THE PRIVATE ENFORCEMENT OF NATIONAL SECURITY

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The private enforcement of public law is a central feature of the American administrative state. As various scholars have argued, the federal government depends upon private parties to enforce public laws through litigation in order to achieve the government's regulatory objectives. This scholarship has, however, largely overlooked the phenomenon of private enforcement in the national security arena. This Article seeks to describe and analyze national security's private enforcement for the first time. In doing so, it explores what national security's private enforcement reveals about the costs of private enforcement more broadly. In particular, this Article identifies an important downside to private enforcement that existing literature has largely ignored—namely its potential to reinforce the state's "despotic powers" and "despotic purposes." Despotic power represents the state's ability to do as it pleases without being accountable or responsive to all or certain members of society. Despotic purpose focuses on the state's pursuit of illiberal policies and practices. National security's private enforcement demonstrates how private enforcement can promote the government's despotic purposes and powers by reinforcing state policies that undermine civil liberties and target communities that are marginalized and have little say or control over the government's actions.

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INTRODUCTION

The private enforcement of public law[1] is a central feature of the American administrative state.[2] As various scholars have argued, to achieve its regulatory objectives,[3] the federal government depends upon private parties to enforce public laws through litigation.[4] To this end, Congress has created numerous statutes that give private individuals and entities the right to enforce various public laws and policies through the courts.[5] Scholars have written countless pieces describing and critiquing these private enforcement statutes.[6] This scholarship has, however, largely overlooked the phenomenon of private enforcement in the national security arena.

This Article seeks to describe and analyze national security's private enforcement for the first time. It makes several contributions along the way. First, it highlights the role of private litigants in national security law, while also reinforcing

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1 See *infra* notes 55–56 and accompanying text for the definition of "private enforcement" used in this Article.

2 J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1141 (2012); Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 281 (2007). While beyond the scope of this Article, state and local governments also rely on private enforcement schemes. *See infra* note 54.

3 Glover, *supra* note 2, at 1140.

4 While this paper focuses on private enforcement through litigation, private enforcement can include an array of other efforts outside the litigation context, including government measures that compel rather than encourage private parties to enforce public laws and policies. *See, e.g.*, Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 782 (2008) ("Private enforcement [of immigration laws] occurs when private parties, acting under a requirement of law, check for legal immigration status before granting applicants access to a restricted benefit.").

5 *See infra* Part I.A.

6 *See, e.g.*, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAW SUITS IN THE U.S. 6–18 (2010) (exploring the role of private enforcement in implementing regulatory policies in the United States, with a focus on federal employment discrimination laws); Stephen B. Burbank, Sean Farhang & Herbet M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 667–71 (2013) (exploring various issues relating to the use of private enforcement regimes within the U.S. regulatory system); David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1274–85 (2012) (exploring the possibilities and limits of private enforcement focusing on qui tam litigations under the False Claims Act).

the emerging view of U.S. national security as a species of federal administrative law. Even though national security is typically understood as a quintessentially governmental function,[7] private parties are using various federal tort statutes to independently enforce the government's national security laws and policies through litigation.[8] While these statutes may be somewhat unusual as private enforcement schemes go,[9] they provide benefits to the American administrative state that are characteristic of private enforcement regimes more generally.[10] These benefits provide further support for the view that national security is part and parcel of the American administrative state.[11]

This Article's second major contribution is to explore what national security's private enforcement tells us about the shortcomings of private enforcement more broadly. While scholars have identified various downsides associated with private enforcement,[12] they have failed to identify an important cost that national security's private enforcement highlights—namely the potential for private enforcement to reinforce the state's "despotic powers" and "despotic purposes."

As described by sociologist Michael Mann, states have two kinds of power: despotic and infrastructural.[13] Despotic power is the state's ability to do as it pleases without being accountable or responsive either to all or certain parts of civil society.[14] Infrastructural power, by contrast, is the power the state derives from and through civil society.[15] Through this infrastruc-

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7 Kristen E. Eichensehr, *Public-Private Cybersecurity*, 95 TEX. L. REV. 467, 475–76 (2017).

8 In some ways, the private enforcement of national security should be unsurprising. Indeed, private parties have long been important players in the national security sector as volunteers acting both independently and through formal and informal relationships with the government. *See, e.g.*, Elena Chachko, *National Security by Platform*, 25 STAN. TECH. L. REV. 55, 55, 71–84, 86–94 (2021) (describing how tech companies do core national security work on their platforms both independently of and in informal collaboration with the government); Eichensehr, *supra* note 7, at 474–502 (describing the voluntary, de facto system of public-private collaboration on cyber-security); Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1435, 1440–42 (2010) (describing the post-9/11 rise of private parties—both formally and informally solicited by the government—working as volunteers on national security matters).

9 *See infra* notes 90–93 and accompanying text.

10 *See infra* Part II.

11 *See infra* notes 273–274 and accompanying text.

12 *See infra* notes 340–344 and accompanying text.

13 Michael Mann, *The Autonomous Power of the State: Its Origins, Mechanisms and Results*, 25 EUR. J. SOCIO. 185, 185 (1984).

14 *See id.* at 188.

15 *See id.* at 189.

tural power, the state is made accountable and subject to the control of civil society groups.[16] At the same time, the state benefits substantially from infrastructural power. By leveraging civil society to pursue the state's objectives, infrastructural power allows the state to implement its policies more broadly than it could relying only on its despotic powers.[17] Indeed, even though infrastructural and despotic power are analytically separate concepts, because it expands the state's reach, infrastructural power can bolster the state's despotic power over weaker groups in society.[18] As other scholars have argued, infrastructural power can also be turned to despotic *purposes*.[19] Despotic purpose focuses on the state's pursuit of illiberal policies and practices.[20] Infrastructural power reinforces the state's despotic purposes, particularly where it undermines the civil rights and liberties of individuals or groups.[21]

While some have argued that private enforcement schemes generally support the government's infrastructural power,[22] this Article highlights the despotic potential that is similarly embedded within private enforcement. It does so by showing how national security's private enforcement bolsters *both* the state's infrastructural power, as well as its despotic powers and purposes.[23] In particular, the private enforcement of national security reinforces the state's despotic purposes and powers by leveraging civil society to promote public national security laws and policies that have illiberal tendencies and target communities that are marginalized within U.S. society.[24] In doing so, the private enforcement of national security effectively weaponizes civil society in ways that enhance the state's despotic authority.[25]

At the center of national security's private enforcement are various federal tort statutes that give private parties' rights to enforce public laws and policies prohibiting the provision of material support to terrorism.[26] Since 9/11, the government

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16 *See id.* at 189–90.
17 *See id.* at 189.
18 *See infra* notes 429–431 and accompanying text.
19 *See infra* notes 432–434 and accompanying text.
20 *See infra* note 435 and accompanying text.
21 *See infra* note 435 and accompanying text.
22 *See infra* notes 363–365 and accompanying text.
23 *See infra* Part III.
24 *See infra* Part III.B.
25 *See infra* Part III.B.
26 While beyond this Article's scope, plaintiffs have used other statutes that are neither focused on nor were passed to address national security-related is-

has relied heavily on the concept of material support to prosecute and otherwise address the terrorist threat.[27]

The ban on material support is reflected in various public laws. Under two criminal statutes, 18 U.S.C. § 2339A ("Section 2339A") and 18 U.S.C. § 2339B ("Section 2339B") (collectively "criminal material support statutes"), providing such support to terrorist groups or activities is a federal offense.[28] Under Section 2339A, individuals are prohibited from knowingly providing material support in preparation for or to carry out specifically enumerated crimes of terrorism.[29] Under Section 2339B, individuals are prohibited from providing material support to groups designated by the U.S. State Department as

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sues, like the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victims Protection Act, 28 U.S.C. § 1350, in order to privately enforce the government's national security prerogatives. Notably, these claims have often been brought alongside the more traditional private national security statutes discussed here. *See, e.g.*, *In re* Terrorist Attacks on Sept. 11, 2001, 714 F.3d 118, 121 (2d Cir. 2013) (case involving claims under 18 U.S.C. § 2333 of the Anti-Terrorism Act—one of the traditional private enforcement statutes discussed here—as well as the Alien Tort Statute and the Torture Victim Protection Act). And though this Article focuses on national security laws involving material support, national security's private enforcement is limited neither to such support nor to terrorism-related claims more generally. For example, the Defend Trade Secrets Act of 2016 ("DTSA") creates a private right of action allowing "[a]n owner of a trade secret that is misappropriated [to] bring a civil action . . . if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce." 18 U.S.C. § 1836(b)(1). National security concerns motivated the creation of this private right to sue for misappropriated trade secrets. *See Economic Espionage and Trade Secret Theft: Are Our Laws Adequate for Today's Threats?: Hearing Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 113th Cong. 4 (2014) (statement of Randall C. Coleman, Assistant Dir., Counter-Intelligence Div., Federal Bureau of Investigation) (describing the DTSA as addressing important threats from foreign adversaries to the security of the U.S. economy); Lauren Rayner Davis, *Secrecy for the Sake of It: The Defend Trade Secrets Act*, 83 BROOK. L. REV. 359, 368 (2017) (noting that "[p]roponents of the DTSA . . . [have] argue[d] that economic espionage for the benefit of foreign nations is a major threat to our national security"). While these concerns arguably make this provision part of national security's private enforcement, the DTSA's private right of action has nothing to do with material support or terrorism more broadly and instead complements provisions of the Economic Espionage Act of 1996, which criminalizes economic espionage involving trade secrets and theft of trade secrets. 18 U.S.C. §§ 1831–1832.

27 See *infra* note 101 and accompanying text for the definition of material support.

28 There are other criminal material support statutes, including ones that are relevant to the private enforcement schemes discussed in this Article. *See infra* notes 106–110 and accompanying text. Section 2339A and 2339B are, however, the main statutes used by the government to criminally prosecute the material support of terrorism and also the most relevant to national security's private enforcement. *See, e.g., infra* notes 102–103 and accompanying text.

29 18 U.S.C. § 2339A(a). See *infra* note 104106 for the full text of Section 2339A(a).

foreign terrorist organizations ("FTOs"),[30] regardless of how those individuals intend that support to be used or how the FTO actually uses that support.[31] The federal government also enforces the prohibition against material support through economic and trade sanctions laws and programs,[32] many of which have been promulgated pursuant to the International Emergency Economic Powers Act ("IEEPA") (collectively "sanctions programs").[33]

The various federal tort statutes discussed in this Article serve as the private enforcement arm for these public material support and sanctions laws (collectively "public material support laws"). These civil statutes—which include the Anti-Terrorism Act's ("ATA") private right of action under 18 U.S.C. § 2333 ("Section 2333" or "ATA's private right of action") and the terrorism exceptions to the Foreign Sovereign Immunities Act ("FSIA") under 28 U.S.C. § 1605A ("Section 1605A") and 28 U.S.C. § 1605B ("Section 1605B") (collectively "FSIA's terrorism exceptions")—are tort laws allowing private persons to recover for injuries resulting from terrorist violence. Under these laws, private parties are variously able to sue individuals, groups, institutions, and countries that have allegedly provided material support to terrorism or terrorist groups.

Under the ATA's private right of action, plaintiffs can bring claims for both primary liability, under 18 U.S.C. § 2333(a) ("Section 2333(a)"), and secondary liability, under 18 U.S.C. § 2333(d) ("Section 2333(d)"), for acts of international terrorism that cause death or injury to persons, property, or businesses.[34] Typically, ATA cases have involved a defendant bank accused of providing material support in the form of financial services to an entity, which is allegedly affiliated with a terrorist group that caused plaintiff's injuries.[35]

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30 See *infra* notes 458–459 and accompanying text for a discussion of the State Department's authority to designate groups as FTOs.

31 18 U.S.C. § 2339B(a)(1). See i*nfra* note 105 and accompanying text for the full text of Section 2339B(a)(1) as well as an explanation of its mens rea standard.

32 See *infra* notes 111–115 and accompanying text describing the relationship between certain U.S. sanctions programs and the concept of material support.

33 International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701–1706. While there are various statutes that are the basis for U.S. sanctions programs, including the Trading with the Enemy Act ("TWEA"), IEEPA is one of the main sources of Executive branch sanctions authority. Erich C. Ferrari, *Shooting in the Dark, Blindfolded, with No Bullets: The OFAC SDN Reconsideration Process*, ASPATORE, 2016 WL 3924415, at *4 (2016).

34 See *infra* notes 97, 148 and accompanying text for the full text of Sections 2333(a) and 2333(d).

35 *See infra* note 116 and accompanying text.

Under Section 1605A, private parties may sue foreign states[36] designated by the U.S. State Department as state sponsors of terrorism,[37] as well as their officials, employees, and agents acting in an official capacity, for personal injury or death resulting from particular terrorism-related activities.[38] Using Section 1605A, plaintiffs have typically sued state sponsors of terrorism for providing material support, such as funding or training, to terrorist groups or activities.[39] Under Section 1605B, plaintiffs can sue for death or injury to persons and/or property resulting from an act of international terrorism occurring on U.S. soil caused by the tortious acts of a foreign state, even if it is not designated as a state sponsor of terrorism.[40] As with the other private enforcement statutes, Section 1605B cases have primarily focused on material support claims, including financing and/or providing weapons and logistical support, to terrorist groups or activities.[41]

While these private rights of action primarily aim to provide remedies and compensation to victims of terrorism,[42] they simultaneously function as prototypical private enforcement statutes—as reflected both in the upsides they generate for the administrative state, and the ways they bolster the government's infrastructural power. Much like other private enforcement suits, private national security litigation benefits the administrative state by (1) providing more resources to enforce public laws and policies; (2) shifting the cost of regulation to the private sector; (3) harnessing private information to identify violations; (4) encouraging legal and policy innovations; and (5) emitting a clear and consistent signal that violations will be prosecuted.[43] As this Article demonstrates, private national

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36 Under the FSIA, a "foreign state" includes "an agency or instrumentality of a foreign state," which is a "separate legal person . . . a majority of whose . . . ownership interest is owned by a foreign state or political subdivision thereof, and . . . is neither a citizen of a State of the United States . . . nor created under the laws of any third country." 28 U.S.C. § 1603(a)–(b).

37 See *infra* note 536 and accompanying text for a discussion of the State Department's power to designate countries as state sponsors of terrorism.

38 See *infra* notes 232–233 and accompanying text for the full text of Section 1605A.

39 *See infra* note 228 and accompanying text.

40 See *infra* note 250 and accompanying text for the full text of Section 1605B.

41 *See infra* note 256 and accompanying text.

42 *See infra* notes 92–93 and accompanying text. Compensation is not unique to national security's private enforcement. In fact, many private enforcements laws encourage plaintiffs to litigate by providing compensation, and even damages enhancements, if they prevail. *See infra* notes 73–74 and accompanying text.

43 *See infra* Part II.

security suits also reinforce the state's infrastructural power by (1) targeting similar activity as the public material support laws; (2) implicating similar terrorist entities as the public material support laws; (3) supporting the same legislative purpose as the public material support laws; and (4) facilitating collaboration between private parties and the U.S. government in terrorism-related cases.[44]

At the same time, the private enforcement of national security has a tendency to reinforce the government's despotic purposes and powers by complimenting and reinforcing the erosion of civil liberties and targeting of marginalized communities characteristic of the public material support laws.[45]

Starting with despotic purposes, national security's private enforcement reinforces those purposes by exacerbating the civil rights problems endemic to the public material support laws.[46] These problems arise from (1) the broad definition of material support; (2) the Executive's designation of groups as FTOs; and (3) the Executive's designation of other entities and individuals as Specifically Designated Global Terrorists ("SDGTs"), Specially Designated Terrorists ("SDTs"), and Specially Designated Nationals ("SDN") pursuant to other sanctions authorities (collectively "other sanctioned entities").[47] The civil liberties problems raised by these policies range from First Amendment free speech and associational problems to Fourth Amendment concerns relating to unreasonable searches and seizures to Fifth Amendment due process shortcomings.[48] The private enforcement of national security reinforces these problems in both explicit and implicit ways.[49]

The private enforcement of national security also enhances the state's despotic powers by bolstering the disproportionate impact public material support laws have on minority communities, particularly Arabs, Middle Easterners, and Muslims, that are present within the United States, marginalized within U.S. society, and that have little influence over the state's activ-

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44 *See infra* Part III.A.

45 *See infra* Part III.B.

46 *See infra* Part III.B.1.

47 *See infra* Part III.B.1. See Part III.B.1.c for a discussion of the government's designation of SDGTs, SDTs, and SDNs, as well as the relationship between the three designations. As noted below, FTOs and state sponsors of terrorism are subject to U.S. sanctions as well. *See infra* notes 403, 407 and accompanying text. In fact, the FTO designation is a species of SDN designation. *See infra* note 403.

48 *See infra* Part III.B.1.

49 *See infra* Part III.B.1.

ities.[50] This bolstering effect is largely the result of the close relationship between the private enforcement statutes and (1) the Executive's designation of FTOs and other sanctioned entities; (2) the Executive's designation of various countries as state sponsors of terrorism; (3) the international focus of certain public material support laws that do not otherwise target designated entities; and (4) the express political motivation behind the passage of certain private enforcement statutes—all of which disproportionately impact Arab, Middle Eastern, and Muslim individuals and entities or those connected with such individuals and entities.[51]

This Article proceeds as follows. Part I canvasses the development of private enforcement mechanisms in U.S. federal law. It then provides a detailed description of the tort statutes used by private litigants to enforce national security in U.S. courts. Part II demonstrates how national security's private enforcement benefits the administrative state. In doing so, this Part lends support to the emerging view that national security is a species of federal administrative law. Finally, Part III explores the concepts of infrastructural power and despotic powers and purposes, as well as the connections between them. It describes how private enforcement schemes, writ large, can *potentially* enhance a state's despotic authority by bolstering its infrastructural power. This section also examines how national security's private enforcement reinforces both the infrastructural power, as well as the despotic powers and purposes, of the federal government, in *practice*.[52]

All told, the private enforcement of national security highlights the ways in which private enforcement regimes can further illiberal objectives and target vulnerable members of civil society. The purpose of this Article is not, however, to offer remedies to the despotic downsides of national security's private enforcement. To the extent a meaningful solution exists, the information presented here points to abolishing national security's private enforcement—at least in this writer's view. Instead of arguing the merits of this or other resolutions, how-

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50 *See infra* Part III.B.2. I define the Middle East to include countries in North Africa and southwest Asia that are either Arab or Muslim-majority. These countries include, but are not limited to, Iran, Afghanistan, and Pakistan.

51 *See infra* Part III.B.2.

52 As Part III explains, private enforcement schemes generally have the potential to reinforce the state's despotic authority, but may not, in fact, do so in practice. It is those private enforcement schemes that bolster the state's despotic authority not only in theory but also in practice—as national security's private enforcement does—that are particularly problematic. *See infra* Part III.B.

ever, this Article's main objective is to prompt practitioners and scholars to think differently about how national security is enforced and to explore the despotic costs of private enforcement statutes more generally.

Admittedly, the notion that private enforcement can serve despotic purposes and powers may be counterintuitive. After all, the value of private enforcement has long been rooted in the supposition that "private litigation can produce public good by enforcing statutory and other important policies."[53] While this Article does not in any way suggest all private enforcement schemes suffer from despotic tendencies in practice, it does urge us to seriously consider how other private enforcement statutes may be designed by Congress, used by litigants, and/or interpreted by courts to bolster the government's despotic authority. The recent spate of private enforcement laws passed by some state legislatures has made this trend increasingly obvious and important.[54] The private enforcement of national security demonstrates, however, that the despotic aspects of private enforcement regimes both predate these developments and may be less explicit, though no less troubling.

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53 John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 216 n.1 (1983).

54 Recently, Republican-dominated state legislatures have passed laws giving private parties the right to sue other private and public parties for activities ranging from providing abortion services and transgender bathrooms to allowing transgender students to play on girls' sports teams. *See, e.g.*, 2021 Tex. Gen. Laws ch. 62 (codified at TEX. HEALTH & SAFETY CODE ANN. § 171.201–.212 (West 2021)) (Texas law authorizing "any [private] person" to sue anyone who performs or "aids or abets the performance of inducement of an abortion" in Texas or "intends" to do so); 2021 Tenn. Pub. Acts ch. 452 (codified at TENN. CODE ANN. § 49-2-805 (2021)) (Tennessee law allowing individuals to sue public schools that have transgender bathrooms or changing facilities); 2021 Fla. Laws 571–72 (codified at FLA. STAT. ANN. § 1006.205 (West 2021)) (Florida law intended to "maintain opportunities for female athletes" by "requiring the designation of separate sex-specific athletic teams or sports" and that permits any student to sue a public school where they have been "deprived of an athletic opportunity" in violation of the statute). As scholars have noted, these state laws embody "an illiberal . . . political agenda" targeting marginalized communities. Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 107 CORNELL L. REV. (forthcoming 2023) (manuscript at 14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915944 [https://perma.cc/L4PE-6GGM].

I
THE PRIVATE ENFORCEMENT OF NATIONAL SECURITY LAW

At the outset, it is important to articulate the definition of "private enforcement" this Article adopts.[55] Broadly, the term is used here to refer to civil statutes that explicitly allow and encourage private parties to litigate[56] in order to directly or indirectly enforce public statutes, regulations, or other directives.

This Part begins by providing a brief overview of private enforcement's place within the American administrative state. It then proceeds to describe the federal tort statutes at the heart of national security's private enforcement. This detailed statutory description is the basis for the rest of the Article, particularly Part III's discussion of infrastructural power and despotic power and purposes. As that Part demonstrates, the design of these national security tort laws, coupled with their use by private litigants, reinforces not only the infrastructural power but also the despotic powers and purposes of the state.

A. Private Enforcement and the American Legal System

While private enforcement is not an inevitable feature of a government's regulatory scheme, it is a key feature of the modern U.S. administrative state.[57] Its roots can be found in the United States' "inherited regulatory design, which relied largely on private suits brought pursuant to common law doctrines."[58] Indeed, private enforcement was part of the government's regulatory structure even before the federal administrative state emerged in the twentieth century. In the nineteenth century, for example, private parties often brought civil suits on behalf

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55 While the term "private enforcement" is used by many scholars, some have adopted alternative terms like "private attorney general" or "citizen suits" to describe how private actors enforce public laws. While I do not use those alternative terms, I rely on the private attorney general and citizen suit literature, as they are necessarily part of private enforcement even if they are not wholly coextensive with it.

56 Private enforcement can also include statutes that have implied rights of action. These statutes are silent about the enforcement rights of private parties but may be judicially interpreted to implicitly create such rights. Glover, *supra* note 2, at 1148 n.31. Recent Supreme Court jurisprudence has, however, disfavored recognizing implied rights of action, making private enforcement in this area more difficult. *See* Burbank, Farhang & Kritzer, *supra* note 6, at 661.

57 *See* Glover, *supra* note 2, at 1146–47.

58 *Id.* at 1147.

of the federal government[59] and even pursued criminal prosecutions as "private prosecutors."[60]

As centralized federal government became more prominent during the New Deal Era, the state continued to rely on private enforcement as an important feature of public regulation.[61] During the second half of the twentieth century, particularly during the 1960s and 70s, Congress passed numerous regulatory statutes that enhanced and bolstered private enforcement.[62] Many of these statutes included "private rights of action" that explicitly gave private parties the right to enforce public laws.[63]

In explaining congressional support for private enforcement, some have speculated that "ideological conflict between Congress and the President accounts for the increased reliance on private attorneys, as opposed to executive agencies, for the implementation of various statutory regimes."[64] There are also arguments that congressional support for private enforcement reflects concerns about the Executive's capacity to enforce the law.[65] Other explanations posit that "legislators rely on private parties when they want credit for crafting broad policies but not the burdens of administrating and enforcing them."[66]

Whatever the rationale for these schemes, private enforcement involves a host of litigation scenarios. It can include lawsuits ranging from class actions redressing injuries suffered by a large group of individuals[67] to criminal defendants seeking remedies against law enforcement to deter constitutional violations[68] to private attorneys hired by the federal government to litigate directly on behalf of the state.[69]

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59 JON D. MICHAELS, CONSTITUTIONAL COUP 27 (2017).

60 *See* William J. Novak, *Public-Private Governance: A Historical Introduction*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 23, 31 (Jody Freeman & Martha Minow eds., 2009).

61 *See* Glover, *supra* note 2, at 1147.

62 *See id.* at 1148.

63 *Id.* at 1151; Michael Sant'Ambrogio, *Private Enforcement in Administrative Courts*, 72 VAND. L. REV. 425, 435 (2019).

64 Glover, *supra* note 2, at 1152.

65 *See id.* at 1151.

66 *Id.* at 1152.

67 *See* Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1496 (2017).

68 *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 250 (1988).

69 *See generally*, David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 MICH. ST. L. REV. 423, 426–55 (2010) (discussing the deputizing of private sector attorneys by state and federal government to prosecute cases in the government's name).

Most private enforcement statutes share several general features. In addition to permitting suit against other private parties,[70] private enforcement statutes sometimes allow private individuals and organizations to sue federal, state, and local government officials[71] and entities.[72] In general, to encourage plaintiffs to litigate, private enforcement statutes include one-way attorneys' fees provisions[73] and, where directed at private defendants, may allow for punitive or treble damages.[74] Either through the text of the legislation itself or judicial interpretation, most federal private enforcement statutes require plaintiffs suffer injury of some kind.[75]

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70 *See, e.g.*, 31 U.S.C. § 3730 (allowing private parties to sue private defendants that have allegedly committed fraud against the U.S. government); 29 U.S.C. § 216(b) (allowing employees to sue their employers for various violations of federal labor law).

71 *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 279 (2001) (holding that private individuals may seek injunctive and declaratory relief against state officials for violation of Section 601 of Title VI of the Civil Rights Act of 1964); 42 U.S.C. § 1983 (giving private parties the right to sue certain state or local officials who "under color of any statute, regulation custom, or usage of any State or Territory or the District of Columbia" subject them or causes them to be subjected to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.").

72 *See, e.g.*, 42 U.S.C. § 7604(a)(1) (allowing private parties to sue "the United States, and . . . any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment of the Constitution" to enforce certain provisions of the Clean Air Act); 33 U.S.C. § 1365(a)(1) (allowing private parties to sue "the United States, and . . . any other governmental instrumentality or agency to the extent permitted by the [E]leventh Amendment of the Constitution" to enforce certain provisions of the Clean Water Act).

73 Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 782 (2011).

74 *See, e.g.*, 15 U.S.C. § 15(a) (authorizing treble damages for plaintiffs in anti-trust cases); 18 U.S.C. § 1964(c) (authorizing treble damages for plaintiffs in suits under the Racketeer Influenced and Corrupt Organizations Act ("RICO")).

75 Individuated injury has become the norm for many private enforcement statutes. Most federal statutes that target non-governmental defendants, for instance, expressly require specific injury to plaintiff. *E.g.*, 15 U.S.C. § 15(a); 18 U.S.C. § 1964(c); *but see* 31 U.S.C. § 3730 (allowing private parties to sue third parties that have allegedly committed fraud against the U.S. government, without requiring plaintiff have suffered any kind of injury). Even where a private enforcement statute targets government defendants, the Supreme Court has increasingly required a showing of injury in most cases. Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 622–24 (2005); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1451–58 (1988).

Private enforcement also exists across a wide array of subject areas,[76] including civil rights,[77] antitrust[78] and environmental regulation,[79] to name a few. In some areas of law, private enforcement is the primary means for enforcing public law. For example, in the area of employment discrimination, private enforcement has been *the* central enforcement mechanism.[80] A similar phenomenon can be seen in labor law where private enforcement has been the primary means for upholding federal labor standards.[81] In other areas, private enforcement supplements the government's enforcement authority. For example, under various federal environmental statutes, federal, state, and local agencies are primarily responsible for bringing enforcement actions.[82] Where agencies decline to exercise their authority, however, private parties may sue to enforce federal environmental laws and policies.[83] While government enforcement outnumbers private enforcement,[84] private enforcement remains an important part of the federal government's environmental regulatory scheme.[85]

Still other private enforcement regimes complement criminal prosecutions prohibiting the same or similar activity. For example, one of the earliest congressionally enacted private enforcement mechanisms allows private parties to enforce federal civil *and* criminal antitrust laws.[86] Similarly, Congress has created a private right of action to enforce the civil and

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76 Burbank, Farhang, & Kritzer, *supra* note 6, at 639 n.2.

77 *See, e.g.*, 42 U.S.C. § 2000e-5 (authorizing private individuals to bring suit against their employers, labor organizations, and other employment-related entities for employment discrimination).

78 *See* 15 U.S.C. § 15(a).

79 *See, e.g.*, 33 U.S.C. § 1365 (authorizing private citizens to bring suit to enforce various aspects of federal environmental law, including the Clean Water Act of 1972 & the Federal Water Pollution Control Act Amendments of 1972).

80 *See* FARHANG, *supra* note 6, at 3.

81 *See* Glover, *supra* note 2, at 1150.

82 James T. Lang, *Citizens' Environmental Lawsuits*, 47 TEX. ENV'T. L.J. 17, 18–19 (2017).

83 *Id.* at 18.

84 David E. Adelman & Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 92 U. COLO. L. REV. 377, 398 (2021).

85 Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 U. KAN. L. REV. 383, 385 (2001).

86 The private right of action under the antitrust laws dates to 1914. Under this private right of action, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor." 15 U.S.C. § 15(a).

criminal provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO").[87]

Though the private enforcement literature has largely neglected national security's private enforcement,[88] it most resembles these last two types of private enforcement. While it is not the primary means by which public national security laws are enforced, national security's private enforcement supplements those efforts. It also reinforces and supports public laws that carry criminal penalties.[89]

Admittedly, the private enforcement of national security is a bit unusual as private enforcement schemes go. For example, one private enforcement statute—Section 2333(a) of the ATA—was passed before any of the criminal material support laws it enforces.[90] By contrast, most private enforcement statutes supporting criminal law prohibitions have been passed alongside or after those laws.[91] Unlike other private rights of actions, Congress's intent in passing Section 2333(a), as well as the other national security private enforcement statutes discussed here, also does not seem (at least explicitly) aimed at

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87 Under RICO's private right of action, "[a]ny person injured in his business or property by reason of a [RICO violation] . . . may sue therefor." 18 U.S.C. § 1964(c).

88 Where Section 2333(a) of the ATA and Section 1605A of the FSIA are concerned, some commentators *have* described these statutes as private enforcement mechanisms. *See* John D. Shipman, *Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism*, 86 N.C. L. REV. 526, 570 (2008) (referring to civil terrorism litigation, including under Sections 2333(a) and 1605A, as "private attorney general" suits); Seth N. Stratton, *Taking Terrorists to Court: A Practical Evaluation of Civil Suits Against Terrorists Under the Anti-Terrorism Act*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 27, 54 (2004) (referring to Section 2333(a) plaintiffs as "private attorneys general empowered to find and rout out terrorists" (internal quotations omitted)). These claims have not, however, been backed up with much elaboration or explanation.

