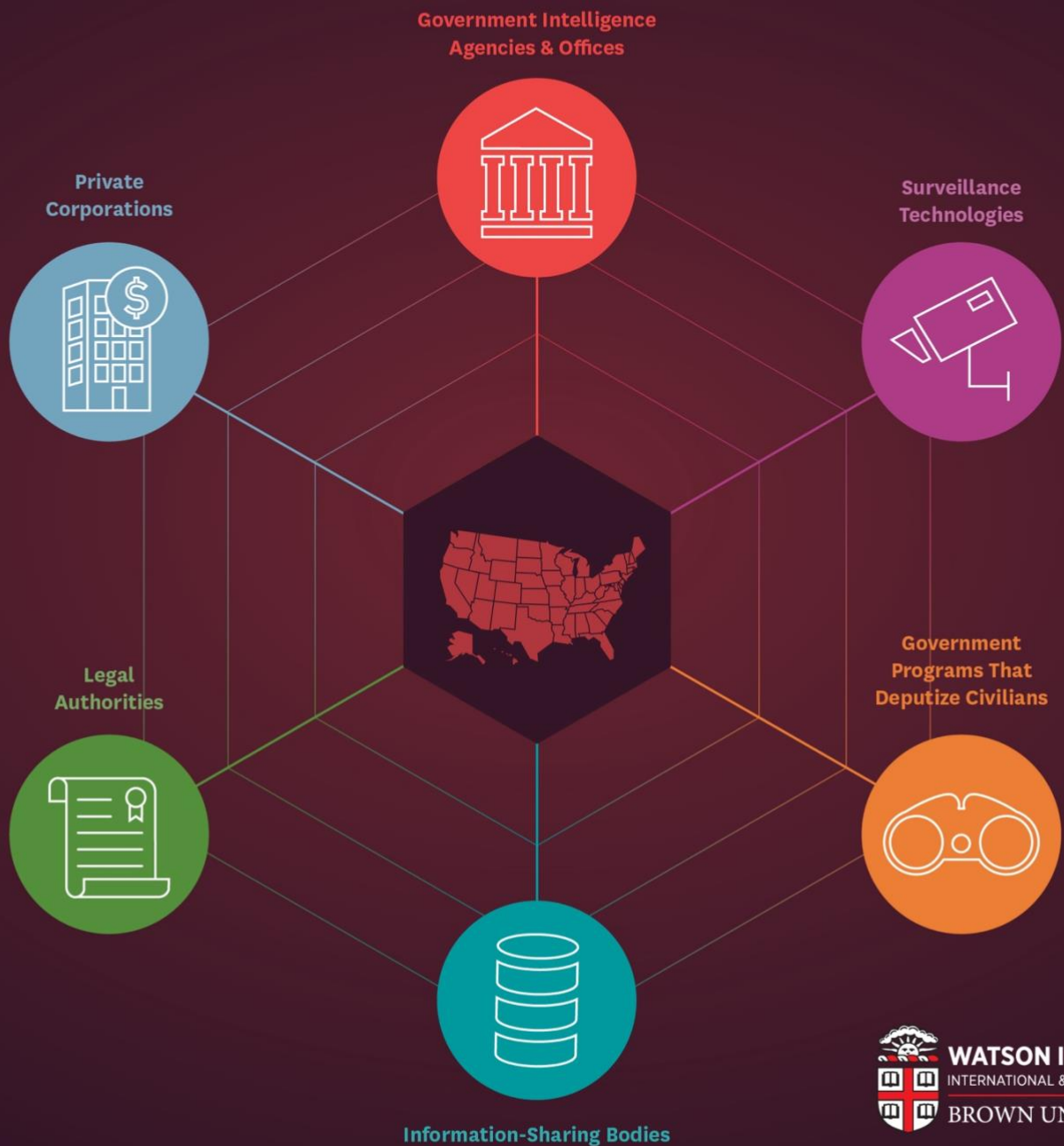


# TOTAL INFORMATION AWARENESS:

## The High Costs of Post-9/11 U.S. Mass Surveillance

Jessica Katzenstein | September 26, 2023



## **Total Information Awareness: The High Costs of Post-9/11 U.S. Mass Surveillance<sup>1</sup>**

### **Introduction**

The United States has witnessed an explosive expansion of mass surveillance since the 9/11 attacks. This post-9/11 expansion has built on wartime population surveillance dating back to World War I, as well as on an even deeper history of government tracking and harassment of racial justice and labor movements, political dissidents, immigrants, and people of color. Yet it is also markedly different from what existed before, in both its technological capacities and its scale and breadth. 1960s-era FBI agents, who wiretapped residential phones and planted informants in political movements, could hardly have imagined the government's ability to track location and usage data on the miniature computers nearly everyone now carries in their pocket. The public sphere, as well as many private homes, are replete with cameras, often accessible to both local authorities and corporations. The immigration tracking system has ballooned as well, bringing ever more intimate aspects of immigrants' lives under the gaze of the government and private contractors. Intertwined factors such as technological advancement, the rise of social media, and longstanding racist and anti-immigrant politics have contributed profoundly to these expansions.

However, the pervasive fear, sanctioned Islamophobia and xenophobia, weakened civil liberties protections, and exponentially increased funding of the post-9/11 era undoubtedly made contemporary mass surveillance possible.<sup>2</sup> These forces amplified each other to enable the unprecedented breadth and scale of surveillance reigning across the United States today.

While "mass surveillance" is often used to refer to government spying, today it involves a constellation of federal agencies, local police, private companies, and even members of the public. This report focuses on suspicionless mass surveillance within the U.S.,<sup>3</sup> practices that indiscriminately sweep up data from groups such as Muslims and immigrants who are not suspected of wrongdoing, and even from anyone who uses the internet or phone in the U.S. and beyond. The growth of mass surveillance after 9/11 was

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<sup>2</sup> See Zuboff, S. (2019). *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. PublicAffairs.

<sup>3</sup> Suspicionless surveillance refers to surveillance on the basis of identity or other markers, rather than on the basis of individual behavior. See Kao, W. et al. (2021). *Brief Amici Curiae*. Federal Bureau of Investigation et al. v. Yassir Fazaga et al., 39. <https://doi.org/10.5860/choice.39-5480>. The costs of mass surveillance outside the U.S. by the U.S. government and corporations, while gestured to throughout this report, are immense enough to require their own paper.

originally justified by the imperative to root out “terrorists”<sup>4</sup> and uncover plots against the U.S., yet its remit has inflated well beyond that. The entire U.S. population has been subjected to increased monitoring, now normalized in an era of both voluntary and involuntary social media-driven transparency. This monitoring not only compromises individual freedom and privacy, but also sorts the population into categories that can be managed and used to limit entire groups’ life chances.<sup>5</sup>

The costs of post-9/11 surveillance are broad. First, mass surveillance has intensified the criminalization of racialized “suspect communities,” from Muslims and Arabs to Latinx communities to Black and Indigenous organizers. It has facilitated the tracking, incarceration, and deportation of thousands of migrants, many of whom were guilty only of the civil offense of crossing a border without government permission. As well, developing and sustaining systems for mass monitoring has been exorbitantly expensive. This expense entails innumerable opportunity costs in a country that regularly fails to ensure all of its citizens have adequate housing, food, and healthcare. The post-9/11 state’s focus on racialized groups may also have ill-prepared it to address rising white supremacist violence. Finally, building a set of institutions and technologies capable of overseeing both mass movement and minute details of individuals’ lives has strengthened law enforcement and corporate power, in ways that have often proved difficult to reverse or even oversee. Twenty-two years after the 9/11 attacks, as U.S. technological and policing capacities continue to grow, the costs of mass surveillance have become increasingly stark and ever more deeply entrenched.

### ***Context: Pre-9/11 surveillance***

The birth of American mass surveillance is often traced to domestic spying during the world wars, but as with so much else in the U.S., it is also rooted in older histories of slavery, xenophobia, and colonial occupation. These histories illuminate how the government has long employed surveillance to control racialized communities and political dissent. During U.S. slavery, Black and Indigenous enslaved people—and in the early periods, Indigenous traders and Irish indentured servants—were considered security threats, liable to escape and free themselves or, more dangerously, plan rebellions together and with poor white

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<sup>4</sup> The term “terrorism” is contested and deeply political, as Deepa Kumar notes in a forthcoming Costs of War Project report. “Terrorism” broadly refers to performances of violence designed to create fear, but the term is often coded specifically to refer to violence committed by insurgent movements and oppressed groups, rather than by states or dominant groups. For instance, while the 9/11 attacks were clearly labeled “terrorism,” the U.S. military’s 2003 “shock and awe” bombing campaign and invasion of Iraq—in which nearly 7,000 civilians were killed within the first three weeks alone—was not. Crawford, N. (2023, March 15). *Blood and Treasure: United States Budgetary Costs and Human Costs of 20 Years of War in Iraq and Syria, 2003-2023*. Costs of War, Watson Institute, Brown University. [https://watson.brown.edu/costsofwar/files/cow/imce/papers/2023/Costs of 20 Years of Iraq War Crawford 15 March 2023 final 3.21.2023.pdf](https://watson.brown.edu/costsofwar/files/cow/imce/papers/2023/Costs%20of%20Iraq%20War%20Crawford%2015%20March%202023%20final%203.21.2023.pdf). The point here is not to legitimize mass violence, but rather to point to the politics at stake in the frame of “terrorism.” For further discussion, see Sinnar, S. (2022, April). Hate Crimes, Terrorism, and the Framing of White Supremacist Violence. *California Law Review*, 110, 489–565. <https://www.californialawreview.org/print/hate-crimes-terrorism-and-the-framing-of-white-supremacist-violence>.

<sup>5</sup> Lyon, D. (2003). *Surveillance as Social Sorting: Privacy, Risk, and Digital Discrimination*. Routledge.

people.<sup>6</sup> Hence, enslavers and officials developed a complex system of slave passes, branding, census-taking, fugitive slave laws, wanted posters, patrols, informants, and lantern laws<sup>7</sup> in order to keep enslaved people visible and under control.<sup>8</sup> Enslaved people challenged this system by forging passes and free papers, altering their appearance to evade tracking, and other forms of resistance.<sup>9</sup> Such resistance became more difficult as the planter class increasingly standardized their techniques of surveillance, such as by shifting from handwritten to typewritten passes that were more difficult to forge.<sup>10</sup> Practices of regulating enslaved people's mobility and freedom through documentation, tracking, and intimidation were precursors to today's technologies of regulation, especially in the form of intensive police surveillance in poor Black neighborhoods.<sup>11</sup>

Today's immigration surveillance system, meanwhile, was seeded in part by the 1882 Chinese Exclusion Act, which catalyzed a system of mass registration and identification. The Sinophobic act prohibited all Chinese workers from entering the U.S.—the country's first federal immigration law to bar a racialized population on the basis of nationality.<sup>12</sup> This law exempted select groups such as students, who were required to obtain identification certificates to document their exemption. State-issued personal identification is now so common as to often go unchallenged, but in the late 1800s, it represented a new practice and faced immediate resistance. An entire “paper sons” industry arose to help Chinese people subvert racist immigration restrictions and gain entry to the U.S. by posing as the fictive children of U.S. citizens.<sup>13</sup> An 1892 amendment to the act required all unregistered Chinese immigrants to gain a certificate of residence, under threat of deportation and white supremacist vigilante violence. Chinese America refused en masse to register and eventually organized a Chinese boycott of American goods.<sup>14</sup> Their political struggle preserved collective rights and safety, and delayed the eventual development of mass race-based surveillance programs.

Finally, modern American surveillance can be traced to the U.S.'s occupation of the Philippines beginning in 1898, the birth of American empire. As in Iraq over a century later,

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<sup>6</sup> Browne, S. (2015). *Dark Matters: On the Surveillance of Blackness*. Duke University Press; Parenti, C. (2004). *The Soft Cage: Surveillance in America From Slavery to the War on Terror*. Basic Books; Roediger, D. (2008). *How Race Survived U.S. History: From Settlement and Slavery to the Obama Phenomenon*. Verso.

<sup>7</sup> Lantern laws in the 18<sup>th</sup> century required that Black, Indigenous, and mixed-race enslaved people in public after sunset, without the company of a white person, carry lanterns to illuminate themselves. Any white person was authorized to stop those without lit candles. These laws have drawn comparisons to modern stop-and-frisk policies and police use of floodlights to illuminate “high-crime neighborhoods.” Browne, S. (2015). *Dark Matters: On the Surveillance of Blackness*. Duke University Press; Scannell, R. J. (2018). *Electric Light: Automating the Carceral State During the Quantification of Everything*. City University of New York.

<sup>8</sup> Browne, S. (2015). *Dark Matters: On the Surveillance of Blackness*. Duke University Press; Parenti, C. (2004). *The Soft Cage: Surveillance in America From Slavery to the War on Terror*. Basic Books.

<sup>9</sup> Browne, S. (2015). *Dark Matters: On the Surveillance of Blackness*. Duke University Press.

<sup>10</sup> Parenti, C. (2004). *The Soft Cage: Surveillance in America From Slavery to the War on Terror*. Basic Books.

<sup>11</sup> Benjamin, R. (2019). *Race After Technology: Abolitionist Tools for the New Jim Code*. Polity Press.

<sup>12</sup> The 1888 Scott Act took nationality restrictions a step further: it recategorized all people of Chinese descent, even if they were citizens of other countries, as Chinese. Lau, E. T. (2007). *Paper Families: Identity, Immigration Administration, and Chinese Exclusion*. Duke University Press.

<sup>13</sup> Lau, E. T. (2007); Parenti, C. (2004). *The Soft Cage: Surveillance in America From Slavery to the War on Terror*. Basic Books.

<sup>14</sup> Parenti, C. (2004). *The Soft Cage: Surveillance in America From Slavery to the War on Terror*. Basic Books.

a powerful military faced intense resistance from a racialized population and responded with pacification and counterinsurgency tactics alongside bombardment and torture.<sup>15</sup> The U.S. Army built a sophisticated set of institutions for tracking Filipino dissidents and leaders, particularly under Ralph Van Deman, the “father of U.S. military intelligence.” Van Deman’s Division of Military Information collected “encyclopedic” data on the Filipino anticolonial resistance, mapping potential insurgents’ locations, kin networks, and ideologies and relying on Filipino operatives to contain or crush insurgent movements.<sup>16</sup> The strength of Filipino resistance forced the occupiers to develop brand-new techniques of counterinsurgency, such as psychological profiling and disinformation campaigns.<sup>17</sup>

These early efforts boomeranged back to the U.S. during World War I, when Van Deman established the U.S. Army’s Military Intelligence Division (MID).<sup>18</sup> MID collaborated with the Bureau of Investigation (later the FBI) and the civilian vigilante group American Protective League to launch an intensive mass surveillance program against anti-war protesters and possible “subversives,” particularly German and Black Americans. Less than 10 percent of the U.S. had telephones by 1917, so postal workers examined around 30 million letters, and 350,000 vigilantes spied on enough suspect groups to generate over a million pages of surveillance reports before the war ended.<sup>19</sup> Through the Military Intelligence Division, Van Deman imported techniques from the U.S. occupation of the Philippines, including state fusion with civilian spy networks, the production of identity cards, and population mapping.<sup>20</sup>

The U.S.’s first Red Scare in the wake of World War I triggered a new round of intensive state surveillance, this time focused on suspected communists, leftists, anarchists, immigrants, and labor organizers because of their presumed ties to communism. The Palmer Raids, a series of highly visible Department of Justice (DOJ) dragnet raids to “round up” and deport suspected dissidents, yielded few deportable offenses and spurred public criticism. Heavy backlash to the raids led J. Edgar Hoover—then the head of the DOJ’s General Intelligence Division, later the FBI’s first director—to shift toward more secretive operations.<sup>21</sup> Hoover spearheaded the FBI’s deployment of wiretapping during World War

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<sup>15</sup> McCoy, A. (2009). *Policing America’s Empire: The United States, the Philippines, and the Rise of the Surveillance State*. University of Wisconsin Press.

<sup>16</sup> Go, J. (2020). The Imperial Origins of American Policing: Militarization and Imperial Feedback in the Early 20th Century. *American Journal of Sociology*, 125(5), 1193–1254. <https://doi.org/10.1086/708464>; McCoy, A. (2009). *Policing America’s Empire: The United States, the Philippines, and the Rise of the Surveillance State*. University of Wisconsin Press.

<sup>17</sup> McCoy, A. (2009). *Policing America’s Empire: The United States, the Philippines, and the Rise of the Surveillance State*. University of Wisconsin Press; see also Vicente L., R. (2000). *White Love and Other Events in Filipino History*. Duke University Press; Shaw, A.; Francia, L. eds. (2002). *Vestiges of War: The Philippine-American War and the Aftermath of an Imperial Dream, 1899-1999*. New York University Press.

<sup>18</sup> See Césaire, A. (2000). *Discourse on Colonialism*, trans. Joan Pinkham. Monthly Review Press.

<sup>19</sup> McCoy, A. (2009). *Policing America’s Empire: The United States, the Philippines, and the Rise of the Surveillance State*. University of Wisconsin Press; McCoy, A. (2014, January 19). *Surveillance and Scandal: Time-Tested Weapons for U.S. Global Power*. TomDispatch. <https://tomdispatch.com/alfred-mccoy-it-s-about-blackmail-not-national-security/>.

<sup>20</sup> McCoy, A. (2009). *Policing America’s Empire: The United States, the Philippines, and the Rise of the Surveillance State*. University of Wisconsin Press.

<sup>21</sup> Weiner, T. (2013). *Enemies: A History of the FBI*. Random House.

