraised directly from foreign sources.<sup>232</sup> Federal law now prohibits any political contributions from foreign sources for federal, state, or local elections and also makes it a felony for a person in the United States to solicit or accept such contributions, punishable by five years in prison for violations aggregating over \$25,000.<sup>233</sup>

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<sup>230</sup> See IRUM SHIEKH, *DETAINED WITHOUT CAUSE: MUSLIMS’ STORIES OF DETENTION AND DEPORTATION IN AMERICA AFTER 9/11*, at 19–21 (2011).

<sup>231</sup> See Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 *BERKELEY J. INT’L L.* 162, 168–69 (2009) (“The Constitutions’ founders were intensely concerned about the prospect of foreign involvement in American politics.”).

<sup>232</sup> Margaret K. Lewis, *When Foreign Is Criminal*, 55 *VA. J. INT’L L.* 625, 663 (2015).

<sup>233</sup> *Id.*; see also 2 U.S.C. §§ 441e, 437g(d)(1)(A)(i) (2012).

Although the Supreme Court's 2010 *Citizens United* decision invalidated a federal restriction on campaign expenditures by domestic corporations as a violation of the First Amendment, the Court made clear in its opinion that the legal ban on foreign campaign expenditures remained intact.<sup>234</sup> If challenged, legal scholars tend to agree that the Court would maintain the ban against foreign expenditures in American political campaigns in order to protect the integrity of the electoral process.<sup>235</sup> Further, while the Constitution does not specifically prohibit foreign influence over elections, the Emoluments Clause expressly prohibits foreign influence over American government officials.<sup>236</sup> The Court could find that the constitutional prohibition on foreign influence over elected officials bolsters the constitutionality of the legislative prohibition on foreign influence over the same officials' campaigns.

Special Counsel Mueller's February 2018 indictment charges Russian institutions and nationals with violating the federal law prohibiting foreign financing of elections.<sup>237</sup> The indictment charges the Russian entities and agents with violating the Federal Election Campaign Act (FECA) prohibitions on foreign entities making contributions, expenditures, or disbursements for electioneering purposes.<sup>238</sup> The indictment also charges them with violating the Foreign Agent Registration Act's requirement that any agent of a foreign government

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<sup>234</sup> *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (noting that the Court was not addressing § 441e of the law, which specifically referenced political contribution and expenditure bans related to "foreign nationals," but was rather addressing 2 U.S.C. § 441b, which covered all corporate expenditures); *see also id.* at 422–23 (Stevens, J., concurring) ("Although we have not reviewed them directly, [the Supreme Court] ha[s] never cast doubt on laws that place special restrictions on campaign spending by foreign nationals.").

<sup>235</sup> *See, e.g.*, Tim Bakken, *Constitutional Rights and Political Power of Corporations After Citizens United: The Decline of Citizens and the Rise of Foreign Corporations and Super PACs*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 119, 141–46 (2013) (examining whether foreign corporations have First Amendment rights); Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J.L. & PUB. POL'Y 663, 703 (2011) ("The Court nevertheless is likely to uphold the restrictions to prevent undue foreign influence over elections.").

<sup>236</sup> U.S. CONST. art. I, § 9, cl. 8 (prohibiting members of the federal government from receiving "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State").

<sup>237</sup> Indictment, *supra* note 12.

<sup>238</sup> *Id.* ¶ 25.

operating in the United States and attempting to influence public opinion, policy, or law must register with the Department of Justice and disclose the scope of the activities.<sup>239</sup> Finally, the indictment charges that the Russian defendants defrauded the United States and committed bank and wire fraud in furtherance of their conspiracy to impair, obstruct, and defeat the lawful government functions of the United States by dishonest means and to interfere with American political and electoral processes.<sup>240</sup>

Though the indictment illuminated the scope of Russian intervention in the elections, bringing the Russian entities and nationals to justice will be difficult. The Russian government is unlikely to cooperate in transferring the individuals to the United States to face justice and will likely claim sovereign immunity for any actions of Russian government agencies, if it responds at all.

### B. International Law Prohibitions Against Foreign Intervention

International law also addresses foreign intervention in domestic electoral processes. International law arising both from treaties and from customary state practice is instructive. The Supreme Court has determined that in order for treaty-based rights to be enforceable as private rights of action in American courts, the treaties must be self-executing<sup>241</sup> or the treaty rights must be codified in domestic legislation.<sup>242</sup> There are several treaties to which the United States is a party that touch on the question of foreign interference in domestic

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<sup>239</sup> *Id.* ¶ 26.

<sup>240</sup> *Id.* ¶¶ 2–10, 28, 97.

<sup>241</sup> A self-executing treaty creates private enforcement rights when its terms are so clear as to not require independent action by Congress or the Executive to enforce said rights. For factors relevant to determining that a treaty is self-executing, see Michael A. McKenzie, *Treaty Enforcement in U.S. Courts—United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992), 34 HARV. INT'L L.J. 596, 603 (1993).

<sup>242</sup> See *Medellín v. Texas*, 552 U.S. 491 (2008) (determining that although Mexican nationals convicted of crimes in Texas courts were denied consular visits as required by the terms of the Vienna Convention on Consular Relations (VCCR), the terms of the treaty were not enforceable as domestic law in the United States because the VCCR was not “self-executing” and Congress had not passed separate legislation to give it effect).



elections. First, the United Nations (U.N.) Charter, a multilateral treaty that entered into force in 1945, prohibits U.N. member states from the “threat or use of force against the territorial integrity or political independence of any state”<sup>243</sup> but permits responsive action in self-defense.<sup>244</sup> The Russian social media campaign, while intrusive, does not necessarily rise to the level of a threat or use of force, as no physical armed attack was used or threatened against the United States. Although cyberattacks that cause significant physical damage can constitute armed attacks under international law, Russian interference in this instance did not involve direct physical violence or harm to individuals.<sup>245</sup>

Foreign espionage has not been expressly addressed under international law. Scholars have argued that espionage has historically been a violation of domestic, but not international, law.<sup>246</sup> Intelligence collection involves the compilation of sensitive information regarding foreign government policies and positions through espionage, signal intelligence from infiltrated radio and phone traffic, satellite intelligence, media, and other methods.<sup>247</sup> The information is then used to inform the collecting government’s decision-making.<sup>248</sup>

In addition to intelligence collection, intelligence activity can also include covert operations—secret operations that intelligence organizations undertake in foreign states.<sup>249</sup> The International Court of Justice (ICJ) has determined that

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<sup>243</sup> U.N. Charter art. 2, ¶ 4. (prohibiting United Nations member states from “the threat or use of force against the territorial integrity or political independence” of other member states).

<sup>244</sup> U.N. Charter art. 51 (allowing United Nations member states to act in self-defense when an armed attack has occurred).

<sup>245</sup> As discussed later in this subsection, the United States Department of Defense Law of War Manual treats cyberattacks that cause physical damage or violence as “armed attacks” under international law, warranting a proportionate response. *See also infra* note 258 and accompanying text. The Russian cyber campaign did not involve direct violence by the IRA, although it did encourage radical groups to host rallies that became violent.

<sup>246</sup> *See, e.g.,* Jens David Ohlin, *Did Russian Cyber Interference in the 2016 Election Violate International Law?*, 95 TEX. L. REV. 1579, 1580 (2017).

<sup>247</sup> Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT’L L. & POL’Y 321, 324 (1996).

<sup>248</sup> *Id.* at 322.