89 While the criminal material support laws, including Section 2339A and Section 2339B, are purely criminal statutes, sanctions programs promulgated pursuant to IEEPA can carry both civil and criminal penalties. 50 U.S.C. § 1705(b)–(c).

90 Section 2333(a) was passed in 1992, while the first criminal material support law, Section 2339A, was passed two years later in 1994. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 1003, 106 Stat. 4506, 4521–22 (enacting Section 2333(a)); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796, 2022–23 (enacting Section 2339A). Section 2339B, the second criminal material support law, was passed in 1996. Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250 (1996).

91 For example, the private right of action under federal antitrust law was passed after the Sherman Act of 1890, which gave the government authority to both civilly and criminally enforce prohibitions against certain antitrust activities. Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 916–17 (2017).

supplementing specific public laws,[92] but rather at providing judicial remedies for particular plaintiffs.[93]

Despite these aberrations, as the rest of this Article demonstrates, Sections 2333, 1605A, and 1605B are more than just run-of-the-mill tort statutes. Rather, they empower private persons to promote and support federal criminal material support laws and sanctions programs in ways that benefit the American administrative state and bolster the government's infrastructural power—as private enforcement statutes all generally do.[94] To begin unpacking these arguments, the remainder of Part I describes each of the federal tort statutes making up national security's private enforcement.

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92 *See* Geoffrey Sant, *So Banks Are Terrorists Now?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533, 559 (2013) ("There is no reason to believe that Congress intended or suspected that [Section 2339A and 2339B] could be used to expand the scope of [Section 2333(a)], enacted half a decade earlier.").

93 All the national security private enforcement statutes discussed here are primarily aimed at giving plaintiffs the opportunity to bring suit for injuries suffered from terrorism-related activities. *See* Maryam Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, 96 WASH. U. L. REV. 559, 561 n.6 (2018) (noting that the decision to create Section 2333(a) was triggered by civil litigation highlighting the absence of clear jurisdiction in U.S courts over claims brought by U.S. victims of foreign terrorist attacks); Dale Kim, *The Inadequate Reach of Aiding and Abetting Liability Under the Antiterrorism Act*, 59 COLUM. J. TRANSNAT'L L. 209, 213 (2020) (noting that "[i]n response to courts mostly barring [aiding-and-abetting] claims, Congress enacted [JASTA], which [added Section 2333(d) to the ATA] to impose secondary liability on defendants who knowingly aid and abet terrorist acts."); H.R. REP. NO. 104-383, at 62 (1995) (noting that 28 U.S.C. § 1605(a)(7) ("Section 1605(a)(7)"), the precursor statute to Section 1605A of the FSIA, was passed in response to litigation relating to Libya's bombing of Pan Am flight 103 over Lockerbie, Scotland, in 1988 and was intended to give "American citizens an important economic and financial weapon against [state sponsors of terrorism]"); *infra* note 544 and accompanying text (describing how Section 1605B was passed to give plaintiffs—who had tried but failed to hold Saudi Arabia liable for the 9/11 attacks—a cause of action). All that said, the legislative history behind these tort statutes makes clear they have a similar purpose to the public laws they support. *See infra* Part III.A.3. Indeed, in a recent amicus brief in a Section 2333(d) case, Senator Charles Grassley—who was the original sponsor of Section 2333(a) and involved in Section 2333(d)'s passage—described both laws as an "important complement to the [criminal] material support statutes." Amicus Brief for Senator Charles E. Grassley In Support of Respondents at 22, Twitter, Inc. v. Taamneh, No. 21-1496 (U.S. argued Feb. 22, 2023) (No. 21-1496) [hereinafter Grassley Amicus].

94 In fact, in his recent amicus brief, Senator Grassley provided support for this view, as he described both Section 2333(a) and 2333(d) as "part of a broader counterterrorism toolbox that includes criminal liability, sanctions, diplomatic efforts, and the use of force." Grassley Amicus, *supra* note 93, at 4.

B. The Mechanics of National Security's Private Enforcement

Through the ATA's private right of action and the FSIA's terrorism exceptions, private parties are empowered to bring tort suits against individuals and entities that engage in terrorism, including by providing material support to terrorist groups or activities. In practice, these provisions have effectively become the private enforcement arm of the criminal material support laws, including but not limited to Sections 2339A and 2339B.[95] Suits under Section 2333 of the ATA have also implicated economic and trade sanctions laws authorized by IEEPA, which similarly aim to prohibit material support for terrorism.[96]

While Part III provides a more detailed account of the relationship between these private enforcement statutes and the public laws they implicate, the rest of this section explores how the ATA's private right of action and the FSIA's terrorism exceptions operate more generally—though their basic relationship to the public material support laws is also addressed.

1. *Section 2333(a)*

Under Section 2333(a) of the ATA, "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue [responsible individuals or entities] therefor in any appropriate district court of the United States."[97] As with other private enforcement schemes, Section 2333(a) allows plaintiffs to collect attorneys' fees and treble damages.[98]

Liability under Section 2333(a) can theoretically be triggered by any underlying violation of federal or state criminal law.[99] The prohibition against material support for terrorism

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95 As discussed below, Section 2333(a) suits have also implicated other criminal material supports laws, like 18 U.S.C. § 2339C and 18 U.S.C. § 2332d. *See infra* notes 106–110 and accompanying text.

96 *See infra* note 111 and accompanying text.

97 18 U.S.C. § 2333(a).

98 *See id.*

99 Gill v. Arab Bank, PLC, 893 F. Supp. 2d 474, 504 (E.D.N.Y. 2012). The criminal laws that are most often cited as underlying violations of Section 2333(a) are found in Chapter 113B of Title 18 of the U.S. Code, which is colloquially referred to as the ATA. *See* Almog v. Arab Bank, 471 F. Supp. 2d 257, 266, 266 nn.7–8 (E.D.N.Y. 2007) (discussing the ATA as part of its analysis of an alleged Section 2333(a) violation).

is, however, the most frequently cited basis for these suits.[100] Under federal law, material support includes:

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[101]

In particular, most Section 2333(a) cases involve underlying violations of two criminal material support laws: Sections 2339A and 2339B.[102] Since 9/11, Sections 2339A and 2339B have been central to the U.S. government's terrorism prosecutions in federal court.[103] Under Section 2339A, individuals are prohibited from knowingly providing material support in preparation for or to carry out specifically enumerated crimes of terrorism.[104] Under Section 2339B, persons are prohibited from providing material support to FTOs they either know are designated as such or know are engaged in terrorism or terrorist activity, regardless of how those persons intend their support to be used or how the FTOs use that support.[105]

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100 *Cf. Gill*, 893 F. Supp. 2d at 504 (stating that when an ATA plaintiff has to prove a violation of federal or state criminal law pursuant to a 2333(a) claim, they will usually rely on one or more of the federal material support statutes).

101 18 U.S.C. § 2339A(b)(1). This definition of material support has been incorporated into Section 2333(a) cases. Jamshidi, *supra* note 93, at 577–79.

102 Jamshidi, *supra* note 93, at 562.

103 Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SECURITY L. & POL'Y 5, 5–6 (2005) [hereinafter Abrams, *The Material Support Terrorism Offenses*]; Norman Abrams, *A Constitutional Minimum Threshold for the Actus Reus of Crime? MPC Attempts and Material Support Offenses*, 37 QUINNIPIAC L. REV. 199, 212–14 (2019).

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

105 *See* 18 U.S.C. § 2339B(a)(1) ("Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so" and knows "that the organization is a designated [FTO] . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism" violates the statute.). In *Holder v. Humanitarian Law Project* (*HLP*), the Supreme Court held that to violate Section 2339B a defendant need not have the "specific intent to further the organization's terrorist activities," but rather only needs to "have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism." 561 U.S. 1, 16–17 (2010). The *HLP* decision and its relationship to

Though less frequently invoked, plaintiffs have also relied on other material support laws to bring Section 2333(a) claims. Plaintiffs have, for example, based their Section 2333(a) suits on alleged violations of 18 U.S.C. § 2339C ("Section 2339C"),[106] a material support law that prohibits providing or collecting funds:

> with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out . . . any . . . act . . . intended to cause death or serious bodily injury to a civilian . . . when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[107]

Though also infrequent, some Section 2333(a) cases have implicated Section 2332d, a material support law[108] tied to the government's sanctions power.[109] Section 2332d makes it illegal for any "United States person, knowing or having reasonable cause to know that a country is designated . . . as a country supporting international terrorism," to "engage[ ] in a financial transaction with the government of that country."[110]

Some Section 2333(a) cases have implicated the material support prohibition in other ways, specifically by invoking IEEPA's economic and trade sanctions authorities as the basis for a material support claim.[111] Under IEEPA, which empowers the president to "control[ ] . . . transactions as well as freeze

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national security's private enforcement are discussed in more depth in Part III.B.1.

106 *See, e.g.*, Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 47 (D.D.C. 2010).

107 18 U.S.C. § 2339C(a)(1). Section 2339C does not require the funds in question actually be used to carry out the predicate act. *Id.* § 2339C(a)(3). Another material support statute, 18 U.S.C. § 2339D ("Section 2339D"), which makes it illegal to receive military training from a designated FTO, has been used in at least one Section 2333(a) case. *See* Strange v. Islamic Republic of Iran, Civ. A. No. 14-435, 2016 WL 10770678, at *3 (D.D.C. May 6, 2016). Given its focus, the fact that Section 2339D is rarely raised in the Section 2333(a) context is unsurprising and, for this reason, it is not addressed in this Article.

108 *See, e.g.*, Freeman v. HSBC Holdings PLC (*Freeman I*), No. 14 CV 6601, 2018 WL 3616845, at *7 (E.D.N.Y. July 27, 2018) (describing Section 2332d as a material support law), *report and recommendation rejected on other grounds*, 413 F. Supp. 3d 67 (E.D.N.Y. 2019), *aff'd on other grounds*, 57 F.4th 66 (2d Cir. 2023).

109 *E.g.*, O'Sullivan v. Deutsche Bank AG, No. 17 CV 8709, 2019 WL 1409446, at *4 (S.D.N.Y. Mar. 28, 2019); *Freeman I*, 2018 WL 3616845, at *7.

110 18 U.S.C. § 2332d.

111 For example, plaintiffs in one Section 2333(a) case alleged that defendants "knowingly and willfully engaged in transactions with, and provided funds, goods, or services to or for the benefit of, [SDGTs]." Sinclair *ex rel.* Tucker v. Twitter, Inc., No. 17-5710, 2019 WL 10252752, at *6 (N.D. Cal. Mar. 20, 2019).

foreign assets under the jurisdiction of the United States,"[112] "[i]t shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under [the statute]."[113] Once a person is designated pursuant to an IEEPA sanctions program, certain other persons are effectively prohibited from providing material support to them. For example, Executive Order 13,224 ("EO 13,224"),[114] which was promulgated pursuant to IEEPA, blocks all property belonging to entities sanctioned as SDGTs. Some Section 2333(a) plaintiffs have based their material support claims on violations of federal regulations promulgated under EO 13,224 that prohibit any:

> U.S. person [from] engag[ing] in any transaction or dealing in property or interests in property of [SDGTs] whose property or interests in property are blocked . . . including . . . the making or receiving of any *contribution of funds, goods, or* services to or for the benefit of [any SDGT] whose property or and interests in property are blocked.[115]

Whatever the underlying criminal violation, Section 2333(a) cases have typically involved a third-party financial institution accused of providing material support, in the form of financial services, to an entity allegedly affiliated with a terrorist group that caused personal injury or death.[116] In recent years, plaintiffs have expanded their efforts to also sue tech companies, such as Google, Facebook, and Twitter, for allegedly providing material support to terrorist groups or activities, in part by making their services available to those groups.[117]

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112 S. REP. NO. 110-82, at 1 (2007).

113 50 U.S.C. § 1705(a).

114 Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

115 31 C.F.R. § 594.204 (2022) (emphasis added) [hereinafter Section 594.204]. *E.g.*, *Sinclair ex rel. Tucker*, 2019 WL 10252752, at *6 (Section 2333(a) case citing to violations of Section 594.204 as the basis for a material support claim). As discussed below, Section 2333 cases have invoked targeted sanctions programs, which prohibit transactions with specific individuals and entities, as well as country-based sanctions programs. *See infra* notes 372–373 and accompanying text.

116 *E.g.*, Owens v. BNP Paribas S.A., 235 F. Supp. 3d 85, 98–99 (D.D.C. 2017), *aff'd*, 897 F.3d 266 (D.C. Cir. 2018); Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 19 (D.D.C. 2010).

117 *E.g.*, Gonzalez v. Google LLC, 2 F.4th 871, 880 (9th Cir. 2021), *cert. granted*, 143 S. Ct 80 (2022) (No. 21-1333); Twitter, Inc. v. Taamneh, 2 F.4th 871 (9th Cir. 2021), *cert. granted*, 143 S. Ct. 81 (2022) (No. 21-1496); Fields v. Twitter, Inc., 881 F.3d 739, 741 (9th Cir. 2018). Section 2333(a) cases have also targeted individual defendants, as well as other organizational defendants, like charities and non-profits. *See infra* note 521 and accompanying text.

Just as the targets of Section 2333(a) suits have evolved over time, so too have judicial interpretations of the statute. For the seventeen years or so years after 9/11, when Section 2333(a) cases began to be filed with greater frequency,[118] the vast majority of courts treated underlying violations of the criminal material support laws as per se "acts of international terrorism" under the statute—without requiring that plaintiffs' Section 2333(a) claims independently satisfy each element of that term's[119] definition.[120] Instead, courts primarily focused on other issues, like whether defendant had the requisite mens rea for providing material support and whether that support was causally connected to the injuries alleged by plaintiffs.[121]

As I have previously written, in considering these issues, courts interpreted Section 2333(a) in plaintiff-friendly ways that departed from tort law norms of fault and causation.[122] In general, to satisfy the fault element of an intentional tort, plaintiff must show defendant intended not only to commit the act in question but also to bring about its consequences.[123] To satisfy the causation element of an intentional tort, plaintiff must show that defendant's action was both the factual and proximate cause of the injuries alleged.[124]

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118 Even though Section 2333(a) was passed in 1992, it remained largely dormant until after 9/11. Jamshidi, *supra* note 93, at 561 n.3.

119 See *infra* note 129 and accompanying text for the definition of an "act of international terrorism."

120 Jamshidi, *supra* note 93, at 562, 562 n.9; *see, e.g.*, Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 68–69 (2d Cir. 2012) (noting that "[t]he Seventh Circuit, and several district courts in this Circuit, have concluded that a defendant's violation of the criminal material-support statutes . . . constitutes an act of 'international terrorism' within the meaning of [Section 2333a]" as a matter of law); Strauss v. Credit Lyonnais (*Strauss I*), S.A, No. CV-06-0702, 2006 WL 2862704, at *1 (E.D.N.Y. Oct. 5, 2006) (holding that "[v]iolations of 18 U.S.C. § 2339B . . . are recognized as international terrorism under [Section 2333(a)]" as a matter of law. While these early cases did mention the definition of an "act of international terrorism," they often failed to discuss whether its elements were satisfied. *See, e.g.*, Abecassis v. Wyatt, 785 F. Supp. 2d 614, 626–47 (S.D. Tex. 2011) (holding that the ATA's definition of an "act of international terrorism" is part of the liability analysis under Section 2333(a) but failing to evaluate whether plaintiff's claim based on a Section 2339A violation satisfied each of the elements of that definition), *on reconsideration in part*, 7. Supp. 3d 668 (S.D. Tex. 2014).

121 Jamshidi, *supra* note 93, at 579–99.

122 *Id.* at 562–64.

123 *Id.* at 570–72. While there are arguably exceptions to the requirement that the defendant both intend to commit the act and bring about its consequences, most common law intentional torts require both elements. *Id.* at 571, 571 n.47.

124 *Id.* at 572–73. While proximate causation is more flexibly applied to intentional tort (as compared to negligence) claims, it remains a key element of any intentional tort action. *Id.* at 573.

In stark contrast to these norms, much of the early Section 2333(a) case law did not require plaintiff to establish that defendant knew or intended its support would further terrorist violence—instead, plaintiff only needed to show that defendant knew or recklessly disregarded the fact that its support would go to a terrorist group or activity.[125] Plaintiff also was not required to demonstrate that defendant's support was the factual cause of any specific violent act or injury.[126] Most courts did, however, require that plaintiff establish defendant's actions were the proximate or legal cause of its injuries.[127]

As a result of two recent developments, some Section 2333(a) cases have shifted in a new and different direction, less favorable to plaintiffs. First, some courts have started to focus more on whether the alleged material support actually satisfies the elements of an "act of international terrorism" under Section 2333(a). This development is primarily the result of the Second Circuit's 2018 decision in *Linde v. Arab Bank, PLC*,[128] which gave rigorous attention to the definition of an "act of international terrorism."

That definition, which is found in 18 U.S.C. § 2331(1) of the ATA ("Section 2331(1)") and is incorporated into Section 2333(a), defines acts of international terrorism as those that:

> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States . . . ;
> (B) appear to be intended—
> (i) to intimidate or coerce a civilian population;
> (ii) to influence the policy of a government by intimidation or coercion; or

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125 *Id.* at 583–84. As I have previously discussed in another Article, this older Section 2333(a) case law, which primarily involved underlying violations of Sections 2339A and 2339B, adopted various approaches to the statute's mens rea requirement. *Id.* at 582–92. In one way or another, many of these approaches allowed for Section 2333(a)'s mens rea requirement to be satisfied by allegations defendant either knew or was deliberately or recklessly indifferent to the fact an organization was a designated FTO, that the organization engaged in terrorist activity, or that it supported such groups or activities. *Id.* While it is beyond this Article's scope to do a similarly deep dive into the mens rea associated with Section 2333(a) cases implicating other material support or terrorism financing statutes, at least some of these early cases also embraced a knowledge and/or deliberate or reckless indifference standard. *See, e.g.*, Gill v. Arab Bank, PLC, 893 F. Supp. 2d 474, 506 (E.D.N.Y. 2012) (Section 2333(a) case involving underlying violations of Section 2339C holding that "[t]he mental state test to be applied . . . [is] that the defendant's alleged actions were reckless, knowing, or intentional.").

126 Jamshidi, *supra* note 93, at 594.

127 *Id.* at 595–97.

128 882 F.3d 314, 318–19 (2d Cir. 2018).

> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
>
> (C) occur primarily outside the jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.[129]

In *Linde*, the Second Circuit held that a Section 2333(a) plaintiff must prove each and every element of this definition.[130] In reaching this decision, the *Linde* court concluded that while "conduct that violates a [criminal] material support statute can also satisfy the § 2331(1) definitional requirements of international terrorism in some circumstances . . . the provision of material support to a terrorist organization does not *invariably* equate to an act of international terrorism."[131] In the court's view, this is because providing financial services to a known terrorist organization can qualify as a violation of the criminal material support statutes without "involv[ing] violence or endager[ing] life" *or* manifesting the intent required under Section 2331(1).[132] Since the *Linde* decision, various courts, both in the Second Circuit and elsewhere, have adopted this approach and focused on whether defendant's alleged material support actually satisfies the elements of an "act of international terrorism."[133]

In addition to focusing on this definitional issue, various courts have recently adopted a more stringent proximate causation requirement in Section 2333(a) cases. Historically,

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129 18 U.S.C. § 2331(1).

130 *Linde*, 882 F.3d at 326.

131 *Id.* (emphasis added).

132 *Id.* The intent requirement for Section 2331(1) is arguably higher than the mens rea for a Section 2333(a) case based on underlying violations of the criminal material support statutes. *See supra* note 125 and accompanying text. For example, courts have recently held that, unlike the fault requirement for material support under Section 2333(a), the intent requirement for Section 2331(1) is not satisfied by deliberate indifference. *E.g.*, Cabrera v. Black & Veatch Special Projects Corps., No. 19-cv-3833, 2021 WL 3508091, at *19 (D.D.C. July 30, 2021); Strauss v. Crédit Lyonnais (*Strauss II*), S.A., 379 F. Supp. 3d 148, 161 (E.D.N.Y. 2019), *aff'd*, 842 F. App'x 701 (2d Cir. 2021).

133 *See, e.g.*, Colon v. Twitter, Inc. 14 F.4th 1213, 1219–20 (11th Cir. 2021) (citing to *Linde* in holding that all the elements of the definition of an "act of international terrorism" must be satisfied to succeed on a Section 2333(a) claim); Gonzalez v. Google LLC, 2 F.4th 871, 899–900 (9th Cir. 2021) (citing to *Linde* in holding that material support does not "invariably equate to an act of international terrorism" and that "[a]cts constituting international terrorism" must satisfy the definition of international terrorism under Section 2331(1)), *cert. granted*, 143 S. Ct 80 (2022) (No. 21-1333).

courts have been scattered in their approach to proximate causation under the statute.[134] Though some courts adopted "flexible" approaches to proximate causation, others required a more substantial showing.[135] Then, in 2018, the Ninth Circuit issued an influential decision in *Fields v. Twitter*,, which took a more rigid approach to proximate causation and seemingly shifted the case law towards a more robust proximate causation standard.[136]

While conceding that Section 2333(a) "does not limit liability to those directly injured," *Fields* held that proximate causation requires "'some direct relation'" between defendant's actions and plaintiff's injury.[137] By contrast, pre-*Fields*, the most stringent requirement for proximate causation under Section 2333(a) was reasonable foreseeability.[138] As the *Fields* court insisted, directness is both a higher and separate standard from reasonable foreseeability, even though foreseeability may still be relevant.[139]

Since *Fields*, other courts, including those outside the Ninth Circuit, have embraced a similarly demanding approach to proximate causation under Section 2333(a).[140] Most notably, in the wake of *Fields*, the Seventh Circuit—which had previously taken a more flexible approach to proximate causation under the statute[141]—backtracked and adopted a more rigid

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134 *See In re* Chiquita Brands Int'l, Inc., 284 F. Supp. 3d 1284, 1312–13 (S.D. Fla. 2018) (canvassing different approaches, some more flexible and others more rigid, to proximate causation under Section 2333(a)).

135 Jamshidi, *supra* note 93, at 594–97.

136 881 F.3d 739 (9th Cir. 2018).

137 *Id.* at 746–48.

138 Jamshidi, *supra* note 93, at 595–96.

139 *Fields*, 881 F.3d at 747–48. While the *Fields*' court did not conclude that foreseeability is irrelevant to proximate causation, the *Fields*' court held that it was insufficient to satisfy proximate causation under Section 2333(a). *Id.* According to some courts, *Fields'* proximate causation requirement does not, in fact, depart much from, at least, some pre-*Fields* case law. For example, another recent case construing Section 2333(a) and citing to *Fields* suggested that directness and foreseeability are "logically linked." Kemper v. Deutsche Bank AG, 911 F.3d 383, 391–92 (7th Cir. 2018). While this Article does not analyze whether *Fields* definitively embraced a more robust proximate causation standard than previous case law, it appears that *Fields* and the cases that have followed it have generally dealt a blow to earlier, more flexible approaches to proximate causation under Section 2333(a). *See infra* notes 140–142 and accompanying text.

140 *E.g.*, Crosby v. Twitter, Inc., 921 F.3d 617, 624 (6th Cir. 2019); Freeman v. HSBC Holdings PLC (*Freeman II*), 413 F. Supp. 3d 67, 83–84 (E.D.N.Y. 2019), *aff'd on other grounds*, 57 F.4th 66 (2d Cir. 2023).

141 In its 2008 decision in *Boim v. Holy Land Foundation*, the Seventh Circuit arguably did away with any proximate causation requirement for Section 2333(a) cases. Boim v. Holy Land Found. for Relief and Dev. (*Boim II*), 549 F.3d 685 (7th Cir. 2008); Jamshidi, *supra* note 93, at 595–96.

rule. In that case, *Kemper v. Deutsche*, the Seventh Circuit cited, in part, to *Fields* in holding that proximate causation was not only required to prove a Section 2333(a) claim but also that "foreseeability, directness, and the substantiality of the defendant's conduct . . . are relevant to the [proximate causation] inquiry."[142]

Historically, Section 2333(a) claims have generally done well at the motion to dismiss stage but failed at the merits stage.[143] Whether newer approaches to Section 2333(a) will change these results or completely displace earlier more plaintiff-friendly case law is hard to say at this point. While these more recent developments have certainly made it harder for plaintiffs to plausibly allege violations of Section 2333(a),[144] they have not prevented plaintiffs from successfully litigating these cases—at least on motions to dismiss.[145]

2. *Section 2333(d)*

Until a few years ago, the jurisprudence was unsettled as to whether Section 2333(a) included claims for secondary liability.[146] Then, in 2016, Congress passed the Justice Against Sponsors of Terrorism Act ("JASTA"), which amended Section 2333 of the ATA to make claims for aiding and abetting and

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142 *Kemper*, 911 F.3d at 392. While in *Kemper* the Seventh Circuit attempted to downplay its earlier decision in *Boim*, it conceded that *Boim* might be "read to suggest that something less than proximate cause might suffice to prove [Section 2333(a)] liability." *Id.* at 391.

143 Jamshidi, *supra* note 93, at 620–21.

144 Since *Linde*, various courts have dismissed claims under Section 2333(a), at least in part, for failure to satisfy Section 2331(1)'s elements. *See* Gonzalez v. Google LLC, 2 F.4th 871, 912–13 (9th Cir. 2021) (dismissing Section 2333(a) claims because plaintiffs failed to plausibly allege defendant's conduct qualified as an "act of international terrorism" under Section 2331(1)), *cert. granted*, 143 S. Ct 80 (2022) (No. 21-1333); *Kemper*, 911 F.3d at 389–90 (same). Use of a heightened proximate causation requirement has also contributed to dismissal of recent Section 2333(a) cases. *See, e.g.*, *Crosby*, 921 F.3d at 622–26 (dismissing Section 2333(a) claim for failing to establish terrorist violence was the direct, foreseeable, and substantial result of defendant's material support); *Kemper*, 911 F.3d at 391–94 (same).

145 *See, e.g.*, Miller v. Arab Bank, PLC, 372 F. Supp. 3d 33, 44–47 (E.D.N.Y. 2019) (relying on more recent, as well as older, Section 2333(a) case law to conclude that plaintiffs' allegations satisfied both Section 2331(1) and proximate causation at the motion to dismiss stage); Schansman v. Sberbank of Russia PJSC, 565 F. Supp. 3d 405, 416, 419 (S.D.N.Y. 2021) (same), *denying reconsideration*, 19-CV-02985, 2022 WL 4813472 (S.D.N.Y. Sept. 30, 2022).

146 Jamshidi, *supra* note 93, at 579 n.106. While some pre-JASTA cases suggested Section 2333(a) included secondary liability claims, this Article's analysis of secondary liability focuses on post-JASTA case law.

conspiracy available under the statute as long as the underlying act of international terrorism involved a designated FTO.[147]

Under JASTA's secondary liability amendment, which is contained in 18 U.S.C. § 2333(d) ("Section 2333(d)"):

> [i]n an action under [Section 2333(a)] for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization . . . as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.[148]

Suits under Section 2333(d) have various similarities with Section 2333(a) claims. As with Section 2333(a), Section 2333(d) suits allow plaintiffs to collect treble damages and attorneys' fees.[149] Like Section 2333(a), Section 2333(d) cases have been brought primarily against private companies, particularly tech companies and banks.[150] The causation standard under both Section 2333(d) and Section 2333(a) is also the same.[151] Finally, like Section 2333(a), most Section 2333(d) cases have involved allegations that defendant engaged in material support of terrorism.[152]

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147 Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 4, 130 Stat. 852, 854 (2016) (codified at 18 U.S.C. § 2333(d)). JASTA also changed Section 2333 by permitting U.S. nationals to bring claims under that statute against foreign states, as long as the requirements of Section 1605B—JASTA's newly-created exception to the FSIA—are satisfied. *Id.* § 3(a) (codified at 28 U.S.C. § 1605B(c)). Previously, plaintiffs were prohibited from bringing Section 2333 claims against foreign sovereigns. *See infra* note 252.

148 18 U.S.C. § 2333(d)(2).

149 *See id.* (referencing relationship to liability regime under 18 U.S.C. § 2333(a) including its attorneys' fee and treble damages provisions).

150 *See, e.g.*, Gonzalez v. Google LLC, 2 F.4th 871 (9th Cir. 2021) (Section 2333(d) case against various tech companies), *cert. granted*, 143 S. Ct 80 (2022) (No. 21-1333); Weiss v. Nat'l Westminster Bank (*Weiss II*), PLC, 993 F.3d 144 (2d Cir. 2021) (Section 2333(d) case against bank). While fewer in number than under Section 2333(a), some cases under Section 2333(d) have also been brought against non-profit organizations. *See, e.g.*, Keren Kayemeth Leisrael-Jewish Nat'l Fund v. Educ. for a Just Peace in the Middle East, 530 F. Supp. 3d 8 (D.D.C. 2021) (Section 2333(d) case brought against non-profit advocacy organization).

151 Copeland v. Twitter, Inc., 352 F. Supp. 3d 965, 973 (N.D. Cal. 2018).

152 *See, e.g.*, Honickman v. BLOM Bank SAL, 6 F.4th 487, 490 (2d Cir. 2021) (alleging that defendant aided and abetted terrorism by providing material support in terms of financial services to customers affiliated with terrorist organization); O'Sullivan v. Deutsche Bank AG, No. 17 CV 8709, 2019 WL 1409446, at *4 (S.D.N.Y. Mar. 28, 2019) (alleging that defendants conspired with Iran, its agents, and proxies, as well as various terrorist organizations in violation of Section 2333(d) to provide material support to terrorism). JASTA's text further demonstrates that Section 2333(d) claims are primarily intended to target material sup-

At the same time, there are important differences between Sections 2333(a) and 2333(d) suits. While Section 2333(d) cases must involve an "act of international terrorism" that caused plaintiff's injury,[153] defendant's *own* acts do not need to "constitute[ ] international terrorism satisfying all the definitional requirements of [Section 2331(1)]."[154] Instead, defendant only needs to have aided and abetted or conspired to support such acts.[155] Depending upon whether an aiding and abetting or conspiracy claim is brought, plaintiffs must also satisfy other elements that are not part of the Section 2333(a) analysis. The remainder of Part I.B.2 discusses the additional elements plaintiffs must establish to support their aiding-and-abetting and conspiracy claims under Section 2333(d).

a. *Aiding-and-Abetting Liability*[156]

In bringing an aiding-and-abetting claim under Section 2333(d), plaintiff must satisfy the aiding-and-abetting elements reflected in the D.C. Circuit case of *Halberstam v. Welch*.[157] In

port to terrorism. *See* 18 U.S.C. § 2333 note (Findings and Purpose) ("The purpose of this Act . . . is to provide civil litigants with the broadest possible basis . . . to seek relief against persons, entities, and foreign countries . . . that have provided *material support*, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.") (emphasis added). Since Section 2333(d) liability is derivative of Section 2333(a), it implicitly relies on the same definition of material support used in Section 2333(a) cases. *See* 18 U.S.C. § 2333(d)(2).