II, monitoring the telephones of suspected political threats and using the scandals he uncovered to blackmail and blacklist people. Such surveillance required expanded capacity, and the FBI's staff indeed grew dramatically from 650 employees in 1924 to 13,000 by 1943.<sup>22</sup>

During the Cold War period, with its second Red Scare, anticommunist fervor justified a then-unprecedented explosion in state surveillance, particularly under the FBI's counterintelligence programs (COINTELPRO).<sup>23</sup> Early COINTELPROs in the 1940s and '50s attempted to "divide, conquer, weaken" the Socialist Workers Party and the Communist Party USA through clandestine and often illegal spying.<sup>24</sup> COINTELPROs in the 1950s and '60s targeted civil rights and antiwar organizers as well, using "techniques of wartime" brought home to the U.S.<sup>25</sup> The FBI under Hoover conducted mass illegal surveillance of the American Indian and antiwar protest movements; systematically spied on and persecuted LGBTQ government employees, seeing them as potential communists or informants; bugged Martin Luther King Jr.'s bedroom and attempted to use his extramarital affairs to blackmail him into committing suicide; and perhaps most infamously, used wiretaps, burglaries, mail tampering, bugging, fabricated documents, public disinformation, agents provocateurs, infiltrators, harassment arrests, and assassinations to undermine and destroy Black liberation organizations such as the Black Panther Party.<sup>26</sup> The extent of COINTELPRO surveillance was revealed beginning only after a group of activists broke into an FBI office in 1971 and released secret FBI documents.<sup>27</sup> The group found that among the 40 percent of investigative files focused on political surveillance, two focused on right-wing and 200 on left-wing individuals or organizations.<sup>28</sup> In 1975 the Church Committee, a Senate committee tasked with examining intelligence agencies' abuses, investigated 2,370 approved COINTELPRO actions and found that many were illegal, violent, or simply "abhorrent in a free society."<sup>29</sup>

Finally, the War on Drugs provided a vast new justification for expanding mass surveillance, building on a century of anti-drug laws developed to criminalize Chinese and

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<sup>22</sup> McCoy, A. (2014, January 19). *Surveillance and Scandal: Time-Tested Weapons for U.S. Global Power*. TomDispatch. <https://tomdispatch.com/alfred-mccoy-it-s-about-blackmail-not-national-security/>.

<sup>23</sup> On FBI surveillance and persecution of Black anticolonial organizing in the Cold War period, see Burden-Stelly, C. (2019). In *Battle for Peace During 'Scoundrel Time'*: W. E. B. Du Bois and United States Repression of Radical Black Peace Activism. *Du Bois Review*, 16(2), 555–74. <https://doi.org/10.1017/S1742058X19000213>; Von Eschen, P. (1997). *Race Against Empire: Black Americans and Anticolonialism, 1937-1957*. Cornell University Press.

<sup>24</sup> Churchill, W.; Vander Wall, J. (2002). *Agents of Repression: The FBI's Secret Wars Against the Black Panther Party and the American Indian Movement*. South End Press.

<sup>25</sup> Select Committee to Study Governmental Operations with Respect to Intelligence Activities. (1976). *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III*. p. 994-755. [https://www.intelligence.senate.gov/sites/default/files/94755\\_III.pdf](https://www.intelligence.senate.gov/sites/default/files/94755_III.pdf).

<sup>26</sup> Churchill, W.; Vander Wall, J. (2002). *Agents of Repression: The FBI's Secret Wars Against the Black Panther Party and the American Indian Movement*. South End Press; Johnson, D. (2004). *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government*. University of Chicago Press.

<sup>27</sup> Medsger, B. (2014) *The Burglary: The Discovery of J. Edgar Hoover's Secret FBI*. Penguin Random House.

<sup>28</sup> Medsger, B (2014). 245.

<sup>29</sup> Select Committee to Study Governmental Operations with Respect to Intelligence Activities. (1976). *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III*. 8. [https://www.intelligence.senate.gov/sites/default/files/94755\\_III.pdf](https://www.intelligence.senate.gov/sites/default/files/94755_III.pdf).

Mexican immigrants.<sup>30</sup> The drug war ushered in an era of intensified narcotics enforcement and mass incarceration, which by design<sup>31</sup> and implementation targeted Black Americans<sup>32</sup> and much of Latin America, particularly Mexico.<sup>33</sup> Well before 9/11, the government used the drug war to justify expanded financial monitoring and prescription database systems, lessened regulations on wiretapping and GPS tracking, and mass logging of Americans' international phone calls.<sup>34</sup> In 1992, President George H.W. Bush's Attorney General William Barr and chief criminal prosecutor Robert Mueller authorized the Drug Enforcement Administration (DEA) to require phone companies to divulge all calls made from the U.S. to as many as 116 targeted countries, particularly in Latin America. The DEA's bulk call records program, publicly revealed only in 2015, was a "blueprint" for post-9/11 bulk records collection. The operation gathered logs on billions of calls in the name of interrupting drug cartels before shutting down in 2013.<sup>35</sup> Given that many of these calls were likely from immigrants calling their home countries, this meant that the DEA "effectively beta-tested" call records surveillance on Latinx people.<sup>36</sup> Meanwhile, the surveillance systems built to track and arrest the mostly Black targets of the War on Drugs—as well as Black liberation groups framed as terrorists, such as the Black Panther Party offshoot Black Liberation Army<sup>37</sup>—were deployed by the post-9/11 counterterror state as well.

Wars of all kinds have thus long justified the implementation and expansion of surveillance techniques originally developed to manage slavery, immigration, and colonial occupation. This history demonstrates how the architecture of mass surveillance was constructed not only to prevent violence and defend national security but also, and perhaps most centrally, to control minority communities and repress dissent. As the Church Committee argued of COINTELPRO in 1976, state surveillance "maintain[s] the existing

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<sup>30</sup> Hodge, J.; Dholakia, N. (2021, June 17). *Fifty Years Ago Today, President Nixon Declared the War on Drugs*. Vera Institute of Justice. <https://www.vera.org/news/fifty-years-ago-today-president-nixon-declared-the-war-on-drugs>.

<sup>31</sup> As Richard Nixon's former aide John Ehrlichman said in 1994, the Nixon Administration criminalized drugs in part to specifically target Black people and the antiwar left. "Did we know we were lying about the drugs?" Ehrlichman said. "Of course we did." See, Hodge, J.; Dholakia, N. (2021, June 17). *Fifty Years Ago Today, President Nixon Declared the War on Drugs*. Vera Institute of Justice. <https://www.vera.org/news/fifty-years-ago-today-president-nixon-declared-the-war-on-drugs>.

<sup>32</sup> Alexander, M. (2012). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. The New Press; Baum, D. (1996). *Smoke and Mirrors: The War on Drugs and the Politics of Failure*. Little, Brown and Company.

<sup>33</sup> Magaloni, B.; Rodriguez-Smith, L. (2020). *Torture as a Method of Criminal Prosecution: Democratization, Criminal Justice Reform, and the Drug War in Mexico*. Center for Effective Global Action Working Paper Series. <https://doi.org/10.26085/C3X30P>; The Washington Post. (2021, June 14). *Lost Cause: 50 Years of the War on Drugs in Latin America*. <https://www.washingtonpost.com/opinions/2021/06/14/war-on-drugs-50-years-latin-america-violence-mexico-colombia/>.

<sup>34</sup> Stanley, J. (2011, June 6). *The War on Drugs and the Surveillance Society*. ACLU Blog. <https://www.aclu.org/news/smart-justice/war-drugs-and-surveillance-society>.

<sup>35</sup> Heath, B. (2015, April 7). *U.S. Secretly Tracked Billions of Calls for Decades*. USA Today. <https://www.usatoday.com/story/news/2015/04/07/dea-bulk-telephone-surveillance-operation/70808616/>.

<sup>36</sup> Bedoya, A. (2016, January 18). *The Color of Surveillance*. Slate. [http://www.slate.com/articles/technology/future\\_tense/2016/01/what\\_the\\_fbi\\_s\\_surveillance\\_of\\_martin\\_lut\\_her\\_king\\_says\\_about\\_modern\\_spying.html](http://www.slate.com/articles/technology/future_tense/2016/01/what_the_fbi_s_surveillance_of_martin_lut_her_king_says_about_modern_spying.html).

<sup>37</sup> Meier, A. (2022). Terror as Justice, Justice as Terror: Counterterrorism and Anti-Black Racism in the United States. *Critical Studies on Terrorism*, 15(1), 83–101. <https://doi.org/10.1080/17539153.2022.2031132>.

social and political order by ‘disrupting’ and ‘neutralizing’ groups and individuals perceived as threats.”<sup>38</sup> Thus, surveillance has historically targeted immigrants, people of color, organizers for racial and labor justice, leftists,<sup>39</sup> and anyone suspected of communist or anti-imperialist leanings, such as LGBTQ people, antiwar demonstrators, and critics of U.S. foreign policy. This legacy grounded the government’s response to the 9/11 attacks.

Pre-9/11 surveillance, however, is not only a history of unmitigated expansion of state power. Rather, it is a cyclical story: extensions of surveillance into new domains have always been challenged by policymakers, organizers, scholars, and dissidents. For instance, Chinese immigrants’ political organizing not only thwarted exclusionary laws but also forced the federal government to drop its most intrusive tactics.<sup>40</sup> Similarly, after the Church Committee investigated COINTELPRO’s “techniques of wartime,” Congress and President Jimmy Carter limited intelligence agencies’ powers of suspicionless mass surveillance, mandating that they could only collect intelligence on Americans on the basis of individual, factual suspicion of criminal activity.<sup>41</sup> This legacy too has carried forward into the post-9/11 world.

### ***Post-9/11 Surveillance***

In the months after 9/11, the mass trauma of the attacks produced popular domestic support for expanding U.S. surveillance and national security institutions,<sup>42</sup> widely considered to have failed in their mission to protect the country from attack despite issuing months of intelligence warnings.<sup>43</sup> Nonetheless, much of the expansion was conducted in secret, often in violation of the Constitution and U.S. law, well beyond the remit of public opinion. Among the many history-making responses to the attacks—the inflation of

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<sup>38</sup> Select Committee to Study Governmental Operations with Respect to Intelligence Activities. *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III*. 5.

<sup>39</sup> Where the U.S. government has targeted right-wing activists—such as the KKK in the COINTELPRO period, or the white power movement in the 1980s and ‘90s—its interventions have often been belated, limited, or deprioritized relative to leftist groups. See discussion of the FBI’s “Black Identity Extremist” label below, and Belew, K. (2018). *Bring the War Home: The White Power Movement and Paramilitary America*. Harvard University Press; Cunningham, D. (2003). Understanding State Responses to Left- versus Right-Wing Threats: The FBI’s Repression of the New Left and the Ku Klux Klan. *Social Science History Association*, 27(3), 327–70. <https://doi.org/10.1017/S0145553200012566>; Meier, A. (2022, February 17). Terror as Justice, Justice as Terror: Counterterrorism and Anti-Black Racism in the United States. *Critical Studies on Terrorism*, 15(1), 83-101. <https://doi.org/10.1080/17539153.2022.2031132>.

<sup>40</sup> Parenti, C. (2004). *The Soft Cage: Surveillance in America From Slavery to the War on Terror*. Basic Books.

<sup>41</sup> Goitein, E. (2021, August 25). *Rolling Back the Post-9/11 Surveillance State*. Brennan Center for Justice. <https://www.brennancenter.org/our-work/analysis-opinion/rolling-back-post-911-surveillance-state>. For an exception from the 1980s, see Greider, W. (1985, May 23). *Ronald Reagan’s Moles*. Rolling Stone. <https://www.rollingstone.com/politics/politics-news/ronald-reagans-moles-66746/>.

<sup>42</sup> For instance, public opinion polls found that support for warrantless government wiretapping of Americans’ phones rose from 18 percent in 1994 to 59 percent immediately after the 9/11 attacks, eventually dropping to 14 percent by 2021. AP-NORC Center for Public Affairs Research. (2021, September 7). *Opposition to U.S. Government Surveillance Grows*. <https://apnorc.org/projects/opposition-to-u-s-government-surveillance-grows/>; Best, S.; Krueger, B; Ladewig, J. (2006, January 1). Trends: Privacy in the Information Age. *The Public Opinion Quarterly*, 70(3), 375–401, <https://doi.org/10.1093/poq/nfl018>.

<sup>43</sup> Ackerman, S. (2021). *Reign of Terror: How the 9/11 Era Destabilized America and Produced Trump*. Penguin.



executive branch powers beginning with the 2001 Authorization for Use of Military Force (AUMF),<sup>44</sup> the creation of the Department of Homeland Security (DHS), registration of and attacks against Muslims, and of course the U.S. military invasions of Afghanistan and later Iraq—were a series of mass surveillance programs, many of which endure today.

These programs are generally legitimized under three legal authorities, two of which were enacted after 9/11, and all of which have operated largely in the shadows: Executive Order 12333, Section 215 of the Patriot Act, and Section 702 of the Foreign Intelligence Surveillance Act (FISA) Amendments Act.<sup>45</sup> Executive Order (EO) 12333 is a little-known directive originally issued by President Ronald Reagan during the Cold War and expanded by later presidents—including President Barack Obama, days before President Donald Trump took office.<sup>46</sup> The “virtually lawless” EO 12333 allows the government to conduct warrantless bulk data collection abroad without judicial or Congressional oversight, and has been used for dragnet programs that siphon the contents of text messages and phone calls made abroad, including those of Americans.<sup>47</sup> Section 215 of the Patriot Act, discussed below, allowed the National Security Agency (NSA) to collect “any tangible thing” the NSA could argue was linked to a foreign intelligence investigation, including bulk phone records.<sup>48</sup> Section 702 of the FISA Amendments Act, also discussed below, legalized warrantless wiretapping of targeted foreigners abroad, with Americans’ and permanent residents’ data swept up “incidentally.”

One mass surveillance program was quietly enacted a mere three weeks after the 9/11 attacks. With authorization from Vice President Dick Cheney, National Security Agency (NSA) director Michael Hayden instituted Stellar Wind, a program that collected in bulk Americans’ and foreigners’ communications metadata from phone records, emails, and browser histories. The NSA was also able to “contact chain” up to three levels beyond their target, gaining phone data on the networks, and networks of networks of networks, of targeted people.<sup>49</sup> Metadata can reveal medical issues, relationships, extramarital affairs,

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<sup>44</sup> See Savell, S. (2021, December 14). *The 2001 Authorization for Use of Military Force: A Comprehensive Look at Where and How It Has Been Used*. Costs of War, Watson Institute, Brown University.

[https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs of War\\_2001 AUMF.pdf](https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War_2001%20AUMF.pdf).

<sup>45</sup> Brennan Center for Justice. (2018, October 25). *Foreign Intelligence Surveillance (FISA Section 702, Executive Order 12333, and Section 215 of the Patriot Act): A Resource Page*. <https://www.brennancenter.org/our-work/research-reports/foreign-intelligence-surveillance-fisa-section-702-executive-order-12333>.

<sup>46</sup> Emmons, A. (2017, January 13). *Obama Opens NSA’s Vast Trove of Warrantless Data to Entire Intelligence Community, Just in Time for Trump*. The Intercept. <https://theintercept.com/2017/01/13/obama-opens-nsas-vast-trove-of-warrantless-data-to-entire-intelligence-community-just-in-time-for-trump/>.

<sup>47</sup> Full details about what programs EO 12333 authorizes are still not publicly available. Laperruque, J. (2022). *Executive Order 12333: The Spy Power Too Big for Any Legal Limits*. Project on Government Oversight. <https://www.pogo.org/analysis/2022/03/executive-order-12333-the-spy-power-too-big-for-any-legal-limits>.

<sup>48</sup> Brennan Center for Justice. (2018, October 25). *Foreign Intelligence Surveillance (FISA Section 702, Executive Order 12333, and Section 215 of the Patriot Act): A Resource Page*. <https://www.brennancenter.org/our-work/research-reports/foreign-intelligence-surveillance-fisa-section-702-executive-order-12333>.

<sup>49</sup> Franklin, S. (2019). *Fulfilling the Promise of the USA Freedom Act: Time to Truly End Bulk Collection of Americans’ Calling Records*. Just Security. <https://justsecurity.org/63399/fulfilling-the-promise-of-the-usa-freedom-act-time-to-truly-end-bulk-collection-of-americans-calling-records/>.

and other deeply personal information about people never suspected of wrongdoing.<sup>50</sup> Abroad, as Hayden said, metadata in the military's hands can have even more dire consequences: "We kill people based on metadata."<sup>51</sup>

Stellar Wind's collection and mining of Americans' metadata so clearly violated the Constitution that Central Intelligence Agency (CIA) director George Tenet reportedly told Cheney and President George W. Bush that "Hayden would go to prison for what he had done."<sup>52</sup> Instead, Stellar Wind would continue mostly in secret for years, enduring throughout legal debates, media leaks, and two presidential administrations. Eventually, companies such as Verizon were secretly court-ordered to turn over millions of customers' metadata to the FBI under Section 215 of the Patriot Act.<sup>53</sup> Former NSA contractor Edward Snowden's 2013 leak of NSA documents catalyzed investigations that brought mass metadata mining into public view, revealed it to be inessential to national security, and ultimately produced legislative limits on bulk collection under the 2015 USA Freedom Act.<sup>54</sup> However, until 2019, the act allowed the NSA to continue obtaining phone metadata through companies using more specific court-approved queries—which translated to records on people two steps rather than three steps removed from targets.<sup>55</sup> In 2018, querying 14 targets gained the NSA over 400 million call records on 19 million phone numbers.<sup>56</sup>

A few weeks after Stellar Wind was secretly instituted in 2001, Congress passed the Patriot Act, which more openly stripped Americans' (particularly Muslims') protections against suspicionless government spying and legalized new mass surveillance tools in the name of counterterrorism. For instance, the act allowed FBI agents to access Americans' phone, computer, and financial records—and preserve those records even when they involve innocent people—without court approval, through secret legal orders for

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<sup>50</sup> Gellman, B. (2013, June 15). *U.S. Surveillance Architecture Includes Collection of Revealing Internet, Phone Metadata*. The Washington Post. [https://www.washingtonpost.com/investigations/us-surveillance-architecture-includes-collection-of-revealing-internet-phone-metadata/2013/06/15/e9bf004a-d511-11e2-b05f-3ea3f0e7bb5a\\_story.html](https://www.washingtonpost.com/investigations/us-surveillance-architecture-includes-collection-of-revealing-internet-phone-metadata/2013/06/15/e9bf004a-d511-11e2-b05f-3ea3f0e7bb5a_story.html); Greenwald, G.; Ackerman, A. (2013, June 27). *NSA Collected US Email Records in Bulk for More Than Two Years Under Obama*. The Guardian. <https://www.theguardian.com/world/2013/jun/27/nsa-data-mining-authorized-obama>.

<sup>51</sup> Ackerman, S. (2021). *Reign of Terror: How the 9/11 Era Destabilized America and Produced Trump*. Viking. 56.

<sup>52</sup> Ackerman, S. (2021). 55.