<sup>249</sup> *Id.* at 330.

covert action, such as proxy wars, involving armed activity and intervention in another state is violative of international law if not carried out in accordance with U.N. Charter procedures.<sup>250</sup> As an example, in *Nicaragua v. United States*, the ICJ determined that the United States had impermissibly intervened in the Nicaraguan civil war in violation of customary international law.<sup>251</sup> It said the United States did so by providing weapons and various forms of military support to an armed insurgency through the CIA without having an independent self-defense rationale for the intervention (as Nicaragua had not militarily attacked the United States).<sup>252</sup>

There has been increasing consensus in the academic community that cyber warfare and cyberattacks are subject to the international law of armed conflict. For example, in 2007, Estonia, a former Soviet state, was the victim of a three-week-long cyberattack.<sup>253</sup> Its institutions' webpages—including the websites of the president, parliament, political parties, banks, and news agencies—were subject to denial of service attacks, defacement, and destruction.<sup>254</sup> Most of the attacks originated from IP addresses in Russia and were organized in a manner that suggested command and control.<sup>255</sup> Immediately before the attack, the Russian government expressed opposition to the Estonian government's removal of a Soviet-era World War II memorial.<sup>256</sup> The attack disrupted communications, undermined the economy, and halted a number of Estonian government activities.<sup>257</sup>

The cyberattack on Estonia led the North Atlantic Treaty Organization (NATO) in 2008 to accredit the NATO Cooperative Cyber Defense Center in Tallinn, Estonia as a Center of Excellence with the mandate to invite an international group of experts to produce the Tallinn Manual on the

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<sup>250</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27).

<sup>251</sup> *Id.* ¶ 82.

<sup>252</sup> *Id.* ¶ 92.

<sup>253</sup> Scott J. Shackelford, *From Nuclear War to Net War: Analogizing Cyber Attacks in International Law*, 27 BERKELEY J. INT'L L. 192, 203 (2009).

<sup>254</sup> *Id.* at 203 n.57, 206.

<sup>255</sup> *Id.* at 203 n.57.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 246.

international law governing cyber warfare.<sup>258</sup> Similarly, the Obama Administration adopted a cyberspace strategy in 2011, which stated that “[l]ong-standing international norms guiding state behavior . . . also apply in cyberspace.”<sup>259</sup> That guidance is reflected in the Department of Defense Law of War Manual (“DOD Law of War Manual”), which states that if a cyberattack creates the “kind of physical damage that would be caused by dropping a bomb or firing a missile, that cyberattack would equally be subject to the same rules that apply to attacks using bombs or missiles.”<sup>260</sup> Cyberattacks may constitute “uses of force within the meaning of . . . the Charter of the United Nations,” giving “rise to a right to take necessary and proportionate action in self-defense.”<sup>261</sup>

It remains an open question whether Russian cyber interference in American elections constitutes the same destabilizing infrastructural attack that would violate the laws of armed conflict. Russian interference did not involve armed attacks or the destruction of infrastructure, even as it sought to disrupt the American political process through social media and disinformation campaigns. The DOD Law of War Manual leaves open the possibility that cyber intelligence activities would not be treated as a use of force “to the extent that cyber operations resemble traditional intelligence and counter-intelligence activities, such as unauthorized intrusions into computer networks solely to acquire information . . . .”<sup>262</sup> As Russian election interference goes beyond information collection but does not rise to the level of a physical attack, it pushes the boundaries of international law.<sup>263</sup>

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<sup>258</sup> See TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 6 (Michael N. Schmitt ed., 2013).

<sup>259</sup> WHITE HOUSE, INTERNATIONAL STRATEGY FOR CYBERSPACE: PROSPERITY, SECURITY, AND OPENNESS IN A NETWORKED WORLD 9 (2011).

<sup>260</sup> OFFICE OF GEN. COUNSEL, U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 997 (2015) [hereinafter DOD LAW OF WAR MANUAL].

<sup>261</sup> *Id.* at 998, 1000.

<sup>262</sup> *Id.* at 999.

<sup>263</sup> See Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT’L L. 291 (2015) (arguing for the development of international law to govern cyber surveillance); Craig Forcece, *Spies Without Borders: International Law and Intelligence Collection*, 5 J. NAT’L SECURITY L. & POL’Y 179 (2011) (arguing that cyber espionage has been conducted largely by countries free from legal controls).

Because Russian online interference raises questions regarding the nationality of the user, the extent of First Amendment protection is unclear. Further, indictments against foreign agents in Russia are unlikely to lead to prosecutions absent Russian cooperation.<sup>264</sup> Given the challenges that Russian cyber interference presents to historic legal frameworks and their enforcement, new approaches must be pursued to confront this threat. A reframing of the manner in which our national security institutions address questions of race is a first and crucial step toward alleviating the racial division that the Russian state has so effectively exploited. The next Section presents a recommendation for how national security institutions might begin to reframe their treatment of race in the United States to confront Russian interference.

### C. International Law Prohibitions Against the Incitement of Racial Hatred

International human rights law prohibits the advocacy of racial hatred that constitutes incitement to discrimination, hostility, or violence. Specifically, Article 20 of the International Covenant on Civil and Political Rights (ICCPR), a multilateral human rights treaty to which the United States is a party, states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>265</sup> Russia’s cyber disinformation campaign incites racial hostility, and even violence, in cases where it has promoted gatherings and sought to inflame

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<sup>264</sup> See Jennie Neufeld, *Read the Full Transcript of the Helsinki Press Conference*, VOX (July 17, 2018), <https://www.vox.com/2018/7/16/17576956/transcript-putin-trump-russia-helsinki-press-conference> [https://perma.cc/X5W5-4MV4]. Despite President Putin’s offer at the Helsinki summit to cooperate with the Mueller investigation, none of the Russians indicted have been transferred to the United States. Putin’s offer was likely rhetorical, as he conditioned it on the transfer of American political appointees to Russia for “political” prosecutions. *Id.*

<sup>265</sup> International Covenant on Civil and Political Rights art. 20, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The European Union has required all of its twenty-seven members to criminalize the incitement of racial violence. See *Europe Outlaws Race Hate Incitement*, S. POVERTY L. CTR. (Oct. 1, 2007), <https://www.splcenter.org/fighting-hate/intelligence-report/2007/europe-outlaws-race-hate-incitement> [https://perma.cc/7MJS-NM3V].

participants through extremist rhetoric.<sup>266</sup> However, the United States has not expressly prohibited through legislation the advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence. In ratifying the ICCPR, the United States adopted a reservation that states that Article 20 does not “restrict the right of free speech and association protected by the Constitution and laws of the United States.”<sup>267</sup> While First Amendment concerns prevent the United States from passing a federal law criminalizing or prohibiting the advocacy of hatred that incites hostility, discrimination, or violence, the Supreme Court has determined that words inciting violence (or “fighting words”) are beyond First Amendment protection.<sup>268</sup>

Though the ICCPR’s prohibition against the advocacy and incitement of racial hostility and violence has not been implemented through a federal law that would punish or prevent the IRA’s socially divisive posts, social media companies have instituted user policies that prohibit the advocacy and incitement of racial hostility and violence on their platforms.<sup>269</sup> These user policies align with the language of Article 20 of the ICCPR and are a useful tool to limit the impact of Russia’s cyber disinformation campaign. Similarly, incorporating prohibitions against the incitement of racial hatred and violence by state agents into the United States’ formal national security strategy, as this Article recommends, is in keeping with the ICCPR and does not unduly infringe upon the First Amendment rights of American citizens.<sup>270</sup>

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<sup>266</sup> See discussion *supra* Part II.