153 *See* Atchley v. AstraZeneca UK Ltd. (*Atchley I*), 474 F. Supp. 3d 194, 212 (D.D.C. 2020) ("[Section 2333(d)] imposes aiding-and-abetting liability for 'an injury arising from *an act* of international terrorism committed, planned, or authorized' by an FTO."), *rev'd on other grounds*, 22 F.4th 204 (D.C. Cir. 2022).

154 *Weiss II*, 993 F.3d at 164 (internal quotation marks and citation omitted). Notably, since Section 2333(d) claims do not require that defendant itself commit an act of international terrorism, establishing liability under the statute does not depend upon defendant's underlying violation of any criminal law, including the criminal material support and sanctions laws—even though plaintiffs often still invoke these laws in one way or another. *See Honickman*, 6. F.4th at 498–99; *O'Sullivan*, 2019 WL 1409446, at *9.

155 *See, e.g.*, Goldstein v. Facebook Inc., No. 19-CV-389, 2020 WL 6482979, at *3 (E.D. Tex. May 26, 2020) ("[B]ecause secondary liability [under Section 2333(d)] necessarily requires conduct supporting primary liability, there must be an allegation that [defendant] aided or abetted some act of international terrorism."), *report and recommendation adopted*, No. 19-cv-00389, 2020 WL 4696457 (E.D. Tex. Aug. 12, 2020).

156 As of this writing, the Supreme Court has granted cert and heard oral argument, but has not yet decided a case that may alter the analysis for aiding-and-abetting liability under Section 2333(d) described here. *See* Twitter, Inc. v. Taamneh, 2 F.4th 871 (9th Cir. 2021), *cert. granted*, 143 S. Ct. 81 (2022) (No. 21-1496).

157 Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983). In enacting JASTA, Congress noted that *Halberstam* provides the "proper legal framework for how [aiding-and-abetting] liability should function" under Section 2333(d). Justice

Halberstam, the D.C. Circuit held that civil aiding-and-abetting liability requires proof of three elements: (1) "the party the defendant aids must perform a wrongful act that causes an injury"; (2) "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance"; and (3) "the defendant must knowingly and substantially assist the principal violation."[158]

As various courts have noted, Section 2333(d) does not limit liability only to those who directly aid-and-abet a designated FTO.[159] Instead, a defendant can be liable for aiding-and-abetting under Section 2333(d) where its assistance goes to an alter-ego or proxy of an FTO that committed, planned, or authorized an act of international terrorism.[160] That being said, where defendant aided-and-abetted a designated FTO, its alter-egos, or proxies through a third-party intermediary, some courts have shied away from finding aiding-and-abetting liability, at least in some circumstances.[161] By contrast, courts have been more inclined to allow plaintiffs' claims to survive the motion to dismiss stage where defendant *directly* aided the FTO that caused plaintiffs' injuries, its alter-egos, proxies, or other close entities.[162]

Against Sponsors of Terrorism Act § 2(a)(5) (codified at 18 U.S.C. § 2333 note (Findings and Purpose)).

158 *Halberstam*, 705 F.2d at 487–88. *See* Gonzalez v. Google LLC, 2 F.4th 871, 902 (9th Cir. 2021) (listing the three *Halberstam* factors for aiding-and-abetting as relevant to aiding-and-abetting under Section 2333(d)), *cert. granted*, 143 S. Ct 80 (2022) (No. 21-1333).

159 *Weiss II*, 993 F.3d at 164; Kaplan v. Lebanese Canadian Bank SAL (*Kaplan II*), SAL, 999 F.3d 842, 855–56 (2d Cir. 2021).

160 *Kaplan II*, 999 F.3d at 856.

161 *See, e.g.*, Siegel v. HSBC N. Am. Holdings, Inc., 933 F.3d 217, 224–26 (2d Cir. 2019) (denying Section 2333(d) claim for aiding-and-abetting where defendant provided services to third-party bank that, in turn, allegedly serviced terrorist groups, in part because the third-party had substantial business operations, many of which were unrelated to terrorism and because defendant itself had no relationship with the terrorist group that allegedly injured plaintiffs). Some courts have pointed to a trend disfavoring aiding-and-abetting cases involving indirect support more generally. *See* Averbach v. Cairo Amman Bank, No. 19-cv-0004, 2020 WL 486860, at *12 (S.D.N.Y. Jan. 21, 2020) (noting the "trend in JASTA case law toward disallowing claims against defendants who did not deal directly with a terrorist organization or its proxy."), *report and recommendation adopted sub nom*, Averbach *ex rel.* Est. of Averbach v. Cairo Amman Bank, No. 19-CV-00004, 2020 WL 1130733 (S.D.N.Y. Mar. 9, 2020). That claim may, however, be overstated, particularly where the terrorist perpetrator and the party that received the support are substantially intertwined. *Kaplan II*, 999 F.3d at 855–56, 862–63.

162 *See, e.g.*, *Kaplan II*, 999 F.3d 842, 862–67 (upholding Section 2333(d) case for aiding-and-abetting where defendant provided services to persons and entities that were "integral parts" of terrorist group that caused plaintiffs' injuries); Est. of Henkin v. Kuveyt Turk Katilim Bankasi, A.S., 495 F. Supp. 3d 144, 159 (E.D.N.Y. 2020) (Section 2333(d) aiding-and-abetting case suggesting a more plaintiff-

Since Section 2333(d) was enacted, judicial interpretations of aiding-and-abetting liability have become progressively more plaintiff-friendly, at least in some circuits.[163] As a result, plaintiffs have enjoyed a decent chance of success, at least at the motion to dismiss stage.[164] Nevertheless, in the majority of Section 2333(d) cases, the second and third prongs of *Halberstam's* aiding-and-abetting test remain the most challenging for plaintiffs to satisfy.[165] They are addressed in turn.

i. *Prong Two of Aiding-and-Abetting Liability*

To satisfy the second prong of aiding-and-abetting liability—which requires that "defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance"—plaintiff need not show that defendant had the specific intent to further a terrorist act

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friendly standard should apply "when a defendant-bank is dealing directly with a known terrorist organization, its fundraisers, mere conduits, or alter egos.").

163 This trend is evident in the Second Circuit, where the vast majority of Section 2333(d) claims have been brought. While various district courts have taken a narrower approach, the Second Circuit Court of Appeals has increasingly adopted a more flexible view of aiding-and-abetting claims under Section 2333(d). For example, district courts in the circuit have held that to establish general awareness under prong two "[a]llegations that a defendant bank was generally aware it was playing a role [in] terrorist activities by virtue of media and non-U.S. governmental designations that its account holders supported or were terrorist organizations are insufficient absent allegations that the defendant actually read or was aware of the designations and media reports." *Averbach*, 2020 WL 486860, at *12. *See* Kaplan v. Lebanese Canadian Bank (*Kaplan I*), SAL, 405 F. Supp. 3d 525, 535 (S.D.N.Y. 2019) (suggesting that plaintiffs' allegation failed to establish defendant's general awareness under prong two because defendant's customers were not designated by the U.S. government as terrorist groups and because plaintiffs did not allege defendant was actually aware of media reports that its customers were connected to an FTO), *vacated in part*, 999 F.3d 842 (2d Cir. 2021). The Second Circuit Court of Appeals has, however, overruled this approach to general awareness and held that plaintiffs do not need to allege defendant actually read or was aware of public information depicting its customers as terrorists or closely intertwined with designated FTOs. *See* Honickman v. BLOM Bank SAL, 6 F.4th 487, 501 (2d Cir. 2021) ("Plaintiffs did not need to allege that [defendant] knew or should have known of the public sources [claiming its customer was affiliated with a designated FTO] at the pleading stage" to satisfy the general awareness element of an aiding-and-abetting claim under Section 2333(d)).

164 *See, e.g.*, Atchley v. AstraZeneca UK Ltd. (*Atchley II*), 22 F 4th 204, 222–23 (D.C. Cir. 2022) (upholding Section 2333(d) aiding-and-abetting claim at motion to dismiss stage); *Kaplan II*, 999 F.3d 842 (same); Averbach v. Cairo Amman Bank, No. 19-cv-0004, 2022 WL 2530797, at *21 (S.D.N.Y. Apr. 11, 2022) (same); Lelchook v. Islamic Republic of Iran, 393 F. Supp. 3d 261, 269–70 (E.D.N.Y. 2019) (same).

165 *See Honickman*, 6 F.4th at 496 (holding that "[t]he second ('general awareness') and third ('substantial assistance') [*Halberstam*] elements form the crux of most JASTA aiding-and-abetting cases.").

or was aware of any specific terrorist act planned by a terrorist group.[166] That being said, the mens rea requirement under this prong is also not identical, as a matter of law, to the relatively more liberal mens rea standard for establishing material support under Section 2333(a)—especially for underlying violations of Section 2339B.[167] Instead, to prove prong two, plaintiff must show that defendant was "generally aware" that it was "playing a role in . . . violent or life-endangering activities"[168] before the attack occurred.[169] This general awareness requires knowledge that defendant was providing assistance either directly or indirectly to an FTO's *violent activities*.[170]

For at least some courts, foreseeability is an important part of establishing prong two. According to this approach, "a defendant may be liable for aiding and abetting an act of terrorism if it was generally aware of its role in an 'overall illegal activity' from which an 'act of international terrorism' was a

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166 *E.g.*, Gonzalez v. Google LLC, 2 F.4th 871, 903–04 (9th Cir. 2021), *cert. granted*, 143 S. Ct 80 (2022) (No. 21-1333). *Accord Siegel*, 933 F.3d at 224; Linde v. Arab Bank, PLC, 882 F.3d 314, 329 (2d Cir. 2018).

167 *See, e.g.*, *Linde*, 882 F.3d at 329–30 ("[T]he mens rea required [for prong 2 of secondary liability under [Section 2333(d)]" may not be coextensive with the showing required for material support under Section 2339B, "which requires only knowledge of the organization's connection to terrorism, not intent to further its terrorist activities or awareness that one is playing a role in those activities."). That being said, courts have held that material support to a FTO can, under some circumstances, satisfy the mens rea requirement for prong two of aiding-and-abetting. *See, e.g.*, *Honickman*, 6 F.4th at 498 (holding that while "allegations that a defendant knowingly provid[ed] material support to an FTO, *without more*, do[ ] not *as a matter of law* satisfy [prong 2,] . . . [t]hat does not [mean] that [a defendant's provision of] material support to an FTO is *never* sufficient for [JASTA] aiding-and-abetting liability.") (internal quotations omitted).

168 *Kaplan II*, 999 F.3d 842, 851 (2d Cir. 2021) (internal quotations omitted); *Linde*, 882 F.3d at 329.

169 *Honickman*, 6 F.4th at 501. Where defendant has ended its relationship with the FTO or its affiliate before the attack happens, plaintiffs may have a harder time establishing general awareness. *See Siegel*, 933 F.3d at 224–25 (holding that plaintiffs failed to establish that defendant had general awareness of its role in a terrorist attack where it had ended its relationship with an FTO's alleged intermediary ten months before the attack occurred).

170 *Kaplan II*, 999 F.3d at 863–64. At the motion to dismiss stage, courts have been clear that circumstantial evidence can establish knowledge under prong two. For example, the Second Circuit has held that the knowledge requirement does not require plaintiff present direct evidence defendant had actual knowledge it was providing assistance directly or indirectly to a designated FTO's violent activities. *Honickman*, 6 F.4th at 500. Instead, plaintiff can allege defendant knew or should have known it was providing direct or indirect assistance to a designated FTO's violent activities, based on circumstantial evidence. Bartlett v. Société Générale de Banque Au Liban SAL, 19-CV-00007, 2020 WL 7089448, at *10 (E.D.N.Y. Nov. 25, 2020); *see Kaplan II*, 999 F.3d at 864 (holding that general awareness can be satisfied under prong two by "allegations of . . . facts or events . . . [that] give rise to an inference of knowledge" because "a plaintiff realistically cannot be expected to plead a defendant's actual state of mind.").

foreseeable risk."[171] Where support goes through a third-party intermediary, plaintiffs can satisfy prong two's general awareness requirement where they plausibly allege the third-party intermediary was "so closely intertwined with [the terrorist organization's] violent terrorist activities that one can reasonably infer that [defendant] was generally aware while it was providing [material support] to those entities that it was playing a role in unlawful activities from which [the terrorist organization's] attacks were foreseeable."[172]

ii. *Prong Three of Aiding-and-Abetting Liability*

The third prong of aiding-and-abetting liability is the most involved of the three *Halberstam* elements. On this prong—which requires that "defendant . . . knowingly and substantially assist[ ] the principal violation"—there are three key issues: (1) what constitutes "the principal violation;" (2) what constitutes "knowing[ly];" and (3) what it means to "substantial[ly] assist."[173]

On issue one, a "principal violation" includes those acts that are a reasonable and foreseeable consequence of the tortious act that defendant aided.[174] As courts have held, a "principal violation" can include both a "broader campaign of terrorism" or a specific terrorist attack that was part of that campaign.[175] On the second issue, "knowingly" appears to require that defendant know its aid was going to support the violent activities of a terrorist organization, either directly or indirectly[176]—much like general awareness under prong two of *Halberstam*.[177] While the violence "must be foreseeable from

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171 *Kaplan II*, 999 F.3d at 860 (emphasis added).

172 *Honickman*, 6 F.4th at 499. Where the third-party intermediary in question engages in a host of activities unrelated to terrorism, then it may be harder for plaintiff to establish that defendant had general awareness that its support would benefit a FTO's terrorist acts under prong two. *See, e.g.*, *Siegel* 933 F.3d at 224 (holding that plaintiff failed to establish the defendant's actions satisfied prong two of aiding-and-abetting where the intermediary bank had "vast operations" and where there were no allegations that "most, or even many, of [those] banking activities are linked to terrorists.").

173 Gonzalez v. Google LLC, 2 F.4th 871, 903–04 (9th Cir. 2021), *cert. granted*, 143 S. Ct 80 (2022) (No. 21-1333).

174 *Id.* at 904.

175 *Id.* at 904–05.

176 *Kaplan II*, 999 F.3d at 866. *See Gonzalez*, 2 F.4th at 905 (Section 2333(d) case holding that plaintiffs had satisfied the knowledge aspect of prong three of aiding-and-abetting where they alleged that "Google reviewed and approved ISIS videos for monetization and thereby knowingly provided ISIS with financial assistance for its terrorist operations.").

177 *See supra* note 170 and accompanying text.

the illegal activity that the defendant assisted; knowing . . . assistance to the *actual* injury-causing act . . . is unnecessary"[178]—also much like prong two's general awareness requirement.[179]

As for the final issue under prong three—which requires "substantial assistance"—*Halberstam* lays out six elements for determining whether defendant substantially assisted the principal violation: (1) "the nature of the act encouraged"; (2) "the amount and kind of assistance given"; (3) "the defendant's presence or absence at the time of the tort"; (4) "the [defendant's] relation to the tortious actor"; (5) "the defendant's state of mind"; and (6) the "duration of the assistance provided [by defendant]."[180] Notably, plaintiff may establish substantial assistance without proving each element of this test.[181]

Element one—"the nature of the act encouraged"—examines the importance of defendant's aid to the principal violation.[182] For example, "financial support is 'indisputably important' to the operation of a terrorist organization . . . and any money provided to the organization may aid its unlawful goals."[183] Element two—"the amount and kind of assistance given"—"recognizes that not all assistance is equally important" and typically requires that plaintiffs allege with some

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178 Honickman v. BLOM Bank SAL, 6 F.4th 487, 499 (2d Cir. 2021) (emphasis added). *But see* Brill v. Chevron Corp., 804 F. App'x 630, 632 (9th Cir. 2020) (Section 2333(d) case seeming to construe "knowingly" under prong three and holding that plaintiffs "did not sufficiently plead *actual* knowledge by the alleged aider and abettor of the wrong and of his or her role in furthering [the specific terrorist act].") (emphasis added) (internal quotation marks and citation omitted).

179 *See supra* notes 166, 171 and accompanying text. Like general awareness under prong two, plaintiff can present circumstantial evidence to demonstrate defendant's support was knowing under prong three. *See* Lelchook v. Islamic Republic of Iran, 393 F. Supp. 3d 261, 267 (E.D.N.Y. 2019) (holding that providing banking services "in an unusual way under unusual circumstances for a long period of time" supports the inference that defendant provided knowing assistance under prong three); Miller v. Arab Bank, PLC, 372 F. Supp. 3d 33, 47 (E.D.N.Y. 2019) (same).

180 Halberstam v. Welch, 705 F.2d 472, 483–84 (D.C. Cir. 1983). *See Gonzalez*, 2 F.4th at 904 (listing the six *Halberstam* factors as relevant to determining substantial assistance for aiding-and-abetting under Section 2333(d)).

181 *See Honickman*, 6 F.4th at 500 (noting that "[n]o factor [in the *Halberstam* six factor test] is dispositive; the weight accorded to each is determined on a case-by-case basis."). Some courts have supplemented the six *Halberstam* factors with the overarching observation that defendant's conduct "should play a 'major part in prompting the tort' or be 'integral' to the tort to be considered substantial assistance." Cabrera v. Black & Veatch Special Projects Corps., No. 19-cv-3833, 2021 WL 3508091, at *27 (D.D.C. July 30, 2021) (internal citation omitted).

182 *Honickman*, 6 F.4th at 500.

183 *Gonzalez*, 2 F.4th at 905.

specificity the amount and kind of aid defendant provided.[184] For most courts, plaintiffs do not need to allege the assistance was actually received by a designated FTO; instead, it suffices that the "allegations . . . permit a reasonable inference that the defendant recognized the [support] it transferred . . . would be received by the FTO."[185]

Element three—"defendant's presence or absence at the time of the tort"—has been liberally construed by some courts. For example, in one case, the court held that even though defendant, Google, had not been present at the time of ISIS's November 2015 attacks in Paris, France,[186] element three was still satisfied because the relevant tort could be viewed "as ISIS's broader campaign of terrorism, including the dissemination of propaganda on Google's website before and after the Paris Attacks," for which Google was arguably present in some capacity.[187] Other courts have understood the presence requirement to demand defendant's physical presence at the tortious act.[188] At least one court has held that, in some cases, element three should be accorded "little weight," particularly where "the tortious enterprise . . . necessarily required certain activities away from where the tort was committed."[189]

Element four—"the [defendant's] 'relation' to the [tortious actor]"—recognizes that "some persons—e.g., those in positions of authority, or members of a larger group—may possess

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184 *Id.* at 905–07. *See* Keren Kayemeth Leisrael-Jewish Nat'l Fund v. Educ. for a Just Peace in the Middle East, 530 F. Supp. 3d 8, 14 (D.D.C. 2021) (holding that plaintiffs only alleged defendant "provided unspecified amounts of financial and other support" in concluding that element two of *Halberstam's* six factor test for substantial assistance was not satisfied). Some courts have been more flexible on this element, merely requiring that plaintiff's allegations raise a "plausible inference" about the amount of support provided by defendant. *See e.g.*, Bartlett v. Société Générale de Banque Au Liban SAL, 19-CV-00007, 2020 WL 7089448, at *13 (E.D.N.Y. Nov. 25, 2020).

185 *Honickman*, 6 F.4th at 500. This holding—that plaintiff does not need to prove that a designated FTO actually received defendant's support—seems to depend on plaintiff successfully showing defendant satisfied the general awareness requirement under prong two of aiding-and-abetting. *See id.* ("[I]f a plaintiff plausibly alleges the general awareness element, she does not need to also allege the FTO actually received the funds . . . [i]nstead, the inquiry should focus on the amount and type of aid the defendant provided.").

186 *November 2015 Attacks: A Timeline of the Night that Shook the French Capital*, FRANCE 24 (Sept. 8, 2021), https://www.france24.com/en/france/20210908-paris-november-2015-attacks-a-timeline-of-the-night-that-shook-the-city) [https://perma.cc/YS8M-2V4J].

187 *Gonzalez*, 2 F.4th at 906.

188 Atchley v. AstraZeneca UK Ltd. (*Atchley I*), 474 F. Supp. 3d 194, 213 (D.D.C. 2020), *rev'd on other grounds*, 22 F.4th 204 (D.C. Cir. 2022); Atchley v. AstraZeneca UK Ltd. (*Atchley II*), 22 F 4th 204, 222–23 (D.C. Cir. 2022).

189 *Bartlett*, 2020 WL 7089448, at *13.

greater powers of suggestion [vis a vis a terrorist group]."[190] Generally, element four appears to require defendant have some kind of meaningful relationship with the terrorist actor.[191] As some courts have held, while a tenuous relationship will not suffice, element four does not require the relationship be direct.[192]

According to some courts, element five—"the defendant's state of mind"—asks "whether the defendant 'was one in spirit' with the tortfeasor, such that its conduct 'evidences a deliberate long-term intention to participate in an ongoing illicit enterprise.'"[193] Using this approach, courts have held that evidence defendant had *other* intentions—for example, to financially profit from the activities in question—will make it difficult for plaintiffs to satisfy this element.[194] Other courts have gone in a different direction and rejected the notion that defendant must be "one in spirit" with the tortfeasor.[195] Instead, these courts have simply required "[k]nowledge of one's own actions and general awareness of their foreseeable results" to satisfy element five.[196]

Finally, element six—"duration of the assistance provided [by defendant]"—reflects the fact that "[t]he length of time an alleged aider-abettor has been involved with a tortfeasor almost

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190 *Gonzalez*, 2 F.4th at 906.

191 *See id.* at 910 (suggesting that element four— "substantial assistance"—was not satisfied because defendants had, at most, "arms-length [business transactions]" with the organization responsible for the terrorist act). Some courts have concluded that the absence of a meaningful relationship between defendants and the organization responsible for the terrorist act does not "detract[ ] from substantiality." *Atchley II*, 22 F 4th at 223.

192 Honickman v. BLOM Bank SAL, 6 F.4th 487, 500–01 (2d Cir. 2021).

193 *Bartlett*, 2020 WL 7089448, at *14.

194 *E.g.*, *Gonzalez*, 2 F.4th at 906–07. On this view, where defendant intended to profit from its activities, rather than "finance, promote, or carry out" the terrorist organization's violent activities, element five will not be satisfied. *Id.*

195 Bernhardt v. Islamic Republic of Iran, 47 F.4th 856, 872 (D.C. Cir. 2022); *Atchley II*, 22 F.4th at 223–24.

196 *Bernhardt*, 47 F.4th at 872 (alterations in original); *Atchley II*, 22 F.4th at 223. On this approach, some courts have held that the "particularly offensive nature of an underlying offense might also factor in the fifth criterion, the 'state of mind' of the defendant." *Atchley II*, 22 F 4th at 223. Another question arising under element five is the type of conduct that will satisfy this prong. For some courts, element five will not be satisfied where defendant knowingly provided support to a designated terrorist organization, as aiding-and-abetting liability generally "cannot be premised merely on a finding" of such support. Keren Kayemeth Leisrael-Jewish Nat'l Fund v. Educ. For a Just Peace in the Middle East, 530 F. Supp. 3d 8, 15 (D.D.C. 2021). Other courts have taken the opposite route and allowed element five to be satisfied where defendant "knowingly or intentionally supported [the terrorist organization]," seemingly collapsing this requirement with the mens rea for providing material support to FTOs under Section 2339B. *Bartlett*, 2020 WL 7089448, at *14.

certainly affects the quality and extent of their relationship and probably influences the amount of aid provided as well; additionally it may afford evidence of the defendant's state of mind."[197] Element six can be satisfied where plaintiff's allegations describe not "a one-off transaction by a firm unfamiliar with its counterparty, but a set of enduring, carefully cultivated relationships consisting of scores of transactions over a period of years."[198] This element also seems to require that the "duration of defendant's assistance" be in aid of terrorism.[199]

b. *Conspiracy Liability*

Plaintiffs can also bring conspiracy claims under Section 2333(d), though such claims are relatively sparse compared to aiding-and-abetting suits. As with aiding-and-abetting, *Halberstam* is central to the conspiracy inquiry.[200] Under *Halberstam*, a civil conspiracy claim has three elements: (1) "an agreement to do an unlawful act or a lawful act in an unlawful manner"; (2) "an overt act in furtherance of the agreement by someone participating in it"; and (3) "injury caused by the act."[201]

The central difference between a conspiracy and aiding-and-abetting claim is that "a conspiracy involves an *agreement* to participate in wrongful activity."[202] A co-conspirator "need not even have planned or known about the injurious action . . . so long as the purpose of the tortious action was to advance the overall objective of the conspiracy."[203] Unlike aiding-and-abetting, conspiracy claims cannot be premised on defendant's indirect activities with an FTO. Instead, defendant must have *directly* conspired with an FTO that committed, planned, or authorized the attack that caused plaintiff's inju-

197 *Gonzalez*, 2 F.4th at 906 (alterations in original).

198 *Atchley II*, 22 F.4th at 224.

199 Siegel v. HSBC N. Am. Holdings, Inc., 933 F.3d 217, 225 (2d Cir. 2019). At least one court has suggested that a lengthy period of assistance can raise the inference that "substantial sums" were provided, Cabrera v. Black & Veatch Special Projects Corps., No. 19-cv-3833, 2021 WL 3508091, at *28 (D.D.C. July 30, 2021)—a view that potentially allows element six to inform assessments of element two regarding the "the amount and kind of assistance given."

200 18 U.S.C. § 2333 note (Findings and Purpose).

201 Halberstam v. Welch, 705 F.2d 472, 487 (D.C. Cir. 1983). *See Gonzalez*, 2 F.4th at 907 (listing the three *Halberstam* factors for civil conspiracy as applicable to conspiracy claims under Section 2333(d)).

202 Cain v. Twitter, Inc., 17-cv-02506, 2018 WL 4657275, at *3 (N.D. Cal. Sept. 24, 2018) (emphasis added).

203 *Id.*

ries.[204] Also unlike aiding-and-abetting claims, the vast majority of conspiracy claims have failed at the motion to dismiss stage because of the many hurdles to establishing the first prong of a conspiracy—namely, that defendant entered into "an agreement to do an unlawful act or a lawful act in an unlawful manner" with an FTO.[205]

Starting with this first *Halberstam* prong, most judicial decisions evaluating Section 2333(d) conspiracy claims typically focus heavily on this element.[206] According to the courts, "[p]roof of a tacit, as opposed to explicit, understanding is sufficient to show agreement" under this prong.[207] Relevant factors for inferring an agreement include "the relationships between the actors and between the actions (*e.g.*, the proximity in time and place of the acts, and the duration of the actors' joint activity)."[208] Courts also consider other factors in determining whether an agreement is established under *Halberstam's* first prong. The two most salient issues here include whether the object of the conspiracy satisfies Section 2333(d) and what it means for co-conspirators to share the same object or goal.

When it comes to the object of the conspiracy, courts appear to disagree as to the conspiracy's necessary objective. According to some courts, the object of the conspiracy can be aimed solely at material support and need not include the com-

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204 Atchley v. AstraZeneca UK Ltd. (*Atchley II*), 22 F 4th 204, 225 (D.C. Cir. 2022); Kaplan v. Lebanese Canadian Bank SAL (*Kaplan II*), 999 F.3d 842, 855 (2d Cir. 2021). This remains the case even if the FTO used proxies or alter-egos to commit the attack itself. *See* Freeman v. HSBC Holdings PLC (*Freeman II*), 413 F. Supp. 3d 67, 97–98 (E.D.N.Y. 2019), *aff'd on other grounds*, 57 F.4th 66 (2d Cir. 2023).

205 *See, e.g.*, Bernhardt v. Islamic Republic of Iran, No. 18-2739, 2020 WL 6743066 at *8 (D.D.C. Nov. 16, 2020) (dismissing Section 2333(d) claim for conspiracy because plaintiffs did "not allege any facts supporting a conclusion that [certain defendants'] provision of financial services to [third-party banks] and those entities' connections to [an FTO] '[were] so coordinated or monolithic that [d]efendants shared a common purpose or plan with [the FTO]'"), *aff'd*, 47 F.4th 856 (D.C. Cir. 2022); O'Sullivan v. Deutsche Bank AG, No. 17 CV 8709, 2019 WL 1409446, at *9 (S.D.N.Y. Mar. 28, 2019) (dismissing Section 2333(d) claim for conspiracy "because Defendants' alleged provision of material support . . . [was] so far removed from the acts of terrorism that injured Plaintiffs that the Court cannot infer that Defendants shared the common goal of committing an act of international terrorism").

206 *See* Kemper v. Deutsche Bank AG, 911 F.3d 383, 395 (7th Cir. 2018) ("The crux of any conspiracy is an agreement between the co-conspirators.").

207 Freeman v. HSBC Holdings PLC (*Freeman I*), No. 14 CV 6601, 2018 WL 3616845, at *20 (E.D.N.Y. July 27, 2018) (alterations in original), *report and recommendation rejected on other grounds*, 413 F. Supp. 3d 67 (E.D.N.Y. 2019), *aff'd on other grounds*, 57 F.4th 66 (2d Cir. 2023).

208 *Id.*

mission of violent terrorist acts.[209] Other courts disagree with this standard and hold that the language of Section 2333(d) suggests that conspiracy liability only lies where "the secondary tortfeasor [conspired with] the principal tortfeasor in committing . . . an act of international terrorism [as defined in the ATA]" and that "not all conduct that violates a material support statute also satisfies . . . the [ATA] definition of an act of international terrorism."[210]

As for what it means for co-conspirators to *share* in the object of the conspiracy, courts are divided on this issue too. According to one court, "the exact goal of the conspiracy need not be identical for each co-conspirator. . . . [as long as it is] not at 'cross-purposes' from what the other members' goals might have been."[211] So, for example, if one co-conspirator's goal is "based on greed and for financial gain, and not intentionally to fund terror" it may not necessarily be at cross-purposes with the other conspirator's goal to fund terrorist activity.[212] By contrast, another court has held that while "a conspirator [need] not agree to commit or facilitate each and every part of the offense," she must "reach an agreement with the specific intent that [a shared] conspiratorial goal be completed."[213] As that court went on to hold, even where the party "knows that his or her actions might somehow be furthering the conspiracy," that party does not become a co-conspirator where they are "indifferent to the goals of [the] ongoing conspiracy."[214]

The second *Halberstam* prong—which requires "an overt act in furtherance of the common scheme"—is satisfied as long as some member of the conspiracy engages in such an "overt act."[215] Indeed, once the conspiracy is formed, "all of its members are liable for injuries caused by any overt acts committed pursuant to or in furtherance of the conspiracy, regardless of who commits them."[216] Overt acts can include the use of vio-

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209 *Id.* at *24 n.43. *See Kemper*, 911 F.3d at 395 (suggesting that "material support *for terrorism*" alone may be the object of a Section 2333(d) conspiracy).

210 *O'Sullivan*, 2019 WL 1409446, at *9, 9 n.14.

211 *Freeman I*, 2018 WL 3616845, at *25.