<sup>53</sup> Gellman, B. (2013, June 15). *U.S. surveillance architecture includes collection of revealing Internet, phone metadata*. The Washington Post; Greenwald, G. (2013, June 6). *NSA Collecting Phone Records of Millions of Verizon Customers Daily*. The Guardian. <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

<sup>54</sup> Laperruque, J. (2021, September 7). *Secrets, Surveillance, and Scandals: The War on Terror's Unending Impact on Americans' Private Lives*. Project on Government Oversight. <https://www.pogo.org/analysis/2021/09/secrets-surveillance-and-scandals-the-war-on-terrors-unending-impact-on-americans-private-lives>.

<sup>55</sup> The NSA was required to provide "reasonable, articulable suspicion" for its targets, but not for targets' first- or second-order contacts. It could obtain complete call records for six months. Franklin, S. (2019, March 28). *Fulfilling the Promise of the USA Freedom Act: Time to Truly End Bulk Collection of Americans' Calling Records*. Just Security. <https://www.justsecurity.org/63399/fulfilling-the-promise-of-the-usa-freedom-act-time-to-truly-end-bulk-collection-of-americans-calling-records/>.

<sup>56</sup> This figure includes some duplication, but still represents a vast amount of data on untargeted individuals. Savage, C. (2020, February 25). *N.S.A. Phone Program Cost \$100 Million, but Produced Only Two Unique Leads*. The New York Times. <https://www.nytimes.com/2020/02/25/us/politics/nsa-phone-program.html>.

information called National Security Letters.<sup>57</sup> The FBI made criminal referrals to prosecutors for only 0.037 percent of its National Security Letters in 2003-2005, including 17 referrals for immigration cases and 0 for terrorism.<sup>58</sup> During a 2011 Congressional vote to reauthorize the Patriot Act, Senator Ron Wyden, a longtime critic of secret mass surveillance, famously warned, “when the American people find out how their government has secretly interpreted the Patriot Act, they will be stunned and they will be angry.”<sup>59</sup> Indeed, while civil rights and other advocacy organizations such as the Arab American Institute (AAI) and the American Civil Liberties Union (ACLU) have opposed the act from its inception,<sup>60</sup> Snowden’s revelations and the ensuing public outrage catalyzed a series of investigative reports, lawsuits, and new regulations limiting its reach.<sup>61</sup>

Perhaps the most “Orwellian” program was Total Information Awareness (TIA), initially drafted the very day of the 9/11 attacks by Reagan national security advisor John Poindexter—a man convicted of five felony charges in 1990 for lying to Congress about the Iran-Contra affair.<sup>62</sup> Eventually implemented in 2002 under the Defense Advanced Research Projects Agency (DARPA), TIA aimed to compile a mass array of commercial, medical, financial, travel, education, communications, and government information about U.S. citizens and noncitizens in a single database that could be searched warrantlessly, on the grounds of counterterrorism. As the *New York Times* put it in 2002, thanks to the digitization of daily life, “it is increasingly possible to amass Big Brother-like surveillance powers through Little Brother means.”<sup>63</sup> Legislators, reporters, columnists, and the public protested this “supersnoop’s dream,”<sup>64</sup> which led Congress to cut the program’s funding in 2003, seemingly dismantling it.

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<sup>57</sup> National Security Letters do not allow the FBI to obtain the content of emails or phone calls. ACLU. (n.d.). *Surveillance Under the Patriot Act*. <https://www.aclu.org/issues/national-security/privacy-and-surveillance/surveillance-under-patriot-act>; Electronic Frontier Foundation. (n.d.). *National Security Letters: FAQ*. <https://www.eff.org/issues/national-security-letters/faq>.

<sup>58</sup> ACLU. (n.d.). *Surveillance Under the Patriot Act*. <https://www.aclu.org/issues/national-security/privacy-and-surveillance/surveillance-under-patriot-act>.

<sup>59</sup> Wyden, R. (2011, May 26). *Press Release: In Speech, Wyden Says Official Interpretations of Patriot Act Must Be Made Public*. Ron Wyden United States Senator for Oregon. <https://www.wyden.senate.gov/news/press-releases/in-speech-wyden-says-official-interpretations-of-patriot-act-must-be-made-public>.

<sup>60</sup> American Civil Liberties Union. (2001). *In Defense of Freedom at a Time of Crisis*. <https://www.aclu.org/documents/defense-freedom-time-crisis>.

<sup>61</sup> Wizner, B. (2017). What Changed After Snowden? A U.S. Perspective. *International Journal of Communication* 11, 897–901. <https://ijoc.org/index.php/ijoc/article/viewFile/6733/1937>.

<sup>62</sup> Pilkington, E. (2021, September 4). ‘Panic Made Us Vulnerable’: How 9/11 Made the US Surveillance State – and the Americans Who Fought Back. *The Guardian*.

<https://www.theguardian.com/world/2021/sep/04/surveillance-state-september-11-panic-made-us-vulnerable>. An appeals court later overturned the charges on the grounds that Poindexter had been granted immunity for his testimony. Johnston, D. (1990, April 8). *Poindexter Is Found Guilty of All 5 Criminal Charges for Iran-Contra Cover-Up*. *The New York Times*. <https://www.nytimes.com/1990/04/08/us/poindexter-is-found-guilty-of-all-5-criminal-charges-for-iran-contra-cover-up.html>.

<sup>63</sup> Markoff J.; Schwartz, J. (2002, December 23). *Many Tools of Big Brother Are Up and Running*. *The New York Times*. <http://www.nytimes.com/2002/12/23/technology/23PEEK.html?todayshadlines>.

<sup>64</sup> Safire, W. (2002, November 14). *You Are a Suspect*. *The New York Times*. <http://www.nytimes.com/2002/11/14/opinion/you-are-a-suspect.html>; see also The Technology and Privacy Advisory Committee. (2004, March). *Safeguarding Privacy in the Fight Against Terrorism*. <https://cdt.org/wp-content/uploads/security/usapatriot/20040300tapac.pdf>.

In reality, the program's funding migrated to a defense "black budget," TIA was shifted to the NSA, and it became the precursor to Prism, the infamous surveillance program revealed by Snowden in 2013.<sup>65</sup> Prism involves direct NSA access to the servers of major internet companies including Google, Apple, Microsoft, Facebook, YouTube, Skype, and Yahoo. Its counterpart, Upstream, siphons and stores international internet communications flowing through telecommunications companies like AT&T and Verizon. Technically both modes of collection target foreigners abroad, but "incidentally" sweep in many Americans' and permanent residents' communications as well.<sup>66</sup> Both Prism and Upstream also sidestep legal requirements to obtain individual court orders, instead warrantlessly vacuuming up the content of emails, video and voice chats, photos, login activity, and more.<sup>67</sup> The NSA limited Upstream under pressure in 2017,<sup>68</sup> but data collection continues today.<sup>69</sup>

Many post-9/11 programs such as Stellar Wind and Prism have only come to public and policymaker attention thanks to the efforts of whistleblowers such as Snowden or Mark Klein. Klein, an AT&T technician, was conducting routine maintenance in an AT&T internet room in 2004 when he discovered a splitter cabinet that copied all data flowing through AT&T and routed the copy into a secret locked NSA room below. Klein attempted to bring the story to the *LA Times*, but after pressure from NSA director Hayden and others, the *Times* did not publish the story.<sup>70</sup> When Klein's revelations of illegal warrantless spying were finally published in 2006,<sup>71</sup> they propelled a series of lawsuits against AT&T and other telecommunications providers. Ultimately, however, Congress handed these companies retroactive legal immunity in 2008 in the sweeping FISA Amendments Act (FAA).<sup>72</sup>

One key component of the FAA is called Section 702, a periodically renewed provision currently scheduled to expire at the end of 2023. It is Section 702 that authorizes Prism and Upstream data collection.<sup>73</sup> The U.S. government already considers foreigners abroad to have minimal privacy rights when their communications to each other pass through U.S. networks, and the NSA has long collected such communications in bulk without needing to

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<sup>65</sup> Harris, S. (2010). *The Watchers: The Rise of America's Surveillance State*. Penguin.

<sup>66</sup> Greenwald, G.; MacAskill, E. (2013, June 7). *NSA Prism Program Taps In to User Data of Apple, Google and Others*. The Guardian. <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>.

<sup>67</sup> Greenwald, G.; MacAskill, E. (2013, June 7).

<sup>68</sup> Froomkin, D. (2017, April 28). *NSA Backs Down on Major Surveillance Program That Captured Americans' Communications Without a Warrant*. The Intercept. <https://theintercept.com/2017/04/28/nsa-backs-down-on-major-surveillance-program-that-captured-americans-communications-without-a-warrant/>.

<sup>69</sup> Boehm, E. (2023, July 13) *We Still Don't Know the Full Extent of the Government's Warrantless Electronic Spying Program*. Reason. <https://reason.com/2023/07/13/we-still-dont-know-the-full-extent-of-the-governments-warrantless-electronic-spying-program/>.

<sup>70</sup> Pilkington, E. (2021, September 4). *'Panic Made Us Vulnerable': How 9/11 Made the US Surveillance State – and the Americans Who Fought Back*. The Guardian.

<https://www.theguardian.com/world/2021/sep/04/surveillance-state-september-11-panic-made-us-vulnerable>.

<sup>71</sup> Singel, R. (2006, April 7). *Whistle-Blower Outs NSA Spy Room*. Wired.

<https://www.wired.com/2006/04/whistle-blower-outs-nsa-spy-room-2/>.

<sup>72</sup> Donohue, L. (2014). Section 702 and the Collection of International Telephone and Internet Content. *Harvard Journal of Law & Public Policy*, 38(1), 117–265.

<sup>73</sup> Center for Democracy & Technology. (2017). *Section 702: What It Is & How It Works*. <https://cdt.org/wp-content/uploads/2017/02/Section-702.pdf>; Electronic Frontier Foundation. (2017). *Upstream vs. PRISM*. <https://www.eff.org/pages/upstream-prism>.

prove targeted suspicion.<sup>74</sup> By contrast, Americans have been protected in theory by the Fourth Amendment, which requires the government to obtain a warrant to access their private communications. Section 702 created a loophole to this requirement: the “backdoor search loophole.” The law allows the NSA to collect Americans’ messages in bulk, stored for years in a searchable database, as long as they are communicating with targeted foreigners—people believed to possess “foreign intelligence information,” a phrase whose broad remit can include journalists and human rights defenders<sup>75</sup>—and as long as their messages are collected “incidentally.” The USA Freedom Act of 2015 failed to address this loophole.<sup>76</sup> Today, the NSA, CIA, FBI, and National Counterterrorism Center can all access this database. Analysts can technically only query the repository using Americans’ identifiers if they suspect a link to foreign intelligence. The FBI can also legally search a small portion of the database for evidence of a crime unrelated to national security, if it obtains a court order.<sup>77</sup>

Nonetheless, despite years of reform efforts and legal checks, the FBI misused the Section 702 database more than 278,000 times between 2020 and early 2021 alone.<sup>78</sup> These searches included the communications of journalists, over 100 Black Lives Matter protesters, Jan. 6 Capitol attackers, two “Middle Eastern” men flagged as they loaded cleaning supplies in a vehicle, 19,000 donors to a congressional campaign, and relatives of FBI analysts.<sup>79</sup> Meanwhile, the NSA admitted in 2013 that in at least 12 instances, its analysts had used the Section 702 database to spy on their partners and exes, an act satirically labeled LOVEINT.<sup>80</sup> The FBI undertook remediation efforts in 2021, leading its annual queries of U.S. persons’ information to dip by over 95 percent.<sup>81</sup> However, that figure still translated to over 200,000

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<sup>74</sup> Savage, C. (2023, February 27). *Security Agencies and Congress Brace for Fight Over Expiring Surveillance Law*. The New York Times. <https://www.nytimes.com/article/warrantless-surveillance-section-702.html>.

<sup>75</sup> American Civil Liberties Union. (2023). *Warrantless Surveillance Under Section 702 of FISA*. <https://www.aclu.org/issues/national-security/privacy-and-surveillance/warrantless-surveillance-under-section-702-fisa>.

<sup>76</sup> Laperruque, J. (2021, September 7). *Secrets, Surveillance, and Scandals: The War on Terror’s Unending Impact on Americans’ Private Lives*. Project on Government Oversight. <https://www.pogo.org/analysis/2021/09/secrets-surveillance-and-scandals-the-war-on-terrors-unending-impact-on-americans-private-lives>.

<sup>77</sup> Croner, G.; Petril, J. (2023). *A Close and Critical Look at the ‘Five Things’ the ACLU Says You Need to Know About ‘NSA Mass Surveillance’*. Just Security. <https://www.justsecurity.org/87378/a-close-look-at-the-five-things-the-aclu-says-you-need-to-know-about-nsa-mass-surveillance/>; Savage, C. (2023, February 27). *Security Agencies and Congress Brace for Fight Over Expiring Surveillance Law*. The New York Times. <https://www.nytimes.com/article/warrantless-surveillance-section-702.html>.

<sup>78</sup> Phillips, A. (2023, May 19). *What’s the Database the FBI Misused to Seek Info on Jan. 6 Suspects, BLM Arrestees?* The Washington Post. <https://www.washingtonpost.com/national-security/2023/05/19/fbi-jan-6-section-702-fisa-database-americans/>.

<sup>79</sup> Brennan Center for Justice. (2023). *Section 702 of FISA: A “Foreign Intelligence” Law Turned Domestic Spying Tool*. <https://www.brennancenter.org/our-work/research-reports/coalition-statement-urges-congress-reform-section-702>.

<sup>80</sup> Farivar, C. (2013, September 27). *LOVEINT: On His First Day of Work, NSA Employee Spied on Ex-Girlfriend*. Ars Technica. <http://arstechnica.com/tech-policy/2013/09/loveint-on-his-first-day-of-work-nsa-employee-spied-on-ex-girlfriend/>.

<sup>81</sup> Croner, G.; Petril, J. (2023, July 26). *A Close and Critical Look at the ‘Five Things’ the ACLU Says You Need to Know About ‘NSA Mass Surveillance.’* Just Security. Intelligence agencies define a “U.S. person” as a U.S. citizen, permanent resident, U.S. corporation, or unincorporated association whose members are largely citizens or permanent residents. National Security Agency/Central Security Service. (n.d.). *Frequently Asked Questions (FAQs)*. <https://www.nsa.gov/about/faqs/sigint-faqs/#sigint4>.

FBI queries of U.S. persons' communications, including over 8,000 that violated regulations, in 2022 alone.<sup>82</sup> Moreover, the government has repeatedly refused to say how many Americans are included in the database.<sup>83</sup>

Section 702 is an unquestionably powerful and unaccountable “domestic spying tool,”<sup>84</sup> to which political dissenters and racialized people are particularly vulnerable. Its 2023 reauthorization faces bipartisan opposition. Politicians from Republican Congressman Jim Jordan to Democratic Senator Dick Durban have signaled they will not reauthorize the act without reforms.<sup>85</sup> A bipartisan coalition of civil society groups recently signed a letter demanding an end to warrantless surveillance under Section 702,<sup>86</sup> and a member of one group leading reform efforts argued that “this year is the biggest opportunity we’ve had [to fight warrantless mass surveillance] in nearly 50 years.”<sup>87</sup>

Social media surveillance has also ramped up over the past several years, particularly against immigrants, protesters, and Muslims, and especially under the auspices of counterterrorism. The Department of Homeland Security (DHS) began pilot programs in 2015 to screen visa applicants' social media accounts upon Congress's request after the San Bernardino attack, which was investigated as an “act of terrorism.”<sup>88</sup> A report on these pilot

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<sup>82</sup> Brennan Center for Justice. (2023). *Section 702 of FISA: A 'Foreign Intelligence' Law Turned Domestic Spying Tool*. <https://www.brennancenter.org/our-work/research-reports/coalition-statement-urges-congress-reform-section-702>.

<sup>83</sup> American Civil Liberties Union. (2023). *Warrantless Surveillance Under Section 702 of FISA*. <https://www.aclu.org/issues/national-security/privacy-and-surveillance/warrantless-surveillance-under-section-702-fisa>.

<sup>84</sup> Brennan Center for Justice. (2023). *Section 702 of FISA: A 'Foreign Intelligence' Law Turned Domestic Spying Tool*. <https://www.brennancenter.org/our-work/research-reports/coalition-statement-urges-congress-reform-section-702>.

<sup>85</sup> In stating their opposition to renewing Section 702 without reform, many Republican politicians have referenced suspicions of the “deep state” and cited the FBI's bungled investigation into former Trump campaign aide Carter Page as part of the Trump-Russia probe. FBI investigators reportedly failed to properly corroborate allegations in its surveillance applications to the FISA Court, albeit not under Section 702. Tucker, E.; Merchant, N. (2023, May 16). *Durham Report Takeaways: A 'Seriously Flawed' Russia Investigation and Its Lasting Impact on the FBI*. AP News. <https://apnews.com/article/durham-report-fbi-trump-clinton-2016-campaign-f3039e651eeb35a09091c363419e6766>.

<sup>86</sup> Vitka, S. (2023, June 13). *Demand Progress Submission for the Record to the Senate Committee on the Judiciary on Behalf of 30 Organizations Regarding Section 702 of the Foreign Intelligence Surveillance Act and Related Surveillance Authorities*. Demand Progress. [https://s3.amazonaws.com/demandprogress/letters/2023-06-13\\_SJC\\_Sec\\_702\\_and\\_related\\_authorities\\_hearing\\_Demand\\_Progress.pdf](https://s3.amazonaws.com/demandprogress/letters/2023-06-13_SJC_Sec_702_and_related_authorities_hearing_Demand_Progress.pdf).

<sup>87</sup> Dayen, D. (2023, June 15). *The Most Interesting Bipartisanship of the Year*. The American Prospect. <https://prospect.org/politics/2023-06-15-most-interesting-bipartisanship-domestic-spying/>.