<sup>267</sup> 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992); see also Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1497 (2003).

<sup>268</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); see also *Virginia v. Black*, 538 U.S. 343, 359 (2003).

<sup>269</sup> See *Community Standards: Violence and Criminal Behavior*, FACEBOOK, [https://www.facebook.com/communitystandards/violence\\_criminal\\_behavior](https://www.facebook.com/communitystandards/violence_criminal_behavior) [<https://perma.cc/5L7S-WESW>]; *The Twitter Rules*, TWITTER, <https://help.twitter.com/en/rules-and-policies/twitter-rules> [<https://perma.cc/X2TE-954T>]; *Community Guidelines*, INSTAGRAM, <https://help.instagram.com/477434105621119> [<https://perma.cc/LN37-3BBN>].

<sup>270</sup> United States government agents and institutions can be expected, by virtue of their employment, to act in accordance with employment arrangements intended to prevent incitement to discrimination, hostility, or violence. *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

## VI. TOWARD A NEW *RACISM AS THREAT* NATIONAL SECURITY PROGRAM

In its recent attack against American democratic institutions, Russia has exploited the racial tensions and divisions that have arisen out of current manifestations of a minority *race as threat* national security state. A new approach to national security, as it relates to race, must replace the *race as threat* paradigm. This new approach must both address ongoing violations of minorities' rights by national security institutions and eliminate Russian and other actors' ability to weaponize racial divisions against Americans through social media. This Article suggests a *racism as threat* national security paradigm as that new approach.

### A. The Post-Racial Myth Following the Obama Election

After President Obama's election, some political and social commentators began to proclaim that we had transitioned into a post-racial America.<sup>271</sup> The election of an African American president symbolized America's movement past its history of racial discrimination and division. While President Obama's election marked a new pinnacle in political achievement for the African American community and reflected racial progress in the United States, his election did not produce, nor reflect, the end of racial discrimination in America. The negative racial tenor of much of the political opposition to President Obama during his eight years in office evidenced this reality.<sup>272</sup>

Several events occurred during President Obama's administration that illustrated how endemic the *race as threat* paradigm is within national security institutions. For example, several states began to push legislative proposals targeted at undocumented workers that had a discriminatory impact upon the Latinx community.<sup>273</sup> Arizona passed a law which made it a

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<sup>271</sup> Peniel Joseph, *Obama's Effort to Heal Racial Divisions and Uplift Black America*, WASH. POST (Apr. 22, 2016), <https://www.washingtonpost.com/graphics/national/obama-legacy/racism-during-presidency.html> [<https://perma.cc/UFU4-JE4G>].

<sup>272</sup> *Id.*

<sup>273</sup> Ian Gordon & Tasneem Raja, *164 Anti-Immigration Laws Passed Since 2010? A MoJo Analysis*, MOTHER JONES (2012), <https://www.motherjones.com/immigration/2012/07/164-anti-immigration-laws-passed-since-2010/>.

state crime to be present in Arizona without immigration documents and to seek employment without paperwork, provided local police with the authority to determine the federal immigration status of someone detained or arrested, and authorized warrantless arrests of people believed to be removable from the United States based on probable cause.<sup>274</sup> The Supreme Court invalidated all of the provisions of the law except for the warrantless arrests based on probable cause, because the laws contravened federal supremacy regarding the enforcement of immigration laws.<sup>275</sup> Other states pushed for identification laws that would harm immigrants' ability to conduct many day-to-day affairs, such as driving.<sup>276</sup> Law enforcement officers, like Sheriff Arpaio in Arizona, engaged in discriminatory stops of Latinx citizens and noncitizens in the state for the purposes of immigration enforcement.<sup>277</sup>

Several state governments also sued to prevent the President from implementing Deferred Action for Parents of Childhood Arrivals (DAPA), which would have enabled the parents of Deferred Action for Childhood Arrival (DACA) children to remain in the country, keeping families together.<sup>278</sup> While these events could be characterized as race-neutral efforts to enforce the law,<sup>279</sup> the punitive response to the President's

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motherjones.com/politics/2012/03/anti-immigration-law-database/ [https://perma.cc/65PW-7JMB].

<sup>274</sup> Support Our Law Enforcement and Safe Neighborhoods Act, S. 1070, 49th Leg., 2d Reg. Sess. §§ 2–3, 5–6 (Ariz. 2010).

<sup>275</sup> See *Arizona v. United States*, 567 U.S. 387, 416 (2012).

<sup>276</sup> See David L. Ulin, *Real ID Will Divide Us All into Documented and Undocumented*, L.A. TIMES (July 30, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-ulin-real-id-20180730-story.html> [https://perma.cc/S96M-LJBW].

<sup>277</sup> Dan Magos, *I Was One of Joe Arpaio's Victims. He Doesn't Deserve a Pardon*, WASH. POST (Aug. 26, 2017), <https://www.washingtonpost.com/news/posteverything/wp/2017/08/26/i-was-one-of-joe-arpaio-victims-he-doesnt-deserve-a-pardon> [https://perma.cc/S6VQ-UGSY].

<sup>278</sup> Adam Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html> [https://perma.cc/BV8C-KHLH].

<sup>279</sup> See, e.g., Kris W. Kobach, *Why Arizona Drew a Line*, N.Y. TIMES (Apr. 28, 2010), <https://www.nytimes.com/2010/04/29/opinion/29kobach.html> [https://perma.cc/Q6PF-2P74]; Hans A. von Spakovsky, *DACA Is Unconstitutional, as Obama Admitted*, HERITAGE FOUND. (Sep. 8, 2017), <https://www.heritage.org/immigration/commentary/daca-unconstitutional-obama-admitted> [https://perma.cc/86PG-6KNB].

efforts to provide a pathway to citizenship to some undocumented workers indicated broader policy concerns about the workers themselves. Some have argued that this response reflects concern about demographic changes and the impending “browning” of America.<sup>280</sup>

During this period, videos of unarmed African Americans being killed by local law enforcement officers went viral on social media, raising public consciousness of this discriminatory pattern and spurring the creation of the BLM movement.<sup>281</sup> Although police violence and killings of unarmed Black men and women were a longstanding issue, the ability of citizens to record and share videos of the violence on a mass scale created an unprecedented response.<sup>282</sup> Despite the impact of the videos, holding public officials accountable was difficult, as shown by the recurring failure to prosecute or convict those involved with these deaths.<sup>283</sup> *Minority race as threat* became a justification for state-sanctioned killing, as officers like Darren Wilson, Michael Brown’s killer, invoked their fear of Black bodies to justify their actions.<sup>284</sup>

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<sup>280</sup> Brian Resnick, *White Fear of Demographic Change Is a Powerful Psychological Force*, VOX (Jan. 28, 2017), <https://www.vox.com/science-and-health/2017/1/26/14340542/white-fear-trump-psychology-minority-majority> [<https://perma.cc/JQ7W-LXAU>].

<sup>281</sup> See *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/herstory/> [<https://perma.cc/J77B-5MJN>].

<sup>282</sup> Peter Dreier, *Racism on Camera*, AM. PROSPECT (July 30, 2015), <https://prospect.org/article/racism-camera> [<https://perma.cc/YQ2M-GTBK>].