212 *Id.*

213 *Kemper*, 911 F.3d at 395 (citing Ocasio v. United States, 578 U.S. 282, 288 (2016)). When it comes to *proving* an agreement, some courts have held that an agreement is established where plaintiff points to "[news] reports and other publicly disseminated information supporting plaintiffs' allegation that, by agreeing to participate in [a] funding scheme, defendants knew, or should have known, that they were potentially [agreeing to] provid[e] material support for terrorism." *Freeman I*, 2018 WL 3616845, at *25.

214 *Kemper*, 911 F.3d at 395 (citation omitted).

215 *Freeman I*, 2018 WL 3616845, at *25 (citation omitted).

216 *Id.* at *27.

lence or the provision or transfer of funds to terrorist organizations.[217] Overt acts are in furtherance of the conspiracy where but for those acts the object of the conspiracy would not have been realized.[218]

The third *Halberstam* prong—which requires an "injury caused by [the] act"—demands that an overt act undertaken by one of the co-conspirators results in injury. Even where courts do not require that the object of a conspiracy be an "act of international terrorism," they do require that the act causing the injury satisfy the definition of international terrorism under Section 2331(1).[219] According to some courts, this can include acts of material support.[220]

3. *Section 1605A*

Section 1605A of the FSIA allows private parties[221] to sue foreign states, their agencies, and instrumentalities, as well as their officials, employees, and agents acting in an official capacity, for terrorism-related activities if the foreign state is designated by the U.S. State Department as a state sponsor of terrorism.[222] Under Section 1605A, plaintiffs can recover punitive damages,[223] but not attorneys' fees.[224] While Section

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217 *Id.*

218 *See id.* at *28 (holding that defendants' overt acts were in "furtherance of [a] conspiracy" aimed at the material support of terrorism where their co-conspirators would have been hampered in their "terror financing" without defendants' support).

219 *Id.* at *22; *see* Freeman v. HSBC Holdings PLC (*Freeman II*), 413 F. Supp. 3d 67, 96 (E.D.N.Y. 2019) (Section 2333(d) conspiracy case holding that "the express terms of [Section 2333(d)] require a . . . plaintiff's injuries to arise from an act of international terrorism that was committed, planned, or authorized by an FTO that has been officially designated as such"), *aff'd on other grounds*, 57 F.4th 66 (2d Cir. 2023).

220 *See Freeman I*, 2018 WL 3616845, at *29 (holding that "[t]he[ ] overt acts [of material support] committed by . . . members of the conspiracy qualify as 'violent acts or acts dangerous to human life' intended to 'intimidate or coerce a civilian population[,]' influence government policy or 'affect the conduct of the government by mass destruction, assassination or kidnapping[,]'" under Section 2331(1)).

221 To bring a claim under Section 1605A, the claimant or victim must be "(1) a national of the United States, (2) a member of the armed forces, or (3) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment." 28 U.S.C. § 1605A(a)(2)(A)(ii). See *infra* note 305 for a more in-depth discussion of the class of plaintiffs who may bring Section 1605A claims.

222 *Id.* § 1605A(c).

223 *Id.*

224 Any prevailing party in a Section 1605A action, whether plaintiff or defendant, could conceivably be entitled to attorneys' fees under Federal Rule of Civil Procedure 54, which allows "[a] claim for attorney's fees and related nontaxable expenses . . . [to] be made by motion unless the substantive law requires those

1605A creates liability for various, specific terrorism-related acts,[225] Section 1605A cases[226] have typically alleged that state sponsors of terrorism provided material support[227]—from technical advice and training to logistical support and financing—to terrorist groups or activities.[228]

While an earlier version of Section 1605A—28 U.S.C. § 1605(a)(7)[229]—was only jurisdictional in nature,[230] Section 1605A is a jurisdictional and substantive statute that both gives U.S. courts the authority to hear cases against state sponsors of terrorism and provides an independent federal cause of action for those claims.[231]

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fees to be proved at trial as an element of damages." FED. R. CIV. P. 54(d)(2). Nevertheless, courts have largely rejected such claims, including from plaintiffs, since there is no basis for recovering attorneys' fees under Section 1605A itself. *See, e.g.*, Kinyua v. Republic of Sudan, 466 F. Supp. 3d 1, 13 (D.D.C. 2020) ("[T]he Court is not aware of any statutory or other basis for the award of attorney's fees."); Gill v. Islamic Republic of Iran, 249 F. Supp. 3d 88, 103 n.8 (D.D.C. 2017) (rejecting plaintiff's request for attorneys' fees).

225 *See infra* note 233 and accompanying text.

226 Because most cases under both Section 1605A and its precursor statute, Section 1605(a)(7), have been brought in the D.C. federal courts, this Article focuses on this body of case law in analyzing judicial interpretations of the statute. See *infra* note 229 for a discussion of Section 1605(a)(7) and its replacement by Section 1605A.

227 Section 1605A uses the same definition of material support used in the Section 2333 and 2339A context. 28 U.S.C. § 1605A(h)(3).

228 *See, e.g.*, Owens v. Republic of Sudan (*Owens I*), 826 F. Supp. 2d 128, 148–51 (D.D.C. 2011) (discussing a Section 1605A case in which plaintiffs alleged Iran and Sudan provided material support, including training and technical advice, as well as safe haven, to Al Qaeda); Collett v. Socialist Peoples' Libyan Arab Jamahiriya, 362 F. Supp. 2d 230, 233 (D.D.C. 2005) (discussing a Section 1605(a)(7) case against Libya in which plaintiffs alleged it provided material support, which seems to have been financial, to a terrorist organization).

229 Section 1605(a)(7) was passed in 1996 as part of AEDPA. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat 1214, 1241. In 2008, Congress replaced Section 1605(a)(7) with Section 1605A. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a)(1), 122 Stat. 3, 338-44 (codified at 28 U.S.C. § 1605A). Overall, Section 1605A is a "much more expansive provision [than Section 1605(a)(7)], one which provides . . . many other statutory entitlements" to plaintiffs. *In re* Islamic Republic of Iran Terrorism Litigation, 659 F. Supp. 2d 31, 40 (D.D.C. 2009).

230 Owens v. Republic of Sudan (*Owens II*), 864 F.3d 751, 764 (D.C. Cir. 2017), *vacated and remanded on other grounds*, Opati v. Republic of Sudan, 140 S. Ct. 1601 (2020).

231 *Opati*, 140 S. Ct. at 1606. Because there was no independent cause of action under Section 1605(a)(7), plaintiffs had to bring their claims under state or foreign law. *Owens I*, 826 F. Supp. 2d at 151. Section 1605A remedied this issue, though plaintiffs may still bring their substantive claims under state or foreign law if they so choose. Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52, 81 n.15 (D.D.C. 2010). The federal cause of action under 1605A(c) arguably makes it easier, however, for plaintiffs to succeed on their claims by allowing federal courts to rely on a uniform body of tort law, which is often more forgiving to plaintiffs. *See infra* notes 241–245 and accompanying text. By contrast, under Section

Under Section 1605A's jurisdictional provision:

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.[232]

Under Section 1605A's substantive provision:

> [a] foreign state that is or was a state sponsor of terrorism . . . and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable . . . for personal injury or death caused by acts described in [the jurisdictional] subsection . . . of that foreign state, or of an official, employee, or agent of that foreign state.[233]

When it comes to construing Section 1605A's jurisdictional prong, courts have taken a relatively plaintiff-friendly approach. For example, plaintiffs can establish jurisdiction under Section 1605A as long as they show that defendant provided material support that proximately caused the terrorist violence and injuries in question,[234] without needing to show that defendant's material support was the factual cause of the

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1605(a)(7), plaintiffs' claims would sometimes fail because of the onerous requirements of some state and foreign tort laws. *Owens I*, 826 F. Supp. 2d at 147.

232 28 U.S.C. § 1605A(a).

233 *Id.* § 1605A(c).

234 The threshold for establishing proximate causation under Section 1605A's jurisdictional prong is arguably low, as reflected in one court's description of the various avenues for establishing it in 1605A material support cases:

> [Material] support has been found to have contributed to the actual terrorist act that resulted in a plaintiff's damages when experts testify that the terrorist acts could not have occurred without such support . . . ; or that a particular act exhibited a level of sophistication in planning and execution that was consistent with the advanced training that had been supplied by the defendant state . . . ; or when the support facilitated the terrorist group's development of the expertise, networks, military training, munitions, and financial resources necessary to plan and carry out the attack.

Gates v. Syrian Arab Republic, 580 F. Supp. 2d 53, 67 (D.D.C. 2008) (citations omitted), *aff'd*, 646 F.3d 1 (D.C. Cir. 2011). *See also* Est. of McCarty v. Islamic Republic of Iran, Civ. Case No. 19-853, 2020 WL 7696062, at *4 (D.D.C. Dec. 28, 2020) (noting that "most courts" have interpreted Section 1605A's jurisdictional causation requirement "loosely").

specific terrorist act or injury.[235] As for fault, Section 1605A's jurisdictional requirement does not have its own independent fault component.[236] As a result, most material support cases under Section 1605A do not explicitly address fault as part of the jurisdictional analysis.[237] The material support cases that *have* considered the issue have rejected any requirement under the jurisdictional clause that plaintiffs establish defendant's fault,[238] including its specific intent to support a particular terrorist act.[239] Notably, in determining that Section 1605A's jurisdictional prong requires neither specific intent nor factual causation, some courts have cited to leading Section 2333(a) case law.[240]

Much like Section 1605A's jurisdictional prong, judicial approaches to 1605A's substantive cause of action also reflect a pro-plaintiff posture. To bring a substantive claim under Section 1605A, plaintiff must plead the elements of an underly-

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235 *E.g.*, Owens v. Republic of Sudan (*Owens II*), 864 F.3d 751, 799 (D.C. Cir. 2017), *vacated and remanded on other grounds*, Opati v. Republic of Sudan, 140 S. Ct. 1601 (2020); Fritz v. Islamic Republic of Iran, 320 F. Supp. 3d 48, 85 (D.D.C. 2018).

236 *See* Braun v. Islamic Republic of Iran, 228 F. Supp. 3d 64, 75–77 (D.D.C. 2017) (describing Section 1605A's jurisdictional requirements without including a fault requirement); Stansell v. Republic of Cuba, 217 F. Supp. 3d 320, 337–39 (D.D.C. 2016) (same).

237 To the extent fault *is* part of the jurisdictional analysis, it depends upon the predicate act(s) of terrorism defendant engaged in under Section 1605A(a). These predicate acts include "act[s] of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act." 28 U.S.C. § 1605A(a). So, for example, the definition of extrajudicial killing requires fault (namely *deliberate* killing) and may be included in the jurisdictional analysis. *See* Thuneibat v. Syrian Arab Republic, 167 F. Supp. 3d 22, 35–36 (D.D.C. 2016) (analyzing Section 1605A's jurisdictional requirements including a fault requirement for extrajudicial killing).

238 While some material support cases suggest fault *is* part of the jurisdictional analysis, these decisions do not address or explicitly state that a showing of fault is required. *See* Karcher v. Islamic Republic of Iran, 396 F. Supp. 3d 12, 54–58 (D.D.C. 2019) (holding that Section 1605A's jurisdictional clause was satisfied in material support case against Iran because Iran had the "purpose" of facilitating specific acts of terrorist violence, but not explicitly stating that such intent is required); Lee v. Islamic Republic of Iran, 518 F. Supp. 3d 475, 490–91(D.D.C. 2021) (same).

239 *E.g.*, *Owens II*, 864 F.3d at 798–99; Doe v. Syrian Arab Republic, 18-cv-0066, 2020 WL 5422844, at *11 (D.D.C. Sept. 10, 2020); Hamen v. Islamic Republic of Iran, 401 F. Supp. 3d 85, 104 (D.D.C. 2019). The decision to eschew a jurisdictional fault requirement in material support cases is likely due to the absence of a fault requirement as part of the definition of material support itself. *See supra* note 101 and accompanying text.

240 *See, e.g.*, *Owens II*, 864 F.3d at 798–99 (citing Boim v. Holy Land Found. for Relief and Dev. (*Boim II*), 549 F.3d 685 (7th Cir. 2008)—a key case construing the tort law requirements of Section 2333(a)—in holding that defendants do not need to specifically intend to support or have their support be "directly traceable" to a particular act of terrorist violence to run afoul of Section 1605A(a)).

ing tort,[241] such as battery, wrongful death, or intentional infliction of emotional distress.[242] In considering these tort causes of action, courts have adopted the same flexible approach to causation taken under Section 1605A's jurisdictional provision and required only proximate, but not factual, causation.[243] As for the other elements of a substantive tort claim brought under Section 1605A, courts have been relatively forgiving in determining whether those elements have been satisfied,[244] especially when it comes to issues of fault.[245]

Because of these flexible approaches to jurisdiction and liability, as well as the fact that many Section 1605A cases are default judgements,[246] most suits brought under Section

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241 *See* Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52, 73 (D.D.C. 2010) (explaining that Section 1605A's substantive cause of action requires that plaintiffs "prove a [tort] theory of liability under which defendants cause the requisite injury or death").

242 In determining whether plaintiffs have successfully articulated a substantive claim under Section 1605A(c), federal courts are not permitted to fashion new law and instead must rely on "well-established principles of law, such as those found in the Restatement . . . of Torts and other leading treaties, as well as those principles that have been adopted by the majority of state jurisdictions." Roth v. Islamic Republic of Iran, 78 F. Supp. 3d 379, 399 (D.D.C. 2015).

243 Spencer v. Islamic Republic of Iran, 71 F. Supp. 3d 23, 29 (D.D.C. 2014); Owens v. Republic of Sudan, 71 F. Supp. 3d 252, 256 n.2 (D.D.C. 2014).

244 As one example, courts have often been flexible in construing claims for intentional infliction of emotional distress ("IIED") brought by family members of victims of terrorism under Section 1605A(c). Amongst other things, such claims typically require the family member be present at the time their loved one was harmed. RESTATEMENT (SECOND) OF TORTS § 46(2)(a) (AM. L. INST. 1965). Under Section 1605A(c), however, courts have often done away with this requirement and allowed IIED claims to proceed even where family members were not present at the scene of attack. *E.g.*, Braun v. Islamic Republic of Iran, 228 F. Supp. 3d 64, 81–82 (D.D.C. 2017); Flanagan v. Islamic Republic of Iran, 87 F. Supp. 3d 93, 115 (D.D.C. 2015).

245 Assault and battery claims are exemplary of the flexible, plaintiff-friendly approach courts have often taken to questions of fault under Section 1605A(c). As intentional torts, both assault and battery require defendant intend to cause a harmful contact of the other or a third person or imminent apprehension of such contact. *See* RESTATEMENT (SECOND) OF TORTS § 13 (AM. L. INST. 1965) (battery); RESTATEMENT (SECOND) OF TORTS § 21(1) (AM. L. INST. 1965) (assault). Rather than evaluating the particular facts of each case, courts in Section 1605A(c) cases have often held that the intent requirement for assault and battery is satisfied, as a matter of law, because "acts of terrorism are, by their very nature, intended to harm and to terrify by instilling fear of further harm." Worley v. Islamic Republic of Iran, 75 F. Supp. 3d 311, 336 (D.D.C. 2014); *accord* Gill v. Islamic Republic of Iran, 249 F. Supp. 3d 88, 101–02 (D.D.C. 2017).

246 *See* DAVID P. STEWART, THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 109 (2d ed. 2018) (noting that the vast majority of 1605A cases are default judgments because "neither the foreign state nor the individuals named as defendants appear or answer"). In general, to issue a default judgement under Section 1605A, courts must establish, to their satisfaction, that the elements of a Section 1605A suit have been satisfied, including that the defendant is a designated state sponsor of terrorism. 28 U.S.C. § 1608(e). In determining whether to

1605A have been successful,[247] including ones raising allegations that are dubious at best.[248]

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issue a default judgment, a court cannot "accept a complaint's unsupported allegations as true." Spencer v. Islamic Republic of Iran, 922 F. Supp. 2d 108, 109 (D.D.C. 2013). Nevertheless, "the quantum and quality of evidence that might satisfy a court [in a Section 1605A default judgment] can be less than that normally required [in an adversarial proceeding]." Owens v. Republic of Sudan (*Owens II*), 864 F.3d 751, 785 (D.C. Cir. 2017) (internal citations omitted), *vacated and remanded on other grounds*, Opati v. Republic of Sudan, 140 S. Ct. 1601 (2020).

247 *See, e.g.*, Belkin v. Islamic Republic of Iran, 667 F. Supp. 2d 8, 20 (D.D.C. 2009) (default judgment holding that Iran was subject to liability under Section 1605(a)(7) for providing material support to terrorist groups); Rux v. Republic of Sudan, 495 F. Supp. 2d 541, 569 (E.D. Va. 2007) (default judgment holding that Sudan was subject to liability under 1605(a)(7) for providing material support to a terrorist group). *See also* Jeewon Kim, *Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act*, 22 BERKELEY J. INT'L L. 513, 519 (2004) ("Most plaintiffs who bring suit against state sponsors of terrorism easily win default judgments."). Despite their success in obtaining default judgments, plaintiffs have often struggled to enforce those judgments. *See infra* note 290 and accompanying text.

248 For example, Section 1605A plaintiffs have successfully alleged that Iran provided material support to al-Qaeda and is, therefore, liable for the 9/11 attacks. *See In re* Terrorist Attacks on Sept. 11, 2001, 03-CV-9848, 2011 WL 13244047, at *39–40 (S.D.N.Y Dec. 22, 2011) (default judgement holding that the "Islamic Republic of Iran provided general material support [and] resources to al Qaeda" and also "provided direct support to al Qaeda specifically for the attacks on the World Trade Center, the Pentagon, and Washington, DC (Shanksville, Pennsylvania), on September 11, 2001"). These allegations, however, contradict several in-depth and independent investigations of this issue. First, they are inconsistent with conclusions contained in the official report of the 9/11 Commission. The 9/11 Commission was established by federal statute to examine "the facts and circumstances relating to the terrorist attacks of September 11, 2001." NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 171 (2004). As the commission's report concluded, "[i]t does not appear that any government other than the Taliban financially supported al Qaeda before 9/11, although some governments have contained al Qaeda sympathizers who turned a blind eye to [its] fundraising activities." *Id.* As for Iran, the commission concluded that there is "no evidence that Iran . . . was aware of the planning for what later became the 9/11 attack." *Id.* at 241. To the extent that Iran provided any "support" to al Qaeda in connection with 9/11, it was in the form of "facilitat[ing] the transit of al Qaeda members into and out of Afghanistan before 9/11 . . . some of . . . [whom] were future 9/11 hijackers." *Id.* As the commission observed, "[a]t the time of their travel through Iran, the al Qaeda operatives themselves were probably not aware of the specific details of their future operations." *Id.* While the commission noted that "this topic requires further investigation by the U.S. government," the only presidential administration to actually accuse Iran of involvement in 9/11—the administration of President Donald Trump—was criticized by experts for doing so. *Id.*; *see* Nicholas Wu, *Pence Says Iran's Qasem Soleimani Aided 9/11 Hijackers. Experts Say That's Not True*, USA TODAY (Jan. 7, 2020), https://www.usatoday.com/story/news/politics/2020/01/04/mike-pence-says-iran-leader-qasem-soleimani-assisted-9-11-hijackers/2812917001/ [https://perma.cc/7E67-74XM] (reporting on then-Vice President Mike Pence's attempt to justify U.S. assassination of an Iranian official by claiming the official supported the 9/11 hijackers and quoting various experts who refuted that claim and noted Iran was not part of 9/11). Second, plaintiffs' allegations against Iran

4. *Section 1605B*

Section 1605B—which was added to the FSIA by JASTA[249]—provides that:

> [a] foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by—(1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state or any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.[250]

The text of Section 1605B generally does not permit plaintiffs to obtain punitive damages or attorneys' fees[251]—though particular plaintiffs may be eligible for both in certain cases.[252] Unlike Section 1605A, Section 1605B does not require that foreign sovereign defendants be designated state sponsors of terrorism, nor does it allow claims to be brought against the officials, employees, or agents of defendant states.[253]

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also contradict other studies showing that Iran and al Qaeda did not form close ties before or in the years following 9/11. *See* NELLY LAHOUD, NEW AM., AL-QA'IDA'S CONTESTED RELATIONSHIP WITH IRAN (2018), *Study Questions Iran-al Qaeda Ties, Despite U.S. Allegations*, REUTERS (Sept. 7, 2018), https://www.newamerica.org/international-security/reports/al-qaidas-contested-relationship-iran/introduction [https://perma.cc/HW5N-RUHN] (report based on hundreds of al Qaeda documents concluding that al Qaeda viewed Iran as a hostile enemy and finding no evidence Iran and al Qaeda cooperated in carrying out terrorist attacks). In total, these investigations suggest that Section 1605A claims holding Iran liable for 9/11 are, at the very least, factually dubious and largely unsupported.

249 Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(a)(1)–(4), 130 Stat. 852, 854 (2016) (codified at 18 U.S.C. § 2333 note (Findings and Purpose)).

250 28 U.S.C. § 1605B(b).

251 *Id.* § 1605B. As with Section 1605A, any prevailing party could be entitled to attorneys' fees under Federal Rule of Civil Procedure 54, though Section 1605A case law suggests the likelihood of this is slim. *See supra* note 224.

252 While Section 1605B claims are not limited to U.S. nationals, the statute specifically allows "national[s] of the United States" to bring substantive claims under Section 2333 against foreign government defendants (something that is not generally allowed per 18 U.S.C. § 2337). 28 U.S.C. § 1605B(c); see *infra* note 305 for a more in-depth discussion of the class of plaintiffs who may bring Section 1605B claims. As such, Section 1605B plaintiffs opting for this route are theoretically entitled to the treble damages and attorneys' fees provided by that statute. *See supra* note 98 and accompanying text.

253 While officials, employees, or agents of defendant states cannot be sued under Section 1605B, since the FSIA's definition of a "foreign state" applies to that statute, agencies and instrumentalities of states *can* be sued under Section 1605B. *See supra* note 36 for the FSIA's definition of "foreign state."

As with the other private enforcement statutes, material support is at the heart of Section 1605B.[254] While liability under the statute is not limited to material support, Section 1605B is primarily designed to allow plaintiffs to target foreign sovereigns providing such support to terrorist groups or activities.[255] This is reflected in the Section 1605B case law. Though still in its infancy, 1605B cases have largely focused on material support claims, including financing, the provision of weapons, and logistical support given to terrorist groups or activities.[256]

Unlike Section 1605A, Section 1605B is primarily jurisdictional in nature.[257] Jurisdiction will not, however, lie under Section 1605B where defendant is accused of "an omission or a tortious act or acts that constitute mere negligence."[258] While, unlike Section 1605A, establishing defendant's fault may be part of Section 1605B's jurisdictional analysis, plaintiff can make this showing by demonstrating defendant "knowingly or with deliberate indifference provided material support to [terrorists]."[259] As with Section 2333(a) and 1605A claims, there is no need to show that defendant specifically intended to further a particular terrorist act.[260] Also like Sections 2333 and 1605A, plaintiff need only show that defendant's material sup-

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254 An earlier version of Section 1605B incorporated the same definition of material support used by Sections 1605A and 2333. 162 Cong. Rec. S2845-01 at S2846-48 (May 17, 2016). While this language was removed from the final statute, and although available judicial decisions have not explicitly addressed the issue, the definition of material support used in Section 2333 and 1605A cases likely applies to Section 1605B.

255 18 U.S.C. § 2333 note (Findings and Purpose).

256 *In re* Terrorist Attacks on Sept. 11, 2001, 298 F. Supp. 3d 631, 646–48 (S.D.N.Y. 2018).

257 *See id.* at 643 (noting that Section 1605B "does not itself define what acts are considered tortious for purposes of satisfying [it]"). Even though it does not create an independent cause of action, as mentioned earlier, Section 1605B allows U.S. nationals to bring substantive claims under Section 2333. *See supra* note 252. This means judicial approaches to Section 2333 ostensibly apply to those claims. While foreign nationals cannot take advantage of this part of Section 1605B, the statute does not seem to prevent them from bringing 1605B claims based on state tort law or other substantive laws that are not limited to U.S. nationals.

258 28 U.S.C. § 1605B(d).

259 *In re Terrorist Attacks on Sept. 11, 2001*, 298 F. Supp. 3d at 647. *See also id.* at 643 (noting that JASTA suggests the "knowing or deliberately indifferent provision of material support to terrorists" gives rise to Section 1605B jurisdiction). It is worth noting that the case law on this point is sparse and may evolve to align more with Section 1605A over time.

260 *See id.* at 647 (holding that plaintiffs failed to demonstrate that a Saudi-owned entity had provided material support that directly or indirectly contributed to the 9/11 attacks but not requiring plaintiffs to show it was defendant's purpose or intent to facilitate those attacks).

port was the proximate—and not the factual—cause of terrorist violence.[261]

Given the statute's recent passage and narrow focus so far,[262] it is difficult to say how successful Section 1605B suits will be over the long-term. In the most important and relevant line of litigation involving Section 1605B, *In re Terrorist Attacks on September 11, 2001*, plaintiffs' claims against the foreign state defendant have survived the motion to dismiss phase, as of this writing.[263] In other cases, however, plaintiffs' claims have been dismissed for failure to satisfy 1605B's elements.[264]

The next part of this Article builds on Part I's descriptive account of Sections 2333, 1605A, and 1605B to demonstrate how these statutes benefit the U.S. administrative state. These benefits are a key characteristic of all private enforcement regimes.[265] As Part II reveals, the ATA's private right of action as well as the FSIA's terrorism exceptions, realize these upsides in ways that underscore their status as private enforcement schemes.

II
NATIONAL SECURITY'S BENEFITS TO THE AMERICAN ADMINISTRATIVE STATE

While administrative approaches to national security are not unique to the post-9/11 period, they have become more central to the U.S. national security state since the 9/11 attacks.[266] During this time, various federal agencies have assumed substantial and increasing responsibility for designing

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261 *Id.* at 644–46. Section 1605B's proximate causation requirement is based on Section 1605A. *Id.* at 645–46.

262 As discussed below, Section 1605B was expressly passed to apply to the 9/11 attacks, and so far has been successfully used only in 9/11 cases. *See infra* Part III.B.2.c and notes 263–264 and accompanying text. It remains possible that Section 1605B could be applied to non-9/11 cases in future.

263 *See In re Terrorist Attacks on Sept. 11, 2001*, 298 F. Supp. 3d at 640 (holding that plaintiffs' allegations "narrowly articulate a reasonable basis for this Court to assume jurisdiction [under Section 1605B] over Plaintiffs' claims against Saudi Arabia" related to the 9/11 attacks and granting plaintiffs limited jurisdictional discovery). In the same decision, the court dismissed claims brought against a Saudi charity established and controlled by the Saudi government. *Id.*

264 While also failing to satisfy the prima facie elements of Section 1605B, these cases have been unrelated to the 9/11 attacks—a fact that may further explain their failure. *See*, *e.g.*, Bloomfield v. Kingdom of Saudi Arabia, 19-CV-04213, 2021 WL 3640716, at *3 (S.D. Tex. June 1, 2021) (holding that Section 1605B claim that did not relate to the 9/11 attacks failed because the relevant act of international terrorism occurred outside the United States).

265 *See infra* note 272 and accompanying text.

266 Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1070 (2020).

and implementing national security measures targeting individuals and entities.[267] These agencies include the Department of Defense, the State Department, the Department of Homeland Security, the National Security Council, the Central Intelligence Agency, the National Security Agency, various divisions of the Department of Justice (DOJ),[268] and the Treasury Department,[269] amongst others.[270]

As this Part demonstrates, private litigation brought under Sections 2333, 1605A, and 1605B benefits and supports the national security work of these administrative departments in various ways.[271] As with other private enforcement mechanisms, these benefits include: (1) providing more resources to enforce public laws and policies; (2) shifting the cost of regulation to the private sector; (3) harnessing private information to identify regulatory violations; (4) encouraging legal and policy innovations; and (5) emitting a clear and consistent signal that violations will be prosecuted.[272]

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267 *Id.* at 1065. These measures include individualized economic sanctions, travel restrictions, detentions, and extrajudicial killings to name a few. *Id.*

268 The primary DOJ division dealing with national security-related issues is the National Security Division, which includes various component divisions like the Office of Justice for Victims of Overseas Terrorism and Office of Intelligence, as well as the FBI. *See National Security Division Organization Chart*, U.S. DEP'T OF JUST., https://www.justice.gov/nsd/about-division [https://perma.cc/2M8T-LHNT] (last visited Feb. 3, 2023) (describing offices that compose the DOJ's National Security Division); *Leadership & Structure*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/about/leadership-and-structure/ [https://perma.cc/9H5Z-5EAR] (last visited Feb. 3, 2023) (detailing the activities of the FBI's national security branch).

269 *See* U.S. DEP'T OF TREASURY, DEFENDING NATIONAL SECURITY: FOUR YEARS OF COMMITMENT TO COUNTERTERRORISM AND FINANCIAL INTELLIGENCE (2021), https://home.treasury.gov/system/files/136/TFI-Booklet.pdf [https://perma.cc/3E5V-FCVQ] (detailing the Treasury Department's national security-related work).

270 Robert Knowles, *Warfare as Regulation*, 74 WASH. & LEE L. REV. 1953, 1955–56 (2017).

271 While the government's overall counterterrorism policies are likely to be broadly supported by national security's private enforcement, these suits most directly support the FBI and DOJ's investigation and prosecution of terrorism-related activities; the State Department's designation of FTOs and state sponsors of terrorism; and the Treasury Department's efforts relating to economic and trade sanctions. Part III.A explores in more detail the ways in which national security's private enforcement supports these specific administrative tasks.

272 This list of benefits is drawn from the work of various scholars analyzing the upsides of private enforcement. *E.g.*, Burbank, Farhang and Kritzer, *supra* note 6, at 662; Sant'Ambrogio, *supra* note 63, at 437–39 (2019); Matthew C. Stephenson, *Public Regulation of Private Enforcement: the Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 107–13 (2005); Glover, *supra* note 2, at 1153–1156. While some of this analysis does not specify who or what benefits from private enforcement, some of this scholarship explicitly focuses, at least in part, on government regulators. *See, e.g.*, Stephenson, *supra* note 272, at

In describing the administrative benefits of private national security suits, this Part not only underscores their private enforcement credentials. It also reinforces and supports scholarship highlighting the administrative aspects of the national security state. While this area of inquiry is relatively new, there is a growing body of work arguing that national security ought to be seen as part of the Executive's administrative framework and as a species of federal regulation.[273] According to this view, thinking in administrative terms about national security aligns with the changing nature of the national security state—including its increasing domestic focus—and explains recent trends—like the individuation of national security practices and delegation of presidential powers to administrative agencies involved in national security rulemaking and adjudication.[274] The existence of private enforcement within national security, as well as the benefits flowing from it to the administrative state provide further evidence of national security's administrative character.