<sup>88</sup> In 2015, Syed Rizwan Farook and Tashfeen Malik killed 14 people and injured 22 at the Inland Regional Center in San Bernardino, CA, where Farook worked. Initial reporting on the couple wrongly suggested that Malik had “talked openly on social media’ about her support for violent jihad,” and that her public posts were missed in multiple background checks conducted during her K-1 visa and permanent resident application processes. In reality, according to then-FBI director James Comey, Malik and Farook had exchanged vague, private direct messages that would have been inaccessible to immigration officials without a warrant. Nonetheless, misreporting on Malik's online posts led to increased calls by politicians and others to screen visa applicants' social media accounts. Apuzzo, M.; Schmidt, M.; Preston, J. (2015, December 12). *U.S. Visa Process Missed San Bernardino Wife's Online Zealotry*. The New York Times. <https://www.nytimes.com/2015/12/13/us/san-bernardino-attacks-us-visa-process-tashfeen-maliks->

programs found they lacked criteria for success and were thus of “limited use” for guiding development of a broader surveillance program.<sup>89</sup> Nonetheless, DHS announced in 2017 that it would begin collecting social media information from nearly all travelers to the U.S.—even existing visa holders, permanent residents, and naturalized citizens.<sup>90</sup> The State Department also began asking visa applicants to submit their social media handles voluntarily, then made it a requirement under President Trump’s “extreme vetting” program.<sup>91</sup> Despite eventually closing down some of Trump’s surveillance programs, President Biden has expanded others, including State Department programs to trawl immigrants’ and visitors’ social media profiles. Data collected by the State Department and DHS can be indefinitely retained and even shared with foreign governments.<sup>92</sup> Although the funding of these social media surveillance programs is secretive, two contracts with the company running the Visa Lifecycle Vetting Initiative—rebranded from the original Extreme Vetting Initiative—obligated over \$42 million from 2018 to 2023.<sup>93</sup>

Official government programs and provisions like Section 702, Prism, and Extreme Vetting are not the only ways intelligence agencies can obtain Americans’ social media information: they regularly buy information from unregulated data brokers, information which can be de-anonymized and used to geolocate users.<sup>94</sup> For example, Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) were recently revealed to be contracting with data brokers such as Venntel and Babel Street to track citizens and noncitizens alike, accessing their locations, Social Security numbers, and public social media posts.<sup>95</sup> On a more local level, one company called Fog Data Science sells police departments access to raw location data, some dating back to 2017, from at least 250 million U.S. devices alone, which it obtains through thousands of third-party mobile apps. Fog claims

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remarks-on-social-media-about-jihad-were-missed.html; Fisher, M. (2015, December 17). *Why Wasn’t San Bernardino Prevented? The Hard Truth That No One Wants to Admit*. Vox.

<https://www.vox.com/2015/12/17/10440854/san-bernardino-attacks-prevented>.

<sup>89</sup> Office of Inspector General. (2017, February 27). *DHS’ Pilots for Social Media Screening Need Increased Rigor to Ensure Scalability and Long-Term Success*. U.S. Department of Homeland Security.

<https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-40-Feb17.pdf>.

<sup>90</sup> Nixon, R. (2017, September 28). *U.S. to Collect Social Media Data on All Immigrants Entering Country*. The New York Times. <https://www.nytimes.com/2017/09/28/us/politics/immigrants-social-media-trump.html>.

<sup>91</sup> Garcia, S. (2019, June 2). *U.S. Requiring Social Media Information From Visa Applicants*. The New York Times. <https://www.nytimes.com/2019/06/02/us/us-visa-application-social-media.html>.

<sup>92</sup> Diakun, A.; DeCell, C. (2022, April 26). *Why Is The U.S. Still Probing Foreign Visitors’ Social Media Accounts?* The Washington Post. <https://www.washingtonpost.com/outlook/2022/04/26/social-media-surveillance-us-visas-state/>.

<sup>93</sup> Brennan Center for Justice. (2021). *Timeline of Social Media Monitoring for Vetting by the Department of Homeland Security and the State Department*. [https://www.brennancenter.org/sites/default/files/Timeline of Social Media Monitoring by DHS and the State Department 11.16.17.pdf](https://www.brennancenter.org/sites/default/files/Timeline%20of%20Social%20Media%20Monitoring%20by%20DHS%20and%20the%20State%20Department%2011.16.17.pdf); Electronic Frontier Foundation. (2022). *EFF Files FOIA Lawsuit Against DHS to Shed Light on Vetting Program to Collect and Data Mine Immigrants’ Social Media*. <https://www.eff.org/press/releases/eff-files-foia-lawsuit-against-dhs-shed-light-vetting-program-collect-and-data-mine>.

<sup>94</sup> Dayen, D. (2023, June 15). *The Most Interesting Bipartisanship of the Year*. The American Prospect. <https://prospect.org/politics/2023-06-15-most-interesting-bipartisanship-domestic-spying/>.

<sup>95</sup> Cox, J. (2023, May 17). *Homeland Security Uses AI Tool to Analyze Social Media of U.S. Citizens and Refugees*. Vice. <https://www.vice.com/en/article/m7bge3/dhs-uses-ai-tool-babel-x-babel-street-social-media-citizens-refugees>; Ng, A. (2022, July 18). *Homeland Security Records Show ‘Shocking’ Use of Phone Data, ACLU Says*. Politico. <https://www.politico.com/news/2022/07/18/dhs-location-data-aclu-00046208>.

it can not only provide data from any targeted device, but also on any device within a designated area.<sup>96</sup> This allows police to access records both for a targeted person’s “pattern of life,” or movements over an extended period, and for every device in a particular area during a specific timeframe.

One key way police departments use social media data is to surveil protesters, particularly in the Movement for Black Lives, often using third-party software that automates searches.<sup>97</sup> For example, monitoring startup Dataminr used its connection to Twitter (now X) to help departments geolocate protesters during the summer 2020 protests, allowing police to track and interrupt marches.<sup>98</sup> Dataminr also alerted the U.S. Marshals Service to the locations of demonstrations during abortion rights protests in 2022, and flagged often innocuous and First Amendment-protected social media content discussing abortion bans.<sup>99</sup> Even after journalists have uncovered law enforcement’s social media surveillance programs, some departments have allegedly continued to monitor social media through automated software that scans public posts or undercover accounts that may attempt to access private accounts.<sup>100</sup> Such monitoring disproportionately harms already oppressed communities.<sup>101</sup>

The post-9/11 counterterrorism mandate is rarely central to the missions of companies like Dataminr, Babel Street, and Fog Data Science, as demonstrated by their focus on protests, immigration, and crime. Nonetheless, funding and policies justified by the 9/11 attacks massively boosted the growth of “surveillance capitalism,” an economy in which “threat intelligence” companies have thrived and found ample customers in government.<sup>102</sup>

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<sup>96</sup> Cyphers, B. (2022, August 31). *Inside Fog Data Science, the Secretive Company Selling Mass Surveillance to Local Police*. Electronic Frontier Foundation. <https://www.eff.org/deeplinks/2022/08/inside-fog-data-science-secretive-company-selling-mass-surveillance-local-police>.

<sup>97</sup> Cagle, M. (2016, October 11). *Facebook, Instagram, and Twitter Provided Data Access for a Surveillance Product Marketed to Target Activists of Color*. ACLU Blog. <https://www.aclu.org/blog/privacy-technology/internet-privacy/facebook-instagram-and-twitter-provided-data-access?redirect=blog/free-future/facebook-instagram-and-twitter-provided-data-access-surveillance-product-marketed>.

<sup>98</sup> *The Intercept* reported that Twitter, as well as the CIA, were longtime investors in Dataminr. Biddle, S. (2020, June 9). *Police Surveilled George Floyd Protests With Help from Twitter-Affiliated Startup Dataminr*. *The Intercept*. <https://theintercept.com/2020/07/09/twitter-dataminr-police-spy-surveillance-black-lives-matter-protests/>.

<sup>99</sup> Biddle, S. (2023, May 15). *U.S. Marshals Spied on Abortion Protesters Using Dataminr*. *The Intercept*. <https://theintercept.com/2023/05/15/abortion-surveillance-dataminr/>.

<sup>100</sup> Gelardi, C. (2023, January 16). *The New York State Police Are Watching Your Social Media*. WSHU Public Radio. <https://www.wshu.org/long-island-news/2023-01-18/gelardi-the-new-york-state-police-are-using-social-media-monitoring-programs>; Hvistendahl, M. (2022, May 20). *FBI Provides Chicago Police with Fake Online Identities for ‘Social Media Exploitation’ Team*. *The Intercept*. <https://theintercept.com/2022/05/20/chicago-police-fbi-social-media-surveillance-fake/>.

<sup>101</sup> Robinson, S. (2018, July 6). *When a Facebook Like Lands You in Jail*. Brennan Center for Justice. <https://www.brennancenter.org/our-work/analysis-opinion/when-facebook-lands-you-jail>.

<sup>102</sup> Zuboff, S. (2018). *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. Public Affairs.



Dataminr’s CEO, meanwhile, claims he founded the company to fill the “real-time information gaps” that hindered evacuation from the World Trade Center on 9/11.<sup>103</sup>

The architecture built to sustain mass surveillance has grown dizzyingly large and complex. This complexity, along with the government’s lack of transparency, makes disentangling mass surveillance from the tightly interlinked areas of intelligence, counterterrorism, and homeland security nearly impossible. However, available data on government intelligence institutions offer some sense of the mushrooming scale of surveillance. For instance, the annual U.S. intelligence budget has doubled from approximately \$40 billion per year in the late 1990s to \$80 billion per year in 2020.<sup>104</sup> The New York Police Department alone has quadrupled its intelligence and counterterrorism budget, spending at least \$3 billion total between 2006 and 2021.<sup>105</sup> As of 2010, “Top Secret America” involved over 1,200 government organizations and 1,900 private companies working on programs linked to intelligence and counterterrorism, spread across approximately 10,000 U.S. locations, generating 50,000 intelligence reports per year.<sup>106</sup> A retired Army officer asked in 2009 to review sensitive programs in the Department of Defense—which houses the majority of U.S. intelligence programs—noted in an interview, “The complexity of this system defies description....We consequently can’t effectively assess whether it is making us more safe.”<sup>107</sup>

Today, mass surveillance is carried out through a constellation of intelligence agencies, corporations, databases, and technologies. See Figure 1, below.

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<sup>103</sup> Bailey, T. (2021, March 23). *Dataminr’s Founder and CEO Ted Bailey on the Company’s \$475M Growth Capital Round*. Dataminr. <https://www.dataminr.com/blog/dataminr-founder-and-ceo-ted-bailey-on-the-companys-475m-growth-capital-round>.

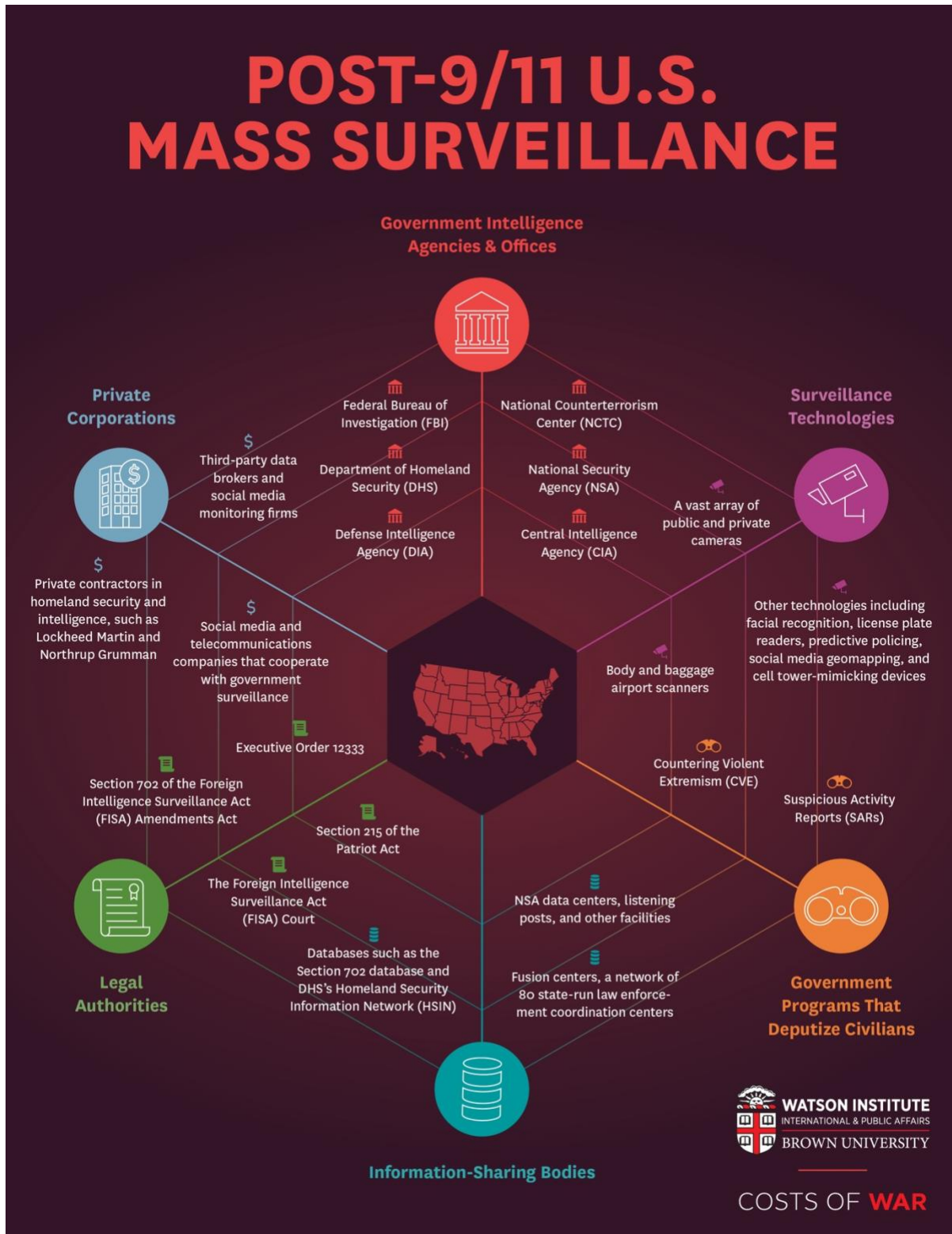
<sup>104</sup> Figures are adjusted to 2020 dollars and include funding for all government intelligence agencies, including the National Security Agency (NSA) and Central Intelligence Agency (CIA). Pilkington, E. (2021, September 4). *‘Panic Made Us Vulnerable’: How 9/11 Made the US Surveillance State – and the Americans Who Fought Back*. The Guardian. <https://www.theguardian.com/world/2021/sep/04/surveillance-state-september-11-panic-made-us-vulnerable>.

<sup>105</sup> This figure does not include funding channeled through federal grants or nonprofit donations. Watkins, A. (2021, September 8). *How the N.Y.P.D. Is Using Post-9/11 Tools on Everyday New Yorkers*. The New York Times. <https://www.nytimes.com/2021/09/08/nyregion/nypd-9-11-police-surveillance.html>.

<sup>106</sup> Priest, D; Arkin, W. (2010, July 19). *A Hidden World, Growing Beyond Control*. The Washington Post. <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/>.

<sup>107</sup> Priest, D; Arkin, W. (2010, July 19).

Figure 1. Post-9/11 U.S. Mass Surveillance <sup>108</sup>



<sup>108</sup> See *Appendix* for full list of accompanying citations.

This massive complex has also spawned diverse modes of resistance and protest. Reporters and whistleblowers have taken professional and personal risks to reveal surveillance programs to the public. Policymakers such as Senators Ron Wyden and Patrick Leahy have introduced legislation to limit these programs. Civil liberties coalitions and community groups such as the Stop LAPD Spying Coalition, Privacy Watch STL, Oakland Privacy, American Civil Liberties Union (ACLU), Surveillance Technology Oversight Project (S.T.O.P.), and Electronic Frontier Foundation (EFF) have used a wide range of tactics to restrain state surveillance, particularly government monitoring of Black people and Muslims. Organizations have filed lawsuits to obtain secret documents or block surveillance programs, helped pass community-oversight laws around new surveillance technologies, and organized against police use of facial recognition cameras.<sup>109</sup> Demonstrators have borrowed from the anti-surveillance tactics of protesters elsewhere, such as in Hong Kong during the 2019-20 anti-extradition bill protests, for instance by using masks to thwart facial recognition, umbrellas to hide from cameras, and encrypted apps to skirt digital monitoring.<sup>110</sup> Finally, organizers and scholars have advocated for understanding mass surveillance as a threat to racial, economic, gender, and migrant justice—in other words, to a notion of public safety that encompasses the entire public—rather than only to individual privacy.<sup>111</sup>

### ***“Suspect Communities”***

Post-9/11 domestic mass surveillance has affected all Americans and U.S. residents, as Snowden’s revelations made amply clear. However, certain communities have borne the brunt of suspicion. The government marked people of Middle Eastern and South Asian descent, and Muslims broadly, as presumed national security threats and targeted their communities for increased surveillance in the wake of the 9/11 attacks. The immigration system clamped down on both documented and undocumented migration under the auspices of defending the homeland from malicious incursion. These efforts, novel in scale more than content, amplified and provided new justifications for existing political forces. For instance, the specific effects of mass surveillance on Muslims and Latinx people built on a long history of framing both groups as “foreign” to the U.S.<sup>112</sup> This report will focus in the subsequent two sections on the effects of post-9/11 surveillance on Muslims and immigrants. However, it is first important to note the impact on many other intersecting communities marked as suspect as well.

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<sup>109</sup> Cicchi, A. (2018, September 27). *Mass Surveillance Begins at the Local Level. So Does the Resistance to It*. The Nation. <https://www.thenation.com/article/archive/mass-surveillance-begins-at-the-local-level-so-does-the-resistance-to-it/>.

<sup>110</sup> Hollingsworth, J.; Sottile, Z. (2019, August 25). *Why Protests Are Becoming Increasingly Faceless*. CNN. <https://www.cnn.com/style/article/protest-design-future-intl-hnk/index.html>.

<sup>111</sup> See Benjamin, R. (2019). *Race After Technology: Abolitionist Tools for the New Jim Code*. Polity; Surveillance Resistance Lab. (2023). *Building Power to Resist Surveillance and Advance Democracy*. <https://surveillanceresistancelab.org>.

<sup>112</sup> Romero, L.; Zarrugh, A. (2018). Islamophobia and the Making of Latinos/as into Terrorist Threats. *Ethnic and Racial Studies*, 41(12), 2235–54, <https://doi.org/10.1080/01419870.2017.1349919>.