<sup>283</sup> Courtney Teague & Amy B. Wang, *Sacramento Police Officers Who Fatally Shot Stephon Clark Will Not Be Charged, Prosecutor Says*, WASH. POST (Mar. 2, 2019), <https://www.google.com/amp/s/www.washingtonpost.com/amphtml/nation/2019/03/02/sacramento-police-officers-who-fatally-shot-stephon-clark-will-not-be-charged-prosecutor-says> [<https://perma.cc/M5DX-6KDA>] (“Just under 1,000 people are shot and killed by police officers each year, according to The Washington Post’s database. A handful of those shootings lead to criminal charges, and convictions are even more rare, which has prompted intense criticism from civil rights activists across the country.”).

<sup>284</sup> Josh Sanburn, *All the Ways Darren Wilson Described Being Afraid of Michael Brown*, TIME (Nov. 25, 2014), <http://time.com/3605346/darren-wilson-michael-brown-demon> [<https://perma.cc/G3UG-3L3V>] (referencing racialized tropes of Black males in describing Brown as a “hulk” and “demon”).



## B. Racial Division During the Trump Administration

The tenor of President Trump's campaign and policies pursued by his administration have further institutionalized racially divisive policies in national security institutions. As he promised during his campaign, President Trump signed what came to be known as the "Muslim Ban" executive orders targeting immigrants and refugees from Muslim-majority countries.<sup>285</sup> The Administration has targeted undocumented Latinx immigrants in widespread and invasive immigration crackdowns,<sup>286</sup> systematically removed children from parents crossing the border,<sup>287</sup> and made efforts to remove DACA protections granted by the last administration.<sup>288</sup> Further, the Administration has signaled to law enforcement that efforts at reform to address unarmed killings of African Americans are no longer a priority.<sup>289</sup> In addition, through the posting of many tweets during his campaign and during his administration, President Trump has sought to inject racially-divisive issues into the national dialogue (from targeting NFL players for their protest of police violence, to characterizing immigrants from Mexico as rapists and murderers, to labeling Middle Eastern refugees as terrorists).<sup>290</sup> The racially divisive

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<sup>285</sup> See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017); Paul Thornton, *The Cruelty and Bigotry of Trump's Immigration Policies*, L.A. TIMES (Aug. 11, 2018), <https://www.latimes.com/la-ol-opinion-newsletter-trump-immigration-20180811-htmlstory.html> [<https://perma.cc/C8NV-FA2Z>].

<sup>286</sup> Thornton, *supra* note 285; see also Ben Leonard, *Under Trump Arrests of Undocumented Immigrants with No Criminal Record Have Tripled*, NBC (Aug. 13, 2018), <https://www.nbcnews.com/politics/immigration/under-trump-arrests-undocumented-immigrants-no-criminal-record-have-tripled-n899406> [<https://perma.cc/5V8V-94GZ>].

<sup>287</sup> Thornton, *supra* note 285.

<sup>288</sup> *Id.*

<sup>289</sup> See Margaret Hartmann, *Sessions Moves to Roll Back Obama-Era Police Reforms*, N.Y. MAG. (Apr. 4, 2017), <http://nymag.com/intelligencer/2017/04/sessions-moves-to-roll-back-obama-era-police-reforms.html> [<https://perma.cc/T4E4-UYLX>].

<sup>290</sup> Christal Hayes, *Here Are 10 Times President Trump's Comments Have Been Called Racist*, USA TODAY (Aug. 14, 2018), <https://www.usatoday.com/story/news/politics/onpolitics/2018/08/14/times-president-trump-comments-called-racist/985438002> [<https://perma.cc/969P-7FTX>]; see Donald Trump (@realDonaldTrump), TWITTER, <https://twitter.com/realDonaldTrump>.

policies and rhetoric from the White House may incur support from President Trump's political base, but they also create an environment of racial division that Russia is able to exploit against the interests of the United States.

### C. Toward a *Racism as Threat* National Security Framework

The majority of American citizens view President Trump's comments while in office as racially divisive.<sup>291</sup> Political commentators have surmised that he views such rhetoric as politically beneficial to his base.<sup>292</sup> Racially divisive political posturing is nothing new in American politics.<sup>293</sup> As a coun-

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aldTrump?ref\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauth or [https://perma.cc/T3P5-4T4T].

<sup>291</sup> Jennifer Rubin, *Most Americans Agree: President Trump Is Divisive*, WASH. POST, (Jan. 17, 2018), <https://www.google.com/amp/s/www.washingtonpost.com/amphtml/blogs/right-turn/wp/2018/01/17/most-americans-agree-president-trump-is-divisive> [https://perma.cc/2PDC-8Z92] (discussing a January 2018 Quinnipiac poll). The Quinnipiac poll found that sixty-four percent of Americans felt that Trump was doing more to divide than to unite the nation, fifty-nine percent found that he "does not respect people of color as much as he respects white people," and fifty-eight percent believed that the comments he made about immigrants from certain countries are racist. *U.S. Voters Split on Whether Trump Is Stable, Quinnipiac University National Poll Finds; President Is Dividing the Nation, Voters Say 2-1*, QUINNIPAC UNIV. (Jan. 17, 2018), <https://poll.qu.edu/national/release-detail?ReleaseID=2513> [https://perma.cc/A27H-UEN6].

<sup>292</sup> Ashley Parker et al., *"I'm Not Going There": As Trump Hurls Racial Invective, Most Republicans Stay Silent*, WASH. POST (Aug. 18, 2018), [https://www.washingtonpost.com/politics/im-not-going-there-as-trump-hurls-racial-invective-most-republicans-stay-silent/2018/08/18/aab7fd8a-a189-11e8-83d2-70203b8d7b44\\_story.html](https://www.washingtonpost.com/politics/im-not-going-there-as-trump-hurls-racial-invective-most-republicans-stay-silent/2018/08/18/aab7fd8a-a189-11e8-83d2-70203b8d7b44_story.html) [https://perma.cc/97FJ-NV35]; Robert Schlesinger, *Trump Doesn't Care About Governing or Being Re-Elected. He Only Cares About Being Popular with His Base*, NBC (Dec. 26, 2018), <https://www.nbcnews.com/think/opinion/trump-doesn-t-care-about-governing-or-being-reelected-he-nca951956> [https://perma.cc/KYS9-CMSU]; Chuck Todd et al., *Where Some See Tragedy in Toxic Politics, Trump Sees Opportunity*, NBC (Oct. 29, 2018), <https://www.nbcnews.com/politics/first-read/where-some-see-tragedy-toxic-politics-trump-sees-opportunity-n925561> [https://perma.cc/KYS9-CMSU].

<sup>293</sup> From the debates about slavery during the drafting of the Constitution, to Reconstruction-era political battles, to Nixon's Southern Strategy, racial messaging (often divisive) has held a prominent place in American politics. See, e.g., Kevin O'Leary, *Trump and the Racial Politics of the South*, AM. PROSPECT (June 27, 2016), <https://prospect.org/article/trump-and-racial-politics-south> [https://perma.cc/K7A4-4WVD]; Clay Risen,

terweight against politicians that might exploit race for political gain and foreign governments' use of American racial division for their own geopolitical ends, the public understanding of racial discrimination must be expanded to make clear that racism is not only morally wrong, but also is a national security *vulnerability*.<sup>294</sup> Enshrining this understanding in the public consciousness and in national security strategic planning can serve as a bulwark against racial division sown by politicians who find political advantage in racial demagoguery and foreign states that exploit that division. Therefore, this Article proposes that social justice and national security legal and policy scholars and advocates use the Russian election interference campaign to articulate how racism is a national security threat and vulnerability that has been weaponized against the United States. In identifying *racism as a national security threat* to the United States, our national security institutions can then strategically plan ways to minimize that threat, as discussed in Part VII.