The rest of Part II demonstrates how private national security litigation affirmatively supports the administrative state, taking each of the five factors listed above in order. Given this focus, other benefits, including broad social benefits and benefits to plaintiffs, that flow from all private enforcement regimes—including national security's private enforcement—are not explored here. It is also worth noting that, even though Section 2333, 1605A and 1605B litigation harnesses many of the advantages of private enforcement, this does not mean those efforts ought to be celebrated or promoted. Indeed, as briefly mentioned at the end of Part II[275] and discussed in more detail in Part III, there are reasons to be concerned about national security's private enforcement.

107–13 (describing those aspects of private enforcement that benefit government regulators as well as society at large).

273 *See, e.g.*, Robert Knowles, *Delegating National Security*, 98 WASH. U. L. REV. 1117 (2021) (examining how administrative agencies regulate national security, why this regulation has been insulated from libertarian critiques of the administrative state, and the effect of these realities on the administrative state as a whole); Chachko, *supra* note 266 (describing how and why the administrative state has become increasingly involved in national security since 9/11); Knowles, *supra* note 270 (examining the U.S. government's national security activities as a form of administrative, regulatory action); Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883 (2014) (describing and critiquing the rise of national security rulemaking by the federal government's administrative agencies).

274 Knowles, *supra* note 270, at 1958–59; Chachko, *supra* note 266, at 1065–68.

275 *See infra* notes 339–350 and accompanying text.

A. Providing More Resources to Enforce Public Laws & Policies

Starting with the first benefit to the administrative state—providing more resources to enforce public laws and policies—private enforcement is generally understood to overcome resource limitations on the government's regulatory enforcement capacity.[276] In particular, private enforcement regimes help ameliorate these resource constraints by mobilizing private parties, as well as their financial resources, to enforce public laws and policies in numbers that may dwarf a particular agency's capacity.[277]

This benefit is realized by both the ATA's private right of action and the FSIA's terrorism exceptions. Admittedly, the national security state is awash in resources. It employs millions of individuals and consumes over half of the federal government's discretionary spending.[278] Investigating and prosecuting national security and terrorism-related cases is also a top priority for departments like the DOJ.[279] That being said, limits on tax revenue mean public funds are not infinitely available[280] even when it comes to national security. As with other private enforcement mechanisms, national security's private enforcement expands the range of resources available for enforcing the government's national security laws and policies by creating enforcement opportunities for a host of actors.

Indeed, a critical component of the U.S. government's counterterrorism strategy involves increasing and expanding the range of actors that can enforce its national security priorities. As John Carlin, former Assistant Attorney General for National Security leading the DOJ's National Security Division,[281] has noted:

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276 *See* Glover, *supra* note 2, at 1153–55; Burbank, Farhang and Kritzer, *supra* note 6, at 662–63; Sant'Ambrogio, *supra* note 63, at 437.

277 Burbank, Farhang and Kritzer, *supra* note 6, at 662–63.

278 Knowles, *supra* note 270, at 1956.

279 *See* DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS § 24.2 (2021) (noting that since 9/11 the FBI has made "collecting and coordinating intelligence about terrorist threats in the United States . . . its highest priority"); U.S. DEP'T OF JUST., NAT'L SECURITY DIV., FY 2021 PERFORMANCE BUDGET: CONGRESSIONAL JUSTIFICATION 1 (noting that "counter[ing] the threat of terrorism [is] the Department of Justice's (DOJ) top priority"), https://www.justice.gov/doj/page/file/1246336/download [https://perma.cc/D4F5-NDAM].

280 *See* Burbank, Farhang and Kritzer, *supra* note 6, at 663.

281 *See National Security Division Organization Chart*, *supra* note 268 for a description of the National Security Division and its organizational structure. The DOJ's National Security Division has primary responsibility for litigating terrorism cases in U.S. courts. 28 C.F.R. § 0.72(a)(7)–(8) (2021).

> [a]s practiced at DOJ, national security law goes beyond the use of one set of tools or body of law. It is cross-disciplinary—encompassing a practical, problem-solving approach that uses all available tools, and draws upon all available partners, in a strategic, intelligence-driven, and threat-based way to keep America safe.[282]

While Carlin does not specifically address the role of private litigants, the "available partners" he mentions include the private sector.[283] By providing another set of private actors to enforce the prohibition on material support to terrorism or terrorist entities, national security's private enforcement supplements the "cross-disciplinary" approach Carlin describes.

In addition to this, the private enforcement of national security extends these supplemental enforcement resources into areas where the administrative state's national security-related enforcement capacity is murkier, specifically when it comes to prosecuting and/or suing foreign governments in terrorism-related matters.[284]

B. Shifting the Cost of Regulation to the Private Sector

This brings us to the second way in which private enforcement benefits the administrative state—by shifting some of the costs of regulation onto the private sector. Because private enforcement regimes are "self-funding," they allow Congress to

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282 John P. Carlin, *Detect, Disrupt, Deter: A Whole-of-Government Approach to National Security Cyber Threats*, 7 HARV. NAT'L SEC. J. 391, 396 (2016).

283 *See id.* at 396, 430–35 (detailing private sector and government collaboration in dealing with cyber security threats).

284 While the U.S. government has the power to sanction foreign countries under various statutes, the legal basis for it to directly prosecute or sue foreign states in terrorism-related matters is less clear. *See* Meredith Rathbone, Peter Jeydel, and Amy Lentz, *Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Laws*, 44 GEO. J. INT'L L. 1055 (2013) (describing various public sanctions laws and programs targeting foreign countries). Though the FSIA—which provides the sole grounds for civil suits against foreign states, their agencies, or instrumentalities—may not preclude criminal prosecutions against state-owned companies or organizations, "foreign states themselves are not generally subject to prosecution in domestic courts." Chimène I. Keitner, *Prosecuting Foreign States*, 61 VA. J. INT'L L. 221, 226 (2021). Recently, the Supreme Court granted cert in a case that may definitely settle at least some of the outstanding issues relating to criminal prosecution of foreign sovereigns. *See* Türkiye Halk Bankasi, A.S. v. United States, 143 S. Ct. 82 (2022). As for bringing terrorism-related civil suits, by its express terms, Section 1605A does not include the U.S. government amongst the range of plaintiffs that can sue under the statute. *See supra* note 221. While 1605B is less clear regarding the class of eligible plaintiffs, it is uncertain whether the government can sue using this provision either. *See supra* notes 252, 305.

reduce the costs associated with the public enforcement of law and policy.[285]

Closely related to the issue of cost is the issue of efficiency, which has also been described as a potential benefit of private enforcement.[286] Specifically, private enforcement provides three potential efficiency benefits. First, as some have argued, private parties affected by a regulatory violation may "sometimes be better at weighing the costs and benefits of bringing an enforcement action—at least when the social interest in bringing suit is strongly correlated with the private interest of potential plaintiffs."[287] Second, by relying on private enforcement, government agencies can "devote more of [their] scarce resources to detecting and prosecuting those types of violations where private plaintiffs lack sufficient incentives or resources, or where the government has a particularly strong interest in conducting enforcement efforts and controlling any resulting litigation."[288] Finally, "centralized public enforcement bureaucracies frequently suffer from diseconomies of scale, given multiple layers of decision and review and the temptation to adopt overly rigid norms in order to reduce administrative costs—problems that generally do not affect private plaintiffs to the same extent."[289]

The private enforcement of national security largely realizes these gains. Cases brought under the ATA's private right of action and the FSIA's terrorism exceptions provide cost savings since they are not funded by the U.S. government. And while Congress has created victims' funds particularly for Section 1605A plaintiffs facing judgement enforcement challenges,[290] those funds have been designed to rely less on U.S.

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285 Burbank, Farhang and Kritzer, *supra* note 6, at 663.

286 *See* Stephenson, *supra* note 272, at 107–09 (arguing that private enforcement increases the efficiency of regulatory enforcement).

287 *Id.* at 108. *Cf.* Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2200–01 (2010) (arguing that private enforcement is less efficient than public enforcement because "a private enforcer is incentivized to maximize her private welfare, which we can expect to diverge from social welfare in significant ways").

288 Stephenson, *supra* note 272, at 109. Private enforcers may also be more efficient at detecting violations because they are personally affected by them—an issue discussed in Part II.C of this section. *Id.* at 108.

289 *Id.* at 108 (internal quotation marks omitted).

290 Despite often winning Section 1605A judgments, plaintiffs have historically faced challenges executing on those judgments because state sponsors often do not appear in 1605A cases or recognize the validity of the judgments against them, *and* because their assets are typically outside the United States. *See In re* Islamic Republic of Iran Terrorism Litigation, 659 F. Supp. 2d 31, 62 (D.D.C. 2009) (noting "the most fundamental problem confronting [1605(a)(7)] actions: the inability of plaintiffs to execute their civil judgments against [state sponsors of

tax-payer dollars and more on fines and other assets seized by the government in terrorism-related matters.[291] Similarly, other government-led efforts to compensate Section 1605A plaintiffs have been seeded from monies paid by state sponsors of terrorism pursuant to bilateral agreements with the United States.[292]

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terrorism]" which usually have few assets in the United States); Kim, *supra* note 247, at 519 (noting challenges facing 1605(a)(7) plaintiffs in enforcing judgments against state sponsors of terrorism). There are, however, exceptions to this trend. *See* Peterson v. Islamic Republic of Iran, 758 F.3d 185, 188 (2d Cir. 2014) (affirming lower court judgment ordering turnover of $1.75 billion in assets belonging to Iran's central bank to plaintiffs holding judgments under Section 1605A's predecessor statute), *aff'd sub nom*, Bank Markazi v. Peterson, 578 U.S. 212 (2016). It is worth noting these particular judgment enforcement challenges are separate from challenges the Executive branch itself has created for plaintiffs attempting to enforce Section 1605A judgments. *See infra* notes 415, 420.

291 While monies have also been paid from the U.S. Treasury's own pocket, congressionally-created funds for Section 1605A plaintiffs have largely been seeded with non-taxpayer money, either by design or in practice. For example, the first victims' fund, which was created through the Victims of Trafficking and Violations Protection Act ("VTVPA") in 2000, was mostly seeded with the assets of designated state sponsors of terrorism or intended to be offset by those countries at some point in the future. Pub. L. No. 106-386, § 2002, 114 Stat 1464, 1541 (2000). Specifically, the VTVPA was limited to plaintiffs with judgments under Section 1605A's predecessor statute, Section 1605(a)(7), against Cuba and Iran in particular cases filed on or before specific dates. *Id.* § 2002(a)(2). For plaintiffs with final judgments against Cuba, the VTVPA fund was seeded using assets owned by Cuba. *Id.* § 2002(b)(1). The situation for plaintiffs with judgments against Iran was more complex. The Iranian fund was to be partially seeded by rental income generated from Iranian diplomatic and consular properties located in the United States and seized by the U.S. government after the 1979 Iranian Revolution. *Id.* § 2002(b)(2). The lion's share of the fund was, however, supposed to come directly from the U.S. Treasury with eventual offset by the Iranian government. *See id.* § 2002(c) (obligating the U.S. president to demand compensation for VTVPA payments from the Iranian government). A second victims' fund was created in 2015, when Congress established the Justice for United States Victims of State Sponsors Terrorism Fund ("USVSSTF") which applies to a much broader range of cases. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, tit. IV, § 404, 129 Stat. 2242, 3007 (2015) (codified as 34 U.S.C. § 20144). The USVSSTF fund allows for payments of certain damages to certain U.S. persons, including those with final judgments under Sections 1605(a)(7) or 1605(A), against any designated state sponsor of terrorism. *Id.* § 404(c)(2)(A)(i). It is seeded by various "forfeited funds and property," including but not limited to funds arising from criminal and civil violations of IEEPA or the TWEA, certain liquidated assets owned by Iran, as well as tax-payer dollars. *Id.* § 404(e)(2)(A)–(B), (e)(5).

292 Some countries designated as state sponsors of terrorism have entered into bilateral agreements with the United States creating victims' funds for those injured by their purported acts of terrorism. These funds have been financed by state sponsor countries themselves in the hopes of re-establishing relations with the United States and being removed from the state sponsor list. *See, e.g.*, Claims Settlement Agreement, Sudan-U.S., Oct. 20, 2020, T.I.A.S. No. 21-209 [hereinafter U.S.-Sudan Claims Agreement] (creating a $335 million fund, financed by Sudan, for settling most pending claims and final judgments under Section 1605A against Sudan arising from events occurring before the agreement's execution); Jennifer Hansler, *U.S. Receives $335 Million from Sudan for Victims of Terrorist*

The private enforcement of national security also creates efficiency gains for government agencies. While it is debatable whether plaintiffs in Section 2333, 1605A, and 1605B suits are better able than government bureaucrats to weigh the costs and benefits of litigation,[293] these statutes make it possible for private parties and the U.S. government to each target those actors they are most incentivized and best positioned to pursue. For example, while government agencies have focused on individual perpetrators and a few serious institutional violators of the criminal material support statutes[294] and sanctions laws,[295] private enforcers have focused on a wider swath of institutional defendants,[296] which the government may be less inclined to pursue for bureaucratic or policy reasons.[297] In

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Attacks, CNN (Mar. 31, 2021), https://www.cnn.com/2021/03/31/politics/sudan-settlement-received/index.html [https://perma.cc/Q9EJ-BFH3] (noting role of U.S.-Sudan Claims Agreement in restoring relations between Sudan and the United States and removing Sudan from the state sponsor list). In some cases, Congress has supplemented these bilateral agreements and created a separate victims fund for certain plaintiffs, though it is unclear whether these supplemental funds are seeded with monies seized by the U.S. government, through fines, or other mechanisms, or from tax-payer dollars. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, tit. IX, 134 Stat 1182, 1821 (2020) (creating separate victims' fund of $150 million, in connection with US-Sudan Claims Agreement, using State Department "emergency funds").

293 As discussed below, the interests of plaintiffs in Section 2333, 1605A, and 1605B cases often do not align perfectly with the public interest. For example, financial goals typically play an important role in these suits, even where plaintiffs are motivated by broader social goals. In addition, private enforcement suits can and have, at times, arguably undermined Executive branch policies relating to national security and foreign affairs. See *infra* notes 340–350 and accompanying text for a more in-depth discussion of these issues.

294 Recently, the U.S. government successfully brought its first criminal material support prosecution against a corporate defendant. *See* Kara Scannell, Tierney Sneed, & Evan Perez, *French Company to Pay Nearly $778 Million as Part of Plea Deal to US Charge of Providing Support to ISIS*, CNN (Oct. 18, 2022), https://amp.cnn.com/cnn/2022/10/18/politics/isis-french-cement-company-holcim/index.html [https://perma.cc/S85G-764K].

295 As one example of the government's sanction-related enforcement work, in 2015, French bank BNP Paribas was sentenced in U.S. court to five years' probation, ordered to forfeit nearly $9 billion to the U.S. government and pay a $140 million fine for conspiring to violate IEEPA and TWEA. Press release, U.S. Dep't of Just., BNP Paribas Sentenced for Conspiring to Violate the International Emergency Economic Powers Act and the Trading with the Enemy Act (May 1, 2015), https://www.justice.gov/opa/pr/bnp-paribas-sentenced-conspiring-violate-international-emergency-economic-powers-act-and [https://perma.cc/AW5C-8G3G]. The majority of BNP Paribas's "illegal payments were made on behalf of sanctioned entities in Sudan, which was subject to U.S. embargo based on the Sudanese government's role in facilitating terrorism." *Id.; See also infra* Part III.A.1.c for more examples of the government's sanctions enforcement.

296 *See supra* notes 116–117, 150 and accompanying text.

297 For example, plaintiffs have brought Section 2333 cases against powerful U.S. business interests, like tech companies. *See supra* notes 117, 150 and accompanying text. By contrast, the government has never prosecuted any of

bringing these suits, private litigants have adopted creative litigation approaches[298] that government bureaucrats may be less apt to embrace. These efficiency gains are further compounded by the fact that some private enforcement suits may have convinced defendants to adopt national security-related policies they otherwise may not have pursued—policies that have generally benefited U.S. interests.[299]

C. Harnessing Private Information to Identify Violations

The third administrative benefit of private enforcement is its ability to harness private information to identify violations. Indeed, government agencies cannot be expected to know about every single violation of federal law at all times.[300] For one thing, administrative bodies are usually geographically distant from many regulatory harms, limiting their ability to know such harms have even occurred.[301] Detecting all violations of regulatory law would also require massive government expenditures.[302] Private enforcement remedies these problems since private plaintiffs who have suffered harm are well placed to

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these kinds of businesses for providing material support to terrorism. While it may have good legal reasons for this, the importance of these companies to the U.S. economy, as well as their lobbying power in Congress, could stymie prosecutions that are otherwise on firm legal ground.

298 *See infra* notes 315–317 and accompanying text.

299 For example, since 2016, U.S. tech companies, like Facebook and Twitter, have voluntarily adopted and implemented various national security policies and protocols on their platforms that generally support U.S. counterterrorism and national security objectives. Chachko, *supra* note 8, at 55, 86–94. Several reasons have been given for this development, including social media's role in propagating disinformation during the 2016 U.S. presidential election. *Id.* at 68. The adoption of these corporate national security policies and protocols, however, also coincides with a spate of Section 2333 cases filed against tech companies since 2016. *See* Complaint, Fields v. Twitter, Inc., 200 F. Supp. 3d 964 (N.D. Cal 2016) (Case No. 16-cv-00213) (earliest known Section 2333 case against a social medial company). Indeed, tech companies have relied on these policies to defend themselves in some Section 2333 suits. Conditional Petition for Writ of Certiorari at 3, Twitter, Inc. v. Taamneh, 143 S. Ct. 81 (2022) (No. 21-1496). As another example of policies national security's private enforcement has triggered to the benefit of the U.S. government—some foreign countries sued under Section 1605A have been spurred, partly by those suits, to enter into bilateral agreements with the U.S. government, as detailed above. *See supra* note 292. Those agreements have both settled outstanding Section 1605A claims and served U.S. interests by restoring diplomatic, political, and economic relations between those countries and the United States. *Id.*

300 Sant'Ambrogio, *supra* note 63, at 438; *see* Glover, *supra* note 2, at 1154–55.

301 Glover, *supra* note 2, at 1154.

302 Burbank, Farhang and Kritzer, *supra* note 6, at 664.

have information about legal breaches.[303] Moreover, private enforcement can give rise to a specialized bar that "provides economies of scale" through accumulated expertise applied across a range of plaintiffs and cases.[304]

Again, the ATA's private right of action and the FSIA's terrorism exceptions realize these benefits. Depending upon the statute, plaintiffs are either the direct victims of terrorism, the estates, survivors, or heirs of victims, or their family members.[305] And while they may not have privileged information about the kinds of material support received by terrorist groups, these plaintiffs are uniquely incentivized to investigate the existence of such support. A specialized bar has also developed around national security's private enforcement. As reflected in innumerable cases, various repeat players serve as plaintiffs' lawyers,[306] developing substantial expertise in this

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303 Glover, *supra* note 2, at 1155; *see* Stephenson, *supra* note 272, at 108; Sant'Ambrogio, *supra* note 63, at 438; Burbank, Farhang & Kritzer, *supra* note 6, at 663.

304 Sant'Ambrogio, *supra* note 63, at 438.

305 As mentioned earlier, Section 2333 cases can only be brought by an injured U.S. national or his or her estate, survivors, or heirs. 18 § U.S.C. 2333(a). Under Section 1605A, plaintiffs—which include U.S. nationals as well as certain non-nationals—may either be the victims of an act violating the statute or the legal representatives of a victim. 28 U.S.C. § 1605A(c). Under Section 1605A, direct family members may also bring claims for intentional infliction of emotional distress. Est. of Hirschfeld v. Islamic Republic of Iran, 330 F. Supp. 3d 107, 140 (D.D.C. 2018). Beyond allowing "U.S. nationals" to bring Section 2333 claims, Section 1605B does not specify who may bring a Section 1605B claim. *See* 28 U.S.C. § 1605B. As the case law suggests, however, the class of eligible plaintiffs in Section 1605B cases has mirrored those in Section 1605A suits—namely victims, their legal representatives, and/or family members separately bringing claims for intentional infliction of emotion distress. *See In re* Terrorist Attacks on Sept. 11, 2001, 03-MDL-1570, 2020 WL 7043282, at *1–2 (S.D.N.Y. Dec. 1, 2020) (noting that a victim's estate may bring claims under Section 1605B, as can family members asserting claims for intentional infliction of emotional distress).

306 These repeat players, who advertise their work as plaintiffs' lawyers in cases variously brought under Sections 2333, 1605A, and 1605B, include, but are not limited to, Gary M. Osen of Osen, LLC (https://www.osenlaw.com/our-team/gary-m-osen) [https://perma.cc/P8KQ-2HKN] (last visited Apr. 17, 2023); John M. Eubanks of Motley Rice, LLC (https://www.motleyrice.com/attorneys/john-m-eubanks) [https://perma.cc/2AD9-L4EF] (last visited Apr. 17, 2023); Steven R. Perles of Perles Law Firm, PC (http://www.perleslaw.com/our-team) [https://perma.cc/R6ML-F8MQ] (last visited Apr. 17, 2023); Paul G. Gaston of the Law Offices of Paul G. Gaston (https://gastonlawoffice.com/bio/) [https://perma.cc/MW9L-ZMW8] (last visited Apr. 17, 2023); Stuart H. Newberger of Crowell and Moring (https://www.crowell.com/professionals/stuart-newberger) [https://perma.cc/27GV-AHM6] (last visited Apr. 17, 2023); and Sean P. Carter of Cozen O'Connor (https://www.cozen.com/people/bios/carter-sean) [https://perma.cc/ZR34-SUY7] .

niche area of law and even, in some instances, bringing closely related and even copycat claims.[307]

D. Encouraging Legal and Policy Innovations

The fourth way in which private enforcement benefits the administrative state is by encouraging legal and policy innovations. Because private litigants are not hemmed in by the government's policy preferences, which tend to be more conservative, they can pursue legal strategies and arguments, as well as defendants, that are more innovative[308] or "adventuresome."[309] Because multiple parties, interests, and jurisdictions are involved, private enforcement also allows for "experimentation with a multiplicity of policy responses to a problem, [such that] successful policy solutions will gain traction and spread."[310]

Neither innovation nor experimentation is in short supply when it comes to the private enforcement of national security. Indeed, this area of law may not have come into existence without the creativity and innovation of private parties. In particular, plaintiffs and prospective plaintiffs were critical to the

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307 In some cases, the same lawyers have attempted to file copycat claims with different plaintiffs, in different courts. *See* Colon v. Twitter, Inc., Case No. 18-cv-515, 2020 WL 11226013, at *2 (M.D. Fla. Mar. 24, 2020) (noting that plaintiffs' counsel filed the instant Section 2333 complaint with different named plaintiffs only five days after the Sixth Circuit rejected counsel's nearly identical Section 2333 suit in *Crosby v. Twitter, Inc.*), *aff'd*, 14 F.4th 1213 (11th Cir. 2021); Retana v. Twitter, Inc., 419 F. Supp. 3d 989, 990 (N.D. Tex. 2019) (noting counsel had filed similar Section 2333 claims in the case of *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874 (N.D. Cal. 2017), which was dismissed by the U.S. District Court for the Northern District of California, using a different group of plaintiffs). In other cases, attorneys have filed complaints substantially related to incidents that have been previously litigated by other plaintiffs. *Compare* Miller v. Arab Bank, PLC, 372 F. Supp. 3d 33, 38–41 (E.D.N.Y. 2019) (Section 2333 suit against Arab Bank alleging that it provided material support to terrorist attacks by providing financial services to Hamas entities and by administering an insurance scheme for Palestinian martyrs and their families), *with* Linde v. Arab Bank, PLC, 882 F.3d 314, 318 (2d Cir. 2018) (Section 2333 case against Arab Bank for providing financial services to Hamas and Hamas-related affiliates and for working with an entity that "made payments to the families of Hamas suicide bombers").

308 Stephenson, *supra* note 272, at 112.

309 Sant'Ambrogio, *supra* note 63, at 439.

310 Burbank, Farhang and Kritzer, *supra* note 6, at 664.

passage of Sections 2333(a),[311] 2333(d),[312] 1605A and its precursor statute,[313] as well as Section 1605B.[314] Plaintiffs have also been instrumental in proposing particular interpretations of and approaches to these laws. For example, in the context of Section 2333(a) of the ATA, plaintiffs have innovated by using the statute against third-parties, like corporations, that have not directly engaged in terrorist violence and are not clearly covered by the statute.[315] While the success of these ap-

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311 The decision to create Section 2333(a) was triggered, in part, by a civil suit brought by the family of Leon Klinghoffer, a U.S. citizen killed by hijackers while on board the *Achille Lauro* cruise liner. Gill v. Arab Bank, 891 F. Supp. 2d 335, 353 (E.D.N.Y. 2012). Because the incident occurred abroad, Klinghoffer's family initially faced various jurisdictional hurdles, which they ultimately overcame. Klinghoffer v. S.N.C. Achille Lauro, 739 F. Supp. 854, 858–59 (S.D.N.Y. 1990), *vacated* 937 F.2d 44 (2d. Cir. 1991). Section 2333(a) was meant to fill the jurisdictional gap highlighted in that case, by extending the reach of U.S. courts to all American victims of overseas terrorism. H.R. Rep. No.102-1040, at 5 (1992).

312 While congressional debates on JASTA focused mostly on Section 1605B, plaintiffs lobbying for JASTA also lobbied for Section 2333(d). *See, e.g.*, *Hearing on S. 2930, the Justice Against Sponsors of Terrorism Act Before the Subcomm. on Crime and Drugs of the Comm. on S. Judiciary*, 111th Cong. (2010) (statement of Richard Klingler, Partner, Sidley Austin LLP) (attorney representing national security private enforcement plaintiffs testifying before Congress in favor of an earlier version of JASTA and supporting the creation of a secondary liability provision under Section 2333)).

313 Section 1605A's precursor, Section 1605(a)(7), was passed, in part, thanks to efforts by individuals who had tried to or wanted to sue foreign sovereigns for terrorist attacks. *See supra* note 93. Section 1605A itself was also the result, in part, of lobbying on behalf of individuals affected by terrorism. *See Amendment to Foreign Sovereign Immunities Act Makes It Easier for Victims to Recover Damages from State Sponsors of Terrorism*, GIBSON DUNN (Jan. 28, 2008), https://www.gibsondunn.com/amendment-to-foreign-sovereign-immunities-act-makes-it-easier-for-victims-to-recover-damages-from-state-sponsors-of-terrorism/ [https://perma.cc/5GNN-TCHF] ("Gibson, Dunn & Crutcher's Public Policy Practice Group successfully lobbied for enactment of [Section 1605A] on behalf of family members of the victims of the 1983 Beirut Marine barracks bombing. . . .").

314 *See The 9/11 Terror Lawsuit Against Saudi Arabia*, KREINDLER LLP, https://www.kreindler.com/cases/9-11-terror-lawsuit-saudi-arabia [https://perma.cc/8N6W-2WLP] (last visited Apr. 26, 2023) (noting role of plaintiffs in 9/11-related cases in advocating for Section 1605B's passage).

315 When Section 2333(a) cases began to be brought, it was at least debatable whether the statute applied to defendants who had not themselves committed violent terrorist acts. *See* Boim v. Quranic Literacy Inst. (*Boim I*), 127 F. Supp. 2d 1002, 1011 (N.D. Ill. 2001) (early Section 2333(a) case noting defendants argument that "neither the language of [Section 2333(a)] itself nor the Congressional Record provide support for the argument that [Section 2333(a)] should apply to anyone other than the 'known terrorists who committed the injury'"), *aff'd sub nom*, Boim v. Quranic Literacy Inst. & Holy Land Found. For Relief and Dev., 291 F.3d 1000 (7th Cir. 2002); Sant, *supra* note 92, at 553 ("Under . . . the original intent of Congress . . . [Section 2333(a)] is limited to terrorist actors and does not reach non-terrorist third-parties, such as banks."). Thanks to plaintiffs' efforts, the first case to consider a Section 2333(a) claim—*Boim v. Holy Land Foundation*—held that the statute was not limited only to terrorist defendants who had engaged in violence causing plaintiff's injury. *Boim I*, 127 F. Supp. 2d at 1014.

proaches has been dubious at best,[316] these innovations have spread out and gained traction across Section 2333(a) case law.[317]

While this is not meant to suggest anything about the merits of those innovations, it is undeniable that, through national security's private enforcement, private parties have significantly shaped the menu of activities and kinds of actors that can be implicated in private tort suits for material support.

E. Emitting a Clear and Consistent Signal that Violations Will Be Prosecuted

The fifth and final way in which private enforcement benefits the administrative state is by emitting a clear and consistent signal that violations will be prosecuted. As scholars have argued, private enforcement is a hedge against the risk that government regulators will underenforce the law.[318] This government underenforcement can result from a host of factors, including regulatory capture,[319] "ideological preferences, career goals, to protect or enhance budget allocations, to avoid political controversy, or simple laziness."[320] Executive branch officials, as well as legislatures, may also pressure regulators to engage in underenforcement.[321] Private enforcement can remedy these problems by supplementing or substituting for public enforcement, thereby increasing the deterrent effect of public laws.[322] In the long run, this benefits administrative agencies as a whole by ensuring that their mission—to ensure compliance with the laws they are tasked to enforce—is bolstered.[323]

Soon thereafter, plaintiffs started filing cases against third-party corporations and banks that had not participated in any terrorist acts themselves but had instead allegedly provided material support to terrorist groups or activities. *See, e.g.*, Strauss v. Credit Lyonnais (*Strauss I*), S.A, No. CV-06-0702, 2006 WL 2862704, at *1 (E.D.N.Y. Oct. 5, 2006) (Section 2333(a) case against bank for providing material support).

316 *See supra* note 144 and accompanying text.

317 *See supra* notes 116–117 and accompanying text.

318 Stephenson, *supra* note 266, at 110; *see* Burbank, Farhang & Kritzer, *supra* note 6, at 664–65; Sant'Ambrogio, *supra* note 63, at 438–39.

319 Glover, *supra* note 2, at 1155.

320 Burbank, Farhang & Kritzer, *supra* note 6, at 665.

321 *See id.* at 665 (noting that "administrators may face pressure to underenforce from executives or legislatures who may be motivated by ideological preferences, electoral imperatives in general, or the desire to protect specific constituents in particular").

322 *See id.* at 700–02 (noting relationship between deterrence and the private enforcement of public laws).