First, in an echo of the Red Scares in 1917-20 and 1947-57, political surveillance of racialized and leftist resistance movements—including immigrants’ rights organizers, labor activists, and antiwar protesters—intensified after 9/11. For instance, as Standing Rock Sioux and their allies protested the proposed Dakota Access Pipeline (DAPL) on unceded land in North Dakota in 2016-17, private security firms such as TigerSwan, created during the Iraq War by a U.S. Army Delta Force veteran, treated protesters as insurgents.<sup>113</sup> Working on behalf of a subsidiary of the Dakota Access Pipeline’s parent company, TigerSwan infiltrated activist groups, set up “fusion centers,” eavesdropped on radio communications, photographed camps from a helicopter, and shared daily intelligence updates with federal and state police.<sup>114</sup> The company also specifically targeted people of Middle Eastern descent and, when projecting intensified protests over the summer, reported that “[m]uch like Afghanistan and Iraq, the ‘Fighting Season’ will soon be here with the coming warming temperatures.”<sup>115</sup> As police forced protesters to leave the resistance camp in 2017, TigerSwan warned of an “anti-DAPL diaspora” and branded itself to a potential client as a solution to what it considered protesters’ “terrorist style tactics.”<sup>116</sup>

Similarly, the Black Lives Matter movement (BLM)<sup>117</sup> came under targeted scrutiny beginning in the mid-2010s and especially in 2020 during the massive Black-led protests after the police killings of George Floyd and Breonna Taylor. The FBI’s powers of investigation had already been strengthened in 2008, when the Bush administration authorized it to use “assessment,” a tool that allowed the agency to conduct invasive investigations—using tactics such as physical surveillance, database mining, confidential informants, and undercover agents—without any individualized suspicion.<sup>118</sup> In 2017, the FBI coined the label “Black Identity Extremist” (BIE), citing six unrelated cases of attacks on police over three years, and used this poorly defined threat to justify conducting assessments against BLM protesters.<sup>119</sup> Leaked FBI documents revealed in 2019 that the agency

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<sup>113</sup> Brown, A. (2020, November 15). *In the Mercenaries’ Own Words: Documents Detail TigerSwan Infiltration of Standing Rock*. The Intercept. <https://theintercept.com/2020/11/15/standing-rock-tigerswan-infiltrator-documents/>.

<sup>114</sup> Brown, A.; Parrish, W.; Speri, A. (2017, May 27). *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to ‘Defeat Pipeline Insurgencies’*. The Intercept. <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>; Brown, A. (2020, November 15). *In the Mercenaries’ Own Words: Documents Detail TigerSwan Infiltration of Standing Rock*. The Intercept. <https://theintercept.com/2020/11/15/standing-rock-tigerswan-infiltrator-documents/>; Brave NoiseCat, J. (2017, June 28). *Surveillance at Standing Rock Exposes Heavy-Handed Policing of Native Lands*. The Guardian. <https://www.theguardian.com/commentisfree/2017/jun/28/surveillance-standing-rock-policing-native-lands>.

<sup>115</sup> Brown, A.; Parrish, W.; and Speri, A. (2017, May 27). *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to “Defeat Pipeline Insurgencies.”* The Intercept. <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>.

<sup>116</sup> Brown, A.; Parrish, W.; and Speri, A. (2017, May 27); Brown, A.; Sadavisam, N. (2023, April 13). *After Infiltrating Standing Rock, TigerSwan Pitched Its ‘Counterinsurgency’ Playbook to Other Oil Companies*. Grist. <https://grist.org/accountability/tigerswan-documents-dakota-access-pipeline-standing-rock-surveillance/>.

<sup>117</sup> BLM is also known as the Movement for Black Lives, a coalition of Black-led organizations.

<sup>118</sup> German, M. (2020). *The FBI Targets a New Generation of Black Activists*. Brennan Center for Justice. <https://www.brennancenter.org/our-work/analysis-opinion/fbi-targets-new-generation-black-activists>.

<sup>119</sup> German, M. (2020).

categorized BIE as a terrorist threat more severe than white supremacist groups or Al Qaeda, despite not citing any specific recent cases of violence.<sup>120</sup>

This language of terrorism, and its material consequences, represents a long history of state repression of Black and Indigenous liberation movements amplified by post-9/11 counterterror tactics. In 2020, the FBI used Section 702, the surveillance tool discussed above, to access the communications of 133 people arrested at BLM protests in summer 2020 in order to search for ties to terrorism—an apparent misuse of authority.<sup>121</sup> The New York Police Department (NYPD) is accused of using facial recognition technology in secret to surveil racial justice protesters.<sup>122</sup> Finally, although the FBI changed its terminology from BIE to “Racially Motivated Violent Extremism” (RMVE) in 2020, it also lumped white supremacist violence and Black protests against that violence into the same category, then used RMVE’s high rates of violence (committed almost exclusively by white supremacist groups) to justify intensified surveillance of Black activists.<sup>123</sup>

Trans and gender-nonconforming people, whose bodies are already heavily surveilled, also saw their freedoms further constricted amidst post-9/11 surveillance. They were subjected to heightened gender policing, particularly when traveling, thanks to security discourses of terrorists disguising themselves as other genders. This not only exposed them to scrutiny, humiliation, and threat, but also reinforced the transphobic notion that non-normative gender identities are innately deceptive.<sup>124</sup> Trans and gender-nonconforming immigrants, people of color, and poor and young people are especially likely to face transphobic surveillance practices.<sup>125</sup> Trans and gender-nonconforming people have also been affected by a more bureaucratic form of surveillance: the post-9/11 standardizing of identity documentation, such as the Real ID Act. Such standardization views inconsistencies across identity documents as inherently problematic, linking “gender ambiguity with national security threats.”<sup>126</sup> Identity document standardization and biometric collection has

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<sup>120</sup> Klippenstein, K. (2019, August 8). *Leaked FBI Documents Reveal Bureau’s Priorities Under Trump*. The Young Turks. <https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/mnzAKMpdtiZ7AcYLd5cRR>.

<sup>121</sup> Miller, M. (2023, May 19). *FBI Misused Surveillance Authorities to Investigate Black Lives Matter Protesters*. Politico. <https://www.politico.com/news/2023/05/19/fbi-surveillance-black-lives-matter-protesters-00097924>.

<sup>122</sup> Amnesty International. (2022, August 1). *USA: NYPD Ordered to Hand Over Documents Detailing Surveillance of Black Lives Matter Protests Following Lawsuit*. <https://www.amnesty.org/en/latest/news/2022/08/usa-nypd-black-lives-matter-protests-surveillance/>.

<sup>123</sup> Patel, V. (2021). Racially Motivated Spying Pretext: Challenging the FBI’s New Regime of Racialized Surveillance. *Columbia Journal of Race and Law Forum*, 11(1), 1–31.

<sup>124</sup> Beauchamp, T. (2009). Artful Concealment and Strategic Visibility: Transgender Bodies and U.S. State Surveillance After 9/11. *Surveillance and Society* 6(4), 356–66, <https://doi.org/10.24908/ss.v6i4.3267>; Fischer, M. (2019). *Terrorizing Gender: Transgender Visibility and the Surveillance Practices of the U.S. Security State*. University of Nebraska Press.

<sup>125</sup> Quinan, C. (2017). Gender (In)Securities: Surveillance and Transgender Bodies in a Post-9/11 Era of Neoliberalism, in *Security/Mobility: Politics of Movement*, eds. Leese, M.; Wittendorp, S. Manchester University Press, 53–69.

<sup>126</sup> Beauchamp, T. (2009). Artful Concealment and Strategic Visibility: Transgender Bodies and U.S. State Surveillance After 9/11. *Surveillance and Society*, 6(4), 361. <https://ojs.library.queensu.ca/index.php/surveillance-and-society/article/view/3267>; Quinan, C. (2017, February). Gender (In)Securities: Surveillance and Transgender Bodies in a Post-9/11 Era of Neoliberalism.

particular resonance for Black trans people, hearkening back to fugitive enslaved people's tactics of "cross-dressing" to avoid identification or "pass" as white or otherwise non-threatening.<sup>127</sup>

Finally, police have expanded their surveillance of poor Black and Latinx people using technology developed for war zones and counterterrorism. For example, the NYPD has repurposed its Domain Awareness System (DAS), originally developed with Microsoft as a post-9/11 counterterror program, as a tool of "crime-fighting."<sup>128</sup> DAS collates live video feeds, license plate readers, radiological sensors, ShotSpotter alerts,<sup>129</sup> crime reports, and legal records in an "all-seeing" database.<sup>130</sup> NYPD's history of racist policing practices has left organizers concerned that its secret surveillance may intensify anti-Black and anti-Muslim policing.<sup>131</sup> After years of advocacy for greater transparency, the New York City Council passed the Public Oversight of Surveillance Technology (POST) Act, which forced the NYPD to publicly reveal its surveillance capacities and their impact.<sup>132</sup> Similarly, the Baltimore Police Department has experimented, at first in secret, with an aerial surveillance plane that flew over majority-Black areas of Baltimore.<sup>133</sup> The public-private "spy plane" partnership could track movements from the air, and was eventually ruled unconstitutional. However, it

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*Security/Mobility: Politics of Movement*, 153-169. <https://academic.oup.com/manchester-scholarship-online/book/20699/chapter/180034956>.

<sup>127</sup> Heberling, W. (2022). Stop Surveilling My Genre!: On the Biometric Surveillance of (Black Trans) People. *Seattle Journal for Social Justice* 20(3), 861-914; Snorton, R. (2017). *Black on Both Sides: A Racial History of Trans Identity*. University of Minnesota Press.

<sup>128</sup> Feuer, A. (2020, June 18). *Council Forces N.Y.P.D. to Disclose Use of Drones and Other Spy Tech*. The New York Times. <https://www.nytimes.com/2020/06/18/nyregion/nypd-police-surveillance-technology-vote.html>.

<sup>129</sup> ShotSpotter, a commercial technology used by many police departments, uses sensors to attempt to identify the sound of gunshots and alert local police. Where records are obtainable, data show that ShotSpotter sensors tend overwhelmingly to be placed in majority-Black and brown neighborhoods. See Feathers, T. (2021, July 19). *Gunshot-Detecting Tech Is Summoning Armed Police to Black Neighborhoods*. Vice. <https://www.vice.com/en/article/88nd3z/gunshot-detecting-tech-is-summoning-armed-police-to-black-neighborhoods>.

<sup>130</sup> Feuer, A. (2020, June 18). *Council Forces N.Y.P.D. to Disclose Use of Drones and Other Spy Tech*. The New York Times. <https://www.nytimes.com/2020/06/18/nyregion/nypd-police-surveillance-technology-vote.html>; New York Police Department (2021, April 11). *Domain Awareness System: Impact and Use Policy*. [https://www.nyc.gov/assets/nypd/downloads/pdf/public\\_information/post-final/domain-awareness-system-das-nypd-impact-and-use-policy\\_4.9.21\\_final.pdf](https://www.nyc.gov/assets/nypd/downloads/pdf/public_information/post-final/domain-awareness-system-das-nypd-impact-and-use-policy_4.9.21_final.pdf); Ungerleider, N. (2012, August 8). *NYPD, Microsoft Launch All-Seeing 'Domain Awareness System' With Real-Time CCTV, License Plate Monitoring*. Fast Company. <https://www.fastcompany.com/3000272/nypd-microsoft-launch-all-seeing-domain-awareness-system-real-time-cctv-license-plate-monito>.

<sup>131</sup> Zubair, A. (2019). *Domain Awareness System*. Surveillance Technology Oversight Program. <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f170be2dc09615b852699d7/1595345890732/Domain%2BAwareness.pdf>.

<sup>132</sup> Brennan Center for Justice. (2021, June 12). *The Public Oversight of Surveillance Technology (POST) Act: A Resource Page*. <https://www.brennancenter.org/our-work/research-reports/public-oversight-surveillance-technology-post-act-resource-page>.

<sup>133</sup> Reel, M. (2016, August 23). *Secret Cameras Record Baltimore's Every Move from Above*. Bloomberg Businessweek. <https://www.bloomberg.com/features/2016-baltimore-secret-surveillance/>; Snyder, B. (2020). 'Big Brother's Bigger Brother': The Visual Politics of (Counter) Surveillance in Baltimore. *Sociological Forum* 35(4), 1315-36, <https://doi.org/10.1111/socf.12649>.

fit within a long history of anti-Black policing<sup>134</sup> and intensive surveillance of poor Black neighborhoods in Baltimore.<sup>135</sup>

### **Muslims, Arabs, and People of Middle Eastern and South Asian Descent**

For U.S. Muslims, the post-9/11 era heralded intensified surveillance from the government and fellow citizens. Islam has long served as the paradigmatic “enemy within” in Western imaginations, a purportedly foreign religion with values inimical to “modernity.”<sup>136</sup> In this vein, Muslims—as well as those mis-racialized as such—have been framed as perpetual foreigners no matter their citizenship, subject to xenophobia and anti-Muslim racism.<sup>137</sup> Under this cloud of racialized suspicion, U.S. Muslims, Arabs, and people of Middle Eastern and South Asian descent have been subjected to surveillance for decades. For instance, President Nixon’s 1972 Operation Boulder authorized the FBI to harass Arab Americans as well as critics of U.S. bombings and invasions of Muslim-majority countries.<sup>138</sup> What the post-9/11 period enabled was not anti-Muslim racism, which already existed, but rather new technologies of surveillance, fresh discourses of “good” and “bad” Muslims,<sup>139</sup> and an ever-expanding counterterrorism infrastructure with its gaze fixed squarely on stigmatized brown communities.<sup>140</sup>

Noncitizen Muslims suffered the harshest state surveillance in the immediate wake of the 9/11 attacks, as discussed in the following section. However, after the 2005 London Underground bombing by four UK Muslims, the U.S. government and media also began hyping fears of “homegrown violent extremists.” Agencies like the FBI and local police turned

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<sup>134</sup> U.S. Department of Justice, (2016). *Investigation of the Baltimore City Police Department*. <https://www.justice.gov/crt/file/883296/download>.

<sup>135</sup> Simpson, J. C. (2021, March). *Under Watch: The Police ‘Spy Plane’ Experiment Is Over, But the Growing Surveillance of Baltimore Continues*. Baltimore Magazine.

<https://www.baltimoremagazine.com/section/history/politics/under-watch-police-spy-plane-experiment-over-but-growing-surveillance-baltimore-continues/>.

<sup>136</sup> Kundnani, A. (2014). *The Muslims Are Coming!: Islamophobia, Extremism, and the Domestic War on Terror*. Verso; Rana, J. (2011). *Terrifying Muslims: Race and Labor in the South Asian Diaspora*. Duke University Press;

Robin, C. (2004). Liberalism at Bay, Conservatism at Play: Fear in the Contemporary Imagination. *Social Research: An International Quarterly*, 71(4), 927–63; Said, E. (1979). *Orientalism*. Vintage Books; Saito, N. T. (2021). Why Xenophobia? *Berkeley La Raza Law Journal* 31, 1–24,

<https://doi.org/https://doi.org/10.15779/Z38XP6V44M>.

<sup>137</sup> For further discussion of the term “anti-Muslim racism,” see Nguyen, N. (2019). *Suspect Communities: Anti-Muslim Racism and the Domestic War on Terror*. University of Minnesota Press, p. 11-17.; Naber, N. (2008). Introduction: Arab Americans and US Racial Formations, in *Race and Arab Americans Before and After 9/11: From Invisible Citizens to Visible Subjects*, eds. Jamal, A.; Naber, N. 1–45; Salaita, S. (2006). *Anti-Arab Racism in the USA: Where It Comes From and What It Means for Politics Today*. Pluto Press.

<sup>138</sup> Akram, S. (2002). The Aftermath of September 11, 2001: The Targeting of Arabs and Muslims in America. *Arab Studies Quarterly* 24(2/3), 61–118; Naber, N. (2008). Introduction: Arab Americans and US Racial Formations, in *Race and Arab Americans Before and After 9/11: From Invisible Citizens to Visible Subjects*, eds. Jamal, A.; Naber, N. 1-45.

<sup>139</sup> Aziz, S. (2014). Policing Terrorists in the Community. *Harvard National Security Journal* 5, 147–224, <https://doi.org/10.2139/ssrn.2222083>; Mamdani, M. (2004). *Good Muslim, Bad Muslim: Islam, the USA, and the Global War Against Terror*. Permanent Black.

<sup>140</sup> Patel, T. (2012). Surveillance, Suspicion and Stigma: Brown Bodies in a Terror-Panic Climate. *Surveillance and Society* 10(3–4), 215–34, <https://doi.org/10.24908/ss.v10i3/4.4216>.

toward preempting domestic threat, arguing that they could disrupt nascent terrorist plots by gathering intelligence on Muslim communities theorized as particularly prone to radicalization.<sup>141</sup> Perhaps the best-known program of government surveillance of Muslims is the NYPD Intelligence Division's suspicionless spying initiative. This program relied on the Islamophobic and unsubstantiated theory that Muslim religiosity—unlike, for instance, Christian fundamentalism—by itself signaled radicalization and potential terrorism.<sup>142</sup> Largely hidden from the public from 2001 to 2011, the program targeted people from 28 “ancestries of interest” by sending informants into mosques, mapping neighborhoods, spying on student organizing, and otherwise gathering intelligence on U.S. Muslims' daily lives across multiple states. These efforts were reportedly unrelated to any active investigation and failed to produce even a single lead.<sup>143</sup> However, they did accomplish several other things: they undermined student movements and organizing for justice, framed Muslim identity as automatically suspicious, stifled protected speech, and eroded Muslims' right to religious practice in community.<sup>144</sup>

Federal agencies also built on Islamophobia and xenophobia fanned by public responses to the 9/11 attacks to surveil Muslims and people of Middle Eastern and South Asian descent. For instance, in 2003, President Bush directed his Department of Justice to ban racial profiling in federal law enforcement, with an exception for using race and ethnicity for “terrorist identification.”<sup>145</sup> Racial profiling serves as a form of surveillance of the body, what some scholars call “soft” surveillance versus the technology-reliant “hard” surveillance of security cameras.<sup>146</sup> It is what enables Transportation Security Administration (TSA) officials to target turban-wearing Sikhs, hijab-wearing Muslims, and other racially and religiously oppressed groups. TSA has done so under the auspices of random screening as well as its much-criticized behavior detection program, which used indicators such as “whistling” or “exaggerated emotions” to pull racialized passengers for extra screening.<sup>147</sup>

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<sup>141</sup> Alimahomed-Wilson, S. (2018, March 2). When the FBI Knocks: Racialized State Surveillance of Muslims. *Critical Sociology*, 45(6). <https://doi.org/10.1177/0896920517750742>.