#### D. Legal Underpinnings of a *Racism as Threat* National Security Framework

Institutionalizing a *racism as national security threat* framework in national security planning is consistent with domestic and international law. The post-Civil War constitutional amendments and legislation of the Civil Rights Era addressed, respectively, the legacies of slavery and Jim Crow segregation and sought to bring African Americans and other racial minorities closer to the promise of equality.<sup>295</sup> These constitutional provisions, legislation, and related anti-

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*How the Party of Lincoln Became the Party of Racial Backlash*, N.Y. TIMES (Mar. 31, 2018), <https://www.nytimes.com/2018/03/31/opinion/sunday/spiro-agnew-mlk.html> [<https://perma.cc/29B6-Q92X>].

<sup>294</sup> See, e.g., Jason Sattler, *Trump and Russia Used Race to Divide America. Now It's a National Security Problem.*, USA TODAY (July 19, 2018), <https://www.usatoday.com/story/opinion/2018/07/19/putin-trump-race-divide-americans-2016-election-interference-column/799765002/> [<https://perma.cc/JSY5-BMEK>].

<sup>295</sup> U.S. CONST. amends. XIII–XV; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973, to 1973bb-1(2006)) 52 U.S.C.A. § 10301 (2014); Fair Housing Act of 1968, Pub. L. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601 to 3619).

subordination jurisprudence reflect what is now an accepted American cultural understanding that racial discrimination is not only wrong as a normative matter, but also an ongoing issue that these laws need to address.<sup>296</sup> Similarly, international human rights law, including treaties to which the United States is a party like the ICCPR and the Convention on the Elimination of Racial Discrimination, express that states have an obligation to ensure that citizens' rights are protected equally by the state without regard to race.<sup>297</sup>

Other states have acknowledged the dangers of racist practices and dialogue through their domestic law. Many European states, in accordance with the ICCPR, criminalize racist speech and incitement to racist violence.<sup>298</sup> In the aftermath of Nazism, the German government sought to suppress behavior and conduct that furthers oppressive ideology and discrimination.<sup>299</sup> History has demonstrated that racial strife can lead to social discord and violence in the United States.<sup>300</sup> Proactively targeting "racism as the threat"

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<sup>296</sup> Andrew Arengue et al., *Poll: 64 Percent of Americans Say Racism Remains a Major Problem*, NBC NEWS (May 29, 2018), <https://www.nbcnews.com/politics/politics-news/poll-64-percent-americans-say-racism-remains-major-problem-n877536> [<https://perma.cc/6395-QY67>]; Joe Neel, *Poll: Most Americans Think Their Own Group Faces Discrimination*, NPR (Oct. 24, 2017), <https://www.npr.org/sections/health-shots/2017/10/24/559116373/poll-most-americans-think-their-own-group-faces-discrimination> [<https://perma.cc/4XW9-2TUS>]; *Discrimination in America: Experiences and Views on Affects of Discrimination Across Major Population Groups in the United States*, ROBERT WOOD JOHNSON FOUND., <https://www.rwjf.org/en/library/research/2017/10/discrimination-in-america-experiences-and-views.html> [<https://perma.cc/SY37-74B9>].

<sup>297</sup> ICCPR, *supra* note 265, art. 2 ("Each State Party . . . undertakes to respect and to ensure . . . the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); International Convention on the Elimination of All Forms of Racial Discrimination art. 2, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) ("Each State Party undertakes to engage in no act or practice of racial discrimination . . . and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation . . .").

<sup>298</sup> Mila Versteeg, *What Europe Can Teach America About Free Speech*, ATLANTIC (Aug. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/08/what-europe-can-teach-america-about-free-speech/537186/> [<https://perma.cc/WAC5-5P9J>].

<sup>299</sup> *Id.*

<sup>300</sup> See discussion *supra* Part IV.

and vulnerability, rather than minority communities as the threat, is a measure that would thwart foreign (and internal) efforts to spark conflict.

A *racism as national security threat* framework would further the anti-subordination objectives of American and international antidiscrimination law by creating an additional policy rationale for state actors to proactively eliminate practices at the federal and local level that have discriminatory effects on racial minorities, further internal racial division, and create opportunities for foreign exploitation. Framing racism as a national security threat would also enhance the rationale that executive antidiscrimination measures undertaken to confront national security vulnerabilities should receive the significant deference typically given by American courts on matters of national security.<sup>301</sup> A thoroughly articulated *racism as national security threat* framework is also needed to help concretize the reality that racial division was employed by the Russian interference campaign against the United States in a broad, strategic manner on social media.<sup>302</sup> Failure to identify racial division itself as a national security threat will result in responses to Russian election interference that focus exclusively on technical mechanisms to limit Russian cyber intrusion without addressing the very vulnerability that Russians exploited.

Further concretizing the reality that institutional practices that have a discriminatory *effect* on racial minorities exacerbates the national security vulnerability of the United States will provide additional justification for the elimination of such practices even when they are deemed permissible by American courts. As seen in the cases of *Korematsu* and *Iqbal* and the recent Muslim Ban decision,<sup>303</sup> the Court has often been deferential to the executive branch when a national security rationale is proffered for policies that have a disproportionate racial impact. Similar court deference is seen

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<sup>301</sup> In the case of *Trump v. Hawaii*, the Supreme Court applied the deferential rational basis review standard in assessing the President's executive order instituting a ban on immigrants from certain majority-Muslim countries—notwithstanding First Amendment concerns—because the executive order involved the national security function of the executive, and sufficient national security justifications validated the executive order according to the deferential standard. 138 S. Ct. 2392, 2420–2423 (2018) (“[O]ur inquiry into matters of . . . national security is highly constrained.”).

<sup>302</sup> See *supra* Part I.

<sup>303</sup> *Hawaii*, 138 S. Ct. 2392.

in the context of local law enforcement practices that have a disproportionate racial impact on minority communities.<sup>304</sup> Nonetheless, those institutional practices inflame racial divisions, even if a non-race-based national security justification is offered. Since litigation and social justice movements alone will not end these practices, additional tools must be used. A *racism as national security threat* framework encourages policymakers to direct the purveyors of these practices to end them—not only due to their discriminatory impact, but also because of the national security threat that they ultimately pose. Enshrining this awareness in national security planning documents will also contribute to the reduction of the vulnerability.

## VII. OPERATIONALIZING A *RACISM AS THREAT* NATIONAL SECURITY APPROACH

The executive branch has an array of tools to respond to new security threats. While legislation is an effective tool for addressing legal matters on a relatively permanent basis, legal and policy priorities can often more efficiently be effectuated through the issuance of executive orders, presidential directives, presidential memoranda, and national security strategies. The issuance of national security planning documents, however, requires that a presidential administration prioritize the retrenchment of racial division and foreign election interference. Though dependent on political realities, the suggestions in this Article are not tailored to the specific national political leaders of the present moment.<sup>305</sup> Rather,

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<sup>304</sup> See *Utah v. Strieff*, 136 S. Ct. 2056, 2067–68, 2070 (2016) (Sotomayor, J., dissenting) (“[M]any innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone’s dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this type of scrutiny.” (citation omitted)). In this case, the Court allowed evidence to be used against a pedestrian who was the subject of an illegal stop by a police officer who had no evidence or reason to believe the pedestrian was engaged in illegal activity. *Id.* at 2064.