323 *See* Stephenson, *supra* note 266, at 111–12 (arguing that "agency heads may not always oppose, and may sometimes even welcome, the constraints on agency enforcement behavior that private suits impose," in part, because private

National security's private enforcement provides just such a bolstering effect for public enforcement efforts. Admittedly, there is little reason to think that federal prosecutors are underenforcing Sections 2339A or 2339B or any of the other criminal material support or sanctions programs implicated by private enforcement cases.[324] That being said, giving private parties the opportunity to enforce those laws and policies supplements the government's enforcement efforts. Indeed, the private enforcement of national security arguably expands enforcement into areas where defendants might otherwise not fear prosecution. For example, as mentioned earlier, it is less than clear whether regulatory agencies can prosecute or sue foreign governments themselves for their terrorism-related activities[325]—something which plaintiffs can more clearly do under the FSIA's terrorism exceptions. As also mentioned earlier, while the U.S. government has prosecuted, investigated, and fined certain—mostly financial—corporations for activities related to the material support of terrorism,[326] it has yet to pursue other parties that private plaintiffs have sued, like tech companies.[327] Even if the merits of these tech company-focused material support suits are debatable,[328] and their success nearly non-existent so far,[329] they undeniably create an

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enforcement "ensure[s] enforcement even when [agency] subordinates shirk [their duties]").

324 *See supra* note 279 and accompanying text.

325 *See supra* note 284 and accompanying text.

326 *See supra* notes 294–295 for examples of some institutional defendants that have been the subject of government enforcement actions relating to criminal material support and sanctions violations.

327 *See supra* note 297.

328 *See* Tribune News Services, *Families Sue Social Media Companies, Blaming Them for a Role in Terror Attacks*, CHI. TRIB. (Jan. 19, 2017), https://www.chicagotribune.com/nation-world/ct-social-media-terror-lawsuits-20170119-story.html [https://perma.cc/3CBQ-AH83] (quoting Professor Eric Goldman—an expert in Section 2333 litigation against tech companies—as describing those suits as "unmeritorious").

329 While the need to establish proximate causation under Section 2333 is one reason why suits against tech companies have largely failed, many of these cases have also been dismissed because of Section 230(c)(1) of the Communications Decency Act ("CDA"), which protects internet providers from liability for third-party content. Under Section 230(c)(1), "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). *See* Michal Lavi, *Do Platforms Kill?*, 43 HARV. J.L. & PUB. POL'Y 477, 517–18 (2020) (noting that Section 2333 cases against social media companies have failed for reasons of proximate causation and/or because of Section 230(c)(1) of the CDA). Recently, the Supreme Court granted cert and heard oral argument in a case challenging the CDA's application to tech companies in Section 2333 cases. Gonzalez v. Google LLC, 143 S. Ct 80 (2022).

increased likelihood of enforcement and, therefore, likely have some deterrent effect.[330]

Notwithstanding all this, the deterrent effects of national security's private enforcement are admittedly complicated, both in terms of specific and general deterrence. Specific deterrence "refers to the effects on the future conduct of the target of enforcement" while general deterrence "refers to the effects of aggregate levels of enforcement activity on the future conduct of members of the regulated population, whether or not they have actually been the target of enforcement."[331] When it comes to national security's private enforcement, private enforcers may over-deter by creating too much specific and general deterrence, even where their suits are otherwise unsuccessful. This is particularly true for cases under Section 2333 of the ATA, which have often failed past the motion to dismiss phase.[332] Despite their high failure rates, these cases have the potential to over-deter both targeted defendants, as well as members of the "regulated population," because of reputational effects that may induce precautions that chill wholly legitimate activities.[333]

In some cases, private enforcement may increase the scope and prospects for enforcement *without* promoting deterrence at all. This is particularly true for Section 1605A cases. The fact that state sponsors of terrorism often do not appear in these cases,[334] together with other challenges in enforcing judgements resulting from these suits,[335] may make deterrence prospects dubious at best.[336] That being said, some states have entered appearances in Section 1605A litigation and/or have eventually settled the terrorism claims against them

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330 See *supra* note 299 for a description of how Section 2333 cases against tech companies may have prompted those companies to police the activity of terrorist groups on their platforms.

331 Burbank, Farhang & Kritzer, *supra* note 6, at 700.

332 *See supra* note 143 and accompanying text (detailing lack of success on the merits for most Section 2333 plaintiffs).

333 Jamshidi, *supra* note 93, at 601.

334 *See supra* note 246.

335 *See supra* note 290.

336 In addition to Section 1605A suits, Section 2333 cases are also likely to have little deterrent effect where they are brought against terrorist entities themselves. *See* Jimmy Gurulé, *Holding Banks Liable Under the Anti-Terrorism Act for Providing Financial Services to Terrorists: An Ineffective Legal Remedy in Need of Reform*, 41 J. LEGIS. 184, 184 (2015) (noting that the "threat of a large civil monetary judgment [in Section 2333 cases] is unlikely to have a deterrent effect on foreign terrorists or terrorist organizations that 'are unlikely to have assets, much less assets in the United States'").

through negotiations with the U.S. government.[337] In consideration for settling those claims, the U.S. government has removed these states from the state sponsor list.[338] One might view this as a deterrence success story suggesting these states have ceased engaging in terrorism. Alternatively, one might understand these developments as simply signaling these countries have become allies, instead of enemies, of the United States, without meaningfully altering their problematic behaviors.[339]

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In addition to benefiting the administrative state, private enforcement regimes are generally understood to have various downsides for the government's regulatory architecture. While the literature contains a lengthy list of such downsides,[340] "[t]he core critique of private enforcement is that it shifts control over regulatory policy from politically accountable public officials to politically unaccountable private litigants and thousands of unelected federal judges" and, "[i]n the process . . . may upset carefully calibrated public enforcement policies."[341] Because they are politically accountable, public enforcers "are expected to prioritize the most egregious legal violations and avoid actions that might be within the letter but not the spirit of the law"—decisions that ultimately turn on these officials' understanding of the "public interest."[342] By contrast, private parties are often driven by personal financial goals, which may prompt them to pursue claims or defendants Congress did not intend or envision private enforcement

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337 For example, Libya was one of a few countries to appear and litigate these claims, though it did cease appearing for a time. *See* Price v. Socialist People's Libyan Arab Jamahiriya, 384 F. Supp. 2d 120, 123 (D.D.C. 2005) (noting that "[s]ince plaintiffs filed this case in 1997, Libya has vigorously litigated several motions to dismiss in this Court and the Court of Appeals" and that "[a]fter failing to have plaintiffs' complaint dismissed in its entirety, Libya announced that it would no longer participate in the case"). See U.S.-Sudan Claims Agreement, *supra* note 292 for an example of a bilateral agreement entered into by a state sponsor of terrorism and the U.S. government.

338 *See supra* note 292.

339 I do not mean to suggest these states deserved to be on the state sponsor list to begin with or that they should not have been removed, but rather that political calculations—instead of behavior—may better explain their removal from the list, which is itself notoriously political. *See infra* note 536 and accompanying text.

340 *See, e.g.*, Burbank, Farhang & Kritzer, *supra* note 6, at 667 (listing seven different downsides to private enforcement).

341 Sant'Ambrogio, *supra* note 63, at 440.

342 *Id.* at 441 (internal quotations omitted).

schemes to cover or to take "advantage of statutory ambiguities to advance novel claims inconsistent with an agency's own interpretation of the law."[343] Even if they are also driven by the "public interest," a private party's interpretation of the term—which is itself highly contestable—is not subject to democratic accountability.[344]

The private enforcement of national security reflects these trends. While some plaintiffs have expressed a desire to support broader public goals,[345] plaintiffs have largely been driven by their personal economic interests—as reflected in their frequent pursuit of deep-pocketed defendants.[346] Whether for this or other reasons, plaintiffs have often filed claims that may be within the "letter" of the law but hardly represent the most egregious violations of the material support prohibition—indeed unmeritorious or frivolous suits are far from uncommon to national security's private enforcement.[347] In addition, while these suits generally further U.S. interests,[348] national security's private enforcement may, at times, undermine the Executive's policy agenda, particularly when it comes to foreign policy.[349] In fact, the Executive branch opposed both of the FSIA's terrorism exceptions when they were being considered by Congress because of concerns that suits brought under those statutes would undermine and/or damage the Executive's foreign policy interests.[350]

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343 *Id.*

344 *Id.*

345 *See infra* Part III.A.4.

346 *See supra* notes 116–117, 150 and accompanying text.

347 *See* Sant, *supra* note 92, at 578 (noting frivolous nature of some Section 2333(a) suits). Frivolous Section 1605A cases are also not unusual especially where state sponsor defendants do not enter appearances to challenge those claims. *See supra* note 248.

348 *See* Part III.A.3.

349 *See* Chad G. Marzen, *The Legacy of* Rux v. Republic of Sudan *and the Future of the Judicial War on Terror*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 435, 461 (2012) (noting that "the most vocal critique of the state sponsor of terrorism exception to the Foreign Sovereign Immunities Act . . . is that private civil lawsuits will adversely affect U.S. foreign policy interests."); Yishai Schwartz, *Following the Money*, LAWFARE (Jan. 18, 2018), https://www.lawfareblog.com/following-money [https://perma.cc/WN6E-TULE] ("Each lawsuit that seeks to move the war on terror into the civil courts deals an additional blow to the possibility of a coherent [U.S.] foreign policy.").

350 See *infra* note 415 for a description of President Obama's veto of Section 1605B because it targeted Saudi Arabia, a U.S. ally; John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 37 (1999) (noting that "the U.S. Departments of State and Justice strongly opposed the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) that amended the Foreign Sovereign Immunities Act [to create Section 1605(a)(7)]" in part for foreign policy reasons). Notably,

As the next part demonstrates, national security's private enforcement also draws attention to another downside of private enforcement absent from the existing literature—a downside tied to the despotic potential of private enforcement measures.

III
REINFORCING THE STATE'S INFRASTRUCTURAL POWER, AS WELL AS ITS DESPOTIC POWER AND PURPOSES

At the heart of private enforcement's despotic potential are the concepts of despotic power and despotic purpose. The term despotic power was coined by the sociologist Michael Mann. It is one of two kinds of state power he has identified—the other type of power is known as infrastructural power.[351] According to Mann, even though the two concepts are distinct, a state's infrastructural power can reinforce its despotic power.[352] Building upon Mann's work, other social scientists have explored how infrastructural power can reinforce a state's despotic purposes, as well.[353] Some legal scholars have been similarly inspired by Mann's work and have analyzed private enforcement's role in furthering the infrastructural power of the state.[354]

No legal scholar has, however, examined whether and how private enforcement can contribute to a state's despotic power and/or further its despotic purposes. This part fills this gap by examining private enforcement's potential to reinforce the despotic powers and purposes of the state through the lens of national security's private enforcement. It begins by demonstrating how private national security suits support the government's infrastructural power—which bolsters their private enforcement credential even further—before examining their role in furthering the state's despotic purposes and power.

By highlighting the dual nature of private enforcement—as not only enhancing the infrastructural but also the despotic powers and purposes of the state—national security's private enforcement draws attention to the potential intersection between these types of government authority. While this symbio-

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despite the Executive's opposition to Section 1605(a)(7)'s passage, it has not necessarily been opposed to individual suits under either that version of the statute or Section 1605A, especially when directed at countries considered unfriendly to the United States. *See infra* note 415.

351 Mann, *supra* note 13, at 188–89

352 *Id.* at 190.

353 *See infra* notes 432–435 and accompanying text.

354 *See infra* notes 363–365 and accompanying text.

sis may be particularly salient in the national security realm, private enforcement laws always have potential despotic consequences *precisely because* they enhance the infrastructural powers of the state, as the discussion in Part III demonstrates.

A. Infrastructural Power: Reinforcing the U.S. Government's Interests and Objectives

According to Michael Mann, infrastructural power is "the capacity of the state to actually penetrate civil society, and to implement logistically political decisions throughout the realm."[355] This capacity depends, in turn, upon civil society's embrace, implementation, and/or reproduction of the state's rules, regulations, and policies.[356] In essence, infrastructural power is "negotiated power, its core features being the capacity for social penetration, resource extraction and collective coordination" with civil society.[357] As one example of a state's infrastructural power, members of ancient societies willingly adopted and expanded upon writing and literacy tools first developed and implemented by governing political entities.[358]

Because infrastructural power depends upon the involvement of civil society, it both limits the range of things a state can do while at the same time giving civil society more control over the state.[359] As a result of this dynamic, the state is unable to "change the fundamental rules and overturn the distribution of power within civil society."[360] At the same time, because civil society is involved in implementing or acquiescing to the state's laws and policies, the government is able to "enforce its will . . . almost anywhere in its domain[ ]."[361] Indeed, it is because of its infrastructural power that the state's reach is so extensive—by contrast, states that have relied exclusively on despotic power have generally had more limited influence over their populations.[362]

Leading private enforcement scholar Sean Farhang has described private enforcement as "a core dimension of the Ameri-

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355 Mann, *supra* note 13, at 189.

356 Linda Weiss, *Infrastructural Power, Economic Transformation, and Globalization*, *in* AN ANATOMY OF POWER: THE SOCIAL THEORY OF MICHAEL MANN 167, 168 (John A. Hall and R. Schroeder eds., 2006).

357 *Id.* at 172.

358 Mann, *supra* note 13, at 193–94.

359 *Id.* at 189–90.

360 *Id.* at 190.

361 *Id.* at 189.

362 *Id.*

can regulatory state's infrastructural power."[363] As Farhang correctly notes, "[p]rivate [enforcement] litigation is state power exercised *through* society . . . by enlisting private citizens as law enforcement officials."[364] According to Farhang, in licensing private actors to enforce public regulatory laws, private enforcement mechanisms allow private parties "to wield the coercive instruments of state power."[365]

When it comes to Sections 2333, 1605A, and 1605B, litigation under these statutes enhances the government's infrastructural power by allowing the state to act through private parties to combat the material support and financing of terrorism. These private enforcement suits achieve those ends by: (1) targeting similar types of activities as criminal material support prosecutions and sanctions programs; (2) implicating similar terrorist entities as those public material support laws; (3) furthering the same legislative purpose as those public material support laws; and (4) facilitating collaboration between private parties and the U.S. government in the "fight" against terrorism. The rest of Part III.A explores these various issues in order.

1. *Similar Activity Types*

Suits under the ATA's private right of action and the FSIA's terrorism exceptions target behavior similar to that targeted by criminal material support prosecutions, specifically under Sections 2339A and 2339B,[366] as well as certain U.S. sanctions programs related to material support. This shared targeting trend is further reflected in the phenomenon of "piggybacking"—namely, private enforcement suits that piggyback off and depend upon government investigations and prosecutions of terrorism-related material support and sanctions cases.

a. *The Criminal Material Support Laws*

Private enforcement cases and criminal material support prosecutions penalize similar activities thanks to their shared focus on the broad concept of material support and loose approaches to liability. As a result of these commonalities, criminal material support and private enforcement cases often reach

363 FARHANG, *supra* note 6, at 9.
364 *Id.* (internal quotation marks omitted).
365 *Id.* at 8.
366 Because Sections 2339A and 2339B are most central to the government's material support prosecutions, this section focuses on those statutes and does not address the other criminal material supports laws sometimes involved in private enforcement cases—namely Sections 2339C and 2332d.

large swathes of non-violent behavior connected in some (at times tenuous) ways to terrorism or terrorist entities.

On the criminal side, because they prohibit a wide range of conduct and do not require that defendants actually cause terrorist violence or any terrorism-related injuries, Sections 2339A and 2339B have allowed the government to prosecute persons "regardless of their proximity to terrorism or terrorist groups."[367] The comparatively weak scienter standard under both criminal material support statutes further enables prosecutions of persons with little to no meaningful connection to terrorist groups or activities.[368]

While the statutes making up national security's private enforcement do require a causal connection to terrorist violence, the ATA's private right of action and the FSIA's terrorism exceptions have also allowed plaintiffs to pursue expansive theories of liability against defendants with loose ties to particular terrorist acts or groups. For example, because of the expansive reach of material support and flexible judicial approaches to scienter and causation under Section 2333(a), plaintiffs have historically been able to pursue defendants that have engaged in activities several degrees removed from terrorist groups or activities.[369] Similarly, because of the material support concept's breadth and plaintiff-friendly approaches to Section 1605A, plaintiffs have been able to win cases against state sponsors of terrorism based on dubious theories of liability.[370]

b. *U.S. Economic and Trade Sanctions*

Some private enforcement cases target activities that are substantially similar, if not identical, to actions forbidden by the government's sanctions laws.[371]

As mentioned earlier, this is particularly true for Section 2333 cases, some of which have relied on underlying violations

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367 Jamshidi, *supra* note 93, at 579.

368 Because the requisite mens rea for both Sections 2339A and 2339B is merely knowledge, the government has been able to use these statutes "in widely varying situations where individuals engage in conduct that may contribute in some way to the commission of terrorist offenses." Abrams, *The Material Support Terrorism Offenses*, *supra* note 103, at 7.

369 Jamshidi, *supra* note 93, at 562–64.

370 *See supra* note 248 and accompanying text.

371 It is worth noting that courts have been skeptical of claims that violating U.S. economic sanctions are sufficient, on their own, to establish liability under Section 2333. *See, e.g.*, Kaplan v. Lebanese Canadian Bank, SAL (*Kaplan I*), 405 F. Supp. 3d 525, 532, 535 (S.D.N.Y. 2019) (holding that providing financial services in violation of U.S. economic sanctions cannot on its own establish liability under Sections 2333(a) and 2333(d)), *vacated in part*, 999 F.3d 842 (2d Cir. 2021).

of sanctions programs. Generally, these Section 2333 cases have focused both on the U.S. government's targeted sanctions programs, which prohibit transacting with specifically designated individuals and entities, like SDGTs, SDTs, and SDNs,[372] as well as the government's country-based sanctions regimes, which broadly prohibit transactions with certain states.[373] Together, these sanctions programs generally penalize persons for violating, attempting to violate, or conspiring to violate sanctions laws and policies.[374]

Section 2333 cases implicating the government's sanctions programs target those same kinds of activities. For example, in one Section 2333 case involving both primary and secondary liability claims, plaintiffs relied on violations of the government's country-based sanctions program against Iran. The Iran sanctions program prohibits nearly all transactions, whether directly or indirectly, involving Iran, the Iranian government, persons residing in Iran, or entities located in Iran or formed under Iranian law.[375] Relying on this broad sanctions scheme, plaintiffs in this Section 2333 case alleged that defendant had engaged in a material support conspiracy by agreeing to and assisting "Iranian banks, airlines, shipping, and oil companies in evading American sanctions."[376] As a result of these alleged activities—which if true would likely violate the government's sanctions program—"Iran acquired hundreds of millions of dollars that it was legally barred from obtaining" and used those funds to support "[various] terrorist groups, which later conducted the terrorist attacks . . . that injured Plaintiffs."[377]

In another case involving claims of primary and secondary liability under Section 2333, plaintiffs again invoked the government's sanctions programs against Iran in accusing defendants of "provid[ing] U.S. dollar-denominated banking services

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372 See *infra* notes 400–404 and accompanying text for a description of the SDGT, SDT, and SDN designations and the relationship between those designations.

373 As noted in Part I's discussion of Sections 2333(a) and 2333(d), sanctions violations are more central to Section 2333(a) claims, but are sometimes invoked in Section 2333(d) suits as well. *See supra* notes 111–115, 154 and accompanying text.

374 *See supra* note 113 and accompanying text.

375 *Iran Sanctions Program*, OFAC SANCTIONS ATT'Y, https://ofaclawyer.net/economic-sanctions-programs/iran/ [https://perma.cc/EVP3-MNDH] (last visited Dec. 24, 2022).

376 Freeman v. HSBC Holdings PLC (*Freeman II*), 413 F. Supp. 3d 67, 84 (E.D.N.Y. 2019), *aff'd on other grounds*, 57 F.4th 66 (2d Cir. 2023).

377 *Id.*

to Iran and its Agents and Proxies [including SDGTs and SDNs]" that were designed to "alter[ ], falsify[ ], or omit[ ] wire transfer information" and by "providing trade finance services and expert advice to Iran and its Agents and Proxies on how to evade economic sanctions."[378] As a result of these alleged activities—which again, if true, would likely violate the government's sanctions regime—"Iran [gained] access to hundreds of billions of U.S. dollars that it would not have otherwise received" such that "Iran and its Agents and Proxies could not have conducted their terror campaign . . . without Defendants' financial services."[379]

c. *The Piggybacking Phenomenon*

Finally, the similarity in activities targeted by the private and public enforcement of national security is also a byproduct of piggybacking. While the government has sometimes launched investigations based on private national security suits,[380] private plaintiffs have exhibited a particular inclination to base their claims off the government's prior national security investigations and prosecutions—a practice arguably common to the private enforcement world.[381]

For example, plaintiffs have brough various cases under the ATA's private right of action against the global financial institution, HSBC—cases that have built off and may, in fact, have been triggered by the U.S. government's terrorism-related investigation into the bank. In 2012, that investigation led to a deferred prosecution agreement between the DOJ and various HSBC entities for violating the Bank Secrecy Act, IEEPA, and the Trading with the Enemy Act.[382] According to the DOJ press release, HSBC's legal violations permitted "narcotics traffickers and others to launder hundreds of millions of dollars through HSBC subsidiaries, and to facilitate hundreds of millions more in transactions with sanctioned countries."[383]

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378 O'Sullivan v. Deutsche Bank AG, No. 17 CV 8709, 2019 WL 1409446, at *2–3 (S.D.N.Y. Mar. 28, 2019) (internal citation omitted).

379 *Id.* at *3 (internal quotation omitted).

380 *See infra* notes 418–419 and accompanying text.

381 *See* Stephenson, *supra* note 272, at 128 n.117.

382 Press Release, U.S. Dep't of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations [https://perma.cc/7MN5-S5V3].

383 *Id.*

Citing to the 2012 deferred prosecution agreement,[384] various Section 2333 plaintiffs sued HSBC for laundering drug money for Mexican cartels,[385] for "enter[ing] into an agreement with Iran and various other Iranian banks to provide material support to Iran and its terror proxies by processing trade arrangements and financial transfers in violation of U.S. sanctions,"[386] and for evading U.S. regulators and facilitating the passage of hundreds of millions of U.S. dollars through the United States for transfer to "terrorist organizations actively engaged in plotting attacks against the United States and its citizens."[387]

Other Section 2333 cases have targeted UBS, another global financial institution. These cases appear to be based on a 2004 Order of Civil Monetary Penalty issued against the company by the U.S. Federal Reserve.[388] According to the Federal Reserve press release announcing UBS's consent to the order, the government assessed a penalty against the company "in connection with U.S. dollar banknote transactions with counterparties in jurisdictions subject to sanctions under U.S. law [including terrorism-related sanctions], specifically Cuba, Libya, Iran, and Yugoslavia."[389] Citing to this order,[390] Section 2333 plaintiffs sued UBS for "illegally providing Iran with hundreds of millions of dollars in cash."[391] Other Section 2333 cases have been based on U.S. government prosecutions or investigations relating to material support and sanctions violations against banks like BNP Paribas[392] and Crédit Lyonnais,[393] to name a few.

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384 Siegel v. HSBC N. Am. Holdings, Inc., 933 F.3d 217, 221 (2d Cir. 2019); Zapata v. HSBC Holdings PLC, 414 F. Supp. 3d 342, 346 (E.D.N.Y. 2019), *aff'd*, 825 Fed. Appx. 55 (2d Cir. 2020); Freeman v. HSBC Holdings PLC (*Freeman I*), No. 14 CV 6601, 2018 WL 3616845, at *34 (E.D.N.Y. July 27, 2018), *report and recommendation rejected on other grounds*, 413 F. Supp. 3d 67 (E.D.N.Y. 2019), *aff'd on other grounds*, 57 F.4th 66 (2d Cir. 2023).

385 *Zapata*, 414 F. Supp. 3d at 345.

386 *Freeman I*, 2018 WL 3616845, at *30.

387 *Siegel*, 933 F.3d at 221.

388 Press Release, U.S. Fed. Reserve (May 10, 2004), https://www.federalreserve.gov/boarddocs/press/enforcement/2004/200405102/default.htm [https://perma.cc/3WCU-6MF4].

389 *Id.*

390 Rothstein v. UBS AG, 708 F.3d 82, 87 (2d Cir. 2013).

391 *Id.*

392 *See* Owens v. BNP Paribas, S.A., 897 F.3d 266, 269 (D.C. Cir. 2018) (Section 2333 case against BNP Paribas citing to bank's guilty plea in federal criminal case for "illegally conspiring with banks and other entities to evade the sanctions regime and unlawfully move nearly $9 billion through the U.S. financial system").

393 *See* Strauss v. Crédit Lyonnais, S.A., 379 F. Supp. 3d 148 (E.D.N.Y. 2019) (Section 2333 case against Crédit Lyonnais relying on deferred prosecution agree-

2. *Implicating Similar Terrorist Entities*

This brings us to the second way national security's private enforcement enhances the state's infrastructural power—namely, by implicating terrorist entities that are similar to those pursued by the government. Specifically, entities targeted either directly or indirectly by the private enforcement of national security are often similar to those actors pursued by the government through its criminal material support prosecutions and economic and trade sanctions laws. This targeting is primarily a byproduct of the relationship (both formal and informal) between government designated FTOs, other sanctioned entities (such as SDTs, SDGTs, and SDNs), as well as designated state sponsors of terrorism, and Section 2333, 1605A, and 1605B suits.

Starting with the FTO designations, as mentioned earlier, to trigger criminal prosecution under Section 2339B, material support must be given to an organization designated as an FTO by the State Department.[394] Many private enforcement cases similarly focus on alleged material support to FTOs. For example, suits under Section 2333(a) of the ATA based on underlying violations of Section 2339B can only be brought for material support going to a designated FTO.[395] While Section 2333(a) cases based on Section 2339A can implicate terrorist activities by non-FTO groups, winning those cases can be difficult absent an FTO designation.[396] Though Section 2333(d)

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ment—between bank's successor company and DOJ—relating to sanctions violations to demonstrate, amongst other evidence, that Crédit Lyonnais provided material support to a terrorist organization).

394 18 U.S.C. § 2339B(a)(1).

395 *See, e.g.*, Weiss v. Nat'l Westminster Bank PLC, 768 F.3d 202, 204–05 (2d Cir. 2014) (Section 2333(a) case involving underlying Section 2339B claim alleging material support to a charity that provided funds to Hamas, a designated FTO).

396 For example, in *Ahmad v. Christian Friends of Israeli Communities*, the court dismissed a Section 2333(a) claim—based in part on underlying violations of Section 2339A—brought against U.S. charities purportedly providing financial support to Israeli settlers. No. 13 Civ. 3376, 2014 WL 1796322, at *5 (S.D.N.Y. May 5, 2014), *aff'd*, 600 Fed Appx. 800 (2d Cir. 2015). Even though plaintiffs presented allegations arguably demonstrating the settlers had engaged in terrorist activity, the court dismissed the complaint. *Id.* at *3. In doing so, it suggested that a "knowing" donor to Israeli settler groups would not inevitably know their money would support terrorist activities; while, by contrast, a knowing donor to Hamas "would know that Hamas was gunning for Israelis . . . and that donations to Hamas . . . would enable Hamas to kill or wound, or try to kill, or conspire to kill more people in Israel." *Id.* In reaching this conclusion, the court intimated that the absence of any affiliation with the sort of "established terrorist organizations" typically designated as an FTO—like Hamas—would undermine even those Section 2333(a) cases based on Section 2339A. *Id.*

cases do not require an underlying violation of Sections 2339A or 2339B, they do require plaintiffs' claim arise "from an act of international terrorism committed, planned, or authorized by an organization [] designated as [an FTO]."[397] Even though Section 1605A does not expressly condition suit on FTO support, many of these cases involve aid to such groups.[398] As for Section 1605B, while these suits do not depend on the involvement of FTOs either, the majority of cases brought so far have focused on material support given to FTOs.[399]

As for other sanctioned entities, the Treasury Department's Office of Foreign Assets Control ("OFAC") has created the SDN designation, which is an "umbrella" label[400] that applies to persons, including organizations and corporations, subject to U.S. economic or trade sanctions.[401] While terrorism is not the only reason an individual or entity might be designated a SDN,[402] SDNs include designees, such as SDTs and SDGTs, that have been sanctioned under various terrorism-related programs.[403] This means that if an entity is a SDT or SDGT, it is a SDN too. The SDN designation also includes individuals or entities flagged for terrorism-related reasons, without being designated under a particular sanctions program.[404] Private enforcement cases under Section 2333 that have invoked violations of sanctions laws have not infrequently implicated these sanctioned entities.[405] Of the three designation types, Section

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397 18 U.S.C. § 2333(d)(2).

398 *See, e.g.*, Braun v. Islamic Republic of Iran, 228 F. Supp. 3d 64 (D.D.C. 2017) (Section 1605A case involving alleged material support to Hamas); Bluth v. Islamic Republic of Iran, 203 F. Supp. 3d 1 (D.D.C. 2016) (same).

399 As discussed below, Section 1605B was primarily designed to allow suits related to the 9/11 attacks—which were perpetrated by al Qaeda, a designated FTO. *See infra* Part III.B.2.c.

400 Kathryn A. Ruff, *Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447, 454 (2005).

401 31 C.F.R. § 515.306; Owens v. BNP Paribas, S.A., 235 F. Supp. 3d 85, 88 n.2 (D.D.C. 2017).

402 *BNP Paribas*, 235 F. Supp. 3d at 88 n.2.

403 O'Sullivan v. Deutsche Bank AG, No. 17 CV 8709, 2019 WL 1409446, at *2 n.3 (S.D.N.Y. Mar. 28, 2019). FTOs are also included in the SDN list. *Id.* As described below, individuals and entities that are part of the SDN list are designated pursuant to the particular rules associated with the sanctions programs that apply to them. *See infra* note 473 and accompanying text.

404 *See* Ruff, *supra* note 400 at 458 ("[A]n individual or group can be added to the SDN list and have its assets blocked *pursuant to* investigation without having been given a formal terrorist designation.").

405 *See, e.g.*, *O'Sullivan*, 2019 WL 1409446, at *4 (Section 2333 case involving allegations of material support going to various SDGTs and SDNs); Boim v. Quranic Literacy Institute, 340 F. Supp. 2d 885, 889, 892, 892 n.2 (N.D. Ill. 2004)

2333 cases have most commonly referenced SDGTs, followed by SDNs, and then SDTs.[406]

Finally, all countries designated as state sponsors of terrorism are both automatically subject to certain specific terrorism-related U.S. sanctions programs and often the target of more comprehensive country-based economic and trade embargoes.[407] Since they can only be brought against state sponsors of terrorism, Section 1605A suits similarly target countries that are or have been the subject of U.S. economic and trade sanctions regimes. For example, Iran, which is perhaps the most frequently sued state under Section 1605A, is both a designated state sponsor of terrorism and the object of an extensive country-based sanctions' program including but not limited to its purported terrorist activities.[408]

3. *Furthering the Same Legislative Purpose*

The third way the private enforcement of national security enhances the state's infrastructural power is by furthering the same legislative purpose and objectives as the criminal material support laws and sanctions programs. In particular, both the private enforcement statutes and the public laws they implicate center on advancing the U.S. government's "fight" against terrorism. For example, in considering passage of the criminal material support statute, Section 2339B, Congress noted that "law enforcement at all levels must be given reasonable and legitimate investigative tools to enhance their capability of thwarting, frustrating, and preventing terrorist acts before they result in death and destruction."[409] As for the U.S. sanctions regime, while these programs involve innumerable

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(Section 2333 case brought against a defendant designated as both a SDT and SDGT).