<sup>142</sup> Akbar, A. (2013). Policing 'Radicalization.' *UC Irvine Law Review* 3(4), 809–83. <https://scholarship.law.uci.edu/ucilr/vol3/iss4/4>.

<sup>143</sup> MACLC, CLEAR Project, and AALDEF (2013). *Mapping Muslims: NYPD Spying and Its Impact on American Muslims*. <https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/clear/Mapping-Muslims.pdf>.

<sup>144</sup> MACLC, CLEAR Project, and AALDEF (2013).

<sup>145</sup> U.S. Department of Justice, (2003). *Fact Sheet: Racial Profiling*. 5.

[https://www.justice.gov/archive/opa/pr/2003/June/racial\\_profiling\\_fact\\_sheet.pdf](https://www.justice.gov/archive/opa/pr/2003/June/racial_profiling_fact_sheet.pdf); see also Nguyen, N. (2019). *Suspect Communities: Anti-Muslim Racism and the Domestic War on Terror*. University of Minnesota Press. 11.

<sup>146</sup> Patel, T. (2012, December 20). Surveillance, Suspicion and Stigma: Brown Bodies in a Terror-Panic Climate. *Surveillance & Society*, 10(3/4). <https://doi.org/10.24908/ss.v10i3/4.4216>

<sup>147</sup> Currier, C. (2017, February 8). *TSA's Own Files Show Doubtful Science Behind Its Behavior Screening Program*. The Intercept. <https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program/>; Denault, V. et al., (2020). The Analysis of Nonverbal Communication: The Dangers of Pseudoscience in Security and Justice Contexts. *Anuario de Psicología Jurídica* 30, 1–12, <https://doi.org/10.5093/apj2019a9>; Schmidt, M.; Lichtblau, E. (2012, August 11). *Racial Profiling Rife at Airport, U.S. Officers Say*. The New York Times. [https://www.nytimes.com/2012/08/12/us/racial-profiling-at-boston-airport-officials-say.html?pagewanted=all&\\_r=0](https://www.nytimes.com/2012/08/12/us/racial-profiling-at-boston-airport-officials-say.html?pagewanted=all&_r=0).



Meanwhile, fusion centers have drafted intelligence reports on Muslims engaging in daily activities, such as delivering a lecture on positive parenting or hosting a seminar on marriage.<sup>148</sup> Loosened restrictions on the FBI authorized the agency to tabulate mosques under then-director Robert Mueller, surveil Muslim individuals and groups without evidence of suspicion, and geomap “ethnic-oriented” businesses and populations.<sup>149</sup> The federal government classifies American Muslims suspected of plotting violence as “homegrown violent extremists (HVEs)” and “international terrorists” rather than “domestic terrorists,” even in the absence of direct links to foreign groups and even if they are U.S. citizens, as they are assumed to have taken “inspiration” from such groups.<sup>150</sup> The HVE designation allows the government to deploy surveillance tools against U.S. Muslims that are usually reserved for foreign spies.<sup>151</sup>

More recently, the Obama administration introduced the Countering Violent Extremism (CVE) initiative to deter Muslim and immigrant youth from “violent extremism.” CVE, promoted as a “gentler” national security initiative than its predecessors, recruits Muslim community leaders and service providers into monitoring and reporting on youth seen as at risk of radicalization.<sup>152</sup> While technically race- and religion-neutral, CVE programming and grants have overwhelmingly focused on Muslim communities, particularly under President Trump.<sup>153</sup> Moreover, while CVE claims to focus on community outreach and resilience rather than intelligence-gathering per se, the FBI’s CVE office noted that its approach was designed to “strengthen our investigative, intelligence gathering, and collaborative abilities to be proactive in countering violent extremism.”<sup>154</sup> The American Federation of Teachers described CVE as “ideological profiling and surveillance,”<sup>155</sup> and the government’s own investigation noted that “we could not determine the extent to which the United States is better off today as a result of its CVE effort than it was in 2011.”<sup>156</sup> After various rebranding efforts, the program claimed to pivot toward “racially motivated violent

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<sup>148</sup> Permanent Subcommittee on Investigations. (2012, October 3). *Federal Support for and Involvement In State and Local Fusion Centers*. 38, [https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/10-3-2012\\_PSI\\_STAFF\\_REPORT\\_re\\_FUSION\\_CENTERS.2.pdf](https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/10-3-2012_PSI_STAFF_REPORT_re_FUSION_CENTERS.2.pdf).

<sup>149</sup> Alimahomed-Wilson, S. (2018, March 2). When the FBI Knocks: Racialized State Surveillance of Muslims. *Critical Sociology*, 45(6). <https://doi.org/10.1177/0896920517750742>.

<sup>150</sup> German, M; Robinson, S. (2018). *Wrong Priorities on Fighting Terrorism*. Brennan Center For Justice. [https://www.brennancenter.org/sites/default/files/publications/2018\\_10\\_DomesticTerrorism\\_V2%281%29.pdf](https://www.brennancenter.org/sites/default/files/publications/2018_10_DomesticTerrorism_V2%281%29.pdf).

<sup>151</sup> German, M; Robinson, S. (2018).

<sup>152</sup> Muslim Justice League. (2020). *#StopCVE Now*. <https://muslimjusticeleague.org/cve/>; Nguyen, N. (2019). *Suspect Communities: Anti-Muslim Racism and the Domestic War on Terror*. University of Minnesota Press

<sup>153</sup> Patel, F; Lindsay, A. (2018). *Countering Violent Extremism Programs in the Trump Era*. Brennan Center for Justice. <https://www.brennancenter.org/our-work/analysis-opinion/countering-violent-extremism-programs-trump-era>.

<sup>154</sup> Patel, F.; Koushik, M. (2017). *Countering Violent Extremism*. Brennan Center for Justice, 23. [https://www.brennancenter.org/sites/default/files/publications/Brennan Center CVE Report\\_0.pdf](https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20CVE%20Report_0.pdf).

<sup>155</sup> Patel, F.; Koushik, M. (2017), 17.

<sup>156</sup> United States Government Accountability Office (2017). *Countering Violent Extremism: Actions Needed to Define Strategy and Assess Progress of Federal Efforts*. 16, <https://www.gao.gov/assets/gao-17-300.pdf>.

extremists”<sup>157</sup> such as white supremacist groups, even as its grants often continued to fund organizations that focused on Muslims.<sup>158</sup>

Finally, anti-Muslim surveillance has not been confined to the government, or those formally acting on its behalf. The post-9/11 “terror-panic climate”<sup>159</sup> rendered Muslims hyper-visible to not only government monitoring but also the media, neighbors, and workplaces. For instance, news coverage of mass violence by Muslims often assumes their connection to international terror groups and implies a “clash of civilizations” between the Christian West and the Muslim other,<sup>160</sup> while framing mass violence by white men as individualized, mental health-related incidents rather than often an outgrowth of organized white supremacy and misogyny.<sup>161</sup> Post-9/11 cultural production further reinforced the facile equation between Islam and terrorism.<sup>162</sup> Such representations intensify Islamophobia, and Muslims and those mis-racialized as Muslim have been targeted for violence, intimidation, and vandalism by fellow citizens, particularly after 9/11 and during the Trump administration.<sup>163</sup> Their hyper-visibility as suspect outsiders, and their

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<sup>157</sup> Clifford, B.; Hughes, S. (2022, July 17). *The History of Countering Violent Extremism Tends to Repeat. It Shouldn't*. Lawfare. <https://www.lawfareblog.com/history-countering-violent-extremism-tends-repeat-it-shouldnt>; Office of the Director of National Intelligence. (2021). *Domestic Violent Extremism Poses Heightened Threat in 2021*.

<https://www.dni.gov/files/ODNI/documents/assessments/UnclassSummaryofDVEAssessment-17MAR21.pdf>.

<sup>158</sup> Aziz, S. (2023). Different Name, Same Aim: Targeting Muslims in ‘Soft Counterterrorism’ in *Politiques de Deradicalisation*, ed. Galonnier, J.; Lacroix, S.; Marzouki, N. *Les Presses de la Fondation nationale de sciences politiques*. <https://doi.org/10.2139/ssrn.4066449>; Reynolds, S.; Gutiérrez, J.; Shahzad, A. (2023). *DHS Rebrands and Expands Biased, Ineffective Countering Violent Extremism Program*. Brennan Center for Justice. <https://www.brennancenter.org/our-work/research-reports/dhs-rebrands-and-expands-biased-ineffective-countering-violent-extremism>.

<sup>159</sup> Patel, T. (2012, December 20). Surveillance, Suspicion and Stigma: Brown Bodies in a Terror-Panic Climate. *Surveillance & Society*, 10(3/4). <https://doi.org/10.24908/ss.v10i3/4.4216>.

<sup>160</sup> Firoz, M. (2012). The Contemporaneity of Terrorism: Assessing the Stakes in Culturalist Readings of 9/11. *Journal of International Relations Research*, (1) 32–54; Mamdani, M. (2004). *Good Muslim, Bad Muslim: Islam, the USA, and the Global War Against Terror*. Permanent Black; Powell, K. (2011). Framing Islam: An Analysis of U.S. Media Coverage of Terrorism Since 9/11. *Communication Studies* 62(1), 90–112; see Huntington, S. (1993). The Clash of Civilizations? *Foreign Affairs*, Summer.

<sup>161</sup> Light, C. (2018). *Stand Your Ground: A History of America's Love Affair with Lethal Self-Defense*. Beacon Press; Mingus, W.; Zopf, B. (2010). White Means Never Having to Say You're Sorry: The Racial Project in Explaining Mass Shootings. *Social Thought and Research* 31, 57–77; Silva, J. et al., (2021). Gender-Based Mass Shootings: An Examination of Attacks Motivated by Grievances Against Women. *Violence Against Women*, 27(12–13), 2163–86, <https://doi.org/10.1177/1077801220981154>.

<sup>162</sup> Awan, M. S. (2010). Global Terror and the Rise of Xenophobia/Islamophobia: An Analysis of American Cultural Production since September 11. *Islamic Studies* 49(4), 521–37. <https://doi.org/10.2105/AJPH.2016.303374>.

<sup>163</sup> Alfonesca, K. (2021, September 11). *20 Years After 9/11, Islamophobia Continues to Haunt Muslims*. ABC News. <https://abcnews.go.com/US/20-years-911-islamophobia-continues-haunt-muslims/story?id=79732049>; Al Jazeera. (2017, July 18). *CAIR: Hate Crimes Against Muslims Spike After Trump Win*. <http://www.aljazeera.com/news/2017/07/cair-hate-crimes-muslims-spike-trump-win-170718034249621.html>; Mishra, S. K. (2017, March 7). *An Indian Immigrant Is Murdered in Kansas. It's Part of a Spike in Hate Crimes against South Asians*. The Washington Post. <https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/07/the-kansas-murder-of-an-indian-immigrant-is-part-of-a-spike-in-hate-crimes-against-south-asians/>; The Sikh Coalition. (2012). *Fact Sheet on Post-9/11 Discrimination and Violence against Sikh Americans*.

vulnerability in an Islamophobic society, has forced many U.S. Muslims to portray themselves as “good,” moderate, and patriotic in order to avoid allegations of terrorist sympathies.<sup>164</sup>

### **Immigrants<sup>165</sup>**

Immigration policy has long dominated U.S. politics, but 9/11 dramatically shifted the landscape. On September 6, 2001, the U.S. and Mexico agreed on a framework for comprehensive immigration reform, which was comprehensively derailed by the attacks five days later.<sup>166</sup> The fact that the 9/11 hijackers had all entered the U.S. legally, on nonimmigrant visas, seemed to indict loopholes in the immigration system while also providing a pretext for government crackdowns on migrants. Tentative political shifts toward more-integrated economic systems were foreclosed and replaced by “more anxious and somber talk about ‘security perimeters’ and ‘homeland defense.’”<sup>167</sup> Agencies like Immigration and Naturalization Service (INS), the Customs Service, and the Coast Guard had previously focused on drug control and undocumented migration.<sup>168</sup> In the wake of 9/11, these agencies and their successors received billions of dollars to shift their infrastructure toward counterterrorism, an “awkward and cumbersome fit.”<sup>169</sup> For instance, INS’s FY2000 budget was \$4.3 billion, only part of which funded enforcement. By FY2020, immigrant enforcement appropriations were \$25.1 billion, a nearly 600 percent increase over 20 years.<sup>170</sup> All of this funding has translated to massively increased surveillance of immigrants, especially people from Muslim-majority and Latin American countries.

One of the most pernicious early post-9/11 forms of immigration surveillance was the National Security Entry-Exit Registration System (NSEERS), overseen by then-DOJ advisor Kris Kobach. From 2002 to 2011, NSEERS required men and boys over age 16 from 24 Muslim-majority countries plus North Korea to register, be fingerprinted and photographed, and submit to interrogation at ports of entry. For the first year and a half of

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[https://www.sikhcoalition.org/images/documents/fact sheet on hate against sikhs in america post 9-11 1.pdf](https://www.sikhcoalition.org/images/documents/fact%20sheet%20on%20hate%20against%20sikhs%20in%20america%20post%209-11%201.pdf).

<sup>164</sup> Mamdani, M. (2004). *Good Muslim, Bad Muslim: Islam, the USA, and the Global War Against Terror*. Permanent Black; Shams, T. (2018). Visibility as Resistance by Muslim Americans in a Surveillance and Security Atmosphere. *Sociological Forum* 33(1), 73–94.

<sup>165</sup> I use “immigrants” here in accordance with its colloquial meaning, as a catch-all phrase to refer to non-U.S. citizens living in the country, including permanent residents, visa holders, and undocumented people. However, according to U.S. immigration law, “immigrant status” technically only refers to permanent residents.

<sup>166</sup> Chishti, M.; Bolter, J. (2021). *Two Decades after 9/11, National Security Focus Still Dominates U.S. Immigration System*. Migration Information Source. <https://www.migrationpolicy.org/article/two-decades-after-sept-11-immigration-national-security>.

<sup>167</sup> Andreas, P. (2003). *A Tale of Two Borders: The U.S.-Canada and U.S.-Mexico Lines After 9-11*. The Center for Comparative Immigration Studies. 1, [https://ccis.ucsd.edu/\\_files/wp77.pdf](https://ccis.ucsd.edu/_files/wp77.pdf).

<sup>168</sup> Ibid. INS was the pre-9/11 predecessor to Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), and Customs and Border Protection (CBP).

<sup>169</sup> Andreas, P. (2003). 5.

<sup>170</sup> Chishti, M.; Bolter, J. (2021, September 22). *Two Decades after 9/11, National Security Focus Still Dominates U.S. Immigration System*. Migration Policy Institute. <https://www.migrationpolicy.org/article/two-decades-after-sept-11-immigration-national-security>.

the program, noncitizens from those countries who were already in the U.S. had to present themselves at their local immigration office to register with INS as well. Finally, everyone subject to NSEERS had to register whenever they left the country, as well as re-register annually. Those who failed to comply could face misdemeanor criminal charges or even be ruled inadmissible to the country in future.<sup>171</sup> Under NSEERS, the U.S. government initiated deportation proceedings against over 13,000 Arabs and Muslims, but failed to produce a single known terrorism-related conviction.<sup>172</sup> The UN Committee on the Elimination of Racial Discrimination urged the U.S. to review NSEERS “with a view to avoiding racial profiling in migration policies.”<sup>173</sup>

In 2016, President Obama officially ended NSEERS, which had been suspended since 2011, after Donald Trump promised in his 2016 presidential campaign to revive Muslim registration and Muslims and allies marched on the White House to demand NSEERS be dismantled.<sup>174</sup> However, NSEERS’s biometric collection function has since been replaced by U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT), which checks non-Americans’ data against various databases upon entry to the country, and Student and Exchange Visitor Information System (SEVIS), which tracks student visa holders and notifies ICE if students violate their visas.<sup>175</sup> Both programs fulfill requirements laid out in the Patriot Act to track and collect data on non-Americans.

NSEERS, US-VISIT, and SEVIS comprise a small portion of the dizzying array of immigration surveillance programs implemented since 9/11, some directly under the mandate of counterterrorism, others amplified by post-9/11 funding or fears. Some measures have been relatively public, such as the social media dragnet programs discussed above.<sup>176</sup> Others are less well known, such as the federal regulations that enable the U.S.

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<sup>171</sup> Penn State Immigrants’ Rights Clinic and Rights Working Group, (2012). *The NSEERS Effect: A Decade of Racial Profiling, Fear, and Secrecy*. *Center for Immigrants’ Rights Clinic Publications Book 11*, 1–46, [https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1005&context=irc\\_pubs](https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1005&context=irc_pubs).

<sup>172</sup> Ackerman, S. (2021). *Reign of Terror: How the 9/11 Era Destabilized America and Produced Trump*. Viking; Penn State Immigrants’ Rights Clinic and Rights Working Group. *The NSEERS Effect: A Decade of Racial Profiling, Fear, and Secrecy*. *Center for Immigrants’ Rights Clinic Publications Book 11*, 1–46, [https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1005&context=irc\\_pubs](https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1005&context=irc_pubs); Rickard, C. (2011). *Homeland Security Suspends Ineffective, Discriminatory Immigration Program*. American Civil Liberties Union. <https://www.aclu.org/news/immigrants-rights/homeland-security-suspends-ineffective-discriminatory-immigration-program>.

<sup>173</sup> United Nations Committee on the Elimination of Racial Discrimination. (2009). *Letter*. American Civil Liberties Union. <https://www.aclu.org/legal-document/un-committee-elimination-racial-discrimination-response-us-government-progress?redirect=credirect/41258>.

<sup>174</sup> Gerstein, J. (2016, December 22). *Obama Pulls Regs That Could Have Fueled ‘Muslim Registry’ Under Trump*. Politico. <https://www.politico.com/story/2016/12/obama-nseers-muslim-registry-trump-232916>;

Pilkington, E. (2016, December 12). *Muslims to March on White House in Bid to Dismantle Discriminatory Registry*. The Guardian. <https://www.theguardian.com/us-news/2016/dec/12/american-muslims-march-white-house-nseers>.