<sup>305</sup> President Trump has failed to take comprehensive and organized action to target Russian election interference. See Julian E. Barnes & Nicholas Fandos, *Lawmakers Dismiss White House Push to Fight Election Interference as Too Weak*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/us/politics/trump-executive-order-election-interference-senate.html> [<https://perma.cc/L3DS-QYF3>]; Ken Dilanian, *Trump Admin Has No Central Strategy for Election Security, and No One’s in Charge*, NBC NEWS (July 27,

this Article seeks to outline best practices for how leaders in the executive and legislative branches and in national security institutions, might address the unique threat highlighted by Russian interference in United States elections over time.

This roadmap will remain available to current and future administrations, legislatures, and national security institutions. This Article seeks the implementation of these recommendations over time, aided by expanded public knowledge of the unique nature of Russian election interference through racial division on social media. Section VII.A highlights legislative and regulatory proposals that focus on the regulation of social media. Section VII.B provides recommendations for how executive, legislative, and administrative officials at the federal and state level can reduce state practices that foment racial division and create fertile ground for Russian interference. Lastly, Section VII.C discusses how the *racism as threat* framework can help support legislative reform in this space.

### A. Regulating Social Media Platforms

As discussed in Part V, existing international law and United States domestic law frameworks do not fully address the unique threat of Russian cyber interference that seeks to exacerbate racial division. The development of a targeted and proportionate response that deters such activity has yet to be identified.<sup>306</sup> Any counterintelligence responses, due to their

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2018), <https://www.nbcnews.com/politics/elections/trump-admin-has-no-central-strategy-election-security-no-one-n895256> [<https://perma.cc/SN2L-YQ34>]. Congress has similarly failed to advance election security legislation. James Lamond, *The 2020 Election Is Vulnerable. Congress Needs to Guard Against Attacks Starting Now.*, USA TODAY (Nov. 25, 2018), <https://www.usatoday.com/story/opinion/2018/11/25/2020-election-hacking-interference-russia-congress-legislation-trump-column/2078279002> [<https://perma.cc/7L45-Y8HU>]. Though the recommendations in this Article will most likely be applied by a future presidential administration, it is the author's hope that Congress may still be persuaded to act on a bipartisan basis to protect the electoral process.

<sup>306</sup> The Obama Administration's expulsion of Russian diplomats and intelligence agents and closure of Russian diplomatic compounds in December 2016 following revelations of a Russian interference campaign did not deter Russian election interference. See Jeremy Diamond, *Director of National Intelligence: Russian Interference in US Political System Ongoing*, CNN (Aug. 2, 2018), <https://www.cnn.com/2018/08/02/politics/dan-coats-russia-interference-election-security/index.html> [<https://perma.cc/RM77-DRFN>]; Lauren Gambino et al., *Obama Expels 35 Russian Diplomats in*

covert nature, are unlikely to be acknowledged by American officials, making their efficacy in deterring election interference difficult to assess. Some scholars have called for greater transparency in American political candidate contact with foreign governments.<sup>307</sup> However, even if candidate contact with Russian agents is controlled, Russia and other states are still likely to engage in their interference campaigns from afar.<sup>308</sup> Criminal indictment of foreign officials and entities under United States law is also an insufficient deterrent. Mueller's indictments are unlikely to result in the prosecution of the indicted Russian agents and agencies due to Russia's refusal to extradite them as well as Russia's claims of innocence.<sup>309</sup>

Policy advocates have called for new legislation that minimizes Russian cyber intrusion and encourages proactive regulation by social media platforms. A new German law that requires social media platforms to remove hate-stirring messages within twenty-four hours and a similar proposal by French president Macron have been criticized due to

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*Retaliation for US Election Hacking*, GUARDIAN (Dec. 30, 2016), <https://www.theguardian.com/us-news/2016/dec/29/barack-obama-sanctions-russia-election-hack> [<https://perma.cc/2WDJ-99XV>]; Ali Watkins, *Obama Team Was Warned in 2014 About Russian Interference*, POLITICO (Aug. 14, 2017), <https://www.politico.com/story/2017/08/14/obama-russia-election-interference-241547> [<https://perma.cc/77T2-8CPM>].

<sup>307</sup> For example, Anthony Gaughan has called for a mandatory forty-eight-hour reporting period by all United States political campaigns of any contacts with foreign governments. Anthony J. Gaughan, *Trump, Twitter, and the Russians: The Growing Obsolescence of Federal Campaign Finance Law*, 27 S. CAL. INTERDISC. L.J. 79, 126 (2017).

<sup>308</sup> But note that some policy advocates have called for the articulation of standards in foreign election intervention that clearly distinguish foreign support for democratic elections in authoritarian and nondemocratic states from the covert spreading of misinformation in democratic states with free and fair electoral processes. These policy advocates' hope is that clearly articulated standards will help galvanize a concerted response from states that support democracy against authoritarian states that seek to undermine it. See Joshua Geltzer & Jake Sullivan, *How to Prevent the Next Election Disaster*, POLITICO (Jan. 22, 2019), <https://www.politico.com/magazine/story/2019/01/22/prevent-election-disaster-224032> [<https://perma.cc/4FPY-ESNN>].

<sup>309</sup> Martin Pengelly, *Putin: Russia Will "Never" Extradite 13 Nationals Indicted by Mueller*, GUARDIAN (Mar. 4, 2018), <https://www.theguardian.com/us-news/2018/mar/04/vladimir-putin-never-extradite-13-russians-robert-mueller> [<https://perma.cc/YJB4-JC28>].



ensorship concerns.<sup>310</sup> A comparable proposal in the United States would likely be challenged on First Amendment grounds. The Alliance for Securing Democracy<sup>311</sup> has called for legislation that would apply the same truthfulness standards to political advertisements on social media as apply in traditional media under the Honest Ads Act.<sup>312</sup> In the international law arena, the Senate Foreign Relations Committee Minority Staff have called for the United States to initiate the drafting of an international treaty, modeled after arms control agreements, that would provide clear rules for the use of cyber tools during peacetime.<sup>313</sup> The proposal has merit, although it would take some time to negotiate such a treaty, and Russia would need to agree to become a party in order to be governed by its terms. The treaty would also need to contain precise mechanisms for monitoring and enforcement in order to deter practices that have become a key element of Russia's geopolitical strategy.

Finally, advocates have called for greater self-regulation of online hate-based content by social media companies.<sup>314</sup>

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<sup>310</sup> Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act], June 30, 2017, DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/12356, <https://cdn.netzpolitik.org/wp-upload/2017/06/Synopse-NetzDG-final.pdf> [<https://perma.cc/TMD3-FPTR>] (Ger.); see also Rick Noack, *Everything We Know So Far About Russian Election Meddling in Europe*, WASH. POST (Jan. 10, 2018), <https://www.google.com/amp/s/www.washingtonpost.com/amp/html/news/worldviews/wp/2018/01/10/everything-we-know-so-far-about-russian-election-meddling-in-europe> [<https://perma.cc/LC2X-XBMY>]. Critics of the law have argued that it opens the door to censorship. *Germany: Flawed Social Media Law*, HUM. RTS. WATCH (Feb. 14, 2018), <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law> [<https://perma.cc/9NQE-2NS3>].

<sup>311</sup> Jankowicz, *supra* note 23.

<sup>312</sup> *Foreign Influence Operations' Use of Social Media Platforms (Third Party Expert Witnesses): Hearing Before the S. Select Comm. on Intelligence*, 115th Cong. 31, 40, 70 (2018) (statement of Laura Rosenberger, Director, Alliance for Securing Democracy). See generally *Honest Ads Act*, S. 1989, 115th Cong. (2017).

<sup>313</sup> SFRC REPORT, *supra* note 41, at 161.