406 Notably, there can be overlap between various terrorism-related sanctions designations. For example, Hamas was listed as a SDT in 1995, as an FTO in 1997, and as a SDGT in 2001. *See* Averbach v. Cairo Amman Bank, No. 19-cv-0004, 2020 WL 486860, at *3 (S.D.N.Y. Jan. 21, 2020), *report and recommendation adopted sub nom*, Averbach *ex rel.* Est. of Averbach v. Cairo Amman Bank, No. 1:19-CV-00004, 2020 WL 1130733 (S.D.N.Y. Mar. 9, 2020).

407 Rathbone, Jeydel, and Lentz, *supra* note 284, at 1067–68.

408 *See* S. Riane Harper, *Can U.S. Sanctions on Iran Survive Iran's World Trade Organization Accession?*, 73 N.Y.U. ANN. SURV. AM. L. 243, 243 (2018) ("For decades, the United States has imposed trade restrictions on Iran due to concerns about Iran's nuclear program, human rights violations, and support for terrorism."). As noted below, currently Iran, Syria, Cuba, and North Korea are designated as state sponsors of terrorism. *See infra* note 537. All these countries have at one time or another been subject to comprehensive U.S. economic and trade sanctions. Rathbone, Jeydel, and Lentz, *supra* note 284, at 1067–68.

409 H.R. REP. NO. 104-383, at 42 (1995).

statutes and regulations, the purpose of a number of targeted and country-based sanctions regimes is, in part, to prevent and end terrorism by cutting off the financial pipeline.[410]

Similarly, the legislative histories for the ATA's private right of action and the FSIA's terrorism exceptions make clear that while these statutes are primarily aimed at providing remedies for individual harm, they are also aimed at combatting the threat of terrorism itself. For example, in describing the need for Section 2333(a) of the ATA, one U.S. senator declared that "[n]ow more than ever, countries around the world must be vigilant and relentless in the fight against terrorism."[411] In passing the predecessor statute to Section 1605A of the FSIA, the House Report struck a similar note. An exception to foreign sovereign immunity was necessary, in Congress's view, because state sponsors had "become better at hiding their material support for their [terrorist] surrogates."[412] Congressional commentary on Section 2333(d) and 1605B's role in the "fight" against terrorism is especially explicit in drawing the connection between private terrorism suits and the government's counterterrorism efforts. In articulating the need for these statutes, the JASTA bill noted both that "[i]nternational terrorism is a serious and deadly problem that threatens the vital interests of the United States"[413] and that the U.S. government has a "vital interest in providing persons and entities injured as a result of terrorist attacks committed within the United States . . . full access to the court system in order to pursue civil claims."[414]

4. *Facilitating Collaboration*

The fourth and final way in which private enforcement cases reinforce the state's infrastructural power is by facilitating collaboration between private parties and the govern-

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410 *See, e.g.*, OFF. OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF TREASURY, TERRORISTS ASSETS REPORT 2 (2020), https://ofac.treasury.gov/recent-actions/20210908 [https://perma.cc/2DUU-4PF3] (describing U.S. sanctions programs targeting terrorists, terrorist organizations, their supporters, and state sponsors of terrorism as "expos[ing] and isolat[ing] terrorists and their organizations"); Exec. Order 13886, 84 Fed. Reg. 48,041, 48041 (Sept. 9, 2019) (Executive Order describing U.S. counterterrorism sanctions as generally aimed at "combat[ing] acts of terrorism and threats of terrorism by foreign terrorists").

411 137 CONG. REC. 3303 (1991).

412 H.R. REP. NO. 104-383, at 62 (1995).

413 Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(a)(1), 130 Stat. 852, 854 (2016) (codified at 18 U.S.C. § 2333 note (Findings and Purpose).

414 *Id.* § 2(a)(7).

ment.[415] Indeed, some private plaintiffs have viewed their work as directly aiding the state's counterterrorism efforts.[416] Some have even felt duty-bound to share relevant evidence with the U.S. government and have provided information to assist with its criminal material support prosecutions and investigations.[417]

The courts themselves have noted how national security's private enforcement can spur government investigations into the activities of certain entities. In one Section 2333 case against Arab Bank, for example, the district court noted how "[private] [l]itigation against the Arab Bank [ ] prompted the Office of the Comptroller of the Currency and the Financial

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415 While one might argue that Sections 1605B and 1605A are exceptions to this rule, the reality is a bit more complicated. Starting with Section 1605B, at its inception, 1605B certainly created more friction than collaboration between prospective plaintiffs and the Executive. Though ultimately overridden by Congress, President Barack Obama originally vetoed JASTA because it included Section 1605B—which is broadly understood to target Saudi Arabia, an important U.S. ally, for its alleged involvement in the 9/11 attacks. *See* 162 CONG. REC. S6071–72 (daily ed. Sept. 26, 2016) (President Obama's veto message regarding JASTA); David Smith, *Congress Overrides Obama's Veto of 9/11 Bill Letting Families Sue Saudi Arabia*, THE GUARDIAN (Sept. 29, 2016), http://www.theguardian.com/us-news/2016/sep/28/senate-obama-veto-september-11-bill-saudi-arabia [https://perma.cc/NQT4-GFMP]. Beyond this initial tense history, Section 1605B also includes a provision that could create further friction between plaintiffs and the Executive, by giving the latter authority to resolve Section 1605B cases through diplomatic efforts with foreign country defendants. *See* Justice Against Sponsors of Terrorism Act § 5(b) (codified at 18 U.S.C. § 1605B note (Stay of Actions Pending State Negotiations)). At the same time, however, that provision may ultimately encourage the government to collaborate more frequently with private plaintiffs to reach a settlement agreeable to all parties in 1605B cases. As for Section 1605A, as mentioned earlier, the Executive opposed passage of this statute's predecessor law. *See supra* note 350. Moreover, the Executive has historically created challenges to executing on Section 1605A judgments. *See infra* note 420. All that being said, the Executive has not, in practice, systematically opposed suits brought under Section 1605(a)(7) or 1605A, especially when raised against countries considered to be unfriendly to the United States. *See* Adam N. Schupack, *The Arab-Israeli Conflict and Civil Litigation Against Terrorism*, 60 DUKE L.J. 207, 228 (2010) (noting that while "[t]he executive's responsibility for the conduct of foreign affairs makes it more sensitive to the impact of [Section 1605A] suits on U.S. foreign relations . . . even that branch is likely to refrain from intervening too vigorously on behalf of states like Iran for political reasons").

416 As the lead plaintiff in one Section 1605(a)(7) case noted about her family's motivations for filing suit, "[w]e don't want to be victims of terror anymore. We want to be soldiers in the war on terrorism; the courtroom is our battlefield." Newsweek Staff, *We Want to Hurt Iran*, NEWSWEEK (Mar. 18, 2003), http://www.newsweek.com/we-want-hurt-iran-132447 [https://perma.cc/9GEQ-U4Y9].

417 For example, plaintiffs in the *Boim v. Holy Land Foundation* case provided evidence they had gathered to the U.S. government to help with its criminal case against several *Boim* defendants. ORDE F. KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR 59–60 (2016).

Crimes Enforcement Network ("FinCEN") to investigate Arab Bank."[418] As a result of these investigations:

> FinCEN . . . found that, despite a heightened risk of illicit activity, Arab Bank failed to implement proper compliance procedures. FinCEN also found that Arab Bank failed to conduct the proper investigations after Arab Bank learned that it cleared fund transfers for entities that the United States government later designated as terrorist organizations.[419]

The U.S. government has returned the favor and directly collaborated with private enforcement plaintiffs.[420] In one case, the U.S. Department of Treasury provided information to plaintiffs' lawyers so they could attach funds held in U.S. bank accounts in fulfillment of a Section 1605A judgment against Iran.[421] In other cases, the government has gone even further. In at least one case involving the precursor statute to 1605A, the U.S. government reportedly sent a team of FBI agents to the Gaza Strip to collect evidence on plaintiff's behalf.[422]

Collaboration between private parties and the government may also be facilitated by a "revolving door" between the private and public sectors. For example, a lead attorney for various 9/11 plaintiffs worked for the administration of President Joe Biden before returning to private practice and resuming his work on the 9/11 private enforcement cases.[423] Though the attorney was reportedly walled off from issues relating to the 9/

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418 Miller v. Arab Bank, PLC, 372 F. Supp. 3d 33, 40 (E.D.N.Y. 2019).

419 *Id.*

420 Under a provision of the FSIA, 28 U.S.C. § 1610(f)(2) ("Section 1610(f)(2)"), the government is obliged to make "every effort" to assist plaintiffs with final Section 1605A judgments in "identifying, locating, and executing" against the property of state sponsor defendants 28. It is unclear, however, whether this provision—Section 1610(f)(2)—is operative or has been extinguished by a presidential waiver that applies to another part of Section 1610(f). Rubin v. Islamic Republic of Iran, 830 F.3d 470, 486–87 (7th Cir. 2016) (noting that "Section 1610(f) *never became operative*" as a result of a blanket wavier of Section 1610(f)(1) issued by President Bill Clinton pursuant to that statute), *aff'd* 138 S. Ct. 816 (2018). Admittedly, the Executive branch has historically created obstacles preventing plaintiffs from executing on judgments under Section 1605A and its predecessor statute—obstacles Congress has sought to remedy, including through passage of Section 1610(f)(2). Sean K. Mangan, *Compensation For "Certain" Victims of Terrorism Under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payments at an Institutional Cost*, 42 VA. J. INT'L L. 1037, 1044–47 (2002). As noted earlier, however, the Executive's opposition to 1605A suits may also be somewhat overstated. *See supra* note 415.

421 KITTRIE, *supra* note 417, at 79.

422 *Id.* at 71.

423 Lee Fang & Ryan Grim, *Biden's Afghanistan Counsel Left the White House in January. Now He's Poised to Reap Financial Windfall from Billions in Seized Afghan Assets.*, THE INTERCEPT (Feb. 15, 2022), https://theintercept.com/2022/02/15/afghanistan-central-bank-911-lawsuit/ [https://perma.cc/BB6G-VJ3P].

11 suits while in government,[424] the revolving door between private practice and government work likely creates opportunities for plaintiffs' bar to collaborate with government officials on material support and sanctions-related cases.

B. Despotic Power & Purposes: Targeting Minorities/ Undermining Civil Rights

In addition to furthering infrastructural power, national security's private enforcement can reinforce the despotic power and purposes of the state—precisely because of its infrastructural reach.

As described by Michael Mann, despotic power is "the range of actions which the [state] elite is empowered to undertake *without* routine, institutionalised negotiation with civil society groups."[425] In effect, this means the state can and does act without any input from or accountability to non-state actors.[426] The more unchecked the state is by outside political and social groups, the more despotic power it enjoys.[427] An example of despotic power is the ability of an absolute monarch to kill whomever they please within their domain without legal process.[428]

As Mann has noted, while despotic and infrastructural power may be analytically separate, they can overlap in practice.[429] For example, "the greater the state's infrastructural power, the greater the volume of binding rule-making, and therefore the greater the likelihood of despotic power over individuals and perhaps also over marginal, minority groups."[430] Infrastructural power can, in other words, increase the state's despotic powers, especially against individuals and groups that are relatively powerless and exercise little control over the state. Indeed, as Mann notes, "[a]ll infrastructurally powerful states, including . . . capitalist democracies, are strong in relation to individuals and to the weaker groups in civil society."[431] This does not, of course, mean that all manifestations of infras-

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424 *Id.*
425 Mann, *supra* note 13, at 188 (emphasis added).
426 *Id.* at 188.
427 Jack A. Goldstone, *A Historical, Not Comparative Method: Breakthroughs and Limitations In the Theory and Methodology of Michael Mann's Analysis of Power*, *in* AN ANATOMY OF POWER: THE SOCIAL THEORY OF MICHAEL MANN 263, 265 (John Hall & Ralph Schroeder eds., 2006).
428 *See* Mann, *supra* note 13, at 189.
429 *See id.* at 190.
430 *Id.*
431 *Id.*

tructural power are bad or should be eliminated, but rather that infrastructural power can, at times, be redirected towards and enhance the despotic powers of the state.

Building on Mann's work, other social scientists have argued that infrastructural power can also be turned to despotic *purposes*, particularly during "wartime." Focusing on the post-9/11 landscape, political scientist Sydney Tarrow has argued that "endless . . . war-making"[432] has eroded "the conceptual distinction between wartime and peacetime" and "with it the practical distinction between despotic and infrastructural power."[433] According to Tarrow, given the American state's significant infrastructural authority—both in terms of its "deep penetration of civil society" and "its capacity to use the resources of private actors to advance its purposes"—the state is well positioned to turn its infrastructural power to "despotic purposes" particularly during times of endless war.[434] Those despotic purposes can include the erosion of civil rights and civil liberties by private groups participating in or implementing the government's policies and programs.[435]

Even though Tarrow's argument appears to depend upon "wartime," his observations about the relationship between infrastructural power and despotic purposes have broader implications for U.S. government authority. Indeed, as others have noted, "wartime" is less "an exception to normal peacetime . . . [and] instead an enduring condition" of American life.[436] As such, infrastructural power's potential to bolster despotic purposes is an "enduring condition" of the American state, as well.

This reality—infrastructural powers' role both in furthering the state's despotic powers as well as its despotic purposes—is particularly concerning. As Tarrow argues, "because . . . [infrastructural power] is imbricated within the plural play of interests between state and private groups, its growth is more dangerous than the naked use of the tools of despotism."[437]

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432 Sidney Tarrow, *Mann, War, and Cyberspace: Dualities of Infrastructural Power in America*, 47 THEORY & SOC'Y. 61, 82 (2018).

433 *Id.*

434 *Id.*

435 *See id.* at 76–77 (describing the role of private companies in the U.S. government's rights-eroding mass surveillance programs). One might even argue that despotic power is as much about the state's ability to do what it wants as it is about the state's ability to pursue despotic purposes by intruding on individual rights. *See id.* at 68 (describing various civil liberties violations by the U.S. government during wartime as forms of despotic power).

436 MARY DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 5 (2012).

437 Tarrow, *supra* note 432, at 69.

While legal scholars have largely ignored private enforcement's role in enhancing the state's despotic powers and purposes, the work of Mann and Tarrow suggests that private enforcement can broadly increase the state's despotic authority in three ways. First, as a theoretical matter, private enforcement enhances the state's despotic authority by generally bolstering the infrastructural power of the state. Second, private enforcement can go even further and bolster the state's despotic purposes *in practice* by undermining the civil rights and civil liberties of individuals and groups. Finally, private enforcement can also further the state's despotic powers as a practical matter by targeting civil society members who have little power or influence over government.

As this framework suggests, the despotic aspects of private enforcement depend upon its infrastructural aspect. Specifically, by distributing enforcement responsibilities to a broad array of civil society actors, private enforcement quantitatively increases the opportunities for the state's despotic powers and purposes to be reinforced. Through private enforcement laws, the state provides a "structure of . . . opportunities" for private parties to pursue particular goals and strategies.[438] These "opportunities" can theoretically be used by the state to weaponize civil society in order to enhance its despotic authority. This is why private enforcement laws *all* have the potential to enhance the despotic powers and purposes of the state.

Bolstering the state's despotic authority in practice, however, depends on more than just civil society participation. Rather, it depends upon the ways particular private enforcement laws are designed and operate, including how they are used by litigants. It is these kinds of private enforcement laws—ones that reinforce the state's despotic powers and purposes in practice—that are particularly troubling.

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438 *See* David S. Meyer & Debra C. Minkoff, *Conceptualizing Political Opportunity*, 82 SOC. FORCES 1457, 1459 (2004) (defining a "structure of . . . opportunity" as "consistent . . . dimensions of the political environment that provide incentives for people to undertake . . . action by affecting their expectations for success or failure"); Michael C. Dorf and Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 L. & SOC. INQUIRY 449, 449 (2014) (noting that "law is part of the 'opportunity structure'" for civil society members). While the "opportunity structure" literature focuses on political movements and mobilizations, its emphasis on how external factors—including those created by the state itself—generate opportunities for political action is also useful for understanding how institutional state structures, like private enforcement laws, can facilitate certain kinds of private behavior more generally.

Like all forms of private enforcement, national security's private enforcement potentially enhances the despotic authority of the state by bolstering its infrastructural power. Even more importantly, however, the private enforcement of national security aggrandizes the state's despotic powers and purposes in practice. It does so by harnessing the infrastructural power it generates to reinforce both the rights deprivations endemic to the government's national security policies, as well as the systemic discrimination reflected in those policies against Arabs, Middle Easterners, and Muslims—who remain a marginalized and demonized group within U.S. society.[439] The rest of this section examines the specific ways in which national security's private enforcement bolsters the state's despotic purposes and powers, in practice, by exacerbating the government's civil rights deprivations and targeting of vulnerable communities in the name of national security.[440]

1. *Civil Liberty Concerns*

The private enforcement of national security bolsters the state's despotic purposes by reinforcing civil liberties problems embedded within two national security policies. The first is the concept of material support. The second is the government process for designating FTOs and other sanctioned entities.

As already demonstrated in this Article, the private enforcement of national security relies on the broad definition of material support reflected in federal law, as well as the Executive's designation of FTOs, SDNs, SDTs, and SDGTs.[441] As this section elaborates, in incorporating these elements from the public material support regime, national security's private enforcement both directly and indirectly exacerbates the rights deprivations endemic to that regime.

This section begins by discussing the civil liberties concerns raised by the concept of material support and the govern-

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439 Maryam Jamshidi, *The Discriminatory Executive and the Rule of Law*, 92 U. COLO. L. REV. 77, 84 (2021).

440 While beyond this Article's scope, the despotic effects of national security's private enforcement may be exacerbated by some of the downsides of private enforcement mentioned earlier, including the lack of democratic accountability. *See supra* note 341–342 and accompanying text. For example, while public prosecutors may be inclined to consider negative public reactions to or perceptions of their criminal material support cases, private enforcement plaintiffs are unlikely to be concerned with such responses. This, in turn, affords private litigants more leeway to pursue sympathetic defendants from marginalized communities—like for example Muslim advocacy groups—that the government may be reticent to prosecute for reasons of optics or politics.

441 *See supra* Part III.A.1–2.

ment's various designation processes and then explores how national security's private enforcement reinforces those concerns. The purpose of this section is not to catalogue which civil rights claims have or have not been successful with the courts—while some have succeeded, many have not.[442] Instead the point is to underscore the ways national security's private enforcement exacerbates threats to civil liberties posed by the public enforcement of national security.

a. *Material Support*

The concept of material support has long been subject to civil liberties critiques,[443] particularly with respect to the First Amendment rights of U.S. persons and foreign nationals with substantial connections to the United States.[444] Many of these critiques have been raised in relation to Section 2339B, which criminalizes material support without requiring any intent or knowledge that such support will further terrorist violence.[445]

The troubling civil liberties consequences of Section 2339B—and, by extension, the material support concept itself—were on starkest display in the Supreme Court case of *Holder v. Humanitarian Law Project* ("*HLP*"), which involved various constitutional challenges to the statute.[446] These challenges included a First Amendment claim that Section 2339B violated plaintiffs' free speech and associational rights by criminalizing material support to designated terrorist groups even where that support was non-violent and unrelated to the groups' purported terrorist activities.[447] In addition to rejecting plaintiffs' other constitutional arguments, the Court ul-

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442 *See* Ferrari, *supra* note 33, at *10–15 (describing varying rates of success for constitutional claims brought against SDN listings).

443 Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 5–18 (2005).

444 Even though Section 2339B applies to foreign organizations, it can impact the First Amendment rights of both U.S. nationals, as well as foreign nationals with substantial connections to the United States (including FTOs themselves) that are entitled to constitutional protections. *See infra* note 460 and accompanying text. For more on the domestic First Amendment impacts of Section 2339B, see Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333, 1368–71 (2019).

445 *See, e.g.*, WADIE E. SAID, CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS 65–68 (2015) (discussing judicial interpretations of Section 2339B and their implications for free speech and association rights). While Section 2339A has also been criticized, Section 2339B has drawn the most fire, in part, because of its particularly loose mens rea standard.

446 Holder v. Humanitarian Law Project (*HLP*), 561 U.S. 1, 7 (2010).

447 *Id.* at 25, 39.

timately denied these First Amendment challenges.[448] In doing so, the Supreme Court's decision underscored the threat to free speech and associational rights posed by the material support concept.

On the free speech issue, the *HLP* Court held that the prohibition against material support applied to non-violent activities plaintiffs sought to engage in, such as training members of a terrorist organization on how to use humanitarian and international law to peacefully resolve disputes, teaching them how to petition intergovernmental bodies for relief, and engaging in "political advocacy" on their behalf.[449] While the Court conceded that these activities constitute speech, it stripped them of their protected status because they were coordinated with or under the direction of foreign groups the speaker knew to be terrorist organizations.[450] In reaching this conclusion, the Court relied heavily on the "judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization."[451] As a result, the Court effectively rejected plaintiffs' argument that the "objective of combating terrorism does not justify prohibiting [plaintiffs'] speech . . . because their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism."[452]

Whatever one thinks of the Court's rationale, the fact that it declared speech acts to be prohibited by Section 2339B demonstrates how the concept of material support reaches "a fair amount of speech"[453]—a fact the dissent in *HLP* recognized and criticized.[454]

As for associational rights, the *HLP* Court made short shrift of plaintiffs' argument that Section 2339B prohibits membership in a foreign terrorist organization in violation of the First Amendment.[455] The Court held that Section 2339B does not

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448 *Id.* at 18–40.

449 *Id.* at 14–15, 25–40.

450 *Id.* at 25–40. The Court did, however, suggest that applying the material support prohibition either to similar support going to domestic organizations or to U.S. nationals who engaged in independent, uncoordinated speech with FTOs may be unconstitutional. *Id.* at 39.

451 *Id.* at 36.

452 *Id.* at 29.

453 Sinnar, *supra* note 444, at 1369.

454 *See HLP*, 561 U.S. at 44 (2010) (Breyer, J. dissenting) (arguing that the kind of speech *HLP* plaintiffs wanted to engage in was precisely the sort for which the First Amendment "ordinarily offers its strongest protection").

455 *Id.* at 39.

prohibit mere membership and instead only prohibits providing material support to designated FTOs.[456] But, as others have noted, the right to association is meaningless without the right to materially support the organization one has joined.[457]

b. *FTO Designations*

The FTO designation process is also fraught with civil liberties concerns for both designated groups and third parties. Pursuant to federal statute, the Secretary of State can label a group as an FTO as long as it: (a) "is a foreign organization"; (b) "engages in terrorist activity . . . or terrorism . . . or retains the capability and intent to engage in terrorist activity or terrorism"; and (c) "threatens the security of [U.S.] nationals or the national security of the United States."[458]

The FTO designation process, which is subject to limited public guidance beyond this statutory authority,[459] potentially impacts the Fifth, Fourth, and First Amendment rights of FTOs, as long as they have substantial connections to the United States.[460] The designation process undermines the Fifth Amendment procedural due process rights of these FTOs[461] by depriving them of any opportunity to challenge their designations before they are made[462] or to obtain mean-

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456 *Id.*

457 *See* Brent Tunis, *Material-Support-to-Terrorism Prosecutions: Fighting Terrorism by Eroding Judicial Review*, 49 AM. CRIM. L. REV. 269, 290 (2012) (noting that "if an individual can be a member of an FTO, but is prohibited from speaking or doing anything that can be construed as 'coordinated activity' with the organization, then what real value does his membership retain?").

458 8 U.S.C. § 1189(a)(1)(A)–(C).

459 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-629, COMBATTING TERRORISM: FOREIGN TERRORISM ORGANIZATION DESIGNATION PROCESS AND U.S. AGENCY ENFORCEMENT ACTIONS 6–8 (2015), https://www.gao.gov/assets/gao-15-629.pdf [https://perma.cc/4C5S-WPUV] (describing the State Department's six-step process for designating FTOs).

460 *See* Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 203 (D.C. Cir. 2001) (holding that where a foreign organization has "entered the territory of the United States and established substantial connections with this country . . . [it is] entitled to the protections of the Constitution"); Ferrari, *supra* note 33, at *13–14 (noting that foreign SDNs, including FTOs, that have "substantial connections" to the United States may be entitled to First, Fourth, and Fifth Amendment protections).

461 The FTO designation process has also been challenged on Fifth Amendment substantive due process grounds for disproportionately targeting Arab and Muslim groups. Sahar Aziz, Note, *The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?*, 9 TEX.J. ON C.L. & C.R. 45, 69–73 (2003).

462 Micah Wyatt, Comment, *Designating Terrorist Organizations: Due Process Overdue*, 39 GOLDEN GATE U. L. REV. 221, 240–41 (2009).

ingful review post-designation.[463] The designation process also undermines the Fifth Amendment procedural due process rights of FTOs where the government does not provide them with the evidentiary basis for their designations in a timely manner or at all.[464]

The designation process raises Fourth Amendment concerns—specifically the right to be free from unreasonable searches and seizures—where the U.S.-based property of an FTO is blocked by the U.S. government without a warrant[465] pursuant to its designation.[466] Finally, the FTO designation process potentially raises the same First Amendment concerns implicated by the prohibition on material support itself both because it prevents designated organizations from engaging in speech and advocacy-related activities[467] and because an organization can be designated an FTO for providing certain kinds of First Amendment-related material support to other FTOs.[468]

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463 FTOs have two ways to challenge their designations after the fact. First, the FTO may seek revocation of its designation with the Secretary of State. 8 U.S.C. § 1189(a)(4). Second, and alternatively, the FTO may seek judicial review of its designation. 8 U.S.C. § 1189(c). Both forms of review have been criticized as inadequate. Julie B. Shapiro, *The Politicization of the Designation of Foreign Terrorist Organizations: the Effect on the Separation of Powers*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 547, 553–63, 574–75 (2008).

464 Ferrari, *supra* note 33 at *12.

465 As with other SDN designations, FTO designation opens designated entities up to the warrantless blocking of their property by OFAC. 8 U.S.C. § 1189(a)(2)(C); Chris Jones, Note, *Caught in the Crosshairs: Developing a Fourth Amendment Framework for Financial Warfare*, 68 STAN. L. REV. 683, 698 (2016). In this regard, designation, whether as a FTO or other sanctioned entity, can also raise concerns under the Taking's Clause of the Fifth Amendment. Under that clause, no "private property [shall] be taken for public use, without just compensation." U.S. CONST., amend. V. Designated parties have argued that OFAC's blocking of their assets constitutes a taking under that clause. Zevallos v. Obama, 10 F. Supp. 3d 111, 132–33 (D.D.C. 2014), *aff'd*, 793 F.3d 106 (2015).

466 Jones, *supra* note 465, at 698; Ferrari, *supra* note 33, at *11–12. Indeed, the sorts of Fifth and Fourth Amendment concerns described here are endemic to FTO designations, as well as other sanctions designations described later in this section, since the government regularly fails to provide pre-deprivation hearings to designated entities, to present the evidentiary basis for its FTO and other SDN designations in a timely manner, give designees an adequate opportunity to challenge their designations, or provide warrants with OFAC orders that block the assets of designated entities. Ferrari, *supra* note 33, at *6–7, *12.

467 *See supra* note 449–454 and accompanying text. By prohibiting individuals and entities from engaging in First Amendment protected activities on behalf of the FTO, the FTO itself is effectively prohibited from engaging in such activities.

468 *See* 8 U.S.C. § 1189(a)(1) (listing substantive requirements for designating group as FTOs, including requirement that the terrorist group engage in terrorist activity as defined in 8 U.S.C. § 1182(a)(3)(B)); 8 U.S.C. § 1182(a)(3)(B)(iv) (defining terrorist activity to include certain kinds of material support that may raise First Amendment concerns).

As for third parties that are U.S. nationals or have substantial connections to the United States, their constitutional rights can be similarly affected by FTO designations. For example, FTO designations can impact the Fifth Amendment procedural due process rights of third-parties as well, by "insulating" government designation of FTOs from meaningful judicial review.[469] Designations can also effectively erode a third-party's First Amendment rights to speech and association by preventing them from donating money, giving other support to, or associating with the speech and advocacy-related activities, like charitable work,[470] of FTOs or other groups engaged in those activities that are supposedly connected to FTOs. Finally, assuming they otherwise satisfy the relevant statutory requirements, foreign third-parties with substantial connections to the United States who *do* provide certain kinds of material support to FTOs are, as just mentioned, potentially susceptible to FTO designation themselves[471]—exposing them to all the civil liberties violations the designation process can entail.

c. *SDN Designations*

Much like the FTO designation process, other SDN designation processes have broadly been criticized on civil liberties grounds.[472] Because the SDN list is a comprehensive list that includes entities designated under various authorities, the designation process for any particular SDN will depend upon the underlying authority being invoked.[473] Nevertheless, there are substantially similar civil liberties problems across SDN designation programs.[474] This section focuses on the two non-FTO, SDN regimes most relevant to this Article—SDT and SDGT des-

469 Humanitarian Law Project v. Reno, 205 F.3d 1130, 1136 (9th Cir. 2000). This argument, which was raised against Section 2339B by plaintiffs in the *HLP* litigation, piggybacked off their First Amendment association claim. According to plaintiffs, both their First and Fifth Amendment rights were limited by the Secretary of State's "'unfettered discretion' to limit their right to associate with certain foreign organizations, and by insulating her decisions from judicial review." *Id.*

470 *See* Aziz, *supra* note 463, at 85–87 (arguing that the donation of humanitarian aid "is [a] clear expression of [a donor's] political, ethical, or religious associations" even when given to a FTO and therefore should be protected by the First Amendment rights to speech and association).

471 *See supra* note 468 and accompanying text.

472 *See, e.g.*, Ferrari, *supra* note 33, at *10–14 (describing various civil liberties challenges brought in courts against SDN listings).

473 *Id.* at *4. For a description of the general process for SDN designations across various legal authorities, as well as how listed entities can challenge their designation see *id.* at *4, *6–8.

474 *Id.* at *10–14.

ignations—and their associated civil liberties problems both for designated entities and third-parties.