<sup>175</sup> Chishti, M.; Bolter, J. (2021, September 22). *Two Decades after 9/11, National Security Focus Still Dominates U.S. Immigration System*. Migration Policy Institute. <https://www.migrationpolicy.org/article/two-decades-after-sept-11-immigration-national-security>.

<sup>176</sup> Diakun, A.; DeCell, C. (2022, April 26). *Why Is The U.S. Still Probing Foreign Visitors’ Social Media Accounts?* The Washington Post. <https://www.washingtonpost.com/outlook/2022/04/26/social-media-surveillance-us-visas-state/>.

Border Patrol to conduct suspicionless stops and searches within a “border enforcement zone” covering two-thirds of the U.S. population, and 75 percent of the Latinx population specifically.<sup>177</sup> Under the auspices of this border exception, Customs and Border Protection (CBP) has seized travelers’ phones and laptops at the border since 2007, claiming the right to search their devices without reasonable suspicion or a warrant, and at times copy the data and store it for up to 15 years in a database accessible to 2,700 CBP officers. Officers can access any data available without special software, such as contacts and messages, and can seize the devices of Americans as well as noncitizens. CBP is accused of specifically targeting Muslims, and has denied entry to foreign nationals on the basis of their friends’ social media posts and messages.<sup>178</sup>

Other surveillance initiatives have remained in the shadows, haltingly revealed only through the efforts of immigrants’ rights organizations. For instance, in its quest to track and deport undocumented migrants—framed especially after 9/11 as a possible national security threat<sup>179</sup>—Immigration and Customs Enforcement (ICE) has built a comprehensive database on a vast swathe of U.S. residents. ICE has access to the driver’s license data of 74 percent of all U.S. adults and can use facial recognition technology on 32 percent of all adults’ licenses, including in at least six of 17 jurisdictions that allow undocumented people to receive licenses.<sup>180</sup> ICE also gained access to an automated license plate reader database that yielded over 5 billion points of location data, as well as 1.5 billion more records from over 80 local police and sheriff’s departments.<sup>181</sup> ICE has contracted with data brokers to buy customer records from utility companies, reportedly gaining access to the contact information of over 218 million people.<sup>182</sup> Perhaps most cruelly, the agency has mined data gleaned from unaccompanied children in order to surveil and deport those children’s family members. Until 2021, the Department of Health and Human Services (HHS) gave ICE access

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<sup>177</sup> The “border enforcement zone” encompasses land within 100 air miles of the entire U.S. border, and even 100 miles from the southern tip of Lake Michigan, which is entirely within the U.S. Hawkins, K. (2023, January 10). *The Border Zone Next Door, and Its Out-of-Control Police Force*. Project on Government Oversight. [https://docs.pogo.org/testimony/2022/The-Border-Zone-Next-Door-and-its-Out-of-Control-Police-Force-01\\_10\\_23.pdf](https://docs.pogo.org/testimony/2022/The-Border-Zone-Next-Door-and-its-Out-of-Control-Police-Force-01_10_23.pdf). For maps, see Misra, T. (2018, May 14). *Inside the Massive U.S. ‘Border Zone*. Bloomberg. <https://www.bloomberg.com/news/articles/2018-05-14/mapping-who-lives-in-border-patrol-s-100-mile-zone>.

<sup>178</sup> Harwell, D. (2022, September 15). *Customs Officials Have Copied Americans’ Phone Data at Massive Scale*. The Washington Post. <https://www.washingtonpost.com/technology/2022/09/15/government-surveillance-database-dhs/>; Whittaker, Z. (2019, August 27). *US Border Officials Are Increasingly Denying Entry to Travelers Over Others’ Social Media*. TechCrunch. <https://techcrunch.com/2019/08/27/border-deny-entry-united-states-social-media/>.

<sup>179</sup> Light, M.; Thomas, J. (2021, February). *Undocumented Immigration and Terrorism: Is There a Connection?* *Social Science Research* 94. <https://doi.org/10.1016/j.ssresearch.2020.102512>.

<sup>180</sup> Wang, N. et al. (2022). *American Dagnet: Data-Driven Deportation in the 21st Century*. Georgetown Law: Center on Privacy and Technology. [https://americandragnet.org/sites/default/files/American\\_Dragnet\\_report\\_English\\_final.pdf](https://americandragnet.org/sites/default/files/American_Dragnet_report_English_final.pdf).

<sup>181</sup> American Civil Liberties Union. (2019). *Records Reveal ICE Using Mass Surveillance Database to Track People With Aid of Local Law Enforcement*. <https://www.aclu.org/press-releases/records-reveal-ice-using-mass-surveillance-database-track-people-aid-local-law>.

<sup>182</sup> Wang, N. et al. (2022). *American Dagnet: Data-Driven Deportation in the 21st Century*. Georgetown Law: Center on Privacy and Technology. [https://americandragnet.org/sites/default/files/American\\_Dragnet\\_report\\_English\\_final.pdf](https://americandragnet.org/sites/default/files/American_Dragnet_report_English_final.pdf).

to its interviews with unaccompanied children, meant to help HHS place children with family members. ICE deployed these data to arrest at least 400 of those family members.<sup>183</sup>

The immense “borderland circuitry”<sup>184</sup> of immigration surveillance, which has mushroomed in the post-9/11 era of surveillance capitalism, is not confined to databases. Electronic surveillance, known as Alternatives to Detention (ATD), has expanded drastically since President Biden took office, from approximately 90,000 ATD enrollees in 2021 to over a quarter million in 2022.<sup>185</sup> Alternatives to Detention allows asylum seekers awaiting hearings and undocumented migrants detained for deportation to wait for court dates at home, as long as they check in regularly with immigration officials. Framed as a humane alternative to detention centers, ATD includes tracking through in-person visits and house arrest, ankle monitors of the type used on prison parolees, phone check-in systems that use voice recognition, and a mobile app that relies on facial recognition to document check-ins. People enrolled in ATD programs remain under government surveillance for over a year on average; over three-quarters of them now use the facial recognition mobile app, called SmartLINK.<sup>186</sup>

SmartLINK is run by BI Inc., a subsidiary of the global private prison corporation GEO Group. ICE began using SmartLINK in 2018, and signed an exclusive five-year contract with BI Inc. in 2020 for \$2.2 billion.<sup>187</sup> GEO claims that “BI does not conduct any ‘surveillance’ activities,”<sup>188</sup> yet SmartLINK collects data such as locations where check-in images were taken, usage details, and mobile device information. Moreover, BI’s privacy policy notes that it may share users’ personal information with certain third parties.<sup>189</sup> Enrollees report being told they must have their phone with them and charged at all times, and that they must always keep the app running and their location services on, or risk penalties.<sup>190</sup> Many experience stress and fear around ICE’s intimate access to their lives, around how contingent their freedom is on the functioning of a 2.8-star app, and around the constant threat of re-

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<sup>183</sup> HHS asks children about their U.S.-based family members, in order to find kin to care for them. Wang, N. et al. (2022). *American Dragnet: Data-Driven Deportation in the 21st Century*. Georgetown Law: Center on Privacy and Technology.

<sup>184</sup> Muñoz, A. (2022). *Borderland Circuitry: Immigration Surveillance in the United States and Beyond*. University of California Press.

<sup>185</sup> Hellerstein, E. (2022, May). ‘I Felt Like I Was a Prisoner’: The Rapid Rise of US Immigration Authorities’ Electronic Surveillance Programs. Coda. <https://www.codastory.com/authoritarian-tech/alternatives-to-detention-immigration/>.

<sup>186</sup> Hellerstein, E. (2022, May).

<sup>187</sup> Mamone, D. (2022, April 20). *ICE Gets Sued for Privacy Concerns Over Immigrant Tracking*. Government Technology. <https://www.govtech.com/public-safety/ice-gets-sued-for-privacy-concerns-over-immigrant-tracking>.

<sup>188</sup> GEO Group. (n.d.). *Getting the Facts about Alternatives to Migrant Detention*. <https://wearegeo.com/facts-about-alternatives-to-detention/>.

<sup>189</sup> Bhuiyan, J. (2023, March 14). *A US Surveillance Program Tracks Nearly 200,000 Immigrants. What Happens to Their Data?* The Guardian. <https://www.theguardian.com/us-news/2022/mar/14/us-immigration-surveillance-isap>.

<sup>190</sup> Bhuiyan, J. (2023, March 14).

detention.<sup>191</sup> Immigrant advocacy groups sued ICE in 2022 over privacy concerns.<sup>192</sup> Ankle monitors often produce even worse outcomes, including social stigma and retraumatization for asylum seekers once subjected to abusive surveillance in their home countries.<sup>193</sup> One report found that 90 percent of shackled people experienced harm to their physical health, such as pain, inflammation, and, for one in five respondents, electric shocks; 88 percent experienced harm to their mental health, including 12 percent who reported suicidal ideation; and 97 percent experienced social isolation.<sup>194</sup> As in the criminal legal system, Black immigrants are disproportionately likely to face shackling.<sup>195</sup>

Another consequential shift in post-9/11 immigration surveillance has been the conscription of the criminal legal system's frontline workers—local police and sheriff's departments—into federal immigration enforcement projects ostensibly designed to protect homeland security.<sup>196</sup> Under the auspices of “combat[ing] specific challenges in their communities” after 9/11,<sup>197</sup> local and federal agencies formalized agreements to share information on noncitizens. For instance, ICE's 287(g) program deputizes local police to serve as immigration officers, allowing them to screen the immigration status of people they arrest and incarcerate. The program, established in 1996 but implemented only in 2002, is designed to “enhance the safety and security of our nation's communities” by finding and deporting “criminal noncitizens.”<sup>198</sup> In reality, by 2010, half of people served with detainees<sup>199</sup> under 287(g) had committed misdemeanors, traffic violations, or immigration violations, the latter of which are civil rather than criminal offenses.<sup>200</sup>

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<sup>191</sup> Hellerstein, E. (2022, May). *'I Felt Like I Was a Prisoner': The Rapid Rise of US Immigration Authorities' Electronic Surveillance Programs*. Coda. <https://www.codastory.com/authoritarian-tech/alternatives-to-detention-immigration/>; Panjwani, A.; Lucal, H. (2022, May). *Tracked and Trapped: Experiences from ICE Digital Prisons*. [https://notechforice.com/wp-content/uploads/2022/05/TrackedTrapped\\_final.pdf](https://notechforice.com/wp-content/uploads/2022/05/TrackedTrapped_final.pdf).

<sup>192</sup> Mamone, D. (2022, April 20). *ICE Gets Sued for Privacy Concerns Over Immigrant Tracking*. Government Technology. <https://www.govtech.com/public-safety/ice-gets-sued-for-privacy-concerns-over-immigrant-tracking>.

<sup>193</sup> Hellerstein, E. (2022, May). *'I Felt Like I Was a Prisoner': The Rapid Rise of US Immigration Authorities' Electronic Surveillance Programs*. Coda. <https://www.codastory.com/authoritarian-tech/alternatives-to-detention-immigration/>.

<sup>194</sup> Benjamin N. Cardozo School of Law Kathryn O. Greenburg Immigration Justice Clinic, Freedom for Immigrants, and The Immigrant Defense Project, (2021, July). *Immigration Cyber Prisons: Ending the Use of Electronic Ankle Shackles*. <https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/60ec661ec578326ec3032d52/1626105377079/Immigration+Cyber+Prisons+report.pdf>.

<sup>195</sup> Benjamin N. Cardozo School of Law Kathryn O. Greenburg Immigration Justice Clinic, Freedom for Immigrants, and The Immigrant Defense Project, (2021, July).

<sup>196</sup> Mackler, C. (2021, September 9). *Immigration Policy Before and After 9/11: From the INS to DHS – Where Did We Go Wrong?* Just Security. <https://www.justsecurity.org/78132/immigration-policy-before-and-after-9-11-from-the-ins-to-dhs-where-did-we-go-wrong/>.

<sup>197</sup> U.S. Immigration and Customs Enforcement. (2008). *ICE ACCESS Fact Sheet*. <https://www.ice.gov/doclib/news/library/factsheets/pdf/access.pdf>.

<sup>198</sup> U.S. Immigration and Customs Enforcement. (2023). *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*. <https://www.ice.gov/identify-and-arrest/287g>.

<sup>199</sup> Immigration detainees are notices that ICE intends to take custody of a noncitizen in order to deport them.

<sup>200</sup> Capps, R. et al., (2011, January). *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*. National Center on Immigrant Integration Policy, US Immigration Policy Reform. <https://www.migrationpolicy.org/pubs/287g-divergence.pdf>.

Enhanced surveillance of noncitizens under 287(g) has also engendered systemic racial profiling, harassment, and incarceration, most notoriously against Latinx people under Sheriff Joe Arpaio's Maricopa County Sheriff's Office.<sup>201</sup> 287(g) produced such damage to community relations that some police have even refused involvement in the program.<sup>202</sup> A 2008 DHS program that automated information-sharing, Secure Communities, triggered similar backlash from immigrant advocates and even local law enforcement. By 2020, over 760,000 people had been deported from the U.S. under Secure Communities.<sup>203</sup> Immigrants and their allies have staged countless protests and rallies against 287(g) and Secure Communities,<sup>204</sup> successfully getting Secure Communities dismantled in 2014, while United Nations racial justice experts in 2014 and 2022 have called on the U.S. to end 287(g).<sup>205</sup>

Finally, immigrants and those misrecognized as such, as well as their advocates, have also faced heightened scrutiny and violence by citizens encouraged to report "suspicious activity" to the state: "if you see something, say something." After 9/11, vigilante groups such as the Minuteman Project, which arrogated to themselves "every legal means [for]...identifying and apprehending those who violate our borders," burgeoned across the country.<sup>206</sup> Such groups are rooted in the xenophobic and racist vigilantism of the 1980s and '90s, and the deeper history of lynchings and white supremacy in the borderlands,<sup>207</sup> but the dominant post-9/11 narrative of a homeland under threat revived far-right anti-immigrant paramilitarism. Racist narratives of Latinx "narco-terrorism"<sup>208</sup> have furthered vigilante efforts to surveil and stop Latin American border-crossers. Over the past few years, groups such as Veterans on Patrol, United Constitutional Patriots, AZ Desert Guardians, and QAnon

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<sup>201</sup> American Immigration Council. (2021, July). *The 287(g) Program: An Overview*.

[https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_287g\\_program\\_an\\_overview.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_287g_program_an_overview.pdf); Sterling, T. G.; Joffe-Block, J. (2021). *Driving While Brown: Sheriff Joe Arpaio Versus the Latino Resistance*. University of California Press.

<sup>202</sup> Harris, D. (2006). The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America. *Rutgers Law Journal* 38(1), 1–60.

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1008927](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008927).

<sup>203</sup> Transactional Records Access Clearinghouse. (2020). *Removals under the Secure Communities Program*. <https://trac.syr.edu/phptools/immigration/secure/>.

<sup>204</sup> Pita Loor, K. (2016). A Study on Immigrant Activism, Secure Communities, and Rawlsian Civil Disobedience. *Marquette Law Review* 100, 565–625, <https://www.ice.gov/doclib/news/library/factsheets/pdf/access.pdf>.

<sup>205</sup> Shah, N. (2022). *UN Racial Justice Experts Call on Biden to End the 287(g) Program*. American Civil Liberties Union. <https://www.aclu.org/news/immigrants-rights/un-racial-justice-experts-call-on-biden-to-end-the-287g-program>.

<sup>206</sup> Minutemen Civil Defense Corps. (2007). *The Minuteman Pledge*.

[https://www.minutemanhq.com/hq/borderops\\_pledge.php](https://www.minutemanhq.com/hq/borderops_pledge.php); Rodriguez, R. M. (2008). (Dis)Unity and Diversity in Post-9/11 America. *Sociological Forum* 23(2), 379–89.

<sup>207</sup> Belew, K. (2018). *Bring the War Home: The White Power Movement and Paramilitary America*. Harvard University Press.; Hernández, K. L. (2010). *Migra! A History of the U.S. Border Patrol*. University of California Press.; Refusing to Forget. (n.d.). *The History of Racial Violence on the Mexico-Texas Border*. <https://refusingtoforget.org/the-history/>.

<sup>208</sup> Romero, L. A.; Zarrugh, A. (2016, July 5). Islamophobia and the Making of Latinos/as into Terrorist Threats. *Ethnic and Racial Studies* 41(12). <https://doi.org/10.1080/01419870.2017.1349919>.



vigilantes have tracked and harassed border-crossing asylum seekers at the U.S.-Mexico border, sometimes holding them at gunpoint until Border Patrol arrives.<sup>209</sup>

### ***Costs of Mass Surveillance***

The toll of post-9/11 mass surveillance ultimately exceeds quantification, even as the U.S. government has spent billions if not trillions of dollars on it. The government has rarely been able to demonstrate that such funding, and all its attendant opportunity costs, has created public safety at a scale that merits the expense. Moreover, the costs of mass surveillance must be tallied in terms of people wrenched from their families and homes, speech stifled, social justice movements dampened, and fear spread. People (mis)racialized as Muslim and Arab, immigrants and asylum seekers, racial justice and labor organizers, and other intersecting racialized and gendered groups have borne the brunt of these costs. However, building surveillance systems that target these groups has had ripple effects in everyone's lives, such as the broad erosion of privacy and freedom across a broad swath of U.S. residents. The U.S. government's focus on left-wing ideologies and racialized groups has likely ill-prepared it to respond to the rise of right-wing, white supremacist, anti-Semitic, and misogynist violence. Finally, once built, surveillance infrastructure often remains entrenched, becoming difficult to dismantle even when political priorities shift.

*Economic costs.* The U.S. government has spent untold taxpayer dollars on constructing databases, developing infrastructures, doling out grants, paying contractors, commissioning reports, researching and developing new technology, and acquiring cameras, airport scanners, fingerprint readers, iris scanners, surveillance apps, and ankle monitors. It has done so even as technological development and voluntary sharing (e.g. through social media) has made surveillance cheaper and easier.<sup>210</sup> The National Security Agency (NSA) spent \$100 million on analyzing Americans' phone logs under the more limited U.S. Freedom Act metadata collection program from 2015 to 2019. In four years, the program produced only one unique lead that led to a new foreign intelligence investigation.<sup>211</sup> The NYPD has been forced to pay out \$3 million in damages in a series of lawsuits over its Muslim surveillance program, on top of the public funds spent to maintain the program.<sup>212</sup> The

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<sup>209</sup> Jordan, M. (2022, May 9). *QAnon Joins Vigilantes at the Southern Border*. The New York Times. <https://www.nytimes.com/2022/05/09/us/border-qanon-arizona.html>; Ring, T. (2023, April 26). *A New Approach to Prosecuting Border Militias*. Lawfare. <https://www.lawfaremedia.org/article/a-new-approach-to-prosecuting-border-militias>.