<sup>314</sup> See Curt Levey, *Self-Regulation, Not Government Regulation, Should Keep Russian Ads Off Facebook*, HILL (Nov. 1, 2017), <https://thehill.com/opinion/cybersecurity/358267-self-regulation-not-government-regulation-should-keep-russian-ads-off> [<https://perma.cc/Z5S5-KNMA>]; John Samples, *Why the Government Should Not Regulate Content Moderation of Social Media*, CATO INST. (Apr. 9, 2019), <https://www.cato.org/publications/policy-analysis/why-government-should-not-regulate-content-moderation-social-media#full> [<https://perma.cc/R5UL-MBFQ>].

The Center for American Progress has called for companies to proactively make and enforce terms-of-use policies that make the incitement of hate online a basis for the termination and suspension of accounts.<sup>315</sup> Most social media companies have such terms-of-use policies, even having them during the Russian election interference in 2016.<sup>316</sup> The key to effective self-regulation is greater investment of resources in the monitoring of hate-based accounts and the provision of avenues for appeal. This will ensure that monitors are not impermissibly targeting viewpoints or terminating the accounts of legitimate users.<sup>317</sup> Even if these legislative and self-regulatory tools are adopted, Russian campaigns will continue to target social media platforms and may have some continued success in disseminating divisive rhetoric online through false profiles. To combat and mitigate this ongoing threat, a robust national security response must directly address state action that inflames racial division.

## B. National Security Strategy Targeting Racism

The use of executive measures to address racism and newly identified security threats is not novel. Case studies from the Clinton and Obama administrations provide excellent examples that illustrate how new policy priorities and better-understood security threats were addressed using executive orders, national security strategy documents, and presidential memoranda. President Clinton issued Executive Order 12,898 in 1994, titled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, to require federal agencies to take action on programs that had an adverse impact on the health or environment of minority and low-income populations.<sup>318</sup> President Obama

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<sup>315</sup> Aastha Uprety & Danyelle Solomon, *Combating Hate and White Nationalism in the Digital World*, CTR. FOR AM. PROGRESS (Aug. 8, 2018), <https://www.americanprogress.org/issues/race/reports/2018/08/08/454494/combating-hate-white-nationalism-digital-world/> [https://perma.cc/9EMC-2RQX].

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* Though the scope of First Amendment rights on social media has not yet been definitively adjudicated, social media companies should act in accordance with the spirit of the First Amendment and not engage in viewpoint discrimination or censorship.

<sup>318</sup> Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

issued a 2015 national security strategy that identified climate change as “an urgent and growing threat to our national security” and a 2016 presidential memorandum that directed federal agencies “to ensure that climate change-related impacts are fully considered in the development of national security doctrine, policies, and plans.”<sup>319</sup> The environmental justice executive order under President Clinton and the national security strategy and policy memorandum addressing climate change under President Obama reflect presidential responses to identified equity and security challenges.<sup>320</sup> Institutionalized discrimination that becomes a focal point for Russian interference could similarly be addressed by a willing administration through these same mechanisms.

### 1. Targeting Racism Through Executive Order

The United States has a long history of utilizing executive orders to prohibit discriminatory practices. In 1941, President Roosevelt issued executive orders that required government defense contractors to agree in their defense contracts not to discriminate on the basis of race or national origin.<sup>321</sup> In 1954, President Eisenhower, by executive order, prohibited government contractors from discriminating on the basis of race, religion, color, or national origin in employment, promotion, demotion, or transfer.<sup>322</sup> In 1961, President Kennedy issued an executive order requiring federal contractors to certify that they would “take affirmative action to ensure that applicants are employed, and that employees are treated . . . without regard to their race, creed, color, or national origin.”<sup>323</sup> In 1965, President Johnson issued Executive Order 11,246,

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<sup>319</sup> Memorandum on Climate Change and National Security, 2016 DAILY COMP. PRES. DOC. 621 (Sept. 21, 2016); Statement on the 2015 National Security Strategy, 2015 DAILY COMP. PRES. DOC. 85 (Feb. 6, 2015).

<sup>320</sup> Memorandum on Climate Change and National Security, 2016 DAILY COMP. PRES. DOC. 621 (Sept. 21, 2016); Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

<sup>321</sup> Exec. Order No. 8802, 3 C.F.R. 234 (Supp. 1941); Exec. Order No. 9001, 6 Fed. Reg. 6787 (Dec. 27, 1941).

<sup>322</sup> Exec. Order No. 10,557, 19 Fed. Reg. 5655 (Sept. 3, 1954).

<sup>323</sup> Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

which prohibited discrimination in federal employment due to race, color, religion, sex, or national origin.<sup>324</sup>

In addition to prohibiting racial discrimination by the federal government or by federally-affiliated contractors, Presidents have also used executive orders to prohibit government practices that have had a racially discriminatory impact. A number of federal housing executive orders, for example, were issued to prevent discrimination in federally owned housing.<sup>325</sup> President Clinton expanded on this tradition of prohibiting federal agency action that has a discriminatory effect on minority communities by issuing Executive Order 12,898 in 1994 to prohibit federal agency action that has a negative environmental or health effect on minority and low-income communities.<sup>326</sup>

Clinton's executive order to prohibit federal agency harm to minority communities in the environmental space could serve as a model for an executive order prohibiting state action that has a disparate impact in the national security arena. This executive order would seek to minimize institutional discrimination and disparate racial impacts by government agencies. Racial profiling, private prison funding, federal prosecution, and sentencing practices would all be subject to review and alteration. Unlike in litigation where a national security rationale often serves as a justification for judges to uphold practices despite their disparate racial impact,<sup>327</sup> an executive order would require federal agencies to end such practices because they undermine the national security interests of the nation.

Some executive orders addressing national security have inferred that negative racial impacts undermine national security. Though not explicit in its terms, Executive Order 12,333 was drafted, in part, as a response to the racially discriminatory targeting of civil rights organizations under J. Edgar Hoover.<sup>328</sup> Making this goal—the avoidance of racially

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<sup>324</sup> Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

<sup>325</sup> See Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 20, 1962); Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994).

<sup>326</sup> Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

<sup>327</sup> See, e.g., discussion of the *Korematsu* and *Iqbal* cases *supra* Part IV.

<sup>328</sup> See Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted as amended in* 50 U.S.C. § 3002 (2017) (originally classified as 50 U.S.C. § 401 (2006)).

discriminatory conduct—explicit in an existing or new national security executive order would enable a direct response to the racial divisions fueling the Russian interference campaigns.

## 2. A Model National Security Strategy and Executive Order

As required by law, every presidential administration produces an annual national security strategy report to Congress that details, among other things, the “worldwide interests, goals, and objectives of the United States that are vital to the national security of the United States” and “proposed short-term and long-term uses of the political, economic, military, and other elements of the national power of the United States to protect or promote the interests and achieve the goals and objectives” of the nation.<sup>329</sup> The report provides administrations with an opportunity to detail new national security challenges that they must confront or to present innovative approaches to a national security challenge. In his 2015 national security strategy, President Obama became the first President to detail how he perceived addressing climate change as a national security priority of the United States.<sup>330</sup> While previous administrations had not characterized it as a national security threat in the same manner, the Obama Administration determined that the impacts of climate change presented serious national security challenges to the United States and detailed the measures that it had taken and would continue to take to respond to climate change.<sup>331</sup> In his 2016 presidential memorandum, President Obama operationalized this national security priority by directing federal departments and agencies to “ensure that climate change-related impacts are fully considered in the development of national security doctrine, policies, and plans.”<sup>332</sup> The presidential memorandum

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<sup>329</sup> 50 U.S.C. § 3043 (2017) (originally classified as 50 U.S.C. § 404a (2006)).