The SDT designation was created in 1995 by President Bill Clinton pursuant to Executive Order 12,947 ("EO 12,947").[475] That order designates various Palestinian and Jewish groups for threatening the "Middle East peace process" and blocks all "property and interests in property" held by those SDTs in the United States or that come within the possession or control of U.S. persons.[476] The order empowers the Secretary of State, in consultation with the U.S. Treasury Secretary and Attorney General, to designate additional persons or entities as SDTs where they have committed or "pose a significant risk of committing" acts of violence threatening the "Middle East peace process" or provide material support to such acts of violence.[477] Though the order focuses on groups in Israel/Palestine, it can and has been used to designate U.S. persons.[478]

Prompted by the 9/11 attacks, the SDGT designation was established a few years after the SDT list. On September 23, 2001, President George W. Bush issued EO 13,224, designating twenty-seven SDGTs.[479] Like EO 12,947, EO 13,224 blocks all property or interests in property held in the United States by designated SDGTs or that come within the possession or control of U.S. persons.[480] The SDGT list is a larger more expansive list than the SDT list, since it is directed towards the general threat of foreign terrorism and is not limited to those individuals or groups impacting the "Middle East peace process."[481] As with SDT designations, EO 13,224 can and has been used to designate U.S. persons.[482]

Like EO 12,947, under EO 13,224, both the Secretary of Treasury and Secretary of State can designate additional

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475 Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

476 *Id.* § 1(a). The order prohibits all transactions and dealings with SDTs by U.S. persons or inside the United States. *Id.* § 1(b).

477 *Id.* § 1(a)(ii).

478 Under EO 12,947, persons in the United States, including U.S. citizens, can be designated where they are "owned or controlled by" or "act for or on behalf of" designated SDTs. *Id.* § 1(a)(iii); Holy Land Found. for Relief and Dev. v. Ashcroft (*HLF*), 219 F. Supp. 2d 57, 64 (D.D.C. 2002), *aff'd* 333 F.3d 156 (D.C. Cir. 2003).

479 Exec. Order 13,224, *supra* note 114.

480 *Id.* § 1. As with EO 12,947, EO 13,224 prohibits all transactions and dealings with SDGTs by U.S. persons or inside the United States. *Id.* § 2(a)–(b).

481 Ruff, *supra* note 400, at 45.

482 Exec. Order 13,224, *supra* note 114, at § 1(c). *See HLF*, 219 F. Supp. 2d at 64 (noting designation of American charitable group as SDGT because it "acts for or on behalf of" another designated SDGT).

SDGTs, in consultation with other agencies.[483] These additional designees include any persons determined to be owned or controlled or acting for or on behalf of SDGTs, any persons determined to have committed or to pose a significant risk of committing acts of terrorism threatening "the security of U.S. nationals or the national security, foreign policy, or economy of the United States," and any persons determined, subject to certain exceptions, to have "assist[ed] in, sponsor[ed], or provid[ed] financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or . . . [SDGTs]" or who are "otherwise associated" with SDGTs.[484] The basis for SDGT designation can be quite loose. For example, "mere *association* [with a SDGT]—quite apart from demonstrated material support—is sufficient" to designate a target as an SDGT and freeze its assets.[485]

In 2019, President Donald Trump issued Executive Order 13,886 ("EO 13,886") which amended EO 13,224 to expand the range of persons potentially subject to designation as SDGTs.[486] EO 13,886 also revoked EO 12,947 and incorporated the existing SDT list into EO 13,224.[487]

Much like the FTO designation process, SDT and SDGT designations have various civil liberties problems that can impact designated entities and third parties, as long as they are foreign nationals with substantial connections to the United States or are U.S. nationals.[488] These include Fifth, Fourth, and First Amendment concerns that are quite similar to the FTO context.

Starting with the Fifth Amendment, the SDT and SDGT designation processes have been challenged for violating designated entities' Fifth Amendment right to procedural due process. A SDT or SDGT's Fifth Amendment due process rights are, for example, undermined by the government's practice of designating individuals and entities using information withheld from them, as well as failing to provide designees with a

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483 Exec. Order 13,224, *supra* note 114, at § 1(b)–(d). President Bush amended EO 13,224 in January 2003 and gave the Secretary of Homeland Security authority to make designations under the order, as well. Exec. Order. 13,284 68 Fed. Reg. 4075, § 4 (Jan. 23, 2003).

484 Exec. Order 13,224, *supra* note 114, at § 1(b)–(d).

485 Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 WAKE FOREST L. REV. 643, 651 (2008).

486 Exec. Order 13,886, 84 Fed. Reg. 48,041, § 1 (Sept. 9, 2019).

487 *Id.* at 48041, § 1.

488 Ferrari, *supra* note 33, at *13.

pre-designation hearing or other pre-designation notice.[489] The Fifth Amendment procedural due process rights of SDTs and SDGTs are also undermined by the absence of any meaningful review post-designation.[490] A SDT or SDGT's Fourth Amendment rights against unreasonable searches and seizures are undermined by the government's practice of blocking designee assets without obtaining a warrant supported by probable cause.[491] Finally, a group listed as a SDT or SDGT may have its First Amendment right to free speech and association eroded where it is preventing from engaging in speech and advocacy-related activities, like using its assets to make humanitarian donations.[492]

As for third-parties, SDT and SDGT designations can potentially impact the Fifth Amendment rights of these individuals and entities in ways similar to the FTO context.[493] Designations can also broadly impact their First Amendment rights by creating an atmosphere that dissuades them from donating to or otherwise supporting or associating with the political, social, or charitable activities of sanctioned groups for fear of being prosecuted or branded as terrorists.[494] Perhaps most troubling of all, under EO 13,224, third-parties can be exposed to sanctions designation themselves and all the rights deprivation that listing entails. As mentioned earlier, under EO 13,224, a person or entity can be designated as a SDGT if they provide material support to or are "otherwise associated with" other SDGTs.[495] Creating even more of a chilling effect for third-parties, OFAC "need have only reasonable suspicion of association or material support to justify designation" under EO 13,224.[496]

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489 Al Haramain Islamic Found., Inc. v. U.S. Dep't Treasury, 686 F.3d 965, 1001 (9th Cir. 2012). Plaintiffs have challenged their SDN listing, and the associated blocking of their assets, under other Fifth Amendment grounds as well, including the Fifth Amendment right to substantive due process. Holy Land Found. for Relief and Dev. v. Ashcroft (*HLF*), 219 F. Supp. 2d 57, 77 (D.D.C. 2002), *aff'd* 333 F.3d 156 (D.C. Cir. 2003).

490 While SDTs and SDGTs may ask OFAC to reconsider their designation and also seek judicial review, both processes provide designated entities with less than a meaningful opportunity for review and often favor OFAC. Ferrari, *supra* note 33, at *6–10.

491 Al Haramain Islamic Foundation, 686 F.3d at 990–93.

492 *HLF*, 219 F. Supp. 2d at 81–82.

493 *See supra* note 469 and accompanying text.

494 Ruff, *supra* note 400, at 473–74.

495 Exec. Order 13,224, *supra* note 114, at § 1(d).

496 Heidi Kitrosser, *Free Speech and National Security Bootstraps*, 86 FORDHAM L. REV. 509, 521 (2017).

d. *The Private Enforcement of National Security*

Because of its reliance on the same broad definition of material support, as well as the government's FTO and other sanctions designations, the private enforcement of national security exacerbates the civil liberties issues raised by those public laws and programs. Admittedly, most of the constitution's civil liberties protections restrict the actions of government not private actors.[497] Nevertheless, there are exceptions to this "state action" requirement, including where private parties undertake functions traditionally and exclusively performed by governments.[498] Even where those exceptions do not apply, private action can still threaten the underlying values represented by civil rights protections.[499] In other words, even though the government is not directly involved, civil liberties "can be chilled and lost just as much through private sanctions as through public ones."[500] At the very least, the private enforcement of national security creates this chilling effect.

In some private enforcement cases, the threat to civil liberties values is relatively direct and explicit. This is especially clear in cases brought under the ATA's private right of action. For example, some Section 2333 cases against tech companies have used the material support concept to directly target protected speech.[501] In other Section 2333 cases, plaintiffs have threatened defendants' First Amendment speech rights by attempting to hold them liable for their charitable donations. For instance, in *Boim v. Holy Land Foundation*, plaintiffs brought Section 2333 claims against U.S.-based non-profit and charita-

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497 John L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 NOTRE DAME L. REV. 1237, 1239 (2014).

498 *Id.* at 1239–40. This Article takes no position on whether national security's private enforcement satisfies exceptions to the state action doctrine.

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

500 Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 510 (1985).

501 *See* Kitrosser, *supra* note 496, at 519–20 (noting that while some Section 2333 cases against social media companies "likely pertain to constitutionally unprotected speech by the FTOs, many of them pertain to FTO speech—such as broadly disseminated propaganda—that would be protected outside of the material-support context"); Rachel E. VanLandingham, *Jailing the Twitter Bird: Social Media, Material Support to Terrorism, and Muzzling the Modern Press*, 39 CARDOZO L. REV. 1, 4–7 (2017) (arguing for limiting the reach of the material support prohibition vis a vis social media companies, because these institutions "serve essential functions with regard to speech and news dissemination" and should be protected by the "First Amendment's Press and Speech Clauses").

ble organizations, as well as a U.S.-based individual, for providing material support, in the form of funding, to a terrorist group[502]—funding the court itself concluded was almost exclusively made to support the "health, educational, and other social welfare services" provided by the group.[503]

In another class of Section 2333 suits, plaintiffs have used the material support concept to directly target groups not only for their speech-related activities, but also for allegedly associating with particular organizations. In *In re Terrorists Attacks on September 11, 2001*, for example, plaintiffs brought a Section 2333 claim against the Council on American-Islamic Relations ("CAIR")—the single largest civil rights organizations for Muslims in the United States[504]—for being "an outgrowth of the terrorist organization Hamas."[505] Plaintiffs alleged that, while CAIR might claim to be a civil rights organization, its "true purpose" was in fact to "legitimize the activities of Islamic militants and neutralize opposition to Islamic extremism, and thereby serve as 'perception management' in support of [terrorist groups]" through speech-based services like "disinformation activities" and "propaganda campaigns."[506] As these allegations suggest, plaintiffs attempted to use the material support concept to transform CAIR's alleged relationship to and advocacy on behalf of "Islamic militants"—activity that, even if true, would arguably be entitled to First Amendment protections—into liability for terrorism under Section 2333.

In another Section 2333 case directly implicating First Amendment-protected speech and associational rights, *Keren Kayemeth Leisrael-Jewish National Fund v. Education for a Just Peace in the Middle East*, plaintiffs brought a material support suit against a U.S.-based non-profit for providing financial and "other support" to the Boycott, Divestment, and Sanctions ("BDS") National Committee ("BNC") and for supporting the Great Return March, a protest in the Gaza Strip in support of Palestinian rights.[507] While plaintiffs claimed the BNC included designated FTOs that caused their injuries, plaintiffs

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502 Boim v. Holy Land Found. for Relief and Dev. (*Boim II*), 549 F.3d 685, 688 (7th Cir. 2008)

503 *Id.* at 698.

504 *About Us*, CAIR, https://www.cair.com/about_cair/about-us/ [https://perma.cc/XT2V-ERPH] (last visited Dec. 24, 2022).

505 *In re* Terrorists Attacks on Sept. 11, 2001, 740 F. Supp. 2d 494, 518 (S.D.N.Y. 2010), *aff'd*, 714 F.3d 118 (2d Cir. 2013).

506 *Id.*

507 Keren Kayemeth Leisrael-Jewish Nat'l Fund v. Educ. for a Just Peace in the Middle East, 530 F. Supp. 3d 8, 11–12 (D.D.C. 2021).

also acknowledged that the "BNC is a broad coalition leading a global movement for Palestinian rights, whose activities include supporting boycotts and engaging university campuses, academic associations, and other communities to engage in mass popular resistance for dignity and liberation."[508] According to plaintiffs, the defendant, which was itself an advocacy organization, was liable for plaintiffs' terrorism-related injuries not because it intended to support terrorist violence. Instead, defendant's liability was a result of its relationship with the BNC and support for a "global movement for Palestinian rights" and other Palestinian political movements[509]—all of which arguably qualify as First Amendment protected-activities.

In other cases—indeed in most cases—the private enforcement of national security has a more indirect impact on civil liberties values, though that impact is no less troubling. The fact that individuals and entities *can*, for example, be sued under Section 2333 for providing material support where they donate to the peaceful activities of designated FTOs and other SDNs, including to their political and charitable activities, can chill the free speech rights of those third-parties.[510] As suggested by the *HLP* case, Section 2333 cases can also potentially chill the associational rights of third-parties by raising the specter of liability where those third-parties associate with FTOs or other SDNs.[511] Section 1605A and 1605B cases can similarly contribute to chilling First Amendment protected speech and association, by further reinforcing the general prohibition on providing material support to certain groups and individuals. The private enforcement of national security can also expand the range of indirect punishments FTOs and other SDNs experience as a result of their designations—including by discouraging third-parties from transacting with them.[512]

None of this is meant to suggest that, in using the ATA's private right of action or the FSIA's terrorism exceptions, private enforcement plaintiffs necessarily seek to undermine civil liberties values. Rather the point here is that in bringing these private enforcement suits plaintiffs rely on a set of laws that necessarily threatens those values.

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508 *Id.* at 12.

509 *Id.* at 10–13.

510 As with humanitarian and charitable donations, donations to political organizations are protected by the First Amendment. Aziz, *supra* note 463, at 85.

511 Holder v. Humanitarian Law Project (*HLP*), 561 U.S. 1 (2010).

512 This indirect punishment arguably exacerbates the Fifth Amendment due process issues raised by FTO and other SDN designations.

2. *Discriminating Against Marginalized Groups*

In addition to reinforcing the government's despotic purposes, the private enforcement of national security bolsters the state's despotic powers by disproportionately and discriminatorily focusing on Arabs, Middle Easterners, and Muslims or those connected to these communities, in ways that echo the government's targeting of those groups. Arabs, Middle Easterners, and Muslims are obviously not the only ones who engage in terrorist violence.[513] Nevertheless, the government's Section 2339A and 2339B prosecutions and sanctions authorities disproportionately target these groups. While this discrimination may not always be aimed at domestic entities and individuals, it reinforces stereotypes about Arab, Middle Eastern, and Muslim persons that impact those communities in the United States; it also has potential material effects on those communities, whether in the United States or abroad.[514] These trends are reinforced by the private enforcement of national security, regardless of plaintiffs' intentions.

Though scattered, available information suggests that most federal terrorism prosecutions, including for material support, have been brought against Arabs, Middle Easterners, and/or Muslims, or those connected with Arab, Middle Eastern, and/or Muslim groups.[515] One study found that of the 487 individuals charged with terrorism-related crimes since 9/11, 89% were Muslim.[516] Another study found that between 2012 and 2017 nearly all forty-five indictments charging violations of Section 2339A involved individuals who "came under the scrutiny of law enforcement based on the perception they

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513 *The Discriminatory Executive and the Rule of Law*, *supra* note 439, at 98–99.

514 *See, e.g.*, Victoria Anglin, *Why Smart Sanctions Need a Smarter Enforcement Mechanism: Evaluating Recent Settlements Imposed on Sanction-Skirting Banks*, 104 GEO. L.J. 693, 715–18 (2016) (noting that U.S. sanctions laws have pushed major international banks to end their correspondent banking relationships in "high-risk areas," like the Middle East and Africa and have made it harder for Muslim communities in the United States, like the Somali community, to send money to family in their home countries).

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

516 Peter Bergen & David Sterman, *Terrorism in America After 9/11, Part II,: Who Are the Terrorists?*, NEW AM., https://www.newamerica.org/in-depth/terrorism-in-america/who-are-terrorists/ [https://perma.cc/65XS-TEDN] (last visited Dec. 24, 2022).

sympathized, or had declared allegiance to, self-proclaimed Islamist militants abroad."[517]

As for the government's SDN sanctions programs, the FTO list, as well as the executive orders creating the SDT and SDGT designations disproportionately target actors in, from, or connected with the Middle Eastern, Muslim, and/or Arab world.[518] In addition to these targeted sanctions programs, most of the government's comprehensive country-based sanctions regimes, which often implicate terrorism-related activities, have historically been aimed at Arab, Middle Eastern, and/or Muslim-majority countries.[519]

Cases brought under the ATA's private right of action and the FSIA's terrorism exceptions exhibit the same disparate impact on the Arab, Middle Eastern, and Muslim worlds. Of the approximately 105 cases brought under Section 2333(a) and/or Section 2333(d) of the ATA, approximately eighty-three have involved underlying terrorist activity allegedly committed by Arab, Middle Eastern and/or Muslim individuals and entities.[520] Even though Section 2333 cases include many defendants that are not Arab, Muslim, and/or Middle Eastern, entities and persons that *are* Arab, Muslim, and Middle Eastern are also often named as defendants, especially in Section 2333(a) suits.[521] When it comes to Section 1605A, the lion's

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517 Scott Sullivan, *Prosecuting Domestic Terrorism as Terrorism*, JUST SEC. (Aug. 18, 2017), https://www.justsecurity.org/44274/prosecuting-domestic-terrorism-terrorism/ [https://perma.cc/2UDU-5G4D].

518 *See infra* notes 526–535 and accompanying text.

519 *See* Rathbone, Jeydel, and Lentz, *supra* note 284, at 1068 (noting that four out of the six countries that have historically been subject to comprehensive economic and trade sanctions are Arab, Middle Eastern, or Muslim-majority (Iran, Iraq, Libya and Sudan)).

520 Maryam Jamshidi, Section 2333(a) and (d) Table of Cases (Dec. 24, 2022) (unpublished research) (on file with author).

521 As noted earlier, most Section 2333 cases target deep-pocketed third-party companies, like banks and tech companies. *See supra* notes 116–117 and accompanying text. Some of these corporate defendants are from the Middle East or Muslim-majority world. *See, e.g.*, Honickman v. BLOM Bank, 6 F.4th 487 (2d Cir. 2021) (Section 2333 suit against Lebanese bank); Linde v. Arab Bank, 882 F.3d 314 (Section 2333 suit naming as defendant, Arab Bank, one of the largest financial institutions in the Middle East). In addition, Section 2333 cases—particularly under Section 2333(a)—have also named as defendants Arab, Muslim, and/or Middle Eastern individuals and organizations, including charitable groups and designated FTOs. *See, e.g.*, Boim v. Quranic Literacy Inst. and Holy Land Found. for Relief and Dev., 291 F.3d 1000, 1003–04 (7th Cir. 2002) (Section 2333(a) case naming various American-Muslim charities as defendants); Kaplan v. Hezbollah, 213 F. Supp. 3d 27, 33–34 (D.D.C. 2016) (Section 2333(a) case naming Hezbollah, a designated FTO, as defendant); Biton v. Palestinian Interim Self-Gov't Auth., 310 F. Supp. 2d 172, 175 (D.D.C. 2004) (Section 2333(a) case naming various Palestinian government officials as defendants).

share of litigation has been raised against Arab, Middle Eastern, and/or Muslim-majority countries.[522] At least to date, Section 1605B litigation has almost exclusively been aimed at Saudi Arabia or Saudi-owned entities.[523]

The major reasons why private enforcement cases exhibit a disproportionate impact on Arabs, Middle Easterners, and Muslims, much like the government's material support and sanctions programs, have to do with: (1) the political economy of FTO designations, SDT and SDGT designations, as well as designations of state sponsors of terrorism; (2) the international focus of public material support laws that do not otherwise target government-designated entities and individuals; and (3) the express political motivations behind passing some private enforcement statutes. The remainder of this section discusses these issues in turn, as well as their relationship to the discriminatory effects of national security's private enforcement.

a. *The Political Economy of FTO, SDT, SDGT, and State Sponsor Designations*

To start with FTO designations, though subject to rules described earlier in this Article,[524] these designations are ultimately the result of political decisions made by the U.S. government.[525] Describing the consequences of these politicized determinations, one scholar has argued that the government's FTO designation practices have "effectively . . . [been used to] halt almost all domestic activities and organizations associated with the Middle East or Islam under the auspices of combating

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522 According to cases accessible on Westlaw, in comparison to hundreds of suits brought under Section 1605A and its predecessor statute against Arab, Middle Eastern, and/or Muslim-majority states, there have been far fewer cases against designated state sponsors of terrorism that are non-Arab, Middle Eastern, or Muslim-majority: specifically, less than fifteen cases against Cuba and six against North Korea, as of this writing. *See infra* note 537, for a complete list of state sponsors of terrorism past and present.

523 The case *In re Terrorist Attacks on Sept. 11, 2001*, 03-MDL-1570, 2020 WL 7043282 (S.D.N.Y. Dec. 1, 2020)—a multi-district litigation in the Southern District of New York that includes thousands of plaintiffs—is the primary line of litigation in which Section 1605B has been used and exclusively targets Saudi Arabia and a Saudi-owned entity.

524 *See supra* note 458 and accompanying text.

525 *See Constitutionality of Counterterrorism Legislation: Hearing on S. 390 and S. 735 Before the Subcomm. on Terrorism, Tech., and Gov't Info. of the S. Comm. on the Judiciary*, 104th Cong. 5 (May 4, 1995) (statement of David Cole, Professor of Law, Georgetown University Law Center) (criticizing FTO designation authority for inviting the government to make designations in a "politically biased manner").

terrorism."[526] And, indeed, since the State Department first began making FTO designations in 1997,[527] sixty-seven of the eighty-eight total FTOs have been Arab, Middle Eastern, and/or Muslim.[528]

The SDT and SDGT designations also disproportionately target Arab, Middle Eastern, and/or Muslim groups and individuals or those connected with such individuals and entities for political reasons. This is reflected in the policies behind the SDT and SDGT designation categories, as well as historical and contemporary information on the individuals and groups designated under those programs.

First, both EO 12,947—which created the SDT designation—and EO 13,224—which created the SDGT designation—were the result of political decision-making that placed the Arab, Middle Eastern, and Muslim world in their cross-hairs. As already discussed, EO 12,947 was aimed at groups threatening the "Middle East peace process."[529] As for EO 13,224, because it came in response to the 9/11 attacks,[530] it exclusively targeted Arab, Middle Eastern, and/or Muslim individuals and entities—much like other 9/11-related policies.[531]

Second, the original designations made under these orders further highlight how the political motivations behind these orders resulted in a disproportionate focus on Arab, Middle Eastern, and/or Muslim individuals and groups. For example, as originally promulgated, EO 12,947 contained twelve SDTs, with ten being Arab and/or Palestinian.[532] As for EO 13,224, when it was first promulgated, it included twenty-seven SDGTs all of whom were Arab, Middle Eastern and/or Muslim.[533]

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526 Aziz, *supra* note 461, at 91.

527 Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 348, 365 (2000).

528 *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, https://www.state.gov/foreign-terrorist-organizations/ [https://perma.cc/2DMC-572B] (last visited Dec. 24, 2022). Throughout this Article, I have used my own expertise and research on this issue to distinguish between designated groups that are and are not Arab, Middle Eastern, and/or Muslim.

529 *See supra* notes 475–476 and accompanying text.

530 Exec. Order 13,224, *supra* note 114, at 48041.

531 *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 327–55 (2002) (demonstrating the disproportionately discriminatory effects of various post-9/11 government policies on Arabs, Middle Easterners, and Muslims).

532 Exec. Order 12,947, *supra* note 475, at 5081.

533 EO 13,224, *supra* note 114, at 490083. EO 13,224 was amended in 2002 by Executive Order 13,268, which added an additional individual and organization, both Middle Eastern and/or Muslim. Exec. Order 13,268, 67 Fed. Reg. 44,751 (July 2, 2002). As one scholar noted, by April 2005, 98% of the individuals

Finally, as previously referenced, EO 12,947 and EO 13,224 give government authorities continuing discretion to list additional persons or entities they deem satisfy the order's requirements[534]—discretion that, at the very least, permits the government to continue basing its designations on the political considerations underlying those orders. Given this fact, as well as EO 12,947's focus on the "Middle East peace process," it is likely that other individuals or entities subsequently designated as SDTs have also been Arab and/or Palestinian. As for EO 13,224, the State Department—which is authorized to designate additional SDGTs—has adhered to the political interests underlying EO 13,224's origins and listed an additional 394 entities and individuals, of which 343 have been Arab, Middle Eastern and/or Muslim organizations or individuals or those connected with such persons.[535]

As for the designation of state sponsors of terrorism, the Secretary of State has broad discretion in making these designations, with decisions often turning less on a country's terrorist activities and more on political factors.[536] In total, there have been eight designated state sponsors of terrorism with six being Arab, Middle Eastern, and/or majority Muslim.[537] As mentioned earlier, being designated a state sponsor not only automatically subjects states to certain terrorism-related sanctions programs—designated countries also are often subjected to comprehensive, country-based sanctions regimes.[538]

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and 96% of the entities on the SDGT list were Arab or Muslim. Donohue, *supra* note 485, at 672.

534 *See supra* note 477, 483 and accompanying text.

535 *Executive Order 13224*, BUREAU OF COUNTERTERRORISM, U.S. DEP'T OF STATE, https://www.state.gov/executive-order-13224/ [https://perma.cc/Y4MF-UN2E] (last visited Dec. 24, 2022).

536 Troy C. Homesley III, *"Towards a Strategy of Peace": Protecting the Iran Nuclear Accord Despite $46 Billion in State-Sponsored Terror Judgments*, 95 N.C. L. REV. 795, 819, 819 n.137 (2017).

537 DIANNE E. RENNACK, CONG. RSCH. SERV., R43835, STATE SPONSORS OF ACTS OF INTERNATIONAL TERRORISM—LEGISLATIVE PARAMETERS: IN BRIEF 1–2, 8–9 (2021), https://fas.org/sgp/crs/terror/R43835.pdf [https://perma.cc/YM7B-GEN4]. These Arab, Middle Eastern, and/or Muslim-majority countries are Iran, Libya, Sudan, Syria, South Yemen, and Iraq. *Id.* Cuba and North Korea have also been designated as state sponsors of terrorism. Currently, Iran, Syria, Cuba, and North Korea are listed as state sponsors. *State Sponsors of Terrorism: Bureau of Counterterrorism*, U.S. DEP'T OF STATE, https://www.state.gov/state-sponsors-of-terrorism/ [https://perma.cc/NQ7T-BRMW] (last visited Dec. 24, 2022).

538 *See supra* notes 407–408 and accompanying text.

b. *International Focus*

Some public material support laws focus on Arabs, Middle Easterners, and/or Muslims not because they rely on any designation authority but rather because of their international focus. This is particularly true for the criminal material support statute, Section 2339A. Despite eschewing an FTO requirement or any express limitation to foreign terrorism, the predicate crimes triggering Section 2339A often have an international nexus.[539] For example, Section 2339A prohibits material support in connection with "[a]cts of terrorism transcending national boundaries"[540] or conspiracy "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in . . . the United States."[541] This focus on international activity has effectively oriented Section 2339A around individuals allegedly aligned with Arab, Middle Eastern, and/or Muslim entities, which are disproportionately associated with international rather than domestic terrorism.[542]

c. *Political Motives*

Finally, one of the private enforcement laws—Section 1605B of the FSIA—was explicitly passed for the purpose of targeting the Kingdom of Saudi Arabia, an Arab and Muslim-majority country in the Middle East. Even though the text of the statute is not limited to Saudi Arabia, Section 1605B was the byproduct of political efforts to salvage various civil suits that tried, but failed, to hold the Kingdom and its state-owned entities liable for the 9/11 attacks.[543] Indeed, some members of Congress supported the statute's passage based, at least in part, on the (dubious) logic that because the majority of 9/11 attackers were Saudi, the Saudi government itself may be liable for 9/11.[544]

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539 Sinnar, *supra* note 444, at 1357.

540 18 U.S.C § 2332b; *see* 18 U.S.C. § 2339A(a) (listing Section 2332b as a predicate crime).

541 18 U.S.C § 956; *see* 18 U.S.C. § 2339A(a) (listing Section 956 as a predicate crime).

542 Sinnar, *supra* note 444, at 1337.

543 Lelchook v. Islamic Republic of Iran, 224 F. Supp. 3d 108, 113 n.1 (D. Mass. 2016); Steve Vladeck, *The 9/11 Civil Litigation and the Justice Against Sponsors of Terrorism Act (JASTA)*, JUST SEC. (Apr. 18, 2016), https://www.justsecurity.org/30633/911-civil-litigation-justice-sponsors-terrorism-act-jasta/ [https://perma.cc/6C8G-B53F].

544 Maryam Jamshidi, *The World of Private Terrorism Litigation*, 27 MICH. J. RACE & L. 203, 221 (2021).

d. *The Private Enforcement of National Security*

Given its reliance on FTO and other sanctions designations, county-based sanctions programs, and criminal material support laws, like Section 2339A, it is unsurprising that Section 2333(a) cases reflect a disproportionate focus on underlying activity by Arab, Middle Eastern, and/or Muslim individuals and entities, while also directly targeting Arab, Middle Eastern, and Muslim defendants. Because Section 2333(d) cases can only be brought for terrorist violence committed, planned, or authorized by FTOs, it is also unsurprising those suits reflect a disproportionate focus on underlying activity by Arab, Middle Eastern, and/or Muslim groups. Because of its dependence on the politically charged state sponsors list, Section 1605A's disproportionate impact on Arab, Middle Eastern, and/or Muslim states is similarly inevitable. As for Section 1605B, given its legislative history, it is unexceptional to observe that Section 1605B has nearly exclusively targeted the Saudi government and its related entities.

In disparately impacting Arab, Middle Eastern and/or Muslim individuals, entities, and countries, the private enforcement of national security reinforces the state's despotic powers over Arabs, Middle Easterners, and/or Muslims more generally. By contrast, national security's private enforcement effectively excludes numerous individuals, groups, and countries that do not belong to one of these communities, even if they have engaged or have attempted to engage in terrorist activities. In perpetuating these dynamics, the private enforcement of national security reinforces discriminatory stereotypes about Arabs, Muslims, and Middle Easterners, including those living in the United States, as predisposed to terrorist violence.[545] National security's private enforcement also encourages third-parties, like banks and other organizations, targeted by plaintiffs to refrain from associating with or donating to members of those groups.[546] In doing so, the private enforcement of national security further marginalizes Arab, Middle Eastern, and Muslim communities and reinforces the chal-

545 *Id.* at 221–22.

546 *See, e.g.*, Jamshidi, *supra* note 93, at 601 (noting how Section 2333 litigation can chill donations to organizations working in the Middle Eastern and Arab World, as well as prompt organizations, like banks, to shutter operations in that region).

lenges they face in resisting the state's national security practices.[547]

CONCLUSION

While national security's private enforcement has long flown under the radar, it is an important part of the government's national security architecture. It gives private litigants an opportunity to participate in national security work; provides benefits to administrative agencies tasked with national security responsibilities; and enhances the state's infrastructural power.

At the same time, national security's private enforcement underscores an underappreciated downside to private enforcement—namely its potential to reinforce the despotic purposes and powers of the state. In highlighting this possibility, this Article aims to encourage more work on this aspect of the private enforcement of public laws. More specifically, this Article endeavors to draw attention to the specific despotic aspects of national security's private enforcement. And even though it does not propose solutions to those concerns, the hope is that it will jump start efforts to remedy those problems.

547 *See generally*, *The Discriminatory Executive and the Rule of Law*, *supra* note 439 (exploring the challenges and opportunities facing American Arabs and Muslims in achieving political accountability for national security laws and programs discriminating against their communities).