<sup>210</sup> Cohen, D. (2014, February 10). *It Costs the Government Just 6.5 Cents an Hour to Spy on You*. Politico. <https://www.politico.com/magazine/story/2014/02/nsa-surveillance-cheap-103335/>.

<sup>211</sup> Savage, C. (2020, February 25). *N.S.A. Phone Program Cost \$100 Million, but Produced Only Two Unique Leads*. The New York Times. <https://www.nytimes.com/2020/02/25/us/politics/nsa-phone-program.html#:~:text=N.S.A.->

,Phone%20Program%20Cost%20%24100%20Million%2C%20but%20Produced%20Only%20Two%20Unique,to%20a%20newly%20declassified%20study.

<sup>212</sup> Goldman, A. (2016, January 7). *NYPD Settles Lawsuits Over Muslim Monitoring*. The Washington Post. [https://www.washingtonpost.com/world/national-security/nypd-settles-lawsuits-over-muslim-monitoring/2016/01/07/bdc8eb98-b3dc-11e5-9388-466021d971de\\_story.html](https://www.washingtonpost.com/world/national-security/nypd-settles-lawsuits-over-muslim-monitoring/2016/01/07/bdc8eb98-b3dc-11e5-9388-466021d971de_story.html); Hauslohner, A. (2018, April 5). *NYPD Settles Third Lawsuit Over Surveillance of Muslims*. The Washington Post.

Obama administration awarded \$10 million to 31 CVE grants, only one of which dealt with far-right violence.<sup>213</sup> 287(g) agreements can cost taxpayers millions in detention, officer overtime, and legal liability, such as the \$43 million in litigation fees Maricopa County owed from lawsuits over its 287(g) program.<sup>214</sup> Public money has also been spent in profiteering, waste, fraud, and abuse on top of licit expenditures. For instance, five years after its creation, DHS was found to have overseen \$15 billion in over-budget, delayed, or canceled contracts, including \$1.5 billion spent on a shelved program to secure the U.S. border with electronic sensors, and mismanagement and delays during the development of the \$10 billion US-VISIT program.<sup>215</sup>

*Opportunity costs.* The opportunity costs of such programs, which rarely provide comprehensive evidence to substantiate their claimed benefits, are immense. For example, the Baltimore Police Department alone has spent millions on its closed-circuit television (CCTV) network, CitiWatch public-private camera program, and cell-phone surveillance devices—the city spends the most per capita on policing of any major U.S. city, nearly \$600 million in next year’s proposed budget, mostly targeted toward majority-Black neighborhoods—even as it has been unable to demonstrate any impact on interpersonal violence.<sup>216</sup> The opportunity costs of this investment fall most heavily on disinvested Black communities. The city’s poverty rate is 20 percent, versus 11 percent nationally, according to the Census Bureau; around 5,200 people, three-quarters of whom are Black, experience homelessness in an average year in a city with 14,000 vacant homes;<sup>217</sup> and poor Black Baltimoreans have long suffered from lead poisoning, disinvested public schools, and

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[https://www.washingtonpost.com/national/nypd-settles-third-lawsuit-over-muslim-surveillance/2018/04/05/710882b2-3852-11e8-9c0a-85d477d9a226\\_story.html](https://www.washingtonpost.com/national/nypd-settles-third-lawsuit-over-muslim-surveillance/2018/04/05/710882b2-3852-11e8-9c0a-85d477d9a226_story.html).

<sup>213</sup> Brennan Center for Justice. (2019, September 9). *Why Countering Violent Extremism Programs Are Bad Policy*. <http://brennancenter.org/our-work/research-reports/why-countering-violent-extremism-programs-are-bad-policy>.

<sup>214</sup> Wolfgang Keppley, L. J. (2020, October 19). *287(g) Agreements: A Costly Choice for Localities*. Niskanen Center. <https://www.niskanencenter.org/287g-agreements-a-costly-choice-for-localities/>.

<sup>215</sup> Hedgpeth, D. (2008, September 17). *Congress Says DHS Oversaw \$15 Billion in Failed Contracts*. The Washington Post. <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/16/AR2008091603200.html>.

<sup>216</sup> Opilo, E. (2022, August 24). *Baltimore Approves \$920,000 Contract to Upgrade Cellphone Tracking Technology Used By City’s Police*. The Baltimore Sun. <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-baltimore-purchase-stingray-cell-phone-20220824-7erztqjn6jf6lklob4dss365ki-story.html>; Reutter, M. (2014, March 11). *Police Surveillance Camera Costs Rising*. Baltimore Brew.

<https://www.baltimorebrew.com/2014/03/11/police-surveillance-camera-costs-rising/>; Simpson, J. C. (2021, March). *Under Watch: The Police ‘Spy Plane’ Experiment Is Over, But the Growing Surveillance of Baltimore Continues*. Baltimore Magazine.

<https://www.baltimoremagazine.com/section/historypolitics/under-watch-police-spy-plane-experiment-over-but-growing-surveillance-baltimore-continues/>; Soderberg, B. (2023, June 13). *Baltimore’s Crime Numbers Game*. The Real News Network. <https://therealnews.com/baltimore-police-spending-violent-crime-statistics>.

<sup>217</sup> Kasakove, S.; Miller, H. (2022, September 2). *Vacant Properties Cost Baltimore at Least \$200 Million a Year, Report Estimates*. The Baltimore Banner.

<https://www.thebaltimorebanner.com/community/housing/vacant-properties-cost-baltimore-at-least-200-million-a-year-report-estimates-6AEJAGIWZBA5NDURLXV5ZM4YSE/>; Maucione, S. (2023, January 26).

*Baltimore City’s Homelessness Census Data Key as \$101M in Federal Funds Are Flowing In to Help*. WYPR. <https://www.wypr.org/wypr-news/2023-01-26/baltimore-citys-homelessness-census-data-key-as-101m-in-federal-funds-are-flowing-in-to-help>.

generational poverty.<sup>218</sup> The money spent on surveilling poor Black communities, only to produce dismal case closure rates,<sup>219</sup> is money lost on addressing the legacies of racist policy-driven immiseration.

*Criminalization and deportation.* As this report has shown, mass surveillance affects everyone living in the U.S., but it does not affect everyone equally. The Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) have claimed since their formation that they target people who threaten national security. Yet while deportation proceedings rose from 1.6 million people in the decade before 9/11 to 2.3 million in the decade after, the absolute number of deportees with national security or terrorism charges decreased.<sup>220</sup> Over five million people have been deported in the last 20 years,<sup>221</sup> inflicting immense damage in the lives of millions of families torn from each other and often deprived of vital income. Longstanding racial frames of both Latinx people and Muslims as “foreign” came together in the post-9/11 era, painting both groups as threats to national security.<sup>222</sup> Meanwhile, technologies developed to surveil Iraqis boomeranged home to intensify the profiling and criminalization of poor Black people.<sup>223</sup> DHS continues to allow profiling and hence potential criminalization on the basis of religion and country of origin in immigration and border control, and lacks protection altogether for disability and gender identity.<sup>224</sup>

*Normalization of erosion of privacy and freedom.* As Snowden’s revelations demonstrated, many U.S. residents have fallen under the gaze of the government and private corporations through their phone and internet records. City dwellers have come to accept being filmed whenever they enter the public sphere, through municipal, commercial, and residential camera systems.<sup>225</sup> Many people are aware at least abstractly that their social media activity is visible not only to friends, social media platforms, and advertisers, but also government agencies. The Supreme Court’s 2022 *Dobbs v. Jackson Women’s Health Organization* decision has unleashed a much-reported explosion in reproductive surveillance, already a threat to many poor women of color and now more firmly

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<sup>218</sup> Brown, L. (2022). *The Black Butterfly: The Harmful Politics of Race and Space in America*. Johns Hopkins University Press; Pietila, A. (2010). *Not in My Neighborhood: How Bigotry Shaped a Great American City*. Ivan R. Dee.

<sup>219</sup> CBS Baltimore. (2022, June 30). *Crime Without Punishment: Homicide Clearance Rates Are Declining Across The US. Baltimore’s Is Down To 42%*. WJZ News. <https://www.cbsnews.com/baltimore/news/baltimore-homicide-clearance-rate-42-percent-crime-without-punishment/>.

<sup>220</sup> Transactional Records Access Clearinghouse. (2011). *Immigration Enforcement Since 9/11: A Reality Check*. <http://trac.syr.edu/immigration/reports/260/>.

<sup>221</sup> Koshgarian, L. (2023, March 13). *After 20 Years, the Department of Homeland Security Is a Money-Guzzling Failure*. National Priorities Project. <https://www.nationalpriorities.org/pressroom/articles/2023/03/13/20-years-dept-homeland-security-is-failure/>.

<sup>222</sup> Romero, L. A.; Zarrugh, A. (2017, July 25). Islamophobia and the Making of Latinos/as into Terrorist Threats. *Ethnic and Racial Studies* 41(12). <https://doi.org/10.1080/01419870.2017.1349919>.

<sup>223</sup> Reel, M. (2016, August 23). *Secret Cameras Record Baltimore’s Every Move from Above*. Bloomberg. <https://www.bloomberg.com/features/2016-baltimore-secret-surveillance/>

<sup>224</sup> Patel, F.; Shamsi, H. (2023). *U.S. Security Agencies Must Strengthen Rules Against Racial Profiling*. Brennan Center for Justice. <https://www.brennancenter.org/our-work/analysis-opinion/us-security-agencies-must-strengthen-rules-against-racial-profiling>.

<sup>225</sup> This normalization of CCTV camera systems has been reinforced by positive portrayals of surveillance technology on crime shows.

institutionalized via police use of period-tracking apps, text and social media messages, and location data.<sup>226</sup> News reports on seemingly dystopic new technologies of surveillance frequently capture public attention then quickly fade, from Amazon's use of AI cameras to watch and punish its drivers, to neurotechnology's potential to compromise "cognitive liberty" through brain biometrics.<sup>227</sup> Our ever-expanding surveillance systems have acquired an aura of inevitability, against which organizers and regulators struggle. Yet this normalization is not itself inevitable, but has instead been underwritten in large part by the loosened regulations, heightened fear, racism, xenophobia, and flow of funding sanctioned in the post-9/11 era.

*Lack of preparedness for right-wing violence.* As discussed above, the government has historically directed its most comprehensive surveillance and disruption against people with leftist ideologies, particularly Black liberation movements. By contrast, the FBI has historically sought to manage rather than obliterate white supremacist groups such as the Ku Klux Klan, objecting to the Klan's violence rather than its ideology per se.<sup>228</sup> This relative restraint with socially dominant ideologies such as white supremacy meant that federal agencies were often slow to recognize and prosecute organized right-wing violence.<sup>229</sup> However, after the Jan. 6 Capitol attack, increasingly overt white supremacist organizing, and over two decades of mass shootings overwhelmingly perpetrated by white men, federal agencies' attention has begun to shift toward right-wing "domestic terrorism." In a reversal of longstanding dogma, the Office of the Director of National Intelligence (DNI) noted in 2021 that among "racially motivated violent extremists," white supremacist groups had "the most persistent and concerning transnational connections."<sup>230</sup> A Senate committee investigating the Jan. 6 coup attempt recently criticized intelligence agencies for failing to act on the information they possessed in the lead-up to the attacks. The committee argued, "This reflects the intelligence community's struggle to adapt to the new reality that the primary threat to homeland security (as identified by these same agencies) is now domestic terrorism driven largely by antigovernment and white supremacist ideologies."<sup>231</sup>

However, while the chorus of voices calling for white supremacist violence to be classified and surveilled as "terrorism" continues to grow, extending the label to white

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<sup>226</sup> Givens, A. R. (2023, June 23). *One Year After Dobbs: Assessing the Fight for Reproductive Privacy*. Tech Policy Press. <https://techpolicy.press/one-year-after-dobbs-assessing-the-fight-for-reproductive-privacy/>.

<sup>227</sup> Farahany, N. A. (2023). *The Battle for Your Brain: Defending the Right to Think Freely in the Age of Neurotechnology*. St. Martin's Press.; Gurley, L. K. (2021, September 20). *Amazon's AI Cameras Are Punishing Drivers for Mistakes They Didn't Make*. Vice. <https://www.vice.com/en/article/88npjv/amazons-ai-cameras-are-punishing-drivers-for-mistakes-they-didnt-make>.

<sup>228</sup> Sinnar, S. (2022, April). *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*. California Law Review. <https://www.californialawreview.org/print/hate-crimes-terrorism-and-the-framing-of-white-supremacist-violence>.

<sup>229</sup> See Belew, K. (2018). *Bring the War Home: The White Power Movement and Paramilitary America*. Harvard University Press.

<sup>230</sup> Office of the Director of National Intelligence, "Domestic Violent Extremism Poses Heightened Threat in 2021," 2. <https://www.dni.gov/files/ODNI/documents/assessments/UnclassSummaryofDVEAssessment-17MAR21.pdf>.

<sup>231</sup> HSGAC Majority Staff. (2023). *Planned in Plain Sight: A Review of the Intelligence Failures in Advance of January 6th, 2021*. p. 104. United States Senate Committee. [https://www.hsgac.senate.gov/wp-content/uploads/230627\\_HSGAC-Majority-Report\\_Jan-6-Intel.pdf](https://www.hsgac.senate.gov/wp-content/uploads/230627_HSGAC-Majority-Report_Jan-6-Intel.pdf).

supremacist groups poses serious risks. The government's historical pursuit of right-wing violence has often subsequently provided cover for or been instrumentalized toward harsh suppression of progressive activism as well, visible for instance in attempts to label Standing Rock and Black Lives Matter protesters as terrorists.<sup>232</sup> Recently, the ongoing struggle over the Atlanta Public Safety Training Center, or "Cop City," provides an instructive example. Georgia expanded its legal definition of "domestic terrorism" in 2017 after a series of mass shootings nationwide, including white supremacist Dylann Roof's massacre of nine Black people in Emanuel AME Church in 2015. The statute redefined terrorism not only as an act intended to injure or kill at least 10 people, but also as any felony, including property damage, intended to intimidate or coerce the government. Cop City, which includes a planned police training site for what organizers call "urban warfare," has faced intense protest over its potential harm against Black residents and the environment. In total 42 Cop City protesters and legal observers have been charged with domestic terrorism for committing acts ranging from possessing an incendiary device or firearm, to damaging property, to misdemeanor criminal trespass combined with their association with Defend the Atlanta Forest—an organization classified by DHS as "domestic violent extremists."<sup>233</sup> Hence a statute passed partly in response to white supremacist violence has been turned instead on racial justice and environmental protesters.

*Expansion of surveillance infrastructure.* Along with these erosions of privacy, justice, and freedom comes a hard-to-reverse expansion of police and corporate power, and of the government itself. The infrastructure built to sustain intensified mass surveillance—new government agencies such as Immigration and Customs Enforcement (ICE), new grant programs and other funding streams, new job titles and positions, new databases, and new ideas of what is "normal"—has proven very difficult to roll back. Time and again, efforts to regulate or halt mass surveillance have been stymied, either directly or in ways only publicized years later. Politicians' promises to curtail warrantless spying vanish upon taking office. Programs supposedly terminated later reappear in a "black budget." A court created to defend against government overreach becomes its greatest ally. Nonetheless, many organizations, policymakers, journalists, and scholars have won concessions and limits while struggling valiantly against post-9/11 surveillance, from grassroots groups like Los Angeles's Stop LAPD Spying Coalition and St. Louis's Privacy Watch STL,<sup>234</sup> to U.S. Muslims suing the government for surveillance overreach,<sup>235</sup> to mass protests such as the anti-Stop Online Piracy Act (SOPA)/Protect IP Act (PIPA) protests in 2012<sup>236</sup> and the Stop Watching

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<sup>232</sup> Sinnar, S. (2022, April). *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*. California Law Review, 110. <https://www.californialawreview.org/print/hate-crimes-terrorism-and-the-framing-of-white-supremacist-violence>.

<sup>233</sup> Brown, A. (2023, January 27). *Documents Show How 19 'Cop City' Activists Got Charged with Terrorism*. Grist. <https://grist.org/protest/atlanta-cop-city-terrorism/>; Yousef, O. (2023, June 28). *Rights Groups Are Alarmed Over Domestic Terrorist Charges in 'Cop City' Protests*. NPR.

<sup>234</sup> Tan-Delli Cicchi, A. (2018, September 27). *Mass Surveillance Begins at the Local Level. So Does the Resistance to It*. The Nation. <https://www.thenation.com/article/archive/mass-surveillance-begins-at-the-local-level-so-does-the-resistance-to-it/>.

<sup>235</sup> Elmasry, D. (2022). *Fighting Global Surveillance: Lessons from the American Muslim Community*. *University of Michigan Journal of Law Reform* 55, 885–917. <https://doi.org/10.36646/mjlr.55.4.fighting>.

<sup>236</sup> These protests, organized by the nonprofit organization Fight for the Future, helped defeat SOPA and PIPA, acts that opponents argued could allow media companies to censor websites.

Us rally in 2012, to current advocacy efforts to end Section 702—and the courageous reporting and scholarship cited throughout this report.

### **Appendix: Sources for Figure 1**

— *FISA Court*: The Court was originally established as a privacy safeguard on the Church Committee's recommendations but is now often accused of rubber-stamping FBI privacy violations in secret. The FISA Court is also called the Foreign Intelligence Surveillance Court (FISC). Mackey, A. (2023, May 22). *Newly Public FISC Opinion Is the Best Evidence For Why Congress Must End Section 702*. Electronic Frontier Foundation. <https://www.eff.org/deeplinks/2023/05/newly-public-fisc-opinion-best-evidence-why-congress-must-end-section-702>.

— *Private contractors*: These contractors' employees often become government employees, and vice-versa, on a revolving-door basis. Alimahomed, S. (2014, March 31). Homeland Security Inc.: public order, private profit. *Race and Class*, 55(4), 82–99. <https://doi.org/10.1177/0306396813519940>.

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