<sup>330</sup> Statement on the 2015 National Security Strategy, 2015 DAILY COMP. PRES. DOC. 85 (Feb. 6, 2015).

<sup>331</sup> *Id.*

<sup>332</sup> Memorandum on Climate Change and National Security, 2016 DAILY COMP. PRES. DOC. 621 (Sept. 21, 2016).

created an interagency task force charged with developing an action plan for implementing the new climate change strategy.<sup>333</sup>

Just as climate change was incorporated into the 2015 national security strategy, a future national security strategy should prioritize the elimination of state action with disparate racial impacts. To help develop and implement the strategy, a task force should be formed with the reduction of institutional racism as a key objective. There is precedent for such an approach. President Obama created a task force on twenty-first century policing in response to the shooting of Michael Brown in Ferguson, Missouri and the unrest that followed.<sup>334</sup>

Some general principles would need to apply to the national security strategy. To ensure that the strategy does not become a new mechanism for targeting American citizens or organizations labeled as racially polarizing,<sup>335</sup> the emphasis of the strategy would be on reducing state action that results in disparate racial impacts that are exploited as part of a foreign influence campaign. As with President Obama's twenty-first century policing task force, community organizations and non-government experts would be included.<sup>336</sup> The national security strategy would include findings that detail how the Russian government seeks to influence democratic electoral processes through a targeted social media campaign that inflames racial divisions and polarizes the electorate. It would prioritize the retrenchment of institutional racism and disparate racial impacts in federal, state, and local government actions as a prophylactic measure against Russian influence campaigns. Government actions having a disparate impact on minority communities would be identified and plans would be developed for their minimization. An executive order that outlines the racial equity scheme would then operationalize the national security strategy.

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<sup>333</sup> *Id.*

<sup>334</sup> Exec. Order No. 13,684, 79 Fed. Reg. 76,865 (Dec 18, 2014); *see also* PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015).

<sup>335</sup> Mechanisms already exist for investigating and prosecuting extremist organizations with violent ideologies; the goal of this effort is to reduce polarizing state action and to respond to foreign state activity.

<sup>336</sup> PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 334.

### 3. A Response to Critiques

A *racism as threat* national security approach would not be without its critics. Some may argue that institutionalized racism does not exist, particularly on the part of national security and law enforcement institutions. However, there is significant evidence that indicates various national security and law enforcement practices have a disproportionately negative impact on minority communities, as discussed in Part IV. Additionally, assessments of the 2016 Russian election interference campaign unequivocally demonstrated that Russians targeted Americans with a racially divisive cyber campaign.<sup>337</sup> Some might argue that targeting institutional discrimination is not a direct response to Russian election interference. Yet, a *racism as threat* national security strategy is an important element of any such response because it seeks to decrease the scope and intensity of internal racial division stemming from policies that have a disparate racial impact. The less intense the internal racial divisions in the United States, the less likely Russia will be able to exploit those divisions. It should also be noted that the exploitation of internal societal divisions is not only an American vulnerability—Russia has also targeted democratic elections in European states as part of a global geopolitical strategy to destabilize governments and influence elections with cyber campaigns uniquely targeted to the racial and social divisions within those states.<sup>338</sup>

Finally, some might critique a national security strategy that seeks to mitigate institutional discrimination as a bulwark against Russian cyber intrusion because the federal government does not control state and local law enforcement practices that have disparate impacts on minority communities. The response to both critiques is similar. While the current administration might not be receptive to this national security strategy, many state and local officials are likely to be sympathetic to these concerns. A *racism as threat* national security strategy could be pursued in all fifty states and would provide state and local officials with an additional policy rationale to eliminate state and local practices that have a disparate racial impact. In the absence of federal leadership, state and local officials concerned

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<sup>337</sup> See discussion *supra* Section II.A.

<sup>338</sup> See discussion *supra* Section II.C.

about protecting electoral processes and the national security of the United States could convene a task force to consider what actions they might collectively take to mitigate Russian cyber intrusion. Similarly, a presidential administration supportive of a *racism as threat* national security approach could work closely with state, local, and community leaders to pursue an institutional discrimination mitigation strategy.

### C. Bolstering Legislative Reform

The value of a *racism as threat* framework is that it helps to crystalize for policymakers that internal racial division is augmented by state practices that have a negative impact on minority communities and that such divisions can now be weaponized against the United States through foreign cyber influence campaigns. The American people have a collective interest in minimizing state-based sources of racial discord that are so easily weaponized against the United States. A national security rationale should be proffered when federal and state legislatures attempt to address practices that have a disparate racial impact. Racial profiling in criminal enforcement against the Black community, immigration-related investigation of the Latinx community, and terror-related investigation of the Muslim community should be understood as equal protection violations and national security threats that create space for foreign influence campaigns. Such an understanding would motivate national security advocates to join with civil rights advocates in pushing for legislative reform that seeks to eliminate state practices that have disparate racial impacts.

## VIII. CONCLUSION

American national security institutions have historically been shaped by the views of their leaders. Accordingly, national security institutions have likewise been vulnerable to the personal fears and biases of those in charge. Since the nation's founding, a recurring theme of minority *race as threat* has manifested itself in institutional policies. This theme has reflected racial tensions and divisions in American society, creating a space for racially biased practices such as COINTELPRO's disruption of civil rights organizations, the World War II internment of Japanese citizens, post-9/11 racial profiling of



Muslims, and punitive immigration crackdowns on Latinx communities.

For nearly a century, Russia has actively capitalized on American racial divisions for its own geopolitical advantage. During the Cold War, America's treatment of racial minorities was the bedrock of Russia's global criticism regarding the limitations of American liberal democracy. Today, Russia has found a new front for this delegitimization campaign—within the United States through the social media interactions of Americans. Russia has attempted to weaponize America's racial divisions against its democratic processes through “fake news,” social media advertisements, and social media posts meant to rile existing divisions. The more divided and disenchanted Americans become with their fellow citizens and with their political processes, the less the United States (and its Western colleagues) will be able to galvanize collective pressure against Russian geopolitical objectives.

Because of its fraught history with race and because Russia has effectively intensified racial divisions online, America must acknowledge in its national security and policy-planning strategies that racism is a strategic threat to the United States and incorporate measures to address that threat. Racism is not just a moral or equality failure, but also a strategic threat that is exploitable by America's enemies. The most direct response to this strategic threat is to take measures to minimize and eliminate it. Fortunately, the actions of state agents are precisely where the federal, state, and local government can target reform efforts. Reducing institutionalized racism will reduce racial tensions, which will in turn reduce Russia's ability to stimulate divisions. Americans whose rights and interests are adequately and fairly being protected by the state are less likely to be vulnerable to Russia's weaponized racial division.

This Article seeks to begin a conversation with the public, American political leaders, and policymakers about the importance of American institutional leaders treating *racism as a national security threat* deserving of a clear and direct response. The author's hope is that this piece will encourage further study and action on this topic. Eliminating institutional racism is a generations-long effort that will require action on a number of fronts—executive, legislative, judicial, political, academic, federal, state, and local—and national security planning must be one of those fronts. To those that believe

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that eliminating racial discrimination and racial division is impossible, this Article suggests that any tools that help to minimize institutional discrimination and racial division, however imperfect, are worthy of pursuit. A *racism as national security threat* framework is a new tool in the arsenal.